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THE INTEGRATION ACT OF POLAND WITH THE EUROPEAN UNION IN THE LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

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1. The accession of Poland to the European Union will be a complex legal act. The Union is a supranational organisation,[1] i. e. an organisation with an autonomous legal system distant from international and national law. The prevailing application of its law is ensured in the internal area of the Member States.[2] Accession to the European Union will involve deep changes in the competence of the state organs, as well as in Polish national law. The favourable fact is that the Constitution of the Republic of Poland gave firm legal grounds to this process, meeting the postulates of the Polish legal sciences, and taking into account the constitutional practice of EU Member States.[3]

Due to the complexity of the process of the accession of Poland to the EU, I would define the provisions of the Constitution concerning this issue as a constitutional integration act.[4] The overall approach to those provisions is relevant, because only then will it be possible to propose a systematic interpretation of the Constitution, taking into account the European integration process. The objective of those constitutional provisions is, in fact, to facilitate the incorporation of Poland into European integration structures, instead of creating obstacles.

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[1] Cf. J. B a r c z: "Organizacja ponadnarodowa" [Supranational Organisation], *Sprawy Międzynarodowe* 1991, no. 708, p. 89 and following.

[2] This approach is accepted by the EU Member States. It was shaped by the judgment of the Court of Justice in the case *Costa* v. *ENEL* of 15 July 1964, p. 1251 and following. More extensively in: W. C z a p l i ń s k i: "Akty prawne Wspólnot Europejskich w orzecznictwie Trybunału Sprawiedliwości" [Legal Acts of the European Communities in the Judgments of the Court of Justice] [in:] M. K r u k (ed.), *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International and Community Law in Domestic Legal Order], Warszawa 1997, p. 188 and following.

[3] See K. D z i a ł o c h a: "Podstawy prawne integracji Polski z Unią Europejską w pracach nad nową konstytucją" [Legal Grounds for the Integration of Poland with the European Union in Work on the New Constitution], *Państwo i Prawo,* 1996, no. 4-5, p. 9 and 10; W. S o k o l e w i c z: "Ustawa ratyfikacyjna" [Ratification Act] [in:] *Prawo międzynarodowe..., op. cit.*, p. 119.

[4] E.g. in German literature the constitutional grounds for the participation of Germany in the integration processes are determined as "a general act of the state integration authority", "Gesamtakt staatlicher Integrationsgewalt" [in:] H. P. I p s e n: *Europäisches Gemeinschaftsrecht,* Tubingen 1972, p. 60, 61.

Three fundamental elements form the constitutional act:[5]

1) The decision of the Polish state authorities on accession to an supranational organisation - the European Union.[6] Such a decision will be expressed in the Treaty on the Accession of Poland to the EU, at an international level. On the other hand, at the national level, the specific requirements concerning the passing of the act of Sejm authorising the President to ratify this Treaty will ensure the firm democratic legitimacy of this decision.

2) As a result of this decision, the competence of the state authority in some issues will be "delegated" to the European Union, "such issues" being determined in the Treaty on the Accession to the Union, and having met the *acquis communautaire* of the EU, as well as including the dynamics of the integration processes.

3) The "delegation" of the competence of the state authorities organs will be accompanied by the renouncing of the exclusivity to exercise such competence in the national area for issues covered by "delegation", and the opening the national area to the "foreign" law of the supranational organisation - the European Union; its application takes precedence over national law.

2.1. Article 89 item 1 the Constitution states that the ratification of the international agreement concerning " the Republic of Poland's membership in an international organisation" requires "prior consent granted by statute". However, in the event that on the basis of such an international agreement the "delegation" to the "international organizational or international institution" of the competence of State authority organs in relation to certain matters (Article 90 item 1) is to be made by the Republic of Poland, the Constitution determines a special procedure of approving such an international agreement.

First - according to Article 90 item 2 of the Constitution, the act approving the ratification of such an international agreement is passed by the Sejm and the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies and Senators;

Second - the Sejm, by way of a resolution passed by an absolute majority of votes in the presence of at least half of the statutory number of Deputies,[7] may order a national referendum for the approval of the ratification of such an international agreement.

Therefore, two separate procedures of approving the ratification of the international agreement with respect to the accession of Poland to a supranational organisation are involved: the approval may be given by means of an act concerning the international agreement[8] or a national referendum.

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[5] Cf. details in my study "Constitutional and Legal Problems of the Application of the European Union Law in Poland in the Light of the hitherto Experiences of the Member States" [in:] *Prawo międzynarodowe..., op. cit.,* p. 206.

[6] Article 90 item 1 of the Constitution determines "international organisation or international organ". I was critical about this formulation, above, p. 208 and following, and presented an analysis of the concept of the "international organisation" or "international organ". Since this analysis remains applicable after the Constitution entered into force, I do not discuss the issue in a more detailed manner, and use the expression "supranational organisation" or simply the "European Union".

[7] Cf. the objections of W. S o k o 1 e w i c z, *op. cit.,* p. 123.

[8] As far as acts of this variety are concerned, I would rather propose the term "act concerning the international agreement". The term proposed by W. S o k o l e w i c z *(op. cit.,* p. 93 and following): "ratification act" is not quite clear, since ratification remains in the domain of the President. On the other hand, this act fulfils at

2.2. The act concerning **international Treaty** on the accession of the Republic of Poland to a supranational organisation (Article 90 item 2 of the Constitution) is a qualified form of an act concerning an international agreement, referred to in Article 89 of the Constitution.[9] Its specific characteristic is an extended scope of democratic legitimacy: in the case of the act referred to in Article 89 there arises a question of the normal procedure of its passing according to Article 120 (by a simple majority vote in the presence of at least half of the statutory number of Deputies); on the other hand, the passing of the act referred to in Article 90 item 2 is subject to special requirements.

This issue is of key importance. Within the framework of a supranational organisation, the law in general is set by organs composed of the representatives of the executive power of the Member States. The potential representations of the parliamentary type (such as the European Parliament of the EU) have relatively limited competence. This phenomenon is defined by the term "the deficiency of the democratic legitimacy of the supranational organisation".

The acts concerning international agreements differ from the remaining acts due to some specific characteristics; there are also differences between the act defined in Article 89 and the act defined in article 90 item 2.

- With respect to acts concerning international agreements, the Government has the exclusive legislative initiative. Thus, the provisions of Article 118 item 1 are limited (in this range, the Deputies, the Senate and the President will not enjoy legislative initiative); the same holds true for Article 118 item 2, according to which a group of 100 000 citizens is entitled to legislative initiative. The exclusive competence of the Government univocally results from Article 146 of the Constitution. Pursuant to Article 146 item 4 s. 10, the Government, concludes, among others, international agreements requiring ratification. The concept of "concluding" the agreement is flexible, and covers, among others, carrying out negotiations and undertaking activities necessary for a given agreement to enter into force, including legislative initiative, insofar as the ratification of a given agreement must be preceded by approval stipulated in the act. The competence of the President in the domain of international relations is assessed in Article 133 of the Constitution. The role of the President as regards the conclusion of international agreements covers the ratification and revoking of international agreements (Article 133 item 1 s. 1) and requesting the preventive control of the constitutionality of the international agreement before its ratification (Article 133 item 2). On the other hand, "cooperation" with the Prime Minister and competent Minister stipulated in Article 133 item 3 as regards foreign policy may undoubtedly concern different kinds of consultations, while negotiating such important agreements as the Accession Treaty of Poland to the EU. Obviously, this does

least three functions: upon its basis, the Sejm and the Senate approve the conclusion of an international agreement (the function of democratic legitimacy); once passed, the act empowers the President to ratify the international agreement (authorising function); and, finally, such an act fulfils an important function which outlines the significance of a given agreement in the national legal system (Article 91 item 2) - function concerning the importance of an agreement in the Polish legal system. Thus, the proposed term - "act concerning an international agreement" - is the most general, and may correspond to all of its functions.

[9] Therefore, I would rather not write about "two types" of such an act, as W. S o k o l e w i c z does, *op. cit.*, p. 121.

not justify the competence of the President as regards legislative initiative. The participation of the Sejm and the Senate with respect to such an act was determined *explicite* in Article 90 item 2 of the Constitution. It is also difficult to imagine that a "group of at least 100 000 citizens" represents legislative initiative in this respect. In the event that it would be a draft obligating the President not to ratify the agreement on the accession of Poland to the EU, then - at the very most - such initiative may be a political argument for the Sejm in favour of a national referendum.

- As far as the act on an international agreement is concerned, the right to amendments is limited. It may concern, to some extent, a formulation of the same text of the draft act; on the other hand, the introduced amendments may not infringe upon the text of the international agreement established in the way of negotiations. Such amendments would be equivalent to the necessary undertaking by the Government of new negotiations concerning the international agreement or the non-entering into a supranational organisation. The act concerning an international agreement in the form submitted by the Government is approved without amendments, or is rejected, which equals to a renouncement of Poland to be bound by a given international agreement, or not to enter the international organisation. The eventual objection of the Senate to the act concerning the international agreement remains an "internal issue" if the act is subsequently approved by Sejm. On the other hand, it may have an impact on the required majority. The Sejm would have to pass such an act by an absolute majority vote in the presence of at least half of the statutory number of Deputies, and if there is no objection, pass the act by a simple majority vote. However, it does not play any role in the case of acts concerning international agreements on the accession of Poland to a supranational organisation, since Article 90 item 2 stipulates stricter requirements.
- An act concerning an international agreement may also be classified to urgent proceedings (Art. 123 of the Constitution), but not when it concerns an international agreement on the accession of Poland to a supranational organisation. Art. 123 item 1 stipulates that acts regulating the characteristics of public authorities may not be classified as urgent. On the other hand, the "delegation" to a supranational organisation of the competence of the state authority organs "in relation to certain matters" undoubtedly constitutes a "regulation" of the "characteristics of the public authorities". Irrespective of this, the fact of acquiring EU membership will also have an impact on other areas listed under Art. 123 item 1 - indirectly on elections (the Constitution will have to be complemented by decisions on the election of deputies to the European Parliament) and the scope of the application of "Codes".

3. Approval for the ratification of the international Treaty on Poland's accession to a supranational organisation may be also expressed in the form of a national referendum (Art. 90 item 3 and 4 of the Constitution). The Constitution clearly determines (Art. 90 item 4) that respective decisions will be taken by Sejm. Thus, the competence of the President referred to in Art. 125 item 2 of the Constitution is excluded since Art. 90 item 4 constitutes *lex specialis* with respect to Art. 125 item 2. The issue of the required quorum during a referendum to confirm that the binding approval was given is not clear. Art. 125 item 3 stipulates: "A result of a nationwide referendum shall be binding, if more than half of the number of those having the right to vote have participated in it". Article 90 item 3 contains no provisions in this respect, and in general refers to Art. 125. Does this mean that the "approval" expressed by a national referendum for an international Treaty on Poland's accession to a supranational organisation requires the binding result of a referendum, i.e. participation of at least half of those persons who have the right to vote?

Provisions of Art. 235 item 6 of the Constitution, providing for a possibility to convene a "confirmatory referendum", if the act on an amendment to Constitution concerns provisions of Chapter I ("The Republic"), II ("The Freedoms, Rights and Obligations of Persons and Citizens") or XII ("Amending the Constitution"), are helpful in solving this issue. To enforce such an act, the "majority of voters" has to approve its amendment. In the event that the Constitution claims that a "majority" of persons voting in the national referendum is sufficient to enforce an act amending the Constitution with respect to regime issues and individual rights, it should be assumed that such a majority is also sufficient to give approval for the ratification of an international Treaty on Poland's accession to an international organisation.

3.1. According to Article 90 item 1 of the Constitution "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". Those provisions determine an essence of the constitutional integration act. On this basis, the Republic of Poland renounced exclusive public power in areas stipulated in the international agreement and, at the same time, makes available, in an appropriate scope, its internal area to a supranational organisation, in particular by ensuring a direct application of the law of such an organisation in Polish national law.

3.2. The Constitution accurately formulates the object scope of "delegation", flexibly stating that the problem concerns the possibility of a delegation of the "competence of organs of State authority in relation to certain matters". Thus, it concerns the areas of legislative, executive and judicial power (Art. 10 item 1), exercised, respectively, by the Sejm and the Senate, the President, the Council of Ministers, as well as Courts and Tribunals (Art. 10 item 2). The extension and diversity of integration processes means that the Constitution accurately imposes no object or functional restrictions in this respect. The competence of the state organs in all these areas may become the object of "delegation". Neither does it have to be a "balanced delegation", in such a way so that the delegation of determined competence in the area of legislative power has to correspond to the appropriate delegation of the executive and judicial powers. "Delegation" may cover the competence of different areas of legislative, executive and judicial powers as well as to a different extent, which meets the needs of Poland's participation in integration processes. Areas, which are precisely concerned, are stipulated in the international agreement on Poland's accession to the given supranational organisation. Art. 90 item 1, on the other hand, sets out a relevant restriction, since "delegation" may only cover "certain matters" of the competence of state authorities organs. This formulation, on the one hand - as was mentioned - ensures the necessary flexibility of interpretation; on the other hand, it delimitates “delegation” in general and in essence. In fact, it concerns the statement that overall state authority may not be subject to “delegation”.

3.3. On Poland’s side, “delegation” of the competence of the state authority organs in certain matters to a supranational organisation results in twofold legal effects. First - the Republic of Poland renounces its exclusive competence in the domain of the legislative, executive and judicial powers covered by “delegation”. Second - the Republic of Poland allows to apply “foreign” sovereign acts (i.e. acts set out by the supranational organisation) and commits itself to ensure the efficacy of those acts.

3.4. Without delving into the details of the evolution of the sovereignty concept,[10] it should be emphasised that the Constitution guarantees to preserve the sovereignty of the Polish state in the integration processes.

First - it will not be easy to establish a relation between the restriction contained in Art. 90 item 1 of the Constitution, declaring that “delegation” may cover the competence of the state authority organs “in relation to certain matters”, and a statement that, in fact, overall state authority may not be subject to “delegation”. Such a statement should be interpreted in a flexible way, due to the diversity of integration processes. However, such a relation is subject to univocal democratic control: an international agreement, on the basis of which “delegation” will take place, requires the approval of the Sejm and the Senate before ratification, under the terms provided in Art. 90 item 2; the approval may also be given - providing the specially controversial cases - by way of a national referendum, according to Art. 90 item 3 and 4 of the Constitution.

However, irrespective of this special term “democratic control” it may be said that Art. 90 item 1 contains an univocal prohibition of the ’’delegation” by the Republic of Poland of overall state authority to a supranational organisation. Such “delegation”, i.e. the participation of the Republic of Poland in a supranational organisation transforming itself into a type of federal state would require an amendment to the Constitution under the terms provided in Art. 235.

Second - “delegation” does not cause the loss of sovereignty of the Polish state with respect to transferred competence. Polish public authority will only renounce its exclusive competence in those areas, but this does not mean a loss of sovereignty in those domains. Such a relevant aspect was clearly expressed in Art. 10 item 2 of the draft Constitution of 19 April 1996, stating that the delegation of “exercising of some of the powers of the state authorities” was in question. This declaration resulted *explicite* in the fact that the Polish State does not transfer to a supranational organisation the powers themselves, but their exercise. Even if further works, due to linguistic reasons, abandoned the expression “the exercise” of powers or competence, this does not change the essence of the matter. It should be considered that delegation is not absolute and may be revoked. The state may also undertake activities in areas covering delegated competence. Obviously, wherever such a revocation of “delegation” or activities in areas covered by “delegation” would be contradictory to the international agreement,

[10] Cf. W. S o k o 1 e w i c z, *op. cit.*, p. 122 and the literature therein, footnote 82.

according to which the delegation of competence took place, the state risks being accused of the violation of international obligations and its own constitutional law. However, this does not change the fact that despite the delegation of competence to a supranational organisation, in such an approach sovereignty remains the state's attribute.[11]

3.3. From the outset, the **legal qualification of "delegation"** gave rise to significant controversies in the Member States.[12] Initially, reference was made to constructions of private law. Thus understood, during the process of "delegation" the former manager of the powers (the state) would lose its right to the object of delegation, and such powers would be transferred to a supranational organisation. However, it soon became impossible to qualify the "delegation" process, in the strict understanding of private law. "Delegation" is a complex process of a special type, which develops at two levels: the international level (on the side of the supranational organisation) and the constitutional and legal level (on the state's side).[13] The specific character of this process consists in the fact that as a result of transferring state powers, the established autonomous supranational organisation exerts an impact upon the internal legal order of the Member States. The obtained result significantly exceeds the sum of the delegated powers.[14] On the other hand, on the state's side - as was mentioned above - the determined competence is not absolutely abandoned, although the exclusivity of its exercise is renounced.

3.4. The legal qualification of "delegation" does not explain, however, the overall process of the complicated **cooperation of the state with a supranational organisation.** The practice of the European Union demonstrates that even in those areas in which the competence of the European Union is especially broad, the legislative activity (complementary and executive) of the state is also targeted and necessary. The ensuing complicated process of the interrelations between the Member State and a supranational organisation is described in literature as a "balance of reasonable cooperation".[15] Anew, relevant value of this problem is the subsidiarity principle, confirmed in the Maastricht Treaty.[16]

4.1. The character of primary law (Treaties establishing the supranational organisation, as well as the Accession Treaties), give rise to controversies; so-called traditionalists assume that whereas the supranational organisation is established by way of an international treaty, its primary law should forcibly be qualified exclusively as international law.[17] Contrary to this, so-called autonomous supporters assume that the

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[11] *Ibid.,* p. 122.

[12] See A. R u p p r e c h t: *Die Integrationsgewalt. Eine staatstheorethische und verfassungsrechtliche Studie zu Artikel 24 Absatz I des Grundgesetzes,* Hamburg 1969, p. 84 and following.

[13] See K. S t e r n: *Das Staatsrecht der Bundesrepublik Deutschland,* vol. 1: *Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung,* München 1997, p. 387.

[14] See H. P. I p s e n, *op. cit.,* p. 56

[15] "Ein Gleichgewicht sinnvoller Kooperation", see Ch. T o m u s c h a t: "Artikel 24GG" [in:] *Bonner Kommentar,* Hamburg 1985, p. 22.

[16] See E. P o p ł a w s k a: "Organy i procedura stanowienia prawa wspólnotowego oraz udział w niej państw narodowych" [Organs and Procedure of Establishing the Community Law and the Participation of National States] [in:] *Prawo międzynarodowe i wspólnotowe..., op. cit.,* p. 176 and following.

[17] See Ch. R o u s s e a u: *Droit International Public,* vol. II: *Les Sujets du Droit,* Paris 1974, p. 465.

lic of Poland contains two provisions, which may be significant in this area. First - Art. 133 item 2 stipulates that the President of the Republic of Poland may, before ratifying an international agreement, apply to the Constitutional Tribunal for its conformity to the Constitution. Second - Art. 188, which determines the cognition of the Constitutional Tribunal, states in section 1 that the Tribunal adjudicates, among others, as regards the conformity of international agreements to the Constitution.

In the first case, there are no problems from the point of view of Community law. The preventive control of the constitutionality of an international agreement before its enforcing remains an “internal” issue of the state.

The other question is that its result may have impact on the pace of the fulfilment of one of the basic strategic goals of state foreign policy. Also, one should take into account the fact that the country entering the EU must adopt all the legal achievements of the organisation - *acquis communautaire* - with no objections. Thus, the presentation, even at the stage of preventive control, of some fundamental constitutional and legal remarks would exclude possible access to the EU.

More serious problems arise in the second case - the competence of the Constitutional Tribunal to decide cases of conformity of international agreements to the Constitution. There are no doubts that the Tribunal may examine the conformity to the Constitution of the international agreement which entered into force pursuant to Art. 188 s. 1.[26] Moreover, in the case of international agreements ratified with previous approval stipulated in the act, the Constitutional Tribunal will be able to choose: according to Art. 188 s.1 it may examine the conformity of the acts to the Constitution (as in the act concerning the international agreement, the control of the constitutionality of the agreement is of an indirect character), or it may examine the conformity to the Constitution of the same international agreement. It seems logical that if the Tribunal deals with examining the constitutionality of the international agreement, it should do so directly, more so considering that it has such an opportunity.[27]

The Treaty on Accession to the European Union will - as an international agreement - be subject to the cognition of the Constitutional Tribunal according to Art. 188 s.l, that is the Constitutional Tribunal will be entitled to examine conformity to the Constitution. When performing such examination, the Constitutional Tribunal, however, will have to take into account the twofold nature of the EU primary law, including the Treaty on the Accession of Poland to the Union, which - regardless if it is an international agreement - upon its entering into force will be included into the EU primary law. The Constitutional Tribunal will have to include the principle of ensuring the effectiveness of the Community law in the national legal system. In conclusion, this leads - as in resolving subsequent constitutional and legal crisis in the Member States - to the necessity of a search for pragmatic solutions. This is reflected in an interpretation

[26] W. S o k o 1 e w i c z, *op. cit.,* p. 125.

[27] From this point of view, the comment by W. S o k o l e w i c z *(op. cit.,* p. 125), who maintains that the Constitutional Tribunal may not examine approval for the ratification of an international agreement, stipulated in the referendum, is of restricted practical meaning. The Constitutional Tribunal may examine the constitutionality of the international agreement itself, directly, without consideration of the form of approval.

of the Constitution "in a way favourable to the Community law". By such an interpretation the Constitutional Tribunal sets a balance between the European Integration process and the provisions of the Constitution in such a manner, so as to ensure the effectiveness of Community law in the national legal system.

4.2. Contrary to the primary law of a supranational organisation, the law set by such an organisation, the secondary law is of a specific character and does not form part of international law, nor of the national law of the Member States. In the national legal systems, the effectiveness of secondary law is guaranteed by its so-called primacy of application. The initial attempts to justify the application of secondary law in the national legal system by referring to the traditional methods to ensure the effectiveness of international legal rules, first of all, with respect to transformation, were not accepted.[28] However, also in this initial period, dominated by so-called traditionalists, secondary law was deemed to be directly binding and applied in the national area; it was emphasised that no special transformation in this respect was required. The secondary law binds directly; it is also directly applied in the internal area of the Member State, remaining in a relation of mutual autonomy with respect to the national law. In fact, this is not absolute autonomy. Both legal systems remain in multiple relations[29] to each other.

The Constitutions of the Member States regulate the issue of applying the secondary law in their Constitutions only incidentally. The fundamental issues were decided by constitutional practice.[30] The introduction into the Constitution of the Republic of Poland of a special provision - Art. 91 item 3 - should be evaluated *explicite* as positive. According to the concept of this article: "If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides,the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".

This provision is of a special character. It does not regulate - contrary to item 1 and 2 of this Article - the application and importance of the international agreement in the national legal system, but it refers to the application of the law set up by the supranational organisation. The special character of this provision consists in the fact that it constitutes one of the fundamental elements of the Constitutional Integration Act. Pursuant to Art. 90 item 1, the Constitution delegates to the supranational organisation "the competence of organs of State authority in relation to certain matters", whilst Art. 91 item 3 enables to open the national legal system to law set by such an organisation. The specific character of this phenomenon, with respect to mechanisms ensuring the efficacy of the norms of international law in the national legal system, consists in the fact that

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[28] The secondary law had to be binding in the internal area of the state as transformed law, since Art. 189 of the EEC Treaty (numbering before Amsterdam) is subject to transformation. Contrary to the transformation of the primary law (international treaty), the transformation of the secondary law was determined as "anticipating transformation", "automatic transformation" or "general transformation". See J. B a r c z: *Między konstytucją a ponadnarodowością. Opcja integracyjna konstytucji RFN* [Between Constitution and Supranationalité The Integration Option of the German Constitution], Warszawa 1990, p. 446.

[29] See Ch. T o m u s c h a t, *op. cit.*, p. 56 and 57.

[30] Cf. J. B a r c z: *Stosowanie prawa Wspólnot zachodnioeuropejskich w państwach członkowskich. Problemy konstytycyjnoprawne* [Application of the Law of the West European Communities in the Member States. Constitutional and Legal Problems], Warszawa 1991, p. 108 and following.

we are faced with a complex process: the opening of the national legal system with respect to the law set by the supranational organisation, and renouncing the exclusive exercise of public power in the determined areas - accompanied by the delegation of the competence of state authority organs to the supranational organisation.

Therefore, three relevant constitutional and legal problems should be considered: a) the concept of the primacy of the application of secondary law, b) the possibility for the Constitutional Tribunal to examine conformity to the Constitution and c) the potential subordination of secondary law to the provisions of Art. 193 of the Constitution.

Ad a) Art. 91 item 3 stipulates accurately a “direct application” of secondary law, and, in the event of collision with the acts, its “precedence”. There is no question of a rank, since the rules of the national and secondary law of the supranational organisation originate from independent, separate legal systems. Secondary law does not “cancel”, “overcome” or “annul” the national rule, in the event of collision, but has so-called primacy of application.[31]

Pursuant to the constitutional integration act, Poland will open its legal system to the EU law, renouncing, to the appropriate extent, its exclusive public powers and ensuring the primacy of the application of the EU law. This formulation reflects accurately the essence of the discussed phenomenon. Thus, in the event of a collision with the rule of national law, Polish organs will be obliged to apply the EU law; however, this does not mean that Polish national law will become invalid. It will remain valid, but the scope of its application will be limited. This is of relevant importance in the context of the mentioned discussion on the sovereignty of the state with respect to EU membership. The delegation of the competence of state authority organs, in relation to certain matters, to a supranational organisation does not not result in losing the sovereignty with reference to the delegated powers, but only in renouncing its exclusive exercise of public power in a given scope; at the same time, it allows for the application of the acts set by foreign public authority (supranational organisation). Thus, if the law of a supranational organisation is amended or cancelled, the rules of the national law, previously contradictory, will be applied to the appropriate extent by the national organs, since the factor limiting their application will disappear.

The Constitution drafts spoke accurately about the primacy of the application of secondary law ”in the event of collision with the national law rules” (compare Art. 75 item 3 of the draft Constitution of June 19, 1996). The introduction into Art. 91 item 3 of the formulation that secondary law “shall have precedence in the event of a conflict with statutes” is not the best possible. It will only give rise to the issue of the conformity of secondary law to the Constitution, which has already been decided by the Member States in favour of guaranteeing efficacy to primary law. The scope of the cognition of the Constitutional Tribunal - as we shall see further - is scant, and such a formulation only provokes discussions over problems, which are decided at other levels.

[31] According to some opinions, provisions of Art. 189 of the EEC Treaty (numbering before Amsterdam) contain a colliding rule - “real rule determining rank” - which, in the case of collision, would lead to an annulment of the applied national rule, cf. *Kommentar zum EEC-Vertrag* (hrsg. von E. Grabitz), München 1986 (chapter on article 189 of the Treaty).

The Republic of Poland enters the EU pursuant to the Constitutional integration act (of special democratic legitimacy). As far as secondary law, established by the Union organs, is concerned, the Republic of Poland will be able to influence its contents by the participation of its representatives in the Union organs. On the other hand, upon passing this law, it will be ensured - according to the primary law of the EU - primacy of application in the national legal system (also with respect to the Constitution); only the competent organs of the EU are empowered to its interpretation.

Ad b) The cognition of the Constitutional Tribunal with respect to the evaluation of the conformity of secondary law to the Constitution may be considered only to a rather small extent. The EU secondary law is not national law ("the statute" in the meaning of Art. 188 s. 1, nor "legal provisions issued by central State organs" in the meaning of Art. 188 s. 3), nor international law ("international agreement" in the meaning of Art. 188 s. 1 of the Constitution). The only possibility to control the constitutionality of secondary law is to refer to the institution of constitutional complaint (Art. 188 s. 5). According to Art. 79 item 1 of the Constitution "Everyone, whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution". The Constitutional Tribunal will have two possibilities: it may state that the EU secondary law is subject to the concept of the "normative act" in the meaning of Art. 79 item 1, and undertake an examination of the constitutional claim with respect to the conformity of secondary law to the individual rights of the citizens guaranteed in the Constitution. Such issues appeared in the constitutional jurisdiction of the Member States and were linked (especially in the 1970s and at the beginning of the 1980s) to a discussion on the necessity to guarantee individual rights, also under the European Communities. In effect, it was stated, that under the EC/ EU there occurs such an univocal development of individual rights, that it guarantees appropriate protection, and thus intervention of the Constitutional Tribunal is not necessary.[32] Therefore, in the event that Constitutional Tribunal decides to follow this way, probably, it will have no other choice than join this trend in the judgment of the constitutional courts of the Member States. Other possibility is to recognise that the concept of the "normative act" in the meaning of Art. 79 item 1 does not extend to EU secondary law. It would also be relevant, due to the need to preserve uniform interpretation in the context of EU secondary law, and especially with respect to Art. 193 of the Constitution.

Ad c) According to Art. 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 or statute, if the answer to such question of law will determine an issue currently before such court". Thus, the Community law does

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[32] Cf. J. B a r c z: "Ochrona praw zasadniczych w ramach Wspólnoty zachodnioeuropejskiej. W sprawie kompetencji Federalnego Trybunału Konstytucyjnego RFN" [Protection of Fundamental Rights within the West European Community. Concerning the Competence of the Federal Constitutional Court in Germany], *Zeszyty Niemcoznawcze PISM* 1989 (IV), no. 2.

not give rise to doubts in this respect: the only competent organ to issue initial judgments as regards the validity and interpretation of the acts of the EU institutions is the EU Court of Justice.[33] Therefore, the Polish Court will address the legal question to the EU Court of Justice. The concept of the "normative act" in the understanding of Art. 193 does not extend to the EU secondary law. Due to the imperfect formulation of Art. 91 item 3 of the Constitution, the confirmation of such an interpretation will be undoubtedly one of the first problems that the Constitutional Tribunal will face after Poland's entrance to the Union.[34]

[33] See Art. 177 of the Treaty establishing the European Community (numbering before Amsterdam).

[34] E.g. one of the first judgments of the Austrian Constitutional Court, connected with Austrian membership in the EU, concerned precisely this problem - judgment in the case B 2300 (95-18 of 11 December 1995).

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THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND POLISH MUNICIPAL LAW IN THE LIGHT OF THE 1997 CONSTITUTION AND JURISPRUDENCE

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The problem of the relationship between international law and domestic law did not play any role in the policy of Central and Eastern European states in the communist period. With the exception of several articles - mostly by Polish international lawyers - scientific publications and research on the topic were relatively rare. An approach to the problem changed with the replacement of the communist regimes by democratic systems. Provisions dealing with the relationship between the two legal orders were introduced into the new constitutions of those states, emphasizing the priority of international law over regulations of domestic legal systems.[1] They deal with the priority of human rights treaties, international agreements, and the supremacy of general principles and generally accepted norms of international law. The constitutions provide for both systems: the incorporation of international law into domestic legal systems, and the transformation of international norms into municipal rules. In the former case international law is applied by domestic courts and state agencies *qua* international (i.e. foreign or external) law; in the latter, it changes its nature and is applied as domestic law. New constitutions introduced also a competence of constitutional courts who now supervise the conformity of international law with the constitutions, and of domestic acts with international law. [2] The aim of our paper is to present the development of the relationship between international law and municipal law in Poland, with special interest in the new Polish Constitution of 2 April 1997. It is important to emphasize that the problem belongs beyond any doubt to the area of constitutional law and not of international law, although the major part of research in this respect has been effectuated by international lawyers.

1. According to Art. 49 of the so-called March Constitution of 1921, and subsequently Art. 15 of the Provisional Constitution of 1947, the provisions about intema-

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[1] See on this topic R. M u l 1 e r s o n et al. (eds.): *Constitutional Reform and International Law in Central and Eastern Europe,* The Hague 1998, *passim;* V. S. V e r e s h c h e t i n: "New Constitutions and the Old Problem of the Relationship between International Law and National Law", *EJIL* 1996, vol. 7, p. 20-41.

[2] See J. A. F r o w e i n, T. M a r a u h n (eds.): *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa,* Berlin-Heidelberg-New York 1998, p. 443 and following.

tional law in Polish municipal law were connected with the participation of the Parliament in the ratification process. Certain categories of treaties, including in particular treaties concerning the rights and duties of individuals, could be ratified by the President after prior approval by Parliament, such approval being given in the form of a ratification law. Duly ratified and published treaties acquired the status of laws of Parliament. In fact, the procedure amounted to transformation.

The situation changed radically after the passing of the Constitution of 22 July 1952 which did not contain any express provisions dealing with the place of international law within the Polish legal order, with the exception of Art. 30(1), conferring the right to ratify international agreements upon the Council of State, a collective presidential body. The constitutional gap caused a lively discussion among Polish authors. Some of them maintained that ratified and published international agreements acquired the power and rank of an Act of Parliament. According to others, ratification could not be treated as a law-making act, and no provision of the Constitution gave grounds for an assumption that transformation was needed. The dominant view was formulated by S. Rozmaryn who claimed that international treaties should be applied directly within the Polish legal order. They are international law instruments and do not rely upon acts of domestic law. The Parliament did not take part in the ratification process nor did any municipal legal act incorporate international agreements into domestic law. They are still valid as part of the internal legal order. Rozmaryn based his position on the lack of express constitutional regulation.[3]

The doctrinal dispute has not been resolved by the jurisprudence of the Polish courts. In the *Pannonia* case, decided on 22 November 1972 and upheld on 5 October 1974, the Supreme Court stated that the courts could apply only the agreements duly ratified and promulgated in the *Official Journal.* This decision was based upon the concept of transformation. The judgment in the *Warta* case of 18 May 1970 provided for the possibility of applying international norms (both treaty and customary rules), and, if necessary in the second stage, domestic law. The decision of the Supreme Court of 10 February 1981 concerning the application of Art. 22 of the Covenant on Civil and Cultural Rights denied any direct effect of the Covenants, and excluded any derogation from the provisions of municipal law incompatible with them. Finally, the decision of 25 August 1978 excluded the application of the ILO Convention No. 87 and Art. 22 CCPR by the courts. According to the Supreme Court Jurisdiction, judges are subordinated only to Parliaments statutes; as the conventions mentioned above were not clearly transformed into domestic law by an Act of Parliament, they could not be applied by the courts. In fact, the Court declared that those norms were not self-executing and required transformation.

One can conclude that notwithstanding the dominant opinion of international and constitutional lawyers, the courts under communist rule, for manifestly political reasons, did not accept the possibility of the direct application and effectiveness of intema-

[3] S. R o z m a r y n: *Ustawa w Polskiej Rzeczypospolitej Ludowej* [The Law in the People's Republic of Poland], Warszawa 1964, p. 329, 332 and 340.

tional law within Polish legal order. Individuals could not claim any right granted under the human rights treaties.

2. The political, economic and social transformation required the modification of the Constitution. The President was conferred with the competence to ratify treaties. If a given treaty imposed significant financial burdens or required changes in the valid legislation, the President had to seek an authorization of the Sejm (Lower House of the Parliament) prior to ratification. A constitutional custom has been established that the consent was to be given in the form of a ratification law. The Constitutional Law of 17 October 1992 on the organization of state authorities and division of competences (so-called Little Constitution) confirmed the President's competence to ratify treaties. Certain categories of treaties require the approval by Parliament in the form of a ratification law prior to ratification. The government could freely decide that an agreement should be ratified with the approval of Parliament or that consent was not needed. The decision of the government in this respect was not subjected to the control of the Constitutional Tribunal. In fact, the problems of the relationship between international and domestic law were left to practice. The decisions of the Constitutional Tribunal and the Supreme Court dealt with two important questions: the principles governing the validity and applicability of international law within Polish municipal legal order, and the rank of international norms in the hierarchy of sources of law.[4]

2.1. The problem of the validity of international law in Polish legal order.

The first judgment of the Constitutional Tribunal dealing with the new approach to international law after the change of the political system was passed on 7 January 1992. The case concerned the restriction of the competence of the Supreme Administrative Court to review certain administrative decisions regarding the officers of the Border Guard. The motion by the Ombudsman and the President of the Administrative Court stated that international human rights treaties to which Poland was party guaranteed to all individuals without any distinction or exception the access to justice and the right to a judicial review of the case concerning them. The Constitutional Tribunal declared itself not competent to control the conformity of domestic legislation with international law, according to Art. 1 of the law of 29 April 1985 on the Constitutional Tribunal. However, the constitutional judges invoked Art. 1 of the Constitution providing for the principle of legality or rule of law. International agreements concluded by Poland constituted an important element of the interpretation of Art. 1 since from the moment of ratification they constituted part of the legal system. The agreements should be applied *ex proprio vigore* unless they are not self-executing. Consequently, the Constitutional

[4] It is impossible to present all judicial decisions dealing with the relationship between international law and domestic law. We can refer, however, to detailed publications in this field - see, e.g. J. Oniszczuk: "Umowy międzynarodowe w orzecznictwie Trybunału Konstytucyjnego" [International Agreements in the Adjudications of the Constitutional Tribunal], *Państwo i Prawo* 1995, no. 7, p. 14 and following; M. Masternak-Kubiak: *Umowa międzynarodowa w prawie konstytucyjnym* [The International Agreement in Constitutional Law], Warszawa 1997, p. 142 and following; A. Preisner [in:] M. Kruk (ed.), *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International and Community Law in Domestic Legal Order], Warszawa 1997, p. 127 and following.

Tribunal did not draw any distinction between the origin of rules valid in the Polish legal order. Let us emphasize that the position of the Tribunal in this respect corresponded with the early practice of Western European states which treated international norms as an important factor of the interpretation of domestic legislation. The concept of the direct applicability of international agreements, and in particular of self-executing treaties, was elaborated later. On the other hand, it is interesting that the Tribunal developed its position towards a competence to control the conformity of international agreements to the Constitution. In its decision of 30 November 1994 the Tribunal decided that it was competent to control the conformity of the act of Parliament, allowing the President of the Republic to ratify a specific international treaty (so-called ratification law).[5] The ratification law is a normative act enacted by the Parliament, and it could be subjected to judicial control similarly to other domestic legal acts.

The decision of the Constitutional Tribunal of 20 October 1992 marks an important step in the jurisprudence. The case concerned the incompatibility with the Constitution of the provision of Article 15 of the Aliens Act of 29 March 1963 as amended on 19 September 1991. The Aliens Act provided for the detention of an alien subjected to expulsion on the basis of an administrative decision of the competent territorial state agency. The Tribunal decided that according to Art. 29 of the Aliens Act in matters within the scope of this act, international agreements binding Poland should be applied if they regulated certain questions in a different way from domestic law. Under those circumstances, the judicial review of an administrative decision on the detention for deportation could have taken place on the basis of Art. 9(4) ICCPR applied *ex proprio vigore* on the ground of Art. 29 of the Aliens Act. The Tribunal referred also to the respective provisions of international agreements including the European Convention on Human Rights of 1950 in order to establish the scope of different institutions introduced by the Aliens Act. The judgment of 20 October 1992 is important for another reason as well. It expressly confirmed the principle that the rights protected by the Constitution are granted not only to Polish citizens but also to aliens residing - even on a temporary basis - in the territory of Poland. Surprisingly, the Tribunal did not refer in this context to Art. 1 of the European Convention on Human Rights of 1950.

The judgment of the Penal and Military Chamber of the Supreme Court of 17 October 1991 was enacted in the extraordinary appeal proceeding dealing with one of the judgments on the legality of martial law proclaimed in Poland in 1981. The Supreme Court pronounced the accused innocent and stated that the introduction of martial law was contrary to the principle of the non-retroactivity of law as formulated in Art. 15 ICCPR (ratified by Poland in 1977). According to the Court, the regulation of Art. 15 was operative within the municipal legal system and it was self-executing.

Finally, one should refer to an interesting decision of the Administrative Chamber of the Supreme Court of 15 June 1993. The decision concerned the registration of an organization called the Union of the Former Members of the German Wehrmacht in the

[5] On the nature of ratification law in the Polish legal order see in particular W. Sokolewicz: "Ustawa ratyfikacyjna" [Ratification Law] [in:] M. Kruk (ed.), *Prawo międzynarodowe..., op. cit.*, p. 93 ff; M. Masternak-Kubiak: *op. cit.*, p. 73 and following.

Republic of Poland, composed of persons of Polish origin and nationality who lived in territories belonging to Germany before the Second World War or annexed by the Reich in 1939, and were enlisted in the German Army. After the war they resided in Poland and decided to organize themselves in order to protect their rights. The organization has been registered according to Polish law by the District Court in Bydgoszcz. The Minister of Justice objected to this decision instituting an extraordinary appeal proceeding. The Supreme Court cancelled the decision of the District Court for formal reasons and returned it for re-examination. The decision of the Supreme Court referred to the applicability of Art. 11(2) of the European Convention on Human Rights in the Polish legal system. Furthermore, the Court stated that the rule of law principle required that the Polish State observed international obligations contained in the duly ratified agreements and conventions; consequently, international legal norms can and should be directly applicable in domestic legal relations, and they do not require any transformation acts. The only condition thereto is a clear or implied intention of the parties to give such an effect to the agreement within the municipal legal order. However, with regard to human rights treaties the intention was clear, since it was hard to presume that the parties had no intention to apply them directly. This decision constituted in fact a step backwards in jurisprudence concerning the validity of international law. It made the direct application of international agreements dependent upon the clear or presumed will of the parties, and not upon the simple test of the fulfilment of necessary criteria (precise, clear and unconditional provisions). However, this trend was not upheld in the later decisions of the Supreme Court.

On the other hand, one should admit that the practice of Polish judicial organs is neither uniform nor consistent. Different state agencies - or even different chambers of the same court - apply international law in different ways. Let us refer here to the decision of the Supreme Administrative Court of 18 January 1994. The case concerned a claim by a Polish national of German origin to have his name changed from Jan to the original Hans. The claim was based upon general international law and upon the provisions of the Polish-German Treaty of 17 June 1991 on Good Neighbourliness and Friendly Cooperation.[6] The Court decided that since administrative agencies pass their decisions based upon domestic statutes, international agreements cannot become the autonomous basis of a decision. However, in the given case, the judges referred to relevant provisions of the Constitution and to the law of 1956 on the change of names, and stated that the right of a person to use one’s name in the version of one’s native language belongs to constitutional rights and justifies the change of a name if requested by a member of a minority. This judgment deserves attention since it mirrors a certain trend of the lower courts not to invoke international treaties as the basis of a decision but to refer to municipal normative acts.

[6] See W. Czapliński: “The New Polish-German Treaties and the Changing Political Structure of Europe”, *AJIL* 1992, vol. 86, p. 169-171.

2.2. The rank of international law in the hierarchy of sources of law in Poland.

Surprisingly, in extensive jurisprudence concerning the validity of international law within the Polish legal order, only extremely rare decisions have dealt with the position of international law in the hierarchy of sources of municipal law.

In this context, the resolution passed by seven judges of the Civil Chamber of the Supreme Court of 12 June 1992 merits mention. The case concerned certain aspects of international adoption and the relationship between the Polish family code and the Convention on the Rights of the Child. The Court indicated that the place of international law within Polish municipal legal order was disputable. Even if the majority of authors maintained that international rules were valid *ex proprio vigore*, the contrary view could also be found both in legal writings and judicial practice. The importance of the latter should diminish, since the practice of the Parliament on the basis of Art. 32(g) of the Constitution required the approval of international agreements by Parliament in the form of a ratification law prior to ratification by the President. However, as the Constitution did not clearly establish the principle of the absolute priority of international law over domestic legislation, international treaties ratified on the basis of the consent of Parliament should have the rank of statutes with all the effects thereof.

In the light of the actual constitutional provisions the position of the Court was correct; however, it did not clearly prescribe methods of the resolution of conflicts between international agreements and subsequent domestic legislation. If the construction had been applied consistently, later domestic acts would have prevailed over earlier international agreements. From the point of view of the principle of rule of law such a solution should have been rejected.

3. The relationship between international law and domestic law in the light of the Constitution of 2 April 1997.

The present constitutional regulation marks an important step in comparison to former ones; however, it is far from fully satisfactory.

The constitutional provisions dealing with the relationship between international law and Polish domestic law start with Article 9 which states that the Polish Republic respects international law binding upon it. This provision covers all international law notwithstanding its origin (whether conventional or customary). It is of purely declaratory character, and situated in a chapter of the Constitution dealing with the principles of the political, social and legal system of Poland. In fact, this provision has been referred to as a possible basis of validity in the municipal legal order of those norms which have not been indicated in the remaining provisions of the Constitution as sources of Polish domestic law: i.e. customary law, non-ratified treaties and covenants, unilateral obligations, and binding norms elaborated by international organizations (if any).

Article 87 of the Constitution opens Chapter III concerning sources of law. According to it, duly ratified international agreements constitute the source of Polish law. There are two kinds of ratified treaties. Certain treaties can be ratified by the President directly on the basis of his personal prerogatives. The other categories of agreements can be ratified exclusively after prior approval by the Parliament, expressed in the form of the so-called ratification law (Art. 89(1) of the Constitution). The Constitution extends the competence of the Parliament upon: treaties dealing with peace, alliances, political and military treaties: treaties concerning fundamental freedoms, rights and duties defined in the Constitution; membership in international organizations; treaties imposing important financial burdens upon the state budget; and international agreements reserved for regulation by the laws of Parliament. Every case of a ratification of the agreement by the President must be notified to the Parliament. It is interesting that although the competence of the Constitutional Tribunal has been extended so as to include the control of the compatibility of international agreements with the Constitution, and of domestic law with international agreements duly ratified, it does not cover the legality of the ratification itself. The competence of the Tribunal is limited to the control of the conformity of legal (legislative) acts, and not the legality of administrative acts (it seems to be indisputable that the nature of the Presidential act of ratification is administrative and not legislative).

The position of ratified international agreements in Polish legal order has been regulated in Art. 91(1) of the Constitution. According to this provision, ratified treaties, upon their publication in the *Official Journal* of the Polish Republic, form part of the domestic legal order and are directly applicable unless their application is dependent upon the adoption of an Act of Parliament. The wording of this Article has been modified in comparison to the draft presented by the Constitutional Commission of the Parliamentary Assembly. The draft situates ratified international agreements among sources of Polish domestic law, suggesting a required transformation of international agreements into domestic law (either by the law of Parliament or by the act of ratification by the President of Republic); the provision on direct applicability was meaningless. Furthermore, the Constitution suggests making a distinction between the position of the treaties ratified after their prior approval by the Parliament and other ratified treaties. The former should enjoy priority before laws (Acts of Parliament,) while the latter are subordinated to them. Such a construction presupposes the conformity of domestic legislation with international obligations, and the duty of the legislative bodies to adjust domestic norms to international law. It does not exclude a possibility of concluding a treaty contrary to domestic acts and even contrary to the Constitution; under such circumstances, however, the ratification law passed by the Parliament should introduce relevant amendments to municipal acts in force.

Summing up the above considerations, it should be emphasized that from the theoretical point of view ratified international agreements are incorporated into municipal law rather than transformed into domestic law.[7]

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[7] In fact, there are good arguments for both positions. Proponents of the transformation theory refer mostly to Art. 87 as listing international treaties as a source of domestic law; cf. R. S z a f a r z: "Skuteczność norm prawa międzynarodowego w prawie wewnętrznym w świetle nowej Konstytucji" [The Effectiveness of International Law Norms in Domestic Law in the Light of the New Constitution], *Państwo i Prawo* 1998, no. 1, p. 5. Other authors refer to the direct applicability of international agreements, provided for in Art. 91, as the basis of an incorporation of international law and an expression of a monistic view. Cf. A. W y r o z u m s k a: "Stosowanie prawa międzynarodowego w prawie krajowym" [The Application of International Law in Domestic Law] [in:] *Stosowanie prawa Unii Europejskiej w wewnętrznym porządku prawnym państwa* [The Application of European

The position of other international agreements in Polish domestic legal order remains unclear. In theory, agreements of this kind should not be directly applicable and should not concern issues listed in Art. 89(1); according to the Constitution, they do not comprise a source of Polish domestic law and are not directly applicable. In practice, numerous international agreements and compacts are concluded in a simplified form; they are neither published in the *Official Journal* nor (sometimes) translated. An example of such a treaty is the statute of the EBRD. Presumably, they are subordinated to laws of the Parliament; such a solution, however, would be contrary to Article 9 of the Constitution. On the other hand, it is unclear on what basis the agreements concluded in the simplified form should be applied in the Polish legal system. The Constitution neither incorporates them nor transforms them into domestic law. The position of those agreements should be regulated by the proposed law on the conclusion and implementation of international treaties (to be passed by the Parliament in the forthcoming months), or it should be left to the decision of the Constitutional Tribunal or the Supreme Court. It might be suggested that the agreements concluded in a simplified form require implementation by a specific domestic act (law of the Parliament). Finally, it is also possible to introduce a delegation by a general agreement ratified upon the prior approval of the Parliament or by the specific law of the Parliament for the Government to conclude an agreement in a simplified form, dealing with questions reserved for the competence of the Parliament according to Article 89, if the need to conclude such an instrument is urgent.[8]

It is important to notice that according to Art. 241 of the Constitution, the regulation of Art. 91 concerning the position of international instruments in Polish domestic legal order should be applied to international agreements concluded before the entry into force of the Constitution, provided that those agreements were ratified and published in the *Official Journal,* and that their content concerns matters referred to in Art. 89(1) of the Constitution (i.e. international agreements subjected to approval by the Parliament).

Finally, emphasis must be placed on the fact that the new Constitution granted the Constitutional Tribunal a power to control the conformity of international agreements in force to the Constitution, and of domestic acts of lower rank to international agreements. If the Tribunal decides that a specific regulation is contrary to international law, judicial and administrative decisions based on such decisions are void, and new proceedings in such matters should be initiated according to respective statutes.

4. Conclusions

The provisions of the Constitution of 1997 mark an important stage in the development of the relationship between Polish domestic law and international law. Although they constitute an object of scientific disputes among international and constitutional lawyers, they can serve as a basis for judicial and administrative decisions, requiring a higher standard of protection of individual rights.

Union Law in the Inner Legal Order of the State], Warszawa 1998, p. 30; A. Wasilkowski: “International Law and International Relations in the New Polish Constitution of 2 April 1997”, *PolYBIL* 1997-8, vol. 23, p. 7.

[8] Agreements concerning the rights and (mainly jurisdictional) immunities of members of foreign armed forces stationing temporarily for the time of manoeuvres in the territory of Poland have been invoked in this context.

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THE LIMITS OF RIGHTS AND FREEDOMS - THE LIMITS OF POWER

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1. Preliminary Remarks

During work on the Constitution we had a chance to observe a peculiar paradox. On the one hand it is indisputable that citizens' rights and freedoms have left an impression on the systematic model contained in the Fundamental Act. This impression is so strong that it led to a concern whether the scope and guarantees of the rights and freedoms of citizens will not constitute an obstacle for the efficient functioning of the State. Concern was expressed that focusing on this issue resulted in lowered interest in structural and political issues. On the other hand, only some issues connected with citizens' rights and freedoms were subject to an in-depth discussion or caused disputes and controversies of an ideological and political nature. Those included, among others, such issues as the right to life from conception to natural death, or the scope and methods of regulating and exercising economic, social and cultural rights. This means that citizens' rights and freedoms, which in the 1944-1989 period constituted a source, and context of a struggle for a democratic and law-obeying state, quickly, and to some extent even unexpectedly gained the status of the indisputable and obvious matter. It also means that the level of understanding the content of the specific rights and freedom of the citizens is much higher that the understanding of many important values of the democratic system.

The constitutional regulation of citizens' rights and freedoms remains in accordance with the current standards of European constitutionalism. This relates both to the position of rights and freedoms in the constitutional system, which exerts influence on its interpretation and the content of individual rights and freedoms, both of material and procedural nature, and, finally, to the mechanism of exercising and protecting said rights and freedoms. The sources of the Europeans standard arise from the constitutional provisions of the individual countries as well as from the general agreement as to the minimum level of rights and freedoms, contained in international treaties. The influence of the constitutional regulations of the European countries on twentieth-century Central European constitutionalism is very differentiated. However, it is impossible to

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overlook the clear impression left by the first chapter of the German Constitution, which *de facto* became a point of reference for all countries following the thorny path from totalitarianism to democracy. Not by coincidence have the Spanish, Greek or Portuguese legislators used the German example, and not by coincidence was the already classical formula of Article 14 of the German Constitution - ‘‘ownership obliges” - repeated in the constitutions of Central European Countries. The international standards include: the Covenants of Political, Social and Economical Rights and the European Convention on Human Rights, including the judicial verdicts of the Human Rights Tribunal and Commission in Strasbourg.

The legislators have recognised the rights and freedoms of citizens as the foundation of the Republic, subsequently confirmed by society in a constitutional referendum. Without aspiring to issue verdicts on the normative importance of the preamble to the Constitution, it is necessary to indicate that it was adopted for the purpose of rendering the dignity of human beings and their freedoms a directive for the activity of all authorities of the State and, primary, for the parliament, government and the courts. Human dignity and freedom were constitutionally recognised as the unalterable foundation of the Republic. This is a directive of positive activity understood as the principle that each authority should act according to its competence in such a way as to create conditions for the freedom of the individual and respect for his dignity to the furthest possible extent.

The scope of the free actions of the public authorities is limited, and the limits are established by, among others, a current understanding of the content of the particular rights and freedoms of the individual. Such a depiction remains in accordance with the present model of relations between the freedom of the actions of public authorities and the scope of protected freedoms and rights. The rule is simple: since no body of public authorities is absolutely free in the execution of its competence, since they are somehow “naturally” limited by the scope of the competence of other authorities, the rights and freedoms of the individual also do not possess an absolute nature and may be subject to certain limitations. At the same time, the essence of this relation is that the limitations of rights and freedoms are not only the limitation in exercising such rights by the individual, but, first of all, limitations for the public authorities, which may not be exceeded in any circumstances. If, however, the inviolable limits of the rights and freedoms are violated, then public authority may expect a specific sanction, which may assume the form of, for example, a declaration of a non-conformity of the normative act with the Act of Parliament and the Constitution, a declaration of the invalidity of the decisions, the quashing of the judicial decision or an order concerning compensation for damages suffered by the individual. The limits of actions and also omissions by the public authority have been defined rather precisely, not only in respect of space, in which the authorities may exercise their competence, but also in respect of sanctions, in the case such limitations are violated.

2. The Rule and the Exception

The freedom of the individual and the rights defined in the Constitution comprise the rule. The exception from this rule is the limitation of rights and freedoms. The normative consequences of this trivial statement are also trivial, but from the political point of view they do not have to be. Although it is clear for any lawyer that if the limitations of rights and freedoms are an exception from the rule, then any intentions of limiting them must take into account the inviolable rule of the strict, maximally restricted extent of such limitations. The exceptional nature of such limitations has been emphasised by the lawmakers by the double use of the limiting expression “only” (only by the Act of Parliament and only...), in conjunction with the adjective “necessary” (only when they are necessary in the democratic state, in order to...”). The restrictive understanding of this relation is derived from its essence; thus, the more restrictive the understanding of the meaning of the exception, the more proper the prerequisite for an interpretation of the rule. Is this rule, obvious for any lawyer, similarly understood by politicians as regards its importance and consequences? Observations of the lawmaking process, including the making of the Constitution, as well as the process of the application of law by public authorities does not allow for a similar judgment. Due to the specific nature of the prerequisites and the regulatory mechanism - both in the field of citizens’ rights and freedoms and transfers in the field of competence of particular bodies of public authorities -1 do not delve into the issue of the limitation of citizens’ rights in exceptional conditions and circumstances. Thus the rule of the limitation of citizens’ rights and freedoms contained in Article 31 section 3 of the Constitution will possess fundamental meaning. This regulation defines the actual scope of the rights and freedoms of citizens, since, in fact, the legally permitted limitation of such rights and freedoms decides about their essence. On its part, by relating to a clause which defines the acceptable limits'of the rights and freedoms of the individual, similarly as with the majority of other norms, the prevailing regulation does not constitute a particularly original achievement of the constitutional idea. However, this is not a reproach but, on the contrary, praise of beneficial moderation in the search for “own” solutions, in a situation, when solutions existing in other legal orders have proven useful. In such cases, the reception of law, and certainly the reception of systematic concepts and constructions comprises the optimal behaviour of the system-makers.

3. Prerequisites for a Limitation of Rights and Freedoms

The reception, fortunately not formal, has already been made. By way of example, let us mention relevant provisions of the European Convention for Human Rights, constituting a reference point and evaluation criteria for all types of limitations in the Polish legislature. Hence in Article 31 section 3 the Constitution contains an already classical, three-part clause limiting the rights and freedoms of the individual. The first one relates to the formal basis of possible limitations, which may have any no other form than the

Act of Parliament. The second one relates to the circumstances permitting such a limitation, and the third one constitutes a guarantee of the inviolability of the essence of a particular right or freedom.

The requirement that the Act of Parliament be regarded as the formal basis of the limitation of the rights and freedoms of the individual is quite obvious. Due to the fact that we recognise the freedoms and rights of the individual as a constitutional matter, the Constitution itself must contain basic norms allowing for the limitation of rights and freedoms; secondly, it should include a detailed regulation on the limitations of particular rights and freedoms, which may be made by means of the Act of Parliament. A few reasons speak in favour of the necessity of using the Act of Parliament as the proper source of limitations. The Act of Parliament is the highest act in the hierarchy of normal legislature. It is adopted according to a procedure characterised by certain features. First of all, such procedure is public, allowing public opinion to learn about the assumptions of the regulations and to follow work on the final form of the Act. This gives public opinion as well as possible external observers a chance to react in the case of a risk that the permissible limitations of rights and freedoms may be exceeded. Additionally, the participation of the Senate in the lawmaking process and the role of the President in the process of the promulgation of the Act constitute a supplementary control element. In addition, the Constitutional Tribunal may be included into the mechanism of controlling the constitutionality of the Act, since the President, before signing the Act, may submit a motion for controlling the compliance of the Act with the Constitution. The requirement of the statutory regulations (by means of the Act of Parliament) acts as a guarantee for the individual, because the Act of Parliament is an act of a general nature. Moreover, the Act and only the Act may limit the rights and freedoms of the individual. The Parliament may not delegate its right to impose limitations upon any other authority, e.g. the government. This does not mean, however, that the government may establish a sub-statutory law, e.g. in the form of regulations. Nevertheless, a material change on the level of details contained in the acts - in order to fully regulate the limitations in the act - shall be assumed. It should be expected that under the new Constitution the regulations (statutory instruments) will not contain any norms limiting the rights and freedoms of the individual.

This is also the essence of the difference in the concept of the legal regulation of the status of the individual in comparison to the status existing before the new Constitution came into force.

The second part of the clause permitting the limitation of the rights and freedoms of the individual relates to the material prerequisites for limitation. First of all the limitations of rights and freedoms are permissible only when they are necessary in the democratic state. There is a little difference here from the content of the relevant clause contained in the European Convention, which does not mention a democratic state, but a democratic society. Let us recall that the judicial decisions of the Commission for Human Rights and the Tribunal for Human Rights allow for describing certain characteristics of the "democratic society." Namely, this is a society of a pluralism of views, behaviour and tolerance; from the political point of view, this is a society which contains guaranteed political freedoms and rights of the individual as factors which moderate or reduce the character of the behaviour of public authorities. At the same time, this is a society in which each individual has a chance for development, and benefits from the guaranteed possibilities of such development, while the execution of rights and freedoms is safeguarded by the control institutions.

I think that the aesthetic approach contained in the constitutional expression concerning a democratic state, not conceived as “a democratic society”, may be somewhat offensive. This is because the present standards of “freedom” do not relate to the state, due to the fact that it is recognised that a state respecting the basic rights and freedoms of the individual meets the minimum requirements of the democratic state, but rather to society, envisaged as the actual subject, whose interest must dominate over the freedoms and rights of the individual if there is no other way to resolve a conflict of values.

“Public order”, as the next prerequisite for limiting the rights and freedoms of the individual, may be understood as a directive for such an organisation of public life, which may ensure the minimal level of consideration for the public interest. When discussing constitutional issues we may add that in Poland too public interest has been taken into account since Article 1 of the Constitution provides that the Republic of Poland is the common good of all its citizens. Additionally, public order assumes the organisation of a society based upon the values shared by this society. Those values should also include the universal rules of social justice, Society must agree as regards the necessity of introducing limitations of the rights and freedoms of the individual due to a universally accepted level of common well-being and the conditions of a proper organisation of society itself. Therefore, public order is co-defined by such elements as public safety and health, moral and aesthetic views or the economic system (e.g. as regards the protection of consumers).

“Public health” or “public morale” may also be a prerequisite for limiting rights and freedoms. It is especially difficult to define “public health” as a value more important than the freedoms and rights of the individual, although it is used in international conventions regulating human rights. This value has been accepted without special discussions and remains the least controversial prerequisite. In fact, the necessity to consider public health in a state of conflict with the rights and freedoms of the individual may mean, for example, the prevention of the transmission of a disease and the necessity to undergo a medical examination; such instances happen only in exceptional circumstances. In such cases, the application of provisions on extraordinary circumstances will allow limitations of the rights and freedoms of the individual other than “ordinary”.

On the other hand, “public morals” may be understood as the set of rules of conduct, quite generally accepted in individual and collective behaviours, and based on the understanding of the notion of “morale” in the given period and society. The content of this notion is a product of many factors, such as culture, religion, tradition, education, tolerance, etc. It is conditioned by the time and place in which the meaning of such a notion is defined. However, this does not necessarily have to mean that attempts to define its content, made in different countries and at different occasions, have no influence on determining the essence of the notion of “public morals”.

Each attempt to limit the rights and freedoms of the individual will undergo a test of proportionality. The rule of proportionality, a fundamental element constituting the essence of the democratic state of law as a political principle, must especially apply in cases of limitations of rights and freedoms. The test of proportionality means that it is necessary to answer the following questions. Firstly, is there a sufficient premise for introducing the intended results of the regulation. Secondly, is this regulation, which limits the rights and freedoms of the individual, really indispensable for the realisation of one of the indicated constitutional prerequisites. Finally, is the effect of the introduced regulation in appropriate proportion to the burdens imposed on the citizens. A joint answer to these questions will provide the basis for an evaluation of the appropriateness of using mechanisms which limit rights and freedoms.

Since exercising rights and freedoms is the rule, and its limitation is subject to restrictions appropriate for the exceptional situation, then the third element of the construction limiting the freedoms and rights, i.e. the guarantee of the inviolability of their essence, is a logical consequence thereof. Although it is an obvious logical consequence, it is fortunate that almost at the last moment the lawmaker decided to include into the Constitution a guarantee of the inviolability of the essence of said rights and freedoms. Such an inclusion of this guarantee into Article 34 section 1 of the Constitution was caused probably by the fact that a guarantee, with identical wording, was left in the provisions of Article 64 section 3, drawn up much earlier and stating that the limitation of ownership is possible only to such an extent which does not infringe upon the essence of ownership rights.

Analysing the limits of rights and freedoms one may not omit the differentiation of regulations concerning Polish citizens and other persons, not citizens of Poland but subject to the jurisdiction of public authority. By way of example, such limitations of rights concern the use of the constitutional complaint in cases of decisions on granting asylum or refugee status. This relates also to more or less obvious limitations in exercising political or social rights. Let us mention, once again by way of example, the citizens' right to vote, which in Europe undergoing unification becomes a universal right that does not depend on holding the citizenship of a given country, at least at the level of local elections.

4. The Remaining Criteria of a Limitation of Rights and Freedoms

The basic question relates to the permissible possibilities of the interpretation of the clause contained in Article 31 section 3 of the Constitution providing that "Any limitation upon the exercise of constitutional freedoms and rights may by imposed only by the Act, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons", from the point of view of the constructions contained in the provisions of Chapter II of the Constitution regulating the freedoms, rights and duties of persons and citizens. Even a superficial analysis of the particular provisions contained in this chapter indicates that there are additional prerequisites for permitting limitations in the rights and freedoms of the individual. Apart from the above mentioned, which include the safety of the democratic state, public order, the protection of the environment, public health and morale, freedoms and rights of the others - the lawmaker allows limitations (or prohibitions) due to the "protection of the private life of the parties", "important legal interest of the parties", "inconsistency with the Constitution or with the Act of Parliament", "binding international agreements" or "the important economic interest of the state". For example, the right to obtain information on the activities of the public authorities and persons acting on public positions, the right of access to documents, or the right to witness the meetings of the collective bodies of public authorities, appointed as a result of general elections, may be limited exclusively owing to the protection of the freedoms and rights of other persons and business entities, as well as the protection of public order, safety or the important economic interest of the state, defined in the acts; thus, we have a complete list of bases for limiting the said right to obtain information. Therefore, it is impossible to limit the right to information with regard to public health or morale or the necessity to protect the environment. This means that the provision of Article 31 section 1 is applicable only in the part relating to the guarantee against the violation of the essence of the right to information (Article 31 section 3 sentence 2) and not in the part relating to the circumstances for its limitation (Article 31 section 3 sentence 1).

The authors of the Constitution introduced a specific gradation of the prerequisites for the limitation of citizens' rights and freedoms. The limits of public authorities' activity defined in Article 31 section 3 are addressed to those bodies, which exercise their lawmaking competence. Those are not the only limitations. An analysis of the constitutional norms contained in Chapter 1 of the Constitution indicates also other circumstances for the limitation of specifically described rights and freedoms. Thus, the freedom of establishing of political parties and their activities is limited by the observance of the principle of the equity of the citizens and the employment of democratic methods for shaping the policy of the state. Moreover, the Constitution prohibits the existence of not only political parties, but also other organisations which refer in their programmes to totalitarian methods and practices, Nazism, fascism, and communism, as well as those whose programme or activity permit national or racial hatred, the use of violence in order to gain power or influence the policy of the state, providing that their structure or membership may be classified.

On the other hand, the limitation concerning the establishment of professional self-governments representing so-called professions of public trust, is in public interest; the limitation of establishing other professional self-governments involves the freedom of practising a profession and the freedom to undertake business activity, which, in turn, may be limited only for reasons of important public interest. The similar condition of public interest, which also constitutes a limitation, is set for expropriation. Finally, limits of the official character of the Polish language are marked by the rights of national minorities stemming from ratified international treaties, whose provisions constitute part of legal order in the State and are directly applicable.

It seldom happens, however, that in the sphere of human rights the application of an international treaty is conditioned by the issuing of an Act of Parliament; even in such cases, the Act must be in conformity with the contents of the treaty, and in the case of a collision with the contents of the norms, the international treaty ratified with prior consent expressed in the Act of Parliament will prevail if it proves impossible to reconcile the Act with it.

A search for other constitutionally defined limits of citizens' rights and freedoms leads to the conclusion that the lawmaker made generous use of clauses permitting limitations. The right to an open court hearing may be limited - apart from the conditions listed in Article 31 section 3, i.e. the safety of the State and public order - for the reasons of morale, the protection of the privacy of the parties involved, or other important private interests. Morale, without the adjective "public", is also one of the prerequisites for limitations in manifestations of religion. Those are the subsequent, independent from Article 31 section 3, circumstances for the limitation of a specific constitutional right. The boundary which regulates the possibilities for the limitation of any right is also the application of the court procedure and the limitation of a right only upon the basis of a valid court judgment. This relates, first of all, to the limitation or rather deprivation of the ownership right in form of forfeiture, secondly - the limitation or deprivation of parent's rights, thirdly - to incapacitation or deprivation of public rights or the right to participate in elections. Limits for the public authorities related to the acquisition, archiving and making available of information about citizens are their indispensability, and such indispensability which is evaluated in categories relevant for the democratic state of law - an interpretation of this norm must take into account Article 2 of the Constitution. Finally, limitations for the duty of military service may assume the form of religious beliefs or subscribed moral rules, which do not permit a citizen to serve in the army, and may constitute a basis for directing a citizen to substitute service.

In three situations the content of the rights and freedoms is defined by means of a direct reference to the norms of international law. Therefore, the scope of the freedom to organise trade unions and organisations of employers and other union freedoms may be subject only to such statutory limitations which are allowed by international treaties binding in the Republic of Poland. Next, the above mentioned limitation of the official nature of the Polish language is based on the rights of national minorities, stemming from the ratified international treaties. Finally, the principle of the non-retroactivity of criminal law is limited, an exception from the rule, by criminal liability for the act, which at the moment of commission constituted an offence under international law. The reference to the norms of international law is important to such an extent as - according to the constitutional regulation - the ratified international treaty, after its publication in the *Journal of Laws*, constitutes part of the legal order, unless its application depends upon an Act of Parliament. It is known that most of the norms of international law relating to human rights are applicable directly. Moreover, the international treaty ratified with prior consent expressed in the Act has priority before the latter, if the Act cannot be reconciled with the treaty.

But happens if the Constitution does not provide directly a possibility for the limitation of a right, as in the case of the right of each person to the protection of private and family life, honour and good reputation as well as the right to decide about his personal life (Article 47 of the Constitution)? If we adopt the view that Article 31 section 3 applies only to those freedoms and rights, whose limitation is expressly and indisputably permitted by the Constitution by indicating that such a limitation is permissible, then we should conclude that the lawmaker did not make allowance for any possible limitation of the right of each person to the protection of his private or family life, honour and good reputation as well as the right to decide about his personal life. Since international law is applicable directly, and the relevant provision of the European Convention permits the limitation of this right, then this means that despite of the lack of an expressed permission for the limitation of rights specified in Article 47, the limitations introduced on the basis of Article 31 section 3 are permissible.

In order to avoid confusion, the Constitution must be read very carefully. Otherwise, if we limit our understanding of the expression “the exercise of constitutional rights and freedoms”, contained in the limiting clause, as relating only to the freedoms and rights specified in Chapter II of the Constitution, entitled “The freedoms, rights and obligations of persons and citizens” then it will appear that such important political rights as, for example, the right to participate in elections, or economic freedom, should remain outside our scope of interest. Yet at least one aspect of the electoral law, i.e. the principle of equity, should be analysed from the point of view of the clauses limiting the rights and freedoms of the citizens. This principle is obviously violated in elections to the Senate.

I pointed out only a few issues relating to the status of the citizen in the democratic State. This status is also defined by limits in exercising rights and freedoms. The constitutional regulation, which is to constitute inviolable limits for actions of the public authorities, requires a sound interpretation. Such an interpretation must relate both to the constitutional norms, statutory regulations and the directly applicable norms of international law concerning human rights.

5. Addressees of Limiting Clauses

The boundaries of the limitations of the rights and freedoms of the individual, defined in the Constitution, apply to the activities of all bodies of public authorities. Thus, this clause is addressed to the Parliament, which is bound by those limitations in the lawmaking process. It is also addressed to all bodies of public administration and executive authorities applying the law, since the application of law should take into account directives contained in Article 31 section 3 of the Constitution. The limiting clauses are addressed to the courts in their capacity as bodies which control the appropriateness of the establishment and application of law, and as bodies administering justice - which may also mean a limitation of the freedom or rights of the individual. The understanding of the content of rights and freedoms by the bodies of the executive authorities and the administration of justice, an understanding which is co-defined by the limiting clauses, will have fundamental meaning for the practical application of the Constitution to the sphere of the individual.

There exists a mechanism for controlling the abuse of the limits of the establishment and application of law. This is a mechanism that gives to the individual a right to initiate the control procedure. In the case of the abuse of law in the lawmaking process and an excessive limitation of freedoms or rights the individual may submit a complaint to the Constitutional Tribunal. This may happen in a situation, when the individual claims that his rights and freedoms have been violated by an Act of Parliament or a normative act, on whose basis a court or a public administration authority issued a final decision about its freedoms and rights, or duties defined in the Constitution. In cases when the right is abused in the process of its application, the individual may lodge a complaint to the court of administration or to the common court. If freedoms and rights have been violated by the decision of a court, the individual has the right of appeal to a higher instance, including a constitutional complaint.

6. Conclusions

The above indicated variety of the forms and scope of constitutional authorisation for limiting the freedoms and rights of the citizens may give rise to doubts as regards the relation between Article 31 section 3, sentence 1 of the Constitution and the other constitutional norms permitting such limitations. The analysed constitutional norms lead to the following conclusions:

Firstly - in all situation of constitutionally permissible limitations of citizens' rights and freedoms the limitation may be introduced only by means of an Act of Parliament. This rule is not waived, even the slightest extent, by the differentiated text of the constitutional authorisation. Regardless whether the legislator uses the authorisation "in the act", "by means of the act", "the act defines" or "defined by the act" - in all cases is an Act of Parliament the only legal form for limiting rights and freedoms.

Secondly - if the constitutional norm generally authorises the legislator to limit freedoms and rights without indicating the prerequisites for such limitation, then only the prerequisites defined in Article 31 section 3 sentence 1 shall apply. On the one hand, the legislator may not take into account any other prerequisites, but on the other hand the occurrence of only one of the prerequisites contained in this norm is sufficient for limiting the rights and freedoms, if necessary.

Thirdly - the statutory regulation must be subject to the "test of necessity" of the limitation of rights and freedoms. The appropriate application of a given prerequisite, scope of limitation, its relation to the essence of a given freedom or right is subject to an ordinary evaluation of the control of law, performed by the citizen (also by means of the constitutional complaint) and by the bodies controlling the appropriateness of the law making process.

Fourth - the use of imprecise notions by the authors of the Constitution imposes on the law establishing bodies and bodies administering and controlling the appropriateness of the establishment and application of law, the duty of due diligence in defining the content of this notion. The rules of reconstructing the context of general clauses must be applied with special diligence owing to the fact that general clauses and imprecise notions are the basis for exceptions from the rule.

Fifth - there is an obvious systematic depiction, i.e. the constitutional norm relating to public wellbeing should be interpreted in the context of Article 1 (common wellbeing).

Sixth - in cases when the authors of the Constitution did not provide a possibility of limiting rights and freedoms (e.g. contained in Article 47 of the right to the legal protection of private or family life, honour and good reputations as well as a right to decide about hiss personal life,) but the norms of international law, directly applicable in the Polish legal system, allow such limitations, then the limitation in Polish law may not be more restrictive than that permitted by international law. The interpretation of the content of the norms provided by international law must obviously take into account the content of the decisions issued by adjudicating bodies, in particular the Commission for Human Rights and the Tribunal of Human Rights in Strasbourg.

Seventh - the rights and freedoms for which the possibilities of limitation were not provided and for which there is no such possibility permitted by international law, may not be subject to limitation (e.g. the prohibition of tortures).

Eighth - each case of limitations, also those defined by the acts regulating states of emergency, still apply the guarantee of the inviolability of the essence of a given freedom or right, contained in Article 31 section 3 sentence 2 of the Constitution.

Ninth - the limitations of rights and freedoms are subject to control by the constitutional authorities of the state and in the process of international control, initiated in particular due to the violation of rights and freedoms guaranteed in the European Convention for Human Rights.

Tenth - the limits of the rights and freedoms of citizens are the function of the essence of the given freedom or right. The content of all citizens' rights and freedoms requires redefinition due to axiological assumptions contained in the Polish Constitution. Also the content of particular prerequisites for the limitation of rights and freedoms calls for redefinition. Since the citizen gained a new status in the sphere of public law, while the nation, understood in the political sense of the notion as a community of citizens, became an actual sovereign, and the organisation and functioning of the state are based upon the principles defined in the Chapter entitled "Republic", then the interpretation of any norm regulating the freedoms and rights of citizens should take into account the new constitutional context to an even greater extent considering that the current model of legal regulations is, in fact, a model of the rights and freedoms of the citizens.

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CONSUMER PROTECTION AS *PUBLIC INTEREST LAW*

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1. Introduction

The need to protect the consumer with legal means, as a general legal and political postulate, was not realized until relatively recent times: it started in the Sixties. Since then, innumerable institutions were created with the objective of providing such protection, both in numerous national legal orders and at international level (European law, where several dozens of directives dealing with various aspects of consumer protection are overtly referred to as the corpus of consumer law). Yet, there have been different ways of discovering the legal relevance of consumer protection. Similarly, there have been different axiological traditions to motivate the legal and political steps taken in this field.

The very act of formulating and asking the question "why should the consumer be protected in the law" requires overcoming many difficulties. Indeed, why the consumer? Understood as an individual or a representative of a group? How far should the postulated protection go? Who, and according to what criteria, should decide whether the proposed level of protection is adequate? Everything depends on the perspective from which one views the problem. Those who want to put it exclusively in the perspective of the law of contract encounter the greatest difficulties. Because when consent, in the formal meaning, was considered as a sufficient prerequisite for concluding a valid contract *(volenti non fit iniuria* and *coactus tarnen voluisti),* it meant questioning the very possibility of formulating an assumption that the consumer could be harmed in any way. The fact of concluding a contract entailed that there was the intention of doing so, and that intention was sufficient to draw the conclusion that nobody could be harmed. However, this approach is not the only one possible. The U.S. was the first country to formulate the need to protect customers and to regard it as a political problem. The crucial date was 15 March 1962, the date of President Kennedy's address to the Congress concerning the protection of consumers' interests. Traditionally, consumer protection is to be perceived as a public law matter, a constitutional one. It is understood as protection of the interests of a certain minority, which, being dispersed and, consequently, having no access to representative

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bodies, cannot articulate their interests using the already existing institutional channels. In other words, consumers are classified here as an example of a disadvantaged minority (as they are deprived of representation) due to the weakness of their position and not due to their number, and, being a minority, they must be protected. In this way, the problem here is put in terms of giving more importance to individuals constituting a minority, and this is, by all means, a public law matter.

In Europe, this approach was regarded as ideologizing the problem too much and criticized[1] for setting the problem on a too high axiological pedestal.

In countries of real socialism there occurred some very particular and peculiar axiological obstacles to planting the banner of consumer protection both in times of planned economy and when the state organization transformations were started.

This study aims at presenting those axiological perspectives, which seem useful for several reasons. Firstly, because the approach which emphasizes elements of public law in the axiology of consumer protection (it has for years been close to the author,[2] and this is already a purely subjective reason) is nowadays, in post-Maastricht times, exposed much more distinctly in European law as well. The perspective of a harmonization of laws forces us to review the opinions on consumer protection presented sometimes in our country. Secondly, because this approach is now present in the new Polish Constitution (Article 76), whereby public authorities are obliged to protect consumers against activities threatening their health, privacy and safety, as well as against dishonest market practices. Thirdly, because public law perspective on consumer protection means that those problems belong to the competence of the ombudsman (Commissioner for Citizens' Rights).

2. Consumer Protection in the U.S. - *Public Interest Law*

"Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process. Philosophically, *public interest law* rests on the assumption that many significant segments of society are not adequately represented in the courts, Congress, or the administrative agencies, because they are either too poor or too diffuse to obtain legal representation in the marketplace".[3] "Public interest law attempts to fill the gaps in our legal system. These days, the lawyers practising this very trend are building on the foundations of the earlier successful fight for citizens' rights and freedoms, discovering new domains of their activity. Before courts, organs of administration, in legislative processes, their activity leads to guaranteeing representation to wide strata of minori-

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[1] M. B e r n i t z:, "Schwedisches Verbraucherschutzrecht", *Rabeiszeitschrift für ausländisches und internationales Privatrecht* 1976, no. 3-4, p. 596.

[2] See E. Ł ę t o w s k a: "Ochrona konsumenta z punktu widzenia polityki prawa "[Consumer Protection from the Point of View of Legal Policy], *Państwo i Prawo* 1978, no. 4, p. 17.

[3] N. A r o n: *Liberty and Justice for All. Public Interest Law in the 1980s and Beyond*, Westview Press 1989, p. 3.

ties, relatively powerless, such as the mentally ill persons, children, the poor of all races. Those lawyers strive to represent the neglected interests, which are commonly present on a large scale, with the majority of us, when we act as consumers, employees, individuals threatened in their privacy or need for a clean environment".[4] The two quotations presented above precisely explain the notion of *public interest law,*[5] a term which is not very familiar in Poland, and indicate that, in the American tradition, the problems of consumer protection belong to this trend of "practising the law". *Public interest law* does not denote a branch or fragment of positive law. What it does signify is a specific direction of strategy of actions within using the law. The point of departure is the assumption that, in a democratic state, all social groups should be granted, in various ways and at various levels, representation enabling them to articulate the interests of individuals associated in them. However, if such representation is missing or if it is, for various reasons, insufficient in (or before) any of the powers (legislative, executive or judiciary), members of the group characterized by deficient representation must be regarded as a minority and, consequently, as being disadvantaged in comparison to the rest of society. This situation calls for actions directed towards compensating for the deficiency of representation. Actions within the framework of *public interest law* are not concerned with the representation and protection of particular, individual interest, but of particularly understood public interest, identified with the interest of many individuals constituting a given social group. If that group is too weak to organize itself, and in this way to obtain adequate representation of the individuals it comprises before the legislative, executive and courts, it must receive support. Since all groups should have the chance of obtaining their representation to act on their behalf, any legal means that helps to articulate, organize and represent those "weak groups" is included in the notion of *public interest law.* Striving to provide representation, before all three powers, of the interests of individuals belonging to socially weak groups equals, as a matter of fact, strengthening democracy and either directly fighting for citizens' rights and freedoms (e.g. in the case of *public interest law* relating to representation of the interests of women or ethnic minorities) or particularly extending such a fight, no longer under the banner of representing a citizen as such, but granting to the latter official representation of one of his specific social roles (as in the case of consumers[6]).

The fact that the notion of "representation" becomes the key element of *public interest law* has two consequences. Firstly, as we have already mentioned, the fight for inadequately interests is placed within the framework of protection of citizens' rights

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[4] T. Marshall: *Financing Public Interest Law: The Role of the Organised Bar,* speech given by T. Marshall, Justice of the Supreme Court of the U.S.A., at the American Bar Association on 10 August 1975 [retranslation].

[5] See also C. Harlow, R. Rawlings: *Pressure through Law,* London Routledge 1992, ch. 7; J. Cooper, R. Dhavan (eds.): *Public Interest Law,* Oxford, Basil Blackwell, 1986, ch. I; R. Thomas: "The Consumer and Public Interest Law", p. 311-332; Ch. R. Halpers: "Public Interest Law: Its Past and Future", *Judicature* 1974, vol. 58, no. 3, p. 118-127; M. Rogovin: "Public Interest Law. A Response to Societal Problems" [in:] R. L. Ellis (ed.): *Taking Ideas Seriously: The Case for a Lawyer Public Interest Movement,* Washington DC, Equal Justice Foundation, 1981.

[6] The famous "we all are consumers" in the above-mentioned address to the Congress.

and freedoms, which, to some extent, constitutionalizes such interests and social roles as *public interest law* strives to expose. In this way, even though the notion of *public interest law* itself was only conceived in the 1960s, it becomes part of a much longer tradition of the fight for citizens' rights and freedoms.[7] Secondly, this particular strategy emphasizes the role of legal, procedural and professional means, and not purely political aims in the pursuit of increasing representativity of the interests of individuals[8] constituting the group. What matters here are all the existing means and procedures thanks to which one can receive attention and protection. Informing and educating individuals also come into play, as they increase the ability to get heard and a readiness to apply the already existing means to protect their interests, to articulate more forcefully their interests and to implement their individual rights. Familiarity with, and creativity in using the existing possibilities play a very important role: it is not enough to want, one must know how. Even in the case of representation before the legislative, when the issue in question is changing the obtaining positive law, something we usually perceive as belonging to the domain of politics, *public interest law* stresses more active participation of the representation or pressure groups in work preceding the preparation of amendments and works on amendments, that is broadly understood "representation": in preparatory procedures and not exclusively in the Parliament. Again, what is important here is to use all possibilities created by the already existing parliamentary mechanisms (which entails a certain skill and creativity), and not just the postulate of achieving a legal and political objective.

It is also mistaken to limit the notion of representation within the framework of *public interest law* solely to the question of litigation, i.e. to representation before the court (either by supporting a well-chosen "strategic" individual complaint with the intention of creating a precedent through adequate publicity or by admitting a public interest group as such). Litigation is only one of the methods (a very valuable one,[9] let us add) within the framework of *public interest law*, but it also comprises parliamentary lobbying or, as we would put it, "social consultation", and many other actions before administrative authorities, sponsorship and educational activities (addressed to individuals and aiming at persuading them to make more determined use of the already existing possibilities in order to obtain better representativity, or addressed to those in power, in order to make them more sensitive towards the protection of inadequately represented groups: to notice and articulate it in the actions of a given power).

[7] See: L. B r a n d e i s: "The Opportunity in the Law", *American Law Review* 1905, vol. 39, p. 559.

[8] We want to emphasise that we have in mind interest of individuals constituting the group and not interest of the group, as eventually the actions undertaken within public interest law should lead to better implementation of the subjective rights (broadly understood) of the individuals constituting such a group, and not to the autonomy of the interest of the group.

[9] See: A. H o m b u r g e r: "Private Suits in the Public Interest in the United States of America", *Buffalo Law Review* 1974, vol. 23, p. 343-409; M. C a p p e l l e t t i, B. G a r t h (eds.): *Access to Justice: The World Wide Movement to Make Right Effective, a General Report,* vol. I, p. 5-124 and vol. III, *Emerging Issues and Perspectives,* Milan, Giuffre, 1978, 1979; M. C a p p e 1 1 e 1 1 i: "Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study", p. 769-903; D. F e 1 d m a n: "Public Interest Litigation and Constitutional Theory in Comparative Perspective", *The Modern Law Review* 1992, vol. 55 (January), p. 44-72.

Another well-marked element of *public interest law* is fighting for "representation with legal means", which exposes the professional legal aspect of representation through procedure. In the search for such representation and its strengthening, legal assistance,[10] i.e. advocates, various *amici curiae,* and specialized organizations, plays a vital role. It must be emphasized that "public interest groups", that is, social organizations and pressure groups are not established to represent their own interests, but to act as an instrument increasing the efficiency of an individual and his interest. A group helps and replaces an individual instead of being an autonomous subject of interest and action. An individual seeks better representation of his interests, due to a specified social role: a group, an organization helps or even enables an individual to obtain it, but the interest of the group does not become autonomous. All the time we are dealing with the interests (rights and freedoms) of an individual.

Consumer protection, understood as a manifestation of *public interest law,* provides a particular solution to the question: against what should the consumer be protected? It is the task of the customers to take this decision when, thanks to increased representation, they are able to freely articulate their interests.

3. Axiological Motivation of Consumer Protection in European Law

3.1. In European law, the awareness of the need to protect customers appeared as a question of legal policy at roughly the same time as in the U. S., that is in the 1960s. However, whereas in the U. S. the problem was immediately judicialized by the "invention" of *public interest law* (both as the term and as the strategy of actions covered by the concept), in Europe the question of giving more importance to customers was not treated holistically, at the level of their deficient representation as a social group "before authorities". This approach was criticized (as we have already mentioned) for placing too much emphasis on ideology. The preferred approach was to see pro-consumer policy as a legislative policy (whose formation depends on the authorities and is not determined by anybody's claims, giving the impression of the State granting certain actions) and not as implementing claims, already legitimized by public law, of individuals demanding, in a specific social role, representation before authorities. The latter axiological motivation was, and still is, missing in European "consumer" literature. Naturally, there have been publications where the notion of *public interest law* was adopted, but only while describing the American experiences or in the context of a proposed covering of consumer protection with a similar strategy, the broad concept of "representation", a key term in public law axiology of *public interest law,* was limited to representing an individual before the court.[11]

[10] See report of the group of Yale students: "The New Public Interest Lawyers", *Yale Law Journal* 1970, vol. 79, no. 6, p. 1069-1152.

[11] See: H. G a d i n g: "Litigation by Public-interest Groups in European Law", *German Yearbook of International Law* 1996, vol. 39, p. 361.

The motivation which judicialized consumer protection policy, and, consequently, saw in its adoption the need to satisfy legitimate claims by individuals or groups representing them, being a result of a broader, public-law understanding of "representation" of consumers as a group of individuals, never had any influence and, moreover, disappeared. In such circumstances, it was by no means obvious not only how to answer, but simply how to ask the question "why indeed should we carry out the policy of consumer protection"?

3.2. Putting the question in terms of "representation before authorities", which is characteristic of the *public interest law* trend, significantly facilitates legal articulation of the need to protect consumers. Part of the difficulties in such articulation result from a false understanding of the ideology of civil law, detached from its history: it is believed to be reluctant towards the idea of protecting the consumer as a subject deserving a privileged position within the law of contract.

Can such reluctance really be ascribed to the ideology of civil law (much newer than the law itself, shaped at the turn of the 18th century as a product of the French Revolution and Kantian philosophy)?[12]

In those times, having been made the centre of the distribution of forces obtaining in society, the individual was intended to have the freedom of pursuit of his own ambitions: "by his labour to gain property, by exchange to satisfy his wants, by upward mobility to achieve a place commensurate with his talents. It was assumed that individuals will differ in their natural endowments, in their energy, drive and motivation, in their conception of what is desirable and that the institutions of society should establish procedures for regulating fairly the competition and exchange necessary to fulfill those individually diverse desires and competences. [...] The social structure of modem society - in its bourgeois form as the universalism of money, in its Romantic form as the thrust of ambition, in its intellectual form as the priority of knowledge is based on this principle".[13] The civil codifications created in the nineteenth century, reflecting those ideas, assumed parties to contracts to be equal. Those codifications based on the assumption of freedom of contract, manifested for instance in contractual co-operation, that is in negotiations between the parties until reaching an approved, "wanted" compromise. That is why those instruments were non-casuistic and their provisions discretionary, leaving much freedom to parties negotiating. The customers here are independent within the offer and the money at their disposition. They are bound by contracts because they express their own will. A customer buying a piece of bread for his last money and a customer taking a fancy to buy an unnecessary gadget are treated identically in the light of law. The legislator was not to take into consideration such circumstances as the social weakness of an individual - this belongs to the realm of moralists. This attitude, present in the Napoleonic Code (and generally in the civil law of those times), became later (especially in the literature inspired by Marxist ideology) the cause

[12] I repeat this fragment after my earlier study: "Umowy - mitologia równości" [Contracts - the Mythology of Equality] [in:] S. W r o n k o w s k a, M. Z i e l i ń s k i (eds.): *Szkice z teorii prawa i szczegółowych nauk prawnych* [Studies in the Theory of Law and Special Legal Sciences], Poznan 1990, p. 47-62.

[13] D. B e 1 1: *The Coming of Post-industrial Society*, New York 1973, p. 425—426.

of accusing their authors of hypocrisy, of consciously obliterating social inequalities. Whereas there are no doubts that the intended social neutrality of the law of that period objectively justified such evaluation, it would be all too simplistic to charge the creators of Napoleon's Code with conscious hypocrisy (such charges can be heard sometimes).

Our forefathers were neither dishonest nor naive. Yet, their conscience was shaped by their times. Equality, as a banner of the French Revolution, meant an equal start. The State and the law were to create conditions and procedures for just competition further in the life race, and "just" meant that everybody should be provided with identical formal chances, that is, free from precedence of birth or class. The notion of equality in the nineteenth century was built in opposition to the programmatic inequality of people before the law, resulting from the feudal precedence of birth. What is important, the demand for equality was not addressed to the legislator, but to the organs applying the law. That what is now taken for granted: that the law should be applied equally to everyone, was not obvious then. For this reason, the fact that the legislator did not take into account social inequalities cannot be used as a basis for accusing the authors of Napoleon's Code of a violation of the principle of equality, the way it was understood in those times. If we were to accuse them of anything, we could only say that they were shortsighted and did not foresee the further course of events. Even if in that instrument the equality of parties was reduced to its purely formal understanding, this is by no means proof that, in those times, the problem of real economic inequality was not believed to deserve any attention. However, it was thought that guaranteeing formal equality of parties, belonging to the domain of law, combined with the principles of free competition, would compensate for other inequalities, even those social or economic. Where the substantial inequality of chances could not be compensated for by non-legal mechanisms, the legislator took care (in such case) to give the weaker party more importance. It is untenable to claim that the ideological substance of the principle of the equality of parties was ever reduced to its purely formal understanding. It was, however, believed, and this conviction was not blatantly inconsistent with reality, at least not in the nineteenth century, that providing for formal equality of rights in addition to the principles of the functioning of the economy was enough to ensure actual equality of chances of the participants in trade. Yet this assumption proved more and more delusive as the economy was developing, technology was progressing, trade was becoming a mass phenomenon, and especially as the economy was becoming monopolized and providers of goods and services professionalized.[14] And this exactly what happened to the consumers. The fact that in the 1960s, in Europe and America, objections were raised as to the consumers' position on the market and the level of protection was a consequence of noticing that economic changes lead to a significant weakening of the consumers' position as "partners on the market". The consumer became a representative of a group whose disadvantage in relation to its professional partners was already typical. In other words, ensuring balance by guaranteeing the consumers formal free-

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[14] E. Łętowska: "Umowy...", *op. cit.*, p. 49-51.

dom of contract correlated with the conditions of competition was becoming impossible as the latter had changed. Possible remedies could be either exercising non-legal influence on those changed conditions on the market in order to strengthen the consumers' position or (and) giving the consumer, as a party to the contract, more importance with the help of legal means. In any case, it was a mistake, in the changed situation, to draw the conclusion that there was no need to act, as the principle of the law of contract is the purely formal equality of parties. Such a conclusion was based on a very shallow, one-sided and detached from the history understanding of that principle (which did not prevent some less far-sighted lawyers from arriving at that conclusion).

3.3. With the problem not being seen from the perspective of public law, as in the U.S., and, at the same time, the instrumental formalism of the law of contract being assigned the importance of a universal axiological principle, the articulation of consumer protection in law was not easy. Besides, in the 1960s and 1970s, the intensification of processes of the unification of law in Europe and the development of European law clearly began to be concerned with consumer matters, and it is worth observing under what banners they did so.

In 1975, the Council of the Communities adopted a preliminary programme for a consumer protection and information policy,[15] based on the assumption of five fundamental rights of consumers: the right to protection of health and safety,[16] the right to protection of economic interest,[17] the right of redress, the right to information and education, and the right of representation of their interests. In the period of operation of the programme many concrete steps were taken in order to eliminate economic and technical barriers connected with requirements as to product safety, mainly through the harmonization of the provisions specifying safety requirements (administrative provisions). The crown of those actions was the adoption of Directive 92/59 on general product safety, laying down the general and subsidiary duties of Member States in relation to ensuring safety of products on the market, and Directive 87/357 concerning products which, appearing to be other than they are, endanger the health or safety of consumers. The second five-year programme for consumer protection was adopted in 1981,[18] the third in 1985.[19] The following programmes lasted three years each: 1990-1992, 1993-1995.[20] They remain unchanged as to the sphere of consumer protection (fundamental consumer rights). The subsequent programmes are characterised by more specific re-

[15] Polish translation published in *Ustawodawstwo konsumenckie Unii Europejskiej* [Consumer Legislation of the European Union], Urząd Antymonopolowy, Warszawa 1996, p. 17 and following. The programme was annexed to the Council Resolution of 14 April 1975.

[16] It was especially concerned (the programme was very specific in this respect) with foodstuffs, cosmetics, detergents, utensils and consumer durables, cars, textiles, toys, dangerous substances, materials coming into contact with foodstuffs, medicines, fertilisers, pesticides and herbicides, veterinary products and animal fodder - all those major sources of danger were listed casuistically.

[17] It clearly indicated the need of protection in respect of conditions of consumer credit and false, misleading advertising, as well as abusive commercial practices, such as terms of contracts, guarantees, door-to-door sales, unsolicited goods, information given on labels and packaging.

[18] The programme was annexed to the Council Resolution of 19 May 1981.

[19] A New Impetus for Consumer Protection Policy, 27 June 1985.

[20] Published in Polish in the volume quoted in footnote 15.

quirements and a rising standard of protection; they contain also a critical account of the work undertaken so far. The main emphasis is on a great number of specific implementing actions, undertaken in order to carry out those programmes. Work is not being done “from one programme to another”, but mainly “in between” the programmes, and each subsequent programme, having a similar object, is concerned with a new qualitative phase, thereby raising the standard of protection. The accumulation of quantitative changes gradually leads to the transformation of “consumer protection”, understood literally, into the pro-consumer attitude pervading in EC economic policy. This, in turn, results in broadening the very notion of “consumer law” so as to include subsequent scopes of harmonization.

In Western Europe, or, more precisely, in the European Union, it took more than twenty years to arrive at the present level of awareness as to what the consumer should be protected against and how it should be done, as well as to work out adequate instruments of law and the practice of application of such law. What matters here is not just the passage of time, but also filling it with conscious, intensive, planned and co-ordinated actions on a large scale. The developing “consumer law” has already become a stable (and substantial) element of European law.[21] However, until recently (more precisely - until the changes introduced as a result of Maastricht agreements) consumer protection was not a strategic objective, but only a tactical objective of the Community. For instance, the question of the standardization of quality belonged, of course, to matters of consumer protection, especially the protection of consumers’ life and health, but from the point of view of achieving the objectives of the Union, the main question was to harmonize economic conditions facilitating free movement of goods and services, to guarantee competitivity and to equalize economic conditions among individual Member States. According to the catalogue of the objectives of the Community, this was the main strategic objective. Consumer protection was perceived as a means for achieving this aim.[22] After the Maastricht Treaty, advanced consumer protection, articulated as such, was added to the catalogue of the policies of the Community (Article 3, letter (s) and Article 129, letter (a) of the Treaty). Whereas in 1972, when the need to protect consumers was confirmed, it was seen as one of the means of achieving the objectives set by the Treaty of Rome, as specified in Article 2 thereof, in 1992 the Maastricht Treaty included the postulate of advanced consumer protection as an independent element of the catalogue of the common policies of the Union - Article 100 of the Treaty. This qualitative change expressly placed the individual “as” a consumer in the centre of the problem. Having given the consumer an independent position, the European approach became - axiologically - similar to the American tradition. It lacks, however,

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[21] See M. A. D a u s e s, M. S t u r m: “Prawne podstawy ochrony konsumenta na wewnętrznym rynku Unii Europejskiej” [Legal Bases of Consumer Protection on the Internal Market of the European Union], *Kwartalnik Prawa Prywatnego* 1997, no. 1, p. 32-57 with a presentation of the scopes and objects of EU legislative initiatives.

[22] See: D. H o f f m a n n: “Analyse der europäischen Rechtsetzungstechniken in Bereich der Vertragesrecht aus der Sicht der Europäischen Kommission” [in:] *Le nouveau droit des contrats et la protection des consommateurs,* Bruxelles 1997, p. 11.

the question of representation in the typical understanding of *public interest law,* which causes the initiatives undertaken on the behalf of the consumer to be much more formalized, understood as actions initiated either by the state or - as harmonizing actions - at an international level, but in any case as actions guided “from above”. Within the framework of *public interest law,* on the other hand, it is not decided in advance where the strengthening of consumers’ representation should lead: it is for the consumers themselves to decide after they have obtained better possibilities of “being represented” in places where the fight for a better protection of their interest is being conducted.

Also, the appearance of a new “field” of consumer protection: the protection of a consumer’s privacy, may be interpreted as a confirmation of the observation that European consumer protection law has discovered connections with the protection of the rights and freedoms of the individual. This question deserves a more detailed discussion as it is not very well known.

3.4. One of the new dangerous areas, until recently unnoticed in European law, is the privacy of the consumer, understood as freedom from being pestered by the *animus contrahendi* (the intention of concluding the contract) on the part of the entrepreneur. In market economy goods follow money, and the entrepreneur and trader become the more active part; their activity is sometimes manifested by an aggressive attitude towards the customer, and this results in a violation of the privacy of the latter. The consumer should be protected (this is one of the elements of his privacy) against unwanted “commercial harassment “and should have, at the time of every contact, a chance to discover its nature (commercial or, for example, social, private) and make a transaction being aware of doing so and under such conditions as to ensure its correctness (e.g. the possibility of comparing the received offer to other offers). It is important that respect be shown for the awareness of one’s own social role, and such awareness and decision on making use of that role be considered as elements of the privacy of an individual under protection. Two European directives included in the consumer law of contract clearly refer to the matters of privacy. Above all, one of the first directives concerning consumer contracts (No. 85/577 - to protect the consumer in respect of contracts negotiated away from business premises) had its origin in the idea of protecting privacy. An unusual place of concluding a contract, away from the “normal” one, poses a special threat to the consumer, who is “attacked by surprise” and has no chance of making a comparative analysis of the offer. Frequently, contracts are concluded at consumer’s home, as door-to-door sales. Here, we can also indicate the element of embarrassment at receiving a visit at home. The seller of goods or services becomes at the same time the customer’s guest, and the customer may feel obliged to show special consideration instead of treating the seller as neutrally as in a shop.

The directive concerning transactions away from the premises of an enterprise envisages protection, giving the consumer the right to renounce a contract concluded in such circumstances, without indicating or evaluating the reasons for doing so, within seven days from its conclusion. Also, the consumer must be informed in writing of this right, as well as of the place where he may make complaints, should he have any. The latter duty is connected with weaker possibilities of identifying the contractor by the consumer, in comparison to contracts concluded at premises where trade or services are carried on normally. The directive attempts to make up for it by imposing adequate duties on the professional. Thus, if the unusual place of concluding a transaction is the consumer's home, protection of the latter is, at the same time, protection of his privacy.

However, the motive of the protection of the consumer's private life is exposed much more decisively in the latest directive No. 97/7, adopted in 1997 and concerned with distance contracts. We will return to this directive later: for the time being we will only indicate the provisions that relate directly to the protection of privacy. The use of the consumer's telephone, fax or automatic calling machine by a supplier who wishes to establish commercial contact with the consumer requires prior consent of the latter. In other words, if the consumer does not want to be called and offered various goods and services by means of his communications devices, thereby violating his privacy, he may demand such pestering to stop. This is feasible insofar as the directive also states clearly that any contact (including contacts made with the use of other means of distance communication than those listed here), established in order to reveal *animus contrahendi* by the entrepreneur, requires this purpose to be immediately communicated to the consumer. It is important that the consumer be clearly informed about the nature of the contact in which he engages, and that he refrain from making any decisions without being able to judge the whole situation. Secondly, the directive obliges the supplier to give the consumer a chance to make such judgement by obliging him to provide information on the commercial nature of the contact. If the supplier uses private devices of the consumer (telephone, fax, calling machines) against the will of the latter, such action displays all the features of an unlawful violation of the right to privacy, which enables the consumer to apply legal means of the protection of this sphere, even without the necessity to prove the violator's unlawfulness.

The preamble to Directive 97/7 expressly refers to the Convention on the Protection of Human Rights and Fundamental Freedoms, quoting, in point 17 of the preamble, Article 8 (protection of privacy) and Article 10 (freedom of information) thereof as values subject to protection from the point of view of the fundamental rights of an individual and, moreover, conflicting values. Therefore, the need must be recognized to protect the consumer against certain aggressive and intrusive techniques of distance communication.

In this way, Directive 97/7 clearly indicates systemic links between its purpose and content and the conception of the protection of human rights. In other words, in the light of the directive there is no doubt that the protection of an individual as a consumer is a fragment, or more precisely, one of the aspects of the protection of the individual within the framework of human rights. This is interesting insofar as for many years, even in countries with advanced systems of consumer protection (like Sweden), strong objections were made against so-called excessive ideologization of consumer law by emphasizing its links with the protection of human rights. The opposite view was more characteristic of the American tradition, where consumer protection was recognized as giving greater importance to one of the groups of citizens, which was socially "weak" in some respects. In that tradition, consumer law gained a clearly constitutional aspect.

The European consumer law, after the amendments following the Maastricht Treaty, which stressed more forcefully the independence of the purposes of consumer protection as creating better living conditions for the individual, emphasizes more clearly its “human rights” dimension. And the preamble to Directive 97/7, with its links with human rights, is indisputable proof for that.

Those links concern not only the necessity to respect the consumer’s privacy, on the one hand, and, on the other hand, freedom of communication, also because of the need to conclude distance contracts and the need to achieve a reasonable compromise in this respect. The preamble to Directive 97/7 makes express reference to European regulations concerning personal data. Let us remember that the latter comprises, above all, Convention No. 108/1981 for the Protection of Individuals with Regard to Automatic Processing of Personal Data. The consumer is also protected due to the fact that the Convention applies to both public and private sectors. Recommendation R/85/20 on the protection of personal data used for the purposes of direct marketing applies, in the first place, to consumers. In particular, it sets forth restrictions as to sources of surnames and addresses of potential customers. There are no restrictions on the use of generally available registers, lists and publications (such as telephone directories). But it is only admissible to collect privately surnames and addresses as long as adequate guarantees are given that the privacy of the person concerned will be protected. National legislations can, therefore, introduce a complete ban or serious restriction on such practices. Making the collected data available to third parties for marketing purposes is only possible on the condition that the person concerned is, at the moment of data collection, informed thereof and expresses no objections. National legislations should provide solutions which ensure that this right of the concerned persons will be enforceable.

3.5. As for methods of action, the formation of European consumer law displays certain specific features, which are also worth a closer examination.

Work on particular European directives (except for questions of the standardization of the quality of the “strategic” groups of goods as indicated above) was initially conducted rather slowly. This was due to the characteristic, slow, dialogic procedure that had been adopted. The first directive in the field of the rights of consumers, concerning the protection of the consumer in respect of contracts negotiated away from business premises (85/577)[23] was adopted as late as 1985. Directive 85/374[24] concerning liability for defective products was adopted in the same year. The year before, Directive 84/450[25] on misleading advertising was adopted. Next came directives on consumer credit (87/107, amended by Directive 90/88[26]), on package travel, package holidays and package tours

[23] For Polish translation, see *Ustawodawstwo konsumenckie,* p. 153 and the translation of the directive with an introduction by E. Ł ę t o w s k a : *Kwartalnik Prawa Prywatnego* 1996, no. 2, p. 383 and following.

[24] Polish text: *Ustawodawstwo konsumenckie,* p. 104 and translation with an introduction by J. S k ą p s k i, *Kwartalnik Prawa Prywatnego* 1995, no. 4, p. 583 and following.

[25] Polish text in: *Kwartalnik Prawa Prywatnego* 1996, no. 1, p. 161 and following; E. T r a p l e, J. P r e u s s n e r - Z a m o r s k a: “Interes konsumenta oraz instrumenty jego ochrony w dziedzinie reklamy” [Consumer Interest and Instruments of its Protection in the Field of Advertising], *Kwartalnik Prawa Prywatnego* 1996, no. 1, p. 5 and following.

[26] Polish text in: *Ustawodawstwo konsumenckie,* p. 283 and following.

(90/314[27]), on unfair terms in consumer contracts (93/13[28]), on contracts relating to the purchase of the right to use immovable property on a timeshare basis (94/47[29]), and on distance contracts (97/7[30]). Directives of 1990 concerning liability of service-providers, guarantees on consumer goods (96 C/307/09), cross-border transactions 94/C 360/11) and sanctions connected with the protection of consumer interests (COM 95/712) are in the draft phase and preparatory work is still conducted. Irrespective of the binding instruments of Community law, numerous instruments, having the nature of a report or information, constitute an important implementing element, obliging individual Member States to harmonize the level of protection. By way of example, one can indicate: the Council resolution of 1995 on products presented as healthy, the Council resolution of 1987 on pursuing claims by customers, a preliminary report (COM 93/576) on consumers' access to jurisdiction and resolving consumer disputes on common market, information (COM 93/456) submitted by the Commission to the Council and European Parliament concerning the language used in information for consumers in the Community, the resolution of the Council and Ministers of Education of 1986 on consumer education in elementary and secondary schools and a report (on the same subject) of the Commission COM 98/17 of 1989, information from the Commission on the information and awareness campaign concerning safety of children (COM 87/211).

Regardless of the system of legal instruments of the European Union - the most comprehensive ones, comprising the most advanced system of such instruments,[31] as we have already mentioned - pro-consumer instruments of the Council of Europe also play a very important role. We should enumerate here especially European Convention No. 41 on the Liability of Hotel-keepers concerning the Property of their Guests,[32]

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[27] Polish text in: *Ustawodawstwo konsumenckie,* p. 313 and following, and *Kwartalnik Prawa Prywatnego* 1996, no. 3, p. 603 and following; M. N e s t e r o w i c z: *Dyrektywa Rady Wspólnot Europejskich o podróżach turystycznych a prawo polskie* [Directive of the Council of European Communities on Tourist Travel and Polish Law], *Kwartalnik Prawa Prywatnego* 1996, no. 1, p. 435 and following.

[28] Polish text: *Ustawodawstwo konsumenckie,* p. 137 and following, and *Kwartalnik Prawa Prywatnego* 1993, no. 2 with an introduction by F. Zoll, p. 191 and following.

[29] A Polish translation has not been published. Discussion in: B. F u c h s: "Timesharing", *Rejent* 1997, no. 4, p. 80-101.

[30] There is no Polish translation of the final text. One of the draft versions is published in *Ustawodawstwo konsumenckie,* p. 166 and following.

[31] It is extremely difficult to compile an exhaustive list of EC instruments concerning consumer matters. (This was attempted in *Ustawodawstwo konsumenckie,* p. 335.) It is much easier to indicate the instruments envisaging the harmonisation of national legislations of Member States of EC concerning the rights asserted by consumers by way of claims or obliging individual states to undertake actions directly in the interest of consumers (quality requirements and supervision, system for gathering information on accidents, duties relating to marking goods and informing). However, more and more often, as a result of pro-consumer actions having been made one of the main objectives of the integration of economies of the Communities, we are dealing with actions (instruments) which affect the consumers' situation indirectly. For example, since one of the assumptions of the common internal market is the promotion of the mutual overlap of national markets, including a continuous development of consumers' habits, it is, therefore, concluded that consumers are discriminated by being deprived of the possibility of learning about products manufactured in the traditional way in other Member States (M. A. D a u s e s, M. S t u r m, see above, p. 53).

[32] Published in *Standardy prawne Rady Europy* [Legal Standards of the European Council], vol. II, M. S a f j a n (ed.), p. 12, together with its discussion by M. N e s t e r o w i c z: "Konwencja (41) o odpowiedzialności

European Convention No. 91 on Products Liability in regard to Personal Injury and Death,[33] resolution 76/47 on inadmissible terms in contracts for the sale of goods and provision of services and appropriate methods of control[34] and recommendation R 81/2 on the legal protection of common consumer interests by consumer organizations.[35] Those instruments, as for their content and scope, are not harmonized with the EU system in details. Yet, unmistakably, they are inspired by a similar strategic thought as to their object and techniques of protection.

The first conclusion, when reading European instruments (and European law in force, various manifestations of soft law,[36] as well as different official statements) concerning questions of consumer protection (nowadays, more often concerning pro-consumer objectives of integration), is that we are dealing with a flood of initiatives ("multiplying beings") and that it would require a great effort to group them and establish mutual relations and interdependencies between them. What strikes the reader is also the length and elaborateness (as compared to the main text) of all preambles, explanations and "self-comments". It would be extremely difficult to illustrate the quality of being economical in creating "normative beings" with the example of European consumer law. Yet, on second thought, one begins to see sense in this method. The lengthy discussions in the preparatory stage, the verbal richness of every instrument, intended to explain the motives and work out common assumptions, are nothing but the implementation process itself (more precisely, the basic assumptions of those instruments). Long, comprehensive, meticulous discussions, patiently returning to apparently settled matters foster internalization, "absorption", getting accustomed to the new consumer axiology and strategy. And since this occurs in a circle of persons, who have strong influence on opinions concerning legislation (both European and national of individual Member States), their familiarity with the subject is decisive for the actual implementation of pro-consumer axiology. Another important factor is real education and information addressed to various groups of consumers (e.g. school education).

It seems curious that within the framework of Polish transformation this aspect does not generate profound interest: traditionally, we are more interested in the "text"

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za rzeczy wniesione przez gości hotelowych a stan prawny obowiązujący w Polsce" [Convention No. 41 on the Liability of Hotel-keepers Concerning the Property of their Guests and the Legal State Binding in Poland], p. 19 and following thereof.

33 Published in the book referred to in the previous footnote, p. 66, together with a discussion by J. K r a u s s: "Europejska Konwencja (nr 91) o odpowiedzialności za szkody na osobie lub śmierć wyrządzone przez produkt a regulacje prawa polskiego" [European Convention No. 91 on Products Liability in Regard to Personal Injury and Death and the Regulations in Polish Law], p. 98.

34 Published in the book indicated in footnote 29, p. 202 and following.

35 In the same source, p. 206. See also: Cz. Ż u ł a w s k a: "Rezolucja Nr (76)47 w sprawie klauzul niedozwolonych w umowach sprzedaży towarów i świadczenia usług oraz odpowiednich metod kontroli oraz Rekomendacja Nr R (81)2 w sprawie ochrony interesów wspólnych konsumentów przez organizacje konsumenckie a prawo polskie" [Resolution 76/47 on Inadmissible Terms in Contracts for the Sale of Goods and Provision of Services and Appropriate Methods of Control and Recommendation R 81/2 on Legal Protection of Common Consumer Interests by Consumer Organizations], in the same source, p. 223 and following.

36 That is instruments of various origins, which are not obligatory in a given State. Their force consists, for instance, in the self-obligation of certain professional groups N. R e i c h, J. L e s 1 e y (eds.): "Implementing the Consumer Supplier Dialogue through Soft Law?", *Journal of Consumer Policy* 1984, no. 2.

than in "how it was invented" and "how it was made generally known and understood". However, successful harmonization of law is, to a great extent, dependent on the latter. That is why the experiences of the formation of European consumer law should be, at least, of equal interest to us: not only from the point of view of achievements, measured in texts, but also how approval for a given strategy and its axiology was obtained. The presented programmes and projects of approximation to the EU law in general, intended to raise the standard of consumer protection in particular,[37] do not devote enough attention to the question "how" it was made, and instead they concentrate on "what" is in force in the countries of the EC, so to say, on the "final product", underestimating the implementation of European law, its methods and internalization of pro-consumer axiology by wide groups of decision-makers and lawyers. That explains also why in our country so little importance is attached to consumer education and representation: they are not concerned with producing "texts", but with undertaking organizing activities in order to raise "self-service" consumer skills. In this aspect, European law shows similarities to *public interest law* as regards consumer protection strategy. They differ in that such strategies, as we have already mentioned, if we envisage consumer protection as *public interest law*, comprise a much wider scope of activities.

4. Difficulties in Settling the Question of Consumer Protection in Conditions of Planned Economy and Its Transformation Towards Market Economy

Unfortunately, consumer protection in our country has always had bad luck: it has been underestimated to the extent of courts not noticing the need for such protection and judges being both insensitive and reluctant to squeeze anything out of legal provisions by way of interpretation. Before 1988 there were, and there still are, people (in the lawyers' environment) who negate the very need to protect consumers, even if their arguments are different. This causes the discussion on more advanced phases of con-

[37] However, in our country, programmes and studies, sometimes truly valuable and interesting, are prepared for a small audience; the same applies to publishing their results. This happened to the studies in *Biala Księga* [White Book], completely unavailable to ordinary readers and unknown even to courts - a series of studies and analyses concerning consumer law, published by URM [Office of the Council of Ministers] in 1996, in particular, vol. 13 *(Standaryzacja umów w obrocie gospodarczym* [Standardization of Contracts in Economic Trade] by W. J. Kätner, M. Pyziak-Szafnicka), vol. 17 *(Polskie prawo postępowania cywilnego a prawo WE* [Polish Law of Civil Procedure and EC Law] by A. Miączyński), vol. 18 *(Jakość wyrobów* [Product Quality] by I. Duda, Z. Cichoń, B. Gnela, A. Ożóg, M. Seweryn), vol. 26 *(Publicznoprawne instrumenty ochrony konsumenta* [Public Law Instruments of Consumer Protection] by R. Szostak), to the already quoted collection *Ustawodawstwo konsumenckie Unii Europejskiej*, and *Model prawnej ochrony konsumenta* [A Model for Legal Consumer Protection] in the series *Harmonizacja Polskiego Prawa Konsumenckiego z Regułami Unii Europejskiej*, vol. VI: *Ochrona konsumentów* [Protection of Consumers], Urząd Antymonopolowy, Warszawa 1996, or, finally, to *Program ochrona konsumenta w Polsce - stan obecny, kierunki zmian i działań dostosowawczych (w aspekcie stowarzyszenia z Unią Europejską)* [Programme Consumer Protection in Poland - Present State, Changes and Adjustment Measures (in the Context of Unification with the European Union] a study by the Ministry of Industry and Commerce, 1995, unpublished. Besides, text-centredness is also characteristic of studies having the nature of programmes: they do not devote sufficient attention to questions of implementation sociotechnology or at least implementation alone.

sumer protection to slow down and their implementation to be delayed. We are still at the initial stage: wide circles of practising lawyers are not convinced that consumer protection is necessary, and have to be continuously persuaded that modem mass trade is something different from its nineteenth-century version.

In the previous period, objections stemmed also from the fact that the consumers' partners were state enterprises. "You can never win with the railways (bank, insurance establishment, etc.)" common wisdom said. And this was true insofar as the courts, in many cases, were reluctant to recognize the individual interests of a consumer as deserving protection in a dispute with units of state economy. The underlying reason was the holistic attitude of socialist doctrine,[38] in the conviction that what is good for a state enterprise must automatically be good for the society, and, consequently, for the individual. When, in the Eighties, about a decade later, the belief that, even in socialism, the problem of consumer protection deserved attention (although the dangers and ways of averting them were in some respects different[39]) started to spread, the economic system changed. Naturally, the freshly approved consumer protection strategies turned out to be outdated or, at least, suspicious. What was even worse, we were again at the point of departure as regards accepting the need for consumer protection. The change in the economic system was followed by a new phenomenon, posing an equal obstacle to the birth of pro-consumer sensitivity. Soon, it became generally accepted that, firstly, an invisible hand of the market (competition) resolves, by itself, problems concerning principles. And that the consumers have to bear various inconveniences that they encounter, since the latter are unavoidable economic inconveniences this time not within socialized, but market economy. Secondly, another equally mistaken and equally widespread belief maintains that "marketized" economy, assuming the elimination of privileges for, let us say, state enterprises, does not tolerate special privileges for consumers. This image of market economy and the place of consumers in it, completely incompat-

[38] In 1983 I wrote the following on the difficulties with accepting the idea of consumer protection: "Such reasoning caused doubts whether insufficient consumer protection really deserved criticism, as it could be seen as unavoidable concession towards a common good. Noticing that the alternative: interest of the society *vs.* interest of an individual, does not exhaust all the possibilities, and that apart from those two types one may also indicate group interests of enterprises, not always compatible with the interest of the society, but sometimes mistakenly identifying and identified with it, made it easier to overcome the objections in this respect and, at the same time, opened the possibility of formulating the banner of the necessity of consumer protection. It was also rendered easier by growing criticism against a too publicist image of interest of the society. Since neither all claims to express such interest, nor each interest of the society (the problem of cost and time horizon!) must automatically prove more important than the interest of an individual. If one understands this regularity, one is free from pseudo-ideological doubts concerning the postulate of consumer protection, even if such doubts have not been expressed formally, but on many occasions formulated indirectly. A certain visible reserve towards adopting the banner of consumer protection might have also resulted from uncertainty as to the boundary between the interest of the consumer, deserving support and protection, and egoistic, exaggerated pretences of the latter". E. Łętowska: "Kształtowanie się odrębności obrotu mieszanego" [Formation of Autonomous Mixed Trade] [in:] E. Łętowska (ed.), *Tendencje rozwoju prawa cywilnego* [Trends in Development of Civil Law], Ossolineum 1983, p. 401. See also W. Wasiak: *Determinanty i podstawy prawne ochrony interesów konsumenta w Polsce* [Determinants and Legal Bases of the Protection of Consumer Interests in Poland], Prace Naukowe Akademii Ekonomicznej, Wrocław 1985, no. 298.

[39] See: C. Żuławska: "Ochrona konsumenta w reformowanej gospodarce" [Consumer Protection during Economic Reform], *Spółdzielczy Kwartalnik Naukowy* 1985, no. 3, p. 41—49.

ible with contemporary reality, was characterized by a somewhat neophyte enthusiasm for returning to the roots, as the market economy, to which it turned, was its old version, from the period when, for reasons of the political system, the links with Western economies were broken, and Polish law and legal thought, for the same reasons, no longer kept up with the latest European achievements.

A closer examination of Western laws, especially the European laws, demonstrates both those assumptions to be completely false. Though the invisible hand of the market ensures in itself freedom of the market, but this alone does not automatically cause the market to be transparent or market relationships to be fair. And thus it is the consumers - a group[40] which uses the market in a dispersed, individualized (both personally and materially) way - who are most affected by the results of the lack of transparency and decent treatment, since the consumers' partners, being well organized, specialized and professional, can profit from a deficit in those values. In the West nobody would deny this statement now, and it is only within the last three decades that statements in this field have become familiar, accepted, even commonplace and have been made the foundation of political and legal strategic programmes of consumer protection. It is, therefore, obvious that if we treat the economy of the earlier period, for example, that of the Thirties (which is sometimes viewed in this way in our country) as the model of market economy and its legal instruments, then the necessity of protecting consumers was not even mentioned.

The above mentioned bad luck of problems of consumer protection in Poland consists in the fact that twice, within a short period of time, it had to fight for its axiological recognition, and that the last stage (the fight for judges' awareness) has by no means been completed. That explains also the somewhat shocking ascertainment that the change in economic system was marked by a regressing legal standard of protection.[41]

Meanwhile, we witness significant moves on the map of dangers, which does not make it easier for the judges to become convinced that consumers face real dangers. When, a few years ago, a group of specialists from "here" and "there" were discussing consumer protection matters, it was striking how assessments of dangers differed. We, from "here", continually turned to the subtleties of warranties and guarantees, since on a market far from abundant, where money followed goods, the main problem was still how to find a seller of goods or a provider of services. Since what they offered was usually of poor quality, how could one force them to repair or replace what one managed to get? The perspective of withdrawal from the contract (that is, refund of money) was by no means satisfying, because it meant being "thrown back on the market" and again joining those who were still seeking goods or services. Our colleagues from the West were concerned about completely different issues: unfair terms of contracts, consumers being deceitfully persuaded to buy unnecessary goods or services, practices connected with concluding contracts in unusual places (especially in consumers' homes), and we

[40] The last reservation is essential: we mean a typical and not an individualised position on the market.

[41] B. Kordasiewicz: "Der Verbraucherschutz in der Übergangsperiode zur Marktwirtschaft" [in:] J. Aregger, J. Poczobut, M. Wyrzykowski (eds.), *Rechtsfragen der Transformation in Polen,* Wydawnictwo Baran i Suszczyński, Kraków 1995, p. 243 and following.

thought such problems to be very exotic, distant and almost imaginary. But times have changed and exotica became everyday life. In the past, the most important problem was protection against the unsatisfactory quality of goods. That is why warranty and guarantee, legal instruments serving to protect the quality of performance on the market (of course, not only in respect of consumers), seemed to be the main instruments protecting the consumer. The interpretation of the statutory provisions concerning warranty and guarantee was stimulated by the needs of consumer protection. The image of consumer protection was determined by the conditions of the economy where demand surpassed supply: other dangers, connected, for example, with aggressive techniques of attracting customers by entrepreneurs, did not exist or seemed unimportant in comparison to the key problem: how to provide customers with the very possibility of "entering" into a contract and ensuring its performance. That was an image of typical dangers in the situation of money following goods and, consequently, the consumer being a much more active subject on the market, the supplier being always able to clear the goods on a "thirsty" market. Now, it is the goods that follow the money, which is typical for a glutted market. In those circumstances, the active part of the one who seeks partners is played the entrepreneur, prompting them to "hunt" consumers in various, sometimes dubious, ways. This fact changes diametrically the picture of dangers to which the consumer is exposed. That effect was amplified by the appearance of private capital, a sharp increase in the number of economic subjects and their dispersion and the opening of frontiers. There appeared new forms of dangers to consumers: aggressive offers, skilfully set traps, such as games connected with premium sales, new commercial and marketing techniques,which tried to take consumers by surprise (door-to-door sales, sales away from the business premises), the growing importance of credit and its new forms. The dangerous field is, thus, moving, in the direction of what consumers in other European countries are protected against: in the direction of unfair terms of contracts, the use of surprising or unusual offers, the lack of clarity of the terms of transactions, as well as deficient information as to performance, its conditions, and the conditions of the whole transaction. With the sole difference that, again, in our country those phenomena are new and unknown, both from the point of view of their blameworthiness (the boundary beyond which they become blameworthy) and the available remedies, existing within legal institutions and provisions which are otherwise present in the Polish legal system, but either not being used as all (due to the different nature of the previous economy[42]) or not being used for the purpose of protecting consumers. Even the courts are unaware of possibilities within the law. Similarly to the Polish public prosecutors, who have difficulties forming opinions about new criminal phenomena and forms of criminality, our courts are not sufficiently sensitive to evaluate the phenomenon, and not skilful enough to find their place in the new circumstances.

[42] Some time ago I wrote on the inaptness of consumer protection in the field of door-to-door sales and aggressive offers in Poland, considering that such features are characteristic for economies where the supply exceeds the demand; in Poland, when the demand was much higher that the supply, consumer protection was effected mainly by warranty and guarantee, since the institutions which ensured were "not being deprived" of performance in kind - E. Ł ę t o w s k a: "Gwarancja i rękojmia. Główne tendencje orzecznictwa Sądu Najwyższego" [Warranty and Guarantee. Main Trends in the Judgments of the Supreme Court], *N. Pr.* 1987, no. 4, p. 35-36. The

Open frontiers and accelerated exchange, of a more universal nature as far as the offer is concerned, brought upon an enormous richness of goods on the market. Now money no longer follows goods, but this happens to the detriment of clarity concerning the features of the goods, the indentity of those introducing the goods on the market, and as regards both legal and purely factual obstacles in executing liability. This started with the appearance on the market of specifically "anonymous" goods (as regards the manufacturer and the importer), distributed with information and labels in exotic, or just foreign, languages. Such goods were often new, unknown, sometimes even dangerous, and they were introduced onto the market without any special information or warnings. Administrative polices (concerned with quality or simply health) are logistically inefficient in the changing market structure and organization, with great numbers of economic subjects whose organizational forms are loose and unstable, with sales effected by a seller without business premises who cannot be found for purposes of submitting a complaint, with an increasing number of distance transactions (such as mail order), skilful combinations of sales and credit, premium sales, lotteries, and new forms of aggressive offers. Openness to the world brings new forms of services such as travel services, and not only those sold as packages. In Poland, time-sharing[43] is beginning to appear as well. All these are new phenomena,[44] both for consumers and for courts. As for the latter, the judges themselves are consumers. When they meet with skilfully intricate terms of contracts, with requests for additional payments for performances already paid for, with contracts stipulating asymmetric rights of the parties in the future, to consumers' detriment, they are already accustomed to all that (as consumers). Therefore, they do not perceive such situations as objectionable, even if this time they act in a different social role: as judges. Nothing strikes them as attention-worthy in the situation they are to judge, they do not search through the instruments and well-known, routine interpretations for remedies against something they accept themselves, as consumers, and something which in their opinion other consumers should bear too. Certainly, according to how consumer protection is nowadays understood in Europe, we tend to demand more from the customers as regards their knowledge, common sense and far-sightedness, and, consequently, we are more indulgent towards the suppliers and their obligations regarding information and fair play. This follows from an anachronic image

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same applied to advertising: in the western world it is used to increase sales of normal goods. In a deficit economy advertising was not necessary for that purpose. This tool was resorted to in order to sell worse goods, for which there was no demand; normal goods sold without it. All this caused distrust towards advertising as such (now a thing of the past).

[43] It is a kind of co-ownership divided in time, guaranteeing co-owners exclusive use of the same real estate at different times. Time-sharing is used mainly in respect of real estate in localities attractive for tourists. Unfortunately, in Poland this form of co-ownership has already appeared in a not very honest form.

[44] It is not by chance that in many new democracies there appear para-banks which prey on their clients' credulity, pyramid transactions, which are prohibited elsewhere, etc. As examples we can mention the case of Albania, Russian swindles or the fate of the Grobelny bank. Credulity and lack of experience (not only of the customers, but even of investigative organs and the courts) make the new markets very attractive for frauds of all sorts.

of trade (in our country held by specialists in both civil and criminal law), where the market risk incurred by the consumers is very high. In the past, when marketing techniques were less sophisticated and mass trade, as a matter of fact, did not exist, one could tell a consumer "if you concluded the contract, then you wanted it" and "one who wants cannot be harmed". However, nowadays this kind of reasoning would mean accepting very sophisticated uses of market socio-techniques, to which the customer is prey. That is why, in Polish practice, the consumer does not receive the protection he is granted in civil or criminal law, even if it were possible. Polish courts and public prosecutors persistently resort to the argument of the customer's free-will participation in trade in general, and in a specific contract in particular, drawing the conclusion of the absence of a negative evaluation (according to the letter of the law) of the phenomenon they are dealing with. The same applies to persons who decide upon the legislative, or generally legal, policy. In an official statement from the Minister of Justice to the Marshal of the Sejm concerning a deputy's enquiry about the so-called "pyramid",[45] we find that "it is impossible to justify the statement that consumers were deceived, especially as they all were adult persons of a certain (what sort? - E. Ł.) intellectual level, whose ability to understand properly the actions they undertook could not be questioned". Even if the "pyramid", which, just like the *perpetuum mobile* can never work, is not, according to the Minister of Justice, a fraud, but simply actions taken at one's own risk where legal protection is unnecessary, it becomes clear why ordinary lawyers also treat the new phenomena, however dangerous to consumers they may appear, as taking actions at one's own risk: *volenti non fit iniuria* and thus one is free to participate in trade or not. The view about participation in trade presented above is distant from the pro-consumer axiology, whose fruit are European directives in this field. They set much higher requirements as to professionals honesty and, in their light, the risk to be incurred by a consumer is much lower.

Let us consider one more interesting issue. Systemic changes have made the countries whose economies are evolving in the direction of market economy an ideal place for importing not only all what is new and unknown, and, consequently, desirable, but also all sorts of techniques, behaviours or routines, which elsewhere, in more developed conditions, are regarded as blameworthy, even punishable, and against which consumers are protected. Besides, abundant supply and weak, ineffective or even inactive supervisory and protective services results in the market being packed with fakes or goods being sold after the date of expiry. The "new markets" also withess the appearance of offers, services, advertisements and contractual techniques that are not allowed in the West as violations of consumers' interests.[46] Such practices enter new markets owing to a lack of experience, even of the investigative organs and the administration of justice, and pretend to be the forefront of progress and forms characteristic for market economy. Frequently, they manage to evoke such evaluations.

[45] Statement of 28 October 1996.

[46] It suffices to familiarise oneself with the French consumer code of 1993, a comprehensive instrument which unifies many laws protecting the consumer and includes also detailed penal provisions in this field.

To sum up: the obstacles to implementing consumer protection in countries which are transforming their economies towards market economy are caused by anachronic views as regards the nature of consumer protection in modem, market-economy countries, how it is motivated, what is its level, and what views in this field are already considered to be historically played out.

5. Consumer Protection and Ombudsmans Competence

Traditionally, the domain of ombudsman's activity is protecting the individual against "vertical" violations of rights, that is, protection from the authorities and abuse of power. In most cases, the issue in question involves "bad administrative practices". It is always difficult to define the scope of ombudsman's competences, especially as regards his possibility to dissent with, or to influence, the legislative policy,[47] since, in such cases, we are always forced to ask how competitive the Commissioner for Citizens' Rights can become for the legislator.

Another problem connected with the ombudsman's scope of activity is setting the boundaries of his competence as regards contacts between the individual and banks, insurance firms, carriers, and providers of services, where the legal basis for such contacts with customers is private law. There, it seems that we are no longer within the sphere of vertical relationships and "bad administration". This problem becomes more acute in countries going through the transitional period. As a result of the advancing privatization of various branches of economy, that what, in the beginnings of the institution of the ombudsman was "obviously" within his competence (especially as regards complaints against banks, insurance institutions or other monopolists) is now beginning to slip out of his hands. First of all, the potentially controlled subjects begin to refer to their private law status (which before was not fully regulated by private law) as an obstacle, and refuse to undergo control by the ombudsman. Secondly, the ombudsman himself encounters problems when trying to justify his intervention exclusively on the grounds of private law. If things continue to develop in this direction, it seems that the competence of the Commissioner for Citizens' Rights in the field of consumer protection will inevitably be questioned.

Objections may be raised as to the ombudsman's authorization to act in spheres regulated by private law or justified with the argument that a given matter belongs to the policy of law, over which the Commissioner for Citizens' Rights does not have direct influence. The question can be reduced to the axiological motivation of the Commissioner's competence. If we go in the direction indicated by *public interest law* and see the actions by the ombudsman in spheres which give rise to doubts (and this is precisely the case of consumer protection) as acting for the public interest through reinforcing representation (in legislative processes, before the administration or the courts) of individuals trying to satisfy their needs and aspirations as consumers, hen we

[47] The attitudes of the Polish Commissioners for Citizens' Rights of first and second term of office differed significantly in this respect.

remain faithful to the conception of ombudsman's competence in the sphere of vertical relationships. Even if we are dealing with the protection of a consumer-client remaining in private law relationships with, for example, a bank, the motivation for the ombudsman's intervention has a public law nature, such as the deficient representation of consumers at the time of the bank creating standard forms of contracts, which causes a consumer to be disadvantaged in a specific contract. In this way, even with recourse to litigation, entering into a particular court dispute (to which he has a right) and supporting a particular person, the ombudsman can easily refer to constitutional motivation, reinforcing thereby his position in the dispute and making it easier to establish a precedent. It is also significant that if we see the ombudsman as a spokesman for *public interest law*, we make it easier for him to decide what kind of cases are to be dealt with, and to defend such decisions in front of other persons, who also wanted him to defend their cases and whom he refused. The fact that *public interest law* signifies many different techniques of action, united by the strategic aim: to strengthen the representation, in society and before all authorities, of individuals whose interests cannot "get through", and that this requires a high level of professional creativity and purely legal professionalism, makes this direction very attractive for an ombudsman who seeks legible axiological motivation for his own actions in general. For an ombudsman of the transitional period it becomes a clear signpost showing his place between that what is public and that what is private, without loosing his "consumer clients".

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POLISH LEGISLATION ON COMPETITION AND ITS HARMONISATION WITH THE EU COMPETITION LAW

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1. Introduction***

Polish competition law has two main areas of regulation, i.e. unfair competition and the anti-monopoly law. Both areas require adjustment to the law of the European Union. Polish obligations in that field are described in Art. 63 of the Europe Agreement.[1] However, in that article "competition" means matters related to the anti-monopoly law rather than to unfair competition law. Recently, both areas of competition law are subjected to substantial changes in Poland. Those relate rather to anti-monopoly regulations than to unfair competition, because in the last area Poland enacted on 16 April 1993[2] quite a modem law oriented on examples of West European legislations. Unfair competition is not directly dealt with in the Europe Agreement; therefore, its evolution is concealed in documents related to an approximation of laws under the headings of audiovisual policy, free movement of goods and others. It is, therefore, difficult to establish the appropriate timetable of the approximation of law in the field of unfair competition.

2. The Unfair Competition Law (UCL)

On 9 December 1993, the new Polish Law Against Unfair Competition of 16 April 1993 came into force.[3]

The new Law is based on a very liberal approach to the interplay of market forces: that is to say, the market should operate freely without state intervention, if possible. That

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[1] The Europe Agreement establishes an association between the Republic of Poland, on the one hand, and the European Communities and their member states, on the other hand, signed on 16 December 1991 in Brussels, *Dziennik Ustaw* [Journal of Laws] 1994, no. 11, item 38, further as: "Europe Agreement" or "E.A.".

[2] Law Against Unfair Competition, *Dziennik Ustaw* 1993, no. 47, item 211, amended in 1996 and 1997. Further as: "UCL".

[3] See Article 31 of the Law. The new legislation was published on 8 June 1993 and came into force six months later.

approach can be seen in the decision to reject any administrative methods of influencing market behaviour, in relation, for instance, to such matters as special offers, rebates, prices and the packaging and labelling of goods. Such administrative methods of control do exist in Polish law (as regards the regulation of prices and the labelling of foodstuffs, for example), but they are not part of the unfair competition law *stricto sensu*. Nor does the Office for Competition and Consumer Protection[4] possess any regulatory powers similar to those of the Federal Trade Commission in the United States.[5]

The new Law also rejects the French approach to unfair competition, which makes use of the general law of civil liability (tort) to supply the grounds for unfair competition claims.[6] This is striking, since the Polish Civil Code follows the French model in the area of tortious liability.[7]

The Commission working on the new Law was looking rather for examples of unfair competition regulation in German legal systems:[8] not only the German Law of Unfair Competition of 1909, but also the Swiss, Spanish, Austrian and Hungarian legislation. However, those systems did not provide a model for the new Polish law, but served rather as "material" and as a source for reflection. The Commission was also concerned to preserve as much as possible of the former Polish law, which had inspired a great deal of debate in the last years of its operation.[9]

Similarly to other examples of unfair competition legislation, the new Law contains a general rule of unfair competition (Article 3),[10] and lists a number of specific torts of unfair competition (article 5 to 16, and 22). The role of the general clause within legislation is crucial for the operation of the law in this area.

It would seem that the general clause of good faith may perform the following roles:

(1) In the first place, it may serve to fill gaps in relation to areas not covered by the specific torts of unfair competition, in which case an injured party may rely on the general clause. For instance, the use of French inscriptions on the packaging of goods, although not including an indication of geographical origin, may lead the customers to believe that the goods are of French origin. This would not be covered by Article 8, which refers to misleading geographical indications, although Article 3 could be used as the basis for a remedy, if customers are misled by the use of French on the packaging.

(2) The second function is to supplement specific torts when they are drafted too broadly. The most striking example would be Article 11 of the new Law, relating to the

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[4] Further as: "OCCP".

[5] See G. E. Weston, P. B. Maggs, R. E. SeheehIer. *Unfair Trude Practices und Consumer Protection: Cases and Comments,* West Publishing Co. 1992, p. 694-707.

[6] See J. Azema: *Le Droit français de la concurrence,* Presses Universitaires de France 1989, p. 121-126.

[7] See Article 415 of the Polish Civil Code of 1964; compare Article 1382 of the French Civil Code.

[8] See E. U1mer: *La Répression de la concurrence déloyale dans les Etats members de la CEE,* vol. 1. *Droit Comparé,* Dalloz 1967, p. 8 -19.

[9] See Law Against Unfair Competition of 20 August 1926, *Dziennik Ustaw* 1930, no. 56, item 467. Unfortunately, the Commission did not reproduce the former Article 1, which prohibited the creation of confusion as to the origin of goods and services. Article 10 of the new legislation does not fulfil that function satisfactorily.

[10] Art. 3: "All acts contrary to law and/or good faith which infringe or threaten to infringe the interest of another market participant and/or customer shall be acts of unfair competition".

protection of trade secrets. That expression contains *expressis verbis* a prohibition of the use of another person's trade secrets, but without reference to the rules of good faith. This may suggest that there exists an absolute protection of trade secrets, although that is not the case. Someone who has discovered trade secrets through permitted reverse engineering, for example, is not acting contrary to the law or good faith, and protection against use by such a party must be based on a reading of the general clause together with Article 11.

(3) Third, the general clause may be used to mitigate the rigour of a particular tort of unfair competition in situations where its application would be contrary to good faith. A good example of this kind of situation would be the situation when one party has acquiesced the use of its trade name or similar designation by another person for a number of years, and then begins legal proceedings against the latter when he becomes successful. In such cases, the position of the second party may be seen as deserving some protection, and this may be achieved through the application of Article 3; considerations of good faith then prevent action for the infringement of a trade name under Article 5 of the Law.

Although a more precise application of Article 3 needs to be worked out through case law, some points of interpretation are clear. First, the general clause must be read in conjunction with Article 1 of the Law: it is applicable to business activities in the sense that only an act carried out in pursuance of economic activity may be regarded as an act of unfair competition. Second, rules of good faith must be understood as rules of morality, existing outside the legal system *sensu stricto*. In this way, reference to good faith allows the judge to apply the law with appropriate flexibility and respond to changing morality. Third, it must be borne in mind that not every violation of law is actionable under the general clause, but only those violations that lead to an undertaking and advantage over competitors. Someone who does not pay a creditor violates the law; this does not amount to a tort of unfair competition, but simply to a breach of contract. On the other hand, avoidance of customs duties, which enables the party concerned to undercut competitors, would be an act of unfair competition in the sense of Article 3. Fourth, the general clause operates only with reference to the torts of unfair competition laid down in the 1993 legislation. If a tort is regulated by other legislation, such as the Commercial Code or the Law on Economic Activity, it is not directly affected by Article 3. Finally, the general clause requires neither proof of damage or proof of fault. Therefore, it provides a different basis for legal liability, compared to the general principle of responsibility for tortious acts as laid down in Article 415 of the Polish Civil Code of 1964.

3. Particular Cases of Unfair Competition

The first group of torts of unfair competition in the new Law relates to distinctive marks (Article 5 to 10). Probably the most important is contained in Article 5, which protects trade names and other designations of business. The protection is based on the use of a designation in the course of a trade. The territorial scope of the protection depends on the territorial range of the enterprise and its good will. Thus, when two enterprises have different groups of customers in different places, the same or similar designations may co-exist without collision. Articles 6 and 7 further apply the same legal concept in relation to the use of an owner's name to designate his business, and to the transformation of enterprises, as is the case quite often in the process of privatisation. Contrary to the text of Article 7(2) of the Law, courts are not able to establish an enterprise's designation, but may only settle the dispute as to which one of the enterprises is authorised to use the disputed trade name of a former company.

Articles 8 and 9 protect indications of origin and appellation of origin. Indications of origin are required to be true and non-deceptive, whereas appellations of origin as such are protected only by the proof of legal protection in their own country of origin. If they do have such protection, then their use must not be deceptive, and even additions such as "kind", "type" or "method" are prohibited. Article 10 prohibits the misleading designation of goods and services. It is concerned in particular with the control of designations which mislead the customers as to the nature or origin of goods or services. It is perhaps regrettable that there is no specific provision dealing with trade marks, as there was under the former law of 1926.

The aim of Articles 11 and 13 is to protect the achievements (trade secrets, get-up of the product) of an enterprise against unfair practices on the market. It should be noted that trade secrets are not protected against their use by a person who has acquired the information in good faith. On the other hand, the protection afforded against a former employee is, as a matter of law, far-reaching, and extends to three years from the termination of the contract. Contracts of employment ought to be drafted carefully in that respect. Any protection against slavish imitation applies only to the distinctive shape of the product and is aimed at the elimination of customers' confusion. It does not extend to functional product features, which may, therefore, be freely copied.

Advertising is dealt with in two distinct provisions: Articles 14 and 16. The former covers false and misleading publicity, both as regards a market participant's own business and personnel as well as those of another party. Other cases may be covered by Article 16 or under the general clause of Article 3. Article 16 was one of most contentious provisions during the legislative debates. It is clearly modelled on the E.C. Directive on Misleading Advertising and is similar to the "Television Without Frontiers" Directive;[11] its final formulation has been open to criticism. It would seem that under Article 16 all cases of misleading publicity should be read in the light of the rule of good faith. [12]

The last group of unfair competitive activities covered by the legislation consists of acts aimed of the diruption of the operation of other enterprises (Article 12 and 22) or a general disruption of the market (Article 15). Article 12 prohibits interference with contractual relationship, whether under contracts of employment or otherwise. Howev-

[11] Council Directive 84/450 on Misleading Advertising, *OJ* 1984 L 250/17; Council Directive 89/552, "Television Without Frontiers", *O J* 1989 L 298/23. Articles 12 to 16.

[12] Only Article 16(1)(1) contains that clause, a fact which may cause some confusion.

er, liability is dependent on an intention to make a profit or cause a loss to another, and this restricts the application of the Article. Article 22 is a novel and interesting provision, which prohibits any legal suit alleging unfair competition.[13] Any person injured by such unjustified litigation may seek damages and an appropriate declaration.

Article 15 is also worthy of note. It is concerned with activities which threaten to disrupt the market. A number of activities are listed under the heading of "making entry to the market difficult" - dumping of goods, unjustified discrimination and boycotts - but the list is not intended to be exhaustive, and other types of market disruption could come within the scope of the provision. As in a number of other cases,under Article 15 the defending party's actions may be properly assessed only with some reference to the general clause of good faith in Article 3. There clearly exists a legal relationship to be worked out between Article 15 and the distinct MPL, an issue which requires further discussion.

4. The Law Against Monopolistic Practices (MPL)

The history of Polish legislation in this field is marked by unexpected turns in a number of directions. The earliest legislation was enacted already on 28 March 1933[14] and dealt with cartels. The new political system after the Second World War rendered that legislation superfluous. During the "Solidarity" period of 1980-1981, many authors argued against socialistic monopolies as harmful to the national economy.[15] As a result, a new law was enacted on 28 January 1987;[16] however, it adopted a tolerant approach towards monopoly situations and was consequently replaced by new legislation on 24 February 1990.[17] This law has remained in force since that time, although with some important amendments.[18] Such legislation is more consistent with the general contemporary approach to competition regulation, as embodied in the European Community rules and those of many other national systems.

The law in question established a new regulatory authority, originally called the Anti-monopoly Office, and recently renamed the Office for Competition and Consumer Protection (OCCP), reflecting the increasing concern of the Polish Government for the situation of the consumer and complying with requirements as regards the approximation of law in the Polish text of the Europe Agreement (Article 69,) as well as the duty imposed on public authorities to ensure consumer protection under Article 76 of

[13] Actually, the groundless claim of unfair competition had to include legal proceedings to justify any relief. Threats alone may be actionable under the general clause of Article 3.

[14] *Dziennik Ustaw* 1933, no. 31, item 270. This law was replaced by the law on cartels of 13 July 1939 {*Dziennik Ustaw* 1939, no. 63, item 416).

[15] See summary of that argumentation by J. Trojanek: "Źródła uprzywilejowanej pozycji producenta w gospodarce uspołecznionej" [Grounds for Privileged Producer's Position in the Socialised Economy], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1986, no. 4, p. 1-13, and articles cited therein.

[16] Law Against Monopolistic Practices in the National Economy {*Dziennik Ustaw* 1987, no. 3, item 18).

[17] Law Against Monopolistic Practices {*Dziennik Ustaw* 1990, no. 14, item 88). Further as: "MPL".

[18] See the second consolidated text of that law in *Dziennik Ustaw* 1997, no. 49, item 318 as amended in 1997 {*Dziennik Ustaw* no. 118 item 318 and no. 121 item 754).

the new Polish Constitution.[19] Consequently, the Office now includes a department specially entrusted with consumer protection, and consumer interests are referred to in various parts of the legislation, in particular in the preamble and in Article 1.

5. The Main Features of the Legislation

Legislation lists three main categories of prohibited anti-competitive practices, involving the following undertakings: prohibited agreements (Article 4);[20] the abuse of a dominant position (Article 5);[21] and practices of monopolistic undertakings affecting prices (Article 7).[22] Prohibited practices are described in the law as "monopolistic practices". This division follows, to some extent, that of Articles 85 and 86 of the E. C. Treaty, although the third category comprised in Article 7 is not covered separately by those provisions. It might be considered something of an innovation on the part of

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[19] Of 2 April 1997 as accepted in a referendum on 25 May 1997.

[20] Art. 4: Monopolistic practices are agreements which consist in particular of:

1) fixing, directly or indirectly, prices between competitors and the way in which prices are established for the purpose of dealings with other parties;
2) dividing markets according to territorial, product category and/or subjective criteria;
3) fixing or limiting the volume of production, sales and/or purchase of goods;
4) restricting access to the market and/or eliminating from the market undertakings not participating in the agreement;
5) establishing between competitors and/or their associations their contract terms with third parties.

[21] Art. 5:

1. Monopolistic practices also include practices which abuse dominant position on the market and in particular:

1) preventing the establishment of conditions which are necessary for the emergence of the development of competition;
2) dividing the markets according to territorial, product category and/or subjective criteria;
3) selling goods in a way which confers a privileged position on particular undertakings and/or other undertakings;
4) refusal to sell or purchase goods in a way which discriminates against particular undertakings if there are no alternative sources of supply and/or outlets for selling;
5) unfairly influencing the formation of prices, including resale prices and selling below costs in order to eliminate competitors;
6) imposing onerous contract terms which provide unjustified benefits for the undertaking which imposes them;
7) making the conclusion of the contract contingent on acceptance or performance by the other party of another benefit not related to the object of the contract which would not otherwise have been voluntarily accepted and/or performed;
8) creating for consumers onerous conditions for asserting their rights.

2. It shall not be considered a monopolistic practice when a cooperative in dealing with its members grants bonuses, discounts and other economic benefits.

[22] Art. 7:

1. Undertakings occupying a monopolistic position on the market are also prohibited from:

1) limiting, despite the existence of capacity, the production, sale and/or purchase of goods in particular when it leads to higher sale prices and/or lower purchase prices,
2) withholding sale of goods leading to an increase of prices,
3) charging excessively high prices.

2. The prohibitions described under para. 1 apply as well to undertakings occupying a dominant position, if their market share and their practices produce similar effects to the behaviour of undertakings having a monopolistic position.

Polish legislature, inherited from the law of 1987. The generality and lack of clarity in the use of those basic concepts of “monopolistic” and “dominant” positions, and their interrelationship, is likely to prove problematic. It is at least clear from the definition in Article 2 that dominance is less than monopoly, so that the prohibition of Article 5 extends further to capture the abusive practices of undertakings which face some insubstantial competition, and have, in principle, a forty per cent market share.[23]

Although the difference between the scope of Articles 4 and 5 is not made explicitly on the basis of a distinction between horizontal and vertical agreements, the outcome is that Article 4 is, for the most part, concerned with horizontal practices (“cartels”; see, for instance, the reference to competitors in points 1 and 5 of Article 4), while Article 5 is concerned with vertical restraints *via* the concept of a dominant position. Indeed, some of the practices listed in Article 5 had originally been placed under Article 4, but were later transferred to Article 5 in order to reflect this distinction.

To some extent, the definition of market dominance in Articles 2(7) and 5 reflects that of E.C. law, but Polish legislation also employs a threshold of the forty per cent market share as a presumption of dominance. This means in practice that when an undertaking is found to have a market share of less than forty per cent, then any allegation of dominance is to be proven by the OCCP, whereas if the threshold had been established, the burden shifts to the undertaking itself, to show that in the circumstances of the market it is not, in fact, dominant.

Similarly to Article 85(1) of the E. C. Treaty, Article 4 provides a non-exhaustive list of prohibited practices, but does not include explicitly any reference (as does Article 85(1) in its general prohibition) to the wider criterion of practices, which have “as their object or effect the prevention, restriction or distortion of competition”. Without such a clause, it is difficult to identify prohibited anti-competitive practices beyond those specially enumerated in Article 4. A similar point may be made in relation to Article 5: the kinds of activity listed there, and especially those referred to in points 6, 7 and 8, may well occur outside situations of dominance, yet are not obviously regulated by the law beyond the context of market dominance.

As a general rule, the law (Art. 8 para. 2) provides that contracts entered into in violation of Art. 4, 5 and 7 are void, either wholly or in their relevant part. The joint application of that provision and Art. 58 of the Civil Code produces the effect of severance. That effect allows parts of the agreement to continue being in force, if it is possible for the agreement to operate without the anti-competitive clauses (Art. 58 para. 3 of the Civil Code).

The kinds of activity referred to in Article 9[24] - collaborative agreements providing for specialisation, joint selling and purchasing - fall within a somewhat different re-

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[23] Monopolistic position is described in Art. 2 p. 6 as: the position of a undertaking when that undertaking is not exposed to competition on a national or local market.

[24] Art. 9:

1. The President of the Office for Competition and Consumer Protection may issue a decision which prohibits the implementation of an agreement which:
1) sets up product specialisation in the production or sale of goods, or

gime, since in principle they are not prohibited. Only if they do not satisfy the criteria laid down in Article 9(2), the OCCP may issue a decision which prohibits the implementation of such an agreement. The approach taken here is, in fact, reminiscent of the balancing exercise carried out under Article 85(3) of the E.C. Treaty, and although, as noted below, Polish law does not provide for an exempting mechanism as such, the discretionary method of regulations laid down in this Article has a similar practical outcome. It should be noted, however, that Article 9 covers a limited range of cooperative ventures; significantly, for instance, it does not include collaboration as regards research and development.

Finally, it should be noted that in Article 2 legislation is said to apply to "undertakings", defined in wide terms in Article 2(1) as "natural and legal persons and entities without legal personality which are engaged in economic activity". One controversial aspect of this definition has been the application of the law to local government authorities, as suppliers of certain services and rented accommodation. As such, they comprise important monopoly powers at a local level, and are now within the scope of the definition of "undertaking" in Article 2.

6. Mitigating the Prohibition

Article 6 lays down a general principle, referred to by some commentators as a "rule of reason".[25] However, its real significance would seem to place it closer to Article 85(3) of the E.C. Treaty than to that of the rule of reason in American practice. Article 6 allows practices listed in either Article 4 or Article 5 to be justified.[26] This is perhaps that feature of Polish law which most clearly diverges from the E.C. approach, especially in that it opens the door to the justification of practices embarked by dominant undertakings.

This rule provides that practices listed in Article 4 or 5 are prohibited unless:

- they are necessary for technical, organizational, and/or economic reasons to perform economic activity, and
- they do not significantly restrict competition.

Both conditions must exist cumulatively, and the burden of their proof lies with the person who is relying on them. From the very beginning, the OCCP was very reluctant to

2) provides for joint sale or purchase of goods, if such an agreement may prejudice the interests of other undertakings and/or consumers.

2.The President of the Office for Competition and Consumer Protection shall issue a decision prohibiting the implementation of an agreement described in para. 1, if the agreement results in a substantial restriction of competition and/or conditions for its emergence on a particular market and/or violates the interests of consumers, and does not give rise to economic benefits, consisting, in particular, of:

1) significant reduction of costs of production and/or sales costs; or
2) improvement of the quality of goods.

[25] See, for example, T. S k o c z n y: *Polish Anti-monopoly Case Law*, Warszawa 1995, p. 149-155.

[26] Art. 6: The practices described in Art. 4 and 5 are prohibited, unless they are necessary for technical, organizational and/or economic reasons to perform an economic activity and if they do not significantly restrict competition; the burden of proof of these circumstances lies with the person who is relying on them.

apply Art. 6 in order to exempt some practices listed in Art. 4 and 5 from its enforcement: “Otherwise, the very objectives of the law might be undermined”.[27] An evaluation of the above mentioned criteria is made from an objective point of view, taking into account both the interest of the market participant and the interest of the national economy as a whole. Unfortunately, and unlike in Art. 85(3) of the E.C. Treaty, the interests of the consumers are not mentioned in Art. 6. Due to the general provisions of preamble and Art. 1 of the MPL, the violation of consumer interests shall be also taken into account while evaluating the impact of particular practice on the national economy. Usually, that condition is covered by the requirement that the practice under scrutiny shall restrict competition in a less onerous way for other competitors and consumers.

For example, RUCH, a press distribution company occupying a dominant position on the market, which compelled its franchisees to contribute financially to the franchisor’s business, violates Art. 5 of the law. That action could not be considered as necessary to perform the franchisor’s economic activity under Art. 6.[28] Equally, there was no ground to justify an exclusive right to dig graves in a cemetery granted to a leasee in a contract of lease by a local government. In such a case, competition on the market of funeral services was virtually foreclosed, taking into account the fact that there was no other cemetery in the locality in question.[29]

In as far as Art. 6 indicates a more lenient approach to the exercise of dominant market power, this practice may be difficult to justify in the future. Admittedly, economic conditions in the earlier period of legislation may have been regarded as exceptional. This argument was put forward by the former President of the Anti-monopoly Office in a paper published in 1993, in which she commented on the earlier policy of the Anti-monopoly Office: “The strategy of the AMO, which began its operation on 13 April 1990, adopted a structural attitude toward competition policy. In the peculiar circumstances of the Polish economy, adopting a regulatory attitude would mean preventing the consequences of economic monopolisation derived from the centrally planned economy, rather than eliminating the reasons thereof”.[30]

It should be noted, however, that a justification defence is clearly not available in relation to any of the third category of practices listed in Article 7 related to pricing.

The aspect of Polish legislation most open to criticism is the absence of any kind of general procedure for issuing exemptions or clearances in relation to specific practices, or of any legal authority on the part of the OCCP to adopt general or group exemptions for the guidance of undertakings when drafting their agreements. The need for such an ex-

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[27] Judgment of the Anti-monopoly Court of 23 April 1992 (XVII Amr 5/92), *Wokanda* 1992, no. 11, quoted by T. S k o c z n y: *Polish Anti-monolpoly..., op. cit.*, p. 150.

[28] See Judgment of the Anti-monopoly Court quoted by T. S k o c z n y: *Przeciwdziałanie politykom monopolistycznym w świetle orzecznictwa* [Counteracting Monopolistic Practices in Jurisprudence], Warszawa 1994, p. 114.

[29] See Judgment of the A.C. of 14 June 1995 (XVII Amr 11/95), quoted by S. G r o n o w s k i: *Ustawa antymonopolowa. Komentarz* [Anti-monopoly Law. Commentary], C.H. Beck, Warszawa 1996, p. 151-152, 154.

[30] A. F o r n a l c z y k: “Competition Policy During the Process of Economic Transformation”, *The Anti-monopoly Office Bulletin,* September 1993, no. 1, p. 8, quoted in the volume ed. by T. Skoczny in the following footnote, p. 72.

empting procedure is clearly felt. For instance, the OCCP has adopted a kind of notice[31] indicating what is permissible as regards patent and know-how licences; nonetheless, this is not a legally binding instrument. This "soft law" approach may produce its own problems.[32] On the one hand, there is little scope for any legal review of the practice in which the OCCP is engaged in this way; on the other hand, there may be constitutional doubts concerning the authority of the Office to issue this kind of notice by virtue of the "closed system" of legal acts provided for in Articles 87 and 93 of the present Constitution. There is also no general provision in the law for the application of a *de minimis* principle; this may also prove to be a long-term problem if the OCCP begins to find itself overburdened with cases which have little real impact on market conditions.

It will be interesting to note that the Implementing Rules of 16 July 1996 for the Application of the Competition Provisions (...) in the Europe Agreement[33] already provide that in the application of Article 63 of the E.A. the principles contained in the block exemption regulations, in force in the Community, are applied fully. Therefore, at least in the relations between the E.U. and Poland, E.U. block exemptions are applicable. The same is true when the effects of activities are negligible. Implementing Rules provide that negligible effects are presumed to exist when;

- the aggregate annual turnover of the participating undertakings does not exceed ECU 200 million, and
- the goods or services which are the subject of E.A., together with the participating undertakings' other goods or services, which are considered by the users to be equivalent in view of their characteristics, price, and intended use, do not represent more than 5% of the total market for such goods or services in the area of the common market affected by the Agreement, and the Polish market affected by the Agreement, respectively.

Here again, and similarly to block exemptions, the *de minimis* rule is applicable through the back door *via* the Implementing Rules to the E.A. It seems, therefore, advisable to have those notions and appropriate legal institutions introduced into domestic legislation, since Poland has to apply them already in its relations with the E.U.

7. Organisational and Procedural Aspects

The tasks necessary for implementing the MPL are carried out by the President of the OCCP. They consist mainly of the prevention of monopolistic practices, the promo-

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[31] Reproduced in S.Gronowski: *Ustawa o przeciwdziałaniu praktykom monopolistycznym* [Law Against Monopolistic Practices], Warszawa 1994, p. 189-198 and English translation in: T. Skoczny (ed.): *Harmonisation of the Polish Competition Legislation with Competition Rules of the European Communities*, Warszawa 1997, p. 322-330.

[32] I. Wiszniewska: "Dostosowanie polskiego prawa antymonopolowego do prawa europejskiego" [Approximation of Polish Anti-monopoly Legislation to the European Law], *Studia Prawnicze* 1996, no. 1-4, p. 129-152, takes the view that this notice is too restrictive in many points and, therefore, not suitable for the present Polish legal system. She shares the opinion that the attempt to make Polish law compatible with E.U. law by enacting notices has failed (see p. 147-150).

[33] Decision No 1/96 of the Association Council, *Dziennik Ustaw* 1997, no. 10, item 74. See Council of Ministers Regulation of 13 January 1997 *(Dziennik Ustaw* 1997, no. 10, item 74) and Annex to those Rules.

tion of competition and the protection of consumers' interests. The President carries out his tasks with the assistance of the OCCP, which is located in Warsaw. In addition, the President has established regional offices of the OCCP, located in the nine main towns of Poland: Bydgoszcz, Gdańsk, Katowice, Krakow, Lublin, Łódź, Poznan, Wroclaw and Warsaw. The President (and Vice-presidents) is appointed by the President of the Council of Ministers, and is an semi-independent authority within central state administration, accountable to the Council of Ministers. The President is not a member of the Government, but it is customary to invite him to Government meetings.[34] As might be seen, the President and Vice-presidents may be dismissed by the Prime Minister at any time, which shows the political dimension of the OCCP. Therefore, unlike in many other countries, the OCCP is not an entirely independent administrative body within the state administration, and political changes in Poland produce personal changes in the position of the President of the OCCP. That structural aspect of the MPL still requires future discussion, and it seems that it is already necessary to grant the OCCP an authority independent of political changes.

The procedure before the OCCP is of an administrative nature, conducted according to the Code of Administrative Procedure. However, unlike in other administrative proceedings, appeals against decisions of the OCCP are lodged with a special Anti-monopoly Court based in the Voivodeship Court in Warsaw, and not with the Supreme Administrative Court. The Anti-monopoly Court (A.C.) is a specialised judicial body created only to deal with appeals against all the final decisions of the OCCP. An appeal shall be lodged within a period of two weeks from the day of handing down the decision by the OCCP, including those made by regional offices of the OCCP. The A.C. decisions are final, and can be appealed against to the Supreme Court only in extraordinary situations of an interpretation of law.[35]

The OCCP may impose rather heavy fines on undertakings calculated upon the basis of a 1/12 turnover earned during the preceding fiscal year. Commentators observe that the amounts imposed so far by the Office, and upheld by the A.C., were comparatively low, and note a too tolerant approach to the violations of the MPL.[36] The heaviest fines up to date were paid by the telecommunication undertaking - a sum of 75.000 zlotys; other fines considered as high amounted to 50.000 or 20.000 zlotys.[37]

As regards the fines which may be imposed under Chapter 4, it is interesting to note the power to impose such penalties on individuals, as distinct from the enterprise as a whole - Article 16 (possible under American law, but not under the E.C. rules). The maximum fine in such cases is fixed by referring to a multiplier of the "average salary", a concept which is further explained in Article 2(9), i.e. the average monthly salary in

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[34] See. A. F o r n a l c z y k: "Competition Law and Policy in Poland in 1990-1995" [in:] *Harmonisation ..., op. cit.*, p. 46.

[35] Art. 392-39320 and Art. 47935 of the Code of Civil Procedure. That extraordinary appeal is called after the French term: "kasacja".

[36] T. S k o c z n y (ed.): *Harmonisation..., op. cit.*, p. 106-107.

[37] See T. S k o c z n y: *Polish Anti-monopoly..., op. cit.*, p. 193.

state enterprises during the last month of the preceding quarter year (this information is based on an official statistical source).

The OCCP's powers of investigation are listed in Article 20(3). Some of them are cast in wide terms, particularly as regards the scope of the explanations, which can be required under point 3, and of the information, which may be collected under point 4. The law does not give the OCCP employees the power to search property and premises in exercise of investigatory powers. Commentators doubt whether employees of the OCCP may even ask the police to help them to conduct investigations, since such a right has not been mentioned by the law. In practice, there have been no cases as yet of a refusal to exercise the right to inspect the premises of an undertaking under investigation,[38] but the problem to extend those powers is a topic for further discussions. The jurisprudence of the A.C. has, however, denied the OCCP the right to require that the controlled undertaking produces special documents, such as reports or analyses, for the needs of investigation, if those documents have not been required by the law.[39]

8. Control of Concentrations

This is a newer chapter substantially amended in 1995 under the convoluted title of "influencing the process of the formation of the structure of the undertaking". Previously, the control of mergers or concentrations was virtually non-existent.

The new version of the MPL subjects mergers to the preventive control of the OCCP. Article 11 of the legislation requires notification to the OCCP of any intention to bring about a concentration within fourteen days of the initiating act. The notified concentration may be prohibited by the decision of the OCCP when, as a result of the concentration, the undertakings taking part in it would acquire or strengthen a dominant position on the market. In the case of the assumption of key functions in two competing undertakings by the same person,[40] it is enough for competition to be significantly weakened. That result is presumed in a case when the joint market share of the participating undertakings exceeds 10%. The OCCP is also entrusted with a scrutiny of the transformation of companies, undertakings and utilities into companies in which only the State Treasury or local governments has shares. Article 12 gives the OCCP the power to break up or dissolve companies, cooperatives or state-owned undertakings which are found to have a dominant position.

It could be argued, in fact, that control of transformations does not make a great deal of sense. What is being considered in such cases is not a structural change within the market, but simply a change of the legal form of an existing undertaking from state-owned to private. The only convincing justification for legal scrutiny of such transformations is if the outcome would be a company occupying a dominant position on the

[38] See S. G r o n o w s k i: *Ustawa antymonopolowa..., op. cit.,* p. 343.

[39] Judgment of the A.C. of 6 September 1993 (XVII Amr 22/93), *Wokanda* 1994, no. 2.

[40] Those functions are described as: director, deputy director, member of the board, member of the supervisory board, member of the board of auditors or the chief accountant (Art. 11 para. 2, p. 5).

market (see Article 11(c)(3) and Article 12 - but we may ask whether the former provision is at all necessary, since Article 12 appears to give the OCCP sufficient powers to deal with this situation). The OCCP has itself recently proposed that Article 11 (c) should be repealed.

When undertakings formerly owned by the state or local government are in the process of a transformation into private companies, it is considered that the state is still interested in monitoring how and where the assets are being disposed. A similar interest is expressed in the Law on Companies with Foreign Participation of 1991,[41] reflecting an attitude which prevailed more in the past socialist regime, by evincing distrust of foreign participation or control.

Undoubtedly, the most significant aspect of Article 11 is the part relating specifically to concentrations. The concept of concentration is, in many respects, similar to that employed in E.C. law through Council Regulation 4064/89, although the Polish definition is somewhat wider. Under Article 11, concentration covers: (a) acquisition of the assets of another company (Article 11(2), points 1 and 2); (b) acquisition of shares (points 3 and 4); (c) acquisition of control by other means (for instance, by contractual arrangement (point 6); (d) the carrying out of the same function in competing undertakings by the same persons (point 5). This last method of concentration is not explicitly covered by the E.C. regulation, although it may be assumed that “other means of control”, mentioned in Article (3)(1) of the E. C. measure, would cover the situation referred to in Polish law. On the other hand, Polish legislation does not explicitly deal with joint ventures, which are covered in Article 3(2) of Regulation 4064/89.

However, the most significant difference of approach to the control of concentrations between E.C. and Polish law remains in the low thresholds for notification, established by the latter. They are set at an aggregate turnover of 5 million ECU for undertakings taking part in concentration on the Polish market, and 2 million ECU in the case of an acquisition of assets. For banks, however, the threshold has been set at 50 million ECU. Those thresholds appear to be very low in comparison with those employed in E.C. law; assuming that the Polish market is about one-tenth the size of that of the Community, scaling down the E.C. threshold would lead to a turnover figure of about 25 million ECU for a market the size of Poland. This view seems to be accepted by the OCCP, which recently submitted a proposal to raise the threshold for notification to 25 million ECU for all concentrations, except for those listed in Article 11(2)(2), where the figure would be 5 million ECU. In this last situation, the issue at stake is the value of the acquired undertaking rather than the aggregated value of the merging companies.

Controversial provisions of the MPL include Art. 11 para. 2, p. 6, which excludes from OCCP scrutiny the acquisition of shares traded in public. The Polish Securities Commission (S.C.) is entrusted with this task by the Law on Public Trading in Securities of 21 August 1997.[42] Here, there is an obvious conflict of interests between OCCP and the S.C. and the respective fields of regulations of the Law on Public Trading in

[41] Law of 14 June 1991, *Dziennik Ustaw* 1991, no. 26, item 143.

[42] *Dziennik Ustaw* 1997, no. 118, item 754.

Securities and the MPL. The Law on Public Trading in Securities gives to the OCCP only the right to express its opinion in the matter of the acquisition of shares on the stock exchange, but the decision of the S.C. is decisive in that matter. The S.C. is not obliged to take into consideration the same criteria as the OCCP, and, in particular, the acquisition or strengthening of a dominant position on the market.

The notification of the intention to concentrate produces a suspensive effect on prospective concentration. The undertakings taking part in it are obliged to suspend activities, which could result or may result in attaining or strengthening a dominant position on the market, until their actions receive notification from the President of the OCCP, namely, that there are no objections to the intention to concentrate or to transform them. That effect is similar to the suspensive effect provided for in Regulation 4064/89.

The final decision prohibiting a concentration or assumption by the same person of functions mentioned in Art. 11 para. 2 point 5 shall be taken by the President of the OCCP within a period of no more than 2 months. That period is considered as a *stricti iuris* period which cannot be extended. As a result, the OCCP decision issued after the expiry of that period is invalid and may be quashed.[43] The length of this period is obviously too short. The OCCP can only formally evaluate submitted concentration in two months. The power given to the OCCP to submit the undertakings to conditions under which the concentration may be effected (Art. 11a para. 2), has to be considered only as an entirely formal pronouncement. As the result of that deficiency, the final decision in the matter of concentration cannot impose any conditions or duties on undertakings taking part in it. Such a decision may only prohibit concentration or the assumption by the same person of indicated functions (Art. 11a para. 4), or notify parties about the OCCP's lack of objections to the intention to concentrate (Art. 1 la para. 3). Only a formal evaluation of concentration by the OCCP requires critical appreciation. In European Law, the position of the Commission is quite different, and never reduced to sole formal decisions. Here again, the MPL requires amendments and the role played by the OCCP needs to be reevaluated.

9. The Spheres of the Application of the MPL and the UCL

There is no doubt that almost all the situations referred to in Articles 4 and 5 of the Anti-monopoly Statue may render "entry to the market difficult" in the sense of Article 15 of the UCL. But it seems that the latter provision should be interpreted in the broadest possible way. For instance, Article 15 should enable an enterprise which is already established on a particular market to seek relief on account of such activities as dumping or boycotting, even though it has tried to enter the market as such. At the same time, any activity which is prohibited under the MPL is by definition contrary to law, and usually to good faith, and would, therefore, be actionable under Article 3 of the UCL.

[43] Supreme Court Judgment of 21 November 1993 (III CZP 63/93), *OSNCP* 1994, no. 6, item 132 with commentary of T. W o ś, *Państwo i Prawo* 1995, no. 1.

There arises the question how the scope of the two statutes may be respectively delimited. The most widely accepted argument refers to the kind of protection, which the legislation seeks to provide in each case: the MPL seeks to protect the freedom to compete, while the UCL aims to protect honesty and fair dealing in competition. The former statute is concerned to protect the existence of competition on the market, while the latter prescribes the manner in which competition should operate and attempts to preserve its “quality”.[44]

It should also be remembered that the two statutes belong to different branches of the law: the UCL is within the field of private law while MPL legislation is within that of public law. This leads to an important distinction in terms of the kind of remedy available under each statute. The MPL entrusts legal action against anti-competitive behaviour to the OCCP, which is primarily an administrative body. The UCL, on the other hand, relies on the initiative of private parties (businessmen, customers and their associations) to take action against violations which they consider to have caused them injury. The different orientation of the two statutes is based on the different kinds of interest, which are the subject of protection in each case. The MPL is concerned with anti-competitive activity, which has adverse consequences for a large number of competitors or for the operation of a particular market. In other words, it has been established to deal with activities which endanger the structure of the market.[45] The unfair competition rules, however, seek to protect the individual interests of competitors and customers rather than the market itself.

The UCL is, therefore, of great significance for private parties. It opens the way to litigation before courts of general jurisdiction, and means that injured parties need not wait for the decision of the OCCP, but can act on their own initiative at what they consider to be an appropriate moment. At the same time, the OCCP will not be obliged to deal with complaints from individuals relating to injury to their specific interests, but instead can direct such parties to the use of civil proceedings. While the exact borderline and interaction between the two statutes will have to be determined by case law, there is every indication that the legislation on unfair competition will come to play an increasingly important role. Generally, the underlying aim is to make Polish legislation on competition matters compatible with that in other European Union legal systems. The UCL is a serious step in that direction. A further revision of the MPL in order to align that law more closely with the law of the European Union is now the second stage in the process of legislative reform.

10. Conclusions

The whole field of competition law in Poland appears to be quite modem and compatible with West European standards. However, the situation is diversified, because

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[44] See H. E i s e n m a n n: *Grundriss Gewerblicher Rechtsschutz und Urheberrecht,* C. E M u l l e r 1985, p. 128-129; and T. S k o c z n y [in:] J. S z w a j a (ed.): *Commentary on the Law against Unfair Competition,* 1994, notes 1 to 5 on Article 15.

[45] See also E. U l m e r, note 8 above, p. 58 and the judgment of the A.C. of 25 January 1991, *Orzecznictwo Gospodarcze* 1991, no. 5, item 35, with the comment by Z. M a r m a j.

the E.A. pays more attention to the competition (anti-monopoly) law than to unfair competition. In fact, unfair competition law as such does not exist on the E.C. level except for few areas, such as advertising, food products marking, or trademarks.[46]

In the area of unfair competition law it seems that the most needed change in the Polish UCL is a different attitude towards comparative advertising. According to Directive 97/55/E.C. of 6 October 1997, amending Directive 84/450/EEC, comparative advertising shall be permitted, while in the UCL it is still prohibited. In addition, the burden of the proof of factual claims in misleading advertising cases shall rest on the advertiser and not on the claimant, as in the UCL.

Another controversial issue relates to geographical indications. The E.U. law introduced a system of a registration of geographical indications and designations of origin for agricultural products and foodstuffs. No system of a registration of geographical indications exists in Poland, where such indications are protected only without registration, through the provisions of Art. 8 and 9 of the UCL. On the other hand, protection of domestic geographical indications in Poland is very weak, because that type of intellectual property right was generally neglected under the socialist regime, and many indications were simply destroyed.[47] Such an attitude clearly contradicts the approach taken by the EC J in its judgment of 10 November 1992,[48] where the Court clearly recognised that the protection of all geographical indications falls under the term of industrial and commercial property according to Art. 36 of the E.U. Treaty. As a way to promote the development of domestic geographical indications, a bill on industrial property law provides for the registration of those indications with the Patent Office in Warsaw. Those provisions are compatible with Regulation No 2081/92. Therefore, the effect of the approximation of law will be achieved.

I. Wiszniewska[49] indicates some differences between Polish provisions on advertising specific groups of products and those of the E.U. law. They relate to alcoholic drinks, cigarettes, tobacco and pharmaceuticals. It seems, however, that those differences are not important enough to require legislative intervention at present.

The M.P.L., on the other hand, is considered by the authorities in Poland as more or less compatible with the European Law.[50] This optimistic approach probably requires verification. Some points in which the law needs to be changed have already been indicated. They include:

- prohibition of agreements which have as their object or effect the prevention or restriction of competition in Art. 4 MPL;
- extension of “rule of reason” formula in Art. 6 in a way similar to that of Art. 85(3) of the E.C. Treaty;

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[46] See R. S k u b i s z: “Polskie prawo o zwalczaniu nieuczciwej konkurencji - z perspektywy prawa Unii Europejskiej” [Polish Law Against Unfair Competition - from the Perspective of the Law of the E.U.], *Państwo i Prawo* 1996, no. 4-5, p. 88-100.

[47] The best example could be “Kiełbasa krakowska” [Cracow Sausage].

[48] Case No C-3/91 - “Turron”, *ECR* 1992,1-5529.

[49] I. W i s z n i e w s k a: *Polskie prawo reklamy* [Polish Advertising Law], Warszawa 1998, p. 157-159.

[50] See *Report on Harmonisation of Polish Law with the E.U. Law of May 1998*, p. 168, 170-171.

- introduction of the *de minimis* exemption;
- introduction of group exemptions, individual exemptions and negative clearances;
- liquidation of the exclusion of stock exchange transactions from OCCP's control;
- further development of the investigative powers of the OCCP.

Two areas which belong to the E.U. competition law remain, however, almost unregulated in Polish law. Those are public aid and public undertakings, to which special or exclusive rights have been granted (Art. 63 and 65 of the E.A.).

Implementing Rules to the E.A. on competition do not relate to public aid, although this form of aid is covered by the provisions of Art. 63 para, l(iii), para. 2, para. 4 and para. 6. It follows that public aid in Poland has to be assessed already on the basis of criteria arising from the application of Art. 92 of the E.C. Treaty. The term for the implementation of those provisions is not clearly stated in the E.A. It is, however, obvious that it started on 1 March 1992, i.e. the date on which the Interim Agreement came in force (Art. 122 of the E.A.). This means that the first five years after the entry into force of Art. 63 expired already in 1997. Despite this fact, Poland has not yet prepared appropriate legislation establishing criteria for granting public aid similar to the provisions of Art. 92 of the E.C. Treaty, and permitting to monitor and report the total amount and distribution of aid each year. The appropriate text is being prepared by the Minister of the State Treasury, but attempts to translate the provisions of Art. 92, certain EEC directives, and certain rules of GATT relating to subsidies into Polish have not been successful. Those texts simply do not correspond to general legislation relating to public finances in Poland. Another problem is the poor quality of the translations of the appropriate texts.

The Association Council has also not issued any regulations dealing with public undertakings and undertakings enjoying special rights (Art. 65 of the E.A.). It seems, however, that the period for the implementation of the rules provided in Art. 90 of the E.C. Treaty has already elapsed. Unfortunately, Polish law has practically no provisions dealing with such undertakings in a general way, but rather legislation concerning the particular sectors in which such undertakings operate (e.g. transportation, coal mining, gas and oil drilling, telecommunications, post, radio and television). This type of regulation does not provide the consistency required by Art. 65 of the E.A. Therefore, a general regulation implementing the provisions of Art. 90 of the E.C. Treaty in domestic legislation seems to be necessary. Contrary to the public aid sector, where preparatory work on the appropriate bill has already begun, such work has not been initiated in public undertakings. Here again, a prompt reaction from the Ministry of State Treasury is required.

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LES INCIDENCES DE LA RATIFICATION DE LA CHARTE SOCIALE EUROPEENNE DU CONSEIL DE L'EUROPE SUR LE SYSTEME JURIDIQUE POLONAIS

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1. La ratification de la CSE, choix irréversible de la voie vers l'Europe sociale

1.1. La Charte sociale européenne du 1961 (désignée dans la suite par le sigle CSE) a été ratifiée par la Pologne en juin 1997[1], près de six ans après sa signature lors de l'adhésion en 1991 de notre pays au Conseil de l'Europe.

Ayant ratifié cet acte, la Pologne se trouve, désormais, dans la communauté des Etats européens, tenus de réaliser leur politique sociale en accord avec l'objectif fondamental que le Conseil de l'Europe a fixé pour ses membres, à savoir: «une union plus étroite entre ses membres afin de sauvegarder et de promouvoir les idéaux et les principes qui sont leur patrimoine commun et de favoriser leur progrès économique et social, notamment par la défense et le développement des droits de l'homme et des libertés fondamentales» (d'après le préambule de la CSE).

En tant que signataire de la Charte, la Pologne est tenue de déployer, conjointement avec les autres Etats cosignataires, tous ses efforts pour améliorer le niveau de vie et promouvoir le bien-être social (...). Ce faisant, elle est tenue de suivre les dispositions de la Convention européenne de sauvegarde des Droits de l'Homme et des Libertés fondamentales, qu'elle avait ratifiée le 26 novembre 1991, et à laquelle la CSE se réfère dans son préambule, en rappelant que les Etats membres du Conseil de l'Europe sont convenus d'assurer à leurs populations les droits civils et politiques ainsi que les libertés y définis.

1.2. La tendance à garantir à tous des conditions de vie décentes, et à édifier en commun des régimes fondés sur la justice sociale, est un élément inhérent à la politique sociale internationale, depuis que la pensée progressiste européenne avait incité les auteurs du Traité de Versailles à inscrire, dans sa Partie XHI, les principes de la protection sociale des populations de différentes nations. Les Hautes Parties Contractantes ont convenu notam- * 1

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[1] La CSE a été «ouverte à la signature» à Turin, le 18 octobre 1961, et entrait en vigueur le 26 février 1965. Le 3 mai 1996 le Conseil de l'Europe a adopté la Charte Sociale Européenne revisée (modernisée), ouverte à la signature et à la ratification parallèlement à la Charte du 1961. Le texte de la CSE du 1961, ratifiée par la Pologne en 1997, fut publié en Pologne dans le Journal des Lois de 1999, n° 8, textes 67 et 68.

ment: 1) que le paix universelle ne peut être fondée que sur la justice sociale, 2) que la non-adoption par une nation quelconque d'un régime de travail réellement humain fait obstacle aux efforts des autres nations. Pour atteindre ces nobles buts l'on a créé une organisation permanente, dénommée Organisation internationale du travail.

Dès son adhésion à VOIT en 1919, la Pologne s'engageait dans la voie de l'Europe sociale. Les nombreuses conventions de l'OIT ratifiées par notre pays, et la législation fondée sur ces textes, constituent un acquis social durable de la République de Pologne, depuis l'avant-guerre jusqu'à nos jours. Il convient aussi de mentionner que la Pologne a confirmé, en 1966, sa volonté de poursuivre les efforts tendant à assurer à ses citoyens les garanties sociales, en ratifiant le Pacte international relatif aux Droits économiques, sociaux et culturels.

La Constitution adoptée le 2 avril 1997 a définitivement réglé les controverses sur les droits sociaux dans la IIIe République, conformément à la vision européenne de la protection de l'homme contre le spectre d'indigence.

L'idée de justice sociale n'apparaît aucunement anachronique au seuil du XXI^{ème} siècle, comme le prétendent les «eurosceptiques». En 1994, à l'occasion du 75e anniversaire de l'OIT[2], l'Organisation internationale du travail a réaffirmé son intention de renforcer dans les Etats membres les principes de la justice sociale.

A présent, l'un des principaux documents internationaux dont la Pologne doit tenir compte en développant sa politique sociale, en tant que signataire de la CSE et candidat à l'Union européenne, c'est le Livre Blanc de l'UE de 1994: Politique sociale européenne, la voie à suivre par l'Union *(White Paper: European Social Policy, a Way forward for the Union).* N'est pas non plus sans intérêt pour notre pays en voie de préparation à l'entrée dans l'Union européenne, la Charte des Droits sociaux fondamentaux des Travailleurs dans les Pays Memores de la Communauté européenne (Charte sociale communautaire) qui n'a pas, il est vrai, de caractère normatif, mais est une déclaration solennelle, contenant les directives d'action des Etats membres dans le domaine de la politique sociale dans leurs pays[3].

1.3. La ratification de la CSE, et, avec elle, les documents précités et la Constitution en vigueur, constituent une base solide de la transformation progressive de la Pologne en un Etat de droit, renouant en partie avec les modèles allemands[4]. Ce qui ne peut signifier un retour à Γ Etat-providence de l'époque du socialisme réel[5].

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[2] «Regards sur l'avenir de la justice sociale», Bureau international du travail, Genève 1994.

[3] Cf. M. M a t e y: «Polskie prawo pracy wobec integracji europejskiej» [Le droit du travail polonais au regard de l'intégration européenne], *Państwo i Prawo* [L'Etat et le droit] 1996, n° 4-5, p. 115.

[4] La notion allemande de Sozialstaat, dérivée de la doctrine socio-politique «bismarckienne» ne peut aujourd'hui entrer en jeu que dans une version modernisée. Le modèle traditionnel de ce droit a déjà été substantiellement critiqué, à la charnière des années 70 et 80, par des auteurs en RFA (v. entre autres, E. G e i g e r: «Sozialstaat als Verfassungsauftrag» (dans:) *Krise des Sozialstaats,* Köln 1977, p. 79 et suiv.; A. B e p p 1 e: *Der Sozialstaat im Abbruch. Von der Wende zur Armutsgesellschaft,* Frankfurt a.M. 1986.

[5] II convient toutefois de noter l'opinion de J. S z t u m s k i, selon laquelle, dans la situation où la libre concurrence offre de vastes possibilités d'exploitation des individus économiquement faibles, Γ Etat-providence est nécessaire à une plus ou moins grande échelle, en raison des programmes sociaux qu'il met en oeuvre («Zmierzch państwa opiekuńczego?» [Le déclin de l'Etat-providence?]), *Polityka Społeczna* 1997, n° 1, p. 31.

2. Le but et la portée de la ratification de la CSE à l'état actuel du développement du pays

La Pologne n'a ratifié que les dispositions de la Charte qui n'exigeaient pas de modifications de la législation nationale (v. Vile partie). Les articles (ou alinéas) ratifiés définissent les standards sociaux minimaux que la Pologne avait déjà atteints, et, dans quelques cas, dépassés. La ratifications n'implique pas, du moins temporairement, une extension des tâches sociales de l'Etat ni l'accroissement des dépenses budgétaires destinées au financement des tâches nouvelles découlant de la ratification. Car, dans le cadre de l'ordre juridiques déjà en vigueur, la Pologne mène une politique sociale conforme en principe aux dispositions de la Charte[6].

3. Les obligations résultant de la ratification

3.1. Comme nous venons de le dire, la ratification de la CSE par la Pologne n'entraîne pas la nécessité de modifier immédiatement la législation polonaise, en adoptant de nouvelles dispositions (lois), en abrogeant ou en amendant des actes en vigueur.

Cependant, quand on envisage le développement du pays qui se poursuivra, il faut tenir compte de la nécessité de renforcer la protection sociale des citoyens conformément au devoir du signataire de la CSE de développer les droits de l'homme dans tous les domaines concernés par la Charte. Il s'agit notamment des actions solidaires à engager tant et à l'échelle nationale 2[n] internationale, pour élargir les droits sociaux de l'homme et du citoyen.

En premier lieu, le législateur polonais doit veiller à garantir la mise en oeuvre des droits inscrits dans les dispositions de la Charte, déjà ratifiées par la Pologne.

3.2. Les obligations découlant des articles et alinéas déjà ratifiés feront l'objet d'une analyse pénétrante de la part du Comité d'experts indépendants (nommés par la Comité des Ministres du Conseil de l'Europe). Les experts ne se contenteront sûrement pas de noter que notre législation prévoit des normes qui, formellement, sont consacrées aux droits figurant dans les textes ratifiés de la Charte. Le Comité d'experts aura le droit d'examiner si le droit polonais garantit un niveau convenable de la réalisation des droits définis dans les dispositions de la Charte. Par exemple, le système de la sécurité sociale existant en Pologne, système prévu à l'art. 12 de la Charte, sera soumis à l'examen tendant à constater s'il est maintenu à un niveau satisfaisant, au moins égal à celui exigé pour la ratification de la Convention 102 de l'Organisation internationale du travail, concernant les normes minimales de la sécurité sociale (la procédure tendant à la ratification de cette convention par la Pologne est en cours). La Comité peut aussi avoir des doutes sur la réalisation suffisante des droits de la famille, lesquels englobent, selon [* 2]

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[6] V. pour plus de détails à ce sujet la partie VI de cette étude et l'article de R. H e n c z e 1, J. M a c i e j e w s k a, «Prawo nieprzekraczalnych granic» [Le droit des limites infranchissables], *Prawo i Życie* du 26 juillet et du 2 août 1997.

l'art. 16 de la Charte, le droit aux prestations effectives, appropriées, et non symboliques seulement, aux jeunes foyers.

L'exercice effectif des droits sociaux que les Etats ratifiant la Charte devraient garantir aux ayants droit, dépend bien entendu de la valeur économique des prestations dues, laquelle valeur varie en fonction de la conjoncture économique. Le contrôle du Comité d'experts doit donc être permanent, ce qui signifie que les évaluations des experts ne sont, en règle générale, ni uniques ni définitives. Les évaluations variables peuvent entraîner la nécessité de modification des lois nationales, en vue de leur adaptation à l'acte ratifié. Il en résulte que les droits sociaux inscrits dans la Charte - dans la plupart des cas d'une façon peu incisive - ont un contenu dynamique, susceptible de différentes interprétations en fonction du contexte, c'est-à-dire de la situation sociale, économique et politique dans la période historique donnée.

3.3. La ratification partielle de la CSE ne fait pas naître pour l'Etat qui ne l'a pas ratifiée en entier, l'obligation juridique de ratifier, dans un proche ou même lointain avenir, les dispositions restantes de ce document. Néanmoins, lors même qu'il aurait accepté une partie seulement de la Charte, l'Etat devenu partie à celle-ci, doit mener une politique conforme, et en tout cas non contraire aux directives générales que contient la Partie I[ère] du traité. On y lit que les Parties contractantes adoptent comme but de leur politique la création des conditions dans lesquelles pourront être efficacement réalisés les droits et principes énumérés en 19 points (développés ensuite dans la Partie II[ème], en articles rédigés sous une forme plus concrète, permettant leur ratification). Cette politique doit être réalisée à l'aide de tous les moyens utiles, tant nationaux qu'internationaux. Les conséquences de la ratification de la Charte ne se limitent donc pas aux mesures de création du droit et de politique sociale, correspondant aux principes de la Charte, mais concernent aussi les relations de la Pologne avec les autres pays et avec les organisations internationales, entre autres avec l'Organisation internationale du travail.

A la lumière des directives susmentionnées de la CSE, il apparaît comme juste que la Pologne doive, à compter de la date de la ratification de la Charte, chercher à créer les conditions favorables «à l'exercice effectif de tous les droits et principes reconnus comme les objectifs fondamentaux de la politique sociale des Etats appartenant au Conseil de l'Europe»[7]. Du reste, le fait même de l'adhésion de la Pologne, en 1991, à l'Organisation, et de la signature de la CSE avec l'intention de la ratifier à l'avenir, peut être considéré comme une *sui generis* source morale de l'obligation de la Pologne envers la société internationale de se comporter de la façon correspondant aux buts promus par le Conseil de l'Europe et recommandés à tous ses membres. Il est évident qu'avant la ratification on ne pouvait pas demander à la Pologne qu'elle rendît compte de ses comportements aux organes de contrôle du Conseil de l'Europe.

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[7] Cf. Ż. S e m p r i c h: «Krok pierwszy, następne - w miarę możliwości» [Le premier pas, les suivants dans la mesure du possible], *Rzeczpospolita*, 23 juin 1997.

4. Les effets de la ratification de la CSE selon le droit constitutionnel

4.1. Dans le catalogue des sources du droit de la RP figurent, aux termes de l'art. 87 de la Constitution, les traités internationaux ratifiés. Ces traités font partie de l'ordre juridique national après leur publication au Journal des Lois de la RP (art. 91, al. 1 de la Constitution).

En vertu des normes constitutionnelles précitées, seules les dispositions de la CSE ratifiées par la Pologne font partie intégrante du système juridique polonais, ce qui se réalise au moment de la publication de l'acte de ratification au Journal des Lois de la RP.

Le Président de la République a ratifié la Charte sociale européenne (certaines dispositions) le 16 juin 1997, alors qu'était en vigueur la Loi constitutionnelle du 17 octobre 1992, appelée «petite Constitution»[8]. La délégation légale prévue à l'art. 33 al. 2 de cette loi n'était pas nécessaire, parce que la mise en oeuvre des dispositions ratifiées n'impliquait pas, selon l'opinion de ceux qui avaient participé aux préparatifs de la ratification, de charges financières de l'Etat ni la nécessité de modifier la législation.

Cette ratification est aujourd'hui un fait inattaquable, car elle a eu lieu en accord avec le droit constitutionnel en vigueur le jour de la ratification, et a produit les effets juridiques dans les relations de la Pologne avec les autres Parties à la CSE. Le principe de la continuité du droit par lequel la Pologne s'est liée avant le changement d'équipe au pouvoir à l'issue des dernières élections, ne peut être contestée par personne. S'agissant des effets de la ratification pro foro interno - pour l'ordre juridique interne - il faut les évaluer selon la nouvelle loi fondamentale, adoptée le 2 avril 1997, entrée en vigueur le 17 octobre 1997, soit après la ratification.

L'art. 91 de la Constitution prévoit, premièrement, que le traité international ratifié (après sa publication au Journal des Lois) est applicable directement, sauf si son application relève de la promulgation d'une loi (al. 1) et, deuxièmement, que le traité ratifié en vertu d'une loi d'autorisation a une autorité supérieure à la loi, lorsque celle-ci est incompatible avec le traité (al. 2).

Un problème à part est celui de savoir que faire dans la situation où, malgré les prévisions que la ratification n'entraînerait pas de charges financières pour l'Etat ni la nécessité de modifier la législation, il s'avère (p.ex. si telle est l'opinion du Comité d'experts) qu'une telle charge ou modification seraient inéluctables?

En tentant de répondre à cette question, constatons avant tout que l'on ne peut que rarement admettre que la ratification du traité international n'entraînerait sûrement pas de charges engageant considérablement les finances de l'Etat (art. 89, al. 1-4° de la Constitution), et encore moins qu'il ne serait pas nécessaire de modifier la législation (art. 33 de la «petite Constitution» et l'art. 89, al. 1-5° de la Constitution). La nouvelle Constitution prévoit à l'art. 91, al. 1, que le traité ratifié peut être appliqué directement dans le cas seulement où cette application ne relève pas de la promulgation d'une loi.

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[8] *Journal des Lois* 1992, n° 84, texte 426.

Les traités internationaux concernant les droits de l'homme sont fondés sur l'hypothèse d'un progrès permanent de la protection de ces droits, et prévoient la nécessité de relever les standards d'une vie digne de l'homme et d'élargir les garanties d'une application efficace des normes des traités dans les Etats membres, par l'intermédiaire des législations nationales. C'est particulièrement important dans le cas des traités qui présentent une valeur intrinsèque de développement, comme la Charte sociale européenne. La ratification de ce document en juin 1997, ne peut donc être entendue comme une obligation de préserver seulement l'état juridique préexistant dans le domaine de la protection sociale, sans l'intention de l'enrichir de nouvelles lois.

4. Le problème de l'application directe des dispositions ratifiées de la CSE

4.1. Il semble particulièrement difficile d'indiquer les dispositions de la CSE qui peuvent être appliquées directement.

Au cours de la discussion sur le projet de constitution avait surgi une controverse sur le point de savoir comment il fallait entendre l'application directe (l'art. 8, al. 2 de la Constitution en vigueur)[9]. Les doutes relatifs à cette disposition concernent partiellement la question de l'application directe, en vertu de l'art. 91, al. 1 de la Constitution, des traités internationaux ratifiés.

Le problème de l'application directe de la Constitution suscite toujours beaucoup de controverses. L'art. 8, al. 2 contient une norme laconique à ce sujet, stipulant que «les dispositions de la Constitution sont directement applicables, sauf dispositions constitutionnelles contraires». D'abord, il n'est pas clair en quoi consiste cette application directe de la loi fondamentale[10]. Et puis, dans quelles situations il y a lieu de constater que la Constitution en statue autrement (que certaines de ses dispositions ne sont pas directement applicables)?

Selon l'interprétation la plus simple, l'application «directe» signifierait que toute personne peut, au cours d'une procédure judiciaire, administrative ou autre, invoquer directement la disposition donnée de la Constitution, et de cette disposition seulement déduire ses prétentions.

Cette conception correspond à l'opinion, en principe bien établie dans la théorie générale du droit, selon laquelle l'application du droit consiste en ce que les tribunaux ou autres corps appelés à connaître des affaires d'un genre déterminé, établissent les

[9] Cf. T. Zieliński: «Konstytucyjne złudzenia» [Les illusions constitutionnelles], *Rzeczpospolita,* 1er juin 1996; E. Łętowska: «Co to znaczy „bezpośrednie stosowanie Konstytucji"»? [Qu'est-ce que signifie «l'application directe de la Constitution»?], *Rzeczpospolita,* 9 octobre 1996; cf. également, sous l'empire de la Constitution précédente, K. Działocha: «Bezpośrednie stosowanie Konstytucji przez sądy» [L'application directe de la Constitution par les tribunaux], *Studia Prawnicze* 1988, n° 4, p. 3 et suiv.; Z. Czeszejko-Sochacki: «Bezpośrednie stosowanie Konstytucji» [L'application directe de la Constitution], *Rzeczpospolita,* 23 janvier 1995.

[10] V. M. Zieliński: «Problemy pojęciowe bezpośredniego stosowania Konstytucji» [Problèmes relatifs au concept de l'application directe de la Constitution], rapport à la réunion du Comité des Sciences juridiques de l'Académie Polonaise des Sciences le 9 janvier 1997 (v. le compte-rendu de E. Sobótka dans *Państwo i Prawo* 1997, n° 9, p. 99 et suiv.).

conséquences juridiques que la loi attache à des faits déterminés[11]. Ces «conséquences» sont établies dans les décisions des tribunaux et dans les décisions administratives statuant sur les droits et obligations des parties à la procédure donnée. L'application directe de la Constitution en ce sens équivaudrait à l'application dite «autonome» de la norme constitutionnelle à une situation déterminée, sans qu'elle doive être concrétisée dans la loi ordinaire[12].

Dans un autre sens, plus large, il conviendrait d'entendre par application directe de la Constitution «la co-application», dans les situations déterminées, des dispositions de la Constitution et d'une loi ordinaire[13]. Dans ce cas la Constitution serait applicable à côté, ou conjointement avec une loi ordinaire.

4.2. La science du droit constitutionnel n'a pas encore tenté d'éclaircir le sens de la disposition de l'art. 8, al. 2 de la Constitution, écartant l'application directe des dispositions de cette loi dans le cas des «dispositions constitutionnelles contraires».

Cette tournure concerne certainement avant tout les cas où une disposition de la Constitution contient une délégation expresse, autorisant le législateur ordinaire à définir dans une loi les questions qui exigent des normes spéciales. C'est dans ce cas, en effet, que la disposition indéfinie de la Constitution n'est pas susceptible d'application directe.

Selon l'opinion qui semble justifiée, l'application directe de la Constitution est à exclure dans deux situations: 1) lorsque la Constitution exclut expressis verbis cette application, en prévoyant des actes «d'application»; 2) lorsque la disposition donnée ne fournit pas aux tribunaux, administrations ou autres corps appliquant le droit, de fondement à prendre décision dans les affaires examinées. Dans ces situations, le texte de la Constitution ne dit pas expressément que son application directe n'entre pas enjeu (il ne contient pas de «dispositions constitutionnelles contraires»), mais l'impossibilité d'application d'une disposition donnée équivaut à l'exclusion expresse d'une telle possibilité par les dispositions renvoyant aux lois ordinaires[14].

4.3. Ces développements sur l'application directe des dispositions de la Constitution semblent utiles comme introduction à la réflexion sur les doutes analogues que suscite l'art. 91, al. 1 de la Constitution. Jusqu'à présent, la doctrine n'a pas donné de réponse sûre à la question en quel sens, et par qui, peuvent être directement appliqués, sous l'empire de la nouvelle Constitution, les traités internationaux ratifiés (publiés au Journal des Lois). Sans éclaircir cette question générale et fondamentale, il est difficile de se pencher sur celle de l'application directe dans l'ordre juridique interne de la III[e] République des dispositions ratifiées de la CSE.

L'acquis déjà considérable de la science du droit international au sujet de l'incorporation de ce droit au droit interne, et de la transformation des normes des traités en droit

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[11] Cf. J. W r ó b l e w s k i: *Sądowe stosowanie prawa* [L'application judiciaire du droit], Warszawa 1972, passim.

[12] Cf. K. D z i a ł o c h a: «Bezpośrednie stosowanie...», *op. cit.*, p. 5.

[13] Cf. M. Z i e 1 i ń s k i, dans le rapport cité à la note 10.

[14] Cf. M. Z i e 1 i ń s k i, *op. cit.*

interne, est certainement de nature à aider ces recherches[15]. D'autre part, des auteurs ont consacré beaucoup d'attention à l'efficacité des actes internationaux ratifiés ex proprio vigore.

4.4. Il convient, entre autres, de partager l'opinion selon laquelle après l'entrée en vigueur de la Constitution du 2 avril 1997, tous les traités internationaux ratifiés par la Pologne sont soumis, en vertu des art. 87 et 91 à la transformation générale en droit interne polonais[16] (c'est-à-dire que l'incorporation de ces traités au système juridique polonais n'exige pas qu'ils soient mentionnés dans des lois)[17].

Le concept de l'application directe du traité international ratifié dans l'ordre juridique interne doit être entendu de la même façon que l'application directe des dispositions de la Constitution selon l'art. 8, al. 2. Conformément aux opinions antérieurement établies dans la doctrine[18], l'application du traité international signifie que les tribunaux et autres organes décideurs (au sens large du terme) établissent les conséquences juridiques des faits définis dans les normes des traités.

L'art. 91 de la Constitution indique, d'une façon un peu plus précise, que l'art. 8, al. 1 de cette loi, quand un traité international ratifié ne peut être directement appliqué, à savoir lorsque son application «relève de la promulgation d'une loi». La réponse à la question de savoir si cette condition ne doit pas nécessairement être respectée, dépend du contenu suffisamment concrétisé de la norme, c'est-à-dire de la possibilité de la considérer comme une norme qui s'applique d'elle-même (self-executing).

Dans la science du droit international a été formulé l'opinion que tel était, par exemple, le statut du Pacte international relatif aux Droits civils et politiques du 16 décembre 1966 (ratifié par la Pologne) ainsi que des Conventions internationales de VOIT[19]. En revanche, de l'avis de l'auteur de cette opinion, n'est pas un tel acte le Pacte international relatif aux Droits sociaux, économiques et culturels[20]. Cette opinion reflète une image fort simplifiée des normes en question, différenciées selon les traités dont elles font partie. Or ce qui décide de leur classement dans la catégorie self-executing, c'est leur contenu, et non pas la présence dans tel ou tel traité. Des normes qui ne sont pas susceptibles d'application directe apparaissent dans le Pacte relatif aux Droits civils et politiques, et inversement, on trouve des normes de ce genre dans le Pacte international relatif aux Droits sociaux, économiques et culturels. De même, les conventions de l'OIT

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[15] Cf. entre autres K. S k u b i s z e w s k i: «Prawo międzynarodowe w porządku wewnętrznym państwa» [Le droit international dans l'ordre interne de l'Etat] (dans:) *Prawo międzynarodowe a prawo wewnętrzne w świetle doświadczeń socjalistycznych* [Le droit international et le droit interne à la lumière de l'expérience socialiste], Warszawa 1980; ibidem: «Przyszła Konstytucja a miejsce prawa międzynarodowego w krajowym porządku prawnym» [La future Constitution et la place du droit international dans l'ordre juridique national], *Państwo i Prawo* 1994, n° 3. En relation avec la nouvelle Constitution, mérite aussi notre attention l'étude de R. S z a f a r z: *Skuteczność traktatów na obszarze RP w świetle prawa konstytucyjnego* [L'efficacité des traités sur le territoire de la République de Pologne à la lumière du droit constitutionnel], Warszawa-Poznań 1996.

[16] R. S z a f a r z: *op. cit.,* p. 15.

[17] Cf. K. S k u b i s z e w s k i: «Przyszła konstytucja...», *op. cit.,* p. 14 et suiv.

[18] K. S k u b i s z e w s k i: «Prawo PRL a traktaty» [Le droit de la République Populaire de Pologne et les traités], *RPEiS* 1972, n° 3, p. 7.

[19] R. S z a f a r z: *Skuteczność..., op. cit.,* p. 11.

[20] *Ibidem,* p. 11, 18-19.

contiennent des normes diverses, qui - ni toutes, ni même leur écrasante majorité - ne se prêtent pas à l'application directe[21]. Il est vrai cependant que font partie de telles normes le plus fréquemment celles qui concernent les droits de l'homme, entre autres celles destinées à la défense des droits du travailleur[22].

5. Les possibilités et modalités de réalisation des dispositions ratifiées de la CSE

5.1. Aux termes de l'art. 1, al. 1 de la CSE ratifiée par la Pologne, intitulé «Droit au travail», la Pologne est tenue de «reconnaître comme l'un de ses principaux objectifs et responsabilités la réalisation et le maintien du niveau le plus élevé et le plus stable possible de l'emploi en vue de la réalisation du plein emploi».

La disposition précitée est une typique norme-programme, définissant les objectifs de la politique sociale de l'Etat dans le domaine de l'emploi. La Constitution polonaise inscrit cette norme dans le texte plus développé de l'art. 65, al. 5, aux termes duquel les pouvoirs publics sont tenus de mettre en oeuvre une politique visant le plein emploi productif par la réalisation des programmes de lutte contre le chômage, y compris l'organisation et le soutien des activités d'orientation et de formation professionnelle, des travaux d'intérêt public et des travaux subventionnés.

Le devoir de l'Etat de mener une politique tendant à assurer le plein emploi productif est l'un des principes fondamentaux du droit du travail. Ce principe est inscrit, sous cette formule laconique, à l'art. 10, § 3 du Code du Travail.

Ces garanties générales du droit au travail, inscrites dans la Constitution et dans le Code du Travail, suffisent-elles à la mise en oeuvre de la norme-programme de l'art. 1, al. 1 de la Charte? Ma réponse est négative, car l'art. 65, al. 5 de la Constitution et l'art. 10, § 3 du Code du Travail sont seulement des normes-programme, insusceptibles d'application directe au sens de l'art. 8, al. 2 de la Constitution. La réalisation de l'objectif indiqué dans la Charte (tendance à assurer le plein emploi) exige, premièrement, des dispositions définissant les moyens indispensables qui permettraient de se rapprocher de l'objectif indiqué, et deuxièmement, l'élaboration et la réalisation de programmes de lutte contre le chômage.

En Pologne sont en vigueur la loi du 14 décembre 1994 sur l'emploi et sur la lutte contre le chômage[23], et de nombreux règlements d'application de cette loi. Ces dispositions établissent un système de l'emploi, conforme à la Constitution et à la CSE. Actuellement sont réalisés: le «Programme de lutte contre le chômage et d'atténuation de ses conséquences», et le programme «La promotion de l'activité professionnelle de la jeunesse», les deux adoptés par la Diète de la IIe législature.

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[21] Cf. T. Z i e l i ń s k i: *Prawo pracy. Zarys systemu.* Cz. I - *Ogólna* [Droit du travail. Précis de système. Ière Partie Générale], Warszawa-Kraków 1986, p. 18, et l'opinion différente y citée de A. C h o b o t.

[22] T. Z i e l i ń s k i: *Prawo pracy..., op. cit.*, p. 181.

[23] Texte unique, *Journal des Lois* 1997, n° 25, texte 128.

Le processus tendant à atteindre le plein emploi productif doit se poursuivre sans aucune limitation dans le temps. Afin d'éviter les critiques du Comité d'experts indépendants, il faut liquider les disproportions des dimensions du chômage au niveau régional, sectoriel et professionnel.

Ayant ratifié l'art. 1, al. 2 de la Charte, la Pologne est tenue de protéger efficacement le droit du travailleur de gagner sa vie par un travail librement entrepris. Cette disposition est obligatoire dans l'ordre juridique interne; premièrement, en ce sens que tous ceux qui sont appelés à appliquer le droit doivent respecter l'interdiction de contraindre quiconque au travail qui n'est pas librement entrepris; deuxièmement, parce que cette disposition est une source de l'obligation des organes de l'Etat (du Parlement) d'assurer dans l'ordre juridique interne les moyens d'une réalisation efficace du principe de la liberté du travail (formulé à l'art. 1, al. 2 de la CSE précité).

Ce principe a, dans le droit polonais, le rang constitutionnel. L'art. 65 de la loi fondamentale comporte deux dispositions le concernant: 1) A chacun est garantie la liberté de choix et d'exercice de la profession ainsi que du lieu de travail. Les exceptions sont définies par la loi. 2). La loi peut imposer l'obligation de travail.

La question se pose de savoir si la possibilité d'imposer exceptionnellement l'obligation de travail n'est pas en désaccord avec l'art. 1, al. 2 de la Charte, qui ne prévoit pas d'exception au principe de la liberté du travail. Mais en supposant qu'il s'agit d'un principe général, la réponse négative semble justifiée. La Charte ne peut exclure l'admissibilité de certaines dérogations justifiées par des circonstances particulières, les mesures d'exception, etc.

La liberté du travail est aussi l'un des principes fondamentaux du droit qui figurent au chapitre II du titre premier du Code du Travail. Aux termes de l'art. 10, § 1, placé au début de ce chapitre intitulé «Principes fondamentaux du droit du travail», toute personne a le droit de choisir librement un travail. Sauf les cas prévus par la loi, il est défendu d'interdire l'exercice d'une profession.

Il ne semble pas que le droit polonais garantisse pleinement les moyens efficaces de réalisation du droit du travailleur de gagner sa vie par un travail librement entrepris (art. 1, al. 2 de la Charte). L'insertion du principe dans l'art. 65 de la Constitution et dans l'art. 101, § 1 du Code du Travail ne suffit pas à l'application directe de l'art. 1, al. 2 de la Charte ni des dispositions précitées de la Constitution et du Code du Travail. Le droit polonais protège efficacement les personnes contraintes au travail, car dans ces cas est applicable l'art. 191 du Code pénal de 1997. En revanche, il est discutable si, en présence d'un chômage toujours élevé, qui atteint dans certaines régions 20%, on peut parler du droit réel des habitants de ces régions au travail librement choisi dans le cas d'une profession et d'un lieu de travail donnés. Il manque toujours de mesures suffisantes de la part de l'Etat qui réduiraient le chômage dans les régions où, par suite du déclin des entreprises dans les années 1990/91 (notamment des fermes d'Etat), un très grand nombre de personnes ont été privées de travail. Après la ratification de l'art. 1, al. 2 de la CSE, la promotion de l'activité professionnelle de ces personnes est une question urgente.

Dans la catégorie des normes-programme, qui ne sont pas susceptibles d'application directe sans actes utiles du droit national, il faut classer l'art. 1, al. 3 et 4 de la CSE.

La première de ces dispositions oblige l'Etat ratifiant la Charte en cette matière à établir ou à maintenir des services gratuits d'emploi pour tous les travailleurs. La seconde disposition l'oblige à assurer ou à favoriser une orientation, une formation et une réadaptation professionnelles appropriées. La Pologne satisfait à cette dernière obligation. En revanche, il faut se demander si la ratification de la Charte dans la partie concernant les services gratuits d'emploi peut empêcher la création des bureaux de placement payants, notamment dans le contexte de l'obligation de la Pologne de respecter la Convention n° 96 de l'OIT (révisée en 1949).

En récapitulant les remarques sur les effets de la ratification de l'article 1er de la CSE, consacré au droit au travail, il y a lieu de constater que la Charte n'oblige aucun des Etats membres à garantir à toutes les personnes désireuses et aptes au travail dans une profession déterminée, le droit au travail comme un droit revendicatif. Le droit au travail est entendu dans la Charte comme un système d'assistance aux demandeurs d'emploi et la liberté du choix de travail.

5.2. En vertu de l'art. 91, al. 2 de la Constitution, n'est pas directement applicable non plus l'art. 2 de la Charte, définissant les obligations des Etats qui l'ont ratifiée d'assurer aux travailleurs les conditions de travail équitables. L'exécution de cette obligation dépend en effet des actes du droit interne qui sont à édicter.

La Pologne a ratifié les alinéas 1 et 3-5 de l'article précité sans avoir à adapter sa législation du travail aux standards définis dans ces textes, car elle les avait atteints avant la ratification, notamment par les dispositions du Code du Travail concernant la durée du travail et les congés payés. La ratification garantit toutefois que la durée du travail et des congés payés ne sera pas réduite au-dessous du niveau indiqué dans la Charte.

5.3. Les mêmes conséquences résultent de la ratification par la Pologne de l'art. 3 de la CSE, qui impose à chaque Etat Partie l'obligation d'édicter des règlements concernant la sécurité et l'hygiène dans le travail et d'assurer les moyens d'en contrôler l'exécution. Ces moyens sont garantis dans le Code du Travail, dans la loi sur l'Inspection nationale du Travail et dans des actes spéciaux. Les dispositions générales concernant la sécurité et l'hygiène du travail figurent au titre dixième du Code du Travail, tandis que les dispositions définissant l'exécution des travaux conforme aux règles de sécurité et à d'hygiène du travail - dans le règlement du ministre du Travail et de la Politique sociale, et dans les règlements des ministres compétents.

La législation développée de la protection du travail en Pologne ne signifie pas que la ratification de l'art. 3 de la Charte n'apporte rien dans l'ordre juridique interne polonais. La ratification a fait naître pour les autorités publiques l'obligation d'entreprendre des mesures plus efficaces en faveur de l'amélioration des conditions de sécurité et d'hygiène du travail, en particulier dans les petites entreprises privées, car comme en informe l'Inspection nationale du Travail, ces conditions sont très insatisfaisantes.

5.4. La Pologne a ratifié en partie l'art. 4 de la CSE concernant le droit à une rémunération équitable. Elle a reconnu ceux des droits du travailleur qui sont déjà institués dans la législation polonaise (dans le Code du Travail et d'autres actes juridiques), à savoir: 1) le droit à un taux de rémunération majoré pour les heures de travail supplémentaires; 2) le droit des travailleurs masculins et féminins à une rémunération égale pour un travail de valeur égale; 3) le droit à un délai de préavis raisonnable dans le cas de cessation de l'emploi; 4) la limitation des retenues sur les salaires à celles prévues par la loi ou par les conventions collectives.

Le droit à une rémunération égale des hommes et des femmes n'est pas défini directement en droit polonais, mais découle de Γ art. 78 en relation avec les art. 112 et 113 du Code du Travail, et avec l'art. 33 de la Constitution. Cependant, proclamer le principe de la rémunération égale sans distinction de sexe ne suffit pas à satisfaire les exigences de la Charte. La Pologne fait malheureusement partie des pays où ce principe est constamment violé au détriment des femmes[24]. La ratification de l'art. 4, al. 3 de la CSE impose à nos autorités publiques (en particulier à l'Inspection du Travail) l'obligation de renforcer le contrôle de l'application de ce principe[25].

Dans l'acte de ratification, la Pologne ne s'est pas engagée à respecter le droit des travailleurs à une rémunération suffisante pour leur assurer, ainsi qu'à leurs familles un niveau de vie décent (art. 4, al. 1 de la CSE). Le Code du Travail prévoit, il est vrai, à l'art. 13 que le travailleur a droit à une rémunération «équitable» de son travail, mais ce terme ne correspond pas à la notion de rémunération assurant un niveau de vie décent au travailleur et à sa famille, comme le veut la disposition précitée de la CSE. La rémunération de tous les travailleurs en Pologne n'a pas encore atteint 68% du salaire moyen national, que le Comité d'experts reconnaît comme remplissant ce critère[26]. Dans cette situation, la Pologne ne pouvait se lier par une obligation qu'elle ne serait pas en mesure de remplir dans l'état économique actuel du pays[27]. C'est un «memento» avertissant que la Pologne doit, en tant que partie à la CSE, tendre à créer les conditions permettant de ratifier la disposition concernée dans un proche avenir.

5.5. En revanche, la Pologne était pleinement fondée à s'obliger, dans l'acte de ratification, à reconnaître les droits des travailleurs et des employeurs de s'organiser en vue de protéger leurs intérêts économiques et sociaux (art. 5 de la Charte). A l'issue d'une lutte opiniâtre menée par le syndicat «Solidarność» pour garantir aux travailleurs le droit de coalition selon le modèle syndical pluraliste (1980-1989), de graves négligences dans le domaine des droits syndicaux ont été réparées à la suite de la «table ronde» de 1989. Les

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[24] Cf. I. B o r u t a: *Równość kobiet i mężczyzn w świetle prawa wspólnoty europejskiej. Implikacje dla Polski* [L'égalité des femmes et des hommes à la lumière du droit de la Communauté Européenne. Implications pour la Pologne], Łódź 1996, chap. VI. L'inégalité des conditions de la rémunération du travail des femmes et des hommes a été notée dans de nombreux rapports au XVe Congrès mondial de Droit du Travail et de la Sécurité sociale, qui s'est tenu les 22-26 septembre 1997 à Buenos Aires.

[25] Le principe de la rémunération égale du travail des hommes et des femmes doit être obligatoirement respecté par les Etats de l'Union Européenne conformément à l'art. 119 du Traité. Le droit polonais n'est pas suffisamment adapté pour observer ce principe. Par exemple, les femmes ne peuvent pas agir en justice si elles sont moins bien rémunérées que les hommes, comme l'exige la Directive n° 75/117 (cf. L. F l o r e k: «Zakaz dyskryminacji w stosunkach pracy» [La défense de la discrimination dans les rapports de travail], *Praca i Zabezpieczenie Społeczne* 1997, n° 1, p. 81.

[26] Cf. J. S k o c z y ń s k i: «Prawo do godziwego wynagrodzenia» [Le droit à une rémunération équitable], *Praca i Zabezpieczenie Społeczne* 1997, n° 4, p. 11 et suiv. J. W r a t n y (dans:) *Europejskie prawo pracy i ubezpieczeń społecznych* [Le droit européen du travail et des assurances sociales], sous l'édition, de L. F l o r e k, Warszawa 1996, p. 154 et suiv.

[27] Cf. R. H e n c z e l, J. M a c i e j e w s k a: «Prawo nieprzekraczalnych granic», *v. supra*, *Prawo i Życie,* 26 juillet 1997, p. 17.

lois sur les syndicats, sur les organisations d'employeurs et sur le règlement des conflits collectifs, votées en 1991, satisfont aux conditions de la CSE. Après la ratification de l'art. 5 de celle-ci, aucune régression n'est plus possible dans la réglementation de cette matière. On prévoit plutôt de continuer à progresser en la matière par la codification des rapports collectifs de travail. Un projet de loi approprié a été rédigé par la Commission pour la Réforme du Droit du Travail, fonctionnant auprès du ministre du Travail et de la Politique sociale. Le 13 octobre 1997, ce projet a été soumis pour avis à la Commission tripartite pour les questions socio-économiques.

5.6. La Pologne a ratifié trois des quatre alinéas de l'art. 6 de la CSE, concernant la négociation collective. Par cet acte, elle s'engage: 1) à favoriser la consultation entre travailleurs et employeurs (al. 1); 2) à promouvoir le mécanisme de négociation volontaire entre les employeurs ou leurs organisations et les organisations de travailleurs en vue de régler les conditions d'emploi par des conventions collectives (al. 2); 3) à favoriser l'institution et l'utilisation de procédures appropriées de conciliation et d'arbitrage volontaire pour le règlement des conflits collectifs (al. 3).

Déjà au moment de la ratification de la Charte, le droit polonais du travail était en principe adapté aux conditions précitées de l'art. 6 de la CSE. Les consultations sur les questions concernant les intérêts des employeurs et des travailleurs sont notamment prévues par la loi de 1991 sur les organisations d'employeurs, par la résolution n° 7/94 de 1994 concernant la création de la Commission tripartite pour les questions socio-économiques, la loi sur les ressources financières affectées à la rémunération dans la sphère budgétaire de l'Etat, et la loi sur le système de négociation de la majoration des rémunérations moyennes, pratiquées par les agents économiques.

Le Code du Travail, amendé en 1996, garantit, de la façon correspondant aux dispositions de la Charte, la liberté de conclure les conventions collectives de travail. Celles-ci sont même, d'après le Code, une des sources prioritaires du droit du travail. La ratification de l'art. 6, al. 2 de la Charte renforce la position des conventions collectives en Pologne. Mais ce qui est inquiétant à propos de la ratification, c'est que, selon une partie de la doctrine, il est à craindre que, dans la pratique, le rôle de cette source du droit ne diminue au lieu de croître[28].

Les «mécanismes» de conciliation et l'arbitrage volontaire, utilisés pour régler les conflits collectifs, sont prévus depuis longtemps dans le droit polonais, à présent dans la loi de 1991 sur le règlement des conflits collectifs.

La réglementation actuelle du droit à la négociation collective dans les domaines susmentionnés n'est pas définitive, bien qu'elle remplisse déjà les dispositions de Γ art. 6, al. 1-3 de la Charte. La Commission pour la Réforme du Droit du Travail a rédigé un projet qui donnerait à la Commission tripartite pour les questions socio-économiques, le rang légal - par voie de la base légale contenne dans le Code des rapports collectifs de travail. Actuellement, cette Commission fonctionne en vertu de la résolution du

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[28] Cette thèse est apparue au cours de la discussion sur les perspectives de développement des règles conventionnelles, à la Conférence organisée le 9 décembre 1997 à Varsovie par l'Institut du Travail et des Affaires sociales.

Gouvernement. Le Tribunal Constitutionnel n'a pas contesté la légalité de ce fondement, mais a signalé au Gouvernement la nécessité d'une initiative législative tendant à relever le rang de la Commission[29]. Le projet a été présenté pour consultation aux membres de cette Commission.

La ratification n'englobe pas l'alinéa 4 de l'art. 6 de la CSE, concernant le droit des travailleurs et des employeurs à des actions collectives en cas de conflits d'intérêt. La législation polonaise garantit aux syndicats seulement le droit d'engager des conflits collectifs, la grève y comprise. A défaut de garanties analogues pour les employeurs (sous la forme de lock-out), cette partie de la Charte n'a pu être ratifiée. Elle pourrait l'être en vertu du Code du droit collectif du travail, si le projet de cet acte, adopté par la Commission pour la Réforme du Droit du Travail devient loi.

5.7. Le droit polonais du travail concorde presque intégralement avec l'art 7 de la Charte obligeant les Etats-Parties à la protection des droits des enfants et des adolescents. Conformément à cet article, le Code du Travail fixe l'âge d'admission à l'emploi même plus élevé que celui de l'art. 7 de la Charte, limite la durée du travail de l'adolescent de moins de 16 ans, prévoit que le temps consacré à l'instruction de l'adolescent, qui ne peut dépasser 18 heures par semaine, est pris en compte dans le calcul de la durée du travail, prévoit une plus longue durée du congé payé de l'adolescent, interdit d'employer les adolescents aux travaux de nuit et exigent que l'adolescent subisse un examen médical préliminaire, ainsi que des examens médicaux périodiques et de contrôle. Le devoir prévu à l'art. 7, al. 10 de la Charte d'assurer aux enfants et adolescents une protection spéciale contre les dangers physiques et moraux qui les menacent, résultant notamment de leur travail, est réalisé en droit polonais par les dispositions concernant en principe l'ensemble des travailleurs (titre dixième du Code du Travail: «Sécurité et hygiène du travail» et titre treizième du Code: «Responsabilité des contraventions aux droits du travailleur») et par certaines dispositions du Code pénal de 1997 (concernant les infractions contre les droits des personnes exerçant un travail salarié, contre les moeurs et la liberté sexuelle). Il semble cependant que l'exécution des obligations de la Pologne découlant de l'art. 7, al. 10 de la Charte devrait être précisée davantage au moyen de dispositions spéciales, définissant les mesures de protection particulière des enfants et adolescents contre les dangers indiqués par cette disposition.

Dans l'ordre juridique actuel de la République de Pologne, trois dispositions de l'art. 7 de la Charte n'ont pu être ratifiées, à savoir: 1) l'art. 1er fixant à 15 ans l'âge minimum d'admission à l'emploi (le droit polonais prévoit une dérogation à ce principe à l'art. 191, § 5-3° du Code du Travail); 2) l'ai. 3 interdisant que les enfants encore soumis à l'instruction obligatoire soient employés aux travaux qui les empêcheraient de bénéficier pleinement de cette instruction (dans la situation actuelle, vu notamment le travail des enfants dans les exploitations rurales individuelles, il serait prématuré

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[29] Cf. J. O n i s z c z u k: «Komisja Trójstronna do spraw Społeczno-Gospodarczych w orzecznictwie Trybunału Konstytucyjnego» [La Commission tripartite pour les questions socio-économiques dans la jurisprudence du Tribunal Constitutionnel], *Praca i Zabezpieczenie Społeczne* 1997, n° 11, p. 38 et suiv.

d'adopter cette disposition dans notre pays[30]). Cette situation ne peut durer à la longue dans l'Etat qui est partie à la Charte.

En raison de l'inadaptation du niveau des rémunérations des adolescents qui suivent une formation professionnelle aux standards définis par le Comité d'experts, la Pologne a dû s'abstenir de la ratification de l'ai. 5 de l'article 7 de la Charte prévoyant le droit des jeunes travailleurs et apprentis à une rémunération équitable ou à une allocation appropriée. Cette contradiction flagrante entre le droit interne et la disposition de la CSE en question, combien importante, doit être liquidée d'urgence, car il ne convient point qu'elle subsiste après la ratification d'autres dispositions du Traité par la Pologne.

5.8. La Pologne a ratifié le texte intégral de l'art. 8 de la Charte concernant «Le droit des travailleuses à la protection». Le Code du Travail contient les normes garantissant la protection du travail des femmes à un degré non inférieur (à certains égards même supérieur) à celui de la Charte, à savoir: le droit au congé de maternité (al. 1), la protection contre la résiliation du contrat de travail pendant le congé de maternité (al. 2), le droit de la mère allaitant son enfant aux pauses suffisantes à cette fin (al. 3), la réglementation de l'emploi de la main-d'oeuvre féminine pour le travail de nuit dans les emplois industriels, ainsi que l'interdiction de tout emploi de la main-d'oeuvre féminine à des travaux de sous-sol dans les mines et à tous travaux ne convenant pas à cette main-d'oeuvre (al. 4). Apropos de l'ai. 2 de l'art. 8 de la Charte, la question se pose si la disposition de l'art. 177, al. 1 du Code du Travail, prévoyant la possibilité de licenciement de la femme durant sa grossesse ou l'absence en congé de maternité pour des causes le justifiant par la faute de la femme, est compatible avec la Charte qui ne prévoit pas une telle possiblité.

5.9. Ce qui importe pour l'évolution du droit polonais du travail et la politique de l'emploi dans notre pays, c'est la ratification du texte intégral de l'art. 9 de la Charte concernant le droit à l'orientation professionnelle. A ces dispositions correspond en principe l'organisation juridique de l'orientation professionnelle et de l'assistance aux handicapés. Dans ce domaine cependant il faut mettre en place un système plus développé et moderne d'information et de préorientation professionnelle. L'équipement insuffisant en ordinateurs des centres d'orientation professionnelle dans les Bureaux régionaux du Travail et les méthodes surannées de leur activité, sont les faiblesses de la politique de l'emploi pratiquée par l'Etat. Au moment où le chômage sévit dans la majorité des voïvodies, la demande de ce genre d'assistance est constante. A l'heure actuelle une adaptation plus stricte à l'art. 9 ratifié de la CSE semble nécessaire.

5.10. Des conséquences plus sérieuses résultent de la ratification partielle de l'art. 10 de la Charte, prévoyant l'obligation «d'assurer ou de favoriser» les différentes formes de la formation professionnelle. Le droit polonais garantit en principe à tous l'accès à la formation technique et professionnelle, et aussi à l'enseignement technique supérieur ou universitaire, comme le veut l'ai. 1er de l'article précité, et aussi la formation des «jeunes garçons et filles» dans le cadre du système de préparation aux divers emplois, comme le prévoit l'ai. 2 de l'article concerné. La garantie constitutionnelle de l'enseignement gratuit dans les écoles publiques, à laquelle une dérogation est prévue

[30] Cf. R. H e n c z e 1, J. M a c i e j e w s k a: «Prawo nieprzekraczalnych...», *op. cit.,* p. 17.

à l'art. 70, al. 2 de la Constitution, satisfait formellement à l'obligation d'assurer (de favoriser) l'accès aux études supérieures seulement selon le seul critère des «l'aptitude individuelle» (al. 1er de l'art. 10 de la Charte).

Le fait de remplir les conditions définies aux alinéas 1 et 2 de l'art. 10 de la Charte (ce qui a permis à la Pologne de les ratifier), ne suffit pas pour donner une évaluation positive de l'état général de l'enseignement professionnel dans notre pays. Le niveau de réalisation du droit à cet enseignement en Pologne ne correspond pas à celui des pays européens. Pour éviter que cet état de choses ne soit critiqué par le Comité d'experts, les autorités polonaises doivent réformer le système de l'éducation nationale dans son ensemble dans un délai qui ne soit pas trop éloigné.

L'absence dans notre législation de garanties suffisantes de la réalisation du droit à la formation professionnelle des travailleurs adultes, notamment des jeunes, mérite des critiques les plus sévères. Ce domaine connaît, même en comparaison avec les années 70, une régression notable. La Pologne n'est pas en mesure de ratifier les alinéas 3 et 4 de l'art. 10 de la Charte, dont l'application exigerait des dépenses accrues, l'organisation des cours de formation gratuits et de nombreuses facilités pour les travailleurs suivant ces cours. Un défaut sérieux c'est l'absence d'un système efficace d'apprentissage professionnel et de rééducation professionnelle, au service du marché du travail dans la situation économique du pays en voie de transformation. Il en résulte que dans les régions où sévit le chômage on continue à former des diplômés pour qui il n'y a pas d'emplois dans la nouvelle structure économique.

5.11. La Pologne a pu ratifier sans réserves toutes les dispositions de l'art. 11 de la Charte, concernant le droit à la protection de la santé, en s'engageant ipso facto à prendre des mesures relevant de la prophylaxie largement entendue: à éliminer, dans la mesure du possible, les causes d'une santé déficiente (al. 1), à prévoir des services de consultation et d'éducation pour ce qui concerne l'amélioration de la santé et le développement du sens de la responsabilité individuelle en matière de santé (al. 2), à prévenir les maladies épidémiques, endémiques et autres (al. 3). La loi de 1991 (avec amendements ultérieurs) sur les établissements du service de santé impose à ce service les tâches précitées. Il ne suffit pas évidemment d'insérer ces tâches dans les dispositions juridiques pour achever le processus d'adaptation du système polonais aux standards des pays de la Communauté européenne hautement développés. La Pologne, en tant que signataire de l'art. 13 de la Charte (commenté plus loin), doit harmoniser tout le système d'assistance médicale avec les acquis récents des sciences médicales, domaine où la Pologne est très en retard. La situation survenue comme suite d'une réforme du service de la santé en 1998-1999 exigerait un re-examin de la conformité avec la Charte.

5.12. C' est la ratification de l'art. 12 de la CSE qui suscite le plus de doutes. Chaque Etat qui a ratifié cet article est tenu d'assurer sur son territoire «l'exercice effectif du droit à la sécurité sociale». La question se pose en effet, si la modification, entamée en 1997, du système des assurances-pensions, réalisée sous la dénomination de réforme du système de la sécurité sociale, remplit pleinement les conditions d'une sécurité *sociale* authentique et non apparente. Précisément, le doute porte sur ce qu'on appelle le deuxième pilier de la réforme en question, lequel doit garantir des prestations en échange de l'épargne individuelle, placée obligatoirement sur les comptes des compagnies d'assurances[31]. Ce système, fondé sur un fonds dit de capital, diffère certainement de systèmes traditionnels, où les prestations sont servies à partir d'un fonds réuni par l'effort solidaire des assurés. On peut même discuter s'il n'est pas, en réalité, une variante des assurances économiques des personnes[32]. Le Comité d'experts indépendants prendra sans doute position sur ce problème. Il peut estimer que, dans son ensemble, notamment en liaison avec le premier pilier, dit pilier de répartition, ce système est une forme d'assurance contre le manque de moyens de subsistance dans les cas de vieillesse, d'invalidité, etc., et que, par conséquent, il correspond au devoir «d'établir et de maintenir un régime de sécurité sociale» (al. 1er de l'art. 12 de la Charte).

En ratifiant l'alinéa 2 de cet article, la Pologne s'est engagée à maintenir le régime de sécurité sociale à un niveau satisfaisant, au moins égal à celui indispensable pour la ratification de la Convention n° 102 de VOIT, concernant les normes minimales de la sécurité sociale. La procédure de ratification de cette Convention a déjà été amorcée, et, quoique non achevée, elle n'en démontre pas moins que la Pologne remplit dès à présent les conditions prévues par cette Convention (et, ipso facto, de l'alinéa 2 de l'article 12 de la CSE). Dans cet état de choses, la procédure de ratification de la Convention n° 102 de l'OIT devrait être accélérée. Précisons que, par suite de la ratification de l'art. 12 de la CSE, la Pologne est liée, en vertu de l'ai. 2 de l'art. 12 de la Charte, par les normes minimales de sécurité sociale prévues par la Convention n° 102.

On ne voit pas, ce qui est inquiétant, que des mesures soient prises tendant à assurer «l'égalité de traitement entre les nationaux de chacune des Parties contractantes» en ce qui concerne les droits à la sécurité sociale, ce à quoi la Pologne s'est obligée en ratifiant l'ai. 4, -a) de l'art. 12 de la Charte. D'autre part, le gouvernement n'a pas expressément annoncé de garantir aux titulaires de pensions, à l'égal des travailleurs, une part du benefice provenant du développement économique du pays.

Dans les conditions de la réforme des assurances sociales poursuivie par la coalition au pouvoir AWS-UW (Action électorale Solidarité - Union de la Liberté), la question du respect des conventions bilatérales déjà conclues et celle des négociations de nouvelles conventions concernant la sécurité sociale, n'apparaît pas bien claire.

A l'issue de la ratification de l'art. 12, al. 4 -b) de la Charte, il faut considérer comme inviolable le principe de la législation polonaise selon lequel sont accordés, maintenus et rétablis les droits à l'assurance par la totalisation des périodes d'assurance ou d'emploi accomplies dans les pays parties aux conventions bilatérales.

5.13. Une haute importance, même du point de vue constitutionnel, présente la ratification de l'art. 13, al. 2 et 3 de la Charte, concernant le droit à l'assistance sociale. En dépit de la résistance des «eurosceptiques», particulièrement hostiles au principe de subsidiarité, la Pologne a réaffirmé, en ratifiant les dispositions précitées, sa volonté de

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[31] Le problème soulevé est lié à la problématique plus vaste du choix de l'une des deux tendances réformatrices: 1) l'une orientée vers les modèles continentaux (Idée de l'Euiupe sociale), ou 2) l'autre orientée vers par les modèles anglo-saxons (cf. M. R y m s z a: «Podstawowe dylematy zabezpieczenia społecznego w Polsce» [Les principaux dilemmes de la sécurité sociale en Pologne], *Prawo i Zabezpieczenie Społeczne* 1997, n° 4, p. 2, et suiv.

[32] Cf. T. Z i e l i ń s k i: *Ubezpieczenia społeczne pracowników* [Les assurances sociales des travailleurs], Warszawa-Kraków 1994, p. 24-27.

poursuivre la politique de protection sociale, la considérant comme un élément du système fondé sur l'économie du marché sociale (art. 20 de la Constitution). La législation polonaise garantit que les services publics compétents offrent à chacun l'assistance «nécessaire pour prévenir, abolir ou alléger l'état de besoin d'ordre personnel et d'ordre familial» (al. 3 de l'art. 13 de la Charte)[33].

En revanche, la Pologne ne s'est pas obligée à garantir une «assistance appropriée» à toute personne qui ne dispose pas de ressources suffisantes et qui n'est pas en mesure de se procurer celles-ci par ses propres moyens ou de les recevoir d'une autre source (al. 1er de l'art. 13). La ratification de cette disposition serait possible si l'Etat était en mesure de garantir le revenu minimum universel par personne (ou par famille), destiné à subvenir aux besoins essentiels, y compris l'assistance médicale[34].

La Pologne ne pourrait pas non plus remplir l'obligation prévue à l'ai. 4 de l'article concerné, de prêter assistance sociale et médicale aux ressortissants d'autres Etats, à l'égal de ses citoyens, dans les conditions définies par la Convention européenne d'assistance sociale et médicale de 1953. La ratification de l'alinéa concerné de l'art. 13 de la CSE est une question d'avenir plus lointain; elle n'est pas d'importance essentielle pour le processus de l'intégration de la Pologne à l'Union européenne.

5.14. En revanche, la législation polonaise représente un niveau satisfasant en ce qui concerne le droit au bénéfice des services sociaux, prévu à l'art. 14, al. 1 de la Charte. La loi amendée de 1990 relative à l'assistance sociale correspond à l'obligation de notre pays d'encourager ou organiser les services utilisant les méthodes propres au service social et qui contribuent au bien-être et au développement des individus et des groupes dans la communauté ainsi qu'à leur adaptation au milieu social (al. 1). Aux conditions précisées à la fin de cet alinéa correspond aussi la loi de 1997 sur la réadaptation professionnelle et sociale et sur l'emploi des handicapés[35].

Mais à l'état actuel des finances de l'Etat, les méthodes de travail social ne sont pas effectives à un degré garantissant aux individus et aux groupes l'approche du bien-être. L'alinéa 1er ratifié de l'art. 14 de la CSE se trouverait donc parmi les obligations découlant l'acte de ratification qui risquent d'être critiquées non pas pour l'absence de normes compatibles avec la Charte, mais à cause de leur application insuffisamment efficace dans les réalités actuelles.

La Pologne n'est pas encore prête à ratifier l'alinéa 2 de l'art. 14 de la Charte, obligeant les Etats signataires à créer un système d'encouragements des individus et des organisations bénévoles ou autres à la création ou au maintien de tels services. Le mouvement des volontaires dont on observe l'essor spontané doit être soutenu dans la loi envisagée sur l'activité d'intérêt public[36].

5.15. Solidement motivée était la ratification de l'art. 15 de la Charte, qui oblige les Etats: 1) à prendre des mesures nécessaires pour assurer aux handicapés des facilités de

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[33] V. l'art. 1 de la loi de 1990 sur l'assistance sociale (texte unique, *Journal des Lois* 1993, n^{n} 13, texte 60 avec amendements postérieurs).

[34] V. R. H e n c z e l, J. M a c i e j e w s k a: «Prawo nieprzekraczalnych...», *op. cit.*

[35] *Journal des Lois*, n° 123, texte 776.

[36] V. R. H e n c z e l, J. M a c i e j e w s k a: «Prawo nieprzekraczalnych...», *op. cit.*

formation, et 2) à prendre des mesures appropriées tendant à l'emploi des handicapés, entre autres à faciliter l'emploi protégé et à encourager les employeurs à les embaucher.

La nouvelle loi d'août 1997 sur la réadaptation professionnelle et sociale, et l'emploi des handicapés (précitée) garantit la réalisation de ces obligations. Les tentatives éventuelles de la Diète nouvellement élue de déroger à certaines dispositions de cette loi favorables aux handicapés, risqueraient d'exposer la Pologne au grief de régression dans la mise en application des dispositions ratifiées.

5.16. La Pologne a ratifié les deux articles de la Charte concernant les droits de la famille: l'art. 16 prévoyant le droit de la famille à une protection sociale, juridique et économique, et l'art. 17 qui vise à assurer l'exercice effectif du droit de la mère et de l'enfant à une protection sociale et économique.

En ratifiant le premier des articles précités, la Pologne s'est engagée à utiliser les mesures telles que les prestations sociales et familiales, les dispositions fiscales, l'encouragement à la construction de logements adaptés aux besoins de la famille, les prestations aux jeunes foyers, etc. S'agissant de la construction de tels logements, et, partiellement, des allégements fiscaux en faveur des familles, la ratification porte sur les engagements qui vont quelque peu au-delà des possibilités réelles du pays.

Pour ce qui est de l'application de l'art. 17, depuis que se trouve au pouvoir la coalition AWS-UW, la Pologne devra maintenir du Bureau du Délégué aux Questions de la Famille, un service spécial appelé à s'occuper des questions féminines, car la fonction du Délégué aux Questions de la Famille et des Femmes a été supprimée. Le champ d'activité du Délégué actuel devrait être étendu après la ratification, sous peine d'affaiblir la crédibilité de notre Etat en ce qui concerne l'intention de maintenir des «institutions ou services appropriés» lesquels, aux termes de l'art. 17 de la Charte, seraient l'un des moyens garantissant la protection des mères et des enfants.

5.17. La Pologne n'a pas encore entièrement reconnu le droit des travailleurs étrangers d'exercer sur son territoire une activité lucrative sur des bases juridiques libérales, car elle n'a pas ratifié les alinéas 1-3 de l'art. 18 de la Charte, prévoyant le libre accès à l'emploi des travailleurs étrangers. La ratification ne concerne que l'ai. 4 de l'article susmentionné, prévoyant le droit de sortie des nationaux des Parties contractantes désireux d'exercer une activité lucrative sur le territoire des autres Etats signataires de la Charte.

5.18. En revanche, la Pologne garantit dans sa législation l'entière symétrie des droits de ses citoyens avec ceux des travailleurs migrants (et de leurs familles) dans les domaines définis à l'art. 19, al. 1-10 de la Charte, lesquels recouvrent la plénitude des droits du travailleur et droits sociaux, dont bénéficie le «monde du travail» polonais. La ratification de l'article concerné, c'est une garantie qu'aucun de ces droits ne sera réduit à un niveau inférieur à celui de la CSE.

Le droit des travailleurs de se déplacer librement au sein de la Communauté européenne est, comme le déclarent certains auteurs, la pierre fondamentale de la Commu-

[37] M. M a t e y: «Praca i polityka socjalna w regulacjach europejskich» [Le travail et la politique sociale dans les régulations européennes] (dans:) *Nowy ład pracy w Polsce i w Europie* [L'ordre nouveau du travail en Pologne et en Europe], sous la dir. de M. M a t e y, Warszawa 1997, p. 149.

de la République de Pologne avec les Communautés européennes et leurs Etats membres, signé à Bruxelles le 16 décembre 1991. En vertu de ce texte, la Pologne est obligée, compte étant tenu de la situation et des conditions internes, de traiter les travailleurs étrangers, légalement employés sur son territoire, de la manière exempte de discrimination nationale, en ce qui concerne les conditions de travail, la rémunération et le licenciement.

Les considérations ci-dessus sur la ratification par la Pologne de la Charte sociale européenne, permettent de conclure que notre pays a progressé d'un pas, grâce à cette ratification, dans la voie de l'Europe sociale, voie irréversible.

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POLISH LEGAL REGULATIONS CONCERNING THE PROTECTION OF PERSONAL DATA IN THE LIGHT OF THE LAW OF 29 AUGUST 1997

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The long-awaited Law on the Protection of Personal Data was adopted on 29 August 1997.[1] Why was it necessary for us to wait so long for such an important act? The reasons were undoubtedly numerous, yet the major reasons for such behaviour on the part of our legislator are to be found in the pre-1989 period. Beyond any doubt, in the People's Republic of Poland, the protection of personal data played a minor role in comparison to other developed countries (such as the present-day EU Member States). The following factors contributed to that state of affairs:

1) That what was feared most in the People's Republic of Poland was the abuse of data pertaining to individuals by State organs, especially the militia, the Security Service and special military services. Therefore, public opinion regarded the protection of personal data as part of a wider problem of the protection of the individual against the actions of an undemocratic State and its organs. The question was to render impossible the manipulation and unlawful use or management of personal data as well as to create protection against their illegal collection and storage.

2) The manner of collecting and storing personal data was traditional (and usually involved manually kept record files, registers, books, etc.). This resulted in underestimating the proper administration of the collected information. Moreover, different State institutions gathered information for their particular purposes and the danger of such institutions exchanging information obtained from citizens was not recognised. Only in mid- and late 1980s did computers become more popular and computer science was applied for the collection and processing of personal data. In the first stage of computerisation, technical innovations were perceived mainly in the context of civilisational progress, and many neglected the connected dangers.[2]

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[1] It was published on 29 October 1997 in *Dziennik Ustaw* [Journal of Law] no. 133, item 883.

[2] This phenomenon had a broader scope. Not until 1990 did the General Assembly of the U.N. adopt Guidelines on the administration of computerised personal data. For more on this issue, see S. R e d o: "Policja a prawa człowieka w systemie Organizacji Narodów Zjednoczonych" [Police and Human Rights in the United Nations Organisation System] [in:] A. R z e p l i ń s k i (ed.): *Prawa człowieka a policja* [Human Rights and the Police],

3) Before 1989, the main interest of the citizens was to create conditions for the development of freedom of expression. Obviously, in this situation, the imposing of restrictions on making information public or obtaining it was of secondary importance. This applied also to personal data.

The issue gained more importance in the 1990s, mainly due to far-reaching political, social and economic transformations initiated after the conclusion of the Round Table Agreements. Another reason for taking greater interest in matters concerning the protection of personal data was that more and more State institutions, private enterprises and companies, etc. were beginning to use computerised information systems.

A scientific discussion (although not a very heated one) followed. In its course, emphasis was placed on the necessity of adopting Polish legislation in this field to the standards introduced by international law and to the requirements of a democratic state of law.

The discussion disclosed, apart from rather general opinions, also those which focused on certain aspects of personal data protection and on specific needs connected with solving practical problems. The main focus here was the so-called "lustracja", in whose context archives of the Ministry of Internal Affairs were usually perceived as incomplete. It was stressed just as often that in practice this state of affairs renders impossible the providing of accurate information about persons co-operating with the former special services of the People's Republic of Poland, at the same time trying to prove that in such conditions available data could not be examined thoroughly and objectively.[3]

The following needs were raised:

- to ensure the fulfilling by organs of State administration of the obligation to provide courts and citizens with information important for the latter, such organs having access to this information;
- to reduce the scope of information to be requested from citizens by State organs and to limit it to data necessary for the purpose for which it is collected;
- to create mechanisms for achieving professionalism in handling personal data in the possession of both State institutions and private companies or enterprises (with particular focus on the need to introduce restrictions as to the transference of data between such subjects and to prevent unauthorised persons from enjoying access to the compiled information);

Legionowo 1994, p. 205. However, in Europe, the dangers associated with automatic data processing were noticed much earlier, as can be seen from the activity of organs of the European Council, which dealt with this problem already in the early 1970s; it suffices to quote two acts: Resolution 22(73) of the Convent of Ministers of the EC, adopted on 26 November 1973, "Protection of natural persons' privacy with regard to electronic data banks in the private sector" (text in: *Collection des recommandations, resolutions et declarations du Comité des Ministères portant sur les droits de l'homme 1949-1987,* Strasbourg 1989, p. 89 and following) and Resolution 29(74) of the Convent of Ministers of the EC, adopted on 20 November 1974, "Protection of natural persons' privacy with regard to electronic data banks in the private sector" (text in *Collection...,* p. 44 and following).

[3] See, among other sources, B. B a n a s z a k: "Lustracja i dekomunizacja w Polsce w świetle praw jednostki w prawie wewnętrznym i międzynarodowym" [Lustration and Decommunization in Poland in the Light of Rights of the Individual in National and International Law] [in:] B. B a n a s z a k (ed.): *Prawa człowieka. Geneza, koncepcje, ochrona* [Human Rights. Genesis, Conceptions, Protection], Wroclaw 1993, and references therein.

- to promote adequate understanding and awareness of the problems of data protection among both civil servants and other subjects gathering such data;
- to hold a public discussion on the protection of personal data and the right to privacy.

Considering that until 1997 there was no comprehensive statutory regulation covering the protection of personal data in its broadly understood processing, we will refrain from an analysis of legal instruments which regulated partially the matters discussed here.[4]

We cannot, however, fail to mention the Law on Accounting of 29 September 1994[5] and Chapter 8 thereof entitled "Protection of Data". This was the first time that Polish legislation contained such a relatively broad regulation of certain aspects of the issue of interest to us. Article 71 of this law states that the documentation of adopted accounting rules, account books, stocktaking records and financial statements shall be stored in due manner and protected against illegal modifications, unauthorised disclosure, damage or destruction.

This law, again for the first time in Polish legal order, defined unequivocally the notion of the protection of data. According to Article 71, para. 2 thereof, if accounting books are kept in a computerised manner, the "protection of data shall consist in using damage-proof data carriers, properly selected external security measures, systematic creation of back-up files for data saved on magnetic carriers, as well as ensuring protection against unauthorised access to computer software".

The above mentioned law regulates also the place and manner of storing accounting books, stocktaking records and accounting evidence, specifies the minimum period of storage thereof (Articles 72 to 74) and determines the principles for making data files or parts thereof available to third persons (Article 75).

Before the Law of 29 August 1997 on the Protection of Personal Data was adopted, it would have been difficult to find any coherent and comprehensive system of legal norms for the purpose of protecting the right of privacy, ensuring, at the same time, that the individuals concerned have access to information about themselves, which is in the hands of subjects dealing with personal data processing. The first indispensable step towards creating such a coherent whole was finishing the work on the law mentioned above. Naturally, it will be necessary to develop and complete it by means of acts of lower rank, as well as careful control of the process of its implementation and, later on, observance of the standards imposed thereby on all subjects covered by its scope. It is, however, worth examining the most important regulations of this law more closely and to attempt some conclusions.

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[4] For instance, Article 2, para. 1, subpara. 2 of the Law of 14 December 1982 on the Protection of Official and State Secrecy, the so-called "Lustracja" Law of the Sejm of 28 May 1992 or Article 81, para. 5, subpara. 4 of the 1993 Sejm Election Ordinance. For more on this subject, see B. Banaszak: "Prawo do ochrony danych osobowych w Polsce" [The Right to the Protection of Personal Data in Poland] [in:] T. Jasudowicz, C. Mik [eds.]: *O prawach człowieka w podwójną rocznicę Paktów. Księga pamiątkowa w hołdzie Profesor Annie Michałskiej* [On Human Rights on a Double Anniversary of the Treaties. A Commemorative Book in Honour of Professor Anna Michalska], Toruń 1996, p. 251-254.

[5] *Dziennik Ustaw* of 1994, no. 121, item 591.

1. The law covers the whole of the matter, irrespectively of the method of processing data (electronically or manually),

a) Its scope covers both traditional collections of personal data, that is record files, books, indices etc., and those contained in computer information systems. It can be said, therefore, that the Polish legislator did not consider it necessary to regulate the protection of data separately and according to where and in what form they are stored. It should also be observed that the resolutions of the Convent of Ministers of the European Council include a number of acts calling for a special treatment of electronic data banks, due to greater potential danger connected with them. Thanks to such a comprehensive regulation, any attempts to evade the norms introduced by this law, for instance, on the part of dishonest administrators who might try to do so by changing the manner of processing data from electronic to manual, are halted. It should be also borne in mind that this statutory regulation is the result of a relatively low, as compared to European (EU) standards, computerisation of both Polish administration and economy, in spite of continuous efforts. This fact, however, does not affect the justifiability of legislators' action. Furthermore, it is right, even for reasons of legislative technique, that related matters should be regulated in one legal instrument, although embracing such a broad issue must present a major problem. This does not obstruct rendering the provisions of this law more specific by other legal instruments, for example regulations (by a Minister competent as regards administration matters), referred to in Article 45 of the Law on the Protection of Personal Data, concerning basic technical and organisational requirements to be met by devices and information systems used in processing personal data, as well as those determining samples of requests or applications and specimens of official identity cards for employees of the Bureau of the Inspector General for the Protection of Personal Data (BIGPPD), the said instruments being necessary for meeting formal conditions for the functioning of the institutions created by the legislator.

b) The law defines broadly the group of subjects obliged to observe its provisions.

- ALL persons are granted the right to the protection of personal data, as specified in Article 1, para. 1. This complies with the provisions of Articles 37 and 51 of the Constitution (which find their statutory amplification in the law in question), where the subject entitled to protection is also determined broadly (no one in Article 51, para. 1 and everyone in paras. 3 and 4 thereof) and should be understood as every natural person (see also Article 2, para. 1 of the Law on the Protection of Personal Data); only para. 2 of Article 51 makes reference to citizens, which entails that public authorities can process information concerning other persons, and moreover such data need not meet the condition of necessity in a democratic state ruled by law.

- Taking into account subjects processing personal data, this law applies to State and local government units, as well as to other State and communal units, and non-Statc subjects involved in the performance of public duties and to natural and legal persons and organisational units without legal personality, which process data as part of their economic or professional activity, or for the achievement of their statutory objective; for such subjects to be covered by this law it is sufficient that they have their seat or place of residence in the territory of the Republic of Poland or, if they do not meet this condition, that they process data using technical means located in this territory (Article 3 of the Law on the Protection of Personal Data).

- Such a broad definition of the group of subjects covered by the provisions of this law will hopefully allow to include all subjects concerned, and the exceptions the law provides for, such as an exception to the obligation to register a data file or to make known the very fact of processing it (guaranteeing the rights and interests of the persons to whom the data pertains), are in principle obvious, and serve solely the purpose of facilitating the work of the organs involved in the implementation of the provisions of this law.

c) This law, amplifying the above mentioned Article 51 of the Constitution, regulates also **basic rights of persons to whom the data pertains and the rights and obligations of subjects resulting from the fact of processing personal data by those subjects.** First, we will examine the rights of subjects to whom personal data pertains. Undoubtedly, one of the most important among such rights is the right of access to data files exercised thanks to the possibility of control over data processing, in particular through obtaining detailed information on: the very fact of the existence of a data file, the purpose, scope and method of processing the data contained therein, its administrator, the source of data and the possibilities of making data available, as well as the right to demand supplementing, updating, or correcting personal data, a temporary or permanent suspension of their processing or deletion if they are incomplete, outdated, untrue, or have been obtained in violation of the law, or are not necessary for the achievement of the purpose for which it has been compiled: (Article 32 of the Law on the Protection of Personal Data).

The most important obligations of a data administrator mentioned by the legislator included:

- **the obligation to register a data file** (Article 40 of the Law on the Protection of Personal Data), upon which the possibility of commencing the processing data is contingent (Article 46 of the Law on the Protection of Personal Data);
- **the obligation to inform the person, whose data is being collected,** about the purpose, identified or intended recipients thereof, the right to review and verify the data, the obligation, or an absence thereof, to provide the information the administrator is interested in (and, naturally, the legal basis for this obligation), and to provide full information allowing the identification of the administrator (Article 24 of the Law on the Protection of Personal Data);
- **the obligation to properly secure data files** (Chapter 5 of the Law on the Protection of Personal Data) expressly requesting administrators to apply such technical and organisational means so as to ensure the safety of processing the data contained therein. In particular, data should be secured from being provided to unauthorised persons, from being removed by non-cntitled persons, and from damage or destruction. The logical conclusion from this obligation, included in this law *expressis verbis*, is that only the persons authorised by the administrator can be admitted to operating the information system and devices constituting its parts, involved in the processing of data.

Such persons are, of course, obliged to secrecy as regards the information they have learned, even after the termination of their employment (Article 39, para. 1 of the Law on the Protection of Personal Data). This seems to be an attempt to define (create) a new kind of professional secrecy, apart from the traditional variety; in some respects, journalists' or doctors' secrecy is accompanied by something we could call information secrecy (even although it applies to an equal extent to persons having access to data processed outside electronic systems - which results from the fact that neither Article 36 nor Article 39 of the Law on the Protection of Personal Data distinguish between obligations imposed on data file administrators with regard to the method of processing data; this term seems to convey well the nature of such secrecy, the more so because we encounter this kind of secrecy in international law concerning electronic data processing. However, we cannot exclude the possibility of another, more adequate, term being coined and accepted in Polish science). In order that the obligation to ensure this special kind of professional secrecy does not remain a void provision, the legislator envisaged (in Articles 51 and 52 of the Law on the Protection of Personal Data) sanctions for disclosing the data to unauthorised persons or providing them with access. It is worthwhile to refer to the text of the law and quote the relevant provisions, paying attention to the special treatment of the obligation to protect data on the part of administrators, as they are not only accountable irrespectively of the form of the offence (since this applies also to other persons under the obligation to protect the data), but also irrespectively of whether or not a leakage of information has actually taken place. Article 51, para. 1 provides that “Any data administrator, or a person obliged to protect personal data, who discloses it to unauthorised persons, or provides them with access to the data, shall be subject to the punishment of a fine, or partial or total limitation of personal freedom of up to two years”. Para. 2: “If the offence is unintentional, the offender shall be subject to punishment of a fine, or partial or total limitation of personal freedom of up to one year”. Article 52: “Should a data administrator infringe - even without any intention to do so - upon his duty to secure the data from being removed by an unauthorised person, from damage or destruction, he shall be subject to punishment of a fine, or partial or total limitation of personal freedom of up to one year. Data administrators are also under the **obligation to ensure current supervision of the possessed information,** since they are to control: what personal data was introduced into the file, when and by whom, as well as to whom it is provided, especially when it is transferred by data teletransmission devices. Naturally, those regulations meet European standards expressed in the resolutions mentioned in footnote 2: No. 22(73) and No. 29(74) of the European Council (in the first resolution, concerned with the private sector, paras. 7 to 9 of the Annex, and in the second one, covering the public sector, paras. 6 and 7 of the Annex). Since the content of Resolution No. 29(74) is, in principle, a repetition (and, in some respects, a specification) of the most important provisions of the former Resolution, No. 22(73), there is no point in quoting both those acts; therefore, we will limit ourselves to listing the most important principles contained in the above mentioned paragraphs. Those principles are: (a) applying due diligence to correct imprecise information and to remove outdated information or information obtained in an illegal way;

(b) undertaking security measures to prevent any abuse of data, and harmful or prohibited use thereof; for this reason electronic data banks should be protected by systems which make it impossible for persons who have no right to obtain such information to enjoy access, and, at the same time, would make it impossible to make known distortions of information, whether accidental or not; (c) limiting access to information to a group of persons whose lawful interest is to have knowledge about such data in order to perform their duties; (d) obliging the persons involved in operating electronic data banks to observe norms preventing the illegal use of the information, and in particular, binding them by secrecy. Of course, our national regulations meet also the standards determined in Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 *on the protection of individuals with regard to the processing of personal data and on the free movement of such data,* Articles 16 and 17.[6]

d) The fact that this law can be considered as covering all the problems connected with the protection of personal data in the broad understanding of the term results also from the legislator's definition of the concept of data processing as any operation on personal data, in particular collecting, saving, storing, arranging, changing and deleting, especially if such operations are performed by means of information systems. This definition of processing goes beyond the intuitive understanding of this term, yet it seems to convey - and this fact should not escape notice - the meaning of the term ***processing of personal data,*** which is used in the legal instruments of the European Union. As an example we can cite the already mentioned Directive 95/46/EC of the European Parliament and the Council, which constitutes a crucial regulation in this field. In Article 2, containing basic definitions, sub-para, b) reads: **processing of personal data shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.** Generally speaking, the operations in question are: introducing, storing or combining, altering, using and communicating data, including transmission, dissemination, protection, correction and erasure. This compatibility with the Polish regulation acquires special importance if we take into consideration Poland's aspiration to join the Member States and the consequent necessity to adjust its legal system.

2. Not only does this law **formulate certain rights and obligations which should serve the purpose of providing greatest possible protection of personal data, but it also attempts to create conditions necessary for its observance.** Certain regulations of special importance as regards the right of access to information can also be found here.

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[6] Text in: *Official Journal of the European Communities* of 23 November 1995, no. L 281, p. 31 and following.

Creating the institution of the Inspector General for the Protection of Personal Data is the most important guarantee from the point of view of granting an individual the right of access to data files and control of their content (the position and prerogatives of the IGPPD will be discussed later); furthermore, those solutions aim at fulfilling and specifying more general provisions (such as those of Article 23, which describes conditions of the admissibility of data processing). Among those solutions we can mention the following:

a) **The obligation to collect only data which is not superfluous for the purpose for which its collection has been undertaken,** which results from Article 35, para. 1. Such purposes must, naturally, be defined and lawful. Further processing of such data should not, in principle, be inconsistent with those purposes, and the data should be correct and adequate for the purposes (Article 26, para. 1, sub-paras. 2 and 3 of the Law on the Protection of Personal Data).

b) General prohibition of processing data concerning **a person's health, genetic code, addictions or sexual life, as well as data disclosing:**

- **racial or ethnic origin;**
- **political views;**
- **religious or philosophical beliefs;**
- **denomination, party or union membership.**

Naturally, it should be observed that there exists a number of exceptions to this prohibition conceived as a general norm; however, there are, in principle, no questions as to the purposefulness of providing for those exceptions. Their existence guarantees full protection of the mentioned data categories or makes processing contingent upon the consent of the person to whom it pertains.

The expression in "principle" has not been used because of excessive caution or to avoid responsibility, since the rather vague permission to process such data, if necessary for the "performance of the duties of data administrator in relation to the employment of persons, when the scope of processing is defined by this Law", may cause misgivings that employers would be unwilling to employ certain groups of would-be employees, for instance women during the first months of pregnancy or HIV carriers (although Articles 32 and 33 of the Constitution of the Republic of Poland guarantee equality and prohibit any discrimination). Reference to statutory law gives good reason to hope that this scope will not turn out to be too wide, and that it will exclude the possibility of abusing the knowledge of such data, in particular data concerning health in its broad understanding. Although another unquestionably justified exception (even by the fact that in this case we are no longer dealing with any kind of secrecy) concerning processing data made public by the person to whom it pertains does not seem, at the first glance, to give rise to any misgivings, we are compelled to reflect on how the conditions necessary for classifying certain behaviour as rendering data public will be defined and interpreted in practice (Article 27 of the Law on the Protection of Personal Data).[7]

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[7] The list of conditions for admissibility of processing contained in Article 27 of the Law on the Protection of Personal Data is not exhaustive. Other directives, formulated in general terms, are to be found in Articles 1 and 23 of the Law on the Protection of Personal Data, and will be discussed in the conclusions from the point of view

c) There exists a category of data which can be processed only on the basis of a law providing for it. This group includes data on sentencing, adjudication on penalties, fines, and other rulings issued under judicial or administrative proceedings (Article 28, para. 1 of the Law on the Protection of Personal Data).

d) Among the guarantees of privacy, we also find one from Article 26, para. 1, sub-para. 4, requiring administrators to ensure that data is stored in a form enabling the identification of the persons concerned no longer than the moment the purpose of processing has been achieved.

e) In order to avoid the danger of discrimination and to allow individuals to control the content of information pertaining to them and possessed by the State organs, it is forbidden to include any secret meaning into the elements of ordinal numbers in registration systems for natural persons; when such numbers are used in population registration systems they may contain only the designation of a person's sex, date of birth, number of entry and control number.

f) It is significant that Article 7, para. 5 of the Law on the Protection of Personal Data contains the specification of conditions required for the consent of the person concerned. Such consent should be a declaration of will, which contains consent for processing the personal data of the person submitting such a declaration; consent may not be presumed or implied from any other declaration of will. For certain categories of data such consent must be given in a written form.

3. Let us now briefly discuss that part of the law, which deals with the organ for the protection of personal data, considering that this organ exercises considerable (even though often indirect) influence upon the individual's right to respect for his private life.

At the beginning, we should emphasise that **it was necessary to establish one centralised organ in charge of registering files, exercising control over them and performing other functions connected with the protection of personal data.**

The reason was that in Polish conditions it was impossible to vest any of the hitherto existing State organs with supervisory, informative and advisory functions. It would be acceptable to assign the registration of personal data files (which would mean managing a register of data files and providing information on registered files, according to Article 12, sub-para. 3 of the Law on the Protection of Personal Data) to one of the courts (e.g. a registration court). It would have to be, however, considered a misunderstanding if such a court were to:

- present opinions on bills relating to the protection of personal data;
- initiate and undertake steps to improve the protection of personal data;
- participate in the work of international organisations and institutions involved in the protection of personal data.[8] Those do not belong to the tasks of the judiciary; more

of the compatibility of this law to provisions of the ECHR. All those regulations comply also with other international norms (e.g. Recommendations of the European Council and its Convention for the protection of individuals with regard to automatic processing of personal data of 28 January 1981) and EU norms - see, for example, the already mentioned Directive 95/46/CE.

[8] See Article 12, subparas. 4 to 6 of the Law on the Protection of Personal Data.

duties of the IGPPD are specified in Article 12 of the Law, especially since the expression "in particular" means that the list is by no means exhaustive. On the other hand, if we wanted to assign the functions of the Inspector General to one of the organs of State control and law protection, such as the Supreme Chamber of Control or the Commissioner for Citizens' Rights Protection (the National Council of Radio Broadcasting and Television being absolutely out of the question), we would provoke a situation in which supervision over the consistence of data processing with regulations on personal data protection (Article 12, para. 1 of the Law on the Protection of Personal Data), the issuing of administrative decisions and consideration of complaints about the application of provisions on the protection of personal data (Article 12, para. 2 of the Law on the Protection of Personal Data) would be vested in institutions whose original designation, although overlapping the new duties, would rather hinder performing the functions of an impartial organ protecting personal data. In the case of the Supreme Chamber of Control, we would certainly observe reluctance on the part of subjects, previously not subjected to control by this institution, but which, being data administrators, would be subjected to it. One should also consider the potential danger associated with access to data files by the organs concerned, and the possibility of using information obtained in this way in other fields of their activity. Besides, both courts and the Supreme Chamber of Control or other organs, which could possibly be taken into account, already perform many other duties (some say too many), and as a result the time necessary for dealing with any matter becomes increasingly prolonged.

Summarising, if the Inspector General for the Protection of Personal Data is to enjoy public confidence (which will be necessary for this organ to be efficient), it should be impossible for the Inspector to use the obtained information for purposes other than its protection. This person must be absolutely neutral, and for this reason the provisions of the law require, among other things, that he/she have outstanding moral authority, relevant knowledge and education and no criminal record. The Inspector's autonomy results also from the fact that he/she is appointed by the Sejm, subject to approval by the Senate, and during the four-year term of office he/she is subject only to this law, being granted formal immunity equal to that of a deputy. As we know, however, gaining public approval and autonomy of actions would not constitute a sufficient basis to consider the Inspector an efficient organ, if he/she had not been granted adequate instruments of control and supervision over personal data files. **Practice will show whether the prerogatives granted to the Inspector General by this law are sufficient.** In the meantime, it is worth examining some of the provisions aiming, in the legislator's opinion, at granting such a position to the Inspector.

a) It is obvious that the IGPPD alone would not achieve anything; this is why he/she is helped in the performance of duties by the Bureau of the IGPPD and the employees of the Bureau, referred to as inspectors (Article 13 of the Law on the Protection of Personal Data). In order to perform duties connected with exercising control, issuing decisions and considering complaints, the Inspector General and authorised inspectors are granted rights typical for such cases: the right to enter the controlled quarters (between 6 a.m. and 10 p.m.) and to carry out the necessary research, the right to demand oral or written explanations and to call and question persons, to the extent necessary for the determination of the actual state of affairs, or the right to demand the presentation of documents and any information directly related to the inspection.

b) On the basis of the findings of the inspection, the Inspector may demand that disciplinary proceedings (or other proceedings prescribed by law) be instituted against persons responsible for the violation of the regulations on the protection of personal data.

c) However, the most important supervisory right of the Inspector General, where a violation of the regulations on the protection of personal data has been found to have taken place, is the possibility to order a data administrator, by way of administrative decision *ex officio* or upon a motion of the person concerned, to restore the proper legal state. This may be achieved in particular through: (a) removing any transgressions; (b) completing, updating, correcting, making available, or not, personal data; (c) introducing additional means of safeguarding the data; (d) withholding any transfer of personal data outside the Polish borders; (e) securing the data or transferring it to other subjects; (f) deleting personal data.

d) In those cases when a violation of the penal provisions of this law has been found, the Inspector General is also under the obligation to inform a proper investigative body of the commission of the crime.

This law, however, allows considerable autonomy for data administrators, as can be seen with regard to administrators of data files compiled solely for technical or educational reasons, or in relation to teaching in schools of higher education, when the data is deleted or made unidentifiable immediately after use, since they are only required to observe the provisions of Chapter 5 concerning the safety of files (Article 2 of the Law on the Protection of Personal Data). The exclusions from the duty to register data files, applicable to administrators of data specified in Article 43, have a similar meaning, because as regards such data the Inspector General does not enjoy control and supervisory powers. Nonetheless, the categories of specified data are varied, starting with **data files concerning vital interests of the State and the judiciary and covered by State secrecy due to State defence or security, protection of the life and health of people, protection of property, and public safety and order,** those processed by appropriate organs for court proceedings or those concerning persons deprived of personal freedom on the basis of statutory law, to the extent necessary for applying temporary arrest, or for punishment in the form of imprisonment. We find also data files **administered by subjects closely linked with the persons whose data is being processed,** such as those concerning persons employed by them, associated with them, studying at their facilities, receiving medical services, notary, attorney or legal counsel services, or those processed exclusively for the purpose of preparing invoices, bills or financial reports. Finally, we come across **data files which are generally available or are processed for minor everyday matters.**

This law does not deprive administrators of the possibility to transfer data abroad as long as the recipient country guarantees protection to an extent corresponding at least to Polish standards; even if it does not, after certain conditions are fulfilled (e.g.

the person to whom it pertains gives a written consent or the data is generally available), the information can be transferred (Chapter 9 of the Law on the Protection of Personal Data).

It is worth observing that on several occasions the legislator provides for not obstructing scientific research, for instance, by exempting data files, processed for a scientific dissertation required for a diploma in a school of higher education or a scientific degree, from the duty of registration. Besides, if data had been collected from persons other than those to whom the data pertains, the administrators are not required to inform the persons concerned of this fact as long as the data is necessary for scientific, didactic, historical or statistical research, or for public opinion polls and, naturally, as long as its processing does not violate the rights or freedoms of the persons concerned, and informing them would incur excessive costs or jeopardise the achievement of the objective of the research.

Data administrators have the right to appeal against any decisions of the IGPPD, usually by way of an application for a review of the given case.

Let us finish our brief discussion of the provisions of this law, and go on to summarise and evaluate its content.

The first conclusion to be drawn is that all regulations of this law manifest the legislator's desire to make all effort in order to ensure the compatibility of Polish norms with international standards, especially regional European and EU standards. The law in question respects the European Convention of Human Rights (although the latter does not mention explicitly the right to the protection of personal data, it does guarantee the right to respect for private life, from which such protection is inferred) both the guarantees of human rights and clauses introducing the possibility of limiting them (Articles 8 to 11 of the ECHR). The Polish Law on the Protection of Personal Data states in general terms that "Processing of personal data may be performed for public benefit, the benefit of the person to whom the data pertains, or for the benefit of third persons, within the scope and procedure specified by this Law. (Article 1, para. 2) and that "The data may only be processed if: 1) the person to whom the data pertains has given his/her consent, except when the data is to be deleted; 2) legal regulations allow it; 3) the person concerned needs it in order to fulfil an agreement to which he/she is a party, or, at his/her request, to take the necessary steps before entering an agreement; 4) it is necessary for fulfilling the tasks defined by law for public benefit; 5) it is necessary for achieving data administrators justified goals (...) and the processing itself does not violate the rights and freedoms of the person concerned. 2. The consent referred to in para. 1, sub-para. 1 may also be applied to future processing of the data if the purpose of the processing remains unchanged. 3. Should processing of the data be necessary for the protection of vital interests of the person concerned, and fulfilment of the condition described in para. 1, sub-para. 1 be impossible, the data may be processed without the person's consent until such a consent is obtained" (Article 23).

The law complies also with the already mentioned recommendations and guidelines of the European Council and of the Convention (EC) *for the protection of individuals with regard to automatic processing of personal data* of 28 January 1981, to whose ratification there will be no obstacles for the legal state after the entry into force of this law, even if the adopted degree of protection comprises only minimum and extended standards, and with the extended scope of its application covered by the application of the Convention of such personal data files, which are not processed automatically (so far, our country has not done so). Let us remember that the aim of this Convention (as stated in Article 1) is to ensure that in the territories of the Member States everybody, irrespective of citizenship and place of residence, enjoys the protection of his fundamental rights and freedoms, and in particular, the right to respect for his personal life with regard to the automatic processing of personal data. Further on, the Convention deals with specifying admissible methods of obtaining and gathering personal data, which should be adequate and of appropriate quality. It provides also for introducing security guarantees and specified procedures for exchanging data, transferring it and access to it by persons to whom the data pertains.[9] The Polish law corresponds also with the above mentioned Directive 95/46/EC, whose provisions are often reflected in our document.

Secondly, the legislator has, in principle, managed to fulfil the postulate of the coexistence within one legal instrument of legal norms ensuring the protection of personal data and those concerning the conditions of access to data files, especially as regards official information.[10] It seems, however, that the Polish system of the protection of personal data places the preservation of the confidentiality of such data and the protection of private life over the right of access to information (but within reasonable limits). One of the reasons for such a state of affairs may be the fact that finding balance between those two values is sometimes extremely difficult, and information, once disclosed, cannot be made secret again.

Thirdly, one may harbour justified hope that after a full implementation of all the provisions of this law, certain negative phenomena should disappear from our life, considering that they result from an underestimation of the protection of personal data. Such phenomena include the excessive diligence of data administrators, disclosed in

[9] Articles 5 and 6 of this document state, among other, that the data shall be: (a) obtained and processed fairly and lawfully; (b) stored for specified and legitimate purposes and not used in a way incompatible to those purposes; (c) adequate, relevant and not excessive in relation to the purpose for which they are stored; (d) accurate and, where necessary, kept up to date; (e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which they are stored. Moreover, Article 8 of the Convention obliges its signatories to ensure that everybody has access to the data relating to him. Any derogations from the provisions of the Convention shall be provided for by national legislation of Member States and constitute a necessary measure in a democratic society in the interests of State security, public safety, the monetary interests of the State or the suppression of criminal offences, as well as in protecting the data subject or the rights and freedoms of others. As we can see (especially in the conditions for introducing restrictions) this document fully respects the provisions of the ECHR, and, taking into account Poland’s openness to international standards of the protection of human rights, it is worth including it in the set of conventions safeguarding their observance, ratified by our country.

[10] One example of such a postulate might be the Recommendation of the Parliamentary Assembly of the EC 1037(1986) *protection of data and freedom of information,* which expresses the fear that separation of legal regulations and actual management of data protection and access to information may lead to collisions, and for this reason it is advisable to correlate those two issues, since they are part of the overall information policy within society.

including in the records information irrelevant for a given cause, or the use of old slips and forms, practised in many offices, requiring citizens to provide information unnecessary for the purpose of filling them (caused rather by a shortage of resources than by bad will). We should, however, observe that if shortly after this law's entry into force[11] its provisions are to be observed too strictly, this situation can give rise to many conflicts leading to unnecessary social tension. The standards imposed by this law will require numerous adaptive amendments in our legislation, but also (and possibly, above all) in the mentality of the subjects to whom it is addressed.

Unfortunately, we note that the application of the law in question is practically impossible in the cases of abuse connected with processing personal data in international information networks, such as the Internet. It is quite possible and feasible for subjects other than domestic ones to create personal data banks (relating to Polish citizens as well) outside the territory of Poland and without using technical means located within Polish territory as a result of the fact that this law is inapplicable (of course, we do not suggest covering such data files by the provisions of the law, as this would not be practicable). Assuming that such data could be collected contrary to Polish statutory law, for example, stolen or made available by unauthorised subjects, we must consider as very negative the fact that the law in question lacks a general prohibition against domestic subjects (both natural and any other persons) using (processing) personal data obtained from illegal sources (the liability being borne by persons responsible for the leakage - if they are identified). It may happen that at a generally accessible (network) address we will find all the information concerning not only well-known persons, but even ordinary people. This situation, confronted with the lack of an obligation to check the origin of the data (even formally: whether the file has been registered in Poland, unless we assume that the duty of an administrator,[12] resulting from Article 26 of the Law on the Protection of Personal Data, to do his/her utmost to protect the interests of the persons concerned, and, in particular, to ensure that the data is processed legally, requires him/her to check the legality of the source) precludes the possibility of applying Article 49 of the Law on the Protection of Personal Data, which prohibits processing personal data wherever such processing is inadmissible or when a given subject has no title to do so, since in such situations the requirement expressed in Article 25, para. 2, sub-para. 2 of the Law on the Protection of Personal Data is met (the data to be collected is generally available); if the purpose of processing is lawful, such a subject will undoubtedly be entitled (if he/she records the existence of the file), and will enable the administrators of files (in this case, even domestic ones) not to inform data subjects of the very fact that their files contain information pertaining to them.[13]

[11] This law came into force in its entirety in May 1998.

[12] Only a data administrator, and not every user.

[13] In order to illustrate, this problem, we will use two examples. 1. A personal data administrator is, in principle, obliged to register his/her data file (Article 40 of the Law on the Protection of Personal Data). Then the IGPPD (pursuant to Article 23, para. 1, subpara. 5 and Article 44 thereof) can, by way of administrative decision, refuse to register a file with regard to a violation of the rights and freedoms of the persons concerned (despite the administrator's vital interest in processing the data pertaining to such persons). Therefore, referring to Article 44

One more final remark, this time from the point of view of constitutional law. It is regretful that the IGPPD has not been included into our new Constitution. He could have been mentioned in Chapter IX together with such institutions as the Supreme Chamber of Control, the Commissioner for Citizens' Rights and the National Council of Radio Broadcasting and Television, or in Chapter II, similarly to the Commissioner for Children's Rights. Since this chapter contains Article 51, which is crucial for the protection of personal data and access to information, it would be natural to add to it para. 6 devoted precisely to the IGPPD. There are no real obstacles for this useful and important State organ, serving the protection of human rights, to appear as a guarantor of our right to privacy, access to information, and even freedom of conscience and religion.

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of the Law on the Protection of Personal Data, he/she orders discontinuance of further processing of the data or its removal (since Article 46 states that the processing may commence immediately after submitting an application, without waiting for the registration), and this is subject to immediate execution. Data processing may be resumed if the administrator's file has been registered, so the IGPPD has considerable supervisory powers. However, what happens if - 2. The administrator is under no obligation to register a data file due to its general availability (Article 43, para. 1, subpara. 9 of the Law on the Protection of Personal Data). At the same time and for the same reasons he/she does not inform the persons to whom the data pertains on the fact of processing it and does not provide other, usually obligatory, information (Article 25, para. 2, subpara. 2 thereof). Then, thanks to other subjects' ignorance, only the administrator can decide whether processing the data violates the rights and freedoms of the persons to whom the data pertains and whether he/she has done his/her utmost to ensure the protection of such persons' interests, in particular, whether the data is processed lawfully (Article 26, para. 1, subpara. 1). Such an administrator will see no reason in finding in this law the obligation to check the legality of the source of the data in question, limiting him/herself to meet the formal requirements expressed in the provisions of the law.

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UN REGARD SUR LA CRIMINALITE DANS LES ETATS EX-COMMUNISTES EUROPEENS

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Ce titre, peut-être quelque peu surprenant, d'un article dans une revue scientifique est justifié. Il est appelé, en effet, à souligner le caractère personnel du texte qui est précisément un regard, l'expression de l'opinion personnelle de l'auteur. Opinion établie à partir de lectures scientifiques, ou d'entretiens ne prétendant pas à ce rang avec de nombreux spécialistes de divers pays, et aussi à partir de réflexions et observations propres de l'auteur.

Il est nécessaire de délimiter nettement - comme dans notre titre - le territoire concerné par ce texte, car il existe toujours des pays excommunistes (voire communistes) hors de l'Europe, or la spécificité de leur situation et de la délinquance qu'ils connaissent, exigerait une réflexion à part.

Dans cet article j'essaie de présenter la délinquance dans notre région de l'Europe, juxtaposée à la délinquance dans les pays ouest-européens, et de prendre parti sur la question de l'impétueuse croissance de la délinquance dans notre pays, fait universellement signalé et souligné. Mais les commentaires le concernant induisent en erreur et obscurcissent l'état réel des choses, ils le dissimulent plutôt que n'indiquent la principale menace que la délinquance représente pour la société.

1. Les Etats en période de transformation

Dans les publications ouest-européennes l'on admet, en règle générale, que les Etats excommunistes de l'Europe centrale et orientale, se trouvent dans la voie des transformations (m *transition),* ce qui rend pertinemment l'essentiel de la situation dans ces pays. Car, bien que toutes les sociétés connaissent des transformations, on peut distinguer dans leur existence des époques où ces transformations s'opèrent lentement, souvent d'une façon même peu visible pour un observateur extérieur, et des périodes où elles se précipitent et affectent la vie en profondeur, au point qu'il devient clair qu'à leur suite, la société changerait totalement d'aspect. Les Etats excommunistes changent justement à nos yeux rapidement et profondément.

Si l'on était invité à énumérer les trois principaux terrains de ces transformations, il conviendrait de mentionner avant tout la transition de l'état de dépendance politique à celui de l'indépendance de l'Etat; le passage de l'autoritarisme politique, économique, social et idéologique au régime démocratique, ne prétendant pas à une aussi vaste domination du gouvernement sur la société; le passage de l'économie centralement planifiée à l'économie de marché. Ces transformations sont étroitement liées entre elles, mais chacune se déroule à un rythme qui lui est propre. Les deux premières sont les plus avancées dans la majorité des pays de notre région, encore qu'elles ne soient achevées dans quelques-uns seulement. Le processus qui s'est avéré le plus difficile, et en même temps le plus criminogène, c'était l'instauration de l'économie du marché.

Néanmoins, il faut souligner que des éléments criminogènes étaient présents dans les deux premiers processus susmentionnés. Il suffit de citer quelques exemples, car ces processus sont déjà très avancés, du moins en Pologne.

Un élément important de l'édification de la souveraineté des Etats de l'Europe centrale consistait à aboutir à l'évacuation des troupes soviétiques de leurs territoires. Comme on s'en souvient, ce processus se déroulait progressivement, au cours de négociations onéreuses, comportant des concessions toujours nouvelles, et sans qu'il fût possible de contrôler ce qui se passait dans les bases pratiquement exterritoriales de ces troupes. Or il s'y passait beaucoup de choses, entre autres organisation et réalisation de la contrebande sur une grande échelle, et du trafic illégal d'armes, pratiqué aussi à l'échelle individuelle. Encore maintenant se font sentir les répercussions de cette activité. L'une des conditions du recouvrement d'une réelle indépendance consistait à sortir de la zone du rouble, sans quoi il aurait été difficile de participer à l'économie mondiale. C'est ce qui a occasionné des abus liés aux exportations fictives, réglées en roubles (et aussi en marks de l'Allemagne de l'Est), portant sur des milliards.

L'abandon des formes autoritaires d'exercice du pouvoir a précédé, ce qui est essentiel ici, la délivrance de la société du contrôle omniprésent de l'Etat, et a ouvert de vastes possibilités. Ainsi ont été créées, sur la base des entreprises d'Etat, des sociétés qui exploitaient celles-ci, en s'appropriant leurs recettes, mais sans prendre en charge leurs obligations; des sociétés chargées de services au profit des entreprises nationales, et notamment de la vente des marchandises fabriquées par ces entreprises dont elles s'appropriaient le bénéfice; enfin la pratique d'amener l'entreprise au bord de la faillite pour ensuite l'acheter à vil prix et la «remettre sur pied». Tout ceci se passait sous la protection de l'appareil toujours totalitaire de l'Etat et du parti (communiste), garantissant l'impunité de fait aux personnes liées à ce procédé, bien que les dispositions du droit pénal eussent été manifestement violées.

Mais c'est plus tard que la criminalité économique a connu un épanouissement, en relation avec le processus de transition vers l'économie du marché libre.

2. L'héritage commun des pays de l'Europe centrale et orientale

La question se pose de savoir si, malgré les immenses différences connues qui séparent les différents Etats de notre région, on peut parler conjointement de la criminalité qui y sévit. Car malgré la diversité de l'état des choses au départ du processus de transformations, malgré les différences culturelles, le degré inégal du développement économique, la composition nationale et ethnique variée, le degré d'athéisation et les genres de confessions différents, les différences de la structure politique de l'Etat (unitaire ou fédératif) ou des traditions juridiques, et malgré beaucoup d'autres caractéristiques qui font leur diversité, il y a assez d'éléments qui ont toujours uni et continuent à unir ces Etats.

Sans remonter dans un passé plus ou moins éloigné, et en nous bornant à quelques dernières dizaines d'années, il faut mentionner avant tout la dépendance d'un centre étatico-politique unique (sauf quelques exceptions, c'est-à-dire la Yougoslavie qui - comme on pouvait constater ces dernières années - constituait elle-même un tel centre, et l'Albanie, phénomène à part). Ensuite, le mode plus ou moins totalitaire d'exercice du pouvoir, faisant des citoyens des sujets soumis à l'Etat. Mentionnons encore les méthodes spécifiques de recrutement et de sélection des élites, l'énorme importance des organes de police (notamment de la police politique) dans la vie sociale, la domination d'une seule idéologie dans la vie politique, sociale et culturelle, la subordination de l'économie à l'Etat. Cette liste pourrait être plus longue, mais même sa version abrégée suffit pour rappeler quelles diverses forces puissantes et s'assistant mutuellement, concentrées autour du pouvoir (centralisation des décisions) avaient formé la société des Etats qui se trouvent dans la voie des transformations. C'est en raison de l'influence exercée par ces forces que, malgré les différences de forme et d'intensité, l'image générale de la criminalité est suffisamment similaire pour qu'on puisse en donner une caractéristique globale.

3. Dimension de la criminalité révélée

Les changements dans la dimension globale de la criminalité dans les pays de l'Europe centrale et orientale ne peuvent être présentés d'une façon synthétique sans multiples simplifications. Et c'est en connaissance de cause que nous avons admis les coefficients moyens généraux dans les années 1986-1989 pour les juxtaposer ensuite aux mêmes coefficients des années 1991-1994 (Table 3.1). Les coefficients moyens sont nécessaires pour éliminer, ou du moins pour réduire les fluctuations incidentes dans les dimensions de la criminalité révélée, et si l'on omet l'an 1990, c'est pour obtenir une image plus contrastée de la dimension globale de la criminalité révélée «avant» et «dans la première phase des transformations». Les données provenant des pays ouest-européens sont présentées de la même façon par le souci justement de respecter cette similitude formelle (Table 3.2).

Précisons que les chiffres qui figurent dans ces tables ne servent pas à comparer les dimensions de la criminalité révélée dans divers pays. De plus, il faut souligner que les comparaisons faites avec tant d'entêtement avant tout par les journalistes - malheureusement pas seulement par eux - n'ont pas de sens. Risquerait-on d'affirmer, à partir de ces données, que les pays de l'Europe occidentale à criminalité la plus élevée sont l'Ecosse, et ensuite, successivement, la Belgique, la Suède et le Danemark? Que la criminalité dans ces pays serait de 3-5 fois supérieure à celle notée en

Grèce ou à Malte par exemple? Serait-il vrai que dans les années 80, la criminalité dans les pays européens, nés après la désintégration de l'URSS, était plusieurs fois inférieure à celle connue en Slovaquie ou en Hongrie? Que la criminalité en Russie, même dans la première moitié des années 90, serait inférieure à celle notée en Hongrie, Slovénie, Pologne ou Slovaquie par exemple? Bref, en s'appuyant sur les données de ce genre, on ne saurait même ranger les pays selon les dimensions de la criminalité y constatée, ou les regrouper selon le niveau «élevé», «moyen» ou «bas» de la criminalité.

Table 3.1

Coefficients des infractions enregistrées par la police
(Pays de l'Europe centrale et orientale)*

Pays	1986-1999	1991-1994	Taux de croissance**
Bulgarie	663	1762	2,66
Estonie	885	2487	2,81
Hongrie	1843	4071	3,21
Lettonie	912	1897	2,08
Lituanie	638	1476	2,31
Macédoine	828[a]	972	1,17
Pologne	1367	2282	1,67
Slovaquie	879[b]	2243	2,55
Slovénie	1911	2307	1,17
Yougoslavie (Nouvelle)	1174	1355	1,15
Pays de la CEI (Communauté des Etats indépendants)			
Arménie	219	336	1,53
Azerbaïdjan	212	256	1,21
Biélorussie	540	909	1,68
Kazakhstan	667[e]	1146	1,72
Moldavie	677[d]	2033	3,00
Russie	920	1752	1,90
Ukraine	513	959	1,87

* Moyenne d'infractions par 100.000 habitants.
** Ce chiffre indique de combien la valeur moyenne du coefficient dans les années 1991-1994 est supérieure à la moyenne des années 1986-1989.
[a] 1992-1994; [b] 1989; [c] 1991-1993; [d] 1991-1992.

Table 3.2

Coefficients des infractions enregistrées par la police
(Etats de l'Europe occidentale)*

Etat	1986	1991-1994	Taux de croissance**
Autriche	5 315	6 207	1,17
Belgique	13 843[a]	15 473	1,12
Danemark	10 290	10 379	1,01
Finlande	6 218	2 082	1,14
France	5 759	6 207	1,10
Italie	3 805	4 835	1,27
Malte	1 860	2 063	1,11
Norvège	4 811	5 282	1,10
RFA	7 141	7711	1,08
Suède	11 482	11 786	1,03
Suisse	4 709	4 861	1,03
Royaume Uni:			
Angleterre et Pays de Galles	7 600	10 540	1,39
Irlande du Nord	3 875	4 084	1,06
Ecosse	16 831	19 636	1,17

* V. Table 1.1.
** V. Table 1.1.

Quand on regarde les données sur la dimension de la criminalité révélée, provenant des statistiques policières, il faut toujours se rappeler que ces chiffres ne traduisent pas seulement le nombre d'infractions mais, avant tout, la disposition des citoyens à informer la police des infractions commises à leur préjudice. Par ailleurs, elles sont affectées par la limite adoptée par le droit en vigueur entre les infractions notées dans ces statistiques et les contraventions qui n'y figurent pas. Chaque Etat fixe cette limite à son gré, et c'est le facteur qui décide au plus haut degré combien de violations du droit de moindre importance se trouveraient parmi les actes défendus par la loi, enregistrés par la police, et, par conséquent, quel serait le nombre total de ces actes. Il ne faut pas en conclure que ces données sont sans valeur. Tout au contraire, sauf quelques réserves, elles permettent de suivre les changements dans la dimension de la criminalité, mais dans chaque pays séparément. Ce qui est à éviter, ce sont les comparaisons entre Etats.

Une question à part est la possibilité de comparer, dans chaque pays séparément, les données des années 80 et celles de 90. Mais si elles ne suscitent pas de réserves quand il s'agit des pays de l'Europe occidentale, une grande prudence est requise dans le cas des pays de notre région. C'est dû à la spécificité des statistiques policières dans les pays dirigés par les communistes.

La police (milice) dans ces pays avait des obligations tant en ce qui concerne la poursuite que la prévention des infractions. Les succès des poursuites étaient mesurés à l'aide du coefficient dit de révélation, soit le nombre des infractions - dont les auteurs ont été identifiés - présenté sous la forme du pourcentage du total des infractions enregistrées. Quant au succès des mesures préventives, il était mesuré au nombre peu élevé et décroissant des infractions enregistrées. Pour faciliter la réalisation de chacune de ces missions on diminuait le nombre des infractions enregistrées ou, au mieux, on qualifiait certaines infractions comme socialement moins dangereuses (par exemple les brigandages de moindre importance, qualifiés de menus vols). Mais ce n'est qu'une partie de la vérité, celle qu'on pourrait appeler mécanisme organisationnel, favorisant l'abaissement artificiel du niveau de la criminalité connue des organes de poursuite.

Mais il est encore une autre partie, même plus importante, à savoir le mécanisme idéologique régissant cet abaissement, lié à la politisation du problème de criminalité. Les autorités considéraient le niveau de la criminalité comme un témoignage de la supériorité du régime socialiste sur le système capitaliste, ce qui, à leur avis, devait se traduire par la baisse de la criminalité. Et si la réalité était autre, on cessait de publier les statistiques concernées (p.ex. en URSS), on les falsifiait ou manipulait (dans tous les pays du «bloc»). Ceci a revêtu des formes grotesques dans l'ancienne RDA, où dès que les données en question étaient rendues secrètes, on construisait des théories appelées à justifier la curieuse idée selon laquelle bien que la criminalité ne baisse pas et même augmente un peu, en réalité elle baisse.

Ayant à l'esprit toutes ces réserves, que peut-on dire cependant de positif sur la dynamique de la criminalité révélée dans les Etats européens? Tout d'abord, on remarquera que, dans la seconde moitié des années 80 et la première des années 90, la criminalité a augmenté dans tous les Etats, encore que, dans certains, notamment au Danemark (0,01%) et en Suède (0,03%), cette augmentation soit symbolique. Parmi les pays ouest-européens la plus haute croissance a été observée en Angleterre et dans le Pays de Galles (39%) et en Italie (27%), dans les autres pays de cette région elle n'a pas dépassé 20, voire quelques pour cent.

Il en a été autrement dans les pays de l'Europe centrale et orientale, où la criminalité révélée a doublé voire triplé. Il y a eu des exceptions à cette règle générale, qui ont eu dans la majorité des cas un caractère spécial. Le plus faible accroissement a eu lieu dans les pays impliqués dans la guerre qui se déroulait dans leur voisinage (Nouvelle Yougoslavie), ou directement engagés dans les hostilités (Arménie, Azerbaïdjan). C'est un phénomène compréhensible et bien décrit. Sur les territoires qui sont théâtre de guerre et à leur arrière, le travail des organes civils de poursuite s'affaiblit ou même s'atrophie. Qui plus est, dans les pays mêlés à la guerre sont appelés sous les drapeaux ou s'engagent comme volontaires des jeunes gens qui représentent le groupe le plus dangereux de délinquants. Du moment où ils ne font plus partie de la population civile, baisse naturellement la criminalité poursuivie par les organes civils. Le cas de Slovénie et de Macédoine est spécial, le niveau de criminalité dans ces pays est traditionnellement bas par rapport aux autres pays de la région.

La dynamique générale de la criminalité dans les pays en période de transformations constitutionnelles présente encore d'autres caractéristiques que les données de la table 1.1. ne reflètent pas.

D'abord, l'accroissement de la criminalité révélée, là où il a été observé, s'est produit par à-coups. On le rattache généralement aux transformations constitutionnelles, ce qui est certainement juste, mais il semble que la dimension de l'accroissement provoquée par ces transformations soit démesurément surestimée. Les transformations concernées ont touché l'Etat et la société, sans omettre la police, qui, subitement, a cessé de subir les pressions visant à lui faire réduire, dans les statistiques, le niveau de la criminalité, et qui ne voyait plus d'intérêt à ce procédé. Un enregistrement honnête des infractions signalées aux organes de poursuite devait nécessairement faire augmenter leur nombre de plusieurs dizaines d'unités pour cent.

Cette opinion s'écarte de la conviction largement répandue que sur la Pologne, et aussi, entre autres, sur la République Tchèque, la Slovaquie ou la Hongrie déferle une vague de criminalité ordinaire. Or la dimension réelle ou révélée a peu d'influence sur cette conviction. Une influence bien plus sensible est exercée par l'image de la criminalité telle qu'elle est donnée par les mass media, ainsi que par l'information et les opinions sur la criminalité et ses manifestations, échangées entre les gens dans leurs contacts directs. Sous le régime communiste, la criminalité était totalement absente des mass media, et les rares mentions qui en étaient faites soulignaient avant tout l'efficacité de la milice, grâce à laquelle le délinquant était vite arrêté et rapidement puni. La suppression ou une limitation sensible de la censure, ainsi que l'apparition de la presse à scandales ont abouti à une vaste exploitation des informations sur les infractions commises. Dès qu'il s'est avéré que c'était un procédé lucratif, les informations de ce genre se sont encore multipliées. Le contraste avec la situation ancienne (plus exactement - récente) a essentiellement contribué à l'enracinement de la conviction sur les grandes et croissantes dimensions de la criminalité. L'appréhension du risque d'être victime ne cesse d'augmenter, en dépit de l'état réel des choses qui ne le justifie pas.

De plus, dans certains pays post-communistes, on observe ces dernières années une décroissance de la criminalité enregistrée (Hongrie, Lituanie, Lettonie, Slovaquie, Slovénie, Russie, Moldavie et, dans une certaine mesure, Pologne). Comment expliquer ce phénomène?

De prime abord on ne veut pas y croire, et l'on soupçonne le retour aux anciennes pratiques d'«embellissement» de l'image de la criminalité par la police. Au lieu de céder aux pressions d'«en haut» comme autrefois, la police commence, sur sa propre initiative, à faire en sorte que la dimension de la criminalité révélée concorde avec ses possibilités opérationnelles, et, aussi, avec les objectifs immédiats à atteindre. Cette dernière tendance semble être confirmée par les fluctuations de la dimension de la criminalité en Pologne: celle-ci augmentait quand le Ministère de l'Intérieur exigeait des ressources budgétaires plus élevées pour la police, et une fois qu'il obtenait gain de cause, elle diminuait rapidement.

Cependant, c'est un phénomène qui demande une réflexion approfondie. Les pays de notre région, ou du moins certains d'entre eux, commencent à atteindre, à mesure que progressent les transformations constitutionnelles, un niveau de stabilité déterminé. Pourquoi cette stabilité ne pourrait-elle pas se traduire aussi par une baisse progressive de la criminalité? Pour vérifier cette hypothèse, il faut connaître les données recueillies d'une manière indépendante des activités des organes de poursuites. On peut obtenir ces données par le biais de l'utilisation des techniques de sondage de l'opinion publique, pour s'informer si l'échantillon, prélevé par le tirage au sort sur la population totale du pays, compte des victimes d'infractions déterminées, pendant une période déterminée, par exemple en un an. Dans les pays de notre région, les enquêtes de cette sorte ont commencé au début des années 90 (auparavant elles portaient seulement sur des groupes choisis de la population), et les résultats n'en sont pas encore pleinement connus. On connaît seulement les résultats d'Estonie et de Pologne, concernant le début et le milieu des années 90. Dans ces deux pays a dominé la tendance à la décroissance de la criminalité, et en même temps les gens se sont montrés un peu moins disposés à dénoncer à la police les infractions commises. Ceci inciterait à croire que la décroissance observée de la criminalité révélée peut être une répercussion d'une baisse réelle de celle-ci. Peut-il en être pareillement dans les autres pays où l'on observe la décroissance de la criminalité révélée? Les résultats précités montrent que cette hypothèse n'est pas à exclure.

4. Les Etats à criminalité moindre ou à criminalité plus élevée

Parmi les criminologues, notamment ceux de l'Europe occidentale, il en est toujours qui sont convaincus que la criminalité dans les pays post-communistes - bien qu'elle ait sensiblement augmenté depuis les transformations connues - est toujours inférieure à celle des pays européens occidentaux. Cette opinion, c'est sans doute un reflet de l'ancienne propagande communiste, selon laquelle l'un des succès sociaux du régime socialiste, à côté de la liquidation (en réalité la dissimulation) du chômage, c'était entre autres, le taux bas de la criminalité. Voyons comment les choses se présentent en réalité.

Selon l'opinion bien établie dans la littérature criminologique, le nombre d'homicides peut être considéré comme l'indice de la criminalité accompagnée de violence, voire peut-être de la criminalité ordinaire en général. On sait que l'homicide est le crime dont la police est le mieux informée, et qu'il est aussi régulièrement révélé dans les statistiques par la police. Parmi les informations sur toutes les infractions, l'information sur l'homicide est la plus proche de la réalité (à côté peut-être de l'information sur les vols de voitures). En tout cas il en est certainement ainsi en temps de paix dans la démocratie. On parle évidemment d'homicides commis, car il n'est pas bien clair qu'est-ce qu'on entend par «tentative d'homicide» dans les différents pays. Suivant le pays, ce terme englobe certainement des comportements très divers. Comment expliquer autrement le fait que, parmi toutes les infractions qualifiées, en 1994, comme homicides, les tentatives d'homicide représenteraient en Lettonie 7%, en Pologne 24%, en Croatie 60% et en Suède 81 %?

Table 4.1

Coefficients d'homicides commis*

(Pays de l'Europe centrale et orientale)

Etat	1991-1994
Bulgarie[a]	5,1
Croatie[b]	3,8
Estonie	15,1
Hongrie	3,0
Lettonie	11,4
Lituanie[b]	6,4
Macédoine[e]	1,9
Pologne[c]	2,4
République Tchèque[c]	1,9
Etat	1991-1994
Slovaquie[e]	2,0
Slovénie	1,9
Etats CEI	
Arménie	6,1
Azerbaïdjan	6,5
Biélorussie[d]	5,1
Géorgie[f]	9,9
Kazakhstan[d]	10,0
Moldavie[d]	18,0
Russie[f]	14,5
Ukraine	6,7

* Moyenne d'homicides par 100.000 habitants.
[a] 1991-1993; [b] 1993-1994; [c] 1993; [d] 1991-1992; [e] 1994; [f] 1991-1992, 1994.

Table 4.2

Coefficients d'homicides commis*

(Etats de l'Europe occidentale)

Etat	1991-1994
Allemagne (Rép. Fed.)[a,d]	1,7
Autriche	1,2
Belgique[a]	1,5
Chypre (partie grecque)[a]	1,4
Danemark	1,4
Espagne[a]	1,1
Finlande	0,7
France	2,4
Grèce	1,4
Irlande[b]	1,0
Italie	2,6
Malte[a]	1,7
Norvège[b]	1,0
Pays-Bas[b]	1,6
Portugal	3,0
Suède	1,9
Suisse	1,3
Royaume Uni:	
Angleterre et Pays de Galles[c]	1,3
Ecosse[d]	1,1
Irlande du Nord[a]	5,2

* Moyenne d'homicides par 100.000 habitants.

[a] 1993-1994;[b] 1991-1993;[c] 1992; [d] 1990-1991.

Les données des tables 4.1 et 4.2, de quoi témoignent-elles? D'abord elles montrent que, dans la majorité des pays ouest-européens, le niveau des homicides est assez semblable. Si on laisse de côté l'Irlande du Nord qu'il serait difficile de qualifier, au début des années 90, de pays pacifique, les coefficients plus élevés sont observés seulement au Portugal, en Italie et en France (2,4-3,0). Dans les autres pays ces coefficients se situent dans des limites étroites (1,0-1,9), et d'année en année montrent une grande stabilité.

Par contraste, les homicides dans les pays excommunistes s'intensifient. Tout d'abord on y distingue comme deux groupes à peine contigus: pays de l'ancienne URSS, et pays qui ne se trouvaient pas dans ses frontières. Dans la majorité de ces derniers - République Tchèque, Macédoine, Pologne, Slovaquie, Slovénie, Hongrie - ces chiffres (1,9—3,0) sont inférieurs ou correspondent à ceux du groupe susmentionné des pays d'Europe occidentale, à intensité relativement plus élevée de ces crimes. Seules la Bulgarie et la Croatie diffèrent de ce groupe. Le coefficient le plus élevé de ces crimes est celui de la Bulgarie (5,1); il est égal à celui de la Biélorussie, lequel s'avère le plus faible parmi les pays de l'ancienne URSS. Il est de plus de trois fois supérieur en Moldavie, qui bat tous les records (18,1), et aussi en Estonie (15,1) et en Russie (14,9). (Signalons qu'aux Etats-Unis, ce coefficient s'élève depuis des années à 9-10, il est donc inférieur d'un tiers à celui de la Russie; ces mêmes coefficients en Europe occidentale sont, nous l'avons dit, plusieurs fois inférieurs).

On voit donc que l'opinion selon laquelle la criminalité dans les pays en voie de transformation serait toujours inférieure à celle des pays de l'Europe occidentale, demande à être révisée.

Cette question incite à attirer l'attention sur la criminalité organisée qui sévit dans les pays excommunistes. C'est elle qui a partiellement contribué à l'accroissement de la criminalité accompagnée de violence, d'une dimension précédemment inconnue (sauf, peut-être, en Russie). Les conflits entre les gangs - généralement peu organisés, exerçant une activité locale et sur une modeste échelle - qui étaient réglés la plupart du temps par une rixe ou coups et blessures, le sont maintenant par la suppression des concurrents engagés dans des affaires incomparablement plus importantes qu'autrefois, à l'aide d'une arme à feu ou d'explosifs. L'histoire se déroule dans un cercle étroit de personnes, aussi la haute intensité d'homicides ne signifie-t-elle pas nécessairement que le fait de se trouver dans les rues des villes des Etats concernés comporte un danger pour la vie, comme on l'entend dire parfois par les gens «moyens», convaincus qu'une vague de criminalité déferle sur le pays.

5. Criminalité et transformations

En période de transformation, les causes générales de la criminalité ou, comme préfèrent le dire beaucoup de gens, les conditions générales favorisant l'apparition de la criminalité, agissent, aimerait-on dire, comme d'habitude, nous n'avons donc pas à en parler ici. Néanmoins, les transformations concernées ont déclenché de nouvelles forces sociales et économiques, et créé aussi des systèmes organisationnels et c'est à la suite de leur fonctionnement ou, plutôt, en marge de ce fonctionnement que s'est développée la criminalité.

Rappelons que l'un des plans reconnus sur lesquels devaient se réaliser les transformations, c'était l'idée d'avoir ou de recouvrer un Etat indépendant. Le divorce des peuples qui précédemment avaient vécu dans un seul organisme étatique, était, en règle générale, pacifique (par exemple des Tchèques et des Slovaques - pour laisser de côté quelques incidents - des Etats baltes, des Etats faisant partie de la Communauté des Etats indépendants), mais parfois aboutissait à une cruelle guerre civile, marquée de crimes (la majorité des Etats de l'ancienne Yougoslavie, Arménie, Azerbaïdjan, Géorgie, Tchétchénie). On peut bien découvrir et compter les crimes, mais l'identification de leurs auteurs, leurs capture et jugement seront limités sans doute à quelques cas particuliers. Mais en évoquant la criminalité de la période de transformation, il ne faudra pas oublier les crimes de guerre et contre l'humanité, les cas de génocide.

Les phénomènes à caractère criminel se sont le plus abondamment produits à l'occasion des transformations du système économique. L'édification de l'économie capitaliste, à la place de l'économie socialiste, consiste essentiellement à substituer à la propriété collective (celle de l'Etat, nommée nationale dans le langage de la propagande) la propriété individuelle (des personnes physiques et morales). Se trouver parmi ces personnes physiques, avoir une part dans la propriété de ces personnes morales, ce but poursuivi par beaucoup a servi d'un terrain favorable à l'esprit d'entreprise et d'initiative, à l'ingéniosité, à l'assiduité au travail, mais aussi à la criminalité. Les processus qui ont joué un rôle particulier en cette matière c'étaient: l'abandon par l'appareil de l'Etat du contrôle méticuleux des activités économiques (mais non de l'intervention dans ce domaine); la privatisation de la propriété de l'Etat; la restitution aux propriétaires légitimes des biens qui leur avaient été illégalement enlevés (ce qui, dans quelques pays, a eu lieu sur une échelle notable); l'instauration de la libre activité économique exercée pour son propre compte dans de très nombreux domaines; l'ouverture progressive des frontières à la circulation toujours plus libre de biens, d'hommes et de capitaux. Si l'on qualifie ces processus comme criminogènes, on rencontre l'opposition chez beaucoup de gens, et l'on se voit accusé d'hostilité à l'égard des transformations économiques. C'est là une séquelle de la pensée manichéenne, propre aux idéologues marxistes, selon lesquels, puisque les phénomènes énumérativement et non exhaustivement précités avaient exercé une influence bénéfique sur l'économie, ils ne pouvaient en même temps avoir un caractère négatif (criminogène).

Les transformations qui ont lieu dans la majorité des pays de l'Europe centrale et orientale se déroulent dans des Etats «faibles», ce qui contraste avec l'Etat «puissant» de l'ancien régime. La faiblesse de l'Etat consiste avant tout en ce que nombre de ses institutions sont toujours en voie d'édification, et aussi en ce qu'il dispose d'un appareil exécutif chétif, entre autres - ceci est le plus important pour nos considérations - d'un fragile appareil de police, d'administration de la justice, douanier, fiscal, de surveillance bancaire, de protection des frontières, etc. Qui plus est, on a l'impression que de puissantes forces politiques et économiques seraient intéressées à faire durer cet état de choses.

6. La criminalité ordinaire

C'est l'aspect le plus visible de la criminalité. Elle comporte les infractions fréquentes et qui sautent aux yeux. La perpétuation d'actes plus graves en de nombreux cas a un scénario dramatique, on peut facilement le relater à nos amis ou décrire dans un journal, coloriser, en faire ressortir les détails piquants ou terrifiants. L'information sur la criminalité ordinaire, à côté peut-être de la criminalité organisée, contribue le plus à former l'opinion courante sur l'état et la dynamique de la criminalité dans le pays.

Il n'est pas difficile d'indiquer les caractéristiques communes de la criminalité dans les pays de notre région. Et il ne s'agit pas de changements aussi évidents que la réduction relative de la part des infractions contre les biens de l'Etat et la croissance de celle des infractions contre les biens individuels, puisque c'est la conséquence naturelle de la contraction du champ concerné par les premières de ces infractions. De partout - le moins peut-être de Slovénie - on apprend que la criminalité ordinaire s'est essentiellement modifiée, non pas tant sa structure mais ses caractéristiques. D'une façon générale, elle est devenue plus grave, en ce sens que sa plus forte recrudescence, et, ensuite sa plus faible réduction, concernaient ses manifestations les plus dangereuses et les plus douloureuses pour les victimes. On voit aussi se modifier les procédés criminels, les instruments utilisés, le degré de complication, voire les buts des infractions.

Les infractions traditionnelles, comme homicides, brigandages, effractions (dont celles de voiture), vols, se sont brutalisées provoquant de plus graves dommages, elles sont perpétrées plus souvent de façon professionnelle, avec plus d'indifférence aux souffrances de la victime, pour ne pas dire avec cruauté. On a l'impression que nous avons affaire à un nouveau type de criminel, qui apprend vite les nouveaux procédés de réalisation d'infractions et moyens d'échapper aux organes de poursuite, qui poursuit opiniâtrement son but sans aucune restriction. De tous les pays parviennent les informations sur les brigandages et les extorsions commis avec une brutalité rarement rencontrée autrefois. Selon l'opinion dominante, fondée sur l'expérience, toute serrure peut être violée, toute voiture - quel que soit le dispositif de protection - peut être volée et sans difficulté transférée à un nouveau possesseur. On voit apparaître le vol de voitures d'un nouveau genre: le délinquant vole la voiture pour la «revendre» à son propriétaire. On note de plus en plus d'effractions soigneusement préparées, visant des objets déterminés.

Les instruments utilisés par les criminels changent aussi. L'ordinateur, naguère inaccessible en Europe centrale et orientale, même au marché noir, actuellement est justement un des instruments nouvellement utilisés. Les machines à imprimer ou à copier textes et images les plus sophistiquées sont utilisées par les faussaires de la monnaie, des labels, des documents. Des explosifs, et surtout des armes à feu sont apparus parmi ces instruments, ce qui a provoqué des propositions douteuses de permettre à tous de posséder une telle arme, ce qui aurait conduit à une recrudescence des infractions commises avec violence et à des accidents provoqués par un maniement maladroit de cette arme. Ainsi tous dispositifs techniques sont utilisés, ce qui est un phénomène mondial, mais nouveau dans les pays de notre région.

L'enlèvement est un bon exemple du changement du but de l'infraction. Avant le début des années 90, notre police notait de quelques à moins d'une vingtaine d'infractions de ce genre par an. Précisons qu'il s'agissait de Γ «enlèvement» d'enfant par un membre de la famille qui n'avait pas le droit de tutelle sur cet enfant ou le droit d'avoir des contacts avec lui.

7. La criminalité économique

Le trait caractéristique de la criminalité économique consiste en ce qu'elle échappe à toutes les statistiques à un degré incomparablement plus élevé que la criminalité ordinaire. Elle était répandue aussi à l'époque communiste, mais à présent elle a changé de formes et d'envergure, et les effets qu'elle produit ne sont plus les mêmes. Sous le régime économique précédent, cette criminalité avait sa source, d'un côté, dans les conséquences de l'idée manquée de «l'unité du pouvoir d'Etat», selon laquelle l'exercice du pouvoir au nom de l'Etat (imperium) n'était pas séparé de l'administration de son patrimoine (dominium), et, de l'autre côté, dans les mesures tendant à exterminer la propriété privée et à empêcher l'exercice d'une activité économique par les particuliers. On affirmait, en effet, que l'activité économique individuelle était une source d'exploitation abusive, et qu'en outre - ce qu'on ne déclarait pas ouvertement - cette activité n'aurait pas permis de soumettre les citoyens au pouvoir totalitaire. Ce pouvoir devait être l'unique distributeur de tous biens, c'était de lui seul que devait dépendre le niveau de vie toléré, tout au plus austère. Line relative aisance n'était garantie qu'à certains (aux groupes détenteurs du pouvoir, à ceux directement liés à eux, appelés à les protéger et glorifier). L'activité économique individuelle exercée pour son propre compte était considérée, en dehors des limites prescrites, comme une activité criminelle. On peut citer comme humoristiques les dispositions, alors en vigueur dans les pays socialistes, sur la spéculation, interdisant entre autres aux citoyens d'acheter des marchandises pour les revendre avec gain - soit de faire du commerce - ou laissant exercer toute activité économique individuelle (en Pologne, sauf l'agriculture) seulement avec l'autorisation des autorités compétentes.

Dès qu'on a entrepris d'instaurer l'économie du marché, c'est l'existence du «pouvoir unique de l'Etat» qui s'est révélée criminogène. Les mêmes personnes, ou liées les unes aux autres, prenaient des décisions impératives et des mesures patrimoniales, et de ce fait, ces dernières valaient «leur pesant d'or». Par exemple, la décision sur la vente ou la privatisation d'une usine, était prise par le même fonctionnaire qui était obligé de veiller à la bonne gestion de cette usine, à son développement et aux revenus optimaux qu'elle devait rapporter au Fisc. Et en même temps, l'acheteur aussi bien que le fonctionnaire qu'il s'était concilié, avaient intérêt à baisser la valeur ou l'estimation de l'usine concernée, pour qu'elle fût vendue le moins cher possible. On ne saurait s'étonner que le conflit de ce genre soit souvent réglé au détriment de l'intérêt public.

Les décisions concernant la privatisation ou la vente des éléments du patrimoine national figurent parmi les nombreuses décisions prises par l'appareil de l'Etat au cours de l'exercice des attributions d'autorité et administratives et présentant une importance économique. D'autres concernent dotations et subventions, quotas d'exportation et d'importation, autorisations de change, allégements douaniers ou fiscaux, concessions, tarifs, conditions et évaluation des résultats des appels d'offre, et beaucoup d'autre matières. Pareillement, les décisions concernant l'apport du capital d'Etat à des entreprises mi-privées ou privées, et aussi celles concernant le choix de l'offrant de travaux ou de services, ont créé et créent toujours de grandes chances de réaliser d'extraordinaires bénéfices aux dépens des recettes budgétaires et d'autres participants aux échanges. Une autre source criminogène, c'est l'information. Elle peut concerner les solutions juridiques en cours de préparation, l'abolition de diverses restrictions en matière économique, la modification des cours des changes, les prix offerts par d'autres participants aux échanges, les revenus des maisons commerciales, les opérations envisagées par la police ou d'autres organes de contrôle, etc.

Le fait que les décisions et les informations soient devenues l'objet du marché (ou du marché noir) est le résultat de la corruption craissante de l'appareil de l'Etat des pays excommunistes. L'étendue du phénomène varie d'un pays à l'autre. Dans de nombreux pays, la corruption a atteint un niveau qui décourage le capital étranger de s'engager ou provoque son retrait. Dans d'autres, elle freine les transformations économiques, et dans un cas (en Bulgarie) elle a provoqué, à un certain moment, le retour d'une hyperinflation.

D'une façon générale, si l'on observe le système du marché en naissance dans les pays excommunistes, on voit nettement que le capital local avait, et a toujours pour source, en majeure partie, la propriété de l'Etat («de toute la nation») et le budget de l'Etat. Dans cette situation, Γ accès au pouvoir, donc aussi à la possibilité de prendre des décisions susmentionnées, et aussi à l'information, est devenu le principal moyen d'enrichissement rapide. Les liens de la politique et de l'économie ont revêtu dans ces pays une forme qui rend sérieusement pathologiques les processus de transformation constitutionnelle. Ce qui, dans une grande mesure, décide du succès d'une initiative économique, ce n'est pas le marché des marchandises et des services, mais l'accès aux décisions et à l'information.

A mesure que progressent les transformations constitutionnelles, la criminalité économique subit des modifications rapides. Les entreprises privatisées ont besoin de capitaux (donc de crédits), de garantie de vente de leurs produits (de préférence sous forme des commandes publiques), d'agents bienveillants haut placés des entreprises qui continuent à être gérées par l'Etat, afin d'y acheter bon marché et de vendre cher, elles ont besoin aussi d'allégements fiscaux, d'exemption des droits de douane, etc.

Egalement le droit a été, et est maintes fois créé de telle façon que sa violation soit facile et lucrative. Voici deux exemples de Pologne, un ancien et un récent. Le premier, c'était l'introduction, et ensuite la modification des dispositions concernant l'importa tion d'alcool. Primitivement, elles autorisaient l'importation d'alcool en très grandes quantités, ensuite elles la limitaient aux quantités non commerciales (sans les préciser davantage), puis, prévoyaient de nouvelles restrictions, mais laissaient toujours trouver une lacune, et enfin retardaient la mise en place de l'accise sur le commerce d'alcool. L'exemple récent, c'est l'adoption des dispositions sur le combustible coloré, vendu aux agriculteurs à un prix préférentiel. Une solution qui, dirait-on, a été inventée exprès pour offrir de vastes possibilités d'abus.

Si l'on tentait de définir en un mot le caractère du système actuellement en vigueur dans la majorité des pays ex-communistes, on n'emploierait pas tant le terme de démocratie ou d'autocratie que, plutôt, de kleptocratie (terme forgé pour désigner le système du pouvoir dans de nombreux Etats africains, nés dans les années 50 et 60).

Le trait caractéristique de la criminalité économique est qu'elle représente, en règle générale, l'élément marginal - parfois peut être signifiant, néanmoins marginal - de l'activité productive, tertiaire ou commerciale. Dans des conditions favorables - or telles sont offertes par le système économique en voie de transformation - les milieux d'affaires - privées et publiques - sont entraînés dans les infractions économiques à une échelle incomparablement plus importante que dans les pays démocratiques à stable système capitaliste. Sans ces infractions, beaucoup des nouvelles initiatives n'auraient pas eu lieu, elles n'auraient pas généré de bénéfices permettant un développement économique rapide, et parfois de faire face à la concurrence et de subsister sur le marché. Un important pourcentage des habitants de chaque pays de notre région commettent des infractions économiques, du fait qu'ils enfreignent - d'une façon qui viole le droit pénal - les prescriptions fiscales relatives à l'emploi (par exemple, en embauchant «au noir»), ceux qui se font attribuer abusivement des prestations sociales et qui font de la menue contrebande.

On entend dire que ces phénomènes étaient répandus également dans le système de l'économie socialiste. C'est juste, seulement à présent ils se déroulent à une échelle incomparablement plus grande. En admettant même que beaucoup de ces phénomènes sont un héritage du système précédent, maintenant ils bénéficient des conditions plus favorables à leur développement. Les économistes classent beaucoup de ces phénomènes dans la «zone grise», et soulignent que son existence favorise le développement économique. Il en est peut-être ainsi effectivement mais cela ne change pas pour autant l'opinion du criminologue qui non seulement attire l'attention sur le fait que ces phénomènes contribuent à déstabiliser l'ordre juridique, mais indique aussi leur incidence négative, d'ordre culturel et à longue échéance, qui se traduit par le respect décroissant du droit et par la prééminence de la roublardise et des machinations frauduleuses. Il n'est donc pas étonnant que, dans l'esprit de la population des pays ex-communistes, l'aisance est associée à la fraude et non au travail assidu et à l'épargne (j'évite volontairement le mot «ingéniosité», car depuis quelque temps il a un sens équivoque).

A l'cpoquc du déclin de l'Etat gouverné par les communistes et de leurs préparatifs à partager le pouvoir avec l'opposition, les procédés d'exploitation parasitaire des ressources de l'Etat revêtaient des formes légales, du reste élaborées sous le diktat des fonctionnaires qui allaient en bénéficier et qui se métamorphosaient en entrepreneurs autonomes. On fondait, par exemple, des sociétés à participation du capital étranger, et ensuite sans ce capital, ce qui était autorisé par les textes en vigueur. Ce n'est pas la création de ces sociétés qui était illégale, mais les règles financières qui présidaient à leur constitution et aussi leurs activités.

Dans les pays de l'Europe centrale et orientale, malgré les différences qui les distinguent, on observe beaucoup de manifestations semblables de la criminalité économique, ce qui témoigne, d'un côté, du caractère analogue des problèmes qu'ont à affronter les pays édifiant l'économie du marché. Dans tous ces pays, à l'échelle différente et à des moments différents (ce qui ne veut pas dire qu'à des étapes différentes de ce processus), on voyait naître des établissements financiers offrant des taux d'intérêt très élevés des capitaux (plutôt de l'épargne) leur confiés, sans exercer aucune activité économique - ou en exerçant une activité apparente - et dont on prévoyait la durée d'existence en fonction seulement du nombre des clients qui viendraient confier leur argent. C'étaient de parabanques ou établissements de crédit, les fameuses «pyramides», etc. L'exemple le plus récent des résultats des activités de ces organismes, qui apparaissent au moment où ils s'écroulent, est l'Albanie qui a connu la rébellion et l'anéantissement des structures de l'Etat. En Russie, l'initiative de l'Etat d'il y a quelques années, mettant fin à l'activité d'un tel organisme, a suscité un vif mécontentement de ceux qui espéraient toujours recouvrer les économies qu'ils avaient confiés à cet établissement. Les autres pays de la région ont connu des activités analogues, sauf que le nombre des naïfs désireux de multiplier rapidement leurs finances n'était pas partout aussi important.

L'exemple de l'enrichissement aux dépens du budget, dans tous les pays ex-communistes, c'est le cas des «mauvaises dettes». L'évaluation de ce phénomène n'est pas très simple, parce que, à côté de l'extorsion des crédits consentis avec l'aide du personnel des banques et de divers intermédiaires qui en tiraient profit, il y avait tout simplement l'incompétence des donneurs de crédits, l'inexistence de procédures précises de vérification de la crédibilité des bénéficiaires de crédits, le manque de registres utiles, etc. Il semble toutefois que les pertes subies sont, en grande majorité, à mettre sur le compte des extorsions commises.

Un élément semblable de la criminalité économique, commun à notre région, c'est son internationalisation. Les vraies grandes affaires impliquent (outre l'appropriation des biens de l'Etat) des échanges avec l'étranger. Importations, exportations, réexportations, transit de marchandises offrent, vu la faiblesse des services douaniers et du contrôle fiscal, des possibilités de réaliser des bénéfices particulièrement élevés au moyen de la fraude fiscale (par exemple, en évitant de payer le droit d'accise, en n'acquittant pas, par fraude, les droits de douane, en extorquant le remboursement de la TVA, etc.).

8. La criminalité organisée

La description des caractéristiques essentielles de la criminalité dans les pays en période de transformations constitutionnelles serait très insuffisante, si l'on n'attirait pas une l'attention particulière sur la criminalité organisée. Elle est une sorte de pont entre la criminalité ordinaire et la criminalité économique. Elle n'est pas chose nouvelle dans les pays de l'Europe centrale et orientale, où elle a existé précédemment mais à une échelle incomparablement plus faible. Et il y a eu également des cas où l'appareil de l'Etat était lié à cette criminalité (en Pologne les affaires du change, ou l'affaire «Żelazo» (Fer), en Russie l'entourage de la fille de Brejnev).

Nonobstant les difficultés connues qu'il y a à définir la criminalité organisée à l'usage du droit pénal, le criminologue a beaucoup moins de problèmes pour préciser de quoi il s'agit. Il dirait qu'on est en présence de la criminalité organisée quand les infractions sont commises par un groupe d'individus, constituant une structure hiérarchisée avec un chef, caractérisée par son caractère durable et par la répartition des rôles et des fonctions, spécialisé dans un (ou plus d'un) genre d'infractions. Si les membres du groupe commettent d'autres infractions (en règle générale ordinaires), c'est pour s'assurer que la principale activité criminelle du groupe - laquelle ressemble souvent à des opérations du monde des affaires - sera efficace. Pareillement, ses activités d'un autre genre, par exemple celles des maisons commerciales qu'il possède (si elles ne sont pas destinées au placement de capitaux), servent à camoufler les infractions commises ou à légaliser les bénéfices réalisés sur cette voie. Si donc le monde des affaires est habituellement orienté vers la réalisation légale des bénéfices, éventuellement «assistée» de délits économiques occasionnels, l'activité économique de la criminalité organisée est axée sur les affaires illégales, parfois sous l'apparence de la légalité. Cette différence, évidente dans les pays à économie du marché stabilisée, s'estompe parfois dans ceux qui commencent seulement à édifier cette économie, où, trop souvent, on ne peut distinguer un homme d'affaires d'un mafioso.

La forme la plus dangereuse de la criminalité organisée est celle qui a le caractère d'une mafia. Sa caractéristique particulière, ce sont les connexions de l'organisation criminelle avec des fonctionnaires publics. Du reste l'un des objectifs d'une telle organisation consiste justement à établir de telles relations, aussi durables que possible. Le fait de corrompre un douanier, agent de police ou homme politique ne signifie pas encore que l'organisation est liée à une mafia. Pour que cette liaison soit réelle, il faut qu'elle les ait à sa solde, les rémunère assez régulièrement, pour les assujettir ainsi, et qu'elle puisse promouvoir scs membres à des fonctions publiques. Les autorités niaient, malgré les faits évidents, l'existence de telles organisations, maintenant elles ne lę font plus. Il semble indubitable que ces organisations se sont épanouies bien plus dans les anciens membres de l'URSS que dans les autres pays de notre région, excepté peut-être la Bulgarie.

Il est caractéristique que jusqu'à présent on ne voit pas que la criminalité organisée se rétrécisse. Au contraire, on voit grandir le nombre de groupes criminels organisés et de leurs membres. Cette criminalité gagne en influence, elle s'adapte aux besoins du marché et établit de nouvelles relations internationales. C'est elle, et non la recrudescence de la criminalité ordinaire, qui présente une grande menace pour le bon déroulement du processus de transformation, car elle provoque des pertes dans l'économie nationale et contribue à la corruption de l'Etat.

Quand on est au courant des activités de la criminalité organisée en d'autres pays, on peut dire qu'elle s'engage dans ses domaines traditionnels, avant tout dans le trafic de marchandises et la prestation des services, et moins dans la production. Toutes restrictions à l'approvisionnement en biens recherchés font naître des conditions favorablés au développement de la criminalité organisée. Les frontières de l'Etat constituent une telle restriction; avec les différences des prix dans les pays voisins, et davantage encore en présence de la demande insatisfaite, elles forment un milieu favorisant l'expansion de cette criminalité. Quant à la matière de la contrebande, elle varie en fonction des besoins du marché dans notre région; on y voyait le trafic illégal, de l'Ouest vers l'Est, d'automobiles, d'alcool, du matériel électronique, et, dans le sens inverse, de narcotiques, d'hommes, d'oeuvres d'art, de métaux non ferreux. Cette liste devait s'enrichir et se diversifier avec le temps. Mentionnons à part le trafic d'armes, car c'est un domaine où il est très difficile - en tout cas dans les pays de notre région - de séparer le commerce de la contrebande, la mafia de l'appareil de l'Etat.

Du côté de la production, il faut citer surtout la fausse monnaie et le faux documentaire, la drogue synthétique, les enregistrements phonographiques, les logiciels.

Mais l'offre la plus diversifiée de la criminalité organisée ce sont les services. Elle propose donc des gardiens et des gardes du corps (services particulièrement appréciables vu l'insuffisance chronique des effectifs de la police), l'organisation du marché de la prostitution, le transport et la distribution des marchandises passées en contrebande, notamment des alcools, des cigarettes et des narcotiques, la fourniture des documents les plus divers (de transport, certificats, etc.), le recouvrement des dettes, le blanchiment d'argent, les vols d'objets soigneusement choisis, sur commande ou en vue de les écouler auprès des acquéreurs concrets (objets d'art, collections numismatiques ou philatéliques) et beaucoup d'autres.

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Le plus grand problème de la criminalité dans les pays de l'Europe centrale et orientale est la criminalité économique et la criminalité organisée. Selon une opinion assez répandue, la propagation de la criminalité économique est inévitable. Les partisans de cette opinion admettent généralement qu'il ne faut, pas «trop en parler», que l'instauration de l'économie du marché s'est toujours accompagné de scandales financiers, que la rapide naissance de la classe moyenne dans les pays qui n'en avaient pas une ne peut se dérouler dans le plein respect du droit et de la probité, non seulement parfaite mais élémentaire, que „le premier million est nécessairement à voler». Néanmoins, les différences entre les pays de notre région dans la propagation de cette criminalité, et du phénomène corrélatif qu'est la corruption de l'appareil de l'Etat et des collectivités locales, sont notables.

De nombreux pays ex-communistes sont menacés d'une nouvelle criminalisation de l'économie et de l'appareil de l'Etat, au sein duquel les personnes mêlées à diverses relations illégales semblent jouer un rôle croissant. C'est d'autant plus facile que, dans la grande majorité de ces pays, les media, délivrés de censure, ne sont pas encore le quatrième pouvoir, ne se sont pas libérés de certains liens de dépendance. Là où la justice fonctionne faiblement et lentement, où sont tolérés divers cas de malhonnêteté, auxquels participent parfois des représentants des pouvoirs publics qui font plier les dispositions de la loi à leur volonté, ou encore les rendent ou font retarder au gré de leurs besoins, là il est difficile de monter un front de résistance à ces pratiques et de les réprouver fermement. D'ailleurs la propagation de telles pratiques n'est pas en contradiction avec l'existence et le développement du système de l'économie de marché, comme le prouve certainement en Europe le cas d'Italie. Nous faut-il suivre cette voie?

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Quo Vadis Iustitia? Stan i perspektywy wymiaru sprawiedliwości w Polsce
[Quo Vadis Iustitia? Present State and Perspectives of the Administration of Justice in Poland], Collective work edited by Andrzej Siemaszko, Warszawa 1996, published by Instytut Wymiaru Sprawiedliwości, 182 pp.

The reviewed book contains a 180-pages long report on the situation of institutions connected with the Polish administration of justice, prepared by a group of workers and collaborators of the Institute of the Administration of Justice (J. Broi, B. Gruszczyńska, J. Jasiński, E. Holewińska-Łapińska, M. Jankowski, M. Safjan, A. Siemaszko, J. Szumski, E. Warzocha, and D. Wojcik). The report is based on materials prepared by organizational units of thee Ministry of Justice and IAJ's own analyses.

The introduction states that the report is merely an attempt at a diagnosis of the present condition of the administration of justice. It reveals the weak areas of the administration of justice and their causes, and points out to the need for concrete measures in order to improve the effectiveness of applying law in those very areas.

Owing to the fact that the report concerns only the area which lies within the competence of the Minister of Justice, it does not cover the activities of the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary and the Chief Administrative Court.

The report covers a very wide range of topics, including courts, prosecutors' offices, legal professions and subsidiary personnel, as well as the budget and investments. It closes with extensive conclusions and annexes containing observations on those amendments in Polish legislation in the years 1989-1994, which resulted in increasing the burden on courts, on the reasons for judges' resignations and the scale of this phenomenon, on certain types of criminality and the posed threat, as well as on complaints and proposals concerning the department of justice.

The dark image of the Polish judicial system, as presented in the report, should not surprise anybody who has any, even rudimental, knowledge of how this system functions.

However, a vast majority of symptoms of the present crisis , gathered in one well prepared, matter-of-fact and competent study, creates a strong impression, almost a shock. Mercilessly, since they are using figures, the authors present the current situation, striving consistently to provide a rational justification for the very formulation of the title of this publication.

Let us take just one example. At the end of 1995 in Poland there were 6 900 judges and assistant judges of common courts. 1 300 more judges would have to be employed in order to make it possible to take control of the currently incoming cases. The received financial means were sufficient to create 215 new jobs. In that very year, the average duration of proceedings in district courts was the longest in the whole period from 1989 to 1995; in comparison to 1992 it was longer by half as regards civil and criminal cases, while in economic non-proceedings cases it was more than twice as long. It goes without saying that there inevitably arises the question: where do we go on from here?

The authors propose a thorough and in-depth analysis of the causes behind this and many other similar symptoms. They write about financial problems, and purely professional or socio-demographic ones, about investments and infrastructure, but they also remember to add a lot of apt and critical observations concerning the shortcomings of legal education at the university level and during postgraduate vocational training. It is just as important that they discuss the situation of the administration of justice in the context of changes made in the existing legal state.

In their conclusions, both those presented in detailed studies and the final ones, the authors indicate many possible therapies. It is worth noting that they are not limited to expectations of greater financial means from the State budget.

This book can be recommended to all readers who are not entirely indifferent towards the problems of our judiciary. It should be read not only by lawyers, but also by students, journalists and persons who are active on the political, social or economic scene. Non-professionals are spared all obstacles, since the publication is written in an accessible manner, and offers a clear and concise presentation of facts and ideas.

The only problem seems to be that the book has probably not been designated for public distribution (the price is not given, and the number of copies is not mentioned, since for a long time now this kind of information has been carefully omitted in most publications). We would like to encourage the Institute of the Administration of Justice to quickly prepare a second edition of this valuable report, this time designed for a wider circle of readers. Such an opportunity could be used to change the size of the book into a more handy one, and possibly to leave out the extremely numerous and meticulously prepared colourful illustrations, which could well be replaced with tables, in this way saving some space.

Jan Skupiński

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Przegląd Prawa Europejskiego [European Law Review] no. 1/1996, published by Fundacja Promocji Prawa Europejskiego and Dom Wydawniczy ABC, Co. Ltd., Warszawa

The appearance of a new quarterly: *Przegląd Prawa Europejskiego* on the market of legal periodicals must be welcomed with attention and recognition.

The idea to create a magazine of such a distinctive orientation follows quite naturally from the growing importance of legal questions connected with European integration. Those problems are and will certainly continue to be present in all the legal periodical;[1] *Przegląd Prawa Europejskiego* declares that they will be its main focus. The editorial, specifying the magazine's aims, written by Prof. E. Łętowska, President of the European Law Promotion Foundation, and the contents of the first issue prove that the Founding Committee (general editors: Dr. hab. W. Czapliński, Institute of Political Sciences at the Polish Academy of Sciences, Prof. C. Mik, Chair of Human Rights at the Mikołaj Kopernik University, scientific secretary Dr. E. Tomkiewicz, Institute of Political Sciences at the Polish Academy of Sciences) has adopted a very broad notion of European law. It comprises questions of the law of the European Communities and the harmonisation of Polish legislation with Community law and the legislations of Western Europe, the legal aspects of the functioning of NATO, Council of Europe, OECD, etc., as well as the protection of human rights and particular comparative questions concerning national legislations.

The arrangement of the magazine is as follows: articles, a review of the judgments of the European Human Rights Tribunal and of the European Communities Tribunal, reviews, reports and a Polish bibliography on European integration.

The first issue contains articles by A. Wojciechowski: "Adjusting Polish Law to European Law - a Never-ending Process", J. Galster: "Constitutional-law Borrowings in the Institutional System of the European Communities", M. Zdanowicz: "Outside Implications of the Schengen Arrangements", W. Czapliński and A. Włosińska: "Certain Aspects of Implementing the European Treaty in Polish National Legislation", M. Kulesza: ‘'Public Assistance for Enterprises in the Republic of Poland. The Role of Communes - Initial Observations in the Light of the Provisions of the Treaty of Rome and the Treaty on Association", A. Gras: "European Community Legislation", C. Mik: "Radio and Television Broadcasting in European Community Law" and B. Gronowska: "Reform of the Control Procedure of the European Convention on the Protection of Human Rights of 1950 - Selected Problems".

The review of judgments is a brief presentation of theses, actual states and extracts from the reasons for selected judgments of the European Human Rights Tribunal and of the European Communities Tribunal on issues which within the past few years related to various fields, such as parents' rights, the protection of property, financial law, and television advertising.

The magazine publishes reviews of both Polish and foreign works. It also takes notice of Polish and international conferences concerned with European studies.

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[1] Some periodicals thought it necessary to devote whole issues to those problems: *Studia Prawnicze* 1996, no. 1-4 and *Państwo i Prawo* 1996, no. 4-5 - a jubilee issue commemorating the fiftieth anniversary of this publication.

A valuable initiative is the extensive bibliography of Polish literature relating to European law and problems connected with European integration from the years 1995-1995, including a separate presentation of books and contents of magazines. The second issue will contain a bibliography from the years 1990-1993.

Przegląd Prawa Europejskiego has good chances for becoming a periodical for readers seeking theoretical reflections and factual information, those interested in tendencies in international, foreign and Polish law, and those advanced or just beginning to study European law. We sincerely hope that the magazine will continue its laudable work.

Ewa Wojtaszek

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REFORM OF THE LAW OF COMMERCIAL COMPANIES
(Conference, Warsaw 29 June 1998)

The conference organized by the Ministry of Justice, the Institute of Law Studies at the Polish Academy of Sciences and the Faculty of Catholic Law at the Catholic University of Lublin, was devoted to the draft of the Act - Law on Commercial Companies, prepared by a special team of the Commission for the Codification of Civil Law, composed of Prof. S. Soltysinski, Prof. A. Szajkowski and Dr. hab. A. Szumański. Participants of the conference included recognised civil law specialists, as well as representatives of practice and the press.

The conference was opened by Dr. H. Suchocka, Minister of Justice. Addressing her thanks to the co-organizers: Prof. Z. Radwański, President of the Commission for the Codification of Civil Law at the Ministry of Justice, Prof. A. Szajkowski, Director of the Institute of Law Studies at the Polish Academy of Sciences and Rev. Prof. M. Stasiak, Dean of the Faculty of Law at the Catholic University of Lublin, she stressed the importance of the problems to be discussed.

Papers containing observations concerning the draft were presented by Prof. J. Frąckowiak, head of the Department of Economic and Commercial Law at the University of Wroclaw, Prof. K. Kruczalak, head of the Chair of Commercial Law and Private International Law at the University of Gdańsk, Prof. W. Popiołek from the Silesian University of Katowice and Dr. A. Wisniewski from the University of Warsaw.

At the very outset, Prof. J. Frąckowiak stated that the draft of the Act - Law on Commercial Companies is a valuable work, although he described some parts of it as highly controversial. The speaker underlined that the authors of the draft, basing themselves on the regulations contained in those provisions of the Commercial Code which have not been repealed, and making use of foreign regulations in the field of company law, introduced many improvements, which will be decisive for Polish company law to remain up-to-date. Prof. J. Frąckowiak stressed also the fact that in his opinion questions concerning companies deserved to be treated as a code matter. However, in his view, such problems should constitute part of a comprehensive code, which would comprise all fundamental questions of private law. In reference to the draft, Prof. J. Frąckowiak observed that it was necessary for the solutions contained therein to be clearly synchronised with the provisions of the Civil Code. He also pointed out that once the assumption of the unity of civil law had been adopted, doubts arose as to leaving civil partnership out of the regulation of the Act in question. Contrary to the draft of the Act, Prof. J. Frąckowiak spoke in favour of granting legal personality to a personal company, and suggested adopting, in relation to such companies, the institution of company in organisation, identical to the solution adopted in the case of capital companies. He described as purposeful the introduction of the institution of the invalidity of a company, a solution adopted with a view to the dispositions of the first directive of the Council of EC concerning company law.

Prof. K. Kruczalak began with the statement that the need to prepare a statute on commercial companies resulted both from the necessity to adjust the law of commercial companies to the requirements of trade, and from the need to harmonise the law of commercial companies with EU directives, as well as to adjust and introduce the law of commercial companies to the provisions of civil law, particularly the Civil Code. He gave a positive evaluation of the introduction of two new kinds of companies: partners' company and limited joint-stock company, adding that no one should question their usefulness in economic trade. However, the author expressed doubts whether a limited joint-stock company should be treated as a personal company. As regards the limited liability company, Prof. K. Kruczalak declared that the draft specified the purpose of company activity too broadly, and suggested preserving the current specification of the purpose of such a company. He observed also that although, in comparison to the existing legal status the draft regulates to a greater degree the sole shareholder limited liability company, it fails to regulate a number of fundamental questions and should be expanded in that field (e.g. as regards legal actions "with oneself"). Prof. K. Kruczalak also expressed doubts as regards those solutions, which reduce shareholders' powers in relation to the existing legal status or which impose more duties on them (the question of preferred shares and requirements pertaining to the form of sale of shares). He indicated solutions which, in his view, provided insufficient protection of creditors' interests in the case of a company in organisation and a sole shareholder company. The speaker also criticised the institution of the invalidity of a company.

Prof. W. Popiołek emphasised that in his opinion the idea of repealing the Commercial Code is justified, both with regard to the requirements of legislative technique and, above all, for substantial reasons. Among them he mentioned the principle of the unity of civil law, which excluded the possibility of a comprehensive codification of so-called commercial law. Prof. W. Popiołek stated that the authors of the draft were right to leave outside statutory regulation such questions as register, business name or commercial representation, since they should apply also to other kinds of entrepreneurs. Prof. W. Popiołek proposed a positive evaluation of the fact that the provisions regulating civil partnership had not been included into the statute, underlying that, in principle, this form should not be used as a legal form of the entrepreneur. He considered omitting problems of so-called concern law positive, although he suggested establishing, apart from the liability of the dominant company in holding structures, regulations envisaging the liability of members of the board of the dominant company. The author judged favourably the institution of conditional initial capital and the institution of company in organisation, and thought it desirable to introduce new types of companies: the civil partnership and the limited joint-stock company. Prof. W. Popiołek expressed the opinion that personal companies should not be granted legal personality.

Dr. A. Wisniewski stated that the draft should be considered as an important step in legislative works, and described it as a good basis for further work on the uniformisation of conceptions and an adequate regulation of relationships among subjects in the area of economic law. The author presented four possible conceptions of amending provisions of the Commercial Code. While discussing the question whether it was purposeful to reinstate the duality of private law, he observed that if commercial law was to lose its autonomy, it was doubtful whether the term "commercial law" should still be used, and suggested applying in this context the term "law of economic subjects". Dr. A. Wisniewski went on to describe as a certain inconsistency of the draft the fact that the basic regulation of the relationship between commercial personal companies and civil partnership was left, traditionally, within the area of the regulation of registered partnership, since the limit of the "greater size of the undertaking" is a very general term and as such may be applied to limited partnership, limited joint-stock company or partners' company. In his opinion, it was correct for the authors of the draft to refrain from granting legal personality to personal companies. The speaker also gave a positive evaluation of the institution of company in organisation, pointing out that this solution, adopted in relation to the limited liability company, should be extended so as to include the joint-stock company. He indicated certain inconsistencies in the draft as regards the invalidity of a company, and suggested preserving the invalidity of the deed of the company formation as the grounds for dissolving the company.

During the discussion, Prof. W. Katner considered questions concerning, among other things, the definition of an entrepreneur, the notion of economic activity, and the commercial register. Informing about the results of a review of Polish legislation in the field of the legal regulation of the activity of small and medium-sized enterprises conducted within the framework of negotiations with EU Member States, he pointed out, among other things, the necessity of repealing the Act on Companies with Foreign Shareholdings. Prof. G. Domański, recognized the novelty of certain solutions of the draft, and accentuated the necessity of harmonising the dispositions of the draft with the new tax system. He pointed out that, in practice, many of the barriers in applying the provisions of commercial law result from the existing tax law in force, which frequently denies basic constructions of civil law. He also expressed the opinion that the draft did not take account certain amendments to the Act on Public Trade in Securities. Prof. M. Pniak-Niedzielska reflected on the possible repercussions of adopting the Act on Commercial Companies in relation to other statutes, where the only link between them would be the term “entrepreneur”. She warned against the danger of creating a particular law of economic subjects, which is merely an annex to the Civil Code. Dr. A. Kidyba was of the opinion that the draft provided insufficient regulation as regards personal companies. He went on to state that reducing the role of a limited partner in limited partnership to a passive one was a rather controversial solution and, as a consequence, would lead to an impoverishment of the structure of such a partnership. Dr. A. Jakubecki underlined the need to provide a regulation, by a general act, of employees’ participation in supervisory and management bodies. Rejecting the conception of company in organisation, he questioned the purposefulness of adopting it in the Polish legal system, and asked whether it was necessary to treat company “in organisation” as a subject. Dr. M. Romanowski stressed that the preparation of such a draft should take into consideration the capital market, and indicated the danger of creating two legal regimes regulating the questions of the capital market provisions of the draft in question and those of the Act on Public Trade in Securities.

In the second part of the conference, the authors of the draft of the Act - Law of Commercial Companies responded to observations and suggestions presented in the reviews and in the course of the discussion.

Prof. S. Sołtysiński underlined that none of the reviews and opinions presented in the course of the discussion questioned the general direction of the solutions provided for in the draft, and that concrete suggestions were made. He went on to present the arguments which influenced the authors’ choice of the conception of the regulation of matters concerning commercial companies. Furthermore, the author declared that recreating a modernised Commercial Code should not be attempted in the name of the unity of civil law. Prof. S. Sołtysiński said that due to the legal nature of personal companies there was no need to introduce the institution of company in organisation, nor was it necessary to grant it legal personality. Prof. A. Szajkowski indicated difficulties resulting from the obligation to adjust Polish law to the requirements set in EU directives concerning company law; in particular, he discussed the question of the invalidity of a company, which was raised in reviews and during the discussion. Next, he pointed out the importance of the legal environment for the law on the system of commercial companies, stating, at the same time, that a choice was to provide a general regulation of the model of company law. Responding to remarks concerning specific regulations, Prof. A. Szajkowski discussed, among others, the question of company in organisation. Confirming the existence of a basic link between company law and tax law, Dr. A. Szumański emphasised the importance of synchronising systemic provisions with provisions relating to taxation. As for the construction of the limited joint-stock company, he stressed that the intention of the authors of the draft, which envisaged the personal nature of this kind of company, was to attach more importance to the position of a complementary, who has the right to issue a share, providing thereby additional capital for the company. Dr. A. Szumański raised also the question of concern law, which the draft regulated only to such an extent so as to avoid violating the basic systemic mechanisms of the law of capital companies, including the fundamental principle that a shareholder of a capital company is not personally liable for the company's obligations.

Summarising the discussion, Prof. Z. Radwański addressed the question of the purposefulness of placing the regulation of commercial companies in a separate statute instead of provisions of the Commercial Code. Emphasising that the conception of a separate codification is not developed and implemented in European countries, the speaker indicated unified comprehensive statutory regulations exemplified by the Swiss Code of Obligations, the Italian Civil Code, the Dutch codification and the new Russian code of 1994. Prof. Z. Radwański rejected the idea of creating different conceptions, based on the duality of private law, as unjustifiable. He declared that, from the pragmatic point of view, this proposal was relevant and rationally justified, although the autonomy of commercial law should not be questioned, either in a didactic or interpretative sense. There are sufficient grounds for treating commercial law as a separate domain of legal sciences.

Closing the conference, Prof. Z. Radwański declared that the materials from the conference will be carefully examined and used, and that new material would be sought. He informed that the authors of the draft will also approach German specialists for an analysis of the draft from the point of view of the conformity of its solutions to the EU law.

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