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LAW ON PRIVATIZATION OF STATE-OWNED ENTERPRISES IN POLAND

Jerzy Rajski*

I

Privatization of a post-communist State economy because of its unprecedented scope and nature requires the establishment of a proper legal and organizational framework. A legal framework has been established in Poland by a series of Acts passed by the Parliament in 1990. They comprise:

a) the Privatization of State-Owned Enterprises Act of 13 July, 1990 (hereinafter "Privatization Act")¹,

b) the Act of 9 November, 1990 on the Extension of Operation of the Privatization of State-Owned Enterprises Act (hereinafter "Privatization Extension Act")²,

c) the Act of 13 July, 1990 on the Establishment of the Office of the Minister for Ownership Transformation (hereinafter "Minister of Ownership Transformation Act")³,

These Acts have been adopted after long parliamentary debates during which deeply rooted political, economic and social controversies came out into the open. Powerful social-reformists groups pressed for a workers' participation in ownership oriented law. They represented workers' claimable attitudes supported by various pro-social (socialist) ideologies.

The government's draft although different from radical promarketeers programme was characterized by a pluralistic towards privatization of the State-owned enterprises (SOEs) attitude, permitting various privatization ways and methods.

Finally, a compromise solution providing for a State controlled privatization concept admitting various methods of its implementation and taking into consideration SOE's employees' interests was agreed.

II

The implementation of privatization of 8,000 SOEs has required the esta-

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¹ *Dziennik Ustaw (Journal of Laws — J. of L.)*, No. 51, item 298.

² *J. of L.*, No. 85, item 498.

³ *J. of L.*, No. 51, item 299.

again some political controversies had to be resolved (Parliament's versus government's directed privatization). Finally, a repartition of tasks between the Parliament and the government was agreed.

The Sejm establishes annually the fundamental directions of privatization operations and determines the distribution of revenues collected therefrom. Its decision to that effect is to be taken, however, in a form of resolution undertaken on the motion of the Council of Ministers (Art. 2 p. 1 of the Privatization Act). Thus the government's responsibility is to prepare appropriate proposals and justify their merits. The Sejm supervises government's privatization activity. A special permanent Sejm's commission (Commission on Ownership Transformation) has been instituted to that effect.

The office of the Minister for Ownership Transformation has been established. The Minister shall in particular:

- 1) prepare guidelines on State policy on privatization of the SOEs;
- 2) prepare, in collaboration with the Minister for International Economic Cooperation, guidelines on State policy on capital cooperation with foreign investors;
- 3) make analysis of ownership changes;
- 4) cooperate with trade unions, associations, chambers of commerce and other civic (social) organizations as well as with regional public administration bodies and local government in the field of formation and development of private enterprises;
- 5) initiate personnel training and improvement in the fields of privatization activity, capital markets and development of private enterprises and dissemination of experience and information in these fields;
- 6) carry out tasks specified in the Privatization Act as well as those arising out of other provisions of law (Art. 2 p. 1 of the Minister for Ownership Transformation Act).

The Council of Ministers has determined by way of a regulation of 14 November, 1990⁴ the detailed scope of operation of the Minister. The Council of Ministers has also issued the statute of the Ministry for Ownership Transformation which envisage, among other things, the establishment of regional offices of the Ministry.

A special Ownership Transformation Council has been created as an advisory body of the President of the Council of Ministers on matters concerning the privatization of the SOEs. The Council is composed of the President, a Vice-President and seven members appointed by the Prime Minister after consulting the Parliamentary Ownership Transformations Commission.

III

The Privatization Act provides for two main methods of privatization of the SOEs. The first one consists in transforming a SOE into a commercial company (limited liability company or joint stock company) in order to sell its shares to third persons. The second one provides for a liquidation of a SOE in

⁴ J. of L., No. 82, item 476.

order to sell its assets to third persons, to contribute these assets to the capital of a company or to offer them for use against payment.

The Privatization Act does not concern ownership changes effectuated by the existing SOEs in the scope of the rights to dispose their assets. Such acts of disposition e.g. sale of assets or assets contributions to the capital of a company are subject to the provisions of the State Enterprises Act of 25 September, 1981⁵ (with subsequent amendments — hereinafter SOEs Act). The Privatization Act does not concern the SOEs which are not subject to the SOEs Act, namely Polish State Railways, Polish Airports, Polish Airlines LOT, State-owned banks and State forest enterprises.

Privatization of the first three of the above SOEs which were created by an Act of Parliament, requires also an Act of Parliament. Such an act was passed in respect of Polish Airlines LOT on June 1991.

IV

A SOE may be transformed either into a joint stock company or a limited liability company. The transformation is being made on a case by case basis on the ground of a decision taken by the Minister for Ownership Transformation. The procedure may be initiated either by the SOE itself (acting through its bodies) or by the founding body (the competent minister or the local government). According to Art. 5 of the Privatization Act the Minister for Ownership Transformation may transform a SOE into a commercial company provided that:

1) the joint application of the director of the SOE and the employee's council is submitted after obtaining the opinion of the general assembly of the employees (or their delegates) as well as the opinion of its founding body:

2) the application of the founding body is submitted with the consent of the director of the SOE and the employees council after obtaining the opinion of the general assembly of the employees (or their delegates).

The initiation of the privatization process of the SOEs listed in the Regulation of the Council of Ministers of 29 October, 1991 concerning the determination of the SOEs of particular importance for the national economy the privatisation of which requires the consent of the Council of Ministers⁶ may be started only after having obtained such consent.

The Minister for Ownership Transformation examines every case on its own merits. He may, however, refuse the transformation of a SOE into a commercial company only because of its economic or financial situation or because of an important interest of the State (Art. 5 p. 3 of the Privatization Act).

The refusal must be made known within three months from the date of submission of the request and, apart from the grounds, include a list of conditions upon whose fulfilment the transformation of the SOE will be possible or the time-period in which the issue of transformation may be reconsidered. The

⁵ Unified text in J. of L. 1987, No. 35, item 201. Further amendments in J. of L. 1989, No. 10, item 57 and No. 20, item 107; 1990, No. 17, item 99 and No. 51, item 298; 1991, No. 2, item 6.

⁶ J. of L., No. 99, item 441.

body which presented the application is granted the right to file an objection to the refusal according to the procedure provided for by Art. 61 of the SOEs Act.

The Privatization Act has also granted the Prime Minister the right to decide on the transformation of a SOE on his own initiative i.e. without or even against the will of the SOEs bodies or their founding bodies. His decision to that effect has to be made upon the request of the Minister for Ownership Transformation (Art. 6 p. 1 of the Privatization Act) after having obtained the opinion of the Ownership Transformation Council (Art. 5 p. 2.2 of the Minister for Ownership Transformation Act). The Minister for Ownership Transformation before submitting a request to the Prime Minister should consult the director, employees council and the founding body of the SOE he is seeking to transform. If no such opinion is received within one month, this is deemed as having no objective (Art. 6 p. 2 of the Privatization Act).

V

The transformation of a SOE leads to the establishment of a commercial company of which the State Treasury is the sole shareholder. The company acquires juridical personality at the moment of entry to the Commercial Register. In the same moment the transformed SOE is automatically deleted from the Register of the SOEs (Art. 12 p. 2 of the Privatization Act). The State Treasury Company established by transformation of a SOE is submitted to the proper rules of the Commercial Code of 1933 unless the Privatization Act provides otherwise (Art. 7). The company as a legal successor of the transformed SOE acquires all rights and liabilities of the latter (Art. 8).

The articles of incorporation (called "statute") for joint stock companies and the founding act for limited liability companies are established by the Minister for Ownership Transformation who acts in this respect on behalf of the State Treasury (Art. 10).

The management board of the successor company is under a duty to file immediately after the establishment of the founding act the application for the entry of the company into the Commercial Register (Art. 12).

A very important modification of the Commercial Code's provisions on commercial companies has been introduced by Art. 17 of the Privatization Act which makes compulsory the establishment of a supervisory board in each company. It provides further that one-third of the members of the supervisory council are to be elected by the employees of the company. The company's articles of incorporation or founding act stipulations concerning the election of the members of the supervisory council by the employees cannot be repealed or amended while more than one half of the shares remain in the hands of the State Treasury, unless consent is given by the majority of the members of the supervisory council elected by the employees.

VI

The State Treasury company established by transformation of a SOE may cease to be a one shareholder company by alienation of its shares to third parties and/or by the increase of stated capital and its acquisition by third

parties. A proper decision to that effect is to be taken by the Minister for Ownership Transformation.

The alienation of all shares should be accomplished within two years from the date of recording of the company in the Commercial Register, unless the Council of Ministers provides for a longer period of time (Art. 19 p. 1 of the Privatization Act).

The Minister for Ownership Transformation is under a duty to order, before offering shares to third parties, an economic and financial study be prepared for the purposes of valuation of the assets of the enterprise and the need of implementation of organizational, economic and technical changes. He may resign to order such study only if the above analysis had been done before the SOEs transformation and the offering of shares of the successor company is to be done immediately after transformation (Art. 20 p. 1 and p. 2). The Minister may also order the analysis to determine the legal status of the company's assets, in particular regarding claims of third parties against company's assets (Art. 20. p. 3). The Regulation of the Minister for Ownership Transformation of 20 November, 1990 concerning conducting legal as well as economic and financial analysis of the company's enterprise, their financing and qualifications required from persons doing them ⁷ adopted on the grounds of Act. 20 p. 4 of the Privatization Act has established detailed rules concerning these issues.

Where it results from such analysis that some changes should be introduced in the enterprise concerned, the Minister may subject offering of the shares of the company to third persons upon implementation of these changes (Art. 21) The Minister may with the consent of the Minister of Finance and acting on behalf of the State Treasury, prior to the alienation of the shares to third parties, assume without recompensation part or all of the debts of the company. He should announce his intention to assume company's debts in the manner determined for announcements concerning company's activities, calling on the creditors to bring forth their possible objections within at least two months from the announcement date. Creditors, who in the designated time do not agree to the assumption of their debts, must be satisfied or otherwise secured prior to the assumption.

The decision on the assumption of the debts of the company must be announced by the Minister for Ownership Transformation in the manner required for company announcements (Art. 22 p. 3).

The State Treasury's shares should be sold in one of the following ways:

- 1) through an auction type mechanism,
- 2) through a public offer,
- 3) through negotiations entered into on the grounds of a public invitation to negotiate.

The Council of Ministers on motion of the Minister for Ownership Transformation may, in specific cases, permit the State Treasury shares to be sold in a different manner (Art. 23).

⁷ J. of L. of 1991, No. 2, item 10.

The shares which have not been sold within three months from the lapse of the time during which they are to be offered according to Art. 19 p. 1 of the Act are to be transferred by the Minister for Ownership Transformation to a bank or another financial institution on the grounds of a contract concluded with it. The bank (or another financial institution) exercises according to the contract rights deriving from ownership of transferred shares. All revenues earned are transferred to the State Treasury (Art. 28).

The Act does not define the nature of the above contract in spite of the fact that it can not be allocated to any category of the contracts for which specific rules of reference have been provided by law (*contractus nominatus*). It may be recognized as a specific type of agency contract close to Anglo-American concept of the trust unknown to Polish law.

VII

The Privatization Act contains specific rules concerning the employees participation in the capital of privatized SOEs.

The employees of a SOE transformed into a commercial company have been granted a right to purchase up to 20 per cent of the total amount of shares held by the State Treasury on preferential terms retaining the right to acquire additional shares according to general terms (Art. 24 p. 1). The preferences consist in a purchase of shares “on a fifty percent of discount compared to the prices of non-preferential transfer offered to other natural persons who are Polish citizens on the first day of offering” (Art. 24 p. 4). The price may not be changed within a period of one year from the date shares have been offered to them i.e. the period of time within which they have to exercise their rights to acquire shares on preferential terms (Art. 24 p. 3).

The total amount of the discount given to the employees may not, however, exceed the average 12 months salary per employee in the state economic sector during the period prior to the date of registration of the company in the commercial register multiplied by the number of employees acquiring the shares (Art. 24 p. 5).

Offering shares to the employees on preferential terms may take place no later than two months from the date the shares have been offered according to general i.e. non-preferential terms (Art. 24 p. 3).

The number of shares to be sold on preferential terms to particular groups of employees as well as the conditions and time-limits for payment for such shares are to be determined in the company’s founding acts (Art. 24 p. 6). The Minister for Ownership Transformation taking his decision to that effect should take into account the proposed scope of preferences for the employees contained in the document which should be attached to the application for the transformation of the SOE into a commercial company (Art. 5 p. 2).

The Act has also granted “the agricultural producers” a right to a preferential acquisition of shares in the privatized SOEs with which they were “permanently linked on the grounds of delivery of agricultural produce or cooperation” (Art. 24 p. 7). The discussed above rules concerning the preferential acquisition of shares to the employees are to be applied here correspondingly.

VIII

The Privatization Act has also introduced a specific concept of the so-called civic shareholding providing for a gratuitous distribution among all citizens of rights to a part of privatized State property. It has been based upon a principle according to which the so-called privatization vouchers will be distributed free of charge in equal amounts to all citizens of the Republic of Poland domiciled in the country (Art. 25 p. 2).

The decision on the issue and value of the privatization vouchers is to be taken by the Sejm on the motion of the Council of Ministers.

The vouchers might be used only as payment for:

- 1) acquisition of shares of companies established by transformation of the SOEs;
- 2) acquisition of rights in financial funds (mutual funds) holding shares of companies established by the transformation of the SOEs;
- 3) acquisition of all or (integrated) parts of assets of the liquidated SOEs (Art. 25 p. 1).

A different concept of mass privatisation is, however, examined by the Parliament. The draft Act on Mass Privatisation and National Investment Funds provides for the establishment of the National Investment Funds created by the State Treasury in the form of joint stock companies. The State Treasury will make non-monetary contributions to these Funds in the form of shares of joint stock companies and limited liability companies (the programme will cover some 400 state-owned companies). The purpose of the Funds is to increase the value of their assets, in particular by enhancing the value of shares of companies held by the Funds. All adult Polish citizens who are permanent residents of Poland will be entitled to receive an equal number of share certificates per person of the Funds. The share certificates will be subsequently exchanged for the shares of the Funds. The Act provides also for possibility of issuing privatization vouchers distributed against payments on credit terms. A decision to that effect should be taken by the Council of Ministers by way of a regulation (Art. 26).

IX

The Privatization Act provides also for de-statization of the property by way of liquidation for some SOEs in order to privatize their assets. The liquidation has to be decided by the founding body of a SOE after having obtained the consent of the Minister of Ownership Transformation. The decision of the founding body may be taken on its own initiative or upon the request of the employees council of the SOE.

The director and the employees council of the SOE to be liquidated may challenge the liquidation decision in accordance with the procedure specified in Art. 61 of the SOEs Act (Art. 37 p. 2 and 3 of the Privatization Act).

The liquidation of a SOE may be decided for the purposes of:

- 1) sale of the whole enterprise or integrated parts of its assets;⁸

⁸ An integrated parts of assets of a SOE in the sense of the Privatization Act means "an aggregate of material and non-material components (tangible and intangible assets) which could constitute a separate enterprise, specifically a plant, a store or a service shop" (Art. 4 p. 3).

- 2) contributing the enterprises assets as a whole or integrated parts of its assets to a commercial company;
- 3) transfer of the enterprise assets as a whole or integrated parts of these assets for a specified period of time for use against payment (Art. 33 p. 1 of the Privatization Act).

The sale of the enterprise of a liquidated SOE as a whole or integrated parts of its assets is submitted to the specific rules of the Privatization Act (see Arts. 41 and 43) as well as to the appropriate provisions of the Civil Code. Thus it should be made in open and transparent procedure (competitive bidding, public offering, public invitation to negotiate). In specific circumstances the Council of Ministers may on the motion of the Minister for Ownership Transformation permit another way of the above sale. The liquidated SOEs assets may be used as a State Treasury's contribution in kind to the capital of a commercial company either an existing one or to be created (e.g. domestic or foreign capital contributions).

The State Treasury may also establish in this way its own company. The foundation act of a company of which the State Treasury is a sole shareholder has to be established by the Minister for Ownership Transformation (Art. 41). The foundation act of a company established with other founding partners is to be established by the founding body of the liquidated SOE jointly with other partners. The liquidation of a SOE in order to transfer its assets for use against payment to persons willing to carry own business on their own account may be decided only on the application of the employees council adopted after obtaining the opinion of the general assembly of the employees (or their delegates). The Act grants to the employees a priority to obtain a right of use of the enterprise's assets provided they create either a limited liability company or joint stock company to that effect joined by the majority of the employees. The shareholders of the company should be exclusively natural persons unless the Minister for Ownership Transformation decides otherwise. The amount of the share capital of the company should be lower than 20 per cent of the joint value of the founding fund and the fund of the liquidated enterprise (Art. 39 p.1).

The right to use the liquidated SOEs assets may be transferred to another company only when the employees have not succeeded in constituting their own company within two months from the date of the employees council application for liquidation of the SOE or upon the general assembly of the employees (or their delegates) prior approval (Art. 38 p. 2).

The transfer of assets for use against payment is made on the grounds of a contract concluded by the founding body in the name of the State Treasury (Art. 39 p. 1). The parties are free to choose type of contract which suits the best their needs. They may conclude either one of the types of contracts provided for by the Civil Code (e.g. lease or tenancy) or create a specific one which can not be allocated to any category of named contracts.

The contract sets forth the terms and conditions under which the leasee may operate the assets. The order of the Minister of Finance of 10 November, 1990⁹ contains detailed rules concerning the dues for the use of State Treasury assets. Art. 39 p. 2 of the Act states expressly that the parties may stipulate in

⁹ *Monitor Polski*, No. 43, item 333.

the contract that after a specified period of time "the user has the right to purchase the assets which he has been using." In determining the price, the value of hitherto paid prestations for use of assets against payment is to be taken into account. This solution has been based upon a concept of a leasing contract which has not been regulated in Polish law.

X

According to Art. 45 p. 1 of the Privatization Act, its provisions are to be applied correspondingly to the privatization of the communal enterprises. The competences provided for by the Act to the Minister for Ownership Transformation and founding body are exercised in these cases by the local administration of commune or the association of communes (Art. 45 p. 2). Taking into consideration the fact that the local administration is lacking both expertise and competent personnel in this domain, the Act states that it may transfer the conduct of all activities connected with the privatization of a communal enterprise to the Minister for Ownership Transformation.

This should be made on the grounds of an agreement concluded with the Minister. The conclusion of such agreement requires a resolution of the Communal Council or the Council of Association of Communes (Art. 45 p. 3).

XI

The adoption of the law on privatization of State-owned enterprises is an important step towards the progressive development of market economy in Poland. Thus a legal framework has been established which enables to develop a privatization policy adjusted to political, economic and social circumstances. The task of privatization of the economy nationalized to the extreme extent is with no precedent in the contemporary history. Its progressive realisation has started even though the necessary market conditions have not yet been created. On 16 April, 1991, the Warsaw Stock Exchange (officially opened on 2 July, 1991) began trading in the shares of the first five privatized companies.

The Act on Public Trading in Securities and Trust Funds was adopted on 22 March 1991.

The privatization law is being verified in practice which will certainly contribute to its further improvement.

LEGAL ELEMENTS OF THE NEW SOCIO-ECONOMIC ORDER

Ludwik Bar*

I

What augured the new socio-economic order in Poland were the August 1980 agreements between the State authorities and the mass movement of Solidarity.

Several years later, a next step was made in this direction: at the "Round Table" conference in April 1989,¹ various social forces reached a political compromise.² There were among those forces some that were guided by the ideas of a democratic version of socialism, as well as those inspired by Christianity, the ideological achievements of Solidarity, the peasant movement and other idealogical sources and traditions.

The agreement was based on the principles of the future political system that follow from the citizens' inalienable right to live in a State that fully realizes the nation's sovereignty.

Specifically, the following principles were adopted:

- political pluralism expressed first and foremost in the right of free association in political, social and professional organizations within the democratic constitutional order;

- freedom of speech, including the creation for the variety of political forces of possibilities of a genuine access to all kinds of the media;

- a democratic procedure of appointment of all representations of State authority where it is nobody but the voters who determine who should be in power;

- independence of courts and their statutory powers to review the rule of law and the public order;

- local government enjoying full rights and appointed in free elections.³

The new economic order is to be achieved basing on the principles adopted

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¹ *Rzeczpospolita* of April 7, 1989; "Round Table" Agreements. "Round Table" Agreements, the Varmia and Mazury Region of Solidarity, 1989: complete materials.

² The "Round Table" conference was held between: Solidarity Opposition on the one hand and Coalition Government on the other hand on February 5—April 5, 1989.

³ "Round Table" Agreements, p. 5.

during the “Round Table” conference by means of transformations that are to consist primarily in the following:⁴

- development of workers’ self-management and participation;
- free development of the structure of ownership;
- development of the market and competition;
- liquidation of the remains of the system of order and distribution and limitation of the central planning to the shaping of State economic policy implemented through economic instruments;
- uniform financial policy with respect to firms;
- subjection of the mechanisms of selection of managers to the criteria of professional competence.”

II

The shaping of a new socio-economic order requires radical changes of the legal order. New legal institutions and solutions have to be created which would contribute to the development of democracy and the introduction of market economy. The former statutory regulations might prove useful but to a slight extent, and that only after the necessary changes are introduced in them.

Thus law is an important element in the shaping of a new socio-economic order. Statutes define the new and equal political and economic subjects, their respective rights and duties, the principles of their functioning, entering into legal relations and responsibility, and also the principles and means of social control. The scope of statutory regulation of this sphere is very broad. The nature and importance of the statutory changes is manifested by examples that are worthy of attention. It would take a book to discuss the whole of the new statutory regulations.

Elements of the new socio-economic order are contained first and foremost in the statutory regulations changing the name of the State, establishing the Senate as a novel institution, establishing the office of President, changing the situation of courts and the Public Prosecutor’s Office, and establishing local government.

THE NAME OF STATE, SENATE, PRESIDENT, COURTS

The name of the Polish State was changed: the former name of Republic of Poland was restored, and the recently used one — Polish People’s Republic — abolished. The Constitution states that Republic of Poland is a State ruled by law which realizes the principles of social justice, and the supreme authority lies with the Nation. Observance of laws is the basic duty of all State agencies, and all agencies of State authority and administration base on the legal provisions in their activity. Political parties group citizens on basis of voluntary membership and equality with the aim to influence the shaping of State policy through democratic methods.

⁴ *Ibidem*, p. 24.

The Senate was established in 1989 by way of constitutional amendment as the other house of parliament beside the Sejm. It is composed of 100 Senators elected for the term of the Sejm. The Senate appoints its Speaker and Deputy Speakers from among its composition. Its role follows from the following powers it exercises: the Senate has the right of legislative initiative; the Senate examines statutes passed by the Sejm and may submit motions as to amendment or rejection of a statute within one month after the handing over of that statute by the Sejm; the Sejm refuses the Senate's motions by a majority of two-thirds of votes with at least a half of all deputies present; the Senate is part of the National Assembly which elects President of the Republic.

The importance of the institution of Senate consists not only in its competences but also in the fact that it amounts to enhancement of the participation of representatives of society in control of the Sejm's legislative function.

The institution of President of the Republic of Poland was established by way of constitutional amendment in 1989. The President is the supreme representative of Polish State in both internal and international relations. Abolished at the same time was the Council of State, a collective body formerly acting as the head of state. The President is appointed for a term of six years by the National Assembly composed of the Sejm and the Senate. Eligible are all citizens who enjoy full electoral rights.

The President exercises his powers and performs his duties on the grounds and within the framework of the Constitution and statutes. Should he infringe any of those acts, he may be brought before the Constitutional Tribunal by force of a resolution of the National Assembly, that is a resolution taken jointly by the Sejm and the Senate by the majority of at least two-thirds of votes of the Assembly's total membership. The Constitution provides for cases of the office of President becoming vacant before the proper time.

The President's rights and duties have been defined in constitutional provisions. In particular, the President: ordains elections to the Sejm, the Senate, and local government; appoints and dismisses representatives of State abroad; accredits and dismisses foreign diplomatic representatives; commands the Armed Forces of Republic of Poland; presides over the Committee for National Defence; moves to the Sejm for appointment and dismissal of Prime Minister and President of the National Bank of Poland; exercises the right to grant pardon; ratifies and terminates international agreements; has the powers to impose martial law and to proclaim the state of emergency (the conditions and legal effects of these latter decisions being specified in statutes).

The rule of law is guaranteed by the functioning of the following institutions: the Constitutional Tribunal; the Tribunal of State; the Supreme Court and common as well as special courts; the Public Prosecutor's Office; and Ombudsman who upholds civil rights and liberties as defined in the Constitution and other legal provisions.

Justice is administered by the Supreme Court and common as well as special courts. The courts guard the political system of Republic of Poland; protect the achievements of Polish nation, the rule of law, social property and civil rights; and punish offenders. Court cases are examined and settled with the participation of appointed lay judges.

The judges are appointed by the President on motion of the National

Council of the Judiciary; they are irremovable with the exception of cases specified in statutes. The judges are independent and amenable to the statutes only. The First President of the Supreme Court is appointed from among judges of that Court, as well as recalled, by the Sejm on motion of the President.

It has to be stressed that the Supreme Court is the chief judicial agency which supervises the activity of all the other courts as far as their decisions are concerned. The Constitution allows of no other State agency to supervise the judicial decisions.

The Public Prosecutor's Office⁵ guards the rule of law and watches over the prosecution of offenders. It is subordinated to the Minister of Justice who is also Public Prosecutor General. Before, the Office was a separate state agency independent of the Minister of Justice.

Attached to the Public Prosecutor General is the Council of Prosecutors composed of representatives appointed by the provincial assemblies of prosecutors, five representatives appointed by the Ministry of Justice, and five prosecutors appointed by the Prosecutor General. The Council's competences include among others: examination of draft instructions that point out the basic directions of activity of the prosecutor's office; appraisal of the state and development of the staff of prosecutors; periodical appraisal of the fulfilment of tasks by the public prosecutor's office; definition of steps aimed at improvement of professional qualifications. Attached to provincial public prosecutor's offices are provincial assemblies of prosecutors and councils of provincial offices; their tasks have been specified by statutes.

LOCAL GOVERNMENT

Local government has been recognized as a basic principle of the system. The Constitution guarantees its participation in the exercise of authority⁶ and freedom of its other forms of activity. The statute that deals first and foremost with the implementation of that principle is Act of March 8, 1990 on local government⁷ and Act of March 8, 1990: electoral regulations in elections to commune authorities.⁸ The Act provides that residents of a commune form a self-governed community by force of law (Art. 1). A commune has legal personality; its independence is protected by law (Art. 2). A commune performs public tasks in its own name and on its own responsibility. The competences and tasks of a commune have been defined by provisions of Art. 6 and 7 of the Act. The Act provides that competences of a commune include all public matters of local importance that are not statutorily reserved to other subjects. A commune's own tasks mentioned in the Act include among other things

⁵ Competences of the Public Prosecutor's Office are regulated by the Act of March 22, 1990 on amending Act on the Public Prosecutor's Office of Polish People's Republic, the Code of Procedure in cases of transgressions, and the Act on the Supreme Court (*Journal of Laws*, No. 20, item 121).

⁶ Act of March 8, 1990: amendment of the Constitution of Republic of Poland (J. of L., No. 16, item 94).

⁷ J. of L., No. 16, item 95.

⁸ J. of L., No. 16, item 96.

matters related to: land development and administration and environment protection; communal roads, bridges, squares and organization of traffic; water-works and water supply; sewage system, removal and treatment; clean land and preservation of sanitary facilities; supply of electric and heat energy; local public transport; health protection and social welfare; communal building; education and culture; markets; communal lawns and parks; cemeteries; public order and fire-control. Obviously, the above list is not complete. Besides, it has to be mentioned that statutes may impose on a commune the duty to perform tasks commissioned by the central administration.

Authority has been vested in population of the commune who decide in a general voting (elections to the commune council and referendum) or through commune agencies. The agency to lay down regulations and to supervise on the commune level is the commune council (Art. 15); a commune's executive agency is its board (Art. 26).

The commune council is elected according to the principles specified in provisions of the electoral regulations in elections to commune councils. The elections are general, equal and direct; all Polish citizens who are 18 years old on the day of the elections have the right to elect members of the council. The elections are also secret; their legal protection is performed by courts.

The commune council appoints its chairman and one to three vice-chairmen from among its membership; the voting is secret.

The executive agency appointed by the commune council is the board composed of the head of commune or major of a town as chairman, his deputies and members of the board.

Competences of the commune council include all the matters within the commune's range of activities; its exclusive competences are matters specified by the provision of Art. 18 section 2 of the Act. They include among other things: adoption of the commune's charter; appointment and recall of the board; passing of the budget, economic and land development plans; resolving on takes and fees within statutory competences; resolving on definite matters concerning the commune's property; resolving on taking over the tasks commissioned by the central administration. The board implements the council's resolutions and performs the tasks specified by legal provisions. The board's tasks include among other things (Art. 30) preparation of draft resolutions of the council; administration of communal property; implementation of the budget; performance of the tasks commissioned by central administration.

The Act of 1990 restored communal property to rural and urban communes. The legal institution of communal property had been abolished in 1950, the property being included in the bulk of national property. Communes had then lost their legal personality and subjectivity as local governments. The new statutory regulation states (Art. 43) that communal property includes the ownership and other property rights of individual communes and communal unions as well as the property of other legal persons, enterprises included. The act defines the principles of communal financial economy.

Communal unions and agreements have been provided for in the Act (Art. Art. 64—75). According to those provisions, communes may form communal unions jointly to perform the public tasks of a commune. Instead, the duty to form an union may only be imposed by a statute.

Local government was established in communes only, and is absent in districts and voivodships. Yet the Act introduced (in its Art. 76 — 83) the institution of the so-called voivodship council: all communes of a voivodship are to appoint their joint representation in the form of a self-government council. Delegates to the councils are appointed by commune councils.

The voivodship council performs its statutory tasks (Art. 77) which include among other things: appraisal of the activities of communes; mediation in disputes between communes; appraisal of the activities of central administration in the province; representation of the interests of communes before the central administration. Attached to voivodship councils are appellate boards which decide in matters of appeals against individual administrative decisions taken by the head of commune or major in the sphere of the communes' own tasks.

Communal activities are supervised by the Prime Minister and voivode (Art. 86) as to their legality; in commissioned matters, the supervision includes also examination of expedience, honesty and economic soundness. Also worth mentioning are the following powers of the supervisory agency: deciding about invalidity of an illegal resolution of a commune agency (Art. 91); suspending the execution of a resolution of that agency due to its faultiness and transmitting the case back for re-examination; passing of a substitute enactment (Art. 95). In case a commune council's repeated infringement of the Constitution or statutes, the Sejm may resolve on motion of the Prime Minister to dissolve that council. The Act also provides for the Prime Minister's right to suspend the commune agencies and to appoint a commissary. The decision of the supervisory agency can be appealed against to an administrative court (Art. 98) in cases of its illegality.

III

The economic system has been changed radically and based on a new statutory regulation. The Constitution in its Art. 6 guarantees freedom of the economic activity irrespective of the form of ownership; that freedom may only be limited by a statute. Republic of Poland protects the right of inheritance and guarantees complete protection of personal property. Expropriation is only admissible for public aims and against just compensation. The former constitutional provisions were quashed which stated among other things that: the socio-economic system "is that of the socialist economy, based on socialized means of production and socialist production relations;" constantly developing is "the country's economic and cultural life based on the national socio-economic plan;" the national property "is subject to special care and protection of state and all citizens;" state "develops plans to consolidate the economic union of town and village basing on the brotherhood and cooperation of workers and peasants."

CENTRAL PLANNING OFFICE

The constitutional principles of national economy have been changed by a succession of statutes. What has to be mentioned first is the liquidation of

the State Planning Commission by force of the Act of December 23, 1989 on establishment of the Central Planning Office⁹ which was made different in nature from the former Commission. Its competences (Art. 2) are as follows: development of draft long-term plans, the national socio-economic plans and central yearly plans as well as plans for land development, and also preparation of analyses of the fulfilment of those plans.

The Central Planning Office¹⁰ is headed by Minister — Head of the Office who is appointed by the Sejm. He cooperates with the chief and central state administrative agencies in the sphere of development of draft plans; cooperates with the Minister of Finance and President of the National Bank of Poland; organizes the public consultations concerning the plans of land development as required by other provisions.

The Central Planning Office is a staff and not administrative agency of the Council of Ministers.

FREEDOM OF ECONOMIC ACTIVITY

The freedom of economic activity was guaranteed by the Act of December 23, 1988 on economic activity¹¹ which states (Art. 1) that the taking up and pursuit of economic activity is free and permitted to all and all enjoy equal rights in this respect provided they meet the conditions defined by legal provisions. As interpreted by the act, economic activity includes manufacturing, building, trade and services which activities the subject performs for profit and independently. Further, the subject involved in economic activity, that is the economic subject, can be any natural or legal person, and also an organizational unit with no legal personality but legally formed, provided its scope of activity includes the pursuit of economic activity.

The economic subject shall:

- satisfy legally established conditions for pursuing economic activity as protection against endangers for the human health and life are concerned, as well as other conditions provided by the law;

- ensure that works, occupations and businesses performed in the framework of the pursued economic activity were performed by duly qualified persons, provided such qualifications are legally required.

The economic subjects may:

- accomplish in the framework of the pursued economic activity any actions or operations not forbidden by the law;

- employ the unlimited number of employees without intermediary of the services of employment;

- associate on a voluntary basis in the organizations of the economic subjects.

The taking up of economic activity by natural persons and organizational units possessing no legal status requires reporting to the record of economic

⁹ J. of L., No. 41, item 327.

¹⁰ K. Pawłowicz, "Centralny Urząd Planowania" [The Central Planning Office], *Państwo i Prawo*, 1989, No. 5.

¹¹ J. of L., No. 41, item 324, No. 107, item 460.

activities held by the territorial state administration body; the body enters the file into the registry of economic activities. The registering body may take a decision (Art. 17) refusing to enter the file into the registry in case of the activity not covered by the provisions of the law. Certain kinds of economic activities are not subject to the duty of reporting and enregistering: these are incidental earnings, as well as production in the agriculture, gardening and pomiculture, economic activity taken up by legal persons or requiring licences. The law determines (Art. 11) the types of economic activity that requires a licence; this requirement concerns, among other things, exploitation and exploration of useful minerals that fall under mining law; processing of and trade in precious metals and stones; manufacturing of and trade in explosives, arms and ammunition; manufacturing of medical drugs, narcotics and psychotropic drugs as well as poisons; running of drugstores; manufacturing of tobacco products. Licences are granted, refused and withdrawn by a chief or central state administrative agency.

The enterprises on which the economic and social prosperity is based have been given legal grounds for activity towards market economy. This concerns state, cooperative and private firms.

ENTERPRISES AND COMPANIES

New legal grounds of activity of state enterprises were specified in provisions of the Act of March 9, 1990 on amending the Act on state enterprises¹². A state enterprise was defined as an independent and self-financing economic subject with legal personality. Provisions were also introduced to facilitate the transformation of such enterprises through fusion, division and liquidation, formation of commercial companies and entering into partnership. A new institution of "correctional proceedings" was also introduced (Art. Art. 63 — 72). It can be instituted by the founding agency in consultation with the Ministry of Finance and the employees' council if a firm fails to pay the dividend. A correctional commission is appointed which takes over the employees' council competences with definite exceptions. The commission recalls or suspends the firm's managing director, and appoints an interim manager. It develops a plan of improvement of the firm's situation. Having found the draft programme or its further implementation insufficient for the actual improvement, the correctional commission may move for the firm's liquidation.

The state enterprises that fall under the above valid act will be commercialized basing on the principles defined in separate statutory provisions. Transformation of the property relation towards privatization is planned¹³.

Foreign subjects in Polish firms are an important element in the shaping of a new economic system. The basic legal regulation in that sphere is provided by

¹² J. of L., No. 17, item 98.

¹³ The problem of transformation of the property relations in state enterprises has been discussed in numerous publications. See e.g.: J. Mujżel, "Alternatywa" [The Option], *Życie Gospodarcze*, 1990, No. 7; T. Jeziorański, "Trudne pytania — wywiad z prof. J. Mujżelem" [Difficult Questions — Interview with Prof. J. Mujżel], *Życie Gospodarcze*, 1990, No. 12; and T. Jeziorański, "Tęsknota za pluralizmem — wywiad z posłem R. Bugajem" [Missing Pluralism — Interview with R. Bugaj], M. P. J., *Życie Gospodarcze*, 1990, No. 8.

the Act of December 23, 1989 on economic activity with the participation of foreign subjects¹⁴. The act specifies the conditions of involvement and principles of pursuit of economic activity by those subjects. It can consist in manufacturing, building trade and services; it is pursued for profit. The economic activity can have the shape of a limited liability and a joint stock company of Polish and foreign subjects or of foreign subjects only. Provisions of Polish law, the Commercial Code of 1934 in particular, apply to the newly established companies.

Persons who establish a company are free to decide about their mutual relations and the internal relations within that company; the decision is contained in the company's deed of foundation. A licence issued by President of the Foreign Investment Agency is required, the Agency being a central state administrative agency subordinated to the Prime Minister. The Act defines the types of economic activity that require a licence (Art. 5) and the conditions in which a licence cannot be issued (Art. 6). A company is subject to registration at a register court. Companies can join the Foreign Investors Chamber of Industry and Commerce and other Polish chambers of commerce.

A foreign subject's contribution to the company's capital can be monetary and non-monetary (Art. 16).

The act regulates the company's functioning, taxes and fees, employment, transfer of the rights that result from a subject's partnership, and liquidation of a company (Art. Art. 33 — 35).

The pursuit by foreign natural and legal persons of economic activity in the field of small industries is regulated by the Act of July 6, 1982¹⁵. Foreign economic subjects can pursue economic activity in their own name and on their own account, and also become partners in a company with Polish economic subjects. The economic activity in small industries consists in manufacturing of products and rendition of services, trade, exports of own products and services and imports of such products and services.

Pursuit of economic activity requires a permit issued by the local state administrative agency (Art. 5) of provincial level. If the economic activity requires a licence, the permit is issued on consultation with a competent licensing agency. A company is included in a register kept by a court.

The Act specifies the general principles of the companies' activity, crediting, distribution of profits, and leasing of state-owned real estate.

ANTI-MONOPOLY OFFICE

Monopolist practices were found detrimental to national economy and inconsistent with the principles of the new socio-economic system. The Act of February 24, 1990 on control of monopolistic practices¹⁶ which replaced a former Act of 1987 defines the principles and procedure of controlling monopolistic practices of economic subjects and their unions.

As interpreted by the Act, monopolistic practices include among others: imposition of harsh conditions of contracts which lead to unjustified profit

¹⁴ J. of L., No. 74, item 442.

¹⁵ J. of L., No. 27 of 1989, item 148.

¹⁶ J. of L., No. 14, item 88, No. 89. item 403.

of the subject that imposes them; conditioning of a contract upon acceptance or rendition by the other party of another service which is not related to the actual subject of the contract; purchase of stock or shares of companies or property of economic subjects if such purchase might result in significant impairment of competitors; combination by one and the same person of the functions of managing director, member of the board, supervisory board or audit commission in competing economic subjects at least one of which has over 10 per cent shares in the market. Other types of monopolistic practices defined in the act are agreements that provide for e.g. division of the market, establishment or reduction of the size of production, limitation of access to the market, refusal to sell or purchase goods, dishonest influencing the shaping of prices. The monopolistic practices mentioned in the Act are forbidden. The Act stipulates that the predominant economic subjects should proceed as specified in its Art. 7. Decisions as to bans and orders mentioned in the Act are issued by the Anti-Monopoly Office subordinated to the Council of Ministers. In cases also specified in the Act, such decisions can be appealed against to the Provincial Court in Warsaw.

The Act regulates the impact of the Anti-Monopoly Office on the shaping of organizational structures of economic subjects, and defines the responsibility for monopolistic practices in the shape of monetary penalties.

It has to be mentioned that proceedings in cases regulated by the Act are initiated *ex officio* or on motion of an entitled person: the economic subject whose interest has been or might be violated through a monopolistic practice. State and social supervisory agencies and social organizations that have protection of consumer interests among their statutory tasks.

Control of anti-monopolistic practices was regulated in separate statutes. What should be mentioned here is the Act of February 24, 1990 on liquidation of the Hard Coal Union and the Power Industry and Brown Coal Union¹⁷ and amendment of a number of other statutes. By force of the above statute, huge and powerful economic organizations that were monopolistic in nature were liquidated. Thus the State enterprises formerly obligatorily included in the large monopolistic economic organizations regained independence.

THE COOPERATIVE MOVEMENT AND VOLUNTARY ASSOCIATIONS

Also in the case of cooperatives, State actions took place to fight monopolistic provisions and practices. The Act of January 20, 1990 on changing the organization and activity of the cooperative movement¹⁸ provided for liquidation of cooperative unions with its entering into force. This statutory regulation removed the legal grounds of obligatory cooperative unions which used to limit the activity of cooperatives. The unions led to administrative subordination of cooperatives to the orders of the union's authorities. The unions approximated in their activity the branches of State administration with which they cooperated.

Liquidation of a cooperative union is effected by liquidators appointed by

¹⁷ J. of L., No. 14, item

¹⁸ J. of L., No. 5, item

the Minister of Finance and heads of revenue offices authorized by the Minister (Art. 2). The liquidation proceeds according to the law on cooperative societies with consideration to special legal provisions.

Plants and material elements of property, with exception of those specified in the Act (Art. 3 section 5) can become, by force of a contract negotiated with the liquidator, property of the individual cooperatives grouped in the liquidated union, other cooperatives founded by those cooperatives and cooperatives founded by the staff of a plant with the aim to continue the economic activity of that plant. A plant can be handed over against partial or full payment and also gratuitously if the purchaser also takes over the liabilities according to the general principles. Plants and material elements of the property of a liquidated cooperative union that are not taken over by cooperatives as provided for in the Act (Art. 3) are sold (Art. 4). The Act provides for the duty to organize a sale by tender and defines the right of first refusal.

The financial means that remain after the liquidation of a cooperative union are divided between cooperatives in portions decided upon by a meeting of representatives in the liquidation plan, with the exclusion of means necessary to secure the performance of obligations. Such means are taken over by the Chief Cooperative Council for the period of security.

It has to be mentioned that the act provides for establishment of the Chief Cooperative Council that can be joined by cooperatives on a voluntary basis.

Voluntary association of economic subjects is among the important elements of market economy. For this reason, the Polish legislators created the legal grounds for such association in the Act of May 30, 1989 on economic chambers¹⁹. The act provides that economic subjects involved in economic activity may form economic chambers basing on that Act and their charter. However, the right to form chambers does not concern natural persons who pursue economic activity for casual profit.

The economic chamber is an organization of economic self-government which represents the economic interests of its members in the sphere of their manufacturing, trade, building or services, particularly before State agencies.

The chamber's range of activities as provided by the Act is quite broad. The chambers:

- shape and propagate the ethics of economic activity;
- are authorized to express their opinion about draft solutions concerning the functioning of economy and can participate in the preparation of draft legal acts in that sphere;
- can appraise the implementation and functioning of legal provisions concerning the pursuit of economic activity.

The economic chamber defines its own tasks independently in its charter within its statutory competences. It has to be stressed, too, that on an economic chamber's motion or upon its consent, the Council of Ministers may, by force of an ordinance, charge that chamber with performance of definite tasks that are normally reserved by law for State administration (Art. 5 section 3).

The economic chamber can be established (Art. 7) on the initiative of at least 50 subjects involved in economic activity in the territory of that chamber,

¹⁹ J. of L, No. 35, item 195.

that is a voivodship. Forming a chamber, its founders pass its charter. A chamber acquires legal personality upon its inclusion in a register that is kept by a court. The chamber's supreme authority is the General Assembly of Members (Art. 7 section 5). The chamber's agencies are specified in its charter.

Economic chambers can voluntarily join the National Economic Chamber which represents its members' joint interests. With the aim to perform common tasks in the sphere of promotion of foreign trade, the National Economic Chamber forms the Polish Chamber of Foreign Trade which is a separate agency both functionally and organizationally (Art. 12). In particular, it can:

- organize expositions and international fairs in Poland and abroad;
- cooperate with and join international and foreign organizations as well as establish its own foreign agency on consent of Ministers of Foreign Affairs and of Foreign Economic Relations.

Should the activity of an economic chamber prove illegal or against that chamber's charter, a minister who is competent for reason of the type of that chamber's activity or a voivode who is competent territorially can urge the chamber's competent authorities to remove those faults or move to the court for application of the statutory measures: admonition of the chamber's competent authorities; quashing of the resolution of those authorities that has been found illegal or against the chamber's charter; dissolve the chamber if its activity constitutes a glaring infringement of the law or provisions of its charter.

EMPLOYEES' SELF-MANAGEMENT AND PROFESSIONAL ORGANIZATIONS

Self-management is an important institution in the new socio-economic system. What should be mentioned first is the employees' self-management, that is self-management organization of the staff of state enterprises established in 1981, and professional self-management introduced by an Act of 1989. The establishment of employees' self-management expresses the recognition of subjectivity of the staff of an economic organization as a community of employees.

In state firms, employees' self-management was introduced by the Act of September 24, 1981 on self-management organizations of the staff of State enterprises²⁰. The Act provides (Art. 1) that the employees self-management has the following competences: deciding about important matters of the firm; expressing opinion, taking initiatives and submitting motions; and supervising the firm's activity. The matters to be decided by the self-government agencies have been specified in the statutory provisions, those of Art. 10 and 24 in particular. The Act provides that the authorities of employees' self-management perform their tasks independently of state administrative agencies, social organizations, trade unions and political parties.

²⁰ J. of L., No. 24, item 123. See also: L. Bar, "Koncepcja samorządu załogi przedsiębiorstwa państwowego w ustawie z 1981 r." [The Conception of Self-management of the Staff of State Enterprises in the Act of 1981], in: *Instytucje prawne w reformowanej gospodarce* [The Legal Institutions in the Economy under Reform], Ossolineum 1989; "Podmiotowość załogi organizacji gospodarczej" [Subjectivity of the Staff of an Economic Organization], *Państwo i Prawo*, 1990, No. 2; R. Sowiński, "Charakter samorządu załogi przedsiębiorstwa jako instytucji prawnej zarządzania gospodarką" [The Nature of an Employees' Self-management Organization as a Legal Institution of Economic Management], *Państwo i Prawo*, 1987, No. 4.

The authorities of employees' self-management include the general assembly of employees and employees' council, as well as the factory employees' council in a firm that consists of many plants. Employees' and factory councils are elected in general, equal, direct and secret elections. The employees' council of a firm represents the staff's self-management. It has to be stressed that in firms with over 300 employees, the functions of general assembly are performed by a meeting of delegates.

Employees' councils of different firms can enter into agreements with one another with the aim to cooperate or undertake joint actions (Art. 35). Basing on this provision, conferences are held, clubs operate, a forum is organized and organizations emerge that represent their member employees' councils.

The Act granted to the employees' council the right to suspend definite decisions taken by the firm's managing director; to oppose a decision; to bring the matter of dispute before the arbitration commission in the firm (Art. 45) and also before the court.

The Act provides for the managing director's right to suspend a decision of the general assembly of staff or the employees' council; all disputes are resolved by the arbitration commission.

The Act of 1981 does not apply to commercialized state firms and to companies.

Professional self-management has been operating in Poland for many years now. Thus there is self-management of the Bar, of counsels, of craftsmen. Recently, the Sejm has passed the act on medical doctors' self-management²¹. What is of particular importance as regards the shaping of the new socio-economic system, though, is the professional self-management established by the Act of May 30, 1989 on professional self-management of some economic subjects²². The Act lays down the principles of formation and operation of professional self-management of persons who are economic subjects involved in economic activity in the field of trade, catering, services, transport and other types of activity. Thus the economic subjects are free to join professional self-management organizations such as the trade and services associations, transport associations and associations of other organizations of economic subjects. The act does not apply to persons who have acquired the status of craftsmen.

An association is formed on the initiative of the statutory number of at least 50 persons involved in economic activity. A meeting of members passes the association's charter. The association is included in a register kept by the court (Art. 9). Upon registration, it acquires legal personality. The association is in particular to consolidate the professional circles of its members, their ethics and dignity of the profession, and also to render cultural, educational and social services to its members; to establish and run loan and relief funds; and to represent the interests of its members before State administrative agencies (Art. 4).

²¹ Act of May 30, 1989 on medical chambers (J. of L., No. 35, item 195, and No. 20 of 1990, item 120). For discussion, see: T. Koszarowski, W. Preiss, "Ustawa o izbach lekarskich" [The Act on Medical Chambers], *Państwo i Prawo*, 1989, No. 12.

²² J. of L., No. 35, item 194.

The associations can form national representations with names defined in the charters. A national representation of a given type of associations is formed on the initiative of at least 10 associations. The national representations are in particular to assist their member associations in performance of their statutory tasks; to develop socio-professional activities; and to represent the interests of members of the association in internal and international relations.

The range of activities of the association, its tasks, authorities and the competences and procedures of those authorities, the rights and duties of its members as well as the sources of financing its statutory activities are defined in the association's charter.

ECONOMIC COURTS

Common courts are competent in economic matters. The adoption in the new socio-economic system of the principles of market economy and the grant of equal rights to all economic subjects resulted in the abolition of the State economic arbitration and the transfer of economic cases to courts. This was made by the Act of May 24, 1989 on examination of economic cases by courts²³. As interpreted by the Act, the economic cases are those resulting from civil relations between economic subjects involved in economic activity basing on the principles defined in separate provisions. Besides, the Act (in its Art. 2 section 2) includes the following among the economic cases: cases resulting from partnership; cases against economic subjects for desistance from polluting the environment and restoration of the former state or for redress of the resulting damage and for a ban or limitation of the activity that threatens the natural environment; cases between the authorities of a State firm, and between a State firm or its authorities and its founding or supervisory agency; cases under the court's jurisdiction basing on the provisions on control of monopolistic practices in the national economy; cases from the sphere of correctional procedure in a State firm and of its bankruptcy; cases under bankruptcy law and the law on procedure.

It has to be stressed that in proceedings before the economic court, the capacity to be party in civil cases has also been granted to economic subjects that are merely organizational units without legal personality but have been created in accordance with legal provisions, if their statutory activities include the economic activity.

Examination of economic cases has been turned over to district and voivodship courts in which separate organizational units are created (economic courts). The economic courts keep registers: the trade register, register of co-operatives and their unions, of state enterprises, of foreign firms, of research centres, as well as other registers as provided for by other provisions. Economic cases are examined by voivodship courts with the exception of cases reserved for district courts. The procedure in economic cases is based on the Code of Civil Procedure with the participation of lay judges who are

²³ J. of L., No. 33, item 175. Discussed by S. Włodyka, "Ustawa o rozpoznawaniu przez sądy gospodarcze spraw gospodarczych" [The Act on Examination of Economic Cases by Economic Courts], *Państwo i Prawo*, 1990, No. 3.

particularly expert in economic problems : the exception are cases examined by one judge where no lay judges sit. Extraordinary appeal can be lodged if a decision is found glaringly to infringe the law.

Provisions of the act on examination of economic disputes do not apply if one of the parties is a natural person who personally pursues economic activity of the type that requires no registration and whose profit from that activity is but an additional profit, or an individual farmer in cases that pertain to his plant and animal production activities, gardening and fruit-culture.

Judicial decisions in economic cases are supervised by the Civil Chamber of the Supreme Court.

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The legal order of the new socio-economic system is still in the making; the legislative works are likely to go on for rather a long time. For this reason, the statutory regulations discussed in this paper are but fragments of that order. Yet, they help the reader understand the directions and nature of the legislation that is to serve political democracy and organization of market economy.

Warsaw, 1991

INDUSTRIAL DEMOCRACY IN POLAND IN THE 1990s*

Maria Matey**

I. THE NOTION OF "INDUSTRIAL DEMOCRACY"

Industrial democracy is the notion that first appeared in the 19th century¹, developed and consolidated in this, reaching its end, century and marking the further perspectives of humanity. Avoiding strict definitions, it is usually considered that we have to do with "an expression with a number of meanings and usages all concerned with the role and status of workers in industrial society and all implying, to a greater or lesser extent, the participation of those who work in industry in determining the conditions of their working lives" or, more generally, that it is the matter of "any theory or scheme as long as it is based on a genuine concern for the rights of workers in industry"². One should pay attention to the ideological element comprised in the above explanations: not every model of collective labour relations³, concerning the relations among the State, employers and employees as well as organizations of both the "social partners", may be called an industrial democracy; only the model taking into account the necessary minimum of rights and interests of the weaker partner — the workers — and accepted by them, may be called an industrial democracy, as the examples of undemocratic models of collective labour relations are not few in our century. For instance, the industrial relations in Poland, as long as they were marked by the predominant role played by the State Political and administrative authorities, had been dependent on the ruling communist party in consequence of virtual absence of employers and their organizations and the weaknees of the official trade unions. Free trade unions did not appear in Po-

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¹ S. and B. Webb, *Industrial Democracy*, 1898.

² That is the definition of "industrial democracy" in: A. I. Marsh, E. O. Evans, *The Dictionary of Industrial Relations*, London 1973.

³ The notion of "collective labour relations" entered the Polish language of law in the 1980s. See W. Szubert, "Kierunki rozwoju zbiorowego prawa pracy" [Trends of Development of the Collective Labour Law], *Państwo i Prawo*, 1981, No. 6; T. Zieliński, "Idea zbiorowego prawa pracy w socjalistycznym porządku prawnym" [The Idea of the Collective Labour Law in the Socialist Legal Order], *Państwo i Prawo*, 1980, No. 10; J. Jończyk, *Zbiorowe prawo pracy [Collective Labour Law]*, Wrocław, 1983, M. Matey, *Labour Law and Industrial Relations in Poland*, Kluwer, the Netherlands 1988.

land before 1980, and even then they were soon suppressed and forced to operate clandestinely until the "Round Table" Agreement was reached in 1989. The term "collective labour dispute" entered into the official vocabulary in 1980—1981. The right to strike was then made legal; however, in 1982 it was subject to restrictions, as a rule disregarded by the strikers, until new legal regulations in that field were adopted in the post-communist Poland in 1991.

Poland did not begin to form its post-communist system of industrial relations until the beginning of the 1990s. Will it meet the criteria of "industrial democracy"? —the question remains open and every effort should be made to maintain that particular trend in Polish transformation. Important reasons seem to justify the hope for the adequate, democratic form of the industrial relations that are being created in Poland at present: 1) the trade union origin of Solidarity, backed, on the one hand, by the socialdemocratic ideas still vivid in Poland⁴, on the other hand by the new social doctrine of the Catholic Church, 2) the broad support for the conception of social market economy, 3) the influence exerted by the European Community, to whose full membership Poland decidedly aspires, the programme of European Community, consisting in "economic and social cohesion", strengthened by the decisions made in Maastricht as well as the influence of West-European patterns of labour system based on three-sided negotiations, 4) Polish obligations arising out of the ratification of the UNO International Covenant on Economic, Social and Cultural Rights and the fundamental ILO conventions. In the reliable milieus exerting an influence upon the formation of the system of industrial relations there is a prevalent belief that those relations system should be formed as a social labour system, i.e. such a system within the State in which employers are absolutely free to act within the limits of the rule of law and the workers are protected against exploitation and they are vested with the necessary guarantees of social security⁵. So understood social labour system, if attained in Poland, will certainly meet the criteria of industrial democracy.

The collective labour relations in Poland at the beginning of the 1990s are governed by the following new statutes;

- a) the Trade Unions Act of 23 May, 1991⁶,
- b) the Employers' Organizations Act of 23 May, 1991^{7,8},
- c) the Solving Collective Labour Disputes Act of 23 May, 1991⁸,
- d) the Labour Code, in the part relating to collective labour agreements⁹ (the new Act relating to collective labour agreements is being drafted at present), and

⁴ An interview with R. Bugaj, the head of "Solidarność Pracy", ("Solidarity of Labour") published in the daily *Gazeta Wyborcza* of 25 May, 1991; see also W. Lamentowicz, "Od państwa 'represyjnego' do 'socjalnego państwa prawnego'" [From the Repressive State to the Social State of Law], published in the daily *Rzeczpospolita* of 25 — 26 April, 1992.

⁵ Prof. T. Zieliński, the Head of the State Commission for the Labour Law Reform: *Założenia ustroju pracy w systemie gospodarki rynkowej, materiał roboczy Komisji z 1991 r.* [The Assumptions of Labour Constitution in the System of Market Economy], working material of the Commission, 1991), not published.

⁶ Dz. U. (*Journal of Laws*) No. 55, item 234.

⁷ Dz. U. No. 55, item 235.

⁸ Dz. U. No. 55, item 236.

⁹ Amendment to the Labour Code introduced by the Collective Labour Agreements Act of 24 November, 1986 (Dz. U. No. 42, item 201).

e) the State enterprises' staff self-management Act of 25 September, 1981, still in force¹⁰.

II. THE COMPONENTS OF THE INDUSTRIAL DEMOCRACY SYSTEM IN POLAND

1. The Trade Unions

a) Organization

The following three basic groups of trade unions operate in Poland in 1992;

— the Independent Self-governing Trade Union "Solidarity", established in 1980 and then counting about 10 million members, delegalized in 1982, again legalized after the "Round Table" Agreement; at present counting about 2 million members (according to its own estimations);

— All-Poland Alliance of Trade Unions (OPZZ), established in 1982 during the martial law, now counting about 5 million members (according to its own estimations);

— trade unions not connected with the above mentioned country-wide trade union organizations, among them the trade union "Solidarity 80", Polish Teachers' Association, etc.

In spite of shortage of the exact data it is believed that about 40% of all the employed people are associated in trade unions. That proportion is particularly low in private enterprises.

The trade union "Solidarity" operates on the grounds of the statute of 1990 with later amendments, introduced in February 1991, as well as the most recent one adopted in June 1992. The following are the all-union authorities: a) the Assembly of Delegates, b) the National Commission, c) the Supervisory Board elected for 3 years. The headquarters of the trade union are located in Gdańsk. The trade union is organized according to the territorial principle, based on division to the so called Regions (for instance Warsaw is the seat of Mazowsze Region of Solidarity). The following are the regional authorities of the union: a) General Assembly of the Region delegates, b) the Region Board, c) the Supervisory Board. The statute allows to establish vocational and industrial sections both at the Region and all-country level which, in the first period, constituted a slight deviation from the territorial principle. With the lapse of time and with the present forms of the trade union activities taking shape strong tendencies to strengthen the industrial (branch) element within the trade union organization have been observed and now one can hear opinions that the organizational principle should be changed in that very direction and that this may happen soon.

The All-Poland Alliance of Trade Unions (OPZZ), an organization of the post-communist Left political orientation, pursues its activities on the grounds of the statute adopted in 1990. The following are its bodies: a) the Congress, b) OPZZ Council, c) the Presidium of the Council, d) the Supervisory Board. The majority of trade unions associated in OPZZ are industrial (branch) unions or their organizations; according to the statute association in OPZZ does not

¹⁰ Dz. U. No. 24, item 123.

deprive them of their independence nor self-government within the limits determined by their statutes and programmes. It is allowed to create local representations of OPZZ and that does not violate the fundamental industrial principle of organization. OPZZ has its seat in Warsaw.

b) Provisions of the Trade Unions Act of 23 May, 1991

The Trade Unions Act of 23 May, 1991 has replaced the former Trade Unions Act of 8 October, 1982, enforced at the beginning of martial law in Poland. The 1982 Act delegatized Solidarity and all other then existing trade unions (the Act theoretically acknowledged trade unions pluralism, however suspended it for an indefinite time which ended, in practice, when the "Round Table" Agreement was reached. ;

The new Trade Unions Act was the result of a year's preparatory works based on the draft worked out and presented to the Sejm by Solidarity; however, that does not mean that the Act strictly reflects the initial draft prepared by Solidarity.

After the first year of the Act being in force various critical opinions appeared. Its final shape is not satisfactory to trade unions, each of which notices different negative sides. However, the Act is mainly criticized by managers who perceive there the philosophy of a syndicalist state¹¹ in which every important economic decision must be first approved by trade unions, and that makes economic activity inefficient and impairs the principles of parliamentary system.

The basic unit of a trade union, according to the Act, is a trade union organization within a workplace (one can hear opinions among managers that the trade unions should be taken out from workplaces). In those work establishments where there are more than one trade union organizations, and usually there are at least two — Solidarity and a trade union associated in OPZZ—each of them protects the rights and represents interests of its members. An employee not being a member of either of them may choose the trade union to protect his rights against the employer, provided the trade union consents to do it. If it does not, the employer will be released from the duty of consulting individual matters of such a worker with the trade unions. In the matters relating to collective rights and interests trade union organizations may form a common representation; so far the trade unions are too much politically antagonized to make such common representations possible.

The all-Poland trade unions (Solidarity and OPZZ) are vested with the right to give their opinions on proposals and draft Acts, as well as on the relevant lower level provisions within the scope of their activities; they also have the right to submit their own drafts or applications to adopt relevant legislative acts through members of Parliament or bodies having the right of legislative initiative, however, they are not vested with the legislative initiative of their own. The trade unions have the right to engage in collective disputes and to conclude collective labour agreements as well as any kind of collective agreements relating to labour relations.

¹¹ R. Matyja, K. M. Ujazdowski, "Krytyka państwa pracy" [Critically on the Labour State], the daily *Nowa Europa* of 21 April, 1992.

There is nothing like the notion of “the most representative trade union” provided by the Polish law so far; the would be difficult because of the present distribution of powers among the basic trade unions. In relation to OPZZ, due to its federation-like character, the Act applies the notion “all-Poland inter-trade union organization”, while with respect to Solidarity — the notion of “all-Poland trade union representing the workers of the majority of work establishments”.

The right to associate in trade unions is vested in all workers irrespective of the grounds of their employment relationship; it is also vested in other, specified under the Act, persons being actually in analogical situation as workers — this relates to, among others, the unemployed, the pensioners, the Police officers and Frontier Guard; however, that right is not vested in professional soldiers nor those drafted for military service.

Trade unions are formed by virtue of the resolution relating to their formation, adopted by at least 10 persons. They are subject to registration in court and when registered, gain legal personality¹². Therefore, according to the Act both the registered and unregistered trade unions may operate in Poland, although the latter ones cannot exercise the powers reserved, by the Act, for the registered trade unions¹³. When the present Act was being drafted there was a controversy between the supporters of the “notificational” character of registration and those supporting its “legalizing” character which was characteristic under the previous legislation relating to trade unions in communist Poland. The adopted solution is of an intermediary character, consisting in a significant, as compared with the previous state, reduction of the matters subject to control by the court during registration (the court may refuse registration only in case the trade union seeking registration fails to meet the requirements relating to the procedure, specified under the Act, of the trade union formation and fails to keep its statute complying with the law in force) and in allowing for legal existence of the unregistered trade unions.

2. Employers' organizations

Employers' organizations are a new phenomenon in Poland. During the 45 year period of the communist Poland true employers were totally absent; in the centrally managed economy there actually was one employer —the State. The first presage of the new economic organization: the Confederation of Polish Employers, appeared in November 1989; it assembled both the new and the previous initiatives, among which the groups of directors of State-owned enterprises played a considerable role. At the same time many bodies similar to employers' organizations were established, for instance the Federation of Small and Medium-sized Enterprises. With the extension of private economy the Confederation of Polish Employers gained more and more features of an employers' organization¹⁴, although with respect to its importance and the

¹² Art. Art. 14 and 15 of the Trade Unions Act of 23 May, 1991; see also the Regulation by the Minister of Justice, on the procedure of trade unions registration, of 2 August, 1991 (Dz. U. No. 77, item 340).

¹³ See W. Masewicz, “Nowe prawo o związkach zawodowych” [The New Law on Trade Unions], *Praca i Zabezpieczenie Społeczne*, 1991, No. 10, p. 7.

¹⁴ M. Seweryński, “Organizacje (związki) pracodawców” [Employers' Organizations

scope of activities it still fails fully to perform the role similar to employers' organizations in the countries of well developed market economy.

Legal regulations provided by the Employers' Organizations Act of 23 May, 1991 were to promote more dynamic development of that participant in the industrial democracy system in Poland. When the above mentioned Act was being drafted, as well as during the parliamentary debates, its purposefulness was considered, as at that stage, when most enterprises were still State-owned, real employers were practically absent. Anyway, the private employers already operating were not really interested in associating to protect their interests¹⁵; that was the consequence of their privileged position as a social partner, as compared with the State-owned enterprises (they had much better possibilities of offering higher wages to their workers), as well as of their unawareness of the advantages resulting from the association in the employers' organizations. However, the belief in promotional role to be played by the Act with respect to the new employers' movement in Poland prevailed.

In the meaning of the Act an employer is a natural person or an organizational unit employing workers, whose objects consist in carrying on economic activity. Employers are vested with the right to freely associate in unions or join the existing ones, without the necessity of obtaining any previous consent. The fundamental task of an employers' organization is to protect the rights and represent interests of the associated members in relation to trade unions, authorities, the State administration and local governments' bodies.

An employers' organization is formed by virtue of a resolution stating its formation, adopted by at least 10 employers. Such organizations must be registered in court¹⁶ and as a result of registration — gain legal personality. The court may refuse registration if an organization fails to meet the requirements relating to the procedure of its formation specified under the Act, or if its statute is incompatible with the law in force.

According to the statute of the Confederation of Polish Employers, adopted in September 1991, there are the following bodies of the Confederation: a) the General Assembly, b) the Executive Board, c) the Presidium of the Executive Board, d) the Supervisory Board.

3. The Role of the Government

It has been assumed, in the model of industrial democracy taking shape in Poland, that the responsibility of the State and the government consists in the creation of the institutional and legal frames for that system operation¹⁷. On

(Unions)], *Acta Universitatis Wratislaviensis*, No. 1258, Wrocław 1990; See also J. Jończyk, "O rolach pracodawcy i charakterze stosunku pracy" [On the Employer's Role and the Character of Employment Relationship], *Polityka Społeczna*, 1991, No. 9.

¹⁵ R. Semerak-Nebeś, "Ustawa o organizacjach pracodawców" [The Employers' Organizations Act], *Praca i Zabezpieczenie Społeczne*, 1991, No. 8/9.

¹⁶ Art. 9 and 10 of the Employers' Organizations Act of 23 May, 1991; see also the Regulation by the Minister of Justice, on the procedure of the employers' organizations registration, of 2 August, 1991 (Dz. U. No. 77, item 341).

¹⁷ That type of activities has been reflected, among others, by the Order No. 1 by the President of the Council of Ministers on creation of the Polish Three-Parties Committee for Cooperation with the International Labour Organization and the Scope of Its Operation, of 6 January, 1990; The Committee consists of the representatives of the governmental side

the contrary, the State bodies should refrain from performing the role of an employer, which was a common practice under the previous political system. It is believed, however, that performing the mediatory and conciliatory function with respect to both the employers' and workers' organizations makes the proper role for the State administration bodies. And indeed, in 1990 — 1991 the Ministry of Labour and Social Policy appeared in that role many times, taking part in negotiations and assisting in settling the disputes relating to various branches of economy, however, quite often the Ministry is not able to refrain itself to the role of a mediator and the elements of its position of a "collective State employer" may be distinctly seen. That is to a large extent the result of the so far weak position of the employers' organization as a social partner against the determination and power of trade unions (the necessity of the parallel but separate negotiations with two powerful trade unions: Solidarity and OPZZ, should be emphasised as being an additional trouble). In early months of 1992 Ministry of Labour and Social Policy is in the course of preparation of an educational programme for social partners pertaining to the methods and techniques of collective negotiations, such a programme is to be realized in cooperation with the "Social Dialogue" Foundation sponsored by the International Labour Office and by the Commission of European Communities.

III. NEGOTIATIONS AND COLLECTIVE AGREEMENTS

Poland may boast a long tradition of collective agreements and the Collective Agreements Act of 1937 was thought, in the pre-war Europe, to constitute an exemplary pattern of legal regulations in that field. After World War II the collective agreements went through the stages of development as well as regression. In the face of shortage of labour law codification before 1975, the agreements played an important role in forming both the individual employment relations and labour law in general. The Labour Code overtaking the detailed regulation of the employment relations drastically limited both the contents and the importance of the collective agreements, which was considerably supported by the communist command of economy. On the grounds of the Labour Code provisions then in force, 77 industrial collective agreements were negotiated, a part of which is formally still in force (although with many modifications), despite their total inadequacy to the present economic and political system.

The amendment of the part of the Labour Code relating to collective agreements, performed in 1986, failed to improve the situation considerably, as it still reflected the centrally commanded State economy. It maintained the scope of collective agreements limited to the matters relating to remuneration and working conditions connected with particular properties of a given industry or trade and also empowered the Ministers of particular industries to sign the agreements on behalf of employers; it also provided for excessively complicated procedure of approvals of the contents of an agreement on the employer's side

(20 persons), the employers' organizations (10 persons) and the employees' organizations (10 persons).

creating obstacles¹⁸ difficult to overcome in order to conclude the collective agreements. That faulty legal regulation of 1986 is still in force, blocking the process of concluding collective agreements (however, two important agreements have been concluded recently — for metallurgists and coal miners) and forcing the social partners to violate this inadequate¹⁹, but still binding law.

The considerable faultiness of the statutory provisions of 1986 relates also to making the collective agreements registration conditional not only on its compatibility with the law, but also on its conformity with the social and economic policy of the State as well as with the principles of determining the remuneration by the Council of Ministers. In case the Minister of Labour would question the agreement from that point of view, a special parity commission is empowered to solve the matter. Such a solution was justly criticized by the ILO Committee of Experts for implementation of the ILO conventions and recommendations.

The need for a new statutory regulation of collective agreements is felt the more painfully and important steps leading to that solution have already been undertaken. A new Act has been drafted by the Commission for Labour Law Reform²⁰, and simultaneously parallel suggestions are being drafted by the trade unions. However, it becomes very distinct that working out a new conception of collective agreements is conditional upon the development of economic system and formation of new collective labour relations more than any other solution to be adopted by the labour law. Having no strict vision of the development in those areas (and that has been the so far situation in Poland) one is not able to suggest any rational conception for the collective agreements in the period of economic transformation. And so, for instance, Solidarity was in favour of the collective agreements within workplaces, now with the structural industrial trends strengthening, it opts for the negotiations and agreements at the level of industries and branches of economy.

On the other hand, the conceptions of regional-industrial collective agreements (for instance for Lower Silesia, for Greater Poland, Masovia, etc.) showing a concern to keep the standards of justice and the specified standards identical or similar within a region, have been recently worked out, reflecting the political trends to regionalization of the country.²¹

The so far ongoing works on the draft of the new Collective Agreements Act have revealed a number of problems whose solution is not being clearly perceived at the moment. There are the following controversial problems:

¹⁸ M. Matey, "Rokowania, układy i spory zbiorowe pracy w nowym modelu prawa pracy w Polsce" [Labour Negotiations, Agreements and Disputes in Poland in the New Model of Labour Law in Poland], in: *Przesłanki reformy prawa pracy* [The Assumptions for the Labour Law Reform], collective work edited by Z. Salwa, Institute Of Labour and Social Matters, Warsaw 1990.

¹⁹ J. Wrątny, *Ewolucja zbiorowego prawa pracy w Polsce w latach 1980 — 1991* [Evolution of the Collective Labour Law in Poland, 1980 — 1991], Warszawa 1991.

²⁰ H. Lewandowski, "O projekcie ustawy o zakładowych układach zbiorowych pracy" [On the Draft of Workplace Collective Agreements], *Praca i Zabezpieczenie Społeczne*, 1991, No. 10.

²¹ J. Jończyk, „Przyczynek do dyskusji o nowym modelu układu zbiorowego pracy” [Contribution to the Discussion on the New Model of Collective Agreement], *Rzeczpospolita* of 10 April 1992.

- a) introduction of country-wide basic agreements, which might be three-sided, with the participation of the Government;
- b) determination of mutual relations of multi-level agreements: one or many work establishments, to a particular industry or country-wide ;
- c) admission of unlimited scope *ratione materiae* of agreements;
- d) admission of derogative clauses (temporary deviations to the workers' detriment from the standards introduced by the State;
- e) determination of the employer's side in collective agreements relating to many work establishments;
- f) determination of the workers' side in the conditions of trade unions pluralism, in the situation where there is no uniform attitude of the trade unions (a possibility to empower one trade union which: 1) would be elected by the workers by ballot with at least half of them taking part, 2) having the biggest number of members among those working in the said work establishment, 3) which would be the first one to terminate negotiations to conclude a collective agreement, is being taken into account).

It should be emphasised that the delay, even if because of justified reasons, in drafting the new Collective Agreements Act, results in a painful gap in the package of statutes forming the system of industrial democracy in Poland, while the three other elements of the said package (the trade unions, the employers' organizations and the collective labour disputes) have already had their statutory regulation passed on 23 May 1991.

IV COLLECTIVE LABOUR DISPUTES

The political doctrine of communism did not allow the possibility of any conflict between the working class and the communist State, therefore the notion of the "collective labour dispute" could not appear in the official vocabulary in Central and East Europe until 1980, as a result of Social Agreement signed in Gdańsk.²² The right to strike was legalized in Poland with the moment the statute of Solidarity was registered in 1980. In the period of martial law the Trade Unions Act of 8 October, 1982²³ maintained the legality of the right to strike, however, subjected it to several restrictions and procedural rigours which deserved the name "paper fortifications". The procedure imposed for collective disputes under martial law was commonly disregarded and violated in the situation of social unrest and spontaneous strikes at the end of the 1980s. The works on new, simplified regulation of the procedure of settling collective disputes, undertaken in 1990, led to adoption of the Settling the Collective Disputes Act of 23 May, 1991.²⁴ Legislative works on this Act were based on

²² See M. Seweryński, "Reglement des conflits collectifs du travail dans les pays de l'Europe de l'Est", *Rapports Nationaux*, Theme II, XIII World Congress of Labour Law and Social Security, Athens, September 1991.

²³ Dz. U. No. 54, 1985, item 277 with later amendments. See L. Florek, "Rapport National Polonais", *Rapports Nationaux*, Theme II, XII World Congress of Labour Law and Social Security, Athens, September 1991.

²⁴ See: L. Florek, "Prawo strajkowe" [The Right to Strike], the daily *Rzeczpospolita* of 11 September, 1991; see also Z. Salwa, "Nowa regulacja rozwiązywania sporów zbiorowych" [New Regulation of Settling the Collective Disputes], *Praca i Zabezpieczenie Społeczne*, 1991, No. 8/9.

the draft prepared by the Commission for Labour Law Reform, however, the attitude of trade unions as well as parliamentary debates exerted an important influence upon the final contents of the Act. According to initial assumptions the regulation relating to collective disputes was to constitute a part of the Trade Unions Act, however the opinion that subordination of collective disputes to trade unions was improper prevailed, therefore that issue has been excluded into a separate statute.

According to the Act by a collective dispute one should understand a dispute relating to working conditions, remuneration or social benefits as well as the rights and freedoms arising out of membership in a trade union. A collective dispute is not allowed to support individual claims of workers; such matters should be settled by the courts. Collective rights and interests of workers are represented by trade unions, while those of employers — by relevant employers' organizations. A collective dispute — in the meaning of the Act — may arise in any work establishment, either State-owned, owned by a co-operative, or constituting the property of private or mixed capital.

The Act envisages three basic stages of the collective dispute: a) negotiations, b) mediation and arbitration, c) strike. Negotiations and mediation are obligatory, i.e. without carrying them on a trade union cannot exercise its right to strike. Arbitration is thought as a facultative instrument.

If the party initiating the dispute supports the submitted claims, the dispute will be further carried on with the participation of a mediator guaranteeing impartiality. The mediator will be appointed jointly by the parties, he may be selected from the list prepared by the Minister of Labour and Social Policy in agreement with the workers' and employers' organizations. The mediation proceedings are terminated with an agreement signed by the parties, and if the agreement is not reached — with a record of divergencies specifying the attitudes of the parties. Failure to reach an agreement in consequence of the mediation proceedings gives right to commence a strike.

However, a trade union may, not exercising the right to strike, undertake another attempt to settle the dispute by submitting it to the board of social arbitration. If neither of the parties reserves the non-binding character of arbitration decision before lodging the dispute to the board, its decision will be binding, i.e. will exclude the possibility of strike.

Collective disputes relating to one work establishment are heard by the boards of arbitration at provincial courts; those relating to many work establishments are heard by the Board of Social Arbitration at the Supreme Court. The board is composed of a chairman appointed from among the judges of the relevant court by the president of the court and of six members appointed by the parties (each of the parties appoints three members of the board) from among the persons not interested in the dispute. The decision of the board is made by the majority of votes.²⁵

According to the statutory definition of a strike — it consists in collective refusal by workers to perform their work, in order to settle the collective

²⁵ See Regulation by the Council of Ministers on the Detailed Proceedings Before the Social Arbitration Boards, of 16 August, 1991 (Dz. U. No. 73, item 324).

dispute. A strike is a final measure and cannot be proclaimed without all the possibilities of settling the dispute through negotiations and mediation being previously exhausted. The lockout is not legally regulated in Poland (however, it has been proposed in the draft of the Law, but disappeared during the Parliamentary debate). However, a strike may be proclaimed irrespective of the above-mentioned principles if unlawful action on the part of the employer made collective negotiations or mediation impossible and also in the case when the employer terminated employment relationship with the trade unions activist carrying on the dispute. The Act stipulates that the trade union, while making the decision on proclaiming the strike, should take into account the commensurability of claims and the losses arising out of the strike.

The strike may be proclaimed by the trade union organization after having obtained the consent of the majority of the voting workers, provided at least half of all the workers employed in the given work establishment participated in voting. The strike should be proclaimed at least five days before it is commenced. Participation in a strike is voluntary. If the strike is organized in compliance with the provisions of the Act, participating in it does not constitute violation of workers' duties. During the strike workers maintain their right to social security allowances, as well as their rights arising out of employment relationship, except the right to remuneration. However, they may get allowances from the strike fund created and run by trade unions.

Despite a considerable simplification, as compared with the regulations of 1982, of the procedure of settling the collective disputes, and particularly of organizing the strike, it appears that the habits of disregarding and omitting the statutory procedures are being transmitted also to the newest regulation of 1991; numerous cases of spontaneous strikes, "illegal" from the point of view of the rules introduced under the Act, have been observed. The mere existence of statutory requirements, in particular the obligatory character of mediation and the binding decisions made by social boards of arbitration in case the parties fail to make prior reservations, is being evaluated by a part of the labour law academic milieu as raising doubts: any procedures should only facilitate the parties' attempts at settling conflicts, they should not constitute an imposed and obligatory element, restricting the freedom of social partners' activities. It seems that the development of industrial democracy system in Poland will tend to further considerable flexibility of legal requirements in that field.

V. WORKERS' PARTICIPATION

Since 1956 the workers' participation has been deemed to be a characteristic trait distinguishing Poland — on a par with Yugoslavia — from among other Central and East European countries under communist rule. Unexpectedly, the long awaited return to democratic system did not necessarily mean the continued development and strengthening of workers' participation patterns. Formation of market economy and privatization proceedings ongoing in this country mark a turning point in workers' participation.²⁶

²⁶ See M. Matey, "Workers' Participation in Poland on the Crossroads", *Bulletin of Comparative Labour Relations*, 1992, No. 23, Kluwer, the Netherlands.

Poland has had workers' participation since as long as 1956, defined as workers' self-government system, although in the 1960s and 1970s it became merely a formal institution, deprived of its natural and authentic character. In 1980 Solidarity's demands for economic reforms and genuine representation were followed by demands for authentic workers' self-government. The Workers' Self-Management Act was negotiated and adopted on 25 September, 1981,²⁷ along with the State-owned Enterprises Act. It reflected the broad public opinion's demands and expectations in the field of industrial democracy. However, full enforcement of the Act has been then hampered by the imposition of martial law.

In 1990 — 1992 in the State-owned enterprises maintaining their former status, the workers' self-management system has continued to operate according to the Act of 1981, unless some modifications have been introduced to the system, along with the process of the so called "commercialization" of State-owned enterprises. The bodies of the workers' self-management are as follows:

- 1) the general assembly of workers in the enterprise,
- 2) the workers' council.

The workers' self-management bodies constitute formal organs of the enterprise, according to the State-owned Enterprises Act which specifies the following bodies of an enterprise:

- a) the general assembly of workers,
- b) the workers' council,
- c) the director of the enterprise.

The workers' self-management bodies are vested with a number of decision-making prerogatives, as well as the consultative and supervisory powers. The scope of decision-making prerogatives of the workers' self-government bodies is presently being regarded as too extensive, even for a State-owned enterprise. The faulty arrangement of powers within an enterprise among its management, the bodies of the workers' self-management and trade unions, allegedly totally paralysing the possibilities of an enterprise operation, is ominously called the "Bermuda triangle." In the broad public opinion most competent managers rather than workers' participation are supposed to be able to push the Polish economy towards Europe. However, the idea of workers' self-management is still supported by a part of the academic milieu;²⁸ it is also backed up by a part of social-democratic political and parliamentary groups and mainly by the political group "Solidarność Pracy" ("Solidarity of Labour").

In the process of forming the market economy in Poland it is hard to find any reference to workers' participation as an important factor in the new system. The Privatization of State-owned Enterprises Act of 13 July, 1990²⁹ clearly replaced the workers' self-management in the privatized enterprises by the system of the employees' shareholding.

²⁷ Dz. U. No. 24, 1981, item 123.

²⁸ L. Bar, "Bezbronna idea samorządu" [The Helpless Idea of Self-government], *Polityka*, 1988, No. 26; by the same author: "Prawne formy reprezentacji załogi jednostki gospodarczej" [The Legal Forms of Representation of the Economic Unit Staff], *Państwo i Prawo*, 1991, No. 9.

²⁹ Dz. U. No. 51, 1990, item 298 with later amendments.

The Privatization of State-owned Enterprises Act has established the procedure of transformation of a State-owned enterprise into a company. According to Art. 24 of the Act the employees of a State-owned enterprise transformed into a company are entitled to purchase 20% of shares in the company on preferential conditions — at half the normal price. They also may buy more shares, however at full price. The preference shares must be offered to the employees not later than two months after the selling of shares on normal conditions begins. The employees' right to buy preference shares expires one year after the sale is commenced. However, the Act sets a limit to the employees' rights to buy preference shares: the total value of reductions cannot exceed the product-quotient of the average wage in the State economy for 12 months and the number of employees purchasing the shares.

Along with the employees' shareholding system the Privatization Act provides (Art. 17) for the creation of boards of directors (as well as supervisory boards) in companies formed out of the privatized State enterprises: one-third of the total number of members should be elected by the staff, possibly from among the employees of the company. Those elected to the board are protected against dismissal.

In this way, according to the programme of further formation of market economy in Poland, along with further ownership transformation (mass privatization) the system of workers's self-management is to be transformed into the system of financial participation of the employees. It seems, however, that even with the fullest enforcement of such a programme (which is doubtful in the next few years) the Polish solutions will not fall below the standards designed within the European Community, ensuring the employees the right to consultation and information.³⁰ Further events in that field in Poland are, at present, difficult to foresee.

³⁰ Amended Proposal of 20 September, 1991, of the Commission for a Council Directive on the establishment of European Works Council in Community-scale undertakings or groups of undertakings for the purpose of informing and consulting employees (*Official Journal of the European Communities*, No. C 336/11).

*LES SOURCES DU DROIT D'APRÈS
LA JURISPRUDENCE DU TRIBUNAL CONSTITUTIONNEL
LES LOIS ET LES RÈGLEMENTS*

*Maria Kruk**

I. Depuis longtemps on connaît les difficultés que la législation polonaise et avec elle les doctrines de la création du droit et du droit constitutionnel, rencontrent en cherchant à mettre en ordre et moderniser le système des sources du droit et à consolider le modèle démocratique du processus de la formation du droit. Que cette matière s'avère particulièrement rebelle à ces mesures, en témoignent les efforts, déployés sans succès définitif depuis des années, en vue de rédiger un projet de loi sur la formation du droit qui puisse satisfaire les aspirations des milieux juridiques et légiférants, et en même temps posséder les caractéristiques exigées de nos jours d'un système des sources du droit, c'est - à - dire être démocratique, humanitaire, public, harmonieux et cohérent, constitutionnel, donnant la primauté à la loi, etc.¹.

La Constitution en vigueur ne contient pas de règles régissant de façon suffisante les sources du droit. Qui pis est, du fait qu'elle n'a pas exhaustivement défini le système de ces sources, elle a laissé la voie libre à de nombreux actes normatifs de toute sorte dont le contrôle institutionnel et social se trouve ainsi affaibli. Ces pratiques, favorisées par les formes bureaucratiques de gouvernement et la dégradation du rôle du citoyen individuel, ont empêché un modèle de «bon droit» de se former et ont été l'une des causes pour lesquelles il était si difficile de régler par la loi le système des sources². Par ailleurs, ces difficultés se trouvaient encore aggravées par ce que l'État était le principal agent de gestion de l'économie nationale, et de là l'administration déduisait son droit de régler juridiquement comme bon lui semblait les processus économiques, en trouvant même souvent qu'une norme juridique peut remplacer les mécanismes économiques, ce qui donna même naissance à une sentence popu-

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¹ Cf. entre autres l'avis du Conseil Législatif sur le projet de loi sur la création du droit, «Biuletyn Rady Legislacyjnej przy Prezesie Rady Ministrów», 1989, n° 17, p. 13.

² Rappelons que les travaux concernant la loi sur la création du droit se poursuivent depuis une quinzaine d'années. Dans *l'Information sur les grands problèmes nés à l'occasion de l'activité et de la jurisprudence du Tribunal Constitutionnel en 1988*, nous lisons notamment ceci: «De l'avis du Tribunal, la réglementation du processus de création du droit sur la base des principes uniques et

laire selon laquelle «Le droit est bon remède pour tout»³ (également dans le domaine social).

La mise en place du Tribunal Constitutionnel l'a fait participer de façon quasi programmée à la reconstruction du système des sources du droit, car il devait, dans son activité jurisprudentielle, prendre contact direct avec les règles régissant ce système, avec sa structure et les liens unissant ses différents éléments. Il devait aussi connaître les lacunes de la définition constitutionnelle de ce système, et aussi les mauvaises pratiques normatives qui allaient contraindre assez fréquemment le Tribunal à éclaircir des questions élémentaires, voire à formuler des principes de base sur lesquels il pouvait fonder sa jurisprudence. Signalons à ce propos ce fait particulier que le Tribunal ne trouvait pas toujours de fondement direct à ces principes dans la Constitution, mais qu'en règle générale il le trouvait dans la doctrine assez homogène et progressiste et dans la science du droit.

Par paradoxe, les lacunes juridiques de la Constitution ont eu une répercussion favorable sur l'objet et les méthodes d'une espèce de cours portant sur les sources du droit et les règles de leur formation que représente la jurisprudence du Tribunal Constitutionnel.

Il est étonnant qu'en un temps si court (depuis 1986), le Tribunal ait pu révéler de façon spectaculaire, à travers les affaires dont il fut saisi ou qu'il a évoquées de son propre gré, plusieurs points faibles du systèmes du droit et de la procédure de sa formation⁴. Cela concerne, il est vrai, principalement le fonctionnement du droit encore sous le régime constitutionnel précédent qui restait encore en vigueur (ce qui, pour le Tribunal Constitutionnel, embrasse la période allant de janvier 1986 jusqu'au milieu de 1989), mais prochainement sans doute nous connaissons quelques spécimens de défauts de la nouvelle

à l'aide d'institutions juridiques cohérentes est un problème urgent [...] De l'avis du Tribunal, une réglementation complexe du processus de la création du droit doit trouver sa place surtout dans la Constitution. Celle-ci devrait définir les principes de base et les institutions pilotes du processus de la création et de la force obligatoire du droit de telle façon que les limites des réglementations plus détaillées soient suffisamment nettes. Cela ne nie pas l'opportunité de l'adoption antérieure d'une loi sur la création du droit dans le cadre de la Constitution en vigueur, avec l'intention qu'elle ouvre la voie de solutions souhaitables concernant les principes et les institutions du processus de formation du droit dans la future Constitution» (Warszawa 1989, p. 16).

³ Dans cette *Information* il est dit entre autres ceci: «L'expérience du Tribunal Constitutionnel démontre que le processus de la formation du droit, tel qu'il est en vigueur, n'est pas satisfaisant. Ceci a pour cause aussi bien les insuffisances de la réglementation constitutionnelle du système des actes normatifs que la réglementation des questions essentielles du processus de la formation du droit par des dispositions de rang divers — souvent trop bas — non publiées, fragmentaires et insuffisamment cohérentes». Depuis longtemps on note dans la science polonaise du droit des critiques semblables et analysant bien plus en profondeur ces problèmes. Cf. p. ex. *Problemy prawodawstwa w nowej Konstytucji PRL* [Les problèmes de la législation dans la nouvelle Constitution de la R.P.P.I.], sous la dir. de A. Patrzalek. Wrocław 1988.

⁴ La jurisprudence du Tribunal Constitutionnel a été globalement commentée à ce point de vue par J. Wróblewski, *System, tworzenie i wykładnia prawa w orzecznictwie Trybunału Konstytucyjnego* [Le système, la création et l'interprétation du droit dans la jurisprudence du Tribunal Constitutionnel], «Państwo i Prawo», 1989, n° 2. Cf. également K. Działocha, *Problematyka ustawy Sejmu w orzecznictwie Trybunału Konstytucyjnego* [La problématique de la loi de la Diète dans la jurisprudence du Tribunal Constitutionnel], dans: *Konstytucja w społeczeństwie obywatelskim. Księga pamiątkowa ku czci prof. Witolda Zakrzewskiego* [La Constitution dans la société civile. Mélanges en l'honneur du prof. Witold Zakrzewski], Kraków 1989, p. 33.

pratique législative, nullement plus facile mais peut-être même plus difficile que les précédentes. Elle est liée en effet à une transformation essentielle du système économique, social et politique de caractère presque révolutionnaire, à une revalorisation des principes juridiques et politiques. En même temps, on voit participer aux décisions et processus législatifs des agents sociaux nouveaux et aussi, souvent, de nouveaux fonctionnaires qui, d'un côté, rompent avec la routine et les mauvaises habitudes évoquées plus haut, mais, de l'autre côté, n'ont pas encore une expérience suffisante.

Dans cet état de choses, la jurisprudence du Tribunal Constitutionnel est appelée à jouer un rôle important en matière de sources du droit dont il dégage, fait accepter, propage et affermit la conception la plus valable.

Les ouvrages analysant l'activité du Tribunal Constitutionnel et les commentaires de ses arrêts apprécient en règle générale hautement l'apport théorique du Tribunal aux conceptions des sources du droit. Sans exclure l'hypothèse de polémique avec ces conceptions, il faut noter la valeur que présentent les décisions du Tribunal pour la future conception constitutionnelle des sources du droit.

Le Tribunal a déjà abordé dans sa jurisprudence des problèmes clés tels que l'objet, l'exclusivité et la primauté de la loi et l'exhaustivité de la réglementation légale; le caractère des règlements en tant qu'actes d'application fondamentaux, dont le Tribunal analyse et formule la conception constitutionnelle théorique, et notamment leur adéquation à la délégation légale, le caractère juridique et la conformité avec la loi d'autres actes normatifs, comme arrêtés émanant des ministres et du gouvernement, et même des statuts d'une organisation sociale quand elle remplit les fonctions qui lui sont confiées par l'État. Le Tribunal s'est occupé des problèmes des conventions collectives et des traités internationaux, bien que là il fût en opposition avec ses compétences légales. S'agissant des principes directeurs de la création du droit, le Tribunal s'est prononcé sur le principe de la non-rétroactivité des lois, sur la sous-délégation à rendre des actes d'application, sur l'admissibilité de l'autorisation à rendre de tels actes et sur d'autres caractéristiques de cette autorisation, sur les dispositions transitoires et sur d'autres principes.

Il est significatif que certaines questions soient revenues à plusieurs reprises sur le tapis. Ce sont là les points névralgiques de notre système juridique. Cela signifie que ce système comporte des points, piliers ou porteurs qui sont soit trop faibles et demandent à être renforcés, soit devenus hors d'usage ou tout simplement inexistantes là où ils sont indispensables, donc à renouveler ou à restituer.

IL Les cas où le Tribunal Constitutionnel avait à statuer sur la constitutionnalité des lois, étaient relativement rares, aussi ne fût-ce que rarement qu'il devait soulever directement la question du caractère juridique de tel ou tel acte. En revanche, il a fréquemment soulevé cette question de façon indirecte, en définissant la position à l'égard de la loi d'autres actes normatifs, notamment des règlements. Il a contribué de cette manière à consolider le principe de la primauté de la loi dans le système des sources du droit et aussi à faire prendre conscience de certains éléments de la définition matérielle de la loi et à les raffermir.

On sait que la Constitution ne définit pas expressément la loi. La doctrine a déduit une telle définition des dispositions de la Constitution⁵ et veille même sur elle comme sur un trésor. Mais toutes les fois où l'on parle de l'objet matériel de la loi, c'est-à-dire de ce qu'elle peut régler ou ce qu'elle doit faire nécessairement (dans ce dernier cas c'est l'exclusivité de la loi), on craint que dans la pratique cette fragile définition doctrinale, du reste équivoque, ne puisse être violée. Voilà pourquoi l'absence d'une définition constitutionnelle ou du moins légale du caractère et de la matière de la loi est si sensiblement ressentie. J.-J. Rousseau écrit dans *l'Émile*: «Ce sujet est tout neuf et la définition de la loi est encore à faire», et de nos jours on pourrait le paraphraser comme ceci: «Ce sujet n'est pas du tout neuf, mais la définition de la loi est toujours à faire»⁶.

Le Tribunal Constitutionnel contribue en quelque sorte à l'édification de cette définition en propageant certains de ses éléments. Et bien qu'une définition générale ne découle pas de la jurisprudence du Tribunal, celui-ci en a affirmé certains principes, très importants du point de vue des intérêts du citoyen.

Dès son premier arrêt, le Tribunal Constitutionnel formulait le principe fondamental concernant l'objet matériel de la loi et il l'a confirmé expressément en statuant en assemblée plénière, à une audience de recours (l'affaire du prix des logements rachetés à l'État)⁷. Le Tribunal a déclaré notamment ceci: «S'agissant de la réglementation juridique des devoirs des citoyens et des autres sujets de droit, la Constitution ne prévoit d'autre voie que celle de la loi [...] et cela à titre seulement subsidiaire, c'est-à-dire en vertu d'une délégation de la loi et en vue de son application par la voie de règlement. Le principe de l'exclusivité de la loi en cette matière concerne entre autres l'établissement de toute espèce de prestations obligatoires, tant personnelles que patrimoniales, en faveur de l'État, et aussi des prestations dans les rapports civils entre citoyens ou entre les citoyens et l'État, pour autant qu'elles ne sont pas fixées par les contrats». Ce fut la première confirmation judiciaire de ce principe et aussi la réaction à la réserve du gouvernement affirmant que «aucune norme constitutionnelle ne prévoit que tous les devoirs des citoyens doivent être réglés exclusivement par la loi»⁸.

S'opposant à cette affirmation, le Tribunal Constitutionnel a invoqué entre autres «non seulement la teneur pure et simple des dispositions de la Constitution» mais aussi leur interprétation «conforme à l'axiologie de notre régime et système du droit»⁹. Ainsi il est hors de doute que le Tribunal Constitutionnel reconnaît fermement que l'établissement de tous devoirs civiques est une matière réservée à la loi, le règlement étant admis comme acte d'ap-

⁵ Rappelons l'ouvrage de S. Rozmaryn, *Ustawa w PRL [La loi en R.P.P.]*, Warszawa 1964. Les problèmes plus récents de la loi sont exposés par A. Gwiżdż dans l'étude *Ustawa i materia ustawodawcza [La loi et la matière législative]*, dans: *Problemy prawodawstwa...*, p. 79.

⁶ S. Rozmaryn cite ces paroles de J.-J. Rousseau dans son livre précité sur la loi.

⁷ U 1/86 et U 5/86 (dans le recueil «*Orzecznictwo Trybunału Konstytucyjnego w 1981 r.*» [par abrég. OTK], pp. 19 et 41) concernant la conformité des dispositions du règlement du Conseil des Ministres du 16 septembre 1985 avec la loi du 29 avril 1985 concernant l'exploitation des fonds de terre et l'expropriation d'immeubles.

⁸ U 5/86, OTK, p. 19.

⁹ *Ibidem*, p. 20.

plication. A l'automne 1988, le Tribunal s'est posé deux questions spéciales relevant de cette matière, à savoir: 1° la détermination des obligations fiscales par la définition des principes (ou formules) de fixation du montant de l'impôt est-elle une matière réservée à la loi? 2° la loi peut-elle transmettre la mission de l'établissement de ces principes (ou formules) par un acte d'application et sous quelles conditions?¹⁰.

Le Tribunal a répondu par l'affirmative à la première question, en déclarant qu'établir l'impôt c'est bien établir un devoir du citoyen et en rappelant que «les matières réglées une fois par des lois deviennent à l'avenir [...] matières légales». Par ailleurs, l'imposition des unités de l'économie socialiste a un impact sur les revenus de la population¹¹. Le Tribunal répond comme ceci à la seconde question: «Il n'est pas douteux que la loi ne devrait pas déléguer aux actes d'application les questions déterminant la construction de l'impôt (contribuable, matière imposable, assiette, taux). Une telle délégation conduirait en fait à éluder le principe de la régulation légale des devoirs».

Il convient d'attirer l'attention sur cette dernière réponse pour cette raison également qu'elle traduit l'avis du Tribunal sur un élément très important de la conception de la loi, à savoir les limites de l'admissibilité des délégations par la loi aux actes d'application¹². Cela est dirigé contre les lois en blanc qui servent d'enseigne à la législation gouvernementale de fait. C'est un principe que lie non seulement le gouvernement ou les organes de l'administration par les conditions spéciales dans lesquelles peuvent être rendus les actes d'application mais aussi le Parlement qui ne peut pas disposer tout à fait librement de la matière légiférée là où entre en jeu la réglementation exclusive par la loi.

La compétence exclusive de la loi de régler les devoirs des citoyens n'est qu'un fragment du principe constitutionnel et doctrinal de l'exclusivité de la loi. Le Tribunal Constitutionnel a-t-il manifesté sa position envers ce principe pris dans son ensemble?

La jurisprudence n'est pas un manuel complet ni systématisé. Le Tribunal Constitutionnel ne prend position que dans la mesure où l'exigent les affaires dont il est saisi. Aussi dans la jurisprudence du Tribunal jusqu'à ce jour ne trouve-t-on pas de définition complète de la matière légale ni d'énumération des affaires qui font l'objet de cette matière.

Mais il y a encore d'autres éléments de cette matière, à savoir la position de la loi à l'égard de la réglementation des droits civiques. Est-ce à la loi, et à la loi seulement, qu'appartient d'établir des droits et des obligations? C'est un problème plus complexe qu'on ne le croit parfois, ce qui se traduit par l'opinion — fréquemment rencontrée mais sans doute simplifiée — qu'il appartient à la loi de définir «droits et obligations», les deux termes étant indissolublement liés. Dans une enquête adressée au Tribunal il est même dit que seule la loi peut «imposer droits et obligations» aux citoyens.

¹⁰ L'arrêt Uw 4/88 («Diariusz Sejmowy», 1988, n° 13) concernant la conformité du règlement du Conseil des Ministres du 18 novembre 1985 et de celui du ministre des Finances du 2 mai 1988, concernant l'impôt frappant les rémunérations excédant les limites fixées, avec la loi du 26 février 1982 sur l'imposition des unités de l'économie socialiste.

¹¹ Par cette décision le Tribunal Constitutionnel fait revivre une règle ancienne selon laquelle l'adoption des impôts est l'une des premières et fondamentales fonctions du Parlement.

¹² A. Gwizdź (*op. cit.*, p. 98) y attire fortement l'attention.

«Imposer des droits», c'est évidemment un lapsus, mais qui témoigne de la conviction que les mêmes principes régissent la réglementation des droits et obligations. Plusieurs théoriciens, mais pas tous, partagent cette opinion¹³.

Dans l'ouvrage devenu classique, quoique fréquemment critiquée ces derniers temps, de S. Rozmaryn sur la loi, son auteur étend l'exclusivité des lois à la réglementation de la situation juridique des citoyens en ce qui concerne leurs obligations envers l'État ainsi que les droits et obligations entre citoyens, à la réglementation de la situation juridique du citoyen dans son ensemble et enfin à la réglementation des droits civiques élémentaires, autrement dits constitutionnels. Cependant il ne voit pas d'obstacle à ce que la Constitution «exclue la possibilité de faire naître des droits des citoyens envers l'État en vertu d'autres normes que celles de la loi», si de tels droits naissent «à l'issue des normes juridiques qui ne sont pas des lois mais imposent des obligations aux organes de l'État»¹⁴. Aujourd'hui, il paraît inopportun de revenir aux opinions des années soixante, car le système des sources du droit se modifie, p. ex. par une élimination progressive des actes originaires du gouvernement, qui à l'époque étaient un élément durable du droit. Mais on voit apparaître de nouvelles sources du droit, p. ex. les conventions collectives, les principes du droit international et il se peut qu'elles exigent une distinction plus précise entre la réglementation des droits et celle des obligations du citoyen.

Le Tribunal Constitutionnel ne s'est pas prononcé sur la compétence exclusive de la loi en matière de réglementation des droits civiques avec autant de fermeté que sur la réglementation des obligations du citoyen. Il n'est pas douteux que le Tribunal affirme que seule la loi peut restreindre les droits du citoyen. Dans un arrêt il déclare expressément que «des obligations peuvent être imposées au citoyen et ses droits peuvent lui être retirés par la loi»¹⁵. Dans un autre arrêt il affirme qu'«il est inadmissible d'apporter des restrictions à la position juridique du citoyen, et en particulier de restreindre ses droits autrement que par la loi. Les restrictions constitutionnelles des droits du citoyen doivent dans leur ensemble avoir le rang de loi», et «le Tribunal estime qu'une réglementation restreignant la position du citoyen ne peut être introduite par un arrêté de ministre»¹⁶. Dans un autre arrêt, nous lisons qu'est inadmissible d'imposer autrement que par la loi des obligations entraînant «une immixtion des organes de l'administration de l'État dans la sphère des libertés et des devoirs [...]»¹⁷, ce qui est évident car l'imposition de telles obligations réduit la sphère des droits.

On voit que la position du Tribunal est bien nette en ce qui concerne l'inadmissibilité de la restriction aux droits civiques autrement que par la loi.

Le Tribunal adopte la même position quand il s'agit des droits civiques élémentaires (donc constitutionnels) que seule la loi peut restreindre dès que la Constitution l'y autorise.

¹³ Le Tribunal invoque p. ex. l'expertise de S. Wronkowska-Jaśkiewicz qui constate que, sauf les exceptions peu nombreuses, dans la doctrine domine l'opinion que tous les droits et obligations civiques doivent être réglés par la loi, avec éventuellement des actes d'application. L'arrêt U 5/86, OTK, p. 20.

¹⁴ S. Rozmaryn, *op. cit.*, pp. 166-177.

¹⁵ L'arrêt p 2/86, OTK, p. 87.

¹⁶ L'arrêt p 2/87, OTK, p. 27.

¹⁷ L'arrêt U 2/86, OTK, p. 81.

Mais quand il exprime une idée plus générale, le Tribunal déclare: «Dans la jurisprudence du Tribunal Constitutionnel s'est jusque-là affirmée l'opinion qu'en ce qui concerne le mode de réglementation des obligations et des droits des citoyens et d'autres sujets de droit, la Constitution ne prévoit pas d'autre acte que la loi, ni d'autre forme que le règlement rendu en vertu de la délégation de la loi et en vue de son application»¹⁸. Cette position est confirmée par la décision dans laquelle le Tribunal, après avoir constaté que l'arrêt du Conseil des Ministres règle les droits et obligations des citoyens, déclare que cet arrêté «[...] ne trouve pas de fondement dans les dispositions de la loi réglant les matières qui font l'objet des dispositions spéciales de cet acte d'application. Cet arrêté a été rendu en vertu de la clause de la compétence générale du Conseil des Ministres, et constitue donc un arrêté dit originaire. Dans ces conditions, le règlementation qu'il comporte des droits et obligations des citoyens, donc une matière réservée à la loi, réglementation qui ne peut être l'oeuvre d'un acte inférieur à la loi que dans la situation prévue à l'art. 41 pt 8° de la Constitution de la R.P.P., doit susciter des réserves quant à sa conformité avec cette disposition de la Constitution»¹⁹.

Il n'est donc pas tout à fait évident que le Tribunal admet ou non les situations où des droits peuvent être accordés en vertu d'autres actes. Ce n'est pas — nous l'avons dit — une question sans importance, car p. ex. en droit du travail surviennent des situations où les droits du travailleur résultent d'actes autres que la loi.

En revanche, le Tribunal a raffermi l'importante constatation selon laquelle «toutes exceptions aux droits et libertés élémentaires ne peuvent être prévues que directement par la loi, aucun renvoi aux dispositions d'application autorisant leur mise en place n'étant admissible»²⁰.

Voilà ce qui vient enrichir la règle susmentionnée qui veut que la délégation autorisant à rendre des actes d'application est limitée et que le législateur n'a pas le droit de faire régler toute matière réservée à la loi par des actes d'application. Tout cela consolide la primauté de la loi dans le système juridique polonais, avant tout au moyen de la formulation des principes qui garantissent la compétence exclusive de la loi pour réglementer les questions concernées. C'est donc — pour employer un langage imagé bien que quelque peu simplifié — la définition des matières qui doivent être réglées par la loi et qui ne peuvent aucunement l'être par d'autres actes (sauf les règlements comme actes d'application soumis à un strict régime juridique).

En principe la doctrine polonaise n'a pas contesté le principe suivant concernant l'objet matériel de la loi, à savoir qu'elle est susceptible de régler tous les rapports que le législateur trouvera utile de régler par elle. En usant de nouveau d'une expression imagée, il était universellement admis que la matière réservée à la loi était illimitée. Ce principe trouve appui également dans la Constitution qui ne prévoit aucune exception à la faculté de réglementation légale²¹.

¹⁸ L'arrêt P 2/87, v. la note 17.

¹⁹ L'arrêt U 1/89 («Diariusz Sejmowy», 1989, n° 17, p. 11) concernant l'arrêt du Conseil des Ministres n° 123 du 19 août 1985.

²⁰ V. la note .19.

²¹ Cela se produit, quoique rarement, dans certains pays, p. ex. en France où la Constitution prévoit la compétence exclusive du gouvernement pour régler les matières déterminées. Ce phé-

Aussi se classent-ils parmi les plus intéressants les arrêts du Tribunal où il soulève le problème de la liberté du Parlement de statuer sur les matières réservées à la loi²², encore que ces décisions du Tribunal puissent paraître les plus discutables²³.

Le Tribunal ne conteste pas le principe général, puisqu'il déclare que «la compétence législative de la Diète n'est soumise, en principe, à aucune restriction constitutionnelle quant à l'objet. La Diète peut donc régler par les lois toute matière dès qu'elle le juge opportun et motivé»²⁴. Il s'ensuit que la disposition de la loi concernée par l'arrêt du Tribunal (précisons qu'il s'agissait de taxes ajoutées aux prix de marchandises dans certaines stations touristiques, ce que le Tribunal a qualifié de double imposition), ne portait pas atteinte à la Constitution (à son art. 8 al. 2 et art. 9 al. 3)²⁵. Cependant le Tribunal a décelé une contradiction entre les dispositions examinées de la loi sur les prix avec l'art. 8 al. 1 de la Constitution, en soutenant son opinion antérieure²⁶ d'après laquelle «le principe de la légalité matérielle exige que le droit traduise les valeurs correspondant au caractère démocratique de l'État». Le Tribunal estime que l'une des conditions du respect de ce caractère consiste à assurer «la stabilité sociale des droits garantis par les lois ainsi que la sécurité des citoyens qu'elle implique»²⁷. Elle consiste aussi en ce que les obligations soient raisonnablement imposées aux citoyens et que soient claires les intentions du législateur qui les a imposées». La double imposition provoquée en fait par la loi sur les prix fait naître un état de choses qui, de l'avis du Tribunal, «ne correspond pas aux règles de la légalité matérielle [...] ne prend pas en considération les conditions requises de la stabilité des droits et obligations, et notamment de leur raisonnable mise en place ni les conditions à remplir pour assurer la sécurité juridique [...]»²⁸.

Par ces arrêts le Tribunal aborde la sphère combien difficile et controversée de la légalité formelle et de la légalité matérielle. Il semble que cette problématique doive encore gagner en actualité avec la nouvelle disposition apportée à l'art. 1 de la Constitution, aux termes de laquelle «la République de Pologne est un État démocratique de droit, réalisant les principes de la justice sociale».

nomène est connu sous un autre aspect des États fédératifs où le Parlement de la fédération ne peut voter des lois dans les domaines relevant de la compétence des unités constitutives de la fédération, et vice versa.

²² Entre autres l'arrêt K 1/88 concernant la constitutionnalité de la loi du 14 décembre 1982 sur le régime de retraite des travailleurs et de leurs familles («Diariusz Sejmowy», 1989, n° 1), et en particulier l'arrêt K 3/89 («Diariusz Sejmowy», 1989, n° 17) concernant la conformité de la loi du 26 février 1982 sur les prix avec l'art. 8 al. 1 et l'art. 67 al. 2 de la Constitution.

²³ Cf. p. ex. la note de H. Pławucka et K. Wojtowicz commentant l'arrêt du Tribunal du 30 novembre 1988, K 1/88 («Państwo i Prawo», 1989, n° 8), et la note de T. Zieliński commentant la décision du Tribunal du 14 décembre 1987, T 2/87 («Państwo i Prawo», 1988, n° 11).

²⁴ L'arrêt K 3/89, v. la note 22.

²⁵ Avant l'amendement de décembre 1989. Il s'agit du texte de la Constitution et de la numérotation de ses dispositions en vigueur au moment où le Tribunal a statué, soit le 26 septembre 1989.

²⁶ Le Tribunal a interprété cette disposition le 30 novembre 1988 dans l'arrêt K 1/88 (cf. la note citée sous 23).

²⁷ Il s'agit sans doute de la sécurité juridique. D'après «Diariusz Sejmowy», 1989, n° 17, pp. 12-13.

²⁸ V. *supra*.

III. L'acte juridique qui a focalisé l'attention du Tribunal Constitutionnel est le règlement. Il est caractéristique que le règlement, cet acte sans doute le mieux «déchiffré» par la doctrine, ait causé le plus de problèmes en ce qui concerne sa légalité dans la pratique. C'est pour cette raison qu'il revient le plus fréquemment dans les arrêts du Tribunal, qui de ce fait en a donné les caractéristiques théoriques les plus complètes.

Le règlement est un acte d'application d'un genre particulier, qui, pouvant régler les matières réservées à la loi (autrement dit de s'ingérer, en vertu de la délégation de la loi, dans la sphère exclusive de la loi) est en même temps un acte normatif, adopté par les organes exécutifs²⁹. De là les caractéristiques du règlement consolidées sur le plan constitutionnel et doctrinal, et qui se résument notamment comme ceci: il a un caractère exécutif, il est fondé sur une délégation concrète de la loi, il ne peut être rendu que par un organe expressément habilité à cet effet, il est conforme à la loi de délégation et à d'autres lois, il reste dans les limites de la délégation et se réfère à celle-ci, il est publié au Journal des Lois.

Dans la pratique parlementaire sont apparues d'autres conditions d'usage ou réglementaires relatives à ces actes. Par exemple, on exige que les projets de règlement soient consultés avec les commissions parlementaires ou que ces projets accompagnent le projet de loi qui les prévoit, afin d'éliminer les délégations en blanc, ces portes entrouvertes laissant le passage libre à la future réglementation de la matière dont le caractère n'est pas entièrement clair au moment de l'adoption de la loi, etc.³⁰

Malgré cette conception doctrinale, claire semblerait-il, du règlement, ce sont cependant les dispositions de ces actes qui ont fréquemment été attaquées en justice pour inconformité avec la loi ou inconstitutionnalité, tant en ce qui concerne le fond que la forme.

Par la force des choses, la jurisprudence du Tribunal Constitutionnel a approfondi et précisé le régime du règlement, et aussi la délégation de la loi autorisant à rendre un règlement. C'est très important, car le contenu et la rédaction de la délégation représentent l'élément numéro un du règlement. Et il ne faut pas oublier que les projets de loi avec la délégation concernée proviennent (ou du moins sont provenues jusque-là) la plupart du temps du gouvernement et le législateur n'a pas été toujours assez sensible et perspicace pour éliminer ou corriger une délégation mal ou imprécisément rédigée.

Le Tribunal a plusieurs fois attiré l'attention sur la formulation de la délégation, en adressant même à la Diète un avis³¹ soulevant le problème

²⁹ Avant la révision de la Constitution en avril 1989, les règlements pouvaient être rendus par le Président du Conseil des Ministres, le Conseil des Ministres et les ministres (et aussi par d'autres organes directeurs de l'administration publique), donc par les organes supérieurs de l'administration de l'État. Depuis l'amendement du 8 avril 1989, le droit de rendre des règlements et des arrêtés en tant qu'actes d'application appartient également au Président de la République. La modification concerne donc les sujets habilités mais non le caractère formel des règlements et de leur matière. Le Président n'a pas rendu de règlements jusque-là (il n'y était pas habilité par la loi), il ne pouvait donc y avoir d'arrêtés du Tribunal en cette matière.

³⁰ Les règlements ont fait l'objet de nombreuses publications scientifiques; cf. entre autres A. Gwizdź, *Z zagadnień organizacji procesu legislacyjnego* [Quelques problèmes de l'organisation du processus législatif], «Państwo i Prawo», 1975, n° 12.

³¹ Cf. l'arrêt U 5/86, OTK, p. 16.

d'une bonne formulation des délégations et d'une répartition correcte des matières entre la loi et l'acte d'application de la façon «correspondant à la place de ces actes dans le système des sources du droit»³². Le Tribunal a déclaré dans le cas concerné que «la délégation [...] ne remplit pas la condition d'une délégation spéciale [...]»³³.

Dans un autre arrêt, le Tribunal dénonce l'imprécision de la délégation, et en particulier l'emploi par le législateur de la notion imprécise de «principe». On y lit notamment ceci: «Le Tribunal Constitutionnel a jugé utile de signaler à la Diète les vices de la loi, consistant non seulement en ce qu'elle emploie la notion imprécise de „principe” [...] mais aussi en ce qu'elle n'indique pas les critères fondamentaux de valorisation»³⁴.

En somme, le Tribunal se prononce aussi contre les délégations en blanc³⁵, et, ce qui semble très important, contre les délégations trop nombreuses. Il cite, p. ex., la loi du 24 février 1982 sur l'imposition des unités de l'économie socialiste, qui compte 58 articles et contient 15 délégations; dans 9 de ces articles concernant l'impôt frappant les rémunérations excédant la limite fixée par les prescriptions en vigueur, on trouve 7 délégations. Par la voie de conséquence, cet impôt a été réglé par une quinzaine d'actes normatifs de rang divers (lois, règlements, arrêtés du Conseil des Ministres, voire arrêtés ou instructions ministériels, pas toujours publiés), maintes fois amendés³⁶.

Le Tribunal s'oppose à une telle réglementation «pyramidale», encore que sous un aspect quelque peu différent, dans un autre arrêt, en déclarant que «dans le règlement contesté les solutions législatives sont allées [...] dans une mauvaise direction, en donnant naissance à toute une échelle d'actes normatifs (par suite de la double sous - délégation)». Et plus loin: «Il y a lieu de constater que toutes les possibilités de construction d'un acte normatif d'application à un seul niveau n'ont pas été mises à profit, y compris la procédure suivant laquelle il est rendu. L'exemple montre l'adoption de la construction à plusieurs niveaux, que la loi n'admet pas, de l'exécution de la délégation légale, construction qui consiste à rendre règlement et arrêté, et à énumérer, un à un, les destinataires des normes juridiques, au lieu de statuer des normes juridiques à caractère général et abstrait dans un seul acte normatif publié dans un organe officiel de publication et de ne pas disperser dans plusieurs actes juridiques la réglementation de la question concernée»³⁷.

Toutes ces remarques s'adressent non seulement aux auteurs de règlements mais aussi, sinon surtout, au législateur, elles visent à faire comprendre qu'une délégation ne peut être formulée d'une façon qui risquerait sa mauvaise interprétation ou une exécution impropre. On peut voir une synthèse de l'opinion du Tribunal en cette matière dans ce passage de l'un de ses arrêts: «La condition de la spécialisation (du caractère concret) de la délégation concerne aussi bien l'organe appelé à rendre le règlement que la matière [soulig-

³² *Ibidem* et U 1/86, OTK, p. 38.

³³ *Ibidem*, p. 19.

³⁴ L'arrêt K 1/87, OTK, pp. 49-50.

³⁵ L'arrêt Uw 4/88, «Diariusz Sejmowy», 1988, n°

³⁶ L'arrêt U 8/88, «Diariusz Sejmowy», 1988, n° 12.

³⁷ L'arrêt U 19/89, «Diariusz Sejmowy», 1989, n° 5.

né-M.K.] à régler. La concrétisation dans la délégation de la matière du règlement qui doit être rendu en vertu de la loi, signifie que cette matière doit être définie par indication des questions du même genre que celles réglées par la loi mais qui ne sont pas essentielles du point de vue des principes de la loi et, pour cette raison, n'ont pas été exhaustivement réglées par elle, mais sont indispensables à la mise en oeuvre des normes de la loi»³⁸.

En suivant la filière, depuis la rédaction de la délégation jusqu'à la définition des compétences de l'organe d'application, le Tribunal constate ceci: «[...] le caractère exécutif du règlement signifie que la délégation qui autorise à le rendre doit être formulée de manière à ne régler que les questions réglées par la loi et qui servent à la réalisation des mêmes objectifs qui trouvent leur expression dans les dispositions de la loi [...] A cet effet, les dispositions de la loi contenant notamment la délégation autorisant à rendre un règlement, doivent indiquer d'une façon au moins générale mais suffisamment précise le sens des normes que contiendra le règlement. On ne peut en effet faire appliquer par règlement ce qui n'est pas prévu par la loi»³⁹. Le Tribunal estime que c'est là un principe constitutionnel, car «le Tribunal Constitutionnel ne partage pas l'opinion selon laquelle l'obligation que la loi qui autorise à rendre un règlement précise le sens essentiel de celui - ci, ne découle pas de la Constitution et ne serait qu'une recommandation à la pratique législative. Or cette obligation résulte de la Constitution plus fortement que la condition incontestée exigeant l'existence d'un fondement juridique exprès et spécial à rendre le règlement»⁴⁰. Ces constatations du Tribunal semblent tout à fait essentielles non seulement pour la pratique courante mais aussi pour la future loi sur la création du droit; sous une réserve cependant, à savoir qu'il serait trop d'exiger que les indications sur la façon de régler la question donnée dans l'acte d'application se trouvent dans la disposition autorisant à rendre cet acte. Les règles desquelles doit résulter le sens de la réglementation dans l'acte d'application doivent se trouver dans la loi qui y autorise.

Enfin, le Tribunal soulève le problème concernant les questions que la délégation ne mentionne pas expressément. Lors même que cela paraît «logique» ou opportun, «l'absence d'une prise de position par le législateur sur une question doit être interprétée comme la non - attribution de compétences normatives en matière donnée. Car la délégation légale est toujours soumise à une stricte interprétation littérale, tandis que la présomption, p. ex. par interprétation téléologique, que la délégation englobe une matière qu'elle ne mentionne pas, ne peut en principe entrer en ligne de compte»⁴¹. Usant du même argument dans l'affaire où la délégation autorisant à définir dans le règlement le mode de délivrance d'autorisations à gérer un débit de boissons a été utilisée pour indiquer aussi les conditions du retrait de ces autorisations, le Tribunal constate: «Une telle formulation de la délégation déterminait le contenu du règlement rendu en vertu de celle - ci qui en aucun cas ne pouvait dépasser la matière sus - indiquée»⁴².

³⁸ L'arrêt K 1/87, OTK, p. 43.

³⁹ L'arrêt K 1/87, OTK, pp. 44-45.

⁴⁰ *Ibidem*, p. 45.

⁴¹ L'arrêt U 5/86, OTK, p. 18.

⁴² L'arrêt P 2/86, OTK, p. 93.

La question suivante est celle de savoir quel organe a été autorisé à rendre l'acte d'application.

Il pourrait sembler que cela ne doit pas susciter de problèmes, puisque le législateur indique expressément cet organe dans la délégation. Cependant là également le Tribunal avait à trancher des litiges et à éclaircir sa position en la matière. Il s'agissait en effet d'établir le droit de l'organe autorisé à rendre l'acte d'application de transférer ses pouvoirs à un autre organe (sous - délégation).

Le Tribunal a tranché la controverse sur l'admissibilité de la sous - délégation en s'appuyant sur la doctrine. «Le Tribunal Constitutionnel partage entièrement l'avis sur l'inadmissibilité de la sous - délégation non fondée sur la loi et concernant les *essentialia* de l'acte légal. En même temps, le Tribunal exprime l'opinion qu'est admissible la sous - délégation fondée expressément sur la loi (p. ex. l'art. 2 du Code civil), et que de plus il n'y a pas de fondements suffisants à écarter la possibilité d'utiliser une sous - délégation concernant exclusivement des éléments secondaires, à caractère réglementaire»⁴³.

En vertu de ce critère, le Tribunal constate dans d'autres arrêts «l'inadmissibilité de la sous-délégation»⁴⁴. Bien que le Tribunal ne trouve pas de fondements à l'exclusion absolue, sur la base du droit en vigueur, du phénomène de la sous - délégation, néanmoins il l'estime être un élément insouhaitable du système juridique, en faisant remarquer à juste titre ceci: «Cette opinion ne signifie pas cependant que la sous - délégation, même dans une mesure aussi restreinte, soit un phénomène souhaitable. Le Tribunal est d'avis que contre la sous - délégation milite avant tout le fait qu'une telle pratique conduit à une réglementation à plusieurs niveaux et excessivement morcelée de la matière juridique»⁴⁵.

En tranchant les problèmes de la sous - délégation, le Tribunal Constitutionnel se sert de la notion de la délégation légale (législative), en y voyant un synonyme de l'autorisation à rendre l'acte d'application ou, plutôt, comme l'essence de l'autorisation à rendre un acte d'application⁴⁶. Cela signifie que le Tribunal accepte justement une telle conception de la délégation. Il convient de le noter, car dans la doctrine juridique cette opinion n'est pas universellement partagée⁴⁷. De nombreux auteurs estiment que la délégation légale (notion qu'on ne trouve jamais dans les textes des lois) signifie le transfert du droit de rendre des lois, ce qu'on appelle législation gouvernementale déléguée.

⁴³ L'arrêt U 3/86, OTK, p. 69.

⁴⁴ P. ex. Uw 4/88, «Diariusz Sejmowy», 1988, n°13; U 20/88, «Diariusz Sejmowy», 1989, n° 5, où il est dit que la sous-délégation «a un caractère originaire»; et Uw 20/88, «Diariusz Sejmowy», 1989, n° 7, où le Tribunal déclare que «le Conseil des Ministres n'a pas mis à exécution l'autorisation prévue à l'art. 26 du droit bancaire [...] et ce qui est inadmissible, a transféré au Président de la Banque Nationale de Pologne la délégation lui donnée par le législateur à rendre l'acte d'application». Cf. aussi la note commentant l'arrêt du 19 octobre 1988, Uw 4/88, de C. Kosikowski, «Państwo i Prawo», 1989, n° 6.

⁴⁵ V. la note 43, pp. 69-70.

⁴⁶ Dans son arrêt U 3/86 (OTK, p. 67), le Tribunal déclare dans les motifs qu'il faut réfléchir sur «le caractère de l'institution de l'autorisation légale (dite délégation) du Conseil des Ministres à rendre des actes d'application sous forme de règlements». Dans une pièce concernant ce cas (p. 65) le Procureur Général emploie le terme de délégation.

⁴⁷ Cf. p. ex. S. Rozmaryn, *op. cit.*, p. 215 et ailleurs.

Ce n'est jusque - là qu'un problème d'inconsistance terminologique résultant de ce que le Tribunal se sert de la notion de délégation. Cependant on peut arriver à une situation où ce terme devient un objet de litige constitutionnel et alors la solution du caractère juridique et des conséquences de la délégation législative présentera une importance essentielle tant pour la pratique que pour la doctrine de la création du droit⁴⁸.

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Le commentaire des opinions du Tribunal Constitutionnel en matière de loi et de règlement n'épuise pas la position de cette juridiction sur les questions du système du droit et de sa formation. Dès l'introduction nous avons indiqué combien plus vaste est la liste des déclarations du Tribunal en cette matière. C'est la raison pour laquelle on ne saurait épuiser cette matière en une étude. Cette fois-ci nous avons choisi lois et règlements, parce que ces actes ont le plus fréquemment fait l'objet de décisions du Tribunal et qu'ils se situent au premier rang dans la hiérarchie des sources du droit.

⁴⁸ Dans son étude intéressante sur la délégation légale, K. Działocha invoque plusieurs arguments judicieux contre l'identification de la délégation législative avec l'autorisation à rendre un acte d'application (*W sprawie dopuszczalności delegacji ustawodawczej w prawie socjalistycznym* [De l'admissibilité de la délégation législative en droit socialiste], «Państwo i Prawo», 1970, n° 2).

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NOTES CRITIQUES * CRITICAL NOTES

Ryszard Markiewicz, *Ochrona prac naukowych [La protection légale des travaux scientifiques]*, «Zeszyty Naukowe Uniwersytetu Jagiellońskiego», vol. CMLV, 1990, Prace z Wynalazczości i Ochrony Własności Intelktualnej, n° 55, 173 pages.

Dans l'ouvrage de R. Markiewicz se rejoignent toutes les orientations essentielles des recherches menées à l'Institut des Inventions et de la Protection de la Propriété Intellectuelle de Cracovie, qui furent présentées dans les publications antérieures à celle - ci. On y trouve de vastes développements sur la protection juridique de l'auteur (chap. I), la protection par des brevets (II), la protection civile des droits inhérents à la personnalité de l'auteur (III), la protection délictuelle et contractuelle des intérêts patrimoniaux de l'auteur ou de celui qui dispose des biens immatériels (IV), la réglementation légale des rapports liés à la création scientifique dans le cadre des rapports de travail. En outre, l'auteur touche fréquemment les problèmes tels que la protection du savoir - faire, la réglementation légale de l'information scientifique et technique, la protection contre la concurrence déloyale, etc. C'est donc, en quelque sorte, la continuation des travaux de J. Barta (n° 20), W. Popiołek (n° 30), F. Budziński (n° 34), A. Kopff (n° 48), T. Trafas (n° 49), ainsi que des sujets traités dans quelques études collectives (nos 23, 35, 36, 40, 45, 46, 47, 52 et 53).

Le champ de recherche est vaste dans cet ouvrage. Il comprend les caractéristiques civiles de la protection des droits personnels et patrimoniaux de l'auteur du travail scientifique - précisons que Markiewicz entend par ce travail les résultats de la recherche (fondamentale, appliquée, de développement), donc «tous les produits immatériels du travail intellectuel tendant à reproduire ou à projeter les aspects du monde réel» (p. 13. 158). Dans cette catégorie il distingue: 1° les oeuvres au sens du droit d'auteur, 2° les objets de droits exclusifs (inventions, modèles d'utilité, nouvelles espèces de plantes), et 3° les autres travaux scientifiques qu'il qualifie de «résultats scientifiques» (*ibidem*). Autre chose est que l'auteur entend largement le terme de science qu'il identifie à «la connaissance acquise de façon créative, rationnellement légitimée», qui se caractérise par «un degré suffisamment élevé (à l'étape donnée de l'évolution) d'ordonnancement logique et factuel, et servant à comprendre et, par la voie de conséquence, à maîtriser le monde» (p. 11). Cette notion de science adoptée, l'auteur dépasse souvent le cadre de la problématique de la protection légale des résultats de la recherche pour aborder les problèmes du processus créateur et de la protection des biens personnels du créateur dans ce processus. Défaut de nature formelle, ce fait ajoute cependant à la valeur de l'ouvrage, en approfondissant l'argumentation et en étendant la réflexion juridique à un terrain rarement exploré jusque - là par les représentants de la doctrine du droit civil, du droit d'auteur et du droit des inventions.

Malgré ce que suggère son titre, l'ouvrage n'épuise pas les problèmes liés à la protection des travaux scientifiques. Comme l'auteur nous en avertit loyalement (p. 12), il «n'a fait qu'aborder d'importantes questions liées à la protection des travaux scientifiques (p. ex. les programmes pour ordinateurs, les nouvelles espèces de plantes, la biotechnologie)». Par ailleurs, «les différents aspects de la protection des travaux scientifiques ont été exposés de différentes manières et de façon inégale». Ainsi, en parlant de la protection juridique de l'auteur d'ouvrages scientifiques, et aussi de leur protection dans le système des brevets, l'auteur s'occupe avant tout (comme il le constate lui-même) à «essayer de définir comment un travail scientifique ou ses éléments peuvent être qualifiés d'oeuvre ou d'invention», tandis qu'il laisse une place marginale à la problématique de la protection par les droits exclusifs (*ibidem*). Il expose sommairement aussi la protection des intérêts patrimoniaux de ceux qui disposent de travaux scientifiques non protégés par les droits exclusifs, en laissant totalement de côté «la question de la rémunération des projets

d'inventions des salariés» (*ibidem*). Les motifs qu'il donne de cette approche sélective sont en général convaincants, sauf peut-être «l'intérêt personnel» que lui suscitent les questions déterminées. Car il ne paraît pas juste que dans une monographie l'auteur omette certaines questions, qui rentrent dans le sujet, pour cette raison seulement qu'elles ne «l'intéressent pas».

Le sujet de l'ouvrage impose la nécessité d'une analyse juridique étendue. Il a fallu en premier lieu se référer aux dispositions du droit d'auteur et du droit des inventions (des brevets), et aussi aux dispositions du Code civil sur la protection des biens inhérents à la personnalité, sur la responsabilité contractuelle. Il a fallu aussi se référer au droit pénal (protection du secret d'État et du secret de service) et à d'autres dispositions. En de nombreux cas, pour trancher des problèmes théoriques et même pour interpréter les dispositions en vigueur en Pologne, il a fallu se référer à la doctrine et à des législations étrangères. L'auteur fait preuve d'une connaissance exceptionnelle de la doctrine et des dispositions des pays capitalistes, en particulier de la R.F.A. et des États - Unis. Il invoque bien plus rarement la doctrine et la jurisprudence de l'U.R.S.S. et des pays de l'Europe centrale, bien que l'acquis en matière de droit d'auteur et de droit d'invention des pays tels que la Hongrie, la Tchécoslovaquie ou la R.D.A n'est pas du tout négligeable. Cela s'explique peut-être par ce que l'auteur n'a -1 il pas eu l'intention de faire un ouvrage de droit comparé.

Les dimensions de ce compte rendu ne me permettent pas de prendre position sur les différentes thèses et affirmations de l'auteur. Je dirai seulement qu'en général je partage ses opinions, et s'agissant de questions controversées, il sera sans doute possible de les discuter en vertu du droit à «la critique scientifique admissible». Je tiens toutefois à souligner que les conclusions finales *de lege lata* et *de lege ferenda* sont intéressantes et que cette dernière publication de l'Institut des Inventions et de la Propriété Intellectuelle est, comme la grande majorité de ses publications, une parfaite réussite. Elle révèle une tendance à poursuivre et à synthétiser une problématique étudiée en profondeur depuis une quinzaine d'années. Elle nous rapproche ainsi d'une étude complète des bases théoriques de la réglementation légale des rapports liés à la protection de tous biens matériels, résultat de la création intellectuelle, et en fin de compte à l'élaboration et l'adoption d'un Code de propriété industrielle.

Andrzej Szewc

LABOUR LAW AND UNEMPLOYMENT

(SCIENTIFIC CONFERENCE, WARSAW, APRIL 26, 1990)

The conference was organized by the Institute of Law Studies and the Union Research Centre of the Mazowsze Region of Solidarity. Beside the scientific circles, the participants included representatives of the Ministry of Labour and Social Policy, the Supreme Court, and trade unions.

In her opening speech, Prof. M. Matey (Institute of Law Studies, Polish Academy of Sciences) stressed the organizers' intention to define more accurately the legal problems related to unemployment through reference of those problems not only to provisions of the act on special principles of dismissal of employees for reasons arising from the workplace and the act on employment, but also to the social context of unemployment and the international standards in this sphere.

Prof. Matey addressed this latter problem in her paper "The Legal Regulations of 'Welfare Europe' in matters concerning unemployment" in which she discussed the West-European regulations of unemployment, and particularly Art. 48 — 51 and 117 — 122 of the 1957 Rome Treaty, the European Welfare Charter of 1961 and the declaration of 1989 under the same title.

Two papers dealt with the act on dismissals for reasons arising from the workplace. In his appraisal of the functioning of that act., L. Nawacki (head of department in the Ministry of Labour) stressed that the discussed regulation aimed at the introduction of guaranties which would lessen the negative effects of unemployment and shorten the search for a new job faced by the unemployed. He stated, though, that in spite of the protective steps, unemployment would remain a social problem in Poland. As estimated by the labour department, the number of the unemployed in search of a job would go up and amount to 800,000 approximately by the end of 1990. Hence the solutions included in the act and aimed at protection of employees deserve approval. They are not faultless, though, as far as both the technical legislative and the substantial spheres are concerned. Thus what requires appropriate interpretation and possibly verification are: the subjective scope of the act; the conditions of dismissal for reasons arising from the workplace; the legal nature of the regulation on severance payments; and the extent of protection against dismissal.

The notion of group dismissal, and chiefly the legal regulation of the reasons for admissibility of such dismissal, was discussed by M. Pliszkiwicz, LL.D. (Institute of Law Studies). He pointed to the problems of defining the reasons arising from the workplace that make it possible to exercise the powers provided for in the act, and stressed that the catalogue of those reasons is not a set of separate items. The situations it specifies tend to intersect. It would thus be more pertinent to base the conception of the act on a general clause, and to guaranty at the same time the possibility of verifying the reasons for group dismissal *ad casum*.

J. Kinowski discussed in his paper the functioning of the acts on special mode of dismissal and on employment as appraised by the Union Research Centre of the Mazowsze Region of Solidarity. He stated that the two acts failed to protect satisfactorily employees against dismissal. The act on dismissals for reasons arising from the employer provides for no sufficient guaranties of its enforcement, while that on employment fails effectively to prevent unemployment. The latter act is based on mechanisms of the administrative law and makes the Ministry of Labour and Social Policy competent in the whole of the matter. The Ministry, though, is languid in its activities aimed at creation of new jobs.

Pointing to the technical legislative defects of the two discussed acts, the authors did not postulate a prompt amendment of the provisions; instead, they focused rather on analysis of the legal instruments and solutions which might contribute *de lege lata* to a better and more effective protection against dismissal and the effects of unemployment. Expressing their satisfaction at the very fact of passage of the act on dismissals for reasons arising from the workplace, they stressed

at the same time that the protective mechanisms provided for by the law in force were not used to a sufficient extent by the employees' representations. This concerns above all the procedure of group dismissals (Z. Salwa, G. Goździewicz, E. Gienieczko, B. Skulimowska); the possible position and role of the workers' self-management in the planning of employment (W. Sanetra) and the role of the union in individual labour disputes (G. Goździewicz).

Also discussed was the problem of the manager's responsibility for violation of the act or provisions of the agreement on staff reduction (Z. Salwa, W. Sanetra, J. Kinowski, S. Bar, W. Uziak). The participants criticized the solutions that make a group dismissal possible without consultation with the unions: the wording of the employment agency's notification of the planned dismissals; the nature of the norm granting to an employee the right to be employed again (B. Skulimowska); the binding force of the provision regulating the amount of severance payments (G. Goździewicz, B. Cudowski); and the special protection against dismissal (G. Goździewicz, S. Perestaj, M. Pliszkiewicz, S. Bar).

Appraising the practice of group dismissals from the viewpoint of the union's powers, the participants stressed that the mechanism of such dismissals makes the union a co-organizer of staff reduction; thus instead of protecting the interests of employees, the union actually protects the employer (J. Kinowski, S. Bar, W. Uziak).

Analyzing the solutions contained in the act on employment, the authors focused above all on the nonconformity of its provisions to international labor law, and also to the current situation on the market due to ignorance of the actual size of the population of the unemployed (A. Rajkiewicz, W. Muszalski). It was also stressed that the instruments provided for in the act are inefficient as far as prevention of job reduction is concerned (S. Bar, J. Kinowski, Z. Salwa). They aim at lessening the effects of unemployment solely through the payment of benefits. At the same time, the principles of granting those benefits — particularly to those never employed before, the graduates included — give rise to many doubts. They might have a demoralizing impact on the attitude to work of the persons concerned (W. Muszalski). Much attention was also devoted to the amount and procedure of granting of loans (J. Kinowski, S. Bar, A. Rajkiewicz, Z. Salwa, W. Muszalski).

Małgorzata Gersdorf-Giaro

THE LAW OF JULY 13, 1990
on the Privatisation of State-Owned Enterprises
(J. of L. of 1990 No. 51, item 298, with subsequent amendments)

CHAPTER 1
General Provisions

Art. 1.

The privatisation of a state-owned enterprise is based on offering to third parties, shares or stocks of a company evolving from the transformation of a state-owned enterprise and owned exclusively by the State Treasury, or offering to third parties the assets of a state-owned enterprise or the sale of the enterprise. Therefore, a state-owned enterprise can be transformed into a company or wound-up upon the basis of this Law.

Art. 2.

1. On a motion of the Council of Ministers, Parliament shall determine annually the general directions of privatisation and specify the use of resources obtained from privatisation activity. Parliamentary decisions are made jointly with the enactment of the yearly budget act.

2. The Council of Ministers, by decree, shall specify those state-owned enterprises which are particularly significant to the national economy, and whose privatisation requires the approval of the Council of Ministers.

Art 3.

The regulations specified in this Law concerning the articles of incorporation, shares, supervisory council, equity (share) capital and general meetings [of a joint stock company] apply equally to the deed of association, original capital and the meeting of shareholders of a limited liability company.

Art. 4.

Wherever this Law refers to:

1. Disposing of shares—is understood to mean specifically: the sale of shares, disposal of the rights to shares, their use as collateral, or lease thereof.

2. An integrated part of the assets of a state-owned enterprise is understood to mean a set of tangible and intangible assets which can constitute a separate enterprise, specifically a plant, shop or a service establishment.

CHAPTER 2
The Transformation of a State-Owned Enterprise into a Company

1. The Minister of Ownership Changes may transform a state-owned enterprise into a company, provided that

a) the joint request of its Executive Director and the Employee Council is submitted after

obtaining the opinion of the general assembly of the employees (delegates) as well as the opinion of its Founding Body, or

b) the request of the Founding Body is submitted with the consent of the Executive Director and the Employee Council after obtaining the opinion of the general assembly of the employees (delegates).

2. The request referred to in paragraph 1 should include specifically: a financial and economic analysis of the enterprise to be transformed, a draft of the company's founding deed as required by the Commercial Code, as well as a proposal for preferential treatment for employees of the company to acquire shares in that company from the State Treasury.

3. The Minister of Ownership Changes can refuse the transformation of a state-owned enterprise into a company due to the financial or economic condition of the enterprise or important national interest.

4. A refusal to transform a state-owned enterprise into a company must be made known within 3 months from the date of submission of the request and, apart from the grounds, include a list of conditions, upon whose fulfilment the transformation of the enterprise will be permitted or the time-period in which the issue of transformation will be reconsidered. Objections to the refusal should proceed in accordance with article 61 of the Law dated the 25th of September, 1981 on State-Owned Enterprises (J. of L. 1987, No. 35, item 201, 1989, No. 10, item 57 and No. 20, item 107, 1990, No. 17, item 99).

Art. 6.

1. The Prime Minister, on the motion of the Minister of Ownership Changes, can order the transformation of a state-owned enterprise into a company. In this case, the regulations of Art. 5 do not apply.

2. A motion, to which paragraph 1 refers, should be presented after obtaining the opinion of the Executive Director and Employee Council of the state-owned enterprise as well as the Founding Body. If no opinion is expressed within a month, it is assumed that there are no objections.

3. The Minister of Ownership Changes shall be in charge of the activities leading to privatisation.

Art. 7.

The Commercial Code shall apply, unless this Law provides otherwise, to companies emerging from the transformation of a state-owned enterprise.

Art. 8.

1. A company emerging from the transformation of a state-owned enterprise, will remain a company owned exclusively by the State Treasury until shares are disposed of to third parties.

2. A company emerging from the transformation of a state-owned enterprise will assume all the rights and duties of the transformed enterprise.

3. By virtue of this Law all rights and responsibilities deriving from administrative decisions are transferred to the transformed company.

1. By virtue of this Law employees of a transformed enterprise, become the employees of a company, with the exception stated in paragraph 2.

2. The employment relationships of those employed by nomination cease, by operation of law, from the day of the enterprise's removal from the register of state-owned enterprises. The above shall be deemed a withdrawal of nomination. Re-employment of such persons by the company will occur on terms agreed by both parties.

3. The Executive Director of a transformed state-owned enterprise is not entitled to the compensation described in the Law on State-Owned Enterprises, if the Director remains employed as a member of the board of directors of the company resulting from the transformation of the state-owned enterprise.

4. The company will be responsible for obligations arising from the terms of employment which existed prior to the transformation of the enterprise.

Art. 10.

The articles of incorporation of a company emerging from the transformation of a state-owned

enterprise shall be settled by the Minister of Ownership Changes acting on behalf of the State Treasury.

The closing annual balance-sheet of a state-owned enterprise shall constitute the opening balance-sheet of a company, the founding fund and the enterprise fund becoming the initial capital of the company. The company's articles shall specify which part of the initial capital constitutes equity capital and which reserve capital.

Art. 12.

1. Immediately after a company's articles are settled, the board of the company shall apply for the company to be entered into the commercial register.

2. After a company is recorded in the commercial register the state-owned enterprise is automatically removed from the state-owned enterprise register.

Art. 13.

Arts. 14—16 apply to companies resulting from the transformation of state-owned enterprises, provided the State Treasury holds all the shares.

Art. 14.

1. Up to the moment that shares are disposed of to third parties, companies are bound by the regulations of the general rules of accounting in state-owned enterprises, taking into consideration the Commercial Code regulations.

2. The Minister of Finance, by an executive order, can determine specific accounting rules for companies, which will observe the Commercial Code regulations.

Art. 16.

A company that came into existence in accordance with this Law can be a sole founder of a joint stock company.

Art. 17.

1. A Supervisory Council shall be established in a company which evolved from the transformation of a state-owned enterprise.

The employees of the company are entitled to elect one-third of the members of the Supervisory Council.

2. The regulations of the company's articles concerning the election of the members of the Supervisory Council by the employees cannot be repealed or amended while more than one half of the shares remain in the hands of the State Treasury, unless consent is given by a majority of those members of the Supervisory Council who are elected by the employees.

3. A company's employees elected to the Supervisory Council, enjoy the same legal protection of their terms of employment as members of the Employee Council in state-owned enterprises.

4. Election of the members of the Supervisory Council conducted by the voting of separate groups (as provided for in art. 379, paragraphs 3 — 5 of the Commercial Code) shall only apply to that part of the Council which is not elected by the employees.

CHAPTER 3

Disposing of Shares to Third Parties

Art. 18.

1. Transferring and encumbering shares belonging to the State Treasury in companies which have emerged from the transformation of state-owned enterprises, as well as subscribing for the shares in such companies provided the State Treasury remains the sole shareholder, are regulated by the Commercial Code unless the present Chapter specifies otherwise.

2. Gratuitous transfer of shares requires the consent of the Council of Ministers.

Art. 19.

1. The Minister of Ownership Changes decides whether shares owned by the State Treasury will be offered to other parties. Shares should be disposed of within two years from the date of recording the company in the commercial register, unless the Council of Ministers provides for a longer period.

2. The Minister of Ownership Changes is authorised to decide upon increasing the share capital of a company owned exclusively by the State Treasury through an issue of new shares.

Art. 20.

1. Before offering shares to third parties the Minister for Ownership Changes shall order that an economic and financial study be prepared for the purpose of asset valuation as well as establishing whether the implementation of organisational, economic or technical changes is required.

2. The Minister of Ownership Changes can grant an exemption from an economic and financial study, as mentioned in paragraph 1 of this Article, if the company was valued before its transformation, and the disposal of shares is to occur directly afterwards.

3. The Minister of Ownership Changes shall order that an analysis is prepared in order to determine the legal status of a company's assets, with specific consideration to claims on those assets by third parties.

4. The Minister of Ownership Changes, by an executive order, shall determine the rules and the methods of preparing such an analysis as well as the qualifications required by the persons preparing such a report.

Art. 21.

The Minister of Ownership Changes can make it a condition that a company's shares are only offered to third parties after the implementation of changes, as discussed in Art. 20, paragraph. 1.

Art. 22.

1. Before offering shares to third parties the Minister of Ownership Changes, with the approval of the Minister of Finance, on behalf of the State Treasury, can take over part or all of a company's debt.

2. The Minister of Ownership Changes will announce the intention to take over the company's debts in a manner required for making company announcements, in which he will call creditors to present their reservations no later than two months from the day of issuing such an announcement.

3. Those creditors, who within the period of time specified in paragraph 2, do not state their agreement for the debt take-over must be satisfied or secured prior to the company's debt take-over. The statement regarding the take-over of a company's debt is made by the Minister of Ownership Changes in the manner required for making company announcements.

Art. 23.

1. Subject to the exceptions specified in Art. 24, shares belonging to the State Treasury will be sold in the following ways:

- 1) on an auction basis
- 2) on a public offer basis
- 3) on a negotiated basis after a public invitation.

2. In specific cases, the Council of Ministers, on a motion of the Minister of Ownership Changes, can permit State Treasury shares to be sold in a different manner from those specified in para. 1.

3. Selling State Treasury shares through ways other than those specified in paragraph 1, or without the permission required by paragraph 2, is void.

4. The Minister of Ownership Changes, in agreement with the Minister of Finance, shall specify, by executive order, the financing principles for the offer of State Treasury shares in companies resulting from the transformation of state-owned enterprises.

Art. 24.

1. Employees of a state-owned enterprise transformed into a company are entitled to buy up to 20% of the total amount of shares of the company held by the State Treasury on a preferential basis. Employees retain the right to buy and acquire more shares on generally available terms.

2. Offering shares to employees on a preferential basis shall take place no later than two months from the time that the shares are offered on general terms.

3. Employees' rights to buy shares on preferential terms expire within 1 year from the movement of opening the sale of shares to employees.

4. Shares sold on a preferential basis to employees shall be sold at a 50% discount compared to the price set for natural persons, who are Polish citizens, offered on the first day of sale. This price is not subject to change during the period discussed in paragraph 3.

5. The total value of discounts given to the employees of an enterprise which was transformed into a company must not exceed the product of the average pay per employee in the state enterprise in the 12-month period prior to the registration of the new company in the commercial register and the number of employees purchasing shares.

6. The number of shares sold on a preferential basis to individual groups of employees and the conditions and deadlines for payment will be specified by the company's articles, in accordance to the request referred to in Art. 5.

7. Agricultural producers who are permanently connected with a company either through contracts of cooperation or of deliveries of agricultural produce may purchase shares in that company on the preferential basis prescribed for employees.

8. The Council of Ministers shall specify the types of companies in which shares may be purchased under the conditions set out in paragraph 7.

Art. 25.

1. Parliament, on a motion of the Council of Ministers, shall pass a resolution regarding the issue and value of Privatisation Coupons which can be used to pay for:

- a) acquiring shares issued as a result of the transformation of a state-owned enterprise;
- b) acquiring title to participation in financial institutions (Mutual Investment Funds) which will have at their disposal shares created as a result of the transformation of state-owned enterprises;
- c) acquiring enterprises or integrated parts of the assets of state-owned enterprises referred to in Art. 37.

2. The Privatisation Coupons issued in accordance with paragraph 1 will be distributed free of charge in equal amounts to all citizens of the Republic of Poland, resident in the country.

3. The Council of Ministers shall determine, by decree the expiry date of particular issues of Coupons, their form and distribution rules as well as the rules for making use of such coupons, and also rules limiting and, under certain conditions, prohibiting the transfer of Coupons.

Art. 26.

The Council of Ministers by decree, may also decide that certain issues of Coupons, referred to in Art. 25, will be available on credit terms.

Art. 27.

1. On the basis of separate legal provisions, payment for the purchase of shares from the State Treasury can also be effected in securities.

2. The Council of Ministers shall, at the request of the Minister of Ownership Changes, specify, by decree, the required form of payment for shares acquired from the State Treasury.

3. The Minister of Ownership Changes, upon the approval of the Minister of Finance, can allow Polish citizens to pay for shares by instalments.

Art. 28.

1. The Minister of Ownership Changes shall entrust shares to a bank or other financial institution according to rules specified in a contract, if the rights to these shares have not been acquired within a period of three months from the end of the time that they were to be offered as discussed in Art. 19 paragraph 1.

2. A bank or other financial institution, according to the contract, can exercise the rights deriving from ownership of the transferred shares. All revenues earned are transferred to the State Treasury.

Art. 29.

State legal persons cannot, without the prior consent of the Minister of Finance, purchase shares belonging to the State Treasury.

The regulations of the present Chapter apply also to the transfer of rights and acquisition of shares in a company, in which the sole shareholder is a company exclusively owned by the State Treasury. [Arts. 31 —36 are repealed]

CHAPTER 4**Privatisation of a State-Owned Enterprise by Means of Winding-up.****Art. 37.**

1. A Founding Body, after obtaining the consent of the Minister of Ownership Changes, may rule that a state-owned enterprise be wound-up in order to:

- 1) sell its assets, or integrated parts of the enterprise's assets,
- 2) use the enterprise's assets or integrated parts of the assets as a contribution to a company,
- 3) allow the enterprise's assets or integrated parts of its assets to be let, against payment, for a specified time.

2. The decision to wind-up and liquidate is made by the Founding Body on its own initiative or at the request of the Employee Council of the enterprise.

3. The Employee Council and the Executive Director of the enterprise have the right to challenge the decision referred to in paragraph 2 as specified in art. 61 of the Law referred to in Art. 5, paragraph 4.

Art. 38.

1. Winding-up, in order to allow an enterprise's assets to be let, against payment, as discussed in Art. 37, paragraph 1, point 3, may take place if:

- 1) a motion to liquidate and to allow the assets to be let, against payment, is adopted by the general assembly of the employees (delegates);
- 2) the permission to let these assets is for the benefit of a company;
- 3) a majority of the employees of the liquidated enterprise join the company;
- 4) only natural persons are partners in this company, unless the Minister of Ownership Changes determines otherwise;

5) the amount of share capital or the equity capital of the company shall not be less than 20% of the joint value of the founding fund and the fund of the liquidated enterprise.

2. Winding-up, in order to allow, against payment, use of assets, may occur regardless of the conditions prescribed in paragraph 1, point 3, if the company which ought to fulfil these conditions is not created within 2 months from the day of the Employee Council's decision on winding-up, or upon the general assembly of employees (delegates) approval.

Art. 39.

1. The letting of assets against payment shall be based on a contract concluded in the name of the State Treasury by the Founding Body.

2. In the contract referred to in paragraph 1, the parties can determine that, after a certain period of time, the user has the right to purchase those assets which he is using. In determining the purchase price, the value of all rentals or other dues paid by the user to date will be taken into account.

3. The Minister of Finance shall prescribe the principles for determining amount due for the use of State Treasury assets in cases referred to in paragraphs 1 and 2.

Art. 40.

Where a state-owned enterprise is wound-up on the basis of the regulations of the Law on State-Owned Enterprises, a Founding Body in the name of the State Treasury can:

- 1) contribute to a company the assets remaining after the winding-up of an enterprise or a part of it,

- 2) sell the assets remaining after the winding-up of an enterprise or a part of it.

Art. 41.

When selling assets of a liquidated enterprise or integrated parts of it, or allowing them, against payment, to be let, the Founding Body shall apply the regulations specified in Arts. 23, 25 and Art. 39, paragraph 3 to the extent relevant.

Art. 42.

The regulations of Chapters 2 and 3 of this Law shall apply to the extent relevant to companies exclusively owned by the State Treasury created on basis of Art. 37, paragraph 1, point 2, as well as Art. 40, point 1, and also to the disposing of shares in such companies.

Art. 43.

The rules for the sale of an enterprise shall apply to the extent relevant to the sale of an integrated part of the assets of a state-owned enterprise.

CHAPTER 5

Specific, Temporary and Final Regulations

Art. 44.

For notarial deeds connected with the transformation of a state-owned enterprise into a company, the Notary Office shall charge a fixed fee. The Minister of Justice shall determine, by executive order, the level of fee payable to notaries public.

Art. 45.

1. The provisions of this Law apply to the extent relevant to the privatisation of municipal enterprises, subject to the provisions of paragraphs 2 and 3.

2. The powers of the Minister of Ownership Changes, as well as of the Founding Body, prescribed in this Law, shall be exercised in respect of municipal enterprises by the Municipal Council or the Council of the Association of Municipalities.

3. The Municipality or the Association of Municipalities may, on the basis of an agreement with the Minister of Ownership Changes, transfer the conduct of all activities associated with privatising a municipal enterprise to the Minister. The conclusion of the agreement requires a resolution of the municipal representatives or the representatives of the Association of Municipalities.

Art. 46.

1. The Minister of Finance in the interest of the National Economy, at the request of the Minister of Ownership Changes, may exempt a company from income tax and tax on wage increases for a period of 3 years from the date a foreign party acquires shares belonging to the State Treasury, or acquires shares issued by a company owned exclusively by the State Treasury.

2. In the event of declaring the winding-up of a company during a period of income tax exemption or within 3 years from the end of this period, the company is obliged to pay the tax for the whole period of exemption. In this case the tax obligations arise at the moment the winding-up of the company is declared.

Art. 47.

The Council of Ministers within a period of 2 months from the Law coming into force will present to Parliament the motion mentioned in Art. 2, paragraph 1 for the year 1990.

1. The following changes are introduced to the Decree Law of the President of the Republic of Poland of the 27th of June 1934, the Commercial Code (J. of L. No. 57, item 502, 1946 No. 57, item 321, 1950 No. 34, item 312, 1964 No. 16, item 94, 1969 No. 13, item 95, 1988 No. 41, item 326):

1) in Art. 207 after the words "company employees" are added: "holding a position of general accountant, legal adviser, plant manager or other direct subordinate to Board members",

2) in Art. 378 after the words "company employees" are added: "having a position of general accountant legal adviser, plant manager or other direct subordinate to Board members".

Art. 49.

1. The following changes are introduced to the Law on State-Owned Enterprises of the 25th of September 1981 (J. of L. of 1987 No. 35, item 201).

1) After article 25.² is added article 25.³ to read:

“Art. 25.³ The order to liquidate a state owned enterprise on the basis of the State-Owned Enterprises Law will be issued in agreement with the Minister of Ownership Changes”.

2) Article 29 is repealed.

3) In article 30:

1) in paragraph 1 the words “and the procedures for liquidating a state-owned enterprise in order to establish a company” are deleted.

2) in paragraph 2, after the words “after the liquidation of a state-owned enterprise” a comma is added and the words “and also a liquidation on the basis of the Law on Privatisation of State-Owned Enterprises”.

3) In article 46 after the words „Founding Body” is inserted “according to the Law of July 13, 1990 on the Privatisation of State-Owned Enterprises”.

2. Uncompleted liquidation proceedings that were commenced under the State-Owned Enterprises Law of September 25, 1981 shall be continued under this Law.

The following changes are introduced to the Law of December 28, 1989, dealing with detailed principles for dissolving employees’ terms of employment for reasons related to the employer and dealing with amendments to some laws (J. of L. of 1990 No. 4, item 19, and No. 10, item 59).

1. Article 8, paragraph 3 shall read as follows:

“3. Severance payments are not payable to employees who:

1) are entitled to obtain a single termination payment upon retirement or disability retirement,

2) at the date of dissolving the terms of employment, accepted an offer to be employed in a firm that has taken over all, or part, of the assets, of the firm employing them to date, or in a firm created as a result of such a takeover,

3) after dissolving the terms of employment, start to undertake economic activity on their own account or as part of a company or co-operative related to the takeover of specified movable or immovable assets also to an employee who at the movement of dissolving the contract of employment is a partner/shareholder in a company, or a member of a co-operative, executing such a takeover”.

2. Article 14 is repealed.

Art. 51.

This Law shall take effect as of the day of its promulgation.

Zakład Narodowy im. Ossolińskich. Wydawnictwo. Wrocław 1993.

Objętość: ark. wyd. 5,80; ark. druk. 4,5; ark. A6.

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