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INTRODUCTION — THE TENTH ANNIVERSARY OF “PRZEGŁĄD SEJMOWY”

In December 1992, the Chief of the Chancellery of the Sejm Ryszard Stemplowski decided to publish a periodical, on a quarterly basis, that would provide information to the general public, and particularly politicians, journalists, teachers, students and scholars, concerning new developments in the work of the Sejm. The periodical was called “Przegląd Sejmowy” [Sejm Review]. The task of publishing it was assigned to experts on parliamentary affairs and specialists in constitutional law (both scholars and practitioners), who have established an editorial board.

The journal has turned out to be quite useful. In Poland, discontinuity of parliamentary traditions have required a deeper reflection on the role of Parliament and better informing the public about the legislative and supervisory work of the Polish Sejm, other developments in modern parliaments, and about the tasks assigned to legislative bodies in the transition period of the Central and Eastern European Countries. The columns of the journal have become a convenient forum for the exchange of opinions and experience, and for presentation of scientific progress from a wider perspective, as they publish texts by local and foreign authors.

During the ten years of its existence, “Przegląd Sejmowy” has gathered a number of more or less permanent collaborators, mostly scientists and scientific workers (including young persons) and, to the lower extent, practitioners. It has managed to integrate not only lawyers, but also politologists and sociologists, around parliamentary themes. The journal has developed a solid reputation among domestic periodi-
As a result of its success, the magazine expanded, in 1996, from quarterly to bimonthly, which helped to bring authors and readers closer together and to supply more frequently information and up-to-date scientific papers in the field.

It is worth noting the role “Przegląd Sejmowy” plays in research and didactic activities of higher educational institutions. This is particularly evident at the law and administration faculties where it serves as an indispensable tool for those who write master, doctoral or habilitation theses.

The journal serves as an important source of information on theoretical and practical aspects of parliament’s activities and, to an extent, information concerning the related activities of certain important organs of the State: the Constitutional Tribunal, the Supreme Court, the Supreme Administrative Court or the Commissioner for Citizens’ Rights (Ombudsman).

The editorial line, developed and implemented by the Editorial Board, proved to be successful. This was manifested in the course of meetings open to authors and readers, held twice in 1995 and 1998. But this does not, however, mean that we can rest on our laurels. In the coming years more attention should be given to the European Union matters, its institutions (already existing and those under consideration) and the role of national parliaments in the uniting Europe.

In 1998, at the conference held on the 5th anniversary of “Przegląd Sejmowy”, a proposal was made to publish, from time to time, an English-language version of the journal, containing translations of articles of interest to foreign readers, selected from among those previously published in the Polish. The first issue of such a publication (in 1999), received a very positive response from the readers. This issue is a new English-language issue of our journal.

Editor-in-Chief Wiesław Skrzydło
HUMAN AND CITIZEN’S RIGHTS UNDER
THE NEW CONSTITUTION OF THE REPUBLIC OF POLAND*

I. SCOPE OF THE CONSTITUTIONAL RIGHTS AND INDIVIDUALS’ FREEDOMS

Every state attributes certain rights and constitutional freedoms solely to its citizens, whereas others apply equally to the citizens and non-citizens of a given state. The scope of these rights and freedoms enjoyed by non-citizens varies from state to state, but there are certain regularities in the way that domestic laws define them. 

Primo: their scope is constantly expanding; merely a handful of rights and freedoms are reserved exclusively for citizens. Secundo: the rights and freedoms reserved only for citizens usually include political rights and freedoms.

The Constitution of the Republic of Poland clearly names the rights and freedoms reserved for Polish citizens, while at same time, its art. 37 para. 1 provides that “anyone under the authority of the Republic of Poland shall enjoy the freedoms and rights ensured by the Constitution”. Under art. 37 para. 2, any exceptions to this rule, excluding those explicitly stated in the Constitution (i.e. certain political rights and freedoms) may only be established by statutes.

The wording of art. 37 para. 1, as well as other constitutional provisions pertaining to individuals’ freedoms clearly sets out that such provisions apply to natural

* This article was published in “Przegląd Sejmowy” No. 5(22)/1997.
persons already born. This was the intention of the authors of the Constitution, who rejected the motion of providing protection of life from the moment of conception. The Constitutional Tribunal went beyond that intention in its verdict of May 27, 1997 — two days after the constitutional referendum — ruling that, under the norms then in effect, the constitutional principle a state governed by the rule of law necessitates that human life be respected from the moment it is conceived.

The [Polish] Constitution does not include any provisions that would extend constitutional protection of rights and freedoms to legal persons thereby resembling art. 19 para. 3 of the basic law of the Federal Republic of Germany. Thus, the Polish Constitution does not reflect trends existing in many democratic states, which hold the belief that extending constitutional protection of rights and freedoms to legal persons does not merely serve to benefit such subjects, but rather the natural persons that constitute them. Naturally, whenever such extension took place it did not relate to the rights that by their very nature apply to natural persons, i.e. the freedom of religion, the right to marriage, etc.

II. LIMITATIONS ON CONSTITUTIONAL RIGHTS AND FREEDOMS

Art. 31 para. 3 of the Polish Constitution provides a general clause relating to limitations on rights and freedoms formulated in the basic law. It states that “any limitations on the exercise of constitutional rights may be imposed only by statute, and only when it is necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, public health and morals, or the freedoms and rights of other persons”. Thus, a principle that is generally recognised in the constitutional laws of democratic states was adopted. It holds that the task of defining the limits of constitutional rights and freedoms rests with the legislature. It is up to them to update and specify the constitutional norms within the framework of the existing social relations. When establishing the limits on these rights and freedoms they can do it exhaustively in statutes, and provide a possibility of issuing appropriate executive regulations, if necessary. The latter is done when the legislator is not able to determine all the situations in which limitations should be imposed beforehand. Then, they ought to indicate the lines and principles for sub-statutory regulations explicitly enough not to leave too much freedom for the executive organs or courts, and not to make them de facto replace the lawmaker.

The Constitution does not give the legislator complete freedom to establish limits on the rights and freedoms guaranteed by it. Its art. 31 para. 3 provides in fine that “such limitations shall not violate the essence of freedoms and rights”. (Inviolability of the essence of the right of ownership is subsequently mentioned in art. 64 para. 3, but that is an unnecessary repetition of the general principle). It does not say, however, how to interpret this essence. In the countries that recognise this principle (i.e. Germany, Liechtenstein, Austria, Switzerland) there is no unanimity of opinion in how to interpret this

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1 On January 27, 1995 — 37 out of 43 members of the Constitutional Committee of the National Assembly participating in voting were in favour of the provision which did not mention protection of life from the moment of conception; see “Komisja Konstytucyjna Zgromadzenia Narodowego. Biuletyn” [The Constitutional Committee of the National Assembly. The Bulletin], vol. XII, p. 92.
“essence of rights and freedoms” in the science of constitutional law. Two main lines of thought can be distinguished:

— the theory of absolute essence — the essence of every right and freedom is constant and absolute, regardless of the situation,

— the theory of relative essence — a concept of essence of right or freedom is relative, and should be defined according to a specific situation, with full consideration of all circumstances.

In broad terms, the essence of any right or freedom is violated when legal regulations, although they do not abolish a given right (or freedom), obstruct its application (e.g. taxes on private means of production could be so high that owning such means would become economically unviable).

Outside the above-mentioned general clause, the Constitution contains provisions, which exclude any limitations or permit establishment of limitation by statutes. A provision in art. 30 of the Constitution belongs to the first group. It states that “the dignity of the person” is “inviolable”. The latter group is more numerous, (e.g. art. 41 para. 1 in fine, art. 49); the fact that the authors of the Constitution provide (as if independently of art. 31 para. 3) an additional possibility for limiting a right by a statute means that this may be an attempt to define limits on the use of rights and freedoms for reasons other that those named in the general clause.

Special limitations on the constitutional rights and freedoms may be enforced when extraordinary measures are imposed. The Constitution of the Republic of Poland recognises three kinds of such extraordinary measures: martial law, a state of emergency, and a state of natural disaster. It provides, in art. 228 para. 2, that any of these states “may be introduced only by regulation, issued upon the basis of a statute, and which are additionally required to be publicised”. Statutes applying to particular measures shall define “the degree to which the freedoms and rights of persons and citizens may be subject to limitation”, and determine “the principles for activity by organs of public authority” for the duration of a given extraordinary measure (art. 228 para. 3). They can specify “the principles, scope, and manner of compensating for loss of property resulting from limitation of freedoms and rights” of persons and citizens during a period requiring the imposing of extraordinary measures” (art. 228 para. 4).

Although the founders of the Constitution left the detailed specification of the extent to which constitutional rights and freedoms can be limited to the legislator, the Constitution does formulate certain general principles. The provisions of art. 228 para. 5 mean that “actions undertaken as a result of the introduction of any extraordinary measure shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State”, while art. 233 defines these rights and freedoms which are not subject to limitations in any emergencies.

Two methods were applied in naming these rights and freedoms. In para. 1, the rights and freedoms that may not be limited during martial law and the state of emergency by the statute defining the scope of limitations were named. They are: the dignity of the person, rights relating to the acquisition and loss of the Polish citizenship, the citizens’ right to be protected by their state while abroad, protection of life, freedom from being subjected to
scientific experimentation without voluntary consent, freedom from torture, from inhuman treatment and punishment, from corporal punishment, the principle nullum poena sine lege (in relation both to statutory norms and to the norms of international law); the right of a defendant to defence, the principle of presumed innocence until found guilty by a legitimate verdict of a court, the right to legal protection of privacy and personal interests, freedom of conscience and religion, the right to petition, the right of parents to raise their children in accordance with their own convictions and respecting the degree of the child’s maturity, protection of the rights of the child. In art. 3 the rights and freedoms that may be limited during the state of natural disaster were named, thus barring any limitations to any other constitutional rights and freedoms. The group of rights and freedoms limited in such cases are: the freedom of economic activity, personal freedom, inviolability of the home, freedom of movement and sojourn on the territory of the Republic of Poland, the right to strike, the right of ownership, the right to work, the right to safe and hygienic conditions at work, and the right to rest.

Art. 233 para. 2 contains additional provisions regarding possible limitations on rights and freedoms in extraordinary circumstances. It states that any limitation of the rights and freedoms “only by reason of race, gender, language, faith or lack of it, social origin, ancestry or property shall be prohibited”. This provision reiterates, in fact, using slightly altered wording, proper norms found in international treaties binding upon Poland (art. 4 para. 1 of the International Covenant on Civil and Political Rights), and it can be interpreted as lex specialis in relation to art. 32 that establishes the principle of equality.

Summing up the remarks on constitutional limitations of rights and freedoms, it should be stated that the basic law does not define limits on the rights and freedoms it guarantees neither in general, nor in relation to any particular ones. These limits are set, as a principle, for specific cases; and the principle in dubio pro libertate should be applied, as the maximum effectiveness can be then secured for the constitutional rights and freedoms.

The Constitution and the statutes, which develop its provisions, guarantee that an individual shall have a certain degree of freedom in exercising his or her rights and freedoms. If such exercise does not go beyond the limits prescribed by law, the individual may demand that his or her legitimate rights and freedoms be protected, even if it is in conflict with generally-accepted customs and morals, etc.

III. THE CONSTITUTIONAL REGULATION OF THE RIGHTS AND FREEDOMS

The general principles, formulated in the first eight articles of Chapter II of the Constitution (art. 30–37), precede specific regulations regarding freedoms, rights and duties of persons and citizens. Some of these principles are as follows:

1) Inviolability of human dignity. The Constitution considers dignity to be an innate and inalienable good, constituting “a source of freedoms and rights of persons and citizens”. This is a reference to the concept of natural laws. Hence any actions, which could violate or even limit it, are strictly prohibited. Public authorities are not only obliged to respect it, but also to ensure protection thereof;
2) Exclusive admissibility of statutory limitations in application of constitutional rights and freedoms (the problem was discussed in the part devoted to limitations on constitutional rights and freedoms);

3) Inviolability of the essence of the rights and freedoms (the principle was discussed in the part devoted to limitations on constitutional rights and freedoms);

4) Equality before the law. This applies not only to the citizens of the Republic of Poland, but also to all persons under Polish jurisdiction. The formula of equality before the law adopted in the Constitution fits within the general broad concept of equality as the fact of given subjects belonging to the same class, which we distinguish from the point of view of the feature considered as important; thus this concept is not equivalent with the concept of identicality. The right of every person to equal treatment by public authorities is complementary to this principle.

The wording of the new Constitution is not, by substance, different from that of the previous one. Therefore, it can be expected that the position, confirmed already in the decisions of the Constitution Tribunal, stating that equality before law should be interpreted as equal treatment of all subjects which possess the same characteristic feature to an equal degree — that is according to the same measures, without any discrimination of preferences. The Tribunal allowed the so-called positive discrimination, that is active preference of some groups, if necessary, to bring about true equality (e.g. granting specific preferences in social security to the holders of policies, who became disabled as a result of accidents at work or of occupational diseases, if the law does not provide special compensations for them”). This principle is lex generalis in relation to other constitutional norms pertaining to equality and specifying it. Among them we may distinguish the following:

— prohibition of discrimination against anyone “in political, social and economic life for any reason whatsoever” (art. 32 para. 2);
— equal rights for men and women “in family, political, social and economic life” and in particular equal rights of men and women “to education, employment and promotion, to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations” (art. 33);
— “a right of access to the public service based on the principle of equality” for citizens (art. 60);
— the principle of equal electoral rights;
— equal access to “cultural goods” (art. 6);
— equal rights of churches and other religious organisations (art. 25);
— equal access to health care services financed from public funds (art. 68 para. 2);
— “equal access to education” (art. 70 para. 4).

5) Acquisition and loss of Polish citizenship. In its art. 34 para. 1, the Constitution defines only one way of acquiring citizenship, which bears the most significance, delegating the regulation of any other cases to the Act on the

Polish Citizenship. The Constitution holds that the Polish citizenship (on the basis of *ius sanguinis* — the law of blood) “is acquired by birth to parents being Polish citizens”. The place of birth is irrelevant in this case, and the authors of the Constitution, in line with the Polish tradition, rejected the principle of the law of the land (*ius soli*) in relation to the children of Poles. Under this principle, acquisition of citizenship depends on whether or not the person is born on the territory of the given state.

Art. 34 para. 2 mentions one possibility of losing the Polish citizenship i.e. its renunciation by the citizen. This means that only a voluntary resignation of citizenship is permissible. Thus, a rather extensive regulation of art. 15 of the Act on the Polish Citizenship, which provides a possibility of depriving an individual of the Polish citizenship by the President becomes invalid. In this context, the contents of art. 137 of the Constitution are not clear. It provides that “the President of the Republic of Poland […] shall grant consent to the resignation of Polish citizenship”. Since art. 34 para. 2 explicitly leaves the decision in this matter only to the citizen, and the formula “voluntary renunciation” underlines a voluntary nature of the act, independent from the state, it is difficult to comprehend the possible role of the President. The only sensible solution is to recognise the formulation of art. 137 as an editorial mishap, and to admit that the issue concerns the permission to change the citizenship. Then this fragment should be applied to the situation foreseen in art. 13 para. 1 of the Act on the Polish Citizenship, of a Polish citizen acquiring a foreign citizenship (with consent to change the citizenship granted by the appropriate Polish administrative organs), which automatically entails a loss of the Polish citizenship. In its art. 41, the Small Constitution also stated that “the President […] shall revoke the Polish citizenship”. Such reasoning further reinforces art. 16 of the Act on the Polish Citizenship, which conveys to the head of state the power to grant the Polish citizenship, to permit the change of citizenship, and to deprive an individual of this citizenship. As deprivation is not possible, only two of the above powers remain in force.

6) Securing the rights of national and ethnic minorities. According to this principle, Polish citizens belonging to “national and ethnic minorities” are guaranteed the freedom “to maintain and develop their own language, customs and tradition, and to develop their own culture”. These minorities also have “the right to establish educational and cultural institutions, and institutions designed to protect their religious identity, as well as to participate in resolution of matters connected with their cultural identity (art. 35).

The Constitution provides protection of these minority rights, but it does not define the very notion of minorities. We can assume that it means groups bound together by a common culture, religion and/or language. The Human Rights Committee’s interpretation of art. 27 (on the rights of minorities) of the International Covenant on Civil and Political Rights should be recognised. It holds that the guarantee of the rights of national and ethnic minorities has no “collective” dimension, and does not apply to collective rights, but rather to the rights of individual persons comprising such minorities. The state is obliged not only to protect the rights of minorities from being violated or denied, but also to

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take action to protect the identity of the minorities and the rights of its members. The Human Rights Committee, unlike the Polish Constitution, also stated that the members of the minorities need not be citizens, or even permanent residents. Therefore, migrant-workers or even visitors in the state — party also constitute a minority, and are entitled to the rights which are granted to the members of minority groups.

Art. 35 of the Constitution concentrates on cultural rights, but the rights of minorities are more than that. They also include, among others, the right to participate, to the appropriate extent, in the political decision-making process. Although the Constitution says nothing on that, this participation is guaranteed at the level of statute (for example in the 1993 Electoral Law to the Sejm). Thus, the legislator goes beyond art. 35 to fulfil the contents of the principle contained therein.

Notably, there is no data in Poland, which would decisively specify the exact number of people belonging to a particular national or ethnic minority. Since 1946, the question about “nationality” has never appeared in questionnaires during any general census. On the basis of various estimates, we can merely assume that approximately 1 to 1.3 million people residing on the territory of Poland belong to minorities (this is about 3–4% of the total population).5

7) The Polish citizens’ right to “protection by the Polish State” during a stay abroad (art. 36).

8) Constitutional rights and freedoms for all individuals under the authority of the Republic of Poland, and admissibility of statutory exceptions to this rule (the problem was discussed in the part devoted to subjective scope of application of the individual’s constitutional rights and freedoms).

From the point of view of an individual who wishes to exercise his or her constitutional rights and freedoms, the principle of direct application of constitutional provisions, formed in art. 8 para. 2, is important. It means that the public authorities are also directly bound by the constitutional provisions concerning rights and freedoms, which determines their normative nature and significantly affect their role in the legal system. According to this principle, statutes need not define the rights and freedoms guaranteed in the Constitution, and constitutional norms should be applied on their own. This is an arrangement that is generally accepted in constitutions of democratic states.

The catalogue of constitutional rights and freedoms includes three groups of freedoms and rights (personal, political, and economic, social and cultural ones); in each

5 The data varies considerably, as is the case with the German minority. Taking into consideration only the members of this minority’s various organisations the figure is approximately 300 000. If we take the number of people voting for the representatives of German organisations in parliamentary or local elections as the basis, the figure increases to 350 000–500 000 (according to J. Szeliga, Obecna sytuacja mniejszości narodowych w Polsce [The Present Situation of the National Minorities in Poland], [in:] Mniejszości na Górnym Śląsku. Pomost czy przeszkoda w stosunkach polsko-niemieckich [Minorities in the Upper Silesia: A Bridge, or an Obstacle in the Polish-German Relations], ed. by W. Lesiuk, Opole 1994, p. 52). The leaders of the German minority organisations speak of about 800 000 Germans living in Poland (comp. P. Mohlek, M. Hoskova, Der Minderheitenschutz in der Republik Polen, in der Tschechischen und der Slowakischen Republik, Bonn 1994, p. 23).
group two categories can be distinguished — rights and freedoms of the person, and
rights and freedoms of the citizen.

1) Personal rights and freedoms:
   a) to be enjoyed by any person on the territory of the Republic of Poland: the rights
to defence of life, freedom from being subjected to medical experimentation without
consent, freedom from torture, cruel, inhumane or degrading treatment and corporal pun-
nishment; the right to personal inviolability (prohibition of unlawful deprivation of fre-
edom, principle of judicial control of deprivation of freedom, principle *nullum crimen
sine lege*); the right of a defendant to defence; the right to a fair and public hearing of his
or her case without undue delay, before a competent, impartial and independent court;
freedom from arbitrary deprivation of property (forfeit of property may only take place
in cases specified by statute and only by virtue of a final judgement of a court); the right
to privacy and protection of one’s dignity and good name, the right of parents to rear their
children in accordance with their own convictions, respecting the degree of maturity of
a child, as well as his or her freedom of conscience and belief and opinion, the freedom
to communicate, inviolability of secrecy of communication, inviolability of the home,
the right to protection of personal data, the freedom of movement within the territory of
the Republic of Poland, the free choice of the place of residence in Poland and of leaving
Poland, the freedom of conscience and religion, the freedom to express opinions, the freedom
to acquire and to disseminate information, the foreigner’s freedom from being extradited
from Poland on grounds of suspicion of having committed a crime for political reasons
but without the use of force, the foreigner’s right to asylum in Poland;
   b) to be used exclusively by Polish citizens: the freedom from expulsion from
the country, the right to return to the country, the freedom from gathering, collecting,
or making accessible by public authorities information on citizens other than that
which is necessary in a democratic state ruled by law, the freedom from extradition.

2) Political rights and freedoms:
   a) to be enjoyed by any person on the territory of the Republic of Poland: the
freedom to organise and to participate in peaceful assemblies; freedom of association,
the right to petitions, proposals and complaints;
   b) to be enjoyed exclusively by Polish citizens: the right to have access to the
public service; the right to obtain information on the activities of the organs of public
authority as well as persons discharging public functions; the right to participate in
a referendum, to elect and to be elected in elections to the parliament, to presidency,
and to local organs of public authority.

3) Economic, social and cultural rights and freedoms:
   a) to be enjoyed by any person on the territory of the Republic of Poland: the
right to ownership, other property rights, the right to succession; the freedom to chose and to
pursue his or her occupation and to choose his or her place of work; the right to safe and
hygienic conditions of work; the right to protection of health; the right of disabled per-
sons to assistance of the public authorities in ensuring their subsistence, adaptation to
work, and social communication; the right to education; the right to protection of the
family, the right of the mother to special assistance from the public authorities;
of the child to protection and to care and assistance provided by the public authorities; the freedom of artistic creation, scientific research and dissemination of the fruits thereof, the freedom to teach, to enjoy the products of culture; the right to protection of the environment, to activities to protect it, and the right to be informed on the quality of the environment and its protection; the right of tenants to protection of their rights; the right of consumers, customers and hirers or lessees to protection against activities threatening their health, privacy and safety, as well as from dishonest market practices;

b) to be enjoyed exclusively by the Polish citizens: the right to social security whenever incapacitated for work and in case of being involuntarily without work; equal access to health care services financed from public funds; the right to establish schools at all levels; general and equal access to education.

The regulation of freedoms and rights of individuals generally observes (in the construction of the catalogue of these rights and freedoms, and in the detailed norms pertaining to the individual rights and freedoms) the norms of international law binding upon Poland, and standards applied in democratic states. The authors of the Constitution did not avoid certain flaws, which, in some cases seriously diminish the legal value of the adopted arrangements, and may hamper interpretation and application of its norms in the future.

Even though a separate chapter is devoted in the Constitution to freedoms, rights and duties of the person and citizen, the norms regarding this matter appear also in other parts of the basic law. On the one hand, this leads to unnecessary repetitions and differences in the normative approach to the same rights (e.g. the rights listed in chapter I, and the same rights contained in chapter II), which may have a negative impact on the interpretation of the appropriate regulations. On the other hand, the electoral law, one of the fundamental political rights of citizens is regulated also outside of Chapters I and II: in other parts of the Constitution (in Chapters IV, V and VII). This means that it enjoys less protection, as it remains largely outside the provisions of art. 235 para. 6, thanks to which Chapters I, II and XII may be amended only by way of a different, more restrictive procedure than the remaining chapters.

In this context it is worthwhile to reflect on the purpose behind placing the elements of the four freedoms (association, press and other means of mass communication, economic activity, conscience and beliefs) as well as the right to ownership before Chapter II, and putting them among the systemic principles of Chapter I. Certainly, the provisions of Chapter I contain rules for interpretation, useful in setting the norms for constitutional rights and freedoms (e.g. the principle of democratic state ruled by law). It is doubtful, however, whether or not, they always apply to those rules, which establish certain elements of rights and freedoms. I shall present this problem on the basis of certain aspects of the freedom to associate.

Article 12 in Chapter I states that the Republic of Poland “shall ensure freedom for the creation and functioning of trade unions, socio-occupational organisations of farmers, societies, citizens’ movements, other voluntary associations and foundations”. Article 58 para. 1 (Chapter II) contains more general wording: “the freedom of association shall be guaranteed to everyone”; further complemented by art. 59 para. 1 which ensures “the freedom of association in trade unions, socio-occupational organisations of farmers,
and in employers’ associations”. Articles 58 and 59, unlike art. 12, delimit the freedom of association. The freedom of association is, therefore, regulated in several places in the Constitution, in provisions, which are not even close to each other, moreover, it is treated slightly differently in different articles. Only in the case of associations of a special kind — i.e. political parties — the provisions regarding the matter were actually placed in one article (the freedom of establishment and operation of parties was defined in art. 11, Chapter I). Political parties appear in the Constitution in two other places, but in a very specific context: art. 13 in Chapter I names the types of parties and other organisations (i.e. also associations, foundations, etc., listed in art. 12 in fine) which are prohibited, while art. 188 subpara. 4 establishes the powers of the Constitutional Tribunal to adjudicate in cases concerning the question of “conformity with the Constitution of the purposes or activities of political parties”. As a result, the regulation of this element of the freedom of association is coherent, although it is situated almost entirely in the part devoted to the basis of the system in the Republic of Poland, and not to rights and freedoms. Yet, that is the reason why the regulation of the freedom to associate is incomplete in Chapter II, and, in order to obtain its full picture, elements scattered throughout five articles in two different Chapters must be brought together.

The regulation of the electoral law is even worse. The Constitutional regulation of the principles of this law is not uniform. They are defined separately for different elections, and, additionally, the provisions pertaining to elections to a given organ are situated in the chapters devoted to the given organ (or organs). Article 96 para. 2 of the Constitution establishes the following principles for the elections to the Sejm: universality, equality, directness, proportionality, secrecy. The catalogue for the Senate — in art. 97 para. 2 is more modest: universality, directness, secrecy. Article 127, in turn, states that the President of the Republic is elected in "universal, equal and direct elections, conducted by a secret ballot”. The constitutional definition (art. 169 para. 2) of the principles of elections to the organs of local self-governments contains universality, equality, directness, and secrecy. Moreover, regulations concerning the principle of universality are contained in art. 62, situated in the part of Chapter II devoted to political rights and freedoms. They establish, among others, the age for the right to participate in referenda, presidential, parliamentary and local elections (18 years of age attained no later than on the day of the vote). At the same time, a principle was adopted that a person may be deprived of the right to participate in elections, or to vote in a referendum only by a final decision of a court, ruling that the person is either incapacitated or deprived of the public or electoral laws. Provisions in subsequent parts of the Constitution define the age limits to the right to be elected. For candidates for deputies it is 21 years of age (art. 99 para. 1), for senators — 30 years of age (art. 99 para. 2), for presidency — 35 (art. 127 para. 3) — in each case attained no later than on the day of the election. The Constitution does not mention any age limits on the right to be elected to local self-governments.

The Constitution does not contain a catalogue of principles common for all kinds of elections, and the regulations pertaining thereto are dispersed throughout the text. This method is a certain step backwards in relation to the Constitution of 1952, which
grouped the principles relating to elections in one chapter (9). This regression is also apparent in another instance: the new basic law eliminates the principle of free elections from the pool of constitutional principles (previously, the Small Constitution of 1992 pointed to it in art. 3, but only in relation to elections to the Senate). The new basic law upholds the differentiation in the principles of elections to the Senate. It is difficult to come up with an explanation for this, because the principle of equality was abandoned with respect to this organ.

The constitutional regulation of the principles of electoral law may become subject to a variety of different interpretations, and its drawbacks may have significant practical implications. These are matters of such great importance to the entirety of the individual’s rights and the functioning of the democratic state that the arrangements adopted in the Constitution should not raise any doubts. Admittedly, these doubts can be clarified in electoral law (e.g. by introducing the principle of free elections into each law), but ordinary statutes should not substitute the Constitution in setting the minimum of norms, that, in contemporary times contain, among others, a coherent catalogue of the principles of electoral law.

A weak part of the constitutional provisions relating to the economic, social, and cultural rights and freedoms is that they frequently transfer the power to issue specific regulations to the ordinary legislature without defining neither the limits or direction for their law-making. The results can be observed in art. 68 para. 2, which grant citizens “equal access to health care services, financed from public funds”, but, “the conditions for, and scope of the provision of services shall be established by statute”. There are no guarantees whatsoever that even the very basic services will be free of charge, and the term “access” is not clear. The phrase “conditions […] of services shall be established by statute” leaves the legislator too much freedom, and, in practice, access to health care may be limited, for example, by introducing fees.

The founders of the Constitution decided to include economic, social, and cultural rights and freedoms in it. In doing so, they recognised the high expectations of society, even though they knew that the financial potential of the state was limited. Therefore, in art. 81, they divided these freedoms and rights into two categories, according to the method of their protection:

1) The rights and freedoms, which may be enforced directly on the basis of constitutional norms, i.e. those that have real guarantees (including court protection). In order to describe the scope of these rights and freedoms the Constitution occasionally grants decisive power to the statutes to develop its provisions (see e.g. art. 67). Such rights and freedoms include: the right to ownership and other property rights, and the right to succession; the freedom to choose and pursue an occupation, freedom to choose the place of work; the right to social security whenever unable for work, or being involuntarily without work, the right to health protection, to education, the right of a child to protection and to care and assistance from public authorities; the freedom of

6 These principles were not, however, fully regulated. For more see B. Banaszak, Prawo wyborcze obywateli [The Electoral Right of the Citizens], Warszawa 1996, pp. 23–24.
artistic expression, and scientific research and dissemination of the fruit thereof, freedom to teach, freedom of access to cultural goods.

2) The rights and freedoms, which can be claimed only within “the limits defined by a statute”. These are all the remaining economic, social, and cultural rights and freedoms not listed in the previous paragraph. Constitutional provisions relating to them often charge the public authorities with the duty to carry out a specific policy. This is seen, e.g. in art. 75 para. 1: “the public authorities shall pursue policies conducive to satisfying the housing needs of citizens”. Such wording permits claiming the rights in this category not only individually, but also collectively, by organised groups of citizens, by political means (e.g. a motion for vote of no-confidence in the government tabled by the deputies representing one of the parties).

The advocates of constitutionalising the economic, social and cultural rights and freedoms stress that it corresponds to international standards defined in agreements concerning human rights. They forget, however, that these acts do not require that this group of rights and freedoms be covered by the constitution. They simply impose specific duties upon the state organs, without excluding their practical implementation by way of ordinary statutes. In the constitutions of many democratic states (e.g. Austria, Germany, Switzerland) the regulations of social, economic, and cultural rights and freedoms are far less developed than in the Polish Constitution. This, however, does not directly determine the results of enforcing such regulations in each of these countries. Moreover, different treatment (in relation to possibilities of implementation) of social, cultural and economic rights and freedoms on the one hand, and political and personal rights and freedoms on the other is quite typical for Western European states and the European system of protection of individuals’ rights.

In the doctrine of constitutional law in many developed democratic countries the number of those who oppose the placement of social laws in the constitution is quite large. They recognise these rights as being program rights, and in order to implement them the state must realise complex social programs. Personal and political rights and freedoms require the state to simply refrain from interfering into the individual’s autonomy, which is protected by law, or, at most, to establish appropriate institutional guarantees. These can be realised faster and easier than the economic and social rights, and the activity of the state is much less affected in this case by economic factors.

To conclude, it ought to be mentioned that “even in the most democratic states permanent or opportunistic departures from the proclaimed principles can be observed. In the broadest sense this relates to social and cultural rights, the scope, and, in particular, the level of implementation of which, is most frequently dependent on the economic situation, which varies according to time and place. All international or national recessions bring with them a tendency to cut social security benefits”.

Translated by Halina Zwolińska-Wrońska

7 Compare e.g. J. P. Muller, Sozialrechte in der Verfassung?, Basel–Frankfurt on Main 1981.
I. The Constitution of 1997 refers to the traditional approach to the nature, role and scope of parliamentary Rules of Procedure that have been established in Poland during the last 80 years. The practice expressly shows the continuation of the concept whose basic premises have not been destroyed in the period of the People’s Republic. The concept of the parliamentary Rules of Procedure, construed as an act of parliament (or a chamber of parliament) by which parliament independently regulates the principles and details of the organization and functioning of its “assembly”, is closely linked to the idea of the autonomy of the parliament. The essence of this idea is the recognition of the fact that the special position of parliament in the system of government requires that decisions on certain matters relating to its organization and functioning should be reserved to that parliament (or its individual chambers), which prevents the use of any interference mechanisms and its subordination to other authorities. This principle is formally reflected in the procedural autonomy of parliament whereby certain matters are subject to regulation by the parliamentary Rules of Procedure.

As a result, in almost all the countries of the modern world, parliamentary rules and procedures have been established as a special normative act situated outside the

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regular hierarchy of the sources of law. In Poland, they were established during the inter-war period, and, from the outset, were based on the provisions of the Constitution. As I have already mentioned, such approach was also reflected in the Constitution of the Polish People’s Republic (1952), with its relevant provisions remaining intact after 1989, and were transferred with slight modifications to the Small Constitution of 1992. This observation allows us to formulate a thesis. According to it, there is a constitutional continuity of legal interpretation of parliamentary Rules of Procedure in Poland’s modern history.

2. This does not, however, mean that there is a uniform political interpretation of this concept or a uniform perception of the role of the Rules of Procedure. In the Polish People’s Republic, the role of the parliamentary Rules of Procedure was, in fact, determined by the degradation of parliament and, in particular, by the elimination of the parliamentary opposition. This resulted in the lack of one of the most important tasks typical of the parliamentary rules and procedures, i.e. specifying the principles of coexistence of the ruling majority and parliamentary opposition in a manner that permits the effective conduct of work in parliament while enabling the opposition to freely express their standpoint. According to the role assigned to it, the Sejm was a “quiet” body and, therefore, its Rules of Procedure were rather limited to matters of organizational and disciplinary nature, and did not involve shaping of political methods of the functioning of its chambers nor the protection of a parliamentary minority.

When discussing the period of the Polish Peoples’ Republic, it is worth mentioning (without going into much detail) three points which have thus far shaped the content of the Rules of Procedure the Sejm, and the way they are perceived.

Firstly, even if the provisions of written law (and particularly constitutional regulations) did not reflect the reality of the political scene, the regulations contained therein have impacted the way politicians and scientists think. In this context, one of the most significant principles was the principle of the “uniformity of state authority”, which declared the superiority of parliament (the Sejm) over other organs of the state. Under this principle, the will of the Sejm, whatever its form of expression, was absolutely binding upon all organs of the state. Thereby, the Rules of Procedure, as an expression of such will, have become binding upon all organs.

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1 See: Comparative data cited by W. Sokolewicz, comment 3 to art. 112, [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. A Commentary], ed. L. Garlicki, Warsaw 1999. Typically, the idea of Rules of Procedure has not existed in the USSR. It was not provided for in the Constitutions of 1936 and 1977, nor has it been developed in practice; see e.g.: Z. Ke˛dzia, Parlament socjalistyczny. Ustrój wewnętrzny [Socialist Parliament. The Internal Structure], Warsaw 1975, p. 31 et seq.


outside the Sejm, and this, in turn, skewed (to the benefit of the Rules of Procedure) the distinction between the Constitution, ordinary statutes and parliamentary Rules of Procedure. In practice, the role played by the Sejm was different, but when the political situation changed (i.e. after the election of 1989), the political class had no real difficulty getting used to the idea of the Sejm being the “supreme organ of state power”, even if the Constitution did not provide for such a status. This has influenced the way in which the role of the Rules of Procedure of the Sejm is perceived, especially in relations between the Sejm and other organs of state.

Secondly, one should bear in mind the peculiarities of the Polish version of a “socialist parliamentarism”. The Sejm has, since at least the 1970s, been operating more regularly and intensively than any other parliaments before this time. Some additional political aspects, unknown to Poland’s neighbours, were noticed from time to time (particularly in 1957, 1971 and 1980) and reflected in the Rules of Procedure.

Thirdly, the role of Rules of Procedure of the Sejm must be perceived in light of the behaviour of policy makers who were reluctant to amend the Constitution of 1952. The evolution of the political situation, manifested also in the changes in perception of the role and tasks of Parliament, had, therefore, to be reflected in other legal enactments. It was as early as in 1957 that it became evident that the Rules of Procedure of the Sejm had to be used for such purpose and, for more than thirty subsequent years, rises and falls of the Polish political system, have imprinted them-

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<td>The standing rules of the Sejm define the mode and order of the proceedings of the Sejm, the type and number of the committees, the number of marshals and secretaries, the rights and duties of the Marshal. (art. 29 para. 1)</td>
<td>No general provision. The existence of the Rules of Procedure was mentioned in art. 36 para. 2 relating to the subject matter of the debate during the extraordinary session of the Sejm.</td>
<td>The conduct of work, the type and number of committees shall be specified by the Rules of Procedure adopted by the Sejm (art. 18 para. 4 and, since 1976, art. 23 para. 4)</td>
<td>The detailed organization and procedure of the work of the Sejm shall be defined by Rules of Procedure adopted by the Sejm (art. 14)</td>
<td>The internal organization and conduct of work of the Sejm and the procedure for appointment and operation of its organs as well as the manner of performance of duties, both constitutional and statutory, by State organs in relation to the Sejm, shall be specified in the Rules of Procedure adopted by the Sejm (art. 112)</td>
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4 The famous work by A. Gwizdż, Istota i charakter prawny regulaminu sejmowego [The Essence and Legal Nature of the Rules of Procedure of the Sejm], provides an excellent example of this approach, “Państwo i Prawo” 1962, vol. 7.
selves on subsequent modifications of the said enactment. At the same time, constitutional provisions concerning the Sejm remained almost intact and, owing to their general nature, played only an ornamental role and had no real impact on the functioning of Parliament. The actual designation of tasks and role of the Sejm had to be found in the Rules of Procedure of the Sejm. Even if such a quasi-constitutional role of the parliamentary Rules of Procedure did not correspond to the traditional perception of this kind of enactment, in practice it gave the rules greater authority and, perhaps — above all — extended its content. Along with, let us say, classical provisions governing the internal organization and conduct of Sejm work, a number of provisions (called “external”) appeared which specified the relations between the Sejm and other organs of the state, in particular, duties of such organs with respect to the Sejm. As I have already mentioned, this fitted well into the concept of “uniformity of state authority”.

These phenomena have been noticed by the doctrine and stimulated its interest in the Sejm Rules of Procedure.

3. The experiences from the period prior to transformations (i.e. from the Polish People’s Republic) naturally affected the way in which the system of parliamentary government has been instituted in the Third Republic of Poland, including the perception of the nature and role of the Rules of Procedure of the Sejm. As previously stated, the perception of the Sejm as a “supreme organ of state authority” was a very attractive idea, which could be implemented in a new political context. Two factors are worth mentioning here.

Firstly, parliament was functioning on the basis of the principle of political pluralism, which, at least since 1991, has led to permanent confrontation between the

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6 As already shown by A. Gwizdż, Istota…, p. 45–47.


majority and minority during debates of the Sejm. The old Rules of Procedure of the Sejm did not envisage such a situation, because in the period of the Polish People’s Republic political conflicts, if any, had been resolved in accordance with the principles of the leading role of the party. However, after this principle had been abandoned, the need to introduce new legal mechanisms for settlement of political conflicts became apparent which, in turn, revealed substantial shortcomings in the existing Rules of Procedure. Moreover, suddenly some of its provisions became too “democratic”, facilitating obstruction and impeding the effective conduct of work in parliament (if only to mention the amount of time the Sejm of the 1st term spent on the adoption of an agenda). This required the comprehensive drafting of adjustments to the parliamentary Rules of Procedure in order, inter alia, to set up mechanisms to protect parliamentary minority rights from the dominance of the majority and give Parliament powers to handle obstruction.

Secondly, the role of constitutional regulations had changed, as the April (1989) Amendment (followed by the Small Constitution of 1992) contained more detailed provisions concerning organization and competences of Parliament, particularly, in the sphere of their relations with the executive branch. Consequently, the role of the parliamentary Rules of Procedure diminished, while the use of the separation of powers principle as a basis for the formation of state apparatus raised the general question of whether or not an “external” effect of the parliamentary rules was possible. At the same time, however, the provisional and laconic nature of the then adopted constitutional regulations still left room for the provisions of Rules of Procedure. Moreover, there has been no clarity as to interrelations between the Constitution, statutes and Rules of Procedure of the chambers of parliament as sources of parliamentary law.

4. The Constitution of 1997 did not introduce any new concept to the parliamentary Rules of Procedure, but it mostly kept the solutions and concepts which were established in the previous eight years. The political context of the functioning of the parliamentary Rules of Procedure was not changed either, although in the Sejm of the 3rd term the “power game” between the ruling majority and minority became more evident.

Nevertheless, because there were some new constitutional solutions that were introduced, we must look at the parliamentary Rules of Procedure from a new perspective. Firstly, the new Constitution (compared with preceding constitutional acts) provides a more detailed regulation of the organization and functioning of Parliament, in particular its relations with other organs of the state. Accordingly, this has left less room for the provisions of the Rules of Procedure or, in other words, its accentuates the implementing nature of the Rules of Procedure.

Secondly, the Constitution represents a completely new approach to the system of sources of law by imposing specific limits on the range of subjects allowed to be governed by the Rules of Procedure, and clearly specifying what the Rules of Procedure cannot be.
Thirdly, the Constitution changes its approach to the matter of the Rules of Procedure. For the first time, it provides explicitly for the admissibility of rules governing some “external” matters, while imposing limits on such regulation. Therefore, any examination of rules of an “external” nature must be made against the backdrop of positive constitutional regulation, and should not, as it was hitherto the case, be based on general assumptions or constitutional tradition.

II.

The legal basis for the Sejm’s competence to adopt its own Rules of Procedure is derived (as it was previously the case) from explicit constitutional provisions (art. 112) and such approach, as already mentioned, is part of Polish parliamentary tradition. The same holds true for the Rules of Procedure of the Senate (see art. 112, in conjunction with art. 124). Moreover, the new Constitution provides an explicit basis for the Rules of Procedure of the National Assembly without specifying the scope of their regulation (art. 114 para. 2).

The question arises whether or not such a constitutional basis is exclusive. At this point, one should refer to the view of Wojciech Sokolewicz who emphasizes the role of “constitutional customary law”. He indicates that “on the level of a constitution, constitutional customary law provides a basis for the adoption of the Rules of Procedure by Parliament, by virtue of its own decision, since such a privilege, reflecting the organizational autonomy of Parliament, is derived from the nature of its own composition and function […]. Even if there were no art. 112 and the constitution did not authorize the Sejm (and the Senate) to adopt the parliamentary Rules of Procedure, the chambers of Parliament would do it by virtue of common customary law”9. This seems to express the idea that the parliamentary Rules of Procedure have a dual nature of empowerment, which includes both positive (constitutional) and customary law. Given this fact, one should consider whether or not these two forms of empowerment are coterminous with one another and more specifically, whether or not the customary law empowerment is broader than the constitutional empowerment. If so, the focus should be to determine an autonomous basis for extending the parliamentary Rules of Procedure to cover matters that are not prescribed by the Constitution.

In my view, this conclusion goes too far. It is true, that one could not deny that even if the Polish constitutions had not governed the matter of parliamentary Rules of Procedure, the existence of such rules would nonetheless be justified on two above-mentioned levels. However, this is a purely hypothetical consideration, since the Polish constitutions have long regulated matters connected with the parliamentary Rules of Procedure and in this respect the Constitution of 1997 is more comprehensive than its predecessors. At the same time, the Constitution of 1997 explicitly stresses the principle of legalism (art. 7) in reference to provisions of previous constitutions and

9 W. Sokolewicz, comment 5 to art. 112, [in:] op. cit.
the case law of the Constitutional Tribunal\textsuperscript{10}. Since the Constitution explicitly provides the foundation for the Rules of Procedure of the Sejm and gives them broad applicability as well as a special place among the sources of law, it exhausts the empowerment for establishing such Rules of Procedure. So, there is no need for seeking any additional empowerment in the rules of custom or customary law. This is because norms of positive law have absorbed customary law empowerment.

Of course, one may say that, whatever the scope of regulation of the Rules of Procedure laid dawn in art. 112 may be, the Sejm has the ability to regulate its further internal activities relying on such organizational powers that inherently belong to any collegial organ. This would mean a departure from art. 112, but not the break its ties with the Constitution, since — in general — rules of internal procedure of any collegial organ may be regarded as an enactment of an internal character, and may be based on art. 93 of the Constitution\textsuperscript{11}. However, in such event the Rules of Procedure would have to meet the criteria of an “internal enactment” and, in particular, would not be able to contain any external provisions. Even if we agree that there are areas within the internal activity of the Sejm that are not covered by the comprehensive enumeration of art. 112, the recognition of an additional norm-giving competence of the Sejm would not require any reference to customary law, as art. 93 would provide a sufficient basis. Any regulation issued under such additional norm-giving competence would not be identified with the Rules of Procedure within the meaning of art. 112, as being deprived of specific traits that follow from this article.

Finally, one may conclude that for the purposes of defining the notion of the Rules of Procedure and, in particular, the scope of matters of parliamentary procedure, the concept of “already existing notions” [i.e. notions existing in the previous Constitution] is of a key importance, as was held by the Constitutional Tribunal in 1993\textsuperscript{12}. By this concept, however, we don’t mean any reference to customary law. Conversely, it refers to the previous constitutional tradition (rooted in positive law). It provides one of the instruments for interpreting the current constitution and, at least for this reason, does not fall within the domain of customary law. The application of this concept is limited to situations where the current constitutional norms are laconic and limited to the use of a general term\textsuperscript{13}. However, art. 112 is drafted differently and

\begin{itemize}
\item[\textsuperscript{10}] One should still recognize the relevance of the view that [the sphere of] competence of an organ of the state cannot be presumed — if it does not result from an explicit legal provision, it does not exist at all (e.g. Resolution of the Constitutional Tribunal dated May 10, 1994, act call No. W.7/94).
\item[\textsuperscript{11}] It should be noted that in the practice of the Constitutional Tribunal, art. 93 is regarded as open (in relation to its subject) and, hence, providing a basis for making enactments of an internal character by other organs of the state which are not specified therein (see: in particular the judgment of December 1, 1998, act call No. K.21/98, OTK ZU 1998, p. 639 et seq.).
\item[\textsuperscript{13}] For example, art. 114 para. 2 provides a basis for the adoption of Rules of Procedure by the National Assembly, but does not formulate any guidelines concerning the matter of such Rules of Procedure. Reference must be made to both art. 112, and the term of “already existing notion” in use by the parliamentary Rules of Procedure when interpreting this provision.
\end{itemize}
gives its own description of matters of parliamentary procedure. Therefore, it would be too risky to take advantage of the concept of “already existing notions” in order to supplement its content.

In other words, there is no reason, under the Constitution of 1997, why the legal bases for the Sejm’s competence to adopt its own Rules of Procedure (and to determine their scope) should be sought outside the positive norms of the constitution, namely art. 112 and, additionally, art. 61 para. 4 and art. 123 para. 2.

III.

One can specify certain features of the parliamentary Rules of Procedure which under the Polish tradition have been developed and remained intact over the entire 80-year period without creating any substantial controversy.

1. Traditionally, the Rules of Procedure have had the following attributes:
   — uniformity (i.e. they governed, in principle, uniformly and comprehensively the matter under regulation);
   — firmness (i.e. they existed longer than for one term of office);
   — normativeness (i.e. in its entirety they were built of legal norms).
   In this respect, the Constitution of 1997 does not introduce any new solutions.

2. During the above said period of over 80 years, the tradition has been for Parliament (or the concerned chamber) to adopt the Rules of Procedure by passing a resolution. Such approach was considered to be a key element of the parliament’s autonomy, since the adoption of resolutions falls within the exclusive competence of individual chambers and, in contrast to the legislative process, neither the second chamber, nor the organs of the executive branch participate in it. There is however, a trade-off between the parliament’s autonomy and the rank of the parliamentary Rules of Procedure. They are of a lower rank than a statute, and as such cannot regulate certain matters. In Poland, the Rules of Procedure have always been passed as a resolution, and the practice of regulation of parliamentary procedure by statute is very rare. Initially, this solution was not questioned in the Polish People’s Republic, however, new ideas have emerged (and continue to do so) in the course of discussions, claiming that the Rules of Procedure of the Sejm contain norms of the rank equivalent to that of statutory norms. This view, however, has not received widespread acceptance and troubles have begun to appear in practice, being caused, firstly, by an unclear normative rank of the Rules of Procedure and, secondly, by a wide scope of its normative extent, overstepping considerably the domain of statutes. This fact has increased the attractiveness of changing the form of Rules of

15 W. Sokolewicz, comment 9 to art. 112, [in:] op. cit., p. 23–24, indicates at this point the territories of the former Austro-Hungarian Monarchy and the region of Scandinavia.
16 E.g. A. Gwizdła, Istota..., s. 57 and later publications of this author.
Procedure and permitting their adoption by statute\textsuperscript{17}, although there was some scepticism\textsuperscript{18}.

The proposal for giving the parliamentary Rules of Procedure the form of a statute lost its relevance in 1989 when a bicameral system was introduced in the Polish parliament\textsuperscript{19}. In effect, and because of the separation of powers principle, the distance between the legislature and the executive branches increased. This gave a new meaning to the principle of parliamentary autonomy. And it became obvious to both the practice and the doctrine that the form of parliamentary Rules of Procedure should remain unchanged\textsuperscript{20}. The Constitution of 1997 takes the same approach.

IV.

Nevertheless, the Rules of Procedure have never been the exclusive source of parliamentary law. The diversity of sources of parliamentary law has always been typical of Polish legal solutions\textsuperscript{21}. Furthermore, the division of the matter of parliamentary law between the Constitution, ordinary statutes and parliamentary Rules of Procedure does not follow from a single generic concept, but is rather a resultant of various traditional remnants and experiences of parliamentary practice.

1. This is particularly evident in the scope of regulation contained in the Constitution itself. As I have already mentioned, the extent of such regulation is now the broadest it has ever been in the entire history of Polish parliamentarism. This results not only from the general comprehensiveness of the 1997 Constitution, but also the experiences of the past eight years. Recalling the various disputes and crises, the authors of the Constitution drafted more detailed regulations. They believed (somewhat naively) that a wider scope of regulation on the level of basic law would prevent past errors form reoccurring. This concerns, for example, the issue of dissolution of the Sejm or formation of a government. In effect, the provisions of the constitution on certain matters are, too precise, but on others they remain con-

\begin{itemize}
  \item \textsuperscript{18} See: K. Działocha, O wzajemnym stosunku..., p. 62 et seq.
  \item \textsuperscript{19} It is rightly indicated that the adoption of Rules of Procedure by statute would, above all, undermine the autonomy of the Senate proportionally to its limited role in the legislative process.
  \item \textsuperscript{21} See: Z. Czeszejko-Sochacki, Prawo..., p. 11 et seq.
\end{itemize}
siderably (and, perhaps, excessively) general. The doctrine recognizes this\textsuperscript{22}, but one must accept this as a reference point that determines the scope of matter left for regulation on a sub-constitutional level.

2. It is quite obvious that not all matters of parliamentary law can be contained in the parliamentary Rules of Procedure and that statutory regulation is necessary. Since the parliamentary Rules of Procedure have to be somehow connected with the organization and functioning of the assembly, some matters which, in fact, relate to parliament but exceed the scope of its organizational and operational activity, should (by their nature) be left outside the realm of parliamentary Rules of Procedure\textsuperscript{23}.

Traditionally, the sources of parliamentary law comprised a particular group of statutes. It included, above all, electoral acts (in Poland they also contained provisions concerning a vacancy in the seat of a parliamentarian and procedures for filling such vacancies before the expiry of the term of parliament), the Act on Political Parties and other related acts. Some statutes deal with specific duties that the executive branch has to parliament (most often, a duty to submit particular information or reports) or confer on some entities the right to participate in the legislative process in matters affecting them (e.g. the National Council of the Judiciary, trade unions).

One should also mention some, the relatively numerous statutes governing those matters located at the “meeting points” between the Sejm (or the Senate) and other constitutional organs, which require statutory regulation, because of their connection with the constitutional scope of exclusivity of the statute or in order to maintain the completeness of a given regulation. An example of this would be the norms contained in the Constitutional Tribunal Act or the Act on the Commissioner for Citizens’ Rights which specify, among other things, the procedure for appointing to such organs or other elements of their relations with parliament, and also the norms contained in the Act on Civil Service (appointment of members of the Council of Civil Service by the Sejm) or in the Act on the Institute of National Remembrance. Another example is the Act on Public Finances, which includes certain principles on the adoption of the budget by parliament and the parliamentary oversight of its implementation into the entire regulation of the budgetary process.

Constitutional provisions that provide for regulation of a given matter by statute are the legal basis for most of these acts. Even if questions sometimes arise as to whether or not individual statutes interfere in parliamentary procedures, these merely serve to highlight imperfections, which still exist in the legislative process. The intent to regulate all aspects of a given issue or institution (which requires, by necessity, regulation thereof by statute) cannot justify interfering in matters which the Constitution reserves for the parliamentary Rules of Procedure.

\textsuperscript{22} In the opinion of P. Sarnecki, \textit{Funkcje i struktura parlamentu według nowej konstytucji} [The Functions and Structure of Parliament under the New Constitution], “Państwo i Prawo” 1997, vol. 11–12, p. 45, even if many norms, e.g. in the field of legislative procedure are “obviously constitutional matters, others appear to be an excessive constitutional interference with matters of the Rules of Procedure”.

The development of statutory regulations in the field of parliamentary law has not been limited to a single generic concept but occurred, to a large extent, as a "by-product" of the work on the regulation of other issues where any connection with parliament’s competences or functioning had appeared. In fact, this was rather incidental, and it wasn’t clear whether a given matter should be regulated in the parliamentary Rules of Procedure or by statute. The situation was worsened by the vagueness of the constitutional provisions concerning admissibility of entering “external” norms into the Rules of Procedure. Such system of statutory regulation, which has developed in the last decade but is also rooted in provisions before this time, should be re-examined in the context of the new Constitution.

3. The provisions concerning the legal status of a Deputy have been gradually separated from the parliamentary procedure. In the first 40 years of the Polish People’s Republic provisions governing these issues were rare and mainly contained in the parliamentary Rules of Procedure. However, in the 1980s the need to introduce broader regulations emerged. This included, above all, laying down the rights of Deputies in relation to organs and institutions of the state (the right to information and right to intervene), and drawing up a more detailed list of social rights (or employee’s rights) of Deputies. In effect, the Act on the Rights and Duties of the Deputies was adopted in 1985 (in 1989, the words “and Senators” were added to its title).

It is noteworthy that in that period there was a serious debate on whether or not the rules and procedures of the Sejm should be regulated by statutes. After 1989 that concept has lost its relevance, but the rationale behind a separate “act on Deputies and Senators” has not been challenged. The result of this was the adoption of the Act of 9 May 1996 on the Exercise of the Mandate of a Deputy or Senator. The new aspects of the status of a parliamentarian are reflected in the so-called anticorruption provisions. They were initially included in the Act of 5 June 1992 but, after the adoption of the Act on Limitation of Business Activity Conducted by Persons Discharging Public Function, most of them can now be found in the Act on the Exercise of the Mandate.

Regulation of these questions by statute was recognized as appropriate in the following provisions of the Constitution of 1997:

— art. 103 para. 3 makes subject to regulation by statute “other instances prohibiting the holding of a mandate of a Deputy or prohibiting the exercise of a mandate jointly with other public functions”;

— art. 105 para. 6 makes subject to regulation by statute “detailed principles of and procedures for bringing Deputies to criminal accountability”;

— art. 106 makes subject to regulation by statute “conditions appropriate to the effective discharge of their duties by the Deputies as well as for defence of their rights resulting from the exercise of their mandate”.

— art. 106 makes subject to regulation by statute the extent to which “Deputies shall not be permitted to perform any business activity involving any benefit from the property of the State Treasury or local government or to acquire such property”.


29
4. Nevertheless, in certain areas the Constitution provides for regulation by statute of issues that are clearly related to the organization or functioning of the Sejm and, therefore, fall under the parliamentary Rules of Procedure. The authors of the Constitution may, of course, admit such interference, which, however, must be based on an explicit provision of the basic law. The Constitutional Tribunal pointed out that "the principle of the parliament’s autonomy regarding its own rules and procedure in relation to matters specified in art. 61 para. 4, art. 112 and art. 123 para. 2 of the Constitution is a general rule, and any admissible exceptions should be based on other constitutional norms or principles. In other words, there are no sources of law for this other than the constitution.

In the Constitution of 1997:
— art. 105 para. 6 makes subject to regulation by statute “the detailed principles and procedures for bringing Deputies to criminal accountability”, although this relates, above all, to the activities of extra-parliamentary organs and specifies the legal situation of a parliamentarian, these words may also be applied to the proceedings in the Sejm for the renouncement of Deputy’s immunity,
— art. 111 makes subject to regulation by statute “the procedures for work by an investigative committee”,
— art. 118 para. 2 makes subject to regulation by statute the procedure for the exercise of legislative initiative by citizens, which may also concern the proceedings in the Sejm in respect of such initiative,
— art. 120, in the second sentence permits a statute to specify the general requirements concerning a majority and quorum for passing Sejm resolutions,
— art. 125 para. 5 makes subject to regulation by statute “the principles of and procedures for the holding of a referendum” — the question arises as to whether or not such reference may also include the procedure for ordering a referendum and Sejm activities connected therewith,
— art. 215 makes subject to regulation by statute “the detailed principles for the appointment of members of the National Council of Radio Broadcasting and Television”, which may also concern the Sejm proceedings [in this respect],
— art. 227 para. 7 makes subject to regulation by statute detailed principles for the appointment and dismissal of organs of the National Bank of Poland and, therefore, also the Council for Monetary Policy whose (three) members are appointed by the Sejm.

All these constitutional provisions provide a basis for interference by ordinary statutes with those issues that pertain, in principle, to parliamentary procedure. As a rule, this is justified by a particular relationship of a given issue with the situation of citizens (art. 111 para. 1, art. 118 para. 2) or by the intent to regulate all aspects of a given issue (art. 125 para. 5, art. 215, art. 227 para. 7).

The question has arisen in practice as to how these references should be understood and, in particular, whether or not they require a comprehensive regulation of those issues by statute. On April 14, 1999 the Constitutional Tribunal ruled (Investigative committee) that “reference to statute applies only to those elements of the procedure of work, which are construed in separation from the procedure of work of other Sejm committees […]. These provisions and the general rules that relate to all the committees of the Sejm may apply to the procedure of work [of an investigative committee]. Because of their nature these provisions and rules are (and should be) included in the Rules of Procedure of the Sejm […]. In all these matters, where no distinction is made in comparison with the procedure for work of other Sejm committees, there is no constitutional requirement for statutory regulation of such matters25.

This provides the basis for a general thesis that in matters which, by virtue of a specific constitutional provision, are exempt from regulation by the Rules of Procedure (although — in material terms — they fall within their scope), the reference to statute comprises only regulation of particular matters related to the specific nature of such reference, while other issues can be regulated by the Rules of Procedure of the Sejm. This also corresponds to the view of the Constitutional Tribunal which stated that “any regulation of matters specified in those provisions (i.e. art. 112, art. 61 para. 4 and art. 123 para. 2) should be included in Rules of Procedures, and regulation by statute is admissible as an exception”26.

V.

The above will provide a starting point for specifying the matter of parliamentary Rules of Procedure in greater detail. The issue has always raised doubts in the doctrine and practice, particularly as regards the so-called external norms, regularly present in the Rules of Procedure.

1. The Constitution of 1997 specifies the matter of parliamentary procedure in art. 112, and also in art. 61 para. 4 and art. 123 para. 2.

In this matter, the Sejm is obliged to issue norms in the form of the Rules of Procedure, and no other type of legal enactments (especially statutes) may be used to regulate such matters without having clear permission from the constitution27.

Art. 112 specifies four areas subject to regulation by the Rules of Procedure: (1) the internal organization of the Sejm, (2) the work conduct of the Sejm, (3) the procedures for the appointment and operation of the organs of the Sejm, (4) the manner in which organs of the State are to perform their duties with respect to the Sejm.

The notion of “internal organization” has not been hitherto used in constitutional provisions. Until 1992, Poland’s constitutions have mentioned (all and specific) organs of the Sejm. Then, a general term of “detailed organization” appeared in the Small Constitution. The notion, applied in the present constitution, is of a general

27 See: Z. Czeszejko-Sochacki, Prawo…, p. 31.
nature and seems to comprise all issues concerning the Sejm’s structure that have not been regulated on the constitutional level. Wojciech Sokolewicz accurately notes that “no inferential conclusions should be derived from the fact that the present wording of art. 112 no longer emphasizes a ‘detailed’ nature of the Sejm’s organization, requiring that such organization be ‘internal’ instead”28. The notion of “conduct of work” has always been present in the provisions of the Constitution governing the scope of the Rules of Procedure, however, different words were used to formulate them: i.e. “the mode and order of the proceedings” in the March (1921) Constitution; “the conduct of work” in the Constitution of 1952; and “procedure of the work ” in the Small Constitution. The current approach goes back to the terminology of the 1952 Constitution, however, this fact does not matter, as all the above listed terms should be treated as equal. The notion of “conduct of work” must be interpreted broadly. According to the Constitutional Tribunal, it means “a manner in which the Sejm exercises its competences. The work of the Sejm is aimed at performance of its functions, and ‘conduct of work’ means a fixed and organized manner of performance of such functions”29. The term “conduct of work” so construed, encompasses, among other things, specifying the procedure for the provision of information on the activity of the Sejm (art. 61 para. 4)30 and defining the distinction of the legislative procedure for urgent bills (art. 123 para. 2)31.

30 It should be pointed out that art. 61 para. 4 relates to the procedure for the exercise of a right of citizens, i.e. the right to obtain information on the activity of public authorities, including access to documents, to sittings and the right to make audio and video recordings of their proceedings. Because of its direct link with the rights of citizens, it is a statutory matter (the more so as the procedure for the provision of information may also include various limitations which — under art. 31 para. 3 — require statutory regulation). Therefore, reference to the Rules of Procedure should be treated as an exception, especially since the regulation of the procedure need not to be limited to establishing norms governing the conduct of organs and officials of the Sejm, but may also specify some duties and requirements of citizens. However, in view of an explicit constitutional basis, it should be considered admissible.
31 W. Sokolewicz, in his comment 7 to art. 112, [in:] ibid, p. 15, and A. Szmyt, Nowe elementy konstytucyjne i regulaminowe postępowania ustawodawczego [New constitutional and regulatory elements of legislative process], “Przegląd Sejmowy” 1999, No. 3, p. 48, rightly indicate that: “defining of distinctions” pertains to abandoning procedural provisions which set the form of a “regular” legislative procedure. This may not be construed as permission to abandon constitutionally specified elements of that procedure, as the Rules of Procedure cannot lay down exceptions to the Constitution. In this context, one may examine the rightness of distinguishing “complementary nature” of those provisions of Sejms’ Rules of Procedure (W. Sokolewicz, comment 7 to art. 112, [in:] op. cit., p. 14–15). Here, in my opinion, there are no cases of complementing of constitutional provisions by the Rules of Procedure. On the contrary, art. 123 of the Constitution establishes a new legislative procedure and authorizes (obliges) the Rules of Procedure to determine its shape, however, within the framework generally outlined by art. 118 and 119. So, the provisions of the Rules of Procedure, which “define distinctions”, are of an implementing nature to the same extent as other provisions thereof concerning the legislative procedure. As a side note, it is noteworthy that the introduction of distinctions into the legislative procedure may occur without clear constitutional authorization (see: e.g. the budgetary process), and even intrinsically in the Rules of Procedure (see: e.g. special procedure for adoption of law codes). These norms, however, are of an implementing nature in comparison to the general scope of Rules of Procedure in art. 112 and with reference to a framework for the legislative procedure in art. 118, 119, 123 and 219–223 of the Constitution.
The notion of “procedures for the appointment and operation of organs of the Sejm” has no autonomous meaning, as these matters are already covered by “internal organization” (which also encompasses the definition of Sejm organs) or “conduct of work” (which also encompasses the conduct of appointment of Sejm’s organs and procedures of their operation). Therefore, this is only a concretization of the initial words of art. 112.

Moreover, the notion of “manner in which organs of the State perform their constitutional and statutory duties with respect to the Sejm” has not yet appeared in constitutional definitions of the scope of the parliamentary Rules of Procedure. It now provides an explicit basis for including “internal” provisions in the Rules of Procedure (as we have seen, until now such approach has been taken by way of an interpretation). At the same time, it indicates two restrictions on the admissible scope of such provisions.

Firstly, they may relate only to duties of “organs of the state”. This definition is so broad as it may pertain to all types of state organs, including the government with its organs, the President of the Republic, the Supreme Chamber of Control (NIK), the Commissioner for Citizens’ Rights or even organs of the judicial branch, naturally, insofar as the Constitution or statutes determine (or may determine) their duties to the Sejm. Beyond this notion remain not only subjects situated outside the organizational structure of public authorities (i.e. citizens, private business entities, political parties, non profit organizations, trade unions etc.) but also organs of local government, as, in the light of the Constitution, the notion of “organs of the state” does not apply to them.

Secondly, such provisions may pertain only to determining “the manner of performing” duties by other organs with respect to the Sejm, and such duties may only be established by the Constitution or statute. In view of the discussed section of art. 112, it should be noted that the Rules of Procedure cannot constitute an autonomous basis for establishing of duties of other organs of the State to the Sejm.

32 Although these questions are regulated in the Constitution, it is assumed that the Rules of Procedure may complement constitutional provisions and establish other organs that are not provided for by the Constitution. Currently, this mostly relates to the Presidium of the Sejm, while — traditionally — the Council of Seniors is based on the Rules of Procedure. See, inter alia: M. Kudej, W. Skrzydło, P. Winczorek, Opinie na temat ustawiania i kompetencji Prezydium Sejmu w świetle nowej Konstytucji RP [Opinions on the position and competence of the Presidium of the Sejm in the light of the new Poland’s Constitution], “Przegląd Sejmowy” 1998, No. 1, p. 73 et seq; M. Kudej, Zmiany w regulaminie Sejmu dokonane 4 września i 28 października 1997 r. [Amendments to the Rules of Procedure of the Sejm dated 4 September and 28 October 1997], “Przegląd Sejmowy” 1998, No. 3, p. 17; M. Chmaj, Wewnętrzna organizacja Sejmu [Internal Organization of the Sejm], “Przegląd Sejmowy” 1999, No. 1, p. 24.

33 Likewise W. Sokolewicz, comment 6 to art. 112, [in:] op. cit., p. 12.

34 W. Sokolewicz, comment 6 to art. 112, [in:] op. cit., p. 14 also excludes all organizational units of the state, which do not have the status of an organ of the state, i.e. are not engaged in the exercise of imperium — the state authority.

founding of an explicit basis for “external norms” is, therefore, accompanied by determining the boundaries of such norms — ones that are more clear than those determined by way of interpretation of art. 23 para. 4 of the 1952 Constitution or art. 14 of the Small Constitution of 1992.

Nevertheless, the phrase in question does not explain how precise the denotation (constitutional or statutory) of “the duty of an organ of the state to the Sejm” should be to allow the Rules of Procedure to determine the manner in which such a duty is to be fulfilled. At this point, a restrictive approach may be taken where a given duty is first determined in detail and then the procedures of the Sejm work are “adjusted” thereto. Another — but, in my view, inappropriate — approach is also possible. It includes defining a general relationship between a given organ and the Sejm, or even drawing a general outline of the competences or functions of the Sejm, as the starting point for establishing both strictly procedural and substantive provisions in the Rules of Procedure which concretize those general provisions of the constitution or statute. In such case, however, the material separability of the Rules of Procedure and statute would be obscured.

2. The question arises whether the enumeration of matters reserved for Rules of Procedure is complete, or whether other norms may also be included. Under the former legal order, the answer to this question was positive. In this respect, the view of Andrzej Gwiżdź was recognized, who permitted making provisions on duties of other organs of the state “if determining and fulfillment [of such duties] is essential to the proper implementation of the provisions of the Constitution relating to the Sejm and those organs”36. The judgment of the Constitutional Tribunal of January 26, 1993 (act call No. U.10/92) seems to follow this approach, using an extensive interpretation of the “procedure of work” and drawing upon the concept of “already existing notions37. It does not seem, however, that such thinking could be applied to the legal order under the new Constitution.

As I have already mentioned, the new wording of art. 112 is so broad that it may provide a basis for including both internal (standard) matters (i.e. organization and conduct of work) and external matters (the manner of discharge of duties by other organs) in the Rules of Procedure. Since, however, the authors of the Constitution found it necessary to form an explicit basis for such “external” provisions, this means that they recognized its necessity. This resulted not only from the attempt to obtain


37 “Based on the constitution the scope of the Rules of Procedure had to be reduced to the entirety of matters concerning the organization of the Sejm and manner of the exercise of its competence, i.e. the procedure for the Sejm’s work. Thus, the Small Constitution applying the term ‘the Rules of Procedure of the Sejm’ does not formulate a new notion, but rather uses the existing notion, which, in the Polish legal practi-
legal protection, but also (and, maybe, above all) from the new approach to the system of sources of law. Indeed, the constitutional enumeration of universally binding sources of law does not include the parliamentary Rules of Procedure and, therefore, creation of a constitutional basis for “external” provisions was indispensable. Such provisions, which relate to “typical statutory matter” provide an exception from the requirement of the form of statute for issuing them. As an exception, they cannot be interpreted extensively, and may provide a basis for regulation of those questions, which are contained in the new wording of art. 112. Moreover, there is no explicit constitutional basis for regulation of any other external affairs, and without such a basis the Rules of Procedure cannot interfere with a statutory matter or provide provisions addressing external matters.

At this point, we should note the substantial change in the perception of the scope of statutes under the Constitution of 1997. In the former legal order, both the doctrine and case law specified matters which fell within the exclusive domain of statutory regulation (from which they derived the conclusion that matters not covered thereby could be subject to other forms of autonomous regulation). The Constitution does not currently allow establishing norms of universally binding law other than by statute or by an enactment made on the basis of statute or in order to implement it. The Rules of Procedure cannot breach this principle and, beyond matters indicated in art. 112, art. 61 para. 4 and art. 123 para. 2, they cannot lay down any norms of “universally binding law”, i.e. any norms addressed to external subjects.

The “organizational units subordinate [to the Sejm]” provide an exception, as art. 93 of the Constitution permits the Sejm to issue enactments of an internal character. Although art. 93 para. 1 only mentions resolutions of the Council of Ministers and orders of the Prime Minister and ministers, it has been rightly stated that the said article has a broader legal sense and relates to the competence to issue enactments of an internal character by all public authorities. Nevertheless, one may wonder how extensive is the class of entities organizationally subordinated to the Sejm (including the Supreme Chamber of Control [NIK], as a consequence of the wording of art. 202 para. 2) and whether or not any legislative power may result from such subordination. In any case, such arrangements go beyond the scope of the Rules of Procedure of the Sejm and should be enacted by separate enactments, to which specific traits of the Rules of Procedure of the Sejm do not apply.

Moreover, there is no obstacle to regulation by the Sejm (exercising its general “organizational powers”) of those questions of its own internal organization and methods of work that are not enumerated in art. 112. It seems, however, that it would be difficult to find such matters which were not contained in the class of “internal organization and conduct of work of the Sejm and procedures for appointment and opera-

38 See: J. Repel, [in:] Konstytucje…, p. 192, however, he uses this notion in a broader meaning.
tion of its organs”, but despite this, pertained to internal affairs (since the “organizational authority” of a collegial body may apply to such class only). In this context, one should probably consider regulation of the activity of parliamentary factions and groups41, but this is not, however, obvious, as it might also be regarded as a matter of statute.

3. Another issue of provisions of the Rules of Procedure which reiterate norms contained in other enactments, mostly in the Constitution. This takes place in practice42 and is justified by the intent of the legislator to comprehensively regulate a given (particularly procedural) question in the Rules of Procedure. From the point of view of the principles of legislative techniques, this solution is not appropriate but does not breach the Constitution and is, therefore, admissible43. Such provisions of the Rules of Procedure do not possess an autonomous legal significance, as they only reflect the norm of a higher rank that already exists in the present legal order. So, even if the Rules of Procedure repeated a constitutional norm (e.g. a provision relating to competence44), this does not constitute a breach of art. 112 of the Constitution.

VI.

The above outlined division of the matter of parliamentary law brings us to the question of what the mutual relations between the Constitution, statutes and Rules of Procedure should be, and in turn, the position of the Rules of Procedure in the hierarchy of sources of law.

1. The relationship between the parliamentary Rules of Procedure and constitution does not cause any substantial controversies. As I have already mentioned, the Constitution requires each chamber of parliament (and the National Assembly) to establish and maintain its own Rules of Procedure, and to ascribe to them such scope of content as stems from art. 112 (as well as art. 61 para. 4 and art. 123 para. 2) of the Constitution.

In the material aspect, the Constitution outlines fundamental elements, which are further developed and concretized by the Rules of Procedure. It should be stressed at this point that today the matter of parliamentary law is quite comprehensively regulated by the norms of the Constitution. This has lead to an increase in the number of matters with respect to which the provisions of the Rules of Procedure implement (relatively detailed) constitutional provisions. This does not exclude the autonomous

40 I expressed my doubts in this respect in a dissenting opinion to the above judgment of the Constitutional Tribunal (ibid, p. 648–649).
41 See: W. Sokolewicz, comment 6 to art. 112, [in:] op. cit., p. 13.
42 For example, art. 26 para. 1, art. 27 para. 1 (in relation to the President of the Supreme Council of Control and the Commissioner for Citizens’ Rights), art. 29 para. 1, art. 33 para. 1 (in relation to statutes), art. 50 para. 7, art. 54c, art. 61b para. 5a, art. 61c, art. 61h para. 7, art. 93 para. 1 of the Rules of Procedure of the Sejm.
nature of the Rules of Procedure, because they are enacted within the framework of a general law-making power that the Constitution confers directly on the Sejm.

In the juridical context, the position of Rules of Procedure, similarly to the position of any normative act, is determined by the principle of legal superiority of the Constitution (art. 8 para. 1). The form of the Rules of Procedure does not matter here, since such superior legal force applies equally to both the resolutions of the parliament (chambers) and the statutes adopted by it. Hence, provisions of the Rules of Procedure cannot be in conflict with the Constitution and must be formulated in such a manner that ensures complete realization of constitutional norms, principles and values. The view of the Constitutional Tribunal that “in the system of sources of law, the Rules of Procedure of the Sejm are placed, obviously, below the Constitution and, as any normative act in the state, must be consistent with the Constitution”, is still relevant.

As regards the procedure for examining the compliance of the Rules of Procedure with the Constitution, it has caused many doubts under the former legal order, but, as we have seen, the Constitutional Tribunal has gradually developed a model that subjected to its scrutiny all normative acts, including the Rules of Procedure.

In the light of the new Constitution, there is no doubt that the Constitutional Tribunal is competent to examine the constitutionality of the Rules of Procedure to the extent set out in art. 42 of the Constitutional Tribunal Act, i.e. in both material and jurisdictional terms (which may be of particular importance in view of the limitations imposed on the Rules of Procedure by the Constitution) and in procedural aspect. A judicial decision confirming unconstitutionality will result in the deprivation of the legally binding force of the contested provisions of the Rules of Procedure, unless the Constitutional Tribunal suspends the coming into force of its decision pursuant to art. 190 para. 3 of the Constitution.

The recognition of admissibility of such scrutiny does not predetermine its scope and methods. In this respect, the Constitutional Tribunal emphasizes the significance of the principle of autonomy of parliament, stating that “the nature of autonomy of parliament compels the Tribunal to exercise extreme restraint in its scrutiny over norms established within the limits of such autonomy. In the event that the constitutionality of the Rules of Procedure is subjected to scrutiny, one should assume that parliament enjoys a wide margin of discretion in establishing any provisions governing its own organization and procedure of work. So, in these areas, the Constitutional Tribunal should presume the Rules of Procedure to be constitutional. Therefore, the accentuation of the principle of judicial restraint in
relation to the scrutiny of the Rules of Procedure remains relevant under the new Constitution.

Other organs of the judicial branch may also examine the compliance of the Rules of Procedure with the Constitution. And, since the Rules of Procedure are not a statute, any court may refuse the application of a given provision of the Rules of Procedure that, in its opinion, does not conform to the Constitution. We should, however, point out that it is only under exceptional circumstances that the Rules of Procedure might constitute the basis for the decision of a common or administrative court in any case.

2. Much more complex problems arise as concerns the relationship between the Rules of Procedure and statutes. If the Rules of Procedure were adopted by means of statute, there would be no limitations as to the scope of norms contained therein, and there would be no obstacle to subjecting matters falling within the exclusive domain of statutes to regulation by the Rules of Procedure. Then, the relation between the Rules of Procedure and other statutes would be a relation between enactments of the same rank, and would conform to the *lex posterior derogat priori* principle. These arguments emerged in the 1980s, when the proposals for giving the Rules of Procedure the rank of a statute were made, and played a decisive role in the exclusion of some matters from the Rules of Procedure and placing them in the Act concerning the Deputies and Senators.

Although the former doctrine formulated a thesis that “the Rules of Procedure of the Sejm, even if adopted by means of resolution, contain norms equivalent to those of statute […]”. The Sejm may contain provisions amending a statute in the Rules of Procedure provided that the subject of that amendment actually constitutes the matter of parliamentary procedure” 49, but even then this thesis was criticized, particularly by Stefan Rozmaryn 50. It became obsolete in 1989 because the second chamber was established and, consequently, the use of separate procedures for adopting statutes and the Rules of Procedure and, in a more general context, because the state apparatus was established in accordance with the separation of power principle. This has become even more evident under the Constitution of 1997 and the principle of “closed” system of sources of law.

Hence, the parliamentary Rules of Procedure cannot be now identified with statutes as to their legal nature (which has always been obvious) and their binding force (which has always been disputed). This does not mean, however, that the Rules of Procedure may be regarded as an “ordinary” substatutory act, i.e. an enactment subordinate to statutes. Such approach would open the door for unrestricted interference (by statutes) with the content of Rules of Procedure, and would make

47 For example, W. Sokolewicz, comment 12 to art. 112, [in:] op. cit., p. 32–33.
the continuation of the separate legal form of the Rules of Procedure unreasonable and would also conflict with the principle of the autonomy of parliament.

It seems that the most advisable approach is the adoption of the principle of material separability of the Rules of Procedure and statute. Since constitutional provisions determine the matter of parliamentary procedure in art. 112 (and also in art. 61 para. 4 and art. 123 para. 2), they reserve regulation of that matter for parliamentary Rules of Procedure. By that means, the Constitution formulates limitations upon matters regulated by statute, although — as a rule — statute may regulate any issue, the Constitution itself makes an exception for matters listed in art. 112 (and also in art. 61 para. 4 and art. 123 para. 2). Thus, the principle of exclusiveness of the Rules of Procedure influences the scope of legislation. The above concept appeared at the beginning of the 1990s, and was confirmed in the judgment of the Constitutional Tribunal of 14 April 1999 on a Sejm investigative committee. The Tribunal held that the above-mentioned constitutional provisions “establish the principle of exclusiveness for regulation by the Rules of Procedure of the Sejm (and those of the Senate) of matters specified therein, thereby excluding regulation of those matters by means of statute. Thus, the principle of autonomy of parliament justifies making an exception to the principle of the unlimited scope of statutes”. As specified by the Tribunal, “the following may be distinguished on the basis of the Constitution: (1) the sphere of exclusiveness of statute, which cannot be interfered with by the parliamentary Rules of Procedure; (2) the sphere of exclusiveness of the parliamentary Rules of Procedure, which cannot be interfered with by statute; (3) the sphere of issues which may be regulated by statute and, in order to make such regulation more detailed, by the parliamentary Rules of Procedure”.

The consequence of such approach is the recognition of the fact that any statute that has interfered with the matters reserved for the exclusive jurisdiction of the Rules of Procedure violates constitutional provisions. So, in such situations, a conflict between statute and the Rules of Procedure will mean nonconformity of that statute with the Constitution. And, conversely, where provisions of the Rules of Procedure exceed the scope of matters designed for them in the Constitution and interfere with the sphere of exclusiveness of statutes, this will signify the unconstitutionality of the Rules of Procedure. The conflict between a statute and the Rules of Procedure will not be examined from the point of view of material (substantive) conformity of their provisions, since in such a case it would not be resolved
without a prior explanation of the mutual relations between these two acts. This conflict will always be in the context of competence (which is also a constitutional perspective) — if the Rules of Procedure are prescribed for regulation of a given matter, that matter cannot be regulated by statute. And if the Rules of Procedure are not prescribed for regulation of a given matter, there is no basis for regulation thereof by the Rules of Procedure and as such it must be regulated by statute. In other words, those constitutional provisions that determine the scope of the Rules of Procedure and, hence, decide the type of a given regulation (statute or Rules of Procedure), will always provide a benchmark for control. For the purposes of such control, it is necessary to predetermine the position of procedural norms in the system of sources of law.

3. The concept of material — and constitutionally determined — separability of Rules of Procedure and statute may be understood in absolutist terms. Under such assumption, there are no such matter for regulation of which the said both types of acts may be appropriate. For that reason, no conflict may arise — on the level of substantive law — between a statute and Rules of Procedure, because the scopes of these two types of acts do not overlap. This makes the whole construction more logical, however, some questions remain unanswered.

Firstly, there is no clarity as to the relation to statute of the so-called external provisions of the Rules of Procedure, i.e. those provisions that govern “the manner of the discharge of their constitutional and statutory duties to the Sejm by organs of the State”. In the view of the Constitutional Tribunal, at this point we have to deal with “the sphere of matters which may be regulated by statute and, in order to make regulation more detailed, by parliamentary Rules of Procedure. The provisions of parliamentary Rules of Procedure relating to such questions must be in conformity with not only the Constitution but also with statutes”55. The acceptance of that concept would mean that the provisions of the Rules of Procedure are (at least in part) subordinated to the statutory way of regulation, so they (not only) may overlap with statutes, but must also be consistent with them. This would mean that the thesis put by Zdzisław Czeszejko-Sochacki that “the Rules of Procedure contain (…) norms based on different legal basis and which, consequently, have different position in the system of sources of law”56. However, the question arises whether this way of thinking is the only one possible. It seems that the consistent application of the concept of separability of matters of statute and matters of the Rules of Procedure may also be appropriate in relation to the “internal” provisions in question. True, the origin for these norms of the Rules of Procedure is found in a norm of the Constitution or statute which — on the level of substantive law — establishes particular duties of a given organ of the state to the Sejm. This does not, however, mean that regulation of the manner of performance of such duties must be

54 Ibid — on some doubts as to distinguishing of the third of those categories, see below section VI. 3.
of implementing nature in relation to (primary) substantive legal norm. This is because there is no rule which says that procedural regulation must be of implementing nature in relation to norms of substantive law, or (in any case) must be of a lower legal rank. The separability principle may also mean a separation of norms of substantive law (setting up of a duty) from procedures (specifying the manner of its fulfillment). Substantive legal norms may be enacted only by means of statute, procedural norms only by means of Rules of Procedure. Therefore, any interference by statute with questions of procedure will also constitute a breach of art. 112, just as any interference by Rules of Procedure with questions of substance. In such case, however, there could be no overlapping between statute and Rules of Procedure, so one cannot formulate a requirement that Rules of Procedure and statute should be consistent. If such an overlapping occurs, it will indicate that the Rules of Procedure or a statute have gone beyond their scope, and, then such conflict will be considered as a problem of competence, rather than a problem of conflict between two norms of different legal force.

Secondly, there is no clarity as to the position of those norms of the Rules of Procedure which, exceeding the scope of issues listed in art. 112, constitute a “facultative matter” which the Sejm may include in the Rules of Procedure. On the assumption that such “facultative matter” at all exists, the problem appears in respect of the relationship between those norms and statute. So, as such norms exceed the list given in art. 112, there are no grounds for excluding them from the domain of statutes. And, since this concept permits overlapping between statutes and the Rules of Procedure, it would be difficult to find arguments for the exclusion of the superior legal force of statutes. I have already pointed out that serious doubts that may arise as to whether or not, under the Constitution of 1997, such “facultative matter” exists in any way. If it encompassed — as postulated by Andrzej Gwizdż, and is now noted by Wojciech Sokolewicz — “internal parliamentary law”, all these issues would be included in the process of regulating “the internal organization and conduct of work of the Sejm and in the procedures for the appointment and operation of its organs”, which are the obligatory matters referred to in art. 112. It would be difficult to find other matters relating to the internal functioning of the Sejm, but not included in the above list, the more so that we recognize that regulation of the legal status of a Deputy to the Sejm belongs to the matter of statute.

Thirdly, “close encounters” between procedural and statutory legal norms may occur within matters which, although enumerated in the list in art. 112, were attributed by specific constitutional provisions (in particular art. 111 and art. 118 para. 2) to statutory matter. This rules out the admissibility of regulating such questions by the Rules of Procedure (again, any possible conflicts should be resolved in context of competence), however, regulation by statutes does not have to cover all elements of a given institution, but only those of a specific character. Nevertheless, general pro-
visions and procedural rules may also apply at this point. In such case, statutes should be given priority, which does not merely result from the recognition of its general superiority over Rules of Procedure, but rather from a particular, and exceptional, constitutional regulation of that matter.

4. In the light of the above said, one may state that the opinion of the Constitutional Tribunal that "the Rules of Procedure of the Sejm are not an act aimed at implementing a statute" have not lost its relevance. It should rather be asserted that these are two simultaneously existing types of normative acts whose scopes of regulation do not overlap. The Rules of Procedure are "an autonomous act, issued directly on the basis of the Constitution" and, as such, their character as an autonomous act does not differ from the character of any of those statutes whose adoption is prescribed for in the Constitution which also specifies matters to be regulated thereby.

As concerns the position of Rules of Procedure in the system of sources of law, it is mostly determined by the fact that they are not listed as sources of universally binding law laid down in art. 87. Such list is not of a "close" nature, which means that other constitutional provisions may indicate other sources of universally binding law (e.g. art. 234), but such indications must always be explicit. Since art. 112 does not explicitly formulate such an indication, the parliamentary Rules of Procedure cannot be recognized as a source of universally binding law. Though, this does not reduce the rank of the Rules of Procedure to an enactment of an internal character (art. 93), because art. 112 (and also art. 61 para. 4 and art. 123 para. 2) permits external operation of the Rules of Procedure, mostly in relation to the manner of performance of constitutional and statutory duties of organs of the state with respect to the Sejm, but also in other issues connected with the conduct of work of the Sejm and operation of its organs. In principle, this allows other organs of the state to be bound by the provisions of Rules of Procedure. However, as an exception, such binding force may be more extensive, e.g. in determining issues referred to in art. 61 para. 4. The Rules of Procedure may, to the extent permitted by the Constitution, serve as a source of universally binding law outside the House, however, the category of addressees of this enactment is not universal and is always (more or less) restricted, depending on the specific nature of matters under regulation. Thus, the characteristics of the Rules of Procedure do not correspond to the basic distinction between acts of universally binding law and enactments of an internal character. They are a special type of enactment, of a mixed character, which is appropriately embedded in special provisions of the Constitution.

This specific character of the Rules of Procedure eliminates the necessity of packing their norms into the “classical” hierarchy of sources of law, currently com-

55 Ibid, p. 251. See also the statement by Z. Czeszejko-Sochacki, Prawo..., p. 35, that “in respect of some questions, the Rules of Procedure of the Sejm is an act aimed at implementing a statute”.

56 Z. Czeszejko-Sochacki, Prawo..., p. 33.

57 W. Sokolewicz, comment 8 to art. 112, [in:] op. cit., p. 18.

prised of: the Constitution, international agreements, statutes and regulations. The doctrine has never managed to precisely specify the legal rank of the Rules of Procedure — it was undoubtedly always lower than that of the Constitution, and everyone agreed that Rules of Procedure are more than a “normal” enactment of a rank below a statute. However, no common view has been developed as to the relationship between the Rules of Procedure and statute. Some believe that the Rules of Procedure and statute are of the same rank, at least with regards to the constitutionally assigned matter of the Rules of Procedure\textsuperscript{62}. Others see the legal rank of Rules of Procedure “as formally lower than that of statute and one should assume that in the event of possible conflict between them, statutory norms would prevail”\textsuperscript{63}. The judicial practice in this field is scarce and does not provide an answer to this question. In its opinion on this issue the Constitutional Tribunal held that “the fact that Rules of Procedure have the form of resolution of the Sejm may indicate that their rank is lower than that of statute. (…) If, however, we will interpret the legal force of a normative act as its derogatory power (i.e. its ability to modify, and to be modified by, other enactments), then we must say that statute cannot interfere with matters assigned by the Constitution to be governed by the Rules of Procedure of the Sejm”\textsuperscript{64}. In the opinion of the Constitutional Tribunal, the level of competence is of vital importance, and this view was later confirmed in the ruling of 1999 on a Sejm investigative committee.

This seems to be an appropriate approach, as the deliberation on a substantive level cannot explicitly determine the position of the Rules of Procedure of the Sejm in the system of normative acts, owing, at least, to the fact that they combine norms of external and internal character. However, the concept of separability of matters covered by the Rules of Procedure and statutes shows that the Rules of Procedure and statutes exist simultaneously and that they regulate different matters, and it is difficult to determine their mutual derogatory power (since they cannot intersect). The thesis about simultaneity of statutes and Rules of Procedure would result in accentuating separability of legislative competence. It would also include recognition of the fact that in this respect the Rules of Procedure are a special type of enactment, situated outside the hierarchy of sources of law referred to in art. 87 and 93 (as they regulate matters that cannot be regulated by statute) and related only to the Constitution. The scrutiny of compliance of the Rules of Procedure with statute would not have a direct character, and would be performed in the field of competence (it would always be based on an alleged interference by the Rules of Procedure with matter of statute, or vice versa), so it would always be a review of con-


\textsuperscript{60} Ibid., p. 24–25.

\textsuperscript{61} E. Gdulewicz, op. cit., p. 198; W. Sokolewicz, comment 9 to art. 112, [in:] op. cit., p. 22.

\textsuperscript{62} As stated by A. Gwizd\l{}, then, and by Z. Czeszejko-Sochacki, now, Prawo…, p. 34, also indicating that — in terms of matters of procedure — these are acts of equal legal force; P. Czarny, [in:] op. cit., p. 194, assumes that there are “no distinctions between norms of Rules of Procedure and norms of statute as to their
stitutionality. At this point, however, it should be stressed that the concept of separability assumes that the Rules of Procedure should not contain provisions exceeding the scope of matters specified in art. 112, art. 61 para. 4 and art. 123 para. 2 of the Constitution. As such, the “traditional” approach should be abandoned, under which the Rules of Procedure enjoy considerable freedom in establishing “external” provisions, which unavoidably leads to a conflict between them and statutes.

Translated by Albert Pol
This article discusses incompatibility with regard to the parliamentary mandate under Poland’s Constitution.

In Poland, rules on incompatibility\(^1\) were introduced for the first time in the March Constitution of 1921\(^2\) and remained in force in the provisions of the April Constitution of 1935\(^3\). However, after the Second World War their raison d’être disappeared due to the predominance of uniform state power. Reintroduced in the Small Constitution\(^4\), it has become a well-established and significant element of Poland’s legal order.

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\(^1\) See: The definition of the term *incompatibilitas* by Z. Cybichowski, in: *Encyklopedia podręczna prawa publicznego (konstytucyjnego, administracyjnego, międzynarodowego)* [A Concise Encyclopaedia of Public Law (constitutional, administrative international)], vol. I, Warsaw [1929], p. 185; cf. *Słownik łaciny średniowiecznej w Polsce* [Dictionary of Medieval Latin in Poland], Ossolineum 1978, p. 84.

\(^2\) See: art. 15, 16, 17 and 36.

\(^3\) See: art. 43.

\(^4\) The Constitutional Act of 17th October 1992, on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-government (*Dziennik Ustaw* of 1992 No. 84, item 426; of 1995 No. 38, item 184, No. 150, item 729 as well as of 1996 No. 106, item 488).
Incompatibility can be understood in one of two ways. In a formal sense, it may be defined as a statutory ban against one person holding two or more offices (or performing functions) that are mutually exclusive as a result of divergent state tasks. In a material sense, it constitutes a statutory ban against engaging in specific legal relationships. The constitutional law doctrine raises incompatibility to the rank of a principle. When we assume that incompatibility is a principle, i.e. a legal norm, then it includes a directive to the legislator to establish a division of posts in any situation which requires the observance of the separation of powers, respect for civil rights and freedoms, independence of a parliamentary mandate while ensuring effective operation of the state apparatus. The content of a properly formulated rule constitutes: first, a ban, which may be stipulated in a generally restrictive clause or by enumeration of incompatible posts; and second, a sanction for violating such ban.

In such meaning, the incompatibility principle constitutes a sine qua non of the operation of the separation of powers principle. Having regard to the fact that it is a principle, (i.e. an optimizing norm), in certain situations its application may be limited to the benefit of other principles. This does not mean that it is a universally observed principle.

But, to make the picture complete, we should discuss the way in which the Small Constitution dealt with this issue. In this article, I will limit myself to only discussing formal incompatibility.

I. INCOMPATIBILITY WITH REGARD TO A PARLIAMENTARY MANDATE UNDER THE SMALL CONSTITUTION

An analysis of the legal situation under the rule of the Small Constitution provides us with arguments which stipulate that the principle of incompatibility encompassed: (1) a ban (absolute, unconditional) against holding two or more offices, construed as their categorical separation, and (2) a ban (relative, suspensive) against the exercise of a mandate, construed as a temporary or transient restraint from the exercise of functions incompatible with that mandate. The content of the sanction prescribed for breach of the ban constitutes the criterion of this distinction.

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8 Art. 150 of the Constitution.
9 Art. 103 of the Constitution.
1. Ban against holding two or more offices

Art. 8 of the Small Constitution expressed absolute incompatibility. Its provisions stated that the office of a Deputy could not be held while holding the office of a Senator and/or any of the following other offices: a judge of the Constitutional Tribunal, a judge of the Tribunal of State, a judge of the Supreme Court, the President of the National Bank of Poland, the Commissioner for Citizens’ Rights [Ombudsman], the President of the Supreme Chamber of Control12, an ambassador or a voivod [provincial governor].

The legislator prevented anyone from being a member of two chambers of parliament at the once, applying the concept of ineligibility13. According to art. 78 para. 3 of the Act on Elections to the Sejm14, nobody could stand for election as Deputy to the Sejm and for election to the Senate at the same time. Thus, it was impossible to become a Deputy and a Senator in one election. However, different regulations were applied in the event of the expiry of the Senator’s mandate before the end of his/her term of office. The provisions of electoral laws did not forbid Deputies from standing for election to the Senate. And the system did not have any sanctioning norms for combining the mandate of a Deputy and that of a Senator as result of an additional election.

Pursuant to art. 131 of the Act on Elections to the Sejm and art. 19 of the Act on Elections to the Senate15, any violation of art. 8 of the Small Constitution is a prerequisite for the expiry of the mandate16. Provisions of electoral laws distinguished two situations. First, where, on Election Day, a Member of Parliament held an incompatible post. In such event, the seat of such Deputy or Senator was declared vacant, unless he or she submitted to the Marshal [Speaker] of the relevant chamber, within the time limit of 7 days following the day of issue of the certificate of election, a resignation from the held post. Second, where a Deputy was appointed to an incompatible post during the term of office. In this case, the seat of the Deputy became vacant on the day of such appointment. The Marshal of the Sejm and the Senate were, respectively, entrusted with pronouncing expiry of “powers” and such actions were purely declarative.

12 In its interpretation, the Constitutional Tribunal held that the ban against holding of a parliamentary mandate applies to the vicepresident and a director general of the Supreme Chamber of Control.

13 One should distinguish between incompatibility and ineligibility, i.e. the lack of passive electoral rights. While the former does not involve invalidation of an election, the latter has such effect. Anyone constrained by incompatibility may effectively obtain a mandate, however, he/she is subject to a special legal procedure, e.g. he/she is compelled to resign from the function hitherto performed, backed by the sanction of expiry of the mandate, or to take an obligatory unpaid leave. Incompatibility precludes an individual who holds an office important from the point of view of public interest from standing (effectively) for election. If he does so, and is successful, the election is rendered invalid, by virtue of law, on grounds of lack of passive electoral rights.

14 Act of May 28, 1993 (Dziennik Ustaw No 45, item 205, as further amended).

15 Act of May 10, 1991 (Dziennik Ustaw of 1994 No 54, item 224, as further amended).

16 Art. 131 of the Act on Elections to the Sejm and art. 19 of the Act on Elections to the Senate was not applied to joint holding of a mandate of a Deputy and the mandate of a Senator.
It should be therefore concluded that the Small Constitution established absolute incompatibility with regard to the parliamentary mandate, which was understood as a ban against holding two or more offices jointly. Sanctions and procedures in the event of a “personal union” were left for regulation by means of ordinary legislation.

2. Ban against exercise

The Act on the Exercise of the Mandate of a Deputy or Senator establishes a relative (suspensive) incompatibility with regard to a parliamentary mandate. In art. 30 of the Act, the legislator decided that Deputies and Senators cannot, during the exercise of the mandate, perform work on the basis of a work contract in: the Chancellery of the Sejm, the Chancellery of the Senate, the Chancellery of the President of the Republic of Poland, the Office of the Constitutional Tribunal, the Supreme Chamber of Control, the Office of the Commissioner for Citizens' Rights, the National Council of Radio Broadcasting and Television, the National Electoral Office, State Inspectorate of Labour, in state and local government administration — except for a work contract resulting from election — nor can they perform the duties of a judge, public prosecutor, administrative worker in a court or public prosecutor's office, or serve as professional servicemen in the armed forces. The observance of such a ban was ensured by the statutory suspension of the incompatible post. A parliamentarian was required to take unpaid leave of absence for the period of his or her activity in the Sejm or the Senate, which had to be granted by the operation of law.

The Small Constitution did not include ministerial posts among incompatibilities with membership of parliament. The practice tended to cumulate such public functions, thereby violating the constitutional principle of separation of powers. Such approach was justified by using the parliamentary form of government.

II. FORMAL INCOMPATIBILITY WITH REGARD TO MEMBERSHIP IN THE PARLIAMENT UNDER THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 2 APRIL 1997

Incompatibility with regard to a parliamentary mandate, as laid down by the Constitution, is absolute.

Under art. 103 of the Constitution, the mandate of a Deputy (a Senator) may not be held jointly with the office of the President of the National Bank of Poland, the President of the Supreme Chamber of Control, the Commissioner for Citizens’ Rights, the Commissioner for Children’s Rights or their deputies, a member of the Council for Monetary Policy, a member of the National Council of Radio Broadcasting and Television, ambassador, or with employment in the Chancellery of the Sejm, Chancellery of the Senate, Chancellery of the President of the Republic, or with employment in government administration. This ban does not apply to members of the Council of Ministers and secretaries of state in government administration.

The Act of May 9, 1996 (As published in Dziennik Ustaw of 1996 No 73, item 350).

Art. 30 did not apply to Deputies and Senators of the term of office during which the said Act came into force.
Paragraph 2 of this article bans a judge, public prosecutor, an officer of the civil service, a soldier on active military service or an officer of the police or the State protection service from performing functions reserved for a member of parliament. The catalogue of incompatibilities listed in art. 103 para. 1 and 2 is not complete. Statutes may also serve to specify other cases where the mandate of a Deputy may not be jointly held with other public posts.

Pursuant to art. 241 para. 4 of the Constitution, in the event a Deputy or Senator holds an office or employment forbidden by art. 103, his or her mandate shall expire within one month of the day the Constitution comes into force, unless he or she resigns from such office or ceases such employment. This raises the question of what should be understood by the term “joint holding” as in use by the founders of the Constitution. When we assume that the term “combining” is a breach of the ban against joint holding, we can construe the expiration of a mandate (merely) as a sanction for breaching art. 103 para. 1 of the Constitution. Such interpretation is, however, unacceptable. The term “joint holding” should be given a broader meaning. It essentially means violating the ban against both the “joint holding” and performance [of the mandate]. Consequently, art. 241 para. 4 contains a sanction for breaching the “entire” art. 103 of the Constitution. Moreover, this conclusion follows from the comparison of the subjective scope of paragraphs 1 and 2 of art. 103 of the Constitution. For example, any person employed in government administration who meets the requirements set out by the Act, may be regarded as a civil servant (in reference to the ban against performance of the mandate). If we assume that art. 241 para. 1 applies only to the ban against joint holding, apolitical civil servants would not be required to completely quit employment during the term of the mandate. After the expiry of the parliamentary term, he or she would remain a member of civil service despite his or her previous political activity in parliament. However, the termination of employment by an officer in government administration (who is banned against joint holding) would be sine qua non for exercising a mandate [by him or her].

In summary, the basic law compels persons bound by the ban against both combining and carrying out functions to completely resign from performing their public functions or to terminate their employment within one month of the day the Constitution comes into force.

1. Ban against performance

The constitutional ban against performance, set forth in art. 103 para. 2 of the Constitution, means ineligibility. With the coming into force of the Constitution, judges, public prosecutors, officers of the civil service, soldiers on active military service and

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19 Cf. J. Mordwiłko, Opinie w sprawie niepołączenności mandatu posła albo senatora z zatrudnieniem w administracji rządowej [Opinions on incompatibility of a mandate of a Deputy or a Senator with employment in government administration], “Przegląd Sejmowy” 1997, No. 6, p. 69.

20 Act of July 5, 1996 on the Civil Service (Dziennik Ustaw No. 89, item 402).
officers of the police and State protection service have been deprived of their passive electoral rights [i.e. right to be elected] in elections to the Sejm and the Senate. The above view is not substantiated by art. 103 para. 2 of the Constitution, if we solely rely on its literal interpretation. The terms “exercise of the mandate” and “carrying out of the mandate” were not foreign to the Small Constitution and to the Act on the Exercise of the Mandate of a Deputy or a Senator. Previously, a Deputy had to take an oath before commencing the exercise of the mandate at the sitting of the Sejm. Today, Deputies are required take an oath before the commencement of the performance of the mandate. Moreover, under art. 106, statutes shall specify the conditions required for the effective discharge of duties by Deputies as well as the protection of their rights resulting from the performance of their mandate. Undoubtedly, the above-mentioned Act on the Exercise of the Mandate of a Deputy or a Senator is such an act. If we assume that this distinction accounts for only a literal difference, with no legal consequences, a suspension of one previous activity by way of taking an unpaid leave (by the operation of law) would be the appropriate sanction for breaching art. 103 para. 2. When examining art. 103 para. 2 of the Constitution, we should take into consideration art. 104 which requires that an oath be taken prior to commencing the performance of a mandate. Therefore, a parliamentarian should, no later than on the day of taking an oath, take an unpaid leave of absence.

From the above, it follows that the ban against performance means a relative (suspensive) ban which covers the period starting from the taking of an oath until the end of the term of office. This view is, however, untenable in the light of art. 241 para. 4 of the Constitution. Moreover, it is unacceptable to define a constitutional term on the basis of terms contained in ordinary legislation. Does the constitutional ban against performance of the mandate mean an absolute (unconditional) incompatibility? If so, too much normative significance cannot

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21 See P. Sarnecki, Opinie w sprawie niepołączalności mandatu posła albo senatora z zatrudnieniem w administracji rządowej [Opinions on incompatibility of a mandate of a Deputy or a Senator with employment in government administration], “Przegląd Sejmowy” 1997, No. 6, p. 69.
22 A Deputy could not be held accountable for his activities resulting from the exercise of his mandate (art. 7 of the Small Constitution).
23 Cf. art. 1, 2, 4, 23, 24, 29, 30, 33 and 34.
25 In the opinion of J. Buczkowski, constitutional incompatibility is set out in both art. 103 para. 1 and art. 103 para. 2 of the Constitution. Podstawowe zasady prawa wyborczego III Rzeczypospolitej [Basic Principles of Electoral Law in the Third Republic of Poland], Lublin 1998.
27 In the opinion of M. Kudej there are no legal obstacles for persons of any of the occupations listed in art. 103 para. 2 of the Constitution to stand for election to the Sejm or to the Senate. In the event that such have been elected, they should resign from their posts before the commencement of the term of office. Without such a resignation, their mandate would be invalid ipso iure. Status prawny posła i senatora w Rzeczypospolitej Polskiej, [in:] Zadecjzenia ustrojowe, struktura i funkcjonowanie parlamentu [The Systemic Assumptions, Structure and Functioning of Parliament], [ed.] A. Gwiazda, Warsaw 1997, p. 269.
be attributed to the terminological distinction contained in art. 103 para. 3 of the Constitution, and any difference between paragraphs 1 and 2 of art. 103 would be limited to the temporal scope of the validity of bans contained therein. Hence, as concerns the ban against performance, a parliamentarian should resign from his or her employment or posts before being sworn in. The situation differs somewhat when a Deputy or a Senator is bound by the ban against joint holding. In this case, a Deputy should resign from his or her post within 7 days from the day a certificate confirming his or her election is issued. If a Deputy fails to do so by these deadlines, his or her mandate expires *ipso iure*. As such, holding the ban against performance of a mandate as absolute is an over-simplification of the problem.

An analysis of the objective scope of art. 103 para. 1 and 2 of the Constitution has thus far been left out. In paragraph 1, there is a list of posts that cannot, for functional reasons (including separation of powers, subordination, dependence, accountability), be combined with a parliamentary mandate. By contrast, paragraph 2 of the said Article enumerates public functions that share common traits: they are apolitical and not associated with any political party. In judicial practice, a view has been expressed that participation in parliament is a political activity, regardless of whether or not the mandate of a Deputy or a Senator is connected with membership in a political party (Judgments of the Constitutional Tribunal, act call W.11/95). Moreover, participation in election campaign activities is also deemed political. Consequently then, not only are judges, police officers, professional soldiers, prosecutors, civil service officers, deemed to be apolitical but also anyone who ran for parliament. For this reason, and for the sake of the judiciary, the prosecution and other law enforcing agencies and, most importantly, to ensure protection of the rights and freedoms of citizens, the deprivation of the abovementioned groups of their right to be elected to parliament is fully justified. The work of the Constitutional Committee of the National Assembly has followed this direction.

In the light of the above observations, the expiry of mandate is a just sanction (laid down in art. 241 ust. 4 of the Constitution) for violating the ban on performance. With the coming into force of the Constitution, this group has been deprived of its passive electoral rights. Pursuant to art. 131 para. 1–2 of the Act on Elections to the Sejm, loss of eligibility causes the authority given by the voters to represent them [i.e. the Nation] in parliament to expire.

To make this analysis complete, one should consider the solutions of art. 53 and art. 54 of the Act on Political Parties, which are directly related to the issue of formal incompatibility in respect of a parliamentary mandate. This Act introduced amendments to the Act — Common Courts System Law (art. 64 para. 2) and to the

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28 Cf. art. 26 para. 2 of the Constitution.
29 Cf. art. 153 para. 1 of the Constitution and art. 49 of the Act on the Civil Service.
31 Act of June 27, 1997 (Dziennik Ustaw No. 98, item 604).
32 Act of June 20, 1985 (Dziennik Ustaw of 1994 No. 7 item 25, as further amended).
Act of June 20, 1985 on Prosecutor’s Office (art. 44 para. 4)\textsuperscript{33}. The amendment provides for the right of a prosecutor and a judge to be granted unpaid leave for the duration of the election campaign, and, in the event of obtaining a mandate — for the term of its exercise. These articles repeat provisions of art. 30 of the Act on the Exercise of the Mandate of a Deputy or Senator. Thus, the legislator imposes suspensive (relative) incompatibility on judges and prosecutors. This is a negation of the thesis whereby art. 103 para. 2 of the Constitution expresses ineligibility.

Furthermore, art. 53 and 54 of the Act on Political Parties should be deemed unconstitutional. This conclusion follows, \textit{inter alia}, from an analysis of the legal status of a parliamentarian who, within one month of the day the Constitution came into force held the office of a judge in a common court or a public prosecutor, as well as a parliamentarian (a judge or a prosecutor) who obtained his or her mandate after one month from the day the Constitution came into force\textsuperscript{34}. It should be noted that Deputies have been elected on the basis of the same principles of electoral law. In the former instance, art. 241 para. 4 applied, which provided that in order to retain the mandate, the parliamentarian was obliged to terminate his or her work contract or to resign from office. In the latter instance, the situation of a parliamentarian should be determined on the basis of the provisions of the Act on Political Parties. Hence, the suspension of one’s previous office (by way of taking an unpaid leave) suffices in order to perform the mandate. This situation leads to a normative differentiation of the status of Deputies of the 3\textsuperscript{rd} term and Senators of the 4\textsuperscript{th} term, thereby breaching the principle of equality and uniformity of a parliament’s composition. According to the common practice of the Constitutional Tribunal, the principle of equality requires that all those [legal subjects] who are in the same position [those who are equally attributed from the point of view of a given substantial trait] should be treated equally, i.e. should receive equal and non-discriminatory treatment (act call No. W.2/94). The above cited constitutional provision is, firstly, a temporal norm and, secondly, a sanction for violating the ban under art. 103 of the Constitution.

As it is merely a transitional provision, once it has performed its role of adjusting the pre-constitutional order to new legal circumstances, it ceases to have effect. We should, however, recall that this provision has the rank of a constitutional norm, and that the will of the founders of the Constitution has the greatest significance and rank, and is binding upon the ordinary legislator.

This raises the question of whether or not, under the Act on Political Parties, only common court judges have the right to suspend their activity for the term of their mandate. It should be noted that in art. 103 para. 2 of the Constitution, its founders use a collective notion of a functionary of the third power. They do not differentiate

\textsuperscript{33} Act of June 20, 1985 (Dziennik Ustaw of 1994 No. 19 item 70, as further amended).

\textsuperscript{34} In the event of a vacancy in the seat of a Senator, an additional election is held. In the event of a vacancy in the seat of a Deputy to the Sejm elected from a constituency list of candidates, his or her place is taken by a candidate from the same list who obtained the next highest number of votes (The same provisions apply in relation to vacancy in a seat of the Deputy to Sejm elected from the national list of candidates). [There are no national lists in the existing electoral system — a note from the editor].
their status on the basis of the place of a given court in the structure of the judicial branch or of the cognition of the court, as was the case under the Small Constitution. The Act on the Supreme Court is mute on matters relating to performance of a parliamentary mandate by a judge [Justice] (see art. 38 para. 4)\(^{35}\) and its art. 61 provides that in matters not covered by the said Act, the Act on the Structure of Common Courts of Law applies, as appropriate, to the Supreme Court and its Justices. Furthermore, matters not covered by the Constitutional Tribunal Act and concerning rights and duties as well as disciplinary liability of the judges of the Tribunal\(^{36}\), are accordingly subject to provisions relating to the rights and duties as well as disciplinary liability of the judges of the Supreme Court (art. 6 para. 4). Assuming that a ban against performance also signifies suspensive incompatibility, and taking into consideration the above statutory references, we can draw the conclusion that not only common courts judges, but also judges [Justices] of the Supreme Court or the Constitutional Court can effectively stand for parliament while enjoying the right to an unpaid leave during the term of office.

The controversial provisions of the Act on Political Parties are not nearly as dangerous for the legal order as they might appear to be. In fact, these provisions are essentially unenforceable in reality. A judge or prosecutor will never take an unpaid leave for the term of his or her mandate, because he or she cannot effectively hold office as a Deputy or Senator. The lack of ineligibility of such a candidate makes his or her election invalid.

2. Ban against joint holding

Given the above, as well as art. 241 para. 4, the ban under art. 103 para. 1 of the Constitution means absolute incompatibility. A violation of this ban results in the expiry of a parliamentary mandate.

The basic law only specifies a sanctioned norm and a temporal sanctioning norm. The issue of sanctions and procedures has been left to statutory regulation.

In contrast with the Small Constitution, Poland’s Constitution of 1997 regulates the subjective scope of the discussed matter. Without going into an in-depth analysis, it is conspicuously apparent that the catalogue of posts incompatible with membership in parliament has been expanded and opened.

Factors that have contributed to the current shape of the catalogue include: first, the establishment of new state bodies, e.g. the Council for Monetary Policy and the Commissioner for Children’s Rights and, second, the case law of the Constitutional Tribunal, which has expanded the catalogue. In its resolution of February 6, 1996 (act call No. W.11/95), the Tribunal held that the ban (contained in art. 19 of Act of the Supreme Chamber of Control\(^{37}\)) against combining the office of President of the Supreme Chamber of Control with other public function includes inadmissibility of combining a parliamentary mandate with an office of a vicepresident or a Director.

\(^{35}\) Act of September 20, 1984 (Dziennik Ustaw of 1994 No. 13, item 48, as amended).

\(^{36}\) Act of July 17, 1997 (Dziennik Ustaw No. 102, item 643).

\(^{37}\) Dziennik Ustaw of 1995 No. 13, item 59.
General of the Supreme Chamber of Control. Hence, incompatibility has been set out in relation to deputies of the following offices: the President of the National Bank of Poland, the President of the Supreme Chamber of Control, the Commissioner for Citizens’ Rights, the Commissioner for Children’s Rights. Third, the implementation of the directive to maintain division between the legislative and executive powers has also played a contributing role. The Constitution bans the combining of the function of a Deputy or Senator with employment in government administration\textsuperscript{38}. This regulation shows that the founders of the Constitution lacked the determination to introduce full division between the individual branches of powers, as they completely left out local government. However, for reasons of functional similarity (performance of public functions) there is need to extend the above ban to include local government officers\textsuperscript{39}. And, fourth, official subordination of MPs employed in the Chancellery of the Sejm, Chancellery of the Senate and Chancellery of the President of the Republic of Poland has been completely eliminated.

It is evident that the catalogue of functions incompatible with a parliamentary mandate is not closed, as was hitherto the case. In accordance with art. 103 para. 3 of the Constitution, other provisions prohibiting the holding of a mandate of a Deputy or prohibiting the exercise of a mandate jointly with other public functions may be specified by statute\textsuperscript{40}. As a side note to the above, one observation, which stems from the fact that the catalogue is left open, is worth noting. The prerequisites for the expiry of a mandate are no longer within the exclusive domain of the Constitution\textsuperscript{41}. The basic law confers on the legislature the power to lay down other instances of absolute incompatibility, which, in the light of art. 241 para. 4 of the Constitution, should be provided, with the sanction of mandate expiry.

The legislator now faces the need to back, by sanction, the constitutional bans against combining a parliamentary mandate with other offices. Because art. 241 para. 4 has now ceased to have effect our search for sanctioning norms should rely on art. 131 of the Act on Elections to the Sejm and art. 19 of the Act on Elections to the Senate. The enforced solutions have essentially met the goals set for them, and correspond to the incompatibility model of the Constitution. Today, however, they do not go far enough, because they do not conform to the subjective scope set out in art. 103 para. 1 of the Constitution.

\textsuperscript{38} See: Findings of the joint sitting of the Presidium of the Sejm and the Presidium of the Senate on November 6, 1997, published in “Przegląd Sejmowy” 1997, No. 6, p. 65 et seq.

\textsuperscript{39} Cf. Judgment of the Constitutional Tribunal, act call No. K.4/95, OTK ZU 1995 No. 2, item 11. The Tribunal underlies the links between local government and the executive power, but does not consider it as part of the executive.

\textsuperscript{40} The example of statutory regulation is provided by the ban against joint holding of a parliamentary mandate and an office of a member of the board of the county (powiat), laid down in art. 26 of the Act of July 18, 1998 on County (powiat) Self-government (Dziennik Ustaw No. 91, item 578).

\textsuperscript{41} The situation under the rule of the Small Constitution was different. In opinion of L. Garlicki, the catalogue of functions governed by incompatibility principle (whose breach resulted in the expiry of the mandate) was closed and belonged to the constitutional domain, Commentary, comments to art. 8.
Naturally, the defect is that, under the present legal order, an employee of the Chancellery of the Sejm, of the Chancellery of the Senate or of the President Chancellery may effectively exercise the mandate of a Deputy or a Senator. No severe sanction is attached under parliamentary law to such constitutional ban nor does it provide a basis for the expiry of a mandate. In such event, making any analogy or a resolution adopted by the Sejm or the Senate to deprive a parliamentarian of his or her mandate is inadmissible. On the one hand, such action would violate the principle of a free mandate, which provides for, among other things, irrevocability of the mandate. This means that the authority vested by the voters to represent them [i.e. the Nation] in a parliament expires only under statutory circumstances. On the other hand, any situation in which a parliamentarian remains in a relationship of official subordination violates another aspect of the free mandate principle, namely its independence.

By virtue of art. 242, the basic law abrogated two statutes: (1) the Constitutional Act of 17th October 1992, on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-government and (2) the Constitutional Act of 23rd April 1992 on the Procedure for Preparing and Enacting a Constitution for the Republic of Poland. However, it did not abolish the entire pre-constitutional legal order. As such, the executive branch will continue to use the above-cited Act on the Exercise of the Mandate of a Deputy or Senator until it is amended or repealed. According to art. 30 of that Act, an employee of the Chancellery will get an unpaid by the operation of law. There are other examples of this. The sanction of expiry of the mandate is not attached to the ban against combining the function of a Deputy or Senator with the office of a member of the Council for Monetary Policy, the National Council of Radio Broadcasting and Television, the Commissioner for Children’s Rights or his or her deputy, as well as a deputy of the President of the National Bank of Poland, a deputy of the President of the Supreme Chamber of Control, and deputy of the Commissioner for Citizens’ Rights.

The basic law does however explicitly establish one exception to this rule. The ban does not apply to members of the Council of Ministers and secretaries of state in government administration. The compatibility of ministerial posts with parliamentary membership is one of the components of the principle of the parliamentary govern-

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42 A violation of the ban against joint holding of a parliamentary mandate and employment in the Chancellery of the Sejm, Chancellery of the Senate or chancellery of the President of the Republic may constitute a basis for holding a perpetrator accountable under the provisions of the rules and procedures, however the protection provided by it should be regarded as inefficient, as it does not eliminate a “cumulation of public functions”.

43 Dziennik Ustaw of 1992 No. 67, item 336; and of 1994 No. 61, item 251.

44 L. Garlicki does not exclude the possibility of such abolishing effect of the Constitution, See: *Konstytucja a ustawy przedkonstytucyjne* [The Constitution and pre-constitutional laws], [in:] *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej* [Coming into force of a new Constitution for the Republic of Poland]: XXXIX Ogólnopolska Konferencja Katedr Prawa Konstytucyjnego: księga pamiątkowa, ed. Z. Witkowski, Toruń 1998, p. 47.
ment. This exception has hitherto operated as a norm of customary law. This case involves limitation of the principle of separation of powers (in its personal aspect) to the benefit of the principle of parliamentary government. The model established in the Constitution of the utter incompatibility of a parliamentary mandate is completely justified. It not only secures the constitutional separation of powers, not permitting the engendering of a “personal union”, but also protects the independence of a parlia-
mentary mandate and strengthens the concept of a professional representative. It tends to the situation in which the holder of a mandate has only one place of employ-
ment. This “first workplace” for a Deputy or Senator is the Sejm or the Senate.

III. CONCLUSION

The incompatibility principle follows from the adoption, by the Republic of Po-
land, of a constitutional regime based on the principle of a state ruled by law. In other
words, this principle is indispensable for the effective functioning of public authori-
ties, which are democratic and law-abiding. This principle is implemented universal-
ly in countries that founded their system of government on separation of powers
principle.

So far the legislator has not managed to implement the provisions of the Consti-
tution concerning formal incompatibility of a parliamentary mandate. A large part of
the established bans on combining offices (i.e. sanctioned norms) is not backed by
sanctioning norms. The effectiveness of a given institution is decided not by the
abundance of established bans, but also by the type of prescribed sanctions. Undoub-
tedly, the issue discussed is directly linked to the independence of a representative
mandate. Thus, because the current legal order lacks mechanism that would eliminate
one of the mutually exclusive posts, the independence of a parliamentary mandate
has not been fully secured.

The conclusion from this article is that there is no uniform concept in Poland of
a systemic regulation of incompatibility with regards to a Deputy or Senator manda-
tate. This is manifested in abundant legislation governing this matter. This includes: the
Constitution, Law on Elections to the Sejm and Senate, the Act on the Exercise of the
Mandate of a Deputy or Senator, other statutes providing bans on joint holding of
a mandate and other offices, as well as the rules of procedure of the Sejm and Senate.
It is not necessary to regulate one issue in so many legal acts. Hence, as a suggestion,
the legislator should provide a more complex regulation of both formal and material
incompatibility. The Act on the Exercise of the Mandate of a Deputy or Senator
(which is, together with the Constitution, the source of a legal status of a repre-
sentative) seems to be appropriate for such regulation.

Translated by Albert Pol

45 Cf. the example of a legal representative in France, M. Granat, Od klasycznego przedstawicielstwa
do demokracji konstytucyjnej [From Classic Representation to Constitutional Democracy], Lublin 1994,
p. 88 et seq.
MARcin KUDEJ  
PROFESSOR, SILESIAN UNIVERSITY, KATOWICE  

CHANGES IN THE RULES OF PROCEDURE OF THE SEJM  
IN THE LIGHT OF THE NEW CONSTITUTION  
OF THE REPUBLIC OF POLAND*  

1. The adoption of the new Constitution of the Republic of Poland of April 2, 1997 has made it necessary to amend the Rules of Procedure of the Sejm of July 30, 1992, to comply with the Constitution or to introduce new solutions requisite for compliance with new constitutional regulations. The first revision of the Rules of Procedure, which addressed only a few issues resulting from the new constitutional solutions, was made on September 4, 1997 at the last sitting of the Sejm of the 2nd term. The work on this legislative project was continued by the Sejm of the 3rd term, and resulted in the revisions of October 28, 1997 and September 30, 1998. This theoretical analysis will address select problems caused by the Rules of Procedure in their entirety, with emphasis on the three above-mentioned revisions.

2. The substantive scope of the Rules of Procedure of the Sejm, as specified in art. 112 of the Constitution, should, above all, be taken into account by those who attempt to introduce changes to the Rules of Procedure and also by the constitutional  

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1 Monitor Polski No. 58, item 558.  
2 Monitor Polski No. 60, item 779.  
3 Monitor Polski No. 34, item 483.
law doctrine when proposing such changes. The above Article identifies four groups of issues, including: (1) the internal organization of the Sejm, (2) the work conduct of the Sejm, (3) the procedure for appointment and functioning of Sejm organs, (4) the manner in which constitutional and statutory obligations are performed by State organs in relation to the Sejm. This regulation is broader than those of previous constitutions. The former Polish Constitution addressed (in art. 23 para. 4) only two issues: (1) the work conduct of the Sejm and (2) the type and number of Sejm committees. Whereas, the so-called Small Constitution distinguished: (1) the detailed organization of the Sejm and (2) the work procedure of the Sejm.

The only notion that should be explained at this point is “the work conduct of the Sejm”. The broad interpretation of this notion, given as the reason for the Constitutional Tribunal’s ruling of January 26, 1993 (act call No. U.10/92), provides that “(…) the work conduct of the Sejm should be construed as the manner in which the Sejm exercises its competence. The objective of work carried out by Sejm is to perform its functions, while the work conduct means a defined and organized manner of performing such functions”\(^4\). The work conduct of the Sejm should not, therefore, be given a narrow interpretation i.e. carrying out debates\(^5\).

If we assume a broader interpretation of the term “work conduct of the Sejm” and take into consideration all other categories of issues listed in Article 112 of the Constitution, then we can say that the said constitutional provision specifies the matters covered by the Rules of Procedure of the Sejm. Hence the Rules of Procedure should not cover anything beyond this.

Accordingly, it is worth commenting here (as these questions sometimes raise doctrinal doubts) that provisions of the Rules of Procedure have been used to set out various types of parliamentary business, including mandatory resolutions, declarations, appeals and statements. Establishing these forms of activity, as listed in art. 55 of the Rules of Procedure, may be admissible only because they are connected with the manner in which the Sejm performs its functions. A similar approach may be taken with respect to part of a regulation contained in art. 85 and 86 of the Rules of Procedure which establishes desiderata and opinions of Sejm committees, being the forms of activity of auxiliary organs of the Sejm, and which are also related to the functions performed by parliament.

However, the group of issues designated in art. 112 as “the manner of performance of obligations, both constitutional and statutory, by State organs in relation to the Sejm” provides restrictions to imposing such obligations on extraparliamentary organs, which do not result from norms of the Constitution or statutes. Under this assumption, the right to address interpellations (and Deputies’ questions) to the President of the Supreme Chamber of Control and to the President of the National Bank of Poland has been abolished. It is also worth noting that addressees of desiderata are no

\(^4\) OTK 1993, part I, p. 19 et seq.
longer required to assume a stance on them (pursuant to art. 86 para. 2, this also applies to addressees of committee opinions) as such requirement did not have any constitutional or statutory grounds.

3. In the above mentioned reasons for its ruling in case U.10/92, the Constitutional Tribunal stated that the Rules of Procedure of the Sejm are “an autonomous act issued directly on the basis of the Constitution and as such, should be considered as an act aimed at implementing the Constitution”. The doctrine of constitutional law has also advocated the Rules of Procedure of the Sejm [in relation to the constitution] as implementing in nature. Consequently, we must hold that the Rules of Procedure should, above all, concretise the Constitution, and that a primary regulation of some parliamentary matters is also admissible, provided that these matters are covered by procedural autonomy. In practice, such procedural autonomy concerns matters connected with the organization and manner in which the Sejm functions, i.e. matters which fall outside constitutional regulation, even if they are generally outlined in art. 112 of the Constitution.

The concretisation of constitutional provisions in the Rules of Procedure may sometimes be in the form of an actual interpretation of specific provisions. This actual interpretation (by Rules of Procedure) may take place in one of two situations: (1) where concise wording of a given constitutional provision permits giving it a broader meaning determined by procedural purposes (2) where the wording of the Constitution is not unequivocal. A good example of the first situation is the interpretation of art. 119 para. 4 of the Constitution provided in art. 33 para. 3 of the Rules of Procedure: although the withdrawal of a bill by its author should mostly be considered as *actus contrarius* to the exercise of [the right of] legislative initiative, the withdrawal of a bill signed by a group of Deputies may also occur *per facta concludentia*, if — following the withdrawal — fewer than 15 Deputies still support the bill. An example which illustrates the second situation is the former art. 61g para. 1 of the Rules of Procedure (as amended on March 5, 1993), concerning the provisions of art. 66 para. 4 of the Small Constitution. The provision provides that: “The Sejm, having passed a vote of no confidence, may at the same time choose a new Prime Minister”. It was interpreted in such a way (contrary to the purpose of a constructive vote of no confidence) that a candidate for a new Prime Minister could be nominated immediately after the Sejm had passed a vote of no confidence.

Art. 52b of the Rules of Procedure, as amended on September 30, 1998 (the third revision), is a current example of how the Rules of Procedure interpret the ambiguous wording of the Constitution. This provision provides a controversial interpretation of the term “removing a non-conformity”, as contained in art. 122 pa-

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7 Monitor Polski No. 13, item 89.
ra. 4 of the Constitution, assuming that the removal of the non-conformity (when-
ner the President refers a bill back to the Sejm before signing it) may be effected
(1) by modifying provisions which the Constitutional Tribunal finds to be non-con-
forming with the Constitution, while maintaining their previous scope of applica-
tion, or (2) by editing other provisions of the bill to suit the amended provisions.
Although this “adoption of appropriate modifications to the text of those provi-
sions” may only relate to certain parts of a given act, it is nonetheless a peculiar
repeat of the legislative process involving the Senate (art. 52c–52f of senate Rules
and Regulations).

However, interpreting the term “removal of the non-conformity” differently is
also possible. This would be a restrictive interpretation, which takes into considera-
tion the entire art. 122 para. 4 of the Constitution. According to this interpretation
the President of the Republic may (after seeking the opinion of the Marshal of the
Sejm) sign a bill while omitting the provisions deemed unconstitutional by the
Constitutional Tribunal, whereas he or she would return a bill to the Sejm (without
the need for the Senate to participate in further proceedings) where — in view of
the formal incoherence of its text — the bill could not be signed without removing
the non-conformity. While the interpretation given in the amended Rules of Proce-
dure accentuates a substantial non-conformity, the proposed method of interpreta-
tion takes into consideration only a formal non-conformity. Hence, “removal of the
non-conformity” should only consist of editing the non-conformity in the text of
the bill following the omission of certain provisions deemed unconstitutional.

The interpretation used in the Rules of Procedure of the Sejm considers the
ruling of the Constitutional Tribunal as a unique suggestion for amending a statute
that has been passed, but not yet signed. However, as the legislative process in
parliament has been concluded, the ruling of the Constitutional Tribunal cannot be
regarded as an incentive for the legislative branch of power. Indeed, in accordance
with the principle of separation of powers, the result of the activity of the legislatu-
re is subject to review by the Constitutional Tribunal. And, if the Constitutional
Tribunal finds certain provisions of a bill as non-conforming with the Constitution,
such provisions should be deleted from that bill. Where such provisions are not
inseparably connected with the whole bill, then, the President of the Republic may

8 Probably, this was the only purpose of the speech of the President of the Constitutional Tribunal
A. Zoll, at the sitting of the Constitutional Committee of the National Assembly on April 2, 1996, who
revealed his plans to introduce an amendment which would permit the President of the Republic to sign a bill
containing one or more provisions which were found unconstitutional by the Constitutional Tribunal (if the
provisions so questioned would be deleted from that bill) and that in such an event there would be no need
to initiate the legislative process from the very beginning (“Komisja Konstytucyjna Zgromadzenia Narodo-
The question of “betterment” of bills by the Sejm was raised by Deputy R. Grodzicki at the sitting of a sub-
committee responsible for drafting of general matters and of provisions implementing the constitution, on
August 20, 1996. However, in such a context that “it is very difficult task to conclude” from some judgments
“how the provision of statute should be properly drafted in accordance with the arguments of the Constitu-
sign the bill with the omission of those provisions deemed unconstitutional. Nevertheless, the deletion of such provisions may result in a bill having certain inconsistencies. Such inconsistencies should be eliminated and only through a formal adjustment. Such adjustment “whilst maintaining their (provisions) previous scope of application” (as provided in art. 52b of the Rules of Procedure) could be made by the Sejm alone, without involving the Senate, since this would not be a new bill containing any substantial amendment.

4. In order to properly assess certain solutions of the Rules of Procedure such solutions should be evaluated in context of Constitutional provisions establishing principles of the governmental system. The range of concrete matters relevant to the Rules of Procedure, which should be associated with the principle of a democratic state governed by the rule of law, is very broad and rather indefinite. It could be defined by the use of the slogan: “All the activity of parliament should manifest the existence of a state ruled by law”. However, in the cited reasons for its ruling in case U.10/92, the Constitutional Tribunal derived — from a general concept of a democratic state governed by the rule of law, from the free mandate principle and the principle of internal autonomy of parliament, as well as from the entirety of constitutional powers and duties of parliament — a principle of providing legal conditions for the exercise by Parliament of its constitutional duties.

Accordingly, “providing Parliament with appropriate conditions for the exercise of its constitutional duties” should serve as a broad criterion that justifies the modification of certain provisions of the Rules of Procedure, as well as a criterion for assessing such modifications by the constitutional law doctrine. In practice, changes to the Rules of Procedure should be evaluated “in terms of gains and losses to the basic values of the parliamentary process such as: democratic principles, speediness, transparency, efficiency, correctness, etc.” Therefore, the postulates proposed by Andrzej Gwizdż in the mid-1980s have not lost their relevance. The said postulates include: (1) the principle of activity, pertaining to both the work of Deputies and the functioning of Sejm committees; (2) the principle of prudence, which ensures that a decision is first subject to thorough consideration before being made; (3) the principle whereby a wide range of arguments is admissible, enabling the Deputies to present contrasting arguments and opinions; (4) the principle of protection of minority rights (reflecting the constitutional principle of political plu-

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9 Similar interpretation of art. 122 para. 4 of the Constitution is given by J. Mordwiłko in: W sprawie usunięcia przez Sejm niezgodności w ustawie po decyzji Trybunału Konstytucyjnego o uznaniu niektórych jej przepisów za sprzeczne z konstytucją (ekspertyza) [An expert opinion on the elimination by the Sejm of inconsistencies in a statute following the decision of the Constitutional Tribunal finding some provisions thereof to be unconstitutional] Biuletyn BSIE Kancelarii Sejmu, “Ekspertyzy i Opinie Prawne” 1998, No. 2, p. 34 et seq.), who believes that such inconsistencies may, above all, include arrangement of the numbers of provisions of the statute, removal of terminological inconsistencies, arrangement of the organization and formal structure of that statute.

eralism); (5) the principle of effectiveness, contributing to an effective and timely achievement of particular results.\(^{11}\)

There are both positive and negative examples of how changes to the Sejm Deput have affected its ability to effectively exercise its constitutional duties. One positive example (limited to the legislative procedure only) is the modification (contained in the first revision dated September 4, 1997) of the procedure for urgent bills, which replaced the two-reading procedure with a regular three-reading procedure. In either case, such change was already predetermined by the tenor of art. 119 of the Constitution. Another example concerns the change of art. 34 of the Rules of Procedure (pursuant to the third revision dated September 30, 1998). It restored the rule requiring the first reading of the bill to be held at a plenary sitting of the Sejm (while the first reading at a committee level was regarded as admissible exception).

There are also negative examples, which include the establishment of an excessive number of standing committees. The second revision of the Rules of Procedure (of October 28, 1997) increased the number of standing committees from 25 to 27, despite arguments against this by the doctrine, which have been voiced for many years now. The third revision added a new committee: the State Control committee.\(^{12}\) Another negative example is the abolition of the Legislative Committee by the second revision of the Rules of Procedure.\(^{13}\) The task of developing a rational system of standing committees of the Sejm, in order to reverse the long-term trend towards fragmentation of committees and to replace the old committee system (based on departmental division) with a new functional one (in view of a reform of the central administrative system), is still a current issue.\(^{14}\)

5. The relationship between particular solutions of the Rules of Procedure and the principle of separation of powers is of great importance. This principle, laid down in art. 10 para. 1 of the Constitution, provides for a separation and balance between the legislative, executive and judicial powers. Moreover, a directive stems from the preamble to the Constitution, which requires cooperation between the branches of power (probably, this mostly relates to the legislative and judicial powers). The doctrine of constitutional law takes into consideration these three aspects of the separa-


\(^{12}\) It is interesting to note that there were 198 votes cast in favour of establishing that committee, with 198 votes against 195 and 5 abstentions [Shorthand Report of the 30th Sitting of the Sejm of the 3rd Term, p. 84].


tion of powers principle\textsuperscript{15}, although an argument is sometimes presented that the idea of separation of powers entails the necessity of “a considerable reduction of the scope of a non-statutory activity of the Sejm and Senate”. However, an opposite argument may be presented based on art. 4 para. 2 of the Constitution, whereby parliament is not deprived of “all of its legal capacity to influence state policy” and which, due to the fact that Deputies fulfill the power of the sovereign, gives the parliament “a privileged place in a constitutional democracy mechanism”\textsuperscript{17}.

In order to effectively assess the Rules of Procedure of the Sejm in context of the principle of separation of powers, the relationship between the Sejm and the executive power, i.e. government, should be examined (which, in practice, relates to the admissibility of resolutions and mandatory resolutions [a mandatory resolution obliges a specified State organ to act once only as indicated by the resolution] addressed to the government as well as desiderata and opinions of Sejm committees). Two scholarly concepts have been used to describe, in general terms, the said issue: (1) “the manner in which the Sejm may influence the executive branch has been expressly specified in the Constitution”\textsuperscript{18}; (2) the manner in which Parliament may influence other branches of power (particularly the government) has been limited — either explicitly or implicitly — by constitutional provisions\textsuperscript{19}. To prove rightness of the former concept one should assume that the phrase “the possibility of influencing the executive” means a legally binding influence. As concerns the latter, it probably accentuates the following phrase: “constitutional provisions permit influence in an implicitly manner.”

To answer (relying not only on the tenor of art. 112 of the Constitution) the question whether or not, the Rules of Procedure may establish a mandatory resolution or desideratum of the Sejm committee; one should also take into consideration further doctrinal arguments. Firstly, “under the traditional concept of the separation of powers, resolutions adopted by parliament are only internal law and cannot impose obligations on extraparliamentary entities”. Secondly, “insofar as the task of establishing procedural and organizational framework of relations between parliament and other organs is considered, such relations should be governed by the Rules of Procedure” (…). Even though the Constitution permits establishing them, this does not necessarily mean that such obligations are legally binding on extraparliamentary en-

\textsuperscript{15} Compare e.g. A. Pulło, \textit{Zasada podziału i równoważenia władz. (Podstawowe dylematy debaty konstytucyjnej)} [The Principle of Separation of and Balances between the Powers (Main Dilemmas in the Constitutional Debate)], “Gdańskie Studia Prawnicze” 1998, vol. III, p. 36.

\textsuperscript{16} P. Sarnecki, \textit{Funkcje i struktura parlamentu według nowej Konstytucji} [The Functions and Structure of Parliament under the New Constitution], “Państwo i Prawo” 1997, vol. 11–12, p. 34.

\textsuperscript{17} W. Sokolewicz, \textit{Rozdzielone, lecz czy równe? Legislatywa i egzekutywa w Małej konstytucji 1992 roku} [The Legislature and the Executive in the Small Constitution of 1992: Separated, but are they Equal?], “Przegląd Sejmowy” 1993, No. 1, s. 23.

\textsuperscript{18} J. Jaskiernia, \textit{Zasady demokratycznego państwa prawnego w sejmowym postępowaniu ustawodawczym} [The Principles of a Democratic State Ruled by Law in the Legislative Process in the Sejm], Warszawa 1999, p. 79.

\textsuperscript{19} L. Garlicki, \textit{op. cit.}, p. 14.
tities. Indeed, under the principle of separation of powers only a statute can be effective in this respect and any resolutions by a chamber of parliament are not legally binding on entities outside of parliament. Another problem is political effectiveness, enforced e.g. by the use of the mechanism of parliamentary accountability of the government or individual ministers (…)20.

Therefore, the principle of separation of powers does not exclude the existing regulation of art. 55 para. 1 and para. 2 of the Rules of Procedure of the Sejm. This provision, which provides a legal basis for adopting mandatory resolutions and appeals, is addressed only to the Sejm and not extraparliamentary organs. So, it only creates “the procedural and organizational framework for contacts between parliament and other organs” and may, however, “provide legal conditions for parliament to exercise its constitutional duties” (the phrase excerpted from the constitutional principles discussed in section 4 of this paper). The principle of separation of powers brought about (which follows the adoption of the Small Constitution) the revision of March 5, 199321 deleting the words “legally binding” previously used to describe the effects of a mandatory resolution. Furthermore, the principle of separation of powers does not exclude the possibility of entering (in art. 85 para. 1 and art. 86 para. 1 of the Rules of Procedure of the Sejm) of desiderata and opinions of Sejm committees, but eliminates the obligation to respond by those to whom they are addressed.

Yet, resolutions of the Sejm that do not ensue from constitutional or statutory powers22, have a sufficient legal basis laid down in art. 95 para. 2 and 4 of the Rules of Procedure, although this provision actually relates to the subject of debate during the sittings of the Sejm. Nevertheless, propriety of the above approach relies on proving that admissibility of resolutions and mandatory resolutions of the Sejm (as well as setting up of desiderata and committee opinions) follows, at least implicitly, from the provisions of the Constitution.

6. The need to specify constitutional provisions which allow, at least implicitly, parliament to influence the executive (the government in particular) justifies the inclusion of the principle of sovereignty of the nation and the principle of a parliamentary (cabinet) system of government in our analysis of the Deput. Our objective is to identify the constitutional grounds for activity of the Sejm and its auxiliary organs, consisting of the adoption of resolutions (on a particular issue) and mandatory resolutions as well as submitting desiderata and opinions. This will include the following brief arguments.

Because the Nation exercises its supreme power in the Republic through its representatives (pursuant to art. 4 para. 2 of the Constitution), any exercise thereof should be formalized, i.e. performed by national representative organs. In theory, the

21 Monitor Polski No. 13, item 89.
22 It should be noted that no competence of the Sejm to adopt resolutions may be derived from the second sentence of art. 120 of the Constitution, because it only concerns the procedure for adopting resolutions.
character of supreme power exercised in the state by the Sejm should be defined as a generalized essence of power exercised by the sovereign himself. Therefore, the power exercised by the Sejm may consist of establishing supreme organs of the state and setting state policy (the doctrine of constitutional law defines the sense of sovereignty of the nation in such a way). And such meaning may, in fact, be attributed to particular competences of the Sejm within the scope of its legislative, creative and, to some extent, oversight functions.

The sovereignty of the nation is of a permanent nature, because, according to art. 4 para. 1 of the Constitution, the supreme power is vested in the Nation. For this reason, the process of setting policy of the state should also be continuous. Such a potential permanence cannot be ensured by concrete constitutional competences of the Sejm. Although the Sejm may enjoy legislative competence upon numerous occasions, the adoption of a bill prevents consideration of a given issue even for a considerable period of time. Similarly, the approval of a government by passing a vote of confidence postpones a repeat exercise of a given creative competence. If the constitutional phrase “the Nation shall exercise [such] power through their representatives” is not to be a pure fiction, then the Sejm should as an organ composed of Deputies, have the ability to influence (possibly permanently) state policy. Therefore, the power of the Sejm to act in the capacity of a representative organ may be implied from art. 4 para. 2 of the Constitution. However, such implied actions should always be confronted with other constitutional provisions (especially those concerning the role of the Sejm in the system of government and its relationship with other organs) and, hence, should be verified by those provisions. Such an implication, obviously, would not challenge theoretical consequences resulting from other principles of the system of government.

One may assume that the only implication that could be drawn from art. 4 para. 2 is that the Sejm (as an organ composed of Deputies, through which the sovereign exercises his power) has the ability to deal with any issue concerning state policy (provided that for whatever reason such issue requires it), even if it cannot resolve this matter in a legally binding manner. In parliamentary practice, such implication may relate to resolutions and mandatory resolutions of the Sejm23 and, probably, to request the government to present its stance on a given matter. Such implication may also apply to desiderata and opinions of Sejm committees. Even though the committees are internal auxiliary organs of the Sejm, they are composed of Deputies to the Sejm and, thus, in view of the impact on state policy, an auxiliary organ may be regarded as a competent organ. The above activity of the Sejm and its committees may, in fact, contribute to their influence on state policy becoming permanent.

The implied ability of the Sejm to deal with a particular problem does not equal the ability to actually resolve that problem. This rules out any possible challenges to the implied competence of the Council of Ministers to pursue state policy, as laid down in art. 146 of the Constitution. Even if the Sejm may, by adopting a resolution or a mandatory resolution, in a way participate in the activities of the executive branch, the addressees of a resolution or a mandatory resolution make their decisions (and may refuse to implement the suggested solutions). Because of this such activity of parliament may be regarded as not only implementing the idea of the sovereignty of the nation, but also reflecting the task of balancing the role of government in pursuing state policy, as well as an example of the cooperation between the executive branches. Accordingly, such activity of the Sejm is fully consistent with the principle of separation of powers in its broad meaning.

Moreover, reference to the principle of the system of parliamentary government and, art. 157 para. 1 and para. 2 of the Constitution in particular (which sets out political accountability of both the government and its individual members), lets us derive the rationale behind Sejm resolutions (and for mandatory resolutions, desiderata and committee opinions) from the fact that power in the state is exercised by the sovereign through the Sejm. The political effectiveness of the above measures, and also the advisability of enclosing them in the provisions of Rules of procedure, is apparently manifested in the mechanism of the Sejm for holding accountable addressees of resolutions, mandatory resolutions, desiderata and opinions.

7. The impact of the principle of political pluralism on the solutions adopted in the Rules of Procedure also warrants attention. Art. 11 para. 1 of the Constitution sets out the freedom for the creation and functioning of political parties whose purpose is to influence state policy by democratic means. As concerns matters of parliamentary Rules of Procedure, from the above provision it follows not only the recognition of a multiparty system, but also, in practice, to “supply the parliamentary opposition with an effective instrument of influencing the pursuit of state affairs”25. Therefore, one may say, in general, that the Rules of Procedure should be “an act relating to vital affairs of the whole chamber, perceived in its complete internal diversity, consistent with the constitutional principle of political pluralism”26.

Among the provisions of the Rules of Procedure relating directly to political pluralism, worthy of attention are above all: art. 15–17 concerning the Council of

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24 If the doctrine decides to derive the idea of a mandatory resolution or the idea of desiderata from the supervisory function of the Sejm (such an approach is often found, particularly in relation to desiderata), a conflict will arise with the tenor of art. 95 para. 2 of the Constitution. The recognition of desiderata as a supervisory measure (to which the phrase “in the scope determined by the Constitution and statute” refers) would lead us to the wrong conclusion that one should “consider the question of further functioning of certain supervisory measures, including the power of the plenary session of the Sejm and of its committees to request reports from government (except for a report on the implementation of the budget), to request the attendance of members of government at plenary and committee sittings, not to mention desiderata or committee opinions” (P. Sarnecki, op. cit., s. 48).


Seniors; art. 21 para. 1 specifying the way in which the composition of individual Sejm committees is set; art. 108 para. 1 providing time limits on speeches given by individual groups [clubs] of Deputies on a particular debate; art. 76 para. 2 obliging presidiums of committees to take into consideration (when drawing up draft schedules of activity of committees) suggestions from clubs and groups of Deputies; or art. 40 para. 3 and art. 56r para. 2 concerning minority motions. Those provisions of the Rules of Procedure have not required any change.

On the other hand, the provisions on the governing (presidency) organs of the Sejm, including the Marshal [Speaker] and the Presidium of the Sejm, are indirectly related to the principle of political pluralism. The assigning of concrete competences to these organs has had serious consequences on the functioning of parliament. The deconstitutionalization of the Presidium of the Sejm does not restrain the autonomy of the Rules of Procedure, which regard it as the second (along with the Marshal of the Sejm) governing (presidency) organ of the Sejm. This is further substantiated by art. 110 para. 2, whereby the duties of the Marshal of the Sejm are limited to (a) presiding over the debates of the Sejm, (b) safeguarding the rights of the Sejm and (3) representing the Sejm in external matters. In view of the fact that the Presidium of the Sejm is more representative, in political terms, than the Marshal of the Sejm, the modifications of the Rules of Procedure contained in the second revision dated October 28, 1997\(^{27}\) (which reduced the role of the Presidium of the Sejm to the benefit of the Marshal of the Sejm) deserve attention, since the Marshal’s role in direction of work of the chamber goes beyond what the Constitution had envisaged. The division of powers to direct such work between these two organs (provided that the powers of the Presidium of Sejm are restricted to internal matters of parliament) would be somewhat different, however, if in the course of modification of the Rules of Procedure of the Sejm we took into account the actual decision-making abilities of a one-person organ, on the one hand, and the optimal benefits to the functioning of a politically pluralistic Sejm resulting from decisions of a representative collective organ, on the other.

The principles of political pluralism might also be referred by the doctrine of constitutional law to the procedure for adoption and/or amendment to the Rules of Procedure. If the solutions of the Rules of Procedure are to accomplish the interests of the whole chamber, in its complete internal diversity (thereby allowing the parliamentary opposition to effectively influence the pursuit of state affairs), then modifications to the Rules of Procedure should not be easily effected by the ruling coalition. A proposal has already been made that a qualified majority of three/fourths of Deputies be required for any adoption of, or amendment to, the Rules of Procedure, and that the right to submit draft resolution be conferred on the Presidium of the Sejm, which is to act in agreement with the Council of Seniors, (or even directly on the Council of Seniors), and also on a group of at least 115 Deputies\(^{28}\). I do not believe


\(^{28}\) W. Sokolewicz, Comment 10 to art. 112, [in:] *op. cit.*, p. 27.
that a three/fifths majority (i.e. 75 percent of votes) is indispensable, the more so as a two/thirds majority (i.e. 67 percent of vote) is required to amend the Constitution (notwithstanding the fact that acceptance by the Senate is also required for such change). A requirement of a three/fifths majority (i.e. 60 percent of votes) would be sufficient here\footnote{If such a requirement was previously introduced, the controversial (in some aspects) amendment to the Rules of Procedure dated October 28, 1997 would not be adopted, because it was supported by 249 Deputies, with 170 Deputies voting against it and 16 abstentions [Shorthand Report of the 1st Sitting of the Sejm of the 3rd Term, p. 67]; while under a 3/5, 261 Deputies would need to vote in favour of it.}.

If the above proposed requirement of a qualified 3/5 majority of votes for adoption of, and/or amendment to, the Rules of Procedure was accepted, then there would be no need for changing art. 129 of the Rules of Procedure which deals with the right to introduce draft resolutions. In my opinion, depriving the Rules and Deputies Affairs Committee of the right to initiative in this respect would be particularly undesirable.

Translated by Albert Pol

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CONTROL POWER OF THE SENATE OF THE REPUBLIC OF POLAND*

I.

1. The principal constitutional role of the Senate of the Republic of Poland (art. 10 of the Constitution) is its participation in law-making, which is not the subject of this discourse. This discourse contains some reflections on the possibility of the second chamber performing another of its functions — by no means a less important one — the function of democratic parliaments — that is parliamentary control. Looking at art. 95 of the basic law — the key one for this issue — one initially believes that the Senate is refused the right to partake in exercising the control function, at least in relation to the most important element of power, i.e. the government administration (the Council of Ministers). Moreover, such conviction would not only be built on this article in the Constitution; it would be additionally strengthened by the absence in the new Constitution of a certain norm, present in previous constitutional provisions (included in art. 12 in relation to art. 26 of the Small Constitution), providing for participation of the Prime Minister and other members of the Cabinet in the sittings of the Senate, and giving them priority for the floor. This provision did not

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1 See a recent publication by B. Banaszak, *Rola Senatu w procesie legislacyjnym* [The Role of the Senate in the Legislative Process], "Przegląd Sejmowy" 2000, No. 5, pp. 29–40.
exclude using just such situations for, for example, the Senate getting information
and explanations, that is just performing certain controlling activities, and expressing
criticism of the government in the presence of its representatives.

Art. 95 of the Constitution (only in reference to the Council of Ministers) raises
the need to consider the possibility of the Senate performing controls of, for example,
local administration, and of activities of various organs of public authority (sensu
largo) which are not subordinate to the government. The possibility of the Senate
performing controls of organs other than the government may hardly be proven only
on the basis of a contrario arguments in conjunction with art. 95 para. 2 of the Con-
stitution (every such attempt requires a thorough constitutional analysis), but it can-
ot be determined a priori that the above-mentioned regulation makes consideration
of controlling powers of the Senate pointless.

2. There is yet another, probably more important aspect to this problem. It emer-
ges from inseparability — in the majority of cases — of the chamber’s parliamentary
functions — legislative and controlling. The majority of cases to me, for example,
mean consideration or adoption (or rejection) of the drafts of the most important laws,
which are usually submitted by the Council of Ministers. Consideration of bills sub-
mitted by the President of the Republic of Poland should be treated similarly, mutatis
mutandis. Only in relation to bills presented by the Senate or the Deputies (given all
the different forms of legislative initiative at the Sejm) can we speak of specific
internal parliamentary control. There is no doubt that, for example, the annual draft
budgets, and the bills relating to the most important institutions of public life, presen-
ted by the government, are an expression of certain political ideas of this organ, or of
its specific concept of solving certain social problems. Consideration of these bills is,
therefore, synonymous with consideration and evaluation of these concepts, so, in
a certain sense, it is a kind of initial control of the work of the government. It is
apparent, however, that it is more than just initial, as each governmental bill is affec-
ted by their assessment of the actual situation and is a response thereto. This assess-
ment must consider the previous activities of the central administration, performed
under the regulations in force. Thus, the evaluation of the bill must, obviously, con-
tain the evaluation of these activities, their correctness and effectiveness. This is con-
spicuously visible during the adoption of the Budget — the new law must directly
relate to the Budget of the previous year. Therefore, irrespective of the adoption of
the so-called approval of the government’s accounts [discharge] — which comes at
a latter stage — the evaluation of the draft budget must be a specific reaction to the
execution of the previous Budget. It is not surprising, therefore, that in different co-
untries the non-adoption of the law (the Budget), which is so important for the go-
vernment, is considered as a sui generis vote of no confidence. The bills of such laws
affect the future functioning of the government, which resigns if the bill is not adop-
ted as a law in time. Such a control of the government by the parliamentary chambers
also takes place during considerations of bills granting consent for ratification of
international agreements.
The issue under consideration in this discourse serves as a good illustration of the problem of distinction between the notion of a function and that of a competence — in this case of the chamber of the parliament. Adoption of a law is a competence, i.e. a specific conventional action, which generates legal consequences. As part of it the chamber exercises both its law-making function (introducing changes into the state of the law universally in force), and the control function (gaining information on the activities of a specific subject, which, obviously, also includes evaluation of this activity). This was seen and described a long time ago. Naturally, in the situation described here a special form of control is mentioned — rather random, undertaken when bills are analysed. Regardless of how widely additional explanations and information from the government can be used then, it is still just a random control — issues unrelated to the bills do not become subject of such parliamentary control. An exception should be made here, however, related to consideration of the draft budget, which, in fact, reflects the entirety of the government’s intended actions, as it is based on its previous activities. Thus, even if art. 95 para. 2 of the Constitution were to be disregarded, it should be stated that the Sejm, partly by force of its law-making function, undertakes steps that are nothing more than the control of the activities of the government.

3. Can such reasoning — and a similar conclusion — be applied to the Senate, which is also a law-making authority, which considers all statutes before promulgation, including, obviously, those that have been drafted and presented by the Council of Ministers? According to the basic law the Senate considers the statutes (this is the term used by the Constitution — art. 121 para. 1 — for the text adopted by the Sejm, and then referred to the Senate) only after the Sejm has adopted them. No draft statutes may be directly submitted to the Senate. Still, the procedure of consideration at the Senate, not determined by the Constitution (unlike the Sejm procedure — see art. 119 of the Constitution, relating exclusively to the Sejm, which ensues from art. 124), could be shaped by the Senate quite at will, and provide it with similar, or even greater powers than those of Sejm in order to control the government during this consideration.

To answer the question, whether or not the Senate’s exercising of the legislative power also means its participation in parliamentary control in the above understanding, it should be stressed that the subjects of consideration are, as it has just been mentioned, statutes adopted by the Sejm, and not the government’s bills, possibly modified in a certain way by the Sejm. This also applies to situations where the bill is adopted by the Sejm without any modifications. Even then, the Senate considers the statute as “authored” by the Sejm, and not as a bill that was prepared by the government. Once a statute is adopted or even before that, i.e. once the government cannot withdraw a bill that it has presented (see art. 119 para. 4 of the

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Constitution), it is no longer its owner, and the responsibility for it is in a certain sense transferred to the Sejm. It is, therefore, logical that just as the Sejm can take specific steps to find the explanations and assess the motives of the government in preparing a bill, the Senate is able, at a later stage, to use similar means of control, to consider and evaluate the motives of the Sejm in adopting the bill as law. The Senate, may not, however, go “further back”, and evaluate the substance of the text as at the pre-parliamentary (governmental) stage. Such is, or seems to be, the position of the Senate in this matter. This is confirmed by its Rules and Regulation, even after the latest amendment of the document\(^3\), which, in the part devoted to the procedure of consideration by the Senate of the statutes adopted by the Sejm (the present art. 68, \textit{et seq.}) provides, for example, neither the possibility of summoning the ministers — the real authors of the bill — to participate in the sittings of the Senate or its committees in order to offer explanations, nor of addressing formal questions to them, etc.

Such an approach, however, would be somewhat too formal, as there is no doubt that other provisions of the Rules and Regulations apply to this particular Senate procedure, i.e. also those which apply directly to participation in the Senate sittings, or its committee sittings, of representatives of proper state or other organs (see art. 32, 33 and 60 of the Rules). This results from the systematic interpretation of this act. In this case it means, naturally, the representatives of the primary initiators of the bill (the members of the Council of Ministers), as well as the representatives of subjects possibly presenting various opinions helping to assess the justification of a specific text. They may all be invited by the Senate and its committees, they may speak during a debate, provide information and clarifications, take questions from the senators and answer them. Some of them have the right to appear at plenary sittings of the chamber and its committees on their own initiative, and also then offer appropriate explanations. It is hard not to see there the elements of control, inseparable from law-making. Notably, this is a regular practice in the functioning of the Senate. It would be hard to come by a sitting of this chamber, at which there would be no representatives of appropriate ministries, usually speaking after the plenary debate, explaining the reasoning behind the bill, and, in particular, responding to issues raised during the debate. Participation of the representatives of ministries in the meetings of the Senate committees working to prepare a draft of the Senate’s position on the given statute is also a rule. Moreover, links between the Senate and the government described here, which were previously regulated by the Small Constitution, now have their basis in the Rules, quite rightly so, for this is not a constitutional matter, but one that belongs exactly there.

4. The possibility of involving the representatives of the government in the works of the Senate on statutes does not ensue only from explicit provisions in the Rules — it has a deeper constitutional rooting. It is a consequence of the very fact that the Senate is a legislative body. Regardless of how broad (or how limited) are the specific competences of the Senate within its legislative function; it is an organ that shares with the Sejm the responsibility for the condition of law making in Poland. It ought to, therefore,

\(^3\) The consolidated text, Official Journal Monitor Polski 2000, No. 8, item 170.
use all means available to it to ensure the proper shape of the legislation, a task that is
certainly well served by its direct contacts with the authors of the bills.

One of the powers of the Senate is rejecting any statute adopted by the Sejm. This
also applies to those laws that were initiated by the government. Moreover, the Senate
may reject a statute even if the Sejm did not make any changes in its draft and accepted
it spontaneously, demonstrating in this way its conviction as to the statute’s appropriate-
ness. The analysis of the Sejm’s dealing with the given (governmental) bill may not yield
anything significant for the evaluation of it. In such cases getting in direct contact with
the initiator is worthwhile. Obviously, the Senate should always be well acquainted with
the course of the legislative debate at the Sejm, including the position of the government
(initiator) presented during that debate. However, there seem to be no obstacles for the
Senate to get in direct contact with the initiator of a statute, and, in this way perform
some controlling activities in the above-mentioned sense, in order to make sure that the
law is made at a properly high level. The provisions of the Rules and Regulations quoted
above (item 3) fully confirm the Senate’s possibilities in this respect.

5. The Senate’s exercise of power through its legislative function in the state also
includes an element of control of the government. The same cannot be said, however,
in relation to its “creative” function, i.e. designating candidates to specific state posi-
tions. The creative function could easily become a tool of controlling the activities of
the nominees. However, the Senate does not participate in the procedure of construct-
ning or reconstructing of the government, nor does it exercise any of its designation
powers upon a motion of the government. Thus, it has no substratum enabling it to
control the functioning of that organ.

II.

An issue for separate consideration is, whether or not — regardless of the controlling
functions described above, integrally bound with the Senate’s execution of its primary
legislative function — the basis for autonomous execution by the Senate of such activities
can be found in the presently binding constitutional law. This concerns mainly the possibi-
ity of controlling the Council of Ministers (interpreted sensu largo, as the central govern-
ment administration). Such possibilities do exist in relation to some other principal state
organs, e.g. the Commissioner for Human Rights or the Constitutional Tribunal, and are
based on specific constitutional or statutory regulations, within the scope defined therein.
In the commentaries concerning the issue, published mainly in textbooks, this power of the
Senate was missed; their authors usually relay on the conclusion resulting a contrario
from art. 95 para. 2 of the Constitution 4. The authors of the commentaries to the Constitu-

4 Compare e.g., L. Garlicki, Polskie prawo konstytucyjne. Zarys wykładu [The Polish Constitutional
Law. A Lecture], Warszawa 1999, p. 216; Z. Witkowski, Senat Rzeczypospolitej Polskiej [The Senate of the
Republic of Poland], [in:] Prawo konstytucyjne [The Constitutional Law], ed. Z. Witkowski, edition VII,
Toruń 1998, p. 228, with a characteristic emphasis: “one should state with a great stress (under-
line P. Sarnecki) that the Senate does not participate in the creation or control of the government”; W. Orło-
wski, Funkcja kontrolna [The Control Function], [in:] Polskie prawo konstytucyjne [The Polish Constitu-
tion of the Republic of Poland of April 2, 1997 — Leszek Garlicki, Józef Repeł i Wiesław Skrzydło present an identical position. In turn, Bogusław Banaszak and Zdzisław Mazur acknowledged certain controlling powers of the Senate under the new Constitution, although the authors refer to sources outside the Constitution for their legal basis.

1. We should recall at this point the generally known truth of fallibility of the a contrario argumentation in the constitutional law, caused by the very high level of generality of the norms in this branch of the law. Article 95 para. 2, mentioned at the beginning of this discourse, does not necessarily exclude the admissibility of autonomous controlling activities of the Senate in relation to the Council of Ministers. However, different premises for this admissibility should be found in the Constitution. It seems that the opinion of prof. Lech Garlicki, that: “it is not possible […] to find other constitutional provisions, which would grant specific controlling powers to the Senate or the senators” is a bit too categorical, unless it is understood verbatim, as the absence in the Constitution of any indications to specific controlling powers, for such, in fact, are not there. Does this mean, however, an exclusion of the Senate’s ability to perform certain control activities of a general nature?

Most probably, the basis for such activities of the Senate is still found in the constitutionally constructed representative nature of both chambers of the Polish parliament. The Senate is one of the collective organs of “the representatives of the Nation” mentioned in art. 4 para. 2 of the Constitution. It is through these organs that the Sovereign executes its supreme power. The representative nature of the Senate is not only confirmed by a regulation, in art. 10 of the Constitution — each of the three main state powers in the three-party division and balance of power holds direct authority over the nation and is its equal representative — but also in sociological and political terms, for the Senate is elected by the nation in universal and direct elections (see art. 97 of the Constitution), and the senators have been called “the representatives of the Nation” expressis verbis (art. 104 para. 1, in relation to art. 108). In line with the constitutionally determined text of the oath they are obliged “to perform their duties to

7 See W. Skrzydło, Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. Komentarz [The Constitution of the Republic of Poland, of April 2, 1997: A Commentary], Kraków 1998, p. 91. The author stresses, however, that “the content of art. 95 para. 2 indicates that the Constitution established the control by the representation of the Nation (i.e. the deputies and senators — underline by P. Sarnecki) over the functioning of the Council of Ministers”.
8 See B. Banaszak, Prawo konstytucyjne [The Constitutional Law], Warszawa 1999, p. 456. The author points only to the appropriate provisions of the Rules and Regulations of the Senate, concerning its “minor”, as he says, controlling powers. Z. Mazur in his Prawo konstytucyjne. Wybrane zagadnienia [The Constitutional Law. Selected Problems], ed. H. Zęba-Załucka, Rzeszów 1998, p. 97, states that the “controlling function of the Senate […] is rather non-existent. This applies especially to the possibility of controlling the organs of the executive branch. […] Certain powers (within this field — P. Sarnecki) […] were granted to the senators individually by the Act on the Exercise of the Mandate of a Deputy or Senator”.
9 Konstytucja…, ed. L. Garlicki, Comment 6 to art. 95.
the Nation diligently and conscientiously” (art. 104 para. 2). It seems that the attribute of representing the nation allows (or even compels) each organ equipped with it to show its interest in the entirety of problems of relevance to this nation, problems that are the subject of lively and broad discussions in the society, and ones in relation to which a response of the authorities is expected. This statement, in its full sense, influences the position of the Senate and its power to act. This chamber, as a representative body, is allowed (or even compelled) to show its interest in all issues relevant to this nation, and must participate in consideration of the most important issues; it must speak. This usually requires knowing the position of the executive authorities, which means effectuating a *sui generis* control of that power\(^{10}\).

I do not believe, however, that we may find any basis for the Senate developing an autonomous control function in relation to the executive branch, i.e. above all with respect to the Council of Ministers, in the constitutional requirement of the balance in functioning of the three main state powers (see art. 10 para. 1). Reciprocal control of the powers (political and legal) is important for meeting this requirement. In theory it may be met by only one chamber of the parliament, even within the system that provides a bicameral body. To conclude — the Constitution does not contain an explicit prohibition for the Senate to perform controls in relation to the executive branch on the one hand, and, on the other — it allows it implicitly, both by giving the Senate the right to partake in the entire legislative function, and by constructing this chamber as a representative organ (politically representing the Nation).

2. Some constitutional basis for developing control activities by the Senate can be found in the principle of bicameralism of the parliament, retained in the Constitution of 1997. The literature, however, does not speak on the issue. Some time ago, I expressed the opinion that recognition of this principle has a certain normative significance\(^{11}\). In my opinion, the criteria for the occurrence of this principle which I presented (in the period under the Small Constitution) are still met in relation to the Senate in the form it acquired under the Constitution of 1997. If so, then, the assumption of equal rights of the two chambers, effective especially when doubts in interpretation appear, is still valid. It applies also, in a specific way, to the parliamentary control function, which is discussed here. In my opinion, art. 95 para. 2 of the Constitution does not remove this assumption.

3. Considering the admissibility of the Senate’s controlling power over the government we must not lose sight of its nature, which should be understood *sensu stricto* as merely obtaining information on the functioning of the controlled organ,\(^{10}\) The above remarks are in line with the arguments of J. Czajkowski included in Senat Rzeczypospolitej Polskiej pierwszej kadencji 1922–1927. Pozycja prawno-konstytucyjna i praktyka ustrojowa [The Senate of the Republic of Poland of the First Term, 1922–1927. The Legal and Constitutional Position, and the Systemic Practice], Warszawa 1999, p. 55 et seq.

\(^{11}\) In the article Czy w Polsce istnieje konstytucyjna zasada dwuizbowosci parlamentu? [The Constitutional Principle of Bicamerality of the Parliament — Does it Exist in Poland?], “Przegląd Sejmowy” 1993, No. 2, p. 43.
and possibly expressing appropriate opinions. In this interpretation, the control function is not a function of power, as it does not imply the right to issue acts influencing the legal situation of the subject under control, even though the latter is constitutionally obliged to submit to such a control. This powerlessness of the Senate’s potential control leaves no room for doubt, especially because the chamber’s right to perform it is not formulated *explicitly*. The Senate has no legal means to burden the Council of Ministers with anything, nor impose any obligations upon it, apply legally effective measures to it as a result of criticism of its activities, etc. The control *sensu stricto* does not correspond to the “narrower” meaning (or rather a scope) of the control function of the parliament in relation to the government, distinguished in the Polish literature from its “broader scope” (meaning)\(^{12}\).

From the point of view of this discourse, only the lack of possibilities for the Senate to apply some consequences to the government following an effectuated control is important. I believe that the formulation of various “postulates, conclusions, opinions, interpretations, which are different forms of influencing the work of the government”\(^{13}\), and which must be taking place to speak of effectuation of controls in the broader sense, may be admissible within the controlling function *sensu stricto*, because it does not change the non-imperative nature of the Senate’s influence upon the government.

4. The Senate’s control has all the characteristics of a parliamentary control. Thus, it should be broadly political, and not specialized. The Senate, in performing it, should apply political and social criteria, concentrating mainly on the analysis of social and political effects of the government’s activities, as this control is, obviously, a derivative of the Senate’s parliamentary nature. Its realisation is not obstructed by the lack of specific instruments of enforcing political accountability. The very fact of bringing the different actions of the executive to light, in particular revealing shortcomings in its operations or suggesting possible steps to amend them is, in practice, quite important, and may, on many occasions, be the Senate’s very painful response to the irregularities revealed. The importance of such kind of procedures, applied by the parliamentary chambers, for the functioning of any democratic state warrants attention.

The necessity to submit not only to the parliamentary surveillance of the Sejm, but also to the control of the Senate, should additionally serve the proper functioning of the government. The two chambers should not compete with each other in these activities, and should avoid repetition of the same actions. Some co-ordination of their work would be most desirable, particularly an exchange of information concerning the steps they intend to take in this respect. No doubt the Sejm has the leading role to play, on account of the above-mentioned constitutional arrangements. The Senate can simply play a complementing role, and thus significantly strengthen the parliamentary control of the executive. The government, in turn, should not consider its obligations to the Senate as an additional hindrance to its work. After all, after being criticised by one

\(^{12}\) See Z. Czeszejko-Sochacki, *Prawo parlamentarne w Polsce* [The Parliamentary Law in Poland], Warszawa 1997, p. 168 et seq., quoting the opinions of other authors.

\(^{13}\) Ibidem, pp. 168–169.
chamber the government can improve its image in the eyes of the public when the sec-
d second chamber gives it a better note, especially, if, in response to the criticism it presents
some additional aspects of its work, which may help the public to see it in a different
light. A democratic constitution may not put obstacles to the government’s voluntary
submission to surveillance by the Senate, as a representative chamber. On the other
hand, we should not lose sight of the danger of the Council of Ministers’ opportunistic
siding with one chamber against another, thereby manipulating public opinion.

5. The interpretation of the Constitution presented here, aiming to recognise two
autonomous control activities of the Senate with respect to the government, is confir-
med by several statutes in force. They may, obviously, not only implement, but also
supplement the Constitution, and be an expression of its specific interpretation by the
executive power. Therefore, confirmation, in statutes, of such interpretation of the
Constitution, which makes it a basis for the development of autonomous control activi-
ties of the second chamber of the parliament, is quite acceptable. The Act of May
9, 1996 on the Exercise of the Mandate of a Deputy or Senator\textsuperscript{14} is the most
important piece of legislation in which such interpretation can be found (an analysis relevant
articles can be found in the latter part of this discourse). The above-mentioned confir-
mation may be made directly, \textit{or per facta conludentia}, that is, for example, by con-
structing proper controlling competences. This second method seems to be more ap-
propriate, as general declarations such as “the Senate may obtain information on the
activities of the Council of Ministers” should rather remain as constitutional regu-
lations.

The admissibility of defining elements of control activities of the Senate in its
Rules and Regulations should also be recognised. This ensues, naturally, from
art. 112, in conjunction with art. 124 of the Constitution, under which the Senate may
define “the manner of performance of obligations, both constitutional and statutory,
by State organs” in relation to itself. The constitutional premises of such provisions
in the Rules and Regulations would thus be fulfilled, especially given that the Coun-
cil of Ministers is obliged by the Constitution to submit to the controlling activities of
the Senate, because the Constitution describes it as a representative organ and
a chamber of the parliament. This duty is further confirmed in the Act on the Exercise
of the Mandate of a Deputy or Senator.

It is impossible to miss, however, that in the listing of the Senate’s debate topics
in its Rules and Regulations (art. 45) there is no mention of the possibility to under-
take control activities with respect to the government, while — although in reference
to specific statutes — consideration of reports and information from the Constitutio-
nal Tribunal, the Commissioner for Citizen’s Rights, the National Broadcasting Co-
uncil, and the President of the Institute for National Remembrance — the Commis-
sion for Prosecution of Crimes against the Polish Nation was named \textit{expressis verbis}.
There are several explanations for this. The first reason is that the dominating instan-
tes of these controlling activities of the Senate over the government are actions taken

\textsuperscript{14} Official Journal “Monitor Polski” No. 73, item 350, and amendments.
in relation to consideration of bills, which is mentioned in item I of this discourse. Secondly, article 45, which lists the items that can be placed on the daily agenda for debates is exemplary by nature, and is supplemented by other provisions setting out what can be discussed at sittings (e.g. art. 49 in which the issue of the so-called Senator’s statements is regulated). Thirdly, many controlling activities take place on the forum of the Senate committees, which cannot be determined by art. 45. However, it does seem that the regulation presented here results from the fact that the Senate itself does not fully recognize its possibilities in this area (refer to the remarks on the “conclusions” in the pre-war rules of the Senate below).

In the commentary to art. 95 of the Constitution (mentioned above), L. Garlicki quotes an opinion, expressed earlier in literature, that the statutory establishment of certain control competences of the Senate should be treated with “much reserve”. Judging by the current situation this is true to a certain extent. A legal status, in which the constitutional “roots” for the Senate’s development of its controlling powers over the government, are more defined would be better than the present one. All the same, L. Garlicki does not consider these statutory regulations, which introduce certain controlling activities of the Senate over the government, as unconstitutional. The obvious conclusion is that art. 95 para. 2 is rather useless. The Sejm and the Senate may act as political supervisors because, as parliamentary chambers, they are representative organs of the nation. As far as the Sejm is concerned, it is not deprived of its supervisory role, because it is not required to maintain balance in the functioning of the “divided” powers, as included in art. 95 para. 2.

6. To support the thesis on the supervision powers of the Senate one must turn to the tradition of the Polish parliamentarism, which was recently the subject of a study by Jacek Czajkowski15. The Senate established by the March Constitution was equipped with certain controlling functions granted to it explicitly. First of all, it participated in the parliamentary discharge of the balance of state accounts (see art. 7), and in the parliamentary control of state debts (see art. 8; underlined by P. Sarnecki). It also had the right to question the government or individual ministers (see art. 33 in relation to art. 37). The act of 3 June 1921 on State Control gives the Senate some influence over the Supreme Chamber of Control. The representatives of the Senate were on the Committee for Controlling the State Debt, established on the basis of art. 8 of the March Constitution by the act of 25 September 1922 on controlling the State debt. The rules for the Senate sittings of 24 March 1923, provided further opportunities for this chamber’s controlling activities, which were not mentioned in the Constitution: the senators’ motions enabling the Senate “to introduce any political matter onto the agenda of a debate”16, participation by the representatives of the government in the works of that chamber (see art. 18), and, especially in the works of the

15 Op. cit., see especially pp. 173–198. The author seems not to have exhausted all the controlling aspects of the Senate’s activities vis-à-vis the government in the period considered in that book.
16 A. Piasecki, Zagadnienie Senatu Polski współczesnej. Materiały i opinie [The Problem of the Senate of Contemporary Poland. Materials and Opinions], Warszawa, 1931, p. 32.
Senate committees (see art. 60). The executive received all with understanding. Some controlling activities, such as, in particular, political program declarations of the representatives of the government, connected with adopting resolutions by the Senate were, in fact, developed in practice. The April Constitution (see art. 29) maintained the Senate’s powers provided in the rules of its predecessor. Other, similarly retained, powers of the Senate included its participation in the procedures aimed to force the Cabinet’s or the ministers’ resignation, and holding the members of the government constitutionally accountable before the Tribunal of State by both chambers (see art. 30), as well as to repeal the decisions of the government to introduce martial law (see art. 78).

The controlling function of the Senate of the 2nd Republic was clearly recognised in scientific literature on the subject, although the limitations of its scope, as compared to the same function of the Sejm were stressed\(^\text{17}\). This remained unchanged in the later period (as well as now) of historic and legal literature\(^\text{18}\). After all, in considering the Senate’s calling to perform controls, we must not forget about the genesis of its restoration in 1989. In various debates and decisions at the Round Table the law making and controlling competences of the newly established organ seem to have been given equal importance. This was clearly expressed in the final document of these talks, in which we read, among others: “the Senate elected by the sovereign will of the nation will exercise important control” (underline P. Sarnecki) especially in the area of human rights and the rule of law, and in the economic and social life”. Apparently, the Senate’s decision to “appropriately” apply the Rules of Procedure of the Sejm included in art. 12 of the first rules of the Senate after its restitution, i.e. in the resolution of that chamber adopted on July 4, 1989, concerning the organs of the Senate\(^\text{19}\), in force until November 23, 1990, and referring to the proceedings by the Senate in matters not regulated by this resolution, could have contributed to the belief that the second chamber is entitled to certain controlling activities. In fact, this has been the regular practice of the Senate since its reestablishment\(^\text{20}\), which must have influenced the present interpretation and justification of the scope of its competences.

7. An issue that is of paramount importance at this point is the legal form of the Senate’s activities in such situations, for the Constitution de lege lata, without describing directly the control powers of the Senate, also does not contain any specific


\(^{19}\) Official Journal “Monitor Polski” No. 22, item 161.

forms (competences) for such controlling activities. It is obvious that the Senate may not exercise the same specific forms of control over the government that have been constitutionally guaranteed to the Sejm. These include: the right to set up investigatory committees (see art. 111), interpellations and Deputies’ questions (see art. 115 para. 1), command of the Supreme Chamber of Control (see art. 202 para. 2) and consideration of reports on the execution of the budget law, and discharging state accounts (see art. 226). Also, the Senate may not draw the most important conclusion from its negative evaluation of the government — it may not adopt a vote of no-confidence (see art. 158 and 159) nor move to hold the members of the Council of Ministers constitutionally accountable before the Tribunal of State (see art. 156 para. 2), which is also an exclusive prerogative of the Sejm. The fact that these provisions are very concrete and unambiguous and that the above-mentioned institutions are concrete does not allow us to use the a contrario arguments; nor shall we find here, unlike art. 95 para. 2 — other constitutional basis, which would permit the extension of the list of the indicated institutions to also include the Senate or its senators.

Yet, analysing both the Rules and Regulations of the Senate and the Act on the Exercise of the Mandate of a Deputy or Senator, one can reconstruct the following possibilities for action by the Senate in the field discussed here:

a. The possibility (the expression used there is “the right”), clearly stated in art. 33 of the Senate’s Rules, of the Prime Ministers and the remaining members of the Council of Ministers to participate in the sittings of the Senate is quite important. This is by no means an aspect of the openness of the Senate sittings (comp. art. 36 of the Rules and Regulations), for the analysed provision mentions the right “to participate” in the sittings. The participation in this context should be understood as the possibility to speak in the debates; this is confirmed explicitly by art. 50 of the Rules, which provides the Prime Minister and other members of the government present at the sitting with only such possibility, and, moreover, they may take the floor out of turn.

From the point of view of (autonomous) control activities of the Senate, the participation of certain representatives of the executive in its sittings may be useful in providing the chamber with information on the government’s activities related to the considered problems. This can be in the form of either separate reports or information ad hoc, given in the course of the debate, or in the form of responses to specific questions posed by the senators during such a debate. Naturally, as is the common practice, such participation will take place within the framework of consideration of individual statutes by the Senate; however, possibly, also when the Senate deals with some political, social, or economic matters. I have already attempted to justify the admissibility of that chamber holding such debates.

Observation of the practice points to the actual undertaking (or rather a continuation thereof) of such steps by the Senate and governmental organs. During the present term of office of the Senate, i.e. already under the new Constitution, the practice was initiated by the Prime Minister, when he presented information concerning the coming trends in the activities of the then-newly appointed Council of Ministers at
the 3rd sitting of the chamber. The Prime Minister appeared at the Senate upon the invitation of the Speaker, after receiving the accepting vote of confidence from the Sejm. There has been no discussion on the information. Appearances of other members of the Council of Ministers at the Senate forum should also be noted (as it has been stressed, this concerns appearances unrelated to the consideration of statutes).

b. The possibility of the government representatives participating in the sittings of the Senate committees was set out in further detail (see art. 60 paras 2–5). Apart from these representatives, persons representing other organs of the government administration (both at the central and local level) may also participate. The rank of these representatives, defined in art. 60 para. 4, is not insignificant. In fact, they can merely be a member of the Council of Ministers, a secretary or under-secretary of state, a plenipotentiary of the government, or the head of a central institution. This arrangement provides evidence of the Senate’s wish to have its committees receive original and credible information. Above all, pursuant to art. 60 para. 3, the committees (and even just the chairpersons thereof) were given the right to demand that the above-mentioned persons provide information, explanations and opinions, and other materials, as well as actively participate in the sittings of the committees (meaning, in all probability, active involvement into the debates on the committees’ fora). All this was included in the general provision on the duties of these representatives “to co-operate” with the committees at the request thereof, or at the request of their chairpersons, which means that the committees have additional possibilities to undertake controlling activities. The Senate committees’ right to obtain information and clarifications from the members of the government is also included in art. 16 para. 2 of the Act on the Exercise of the Mandate of a Deputy or Senator. Hence, art. 60 para. 3 of the Senate Rules and Regulations may be deemed as the definition of the manner in which the Senate is to perform these competences, as stated in the provision of this law quoted above. The requirement, included in the Rules and Regulations, to provide the above-mentioned information and explanations “in writing or with the use of some other appropriate means” provides additional details to the law. Moreover, the Rules make it possible to demand opinions. It is interesting to note that during the Senate discussion on new amendments to the Rules, held on January 26, 200021, the senator-rapporteur stated that “these provisions (sc. on competences of the Senate committees) are contained in superior laws, such as the Act on the Exercise of the Mandate of a Deputy or Senator, and also the Constitution of the Republic of Poland” (underlined by P. Sarnecki). This confirms the earlier discourse of the constitutional foundations of the control activities of the Senate. As we can see, the chamber itself also notes them.

This is another case of where there is no distinction between situations in which the representatives of the government participate in the committee sittings devoted to the statutes, and those in which the committees deal with matters formally not related to consideration of texts referred by the Sejm, or to the Senate’s own bills. This brings us to a consideration of the nature of the Senate committees.

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21 See Minutes of the 50th sitting of the Senate of the 4th term, p. 51 et seq., in particular p. 52.
c. The Rules of Procedure of the Sejm, in clear reference to art. 95 para. 2 of the Constitution, define the Sejm committees as organs “of the Sejm control within the scope specified by the Constitution and statutes” (art. 18 para. 2). The Rules and Regulations of the Senate contain the definition of the nature of the Senate committees only from the organisational side, indicating in a general provision (art. 12 para. 1) that the committees may consider and prepare matters on their own initiative or work on those referred to it by the Senate or its organs. The above-mentioned provision of the Rules and Regulations of the Senate does not deal with the functional aspect of the character of the committees.

The general nature of the Senate committees may be derived from the very nature of the Senate itself. We need to refer here to the earlier statements expressed in the thesis that the Senate possesses control power over the government, a function of parliamentary and political nature, yet without the possibility of imperative action. We should thus conclude, remembering, naturally, about the auxiliary role of the committees in relation to their parliamentary chambers, that the Senate may also use its committees to carry out such control activities, as will be politically ascribed to it. The Senate may also authorise the committees to carry out specific controlling actions, either a casu ad casum, or, by a general provision of the Rules and Regulations, or combining these two possibilities. In the rules of the Polish parliamentary chambers this third method is used (in the Rules and Regulations of the Senate, see art. 12).

I believe that the Senate also established some organs of a sectoral nature among its committees (although not as clearly defined as the Sejm committees) with the view that such structure of the committees may be useful for the requirements of controlling activities in the long run. This was marked by the initial regulations of the chamber soon after its re-establishment, and remains characteristic of it till this day. Notably, after successive changes in the rules, the number of such sectoral committees increased. Another instance where the Senate clearly had the same objective (the control) in mind was the introduction of a provision on establishing extraordinary committees “for specific purposes” (art. 13 para. 1 of the Rules and Regulations). Although the usefulness of such committees to the legislative work of the Senate is not possible to rule out, traditionally the extraordinary committees are a useful tool of control in the work of parliamentary chambers. We should note that the distinction between standing committees for certain kind of matters, and committees for individual cases was already made in art. 8 of the resolution of July 4, 1989 concerning the organs of the Senate.

d. The conclusion drawn from the functions of the Senate is not the only argument, which supports the thesis that the committees have the ability to develop independent control activities in relation to the government administration. This is also confirmed by the specific competences of the committees of such very nature, as defined in the rules of the chamber. Among them are the competences of the committees to express opinions “on the correctness of introducing into force and implemen-
tation of statutes” (art. 12 para. 3). This is clearly a control competence, and, equally obviously, it is not related to adopting new laws.

Lastly, there is also an argument ensuing from the provisions on the objective scope of operation of the Senate committees annexed to the Rules the Rules and Regulations, which are rarely used in scientific analysis. It would be a mistake to consider this merely a list of areas or elements of public life. Quite often the scope of operation is treated “dynamically”, that is in a way that clearly suggests active investigation by the Senate committees of the situation in individual social matters, their permanent interest in them, and also certain (even if merely general) control. Thus, for example, the National Economy Committee has within its scope of operation, among others, “the present and future economic policy of the state”, “restructuring of the economy”, “monetary policy”, or anti-trust activities”. The Culture and Media Committee has on its list, among others, “promotion of culture”, and “international cultural co-operation”; Science and National Education Committee — the “system of education”, and “care over children and youth”. I believe that there is no indication that this list of the scope of operation is merely intended to help in defining the substantive fields of work of the committees when the texts of bills are passed on to the Senate from the Sejm (see art. 68 para. 1, 2nd sentence of the Rules and Regulations), although, naturally, this is the most important objective. The above-mentioned “dynamism” of the approach points to much broader plans of the authors of the Rules, stemming from the premise (of which they may not have been entirely aware, and which was not explicitly stated in any of the provisions thereof) assuming that the Senate — and, therefore, its committees may perform certain control functions as well. Nonetheless, in the case of the committees these may be the activities undertaken both at the request of the Senate or its organs, or through their own initiative. Obviously, these activities may not go beyond the constitutional framework defining the scope of control of the Senate itself.

In practice, the Senate committees often hold sittings to discuss the situation in specific matters in the presence of representatives of appropriate government departments. The representatives present information, provide clarifications, answer questions, etc. Some committees organise field sittings, to enable their members to see for themselves the reality in the areas of interest to them. Assessment of the situation is further assisted by occasional invitations extended by the committees to experts and specialist to inform the committees of the desired status of matters, or of possibilities existing in the given area. This applies even more so to the occasional consideration of materials provided to the committees by the Supreme Chamber of Control, the Constitutional Tribunal and the Commissioner for Human Rights as part of their statutory duties to submit information on their functioning to the Senate. One may also mention here the committee sittings attended by representatives of organisations and social institutions (which are in a way affected by the activities of the administration), which are to inform the committees, also from their perspective, of the trends, the intensity and the methods of operation of the executive. This possibility is explicitly stated in art. 60 para. 6 of the Rules and Regulations.
The periodical “Diariusz Senatu RP” [The Diary of the Senate of the Republic of Poland], which is published rather regularly, offers synthesised information on all the above-mentioned matters. It is a pity that all this committee work is practically not included for presentation in the *Wybrane dane o pracy Senatu Rzeczypospolitej Polskiej* [Select Data Concerning the Work of the Senate of the Republic of Poland] prepared by the Senate Information and Documentation Office. For, also at the Polish Senate, like in most parliamentary chambers, the committees must be the working organs, responsible for the greatest bulk of work. The study analysis of the first two years of the 4th term shows that the 14 Senate committees held 871 sittings (in fact, this number is somewhat smaller, as some meetings were held jointly by several committees). However, it is difficult to say how many “statute” meetings were held (devoted to consideration of the bills referred to the Senate by the Sejm, and of the Senate bills), and how many focused on the control activities (in the understanding of this discourse), which could also be described as “problem studies”. Having studied the “Diariusz Senatu RP”, I believe that the latter (including all the field sessions) constitute about 25% of the total number of sittings.

I would also like to emphasise that the Senate committees obtain information from the representatives of the government attending their sittings quite decidedly. Once, when the invited representative of one of the departments failed to appear at a sitting, the committee wrote a letter to the Prime Minister describing such manners in very harsh words, and demanded that the official be punished (see “Diariusz Senatu RP”, no. 58, of March 20, 2000, p. 7). Time permitting, and according to their possibilities the committees try to follow the developments in the area of their interest, and to evaluate the functioning of the administrative authorities, that is, to control their actions.

e. Besides the Senate’s controlling activities performed *in gremio* in the plenary, and the committee work, the present regulations also introduce the possibility for senators to undertake in certain control actions. Firstly, art. 16 para. 1 of the Act on the Exercise of the Mandate of a Deputy and Senator gives them the same rights that the committees have — they can obtain information and explanations from members of the government and representatives of other organs. Secondly, pursuant to of art. 19 para. 1 of that Act, they have the right to “inspect the activities of the organs of the government administration” (and other subjects). This means performing control with respect to these subjects, both by studying the documents depicting their work, and by *sui generis* inspections or visits. Thirdly, the Senate has the right to intervene in settling a matter of an organ of the government administration, stated in art. 20, is directly related to the above competences. The chiefs of the organs in question should receive the arriving senator without delay, provide him or her with the required information and explanations, notify him or her of the developments concerning the issue that was the subject of intervention within 14 days, and agree with the senator on the deadline for the conclusion of all respective actions. During that period the senator is entitled to follow the course of work on the given matter. Fourthly, the
power to make the so-called senator’s statements (see art. 49 of the Rules and Regulations) is an important controlling competence. Unlike in the case of interventions, they are made on the forum of the Senate, at the end of sittings, once the day’s agenda has been completed. They may not apply to matters which were the subject of that sitting and may vary in content — if they contain some conclusions and remarks addressed, even if only vaguely, to the members of the Council of Ministers (and other subjects), they are directed to the addressees by the Speaker of the Senate with the objective of not simply familiarising them with such conclusions and remarks, but also of making them “assume a position”. Thus, there are some clear analogies here to the Deputies’ questions and interpellations, although the scope of their regulation, in comparison to that of questions and interpellations (see Part III, Chapter 4 of the Rules of Procedure of the Sejm) is, understandably, much more modest. Notably, the rules of operation of the Council of Ministers impose the duty upon its members to respond to, among others, the senators’ statements\textsuperscript{22}. In the course of the first two years of the 4\textsuperscript{th} term of the Senate, which is already under the Constitution of 1997, 849 statements were made at sittings, or referred to the Minutes. Responses to the statements are published in the “Diariusz Senatu RP”.

It is important to note the legal basis for the senators’ involvement in the above-described activities, specified in the quoted regulations. The right of the members of the second chamber to obtain information and explanations relates to “matters connected to their performance of the […] senatorial duties”. The senator is entitled to inspect, as part of “exercising a mandate”. In turn, he or she may intervene as part of “performance of the […] senatorial duties”. And finally, under art. 49 para. 1 of the Rules and Regulations of the Senate, “issues related to the exercise of the mandate” also may be the subject of a statement. All this confirms the argument that the competences to perform parliamentary controls is a prerogative of both chambers \textit{eo ipso}, in force by the very fact that they are appointed representative organs of the nation, and the appropriate work of the organs of the chamber and the parliamentarians themselves is an instance of such control. This, however, is possible only within the above-mentioned limits (the parliamentarians, in particular, may not use these competences for their own or particular interests).

Therefore, the Senate undertakes its control activities in a traditional scheme of parliamentary control, by plenary work, the work of the sectoral committees, and the activities of individual senators.

\textbf{f.} In the broadest sense, the subjective scope of Senate control (including committees and individual senators) encompasses the Council of Ministers and all of its members. They are the principal addressees of the general controlling activities, resulting from the representative and parliamentary nature of the Senate. Concrete statutory provisions, and regulations mentioned above expand this scope by further subjects belonging to public administration in a broad sense. According to art. 16

\textsuperscript{22} See para. 44 item 2 of the Resolution No. 13 of the Council of Ministers of February 25, 1997 — Rules of the Council of Ministers (Official Journal “Monitor Polski” No. 15, item 144, and amendments).
para. 1 of the Act on the Exercise of the Mandate of a Deputy or Senator, senators have the right to obtain information, also from the “representatives of the appropriate organs, and state as well as self-governmental institutions”. The latter relates not only to territorial governments, but also to professional and economic self-governments. Under para. 2 of the same article, Senate committees may request information and explanations from representatives of “social organisations, firms and companies owned by the state and the local governments, trade companies with participation of the state or communal legal persons”. The committees make use of this prerogative in practice.

g. Under provisions currently in force, the Senate does not have the possibility whatsoever to make the respective subjects consider its opinions during the control. In particular, it has no right to pass binding orders (resolutions, statements and appeals, provided in art. 85 in conjunction with art. 55, are not binding by nature, due to the constitutional division of power), nor does it partake in the procedure of holding the government and its members politically and constitutionally accountable. Its criticism of certain actions of the Council of Ministers, or of the work thereof in general only bears political significance, depending on the specific situation (the Senate’s opinion may influence the administration to a certain extent or remain irrelevant, depending on the situation).

In this context, we should also consider the possibility of the Senate to refer its control findings to the Sejm, which possesses post-control authority of an imperative nature. To date we have not seen any such action in practice, yet under the law in effect there is nothing that prevents it. It would be a manifestation of good co-operation by the two legislative chambers.

III.

In the division of tasks’ the Senate was developed as the “chamber of reason and reflection”. Such nature of this chamber does not seem to be particularly well harmonised with the process of systemic transformation which is still in progress in Poland, nor with the process of adapting Polish law to the requirements of the EU. Both processes require extensive and expeditious legislative work. Still, in light of the imperfections, which still continue to hinder on the quality of the Sejm’s legislative work, the Senate’s involvement in the legislative process frequently helps to improve legislation, although even this is not always enough.

The Senate’s competences to exercise parliamentary control over the executive are even less significant than in the case of legislation, and it is even more difficult to find justification for why the chamber functions in this form. An analysis of these competences confirms the striking infirmity of the present constitutional construction of the bicameral parliament.

Translated by Halina Zwolińska-Wronśka
1. As was the case during the inter-war period, the shape of the Polish bicameral parliament has been the subject of fierce discussion for more than a decade now. In this context it is interesting to examine the discourse by prof. Paweł Sarnecki, though not all the conclusions formulated there are acceptable. After conducting a broad analysis of the systemic nature of the Senate and the statutory and regulatory basis behind its operation the author reaches the conclusion that “the Council of Ministers is obliged by the Constitution to submit to the controlling activities of the Senate, because the Constitution describes it as a representative organ and a chamber of the parliament.” (p. 77). Though the extent to which this constitutional basis is developed is most apparent in the provisions of the Senate’s Rules and Regulations, it also appears in some regulations of the Act on the Exercise of the Mandate of a Deputy or Senator. Although prof. Sarnecki does not specify what the connotation of the term “control activities of the Senate” is to be, the discourse in itself (and its very title) shows that he is referring to the control that is exercised separate from the chamber’s legislative function (autonomously), and one which imposes certain legal duties on the addressee.

* This article was published in “Przegląd Sejmowy” No 6(41)/2000.
This raises the question of whether or not such a conclusion is adequately substantiated in the constitutional interpretation of the role, function, and competence of the Senate.

2. We should bear in mind that discussions concerning the interpretation of the term “parliamentary control” have been going on for quite some time in our doctrine, if only to mention the dispute between Witold Zakrzewski and Jerzy Stembrowicz in the early 1970’s1, quoted partly by Paweł Sarnecki. In context of these opinions and those that follow, two issues need to be addressed.

First, as prof. Sarnecki accurately notes: the distinction between the legislative and control functions is relative. Though this is not the case in Poland, the legislative process includes some elements of control, especially if it is dominated by work on government bills. As such, the passing of a bill by parliament is, at the same time, a way of verifying the government’s plans, i.e. it becomes a specific form of control over the ideas and proposals put forth by the government. To an even greater extent, the same applies to works on the budget. Speaking of the parliamentary control over the government’s presentation, exercised in many countries, we must adopt a specific terminology, according to which this control is given a broad scope. One can only wonder, whether this does not further blur the fine line distinguishing the individual functions of the parliament, especially given the fact that in Polish practice the government’s initiatives are not predominant in number, and the parliament is not overly eager to accept them in the form presented by the government.

Second, despite various legal regulations, contemporary parliaments are increasingly becoming the venue for lively political relations between the chambers (their committees) and the government (and its different agencies). By and large, this also applies to the upper chamber. This results, on the one hand, from the political authority of that chamber and the respect it enjoys among the organs of the executive branch, and, on the other, from the importance of its legislative power. Any government wishing to enforce its legislative proposals must promote and maintain good relations with it, which often means having to observe its various suggestions and requests. There is no doubt that this is precisely the working relationship that exists between the Senate and the Council of Ministers in Poland. It is largely independent of any changing constitutional regulations. Thus, this activity of the Senate may be also deemed as form of “control”, provided that the term’s interpretation is sufficiently broad2.

The proper (narrow) sense of the word “parliamentary control” however yields some discrepancies. In this meaning, parliamentary control does not only include

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analysis and evaluation of the government’s work, but it also gives parliament certain powers, and imposes duties on the government and its subordinate units. Such control is at its maximum when it is further strengthened by the mechanism of the government’s accountability before the parliament, although it may also be limited to (using the well-known description by Andrzej Gwizdł) the right to demand attendance, information, and being heard. Each of these parliamentary rights corresponds to specific legal duties of the government. It is apparent that control competences in such understanding are the prerogative of the Sejm. Currently, the Constitution reflects this very well (art. 95 para. 2). Even though it does not explicitly provide for it (as is the case with the Small Constitution), the very definition in the Constitution of both the principles of the government’s parliamentary accountability, and the detailed control procedures (discharge of the budget, investigation committees, interpellations and Deputy questions) demonstrates the constitutional roots of the control function of that chamber. However, attempting to attribute control competences to the Senate in this understanding raises even more serious doubts.

3. The starting point in a discourse of the title subject must be the statement that in the state ruled by law each organ of public authority — even of a rank as high as that of a parliamentary chamber — must derive its powers from positive legal regulation. As the Constitutional Tribunal has indicated “the constitutional principle of legitimacy, and the principles of a democratic state mean that, if the legal norms do not explicitly provide the competences of a state organ, this competence may not be assumed, and on the basis of a competence of a different genre ascribe to the legislator intentions it never had”.

As concerns a competence as important as the control function of a parliament, its framework must be rooted directly in the constitution.

The legislator explicitly names only the Sejm in art. 95 para. 2 of the Constitution, which is the basic provision regarding this function of the parliament. This suggests that this function is not attributed to the Senate. Professor Sarnecki is right, however, when he points to “a generally known truth of fallibility of the a contrario argumentation in constitutional law […] Article 95 para. 2 […] does not necessarily exclude the admissibility of autonomous controlling activities of the Senate in relation to the Council of Ministers. However, different premises for this admissibility should be found.” (p. 74).

A search for these premises can go in one of two directions. One approach would be to rely on the more specific provisions and extrapolate from them the existence of the control function, provided that such provisions give concrete examples of this function and concrete mechanisms of the government’s accountability. This, however, would be a flawed approach because all the specific constitutional provisions

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3 See L. Garlicki, Comment 3 to art. 11 of the Small Constitution, [in:] Komentarz do Konstytucji Rzeczypospolitej Polskiej [Commentary to the Constitution of the Republic of Poland], ed. L. Garlicki, set 2, Warszawa 1996.

regarding control are exclusively related to the Sejm (see art. 111, art. 115, and art. 226), and the accountability of the Council of Ministers and its individual members is provided only in relation to the Sejm. Thus, this leaves us only with the second approach: seeking the foundations for the control function of the Senate in the general constitutional concept (and role) of this organ. This is what prof. Sarnecki is doing, and — on a methodological plane — it is plausible, for, if the immanent necessity of attributing also the control function to the Senate was to be derived from the general constitutional concept of that chamber, this would be a sufficient basis for setting specific competences for the Senate by the sub-constitutional legislator.

4. The author quotes two general systemic arguments: the constitutional qualification of the Senate “as a representative organ and a chamber of the parliament” (p. 77). This raises the question of whether or not such indisputable attributes of the Senate are a sufficient basis for granting a control function to it.

The nature of the Senate as a representative organ gives it the attribute of representing the nation. According to prof. Sarnecki, this “attribute allows (or even compels) each organ equipped with it to show its interest in all issues relevant to this nation, […] This usually requires knowing the position of the executive authorities, which means effectuating a sui generis control of that power” (p. 75). I believe that this conclusion is somewhat far-fetched. On the one hand its adoption would mean agreement to the exercise by both chambers of the control over the activities of the President of the Republic of Poland. For, if, ex definitione, each representative organ has a mandate to engage in all matters relevant to the nation, then, the president’s actions must not be excluded as may be of vital relevance to the nation. Therefore, applying the control function of the Sejm by art. 95 para. 2 of the Constitution only to the Council of Ministers would not interfere with applying it also to the president, and accepting the Senate’s control of the government would thus consequently lead to submitting the president to such a control as well. No attempts to date have been made to expand the scope of control in that way, even for the Sejm. On the other hand, if specific competences of a state organ were to stem from the fact that it comes from direct elections, then the question would arise of whether or not, the same approach should be applied to the powers of the president thereby providing him with various control competences over the government (especially since the Constitution grants the president a significant role in forming the government). In fact, the present basic law does not describe the president as “a representative of the nation”5, but the formula “the Nation exercises power by its representatives elected to the Sejm and Senate” (as it was worded in art. 2 para. 2 of the Constitution of 1952, and in force from 1989 through 1997), clearly disregarding the Head of State, was abando-

ned. It is not my intention to obscure the fundamental systemic differences between the parliament and the president. I only wish to point out that once we begin to elicit competences and functions from broad systemic principles, it can easily lead us to draw absurd conclusions like in the two above examples.

As concerns the basis for attribution to the Senate of autonomous control competences; I do not believe that the mere fact of it being the second chamber of the parliament would suffice. The author claims that under the present Constitution “the assumption of equal rights of the two chambers, effective especially when doubts in interpretation appear, is still valid. It applies also, in a specific way, to the parliamentary control function which is discussed here” (p. 75). I disagree with this reasoning. Notably, the principle of equal rights of the chambers is neither common nor typical for contemporary parliamentarism. The constitutional position as well as competences of the second chamber vary from state to state. There are states in which their position is equal to that of the first chamber (USA), or even stronger (Russia), but there are more states in which this position is weaker. This last situation may be reflected in different approaches to the tasks and competences of that chamber, but, quite frequently, it means simply leaving it with only the legislative function, without any powers to exercise the control function. Thus, searching for some universal model of equality of rights of the two chambers, and applying it to the role and tasks of the Polish Senate is futile.

More importantly still, there is no justification for formulation of the principle of equal rights of the two chambers on the grounds of Polish constitutional law. The Polish parliamentary tradition always made the Senate the weaker chamber. This was apparent during the inter-war period, and after the restoration of that organ in 1989. As the Constitutional Tribunal has indicated “the Constitution of 1997 retained the bicameral asymmetry, in which the Senate is an element of the legislative power, but its powers and the scope of influence are not identical with those of the Sejm. The systemic equality of the two chambers is thus accompanied by differentiation of competences”6. Therefore, it is not possible to derive any competences of the Polish Senate from the very fact that it is the second chamber. If the equality of the chambers cannot be assumed, then it is not possible to stipulate that just because the Constitution does not explicitly reserve a given competence for the Sejm, it can also be vested in the Senate.

Now, I will focus on three more specific issues. First, Paweł Sarnecki rightly stresses (p. 78–79) that during the inter-war period the Senate had certain control competences, inscribed in art. 7, 8, and 33 in relation to art. 37 of the March Constitution, subsequently developed in the April Constitution. These competences, however, had sound constitutional origin, which meant that the authors of those two constitutions believed that such provisions were necessary in order to grant appropriate powers to the Senate. Therefore, it is not merely incidental that the control competences of the

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second chamber were consequently disregarded in all three constitutional documents which are the foundation for the system of the 3rd Res Publica. Second, although the Senate was granted “important control” competences over some areas of public life (p. 79) at the Round Table, this arrangement was not reflected in the amendment of April 1989, and the subsequent events de-validated the initial concept of the role of the Senate as “the opposition chamber”. Thus, it is difficult to interpret the present position of the Senate in context of the expectations established in the spring of 1989. Third, the author states that even if there had been no art. 95 para. 2 in the present Constitution, the Sejm, and — in his opinion — the Senate would still be able to exercise the control function, and, therefore, “the obvious conclusion is that art. 95 para. 2 is useless” (p. 78). This may be acceptable in reference to the Sejm because, as previously mentioned, this was the case under the Small Constitution. However, since the authors of the basic law of 1997 decided to base the control functions of the Sejm on the Constitution, they believed this was necessary. The fact that, in doing so, they omitted the Senate means that, in their opinion, that chamber does not need, and should not, be included in the exercise of the control function by parliament. The different wording of the two fragments of art. 95 proves that the founders of the constitution wanted the control function to be solely performed by the Sejm, leaving the Senate with only legislative tasks. Even if there are no grounds for using the a contrario interpretation, art. 95 clearly sets out the functions of the two chambers as well as their formation on the basis of asymmetry.

Thus, searching for constitutional roots of the control function of the Senate in its general nature as a representative organ, or in the fact of its being the second chamber is futile. Since such grounds cannot be found in the general constitutional definition of the functions of both chambers (see art. 95), nor in any specific provisions concerning parliamentary control, we must come to the conclusion that the Constitution of the Republic of Poland simply does not offer such grounds.

5. The author states that the interpretation of the Constitution which he suggests, and which leads to the recognition of the autonomous control competences of the Senate in relation to the government “is confirmed by some statutes in force” (p. 77, underline — L. Garlicki). He names only the Act on the Exercise of the Mandate of a Deputy or Senator of 9 May, 1996, but there is no doubt that art. 16 para. 2 of that Act places a duty on the members of the Council of Ministers to present information and explanations “on request of permanent and special committees of the Sejm and Senate related to matters falling within the scope of their activity”. Numerous control instruments are also inscribed into the Rules and Regulations of the Senate, especially following its amendment on January 27, 2000. Professor Sarnecki quotes art. 33, art. 49, and art. 60 paras 2–5 of the Rules and discusses practical contacts between the Senate (its committees) and the government bodies.

All the same, the existence of lower rank regulations, and the emergence of specific practices is not synonymous with the introduction of new content into the Constitution. Interpreting the Constitution, based on norms of lower rank is a risky pra-
ctice. It can be an indication of how the basic law is interpreted by its authors, but there may always be a question whether or not this interpretation is admissible by the constitutional provisions and simply, whether or not it is constitutional. Therefore, one should consider whether or not, the sub-constitutional regulations may autonomously attribute specific control competences to the Senate and if so, to what extent.

The starting point for my considerations is the statement that I tried to justify above, namely, that the Constitution of 1997 does not provide for a control function of the Senate. This does not mean that some control competences of the Senate cannot be introduced by ordinary statutes. After all, the Constitution does not require each and every single competence of the Sejm or Senate to be regulated by its provisions. At the same time, however, since the Constitution itself does not offer the basis for recognizing the control competences of the Senate, possible statutory provisions, in which such competences would be formulated, may not be subject to extensive interpretation. According to the resolution of the Constitutional Tribunal quoted above in relation to case W.7/94, the competences of a state organ may not be assumed. This means that as long as the control competences of the Senate are explicitly worded in ordinary statutes, and they do not violate the basic nature of the tasks of the Sejm, one may not claim their unconstitutionality.

The issue of establishing control competences of the Senate in its own Rules and Regulation requires a somewhat different approach. The extent of admissible regulations in parliamentary rules has been subject to doctrinal dispute for decades. The Constitution of 1997 stated that the rules should determine “the manner of performance of obligations, both constitutional and statutory, by State organs in relation to the Sejm” (art. 112), and relating the same principle (according to art. 124) to the rules of the Senate, partly explained the so-called external provisions of the rules. These provisions may be included in the rules, but may pertain only to the definition of “the manner of performance” of the obligations of other organs in relation to the Sejm, and respectively, to the Senate. Only either the Constitution or ordinary statutes may in turn establish the obligations. Thus, the rules “may not be an autonomous basis for the establishment of obligations of other state organs” in relation to a given chamber of the parliament. As such, there are no obstacles to including the norms for the control function of that organ in the rules of the Senate, provided that they are secondary in nature, defining only “the manner of performance” of the competences established by the Constitution or statutes. As I tried to demonstrate, since no such competences exist in the Constitution, connecting them to appropriate provisions in ordinary statutes must be the premise for the admissibility of the norms provided in the rules. The absence of such connection may mean that the provisions of the rules have exceeded the limits allowed by art. 112 of the Constitution.

6. What is, then, the normative content of these specific regulations, which prof. Sarnecki regards as control competences of the Senate? As previously mentioned, only one such regulation may be found at the statutory level, that is art. 16

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para. 2 of the Act on the Exercise of the Mandate of a Deputy or Senator\(^8\), imposing upon — among others — the members of the Council of Ministers an obligation to present information and explanations “on request of permanent and special committees […] of the Senate related to matters within the scope of their activity”. It seems, however, that this provision may not be regarded as a universal foundation for the Senate committees exercising control over the activities of the government. In art. 16 para. 2 the phrase “matters within the scope of their activity” was used, which may be understood as a limitation of the duty to present information and explanations only to those matters, which are within the scope of activity of individual committees. Therefore, this scope was neither defined nor expanded; some instruments were only provided for the committees to use. This scope may be defined on the basis of two denominators. One is the subject of work of individual committees, ensuing from the annex to the Rules and Regulations of the Senate. The other, and — in my opinion — the fundamental one is the scope of competence of the Senate and its committees, inscribed in the Constitution and in the ordinary statutes. Art. 16 para. 2 should only relate to these competences, which were attributed to the Senate, and may not be regarded as a separate source of new powers for that chamber (its committees). Thus, the obligations resulting from this provision apply to the exercise by the Senate of its legislative function, and — within this framework — the committees may demand information and explanations from the members of the Council of Ministers, which is, after all, well reflected in practice. There are no grounds, however, to extend the interpretation of art. 16 para. 2, and treat it as an autonomous basis for control competences, separate from the legislative process. In the present shape of the constitutional regulations it is not possible, as I have mentioned above, to apply extensive interpretation in relation to statutory regulation of control competences of the Senate. Therefore, the verbatim interpretation of art. 16 para. 2 suggested here corresponds to the constitutional notion of the role and tasks of the second chamber.

Such an interpretation of the provision discussed here allows us to regard it as the basis for setting the norms in the rules only in relation to the exercise by the Senate of its legislative function. There are no obstacles to developing the provisions of art. 16 para. 2 in the Rules and Regulations of the Senate, and to specify the “manner of performance” of the obligations ensuing from these provisions. Nevertheless, this provision does not appear to empower the Rules and Regulation to grant autonomous control competences to the Senate, for art. 16 para. 2 does not allow that.

In analysing the provisions of the Senate’s Rules and Regulations the author points to its art. 33 concerning the participation of the Prime Minister and the members of the government in the sittings of that chamber. Notably, this provision mentions their right to participate in the sittings of the Senate. Thus, the obligations

\(^8\) Art. 16 para. 1 can be disregarded here. It states that “Deputies and Senators have the right to obtain from members of the Council of Ministers and the representatives of relevant organs and institutions […] information and explanations related to matters arising from the performance of the Deputies’ or Senators’ duties”. It is an individual right of the Senators, which does not translate into control competences of the Senate as a state organ.
resulting from it are rather on the part of the Senate (it must allow the members of the
government to attend the sittings, and to speak). Neither art. 33 of the Rules and
Regulations of the Senate, nor any other provision formulate a legal obligation of the
Prime Minister or other ministers to attend the sittings of the second chamber. In fact,
there is no explicit provision stating such an obligation in relation to the Sejm either.9
This duty may actually be derived indirectly from art. 115 para. 2 of the Constitution,
and from the general principle of political accountability of the government before
the parliament, but this cannot be transferred to the relations between the government
and Senate. Thus, regarding art. 33 as a sign of the control competences of the Senate
being established in its rules, is not possible, even if the practice of participation, by
the representatives of the government in the sittings of the Senate is common and
goes beyond just legislative work. This, however, is not caused by obligations inscri-
based into the legal norms, but by a political mechanism of contacts between these
organs, founded on respect that the executive owes to both parliamentary chambers.

The present art. 60 of the Rules and Regulations of the Senate takes a different
approach. It imposes a duty on representatives of the Council of Ministers (among
others) to co-operate (as requested by a committee or its chairperson) with the com-
mittee on “issues being the subject of their activity”; such co-operation covers mainly
the presentation of information, clarifications and opinions, through the provision of
materials, and in active participation in the sittings of the committees (see para. 3). In
para. 4 the rank of these representatives is established (the members of the Council of
Ministers, secretaries and under-secretaries of state, government plenipotentiaries,
heads of central institutions, and other persons only “in particularly justified cases”).
As it is also necessary (under art. 5) to meet deadlines set by the chairpersons of the
committees, and, in the event the obligation to co-operate is violated provisions of
art. 8 para. 1 nos. 13 and 14 of the Rules and Regulations of the Senate may be
enforced. These provisions make the Marshal (Speaker) of the Senate responsible for
the execution of duties of other organs in relation to that chamber, and to assess the
execution of those duties by those organs. Paras 3–5 of art. 60 were added in an
amendment of January 27, 2000; before that — following the arrangement adopted in
the present article 33 — the Rules and Regulations of the Senate contained a provi-
sion that “the representatives of the government […] may participate in the commit-
tee sittings”. Clearly, according to the new wording of art. 60 new obligations appe-
ared on the government’s side. This still does not mean that we can speak of new
control competences of the Senate (or rather its committees). As previously men-
tioned, the parliamentary rules cannot autonomously impose any new obligations on
organs external to the chambers. Only defining the manner of executing obligations
that already exist is admissible. Therefore, if we were to follow prof. Sarnecki and

9 During works on the Small Constitution one of the drafts contained a provision explicitly estab-
lishing the right of the Sejm (but not the Senate) to summon the members of the government to sittings and
to demand clarifications. It was not incorporated into the Small Constitution, which should be considered as
deliberate choice of its founders (see L. Garlicki, Comments 2 and 16 to art. 12 of the Small Constitution,
regard art. 60 paras 3–5 as the legal basis for the Senate’s control competences, the question would emerge, of whether or not this is constitutional. This question could only be avoided if art. 60 paras 3–5 of the Rules and Regulations of the Senate was related to art. 16 para. 2 of the Act on the Exercise of the Mandate of a Deputy or Senator, and if these provisions were treated in the rules as the definition of the manner of execution of the obligations resulting from art. 16 para. 2. Then, however, the obligations named in art. 60 paras 3–5 may only be related to the execution by the Senate of its legislative function.

Similar remarks may be made in relation to the institution of the Senators’ statements. The amendment of 27 January, 2000 gave the present art. 49 of the Rules and Regulations a much more categorical nature, clearly putting the delivery of an exhaustive and punctual answer among the duties of the addressee (as confirmed particularly by para. 6). Again this raises the question of which provisions: constitutional or statutory, are to be the material basis of this duty, since the rules of the parliament may only regulate the manner in which already existing obligations are to be performed. The provision of the rules of the Council of Ministers quoted by prof. Sarnecki (see p. 85) is irrelevant here. It makes it mandatory for members of the Council of Ministers to respond to the Senators’ statements, but it should be perceived as mere political courtesy on the part of the government. It would have a broader legal meaning only if it were included in the act on the organisation and work procedures of the Council of Ministers and on the scope of activities of ministers, or in another act of a comparable rank.

7. In conclusion, it is obvious that the Senate, as an organ of very high constitutional standing — was, is, and will remain very much involved in the entire current policy of the state. Equally as important is that the representatives of the government did, do, and will participate in the works of the Senate, providing it with their full knowledge and information. This is not, however, caused by the fact that the Constitution vested the Senate with control competences, but by the political authority of the Senate, and by the esteem that this chamber enjoys among the executive circles. This issue, however, moves the discourse onto the political plane, where the shape of relations between the government and the Senate is left exclusively to mutual agreement between these organs. Therefore, in my opinion, there is no constitutional foundation for the control function of the Senate, for neither the constitutional positioning nor the concept of that chamber in the norms adopted in Poland after 1989 allow it.

Thus, even if one may speak of the existence of control activities of the Senate, stating the existence of control competences of that organ seems unfounded. There is no justification for this in the provisions of the Constitution in force, and, if some traces of such approach may be found in the acts of laws of lower rank, their interpretation and evaluation may not conflict with the constitution.

Translated by Halina Zwolińska-Wronska
The position of the Marshal of the Sejm, among the internal bodies of the Sejm in particular, was determined by the principle of collective management of works of the chamber according to the legal status in the period preceding the coming into force of the new Constitution. This principle was strongly accentuated during the time of the Polish People’s Republic, but weakened a little in the course of systemic transformations after 1989, and raising the Presidium of the Sejm to the constitutional standing in 1992 decisively confirmed the existing model of management of Sejm works. Awarding the competence to summon sittings of the Sejm and to supervise its activities to the Presidium of the Sejm was a consequence of this state of things.

The Constitution of April 2, 1997 introduced important changes to the managerial organs of the Sejm. The goal of the legislator was to strengthen the position of a one-man managerial organ of the chamber. The Constitution devotes 15 articles to the basic spheres of activity and to the competences of the Marshal of the Sejm. It is worth noting that the Constitution does not mention the Presidium of the Sejm as a Sejm organ. Although this organ lost its constitutional standing, this does not mean that it was completely eliminated. Nonetheless, because of this as well as the fact that the Constitution gave certain new competences to the Marshall, the Marshal’s posi-

* This article was published in “Przegląd Sejmowy” No. 3(44)/2001.
tion as a Sejm organ has been strengthened. The present legal state raises the question of what the model of management of the chamber’s works should be like. It should be emphasized that the principle of collective management has been substantially weakened, if not rejected as Prof. Bogusław Banaszak holds, for the benefit of the principle of one-man management¹. Making the Marshal of the Sejm the guardian of its rights and the only representative of the Sejm in external matters, the Constitution brings this function into prominence also in relations with non-parliamentary organs. Also, taking into account other constitutional competences of the Marshal, such as the function of the substitute of the President of the Republic of Poland, presiding over the National Assembly, ordering presidential elections or expressing his or her opinion, which the President must seek before ordering the shortening of the Sejm’s term of office, the legal and systemic position of the Marshal of the Sejm requires a more comprehensive description.

Art. 110 para. 1 of the Constitution resolves: “The Sejm shall elect from amongst its members a Marshal of the Sejm and Vice-Marshals”. This takes place during the first Sejm sitting, which according to art. 109 para. 2 of the Constitution is convened by the President. The President also has the duty to appoint the Sejm Marshal-Senior from amongst the eldest Deputies. The law does not regulate the President’s choice and there is no need to consult the choice with political groups. It is rational because the role of the Marshal-Senior is strictly determined by Sejm Rules of Procedure. In accordance with them, the Marshal-Senior opens the first sitting of the Sejm, appoints temporary secretaries, takes the Deputies’ oath and conducts the election of the Marshal of the Sejm. His function expires when the new Marshal is elected. It should be noted that the Marshal-Senior does not assume the legal standing of the Marshal of the Sejm with respect to competences of this office².

The procedure for electing the Marshal is determined by art. 3 of Sejm Rules of Procedure³. Candidates for Marshal of the Sejm must be nominated by at least 15 Deputies and a Deputy may support only one candidate. Such solution is meant to limit the number of candidates.

In practice, however, it is rather insignificant mainly due to the political criteria for the appointment to this post and a well-established custom that one of the parties forming a ruling coalition, not necessarily to the biggest one, should have such exclusive privilege. This thesis is best illustrated in parliamentary practice. On October 14, 1993, Józef Oleksy, a member of the ruling SLD-PSL (Democratic Left Alliance-Polish Peasant Party) coalition, was elected the Marshal of the Sejm. He was a rep-

¹ B. Banaszak, Prawo konstytucyjne [Constitutional Law], Warszawa 1999, p. 466.
representative of the Democratic Left Alliance, then the largest party in the Parliament. After his resignation, the Vice-Marshall Józef Zych, a representative of the Polish Peasant Party, assumed the post. In the next parliamentary election, the AWS-UW (Solidarity Election Action-Union for Freedom) coalition became the ruling coalition. The Sejm appointed Maciej Płazyński (AWS) the Marshal. From among 449 Deputies present, 446 voted in favor of his election, nobody was against it and three Deputies abstained from voting. This result shows that both the ruling coalition and the parliamentary opposition accept the custom that a representative of the ruling coalition should hold the post of the Marshal of the Sejm.

Under art. 3 para. 3 of Sejm Rules of Procedure, “The Marshal of the Sejm shall be elected by an absolute majority of votes in the Sejm; the election shall be held by a roll call vote, unless the Sejm decides otherwise”. An absolute majority means that a candidate must receive more than half of valid votes. In the resolution of September 20, 1995, act call No. W.18/94, the Constitutional Tribunal held that the notion of “absolute majority” shall mean “at least one vote more than the sum of other valid votes, i.e. negative votes and abstaining from voting”. An absolute majority is construed in this way if the number of valid votes is even, but if the number of votes is uneven, the rule 50% + 1 is somewhat compromised, nevertheless the number of affirmative votes must always be greater than the number of other valid votes. In the event that 459 people participate in voting and all votes are valid, the absolute majority will be 230 affirmative votes.

As a rule, the election of the Marshal of the Sejm is held as a roll call vote but the Sejm can decide otherwise. The roll call vote is taken with the use of ballot papers signed by a Deputy. The Secretary of the Sejm calls up Deputies in alphabetical order to cast their vote into the ballot box. Five secretaries of the Sejm, appointed by the Marshal-Senior, open the box and count the votes. The result of the voting is announced by the Marshal-Senior on the basis of the protocol presented by the secretaries. Under art. 114 para. 4 of Sejm Rules of Procedure “the results of a vote by roll call shall not be subject to repetition”. An alternative to the described procedure is the Sejm’s decision to vote by show of hands and to use the vote-recording machine. Art. 3 paras 3–5 of the Rules of Procedure set out the procedure leading to an effective election of the Marshal of the Sejm. The current wording of this regulation eliminates any doubts that existed in the legal order prior to October 16, 1997. Art. 3 para. 4 of Sejm Rules of Procedure provided that if in the first voting, a given candidate did not obtain an absolute majority of votes and there were more than one candidate, the names of candidates which received the least votes would be omitted in successive votes. Prof. Paweł Sarnecki pointed out that such wording expresses the

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7 OTK ZU 1995, No. 1, item 7, p. 45.
idea that in case only one candidate is nominated, regardless of whether her or she received an absolute majority approval or not, he or she will become the Marshal of the Sejm because there is only one vote. Under the current regulation, it is necessary for the candidate to receive an absolute majority of votes. This requirement has to be met at all stages of the procedure, regardless of the number of appointed candidates and successive votes. This conclusion follows from an analysis of art. 3 paras 3–5 of the Sejm Rules of Procedure. Paragraph 3 lays down the requirement of an absolute majority of votes, paragraph 4 regulates the situation where more than one candidate has been nominated and none of the candidates received an absolute majority approval in the first vote. Paragraph 5 provides that “if nobody has been elected as a result of application of the procedure specified in paras 3 and 4, the election of the Marshal of the Sejm shall be repeated”.

Law regulations do not expressis verbis set a term for holding the office of the Marshal of the Sejm. Art. 98 of the Constitution provides that the Sejm is elected for a 4-year term of office and this is why it is accepted that the Marshal is elected for the duration of the Sejm term of office. The Marshal’s term commences at the first sitting of the Sejm and lasts until the day before a new Sejm assembles. Candidacy for the post of the Marshal of the Sejm is voluntary. So it has to be accepted that a person who is the Marshal can resign from this post without giving any reasons for his or her decision.

Nevertheless, the legal admissibility of dismissing the Marshal of the Sejm prior to the expiry of his or her term in office will be examined. Both the Constitution and the Sejm Rules of Procedure do not resolve this issue. Prof. Leszek Garlicki believes that dismissing the Marshal is possible and in a manner that complies with the law. This point of view is supported by the lack of prohibition in regulations and political criteria of the election to this office. Prof. Zdzisław Czeszejko-Sochacki does not share this view. The presumption of law, based on the very idea of the term of office, is that in principle the Marshal cannot be dismissed (except in cases clearly provided by the legislator). Such point of view provides the reasoning behind the lack of regulation that would exclude the above-mentioned presumption and procedural regulations. According to this author, the legal possibility of dismissing the Marshal prior to the expiry of his or her term in office should be based on explicit legal regulation that give the Sejm such a right. Referring to the judgments of the Constitutional Tribunal, prof. Czeszejko-Sochacki held that in a state governed by the rule of law, it is not possible to presume the competence to dismiss. Such competence must be explicitly provided in the law. Moreover, the legal basis for one’s dismissal should be precisely specified so that reasons for the dismissal are not arbitrary and improvised.

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8 P. Sarnecki, op. cit.
9 Z. Czeszejko-Sochacki, Prawo parlamentarne w Polsce [Parliamentary Law in Poland], Warszawa 1997, p. 138.
The inadmissibility of dismissing the Marshal is also supported by Prof. B. Banaszak who writes: “Neither the Constitution nor Sejm Rules of Procedure […] accept the possibility of dismissing the Marshal of the Sejm and Vice-Marshals before the end of the term of office of the Sejm […]. It means that they cannot be politically accountable to the Sejm”\textsuperscript{12}. It seems that the dismissal of the Marshal of the Sejm is inadmissible. This point of view is supported not only by the above-mentioned arguments but also by the sphere of competences of the Marshal and in particular, the possibility of charging him with the function of a substitute to the President of the Republic. If a motion to dismiss the Marshal is accepted in a vote, the situation in the state could be destabilized. It should be noted that the Marshal of the Senate would also then be a subject to an identical scenario\textsuperscript{13}. The question of the admissibility of dismissing the Marshal of the Sejm before the end of the term of office of the Sejm should be regulated more precisely. I believe that an appropriate regulation will be introduced in the new Sejm Rules of Procedure. If the possibility to dismiss the Marshal exists, it would be necessary to exclude the possibility to move a motion and to vote on it during the period he (she) performs the function of the President of the Republic.

Another important issue is the resignation of the Marshal of the Sejm who wishes to assume some other governmental post. In the past, there was a situation where the Marshal was proposed for the post of the Prime Minister in a motion requiring a constructive vote of no confidence. The Sejm reached a decision by voting on this motion and then adopting a resolution concerning the resignation from the function of the Marshal. This situation took place in 1995 and concerned the then Marshal of the Sejm Józef Oleksy\textsuperscript{14}.

There are no doubts as far as the status of the Marshal of the Sejm is concerned in light of the present regulations. This problem existed until the constitutional amendment of March 17, 1995 came into force and was connected with the so-called inter-term of office period. Pursuant to art. 98 of the Constitution the term of office of the Sejm currently lasts until the day preceding the day on which the Sejm assembles for its first sitting. This rule is valid regardless of who decided to shorten the term of office. Despite the fact that term of office is shortened, it still lasts up until a new Sejm is constituted. The same applies for the term of office of the Marshal of the Sejm.

As a governing organ of the Sejm, the Marshall is equipped with some important competences that give him or her real power in the current legal order. The vaguely defined limits of the “domain” of this one-person organ raise questions concerning the form and manner in which his or her powers are to be exercised. As

\textsuperscript{12} B. Banaszak, op. cit., p. 467.

\textsuperscript{13} See: Resolution of the Senate of the Republic of Poland of November 23, 1990 — Regulamin Senatu, a consolidated text in MP 2000, No. 8, item 170. Art. 6 para. 3 decides: “Recalling the Marshal of the Senate takes place on a motion from at least 34 Senators in a secret ballot, passed with an absolute majority of votes cast by the statutory number of Senators”.

\textsuperscript{14} Shorthand Report of 44th sitting of the Sejm, 1, 2, 3, 4 March, 1995, p. 25 and 204.
far as the law is concerned, the Marshall must act in full compliance with the law. In the area of politics, neutrality and impartiality should be recognized as a standard for complying with the rules of democracy. It is to be decided whether his or her neutrality should be absolute or limited only to the function of presiding over Sejm debates, or to all competences and prerogatives of this function. There are many answers to this question. For example, in Great Britain, the Speaker of the House of Commons is supposed to be absolutely politically neutral so it is custom that he resigns from his party when he is chosen for this post\(^\text{15}\), which is apolitical. The situation is somewhat different in the House of Representatives of the American Congress. The Speaker is also the leader of the ruling party in the chamber\(^\text{16}\). In Poland, the person elected the Marshal of the Sejm need not resign his party membership. He is a Deputy of the Sejm and enjoys all rights that are conferred on him or her. The activity of a Deputy does not require neutrality. The Marshal of the Sejm can voice his or her political views both in the chamber and outside of it without specifying that he or she expresses them as a member of parliament\(^\text{17}\). As far as his capacity of the Marshal of the Sejm is concerned, and exercising the competences of the function, neutral and impartial behavior is natural and much desired. I am convinced that the impartiality requirement should cover the entire sphere of internal and external competences. Opposing this view would be inconsistent with the principle of a democratic state of law. In this context, the problem of the guarantees of neutrality bears importance. Unquestionably, these should be provided by regulations of the law. Furthermore, the inadmissibility of dismissing the Marshal before the end of his or her term of office would also add to the impartiality of this organ. The most significant guarantee of neutrality however is the personality and character of the person who is to hold this office.

Current regulations of the law considerably strengthen the position of the Marshal of the Sejm. This has been achieved by the deconstitutionalization of the Presidium of the Sejm and by making the Marshall the chairperson of Sejm debates. But the deconstitutionalization of this institution does not mean it has been liquidated, the more so that it assumed the status of a constitutional body only in 1992 on the basis of art. 10 para. 2 of the Small Constitution\(^\text{18}\). Previously, Sejm Rules of Procedure had been the only basis for the existence of the Presidium. At present, there are no reasons for why these rules should not be such a basis. This view is supported by the principle of procedural autonomy of the chambers of parliament. The dual character of the presiding organs of the Sejm raises the question of what the principles gover-


\(^{17}\) Z. Czeszejko-Sochacki, *op. cit.*, p. 140.

ning their mutual relations should be. In particular, is it possible to consider the position of the Marshal as superior towards the Presidium of the Sejm. But perhaps this may be a case of two unrelated relations of subjection of institutions, which are supposed to co-operate professionally to guarantee the effective and efficient functioning of the chamber. According to Prof. Marcin Kudej, there should be no hierarchical relations between the Marshal of the Sejm and the Presidium of the Sejm. The idea of superiority of the Presidium (a non-constitutional organ) over the Marshal is unacceptable, and it is hardly possible to agree that a one-man organ has superiority over a collegial organ, even if it is not mentioned in the Constitution. Their competences have influence on the relations between these two organs, and some important changes in this area have been introduced.

The competences of these organs overlap. Under the new constitutional regulations there is a practical and not fully solved problem of some statutory competences of the Presidium of the Sejm given to it by pre-constitutional statutes. In this situation it is too early to define consistently and conclusively the roles of the Marshal and the Presidium. Nevertheless, undertaking the task to define the legal-systemic status of the Marshal of the Sejm, it is necessary to review his or her competences in depth. These are provided in several normative acts such as the Constitution, statutes and Sejm Rules of Procedure. An analysis of these competences leads to two general conclusions. First, they are of a different and multi-dimensional character. Second, their importance varies. The office of the Marshal of the Sejm is constructed in such a way that it enables the person who holds it to exercise influence over the course of issues both in the parliament and outside of it. The diversity of his competences is the result of his double role in the Polish constitutional system (both a governing organ of the Sejm and a state organ) but also some systemic solutions (i.e. the place of the organs of control and protection of law) and to some extent, the tradition of the political system. This broad range of competences as well as their multi-dimensional and detailed character makes it very difficult to clearly classify them. It is not easy to use one criterion and then divide the Marshal’s competences in a way that would show the very essence, the role and the character of this office.

In literature on the subject, competences are divided into internal and external ones and there are also classifications based on objective and functional criteria. All those divisions are conventional. Their value is measured by the purpose for which they were created. The competences of the Marshal of the Sejm can be divided into two groups: 1) connected with the daily routine and the work of the parliament, 2) concerning all other spheres. The competences belonging to the first group are provided in the Constitution and are set out in detail in Sejm Rules of Procedure. The second group consists of the remaining constitutional competences and the powers conferred on the Marshal by statutes.

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Ad 1. Art. 110 para. 2 of the Constitution states that: “the Marshal of the Sejm shall preside over the debates of the Sejm, safeguard the rights of the Sejm as well as represent the Sejm in external matters”. As such, there are essentially three main forms of activities that the Marshal performs. They are set out in art. t. 11 of Sejm Rules of Procedure. The Marshal undertakes tasks which i.a. ensure the proper circulation of documents and information. He notifies the time and orders of the day to the Deputies, the President, the Marshal of the Senate, members of the Council of Ministers, the First President of the Supreme Court, the President of the Constitutional Tribunal, the President of the Supreme Chamber of Control, the President of the National Bank of Poland and the Commissioner for Citizens’ Rights (art. 97 of Sejm Rules of Procedure). “The Marshal of the Sejm shall order the printing of bills, draft resolutions and Committee opinions, […] and delivery thereof to the Deputies. […] shall submit bills and draft resolutions which have been introduced, to the President, to the Marshal of the Senate and to the Prime Minister” (art. 32 paras 1 and 2 of Sejm Rules of Procedure). The Marshal orders printing of committee reports and delivery thereof to the Deputies (art. 40 para. 4). He submits bills passed by the Sejm to the Senate (art. 121 of the Constitution). Once the procedure in the Sejm is finished, the Marshal submits the adopted bill to the President of the Republic for signing. The same applies to the Budget or interim Budget and bills to amend the Constitution (art. 122 para. 1, art. 224 para. 1, art. 235 para. 7 of the Constitution). “1. The Marshal of the Sejm shall send any bill, which the President has refused to sign and which he has referred for reconsideration, with reasons given thereof, to the committees that considered the bill prior to its adoption by the Sejm. 2. The Marshal […] shall order the printing of any referral by the President, mentioned in para. 1, and its delivery to the Deputies. […] 4. The Marshal […] shall immediately notify the President about the re-passing by the Sejm […] of any bill in its original wording” (pursuant to art. 53 of Sejm Rules of Procedure). The Marshal of the Sejm “shall notify the President, the Marshal of the Senate and the Prime Minister of any resolutions adopted by the Sejm, and shall deliver to them texts of the resolutions signed by him” (art. 49 para. 1 of Sejm Rules of Procedure). He informs the Sejm about resolutions of the Senate accepting a bill without amendment adopted by the Sejm (art. 51), refers to appropriate organs all desiderata adopted by committees and delivers interpellations handed to him to whom these are addressed (art. 85 para. 2, art. 118 para. 6 of Sejm Rules of Procedure). The Marshal orders the delivery of the reports concerning results of investigation in matters pertaining to the implementation and exercise of acts and resolutions of the Sejm — to all Deputies (art. 88 para. 2 of Sejm Rules of Procedure). Moreover, the Marshal of the Sejm informs the Sejm on lodged interpellations, about received answers to interpellations and about interpellations that have not been answered by specific deadlines (art. 119 of Sejm Rules of Procedure).

The Marshal of the Sejm convenes the sittings of the Sejm (art. 11 para. 1, point 3 of Sejm Rules of Procedure). Such decision however is not discretionary decision
because Sejm sittings are held according to a schedule set by the Presidium of the Sejm or by Sejm resolution. The Marshal sets the orders of the day for a Sejm sitting after hearing the opinion of the Council of Seniors (art. 99 paras 1 and 2 of Sejm Rules of Procedure). If there is no unanimous opinion of the Council of Seniors concerning the orders of the day, a decision on the disputed point is made by the Sejm. The Marshal of the Sejm decides the time and orders of the day for the sittings of the Presidium of the Sejm, supervises the work of this organ and presides during its debates. He also convenes the Council of Seniors and presides over its debates, convenes and presides over the first meeting of a committee (art. 21 para. 2 of Sejm Rules of Procedure). In accordance with constitutional regulations, the Marshal presides over the debates of the Sejm. As part of this authority, he or she makes ongoing decisions concerning procedure thereof. The Marshall sets the order for voting on draft resolutions and bills (art. 46 para. 2 of Sejm Rules of Procedure). It is important to note that the Marshal may refuse to put to a vote any amendment that has not been previously submitted to a committee (i.e. in usual legislative procedure) (art. 119 para. 3 of the Constitution). The Marshal of the Sejm shall refuse to order a vote on an amendment to an urgent bill, which has not been previously referred to the relevant committee in writing (art. 56g para. 2 of Sejm Rules of Procedure). Under art. 101 para. 1 of the Constitution, “The Marshal of the Sejm shall safeguard the observance of the Rules of Procedure of the Sejm in the course of its debates and shall maintain order in the chamber”. In this scope, the Marshall may call upon a Deputy to keep to the point under discussion, and may direct the speaker to discontinue his or her speech. The Marshal can also call a Deputy to order and even expel a Deputy from a sitting.

In addition, the Marshal of the Sejm issues regulations according to which the public can watch the sittings from the gallery in the chamber (art. 98 para. 1, point 3 of Sejm Rules of Procedure). The Marshal presides over debates of the Sejm (art. 105). For this reason he or she gives the floor during debates, decides whether or not to give more time to a given Deputy, to give the floor once again, and signs the accepted minutes drawn up from the sittings of the Sejm. The Marshal of the Sejm orders a closure of the discussion, announces that the Sejm shall proceed to a vote and announces its results (art. 113 paras 1 and 6 of Sejm Rules of Procedure). Among the Marshal’s competences there are those that set discipline during the sittings of the Sejm and committees. In case of an unjustified failure by a Deputy to participate in a sitting of the Sejm, the Marshal orders a reduction in the per diem allowance and salary of the Deputy or one of these payments. The Marshal accepts and rejects the Deputies’ justifications for the failure to participate in a sitting of the Sejm, and grants them leaves (art. 8 paras 5 and 9 of Sejm Rules of Procedure).

The Marshal of the Sejm ensures the operation and punctuality of the work of Sejm and its organs. To fulfil this task, he starts the procedure with the legislative initiatives, draft resolutions and motions of State organs addressed to the Sejm. He
also establishes a provisional timetable for work on urgent bills in the Sejm (art. 56a and 56d para. 2 of Sejm Rules of Procedure). Bills submitted to the Marshal of the Sejm are subject to his formal control, which can result with the returning of a bill to its mover if the bill does not satisfy the established requirements as to its form.

The Marshal of the Sejm decides on the manner in which the first reading of bills and draft resolutions will be held (art. 34 of Sejm Rules of Procedure). Acting on the recommendation of a committee, he may request that the sponsor of a bill or draft resolution rework it (art. 39 para. 4). The Marshal may consent to a committee meeting taking place during the time of a Sejm sitting.

Pursuant to the Constitution, the Marshal of the Sejm represents the Sejm. This means that all relations of the Sejm with other State organs are the Marshal’s responsibility. According to art. 11 paras 9 and 10 of Sejm Rules of Procedure, it is the Marshall that performs tasks concerning relations of the Sejm with the Senate and with the parliaments of other countries. The task of representing the Sejm also includes safeguarding the rights and dignity of the Sejm. The Marshal is required to take action in situations and statements that violate the rights or dignity of the Sejm. The Marshal of the Sejm performs certain administrative functions, as well. He ensures order and decorum on the premises of the Sejm and issues appropriate instructions for the maintenance of order; promulgates, by means of an order, the Statutes of the Chancellery of the Sejm; adopts, in consultation with the Rules and Deputies’ Affairs Committee and the Presidium of the Sejm, the draft budget of the Chancellery of the Sejm and supervises its implementation; appoints and recalls the Chief of the Chancellery of the Sejm (also after seeking the opinion of the above Committee) and the Deputy Chiefs of the Chancellery of the Sejm (art. 11 para. 1, points 13, 14, 15, art. 127 paras 2, 3 of Sejm Rules of Procedure).

Ad 2. Among the second group of competences, it is possible to distinguish competences that are clearly connected with the office of the President of the Republic of Poland.

Art. 128 para. 2 of the Constitution provides the procedure for electing the President. The Marshal of the Sejm orders the election no later than 75 days before the expiry of the term of office of the serving President of the Republic, and in the event the office of President becomes vacant, no later than on the 14th day thereafter. The Constitution also regulates the temporary discharging of the duties of the President of the Republic. The Constitution resolves that the right to perform these duties shall be conferred on the Marshal of the Sejm. Two situations must be distinguished here. The first is when the office of the President is assumed and there are only some circumstances of actual or legal nature that make the President unable to perform his duties.

The Constitution sets out in detail the steps to be taken in such cases. According to art. 131 para. 1 of the Constitution, “if the President of the Republic is temporarily unable to discharge the duties of the office, he shall communicate this fact to the Marshal of the Sejm, who shall temporarily assume the duties of the President of the Republic. If the President […] is not in a position to inform the Marshal of the Sejm
of his incapacity to discharge the duties of the office, then the Constitutional Tribunal
shall, on request of the Marshal […], determine whether or not there exists an impe-
diment to the exercise of the office by the President […]. If the Constitutional Tribu-
unal so finds, it shall require the Marshal of the Sejm to temporarily perform the duties
of the President of the Republic”.

The legislator does not define the reasons for temporary incapacity to discharge
the duties of the office with the exception of reasons of legal character, namely: “On
the day on which an indictment, to be heard before the Tribunal of State, is brought
against the President of the Republic, he shall be suspended from discharging all
functions of his office” (art. 145 para. 3 of the Constitution).

The second situation takes place when the office of the President of the Republic
is vacated for reasons defined in art. 131 para. 2, points 1–5 of the Constitution. The
Marshal of the Sejm discharges the duties of the President on the strength of law.
A Marshal discharging the duties of the President enjoys all authorities that belong to
the office of the President of the Republic but with one exception: he cannot shorten
the term of office of the Sejm (art. 131 para. 4 of the Constitution).

It needs to be considered whether or not the actions of the Marshal of the Sejm
who discharges the duties of the President come within the regime of constitutional
accountability of the person holding this office. In other words, is the responsibility
of the Marshal performing this role identical with the responsibility of the President
of the Republic? The Constitution does not answer this question. Art. 145 concerns
only the President. Also art. 198, which establishes the personal scope of the cogni-
tion of the Constitutional Tribunal, says nothing of the person who discharges the
duties of the President. It seems that the lack of constitutional regulation can cause
some uncertainty.

A regulation concerning this matter is in the statute on the Tribunal of State20.
Art. 2 of this statute implies that the person who discharges the duties of the President
is constitutionally responsible. This person is constitutionally responsible for com-
mitting a constitutional delict. This responsibility cannot be questioned if it concerns
only those activities that are directly connected with the replacement of the President,
i.e. activities which are part of official duties. Undoubtedly, a common offence in no
way connected with official duties does not apply here. Therefore, the Marshal who
discharges the duties of the President is constitutionally responsible before the Tribu-
nal of State only for an offence that is both a constitutional delict and a misdemeanor.
Only then would it be similar to the responsibility of other persons who are respon-
sible in connection with their office. But if a person who replaces the President is
a common offender, then I believe he or she should bear penal liability before a com-
mon court. One should remember that regulation concerning the President’s penal
responsibility before the Tribunal of State is of exceptional character and follows

20 See: art. 2 paras 1–3 of the statute of March 26, 1982 on the Tribunal of State, a consolidated
item 321.
from the special respect attributed to the office of the President and is a guarantee of
the principle of independence of courts. The application of this regulation to the per-
son who discharges the duties of the President would be groundless because this
person does not actually become the President (under Polish law, the institution of
a vice president does not exist), nor does the person take an oath and his or her func-
tions do not entitle him or her to all competences of the President. This is directly
stated in art. 131 para. 4 of the Constitution. In addition, the function of the replace-
thment is limited also as far as its term is concerned and the regulation on this function
is of a unique character.

Art. 122 para. 4 of the Constitution provides that in case certain provisions of
a bill are unconstitutional, the President of the Republic, after seeking the opinion of
the Marshal of the Sejm, signs the bill with the omission of those provisions deemed
inconsistent with the Constitution or returns the bill to the Sejm for the purpose of
removing the non-conformity.

An important competence of the Marshal of the Sejm (connected with the func-
tion of safeguarding the rights of the Sejm) is the right to express an opinion on the
matter of shortening the Sejm’s term of office when the President of the Republic
seeks his or her opinion (art. 98 para. 4 of the Constitution). Although such opinion
is not binding on the President, if omitted, the President’s decision is defective and
unconstitutional.

Under art. 114 para. 1 of the Constitution, the Marshal of the Sejm presides over
the sittings of the National Assembly — an organ that gathers i.a. to be present when
the President-elect is sworn into office and to bring an indictment against the Presi-
dent of the Republic.

A new competence of the Marshal is the making of applications to the Constitu-
tional Tribunal regarding matters specified in art. 188. He can e.g. commence the
procedure for adjudication on the conformity of law to the Constitution and concern-
ing disputes over authority between central constitutional organs of the State
(art. 191 and 192 of the Constitution).

Moreover, art. 107 para. 2 of the Constitution reads: “In respect of any breach of
the prohibition […] [to perform any business activity involving any benefit derived
from the property of the State Treasury or local self-government or to acquire such
property], a Deputy shall, by resolution of the Sejm adopted on a motion of the Mars-
hal of the Sejm, be brought to accountability before the Tribunal of State […]”. Purs-
suant to the Constitution, the Marshal is authorized to order an immediate release of
a Deputy detained by organs of prosecution (art. 105 para. 5). According to art. 235
para. 6 of the Constitution, the Marshal orders the holding of a constitutional referen-
dum.

Among the constitutional powers of the Marshal of the Sejm there are ones which
are given to him or her for the reason of systemic solutions, i.e. the structural situation
of the organs of State control and safeguarding of law, first of all the Supreme Cham-
ber of Control and the Commissioner for Citizens’ Rights. The legislator tied them
more or less strongly with parliament and it undoubtedly has influence on the scope
of the Marshal’s competences with respect to these organs. Art. 206 of the Constitu-
tion gives the Marshal the competence to order an immediate release of the President
of the Supreme Chamber of Control in the event he or she is deprived of liberty, and
art. 211 gives him the same competence with respect to the Commissioner for Cit-
zens’ Rights.

Statutes establish some competences of the Marshal. According to the Electoral
Law to the Sejm, the Marshal is entitled to state an expiration of a mandate of a De-
puty and to order to replace him (her) by the next candidate from the same list
(art. 131 para. 2, art. 132 paras 1 and 2 of the Electoral Law to the Sejm).

Members of the Tribunal of State take the judicial oath in the presence of the
Marshal of the Sejm who decides also not to take any further action with respect to
the motion to bring certain person to constitutional accountability if the motion
does not comply with the requirements specified by statute and the mover failed to
rectify it within 14 days. The Marshal of the Sejm declares that proceedings in the
case are to be discontinued if the Sejm has not adopted the resolution to proceed to
constitutional accountability in respect of those persons referred to in art. 1 para. 2,
points 2–7 of the Act on the Tribunal of State (art. 6 paras 4, 5; art. 13 para. 3; art.
15 para. 4).

Moreover, the Marshal of the Sejm keeps the Register of Deputies’ interests.
Deputies lodge with the Marshal their financial statements and notify him or her of
their intention to undertake in any additional engagements (art. 33 para. 1, art. 35
para. 3, art. 35a para. 7 of the Act on the Exercise of the Mandate of a Deputy or
Senator).

The Marshal of the Sejm is also entitled to present motions concerning nomi-
nations. He has the right to propose, to the Sejm, a person for the post of the Inspector
General for the Protection of Personal Data (art. 3 of the Act on Protection of Perso-
nal Data).

Art. 14 para. 1 authorizes the Marshal of the Sejm to recommend, to the Sejm,
a candidate for the post of the President of the Supreme Chamber of Control. The
Marshal, on request of the President of the Chamber, appoints and recalls the Vice
Presidents of the Chamber, its Board’s members, approves appointment and dismiss-
ial of the Director General of the Chamber and — also at the request of the President
of the Supreme Chamber of Control — the Marshal of the Sejm, by way of an instruc-
tion, grants the Supreme Chamber of Control its statute.

Also, the Act on the Commissioner for Citizens’ Rights grants the Marshal of the
Sejm some competences. The Marshall presents motions concerning the appointment
and recalling of the Commissioner; at the request of the Commissioner, the Marshal
grants the Office of the Commissioner its statute that specifies the organization and
tasks of the Office, and the Marshal — on the motion of the Commissioner — appo-
ints no more than three Commissioner deputies. The Marshal is entitled to present
a motion that the Commissioner is to present information or take action in specific cases (art. 3 para. 1, art. 7 para. 2, art. 19 para. 4, art. 20 paras 2 and 3).

As was the will of the legislator, the position of the Marshal of the Sejm has been considerably strengthened vis à vis other internal organs of the Sejm; a broad scope of competences of internal and external character enables him to play an important role in the political life of the country. The endowment of the Marshal with the right to act as a substitute for the President of the Republic, to order presidential elections and to preside over sittings of the National Assembly, makes the Marshal de facto the second person in the State. Eventually, new Rules of Procedure of the Sejm will have a substantial influence on the role of the Marshal and the performance of duties of this office.

Translated by Jerzy Kugler
Amendments to the Rules of Procedure of the Sejm introduced during the years 1997–2000 considerably changed the internal governance of the Sejm by limiting the competencies of the Presidium of the Sejm and making the Marshal (Speaker) of the Sejm the main governing organ. These changes, especially the amendment of Sejm Rules of Procedure passed on October 28, 1997, were connected with the coming into force of the Constitution of the Republic of Poland of 1997. This article will analyze the constitutional and Rules of Procedure regulations concerning governing organs of the Sejm, beginning with an analysis of the impact the new Constitution had on Rules of Procedure of the Sejm.

From September 1997 until July 2000 the Sejm passed eight amendments to its Rules of Procedure: dated September 4, 1997 (“Monitor Polski” [MP], i.e. Official Register [Gazette] of the Republic of Poland, No. 58, item 558); dated October 28, 1997 (MP No. 80, item 779); dated April 3, 1998 (MP No. 10, item 181); dated September 30, 1998 (MP No. 34, item 483); dated March 19, 1999 (MP No. 11, item 150); dated June 25, 1999 (MP No. 23, item 331); dated March 17, 2000 (MP No. 9.

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item 177); dated July 13, 2000 (MP No. 21, item 428). The uniform text of the Sejm Rules of Procedure was made public by the Marshal of the Sejm in MP dated 1998, No. 44, item 618.

THE MARSHAL-SENIOR OF THE SEJM

The Marshal-Senior of the Sejm is an organ which operates only once during the first sitting of every office term of the Sejm; he (or she) opens this sitting (art. 1 para. 2) at which Deputies take an oath (art. 2 para. 2) and the Marshal of the Sejm is elected (art. 3 para. 1). The act of assuming the chair by the newly elected Marshal results in the function of the Marshal-Senior expiring.

The Marshal-Senior of the Sejm is appointed by the President of the Republic “from amongst the elder Deputies”. Within this scope, the President enjoys some freedom of choice but because the Marshal-Senior performs functions of a technical nature, and not any independent political actions, the President should appoint a person who will be able to duly perform such functions. The idea is to avoid the situation described in art. 30 para. 2 of Senate Rules and Regulations, where the Marshal-Senior is unable to take up the functions of the chairman and must be replaced by the next elder Senator.

Although the participation of the Marshal-Senior in the works of the Sejm is rather brief, it should not be regarded as insignificant. The Marshal-Senior plays an important role during the first Sejm sitting. Both, the swearing in of Deputies and the election of the Marshal are of key importance to the whole term of office of the Sejm allowing it to function normally. The Sejm Rules of Procedure do not have any provisions synonymous with art. 30 para. 2 of the Senate Rules and Regulations. If for whatever reason, the appointed Marshal-Senior is unable to exercise competences named in art. 1, 2 and 3 of Sejm Rules of Procedure, the President may and should appoint a new Marshal-Senior of the Sejm. Therefore, it is unacceptable for the Marshal-Senior to be dismissed by Deputies.

In examining the appointment of the Sejm Marshal-Senior by the President it is worth to consider what the consequences would be of him or her not being appointed. If this were to happen the establishment of a newly elected Sejm would be impossible, i.e. “the chamber would not acquire the ability to act independently and in particular, carry out further sittings”. Art. 98 para. 1 of the Constitution guaran-

1 If not stated otherwise, the quoted regulations come from the resolution of the Sejm of Republic of Poland of July 30, 1992 — Standing Orders of the Sejm, “Monitor Polski” [MP], Official Register of the Republic of Poland of 1998, No. 44, item 618, as amended.


3 The resolution of the Senate of the Republic of Poland of November 23, 1990, MP 2000, No. 8, item 170.

tees that the President will convene the first assembly of the Sejm: it is the continuation of the previous parliament that may make the President constitutionally accountable. But is quite possible to imagine a situation where the President convenes the first sitting of the Sejm on a given day, meaning that the previous term of office of the Sejm has expired, without appointing the Marshal-Senior. Since the appointment of the Marshal-Senior is a competence derived from the competence to convene the first sitting of the Sejm, and both competences create formal possibilities for the Sejm to act, art. 109 para. 2 of the Constitution should be interpreted as not merely indicating a fixed date on which the new Sejm is to assemble, but also providing for the exercise of the President’s powers required for the Sejm to be established, i.e. the competence to appoint the Marshal-Senior. According to this interpretation the term of office of the previous Sejm does not end if the President fails to exercise his or her powers needed to establish the new Sejm.

The amendments made during the analyzed period have not significantly changed the position of the Marshal-Senior. Only the resolution of September 1997, which amended art. 3 of the Sejm Rules of Procedure, provides that in the event the election procedure fails to elect a Marshal, “the election of the Marshal is to be repeated” and it is the obligation of the Marshal-Senior as an organ to effect the election.

THE MARSHAL OF THE SEJM

The position of the Marshal of the Sejm as a governing organ of the Sejm is established first of all by art. 110 para. 2 of the Constitution and art. 11 of the Sejm Rules of Procedure. Article 110, para. 2 of the Constitution states that “The Marshal of the Sejm shall preside over the debates of the Sejm, safeguard the rights of the Sejm and also represent the Sejm in external matters”. The phrase “preside over the debates of the Sejm” is repeated in art. 11 of Sejm Rules of Procedure and refers to a part of activity of this chamber, i.e. to sittings of the whole Chamber (under art. 77 para. 3, chairmen or Deputies preside over the sitting of their committees). In a similar way, the phrases “safeguard the rights of the Sejm” and “represent the Sejm in external matters” also are rather narrow and refer only to some aspects of Sejm activities. The new Constitution does not contain a general formula that indicate the organ governing the work of the chamber, as it was in the Small

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5 Ibidem, p. 173.

6 P. Samecki, Prezydent Rzeczypospolitej Polskiej. Komentarz do przepisów [The President of the Republic of Poland. A Commentary to Regulations], Kraków 2000, p. 82.

7 This classification proposes P. Samecki, ibidem, p. 80–82.

8 W. Skrzydło, Opinia na temat usytuowania i kompetencji Prezydium Sejmu w świetle nowej Konstytucji [An Opinion on the Place and Competences of the Presidium of the Sejm in the Light of the New Constitution], “Przegląd Sejmowy” 1998, No. 1, p. 77: “presiding over sittings is only a part of governing tasks and activities”.
Constitution in art. 10 para. 2 which provided for the Presidium to supervise the work of the Sejm. As the new Constitution lacks such regulations and merely contains a modest description of the functions of the Marshal, the Sejm Rules of Procedure must address this matter. This interpretation is substantiated by art. 112 of the Constitution which in accordance with the principle of procedural autonomy of the chamber leaves "the internal organization and conduct of work of the Sejm and the procedure for appointment and operation of its organs" to Sejm Rules of Procedure. Thus, it is rather hard to find justification for allegations appearing in the doctrine and in the Sejm that the Constitution gives predominant or leading role in directing the of work of the chamber to the Marshal of the Sejm\(^9\).

In summary, the Constitution grants certain governing functions to the Marshal of the Sejm from among the entire catalogue of functions and powers needed to manage the chamber\(^10\). First of all, the Marshall presides over the debates of the Sejm (art. 110 para. 2) and has the right to refuse to put to a vote any amendment that has not previously been submitted to a committee (art. 119 para. 3 of the Constitution). It appears that the Marshal’s right to represent the Sejm in external matters (art. 110 para. 2 \textit{in fine}) is an exclusive right of the Marshal. All other decisions concerning the work of the Sejm have been left to the chamber itself in its Rules of Procedure. Ensured by the Constitution, the Marshal’s powers cannot be limited by the Rules of Procedure but because the Marshal is the only constitutional governing organ of the Sejm, the Rules of Procedure may grant him all governing competences in the Sejm. No other constitutional organ should be taken into consideration. The deconstitutionalization of the Presidium of the Sejm does not mean \textit{per se} that the Marshal overtook its competences but it made it possible and the Sejm has taken advantage of it to a large extent.

The procedure of the Marshal’s election is covered by art. 3 of Sejm Rules of Procedure in the wording introduced by the resolution of September 1997. The election of the Sejm Marshal effected by the Marshal-Senior follows the taking of an oath by Deputies. A group of at least fifteen Deputies has the right to propose a candidate and a Deputy can only support one candidate. There are no regulations against putting up a candidate who was previously appointed Marshal-Senior by the President. But it should be considered a parliamentary obstruction to propose...
the candidature of a Deputy who refused to take on oath, because according to art. 2a of the Rules of Procedure, in assuming to the office of the Marshal of the Sejm this person would be obligated to declare that his or her mandate had expired.

The election is effected in a roll-call vote but a resolution of the Sejm may provide otherwise. The Marshal must be elected by an absolute majority vote of the Sejm. If more than one candidate is put up and in the first vote no candidate receives an absolute majority of votes, the Marshal-Senior orders a run-off election and the candidate (or candidates) that received the least number of votes in the last vote are removed from the list of candidates. The absolute majority requirement does not apply to a run-off election so if the choice is not made, the election of the Marshal of the Sejm has to be repeated. In practice, usually a candidate who is likely to receive such majority is put up (in 1997, during the first sitting of the 3rd term Sejm, only one candidate was put up and he got 446 votes). When the newly elected Marshal takes over the chairmanship of the debates, the office staff is assigned to him.

The Marshal term of office should expire with the Sejm term of office. The issue of dismissing the Marshal before the end of his term is subject to conflicting doctrinal views. Despite the fact that many amendment to Sejm Rules of Procedure have been made to date, there are still no provisions on this matter. One possible solution would be to introduce a provision similar to art. 6 para. 3 of the Senate Rules and Regulations into the Sejm Rules of Procedure. With a view to the importance of the competences of the Marshal and his influence on the effective functioning of the Sejm, the act of dismissing the Marshal, according to the proposal of Marek Chmaj, should be constructive and at the same time appoint a new Marshal of the Sejm.

A detailed listing of the tasks and qualifications of the Marshal is contained in art. 11 of the Rules of Procedure as passed by the resolution of October 1997. This listing repeats three of the Marshal’s competences established by the Constitution, i.e. he presides over the debates of the Sejm, safeguards the rights of the Sejm and

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11 In 1997, the Sejm gave up voting by roll call because only one candidate was proposed.

12 P. Czarny admits there being such a possibility due to the internal nature of this office, [in:] Prawo konstytucyjne RP [Constitutional Law of the RP], ed. P. Samecki, Warszawa 1999, p. 197. This is similar to the standpoint of L. Garlicki, op. cit., p. 178, who thinks that the possibility to dismiss the Marshal from his office is the consequence of political rules of designating him to this office, also M. Chmaj, op. cit., p. 23, who, in case of political conflict between the Marshal and the parliamentary majority of the day, postulates the use of the procedure of constructive vote of no confidence. B. Banaszak, op. cit., p. 467, is against the option of dismissing the Marshal during the term of office, because neither the Constitution nor Sejm Rules of Procedure do not provide for this. Z. Czeszejko-Sochacki, [in:] Prawo parlamentarne w Polsce [Parliamentary Law in Poland], Warszawa 1997, p. 138–139, goes even further in stating that abandoning the presumption of irremovability of the Marshal requires the legislator to specify conditions under which this would be possible, so it is inadmissible to recall the Marshals of the Sejm and Senate as the Senate Rules and Regulations comprise only procedural conditions.
represents the Sejm in external matters. Under art. 11 para. 1, the Marshal also convene Sejm sittings, ensures the operation and punctuality of the work of Sejm and its organs, supervises the work of the Presidium of the Sejm and presides over its debates, summons the Council of Seniors and presides over its debates, after seeking the opinion of the Presidium of the Sejm, initiates the discussion over bills, draft resolutions and motions referred to the Sejm by State organs, fulfills tasks concerning relations with the Senate and the parliaments of other countries, presents periodic appraisals to the Sejm and its organs and Deputies of the discharge by organs of State administration of their duties, provides the Deputies with necessary assistance in their work, ensures order and decorum on the entire premises of the Sejm and issues the appropriate instructions for the maintenance of order, and also promulgates the statutes of the Chancellery of the Sejm, adopts the draft budget of the Chancellery of the Sejm and supervises its implementation, appoints and recalls the Chief of the Chancellery of the Sejm and the Deputy Chiefs.

Many of these competences used to be attributed to the Presidium of the Sejm (ensuring the operation and punctuality of the work of Sejm, summoning the sittings of the Sejm, initiating discussion over bills, drafting resolutions and motions referred to the Sejm by State organs, fulfilling tasks concerning relations with the Senate and the parliaments of other countries, presenting periodic appraisals to the Sejm of the discharge of duties by organs of State administration, its organs and Deputies, providing the Deputies with necessary assistance in their work, promulgating the Statutes of the Chancellery of the Sejm and its draft budget).

A considerable amount of detailed competences of the Marshal result from other regulations of Sejm Rules of Procedure, i.e. stating the expiration of a Deputy’s mandate (art. 2a), granting leaves to Deputies (art. 8 para. 9), setting the orders of the day and times of sittings of the Presidium of the Sejm (art. 14 para. 1), ordering a cuts to salaries and parliamentary allowances in cases provided for in the Sejm Rules of Procedure (art. 24 para. 1), delivering text of a bill passed by the Sejm to the Marshal of the Senate and to the President (art. 48 para. 1), delivering texts of resolutions adopted by the Sejm to the President, the Marshal of the Senate and the Prime Minister (art. 49), choosing a representative of the Sejm in proceedings before the Constitutional Tribunal to adjudicate upon the conformity of a statute to constitutional provisions (art. 62 para. 1), setting the orders of the day for Sejm sittings upon hearing the opinion of the Council of Seniors (art. 99 para. 2), safeguarding the observance of the Standing Orders of the Sejm in the course of its debates, maintaining order in the Chamber which entails calling to order any Deputy who disturbs the order of the debate and even expelling from a sitting any Deputy who disturbs the order of the debate (art. 101), presiding over debates of the Sejm and giving the floor to speakers (art. 105 et seq.).

An analysis of the regulations of the Rules of Procedure shows that the position of the Marshal has been made considerably stronger because he has taken over, from the Presidium of the Sejm, a lot of competences that concern the work orga-
zation of the Sejm\textsuperscript{13}. The Marshal of the Sejm has become an organ who concentrates governing competences within the Sejm.

The Marshal’s powers connected with the initial review of bills and draft resolutions have great importance\textsuperscript{14}. Bills and draft resolutions are submitted to the Marshal of the Sejm (art. 31 para. 1) who may demand that any draft resolution be accompanied by an explanatory statement (art. 31 para. 4), who may return a bill or draft resolution, if an explanatory statement enclosed to it does not satisfy the requirements of the Rules of Procedure (art. 31 para. 5), may refer (after seeking the opinion of the Presidium of the Sejm) any bills or draft resolutions which raise doubts as to their consistency with law, to the Justice and Human Rights Committee for its opinion (art. 31 para. 6), may order experts of the Chancellery of the Sejm to prepare an opinion concerning the conformity of the introduced bill to legislation of the European Union (art. 31 para. 7) and in the event their opinion is negative, the Marshal refers that bill to the European Integration Committee of the Sejm seeking its opinion (art. 31 para. 8). This opinion is printed on the Marshal’s order and delivered to the Deputies (art. 32 para. 1), so one can expect that it should be delivered together with the bill, even if the opinion indicates that the bill does not conform to the legislation of the European Union. The Sejm Rules of Procedure do not state that the opinion of the Justice and Human Rights Committee should also be presented to the Deputies which can suggest that the Committee’s opinion on inadmissibility of the bill — on the grounds of the Rules of Procedure\textsuperscript{15} — means that legislative procedure with reference to such bill will be renounced\textsuperscript{16}. It is questionable that it is Marshal’s duty to order preparation of an opinion by experts as stated in art. 31 para. 7, and that it is the Marshal’s obligation to refer a bill with receives a negative opinion to the European Integration Committee, but if a bill raises doubts as to its consistency with law the Marshal “may refer” to the Presidium of the Sejm, but its opinion is not binding.

Under art. 32 para. 1, “the Marshal of the Sejm shall order printing of bills, draft resolutions and Committee opinions (…) and delivery thereof to the Deputies”; this procedural act opens the legislative procedure\textsuperscript{17}.

Amendments of Sejm Rules of Procedure in the analyzed period considerably changed the position of the Marshal. The resolution of September 1997 defined i.a.

\textsuperscript{13} Z. Czeszejko-Sochacki, op. cit., p. 143.
\textsuperscript{15} There is a question of whether or not such solution is in conformity to art. 119 para. 1 of the Constitution, which states that the Sejm considers bills, and not only its internal organ: the Committee of Justice and Human Rights.
\textsuperscript{17} M. Kudej, Postępowanie ustawodawcze w Sejmie RP [Legislative Procedure in the Sejm of the RP], Warszawa 1998, p. 32.
the procedure for electing the Marshal, his participation in the election procedure of State organs mentioned in art. 25 and 27, and it gave the Marshal the right to choose a representative of the Sejm in proceedings before the Constitutional Tribunal.

The resolution of October 1997 was the source of change of the model of governance in the Chamber whereby the majority of competences of the Presidium of the Sejm were transferred to the Marshal. The new wording of art. 11 para. 1 broadened the Marshal’s competences in the above-described way. From among many other changes, it is worth mentioning that the Marshal sets time-limits on offering candidates for the office of Prime Minister, that the Marshal participates in the procedure in cases of constitutional responsibility, sets the orders of the day of the Sejm, and that he can address various organs, institutions and organizations in connection with a motion or remark made by a Deputy during Sejm sittings.

The resolution of April 1998 defines the Marshal’s participation in the procedure of the adoption of a resolution on holding a referendum. A proper motion should be submitted to the Marshal who refers it to a sitting of the Sejm.

The resolution of September 1998 determines i.a. that the Marshal refers to consultation (in a manner and on principles set by law) all bills that have not yet been consulted. The Marshal was given the power to refer, for important reasons, bills other than those specified in art. 34 para. 2 and draft resolutions of the Sejm to a first reading at a sitting of the Sejm. Moreover, the resolution regulates the Marshal’s participation in the discussion of the Sejm concerning a Senate resolution containing amendments to a bill passed by the Sejm or rejecting a bill as a whole; it also regulates the Marshal’s participation in the procedure of works on a bill (a law), some articles of which the Constitutional Tribunal found to be as inconsistent with the Constitution. The new wording of art. 111 lists many subjects to whom the Marshal gives the floor during Sejm sittings.

The resolution of March 1999 added the above-analyzed paras 7 and 8 of art. 31, concerning expert opinions on the conformity of bills to legislation of the European Union.

The resolution of June 1999 gave the Marshal the right to set deadlines by which recommendations shall be made concerning the election by the Sejm of individual persons to particular State offices specified in art. 25 and 27, if the election is held for the first time and the law does not appoint any proper time and in the case of consecutive election if the end of the term of office does not arise from the acts published in the Monitor Polski (Official Gazette of the Republic of Poland).

The resolution of March 2000 gave the Marshal the right to lodge a motion concerning the appointment by the Sejm of a person to the office of the Commissioner for Children’s Rights.

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18 I.e. the words “the Presidium of the Sejm” have been replaced 31 times with the words “the Marshal of the Sejm”, the obligation of the Marshal to seek the opinion of the Presidium of the Sejm is introduced three times.
The resolution of July 2000, which regulates the procedure for approximating Polish law to the law of the European Union, gave the Marshal (in justified cases and after seeking the opinion of the Presidium of the Sejm) the right to refer an approximating bill to a competent standing committee or the Special Codification Committee, and the right to decide (after seeking the opinion of the President) whether or not a second reading of the approximating bill will be held at the nearest Sejm sitting once the Deputies receive the report of the European Law Committee.

**THE PRESIDIOUM OF THE SEJM**

The Presidium of the Sejm is a collective organ comprised of the Marshal and the Vice-Marshals of the Sejm. The Vice-Marshals, who substitute the Marshal of the Sejm as directed by his or her, are selected by the Sejm at its first sitting after the Marshal is elected. A resolution of the Sejm sets the number of Vice-Marshals. As is parliamentary custom, the representatives of the strongest parliamentary clubs, including the opposition, are selected Vice-Marshals. The Vice-Marshals act independently within the Presidium of the Sejm. The Rules of Procedure do not set the mode and the reasons dismissing the Vice-Marshals; the remarks concerning the dismissal of the Marshal of the Sejm apply here.

The deconstitutionalization of the Presidium of the Sejm has resulted in the Sejm Rules of Procedure becoming the only legal basis for its existence. The Sejm is not obliged to create this organ and the option doing so comes from art. 112 of the Constitution, which confirms the chamber’s right to decide its internal organization and conduct of work as well as the procedure for the appointment and operation of its organs. Since the Sejm Rules of Procedure are the only legal basis for the existence of the Presidium of the Sejm, the internal character of this organ is apparent.

The constitutional phrase “The Marshal of the Sejm (...) represents the Sejm in external matters” and the deletion of the words “The Presidium of the Sejm performs also other tasks mentioned in the laws” from Sejm Rules of Procedure (art. 13 para. 2) have sparked controversy in the doctrine of constitutional law concerning the performance of statutory external competences by the Presidium of the Sejm. Marcin Kudej stated: “Nowadays, the Presidium should not (...) exercise any competences towards non-parliamentarian organs because only the Marshal is clearly authorized by the Constitution to represent the Sejm in external matters”

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19 Three Vice-Marshals were elected in the 3rd term of office of the Sejm.


This author also suggests that “representation” concerns “perhaps all relations between this legislative organ and non-parliamentarian subjects”\(^{22}\). Piotr Winczorek also raises doubts about the legal basis for the activities of the Presidium of the Sejm in external relations and he proposes transferring such tasks and authorities from the Presidium of the Sejm to the Sejm or its Marshal\(^{23}\). Paweł Sarnecki’s position is different. He notes that, because there are no limits to the application of statutes, the Presidium of the Sejm has statutory authority with respect to non-parliamentarian subjects\(^{24}\).

The Supreme Court also expressed its opinion on the matter by stating that the Presidium of the Sejm “lost its standing as a constitutional organ of the Sejm and only the Constitution can name the organs of this institution authorized to act externally”\(^{25}\). It seems that the Constitutional Tribunal shares this opinion: “Neither the deconstitutionalization of the Presidium of the Sejm nor the constitutionalization of the institution of the Marshal of the Sejm can prevent the charging of a Sejm organ with tasks specified by statutes provided that these tasks are those of an internal Sejm organ”\(^{26}\).

It is reasonable to agree with the opinion that under the Constitution the exclusive right to represent the Sejm is vested in the Marshal of the Sejm and that the laws, which entrusted the Presidium of the Sejm with this right, were exposed to a charge of unconstitutionality. The laws that granted the Presidium of the Sejm some external competences could be considered unconstitutional because they violate the principle of regulatory autonomy of the Sejm expressed in art. 112 of the Constitution. This is because strict compliance with this principle limits the scope of application of the law\(^{27}\).

This raises the question of whether or not the Presidium of the Sejm performs activities with respect to non-parliamentarian subjects that do not involve representing the Sejm. Article 18, para. 4 of the Act on the Exercise of the Mandate of

\(^{22}\) M. Kudej, *Opinia na temat…* (An Opinion on…), p. 74.


\(^{26}\) The judgement of the Constitutional Tribunal of December 1, 1998, act call No. K.21/98.

\(^{27}\) An example of this is art. 5 para. 4 of the Constitutional Tribunal Act, “Dziennik Ustaw” (Journal of Laws of the Republic of Poland [Dz.U.] of 1997, No. 102, item 643, as further amended) which states that “Candidates for the office of a judge of the Tribunal shall be nominated by at least 50 Deputies or the Presidium of the Sejm”. The Constitution does not specify what Sejm procedure for electing judges of the Constitutional Tribunal should be, and the statute stipulated in art. 197 of the Constitution is to specify the organization of the Tribunal, as well as the mode of proceedings before it, so the provision of this statute which regulates the element of the procedure of the election of the Tribunal judges by the Sejm falls into the legal scope that art. 112 of the Constitution reserves for the Rules of Procedure.
a Deputy or Senator of 9th May, 1996 concerns such activity. It reads: “The Pre-
sidium of the Sejm and the Presidium of the Senate shall jointly establish the prin-
ciple for granting to employees (...) bonuses for long-term service, additional an-
nual salary and termination allowances related to the expiry of the term of office of
the Sejm and Senate, and shall provide funds for such purpose”. It seems that this
external activity of the Presidium of the Sejm, performed together with the Presi-
dium of the Senate and concerning also the employees of offices of parliamentary
clubs and groups of the Senate, is not directly connected with the constitutional
functions of the Sejm where it is represented by the Marshal. The legislator may
grants some competences to the Presidium of the Sejm. Even the more so, given the
fact that the law, setting conditions necessary for the effective discharge of Deputy
duties (and among those conditions: the services for political factions and groups),
must be adopted in compliance with art. 106 of the Constitution. The deletion of
art. 13 para. 2 should not be understood as limiting the subjection of the Presidium
of the Sejm to laws.

The basic competences of the Presidium of the Sejm are specified in art. 13 of
Under this article, the Presidium shall establish an agenda for the Sejm (after se-
eking the opinion of the Council of Seniors), determine, at least 3 months in advan-
ce, the so-called sitting weeks, topics on the agenda (after seeking the opinion of
the Rules and Deputies’ Affairs Committee), interpret the Rules of Procedure of the
Sejm, express opinions on matters referred to it by the Marshal of the Sejm, orga-
nize co-operation between Sejm committees and coordinate their activities, formu-
late the principles of organizing scholarly consultation for the benefit of the Sejm
and its organs, appoint consultants to the Sejm and utilize the opinions and reports
of experts. As in the case of the Marshal of the Sejm, the competences of the Presi-
dium of the Sejm are specified in other regulations of Sejm Rules of Procedure, e.g.
it defines the procedure for submitting by Deputies of justification of absence at
sittings (art. 8 para. 5), initiates of summoning of the Council of Seniors (art. 17
para. 2), reproaches a Deputy, admonishes him and reprimands for breach or failu-
re to perform the duties specified in art. 33–35 of the Act on the Exercise of the
Mandate of a Deputy or Senator, concerning undertaking any additional engage-
ment, conducts any business activity and lodges a statement relating to his financial
status (art. 22), introduces draft resolutions of the Sejm (art. 30), lodges a motion to
hold a referendum on a particular matter (art. 54 para. 3), considers annual reports
on the activities of the Supreme Chamber of Control (art. 67 para. 4), refers to
committees matters for consideration (art. 90 para. 1), gives consent for appoint-
ment of standing subcommittees (art. 91), immediately considers appeals of Deput-
ties from the decisions of the Marshal of the Sejm to expel them from the sitting of
the Sejm (art. 101 para. 6) and moves motions to amend Sejm Rules of Procedure
(art. 129).
The Presidium of the Sejm can still be regarded as a governing organ of the Sejm. It has competences with respect to the entire chamber (i.a. establishing a plan of work for the Sejm, determining the so-called sitting weeks and times of sittings of the Sejm) and Sejm committees (i.a. organizing co-operation between Sejm committees and coordinating their activities, referring matters to be analyzed by them, establishing principles and timetables for executing inspections by the committees, establishing principles of executing control in matters connected with the coming into force and applying laws and resolutions of the Sejm, demanding that sittings of a commission be convened to consider a particular matter). With regards to Deputies, the Presidium of the Sejm exercises mainly its authority connected with disciplinary matters and with matters of bringing them to justice for crimes or offences, or matters of arrest or detention. The competences of the Presidium of the Sejm connected with the exercise of a Deputy’s mandate are also contained in the Act on the Exercise of the Mandate of a Deputy or Senator.

Amendments to Sejm Rules of Procedure, which deprive the Presidium of the Sejm of certain powers for the benefit of the Marshal of the Sejm, clearly show that the governing function of the Presidium has been largely limited and is mainly performed with respect to the activity of committees. Hence, the Presidium of the Sejm has become a subsidiary and consultative body to the Marshal of the Sejm29 who supervises its work, presides over its debates, establishes the orders of the day and times of its sittings.

The resolution of the Sejm of September 1997, which amended the Sejm Rules of Procedure, granted the Presidium of the Sejm the right to move a motion in the matter of appointing a person to the office of a judge of the Constitutional Tribunal. The resolution of October 1997 was the basis for transferring many powers of the Presidium to the Marshal of the Sejm. The resolution of September 1998 required the Presidium of the Sejm to seek the opinion of the Committee of State Control when it analyzed the findings and reports of the annual activity of the Supreme Chamber of Control. The resolution of July 2000 extended the rights of the Presidium of the Sejm to include placing motions with the Committee of European Law concerning membership in committees (after seeking the opinion of the Council of Seniors).

**FINAL REMARKS**

An analysis of art. 110 para. 2 in connection with art. 112 of the Constitution of the Republic of Poland leads to the conclusion that it is not unconstitutional for Sejm Rules of Procedure to give the Marshal of the Sejm many of the competences which the Presidium of the Sejm used to have. As the Constitution does not specify the organ that shall manage the work of the Sejm, it became necessary to auto-

29 Art. 11 para. 1, points 8 and 15; art. 19 para. 3; art. 31 para. 6; art. 56a para. 2 of Sejm Rules of Procedure.
nomously decide how the Chamber should be managed. The current Rules of Procedure concerning the role of the Marshall, do not exceed constitutional assumptions because the constitutional powers vested in the Sejm to determine its internal organization, order of work and the way its organs function, do not preclude this.

This does not mean that the regulations of Sejm Rules of Procedure deserve absolute acceptance. Objections, which claim that the role of the Marshal is excessive and unjustified in the initial stage of the procedure for legislative initiatives, are well-founded. The political nature of decisions which include selecting bills brought to the Marshal, suggests that it is necessary to take into account, to a greater extent, the opinion of the parliamentary opposition represented in the Presidium of the Sejm. Although art. 11 para. 1 point 8 provides for the option of seeking the opinion of the Presidium of the Sejm this is not legally binding. It is clear that the Rules of Procedure do not ensure that the opposition is represented in the Presidium — the basis here is parliamentary custom. Therefore, there are reasons to believe that the amendments to the Rules of Procedure, introduced after the Constitution of the Republic of Poland came into force, are a legislative attempt to abandon a compromising model of treating the opposition.

A precise division of tasks and competences between the Marshal of the Sejm and the Presidium is essential if the Sejm is to work effectively. Some objections are possible concerning the transfer to the Marshal of the competence of ensuring the operation and punctuality of the work of Sejm and to the leaving to the Presidium the task of coordinating the activity of Sejm committees and the manner in which they are to cooperate.

The procedure and punctuality of the work of the Sejm are strictly connected with the activity of Sejm committees and this can be a cause of competence conflicts, the more so that the wording “operation of the work of Sejm” comprises also the activity of Sejm committees coordinated by the Presidium of the Sejm.

In accepting that the chamber should have the freedom to determine its Rules of Procedure, it would be advisable to maintain moderation in introducing off-handed amendments of the Rules of Procedure when meeting the needs of consecutive
Sejm majorities. The stability of the Rules of Procedure is valuable in itself, which promotes co-operation between the majority and the opposition in the chamber because every party knows that in the next elections it may have to take on the role of the current opposition on the same conditions.

Translated by Jerzy Kugler

THE CONSTRUCTIVE VOTE OF NO CONFIDENCE
AS A FORMULA FOR THE CREATION AND DISMISSAL
OF THE COUNCIL OF MINISTERS *

The essence of all parliamentary systems is the creation of the cabinet by political parties, which have a majority vote in the parliament. This serves to guarantee effective co-operation between the government (which carries into effect political policies) and the parliament (which executes the political responsibilities of the government and the Prime Minister) down the road.

A lack of this co-operation can result in a serious political crisis, which can be overcome with the use of one of the most effective instruments of political control over the executive power, i.e. a vote of no confidence. Such vote means that the parliamentary majority may find the Prime Minister and the cabinet responsible for the crisis and demand their dismissal. A vote of no confidence provides a formula for holding the government severally and jointly accountable before the parliament, and as such is a classic institution of the parliamentary system. It must be noted here that a vote of no confidence may also act as an instrument for holding individual ministers politically accountable.

The political accountability of the government, executed in the form of a vote of no confidence, does not comprise sanctions for a violation of legal norms but is con-

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nected with an appraisal of purposefulness and substantiation of the policy carried on by the government\(^1\). A negative opinion of the government’s policy can result in a break-up of the hitherto existing ruling coalition due to dissonances and frictions within parliamentary clubs, and these frictions may result in some Deputies changing clubs. Such opinion can also stem from fierce disagreement on a given policy within the cabinet and government coalition members.

The Constitution of April 2\(^{nd}\), 1997 establishes a parliamentary system of government along with its classic institutions of control over the government, i.e. a vote of confidence (both during the procedure of establishing the Council of Ministers and its term in office) and a vote of no confidence. There are two kinds of no confidence votes: the ordinary form, used to hold individual ministers politically accountable, and the constructive form, which pertains to the entire cabinet. The second form clearly resembles the German formula of a vote of no confidence set out in art. 67 of the basic law of the Federal Republic of Germany\(^2\).

A constructive vote of no confidence first appeared in the German doctrine during the period of Weimar Republic as an important element of the so-called dualistic concept of constitutional equilibrium between the President and the parliament. The instability of the Weimar ruling coalition caused deep division in parliament crisis resulting in an economic crisis of the Reich. This created the need to devise mechanisms for limiting the excessive dependence of the government on the parliament, while making possible the establishing and functioning of the cabinet based, to a larger extent, on the authority of the Head of State. These goals were reflected in the concept of the so-called constructive (positive) vote of no confidence devised by Heinrich Herrfahrdt. According to this concept, whether the government resigns or not depends on the ability of the parliamentary opposition to form a new government. At the same time, the President is relieved from the duty to dismiss the Chancellor and the government for whom the parliament passed a vote of no confidence without presenting any personal and political alternative\(^3\).

This concept, initially considered to be an attempt at shaking the very essence of a parliamentary system, was brought into fruition same twenty years later as one of the most characteristic features of the chancellory model, developed in the German basic law of 1949.

The already mentioned art. 67 of the German basic law provides that the Federal parliament can pass a vote of no confidence against the chancellor only when it is able

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to choose his successor by a majority vote and when it addresses the President of the Federation with a motion to dismiss the chancellor. The President must comply with the motion and appoint the chosen successor. There must be 48 hours between the motion and the vote.

A constructive vote of no confidence is then not only an instrument for holding the chancellor and government politically accountable before the parliament but also a special formula to elect a new political leader of the state. A motion in this matter must be submitted by at least one-fourth of Deputies of a party which holds at least one-fourth of all parliamentary seats. In accordance with the Rules of Procedure of the Bundestag, a single vote is held regardless of how many candidates were nominated.

In the event the opposition meets the majority requirement but is incapable of choosing a new chancellor, the chancellor of the minority remains in office. The constitution obliges him, along with the President, to take action to overcome the existing parliamentary crisis. He is to submit a motion for a vote of confidence to the parliament and if it is rejected, he proposes dissolving the Bundestag or introducing a state of higher legislative necessity. Like the chancellor’s initiative, the President undertakes his political mediation and makes a decision of his own. As one of basic mechanisms for rationalization of the parliamentary system of government, a constructive vote of no confidence strengthens the stability of a coalition cabinet preventing the so-called negative parliamentary majority.

The institution of a vote of no confidence was present in both the March Constitution of 1921 and the April Constitution of 1935, although neither of them provided it expressis verbis. Under the first Constitution, the Council of Ministers was obliged to resign when the motion of a Deputy to dismiss the government was supported by a simple majority in the Sejm. Pursuant to art. 29 of the Constitution of 1935, the effectiveness of the Sejm’s initiative to dismiss the government was dependant on a decision of the President. Once a simple majority in the Sejm had approved the motion, the President had the option of dismissing the government or dissolving the parliament within three days. If no decision was reached during this period, the matter was then referred to the Senate. If the second chamber supported the motion passed by the Sejm, the final decision on whether or not to dismiss the government or dissolve the parliament was to be made by the President.

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5 In 1972, a vote of no confidence for Chancellor W. Brandt was effected together with the choice of R. Barzel. Due to the fact that two votes were missing to adopt the motion, W. Brandt addressed the President to dissolve the parliament; see: L. Garlicki, Ustrój polityczny Republiki Federalnej Niemiec [Political System of the FRG], Warszawa 1985, p. 206.
6 The only case of a dismissal of the government by a constructive vote of no confidence took place in 1982, when in the result of disintegration of the SPD-FDP coalition Chancellor H. Schmidt was dismissed and replaced by the leader of the CDU H. Kohl.
After the Second World War, the vote of no confidence against the Council of Ministers was introduced in the Constitutional Law of October 17th, 1992 in connection with the restitution of the division of powers principle. Under art. 66 of the Small Constitution, the Sejm could pass the vote of no confidence in the Council of Ministers by an absolute majority vote. At the same time, the Sejm could pass a resolution to elect a new Prime Minister charging him with the task of establishing a government in compliance with art. 58 of the Small Constitution. If the Sejm adopted the no confidence motion without electing the Prime Minister, the President could accept the dismissal of the government or dissolve the Sejm.

The Small Constitution then introduced two variants of a procedure for a vote of no confidence in the Council of Ministers. The first one provided for the option of replacing the government exclusively by a Sejm negative majority. The second one — besides the destructive element for the dismissal of the cabinet — also included the creation of a new cabinet and it allows to qualify this variant as a constructive vote of no confidence. It means that the first solutions concerning the parliamentary responsibility of the government rationalizing the parliamentary system of government, first appeared in Polish the post-war legal system. The Sejm could change the government, safely for itself and independently of the Head of State, provided that it elected a new Prime Minister at the same time. In the case of an ordinary vote of no confidence, the President was charged with the task of resolving the conflict between the parliamentary majority and the Council of Ministers. On the basis of his own evaluation of the political situation, he was to autonomously decide whether to accept the resignation of the cabinet or dissolve the Sejm. Therefore, the formula provided in art. 6 para. 5 of the Small Constitution was among the most vital instruments of political mediation available to the Head of State.

Much of the discussion over a new Polish constitution was devoted to the formula of a vote of no confidence. In the matter of relations between the Prime Minister and the government on the one hand and the parliament on the other, all drafts of the constitution sought to rationalize the system of parliamentary rule by limiting the Sejm in its ability to dismiss the government. The authors of the drafts considered the vote of no confidence as the basic form of political accountability of the cabinet. The formula of this vote of no confidence was adopted in the drafts of the Polish Peasant Party/Union of Labour, the Democratic Left Alliance, and the Democratic Union as well as that of citizens’. In one draft, the Democratic Union proposed that there also be an ordinary vote of no confidence. Its adoption however could lead to the dissolution of the parliament by the President in similarity to the Small Constitution. In all

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10 This option was pursued in 1995 by the then governing coalition of the DLA-PPP which by way of a vote of no confidence replaced W. Pawlak’s Government by the Government of J. Oleksy.
11 Also, this variant was put into practice in connection with the passing of a vote of no confidence in the government of H. Suchocka. It resulted with President L. Wałęsa’s decision to dissolve the parliament.
the presented drafts, the initiative for a vote of no confidence entailed certain formal requirements. These included: the number of signatures such motions would require (e.g. 46 Deputies in the drafts of the DLA, Senate’s and citizens’, 111 Deputies in the Presidential draft), the period for considering the motion as well as special majorities required to adopt it (in the Presidential and the DLA drafts — the majority of the statutory number of Deputies; in the PPP-UL, DU and citizens’ drafts — absolute majority). There were two drafts which introduced a mechanism for holding the government politically accountable before the President (DLA and the Confederation of Independent Poland ones). In the last one, the right to initiate the procedure for dismissing the government was conferred on the Senate.

The idea of how to enforce the parliamentary responsibility of the government was also always present in the works of the Constitutional Committee of the National Assembly. There was discussion over what model of a vote of no confidence should be adopted. At the third sitting on August 23rd, 1994, the Subcommittee of the Organs of Legislative and Executive Powers and Territorial Self-Government made a choice. There was discussion over whether it should resemble the chancellor’s model or some other model. A constructive vote of no confidence was linked to the changes in the composition of the government. This should exclusively result from an initiative of the Prime Minister or the Council of Ministers.12

The Constitutional Committee then examined this problem. In the course of the debate in July 1995, they tried to set the number of variants in which a vote of no confidence should be introduced into the constitution. Those who opposed copying the mechanisms allowing the so-called ordinary (not constructive) vote of no confidence believed that giving the Deputies the freedom to choose a variant would result in the constructive vote of confidence not being executed at all, as it is more difficult to enforce. The idea of a constructive vote of no confidence with respect to individual ministers was criticized as a disguised remodeling of the government by parliament.

On the other hand, those who opposed the introduction of a vote of no confidence as an exclusive form for executing parliamentary responsibility of the government believed that, in terms of the procedure for establishing the government, this model did not reflect the classic solutions of the parliamentary government model.13

In the course of its work on the General Problems and Introductory Regulations to the Constitution, the Subcommittee of Edition tried to use the exact phrase of “a new Chairman of the Council of Ministers”. The problem was whether or not this should be a completely new candidate or a person who previously held this office. The character of Sejm resolution adopted in connection with a vote of no confidence for the government was equally important. It was under consideration

whether the resolution should concern only the destitution of the Council of Ministers or the election of a new Prime Minister as well and if the newly elected head of the government should compete for a vote of confidence of the Sejm.

In November 1996, the Commission selected two variants for a vote of no confidence. In the first variant, the Prime Minister would be elected by a statutory majority of Deputies and — without having to compete for a vote of confidence of the Sejm for his political policies and the composition of the government — he would present the composition of the government for acceptance by the President.

The second variant clearly limited the freedom of the Prime Minister to determine the composition of the government. It envisaged the division of the procedure for a vote of no confidence into two separate Sejm resolutions. The first would concern a vote of no confidence for the outgoing cabinet whereas the second would concern the appointment of a new government.

Regardless of which variant was selected, the disputants stressed that in either case, a coalition, which ensured agreement on the composition of a new government, would be required.

In the end, the Commission adopted the first variant. However, amendment No. 303 proposed in the second reading, which obliged the Prime Minister who was elected following a constructive vote of no confidence to compete for a vote of confidence, was rejected.

As a result of this, the Constitutional Committee devised a constructive vote of no confidence model which resembled the chancellor’s model with regards to both formal limitations on the realization of this initiative strengthening the stability of the government, and the scope of creative competences of the new Prime Minister who establishes the government without having to receive a vote of confidence of the parliamentary majority which elected him.

A vote of no confidence, as defined in art. 158 of the Constitution, has a double role. First, it is an instrument for holding the government politically accountable before the Sejm; and second, it is a specific form of electing the President of the Council of Ministers and establishing his cabinet.

Under para. 1 of the above-mentioned article, the Sejm passes for the Council of Ministers a vote of no confidence by a statutory majority, on a motion moved by at least 46 Deputies specifying the name of a candidate for Prime Minister. If the Sejm passes such a resolution, the President of the Republic shall accept the resignation of the Council of Ministers and appoint the new Prime Minister. Upon his application, the President shall accept other members of the government and their swearing into office. In the second paragraph, the legislator established the minimum period (7 days) between the date of the motion to pass a resolution referred to in para. 1 is submitted and the date of the vote.

This regulation divides the procedure for establishing the government into three stages. The first one consists of passing a Sejm resolution to dismiss the Co-
uncil of Ministers and electing a new Prime Minister. In the second stage, the President accepts the dismissal of the Council of Ministers and the appointment of a new Prime Minister. In the third stage, he accepts the appointment of other members of the Council of Ministers and their swearing into office.

The details of the procedure for passing a vote of no confidence are regulated in the Rules of Procedure of the Sejm. These include rules concerning the submission of the motion and the principles of its consideration and voting on it (art. 61f of the Rules of Procedure of the Sejm; further on — RP).

A motion for a vote of no confidence for the government can be handed in writing to the Marshal of the Sejm by at least 46 Deputies. The motion must name the nominee for the office of Prime Minister. The Constitution then resolves that only the same Deputies, contesting the activity of the present cabinet, may present the candidacy. The proposal of a new head of government is an integral part of the motion on the matter of a vote of no confidence and is a subject to a vote together with the whole motion. This helps to eliminate problems caused by the previous art. 66 of the Small Constitution, concerning the simultaneous election of a new Prime Minister15. There can be several such motions but each of them is to propose only one candidate. Neither the Constitution nor the RP of the Sejm questions the possibility of one Deputy signing several motions.

Under art. 61f of the RP, the motion has to be submitted in writing and signed by the Deputies who support the idea of replacing the Prime Minister and the government. Once the motion is handed to the Marshal of the Sejm, the signatures of the Deputies supporting it cannot be withdrawn nor any other signatures added to it. If the number of signatures falls below 46 due to the expiry of parliamentary mandates of some Deputies, the motion becomes invalid.

If the motion is handed according to the formal requirements stated in the Constitution and in the RP of the Sejm, the Marshal of the Sejm is obliged to immediately notify the President and the Prime Minister about its submission (art. 61f para. 3 of the RP).

In case a few groups of Deputies file motions to elect a new Prime Minister, the motions are considered jointly because their object is the same, though they are different as far as the person of the candidate is concerned. It is true, however, that there are no formal obstacles against nominating the same candidate in several motions but it seems rather unlikely from practical point of view. The different proposals for a new head of government are put to a vote separately in the submitted order. It means that in the event a motion is passed, the remaining motions are not to be put to a vote (art. 61f para. 5 of the RP).

The vote is preceded by a debate on the motion. In addition to presenting information on its contents, the debate serves to evaluate the policies of the outgoing cabinet and present arguments in favor of electing a new Prime Minister. The debate is not only of an informative and political nature but it also has substantial meaning, especially when a written motion handed to the Marshal of the Sejm does not need to be justified.

"After the conclusion of speeches in accordance with the list of speakers, only the Prime Minister may speak in the debate on a motion requiring a vote of no confidence". As the person mainly responsible for the policies and activity of the criticized government, the Prime Minister has the proverbial “last word”. It is surprising that neither the Constitution nor the RP of the Sejm requires the candidate for the Prime Minister to make a speech in this situation, the more so that in the procedure of a constructive vote of no confidence it is unnecessary to compete for a vote of confidence. It means that the candidate can take the floor only on general conditions and only if he (she) is a Deputy. It seems that the candidate’s speech in the course of debate on his election could have enormous informative value. It would serve to reinforce the candidate’s intent to run for this office and inform the Deputies of his policy plans as Prime Minister. This could have a significant impact on the outcome of the vote.

This is the only time that the Sejm, while electing a new Prime Minister thereby deciding that a new government will be formed, makes a gamble on the government, in the belief that the new cabinet will avoid mistakes which lead to the fall of the previous one.

The debate over the motion and then voting is executed at the nearest Sejm sitting after 7 days from the date of its submission and not later than at the next sitting. The ballot is open and is carried through in accordance with art. 113 para. 2 of RP. Due to the importance of the decision, the Sejm may resolve to effect a roll-call vote, especially if several motions have been submitted in the matter of a vote no confidence for the government.

According to art. 158 para. 1 of the Constitution, “the Sejm shall pass a vote of no confidence by a majority vote of the statutory number of Deputies”, so the requirements are more stringent than when the Prime Minister and the government are elected pursuant to art. 154 of the Constitution. In case of a failure, a subsequent motion may be submitted no sooner than after three months from the date of the previous motion, unless it is submitted by at least 115 Deputies.

Undoubtedly, such regulations of art. 158 para. 2 of the Constitution are restrictive and are aimed at the opposition, which hastily undertook to overthrow the government, i.e. without being fully aware of its ability to act constructively.

The words “subsequent motion” used in these regulations seem rather problematic. There are no doubts as far as the addressee of the motion is concerned — it is definitely the same government, left unscathed after the previous voting. The problem is with the “constructive” part of the motion and with the candidate for
the new Prime Minister. According to Wojciech Sokolewicz, “subsequent” refers to a motion that concerns the same government and obviously the same candidate. It follows from this wording that if the opposition proposes some other person for the Prime Minister, it can avoid the period of a three-month delay and it need not gather the signatures of 115 Deputies for the motion. It is a controversial approach, especially given that the legislator had intended to protect the government from both an “accidental” overthrowing or by an ad hoc constructed negative majority, as well as unwanted political instability brought on by repeated attempts to pass a resolution for a vote of no confidence. Whether the Prime Minister is replaced by the earlier proposed candidate or by a new candidate makes no difference to him. In either case his term in office and that of his government will come to an end. So it seems that the three-month period should apply to all motions aiming to replace a given government, regardless of who is nominated for the office of Prime Minister.

Passing a vote of no confidence in the outgoing cabinet and choosing a new Prime Minister entails a vote of confidence in a new government while the new Prime Minister becomes the only man in which the parliament has confidence.

The vote of no confidence and the election of a new Prime Minister are two separate actions incorporated into one act. This prevents situations that were possible under art. 66 of the Small Constitution where the passing a vote of no confidence did not entail the election of a new Prime Minister.

The result of a vote of no confidence is the dismissal of the government, which remains in office until the President appoints a new Prime Minister and the ministers selected by him.

The Sejm executes its control and creating prerogatives with respect to the government by way of the described procedure. In the course of enforcing collective responsibility and solidarity of the members of the Council of Ministers, a new government is established. In this sense, this institution clearly resembles the classic form of the so-called constructive vote of no confidence. This notion exists solely in the doctrine and was not introduced into the text of the Constitution.

The legal model adopted in art. 158 of the Constitution brings together two variants of establishing a government as described in art. 154 of the basic law. As in the first additional procedure (art. 154 para. 3), the Prime Minister is nominated by the Sejm by a procedure that it initiated. Then, without the formal participation of parliament, he determines the personal composition of his government and together with

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17 Cf.: W. Sokolewicz, Rada Ministrów..., p. 48, 49.

18 According to W. Sokolewicz, it differs from the classic German model, because it consists of two parts: choosing a new head of government while disapproving the policy of the hitherto Government, W. Sokolewicz, ibidem, p. 47.
the Council of Ministers is appointed by the Head of State. This procedure partly resembles the procedure described in art. 154 paras 1 and 2 of the Constitution, but with one crucial difference: under art. 158 the resolution of the Sejm only pertains to a new Prime Minister and not other members of the cabinet. Passing the resolution on a vote of no confidence results in the government being dismissed and a new Prime Minister elected. It means that he has the support of the Sejm majority on whom he can rely when determining the policies and composition of the new cabinet. This way a new, constructive Sejm majority replaces the hitherto existing19.

It should be stressed that the election of the Prime Minister is the last moment when this majority formally has influence over the composition of the new government. Once the Prime Minister is elected it no longer has such influence as establishing a new cabinet becomes the exclusive right of the Prime Minister. The President cannot question the Prime Minister’s choices in the composition of the Council of Ministers and the Prime Minister does not have to — although he may — deliver an exposé in the Sejm. Even if he delivers it, it would have nothing to do with competing for a vote of confidence.

As mentioned earlier, the result of the resolution on a vote of no confidence is the short-lived coexistence of the Prime Minister and the government whom the resolution concerned, and a new Prime Minister who was chosen by this resolution but not yet appointed by the President. Pursuant to art. 162 para. 3 of the Constitution it would appear that “the President of the Republic, when accepting the resignation of the Council of Ministers, shall oblige it to continue with its duties until a new Council of Ministers is appointed”. The appointment of a new government brings an end to this situation20.

If compared with the regulations of the Small Constitution, the new basic law shows visible progress in rationalizing the procedure for appointing a new government as well as the whole system. In the light of art. 66 of the Constitutional Act of 1992, the adoption by the Sejm of a resolution on a vote of no confidence for the hitherto government did not necessarily mean that new Prime Minister would be successful in creating a government. Having received parliamentary approval, he had still had to receive Sejm approval for his proposed government. If this failed, the next variant of the procedure, established in art. 59 of the Small Constitution, was pursued.

Presently, the adoption by the Sejm of a resolution concerning a vote of no confidence for the government and the choice of a new Prime Minister, although it is not identical to the appointment of a new Council of Ministers, it practically means that a new government is established because neither the Sejm nor the President are able to create a new government. Only the resignation of the Prime Minister, due to an


20 Cf.: Z. Czeszejko-Sochacki, Prawo parlamentarne w Polsce [Parliamentary Law in Poland], Warszawa 1997, p. 173.
inability to form a pro-government coalition and to appoint nominees for ministerial posts, could destroy this process. But such sudden breakdown of majority support for a new Prime Minister in such a short time between the election and the appointment of a new government seems rather unlikely.

The position of the Head of State in the process of establishing a new government and a Prime Minister is similar to the situation established in the first additional procedure. The President is to conform to the will of the parliament as far as the head of the government is concerned and to the will of the Prime Minister as concerns the composition of the government. The President accepts the dismissal of the hitherto Council of Ministers and, in accordance with the motion of the newly elected Prime Minister, appoints the other members of government and then accepts their swearing into office.

In comparing the present status of the President and the possibilities which were available to him under the Small Constitution concerning the vote of no confidence, it is not possible to negate the fact that in the present law — in contrast to that of 1992 — there are no means for passing an unconstructive vote of no confidence for the government nor is the President able to dissolve (as executed once in the past) the parliament.

The position of the Prime Minister elected by the majority of votes of statutory number of Deputies in the course of the constructive vote of no confidence is similar to the position of a Prime Minister designated by the Head of State under the procedure set out in art. 154 paras 1 and 2 of the Constitution. As in the basic course, the elected Prime Minister undertakes to create a new government, but there is one difference: he is not obliged to receive the approval of the President for his government nor majority approval in the Sejm for his political policies.

In this situation the Prime Minister enjoys the greatest freedom in the model of the Council of Ministers because neither the Sejm nor the President can effectively hinder on his personal ideas. This is why this government is, first of all based on the authority of the prime Minister21. Following the example of the German Chancellor, the Prime Minister is the only subject of a motion of a vote of no confidence. However, the Polish doctrine extends such confidence to include other members of the government though they are never chosen by the Sejm22.

As in the first additional procedure, the Prime Minister is appointed along with other members of government23.

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In conclusion, the mechanism established by art. 158 of the Constitution aligns the Polish model of a vote of no confidence more closely with the German solutions, characteristic of the chancellor’s model. Still, there are some differences between them. These exist in the structure of the motion to adopt the resolution concerning a vote of no confidence.

In Polish version, the motion is composed of two elements, i.e. apart from the “constructive” part, it contains also the negation of the hitherto government. The second difference is that in the chancellor’s model the only addressee of a vote of no confidence is the Chancellor, while in the Polish model, the choice of a new Prime Minister entails a vote of no confidence for the entire government.

Considering the problem of a constructive vote of no confidence from the point of view of the dismissal of government, we should once again notice that the institution introduced in art. 158 of the Constitution is connected with the classic German formula of a constructive vote of no confidence. But the Polish version, in the “destructive” part, does not refer to the Prime Minister but rather the Council of Ministers as a whole. A vote of no confidence is adopted for the government together with the Prime Minister, who is a member of the government, which is collectively responsible for the policies of the Council of Ministers. Undoubtedly, the political meaning of this institution is intended to undermine the credibility of the Prime Minister and his hitherto decisions. It is he who determines the composition of the government, introduces changes therein and — acting as the head, coordinator and internal inspector of the works of the government — decides the methods carrying his political policy in fruition. For formal reasons, the Sejm can direct its disapproval for actions of the Prime Minister exclusively against the government as a whole. In such case, the debate over the motion can show that the Prime Minister is responsible for the crisis.

It is worth remembering here that in the period when the Constitution of the Polish People’s Republic was in force the Prime Minister, being primus inter pares, was politically accountable before the Sejm just like the ministers. So it was possible to dismiss the Prime Minister without replacing the entire Council of Ministers. This is precisely what happened in 1970 when Józef Cyrankiewicz was ousted. Today, the execution of political responsibility of the Prime Minister always results in holding the entire government accountable.

A Prime Minister who faces a vote of no confidence for his government must realize that there is a candidate for his office who enjoys the support of the Sejm majority. But this does not relieve him of the obligation to take action to reverse this unfavorable political situation.

24 Cf.: B. Banaszak, op. cit., p. 531.
26 As S. Bożyk points out, the tactic of seeking undecided Deputies of the opposition and gaining their support for the government was successfully carried out by the government of H. Suchocka, see:
Both, after the motion has been moved and when there is only the possibility that the opposition will come forth with such initiative, whether the government is replaced or not solely depends on the Prime Minister’s efficiency and negotiation efforts. Such activity is supported by the Constitution, which sets out in art. 158 para. 2 that the motion may be put to a vote no sooner than after 7 days of its submission. This gives the Prime Minister some time to carry out necessary consultations in order to discipline the Deputies of the coalition before the vote and possibly to gather support from undecided fractions and individual Deputies from outside the coalition.

A special duty to gain the acceptance of hesitant Deputies and even of representatives of the opposition rests with the Prime Minister of a minority government whose existence in a long run depends on being made a stable government based on an explicit and loyal Sejm majority.

The Prime Minister must focus his actions exclusively in the Sejm. Because the Senate is excluded from the procedure of passing a vote of confidence and a vote of no confidence, Senate majority approval would have no affect on the position of the Prime Minister.

When the Sejm majority adopts the resolution on a vote of no confidence, the Prime Minister is obliged to submit the resignation of the government to the President who must accept it. This resignation is always submitted to the President by the Prime Minister in written form and with justification. The Constitution does not impose deadlines on the President by which he is to assume a stance concerning this resignation in accordance with art. 162 para. 3 of the basic law. Nevertheless, because of the seriousness of the situation, the President should do it as soon as possible.

In case the Prime Minister refuses to submit a resignation, the President who ensures observance of the Constitution should dismiss the government and apply to the Sejm to hold the Prime Minister constitutionally accountable. The refusal to submit a resignation in cases enumerated in art. 162 of the Constitution signifies a violation of constitutional norms and results in the commencement of proceedings before the Tribunal of State.

The problem of the validity of this official act emerges, which is theoretically impossible to solve. The Constitution resolves that a countersignature is not needed to accept the dismissal of the Council of Ministers. However, it says nothing about

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137 S. Bożyk, Opozycja parlamentarna w Polsce [Parliamentary Opposition in Poland], [in:] Ustrój polityczny…., p. 142.

27 A similar legal model is adopted in the Constitution of the Czech Republic i.e. the President is given the power to dismiss the government. Unlike in Romania, where the President is obliged to appoint a temporary Prime Minister from among the members of Government when the former Prime Minister’s office expires due to constitutional or other reasons. See: K. Skotnicki, Republika Czeska [The Czech Republic], p. 72, and W. Brodziański, Republika Rumuńska [The Romanian Republic], p. 123, [in:] W. Brodzinski, D. Górecki, K. Skotnicki, T. Szymczak, Wzajemne stosunki między władzą ustawodawczą a wykonawczą (Białoruś, Czechy, Litwa, Rumunia, Słowacja, Węgry) (Mutual Relations between the Legislative and Executive Powers), Łódź 1996.
the dismissal of the government when it is not preceded by the Prime Minister’s motion or by some other member of the government acting in his name. Assuming that the catalogue of the President’s prerogatives, set out in art. 144 para. 3 of the Constitution, is closed, we should agree that this official act must be countersigned by the Prime Minister who, in an implied way, refuses to present his resignation and will also likely refuse to countersign.

The election of a new Prime Minister in the procedure of constructive vote of no confidence does not mean that when the Sejm adopts an appropriate resolution, the hitherto government stops functioning. The period of time in which the dismissed government continues to perform its duties is equal to the time required to establish a new government. It ends when the new government is appointed and not when a new Prime Minister is designated. Therefore, it eliminates any potential conflicts between a new Prime Minister and the old government during the transition period. The processes of establishing the new government determines the length of time the dismissed Prime Minister will actually perform his duties.

The government approved for dismissal, which functions under the threat of parliamentary accountability, in practice, has much greater discretion than a government prior to dismissal. This is because it no longer has to face a looming conflict with the parliamentary majority, which would bring about its dismissal, as any government can only be overthrown once. The above statement leads to a question concerning what activities the dismissed Prime Minister can and should be involved in. From formal-legal point of view, there is no need to limit the activity of such government. The end of the hitherto Council of Ministers signifies the appointment of a new Prime Minister and government. Until this occurs it should function normally, the more so that the Constitution does not introduce any limits in this regard. Even if the Prime Minister should limit his activities to only basic and necessary matters due to political reasons, he should not refrain from countersigning Presidential acts because often they concern current affairs.

It seems that the obligation of the Council of Ministers to limit its activity in such circumstances stems exclusively from the norms of the political culture of governing elites, especially if the dismissal of the government resulted from a lack of Sejm majority support.


29 Such conflict arose in 1992, after the dismissal of J. Olszewski’s government, when the members of this Government refused to execute the orders a new Prime Minister — W. Pawlak.


A vote of no confidence cannot be enforced with respect to the Council of Ministers whose Prime Minister submitted a resignation accepted by the President according to art. 162 para. 3 of the Constitution. Until the time a new Council of Ministers is appointed, the hitherto Prime Minister and his government continue to fulfil their obligations under the “protection” of the Head of State who charges them with this task.

The resolution on a vote of no confidence can result in the Prime Minister being held constitutionally accountable when the Sejm disapproves his political decisions because they violate the Constitution or statutes.

To date the most recent motion for a vote of no confidence in the government was submitted by the Polish Peasant Party — a member of ruling coalition — in 1997 against the government of W. Cimoszewicz. Taking into consideration the fact that two previous motions — concerning the governments of H. Suchocka and W. Pawlak — were submitted also by Deputies belonging to ruling coalitions, one may conclude that in Polish practice the institution of a vote of no confidence, which is basically a weapon of the opposition, is enforced exclusively by the initiative of parties establishing and formally supporting the government.

Summing up, the present model of a vote of no confidence, provided in art. 158 of the Constitution, shows a trend of rationalizing the system of parliamentary rule in Poland by strengthening the position of the Council of Ministers and bringing into prominence the role of a Prime Minister.

The ability of the opposition to effectively enforce a procedure of no confidence in a government is very much dependent on its ability to propose an alternative candidate for the Prime Minister as well as an alternative policy for the government.

The model of a vote of no confidence shows ever more clearly a political tie between the head of the government and the ministers: there is no vote of no confidence in the Prime Minister alone nor in the Council of Ministers without its head. A visible flaw is the institution of individual responsibility of the ministers regulated in art. 159 of the Constitution, which together with some elements distinctively connected with the idea of the domination of the Prime Minister over the members of the executive makes the regulations of the Constitution in force somewhat eclectic. This is further substantiated by art. 158 of the basic law, under which the mode for enforcing the political accountability of the government and its Prime Minister, typical of the chancellor’s model, does not match the mode of his appointment, characteristic of a parliamentary government model.

Literature on the subject presents opinions that criticize the constructive vote of no confidence as weakening the control function of the parliament by giving the

minority government a chance to stay in power. Such weakening also encompasses the function of the Sejm to establish a government. Its role in this procedure is limited exclusively to selecting a new Prime Minister, so it is much less developed than in other modes of establishing the government33.

On the other hand, such form of a no confidence vote rationalizes the system of parliamentary rule by strengthening the role of the government and the Prime Minister because it restrains the parliament from hastily dismissing the government without providing any other nominee or policy alternative.

Translated by Jerzy Kugler
ON THE NECESSITY OF THE IMPLEMENTATION
OF NEW RULES OF PROCEDURE FOR THE SEJM*

1. The Constitution clearly warrants the adoption of Rules of Procedure both, by the Sejm (art. 112) and by the Senate (art. 124 in connection with art. 112) as well as by the National Assembly (art. 114 para. 2). The latest literature on the subject devotes a great deal of attention to the theoretical aspects of the place of the Rules of Procedure of parliamentary chambers (especially of the Sejm) in the system of sources of law1. Much less attention however is focused on problems connected with questions concerning the functioning of the Sejm or the Senate under regulations currently in force2.

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This article exclusively concerns the Rules of Procedure adopted by the first chamber and its objective is not necessarily to prove that these as opposed to the previous regulations are more appropriate. It is rather meant to provide an opinion for further legal discussion and encourage Deputies to undertake to work out and pass new Rules of Procedure of the Sejm.

2. In accordance with the developed constitutional practice in Poland, the Rules of Procedure of the parliamentary chambers are rather long-term acts: the period they are in force lasts longer than one term of office. This is why their regulations also reflect changes in the entire country, although by definition they concern parliament affairs. So, all kinds of systemic changes have significant influence on the regulations adopted in the Rules of Procedure. Soon after the adoption by the Sejm (on July 30, 1992) of the present Rules of Procedure such changes were abundant in number. First of all, on October 17, 1992 the parliament adopted the Small Constitution, which was later subject to three amendments — deemed essential from the point of view of parliamentary law, and then on April 2, 1997 — the Constitution of the Republic of Poland. This was also a period in which bills were passed (or amended statutes) that was connected with the way the Sejm functions and the Deputies work.

The Sejm Rules of Procedure now in force were created in the situation of urgent necessity to regulate anew matters concerning the activity of the chamber following the political transformation at the turn of the 80’s and the 90’s of the XX century. It replaced the previous Rules of Procedure, formally of 1986, originally entitled “The Rules of procedure of the Sejm of the People’s Republic of Poland” which after 1991 functioned as temporary Rules of Procedure of the Sejm of the Republic of Poland.

The Rules of Procedure of 1992 were amended more than 20 times. Most often, the amendments were aimed at adapting their solutions to new constitutional and statutory regulations. Only sporadically they tried to essentially “rationalize” the way the Sejm works. Unfortunately, because these amendments lack adequate legislative precision, an even superficial analysis of the regulations of the present Rules of Procedure reveals their eclectic character and numerous inconsistencies. Many consti-

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5 MP No. 21, item 151, with later amendments.

6 Last amendment of December 15, 2000 (MP No. 42, item 804) concerned the introduction of regulation on the procedure in the chamber in case the President receives from the government an information about its intention to submit to him for ratification an international agreement without earlier consent granted in a statute.

7 Efforts to find a way out of resulting complications are resolutions of the Presidium of the Sejm on the interpretation of Rules of Procedure. From 1994 till March 2001 there were 9 of them. They concerned: art. 78 para. 3 (a resolution of December 23, 1994), art. 8 para. 5 in connection with para. 7 (a resolution of March 14, 1995), art. 84 para. 2 and art. 89 para. 2 in connection with art. 113 para. 2 (a resolution of April
tutional and statutory competencies of the Sejm are not covered by them and that is why questions arise e.g. about the legal basis of the Sejm procedure in certain matters and even doubts as to its constitutional nature.

If we consider the Rules of Procedure to be “an internal law” of the chamber, which first of all is created to regulate its Rules of Procedure, in view of the above-mentioned circumstances, we must come to the conclusion that the Rules of Procedure of 1992 do not satisfy the needs of the Sejm any longer. It seems that in their present shape they have reached their limits of effective regulation of the chamber’s works. Therefore, it is not rational to amend them further. It is necessary to adopt (without any needless delay) new Rules of Procedure that would implement solutions with a proven track record into the present Rules of Procedure and be consistent with the regulations of the Constitution and statutes in force.

3. In the course of works on the new Rules of Procedure the postulate to distinguish general principles in their text is worth considering. These principles would refer to all regulations and determine their meaning. They would be e.g. the principle of effective work of the chamber (the works of the Sejm should be properly organized in order not to allow — but to preserve the possibility to present various standpoints — obstruction on the part of the “negative” majority), a principle of political neutrality of the Marshal of the Sejm (this does not mean that he is to be completely apolitical because the Polish political scene makes this utterly impossible, but rather that the Marshal, while performing his functions, should have the best interests of the State in mind as well as safeguard the integrity of the chamber), a principle of pluralism (during Sejm works there must exist a rational possibility to present all viewpoints represented in the Sejm and to consult — again in a rational manner — the Sejm’s activities with subjects interested in it), a principle of activity (the regulations of the Rules of Procedure should encourage Deputies to a duly perform their parliamentary duties and to eliminate — at least to a degree attainable with the use of legal methods — passive attitudes), a principle of “acting with deliberation” (Sejm decisions must be accompanied by reflection and consideration), a principle of protection of a minority (there should be clear separation of institutions which serve the Sejm to function effectively and to make decisions by the majority from institutions which are a guarantee of the rights of the parliamentary minority; also a minority should have real possibility to make use of its rights).

It seems that it is not necessary to separate the above-mentioned “general principles” in a special chapter of the Rules of Procedure. Nevertheless, it has to be possible to decode them out of all regulations and without doubt as to what the intentions of

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19 1995), art. 84 para. 2 and art. 89 para. 2 (a resolution of June 20, 1995), art. 90 para. 1 in connection with art. 40 para. 3 (a resolution of September 13, 1995 — repealed, and a resolution of October 24, 1996), art. 99 (a resolution of February 5, 1998), point 4 of an Annex “Przedmiotowy zakres działania komisji sejmowych” [Substantive Scope of Activity of Sejm Committees] in connection with art. 74h (a resolution of March 31, 1998) and art. 50 para. 6 (a resolution of March 6, 2001).

the legislator are. Perhaps the best way to express such principles (at least some of them) would be to introduce into the Rules of Procedure a section that would not be divided into articles. The normative sense of this section would be to show the values that are the basis for the new regulations. It would have significance to the interpretation of all regulations, especially if a given regulation would have a different meaning according to general principles of interpretation. It should not be allowed to interpret the regulations of Rules of Procedure in such a manner that would produce an outcome contrary to the general principles expressed in the non-articulated part of them.

4. A draft of new Rules of Procedure should be an executive act to the Constitution and no statute can enter constitutionally determined matter of Rules of Procedure (if there is discrepancy between the rules of a statute and Rules of Procedure, then in the scope of this matter statutory regulations must give way to those of the Rules of Procedure). So, there are no obstacles to such draft containing — wherever is necessary to introduce new solutions — even if such regulations are discordant with the present statutory stipulations. But with a view to the rationality of the creation of law (at the time of passing Rules of Procedure) amendments should be introduced to those statutes that would be at variance with new regulations.

It is worth considering whether the new Rules of Procedure should contain an essential revaluation of some parliamentary institutions (e.g. parties and groups of Deputies) and of the whole legislative procedure. A part of the changes would result from the National Assembly and the legislator’s decisions of the last decade in the sphere of rationalization of Polish parliament. New regulations in the Rules of Procedure could reflect the changes, which were introduced — especially those following the Second World War — in the way contemporary parliaments function in many European countries, and the changes in approach to the process of creating law in a democratic state. Due to its historical and political landscape, experiences from these changes have not yet been “consumed” in Poland. It seems crucial to modernize the process of deliberations, especially in light of the practice of Polish parliament in the last decade to reflect a democratic state governed by the constitutional principle of three-way separation of power.

5. Changes in the legal system, which were introduced since the Rules of Procedure were adopted, i.e. since 1992, had influence over their terminology. It means that all notions present in the draft of Rules of Procedure should be absolutely harmonized with terminology used in the Constitution and numerous statutes adopted after 1992, in

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10 It is enough to mention amendments in the Rules of Procedure of the Chamber of Deputies in Italy, introduced in second half of 90s of the XX century. See: Costituzione della Repubblica, Regolamento della Camera, Roma 2000.
which obligations of state organs towards the Sejm were settled. The new Rules of Procedure must maintain an internal terminological uniformity (the present Rules of Procedure do not correspond with standards of legislative technique). Here is an example of confusing terminology: documents which the Supreme Chamber of Control, in accordance with the Constitution, presents to the Sejm, connected with the state budget, are described as “an analysis of the implementation of the State Budget and the purposes of monetary policy” and as “an opinion concerning the vote to accept the accounts for the preceding fiscal year presented by the Council of Ministers” (art. 204 para. 1, subparas 1 and 2 of the Constitution). These documents are identically named in the Act of 23rd December 1994 on the Supreme Chamber of Control11 (art. 7 para. 1, subparas 1 and 2). But no one knows why in the Rules of Procedure of the Sejm of the Republic of Poland read: “comments on the report of the Council of Ministers on the implementation of the Budget” (art. 67 para. 1, subpara. 1).

It seems that it is necessary (despite criticism from theoreticians of such legislative practice) to repeat the relevant constitutional regulations in the new Rules of Procedure, especially when the Constitution regulates a given matter is detail, but not all related problems are regulated as well. This is apparent in the regulations concerning the appointment of the Council of Ministers and the institution of a vote of confidence and a vote of no confidence. Clear regulations of all phases of Sejm procedure in these matters in the Rules of Procedure without clearly indication to which phase of constitutional procedure such regulations refer can prove to be very difficult or will make it necessary to rewrite constitutional regulations. The character of Rules of Procedure as an internal law of the Sejm which regulates everything connected with the procedures of the chamber, can justify — at least in some situations — a departure from the principle not to quote regulations from acts of a higher rank in acts of a lower level. So, I would not blame the legislator for using — in a sensible way — the above-described practice in the Sejm Rules of Procedure in order to clearly and concisely regulate the issues important for Sejm procedure in particular matters.

6. A general structure of the draft of the Rules of Procedure should rather be “flattened”. The present division of Rules of Procedure into five parts of unequal length (e.g. part V is composed of only five short articles and part II of about 400 articles and paragraphs, often very lengthy) is not functional.

It should be accepted that all matters belonging to the same subject matter are put into one editorial unit. Necessary exceptions to that rule would include matters closely connected with a few legal institutions at the same time.

It appears to be necessary to better harmonize the regulations, even at the expense of a larger number of articles, and to more carefully arrange them in order for the new structure to give clarity to Rules of Procedure thereby facilitating the usage of their text. The basic structural unit of this act would be a section, and an ancillary unit — a chapter. Sections would comprise matters objectively uniform, concerning e.g.

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terms of office, Sejm organs, Deputies, sittings of the chamber, committee sittings, legislative procedure or a choice of the Council of Ministers. Chapters would contain regulations concerning a particular part of matters regulated in a section. It would not be possible to rigidly set the limits of sections or chapters in regard to the subject of regulation; nevertheless this approach seems to be rational.

Consistent application of the above mentioned method of legislative technique would lead i.a. to a disproportion in the length of articles, chapters and sections (greatest disproportions would concern articles) but it would not be too high of a cost for consistency on the merits of the texts and for a clear handling of the regulated matters.

7. It is worth considering whether it would be right to give to the first sitting of the Sejm a specially solemn character, e.g. by the submission of a statement by a newly elected Marshal and by a message of the President of the Republic (on the basis of art. 140 of the Constitution) to the Sejm. If a draft of the new Rules of Procedure contains such solutions, it will have to be decided, what actions, especially those concerning the election of majority of Sejm organs, should be made at the first sitting of the chamber after the election and what matters will be discussed at the second sitting convened by the Marshal of the Sejm, which in my opinion, should be held at the latest 7–14 days after the first one. The Sejm would choose its other organs (in particular the personal composition of Sejm committees) and the judges of the Tribunal of State. There is nothing else to prevent the chamber from undertaking other matters as well.

Regardless of whether these proposals are accepted or not in a draft of the new Rules of Procedure, additionally, questions concerning the choice of the Marshal and Deputy Marshals of the Sejm should be accurately defined. First, it seems necessary to regulate, in a more detailed way, the voting on draft of resolutions of the Sejm that are to determine the number of Deputy Marshals, provided that this question will remain a matter for discussion in the next consecutive terms of office. It is possible then to accept that voting on draft resolutions in this matter should start with a draft with the largest number of Deputy Marshals. This method would allow eliminating these drafts giving preference to drafts that propose a smaller number of Deputy Marshals. Second, it is also worth considering the possibility to differentiate the procedure for appointing the Marshal and Deputy Marshals of the Sejm, as well as introducing representatives of parliamentary minorities into the Presidium of the Sejm. A certain practice has already been developed in the Sejm but it requires procedural regulations that would foster it. I would approach with caution the “substantive” regulations concerning e.g. a fixed number (one or two) of Deputy Marshals representing the Opposition. Third, it needs to be thought over again how Marshal of the Sejm should be elected. The chamber could appoint him by a majority vote of the statutory number of Deputies (at present, an absolute majority vote is needed); the proposed majority is not directly connected with the number of Deputies participating in the vote (although at the first sitting almost all Deputies are usually present) and in addition, it emphasizes the decorum of the Marshal’s office. All Deputy Marshals would be chosen together by the majority vote of present Deputies.
8. It does not seem necessary for the regulations concerning the organs of the Sejm to be considerably changed in the new Rules of Procedure. Emphasis should be placed on the proposed obligation of the Marshal of the Sejm to be impartial with respect to political groups and neutral towards views presented in the Sejm. A suggestion would be to remove from the present catalog of matters with which chairman of the chamber is entrusted the “periodic appraisals of the discharge by organs of State administration of their duties to the Sejm and its organs and Deputies” (art. 11 para. 1, subpara. 11). This regulation in its present shape does not have any substance and additionally it creates conflicts because it does not correspond with the character of the Marshal’s office and raises doubts from the point of view of the principle of separation of powers.

It is worth considering whether to introduce a completely new solution concerning the situation that the posts of the Marshal and Deputy Marshals of the Sejm are vacant. It would also concern the dismissal of the Marshal and the procedure in case of his death. There are here a few detailed matters that need to be addressed. The dismissal of the whole Presidium of the Sejm should not be permitted because this would create problems as to how the Sejm should function, unless some new additional and specific solutions are introduced. A motion in this matter could only be made by a large group of Deputies (e.g. 46). The dismissal of the Marshal and Deputy Marshals of the Sejm would be effected by a majority of the statutory number of Deputies. With regard to the Marshal, this would be a consequence of the mode for appointing the chairman of the chamber, and this demand would prevent the majority (also an accidental one) of the Sejm from “plucking out” members of the Presidium of the Sejm who have been appointed by the Sejm minority and choosing their own. It would be advisable to placing limitations on motions to dismiss a member of the Presidium of the Sejm in the event the chamber had previously rejected it. The grace term for a new motion could be one to three months.

A postulate to considerably diminish the number of permanent committees (12 to 14) and establish, in a more comprehensive way, the place and legal character of special committees is well grounded. The large number of permanent committees has substantially impaired the ability of these to function and blurred divisions in the subject matter delegated to individual committees. As a result, a large number of bills go to several committees making the legislative procedure unclear. Eliminating some committees would enlarge the remaining ones enabling them to present their standpoint to the chamber on the bills evaluated from a much more broader perspective than ever before. Furthermore, reducing the number of committees would make them more efficient because the works of individual committees would rarely overlap — both in terms of procedure (when several committees work simultaneously) and subject matter (when the same Deputies work over the same bill but in different committees).

It is necessary to think over the regulations on determining the composition of the committees and introduce proportional (i.e. based on numbers) participation of parties and groups of Deputies and non-party Deputies in the works of the Sejm and its
organs. It would also be advisable to introduce regulations to the Rules of Procedure that would set the number of participants from clubs, groups and non-party Deputies in each Sejm committee. If these matters are covered by the Rules of Procedure (now they are a subject of agreements under parliamentary custom), then they will cease to have a political component.

9. In my opinion, a completely new approach should be taken on matters concerning Deputies. Such regulations could be put into one section and cover the duties of Deputies, principles of responsibility and the procedure connected with it, and the procedure connected with parliamentary immunity. The present regulations of these issues are scattered throughout the Rules of Procedure. Moreover, they are not consistent (not to mention being inconsistent with the Constitution). A committee for ethics and Deputies’ affairs could be set up, which would combine the activities of the hitherto existing Rules and Deputies’ Affairs Committee with those of the Committee of Deputies’ Ethics. Regulations concerning the new Committee of Deputies’ Ethics and Affairs should be placed in the same section mentioned at the beginning of this point. It means that this section would concern all of the most important matters connected with the work of Deputies in the Sejm and with their statutory and penal responsibility.

The present regulations on the obligations and responsibility of Deputies could be — upon introducing the necessary changes — repeated in the new Rules of Procedure. The specific duty to safeguard the interest of the State and its citizens, to be guided by the interest of the whole nation and to safeguard the dignity of the Sejm should be stressed. Making such obligations law will not obstruct certain inappropriate behaviour of Deputies but it may prove useful in promoting good parliamentary etiquette.

The regulations concerning procedure in the matters connected with Deputies’ immunity must be considerably changed. First of all, this results from the need to bring the regulations of Rules of Procedure in line with art. 105 of the Constitution. I am not going to discuss this matter here because it has been thoroughly discussed in the literature.

It seems that it is possible to omit regulations concerning the appointment of members of the hitherto existing Deputies’ Ethics Committee. These read, “A candidate for membership in the Committee shall be a person of unblemished reputation and high moral authority” (art. 74g). These regulations allow voicing objections to the candidates. But because the possibility to nominate the candidates is limited to the chairpersons of the clubs and a Deputy being a member of this committee is a representative of his party, then the evaluation of the “authority” and moral standing of a Deputy should

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be left to the parties. Introducing more detailed regulations into the statute of the Deputies' Ethics and Affairs Committee would also be advised. The present regulations are inadequate. I suggest that the Rules of Procedure of the chamber should stipulate: the subject matter delegated to this Committee's statute, the procedure of its adoption by the Sejm, matters connected with its interpretation, etc.

I believe that regulations concerning parties and groups of Deputies should be reconsidered. Upon numerous occasions, parliamentary practice has revealed the shortcomings of the present solutions, which for example, give parties, no matter how small they are, the same right to influence the works of the Sejm as the considerably larger parties.13

The model of forming associations by Deputies is important as well. To give them complete freedom in this area would be the best solution but the share of particular associations in the managing of the chamber's work should not be identical. Since the clubs have more members, they enjoy greater privileges in the decision-making activities of the Sejm. I have not touched upon the matter of legal preferences of parties which are regulated elsewhere, mainly in electoral law, because this matter has no immediate effect on the appropriate standing of parties in the works of the Sejm.

While working on the new Rules of Procedure, it is worth considering the conceivable raising of a threshold from 15 Deputies to perhaps 46 (one-tenth of all Deputies) to form a club. The groups of Deputies could be formed by — let's say — 5 Deputies (now 3 is enough). It comes from the character of Deputies' clubs that they are created to rationalize the self-organization and functioning of the Sejm (of course, in addition to other tasks, mainly of political nature, such as to discipline Deputies, to work out common policy, etc.). If we accept the idea that the clubs should exercise significant influence over the works of the Sejm and have some formal capacity to act in the parliament, then we should also agree that the adopted regulations should consider their power (number of members) and to differentiate their actual position (proportional equality).

Certainly, the number of members in a club is determined by the regulations of electoral law and the results of votes. Nevertheless, the Sejm decides the required number of Deputies for forming a club or group. Raising the threshold necessary to form a club serves to accentuate the real importance of these units. The Rules of Procedure should allow creating a common representation of Deputies (which in strictly defined circumstances would be on equal footing with clubs) regardless if they are members of the same (or any) political party. These regulations would ensure that Deputies have the freedom to create parliamentary groups and that parliament would have the legal instruments to effectively organize its work and to perform its constitutional tasks.14 Raising the minimum number of Deputies required to form

13 For example, in the result of election campaigne to the 2nd term Sejm the SLD (Democratic Left Alliance) got 171 mandates and the BBWR (Non-party Block in Support of Reforms) got 16 mandates; at the beginning of the 3rd term the AWS (Election Action “Solidarity”) got 201 mandates, the PSL (Polish Peasant Party) — 27.

a club to 46 is based on a substantially justified (in light of the Constitution) criteria for classifying Deputies’ groupings. This may however, be perhaps the upper limit that the Sejm can adopt for clubs so as not to hinder on the liberty to associate in parliament. This number is present in the Constitution (art. 158 para. 1). A possible repetition of this number in reference to clubs needs be correlated with new provisions in the Rules of Procedure concerning actions taken on behalf of a group of Deputies (e.g. nominating a Deputy for the Marshal or Deputy Marshal of the Sejm, making a motion to remove the Marshal or Deputy Marshal of the Sejm, representing several groups of Deputies in the Council of Seniors, making a motion to supplement orders of the day, proposing some legislative initiative, making a motion on an in camera sitting).

There should be a requirement in Sejm Rules of Procedure to notify the Marshal of the Sejm about the formation of a club and the consequences for not doing so should also be named. I believe that the Sejm Rules of Procedure should be supplemented by regulations that would determine whether the internal regulations of the parties are consistent with the Constitution, statutes and the Sejm Rules of Procedure. The Deputies’ Ethics and Affairs Committee could be charged with this task. Adoption of such regulations is necessary e.g. because in the past parties misused their financial resources for running Deputy offices.

It would be advisable to strengthen the role of the leaders of Deputies’ clubs. The right to make motions on behalf of the clubs could also be subject to certain limitations (it could be the right of the leader and two or three persons who are named on the notification of the creation of the club submitted to the Marshal of the Sejm). Such regulation would allow using the institution of motions more rationally.

10. In the course of work on a section of the new Sejm Rules of Procedure concerning proceedings in the Sejm, replacing the hitherto existing solutions should be considered. This would involve slightly modifying the current chapter 1 (“General Provisions”), chapter 2 (“Proceedings in the Sejm”) and chapter 4 (“Interpellations and Deputies’ Questions”) of the III part of the Rules of Procedure of 1992. Regulations concerning participation in sittings of the Sejm of State organs or their representatives and drawing up shorthand reports from sittings require some corrections. Perhaps it would also be advisable to distinguish between the wordings “to hold a debate in secret”, used i.a. in art. 113 of the Constitution, and the term “closed sitting”. In the first case, the idea is, in accordance with constitutional terminology, that the cham-

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15 More about it in: M. Chmaj, Wewnętrzna organizacja Sejmu [Internal Organization of the Sejm], “Przegląd Sejmowy” 1999, No. 1, p. 41, 42.
16 It should be considered to add the Commissioner for Children’s Rights to the subjects who can participate in Sejm sittings.
17 It seems it is possible to resign of art. 102 para. 3 of Rules of Procedure which admits authorization of the texts of speeches at Sejm sittings and introduction to them so-called editorial corrections. The present solution is not functional and it creates troubles in practice. If a Deputy has been misunderstood, he can always use the right to rectify his utterance. But introduction of changes in the text which was delivered (except that the Marshal can cross out insulting words) gives reason for questions about authenticity of the shorthand report.
ber resolves to exclude the openness of a sitting. In the second case, closed sittings of chamber (or committee) debates would be held in camera by virtue of law.

In the present chapter 2 of the third part of the Rules of Procedure, some small corrections should be introduced to regulations concerning the time of speeches and the raising of a point of order (including a motion for a repeat vote).

In the part devoted to proceedings in the Sejm, there should be a separate chapter providing a definition of an amendment (understood as a proposal submitted by an entitled subject to add, delete or amend fragments of a bill) and regulations concerning the procedure for proposing amendments. There should also be a procedure for determining whether or not a given amendment is consistent with the Constitution or Rules of Procedure. This procedure could be patterned on the relevant regulations on determining the conformity of a bill to law.

The interpretation of certain concepts pertaining to voting, such as “participation in voting” or “statutory number of Deputies” should be more concise. It could also be considered whether or not the Rules of Procedure should grant the Marshal of the Sejm the authority to determine the mode of voting while having full discretion in selecting a technique for voting (certainly, Deputies would have to be informed in advance about the details of this technique).

The following institutions should be more clearly distinguished: interpellation, Deputies’ questions and questions on current issues. At present a substantial number of issues pertaining to this have faded into obscurity, which raises doubts in interpretation. The remaining regulations in part III of chapter 4, apart from a few ones that are imprecise (e.g. art. 123 does not make it clear whether or not the orders of the day of a sitting of the Sejm should contain only interpellations that are not answered satisfactorily in due time), could be left unchanged.

11. More substantial amendments to the regulations concerning Sejm committees should be introduced. Strengthening the role of a chairperson and the presidium of a committee is one available option. Another option would be to consider whether or not to exclude committees that rely on their own experts. The whole service of experts, in particular, preparing opinions and experts’ reports, should probably be entrusted to the service of the Chancellery of the Sejm. It would allow eliminating, at least some, hidden forms of lobbying and would contribute to rationalizing spending of public resources, especially if the Chancellery employs qualified personnel. It could also limit the practice of a single Deputy or a whole committee ordering the opinion of a person who cannot be regarded as a specialist. Such practice has undermined the authority of experts as opinions prepared by individuals lacking in competence, serve to show that the presented remarks should not be taken into account.

18 The Sejm would resolve on an in camera sitting at a closed sitting.

19 If on the day of elections a mandate is vacant, then in my opinion this wording refers to the number of 460.

20 Compare: S. Wronkowska, op. cit., p. 76, 77.

A different approach to the role of Deputy-Rapporteur should be taken. It would be advised to bring it into more prominence throughout the legislative procedure and in other Sejm works. Deputies who are familiar with the details of all phases of work on "their" bills could monitor the Sejm (and not only the Sejm) legislative procedure. This would certainly require the Deputy-Rapporteur to have special preparation.

Moreover, provisions on the appointment of subcommittees by Sejm committees should be more detailed. Previous experience has shown the need to strengthen the role of subcommittees, which solely perform auxiliary functions with respect to committees and are not attributed more rights than committees in performing their functions in the Sejm.

The new Rules of Procedure (without undermining them as a whole) could also abandon regulations on Sejm committee supervision of matters pertaining to the implementation of acts and resolutions of the Sejm. The current art. 87 has essentially become a dead letter. Committees are not, in fact, able to effectively execute their competencies accorded to them in this article.

Changing the number of standing committees in the Sejm (as proposed) and regulating the legislative procedure anew should also entail disallowing different committees from holding meetings with each other, while preserving their right to address one another for opinions on certain matters.

The new Rules of Procedure could draw on the hitherto existing solutions concerning the Special Services Committee. But it should be considered whether or not there is a need to create a specialized standing committee that would safeguard the realization of the legislative process. It could be named the Legislative Committee and it would play a leading role in the legislative process. The new regulations should not draw on the concept of the Lawgiving Committee of the 1992 Rules of Procedure (before the October 1997 amendments were introduced). If the Legislative Committee is established, it should have more judicial character than other Sejm committees. This could be achieved i.a. through regulation concerning its members (e.g. requiring a certain percentage of its members to be lawyers or have extensive experience in participating in state or self-government administration). The tasks of the Legislative Committee would include: preparing opinions on bills submitted to the Sejm; assessing the purposefulness of returning a statute to the Sejm by the President of the Republic of Poland in accordance with the second sentence of art. 122 para. 4, of the Constitution; preparing opinions on the admissibility of offering an amendment; assuming a position on a procedure for ratifying international agreements as proposed by the Council of Ministers; to assume a position whether it is justifiable to validate by the Sejm a regulation having the force of a statute issued by the President of the RP. It should also be considered whether the Legislative Committee, as only Sejm committee, should have the right to submit a motion to hold a national referendum and the right of legislative initiative. Limiting the competences of remaining committees in this way would be offset by the Legislative Committee’s right to act on their motions. Introducing such regulations may help to rationalize the legislative procedure in the Sejm.
12. In my opinion, the legislative process requires a new approach. The legislative procedure, not only in the Sejm, is a product of long practice and of findings in the theory of law. In Poland, however, immediate needs have played a considerable role in shaping the present legal order in this area. These have sometimes resulted from Rules of Procedure stipulations inconsistent with the systemic transformation. Among them were also regulations, adopted ad hoc. Such regulations reinforced certain habits that were detrimental to the rationality of making law in a democratic state, as they did not fully comply with the principle of separation of powers. The currently existing legislative paths are so dysfunctional that it is a wonder that they have not yet caused a total collapse in the legislative work of the parliament. They are perhaps among the most difficult issues of the Rules of Procedure to resolve. Though this may be the case, amendments to the regulations of internal Sejm procedure should not be postponed. They demand the immediate attention of the legislator. Any changes in the Rules of Procedure, which do not provide for a completely new legislative procedure, should only be regarded as half measures. This is why I do not share the view of certain authors who — rightly emphasizing the need to stabilize the regulations of the Rules of Procedure — propose not to introduce substantial amendments in the regulations of Sejm legislative procedure22.

The new Rules of Procedure should attempt to equalize the duties of bill movers. Wherever the legislator thought it necessary, he clearly differentiated their legal position23. In all other cases — covered in the Rules of Procedure — it is groundless. Only two exceptions can be regarded as rational and justified in the new Rules of Procedure. The first one is the obligation of the Council of Ministers to submit drafts of regulations together with government bills. The second one is that all bills other than those proposed by the government would require an opinion as to their compliance with European Union law.

Raising the minimum number of Deputies required for submitting a bill from 15 to 46 would be advisable. As the hitherto practice shows, a substantial portion of Deputy bills is supported by a number of Deputies slightly higher than the minimum requirement24. Elimination of bills supported by less than 20 Deputies would bring the following advantages: firstly, it would prevent from submission of some bills and


23 In this connection, it is necessary to consider repealing of art. 13 of the statute of June 24, 1999 on exercising legislative initiative by citizens (Dz.U. No. 62, item 688) in which there is introduced a non-exceeded term to pass to first reading a bill submitted by a group of at least 100 thousand citizens having the right to vote in elections to the Sejm. This regulation differentiates legal situation — in a way constitutionally unfounded — of bills in regard to the movers. In addition, this article does not mention any sanction so its effectiveness to “extort” on the Sejm to consider the above mentioned bill is doubtful.

24 From October 20, 1997, to October 20, 2000 bills signed by not more than 20 Deputies amounted to 35 per cent of all Deputies’ bills; data from: W. Odrowąż-Sypniewski, Analiza projektów ustaw wniesionych do Sejmu III kadencji (w okresie 20 X 1997 r. – 20 X 2000 r.) [An Analysis of Bills Submitted to the 3rd Term Sejm, 20 October 1997 – 20 October 2000], “Przegląd Sejmowy” 2001, No. 2, p. 180. Further data quoted in this article are from the same period.
it would reduce the burden of work of the chamber; secondly, it would limit the phenomenon of doubling the bills submitted in the same matter and it makes more than twice longer the time of legislative procedure; thirdly, it would considerably hinder the practices of “wild” lobbying; fourthly, it would bring into line the number of bills submitted by the Council of Ministers and those by Deputies.

It would also be advisable to clearly point out the legal effects stemming from the opinion of the Legislative Committee on the conformity of a bill to the Constitution or to an international agreement ratified with earlier consent granted by statute. If according to this Committee a bill is inconsistent with any of the above-mentioned acts, then the Marshal of the Sejm could not proceed with it and the legislative procedure would be closed by virtue of law. It should be emphasized that some other solution is also possible. For instance, in the event the opinion of the Committee is negative, a decision of the entire chamber would be required in order to take any further steps regarding the bill. In any case, the Rules of Procedure should contain clear regulations in this respect.

The Deputies could be served copies of bills via their mailboxes or in electronic format. The second solution is more efficient because it is quicker and is likely to reduce paper consumption (see art. 74 para. 2 of the Constitution).

The new Rules of Procedure could abandon the hitherto practice and link the constitutional notion of readings to the consideration of bills by the Sejm in pleno. The first reading would always be held at Sejm sittings and legislative work in committees would never be deemed a reading in the meaning of art. 119 para. 1 of the Constitution. The procedure could be closed as early as during the first reading (at present if the first reading is completed at a meeting of a committee this is not possible).

If the proposals concerning Sejm committees (see point 8) are accepted, then all bills (perhaps with the exception of the Budget bill) would be directed to one committee only, which would be the only committee designated for its consideration. This committee would perform the fundamental, “technical” part of the legislative work.

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25 Of 844 bills submitted to the Sejm, not more than 20 Deputies supported in writing 127 ones. 189 bills were supported by a group of 21–50 Deputies. See: W. Odrowąż-Sypniewski, op. cit., p. 180.

26 145 bills (17 per cent of all submitted ones) were commonly considered in one procedure; in such cases an average time of consideration (together with third reading) was 246 days and an average time of separate consideration of bills was 122 days. See: W. Odrowąż-Sypniewski, op. cit., p. 181 and 194.

27 43 per cent of all bills are submitted by a group of Deputies, 47 per cent — bills submitted by government. As far as legislative effectiveness is concerned, then among bills with completed legislative procedure 59 per cent were government bills and only 30 per cent the Deputies’ ones. See: W. Odrowąż-Sypniewski, op. cit., p. 179 and 195.

28 It is worth noticing that during first three years of the 3rd term Sejm 57 per cent (486) of bills were referred to first reading at Sejm sitting. Despite of popular views, works started at Sejm sittings proved more (although not much) effective. 88 per cent of such bills till October 20, 2000 were completed and among bills referred to committees for first reading in the same period of time — only 81 per cent. See: W. Odrowąż-Sypniewski, op. cit., p. 182, 183.

29 After the first reading (at the Sejm sitting, of course) there were proceedings in relation to 38 bills closed, and it was 9 per cent of total number of bills considered in the first reading at the Sejm sitting. See: W. Odrowąż-Sypniewski, op. cit., p. 185.
on the bill. Also, any lobbying action, which at present is well concealed, i.a. through the appointment of committee experts or the submission of different opinions, would be restricted to this stage.

It would also be advisable to adopt different regulations concerning the procedure over a bill in a committee after the first reading in the Sejm is completed. Perhaps it would be justified to adopt a regulation that would allow for the proposal of amendments exclusively in writing and only by strict deadlines (e.g. 7 days after a bill was directed to a committee) already at this stage.

A debate could begin the consideration of a bill by a committee, which could involve having consultations regarding it with different interested subjects. Following the debate in the committee and any amendments to the bill, an editorial sub-committee would consider the bill, though it would not have the right to reconstruct the bill in any other way than in line with the proposed amendments, unless it is necessary to comply with the rules of legislative technique. Then the whole committee would debate on the sub-committee’s proposals in regard to the bill and to particular amendments and finally it would take a vote on these proposals.

The right to submit amendments must be held also during the second reading (according to art. 119 para. 2 of the Constitution) by the mover of a bill, by the Council of Ministers and by Deputies. It is worth considering whether this right should not concern a group of Deputies (e.g. five of them). It seems that introduction of such requirement at this stage of legislative procedure would better reflect the idea of the Constitutional Tribunal’s settlements concerning an admissible scope of amendments to a bill in the course of readings in the Sejm. In case any amendments are submitted during the second reading, a bill will be directed to an editorial sub-committee or the Sejm will proceed to a third reading. In such case, procedural matters settled in Rules of Procedure could be much more formalized than presently. I would leave some freedom to the Sejm as far as this procedure is concerned, e.g. the Sejm should not have to adopt a detailed resolution.

Much needed would be a more detailed rendition of the hitherto existing regulations concerning the possibility to turn a bill back to the mover to re-elaborate on it

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30 During the work on new Rules of Procedure in would be good to consider the justification of repealing at least a part of statutory regulations which impose the obligation of consulting bills with appointed persons (see: M. Zubik, Informacja na temat podmiotów, do których należy kierować projekty ustaw w trybie art. 31 ust. 3 regulaminu Sejmu w celu konsultacji tych projektów [Information about Subjects to Which Bills Should be Submitted According to art. 31 para. 3 of Sejm Rules of Procedure], “Przegląd Sejmowy” 1999, No 2, p. 94 et seq.). A “consultative” debate in a committee appropriate for a given bill to consider it could allow this Sejm organ to learn of different standpoints and would counteract pathological phenomena connected with the omission of procedures of consultation of bills.

31 Worth considering is to regulate in new Rules of Procedure, perhaps in the form of an annex, the rules of legislative technique obligatory for Deputies and organs of the Sejm during internal legislative work in the Sejm. These rules could be prepared according to the pattern of the resolution No. 147 of the Council of Ministers of November 5, 1991 (MP No. 44, item 310).

32 See e.g. the judgment of the Constitutional Tribunal of February 23, 1999, act call No. K.25/98, OTK ZU 1999, No 2, item 23, p. 137–139 and quoted there earlier judgments of this Tribunal.

33 Different opinion expressed B. Banaszak, M. Jabłoński, op. cit., p. 65, 66.
and to check whether a s a result of consideration by the Sejm of amendments there are no contradictions in it. The present regulations are not sufficient. It is worth considering adopting a grace period for an examination by the Sejm of a second bill if the chamber had earlier rejected a bill referring to the same matter.

I am determined not to agree (against some opinions in the doctrine) that there should be fixed time limits in the internal legislative procedure in which a bill would have to be considered (i.e. either rejected or adopted in the form of a statute)\(^{34}\). In accordance with constitutional regulations, the Sejm is not bound — in principle — by any time limits in this respect. Also, the actual time for considering a bill in Poland is rather short\(^{35}\) and it belies current views on this subject.

It seems that in case these changes are introduced to the legislative procedure, it will be possible to discard a separate procedure for drafts of codes. Certain distinct features such as longer time limits could remain in tact. It would be rather pointless to preserve differences concerning the procedure on conforming bills. When Poland enters the European Union, the Rules of Procedure — according to the pattern of Rules of Procedure of the present EU member states — should include regulations of a special legislative path which purpose will be to implement — as required — European law into the Polish legal order.

The Rules of Procedure should introduce new and yet unknown regulations for the procedure with a law that expresses consent to the ratification of an international treaty which delegates “to an international organization or international institution the competence of organs of State authority in relation to certain matters” (art. t. 90 of the Constitution). As far as the regulations concerning procedure with Senat’s resolution on a law adopted by the Sejm are concerned, they could remain unchanged.

It would also perhaps be advisable to reconsider the procedure for a bill that is returned to the Sejm by the President in the event some of its provisions are deemed unconstitutional by the Constitutional Tribunal. It seems that art. 122 para. 4 of the Constitution does not provide any grounds for including the Senate in the procedure of removing non-conformity\(^{36}\). The removal of a non-conformity would be understood exclusively as an introduction of such changes into the text of a law, which stem from the necessity to comply with principles of correct legislative technique and because some of its regulations were deemed unconstitutional by the Constitutional Tribunal.

\(^{34}\) Compare: P. Winczorek, op. cit., p. 59; B. Banaszak, M. Jabłoński, op. cit., p. 63.

\(^{35}\) In the period mentioned in foot-note 24, an average time for considering a bill (together with third reading) was 150 days, including urgent bills — 21 days. See: W. Odrowąż-Sypniewski, op. cit., p. 193.

In my opinion, the Constitution does not provide reasons to argue that the returning of a law to the Sejm by the President opens a new legislative path. If this were true, the legislator would have expressed it outright. If the consequence of the removal of the non-conformity is the introduction of a new regulation, then passing only a revisal law would be admissible. There are no constitutional grounds for any other legislative way. Such presumption of law is not allowed. Then retaining different regulations in the Rules of Procedure in the matter of removing non-conformities by the Sejm in reference to art. 122 para. 4 of the Constitution cannot be justified. So it seems reasonable that in accordance with new regulations of Rules of Procedure the removal of non-conformities would be performed exclusively by the Sejm and would exclusively concern editorial and technique issues to which the judgment of the Constitutional Tribunal refers. It means that the Rules of Procedure should include the relevant regulations that would allow making substantial changes requiring legislative initiative at this stage in compliance with art. 122 para. 4, second sentence of the Constitution.

13. A separate part of the new Rules of Procedure could concern the procedure for urgent bills. General regulations on legislative procedure could apply here. Simplifying the procedure for an urgent bill could be achieved i.a. by excluding the “consultative” debate and by shortening the time limits for performing certain functions also during the “normal” legislative procedure.

Another part should contain regulations concerning the procedure on the Budget bill. Due to the specificity of the matter regulated in this bill and systemic importance connected with the Budget there should be maintained the present construction of legislative works in various committees but with a leading role of the Committee of Public Finances. A consultative debate would not be held over this bill.

Regulations concerning the procedure for a bill to amend the Constitution also deserve a separate part. New solutions must be introduced as the Rules of Procedure of 1992 completely discard the implications of chapter XII of the Constitution. Regulations contained in this chapter are very detailed so the scope of the regulation of the Rules of Procedure is rather narrow but a modification of some elements of this procedure is necessary in order to comply with art. 235 of the Constitution.

The competent committee for considering a bill to amend the Constitution could be the Legislative Committee. A sufficiently large group of deputies (at least 46) and certainly the mover (see art. 119 para. 2 of the Constitution) should have the right to make motions for amendments in the above procedure. The Rules of Procedure should prohibit amendments to chapters I, II or XII of the Constitution (unless a bill to amend the Constitution would contain proposals to introduce changes in these chapters). Any other solution could lead to the evasion of the procedure for amending the Constitution, which under art. 235, is not the same for all chapters of the Constitution.

14. The specificity of acts of the Sejm adopted in the form of resolutions fully justifies the division of the procedure concerning laws from the procedure concerning resolutions. It seems that the separation of a part devoted to the procedure with resolutions would be a fully justified solution although quite new. But this procedure
should also provide clearly named regulations that govern the legislative procedure. On the one hand, such solution would prevent the excessive expansion of the provisions of the Rules of Procedure, and on the other hand, it would ensure that there are proper solutions of legislative procedure in the process of adopting resolutions.

We will now focus on the separation of several kinds of procedure connected with the adoption of resolutions. They concern: holding a national referendum, Sejm’s expression of an opinion on the choice by the Council of Ministers of a procedure of ratification of an international agreement, the Sejm approval of a regulation having the force of a statute, the Sejm consenting to the introduction of a state of emergency or a state of natural disaster and for amendments of Sejm Rules of Procedure. Such separation is justified by the specificity of subject matter that is to be regulated and it would draw greater attention to the systemic nature of these particular kinds of procedure.

In the course of works over new Rules of Procedure it seems necessary, besides the adjustment of terminology (e.g. the Constitution speaks of the right to order a nationwide referendum, the Rules of Procedure — of submitting a certain matter to a referendum), to re-think again the whole procedure with a motion for holding a nationwide referendum. The Sejm must specify in its Rules of Procedure e.g. who is entitled to submit a motion for holding a referendum on granting consent for ratification of an international agreement as in art. 90 of the Constitution.

It is necessary to regulate the procedure concerning the Sejm’s approval of the President’s regulations having the force of statute. In regard to the provisions of the Constitution (especially to art. 234 para. 1, second sentence) it could be a very shortened procedure but enabling the chamber to fully analyze those regulations. In case the Sejm does not approve that act of the Head of State, the Rules of Procedure should provide for a special legislative procedure, which would normalize questions arising under the rule of a regulation having the force of a statute.

Limiting the right of the initiative to move resolutions should also be considered. The exclusive competence to do so could be reserved for the Presidium of the Sejm. It seems that this collective organ of the Sejm, which represents the main political factions present in the parliament, should estimate possible dysfuncionality of Rules of Procedure. This solution would allow to limit the possibility to introduce changes into this act under the influence of passing, current needs and political disputes (such practice leads to get loose the structure of Rules of Procedure and to use law instrumentally).

15. The hitherto existing regulations of Rules of Procedure concerning the election of the Council of Ministers and the institutions of a vote of confidence and a vote of no confidence could in principle remain in force without deeper changes. Serious
changes are needed in respect of regulations concerning the procedure applied to
elect and to recall State organs and to give consent to lift immunity of persons elected
to constitutional State posts.

In reference to the first case, the present Rules of Procedure are not adjusted to
statutory regulations (e.g. they lack regulations of appointing and dismissing of the
Commissioner for Children’s Rights Protection). As far as the second complex of
matters is concerned, there are no regulations in Rules of Procedure at all and it is
a serious lacuna. It is the more surprising that at least a part of these matters was
within the competence of the Sejm by virtue of the Constitution (e.g. art. 206 concern-
ing the President of the Supreme Chamber of Control or art. 211 concerning the
Commissioner for Citizens’ Rights). In new Rules of Procedure there should be, fir-
slly, arranged the hitherto regulations concerning appointment and dismissal by the
Sejm of these State organs which are grounded in the Constitution and statutes, and
secondly, adopted solutions concerning Sejm consent for bringing persons holding
some State posts to criminal accountability or for arresting or detaining them. The
procedure applied to express consent for waiving of immunity or the privilege of
inviolability that these persons enjoy could be based on the construction of procedure
of waiving Deputy’s immunity and inviolability.

16. Regulations of new Rules of Procedure should also be adjusted in the field
of procedure concerning decisions, reports, information, proposals and remarks of
State organs to the regulations of the Constitution and statutes that settle what obliga-
tions of this kind they have towards the Sejm.

It seems that due to differences in the position of State organs which have an obliga-
tion (based i.a. on the Constitution) to present to the Sejm certain documents, there
should be applied at least two basic types of Sejm procedure towards them. The first
type would concern information of the Constitutional Tribunal on main problems of its
activity and of annual assumptions of monetary policy of the Council for Monetary
Policy. In the case of these two documents there should not be taken a vote in the Sejm
to accept them. It is connected with systemic position of the Constitutional Tribunal
and with constitutionally defined character of the assumptions (see art. 227 para. 6, first
sentence of the Constitution). As far as the other documents are concerned (excluding
the secret part of information of the President of the Institute of National Remembrance
— Commission for the Prosecution of Crimes against the Polish Nation), there could
be held a debate over them and a vote in the Sejm to accept or to reject them.

17. A special comment is needed on new regulations on Sejm’s role in the reali-
zation of constitutional responsibility. It seems that an assumption should be taken
that an internal Sejm procedure concerning bringing persons named in the Constitu-
tion to constitutional responsibility should be regulated in the Rules of Procedure.

38 At this occasion, it is worth considering the amendments to the Act of 15th July 1987 on the Com-
missioner for Citizens’ Rights (uniform text in the Dz.U. of 1991, No. 109, item 471, with later amend-
ments) concerning his dismissal; in particular, there should be settled doubts whether Senate’s consent to his
dismissal is necessary.
There is no appropriate regulation in the Constitution, which would exclude the procedure in this matter from general regulation of art. 112.

To be precise, till a new law on the Tribunal of State is adopted there is no possibility to regulate comprehensively and cohesively in the Rules of Procedure the problems connected with the realization of constitutional responsibility. Many regulations of a law on the Tribunal of State in force do not agree with new constitutional regulations so it is necessary that the parliament adopt a new law as quickly as possible.

It seems that internal Sejm procedure in this matter need not have the character of preparatory proceedings as in the code of penal proceedings. It is not necessary that the Sejm (or its organ) fulfil the role of a prosecutor mentioned in this code. The work of Sejm committee should rather be directed at a decision of mixed character: both political and legal.

Considering the hitherto experiences, it should be thought necessary to rationalize the Sejm procedure with a preliminary motion to bring to constitutional responsibility persons holding the highest state jobs. Any future regulations of the Rules of Procedure should strive to achieve this goal, regardless of how far work on a new law on the Tribunal of State has progressed. In particular, in the Rules of Procedure there could be put regulations on the substantial content of a preliminary motion and on binding a competent Sejm committee with the scope of this motion. The possibility to conduct a hearing of evidence by this committee should be limited. Well justified seems to be a change of the present regulations concerning the closure of proceeding with the motion in case it does not have demanded majority in a vote; this would help to eliminate stalemate situations which cannot be avoided under the rule of the present Rules of Procedure.

18. The new Rules of Procedure should specify a form for informing citizens on the activity of the Sejm, which entails changing some of the rules pertaining to the observance of regulations. This would be accomplished through the application of art. 61 para. 4 of the Constitution.

Direct watching of Sejm and committees sittings could be possible, similarly as till now, after receiving a pass issued by a responsible Bureau of the Chancellery of the Sejm. Most clear would be issuing, on a citizen’s application, an entrance ticket. However, the Rules of Procedure should specify the rules of its issuing, and also the conditions of admissibility of registration of picture and sound during Sejm and committees sittings.

In the course of work on the new Rules of Procedure, the Marshal of the Sejm should have the right to issue orders pertaining to the observance of regulations and to specify the rules how to maintain order on Sejm premises.

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40 On 25th July 2001 the Sejm adopted an Act on the amendment of the Act on the Tribunal of State but at the time this issue of “Przegląd Sejmowy” was in print, the new Act’s legislative procedure was not completed yet.
19. An approaching end of the third term Sejm creates a special occasion to undertake work on the preparation of new Sejm Rules of Procedure, which would come in force from the beginning of the fourth term. Now is the time for discerning analysis of necessary reforms in this sphere. Expectation that the Sejm established in September 2001 will adopt new Rules of Procedure immediately after the elections, can prove delusive because its attention will be naturally concentrated on problems connected with the starting point of the new term of office and in addition the new Sejm must intensify its legislative work on preparations that Poland joins the European Union and on passing of the Budget.

Translated by Jerzy Kugler
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