# TABLE OF CONTENTS

Bogusław Banaszak, Professor Doctor Habil., University of Wrocław

The Judicial Activism of the Constitutional Tribunal .......................... 5

Anna Łabno, Professor Doctor Habil., University of Silesia

The Sejm of the Republic of Poland and the Representation of Interests .... 25

Piotr Tuleja, Professor Doctor Habil., Jagiellonian University, Cracow

Proceedings Before the Constitutional Court in Relation to Hierarchical Review of Norms ......................................................... 47

Jerzy Ciemniewski, Professor Doctor Habil., Institute of Law Studies of the Polish Academy of Sciences

Bicameralism under the Constitutional System of the Third Republic of Poland 65

Dorota Lis-Staranowicz, Doctor Habil., University of Warmia and Masuria in Olsztyn

Jan Galster, Professor Doctor Habil., The Nicolaus Copernicus University in Toruń

Europeanization of Polish Constitutional Law ..................................... 85

Paweł Sarnecki, Professor Doctor Habil., Jagiellonian University, Cracow

The Sejm of the Republic of Poland in the Period of Transformation ....... 111

Andrzej Szmyt, Professor Doctor Habil., University of Gdańsk

The Sejm and the Senate Under the Proposals for Amendment of Poland’s Constitution of 1997 .......................................................... 129

Krzysztof Wojtyczek, Doctor Habil., Jagiellonian University, Cracow

The Impact of the Treaty of Lisbon on Poland’s System of Government .... 149

Marek Zubik, Professor Doctor Habil., University of Warsaw

When the Marshal of the Sejm is the Most Important Person in the State or the Polish Interregnum ...................................................... 167

Anna Rakowska, Doctor, University of Łódź

Krzysztof Skotnicki, Professor Doctor Habil., University of Łódź

Changes in Electoral Law Introduced by the Election Code ................. 189

Martin Bożek, Doctor, Kazimierz Pułaski Technical University of Radom

Parliamentary Scrutiny of the Secret Services in Poland ....................... 215

Iwona Wróblewska, Doctor, The Nicolaus Copernicus University in Toruń

Public Hearing in Poland. An Analysis of Normative Solutions and the Practice of Their Application ...................................................... 233

Annex. Alphabetical list (by author’s name) of English summaries of articles contained in Sejm Review (Przegląd Sejmowy) from No. 6(101)2010 until No. 5(118)2013 ............................................................... 255
In the recent decades, there has been growing discussion in the democratic counties on the problem of judicial activism within the supreme and constitutional courts. The above-mentioned notion is generally recognized as a departure by the court beyond adjudicating individual cases and as an involvement in a broadly understood resolution of social problems or in shaping the concept of the state.

Judicial activism of the Constitutional Tribunal within such a meaning existed in the first phase of Poland’s transformation, which lasted from June 1989 to the adoption of the current Polish Constitution in 1997. During that period, the norms of the previous constitution, successively amended after 1989, were given — within the jurisprudence of the Constitutional Tribunal (and within jurisprudence of other courts and activities of supreme state authorities) — a new meaning which made it possible to apply solutions adjusted to the changing social circumstances. Therefore, necessary reforms could be implemented relatively quickly without a time-consuming work on modification of the constitution.

Judicial activism of the Constitutional Tribunal has not yet been thoroughly examined in the Polish literature of constitutional law. The problems related to it are seldom recognized and discussed only in the context of other issues or in glosses to judgments. Judicial activism existing after the adoption of the 1997 Constitution is diversely appraised. Negative appraisals appeared rarely in the beginning of that period and, over time, became more frequent. Excessive judicial activism of the Tribunal may lead to a situation in which the Tribunal will decide not only of the vision of the law-governed state, but rather of its particular solutions. It should be noted that judicial decisions made by the Tribunal are no more subject to institutionalized legal review. Therefore, it is difficult

* This article was published in “Przegląd Sejmowy”, 2009, No. 4.
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to understand why these decisions, and not the decisions of the legislative power, would have priority and be more consistent with the expectations of the public. On the contrary, its parliament itself, chosen in democratic way that is — on its nature — better fit to articulate these expectations. Otherwise, it would be shown that the constitutional court occupies a central position within the system of government (as some authors imply on the basis of experiences of an increased judicial activism in some modern democracies). In Poland, the scope of judicial activism of the Constitutional Tribunal is not large enough to enable us to say that the above-mentioned threat is real.

I. THE CONCEPT OF JUDICIAL ACTIVISM OF THE SUPREME COURT OR CONSTITUTIONAL COURT: ADVANTAGES AND DISADVANTAGES

Judicial activism of the Supreme Court or Constitutional Court is generally recognized as their going beyond the adjudication of individual cases, and as involvement in a broadly understood resolution of social problems or in shaping the concept of the state. It is among the factors influencing the frequency of constitutional amendments. The more active the court becomes in interpreting the provisions of the Constitution, the easier it is to avoid the need to change the constitution, since the meaning ascribed to it can be simply modified. Convincing evidence in support of this thesis is provided by the United States. In addition to the U.S.A., judicial activism can be seen in both Germany and Switzerland.

The initial period of judicial activism of the Constitutional Tribunal, within the above-mentioned meaning, occurred during the first phase of Poland’s transformation that lasted from June 1989 to the adoption of the current Polish Constitution in 1997. During this period, in the jurisprudence of the Constitutional Tribunal (but also in the case law of other courts and the decisions of supreme State authorities), the norms of the former Constitution were frequently amended after 1989 and the Constitution was often given a new meaning in order to introduce solutions consistent with the changing realities of social life. “This activist role derives, primarily, from the fact that in some circumstances judges are compelled to make law. In such law-making decisions, the court may refer to arguments based on general principles contained in the Constitution or on arguments driven by policy-making requirements”. In this period, the advantage of the Constitutional Tribunal’s activism was that the Constitution was not an obstacle to democratic reforms, even if its structure dated back to the times of real socialism. Thus, socially desirable reforms could be implemented relatively quickly, without working on the revision of the Constitution. It should be noted that such work would have been time-consuming; not only for procedural reasons, but mainly because of the need to develop a consensus between emerging political formations.

In general, this type of activism of the Supreme Court or constitutional court has been evaluated positively. One of the German constitutional law theorists even

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1 P. Tuleja, Stosowanie konstytucji w świetle zasady nadrzędności (wybrane problemy), Kraków 2003, p. 27.
claims that the reluctance to amend the constitution, which he described as constitutional and political immobility, may imply the creation of a new function for the Federal Constitutional Court, consisting in adapting the constitution to various challenges that may arise⁡. This makes it possible to solve many social problems in a way that ensures social peace in those countries where the system of political forces is relatively stable, and also in those countries where there is a great diversity of views on political topics accompanied by instability of the political system entailing lack of consensus needed to adopt a Constitution. This does not mean, however, that the activism of the supreme court or constitutional court totally eliminates the need for constitutional amendments. Not everything can be done through the interpretation of law. “There are, of course, limits concerning the content in, and time for which, the State may benefit from the old constitution — even at a high level of constitutional court activism — under qualitatively new social and political relations”³.

The activism of the supreme court or constitutional court in their relations with other branches of power and, particularly, with parliament, may provide justification for expressing doubts and indicating some flaws. These encompass the following issues:

Firstly, an extremely active Supreme Court or constitutional court can interpret the constitution in a specific way (i.e. in a manner going far beyond that of the literal interpretation) and in its case law thereby impose its own system of values - of which it then becomes the sentinel⁴.

This can result in the acquisition by the constitutional court of the role of a key actor in the State⁵ by going beyond the list of competences conferred on it by the Constitution, and also by the transformation of the court into a “negative legislator”⁶, or even a “substitute legislator”, because its judgments contain very precise instructions concerning how the provisions of statutes are to be made consistent with the constitution⁷.

Secondly, opinions are voiced that in the event of a high degree of activism on the part of the supreme court or constitutional court, there can emerge a situation in which it is impossible to avoid politicization of constitutional courts⁸ since they very often engage de facto in making “decisions requiring the balancing of opposing social values and interests, and therefore become strictly political decisions”⁹, rather

than taking decision within the sphere of administration of justice, i.e. resolving legal disputes.

Thirdly, an excessively active supreme court or constitutional court does not respect the limits of activism set forth in the principle of checks and balances between the branches of government and the principle of judicial self-restraint, which is closely related to the above-mentioned principle and based on two pillars:

— the presumption of conformity of the legal norms to the Constitution — which is “a basic principle of legal interpretation of law by which all legal norms are integrated into the legal system and must be interpreted so as not to come into conflict amongst themselves”\(^\text{10}\); while recognition of “a statutory norm as incompatible with the constitution is a last-resort measure and can only be applied where attempts at interpreting the statutes in accordance with the constitution have failed; simultaneously, the Tribunal may stay away from open conflict with the legislature since, instead of quashing, a statute, it only establishes a particular interpretation of it”\(^\text{11}\);

— giving the legislature a wide discretion in issuing acts extending the constitution, “the assessment of the quality of law” should be distinguished from “the question of its unconstitutionality”, for if this distinction were overlooked, the Tribunal would assume the role of censoring the legislature in the performance of its exclusive and inalienable functions which are essential to the implementation of specific program objectives in the economic or social sphere”\(^\text{12}\).

II. EXCESSIVE ACTIVISM IN THE JUDICIAL PRACTICE OF THE CONSTITUTIONAL TRIBUNAL

In light of the current judicial practice of the Constitutional Tribunal, we can observe a number of worrying cases of excessive activism. Due to the limited scope of this article, I will focus my attention on some cases — important in my opinion — that have occurred in recent years. Some earlier cases have already been discussed in the literature. As far as I know, this problem is extensively addressed by B. Zdziennicki\(^\text{13}\), who presents it in the context of the principles and values referred to in the dissenting opinions of judges of the Constitutional Tribunal. He pointed to cases from the years 1986–2004. All the arguments presented below as well as others discussed in the cited literature, compel us to treat some of the identified concerns as not just potential in nature but actual, and can justify addressing the problem of excessive judicial activism of the Constitutional Tribunal.

In order to achieve greater clarity of presentation, the cases will be divided into groups in accordance with the most commonly used formulations.

\(^{10}\) K. Stern, Das Staattrecht der Bundesrepublik Deutschland, vol. III/1, München 1988, p. 1316.

\(^{11}\) L. Garlicki, Sądownictwo konstytucyjne w Europie Zachodniej, Warszawa 1987, p. 216.


The Constitutional Tribunal specifically interprets the constitution and in its case law introduces its own system of values.

A cause of special concern in this context are those judgments in which the Constitutional Tribunal seems to interpret the norms of the Constitution concerning rights of the individual quite freely and departs from the practice of other democratic countries in this respect.

A good example of this is provided by the notion of “meta-rights”, established by the Constitutional Tribunal in the context of the principle of equal treatment. The Tribunal declares that Article 32 para. 1 of the Constitution, establishes a “general principle”, but at the same time it finds that the said provision formulates a substantive right, which is however a right of the “second degree” or a “meta-right”. This construction is of great practical meaning, because in the view of the Constitutional Tribunal it implies the application of Article 32 as a basis of constitutional complaint only in conjunction with another constitutional right or freedom. Moreover, it is not certain whether “meta-rights” should be treated as a superior category which refers to socially important extra-legal values, in which rights are formulated in a more general manner. The provisions containing them would perform a function similar to those of meta-clauses or general clauses.

In this respect, the Tribunal departs from its previous approach in which it recognized the primary role of literal interpretation. It should be recalled here that, as early as 1999, the Constitutional Tribunal held that: “Placing of the provision formulating the principle of equal treatment in Chapter II under the title The freedoms, rights and obligations of persons and citizens cannot be a decisive factor in this respect. So, if the provision of the constitution does not raise doubts from a grammatical point of view, then the argumentum a rubrica (the argument invoking the arrangement of the basic law) should fail”.

Currently, the Constitutional Tribunal “pushes” the literal interpretation to the margins, precisely in those situations that enable the Tribunal to give explicit content to a phrase of considerable importance for the matter in question. The problem at issue is the phrase used in Article 32: “[A]ll persons shall have the right to equal treatment by public authorities”. From linguistic rules it follows, beyond a shadow of doubt, that the “right to ...” simply means the power vested in a natural or legal person. For unknown and inexplicable reasons, the Constitutional Tribunal erroneously assumes that the literal interpretation does not give an unequivocal result. This error causes another; such is the departure from using literal interpretation as a primary tool and generally making use of systematic interpretation.

Such a concise approach to the concept of “meta-rights” by the Constitutional Tribunal may, however, be interpreted as evidence of their downgrading and placing in

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a lower rank. This seems to be reflected in the fact that they cannot be the basis of a constitutional complaint. Moreover, this happens in a situation in which the constitution-maker adopted the structure of a constitutional complaint as involving a wide range of bodies entitled but a narrow range of subject matter covered. It deviates from the standards used in other democracies. There is a requirement that a complaint may be lodged against an act only on the basis of a challenged act of a decision of a court or other public authority that has in fact been issued. This prevents the lodging of the complaint if the violation of the constitutional rights of the individual occurs due to the direct application of a normative act or failure to apply it due to the inactivity of a public authority. In addition, assuming the possibility of challenging only a normative act underlying an individual decision or judgment deprives the individual of national means of protection in the event that the normative act is consistent with the constitution, but has been applied in an erroneous way, that is in breach of it.

Here, it is worth pointing out that in recent years the constitutional courts of numerous democracies do not seem to have any considerable problems in attributing to the constitutional principle of equality (formulated similarly to that in Poland) the role of a legal basis for the entitlements and claims of the individual, even if they do not emerge from any of the rights covered by constitutional regulation. In many cases, they assess the interference of the state in the sphere protected by constitutional rights not on the basis of criteria relating to the rights at stake, but the criteria relevant to the principle of equality. It is also noteworthy that some constitutional courts guided by the principle of equality examine the proper operation of state bodies in the distribution of benefits.

Another example of a situation in which the Constitutional Tribunal appears to impute its own system of values to the Constitution is a judgment concerning time limits on bringing a claim for compensation for damage.

As a template of review, applied to contest the statutory regulation of statutes of limitation, the Constitutional Tribunal used Article 77 para. 1 of the Constitution which states that everyone has the right to compensation for any harm done to him by any action of an organ of public authority contrary to law. The Constitutional Tribunal held that “under the axiology adopted by the legal system, damage to a person enjoys particularly extensive protection”.

However, as was noticed by one commentator, “the said rule cannot be derived from the content of Article 77 para. 1. The concept of “damage” under this provision


18 For more on this topic in relation to the jurisprudence Austrian Constitutional Court, see B. Banaszak, Sądownictwo konstytucyjne a ochrona podstawowych praw obywatelskich, RFN, Austria, Szwajcaria, Wrocław 1990, p. 160.

19 Cf. ibidem, p. 158.

is not precisely defined; in particular, there is no distinction between damage to property and damage to a person. […] The Constitution protects, after all, the right of ownership and other property rights (Article 64), but the Tribunal held that a claim arising from damage to a person deserves special treatment”21 As a result, even if life and health are certainly core values protected by the Constitution, the gradation of values protected by the basic law given in that judgment must engender doubts.

The group of doubts addressed in this part of the article also includes those judgments in which the Constitutional Tribunal allows a departure from the principle of non-retroactivity derived from the principle of the democratic state ruled by law, arguing that a new regulation, intended to be retroactive, if more advantageous to the protected entity22. The Constitutional Tribunal recognizes this value, without any constitutional grounding, as more important than others. At this point, I share the views of those who criticize this approach if a more favorable change does not apply to regulations in the field of criminal law. One of them rightly claims: “any retroactive operation of the law is a wrong […] the argument that retroactive changes in the law which are beneficial for individuals become a priori acceptable is, in my view, misguided in the light of the principles of good legislation. Retroactive change of law that benefits the individual usually has serious adverse effect on the state’s finances and is, therefore, questionable from the point of view of the protection of citizens’ trust in the state and the imperative of caring for the common good”23.

An example of a peculiar — i.e. far from literal interpretation of the Constitution — is the judgment in which the Tribunal found that a statutory regulation concerning the extension of pre-trial detention was incompatible with the basic law24. The Tribunal admitted (for consideration on the merits) two constitutional complaints against the decision of an appellate body on the extension of pre-trial detention, and found them to be final. “Thereby it not only ignored the wording of Article 79(1) of the Constitution, but also extended the semantic limits of the phrasing used in this provision […] functional arguments (“guarantee aspect of the complaint”) that completely took precedence over the wording of the Act, and in doing so it failed to meet the requirements of literal interpretation of Article 79(1) of the Constitution”25.

Another example of an interpretation differing from the literal one was given by the Constitutional Tribunal26 which arrived at far-reaching conclusions about the

phrase “exercise” by professional corporations “of care over the proper practice” of the profession, used by the Constitution in Article 17 (1). In its judgment on the amendment of the statutory provisions governing, among others, access to barristers’ apprenticeships, the Tribunal inferred that such care covers, inter alia, the effect on the Polish Bar Council’s rules governing barristers’ apprenticeships and passing the bar exams. Such a detailed definition of the concept of “care” can only produce doubts.

At this point, it should be emphasized that the Constitutional Tribunal — although considering literal interpretation to be the most important principle — quite often departs from it. Other courts act with due caution in this respect. Compare, for example, the following approach of the NSA (the Supreme Administrative Court): “[…] attributing to the legislature intentions other than those explicitly specified in the Act is not justified. Additionally, the literature indicates the adverse consequences caused by application of teleological interpretation, neglecting the will of the ‘historical’ legislator, in isolation from other types of interpretation […]. This may result in a distortion of the real intention of the legislature, latitude in the application of the law and the resultant loss of legal certainty”27.

Another issue of controversy is the approach of the Constitutional Tribunal to investigative committees in which it quite arbitrarily interprets the constitutional norms. This is due to the connection between its activities and the functions of parliament. Currently, in the theory of parliamentary law only a few authors situate the close links between investigative powers of the parliament solely within the function of oversight28. Only by a few constitutional courts share such a view, including the Polish Constitutional Tribunal: the latter has held that: “The activities of the investigative committee must in fact be consistent with constitutional principles defining the boundaries of parliamentary oversight. The matter subject to examination by the committee must fall within the scope of parliamentary oversight set out in the Constitution and statutes. Investigative committees may therefore only scrutinize the activities of public authorities and institutions expressly specified by the Constitution and statutes. The activities of all entities not specified as subjected to Sejm oversight are beyond the scope of activity of the investigative committee”29.

Critics of these views believe that they negatively affect the position of parliament as the representative body as its interest in some spheres of public life is thereby reduced.

It should be added that today there is a widely held view that investigative powers function to pursue the public interest. This is declared explicitly in some constitutions (e.g. Article 82, first sentence, of the Italian Constitution of 1947) or implicitly (e.g. the Spanish Constitution states in Article 76 (1) that the investigative committee is created to examine matters “of a public nature”). Even the absence of

27 ONSA 2001, No. 1, item 2.
such wording in the basic law or parliamentary rules of procedure cannot, according to proponents of that conceptualization, deprive investigative powers of their links with the public interest. Such links always exist and are objective in nature, arising from the essence of a democratic state. On this basis, it may be concluded that its investigative powers allow parliament to examine any matter, as long as it is in the public interest.

Practically, any matter of public interest may be examined, including those related to moral behavior in the private sphere of the holders of high state positions or MPs. With the knowledge gained from use of its investigative powers, parliament may not only take decisions having binding legal effect, but also political decisions (e.g. to recall someone from his/her position in the pursuit of political responsibility), to formulate appeals and assessment.

Critics of this position point out that it is too far-reaching and excessively extends the powers of parliament, allowing it, in fact, to interfere with the jurisdiction of other bodies, which in turn can distort the functioning of the principle of separation of powers. Therefore, some of them — accepting the importance of the public interest as a determinant of parliament’s activity — however, try to soften its application. They believe that the public interest or — in other words — matters of public interest “are always seen from within the angle of the constitutional principle of separation of powers and the oversight functions of the parliament”30. This corresponds with the view that “where parliament is not competent in a given field of life, there is no possibility to justify investigative competence on the basis public interest — even if considerable […] . Public interest may […] be a relevant criterion to limit the admissibility of appointment of an investigative committee. This limitation may, however, be effective only if the examined matter was clearly contained within the scope of parliament’s competences”31.

In this context, it is worth noting that the contemporary functions of parliament cannot be treated separately, in isolation from each other. This truth is evident especially in the example of the oversight and legislative functions. I agree with K. C. Wheare who says: “Many legislatures find that their most effective instrument for making the government behave arises out of their functions as law-making bodies. They are asked to consider bills and, in the course of doing this, they look into administration. In particular they take the opportunity of financial legislation to find out what use the government is making of money that is to be voted. In most continental legislatures and in the legislatures of the United States also, it is through their law-making functions that the legislatures find their principal opportunities to control the executive”32.

From the constitutional principle of separation of powers the Constitutional Tribunal derives the view that an investigative committee cannot carry out examination

30 M. Lewandowski, T. Osiński, Sejmowa..., p. 11.
of bodies possessing attributes of autonomy and independence or possessing “only the attribute of independence of any other authority in full or in part”33. An example of such a body is — in accordance with the judgment of the Constitutional Tribunal on the so-called banking investigative committee — the National Bank of Poland and, in particular, its President. Commenting on this view, Ryszard Bugaj, a member of the Constitutional Committee of the National Assembly and one of the makers of the constitution, said: “We did not intend to put the President of the NBP above the law”34.

The Constitutional Tribunal plays the role not so much of “negative legislator”, as a positive “substitute legislator”. In its case law, the Constitutional Tribunal has repeatedly stressed that it is not its responsibility to assess the relevance, or even the rationality, of law-making actions35. However, there are examples of judgments in which it took the opposite position. Obviously, they are worth discussing in the context of the above concerns.

Most often, the Constitutional Tribunal examines the advisability of legislative action, relying on the principle of proportionality which has its origin in two components. In the case of the review of constitutionality of statutory provisions relating to the sphere of individual rights and freedoms, limitations thereof associated with the principle of proportionality, may be examined on the basis of the unambiguous provisions of Article 31(3) of Poland’s Constitution. This norm formulates a criterion of necessity, which amounts to imposing an obligation on the legislature the least burdensome means to achieve their declared purpose. It must at the same time respect the principle of proportionality, which is related to the adequacy requirement and the means of attaining it. This means that “from among the possible measures we should choose the least burdensome for entities on which they are imposed, or onerous to the extent no greater than is necessary to achieve the objective”36.

However, as concerns the regulations not related to the sphere of rights and freedoms of the individual, The Constitutional Tribunal derives the principle of proportionality from the concept of the rule of law (Article 2 of the Constitution). This principle is not explicitly or implicitly expressed in the Constitution. It expresses the interpretation by the Tribunal of Article 2 of the Constitution. There are, however, no clearly defined premises for its use in the basic law.

Under this approach the Tribunal sometimes seems to interpret the principle of proportionality too broadly, forgetting judicial restraint. In assessing whether there has been a violation of the principle of proportionality, the Tribunal examines “any allegation of unreliable, incomprehensibly intense action by the legislature using its regulatory freedom”37.

In one judgment, the Constitutional Tribunal held that an application can be “regarded as proven if — from the point of view of the standards of legal culture and the principles of rationality — legislative interference was excessive in relation to the objectives, or these objectives were outside the scope of operation of power admissible in a democratic system of government”\(^{38}\). In the judgment on the so-called banking investigative committee, it moved beyond this restrictive approach. In the case of a developed system of standing committees it presented an approach allowing for the creation of investigative committees only when a matter cannot be dealt with by the standing committees. The Constitutional Tribunal said, “replacing the function of parliamentary committees — having sufficient means of making studies and analysis of a phenomenon which can be examined with the use of conventional analytical methods typically applied to legal and economic phenomena — with an investigative committee by means of inquiry would be a ‘constitutional excess’ because there is no proportionality between the aim and the means of achieving it”\(^{39}\). In this justification, the lack of argument, characteristic of legal positivism, is clearly visible.

This position seems to violate the principle of autonomy of the parliament and does not receive much support in the literature and parliamentary practice of democratic states. On the contrary, opposite trends can be observed in some parliaments of developed democratic countries where, despite conferring investigative powers on standing committees, there is no disappearance of investigative committees (see, e.g., in the United States and France).

In its judgment concerning the declarations of assets of elected members of local government\(^{40}\) the Constitutional Tribunal held that the deprivation of the mandate of those members of local governments who failed to submit the required declaration on time is a violation of the principle of proportionality by the legislature. At the same time, it referred to both the origins of that principle and pointed to “the causes of the lack of proportionality of the contested norms […] that is: the severity of sanctions in combination with the weight of infringement in the absence of any harm to the objective of declaring assets; the unnecessary nature of the sanctions in combination with the purpose of declarations; inadequacy of prolonged procedures for expiration of the mandate in combination with the lack of premises for verification of the causes and seriousness of flaws in this proceeding; the weight of the good sacrificed (restriction of passive and active voting rights by depriving the election of effect, the abandonment of the principle of sustainability of a mandate obtained in the elections, which should be given protection under the principle of subsidiarity) indicates a violation […] of Article 2 and Article 31(3) of the Constitution”.

From the grounds of the judgment on the asset declarations of members of local government it follows that the Tribunal, relying mainly on the principle of propor-


tionality, found the provisions governing penalties for late submission of the declaration unconstitutional. It considered the severity of the sanctions to be excessive and stated that the purpose of the regulation, which is submission of a declaration by a member of local government, could have been achieved without using it. Thus, the Constitutional Tribunal, as it were replacing the legislature, has expressed a different philosophy of approach — less restrictive, with a more developed procedure for correction of deficiencies and the system of appeals in relation to expiration of mandate. So it attempted, in fact, to balance conflicting values and interests of society, but this is mainly the role of a democratically elected parliament, in which different social groups are represented and articulated. It is also worth noting that the regulation challenged by The Tribunal, despite — or perhaps because of — its rigorous consequences, was recognized as adequate by two parliaments — one that enacted it and the other which made no attempt to change it.

In addition, in its earlier case law the Constitutional Tribunal had approved similarly stringent sanctions and recognized the freedom of the legislature to impose them. In one case, it held that the expiry of mandate of a councillor who did not resign — within 3 months of the taking an oath — from carrying on economic activity with the use of property of the local government body for which he had been selected — to be in accordance with the Constitution. It was in favor of the introduction of “a real sanction for non-compliance with the prohibition”41 and did not consider as such the pre-existing disciplinary responsibility combined with the loss of the right to per diem allowance.

The Constitutional Court also examines the appropriateness of legislative action, based on the principle of rationality of the legislature’s actions related to the principle of good legislation (derived from the rule of law, but not explicitly expressed in Article. 2 of the Constitution). In this respect, the most far-reaching views have been expressed by the Constitutional Tribunal in its judgment concerning the constitutionality of certain provisions of the Act of 1997 on Enforcement Officers and Enforcement Procedures42. In examining this case, when assessing the advisability of statutory regulation, the Constitutional Tribunal did not seek merely to determine whether the examined provisions enabled the implementation of the objectives set by the legislature, but it also set targets which — in its opinion — the legislature intended to, or even should, achieve. It was only on the basis of this criterion that it negatively assessed the advisability of the examined statutory regulation and therefore — considering it as unreasonable (“doubly inadequate to the purposes of regulation”) — and found to be incompatible with the Constitution. “It is difficult to agree with this opinion, First of all, due to the fact that accepting it would confer on the Constitutional Tribunal powers that make it a positive legislator”43.

The Constitutional Tribunal exceeds its index of power as conferred by the Constitution.

As an example we may use a judgment on the constitutionality of certain provisions of the Act of 29 December 2005 on Transformations and Changes in the Division of Tasks and Powers of State Bodies Competent for Communications and Broadcasting\textsuperscript{44}. In justification of that judgment, the Tribunal criticized several infringements that it found in the legislative process, and concluded that they influenced the quality of the process and its product, namely, the enacted legal regulations. All of this led to a situation where — in the words of the Constitutional Tribunal — there had been “a violation of standards of moral conduct in parliament’s activity as well as political and legal culture.” This expression goes beyond the scope of competence conferred on the Constitutional Tribunal by the Constitution, because — as is rightly noted in a commentary to that judgment — “it appears that the Constitutional Tribunal has no constitutional legitimation to assess the activities of other constitutional organs of the state in terms of quality, moral standards or the requirements of political and legal culture”\textsuperscript{45}.

Exceeding the normative content of the challenged Act clearly violates the scope of constitutional powers of the Tribunal. This has been pointed out and criticized above in relation to other judgments\textsuperscript{46}, but sometimes the Constitutional Tribunal ignores this criticism.

In its judgment on the Sejm resolution to establish the so-called banking investigative committee one can further notice that the Tribunal exceeds the scope of its constitutional competences. In justification of its judgment, the Tribunal relied upon the principles relating to the questioning of witnesses (e.g. the manner of posing questions) and stated that in the case of members of the investigative committee “it should be reasonably expected that the highest moral standards be respected” as well as “cultural sensitivity and tactful conduct”. It is worth noting that the Constitutional Tribunal articulates these comments in an abstract way, and not when it went on to assess the work of the committee. “However, this may raise doubt as to whether the Tribunal goes beyond its constitutionally defined roles, instructing other state bodies how to apply the existing law. Indeed, that part of the justification discussed here is addressed not to the legislature but for benefit of future investigative committees and their members”\textsuperscript{47}.

the Tribunal exceeded norms of interpretation as to the limits of an application. In that case, the applicants asserted the unconstitutionality of the entire Act or non-compliance with the Constitution of the Republic of Poland in twelve of its articles indicated by them. The judgment and — as noted in the dissenting opinion by one of the adjudicating judges — the Constitutional Tribunal “using a special (a not hitherto applied) legal formula found unconstitutionality only in relation to most of its chapters […]]. In practice, however, this will result in the inoperability of the entire […] act and a number of provisions of the ‘accompanying statutes’. […] Only one of the provisions was found to be definitely unconstitutional but only one rule […] ‘in conjunction’ with the provisions (although unspecified) contained in the enumerated chapters of the Act (half of the total number of chapters). […] In its judgment, the Tribunal expressed no opinion on all the contested provisions, nor did it only confine itself to analysis thereof, but also addressed norms whose defects had not been raised in the application”49.

Another example of the tendency of the Tribunal to go beyond the index of powers conferred on it by the Constitution, are some decisions interpreting Article 190 (3) of the Constitution. This provision allows for the postponement of the binding force of a normative act. In such case, according to the Tribunal, it is entitled, “not only to adjudicate on the unconstitutionality of normative acts referred to in Article 188, and also in Articles 79 and 193, of the Constitution, but is also empowered to determine The time frame of the reverse effect of the judgment finding non-conformity of a particular provision (legal norm) with the Constitution”50. Defining them “involves consideration of various, sometimes conflicting, constitutional values”51. This form of reasoning as to the competence of the Constitutional Tribunal, even if not expressed explicitly in the Constitution but derived from Article 190 (3), has been generally approved in the court’s jurisprudence52. However, it has encountered doubts from legal theorists who argue, above all, that the Tribunal has no jurisdiction to rule on the application of the law, which falls within the scope of competences of the courts53.

The activism of the Constitutional Tribunal in this area leads inevitably (in this situation) to the “ politicization” of its jurisprudence.

This phenomenon can be seen in an analysis of the judgment concerning the conformity with Poland’s Constitution of certain provisions of the Act of 29 December 2005 on Transformations and Changes in the Division of Tasks and Competences of the State Authorities Competent for Communications and Broadcasting. The Tribu-

49 Ibidem: dissenting opinion of B. Zdziennicki.
51 Ibidem.
nal made critical assessment of the Act’s defects arising in the course of the legislative process. In considering that case, the criterion of moral standards in parliamentary work and criterion of parliamentary political and legal culture were used unnecessarily. In one of the commentaries, the author rightly notes that in the process of review of constitutionality of the Act and previously adopted positions of the Constitutional Tribunal it should be first determined whether the provisions of the Standing Orders of the Sejm, which the applicant referred to, are contained in that part of the Standing Orders which gives concrete forms to constitutional solutions, i.e. are ‘constitutionally essential’. If that is not the case, and this is evidently so from the Tribunal’s judgment, further findings of fact on the issue and assessments based on extra-legal criteria are unnecessary”. In order to explain the Tribunal’s reasoning, he made the following assumption: “not adhering fully to ‘purity’ of legal considerations, the Tribunal wished, perhaps, to indicate that Members who have lodged the application may be partly right, but their arguments are not strong enough to determine the unconstitutionality of the above Act”. This can be understood in two ways, either as an expression of a solidarity with the views of the applicants and with an element of justification with political overtones, or more modestly — “that the Constitutional Tribunal departs from the ‘letter of the Constitution’, and strives to reconcile (on the basis of a ‘compromise settlement’) various political and social forces”.

In the justifications for certain judgments of the Tribunal, we can find fragments that we consider inappropriate, for example, in the judgment concerning the so-called banking investigative committee. In these examples, the Tribunal considers the possibility of summoning the holder of the office of President of the Republic, although the issue at hand did not concern that possibility. It held that “the inclusion within a category of persons controlled — even potentially — by the investigative committee of persons holding the office of President of the Republic […] exceeds the scope of authority of an investigative committee specified by the Constitution and statutes”. One must ask what is the sense in expressing this view, since it is not known whether this means a prohibition on summoning the President of the Republic for questioning. The Tribunal has not taken a precise position in this regard. So what, exactly, did it want to say? Or was it warning us of something? In answering such questions, we may use not only the arguments of a legal nature (to clarify the possibility of summoning the President of Poland for questioning we may perhaps refer to the views Polish legal theorists, and they are not uniform), but even different speculations of a political nature.

The political nature of the case law of the Constitutional Tribunal is also manifest in that part of its judgment on the declaration of assets by members of local government, in which it attempted to balance conflicting values and interests of society.

Another example of the inclusion of assessments of a political character in the reasoning of the Tribunal’s judgments relates to the regulation on the so-called sec-

54 P. Czarny, Glosa do wyroku TK z dnia 23 marca 2006 r..., p. 122.
The activism of the Constitutional Tribunal infringes the principle of judicial restraint.

The Constitutional Court in its case law has repeatedly emphasized that aspect of the principle of judicial restraint that approaches review of statutes with a presumption of conformity of the examined norms with the Constitution. In this situation, the burden of proof should rest with those contesting that conformity. Therefore, the imposition on the legislature of the burden of proving that the claim is inconsistent with the Constitution, is an abandonment of the principle of judicial restraint. However, that was the case in the judgment concerning biofuels. In that judgment, the Tribunal made restrictions on freedom of economic activity dependent on the legislature proving the beneficial impact of biofuels on the environment. If it could do so then the effect on environmental protection would be proportionate to the restrictions placed on freedom of economic activity.

III. ADJUDICATIVE ACTIVISM OF THE CONSTITUTIONAL TRIBUNAL AND THE DOCTRINES OF POLISH CONSTITUTIONAL LAW

The adjudicative activism of the Constitutional Tribunal has not so far been the subject of any comprehensive study in Polish literature in the field of constitutional law. The problems associated with it are rarely noticed and discussed only in the context of other issues or in commentaries to judgments. This activism is assessed in different ways. It has met with a generally positive reception since the emergence of the phenomenon in the transition period, in the context of the role of the Constitutional Tribunal in adapting the Constitution to the needs of social development. Thereafter, the first negative opinions emerged concerning the interpretation by the Tribunal of the principle of the democratic state ruled by law introduced in Article 1 of the Constitution in December 1989. In his comments on the importance of this constitutional provision, both in constitutional law doctrine and the case law of the Constitutional Tribunal, A. Pułło wrote: “sometimes it sees only one rule, sometimes two, three, four, or even five. Moreover, if we bear in mind the principles de-
rived by the theory and practice from the words and phrases used in Article 1, we will obtain a set of at least a dozen rules of law”.

In consequence, A. Pułło comes to the following conclusion: “modern constitutional law should not give the opportunity to acquire the character of legal principle through terms which have a distinct ideological and programmatic orientation and, in addition, are ambiguous and general”. This critical view is also shared by other constitutionalists and legal theorists, including L. Morawski who claims⁶³: “it will forever remain a mystery by means of what logic the Constitutional Tribunal has managed to derive from a few words contained in Article 1 of the Constitution such a magnitude of principles in such diverse fields of application and regulation, and at the same time justified so many exceptions to them.” The views emphasizing an excessively broad interpretation of the principle of rule of law are still valid when considering the basis of the current jurisprudence of the Constitutional Tribunal, the more so that the constitutional formula has not much changed. In 2006, Z. Witkowski, in reference to the above-cited view of L. Morawski, wrote: “There is much justification for it. The principle of the rule of law, not yet explored, is given in the Tribunal’ jurisprudence and literature the broadest possible meaning — as if ‘in advance’”⁶⁴.

Deriving a too-far-reaching content from the rule of law is also criticized by some members of the Constitutional Committee of the National Assembly who created the new constitution. A good example of this is the following statement by R. Bugaj: “And if we knew that the Tribunal — pursuant to Art. 2 stating that the Republic is a state ruled by law — could question the provision of the right to abortion for so-called social reasons, we probably would not have included this article in the Constitution”⁶⁵.

These observations retain their relevance in the context of the inference by the Tribunal from the concept of the rule of law (Article 2 of the Constitution) of a principle of the rationality of the legislature’s actions related to the principle of good legislation, and in the context of the interpretation of the above-mentioned examples of the principle of proportionality, also derived from Article. 2 of the Constitution.

For those who are satisfied with an increase of adjudicative activism by the Constitutional Tribunal that reduces the significance of other authorities, particularly the legislature, the view of S. Wronkowska is typical. She — at the conclusion of her very interesting study — states that⁶⁶ “These observations clearly indicate […] a significant degree of discretion in the Tribunal in the phase of interpretation of the pattern of constitutional review and in the course of adjudication (based on this pattern) on the unconstitutionality of a law. This discretion seems to be so far-reaching that the Tribunal co-decides, within the limits specified by the Constitution, what are the values of the rule of law and decides when these values have been violated by the legislature to such

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an extent that it justifies finding the lawmaking act unconstitutional. The question arises of how to justify this kind of decision. [...] I find two answers to this question. [...] Respecting the rules of decent legislation and favoring the achievement of the attributes of law, such as its consistency and functionality, transparency, comprehensibility and certainty, helps to preserve the regulatory capacity of law [...] and also hinders acts of political manipulation of the law. [...] With reference to the rules of good legislation and taking them into account when adjudicating the constitutionality of a law, the Tribunal does so for the sake of protection of the legal situation of the individual [...] and for such actions it seemingly has public acceptance”. S. Wronkowska points out one threat related to the activism of the Tribunal: that it ignores “one of the fundamental values of the rule of law, which is the predictability of decisions by public authorities”. But at the same time she asks: “What could be an alternative to that significant activity of the court?” And she responds: “the vision of the state in which the legislative authority has, indeed, the duty of achieving the ideal of the rule of law, but to the extent and insofar as it considers it [...] to be admissible and desirable. At the same [...] the decisions of the legislative authority in this matter would no longer be subject to institutionalized legal control. So, in fact, the dispute is about the contemporary concept of the rule of law [...]”.

The last sentence perfectly reflects the essence of the problem, and at the same time shows what can be the result of the excessive adjudicative activism of the Constitutional Tribunal — an assumption by the Tribunal of the power to decide not so much about the vision of the rule of law, but about its specific solutions. At this point, it should be noted that the decisions of the Tribunal are no longer subject to institutionalized legal control. It is, therefore, difficult to understand why they, and not the decisions of the legislature, would be better and more consonant with social expectations. Obviously, it is parliament that emerges from democratic elections and it should, in principle, be better at articulating these expectations. Otherwise, the fears of those who, based on the growth of democratic activism in some countries and the jurisprudence implied by an expanding role for the constitutional court, discern an assumption by the court of a central position in the state may prove to be well-founded. The instances of the excessive adjudicative activism of the Constitutional Tribunal outlined above, and those referred to in the literature cited, allow us to conclude that the scale of the phenomenon is not yet so advanced as to be an actual threat in Poland. However, we should discuss how to keep the adjudicative activism of the Constitutional Tribunal within the limits preventing it from assuming a central position in the state and so prevent the emergence of other problems connected with it. Here we can raise the following matters.

1. Attention should be paid to the growing importance of the principle of judicial restraint and giving to it the shape adopted by the U.S. Supreme Court and some constitutional courts of democratic states.

2. “In order to prevent adjudicative activism from becoming ‘chaotic’ or ‘political’, we must observe [...] the principles of legal rationalism, based among other
things on excellent knowledge of the law (required of lawyers) and its resultant case law […] with a positivist narrative, closely related to the content of normative acts and the Constitution, should definitely dominate”67.

3. Each judge of the Constitutional Tribunal should observe the following principle: “A correlate of the principle of the independence of the judge is the duty of impartiality” which “sometimes goes further than the scope of protection of independence. While this principle applies to the impact of external actors, the duty of impartiality obliges the judge to resist assessments stemming from his experience, stereotypes and prejudices”68.

4. Each judge of the Constitutional Tribunal should reduce to the minimum any public statements of a political nature. Groups or persons criticized by the judge may have reasonable doubts as to his/her impartiality before he/she takes on any activity. Any decision of such a judge would be assessed by the public from the perspective of his/her earlier statements (or the manifestation of views made in a non-verbal way). It should be remembered in this context that “judges, like other citizens, enjoy freedom of expression, belief, association and assembly, provided, however, that in the exercise of these rights they strive to protect the dignity of their office, its impartiality and independence”69.

5. The entire Tribunal “in cases with a considerable political context, should demonstrate that the selection of the judges by a particular political party does not affect the independence of the decisions of this body. It cannot be subject to social emotions and stereotypes or conformist behavior”70.

6. The issue of re-introducing the possibility of rejection of the Tribunal’s judgment by parliament by means of a majority vote required to change the constitution should be considered71.

68 Ibidem, s. 359.
69 S. Pawela, Zasada niezawisłości sędziowskiej w poglądach Trybunału Konstytucyjnego, [in:] Kons
70 B. Zdziennicki, Zdania…, p. 146.
71 This proposal was submitted, inter alia, by. R. Bugaj i A. Wołek, for more on this topic see: E. Olczyk, B. Waszkielewicz, op. cit., p. A1.
THE SEJM OF THE REPUBLIC OF POLAND
AND THE REPRESENTATION OF INTERESTS*

ABSTRACT

The Sejm of today should be seen in connection with the entire system of representation of interests, where parliamentary representation is only one of the platforms in which different interests are manifested. Poland should adopt solutions to organize her system of governance and system of organization of public interests in a way enabling her to protect the interests of the state and its people in the globalized world. The perception of the Sejm, in the context of the emergence of extra-parliamentary forms of representation of interests seems to be of utmost importance for parliamentarism in Poland. What is at issue is the political and organizational ability of the Sejm to discourse with the most widely comprehended representation of public interests, performed either by the political parties and corporations, or by lobbyists. It determines, on the one hand, the cohesion of the system of governance, and on the other — its ability to claim public legitimacy. Due to its law-making function, the Sejm should be treated as an organ in which the activities reflecting different interests of various elements of the society are concentrated. This means, as a consequence, that it has to gather together all forms of representation of interests, since this is now the most important issue for the development of Polish parliamentarism.

The system of representation of interests and the system of governance must be perceived as a combination of an organized civil society (with a well-developed system of representation of interests) and an effectively functioning representation within the system of governance (in particular, the Sejm). In Poland, participatory democracy is particularly desirable, mostly because of the weakness of her parliamentary system and a definitely negative view of parliament expressed in public opinion polls. A multitude of newly created systems of representation of interests would contribute to effective protection of interests and promote the legitimacy of governance. To this end, above all, the instruments of lobbying and corporativism.

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The Treaty of Lisbon, giving the opportunity to find proper solutions for strengthening the position and function of the Sejm within the system of governance, forces changes which should enable Poland to contribute effectively in the law-making process. Increase of powers of European Parliament in that area results in the need for greater symmetry of power in Polish solutions. The task of Poland’s effective involvement in the system of the European Union may be accomplished by establishing new mechanisms of operation of the Sejm (and the Senate) to be supported by activities of institutions representing interests.

The recognition of the liability of the state for legislative unlawfulness places the Sejm in a new position in relation to the sovereign. The case of claiming damages for “legislative nonfeasance” is of special significance in that respect. However, its application may be limited.

Nearly a quarter of a century of Poland’s independent existence is, on the one hand, a relatively long period of time, because as long as a generation; but if, on the other hand, you look at the achievements, you may find the period too short to change anything truly essential. How should we interpret nearly 25 years of the existence of an independent parliament? The adoption of two constitutional acts, namely the Small Constitution and then its complete replacement by another — accompanied by new rules of procedure of the chamber and many amendments, Poland’s accession to the EU and the regulation of lobbying — these are some, perhaps the most important, of the achievements that have significantly shaped the status of the Sejm within the system of government. The question is, which point of reference should we use when discussing the achievements of the Sejm: similar institutions in Western Europe, the solutions followed in neighbouring countries, and perhaps the 20-year interwar period, a period that can boast two constitutions, the August Amendment — from a constitutional and political perspective perhaps the greatest achievement of that time, or should we rather refer to perceptions and expectations? Polish political thought of the last 25 years probably more often reflects patterns from the inter-war period and from such experience the Polish political class started its path towards democracy when introducing reforms in 1989. This path can be divided into several periods, for which the turning point is not necessarily the adoption of successive constitutional acts; it will be the subject of detailed analysis below. Addressing the process of change, we should take into account the authoritarian nature of the communist regime in the Polish People’s Republic, as well as the consequences for the mentality and political culture of the Poles. Therefore, the starting point was particularly fraught: the former communist regime not only left an institutional legacy, but also shaped a personality devoid of knowledge of the most important mechanisms of public life and incapable of self-involvement in the process of change.

The reforms begun in 1989 were initially devoted to remodelling the institutions of power, and only later did new solutions appear which were based on civil society creating its own system of organizations on which the modern state is founded. Even after twenty-odd years, it is difficult to argue that the process of building a system of “social pressure” organizations has been completed. It is worth noting that, in practice, it is developing with some difficulty; but taking into account the mechanisms of
power, both in the internal context as well as Poland’s participation in the system international co-operation, it remains an indispensable solution to underpin protection of the country’s interests.

The modern Sejm should be seen in conjunction with the entire system of interest representation in which parliamentary representation is only one of several platforms providing for advancement of various interests. We must therefore address the issue of the evolution of Polish solutions to such changing circumstances and, above all, adopt those that will allow Poland to organize its system of power and organization of social interests in order to protect the interests of the state and its people in a globalizing world. The process of globalization should be seen from the perspective of the impact of the European Union and international corporations, as well as the possible transformation of civil society — at least in Europe — due to developments in information technology. The question arises to what extent the political changes introduced over the last quarter of a century have let the Poles engage through the institutions of state and society — in global governance processes and what part in this process is taken by the Sejm. Here, it is important not only to identify which state institutions are shaped and how, but also — and, perhaps, primarily — to identify what the priorities are in this activity.

It should be remembered that Poland undertook reforms to restore the traditional institutions of parliamentary democracy founded on the principle of the sovereignty of the nation implemented by and through the principle of representation. At the institutional level, the assumptions of democracy-building were rationally complemented by the principle of the separation of powers and the adoption of the parliamentary system of government with a significant locus of powers in the office of the President of the Republic. The functions performed by these principles are varied and, perhaps, the most spectacular was the return by Poland to the principle of separation of powers, which, together with the reference to the principle of national sovereignty and the principle of representation, formed a turning point in the status of the Sejm: it thereby found itself in a properly defined position in relation to the other powers. Regaining a rational position within the system of powers, the Sejm has become part of a newly established mechanism of the representative form of governance. This was explicitly stated in Article 1 of the Small Constitution of 1992, according to which “[T]he State organs of legislative power shall be the Sejm and the Senate of the Republic of Poland, executive power shall be the President of the Republic of Poland and the Council of Ministers, the judicial power shall be independent courts”. This may seem an obvious solution in hindsight but for Poland it was a fundamental change, completely altering the existing structure of state power. It should be emphasized that the above-mentioned regulation was important not only for the country’s system of government, but also for initiating a process of transformation in political mentality, especially of those politicians who had begun their career in the communist era. Moreover, the political class was faced with the problem of an appropriate division of tasks, functions and powers between the legislative and executive branch and this was finally supported by several significant judgments of
the Constitutional Tribunal which clearly put the mechanisms of power into order. Such a class of “problems” — even if only relating to individual cases of the exercise of powers — could be and were resolved fairly swiftly. By contrast, the place of the Sejm in the apparatus of power, i.e. in its relation to an executive composed not only of the Council of Ministers but also the President of the Republic, as well as the detailed division of powers between them, has been notably more problematic: it is, above all, a question of the constitutional concept of the state.

To summarize, it can be said that on the brink of democracy in Poland and the new position of Sejm within the system of power, there are two issues of crucial importance for the system of government:

1) the location of the Sejm in the system of interest representation as the main entity implementing the principle of representation, but seen from the perspective of its relationship with other entities currently participating in the performance of this task;

2) the location of the Sejm in the apparatus of power, that is — considering the issue in the context of its purely structural aspect in relation to the executive.

It seems to me that the first of these two issues is extremely important and decisive for the effectiveness of the Polish political system, the more so because it affects the issue of legitimation of authority, in particular, that of the Sejm. In the present context, the position of the Sejm in the apparatus of power should always be examined through the prism of its capacity to represent the interests of the public.

Thus, an independent Poland, like all states on a path to democracy based on the model of representative government and a tripartite separation of powers, has made an attempt to integrate these concepts into its constitutional arrangements. From the formal point of view, implementation of the principle of representation in the spirit of liberal democracy was already reflected in the Constitutional Act of 29 December 1989 amending the constitution of the Polish People’s Republic. But the principle of separation of powers was only established by Article 1 of the Small Constitution of 1992. These solutions were later replicated in the Constitution of 1997.

As a starting point for analysis of the transformation of the position and role of the Sejm, the following two approaches should be adopted: (1) the presentation of the Sejm as a subject of representation of interests, i.e. in relation to the entire system of organizations representing interests and (2) a strictly constitutional-legal approach that enables one to establish the systemic concept of parliament within the whole apparatus of power. Certainly, the question may be posed whether such division in analysis of the Sejm is actually possible: taking into account the previously-mentioned assumptions about the examination of the concept of political status of the Sejm, I think that such approach to the matter in question is acceptable and the identified issues may be considered separately. Consequently, the issues relating to relations within the apparatus of power will be outside the scope of my interest.

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It seems to me that the most important factor in the further development of the Polish parliamentary system is the perception of the Sejm in the context of forms of representation of interests — other than the parliamentary — now emerging in Poland. By this, I mean not the representativeness of the Sejm in the party political sense, but its political and organizational ability to enter into relations with the representatives of social interests, broadly conceived. The Sejm — due to its legislative function — should be treated as an entity in which forces reflecting a multiplicity of different social interests are focused. Consequently, this means that it should encompass all the forms of interest representation, including political party interests, corporate interests and lobby groups. I believe that this is today the key area for activity by the Sejm and is an important factor determining, on the one hand, the coherence of the system of power and, on the other, its ability to achieve social legitimacy. The activity of the parliament in this field may be crucial for the participation of Poles in the exercise of power and, as a consequence, affect its political position. It is also even more important in connection with changes taking place within the EU.

There is no doubt that in relation to the issues identified above, we cannot ignore the position of the Sejm in the field of European affairs, even if the relationship between them is indirect. The globalization of power, affecting not only the economic system but explicitly limiting the functions of nation states consequentially influences the role of parliaments and their political importance. The problem of finding solutions that would combine the effectiveness of Poland’s activity in the EU with the need to maintain a strong position for the Sejm within the system of power, seems to me to be particularly important and deserving of analysis.

There can be little doubt that the issues outlined are of a fundamental nature, but they do not cover all aspects of the articulation of the Sejm with existing interests and its relation to the individual. I believe that we should focus on the position of the Sejm as a representative of the will of the nation of the subject to liability of the State for legislative illegality introduced — for the first time in Polish constitutionalism — in Article 77 paragraph 1 of the Constitution of 1997.

I. THE SEJM AND CURRENT CHALLENGES IN INTEREST REPRESENTATION

In this respect, the basic issue is, obviously, the choice of electoral law, but this issue is the subject of another article. Currently, a matter of particular importance for the place of each parliament, and thus also the Sejm, is defining its role and function in the mechanisms of power in the state in the face of processes of globalization.

This may seemingly appear a side issue, and it is so perceived, I believe by politicians. However, the empowerment of the people, increasingly evident in domestic relations, associated as it is with a considerable diversity of interests, clearly limits the representativeness of parliament and exposes the need within the Polish system for forms of interest representation other than party interests, such as lobbying or public hearing. These developments are not merely an adjunct to the model of parliamentary representation, but considerably complement the representativeness of power in spheres that are inaccessible to the typical operations of parliament.

The principle of representation, not only in its classic version, requires some modification, as was pointed out by G. Leibholz in the 1950s\textsuperscript{3}, but also today, as it becomes progressively more inadequate.

The multidimensional character of decision making — resulting from the global approach to the process of governance in Poland — has been clearly evident since Poland’s accession to the EU; environmental and security issues come to mind. Factors of this type should compel reforms of the state system aimed at extending the means to enable civil society to gain greater access to the decision-making process. We cannot omit looking at the decision-making process from the perspective of the interests of big business corporations whose level of globalization is particularly great. Given an extensively open market, this results in the reduction in the ability of the nation-state to make decisions. This fact is further reflected in the scope of real ability to make laws, even at the level of parliament. These processes cover the system of organization of the Polish state. Its adaptability is also reduced by weaknesses in the social structure, so evident in contemporary Poland.

The system of representation of interests and the exercise of power must be conceived as a combination of two complementary structures: (a) an organized civil society with an extensive system of interest representation and (b) an efficiently operating representation in the system of power, above all — the Sejm. The consequences of the transformations taking place under liberal democratic premises in Poland are felt the more strongly as the country is weak and, particularly, where the availability of domestic capital is limited. The effectiveness of the Sejm and its representativeness is considerably weakened as a result of the combination of these circumstances, including the weakness of the social structure and, hence, poor organization of interests and economic backwardness as well as clearly evident traits of political capitalism: the latter two have met with a particularly negatively public reception.

The consequences can be readily seen in the actual scope and mode of operation of the Sejm. As Maria Kruk rightly remarks, in the legislative function (classically formulated as highlighting the implementation of the will of a sovereign nation) one can identify the point of encounter of the traditional doctrine, which places both the

Sejm and its statutes in the role of representative of the nation’s will, with the hard reality of global Europe and also, in many instances, of the world⁴.

A question may therefore be asked as to whether the development of institutions supporting the participation of organized social interests of multiple character is of decisive importance to the representative system of government in Poland. In my opinion, such system is primarily intended to manifest the diversity of interests and to enhance representativeness, both of which should lead to an increased improvement of the system. Moreover, their purpose — and this seems to be a matter of great importance — is to encourage transparency in law-making and, consequently, to reduce such negative phenomena as corruption, nepotism and clientelism. One may assume, I believe, that the result can be seen as a peculiar triad of interest representation. This triad would, in my view, include typical parliamentary activities, organized interests, or corporations operating in the Tripartite Commission and — particularly — lobbying. The system is nascent and requires transformation, but is a strong starting point for the creation and consolidation of a strong civil society in Poland.

The tasks of the Sejm functioning as an entity representing interests in accordance with Article 4, para. 2, of the Constitution, are nowadays subject to various processes transforming Polish society. This is a matter of great practical importance and, from a purely legal point of view, one must pay special attention to the results of Poland’s membership in the EU. This gives rise to definite effects on the Sejm due to the specific nature of this organization, but we should bear in mind that membership in other organizations also brings about consequences which restrict the ability of the Sejm to act independently. In short, its ability to represent interests is also restricted.

So, this is why the political consequences of regulation powers in the law-making are of particular importance. In my opinion, they also indirectly affect the relations between national parliaments and the European Parliament. But for internal relations, the fundamental importance is the regulation of cooperation between the Council of Ministers and the Sejm on issues related to Poland’s membership in the EU.

The rise of lobbying in Poland has had effects on the Sejm within the system of interest representation system. Here, we should pay particular attention to the role of the institution of the public hearing: it has a special character, at least when looked at from a purely formal point of view. Additionally, there are limited forms of corporatism that have persisted for many years: they, too, have consequences. The regulations introduced in Poland by the Act on Lobbying in the Law-making Process⁵ in no way satisfies the requirements usually imposed by regulations of a similar type⁶. First of all, we should subject to critical evaluation the approach that primarily treats

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⁴ M. Kruk, Tryb przystąpienia Polski do Unii Europejskiej i konsekwencje członkostwa dla funkcjonowania organów państwa, [in:] Otwarcie Konstytucji RP..., p. 159.
⁶ This is pointed out, with right justification of negative assessment, by M.M. Wiszowaty, Ustawa o działalności lobbingowej w procesie stanowienia prawa, “Przegląd Sejmowy”, 2006, No. 5, p. 54 et seq.
lobbying as a method of counteracting corruption and other social pathologies. Leaving aside other regulations with the same aim, it should be clearly stated that the function of lobbying should have been seen as an opportunity going beyond representation of interests pursued by the party representative directly on behalf of entities represented by lobbyists. This attitude has produced a negative public reaction, the more so since various pathologies are frequently seen in the activity of the Polish parliament. The opportunity to develop a broad form of interest protection was thus squandered and, ultimately, lobbying, instead of being one of the tools applied by civil society, is just another less effective way to represent interests. Its already small importance is weakened by the restriction of its use to the field of law-making and, in this respect, the imprecise definition of the class of clients for whom lobbying can be carried out. The above-mentioned Act states, Article 2, that: “lobbying activity consists of actions conducted by legally admissible methods and that seek to influence, which regulates lobbying in an unequal way and — as can be concluded on the basis of the whole — public authorities in the law-making process”. At the same time, disclosure of information on the legislative work program applies only to bills submitted by the Council of Ministers. This does not, however, necessarily result in exclusion of the Sejm from its application, but it does reflect the lack of a clear concept characterizing both legislative proceedings and its legislation — a misunderstanding of the importance of the specific nature of that institution. It is difficult to give an unequivocal answer whether this legislative mess affects the scope of lobbying in Poland. But, obviously, it has a negative impact on the use of new mechanisms in the representation of interests in Poland.

These criticisms also apply to the public hearing, whose structure also does not comply with generally accepted requirements. It is very rarely used as an instrument. To sum up, it can be stated that the solutions intended to assist parliament in the exercise of its function of representing interests have proved ineffective. The main reason, I suggest, is the “watering down” of the lobbying legislation which is primarily the result of an erroneous definition of the notion of lobbying; this not only produces its improper application in Poland, but also has negative consequences for the system of government. The Act defines lobbying as …actions conducted by legally admissible methods that seek to influence…” and states that “professional lobbying is a gainful lobbying activity conducted on behalf of third parties in order to promote the interests of such third parties being taken into account in the law-making process”. This approach results, above all, in the lack of real ability to properly control the legality of lobbying, which has been practically confirmed in recent years. More-
over, as a consequence of the broad legal definition of Polish lobbying the distinction between this form of representation of interests and corporatism (whose fundamental institution in Poland is the Tripartite Commission for Social and Economic Affairs) has been blurred. Similar consequences are caused by including in the category of lobbying all those activities that are undertaken by many other organizations which perform important consultancy functions, primarily in the legislative process. This blurs the difference between lobbying and other methods of protection of interests. It may also raise doubts as to whether, in its current form, lobbying does not affect the ability to create institutions of participatory democracy in Poland, those that have the purpose of producing democratic consensus. In Polish conditions, participatory democracy is particularly desirable due to the weakness of the parliamentary system and the latter’s poor reputation in the eyes of the public. This purpose would not be easy to implement in practice, as the causes of impairment of the parliamentary system are largely rooted in the decomposition of the social system; but it seems preferable to seek solutions of a diverse nature. One might expect that a multiplicity of systems of interest representation would facilitate an improvement in the efficacy of their organization and increase the representativeness of power. Accordingly, it is necessary to adopt a new Act, which should primarily regulate lobbying as a professional activity — or not — and paid for, by a specific subject. This would allow for the introduction of detailed provisions governing its legality and, in consequence, dealing with any breaches.

Additionally, this would resolve doubts about the nature of the political system, allowing us to distinguish acting in the interests of third parties for remuneration as distinct from the implementation of certain freedoms and civil rights; it could also provide a basis for detailed regulations, especially concerning the control of the activities and consequences of legal violations. The experience of Poland and, above all, liberal democratic countries clearly indicate that in modern society there is a need to create a diverse system of interest representation, one of whose tasks is to support the parliamentary system which — in today’s social and political circumstances — is inadequate. The parliamentary system defines the actors and their interests too narrowly to be able to form a force capable of representing them independently.

The creation of a system of interest representation and the situation of parliament within it is today a major challenge for many countries, obviously including Poland which lacks a liberal tradition and sufficient experience in the field. In this respect, the shaping of lobbying and social dialogue is of key importance.

10 A different viewpoint, especially on determining the scope of lobbying activity, is presented by W. Wołpiuk, *Lobbing...,* p. 239 et seq.
11 The need for amendment of the Act is explicitly expressed by NGOs and firms performing professional lobbying activity, who demand inter alia regulation of issues connected with non-professional lobbying. Cf. *Informacja o działaniach podejmowanych wobec Sejmu rzeczypospolitej Polskiej w 2012 roku przez podmioty wykonujące zawodową działalność lobbingową,* [access: 7 July 2013].
In representation of interests there appear some threats of a more complex nature, which relate to the method and institution of interest representation. Here, I mean threats resulting from the division of powers between the Member States and the European Union. This engenders the emergence of two basic platforms for operation of the system of interest representation. The first concerns internal relations, and this aspect I have attempted to examine in this article. The second one may be defined as “EU relations”. The consequence of their existence is the need to add new concrete meaning to the function of representation of interests by the Sejm. At the same time, they are closely related with the representation of interests on the internal level.

It is therefore necessary, in my view, to state that establishing a real ability to participate in the process of interest representation of Poles by the Sejm — in both internal relations and relations with the EU — is of considerable importance in view of the emerging system of global power, in which the role and importance of the State is being transformed. The consequence of this process is the progressive restriction of the role and importance of the Sejm whose scope of functions and competences is being reduced. Thus, it should be pointed out that the government is also engaged in this relationship between the Sejm and the globalized system of power, in a manner typical of the executive branch of government. The government is, in fact, the beneficiary of this change, as it has the ability to operate actively, which determines events of real political significance. Analyzing the situation of the Sejm as the entity implementing the principle of representation, it should be noted in anticipation of further remarks, that the Sejm can obtain real ability to exert influence only if it is able to effectively exercise its function of controlling the government. This relates to both the actions taken in the context of internal relations and the decisions made by the institutions of the European Union. Due to the realities of the exercise of power, control mechanisms play a key role.

This does not, however, exhaust the list of doubts about how the resulting tasks and responsibilities are to be specified, and therefore we need to ask a further question. How the parliament should represent the interests of Poles in an internal context, so that the consistency of operation of the entire state apparatus together with interest representation at EU level could be simultaneously ensured? The response to this problem is of utmost importance for the implementation of two fundamental constitutional principles: the principle of sovereignty and the principle of separation of powers. Certainly, this does not require creation of separate systems, but has to have consequences for the organization of work in the institutions that exercise power, both the Sejm and the government. The existence of other decision-making centres cannot be ignored, and finding new mechanisms for maintaining the involvement of Poles has proved necessary. The task of finding new solutions is, of course, open to

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12 This is rightly pointed out also by J. Wawrzyniak, Globalizacja..., p. 225; cf. on this subject, though in a slightly different context, see Z. Bauman, Płynna nowoczesność, Kraków 2006, pp. 286–287.
13 This is pointed out by K.Wójtowicz in Funkcja kontrolna Sejmu w zakresie integracji europejskiej, “Przegląd Sejmowy”, 2008, No. 3, p. 83.
debate but it has an overriding importance within Poland today, particularly in the context of the experiences not only from the communist regime, but also from almost 25 years of an independent Sejm.

As we today formulate the assumption of the multi-centric nature of the sources of law, we must point out that this phenomenon is derived and depends on prior recognition of pluralism of the centres of power. After its accession to EU in 2004, Poland found itself — in the political sense — within a dual system of power composed of a national centre focused around the Sejm, the Senate and the executive, and a supranational centre — the EU institutions. In transferring some of its powers under Article 91 of the Constitution, the Sejm entered into a new institutional arrangement within the European order. The question we ask today concerns the relationship between the Sejm (and the Senate) and the European institutions. This issue has two dimensions, as it is not just about regulating the scope of competences, subordination, co-existence of different types of sources of law, but probably to the same extent reveals the need to find an ideological motivation which could be used as a legitimating factor in relations between the nation, the Sejm and the European Union. Therefore, I would like to identify two fundamental issues: the first — presented above — which deals with recognition of the new mechanisms for legitimizing power in the Republic of Poland and, the second issue which is strongly connected with it, concerning the rationality of the solutions adopted. In my view, the place of the Sejm in relation to the EU institutions and their functions as well as the ability to create a complementary system of interest representation both in connection with participation in them and domestic activities, is a measure of the development of democracy and political significance of the Sejm itself. Addressing this field in both the ideological and political context, as well as its practical issues is — in my view — the biggest challenge for the Sejm in the coming years. To bring together the idea of Poland’s sovereignty14 and the necessary rationality of action is the greatest barrier in seeking solutions that would gain public acceptance15. This, however, requires the use of the institution of lobbying and corporatism. The current regulations do not provide for such opportunity, thereby reducing the role of social dialogue.

II. THE SEJM AND THE TREATY OF LISBON

The trend of strengthening the position of the European Parliament, currently evident in the EU, indicates — to an extent — the direction of thinking about the role

14 I use the terms sovereignty of nation and sovereignty of state interchangeably because, in the context of the representation of interests by the Sejm, the influence of other centers of power affects not only the sovereignty of the Polish authorities, but also affects the scope of competence of the parliament, and that means limitation of the sovereignty of the nation. This was pointed out by J. Kranz, Kilka uwag o suwerenności państwa, [in:] Konstytucja dla rozszerzającej się Europy, E. Popławska (ed.), Warszawa 2000, p. 148.

15 This task becomes especially difficult in times of crisis, especially when the trend to protect the national interest revives.
of parliaments in member states. What is important is the source of these changes, which clearly shows the precedence of the executive.

We cannot ignore the ties of parliament with the structure of social interests, because such articulation is essential, especially in Poland. Their connection takes place not only through political party representation, but this observation does not yet provide a clear guideline for expanding the possibilities of interest representation. The enhancement of the powers of national parliaments within the scope the EU’s activities should lead to an increased ability of the Sejm to operate more effectively and by strengthening its relationships with institutions of interest representation. Therefore, we can perceive two possible ways of increasing such capacity; firstly in the relation of the Sejm with the EU institutions and, secondly, in relation to its ties with a system of organized interest representation, in particular through lobbying.

The Treaty of Lisbon provides many opportunities to find appropriate solutions to strengthen the political position and function of the Sejm. The widened scope of control exercised by the Sejm, and other national parliaments, in the process of making EU law — deeply rooted in the EU’s concepts of development — confronts the Polish parliament with the task of selecting the path that allows for parliamentary functions to be more effectively discharged in changed conditions. We must therefore assume that it is necessary to create new concepts unequivocally based on the assumption of the multi-centric character of centres of power, but this is just a starting point for further decisions. Participation in determining the position of Poland in the process of creation of EU law or just control, “even a directive control”16 — is now a question of fundamental importance. I believe that our priority should be Poland’s effective participation in the law-making process (and not the Sejm as sovereign of the Polish nation and the entity holding the exclusive legislative function), since it ultimately determines the ability to represent interests promoted by the various groups.

The consequence of this approach is a change in the field of law-making. In light of the functioning of the European Union and the real capacities of national parliaments to participate in the EU law-making procedure, the impact of the Sejm and other national parliaments in this respect will always be indirect. We can only, in fact, modify the scope of this participation while recognising the limits to its influence. This, undoubtedly, is an important element of the transformations currently underway in Poland’s system of government.

Almost ten years of Poland’s membership in the European Union allows us to sum up and make assessments. An important factor for the process of Poland’s inte-

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gration with the EU, particularly in the context of internal relations, was the initiation of attempts to regulate the participation of the Sejm in the EU decision-making process. In the circumstances specified in the Treaty of Lisbon, the solutions provided by the Act of 2004\textsuperscript{17} proved to be insufficient. They may, and even should, be recognized as a valuable experience in developing the relationship between the authorities of the national state on European issues. The extension of the European Parliament’s involvement in EU decision-making required, however, introducing greater symmetry in legal solutions within Poland. The above mentioned “directive control” is clearly seen in the context of conferring complementary competences on parliament, so that it could exercise not only “pure” control over the executive in a domain which previously was reserved for parliament. The democratization of the functioning of the EU, understood as broadening the range of functions of the European Parliament, on the one hand, and involvement of national parliaments in the law-making process, on the other, requires strengthening of the position of the Sejm in its relation to the government. I find such an approach indispensable in order to preserve a relative balance within the exercise of power in Poland.

The necessary organizational and functional adjustments, and adaptation of procedural mechanisms of operation of the Sejm (and Senate) to the process of democratization of EU structures and institutions took place, finally, in the so-called Cooperation Act of 2010\textsuperscript{18} which replaced the Act of 2004.

The new Act introduced many changes resulting not only from the provisions of the Treaty of Lisbon, but also the jurisprudence of the Constitutional Tribunal, as well as those proposed in the literature, such as the extent of information provided by the government\textsuperscript{19}. The solutions, therefore, have gone in the right direction and, among them, special attention should be given to those which strengthen the role of parliament, and so, the Sejm. It is also worth noting that the amended Act regulates the place of the office of President of the Republic in relation to European affairs. It specified his competences in the field, but their implementation involves cooperation with the Council of Ministers seen in a political context. In this way, the Act upholds the position of the Constitutional Tribunal in explaining the relations between the government and the head of state in European matters, thereby avoiding any possible legal disputes.

Nonetheless, without delving deeply into the provisions of the new Cooperation Act, it can be said that it provides a much wider range of responsibilities for the

\textsuperscript{17} The Act of 11 March 2004 on Cooperation of the Council of Ministers with the Sejm and the Senate in Matters Related to the Republic of Poland’s Membership in the European Union, \textit{Dziennik Ustaw} of 2004, No. 52, item 515.


Council of Ministers in relation to the Sejm. In fact, the government is required to submit the documents of the European Union, EU draft legal acts, as well as information (with justification attached) of the position held, as well as draft international agreements. The Act also requires the government to cooperate in assisting the Sejm to lodge complaints with the European Court of Justice for infringements of the principle of subsidiarity and cooperation in the implementation of EU law. The adopted regulation is characterized by a more specific and precise definition of the responsibilities of the Council of Ministers in its relations with the Sejm.

The Treaty specifies the additional fields of activity which, in practice, deal not only with control of, for example, the aforementioned compliance with the principle of subsidiarity or the application of the so-called flexibility clause. In all these instances, the Sejm has a formal right to obtain information about the position adopted by the government and, then, to assess it. However, this does not involve any right to have a casting vote. It seems to me that — examining the powers of the Sejm outlined above — we have to see them in the context of directive control function in its broad meaning of control\textsuperscript{20}. Such an approach would allow us, in doctrinal terms, to reconcile the thrust of the classical understanding of the position of the Sejm (evident in Poland) with rational principles that I believe is necessary in contemporary Europe and which could become the foundation of legitimacy, especially in a globalized world.

Therefore, the strengthening of the position of the Sejm (and also the Senate) in relation to matters arising from Poland’s membership in the European Union resulted in the extension of its powers and, consequently, greater importance for the Sejm Committee on European Union Affairs. Similarly increased powers were conferred on the European Union Affairs Committee of the Senate.

The new regulations are, however, a simple consequence of the provision of the Treaty, but do not change the substance of the operation of the Sejm in its relations with the government as regards EU membership. The Cooperation Act has rather put an end to the dispute about the legal effectiveness of decisions taken by the Committee on European Union Affairs while maintaining its consultative character. The role of the Sejm acting through its committee is still but opinion-giving in nature. The concept of the creation of a “great joint committee of the Sejm and Senate” — proposed earlier by some circles — has become irrelevant due to the effects of the Lisbon Treaty. The powers acquired by the Senate as a result of the Lisbon reform required its involvement in the creation of law of the European Union. In contrast, the legislature decided not to go beyond those competences and, hence, the Senate does not cooperate with the Council of Ministers in providing opinion on the candidacies for certain posts in the European Union. Thus, the view prevailed that even in matters of co-operation between the government and the Union, the role of the Sejm

\textsuperscript{20} The legitimacy of such an approach is emphasized by W. Sokolewicz, \textit{Formy oddziaływania polskiego parlamentu na prawodawstwo Unii Europejskiej. Wybrane problemy prawne, [in:] Polska w Unii Europejskiej. XLVI Zjazd Katedr i Zakładów Prawa Konstytucyjnego, Wierzba, 3–5 June 2004, Kraków 2005, p. 73 et seq.
should be dominant. Undoubtedly, this does not go beyond the political conceptualization of the Third Republic of Poland, but I can see no theoretical obstacles to equipping the Senate with wider competences.

This example does not exhaust the regulations provided by the Act, but even such limited description leads to the conclusion that, in consequence, the Sejm has obtained a larger share in the exercise of cooperation with the Council of Ministers in matters related to Poland’s membership in the EU. This does not change the fact that the leadership in this area is held by the Council of Ministers. The issue has not been formally resolved, because this rule is not explicitly derived from the Cooperation Act and, much less, the Constitution.

The consequence of these new solutions is the activity of the parliament in the use of the instruments provided for control of the subsidiarity principle. There is a marked increase as compared to the previous period. This is undoubtedly the effect of the provisions of the Act of 2010; they strengthen the participation of the legislature in the decision-making process.21

Analysis of the implication of changes introduced by the Lisbon Treaty on the position of national parliaments and the provisions of the Cooperation Act of 2010, leads to the conclusion that, in terms of the system of government, there exist in Poland favorable conditions for performance of the tasks of both the EU institutions and the Sejm. We must emphasize above all that, as Maria Kruk rightly observed, this applies to a number of important spheres of action of parliaments, such as stimulation of further development of integration, monitoring of the subsidiarity principle and, in particular, the use of the application in case of breaches thereof. We also must be aware that the use of already-introduced instruments can help impede the progress of “depletion of parliament’s power” for the benefit of the executive and so any impairment of the primary function of this body which is the legislative function.22 In this context, an essential importance must be attributed to the ability of the Sejm to perform control in such forms which can be described as “soft”. It may include, in particular, activity of Sejm committees, plenary debates, the use of means available to Members individually (for example, parliamentary questions). Following the example of annual debate on foreign policy one could implement debate on the outlines of Polish policy pursued in the European Union. The latter proposal would be important primarily because of its public nature and ready access.

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22 C. Mik, Opinia w sprawie możliwości określania przez przyszłą Komisję ds. Europejskich stanowiska wiążącego Radę Ministrów na forum Unii Europejskiej, “Przegląd Sejmowy”, 2004, No. 2, p. 145; His extensive criticism is not shared by E. Popławska in Rola parlamentów narodowych w świetle Traktatu z Lizbony, “Przegląd Sejmowy”, 2010, No. 5, p. 165. She points out that it is difficult to conclusively establish to what extent the competences of parliaments have been reduced as a consequence of EU membership, and what role in this situation is played by the entirety of phenomena strengthening the political and systemic position of governments.
Due to the special nature of membership of the EU, and especially after entry into force of the Lisbon Treaty, substantial doubts arose because of the lack of constitutional regulation. The Cooperation Act, even if it fulfils its function in a correct manner, cannot be a surrogate for a constitutional act. There is, therefore, a strong need to amend the Constitution in the “European” context, even if in a limited form. There have been several draft amendments to this effect. Particularly noteworthy, however, was that presented in 2010 by a special team of experts appointed by the Marshal of the Sejm. This presented a detailed outline of a comprehensive approach. In relation to the subject matter of this article we must say, first of all, that the Council of Ministers was to be entitled to pursue Polish policy in the European Union. In contrast, the Sejm (and the Senate) were to implement the powers conferred on the national parliaments in the Treaties on which the European Union is based — within the scope and in forms specified in those treaties. Additionally, the amendment was to provide a statutory basis for the operation of public authorities and their cooperation in the field of implementation of competences relating to European affairs.

The guidelines developed by the team were thereafter, adopted in a draft amendment submitted by the President of Republic of Poland and, together with the draft presented by “Law and Justice” party were the subject of debate in the Sejm’s Constitutional Committee. Their efforts were, however, not crowned with any change to the constitution, due to the termination of that Sejm’s term of office. Political considerations prevented further work on the revision of the constitution.

The current legal status of relations between the Sejm and the government relating to EU matters is therefore disappointing as it is determined by the above mentioned Cooperation Act of 2010 and — e.g., in the case of issues related to law-making, in particular the compliance with the subsidiarity principle — the Standing Orders of the Sejm. Chapter 1 of the Orders concerns proceedings in relation to bills and draft resolutions, and Chapter 13a regulates the functioning of the Committee on European Union Affairs.

Past experience shows that reaching an agreement on the constitutional level is not politically possible. It seems, therefore, that for an unspecified duration of time, legislation of lower (non-constitutional) rank will be the basis of cooperation in EU matters. It should be noted, however, that practice nonetheless shows considerable activity by the Sejm in matters connected with making EU law, of which good examples are the so-called reasoned opinions concerning the principle of subsidiarity and participation in the procedure of the so-called “yellow card”.

Legal issues are of key importance but, as practice demonstrates, the scope of regulation, and in particular the constitutional quality of legislation on which there is a political agreement, does not always achieve the highest level, though this is not necessarily an obstacle to the proper functioning of certain institutions. An issue no less

23 Zmiany w Konstytucji Rzeczypospolitej Polskiej dotyczące członkostwa Polski w UE. Reports from the work of the team of experts appointed by the Marshal of the Sejm, Biuro Analiz Sejmowych, Wydawnictwo Sejmowe, Warszawa 2010.
important than those presented above and — as experience shows — at least as difficult to implement, is how to build structures and institutions representing interests and to improve the performance of those already in existence undertaking activity in the European Union. The task of effective integration of the Polish system with that of the EU is, in my opinion, possible if it is supported by the activity of institutions representing interests\textsuperscript{24}. Such purpose not only involves formal and institutional participation in the EU as implemented by the Sejm (possibly extended in comparison to the current one), and the activity of the Senate, but the introduction to this process, in institutionalized forms, of social factors whose role in public and, particularly, economic life is significant. I believe that an important argument in favor of such conception for shaping the representation of Polish interests — which should also be taken into account in the work on reforming the Polish institutions cooperating with the EU — are the consequences of transformations taking place in Polish society. It builds the foundations of civil society which is the condition of development and stabilization of the Poles’ own state. In this process, an essential role is played by the exercise of power, especially because of its multi-level nature. Protection of the interests of Polish society requires, in my opinion, a considerable extension of the sphere of social dialogue, so that it is not limited to labour relations, but allows the transfer of interests, especially those of an economic nature — to the sphere of exercise of power. The Union should follow this direction, treating dialogue as one of the basic tools of exercising power\textsuperscript{25}.

What is beyond dispute is the question of the inclusion of social partners within the discussion, the more so that a significant part of EU legislation concerns economic issues. The elements of such a structure would, therefore, be as follows: the government, the Sejm and social partners through forms of cooperation useful for social dialogue.

This means that the actors involved in the law-making process, examining the principles of subsidiarity and proportionality\textsuperscript{26} should include social partners. The matter is made organizationally more difficult because national monitoring of this principle would have to be implemented whilst encompassing the possibility of actions by state institutions at regional and local level. This would mean the need to create an appropriate level of management. The provisions of the Treaty confirm the solid foundation of a trend to extend the scope of competences decentralized at Member State level. As a result, the idea of sovereignty divided\textsuperscript{27} between a Mem-


\textsuperscript{27} A. Kalisz, \textit{Multicentyczność systemu prawa polskiego a działalność orzecznicza Europejskiego Trybunału Sprawiedliwości i Europejskiego Trybunału Praw Człowieka}, “Ruch Prawniczy, Ekonomiczny i Socjologiczny”, 2007, fascicle 4, p. 45 et seq., and references therein.
ber State and the EU is in process of being established, while on the other hand we might dare to say that the democratic deficit in the EU structures of power is compensated for, in a peculiar way, by an extension of the powers of regional levels of government. In Polish conditions, this may create organizational difficulties, but all we must note that there is no legislation that would secure interests at the regional and local levels. It is all the more important that the Treaty strengthens the role of the Committee of the Regions. Additionally, it is worth noting the inclusion of the Committee of the Regions in the procedure for the application of these principles. As Poland has its representatives on the Committee, it may be concluded that we are now faced with the need to create a coherent mechanism for identifying interests and determining positions within the scope of activities of the Committee. In view of the Treaty’s requirements, the relations between the Sejm and the government are now inadequate and, moreover, the mechanisms for ensuring well-articulated procedures are not included.

The key issue is the position of the Sejm (along with the Senate), and it is necessary to provide for mechanisms that, in existing circumstances, would allow for the upholding of Poland’s interests. This issue depends not only on the regulation EU affairs, but also — to a large extent — on the stabilization of “internal” power.

III. THE SEJM AND LIABILITY FOR LEGISLATIVE ILLEGALITY

Presentation of the place of the Sejm in the system of interest representation would be incomplete without addressing the issue of State responsibility for normative illegality, regulated by Article 77(1) of the Constitution. This combination may seem unjustified, but in terms of the political system (I mean, here — constitutional) we can assume that the transformation in relations between the parliament and an entity subordinate to any law enacted by it, based on the relationship defined by the principle of representation, produces a departure from a purely political legitimization to the relationship typical of the formation of subjective public law; or — from a practical point of view — the civil law aspect of the relationship between an individual and a public authority. However, in Polish literature the importance of Article 77(1) also emphasizes the guarantee of freedoms and rights of the individual and, recognizing the relevance of a dual interpretation, it is worth noting that this regulation is important for the transformation of the Polish political system.


29 I believe that such an approach is appropriate because the entitlement to claim compensation is separated from assessment of the real ability of parliament to a particular individual to whom the norm is addressed. In this case it is assumed, quite rightly as a consequence of the assumptions of the model of representativeness of each parliament, that anyone who is subjected to the law enacted by that authority, has a claim for damages caused by normative unlawfulness.

30 It is so classified by L. Garlicki, Comment No. 1 on Article 77, [in:] Konstytucja..., p. 1, and references therein.
The Sejm enacted a series of reforms, starting with the April Amendment of 1989 when, despite fundamental changes, it was still the subject of supreme authority, up to the solutions of the Constitution of 1997 which allow for compensation for legislative illegality. In the public perception, this issue probably does not matter much but the consequences for the political system seem to me to be extremely important.

The recognition of State liability for legislative unlawfulness places the Sejm in a completely new situation in relation to the sovereign\(^{31}\). Having been thus granted a special place within the apparatus of power, within the principle of separation of powers, it becomes responsible for adopted legislation, while representing the interests of the sovereign and electoral legitimacy ceases to be a shield against liability for the consequences of law-making. Representing the interests of the sovereign is now the source of the obligation not only in the political, but also in its legal aspect.

It could be argued that in the last century parliaments in Europe have undergone, twice, very significant transformations. By this, I mean the examination of the constitutionality of laws and recognition of a liability arising from unlawful parliamentary legislative action. The development of European constitutionalism did not immediately involve review of the constitutionality of the law. Much later, undoubtedly as a consequence of examining the constitutionality of acts of parliament, there appeared the recognition of liability caused by legislative illegality. Apart from a purely political relation to parliament, in a specifically designated field the individual acquires a substantive public right that entitles that entity to claim appropriate compensation that may be satisfied through the provisions civil law.

The consequences of such change are, I believe, twofold. Firstly, even though perhaps less important for the status of the Sejm, is the individual’s subjective right which creates a right to compensation and which is an extension of the catalogue of constitutional rights of individuals. Therefore, its position in relation to a public authority is strengthened.

In the field constitutional law, there appears the question of its impact on the role of parliament in the system of interest representation. First of all, it must be emphasized that — as a rule — the relations between the Sejm and those affected by the legislation have been made more realistic. Although this has not so far been reflected in concrete electoral actions, political parties, and the Sejm, should recognise the need to increase interest in how to improve legislation. In my opinion, the relation of a political nature which extends between the sovereign and parliament is supplemented by the subjective right to claim compensation and this is not affected by the scope of compensation for the damage\(^{32}\). In the public perception, a purely political relationship

\(^{31}\) This is rightly stressed by J. Parchomiuk, *Odpowiedzialność za bezprawie legislacyjne w sytuacji odroczenia utraty mocy obowiązującej aktu normatywnego (uwagi na marginesie uchwały Sądu Najwyższego z dnia 7 grudnia 2007 r.),* “Przegląd Sejmowy”, 2009, No. 1, p. 107.

\(^{32}\) Garlicki points out that Article 77 para. 1 should be treated as a minimum to be applied in any case of damage being caused, and that such right is not absolute in nature and in some cases its use may be restricted under the principles specified by Article 31 para. 3 of the Constitution; L. Garlicki Comment No. 1 on Article 77, [in:] *Konstytucja…*, pp. 11–12.
is often seen as a kind of illusion. But the right to obtain compensation, even if the procedure for actually receiving it may be daunting, represents a concrete element. In this respect the fact that the Sejm is not held directly liable, while the State accepts the liability, does not matter. In the sphere of political system, the activities of the Sejm are subject not only to the review of constitutionality, but also may give rise to submission of claims for compensation. Marek Safjan rightly observes, although not referring to the function of the Sejm: “Liability for damage inferred from this provision [Article 77(1): author’s note] appears in this perspective, as a kind of specific sanction for violation of the constitution. For this reason, we can speak about a real revolution in the relations between the state and the individual”33. In my view, not only was there a revolution in relations between the state and individual, but there was also a change in the place of the Sejm within the political system of the State. There are many different problems in this field which will probably not be resolved soon, especially in the absence of relevant constitutional regulations34. However, it is a fact that the catalogue of rights of the individual has been extended to include one which provides protection against acts of the legislature and this fact should be emphasized.

These solutions, shaping in a specific way a new common ground for relations between the legislature and the individual do not affect the relationship between the authorities under the principle of separation of powers. In accordance with the principles of the review of constitutionality of the law in Poland, the procedure for claiming compensation is based on a two-pronged procedure, but theoretically speaking, it is not important whether the review of constitutionality is engaged or not. In each of these situations, the principle of separation of powers is infringed, because this is the result of the review of constitutionality of the law in general. The place of the Sejm in the system of authorities does not change. This does not mean, however, that no other problems arise, and attempts to resolve them may involve serious difficulties.

In contrast, claiming compensation for legislative failure to act may have, as I believe, other consequences for the assessment of relations within the apparatus of power acting on the basis of the separation of powers principle, involving — primarily — the Sejm. We should bear in mind that the decisive factor in such instance is the fact that the consequence of finding a breach of obligation to adopt a statute is an interference in the autonomous right of the Sejm to decide on legislation. How wide should this autonomy be understood and applied? What conditions must be met in order for a court to determine a legislative failure to act by the Sejm?

It is worth noting that making claims in court for compensation due to legislative unlawfulness should be seen in relation to the political system and in the context of

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34 This is pointed out by M. Safjan, ibidem, p. 30 et seq. In my view, constitutional regulation in this field (particularly a more detailed one) is not possible. The nature of these issues is specific, and I mean first of all that it is highly varied and extensive, and, consequently, causes considerable difficulties in constitutionalization due to the nature of the norms of this legislative act.
maintaining a proper relation between the power of the Sejm to make law and the power of the judiciary to enforce it, which is important for the system of government. We need to make a distinction between the failure to adopt a bill, which falls within the competence of the Sejm, and the failure to issue other normative acts, which does not affect the relationship to the legislature. It has been pointed out by Marek Safjan that too broad an interpretation of the “obligation to issue a normative act” by courts adjudicating on liability for normative failure to act would upset the balance between the legislative and judicial powers by interfering with the competence of the former. For that reason, it is advisable to act very carefully and reasonably. However, the implementation of new, even very practical, solutions should always be based on rational arguments.

The position expressed by M. Safjan deserves strong support. We can also concur with the view that it would be advisable to appropriately revise the Constitution in terms of the powers conferred on the Constitutional Tribunal, because the ordinary courts currently use a formally wider scope of powers than that of the constitutional court. The issue of review of normative failure to act has, in my opinion, a stronger significance in the doctrine than the assessment of constitutionality of legal norms. In the latter case, the Tribunal examines the effect of the implemented competence, while in the former its task is to find whether there is obligation to make legislation. It is quite obvious due to constitutional regulation that we are dealing with interference in the exclusive powers of the parliament. In any case, under the current state of law, the Sejm has an exclusive power to adopt regulations having the force of a statute, because during the last 20 years the issuance by the government or by the President of acts having the force of a statute has been abandoned. And I believe that this solution must be treated as a special guideline for the political system, regardless of how we assess it. As a result, it would be within the competence of the Constitutional Tribunal to adjudicate about a legislative failure to act.

Generally positive assessment of the introduction of the principle of liability of the Sejm for laws made by itself does not mean an uncritical approach to the real possibilities of the use of this legal instrument. Agreeing with criticism by Ewa Łętowska of the efficacy of this measure in Polish circumstances, we must — looking primarily from the perspective of the place of the Sejm in the system of government — see the special nature of these changes. But I would agree with E. Łętowska, that
liability for the failure to act — as a highly specific case (i.e. difficult to apply in practice) — is probably a solution going beyond the present.

Perhaps, it would first be better to prepare the ground for the implementation of such a far-reaching instrument than to risk a negative assessment by the public\textsuperscript{39}. In this curious, and perhaps instructive, approach Ewa Łętowska show us the consequences of implementing liability for legislative unlawfulness in a period of serious weaknesses within the Polish legal system and State institutions. This is a serious argument, which — I think — should determine our future actions\textsuperscript{40}.

In this article, I have chosen a distinct display of a personal opinion; but, on the occasion of the upcoming 25\textsuperscript{th} anniversary of an independent Sejm, I have tried to present those issues which seem to me most useful for the evaluation of the past while indicating the need for setting specific directions in the development of the Polish system of interest representation. My task was not a detailed analysis of the structure and function of the Sejm, but recording what determines its essence in Poland which — as in other countries — is subject to multiple influences, particularly globalization and progressive empowerment of the people. Both these processes determine the way in which the modern parliamentary system is perceived, and in Poland (where the social system is considerably weaker than in the Western democracies and even some of its neighbours), these phenomena require particularly careful and competent analysis if there is to be implementation of effective reform.

Reforms of the Polish parliament are not complete, but stand at a beginning and many existing solutions, such as the regulation of lobbying, require considerable further alteration. There is no doubt that the Sejm currently remains the most important forum for disclosure and, consequently, representation of interests in Poland. But it must be emphasized that the Sejm, alone, cannot be the sole representative of them. Consensual democracy, the framework of which is yet to be built in Poland, requires the creation of a broad formula including not only the Sejm, fulfilling the most important legislative function, but also various forms of interest representation (other than political party representation) and the Sejm will be able to give them a final shape.

\textsuperscript{39} Ibidem, p. 238.
\textsuperscript{40} Ibidem.
PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT IN RELATION TO HIERARCHICAL REVIEW OF NORMS*

ABSTRACT

The article deals with the procedure for the control of hierarchical conformity of legal norms by the Tribunal. The starting point is the analysis of the differences between the procedures, as a result of a specific type of the subject of control. Then, the basic principles of the procedure contained in the Constitutional Tribunal Act are discussed. The analysis of these principles provides a basis for the description of preliminary consideration, a hearing before the Tribunal and the stage of rendering a judgment. The different procedural institutions are examined for their compatibility with the subject of the proceedings, i.e. the control of norms. In this respect, the author presents critical comments indicating incompatibility of the existing solutions with the duties to be currently performed by the Constitutional Tribunal and with de lege ferenda propositions.

Among the latter, the most important are: drawing up a new procedure for the selection of cases, particularly the selection of constitutional complaints, application of new instruments of hearing procedure in order to facilitate gathering of information by the Tribunal, diversification of the duties of the parties to the proceedings and the use of a written procedure instead of oral hearing.

I. THE PURPOSE AND OBJECTIVE OF THE PROCEEDINGS

A basic standard of each procedure under the rule of law is adequacy to its subject matter. This subject matter determines, to a large extent, the distinct nature of a given procedure. Whether we can speak — taking the above approach — of a distinct constitutional procedure, or whether this procedure is — at most — a modifica-

* This article was published in “Przegląd Sejmowy”, 2009, No. 5.
tion of administrative or civil law procedure is a matter of debate. However, given the subject matter of decisions made by public authorities, based on the provisions of the Constitution, we can claim that we are dealing with separate set of proceedings making up constitutional procedural law. Within the framework of constitutional law we can identify at least two distinct procedures — in terms of subject matter and adopted rules — which are based on constitutional principles: first, parliamentary procedure, concerning in particular the adoption of bills and, second, the procedure to be followed before the Tribunal concerning the hierarchical review of norms.

Hierarchical review of norms is the subject matter of proceedings before the Constitutional Tribunal. This follows directly from Article 188 (1)–(3) of the Constitution. To put it simply, we can say that the Tribunal should determine the content of the norm(s) of an act higher in the hierarchy and an act lower in the hierarchy, and decide on their consistency. The unique nature of the subject matter of proceedings defined in this way requires additional description. Firstly, its specificity is related to the kind of norms and methods of interpretation, on the basis of which we determine the content of these norms. This concerns norms decoded from the provisions of the Constitution. The structure of the constitutional provisions, their generality and the need to decode them into unambiguous norms of conduct makes it necessary to adopt such methods of interpretation, which — in the process of the judicial application of the law — might be considered as law-making action. This relates, in particular, to establishing the content of constitutionally optimized precepts and settlement of conflicts between them — based on the principle of proportionality. This openness of the constitution once aroused doubts about the possibility of its use. Currently, the principle of the supremacy of the Constitution settled these doubts and it is undisputed that unambiguous legal norms can be derived from the generally formulated provisions of the Constitution. Nonetheless, this does not remove numerous doubts regarding methods of interpretation.

Secondly, the specificity of hierarchical review of norms is associated with the assessment of compliance of the norms expressed in the provisions with varying degrees of generality. As a consequence of this diversity, such an assessment cannot be made simply on the basis of a conflict of law rule — *lex superior derogat legi inferiori* (a law higher in the hierarchy repeals the lower), but the inverse of that rule.

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1 On the need for distinguishing procedural constitutional law and on its specific nature: Cf. E. Benda, E. Klein, *Verfassungsprozeßrecht*, Heidelberg 2001, p. 78 et seq.
2 The Constitution uses the notion of normative acts in Article 188, Article 79 and Article 193. The subject matters of proceedings before the Tribunal may include the whole normative act, a provision or provisions as editorial units of the text and, finally, the legal norm understood as a clear imperative or prohibition of a particular conduct. In some special cases, e.g. relating to inter-temporal provisions, the review may cover specific legislative acts. The basic element of the hierarchical review of norms, however, is the legal norm. More information on the legal norm as a fundamental element of the legal system, see: A. Grabowski, *Prawnicze pojęcie obowiązywania prawa stanowionego*, Kraków 2009, p. 249 et seq.
From the point of view of legal theory the controversy relates primarily to the admissibility of inference from norms, and the use of rules of functional interpretation not comprised by this kind of interpretation. From the systemic point of view, the controversy primarily revolves around the scope of interference by the Constitutional Tribunal in the activities of parliament. Proceedings before the Court should be so shaped as to guarantee, to the maximum extent possible, implementation of the principle of the supremacy of the Constitution while, at the same time, guaranteeing the constitutional balance of powers. The former concerns the use of review of the constitutionality of norms as an instrument for the implementation of constitutional values. The hierarchical review of norms is not a goal in itself but is intended to protect the constitutional rights of the individual and constitutional principles of an objective nature. As to the latter, this prevents unjustified encroachment by the Constitutional Tribunal into the scope of the legislative, executive and judicial branches of power. The constitutional procedure should, in particular, ensure the proper relationship between the parliament and the Constitutional Tribunal. In the following part of this article, I will focus on those elements of operation of the Tribunal, which may cause a problem from the point of view of the above mentioned purpose.

From the point of view of purpose of the proceedings, its character is determined by the following principles: fairness of the proceedings before the judicial authority, a comprehensive examination of the case, the adversarial nature of the proceedings, finality of judgments and a single-instance procedure before the Tribunal, as well as the principle of proper application of the provisions of the Code of Civil Procedure. The first principle is not explicitly expressed in the provisions of the Constitution and the Constitutional Tribunal Act; however, it results from Article 2 and Article 45 para. 1 of the Constitution. The Constitutional Tribunal is not a court exercising administration of justice, and the standards of the constitutional right to trial do not directly apply to it. However, the Tribunal itself stresses that the standards of fair conduct, based on the standards concerning the right to apply standards applicable in quasi-judicial bodies and proceedings. In addition, all proceedings conducted by public authorities should satisfy the principle of procedural fairness arising from principles of the rule of law. This applies particularly to the proceedings in which the validity and content of the reviewed law is determined. For the interpretation of this principle of considerable importance is the concept of the case. It is not a case within the meaning of Article 45 para. 1 of the Constitution. The subject matter of proceedings before the Tribunal is not, in fact, the situation of the individual, but the decision issued by the Court may have an

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5 It is, inter alia, about giving a functional interpretation despite deriving an unequivocal result from a literal interpretation, Cf. M. Zieliński, Wybrane zagadnienia wykładni prawa, “Państwo i Prawo”, 2009, fascicle 6, p. 8.


8 This relates, in particular, to the way in which the decisions of public authorities influencing the legal situation of the individual are taken and justified. U. Kischel, Die Begründung, Tübingen 2003, p. 39.
impact on that situation. This is, in particular, the case of a constitutional complaint and question of law. The principle of a comprehensive examination of the case is expressed in Article 19 of the Constitutional Tribunal Act.

An important role in the proceedings before the Tribunal is played by the principle of adversarial nature of the proceedings, which has constitutional significance, as it defines the scope of Tribunal activity. This principle determines the subject matter of the proceedings in terms of the provisions which are to be subject to review, and the patterns of that review. From this principle the Tribunal derives the locus of the burden of proof and the manner in which the presumption of conformity of the contested normative act to the Constitution may be rebutted. The consequences of adoption by the Tribunal of the principle of adversarial nature of proceedings may be questionable from the point of view of the comprehensive examination of the case. At this point, it is in particular about the locus of the burden of proof, demonstration of the unconstitutionality of the contested normative act and stating that if the entity initiating the proceedings cannot rebut the presumption of constitutionality of the contested act, the Tribunal has to determine its conformity with the Constitution. Such a position may lead to a limitation of the requirement for a comprehensive examination of the case. Hence, the Tribunal should weigh both principles so as to found an adequate ratio legis.

The principle of finality of judgments is not only important for the characterization of similar judgments, but has an impact on the formation of certain procedural measures and the method of dealing with the case where the decision of the Tribunal is not subject to appeal. From this principle there follows the principle of the single-instance procedure before the Tribunal, from which exceptions must be provided by statute.

Proceedings before the Tribunal on the review of the constitutionality of norms is governed by the Constitution and the Constitutional Court Act and, in matters not regulated by the above Acts, the provisions of the Code of Civil Procedure (CCP) are applicable, as appropriate. However, the application of the provisions of the Code of Civil Procedure has produced doubts in practice. The case referred to in Article 19 of the Constitutional Tribunal Act differs fundamentally from the case mentioned in Article 1 CCP. The status of a court and that of the Constitutional Tribunal are also different.

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11 For example, exclusion of review of the decision concerning the recusal of a judge and admissibility of reopening of the procedure, cf. decision of the Constitutional Tribunal of 17 July 2003, Ref. No. K 13/02, OTK ZU 2003, series A, No. 6, item 72.

12 The proceedings before the Constitutional Tribunal are also governed by its Rules of Procedure. However, as an internal act it cannot specify the duties of participants of the proceedings, so it is not the subject of analysis in this paper.

II. INITIATION OF THE PROCEEDINGS AND PRELIMINARY REVIEW

The rules specifying how to initiate proceedings before the Tribunal are important for several reasons. First, they determine the effectiveness of the review of constitutionality of norms. Given the lack of possibility to initiate proceedings by the operation of law, these rules guarantee the respect for the principle of the supremacy of the Constitution. However, a too narrow scope of access to the Tribunal hampers the implementation of this principle. Secondly, this scope should be so defined that the Tribunal deals only with significant constitutional issues. Too wide a range of entities authorized to start proceedings before the Tribunal may cause an excessive inflow of cases. As the practice of other tribunals shows, this can produce lengthy proceedings and a lesser quality in judgments. The actual range of entities authorized to initiate such review and the manner of doing so is determined by the adopted model of constitutional judiciary practice. For the continental European model, on which the Polish system is based, the most characteristic are the abstract applications made by the entities referred to in Article 191 para. 1 subpara. 1 of the Constitution. Similar comment can be made in relation to applications made by entities with limited right to bring proceedings, referred to in Article 191 para. 1 subparas. 2–5 of the Constitution. Limitation of the right to bring proceedings affects the scope of application, but does not directly affect the form in which arguments are formulated. Constitutional complaint and questions of law are less harmonized with this type of review of the constitutionality of the norms. So far as the constitutional complaint in Polish legal system is concerned, it involves a situation in which a particular decision on the rights of the applicant raises a constitutional problem. However, as concerns a question of law, the future decision of the court depends on the resolution of such a problem. In both cases, the sphere of making the law is associated with the sphere of application of the law.

In relation to the first group of entities, with unlimited right to bring proceedings, the Constitution and Constitutional Tribunal Act do not provide for any specific requirements for admissibility of the application. Such an application should be within the jurisdiction of the Tribunal and meet the formal requirements set out in Article 32 of the Constitutional Tribunal Act, which does not provide for a specific procedure for examination of applications. In accordance with Article 37 of Constitutional Tribunal Act, when no formal obstacles exist, the President of the Tribunal refers applications for consideration at a hearing by a competent bench. The Act in no other place uses the term “formal obstacles”, nor does it directly define what happens when such obstacles do exist. Thus, it is not clear what kind of situations it in fact covers. Article 36 para. 2 of the Act, though not referring directly to this kind of application, uses the term “formal de-

fects”. The President of the Tribunal must determine whether the submitted document is a request within the meaning of Article 32 para. 1 of the Act. Other defects in the application should be examined by the presiding judge of the adjudicating bench or by a bench designated for consideration of the application. The meaning of formal obstacles can also include the prerequisite for discontinuance of proceedings, referred to in Article 39 para. 1 of the Act. Due to the clear terms of that provision, the existence of these obstacles and discontinuance of proceedings may only be declared by the adjudicating bench. The Act does not specify unambiguously in what circumstances the President will refuse to refer the case for consideration by the competent bench. In practice, this can be seen to relate to two types of situations. First, if the President finds that a document submitted to the Tribunal is not an application within the above-mentioned meaning and, second, when the document is recognized as such an application, but includes formal defects, they may be corrected in accordance with the order of the President. The Act does not further define the notion of “formal defects”. It is reasonable to assume that the President may require only correction of such defects, so far as it is necessary to determine the nature of the document submitted. Other formal defects should be corrected at the request of the presiding judge of the bench designated to hear the case.

Examination of the admissibility of applications submitted by entities with limited right to bring proceedings is different. A special place among these entities is held by the National Council of the Judiciary (Krajowa Rada Sądownictwa — KRS). In accordance with Article 191 para. 1 subpara. 2 of the Constitution, it may make application for hierarchical review of norms regarding matters specified in Article 186, para. 2 of the Constitution. The Constitutional Tribunal Act, however, does not provide for a preliminary examination of whether this requirement has been satisfied. In practice, the application submitted by KRS is sent directly to a designated bench for consideration. In the event that the subject matter of an application goes beyond the scope specified in Article 186, para. 2 of the Constitution, the Tribunal should discontinue the proceedings. Nevertheless, this examination is not rigorous and it is possible to identify cases in which the decisions concerning the admissibility of applications made by KRS could raise doubts. The result, according to which the right of an entity to bring proceedings is restricted with the simultaneous lack of preliminary examination of applications is inconsistent and may result in referral for consideration of an application whose subject matter goes beyond the scope specified in Article 186, para. 2 of the Constitution.

Applications made by other entities with a limited right to bring proceedings are subject to preliminary examination. Statutory regulation of this procedure produces some concerns.

First of all, the Act does not clearly specify who decides on the admissibility of an application. Even greater doubts are raised by the procedure of examination by the

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17 From Article 36 para. 1 of the Constitutional Tribunal Act it follows that admissibility of an application is decided by a judge by means of an order. But from Article 70 para. 2 of the Act it follows that a judge cannot issue an order, because they are issued by the Constitutional Tribunal. This doubt has been resolved.
Tribunal of an interlocutory appeal against the order to refuse to further process the constitutional complaint (regulated by Article 36 paras. 5–7 of the Constitutional Tribunal Act). The literal reading of these provisions leads one to conclude that the Tribunal should first determine whether the submission of an appeal is within the prescribed time limit, then the President of the Tribunal should designate the bench and then refer the appeal for consideration; and, then, the Tribunal rules on the merits of the appeal. This procedure, however, is self-contradictory and impossible to implement. In fact, the practice of examining interlocutory appeals has developed in a different way. It consists in the fact that the President of the Tribunal designates a bench to examine the appeal, which examines the admissibility of lodging the appeal, including submitting it within the prescribed time limit, then its legitimacy and then issues an order referred to in Article 36 para. 7 of the Act. The Constitutional Tribunal Act does not directly specify the subject matter of the proceedings in relation to interlocutory appeals. In the jurisprudence of the Constitutional Tribunal the view has been established, according to which the subject matter of this proceeding is to examine the validity of the grounds for refusal to entertain the application. Therefore, in the interlocutory appeal there is no opportunity to supplement the application or correct any of its defects that were the basis for the refusal to accept the application or constitutional complaint.

In the course of the preliminary examination, decisions are made in which the inadmissibility of the application is declared — i.e. an order to refuse to proceed further with the application and order not to grant an interlocutory appeal against this order. Interestingly, in these proceedings no binding decision on the admissibility of the application is made.

If the application is held admissible, the judge issues an order concerning the presentation of the application to the President of the Constitutional Tribunal for designation of an adjudicating bench. Such a decree is also to be issued if the application is found admissible due to the granting of an interlocutory appeal against the order to refuse to proceed further with the application. In both cases, the Tribunal assumes, however, that it may continue to examine the admissibility of the application and, if the Tribunal finds it inadmissible in the course of the proceedings on the merits, it shall make an order to discontinue the proceedings. The passage of the application through the preliminary examination does not guarantee that the application will be heard and that a judgment regarding the constitutionality of the challenged provisions will be rendered. This procedure raises doubts, not only in the case of applications, but primarily in relation to constitutional complaints.

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19 The Act does not directly regulate the form in which applications are to be referred to substantive proceedings. A disposition is made by a judge on the basis of a contrario interpretation of Article 36 para. 3 of the Act.
In passing, it should be noted that the refusal to proceed further with a constitutional complaint, as well as granting — or refusal to grant — an interlocutory appeal, has the form of a judicial decision (order) of the Constitutional Tribunal. By contrast, referral of the application for substantive examination takes place on the basis of an order of the judge. Such orders, in accordance with Article 70 of the Act, are not judicial decisions. They are also not judicial decisions on the basis of the relevant provisions of the Code of Civil Procedure.

The Constitutional Tribunal Act does not provide for a separate review procedure concerning constitutional complaints. In accordance with Article 49 of the Act, Article 36 thereof shall be applied, as appropriate, to the initial hearing of constitutional complaints. Such a solution should be considered flawed for several reasons. Firstly, the reference is too narrow. Due to the subject matter of preliminary proceedings, they should include at least Article 32 of the Constitutional Tribunal Act. Secondly, this defect is due to different formulation of the requirement of admissibility of the application and that of a constitutional complaint. In the case of a constitutional complaint, there are additional requirements and their interpretation and application raises controversy, therefore a different resolution would be acceptable. It is better to separately regulate the procedure for preliminary examination of constitutional complaints and, possibly, apply it as appropriate for preliminary examination of applications. It would be best, however, to regulate separately both procedures by means of statute. This lack of regulation has far-reaching consequences in terms of the preliminary examination of constitutional complaints. Some of the solutions applied to applications do not work with regard to constitutional complaints. As an example we can indicate the already mentioned lack of binding decision on the admissibility of a constitutional complaint. While in respect of applications the settled practice does not cause substantial controversy, such controversies are engendered in relation to constitutional complaints. The consequence of the larger number of prerequisites and the contentious nature of some of them, as well as the subject matter and purpose of the complaint procedure is such that a relatively large number of complaints admitted to a substantive hearing are then ordered to be discontinued. In addition, there are situations in which the Constitutional Tribunal in subsequent phases of the proceedings expresses different views on the admissibility of the complaint. Sometimes, in a particular legal and factual situation the same prerequisite of conduct is interpreted in different ways — in the order refusing to proceed further with the complaint, in the order to grant the interlocutory appeal and the order to discontinue the proceedings.

The Act does not provide for a number of procedural situations that may occur in practice, such as the statutory lack of legal grounds to suspend proceedings on the constitutional complaint when it is necessitated by the principle of subsidiarity of the pro-

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ceedings, or by the absence of a provision explicitly allowing partial refusal to proceed further with the constitutional complaint. The making of such orders is necessary if the complaint only partly meets the conditions of admissibility. The most important factor is, however, the lack of statutory regulation of the consequences of non-compliance with particular conditions of admissibility of a constitutional complaint. Literally speaking, the preliminary examination of constitutional complaints and applications covers only formal defects and evident groundlessness. This is so stated in Article 36 paras. 2 and 3 of the Act. The Act does not enumerate, nor does it define the formal defects. Certainly such defects exist when the requirements specified in Article 32 Tribunal Act or in the provisions of CCP are not satisfied. However, the Constitution and the Constitutional Tribunal Act contain other requirements for constitutional complaints, and the failure to comply with them can be regarded as a formal defect. From Article 79 para. 1 of the Constitution and Articles 46–48 of the Constitutional Tribunal Act there follows the obligation to indicate the constitutional rights and how they have been violated, the formulation of the allegation of unconstitutionality, which is not evidently unfounded, indicating that the contested provisions have formed the basis of a determination and that all legal remedies have been exhausted. These requirements are diverse, and the way in which they are understood in the Tribunal’s jurisprudence raises doubts. Different admissibility requirements for constitutional complaints follow from Article 39 of the Constitutional Tribunal Act. All of these issues deserve a comprehensive analysis, which, however, does not fall within the scope of this article. At this place, it suffices to note that the substantive-law requirements of the constitutional complaint procedure do not correspond with the procedure for the determination of their fulfillment. For example, a literal interpretation of Article 36 of the Constitutional Tribunal Act leads to the conclusion that the submission of a constitutional complaint after the prescribed deadline does not provide grounds for a refusal to proceed further with it. Based on this conclusion, one can formulate a more far-reaching remark that the Constitutional Tribunal Act does not formulate any model for preliminary examination of constitutional complaints and applications.

The procedure for dealing with questions of law also produces doubts. As is apparent from Article 193 of the Constitution and from the Constitutional Tribunal Act, a question of law is admissible if it is within the jurisdiction of the Tribunal, there is no prerequisite for the discontinuance of the proceedings under Article 39 of the Act, and the functional condition is met. An increasing number of questions of law addressed to The Tribunal exposes the inadequacies of the current regulation. First, it would be reasonable to increase the number of requirements to be met by questions of law. For example, there might appropriately be introduction of the prerequisite of evident groundlessness, where the question of law is based on an erroneous interpretation of the contested provision or contains an interpretation of a constitutional principle that is not based on the text of the Constitution. Secondly, one might consider the interpretation

\[23\] Such a situation occurs e.g. when a cassation appeal is lodged together with the constitutional complaint.
of the functional prerequisite referred to in Article 193 of the Constitution. Thus, the question arises about who decides on whether that condition has been fulfilled: the court referring the question of law or the Constitutional Tribunal? We should reject the assumption that it is only the court that decides on whether its future judgment depends on the answer to a legal question. If the Constitutional Tribunal were bound by the position of the court, this would mean that the Tribunal must additionally consider the question of law in a situation where the relationship between the constitutionality of the challenged provision and the future decision of the court does not occur. As a consequence, the specific review of norms would be transformed into an abstract review. However, too strict an interpretation by the Tribunal of the prerequisite contained in Article 193 of the Constitution may raise doubts. The demand that the court show the functional prerequisite may cause the court — trying to justify it — to take a position prejudicing future assessment of the case. In extreme instances, this may require disqualification of a judge from deciding on the case. It should also be reasonable to consider the introduction of a preliminary review of questions of law or, at least, statutory regulation of the competence of the President of the Constitutional Tribunal and the presiding judge of the adjudicating bench to examine the requirements for the question of law. Currently, the Act does not expressly provide for such examination, however it is introduced by § 24 of the Rules of Procedure of the Constitutional Tribunal. These Rules, as an internal act, cannot be applied as a basis of procedural action addressed to the court. Such a basis, however, may be provided by properly applied provisions of the Code of Civil Procedure. Examination of questions of law comes down to issuing of orders addressed to the court for correction of legal defects in the question of law. Doubts most often concern the scope of the claims formulated in a question of law or showing functional prerequisites referred to in Article 193 of the Constitution.

III. HEARING OF THE CASE ON ITS MERITS

The subject matter of the proceedings relating to hierarchical review of norms is defined in Article 188 (1)–(3), Article 79 and Article 193 of the Constitution and in Article 32 of the Constitutional Tribunal Act. The wording of Article 188 is questionable, since it contains an enumeration which is based on different criteria. In relation to points 1–3 of the enumeration, it refers to the concept of review of norms and types of normative acts, whereas point 5 of Article 188 refers to the method of initiation of the proceedings. Such an approach is a cause of doubt regarding the permissible scope of review of norms. These doubts, however, do not impinge on the manner of the review. Proceedings resting on the legal provisions, normative acts and the norms are the foundation of the thesis that the Tribunal is a court of “law”. This as-

26 In this way the Tribunal itself defines its activity, Cf. judgment of the Constitutional Tribunal of 27 June 2000, Ref. No. K 20/99, OTK ZU 2000, No. 5, item 140.
essment indicates that the Tribunal does not administer justice in individual cases. However, to say that the Tribunal is a court of “law” does not mean that the Tribunal is not a court of “fact”. The subject matter of proceedings in the hierarchical control of standards cannot be limited only to the analysis of legal norms. In the course of the proceedings it is necessary to make findings of fact.

The need to establish the facts traditionally is connected with the issue of examination of the procedure for issuance of the normative act. Making findings of fact, however, have a much broader scope. First, this is due to the very structure of constitutional norms.

Determining the content of these standards, in particular the resolution of conflicts between them, requires the finding of a number of facts that are legally relevant and that will often determine the outcome. Second, the Tribunal has to make a number of findings of fact because of the anticipated consequences of their decisions. We must bear in mind that the decisions of the Constitutional Tribunal — apart from the direct derogating effect — have many other consequences in the domain of law-making, the application of the law and in a wider extra-legal sphere. All such findings of fact — important from the point of view of the reviewed normative acts — are called legislative facts.

Finding of these facts takes place in the course of proceedings before the Tribunal.

In accordance with Article 27 of the Act, participants in the proceedings before the Tribunal are: the entity on whose initiative the proceedings have been instituted by the submission of an application or a constitutional complaint, a representative of the authority which has issued the contested normative act or the Treasury Solicitors’ Office, the Public Prosecutor General, the representative referred to in Article 27 (7) and (8) of the Act and, in the case of constitutional complaints, also the Human Rights Defender, if he/she has notified his/her participation in the proceeding. Pursuant to Article 27 (2a) of the Act the court submitting the question of law is a participant in legal proceedings if it has notified its participation in the proceeding. Without questioning, as a rule, optional participation of the court in the proceedings before the Tribunal, it should be pointed to two concerns arising in respect of that provision.

If the court does not participate in the proceedings, the Tribunal has very limited possibilities to request that court for further clarification of the case. The literal interpretation of Article 27 (2) leads us to the conclusion that in such a case the authority that has issued the normative act indicated in the question of law does not also participate in the proceedings. It seems that the inclusion of Article 27 (2a) in the Act was

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27 In the context of examination of the procedure for issuing a normative act, it would advisable to change Article 42 of the Constitutional Tribunal Act. In its current wording this provision does not definitively resolve whether the examination of the procedure is admissible by the operation of law or upon request. The Tribunal accepted the former possibility, but this causes serious doubts; Cf. M. Zubik, M. Wiącek, *Kompetencje sądu konstytucyjnego a granice swobody orzekania przez sędziów Trybunału Konstytucyjnego*, “Przegląd Sejmowy”, 2009, No. 3.

unnecessary. It is the source of inconsistencies in the same proceedings, and its intended goal in the form of a voluntary appearance of a representative of the court at the hearing, has already been achieved on the basis of a previously-existing regulation\(^29\). The reasons for the defect in the existing regulation is also the fact that the party to the court proceedings does not participate in the proceedings before the Tribunal\(^30\).

Entities instituting proceedings before the Tribunal have different possibilities to challenge normative acts, based on Article 191 para. 1 subpara. 3, Article 79 and Article 193 of the Constitution, and the various possibilities for the designation of patterns of control, pursuant to Article 191 para. 1 subpara. 3 and Article 79 of the Constitution. The Constitution and the Act do not differentiate between the powers and duties of these entities in the phase of substantive hearing of the case. However, this does not correspond to the position of these entities in the system of government nor to the role they should play in the proceedings before the Tribunal. In particular, these are entities with unlimited procedural legitimacy that can initiate an abstract review. For some of them, indeed, initiating proceedings before the Court is a means for the performance of their constitutional and statutory duties. Their duties include applying to the Tribunal and, possibly, demonstration of hierarchical non-compliance of norms. For this reason, their procedural status should be regulated differently.

Entities such as the President of the Republic, Prime Minister, Marshal of the Sejm and the Public Prosecutor General should be specifically required to take actions aimed at proving a hierarchical non-compliance of the challenged provisions. This approach corresponds to their position and role in the political system and the actual capacity to make various findings. In a narrower sense, such duties may be imposed on applicants with limited procedural legitimacy and on the court. The entities submitting constitutional complaints should be burdened with them to a minimum extent. The constitutional complaint admittedly satisfies subjective and objective functions, but there is no basis to impose procedural duties on the applicants’ solely in the public interest. The Constitutional Tribunal Act does not specify more precisely the roles of other participants in the proceedings: a representative of the authority which has issued the contested act and a representative of the Public Prosecutor General. Also, the procedural role of the Civil Rights Defender, where he/she is engaged in a constitutional complaint is not clearly defined, which has been the subject of controversy in the jurisprudence\(^31\).

The Act introduces certain procedural measures enabling a comprehensive hearing of the case: the obligation of the President of the Tribunal to apply to the Council of Ministers for an opinion on the financial consequences of decisions of the Tri-


\(^{30}\) Cf. ibidem, s. 358.

\(^{31}\) The controversy related to the possibility of going beyond the limits of claim by the Ombudsman, and — particularly — extension of the limits of the claims. The latter possibility was excluded by the Constitutional Tribunal, judgment of the Tribunal of: 21 May 2001, Ref. No. SK 15/00, OTK ZU 2001, No. 4, item 85; 30 May 2007, Ref. No SK 68/06, OTK ZU 2007, series A, No. 6, item 53.
buinal referred to in Article 44 of the Act, and the Tribunal’s power — based on Article 22 of the Act — to request the Supreme Court or the Supreme Administrative Court for information about the interpretation of certain provisions of law. As concerns the first measure, the grounds and scope of cases in which opinion the Council of Ministers is presented, should be wider. Requesting the Council of Ministers or other governmental body or public authority should not be an obligation. We should bear in mind that establishing the so-called legislative facts relevant for resolving the case is not limited to financial consequences. Article 22 of the Act is also formulated too narrowly. At this point, however, any change would be more complicated.

Judicial interpretation of a provision reviewed by the Court is, therefore, of crucial importance. The Tribunal itself acknowledges the fact, that if a provision is constantly and consistently understood in the jurisprudence in a certain way, the Tribunal cannot opt for a different meaning, even if it would be theoretically possible. Requesting information on the judicial interpretation is very important. But the problem is that complete monitoring of case law does not fall within the responsibilities of the Supreme Court, the Supreme Administrative Court or any other authority. Both above mentioned courts exercise judicial supervision over common and administrative courts, but only to the extent specified by statute. This means that there are issues that cannot be covered through judicial supervision by the Supreme Court and the Supreme Administrative Court. Claims in such cases are heard by district courts or appellate courts. The Tribunal had to deal with such a situation in the case Ref. No. SK 89/06 concerning time restrictions applicable to evidence in civil proceedings. Of crucial importance for assessing the constitutionality of Article 479 § 1 of the Code of Civil Procedure was the assessment of how this provision was interpreted by the courts. Therefore, the Tribunal made a request to the Supreme Court under Article 22 of the Act. In response to this request the Research Office of the Supreme Court responded that the Court had not dealt with exclusion of evidence and could not provide a comprehensive analysis of the use of that provision. This is evident when we take into account the shape of a cassation appeal.

Article 21 of the Act should also have a wider scope. In its current wording, the obligation expressed in it, comes down to making court files accessible. However, the Tribunal should have the possibility of making a binding request to public authorities in matters relating to the broadly understood functioning within the system of review of normative acts. The basic procedural guarantee of comprehensive examination of the case is the principle of the examination of it at the hearing, expressed in Article 59 para. 1 of the Act. The Act provides for only one exception to this principle — formulated in Article 59 para. 2 But examination of the case at a hearing does not itself guarantee the comprehensiveness of its analysis.

A more effective instrument would be making a written request for an opinion, addressed e.g. to the Supreme Audit Office, the Minister of Finance, Government Legisla-

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tion Centre and other supreme and central organs of the state. The principle of procedural economy indicates that conducting the hearing in some cases is unnecessary and does not contribute to the clarification of the case. The latter issue is closely associated with the next phase of the proceedings, which is the pronouncement of the judicial decision.

IV. PRONOUNCEMENT OF A JUDICIAL DECISION

The Constitutional Tribunal Act does not specify at what time after the closure of the hearing a deliberation session should be convened to give a judgment. It seems that the deliberation should be held immediately. From Article 67 paras. 2 and 3 of the Act it follows that the deliberation should end with issue of the judicial decision (a judgment or an order to discontinue the proceedings). Due to complexity or other compelling reasons, pronouncement of judgment may be postponed for a period not exceeding 14 days. In practice, a procedure has been established whereby deliberations are held immediately after the closure of the hearing and pronouncement of the judicial is made on the same day. There are cases in which pronouncement of judicial decisions are given in excess of the 14-day period referred to in Article 67 para. 2 of the Act.

Pronouncing the decision within a few hours after the closure of the hearing may well indicate that any hearing brought little of value to the proceedings before the Court. In such case, the decisive phase of the proceedings takes place before the hearing and involves the preparation of a proposal of decision by the adjudicating bench. In addition, more frequent situations in which a 14-day period specified in Article 67 para. 4 of the Act has been exceeded, indicate that the formula of pronouncing decisions within a short time after the closure of the hearing sometimes does not sit well with the complexity of the case.

The procedure for resolution by the Tribunal has been adequately formulated in the Act, with one exception. The Act does not specify the procedure to be followed when, hearing the case, the Tribunal in a full bench is not able to take decisions by majority vote. This issue is resolved by § 44 of the Rules of Procedure of the Constitutional Tribunal, according to which the judge presiding over the bench opens the hearing again and declares postponement of the judicial decision. There are two points in this solution that produce doubts. Firstly, the process of taking decisions should be fully specified in the Act. Second, the Act should clearly specify the consequences of a vote in which an equal number of votes both “for” and “against” was given on the conformity of the challenged normative act.

Moreover, doubts are caused by the scope of the patterns of review referred to in the judgments of the Tribunal. This relates to the situation in which the Tribunal finds the challenged provisions to be incompatible or compatible with the Constitution, but only for certain patterns of review. As concerns other patterns, the Tribunal can declare needlessness of adjudication. From the point of view of the principle of sub-

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34 It should be noted, by the way, that the cited provision does not indicate the moment from which the 14-day time limit is to be counted. This issue is not regulated by Article 64 of the Act.

premacy of the constitution such practice in many cases has adverse effects. First, the Tribunal, on its own initiative, deprives itself of the opportunity to speak on important constitutional issues, such as the assessment of a specific legal institution from the point of view of a rule of law principle. Secondly, due to the lack of assessment of the challenged provisions in accordance with some patterns of review, subsequent requests, constitutional complaints or questions of law requiring the review of norm in this area may be submitted. Similar concerns may relate to limitation of applied patterns due to the principle of the adversarial nature of the proceedings.

This issue is not directly regulated by the Act. The Court takes the view, however, according to which the provisions directly referred to in the application, the question of law or the constitutional complaint may be used as a pattern of review. Sometimes, on the basis of the principle of falsa demonstratio non nocent, the Tribunal accepts as patterns the provisions of the Constitution (other act of a higher rank) not indicated in petitum of a written statement of claim, if from the justification contained therein it follows that the applicant, the claimant or the court submitting the request makes them the basis of the formulated claim. The patterns utilized are also interpreted in the context of other provisions that may have impact on their content, such as the right to challenge decisions under Article 78 as interpreted in the context of Article 2 of the Constitution. In essence, however, this practice narrows the basis of the review. On the one hand, it promotes limitation of judicial activism and, on the other hand, can limit the effectiveness of the protection of the supremacy of the Constitution. The task of the Tribunal is not to protect its individual provisions (patterns), but to protect the primacy of the whole constitution. This issue requires in-depth analysis and reflection, based on individual decisions and their consequences and on whether the current practice of Procedure of the Court is justified.

A further point of criticism is the lack of definition of the forms for passing judgments both in the Constitution and the Act. From Article 188 (1)–(3) and Article 190 para. 3, it only that the Tribunal adjudicates only on the compatibility or incompatibility of the contested normative acts or their parts. This latter provision is the basis for inclusion in the operative part of the judgment of the so-called ruling deferment clause. But Article 71 para. 1, subpara. 6 of the Act provides that the Tribunal’s judicial decision should only include a determination of the matter. However, in practice, the Constitutional Tribunal has developed several different formulas for its judgments: these relate to scope, interpretation or application. These judgments differ in terms of formulating the operative part and the impact that they may have in the sphere of making and applying the law. Some judgments have attracted objections concerning the lack of legal grounds for their pronouncement. It seems, however, that clarification of the forms of a judgment, and particularly the form of its operative part, would not be wholly desirable. The form of the judgment should be relevant to the subject of the claim and the effects which should be achieved through the judgment. With regard to

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37 Cf. M. Zubik, M. Wiącek, Kompetencje sądu...
the first issue, we should bear in mind that adjudication may cover the whole normative act, a group of provisions, a provision and, sometimes, a legal norm encoded in the provisions. In the latter case, the judgment does not alter the wording of the provision itself, but it makes a normative change in the system. The effects of the Tribunal’s judgment may be even more complicated. The correct specification of these effects, and avoidance of the state of the so-called secondary unconstitutionality may require recourse to complicated formulas in the operative part of a judgment. Attempting to provide statutory specification of the formulas for passing judgments could hamper the Tribunal in adequately responding to a finding of unconstitutionality. Therefore, such specification would not be advisable.

V. INCIDENTAL PROCEEDINGS

Incidental proceedings are not the subject of this study. Therefore, the problems occurring in these proceedings are not discussed here in any detail. Due to lack of space, only those issues directly connected with the review of the constitutionality of normative acts will be outlined. The first concerns the grounds, referred to in the Act, for recusal of a judge. The ground indicated in Article 26 para. 1 subpara. 1 of the Act, i.e. participating in the enactment of a normative act, is ambiguous. Although the Constitutional Tribunal has indeed presented its interpretation, it was so questionable that it produced a further application to the European Court of Human Rights. The interpretation of this ground presented by the Tribunal can be difficult to apply in practice, particularly when the judge was previously a Deputy or Senator holding a mandate for several terms. Determining his/her active participation in the legislative work requires a thorough examination of its history. However, strict interpretation of the word “participation” may require disqualification of a judge from examining a large number of cases, which may disorganize the work of the Court. In this connection, it can be reasonably proposed that only involvement in certain steps of the legislative process would form the basis of the exclusion. Therefore, it would be advisable to propose abolishing this prerequisite or its more precise formulation, so that only particular forms of engagement in the legislative process could be provide a basis for recusal. It would also be possible to introduce a grace period for parliamentarians wishing to apply for a seat on the Tribunal. Moreover, interpretative difficulties are posed by the second sentence of Article 27 para. 1 subpara. 1 of the Act, according to which such a recusal may be used in relation to the judge who has issued or participated in the issuing of the challenged judgment, administrative decision or any other decision. However, in the proceedings before the Tribunal on the

38 However, there is need for more precise definition of the effects of judicial decisions of the Tribunal. The current regulation contained in Article 190 of the Constitution is insufficient. From the procedural point of view special doubts are raised by awarding a bonus for active conduct in the operative part of the judgment resulted from the constitutional complaint or question of law. This issue is not, however, the subject of this paper.

39 This complaint was submitted in the context of the previously cited case (K 13/02.). The complaint was admitted for consideration, but no decision has been issued in this case. Currently work is under way on preparation of an agreement between the Polish state and the Autocephalous Church.
review of norms no concrete individual acts are questioned. The literal interpretation of this provision would lead to the conclusion that this prerequisite can never find application in the procedure for review of constitutionality of norms. Trying to find the ratio legis for this provision, one should assume that this recusal applies to the examination of constitutional complaints when the judge of the Tribunal has issued or participated in taking a decision on the rights of the applicant referred to in Article 79 para. 1 of the Constitution. Such an interpretation, however, has weak support in the text of the provision and, therefore, further clarification is needed.

The instrument of the temporary decision has also been regulated in an imprecise way. The procedure to issue a temporary decision has a specific nature. In the conduct of proceedings pursuant to Article 50 of the Act, the Tribunal ceases to be a court of law. It has to assess concrete individual decisions and to determine the possible occurrence of the statutory prerequisites in relation to a particular person and the situation. Therefore, this procedure is of an unusual nature. An analysis of the distinctiveness of this procedure would require a separate study. It should be only noted that the legislature should determine whether a proceeding to issue a temporary decision is carried out by the operation of law or on request, and precisely determine the period of the suspension or stay of enforcement of the decision. The lack of specification of the method of initiation of such proceedings makes it difficult to answer the question of whether the Constitutional Tribunal should examine the statutory prerequisites in each case, which — due to the above indicated distinction — seems rather impossible, or whether it should examine those prerequisites only when the applicant seeks the suspension or stay of enforcement of the decision. As a rule, it should be the case that proceedings are initiated at the request of the applicant. The appropriate provision should have a wording close to Article 61 § 3 and § 6 of the Act — Law on Proceedings before Administrative Courts. The possibility of initiating proceedings by the operation of law in relation to issuing a temporary decision should be allowed, but only as an exception to the rule.

VI. CONCLUSIONS

The way in which proceedings before the Constitutional Tribunal are regulated has been mostly influenced by the previously existing Act and its practices evolved before 1997. After the entry into force of the Constitution, the introduction of a constitutional complaint and extension of the scope of questions of law, it transpired that the solutions adopted were not adequate to solve the problems now facing the Constitutional Tribunal.

First of all, there is no procedure for selection of cases coming to the Tribunal. Only some elements of such a procedure are regulated in Article 36 of the Act. The absence of such procedure hinders the activity of the Tribunal for two reasons. First, it means that the Tribunal is saddled with cases in which there is no significant constitutional problem. Secondly, the existing solutions do not prevent the inflow of an excessive number of cases. Meanwhile, the summary statistics of the last few years
shows a steady increase in cases referred to the Tribunal. It can be clearly stated that there is now an excessive infl ow, typical of other constitutional courts, with all the negative consequences of this phenomenon\footnote{P. Czarny, Zjawisko przeciążenia..., p. 46; Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2008 r., Warszawa 2009, p. 141 et seq.}. Lack of a proper screening procedure significantly hinders the examination of constitutional complaints.

Adaptation of procedures to modern methods of examination of constitutionality of laws requires the Tribunal to have new procedural instruments to hand. The Tribunal should have the power to compel the authorities and public administration entities to provide any kind of information related to the operation of reviewed normative acts. The solutions currently existing in this area are plainly insufficient. In this regard, there is a problem of a systemic nature going beyond the regulations of the Constitutional Tribunal Act. There is a need for uniformity of principle underpinning the case law as a prerequisite of the review of constitutionality of law. Currently, in Poland there is no institution that can monitor the case law of the courts in a comprehensive way. However, the assessment of that case law is sometimes a crucial prerequisite for determining the constitutionality of the reviewed normative act.

The procedural roles of the various participants in the proceedings should be diversified. Bearing in mind that the proceedings before the Tribunal relate to matters of a public law character, it is necessary to impose new procedural obligations on those who should appear in the public interest. Such obligations should not be imposed on those who submit constitutional complaints and on the courts submitting questions of law. As concerns courts, any expansion of the procedural duties, such as a request for an analysis of precedents in the jurisprudence of the courts in similar cases, goes beyond the specific review of norms. Such extension would also violate independence of the courts.

Finally, the concept of hearing should be changed. The principle requiring the examination of cases at a hearing should be abolished. It is the adjudicating bench of the Tribunal that should decide in each case whether there is the need for a hearing, which is not always necessary for a comprehensive explanation of the matter. Due to the nature of the proceedings before the Constitutional Tribunal, it is often more efficient to apply a written procedure without a hearing. In the existing situation of excessive case overload, the hearing may also be an element that hinders consideration of the case within a reasonable time. Changing the concept of trial should also involve a change in the rules for publishing judicial decisions.
ABSTRACT

Re-establishment of the Senate in 1989, as a freely-elected chamber of legislature, was intended to constitute the first stage of the transformation of the institutions of the communist state into democracy. However, the results of the elections of June 4th, 1989 followed by the appointment of Tadeusz Mazowiecki’s government thwarted those political foundations on which the constitutional concept of bicameralism was based. Since then, the model of bicameralism has not been changed significantly despite changes of the political situation, and further amendments provided in constitutional acts. The model is based on the principle of identity of electorates of both chambers (universal suffrage) and asymmetry of competences and decisive powers between the Sejm and the Senate.

The Sejm has been given a dominant position. The main function of the Senate is to participate in the legislative process. The Senate has the right to initiate bills and the right to either reject as a whole the bill passed by the Sejm or to offer amendments thereto. However, amendments submitted by the Senate is limited to the matters covered by the contents of the bill passed by the Sejm. The Sejm has the power to turn down, by an absolute majority of votes, both the regulation of the Senate rejecting the bill as a whole, and the amendments offered by the Senate. In 2005, the Senate initiated specific kind of legislative initiatives in relation to statutes adopted as a means of implementation of the judgments of the Constitutional Tribunal. From the perspectives of the provisions of the constitution, this initiative does not amount to widening the scope of competences of this chamber, since it falls into its powers to exercise legislative initiative. Charging this task with the Senate, in practice, has made it possible to fill the gap by the structures of the State as concerns the fulfillment of the requirements of the “state ruled by law”. Special formula of participation by the Senate is specified by the provisions governing the procedure for amendment of the Constitution of the Republic of Poland. Adoption of such amendments requires passing of a bill in the identical wording

* This article was published in “Przegląd Sejmowy”, 2010, No. 5.
by both chambers (the Sejm by a two-thirds majority of votes and the Senate by an absolute majority of votes). Nevertheless, the Constitution does not specify the procedure for reaching the identical wording of such a bill.

The model of bicameralism existing in Poland excludes the Senate from the process of appointment and dismissal of the government and the exercise of oversight of the government. However, the constitutional provisions, as well as provisions of ordinary statutes, provide for participation of the Senate in appointment of other organs of the State, particularly those, which, by nature, require independence. The position of the Senate in relation to both the Sejm and the government was strengthened after Poland’s accession to the European Union. Another step on this path was the adoption of the Treaty of Lisbon which provides for separate participation of every chamber of national parliaments in the decision-making process of the EU.

Re-establishment of the bicameral structure of parliament on the basis of Round Table Agreements was not a reference to the systemic traditions of the First and Second Republic of Poland, but rather a result of a search for systemic solutions adequate for the existent political needs. It was to be the first step towards introducing an organ deriving its mandate from democratic elections, into the existing system of institutions realizing the principle of the leading role of communist party. It was a particular, unintended conjuncture that the shaping of the system of the People’s Republic of Poland began with the referendum of 1946, as a consequence of which — on the basis of falsified results — the Senate was liquidated, and the act actually bringing this period in the history of Poland to an end was the adoption of a Constitution, which reinstated this institution to Polish parliamentarism.

An idea to appoint the Senate was not a product of historical reflection or recognition of the chamber’s importance in the past; neither was it a result of comparative analysis of the systems of modern democratic states. It was rather an effect of opinions, evolving during the Round Table works, on how to include the heretofore existent, unrealized opposition in the functioning political structure. The government’s starting point in its thinking about the second parliamentary chamber was not re-establishment of the Senate as a chamber taking its origin in democratic elections, but providing a consultative organ in the form of the Social-Economic Chamber, operating since 1982, with a more pluralistic nature by including opposition representatives in its composition. A resolute dissent on the part of Solidarity to the method of absorbing its representatives into the structures of authority on the basis of agreements concluded beyond the society, without a democratically acquired mandate, extinguished such a compromise formula between authorities and opposition.

Ultimately, at the price of opposition’s consent to establish an office of the President of broad competences, there was assumed the model of the Senate, as the second chamber of the parliament, established in democratic elections. Its primary competence was the right to dissent to the acts passed by the Sejm and to introduce amendments thereto. A resolution of the Senate could be rejected by the Sejm with a majority of 2/3 votes. Such majority was not an incidental choice, but was connected with
the composition of the Sejm, of which 35% seats were to be democratically elected. The joint sitting of the Senate and the Sejm was the National Assembly, whose function was to elect the President and bring him to accountability before the Tribunal of State — if necessary — with a majority of 2/3 votes. Furthermore, the Senate granted its consent to the appointment of the Commissioner of Citizens’ Rights and the President of the Supreme Audit Office.

The Senate, however, was not in any way included in the procedure of appointing and discharging the government and was equipped with no instruments allowing oversight thereof. Such a role of the Senate did not result from a reference of the March Constitution or most of modern constitutions in force in countries of bicameral system, but corresponded with the concept worked out by Round Table agreements. These assumed that during the term of the so-called Contract Sejm, in which the authorities were statutorily guaranteed 65% mandates, ruling shall be the Party’s inviolable prerogative.

Results of elections held on 4 June 1989 put an end to the political concept, whose realization was to be served by the system of institutions established by the Constitutional Amendment of 7 April 1989\(^1\). The electoral defeat of the government authorities and the sheer scale of Solidarity’s victory were the reasons why the process of “maturing” of Solidarity opposition to take over the governance lasted not four years — as was assumed at the Round Table and manifested in the title of the Electoral Ordinance to the Sejm\(^2\) — but in less than four months. When the political arrangement of the Sejm, guaranteed by granting 65% mandates to the ruling coalition, was overcome and majority supporting the government of Tadeusz Mazowiecki established, there became outdated the political assumptions as of which the Senate was to be the guarantor of the Party’s conformity to the obligation, accepted thereby at the Round Table, to respect the principle of political plurality.

Evoking the origins and political circumstances in which the Senate in Poland was re-established, as well as the form, which this institution was then provided, serves not only the recollection of history of democratic system development. It is important, since solutions then accepted remain virtually unchanged in the constitutional system, despite political changes and transformation of the systemic function. Most likely, this stems from the fact that bicameral system in unitary states finds no justification in the fundamental principles, on which systems of modern democratic states are based. The principle of sovereignty of the Nation, of representation, the republican nature of the state, the principle of the state ruled by law — may be realized in systems of both unicameral and bicameral parliament. Bicameralism has no canon or standard, to which the functioning solutions may be referred. The form of a bicameral system, competences of the second chamber, relations between the two chambers are sometimes a result of the systemic tradition reaching back to the times of estate monarchy or are a consequence of immediate political needs, which with time acquire an autonomic

\(^1\) Dziennik Ustaw, No. 19, item 101.
systemic value. The rationale behind the existent solutions shall not necessarily be looked for in the systemic rationality, modernly understood, but rather in circumstances and conditions, in which they had been formed.

I. SYSTEM OF REPRESENTATION

The system of representation adopted in 1989 was and is still based on the principle of identity of the electorate of both chambers of the Polish parliament. In the elections to both the Sejm and the Senate, the principle of universality of the right to vote is applied, which excludes qualifications eliminating any groups of citizens from participation in voting. This principle is an application of the general norm of universality of political rights in the electoral law. In the conditions of establishing the bicameral system, it also had its instrumental function as regards political goals which the establishment of the Senate was to serve. Excluding any group of citizens from participation in voting would hamper the political effect of the declared democratic nature of the election process. Even a reference to solutions of the March Constitution of 1921, vesting the right to vote in the elections to the Senate in persons who have attained 30 years of age would have not served as protection from an accusation of manipulating the criterion, in order to deteriorate Solidarity’s electoral results. This solution became a permanent element of the constitutional system, not questioned in constitutional drafts presented before the National Assembly nor during the works on the Constitution of the Republic of Poland.

The principle of universality of the right to vote is strengthened by the principle of direct elections. It prevents the deformation of constituents’ will by mediation. Indeed, in the political debates there appeared the concept of the Senate as the representation of the territorial government, but it never matured into the form conjoining the nature of representation with the scope of competences of the Senate and its relations with the chamber of political representation.

Whereas as regards the right to vote, invariably there is applied the principle of equal prerequisites to be fulfilled by electors of both chambers, as regards the right to be elected do the Senate, the Constitution of 1997 established a significant divergence of the age required to be able to run for the office of a Deputy and Senator. Eligible to be elected to the Sejm are Polish citizens who have attained the age of 21 years, and to the Senate — citizens who have attained the age of 20 years. This change was to attest treating the Senate as the chamber of prudence and reflection, the ability for which one acquires with time. Introduction of a higher age criterion shall not be regarded as limitation of political rights. It is a specification of requirements for performing public service.

4 Article 36 of the Constitution of 17 March 1921.
5 See Article 99.
Establishing it, the legislator has greater liberty than in vesting electoral rights, and does not incur the accusation of establishing norms inconsistent with democratic standards.

The identity of the Sejm and the Senate transfers the gravity of divergence in the nature of representation in both chambers onto divergence in the applied electoral systems. In order to explain factors affecting the divergence of the adopted systems, one shall refer to political circumstances, which affected shaping of those models.

The aim of the governing party was to eliminate — as its representatives put it — the “confrontational” nature of the first, partly democratic elections, i.e. limiting competition between political groups for the benefit of personal competition. It was hoped that convincing the public opinion to perceive elections in this manner would prevent the delegitimization of governing authorities, even in case of their loss. In the elections to the Sejm, this purpose was to be served primarily by the quasi-grotesque system, which excluded direct competition between candidates of the governing party with the candidates submitted by groups of citizens, and specified the number of mandates to be admitted to each of those electoral groups in advance. Formally, there was excluded the victory or loss of political groups. Although elections to the Senate were personal elections, in practice they were a competition between Solidarity candidates nominated both by parties and other citizen groupings. Unparalleled success of Solidarity candidates in such shaped system petrified the system itself. This was due to a conviction of many successful candidates that they owe success to their personal qualities and that maintaining the system guarantees their permanent position on the political stage.

Amendments to electoral systems to the Sejm and the Senate adopted various solutions. Already during the first democratic elections to the Sejm, the principle of proportionality was applied. Electoral ordinance to the Sejm of June 1991, applying the Hare-Niemeyer method of dividing mandates between parties provided for the composition of Sejm which mirrored the then dismembered political scene. At the beginning of the Sejm of the 1st term, there were 19 Deputies’ clubs and the largest parliamentary fraction was composed of 61 Deputies.

In 1992, the principle of proportional elections to the Sejm was introduced in the Constitutional Act about the mutual relations between the legislative and the executive power of the Republic of Poland and the territorial government (the so-called Small Constitution) and from then on became a constitutional norm. However, further changes in the electoral ordinance resulted in significant transformations in the application of this principle, as they were aimed at consolidating and rationalizing the party system. Of special importance for stabilization and consolidation of this system was the introduction of the 5% electoral threshold for political parties and 8% — for coalitions into the electoral ordinance to Sejm in 1993. As a consequence, the number

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8 Act of 28 May 1993, Electoral Ordinance to the Sejm of the Republic of Poland, Dziennik Ustaw, No. 45, item 205.
of parties represented in the Sejm was radically reduced; moreover, their internal consolidation occurred. In effect, there was created a stable political base for the government, its ability to perform its function was strengthened, as was the rationality of decisions made by citizens during elections.

The phenomenon of depersonalized representation and diminishing bonds between Deputies and voters, accompanied by strengthening the role of political parties, prompts a part of the public opinion to formulate the postulate of substituting the proportional system with majority elections held in single-member constituencies. In the conditions of weak political parties and unstable political system, such changes may not be safe for the functioning of the system of representation. The system of elections held in single-member constituencies favors political corruption, facilitates political autonomy of groups of interests and anarchization of relationships within parliamentary clubs. It is particularly dangerous in case of clubs constituting the political “background” of the government, as it affects the government’s ability to conduct coherent politics. On the other hand, along with establishment of party structure and developing monopoly of parties present on the political scene, there may be recognized serious advantages of such an electoral system for the functioning of the principle of representation and strengthening the personal factor during the elections.

Electoral system to the Senate underwent certain modifications, evoked rather by external factors than by recognizing faults of the existent system. In 1991 the absolute majority system, in force during the elections of 1989, was substituted by the system of qualified majority\(^9\). Resignation from the system of absolute majority, whose application requires two-round elections on a large scale to be conducted in practice, took place along with application of proportional system in the elections to the Sejm, which obviously makes the second round dispensable. It was admitted that there are economic reasons to shorten the procedure leading to commencement of the Senator’s mandate.

Another change in the principles for elections to the Senate was closely related to the reform of administrative division of the country accomplished in 1998. In 1989, a principle was applied that there shall be elected two Senators in each voivodeship, with the exception of the most numerous Warsaw and Katowice voivodeships, which elected three Senators each. Those rules were not a result of incidental number jugglery, but had a certain political goal behind them. First of all, multi-member (two or three) districts favored weakening of the mentioned “confrontational” quality of elections, which the authorities desired to avoid. As opposed to the system of single-member constituencies, there was a possibility of dividing the mandates and avoiding an explicit division into winners and losers. Also, an equal division of mandates between voivodeships was a kind of an electoral manipulation. The authorities hoped for a favorable situation, as the system provided greater representation to agricultural voivodeships, where there were no strong Solidarity structures. This was an infringement of the principle of equality understood as providing each citizen with the same voting power.

The disproportion between the voting power in Łódź voivodeship, the most populated of voivodeships electing two Senators, and the least populated Chełm voivodeship equaled 1:5. For that reason the principle of equality had to be omitted among principles for electoral law to the Senate. To a certain extent, this impaired the quality of representation of this chamber. Moreover, it shall be remembered that electing Senators in voivodeships does not make them voivodeship representatives in a legal sense. They are representatives of the Nation, integrally understood, elected by a part of this Nation inhabiting a certain voivodeship. In the elections to the Senate, a voivodeship exclusively serves the function of an electoral constituency, i.e. technical function in the election process, and does not become a political-territorial structure as a subject represented in the Senate. The system established in the described form was maintained — due to inertia, presumably — until 2001. On the one hand, there were no convincing concepts for its change, and on the other there was an express reluctance of local political groups to infringe political customs and habits.

Liquidation of 49 voivodeships questioned the raison d’être of this system and enforced changes. It is symptomatic, that the new system was established in a way, which to an even greater degree than the system of two-member electoral districts limits the competitiveness of elections and ensures the mandates are obtained by candidates supported by elites of the main political parties. Amending the electoral ordinance to the Senate, no advantage was taken of evaluating the assets of conducting elections in single-member constituencies, in which the candidates directly compete. There remained the election of Senators in voivodeships, while the number of mandates was increased proportionally to the population of a given voivodeship\(^\text{10}\); at the same time, the method of distributing mandates in the order reflecting the number of obtained votes was maintained\(^\text{11}\). This system reduces competitiveness of the elections.

The above remarks shall be concluded with a question, whether or not various structurization of representation of the same electorate by applying various methods of election creates some added value, absent in the uniform representation system. Indeed, it shall be recognized that as a result of elections, the political composition of the Senate only insignificantly differs from that of the Sejm.

II. RELATIONSHIPS BETWEEN THE SEJM AND THE SENATE IN THE SECOND REPUBLIC OF POLAND

Constitutionally specified tasks and competences of the Sejm and the Senate provided bicameralism with asymmetry. Such establishment of bicameralism was a result of the origin of the second chamber, as well as priorities of negotiation parties to the Round Table as regards establishment of the Senate. As had been mentioned, restating the Senate in the Polish constitutional system was not a result of a reflection on the functioning of the parliamentary system, nor analysis of its deficiencies and defects

\(^\text{10}\) Article 192 of the Act of 12 April 2001, Electoral Ordinance to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland, unified text, Dziennik Ustaw of 2007, No. 190, item 1360.

\(^\text{11}\) Article 206 in relation to Article 192 para. 2.
concluded with the necessity for creation of the second chamber. Indeed, it was not about creating some ideal construction of the parliament, but about an immediate solution, which was to lead to the democratic reconstruction of the state. Parties to the agreement had a different perception of priorities, whose accomplishment was to be served by the establishment of the Senate, as envisaged by the Constitutional Amendment of 7 April 1989. Of fundamental importance for Solidarity was establishing an institution with a democratic mandate in the structure of organs of the State. It was thought that holding free elections and introducing representation of the society into the state structure will be perceived by the public opinion as a democratic breakthrough and will result in a conviction on irreversibility of changes taking place. Hence, the very fact of appointing the Senate and holding democratic elections to this organ were more important than the chamber’s systemic position and competences. The government, on the other hand, was primarily interested in maintaining the principal decision-making instruments.

The Senate was equipped with the system of checks, but could positively influence the policy of the state in a limited scope only. In September 1989 the political concept, which was the basis for institutional solutions became outdated, but for various reasons — both political and legal — the institutions, which were to fulfill other functions than those for which they were constructed, remained unchanged.

Characterizing relationships between chambers of the parliament in the Polish constitutional system, whose shaping began in 1989, one shall keep in mind that the lack of equiponderance as regards their roles refers to both the scope of their activity and the force of decisions made by them.

The internal organization of the chambers is their exclusive competence. Both the Sejm and the Senate are autonomous as regards passing their regulations, they elect their organs, decide on immunity and disciplinary matters referring to their members.

III. RELATIONS BETWEEN THE CHAMBERS AS REGARDS THE LEGISLATION

The primary function of the Senate is its participation in the legislative process. The Constitutional Act of 17 October 1992, which reinstated the principle of separation of powers in the Polish constitutional system, specified the Sejm and the Senate to be organs of the legislative power. Thereby, it brought an end to a vague — from the point of view of the systematics of organs of the state — situation of the Senate in the constitutional system in the years 1989–1992. However, this was not tantamount to equiponderance of both chambers in the legislative process. The leading role was assigned to the Sejm.

In order to acquire an image of real decision-making power of the chambers, competences of each chamber in consecutive stages of the legislative proceedings shall first be considered.

The constitutional specification of subjects vested with the legislative initiative establishes a fundamental difference in the rights of Deputies and Senator or the Sejm
and the Senate as regards the right to introduce legislation. Constitutional regulation referring to the legislative initiative of Deputies and the Senate signifies that it is an individual right of a Deputy — which indeed may only be realized collectively, but this is decided by the Sejm itself, in its Standing Orders. The provision presently in force, vesting this right in a group of minimum 15 Deputies\textsuperscript{12} means that without any procedure for preparation of a bill, only after it has been signed by those Deputies, it may be submitted to the Marshal and become an object of legislative proceedings. Theoretically, even a smaller number of Deputies may introduce proceedings, if the group realizes the legislative initiative as a Sejm committee. Specifying the Senate as an object of legislative initiative reduces the possibility of Senators’ individual activity and is tantamount primarily to the necessity of conducting formalized proceedings over a bill in the Senate, finalized with the chamber’s resolution on its adoption and execution of the legislative initiative\textsuperscript{13}. In a situation when parties supporting government have a majority in the Senate, they may prevent passing initiatives uncomfortable for the government or alter their sense during the works in the Senate.

Works on a bill are held in the Sejm. A requirement to submit a bill to the Marshal is the first element of the leading role of the Sejm in the whole legislative process. Marshal of the Sejm is not only ensured a certain influence on specifying the moment of commencing works on a bill by the Sejm, but may also refer a bill to the Legislative Committee, which may pass its opinion on inconsistency of the bill with the law in force, with the majority of 3/5 votes. The first reading of a bill is a stage, in which Sejm may conclude the legislative proceedings by negatively assessing the bill’s general principles. This refers to bills submitted by all subjects vested with the legislative initiative, including the Senate. Hence, a bill worked out by the Senate may cease to exist already in the first stage of the proceedings, on the basis of an assessment of its principles passed by the Sejm.

Referring a bill to a committee begins the stage, when a bill is provided a form, which may gain support of the majority of the chamber. Committees, constituting organs representative for the political composition of the Sejm, have great liberty in shaping a bill and hallmarking it. Indeed, a sponsor may submit his amendments, but ultimately the decision on the content of a bill submitted for the second reading is made by a committee, and the right to withdraw a bill vested in its sponsor before the second reading is completed, has not heretofore been exercised in the parliamentary practice. Proceedings in the Sejm are concluded with the third reading, when a contingent motion to reject a bill in the form proposed by a committee is subject to a vote, as well as minority motions, amendments and the final text of a bill along with accepted motions and amendments. The final vote in the third reading transforms a bill into an act. A passed act is referred by the Marshal of the Sejm to the Speaker of the Senate.


\textsuperscript{13} Articles 76–83 of the resolution of the Senate of the Republic of Poland of 23 November 1990, Rules and Regulations of the Senate, unified text, \textit{Monitor Polski} of 2010, No. 39, item 542.
Acquiring the status of an act by a bill passed by the Sejm even prior to its consideration by the Senate is of crucial importance both from the point of view of relations between the two chambers and the mode of proceedings in case of a conflict between them. The Constitutional Amendment of 7 April 1989, introducing the Senate into the system of organs of the State, was the first to adopt the formula of referring an act, and not a bill, to the Senate. This was inconsistent with the tradition of the interwar period, when both the March Constitution and April Constitution applied the term “bill” to the document referred to the Senate. Also, in bicameral parliaments of other states it is a rule that a bill becomes an act past its adoption by the second chamber or past adopting a standpoint thereon by the first chamber. Justification for the formula of 1989 was searched in the constitutional position of the Sejm as the highest organ of authority, in the constitutional provision stating that the Sejm passes acts, and in a pragmatic argument that against the formula that the Sejm passes act, in case of not submitting amendments by the Senate, returning an act to Sejm would needlessly lengthen the whole procedure.

Speaker of the Senate directs the referred act to a relevant committee. A committee, according to the Rules and Regulations of the Senate, shall propose within no longer than 18 days a draft resolution in which it shall recommend to accept the act without amendments, to enter amendments into its text or to reject an act. Works in the Senate are conducted under the pressure of time, as the Senate shall pass its resolution in no longer than 30 days, with the exception of urgent bills when that period is shortened to 7 days. Comparing an average period of Sejm’s works on a bill with the time which is left for the Senate is another preclusion of equiponderance of the two chambers in the legislative process.

However, a fundamental problem in the relation between the Sejm and the Senate in the scope of legislative activity is the issue of substantive law limits to amendments passed by the Senate. Does the right to introduce amendments make the Senate a co-author of acts, or does it allow corrections within limits strictly specified by the Sejm? Conflicts between the chambers have occurred almost from the very beginning of the Senate’s existence and numerous times they were resolved by the Constitutional Tribunal. The Tribunal adjudicated the matter in two aspects: substantive, i.e. specifying the limit of the contents of the bill, which the term “Senate’s amendment” may be referred to, and in the procedural aspect: admissibility of not holding a vote in the Sejm on such amendments, which substantively transgress the scope qualifying a proposed regulation as an amendment.

The first conflict between the Sejm and the Senate as regards the scope of amendments took place in December 1989 as regards amending the Constitutional Tribunal Act. To the act passed by the Sejm, altering the oath taken by the Tribunal’s judges, the Senate introduced a number of amendments referring to relations between the Tribunal and the Senate. The Senate assumed that its amendments may refer to the whole sphere of relations regulated with the amended act. The Sejm, on the other hand, decided that the Senate transgressed the admissible limits of amendments, did not hold
a vote on them and referred the bill to the President for signature, without the Senate’s amendments. A protest of the Speaker of the Senate prevented the President from signing the bill. Ultimately, the issue was solved by appointing a joint Sejm and Senate commission and passing by the Sejm, at the initiative of the Legislative Committee, of an act including contents proposed by the Senate in its amendments. However, as regards the core of the argument, both parties have not changed their position.

An argument over the scope of amendments was referred to the Constitutional Tribunal already in 1993, under the rule of the Small Constitution. Tribunal’s judgment of 23 November 1993, Ref. No. K 5/93 set the direction for jurisprudence in that scope. In its statement of reasons, the Tribunal formulated the concept, that establishing whether a proposal is an amendment or a new regulation requires examining a specific matter, and as regards amending bills, the Senate is solely authorized to pass amendments to an amending act. This view was maintained both in the period of the binding force of the Small Constitution and the Constitution of the Republic of Poland of 1997 (i.e. judgments of: 24 June 1998, Ref. No. K 3/98; 19 June 2002, Ref. No. K 11/02; 22 May 2007, Ref. No. K 42/05).

It shall be added, that the legislator had an opportunity to take a stand on this issue during the passing of the Constitution of the Republic of Poland. A proposal, submitted at the second reading, to add into the draft Constitution a provision stating that “The scope of amendments introduced by the Senate to the bill referred thereto is unlimited” was rejected by the decisive majority of votes of the members of the Constitutional Assembly14.

As to motivations for the decision of the Constitutional Tribunal related to this issue, it was establishing that during the process of law-making each constitutional stage of proceedings serves a crucial guarantee function. Introducing new regulations during the stage of the Senate’s proceedings is tantamount to those regulations not being the subject of earlier works, i.a. in the first reading, proceedings before Sejm committees and the debate during the second reading. An accusation of thereby limiting the role of the Senate as an element of the legislative power is unjustified in view of the right to a legislative initiative vested therein.

This problem was referred to the Constitutional Tribunal for its adjudication on a number of occasions. The Tribunal has maintained its uniform jurisdiction on the matter. In subsequent judgments, it had been enriched with the notion of the “width” and “depth” of amendments, by which the Tribunal set criteria which shall be adopted when evaluating their admissibility. A fundamental thought included in the doctrine adopted by the Tribunal may be reduced to protecting the legislative process from actions, which would allow omitting some stages of those proceedings, harming the quality of law passed by the parliament.

The fundamental element of the functional relations in the bicameral system is the procedure for accepting or rejecting the Senate’s position by the Sejm. In relation thereto, the model constructed by provisions of the Constitutional Amendment of 7

14 Shorthand report of 3rd sitting of the National Assembly, part 2, pp. 43–44.
April 1989 proved inefficient both from the point of view of rationality of the procedure, and coherence with the parliamentary-cabinet system taking its form. Article 27 para. 1 of the Constitution amended in April 1989 stated that “the Senate may, within one month […] submit to the Sejm the proposals for particular amendments thereto or to reject it. Rejecting the Senate’s proposal by the Sejm shall be passed with the majority of two thirds votes […]”. Article 3, on the other hand, stated that “The act shall be signed by the President […], if […] the Sejm adopts amendments proposed by the Senate or rejects the proposals of the Senate”.

Such provisions created a situation, which resulted in the necessity to pass an act with an ordinary majority in case the Senate’s proposal was rejected with the required majority of 2/3 votes. Failure to fulfill both requirements resulted in what is called “legislative gridlock” in parliamentary nomenclature. The first situation of this kind took place during works on a bill amending the Constitutional Tribunal Act. The crisis which occurred then in the relations between the Sejm and the Senate was solved with means unforeseen in the existent parliamentary procedure and based on the manner of proceedings in similar cases under the rule of the March Constitution. There was appointed a joint Senate and Sejm committee, which worked out a compromise accepted by both sides, and the Senate withdrew its refusal for signing the act by the President. A compromise was indubitably favored by the subject matter of the act, whose regulation was of priority for both chambers. This co-operative model of conflict-solving did not become a precedent. The reasons for not applying this model again include primarily the triumphant atmosphere in the Senate past the electoral victory and a conviction that the Senate has monopoly on representing society’s real will. An obstacle in consolidating the cooperative model was also the constitutional provision, which described the document referred to the Senate as an act, as opposed to a bill, as described in the March Constitution. Amending an act, according to the agreement worked out by the organ established to reach a compromise, would require at least a part of the legislative procedure to be repeated. This issue is mentioned here not because of the author’s fondness for describing constitutional cases, but to remind that in the practice of public life sometimes the choice of a method for solving crises leaves a permanent mark on relations between institutions and creates a specific social atmosphere.

In the subsequent case of not accepting the Senate’s amendments and not passing an act, i.e. another legislative gridlock (which took place in the proceedings referring to amending the Penal Code and the Penal Execution Code), the Sejm concluded the legislative proceedings unsolved.

The Small Constitution passed in 1992, whose adoption was also accompanied by a conflict resulting from incoherence between a provision specifying conditions for rejecting the Senate’s amendments, originating from the constitutional amendment (Article 27 para. 1) and the provision regulating the procedure for amending the Constitution, maintained in the wording from 1952 (Article 106), introduced an important change in the heretofore existent regulation. It supplied a resolution of the Senate re-
jecting an act or introducing amendments thereto, with legal validity. The position of the Senate could be overcome by the Sejm exclusively with a resolution adopted with the absolute majority of votes (Article 17 para. 4). From the moment of entry of the Small Constitution into force, there was adopted the formula of subjecting a motion to reject the Senate’s amendments by the Sejm to a vote. Where a motion did not obtain the support of absolute majority, amendments were accepted and considered an integral part of an act. The new solution strengthened the position of the Senate and liquidated the basis for a legislative gridlock, which rationalized the legislative process, as it excluded conducting it unproductively. However, an incontestable weakening of the Senate’s position vis-à-vis that of the Sejm was changing the majority required to reject amendments of the Senate, by substituting the heretofore applied 2/3 of votes with absolute majority. This change shall be regarded as a resignation from instruments, which were to safeguard the Round Table agreements. In the conditions of existence of the democratically elected Sejm, it infringed coherence of the functioning of parliamentary-cabinet system. The requirement to reject the Senate’s amendments with the majority of 2/3 votes of the Sejm created a situation, in which there occurred divergence between requirements necessary for the appointment and existence of the government and requirements indispensable for its effective functioning. According to principles laid down by the Constitutional Act, appointing the government required the support of an absolute majority in the Sejm. However, maintaining the heretofore existent conditions for rejecting the Senate’s amendment would create a situation, in which passing acts indispensable for the government to realize its program, would require either the support of the majority of the Senate, which does not participate in the process of appointing the government, or the support of at least 2/3 votes in the Sejm.

The change introduced by the Small Constitution stabilized the constitutional principles of relations between the chambers in the legislative process. They were adopted unchanged by the Constitution presently in force.

A clearer regulation of the conditions for rejecting the Senate’s amendments by the Sejm did not bring an end to conflicts between the two chambers as regards both the essence of the notion of an amendment and the procedure for deciding on its admissibility. In the proceedings before the Constitutional Tribunal, the Senate questioned not only limiting the scope of amendments, but also the Sejm’s right to decide on not subjecting the Senate’s amendments to a vote in the Sejm due to not fulfilling the criteria, which an amendment shall conform to15. The fact that the Sejm decided not to consider the Senate’s amendments with an ordinary majority of votes was regarded by the Senate as a violation of Article 17 para. 4 of the Small Constitution, in force at the time. It persuaded that the only admissible procedure for rejecting the Senate’s amendments was rejecting it with a vote passed by the absolute majority of votes. The actions of the Sejm were considered at attempt at subjecting the Senate to control of the Sejm, for which there were no constitutional grounds. The Tribunal, however, found no violation of constitutional provisions in the actions of the Sejm. It adjudicat-

ed that the classification of amendments was not an act of controlling the Senate, but deciding on inadmissibility of actions due to their inconsistence with the law. Although the Tribunal emphasized the necessity for a thorough evaluation of amendments in each proceeding, it decided that it finds its justification in every organ’s duty for diligence to act in accordance with the law. It may here be digressed, that the Constitutional Tribunal’s rigidity limiting the scope and subject matter of amendments shall not be regarded as adopting a position reluctant to the Senate. The same approach, limiting possibilities to introduce new content via amendments, is adopted by the Tribunal in its examination of all stages of the legislative process, which increases the rigor of their introduction in subsequent stages of legislative works.

The above discussion shall be concluded with a remark, that in the procedure of passing a budget act, the Senate’s participation is the same, with the exception of a shorter, 20-day period for introducing amendments.

IV. EXECUTION OF THE CONSTITUTIONAL TRIBUNAL’S JUDGMENTS

A task, which the Senate was vested with in 2005, was execution of the judgments passed by the Constitutional Tribunal. As regards the category of the Senate’s constitutional entitlements, the Senate’s actions aimed at executing the Tribunal’s judgments are encompassed by its right to exercise the legislative initiative. However, due to specific prerequisites for undertaking the initiative, the scope in which it is taken, and the special procedure applied in the Senate in order to realize the initiative in this scope, actions aimed at realizing the Tribunal’s judgments may be classified as a separate function of the Senate.

The matter of realization of the Constitutional Tribunal’s judgments became a grave problem from the point of view of the functioning of the Republic of Poland as a state ruled by law. Past equipping the Tribunal’s judgment with the quality of finality by the force of the Constitution of 1997, neither the Constitution nor the Constitutional Tribunal Act specified unambiguously the organs responsible for initiating acts indispensable for ensuring the coherence of the legal order with the Constitution.

Many of Tribunal’s judgments on inconsistence of statutory provisions with the Constitutions do not limit their result to annulling the binding force of unconstitutional provisions, but requires substituting them with new statutory regulations. Theoretically, the duty to prepare such bills and submitting them to the Sejm in vested in all organs entitled to exercise the legislative initiative. In practice it meant that no organ took responsibility for delays in passing relevant acts. Persistent signals of the Constitutional Tribunal and legal circles on deficiency of trust in the state prompted the Senate to accept the obligation to oversee realization of Tribunal’s judgments. In November 2005, the provisions (Articles 85a–85f) regulating a separate mode of proceedings aimed at exercising the legislative initiative in order to execute the Constitu-

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16 See e.g. Informacja o istotnych problemach wynikających z działalności i orzeczniectwa TK w 2006 r., Warszawa 2007, pp. 83–87.
tional Tribunal’s judgments were introduced into the Rules and Regulations of the Senate. When discussing including the realization of Tribunal’s judgments execution in the sphere of the Senate’s activity, I purposely used the term “obligation to oversee”, as opposed to an obligation to execute, since the Senate — as may be assumed — was aware of its limited opportunities to independently prepare all bills executing Tribunal’s judgments. Many of them require coordinating the content at the governmental level in the procedure of interdepartment agreements, as well as preparing solutions, taking into account both budget effects, and their consequences for the functioning of the state apparatus. I believe that of fundamental importance for the factual fulfillment of the role of an active participant to the process of the Tribunal’s judgment execution by the Senate, are not the provisions specifying the procedure for bill preparation, but those regulations which are the basis for evaluation by the Legislation Committee of the analysis of the Tribunal’s judgments as regards the necessity to pass amendments to acts in force (Article 85a para. 1) and those entitling the Senate to address organs of the State to collaborate with the Senate on executing judgments of the Constitutional Tribunal (Article 85b). With the help of those instruments, the Senate may exert pressure on executive organs in order to prompt them to effectively work on bills executing the Tribunal’s judgments.

V. RELATIONS BETWEEN THE CHAMBERS IN THE PROCEDURE OF AMENDING THE CONSTITUTION OF THE REPUBLIC OF POLAND

Provisions of the Constitution of the Republic of Poland presently in force, regulating the procedure for its amendment, adopt a different formula of relations between the chambers than the one applied in the years 1989–1997, which is also employed in the procedure of passing ordinary acts. There was not applied a procedure foreseen in the constitutional act of 23 April 1992 on the mode of preparation and passing the Constitution of the Republic of Poland, which established the Constitutional Assembly in the form of the National Assembly, consisting of the two joint chambers, while an auxiliary organ in the form of the Constitutional Committee was established in the composition proportionally reflecting the number of members of the Sejm and the Senate. Article 235 para. 2 states that: “Amendment to the Constitution shall be passed as an act passed in the same wording by the Sejm, and then in the period of no longer than 60 days, by the Senate.” Amendments of the Senate are no longer mentioned in the provision, and the passing of an act in the wording by the Sejm and the Senate was introduced.

Such formulation of the provision allows two interpretations — divergent as regards the role of the Senate in the process of amending the Constitution. A requirement of passing an act in the same wording by the Sejm and the Senate may mean, that the

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Senate has no influence on the content of constitutional amendment and may either accept or reject it. Such an interpretation is confirmed both by the content of the Standing Orders of the Sejm (Articles 86a–86k), and the Rules and Regulations of the Senate (Article 70), and the resultant practice

It seems, however, that this is not a proper decipherment of the legislator’s intentions. If it were the legislator’s intention to restrict the role of the Senate solely to accepting or rejecting the proposal of the Sejm, it would have been simpler and unambiguous to formulate a provision stating that the Senate may, within 60 days, reject an act amending the Constitution. Passing an act in the same wording by both chambers is — in my opinion — a requirement for achieving the same wording via cooperation between the chambers. The fact, that constitutional provisions do not specify forms or mode for cooperation, does not mean that it is inadmissible and that the provisions of regulations of the two chambers may not specify a procedure for co-creating acts of the parliament. In the bicameral systems of numerous countries, similarly to Poland in the period of the binding force of the March Constitution, there are appointed joint committees at various stages of legislative procedures, whose function is not to make final decisions, but to prepare compromise-based solutions. In the Polish constitutional system, there seem to be too few “soft” decision-making forms. As far as constitutional amendments are concerned, due to importance of regulations and their desired permanence, it would seem purposeful to work out normative solutions in the process of cooperation between the Sejm and the Senate.

VI. CREATIVE AND OVERSIGHT FUNCTIONS IN THE BICAMERAL SYSTEM

A fundamental difference in the systemic position of the Sejm and the Senate in the bicameral structure of the parliament is connected with the Sejm’s exclusive competences to participate in procedures of appointing and discharging the government and exercising the parliamentary oversight thereof. The Senate has no direct influence on the functioning of the executive and is not a forum for arguments on current politics. Thus specified role of the Senate in the systemic structure was the foundation for the idea of reestablishing bicameralism of parliament in 1989. It was not principally questioned in the later debates on the system of a democratic state. An assumption that the government’s mandate is derived from the will of a single political center and is accountable before it was rather commonly approved of. It was applied by both the Small Constitution of 1992 and the Constitution of the Republic of Poland of 1997.

Therefore, the Senate as a chamber had not been constitutionally equipped with such instruments of parliamentary control, as a yearly consideration of the financial accounts submitted by the Council of Ministers and granting approval thereof, appointing investigative committees, a most of all, passing a vote of no confidence in the government and its individual members. Although Senators, on the basis of the act on

obligations and rights of Deputies and Senators were vested with the right to receive information and explanations\(^{19}\) from the members of the Council of Ministers and delivering statements addressed to members of the Council of Ministers, which the Rules and Regulations of the Senate established in the manner similar to that of Deputies’ interpellation\(^{20}\), this right is not followed by a possibility to hold a member of the government constitutionally accountable. Neither is the Senate equipped with the right to initiate proceedings aimed at holding members of the government constitutionally accountable. Relations between the Sejm and the government are reduced to confronting positions during works on the Senate’s amendments to bills, an in parliamentary practice are limited to convincing Senators to support government initiatives.

As of the force of the Constitution of the Republic of Poland and ordinary acts, the Senate participates in staffing numerous positions and appointing members of collective organs. It is difficult to establish criteria on basis of which categories of positions and organs, in the fulfillment of which the Senate participates, were established. For instance, the President of the National Bank of Poland is appointed solely by the Sejm, while the President of the Supreme Audit Office is appointed by the Sejm at the consent of the Senate. What were the reasons for vesting the appointment of the Constitutional Tribunal’s judges in the Sejm, and members of the Monetary Policy Council — in the Sejm, the Senate and the President of the Republic? The principle, according to which positions of particularly strong independence, constitutionally or statutorily guaranteed, are appointed by both chambers is not being consequently realized.

As a principle, there were adopted two kinds of procedures for the Senate’s co-participation in decisions pertaining to this matter. Appointing monocratic offices is achieved via the Senate’s consent to the candidature chosen by the Sejm. In this procedure there are appointed the Commissioner for Citizens’ Rights, President of the Supreme Audit Office, and as regards offices appointment for which is specified by statutes — Commissioner for Children’s Rights, Inspector General for the Protection of Personal Data, President of the Institute of National Remembrance, President of the Office of Electronic Communications. Initiative of forwarding candidatures belongs to the Sejm, while the Senate shall consider the motion within 30 days; in case the Senate does not consent to the given candidature, the Sejm repeats the appointment procedure. On the other hand, the Senate’s co-participation in fulfilling collective organs involves appointing a specific part of the composition of such organs According to this principle, the Senate appoints members of the Monetary Policy Council, National Council of the Judiciary, National Prosecutors’ Council, the Council of the Institute of National Remembrance and a member of the National Broadcasting Council. Generally, a rule is applied that the members of those organs are not delegates of an organ which appointed them, and are not accountable before it for the performance of their function. The National Broadcasting Council is in a special situation in that re-

\(^{19}\) Article 16 of the Act of 9 May 1996 on the exercise of the mandate of a Deputy or Senator, consolidated text, Dziennik Ustaw of 2003, No. 221, item 2199.

\(^{20}\) Article 49 paras. 1 and 2 of the Rules and Regulations of the Senate.
spect. It is responsible for its operation before all three organs, which appoint its members. A rejection of the yearly report of the Council by all organs appointing its members results in the end of the term of office of the Council.

VII. BICAMERAL SYSTEM IN THE CONDITIONS OF POLAND’S MEMBERSHIP IN THE EUROPEAN UNION

Poland’s accession to the European Union opened a new sphere of parliamentary activity and required the creation of new mechanisms in the relations between parliamentary chambers, as well as between the chambers and the government. The structure of the European Union as an international organization whose members are states, on the one hand, and on the other — the character of decisions made at the forum of European organs, which are of mostly law-making nature either directly applied in Member States (regulations) or determining solutions adopted by internal organs of those states (directives), does not allow to clearly distinguish the law-making function from tasks of executive organs. This symbiosis of functions, particularly the role of governments of the Member States in passing law whose binding force applies to citizens of Member States, required — according to democratic standards — the inclusion of parliaments of Member States in preparing positions their governments take at the forum of European organs. At the moment of Poland’s accession to the European Union this issue was referred to by the Protocol on the Role of National Parliaments in European Union annexed to the Amsterdam Treaty of 1997, which — using the wording applied therein — encouraged greater involvement of national parliaments in the activities of the European Union.

This “encouragement” is realized in Poland by the Act of 11 March 2004 on Cooperation of the Council of Ministers with the Sejm and the Senate in Matters Related to the Republic of Poland’s Membership in the European Union, adopted directly before obtaining the membership. It vests the government with the obligation to inform both chambers and their bodies competent under the rules of procedure of both chambers (Sejm European Union Affairs Committee and the Senate’s European Union Affairs Committee) on any matter related to the Republic of Poland’s membership in the European Union, to deliver to both chambers the documents of the European Union, subject to consultation with Member States, operational programs of activities of the Council of the European Union, the European Commission’s annual legislative plans and evaluations of annual legislative plans made by the European Parliament and the Council of the European Union; most of all, the Council of Ministers shall deliver to the Sejm and the Senate the Council of Ministers’ draft positions to the draft acts, on which parliamentary European Union Affairs Committees may refer to the government its opinions in due time. This part of the Act has not raised controversies. Arguments between the two chambers — first, in the form of rejecting the Senate’s amendment by the Sejm, then in referring the matter to the Constitutional Tribunal — ensued over the provision authorizing solely the Sejm committee to express an opinion, binding for the government, on draft legal acts prior to their consideration by the
Council of the European Union. The Tribunal’s adjudication was in favor of the Senate, and as a consequence the act was amended in order to vest also the Senate’s committee with the right to express an opinion binding for the government.

Of much farther-reaching consequences for the role of the Senate in the decision-making model adopted in Poland are provisions which entered into force along with the entry into force of the Lisbon Treaty. Protocol no. 1 to the Treaty on the European Union foresees in the procedures related to the participation of national parliaments in the EU decisions a separate participation of each chamber. Particularly, this refers to the right to notify of dissent against simplified treaty amendments (the so-called passarelle) and initiating proceedings before the Court of Justice of the European Union as regards inconsistency of the EU legal act with the principle of subsidiarity — both essential from the point of view of conducting state policy in European matters. A consent to such establishment of rights of both parliamentary chambers seems to confirm that Polish negotiators of the Lisbon Treaty were either unaware of or ignored incoherence of those provisions with the construction of asymmetry in the role and binding force of the two chambers’ decisions, on which Polish bicameral model is founded. However, these rules were accepted by Poland via the ratification of the Treaty and assign the Senate a role much more significant than that created by the norms of the Constitution of the Republic of Poland with reference to matters related to Poland’s membership in the European Union.

VIII. CONCLUSIONS

Contemporarily, the problem of bicameral structure of parliament is not entangled in ideological arguments, as had been a few decades ago. Electoral systems do not enforce the prestige of particular social groups, nor are they a factor discriminating them. The weight of political conflicts is transferred from the sphere of legal norms specifying the character of representation, onto a purely political sphere of interparty conflicts. Differences as regards the issue of bicameralism, which appeared, although not intensely, during the works on the Constitution of the Republic of Poland of 1997, rather reflected divergences in the attitude of political groups of the time towards the Senate as a certain symbol of Solidarity’s victory in the elections of June 1989, than were an expression of precise systemic concepts.

In the constitutional debate presently held, the problem of bicameralism is perceived largely through the prism of relations of expenditures for the Senate’s activity and effects thereof, measured on the basis of vague criteria. There are formulated opinions, that the improvement of the state of legislation, more so than by activities of the second chamber, may be achieved by improving the quality of legislative services of the Sejm. Such an opinion, I think, is a result of misunderstanding the role, which the Senate as a representational organ may fulfill, by critically examining solutions adopted by the Sejm. Relations between two chambers are of a different character than those

referring to the legislative technique, in which the administrative apparatus of the parliament may only be helpful. Upon evaluating efficiency of the activity of the Senate, there may be considered the issues of its tasks and possibilities to commence activity in spheres which are presently beyond interests of other state organs, as the Senate had done, assuming the task to execute judgments of the Constitutional Tribunal.

There is, however, another perspective to be adopted, different from perceiving systemic institutions through the prism of their direct utility in the process of realizing state authority; perceiving systemic institutions as an element of the spiritual heritage of the nation, i.e. a significant part of its culture. Historic circumstances, in which these institutions were formed, the influence they exerted on society’s consciousness, on its manner of understanding the role of the State and the citizen’s place in it, are an important factor consolidating the Nation’s identity. They are also a certain model of public conduct, relying on questioning monopoly on truth, on appreciating various views, on obtaining decisions upon confronting various reasons, i.e. a model of tolerance in the public debate. I believe that in the social consciousness the existence of bicameral parliament, regardless of the form of bicameralism, is an important symbol of the return to systemic traditions of independent Poland.
Europeanization of law is the consequence of influence of European integration on the domestic legal system of countries aspiring to EU membership. The constitution is not free from this influence. To put it more simply, Europeanization of the constitution means constitutionalization of matters either related (even if in a different way) to European Union law (a sensu stricto Europeanization) or generally connected with law enacted by European international organizations (a sensu largo Europeanization).

Constitutional transformation resulting from the EU accession is mostly reflected in the organizational structure of the state. In Poland, the consequence of delegation of some powers of state authorities to the European Community/European Union (under Article 90 of the Constitution) means the extension of the state activity to the European level. This function of the state does not correspond with the classical separation of powers doctrine. The exercise of this function only by the Council of Ministers threatens the balance of powers guaranteed by Article 10 of the Constitution. There is, above all, a need for involvement of the representative bodies of the Nation in the exercise of this function. Therefore, an amendment to the constitution should be considered that would specify the principles of cooperation in European affairs between the Council of Ministers, the Sejm and the Senate, and the president of the Republic.

Europeanization of the constitution does not always have positive effect on its “improvement”. It may lead to “erosion” of constitutional standards: disavowal of the principles of the system of government, the weakening of the regulatory function of the state. The absence of constitutionalization of the “progress in integration” exposes the legal system to criticism for being contradictory and lacking completeness. The scope of Europeanization should be limited by the so-called identity of the constitution, i.e. a relative immutability of fundamental constitutional principles and values. When proclaiming an “integration option”, their authors have not identified those categories which determine the substance of the basic law.

* This article was published in “Przegląd Sejmowy”, 2010, No. 2.
We can imagine a situation in which the Court of Justice of the European Union [hereinafter: ECJ] adjudicates that a legislative act of a secondary law is consistent with a certain disposition of the Treaty on the Establishment of EU, whereas the constitutional tribunal of the Member State questions the compliance of such disposition with the national Constitution. Therefore, a consequence of various adjudicating patterns of constitutionalization may be a contradiction of, for instance, a directive which is legal in the opinion of judges from Luxembourg, with the basic law. Such a potential conflict proves *implicite a* confrontational relation between the Constitution and the Community law. However, it seems that both those legal orders are more complementary than incoherent with each other, because, on one hand, the European law stems from the experience and legal culture of the Member States, and, on the other hand, must comply with the requirements of growing integration. Another fact which is obvious is that the national legal order is subject to transformation as a result of the participation of the state in the European Community. Such changes are a natural effect of the binding force of the European law in the territory of the Member States.

A problem of mutual reactions between the European and domestic laws is so complicated that it goes beyond the scope of this article. That is why, we will limit our discussion to the so-called Europeization of the domestic law, and in particular Europeanization of the Constitution. A few comments made in this article, based on the systematics of the Constitution, are more of a diagnostic than axiological character, whereas the ascertainment made herein is — to put it immodestly — more corrective than critical.

I. THE NOTION OF EUROPEANIZATION

Europeanization of law is the consequence of influence of European integration on the domestic legal system of countries aspiring to EU membership¹. The Constitution is not free from this influence either, even though the possible opportunism of the authors of the basic law, with regard to the taking into account of those implications may result from the highest legal rank thereof. Europeanization of the Constitution means, to put things in a simplified manner, constitutionalization of matters either related (even if in a different way) to European Union law (a *sensu stricto* Europeanization) or generally connected with law enacted by European international organizations (a *sensu largo* Europeanization).

Can the number of amendments to the Constitution caused by membership in the EC/EU prove Europeanization of the Constitution and indirectly document its support for the progress of integration? If we assume legislative perfectionism of the authors of the Constitution of the Republic of Poland, and — what follows from that —

the completeness of the “European” regulation in 1997, the only amendment to the Polish basic law in 2006, providing for the execution of the European Arrest Warrant [hereinafter: EAW] in accordance with the Constitution, proves, in a way *prima facie*, the appropriate level of the phenomenon concerned. Moreover, we may conclude (also *prima facie*) that the constitutional legislator’s failures and omissions have never been “remedied”. Of course, then the condition of Europeanization of the Constitution may prove unsatisfactory.

It is surprising that the nomenclature of the Constitution of the Republic of Poland does not contain any categories such as: the European Communities, the European Union, the Community law, the EU law, a European regulation, directive, sources of the EU law, etc. “Onomastically”, it would be difficult to consider the Polish basic law to be “Europeanized”. The constitutional legislator used more general distinctions: an international organization, an international organ, law established by an international organization. Meanwhile, for instance in the German Basic Law, Article 23 thereof clearly refers to the European Union. On 2 December 1992, Bundestag adopted that “European” Article3, because, in the opinion of the commentators of that amendment, the Treaty from Maastricht somehow forced the constitutional legislator to supplement the text of the Constitution, because the EU does not consent to the use of the term of an “international institution” from Article 23 of the basic law4. We should think about the *mutatis mutandis* reception of this disposition which, in section 1, stipulates that “For the purpose of bringing the united Europe to life, the Federal Republic of Germany co-operates with the aim of development of the European Union, which is obliged to comply with the democracy principles, the principles of legal, social and federation state, and the principle of subsidiarity, and which guarantees the protection of fundamental rights which is, in its essence, comparable with this Basic Law”.

The progress of the process of the European integration is not without influence on the supremacy clauses in the Constitutions of Member States. According to the interpretation of Article 8 para. 1. of the Constitution: “The Constitution shall be the supreme law of the Republic of Poland”, we should eliminate the absolute character of this primacy. The Constitutional Tribunal (Trybunał Konstytucyjny, TK), in the justification of its judgment of 11 May 2005 on compliance of the Treaty on Accession with the Constitution of the Republic of Poland5, emphasises the priory of the rule and application of the Constitution of the Republic of Poland in the territory of Poland. This may not, however, lead to absolute derogation of the Community legislative acts which are in contradiction with the basic law. The primacy of the constitutional legislator consists rather in a free choice of the “rule of conflict” restoring priority to the Constitution. Therefore, the supreme legal force thereof entails either an “integration”

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2 Dziennik Ustaw, No. 200, item 1471.
option (an amendment to the Constitution) or an “integration-étatiste” option (an amendment to the Community legislative act), or finally an “étatiste” option (the withdrawal by the Republic of Poland from the EU). Therefore, we may consider whether possible constitutionization of such a rule of the “conflict of law” does not have a relevant explicative value for the supremacy clause de lege fundamentali lata. Such an effect may be achieved by supplementation of Article 8 para. 1 of the Constitution with the following subpara. 1: If the legislative acts of the EU are inconsistent with the Constitution of the Republic of Poland, elimination of such inconsistency occurs through: a) an amendment to the Constitution, b) an amendment to the legislative act of the EU, c) the withdrawal by the Republic of Poland from the EU, and point 2: The right accepted by the institutions of EU in discharge of the competence entrusted thereto has priority over the domestic law. This stipulation, contained in point 2, constitutes, as we know, a repetition of the disposition of the Treaty establishing the Constitution for Europe (Articles 1–10). Such “borrowings” exemplify a special form of Europeanization of the national Constitution consisting of the supplementation of the text thereof with the text of the European Constitution.

A certain test on Europeanization of the basic law is the origin of the entity verifying the entrusting, transfer, possible delegation of the competence of the state authority to the EU. Ultimately, this is about an evaluation of the EU legislative acts: whether or not they fall within the scope of competence entrusted to the Community, or à rebours — they exceed such competence.

We can encounter a view in the German literature that, in the event of the Community’s action, we need an instance which, according to the Constitutional standards, will examine the legislative acts of the EC within the scope of supremacy power entrusted thereto by the Federal Republic of Germany. A conflict between the Federal Constitutional Tribunal [hereinafter: FCT] and the ECJ is not a catastrophe or a sign of disintegration, by a constitutional and legal necessity. Such findings remind us of the publicised judgment of FCT of 29 May 1974 (Solange versus Beschluss), where FCT confirmed a possibility of control of the EC law: “As long (Solange) as the process of integration does not reach such progress to ensure that the Community law contains a catalogue of citizen rights adequate to the catalogue of citizen rights in the Basic Law — a request for verification of constitutionality of such law shall be permitted”. On 22 October 1985, FCT conditionally suspended its com-

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6 The principle of entrusted competence is a category of the European law and constitutes a pattern of legality in the proceedings before ECJ (Article 230, Article 234 of the Treaty on Functioning of the EU). However, domestic courts refuse to acknowledge ECJ as an “arbiter of constitutionality”. Cf. R. Kwiecien, Zgodność traktatu akcesyjnego z Konstytucją, “Europejski Przegląd Sądowny”, 2005, No. 1, p. 44. Cf. also M. Kumm, Who is the Final Arbiter of Constitutionality in Europe?, “Harvard Jean Monnet Working Paper Series” 1998, No. 10. In its judgment of 30 June 2009 (BVerfG, 2 BvE 2/08) FCT yet again considered this rule as a criterion for its own control of constitutionality of the secondary European law.


9 BVerGE 37,271.
petence to examine the Community law. In point 2 of the Tribunal’s sentence, the Tribunal stated that: “As long as (Solange) the EC, and in particular the jurisprudence of ECJ guarantees effective protection of the basic laws, FCT shall not discharge jurisdiction for the Community law and control the same by means of the standards of the laws contained in the Basic Law”\(^{10}\). In another, well-known judgment of 12 October 1992 on constitutionality of the Treaty of Maastricht\(^{11}\), FCT confirmed the control competence with regard to the public authority exercised by the EC, limiting, however, the scope of such control to a general security of non-transferable standard of the basic rights deriving from the Basic Law. In this context, FCT performed the adjudicating function in relation to the Community law, with regard to co-operation (\textit{Kooperationsverhältnis}) with ECJ. On the other hand, Austrian Constitutional Tribunal stated that legislative acts of the domestic law, implementing Community rules are not subject to the control of constitutionality\(^{12}\). The French Constitutional Council, in its judgment of 10 June 2004, stated that the meeting of the constitutional requirements of transposition of the Community directive could interfere with clear, opposing provisions of the Constitution\(^{13}\).

In the above-quoted judgment of 11 May 2005 on constitutionality of the Treaty on Accession of Poland, TK stated that: “Member States retain their right to evaluate whether the legislative Community (EU) authorities, passing a certain legislative act (a provision of law), act within the scope of the entrusted competence and whether they exercise their rights in accordance with the rules of subsidiarity and proportionality. The exceeding of this scope means that legislative acts (provisions) passed outside their scope are covered by the principle of priority of the Community law”.

We cannot fail to notice that the Europeanization of the Constitutional law is accompanied by the phenomenon of “state control”, which — in the most general sense — consists of an attempt to strengthen the state control, protection of the so-called identity of the national Constitution (maintenance of the fundamental principles thereof), adding an extra value to the national parliament with regard to European matters and the conservative adjudicating line of constitutional tribunals with regard to the EU and its laws. This phenomenon is strengthened in the situation of revision of establishment treaties. Exemplification may be provided here by ratification of the Lisbon Treaty or an attempt made at the challenging of constitutionality thereof.

A “conservative” trend of adjudication with regard to the EU was maintained mainly by the German jurisprudence. In its judgment of 30 June 2009 regarding the compliance of the Lisbon Treaty with the Basic Law\(^{14}\), FCT confirmed the constitu-

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\(^{10}\) BVerGE 73, 339.

\(^{11}\) BVerGE 89, 155


tionality of the Treaty, nevertheless it stated that the act on extension and strengthening of the powers of Bundestag and Bundesrat in EU matters of 17 November 2005 is unconstitutional and postulated the strengthening of co-operation of the German Parliament in the process of taking decisions by the Council of Europe or the European Union Council with regard to amendments to treaties. This is particularly important in case of modification thereof, not through a revision treaty, but on the basis of other legal regulations. A new act of 22 September 200915 took into account the position of FCT. Obiter dicta, FCT established other criteria for its own examination of constitutionality of the EU laws: compliance with the principle of subsidiarity, the principle of entrusted competence, the identity of the Constitution16. Europeanization may consist also of “duplication” of the EU law by the constitutional legislator. The integration clause specified in Article 23 of the Basic Law was supplemented by the following section: “Bundestag and Bundesrat shall be entitled to lodge a complaint to the Court of Justice of the EU in consequence of a breach of the principle of subsidiarity by a legislative act of the EU”17, which mutatis mutandis constitutes the repetition of the disposition of Article 8 of Protocol No. 2 regarding the application of the rules of subsidiarity and proportionality, incorporated in the Lisbon Treaty.

A problem of a mutual impact of the domestic and European law was also an object of an opinion of the Constitutional Court [hereinafter: CC] in the Czech Republic18. In the opinion of CC, the Czech legal order and the European law constitute two relatively independent and autonomous systems, which are, however, based on common foundations. This derives from the fact that the EU, after the coming into force of the Lisbon Treaty, is not a federal state or an institution going in the direction of federation, but is an international organization with a legal personality, based on such values as respect for human dignity, freedom, democracy, i.e. values which are inherent to the substantive state of law. Therefore, the Lisbon Treaty is, in the opinion of CC, consistent with regular principles protected by the Czech constitutional order. This does not mean that CC is free from a duty to supervise the secondary law. The Constitution is still the supreme law in the state, and CC still remains the supreme authority for the protection of constitutionality of the law, also in the context of possible conflict with the European law. The court should interfere when the authorities of the Union act in contradiction with common values or exceed the scope of

16 Point 240 of the judgment.
18 Cf. judgment of the Constitutional Court of 26 November 2008 regarding the compliance with the constitutional order of the Czech Republic of the Lisbon Treaty (Ref. No. PL. US 19/08); cf. also a translation and discussion of this judgment presented by K. Witkowska-Chrzczonowicz, “Przegląd Sejmowy”, 2009, No. 2, pp. 271–290.
competence entrusted to them. A category of the entrusted competence may not — in the opinion of CC — be exercised in a manner contradicting the core essence of the Czech Republic as a sovereign and democratic state of law, based on the respect for the human and citizen rights and freedoms (Article 1 para. 1 of the Czech Constitution), as well as in a manner changing the substantive aspect of the democratic state of law (Article 9 para. 2 of the Czech Constitution). That is why, the legislative acts of the European Union which are in contradiction with non-amendable provisions of Article 1 para. 1 and Article 9 para. 2 of the Constitution may not be of a binding nature in the Czech Republic.

II. AMENDMENT TO THE CONSTITUTION
OF THE REPUBLIC OF POLAND AS AN EXPRESSION
OF EUROPEANIZATION OF THE BASIC LAW

It is obvious that the membership of Poland in the European Union somehow forces the adoption of statutes implementing the legislative acts of the Community/EU law, which may entail non-constitutionality of such laws in the situation where the Constitution regulates a given matter. This case is illustrated by the aforementioned EAW. In its judgment of 27 April 2005, TK considered a legal question in a matter concerning the compliance with the Constitution of the Republic of Poland of national means aimed at implementation of the Framework Decision of the EU Council of 13 June 2002 regarding the European Arrest Warrant19. On 18 March 2004, the Sejm amended the Code of Penal Procedure and supplemented it with the text of Article 607 incorporating the Framework Decision regarding EAW. TK stated that this Article was inconsistent with Article 55 para. 1 of the Constitution of the Republic of Poland to the extent in which it allows a transfer of Polish citizen on the basis of EAW to another Member State of the EU. The tribunal emphasized that: "[…] the prohibition of extradition formulated in Article 55 para. 1 of the Constitution expresses a right of a citizen of Poland to be tried, in view of his/her penal liability, before a Polish court. Meanwhile, the transfer of a Polish citizen on the basis of EAW to another Member State of the European Union could infringe this entitlement. From this point of view we should consider that the prohibition of extradition of a Polish citizen, as formulated in Article 55 para. 1 of the Constitution, has an absolute character and the subjective personal right of citizens, deriving therefrom, may not be subject to any limitations, because an introduction thereof would prevent the discharge of such right". Obiter dicta, if the law under this Article is of an absolute character, then it should also be relatively non-amendable, and therefore, a limitation thereof could not take place by means of an ordinary amendment to the Constitution. The Tribunal, pursuant to Article 190 para. 3 of the Constitution, postponed the date on which the “incriminated” provision will lose effect by 18 months, considering that: “in the situation where the loss of the binding power by a provision considered to be non-constitutional could lead to an infringement of international obligations of

19 OTK ZTJ 2005, series A, No. 4, item 42.
the Republic of Poland, and therefore, an institution of postponement of the period of application thereof gains new dimension from the point of view of international obligations of the state. The exercise thereof is not a solution which ensures, until the time that all irregularities are eliminated within the internal legal order, the fulfilment by Poland of the obligations it has undertaken”.

Without going into details of determination whether or not this settlement is correct, we could think about the mechanism eliminating pro futuro pertaining condition of non-constitutionality of a normative act after the judgment of TK: implementation of a directive and transposition of a framework decision which are inconsistent with the Constitution take place upon prior amendment to the Constitution. Similar solutions with regard to international treaties are adopted, inter alia, in the Spanish Constitution (Article 95). Similarly, Article 188n para. 11 of the Treaty on Functioning of EU stipulates that an international treaty which is an object of a negative opinion of ECJ, may come into force only subject to the conditions specified in Article 48 of the Treaty on EU [a procedure of revision of the Treaty — D.L.-S., J.G.].

The Basic Law of the Federal Republic of Germany was amended before the execution of EAW\(^{20}\). It prohibits extradition of a German citizen, but in Article 16 para. 2 it stipulates that: “The statute may regulate otherwise extradition to Member States of the EU or an international court, as long as the principle of the state of law is complied with”. This did not, however, prevent FCT from consideration, by means of its judgment of 18 July 2005, of the statute implementing EAW as inconsistent with the Constitution. In the opinion of FCT, the “incriminated” statute violated the principles specified in Article 16 para. 2 of the Basic Law\(^{21}\).

Article 55 of the Constitution, amended by means of the Act of 8 September 2006, reads, in para. 2, as follows: “Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organization of which the Republic of Poland is a member, provided that the act covered by a request for extradition:

1) was committed outside the territory of the Republic of Poland, and

2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request”.

We may ask if this amendment meets the postulate of Europeanization. EAW is not, after all, an institution identical to extradition. According to the preamble of the framework decision under discussion\(^{22}\), EAW means a system of free flow of jurispru-

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\(^{20}\) Act of 29 November 2000 on an Amendment to the Basic Law, Bundesgesetzblatt 2000, No. 52. p. 1633.

\(^{21}\) 2 BvR 2236/04.

dence oriented by the principle of a high degree of trust in Member States. Moreover, Article 2 para. 2 of the decision anticipates exceptions from the principle of dual criminality. The exclusion thereof occurs when an act in the state of issue of EAW is threatened with a penalty of imprisonment or another security measure for at least 3 years. Therefore, if an act which constitutes the grounds for an issue of EAW constitutes an offence according to the Polish law, the transfer of a citizen of the Republic of Poland is still prohibited according to the Constitution of the Republic of Poland23.

III. CONSTITUTIONAL PRINCIPLES CONCERNING THE EUROPEANIZATION PRINCIPLE

Membership in the European structures affects the text of constitutional principles of the Republic of Poland established in the domestic doctrine and jurisprudence of domestic court24. Before our accession, they were binding in the state whose authorities discharged of all the tasks of the public authority. In the traditional Polish constitutionalism, the legislative function is served by the Sejm and Senate as representative authorities of the Nation. A statute, being a source of commonly-binding laws of the Republic of Poland, has democratic legitimacy, because it is adopted in a democratic procedure by authorities which are elected in direct and common elections, representing the sovereign. The parliament also safeguards other normative acts. Through its guidelines, it interferes with the text of regulations and controls the process of ratification of international treaties. Such a state of affairs identifies the principle of superiority of the nation and democratic representation of the state of law and distribution of power. The transfer of competence to the European Community and its authorities means that certain functions, so far reserved for the state, have been taken over by an external entity, not subordinate to the supreme power of the nation and not bearing any responsibility towards it. We mainly entrusted EC/EU with the function of making the laws which are commonly binding, thus entering into the sphere reserved for statutory regulation, including the sphere of constitutional rights and freedoms. The laws stipulated by the EU authorities do not have full democratic legitimacy, because they do not originate (with the exception of the European Parliament) from common elections and they do not bear direct responsibility before the nation. Such a modus vivendi means that the principles of the democratic state of law, sovereignty of the nation and distribution of power are subject to the process of “Europeanization”25.

23 Austria achieved, on the basis of Article 33 para. 1 of the Framework Decision, the postponement of the period of transposition until 31 December 2006, with regard to the extension of EAW to Austrian citizens, if acts which constitute the grounds for an issue of the warrant do not constitute offences in the light of the Austrian law. Cf. J. Barcz, Europejski nakaz aresztowania — konsekwencje braku transpozycji lub wadliwej transpozycji decyzji ramowej w państwie członkowskim UE, “Europejski Przegląd Sądowy”, 2005, No. 1, p. 17.

24 K. Wojtyczek, Przekazywanie kompetencji państwa..., pp. 27–54.

25 More on this topic in: M. Dobrowolski, D. Lis-Staranowicz, Podstawowe zasady ustroju RP w europejskich orzeczeniach Trybunału Konstytucyjnego, “Przegląd Sejmowy”, 2007, No. 1, p. 9 et seq.
This problem is also perceived by the Constitutional Tribunal. In the opinion of TK, the development of the EU, in many cases, forces a new approach to legal issues and institutions which, in the course of many years (and sometimes many centuries) of tradition, have been shaped, enriched by the jurisprudence and the doctrine and which are well-fostered in the awareness of many generations of lawyers. A necessity arises of re-defining certain prevailing and so far unchanged institutions and notions. The source thereof is European integration, because sometimes a conflict may arise between the well-established understanding of certain constitutional provisions and a need of exerting an effective influence on the EU, which, at the same time, is consistent with the constitutional principles26.

It seems that one of the consequences of transfer of competence to EC/EU is the occurrence of a new function of the state. The presence thereof affects the text of constitutional principles. The essence of this function is not merely exhausted by the law-making process, or only by the process of execution thereof. On the one hand, it consists of competence to take political decisions concerning the implementation of the interests of the Republic of Poland in the European Community, and on the other hand — of competence to take political decisions concerning the whole Community. The European function is a certain conglomerate of transposed competences and new competences, a source whereof is the Community law. The practice so far indicates that this function is fully discharged of by the Council of Ministers, which is certainly authorized by the Constitution of the Republic of Poland in view of a lack of constitutionization of this matter (Article 146 para. 2). The implied competence of the Government in European matters may not be an obstacle for other constitutional authorities to participate in the execution thereof.

The doctrine of the constitutional law has made attempts aimed and re-defining the constitutional principles in the context of our membership in EC/EU27. First of all, it accentuated a necessity of limiting the deficit of democratic legitimacy of the Council of Ministers participating in the procedure of the making of the European law. A necessity was pointed out of inclusion of authorities elected in common elections in this procedure28. This postulate was executed only to a small extent, by means of the so-called Co-operative Act29. The President is still absent from the procedure, and, after all, he is also elected by the people.

At this point, we may conclude that the Europeanization leads to the weakening of the value of the representative principle of the form of discharging power. More-

27 Cf. M. Dobrowolski, D. Lis-Staranowicz, Podstawowe zasady ustroju RP..., p. 12 et seq.
29 The Act of 11 March 2004 on Co-operation of the Council of Ministers with the Sejm and Senate in Matters Connected with the Membership of the Republic of Poland in the European Union (Dziennik Ustaw, No. 52, item 515, as amended).
over, a limitation, at least from the quantitative point of view, applies to the scope of the national law-making process. Moreover, other constitutional principles are devalued as well. Depreciation means here that their systemic importance is reduced. In the case of such interpretation, validation comes down to the existence of law which is formally supported by the authority of the legislator. However, this statement of the ontic status of the standard does not constitute a recommendation for the application, observation or at least confrontation thereof with pro-Community interpretation of the Constitution.

IV. EUROPEANIZATION OF THE ELECTION LAW

The Constitution of the Republic of Poland does not contain any provisions which refer to elections to the European Parliament. This does not mean that the procedure of selection therein of Polish representation could be indifferent for the constitutional legislator, quite on the contrary — the law on elections to the European Parliament should, toutes proportions gardées, become an object of constitutionization. The sufficient ratio legis is the constitutional level of protection of that law (Article 79 of the Constitution). It seems that the status of a voter constitutes, sit venia verbo, an exclusive matter of the Basic Law, and therefore it may not — in our opinion — be determined only by an ordinary statute which, at the most, determines principles and procedure of nomination of candidates, conduct of elections and conditions of their validity (a simili moting under Article 100 para. 3 of the Constitution). Therefore, the making of an analogy to the constitutional model of national elections in an analysis of the basic principles of the “European” ordinance seems justified. Thus, a beneficiary of the electoral law to the European Parliament and to the national authority should be the same. Meanwhile, the circle of entities which are authorized in the European elections is extended to foreigners (Article 8 of the Election Ordinance to the European Parliament)30. This gives rise as to the constitutionality of such extrapolation. Objections may be raised already at the level of literal interpretation of Article 37 of the Constitution, according to which a person who is under the power of the Republic of Poland enjoys freedoms and rights conferred by the Constitution, e.g. a foreigner may enjoy the right of asylum, or may be granted a statute of a refugee (Article 56 of the Constitution). On the other hand, according to Article 62 of the Constitution, only a Polish citizen may elect and be elected. Argumentum ex silentio: the constitutional catalogue of political rights and freedoms is complete, and the “incriminated” Article 8 of the Ordinance, in confrontation with the text and context of the Constitution of the Republic of Poland, should be considered as praefer legem fundamentali. Therefore, in order to restore the desired level of constitutionality, we should supplement Article 62 of the Constitution with a passus constituting expressis verbis para. 1 of Article 8 of the “European” ordinance: “A right of election to the European Parliament in the Republic of Poland may also be exercised

by a citizen of the European Union who is not a Polish citizen, and who, not later than on the election day, turns 18 and, according to the law, is permanently domiciled in the Republic of Poland and is entered in the regular register of voters’.

The election ordinance to the European Parliament has been an object of judgments of TK. In its judgment of 31 May 2004\(^{31}\), TK confirmed the compliance of certain provisions thereof (including of Article 8) with the Constitution of the Republic of Poland. However, the applicants contested the contradiction thereof with Article 4 of the Constitution (the principle of sovereignty of the nation), and not with its Article 62. As we know, TK is bound by the limits of the application (Article 66 of the Constitutional Tribunal Act). The Tribunal, in its judgment passed on 11 May 2005, also expressed its opinion regarding the law on elections to local self-government organs\(^{32}\). The authors of the application requested determination of inconsistency of Article 19 para. 1 of the Treaty on the Functioning of the European Union with Article 62 para. 1 of the Constitution. According to this disposition, a Polish citizen is entitled to participate in a referendum and to elect the President of the Republic of Poland, deputies, senators and representatives to the local self-government organs, if, not later than on the election day, he turns 18. The contested provision of the Community law states that each citizen of the Union, domiciled in a Member State he/she is not a citizen of, has a right of vote during elections and be a candidate in local elections in a Member State where he/she is domiciled, subject to the same principles as citizens of such state.

The applicant stated that, in consequence of ratification of the Treaty on Accession, the citizen rights were unlawfully extended to natural persons who are not Polish citizens, and who are EU citizens. For the complainants this meant that the Republic of Poland was no longer a common property of the Polish citizens, but became a common property of EU citizens. The common property — the Republic of Poland — remains, after the accession to EU and the European Communities, one of twenty-five individual parts belonging to super-national organism, known as the European Union. Therefore — as claimed by the applicants — the Republic of Poland ceases to be an independent state\(^{33}\).

The Constitutional Tribunal did not notice any unconstitutionality of Article 19 para. 1 of the Treaty on Functioning of the European Union stating that the same was not inconsistent with Article 62 par. 1 of the Constitution\(^{34}\). In its judgment, it did not substantially relate to the claim of non-constitutionality, but it merely stated the fact of inadequacy of the control pattern, as referred to in the application. Nevertheless, it gave its approval to the issue of the granting to the citizens of the EU of the contested rights to election. TK justified its position by the following arguments. Firstly, Article 19 para. 1 of the Treaty on the Functioning of the European Union does not

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\(^{31}\) OTK ZU 2004, series A, No. 5, item 47.


\(^{33}\) More in the justification of the judgment Ref. No. K 18/04.

\(^{34}\) Cf. point 18 of the justification of the judgment Ref. No. K 18/04.
pose a threat to the Republic of Poland as a common property, because self-governing communities have a limited scope of matters conferred to their exclusive competence, and their power is limited territorially. They may not take decisions which, by the force of law, apply to the territory of the whole state. Secondly, a self-governing community is formed, by the force of law, by inhabitants (Article 16 para. 1 of the Constitution). An inhabitant may be a Polish citizens and a citizen of another state. At the time of election to the local self-governmental organs, the issue is not so much the exercise of sovereign rights of the Nation, but the rights of the community of inhabitants which is a foundation for self-governing. Thirdly and most importantly, the citizen rights guaranteed under Article 62 para. 1 of the Constitution are deprived of the feature of “exclusivity”. This certain type of “exclusivity” of the rights is interpreted by TK in such a manner that if a given right is granted to a Polish citizen, then citizens of other states may not enjoy the same, and that includes citizens of the EU. The position of TK in the present matter is an example of the “pro-European interpretation” which may not — as was noted by TK — breach the Constitution of the Republic of Poland. The interpretation of the Constitution of the Republic of Poland which is favorable from the point of view of the Community law was in contradiction with the current understanding of Article 62 of the Constitution, which granted rights to election to Polish citizens on exclusivity basis.

An ideal situation would be for all those forming the community to have rights of election. The right of participation in the election procedure by foreigners residing within the jurisdiction of a given local self-government unit is fully justified. Thanks to that, they may participate in the process of taking important decisions for the community. By getting involved in political and social life, local self-governments assimilate. That is why, an amendment to Article 62 is necessary, but it should take place after the application of the relevant procedure anticipated in Chapter XII of the Constitution, and not by way of interpretation thereof, in particular connected with the fact that the said provision applies to a matter which is important for representative democracy.

We should pay attention to the concept of a “lack of exclusivity” of citizen rights, as outlined by TK in the present matter. Some constitutional citizen rights, in the opinion of TK, are not solely the rights of citizens of the Republic of Poland. They are also vested in citizens of other states, and in particular the states of the EU. This concept makes the Constitution of the Republic of Poland open to the institution of the so-called European citizenship and may prove Europeanization of the basic law.

35 Cf. point 18 of the justification of the judgment Ref. No. K 18/04.
37 Cf. point 18 of the justification of the judgment Ref. No. K 18/04.
38 The European citizenship was established by means of the Treaty of Maastricht. The purpose thereof was the strengthening of protection of rights and interests of EU citizens.
V. THE SYSTEM OF STATE ORGANS
VERSUS THE PHENOMENON OF EUROPEANIZATION

A. The consequence of Poland’s membership in the EU is, on the one hand, the loss by the representative authorities of the state of some of their competences\(^{39}\), and, on the other hand, a need of getting the Sejm and Senate involved in the implementation of the European policy. So far, this issue was regulated by the Act of 11 March 2004 on Co-operation between the Council of Ministers and the Sejm and Senate in Matters Connected with the Membership of the Republic of Poland in the European Union, whereby rules were established for the manner in which the legislative authorities influence the policy of the Republic of Poland in European matters\(^{40}\). A model of co-operation between the Sejm, Senate and the Council of Ministers is as follows: the Council of Ministers is obliged to notify the Sejm and Senate of European matters, and in particular of undertaken law-making initiatives. The competent committees of the Sejm and of the Senate are authorized to issue opinions regarding European matters. Opinions of those committees are taken into account at the time of formulation of the position of the Council of Ministers represented by the authorities of the Community. If the Council of Ministers fails to comply with the wording of the opinions of the committee of the Sejm, then a representative thereof shall be obliged to immediately explain any discrepancies to the committee (Art. 10 of the Cooperative Act). The Government is obliged to take into account the opinions of the committee, but is not absolutely bound by such opinions. It is stated in the doctrine that the opinion of the committee, being relatively binding, serves the function of a certain political guideline\(^{41}\).

In the legal science, the authority of the Sejm and Senate in European matters, according to the constitutional regulation, is perceived as an expression of the legislative function of the parliament\(^{42}\), consisting of enactment of statutes, adoption of resolutions, as well as amendments to the Constitution. Therefore, in view of the provisions of the basic law, it is difficult to consider the right to issue relatively binding opinions as being incorporated by the law-making function interpreted in this way. It is emphasized in the doctrine and jurisprudence that this function is not exhausted merely by the establishment of the domestic law. It also consists of another competence involving exertion of an influence — even though minimal — on the contents of EU acts

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\(^{39}\) The issue of the role of national parliaments in the EU is vast and complex; cf. R. Grzeszczak, *Parlamenty państw członkowskich w Unii Europejskiej*, Wrocław 2004.


of law\textsuperscript{43}. Such an interpretation of the law-making function is unacceptable, taking into account the systemic position of the parliament. The exercise of this function does not consist of minimal, but of real influence of the Sejm and Senate on the contents of the established law. This requirement is not fulfilled by the authority to issue relatively binding opinions by the Sejm and non-binding opinions by the Senate\textsuperscript{44}.

In the opinion of certain representatives of science, the authority of the Sejm Committee for the EU and the relevant Senate committee to issue opinions is an expression of the control function\textsuperscript{45}. The purpose of opinions formulated by the commissions is to exert an influence on the domestic government and elaboration of a common position. We may not rule out a possibility that the formulated opinion is of a control nature, but we may rule out that it is an expression of the exercise of the control function of the parliament\textsuperscript{46}. Some authors indicate a mixed character of opinions formulated by committees for EU. On the one hand, they may be qualified as the exercise of the control function, but on the other hand, this supervision is exercised only in the area of establishment of the European law. We perceive a new competence of the parliament as modification of the classic control function discharged in relations with the Council of Ministers in areas other than law-making. It constitutes an expression of a new function of the Parliament, i.e. a function of control over the Community law-making process\textsuperscript{47}.

We can come across a view in the literature that Poland’s membership in the EU entailed a phenomenon of Europeanization of classical functions of the parliament. Most of all, transformation has occurred in the area of performance of various functions by the Polish parliament, i.e. a transformation of the functions existing so far and the occurrence of European elements\textsuperscript{48}. That is why we observe Europeanized legislative function and Europeanized control function\textsuperscript{49}. We believe that Poland’s membership in the EC/EU entailed changes in the functions of the parliament, not in the form of their modification, but in the development of a new sphere of activity thereof. This is a derivative of a new function of the state, i.e. a European function\textsuperscript{50}. The nature of the tasks of the Polish parliament, modified by the accession, entails a need of separation of this function. New tasks go beyond the classical functions of the parliament. Also, they may not be perceived as extrapolation of classical functions.

\textsuperscript{43} E.g. TK in its judgment of 12 January 2005, Ref. No. K 24/04.
\textsuperscript{45} E.g. R. Grzeszczak, Parlamenty państw członkowskich..., p. 116 et seq.
\textsuperscript{48} Cf. C. Mik, B. Pawłowski, Glosa..., p. 137.
\textsuperscript{49} Ibidem, p. 139.
New tasks consist of implementation of EU forms in the national legal order, which is undoubtedly an expression of legislation. However, a difference lies in the fact that the parliament is bound by the contents of the implemented Community standard and may not independently decide about the issues covered by that regulation. It takes the part of an entity implementing the will of the European Union. The national parliament acts merely as an intermediary in transposition of EU standards to domestic law, without acting either fully independently or creatively in this area. Moreover, we may not talk here about a right of the national parliament to establish law, we should rather analyse the implementation in “deontic” categories. The duty of the parliament consists of an obligation to establish domestic law which is not in contradiction with the European standard or based on a systemic adaptation thereof. Such an obligation derives from the Treaty and is accompanied by the state’s liability for damages. Things are different in the case of the classical legislative function. The Sejm and Senate do not have a legal law-making obligation which would be secured by a legal sanction. We can say at the most that the Sejm is obliged to consider presented draft statutes, but is not obliged to enact them. The law-making process which ends in a failure or an initiative which is not carried through do not entail any legal liability. They may only entail political criticism.

The European function of the parliament consists of the control authority of both chambers thereof with regard to the Council of Ministers, in the area of implementation of the European policy. The expression thereof is the competence granted to the Sejm committee and the Senate committee on the basis of the Co-operative Act. However, we should remember that the committee’s right to formulate opinions is not accompanied by any sanction, which is present in the case of the classical control function of the parliament. The Council of Ministers is not absolutely bound by the text of the analysed opinions, but is obliged to present the committee with its own position and explain the reasons why it does not accept the position of the committee. A cooperation between the Council of Ministers and the parliament resembles more a mechanism of consultations rather than a typical parliamentary control instrument.

Does the authority to issue decisions satisfy the need of the parliament’s participation in European affairs? Does the parliament sufficiently participate in the discharge of its European function? An advantage of the instrument introduced by means of the Co-operative Act is that it provides a minimal level of influence of the representative organs upon the exercise of the European function, whereas a disadvantage is that such an influence is entrusted only to the parliamentary organs. Even though the composition of the committee issuing opinions reflects the distribution of political powers in the parliament, we should emphasise that work and discussions within the authorities of the Sejm and Senate are one thing, whereas a public debate in the forum of the chamber is another thing. It would not be a good solution to entrust all the tasks connected with formulation of opinions to the chamber, but we be-

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51 Cf. J. Szymanek, op. cit., p. 347 et seq.
52 Cf. ECJ judgment in the matter of Francovich and Bonifaci versus Italy, ECRI-5357.
lieve that it would be justified to separate issues which are important for the state and with regard to which the Sejm and Senate express their opinions in pleno. As far as such matters are concerned, the nature of the opinions issued by the chamber should also change. Instead of formulating political guidelines in important matters, the Sejm and Senate must be entitled to issue mandatorily binding directives for the Council of Ministers\textsuperscript{54}. In this way, we may ensure not only minimal, but real influence of the parliament on the European function of the state.

A necessity of an amendment to the Co-operative Act is also justified by the coming into force of the Lisbon Treaty\textsuperscript{55}. Mainly in view of the fact that Article 12 of the Treaty on the European Union [hereinafter: TEU] and Protocol No. 1 regarding the role of national parliaments in the EU, attached to the Treaty, encourage national legislatures to actively participate in the decision-making process at the European level, if only through the procedure of expressing opinions in matters which may constitute an object of their particular interest. The Protocol also assigns the role of guardians to national parliaments with regard to a principle which is important for the EU - the principle of subsidiarity. National parliaments may initiate preventive control within the framework of pending law-making proceedings in such a manner that they provide the European Parliament, Commission and Council with justified opinions regarding the compliance of a draft of the legislative act with the principle of subsidiarity (Article 3 of Protocol No. 1 and Article 6 of Protocol No. 2\textsuperscript{56}). They may also initiate \textit{a posteriori} control implemented by the ECJ, bringing before the ECJ legislative acts violating that principle (Article 8 of Protocol No. 2).

National parliaments also participate in a simplified procedure of amendment to treaties, without a necessity of ratification thereof. This is regulated by the provision of Article 48 of the TEU governing the procedure of revision of treaties in a simplified procedure and conferring upon the parliaments of Member States a right to lodge objections\textsuperscript{57} against decisions on acceptance of such procedure\textsuperscript{58}. Moreover, the

\textsuperscript{54} In the event of international treaties, as referred to in Article 89 of the Constitution (this applies to matters which are relevant for the state and its citizens), the Sejm and Senate grant their consent to ratification.

\textsuperscript{55} Cf. deputies’ draft statute on the role of the Sejm and Senate in the matters connected with the membership of the Republic of Poland in the European Union, Sejm print No. 2617.

\textsuperscript{56} Protocol No. 2 to the Lisbon Treaty on application of the principles of subsidiarity and proportionality.

\textsuperscript{57} The national parliament is entitled, on the basis of Article 81 of the Treaty on Functioning of the European Union, to lodge an objection against a European act specifying trans-border consequences of the family law.

\textsuperscript{58} According to Article 48 para. 7 TEU, “If the Treaty on Functioning of the European Union or Title V of this Treaty stipulates that the Council rules on a given matter or in a given case, the European Council may pass a decision authorizing the Council to rule in such a matter or in such a case by a qualified majority. This paragraph shall not apply to decisions which influence military or defence issues. If the Treaty on Functioning of the European Union stipulates that legislative acts are adopted by the Council according to a special legislative procedure, the European Council may pass a decision granting its consent for the adoption of such acts according to the usual legislative procedure. The above initiatives undertaken by the European Council are transferred to national parliaments. In the event that the national parliament notifies of its objection within six months of the date of such transfer, the decision referred to in the first or second paragraph is not adopted. In the event that there is no objection, the European Council may adopt such a decision […]”
Lisbon Treaty contains many procedures which may lead to an extension of the scope of granted competence. Taking the foregoing into account, we should state that a risk exists that an extension may arise, within the framework of those procedures, of the scope of granted competence. That is why, we should subject them to a special control exercised by the parliament\textsuperscript{59}. In the present state of legal affairs, the Sejm and Senate formulate opinions which do not have a nature of mandatorily binding instruments. It seems that a proper form of granting consent should be a statute, if the transfer of competence also occurs by way of a statute. In this manner, we can include democratically-elected representative authorities in the European decision-making process. “This will also contribute to implementation of important constitutional values of the Republic of Poland: sovereignty, democracy and reliability of actions of the state organs. Moreover, this will help to strengthen the negotiating power of Poland on the EU forum\textsuperscript{60}.

An impact of the European law on the Polish legislation preceded the accession. Since 1992, i.e. since the time of Poland’s accession to the Europe Agreement, we have systematically adapted our legislation to the European law. That was one of the \textit{sine qua non} conditions for our presence within the European structures. A visible effect of that adaptation was constituted by amendments to the Standing Orders of the Sejm and Senate, consisting of, \textit{inter alia}, an introduction of a special legislative procedure. Our membership in the EU somehow forced the adoption of the Co-operative Act. The Constitution of the Republic of Poland is still indifferent to the European function of the Sejm and Senate. After all, the European function of the parliament is not a hypostasis, and the tasks within this function are being systematically fulfilled. It seems that constitutionization thereof by means of an amendment to chapter IV of the Constitution, consisting of ensuring an influence of the parliament on the European policy of the Republic of Poland, is necessary. It also seems that the Co-operative Act and the provisions of the Standing Orders of the Sejm and Senate do not satisfy this need.

B. In traditional constitutionalism, the President participates in the legislative process either as an initiating entity or as an entity responsible for promulgation of the statute, and, in certain special cases, as an entity challenging the justification or compliance with the Constitution of the statute. In the area of foreign policy, the head of state implements his systemic tasks by, \textit{inter alia}, ratification and termination of international treaties. The President — challenging the justification of a treaty — may refuse to

\textsuperscript{59} The Federal Constitutional Tribunal of the Federal Republic of Germany, in its judgment of 30 June 2009 (Ref. No. 2 BvE 2/08 et seq.) emphasized that, for the purpose of transfer of competence to the Union, the standard authorization contained in the Lisbon Treaty, conferring a right to pass certain decisions by the European Council or the EU Council in the future, is not sufficient. Each subsequent growth in EU competence on the basis of the Treaty requires the consent expressed in a special statute, just like was the case with the ratification of the Treaty. In the opinion of J. Barcz, the position of the Federal Constitutional Tribunal regarding the role of Bundestag and Bundesrat in European matters may not be transferred directly to the Polish ground due to a lack of the integration clause in the Constitution, which was expressed in Article 23 of the Basic Law. Cf. J. Barcz, \textit{Wybrane problem…}, p. 13 et seq.

\textsuperscript{60} According to the draft statute on the role of Sejm and Senate in matters connected with the membership of the Republic of Poland in the European Union, Sejm print No. 2617.
ratify thereof or, challenging the compliance thereof with the Constitution — may apply to the Constitutional Tribunal for the purpose of examination of the compliance thereof with the Constitution. Disregarding a detailed analysis of the systemic position of the head of state\textsuperscript{61}, we should note that the aforementioned competence serve an important role in internal and foreign policy of the state. A control nature thereof may, in certain circumstances, hamper efficient implementation of internal and foreign policy, as conducted by the Council of Ministers, or protection against irrevocable consequences of political decisions which are not always good for the state\textsuperscript{62}.

In Europeanized constitutionalism, the law-making function of the parliament is reduced, and, in consequence, the President’s participation in the discharge thereof is also limited. The formula of political relations between Poland and the other Member States of the EU, as well as with third countries, changes as well, taking the form of a common policy established by the European Council\textsuperscript{63}. This area of activity of the EU was significantly strengthened after the reform introduced by means of the Lisbon Treaty\textsuperscript{64}. There is no space therein for instruments such as ratification or refusal to ratify, or preventive control of compliance of an international treaty with the Constitution. Despite the fact that they still remain in force with regard to foreign policy, they do not apply, or apply only to a limited extent in European policy. On this basis, we can state that the process of Europeanization also affects the competence of the President, significantly affecting the area of implementation thereof.

What is of key importance is the question whether and how the President of the Republic of Poland participates in the European policy or — to put it in another way — whether he participates in the European policy of the state at all? This problem has not been an object of a deeper analysis of the doctrine and the practice of law, even though it does not have only a theoretical nature, as proven by a competence dispute between the Prime Minister and the President of the Republic of Poland\textsuperscript{65}. The problem of participation in the European policy concerns only a certain sphere of activity of the organs of the Republic of Poland and the Union, namely participation in meetings of the European Council. The Prime Minister applied to TK for interpretation which central constitutional organ of the state was authorized to represent the


\textsuperscript{64} Cf. Article 23–41 of TEU.

\textsuperscript{65} The problem of relations between the President of the Republic of Poland and the Council of Ministers was presented in the legal science by, \textit{inter alia}, D. Dudek in his speech “Prezydent a rząd — rozdział kompetencji i zadań ustrojowych”, delivered during Zjazd Katedr i Zakładów Prawa Konstytucyjnego, Warsaw 19–21 June 2009.
Republic of Poland in meetings of the European Council for the purpose of presentation [thereat] of the position of the State. So the object of the dispute was the competence to represent the Republic of Poland and the competence to present the position of our state during such meetings 66.

The basis for the considerations of TK was constituted by the provisions of the Constitution concerning the foreign policy. The court did not notice that, in addition to internal and foreign policy, the European policy has come to existence 67, which differs from the other two, classical forms of operation of the authorities of the state. This is a consequence of the phenomena of Europeanization and a new function of the state, i.e. the European function. That is why settlement of the European competence dispute on the basis of the provisions of the Constitution of the Republic of Poland, which does not recognize organisms such as the European Union and the European Community, could not bring about the expected results. The Tribunal based its settlement on the obligation to co-operate between the Council of Ministers and the Prime Minister on one hand and the President of the Republic of Poland on the other. In the opinion of TK, the President of the Republic of Poland, being the highest representative of the Republic, may, pursuant to Article 126 para. 1 of the Constitution, take a decision on his participation in a given meeting of the European Council, if he deems it necessary for the purpose of fulfilment of his tasks, as referred to in Article 126 para. 2 of the Constitution. However, it is the Council of Ministers, according to Article 146 para. 1, 2 and 4 subpara. 9 of the Constitution, that determines the position of the Republic of Poland during a meeting of the European Union, and the Prime Minister represents the Republic of Poland during the meeting of the European Council and presents the previously-established opinion. The participation of the President of the Republic of Poland in a given meeting of the European Council requires his co-operation with the Prime Minister and the relevant minister 68. Such a co-operation enables the President of the Republic of Poland to refer — in matters connected with the discharge of his tasks, as specified in Article 126 para. 2 of the Constitution — to the position of the Republic of Poland, as determined by the Council of Ministers.

If the President of the Republic of Poland may refer to a position of Poland, adopted by the Council of Ministers, then a question arises how far the aforementioned reference may be binding for the Council of Ministers. Is it capable of evoking a consequence which is similar to a statutory veto, an act of ratification or refusal to ratify an international treaty 69? If we analyse a dispute in the category of foreign policy, we should remember that the head of state uses such instruments in this area. Things

68 Cf. point 4 of the sentence of the decision Ref. No. Kpt 2/08.
69 P. Sarnecki challenges the independence of the President in his right to refuse to ratify a treaty, whereas this is beyond any discussion that the head of state is capable of refusing ratification in the situation of a judgment of TK stating the lack of compliance of an international treaty with the Constitution. Cf. P. Sarnecki, comments on Article 133, [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz, L. Garlicki (ed.), Warszawa 1999, vol. 1, p. 3.
look different in the case of European policy, where the President of the Republic of Poland, as stated above, may not apply such measures with regard to arrangements adopted during the meeting of the European Council, because they differ, from the quality point of view, from international legal obligations. In practice, decisions taken by the Council of Ministers during a meeting of the European Council, are beyond any control. We should add that the President of the Republic of Poland also does not express his opinion regarding the position of the Council of Ministers, as presented during the meeting of the Council of the European Union70.

This competence dispute reflects changes which have occurred in the structure of the state authorities as a result of our membership in the EU. The European function, which is not an object of constitutionization, was attributed, on the basis of implied competence, to the Council of Ministers, which has full freedom to implement the same, even though it is not granted full democratic legitimacy71. If, on the one hand, the Sejm and Senate participate in the exercise of this function to a minimum and insufficient extent, the President, on the other hand, is outside the domain thereof. That is why, it seems necessary to provide for more intense involvement of the representative authorities in the discharge of the European function. Our intention is not to entrust the conduct of the European policy to them, but to provide them with a possibility of exerting realistic influence on the matters transferred to EU. This is a necessary condition for guaranteeing a relative balance between the organs of the state.

C. Europeanization of, inter alia, sources of law does not remain indifferent from the point of view of the functioning of other constitutional organs of the state, including constitutional principles of justice. We should mainly revalue the concept of independence of judges here. The constitutional standard thereof, according to which: “Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes” (Article 178 para. 1) already seems to be an anachronism. Even though, thanks to the systemic interpretation taking into account references to Articles 9, 87, 91 of the Constitution, we would manage to extend the pattern of dependence by (EU) Community legislative acts, this would still be in contradiction with the principle of exceptiones non sunt extentendae. However, a question arises how to combine the judge being bound by the statute with the judicial application of the Community/EU law in the event of a conflict between those two sources of law72. Who should adjudicate about non-application of the law which is in

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70 The European Union Council has the following competence: legislative, with regard to establishment and implementation of the Community policy, creative and control. More: Prawo europejskie, R. Skubisz, E. Skrzydło-Tefelska, E. Calka (eds.), Lublin 2008, pp. 73 and 74.


72 The amendment to the constitutional formula of judge’s independence is supported by, for instance, Z. Brodecki, J. Koska-Janusz, Niezależność: sądów w perspektywie członkostwa Polski w UE, [in:] Konstytucja RP z 1997 r. a członkostwo Polski w Unii Europejskiej, C. Mik (ed.), Toruń 1999, p. 194.
contradiction with, for instance, a EU regulation, if the judge, according to Article 178 para. 1 is subject thereto. The matter is even more complicated by the fact that a principle is being established in the jurisprudence of the ECJ of absolute and unconditional priority of the Community law.

Therefore, we should consider whether we should not, for the sake of clarity of the constitutional structure, amend the same by the following passus: “In application of the laws of the European Union, judges shall only be subject to the Constitution and those laws” (Article 178 para. 2). Despite the fact that the judge is bound by the statute, we should note that judicial authorities use the prejudication of the ECJ. In judicial practice, a possible conflict of the European law with the statute is settled to the advantage of the European law.

The process of Europeanization poses a question regarding the ability of TK to examine the compliance of the Community law with the Constitution of the Republic of Poland. The practice so far shows that in proceedings before the Tribunal, the constitutionality had been challenged of the accession treaty and the founding treaties which, by their nature, are international treaties. Therefore, according to Article 188 of the Constitution, they are subject to cognition of the constitutional court. An issue whether or not TK may evaluate the compliance of secondary Community law with the Constitution of the Republic of Poland remains disputable. The provision of Article 188 of the Constitution, determining the jurisdiction of the TK, does not list expressis verbis normative acts adopted by the EU. On the one hand, we come across voices in the legal science that TK does not have cognition, and therefore an application of the party should be rejected by the court, and on the other hand, we may not rule out that TK will be considered an appropriate body to examine compliance of secondary Community law with the basic law. A constitutional court expresses an opinion regarding a need of conducting an assessment of constitutionality of secondary Community law, if this determines the protection of constitutional rights and freedoms.

It seems that such a position opens up a road to contestation of a derivative law by way of a cassation complaint, because the essence thereof is aimed at the protection of the constitutional status of an entity. It also seems that the evaluation of secondary Community regulation may occur by questioning of the constitutionality of a Treaty standard. Normative acts established by Community organs have an executive nature with regard to the primary law and are aimed at the achievement of certain Community targets set by the treaties. A constitutional court is entitled to examine whether legislative Community authorities, by passing a certain act, operate within the framework of the competence conferred upon them. In view of the above, the authority of TK to evaluate the compliance with the Constitution of secondary law is, as it seems, justified and it follows normative argumentation.

75 Cf. R. Kwiecień, Zgodność traktatu akcesyjnego..., p. 44.
The influence of our membership in the EU allows us to have a different view on the principle of finality of judgments of TK. This means that, in the most general terms, a settlement reached by TK is not subject to another evaluation by another state organ or by another Tribunal composition, and there are no means of appeal against the same. The finality may also take another form, and it may be considered in another procedural context. First of all, no-one contests the right of the nation to amend its Constitution. Such an amendment may be dictated by the text of the settlement reached by the constitutional court which is in contradiction with the needs of a sovereign. The first amendment to the Constitution of 2 April 1997 was dictated by the judgment of TK stating lack of compliance with the Constitution of the Republic of Poland of the statutory regulation of the EAW. The Sejm and Senate maintained EAW by an introduction of the relevant amendments to the basic law. In this way, the judgment of TK lost its finality feature in the substantive sense, because the rejected statutory standard became a prototype for the new constitutional standard. We may even suspect that the activity of TK in revocation of European standards or implementing standards implementing the European law will affect the frequency of amendments to the Constitution of the Republic of Poland.

D. The binding of the European law in the territory of the Republic of Poland changes the scope of operation of other constitutional organs as well. An example may be the Supreme Chamber of Control or the Ombudsman for Citizens’ Rights. The provision of Article 203 para. 1 of the Constitution states that the Supreme Chamber of Control conducts the audit with regard to legality, which should be understood as compliance with the binding law. Undoubtedly, the law commonly binding in the territory of the Republic of Poland is constituted by normative acts of the EU and the founding treaties. Therefore, the concept of legality also covers compliance with the European law. This means that the Supreme Chamber of Control is obliged, in the course of the audit procedure, to evaluate whether the existing actual state of affairs is consistent with the EU law. The objective scope of the activity of the Ombudsman for Citizens’ Rights was extended after Poland’s accession to the European structures. According to Article 208 of the Constitution, the Ombudsman for Citizens’ Rights safeguards the rights and freedoms specified in the Constitution of the Republic of Poland and in other normative acts. Europeanization of the courses of law means that the Polish Ombudsman is not only an ombudsman for the rights and freedoms deriving from the domestic, international law, but also an ombudsman for rights and freedoms granted and guaranteed in the normative acts of EC/EU.

The European accession obliged the public authority organs to comply with the European law. The presence of the Community law in the space of the state means that public institutions must also act on the basis and within the limits thereof. Therefore,

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the organs of state control and law enforcement became the guarantees of compliance with the European legal order in the territory of the Republic of Poland.

VI. LOCAL SELF-GOVERNMENT VERSUS EUROPEAN STANDARDS

As was noted above, the phenomena we are interested in may be exemplified by the convention system of the Council of Europe (sensu largo Europeanization). Here, the example is the European Charter of Local Self-Government [hereinafter: the Charter], which was ratified by Poland on 26 April 1993 and which came into force with regard to Poland on 1 March 1994. The normative value of this regulation is weakened by numerous references to legal systems of other Member States. Moreover, the manner of being bound by the Convention is generally criticized (system à la carte)\(^7\). A state ratifying the Charter is obliged to accept 20 out of 30 its most important dispositions, and 10 provisions must be selected from among the Articles and paragraphs specified in Article 12. This definitely disavows the standard-forming function of the Convention and affects the integrity thereof. It seems that the concept of the local self-government, as reconstructed in Article 3 of the Charter is not consistent with the constitutional (statutory) model of self-government treated objectively, whereas the Convention treats the category we are interested in as a function of subjective rights of an entity, defining self-government as a law and ability of local society to manage and direct a part of public affairs\(^8\). The systemic interpretation of Article 163 of the Constitution leads to the understanding of the self-government as decentralization of administration. It would be difficult to consider this diversity in view of the essence of self-government according to the category of contradiction. However, it may have an influence on the interpretation of detailed standards considering, for instance, the competence of self-governments or, generally, the authority thereof to perform certain public tasks.

A certain regress in comparison with the Charter exists with reference to the statutory regulation of the scope of operation of the local self-government. Pursuant to Article 4 para. 2 of the Charter: local societies have — within the limits specified by law — full freedom of action in any matter which is not excluded from the scope of their competence or which does not form a part of competence of other authorities. We should agree with the opinion that, as far as implied competence is concerned to the benefit of the local self-government, the Charter goes much further than the Polish legislation\(^9\).

Both of the analysed regulations are aware of a division of tasks into own tasks and tasks entrusted to self-governamental corporations. However, the Charter, contrary to relevant statutes, does not carry out any significant repartition of those tasks. What is more, such a division is blurred by the principle of subsidiarity adopted by

\(^7\) Cf. e.g. I. Lipowicz, *Europejski standard samorządu terytorialnego a ustawodawstwo polskie, “Samorząd Terytorialny”,* 1991, No. 11–12, p. 75.

\(^8\) Attention is drawn to this fact by J. Filipek, *Prawo administracyjne,* Kraków 1995, p. 131.

\(^9\) Ibidem, p. 139.
the authors of the Convention, according to which liability for public affairs should be incurred mainly by those authorities which are closest to the citizens.

If we follow this comparative analysis, such comparison should be extended to the institution of supervision of communal activity. The criterion of effectiveness as a pattern of supervision in proceedings for the establishment of compulsory administration is clearly in contradiction with the European standard. The principle of proportionality of supervision postulated by the Charter has not been statutorily proclaimed *expressis verbis* and may, at the most, be inferred from the systematics of self-governmental statutes. A realistic being of such standard may be, however, disavowed in practice by the use of the institution of free discretion in the process of discharging the function of supervision by a local self-governmental organ.82

The statutory interpretation of the so-called financial power of the self-government does not satisfactorily meet the conventional requirements. According to Article 9 para. 4 of the Charter, the financial systems on which the income made available to local communities is based, should be varied and flexible, and, as far as possible, developing in practice in line with the changes occurring at the level of actual costs connected with the exercise of power. According to Article 9 para. 5, protection of local communities, which are financially weaker, requires the application of compensatory procedures or balancing activities, whose aim is to correct the consequences incurred by such communities. On the other hand, according to Article 9 para. 7 of the Charter, as far as that is possible, subsidies granted to local communities should not be allocated for the financing of specific projects. The granting of subsidies may not threaten the basic freedom of local community to freely conduct its own policy within the scope of the authority granted to it. Meanwhile, in our statutory reality, the principle of flexibility of self-governmental finance is not observed, and the scope of special-purpose subsidies is too large, whereas the position of the Minister of Finance is too strong in order for us to be able to talk about the compliance of our self-governmental legislation with Article 9 para. 2, 4, 5 and 7 of the Charter.83

The evaluation of the relation concerned is not obvious. Undoubtedly, the Polish self-governmental regulations aspire to meet the minimum Strasbourg standards. Providing them with full validation within the domestic legal system requires continued efforts aimed at convergence and adaptation. Moreover, we should believe that such harmonization may be supported by supervisory organs of the Council of Europe and by the cognition of the Constitutional Tribunal.

**VII. CONCLUSIONS**

The conclusions which come to our heads after this rudimentary review of constitutional standards are as follows:

1. Constitutional transformation resulting from the EU accession is mostly reflected in the organizational structure of the state. In Poland, the consequence of de-

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83 Cf. I. Lipowicz, op. cit., p. 82.
legation of some powers of state authorities to the European Community/European Union under Article 90 of the Constitution means the extension of the state activity to the European level. This function of the state does not correspond with the classical separation of powers doctrine. The exercise of this function only by the Council of Ministers threatens the balance of powers guaranteed by Article 10 of the Constitution. Therefore, an amendment to the Basic Law should be considered that would re-define the equilibrium in the context of the phenomenon of Europeanization we are concerned with here.

2. It is necessary to include the representative organs of the nation in the exercise of European function. The source of exercise of the same may not be a statute or standing orders, or a judgment of TK settling a competence dispute. Therefore, we should consider an amendment to the Constitution of the Republic of Poland which would establish the principles of co-operation between the Council of Ministers, the Sejm, the Senate and the President of the Republic of Poland in European matters.

3. The independence of the European function is relative: it shows autonomy with regard to the so-called territorial power, but forms a component of the external functions of the state.

4. An appropriate level of Europeanization of the Constitution may be achieved not only through changes an additions to the constitutional matter, but also through interpretation of the basic law in a manner favorable for the basic law. The interpretation thereof may not, however, replace the law maker.

5. The scope of Europeanization should be limited by the so-called identity of the Constitution: a relative immutability of fundamental constitutional principles and values. Its authors, proclaiming “the integration option”, did not specify those categories which determine the essence of the basic law.

6. The Europeanization of the Constitution does not always serve as an “improvement” thereof. It may lead to “erosion” of the Constitution matter: disavowal of systemic principles, limitation of the regulatory function of the state authorities.

7. The Europeanization of the domestic law without the necessary constitutionization of the “integration progress” exposes the legal system to being charged with inconsistency and incompleteness.

8. The Europeanization is not always created by the positive attitude of the national legislator towards the European integration and may have “etatistic” orientation.
PAWEL SARNECKI

THE SEJM OF THE REPUBLIC OF POLAND
IN THE PERIOD OF TRANSFORMATION*

ABSTRACT

Since the beginning of the process of transformation in Poland (initiated by the parliamentary election on 4 June 1989), the Sejm has operated within several constitutional structures. They have brought, step by step, the principle of separation of powers into Poland’s system of government and made the Sejm the key element of legislative power. Apart from law-making, the Sejm has other functions (including those relating to oversight, budget, adaptation of international law, political inspiration, and — recently — the European function). The wide-ranging approach to the duties of the Sejm is not only the result of habits from our past (years 1952–1989), when the Sejm was declared to be the superior authority of the State. We must not forget that the Sejm is a house of parliament, and that in a democracy such a body may deal with any public matter, discuss it and express its position thereon, not only for the purpose of making law on its basis. Therefore, the list of competences of the Sejm included not only statutes, but also resolutions concerning particular matters, as well as declarations.

The article contains statistical data on the activities of the Sejm in respect to certain issues.

The author concludes that, in general, the Sejm has successfully completed its transformation to the new system. However, as concerns the development of appropriate political culture, its activity may raise some doubts.

In the elections of 4 and 18 June 1989, meant to establish the composition of both the Sejm and the Senate, social attention and hope were primarily focused on the composition of the first chamber. Functions of the Sejm, those expected and consolidated in society’s feelings and apprehension — although transformed as an ef-

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fect of the Constitutional Amendment of 7 April 1989 — were still understandable for the society and the sense that the chamber of Deputies may be “the representative [...] of Supreme national authority [and] sanctuary of the legislature” (Article 6 of the Constitution of 3 May) was still pre-eminent, despite the period of “socialist democracy”. The number of Deputies to the Sejm was also unquestionable. However, the role of the Senate, reactivated not until two months before the elections, was ambiguous and the “round” number of 100 Senators was considered, as it seems, as accidental, with no apparent connection with the chamber’s functions.

Despite the established bicameralism, restraining the Sejm’s opportunities to act, and other limitations of the chamber’s role introduced with the mentioned amendment, Article 20 of the constitutional provisions then in force still described the Sejm as the “supreme organ of public power”; thus, the principle of uniformity of state authority was still recognized as the foundation of the system. The position of the Sejm was attested by such constitutional phrases as “the highest exponent of the will [of the sovereign]”, “realizes the sovereign rights of the Nation”, “enacts laws, passes resolutions determining the fundamental directions of activity of the State”, “exercises control over the activity of other organs of State power and administration”, “adopts national social-economic plans”, “adopts the State budget”, “approves the report of the government on the execution of the budget”, “considers judgments of the Constitutional Tribunal on non-conformity of statutes to the Constitution”, “may adopt a resolution on the state of war”, “elects the President [with the Senate]”, “appoints and discharges the government”, “appoints the First President of the Supreme Court”, “elects Constitutional Tribunal’s judges, members of the Tribunal of State and the President of the Supreme Chamber of Control and the Commissioner for Citizens’ Rights”, “grants its consent prior to ratification by the President of international agreements [of special importance]” (new, important constitutional competence, introduced with the mentioned amendment). These constitutional phrases were further expanded in provisions of numerous statutes in force, as well as in the Standing Orders of the Sejm, considered also a possible source of competences.

It shall here be added, that formally, provisions of the Standing Orders of the time (of 17 July 1986) equipped the Sejm with an ample set of instruments allowing the realization of both the legislative and oversight functions in a manner consistent with the principles of democratic parliamentary system. However, before the elections of 1989, there was no fundamental political factor, interested in factual utilization of those instruments, i.e. political parties freely competing for parliamentary mandates in free elections. There must be periodically held parliamentary elections, for the procedures foreseen in regulations to be utilized by both governing parties (in order to prove their accomplishments to the voters), and oppositional ones (in order to exercise control aimed at proving inefficiency of ruling authorities). The first months of the so-called Contract Sejm may be regarded as “all parties’ rule” (formally reminding “government coalitions” from the period of the People’s Republic) under Prime Minister Tadeusz Mazowiecki. This explains why the provisions of the mentioned
Standing Orders were not an obstacle in developing democratic parliamentary practice, despite the lack of a fundamental amendment thereto. Furthermore, the new Standing Orders of the Sejm (of 30 July 1992) were essentially their continuation.

The April Amendment liquidated the session system, heretofore existent in the Polish parliamentarism, and introduced the system of permanence, thus adding a further, essential element strengthening the systemic position of the Sejm. Generally, it seems that the general constitutional description of the Sejm in Article 20 was confirmed by the chamber’s specific competences. They are not depreciated by either competences of the President or of the Constitutional Tribunal in relation to the Sejm, which — this refers especially to the President — are of extraordinary nature (perhaps with the exception of appointing and discharging the Council of Ministers by the Sejm). Hence, it may be assumed, that from the moment of entry of the April Amendment into force, the principle of supremacy of the Sejm as the fundamental organizational principle, became somewhat flawed; nevertheless, there has not emerged a contrary principle, i.e. that of the separation of powers.

Under the rule of thus amended Constitution, the Sejm (formally the Sejm of the 10th term) functioned for a few months only, but this was a period of a decisive political breakthrough, achieved by Sejm factors and not — as in previous decades — by authorities of the governing party. Hence, there occurred an extremely rare situation (at least in the history of the twentieth century), when the formal, constitutional structure of power coincided with the actual configuration of political forces, while the mentioned “Sejm factors” were primarily the All-Poland Parliamentary Club and Deputies’ Clubs of United People’s Party and Democratic Party. Members of the latter two to a certain extent owed their nomination — as a rule, not until the second round of voting — to a more or less aware approach of the voters, “Solidarity” supporters. It seems that this crucially influenced the conduct of two former “alliance groupings”. The agreement between these three groups in the Sejm and the government appointed thereby began the disassembly of the heretofore existent system in all its manifestations, and substituting them with new rules. However, it may be a paradox, that the first formal herald of this process was approval of the last decree of the State Council, soon to be liquidated, amending the act on Deputies’ rights and obligations as regards the content of parliamentary oath — a consequence of Deputies’ and Senators’ dissent to take an oath in its old wording.

The primary achievement of the Sejm (cooperating with the Senate of the 1st term) in the period of the mentioned few months, i.e. until the end of 1989, was passing a pack of statutes introducing the new economic system (Acts of 27 and 28 December) and a fundamental transformation of the constitutional regulation by means of the Amendment of 29 December (second constitutional act of fundamental importance in that period). Both those legislative moves were closely connected. As regards the political system, the text of the fundamental law was deprived of all phrases referring to ideology of the state of “real socialism”, including provisions on the “leading” role of the Polish United Workers’ Party (PZPR), which disposed of the di-
lemma in the form of relating that principle to the principle of superiority of the Sejm, and indubitably strengthened the systemic position of this chamber. The new economic system signified opening to principles of market economy (the whole Chapter 2 of the Constitution was annulled). As a consequence, the Sejm and the Council of Ministers lost their competences to pass social-economic plans. The Sejm’s reforming activity was apparent during those few months in all its fields of activity: legislative, oversight and inspirational, preparing the systemic transformation. Until the end of 1989, the Sejm passed 32 ordinary statutes (three of which amended the Budget Act), appointed the Prime Minister twice, and once — all of the government, it heard six government pronouncements, reports and information, recalled and appointed the President of the National Bank of Poland, elected six judges of the Constitutional Tribunal and the whole composition of the Tribunal of State. One of the first activities of the new Sejm was also introduction of changes in the structure and scope of activities of Sejm committees (resolution of 31 July 1989), with an explicit tendency to transform them into organs of a more general nature, conforming to political importance of their oversight actions. In the systemic practice of the first few months of the Third Republic of Poland (this term seems appropriate), the Sejm continued and even developed its formal status of the “supreme organ of public power”. This practice has been substantially changed also in further systemic transformations. It may be concluded that in the difficult period of unprecedented transformation, unknown to both states of real socialism and free-market democracy, the Sejm proved efficient.

After the April Amendment, the Constitution (still Constitution of the People’s Republic of Poland) consisted of a large preamble and 118 articles (enumeration of this act was different, due to a number of articles additionally marked with letters). After the amendment of 29 December 1989, the Constitution did not contain a preamble and there were 11 articles fewer. The annulled articles were mainly included in Chapter I (The Political Structure) and Chapter II (Social and Economic Structure); the matters so far regulated therein — obviously, fundamentally transformed — became included in a single chapter (Principles for the political and economic system). However, numerous other provisions of other chapters were also altered, and the constitutional act was provided a new name, consistent with the name of the State: “Constitution of the Republic of Poland”. Naturally, systemic transformations achieved with the December Amendment were not a result of the number of annulled articles, but of the new content introduced\(^1\). Of fundamental importance for this discussion is the new Article 1 para. 1 of the Constitution: “The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice”. In this context, there shall also be mentioned the resignation from the principle of accountability and recall of Deputies by the electorate (resignation of the former Article 2 para. 2). Other, more detailed provisions referring to organization and competences of the Sejm were not then changed. However, the principle of a democratic state ruled

by law directly affects the position of the Sejm by a strong emphasis on “rule of law”. Although the principle of legalism remained unchanged by the December Amendment (cf. Article 8 para. 3 of the former provisions and Article 3 para. 2 of the new provisions), it was in a way “diluted” in the much more broader principle included in the new Article 1 para. 1. In the view of those transformations and despite all the phrases of Article 20 left unchanged, I believe we can no longer talk of a supposition of the Sejm’s competences, resulting directly from its systemic functions. It shall be assumed that the Sejm’s competences, however broad, must always be founded on express constitutional provisions and the Constitution’s “silence” or not infringing competences of other constitutional organs shall not suffice (cf. the issue of passing yearly economic plans by the Sejm, lasting despite the lack of a relevant competence provision). Whether or not the principle of a democratic state ruled by law implicitly contains the principle of separation of powers into three branches is debatable; although a number of elements typical therefor were introduced in the April Amendment (e.g. some competences of the President, an organ never appointed by the Sejm, competences of the Constitutional Tribunal expanded with the right to a universally binding interpretation of statutes, vested therein by the amendment; strengthening the role of courts by appointing the National Council of the Judiciary), at the time, it could not have been ascertained that the principle had already been operating. Hence, it may not be assumed that the competences of the Sejm which essentially do not belong to the legislative, but are founded on explicit statutory grounds, would be a violation of the Constitution. Hence, they would be admissible.

Therefore, it seems purposeful to remark, that in the discussed period new acts were passed referring to competences of the Sejm. They were developed, which was important for the reception of the discussed principle. Already before entry of the amendment into force, the Act of 20 December 1989 on the National Council of the Judiciary vested the Sejm with the right to elect members thereof. On the other hand, the Act of 30 November 1990 annulling the act on social-economic planning vested the government with the obligation to submit to the Sejm (and the Senate) “the yearly directions of the social-economic policy”, “yearly and long-term forecasts of economic situation”, as well as “information, analyses and evaluations of the social-economic situation of the state”. Naturally, these acts are connected with oversight competences of the Sejm, but this organ seems to be treated as a body appointed to co-form the economic and social policy of the state, not only via passing relevant acts. Similarly, obligations of the Commissioner for Citizens’ Rights against the Sejm are precisely specified by the Act of 24 August 1991 amending the Act on the Commissioner for Citizens’ Rights. These acts sometimes take on the form of regulations of individual nature, as e.g. the Act of 22 March 1990 on the liquidation of the Workers’ Publishing Cooperative “Prasa-Książka-Ruch”. Attention shall also be brought to the new Standing Orders of the Sejm of 30 July 1992, which increase the Sejm’s

\[2\] Dziennik Ustaw, No. 87, item 505.
\[3\] Dziennik Ustaw, No. 21, item 125.
influence on the process of appointing other organs of the state, by the inexpedient stage of considering and issuing opinions on candidates by Sejm committees. Earlier, as a result of Amendment to the Standing Orders of 18 April 1990, in the appointment of “units” of the Legislative Committee, the concern for the quality of legislative works was manifested.

The period between the passing of the December Amendment and the entry into force of the Constitutional Act of 17 October 1992 (cf. further) was therefore a transition stage: from the rule of principle of superiority of the parliament to the system of the principle of separation of powers. The mentioned new competences of the Sejm and its committees are indubitably an expression of continuity in the functioning of this first principle. Also subsequent constitutional reform of 8 March 1990, which liquidated state councils as — similarly to the Sejm and the Senate — “organs of the nation’s authority” (cf. new content of Article 2 para. 1), seem to increase it, although it shall be considered an important departure from the heretofore applied qualification of organs of the state. The mentioned reform thus ultimately reinstates the traditional content to the principle of democratic parliamentary representation, this time expressed with no reservation in this constitutional provision.

The most influence on the principle of separation of powers in this period was exerted by the constitutional reform of 27 September 1990, which introduced fulfillment of the office of the President by means of universal, direct elections, which — naturally — provided the President’s competences, also vis-à-vis the Sejm, with much more gravity, regardless of the fact that it had been passed due to a specific political situation. This period ended with the passing of a fully democratic, five-adjective electoral ordinance (of 28 June 1991) and holding the elections on 27 October 1991 on its basis. Particularly, the ordinance was based on the idea of an integral proportionality of elections, as a result of which the Sejm was dismembered into numerous groupings, with all the classic consequences thereof, including dissolution before the end of the term, after only 18 months of functioning. However, of fundamental importance was realization by the mentioned constitutional act of the principle of democratic parliamentary representation (taking into consideration the earlier electoral ordinance to the Senate). This principle shall be permanent in the Third Republic of Poland, although its specific content as regards the Sejm has evolved. Already the next electoral ordinance of 29 May 1993 introduced a 5% threshold (7% for coalitions), an institution of the nationwide pool of mandates (not fulfilled in electoral constituencies), as well as integrally less proportional system of mandate distribution. In practice, these solutions introduce a specific appropriation of the representation process by political parties, which — naturally — is consistent with general tendencies in democratic countries, nevertheless it diverges from idealistically perceived principle of representation. This phenomenon was accompanied by a simultaneous process of institutionalization of political parties; hence, there converged and accumulated the faults of both processes: transformations of electoral law weakened the legitimacy for power exercise, while due to the Sejm of weaker legiti-
macy, parties were all too slowly instilled in the society. The Sejm’s low prestige in the eyes of public opinion was another result. It shall be added, that this form of representation was only to a small extent corrected by the nature of the Senate’s representation; despite a different electoral system, the Senate was also completely dominated by political parties. The position of the Sejm in 1990s was unfavorably affected by the political reality of the time, especially the conflict between Lech Wałęsa and the government of Tadeusz Mazowiecki. Perhaps in the period of hastily conducted systemic transformation this was inevitable, but soon after the whole political class had to pay the cost. Political scene in its entirety became expressly decomposed, electoral turnout dramatically dropped, and the Sejm of the 1st term was entered by groupings outright discrediting for the Poles, while — astonishingly — in the second parliamentary elections, forces related to biggest losers of 1989 turned out winners.

An unambiguous specification of the systemic position of the Sejm was brought by the Constitutional Act of 17 October 1992 on mutual relations between the legislative and executive powers of the Republic of Poland and on the territorial government (the so-called Small Constitution), which already in its Article 1 qualifies the Sejm (along with the Senate) as “an organ of the state in the scope of the legislative power”. Thus, this constitutional act, not only by its title, explicitly includes the principle of separation of powers into the systemic principles of the Polish State. In accordance with the existent Polish systemic tradition, this principle — definition-wise — was not expressed as a principle of separation, but of cooperation of powers, with some advantage of parliament over other powers, an within the legislative — some advantage of the Sejm over the Senate. Hence, from the text of the Small Constitution there were removed phrases referring to the Sejm as “the highest organ of state power”, to realization of “sovereign rights of the Nation” by the Sejm, to its competence to adopt “resolutions specifying fundamental directions of activity of the State”. These were replaced by — somewhat analogical — provisions referring to the functions of the Council of Ministers, which “shall conduct domestic and foreign policy of the Republic of Poland”, and “make decisions in all matters related to the policy of the State”. The Senate’s position was expressly reduced as the requirement of qualified majority (of 2/3 votes) was replaced with an absolute majority of votes sufficient to reject the Senate’s amendments by the Sejm or the Senate’s attempts at rejecting an act in its entirety. Similarly, there were limited competences of the President of the Republic vis-à-vis the Sejm, as the possibility of exercising a legislative veto was eliminated in cases, when the President refers as act (in the procedure of preventive review) to the Constitutional Tribunal. The Sejm (and the Senate) was to still function in the system of permanence, i.e. with the elimination of any external influence on the course of their sessions. This solution was to become permanent among constitutional regulations. Attention shall also be drawn to the fact, that the text of the discussed constitutional act contained more provisions related to the legislative procedure, not only in comparison to the state directly preceding it, but also in comparison to the March Constitution of 1921. These provisions were partly trans-
ferred from the Standing Orders of the Sejm and were related to: the government’s
obligation to submit financial consequences of a bill, as well as draft executive acts,
specifying subjects entitled to introduce amendments; the right to withdraw a bill or
the institution of urgent bills (cf. Articles 15 and 16). This tendency to constitution-
alize procedural provisions will be continued by the Constitution presently in force
and is important for specifying the systemic position of the Sejm.

On the other hand, the Constitution of the Republic of Poland of 2 April 1997 not only differently expresses the principle of separation of pow-
ers, but also introduces new elements into it; therefore, it seems justified to regard it
as a transformation of the content in comparison to the previous period. Primarily,
this refers to an express requirement to provide the systemic structure of the state
with “balance between the legislative, executive and judicial powers”, which had to
be followed by some competence transformations (e.g. liquidation of regulations
having the force of statutes, liquidating the Constitutional Tribunal’s competence to
establish a universally binding interpretation of statutes, further limitation of compe-
tences of the President of the Republic vis-à-vis the chambers; from then on, he may
exercise, alternatively, a single “check” of the acts referred for this signature). On the
basis of Article 10 of the Constitution, the Sejm and the Senate “are vested with the
legislative power”. As opposed to Article 1 of the Small Constitution, the Constitu-
tion of 1997 adopts a “functional”, rather than “organizational” approach. Indubita-
ably, however, the Sejm and Senate — as in that provision — are also organs of the
state in the scope of the legislative power.

It does not seem, however, that despite such constitutional wording, the Sejm —
also in the light of the Constitution in force — could be reduced to solely one of the
organs of the legislative; what is more, the legislative “balanced” in its position with
the two other powers. It may not be required that everything the Sejm does is sub-
jected to passing a specific act and serve this purpose only. Polish political culture
seems to regard the Sejm as a continuation of the Chamber of Deputies of the Con-
stitution of 3 May, “the representative and composition of Supreme national author-
ity”. This idea of the May Constitution was consistent with the idea of separation of
the three powers, also expressed therein (cf. its Chapter V), hence it may also be rec-
conciled with Article 10 of the Constitution of the Republic of Poland of 1997. Fur-
thermore, the legislative power in democratic states is the “parliament”, and this
term has its universally accepted content. It is known that etymologically it means
“a speaking, talk”; it is also known that it is appointed to “talk” of all the issues
which are of interest for the sovereign it represents. The term “parliamentary” is also
applied in the March Constitution upon a number of occasions (cf. Articles 8, 51, 56,
58). The Sejm of the March Constitution and of all the constitutional acts of the
Third Republic is a dominating element of the “National” Assembly (a specific al-
ter ego of the Nation), while Deputies are “representatives of the Nation as a whole”,
“in whom the trust of the Nation is vested” (Chapter VI, para. 7 of the Constitution
of 3 May; Article 20 of the March Constitution; Article 104 of the Constitution pres-
ently in force). The Sejm is a political representative of the sovereign Nation and may not be reduced to performing the role of a subject taking part in specifying policy by passing acts; “as an organ composed of Deputies, it shall also have the opportunity to potentially permanently influence the policy of the State” [...] and to consider any case in the scope of the policy of the State”⁴. At the same time, the Sejm is the organ potentially representing the Sovereign to the highest degree (creating opportunities therefor), most authentically in comparison to other organs, which is due to the number of its members and its manner of creation. Hence, it shall manifest the Nation’s experiences of all important public matters, both current and those arising, as well as those referring to the past; it shall express its views, evaluations, opinions and expectations, also against other powers, which are not created by the Nation. Certainly, “considering” is not tantamount to “resolving”; strictly speaking, resolving any public matter by the Sejm (with the Senate’s co-participation, dominated by the Sejm) may take place by passing an act concerning a particular matter (or resolving it in a different manner, when explicitly admitted by the fundamental law; cf. Articles 116, 230, 231).

A statute, however, is a source of law, an act of norm-creating, general and abstract nature. Not all of those views, evaluations, opinions and expectations are possible to “resolve” in this manner. If as a rule “considering” a certain matter does not lead to formulating an act, the Sejm may still conduct deliberations and discussions, as well as formulate its position⁵, although in doing so it may not restrict the scope of competences of the two other “powers”, balanced with the legislative. The Standing Orders of the Sejm (Article 69) hence signify that an effect of the Sejm’s activity may also be mandatory resolutions, appeals, statements and declarations, as well as other resolutions of no specific genre. Their importance is primarily political, actually dependent on the whole, current political context. The above reasoning is also confirmed by the fact, that similar possibilities to act are also listed in the Rules and Regulations of the Senate (Articles 55 and 85)⁶ — a representative body and the second chamber of the parliament. The Sejm, as the substitute of the Nation in a sense, oversees the activity of other powers and evaluates it. Such oversight is an immanent task of each democratic parliament and does not even require a particular specification in the constitution appointing “parliament” (however, oversight repartitions between the two parliamentary chambers as well as establishing more specific oversight means require formalization)⁷. It shall here be added, that also in view of the

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⁶ See e.g. Resolution of the Senate of 3 June 2005 on the postulates referring to the National Development Plan for the years 2007–2013 and other government program documents for the years 2005–2013 as regards regional policy concerning voivodeships threatened with marginalization; *Monitor Polski*, No. 134, item 469.
Constitution of the Republic of Poland, there continues the process of extending the Sejm’s competences by ordinary statutes, which in a specific way supplement the fundamental law. As an illustration there may serve the act of 27 April 2001 — Environment Protection Law⁸, whose Article 15 states that the “ecological policy of the State is passed by the Sejm at the motion of the Council of Ministers”.

It seems relevant to consider now the issue of the “functions” of the Sejm, certainly vis-à-vis the Constitution. The broadest approach to the matter has recently been presented by A. Balaban, who distinguishes six functions of this organ: system-shaping, legislative, budget, accepting the international law, appointing and recalling organs of the State, oversight with elements of inspiration⁹. Such a broad approach well illustrates the systemic position of the Sejm and does not collide, in my opinion, with earlier reasoning on possibilities of the Sejm (and the Senate) to act besides the legislative function. However, a dissent is raised to A. Balaban’s resignation from distinguishing the “European” function of the Sejm. In the author’s opinion, “membership in the European Union is not a source of a new function of the Sejm”, but solely affects the “manner of realization” of the functions it has so far been equipped with. Nevertheless, it seems that affecting the content of non-Polish (i.e. European) legislation is indeed a new function and not a continuation of any of the heretofore performed functions. I believe the fact that this function is realized not by the plenum, but by an individual organ of the Sejm, anyhow particularly constructed (cf. Article 148a of the Standing Orders of the Sejm) is of no significance. Affecting the content of the European law (as well as the personal composition of EU authorities) must obviously become all the more important sphere of activity of the Sejm, as integration processes become intensified¹⁰.

The principle of separation and balance of powers, combined with the constitutional regulation of the system of the sources of law, had soon led to unambiguous defining of the legislative power (in the functional sense), which shall be regarded as another aspect in specifying the position of the Sejm in the new constitution. This refers to abrogating the term “matters reserved for the legislature” (and thus “matters not reserved”) and assuming that the scope of legislative regulation are indeed all matters¹¹ subject to legal regulation (a breakthrough in this sphere was the Constitutional Tribunal’s judgment of 9 November 1999, Ref. No. K 28/98) and that in the scope of regulating freedoms and rights of an individual, all important issues shall be included directly in a statute, and in the scope of repressive and tax law, the exclusivity of statutory regulation results directly from the Constitution.

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⁸ Dziennik Ustaw, No. 62, item 627.
¹¹ An exception is the regulation of the matter of parliamentary rules of procedure, reserved for the exclusive regulation by the chambers, in accordance with Article 112 of the Constitution (principle of internal or regulatory autonomy).
Realization of the legislative function by the Sejm was expressed not only in the number of passed acts. Contract Sejm (functioned for 28 months, in session for 177 days) passed 248 acts, 78 bills were either rejected thereby or withdrawn by their sponsors, works on 83 bill began but were not concluded. Sejm of the 1\textsuperscript{st} term (functioned 27 months, in session for 136 days) passed 94 out of 335 submitted bills (of the remaining ones, 43 were rejected, withdrawn or abandoned, and works on 193 bills were not concluded). Sejm of the 2\textsuperscript{nd} term (in session for 297 days) passed 473 out of 826 submitted bills (118 bills were either rejected or withdrawn, works on 118 were not concluded). Sejm of the 3\textsuperscript{rd} term (in session for 316 days) passed 640 acts of 1152 bills submitted (152 bills were either rejected or withdrawn, works on 223 bills were not concluded). Sejm of the 4\textsuperscript{th} term (in session for 334 days) passed 894 acts of 1265 submitted bills (79 bills were either rejected or withdrawn, works on 188 were not concluded). Sejm of the 5\textsuperscript{th} term (functioned for 25 months, in session for 146 days) passed 384 acts out of 708 submitted bills (35 bills were either rejected or withdrawn, works on 232 bills were not concluded). Sejm of the 6\textsuperscript{th} term (in the first 14 months of its functioning, 94 session days) passed 270 act out of 614 initiatives\textsuperscript{12}. Altogether, the Sejm passed 3116 acts (including 13 acts of constitutional legislation). Certainly, it may not be oversee that many of the passed acts were an implementation of European law by Poland, hence their passing was a \textit{sui generis} duty of the Sejm.

Besides the number, there also seems to increase the specificity of regulations; this is attested by a specific and imperfect indicator in the form of increasing volume of subsequent annuals of \textit{Dziennik Ustaw}. The legislation still encompasses not only the classic regulation of the freedoms and rights of individuals, as well as competences of public authorities, but also political acts \textit{par excellence}, reminding former “resolutions specifying the fundamental directions of the activity of the State”. Here “acts on programs” may primarily be pointed, e.g. the Act of 1 July 2005 on establishing a long-term “National cancerous diseases counteraction program”\textsuperscript{13} or the Act of 29 December 2005 on establishing a long-term program “State food aid”\textsuperscript{14}. Moreover, there are passed very detailed acts almost resembling individual resolutions, e.g. numerous acts on establishing or changing the name of a specific higher learning institution or — from a different area — the Act of 18 October 2006 on subsidy for the state company Zakłady Chemiczne “Tarnowskie Góry” in Tarnowskie Góry, being liquidated\textsuperscript{15}. Such “constitutional practice”, “referring to namely specified subject or individual actions or events, including provisions, from which individual or specific norms may be derived”, was somewhat “acknowledged” by the Constitution-

\textsuperscript{12} The data provided on the basis of information on the Sejms of subsequent terms, prepared by the Chancellery of the Sejm. Certainly, these are different from the number of acts, which indeed entered into force in a specific term as an effect of e.g. an effective veto of the President of the Republic, effective rejection by the Senate, and especially due to application of the principle of discontinuance of parliamentary works.

\textsuperscript{13} \textit{Dziennik Ustaw}, No. 143, item 1200.

\textsuperscript{14} \textit{Dziennik Ustaw}, No. 267, item 2259.

\textsuperscript{15} \textit{Dziennik Ustaw}, No. 202, item 1482.
al Tribunal in its judgment of 14 December 2009 (Ref. No. K 55/07), but the Tribunal admitted that the “adjudication on constitutionality of this practice transgresses the scope of jurisdiction of the Constitutional Tribunal”.

The specificity of the Sejm’s legislative activity is a high number of Deputies’ legislative initiatives (altogether in both forms: initiatives of groups of Deputies and committees), comparable with the initiative of the government (1st term — 225 Deputies’ initiatives, 91 — government initiatives; 2nd term — 431 Deputies’ initiatives, 346 — government initiatives; 3rd term — 551 Deputies’ initiatives, 553 government initiatives; 4th term — 398 Deputies’ initiatives, 808 government initiatives; 5th term — 284 Deputies’ initiatives, 377 government initiatives; first period of the 6th term — 311 Deputies’ initiatives, 256 government initiatives). The number of initiatives exercised by the Senate, the President of the Republic and citizens is insignificant.

Among the passed acts there decisively dominate those submitted by the Council of Ministers. As a rule, government acts are passed with numerous amendments submitted by Deputies. Generally, the Senate is also quite active in submitting amendments, and its proposals are often accepted. On the other hand, the cases where the bills are rejected by the Sejm or withdrawn by their sponsors — although amount to from a few dozen to over a hundred and a few dozen in each term — are a relatively small ratio thereof. More numerous are bills, which had not been subjected to a vote before the end of the term. However, a Deputies’ high activity in that scope is not always unambiguously evaluated. For instance, M. Graniecki drew attention to the fact, that the dispersion of the legislative initiative results in coordination difficulties in the scope of establishing legislative priorities\(^\text{16}\); there are also expressed opinions, that the governing parties omit the path of government initiative due to strict requirements for creating and submitting such acts, not all of which are applied to Deputies’ bills. In turn, multiplying amendments to government bills results in incoherent final versions of acts. It is known that in the interwar period elimination of this phenomenon was an excuse to pass to a large extent the extra-parliamentary law-making of the force of a statute. The Sejm of the Third Republic attempts to reduce this phenomenon by introducing — by the amendment to the Standing Orders of the Sejm of 22 December 1995 — of a separate legislative procedure for codes of laws. Since the Small Constitution, there also has functioned a separate procedure for passing urgent bills. It also seems that the phenomenon — recognized already 10 years ago — of domination of bills amending acts over the acts regulating a certain matter comprehensively or all anew\(^\text{17}\) has not been overcome, although precise evaluation would require a detailed research. Quantitative advantage of bills amending acts is an obvious phenomenon, but the question is whether or not the Sejm displays certain opportunism towards increasing problems.

A separate, important problem is the quality of the legislative activity of the Sejm. In a significant scope, it is substantially corrected by the Senate’s amendments,

\(^{16}\) M. Graniecki, *Ocena polskiego ustawodawstwa w procesie dostosowania prawa*, “Przegląd Sejmowy”, 2000, No. 5.

\(^{17}\) Ibidem.
but apparently, this quality still raises reservations. Extension of the legislative services of the Sejm and the Senate shall not suffice, as their existence itself is not a guarantee of effective use by MPs of opportunities provided therefor (and to an even lesser extent it refers to the actual role of the legislative committees of both chambers). A problem arises of doubling works of those services with the legislative services of the government. Due to the nature of things, the quality of legislative works may not be approach “quantitatively”.

It is also important that the Sejm (using the Senate’s participation), in majority of its actions remains within boundaries set by the Constitution (although it is not a decisive majority), as may be concluded from the Constitutional Tribunal’s jurisprudence. The scale of this phenomenon, however, is difficult to establish, i.a. because it may not be ascertained that there will not occur cases of effective referring acts to the Constitutional Tribunal. Secondly, the Tribunal adjudicates upon statutes already in force, whereas this discussion — due to its subject — pertains to acts passed by the Sejm. However, some data, incidentally selected\(^\text{18}\), may prove interesting. For instance, in 2001 the Tribunal adjudicated upon constitutionality of 40 acts, passed after 1989, 25 of which it considered consistent with constitutional norms, 4 — partially consistent, and 11 — inconsistent. In 2006, in judgments referring to 78 such acts, the Tribunal considered 42 acts — consistent with the Constitution, 8 — partially consistent and 27 — inconsistent. One could assume, that the number of act referred to the Tribunal for its adjudication increases, as does the number of acts considered unconstitutional.

The basic stages of the legislative procedure were laid down in the Constitution of the Republic of Poland. They are specified primarily in the Standing Orders of the Sejm. The Constitutional Tribunal’s judgments also became important for this procedure, as the Tribunal applies the “procedural” criterion to evaluate constitutionality of the passed acts. Adjudications related to the notion of “amendment” to a bill proved fundamental, as well as the ones related to the scope of Senate’s competences as regards acts passed by the Sejm, the right to give opinions on acts by extra-parliamentary bodies. Also, there shall be mentioned acts foreseeing a particular participation in the legislative procedure of bodies being the subject of a given regulation. This particularly refers to vesting various organizations (trade unions, public benefit organizations) or organs (e.g. the National Court Register) with the right to issue opinions on bills. Of some importance for the legislative process is also the Act of 7 July 2005 on lobbying activity in the law-making process (third in Europe). Hence, the Sejm seems to manifest a proper understanding of the regulation of this process, although effects of those efforts are often critically evaluated\(^\text{19}\).

This understanding seems to be best confirmed by permanent amendments to the Standing Orders, related to a great extent to the law-making process. From its entry

\(^{18}\) On the basis of annual Information on the activity of the Constitutional Tribunal prepared by its office.  
\(^{19}\) See e.g. M. Wiszowaty, *Ustawa o działalności lobbingowej w procesie stanowienia prawa*, “Przegląd Sejmowy”, 2006, No. 5.
into force (virtually simultaneous with the Small Constitution), the Standing Orders of 30 July 1992, were amended 11 times; from that time until 19 February 2010 — 28 times, their unified texts were published three times. The following amendments referred to the legislative procedure: of 30 September 1998 (proceedings with the amendments of the Senate), of 19 October 2001 (reactivating the Legislative Committee), of 24 February 2006 (introduction of a “public hearing”), of 29 March 2007 (procedure for amendment of the Constitution). Quite often, criticism of this state of affairs (amending the Standing Orders instead of passing new ones) is not utterly right. Among numerous amendments there are also such, which introduce vast changes, present new ideas or concepts for regulating important issues from the scope of rules for procedure (not only referring to legislation), as e.g. amendments of 30 September 1998, of 24 February 2006, of 19 December 2008. The unified texts play the role of a specific substratum of the new Standing Orders. This seems a very practical approach. The Constitution shall not be disregarded here, as it sets inviolable framework for regulation of the rules of procedure.

In the sphere of “extra-legislative” activity, the Sejm — past commencement of the transformation process, as well as currently — acts in a very broad scope, although the principle of separation of powers put limits to this activity. The amendment of 6 March 1993 may be regarded as symbolic in this scope; it brought i.a. the resignation of describing the resolutions of the Sejm as acts “legally binding”. It shall here be added that the so-called Contract Sejm passed 162 resolutions, 15 draft resolutions were rejected or formally withdrawn, and the works on 8 draft resolutions were not completed. During the Sejm of the 1st term, 232 draft resolutions were submitted, of which 135 were passed, 40 were rejected or withdrawn, and works on 57 were not completed. During the Sejm of the 2nd term — 371 draft resolutions were submitted, 296 were passed, 58 were either rejected or withdrawn, works on 32 were not completed. During the Sejm of the 3rd term, 225 draft resolutions were submitted, 190 were passed, 26 were rejected or withdrawn, works on 34 were not completed. During the Sejm of the 4th term, 310 draft resolutions were submitted, 256 were passed, 69 were either rejected or withdrawn, works on 113 were not completed. During the Sejm of the 5th term, 173 draft resolutions were submitted, 203 were passed, 18 were either rejected or withdrawn, works on 36 were not completed. Altogether, until the end of the fifth term, there were passed 1242 resolutions.

Certainly, among those cumulative numbers, there were acts of various nature; not only the mentioned resolutions or statements, but also resolutions concerning the appointment of other organs, including intra-Sejm organs, amendments to the Standing Orders, extraordinary resolutions, those granting approval of the financial accounts submitted by the Council of Ministers, etc. Particularly, attention shall be brought to the fact, that there still functions the praxis of passing “resolutions specifying the fundamental directions of the activity of the State”, despite removal of the relevant constitutional phrase, although — naturally — from the entry into force of the Small Constitution, they may not be assigned an identical legal meaning to the
one applied previously. Examples of such resolutions are: Resolution of 10 May 2000 on the directions for privatization of PKO BP, BGŻ and PZU SA\textsuperscript{20}, Resolution of 17 December 2001 concerning actions for the benefit of persons in pre-retirement age\textsuperscript{21}, or Resolution of 8 May 2003 concerning the adoption of “Ecological policy of the State for the years 2003–2006”, taking into account the perspective for the years 2007–2010\textsuperscript{22}. They differ from the earlier mentioned “program” acts, because they may not establish any obligations on the part of “external” subjects. Sometimes this refers to very particular acts, e.g. Resolution of 5 July 2002 on summoning organs of the State administration to conduct control in supermarkets and hipermarkets\textsuperscript{23}.

In addition, the Sejm passes acts specified in Article 69 of the Standing Orders: mandatory resolutions\textsuperscript{24}, declarations\textsuperscript{25}, appeals\textsuperscript{26} and statements\textsuperscript{27}, as well as “resolutions”\textsuperscript{28}, for which no special title was used. Sejm committees still take advantage of their right to pass desiderata\textsuperscript{29} and opinions\textsuperscript{30}. With no detailed research, it is difficult to precisely evaluate efficiency of all those means; nevertheless, they do seem to be creating a plane for “cooperation of powers”, required by the Constitution.

In the discussed period, there visibly develops the oversight (control) activity of the Sejm. The above general remarks on the nature of this organ are also applied here and are the reason why not only the activity of the Council of Ministers (cf. Article 95 para. 2 of the Constitution)\textsuperscript{31}, but also of all other powers may become subject of the Sejm’s interest, parliamentary and committee debates, as well as adopting positions, expressing opinions and postulates. This finds confirmation in numerous acts, vesting such organs as the Constitutional Tribunal, the Supreme Court, the Supreme Administrative Court, the National Bank of Poland (Council for Monetary Policy), Commissioner for Citizens’ Rights and the National Broadcasting Council and others, with the obligation to submit their reports, information or signalization to the Sejm. However,

\begin{itemize}
\item \textsuperscript{20} Monitor Polski, No. 14, item 284.
\item \textsuperscript{21} Monitor Polski, No. 47, item 764.
\item \textsuperscript{22} Monitor Polski, No. 33, item 433.
\item \textsuperscript{23} Monitor Polski, No. 33, item 504.
\item \textsuperscript{24} E.g. of 14 May 2004, summoning the Council of Ministers to undertake urgent action aimed at transferring financial means to cover the effects of the Act of 22 December 2000 amending the act on the negotiatory system of establishing the increase of average pay…; Monitor Polski, No. 22, item 386.
\item \textsuperscript{25} E.g. of 16 September 1994, titled: Declaration as regards “The Green Lungs of Poland” area; Monitor Polski, No. 53, item 446.
\item \textsuperscript{26} E.g. of 6 December 2006, titled: Appeal for accelerating works on concluding the social agreement “Economy — Work — Family — Dialogue”; Monitor Polski, No. 89, item 920.
\item \textsuperscript{27} E.g. of 8 July 2005, titled: Statement as regards terrorist attacks in London; Monitor Polski, No. 41, item 550.
\item \textsuperscript{28} E.g. of 5 November 2004 concerning the Government plans to sell the Company “Wydawnictwa Szkolne i Pedagogiczne SA”; Monitor Polski, No. 47, item 796; or of 2 September 2008 concerning the Georgian crisis; Monitor Polski, No. 66, item 585.
\item \textsuperscript{29} During the 1\textsuperscript{st} term — 84, 2\textsuperscript{nd} — 280, 3\textsuperscript{rd} — 338, 4\textsuperscript{th} — 230, 5\textsuperscript{th} — 134, 6\textsuperscript{th} — 84.
\item \textsuperscript{30} During the 1\textsuperscript{st} term — 304, 2\textsuperscript{nd} — 881, 3\textsuperscript{rd} — 1096, 4\textsuperscript{th} — 1507, 5\textsuperscript{th} — 886, 6\textsuperscript{th} — 582.
\item \textsuperscript{31} The Sejm of the 1\textsuperscript{st} term considered 54 information, statements and government reports; of the 2\textsuperscript{nd} term — 192, of the 3\textsuperscript{rd} — 87 (including 50 information of current issues), of the 4\textsuperscript{th} term — 108 (58), of the 5\textsuperscript{th} term — 52 (19).
\end{itemize}
the Sejm may not use all the possibilities to act, both as regards pure oversight and past-oversight (inspirational, postulating), which it is vested with as regards the Council of Ministers on the basis of provisions expanding Article 95 para. 2 of the Constitution. Oversight conducted by the Sejm shall be comprised within the parliamentary system, adopted in the Constitution of the Republic of Poland\textsuperscript{32}. Functioning of the parliamentary opposition in turn results in this oversight adopting a political nature, developed for the needs of political competition and striving for obtaining power by various political forces. This is a fundamental difference in comparison with the period of the People’s Republic, despite utilizing by the “then Sejm” and “current Sejm” (certainly, keeping in mind differences in the very construction of both) formally the same legal instruments, even if the extent of their utilization is convergent. Naturally, this does not mean, that Deputies of governing coalitions do not utilize also those possibilities, but the intensity of those actions depends on the level of party discipline.

Observing the actual activity of the Sejm, one recognizes that it hears and politically approves (via a vote of confidence) the Prime Minister’s expose, adopts resolutions on granting approval of the financial accounts provided by the Council of Ministers, commissions audits conducted by the Supreme Audit Office and considers its reports, demands government information and receives it. The same may be done by Sejm committees, both permanent and special; moreover, committees are allowed to conduct away sessions. Committees’ desiderata and opinions have already been mentioned. In the so-called Contract Sejm, 2432 Committee sittings (permanent and special) and 1261 subcommittee sittings were held. In the Sejm of the 1\textsuperscript{st} term, respectively — 2283 and 860, of the 2\textsuperscript{nd} term — 6522 and 3146, of the 3\textsuperscript{rd} term — 6379 and 3636, of the 4\textsuperscript{th} term — 6244 and 3549, of the 5\textsuperscript{th} term — 2927 and 1157, of the 6\textsuperscript{th} term — 2025 and 721. As a result committees passed: in the so-called Contract Sejm — 173 desiderata and 241 opinions, in the Sejm of the 1\textsuperscript{st} term — 84 desiderata and 304 opinions, in the Sejm of the 2\textsuperscript{nd} term, respectively — 280 and 881, in the Sejm of the 3\textsuperscript{rd} term — 338 and 1096, in the Sejm of the 4\textsuperscript{th} term — 230 and 1507, in the Sejm of the 5\textsuperscript{th} term — 134 and 886, in the Sejm of the 6\textsuperscript{th} term — 84 and 582 (altogether 1242 desiderata and 5497 opinions). It shall be assumed, that committees mostly received the relevant answers of departments.

An important solution is adopting by the Sejm of the system of permanent committees as a primary model — committees specialized as regards their subject matter, numerous and autonomous (independent of the plenum) in undertaking oversight actions and using the results thereof. These features provide oversight activities with gravity (investigative committees shall not be disregarded here; they play an important role in the political practice)\textsuperscript{33}, although — as pointed by H. Pajdala\textsuperscript{34} — during


\textsuperscript{33} It may be assumed that in the so-called Contract Sejm, there functioned 3 committees of this kind; in the Sejm of the 1\textsuperscript{st} term — also 3, 2\textsuperscript{nd} — 4, 3\textsuperscript{rd} — 0, 4\textsuperscript{th} — 3, 5\textsuperscript{th} — 1 and in the Sejm of the 6\textsuperscript{th} term (presently) — 4.

\textsuperscript{34} H. Pajdala, \textit{System komisji sejmowych, uwagi de lege ferenda, “Przegląd Sejmowy”}, 2001, No. 3.
the first terms, due to undergoing transformation, the burden of parliamentary works (including committee works) amounted mostly to legislative activity, to disadvantage of intensity of oversight activities. All in all, Deputies have the right to lodge interpellations\textsuperscript{35}, Deputies’ questions\textsuperscript{36} and questions on current issues (this last procedure was introduced by the Constitution presently in force)\textsuperscript{37} and to deliver statements\textsuperscript{38}. It shall here be added, that an express majority of interpellations and Deputies’ questions were answered.

Oversight activity performed by opposition Deputies is focused on initiatives to pass a vote of no confidence (collective or individual). Basing the Constitution (beginning with the Small Constitution) on the idea of rationalized parliamentarism results in the fact that the commencement of such a procedure is not easy. Of fundamental importance is obviously the party-political composition in the Sejm. Even greater procedural difficulties are met by an initiative to bring a member of the government (or holders of other positions) to accountability before the Tribunal of State. Therefore, commencement of those procedures is rare and does not yield results against the stability of government-coalition configurations.

Experiences of the Sejm in the period of the Third Republic of Poland are also experiences of two different models of internal organization. The first functioned until the entry into force of the present Constitution (i.e. in the period of the so-called Contract Sejm, as well as the Sejm of the 1\textsuperscript{st} and 2\textsuperscript{nd} term) and was based on the idea of collectivity, manifested in vesting the most important competences as regards managing the functioning of the chamber in the Presidium of the Sejm, as a rule cooperating with the Council of Seniors. The other model (current, since the entry of the Constitution of the Republic of Poland into force) is rather based on the idea on a one-person management of the Marshal of the Sejm with the role of the Presidium of the Sejm reduced to a consulting function. These changes have been meticulously analyzed in the literature\textsuperscript{39}, but — judging by the effects of the works of our chamber — no fundamental partition may be distinguished in its activity and efficiency, which would result from the transformation of the structure of its internal management\textsuperscript{40}.

\textsuperscript{35} In the so-called Contract Sejm — 619, in the Sejm of the 1\textsuperscript{st} term — 773, 2\textsuperscript{nd} — 2613, 3\textsuperscript{rd} — 7081, 4\textsuperscript{th} — 10660, 5\textsuperscript{th} — 9581, in the short, beginning period of the 6\textsuperscript{th} term — already 7218.
\textsuperscript{36} Respectively: 150, 508, 672, 4247, 4386, 3495 and 3106.
\textsuperscript{37} During the 3\textsuperscript{rd} term — 311, 4\textsuperscript{th} — 710, 5\textsuperscript{th} — 439, 6\textsuperscript{th} — 283.
\textsuperscript{38} In the so-called Contact Sejm — 520, in the Sejm of the 1\textsuperscript{st} term — 506, 2\textsuperscript{nd} — 496, 3\textsuperscript{rd} — 1734, 4\textsuperscript{th} — 1023, 5\textsuperscript{th} — 839, 6\textsuperscript{th} — 739.
\textsuperscript{40} I am not certain this phenomenon may be measured with the number of draft resolutions and bills, which remain (their consideration have not been completed) after the end of a given term. After the first three terms (the Sejm managed by the Presidium), there remained altogether 381 draft resolutions and 98 bills. After the subsequent three terms of the Sejm managed by the Marshal, there remained 643 draft resolutions and 124 bills. Hence, could the transformation into the system of “one-person management” result in weakening the efficiency of the Sejm’s activity?
The Sejm of the Third Republic of Poland — if we assume the Third Republic began on 4 June 1989, a date so closely connected to this organ — has functioned for the past 21 years within different framework set by Constitution and rules of procedure. Formally, it was very active. The cited data and generally known facts attest to its fulfillment of all the functions, which it is vested with by the Constitution and expected by the sovereign: the system-shaping and legislative functions, budget and oversight functions, creative function and that of accepting international law. It also performed the “European” function, successfully — in general — adapting Poland to the European Union. It generally constituted a strong factor for government stabilization. Also, it put a large effort into establishing a rational manner of realizing its competences, very often amending its Standing Orders. Intensity of the works and the subject matter of the debates, discussions and resolutions are the reasons why it may be considered an alter ego of the Nation itself. The greatest achievement of the Sejm is — in its cooperation with the executive — accomplishing the systemic transformation in its different dimensions, and then continuing to stabilize the new system.

On the other hand, it seems that the Sejm as the promoter of the Nation (which is also to be required of representatives, as opposed to solely reflecting the composition of political forces within the society) and as the promoter of the new model of political culture failed; it was not sufficiently disciplined; instead it proved quarrelsome, dominated by party, and sometimes even corruption (political corruption) determinants of activity. The question is whether or not it could have been different, especially past 45 years of the “real socialism”, and previous historical periods which have not provided many appropriate models; also, whether or not this state of matters was strengthened by the general reluctance of society towards politics and politicians. Another question is to what extent its modus vivendi diverged from the functioning of other parliaments, which are generally collective bodies of a different kind than social clubs. Let us hope that slowly within it there will grow and develop signs of the new.
THE SEJM AND THE SENATE UNDER THE PROPOSALS FOR AMENDMENT OF POLAND’S CONSTITUTION OF 1997*

ABSTRACT

The article provides a review of legislative proposals offered to Poland’s Constitution, concerning the Sejm and the Senate matters that have not been enacted into law (i.e. constitutional amendment bills submitted in 1997, 2006, 2007 and 2008). The proposals, providing for partial changes, related to abolition or limitation of parliamentary immunity (including both non-liability and inviolability of MPs), as well as restricting of the right of persons with criminal record to be elected as members of parliament. The amendment of Article 99 of the Constitution, passed in 2009, is also described.

Central part of the article deals with the origins of the first, and more comprehensive, bill of 19 February 2010 on the amendment of the Constitution as well as its substantive suggestion in relation to parliamentary matters. This concerns the following issues: 1) reduction on the number of Deputies and Senators, 2) constitutional regulation of the principle of proportional elections of Deputies to the Sejm, 3) change in the procedure for election of Senators, 4) inclusion of former Presidents of the Republic of Poland in the composition of the Senate, 5) change in the scope of application of the principle of incompatibility of exercise of the mandate with performing other offices, 6) limitation of immunity of Deputies, 7) reduction of the level of votes (majority) required to override the legislative veto of the President of the Republic, 8) specifying the time-limit for an a priori review by the Constitutional Tribunal to a particular extent, 9) abolition of individual political accountability of minister to the Sejm.

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I. Adoption of the Constitution of the Republic of Poland of 1997 completed the period of systemic transformation, understood as departure of the constitutional solutions from the previous systemic model and laying stable foundations to the new systemic order. Formally, passing the new constitution is not a limit point ending the processes of constitutional transformations in a different legal and political context. The period of the binding force of the Constitution of the Republic of Poland already brought first actions and attempts at altering the fundamental law: in 2006 an amendment to Article 55 of the Constitution was passed, and in 2009 — another amendment, to Article 99. Besides the two passed amendments, in the period of 13 years of the binding force of the Constitution there were also made 11 attempts at amending the Constitution, began with formally submitted bills amending the Constitution, some of which referred to amending provisions related to the Sejm and the Senate. These bills were characterized by their partial nature, limited to fragmentary proposals for change in a very limited scope — with a small exception in the form of the newest bill (Sejm print No. 2989 of 19 February 2010), although even this bill may not be regarded as an attempt at a complex constitutional amendment.

In each sphere of the systemic practice — both minute achievements, more numerous formal legislative attempts of limited scope, and most broadly in the sphere of bills of solely political-medial status — there are to be found initiatives pertaining to the problems of the Sejm and the Senate, both as regards matters strictly pertaining to the functioning of the parliament, and those referring to broader relations, especially vis-à-vis other organs. Regarding these issues through the prism of the bills may serve as the background for the discussion of directions or scope of future works and legislative decisions.

II. Already the first term under the rule of the Constitution of 1997 (3rd term of the Sejm, 1997–2001) brought about a bill to amend the Constitution with reference to parliamentary problems; this took place already in the first month after the entry of the Constitution into force. At the initiative of a group of AWS (Solidarity Electoral Action) Deputies, an amendment of Article 105 of the Constitution was proposed. The bill was founded on a presumption, that the Constitution in force provides MPs with an excessive protection, and thus significantly diverges from the principle of equality before the law. The essence of the bill was to maintain the material immunity with a single listed exception (violation of other persons’ personal rights) and to depart from the necessity to obtain the chamber’s consent to bring MPs to (penal, civil) accountability for ac-

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2 Dziennik Ustaw of 2006, No. 200, item 1471.
3 Dziennik Ustaw of 2009, No. 114, item 946.
tions violating personal rights of other persons. A further-reaching change was to refer to formal immunity and parliamentary privilege, which would not be connected with obtaining a consent to bring MPs to criminal accountability or to apprehend (arrest) them, but solely with an obligation to suspend criminal proceedings at the Sejm’s demand or an obligation to inform the Marshal of the Sejm, whereat the Marshal would have the right to demand an immediate release of the apprehended. According to the sponsors of the bill, the new regulation would reconcile the goals of criminal proceedings with parliament’s autonomy. After the first reading, on 8 January 1998, the bill was referred to committees, which began works on the project in the spring of 1998, but only in the organizational-preparatory scope, while the subject matter of the bill was not considered. Ultimately, the bill was abandoned at the end of the term, due to the principle of discontinuance of legislative works. Nevertheless, the issue of amending Article 105 of the Constitution was to return upon a number of occasions.7

III. During the 5th term of the Sejm (from 19 October 2005 until 4 November 2007), there were submitted 4 Deputies’ bills to amend the Constitution, all related to the functioning of the parliament. Successively, those were bills: 1. Of a group of PO (Civic Platform) Deputies of 12 December 2006 (print No. 1302); 2. Of a group of PiS (Law and Justice) Deputies of 11 April 2007 (print No. 1835); 3. Of a group of PiS Deputies of 17 April 2007 (print No. 1834) and 4. Of a group of PO Deputies of 8 May 2007 (print No. 1883). The documents could precisely be distinguished into two “pairs” of bills related to different subject matter — one pair are prints No. 1302 and 1834, concerning amending Article 99 of the Constitution as regards the right to be elected to the Sejm and the Senate, the other pair are prints No. 1835 and 1883, concerning amending Article 105 of the Constitution as regards the problems of parliamentary immunity and privilege. Both bills amending Article 99 of the Constitution were referred to committees, past the first reading, while the bills amending Article 105 of the Constitution were only referred to a first reading at the sitting of the Sejm; the works on all four of them — due to an end of the term — were abandoned upon the principle of discontinuance of legislative works. The issue of amending both Article 99 and Article 105 returned during the next term.

Both bills to amend the Constitution of the Republic of Poland as regards the right to be elected to the Sejm and the Senate (Article 99) were a specific reflection of a dis-


6 Print No. 72 of 10 November 1997.

7 More on the subject: R. Chruściak, Prace konstytucyjne..., pp. 13–21.

8 During the Sejm of the 4th term (2001–2005) no bill to amend the Constitution was submitted.

Discussion on a low condition of a part of political class, whose spectacular manifestation was performance of representational mandates by persons previously convicted by courts. PO bill assumed adding the following para. 3 to Article 99: “No person: 1. Convicted of committing an intentional and indictable offence; 2. Against whom a final and enforceable judgment has been passed conditionally discontinuing penal proceedings in a matter concerning the commitment of an intentional and indictable offence, shall be eligible to be elected to the Sejm or the Senate”. As regards the functioning of the Sejm, the bill submitted by PiS also assumed adding para. 3 to Article 99 in the following wording: “A statute shall specify cases, in which the commitment of an intentional and indictable offence or a fiscal offence results in the deprivation of a right to be elected to the Sejm or to the Senate or in the expiration of the mandate of a Deputy or Senator”; Article 2 of the PiS bill assumed the amendment to enter into force on the day of its publication, although the act would be applied to the elections to the Sejm and the Senate held after its entry into force, as well as Deputies and Senators of the subsequent term. Apparently, the primary goal of the two bills was the same; the difference was that the PiS bill referred to ordinary legislation for specification of acts which are to be followed by the deprivation of the right to be elected, thus making the constitutional regulation itself less concrete and ambiguous and creating opportunities for overly flexible legislative actions. The bills also differed as regards specifying the scope of the thus sanctioned sphere (prints No. 1835 and 1883).

Another pair of Deputies’ bills to amend the Constitution of the Republic of Poland referred to the problem of parliamentary immunity and privilege (Article 105). Both bills were founded on a conviction, expressed in justifications to the bills, that in practice, immunity is overused, serves to avoid responsibility even for common criminal offences and is inconsistent with the principle of equality of citizens. The bill submitted by PiS Deputies assumed the following wording of Article 105 of the Constitution: “A Deputy shall not be held accountable for his activity performed within the scope of a Deputy’s mandate during the term thereof or after its completion. Regarding such activities, a Deputy can only be held accountable before the Sejm and in a case where he has infringed the rights of third parties, he may only be subject to legal proceedings before a court at the consent of the Sejm” (para. 1); “The Marshal of the Sejm shall be immediately notified of the apprehension of a Deputy, and may order an immediate release of the person apprehended” (para. 2); “The provision of para. 2 shall not apply to execution of the penalty of imprisonment by a valid court judgment or an arrest on the basis of a court judgment” (para. 3). Hence, the above proposal assumed maintaining the material immunity (Article 105 para. 1 unchanged), but abrogating the formal immunity and parliamentary privilege, although with reference to the latter, a restriction was to be introduced in the form of admitting the Marshal of the Sejm to immediately order the release of a person apprehended, where the apprehension had been executed by a non-court organ. The bill sub-

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10 More on the subject: R. Chruściak, Prace konstytucyjne..., pp. 115–121.
mitted by PO Deputies assumed the following wording of Article 105: “A Deputy shall not be apprehended or arrested without the consent of the Sejm, with the exception of cases, where apprehension is inexpedient to ensure the proper course of proceedings. The Marshal of the Sejm shall be immediately notified of the apprehension, and may order an immediate release of the person apprehended” (para. 1); “The detailed principles and mode of procedure in cases referred to in para. 1 shall be specified in a statute” (para. 2). The above proposal assumed a total abrogation of both material and formal immunity and maintaining parliamentary privilege, although in a limited form.

IV. Already in the first months of the 6th term of the Sejm (which began 5 November 2007), there returned — in the form of bills to amend the Constitution — both motions formulated earlier, related to amending Article 99 and Article 105 of the Constitution. Both bills (prints No. 432 and 433) were submitted by PO Deputies on 26 February 2008. Submitting those bills to the Sejm may certainly be connected with an explicit support of all parliamentary forces for actions aimed at reinstating proper rules for activity within public life, despite insufficient determination, apparent for years, to finalize earlier bills by amending the Constitution. During the present term, the situation was partly different, as on 7 May 2009 there was passed the act amending the Constitution of the Republic of Poland as regards Article 99 (limiting the right to be elected to the Sejm and the Senate); this is the second of the accomplished amendments to the Constitution of the Republic of Poland (after amendment of Article 55 in 2006), and the first as regards parliamentary subject matter. Also, the course of the Sejm proceedings was concluded on the bill to amend the Constitution of the Republic of Poland as regards Article 105 of the Sejm of the print No. 433 (immunity), since the bill was withdrawn by its sponsors on 12 February 2010. As has been mentioned, on 19 February 2010, a group of PO Deputies submitted a broader, complex bill to amend the Constitution (print No. 2989), including a proposal to amend Article 105 of the Constitution, although in a slightly different manner.

As has been signaled, the procedure for amending Article 99 of the Constitution on 7 May 2009 began with the bill submitted on 26 February 2008 (print No. 432), in which the sponsors proposed to add a new para. 3 to Article 99: “No person 1) convicted of an intentional and indictable offence; 2) against whom a final and enforceable judgment has been passed, conditionally discontinuing penal proceedings concerning the commitment of an intentional and indictable crime, shall be eligible to be elected Deputy or Senator”; in its Article 2 the bill foresaw that the act shall enter into force three months past its publication. Obviously, the proposed meaning was identical to that of the provision included in the bill of 12 December 2006 (print No. 1302), works on which were subsequently discontinued, and did not refer to MPs already performing the mandate. Expert opinions prepared as a part of the works on

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12 In accordance with the register of bills withdrawn by their sponsors published on the Sejm website www.sejm.gov.pl.
the project, and also earlier ones (referring to the print No. 1302) displayed a broad spectrum of problems to be considered in the course of legislative proceedings\(^\text{13}\), and the course of the works — controversial until the last moments (including the works of the Senate) — questioned the possibility of reaching a compromise\(^\text{14}\). However, due to amending the Constitution, it seems worthwhile to point solely to the new form of Article 99, supplemented with para. 3 in the following wording: “No person sentenced to imprisonment by a final judgment for an intentional indictable offence may be elected to the Sejm or the Senate”\(^\text{15}\). Indubitably, the constitutional formula specifies the scope of “parliamentary inconvenience” in a way which blocks the access to the mandate to only some group of persons. Article 2 of the Act of 7 may 2009 amending the Constitution of the Republic of Poland establishes a transitional provision, according to which the new Article 99 para. 3 of the Constitution is not to be applied until the elections for the next term. This solution shall be evaluated positively, as it eliminates the controversial change of rules applying to the mandate during the term. Since the amendment is relatively recent, it may be assumed that the obtained compromise shall prevent postulates to amend Article 99 of the Constitution, as virtually purposeless.

On 26 February 2008, PO Deputies submitted the bill to amend the Constitution of the Republic of Poland (print No. 433) as regards Article 105 (immunity), which was later withdrawn by the sponsors on 12 February 2010; it was the fourth bill to amend Article 105, submitted since the Constitution entered into force; nonetheless, the bills differed as regards their specific details. The bill of the print No. 433 assumed Article 105 to “annul paras. 2, 3 and 4” (Article 1), which would be tantamount to abrogating the so-called formal immunity — the furthest-reaching interference into the scope of the form of this immunity\(^\text{16}\); according to the proposal, the so-called material immunity would remain unchanged, as regulated by the maintained Article 105 para. 1 of the Constitution. In accordance with the Deputies’ proposal, an MP’s accountability in the sphere of activity within the scope of mandate exercise would be legally executed (including criminal accountability) on the same principles as applied to all other citizens. Eliminating formal immunity would also mean eliminating the Sejm’s right to demand suspension of criminal proceedings commenced against a person prior to the day that person was elected a Deputy and the possibility to grant a consent by a Deputy to be held criminally accountable. Indubitably, this was a proposal greatly interfering with the heretofore applied guaran-


Andrzej Szmyt: The Sejm and the Senate under the proposals for amendment of Poland’s Constitution of 1997

The mentioned withdrawal of the bill took place at the stage of committee works.

V. Currently — past withdrawal of the bill of the print No. 433 — in the Sejm, there is only the aforementioned bill to amend the Constitution of the Republic of Poland (print No. 2989) submitted on 19 February 2010 by a group of PO Deputies, and on 27 April 2010 referred to the first reading at the sitting of the Sejm; until the parliamentary holidays, it had not been placed in the orders of the day of the chamber.

The discussed bill significantly differs from all the previous bills to amend the Constitution, as the scope of its subject matter explicitly transgresses all the previous incidental proposals for changes, also those which did not pertain to problems of the parliament. Therefore, so far the Constitution has been only slightly altered with two amendments, while no bill referred to its fundamental principles. Hence, Ryszard Chruściak was right when he said that in the years 1997–2007 “even a specific sum total of the submitted bills had not created an area of changes, which could essentially modify the fundamental law in force. In other words: the scope of the proposed amendments was not broad and even if all the amendments proposed were passed, the Constitution of the Republic of Poland in force would remain in the form which would not alter either its original, fundamental principles or a vast majority of its detailed regulations”. This remark may also be applied to the discussed proposals, which referred to the problems of the parliament.

From this perspective, the bill of 19 February 2010 (print No. 2989) is of a different nature, also as regards the subject matter of the parliament. The bill to amend the Constitution contains 18 items listing technical-legislative changes referring to 19 Articles, including annulling 5 articles in their entirety, adding 5 new articles and providing new content to 14 articles.

17 The first reading of the bill was held at the sitting of the Sejm on 9 May 2008; subsequently, the bill was referred to the Special Committee to consider Deputies’ bills to amend the Constitution of the Republic of Poland (the Committee was also to consider the bill of the print No. 432 as regards amending Article 99 of the Constitution). Besides the sittings, on 4 and 25 September 2008 devoted to both mentioned bills, the Special Committee also considered the bill of the print No. 433, but not until May 2009 — after completing the works on bill of the print No. 432 (sittings on: 21 May, 18 June, 24 September and 5 November 2009); formally, the Committee concluded its works on 12 February 2010, after the bill had been withdrawn by its sponsors.

18 See R. Chruściak, Prace konstytucyjne..., pp. 129–130; summing up bills of the years 1997–2007, the author lists the proposed amendments to the Constitution: Articles 30, 38, 55, 60, 61, 99, 105, 179, 227 and 236a. Bills of the years 2007–2008 submitted during the 6th term supplement with list with Articles 17, 39, 61a and 65.

19 Systematically listing, the changes are to refer to: the composition of the Sejm of the Republic of Poland and the Senate of the Republic of Poland, excluding the principle of proportionality from the catalogue of constitutional principles for electoral law in the elections to the Sejm, limiting the scope of formal parliamentary immunity, the requirement of majority of votes in order to repass an act to which a legislative veto had been passed by the President of the Republic, an obligation to pass the judgment by the Constitutional Tribunal within 3 months from the submittal of the motion referring thereto by the President of the Republic, fulfillment of the function of representing the State by the President of the Republic, a requirement of a minimal number of persons submitting the candidature for the President of the Republic, temporary performance of the duties of the President of the Republic by the Marshal of the Sejm, establishing a deadline for ratifying and denouncing an international agreement ratified at the consent of the Sejm, principles for co-
Among the proposed changes, the subject matter of the parliament is of great significance, both as regards the importance of the matter and its scope. To ensure the legibility of the proposed amendments, they may be presented in accordance with the order of items in Article 1 of the bill.

Firstly, Article 1 item 1 of the bill assumes reducing the number of the members of the Sejm to 300 Deputies (Article 96 para. 1 of the Constitution) and deconstitutionalizing the principle of proportionality in the elections to the Sejm (Article 96 para. 2). As regards the reduction of the number of Deputies, in the “Justification” to the bill, its sponsors state, that presently, the Sejm of the Republic of Poland (460 Deputies) is a more numerous organ than parliamentary chambers of Western European states20, and the proposed number of members shall ensure the realization of the representational norm at the level of 127 thousand inhabitants to one mandate, which would be comparable with other large European countries (e.g. France — 111 thousand, Spain — 133 thousand, Germany — 137 thousand). In the “Justification” this argument was not evoked, but one shall remember the vivid context of political and medial arguments on the necessity to reduce the “bummer class” and the benefits which financial savings shall bring. Numerous previous comparative analyses proved that the difference in number of seats in parliaments of various countries results primarily from a different number of inhabitants, from their historical and political specificity (original traditions); also, of importance is the structure of uni- or bicameral parliament with an explicit tendency for overrepresentation in European countries. Computer simulations of relations in various correlations have always displayed an “excessive” number of parliamentary seats in Poland21; however, in the most relevant correlations, i.e. in the European dimension and bicameralism of parliament — this excess equals about 60–90 mandates; in Poland, the number of MPs per one million inhabitants equals 14 and is larger than the number “due” (12) on the basis of the analyzed correlations, but also smaller than the European average (16). It is up to the pouvoir constituant to evaluate rationality of the number of members of both chambers, taking into account both the possibility to reflect various political groups constituting the sovereign and the scope of tasks which are to be fulfilled by representatives. Perhaps a relative reduction of the role of representatives, resulting from the operation of the President of the Republic in the scope of foreign policy with the Prime Minister and the relevant minister, the procedure for appointing the Chief of the General Staff and commanders of branches of the Armed Forces by the President of the Republic, the scope of prerogatives of the President of the Republic, prerequisites enabling the President of the Republic to refuse to appoint judges in accordance with the motion submitted by the National Council of the Judiciary, introducing provisions referring to the Prosecution to the Constitution; moreover, there are to be annulled provisions of the Constitution referring to the National Security Council and the National Broadcasting Council, as well as those related to individual political accountability of the members of the Council of Ministers and the procedure for passing a vote of no confidence in a minister.

increasing importance of the government and political parties, affects the perception of the optimal number of Deputies\textsuperscript{22}. Deciding on the number of members of the Sejm, one shall keep in mind that comparatively, the Senate is less numerous than its Western European counterparts in countries of a similar number of inhabitants.

In the context of the planned regulation, it shall be considered that in some of its provisions, the Constitution of the Republic of Poland specifies the number of Deputies (Senators), entitled to submit a particular motion (undertake a particular action), e.g. in its Articles 145, 156, 158 or 191\textsuperscript{23}. Reducing the number of Deputies — if the mentioned “minima” were to remain unchanged — would result in a substantial increase of requirements indispensable to undertake particular initiatives. If those “relations” — to which an aspect of relations between majority and opposition also applies — were to remain unchanged, then also those constitutional provisions which specify the “minima” should be amended (unless a provision is proposed to be abrogated, as e.g. Article 159 of the Constitution). Since this issue had not been addressed in the “Justification”, it is not clear whether or not it was the sponsors’ intention to maintain the literal requirements of the mentioned “minima” as they are\textsuperscript{24}, or if it is solely an inadvertence of potential consequences of amending Article 96 para. 1 of the Constitution.

It stems from the “Justification” to the bill, that the sponsors proposing to amend Article 96 para. 2 of the Constitution (deconstitutionalization of the principle of proportionality in the elections to the Sejm) are aware of the fact, that this shall not decide on the form of the future electoral ordinance, which is up to the decision of the ordinary legislator. Indeed, there will perish the constitutional obligation to maintain the principle of proportionality, which may open the way for the principle of majority or some sort of a mixed system, but this is not an obstacle for further maintenance of the principle of proportionality. Such a way of thinking not only signifies decisions of particular gravity as regards their subject matter, but also makes deconstitutionalization necessary\textsuperscript{25}, if the ordinary legislation is to turn to the mixed system. Deconstitutionalization would extend regulatory freedom on the part of the legislator, but also — what shall be taken into consideration — would provide opportunities for more frequent changes of electoral ordinance and political arguments connected therewith.

Secondly, Article 1 item 2 of the bill foresees amending Article 97 of the Constitution, which on the one hand signifies the reduction of number of the members of the Senate, and on the other — change in the manner of electing the chamber; the sponsors themselves, in the “Justification” to the bill, emphasize gravity of the new form-

\textsuperscript{23} This refers to a particular minimum required to commence the procedure of holding the President of the Republic of a member of the Council of Ministers accountable before the Tribunal of State, the procedure for a constructive or individual vote of no confidence, submitting a motion to the Constitutional Tribunal.
\textsuperscript{24} This was pointed to in his position on the bill by the Minister of Justice-Public Prosecutor General in his address to the Chief of the Chancellery of the Sejm (letter DL-P-V-430—2/1- of 30 March 2010), p. 3.
\textsuperscript{25} Introducing the principle of proportionality into the Constitution excludes not only the majority rules, but also the so-called mixed systems; see A. Szmyt, \textit{Mieszany system wyborczy (głos w dyskusji)}, [in:] \textit{Zmiana ordynacji wyborczej a zmiana Konstytucji}, S. Grabowska, R. Grabowski (eds.), Rzeszów 2008, pp. 67–68; \textit{idem}, \textit{Władza ustawodawcza w Konstytucji...}, pp. 86–87.
la for establishing the composition of the organ. Changes in the scope of specifying the number of members of the Senate are aimed at combining the number of mandates to be fulfilled in a voivodeship with a number of inhabitants of that voivodeship, whereby each million would translate into 1 mandate; there was abandoned the strict specification of the number of Senators, which would consequently mean changes in this scope accordingly to demographic changes within voivodeships. In the actual state, it would mean that the Senate would be composed of 49 elected Senators and the number of mandates per voivodeship would equal 2 to 6. Constitutional connection between establishing the number of Senators elected in voivodeships and the number of inhabitants of those voivodeships would also result in changes in the composition of the Senate due to foundation or liquidation of a specific voivodeship. Apparently, the number of members of this organ would presently be reduced by half, while the concept of the organ’s tasks would remain unchanged — departure from specifying the number of Senators would affect specifying the minimal number of Senators required to commence particular constitutional procedures.

Thirdly, in Article 1 item 3 of the bill, the new Article 97a of the Constitution is proposed, as of which former Presidents of the Republic, elected in universal elections, would become lifelong members of the Senate, although they could renounce this right; they would be vested with Senators’ rights, and the number of former Presidents would not be taken into account when specifying the number of Senators required for a vote to be valid. The proposed solution is an example of a mechanism — nowadays rarely applied — of an “extra-electoral” system of establishing the composition of the second chamber. Indeed, the bill assumes it is to be applied to Presidents of the Republic “elected in universal elections”, but it is a fact that despite it being a mandate approved by citizens’ votes cast in universal elections, it refers to other systemic purposes. According to the sponsors of the bill, the specific “guaranteed seats” ex lege provide the chamber with experience and prestige earlier acquired at the public scene by former presidents; as it seems, in a certain scope this may be a formula expressing the Nation’s (the State’s) recognition of merits in the public service, and on the other hand it enables those persons’ further participation in political life, contributing to a new quality of the integration formula26. The atypicality of the non-uniform nature of the Senate’s composition could certainly give rise to numerous “construction” questions, related to ensuring the internal coherence of constitutional solutions. Only exemplarily, basing on the proposed content of the new provision, one could look for an answer to the question, whether or not the foreseen “resignation” would be permanent (final) or could only refer to a particular term. “Justification” to the bill provides no answers to the rising detailed questions on the regulated matter. It may here be digressed, that the sponsors of the bill — as a rule — do not address the fundamental question about the nature and role of the Senate in the system of organs of the State; in other words, they do not postulate any changes in this scope. Therefore, the proposed change as regards the Senate is only a minor one.

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Fourthly, Article 1 item 4 of the bill foresees new content of Article 103 para. 1 of the Constitution, regulating the principle of incompatibility of the Deputies’ mandate with particular functions and occupations. The change is of a formal and non-autonomous nature, as it is only a simple consequence of another proposal, i.e. liquidation of the National Broadcasting Council (National Council of Radio Broadcasting and Television), hence the deletion from Article 103 para. 1 of the Constitution of “member of the National Council of Radio Broadcasting and Television”, as a function which the mandate of a Deputy shall not be held jointly with.

Fifthly, Article 1 item 5 of the bill assumes changing the constitutional norm as regards parliamentary immunity, which — as has been signaled — must have been the direct cause for the withdrawal of the bill to amend the Constitution of the print No. 433 on 12 February 2010. A number of bills related to parliamentary immunity have been submitted since 1997. This regulation maintains MPs’ material and personal immunity. Also, the bill foresees resignation from formal immunity, which results in the necessity to resign from a Deputy’s (Senator’s) right to express consent to be brought to criminal accountability. It is proposed to allow to conduct criminal proceedings commenced against a person prior to the day of that person’s election for a Deputy or during the term, at the same time granting the chamber with the right to demand proceedings to be suspended until the expiry of the mandate; the reference to statutory regulation is also edited.

So far, the legal state relied on constitutionally enabling the conduct of proceedings against an MP, with the exceptions in which immunity was either abrogated by the decision of the chamber, or renounced by an MP it himself. According to the bill, a situation would be specifically “reversed”. The problem of the scope of parliamentary immunities itself has been a subject to debate for quite a while now, and an opinion on its being well-founded essentially depends on an answer to the question if the level of development of other constitutional guarantees, especially the right to a fair trial, is sufficient for parliamentary needs, taking into account the guaranteeing balance of the nature of formal immunity, for both the person of a Deputy (Senator), and the chamber\textsuperscript{27}. In “Justification”, sponsors of the bill persuade that the new content of Article 105 of the Constitution is to be an answer to multiple postulates of the society to reduce the privileged position of MPs, which — perhaps — partially explains an advanced readiness to resign from guarantees, despite quite recent experiences pointing to threats also to a democratic state.

Sixthly, Article 1 item 6 of the bill introduces two changes, i.e. a change in the majority of votes necessary to repass an act which had been vetoed by the President (Article 122 para. 5 — absolute majority instead of 3/5 votes) and a novelty in the form of Article 122 para. 7 of the Constitution, which would foresee the deadline of 3 months for a passing of a judgment by the Constitutional Tribunal on a matter referred to it in the procedure of a preventive review upon a motion of the President of the Republic, prior to signing an act.

\textsuperscript{27} Cf. Interesting remarks de lege ferenda: J. Rzucidło, J. Węgrzyn, Propozycja nowelizacji immunitetu..., pp. 325–328.
As stems from “Justification” to the bill, the sponsors regard the issue of the President’s veto to acts as a solution of grave systemic importance, and the proposed change — as justified by practical experiences. Its nature of a public appeal for reflection and Sejm’s new discussion on an act previously passed is regarded by the sponsors at the primary attribute of the veto. The sponsors strongly emphasize the “reflective” nature of a veto, and signal that it is not to fulfill solely a symbolic role, then conclude that its form is to ensure effective governance. Evaluating the so far observed practice, the sponsors persuade that the veto lost its reflective character and became an element of obstructing the legislative procedure. They claim that reducing the number of votes indispensable to reject the veto from 3/5 votes to an absolute majority (in the presence of at least a half of the statutory number of Deputies) will reduce the danger of legislative paralysis and will provide parliamentary majority with an opportunity to pass acts which had been vetoed, a thus — to realize the program approved by the electorate during elections. A consequence of the proposed change would primarily be the increase of the government’s ability to efficiently realize its program and an unambiguous responsibility in this scope, a greater transparency of the law-making process and conducting politics by the government, whose actions are based on parliamentary majority and its electoral legitimacy. The changed institution of a veto — as concluded by the sponsors — would still allow the President to publicly present arguments against entry of a certain act into force, and shall not be reduced to a symbolic act, but shall rather ensure the possibility to rule efficiently. Therefore, it seems that the sponsors regard the institution of the Presidential veto mostly in the relations within the executive, as a manifest of competitive relations between the President and the Council of Ministers.

Experiences evoked by the sponsors of the bill display possibilities to block a particular bill with a Presidential veto, if — in the course of the proposed procedure for passing acts — the veto is supported by the opposition and the ruling majority does not have the majority of 3/5 required to reject it. With the provisions presently in force, the President in some “coalition” with the opposition may block the current policy of the government, supported by the Sejm majority, less numerous than the majority required to reject the veto.

This requires the essence of the constitutional provision to be deciphered. Assuming that the authors of the Constitution of 1997 intended solely for a Presidential veto to cause the parliament to come to its senses and repass an act, would be too minimalistic. The established majority of 3/5 points to the intention of establishing a strong blocking mechanism in the hand of the President as an independent actor on the legal-systemic scene, so that — in particular circumstances, when it may be assumed that the majority required to repass an act shall not be found — he can “stop” such legislative ideas, which he believes shall be put to an end. Hence, the authors of the Constitution

28 “Justification” to the bill, pp. 5–6 of the Sejm print.
created such a construction, where the acts are passed by a simple majority vote (Article 120 of the Constitution), which in the relations with the President allows for an act to be passed, if the President does not apply his veto, and if he does, the majority of 3/5 votes is required for an act to be repassed. In other words, it was intended by the authors of the Constitution for the veto not to be reduced to a “reflective” instrument, as in this case a simple majority vote would suffice for an act to be repassed.

Not until such constitutional-legal “background” has been presented, the remarks on the required or actual scope of Sejm support for the government — even taking into account the specificity of the minority government — may be proposed. Let us remember, that each threshold which could have been established by the pouvoir constituant, shall be relative in a sense, that it has to be referred to the legal-political reality of subsequent terms. Depending on how numerous the Sejm majority is, it may or may not “overcome” a certain threshold. Today it is the threshold of 3/5; it could have been or could be the threshold of 2/3 or 11/20, or an absolute majority. There are arguments for each threshold, but within particular systemic circumstances of a particular term. In the situation of a significant political fragmentation and a weak coalition, it is conceivable that the threshold of absolute majority — proposed by the sponsors of the bill — may not be attained. Hence, it may be said that even “only” absolute majority is relatively high, but in a normative comparison to the majority of 3/5, it is tantamount to reducing the difficulty level required for a Presidential veto to be rejected; in this sense, the sponsors propose the legal position of the President of the Republic to be weakened.

It could be assumed, that the “reduction” from majority of 3/5 to absolute majority is not significant and may be acceptable in accordance with the logic of the Constitution in force, but pro futuro, the approach of the person holding the office of the President is essential on the one hand, and the relations between the ruling majority and opposition on the other. In the normative sphere of the proposal, the sponsors realize — although to a smaller extent — the requirement for the Presidential veto not to be reduced to a purely symbolic act. It is not surprising, however, that there are expressed opinions that the postulates to amend the Constitution of the Republic of Poland, due to Presidential activity in exercising the legislative veto, aimed at reduction of the role of the veto, “are a manifestation of treating the fundamental law instrumentally and opportunistically, as an tool of current politics.”

As has been mentioned, another issue in Article 1 para. 6 of the bill is the proposal to add para. 7 to Article 122 of the Constitution, according to which within the

30 Here, the relations with the Senate (Article 121 of the Constitution) are disregarded, according to which a resolution of the Senate rejecting a bill, or an amendment proposed in the Senate’s resolution, shall be considered accepted unless the Sejm rejects it by an absolute majority vote in the presence of at least half of the statutory number of Deputies (para. 3).

31 See A. Szmyt, Relacje między organami władzy, [in:] Konstytucja Rzeczypospolitej Polskiej 12 lat po wejściu..., pp. 35–36.

preventive review of norms at the motion of the President of the Republic submitted prior to signing the bill (Article 122 para. 3), the Constitutional Tribunal shall adjudicate “in no later than 3 months from the day the motion was referred thereto”. As stems from “Justification”, the sponsors’ proposal results from an anxiety that the institution of the motion referred to in Article 122 para. 3 of the Constitution could become an overused equivalent of the veto, and prolong uncertainty as to conformity to the Constitution of the bill to which the motion refers to. Apparently, the object of distrust is the Constitutional Tribunal.

Indeed, the Constitution in force binds the Constitutional Tribunal with an even shorter, two-month time limit for the preventive review in specific cases (Article 224 para. 2 of the Constitution), but it is an exclusive and specific exception, as it is related to the Budget Act, which is of special significance for the functioning of the state. Identically to Article 224 para. 2, the sponsors do not resolve on consequences of not adhering to the time limit by the Tribunal.

However, due to the lack of a regulation related to consequences of not meeting a certain deadline in the discussed matters, the provision is essentially about pointing to urgency of matters of this kind33. Hence, such a regulation does not seem necessary; as a last resort, it could refer to a constitutional formula, that in such matters the Constitutional Tribunal adjudicates “without delay”, which would be more dexterous and would make a term of solely instructional character dispensable.

Seventhly, Article 9 item 9 of the bill proposes a change in Article 131 para. 2 of the Constitution, so as to remove the time gap in the contents of provision referring to temporary performance of duties of the President of the Republic by the Marshal of the Sejm. Instead of the phrase “until the time of election of a new President”, the sponsors propose it to be worded as follows: “until the newly elected President assumes the office”. This would result in eliminating the necessity to functionally interpret the provision in its heretofore adopted wording, against the linguistic interpretation, based on the literal meaning of the provision. In practice, this usually refers to the period of about two months between the election day and the day of assuming the office, also due to adjudicating on validity of elections by the Supreme Court. Apparently, the scope of the sponsors’ proposal does not transgress the Polish tradition of performing this role by the Marshal of the Sejm (further — Senate), although there are known systemic solutions of other countries, where such a temporary performance of duties is accomplished within the executive, e.g. by the Prime Minister. The proposed change would therefore be solely of corrective nature, referring to the Marshal of the Sejm (Senate).

Eighthly, Article 1 item 13 of the bill proposes the new wording of Article 144 para. 3 item 6 of the Constitution, in order to specify the President’s prerogatives as regards bills referred to the President for his signature. The heretofore applied wording of item 6 encompassed signing the bill or a refusal to sign a bill (referred the bill to the Constitutional Tribunal is discussed separately in item 9), while the constitutional scope of competences at this stage of finalizing the bill also encompasses the legis-

33 As persuaded by the Minister of Justice-Public Prosecutor General in the cited opinion on the bill..., p. 3.
lative veto (Article 122 para. 5 — referring the bill, with the reasons given, to the Sejm for its reconsideration). Supplementing the prerogative catalogue with this competencies serves solely to correct and specify the provision and does not expand the scope of Presidential prerogatives, also, because so far such an official act of the President has not been regarded as one requiring the Prime Minister’s countersignature.

Ninthly, Article 1 item 14 of the bill abrogates Article 157 para. 2 of the Constitution, according to which the members of the Council of Ministers shall be individually responsible to the Sejm for those matters falling within their competence or assigned to them by the Prime Minister; a consequence of this principle in the current legal state is the possibility of passing a vote of no confidence in an individual minister by the Sejm (Article 159 of the Constitution).

Tenthly, Article 1 item 15 of the bill is to annul Article 159 of the Constitution and those two changes shall be regarded jointly. The sponsors of the bill directly point that the liquidation of the procedure of Article 159 is a consequence of annul-ling Article 157 para. 2 of the Constitution. The sponsors justify the changes primarily with the years of Sejm practice, and argue that the motions are political demonstrations of the opposition, rather than substantial evaluation of a certain minister’s work. A number of times, the doctrine of constitutional law pointed to incoherence of constitutional solutions in a situation, when individual accountability (vote of no confidence in an individual minister) was foreseen besides the institution of a constructive vote of no confidence in the government as a whole\textsuperscript{34}. The proposed amendment is very important for the position of the Sejm from a strictly legal point of view, as it reduces its classic set of instruments of exercising control and executing parliamentary (political) accountability, although indubitably the Sejm practice proved indeed spectacularly — especially in 2007\textsuperscript{35} — the dysfunctionality of constitutional solutions in force. The proposed changes may be regarded as sufficiently justified with the Sejm practice, as from the very beginning they have been rested on the awareness of the risky nature of the solution adopted in the Polish Constitution in force. They may not be suspected to be the result of an instrumental approach, motivated by expectations of exercising power by the ruling majority.

The presentation of the above discussed proposals for amendments to the Polish Constitution as regards the Sejm and the Senate, included in the Deputies’ bill of 19 February 2010 (print No. 2989), shall be supplemented with a general remark, that the sponsors — foreseeing the entry of an act into force after three months of its proclamation (Article 2 of the bill) — completely disregarded the expedient transitional provisions, which would regulate the influence of the adopted changes on relationships formed under the rule of constitutional provisions as worded prior to amendments and not ended before the day of entry into force of the adopted changes. As an


example from the scope of parliamentary matters it may be evoked, that the bill does not connect the reduction of the number of members of the Sejm and the Senate with the beginning of a new term; the date of entry of the amendment into force included in the bill results in the fact that the changes could enter into force during the term. Analogical provisions of intertemporal nature would be necessary with reference to the course of legislative processes past the conclusion of parliamentary proceedings. Certainly, it would be desirable for some provisions of the amendment to enter into force after the term of the Sejm and the Senate is concluded, in which the bill to amend the Constitution is passed.

VI. In the sponsors’ opinion, the bill to amend the Constitution of 19 February 2010, discussed earlier — presently, the only one officially submitted to the Sejm — takes into account also the proposals submitted by political groups and authority figures, particularly the bill to amend the Constitution of the Republic of Poland, submitted by former Presidents of the Constitutional Tribunal: Marek Saślan, Andrzej Zoll and Jerzy Stępień, on 5 February 2009; the bill to amend the Constitution of the Republic of Poland, included in the “Report” 2009, No. 4 of the Seminar “Doświadczenie i Przyszłość” [Experience and Future] of 3 September 2009; proposals for amendments presented in an address by the Prime Minister Donald Tusk on 21 November 2009; as well as proposals included in the “Report on a bill to amend the Constitution of the Republic of Poland” of 11 January 2010, prepared by a group of experts, appointed by the Prime Minister36. The mentioned drafts are a specific “genetic core” of the bill of 19 February 2010.

The basis for subsequent proposals for changes were arguments over interpretation of provisions of the Polish Constitution as regards relations between the two segments of the executive, brought about by the results of fall parliamentary elections in 2007. The practice of the few months past the elections — especially as regards the application of the Presidential legislative veto — prompted the Prime Minister to pass a political declaration at the end of February 2008, on the necessity to resolve more unambiguously, for the future, whether the axis for constitutional solutions shall be the parliamentary-cabinet or presidential system. In the first case, i.a. with the president elected by the parliament. As regards parliamentary matters, there were formulated declarations about i.a. abolishing the Senate, reducing the number of Deputies, introducing single-member constituencies in the elections to the Sejm, limiting parliamentary immunities. The tensions within the dualistic executive formally culminated in the form of the motion of the Prime Minister of 17 October 2008 to the Constitutional Tribunal to resolve a competence argument between the President of the Republic of Poland and the Prime Minister as regards specifying the central constitutional organ of the State entitled to represent the Republic of Poland in the Eu-

36 From the “Justification” to the bill, p. 8 of print No. 2989; some proposals included in the bill were also submitted in 2005, during the social campaign “4 times YES” conducted by PO, when over 700 000 signatures of citizens supporting the forwarded postulates were collected.
ropean Council meetings in order to present the state’s position. This matter was adjudicated by the Constitutional Tribunal on 20 May 2009.

After the proceedings were commenced, on 5 February 2009, the three former presidents of the Constitutional Tribunal delivered an address as a part of the Seminar “Doświadczenie i Przyszłość” (further referred to as DiP), and announced a bill to amend the Constitution of the Republic of Poland along with two alternative solutions — either with a strong government, or a strong President. In the course of the works, the presumption was modified by assuming that there will be prepared proposals to specify solely the relations within the executive, leading to strengthening the government within the present constitutional variant of the parliamentary-cabinet system. The results of those works was the mentioned “Report” No. 4, pronounced at the beginning of September 2009, signed by the DiP Seminar, containing the “articulated” draft amendments to particular constitutional provisions along with a lengthy justification. The scientific presentation of the report at the conference held on 21 October 2009 was described by the Marshal of the Sejm as opening a constitutional debate in the Sejm.

With reference to parliamentary matters, the DiP draft was reduced to two issues: firstly, modifying Article 122 para. 5 of the Constitution by assuming that in order to reject the Presidential legislative veto by the Sejm, an absolute majority shall suffice (instead of 3/5 votes passed in the presence of ½ of statutory number of Deputies); secondly, modifying Article 133 para. 1 item 1 of the Constitution referring to ratifying and renouncing international agreements by the President of the Republic. In Article 133, a novelty would be the provision, according to which “The Sejm, at the motion of the Council of Ministers, with a resolution adopted with an absolute majority of votes, may oblige the President of the Republic to ratify or renounce an international agreement specified in Article 89 para. 1 of the Constitution, immediately after submitting an act on granting a consent to ratify or renounce an agreement to the President for a signature. The President of the Republic, in accordance with the submitted act, ratifies or renounces the agreement within 21 days”.

The proposal included in the DiP draft, related to rejection of the Presidential legislative veto, was transferred — in its exact wording — along with its justification, to the Deputies’ bill of 19 February 2010 (print No. 2989), as item 6 in Article 1 of the proposed amendment. As regards the DiP proposal related to the procedure for ratifying international agreements, the bill of 19 February 2010 differs by the concept (item 10 in Article 1 of the proposed amendment) and approach to the role of the Sejm. With reference to the DiP proposal, it was pointed out that the obligations of the President of the Republic stem from the Constitution and statues, and are not to be formulated in the resolutions of the Sejm, although after the amendments, this would be lege artis, as the Constitution would explicitly foresee the form of a resolution.

38 The sentence of the judgment was pronounced on 28 May 2009, Monitor Polski, No. 32, item 478.
39 Konstytucja Rzeczypospolitej Polskiej 12 lat po wejściu…, p. 5.
40 See A. Szmyt, Relacja między organami władzy…, p. 35.
Accepting the solution proposed by DiP could easily lead to instrumentalization of the Sejm activities. Hence, it would be a better solution to adopt another concept for constitutional amendment in this scope, so as not to involve the Sejm whenever needed. The proposal of the Deputies’ bill of 19 February 2010 took that into account, and established a specific obligation on the part of the President, explicitly expressed in the Constitution, omitting the role of the Sejm proposed by DiP41.

The political address by the Prime Minister of 21 November 2009, referred to by the sponsors in the “Justification” to the bill of 19 February 2010, directly initiated the stage of debates on amending the Constitution, which brought on the discussed Deputies’ bill of print No. 2989. The presented vision of constitutional changes — the bill itself in its legislative versions has not yet been prepared — encompassed primarily concentration of the executive power in the hands of the government, election of the President by the National Assembly, depriving the President of the right to the legislative veto, introducing single-member constituencies in the elections to the Senate, introducing a mixed ordinance in the elections to the Sejm, reduction of the number of Deputies and Senators. The scope of the presented proposals was broader; also, were they further-reaching than the DiP draft as regards abandoning the form of the Polish Constitution in force, although they did refer thereto. As far as fundamental principles for amending the Constitution presented by the Prime Minister are concerned, the Marshal of the Sejm informed the public opinion, that there had already been commissioned expert amendments to the Constitution of the Republic of Poland as regards Poland’s membership in the European Union42. In turn, in the Chancellery of the Prime Minister, works were commenced by a group of experts, whose effect — referred to in the “Justification” to the Deputies’ bill of 19 February 2010 — was the “Report on draft amendments to the Constitution of the Republic of Poland” of 11 January 201043, which specified proposals for recommended “necessary” changes and included opinions on “issues for further constitutional debate”; the Report was presented to the Marshal of the Sejm.

As regards parliamentary issues, the “Report” foresaw:

A. A proposal to reduce the threshold for the rejection of the Presidential legislative veto (Article 122 para. 5) from the heretofore applied 3/5 to an absolute majority of votes in the presence of the ½ of statutory number of Deputies.

B. A proposal to specify the time, in which the Constitutional Tribunal considers a motion submitted by the President within the preventive review of the passed act — 3 months from the date of submitting the motion to the Tribunal (new Article 122 para. 7).

41 In the Deputies’ bill of 19 February 2010, in this scope it is proposed to add a new para. 2a to Article 133, according to which “ratification and renouncement of an international agreement specified in Article 89 para. 1 and Article 90, takes place during the 7 days of the signing of the bill referred to in Article 89 para. 1 and Article 90 para. 2 […]”; it is another thing, that the specified term for ratification (renouncement) of the mentioned agreements, if it were to be introduced — shall rather be counted from the day of entry of the “accepting” act into force, and not from the day of its signing.
43 The Report is available at the website of the Chancellery of the Prime Minister, www.kprm.gov.pl.
C. As regards ratifying international agreements — two proposals of a wording of Article 133 para. 1 item 1 of the Constitution: first, assuming the concept obliging the President to accept a resolution of the Sejm discussed in the DiP draft (but with only 7 days for the ratification); second, assuming a direct constitutional obligation to ratify a certain category of international agreements by the President, but within 21 days for ratification. Apparently, in the Deputies’ bill of 19 February 2010, the proposals included in the “Report” were applied literally to Article 122 of the Constitution, while with reference to Article 133 para. 1 item 1, the adopted solutions were a combination of two versions: rejecting the Sejm’s interference in the form of resolutions on the one hand, and adopting a shorter of the proposed deadlines (7 instead of 21 days) for ratification by the President. It is a separate issue that in both proposals referring to Article 133 of the Constitution, included in the “Report”, the points of reference for setting the deadlines were specified unusually awkwardly.

D. As regards changes resulting from Poland’s membership in the European Union, there were two “issues to be considered” (principles for elections to the European Parliament and principles for the mechanism of cooperation between the Council of Ministers and the Sejm and the Senate in the matters related to EU), while the authors of the “Report” formulated their “signalizations” for the needs of a working group appointed by the Marshal of the Sejm, preparing the detailed recommendations. These issues are not included in the Deputies’ bill to amend the Constitution of 19 February 2010.

With reference to matters related to the Sejm and the Senate, the following were also considered by the authors of the “Report” and regarded as “issues for further debate”: 1) limiting the formal immunity of Deputies and Senators in Article 105 of the Constitution, 2) the number of Deputies and Senators with conceivable changes in the manner of their election, 3) the potentiality of passing regulations having the force of statutes (which would affect the role of a statute in the system of the sources of law) by the government in order to transpose the Union law. From among the presented catalogue of issues, the regulations having the force of statutes, have not become subject of the Deputies’ bill to amend the Constitution of 19 February 2010.

VII. In the sphere of politics and media, there also appeared elements of the new “constitutional discussion” on a complex vision of the system of governance, as opposed to partial amendments to the Constitution in force. A feature of such drafts is their informal character, in a sense, as none was officially submitted to the Sejm. This refers primarily to a new draft of the Constitution prepared by Liga Polskich Rodzin (League of Polish Families), a draft by Samoobrona (Self-Defence of the Republic of Poland), a draft by PiS and a — formally expert — draft, in a sense sponsored by PO, in the form of a fundamental revision of the Polish Constitution in force; all those drafts were a direct manifestation of interest which the political forces had in amending the Constitution due to the electoral campaign of 2005.

44 Although the draft have never become subject of formal legislative proceedings, the doctrine of constitutional law did initially evaluate tchem; see R. Chruściak, Prace konstytucyjne..., pp. 131–160; J. Kuciński, Władza ustawodawcza, wykonawcza i sądowiczca w projektach Konstytucji RP z lat 2004–2005.
A stream of new visions and complex constitutional solutions reappeared in 2009. The Commissioner for Citizens’ Rights decided he should remain an active participant to the public debate in a situation, where — in his opinion — there opens a “constitutional moment” as a strong urge to thoroughly reform the structures of the Republic. Taking part in the discussion, in September 2009, the Ombudsman presented three complex systemic proposals (in the form of three drafts of a new Polish Constitution), differing substantially, proposing either rationalized parliamentary cabinet system (draft No. 1), or the parliamentary-cabinet system (draft No. 2), or the presidential system (draft No. 3). In the end of 2009, PiS presented its program “New, solidary, safe Poland” (Kraków 2009); in its Chapter 2 (Effective system of governance) there were signaled new elements of the constitutional vision, and in its effect — in January 2010 — a draft of a new Constitution. On 17 December 2009, PSL presented its draft amendments to the Constitution, but it was not a complex vision of a new document, but a relatively broad amendment of the Constitution in force. As regards substantially limited, informal drafts to amend the Constitution, “Draft amendments to the Constitution of the Republic of Poland (of 2 April 1997)” announced in 2009 may not be disregarded, prepared by the group of the Seminar “Doświadczenie i Przyszłość”, initiated by the three former Presidents of the Constitutional Tribunal (M. Safjan, J. Stępień, A. Zoll); this document has already been discussed, due to the fact that it is the basis for the Deputies’ bill to amend the Constitution of the Republic of Poland of 19 February 2010.

It may be concluded that the systemic practice under the rule of the Constitution of the Republic of Poland of 1997 has not yet confirmed that the “constitutional moment” has come, a moment appropriate for either complex or fundamental changes. Actions and attempts heretofore taken in the strictly legislative dimension do not confirm that profound changes are needed, for such a need had not been expressed by submitting a proper draft to the Sejm, and thus attesting to political declarations.


Thus it reminds of a bill to amend the Constitution (print No. 2989 of 19 February 2010) submitted by a group of PO Deputies, but it differs from it as regards its status, as it has never been submitted to the Sejm.

The nature of those drafts and their scope require a separate analysis.
THE IMPACT OF THE TREATY OF LISBON ON POLAND’S SYSTEM OF GOVERNMENT*

ABSTRACT

The Treaty of Lisbon is a legal act shaping the form of the European constitutional system. The Treaty introduces substantial changes in the system of government of the European Union, the structural system of public authority existing within the territory of the member states, including Poland. It also provides for new regulation of the relations between the European Union and its members states, and exerts different influence on the system of government of the Member States.

An increased effectiveness of the functioning of the EU involves the need for improvement of the operation of the Polish State apparatus, so that it should enable Poland to effectively participate in the Union decision-making process on the one hand, and to improve and accelerate the implementation of EU law by Polish public authorities on the other. The ratification of the Treaty makes us aware of the insufficiency of current constitutional solutions in the sphere of relations of the procedures for the adoption of a position by a state in new decision-making mechanisms and the procedures for the exercise of competences conferred by the above-mentioned act on the Polish public authorities.

I. Membership in the European Union has its far-reaching systemic consequences, which have been subject to thorough scientific research in Europe for some twenty years. Of particular importance for the European integration was the Maastricht Treaty, which brought new legal solutions and at the same time became a subject of important judgments by some constitutional courts1. The treaties later

* This article was published in “Przegląd Sejmowy”, 2010, No. 4.
signed in Amsterdam and Nice have not yielded such innovative and far-reaching consequences of legal-constitutional nature. A question arises, whether the Treaty Amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007 bears new consequences for the Polish constitutional law, or if its significance shall be reduced to maintaining and conceivable increasing of the heretofore observed systemic influences of the Union law.

II. The presentation of the Lisbon Treaty on Poland’s system of government requires a prior recollection of the importance of national constitution in the conditions of European integration. In classic constitutionalism, a constitution is a legal act, which — on the one hand — establishes primary values, goals and tasks of a state, and on the other — regulates the state’s system of government. Systemic provisions of a constitution are a fundamental instrument serving to ensure the realization of values, goals and tasks specified in the fundamental law. Therefore, the systemic regulations are secondary vis-à-vis the material and legal norms of a constitution.

In the present economic and social circumstances, a modern state is unable to independently realize all its tasks specified in a constitution. Modern constitutionalism is characterized by internal inconsistency between the material sphere of the constitution, establishing goals and tasks of a state, and the systemic sphere, specifying instruments for realization of these tasks. The material and legal norms of a constitution prove increasingly impossible to be realized by the state apparatus organized by systemic provisions of a constitution, while the intrastate system is becoming an increasingly less adequate instrument to realize fundamental material and legal norms. Presently, the state is forced to search for solutions, which would allow overcoming this primal inconsistency of modern constitutionalism. States refer their competences to supranational organizations, in hope that the new structures of authority allow to collectively solve problems transgressing individual states’ capabilities to act. A national constitution becomes partial and at the same time defective, as it needs the European Union law in order to realize its values and tasks.

European integration, considered from the perspective of Poland’s constitutional law, is primarily a form of overcoming the structural incapacity of a modern state at the present stage of social and economic development, in the conditions of globalization. From the point of view of the Constitution of the Republic of Poland, referring competences is sensible solely when it serves a better realization of material and legal norms of our fundamental law. Referring competences is constitutionally justified, if it concerns competences, which a state is not able to efficiently realize, and leads to a situation, in which values, goals and tasks of a state are better realized by appropriate legal acts of the European Union. The Constitution of the Republic of Poland spec-

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ifies, in its axiological sphere, the criteria for admissibility of delegating competences to organs of public authority.

Referring competences always involves some constitutional “costs”. The system of the European Union is a manifestation of a compromise between EU Member States; no state may independently shape the EU’s system of governance according to the principles of its national constitution. It may not be expected — and even more so, it may not be required — for the European Union law to be fully consistent with the constitutions of all 27 Member States. Nonetheless, the European Union law must provide for a better realization of constitutional values specified in all national constitutions, whereat to ensure the efficient realization of more precious values and tasks, at times it is necessary for some states to sacrifice some of the less important constitutional values. In these circumstances, the paradox of modern constitutionalism is that the national constitution becomes realized via a partial “self-annihilation”. In order to protect fundamental values, sometimes it is required to resign from fully protecting less important constitutional values and accept the fact, that some legal acts of the European Union may infringe less important provisions of national constitutions.

In the present circumstances, the very notion of a constitution becomes inscribed with inherent dynamics. On the one hand, the primary law of the European Union, which may be described as the constitution of the European Union, is being developed. On the other hand, the European integration leads to comparable transformations of national constitutions. Preserving what is the most precious, many a times requires sacrificing and changing secondary provisions. A national constitution is not a set, unchangeable legal act; on the contrary, the realization of fundamental values requires a constant search for new instruments, particularly referring new competences, but also indispensable corrections of constitutional provisions of lesser importance. As a result, a national constitution becomes a process, similarly to the European Union constitution. A national constitution, which does not evolve or change, shall gradually wither. The Lisbon Treaty not only displays the dynamic nature of the European constitution, but also the dynamic nature of national constitutions.

III. European integration leads to the phenomenon of dualism, or rather pluralism of public authority and constitutional pluralism. In the territory of Member States, the public authority is exercised by various political structures. Primarily, they are Member States and the European Union. Moreover, in federal states they are the constituent parts of the federation, and in regional states — autonomous regions. One may wonder whether or not there shall also be listed the units of territorial government, equipped with lesser or greater independence according to the degree of decentraliza-

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tion of public authority in particular countries. The listed structures, vested with public authority together form a very complex, multilevel “metastructure”, which may be called the European constitutional system⁷.

In the European constitutional system, on the territory of each Member State, various regulations of constitutional nature are in force: the national constitution and the European Union law. In federal states, also the constitutions of constituent parts of the federation must be taken into account, and in regional states — statutes of the regions. Pluralism of structures of public authority is therefore paired by constitutional pluralism. It shall be added, that the constitutional dualism (EU Constitution — national constitutions) in the European constitutional system shall be regarded in a broader context of global political system, in which new political structures vested with public authority appear, competing for power with Member States⁸.

Relations between the European Union primary law and national constitutions are marked with three kinds of forces. Both elements mutually need and support each other, both affect the other’s contents, and furthermore, between the two elements there occur various tensions and even inconsistencies. As has been mentioned, a national constitution needs the European Union law as an instrument of realization of its fundamental values. On the other hand, the European Union law is of auxiliary nature against Member States, and serves the realization of those values and tasks, which the states are incapable of realizing independently. Moreover, the European Union law is not a complete legal system, but needs national law, including national constitutions, to ensure its efficiency. The efficiency of the European Union law depends i.a. on including relevant provisions in national constitutions, ensuring the efficiency of this law in national legal orders.

Both discussed elements mutually affect each other⁹. On the one hand, national constitutions set fundamental values, which give direction to actions of state authorities in establishing the European Union primary law, and indirectly — shape the content of this law. National constitutions authorize the transfer of competences and at the same time provide goals and limits to this transfer. Members States, concluding subsequent treaties, act according to provisions of their constitutions. Even if a state assumes amending its constitution in order to enable the ratification of a subsequent treat-

⁸ See N. Walker, op. cit.
ty, in their axiological sphere, national constitutions determine the directions for the European integration process.

On the other hand, the European Union law affects the content of national constitutional law. It sets the scope of competences remaining at the disposal of a Member State, specifies states’ authorizations in decision mechanisms in the European Union, provides fundamental systemic principles of the Member States. Furthermore, it encompasses the detailed principles for organization of some elements of the state apparatus of the Member States, particularly, it regulates the status of national central banks, included in the European System of Central Banks. It eliminates some indicated detailed competences of specific national organs, e.g. it prohibits vesting national governments with competences in the sphere of monetary policy. It directly vests some competences in relations with the European Union in the national organs, primarily all parliaments and presidents of central banks.

Finally, there may occur tensions and inconsistencies between the European Union law and constitutions of the Member States, as it may not be required — which has already been mentioned — that the European Union legal acts are consistent with all the 27 national constitutions. European integration requires adapting national constitutions to its requirements.

IV. The Lisbon Treaty is a legal act shaping the system of governance of the European constitutional system in various ways. Firstly, it significantly changes the system of the European Union, and hence the system of the structure of public authority functioning at the territory of Member States, including the territory of Poland. Secondly, the analyzed international agreement also changes the regulation of relations between the European Union and Member States. Thirdly, this act affects the system of governance in Member States in various ways, which shall be discussed further. Materially, the discussed international agreement is an act of the system-establishing power, shaping the system of not only the European Union, but also the whole European constitutional system.

The Treaty of Lisbon is a manifestation of a dichotomization of the legislative in the European constitutional system. In the process of European integration, constituent power of individual Member States becomes “Europeanized” and specifically split into constituent power performed independently and constituent power performed collectively. On the one hand, the constituent power is exercised independently by individual Member States, while the scope of this independence becomes increasingly reduced. Its boundaries are set not only by the norms of international law, particularly international instruments serving to protect human rights, but also the European Union law. Europeanization of the national constituent power is in this case manifested in the necessity to taken into account limitations resulting from the European Union law.

On the other hand, the constituent power is exercised collectively by Member States in the form of treaties amending treaties which laid foundations to the Europe-

10 On the legislative power in the European Union, see K. Wojtyczek, Przekazywanie kompetencji..., Chapter XI, item 3.
an Union. In the process of European integration, the states acquired an instrument allowing them not only to form the European constitutional system, but also to affect their own national systems of government. This influence is at times fully intended, e.g. when the states specify primary systemic principles in force in European Union Member States. However, many a time this influence is not really intended and may be regarded as a sort of a “constitutional cost” of the European integration. Sometimes, this influence is not fully voluntary, but enforced on Members States by the necessity of reaching compromise and adapting to expectations and pursuits of other Member States.

V. Whereas the Treaty on Poland’s accession to the European Union was followed by an authentic systemic revolution, the influence of the Lisbon Treaty is less spectacular and much more difficult to be presented in the science of constitutional law. It could be said, that the Lisbon Treaty affects the system of government of the Republic of Poland in a twofold manner. On the one hand, the agreement manifests general regularities in the scope of influence of the European Union primary law on the systems of government of the Member States, and in some cases it consolidates the heretofore existent forms of influence of the European Union law on the political system of the Republic of Poland. The Lisbon Treaty, expanding the scope of actions and competences of the European Union, at the same time limits independence of organs of public power of Member States in realizing their competences. Exercising competences by national organs of public authority becomes subjected to more and more further-reaching limitations and rigors. This refers to i.a. competences in the scope of foreign policy.

On the other hand, the Lisbon Treaty brings some new specific forms of influence on the Member States’ constitutional law. Principally, it improves functioning of the European Union, e.g. the mechanism of posing sanctions for violations of the Union law. Increasing the efficiency of the European Union actions requires the improvement of functioning of the Polish state apparatus, so as to ensure the possibility of Poland’s effective participation in the decision-making processes in the Union on the one hand, and to improve and accelerate implementation of the EU law by Polish organs of public authority on the other. Member States, wishing to effectively participate in the decision-making process in the European Union, shall regulate their internal procedures in the scope of assuming the state’s position in the organs of the Union in such a way, so as to ensure efficiency of the internal decision-making process. At the same time, the states shall ensure a proper democratic legitimacy for the decisions as regards their position presented to organs of the Union.

So far the constitutional regulation of matters pertaining to relations with the European Union has been incomplete. Polish constitutional law-maker established regulations planned primarily to enable Poland’s accession to the European Union, and omitted indispensable regulations enabling the state’s efficient actions past the accession. Ratification of the Lisbon Treaty illustrates the deficiency of the heretofore applied constitutional solutions related to relations between Poland and the European Union and creates another impulse to comprehensively regulate many issues from this
scope in the Constitution of the Republic of Poland. The constituent power shall regulate with adequate specificity i.a. the procedure for accepting Poland’s position expressed to the European Union organs, particularly — it shall strengthen competencies of the Sejm in this sphere. This issue is of constitutional nature and shall not be referred to be regulated by ordinary statutes.

The European Union law excludes particular spheres from the scope of exclusively national decision-making procedures, subjecting them to mixed regulations: a decision is made by organs of the European Union in procedures regulated by this law, but at the same time each individual Member State adopts its position in a given sphere according to procedures regulated by national law: constitution and statutes. Constitution of the Republic of Poland does not regulate these matters and leaves them to be regulated by ordinary statutes, while respecting general constitutional principles related to division of competences between superior organs of the state. The European Union law does not include obligatory regulations as to adopting a position by a Member State and particularly admits liberty as regards the scope of competences of a national parliament in this sphere; nevertheless, in the practice, it does enforce passing regulations enabling the effective participation in the European decision-making procedures.

The Lisbon Treaty introduces some new kinds of EU decisions; it also grants new competences to states or their organs. The treaties foresee various simplified procedures for amending them, which requires an approval by Member States according to their constitutional requirements. The treaties also foresee various procedures for adopting amendments to treaties without their approval by Member States. Moreover, the treaties vest national parliaments with i.a. the right to dissent to some EU legal acts amending provisions of the treaties. In effect, procedures for adopting a state’s position in the new decision-making mechanisms and the procedure for realizing competences granted by the analyzed agreement to the Polish organs of public authority, shall be regulated.

VI. The Treaty of Lisbon, as opposed to the Treaty establishing the Constitution for Europe, does not include a provision expressly establishing primacy of the European Union law over national law. It does, however, strengthen the principle of primacy of the European Union law. In the Declaration No. 17 to the Treaty, the States-Parties to the Treaty remind that “in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law”. A view may not be accepted, that Declaration No. 17 is of no legal importance. This act may be of significance for the interpretation of the European Union law. In Declaration No. 17, the states agreed on the interpretation of treaties, fully approving the heretofore existent case law of the Court of Justice as regards the principle of primacy of the European Union law. It may be assumed, that the declaration officially expresses the concordant will of all States-Parties to the Treaty as regards understanding of the European Union primary law. From the point of view of the European Union law, it shall be stated, that since the Republic of Poland, adopting Declaration No. 17, expressed its approval for this interpretation, it may
not question the heretofore European case law, and particularly, it may not refuse to implement the European Union law inconsistent with the Constitution of the Republic of Poland. Declaration No. 17 may serve as an additional argument for the Court of Justice, in case a Member State refers to its national constitution in order to justify not fulfilling obligations resulting from treaties on which the European Union is founded. On the basis of the Declaration, it may not be argued, that the position of the Court of Justice of the European Union as regards the principle of primacy of the Union law has no basis in the will of States-Parties expressed in treaties.

In view of the above, there arises a question on consistency of the Treaty of Lisbon with the principle of primacy of the Constitution of the Republic of Poland11. The problem of primacy shall be reconsidered by the constitutional jurisprudence. It seems that the only solution to this problem shall be a fundamental reinterpretation of the principle of primacy of the Constitution of the Republic of Poland and assuming that this primacy is expressed in establishing the constitutional criteria of admissibility of delegating competences and in setting inviolable boundaries for the European Union authority in the form of fundamental constitutional principles, which may not, in any case, be infringed by the European Union. The principle of primacy of the Polish Constitution may not be tantamount to a statement that each legal act of the European Union shall be consistent with the Constitution of the Republic of Poland12.

VII. One of the fundamental constitutional principles is the principle of a democratic state. An indispensable condition for democracy is the existence of authority apparatus able to effectively realize decisions made by the sovereign people. A democratic decision impossible to be effectively realized is senseless. Hence, it shall again be here reminded that a modern state is not able to solve numerous social and economic problems, whose scope transgresses its territorial boundaries or ability to act. The number of those problems is constantly increasing. This results in a democratic deficit within a state, as it leads to limiting the scope of democratic decisions which may be efficiently realized.

Delegating competences is constitutionally justified, if it leads to a better realization of a states’ constitutional tasks and constitutional values. In other words, transferring competences is admissible, if it is consistent with the principle of subsidiarity. The democratic deficit is not increased by delegating competences in those matters, which transgress an individual state’s potentiality to act. On the contrary, it may be an


12 See K. Wojtyczek, Przekazywanie competencji..., Chapter 10.
instrument for overcoming the democratic deficit, if a supranational organization is founded on the principle of democracy. On the other hand, delegating competences, which would not be realized more efficiently at the supranational level, increases the democratic deficit.

Prior to entry into force of the Lisbon Treaty, the European Union has not been based on the principle of democracy. A primary form of legitimization of its authority was the will of Member States, expressed mainly by the European Council and the Council. A particular role of the states in providing European Union with legitimacy was strongly emphasized by the German Federal Constitutional Tribunal in its judgments referring to the Treaty of Maastricht and the Treaty of Lisbon. The latter includes regulations aimed at expanding competences of the European Parliament, strengthening the national parliaments and extending instruments for democratic participation by introducing the people’s initiative. It is difficult to foresee how the new legal instruments will function in the practice. Nevertheless, it shall be stressed that in the present scope of Union competences, the accomplished reforms are not able to solve the problem of the democratic deficit in this organization. This problem may not be solved without limiting the position of the Member States. The democratic deficit may be eliminated solely via a radical democratization of its structure, i.e. regarding the political community of European citizens as a source of power and creating mechanisms ensuring consistency of decisions made by the Union with the will of European citizens, instead of assuming that the Member States ensure the democratic legitimacy of the European Union decisions.

The answer to a question on consequences of the Lisbon Treaty for the democratic deficit is not a simple one. Past the Lisbon Treaty, the Union shall not become democratic, although the problem of the democratic deficit shall be less apparent. It may be assumed, that the governments concluding the Treaty aimed not at the EU’s real democratization, but at increasing the citizens’ acceptance for the Union. Evaluation of consequences of the Lisbon Treaty for democracy in Member States would require answering the question on whether particular public tasks will be better performed at the European Union level or by delegating the Union’s competences. A negative answer would mean that a particular competence, enabling the realization of a specific task, instead of being performed in a democratic and efficient manner in a Member State, would be performed less efficiently and less democratically at the level of the European Union. Comparing the efficiency of actions of a state and the European Union, even taking full advantage of the modern knowledge of social sciences, is nonetheless not easy.

It shall be noted, that the conversion from the principle of unanimity to majority rule in many areas — conducted in accordance with the discussed Treaty — does not in itself infringe either the national sovereignty or people’s sovereignty in Member States. Due to a number of reasons, unanimity does not guarantee making decisions

13 Ibidem.
either concordant with interests of the Republic of Poland or the will of the Polish society. Firstly, as regards the Union competences realized according to the principle of unanimity, a state may not act independently, but shall communicate with other states. Secondly, a particular individual decision may be a part of a broader context of a larger number of political decisions in other matters. Thirdly, unanimity may lead to a decision paralysis in an international organization, in a situation, when Poland’s interest requires issuing a relevant legal act.

VIII. In the heretofore applied law of the European Union, there were simplified procedures for amending treaties, the so-called passerelle clause. The Lisbon Treaty increases the number of those provisions and the scope of their application\(^{15}\). Applying the passerelle clause shall hence be more often and therefore becomes an important constitutional issue. It seems necessary to regulate in the constitution the procedure for adopting a position by the Republic of Poland as regards amending treaties, and in case of amendments requiring approval by states in accordance with their constitutional requirements — also the procedure for their approval by organs of the Republic of Poland.

One shall keep in mind that according to Article 90 of the Constitution in its present wording, the Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority. The Constitution does not talk of delegating competences “by an international agreement,” but of delegating competences “by virtue of international agreement”\(^{16}\). The wording applied is of grave legal consequences. It means that the delegation of competences may take place not only directly in an international agreement, but also by a legal act passed on the basis thereof. This may be a unilateral legal act of the Republic of Poland foreseen by the given agreement or a legal act of an international organization (e.g. the European Union). The procedure specified in Article 90 is applied to an agreement constituting the basis for competence delegation, and not necessarily the act of delegation itself. The act of delegating competences issued on the basis of an agreement ratified according to the procedure of Article 90 of the Polish Constitution does not require ratification according to this procedure, as it already fulfills all the requirements specified therein. At the same time, the Constitution of the Republic of Poland does not provide an unambiguous answer to the question, whether the discussed act of delegation passed on the basis of an agreement ratified according to the procedure of Article 90 of the Constitution would require ratification on the basis of Article 89 of the Constitution or its approval via another procedure.

In view of Article 90 of the Constitution the subject delegating competences is always the Republic of Poland. This means that an international agreement being the basis for competence delegation may foresee the delegation via a unilateral act of

\(^{15}\) Particularly, the following shall be listed here: Article 31 para. 3 and Article 42 para. 2, Article 48 para. 6 and Article 7 of the Treaty on European Union, Article 25 para. 2, Article 153 para. 2, Article 192 para. 2, Article 218 para. 8, Article 223 para. 1, Article 262, Article 311 para. 3, Article 312 para. 2, Article 333 paras. 1 and 2 of the Treaty on the functioning of the European Union.

\(^{16}\) More on the subject: K. Wojtyczek, Przekazywanie kompetencji..., Chapter VII, item 3.
a Member State or via an act of an international organization approved at the consent of the Republic of Poland. In the latter case, this refers to an act simultaneously approved by all the Member States; otherwise, it could not be stated that the subject delegating competences is the Republic of Poland. In view of the above, it shall be admitted that Article 90 of the Constitution authorizes concluding agreements with the so-called passarelle clause, enabling the delegation of competences or introducing significant changes into the principles for realization of the delegated competences by an international organization. At the same time, an international agreement shall precisely specify the scope of admissible amendments accomplished via passarelle clauses. If the requirement of specificity is fulfilled, the delegation of competences is constitutionally admissible without the necessity to repeatedly apply Article 90 of the Constitution to the delegation act itself, passed on the basis of an agreement ratified in the procedure of Article 90 of the Constitution.

If a treaty includes a provision, that its amendment passed as a passarelle clause shall be adopted by all Member States according to their constitutional requirements, in case of Poland, ratification of a Union act in the procedure of Article 90 of the Constitution is not necessary. However, a question arises, whether it is necessary to ratify such an act in the procedure of Article 89 of the Constitution. It shall be assumed, that in such a case, provisions on ratification are respectively applied. Regulating competences of power falls within the scope of matters, for ratification of which the Constitution requires a statute; hence, as a rule, ratification in the procedure of Article 89 para. 1 of the Constitution shall be necessary — ratification past a consent granted by statute.

On the grounds of the Constitution in force, a problem may arise when the concluded treaty does not foresee any form of adoption of an act amending a particular agreement. A question arises, if in this case it is possible to properly apply provisions of Article 89 related to ratification. Proper application would then involve a requirement to pass a statute prior to granting the consent by the Republic of Poland to pass a specific act of an international organization. However, a view may be defended, that in such a situation the Council of Ministers may independently adopt a position subsequently expressed by Poland’s representative to a given international organization, with no need to obtain the consent of the legislator.

It shall be noted, that the Polish Constitution does not admit delegating competences via an act adopted by the passarelle clause, which would not require ratification in the procedure of Article 90, if the scope of admissible changes would not be specified precisely enough in an agreement ratified in the procedure of the discussed article.

In view of the above, it seems indispensable to introduce in the Constitution two kinds of regulations. Firstly, the constitutional law-maker shall unambiguously regulate the procedure for adopting European Union legal acts by the Polish State, where the treaties foresee adoption thereof by Member States in accordance with their constitutional requirements. Secondly, the constitutional law-maker shall also precisely regulate the procedure for adopting Poland’s position as regards amending treaties not foreseen to be adopted by Member States. Particularly, the constitutional law-maker
shall resolve, whether or not a consent granted by Poland’s representative to adopt an act amending a treaty shall require the legislator’s prior consent and whether or not such an act shall be passed with a qualified majority of votes.

IX. As has been mentioned, in some cases treaties vest national parliaments with the right to express their dissent to amending a treaty (Article 48 para. 7 of the Act on the European Union and Article 81 of the Act on the Functioning of the European Union). Amending a treaty takes effect if no national parliament expresses its dissent. Against this, a question arises on the legal form which a parliament’s dissent shall adopt and the procedure for its passing. This question is especially valid in case of bicameral parliaments. Shall a dissent of a bicameral parliament be passed by both chambers, or would a dissent of one of the chambers be sufficient? If the Polish legislator vested the right to express dissent in one chamber, doubts would arise as to whether or not a single chamber’s position could be identified with the position of a parliament as a whole. Specifically, doubts are raised in relation to the Senate’s independent right to express dissent and block amending a treaty against the will of the Sejm. On the other hand, if a requirement was introduced that both chambers shall be univocal on the matter, the right to express dissent by the national parliament may prove illusory where there are political divergences between the two chambers. In such a case, acceptance of either of the chambers for the EU act would be tantamount to Poland’s acceptance of the act. In our circumstances, a form of a statute shall rather be excluded, as it assumes including the President of the Republic, vested with the right to a legislative veto, in the decision-making process. It seems indispensable to introduce in the Constitution a separate procedure for expressing dissent by the Polish parliament and to precisely specify competences of the Sejm and the Senate therein.

X. The Lisbon Treaty expressly vests Member States with the right to withdraw from the European Union17. In accordance with Article 50 of the Treaty on European Union, the withdrawal takes place by a complex procedure, in which a Member State takes numerous actions: it makes a decision to withdraw from the Union, then notifies of its intention, after which it negotiates, concludes and ratifies an agreement specifying the conditions for withdrawal. Notification of withdrawal bears particular legal consequences: a state ceases to be a party to agreements on which the European Union is founded at the moment of entry of an agreement specifying conditions for withdrawal into force, and in case of a lack of such an agreement — two years past the notification, unless the date becomes prolonged by an unanimous decision of the European Council in agreement with the Member State. A state which wishes to ensure its potentiality to withdraw, shall for this purpose regulate the procedure for making a decision on withdrawal and the procedure for ratifying an international agreement specifying the conditions for withdrawal. Regardless of a position on the issue of European integration — either pro-European or Euro-skeptical — it shall be as-

sumed, that the Polish State shall not a priori resign from a political instrument relying on a possibility to threaten to withdraw from the European Union.

The Constitution in force does not expressly regulate the procedure for making a decision on withdrawal; neither does it unambiguously specify which ratifying procedure would be relevant for an agreement specifying the conditions for withdrawal. In the doctrine, divergent opinions are expressed as regards the issue whether or not denouncing an agreement being the basis for competence delegation requires the procedure of Article 90 of the Constitution or of Article 89 para. 1. In the opinion of some scholars, denouncing a treaty delegating competences is an act contrary (actus contrarius) to the ratification of such an agreement, it bears more significant systemic consequences and hence, requires application of procedure of Article 90 of the Constitution\textsuperscript{18}. In the opinion of others, denouncing such an agreement results in “returning” competences to the State, i.e. to the original constitutional state, and does not require particular procedural impediments\textsuperscript{19}. What is more, the necessity to apply Article 90 of the Constitution in such a case could lead to a situation, in which a minority opposing the denouncement of an agreement could block the decision on its denouncement approved by majority of citizens. Argument against application of Article 90 of the Constitution to “repatriate” competences to the state seems more persuasive.

\textit{De lege lata}, it shall be assumed, that a decision on withdrawal could be passed in the procedure foreseen for denouncing an international agreement, with no necessity to apply procedure of Article 90 of the Constitution. On the basis of a decision to denounce an agreement, the Minister of Foreign Affairs could notify the intention to withdraw, according to provisions of Article 50 of the Constitution. In turn, an agreement specifying the conditions for withdrawal itself would require ratification according to the procedure of Article 89 para. 1 of the Constitution. These issues shall be expressly regulated in the Constitution of the Republic of Poland in a manner harmonized with the contents of Article 50 TUE.

XI. European integration leads to upsetting the balance between powers and deparlamentarizing the systems of Member States\textsuperscript{20}. The national legislative power is most affected by the process of delegating competences, as it becomes deprived of the possibility to freely pass law in spheres falling within the scope of activity of the European Union and thus lose importance\textsuperscript{21}. At the same time, governments acquire the


\textsuperscript{19} More on the subject: K. Wojtyczek, \textit{Przekazywanie kompetencji...}, Chapter VIII, item 8.


\textsuperscript{21} On the role of national parliaments in the European constitutional system, see i.a.: A. Maurer, \textit{Parlamente narodowe po Amsterdamie; adaptacja, dostosowanie skali oraz sukcesywna europeizacja}, [in:] \textit{Rola parlamentów narodowych w perspektywie rozszerzenia Unii Europejskiej oraz Konferencji Międzyrządowej},
possibility to participate in the realization of the delegated law-making competences via their representatives in the Council. Such a tendency leads to a situation, in which the legislative power just exercised by governments of Member States represented by their representatives in the Council, and national parliaments become gradually transformed into organs of the executive, issuing legal acts (in the form of a statute), indispensable to implement and execute the EU law.

The authors of the Lisbon Treaty meant to partially counteract those tendencies by extending competences of national parliaments in the sphere of European Union activity. Strengthening national parliaments was to simultaneously reduce the democratic deficit in this organization.

The Lisbon Treaty vests the national parliaments with competences in relations with the European Union. It foresees their participation in the law-making procedure, vesting them with oversight of compliance to the principle of subsidiarity. National parliaments, and in case of bicameral parliaments — their chambers, have the right to present an opinion on inconsistency of a draft legal act of the European Union with the principle of subsidiarity. Each parliament has two votes, and in case of bicameral parliaments — each chamber has one vote.

The competence vested in the national parliaments raises a few questions. First of all, the European Union law interferes with the relations between the chambers of bicameral parliaments. Bicameral parliaments acquired two votes, divided evenly between the chambers, regardless of the general constitutional principles related to bicameralism, in force in individual states. In Polish circumstances, this signifies strengthening of the Senate, which on the grounds of the Polish Constitution, is vested with limited competences in comparison to the Sejm. Granting its consent to the ratification of the Lisbon Treaty, the Sejm also consented to extending competences of the Senate. Secondly, realizing new competences requires keeping deadlines foreseen by the Union law. Therefore, it is indispensable to introduce into the Standing Orders of the Sejm and the Rules and Regulations of the Senate the provisions enabling fast decision-making in relation to oversight of the principle of subsidiarity and creating specialized units within Chancelleries of the Sejm and the Senate providing professional and fast legal aid in those matters. Both chambers of the Polish parliament passed amendments to their rules of procedure in order to adapt them to the Lisbon Treaty.


for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust’s activities in accordance with Articles 88 and 85 of that Treaty. It shall here be noted that according to Article 70 of the Treaty on the Functioning of the European Union, “the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States’ authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national parliaments shall be informed of the content and results of the evaluation.”

The national parliaments’ participation in the mechanisms evaluating the implementation of the Union policies would in this case be reduced to receiving the information. In turn, according to Articles 85 and 88 of the Treaty on the Functioning of the European Union, the principles for participation of national parliaments in the evaluation of Eurojust and Europol are to be specified in Union regulations.

Based on the Treaty itself, it is not clear what specific oversight competences shall be vested in national parliaments. This matter shall be specified in secondary law. After relevant acts of the Union law regulating oversight competences of national parliaments are passed, it may be necessary to amend the provisions of the rules of procedure of the chambers of Polish parliament, and even the constitutional provisions. This way or another, the Treaty of Lisbon provides the oversight function of parliaments with a new, European dimension.

XII. European integration significantly alters the realization by the state of its external function. Twofold qualifications may be pointed here.

Firstly, vesting specific competences in national parliaments corresponds with the general tendency within the European Union to regulate matters from the scope of relations with this organization to principles different from those in force in international relations. The specificity of relations between a Member State and the European Union justifies the thesis on distinguishing them from the scope of foreign relations. Besides domestic and foreign policy (conducted with third countries), there is a third, qualitatively distinct sphere of politics, which is the policy related to the matters of the European Union. Whereas in the sphere of foreign policy, the Council of Ministers as a rule has monopoly in the sphere of external relations, in the sphere of European relations there are being developed regulations foreseeing direct contacts of various organs of public authority with Union organs and analogous organs in other states. In this sphere, the Council of Ministers has long lost its monopoly and does not exercise full control of the European relations, which are being entered by organs of public power not subjected to the government. Particularly, national parliaments become independent subjects of European politics, creating complex networks along with the European Parliament.
Secondly, the strong influence of the European Union law also affects the foreign policy conducted in relation to third countries. Member States took on an obligation to conduct common foreign and security policy, thus reducing their liberty to act in international relations. A state’s external competences shall be realized in accordance with principles specified in treaties and decisions made by the European Council and the Council. Moreover, Member States equipped the European Union with a competence to conclude international agreements in particular areas, and at the same time partially resigned from realizing their own competences in this scope. In these circumstances, the external function of a state becomes Europeanized, as it is being realized collectively to a gradually larger extent. The most important here seem the actions undertaken at the forum of the European Council and the Council vis-à-vis other Member States; the sphere of states’ independent actions in the scope of foreign policy vis-à-vis third countries becomes more and more limited. A state, conducing its foreign policy, must increasingly more often convince other states to its reasoning and adapt to their collective decisions. The Lisbon Treaty intensifies this process and extends the scope of competences of the European Union in external relations. At the same time, it expands limitations imposed on the manner of exercising competences by states in their external relations.

XIII. On the one hand, the European integration extends the scope of protection of numerous fundamental rights, but on the other — it also poses new threats to those rights and involves various problems related to realization thereof\(^\text{23}\). Most of all, European integration leads to diffusing the status of an individual, as his fundamental rights are regulated with various legal acts\(^\text{24}\). Those include the national constitution and the primary law of the European Union.

The national constitution regulates the status of an individual in relations with the state beyond the sphere of competences of the European Union. The primary law of this organization regulates the status of an individual in the sphere of competences of the Union. In the latter, the importance of national constitutions is limited. Firstly, the national constitution sets directions for Poland’s representatives’ actions in the organs of the European Union, requiring representatives to endeavor to have the legal acts passed in consistence with the Polish Constitution, and to vote — with the exception of extraordinary situations, against legal acts infringing rights guaranteed by the Polish Constitution. Secondly, the Constitution establishes the manner of using by Polish organs of public authority of decision margins left by the Union law to the national organs in the process of its realization. Thirdly, the national constitution may — in extraordinary cases — become a basis to issue opinion on inconsistency of a European Union legal


act, infringing fundamental constitutional principles, e.g. an obligation to protect the inherent dignity of the person. Fourthly, provisions of the Constitution of the Republic of Poland co-establish the common constitutional traditions of the Member States, which are a basis for setting general principles of the European Union law, in accordance with Article 6 para 3 of the Treaty on European Union.

It shall here be reminded, that the constitutional and union regulations are not identical. Limitations to fundamental rights set by the European Union shall take into account the threats for the general social values within the whole Union, including countries of greatest threats, instead of a scale of a single country. This creates a natural pressure to lower the standard of the protection of fundamental rights in relation to their protection at the national level in those countries, where the threats to particular general social values are less serious. Divergences may be disclosed particularly in case of collision of rights of various subjects. Resolving collisions of laws requires to diligently weigh values at their base, while an evaluation of importance of individual rights from the point of view of various Union institutions may significantly differ from an evaluation by a Member State. Also, the formal guarantees of particular rights differ, as do the possibilities to vindicate them in relation to organs of public authority.

As a result of the European integration, there takes place a far-reaching denationalization of fundamental rights protection, as Member States have partially lost control over specifying the content of those rights, establishing guarantees therefor, their application in practice and providing effective protection in case of their violation.

The Lisbon Treaty includes important provisions related to fundamental rights protection, which will differently affect the fundamental rights of Polish citizens. Firstly, the Treaty recognizes the binding force of the Charter of Fundamental Rights, at the same time, in Protocol No. 30 reduces its application for Poland and the United Kingdom. Secondly, the Treaty foresees new rights for European citizens in their relations with the European Union. Thirdly, the Treaty foresees the accession of the European Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, and thus enables extending the guarantees of rights guaranteed in this legal act in case of their violation by European Union organs.

In accordance with Article 1 para. 2 of Protocol No. 30, the Charter does not extend the competences of the European Court of Justice or Polish courts to consider Polish normative acts inconsistent with the rights guaranteed in the Charter. The provisions of the Lisbon Treaty and Protocol No. 30 do not extend the protection of Polish citizens from violation of their rights by legal acts passed by Polish organs of public authority, but they do extend the protection from violation thereof by legal acts of the European Union. The Charter provides direct protection in relations between an individual and the European Union; protection from Polish authorities implementing European Union law is of indirect nature and relies on affecting the content of the EU law, subjected to implementation by Polish organs of public authority. In the light of Protocol No. 30, the Charter does not specify the manner of using the decision margins left by the European Union law by Polish authorities; the manner of their using is specified by the Constitution of the Republic of Poland.
Protocol No. 30 significantly reduces the influence of the Lisbon Treaty on Poland’s system of government. It considerably limits the scope of denationalization of fundamental rights protection, narrowing the scale of superseding constitutional provisions related to fundamental rights by provisions of the Union law. The gravity of protection of these rights is to a greater extent borne by the Polish Constitution and organs implementing it.

XIV. The Lisbon Treaty much more intensely affects the system of government of the European Union Member States than do the Treaties of Amsterdam and Nice; nevertheless, it does not bring as many new kinds of constitutional influences as did the Treaty of Maastricht. A more detailed analysis of the scope of legal and constitutional consequences of the Lisbon Treaty shall not be possible until a few years of its application pass. Indubitably, however, it is necessary to adapt the Constitution of the Republic of Poland to the primary law of the European Union in its wording established in the last revision treaty. An optimal solution would be a broader reform, which — besides changes necessary to realize obligations resulting from the ratified treaties — would remove faults and defects of the heretofore applied constitutional regulations.

In the globalization era, Europe gradually loses its economic and cultural importance. One of the goals of the discussed treaty is adaptation of the European Union to challenges of globalization. Despite recently strong influence of the German constitutional thought, Europe also loses its importance in the development of the world constitutionalism. It seems doubtful that the Treaty of Lisbon becomes an attractive systemic model for international organizations of regional character on other continents.

The Maastricht Treaty gave a considerable impulse for the development of research on the legal and constitutional aspects of the European integration in the Western Europe. These issues are also a subject of numerous publications in Poland, however, it seems that the Polish doctrine of constitutional law is not fully aware of the scale of the systemic consequences, which were brought on by delegating the State’s competences to the European Union and does not keep up in its analyses with the forefront of the European doctrine25. It may be hoped, that the Treaty of Lisbon becomes an impulse for the Polish doctrine of constitutional law to undertake research on the systemic consequences of the European integration.

WHEN THE MARSHAL OF THE SEJM IS THE MOST IMPORTANT PERSON IN THE STATE OR THE POLISH INTERREGNUM

ABSTRACT

The article examines historical circumstances and normative basis of the exercise of the duties of the head of state by the Marshal of the Sejm, or the Marshal of the Senate, in the event that the office of the head of state becomes vacant.

The tragic events of 10 April 2010 have brought an end to the exercise of office by several persons holding top positions in Poland, including the President of the Republic. The author provides an analyses of constitutional practice existing in the period preceding the assumption of the office by a newly elected President in August 2010. He presents principles accepted by the legal study and confronts them with actual actions taken at that time by Marshals [Speakers] of the Sejm and the Senate. He also attempts to point out the specific nature of the events between April and August 2010. The solutions of the problem are presented by the author in the context of Polish political life, particularly the election campaign in which the person acting as the head of state were participating.

Moreover, in the article legal problems are raised as to the consequences of election by the People of the Marshal of the Sejm on whom the Constitution confers the power to perform the duties of the President of the Republic. Impact of such election on the possibility of exercising the mandate of the representative is also considered, as well as problems with the assumption of the duties of the head of state after the renouncement of the seat of the Deputy by the President-elect.

The tragic events of 10 April 2010 have brought an end to the exercise of office by several persons holding top positions in Poland, including the President of the Republic of Poland. This situation, apart from being an obvious tragedy for the

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families of the dead and a reason for national mourning, entailed a number of legal problems. It was also a test of constitutional solutions applicable in the event that the office of the head of state becomes vacant.

I. Poland entered year 2010 with a divided political stage, dominated by two political parties, which had been competing with each other for the previous five years, and with plans for presidential elections in the early autumn. This competition, sometimes taking a form of a sharp battle, led to a certain division of influence on individual constitutional organs of the state which were filled throughout that period. The government coalition which was created after the elections in October 2007 and which held the majority in the Sejm, even though such majority was less than the 60% required to reject the President’s veto, and an absolute majority in the Senate, faced a challenge of conducting the politics of the state, being aware of the aversion on the part of the head of state, but also on the part of many state organs, governed by the principle of rotation in office, filled in 2005–2007. A deadlock occurred. The competition between the two political centres concentrated on disputes between the President and the Council of Ministers. It is true that, based on Constitution of 1997, disputes were observed even earlier between the government and the head of state, in particular concerning the conduct of foreign policy and a degree of influence on matters of state defence and security, but, in this regard, the period after 2007 abounded with particularly tense situations. A conflict concerning the form of exercise of the President’s task to represent the state with regard to Poland’s membership in the EU and the accompanying dispute concerning the use of an aeroplane became a symbol of such fight. This conflict, as far as legal solutions were concerned, was even examined by the Constitutional Tribunal.

From among top ten politicians enjoying the greatest social confidence at the beginning of 2010, no fewer than five were activists of the ruling coalition, including the top three places being held by the Minister of Foreign Affairs, the Prime Minister and the Marshal (Speaker) of the Sejm. The fourth position was held by Deputy Prime Minister Waldemar Pawlak. The President was in the fifth position. Andrzej Olechowski held the seventh position in this ranking, and was followed by Jerzy Szmajdziński, whereas Grzegorz Napieralski held the twentieth place. Meanwhile, as far as the ranking is concerned of politicians who were most distrusted by the social opinion, the first two places were held by the leader of the largest opposition party and his brother, the President holding the office.

In view of all of those circumstances we could anticipate a heavy battle between the two main candidates: the President holding the office and fighting for re-election.

4 Cf. e.g. P. Gursztyn, Prezydent zacznie w Łodzi, “Rzeczpospolita”, 9 April 2010, p. A5.
and the Marshal of the Sejm, Bronisław Komorowski, appointed in primary elections after withdrawal of the head of PO from the battle for the position of the head of state\(^5\). The candidates appointed by other parties: M. Jurek, A. Olechowski, W. Pawlak, J. Szmajdziński, did not seem to have any significant chance to be elected.

Everything changed on 10 April 2010, after the disastrous flight of Tu-154 to Smolensk. That was not only because two potential candidates for the presidential elections were killed in the catastrophe, but also that a few other persons died who served functions in key organs of state, and a political possibility of their dismissal, due to the protection deriving from the principle of rotation in office, was not within the reach of the ruling coalition. The situation started to get dynamic. Sooner than expected, the political life offered a chance to fill state positions with persons supported by the PO-PSL majority. The filling of those positions could also become an asset in the hands of policy-makers. At the same time, a new factor arose. The psychological consequences of the catastrophe opened up realistic possibilities of election of a new, “natural” candidate — the brother of the deceased — for the President. Moreover, a candidate for the President, appointed by the party forming the Government, who also served the function of the Marshal of the Sejm, assumed the performance of the duties of the head of state and could fight for the office from that position, at the same time demonstrating his leadership skills.

II. If we accept the view of the Constitutional Tribunal that the Constitution of 1997 adopted the principle of continuity of operation of constitutional organs “with particular determination” and that such principle constitutes “one of the fundamental principles on which each constitutional system is based”\(^6\), this conclusion applies even more to the ensuring of the continuity of serving the function of the head of state. An interpretational reference for all provisions in view of the aforementioned principle is constituted by clear regulations of the Constitution, and they offer a different solution. The systemic necessity of providing the state with a guarantee of efficient functioning of all of its organs must be based on the assumption that any type of situations where there is an objective obstacle for the exercise of duties by public officials (this mainly applies to state authorities which consist of one person) may be accepted if they are short-term and if they are solved within a reasonable period of time.

Since the most ancient times when state organisms were formed for the first time, there has existed a problem of succession of power\(^7\). Depending on historical developments, this problem was solved by determination of an order of succession within the ruling family, or other solutions were adopted, provided however, that care was always taken to specify clearly in whose hands the ruling of the state would remain.

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\(^7\) The issue of definitive succession of power should be differentiated from temporary exercise of the duties of the head of state, for instance in the situation that the monarch is under age (regency). In the following parts of the article, I will use the term “substitution” with regard to each case of the exercise of presidential duties by Marshals of the Chambers of the Polish Parliament, according to the provisions of Constitution.
In the First Republic, the times after the patrimonial monarchy, a principle was established which entrusted primates of Poland (Archbishops of Gniezno), considering their position in the clerical hierarchy of the Catholic Church, their position in the Royal Council (the Senate), and sometimes even blood ties with the royal family, with representation of the state until the time of election of a monarch. With time, and with reference to an office known in the ancient Rome of the royal and republican period, they started to be called an *interrex*. It was also possible, and it happened in practice, that those duties were performed by another Roman Catholic bishop, sometimes referred to as a *vice interrex*. Those traditions were reflected by the composition of the Regency Council established during the First World War and ruling over the areas of the former Kingdom of Poland occupied by Germans. One of the members of the Council was the Archbishop of Warsaw, using the title of the Primate of the Kingdom of Poland.

In the Second Republic, the solution from the times before partitions was already outdated. The March Constitution of 1921 entrusted the substitution for the President to the Marshal of the Sejm. In practical terms, those provisions were exercised twice. The Marshal of the Sejm, Maciej Rataj, served the duties of the head of state on two occasions. The first time was after the assassination of President Gabriel Narutowicz (from 16 to 20 December 1922), and the second time after resignation of Stanisław Wojciechowski following the May coup (from 15 May to 4 June 1926). Different solutions were stipulated by the April Constitution of 1935; the substitution for the president, in addition to a possibility of nomination of his successor by a person serving the office (in the event of an ordinary lapse of the term of office and for the duration of war), was entrusted to the Marshal of the Senate.

The Small Constitution of 1947 restored, with regard to the issues under discussion, the solutions introduced by the March Constitution. During the period of the Polish People’s Republic (PRL), after the adoption of the concept of a collegiate head of state, the problem of succession practically ceased to exist\(^8\). On the other hand, the April amendment of 1989 to the PRL Constitution, together with restoration of the model of a single-person head of state, anticipated the substitution for the President of PRL by the Marshal of the Sejm.

The Constitution of the Republic of Poland — similarly to the solution adopted for the first time by the Small Constitution of 1992 — stipulates not only one, but two emergency solutions in case of any impediment to the exercise of the office or in the event of vacation of the office of the President. In such circumstances the duties of the head of state are assumed by the Marshal of the Sejm, and if the latter is unable to discharge the same — by the Marshal of the Senate (Article 131). Apart from the fact that it follows the systemic tradition, the adopted solution is not fully justified from the point of view of division of power, and it even seems to eliminate such di-

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\(^8\) It should be added that after the death on 7 August 1964 of the President of the State Council, Aleksander Zawadzki, while serving his office, he was buried in a ceremony due to the head of state, and the national mourning was declared.
vision. That is because an entity of a legislative power assumes the exercise of competence of an executive power organ. It is true that each Marshal of any chamber, being elected in general elections, enjoys a social mandate, and also — at least in principle — the confidence of the majority of Deputies who elected him for the purpose of discharge of the function of a single-person governing body of the chamber. The mere fact that he substitutes for the head of state should not be perceived as a consequence of the control function of the Parliament or even as co-operation between the authorities. Neither of those two perspectives explains the solution adopted by the constituent organ. There is no obstacle for the substitution for the President to be discharged within the framework of the executive power and to be effected by, for instance, the Prime Minister who is under the political oversight of the Sejm in consequence of a constructive vote of no confidence against the Government. After all, the explicit solution adopted by the constituent organ falls within the framework of its regulatory freedom.

III. If we look at the situation from the point of view of the duration of impediment to the discharge of the office, the Constitution distinguishes temporary and permanent impediments. On the other hand, from the point of view of a nature of the impediment, we can distinguish legal and actual impediments. Those divisions overlap.

The Constitution does not list a catalogue of prerequisites of temporary impediments to the discharge of the office. They will mostly be in the nature of actual impediments. However, they may also include at least one case of a legal impediment, namely impeachment of the President by the National Assembly and, what follows from that, his suspension in the discharge of the office (Article 145 para. 3). Then, until the date of the final judgement of the Tribunal of State acquitting the President, which is passed before the lapse of the President’s five-year term of office, a temporary impediment in the discharge of the office would also exist. The circumstances forming an impediment to the discharge of the office do not have to be, in themselves, of a short-term nature, because Article 131 para. 1 of the Constitution refers to a temporary situation in which the head of state is unable to discharge the duties of his office, and not to the occurrence of such circumstances limited in time, even though probably the latter will be the most common situation. The literature refers

10 Attention should be drawn to yet another issue. Article 145 para. 3 of the Constitution refers to the “suspension” of discharge of the office by the President of the Republic of Poland on the date on which a resolution is adopted on his impeachment. This could suggest that the course of the five-year term of office is then interrupted. But it does not seem to be the intention of the provision of Article 145 para. 3 of the Constitution. Such suspension applies only to the “discharge of the office”, and not to the course of the term of office. The term limit is connected with the office of the head of state and is a requirement of a democratic state of law. The elimination of the requirement of “renewability” of the representative office is not justified by the “protection” of the five-year term of discharge of the office by a given person.
11 For instance a natural disaster which prevents the President, for a certain time, from returning to the capital, may last much longer than the circumstances preventing the assumption of the discharge of office by the head of state. Contrary opinion in: P. Sarnecki, comment 5 on Article 131 of the Constitution, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. I, L. Garlicki (ed.), Warszawa 1999, p. 3.
to various circumstances which may be considered to constitute impediments to the discharge of the office and potential basis for the application of the institution of substitution for the President, as defined in Article 131 para. 1 of the Constitution, e.g.: long-term loss of consciousness, kidnapping\textsuperscript{12}, being captured as a prisoner, surgery, serious disease, family situation\textsuperscript{13}.

In the event of occurrence of circumstances indicating a permanent impediment to the discharge of the office, it is more difficult to distinguish between the dominant nature of actual or legal circumstances. These include both events and legal activities (including unilateral ones). They are all characterized by an irrevocable legal state of affairs, which the main act considers to be a situation of vacancy in the office of the head of state. A closed catalogue of such circumstances is contained in Article 131 para. 2 of the Constitution, i.e. the death of the President serving the office, the President’s resignation from office, declaration of invalidity of the elections, non-assumption of office\textsuperscript{14}, a declaration by the National Assembly of the President’s permanent incapacity to exercise the duties of his office due to the state of his health\textsuperscript{15}, dismissal from office by a final judgement of the Tribunal of State. The occurrence of such circumstances means that the term of office may not commence at all (Article 131 para. 2 point 3 of the Constitution) or, if it has commenced, it is shortened (Article 131 para. 2 point 5).

We should also point out that the Constitution of 1997 does not directly stipulate any legal basis for the substitution discharge of presidential duties in the situation of an ordinary lapse of the term of office of the head of state, where a new president is not yet elected (for instance, due to the fact that there is an insufficient number of candidates in elections conducted in accordance with Article 127 of the Constitution). It is possible, at least in some cases, to consider the circumstances listed in Article 131 para. 3 of the Constitution to constitute such a situation.

IV. The style of the constitutional provisions, as well as the adoption of the binding principle ensuring continuity of the functioning of the state authorities mean that we should assume that the substitution for the President of the Republic of Poland by the Marshal of the Sejm, in any of the situations listed in Article 131 and Article 145 of the Constitution, is a duty imposed on an individual serving the function of a single-person governing body of the Sejm. It is only an objective impediment that may justi-

\textsuperscript{12} P. Sarnecki, comment 3 on Article 131 of the Constitution, [in:] \textit{Komentarz...}, p. 2.

\textsuperscript{13} J. Ciapała, op. cit., p. 126.

\textsuperscript{14} In the case of this prerequisite, we should assume that it applies to an intentional or permanent impediment to non-assumption of the office, and not temporary, objective impediments which prevent the validly-elected person from taking an oath before the National Assembly. This is probably the most imprecise legal prerequisite which is classified as a permanent impediment to the discharge of office by the head of state.

\textsuperscript{15} In pre-war literature, a permanent impediment to the discharge of office, from the point of view of the condition of health, was also considered to encompass a mental illness, as well as a paralysis causing immobility of the hand which prevented the President from placement of his signature. Cf. W. Komarnicki, \textit{Polskie prawo polityczne (geneza i system)}, Warszawa 1922, pp. 250–251; idem, \textit{Ustrój państwowy Polski współczesnej. Geneza i system}, Vilnius 1937, pp. 210–211.
fy the transfer of this obligation to the Marshal of the Senate\textsuperscript{16}. Substitute discharge of duties of the head of state is of a personal nature. Legal discontinuance of the discharge of the function of the Marshal of the Sejm constitutes — without any exceptions — discontinuance of a possibility of discharging the presidential duties. In particular, such duties may not be performed by Vice Marshals. Such rights may not be delegated to them by the Marshal on the basis of an individual instruction, and they may not be vested in them under the provisions of the rules of procedure of the Chamber.

The discharge of the presidential duties by the Marshal takes place by force of law. It does not require — in principle — a separate confirmation (with an exception of the procedure specified in Article 131 para. 1 of the Constitution, in relation to a judgement of the Constitutional Tribunal (Trybunał Konstytucyjny, TK) in this matter), or public announcement of this fact. The commencement of substitute discharge of duties of the head of state is not preceded by the taking of an oath, as specified in Article 130 of the Constitution. With regard to the Marshal, no special term of office takes course either. The term of office of the President, in the event of temporary impediment to the discharge of his office, continues to be counted according to general rules, including all the consequences deriving therefrom for the lapse thereof\textsuperscript{17}. The mandate of the Marshal of the Sejm is also discharged according to the constitutional cycle of parliamentary elections.

The Marshal of the Sejm, discharging duties of the President, functions according to the same principles as the state organ he substitutes for, classified by the Constitution of the Republic of Poland as an executive authority\textsuperscript{18}. Even though he does not become the President, he holds all the attributes of the head of state, both from the point of view of international and national laws. Moreover, in principle, all competence standards, provisions concerning the legal status, and solutions deriving from the routines and ceremonies applicable to the head of state apply to him as well. Then, he undoubtedly becomes the first person in the state. The Marshal of the Sejm, temporarily discharging duties of the head of state, assumes all the presidential rights and obligations\textsuperscript{19}. Any exceptions in this regard are explicitly specified by the Constitution of the Republic of Poland. A person discharging the duties of the President may not take a decision on the shortening of the term of office of the Sejm (Arti-

\textsuperscript{16} Further considerations regarding the Marshal of the Sejm should, in principle, also be referred to the Marshal of the Senate as a person discharging the duties of the President.

\textsuperscript{17} That is because there are no grounds to apply the institution of suspension of the course of the set periods of time, as, for instance, is directly done by the Constitution of the Republic of Poland, if only in Article 122 para. 6.

\textsuperscript{18} However, TK refuses, it is current jurisprudence, contrary to the acceptance of this view by some authors, to consider the Marshal of the Sejm, in addition to his status of a single-person, constitutional body of the Sejm, also as a central, constitutional body of the state. Cf. however M. Zubik, \textit{Organizacja wewnętrzna Sejmu Rzeczypospolitej Polskiej}, Warszawa 2003, p. 91 et seq., or A. Paprocka, \textit{Glosa do postanowienia TK z dnia 17 grudnia 2007 r (sygn. akt Pp 1/07), “Przegląd Sejmowy”}, 2008, No. 3, pp. 238–239, including the literature quoted therein.

It is more problematic to determine whether any other restrictions exist which are of an implied nature. We should assume that there are no such restrictions, and this should not be perceived as a departure from the principle of legalism. We should also remember that certain competences of the head of state overlap with the competences of the Marshal of the State (e.g. an authority to institute an abstract control of standards). Then, their exercise by the same person differs only from the procedural point of view.

On the other hand, an issue of a necessity of formulation of a general postulate regarding the manner of exercising the presidential competence by the Marshal is a different story. The Marshal should exercise such competence with caution, however taking into account the reasonable requirements of a necessity of the functioning of the state. There is not a single pattern of evaluation here. Each time, such postulate should be formulated anew, almost ad casum, taking into account the needs of the state. The Marshal should remember that all actions undertaken at such time should be aimed at reaching the end, as soon as possible, of the period during which the state does not have a ruling president. The above postulate derives not only from the fact of consolidation of the legislative and executive function in the hands of a single person, but is also a consequence of a general, extraordinary and temporary nature of discharge of presidential duties by the Marshal, as defined in Article 131 of the Constitution. If, on the other hand, such substitution applies to a situation of a permanent impediment to the discharge of office, the basic duty of the Marshal is to ensure that elections are held as soon as possible. This entails an immediate necessity of ordering the elections (Article 128 para. 2 of the Constitution), followed by the convening of the National Assembly for the purpose of commissioning the oath of a newly-elected President of the Republic (Article 130 of the Constitution).

Meanwhile, it is not clear how far the provisions of the Constitution of the Republic of Poland and legislative acts regulating the status of the head of state apply to the Marshal substituting for the President. This is both with regard to the restrictions deriving, for instance, from the principle of incompatibility and liability solely before the Tribunal of State, and the issues concerning special, personal rights of the President. In my opinion, the legal status of the President translates to the person who substitutes for him in the discharge of his duties only to a necessary extent. Article 132 of the Constitution itself — stipulating an absolute prohibition on holding any other offices by the President — is modified if the functions of the Marshal and the head of state are held by the same person. It seems that full application of the restrictions deriving from Article 132 of the Constitution to the Marshal of the Sejm is neither sufficiently justified nor absolutely necessary. It would also be difficult to apply to him the requirement of no party affiliation. We should remember as well that the discharge of such duties is of a temporary nature and, generally, lasts for a short time. It is also not clear what consequences could be for the Marshal of the Chamber who breaches the prohibitions imposed by Article 132 of the Constitution. However, even in the sit-

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uation that this would be possible from the point of view of his parliamentary mandate, the Marshal of the Sejm substituting for the head of state should not hold any other offices. In this case the postulate of temperance should be strengthened by the general principle of absolute incompatibility of the office of the President.

The Marshal discharging the duties of the President is not automatically entitled to the same personal rights as the head of state. For instance, the Marshal of the Sejm will not become a Knight of the Order of Polonia Restituta or the Order of the White Eagle merely due to the fact that he assumes the discharge of the duties of the head of state. After the end of serving such duties, he will also not be allowed to exercise the rights stipulated in the Act on Emolument of the Former President of the Republic of Poland\textsuperscript{21}. From the legal point of view, substitute discharge of the duties of the head of state does not affect the scope of competence of the Marshal which derives from the governance of the Chamber. What is more, he is not released from discharge of his Sejm duties. However, the substitution for the head of state will affect the actual possibilities of fulfilment of his Marshal’s duties. This will be determined by time factors and the scope of presidential duties. However, due to reasons of prestige and for the purpose of ensuring a certain political distance, the Marshal of the Sejm, who temporarily discharges presidential duties, should — as far as possible — reduce the personal fulfilment of his Sejm duties.

V. In the following part of the article, I would like to concentrate only on the problem of substitute discharge by Marshals of the Chambers of the parliament of presidential competence due to the death of the person serving that office, in particular taking into account the systemic practice in this regard which we encountered after the catastrophe of 10 April 2010. The period of vacancy in the office of the President lasted from the date of the catastrophe to 6 August 2010, when the newly-elected President took his oath before the National Assembly. During that period, three persons discharged the duties of the President of the Republic of Poland: the Marshal of the Sejm, Bronisław Komorowski, in the period from 10 April to 8 July; the Marshal of the Senate, Bogdan Borusewicz, on 8 July, and again the Marshal of the Sejm, Grzegorz Schetyna, in the period from 8 July to 6 August 2010.

Even though the death of a person is, in principle, an objective matter, from the legal point of view the determination thereof gives rise to certain problems. That is because the law regulates methods of official determination of the death of a person. As a matter of fact, this issue is of key importance, because it implies far-reaching consequences in the area of law and obligations. The death of President Lech Kaczyński, which was a result of the catastrophe of an aeroplane in the territory of the Russian Federation, made this problem even more acute, in view of the relations

\textsuperscript{21} Act of 30 May 1996 on Emolument of the Former President of the Republic of Poland, \textit{Dziennik Ustaw}, No. 75, item 356; Article 1 para. 1 of that Act stipulates directly that the same applies to the President elected in general elections (the only exception is anticipated in Article 3 of the Act), and the condition for the application thereof is the lapse of the term of office of the President or determination of his permanent disability to discharge the duties of his office due to the condition of his health (Article 1 para. 2 of that Act).
between two separate legal orders. In practice, it was sufficient to exchange a diplomatic correspondence regarding the catastrophe and this constituted the basis for the Marshal of the Sejm to assume the discharge of presidential duties. In those circumstances, this solution should be considered to be appropriate, in particular in view of the fact that we had to wait for a while for the official document constituting the certificate of death of the President.

From the point of view of discharge of the duties of the head of state, the Marshal of the Sejm faced three organizational problems. Firstly, the catastrophe of 10 April killed the Head of the Chancellery of the President of the Republic, the Head of the National Security Bureau and many executive members of the Chancellery. It was quite a challenge, which had to be faced up to, to ensure the security of the state, if only in the context of securing documents, equipment and other sources of knowledge which possibly could have been in the possession of the persons tragically killed in the catastrophe. Secondly, there were pending matters which had been started by the killed President and which he did not manage to finalize; thirdly, which was also of no less importance, there had been no systemic practice until then which could be relied upon. The Marshal of the Sejm had to face two other problems of a practical nature as well. He sustained his intentions of being a candidate for the office of the President which, of course, meant that he had to get involved in the election campaign. But two Vice Marshals of the Sejm died in the catastrophe. This meant that the personnel composition of the Presidium of the Sejm was reduced to the minimum. On the other hand, parliamentary clubs whose Deputies formed a part of the Presidium and were killed on 10 April 2010, were nominating their candidates only after the presidential elections. Therefore, the Marshal could expect that only two members of the Presidium of the Sejm could support him in the discharge of his Sejm duties, who were elected at the recommendation of the party holding the majority in the Sejm.

The first formal duty performed by the Marshal who substituted for the President in the discharge of duties of the head of state was to declare national mourning. A relevant decision in this regard was issued already on 10 April. On the same date, restoring the Chancellery of the President, he appointed, from outside of the then valid composition thereof, Jacek Michałowski to serve the office of the Secretary of State in that Chancellery and entrusted him with the duties of the head of the Chancellery. Finally, the Marshal nominated him for the office of the head of the Chancellery.

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22 A representative of the Lewica club was elected by the Sejm on 8 July, and of the PiS club — on 4 August 2010.
23 Regulation of the Marshal of the Sejm discharging the duties of the President of the Republic of Poland on 10 April 2010 regarding declaration of national mourning in the territory of the Republic of Poland (Dziennik Ustaw, No. 58, item 368). The mourning was extended by Regulation of the President of the Republic of Poland of 13 April 2010 amending the Regulation declaring the national mourning in the territory of the Republic of Poland (Dziennik Ustaw, No. 61, item 376).
24 Decision of the Marshal of the Sejm discharging the duties of the President of the Republic of Poland of 10 April 2010 regarding the appointment of the Secretary of State at the Chancellery of the President of the Republic of Poland and entrusting him with the duties of the Head of the Chancellery of the President of the Republic of Poland, Monitor Polski, No. 21, item 199). Cf. Piotr Gursztyn, Czystek w Palacu nie będzie, “Rzeczpospolita”, 23 April 2010, p. A8.
cellery only after the presidential elections\textsuperscript{25}. Further changes in the executive bodies of the Chancellery of the President were connected with resignation of the then Secretaries of State and directors of that Chancellery from their positions\textsuperscript{26} and nominations of Jaromir Sokolowski (12 July) and Dariusz Młotkiewicz (1 August).

During the period of four months of substituting for the President, the Marshals exercised almost all the competences which the Constitution of the Republic of Poland reserved for the head of state. Such a wide scope of exercise of competence probably resulted from a number of factors. Both the human dimension of the vastness of the tragedy contributed to that and the relatively long period of substitution, not to mention a combination of circumstances, connected, for instance, with the lapse of the term of office of certain state authorities.

The setting of the date of presidential elections, including the election calendar took place after 11 days from the date of vacating the office — on 21 April\textsuperscript{27}. Such a relatively long period — even though permitted under Article 128 para. 2 of the Constitution — cane hardly be classified within the framework of immediateness. It may, however, be justified through the prism of the respect for the national mourning (the President’s funeral was held on 18 April). But it was not necessary from the legal or actual points of view. The Marshal of the Sejm, this time acting as a person substituting for the President of the Republic of Poland, also ordered supplementary elections to the Senate and set the date for the vote and the first round of the presidential elections on 20 June 2010\textsuperscript{28}.

As far as legislative matters were concerned, the Marshals submitted two legislative initiatives\textsuperscript{29} and signed 76 bills. Despite certain suggestions made by the collaborators of the deceased President and by one opposition party, not even once did they decide to exercise the competences specified in Article 122 para. 3, i.e. a referral to TK regarding adjudication of the conformity of the bill with the Constitution\textsuperscript{30}.

\textsuperscript{25} Decision of the Marshal of the Sejm discharging the duties of the President of the Republic of Poland of 6 July 2010 on appointment of the Head of the Chancellery of the President of the Republic of Poland, \textit{Monitor Polski}, No. 53, item 727.

\textsuperscript{26} Executive members of the Chancellery of the President at the time L. Kaczyński held the office (M. Bochenek, B. Borys-Szopa, A. Duda, M. Łopiński and J. Sasin) submitted their resignations upon the public announcement by the State Election Committee (Państwowa Komisja Wyborcza, PKW) of the results of presidential elections. Cf. e.g.: K. Manys, A. Niewińska, \textit{Prezydent Komorowski}, “Rzeczpospolita”, 5 July 2010, p. A3.

\textsuperscript{27} Decision of the Marshal of the Sejm of the Republic of Poland of 21 April 2010 on ordering the elections for the President of the Republic of Poland, \textit{Dziennik Ustaw}, No. 65, item 405.

\textsuperscript{28} Decision of the President of the Republic of Poland of 22 April 2010 on ordering supplementary elections to the Senate, \textit{Dziennik Ustaw}, No. 66, item 424; and Decision of the President of the Republic of Poland of 23 April 2010 on ordering supplementary elections to the Senate, \textit{Dziennik Ustaw}, No. 67, item 427.

\textsuperscript{29} On an amendment to the Act — the Public Procurement Law and the Act — Provisions Implementing the Act on public finance and on detailed principles of preparation for implementation of investments encompassing anti-flood constructions (print no. 3158/Sixth term Sejm), as well as on detailed principles of preparation for implementation of investments encompassing anti-flood constructions (print No. 3131/Sixth term Sejm).

\textsuperscript{30} Cf. E. Siedlecka, \textit{Nowelizacja ustawy o IPN podpisana}, “Gazeta Wyborcza”, 30 April 2010, p. 6. Practice proved, in connection with the death of the President of the National Memorial Institute in the ca-
or in Article 122 para. 5 — a referral to the Sejm for the repassing of the bill. The latter case, if it had happened, would have been politically difficult to explain, especially considering the fact that all the Marshals represented parliamentary clubs forming the majority in the Sejm, accepting the bills they signed.

As regards international affairs, the balance of discharge of competence of the head of state by the Marshals is moderately high and is mainly a result of elimination of antagonisms along the line of the President and the Government. The Marshals ratified 9 international treaties (including treaties amending the current treaties) and passed decision on publication in the Dziennik Ustaw (Journal of Laws) of 13 international treaties. They also dismissed 12 and appointed the same number of plenipotentiary representatives of the Republic of Poland in other states. Two foreign trips were held. The Marshal of the Sejm, as the person discharging the duties of the head of state, participated in the celebration of the 65th anniversary of victory over Nazi Germany in Moscow and visited soldiers serving in the Polish military contingent in Afghanistan.

As regarded the defence of the state, it became necessary to reconstruct the main decision-making core of the generals’ corps, to conduct the on-going personnel policy, and to co-operate in the decision-taking process regarding the security of the state. As proven by the practice, nomination issues constituted the greatest challenge. It was only on 7 May that the Marshal discharging the duties of the head of state nominated the Chief of the General Staff of Polish Armed Forces (Lieutenant General Mieczysław Cieniuch), on 20 May — the Commander of the Polish Land Forces (Divisional General Zbigniew Głowienczka), the Commander of the Air Forces (Lieutenant General Lech Majewski) and the Operations Commander of the Armed Forces (Divisional General Edward Gruszka), and on 24 June — the Commander of the Navy (Admiral of the Fleet Tomasz Mathea). The Marshals also nominated persons for the first commissioned officer’s ranks and awarded general’s ranks. In this context, it also became necessary to consider whether or not the retirement age of high-rank commanders should be raised. That is because the act stipulates that in the event of the on-going personnel policy adopted in that act, as well as nomination of the person substituting for him, requires an urgent amendment. Cf. E. Łosińska, Trzecia nowelizacja ustawy o IPN, “Rzeczpospolita”, 28 July 2010, p. A4.

33 Decision of the President of the Republic of Poland of 7 May 2010 on nomination of the Chief of the General Staff, Monitor Polski, No. 43, item 613.
34 Decision of the President of the Republic of Poland of 20 May 2010 on nomination of commanders of various types of the Armed Forces, Monitor Polski, No. 44, item 622.
35 Decision of the President of the Republic of Poland of 20 May 2010 on nomination of the Operations Commander of the Armed Forces, Monitor Polski, No. 44, item 623.
36 Decision of the President of the Republic of Poland of 24 June 2010 on nomination of the Commander of the Navy, Monitor Polski, No. 53, item 726.
37 Cf. e.g. Decision of the President of the Republic of Poland of 15 April 2010 on commissioning of officers to the rank of a general, a lieutenant general, admiral of the fleet, divisional general and brigadier general, Monitor Polski, No. 35, item 497.
order to be released from active military service, a person has to reach the age of 60\textsuperscript{38}. Meanwhile, the career path of soldiers and their access to higher military ranks and commandship levels are so long that promotion to commandship positions occurs, in the majority of cases, directly before the end of their professional career.

The Marshal discharging the duties of the President of the Republic of Poland changed the composition and rules of functioning of the National Security Council\textsuperscript{39}. And he called a meeting of the Council, as a constitutional advisory body of the President with regard to the security of the state (Article 135 of the Constitution)\textsuperscript{40}, on four occasions. The agendas of those meetings covered, \textit{inter alia}, an analysis of information recorded by on-board recording devices of the Tu-154 aircraft which crashed near Smoleńsk, the issues concerning the flood situation and the development of a new strategy in view of the conflict in Afghanistan. No later than on the third day of serving the duties of the President did the Marshal appoint Gen. Stanisław Koziej\textsuperscript{41} to serve the office of the head of the National Security Bureau\textsuperscript{42}. Meanwhile, in connection with the submitted resignations, at the beginning of July, he dismissed Witold Waszczykowski and Zbigniew Nowak from the National Security Bureau. As a person substituting for the President, the Marshal signed a decision on the extension of the period of use of the Polish Military Contingent in the Islamic Republic of Afghanistan\textsuperscript{43} and a decision on the extension of the period of use of the Polish Military Contingent in the Allied Forces of the North Atlantic Treaty Organization as part of the military mission of supervision of the air space of the Republics of Estonia, Lithuania and Latvia\textsuperscript{44}.

As regards nominations for judges, the Marshals, acting in the capacity of persons discharging the duties of the head of state, appointed — as a result of the lapse of the six-year term of office — a new President of the Supreme Administrative Court\textsuperscript{45} and, at his motion, the Vice President of the Supreme Administrative Court (Naczelny Sąd Administracyjny, NSA)\textsuperscript{46}. They also granted 179 nominations for


\textsuperscript{39} Ordinance of the President of the Republic of Poland of 24 May 2010 regarding the procedure of operation of the National Security Council (unpublished).


\textsuperscript{43} Decision of the President of the Republic of Poland of 13 April 2010 on an extension of the period of use of the Polish Military Contingent in the Islamic Republic of Afghanistan (M.P. No. 21, item 200).

\textsuperscript{44} Decision of the President of the Republic of Poland of 14 April 2010 on the use of the Polish Military Contingent in the Allied Forces of the North Atlantic Treaty Organization in a military mission of supervision of the air space of the Republics of Estonia, Lithuania and Latvia, Monitor Polski, No. 22, item 212.

\textsuperscript{45} Decision of the President of the Republic of Poland of 19 May 2010 on the appointment of the President of the Supreme Administrative Court, Monitor Polski, No. 44, item 621.

\textsuperscript{46} Decision of the President of the Republic of Poland of 17 June 2010 on the appointment of the Vice President of the Supreme Administrative Court, Monitor Polski, No. 53, item 725.
judges, some of which were initiated by the deceased President (87), and some were signed by them (92). The Marshal also commissioned the oath of a newly-elected judge of the Constitutional Tribunal. However, the General Assembly of the Constitutional Tribunal did not present to the person discharging the duties of the head of state its resolution of 17 July 2010 regarding the nomination of candidates for the position of the President of the Constitutional Tribunal and Vice President of the Constitutional Tribunal. This was done only after the commissioning of the oath of the newly-elected President of the Republic of Poland47. This practice — in my opinion — is not justified and is based on a wrong assumption of somehow “worse” systemic legitimization of the Marshal, acting pursuant to Article 131 of the Constitution, in comparison with a person elected for the office of the President in general elections. Meanwhile, the did not decide to nominate their representative in the National Council of the Judiciary48.

In relations with the Council of Ministers, if only with regard to the political identity of the persons discharging the duties of the head of state and the government, no conflicts needed to be anticipated. This also have opened up an opportunity to use this as a factor strengthening the main candidate to the office of the President supported by a larger ruling party. At that time, no changes occurred in the composition of the Council of Ministers, and official acts of the head of state were counter-signed on an on-going basis. The only expression of presidential competence in relations with the government, which was used by the Marshals acting pursuant to Article 131 para. 2 of the Constitution, was to convene the Cabinet Council. The meeting of the Cabinet Council was held on 10 June 2010. As stated officially, the purpose of the meeting was to discuss the flood situation in the country and determine actions aimed at reconstruction and preparation of new legal solutions providing for more efficient functioning of the state in the situation of a flood.

The Marshal discharging the duties of the President sealed the future of the then current composition of the National Radio and Television Broadcasting Council (Krajowa Rada Radiofonii i Telewizji, KRRiTV). In view of rejection by the Sejm and Senate of the annual report of the Council for 2009, according to the Act on Radio Broadcasting and Television, he confirmed the expiry of the term of office of all members of KRRiTV by means of his decision of 14 June 2010. He also indicated the date of 24 June as the end date of the term of office of the Council, and therefore of also all of its members49. This opened up an opportunity to elect a new composition of KRR-

48 In view of this situation, a problem arose of the participation in the work of the National Council of the Judiciary (Krajowa Rada Sądownicza, KRS) of the then current representative of the President of the Republic of Poland. Then Act on KRS stipulates that a mandate of a person appointed to serve a function in the Council by the head of state lapses no later than within 3 months of the end of the term of office of the President who appointed it (Article 5 para. 2). Cf. E. Siedlecka, *Prezydent Komorowski nie nominuje*, “Gazeta Wyborcza”, 14 September 2010.
49 Decision of the President of the Republic of Poland of 14 June 2010 regarding the expiry of the term of office of all members of the National Radio and Television Broadcasting Council, *Monitor Polski*, No. 44, item 624.
RiTv. The Marshal of the Sejm, acting in the capacity of the person discharging of duties of the President, also took advantage of this situation and appointed two members of KRRiTV. We should add that it was the last official act performed by B. Komorowski, who was then the President-elect, but who was still acting in the capacity of the Marshal of the Sejm discharging the duties of the head of state.

Among other victims, the President of the National Bank of Poland was killed in the tragedy of 10 April 2010. According to Article 227 para. 3 of the Constitution, the only person entitled to nominate a candidate for this office is the President of the Republic of Poland. Initially, it seemed that the filling of this office, similarly to the office of the Ombudsman for Citizen Rights, will be postponed, maybe even to the time falling after presidential elections. However, finally, not without voices contesting this decision, the Marshal of the Sejm, acting in the capacity of a person discharging the duties of the head of state, presented the Sejm with its nomination of Marek Belka, the former Prime Minister in SLD government in 2004–2005, as a candidate for the office of the President of the National Bank of Poland. The Sejm appointed him for that office on 10 June 2010.

The Marshals — discharging the duties of the head of state — gave Polish citizenship to 43 persons and, in case of 107 persons, granted their consent to resignation from Polish citizenship. They also granted orders, distinctions and medals, as well as granted consent for Polish citizens to accept distinctions from third countries. They did not award the highest Polish order — the Order of the White Eagle. They also completed a number of official procedures commenced by the deceased President. This concerned the award of the already-granted orders and distinctions, as well as professor titles.

Quote an interesting systemic problem arose in connection with nominations of prosecutors, and more precisely in connection with the appointment of deputies of the Prosecutor General. The first deputy and the other deputies of the Prosecutor General are appointed by the President, at the motion of the Prosecutor General, from among the prosecutors of the General Prosecutor’s Office (Article 12 of the Act on the Prosecution Service). Since the official act of the President regarding the appointment of prosecutors is not his prerogative, in order to be valid, such act requires a counter-signature of the Prime Minister. A decision regarding this matter was signed on 31 March 2010 still by President L. Kaczyński. However, by doing that, he changed the practice which had prevailed for the previous few years, and he did not wait for the receipt from the Chancellery of the Prime Minister of an official docu-

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50 Decision of the President of the Republic of Poland of 7 July 2010 on appointment of members of the National Radio and Television Broadcasting Council, Monitor Polski, No. 53, item 728.
53 Resolution of the Sejm of the Republic of Poland of 10 July 2010 regarding the appointment of the President of the National Bank of Poland, Monitor Polski, No. 44, item 616.
ment of the President, previously signed by the Prime Minister. Finally, the counter-signature of those nominations was provided by the Prime Minister on 17 April, and the Marshal of the Sejm, discharging the duties of the head of state, on 20 April\textsuperscript{54} presented the nomination certificates to Marek Jamrogowicz — for the office of the first deputy of the Prosecutor General, and Marzena Kowalska and Robert Hernand — for the offices of deputies of Prosecutor General. What is interesting is that, despite the fact that official acts of the President in such personnel matters, in order to be valid, require a counter-signature of the Prime Minister, the published decision of the President bears the original date of his signature, without the counter-signature\textsuperscript{55}.

The last official acts of the Marshal, issued pursuant to Article 131 para. 2 of the Constitution, which were published in official journals, bear the dates: 5 (\textit{Monitor Polski}\textsuperscript{56}) and 8 July 2010 (\textit{Dziennik Ustaw}\textsuperscript{57}).

The Marshal of the Sejm called the National Assembly for the purpose of commissioning the oath of the newly-elected President on 6 August 2010\textsuperscript{58}. On that date, the period of substitute discharge of the competence of the head of state by Marshals of the Chambers of the parliament ended.

\textbf{VI.} The second round of presidential elections which was held on 4 July 2010, brought about the election for the President of the Republic of the then current Marshal of the Sejm acting in the capacity of the person discharging the duties of the head of state.

In view of the above, two questions arose. Firstly, how Article 131 para. 2 of the Constitution should be interpreted, which specifies the time framework for substitute discharge of the duties of the head of state. Secondly, what legal consequences derive from an election of a Deputy for the office of the President in view of a possibility of exercising by him of his parliamentary mandate.

The provisions concerning the discharge of the duties of the head of state in the situation of a vacancy in that office, used, while setting the timeframe of such substituting, the phrase of “until the time of election”. In comparison with, for instance, Article 128 para. 1 or Article 130 of the Constitution which use the term of the “assumption of the office”, this could suggest the existence of a structural gap in the mechanism of substitute discharge of the duties of the head of state specified in the

\textsuperscript{55} Decision of the President of the Republic of Poland of 31 March 2010 on appointment of the first deputy of the Prosecutor General, \textit{Monitor Polski}, No. 35, item 494. Decision of the President of the Republic of Poland of 31 March 2010 on appointment of a deputy of the Prosecutor General, \textit{Monitor Polski}, No. 35, item 495. Decision of the President of the Republic of Poland of 31 March 2010 on appointment of a deputy of the Prosecutor General, \textit{Monitor Polski}, No. 35, item 496.
\textsuperscript{56} Decision of the President of the Republic of Poland of 5 July 2010 regarding dismissal of the Ambassador of the Republic of Poland, \textit{Monitor Polski}, No. 55, item 754.
\textsuperscript{57} Act of 8 July 2010 on detailed principles of preparation for implementation of investments in the area of anti-flood constructions, \textit{Dziennik Ustaw}, No. 143, item 963.
\textsuperscript{58} Decision of the Marshal of the Sejm of the Republic of Poland of 3 August 2010 regarding the calling of the National Assembly for the purpose of commissioning the oath of the newly-elected President of the Republic of Poland, \textit{Monitor Polski}, No. 54, item 729.
main legislative act. Such interpretation of the constitutional provisions was indicated by some representatives of the legal science. This could have been supported by historical interpretation. That is because the provisions of the Small Constitution of 1992 contained a different solution, which did not give rise to any doubts that the substitute discharge of the duties of the head of state remains valid until the time of assumption of the office by a newly-elected President (Article 49 para. 2 of the Small Constitution). Moreover, a few months before the catastrophe of April 2010, the Deputies’ draft act on an amendment to the Constitution of the Republic of Poland anticipated modification of Article 131 para. 2 of the Constitution and elimination of any of the aforementioned concerns. In my opinion, such interpretation of the provisions of the Constitution was not the only one and it was not pertinent from the systemic point of view. If we assume that a necessity of nominating a person who governs the state is of an objective nature, the interpretation of the provisions in isolation from this principle seems to be unacceptable. That is because it is hard to assume that the constituent organ intentionally introduced an “inter-term break” in the discharge of the office of the President. If it had wanted to do that, it would have done it directly. But even then it would have had to designate a person who could have discharged the competence of the head of state during such time. That is because we cannot follow any contrary reasoning, assuming, in case of doubt, the implied existence of a break in the discharge of that office. After all, the state may not change its functioning. In this context, the Roman rule of conduct — *necessitas non habet legem* — remains valid. It is also possible to interpret Article 131 para. 2 of the Constitution in such a manner which would give the term of “the time of election” a wider meaning than merely the announcement of the results of the general elections, covering the whole process — from the vacancy of the office to the assumption of the office by the newly-elected President. And such interpretation of Article 131 para. 2 of the Constitution was adopted in practice. Notwithstanding the fact that it was possible to find such interpretation of the main act which prevented the systemic crisis, it would be a good idea to take the opportunity at the time of the next amendment being made to the Constitution to specify precisely the provision referred to above in such a manner that the timeframe for the substitute discharge of the duties of the head of state does not evoke any doubts.

The election of a Deputy serving the function of the Marshal of the Sejm for the office of the President of the Republic of Poland, gave rise to a problem of evaluation of legal consequences of such fact from the point of view of admissibility of exercising the parliamentary mandate. Indisputably, Article 132 of the Constitution prohibits the combination of the function of the President with the exercise of the parliamentary mandate. Indisputably, Article 132 of the Constitution prohibits the combination of the function of the President with the exercise of the parliamentary mandate. Meanwhile, the ordinance of elections to the Sejm and the


60 Cf. draft acts on an amendment to the Constitution of the Republic of Poland, print no. 2989/Sixth term Sejm.
Senate\textsuperscript{61} specifies the moment of expiry of the Deputy’s mandate in connection with such Deputy being elected for the position which may not be combined with the exercise of the mandate. Article 177 para. 4, with reference to para. 1 subpara. 6 of the ordinance indicates that this is the date of election. Generally, the same was the uniform systemic practice in this regard, on the grounds of the provisions of the Constitution of 1997. The election of a Deputy for the position which may not be combined with a parliamentary mandate was considered to mean a definite end to a possibility of exercising the mandate. In the event that the election was performed by the Sejm, the consequences of incompatibility were perceived already at the time of adoption of a resolution on election of the Deputy (referring them also to the other part of the points covered by the agenda of a relevant meeting), treating such resolution as an ultimate resolution, entailing constitutive consequences, notwithstanding the declaratory character of the publication of the resolution itself.

The previous case of election of a Deputy for the office of the President of the Republic of Poland occurred in 1995, when Aleksander Kwaśniewski was elected to serve the office of the head of state. The Small Constitution binding at that time stipulated a direct prohibition of combination of the office of the head of state with a parliamentary mandate (Article 31 of the Small Constitution). Meanwhile, ordinance of elections to the Sejm if 1993\textsuperscript{62} did not specify precisely the consequences connected with the election of a Deputy for the office of the President. The catalogue of offices which the principle of incompatibility associated with the determination by the Marshal of the State of expiry of the mandate did not include the office of the head of state (Article 131 para. 1 subpara. 5 of the election ordinance of 1993). In such legal state of affairs, Deputy A. Kwaśniewski waived his parliamentary mandate as of 23 December 1995, i.e. on the date on which he took the President’s oath before the National Assembly. Therefore, the legal basis for the expiry of the mandate changed over time; from the consequence of incompatibility of offices to resignation (Article 131 para. 1 subpara. 3 of the election ordinance of 1993). And this was the legal basis which was referred to by the Marshal of the Sejm issuing a decision and establishing the date of expiry of the Deputy’s mandate\textsuperscript{63}. Therefore, the example from December 1995 was — in view of the legal regulation — not very adequate in order to be accepted as precedence which might constitute the basis for analogue conduct in July 2010. If we accept the changing nature of the legal basis for the determination of expiry of the mandate, a question remained when such mandate should expire and who should determine this fact. In other words, what moment of time — the date of vote in the second round, the date of public announcement of a resolution of PKW or the date of announcement thereof in an official journal, or the date of confirmation

\textsuperscript{61} Act of 12 April 2001 — Election ordinance for the Sejm of the Republic of Poland and the Senate of the Republic of Poland, Dziennik Ustaw of 2007, No. 190, item 1360, as amended.

\textsuperscript{62} Act of 28 May 1993 — Election ordinance for the Sejm if the Republic of Poland, Dziennik Ustaw, No. 45, item 205, as amended.

\textsuperscript{63} Decision of the Marshal of the Sejm of the Republic of Poland of 23 December 1995 regarding determination of expiry of the mandate of Deputy Aleksander Kwaśniewski, Monitor Polski, No. 1, item 5.
of validity of presidential elections by the Supreme Court — would be appropriate to evaluate the occurrence of the consequences of operation of the principle of incompatibility. All of the above four possibilities were considered, but the last two seemed to be most coherent. It still remained to be decided who should determine the expiry of the Deputy’s mandate and provide this information to the Marshal of the Sejm serving his office. However, ultimately the newly-elected President spared the systemic practice and released it from a necessity of answering this question as he himself, on 8 July, after the public announcement of the resolution of the resolution of PKW, and before the publication thereof in Monitor Polski, resigned his Deputy’s mandate. The determination of this fact was performed by the Marshal of the Sejm, newly-elected on that day.

VII. The case of substitute discharge of the duties of the head of state in 2010, in connection with an expiry of the mandate of a Deputy who was the Marshal of the Sejm and a person discharging the duties of the President of the Republic of Poland, also brought about a necessity of providing a reply to one more question. Namely, an interpretation of Article 131 para. 3 of the Constitution with regard to succession of discharge of such duties. This provision regulates two issues. Firstly, it points to the Marshal of the Senate as the person following the Marshal of the Sejm in the line of persons entrusted with the discharge of duties of the head of state. Secondly, it specifies the prerequisite of such competence succession. This is the alleged lack of possibility for the Marshal of the Sejm to serve the duties of the President. Article 131 of the Constitution uses two separate notions while referring to situations in which the holder of a given office may not discharge of his duties. Namely, with regard of the President the notion of “is unable to discharge the duties of his office” is used, whereas with regard to the Marshal of the Sejm — “is unable to discharge the duties of the President”. To a certain extent, we could justify such terminological differentiation. Nevertheless, in both cases we are talking about such legal or actual situations which prevent a specific person serving one of the above offices to discharge the duties or exercise the rights connected with a given function.

The phrase: “is unable to discharge the duties of the President” should be interpreted widely, as encompassing prerequisites of an objective nature, as well as prerequisites which are subject to evaluation on the part of the Marshal of the Sejm. Situations where the Marshal of the Sejm is the most important person in the State or the Polish Interregnum.
uations in which the Marshal of the Sejm may not discharge the duties of the President may be associated with impediments concerning the substitution itself, as well as more general impediments connected with the parliamentary mandate or the function of the Marshal of the Chamber.

With regard to the Marshal of the Sejm, a question may arise whether there exists any legal or actual state of affairs which would prevent him from the discharge of the duties of the head of state, without eliminating a possibility of discharge of the duties of a single-person, governing body of the Chamber. If the answer to this question were positive — which I may not rule out — then the terminological differentiation contained in Article 131 of the Constitution, as indicated by me above, would be fully justified.

The specific actual situation, deriving from the constraints of the work of the Sejm, which prevents the Marshal of the Sejm from due discharge of the duties of the head of state, may constitute the basis for the assumption of the discharge of the duties of the head of state by the Marshal of the Senate. On the other hand, the issue of a possible legal impediment seems to be less clear. This would have to be connected with an impediment to the discharge of the office, deriving — as it seems — from prohibitions addressed to the President\(^69\). Since I consider it to be impermissible in view of the Constitution to extend the objective scope of constitutional liability\(^70\), I rule out a possibility of occurrence of a legal, negative impediment to discharge of the duties of the head of state in the form of an impeachment of the Marshal of the Sejm by the National Assembly according to the principles deriving from Article 145 of the Constitution.

A possible dispute between the Marshal of the Sejm and the Marshal of the Senate as to the discharge of the duties of the President could be viewed as a competence dispute between central, constitutional organs of the State (Article 189 of the Constitution). Meanwhile, more caution should be exercised while determining the permissibility of consideration of such dispute by the Constitutional Tribunal according to the rules applicable to proceedings concerning determination of existence of a temporary impediment in discharge of the office, as specified in Article 131 para. 1 of the Constitution. Nevertheless, this possibility may not be fully ruled out either. That is because it applies to a situation analogous to that which arises in the event of a temporary impediment to the discharge of the office by the President. Such structure is also more attractive from the systemic point of view than the procedure applicable to a competence dispute, even if in view of certain procedural simplifications. Finally, if the Marshal of the Sejm assumes all the rights and duties of the head of state, there are

\(^69\) It does not seem that such an impediment could be constituted by possibly insufficient age, i.e. a failure to fulfil the requirement specified in Article 127 para. 3 sentence 1 of the Constitution, which is theoretically possible, in connection with a passive electoral law, with regard to Deputies (Article 99 para. 1) and the President.

no impediments to the application of all the regulations of Article 131 para. 1 of the Constitution to him. Then the applicant would have to be the Marshal of the Senate.

The procedure of succession in discharge of the duties of the head of state specified in Art. 131 para. 3 of the Constitution gave rise to one question in practice. Namely, whether a possible impediment on the part of the Marshal of the Sejm to the discharge of the duties of the head of state entails permanent succession of discharge of such duties to the benefit of the Marshal of the Senate, or whether this is just a reserve procedure, applicable for the duration of existence of the impediment. Both structures seemed possible to be accepted and they had certain good points. The first one, in the case of a necessity of applying the reserve procedure and assumption of discharge of such duties by the Marshal of the Senate, did not require them to revert to the Marshal of the Sejm in the situation where the cause for an impossibility to discharge the duties of the head of state was no longer in existence on the part of a single-person body of the Sejm. However, such solution would give rise to a question what if such impediment arose then on the part of the Marshal of the Senate. Would it be possible for the Marshal of the Sejm to resume the discharge of presidential competence? However, finally it was assumed that the solution contained in Article 131 para. 3 of the Constitution is a reserve procedure and applies only to the duration of existence of circumstances giving rise to a lack of possibility of discharging the office by the Marshal of the Sejm. This solution, even though it creates a certain level of confusion, because it assumes the transfer of “presidential competence” between the Marshals, still corresponds better to the principle of ensuring continuity of discharge of the office. The Marshal of the Senate is always the second person in the line to substitute for the President of the Republic of Poland. Therefore, as long as the Marshal of the Sejm may discharge such duties, no need arises to apply the reserve procedure any further. In fact, meanwhile, a systemic problem would arise if the duties of the President could not be discharged by any of the Marshals. Then — regardless of which of the above manners of interpretation of Article 131 para. 3 of the Constitution we would adopt — there would be no legal grounds to specify any further reserve procedures in this regard.

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The situation of discharge of the duties of the President of the Republic of Poland by the Marshals, which we encountered in the period between April and August 2010, was a special time. And that was not only because any period during which the state is deprived of its head is always a sensitive time. That situation was unusual also in view of the dimension of human tragedy suffered on 10 April 2010 and complicated circumstances which it entailed for state authorities who were suddenly deprived of their leaders. Certainly, the practice of that period will be analysed by the legal science. But let us hope that it will never have to be repeated in the future of the Republic.

The Election Code was adopted on January 5, 2011 and entered into force on August 1, 2011 replacing five existing laws governing elections. It has unified the electoral system and implemented some new solutions aimed at changing considerably the electoral process or providing only an arrangement of the existing regulations.

The authors describe and provide assessment of some novelties implemented by the Code, including single-member constituencies in elections to the Senate and in local self-government elections, the requirement for candidates to have no criminal convictions, obligation to apply gender quotas on electoral lists, changes in the election campaigning procedures, possibility of two-day voting, correspondence voting, as well as the powers of international election observers. They discuss the advantages and disadvantages of these institutions, at the same time identifying those solutions which may cause problems in practice.

As regards single-member constituencies the authors claim that their introduction in elections to the Senate mostly shows a continued lack of vision for the second chamber and, in relation to local self-government elections, it may tempt municipal councils to determine the boundaries based mostly on the results of elections in former polling districts. Concerning gender quotas, the authors pointed out doubts as to their compliance with several constitutional provisions. Constitutional and interpretative doubts also appear in relation to the provision requiring candidates to have no criminal convictions. Regulations concerning election campaigning are also criticized, showing lack of preciseness of the provisions the Code which may cause a lot of doubts in practice. Discussing the possibility of a two-day voting, the authors conclude that it is no inconsistent with Poland’s constitution. They support the idea of correspondence voting for citizens staying abroad and introduction of a statutory basis for activities performed by international election observers.

* This article was published in “Przegląd Sejmowy”, 2011, No. 4.
Finally, the authors conclude that the changes introduced in electoral law mostly result from the practice of its application and are of arranging nature; therefore they should rather be approved. However, there are provisions that should be considered as imperfectly prepared, which prove the continued existence of a tendency to treat electoral law as an instrument for political dominance.

On 5 January 2011, the Election Code was enacted¹, which replaced five existing laws governing elections². The work on the Code lasted more than two and a half years (the draft was submitted by a group of Democratic Left Alliance (Sojusz Lewicy Demokratycznej, SLD) Deputies on 24 June 2008), and the need of adopting an election code in Poland had been voiced for a number of years³. Such a postulate was formulated not only by representatives of science dealing with election law (e.g. J. Buczkowski, A. Patrzalek, K. Skotnicki, W. Skrzydlo and A. Żukowski)⁴, but also by representatives of electoral administration (in particular, the National Electoral Commission and the National Electoral Office)⁵, and politicians. It was even postulated that, in addition to electoral issues, this legislative act extended, in its subjective scope, also to the procedures of referendums⁶. That was because the adoption of the Election Code was perceived as a chance of not only a departure from multiplicity of the number of legislative acts regulating the electoral issues, frequency of amendments thereto (unfortunately introduced on numerous occasions, immediately before elections, with an intention of gaining political benefits) and incomprehensible discrepancies between regulation of the same issues in various legislative acts, but also as a chance of stabilization of the election law and establishment of new solutions, which had not been applied so far. That is because codification is such a regulation of a certain area of life, which is aimed not only at the gathering, in the form of a single legislative act, of various dispersed legal provisions, but also at the adaptation

¹ Dziennik Ustaw, No. 21, item 112, as amended.
² They were (in order of their enactment): the Act of 27 September 1990 on Election of the President of the Republic of Poland (uniform text, Dziennik Ustaw of 2010, No. 72, item 467), the Act of 16 July 1998 on Elections to Councils of Communes (gmina), Counties (powiat) and voivodeships (województwo) (uniform text, Dziennik Ustaw, of 2010, No. 176, item 1190), the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (uniform text, Dziennik Ustaw of 2007, No. 190, item 1360, as amended), the Act of 20 June 2002 on Direct Elections of Wojt (head of commune), Mayor and President (uniform text, Dziennik Ustaw of 2010, No. 176, item 1191) and the Act of 23 January 2004 on Elections to the European Parliament (Dziennik Ustaw, No. 25, item 219, as amended).
³ We should recall that the first draft of the Election Code was developed as early as in 1996 at the inspiration of President Aleksander Kwaśniewski by a working team appointed for that purpose. Cf. more in: A. Patrzalek, W. Skrzydlo, Cele i zasady kodyfikacji prawa wyborczego w Polsce, “Przegląd Sejmowy”, 1997, No. 2; W. Skrzydlo, O potrzebie i walorach kodyfikacji prawa wyborczego, “Studia Wyborcze”, 2006, vol. I, pp. 18–20.
thereof to the present conditions and to the future in which they will function. Therefore, the codification of law entails, in addition to the gathering, in the form of a single legislative act, of various dispersed legal provisions, also a reform of the law within the codified field.

Without doubt, the Election Code meets many of the above expectations. That is because it did not only revoke five of the existing laws governing elections and unify the regulated matter, but it also introduced new solutions. Some of the introduced novelties significantly amend the electoral laws and the electoral procedure (e.g. the establishment of single-member constituencies in elections to the Senate, limitations regarding the forms of conducting election campaigns), whereas others merely order, supplement and improve the existing solutions (e.g. the regulation concerning international observers, unification of the opening hours of constituency electoral commissions). All of the introduced changes definitely deserve interest and comments. That is because together they form a framework for competition between election commissions and their candidates, the electoral activity of voters and the work of electoral administrative authorities. Unfortunately, the size of this study allows us to present a closer analysis of only a few of such new solutions introduced by the Code.

We have decided to discuss single-member constituencies in elections to the Senate and in local self-governmental elections, the requirement for candidates to have no criminal convictions, obligation to apply gender quotas on electoral lists, changes in the election campaigning procedures, possibility of two-day voting, correspondence voting, as well as the powers of international election observers, considering them to be the most important changes in the electoral law introduced by the Election Code, and, in the case of some of them, also some of the most controversial ones.

I. SINGLE-MEMBER CONSTITUENCIES

An important new solution introduced by the Election Code was the establishment of single-member constituencies in elections to the Senate (Article 260 § 1) and in elections to councils of communes (gmina) in communes which are not city counties (miasto na prawach powiatu) (Article 418 § 1). Thus, a departure was made from the current system of election of those authorities in multi-member constituencies — with a majority system in the case of elections to the Senate and a majority or proportional representation system, depending on whether the commune was inhabited by more or less than 20,000 inhabitants. The introduction of those changes was possible in view of exceptionally laconic character of the provisions of Constitution of 1997 regarding the method of conducting elections to the Senate, as well as elections to the governing bodies of local self-governments, which, at least in the former of the above cases, is very rightly evaluated as a significant fault which is in conflict with both the nature of the Constitution itself as a legislative act, and also with the nature of that organ itself.

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A problem of division of the state or a certain area of operation of the elected representative organ into single-member or multi-member election districts is always a topic of a vivid discussion. Such a division serves three fundamental functions: it provides (equal) representation to individual parts of the country (constituencies), it provides for fulfilment of certain objectives and preferences considered to be important by the legislator, and finally it provides for transformation of votes into mandates. Even though, from the point of view of knowledge of election systems, this is a strictly technical, mathematical and, generally, well-examined element, whose basic regularities have been known for more than two hundred years, it always raises serious controversies, because it constitutes a very important political issue. That is why the literature emphasizes that a “correct and just division into constituencies and mandates allocated to them should be a result of selection of certain criteria considered by the legislator to be valid and rational”.

However, whether or not this took place at the time of adoption of single-member constituencies in the Election Code is doubtful. After all, it is common knowledge that “the principle of relative majority and single-member constituencies means that election results, both in the scale of a single constituency, and in the nationwide scale, often does not reflect the actual will of voters”. At the same time, it is highly difficult to make such a division into constituencies in a manner which does not breach the principle of equality of elections in its substantive aspect, i.e. an attempt at ensuring an equal force (value) of the vote of each voter, if it is so easy to manipulate the political representation and treat in a preferential manner a certain political party or certain parts of the country.

Another puzzling aspect is an argument which is often quoted in favor of an introduction of single-member constituencies, namely that the intention is to increase the ties between the elected representative of a given constituency with his/her electorat, while Article 104 para. 1 of the Constitution of the Republic of Poland establishes a principle of an independent mandate. Therefore, this is simply a catchy phrase, easy to influence the society which is not aware of the mechanisms functioning in the course of elections conducted with the use of various electoral systems.

It is worth noting, with reference to an introduction of single-member constituencies in elections to the Senate, that even though this idea was already voiced at the

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time of work on the Code in the Sejm, it was rejected in the course of the third reading\(^\text{14}\). Its restoration took place only as a result of the Senate’s amendment, which was not rejected by the Sejm\(^\text{15}\). The election of senators in single-member constituencies proves, unfortunately, the fostering lack of perception of the Senate as the second chamber\(^\text{16}\). This reflects a desire to dominate this organ, even more than it is apparent at present, by representatives of the political party which has gained the largest number of Deputies’ mandates in elections to the Sejm.

This negative evaluation is additionally deepened by the fact of making a division into single-member constituencies without any consultation, for which, of course, there was no time in such circumstances (Appendix No. 2 to the Election Code). Even though Article 261 stipulates that the division into districts will take place according to the uniform representation standard, discrepancies in the number of inhabitants per individual constituencies are significant and vary between 339,000 inhabitants in the smallest constituency No. 12 to no less than 595,000 inhabitants in constituency No. 9\(^\text{17}\). Objections are also raised by borders of certain established constituencies. An example may be constituencies Nos. 43 and 44 established in Warsaw, encompassing the right-hand bank and left-hand bank parts of the city, where different problems arise and which are not even joined by bridges\(^\text{18}\). The lack of proper preparation for division into constituencies is best demonstrated by a need of making a change in the case of constituencies Nos. 23 and 24, which was done by means of an amendment to the Election Code of 15 April 2011.

Critical comments may also be made with regard to single-member constituencies introduced by the Code and established for the purpose of elections of councils for communes which are not city counties. That is because this means that this method of election will now apply to councillors from many towns with a significant number of inhabitants, often exceeding 50,000 inhabitants (for instance Belchatów, Będzin, Pabianice, Zgierz), whereas so far, elections had been based on the principle of proportional representation in towns of over 20,000 inhabitants. Even though Article 417 of the Election Code stipulates that an account has to be taken at the time of division into constituencies of the existing division into auxiliary units; however, such units may be, at the time of creation of single-member constituencies, either consolidated or divided, if this derives from a necessity of maintaining a uniform representation standard. That is why we can deduce that the council of the commune, while making a division, at the motion of the wojt (mayor, president), into constituencies, will mainly follow, in the process of setting out the borders thereof, the elect-

\(^{14}\) Stenographic report on 79\(^{\text{th}}\) sitting of the Sejm on 3 December 2010, p. 249.

\(^{15}\) Stenographic report on 82\(^{\text{nd}}\) sitting of the Sejm on 5 January 2011, p. 149.


\(^{17}\) Quoted after the motion of the “Law and Justice” (“Prawo i Sprawiedliwość”) Parliamentary Club submitted to the Constitutional Tribunal.

\(^{18}\) Ibidem.
tion results from the past in particular election districts. That is because in such large territorial units, elections are not of a personal nature, but they are mainly political, where no individual characteristics of the candidate is important, but his/her party affiliation. Therefore, it does not seem feasible that the introduced change was capable of leading to political neutralization of commune councils in communes with a large number of inhabitants, quite the opposite, in view of the aforementioned consequences of establishment of single-member constituencies, it will mean that the elected commune council will be an organ which is less representative of the political views of the inhabitants.

We are of the opinion that the establishment in the Election Code of a method of election of senators and councillors in communes which are not city counties in single-member constituencies, by means of an ordinary majority of votes is not a good solution which contributes to representativeness of the organs elected in this way. This may lead, in effect, to even smaller involvement of the society in public life and in the process of building a citizen society.

II. GENDER QUOTAS ON ELECTORAL LISTS

Another novelty introduced by the Election Code is an imposition of a requirement of compliance with the so-called gender quotas at the time of registration of electoral lists. This requirement applies to electoral lists of deputies, electoral lists of councillors in city counties, electoral lists for elections to commune councils and for elections to voivodeship councils.

As regards elections to the Sejm, this solution means that in the electoral list, the number of both women and men may not be lower than 35% of all candidates on the list (Article 211 para. 3). If the list does not meet this requirement, the district electoral commission summons the person submitting such list to remove any faults therein within 3 days. In such situation, the person submitting the list should change the candidates in the list (Article 212 § 6 prohibiting an introduction of any changes after the announcement of the list shall not apply). In the event of failure to remove such faults within the set time limit, the commission takes a decision on refusal to register the list in whole (Article 215). An analogous requirement is contained in the Code with regard to elections to commune councils in city counties (Article 425 § 3). The sanction for the meeting of the requirement is the same as in the case of elections to the Sejm (Article 431 § 2). With regard to elections to county councils, the Code orders that, within the scope unregulated thereby, the provisions should be applied concerning elections to commune councils (Article 450), i.e. both Article 425 § 3, and Article 431 § 2. In addition, it stipulates that in the event of submission of a list containing 3 candidates, the number of, respectively, women and men may not be lower than 1 (Article 457). Also, in the case of elections to voivodeship councils under Article 459, the relevant provisions of Article 425 § 3 and Article 431 § 2 apply.

The introduced solutions concerning gender quotas on electoral lists were an object of a discussion even before the adoption of the Code. As a justification thereof, argu-
ments were quoted which had previously been raised in a public discussion that women had unequal chances in politics, that they were not sufficiently represented, which translated to their insufficient participation in parliamentary groups. At the same time, a sociological theory of the so-called critical value was quoted, according to which after the exceeding of such critical value, a certain group reached the point of having actual influence on the functioning of the organ it formed a part of. This critical value was most commonly specified at the level of 30% or 1/3 of the composition of the organ19.

We should note that the Election Code is not the only attempt aimed at an introduction of parities and quotas in electoral lists. At the time of adoption of the Election Code, also on 5 January 2011, the Sejm adopted a legislative act amending the law on elections to councils of communes, counties and voivodeships, law on elections to the Sejm and Senate and law on elections to the European Parliament, which also included the requirement of an introduction of a 35% quota for each of the genders20. The original draft of that statute (having a status of a citizen draft, print No. 2713) introduced more requirements and stipulated that the number of women in electoral lists may not be smaller than the number of men21. We should note that the legislator anticipated a very short, lasting only 14 days, period of vacatio legis, which also raised doubts from the point of view of compliance with the principle expressed by the Constitutional Tribunal in an act Ref. No. K 31/06 on adoption of important changes in the electoral law at least six months before the next elections, which are understood not as a mere fact of voting, but as all the activities covered by the so-called election calendar22.

However, if we return to evaluation of solutions introduced by the Election Code with regard to gender quotas, we should indicate that they raise serious concerns as to their compliance with a number of constitutional standards. In literature, there is almost a consensus in raising their lack of consistency with the principle expressed in Article 32 para. 1 of equality in the face of law and the principle established in Article 33 of equal rights or women and men. The essence of the principle of equality consists of the fact that all persons who are subject to the law and who are characterized by a certain important (relevant) feature should be treated as equal, according to the same measure and without any discriminating or preferential differentiations23.

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20 Dziennik Ustaw, No. 34, item 172.
However, we may “establish positive discrimination or compensatory privileges. But it is not permissible to differentiate between citizens from the point of view of criteria which lead to the creation of closed categories of citizens with a varied legal status. An example of such criteria is nothing else but gender”24. At the same time, it is emphasized that compensatory privileges must have certain limits, which are different in the area of social rights, and different in other areas, in particular with regard to freedoms and rights of a personal and political nature, where the “principle of equality has a stricter character”25. Therefore, an introduction of quotas raised serious concerns as to the compliance thereof with the principle of equality26.

Somehow, by way of giving more precision to the evaluation of establishment of quotas as a condition for registration of electoral list from the point of view of Article 32 para. 1 of the Constitution, the literature considers this issue also from the point of view of the principle of free elections, which, even though not currently reflected expressis verbis in the Constitution of the Republic of Poland, still exists in consequence of the democratic character of the state, and therefore, it constitutes “at least an implied principle of the electoral law and the election system in the widest sense of the word”27. While evaluating this issue, Grzegorz Kryszeń points out that “[it — note from the author] always — more or less — narrows the framework of a free electoral game, because it entails privileges in the electoral process of a certain social group”28.

Finally, another doubtful issue is the compliance of the solutions introducing the quotas with the principle of political pluralism expressed in Article 11 of the Constitution of the Republic of Poland. This principle guarantees not only the freedom of formation, but also the freedom of operation of political parties. In the same way, interference of “public authorities in the internal life of a party is permissible only in serious cases of obvious and gross breach of law, if, at the same time, it serves implementation of constitutional or statutory principles”29. An introduction of quotas on electoral lists undoubtedly limits the electoral function of political parties30 and their autonomy within the scope in which they are authorized to take independent decisions about whom and in what order they wish to present as a candidate for a mandate31.

Another important issue is the issue of sanctions which the legislator anticipated in the event of the commission’s failure to meet the requirement of keeping the quotas, and which comes down to refusal to register the whole list of candidates. Therefore, it will be rendered impossible to fulfil the basic function of a political party,

26 Cf. also A. Szymt, Opinia w sprawie wprowadzenia parytetu..., pp. 135–136.
27 G. Kryszeń, Standardy prawne wolnych wyborów parlamentarnych, Białystok 2007, p. 15.
28 Ibidem, p. 139.
30 A. Szymt, Opinia w sprawie wprowadzenia parytetu..., p. 137.
namely an application of democratic methods to design the policy of the state. Therefore, the establishment of such a far-fetched sanction infringes the principle of freedom to exercise passive suffrage and the principle of political pluralism.  

III. THE CONDITION OF NO CRIMINAL CONVICTIONS

We should not that the Election Code introduces a restriction of passive suffrage with regard to a particular category of people. They are people who have been convicted by means of a final and enforceable judgement to a penalty of imprisonment for an indictable offence or for an intentional fiscal offence (Article 22 § 2 subpara. 1). At the same time, it does not matter whether or not the execution of the penalty of imprisonment has been conditionally suspended by the court. Therefore, the said restriction does not apply to the following persons: persons convicted by a non-final judgement by a court of the first instance, persons convicted by means of a final and enforceable judgement to a penalty of imprisonment or a fine, or in a situation where a court waives the imposition of penalty, persons sentenced by a final and enforceable judgement to a penalty of imprisonment for an unintentional offence, persons sentenced by a final and enforceable judgement to a penalty of imprisonment for an intentional offence which is subject to private prosecution or with regard to which the proceedings are conditionally discontinued.

The new regulation raises certain concerns from the point of view of its compliance with the Constitution of the Republic of Poland with regard to standards regulating elections to the Sejm, Senate and to the office of the President of the Republic. That is because, in this regard, the basic law directly stipulates the conditions which determine the right to passive suffrage. Even though, by means of the Act of 7 May 2009, an amendment was made to the Constitution of the Republic of Poland by adding new para. 3 in Article 99 stating that “no person sentenced to imprisonment by a final judgement for an intentional indictable offence may be elected to the Sejm or the Senate”, but we should note that this provision does not mention persons sentenced for fiscal offences. And we may not disregard a clear distinction which is well-established in the doctrine, jurisprudence, as well as in the current legislation between the terms of “offence” and “fiscal offence”, and a common belief that the regulation referring only to the former phrase does not apply to fiscal offences. However, we should point out that in other constitutional provisions, e.g. in Article 42, the lawmaker, using the terms of “offence” and “penal liability”, interprets them in a wide sense of the word, extending them also to liability for fiscal offences. Nevertheless, it seems that interpretation of the term “offence” from Article 99 para. 3 and Article 42 does not have to be the same, and the raised issue should be an object of a thorough analysis in the course of the work on an amendment to the basic law (especially in view of the fact that a necessity of conviction for fiscal offences being directly taken into account in such amendment has already been noted by the opinions of

32 Ibidem.
Z. Witkowski and P. Chybalski. We should remember that even though Article 42 of the Constitution establishes a direct human right, Article 99 para. 3 — quite the opposite — restricts the electoral right, and therefore should be interpreted narrowly.

IV. ELECTION CAMPAIGN

At the time of adoption of the Election Code, a significant change was made to the provisions concerning the election campaign. Before we proceed to an analysis of individual novelties, we should point out that, despite the suggestions from the National Election Commission regarding a necessity of elimination of “incoherence and lack of precision of the notions of campaigning and an election campaign” in the Polish electoral law, both before the coming into force of the Election Code and now, there is no legal definition of an election campaign. Therefore, in order the establish what an election campaign is, we should reach to the works of the legal science. In the widest sense, an election campaign is perceived as all election efforts undertaken at a time, place and in a form clearly specified by law. Therefore, an election campaign is a “separate phase of the election process, covering a period from the announcement of a decision on holding elections to a specified point in time preceding the ballot”.

In the course of a campaign, election campaigning takes place which, so far, has not been defined by the legislator either. Before the coming into force of the Election Code, campaigning was defined as a co-ordinated action aimed at the achievement of a specific objective: election of a candidate to a given office. Therefore, the process of campaigning is composed of actions aimed at the obtainment of the best possible result in elections, undertaken in legally-specified forms and at an officially-set time. The term of campaigning refers to “propagation of certain views, ideas, slogans, for the purpose of increasing a group of supporters of a given cause, and mainly for the purpose of gaining social approval”, expressed by a number of votes gained in the elections.

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While adopting the Election Code, the legislator decided to define the term of “election campaigning”, stating that campaigning (or electioneering) is “encouraging the public to vote a certain way or to vote for the candidate of the election committee” (Article 105 § 1). It also indicated that campaigning (electioneering) can be carried out from the date of acceptance by the competent authority of a notice of establishment of the electoral committee in accordance with the provisions on form and place, specified by the Code (Article 105 § 2).

Therefore, the definition of electoral campaigning, adopted in the Code, is wide. Campaigning is said to consist of encouraging a certain electoral behavior, and it covers both positive campaigning (voting for a candidate of a particular election committee), and negative (such conduct will consist of encouragement to vote “in a certain way”). It seems that most concerns are raised by the term “the public” used by the legislator in the definition of campaigning, which is an aspect which has to be met by the process of encouragement to vote in order to be considered an expression of campaigning. Before, the “public” aspect of undertaken actions had not been used in electoral law, but it appears in the widest sense of the penal law, and therefore it is a good idea to consider the meaning thereof, reaching to the works of the legal science40.

In penal law, a conduct has a public character, if it is available to a number of persons unspecified from the point of view of circumstances or space41. As emphasized by the Supreme Court, “an act is addressed to the public […] if it occurs in a place which is commonly accessible by an unspecified number of accidental persons in the conditions where they can gain direct knowledge thereof”42. Therefore, an act is available to the public only if knowledge thereof is or may be gained by a larger circle of people. At the same time, the Supreme Court noted that, in order to determine whether a given act is available to the public or not, what is important is whether such act may be perceived only by certain individuals or also by persons who are unspecified from the point of view of their number and identity. Therefore, whether or not an act is available to the public is not the same as an act performed publically43.

A speech in public, for instance in a square, in a market, is of a public character, if it takes place in the presence of an unspecified number of non-individualized persons.

40 Even more so, considering the fact that an act consisting of campaigning conducted in a manner inconsistent with the rules deriving from the Code constitutes a penal act, so penal courts, adjudication in matters of contraventions connected with unauthorized methods of conducting the campaigning process, will have to interpret this notion.


If we translate the above consideration to a need of specifying precisely the notion of “the public” in the Code definition of electoral campaigning, we should indicate that, according to the Election Code, campaigning should be considered to be only such encouragement to adopt a certain electoral position which may reach an unspecified number of people. If we reach to examples from practice, it seems that sending short text messages (SMS), whereby the sender encourages the recipient to vote in a certain manner, does not constitute campaigning, as defined by Article 105 of the Code, if such messages are sent to individually-identified persons. More concerns are evoked, however, if we consider the placement of the same type of entries on Internet social networking sites. That is because it is known that some of such sites offer a possibility of restricting the circle of recipients of a given message only to, for instance, the circle of “friends” of the author. It seems that if we face such a restriction of the placement of a message encouraging to a certain manner of voting, such act will not meet the condition of reaching “the public”, and therefore, it will not constitute an act of campaigning, as defined by the Election Code.

We should also emphasise that, according to the definition, the information activity of election committees does not constitute campaigning. That is because information as such is not an “encouragement” or “incentive”.

If we analyse the provisions of the Election Code concerning election campaigns, we should also point to a small, but significant change in the scope of unauthorized methods of collecting signatures of supporters of presented candidates. Before, it was forbidden to obtain signatures under threat, deceit or any pressure, and now the legislator has limited the unauthorized forms only to prohibition of application of pressure. We may not possibly consider this change to be positive. That is because it eliminated the prohibition of collecting signatures under threat or deceit, since, without any doubt, the term “pressure”, as retained by the legislator, does not include a threat, and even more so a deceit, which was eliminated from the regulation.

More changes concern forms and place of campaigning. In this regard, the conduct of campaigning was forbidden at schools with purpose of reaching students (Article 108 § 2), and therefore, the previously-binding prohibition which did not allow the conduct of campaigning at primary and lower secondary schools for the purpose of reaching students who did not have any electoral rights, was extended. The Code also states that school classes on civic education involving the dissemination of knowledge among students about rights and responsibilities of citizens, the meaning of elections in the functioning of a democratic state and the principles of the organization of elections shall not be regarded as election propaganda (Article 108 § 3). This exclusion seems doubtful. That is because we should assume that the classes referred to in Article 108 § 3 should not, by their nature, “encourage to vote a certain way or to vote for a candidate of a certain election committee”, and they should rather be of an informative character — as derives from their description in the Code. Therefore, an introduction of such exclusion may encourage to evasion of the prohibition expressed in Article 108 § 3 concerning the conduct of campaigning at schools.
for the purpose of reaching students, by undertaking, as part of the classes offered by
the school, of activities of a stricte propaganda nature.

Another important novelty of the Code is a definition of an “electoral material”
expressed in Article 109 § 1, which is deemed to mean “any message issued by the
election committee which is made public and connected with information related to
the election”. The greatest concerns are raised by the specification of the electoral
material as “information”, as referred to in that definition and that is because — as
was stated above — the legislator excluded information from the scope of electoral
campaigning. At the same time, describing the electoral material as “information”, it
left any other messages which are aimed at encouraging to vote in a certain way and
which are not information (definition of campaigning, Article 105 § 1) outside the
scope of definition contained in Article 109 § 1 of the Code. Therefore, we can state
that the Code definitions of “electoral campaigning” and “electoral material” some-
how refer to different forms of messages. If we interpret the above provisions, we
should take into account that messages are divided into descriptive, evaluating (ex-
pressing approval or disapproval for a given state of affairs), optative (expressing
a wish, hope or postulates) and normative (expressing standards of conduct). And if
descriptive messages are used to transfer information44, evaluating or optative mes-
sages are used for the purpose of conducting campaigning, i.e. for encouraging a cer-
tain way of voting. Therefore, while defining electoral material as “information”, and
electoral campaigning as an “encouragement or incentive”, the legislator, probably
unintentionally, seems to exclude a significant number of electoral materials from the
scope of forms of conducting electoral campaigning45.

The Code adopted, from previous ordinances, a reservation that election materi-
als should contain a clear indication of the election committee, from which they de-
rive (Article 109 § 2) and that they are protected by law (Article 109 para. 3). Unfor-
tunately, the legislator did not specify what this special protection awarded by the
provisions of electoral law should consist of. If it only came down to protection of
copyrights or personal rights, then such protection would derive from the provisions
of other statutes (the Civil Code, the Act on Copyrights and Neighbouring Rights)
and an additional stipulation thereof in the Election Code would not be necessary. If,
on the other hand, it were to offer any special or wider scope of protection, then it
would be necessary to specify precisely what such strengthening of the protection
should consist of.

The Code also introduced a number of new solutions with regard to methods of
conducting campaigns, even though — as should be emphasized as a shortcoming
— the description of permitted and prohibited methods of conduct thereof still ap-
plies the current, incoherent and incomprehensible division to election “posters and

44 W. Taras, Pojęcie „informacji” jako narzędzia badania administracji publicznej, “Samorząd Tery-
torialny”, 2000, No. 12, pp. 34–35.

45 According to Articles 105 § 1 and 109 § 1 of the Election Code, a leaflet with the slogan: “Vote for
X!” will constitute a campaigning element, but it will not be an election material, because the sentence: “Vote
for X!” does not transfer any information.
slogans” as material forms of conducting the campaign (Article 110). The retention thereof in the Code seems even more redundant that a definition of the “election material” was introduced after all; therefore, it seems that in consequence the legislator should use this term in the description of the permitted methods of conducting campaigns.

Then the legislator placed a ban on “display of posters and slogans of a surface area greater than 2m²” (Article 109 § 4)\(^{46}\). Notwithstanding the lack of terminology consistency referred to above and questions arising therefrom on how to measure a surface area of an “election slogan”, in view of the analysed regulation a question also arises what an election poster is, and — what follows from that — which type of materials are covered by this ban.

The Election Code does not define the term “election poster” or “poster”. Those terms are not defined in any other statutes either. Therefore, we have to refer to the works of other sciences and assume that a “poster” is a type of printed matter, a single-side print of a large format, having a propaganda or advertising character, used to be displayed in public places. It is usually printed on the whole surface of the paper and is rich in colours. The graphic elements are at least the same as the text information, but usually they dominate. Inscription are often processed graphically\(^{47}\). In printing business, a poster is distinguished from an announcement, the main purpose of which is to transfer information, and not to bring about thought associations or evoke artistic feelings. The main element of an announcement — contrary to the poster — is therefore a text, and it does not contain any complicated letter compositions or elaborate graphic forms. If an announcement contains any graphic element, it is usually secondary\(^{48}\).

Considering that there is no definition of a poster in the election law, we should assume that the prohibition expressed in Article 110 § 4 applies to a poster as defined in the printing sector; therefore, doubts arise whether this prohibition applies to, for instance, announcements, and certainly the same does not cover other forms of campaigning, such as, for instance, forms consisting of multimedia (diode) display of electoral materials. Such narrowing interpretation is justified considering the fact that the discussed prohibition concerns a restriction of methods of electoral campaigning by participants in elections during the election campaign, which means that it is an exception from the principle of political pluralism and free elections. Therefore, it should be strictly interpreted.

\(^{46}\) This ban was previously proposed in the draft act on an amendment to the Act on Political Parties, the Act on Elections of the President of the Republic of Poland, the Act on Elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland and the Act on Elections to Councils of Communes, Counties and voivodeships, submitted on 3 April 2009, print No. 1863, Sixth Term Sejm. The Act was enacted on 24 April 2009 and the President referred the act to the Constitutional Tribunal on 16 May 2009. The Tribunal passed its judgment on 20 January 2010 (Ref. No. Kp 6/09). The provision was challenged before the Constitutional Tribunal, act call No. K 9/11.


The above concerns lead to the conclusion that the lawmaker, while establishing the aforementioned prohibition, did not achieve its goal, i.e. did not eliminate large election materials, and therefore, did not lead to a reduction of costs of conducting the campaign by individual committees\textsuperscript{49}. What is more, it may turn out that the effect will be the opposite, because modern forms of campaigning, much more costly than posters, were not prohibited. We should also emphasise that due to interpretational concerns regarding the notion of a “poster”, and in particular of an “election slogan”, as well as the method of measurement of the surface area thereof, considering an introduction of a definition of the “election material” in the Code, it would seem more justified and clear for the legislator to use the term of the election material from Article 110 § 4.

Another controversial change regarding the rules of conducting election campaigns was introduced not in the first version of the Code, but by force of the Act of 3 February 2011 on an Amendment to the Act — the Election Code\textsuperscript{50}. This amendment imposed a prohibition on election committees of dissemination, against payment, of election broadcasts in programs of public and private radio and television broadcasters (Article 119 § 1), at the same time defining the broadcast, for the purpose of the Code, as a part of a radio or television program, which is not produced by the broadcaster and which constitutes a separate whole in view of its contents or form, the emission whereof is ordered by an election committee as part of the conducted election campaign (Article 119 § 2).

This amendment is an object of serious controversies. “Law and Justice” (“Prawo i Sprawiedliwość”, PiS) Deputies submitted a motion to the Constitutional Tribunal where they challenge the compliance thereof with Article 2, and with Article 54 para. 1, with reference to Article 31 para. 3 and Article 32 para. 1 and para. 2 of the Constitution of the Republic of Poland\textsuperscript{51}. They also sought interference from the European Parliament, where they claimed a controversy of the adopted solutions with the provisions of the Constitution of the Republic of Poland by restriction of the freedom of information and citizens’ access to information, as well as freedom of activity of political parties and their constitutional right to present the election program and freedom of action. They also emphasized inconsistency of the discussed solutions with the EU law, and with the Directive of the European Parliament and Council 2010/13/EU regarding co-ordination of certain statutory, executive and adminis-

\textsuperscript{49} Cf. a discussion held during the session of the Extraordinary Committee held for the purpose of consideration of the Deputies’ draft act — the Election Code, the Deputies’ draft on an amendment to the Act on Political Parties, the Act on Election of the President of the Republic of Poland, the Act on Elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland and the Act on Elections to Councils of Communes, Counties and Voivodeships, as well as the Committee’s draft act on an amendment to the Act on Election of the President of the Republic of Poland and other Statutes (No. 1), the Chancellery of the Sejm, Sejm Committee Bureau, Bulletin 2108/ Sixth Term Sejm, p. 7 et seq. and the Extraordinary Committee for consideration of certain draft elections laws (No. 17), Chancellery of the Sejm, Sejm Committee Bureau, Bulletin 3513/Sixth Term Sejm, p. 25.

\textsuperscript{50} Dziennik Ustaw, No. 26, item 134.

\textsuperscript{51} Ref. No. K 9/11.
trative provisions of Member States, concerning the provision of audio-visual media services, and with the European Convention on Protection of Human Rights and Fundamental Freedoms.\textsuperscript{52}

V. TWO-DAY VOTING

Another important change introduced by the Election Code was an introduction of a possibility of two-day voting. Pursuant to Article 4 of the Election Code, elections are held on a non-working day (para. 1), however, the elections management body may provide that a vote in the elections will be carried out within two days (para. 2). In such situation, the voting time is set on a non-working day and the day preceding it (para. 3). If voting is held on a single day, then it is held without a break, from 7.00 to 21.00 (Article 39 § 2), and if the vote is carried out in two days, the vote takes place the first and second day without a break from 7.00 to 21.00; there shall be a break from 21.00 the first day until 7.00 am on the second day (Article 39 § 4).

We should first point to the fact that the Code anticipates only a possibility of a two-day vote, and not an obligatory nature thereof. Whether or not the vote will be held on one or on two days will, therefore, each time be determined by the organ organizing elections. An introduction of such a possibility is — in the opinion of the authors of this concept and of the supporters thereof — aimed at an increase of the voter turnout. However, not all experts expressing their opinion in the course of the work on the Code shared this hope. Waldemar Paruch indicated that “the anticipation of extension of the vote for two days is not a desirable solution” due to “doubtful contribution to a significant increase of the voter turnout”. He quoted, as an additional argument against the appropriateness of such a solution, the high direct and indirect costs it entails.\textsuperscript{53} On the other hand, Grzegorz Górski emphasized that he did not share the view that “in consequence of the lengthening of the voting procedure a possibility allegedly existed to ensure a much higher degree of participation in an election act. This is quite a naive hope.”\textsuperscript{54}

From the point of view of legal evaluation of the introduced solution, the most important aspect is that no expert has ever contested the compliance thereof with the Constitution of the Republic of Poland, and in particular with the provisions of Article 98 para. 2, Article 128 para. 2 thereof, which refer to the setting of an “election day” and not “election days”. It is raised that the election day, as referred to in the Constitution, is a “day on which the vote ends and the ballot boxes are opened. Whereas the vote may be extended to more than one day.”\textsuperscript{55} Therefore, the arguments

\textsuperscript{52} A petition presented by Ryszard Czarnecki and Tomasz Poręba in a matter of an amendment to the Election Code, imposing a prohibition of dissemination, against payment, by election committees of election announcements in programs of public and private radio and television broadcasters, from the authors’ resources.

\textsuperscript{53} W. Paruch, \textit{Opinia na temat ogólnej oceny poselskiego projektu ustawy — Kodeks wyborczy (druk sejmowy 1568)}, p. 3.

\textsuperscript{54} G. Górski, \textit{Opinia do projektu ustawy Kodeks wyborczy (druk sejmowy 1568)}, p. 4.

\textsuperscript{55} M. Chmaj, [in:] “Gazeta Wyborcza”, 3 March 2011; http://wyborcza.pl/1,75478,9180791,Prof_Chmaj_Dwa_dni_wyborow_konstytucyjne.html.
come to a differentiation between the terms of “elections” and “voting”. A similar conclusion may be drawn from an analysis of Article 4 of the Code which stipulates clearly, in para. 1, that “elections are held on a non-working day”, and, in para. 2, opens a possibility of conducting “a vote”, and not “elections” on two days. Despite the fact that we should consider this view to be right, we can still raise that it might be desirable to define the term “vote” or “the date of vote” in the Code in order to distinguish it clearly from “the date of elections”. On the other hand, an opposing argument, equating the date of elections with the date of vote, constitutes the basis for a motion of PiS Deputies submitted to the Constitutional Tribunal for an examination of the compliance of, inter alia, Article 4 § 2 and 3 of the Election Code with Article 2, Article 98 para. 2 and para. 5 and Article 128 para. 2 of the Constitution.

Moreover, we should raise that the challenging of the compliance of a possibility of ordering two-day voting under Article 98 para. 2, Article 128 para. 2 of the Constitution would also, in consequence, lead to determination that the solutions of the Code which introduce correspondence voting for citizens who are abroad (Chapter 8) are inconsistent with the Constitution. That is because in such situation the act of voting itself takes place before the date of elections, which means that — according to the arguments of the opponents of the discussed solutions, equating the term of “vote” with elections — elections last much longer than one day.

We should also refer to the solutions adopted in the Code which develop the regulation of a two-day voting, providing for the conduct thereof and settlement of doubts concerning the management thereof. The provision of Article 26 § 3 stipulates that, if voting is held on two days, then, for persons who turn 18 on the second day of voting, an additional electoral roll will be drawn-up. This provision is connected with the disposition of Article 10 § 1, which stipulates that a Polish citizen who is at least 18 years of age on election day enjoys the right to take part in the vote. Such a solution is a repetition of constitutional solutions from Article 62 para. 1 and — when adopted by the Election Code — may raise doubts, with regard to two-day voting, which day of vote they apply to. We should remember that Article 62 of the Constitution applies not only to the right of participation in elections, but also to the right of participation in a referendum, and therefore, it may not use the term of the “election day”. Meanwhile, the Election Code applies only to elections. Therefore, it seems that a better solution would be the adoption in Article 10 § 1, that active suffrage is enjoyed by persons who turn 18 “not later than on the election day”.

Developing the regulation of two-day voting, the Code also stipulates that in the event that a constituency electoral commission orders the early termination of voting, if all voters registered in the roll of voters cast their votes, a decision for early termination of voting, if the vote is carried out in two days, may take place no earlier than 18.00 on the second day (Article 39 § 7). It also stipulates that if the elections are held over two days, the constituency commission shall establish the result of the elections at the end of the second day (Article 69 § 3).
In the event of two-day voting, most concerns are certainly raised by the break between the first and second day. Then it is necessary to ensure proper security to the premises of constituency election commissions and the documents connected with the conducted voting. In this regard, Article 43 of the Code stipulates that if the vote is carried out within two days, after the first day of voting, the electoral commission shall seal the opening in the ballot boxes and determine, by way of protocol, the number of unused ballot cards, the number of people entitled to vote, the number of people included in the roll of voters, the number of ballot cards issued — based on the signatures of people in the electoral roll. After completing those steps, the constituency electoral commission must place separately in sealed packages unused ballot card and the roll of voters which, together with the ballot box remain on the premises of the polling station. Then the electoral commission chairman closes the perimeter of the polling station and seals the entrance thereto with the official seal of the committee. The mayor provides security of the premises during the break in voting. Before the voting begins on the second day, the constituency election commission must, by way of protocol, check that the seals on the entrance to the premises of the commission, the ballot box, and packages with ballot cards and the roll of voters are intact and have not been tampered with. The detailed way in which the constituency electoral commission’s activities shall be carried out, shall be determined by resolution of the National Electoral Commission. The minister responsible for internal affairs shall determine, by regulation, the detailed requirements for the protection of the premises during the break in the voting.

VI. CORRESPONDENCE VOTING

The Election Code quite unexpectedly introduced for some voters a new, unprecedented in Poland method of voting, namely correspondence voting for voters who are abroad on election day. We should remember that this solution was not anticipated by the draft. Even though this solution was deliberated during the work on the Code by the Extraordinary Committee appointed for the purpose of consideration of certain draft statutes concerning the election law, a decision was finally taken not to introduce the same due to a concern that it would breach (in view of a lack of possibility of such voting for voters who are in Poland) the constitutional principle of equality.

56 This Committee was appointed on 2 April 2009 under the name of the Extraordinary Committee for consideration of the Deputies’ draft act — the Election Code, the Deputies’ draft on an amendment to the Act on Political Parties, the Act on Election of the President of the Republic of Poland, the Act on Elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland and the Act on Elections to Councils of Communes, Counties and Voivodeships, as well as the Committee’s draft act on an amendment to the Act on Election of the President of the Republic of Poland and other Statutes. The change of the name of the Committee to the name specified in the text occurred on 9 October 2009. Due to adopted amendments to the election law and submission of more draft laws concerning election issues, the scope of the work of the Committee was changed on a number of occasions.

57 The taking of the decision at that time was not helped by a lack of reply on the part of the Ministry of Foreign Affairs to the question whether it will be possible for Polish diplomatic establishments to cope with such tasks. Cf. a reply to the questions during the second hearing, given by reporting deputy, Witolda Gintowt-Dziewałtowski. Cf. stenographic report on 79th session of the Sejm on 1 December 2010, p. 43.
Formally, the submission was made only during the second reading of the draft Election Code on 1 December 2010 by Deputy Waldy Dzikowski, representing the “Civil Platform” (Platforma Obywatelska, PO) Deputies Club. This idea had a clear support of the “Law and Justice” (Prawo i Sprawiedliwość, PiS) Deputies’ Club. That is why, after approval on the part of the Extraordinary Commission, there was no problem to adopt the draft during the third reading at the Sejm, on 3 December 2010, of a draft amendment introducing a possibility of correspondence voting abroad. This solution was not opposed by the Senate either, merely suggesting, which was later approved by the Sejm, that the Minister of Foreign Affairs should participate in preparation of a regulation setting out technical conditions of correspondence voting abroad.

By establishing a possibility of correspondence voting, Poland joined many countries which have applied this method of voting for many years (e.g. Spain, Lithuania, the Netherlands, Canada, Norway, Federal Republic of Germany, Sweden or the United Kingdom); this is currently an alternative method of voting which is becoming more and more common in the world. And this idea has been popular in Poland for some time. A possibility of correspondence voting by voters who are: in hospitals, in social care homes, in penitentiary institutions, as well as temporarily abroad, was already stipulated by the Act on Elections of members of the European Parliament adopted during the third hearing by the Sejm on 18 December 2003. However, a failure to develop this regulation meant that the Senate was for the elimination of this solution, and the Sejm did not reject the amendment. We also came across an announcement of establishment of a possibility of correspondence voting in the governmental draft of the act on an amendment to the Act on Election of the President of the Republic of Poland and the Act on Elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland, which was published in the “Program of legislative works in the first half of 2007”.

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58 Stenographic report on 79th session of the Sejm on 1 December 2010, p. 30. The Civic Platform (Platforma Obywatelska, PO) Club convinced the Institute of Public Affairs that this idea was good, and the latter ordered the development of the relevant provisions of Election Code at the Centre of Electoral Studies at the University of Łódź. Then they constituted the basis for further parliamentary work on the establishment of correspondence voting.

59 Deputy Mikołaj Dera, acting on behalf of the Club, stated: “Our Club will look favorably upon such amendments or proposals, in particular if we are talking about improvements of the voting procedure for persons from outside our country, who could cast their vote by correspondence. It is true that the present situation poses a great difficulty for Poles living in the United States or the United Kingdom, where there are few polling stations and where they have to travel many or many hundreds of kilometres to be able to vote, because they feel Poles and they want to participate in this procedure. This proposal will make it easier or even possible for them to vote, and this is important. It is definitely a good solution”. Ibidem.

60 From among 427 Deputies participating in the vote, 364 were in favor of this method of voting, 63 were against and non-one abstained. Cf. Stenographic report on 79th session of the Sejm on 3 December 2010, p. 247.

Correspondence voting means that a voter receives, at his/her own request, at a certain time before the voting day during elections or a referendum, a ballot card (and also, possibly, other materials necessary for voting), which, after completion, is submitted at a certain time and according to a method specified by law to the address of the relevant electoral organ\textsuperscript{62}. This is undoubtedly a controversial solution, which allegedly gives rise to a threat of many abuses at a number of stages of electoral proceedings. For example, despite the submitted request, a ballot card may intentionally not be sent to the voter, and unpermitted pressure may be exerted in the voter, a risk of trade in ballot cards arises, a secrecy of the vote is endangered, and finally it is easier to falsify the results of voting and elections. However, on the other hand, an advantage is that such a method of vote does not breach the principle of directness of voting (such claim is voiced with reference to voting through and attorney), is consistent with the principle of non-transferability of vote, does not entail a significant growth in the costs of elections, and enjoys a great interest on the part of voters\textsuperscript{63}. As rightly emphasized by R. Balicki and A. Preisner, its adoption, therefore, constitutes “a victory of utility over security”\textsuperscript{64}. Minimalizing of dangers is served, as recommended by the so-called Vienna Committee, by the granting of the right to correspondence voting only to a limited circle of voters, who include voters who are in hospitals, prisons, disabled voted and voters who reside abroad\textsuperscript{65}.

As was emphasized, the Election Code granted a possibility of voting only to persons who are abroad and it applies only to elections during which election constituencies are formed abroad (i.e. parliamentary elections, presidential elections and elections to the European Parliament). Before, as we know, such voters could vote by going in person to constituency election commissions formed abroad. However, that method of providing them with a possibility of voting has many shortcomings. Apart from costs connected with the establishment of such constituencies, we should mainly emphasize that, despite a continually growing number of such polling stations, as well as the number of voters, the trip to the polling station and casting a vote is still beyond reach of a significant number of persons entitled to vote, such number being hard to determine\textsuperscript{66}. Therefore, a possibility of correspondence voting by voters who are abroad on the voting date constitutes an important new guarantee of generality of the active suffrage and deserves, in our opinion, full approval. For many voters, it creates a realistic opportunity to exercise their basic right to vote in elections. It also does not deprive them of a possibility of casting a vote at the polling station of a constituency electoral commission.

\textsuperscript{62} Leksykon prawa wyborczego i systemów wyborczych, B. Michalak, A. Sokala (eds.), Warszawa 2010, pp. 41–42.

\textsuperscript{63} Cf. G. Kryszeń, Standardy…, p. 226.

\textsuperscript{64} R. Balicki, A. Preisner, E-voting — szanse, możliwości, zagrożenia, [in:] Międzynarodowa Konferencja…, p. 53.

\textsuperscript{65} Cf. G. Kryszeń, Standardy…, p. 227. The author is right to wonder whether the inclusion of this group of prisoners is justified, because this is a group which can be fairly easy to pressure.

\textsuperscript{66} During presidential elections in 2010, 253 such commissions were formed; and in the second round of elections 201 586 voters cast their votes there; cf. http://prezydent2010.pkw.gov.pl/PZT/PL/WYN/W/index.htm.
In principle, correspondence voting is, of course, personal voting, and that is why we are not sure if this fact needs to be articulated additionally in Article 38 § 2 of the Election Code. This is determined by the manner of casting the vote and the requirement of confirmation thereof in a separate statement, as referred to in Article 65 § 1 subpara. 4 and Article 66 § 1 of the Election Code.

The Code imposes an obligation upon Consuls to notify the voters, by way of an announcement, within maximum 21 days before the election day, of the establishment of constituencies and of the addresses of polling stations, as well as of a possibility of correspondence voting (Article 16 § 3, with reference to § 1 of that Article, and Article 62 of the Election Code). This obviously constitutes a necessary formal requirement. However, we should be aware that contrary to announcements of elections issued in the country by mayors, announcements issued abroad will not constitute such an important source of information for voters about elections and, therefore, also about a new method of voting. This will mainly depend on information provided by the media, including mainly TVP Polonia.

Generally, voting abroad is connected with a necessity of high activity of voters. As we know, they must apply to the Consul with an application for being entered in the list of voters prepared by him, because a vote may be cast solely by a voter from that list. The voter must also notify the Consul of his/her intention to cast a vote in correspondence voting at the time of submission of the aforementioned application form or separately, not later, however, than by the 15th day before the election day, and in the case of a repeated vote in elections of the President of the Republic and re-elections of the President of the Republic, by the 10th day before the date of voting or election day (Article 63 § 1 and Article 67 of the Election Code). Between the date of notification and the election day, time is left for delivery of a voting package to the voter, including a ballot card, and the same must be sent back to the Consul. If this time was shorter, a risk could occur that the completed ballot card did not reach the Consul and the constituency electoral commission before the completion of the count of votes in a given polling station.

A notification of the Consul of one’s intention to take part in correspondence voting (similarly to the submission of an application for being entered in the list of voters) may be made in a number of ways: orally, in writing, by telegraph, fax or electronically (Article 63 §2 of the Election Code). The notification should contain the same elements which are required of an application for an entry in the list of voters. This does not constitute an unnecessary repetition of the same data, because — in particular in the situation of a separate application for an entry in the list of voters and notification of one’s intention to take part in correspondence voting — the Consul must be certain that it is actually the voter that applies for this form of voting.67

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67 Pursuant to Article 63 § 2, the notification should contain: the last name and first (middle) name(s), father’s name, birth date, personal identity number (PESEL), voter identification of residence abroad, the number of valid Polish passport and the place and date of issue thereof, place of registration of the voter in the voter register — in the case of Polish citizens temporarily staying abroad, as well as the address to which the voting package should be sent; in the case of European Union citizens who are not Polish citizens, the notification should include the number of another valid identity document and place and date of issue thereof.
If elections to a number of authorities take part at the same time, the voter may also indicate in his/her application whether the same concerns all elections or just one (some) of them (Article 64 of the Election Code).

A notification meeting certain criteria specified in the Election Code imposes an obligation on the Consul to send a voting package to such voter. This must be done by the 10th day before the election day, and in the event of a repeated vote in elections of the President of the Republic and re-elections of the President of the Republic, by the 7th day before the voting day or election day (Article 65 § 1 and Article 67 of the Election Code). The voting package shall include: addressed return envelope, the ballot card or cards, an envelope for the ballot card or cards, a statement on personal and secret casting of the vote on the ballot card and the voting instructions. The return envelope shall be addressed to the Consul who has sent the voting package, and the envelope for the ballot card (cards) shall have the inscription: “the ballot card envelope”. The fact of sending the voting package to the voter shall be noted by the Consul in the list of voters in the column entitled “remarks”, next to the name of the voter concerned (Article 65 § 4 of the Election Code).

What is of great importance for the ensuring of correctness of elections is the statement on personal and secret casting of the vote. This is a document which is aimed to confirm that no undue pressure or a breach of the principle of secrecy of voting took place. The existence thereof definitely serves a protective purpose.

A voter casting a vote in correspondence voting, after filling-in the ballot card(s), places the same in an ballot card(s) envelope and seals the same, and then places the envelope, together with a signed statement on personal and secret voting in a return envelope, and sends the same to the address of the Consul (Article 66).

The return envelope must be sent to the address of the Consul, because such correspondence may arrive at the time when the constituency electoral commission will not be working. The original version of the Election Code anticipated that the Consul, not later than on the 3rd day before the election day submits the received envelopes to the relevant constituency electoral commission. But there was no provision regulating what should happen with the return envelopes which are delivered after the 3rd day before the election day, because the Election Code did not regulate the same. This significant shortcoming was fortunately eliminated on the basis of the amendment of 15 April 2011. The introduced change consists in the provision that the Consul transfers the received envelopes to the relevant electoral commission before the voting end time (new text of Article 66 § 2). Meanwhile, according to new Article 66a, envelopes received later (and voting packages which are not delivered to the voter in the indicated address) are stored by the Consul on deposit until the time of determination of validity of elections by the Supreme Court.

At the constituency electoral commission where correspondence voting is held, a special second ballot box is used for that purpose (Article 45 § 2 of the Election Code). According to the original text of the Election Code, such ballot box was used to place return envelopes therein; the amendment of 15 April 2011, however, intro-
duced a change consisting of the fact that now only ballot card envelopes are placed in such boxes (Article 66 § 4). We are not convinced about the justification of that change, because it means that certain activities connected with the determination of the results of vote in a given circuit must be performed even before the voting end; this applies to a need of destruction of the voting envelope and the ballot card in the event that the return envelope does not contain the signed statement on personal and secret casting of the vote or in the event that the envelope for a ballot card is not sealed (Article 72 § 3 of the Election Code). A question also arises about the justification of the application of the second ballot box, if it is used only for the purpose of placement therein of envelopes with ballot cards.

The amendment to the Election Code of 15 April 2011 deprived the voter to whom a voting package is sent of a possibility of taking a decision on voting at the polling station of the constituency electoral commission, which was connected with a destruction of the previously-submitted vote cast by correspondence (the original text of Article 52 § 3, last sentence). On the other hand, the added Article 66b established a possibility of personal delivery of the return envelope to the constituency electoral commission by the time of vote.

In our opinion, the solution adopted in the case of a possibility of correspondence voting by voters who stay abroad on the election day corresponds to similar regulations adopted in other countries, and that is so even despite the fact that they do not have a separate electoral constituency in the country. We even believe that this is a better solution, because problems with delivery of foreign packages are always greater than in the case of national correspondence. We also hope that positive experience connected with the application of correspondence voting in the parliamentary elections held in the autumn of 2011, when this method was applied for the first time, will lead to the extension of this possibility of voting to voters in Poland.

VII. INTERNATIONAL OBSERVERS OF ELECTIONS

The Election Code introduces a new regulations which deserves full approval, according to which international observers invited to Poland by the National Electoral Commission, upon consultation with the minister responsible for foreign affairs, are entitled to observe the course of elections and the work of electoral bodies, including constituency electoral commissions (Article 50 § 1). Observers are granted the powers of stewards, with the exception of making annotations in the official protocol (Article 50 § 2).

Before, the attendance of international observers was regulated each time, by way of guidelines and explanations of the National Electoral Commission68, where-

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by PKW conferred rights upon international observers invited by the National Electoral Commission and international observers representing the OSCE Office for Democratic Institutions and Human Rights (ODHIR) to observe the work of electoral commissions at all levels, subject to the same principles as the principles binding stewards (only without a right of making annotations in official protocols). In connection with their work, a number of duties was also imposed on electoral bodies. Some of them, such as: facilitation of participation in sessions, training and other undertakings of a similar type, provision of information regarding preparation for elections within one’s own constituency, provision of access to electronic information on the Internet and in the “Election Platform” system, were aimed at enabling observers to undertake activities even before the election day. On the election day, they were given a right to observe the beginning and process of voting at each polling station of his/her choice, as well as a right to be present during the process of determination of results, as well as to obtain information about results, and a possibility of observing the procedure of acceptance of voting protocols from constituencies and participation in the session whose purpose was to determine voting results and election results in a given constituency and nationwide.

As regards the basis for the adopted guidelines and explanations, PKW referred to obligations deriving from the fact of signature by Poland of the Document of the Copenhagen Meeting of 29 June 1990 of the Commission on Security and Co-operation in Europe (currently CSCE)\(^{69}\). In is emphasized in that document that presence of observers, both international and national, may strengthen the electoral process, and therefore, states should invite observers and allow them to observe the course of elections, both at the nationwide and local levels, provided that such observers may not influence the course of election processes (point I. 8). Therefore, together with the coming into force of the Election Code, PKW gained national, generally-binding grounds for an issue of this type of regulations, and the guidelines and explanations thereof constitute a detailed continuation of regulations contained in Article 50 of the Election Code.

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As we noted at the beginning, this study discusses only some amendments which were introduced to the electoral law by the Election Code. Other changes, such as unification of working hours of polling stations, changes in the procedure of settlement of electoral protests and extension of the statutory catalogue of competence of the National Electoral Commission result from the current practice of application of the provisions of electoral law, have an ordering nature and basically deserve approval. The next elections, which will be conducted on the basis of the provisions of the Code, will certainly verify the changes introduced by the legislator. That is because we should remember that the principal part of the work on the Code was conducted

\(^{69}\) Resolution of PKW of 16 March 2009.
in a hurry. Due to this reason, the Code has, unfortunately, a number of faults which, in view of the subject matter of this study, we will not discuss. Attention is drawn, for instance, by the fact that many solutions which have been postulated for years, have not been taken into account, and they will probably have to be introduced soon. For example, an institution of central electronic register of voters, which has been applied in recent years in a growing number of European states\(^7\). The fact that this institution was omitted in the course of work on the Election Code should be evaluated even more negatively considering that central state registers, such as the Central Register of Motor Vehicles and Drivers or the Universal Electronic System for Registration of the Population (PESEL), have been established in Poland for some time now. An introduction of a central electronic register of voters seems to be a necessity in Poland and it could constitute the basis for further reforms of the electoral law, in particular within the scope of use of alternative methods of voting, facilitating the process of casting votes for voters.

As evidence of a failure to fully develop some institutions, but also of a regular trend pertaining among political forces to treat electoral law in an instrumental manner despite the codification thereof, we may refer to two amendments to the Code which have been made so far and which have been mentioned by us: of 3 February and of 15 April 2011, as well as the motion to the Constitutional Tribunal, submitted by a group of PiS deputies for an analysis of constitutionality of certain solutions thereof. Despite the former, hasty amendments, we should state that an incorporation in a single legislative act of all regulations of the electoral law is a step in the right direction. Moreover, we should hope that the fact of codification thereof will encourage political forces and the legislator to reflect deeper at the time of subsequent attempts aimed at future amendments thereto and undermining the provisions thereof, and that such attempts will be taken only if they are truly needed.

ABSTRACT

The exercise by the intelligence and security services of their role in protecting the fundamental interests of the State, while maintaining a high degree of confidentiality of their operational activities, requires continuous scrutiny from the political authorities, in particular from parliament performing its representative and oversight functions. This is the starting point of all deliberations on the relationship between parliament and the secret services, both in Poland and all over the so-called democratic world. Another question is the state’s system of government. Parliamentary scrutiny of the government is an immutable feature of the parliamentary system of government. If we count special services among the government administration bodies, which is the most practicable solution (also in Poland), the parliament must have a legally guaranteed opportunity to examine and evaluate their activities. Therefore, parliamentary scrutiny of special services is a consequence of the control exercised by parliament over the government and its subordinate agencies.

The extent of practical application of these general principles is determined by way of ordinary statutes. In Poland, this matter is regulated by legislative acts governing the functioning of secret services (the so-called competence acts). The basic purpose of this article is to provide an analysis of these acts. From this analysis a general thesis is derived that, under the existing legal order, proper parliamentary scrutiny of secret services in Poland is not feasible. This is because the provisions of the competence acts prevent parliament from gaining access to classified information showing the activity of secret services. Instead of repeating in the competence acts the idea of subjecting the secret services to parliamentary (Sejm) scrutiny, it is much more important to define precisely the relationship between the Sejm Secret Services Committee and the heads of those services. Both the catalogue of the obligations of the heads of the agencies to the Committee, and the issue of accessibility of information gathered by secret services should be included, as soon as possible, in the competence acts. A ma-

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or, but not the only, problem — identified after examining the competence acts — is the lack of sufficient knowledge about the classified aspects of the activity of secret services. Without this knowledge, the Committee and, thus, parliament, cannot carry out its scrutiny function.

The illusory nature of parliamentary scrutiny is also the result of the fact that heads of services pretend to be politically neutral and conceal their party affiliation, but their real position within the ruling hierarchy is similar to that of members of government. It is not without reason that, even on ceremonial occasions or in official letters they are called ‘ministers’. However, in no way this translates into normative solutions concerning their position under constitutional law. Still the only attempt at changing this situation — taken in 2002 — failed. At that time, the Act on the Internal Security Agency (ABW) and the Foreign Intelligence Agency (AW), was found unconstitutional by the Constitutional Tribunal, to the extent that the heads of the secret services were granted the rank of secretaries of state, (Tribunal judgment of 20 April 2004, Reference No. K 45/02). There was lack of system thinking. However, instead of appointing a new category of secretaries of state, it was enough to enter the positions of heads of ABW and AW into the directory of government positions (in Article 38 of the Act on the Council of Ministers). This proposal is worthy of consideration, and there is one important reason for this. It provides a systemic solution of the problem of political neutrality and party affiliation of heads of these services, at the same time making it possible for parliament to exercise actual assessment of the activity of secret services and to adjust their activity with the use of a vote of no confidence.

I. CONSTITUTIONAL AND STATUTORY CONSTRAINTS

Parliamentary scrutiny of the functioning of the secret services is a derivative of the scrutiny exercised by the parliament towards the government and its subordinate governmental agencies. What follows is that the legal structure of such scrutiny is determined by the provision of Article 95 para. 2 of the Constitution of 2 April 1997. In view of this provision, “the Sejm shall exercise control over the activities of the Council of Ministers within the scope specified by the provisions of the Constitution and statutes”. This means that individual forms of such control derive not only from the constitutional provisions of law, but also from ordinary statutes. And this is the first consequence of the regulation contained in Article 95 para. 2 of the Constitution. Another is that, pursuant to this provision, the control over the government falls within the competence of the Sejm only, and not of both chambers of the parliament.

The former of the above reservations is of particular significance if we look at it from the point of view of the legal basis of the control of the government by the Sejm. It is exactly in this context that the doctrine talks about the constitutional clause providing for “legal restrictions on the establishment by the Sejm of intrinsic control competence and procedures by way of rules of procedure or separate resolutions”. In this case, “restrictions” may not mean limitation of the Sejm in specification of “the methods of fulfilment of constitutional and statutory obligations of the state organs” with

regard to the parliament, because this authority of the Sejm is guaranteed under Article 112 of the Constitution. Nevertheless, the “restrictions” clause constitutes a certain valuable indication as to the importance of legal acts where the substantive part of such obligations should be specified. Its practical meaning may be equated to the rule according to which the legal basis for the control activities of the Sejm, including the procedure of conduct of the same, should derive from the Constitution or from the statutes.

If we were now to indicate the constitutional solutions binding in this regard, we should note that the measures of the Sejm’s control are discussed in a number of provisions of the main act, for instance at the time of regulating matters such as: investigative committees (Article 111), interpellations and Deputies’ questions (Article 115), implementation of the budget (Article 226). Within the framework of all of those institutions, the Sejm may also exercise the control of the secret service, since the latter forms a part of the governmental administration. Meanwhile, as far as statutory regulations are concerned, the legal foundations for parliamentary scrutiny of the secret service should be sought mainly in legislative acts forming the basis for the functioning thereof, i.e. in the so-called competence acts. These include acts of: 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, 9 June 2006 on the Military Counter-Intelligence Service and the Military Intelligence Service, 9 June 2006 on the Central Anticorruption Bureau.

An analysis of the provisions contained in the first two of the above acts shows that they form grounds for clear references to Article 95 para. 2 of the Constitution. They are contained in the provisions of Article 3 para. 3 of the Act on the Internal Security Agency (Agencja Bezpieczeństwa Wewnętrznego, ABW) and the Foreign Intelligence Agency (Agencja Wywiadu, AW), and in Article 3 para. 3 of the Act the Military Counter-Intelligence Service (Służba Kontrwywiadu Wojskowego, SKW) and the Military Intelligence Service (Służba Wywiadu Wojskowego, SWW). Both of those regulations stipulate that the activities of the heads of secret services, i.e., respectively, ABW and AW, and SKW and SWW, “are subject to the scrutiny of the Sejm”. Even though there is no direct reference to the text of Article 95 para. 2 of the Constitution, the intention of the legislator is exceptionally clear. At this point, it is worth noting that a reference to the control function of the Sejm in the aforementioned

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2 According to Article 112 of the Constitution, “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 obligations, both constitutional and statutory, by State organs in relation to the Sejm, shall be specified in the rules of procedure adopted by the Sejm”.

3 “Such provisions [issued pursuant to Article 112 of the Constitution — annotation by M.B.] may refer only to the specification of the manner of performance of obligations of the other organs in relation to the Sejm, whereas the establishment of such obligations itself must be stipulated either in the Constitution or in ordinary legislative acts. With a view to the discussed Article 112, we should conclude that the rules of procedure may not form an intrinsic basis for the establishment of obligations of the other State organs in relation to the Sejm.” Cf. L. Garlicki, Konstytucja — regulamin Sejmu — ustawa, “Przegląd Sejmowy”, 2000, No. 2, p. 23.

provisions takes the form of a general guideline, a kind of general competence of the chamber of deputies to control the secret service. Meanwhile, those provisions do not specify either the measures or the procedure of such control. And this does not apply only to the provisions which establish such general competence of the Sejm, but to all the regulations contained in the competence acts. To put it more precisely, a solution is applied on the grounds of the competence acts, according to which the Sejm is empowered to scrutinize the activities of the heads of secret services, without any further specification of the rules subject to which such scrutiny is to take place.

The only reference to this issue is found in the provisions which stipulate information duties of the secret services in relation to the constitutional organs of the State. The performance of such duties forms the tasks of ABW and AW, as well as SKW and SWW. In the competence acts, they take the form of “gathering, analysis, processing of information and transfer thereof to the competent organs […]”. Even though the text of the provision quoted above — imposing a special information duty upon the secret services — does not refer directly to the Sejm as an organ to which such information gathered by the secret services is to be transferred, it is reasonable to assume that the term of “the competent organs” encompasses this organ of the State as well. Such interpretation is even more justified if we consider that within the structures of the Sejm there functions a standing organ specialising in the secret service affairs, namely the Sejm Secret Services Committee. It is this Committee that is the beneficiary of the information provided by the secret services.

The issue of the information duties of the secret services in relation to the parliament is regulated differently in the Act on the Central Anticorruption Bureau (Centralne Biuro Antykorupcyjne, CBA). This Act also contains a provision referring to Article 95 para. 2 of the Constitution, but there are other provisions as well, which give a more precise meaning to the general statement on the Sejm scrutiny of the activity of the secret services. Contrary to the competence acts which form the basis for the functioning of the other secret services, the Act on CBA refers directly to a substantive form of the information duties of CBA in relation to the parliament. According to Article 2 para. 1 point 6 and Article 12 para. 4 of the Act on CBA, such duties consist of presentation by the head of CBA, to the Sejm and Senate, of written information concerning “occurrences arising within the scope of competence of CBA” and “every year, by 31 March, of information about the results of activity of CBA”. It should be noted here that the beneficiary of such obligations is both chambers of the parliament, and not only the Sejm. This is particularly worth emphasising, because, according to the Constitution of the Republic of Poland, a model of unequal bicameralism of the parliament is in force. A significant representation of such “unequal bi-
cameralism” is the attributing, by means of Article 95 para. 2 of the Constitution, of the control function solely to the Sejm, although opposing voices may also be encountered in the doctrine⁹.

On the other hand, pursuant to the Act on CBA, the assessment of the activity of the Bureau is entrusted not only to the Sejm, as is the case with the other secret services (ABW, AW, SKW and SWW), but also to the other chamber of the parliament (the Senate). Whether or not both chambers of the parliament have the same legal measures at their disposal to exercise the control of such governmental administrative bodies as CBA is a totally different story. If we treat the gathering of information about the activity of this service as the first stage of the scrutiny process, then this is certainly the case, because both chambers have a right to obtain information, and the obligations corresponding to this right are imposed on the head of CBA. The text of the provisions of Article 2 para. 1 point 6 and Article 12 para. 4 of the Act on CBA does not leave any doubts in this regard. If, on the other hand, we look at the discussed matter from the point of view of a possibility of both chambers to influence CBA, then, taking into account the system constraints, if only those concerning the parliamentary liability of the government, we should state that the role played by the Sejm in the process of control of CBA is definitely more significant. This applies to all secret services, but, in view of the Act on CBA, the meaning thereof is slightly different due to the fact that the provisions of the Act refer to both chambers of the parliament (Sejm and Senate) as beneficiaries of the information transferred by the head of CBA.

At this point we should note that the parliament — scrutinising the activity of CBA on the basis of the information transferred by the Head of CBA, in particular the information about the results of the activities of the Bureau — exercises the classic form of the control function of the parliament¹⁰. According to the provisions of the Act on CBA quoted above, the scope of control does not extend to specific plans of actions and undertakings of the Bureau. In this situation, this means that the scrutiny of the Sejm and Senate — carried out on the basis of an assessment (analysis) of the information provided by the head of CBA pursuant to Article 2 para. 1 point 6 and Article 12 para. 4 of the Act on the Central Anticorruption Bureau — is not of an initial character. In this context, we should note that the parliament, assessing the activity of
¹⁰ The essence of this function is expressed by the fact that “the parliamentary scrutiny should not be transformed into the management of all individual undertakings and steps taken by the government. This is the basic rule of classical parliamentarism, often expressed by the following statement: the parliament does not rule. Therefore, scrutiny is merely an examination and assessment of the actions taken by the government, but not of its plans”⁹. M. Sobolewski, Zasady demokracji burżuazyjnej i ich zastosowanie, Warszawa 1969, p. 169.
CBA, has in its possession only the information about past events connected with the activity thereof, and the source of such information is the Bureau itself.

What is characteristic of this type of control is the fact that it takes place after some time from the occurrence of the events which form the basis for the assessment; in the event of a report on the activity of CBA, submitted by the head of CBA to the parliament, such assessment is carried out only after a year. Another, equally important feature of such control is that the initiative concerning the commencement thereof does not depend on the parliament, but on CBA. According to the text of the relevant provisions (Article 2 para. 1 point 6, Article 12 para. 4 of the Act on Central Anticorruption Bureau), it is CBA that provides the parliament with information which forms the basis for the evaluation performed by the Sejm and Senate. Therefore, the commencement of the control process depends on a decision of the head of CBA regarding the submission to the parliament of information which forms the object of such control. Although, according to Article 12 para. 4, the head of CBA is obliged to present the information about the results of the activity of the Bureau on an annual basis and should fulfil this obligation by a final deadline of 31 March, nevertheless this does not change the fact that the commencement of the parliamentary scrutiny takes place, in fact, in consequence of certain actions of CBA.

This issue looks exactly the same if we analyse it on the basis of the other two competence acts: the Act on the Internal Security Agency and the Foreign Intelligence Agency, and the Act on the Military Counter-Intelligence Service and the Military Intelligence Service. The transfer of information to the Sejm — being the “competent organ” — regarding the effects of activities of the services functioning on the basis of those Acts, is possible only on the basis of a positive decision of the heads of those secret services. According to the adopted solutions, it is the heads of the secret services that take decisions what information and when will be transferred to the parliament. The aforementioned Acts neither stipulate an obligation to transfer certain types of information nor, even more so, do they indicate a deadline by which information materials illustrating the activities of the secret services are to be submitted to the parliament (the Sejm). All of those issues are not regulated by the Act on the Internal Security Agency and the Foreign Intelligence Agency, and by the Act on the Military Counter-Intelligence Service and the Military Intelligence Service. The legislator merely stated that the activity of the heads of secret services “is subject to the control of the Sejm”. What is more, in subsequent solutions contained in those two Acts, such general competence of the Sejm does not take the form of duties of the heads of secret services. Contrary to the Act on the Central Anticorruption Bureau, the provisions of those Acts do not impose upon the heads of, respectively: ABW, AW, SKW and SWW, an obligation to present the Sejm with annual reports on the activities of their subordinate secret services by 31 March each year. In view of the provisions of Article 7 para. 3 of the Act on the Internal Security Agency and the Foreign Intelligence Agency, such an obligation must be fulfilled by the heads of ABW and AW by 31 January every year, only in relation to the Prime Minister. According to Article 7 para. 3 of the
Act on the Military Counter-Intelligence Service and the Military Intelligence Service, the heads of military secret services are obliged to submit annual reports on the activities of SKW and SWW for the previous calendar year by 31 March, both to the Prime Minister and to the Minister of National Defence. Meanwhile, there is no mention in either of those Acts of the parliament as the addressee of collective information on the activities of the secret services. This means, in turn, that the parliament is deprived of an opportunity of assessment of reports illustrating the annual activity of ABW, AW, SKW and SWW.

Therefore, at the level of competence acts, there are no regulations concerning the substantive elements of the obligations of secret services in relation to the parliament. In view of this general conclusion, the Act on the Central Anticorruption Bureau constitutes a certain positive example. However, even the solutions adopted on the basis thereof do not solve the main issue, namely they may not constitute the legal grounds for all those obligations which CBA (despite the fact that there are no such grounds in the Act itself) fulfils in relations with the parliament. That is because apparently, both in the case of this secret service and in the case of the other secret services (ABW, AW, SKW and SWW), a number of obligations they have in relations with the parliament (the Sejm) does not derive from the competence acts, but from an act of a sub-statutory rank. To put it more precisely, detailed substantive aspects of such obligations are specified by means of the provisions contained in the attachment to the resolution of the Sejm of the Republic of Poland of 30 July 1992 — the Standing Orders of the Sejm of the Republic of Poland11. The text of that document refers to the objective scope of activity of individual Sejm committees, including, inter alia, the Sejm Secret Services Committee. It is incidentally to the listing of matters falling within the scope of activity of that Committee that certain obligations are imposed, even though only indirectly, upon the persons who are heads of such secret services. Point 2 of the attachment states, inter alia, that the Sejm Secret Services Committee is responsible for “giving an opinion regarding the directions of actions and consideration of annual reports of the heads of the secret services”, as well as evaluation of certain aspects of functioning of the secret services. Moreover, according to point 2 of the attachment, the scope of activity of the Committee also includes: “a review of information regarding particularly important events covered by the operations of the secret services, as well as evaluation of their “co-operation with other bodies, services and institutions authorized to carry out operational-investigation activities, the Armed Forces, state and local governmental bodies, prosecution authorities, services of other states”.

This way of specification of the areas of operation of the Committee means that the heads of the secret services are obliged to provide the Committee with certain documents concerning the effects of activities of the secret services, even if they are only the aforementioned annual reports. It is only on the basis of those materials that the Committee forms an image of the functioning of the secret services, and then compares its findings with the tasks imposed upon the services by the provisions of the

The starting point for the formulation of evaluation of the secret services, as performed by the Sejm Committee, is the regulations contained in the competence acts. It is another issue that the legal basis which actually provides for the Committee to perform such evaluation derives from an attachment to the Standing Orders of the Sejm, and not from the provisions of such Acts. As far as the aforementioned reports on the activities of the secret services for the previous calendar year are concerned, again only the Act on the Central Anticorruption Bureau constitutes a positive example. Article 12 para. 3 of that Act states that the head of CBA shall submit, by 31 March of each year, to the Sejm Secret Services Committee, a report on the activity for the previous calendar year. Thus, as far as this secret service, i.e. CBA, is concerned, the substantive aspect of certain obligations of the head of the service is specified in the competence act. In the case of the other secret services, the legal basis for this type of obligations of the heads of those services is constituted by point 2 of the attachment to the Standing Orders of the Sejm.

II. SCRUTINY WITHOUT SCRUTINY INSTRUMENTS

In the context of an analysis of the provisions of competence acts which form the basis for the functioning of secret services, one main conclusion comes to mind, namely that the parliament controls the activities of the heads of secret services on the basis of a general formula contained in the text of such acts, without any further specification of the rules according to which such control should be performed. There are no doubts whatsoever that a head of each such secret service should be a subject of such scrutiny. In the states which operate on the basis of a concept of a parliamentary-cabinet system of government (just like in Poland), this is an absolute requirement of a systemic nature. After all, in such a system, the government must enjoy the support of the parliament. What follows, is that the parliament should be able to influence the government, including the control of the activities thereof. At the same time, the idea is not merely to include a general principle in the Constitution or in competence acts that the parliament (Sejm) controls the government. It is about something more. The parliament must have at its disposal realistic measures (instruments) of control, particularly if such control is to be applied to secret services; i.e. the part of the governmental administration which is responsible for the state security, and whose activities are associated with a high degree of confidentiality.

In the case of secret services, a mere statement that the activities of the heads of such services are subject to the control of the Sejm is definitely an insufficient solution. The control competence of the parliament must be clearly and precisely specified. The best solution would be to specify in the competence acts the scope of the control competence of the parliament and the corresponding obligations of the heads of services. Only then would the notion of scrutiny of the secret services gain a more specific shape. Unfortunately, and this must be emphasized straight away, this is not the case on the grounds of the binding solutions. The text of the competence acts merely contains a simple reference to Article 92 para. 2 of the Constitution, according to
which the Sejm exercises the control over the activities of the Council of Ministers (and therefore over its subordinate agencies as well). It is only the Act on the Central Anticorruption Bureau that specifies solutions which go a little further. It described certain obligations of the head of CBA in relations with the parliament, including the Sejm Secret Services Committee. However, no rules and procedures are specified for the parliament to follow in order to exercise its control function. This means that the Act does not stipulate any control measures or any procedures of such control.

As a matter of fact, the same applies — with no exceptions — to all the competence acts. And this is where the fundamental problem arises. That is because there may be no control without the legally-stipulated measures of such control, i.e. without statutory specification of a general rule. The fact that the competence acts contain a provision corresponding to the provision of Article 95 para. 2 of the Constitution is only symbolic. It merely reminds us of something which is already regulated anyway, and, what is more, regulated by the provisions of a constitutional rank. However, nothing more derives from that provision than the fact that the parliamentary control of the activities of the heads of secret services is one of the forms of control which the Sejm exercises in relations with the government and its agencies. Meanwhile, parliamentary scrutiny of the secret services should settle two key issues. On the one hand, the parliament should be able to perform an on-going evaluation of the activities of the secret services, and on the other hand, it should be able to take disciplinary actions against members of the government supervising such services. The achievement of both of those objectives by the parliament is possible only through the application of appropriate measures (instruments) of control. Specific forms of such measures should be regulated in competence acts. If no such solutions are available, the parliament is unable to realistically control the secret services, not to mention any correction of their activities. The worst aspect of this sad conclusion is that it has prevailed in the Polish conditions for the past 20 years. There are a few reasons for this state of affairs, but essentially they come down to two fundamental reasons.

1. “Sacred secret”

Parliamentary scrutiny, just like any other type of scrutiny, requires access to information. At first glance it seems that the Sejm’s access to the knowledge about the activities of the secret services is secured. The Sejm Secret Services Committee, which is a specialized body of the Sejm control of the secret services, has a right to demand information. This is regulated by the attachment to the Rules of Procedure of the Sejm of the Republic of Poland, which specifies an objective scope of operation of the Sejm committees. According to point 2 of that attachment, the Sejm Secret Services Committee is entitled to “review the information of the secret services regarding events occurring within the scope of their activities which are of particular impor-

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12 Cf. Article 2 para. 1 point 6, Article 12 para. 3 and 4 of the Act on the Central Anticorruption Bureau.

13 Attachment to the resolution of the Sejm of the Republic of Poland of 30 July 1992, the Standing Orders of the Sejm of the Republic of Poland, Monitor Polski of 2009, No. 5, item 47.
tance, including the information concerning suspicions of occurrence of any irregularities in the functioning of the secret services and suspected violations of law by those services”, as well as to “review any complaints concerning the activities of the secret services”. What is important, the Committee may demand, while exercising this authority, detailed information regarding a given matter, even if it concerns the operational work of the services and constitutes a state secret. But this is not all. The Committee is also entitled to request that its meetings are participated in by members of the authorities of the secret services. This obligation extends both to participation in meetings of the heads of secret services, and to the provision by them to the members of the Committee of information and explanations, as well as presentation of reports14. Therefore, everything seems to be precisely regulated.

However, a problem arises when we look at the same issue from the point of view of the solutions binding on the grounds of the competence acts. The confrontation of their contents with the regulation contained in the attachment to the Standing Orders of the Sejm of the Republic of Poland is to the benefit of the competence acts. That is because parliamentary scrutiny should be anchored in statutory provisions, but such “anchoring” does not mean a mere repetition of the general rule that the heads of the secret services are subject to the control of the Sejm. That is because Article 95 para. 2 of the Constitution states that “the Sejm shall exercise control over the activities of the Council of Ministers within the scope specified by the provisions of the Constitution and statutes.” This means that the Standing Orders of the Sejm of the Republic of Poland (and therefore also an attachment thereto) may only specify the manner of performance of the obligations of the heads of secret services in relations with the Sejm (the Sejm Committee). This derives clearly from the so-called constitutional clause providing for “legal restrictions on the establishment by the Sejm of intrinsic control competence and procedures by way of rules of procedure or separate resolutions”15. What follows from that is that the substantive aspect of the obligations of the heads of secret services should be regulated in competence acts. And this is what it is like to some extent. A worse aspect is such that the current text of the competence acts definitely restricts the access of the Sejm Special Services Committee to information about the activities of secret services. Firstly, by legally-decreed discretion of the heads of secret services with regard to granting access to information illustrating the operational activities of secret services. Secondly, by legal prohibition of disclosure of “sensitive” information outside the structures of secret services. We are talking about similar solutions adopted by the provisions of competence acts, i.e. Article 39 of the Act on the Internal Security Agency and the Foreign Intelligence Agency, Article 28 of the Act in the Central Anticorruption Bureau and Article 43 of the Act on the Military Counter-Intelligence Service and the Military Intelligence Service.

14 Article 153 para. 1 of the Standing Orders of the Sejm of the Republic of Poland.
On the basis of those solutions, decisions regarding the granting access to classified information to external entities, which also include the Sejm Committee, are taken autonomously by the heads of secret services. This is different than in the case of the Police and the Border Guards, where this type of decisions are taken by a “civil” minister of the interior and administration responsible for the supervision of the operations of those services. According to the text of the competence acts, it is clear that the heads of secret services have a right to refuse to provide classified information (including refusal to grant access to documents), even if a demand in this regard is submitted to them by a Sejm Committee. Naturally, we may claim that sufficient grounds for the Committee to obtain access to information are constituted by those provisions of the competence acts which state that the activities of the heads of secret services are subject to the control of the Sejm. However, it is difficult to draw a conclusion from the mere statement: “is subject to control of the Sejm” that the Sejm Secret Services Committee is entitled to demand any information (materials) from the heads of secret services. In a state of law, the competence of public authority organs, in this case of a Sejm Committee, may not be implied. This means that the scope of rights vested in the Committee, including the rights to obtain information, is limited by the discretion of the heads of secret services who rely on the “sacred secret”.

### 2. Heads of the services beyond the criticism of the Sejm

In addition to the obtainment of information about the activities of the government of the subordinate administration, parliamentary scrutiny is also aimed at effecting a positive impact on such activity. After all, it serves not only the purpose of gathering information necessary to exercise the legislative function (the Sejm), but is also aimed at providing possibilities of enforcement of political liability of the government and its members. And this is where the second function of parliamentary scrutiny comes to play, even though its value for the secret services themselves is only indirect. That is because the enforcement of political (parliamentary) liability of the heads of secret services is beyond the competence of the Sejm. The heads of secret services do not form a part of the Council of Ministers, and therefore they are not subject to the mechanisms of parliamentary liability. At least this is the logic of the system solutions binding in this regard. But even this logic, after deeper consideration, is subject to certain modifications. That is because the Sejm may enforce liability from those members of the Council of Ministers to whom the heads of secret services report. In the event of civil secret services (ABW, AW, CBA) this is the Prime Minister, and in the event of military secret services (SKW and SWW) this is the Minister of National Defence. They are the persons supervising the activities of such services and their heads, and, therefore, they bear responsibility for them before the Sejm. If a minister was appointed as a member of the government, who would serve the function of a co-ordinator of secret services, the issue of parliamentary liability could also apply to him.

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16 Cf. Article 9 of the Act of 21 June 1996 on Certain Rights of Employees of the Office Serving the Minister Responsible for the Interior and of Officials and Employees of Offices Supervised by that Minister, Dziennik Ustaw of 1996, No. 106, item 491, as amended.

17 Article 158 and Article 159 of the Constitution.
Meanwhile, anything that concerns the mechanism of such liability is fairly simple. The parliament evaluates matters falling within the competence of the whole Council of Ministers and its individual members. The scope of such matters encompasses also supervision of the heads of secret services subordinate to members of the government. If the parliament negatively evaluates the actions undertaken by secret services, this may lead to dismissal of a member of the government supervising their activities or to dismissal of the whole Council of Ministers. It is enough that a majority of the Sejm adopts a vote of no confidence against them. Even though this would not be easy to carry out, from the point of view of system solutions, this would be feasible. The difficulty lies in the fact that the majority of the Sejm which could carry this out is (in principle) the same majority which supports the government on a daily basis. What is more, an attempt of adoption of a vote of no confidence against the Prime Minister would entail a necessity of election of a new Prime Minister\(^{18}\), and this complicates matters even more. That is because it is not every day that this type of political re-orientation takes place in the Sejm which forms a new majority capable of dismissal of the current cabinet and election of a new government.

However, even then a change in the positions of the heads of secret services is not automatic. An effective action of the majority of the Sejm leading to resignation of the whole government or “dismissal” of the minister supervising the work of the secret services does not guarantee such changes. That is because the final decision in such matter is beyond the competence of the Sejm anyway. Formally, this is due to two main reasons. Firstly, because the heads of secret services do not form a part of the Council of Ministers. That is why changes in the government do not need to entail a change in the positions of the heads of secret services, if such a decision is taken by the head of a new cabinet, who — being the Prime Minister — is responsible for appointment of the heads of secret services. Secondly, the heads of secret services do not form a group of governmental positions, as referred to in Article 38 of the Act of 8 August 1996 on the Council of Ministers\(^{19}\). According to that provision, only Secretaries and Under-Secretaries of State, as well as Heads and Deputy Heads of Provinces submit resignations in the event of acceptance of resignation of the government by the President of the Republic of Poland, and the acceptance of such resignation is at the discretion of a new prime minister within three months of the date of appointment of a new Council of Ministers. Meanwhile, the same duty is not imposed on the heads of secret services, which is a simple consequence of the fact that their positions are not at the rank of Secretaries or Under-Secretaries of State. In the case of the head of CBA, an additional obstacle on the way of an “automatic” change in that position is the principle of rotation in office. The head of CBA is a body appointed by the Prime Minister for a term of 4 years. Moreover, the Prime Minister may take a decision on dismissal of the head of CBA and the shortening of his term of office only in certain specified circumstances\(^{20}\). A catalogue of such cir-

\(^{18}\) Article 158 para. 1 of the Constitution.

\(^{19}\) Dziennik Ustaw of 2003, No. 24, item 199.

\(^{20}\) Cf. Article 8 of the Act on the Central Anticorruption Bureau.
cumstances is closed, and, what is important, it does not anticipate a situation of dismiss-
al of the head of CBA due to a negative evaluation of the functioning of the Bureau by
the parliament. The same applies to the situation where a negative evaluation of the ac-
tivities of CBA is the only reason for the use by the Sejm of a vote of no confidence
against the government. Therefore, a negative evaluation of secret services by the par-
liament and, in effect, a change of the cabinet, is not a sufficient reason for personal ro-
tation in the positions of the heads of secret services.

III. CONCLUSION. DE LEGE FERENDA POSTULATES

The actual parliamentary scrutiny of secret services is practically infeasible in view
of the currently-binding legal solutions. That is because there is an iron law of an om-
nipotent secret. In consequence, the granting of access to information about the opera-
tional work of secret services is significantly restricted, even if demanded by the Sejm
Secret Service Committee. Meanwhile, the Committee, without having any knowledge
about that aspect of the functioning of secret services, and therefore the Sejm, may not
exercise its control function. The Sejm, deprived of the possibility of establishing a pic-
ture of the functioning of the services is, in fact, “deaf and blind”. It is the heads of serv-
ces who decide what information (materials) are disclosed to the Sejm and the Sejm
Committee. Depending on needs and the adopted tactics they either flood the Commit-
tee with irrelevant details of official statistics or they remain silent, hiding behind a ne-
cessity of protection of sources of information or methods of operational work.

Contrary to certain expectations and stipulations, this situation was not changed
by the amendment to the Code of Penal Procedure and other Acts (paper No. 2915,
Sixth Term Sejm) and it will not be changed by an adoption (if it ever occurs) of an
Act on Operational-Investigation Activities (paper No. 353, Sixth Term Sejm). That is
because neither of the above solutions encompasses any proposal which would bring
about actual changes in the scope of disclosure of classified information outside the
structures of secret services. An exception is constituted by the number of operation-
al controls (surveillance) applied by the services in a given calendar year, which is also
treated as a symbol of departure from the secrecy of activities of secret services. In
fact, what could constitute a step in the right direction was rejected by the ruling ma-
jority; and that was done in contradiction with the analyses of Sejm experts21 and the
jurisprudence of the Constitutional Tribunal22. No decision was taken to follow the ex-

21 Cf. A. Sakowicz, legal opinion of 17 May 2010, Biuro Analiz Sejmowych Kancelarii Sejm

22 The Constitutional Tribunal [TK], while evaluating in the justification of its judgment of 12 Decem-
ber 2005 (Ref. No. K 32/04) of the essence of operational activities, indicated that the confidentiality there-
of means that the person subjected to such surveillance is unable to commence any procedures and guaran-
tees the use whereof depends on his/her knowledge and initiative. TK emphasized that secret surveillance
activities of the prosecution bodies, regulated by legislative acts, are in a natural, insoluble conflict with
a right of an individual to privacy, freedom and secret of communication, protection of information autono-
my, constitutional guarantee of court protection of the rights of an individual; OTK ZU 2005, series A,
No. 11, item 132.
ample of other democratic states to propose a solution whereby, upon discontinuance of surveillance activities, the services would inform the person subjected thereto of such fact, provided that no procedural activities were conducted against such person.

In this situation, a postulate of making parliamentary scrutiny of the activities of the secret services more realistic is still valid. It is much more important to specify precisely the mutual relations between the Sejm Secret Services Committee and the heads of secret services than to repeat constitutional regulations in competence acts that the activities of the head of secret services is subject to control of the Sejm. Such issues as: the substantive aspect of the obligations of the heads of secret services in relations with the Committee as well as the procedure of granting access to information gathered by secret services should be regulated as soon as possible by competence acts. And we are not talking about turning upside down anything in such acts which now works properly. We are more concerned with the establishment of a clear legislative framework which would form the precise basis for the operation of both the Sejm Committee and the heads of secret services.

Competence acts, or possibly one of those acts, seem to be the best place for regulation of those highly important issues. At the same time, we should emphasise that a sufficient legislative effort would be to extend the existing provisions of competence acts in the direction of specification of clear rules of co-operation between the heads of secret services and the Sejm Secret Services Committee. At this point, a certain analogy comes to mind with a solution adopted with regard to regulation of the legal position of the Collegium for Secret Services. The place and role of this organ in the system of management of secret services are specified by the Act on the Internal Security Agency and the Foreign Intelligence Agency, i.e. by means of provisions of a competence act; and that was done without a necessity of repeating the same provisions in other acts forming the basis for the functioning of secret services. In the case under discussion, this may not be a straightforward analogy, because the Collegium is an organ functioning within the structures of the government, i.e. within the structures of an executive authority. However, we are trying to show a direction in which possible solutions should go, which could bring about desirable changes in the current state of affairs. An amendment to the competence act (acts) should settle one key issue, namely equip the Sejm Secret Service Committee with a right to review materials illustrating each aspect of the activity of secret services. Otherwise, instead of actual control, we will deal merely with a game of pretences.

An example of a proper settlement of an issue which constitutes the object of the present considerations is the Act on Slovak Intelligence Service [hereinafter: SIS]

23 An illustration of this state of affairs may be constituted by a situation described in an article of E. Żemła, *Fikcyjny nadzór nad służbami?*, “Rzeczpospolita”, 6 July 2009, No. 156, when the heads of secret services refused to grant access to the Sejm Secret Services Committee to a material concerning the actions undertaken by the secret services in connection with disappearance of a warrant officer of the Military Intelligence Service, S. Zielonka.

24 Zakon Narodnej Rady Slovenskej Republiky z 21 januara 1993 o Slovenskej informacnej službe (V znení zakona c. 72/1995 Z. z.).
§ 5 and § 6 of that Act specifies the rules which must be followed by the Slovak parliament (the National Council) in the process of control of the activities of the secret services. What is important here is that those provisions mention the rights of the SIS Control Committee, which is responsible for the control of secret services on behalf of the Slovak parliament. Such rights include, *inter alia*, a right of members of the Committee to enter the sites which are at the disposal of secret services and a right to demand materials illustrating their activities. The scope of legal competence of operation of the SIS Control Committee is, in a sense, complemented by the scope of duties of the Director of SIS. According to §5 section 3 of the Slovak Act, the Director of SIS is obliged to provide the Committee with: the acts regulating the detailed structure and the principles of functioning of the records kept at SIS, as well as reports concerning the effects of SIS’s activities. The Committee notifies the parliament and the General Prosecutor of Slovakia of any identified cases of violations of law by SIS in the course of its activity.

The illusory nature of parliamentary scrutiny in the Polish conditions is not only an effect of the fact that appropriate regulations are missing in the texts of competence acts with regard to the rules of such scrutiny. To a significant extent, this is also a consequence of pretended political neutrality and concealed party affiliation of the heads of secret services. Meanwhile, their actual position within the ruling hierarchy is similar to that of members of the government. It is not without a reason that they are referred to — even during official events and in official correspondence — as ministers. However, this does not translate at all to normative solutions concerning their position under constitutional law. Still the only attempt at changing this situation — taken in 2002 — failed. At that time, the Act on the Internal Security Agency and the Foreign Intelligence Agency was found unconstitutional by the Constitutional Tribunal to the extent in which it granted the heads of secret services the rank of Secretaries of State25. There was lack of system thinking. However, instead of appointing a new category of Secretaries of State, it was enough to enter the positions of heads of ABW and AW into the directory of government positions, as specified in Article 38 of the Act on the Council of Ministers. But this did not happen and the issue was never discussed again during subsequent re-organization of secret services.

Meanwhile, this proposal is worthy of consideration, and there is one important reason for this. It provides a systemic solution of the problem of political neutrality and party affiliation of heads of these services, at the same time making it possible for the government to fulfil its constitutional obligations. That is because, if the Council of Ministers is responsible for the external and internal security of the state and public order26, it must have instruments at its disposal which would serve the performance of such task. The role of such instruments (measures) is served, *inter alia*, by secret services. In turn, this means that the government (Prime Minister) must have a legal possibility of influencing the appointment of persons to serve the positions of the

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26 Article 146 para. 4 items 7 and 8 of the Constitution.
heads of such services. Unless we take a decision that we change the legal status of secret services by incorporating them in the category of offices which are subject to the same regime as the civil service. The consequence would be that the heads of such secret services would be politically-neutral civil servants, having no party affiliation, who would be elected in a competition. This is an idea worthy of consideration, however it gives rise to one basic problem. A serious concern arises that a collision between the openness and unclassified nature of information, which is strictly connected with the functioning and recruitment to the civil service, with the secrecy of activities of secret services would not work in practice. It is difficult to imagine that open competitions were announced for positions of the heads of services, or maybe even officials (employees) of such services, and descriptions of such positions and requirements imposed upon candidates were published in a public information bulletin. Due to the above reasons, we must retain the current solutions, but dispose of a certain kind of “schizophrenia” accompanying them.

To put things briefly, we are talking about political neutrality and no party affiliation of the heads of secret services to be decreed by competence acts. According to this solution, the heads of services are “politically-neutral professionals” on a daily basis, who, in their activities, follow only the interest of the state. Provided, however, that such politically-neutral professionals may be dismissed from their positions at any time by the Prime Minister or a relevant minister. It is sufficient for such minister to conclude that such persons have lost their predispositions to perform the functions entrusted in them27. Even the principle of rotation in office applicable to the heads of secret services does not form a guarantee preventing the Prime Minister (minister) from their dismissal. If, in the opinion of the Prime Minister (minister), the head of a secret service no longer has the asset of “impeccable citizen’s or patriotic attitude”, which he should have according to the competence acts, he may be dismissed before the lapse of the term of his office28. Even more, this will be in a sense a duty of the Prime Minister supervising the activities of the heads of secret services. As a supervisory organ, the Prime Minister may not tolerate a situation in which the head of a secret service fails to meet one of the statutory conditions to continue serving his function.

This ridiculous state of affairs, where politically-inconvenient heads of services may be dismissed by the Prime Minister at any time, should be changed, if we were to treat seriously the provisions of the competence acts, in view whereof the heads of secret services may not be guided by political reasons in their activities. More so, when this type of motivation of the heads of secret services is a consequence of pressure put

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27 This is one of the reasons of dismissal of the head of the secret service from his position, as listed in the Acts on the Internal Security Agency and the Foreign Intelligence Agency (Article 16 item 4) and on the Military Counter-Intelligence Service and the Military Intelligence Service (Article 17 item 4).

28 Meanwhile, the Act on the Central Anticorruption Bureau refers to, in the catalogue of cases of dismissal of the head from his function, his failure to demonstrate impeccable moral, citizen’s and patriotic attitude (Article 8 item 2). It is this reason that Prime Minister D. Tusk relied on when he dismissed M. Kamiński from the function of the Head of CBA in October 2009, despite the principle of rotation in office applicable to this position.
on them by the Prime Minister or minister. It is obvious that a line between the supervision of secret services and the use by members of the government of such services for political reasons is thin. It is certainly so if we classify the positions of the heads of secret services as governmental positions, as referred to in Article 38 of the Act on the Council of Ministers. In this way it will become clear that the heads of services form a group of closest collaborators of the Prime Minister or a relevant minister, and the time scope of their functioning within the governmental administration is limited by the time of resignation (dismissal) of the cabinet. At the same time, there is no concern about the continuity and stability of the operations of secret services, because the acceptance or non-acceptance of their resignation is decided by the Prime Minister within 3 months29.

29 Article 38 second sentence of the Act on the Council of Ministers.
PUBLIC HEARING IN POLAND.
AN ANALYSIS OF NORMATIVE SOLUTIONS
AND THE PRACTICE OF THEIR APPLICATION

ABSTRACT

Public Hearing, as part of the legislative process, has been introduced into Polish law in 2005. The author criticizes the approach of the lawmaker to this instrument in the Lobbying Act, and also how it is regulated in detail. She proposes several solutions aimed at its improvement, so that it may serve as a real tool for social participation in the law-making process.

Public hearing has been introduced as a special form lobbying, however the class of persons entitled to take part therein has been specified widely to include any interested person. Lobbyists benefit from it only occasionally, preferring other instruments of influencing the content of normative solutions.

The hearing may take place with respect to statutes and regulations. The decision whether to initiate it is optional and may be taken by a parliamentary committee examining the bill, and to the relevant ministry. The Act and the rules of procedure of Sejm specify in detail the formal procedure for notifying interested parties, as well as the requirements that must be met to attend the hearing and its course. The law does not provide for the legislature to take into account information obtained during the hearing. Based on the above provisions, 18 hearings have been so far held in Poland in relation to bills and two hearings in relation to regulations.


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The institution of public hearing was introduced to the latter of the above acts in the form of chapter 1a by Resolution of the Sejm of 24 February 2006 regarding an amendment to the Standing Orders of the Sejm of the Republic of Poland (Monitor Polski, No. 15, item 194). Detailed regulations discharging the statutory delegation are contained in Regulations of the Council of Ministers of: 7 February 2006 on public hearing regarding draft regulations (Dziennik Ustaw, No. 30, item 207) and 22 August 2011 on expressing an interest in work on draft normative acts and draft legislative guidelines (Dziennik Ustaw, No. 181, item 1080).

Due to a short period of time which has lapsed since the aforementioned provisions came into force, it is difficult to formulate general evaluation regarding the effectiveness of the public hearing institution. It is a tool which is very rarely used in parliamentary practice, and it is almost never used in ministerial work. Since 7 March 2006, i.e. since the time of coming into force of the provisions on public hearing, to the time of completion of the Sixth Term Sejm, Sejm committees conducted 18 hearings in matters concerning draft statutes (the number of bills passed since the beginning of the Sixth Term Sejm).

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1 It replaced Regulation of the Council of Ministers of 24 January 2006 on notifying an interest in work on draft normative acts, Dziennik Ustaw [Journal of Laws], No. 34, item 236.

2 The list of hearings held at the Sejm, including the specification of dates, the committee organizing the hearing and the subject of the hearing: 22 August 2006, the Education, Science and Youth Committee, regarding a governmental bill on the National Education Institute (print No. 650); 28 September 2006, the Justice and Human Rights Committee, regarding a bill presented by the President of the Republic of Poland regarding an amendment to the bill on the National Council of the Judiciary and on amendment to certain other statutes (print No. 713); 13 March 2007, the Economic Committee and the Local Self-Government and Regional Policy Committee, regarding Deputies’ bills on amendments to the statute on the principles of discharging the development policy (prints Nos. 1290, 1291 and 1292); 17 April 2007, the Culture and Media Committee, regarding a governmental bill on an amendment to the Act on Copyrights and Neighbouring Rights, including a draft of the executive act (print No. 1489); 23 August 2007, the Economic Committee and the State Treasury Committee, regarding a governmental bill on rules of free-of-charge acquisition from the State Treasury of stocks by authorized employees in the process of consolidation of companies of the power sector, rules of exchange of their stocks and an amendment to the Act on Income Tax from Natural Persons (print No. 1750); 4 September 2007, the Social Policy Committee, regarding a governmental bill on an amendment to the Act on Public Utility Activity and Volunteer Organizations, as well as Certain Other Statutes (print No. 1810); 9 July 2008, the Justice and Human Rights Committee regarding a bill presented by the President of the Republic of Poland on an amendment to the Act on Personal Data Protection (print No. 488); 27 May 2008, the Education, Science and Youth Committee and Social Policy and Family Policy, regarding Deputies’ bill on an amendment to the Act on Ombudsman for Children’s Rights (print No. 434); 2 December 2008, the Economic Committee and Social Policy and Family Committee, regarding the Committee’s bill on an amendment to the Act on Social Co-operatives and Certain Other Statutes (print No. nr 1136); 31 March 2009, the Social Policy and Family Committee, regarding a governmental bill on an amendment to the Act on Combating Domestic Violence and Certain Other Statutes (print No. 1698); 21 April 2009, the Social Policy and Family Committee, regarding a governmental bill on an amendment to the Act on Public Utility Activity and Volunteer Organizations and Certain Other Statutes (print No. 1727); 18 June 2009, the National Defence Committee and Social Policy and Family Committee, regarding a bill presented by the President of the Republic of Poland on Veterans of Struggle for Independence of the Republic of Poland (print No. 1367); 9 February 2010, the Environmental Protection, Natural Resources and Forestry and the Agriculture and Rural Development Committee, regarding a governmental bill — the Law on Genetically Modified Organisms (print No. 2547); 6 July 2010, the Culture and Media Committee, regarding a Deputies’ bill on an amendment to the Act on Radio Broadcasting and Television and the Act on Subscribers’ Fees (print No. 3139); 19 October 2010, the Social Policy and Family Committee and the Local Self-Government
ning of 2006 amounts to 1315), whereas ministries noted 2 public hearings with regard to regulations. The concept of public hearing, soon after its introduction in the system of Polish law, was dealt with by the Constitutional Tribunal, which, in its judgement of 3 November 2006 (Ref. No. K 31/06), expressed its opinion regarding the importance thereof. A few years of application of the institution of public hearing have shown many shortcomings encountered in the Polish regulation of that institution. A significant number of those could have been avoided already at the stage of development of the relevant regulations, whereas others could only be verified in practice. This article is devoted to a critical analysis of the institution of public hearing in Poland. Its underlying principle is a detailed discussion, often in a comparative legal context, of the provisions regulating the principles and procedure of the conduct of the hearing, including an indication of weak points thereof, as well as formulation of de lege ferenda postulates. A properly-understood and well-regulated institution of the public hearing could serve as an important tool contributing to democratization of the process of taking law-making decisions. Without an introduction of appropriate amendments to the relevant provisions, it will only be a substitute for an instrument which successfully operates in other states. The parliamentary practice shows one more danger consisting of the use of this instrument for its ad hoc political games, and this aspect will also be discussed further.

In the literature of the matter, we may encounter two ways of reasoning as far as the roots of the discussed institution are concerned. Firstly, a reference is made to ancient Athens. As we know, the process of decision-making by National Assemblies constituting the supreme authority is governed by the idea of direct democracy. This idea was expressed by the fact that a right of share in Ecclesia was conferred upon each citizen who had full rights, after reaching the age of 20. In the opinion of other...

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3 On 25 February 2011, at the Ministry of Economy, regarding a draft regulation of the Minister of Economy amending the regulation of 21 November 2005 regarding technical conditions which should be met by liquid fuel bases and stations, long-distance pipelines used to transport oil and oil products, as well as location thereof; 5 July 2011, at the Ministry of the Interior and Administration regarding a draft regulation of the Council of Ministers on clearance of sites from explosives and dangerous materials (a hearing combined with a consensus conference). I do not take into account here the “hearing”, as referred to by the Ministry of Environmental Protection in its website. According to the information from the Ministry of Environmental Protection, on 30 July 2007, “a public hearing was held of entities interested in wok on a bill on instruments facilitating reduction of emission of greenhouse gases and other substances to the air - Sejm print 1791”, and that is because according to Article 9 para. 1 of the Lobbying Act, which the Ministry of Environmental Protection refers to, hearings may be held at Ministries only with regard to regulations.

ers, it is more appropriate to derive the institution of a public hearing from the development of democracy in the United States in the 19th century or from the English House of Commons from the middle of 17th century. The discussed institution has the longest history in the states of Anglo-Saxon legal systems — in addition to the states listed above, also in Canada and Australia. However, what is interesting is that in Anglo-Saxon states, public hearing is not conducted on the basis of detailed provisions, but takes place within the right inherent to the parliament of calling people and questioning them in connection with the work on a certain bill for the purpose of presenting them with its own reasoning and hearing their opinions.

If we assume that in a democratic system everyone has an actual right to present his/her own views regarding a given subject matter to other members of the society, then we can perceive the institution of a public hearing as a phenomenon natural for that system. A review of various solutions applied in different states regarding methods of citizens’ participation in the law-making process leads to the conclusion that we deal with a high diversity of forms, characterized by many similarities, but also always having a number of distinctive features. Even though the public hearing has the longest history in the Anglo-Saxon legal system, it may also be encountered in certain other states of continental Europe. In each of those states we may also encounter similar institutions, in particular various consultation procedures which serve comparable functions and which are similar, in their essence, to the public hearing.

The institution of public hearing is most commonly applied in Anglo-Saxon states. A characteristic feature of this solution in this regard in the United States or the United Kingdom is a significant variety of forms of public opinion hearing, with simultaneous lack of any precise principles and procedures which would be formalized in normative acts and which would indicate the method of organization of such public hearing, and, therefore, which could, at the same time, constitute an example or at least a source of information for the introduction of the institution concerned in the other legal systems. It is probably due to the above reasons that the Polish regulation is based on German solutions. As far as the United States are concerned, at the central level, the right to conduct public hearings and the so-called investigative hearings is vested in all the standing committees of the Congress, and, what is more, in connection with the openness of the sessions of such committees, they are usually open to the public. At a local level, they are regularly organized by State Congresses, but also by various offices or authorities who hold legislative competence. The American literature distinguishes two basic types of hearings, investigative hearings

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7 Information about it should not be sought merely in the text of normative acts (statutes or even Standing Orders of the parliament), but rather on the websites of the parliaments and other public organs, in stenographs from hearings organized ad hoc or in announcements of scheduled hearings.
and quasi-judicial hearings\(^8\), and the First or, respectively, Fourteenth Amendment to the Constitution of the USA are quoted as the general legal basis thereof. The purpose of the former type of hearing is for the authorities to obtain an opinion of a certain community regarding anticipated legislative decisions. There is not a regular procedure for the conduct of this type of hearings, because they are of a non-formalized nature and — in principle — they are facultative. Quasi-judicial hearings are not so common, and their normal purpose is for the authority to take a decision concerning rights and duties of particular entities.

Public hearings or *public inquiries* in the United Kingdom are organized by parliamentary committees, in particular committees appointed to discharge oversight of ministries and by Ministers of the Crown. The former is characterized by non-formalized character, because there are no normative acts regulating its principles and course\(^9\). The latter is regulated by the Inquiries Act of 2005 and the relevant executive acts\(^{10}\). The public hearing in a non-formalized form is also known in Australia. It was a widely-used tool in 1970s by the Parliamentary Committee for the Australian Law Reform\(^{11}\). In the Federal Republic of Germany, a public opinion hearing is held by Bundestag committees (*öffentliche Anhörung*) and at a local level, by parliaments of certain federal states. Hearings are held on the basis of a procedure specified in detail in the Standing Orders of the parliament\(^{12}\). A similar instrument (*Anhörung*), which does not, however, have a public scope, is used by the federal administration, based on common Standing Orders of federal ministries or based on special statutes\(^{13}\). The public hearing also operates at the level of the European Union, where it is applied as the so-called *hearing* by the European Commission and the European Parliament which invite representatives of interest groups for the purpose of


\(^{10}\) We refer to the *Inquiries Act* 2005 and to the *Inquiries Rules* 2006.


\(^{12}\) At the central level, the Standing Orders of Bundestag are in force, version of 2 July 1980 (*Geschäftsordnung des Deutschen Bundestages*).


\(^{14}\) The Treaty of Lisbon introduced Title II to the Treaty on European Union, entitled “Provisions on Democratic Principles”. It made the principle of the equality of citizens the basis for the functioning of the EU, stating, *inter alia*, that “Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen” (Article 10 para. 3), as well as “The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action” (Article 11 para. 1) and “The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society” (Article 11 para. 2).
of presentation of their opinions regarding a given bill\textsuperscript{14}. An example of the state where an attempt aimed at a formal introduction of the discussed institution in the legal system of the state was unsuccessful is Sweden. Sweden applies an institution similar to public hearing, namely \textit{presentation to the public}, which consists in the transfer of a bill to various public and private institutions during the first stage of the legislative work, for the purpose of voicing any comments they may have thereon\textsuperscript{15}.

An analysis of Sejm bulletins documenting the course of work conducted on the draft lobbying act leads to the conclusion that an introduction of the discussed institution in the Polish legal system was characterized by a certain degree of randomness and lack of consensus or even lack of knowledge regarding the properties and functions thereof\textsuperscript{16}. However, since the time of occurrence, in the course of the work of the Extraordinary Committee for consideration of a governmental draft lobbying act [hereinafter: the Extraordinary Committee], of an idea of incorporation of the public hearing in this draft, the Deputies joined efforts in their mutual conviction that this is what should be done. The plenipotentiary of the Government was the only person disapproving the idea. We should point out that the original version of the draft of the discussed act did not anticipate the institution of public hearing. An incorporation thereof in the governmental draft was possible thanks to a shift in the focus of the work of the Extraordinary Committee from the professional aspect of the lobbying activity in the direction of transparency of legislative procedures\textsuperscript{17}.

If we talk about the proper genesis of the institution of public hearing in our country, we should point out to two phenomena. The initiator of an introduction of the public hearing in parliamentary procedures (i.e. only with regard to statutes) was the Sobieski Institute, which applied to the Marshal and Vice Marshals of the Sejm with a petition signed by eleven Polish non-governmental organizations and a self-prepared draft anticipating appropriate changes in the Standing Orders of the Sejm (\textit{regulamin Sejmu, rS}, [hereinafter: \textit{rS}])\textsuperscript{18}. The initiative of the Institute was acted upon by Deputies, but the final shape of the regulation departs, in many detailed points, from the solutions postulated by the applicant\textsuperscript{19}. Namely, the signatories of the petition wanted to maintain a narrow definition of lobbying, i.e. the exclusion of public hearing from the regime of the Lobbying Act. An important event, preceding the legal regulation of the discussed institution, was an application in the procedure of introduction of amendments to the Act of 29 July 2005 on Counteracting Drug Addiction\textsuperscript{20}, of the so-called “public opinion hearing”, which was conducted on 9 Feb-

\textsuperscript{15} We should, however, be aware that in 2004–2005, there were no in-depth studies about this in the literature.
\textsuperscript{16} We should note that the characteristic element of Polish discussions of a need of regulation of lobbying is that the main emphasis is placed on a necessity of prevention of the use thereof for corruption purposes.
\textsuperscript{17} This occurred on 18 April 2005.
\textsuperscript{19} \textit{Dziennik Ustaw}, No. 179, item 1485.
ruary 2005 by the Ministry of Health on the basis of a self-developed set of rules. This novel — as of those times — undertaking revealed significant divisions of public opinion in the consulted matter, providing a reliable material for analysis for the purpose of the following parliamentary work on the draft. In the literature, a good organization of the hearing was commonly emphasized, and the participants therein were convinced that the hearing was necessary.

The consideration of the legal regulation of the public hearing in Poland should start with an analysis of the fact of placement of this institution in the Lobbying Act and evaluation of the justification of such step. That is because this issue is of key importance from the point of view of a reply to the question how a Polish lawmaker defines this institution, what role is assigns to it and how its objectives are perceived. According to the stenographs of the sessions of the Extraordinary Committee and in view of the randomness, lack of consensus or even lack of knowledge of members thereof regarding features and functions of that institution which they reveal, the finding of a univocal answer to a posed question may seem difficult. According to the presumed rationality of lawmaker, we should assume that the Polish lawmaker — taking a vote on 7 July 2005 in favor of the draft — intentionally and purposely supported the idea of institutionalization of the public hearing in the shape specified by the statute. Due to the fact that the above issue has already been widely commented upon in the literature, the following remarks are limited to the most important issues.

The public hearing is regulated by the Lobbying Act, Articles 8 and 9 of Chapter II entitled “The principles of transparency of the lobbying activity in the law-making process”. According to the text of bulletins on sessions of the Extraordinary Committee, it is clear that the public hearing was introduced in the system of law as a special form of lobbying activity. Such an approach evoked — in principle — a negative reaction in the literature. In the opinion of Marcin Wiszowaty, specializing in the field of lobbying, the equation of both institutions is a serious abuse, which shows that the Polish lawmaker does not comprehend their respective natures and mixes up ideas.

Articulation of interests which takes place within the scope of the public hearing is perceived as the exercise of the citizen’s right to petition (we will come back to this issue later). In particular, the emphasis is placed on the fact that, contrary to lobbying which also consists of promotion of certain interests, the public hearing is made in one’s own interest or in the public interest and is free of charge. On the other hand, the characteristic feature of lobbying is, in turn, a professionalized and payable act in the interest of third parties, which are particular groups of interest.

Despite many distinct differences between the two institutions, it does not seem to be justified to pose a thesis, according to which their essence is different and they...
should be categorically separated. After all, according to the definitions provided by the literature of both the public hearing and the lobbying, the essence of both those legal instruments is to get citizens involved in the process of making decisions by public authorities\textsuperscript{24}, and letting them have an influence, in particular, on the law-making process. The richness of legislative solutions regarding public hearing (or similar institutions) adopted in different states, as well as the practice of their application shows that similarities in this regards are respected\textsuperscript{25}. Meanwhile — undoubtedly — we should criticize the fact that the Polish lawmaker included the institution of public hearing within the framework of the Lobbying Act, as well as the manner in which it was done. Most of all, if the whole act is devoted to, in principle, professional lobbying (Chapters 3, 4, 5), it is incomprehensible why it regulates unprofessional forms of influence on public authorities (Chapter 2). Let us recall that Deputies who were members of the Extraordinary Committee had at their disposal legal opinions which negatively evaluated such a move. In one of them, it stated clearly that an extension of the draft law to the issue of transparency of legislative work in Chapter 2 would raise doubts from the point of view of compliance with the Constitution due to an insignificant connection thereof with the issues of lobbying activity\textsuperscript{26}.

The public hearing, according to the previously-presented intention of the members of the Extraordinary Committee, as a result of the definition of the lobbying activity contained in Article 2 para. 1 of the Act, became, \textit{de iure}, a form of lobbying. We can read that “a lobbying activity is any activity conducted by means of legally-admitted methods, aimed at exerting an influence on public authorities in a law-making process”\textsuperscript{27}. A necessity, unquestionable in the case of a public hearing, of creating a possibility for the largest possible number of persons interested in the law being established to participate therein, may lead — in view of the fact that the hearing becomes a form of lobbying — to evasion of the requirements which are traditionally imposed on a lobbyist\textsuperscript{28}. One of the authors is correct to ask what special advantage should professional lobbyists derive from an institution which serves all citizens? \textsuperscript{29}

\textsuperscript{24} Cf. e.g. the definitions presented by G. Makowski, op. cit., p. 158 et seq.

\textsuperscript{25} E.g. in the USA, Congress committees organize the so-called public hearings which are treated as a direct form of exerting an influence by lobbyists, and the right to practice lobbying can be found in the First Amendment to the Constitution of the USA, which refers to the right to petition for remedy of damages. The structure of hearings applied by the administration in Germany anticipates that they do not serve citizens, but interest groups. Cf. K. Działocha, J. Trzciński, K. Wójtowicz, \textit{Studia nad udziałem grup interesów w procesie tworzenia prawa}, Wrocław 1987, pp. 36–42 and 83–93.

\textsuperscript{26} Cf. e.g. an opinion of J.M. Karolczak of 17 May 2005, \textit{Opinia prawna dot. art. 8 projektu ustawy o jawności prac legislacyjnych i zawodowej działalności lobbingowej}, print No. 2188, Fifth Term Sejm.

\textsuperscript{27} Article 2 para. 2 contains a definition of professional lobbying, which — as defined by the Act — is a money-earning lobbying activity conducted to the benefit of third parties for the purpose of ensuring that the interests of such parties are taken into account in the law-making process.

\textsuperscript{28} We are talking about duties of a professional lobbyist, which include, \textit{inter alia}, making an entry in the register and payment of a relevant fee; cf. Chapter 3 of the Lobbying Act.

ter: SIS], lobbyists use the same only occasionally, preferring other instruments of influencing the text of normative solutions being developed in the parliament. Taking into account the aforementioned controversies, it is difficult not to agree with the postulates voiced in the scientific and journalistic discourse for separation of the public hearing from the regime of the Lobbying Act. In particular, a possibility is indicated of incorporation of this institution in the Act of 6 September 2001 on Access to Public Information, which, according to Article 6 para. 1 subpara. 1 guarantees each citizen a right of access to such information, in particular with regard to internal and external politics, including the intentions of the acts of the legislative and executive powers, as well as drafting of normative acts. I believe that it would be a good idea to consider a solution consisting of a combination of this regulation with the execution of the standard deriving from Article 63 of the Constitution, which imposes a duty on the lawmaker to specify, in a statute, a procedure for consideration of petitions, motions and complaints. In the course of the work on the Constitution of the Republic of Poland of 1997, the Constitutional Committee of the National Assembly indicated a non-formalized nature of the right to petition. It was emphasized that the submission of motions and petitions may be possible in each available form and the conditions and object thereof should not be specified. According to such interpretation of the power expressed in Article 63 of the Constitution, the only thing which would remain to be done would be to make the public hearing one of the forms of exercise of such power. Also, the manner of determination of the interest justifying the submission of a petition (a public interest, whether one’s own or of another person) overlaps, in fact, with an identical condition regulating the participation in a public hearing. The legislative solution proposed here is rational to the extent that it would mean or at least give an impulse for the discharging of the constitutional delegation deriving from Article 63 sentence 2, which has not been fully realized so far.

A certain way of understanding the institution of hearing emerges from the judgement of the Constitutional Tribunal of 3 November 2006, and in particular from the dissenting opinions thereto. The Constitutional Tribunal (Trybunał Konstytucyjny, TK) stated that this was not a constitutional or statutory element of the legislative procedure, because it derived only from the provisions of a regulatory rank. Even though an improper cancellation thereof means a breach of the Standing Orders of the Sejm, it is insignificant enough not to constitute a sufficient grounds for determination of non-compliance of the adopted statute with the Constitution. The authors

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31 G. Makowski, op. cit., p. 186.
32 E.g. P. Kuczma, Lobbing w Polsce, Toruń 2010, p. 237; W. J. Wołpiuk indicates this statute as a possible instrument for regulating the lobbying activity; by the same author, Ustawa o lobbingu i perspektywy..., p. 144.
34 Currently, we can only talk about a partial discharge of this constitutional delegation, namely Article 221 of the Code of Administrative Procedure.
of *votum separatum*, Ewa Łętowska and Marek Sąfjan, talked more about the meaning of the hearing. E. Łętowska emphasized the legitimization character of consultation instruments and their importance in the context of the principle of subsidiarity, indicating a breach of Articles 7 and 2 of the Constitution. M. Sąfjan also noted that a public hearing is incorporated in the constitutional ideas, such as the principle of co-operation and social dialogue, the principle of a democratic state and the principle of the sovereignty of nation.

An analysis of the text of the Lobbying Act and rS, as well as of relevant executive acts, provides for reconstruction of the most important features of the public hearing, including the subjective and objective scope thereof, as well as elements forming a part of the procedure of conduct thereof. It provides for identification of many common features and demonstration of differences connected with a different character and procedure of development of provisions which are subject to the hearing.

In our country, the public hearing is anticipated for two types of normative acts: statutes (Article 8 para. 1 of the Lobbying Act and Article 70a para. 1 of rS) and regulations (Article 9 para. 1 of the Lobbying Act). Types of provisions which are subject to public hearing are specified differently in the states applying those institutions. A classic meaning of the *public hearing* relates the same to acts adopted in a parliamentary procedure, i.e. with statutes. Let us state, by way of a comparison, that in a German legal system, the subjective scope of the hearing is wider, because, in addition to statutes and federal regulations, it also covers general administrative provisions (*allgemeine Verwaltungsvorschriften*). In the original version of the governmental draft of the lobbying act, this institution was not anticipated with regard to regulations. In the course of the work on the statute, it was raised that a public hearing was an institution close to the consensus conferences conducted by ministries, during which a possibility arose to review an opinion of a wide circle of consultants, consisting not only of public administration entities, but also social organizations (e.g. trade unions, employer confederations). An idea that the discussed institution should also extend to regulations is criticized due to the fact that regulations are of an executive nature in relation to statutes and, therefore, the author thereof has little influence on the substantive contents of the statute. Pursuant to Article 92 of the Constitution, such author must respect the scope of matters delegated to it for regulation, and the guidelines concerning the text of the statute. Also, the possibility of undertaking any actions by participants in the hearings regarding regulations is limited. In the opinion of one of the authors, it may consist of either an oversight of compliance of drafts of such statutes with the contents of statutory authorization or of postulating changes whose purpose is to ensure better execution of the statute, provided, however, that this is always done subject to and within the scope of such authorization. The experiences of the Federal Republic of Germany show, however,

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35 Cf. dissenting opinions submitted to the judgment of the Constitutional Tribunal (Trybunał Konstytucyjny, TK) of 3 November 2006, Ref. No. K 31/06.
that, for instance, groups of interests (one of the entities entitled to participate in public hearings) seek possibilities of exerting an influence mainly on law-making activity of administrative organs, and the hearings organized by the administration evoke much more interest that those which take place in the legislative procedure 37.

A possibility of conducting a public hearing with regard to regulations was limited to bills passed by the Council of Ministers, the Prime Minister and Ministers. Even though direct information is not available in the text of the Lobbying Act, but such a conclusion may be drawn from the interpretation of the provisions of the second chapter thereof 38, which refers to a duty of disclosure by such authorities, in the Public Information Bulletin (Biuletyn Informacji Publicznej, BIP [hereinafter: BIP]), of their legislative plans and draft regulations. That is why, it was only with regard to those regulations that a possibility was opened up for interested entities to notify their interest in taking part in the hearing with a sufficient notice. Moreover, according to the text of the bulletins of sessions of the Extraordinary Committee, there is no intention to extend the procedure of public hearing to other types of regulations, the President of the Republic of Poland or the National Radio and Television Broadcasting Council 39, and there is also no justification therein justifying such exclusion.

As regards statutes, the public hearing may extend to each draft of such act. The imposed limitation applies to the circle of entities which may participate in a hearing with regard to an urgent draft of a budgetary act. Pursuant to Article 70a para. 6 of the rS, such rights are not vested in the entities which have expressed their interest in the draft pursuant to the Standing Orders of the Sejm. A similar exclusion is missing in the case of entities which do so according to the procedure specified in the Lobbying Act.

In the course of the work, the Extraordinary Committee also considered a possibility of statutory regulation of the public hearing with regard to the legislative acts of a local law 40. This issue arose at the occasion of a discussion regarding a supplementation of the draft lobbying act by provisions concerning the conduct of lobbying in a local law-making process. Finally, in view of numerous difficulties which were connected with such regulation, members of the committee did not only decide to introduce the same, but also gave up the idea of a more complex discussion of the issue and development of a common idea. The reasons preventing the translation of the discussed institution to a local law included a complex, three-level structure thereof, a high variety of the provisions of that law, a fast process of establishment thereof, as well as the observed delays in submission of such bills for publication. It was decided that local self-government units may use forms similar to the institution of the hearing, basing themselves, in this regard, on a self-developed customary standard, as is the case in certain communes 41.

37 Cf. K. Dzialocha, op. cit., p. 94.
38 Cf. Articles 4, 5 and 6 of the Act.
39 Cf. e.g. Bulletin of 4 May 2005, print No. 4521, Fourth Term Sejm.
40 Cf. the text of Bulletin of 19 May 2005, print No. 4521, Fourth Term Sejm, and print No. 4606, Fourth Term Sejm.
According to the Standing Orders of the Sejm, a resolution on the conduct of a hearing may be adopted upon the first reading of the draft statute, and before the commencement of a detailed consideration thereof, provided that the hearing itself also takes part before such time (Article 70a para. 4 and 70f para. 1). The stage of a detailed consideration of the draft by the committee takes place after the completion of the first reading. The term of “detailed consideration” should be interpreted in the context of the other provisions of the Standing Orders in which it is used. It should definitely extend to the commencement of substantive work on the draft, and in particular to the commencement of the hearing by the committee of experts’ opinions and representatives of interested communities and agencies. From that moment there is no more a possibility of adoption of a resolution on conducting a public hearing. A solution restricting a possibility of organizing a hearing with regard to only one, strictly-specifed moment along the whole legislative path is — in my opinion — unjustifed. A need of obtaining a public opinion with regard to the prepared statutes may arise also at later stages of the work thereon and at such time the lawmaker should be equipped with a possibility of using the instrument under discussion.

A resolution on the hearing must specify the date and time of such hearing. Along with information concerning the venue of conduct of the hearing, it must be made available in SIS at least 14 days before the date of public hearing. In the event of a hearing concerning a regulation, a relevant information is placed in BIP at least 7 days before the hearing. A public hearing in a matter of a statute takes place during one session of the committee, and the agenda of such meeting may not cover any other matters. In the event of draft regulations, a hearing may be combined with an inter-ministerial consensus conference concerning a given draft (§ 2 of the Regulation of 7 February 2006).

The interpretation of Article 70a para. 4, in particular with relation to Article 39 of the rS, raises certain repercussions in the parliamentary practice. That is because a decision on ordering a hearing is at the discretion of the committee, but Sejm in pleno is, in fact, capable, by means of its decision, of excluding a possibility of the conduct thereof. Namely, the Sejm, pursuant to Article 39 para. 3 of the rS, by submitting a draft to the committee, may set a date therefor for the submission of a report. In the situation where the date set by the Sejm falls in advance of the date of holding the hearing, as indicated in the resolution of the committee, we should assume that the hearing may not take place, and, what is more, such a resolution constitutes a breach of law. The above position was formulated in the doctrine of law on the basis of a resolution of the Local Self-Government and Regional Policy Committee scheduling the hearing for 11 September 2006, with the date set by the Sejm for

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42 Article 41 para. 1, Article 91 para. 1, Article 95c para. 1.
43 Cf. discussion of this topic in W. Odrowąż-Sypniewski, Zagadnienie wykładni art. 70a ust. 4 regulaminu Sejmu na przykładzie Komisji Finansów Publicznych, [in:] Regulamin Sejmu w opiniach Biura Analiz Sejmowych, the Chancellery of the Sejm, Bureau of Research, Warszawa 2010, pp. 412–414.
the submission of the report by 21 August 2006. Although we can derive the principle of autonomy of the Sejm committees from the Standing Orders of the Sejm, as well as a lack of possibility of interference by the Sejm with the text of resolutions adopted by the committees resulting therefrom, nevertheless the aforementioned actions of the committee should be classified as a breach of good customs in parliamentary work and of a political and legal culture, which is in contradiction with confidence of the Sejm in pleno in its internal organs. In view of the above, notwithstanding the fact that there is no precise legal sanction in the provision of Article 39 para. 3 of the rS, the committee’s failure to meet the deadline for the submission of a report constitutes a breach of that provision.

As indicated above, the object of a public debate within the framework of a public hearing is constituted by draft statutes which are at the stage of parliamentary work. Due to the fact that authors of the majority of drafts are not Deputies, we should consider an introduction of a possibility of holding a public hearing already at the stage of draft development by an entity putting forward the legislative initiative, and in practice, most commonly this is the Government. Such a proposal was put forward during the work of the committee developing the draft lobbying act, but finally it was not approved by members thereof. Arguments were presented that an introduction thereof would lead to the repetition of the social consultation procedure conducted by the Council of Ministers at the stage of development of a statement of the main objectives of draft statutes. Meanwhile, the practice of application of the provision of the Act on the Council of Ministers amended on 23 January 2009 and of the provisions of the Standing Orders of the Council of Ministers revealed numerous shortcomings thereof, as far as the level of social participation in the process of development of governmental draft statutes was concerned, deriving from, among other things, a lack of precision of new regulations. The use of the public hearing procedure at the stage of ministerial consultation would render the developed draft more mature, and would allow for possible withdrawal by the Government from a draft statute if that were justified by the result of the hearing.

The public hearing institution has a facultative character. The conduct thereof with regard to a draft statute is decided on the basis of a resolution of the committee which is entrusted with the consideration thereof. In order to adopt a resolution, a prior written motion of Deputy is required, and — unless it is directed otherwise — we should assume that such Deputy does not have to be a member of the committee considering

46 We should note here that the Ministry of Environmental Protection incorrectly indicated Article 9 para. 1 and 3 of the Lobbying Act as the legal basis for the hearing held on 30 July 2007 regarding a draft act concerning, inter alia, reduction of gas emission. Cf. more about this subject in note 3.
48 Dziennik Ustaw, No. 42, item 337.
a given draft (Article 70a para. 3 of the rS). In the event of regulation, the public hearing is ordained at the discretion of an entity responsible for development of the draft, which, *de facto*, entails a discretionary nature of the process of adoption of such solution. Let us note that it is in the interest of a given solution that his draft retains its original shape. A decision of the Polish lawmaker regarding the facultative nature of conducting public hearing was given few voices of approval, and it mainly encountered criticism on the part of representatives of the doctrine who formulated various proposals of changes to the existing state of affairs. Naturally, we cannot deny the correctness of the argument according to which not every draft statute (or a draft regulation) will attract so much attention from the citizens that it would make sense to automatically cover it by the public hearing procedure and that what counts is not the number of public hearings, but their influence on the quality of the public debate.

The regulations adopted in other states also do not incorporate any solutions which would be absolutely obligatory in this regard, but they offer — in principle — more possibilities for the launch of the procedure we are interested in, without making it dependent only and exclusively upon a motion or decision of a single entity. For example, in Germany, a public hearing may be ordered within the parliamentary procedure in consequence of a demand submitted in this regard by 1/4 of members of the committee, which means that there is no relevant claim on the part of the entities interested in participating therein. In parliamentary practice, the discussed institution is widely used and it constitutes a routine action for each significant bill. The public hearing may be obligatorily ordered on the basis of the provisions binding in Germany in the situation where a draft considered by the committee requires a position to be taken by a communal organization with a federal scope of operation. In the United States, it is special statutes that oblige the relevant entities to carry out public hearings in certain matters, such as, for instance, land utilization plans or the budget.

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51 In the literature, it is rightly noted that the taking of a decision by a Deputy on submission of a motion, as well as the manner of vote by members of the committee may be a result of previous pressure put by certain groups of interest. Cf. P. Kuczma, op. cit., p. 230.
52 Cf. § 70 para. 4 of the Standing Orders of the Confederation Parliament in its version of 2 July 1980.
53 A situation is different as regards hearings of groups of interests organized by ministerial administration with a view to statutes and regulations. In the event of certain statutes, organization of hearings is obligatory (e.g. the Act on Civil Servants, the Act on Conduct of Business Activity, the Act on CollectiveLabour Agreements, the Act on Inland Cargo Transport, the Act on Road Cargo Transport and the Act on Out-workers), and a refusal to organize the same authorizes the Confederation to institute proceedings before the administrative court. With regard to regulations which, in contradiction with a statutory standard, are passed without an obligatory hearing, the interested parties may subject such regulations to abstract court control or may expect that, in the process of application thereof, courts will consider them to be in contradiction with a higher-rank statute. Cf. K. Działocha, op. cit., p. 89.
54 Even though § 69 of the Standing Orders of the Confederation Parliament uses the word *sollen* (should) which, in German legal terminology is not semantically equal to *müssen* (must), nevertheless such communal unions are heard as a rule. And they attempt to exert an influence to ensure that the latter term is introduced in the Standing Orders.
55 B. Meinig, op. cit.
Notwithstanding the above, local governments may take a decision on organizing a hearing if they determine that this is required by a controversial political issue. In the context of the Polish regulation, on the other hand, what makes sense is the proposals that public hearings should be made obligatory in the case that an interest in participation therein were expressed by a certain number of entities. That is because it would be logical and consistent with the essence of the discussed institution to leave each decision on implementation thereof at the discretion of the entities whose legal situation is the object of the draft covered by a given public hearing. A large number of such interests would constitute a signal for the lawmaker that a draft statute or a draft regulation deals with a subject matter which is important from the social point of view and which should be discussed on the forum. On the other hand, I completely reject, as wrong and harmful due to a number of reasons, the arguments, according to which, in the event of highly complicated statutes, the participation of citizens in the development thereof does not have “any sense”. Firstly, the public hearing is aimed at nothing else but activation of citizens in the area of legislation and, thus, help the authorities to gain a public opinion of the potential addressees of a certain normative act with regard to the solutions adopted therein. Secondly, a formula of the hearing has an important educational value, because the fact of participating therein somehow forces interested entities to review the drafted act in advance, and a possibility of gaining knowledge about the opinions and comments presented in the course of the hearing contribute to better understanding of the objectives and text of such act. Thirdly, the approach criticized here may foster consent to development of laws which are excessively complicated and thus incomprehensible for an average citizen. I believe that the democracy argument justifies a negative evaluation of the situation where a high level of detail and technicality of legal regulations limits, de facto, a possibility of discharging the citizens’ right to petition. It also seems that the giving of opinions about draft provisions of law by “ordinary” citizens (or by entities representing them) in the course of hearings is capable of drawing the attention of the authors of legal provisions to certain new aspects or helping them in discovery of shortcomings which they themselves have failed to notice, and thus it is capable of improving the quality of law.

The Polish provisions regulating an issue of the public hearing stipulate a possibility of changing the date and venue thereof, as well as cancellation thereof. As far as the date and venue are concerned, a decision is taken, with regard to a hearing concerning a statute, by the Presidium of the committee, and with regard to regulations, by an entity authorized to organize the hearing. A formal requirement is the announcement in an appropriate (for a type of statute which is subject to the hearing)

56 Ibidem.
59 In view of a low quality of law established in our country, this argument may not be ignored.
60 In such situation, a right to participation in a hearing is vested only in entities which previously voice their interest in the work on the draft (Article 70e para. 2 of the rS).
publication of reasons of such change (SIS, BIP) and a new date or venue. Cancellation of a hearing also requires the specification of a reason therefor, and a decision in this regard is taken by a relevant Sejm committee (statutes) or an entity authorized to organize the hearing (regulations)\(^6\). Both the Standing Orders of the Sejm, and the Lobbying Act, in its Articles concerning the prerequisites justifying the taking of such decisions, indicate a lack of possibility of organizing a hearing “due to space or technical reasons, and in particular due to a number of persons willing to take part in the hearing”. A very general and imprecise notion, in particular with regard to “technical reasons”, means that cancellation of hearings is relatively easy, and this strengthens the discretionary nature of this institution. We may encounter an opinion in the literature that the prerequisite of “the number of interested parties” is not clear either, because it may mean both an excessive and insufficient number of such persons\(^6\), even though, it is, beyond doubt, in the context of the phrase of “space reasons”, more justified to adopt the former interpretation. A problem connected with the interpretation of Article 70e of the rS arose in connection with the consideration by TK, in the aforementioned judgement of 3 November 2006, of the correctness of cancellation by the Local Self-Government and Regional Policy Committee of the public hearing in a matter concerning a bill on an amendment to the Act of 16 July 1998 on Elections to Councils of Communes (\textit{gmina}), Counties (\textit{powiat}) and voivodships (\textit{województwo}) — and the Act of 20 June 2002 on Direct Elections of wójt (head of commune), mayor and president. The circumstances of adoption of the resolution by the committee clearly had a political character\(^6\), and the reason for cancellation of the hearing, as specified in the text of the resolution, was based on an argument that there was no possibility of meeting the deadlines connected with the consideration of the draft. However, TK decided that the Standing Orders were breached, because that reason was not a “reason of space” (especially that an interest in participation therein was expressed by 14 entities\(^6\)) or a “technical reasons” in the strict sense of the word, and it also did not fully reject the interpretation of the latter term, as presented by the Marshal of the Sejm, according to which it also applied to “the procedure of consideration of a given matter”\(^6\). Anyway, that was the only example of cancellation of a public hearing in our parliamentary practice so far.

\(^6\) The provisions concerning both draft bills and draft regulations fail to indicate the deadline by which cancellation may take place or by which a change may be made of the date and venue of holding the public hearing. This is a legal gap which should be remedied.


\(^6\) The Act referred to above introduced, briefly before the date of elections, the necessary changes in the electoral law (a possibility of the so-called “blocking of electoral lists”). A motion submitted by the opposition and accepted by the Local Self-Government and Regional Policy committee for the conduct of a hearing was aimed to block the work of the parliament and prevent an introduction of changes before the election. The reaction of the ruling coalition was to increase the number of their Deputies in the committee to ensure that a motion for cancellation of the hearing could be voted through.


\(^6\) The Marshal of the Sejm presented literal interpretation, by referring to \textit{The Dictionary of the Polish Language}. 
A circle of entities authorized by the legal provisions binding in Poland to take part in a public hearing is wide, and the rules specifying a possibility of joining a hearing with regard to statutes are not clear. They vary depending on whether the basis for exercise of this right is the Standing Orders of the Sejm or the Lobbying Act, which is connected with variation of entities exercising such rights. The former stipulate that the right to join a hearing concerning a draft statute is vested in entities which, after the announcement of the draft in a form of a print, notify the Sejm of their interest in the work on the draft not later than 10 days before the date of the hearing. The Lobbying Act confers a right of participation in a hearing both with regard to statutes, and regulations to each person who, after the time of announcement of the draft in the Public Information Bulletin, expresses his/her interest in the work on the project. As far as draft regulations are concerned, the final deadline for such notification is 3 days before the date of hearing; with regard to statutes — in view of the fact that there is no regulation in the Lobbying Act of this issue — we should assume that that this can be done by the time of completion of ministerial work on the draft. The Council of Ministers, along with its draft act, submits notifications of entities who have expressed their interest in the work on the draft act under the Lobbying Act, indicating the order in which individual notifications have been made.

An analysis of the provisions contained in the statutes regulating the public hearing, provides for a distinction in the literature of three groups of entities entitled to take part therein. They are, first of all, professional lobbyists, and — according to the definition adopted in Article 2 of the Act — entrepreneurs or natural persons who, on the basis of a civil legal agreement, conduct a money-earning activity to the benefit of third parties for the purpose of the interests of such parties to be taken into account in the law-making process. Such entities must first obtain an entry in the register kept by the Minister responsible for public administration, which is connected with the meeting of certain formalities, such as the making of a payment. The second group includes entities which are not professional lobbyists and submit their notification on the basis of the Lobbying Act. This is possible, because — as noted above — the Act, when listing the persons who may express their interest in the work on the draft, uses the term “anyone” (Article 7 para. 1), and also, it defines a lobbyist as anyone who “acts with a purpose of influencing public authorities in a law-making process”. Such a wide and general definition of the lobbying activity is absolutely

66 Even though the Lobbying Act makes a reference, with regard to the exercise of the right of participation in the hearing, to the principles specified in the Standing Orders of the Sejm, the linguistic interpretation of Article 70b para. 2 of the rS (“the right to participate […] is also vested in entities which notified their interest according to the procedure specified in the Lobbying Act”) leads to a clear conclusion that — as far as the manner of expressing one’s interest in the hearing (at least in the opinion of the authors of the Standing Orders) — that we come across two separate legal regimes.

67 Article 34 para. 4b of the rS.


69 P. Kuczma refers to them as “occasional” lobbyists; the same author, op. cit., p. 225.
criticized in the literature as leading to the extension of the circle of lobbyists to entities which have not been considered as such so far. The third group is constituted by entities whose interest in participation in the hearing (solely with regard to the draft act) has been notified according to Article 70b para. 1 of the rS.

As part of the critical comment concerning the method of classification of a circle of entities entitled to participate in the hearing, attention should be drawn to a few issues, which have already been highlighted to some extent. The justification of acceptance of lobbyists as participants in the hearing is contested. Lack of consistency of the lawmaker presented in the Lobbying Act consists in the fact that, while deciding to make such a legislative move and incorporating the institution of hearing in this Act, it did not limit the circle of participants therein to lobbyists or professional lobbyists. It would also be justified to ask a question why the Act does not introduce any preferences for lobbyists regarding access to participation in the hearing. However, despite critical comments, we may not disregard the fact that the circle of entities authorized by the Polish provisions of law to take part in the public hearing does not significantly differ from the solutions adopted in other states. This is opposed to the thesis that the institution of the hearing “worldwide” — contrary to our country — is treated as a mechanism ensuring the discharge of citizens’ rights to petition. The structure of hearings held at the committees of the German parliament follows the rule that the persons who may be heard include experts, representatives of interested entities and persons who possess appropriate information (§ 70 of the Standing Orders of Bundestag). Individual citizens may take part in a hearing, but they are not entitled to express their opinions or ask any questions. That is why, in Germany, from among various institutions capable of affecting the legislative work of the parliament, we distinguish the public hearing and the right to petition, because the latter is also available to individual entities. The committees of the British Parliament hear, in addition to proverbial housewives, associations and organizations, also persons representing various institutions, representatives of governmental agencies, ministries and various other agencies. A very wide scope of entities is admitted to participation in the public hearing by Italian regional statutes. In the

70 M. M. Wiszowaty, op. cit., pp. 57–58. The author stated that, according to the Polish regulations, a lobbyist would be any entity which was authorized or obliged to present its opinion in the course of the law-making process (compare, for instance Article 34 para. 3 of the rS), and also, for instance, a journalist, a scientist, a teacher or a priest.

71 M. M. Wiszowaty, op. cit., p. 60.

72 Ibidem, p. 60. Of course, this comment applies only to this statute. We may not agree with a point (P. Kuczma, op. cit., p. 239) that there is a need of general limitation of the category of entities taking part in the hearing to professional lobbyists, as it is in absolute contradiction with the essence of the hearing.

73 M. Zubik, Wykaz podmiotów, do których należy kierować projekty ustaw w trybie art. 31 ust. 3 Regulaminu Sejmu w celu konsultacji, the Chancellery of the Sejm, Bureau of Research, information No. 896, July 2002, p. 3.

74 M. M. Wiszowaty, op. cit., p. 60.

75 Such information is available on the website of Bundestag http://www.bundestag.de/bundestag/ausschuesse17/ a06/ anhoerungen/index.html.
Emilia-Romania region, a discussion held in the course of the assembly may be participated in by representatives of the public administration, social organizations, associations, groups representing group or individual interests as well as other parties concerned. It is only the Standing Orders of the Sejm that anticipate a possibility of limiting a number of entities participating in the hearing. This may be based on previously-discussed reasons of “space or technical” nature. The limiting criterion, which may be, in particular, the order of notifications, should be justified and applied in a uniform fashion in relation to all entities. Information about entities which are admitted to the hearing in the above case is subject to announcement in SIS. The entities which express their interest in the hearing concerning a particular statute, but which do not take part therein, are allowed to submit, by the date of holding the hearing, the text of their undelivered opinion.

As indicated above, the taking part in a public hearing has a rank of an entitlement in our country. In the literature, we may come across certain postulates of opening possibilities, following the American example, of calling witnesses to the hearing. This would require an introduction of certain amendments to the current provisions of law, connected, for instance, with an issue of specifying the principles of hearing witnesses, liability for untrue statements or the manner of reimbursement of costs of participation in the hearing, and the hearing itself would evolve more in the direction of an inquiry. It seems that, even though this is justified in the case of American quasi-judicial hearings concerning matters of an individual nature, it is rather difficult to find convincing arguments for application thereof in the situation where such hearings would apply to legislative acts of a more general nature (statutes, regulations). As far as legislative procedure of the Sejm is concerned, Article 34 para. 3 of the rS indicates an institution of consultation of draft statutes, the conduct whereof is obligatory in certain situations. If, however, a Sejm committee or an entity responsible for the development of a draft regulation has knowledge about the entities which could provide relevant and reliable information regarding a given act which is subject of a hearing, it should have a possibility, similarly to the solutions applied in other states, of inviting such an entity.

A formal requirement for participation in a hearing is the submission of an appropriate form which constitutes an unclassified document. In the event of expressing an interest in the work on the draft statute or regulation according to the procedure of the Lobbying Act, the form is submitted, accordingly, to an authority responsible for the development of a respective bill (or, possibly, an authority responsible for the submission of the draft to the Council of Ministers) or an authority responsible for the development of a draft regulation. The notification referred to in the

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78 This duty may derive from a certain statute.
Standing Orders of the Sejm is submitted to the Marshal of the Sejm. At the same time, we may not possibly fail to criticise the fact that such notifications are announced in separate information systems. Under the Lobbying Act, BIP is provided for that purpose (Article 7 para. 3), whereas the Standing Orders of the Sejm refer to SIS as the appropriate publication (Article 70c). The consequences of improper completion of the form are also treated differently. The Standing Orders of the Sejm are more restrictive in this regard, because they consider any notification which does not meet the formal requirements to be ineffective. According to the Lobbying Act, such shortcomings may be remedied within maximum 7 days of the summons of the authority to which such notification is submitted\textsuperscript{79}. But the scope of information required to be disclosed by the interested party in both types of forms is the same. In addition to his/her personal details and, possibly, the details of the entity he/she represents, and — in the case of a professional lobbyist — confirmation of an entry in the register, he/she is obliged to disclose the interest which he/she intends to protect with regard to a given regulation, as well as a legal solution whose taking into account by the regulation he/she will attempt to ensure. The one but last point raises doubts connected with the fact that it is often in the interests of lobbyists to hide the real interest, and the information provided in this regard in the form is impossible to be verified by the authority which receives the application. In addition, the fact that the aforementioned statutes do not stipulate any sanctions for untrue description of one’s interest means that the idea of increasing the transparency of the legislative process followed mainly by the authors of the Lobbying Act may only be implemented to an insignificant extent in view of such a solution\textsuperscript{80}.

The chairman of the Sejm committee presides over the course of the public hearing concerning statutes, and a representative of an organizational unit which has developed a given draft regulation presides over the course of the public hearing concerning such regulation. A wide scope of authority of the chairman of the committee covers not only the determination of the order of speeches, but also the duration thereof, which is significant in view of the fact that the Standing Orders do not include any regulation stating that such time should be the same for everyone\textsuperscript{81}. Moreover, the chairman is also entitled to extend the duration of the speech. The general category of “particularly justified cases” gives him a right to interrupt the session. He also takes a decision on a date, time and venue where the adjourned session should be held. The categorical text of Article 70h para. 3 of the rS, according to which the chairman “provides” the information about the date of holding the adjourned session or “places thereof” in SIS, means that the holding of an interrupted session consti-

\textsuperscript{79} § 3 para. 1 of the Regulation of the Council of Minister of 22 August 2011 regarding the notifying of an interest in work on draft normative acts and draft legislation guidelines (Dziennik Ustaw, No. 181, item 1080).

\textsuperscript{80} Regarding this topic, cf. P. Kuczma, op. cit., p. 228.

\textsuperscript{81} In point 28 of the rules of the public opinion hearing at the Ministry of Health concerning the hearing on 29 February 2005, it was decided that “Each participant shall have 3 minutes to present his/her opinion”.

"Sejm Review" Fifth special edition / 2014
stitutes a duty of the committee. As regard the person presiding the hearing concerning regulations, the Regulation of 7 February 2006 merely indicates that such person draws up the list of attendance and ensures that each of the participants in the hearing is given an opportunity to express his/her opinion, and refer, on an on-going basis to arguments expressed by other participants. In view of the above, if the regulation does not talk about a possibility of limiting the number of heard entities, and, quite on the contrary, it formulates an obligation to enable “all participants” to express their opinions, this must mean that the intention of the lawmaker is to eliminate such a possibility. The regulation also does not mention a possibility of interruption of the session.

Chapter 1a of the rS does not indicate how the information obtained by the committee in the course of the hearing should be used. As regards the method of recording thereof, Article 166 of the rS applies, according to which the course of each session shall be recorded by minutes published in SIS. The minutes constitute an official confirmation of the course of the session of the committee, and they are also accompanied by any documents and materials from the meeting. The minutes are also accompanied by texts of speeches which have not been delivered by persons participating in the hearing, and speeches of those entities which have expressed their interest in the work on the draft act, but have failed to take part in the hearing. The elements of the minutes documenting the course of the public hearing regarding a draft regulation must include, in addition to the particulars of participants who take the floor and the main points of the opinions presented by them, and also details of the position of the person presiding such hearings regarding such opinions (§ 8 para. 3 of the Regulation of 7 February 2006). The minutes are published in BIP, on the website of the authority responsible for the development of the draft regulation. Coming back to the issue of the manner of use by the Sejm or the Ministry of the information obtained in the course of the hearing, we should note that, since the minutes constitute merely a document confirming the course of the session, they do not give rise to a formal obligation of considering the information contained therein and absolute obligation of taking them into account in subsequent legislative work. As regards the hearing conducted by a Sejm committee, a resolution adopted by it determines this issue. However, in view of the purpose of the hearing, which is the obtainment of an opinion of entities representing various positions with regard to certain normative solutions, it is hard to image that a rational lawmaker should intentionally ignore them. A failure of taking such opinions into account in the legislative process equals the undermining of the idea of the hearing.

82 Opposing view: W. J. Wołpiuk, op. cit., p. 155.
83 Also in the event of hearings heard at ministries, we may imagine a situation where a need arises of limiting the number of entities due to space or technical reasons. Then the per analogiam interpretation will be justified and the observation of the 2-day deadline also for cancellation of hearings concerning regulations, even though such situation should not often occur due to the fact that public opinion interest is — in principle — lower as far as the work on this type of legislative acts is concerned.
The proposals and suggestions presented in this article concerning amendments to regulations concerning the public hearing are aimed at the facilitation of this institution in such a manner that it serves as a real and effective tool of social participation in the law-making process. Firstly, we point to a need of another consideration by the lawmaker of the concept of the hearing. At the same time efforts should be made to promote knowledge regarding possibilities of use of the institution of public hearing by the so-called “ordinary” citizens, because they should be the main beneficiaries thereof.
ALPHABETICAL LIST (by author’s name)
of English summaries of articles contained
in Sejm Review (Przegląd Sejmowy) from the No. 6(100)2010 until No. 5(118)2013

ARASZKIEWICZ MICHAŁ, GIZBERT-STUDNICKI TOMASZ, Alexy’s Theory of Constitutional Rights, No. 3(104)2011, p. 113.


BANASZAK BOGUSŁAW, The Circumstances and Purposes of the Reform of Military Administration of Justice, No. 6(101)2010, p. 69.


BARCZ JAN, KRANZ JERZY, Conferral of Competences on the European Union and the Treaty Establishing the European Stability Mechanism and the Treaty on Stability, Coordination and Governance in Economic and Monetary Union: Comments on the Jurisprudence of German Federal Constitutional Court and the Judgment of the European Court of Justice in Case C-370/12, No. 4(117)2013, p. 23.

BERNACZYK MICHAŁ, Constitutional Right to Information about the Activities of Deputies and Senators and the Scope of the Act on Access to Public Information, No. 3(110)2012, p. 41.


BOŻEK MARTIN, Cooperation between the President of the Republic of Poland and the Council of Ministers as a Constitutional Requirement for Ensuring State Security in the Event of Particular Threats, No. 2(103)2011, p. 83.


BOŻEK MARTIN, The Constitutional Grounds for Public Participation and Forms of its Implementation in Local Governance, No. 5(112)2012, p. 89.

BOŻEK MICHAŁ, The Origins of the Constructive Vote of No Confidence, No. 5(106)2011, p. 81.

BRZOZOWSKI WOJCIECH, Guidelines for the Content of Regulations (Comments on the Formulation of Statutory Authorisation Provisions), No. 4(117)2013, p. 65.


ESMUND TOMASZ, The Legislator’s Response to the Judgments with a Delaying Clause, Issued by the Constitutional Court's in 2008–2009, No. 1(102)2011, p. 27.

FLORCZAK-WĄTOR MONIKA, “Benefit privilege” in the Case Law of the Constitutional Tribunal, No. 6(113)2012, p. 29.

FLORCZAK-WĄTOR MONIKA, Review of Constitutionality of General Clauses, No. 4(117)2013, p. 49.

FRYDRYCH ANNA vide MICHALAK BARTŁOMIEJ, FRYDRYCH ANNA.


GĄSIOR TOMASZ, The Funding of Political Parties in Poland, No. 5(118)2013, p. 9.

GIZBERT-STUDNICKI TOMASZ vide ARASZKIEWICZ MICHAŁ, GIZBERT-STUDNICKI TOMASZ.


HERMANN MIKOŁAJ, *Legal Norm: An Expression or a Statement?*, No. 2(115)2013, p. 67.

IŁOWIECKI RADOSŁAW, *Status of Legislative Drafting. The profession of Drafter*, No. 6(101)2010, p. 27.

JACKOWSKI MICHAŁ, *The Constitutionalization of the Principle of ne bis in idem in the Polish Legal Order*, No. 6(107)2011, p. 79.

JAKUBIAK ŁUKASZ, *The Procedure of Representative Recall in British Columbia as Compared to the US Model*, No. 4(105)2011, p. 75.


JARENTOWSKI MAREK, *Change in the System of Election of the Polish Senate, Adopted in 2011*, No. 4(105)2011, p. 33.


KACPERSKI KAMIL, *The Concept of Reform of Law in Relation to General Elections to the Sejm and Senate in the Process of Adoption of the August Amendment*, No. 1(102)2011, p. 43.


KRANZ JERZY *vide* BARCZ JAN, KRANZ JERZY.


MAJCHRZAK BARTOSZ, *Material and Technical Actions (as a Legal Form of Operation of the Administration) and a Judgment within the meaning of Article 79 (1) of the Constitution*, No. 3(116)2013, p. 43.


MIKŁASZEWINCZ PRZEMYSŁAW vide SAFIAN MAREK, MIKŁASZEWINCZ PRZEMYSŁAW.


MILLER WOJCIECH vide JAROSZYŃSKI TOMASZ, MILLER WOJCIECH.


NOWOTARSKIBARTŁOMIEJ, Veto-Actors and Veto-Players as a Model of Constitutional Design for Young Democracies*, No. 6(101)2010, p. 103.


OLZÓWKAMARCIN, Conclusion of Agreements and Adoption of Statutes Referred to in Article 25(5) of Poland’s Constitution*, No. 6(101)2010, p. 49.

PACH MACIEJ, *Accountability of the Marshal of the Sejm or the Marshal of the Senate Discharging the Duties of the President of the Republic of Poland*, No. 2(109)2012, p. 35.


PROSTAK RAFAŁ, Doctrinal Basis of the Relations Between Church and State in the Case Law of the Supreme Court of the United States, No. 5(106)2011, p. 69.

PUDŁO ANNA, Strengthening the Status of the Senate of the Republic of Poland under the Treaty of Lisbon, No. 6(107)2011, p. 47.

RACHWAŁ MARCIN, Institutions of Direct Democracy in the Sejm Debate Preceding the Adoption of the March Constitution, No. 6(113)2012, p. 71.


RADZIEWICZ PIOTR, Scientific Consultancy Services in the Work of the Sejm, No. 5(118)2013, p. 33.

RAKOWSKA ANNA, SKOTNICKI KRZYSZTOF, Changes in Electoral Law Introduced by the Election Code, No. 4(105)2011, p. 9.

RUCZKOWSKI PIOTR, A Decision Banning Public Assembly as an Example of Administrative and Legal Control of Individual Rights and Freedoms, No. 2(109)2012, p. 79.


SAFJAN MAREK, MIKŁASZEWICZ PRZEMYSŁAW, The Limits of Compensatory Preference, No. 6(107)2011, p. 31.

SARNECKI PAWEŁ, Superior Powers of the Prime Minister within the Structure of Government Administration, No. 3(104)2011, p. 57.


SKOTNICKI KRZYSZTOF vide RAKOWSKA ANNA, SKOTNICKI KRZYSZTOF.


SUŁKOWSKI JAROSŁAW, Political Parties’ Autonomy and an Internal Democracy Issue, No. 3(104)2011, p. 73.


<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Volume</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>SZMYT ANDRZEJ</td>
<td>Examination of Admissibility of Bills under Article 34 para. 8 of the Standing Orders of the Sejm</td>
<td>5(112)2012</td>
<td>p. 9</td>
</tr>
<tr>
<td>SZYMANEK JAROSŁAW</td>
<td>The Representative Relationship at a European Union Level: An Attempt to Describe the Nature of a Mandate</td>
<td>3(104)2011</td>
<td>p. 91</td>
</tr>
<tr>
<td>SZYMANEK JAROSŁAW</td>
<td>Parliamentary Decision-Making Process: A Political Analysis</td>
<td>3(110)2012</td>
<td>p. 9</td>
</tr>
<tr>
<td>SZYMANEK JAROSŁAW</td>
<td>Representation Models in Second Chambers of Parliament</td>
<td>3(116)2013</td>
<td>p. 9</td>
</tr>
<tr>
<td>TKACZYK EDYTA</td>
<td>Professional Bodies in the light of the Constitution of the Republic of Poland</td>
<td>6(107)2011</td>
<td>p. 61</td>
</tr>
<tr>
<td>TULEJA PIOTR</td>
<td>The Issue of the Constitution of 1997 as Covered in the Pages of “Przegląd Sejmowy”</td>
<td>2(115)2013</td>
<td>p. 39</td>
</tr>
<tr>
<td>URUSZCZAK WACŁAW</td>
<td>The May 3, 1791 Constitution as a Political Testament of the Polish-Lithuanian Commonwealth</td>
<td>2(103)2011</td>
<td>p. 9</td>
</tr>
<tr>
<td>WIECIECH TOMASZ</td>
<td>Vote of No Confidence under the Westminster Parliamentary System</td>
<td>6(101)2010</td>
<td>p. 83</td>
</tr>
<tr>
<td>WIECIECH TOMASZ</td>
<td>Contingent Presidential Election by the US House of Representatives</td>
<td>4(105)2011</td>
<td>p. 91</td>
</tr>
<tr>
<td>WIERCZYŃSKI GRZEGORZ</td>
<td>Poland Reforms its Law Publication System</td>
<td>5(106)2011</td>
<td>p. 23</td>
</tr>
<tr>
<td>WISZOWATY MARCIN MICHAŁ</td>
<td>Legal Regulation of Lobbying in the European Countries — Recent Examples and Preliminary. Summaries on the Basis of Global Trends</td>
<td>5(112)2012</td>
<td>p. 51</td>
</tr>
<tr>
<td>WRÓBLEWSKA IWONA</td>
<td>Public Hearing in Poland: An Analysis of Normative Solutions and the Practice of their Application</td>
<td>3(110)2012</td>
<td>p. 89</td>
</tr>
<tr>
<td>WRÓBLEWSKI BARTŁOMIEJ P. vide ŁĄCKI PAWEŁ</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ZAJADŁO JERZY</td>
<td>The Idea of Equality in Modern Philosophy of Law and Political Philosophy</td>
<td>6(107)2011</td>
<td>p. 11</td>
</tr>
</tbody>
</table>

ZIÓŁKOWSKI MICHAŁ, *Prerogative of the President of the Republic of Poland to Appoint Judges (Comments on Article 144, para. 3, subpara. 17 and Article 179 of the Constitution)*, No. 1(114)2013, p. 59.

