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Influence of the European Democratic Standards on the Constitutional Development in Poland after 1989*

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The author analyses the constitutional-writing process in Poland after 1989. Although Poland was the first socialist country from Central and Eastern Europe to choose a democratic path of development, it took almost eight years to pass the Constitution of the Republic of Poland of 2 April 1997. The author describes why building the constitutional compromise was so difficult. He also stresses the role of European democratic standards in this process. Despite that influence not being as strong as in other Central and Eastern European Countries, several constitutional articles (e.g. citizens' rights and freedoms) were adopted almost directly from the European Convention on Human Rights. The important leverage of the Council of Europe was connected with expectation to provide free parliamentary elections in Poland as a condition of membership. The influence of other European organisations (European Union, OSCE), based on that same axiology as Council of Europe, was less important.

Keywords

Polish Constitution, democratic transition, constitutional development, European standards.

Introduction

The Constitution of the Republic of Poland was passed by the National Assembly (composed by both parliamentary houses: Sejm and Senate) on 2 April 1997 and then confirmed by the Nation in a referendum on 25 May 1997. It is interesting to note, that it took over eight years to pass the

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Constitution. For a long time, Poland – the first post-socialist country to enter of the path of democratic reform in 1989, was unable to adopt a modern and fully democratic constitution. In this paper I will try to explain why the Constitution-writing process took as much time and to what extent this process was influenced by the European democratic standards, especially offered by the Council of Europe (CoE).

Constitutional Development in Poland 1989-1997

Major changes took place in Poland in 1989. The Polish United Workers Party, faced with social and economic hardships as well as transformation occurring in the Soviet bloc, agreed to talk with the democratic opposition. It was the party's intention that the systemic changes should include concessions to the opposition while maintaining within the party considerable influence on the functioning of the State. Basic agreements between the communist party and the opposition were made during the "Round-table" debates¹.

The political experiences of the country in 1989 were an obvious rejection of the previously existing structure of government. Initially, without even formal changes to the existing constitutional norms, many of them ceased to operate when the Nation recovered its sovereign position in the State – manifested most directly in the results of the election of 4 June 1989. Certain constitutional phrases, dealing with the "Socialist state", the leading role of the working class and the worker-peasant alliance as a "base of power" declared to be the sovereignty "of the working people of towns and country", implementation and development of "socialist democracy", phrases which treated binding legal regulations completely instrumentally as "an articulation of interests and will of the working people" as well as other similar constitutional contents – were suspended in the air. The Polish people had demonstrated explicitly their desire to live in a system of pluralistic democracy – a

¹ **Tuleja P.**, Introduction, *Polish Constitutional Law. The Constitution and Selected Statutory Materials*, eds. E. Gierach, P. Chybalski, Chancellory of the Sejm, Warsaw, 2009, p. 8.

system where the rule of law expresses objective values, freedom of the individual is respected and the economy is rational².

The Constitutional vacuum, which appeared in the summer of 1989, as a result of an effective – even if only *via facti* – negation of the operation of the fundamental principles of the Old Constitution (formally – the Act of 22 July 1952, though much amended), was filled with the formulation of new provisions. This happened by way of a comprehensive amendment adopted by the Parliament at the end of December 1989. By deletion, in full, of the introduction and chapters on the principles of the political systems and socio-economic system, the Act formally approved the rejection of the premises of the then-existing system of government. They were replaced by the following principles, declared to have binding force: (1) a democratic state ruled by law and implementing the principle of social justice; (2) sovereignty of the Nation; (3) legality of the functioning of State organs; (4) political pluralism and freedom to create political parties; (5) decentralisation of State functions through local government; (6) freedom of economic activity; (7) full protection of property rights and equal status of all forms of ownership³.

After 1989 the role of the so-called leading constitutional principle has been played by the principle of the democratic state ruled by law. However the absence of an extensive list of human rights and many important legal principles in the Constitution made the Constitutional Court derive many such principles from the principle of a democratic state ruled by law. Afterwards, some of these principles were written into the existing Constitution⁴.

Even though these changes represented democratic values, approved by the society, history showed, that achieving a new constitution, based on those values, was not an easy task. Several attempts were necessary to fulfill this goal⁵.

² **Sarnecki P.**, The Origin and Scope of the Polish Constitution, *The Principles of Basic Institutions of the System of Government in Poland*, eds P. Sarnecki, A. Szmyt, Z. Witkowski, Sejm Publishing Office, Warsaw 1999, p. 13.

³ Ibidem, p. 14-15.

⁴ **Tuleja P.**, *Introduction...*, p. 9.

⁵ **Działocha D.**, A New Constitution for the Republic of Poland. A Legislative History, *The Principles of Basic Institutions of the System of Government in*

The first attempt to adopt a constitution was made by the Sejm and Senate in the years 1989-91. At that time, constitutional committees were appointed by both houses of the Parliament. Each house prepared its own draft constitution. Political parties and individuals, in particular experts in constitutionalism, also prepared their own drafts. There were some ten draft constitutions. The chance to adopt a constitution, no matter whether durable or not, disappeared in a short time, since a viewpoint prevailed that a Parliament chosen through not entirely democratic elections (the so-call “contractual Sejm”, based upon “Round table agreement”) should not be one to adopt a new constitution.

The second attempt to adopt a constitution was made by the Parliament chosen in free elections in October 1991. A constitution had to be passed in accordance with the procedures specified in the Constitutional Act adopted by that Parliament on 23 April 1992. The act envisaged a democratic, but very complex procedure for the preparation and adoption of a constitution. The Constitutional Committee appointed by the both houses of Parliament on the basis of the Act began its work in January 1992. Within the required period of six months following the establishment of the Committee, seven drafts were submitted to the National Assembly. Unfortunately, shortly after the beginning of work on the constitution, President Lech Wałęsa dissolved Parliament in May 1993 when the Sejm adopted a motion of no confidence in the government of Ms. Hanna Suchocka.

The third attempt to adopt a new constitution was made after parliamentary elections held on 19 September 1993, won by left-centrist parties. The problem was, however, with the political legitimacy of this Parliament. The introduction in Poland of a 5% threshold for parties (8% - for coalitions) to be qualified to Parliament created an unexpected result: several right-wing parties did not reach this threshold and in consequence almost 35% of the rightist electorate was not represented in the Parliament⁶. In such a situation, right-wing parties suggested that this Parliament, however legally elected, had not a “moral legitimacy” to adopt

Poland, eds P. Sarnecki, A. Szmyt, Z. Witkowski, Sejm Publishing Office, Warsaw 1999, pp. 5-8.

⁶ **Jasiewicz P.**, Dead Ends and New Beginnings: the Quest for a Procedural Republic of Poland, *Communist and Post-Communist Studies*, 2000, 1, 101-109.

a new constitution. Reacting to this situation, the Act of governing the procedure for work on a constitution was amended, e.g. allowing to offer citizens' legislative initiative. On this basis, the draft was submitted to the National Assembly by "Solidarity" Trade Union, supported by almost one million citizens. The work of the Constitutional Committee of the National Assembly was concentrated on six drafts (from among seven) offered to the Assembly of the previous term. All the drafts were presented by their sponsors in the Constitutional Committee. In September 1994 they were discussed (in the course of the first reading) in the National Assembly and, afterwards, referred to the Constitutional Committee for preparing a single, uniform draft constitution. A month later, a debate was held in the Sejm on the subject of fundamental questions of the system of government indicated by the Constitutional Committee.

In the course of two debates, and during the work of the Constitutional Committee, there appeared all the controversies typical of the constitutional discussion held after 1989, as well as various differences between particular draft constitutions. Despite this and various breakdowns of work on a uniform draft constitution in the Constitutional Committee, it was successfully concluded within a period of three years. As a consequence of the talks started at the beginning of January 1997 with participation of SLD (Democratic Left Alliance), PSL (Polish People's Party), UW (Union for Freedom) and UP (Labour Union), and following the appeal to the Constitutional Committee addressed by the President of the Republic, Aleksander Kwaśniewski, who was concerned about the crisis in the work of the Committee, the wording of amendments was determinate as a result of mutual concessions. The amendments took into account the proposals for a wider scope of the free of charge principle in education in public schools and basic health care (proposed by UP), and for leaving unsettled the question of territorial division and three-level structure of local government in the Constitution. The concept of the family farm as a basis for the structure of agriculture was also introduced (in accordance with the proposal of PSL), as well as the principle of overriding the President's veto by the three-fifths majority of votes in the Sejm (instead of a two-thirds majority originally drafted).

A different position was taken by the opposition in the Constitutional Committee. The representative of the draft constitution

prepared by the Trade Union “Solidarity” (called a “citizens draft”, and which was treated as opposite to that proposed by the Constitutional Committee, even though in fact the latter was taken into account to the same extent as other drafts) proposed that all provisions of the draft constitution of the Committee be repeatedly voted and replaced by relevant provision of the draft submitted by the “Solidarity”. When this motion was voted down, it offered 19 amendments to particular provisions of the Constitutional Committee’s draft. As a result of the debate held in the Constitutional Committee on 14-16 January 1997, and a vote on the above proposals, the majority of amendments, offered by “Solidarity”, were rejected. The proposal to prohibit the existence of political parties and associations of a totalitarian character (the present article 13 of the Constitution) was passed. They also accepted the proposal to supplement the list of duties of citizens with duty to show concern for the common good as well as the proposal to reformulate the wording of provision about the social and economic policy of the State in relation to the family. All the negotiated proposals for amendments, as mentioned above, offered by PSL, UP, UW and SLD were adopted.

During 24-28 February 1997, the National Assembly sat to consider the report of the Constitutional Committee on the draft constitution (its second reading). In the course of the discussion, 400 amendments were offered to the draft constitution. They referred to matters which had been the most controversial during the work of the Constitutional Committee, including the preamble, freedom of religion and its relation to the State – Churches, the right to education and other social rights, State finances and relations between international and Community law on the one hand and domestic law on the other. All the amendments were discussed by the Constitutional Committee, which approved 118 amendments.

The results of the work of the Committee were presented on 21 and 22 March 1997 in an additional report of the National Assembly to be voted together with the previous minority motions of the Committee. After adoption of the amendments by the required two-thirds majority of votes, on 22 March, the National Assembly adopted a whole draft constitution. According to the provisions of the existing constitutional act on the procedure for the adoption of the constitution, the President of the Republic

proposed (at its second reading) 41 amendments to the draft Constitution adopted by the Constitutional Assembly. The Constitutional Committee considered the President's proposals and approved some of them.

On the 2 April 1997 the third reading of the constitution was held in the National Assembly. The reading was devoted to the consideration of the report of the Constitutional Committee on the proposals of amendments to the Constitution offered by the President of the Republic. The National Assembly voted to approve most of those amendments which received support from the Constitutional Committee. In the final voting, 451 members of the National Assembly (out of 497 of members present) voted for the Constitution, 40 were against and 6 abstained. In their speeches given after the final vote in the National Assembly, the President of the Republic, the President of Assembly and presidents of the major parliamentary causes recognized the Constitution as a reasonable compromise and a modern basic law which takes into account universal trends of contemporary constitutional theory and the values shared by the Polish Nation.

The President of the Republic declared a nationwide referendum to be held on 25 May 1997, and soon confirmed this by issuing an appropriate order. The campaign before the referendum was characterised by explicit polarisation of forces between political parties represented in Parliament and extra-parliamentary opposition (mostly: Election Action "Solidarity" (AWS) and the Movement of the Reconstruction of Poland (ROP, of the former Prime Minister, Jan Olszewski) and also by the harsh tone of remarks made by adversaries of the Constitution, accompanied in part by Roman Catholic Church. The harshness of their position was not always supported by substantial arguments. The objections most often raised to the Constitution by its opponents concerned the disposal of sovereign rights of the Nation (in connection with Article 90), rejection of the concept of natural law as a basis of legal order in the State, and limitation of the rights of parents to rear their children in accordance of their [e.g. parents'] convictions.

The results of the constitutional referendum held on 25 May 1997 on the basis of the Act of 29 June 1995 on Referendum, published in the proclamation by the National Electoral Commission, demonstrated that 42.68 percent of those having the right to vote (28,324,965) participated

in the voting and that 12,139,790 valid votes were cast (with 1068 invalid votes). 6,398,316 votes (or. 52.71 percent) were cast for the Constitution and 5,571,439 votes were cast against (45.89 percent of valid votes). The validity of the constitutional referendum was approved by the Supreme Court by its decision of 15 July 1997 after consideration of all protests lodged against the referendum.

The Constitution of the Republic of Poland came into effect on 17 October 1997 (after the expiry of the three-month period following the day of its promulgation). Certain provisions, specified in Article 236(2) and 237(1), came into force on a later date⁷.

1. General characteristic of the Constitution of the Republic of Poland

The Polish Constitution is a “constitution of compromise”⁸. A single document had to be forged from several competing drafts, including those from the Constitutional Committee of the pre-1993 parliament, those of the post-1993 Parliament, as well as a “citizens” draft constitution submitted by “Solidarity”. The peaceful course of transformation in Poland made possible a specific symbiosis of elements of continuity and discontinuity⁹. What was common to all drafts were references to a republican form of government, the democratic character of the “state ruled by law”, the Nation as a sovereign entity, political pluralism, separation and balance of powers, and an extensive catalogue

⁷ The Constitution of the Republic of Poland of 2nd April 1997, *Polish Constitutional Law...*, p. 19.

⁸ **Tomaszewski W.**, *Kompromis polityczny w procesie stanowienia Konstytucji Rzeczypospolitej Polskiej z kwietnia 1997 roku* [Political Compromise in Process of Writing the Constitution of the Republic of Poland], Akademia Humanistyczna im. Aleksandra Gieysztor, Pułtusk 2007, p. 130; **Jaskiernia J.**, *Wpływ kompromisu leżącego u podstaw Konstytucji RP na jej percepcję i propozycje zmian w latach 1997-2007* [Influence of Compromise based upon the Constitution of the Republic of Poland on its Perception and Proposals of Change 1997-2007], *Porządek konstytucyjny w Polsce* [Constitutional Order in Poland], eds W. Jakubowski, T. Słomka, Oficyna Wydawnicza ASPRA-JR, Warszawa-Pułtusk 2008, p. 173.

⁹ **Sokolewicz W.**, The New Role of the Constitution in the Post-socialist States of Central and Southeast Europe, *Ten Years of the Democratic Constitutionalism in Central and Eastern Europe*, ed. by K. Działocha, R. Mojak, K. Wójtowicz, Lublin 2001, pp. 17-18.

of civil and political rights and freedoms with effective mechanisms for their protection¹⁰. However, a fundamental dispute arose over such issues as the system of values underlying the organisation and functioning of society and the State, and whether the structure of parliament should be unicameral or bicameral. There was also wide disagreement as to the place and functioning of the Roman Catholic Church in a democratic state, the nature and scope of economic and social rights, as well as the so-called “European clause”, allowing the possible transfer of some powers of public authorities to international bodies¹¹.

The final compromise had to be preceded by many parliamentary compromises. First, those included internal compromises within individual political parties of the constitutional constitution, since many constitutional issues had stirred up intra-parliamentary controversies. Second, compromises were made between the different parties constituting the parliamentary coalition, which proved extremely difficult to accomplish. Third, there were compromises between the parliamentary coalition and opposition parties – which is what ultimately led to the formation of the constitutional coalition. However, the most important compromise was the unilateral acceptance by the constitutional coalition of most of the demands of “Solidarity” and the Roman Catholic Church, who despite their demands being met, vigorously opposed the draft constitution adopted by the National Assembly. The negative attitude of “Solidarity” and the Roman Catholic Church can be explained by the fact that the political forces that finally produced the Constitution were not controlled by either of them. Rather, the distinction fell primarily upon those political forces which, as a result of peaceful revolution of 1989-1990 had lost power (or so it seemed at that time) and were not expected to play a significant role in Poland’s future political life¹².

It is quite evident that ideals of legislative rationality formulated by the theory of law can seldom be fully met in the process of drafting and passing normative acts, especially when this involves the

¹⁰ **Diemer-Benedict T.**, Die neue Verfassung der Republik Polen, *Osteuropa Recht*, 1997, 43, 222-234.

¹¹ **Wyrzykowski M.**, Introductory Note to the 1997 Constitution of the Republic of Poland, *Constitutional Essays*, M. Wyrzykowski (ed.), Institute of Public Affairs, Warsaw, 1999, p. 12.

¹² *Ibid.*, pp. 12-13.

participation of parliamentary bodies in plenary sessions. Law-making under such circumstances is largely subordinated to considerations of political rationality, and the latter, in turn, can sometimes be far removed from significantly defined requirements for sensible decision-making. The concentration of emotions and interests, of religious and ideological arguments, of economic and axiological considerations that accompany the drafting and adoption of Constitutions is quite extreme. This is only partly due to the fact that the Constitution is indeed an act of fundamental significance for the legal system, and thus one which triggers political disputes of a greater political calibre than those accompanying the adoption of any “normal” statutes. The other factor is that work on drafting the Constitution gives parliamentary parties a unique opportunity to demonstrate their ideological identity and to manifest their role in the history of national law-making and statehood. The constitutional dispute also tends to be heated in character because a Constitution is a legislative act difficult to change later on¹³.

Axiology-oriented constitutional debate typically revolves around the ontological status of values and their identification. Almost invariably there arises a conflict between two radically different approaches: absolute (or cognitional), and relativistic (or non-cognitional)¹⁴. When this debate is transferred into the arena of practical choices confronting the constitution-maker, advocates of one approach are unable to agree with advocates of the other. It is also impossible to find a common ground between those who claim that values, in particular moral values, have an objective nature and derive from God’s will, and those who hold that there are simply a product of conscious and culturally-determined human choice. The advocates of the absolute approach are firmly convinced that there exists a rigid hierarchy and coherent system of values. In contrast, the proponents of the relativistic and non-cognitional approach reject the existence of such a fixed and unquestionable hierarchy. These two approaches, evident in Polish contemporary society

¹³ **Winczorek P.**, The Political Circumstances of the Drafting of the Republic of Poland’s Constitution of 2 April 1997, *Constitutional Essays*, M. Wyrzykowski (ed.), Institute of Public Affairs, Warsaw 1999, pp. 15-16.

¹⁴ **Ziemiński Z.**, *Wartości konstytucyjne. Zarys problematyki* [Constitutional Values. An Outline], Sejm Publishing Office, Warszawa 1993, p. 7.

and reflected in constitutional discussions, reveal an axiological pluralism. This pluralism also effects the views about what is a value, and what is, and what should be, the hierarchy of such values¹⁵.

The following overlapping sets of preferences and values typify Polish society: (a) national-authoritarian: exposing such notions as nation, race, and power; (b) national-Christian (Catholic); favouring religion, nation, and tradition; (c) conservative-authoritarian: espousing ownership, authority, and tradition; (d) conservative-liberal: favouring ownership, liberty, tradition, and law; (e) Christian-democratic: espousing the case of labour, ownership, religion, and law; (f) agrarian: favouring labour, ownership, law, and tradition; (g) liberal-democratic: favouring ownership, liberty, law, tolerance; (h:) social-liberal: advocating ownership, liberty, labour, and tolerance; (j) communist: advocating equality, law, and authority; (k) anarchistic: favouring liberty, equality, and tolerance; and (l) populist: advocating equality and authority. It is almost impossible for any single coherent and comprehensive system of values to be adopted in its entirety by the parliamentary body charged with preparing a constitution. Poland was no exception. In fact, the essence of various constitutional proposals, offered in 1989-96, was influenced, with varying degrees of intensity, by political orientations listed in “(b) through “(i)”¹⁶.

The Constitution of 2 April 1997 is a document abundant in principles and general clauses. It undoubtedly belongs to a group of basic laws whose authors have aimed not only at the creation of a system of organs and institutions, but also at making it subject to a developed network of principles and values of a more general character¹⁷. They are expressed, above all, in the intensive preamble, which contains a particular *invocation Dei*, and which identifies such universal values as truth, justice, good and beauty as emanating, *inter alia*, from belief in God. Some of them express the ideas and values typical of contemporary

¹⁵ **Winczorek P.**, Axiological Foundations of the Polish Constitution, *Constitutional Essays*, M. Wyrzykowski (ed.), Institute of Public Affairs, Warsaw 1999, pp. 61-62.

¹⁶ *Ibid.*, pp. 62-63.

¹⁷ **Balaban A.**, The New Role of the Polish Constitution of 2 April 1997, *Ten Years of the Democratic Constitutionalism in Central and Eastern Europe*, ed. by K. Działocha, R. Mojak, K. Wójtowicz, Lublin 2001, p. 47.

democratic states, other manifest the specific character of Polish tradition and its path to democracy. Altogether, they compose the constitutional identity of the state¹⁸.

The most radical changes effected by the new Constitution, compared with its predecessor (including constitutional changes of December 1989 and so called Small Constitution of 1992) was demonstrated by substantial revision of the first chapter. At this point, one should chiefly note a newly introduced principle declaring “the state to be the common good of all its citizens”, as specified in Article 1. Other new features characterising Polish statehood include the principle of uniformity of the state – however, with the decentralisation of public power, a “social market economy” as a characteristic feature of the state economic system, provision of special protection for the family farm in agriculture, and the requirement for co-operation between the state and churches for the good of society with a simultaneously declared impartiality of the states in matters of personal conviction. The principle of a democratic state ruled by law, originated in December 1989, was developed by declaration of the requirement to respect international law and that the Constitution was to be applied directly by all state authorities, irrespective of the fact of whether laws operate, or not, in this field of activities¹⁹.

The second, and principal, complex of transformations generated by the Constitution, was the provisions concerning freedoms and rights of the citizens. Chapter II of the Constitution is designated to deal with this issue and, like Chapter I, is secured by a more difficult procedure for modification and constitutes an extended “Chapter of Civil Rights”, with its own, formalised internal regularity. It is important to stress, dealing with the subject of this paper, that in construction of individual subjects in this Chapter, one can easily see a tendency to ensure a maximum conformity of its provisions of international conventions concerning the

¹⁸ **Garlicki L.**, The Principles of the System of Government in the Republic of Poland, *The Principles of Basic Institutions of the System of Government in Poland*, eds P. Sarnecki, A. Szmyt, Z. Witkowski, Sejm Publishing Office, Warsaw 1999, p. 52.

¹⁹ **Sarnecki P.**, The Origin and Scope of the Polish Constitution, *The Principles of Basic Institutions of the System of Government in Poland*, eds P. Sarnecki, A. Szmyt, Z. Witkowski, Sejm Publishing Office, Warsaw 1999, p. 18.

status of individual, e.g. European Convention on Human Rights. An open attitude to so-called international humanitarian law is another important feature of the new Constitution, clearly distinguishing it from the evident mistrust manifested in this respect by its predecessor – Poland’s “socialist” constitution. The new “Charter of Civil Rights” derives rights from the inherent and inalienable dignity of persons, and the role of public authority is not primarily to specify the scope of the rights granted, but rather to “respect and protect” such a dignity. A series of new rights of the citizens, previously unknown (rights of ethnic minorities, the right to have one’s privacy protected, the right of parents to rear their children in accordance with their own convictions, the right to obtain information on the authorities) have been included in Chapter II²⁰.

The system of division of power, as well as the parliamentary-cabinet system, originated in 1989 (December amendments to the Constitution) and 1992 (Small Constitution) were approved by the new Constitution. The Constitution stressed the importance of the judiciary as a “third power”. It was closely linked to a concept of civil rights, as the new Constitution attached a great importance to the question of guaranteeing such rights, and among these guarantees, the independent administration of justice constitute a prime guarantee. It introduces a universal right to have one’s case heard by the court as a civil right, the principle of at least two-instance operation of the courts, a citizen’s right to lodge a constitutional complaint, final character of adjudication of the Constitutional Court, the right of all courts to involve this Constitutional Court – by means of the so-called “question of law” – to deal with the constitutionality of statutes, applied by them in individual cases. Moreover, there has been a considerable strengthening of guarantees for independence of judges and, in this context, also an extension of the provisions concerning the National Council of Judiciary as an instrument of guarantee for the observance of such independence²¹.

²⁰ Ibid, pp. 19-20.

²¹ Ibid, p. 20. **Sadurski W.**, Allegro without Vivaldi: Trademark Protection, Freedom of Speech, and the Constitutional Balancing, *European Constitutional Law Review*, 2012, 3, 454-469.

The Constitutional Court's organisation and procedure are determinate by the Act of 1 August on the Constitutional Court. Art. 1 of the Act refers to Art. 1888 of the Constitution, and includes that the main function of the Constitutional Court, as the authority of the judiciary is to examine the constitutionality of normative acts and international agreements as well as perform other tasks specified by the Constitution. The Constitutional Court is called a "negative legislator", and there is no doubt that its activity has a direct impact on the political process of governance. The Polish model on constitutional review was based on existing European models, specifically on the Austrian Constitutional Court. In the current era, judicial review of the Law's compatibility with the Constitution is one of the fundamental guarantees of compliance with the Basic Law in modern democratic states²².

2. *Influence of European democratic standards on the Constitution of the Republic of Poland*

The situation in Poland in this area was different than in several countries of Central and Eastern Europe²³, especially from the former Soviet Union. At the start of the process of democratisation, several Polish democratic institutions, belonging to European democratic standards, were already in place, e.g. Constitutional Court, State Court, ombudsman, administrative courts. Of course, in the new political climate, those institutions have strengthened their positions, especially in the framework of the division of power and political pluralism, but Poland was not one of the countries where institutional democratic progress was to a huge extent the reaction to the influence of international organisations, especially the Council of Europe.

²² **Dana A.**, *Constitutional Review – Distribution of the Burden of Proof*, "Volumina Scientiala Scholae Superioris de Disciplina Informatica in Rebus Gubernandis ac Administrandis", 2014, No. 3, p. 83.

²³ **Pridham G.**, The international dimension of democratization: theory, practice, and inter-regional comparisons, *Building Democracy. The International Dimension of Democratisation in Eastern Europe*, ed. by G. Pridham, E. Herring, G. Sanfors, London-Washington 1997, p. 7.

The report on Poland's application for membership in the Council of Europe (CoE), prepared by Sir Geoffrey Finsberg²⁴ has acknowledged, that upon the "round table" agreement, in the constitutional changes of 7 April 1989, two values, important for CoE's axiology system, have been introduced: division of power and political pluralism. The report has stressed as well another important value: independence of judicial power, and changes introduced to guarantee independence of judges²⁵.

The report has noted several changes, which occurred in Poland, which was important for Poland's application for membership of the Council of Europe: introducing free labour movement; introducing freedom of political parties and associations; the law guaranteeing freedom of conscience and religion (17 May 1989); a new press law, eliminating censorship (29 May 1989); introducing equality based on the law; and introducing independent self-government (8 March 1990)²⁶.

The only factor which blockaded Poland's membership in the Council of Europe, was the question of free election. Without any doubt the election in Poland of 4 June 1989 was crucial and created a new political situation, influencing development in the whole of Central and Eastern Europe. But from the formal point of view, this election may not be perceived by CoE as "free and democratic" because only a third of sites in Sejm were opened (under "round table" agreement) for free competition and only the Senate was elected freely. In Finsberg's report, condition to hold free election had crucial meaning. The CoE's Parliamentary Assembly *expressis verbis* stated, that acceptance of Poland as a CoE's member will be possible "immediately upon informing the Assembly's President, that the Assembly's Bureau is satisfied on fact of holding free elections in Poland"²⁷. Similar was a decision of the CoE's Committee of Ministers, based upon this opinion²⁸.

²⁴ *Report of Poland's application for membership of the Council of Europe* (Rapporteur: Sir Geoffrey Finsberg, United Kingdom, Conservative), Parliamentary Assembly of the Council of Europe, Strasbourg – 19 September 1990, Doc. 6289), p. 2.

²⁵ Ibid, p. 3.

²⁶ Ibid, p. 3-6.

²⁷ Opinion No. 154 (1990)

²⁸ Resolution (90) 18.

Poland was finally accepted to the Council of Europe on 27 November 1991, after free democratic election was held in October 1991. On this date Poland signed the European Convention on Human Rights, which was ratified on 15 December 1992, and came into force on 19 January 1993.

The influence of the Council of Europe on constitutional development in Poland may be seen especially in the area of constitutional rights and freedoms, where several articles of the European Convention on Human Rights were almost directly accommodated into the Constitution.

Standards described as a “soft law” also had important meaning, especially in the area of organising judicial power, e.g. status of the judges.

We may suggest that the CoE’s influence in the case of Poland was not as strong as, for example, in the cases of Russia, Ukraine, Moldova, Georgia, Armenia and Azerbaijan²⁹. Several democratic institutions were already in place in Polish constitutional law (some of them from the Communist time), so the CoE’s influence was not necessary in those areas. Poland has realised a democratic structure of government (e.g. division of power, political pluralism, independence of judiciary, local self-government) on its own initiative. Without any doubt, the CoE’s pressure to hold free elections was one of the important factors for the decision to hold such a election in October 1991 (it is important to remember that the term of the so-called “contract Parliament” should have ended in 1993). The CoE’s standards (conventional, “soft law”) clearly played the role in the constitution-making process, especially dealing with formulation of rights and liberties.

The European Union’s influence on constitutional processes in Poland was yet more limited³⁰. The enlargement of the European Union to include the countries of Central and Eastern Europe was the final step

²⁹ **Jaskiernia J.**, Влияние Совета Европы на системные изменения в государствах бывшего Советского Союза, *Problemy konstytucjonalizma i jego sudiebnoj zaszczyty w gosudarstwach wostocznoj Jewropy*, *Studia Politologiczne*, vol. 32, 2014, p. 11

³⁰ **Jaskiernia J.**, Fünf Jahre Mitgliedschaft der Republik Polen in der Europäischen Union. Umgestaltungen des polnischen Rechtssystems und des Bewusstseins der Bevölkerung, *Deutsch-Polnische Juristen-Zeitschrift*, 2009, 2, 5-19.

in the reintegration of the continent after almost half a century of forced division³¹. Once Poland fulfilled European democratic standards offered by the Council of Europe, it practically fulfilled the expectations of the European Union in this area³². The “democratic conditionality”³³ instrument of the EU’s leverage was not as important as in several other EU’s candidates³⁴. The new Polish Constitution enacted provisions enabling Poland’s future membership in the EU. Indeed, Poland’s integration with the EU was having an impact on the organisations, tasks and functioning nature of the public authority³⁵. During the pre-accession stage, the Polish parliament introduced procedure for approximating Polish law to the law of the European Union³⁶. During this time Poland initiated several changes in the area of Public law³⁷ and rationalisation of the work of the Parliament³⁸. The Treaty of Nice prepared the European Union for the big territorial extension, which occurred in 2004³⁹. The Polish Constitutional Tribunal held conformity of the Accession Treaty

³¹ **Mayhew A.**, *Recreating Europe, The European Union’s Policy towards Central and Eastern Europe*, Cambridge 1998, p. xiii.

³² **Pridham G.**, EU Enlargement and Consolidating Democracy in Post-Communist States: Formality and Reality, *Journal of Common Market Studies*, 2002, 5, 942-958.

³³ **Williams A.**, Enlargement of the Union and the Human Rights Conditionality, *European Law Review*, 2000, 6, 610-623.

³⁴ **Schimmelfenning F., Engert S., Knobel H.**, Cost, Commitment and Compliance: the Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey, *Journal of Common Market Studies*, 2003, 3, 497-516.

³⁵ **Biernat S.**, The Impact of European Integration on the Organization and Functioning of Poland’s Legislative and Executive Authorities, *Revue européenne de droit public. Revue quadrilingue*, 1997, 4, 1182-1197.

³⁶ **Jaskiernia J.**, Polish Sejm’s Procedure for Approximating Polish Law to the Law of the European Union, *Contemporary Polish Law*, 2000=2001, p. 63.

³⁷ **Łętowski J.**, Polish Public law in the Face of European Integration, *The National Constitution and European Integration*, ed. by E. Popławska, Warsaw 1995, p. 54.

³⁸ **Jaskiernia J.**, The Regulation of the Procedure as a Means of Rationalizing the Work of Parliament, *The National Constitution and European Integration*, ed. by E. Popławska, Warsaw 1995, p. 115.

³⁹ **Jaskiernia J.**, Political and Institutional Problems of the European Union’s Political System in the Post-Nice Process, *The Treaty of Nice. Conclusions for Poland*, ed. by J. Barcz, R. Kuźniar, H. Machińska, M. Popowski, Warsaw 2002, p. 66.

with the Polish Constitution⁴⁰. We should note that an instrument included in art. 7 of the Treaty of the European Union⁴¹ may play a role in Poland in the improbable scenario that Poland will break democratic rules accepted by the European Union (this instrument was used by the EU toward Austria, when the xenophobic party of J. Haider joined the government). Poland should have introduced in the Constitution the so-called “European clause”, as a consequence of its’ EU’s membership⁴². Several attempts to do so have not yet been successful⁴³.

Dealing with commitments toward Organization of Security and Cooperation in Europe (OSCE) it is worthwhile to observe that this organisation played an important role in diminishing the communist system in Central and Eastern Europe, based upon the instrument of the so-called “third basket” included in the Helsinki Final Act of 1 August 1975. After dramatic political changes in Central and Eastern Europe the significance of this institution was reduced comparative to Communist times. In actuality, OSCE’s “human dimension” commitments⁴⁴ represent almost that same values as the Council of Europe’s, so it brings no new axiology, which may influence Poland’s constitutional process, however, OSCE plays an important role in election monitoring processes⁴⁵. In 2007 OSCE (Bureau of Democratic Institutions and Human Rights) decided to monitor a parliamentary election to Poland. Jarosław Kaczyński’s

⁴⁰ **Lazowski A.**, Accession Treaty: Polish Constitutional Tribunal. Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005, *European Constitutional Law Review*, 2007, 1, 142-156.

⁴¹ **Richardson J.**, The European Union in the World: a Community of Values, *Fordham International Law Review*, 2002, 1, 6-19.

⁴² **Jaskiernia J.**, *Członkostwo Polski w Unii Europejskiej a problem nowelizacji Konstytucji RP* [Membership of Poland in the European Union and the Problem of Changing of the Constitution of the Republic of Poland], „Żurawia Papers, z. 2, Warszawa, 2004, p. 61.

⁴³ **Safjan M.**, The Constitution and the Membership of the Republic of Poland in the European Union, *Contemporary Polish Law, 2000-2001*, p. 21

⁴⁴ *OSCE Human Dimension Commitments*, vol. I, *Thematic Compilation*, OSCE/ODIHR, Warsaw 2005.

⁴⁵ **Jaskiernia J.**, *Międzynarodowe obserwowanie wyborów jako czynnik demokratyzacji procesów wyborczych* [International Observation of Elections as a Factor of Democratization of the Elections Processes], *Z zagadnień współczesnych społeczeństw demokratycznych* [On the Issues of Contemporary Democratic Societies], eds A. Jamróz, S. Bożyk, Temida 2, Białystok 2006, p. 81.

government originally refused to accept OSCE's mission under explanation that Poland is a democratic country which international observers should not visit. Finally, under international pressure, OSCE's observers were accepted and offered a report⁴⁶. Poland introduced in a new Election Code the institution of foreigner observers of elections⁴⁷.

Conclusion

The constitutional process in Poland, which occurred from 1989-1997, was a specific one. Poland was the first Central and Eastern Europe state to change its political system to democracy, but it took several years to achieve a new Constitution. Finally, Poland received a democratic and modern Constitution. Even those who voted against this Constitution finally acknowledged that the Constitution of the Republic of Poland was a strong pillar of stabilisation of the Polish Political system. The foreign influence on this process was limited because Poland introduced democratic institutions before joining the Council of Europe. However, several constitutional articles, especially regulating individual rights and freedom, were based on the language of the European Convention on Human Rights. Also several CoE "soft law" standards were useful in building independent judicial power. The Congress of Local and Regional Authorities Europe (CLRAE) was instrumental in writing a self-government law. In such a circumstance it is rational to argue that European democratic standards were not a crucial factor in Poland's constitutional-writing process but they were helpful to find proper constitutional language, based on the Western European democratic

⁴⁶ **Jaskiernia A.**, *Przekaz medialny wyborów parlamentarnych 2007 r. w świetle analiz misji obserwacyjnej OBWE* [Medias' Coverage of the 2007 Parliamentary Elections in the light of the OSCE's Observation Mission], *Wybory 2007 i media – krajobraz po „IV RP”* [2007 Elections and the Media – What after the "IVth Republic of Poland"], ed. D. Waniek, AlmaMer Wyższa Szkoła Ekonomiczna, Warszawa 2009, p. 260

⁴⁷ **Jaskiernia J.**, *Międzynarodowi obserwatorzy wyborów w świetle Kodeksu wyborczego* [International Observers in the Light of the Election Code], *Prawo w służbie państwu i społeczeństwu. Prace dedykowane Profesorowi Kazimierzowi Działosze z okazji osiemdziesiątych urodzin* [Law in Service of State and Society. Works dedicated to Professor Kazimierz Działocha], eds B. Banaszak, M. Jabłoński, S. Jarosz-Żukowska, Wrocław 2012, p. 104.