Strasbourg, 27 June 2001
<cdl\doc\2001\cdl-ju\34-e>

CDL-JU (2001) 34
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

The Constitutional Court and the Principle of Separation of Power

Report by Judge Lech Garlicki

Constitutional Tribunal, Warsaw, Poland

*** * ***

Seminar on "The Role of the Constitutional Court in the State and Society"
(Kyiv, 10-11 May 2001)

organised by the Constitutional Court of Ukraine in co-operation
with the Venice Commission and
the German Foundation for International Legal Cooperation

I.

1. Nearly all democracies in the modern world base the construction of their central organs on the principle of separation of power. A democracy is also characterised by the principle of political pluralism, which secures parliamentary mandates to the opposition, and assumes regular alternation of the ruling majority and the opposition. Obviously, in such constitutional and political context various controversies concerning the scope of competence and mutual relations between different participants of the governing process inevitably appear from time to time.

Most of these controversies are solved by political means. Without going deep into details one should only note that the knowledge of the art of arguing is one of the fundamental elements of political culture. Respect for political opponents, ability to compromise, and, above all, to face a defeat, are the foundations of this culture. Let us not forget, that in our part of the world we had to learn all this nearly from a scratch. The typical methods of operating of the communist party showed no respect for different views, nor accepted any possibility of defeat in a political dispute.

Another typical feature of a modern democracy is the increased role of the judicial branch, as is expressed, among others, by involving the courts into the process of solving political contentions. The procedures and forms vary, but, without a doubt, it is the constitutional court that emerges as the most important agent. The growing significance of constitutional courts is closely linked with the growing importance of constitutions (some feedback is clearly visible here). In relation to political disputes this means that more and more frequently they are presented as controversies of legal nature, for each side invokes constitutional arguments, and tries to prove that the law is on their side. Thus, the constitution becomes an instrument of solving political controversies, meaning that these gradually become more civilised, especially since formal procedures to solve them are provided. It seems, therefore, that we should accept the existence of a phenomenon of increasing dependence of politics on the law ("judicialisation" of politics, which the Germans call *Verrechtlichung der Politik*), accentuating the role and tasks of constitutional courts.

2. The contemporary European constitutional courts use different procedures to solve cases and contentions mentioned above. The following procedures, specifically oriented at solving controversies over the operating of supreme organs of the executive and legislative branches, should be named here:

a) disputes between organs of the state - the procedure was first devised in Germany, and it was extensively developed there. The German constitutional court rules on "interpretation of the constitution in cases of controversies over the rights and duties of any supreme federal organ, or any other subject equipped by this constitution or by standing orders of any of the supreme federal organ with its own rights" (art. 93 para 3 subpara 1 of the Constitution of 1949). Thus, if a doubt appears, as to whether or not an action or inaction of a state constitutional organ violates or endangers the rights or duties vested by the constitution with another organ, the latter may address the federal constitutional court. The "organ" is a broad term, used also in relation to political parties and to individual deputies. The ruling of a constitutional court provides proper interpretation to a controversial provision of the constitution, thus determining how the given dispute should be solved. A similar approach can be found in the constitutions of Italy and Spain, although the powers of constitutional courts in these countries are of a more limited nature. In practice, competence disputes do emerge in all these three countries, although on a smaller scale, as procedures of control of the norms are more important there. A special procedure for competence disputes is not always provided, either. Suffice to say, in some

countries (Austria, France) these disputes can be considered by constitutional courts only on a small scale, while in others (f. ex. Portugal) such procedures simply do not exist at all. In the countries of our part of the world special procedure for competence disputes exists in Hungary (par. 50 of Constitutional Court Act), Bulgaria (art. 149 para. 1 item 3 of the Constitution), the Czech Republic (art. 87 para 1 letter k), Slovakia (art. 126), Russia (art. 125 para 3), and Poland (art. 189). Some constitutions (Romania, Lithuania, Latvia, Estonia, Belarus, and the Ukraine) do not provide any such procedure.

b) Electoral contentions. In nearly all contemporary states any contention concerning the validity of parliamentary or presidential elections, or referenda may be referred to courts for the final ruling. In Western Europe it may be a competence of the constitutional court (Germany, France, Austria, Portugal), or it may remain entirely (Spain) or partly (Italy) outside the competence of such a court. In Central and Eastern Europe there are different solutions, too. In Bulgaria (art. 149 para 1 item 6 and 7), Lithuania (art. 105 para 3 and art. 106 para 5), the Czech Republic (art. 87e), Slovakia (art. 129 para 2) assessment of validity of elections belongs to the constitutional courts, while in Romania (art. 144 letter d and g) such control power applies only to presidential elections and to referenda. In other countries, f. ex. in Poland, electoral contentions are considered by the Supreme Court, and remain outside the scope of jurisdiction of the constitutional court.

c) Accountability for violation of the constitution. This procedure concerns, above all, the president, then the ministers and other people in top state positions. In Western Europe ruling on such issues is sometimes vested with constitutional courts (Germany, Austria, Italy, Portugal), or special courts of impeachment (France), or Supreme Courts. In our part of Europe a special court of impeachment exists only in Poland, while a majority of the constitutions confer jurisdiction upon constitutional courts (Hungary, Bulgaria, the Czech Republic, Slovakia; the role of the constitutional court is less important in Romania, Lithuania, Russia, and the Ukraine). The solution currently in force in Belarus is quite unusual: the constitutional court does not participate in the proceedings concerning the president's accountability, whereas this court has the authority to rule on "serious and systematic violation of the constitution by the chambers of parliament" (art. 116 para 6.)

d) Determining the interpretation of the constitution. This is a competence which is not known to the constitutional courts in Western Europe, whereas it can be quite frequently found in the countries of Central and Eastern Europe (Hungary, Bulgaria, Slovakia, Russia, and the Ukraine) In Poland, until 1997, the constitutional court had the power to determine the universally binding interpretation of statutes, but lost this prerogative under the present Constitution. One should notice that, in contradiction to the procedures mentioned before - determining the interpretation of the constitution is very important in some states. This procedure was repeatedly applied in Russia to define the framework of the legislative process, and the relations between the chambers of parliament and the President of the Federation. In Hungary the procedure to determine the interpretation of the constitution became an opportunity to decide on the scope of the President's powers in military matters, and the procedures of amending the constitution. In Poland a similar role was played by the procedure of determining the universally binding interpretation of statutes.

3. In the practice of majority of the European countries the powers of constitutional courts to consider cases of controversies over competencies, elections and impeachment, are rather negligible. This does not mean, however, that the questions concerning the functioning of the supreme state legislative and executive branches remain outside the control of the constitutional

court, as the procedure for control of norms is broadly applied in solving any relevant problems. It is by this procedure that the constitutional courts determine the framework of competencies and functioning of other state organs, and participate in tackling political disputes in their respective states.

II.

The present situation in Poland is very similar to that described above. The Polish Constitutional Court is equipped with a special power to rule in cases of controversies between the central constitutional organs of the state, but, so far, it has never had to put it to practice. The procedures for settling electoral contentions (the competence of the Supreme Court) do not play any significant role, and neither do those concerning impeachment (the competence of the special Tribunal of State). Important questions of interpretation of the principle of separation of power, and of the role of individual constitutional organs of state are solved by the procedure of control of norms. Before 1997 the procedure for determination of the universally binding interpretation of statutes was equally important.

Looking at the jurisprudence of the recent years one may distinguish four basic areas of functioning of the principle of the division of power, which became the subject of the Polish Constitutional Court's interest.

1. The first area is the powers of the parliament, especially in the field of law-making. The majority of the Constitutional Court's decisions concerned the determination of the position of statutes, and the scope of competence of the governmental bodies to issue regulations. Since the very beginning of its existence (decision of 28 May, 1986, U 1/86) the Polish Constitutional Court has adopted a restrictive concept of governmental law-making. Under the Constitution of 1997, this concept has been sustained by extensive regulation of the sources of law (art. 87 - 93). Moreover, the Constitution provides that any limitation of an individual's rights and freedoms may be introduced only by way of a statute of Parliament (in particular art. 31 para 3). Thus, the Constitutional Court assumes that any of the basic elements of legal regulations of a universally binding nature must be inscribed into statutes. The regulations issued by the governmental organs must always be of an executive nature, which makes them sub-legislative acts.

This means, in the case of a regulation, that it may be issued only on the basis of an authorization (delegation) explicitly stated in the statute, and must stay within the limits of this mandate. Even if a statute is imperfect, there is no possibility to improve it with regulations. An authorization to issue a regulation may not be extended, and, thus, the fact that the statute does not explicitly provide that a given issue be governed by regulations must be interpreted as non-granting of the legislative authorization. This, among others, is a consequence of the principle of the separation of power, which requires that the duty to make laws be vested with the parliament as an organ of legislative power. Regulations issued in contradiction to these requirements are unconstitutional.

In relation to statutes, this means that if an authorization to issue a regulation is formulated in it, such formulation must be sufficiently precise. The authorization must, therefore, clearly name this governmental organ which is authorised to issue the regulation, it must define the scope of the matter that is to be thus regulated, and must define guidelines concerning the contents of such a regulation. Any authorization that does not meet these requirements is unconstitutional, and, therefore, any regulation issued on its basis is also unconstitutional. An abundant case-law of the Constitutional Court has already been amassed (f. ex. rulings of 27. 06. 2000, K 20/99; 17. 10. 2000, K 16/99; 7.11. 2000, K 16/00; 11. 12. 2000

U/2000, and prior jurisprudence quoted therein). One may say that the determining of relations between statutes and governmental regulations is the most extensively developed and the most stabilised element of constitutional jurisprudence concerning the separation of power. The same rules apply to the regulations issued by the President of the Republic; this, however, has little practical impact, as the president's law-making powers are very limited.

Such interpretation of the division of the matter between statute and regulation means that there are no limits to the scope of statutes. The parliament may (and in many cases - must) regulate a given matter in a statute down to minute details. A question arises therefore, whether or not this allows the parliament to tackle executive decisions, which should belong to the government. In several rulings, issued in mid-nineties, a concept of the "minimum of competence " which must be left both to the legislative and to the executive branch, was formulated. This means that a statute, when determining the competence of individual organs may not infringe upon the "vital scope of power" of particular organs (see also II. 3 below). This is obvious in relation to the judicial power, as its monopoly of the administration of justice is also explicitly stated in the Constitution. However, there are strict limits beyond which legislation may not go even in relation to the executive power. Thus, the Sejm may not be charged with decision-making in respect of privatisation of different industries of the economy, as these are individual decisions, and belong to the government (ruling of 22. 11. 1995, K 19/95). Neither is at allowed to put an obligation in the Budget to spend a specified amount of money on the purchase of a specified type of aircraft, from a specified producer, as this, again, is an executive decision, to be taken by the government, and does not belong to the parliament (ruling of 21. 11. 1994, K 6/94).

2. Another area where the position of the constitutional court is well developed is the relation between the two chambers of the parliament in the legislative process. The Polish Constitution does not make the Sejm and Senate equal. The Sejm must first adopt a bill, and then the Senate has a specified period of time to suggest amendments, which can be rejected by the Sejm by an absolute majority of votes (art. 118 and 119 of the Constitution). This aroused controversies over the scope of amendments that the Senate may propose to a bill adopted by the Sejm. In particular a question arose as to whether the Senate's amendments may tackle issues, which are not addressed in the given bill. As it may easily be guessed the positions of the Sejm and Senate were quite diverse in this case. There have been many disputes over the issue, and in some cases the President of the Republic refused to sign the statute and asked the Constitutional Court to consider whether or not this statute had been adopted in the right mode.

The Constitutional Court consequently adopts a position, which limits the Senate's power to introduce amendments into the bills passed by the Sejm. In the Court's opinion the relation between the chambers should remain that of "asymmetric bicameralism". This is conspicuous particularly in the controlling function, which belongs exclusively to the Sejm, but also in the legislative process "the position of the Sejm is privileged in relation to that of the Senate". This affects the scope of the Senate's amendments and keeps them within certain contextual frames determined by the scope of the bill adopted by the Sejm. Thus, we should distinguish between the "width" and the "depth" of the Senate amendments. "There are no obstacles for the amendments to thoroughly change the contents of the solutions devised by the bill, provided that they apply to issues already included in that bill. One should not exclude the amendments' going some steps beyond the scope of the bill - especially if its modification or improvement is concerned - within limits broadly denoted by the objective and subject of that bill. However, should such extension go very far, and the amendments suggest that contents which is not directly linked to the purpose and subject of that law be introduced into the bill, then such

amendments surpass the scope of the bill and thus become constitutionally unacceptable" (the ruling of 23 February 1999, K 25/98, similarly earlier rulings, of 23 November 1993, K 5/95 and 22 September 1997, K 25/97). Therefore, the Sejm is constitutionally obliged to reject such amendments, and, should they, nevertheless, make their way into the final text of the statute, that portion of the statute will be unconstitutional.

The Constitutional Court takes a similar view of the Members' amendments introduced to bills, which are considered as urgent (art. 123 of the Constitution). As indication of urgency of a bill is the government's prerogative, similarly so is the determination of the scope of any such proposed amendments. The Members' amendments may, naturally, change the contents of the government's proposals; they may not, however, introduce into the bill any new contents, which were not included there by the government (ruling of 9 January 1996, K 18/95). However, there are no restrictions on submission of the Members' amendments into the bills considered on the regular legislative path, unless it is too late. The decision of 24 June 1998 (K 3/98) indicates that it is not possible to table amendments which would seriously extend the scope of a bill at the stage of the second reading (that is after the committees have ended their work on the bill). An amendment must not become a legislative initiative, particularly at such a stage of the parliament's work on it when it is too late to consider it *in extenso*.

3. The control function is one of the fundamental tasks of the Sejm, and, as I already mentioned, the Senate is not entitled to perform it. The controlling function gives the Sejm the right to obtain information about the activities of specified organs and public institutions, and to express its opinion in respect of these activities. According to the ruling of 14 April 1999 (K 8/99 - the Sejm investigative committees) this control may not go as far as to interfere with the "vital scope" of activities of the other branches of government. This means that, in relation to the executive branch, the implementations of the Sejm's controlling powers may not interfere with the competencies of the Council of Ministers in the field of governmental administration (*ibid*). At the same time, however, it remains clear that the analysis and evaluation of the operation of the governmental bodies is the very essence of parliamentary control, and that the work of investigative committees should serve just this purpose. By contrast, the judicial branch is independent by principle. Any control by the legislative branch of the judicial practice of the courts is excluded, meaning that, among others, the investigative committees may not review the decisions of the courts, and, in particular, it may not express opinions concerning the way a court decided in a case, nor challenge the legitimacy of the rulings. The committees may, nonetheless, investigate a case in parallel with the court proceedings; in such a case, however, they are obliged, to act "with particular caution". In this respect the principle of the separation of powers is clearly applied in a very restrictive way.

The principle of separation of powers does not exclude a participation of the members of parliament in the governmental opinion-making and consultative bodies (ruling of 28 April 1999, K 3/99 - the participation of the MPs in the Council of Civil Service appointed by the Prime Minister). This participation must not, however, cause any dependence of the parliamentarians upon a governmental organ, and they may not partake in performance of these competencies of that organ, which relate to public administration. The Prime Minister is not allowed to choose, at his discretion, the MPs to participate in the works of such consultative and opinion-making bodies. Therefore, if the law says that the MPs are nominated by their political groups, the Prime Minister must treat all groups in a politically fair way (i.e. he must consider the size of the group and not its political orientation), and respect the personal decisions made by these groups.

4. The number of rulings of the Constitutional Court concerning the role and the competencies of the President of the Republic is small, but that has to be seen in the context of a relatively weak position granted to the President by the Polish Constitution. All the same, the Constitutional Court strictly opposed - especially in the first half of the 1990s - any attempts to strengthen that position in the practice of the president's activities.

In its resolution of 10 May 1994 (W 7/94) the Constitutional Court considered the procedure of dismissing the president of the National Broadcasting Council. In 1992 a new regulation was introduced into the Constitution, concerning the position of the public radio and television, and the above-mentioned Council was granted a position of an independent organ, safeguarding the proper functioning of the electronic media. The Council worked in terms, and the statute provided that its members are nominated respectively by the Sejm, Senate, and the President. The President of the Republic nominated the President of the Council from among the Council's members. Unfortunately, the statute said nothing about the procedure of dismissing the President of the Council before his/her term of office expires. Some practical controversies arose over the issue, but the Constitutional Court held that, as the law did not grant any such specific competence to the President - he has no power to dismiss the President of the Council. The principle of legality, which permits an action of a state organ only if the law allows it, was referred to. At the same time the Court indicated that the "competence regulation must always be strictly interpreted, and any assumed inclusion into the scope of competencies of a matter not mentioned in the regulation is inadmissible".

The above ruling of the Constitutional Court should be considered on two different planes. Firstly, it accentuated the independence of the National Broadcasting Council as a separate constitutional organ with a special status. This was also expressed in other rulings of the Court concerning radio and television, which emphasised that separation must be maintained between the public radio and television, and the current political leadership of the state (resolutions of 7 March 1994, W 3/93; 13 December 1995, W 6/95; and the ruling of 28 November 1995, K 17/95). Secondly, it excluded any concept of "implied powers" of the President of the Republic, which would be the prerogatives of the head of state, without an explicit statement of that in the text of the Constitution. Other, later rulings of the Court had a similar bent (f. ex. the resolution of 11 April 1995, W 2/95, in which the principles of dissolution of the Sejm in case of non-adoption of the Budget were defined). Nevertheless, the Constitutional Court did not always act consequently, as, f. ex., it decided that, although the requirement that the government countersigns the acts of the President of the Republic is a principle, some exceptions are acceptable, even if the Constitution does not specifically provide that (the resolution of 5 September 1995, W 1/95).

It should be noted that the disputes over the role and competencies of the President of the Republic were typical mostly for the first half of the 1990s decade. The jurisprudence of the Constitutional Court, and then the text of the new Constitution of 1997 clarified the most important issues, and, in recent years, there have been no more such cases to consider.

5. The position of the judicial branch has often been the subject of the opinions expressed by the Constitutional Court. They concentrated, above all, on the principle of the monopoly of the courts to administer justice and, therefore, on the availability of and access to legal proceedings in all types of cases and disputes relating to an individual person's situation.

As concerns the position of the judiciary *vis à vis* other authorities, in recent years it has been studied mostly in light of some disputes over the ways of determining the judges' salaries

(rulings of 11 September 1995, P 1/95; 22 March 2000, P 12/98; 4 October 2000, P 8/00). Much attention has also been devoted to the position of the National Council of the Judiciary as a separate constitutional organ established to stand guard over the independence of judges and courts. The Constitutional Court ruled, among others, that the Council must participate in all legislative work relating to the judiciary, and that failing – on the part of the Sejm - to seek the Council's opinion is a breach of the Constitution (ruling of 24 June 1998, K 3/98). The Council, in turn, may take some personal decisions concerning judges, f. ex. grant a consent to a judge to continue in his hitherto capacity despite having reached the retirement age (ruling of 11 July 2000, K 30/99). At present, questions of constitutionality of regulations on protection of state secret, and of the extent to which such regulations may be applicable to the judges are pending before the Constitutional Court.

6. Another area of the Constitutional Court's jurisprudence was the problems related to the functioning of local self-governments. The issue is not directly linked to the subject of my paper, but it should be mentioned that the jurisprudence emphasises the principle of independence of local self-governments from central authorities, as well as the principles of separation of local property, financial independence of the local authorities (it particularly stresses the ban to impose new tasks on self-governments without providing them, in advance, with appropriate financial means), and judicial protection of independence of the local self-governments. Since the organs of local self-governments are entitled to take cases to the Constitutional Court it is no wonder that their problems are regularly reappearing in the Court's rulings.