

Patrycja Dąbrowska*

The Polish Legal System Facing the Treaty of Lisbon – Remarks on Necessary Modifications and Possible Problems

Abstract: *This paper gives an overview of the consequences of the entry into force of the Treaty of Lisbon in the Polish legal order. The text begins with a summary of the present legal framework concerning Polish membership in the EU. It proceeds to examine the provisions of the new Treaty which regulate the increased role of national Parliaments and reform of the system for protecting fundamental rights in the EU. Then the effects of these reforms are analysed in the context of the Polish legal system and the following issues are examined: the enhanced role of the Polish Parliament (the Sejm and the Senate); the obligations of the Government; the inter-institutional co-operation between the central governing branches; and the interpretation and application of the so-called Polish-British Protocol in light of the change in status of the EU Charter of Fundamental Rights. Finally, the question whether changes are needed in the Polish Constitution is discussed.*

1. Overview of Polish membership in the EU and the status quo of the national legal system

1.1. The constitutional framework of Polish membership in the EU

The normative framework for Polish membership in the EU and the applicability of EU law in Poland is provided by both Polish law and European law.¹

* **Patrycja Dąbrowska**, Ph.D. – Centre for Europe, University of Warsaw. An earlier version of this text entitled *The Effects of the Treaty of Lisbon in the Polish Legal Order – an Overview of Problematique* was presented at the conference at Metropolitan University Prague on 27.03.2009 and included in the volume of the proceedings of the conference *The Effect of the Treaty of Lisbon Upon the Czech Legal Order*, ed. J. Zemanek, Prague 2009.

¹ See generally: *Ustrojowe aspekty członkostwa Polski w Unii Europejskiej (The Constitutional Aspects of the Polish Membership in the EU)*, ed. J. Barcz, Warszawa 2003; K. Wójtowicz in: *Prawo*

The overarching provisions are encompassed in the Constitution of the Republic of Poland of 1997. The following provisions of the Constitution allow for the Polish membership in the EU and play an important role in ensuring the effectiveness of EU law in the Polish legal system.

- a) Art. 90 – allowing for the transfer of competences to international organisations in some matters;
- b) Arts. 9 and 91 – allowing for the direct effect of international agreements in Polish law and their supremacy over national laws and statutes;
- c) Arts. 8 and 87 – defining sources of Polish law and the supremacy of the Constitution.²

In light of the Polish Constitution, EU/Community law takes precedence in cases of collision with Polish laws and statutes, but not over the Constitution itself. This normative reality has been rather consistently upheld by in the decisions of the Polish Constitutional Tribunal.³ In addition, the constitutional framework allows EU law to constitute a part of the national legal system and to be applied directly.

Unii Europejskiej Zagadnienia systemowe (The System of EU Law), ed. J. Barcz, Warszawa 2006, p. I-517-39; A. Wyrozumska in: *Instytucje i prawo Unii Europejskiej (The Institutions and System of EU Law)*, ed. J. Barcz, M. Górka, A. Wyrozumska, Warszawa 2008, p. 320–35.

² See the text of the Constitution of the Republic of Poland of 2 April 1997, *Dziennik Ustaw* (Journal of Laws) No. 78/1997, item 483), *Art. 8.1 The Constitution shall be the supreme law of the Republic of Poland (...); Art. 9 The Republic of Poland shall respect international law binding upon it.; Art. 87 The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations (...); Art. 90 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 in relation to certain matters (...); and Art. 91 (1). After promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. (2) An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. (3) If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.* English version accessible at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (unless stated otherwise the quoted web-sites were last visited on 30 October 2009).

³ See the judgments of the Polish Constitutional Tribunal on the Treaty of Accession, K 18/04, 11.05.2005, Z.U. 2005/5A/49; on the European Arrest Warrant, P 1/05, 27.04.2005, Z.U. 2005/4A/42; and the procedural decision on the excise tax, P 37/05, 19.12.2006, Z.U. 2006/11A/177. English versions accessible at http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm

Secondly, the Treaty of Accession of 2003,⁴ which is a ratified international agreement from the perspective of the Polish legal system, contains important provisions that ensure the effectiveness of EU/Community law in Poland. It constitutes the basis for Polish membership in the EU and establishes the conditions of accession. The Act concerning the conditions of accession stipulates, above all, that *‘From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act’*.⁵ Moreover, the general accession conditions and criteria establish that the new Member States had to accept the entire *acquis communautaire*, including the jurisprudence and decisions of the European Court of Justice regarding the general principles of Community and the doctrines of direct effect and supremacy.⁶

1.2. The legal basis for decision-making in EU affairs at the national level

In addition to the constitutional framework, Polish law contains specific statutes which apply to the ‘everyday’ decision making process in EU matters. These statutes, the so-called by-laws, lay down the conditions of co-operation and the division of competences for national bodies involved in EU decisional processes and procedures.⁷ Consequently, the scope and modalities of national powers and their co-operation in EU affairs are specified in the acts, which:

- (a) establish the governmental bodies responsible for dealing with EU affairs;⁸ and

⁴ Treaty of Accession of 2003, OJ L 236, 23.9.2003, p. 33.

⁵ Act concerning the conditions of accession, OJ L 236, 23.9.2003, p. 33.

⁶ See also: S. Biernat, *Impact of EU Accession on the National Legal Orders of New Member States: Poland* in: *The Impact of EU Accession on the Legal Orders of New Member States and (Pre-) Candidate Countries. Hopes and Fears*, ed. A.E. Kellermann, J. Czuczai, S. Blockmans, A. Albi, W.Th. Douma, The Hague 2006.

⁷ See: J. Barcz in: *Pięć lat członkostwa Polski w Unii Europejskiej Zagadnienia polityczno-ustrojowe (Five Years of the Polish Membership in the EU The Constitutional and Political Aspects)*, ed. J. Barcz, Warszawa 2009, p. 70–103.

⁸ Act of 8 August 1996 on the Committee for European Integration, Dziennik Ustaw (Journal of Laws) No. 106/1996, item 494 as supplemented by the Order of the Chairman of the Council of Ministers of 23 March 2004 establishing the European Committee of the Council of Ministers (KERM), Monitor Polski No. 14/2004, item. 223 with amendments and Regulation of the Chairman of the Council of Ministers on the Assignment of Statute to the Office of the Committee for European Integration on 19 January 2006, amending the regulation on the as-

- (b) establish the inter-institutional co-operation between the Polish Parliament and the Government in matters related to Polish membership in the EU.⁹

It should be noted that the specific rules establishing the legal framework for decision-making in EU affairs that are in force in Poland have been 'located' in the laws and statutes. Thus the power-sharing in EU matters between responsible institutions must be compatible with the general constitutional framework, but there are no specific constitutional provisions nor chapter devoted to regulating relevant aspects of Polish membership in the EU as such. Moreover, the Constitution itself does not provide clear answers in cases of interpretative doubts or conflicts of competence between the responsible bodies.¹⁰

2. Powers of the Government and the Parliament in EU affairs

The principal national institution that has the power of decision in EU matters is the Polish Government, i.e. the Council of Ministers.¹¹ Yet, the latter is generally obliged to co-operate with both Chambers of the Parliament when taking relevant positions. The particulars of this co-operation are outlined below.¹²

2.1. Powers and obligations of the Polish Council of Ministers

Pursuant to the relevant national regulations, the Council of Ministers performs the following duties regarding the Polish membership in the EU:

signment of Statute to the Office of the Committee for European Integration. See also: the Act of 5 May 2005 on the Common Commission of the Government and the Local Government and Polish Representatives to the Committee of the Regions, *Dziennik Ustaw* (Journal of Laws) No. 90/2005, item 759.

⁹ Act 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, *Dziennik Ustaw* (Journal of Laws) No. 52/2004, item 515, as amended by the Act of 28 July 2005, *Dziennik Ustaw* (Journal of Laws) No. 160/2005, item 1342.

¹⁰ See the recent decision of the Constitutional Tribunal on the conflict of competence regarding the identification of that central constitutional institution of the State which is entitled to represent the Republic of Poland at the meeting of the EU Council, Kpt 2/08, 20.05.2009., Z.U. 2009/5A/78. See also: the text of the decision in this volume.

¹¹ See also: Art. 146 of the Constitution.

¹² The analysis of the relevant powers of the President fall beyond the scope of this text. It suffices to say that the President shares the general representative function at the EU level with the Prime Minister and has a duty of co-operation therewith. Moreover, he possesses the important power of final ratification of international agreements, see: Art. 126 and 133 of the Constitution.

- a) representation of Poland at the EU level;
- b) programming and co-ordination of policy relating to EU integration;
- c) adoption of the official positions on European issues;
- d) participation in the EU law-making process;
- e) implementation of EU law and policy at the national level;
- f) co-operation with the Parliament in EU affairs through transmission of EU documents, providing information, and seeking opinions on EU draft legislation.¹³

The relevant institutional setting embraces: the European Committee of the Council of Ministers ('KERM'), the Committee for European Integration ('KIE') and the Office of the Committee for European Integration.¹⁴ KERM is a permanent committee of the Council of Ministers and its advisory body which provides a forum for discussing, negotiating and settling on governmental positions and taking decisions in EU matters.¹⁵ In order to ensure proper co-ordination of its work and the effective discharge of its responsibilities, KERM enjoys decision-making powers in the field of European policy in areas which do not fall under the exclusive competence of the Council of Ministers. KERM is also tasked with reconciling differences of views and resolving inter-ministerial conflicts that may arise during the preparation of the Polish Government's positions for EU Council and COREPER meetings. KERM is composed of: a the Prime Minister; the Secretary of State of the Office of the Committee for European Integration; and members – the Secretaries and Undersecretaries of State in the ministries engaged in European integration issues. The Committee for European Integration is the supreme governmental body with competence to program and coordinate policy relating to Poland's integration with the European Union. After the accession, its influence and operation is limited.¹⁶ In light of the statutory provisions, the Committee is composed of: the Chairman of the Committee, who is the Prime Minister; the Secretary of the Committee, who is at the same time the chair-

¹³ See generally: A. Wyrozumska in: *Instytucje i prawo Unii Europejskiej*, op.cit., p. 362–79.

¹⁴ It should be noted and emphasised that after a long planned reform, as of 1 January 2010, the Office of the Committee for European Integration and its respective departments were incorporated in the structure of the Ministry of Foreign Affairs. However, this text presents the law as it stood on 1 November 2009. For the recent changes see: the Ministry's website <http://www.msz.gov.pl/Organizacyjny,chart,of,MFA,32560.html>

¹⁵ See generally: A. Nowak-Far, *System koordynacji polityki Polski wobec Unii Europejskiej po akcesji* (*The After-Accession System of Co-ordination of the Polish Policy in EU Matters*) in: *Pięć lat członkostwa Polski w Unii Europejskiej Zagadnienia polityczno-ustrojowe* (*Five Years of the Polish Membership in the EU The Constitutional and Political Aspects*), ed. J. Barcz, Warszawa 2009, p. 146–55.

¹⁶ A. Nowak-Far, op.cit., p. 147–48.

man of the Office of the Committee for European Integration; and members of the Committee, who are ministers engaged in European integration issues. The Office of the Committee for European Integration was established to assist both KERM and KIE in the performance of their statutory tasks, but it has continued to be one of the main governmental bodies specialised in European integration. Currently, it performs tasks of co-ordination and exchange of information between central institutions and bodies in EU matters and it is functionally located within the structure of the Ministry of Foreign Affairs.¹⁷

2.2. Control powers of the Parliament

Although, it is the Council of Ministers which formulates Polish politics and decisions in EU affairs, the Parliament enjoys some important control powers over the Executive.¹⁸ Co-operation conditions and obligations of the Government in Poland reflect generally the framework for co-operation of national parliaments with their respective governments in other EU Member States, as regulated in the Protocol on the role of national parliaments in the European Union, appended to the Amsterdam Treaty.¹⁹ Nevertheless, the Polish system has its specific aspects, which are outlined below.

The Polish Parliament consists of two Chambers (the *Sejm* and the *Senate*) which possess equal status in terms of participation in decision-making in EU matters and control powers over the Council of Ministers. The parliamentary powers are exercised by assigned Committees, i.e., the European Union Affairs Committee of Sejm and the European Union Committee of the Senate.

The Parliament, when acting in EU affairs, has the following rights and powers:

- a) the right to receive the information regularly (at least every six months), as well as upon request, from the Government on the status of the Polish participation in EU matters;

¹⁷ Ibidem.

¹⁸ See also: K. Bałon, *Parlamentarna kontrola rządu w zakresie członkostwa w Unii Europejskiej* (The Parliamentary Control of the Government Acting in EU Matters), "Biuletyn PISM" Vol. 21(209)/2004 and J. Borkowski, *Warunki współpracy Sejmu i Senatu z Radą Ministrów w sprawach związanych z członkostwem Polski w Unii Europejskiej* (The Conditions of Parliamentary Co-operation with the Council of Ministers in Matters Related to the Polish Membership in the EU), "Studia Europejskie" Vol. 1/2005.

¹⁹ See generally: P. Kiiver, *The National Parliaments in the European Union – A Critical View on EU Constitution-Building*, The Hague/London/New York 2006; K. Auel, *Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs*, "European Law Journal" No. 13/2007, p.487–504.

- b) participation in the EU law-making process by expressing opinions on governmental positions;
- c) participation in the national implementation of EU law, which stems from its general legislative powers;
- d) expressing opinions on candidates for certain EU posts.²⁰

Accordingly, the scope of activities of the parliamentary Committees are related to Poland's membership in the European Union. In particular, as enumerated above, they take a position and express an opinion on draft legislative acts of the EU (at three stages); on draft international agreements to which the EU/EC or their Member States are to be parties; on operational programmes concerning activities of the EU Council; and on annual legislative plans of the European Commission. Moreover, they formulate recommendations to the Polish Council of Ministers regarding the positions it is going to or may adopt during the consideration of legislative proposals in the EU Council, and consider information and other documents from the Council of Ministers. Finally, they give their opinion on proposed candidacies for some positions in the EU bodies.

In addition, the Committees take part in the inter-parliamentary collaboration between national parliaments of the Member States under the umbrella of COSAC (Conference of Community and European Affairs Committees of Parliaments of the European Union), which is reflected in the Report prepared by the COSAC Secretariat. The reports from COSAC to date indicate that the relevant Committees of the Polish Parliament have not made a frequent use of IPEX (Interparliamentary EU Information Exchange).²¹

2.3. The current state of power-sharing in EU affairs – a brief analysis

The current division of powers between the Government and the Parliament in EU matters merits some more analytical observations.

The most important control power of the Parliament over the Government is participation in the EU law-making process through expressing opinions on governmental positions. From the formal standpoint, opinions of the

²⁰ See: Arts. 3, 6, 8 and 9 of the Act 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.

²¹ See: COSAC Report on the results of the test on the subsidiarity check mechanism of the Lisbon Treaty, coordinated by COSAC, on the Commission proposal for a Framework Decision on Combating Terrorism, COSAC Secretariat, February 2008.

parliamentary Committees are non-binding, but they should be incorporated into governmental positions unless a justifiable reason not to do so exists.²² Opinions can be expressed at three stages of the decision-making process: first on a draft project; second during the EU Council's work; and finally before voting in the EU Council takes place. In the latter instance, the Government is obliged to seek an opinion. Therefore, the idea of parliamentary participation in the EU law-making process is realised principally through the requirement that the Government to seek an opinion of the parliamentary Committees on draft EU legislation prior to Poland's taking a position in the EU Council. The Government is permitted to not seek an opinion, but the reasons for not doing so must be explained and justified. In two instances an opinion must be sought, without exception: when the referred matter belongs to the field where the Council acts unanimously; and in matters which substantially burden the State budget.²³

Accordingly, the division of powers between the parliamentary chambers and the governmental bodies in matters related to Poland's membership in the EU represents a co-operative model of inter-institutional relations, with a 'medium-weak' system of parliamentary control over the Government in EU decision-making.²⁴

It should also be added that although the co-operation between the responsible bodies in EU affairs is based on a solid constitutional framework, the power-sharing between the concerned institutions results from statutory provisions and not the Constitution as such, so the legal framework is not perfect. Even though it was proposed during the drafting phase of the new constitution of 1997 to include specific provisions concerning Poland's then-future membership in the EU, the more conservative arguments prevailed and the provisions of the Constitution were constructed in a much more cautious manner.²⁵ Moreover, a broad academic debate on revision of the new consti-

²² Art. 6 par. 3, Art. 8 par. 2 and Art. 9 par. 1 of the Act on Cooperation.

²³ Art. 9 par. 3 of the Act on Cooperation.

²⁴ The classification after J. Barcz in: *Instytucje i prawo Unii Europejskiej (The Institutions and System of EU Law)*, op.cit, p. 339–60, who applies the criteria of A. Maurer relating to the scope of transferred documents, the legal character of parliamentary opinion, and the efficiency of parliamentary work. See also: C. Mik, M. Górka, *Ustawa o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej. Komenatrz (Act 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. A Commentary)*, "Kwartalnik Prawa Publicznego" Vol. 2/2004.

²⁵ For example, the draft wording of the first version of Art. 91 par. 2 of the Constitution had presumed the precedence of EU law over 'national law', not only the statutes; which would also imply over the Constitution as well.

tution took place long before accession (1997–2002), but in the end the idea of including a separate chapter on EU membership in the text was not accepted.²⁶ Instead, a practical and incremental approach was adopted, with judicial decisions and interpretations of the Constitutional Tribunal incorporating aspects of EU law into the existing constitutional system.²⁷

The general assessment of the current co-operation system is positive, although it is acknowledged that it is not free of shortcomings. It is not really efficient in terms of the present workload. There are so many documents that the responsible parliamentary committees often do not make use of their competence to express an opinion, and there is a lack of filtering tools for the documents' allocation and to assist in the sharing of competences between Chambers. Moreover, in practice its functioning not only reflects the actual centralisation of decisive powers in the hands of the Council of Ministers, but also shows that there is no real understanding by the Members of the Parliament themselves of the role which the Parliament could play in EU decision-making at the national level.²⁸

3. Reforms needed in light of the Treaty of Lisbon – selected aspects

3.1. The enhanced role of the Parliament – the need for regulation of the new powers

The increase of the role of national parliaments which is envisaged by the provisions of the Treaty of Lisbon ('TL') and the Protocol No. 1 annexed

²⁶ See further: S. Biernat, *Constitutional Aspects of Poland's Future Membership in the European Union*, "Archivdes Völkerrechts" Vol. XXXVI/4/1998, p. 398–424; S. Biernat, *The Openness of the Constitution of the Republic of Poland towards European Integration* in: ed. G. Amato, G. Braibant, E. Venizelos, *The Constitutional Revision in Today's Europe*, London 2002, p. 439–51; *Przystąpienie Polski do Unii Europejskiej. Traktat akcesyjny i jego skutki (Polish Accession to the EU: The Accession Treaty and Its Effects)*, ed. S. Biernat, S. Dudzik and M. Niedźwiedz, Kraków 2003.

²⁷ See also: Art. 188 of the Constitution which allows for the *ex post* control of ratified international agreements by the Polish Constitutional Tribunal.

²⁸ See e.g.: one of the EUAC Reports reads 'no plenary discussion was held on the above matter at a Sejm sitting. It was the European Union Affairs Committee who gave its opinion on the matter.' Report on the test on conformity to the principle of subsidiarity of the Proposal for the Council (EC) Regulation No. 2201/2003 on jurisdiction, and introducing the principles of the law on matrimonial matters (COM (2006)399), the European Union Affairs Committee, Warsaw, 19.09.2006. This report implies the will in the inter-parliamentary co-operation of responsible Committees of the Sejm and the Senate (EUC and EUAC), but not the general interest of the Polish MPs.

to the Treaty of Lisbon creates a need for the Polish legislature to amend the current legal and institutional framework.²⁹

First, the extended powers of national parliaments that derive from the TL ought to be implemented to the national legal order so that the Polish Parliament is able to exercise its new direct powers, e.g. the veto power under Art. 48 Treaty on European Union ('TEU') and Art. 81 Treaty on the Functioning of the European Union ('TFEU') (application of the general *passerelle* clause and the special *passerelle* clause in the area of family law, with cross-border implications), as well as its new indirect powers, e.g. *locus standi* before the European Court of Justice via the Government.

Additionally, other appropriate modifications would be desirable in order to provide for effective enforcement of the powers of the Parliament:

- a) to avoid duplication of transferred documents (which are now transferred by the Government and will be transferred by the EU institutions directly);
- b) to establish a more effective internal mechanism for co-operation with the Government regarding the powers relating to assessment of draft European legislation in view of the subsidiarity principle and the issuing of reasoned opinions on the governmental positions, including the functioning of the new flexibility clause;
- c) to absorb a broader scope of transferred documents and information, etc.

Therefore, above all there is a need to reform of the 2004 Act 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, as well as to modify and adjust the rules of procedures of both Chambers in view of their new powers.³⁰

It would also be desirable to adopt an entirely new act which would adjust the Polish institutional framework to the new parliamentary powers and make the present system more effective. It would be essential that such an

²⁹ See: Protocol (No 1) on the role of National Parliaments in the European Union, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 115/2008, 9.5.2008, p.203. See generally: K.Kowalik-Bańczyk and M.Szwarc-Kuczer, *The EU Reform in the Treaty of Lisbon – the Horizontal and Systemic Changes*, "Yearbook of Polish European Studies" Vol. 11/2007–2008, p. 139–55; A.Grzelak, *The Reform of the Area of Freedom, Security and Justice in view of the Provisions of the Treaty of Lisbon*, "Yearbook of Polish European Studies" Vol. 11/2007–2008, p. 157–75.

³⁰ See also: A.Pudło, *Udział Sejmu i Senatu w zarządzaniu sprawami Unii Europejskiej (The Participation of the Sejm and the Senate in Governing the EU Affairs)* in: *Pięć lat członkostwa Polski w Unii Europejskiej Zagadnienia polityczno-ustrojowe (Five Years of Polish Membership in the EU: The Constitutional and Political Aspects)*, ed. J.Barcz, Warszawa 2009, p. 169.

act regulate the allocation of tasks/division of powers between the two Chambers; define the responsibilities and relationship between the EUAC (European Union Affairs Committee) and EAC (European Affairs Committee) and the Plenary regarding everyday work as well as exercise of the envisaged veto power; and strengthen the role of the current Committees. Moreover, it would be useful if such an act also requires the creation of a separate Committee solely responsible for matters in the Area of Freedom, Security and Justice, because the scope of documents transferred for parliamentary opinions will be expanded (e.g. agendas and minutes of the EU Council) and will require some specialised knowledge of the field.

Accordingly, it is clear from the above that in order to assure the adequate effectiveness in the Polish legal order of the new powers assigned by the Treaty of Lisbon to national parliaments, there is a need for institutional reorganisation and the establishment of new forms of co-operation at the national and EU levels of governance. This would imply modifications within and between Parliamentary chambers; possible modification of the forms of co-operation with the Government, and perhaps a need for direct channels of collaboration (documents' transfer) with EU institutions and other national parliaments, as well as with the Polish Members of the European Parliament. These modifications would result in not only in making better use of the existing tools (e.g. COSAC, IPEX) for the EUAC and EAC Parliamentary Committees, but also further learning and understanding of the role the Parliament could play in order to become an important actor at the EU level.

Yet it is crucial to keep in mind that any legal changes or amendments to the existing Polish legal order must be compatible with the provisions of the Constitution, which stipulate the equality of both Chambers and do not allow for the additional division or development of their powers in a statute. That is, the scope and extent of any proposed new law must be in accord with the Constitution; any proposed changes reaching beyond the constitutional provisions would require amendment of the Constitution as well. For example, parliamentary opinions cannot be directly binding on the Government in view of the current constitutional power-sharing arrangement between the state bodies, and some scholars claim that the competence of the EU Committees of Sejm and Senate to act on behalf of the whole Plenary already goes beyond the constitutional framework, because the Constitution always uses the phrase 'Sejm' and 'Senate'.³¹ So any further extension of the Committees' powers could be very contentious.

³¹ Cf. Arts. 10, 95, 146 of the Constitution.

3.2. The need for reflection on a new model of inter-institutional co-operation

It is clear from the above considerations that the TL poses the need and offers the opportunity for the policy-makers in Poland to reflect upon the current mechanism of co-operation in EU affairs at the national level.³² This is especially true in view of the fact that in some cases (e.g. the exercise of the veto powers) the TL offers national parliaments a stronger position versus EU institutions (i.e. at the EU level) than they may have against their own governments pursuant to national regulations. As a result this top-down approach to enlarging the input of representative democracy at the EU level indirectly affects the sharing of powers at the national level as well, and could lead to the strengthening of constitutional positions of national parliaments in relation to national governments in EU affairs.³³

In other words, complete incorporation of the desired legal and organisational changes in the Polish legal order would have the effect of strengthening the parliamentary position *vis-à-vis* the Government and create a new model for inter-institutional co-operation, for example through the introduction of a parliamentary binding mandate for the Council of Ministers at national level, at least in some EU decision-making processes. Still, the question remains whether Poland and current political/ academic/ institutional elites are actually ready for such far-reaching reforms, which would necessarily imply revision of the Constitution. Therefore, a core question is whether the political will exists for the constitutional amendments. Otherwise, legal reforms and increasing the future efficiency of work of the EU Committees of Sejm and Senate can only be undertaken partially in order to avoid the danger of the so-called 'softening' of the Constitution, which means regulating constitutional matters by laws and statutes.

For these reasons there is a need for reflection on the current legal and constitutional framework and the scope of possible changes in order to move towards a new model of inter-institutional co-operation in EU affairs. Cur-

³² See generally: J. Barcz, *Zmiana roli Sejmu i Senatu po przyjęciu Traktatu Lizbońskiego* (*The Changing Role of the Sejm and Senate after the ratification of the Treaty of Lisbon*) in: *Co warto, co należy zmienić. Poprawa jakości demokracji w Polsce* (*What should and could be changed? Enhancing the Quality of Democracy in Poland*), ed. L. Kolarska-Bobińska, Warszawa 2008, p. 33–44.

³³ Cf. the recent ruling of the German Federal Constitutional Court, Judgment of 30 June 2009, English version available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.en.html

See also: the Special Issue of the German Law Journal Vol. 10/2009, <http://www.germanlawjournal.com>

rently, the boundaries of possible legal reforms are delineated by the constitutional lines of demarcation.

3.3. Possible legal and political scenarios

There would seem to be three feasible scenarios for the reform of national institutional power-sharing in EU affairs in light of the entry into force of the Treaty of Lisbon.

The first possibility presupposes a minimum reform. This would mean revision of the 2004 Act 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 in the most essential matters and modifications in the rules governing the procedural and institutional organisation of responsible bodies of the Parliament and the Government.

The second possibility encompasses moderate reform, which would involve replacement of the 2004 Act by a new law(s) which would allow for the better enforcement of the new powers of the parliament in light of the TL, but still within the current constitutional frames.

Finally, the third possibility involves major reform, which would establish a new model of institutional co-operation in EU affairs on the basis of revision of the Constitution. If this approach is adopted, the most appropriate solution would then involve the inclusion of a new Chapter in the Constitution on EU affairs and the introduction of relevant secondary laws based on the amended constitutional provisions.³⁴ This option, being the most ambitious, is simultaneously the least probable.

4. Fundamental rights in the EU – the Polish dimension

Following the second proclamation of the EU Charter of Fundamental Rights ('CFR') in December 2007, just before the Treaty of Lisbon was signed, and in light of its being granted new status with the same legal value as the Treaties, Poland joined the United Kingdom in adding a specific Protocol to the TL, the so-called Polish-British Protocol ('the Protocol'), containing some reservations concerning the CFR.

³⁴ See: J. Barcz in: *Pięć lat członkostwa Polski w Unii Europejskiej Zagadnienia polityczno-ustrojowe* (Five Years of the Polish Membership in the EU: The Constitutional and Political Aspects), op.cit, p. 94–102; J. Osiński in: *Przyszły Traktat Konstytucyjny* (The Future Constitutional Treaty), ed. J. Barcz, Warszawa 2004; and *Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej* (Should the Constitution be Changed? The Constitutional Aspects of the Polish Accession to the EU), ed. J. Barcz, Warszawa 2002.

Moreover, due to internal political disagreements whether Poland should indeed access the Protocol, the Polish Government added two additional Declarations to the TL concerning the CFR: (61) Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union and (62) Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom.

The Polish accession to the Protocol and its issuance of Declarations took place at the very last moment before signature of the Treaty. Interestingly, although the Polish Government had raised several political objections internally regarding the application of the CFR in Poland as being the grounds for its opposition to the Treaty, in fact it did not negotiate the text of the Protocol, and finally joined the British without having any input into the wording of the Protocol.

The background, and the real reasons for Poland's accession to these documents, are rooted in the stereotypes and political arguments of some political parties in Poland, which play on the fears and prejudices of the Polish society. Arguments were put forth concerning the invasion of national competence in the regulation of some sensitive areas and, as a result, a lowering of moral standards involving intrusions into family law, the imposition of homosexual marriages and euthanasia, etc. It is said that the aim of this campaign was to play on national fears that the CFR will lead to the creation of new rights which are not respected in the Polish legal order.

However, following the signing of the TL the interpretation and significance of the Protocol (and the Declarations) in terms of their effect on the application of the CFR in Poland has become quite contentious. The subsequent sections present some remarks and a summary of the scholarship concerning the possible interpretations and effects of the troublesome Protocol.³⁵

³⁵ See: A. Wyzomska, *Traktat reformujący UE – umocnienie ochrony praw podstawowych (status Karty Praw Podstawowych i przystąpienie UE do EKPCz) (The Reform Treaty – Strengthening of the Fundamental Rights Protection (the Status of the Charter and the EU Accession to the ECHR))* in: *Traktat reformujący Unię Europejską. Mandat Konferencji Międzyrządowej – analiza prawno-polityczna. Wnioski dla Polski (The Reform Treaty and The Mandate of the Intergovernmental Conference – A Legal and Political Analysis)*, ed. J. Barcz, Kozłowski Law School Papers, No. 2007/5, p. 51–72 and K. Kowalik-Bańczyk, *Konsekwencje przyjęcia protokołu polsko-brytyjskiego dotyczącego stosowania Karty Praw Podstawowych (Consequences of the Adoption of the Polish-British Protocol on the Application of the Charter of Fundamental Rights)* in: *Karta Praw Podstawowych w europejskim i polskim porządku prawnym (Charter of Fundamental Rights In the European and Polish Legal Orders)*, ed. A. Wróbel, Warszawa 2009, p. 131–50.

4.1. The Polish-British Protocol and the Polish Declarations – the legal texts

The Polish-British Protocol, as annexed to the Treaty of Lisbon, reads as follows:

Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom

Article 1

1. The Charter **does not extend** the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates **justiciable** rights applicable to Poland or the United Kingdom **except in so far as Poland or the United Kingdom has provided for such rights in its national law**.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom. [author's emphasis].

The Polish Declarations are as follows:

61. Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union

The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.

62. Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom

Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.

4.2. The Polish-British Protocol – possible normative interpretations and effects for Poland

Since its text is ambiguous, the interpretation of the Protocol is problematic and varies significantly among legal scholars. Accordingly, three possible groupings of scholarly analysis and legal interpretations may be postulated.

a) The Protocol constitutes a definitive opt-out of the application of the CFR in Poland – and in consequence the CFR cannot be invoked in the Polish courts.

This interpretation had initially been announced through some political and governmental declarations in June 2007, but has not reappeared since then.

b) The Protocol constitutes a procedural opt-out of the application of the CFR in the assessment of Polish national law.

This interpretation has both a weak and strong version,³⁶ which are set out below.

b1) The weak version of this option presupposes the following effects of the Protocol as regards the application of the CFR in Poland:³⁷

- the exclusion of national and EU judicial procedures which would lead to the assessment of Polish laws and practices as compared to the rights, freedoms and principles set out in the CFR;
- the exclusion of the possibility of individuals to question national laws on the ground of the CFR unless they involve rights that are also protected by Polish law;
- the exclusion of legal effects of ECJ judgements under Article 267 TFEU when they render Polish law incompatible with CFR and therefore inapplicable under the supremacy doctrine;

b2) In addition to the above, the strong version of this option argues for:³⁸

- the exclusion of Art. 258 and 259 TFEU proceedings against Poland for breach of CFR and of the Art. 267 TFEU preliminary ruling procedure relating to questions on the compatibility of Polish laws with the CFR;

³⁶ See above all: C. Mik in: *Fundamental Rights Protection In the European Union*, ed. J. Barcz, Warszawa 2009, p. 77; M. Muszyński in the Advisory Opinion of the Polish Legislative Council of 17.03.2008, RL-0303-8/08.

³⁷ Cf. C. Mik in: *Fundamental Rights Protection In the European Union*, op.cit.

³⁸ M. Muszyński, op.cit.

- ban on the invocation of the CFR by individuals in Polish courts; in other words the CFR cannot provide a basis for assessing the legality of Polish laws;
- the exclusion of direct effect of CFR provisions in proceedings in Polish courts and of the supremacy of its provisions over Polish laws.

Clearly, the views expressed above envision very extensive legal effects of the Protocol. At present, it is difficult to evaluate the effects unequivocally, although it should be remembered that these views nevertheless overlook two important aspects of EU law. First, the protection of fundamental rights in the EU is already guaranteed and their status as general principles of law already recognised through the wording of Art. 6 of the TEU. Member States are additionally obliged to respect these provisions under the general principle of solidarity. Moreover, the exclusive decision on the interpretation and application of the Protocol as a part of the Treaty (primary law) belongs, in view of *inter alia* Art. 267 TFEU, to the European Court of Justice (ECJ), which will be the final arbiter on the ultimate effects of the Protocol.

Finally, there is a third possible interpretation of the Protocol, which is supported by some Polish scholars as well as UK and European scholars.³⁹

c) The Protocol constitutes an interpretative clarification of the application of the CFR and its legal effect should be limited to explanatory significance.

The authors who are proponents of this view argue that the Protocol actually repeats the reservations in the TL and CFR itself on the division of competence between EU and its Member States in the area of fundamental rights, and accordingly does not mean more than interpretative clarification. This view seems also to be confirmed by the wording of the Preamble to the Protocol.⁴⁰

Lastly, some authors agree that the Protocol could perhaps limit the application of CFR in proceedings in Polish courts, but only insofar as the fundamental right in question is not covered by the Polish Constitution or Pol-

³⁹ See: A. Wyrozumska, *Incorporation of the Charter of Fundamental Rights into EU Law: Status of the charter, scope of its binding force and application, interpretation problems and the Polish position* in: *Fundamental Rights Protection In the European Union*, ed. J. Barcz, Warszawa 2009, p. 80–112 and M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, “Common Market Law Review” Vol. 45/2008, p. 617–703.

⁴⁰ See also: T. Tridimas and D. Chalmers, cited in House of Lords, Constitution Committee 6th Report of Session 2007–08, European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution, March 2008, and J. Dutheil de la Rochère cited in House of Lords, European Union Committee 10th Report of Session 2007–08, The Treaty of Lisbon: an impact assessment, March 2008.

ish international obligations other than EU. No example however is given of any particular right that could belong to this group.⁴¹ In other words, the Protocol guarantees that the rights reaffirmed by the CFR can be invoked in Polish courts insofar as they have been provided for and implemented in national law (Polish) and fall within the scope of their functioning and interpretation by national system. As a result, the rights provided by the CFR will be applied in relation to Polish laws and administrative practices as long as they exist in the Polish legal system, which is generally the case in view of the fundamental rights granted in the Polish Constitution or guaranteed by binding international obligations.

4.3. The Polish-British Protocol – arguments for its limited significance

The number of normative interpretations and debatable legal significance of the Protocol causes numerous opportunities for contradictory analyses by legal scholars and practitioners, and thus constitutes a threat to the principle of legal certainty and the protection of the legitimate expectations of citizens. This creates an additional argument for a relatively limited view of the significance of the Protocol, which could be summarized as follows:

First, the provisions of the CFR codify and confirm the current doctrine of EU fundamental rights as developed by the ECJ, and under the TL, the Charter acquires the important status of primary law. Moreover, EU law provides for the conditions of its application, which are careful to safeguard national competence in sensitive areas through reservations on the application of the CFR in the text of the Treaty (Art. 6 TEU) and the CFR itself (Art. 51 CFR).

Second, in future ‘Polish cases’ which would involve questions of fundamental rights and the potential application of the Protocol, the ECJ can in any event interpret and construe fundamental rights and principles as it has done so far, through referring to fundamental rights as general principles of law under Art. 6 TEU. Strict application of the Polish and British ‘exclusions’ creates the danger of a dual set of fundamental rights and bases for their application, i.e. one for Poland and the UK, and the other for the rest of the Member States.

Third, the wording and content of the Protocol and Declaration 62 (although it is non-binding) are contradictory, which causes additional confusion in its interpretation.

And finally, there is a general constitutional argument which has been raised by M. Wyrzykowski, who points out the following aspects which should

⁴¹ Cf. A. Wyrozumska, *Incorporation of the Charter of Fundamental Rights into the EU Law: status of the charter, scope of its binding force and application, interpretation problems and the Polish position*, op.cit.

be considered.⁴² The Polish constitutional system is based on liberal democracy which guarantees rights and freedoms of citizens. The realisation of these principles is the constitutional obligation of every government (and this was also reflected in the parliamentary mandate for negotiation of the TL by the Council of Ministers). On the other hand, an activity which can be deemed contradictory to the protection of these principles means denying their importance – i.e. the decision of the Government in 2007 to access the Protocol, which was outside the mandate given by the Polish Parliament in June 2007.⁴³ From this perspective, the Polish accession to the Protocol can be viewed as being in contradiction with the Polish Constitution and the system of fundamental rights and freedoms of citizens that it establishes, as they have been interpreted by the Polish Supreme Court and Constitutional Tribunal.

In sum, the above arguments in favour of limited significance of the Protocol are based on its equivocal wording as well as the unclear *ratio legis* of Poland's accession to its text in light of the Polish Constitution and its international obligations.

4.4. The Polish-British Protocol – an ambiguous outcome?

The preceding considerations demonstrate that it would be desirable to perceive the Protocol as an interpretative guideline with a carefully construed (limited) legal significance. For the reasons outlined above, the effectiveness of the Protocol can be doubted. On the other hand, the Protocol is unquestionably binding, so if the TL enters into force, the main question will concern its legal effects and any resulting modifications in the application of the CFR in Poland (and the UK). Thus the result of the Polish accession to the Protocol and its future effect on the application of the CFR is highly uncertain and unclear. And since the outcome is ambiguous, the certainty of law is affected, which can cause further undesirable results.

The uncertainty regarding the interpretation of the Protocol can, in and of itself, influence the effectiveness of the application of the CFR and the protection of rights and freedoms. From the perspective of the certainty of law and the equivalence of the protection of fundamental rights in all 27 Member States, this is definitely an undesirable result for individuals. This uncertainty is exacerbated by the fact that Polish legal scholars (and politicians) are also divided over the normative interpretation and meaning of the Protocol.

Furthermore, there is a risk of judicial opportunism in Polish courts, some of which can potentially invoke the Protocol in order to ignore the provisions

⁴² M. Wyrzykowski in: *Fundamental Rights Protection In the European Union*, ed. J. Barcz, Warszawa 2009, p. 25-36.

⁴³ Ibidem.

of the CFR in their jurisprudence, even when it should be applied. In this sense, it can also affect the uniformity of application and interpretation of EU law.

Thus it should be hoped that resolution of the problem will be in the hands of the European judiciary (at the EU and national levels), who hopefully will give precedence to citizens' and individuals' rights when interpreting any doubtful provisions. Finally, it should be remembered that the Protocol cannot ultimately change the scope of the protection fundamental rights in the EU and does not exclude the jurisdiction of the ECJ in this area.

Conclusions

To wrap up, it should be stated that this paper offers a necessarily simplified overview of a *problematique* which suffices for a book. As a result the paper has focused on two themes, the institutional co-operation between the Polish Parliament and the Government in EU affairs in the context of the increasing powers of national parliaments under the TL, and the protection of fundamental rights in the context of the Polish-British Protocol. Certainly, there are many more issues regarding the effects of the new Treaty in the Polish legal system which will require thoughtful analysis and elaboration when the TL enters into force, but which must be left outside the scope of this text.

The main conclusion of this paper is that the politicians and the Legislature in Poland will face a number of challenging tasks in adopting new laws and revising the existing ones because of the entry into force of the TL. They will also have to decide promptly whether there is the political will to revise the Constitution. Since the Government is engaged in preparations for the Polish Presidency which will commence on 1 July 2011,⁴⁴ and aware of the fact that Poland's future accession to the Euro-zone will compel constitutional amendments anyway, it may (or may not) be interested in reopening the constitutional debate in this particular context. Having considered the effects of the new provisions of the TL this would seem to be highly desirable.

In any case some draft work and legal preparations need to be undertaken at least at the statutory level. Unfortunately, as of November 2009, no draft act has yet been proposed, and the Polish Sejm and Senate have not adopted any changes in the rules of procedure with regard to implementation of the TL. It is expected that the discussion on these issues will be scheduled in the nearest future.⁴⁵

⁴⁴ See also: J. Skoczek, in this volume.

⁴⁵ Cf. COSAC Report, February 2008, op.cit. See also: *Unia Europejska nas rozstajach. Dynamika i główne kierunki rozwoju reformy instytucjonalnej (EU at a Crossroads: The Dynamics and the Principal Directions of the Institutional Reform)*, ed. J. Barcz, Warszawa 2010.