

# Introduction

## I. Political and legal conditions

The materials published in this book have been gathered as a result of an academic project entitled: ‘Strengthening of the Protection of Fundamental Rights on the Basis of the Treaty of Lisbon. Conclusions for Poland and Other States of the Visegrad Group. This project was supported by the Trust for Civil Society in Central & Eastern Europe’. Objectives for this project were set in summer 2007, and therefore at a time when the 2007 Intergovernmental Conference was conducted whose agenda was adopted at the European Council Meeting of 21–23 June 2007. As the mandate of the Conference in the form negotiated by the Member States was very detailed<sup>1</sup>, it was obvious that one of essential, new objectives of the Reform Treaty (the future Treaty of Lisbon) was strengthening of the European Union democratic legitimacy, with inclusion of significant reinforcement and consolidation of fundamental rights protection system. This was to be expressed by means of accession of the Union (already as a uniform international organization) to the European Convention on the Protection of Human Rights and Fundamental Freedoms and by granting binding character to the Charter of Fundamental Rights – hitherto the document of political character. Yet, the Charter was not to be incorporated into the text of the Treaties which were to constitute the Union (as it was proposed in the Constitutional Treaty in the case of which the Charter constituted second part thereof). On the contrary, within the scope of ‘deconstitutionalisation’ of the Union’s reform, the Charter of Fundamental Rights was to ‘have the same legal value as the Treaties’ (Article 6(1) of the TEU as worded by the Treaty of Lisbon), and thus was to be incorporated into the primary law of the (EU). As we know, this is what happened. The Reform Treaty (the Treaty of Lisbon) which was signed on 13 December 2007<sup>2</sup> introduced necessary provisions to the new Treaty on European Union (TEU).

Proposals within this field included in the Treaty of Lisbon, undoubtedly, confront the European Union and its Member States with a number of issues, legal and political in nature. The solutions thus suggested lead, on the one hand,

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<sup>1</sup> *Annex I to the Presidency Conclusions adopted during the Meeting of the European Council on 21–23 June 2007*, Presidency Conclusions Brussels, 23 June 2007, 11177/07, p. 19. See Traktat reformujący Unię Europejską. Mandat Konferencji Międzyrządowej: analiza prawno-polityczna. Wnioski dla Polski [Reform Treaty of the European Union. Intergovernmental Conference Mandate – legal and political analysis], Kozminski Law School Papers 2007, No. 5. *F.C. Mayer*, Die Rückkehr der Europäischen Verfassung? Ein Leitfaden zum Reformvertrag, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2007, No. 4.

<sup>2</sup> OJ 2007 C 306/1.

to strengthening of fundamental rights protection in the EU and to the reinforcement of the coherence of the European fundamental rights protection system (which is based on the Council of Europe mechanism). On the other hand, a number of significant issues requires clarification, especially as to the cooperation between the EU and the Council of Europe (above all the relationship between the European Court of Justice and the ECtHR needs to be explained) as well as to the scope of enforcement and application of the provisions of the Charter of Fundamental Rights to the institutions of the EU and to the internal affairs of the Member States. Obviously, these issues constitute the core of the research project at hand.

The research done within this substantial project also concerned one more general issue. As result of the big enlargement of 2004–2007 in the ‘new’ Member States and especially in those which have undergone the systemic transformation, different issues with reference to the position of fundamental rights and the rule of law add to the above-mentioned legal and political issues. They are the consequence of the period in which the state of law in tandem with democratic structures and party systems was erected. Although the countries mentioned established rigid frames for the rule of law and market economy and regardless of their membership in international organisations which guarantee those frames (above all in the North-Atlantic Organization and in the European Union), those countries are prone to give in to populist enticements, and one of the fields which is particularly sensitive to populist policy is the status of individual and fundamental rights guarantees. A so-called ‘new Member States syndrome’ can be observed in most of those countries. Its essence comprises in the fact that having gone through the pre-accession period, all the renunciations connected with the adjustment and becoming the Member State of the EU – having achieved this strategic aim – those countries often act as if they still belonged to the ‘outside’ of the EU. Thus, they perceive the EU not as the structure they belong to and shape, but as a threat to their own national interests.

Such problems could be observed to a different degree in all the states of the Vysehrad Group. In Poland, they appeared in the highest density during the reign of the Law and Justice (*Prawo i Sprawiedliwość*) political party (2005–2007). It is, however, characteristic of Poland that the EU membership has enjoyed there a strong, almost 80 per cent support of the society. Understanding the necessity to reform the EU has been strong as well, and it has been expressed by the support firstly for the Constitutional Treaty and then for the Treaty of Lisbon which reached 60–70 per cent. In Poland, thus, different phenomenon from that occurring in most of the ‘old’ Member States could be observed. Whilst in the ‘old’ Member States the political élites expressed their support for the EU often against the resistance of the society (manifested by negative results of referenda on ratification of the Constitutional Treaty of 2005 in France and Netherlands), in Poland sceptical attitude towards the EU was presented by a part of the political environment, which was gathered mainly around the Law and Justice party and former members of its coalition – the Self-Defence party (*Samoobrona*) and the League of Polish Families party (*Liga Polskich Rodzin*). There is, however,

a limited field in Poland to build one's position on the basis of political anti-European attitudes, which was revealed by the parliamentary elections in autumn 2007. They resulted with the Law and Justice's loss and a complete political marginalization of the members of its former coalition. Due attention should also be given to attitudes of the Catholic Church, which, although generally supportive of the Polish membership in the EU, in some areas, especially with relation to the protection of fundamental rights, presents diverse positions which are expressed by bishops and priests.

The above-described political dynamics has had a relatively significant impact on the stance of the Polish delegation which negotiated the content of the mandate of the Intergovernmental Conference and the Treaty of Lisbon. This position was particularly clearly reflected in the Polish accession to the Protocol on the Application of the Charter to the United Kingdom (Protocol No. 30) and other actions which aimed at guaranteeing the 'negotiations results' achieved (especially the so-called Ioannina formulae). After the takeover of power at the end of 2007 by the Civic Platform (*Platforma Obywatelska*) the above political conditions were also to have an impact on the debate over ratification of the Treaty of Lisbon in 2008.

The Treaty of Lisbon is to be ratified in Poland in accordance with Article 90 of the Constitution. This means that the President of the Republic of Poland (RP) must be given consent to ratify the Treaty either by a two-thirds majority of the Deputies and Senators (in the presence of at least half of the statutory number of Deputies and Senators respectively), or by a nationwide referendum. The Law and Justice party (despite their loss in the autumn 2007 parliamentary election) retained sufficient representation in Sejm, so as to block the achievement of the two-thirds majority, indispensable for the consent to ratify the Treaty. Announcing a referendum would be possible (and the result in favour of the Treaty would be more than possible considering the firm support of the society for the Polish membership in the EU and for the Treaty), yet at least more than half of those having the right to vote must participate in the referendum, if its result is to entitle the President of the RP to ratify the Treaty. Exceeding this threshold in Polish conditions would be extremely difficult. Moreover, additional, important circumstance arose when the President of RP – *Lech Kaczyński* – explicitly announced that he would not sign the ratification documents if his 'negotiations achievements' were not to be sustained; above all the guarantee of the Ioannina formulae (which concerned decision-making in the Council by the qualified majority) and not retracting from the Protocol on the Application of the Charter of Fundamental Rights (Protocol No. 30). In this situation the government of the Prime Minister *Donald Tusk* decided to sign the Treaty of Lisbon as it was negotiated (that is with the Protocol No. 30)<sup>1</sup>, yet in the course of discussion on the ratification of the Treaty the above issues became subject to different political compromises

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<sup>1</sup> See *J. Barcz*, Nie warto umierać za protokół brytyjski [It is not worth dying for the British Protocol], GW 30 November 2007.