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Social Dialogue Council: the Shifting Sands of Tripartite Social Dialogue[1]

Barbara Surdykowska*

Abstract

This paper discusses the work of Social Dialogue Council (henceforth referred to as RDS, from the Polish acronym of Rada Dialogu Społecznego) an institutional keystone of tripartite dialogue in Poland. The point of departure for our discussion is the COVID-19 epidemic, a litmus test not only for the world economy, but above all for social life. Its impact on industrial relations and the state of social dialogue seems undisputable. These processes apply to Poland. The trials and tribulations of the epidemic have had a negative impact on the functioning of the RDS. It seems, however, that the current inertia of this institution is primarily due to the processes of destruction of social dialogue which have been going on for a long time, with twists and turns around COVID-19 only exposing their destructive scale.

The first part of this paper addresses the role of RDS during the period of the epidemic. Following from there, the process of the formation of RDS and its competences will be presented. In this context, the article will also refer to the activity of social partners with regard to issuing comments on draft legislative acts and their ability to effectively influence the direction of legislative work (in the context of the decisions of the Constitutional Court, taking as an example the joint struggle of employers and trade unions for the so-called 'multiple of 30' contributions). The article concludes by closing remarks.

Keywords: social dialogue, Poland, tripartite structures.

JEL Classification: J 50, J 58.

* Warsaw School of Economics (SGH), b.surdykowska@solidarnosc.org.pl, ORCID: 0000-0003-4569-1274.

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Introduction

Tripartite dialogue becomes particularly important considering the absence of any form of bipartite dialogue in our country beyond the workplace level. The former takes, above all, an institutional form. This is due to the inability to develop a sustainable practice of tripartite social pacts in Poland as an instrument for flexibly addressing emerging challenges.

As pointed out in the academic publications, the sine qua non condition for dialogue is the existence of the parties to the debate and the awareness of the links between the group in question resulting primarily from a sense of community of interest (Abramowicz 2009). There are three basic models of collective interest representation: pluralistic, consensual and corporate. The pluralist model, which falls within the category of majoritarian democracy, assumes that interests are articulated by groups operating on the basis of voluntary membership, which make attempts to influence the political system in such a way that these interests are reflected in political decisions. The consensus model is based on four elements: rule by broad coalition, the principle of mutual veto, the principle of proportionality and a high degree of autonomy for each segment of society. Corporate model – is considered to be a manifestation of domination in a given country of socioeconomic divisions, which to a larger or lesser degree reflect class conflicts (Herbut 2003).

In Polish academic literature, the notions of social dialogue and civic dialogue are often regarded as separate, but sometimes are interchangeable. The link between the notions of social dialogue and negotiation is also very unclear (Błaszczyk, Sroka 2005: 7–8). Juliusz Gardawski, for instance, puts it this way: The notions of negotiation and dialogue are not separate. Under certain conditions, negotiations are sometimes enriched with the element of dialogue, and on the other hand, each dialogue involves negotiations of interests. The lack of dialogue does not presuppose the impossibility of reaching a compromise and agreement, however, with dialogue, these compromises and agreements are more durable (Gardawski 2004: 100).

The framework for social dialogue in Poland is established by the Constitution of the Republic of Poland, and in particular its Article 12 (ensuring freedom for the creation and functioning of trade unions, societies, citizens' movements, other voluntary associations) and Article 20 (pointing to the social market economy, solidarity, dialogue and cooperation between social partners as the basis of the economic system of the Republic of Poland). The Preamble also refers to social

dialogue and the principle of subsidiarity. Individual areas of dialogue are regulated by specific laws.

The researchers tend to regard the tripartite social dialogue as the most rational opportunity for the reduction of the negative consequences of various social phenomena in those countries where industrial conflict was the main factor influencing the dynamics of the economy (Dziewięcka-Bokun, Mielecki 1998: 92–93). As Kazimierz Friske points out, over time, the content and the concept of social dialogue as a 'peaceful' method for problem solving has evolved. It became apparent that in modern societies, different social interests cannot be reduced only to the labour relations dimension (Friske 2005: 47).

RDS During the Pandemic: an Invisible Institution

Dealing with the consequences of the COVID-19 epidemic has become a symbolic test for many institutions and mechanisms of social and economic life. This also applies to the functioning of social dialogue in an extreme situation, the rollout of global lockdowns should be considered as such. The results of this test varied depending on the specific nature of a given country. What is the situation in Poland and what conclusions can be drawn from it? The point, of course, is not to give an outline of the overall impact of the epidemic on social dialogue in Poland (it is, after all, too early for such a balance sheet). I will refer only to a small section of the legal provisions that determine the functioning of the RDS. In one of the first legislative actions related to COVID-19 (the so-called Anti-Crisis Shield 2.0), the legislator introduced changes to the Act on the Social Dialogue Council. The most important of them gave the Prime Minister new competences to dismiss the members of the Council. Thus, the Act of 30 March 2020 amending the Act on specific solutions related to the preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them, together with other acts, after section 2 of the Article 27 of Act on the Social Dialogue Council, sections 2a and 2b were added:
2a. The Prime Minister shall dismiss a member of the Council in the event of:

1) the loss of trust in connection with the information concerning work, cooperation or service in state security bodies within the meaning of Article 2 of the Act of 18 October 2006 on the disclosure of information on documents of state security bodies from the years 1944–1990 and the content of those documents (Journal of Laws of 2020, item 306);

2) compromising the Council's activities leading to the inability to conduct a transparent, substantive and regular dialogue between employees' and employers' organisations and the government.
2b. Membership of the Council shall expire in the event of a false vetting declaration, as referred to in the Act of 18 October 2006 on the disclosure of information about the documents of state security authorities from 1944–1990 and the content of those documents, as established by a final court decision.

Another regulation (Article 85 of the Anti-Crisis Shield 2.0) indicated that during the period when a state of epidemic risk or state of epidemics is in force, the Prime Minister is authorised to dismiss RDS members who are representatives of employees, employers and government, at their request of their organisations or without such a request.

These modifications cropped up as parliamentary amendments after the first reading of the law in the Sejm (lower chamber of the Polish parliament), so they were not even consulted with the social partners. They were a complete surprise to them. The NSZZ 'Solidarność', counting on its formally good relations with the ruling party, appealed directly to the President of the Republic of Poland and to the Law and Justice party to withdraw from the above-mentioned regulations[2]. To no effect. Admittedly, at the time of signing into law the Anti-Crisis Shield 2.0 in April 2020, President Andrzej Duda stated that he would refer its provision concerning RDS to the Constitutional Court (which he did on 26 May 2020, case K 9/20)

This regulation met with an extremely negative reception outside Poland. This was manifested by protests from the Director General of the ILO[3], the European Trade Union Confederation and the International Trade Union Confederation. In their joint letter, the European social partners called on the European Commission to intervene in this case of a violation of the autonomy of Polish social partners (Businesseurope 2020). As pointed out by the social partners, the Anti-Crisis Shield 2.0 had not been consulted appropriately[4] and, which is crucial, violates international

[2] https://www.tysol.pl/a45474-Piotr-Duda-To-niedopuszczalna-ingerencja-w-autonomie-partnerow-spolecznych; https://www.tysol.pl/a45716--Tylko-u-nas-Piotr-Duda-%C2%A0Pan-Prezydent-podjal-jedyna-sluszna-decyzje-w-tej-kuriozalnej-sytuacji; https://www.tysol.pl/a45734-Tadeusz-Majchrowicz-To-wchodzenie-z-butami-w-uprawnienia-Prezydenta

[3] http://www.solidarnosc.org.pl/aktualnosci/wiadomosci/kraj/item/19420-list-dyrektora-generalnego-mop-do-premiera-rp-w-sprawie-poprawek-o-rds

[4] https://www.tysol.pl/a46486-%E2%80%9ESolidarnosc%E2%80%9D-Rzad-zmierza-do-otwartego -konfliktu-zadamy-dialogu-i-konsultacji; https://www.tysol.pl/a46318-Sprzeciw-Rady-

agreements binding Poland, which set out the principles of autonomy of social partners and their right to negotiate unobstructed by public authorities.

Subsequent actions of the government were equally controversial and could even threaten the foundations of social dialogue in Poland. For example, the government was considering involuntary suspension of collective agreements. NSZZ Solidarność trade union considered the provisions of the Anti-Crisis Shield 3.0 draft project (which ultimately were not adopted) as potentially blocking trade union activity[5].

As regards the functioning of the RDS itself, it is worth noting that, in general, most of the government's activities within the area of employer-employee relations during the COVID-19 pandemic were carried out outside the framework of RDS and without consultation with this institution. Given the threat from the virus and social distancing, it is not surprising that during the epidemic, the activities of the RDS decreased. However, looking at the number of online sessions of Problem Taskforces or the RDS Bureau, we can see that the activity of the institution has been de facto brought to a standstill.

The social partners have not drafted joint proposals for government concerning the proposed solutions during the lockdown and the period following it. Nor have there been any formal proposals from trade unions or employer organisations.

Given these circumstances, it is only natural to ask the following question: was the collapse of the RDS caused by COVID-19 or was it the result of prior events? To address this question, we need to look back at the past.

The Rise of the Social Dialogue Council

The first impulse for the institutionalisation of tripartite dialogue in Poland was the signing of a Pact on a state enterprise under transformation. This came about at the behest of the government which approached trade unions and the only then-existing organisation of employers (Confederation of Polish Employers, KPP), A year later, the

Krajowej-Sekcji-NSZZ-Solidarnosc-PARiS-do-zapisow-w-ustawie-Tarcza-II; https://www.tysol.pl/a46086-Stanowisko-Prezydium-Komisji-Krajowej-Epidemia-nie-zwalnia-Rzadu-z-przestrzegania-prawa

[5] https://www.tysol.pl/a47516-Tadeusz-Majchrowicz-W-tarczy-3-0-byly-zapisy-ktore-mogly-doprowadzic-do-likwidacji-ruchu-zwiazkowego

government set up the Tripartite Commission, whose informal father and patron was Andrzej Bączkowski, a minister enjoying widespread recognition of social partners[6].

In accordance with the provisions of the Resolution of the Council of Ministers, the Tripartite Commission was made responsible for monitoring economic processes and assessing mechanisms and instruments used in social and economic policy. The Resolution of the Council of Ministers did not specify the representativeness criteria, upon fulfilment of which trade unions and employers' organisations could obtain the status of a member of the Commission. The historical criterion was adopted, by which the parties to the Pact on State Enterprise became members of the Commission. The resolution provided for the possibility of extending the composition of the Commission, at the request of the Commission addressed to the Prime Minister, so that it encompasses other organisations of social partners[7]. The Commission's activities were affected by the fact that trade unions had direct links with parliamentary groups. Thus, they were promoting their priorities not through the Tripartite Commission but through the Parliament. In other words, the dialogue took place *de facto* outside the Commission (Fałkowski, Grosse 2006: 18, 19; Gąciarz, Pańków 2001: 94, 95).

The adoption by the Sejm of the Act of 6th July 2001 on the Tripartite Commission for Socio-Economic Affairs and in Voivodship Social Dialogue Commissions was a milestone in the development of tripartite dialogue in Poland. The work preceding the creation of the act took many years. There was even an idea, which was never implemented, of putting the tripartite commission in the Constitution (Waniek 1991: 35). The need to create a statutory basis for tripartite dialogue in Poland was signalled by the Constitutional Tribunal in its case law[8]. Two bills on the Tripartite Commission for Social and Economic Affairs – a parliamentary draft (by the Democratic Left Alliance) and a government draft – were submitted to the Sejm[9].

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[6] The composition, organisation and competences of the Tripartite Commission were defined in detail in Resolution No. 7/94 of the Council of Ministers of 15 February 1994. In 1997, after Bączkowski's death, the activities of the Commission went into decline. This suggests a high degree of personalisation of the tripartite dialogue. The suspension of participation in the Commission's work by the NSZZ Solidarność in 1998 and then by the OPZZ in 1999 led to its de facto shutdown.

[7] In practice, the parties to the Commission have never reached a consensus on this matter and have not made any proposals.

[8] C.f. the ruling of 6 May 1997, U 2/96.

[9] Sejm prints 2020 and 2021.

The legal form of the Tripartite Commission has been discussed many times in the academic literature (Całka-Lajnert 2012). According to Karina Całka-Lajnert, the Tripartite Commission supplemented representative democracy with mechanisms of participatory democracy, dialogue and participation were used to legitimise the authorities. Jacek Męcina points out that his analyses suggest that despite critical assessments of the dialogue carried out within the framework of the Tripartite Commission for Social and Economic Affairs, its activity had an impact on labour relations in such areas as labour law, the labour market, salaries and social benefits, and the social security system (Męcina 2010: 289).

The suspension of employee-representatives participation in the work of the Tripartite Commission for Social and Economic Affairs, provincial social dialogue committees and all Tripartite Industry Taskforces during the session of the Tripartite Commission on 26 June 2013 attended by Prime Minister Donald Tusk sealed the fate of this body.

The history of the Act on Social Dialogue Council (henceforth referred to as Act on RDS) begins on 28 October 2013. On that day, during a meeting at the Chancellery of the President of the Republic of Poland, the trade unions presented the President of the Republic of Poland and employers' organisations with initial draft proposals for changes to the architecture of tripartite dialogue in Poland. Following from there, a series of bipartite meetings of social partners began. These were concluded in early 2015. As a result, a preliminary version of the Act on RDS was drafted. Tripartite negotiations were initiated following the submission of this document to the government. These ended on 21 March 2015 with the agreement concluded in Dobieszków. On 8 April 2015, formal legislative work on the draft began. As a consequence, on 24 July 2015, the Sejm passed the *Act on the Social Dialogue Council and other social dialogue institutions*, which entered into force on 11 September 2015 (Grabowska 2016).

Several controversial issues have arisen during the work on the law. These included, for example, whether it would be legal to specify in the law the issues on which the government has to come to an agreement with the Council. The trade union organisations argued for putting a catalogue of such issues into the law. Employers' organisations argued that it would violate the constitutional order and the principle of separation of powers. They contended that such a provision could paralyse the decision-making and legislative process. The trade unions' proposal, according to which the lack of public consultation on a draft legal act would be grounds for a complaint to the Constitutional Court, gained the employers' approval. The social partners emphasised that the existing regulations indicating the need to

carry out the consultation process of draft legal acts (resulting from the Trade Union Act and the Employers' Organisations' Act) do not specify any sanctions in the event of a breach of procedure. Thus, the future regulation had to amend this situation. In the end, no 'sanctions' of this sort were included in the Act on RDS[10].

Social partners also presented the following demands, which had been raised many times before, to the government: obtaining a greater and direct influence of the social partners on the spending of funds from the Labour Fund and the Guaranteed Employee Benefits Fund. Naturally, these demands were supposed to be implemented not in the Act on RDS itself (which concerned another matter), but were presented as recommendations for further legislative work. This question crops up in the common positions issued by the Council's trade union and employer members. We are still far from achieving any progress on this front.

Much of the discussion concerned the financial independence of the Council. The condition of the Polish social partners is evidenced by the fact that no one seriously suggested that they should co-finance/finance the RDS.

Throughout the work on the Act (and later, when its first amendment was underway), NSZZ Solidarność pushed for the idea of a Social Dialogue Ombudsman (appointed by the Sejm at the request of the Speaker of the Sejm or a group of 35 MPs). Other trade unions, OPZZ and FZZ, and employer organisations have not been supportive of this idea. They have reservations about the institution's high profile. In their view, the relationship between the RDS Chairperson and the potential Social Dialogue Ombudsman is unclear.

In the end, a lot of new provisions have been included in the Act on RDS, as compared against the Act on Tripartite Commission. These include: the ability to appeal by the partners to the Supreme Court and Constitutional Court, the ability to propose joint drafts of legal acts. The competences of the RDS and the legal institutions introduced under this law are discussed below.

The tasks of the Social Dialogue Council are set out in Article 1 of the Act. They are as follows. The Council conducts dialogue in order to ensure conditions for social and economic development and increase the competitiveness of the Polish economy and social cohesion. The Council works for the implementation of the principle of social participation and solidarity in the field of employment relations. The Council works to improve the quality of development and implementation of social and economic policies and strategies, as well as to build social understanding

[10] This issue is important in the light of the ruling of the Constitutional Court of 4 November 2018 (Kp 1/18), which is discussed in the subsequent part of this paper.

around them by conducting a transparent, substantive and regular dialogue between employees' and employers' organisations and the government. The Council supports social dialogue at all levels of local government.

This broad range of objectives of the Council's actions is reflected by instruments for implementing these tasks, which will be discussed below. An important role is envisaged for the Council's Action Plans[11]. However, it should be pointed out that these documents are very vague.

The following are some of the most important competences of the Social Dialogue Council:

– adoption of tripartite and bipartite resolutions;
– the right to request changes in the law;
– issuing positions on draft laws;
– conclusion of agreements;
– consultation of the Multiannual Financial Plan of the State (and the increase of salaries in the national economy, including in the state budgetary sphere, the minimum wage, pensions from the Social Insurance Fund, FUS);
– issuing position on the draft state budget.

Article 28 of the Act deals with rules covering the adoption of tripartite resolutions at plenary sessions of the Council. The Council takes decisions by way of a resolution at plenary sessions, if the session is attended by:

1) representatives of more than half of the representative trade union organisations;
2) representatives of more than half of the representative employer organisations;
3) at least one representative of the Council of Ministers.

The adoption of a Council resolution requires the consent of each party. The positions of employee and employers are adopted by a simple majority, with at least two-thirds of the members of the Council representing the party concerned being present at the voting. The position of the Government is adopted unanimously by the members of the Council of Ministers present at the session and representatives of the minister in charge of labour and the minister in charge of public finance.

Another issue that should be highlighted concerns the rules of adopting resolutions by employees' and employers' representation at the plenary sessions of the Council (Article 29 of the Act). The employees' and employers' representation agrees on a motion, expresses its opinion or takes a position by means of a resolution adopted at a plenary session, if the session is attended by:

[11] The Council's work programmes for the years 2018, 2019 and 2020 are included as the Annex to this paper.

– representatives of more than half the representative trade union organisations;
– representatives of more than half of the representative employer organisations.

Adoption of the resolution requires the consent of the representatives of employees and employers. The resolution is adopted by a simple majority, with at least 2/3 of the members of the Council representing the party concerned being present at the voting.

With regard to both tripartite and bipartite resolutions, the law provides for the possibility of voting by electronic means of communication. Unanimity is required to adopt a resolution under this procedure.

The parties to the Council may conclude agreements and adopt common positions. It should be stressed that these agreements (referred to in Article 3 of the Act) belong to a different category from the inter-company collective agreements referred to in Article 15 of the Act).

The RDS has the following additional powers and prerogatives: to apply to the Supreme Court to resolve a legal issue; to apply by the Chairman of the Council to the minister in charge of public finance for a general tax interpretation; to apply by the Chairman of the Council to the Sejm and the Senate for presenting to the Sejm or the Senate information concerning matters of significant importance; to conclude an inter-company collective agreement; to apply for a public hearing.

The social partners of the Council may conclude inter-company collective agreements (Article 15 of the Act). The employee and employer representatives in the Council may conclude collective agreements covering all the employers affiliated to the organisations referred to in Article 24(1) or a group of those employers and the workers employed by those employers, as well as agreements setting out the mutual obligations of those parties[12].

The employees' and employers' representations in the Council may request a public hearing with the body responsible for drawing up the draft legislative act concerning matters falling within the Council's sphere of competence. Any of the organisations who is represented in the Council may take the initiative to request a public hearing on a draft legislative act. The adoption of the relevant motion takes place by way of a resolution of the employee and employer representatives in the Council.

[12] Articles 239–241^{1}, 241^{2} (1) and (3), 241^{3}–241^{9} (1) and (2) and 241^{10}–241^{13} of the Labour Code apply to collective agreements.

First 5 Years of RDS (2015–2019)

First, it should be noted that Social Dialogue Council has made very little use of the potential legal instruments at its disposal. As I have already pointed out, the RDS has additional (in comparison with previous legal framework) prerogatives. In practice, however, they are rarely used[13]. For example, there has been no request to the Supreme Court nor to the Constitutional Court or any request for a general tax interpretation. The parties did not enter into an agreement or an inter-company collective agreement. Tripartite resolutions are almost exclusively concerned with organisational issues. The basic question that arises is: what are the reasons for this? Are these instruments *de facto* not needed by the social partners or do they not have the social/intellectual capacities to use them? Mateusz Szymański points out that to date, the employee and employer representation have never worked out a common position in the draft budget consultations procedure (Szymański 2018). This was again the case in 2019[14]. However, the parties individually did adopt their positions: for example, the position of the employers' representation on the budget bill in 2018 and, in the same year, a joint proposal of the employee representation in the RDS concerning the increase in salaries in the national economy in the following year, including in the state budgetary sphere, the minimum wage for work and pensions from the Social Security Fund (Szymański 2018).

Second, the public does not get enough systematic information about the Council's activities. Just as in the case of the Tripartite Commission, no transcripts of the RDS plenary sessions or of the individual Problem Taskforces are published.

It seems that the basic research question which should now be analysed is to what extent the bipartite resolutions of the social partners influence the work or directions of legislative work and other decisions of the government. The analysis of individual resolutions and the government's replies[15] would allow the 'outside world' to get to

[13] Resolution of the social partners of the Social Dialogue Council No. 18 of 19 October 2016, http://www.dialog.gov.pl/dialog-krajowy/rada-dialogu-spolecznego/uchwaly-partnerow-spolecznych/. It should be noted, however, that work on this amendment to the Labour Code (extension of deadlines for appealing to the labour court against the termination of a contract) was already under way in the Sejm at that time.

[14] https://www.cpsdialog.pl/index.php/108-z-zycia-dialogu/zespoly-problemowe-rds/485-10-07-2019-zp

[15] These, however, are not available on the website of RDS.

know the positions of all the parties involved. Let us take two examples which are, in my opinion, concrete and valuable resolutions of the social partners:

– Resolution No 75 of the Employee and Employer Representatives in the Social Dialogue Council of 27 February 2019 on initiation of work on changing the determination of the amount and rules for granting unemployment benefits[16].
– Resolution No. 74 of the Employee and Employer Representation in the Social Dialogue Council of 27 February 2019 on the recommendation of amendments to the Regulation of the Council of Ministers of 28 May 1996 concerning vocational training of young persons and their remuneration, the manner of determining the minimum remuneration of juvenile employees employed for the purpose of their vocational training[17].

For the public opinion, however, analysing the resolutions' potential impact on the 'way of reasoning' of the government or following the debate which is taking place around the issue of the amount of unemployment benefits or the amount of remuneration for juvenile workers requires learning about the government's reply[18].

As I have already pointed out, it is not possible to even make an attempt at analysing the impact of tripartite resolutions on state policy, as the tripartite resolutions adopted to date only concern organisational and formal issues[19]. Another question concerns giving opinions on legal acts; the current state of the law we have a two-pronged approach to the this procedure. The right to give opinions on draft laws results both from the Trade Union Act (Article 19), the Employers' Organisations Act (Article 16) and the Act on RDS. In a handful of cases, the RDS Problem Taskforces had the will (and were able to) work out a common position of the social partners over a draft law. However, the position would be worked out after the government sent the bill to the Sejm. Ultimately, the impact on the legislative process boiled down to informing during committee/subcommittee sessions in the Sejm or Senate about the common position. Needless to say, the common position did not result from the institutional 'toolkit' within the Act on RDS, but from the perception of a given problem as important and of common interest.

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16 http://www.dialog.gov.pl/dialog-krajowy/rada-dialogu-spolecznego/uchwaly-partnerow-spolecznych/

17 Ibidem.

18 The author of these lines believes that if the RDS itself does not perceive the disclosure of these replies to the public as something relevant, it is difficult to assume that the parties see the exchange of views as something more than formalised theatre.

19 http://www.dialog.gov.pl/dialog-krajowy/rada-dialogu-spolecznego/uchwaly-rds/

It should be noted that some of the legal instruments present in the Act on RDS virtually duplicate the provisions from the Trade Union Act and the Employers' Organisations Act. Both acts were adopted in 1991 and the regulations in question have been included in them from the very beginning. For example, Article 13 of the Act on RDS provides the right to request changes in the law. Article 20 of the Trade Union Act indicates that a representative trade union organisation has the right to apply for issuing or amending of a law or other legal act falling within the scope of trade union actions. Trade unions pass motions regarding laws to MPs or bodies with the right of legislative initiative. As for the lower-level legislation, requests are addressed to the bodies authorised to issue them. The state authority to which the request is addressed is obliged to present its position to the trade union within 30 days and, should the reply be negative, include a justification. A similar regulation is contained in Article 16 (2) of the Employers' Organisations Act. A simple question may be posed: since Article 20 of the Trade Unions Act and Article 16(2) of the Employers' Organisations Act have not been used in practice by the social partners, how could one assume that the same provision in the Act on RDS will lead to a sudden inundation of draft legal acts from the social partners?

Personally, I always find it surprising that among the prerogatives of the Council expressed in the Act on RDS there is no reference to the National Reform Programme (NRP). Of course, there are no legal obstacles to a 'bottom-up' initiative from one of the organisations to place this subject on the agenda and then try to work out a common position of the social partners towards the draft National Reform Programme. However, no such actions have been observed. The NRP is not explicitly indicated in the Act on RDS. It is dealt with by the government's inter-ministerial team for Europe 2020, where social partners are formally participating in the European Semester process, together with a large group of non-governmental organisations and, above all, ministerial officials, who play a dominant role there. This shows that the process of economic governance stemming from the Europe 2020 strategy is still quite 'external' and 'abstract' for social partners[20].

[20] This issue is addressed by Sławomir Adamczyk in his article entitled 'Self-organizing Social Dialogue: Impact of the European Union Level on the Relations between Polish Social Partners' (see next article).

Illusory Belief in the Social Partners' Impact on the Legislative Process

It seems that the above considerations concerning the Social Dialogue Council should be complemented by a few remarks concerning the 'tool' that has 'always' been available for trade unions (and for employers' organisations, for that matter) as a means of influencing public policy, that is, giving opinions on draft legislation. In my opinion, this is (in addition to participation in the process of adopting the budget and supplementary budget acts) the dominant area of activity of all three representative trade unions. It seems that neither the NSZZ Solidarność, nor the OPZZ, nor the Forum of Trade Unions wield the instruments of influence traditionally used by trade unions in the West, and so they do not pursue any coordinated policy of collective bargaining undertaken by the unions/sectoral federations or company/inter-company organisations within their structures. None of the national trade unions officially present their expectations and results of bargaining to the 'outside world'. The main form of external communication are the opinions, positions, views expressed in the process of giving opinions on draft legislation, which is based on Article 19 of the Trade Union Act. Even this fact on its own suggests where the national trade unions concentrate their actions.

However, this does not imply that these actions are effective. The jurisprudence of the Constitutional Court suggests that a breach of the procedure specified in Article 19 of the Trade Union Act has a negligible impact on the correctness of the legislative process. It is worth noting the unfavourable interpretation of Article 19 concerning consultation with the trade unions on draft legal acts on the example of several rulings of the Constitutional Court. For example, in the ruling of 4.4.1995. (K 10/94, Legalis) (from the motion of NSZZ Solidarność and OPZZ) in the absence of consultations under Article 19, the Constitutional Court found no infringement of the Constitution of the Republic of Poland. The aforementioned case concerned the Act of 23 April 1994 on the methods of determining remuneration and funds for remuneration by economic entities and amending certain acts. The act was passed after an earlier act concerning the same area had been vetoed by the President of the Republic of Poland. In principle, the Act was passed in the same form, with the exception of the provisions that were challenged by the President, without consulting the trade unions again. The Court pointed out that the legislative process as a result

of which the contested Act was passed was, in terms of substance, a continuation of the legislative process that ended with the President's veto. For these reasons, the mere failure to refer the draft of the contested bill to consultation, in view of the fact that the trade unions had been subjected to consultation of the draft of the preceding vetoed bill, does not constitute a sufficient basis for declaring a breach of the obligation of state authorities to respect the rights of the Republic of Poland, provided for in Article 3 of the Polish Constitution. The obligation to consult provided for in Article 19 may be fulfilled by subjecting the draft law or its assumptions to consultation.

Furthermore, in the judgment of 18 January 2005 (K 15/03, Legalis), the significance of Article 19 was downgraded. The government sent a draft law to the representative trade unions on the same day as it was submitted to the Parliament. The Court pointed out that while adopting the challenged law, the government undoubtedly violated the provisions of Article 19. At the same time, it pointed out that this fact alone does not necessarily determine the unconstitutionality of the law adopted in this manner. The Constitutional Court pointed out that first of all, there was no direct violation of the provisions of the Constitution, but the provisions of an Act, which may (but in some situations does not have to) mean a violation of constitutional principles. In the situation under discussion (the recent change of government and the necessity to change the draft budget submitted by the previous government, which, in the opinion of the new government threatened budget balance), it is reasonable to accept that the legislator acted in a peculiar state of higher necessity, i.e. it had the choice of either violating the principle of consultation or that of budget balance.

The proverbial straw that broke the camel's back was the Constitutional Courts' judgment of 4 November 2018 (Kp1/18). The case from the motion of the President of the Republic of Poland concerned a violation of the legislative procedure, including the procedure for issuing opinions in connection with the enactment of an Act amending the Act on the social insurance system with regard to the so-called 'multiple of 30'[21], i.e. the limitation of the amount of money on which contributions for pension insurance are paid. There is no need to discuss the substantive objections which trade unions and employer organisations raised in relation to this regulation. In his motion to the Constitutional Court, the President pointed to the violation of Articles 2, 7, and 59 (2) in connection with Articles 12 and 20 of the Polish Constitution. The position of the Prosecutor General stated that the procedure of issuing opinions on the draft bill had not been completed before the bill was submitted to the Sejm, which constitutes

[21] The so-called 'multiple of 30' is a rule indicating that no pension insurance contribution is paid on the salary of an insured person in excess of thirty times the average salary.

a violation of Article 34 sections 2 and 3 of the Rules of Procedure of the Sejm and paragraph 58 of the Work Regulations of the Council of Ministers. However, these violations were not linked in substance to the constitutional provisions, thus, it cannot be concluded that this undermined the purpose which these provisions were intended to serve, all the more so because during the legislative process on the amending act, trade union organisations, employers' organisations and the Social Dialogue Council were not prevented from giving their opinions on the draft act. Violation of the above mentioned Regulations is not tantamount to violation of Article 2 and 7 of the Constitution of the Republic of Poland. Also, in its position, the Sejm stated that the irregularities in the course of consultations do not have serious consequences. The Constitutional Court concluded that it does not find any constitutional basis for the consultative competences of trade union organisations and employers' organisations. These competences have their source in provisions in the Act and cannot be derived from Article 59 (2) of the Constitution. Moreover, they are not present *explicitly* anywhere else in the text of the Constitution. Therefore, the Constitutional Court does not see any deviation from the provisions of the Constitution, or even a serious violation of statutory provisions in the course of legislative work on the amending act. The infringement of Article 7 of the Constitution, which allowed the Act to be considered unconstitutional, concerned the procedure for voting in the Senate and the way in which the quorum was established. I am mentioning this judgment in order to demonstrate that the fact that the Act on RDS had already entered into force has in no way indirectly affected the Constitutional Court's perception of the importance of issuing opinion on legal acts.

However, it should be stressed that the matter of the so-called 'multiple of 30' was, beyond a shadow of doubt, an example of a situation where the voice of trade unions and employers' organisations has penetrated the mass media and other sources to the greatest extent possible. In my opinion, it can be assumed with a high degree of probability, bordering on certainty, that if the government had not violated the deadlines (in other words, if it had referred later the draft to the Sejm), the results of the vote would have been the same. They would have been the same if the Social Dialogue Council had formally passed a resolution on the law (which it failed to do). I may be wrong, but in my opinion, the essence of the problem of the social partners' (lack of) influence on legislative changes lies elsewhere.

Some Final Remarks

An interesting prologue to these final remarks is offered by the results of the research on provincial social dialogue committees carried out by Andrzej Zybertowicz's team. The conclusions from their research were as follows:

– The institutions of social dialogue have been appropriated by people who play many other, more or less time-consuming functions and are treated as instruments for multiplying their own social capital and building their position;
– There is a deep-rooted conviction among the actors of the dialogue that the very existence of social dialogue was forced by the European Union, and that the whole project is considered to have a facade nature *par-exellance*;
– There is a significant tendency on the part of the actors of social dialogue to act outside the official articulation channels, including through the use of various forms of pressure (Spławski 2005: 92).

As Andrzej Zybertowicz and his team conclude: If the hypothesis (concerning social dialogue as an 'alien body' – B. S.) is correct, the failure to take into account the factos to which it points must result in the adopted strategy of implementing formal social dialogue institutions proving ineffective in many respects... some informal institutions may have more clout on social processes than consciously designed formal institutions (Spławski, Zybertowicz 2003). According to the researchers, the three scenarios that emerge before social dialogue as an 'alien body' are: (1) either the institutional environment will reject social dialogue institutions (this will lead to them losing their identity), or (2) they will be dismantled/redefined (as a result of contact with the environment they will start to perform functions different from those originally envisaged), or (3) they will be neutralised (they will work according to 'healthy' rules, but will no longer be able to influence the environment) Spławski 2005: 93).

Naturally, it can be argued that the study refers to the already non-functioning Provincial Social Dialogue Committees and the past. However, do the processes that could be observed later on do not confirm these conclusions?

It is worth quoting Anna Dobaczewska's opinion on civic dialogue. I do not go into this topic in this paper, but it is an important and indispensable component of a genuine civil society. The author believes that non-governmental organisations in our country are not treated as partners, as an equal, stakeholder or even 'client', but

as a 'supplicant' in the worst sense of the word (Dobaczewska 2017: 246). It seems to me that the same approach characterises authorities when it comes to their approach to social partners. In my opinion, public authorities will treat social partners as a burdensome 'ballast' in the decision-making process unless they feel the strength of individual organisations or when the social partners are able to speak with one voice (the case of 'multiple of 30'). The essence of the weakness of the Polish tripartite dialogue is the inexistence of bipartite dialogue beyond the company level. The negative consequences of this state of affairs were revealed with full force during the COVID-19 pandemic. In Poland, no plan, scheme or pact was signed between unions and employers representative at national level. They were not even able to produce any 'soft' document. This is a fundamental difference compared with other EU Member States, and not only with the EU-15 but also with those in Central Europe[22].

Faced with this historical inability of trade unions and employers' organisations to take joint action, it is not surprising (according to the author of this paper) that the public authorities ruthlessly violated the autonomy of social partners in the RDS by introducing regulations allowing the Prime Minister to dismiss RDS members.

Of course, the very legislative process leading to these changes (introduction of the amendment after the first reading in the Sejm, the absence of any connection between the amendment and the main subject of the legal act (counteracting COVID-19 or voting at night) violates the correct legislative technique, which can be assessed in the context of the rule of law and correct lawmaking. The question is different, however: what motivated the government to 'remind' the social partners in Poland of their deeply-rooted dependence on public authority through this amendment (formally introduced by the MPs). Blame for this dependence, to a large extent, social partners themselves. It results (in my opinion), among other things, from their lack of will, faith and willingness to take bipartite action.

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[22] For information on actions taken jointly by the social partners, see e.g.: https://tuac.org/news/covid19-crisis-mapping-out-trade-union-and-social-partners-responses/; https://www.etuc.org/en/trade-unions-and-coronavirus.

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Annex

Action plans of the Social Dialogue Council:

The Council's work programme for 2018 included:

1. Promoting vocational education;
2. Polish climate policy - in the context of preparations for the UN COP 24 conference;
3. New regulations in public procurement;
4. Actions by government and social partners for active ageing;
5. Amendments to the Labour Code – conclusions from the work of the Codification Committee;
6. Review of the pension system – developing recommendations;
7. Review of the principles of wage formation in the state budgetary sphere and the minimum wage.

The Council's work programme for 2019 included:

1. The future of work in Poland, professional qualifications in the context of the changing needs of the economy and labour market;
2. Review of the tax system and non-wage labour costs in Poland;
3. Climate, energy and environmental policy – impact on economic development and social security of citizens;
4. Evaluation and prospects for the functioning of social dialogue in Poland – drafting changes, including to the Act on RDS, strengthening the social dialogue mechanism and participation of social partners in the legislative process;
5. Review and evaluation of the pension system in Poland;
6. Review of the implementation of the principles and rights of the European Pillar of Social Rights – developing recommendations;
7. Review, evaluation and proposals for changes in individual and collective labour law;
8. Review and evaluation of the results of the implementation of the education reform in Poland.

The Council's work programme for 2020:

1. Labour market policy in Poland, professional qualifications and competences in the context of changing needs of the economy and labour market;
2. Costs of labour in Poland – recommendation of changes;

3. Climate, energy and environmental policy – European challenges and their impact on the development of the Polish economy;
4. Review and evaluation of the functioning of the Act on RDS – drafting an amendment to the Act;
5. Evaluation of the social security system in Poland and proposal for changes;
6. Health care system – developing recommendations and changes;
7. Remuneration in public finance sector – developing a model for determining remuneration in this sector;
8. Implementation of tasks resulting from the Act on the Social Dialogue Council and other social dialogue institutions;
9. Consideration of proposals developed by the Council's problem taskforces resulting from their work programme.