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Commission I – Kommission I

**THE RIGHT TO ADEQUATE FOOD – SELECTED LEGAL ASPECTS
LE DROIT A UNE ALIMENTATION ADÉQUATE –
ASPECTS JURIDIQUES**

**DAS RECHT AUF ADÄQUATE ERNÄHRUNG –
AUSGEWÄHLTE RECHTLICHE ASPEKTE**

National Report – Rapport national – Landesbericht

Poland – la Pologne – Polen

Polish report – Rapport polonais – Polnischer Bericht

Małgorzata KORZYCKA-IWANOW, PhD – University of Warsaw, Law and Administration Faculty, Head of the Food Law Workshop

Motto:

“Hunger, though it has accompanied humanity since history began, in our times is no fatalism. It is policy ... food is a commodity for speculators to trade on stock markets around the world!” – Jean Ziegler, sociology professor at Geneva University and the Sorbonne, author of the book *“Wie kommt der Hunger in die Welt?”* (*“Hunger in the World Explained to my Son”*) published by Bertelsmann.¹

The right to adequate food – does Poland have grounds for its implementation?

The International Covenant on Economic, Social and Cultural Rights was adopted on 16 December 1966 and came into force on 3 January 1976. This act, which forms an integral part of international legislation devoted to human rights, was signed by Poland on 2 March 1967 and ratified on 18 March 1977. To date, Poland has not participated actively in the work of the UN Committee on Economic, Social and Cultural Rights established on grounds of the Covenant. In the Covenant’s wake has followed “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” (Article 11.1 of the Covenant) as well as “the fundamental right to freedom from hunger and malnutrition”. In line with the 1997 Constitution of the Republic of Poland, Poland adheres to binding international legislation. Ratified international agreements are sources of valid legislation (Articles 9 and 87 of the Constitution). On its territory, that is within the framework of national laws, the Republic of Poland observes legislation by which it is bound on the international level. This regulation is also behind the principle that in general, Polish legislation is favourable towards international norms, along with the assumption that international legal norms are automatically albeit indirectly incorporated into the Polish system². There has not been a direct import into Polish legislation of the “right to adequate food” concept as contained in the Covenant on Economic, Social and Cultural Rights, nor of any equivalent. Nonetheless, one may claim that legislation in place in Poland creates grounds for implementation of “the right to food” both in the respect of food security as well as food safety.

1) The problem of food security in Poland’s legal order

a) The principles of the economic system of the Republic of Poland as contained in the 1997 Constitution, serving as grounds for the implementation of “the right to food”

The matter of access to adequate food is closely related to the overall economic arrangement of the state and its system foundations, as set forth in the Constitution. According to Article 20 of the Constitution, the fundament of the economic system of the

¹ In an interview for Polish daily “Rzeczpospolita”, 20-21 January 2001, no. 17(5790).

² R. Szafarz: Międzynarodowy porządek prawny i jego odbicie w polskim prawie konstytucyjnym, (International legal order as reflected in Polish constitutional law) in: Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym, (International and EU law in the domestic legal system), edited by M.Kruk, Warsaw 1997, p. 19

Republic of Poland is “a social market economy based on freedom of economic activity, private ownership and solidarity, dialogue and cooperation between social partners”. Furthermore, “any limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons” (Article 22 of the Constitution of the Republic of Poland). The constitutional approach to freedom of business enterprise and other constitutional provisions establish at the core of the economic order of the state a system of market economy that excludes central planning but simultaneously anticipates the realization of the fundamental interests of the Republic of Poland³. The market economy system, based on the principle of economic freedom, also guarantees fundamental rights, particularly private ownership (Article 64 of the Constitution). The principle of economic freedom is not understood as absolute, and realized within limits defined by legal provisions that should account for important public interests (Article 22 of the Constitution). These can, however, be adopted only if necessary to a democratic state of law, in order to guarantee security or public order, or for the purpose of environmental protection, preservation of health, public morality or the freedoms and rights of other individuals. (Article 31.3 of the Constitution of the Republic of Poland). Economic freedom cannot be used in any way which might violate inherent and inalienable human dignity (Article 30 of the Constitution) and should serve towards the realization of the principle of social justice (Article 2 of the Constitution).

As concerns consumers’ protection, the Constitution of the Republic of Poland defines such duties of public authority: “Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The extent of such protection shall be specified by statute.” (Article 76). This provision clearly indicates the protection awarded consumers, including the consumers of food products, in respect of health but not only, citing protection against dishonest market practices, i.e. protecting the economic interest of consumers.

The principle of planned social economy stands in contrast to that of socialist planned economy, functioning in Poland for long years after World War II. Planned economy was based on the domination of state ownership, which was in practice under the management of state administration. Market policy is linked to the overall fiscal economy of the state, domestic and international (prices, subsidies for food production, import taxes, quotas, etc). This particularly requires careful balancing of state interests in respect of commercial relations on the international scale, as well as ensuring such economic conditions (growth rooted in economic freedom, the right conditions for a proper development of production and distribution networks) so that citizens (consumers) indeed have access to food. Accessibility of food is understood in a wide sense, incorporating products manufactured in the country (processed from domestic and foreign raw materials) as well as imports (e.g. citrus fruit, rice, spices). As there is no differentiation in the general financial policy between instruments for domestic and foreign products, Polish consumers are given full access to foods from a variety of origins.

The Polish Constitution does not provide for “the right to adequate food” nonetheless there are conditions built into the system for the implementation of this right. The liberties, rights and obligations of persons and citizens contained in Chapter II of the Constitution and especially the economic, social and cultural rights closely relate to human rights as set forth by international law.

³ S. Biernat, A. Wasilewski: Wolność gospodarcza w Europie, (Economic freedom in Europe), Zakamycze 2000, p. 140 et al.

b) Legal grounds for food security as provided by the European Treaty (hereinafter referred to as the Treaty)

The Treaty on the European Communities (further referred to as the Treaty) came into the Polish legal order upon Poland's accession to the European Union along with the full *aquis communautaire*, including the original EU legislation. It contains some grounds for the implementation of the right to food, although these are very general provisions primarily concerning consumer protection.

In accordance with Article 4 of the Treaty, one of the fundamental principles in the economy of member states and the EU is, among others, an open market economy, which in its negative aspect contains a ban on the introduction of any planning mechanisms even though it does not preclude the use of instruments of command for the protection of consumers or the environment, if need be⁴.

In relation to Treaty Article 2, among the duties of the EU is social protection and raising living standards and quality of life, realized via application of certain policies, such as supporting high health standards and increased protection of consumers (Article 3).

Assuring the availability of supplies has been directly written into the objectives of the Common Agricultural Policy (Article 33 of the Treaty). It is noteworthy that the objectives and implementation of the Policy are not only connected to production and trade. On grounds of Treaty Article 37, measures are taken relating to further production stages, e.g. re-processing of agricultural produce, consumption or industrial use.

Importantly, Article 37 of the Treaty is mentioned in the preamble as grounds for Regulation 178/2002 of the European Parliament and the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety; a fundamental EU act on food law which is fully and directly operating in Poland.

As a result of the crisis of consumer confidence in food safety (the outbreak of BSE, discovery of dioxins in animal fodder and foods) as well as fears over the introduction and marketing of genetically modified foods, there is a belief that although many of the agricultural provisions of the Treaty initially aimed to support the principle of free trade, with time the significance of this decreased and the changing situation brought about an important adjustment of Policy objectives with focus on improving the quality of agricultural products. The Common Agricultural Policy, in which Poland participates as a member country, among others is concerned with the security of food supplies understood in the full sense, i.e. guaranteeing the quantity of supplies and the health safety of supplies, as well as accounting for the preferences and economic interests of consumers⁵.

c) Opinions of economic specialists on issues of food supplies security in Poland

Specialists from economic research domains indicate that Poland's integration with the European Union has resulted in, among others:

- 1) the opportunity to accelerate the growth and stabilization of the Polish economy, i.e. achieve profit-inducing results, developing the domestic food market,
- 2) promoting awareness of the food-health relationship;

— and also threats arising from:

⁴ Wprowadzenie do prawa Wspólnot Europejskich, (An introduction to EC legislation), edited by A. Wróbel, Zakamycze 2002, p. 43

⁵ A. Jurcewicz: Związki prawa żywnościowego z prawem rolnym, (Connections between food law and agricultural law), *Studia Iuridica Agraria*, vol. III, Białystok 2002, p. 89 et al.

- 1) possible increase of food prices;
- 2) the institutional and legislative weakness of the food and agricultural sector, incomplete adaptation to EU standards that could result in restrictions of access to EU support funds as well as markets;
- 3) the technological and organizational gap which impacts on the competitiveness of Polish producers⁶.

Research by the Department of Consumption Economics at the Academy of Economy in Poznań has shown⁷ that in 2000 expenditures on food reached an average 36% of household expenses, ranging from 30% in more affluent households up to 45% in poorer ones. Comparably, in EU countries households spend far less than 30% on food⁸.

2) Food safety

a) Food safety as the minimum standard of the food product

Community standards on food safety, introduced in Regulation 178/2002 deal with the free flow of wholesome food. Although EU legislation and Polish legislation provide for high standards of health protection, food, like any other commodity, is mainly subject to regulations of a commercial nature. This means a constant 'balancing' of interests of an economic character and those which preserve the wellbeing of consumers. There is also the concern on the international arena that 'protection' awarded to foods does not become 'protectionism', an issue often raised on the forum of the World Trade Organisation.

Poland's food safety standard follows that of Regulation 178/2002 which has a unifying character for the EU and is the minimum standard required for all food products placed on the market.

As regards food safety, the EU has competence in respect of definitions and guiding principles, which form a framework for more specific legislation in the area, e.g. concerning food hygiene, official control of animal feed and foodstuffs, marking, contamination, food additives, dietary supplements and special purpose foods.

Relevant to Article 14 of Regulation 178/2002, the fundamental principle is that unsafe food (injurious to health or unfit for human consumption) cannot be marketed. In determining whether food is unsafe regard shall be had:

- a) the normal conditions of use of the food by the consumer and at each stage of production, processing and distribution, and
- b) to the information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods.

In determining whether any food is injurious to health, regard shall be had:

- a) not only the probable immediate and/or short-term and/or long-term effects of that food on the health of the person consuming it, but also on subsequent generations,
- b) to the probable cumulative toxic effects;

⁶ R. Urban (ed.): *Polski przemysł spożywczy. Analiza ekonomiczna*. (Poland's food industry. An economic analysis), Warsaw, 2002.

⁷ J. Rachocka: *Ocena kondycji finansowej gospodarstw domowych i sytuacji rynkowej w Polsce w świetle badań naukowych* (An assessment of the financial condition of households and the market situation in Poland in the light of research results) in : *Konsument żywności i zachowania rynkowe*, (Food consumers and market behaviour), Warsaw 2000. p. 427 et al.

⁸ Eurobarometer, report 52, April 2000.

- c) to the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers.

In determining whether food is unfit for human consumption, regard shall be had to whether the food is unacceptable for human consumption according to its intended use, for reasons of contamination, whether by extraneous matter or otherwise, or through putrefaction, deterioration or decay.

Nonetheless, even if a food complies to regulations this does not immediately mean that it is safe. Restrictions should then be applied and possibly the food should be withdrawn from the market (see Article 14.8 of Regulation 178/2002).

Legislation cannot guarantee the result of its norms; there is a close relationship between law and risk perception, thus it is not possible to exclude errors in the area of so-called development risk in science.

In Poland, the fundamental legal act on food safety is the Law of 11 May 2001 on the health safety conditions of food and nutrition⁹ which is adapted on an ongoing basis to EU law. With transformation, it is becoming a legal act which in many instances delegates reference (especially in respect of definitions and principles) to Regulation 178/2002. It should also be highlighted that the extensive Polish legislation on food safety, contained in dozens of executory acts to the Law on health safety conditions of food and nutrition, does take into consideration the necessity to regulate foods for specific groups in the society, i.e. babies and small children or invalids. In particular, those regulations which concern special purpose foods¹⁰ are distinctively geared to the needs of the special consumer groups.

b) Food education

The state, as it performs its social watchdog and health protection function, should also obligate authorities to educate the public on issues of food and nutrition. Such duties cannot be fulfilled by private organisations, mainly because education in this respect should be based on research results prepared by institutions of some rank, financed from the state budget for the needs of the public.

c) The development of intellectual property in the context of food safety

It is noteworthy that Polish regulations currently in place regarding the legal protection of plant varieties (the existing Law was adopted in 2003¹¹), are in harmony with international law (UPOV Convention), European standards (Regulation 2100/94) and the 1994 WTO TRIPS Agreement. In operation since 1987 is the model where protection focuses on the breeder of a variety, in practice a company, usually with concentrated capital and oriented at increasing profits. Although regulations on sole breeder's rights are primarily intended to support biological development in agriculture, the protection awarded by law more and more often includes the commercial aspect. Without elaborating further on this complex subject it should be highlighted that this legislation mostly supports the financially-strong private sector, gradually eradicating the rights of users, that is a large group of farmers, increasingly dependent on the suppliers of growing material. There is a concern that

⁹ Journal of Laws of the Republic of Poland No 63, item 634 with amendments.

¹⁰ Any foodstuff which differs from foods commonly consumed by its special contents or method of preparation and accordingly to information featured on its label is marketed to fill special dietary requirements:

- a) of persons who have impaired digestive processes or metabolism, or persons whose special physiological condition can specifically benefit from the controlled intake of certain substances contained in food; these foodstuffs can be called "dietetic" or
- b) healthy babies and small children (Art.2 item 16 of the Law on health conditions of food and nutrition)

¹¹ Law of 26 June 2003 on legal protection of plant varieties, Journal of Laws no 137, item 1300.

development of science, especially in the field of biotechnology, may transfer out from the intellectual centres in the public sector (universities, institutes) to centres which have strong economic standing (financially powerful business which has its own research bodies or which commissions research from academic institutions)¹². A relevant model of legal protection undoubtedly impacts on the implementation of the right to food, as the dependencies and interconnections described above do not, as a rule, serve the objective of filling the health-related and economic needs of consumers of foods obtained from new plant varieties, but rather look to the advantages of marketing novelties.

3) Some issues of responsibility for harm caused by a food product

This is part of a much wider set of problems concerning responsibility for products. Responsibility for a product is a term used to describe a form of liability in civil law for damages caused by the defects of a product which render it dangerous to the environment¹³.

Responsibility for a product relates to the damages caused by defective products. The concept of defectiveness should be understood in a wide sense, as a failure to guarantee product safety in a degree to which the consumer is authorised to expect it.

Food products take a very particular position within the problematics of product responsibility, even for the reason of new technologies introduced that are questioned regarding their doubtful effect on human health. The proper construction of product liability may significantly support consumers in claiming rightful compensation or satisfaction for harm.

Responsibility for a product is regulated by Directive 85/374 on approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. The directive aims to unify legal solutions dealing with the liability of producers, to the advantage of free competition and free flow of goods within the European Union. Liability structured on the principle of risk intends to guarantee a high level of consumer protection, giving consumers assumingly rapid and effective measures to hand.

From the perspective of food law issues it is specially important that this particular responsibility falls under Regulation 178/2002 in the sense that the European legislator refers liability outright to Directive 85/374. On the other hand liability, as described in Regulation 178/2002 (Articles 17,18 and 19 in particular) does not incorporate civil-legal answerability, although it provides for duties and sanctions under public law. Even so, the regulation keeps "within sight" the entire important sphere of consumer protection following the occurrence of damage, by the same supporting a more effective and possibly faster response via the liability mode and principle of risk perception. Admittedly, protection would be even better defined and more effective if directive 85/374 spoke of absolute responsibility for food products, but even so, the direction has been set.

Some countries have decided to impose such liability, however this connects to the difficult matter of regulating the insurance of producers against absolute risk, so as not to threaten producers with serious economic consequences or even total bankruptcy.

Introduction to the Polish civil code of a new type of answerability (Article 449.1) was carried out on grounds of the Law of 2 March 2000 on the protection of certain consumers' rights and responsibility for damages caused by a dangerous product. The solution adopted

¹² M. Korzycka-Iwanow in *Hodowla roślin i nasiennictwo: Prawo rolne (Breeding plants and seed culture in Agricultural Law)* edited by A.Stelmachowski, Warsaw 2005, p. 330, also therein literature on the subject

¹³ See monograph by B. Gnela: *Odpowiedzialność za szkodę wyrządzoną przez produkt niebezpieczny, (Responsibility for damages caused by a dangerous product)* Zakamycze 2000, p. 13, therein extensive literature on the subject

is an implementation into the Polish legal order of solutions contained in directive 85/374 concerning liability for a defective product. The Polish version, since it was introduced after the directive was amended in 1999 and the definition of product was expanded to cover agricultural products, is one of a few where the concept of product has the same scope as featured in the directive. It is, however, difficult to assess the effects of this regime for the protection of persons who have suffered harm because of dangerous products; as yet there are no data on these regulations operating in practice. The new regime is somewhat simpler as regards compensation claims, although there are restrictions on the scope of full compensation for injury¹⁴.

Conclusion

Although Poland has ratified the Covenant on Economic, Social and Cultural Rights, it has not directly introduced the concept of “the right to food” into the Polish legal order. The implementation of this right can be done via regulations establishing social and economic grounds for the operation of the food sector in such way as to guarantee the availability of food supplies and food safety, also taking into account the protection of consumers not only from the perspective of health but also economy.

¹⁴ See E.Kremer: Odpowiedzialność za zobowiązania związane z prowadzeniem gospodarstwa rolnego, (Responsibility for liabilities connected with farming) Zakamycze 2004, p. 150.