Central European Constitutional Courts in the face of EU membership : the influence of the German model of integration in Hungary and Poland

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CHAPTER FIVE
THE POLISH CONSTITUTIONAL TRIBUNAL AND EUROPEAN LAW: A CASE OF "SOVEREIGNTY REGAINED"?

BACKGROUND

Together with Hungary, Poland was at the forefront in the political and systemic changes experienced in Central Europe in the late 1980s and early 1990s. While democracy initially returned to Hungary through contested elections that in Poland occurred as a result of political compromise.[1] When the trade union/political movement, *Solidarity*, headed by Lech Wałęsa, sat down at Round Table negotiations with communist government officials in the spring of 1989, the idea of free elections was inconceivable. By the close of the following year, Wałęsa had been elevated to the post of President in new direct elections. Free parliamentary elections in June 1989 (in which Solidarity supporters gained a majority in the Senate) and in October 1991 ousted the Communist Party from its previous dominant position in government.[2]

Like Hungary, Poland signed an Agreement on Trade and Commercial and Economic Co-operation with the EEC in September 1989[3] and this was subsequently followed (and superseded) by a Europe Agreement, signed on 16 December 1991[4] between the EEC and its Member States on the one hand and Poland on the other. This Europe Agreement was finally ratified by the President on 20 October 1992[5] but, in view of all the necessary EU Member

[1] J. Gross, "Poland: From Civil Society to Political Nation" in I. Banac, *Eastern Europe in Revolution*, Cornell University Press, Ithaca and London (1992), at 60.

[2] R.R. Ludwikowski, "Constitution Making in the Countries of Former Soviet Dominance: Current Development" (1993) 23 Ga. Jo. Intl. & Comp. Law 155, at 211-213.

[3] Agreement between the EEC and the People's Republic of Poland on trade and commercial and economic cooperation: OJ 1989 L339/1.

[4] Before the EA came into force, the trade and trade-related matters in certain chapters of the EA were put into force by an Interim Agreement on 1 March 1992: OJ 1992 L114/2.

[5] According to the 1952 Constitution (as amended), Art. 32 provided that ratification of international treaties – having financial consequences or implying amendments to statutes – required the authorisation of both Houses of Parliament. The necessary statute authorising ratification was adopted by the *Sejm* on 4 July 1992 and subsequently accepted by the Senate. On 31 July 1992, the President signed the authorising statute: Act of 4 July 1992, Dz. U. No. 60/1992, item 302.

State ratifications,[6] it did not enter into domestic force until 1994.[7] EU accession negotiations with Poland were opened at the same time as those with Hungary: both States eventually entered the Union on 1 May 2004.[8]

As with the two previous Chapters, this one also begins with a description of constitutional review, concentrating on the main proceedings by which European law issues could be raised before the Polish Constitutional Tribunal ("CT") (A.). The work then discusses the essential core of sovereignty, i.e., that part of a State's existence without which it would cease to be: while the Polish Constitution[9] has an express provision providing for its being the supreme law of the land, the CT has sought to set out the content of an essential core through constitutional interpretation, inspired by reference to the German model (B.). The Chapter carries on though examination of the issue of transfers of sovereignty in the face of EU accession, providing a constitutional matrix within which the CT functions.

The emphasis of this research, as before, is the case-law of the CT. In this respect, the CT has been more judicially active than its Hungarian counterpart in negotiating the extent of the impact of European law domestically. Again, this Chapter will concentrate on the CT's acceptance of certain principles and matters regarding European law: supremacy or priority of application; direct effect; as well as references to the European Court of Justice (D.). However, it also looks at the limits the CT has put on its acceptance of European law, basically its defence of the essential core of sovereignty; its review of national legislation transposing European law into the domestic system; as well as refusals, if any, to refer questions to the ECJ (E.). The Conclusion seeks to discern the extent both to which the CT has attempted to maintain its judicial dialogue with the ECJ and to which it might have been influenced in its approach through following their German cousin.

[6] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part: OJ 1993 L348/2.

[7] Dz. U. No. 11/1994, item 38.

[8] Treaty of Accession to the European Union: 2003 OJ L236/01.

[9] The present author has used the expression "Constitution" rather than "Basic Law" which is a direct translation of the German "*Grundgesetz.*"

A. CONSTITUTIONAL REVIEW

1. Introduction

The CT,[10] like the 1952 Constitution,[11] was a creation of the Communist regime[12] inserted into that Constitution by Art. 33a,[13] thereby providing the legal basis for the setting up of a constitutional tribunal and, ultimately, to the passing of the 1985 Constitutional Tribunal Act[14] (with its work commencing from the start of 1986[15]).

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[10] M. Brzezinski & L. Garlicki, "Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?" (1995) 31 Stanford Jo. Intl. Law 13, at 21-22; A. Gwiżdż, "Trybunał Konstytucyjny [The Constitutional Tribunal]" 1983/12 *Państwo i Prawo* 3.

[11] The current constitution of Poland dates from 1997 and replaced the amended 1952 Constitution, modelled on the Soviet Union Constitution of 1936: M. Exner, "Recent Constitutional Developments in Poland" (1991) 42 ÖZöRV 341, at 342. The 1952 Constitution had been variously amended after the change of regime, most particularly by Constitutional Act of 17 October 1992 on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Government, known as the "Little" or "Small Constitution": *Dziennik Ustaw Rzeczpospolitej Polskiej* [Journal of Laws of the Republic of Poland], 23 November 1992, No. 84, Item 426. It focused on checks and balances between the Parliament, the President and the Government as well as the structure and competencies of autonomous local government, while leaving aside other issues for regulation to the new constitution: R.R. Ludwikowski, "Constitution Making in the Countries of Former Soviet Dominance: Current Development" (1993) 23 Ga. Jo. Intl. & Comp. Law 155, at 291-221

[12] M. Brzeziński, "The Emergence of Judicial Review in Eastern Europe: The Case of Poland" (1993) 41 AJCL 153, at 158.

[13] "1. The Constitutional Tribunal shall adjudicate upon the conformity to the Constitution of laws and other normative acts enacted by main and central State organs, and shall formulate universally binding interpretation of the laws.
2. Judgements of the Constitutional Tribunal on the non-conformity of laws to the Constitution are subject to examination by the *Sejm*.
3. Judgements of the Constitutional Tribunal on the non-conformity of other normative acts to the Constitution or laws are binding. The Constitutional Tribunal shall apply measures to remove any non-conformity."

[14] Ustawa z dnia 29 kwietnia 1985 o Trybunale Konstytucyjnym [Constitutional Tribunal Act of 29 April 1985], *Dziennik Ustaw*, Issue 22, Item 98, at 245 (1985). The procedure and operation of the CT was governed by a separate Act: Uchwała Sejmu Rzeczypospolitej Ludowej z dnia 31 lipca 1985 w sprawie szczegółowego trybu postępowania przed Trybunałem Konstytucyjnym [Parliament Resolution of 31 July 1985 on the Special Mode of Proceedings Before the Constitutional Tribunal], *Dziennik Ustaw*, Issue 39, Item 184, at 493 (1985).

[15] For further discussion of the CT generally see, *e.g.*, W. Sokolewicz, "Kontrola konstytucyjności prawa w państwie socjalistycznym. Zagadnienie form organizacyjnych" ["Review of Constitutionality of Law in a Socialist State. The problem of Organizational Forms."] in K. Działocha *et al.* (eds.), *Konstytucja w społeczeństwie obywatelskim. Księga pamiątkowa ku czci prof. Witolda Zakrzewskiego [The Constitution in a Civil Society. Commemorative Homage to Prof. Witold Zakrzewski]*, Krajowa Agencja Wydawnicza, Kraków, (1989), at 187ff; W. Sokolewicz, "The Commissioner for Civic Rights Protection and Protection of Human Rights by the Constitutional Tribunal in Poland: Legal Regulations and Practice," in AAVV, *Democracy and the Rule of Law: Proceedings of the Norwegian-Polish Seminar in Warsaw*, 4 June 1980 [*Demokrati & rettsstat: Innlegg pd norsk-polsk seminar i Warszawa, 4 juni 1990*], Det KgI. Utenriksdepartement, Oslo (1991), at 70ff; See also AA.VV., *Constitutional Court in Poland in a Period of State System Transformation*, Trybunał Konstytucyjny, Warszawa (1993).

Despite its achievements in the transition period,[16] limitations to its jurisdiction dating from its original establishment were finally addressed by the 1997 Constitution and the enactment of the 1997 Act on the Constitutional Tribunal.[17]

2. Types of constitutional review

According to the 1997 Constitution, Art. 188 and the 1997 Act, s. 2, the CT may review, *inter alia*, the conformity of statutes to the Constitution[18] as well as the conformity of a statute to ratified international treaties, the ratification of which requires prior approval granted by statute.[19]

Under Constitution Art. 191(1), the right of initiative is treated very broadly; the following political and judicial actors have standing to seek constitutional review of statutes:

> the President of the Republic, the Marshal of the *Sejm*, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Chief Public Prosecutor, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights [Ombudsman].

In addition, at the request of the President of the Republic, the CT has the competence to rule on the conformity to the Constitution of a bill prior to his signing it. The President may not, however, refuse to sign a bill which has been judged by the CT as conforming to the Constitution.[20]

According to the 1997 Act, s. 42 the CT shall, while adjudicating on the conformity of the statute to the Constitution, examine both the contents of the said statute as well as the power and observance of the procedure required by the relevant legal provisions to promulgate the statute.

In addition to such abstract review, the ordinary courts have the standing to launch an incidental (concrete) review before the CT. According to Constitution Art. 193, any court

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[16] S. Oliwniak, *Wpływ orzecznictwa Trybunału Konstytucyjnego na system prawa w latach 1985-1997* [*The influence of rulings of the Constitutional Tribunal on the system of law in the years 1985-1997*], Temida 2, Białystok (2001); and L. Garlicki, "Das Verfassungsgericht und das Parlament. Die Zurückweisung von Entscheidungen des polnischen Verfassungsgerichtshofs durch den Sejm," in M. Hofmann & H. Küpper (eds.), *Kontinuität und Neubeginn. Staat und Recht in Europa zu Beginn des 21. Jahrhunderts (FS Brunner)*, Nomos Verlag, Baden-Baden (2001), at 357-364

[17] Ustawa z dnia 1 sierpnia 1997 r. o Trybunale Konstytucyjnym [Act of 1 August 1997 on the Constitutional Tribunal]: Dz. U. 1997, nr.102, poz. 643. See generally J. Oniszczuk, *Konstytucja Rzeczpospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego* [*The Constitution of the Republic of Poland in the rulings of the Constitutional Tribunal*], Zakamycze, Kraków (2000); G. Brunner & L. Garlicki, *Verfassungsgerichtsbarkeit in Polen*, Nomos Verlag, Baden-Baden (1999).

[18] 1997 Constitution, Art. 188(1) and 1997 CT Act, s. 2(1).

[19] 1997 Constitution, Art. 188(2) and 1997 CT Act, s. 2(2).

[20] 1997 Constitution, Art. 122(3) and 1997 CT Act, s. 2(2).

which has doubts about the conformity to the Constitution[21] of the provision of a statute (or other normative act) which will form the basis of the judgement in the case pending before that court, it has the competence to refer the matter to the CT.[22]

According to 1997 Constitution, Art. 188 and the 1997 Act, s. 2, the CT may also review the conformity of international treaties to the Constitution[23] and in so doing it is to examine both the contents of the treaty as well as the power and observance of the procedure required by the relevant legal provisions to conclude and ratify the treaty.[24] Such review may be conducted at the request of the same political and judicial actors empowered to request constitutional review of statutes under Constitution, Art. 191(1). Further, the President of the Republic has the power to request the CT to rule on the conformity to the Constitution of an international treaty prior to ratification.[25]

Lastly, under Art. 193[26] any court may refer a question of law to the CT as to the conformity of a normative act to the Constitution, a ratified international treaty or statute, if the answer to such question of law will determine the issue pending before such court.

3. Constitutional complaints (Fundamental rights protection)

A further enhancement of the CT's role under the 1997 Constitution is the possibility of adjudicating complaints concerning constitutional infringements,[27] as specified in Art. 79(1):[28]

> In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a

[21] As well as a ratified international treaty or a statute.

[22] The CT is ever mindful of its role in the Polish system in this respect and has guarded its exclusive jurisdiction with respect to the review of statutes: A. Mączyński, "Bezpośrednie stosowanie konstytucji przez sądy [Direct Application of the Constitution by the Courts]" (2000) 56 PiP, no. 5, 3. In *Dec. P 4/99* (31 January 2001: OTK ZU 2001/1, Item 5) and *Dec. SK 18/00* (4 December 2001: OTK ZU 2001/8, Item 256), the CT ruled that ordinary courts may not independently refuse to apply statutes claiming their unconstitutionality. Such view is generally shared by the Supreme Court and the Supreme Administrative Court but the actual case-law on this is not consistent: L. Garlicki, "The Experience of the Polish Constitutional Court," in W. Sadurski (ed.), *Constitutional Justice, East and West*, Kluwer Law International, The Hague/London/New York (2002), chap. 11, 265, at 275.

[23] 1997 Constitution, Art. 188(1) and 1997 CT Act, s.2(1).

[24] 1997 CT Act, s. 42.

[25] 1997 Constitution, Art. 133(2) and 1997 CT Act, s. 2(2).

[26] 1997 CT Act, s. 3.

[27] 1997 Constitution, Art. 188(5) and 1997 CT Act, s. 2(4).

[28] Paragraph 2 of this Article excludes its application to the rights in Art. 56, *viz.* rights of asylum and refugee status for foreigners.

> statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

1997 Constitution, Art. 191(6) permits anyone whose rights are infringed according to Art. 79(1) to bring a constitutional complaint before the CT. Yet, under Art. 81, no constitutional complaint is permitted in cases where economic rights[29] have been violated, even if these rights are listed in the Constitution.[30] The narrow framing of the terms of the constitutional complaint[31] thus excludes alleged violations of constitutional provisions not concerned with rights and freedoms as well as of provisions of international treaties.[32]

Further, constitutional complaints are not to deal with court judgments or administrative decisions, but only with the statutes on which a particular decision had been made. Thus, unlike in Hungary, a complaint could not be directed against a statute *in abstracto* as unconstitutional: this includes not only situations where harm was sustained because of an erroneous law but also where citizens consider a particular provision as potentially dangerous to themselves regardless of whether the citizens are affected by its existence. Consequently, there must be an actual breach of the relevant constitutional right or freedom.

Citizens can lodge a constitutional complaint only in connection with a final decision in a case; they therefore have first to exhaust all available avenues of appeal. Moreover, citizens cannot themselves raise a constitutional complaint against court inaction, even though they are entitled to judgments without unjustifiable delay.[33]

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[29] These are found in 1997 Constitution Arts. 65(4) (minimum wage); 65(5) (full employment); 66 (health and safety at work, paid holidays, working time); 69 (social support for disabled persons); 71 (social assistance for families, single parents and mothers); 74 (environmental protection), 75 (housing); and 76 (consumer protection). The inclusion of such rights has been regarded as problematic, W. Sadurski, "Rights and Freedoms under the New Polish Constitution: Reflections of a Liberal" (1997) St. Louis-Warsaw Transatlantic LJ 91, at 97-98.

[30] 1997 Constitution, Chapter II, Economic, Social and Cultural Rights and Freedoms, Arts. 64-76.

[31] Compared to that under the German Constitution: see G. Brunner & L. Garlicki (eds.), *Verfassungsgerichtbarkeit in Polen*, Nomos Verlag, Baden-Baden (1999), at 49-50.

[32] Controversy has surrounded the question as to whether or not a constitutional complaint may be based exclusively on infringement of principles such as those of equality or of the rule of law. In *Dec. SK 10/01* (24 October 2001: OTK ZU 2001/7, Item 225), the CT declared that a complaint based solely on the breach of the principle of equality was inadmissible.

[33] 1997 Constitution, Art. 45.

B. ESSENTIAL CORE OF SOVEREIGNTY

1. Introduction

According to 1997 Constitution, Art. 8(1), the Constitution is "the supreme law of the Republic of Poland" and occupies the highest place in the system of the sources of law[34] and accords all its provisions the same legal status. It thus contains no norms of the most fundamental nature which cannot be changed by means of amending the Constitution. In other words, there are no provisions similar to the 1949 German Constitution, Art. 79(3) that prohibit changes to certain clauses. The same is true for amendments to the provisions that deal with fundamental human rights – no such rights are unalterable.

Yet certain constitutional provisions remain subject to a different, more complex amendment procedure which includes the possibility of a referendum. These provisions are to be found in Chapter I (general principles), Chapter II (the rights and freedoms of individuals) and Chapter XII (constitutional amendment). It still follows though that the 1997 Constitution maintains a flexibility of amendment not afforded by the German Constitution but which, as will be seen later, has allowed the CT to develop its own understanding of an essential core of sovereignty, protected from infringement by European law.

As with the situation in Hungary, the prospects of (future) EU accession acted as a catalyst in discussion of the notion of sovereignty in Poland.[35] Constitution, Art. 90(1) does not refer to the limitation of sovereignty or to the transfer of sovereignty but rather to the politically neutral formulation of the transfer or delegation of competences. In Poland, the issue of sovereignty plays an exceptionally large role[36] – in consideration of historical experiences – the Preamble to the 1997 Constitution reads in part: "Having regard for the existence and future of our Homeland, which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate…."

Indeed sovereignty as a principle is strongly prominent in the Constitution[37] and the effect on it with EU accession was indicated by Wójtowicz[38] in the sense that –

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[34] Unlike the period 1992-1997 when the 1952 Constitution (as amended) and the 1992 Small Constitution were in force: see K. Działocha, "The Hierarchy of Constitutional Norms and Its Function in the Protection of Basic Rights" (1992) 13/3 HRLJ 100 However, the 1997 Constitution does make reference to a higher law, *e.g.*, in the Preamble and Art. 30, in this case the inviolability of the inherent and inalienable dignity of the person which constitutes a source of freedoms and rights of persons and citizens.

[35] See generally, W. Czapliński, I. Lipowicz, T. Skoczny & M. Wyrzykowski, *Suwerenność i integracja europejska*, Centrum Europejskie UW, Warszawa (1999). For information regarding the classic concept of sovereignty and the intensive debate over the extent of the loss of Polish sovereignty once Poland has acceded to the EU then see A. Wasilkowski "Uczestnictwo w strukturach europejskich a suwerenność państwowa [State Sovereignty and Participation in European Institutions]" 1996/4-5 *Państwo i Prawo* 15-23.

[36] J. Menkes, "Konstytucja, suwerenność, integracja – spóźniona (?) polemika," ['Constitution, sovereignty , integration – delayed (?) polemic.'] in C. Mik (ed.), *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej* [*The Constitution of the Republic of Poland 1997 and membership of Poland in the EU*] , TNOiK, Toruń (1999), at 89ff.

[37] L. Garlicki, *Polskie prawo konstytucyjne* [*Polish Constitutional Law*], 5th ed., Liber, Warszawa (2001), at item 46; P. Sarnecki, *Prawo konstytucyjne Rzeczpospolitej Polskiej* [*Constitutional Law of the Republic of Poland*], 3rd ed., C.H. Beck, Warszawa, (1999), at 122–130.

> in the areas, which are laid down in the basic treaties, Poland will lose the competence for independent, sovereign action and corresponding legislative, executive and judicial decisions will be made through the [Union] organs. Independent of this, whether one speaks of the transfer of competences or of the transfer of rights with regard to such realisation, it is a question essentially of the limitation of the sovereignty of the state.

In academic literature, however, other viewpoints could be found, calling for a new definition of sovereignty[39] and also considering the transfer of competences as no longer being able to be judged as a limiting factor of state sovereignty but rather as an inseparable part of sovereignty.[40] Consequently, it was argued, that states now no longer describe themselves as merely a group of equal legal subjects but as an organised community, a society with its own constitution and legal system.[41]

2. State under the rule of law

The original post-transition rule-of-law clause was inserted into the 1952 Constitution by one of the December 1989 amendments.[42] The new Art. 1 of the 1952 Constitution read: "The Republic of Poland shall be a democratic state, ruled by law and implementing principles of social justice." This provision – with the same wording – is now contained in Art. 2 of the 1997 Constitution.[43]

In its early case-law,[44] the CT very quickly decided that the principles set out in 1952 Constitution, Art. 1 had binding authority and thus provisions of statutes that violated such

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[38] K. Wójtowicz, "Verfassungsmäßige Grundlagen des Beitritts Polens zur Europäischen Union," in M. Maciejewski (ed.), *Społeczeństwo w przełomie. Polska, Niemcy i Unia Europejska. Die Gesellscaft in der Wende. Polen, Deutschland und die Europäische Union*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław (1999), at 118; M. Wyrzykowski, "Europäische Klausel – Bedrohung der Souveränität? (Souveränität und das Ratifikationsverfahren für die EU-Mitgliedschaft Polens), *Forum Constitutionis Europae Series* No. 6/98, Walter-Hallstein-Instituts für Verfassungsrecht, Humboldt-Universität, Berlin (1998).

[39] A. Wasilkowski, "Uczestnictwo w strukturach europejskich a suwerenność państwowa [Participation in the European structures and state's sovereignty]" 1996/4-5 PiP 15, at 17.

[40] A. Wentkowska, "Wpływ zasad wspólnotowego porządku na suwerenność państwa polskiego [Influence of community principles on sovereignty of the Polish state]," in C. Mik (ed.), *Konstytucja Rzeczypospolitej Polskiej z 1997 roku członkostwo Polski w Unii Europejskiej*, TNOiK, Toruń (1999), at 115.

[41] Wasilkowski (1996), at 18.

[42] Its importance was underlined by M. Pietrzak, "Demokratyczne państwo prawne" [Democratic State of Law], *Gazeta Prawnicza*, 16 May 1989, at 9.

[43] See generally, Sarnecki (1999), at 30-32; L. Garlicki & K. Gołyński, *Polskie prawo konstytucyjne. Wykłady* [*Polish Constitutional Law. Lectures*], Liber, Warszawa (1996), at 47-54; W. Skrzydło, *Polskie prawo konstytucyjne* [*Polish Constitutional Law*], Verba, Lublin (2003), at 109–111.

[44] J. Nowacki, "Klauzula 'państwo prawne' a orzecznictwo TK [The Clause of a 'Democratic State under the Rule of Law' and Judgements of the Constitutional Tribunal]," in E. Zwierzchowski (ed.), *Prawo i kontrola jego zgodności z konstytucją* [*The Law and Control of its Conformity with the Constitution*], Wydawnictwo

principles could be annulled by the CT.[45] Subsequently, in *Dec. K 7/90*,[46] the CT was seised of a petition challenging the provisions of a statute on the grounds that they violated the principle of non-retroactivity and the principle of vested rights. In its judgement, the CT clearly recognised that both principles enjoyed the constitutional rank under the *Rechtsstaat* clause.[47]

The CT continued to develop this line of case-law, transforming the general rule of law principle into more specific standards, formulating new ones and imposing them on the legislature. In *Dec. U 6/92*,[48] the CT ruled that: "a norm restricting civil rights in a sub-statutory legal act, such as by a resolution of the *Sejm*, constitutes a violation against Constitution Art. 1." According to the CT, the criterion of sufficient specification denoted the precise definition of the permissible scope of interference as well as the manner in which the entity, whose rights and liberties were being limited and restricted, might protect itself against unjustifiable violation of its "personal" interests. In a democratic state under the rule of law, every form of infringement by a state body on a personal interest had to be linked to potential review of the expedience of the actions taken by the state body.

Garlicki was able to observe[49] that, by early 1995, the CT had developed at least five important aspects of the rule of law clause:[50] (a) the supremacy of statutes over government decrees; (b) the prohibition of retroactive laws; (c) the protection of vested rights; (d) the individual's right to judicial protection; and (e) the requirement of precision in drafting legislation.[51] In *Dec. S 6/91*,[52] the CT had also made reference to the fact that, "under a democratic state ruled by law, criminal law must be founded on at least two principles:

Sejmowe, Warszawa (1997), at 161-174; E. Morawska, *Klauzula państwa prawnego w Konstytucji Rzeczpospolitej Polskiej na tle orzecznictwa Trybunału Konstytucyjnego* [*The clause of the rule of law in the Constitution of the Republic of Poland and rulings of the Constitutional Tribunal*], Dom Organizatora, Toruń (2003).

[45] *Dec. K 1/90*, 8 May 1990: OTK ZU 1990, Item 2.

[46] *Dec. K 7/90*, 22 August 1990: OTK ZU 1990, Item 5; OTK 1990, 42.

[47] L. Garlicki, "Necessity and Functions of the Constitution," in R. Bieber & P. Widmer (eds.), *The European constitutional area*, Vol. 28 *Publications of the Swiss Institute of Comparative Law*, Schulthess Polygraphischer Verlag, Zürich (1995), 25, at 31.

[48] *Dec. U 6/92*, 19 June 1992: OTK ZU 1992, Item 13; OTK 1992/I, 196.

[49] Garlicki (1995), at 31.

[50] See, e.g., *Dec. K 9/92*, 2 March 1993: OTK ZU 1993, Item 6; OTK 1993, I, 60; *Dec. K 14/92*, 19 October 1993: OTK ZU 1993, Item 35; *Dec. K 12/94*, 12 June 1995: OTK ZU 1995, Item 2. In *Dec. U 11/97*, 27 November 1997: OTK ZU 1997/5-6, Item 67, the CT expressly summarised and restated its previous rulings on the components of the principle of the rule of law in 1952 Constitution Art. 1 in the context of acquired rights and legal certainty.

[51] In *Dec. Kp 3/08*, 18 February 2009: OTK ZU 2009/2/A, Item 9, at paras. III.6.1-III.6.2, the CT noted that the "specificity of law" covered three criteria: (i) precision of a legal regulation; (ii) clarity of a provision; and (iii) its legislative correctness.

[52] *Dec. S 6/91*, 25 September 1991: OTK ZU 1991, Item 34; OTK 1991, 290.

forbidden actions have to be defined by law (*nulla crimen, nulla poena sine lege*) and the retroactive effect of law introducing criminal punishment or making it more severe is banned."[53]

Moreover, the CT has observed the intimate connection between the principle of legality[54] and the rule of law.[55] In *Dec. U 11/97*,[56] it noted: "Refusal to comply with the decisions of ordinary courts by the state organs and a failure to respect judgments issued in specific cases shall be a drastic violation of the fundamental principles of legality applicable in the rule of law."

Also linked to the concept of a State under the rule of law is the principle of the separation of powers, the express wording[57] of which now appears in 1997 Constitution, Art. 10 and includes the notion of balancing:

> (1) The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.

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[53] Safjan, in talking about the role of the CT in the transition, has observed: "The Constitutional Tribunal justly recognized that the idea of a state ruled by law denotes the subjection to the law of all state authorities, including the legislative authority, and it showed that certain minimum standards of good law are *implicitly* inherent in the principle of a state ruled by law. [Emphasis in original.]": M. Safjan, "The Role of the Polish Constitutional Tribunal in the Transformation from Totalitarianism to the Democratic Rule of Law," Polish Embassy, London, 24 February 2000, at 2: <http://www.poland-embassy.org.uk/events/saf.htm>. 21 May 2000.

[54] According to the CT (*Dec. K 14/92*, 19 October 1993: OTK ZU 1993, Item 35), the principle of legality followed from the amended 1952 Constitution, Art. 3 which stated:
"(1) Observance of the laws of the Republic of Poland shall be the fundamental duty of every state organ.
(2) All the organs of state authority and administration shall work on the basis of compliance with the law."

[55] *Dec. K 12/93*, 16 May 1995: OTK ZU 1995, Item 14. Yet the CT had, even prior to the 1989 constitutional amendments, accepted the principle of legality and tied it in with the abovementioned principles of the non-retroactive effect of laws and maintenance of citizen confidence in the State: *Dec. K 1/88*, 30 November 1988: OTK ZU 1988, Item 6; OTK 1988, 81.

[56] *Dec. U 11/97*, 27 November 1997: OTK ZU 1997/5-6, Item 67.

[57] The April 1989 amendments to the 1952 Constitution did not expressly recognise the principle of the separation of powers as the foundation of the system of government, even though the amendments introduced institutions which were incompatible with the concept of unity of power: On this principle in Polish Constitutions since the 1989 changes, see H. Suchocka, "Zasada podziału i zrównoważenia władz" ("The principle of separation and balance of powers"), in Sokolewicz, (1998), at 146-164; Skrzydło (2003), at 127-130; Banaszak (1999), at 432-446; Garlicki & Gołyński (1996), at 55-60; W. Sokolewicz, "Zasada podziału władzy w prawie i orzecznictwie konstytucyjnym RP," in J. Trzciński & A. Jankiewicz (eds.), *Konstytucja i gwarancje jej przestrzegania: Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej* [*Constitution and guarantees of the Observance Thereof: In Honour of Prof. Janina Zakrzewska*], Wydawn. Trybunał Konstytucyjny, Warszawa (1996), 187. A consensus emerged that the principle should be expressly stated but it took until 1992, with the Small Constitution for this to be formally realised through adoption of the approach of the 1921 Constitution. Article 1 of the Small Constitution thus provided: "The State organs of legislative power shall be the *Sejm* and the Senate of the Republic of Poland, executive power shall be the President of the Republic of Poland and the Council of Ministers, and judicial power shall be independent courts." See J. Ciemniewski, "Podział władz w Małej Konstytucji" [The Separation of Powers in the Small Constitution], in M. Kruk (ed.), *"Mała Konstytucja" w procesie przemian ustrojowych w Polsce* [*The Small Constitution during the Systemic Changes in Poland*], Wydaw. Sejmowe, Warszawa (1993), 20ff.

> (2) Legislative power shall be vested in the *Sejm* and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

In examining the case-law of the CT,[58] the four main areas may be distinguished in its treatment of the separation of powers principle: (a) powers of Parliament;[59] (b) the relationship of the two chambers of Parliament *inter se*;[60] (c) the control function of the *Sejm*;[61] and (d) the powers and competences of the President of the Republic.[62] It is possible to observe that one of the main reasons for the higher case-load on the CT's docket for these four areas was directly attributable to the imprecise constitutional framework from the early 1990s[63] which was subject to much-needed clarity under the 1997 Constitution.[64]

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[58] E. Łętowska & J. Łętowski, "Co wynika dla sądów z konstytucynej zasady podziału władz" [What results from the Constitutional Principle of Separation of Powers for Courts], in Trzciński & Jankiewicz (1996), at 391-393.

[59] Commencing with its first ruling, *Dec. U 1/86*, 28 May 1986: OTK ZU 1986, Item 2. See also *Dec. K 19/95*, 22 November 1995: OTK ZU 1995, Item 35; *Dec. K 6/94*, 21 November 1994: OTK ZU 1994, Item 39; *Dec. K 20/99*, 27 June 2000: OTK ZU 2000/5, Item 140; *Dec. K 16/99*, 17 October 2000: OTK ZU 2000/7, Item 253; and *Dec. K 16/00*, 7 November 2000: OTK ZU 2000/7, Item 257.

[60] *Dec. K 25/98*, 23 February 1999: OTK ZU 1999/2, Item 23. Similarly earlier rulings, *Dec. K 5/93*, 23 November 1993: OTK ZU 1995, Item 39; OTK 1993, II, 376; *Dec. K 25/97*, 22 September 1997: OTK ZU 1997/3-4, Item 35; and *Dec. K 3/98*, 24 June 1998: OTK ZU 1998/4, Item 52.

[61] *Dec. K 8/99*, 14 April 1999: OTK ZU 1999/3, Item 41. Moreover, the principle of separation of powers does not exclude MPs' participation in the executive opinion-making and consultative bodies (*Dec. K 3/99*, 28 April 1999: OTK ZU 1999/4, Item 73, concerning the participation of the MPs in the Council of Civil Service appointed by the Prime Minister).

[62] R. Mojak, *Instytucja Prezydenta RP w okresie przekształceń ustrojowych* [*The Presidency of the Republic of Poland during the Period of Transformation*], Wydawn. Uniwersytetu Marii Curie-Skłodowskiej, Lublin (1995). See *Dec. W 7/94*, 10 May 1994: OTK ZU 1994, Item 23. Other, later rulings of the Court had a similar bent (*e.g.*, *Dec. W 2/95*, 11 April 1995: OTK ZU 1995, Item 22, in which the principles of dissolution of the Sejm in case of non-adoption of the Budget were defined).

[63] While the value was recognised of having the principle explicitly formulated, thereby becoming a constitutional principle and symbolising a return to democratic traditions, nevertheless no clear answer was given as to the consequences of the principle for the functioning of state organs and the meaning of the division: Did it amount to a distinct separation of powers or did it also encompass co-operation and balancing between these powers? The CT played a great role in determining the content of the principle in the absence of clear constitutional specification.[63] In *Dec. K 11/93* (9 November 1993: OTK ZU 1993, Item 37; OTK 1993, II, 350, at 358) in respect of the separation of powers, it stated: "[T]he legislative, executive and judicial powers are separated and, further, there has to be a balance between them and they have to co-operate. The meaning of this principle is not limited just to organizational matters. The purpose of the separation of powers is among others the protection of human rights by making an abuse of power impossible by any organ wielding such power." The CT elaborated on this in *Dec. K 6/94* (21 November 1994: OTK ZU 1994, Item 39) when it turned to discuss the relation between the three powers in 1992 Constitutional Act, Art.1: "[the] requirement of separation of powers means, *inter alia*, that each of the three powers should have a substantive competence reflecting their character, and what is more, each of the three powers should maintain a certain minimum of exclusive competence constituting its essence.

The CT has thus played a crucial role in creative interpretation of the principle of a democratic state under the rule of law[65] although, in its judgments,[66] it has often admitted that the principles it has drawn from the rule of law principle were not expressly formulated in the Constitution.[67] Like its Hungarian counterpart, the CT has not been averse to pursuing an activist approach to interpreting the Constitution.

3. Democracy

The post-transition amended Art. 1 of the 1952 Constitution stated that Poland would be a democratic state.[68] The components of this principle were further expanded on in the 1952 Constitution and were subsequently reiterated and consolidated in the 1997 Constitution:[69] thus, according to Art. 4, supreme power is vested in the Nation, which "shall exercise such power directly or through their representatives." The new Constitution affirmed the already existing principles enabling the proper functioning of a representative democracy[70] including the principle of political pluralism as set out in 1997 Constitution Art. 11.[71]

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[64] As concerns the position of the judiciary *vis-à-vis* other authorities, this has come before the CT in respect of petitions challenging the methods of determining judges' salaries (*Dec. P 1/95*, 11 September 1995: OTK ZU 1995, Item 26; *Dec. P 12/98*, 22 March 2000: OTK ZU 2000/2, Item 67; and *Dec. P 8/00*, 4 October 2000: OTK ZU 2000/6, Item 189) as well as the position of the National Council of the Judiciary, a separate constitutional organ established to patrol the independence of judges and courts: *Dec. K 3/98*, 24 June 1998: OTK ZU 1998/4, Item 52; and *Dec. K 30/99*, 11 July 2000: OTK ZU 2000/5, Item 145.

[65] E. Popławska, "The 'Constitutionalization' of the Legal Order," in M. Wyrzykowski (ed.), *Constitutional Essays*, Institute of Public Affairs, Warszawa (1999), 71, at 84.

[66] *Dec. K 3/88*, 4 October 1988: OTK ZU 1989, Item 2; OTK 1989, 23; *Dec. K 5/90*, 24 July 1990: OTK ZU 1990, Item 4; *Dec. K 7/89*, 8 November 1989: OTK ZU 1989, Item 8; OTK 1989, 112; and *Dec. K 15/91*, 29 January 1992: OTK ZU 1992, Item 8; OTK 1992, I, 149.

[67] J. Nowacki, "Klauzula 'państwo prawne' a orzecznictwo TK [The Clause of a 'Democratic State under the Rule of Law' and Judgements of the Constitutional Tribunal]" in E. Zwierzchowski, *Prawo i kontrola jego zgodności z konstytucją* [*The Law and Control of its Conformity with the Constitution*], Wydaw. Sejmowe, Warszawa (1997), at 163-174.

[68] A. Pułło, "Przedstawicielskie i pozaprzedstawicielskie formy sprawowania władzy: demokracija pośrednia i bezpośrednia (wnioski dla przyszłej regulacji konstytucyjnej" [Representative and Non-representative forms of the Exercise of Power: Indirect and Direct Democracy (Conclusions for Future Constitutional Regulations)], *Studia Prawnicze*, 1989, Nos. 2-3**,** 177-181.

[69] See generally, E. Popławska, "Zasada rządów przedstawicielskich i formy demokracji bezpośredniej [The rule of representative government and forms of direct democracy]," in W. Sokolewicz (ed.), *Zasady podstawowe polskiej Konstytucji* [*Basic principles of the Polish Constitution*], Wydawnictwo Sejmowe, Warszawa (1998), at 142–145; B. Banaszak, *Prawo konstytucyjne* [*Constitutional Law*], C.H. Beck, Warszawa (1999), at 218 – 226.

[70] Banaszak (1999), at 259-349.

[71] Article 11:

> "(1) The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish

The free mandate principle[72] in 1997 Constitution Art. 104(1), "Deputies shall be representatives of the Nation. They shall not be bound by any instructions of the electorate,"[73] impliedly keeps in force the previous express constitutional prohibition on recall of a deputy or senator. The new provision ensures that the free mandate is universal (a representative represents the whole collective subject of sovereignty – the Nation), independent (there is no possibility of forcing her to act in a certain way), and irrevocable (there being no possibility for any outside body to bring about the expiry of his mandate before the term ends).[74]

Direct democracy[75] under the 1997 Constitution (Art. 4) is placed on a par with representation. The increasing value of the referendum is reflected in its extended forms, particularly in broadening the scope of facultative application of a referendum to include matters of fundamental importance of the State.[76] This is especially true with respect to the transfer of competences to an international organisation.[77]

In addition, a new instrument of legislative popular initiative was introduced in the 1997 Constitution which, according to Art. 118(2), accords "the right to introduce legislation … also … to a group of at least 100,000 citizens having the right to vote in elections to the *Sejm*."[78]

The CT has been seised of a number of cases dealing with the principle of democracy and its practical operation. In *Dec. U 6/92*,[79] e.g., it accepted the petitions of a group of MPs that a contested Parliamentary Resolution had been ratified in violation of the Interim Standing Orders of the *Sejm* and thus infringed both the rule of law principle and the principle of representative democracy: "An essential feature of representation … is that in a democratic state there is a specified manner for undertaking legal acts (statutes and

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citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means.
(2) The financing of political parties shall be open to public inspection."

[72] M. Kruk, "Koncepcja mandatu przedstawicielskiego w doktrynie konstytucyjnej i praktyce" [The Concept of the Representative Mandate in Constitutional Doctrine and Practice], *Przegląd Sejmowy*, 1993, No. 4, 32.

[73] This provision applies, *mutatis mutandis*, to senators: 1997 Constitution, Art. 108.

[74] L. Garlicki, *Komentarz do Konstytucji RP. Artykuł 6* [*Comments on the Polish Constitution. Article 6*], Wydawnictwo Sejmowe, Warszawa (1996), Vol. II, at 5.

[75] Banaszak (1999), at 239-258.

[76] 1997 Constitution, Art. 125.

[77] 1997 Constitution, Art. 90(3). For further explanation, see below at Chapter Five, point C.2.

[78] Lastly, there is a constitutional base under 1997 Constitution, Art. 170 for referenda to be held in communes: members of a self-governing community (commune or *gmina*) may decide, by means of a referendum, matters concerning their community, including the dismissal of an organ of local self-government established by direct election.

[79] *Dec. U 6/92*, 19 June 1992: OTK ZU 1992, Item 13; OTK 1992, I, 196, at 204. See also *Dec. W 2/94*, 13 April 1994: OTK ZU 1994, Item 21; OTK 1994, I, 190-191.

resolutions) that is satisfied by debate, for example. This is the essence of a representative and democratic system for the making of laws."

4. Protection of fundamental human rights

The fundamentality of human rights was not an essential operative component of the legal order established under the 1952 Constitution. Only with the democratic transition and the subsequent constitutional amendments did human rights really start to enter into their own as part of the essential core of Polish sovereignty.[80]

While the 1952 Constitution catalogue covered the majority of those accepted in the Western democracies,[81] important rights were absent.[82] Further the Constitution did not protect rights from limitation either by statute or by executive decree, and certain rights, normally granted constitutional protection, remained regulated (inadequately) in ordinary statutes: *e.g.*, the right to privacy; the right to a fair trial; and the rights accorded to persons deprived of their liberty.

Despite the absence of a proper catalogue of rights until the coming into force of the 1997 Constitution, Chapter II, Arts. 30-86, the CT had already affirmed their centrality through various decisions, basing their rulings in many cases on the principle of a democratic state under the rule of law (1952 Constitution, Art. 1) as well as reference to international human rights instruments of which Poland was a party.[83] The CT early on dealt with and expounded upon the protection of private property,[84] the principle of laïcity and the neutrality of the State,[85] the freedom of conscience,[86] and the freedom of association.[87]

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[80] See generally, Sarnecki (1999), at 42-121; Skrzydło (2003), at 149-173; Banaszak (1999), at 350-429.

[81] For example, freedom and inviolability of the person (1952 Constitution, Art. 87(1)); inviolability of the home and confidentiality of correspondence (Art. 87(2)); freedom of conscience and religion (Art. 82(1)); freedom of speech and freedom of the press (Art. 83); freedom of assembly (Art. 83); freedom of association (Arts. 84 and 85); and freedom of economic activity (Art. 6).

[82] These included the right to information; the right to privacy; the right to citizenship; freedom of movement; property rights; the right to self-government, *etc*.

[83] For example, 1966 UN International Covenant on Civil and Political Rights and the 1950 ECHR were referred to by the CT in *Dec. K 1/92*, 20 October 1992: OTK ZU 1992, Item 23; OTK 1992, II, 27. This case concerned amendments to the 1963 Aliens Act. The changes allowed administrative agencies to impose, without judicial supervision, different types of deprivation of liberty on persons subject to an expulsion order. Both Houses of Parliament were cognisant of the discrepancy of these provisions with ECHR Art. 5. The Ombudsman petitioned the CT on the grounds, *inter alia*, that the provisions were contrary to 1952 Constitution Art. 87(1) which guaranteed the right to personal inviolability. The CT, generally sharing the view of the Ombudsman, found the challenged provisions infringed Constitution Art. 87(1) and stressed, with reference to ECHR Art. 5(4) and 1966 ICCPR, Art. 2(3) and Art. 9(3), that "as far as protection of human rights is concerned, the Aliens Act amendment is a step backwards." On the matter of the ECHR, see below under this point, Chapter Five, point B.4.

[84] *Dec. K 1/91*, 28 May 1991: OTK ZU 1991, Item 4.

[85] *Dec. K 11/90*, 30 January 1991: OTK ZU 1991, Item 2; OTK 1991, 27.

[86] *Dec. U 8/90*, 15 January 1991: OTK ZU 1991, Item 8; OTK 1991, 134.

In a series of rulings,[88] the CT also acknowledged that, while it was constitutionally possible to put limitations on fundamental rights, this could only occur through statute and was an absolute requirement forming part of the principle of a democratic state under the rule of law.[89] The situation regarding limitation of rights was finally clarified by the wording of 1997 Constitution, Art. 31(3):

> Any limitation upon the exercise of constitutional freedoms and rights may by imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Consequently, confirming the CT's extensive case-law on the subject, limitations on rights may be made only through statute and then only for the purpose of protecting higher values.

In addition, the CT actively developed the principle of equality, holding in *Dec. U 5/86*[90] that a provision of a 1985 Council of Ministers' Decree contravened the constitutional principle of equality in the 1952 Constitution, Art. 67(2) which provided that "all citizens of the People's Republic of Poland shall have equal rights irrespective of gender, birth, education, profession, nationality, race, religion, social status and origin."[91]

After the 1997 Constitution came into force, Art. 32 became the new constitutional basis for the principle of equality in the Polish system: under para. (1), "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities"; and under para. (2), "No one shall be discriminated against in political, social or economic life for any reason whatsoever." Still the CT was able to remark[92] that the principle remained a stable part of its case-law.

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[87] *Dec. K 6/90*, 12 February 1991: OTK ZU 1991, Item 1.

[88] *Dec. U 1/86*, 28 May 1986: OTK ZU 1986, Item 2; OTK 1986, 32; *Dec. U 5/86*, 5 November 1986: OTK ZU 1986, Item 1; OTK 1986, 7; and *Dec. K 3/89*, 26 September 1989: OTK ZU 1989, Item 5.

[89] Such statutory limitation on a right also had to satisfy the criterion of sufficient specificity (*Dec. U 6/92*, 19 June 1992: OTK ZU 1992, Item 13; OTK 1992, I, 196) and proportionality (*Dec. K 11/94*, 26 April 1995: OTK ZU 1995, Item 12; and e.g., in *Dec. U 10/92*, 26 January 1993: OTK ZU 1993, Item 2; OTK 1993, I, 19, at 32). In putting statutory limits on rights, it was necessary to take into account special features of particular rights and freedoms because they determined the general boundaries of permissible limitations: thus more restrictive standards applied to personal and political rights and freedoms than applied to economic and social ones: such requirements were repeated and built upon in *Dec. K 28/97*, 9 June 1998: OTK ZU 1998/4, Item 50; and *Dec. SK 19/98*, 16 March 1999: OTK ZU 1998/3, Item 36

[90] *Dec. U 5/86*, 5 November 1986: OTK ZU 1986, Item 1; OTK 1986, 7.

[91] In a subsequent case, *Dec. P 2/87* (3 March 1987: OTK ZU 1987, Item 2; OTK 1987, 20), the CT declared that the principle of equality enjoyed the rank of a general principle underlying all civil rights, liberties and duties and that any restrictions on it, which did not follow on from an effort to attain real social equality, were impermissible.

[92] *Dec. K 3/98*, 24 June 1998: OTK ZU 1998/4, Item 52. Having already noted in *Dec. K 8/97* (16 December 1997: OTK ZU 1997/5-6, Item 70) that the basic issue to evaluate the observance of the principle of equality: "is thereby the determination of the essential trait on account of which the provisions of law differentiated the

In fact, the 1997 Constitution heralded the domestic introduction of a number of sought-after changes to the system of human rights protection: (1) by Art. 8(2), the provisions of the Constitution were declared to be directly effectively; and (2) Arts. 77-80 laid down the rules governing the right of redress when rights and freedoms have been violated, the right to judicial protection, the right to appeal against a court decision, the right to address the Ombudsman, and right of constitutional complaint. These rights are completed with the constitutional guarantee of judicial independence and the express statement, in Constitution Art. 178(1), that judges are subject only to statutes and the Constitution – and not to anyone or anything else.

As with its Hungarian counterpart, the CT has made extensive use of the provisions of the ECHR[93] and decisions of the ECtHR in its case-law.[94] Despite the difficulties international law experienced in the Polish constitutional system before 1997, the CT was clear that the ECHR, and the case-law under it, provided human rights standards which should be regarded as laying down one of the very foundations of the Polish legal order. Thus, by using 1952 Constitution, Art. 1 on the rule of law, the CT recognised the Convention's importance as an act to be used for interpretation of domestic law.[95]

Cases subsequent to the 1997 Constitution also used the ECHR and its interpretations by the ECtHR but in these judgements, the CT – with its revised jurisdiction – was able to rely directly on the Convention to review inconsistent national legislation.[96] Consequently, with regard to the amended 1952 Constitution or its 1997 successor, the decision of a Polish

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legal situation of its addressees…. The differentiation of the legal situation of citizens contravenes the Constitution if it treats similar entities or situations differently if the differences in treatment are not duly justified in the Constitution."

[93] Poland became a member of the Council of Europe on 26 November 1991, signing the ECHR. On 2 October 1992, the *Sejm* (according to the then rules in force) expressed its approval through the adoption of a statute ratifying the Convention (Although passed in October, the statute was not published until the next month in the Journal of Laws: *Dziennik Ustaw*, no. 85, item 427, 24 November 1992, p. 1485) which statute was signed by the President of the Republic on 15 December 1992. The instruments of ratification of the Convention were deposited on 19 January 1993: L. Garlicki, "Ratyfikacja Konwencij o ochronie praw czeowieka i podstawowych wolnośi" [Ratification of the Convention on the Protection of Human Rights and Fundamental Freedoms], *Biuletyn - Ekspertyzy i opinie prawne,* Kancelaria Sejmu, 1992, No. 1(4), at 32-35.

[94] L. Leszczyński, "Application of the European Convention in the Polish Courts: An Impact on the Judicial Argumentation," (1996) 2 *East European Human Rights Review* 19; A. Drzemczewski & M. Nowicki, "The Impact of the ECHR in Poland: a Stock-taking after Three Years" [1996] EHRLR 261.

[95] *Dec. W 3/93*, 2 March 1994: OTK ZU 1994, Item 17; OTK 1994, I, at 157-158.

[96] As with Hungary, there are dozens of examples: *Dec. K 21/99*, 10 May 2000: OTK ZU 2000/4, Item 109. This case used a series of ECtHR decisions in its reasoning: *Leander v. Sweden*, Judgement of 26 March 1987, Series A, No. 116; (1988) 9 EHRR 433; *Klass v. Germany*, Judgement of 6 September 1978, Series A, No. 28; (1979-80) 2 EHRR 214; *Tinnelly & Sons Ltd. and McElduff v. United Kingdom* (App. 20390/92), Judgement 10 July 1998; (1998) 27 E.H.R.R. 249; *Pellegrin v. France* (App. 28541/95), Judgement of 8 December 1999; *Vogt v. Germany* (App. 17851/91), Judgement of 26 September 1995; (1996) 21 EHRR 205; *Glasenapp v. Germany*, Judgement of 28 August 1986, Series A, No. 104; (1986) 9 EHRR 25; *Wille v. Liechtenstein* (App. 28396/95), Judgement of 28 October 1999; (2000) 30 EHRR 558; and *Rotaru v. Romania* (App. 28341/95), Judgment of 4 May 2000.

court openly contradicting the ECHR would not be accepted by the superior courts, including the CT, especially in the light of the rule of law principle and judicial practice.

C. TRANSFERS OF SOVEREIGNTY AND EUROPEAN INTEGRATION

1. Introduction

Poland did not need to pass specific amendments to the Constitution in order to accede to the EU.[97] In fact, it has been noted, one of the most characteristic features of the 1997 Constitution is its opening to the rules of international and supranational law.[98] Even at the preparatory stage, the issue had been raised as to whether the new Constitution should include integration provisions aimed specifically at EU accession – even though Polish membership at that time was considered a remote possibility. The view prevailed, as in the case of Spain preparing its 1978 Constitution, that early adoption of integration provisions would show unequivocally Poland's commitment to joining the EU and that approval of the Constitution in a referendum – including the integration clauses – would underline popular support for the sensitive issue of limiting the exercise of state powers.[99]

In this way, the constitutional implications of Polish accession to the EU had already been subject to parliamentary scrutiny and academic debate[100] in the process of drawing up the 1997 Constitution. The new Constitution thus provided the necessary empowerment clause (the so-called "European clause") and procedural rules to allow Poland to accede to the Union. In this respect, Constitution Arts. 90 and 91 had in general been positively assessed by academic literature:[101] Constitution Art. 90 governed the matter of the decision

[97] Although this was the subject of much academic discussion before accession: see J. Barcz, "Akt integracyjny Polski z Unią Europejska w świetle Konstytucji RP [Poland's Integration Act with the European Union in the light of the Polish Constitution]," (1998) PiP 4/1998, 12.

[98] A. Wasilkowski, "International Law and International Relations in the New Polish Constitution of 2 April 1997" (1997-1998) 23 PolYBIL 7; and Czapliński (1999), 289.

[99] K. Wójtowicz, "Proposed Changes in the Polish Constitution of 1997 ahead of Poland's Accession to the European Union" (2001) XXV PYBIL 27, at 27-28.

[100] K. Complak, "Die Prinzipen des Systems der Republik Polen und der Beitritt zur Europäischen Union," in M. Maciejewski (ed.), *Społeczeństwo w przełomie. Polska, Niemcy i Unia Europejska. Die Gesellschaft in der Wende. Polen, Deutschland und die Europäische Union*, Wydawn. Uniwersytetu Wrocławskiego, Wrocław (1999), 146ff; and P. Winczorek, "Kilka uwag w kwestii dostosowania Konstytucji Rzeczpospolitej Polskiej do wymogów prawa europejskiego [A few comments on adopting the Constitution of the Republic of Poland to the requirements of European law]," in E. Popławska (ed.), *Konstytucja dla rozszerzającej się Europy* [*A Constitution for Enlarging Europe*], Instytut Spraw Publicznych, Warszawa (2000), 187ff.

[101] J. Barcz, "Konstytucyjnoprawne problemy stosowania prawa Unii Europejskiej w Polsce w świetle dotychczasowych doświadczeń państw członkowskich [Constitutional problems of application of EU law in Poland in the light of recent experiences of Member States]," in M. Kruk (ed.), *Prawo międzynarodowe i*

on accession and the procedure for the transfer of (the exercise of) competences; and Constitution Art. 91 opened the Polish legal order to European law and governed the applicability of European law in the domestic field.

Constitution Art. 89(1)(3) provides that ratification of an international treaty concerning "Poland's membership of an international organisation" requires "prior consent granted by statute." Where, however, such membership entails – according to Constitution Art. 90(1) – a transfer of powers of state organs in certain matters to the international organisation in question, then a choice of special procedure is set out for expressing the necessary prior approval or consent to this type of treaty: (a) under Constitution Art. 90(2), the prior consent statute approving ratification of the relevant treaty must be passed by a two-thirds majority of the members of each chamber of Parliament, in the presence of half or more of the statutory number of members of each chamber; or (b) under Constitution Art. 90(3), the granting of consent for the ratification of such a treaty may also be passed by a nationwide referendum in accordance with Constitution Art. 125.[102]

The common characteristic of these alternative procedures is the enlarged sphere of democratic legitimisation which recognises the transfer (implicit and explicit) of sovereign powers, in this case to the EU. Such procedures are therefore essential when, in spite of the increased powers of the European Parliament, the main executive powers remain firmly with the representatives of the Member States in the Council of Ministers. The inherent deficit in democratic legitimisation of the EU was thus addressed in part, on the Polish side, by the decision of the *Sejm* (under Constitution Art. 90(4)) to enhance the role of popular participation in the approval of the ratification of the 2003 Accession Treaty through a nationwide referendum.

Poland's accession to the EU was thus a complex act:[103] together with the then EU-15 and the nine other acceding States, Poland signed the EU Accession Treaty on 16 April 2003 in Athens. Pursuant to that Treaty, Poland undertook to implement in their entirety the EC Treaty and the EU Treaty. The CT in *Dec. K 11/03*[104] ruled such procedure constitutional and this was followed shortly after, on 7 and 8 June 2003, by the referendum on Polish membership of the EU.[105] A majority of 77.45% of the electorate voted in favour which

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wspólnotowe w wewnętrznym porządku prawnym [*International and Community Law in internal legal system*], Wydawnictwo Sejmowe, Warszawa (1997), at 203ff; K. Działocha, "Podstawy prawne integracji Polski z Unią Europejską w pracach nad nową konstytucją [Legal basis for integration of Poland with the EU in the works on new Constitution]" (1996) PiP 4-5/1996, 5, at 9ff; M. Safjan, "Konstytucja a członkowsto Polski w Unii Europejskiej [The Constitution and membership of Poland in the EU]" (2001) PiP 3/2001, 3, at 6.

[102] 1997 Constitution, Art. 125 states, *inter alia*:

> "(1) A nationwide referendum may be held in respect of matters of particular importance to the State.
> (2) The right to order a nationwide referendum shall be vested in the *Sejm*, to be taken by an absolute majority of votes in the presence of at least half of the statutory number of MPs, or in the President of the Republic with the consent of the Senate given by an absolute majority vote taken in the presence of at least half of the statutory number of Senators."

[103] J. Barcz, "Membership of Poland in the European Union in the Light of the Constitution of 2 April 1997. Constitutional Act of Integration," (1997-1998) 23 PolYBIL 21, at 21.

[104] *Dec. K 11/03*, 27 May 2003: OTK ZU 2003/5A, Item 43.

[105] Held in accordance with Constitution Art. 125 and the 2003 Referenda Act: Act of 14 March 2003 on Nationwide Referenda, Dz. U. 2 April 2003, No. 57, Item 507 and Dz. U. 10 May 2003, No. 85, Item 782.

result was confirmed by the Supreme Court.[106] Accordingly the President of the Republic ratified the Accession Treaty.[107] After such ratification, the constitutionality of the 2003 Accession Treaty was challenged by several deputies from the *Sejm* – the CT ruled the Treaty constitutional in *Dec. K 18/04*[108] which will be considered in more depth later in this Chapter.

2. Transfers of the exercise of sovereignty

The 1997 Constitution does not permit the transfer of sovereignty:[109] rather it provides in Art. 90(1): "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."

In some drafts of the Constitution, they did not speak of the transfer of competences but rather of the transfer of the right to their exercise.[110] But the Constitution authorises – in spite of the alteration of the formula in Constitution Art. 90 – only the transfer of the exercise of specific competences and not the power in itself.[111] Hence it followed[112] that, as the transfer of competences "in certain matters" was spoken about, it might be concluded that only specific competences could be transferred. As such it raised the question as to what competences could be thus transferred, or more starkly, to what extent could sovereignty be limited.

The 1997 Constitution provides no positive indication as to what competences it means. But it is clear that the formulation of Constitution Art. 90 excludes the transfer of sovereignty "in all cases," *i.e.*, there are some areas which are not subject to the transfer. The question as regards which matters ought or ought not to be the object of the transfer are not answered clearly by the Constitution.[113]

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[106] In accordance with Constitution Art. 125(4): "The validity of a nationwide referendum and the referendum referred to in Article 235(6) shall be determined by the Supreme Court."

[107] Together with the accompanying documents, the 2003 Treaty was published in the Dz. U. 30 April 2004, No. 90, Item 864.

[108] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49.

[109] M. Granat, "Constitutions nationales et Constitution européenne: Pologne" (2005) XXI AIJC 201, at 216.

[110] S. Biernat, "Constitutional Aspects of Poland's Future Membership in the European Union" (1998) 36 AVR 398, at 407.

[111] Biernat (1998), at 407.

[112] M. Jankowska-Gilberg, "Verfassungsrechtliche Grundlagen des Beitritts und der Mitgleidschaft Polens in der Europäischen Union" [2003] EuR 417, at 425.

[113] K. Wójtowicz, "Proposed Changes in the Polish Constitution of 1997 ahead of Poland's Accession to the European Union," in W. Czapliński (ed.), *Poland's Way to the European Union: Legal Aspects*, Scholar Publishing House, Warszawa (2002), 34, at 45.

As previously noted, unlike the German Federal Constitution Art. 79(3), the Polish Constitution recognises no unalterable provisions. However, despite the absence of formal limitation on the transfer of competences, several limits can be derived from the Constitution.

These limits cannot be limited *in abstracto*[114] but are rather bound up with the system of values of the constitutional order.[115] In both Constitution Chapters 1 and 2 can be found the fundamental principles of the Polish legal order, *e.g.*, parliamentary democracy, the rule of law, and the separation of powers.[116] Even before accession, then, it was strongly arguable that the transfer of competences could not infringe these basic principles of the constitutional order, the essential core of sovereignty.

According to recent case-law of the CT, the ceding of competences under Constitution Art. 90 is not a ceding of sovereignty. In *Dec. K 18/04*[117] on the constitutionality of the 2003 Accession Treaty, the petitioners contended *inter alia* that, through the transfer of competences to the EC/EU on accession to the Union, Poland had lost its capacity to act as an independent and sovereign State. In its judgment in the case, the CT observed that Constitution Art. 8(1) – which states that the Constitution is "the supreme law of the Republic of Poland" – was accompanied by the requirement under Constitution Art. 9 to respect and to be sympathetically disposed towards appropriately shaped rules of international law binding on Poland.[118] The Constitution therefore assumed that, within the territory of Poland – in addition to norms adopted by the national legislator – there operated rules created outside the framework of national legislative organs.

The 1997 Constitution, the CT reminded the petitioners, had been approved in a national referendum and its provisions had thus been sanctioned through the exercise of sovereignty by the Polish constitutional legislator with the participation of the citizens. The

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[114] C. Mik, "Przekazanie kompetencji przez Rzeczpospolitą Polską na rzecz Unii Europejskiej i jego następstwa prawne (uwagi na tle art. 90 ust. 1 Konstytucji), [Transmission of competences by the Republic of Poland in favour of the EU and its legal consequences (comments on Art. 90 (1) of the Constitution]" in C. Mik (ed.), *Konstytucja Rzeczpospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej* [*Constitution of the Republic of Poland of 1997 and membership in the EU*], TNOiK, Toruń (1999), at 154.

[115] L. Garlicki, "Normy konstytucyjne relatywnie niezmienialne [Constitutional norms relatively unamendable]," in J. Trzciński (ed.), *Charakter i struktura norm Konstytucji* [*Characteristic and structure of the Constitution's norms*], Wydawnictwo Sejmowe, Warszawa (1997), at 139ff.

[116] Garlicki (1997), at 152.

[117] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49.

[118] The German Constitution enshrines "the principle of openness towards international law" ("*das Grundsatz der Völkerrechtsfreundlichkeit*"): *Eurocontrol I*, 23 Juni 1981, 2 BvR 1107, 1124/77 und 195/79: BVerfGE 58, 1, at 34; and *Eurocontrol II*, 10 November 1981, 2 BvR 1058/79: BVerfGE 59, 63, at 89. See also R. Geiger, *Grundgesetz und Völkerrecht*, 3rd ed., Beck, München (2002), para. 34 II. From this concept, the FCC has derived a general rule of interpretation: in case of doubt, the Constitution as well as all ordinary statutes have to be interpreted as much as possible in conformity with German obligations under public international law: *Ostverträge*, 7 Juli 1975, 1 BvR 274/72: BVerfGE 40, 141, at 178; and *Grundlagenvertrag*, 31 Juli 1973, 2 BvF 1/73: BVerfGE 36, 1, at 14. In several cases, e.g., the FCC has ruled that the principle of openness towards international law obliges it to ensure, within its own competences, that administrative and judicial bodies respect the provisions of international treaties and to take into consideration the relevant case-law of international courts: *Fair Trial*, 26 März 1987, 2 BvR 589/79: BVerfGE 74, 358, at 370; *Görgülü I*, 14 Oktober 2004, 2 BvR 1481/04: BVerfGE 111, 307, at 315ff.

Constitution, in Arts. 90 and 91, provides for stricter conditions to be fulfilled when delegation of competences to international organisations would give precedence to such organisations' rules over conflicting Polish statutory norms. Ratification of treaties resulting in this type of transfer – as indicated above[119] – requires consent by a qualified majority in both houses of the Polish Parliament representing the Nation as sovereign, in accordance with the principle in Constitution Art. 4(2), or by the sovereign itself as expressed in a national referendum which procedure is an even more intensive and direct expression of the sovereign decision of the Nation: this was indeed a recognition of the impact of the transfer as being similar to an amendment of the Constitution.[120] These requirements introduced essential (significant) protection from "too easy" or insufficient authorised delegation of the competences of organs of state authority: such protection concerned all cases of delegation of competences to EU organs.

In its decision, the CT further noted that the EU function, according to the founding Treaties, on the basis and within the scope of competences delegated to them by the Member States (as determined by the FCC in *Maastricht*[121] and *Lisbon*[122]). As a result, the EU and its institutions could only act within the framework of competences indicated in the provisions of the Treaties:[123] "The Nation, by the acceptance of the Constitution in the referendum, has agreed to the possibility of the Republic of Poland being bound by the law passed by an international organisation or international organ, thus law other than treaty law. This happens within the boundaries [scope] provided for in the ratified international agreements."

Thus the CT expressly stressed the supremacy of the Constitution in relation to EU law applied within the territory of Polish sovereign power and indicated the constitutional limits of the transfer of the competences of state organs to EU institutions.[124] Such constitutional limits were for the CT to patrol, as the FCC has provided in its *ultra vires* review jurisdiction in *Lisbon*.[125] How then was it to determine the limits of transfer? The basis of the review power centred on its interpretation of the phrase in Constitution Art. 90(1) regarding the transfer of competences "in relation to certain matters." The CT understood this phrase to be:[126]

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[119] See at Chapter Five, point C.2.

[120] Constitution Art. 235(4): "A bill to amend the Constitution shall be adopted by the *Sejm* by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of senators."

[121] *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155; [1994] 1 CMLR 57.

[122] *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.

[123] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 4.4.

[124] In support of these arguments, the CT had made reference to the FCC in *Maastricht* and the Danish Supreme Court in *Carlsen*.

[125] *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 237- 238.

[126] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 4.1. See a similar result by the German Court in *Lisbon*: see above at Chapter Three, point E.2.d.

> a prohibition on the transfer of all competences of a certain state organ, on the transfer of all competences in all matters within a certain field and also as a prohibition on the transfer of competences determining the substantial scope of the activity of a certain state organ. It was therefore necessary to determine precisely the filed of competence as well as to indicate the range [scope] of competences that are subject to transfer.

Subsequently in this ruling,[127] the CT emphasised the point that the process and matter of the transfer of competences "in certain matters" had to remain in accordance with the Constitution and any change to the transferred competences required compliance with the procedure for constitutional amendment under Constitution Art. 235. Of fundamental importance, from the point of view of sovereignty and protection of other constitutional values – the CT continued – was the limitation of the possibility of the transfer of competences "in certain matters:" such transfers could thus not infringe the essential core of rights that enable – according to the Preamble to the Constitution – the sovereign and democratic determination of the future of the Republic of Poland.

The CT's approach to conferral of powers is clearly inspired by the FCC's *Maastricht* ruling to which it makes express reference[128] and repeated in the 2009 *Lisbon* ruling. Moreover, it follows the FCC approach by affirming its own jurisdiction to police the boundaries of these conferred powers so that they remain in conformity with the Constitution. In its own *Lisbon* ruling, the CT would only go as far as assuming the protection of constitutional identity as the central theme of its jurisdiction over EU law but not by adopting the FCC's reasoning as to the need for and promotion of novel forms of constitutional complaint in the form of proceedings for the protection of such constitutional identity and for *ultra vires* review. Instead, as will be seen below,[129] the CT sought to balance the demands of protecting national sovereignty with those of European integration.

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[127] OTK ZU 2005/5A, Item 49, at para. 8.4.

[128] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 4.5.

[129] See below at Chapter Five, points E.2.c.-d.

D. NATIONAL CONSTITUTIONAL COURT ACCEPTANCE

1. Introduction

As has been seen so far in this Chapter, both academics and judges were well aware of the constitutional implications of EU membership before accession. Nevertheless, despite various considerations,[130] it was clearly only after accession that the CT could effectively mould the constitutional landscape in response to the implications of European law in the national system.[131]

2. Priority/Supremacy of European law

The 1997 Constitution, as already discussed, was drafted to allow for membership of the EU without the need for further amendment. Primary European law – as an international treaty – thus became a component of the domestic legal order and could be directly applied. According to Constitution Art. 91(2), "[a]n 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." The Constitution here speaks only of international treaties whose ratification is provided for in a prior consent statute: the same supra-statutory level therefore had to apply to a treaty, which had been approved in a referendum (i.e., the Accession Treaty and with it the EC/EU Treaties), since both methods of consent had the same value.[132]

In addition, the general formulation of precedence of application of European secondary law, as expressed in Constitution Art. 91(3), had to be interpreted as a demand to apply the European provision and thus simultaneously a refusal to apply a domestic rule conflicting with it.[133]

The CT practice has subsequently examined these provisions in its case-law. The proceedings in *Dec. P 37/05*[134] amounted to a *Simmenthal*-style case[135] but within a Polish

[130] C. Mik, "Zasady ustrojowe europejskiego prawa wspólnotowego a polski porządek konstytucyjny" 1998/1 PiP 33, at 36; M. Safjan, "Konstytucja a członkostwo Polski w Unii Europejskiej [The Constitution and the membership in the EU]" 2001/3 PiP 3, at 14; and Barcz (1998), PiP 1998, at 12.

[131] See generally, N. Skrzypek, "Le tribunal constitutionnel polonais et le droit communautaire" (2007) 33 CDE 179-212.

[132] See, e.g., K. Wójtowicz, "Konstytucja Rzeczpospolitej Polskiej a członkostwo w Unii Europejskiej [The Constitution of the Republic of Poland and membership in the EU]," in Popławska (2000), at 168.

[133] M. Safjan, "The Constitution and Accession of the Republic of Poland to the European Union," in European Commission for Democracy through Law, *European integration and constitutional law*, No. 30 *Collection Science and technique of democracy*, Council of Europe Publishing, Strasbourg (2001), 137, at 150.

[134] *Dec. P 37/05*, 19 December 2006: OTK ZU 2006/11A, Item 177; [2007] 3 CMLR 48, 1323. See generally, A. Łazowski, "Case Note: Poland. Constitutional Tribunal on the Preliminary Ruling Procedure and the Division of Competences Between National Courts and the Court of Justice: Order of 19 December 2006" (2008) 4 EuConst 187.

[135] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

(monist) setting. The subject matter was the payment of excise duties imposed, in accordance with s. 80 of the 2004 Excise Duty Act, on cars imported from another Member State. The Regional Administrative Court in Olsztyn requested the CT whether s. 80 conformed to (directly effective) Art. 90(1) EC[136] (now Art. 110(1) TFEU) and to Constitution Art. 91. The mindset behind the reference to the CT was one typical of the administrative organs and courts in the face of the application of European law[137] – even with the express wording of the 1997 Constitution. In this context, such entities considered that the Excise Duty Act was still a binding law and had to be applied barring annulment by the CT or repeal by the legislature – the paradigm *Simmenthal* case.

The CT confirmed – although not referring expressly to *Simmenthal*[138] – the duty of a national court to apply European law directly, the primacy of European law and the lack of necessity to refer to the CT legal questions concerning the conformity of national and European law or waiting for its annulment by the CT or repeal or amendment by the legislature. The CT also affirmed that ratified international treaties, e.g., the EC and EU Treaties, which (by virtue of Constitution Art. 91(1)) had become an integral part of the domestic legal system "shall not change into normative acts of the State but shall remain in their nature – and by virtue of its origin – the act of international law."

The CT correctly identified the fact that it was dealing with a conflict between s. 80 of the Excise Duty Act and Art. 110 TFEU (ex-Art. 90 EC) but could not deal with the conformity of s. 80 with Constitution Art. 91; indeed, it was difficult to imagine how s. 80 could have been inconsistent with Art. 91 since they concerned totally different issues. The CT therefore concluded that the question referred was related to the application of law because of application of Constitution Art. 91(2) and European law, and not to the question of conformity of a statute with the Constitution: as such the reference was inadmissible.

In its decision, the CT emphasised the point that the case concerned the application of law as opposed to its binding force.[139] In this way, it followed the German constitutional jurisprudential differentiation between "*Anwendungsvorrang*" (priority of application) and "*Geltungsvorrang*" (priority of validity) of European law in conflict with national law.[140]

The CT further indicated that the alleged non-conformity of s. 80 of the 2004 Act to Art. 110 TFEU (ex-Art. 90 EC) did not "accordingly" indicate its non-conformity to Constitution Art. 91(2). On the contrary, Constitution Art. 91(2) actually authorised the national court referring the question of law to the CT to refuse to apply the statutory provision:[141]

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[136] Declared to be of direct effect in Case 57/65 *Alfons Lütticke GmbH v. Hauptzollamt Saarlouis* [1966] ECR 205.

[137] A. Wyrozumska, "Stosowanie prawa wspólnotowego a art. 91, 188 ust. 2 i 193 Konstytucji RP – glosa do postanowienia Trybunału Konstytucyjnego z 19.12.2006 r. (P 37/05) [Application of Community law and Articles 91, 188(2) and 193 of the Polish Constitution – gloss to the procedural decision of the Constitutional Tribunal of 19 December 2006 (P 37/05)]" *Europejski Przegląd Sądowy* marzec 2007, 39, at 39.

[138] Wyrozumska (2007), at 39.

[139] Wyrozumska (2007), at 40.

[140] Jankowska-Gilberg (2003), at 433.

[141] *Dec. P 37/05*, 19 December 2006: OTK ZU 2006/11A, Item 177, at para. III.3; [2007] 3 CMLR 48, 1323, at 1335.

> In principle, preference should be given to the elimination of conflicts between domestic and international norms at the level of applying the law. Leaving purely doctrinal considerations aside, the mechanism for the elimination of conflict of norms at the level of applying the law is more efficient and flexible than the review of legality undertaken by the CT, and from the perspective of the structure – justified by the fact that, generally, an international law norm will have a narrower scope of binding force than a domestic statutory norm – be it in temporal, objective or subjective aspect.

According to the principle of precedence, the application of an international (European) norm therefore neither repealed, breached nor invalidated the domestic statutory provision but rather only limited the latter's scope of application. Changes in the contents or loss of binding force of an international (EC) norm would alter the scope of application of a statutory norm without the need for the national legislator to undertake any action. The CT later stated:[142]

> Accordingly, contrary to the stance presented by the court referring the question of law, national courts shall not only be authorised, but also obliged to refuse to apply a domestic law norm, where such norm remains in conflict with European law norms. National court shall not, in such case, adjudicate upon the repeal of a domestic law norm, but shall only refuse to apply the norm to the extent that is required to give precedence to the European law norm. The legal act in question shall not be deemed invalid, and shall remain in force within the scope that is not encompassed by the objective and temporal binding force of the European Regulation.

Where any doubts arose as to the relationship between a domestic and a European legal norm, the relevant court could refer any question for a preliminary ruling to the ECJ. The CT therefore acknowledged that there was no necessity to refer to it questions of law regarding the conformity of domestic law to European law, even in situations where the referring national court intended to refuse to apply a domestic statute. Solving conflicts of European law in relation to domestic statutes fell outside its jurisdiction, of the CT and instead fell within the power of the Supreme Court, ordinary and administrative courts, while interpretation of European law remained in the province of the ECJ through the Art. 267 TFEU (ex-Art. 234 EC) reference procedure.[143] Interestingly, in support of its argument, the CT cited to a 1990 judgement of the FCC[144] which had dealt, in part, with the infringement of the right to a lawful judge,[145] as well as to the decision of the Italian Constitutional Court

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[142] OTK ZU 2006/11A, Item 177, at para. III.4.2; [2007] 3 CMLR 48, 1323, at 1337.

[143] L. Garlicki, "Członkostwo Polski w Unii Europejskiej a sądy [The Membership of Poland in the European Union and Courts]" in E. Popławska (ed.), *Konstytucja dla rozszerzającej się Europy* [*The Constitution for the expanding Europe*], Instytut Spraw Publicznych, Warsaw (2000), at 215.

[144] *Absatzfonds*, 31 Mai 1990, 2 BvL 12, 13/88, 2 BvR 1436/87: BVerfGE 82, 159.

[145] See above at Chapter Three, point D.4.a.

in *Granital*.[146] In following the ECJ's *Simmenthal* jurisprudence, the CT (like other constitutional courts in the EU Member States) has thereby accepted an important restriction on its jurisdiction in "European questions."[147]

Nevertheless, lest the CT's attitude were to prove too "Euro-friendly," it added its own rider: viz., where a national court questions the conformity of a statute to the Constitution, there would be no other possibility of finding the potential unconstitutionality of a statute other than on the basis of a decision by the CT.[148] Yet even this rider was circumscribed, with the result that the national court's ability – to refer to the CT a question of law on the conflict between a domestic statute and European law – itself became limited: first, by the conflicting rule contained in Constitution Art. 91(2); and secondly through means of applying the principles of European law, especially the principle of direct application (effect) of European law in the event of a conflict with a statute.

3. Direct effect

The principle of direct effect was fully discussed in domestic academic literature before accession,[149] with the focus of the discussion was Constitution Art. 91(2) and (3) and its general form of precedence of application of the provisions of European law, either of the Treaties or European secondary legislation over conflicting national laws.

In the *2003 Accession Treaty case, Dec. 18/04*,[150] the principle of direct effect was implicitly referred to in respect of the ECJ's competence to declare a binding interpretation of European law:

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[146] *SpA Granital c. Amministrazione delle Finanze*: Corte cost. 5 giugno 1984, n. 170: *Giur. cost.* 1984, 1098. F. Capelli, "Una sentenza decisive sui rapporti fra CEE e leggi nazionali" *Dir. com. scambi. internaz.* 1984, 204; G. Sperduti, "Una sentenza innovativa della Corte costituzionale sul diritto comunitario" *Riv. dir. inter. priv. proc.* 1984, 263; M. Berri, "Composizione del contrasto tra Corte costituzionale e Corte di Giustizia delle comunità europee" *Giur. it.* 1984, I, 1521; P. Mori, "La recente giurisprudenza della Corte costituzionale sui rapporti fra diritto comunitario e diritto interno" *Riv. dir. internaz. priv. proc.* 1985, 773; P.A. Capotosti, "Questioni interpretative dell'attuale giurisprudenza costituzionale sui rapporti fra diritto interno e diritto comunitario" *Giur. cost.* 1987, I, 3810.

[147] L. Garlicki, "Chronique 2006: Pologne" (2006) XXII *Annuaire international de justice constitutionnelle* 841, at 852.

[148] *Dec. P 8/00*, 4 October 2000: OTK ZU 2000/6, Item 189; and *Dec. P 4/99*, 31 January 2001: OTK ZU 2001/1, Item 5.

[149] Mik (1998); W. Czapliński, "Akty prawne Wspólnot Europejskich w orzecznictwie Trybunału Sprawiedliwości [EC legal acts in the case-law of the ECJ]," in Kruk (ed.) (1997), at 188; and A. Wyrozumska, "Formy zapewnienia skuteczności prawu międzynarodowemu w porządku krajowym [Forms of assurance of effectiveness of international law in the national legal order]," in Kruk (ed.) (1997), at 193ff; Safjan (2001), CoE, at 151-152; Wójtowicz (2001), at 4; and C. Mik & M. Górka, "The Polish Courts as Courts of the European Union's Law," in B. Banaszkiewicz *et al*., *1 Jahr EU Mitgliedschaft: Erste Bilanz aus der Sicht der polnischen Höchstgerichte*, *EIF Working Paper* No. 15, Institut für Europäische Integrationsforschung, Österreichische Akademie der Wissenschaften, Wien (2005), 33, at 43:
<http://www.eif.oeaw.ac.at/downloads/workingpapers/wp15.pdf>. 12 January 2007.

[150] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 11.4.

> As the obligation to apply European law arises from – on the basis of constitutional authorisations – the ratified international agreements that are consistent with the Constitution, and that constitute for the Republic of Poland [obligations] binding upon [it under] international law (Art. 9 of the Constitution), it would be difficult to accept that independent judges (Art. 178 (1)) or judges of the Constitutional Tribunal (Art. 195(1)) who are bound with the provisions of the Constitution, does not embrace the constitutional obligation to apply European law that is binding upon the Republic of Poland. Such an obligation is a legal consequence of the ratification, in accordance with the Constitution (and on its basis), of international agreements concluded with the Member States of [the] EU. *As an element of these agreements, one finds the challenged EC Art. 234 [now Art. 267 TFEU] and the competence of ECJ to giving preliminary rulings concerning the answers to references and also to decide on the binding interpretation of European acts*. [Emphasis supplied.]

The acceptance by the CT of the direct effect of EU provisions in primary and secondary law may also be gleaned from its earlier statements on the petitioners' claim of the unconstitutionality of certain ECJ cases in particular as well as its line of case-law in general. The CT replied:[151] "Regardless of subjective elements in 'interpretation' of this 'line,' what naturally can lead to most diverse results, the assessment of the jurisdiction of any of the [Union's] organs is beyond the cognition of CT, precisely defined in Art. 188 of the Constitution."

Consequently, the CT[152] could not judicially evaluate the statements of the ECJ in judgements selectively quoted by the petitioners as well as the allegations of incoherence between judgements of the ECJ and Constitution Arts. 8(1) and 91(3) since: "the Constitutional Tribunal fully appreciates the importance of the European Court of Justice and its rulings in the functioning of the EC and the EU." The CT has thus clearly noted the principles developed by the ECJ – primacy or priority of application already having been discussed above – and appears to read Constitution Art. 91 as including interpretation of the international agreement and norms made by organs created under it (in this case, European primary and secondary law), and thereby accepting the principle of direct effect within constitutional limits: Constitution Art. 91 gives precedence to international agreements and laws made under them but such precedence is secured only for statutes.

The subsequent case, *Dec. P 37/05*,[153] dealt mainly with the priority of application of European primary and secondary law and concerned a conflict between the application of (directly effective) Art. 110(1) TFEU (then numbered Art. 90(1) EC) and a provision of a Polish statute. In highlighting the division of competences between the ECJ and national courts with the interpretation of European law being vested in the ECJ,[154] the CT noted, "while the application … shall be entrusted to a national court which, in a given case, shall be bound by the case-law of the ECJ." It accepted that, as well as being bound to apply domestic law directly, "a

[151] OTK ZU 2005/5A, Item 49, at para. 9.1.

[152] OTK ZU 2005/5A, Item 49, at para. 9.3.

[153] *Dec. P 37/05*, 19 December 2006: OTK ZU 2006/11A, Item 177; [2007] 3 CMLR 48, 1323.

[154] OTK ZU 2006/11A, Item 177, at paras. III.4.1. and III.4.2; [2007] 3 CMLR 48, 1323, at 1335 and 1336.

national court judge shall in addition be obliged to examine whether given facts of the case are subject to the norms of European regulation which are directly applicable [effective] in the territory of each Member State (see C-213/89 *Factortame*)."

Factortame[155] had dealt *inter alia* with the effective protection of EU rights before national courts according to Art. 4(3) TEU (ex-Art. 10 EC), based on their (putative) direct effect.[156] Although *Factortame* dealt with the possible direct effect of Treaty Articles, the CT clearly regards the principle as equally applicable to provisions of European secondary legislation. The CT in *Dec. P 37/05* evidently admonishes ordinary and administrative courts to disapply domestic statutes conflicting with directly effective norms of European law:[157]

> However, in certain situations relating to the conflict of a statute with European law, the competence of a court to refer a question of law becomes, in a sense, limited by virtue of both the conflicting rule contained in art. 91 para. 2 of the Constitution, and the principles of applying European law, in particular, the principle of direct application [effect] of European law in the event of a conflict with a statute.

In this way, it is clear that the principle of direct effect has its place in the Polish legal order through a combination of Constitution Art. 91(2) and the developments under ECJ case-law. Nevertheless, this view of the CT confirms the limitation of applicability of direct effect vis-à-vis constitutional provisions, a matter discussed in more detail below.[158] It also reflects the approach of the FCC in *Kloppenburg*[159] wherein it had accepted the possibility of direct effect of European law and its priority over conflicting, sub-constitutional law.

4. References to the European Court of Justice

Interestingly, the CT has accepted the existence of the relationship of co-operation between the ECJ and national courts, as propounded by the German Court in *Maastricht*. In the recent ruling in *Dec. Kp 3/08*,[160] the CT stated:[161] "The preliminary ruling procedure constitutes a fundamental mechanism of European Union law aimed at ensuring uniform interpretation and application of that law in all the Member States and enabling cooperation between

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[155] Case C-213/89 *R. v. Secretary of State for Transport, ex parte Factortame Ltd*. [1990] ECR I-2433.

[156] A.F. Tatham, "The Sovereignty of Parliament after Factortame" [1993] EuR 188; and on Art. 4(3) TEU (ex-Art. 10 EC) and national courts, see generally J. Temple Lang, "The Duties of National Courts under Community Constitutional Law" (1997) 22 EL Rev. 3.

[157] *Dec. P 37/05*, 19 December 2006: OTK ZU 2006/11A, Item 177, at para. III.4.2; [2007] 3 CMLR 48, 1323, at 1338.

[158] See below at Chapter Five, points E.2.c.-d.

[159] *Kloppenburg*, 8 April 1987, 2 BvR 687/85: BVerfGE 75, 223 (1987); [1988] 3 CMLR 1.

[160] *Dec. Kp 3/08*, 18 February 2009: OTK ZU 2009/2/A, Item 9.

[161] *Dec. Kp 3/08*, 18 February 2009: OTK ZU 2009/2/A, Item 9, at para. III.2.1.

national courts and the Court of Justice." Earlier in *Dec. P 37/05*, the CT spelled out this relationship more clearly, with the Art. 267 TFEU (ex-Art. 234 EC) reference procedure constituting a fundamental mechanism of legal co-operation between national courts and the ECJ – the interpretation of European law resting with the latter, the application with the former:[162]

> The ECJ contributes to the settlement of a dispute, yet does not adjudicate in a particular case. The Court of Justice has often emphasised that the procedure is a form of "judicial cooperation", by means of which the national court and the ECJ, in accordance with the competencies vested in either of them, directly and mutually contribute to reaching a particular decision (see *Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (16/65) [1965] E.C.R. 877; [1966] C.M.L.R. 172).
>
> One has to, however, bear in mind that, pursuant to the principle of loyalty, as expressed in Article 10 of the EC Treaty, the preliminary ruling shall be binding for the referring court, and it shall be the obligation of that court to take the ruling into account while considering the case on the merits.

Clearly the decision to refer under Art. 267 TFEU is taken by an independent court or tribunal, acting when it has doubts about the validity or interpretation of European law.[163] Moreover the referring court also carries the responsibility[164] to include the ECJ's answers in its ruling – failure to do so amounts to an infringement of European law and can, so the CT noted in *Dec. P 37/05*, constitute the basis for an Art. 258 TFEU (ex-Art. 226 EC) infringement procedure[165] by the Commission against the Member State as well as the possibility of state liability according to *Köbler*.[166]

In the *2003 Accession Treaty case*, the CT was at pains[167] to distinguish between Art. 267 TFEU (ex-Art. 234 EC) and Constitution Arts. 188(1) and 190(1) – and thus avoid any pre-*Simmenthal* dual references to the ECJ and the CT. It stated:[168]

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[162] *Dec. P 37/05*, 19 December 2006: OTK ZU 2006/11A, Item 177, at para. III.4.1; [2007] 3 CMLR 48, 1323, at 1336.

[163] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 10.3.

[164] *Dec. P 37/05*, 19 December 2006: OTK ZU 2006/11A, Item 177, at para. III.4.1; [2007] 3 CMLR 48, 1323, at 1336.

[165] Art. 258 TFEU: "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

[166] Case 224/01 *Köbler v. Austria* [2003] ECR I-10239.

[167] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 11.3.

[168] OTK ZU 2005/5A, Item 49, at para. 11.3.

> These are two separate things: the establishment of validity and interpretation of European law provisions made within the frames of Art 234 EC by the ECJ and Court of First Instance; and the comparison of the content of statutes and international agreements with the Constitution and checking of its conformity by the Constitutional Tribunal's adjudication within the scope of Art. 188(1) with the results defined in Art. 190(1) of the Constitution. The actions undertaken in these jurisdictions do not preclude each other and do not conflict with each other.

The CT further noted that it still had the possibility to review the constitutionality of a statute authorising ratification of an international agreement including those as defined in Constitution Arts. 90(1) and 91(3). Moreover, the CT did not agree with the petitioners that Art. 267 TFEU (ex-Art. 234 EC) was a threat to its competences and narrowed them down under Constitution Art. 188. The CT also admitted the possibility of its making a reference to the ECJ:[169]

> If the Constitutional Tribunal would decide to bring a reference to the ECJ (or Court of First Instance) that will concern the validity or interpretation of a European law act (provision), then in such a situation – first – the Constitutional Tribunal shall do so within the realisation of judicial competences determined in Art. 188 of the Constitution (therefore in accordance with this provision); and – secondly – only in the cases when, according to the Constitution, the Constitutional Tribunal is to decide on the application of European law.

In this way, having made very clear statements on the constitutionality and use of the ECJ reference procedure, the CT follows the FCC[170] in admitting its ability to refer questions but has yet to consider it necessary to exercise this part of its new-found jurisdiction.

More recently, the CT was called upon in *Dec. Kp 3/08*[171] to determine whether granting all Polish courts the competence to refer questions to the ECJ for a preliminary ruling, with regard to the validity and interpretation of acts from the field of police and judicial co-operation in criminal matters, as referred to in then Art. 35(1) TEU (since repealed by the Lisbon Treaty), might constitute the source of undue delay in the hearing of cases by courts, and at the same time infringe Constitution Art. 45(1) which, as will be seen in the next section, includes the right to a hearing without undue delay. The CT ruled that:[172]

> [I]n the context of the indicated provision of the Constitution, which constitutes the higher-level norm for review in the present case, the preliminary ruling procedure regulated in the EC Treaty and the EU Treaty should be assessed in an analogical way to the procedures … which consist in referring questions to the Supreme Court, the Supreme Administrative Court or the Constitutional Tribunal by Polish courts. Since Poland's accession to the European Union, the EU law has been part of the current

[169] OTK ZU 2005/5A, Item 49, at para. 11.1.

[170] *Internationale Handelsgesellchaft ("Solange I")*, BVerfG 21 Mai 1974: BVerfGE 37, 271; [1974] CMLR 540.

[171] *Dec. Kp 3/08*, 18 February 2009: OTK ZU 2009/2/A, Item 9.

[172] *Dec. Kp 3/08*, 18 February 2009: OTK ZU 2009/2/A, Item 9, para. III.4.2.

> legal system in Poland. Ratifying the Treaty of Accession, Poland accepted the separation of functions within the framework of the system comprising the institutions of the European Communities and the European Union. What remains an element of that separation is the jurisdiction of the Court of Justice of the European Communities to interpret Community (EU) law and ensure the uniformity of that interpretation (cf. [Dec.] *K 18/04*, [*2003 Accession Treaty*]).

The CT continued by noting that the structure of questions referred for a preliminary ruling, as referred to in then Art. 35 TEU, facilitated giving proper rulings by national courts, which took into account the interpretation and assessment of validity of EU legal acts provided by the ECJ. Avoiding irregularities before rulings became final, and were referred for execution, was of special significance in the realm of criminal law, as making an erroneous judgment by a court often brings about grievous consequences which are difficult to remedy. Therefore, the CT stated that commencing a procedure aimed at eliminating doubts as to the interpretation or validity of an EU legal act may not be regarded as a cause of delay which would be unjustified within the meaning of Constitution Art. 45(1). While applicable then only to matters falling within then Art. 35 TEU, it may be argued that this indicates the general positive approach of the CT to the preliminary reference procedure.

a. Lawful judge

The German concept of lawful judge is not precisely replicated in Poland (the situation, as will be recalled, is the same in Hungarian constitutional law). Nevertheless, it is possible to determine the constitutional principle of the right to court[173] as the Polish principle most closely approximating to the lawful judge principle: this viewpoint is supported by the case-law of the CT.

As with the basic constitutional principles highlighted earlier in this Chapter,[174] the constitutional right to court was initially developed by the CT in its rule-of-law jurisprudence under Art. 1 of the 1952 Constitution (as amended).[175] Under the 1997 Constitution, the right is expressly provided for under Art. 45(1): "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court." This provision is complemented by Art. 77(2) which reads: "Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights."

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[173] B. Banaszak, *Outline of Polish Constitutional Law*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław (2005), at 125-126. For a recent study, see A. Kubiak, *Konstytucyjna zasada prawa do sadu w swietle orzecznictwa Trybunału Konstytucyjnego* [*The Constitutional Guarantee of the Right to Court in the Light of the Constitutional Tribunal's Jurisprudence*], Wydawnictwo Uniwersytetu Łódzkiego, Łódz (2006).

[174] See above at Chapter Five, points B.2.-4.

[175] I. Kondak, " 'The Right to Court' in the Polish Constitution," in M. Wyrzykowski (ed.), *Constitutional Essays*, Institute of Public Affairs, Warsaw (1999), 221, at 222-223; and Z. Czeszejko-Sochacki, "Prawo do sądu w polskiej konstytucji [The Right to Court in the Polish Constitution]" 1997/11-12 PiP 86-105.

The right to a court encompasses the following:[176] (1) the right to access to a court, i.e., the right to commence proceedings before a court (an authority possessing certain characteristics, viz., impartial and independent; (2) the right to a fair and public trial;[177] (3) the right to a court's decision, i.e., to be granted s binding ruling in a given case by a court; and (4) the right to have cases examined by the authorities with an adequate organisational structure and position. It follows from these four criteria[178] that the individual's right to a court is exercised by the entirety of the principles which lead to a hearing that is fair and proper with regard to the subject matter as well as carried out within a reasonable time.[179]

Under the (amended) 1952 Constitution, the CT had decided in *Dec. K 8/91*[180] that the right to court was an element of the rule of law principle. It held the citizens' right to access to court in order to allow them to protect their rights before an independent authority bound by law was one of the fundamental foundations of a democratic state under the rule of law. Everyone's right to a fair and public hearing (whether civil, criminal or administrative[181]) derived from the rule of law principle in Art. 1 of the (amended) 1952 Constitution: as an essential component of this principle, there was no room for a restricted interpretation of Art. 1 with respect to the right to court. Moreover, as held in *Dec. K 21/96*[182] the purpose of this right is to ensure an individual protection against the arbitrariness of any state organ; the principle also provides, according to *Dec. K 3/91*,[183] for the presumption of access to a court, irrespective of the absence of a statutory rule on the particular matter.

The CT further emphasised, in *Dec. W 14/94*,[184] that: "the right to court may not be conceived only in a formal manner, as access to court in general, but it demands legally effective protection by a court." Connected to this problem – under the requirement of a competent court – was the need to have a court possessing full jurisdiction over the merits of the case: a competent court is therefore one that is able to consider any point of law or fact raised by one of the parties to the proceedings.[185]

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[176] *Dec. SK 12/99*, 10 July 2000: OTK ZU 2000/5, Item 143; and *Dec. SK 7/06*, 24 October 2007: OTK ZU 2007/9/A, Item 108.

[177] The CT has stated that: "a fair judicial procedure should ensure parties the procedural entitlements which would be adequate to the object of pending proceedings": *Dec. SK 5/02*, 11 June 2002: OTK ZU 2002/4/A, Item 41, at 554; and also that: "in accordance with the requirements of a fair trial, the parties to proceedings must have a real possibility of presenting their arguments, and a court is obliged to consider them": *Dec. SK 32/01*, 13 May 2002: OTK ZU 2002/3/A, Item 31, at 409.

[178] *Dec. Kp 3/08*, 18 February 2009: OTK ZU 2009/2/A, Item 9, at para. III.3.1.

[179] *Dec. SK 19/98*, 16 March 1999: OTK ZU 1999/3, Item 36.

[180] *Dec. K 8/91*, 7 January 1992: OTK ZU 1992, Item 5; OTK 1992, I, 76.

[181] L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich ochrana prawna* [*Fundamental Rights of the Individual and their Judicial Protection*], Wydaw. Sejmowe, Warszawa (1997), at 186-234.

[182] *Dec. K 21/96*, 24 June 1997: OTK ZU 1997/2, Item 23.

[183] *Dec. K 3/91*, 25 February 1992: OTK ZU 1992, Item 1.

[184] *Dec. W 14/94*, 25 January 1995: OTK ZU 1995, Item 19.

[185] Kondak (1999), at 233.

The right to appeal (or to a review) was only expressly recognised in the 1997 Constitution under Art. 78: "Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute;" and Art. 176(1): "Court proceedings shall have at least two stages." It is however clear, from its role and jurisdiction, that these provisions do not apply to the CT.[186]

How then does this discussion impact upon the CT applying a lawful judge-type principle where a Polish court refuses to make a reference to the ECJ under Art. 267 TFEU? Through a reading of the Constitution, it might be possible for the CT to deduce such principle: on the one hand, it could refer to Art. 9 (that Poland "shall respect international law binding upon it") and Art. 91 on the direct application and precedence over statutes of international treaties which together make the TFEU including Art. 267 TFEU (and its interpretation by the ECJ) binding on Polish courts; and, on the other, the CT could continue to argue that the right to court contained in Arts. 45(1) and 77(2) requires that a claimant is not denied her or his "constitutional right" to make a reference to the ECJ unless refused by the national court on the grounds set out in *CILFIT* (including *acte clair* and *acte éclairé*).[187] Taking both points together would allow for the CT to follow the German model of lawful judge in respect of ECJ references.

b. ECJ ruling priority

From the academic point of view, it was a moot point before accession as to whether or not an express legal (constitutional) provision should be introduced into the Polish system which would require domestic courts to make preliminary references to the ECJ under the Art. 267 TFEU (ex-Art. 234 EC) procedure.[188]

Since no modification was attempted either to the 1997 Constitution or to the 1997 Constitutional Tribunal Act, the solution to these points has lain with the CT which has consequently filled the gaps through its rulings. In the *2003 Accession Treaty case*, *Dec. K*

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[186] Nevertheless, even before the entry into force of the new Constitution, the CT had already determined in *Dec. K 17/92* (29 September 1993: OTK ZU 1993, Item 33; OTK 1993, II, 297) that the possibility to appeal against the judgement of a court to a higher instance was part of the right to court and thereby the rule of law principle.

[187] Case 283/81 *Srl CILFIT v. Ministero della Sanità* [1982] ECR 3415. Under the *acte clair* doctrine, the highest court is not obliged to refer either if the question has not yet been answered in the case law of the ECJ, but the answer to that question is beyond all doubt. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious both to the courts of the other Member States and to the ECJ. As regards *acte éclairé*, the highest court is not under an obligation to refer if the question that has arisen has already been answered in an earlier judgment of the ECJ.

[188] In favour, e.g., Mik (1998), PiP, at 36-37; and against J. Skrzydło, "Konieczne zmiany w prawie polskim w perspektywie współpracy polskich z Trybunałem Wspólnot (Na podstawie art. 177 Traktatu WE) [Changes in Polish law needed in view of Polish courts' co-operation with the ECJ (On the basis of EC Art. 177)]," (1998) PiP August/1998, 89, at 91-92; and Barcz (1997-1998), at 34.

18/04,[189] the CT admitted[190] that it did not have the jurisdiction to assess directly the rulings of the ECJ – whether on individually or through a line of jurisprudence – since this was beyond its competence as defined in Constitution, Art. 188:[191] "[The] Constitutional Tribunal fully appreciates the importance of the ECJ and its judgments in the functioning of the EC and the EU." The phrasing of the CT is redolent of "deconstitutionalising" ECJ rulings and removing them from direct consideration by the CT, a practical application of the "two distinct yet co-ordinated legal systems" theme which pervades the CT's reasoning in the case; it might also be regarded as some form of implicit recognition of the priority of ECJ rulings within the ambit of the application of European law.

On the alleged unconstitutionality of ECJ references,[192] the CT noted that such references would only be made by domestic courts and tribunals that had a duty to apply European law.[193] The field of application of European law had been determined by the scope of the transfer of competences on the basis of Constitution Arts. 90(1) and 91(3). On the basis of its exclusive competence (along with the respective jurisdiction of the CFI), the ECJ ruled on the validity and interpretation of European law. According to the CT,[194] this interpretation occurred within the functions and competences delegated by the Member States to the EU and correlated with the principle of subsidiarity that determined the operation of EU institutions. The CT reiterated this position in *Dec. P 37/05*[195] when it stated:[196]

> Adjudicating by the ECJ within the preliminary ruling procedure constitutes an interlocutory action, which stays main proceedings before a national court, the latter being solely responsible for the delivery of a decision in the matter pending before it. The sole competence of the ECJ in such a case is to elucidate the European law provision or adjudicate upon the binding force thereof.... The aim of the preliminary ruling procedure is to ensure uniform application of European law by national courts of all Member States.

Returning to its *2003 Accession Treaty* decision, the CT emphasised[197] that the ECJ interpretation of European law was based on the assumption of mutual loyalty between the EU institutions and the Member States.

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[189] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49.

[190] OTK ZU 2005/5A, Item 49, at para. 9.1.

[191] OTK ZU 2005/5A, Item 49, at para. 9.3.

[192] OTK ZU 2005/5A, Item 49, at para. 10.

[193] OTK ZU 2005/5A, Item 49, at para. 10.2.

[194] OTK ZU 2005/5A, Item 49, at para. 10.2.

[195] *Dec. P 37/05*, 19 December 2006: OTK ZU 2006/11A, Item 177; [2007] 3 CMLR 48, 1323.

[196] OTK ZU 2006/11A, Item 177, at para. III.4.1; [2007] 3 CMLR 48, 1323, at 1335.

[197] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 10.2.

E. LIMITS TO NATIONAL COURT ACCEPTANCE

1. Introduction

The CT – like the FCC[198] – has been forthright in its relationship with the EC/EU legal order from the very start of its membership. The constitutionalisation of the European legal order, as created and managed by the ECJ, thus remains in its eyes an essentially contested polity wherein the CT is called upon to play the role of guardian of the national constitution. In the cases so far, the CT has expressed that domestic constitutional limits may exist with respect to deepening integration but it has so far held back from entering into internecine judicial conflict in realising its own principles.

2. Essential core as limitation to integration

As already noted,[199] Constitution Art. 90(1) allows for the transfer (of the exercise) of *certain* powers of the State to an international organisation. With this clear limitation, as with Hungary, the CT maintains its role to be able to review the extent to which EU law affects the basic principles of the Constitution.

a. Pre-accession

For the determination of these irrevocable values of the Constitution, it was suggested before accession that reference could be had to the Preamble of the Constitution[200] and then to the principles forming part of the essential core of sovereignty,[201] as previously outlined.[202] Biernat[203] noted two types of constitutional limits on Polish accession to the EU. First, those constitutional rules that were essential to the very identity of the State[204] and its most important characteristics. As mentioned earlier in this Chapter, the debate focused on which

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[198] See, e.g., *National Implementation of EEC Regulations*, 5 Juli 1967, 2 BvL 29/63: BVerfGE 22, 134, at 146-152; *Steinike & Weinlig*, 25 Juli 1979, 2 BvL 6/77: BVerfGE 52, 187; *Internationale Handelsgesellschaft*, 29 Mai 1974, 2 BvL 52/71: BVerf GE 37, 271, at 279; [1974] 2 CMLR 540, at 550; and *Eurocontrol I*, 23 Juni 1981, 2 BvR 1107, 1124/77 und 195/79: BVerfGE 58, 1, at 35ff.

[199] See above at Chapter Five, point C.2.

[200] Mik in Mik (ed.) (1997), at 154.

[201] S. Biernat, "Constitutional Aspects of Poland's Future Membership in the European Union," (1998) 36 AöR 398, at 405ff; and K. Wójtowicz, "Verfassungsmäßige Grundlagen des Beitritts Polens zur Europäischen Union," in Maciejewski (1999), at 119.

[202] See above at Chapter Five, point C.

[203] Biernat (1998), at 406.

[204] Constitution Art. 1: "The Republic of Poland shall be the common good of all its citizens."

provisions of Chapter I of the Constitution formed the inviolable limits: for Biernat, it was obvious that these would include Constitution Arts. 2,[205] 3,[206] 5[207] and 20[208] that form the basic characteristics of the Polish system and which could not be violated as a result of accession. (The present author would also add to such list Constitution Art. 10 on the separation of powers.[209])

b. 2003 Accession Treaty case

The recognition of the areas of national sovereignty which would remain inviolate as well as the monitoring of the borderline between powers transferred, powers shared, and powers retained at the domestic level, formed the very essence of the CT's eventual ruling in *Dec. K 18/04* on the constitutionality of the 2003 Accession Treaty.[210]

This case was initiated by petitions from three different groups of *Sejm* deputies claiming that various provisions of the 2003 Treaty as well as of the EC and EU Treaties (which were required to be implemented in Poland by the terms of the 2003 Treaty) were contrary to the principles of sovereignty of the Polish Nation (e.g., Constitution, Preamble and Arts. 1, 2, 4, 5, 6 and 10) and of the supremacy of the Constitution over all other legal acts existing in the Polish legal order (Constitution Art. 8(1)). The CT ultimately ruled that the Accession Treaty as a whole and particular provisions of the various Treaties challenged by the petitioners did not infringe the Constitution. However, while acknowledging the multi-component nature of the Polish legal order (particularly in respect of the situation post-EU accession), the CT nevertheless determined that the Constitution remained the supreme law of the land according to Constitution Art. 8(1).

The CT[211] first observed the "constitutional assumption, that on the territory of the Republic of Poland, next to provisions enacted by the national legislature, the regulations

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[205] Constitution Art. 2: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice."

[206] Constitution Art. 3: "The Republic of Poland shall be a unitary State."

[207] Constitution Art. 5: "The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development."

[208] Constitution Art. 20: "A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland."

[209] Constitution Art. 10: "(1) The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers. (2) Legislative power shall be vested in the *Sejm* and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals."

[210] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49.

[211] OTK ZU 2005/5A, Item 49, at para. 2.1.

created outside the system of national (Polish) legislative bodies are binding." In accepting the multi-component nature of the domestic legal order, the CT added that European law was not totally external law since national bodies also participated in the process of its creation (i.e., through the making of secondary legislation in the Council of Ministers) and concluded:[212] "Therefore in the territory of Poland there are both in force [binding] 'sub-systems' of legal regulations that originate from various legislative centres. They should co-exist on the basis of 'mutual friendly' interpretation and co-operative co-application. Those circumstances, from another perspective, could give rise to a potential conflict of norms and the ultimate supremacy of one of the distinct sub-systems."

Thus, according to Constitution Arts. 9, 87(1) and 90-91 – the CT added – the Constitution recognised the multi-component structure provisions legally binding within Poland and provided a special procedure for its application: this special procedure had a close affinity to the one for constitutional amendment under Constitution Art. 235.[213] The multi-component structure of law therefore occurred by virtue of the Constitution and could only be revoked following the Art. 235 constitutional amendment procedure.[214]

The issue of transfer of competences in respect of "certain matters" under Constitution Art. 90(1) and its relation to national sovereignty has already been discussed.[215] In its 2004 ruling, the CT expressly announced that the multi-component structure ultimately gave way to the precedence of the 1997 Constitution:[216]

> The priority of application of international agreements (as guaranteed in Art. 91(2)) ratified on the basis of authorisation by statute or nationwide referendum (according to Art. 90(3)), including agreements transferring competences 'in relation to certain matters' – over the provisions of statutes that cannot be co-applied – does not lead directly lead to the acceptance of the analogous recognition of the priority of these agreements over the provisions of the Constitution. The Constitution is still then – because of its special legal force – 'the supreme law of the Republic of Poland' in relation to all international agreements binding upon the Republic of Poland. This also applies to ratified international agreements transferring competences 'in relation to certain matter.' Therefore, by virtue of the legal power of the supremacy of the Constitution as expressed in Art. 8(1) it enjoys the priority of application and of binding force on the territory of the Republic of Poland.

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[212] OTK ZU 2005/5A, Item 49, at para 2.2.

[213] A. Wyrozumska, "Some Comments on the Judgments of the Polish Constitutional Tribunal on the EU Accession Treaty and on the Implementation of the European Arrest Warrant" (2004-2005) XXVII Pol.Ybk. Intl. L 7, at 19.

[214] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 2.2.

[215] See above at Chapter Five, point C.2.

[216] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 4.2.

Evidently, such position on domestic constitutional primacy conflicts with that put forward by the ECJ on the supremacy of European law.[217] Indeed the CT acknowledged the ECJ case-law in general on its reading of European law supremacy but nevertheless reiterated the position of constitutional primacy:[218]

> The principle of supremacy of European law in relation to national law of Member States is strongly expressed by the case-law of the European Court of Justice.
>
> This state of affairs has been justified by the aims of European integration and the need to create a common European legal framework. This principle undoubtedly confirms the aspirations for guaranteeing the uniform application and execution of European law. However, it is not exclusively this principle that determines the final decisions of sovereign Member States in a situation of a hypothetical conflict between the [Union] legal order and a constitutional provision. In the Polish legal system, such decisions shall always be taken with consideration of the content of Art. 8(1) of the Constitution. According to it, the Constitution is still the supreme law of the Republic of Poland.

So far, this analysis has indicated that in the event of an irremovable conflict between the Polish Constitution and EU law, Constitution Art. 8(1) commands the CT to give precedence to the Constitution. While such conflicts are in fact relatively uncommon – see the number of cases before the FCC in Chapter Three – the CT remained heavily influenced by the FCC (especially in *Solange I*, *Solange II* and the *Banana Market* cases) in ruling out the priority of application of European law in view of its impermissible infringements of the protection of national constitutional rights:[219] "Such a conflict cannot, in any event, be resolved in the Polish legal system by the recognition of the supremacy of a European provision over a constitutional norm. Moreover, it cannot lead to the situation whereby the constitutional norm will lose its binding force and will be substituted by a European norm, or to the restriction of its application only to the area that will not be covered by the European legal rule."

In such an event, the CT stated, it would be for the Polish legislator to decide either to amend the Constitution, or to have the European rule modified, or ultimately to decide on Polish withdrawal from the Union. Such decision would have to be taken by the Nation as sovereign, i.e., the Polish Nation or a state organ authorised by the Constitution to represent the Nation. The CT then turned to consider one example of how the essential core of sovereignty provided a limitation on the priority of application of European law in Poland:[220]

> The norms of the Constitution concerning the rights and freedoms of individuals indicate the minimum and unsurpassable threshold that cannot be lowered or questioned because of the introduction of European provisions. The Constitution has

[217] See above at Chapter One, point A.

[218] OTK ZU 2005/5A, Item 49, at para. 7.

[219] OTK ZU 2005/5A, Item 49, at para. 6.4.

[220] OTK ZU 2005/5A, Item 49, at para. 6.4.

> here a guarantee role from the point of view of the protection of rights and freedoms clearly specified in it; the role is exercised with respect to all subjects active within the sphere of its application. The principle of the interpretation of domestic law in a manner "sympathetic to European law," as formulated by the Constitutional Tribunal in its case-law, has its limits. In no case, can it lead to results that will be in conflict with the "clear tone" [express wording] of constitutional norms or impossible to reconcile with the minimum guarantee functions realised by the Constitution.

The CT concluded on this point that it did not recognise that possibility of questioning the validity of a binding constitutional norm because of the mere fact of the introduction into the European legal system of a European legal provision that would be in conflict with the Constitution. While individual rights and freedoms are used to exemplify the restrictions on the priority of European law vis-à-vis domestic constitutional norms, such restrictions are arguably embodied in other principles encompassed by the essential core of sovereignty (democracy, rule of law and separation of powers).

The CT left open the possibility that primary European law could be submitted to control before it, *e.g*., whether the CT could measure a Treaty provision against national fundamental rights. The Constitution here does not exclude the jurisdiction of the CT.[221] According to Constitution Art. 188, the CT decides on the conformity of international treaties with the Constitution. The theoretical possibility therefore remains of basing a constitutional complaint on the contradiction of a provision of European primary law with the Constitution.[222] The actual likelihood of such a development is however seemingly remote.

Barcz had argued that[223] the democratic legitimisation of the Accession Treaty, similar to a constitutional amendment, would invest it with an exceptional "power of existence." His contention then was that the constitutional act of integration represented an approval of the Constitution under the requirement that EU law and the basic concept of the Polish Constitution would agree on the same value concepts.[224] For that reason, the possibility of the examination of primary European law had basically to be limited. Further it was considered that the mutuality of the values and aims could also represent, in practice, a good basis for the harmonising solution of potential tension between constitutional provisions and European law.[225] Although EC/EU Treaties would formally enjoy a position between the Constitution and ordinary statutes, using the mutuality solution, there would only exist the exceptional possibility of conflict

[221] Safjan (2001), CoE at 145.

[222] Wójtowicz (1998), 89; Barcz (1998), PiP, at 16; Biernat (1999), Toruń, at 186.

[223] J. Barcz, "Konstytucyjnoprawne problemy stosowania prawa Unii Europejskiej w Polsce w świetle dotychczasowych doświadczeń państw członkowskich [Constitutional problems of application of EU's Law in Poland in the light of recent experiences of Member States]," in Kruk (1997), at 217ff.

[224] K. Działocha, "Artykuł 91 [Article 91]," in L. Garlicki (ed.), *Konstytucja Rzeczpospolitej Polskiej. Komentarz* [*The Constitution of the Republic of Poland. Commentary*], Wydawnictwo Sejmowe , Warszawa (1999), at 10.

[225] M. Jankowska-Gilberg, "Verfassungsrechtliche Grundlagen des Beitritts und der Mitgleidschaft Polens in der Europäischen Union" [2003] EuR 417, at 430-431.

between the two legal orders. Such views were subsequently confirmed by the CT in its *2003 Accession Treaty* ruling in which it observed:[226]

> The concept and the model of European law have created a new situation when, at the same time and next to each other, autonomous legal systems are legally binding [in force]. Their interaction cannot be fully described by means of the traditional concepts of monism and dualism in the system: internal law – external law. The occurrence of the relative autonomy of the legal systems, based on domestic principles of hierarchy, does not preclude their interaction. Neither does it eliminate the possibility of the occurrence of conflicts between provisions of European law and provisions of the Constitution. This last situation will occur when one will find an irremovable conflict between the constitutional provision and a provision of European law, and moreover this conflict will still be irremovable when using the interpretation respecting the relative autonomy of European law and national law. One cannot preclude such situation, but it can occur only exceptionally because of the abovementioned shared values and principles [between the Constitution and the EU].

Concerns had also been raised in the pre-accession period as to whether or not European secondary legislation (i.e., Regulations and Directives) might be subject to constitutional review. While the issue of Directives will be dealt with more fully in the next section, the issue of the possible constitutional review of Regulations was mooted by authors and it was at least arguable that such review was possible.[227]

The wording of Constitution Art. 91(3)[228] provides a basis for immediate application of European secondary law in Poland but, at the same time, it left several questions open: *e.g.*, as to the position of the provisions of European secondary law in the domestic system of sources of law since Constitution Art. 87 does not mention such European law as a source of law in Poland and was rather viewed as belonging to an autonomous legal order. [229] As later approved by the CT in the *2003 Accession Treaty case*,[230] European secondary law is based on the constitutive acts of the EU and their legality, binding nature and direct applicability/direct

[226] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 6.3.

[227] S. Biernat, "Miejsce prawa pochodnego Wspólnoty Europejskiej w systemie konstytucyjnym RP [The Place of derived law of the EU in the Polish constitutional system]," in Mik (ed.) (1997), at 182; K. Wójtowicz, "Skutki przystąpienia Polski do Unii Europejskiej dla Sądów i Trybunału Konstytucjnego [The Consequences of Polish EU Accession for the courts and the Constitutional Tribunal]," in Z. Witkowski (ed.), *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej* [*Entry into force of the new Polish Constitution*], Wydawnictwo UMK, Toruń (1998), at 89; and Safjan, (2001), CoE, at 146.

[228] In respect of European secondary legislation, Constitution Art. 91(3) states: "If a treaty, 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."

[229] Wójtowicz (1998), Toruń, at 86.

[230] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49.

effect are defined according to these acts. They function in the area where Polish state authority has divested itself of its legislative competences on behalf of the [EU] organs.[231]

In addition, there is the issue of the competence of the CT in relation to the provisions of European secondary legislation. Constitution Art. 188 does not provide for such review control since Regulations and Directives are neither treaties under para. 1 nor are they qualified as a set of decrees issued by the central organs of state under para. 3.[232]

Nevertheless, there might be the possibility of a challenge to a Regulation[233] under Constitution Art. 79 which allows a constitutional complaint against a statute or other normative act violating constitutionally guaranteed rights and freedoms. There was the further possibility of control over a provision of European secondary legislation through a legal inquiry, directed to the CT, by a court judging a specific case. According to Constitution Art. 193, any Polish court can refer a question of law to the CT as to conformity of a "normative act." However, it was arguable as to whether or not European secondary law could not be regarded as "normative acts" falling within the scope of either Constitution Art. 79 or Art. 193.[234]

But Barcz advocated the theory that a normative act was every act which was applicable in Poland:[235] consequently, the CT – in order to satisfy the duties which European law imposed – would have to limit the exercise of its review competences against European law *vis-à-vis* the examination of the infringement of the content of the essential core of sovereignty. Then it would have to determine that its intervention was no longer necessary as long as fundamental rights in the EU were sufficiently protected, thus following the German example.[236] This interpretation would clearly not be fully compliant with European law,

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[231] This view was challenged by Mik who submitted that the institutional (secondary) law belonged by the force of the ratified international treaty to the national legal order. It thereby became a source of Polish law despite the absence of clear wording to that effect in Constitution Art. 87: Mik in Mik (ed.) (1997), at 159. Such a view was open to debate on the grounds that it contradicted the concept of the autonomy of the EU legal order and led as well to the undermining of the principle of the exclusive jurisdiction of the ECJ: Safjan (2001), CoE, at 148-149.

[232] Safjan (2001), CoE, at 146-147.

[233] T. Jaroszyński, "Rozporządzenie wspólnotowe jako przedmiot skargi konstytucyjnej [EC Regulation as a subject of the constitutional complaint]" *Europejski Przegląd Sądowy*, kwiecień 2007, 26, at 27-30; S. Biernat, "Constitutional Aspects of Poland's Future Membership in the European Union" (1998) XXXVI/4 *Archiv des Völkerrechts* 398, at 422.

[234] Jaroszyński (2007), at 31; Działocha, in Garlicki (ed.) (1999), at 9; Barcz, in Kruk (ed.) (1997), at 221.

[235] With this interpretation, the decisions of the CT ought to be compatible: Barcz (1998) PiP, at 16; A. Wasilewski, "Przedstawianie pytań prawnych Trybunałowi Konstytucyjnemu przez sądy (art. 193 Konstytucji RP) [Submitting references to the Constitutional Tribunal by courts (Art. 193 of the Constitution of the Republic of Poland]" (1999) PiP 8/1999, 25, at 30. In fact, Garlicki has noted (L. Garlicki, *Polskie prawo konstytucyjne* [*Polish Constitutional Law*], 5th ed., Liber, Warszawa (2001), at Item 349) that the CT proceeds from a material concept of normative acts. According to this understanding, a normative act is every legal act regardless of its designation, which contains legal norms, therefore a general binding rule, that is addressed to an indeterminate number of persons: cf. *Dec. U 22/97*, 24 March 1998: OTK ZU 1998/2, Item 16.

[236] Jaroszyński (2007), at 32; and S. Biernat, "Czy konieczne są zmiany w Konstytucji przed przystąpieniem Polski do Unii Europejskiej?," in J. Barcza & S. Biernat (eds.), *Czy zmieniać Konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej*, Instytut Spraw Publicznych, Warszawa (2002), 41, at 65.

according to the interpretations of the ECJ stating that European law enjoys priority even over the Constitution.[237]

In fact, this is what the CT ultimately decided with respect to protecting the essential core of the Constitution. Consequently, European secondary law – passed within the boundaries of the conferred powers provided for under the Treaties – was binding on the Member States but only up to a point. In *Dec. K 18/04* on the 2003 Accession Treaty, the CT ruled that the EU and its institutions could only act within the framework of competences indicated in the provisions of the Treaties:[238] "The Nation, by the acceptance of the Constitution in the referendum, has agreed to the possibility of the Republic of Poland being bound by the law passed by an international organisation or international organ, thus law other than treaty law. This happens within the boundaries [scope] provided for in the ratified international agreements." Since the principle of the sovereignty of the Nation occupied the place of primacy in Polish constitutional law,[239] the CT took the view that – [240]

> neither Art. 90(1) nor Art. 91(3) can constitute the basis for the delegation to an international organisation (or its organ) the authorisation to pass a law or make a decision that would contradict the provisions of the Constitution of the Republic of Poland. In particular, the mentioned provisions cannot form the basis for the delegation of competences that, as a result of delegation, will lead to the situation that the Republic of Poland would no longer function as a sovereign and democratic State. In this matter, the view of the Constitutional Tribunal is similar (convergent) as a rule with the view of the Federal Constitutional Court of Germany (see decision of 12 October 1993 in case 2 BvR 2134, 2159/92 *Maastricht*) and of the Supreme court of the Kingdom of Denmark (see decision of 6 April 1998 in the case of *Carlsen v. Prime Minister of Denmark* I 361/1997).

The CT's approach was not universally accepted: Wyrozumska[241] noted that the CT, despite its wording to the contrary, actually applied traditional concepts (dualism) whereas "the enduring achievement of the Community law is the monistic approach. The EC/EU law forms part of the national system (as one order)." She continued by underlining the ECJ's own approach – contained in *Internationale Handelsgellschaft*[242] – that no norm of national law, remaining in conflict with a European norm, might be applied including a constitutional norm (but this had no influence on the validity of the norm as such). In seeking to stress the CT's attachment to the priority of application of the Constitution, Wyrozumska noted that the CT itself referred to the decisions of the FCC in *Maastricht* and the Danish Supreme Court in *Carlsen* which

[237] Nevertheless, Jankowska-Gilberg argued that this could be tolerated: Jankowska-Gilberg (2003), at 436.

[238] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 4.4.

[239] Granat (2005), at 217.

[240] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 4.5.

[241] Wyrozumska (2004-2005), at 22.

[242] Case 11/70 *Internationale Handelsgellschaft mbH v. Einfuhr-und Vorratsstelle für Getriede und Futtermittel* [1970] ECR 1125.

were in line with the CT's "dualistic approach." Nevertheless, she was at pains to question whether the same solution should be applied in Poland considering the rather monist order provided under the 1997 Constitution, Art. 91(2) and (3).

c. Lisbon Treaty case

Following the FCC and the HCC, the CT also dealt with the constitutionality of the Lisbon Treaty[243] in *Dec. K 32/09*[244] in which the CT built on its previous case-law, particularly *Dec. K 18/04* on the 2003 Accession Treaty. Without examining the submissions in great detail, the senator petitioners in essence challenged the competences of EU bodies in the light of the new decision-making mechanisms and revision procedures, introduced by the Lisbon Treaty, referring to Art. 48 TEU[245] and Art. 352 TFEU.[246] They argued that the application of the new mechanisms gave the EU *carte blanche* to extend its own competences, thereby infringing domestic constitutional procedures. Since there was no Treaty-based provision for the exercise of a possible veto over amendments to EU primary law, there was resulting infringement of the constitutional requirements for conferring national sovereign rights on the EU, viz. Constitution Art. 8 (declaring the primacy of the Constitution in the internal legal order) and Art. 90 (allowing for the transfer of the exercise of powers of state organs to international organisations "in certain matters").

(i) Presumption of Lisbon Treaty constitutionality

Surprisingly, the CT started its ruling on the basis that the Lisbon Treaty was presumed to be constitutional[247] since it had been ratified by the President of the Republic, upon consent granted by statute in accordance with Constitution Art. 90:[248] "The Treaty of Lisbon, ratified

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[243] 2007 Lisbon Treaty: Dz. U. 2009, No. 203, Item 1569. The ratification statute, as required by Constitution Art. 90(1), was Act of 1 April 2008 on the Ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007: Dz. U. 2008, No. 62, Item 388.

[244] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108.

[245] Article 48 TEU provides for the ordinary amendment procedure (paras. 2-5) and the special amendment procedure (paras. 6-7) for the basic Treaties.

[246] Article 352 TFEU (ex-Art. 308 EC, as amended) provides under para. 1: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament."

[247] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, at Part III, para. 1.1.2.

[248] Ibid. Emphasis supplied.

in accordance with that procedure enjoys a *special presumption of constitutionality*. It should be emphasised that enacting the statute granting consent to the ratification of the Treaty occurred after meeting the requirements which were more stringent than those concerning amendments to the Constitution." Moreover both chambers of Parliament had acted under the conviction that it was constitutional and the President had ratified it without having previously referred it to the CT for preventive review.[249]

On that basis, the CT could only overturn such presumption of constitutionality if it were unable to interpret the Treaty or Constitution in a way which would allow it to rule the Treaty provisions constitutional.[250] In determining the present case, the CT could not ignore the context of the effects of its decision and underscored its need to examine these effects from the point of view of constitutional values and principles, as well as the decision's consequences for the sovereignty of the state and its constitutional identity.

Such strong presumption of constitutionality, linked as it is to its case-law on the principle of a predisposition towards European integration,[251] and the contextualisation of its ruling appear as an attempt to "square the circle" – certainly the CT would examine the constitutional issues and give them due consideration but such issues would have to be capable of overturning its own (subjectively high?) standard of presumed constitutionality in order to succeed. This approach was, in fact, rejected by Granat, J. in his dissent[252] on the grounds that: (a) it suggested a normative act enjoying such a presumption might be deemed constitutional provided the petitioner seeking review was unable to present special (unique) arguments for such review. Even the stringent requirements of Constitution Art. 90 did not guarantee a treaty´s constitutionality: the special procedure in that Article merely protected the constitutional order against defective and negligent conferral of competences; (b) preventive review commenced by the President covered statutes as well as treaties with the result that the argument of "a special presumption of constitutionality" suggested that statutes should also enjoy it. In addition, the President had discretion in exercising his rights under Constitution Art. 133; and (c) the Constitution itself did not provide bases for grading the presumption of constitutionality of normative acts binding in the national legal order. In Granat, J.'s view then the presumption discussed by the majority of the bench could be boiled down to a simple tenet: "Every normative act is regarded as consistent with the Constitution, as long as it is not proved otherwise."

[249] Constitution Art. 133; and *Dec. K 3/95*, 7 March 1995: OTK 1995, Part 1, Item 5.

[250] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, at Part III, para. 1.1.2.

[251] See below later in this section.

[252] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, dissenting Opinion of Granat, J., point 1.

(ii) Nature of conferral of competences and limitations of sovereignty

In respect of conferral of competences, the CT agreed with academic doctrine[253] that while states had renounced their powers to take autonomous legislative action in internal and external relations, this renunciation had not led to a permanent limitation of their sovereign rights. Since the conferral of competences was not irrevocable and the relations between exclusive and competing competences had a dynamic character, the Member States merely assumed the obligation jointly to conduct state duties in areas of co-operation. Consequently, provided the states maintained their full ability to specify the forms of conducting state duties (which was concurrent with the competence to determine competences or "*Kompetenz-Kompetenz*"), they remained – according to international law – sovereign subjects. The CT continued:[254]

> There are complicated processes of mutual dependencies among the Member States of the European Union, relating to conferring part of the competences of state organs on the Union. However, these states remain the subjects of the integration process, maintain "the competence of competences" and the model of European integration retains the form of an international organisation. [Emphasis supplied.]

This last point is most revealing and echoes the German FCC's own *Lisbon* ruling.[255] This point is subsequently confirmed when the CT cites,[256] with apparent approval, the *Maastricht*/*Lisbon* rubric of the FCC,[257] according to which the EU was an association of sovereign states ("*Staatenverbund*") with the Member States remaining "masters of the Treaty."

By emphasising the EU's status as an international organisation, the CT reinforced the voluntary limitations of sovereignty that had arisen from the will of the Polish state to join and participate in European integration, as being in accordance with international law and thus retaining its sovereignty and independence, and with it the confirmation of the primacy of the Polish Nation to determine its own fate. In fact, the CT believed:[258] "incurring international liabilities and managing them do not lead to the loss or limitation of the state's sovereignty, but it is its confirmation, and membership in the European structures does not, in fact, constitute a limitation of the state's sovereignty, but it is its manifestation." Such

[253] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, point 2.1.

[254] Ibid.

[255] *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.

[256] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, point 3.8.

[257] See above at Chapter Three, points C.2.b. and E.2.

[258] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, point 2.1.

limitation was compensated for by the possibility of participation in the EU decision-making process.[259]

(iii) Limitations to conferral of competences

Recalling its previous arguments in *Dec. K 18/04*,[260] the CT reaffirmed that Constitution Art. 90 prohibited: (1) conferring all the competences of a given state organ; (2) conferring competences in all matters in a given field; and (3) conferring the competences in relation to the essence of the matters determining the remit of a given state organ. Thus it was necessary to determine precisely the areas and indicate the scope of competences which were subject to conferral although it admitted[261] that "the limits of competences are not, and may not, be sharp." Furthermore a possible change of the manner and object of conferral required the observance of the rules on constitutional amendment.

The *Lisbon* decision added a gloss[262] to *Dec. K 18/04* by stating that the conferral of competences could not be understood in such a way that would allow a possibility for determining any competences that might be presumed to be conferred. The CT had previously stressed that it was impossible in a democratic state under the rule of law to create presumed competences which position, it added, applied equally to the EU:[263] "The conferral of competences may not result in gradual deprivation of the state of its sovereignty, due to allowing the possibility of conferring competences 'in relation to certain matters.' " As an exception to the principle of independence and sovereignty,[264] then, the conferral of competences might not be interpreted in a broad sense.

In addition, such conferral could not act as a premise for allowing a presumed constitutional amendment thus bypassing the requirements of Constitution Art. 90(1).[265] Such a bypassing would occur if a broad interpretation of the scope of conferred competences were recognised in particular either by allowing for a possibility of conferring competences on a subject other than an international organisation or institution, or by including – within the scope of conferred competences – the competences which had not been conferred to be in fact recognised as having been conferred.[266] Thus, since the power to decide which competences could be conferred and which not was vested in the relevant

[259] L. Garlicki, *Polskie prawo konstytucyjne* [*Polish Constitutional Law*], 13th ed., Liber, Warszawa (2009), at 57.

[260] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49, at para. 4.1.

[261] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, point 2.3.

[262] Ibid.

[263] Ibid.

[264] Garlicki (2009), at 55.

[265] See above at Chapter Five, point C.2.

[266] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, point 2.3.

Polish authorities,[267] the subject upon which the competences had been conferred could not independently extend the scope of these competences.[268]

(iv) Constitutional identity as the limitation to the conferral of competences on EU

In *Lisbon*, the CT clearly defined what it understood as the "essential core" of national sovereignty, by employing the concept of "constitutional identity" previously used by the German FCC in its own *Lisbon* decision[269] as well as by Czech[270] and Hungarian[271] courts in their own rulings on the constitutionality of that Treaty.

From the point of view of sovereignty and the protection of other constitutional values, the CT held[272] that what was significant was the limitation of conferral of competences "in relation to certain matters" under Constitution Art. 90(1) and thus[273] "without infringing the 'core' competences, which allow for sovereign and democratic determination of the fate of the Republic of Poland, pursuant to the Preamble to the Constitution." The CT highlighted in particular provisions of the Preamble as well as Constitution Arts. 2, 4, 5, 8, 90, 104(2) and 126(1),[274] in the light of which the sovereignty of the Republic was expressed in the inalienable competences of the organs of the state, thereby making up the constitutional identity of the state. The notion of "inalienable competences" may be considered as a pale reflection of the unamendable provisions of the German Constitution, Art. 79(3).[275] While evidently regarding it as difficult to set out a detailed catalogue of inalienable competences, the CT nevertheless held the following matters were to be included among those completely prohibited from conferral:[276]

> decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state,

[267] Ibid., at point 2.2.

[268] K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków (2007), at 120.

[269] See above at Chapter Three, point E.2.d.

[270] See above at Chapter Three, point F.

[271] See above at Chapter Four, point E.2.d.

[272] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, at point 2.6.

[273] Ibid.

[274] Constitution, Art. 104(2) provides for the wording of the oath to be sworn by deputies on taking their seats in the *Sejm*; and Art. 126(1) provides that the President of Poland is to be the supreme representative of the Republic and the guarantor of the continuity of state authority.

[275] See above at Chapter Three, point B.1.

[276] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, point 2.3. Cf Wojtyczek (2007), at 284ff.

> including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state under the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to amend the Constitution and the competence to determine competences.

In addition, it later mentioned[277] competences constituting the essence of sovereignty, which included, in particular, the enactment of constitutional rules and the control of their observance, the judiciary, the power over the state's own territory, armed forces and the forces guaranteeing security and public order.

Guaranteeing the preservation of national constitutional identity and the limits of conferral of competences – on the basis of Constitution Art. 90 – was an ongoing process and no a "once-and-for-all" conferral which would pave the way for further conferrals bypassing that Article, otherwise it would be deprived of its normative value. As a result, Art. 90 had to be applied with respect to amendments to the Treaties forming the basis of the EU were those amendments to lead to the conferral of competences on the EU.[278]

(v) Role of the Constitutional Tribunal protecting constitutional identity

The CT reaffirmed its role as guardian of Polish sovereignty in the face of deepening European integration and acknowledged that constitutional identity formed the yardstick for review of EU developments, as it had with other such courts reviewing the Lisbon Treaty:[279]

> The constitutional courts of the Member States share – as a vital part of European constitutional traditions – the view that the constitution is of fundamental significance as it reflects and guarantees the state's sovereignty at the present stage of European integration, and also that the constitutional judiciary plays a unique role as regards the protection of the constitutional identity of the Member States, which at the same time determines the treaty identity of the European Union.

In determining whether or not the Lisbon Treaty impinged upon Polish constitutional identity, the CT[280] had to balance the protection of the State's sovereignty in the process of European integration against the constitutional principle of a favourable predisposition towards the process of European integration and the co-operation between States, noting

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[277] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, point 2.2.

[278] See the draft amendment to the Constitution, prepared by a team led by K. Wójtowicz: AAVV, *Zmiany w Konstytucji RP dotyczące członkowsta Polski w Unii Europejskiej*, Bureau of Research of the Chancellery of the Sejm, Warszawa (2010), at 28.

[279] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, point 3.8.

[280] Ibid., at 2.2.

from its previous case-law[281] that "the constitutionally correct and preferred interpretation of law is the one which serves the implementation of the indicated constitutional principle." It found, in fact, that the model of the European Union under the Lisbon Treaty actually respected those two principles:[282] "This finds confirmation in the full compatibility of the values and aims of the Union, determined in the Treaty of Lisbon, as well as the values and aims of the Republic of Poland, determined in the Constitution of the Republic of Poland, and in specifying the principles of allocation of competences between the Union and its Member States." In this way, the CT underlined a vital characteristic of the culture of European integration, viz., mutual loyalty between the Member States and the Union.

Of especial interest to the present research is the view of the CT in *Lisbon* towards the FCC's ruling on the same Treaty.[283] While adopting the "conferral of competences" and "constitutional identity" terminology of the FCC in *Lisbon* as well as citing to its re-affirmation of the *Maastricht*-based "*Staatenverbund*" rubric, the CT nevertheless decided overall to follow a different course. It emphasised the point that it was not responsible for specifying either the content of the statute granting consent to ratification of a treaty under Constitution Art. 90 or the rules of participation of the parliament and government as regards implementation of the Lisbon Treaty. The petitioners had voiced an expectation that the CT would specify the tasks of the legislator related to the Treaty's ratification, by analogy to the FCC in *Lisbon*. In very clear terms, the CT disabused the petitioners of that notion:[284]

> However, this expectation does not take into account the vital differences between the Constitution of the Republic of Poland and the Basic Law for the Federal Republic of Germany, when it comes to regulating the systemic foundations of European integration. It is the task of the Polish constitution-maker and legislator to resolve the problem of democratic legitimacy of the measures provided for in the Treaty, applied by the competent bodies of the Union.

The impact of this wording still resonates, stressing the distinctive approaches to European integration adopted by the two constitutional courts, with the CT seeking a more accommodating stance than that usually exhibited by the FCC. The CT's adoption of the vocabulary of the FCC and the association of sovereign states image might play well to some in the Polish domestic audience; but it evidently cannot be accused of blindly following Karlsruhe in dealing with the problems posed by ever-deepening EU integration.

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[281] *Dec. K 11/03*, 27 May 2003: OTK ZU 2003/5A, Item 43.

[282] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, point 2.2.

[283] See above at Chapter Three, point E.2.d.

[284] *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108, Part III, point 2.6.

3. Review of national transposing law

Examination of domestic legal measures transforming European law into the internal system (generally speaking, statutes and decrees "internalising" Directives) remained an open question in Poland until 2005. There was clear support for the argument that the CT retained a jurisdiction in this case. As previously mentioned, the express wording of Art. 188(1) allows the CT to judge the constitutionality of a domestic statute (Art. 188(3) for government and ministerial decrees). A Directive requires adoption into national law. Although the CT could not review the Directive itself,[285] it could find itself in the situation where – through the EU-conform implementation of a Directive in a national legal rule – an infringement exists of the Constitution. In such case, the relevant legal act of domestic state power would be the object of review.[286]

This is indeed what the CT held in its judgement in *Dec. P 1/05* on the European Arrest Warrant ("EAW").[287] This case concerned an application for a constitutional review from the Regional Court of Gdańsk as to whether art. 607t of the Code of Criminal Procedure, implementing Council Framework Decision 2002/584/JHA on the EAW[288] was consistent with Constitution Art. 55(1) that prohibited extradition of Polish citizens. The CT ultimately ruled the provision of the Code to be unconstitutional as the absolute right contained in Constitution Art. 55 was infringed by the Code of Criminal Procedure, art. 607t because it deprived Polish citizens of the very essence of the right under Art. 55. By infringing the essence of a fundamental constitutional right, the legislator had breached Constitution Art. 31(3) which provides that, while any limitation upon the exercise of constitutional freedoms and rights may by imposed only by statute and only when necessary in a democratic state (*e.g.*, for the protection of its security or public order), such limitation may not violate the essence of freedoms and rights.

In the part of its ruling relevant for present purposes,[289] the CT noted that Framework Decision corresponded conceptually and in terms of structure to Directives in the First Pillar. According to then Art. 34(2)(b) TEU (now repealed through the 2009 Lisbon Treaty), Framework Decisions were adopted in order to increase the convergence of legislative and executive provisions, binding the Member States with respect to the result to be achieved but leaving them the discretion as to the choice and forms of instruments. In contrast to Directives, the terms of former Art. 34(2)(b) TEU expressly prohibited Framework Decisions from generating any direct effect even if their provisions were precise and unconditional. In addition, Framework Decisions did not grant any rights nor did they impose obligations upon individuals in Member States. Lastly their enactment into national law was governed by

[285] See above at Chapter Five, point E.2. the argument in respect of Regulations.

[286] Jankowska-Gilberg (2003), at 436-437.

[287] *Dec. P 1/05*, 27 April 2005: OTK ZU 2005/4A, Item 42; [2006] 1 CMLR 965.

[288] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States: OJ 2002 L190/1.

[289] *Dec. P 1/05*, 27 April 2005: OTK ZU 2005/4A, Item 42, at para. 2.1; [2006] 1 CMLR 965, at 978.

principles analogous to the principles of transposition of Directives.[290] The CT subsequently turned to address the issue of its jurisdiction in the present case:[291]

> The obligation to implement Framework Decisions is a constitutional requirement stemming from art. 9 of the Constitution, but its enactment does not assure automatically and in every case the material conformity of the provisions of derivative EU law and of legislative acts implementing them to the national law with the norms of the Constitution. The basic function of the Constitutional Tribunal in the political system consists of reviewing the conformity of normative acts with the Constitution, and the same task applied also to situations, where the claim of unconstitutionality concerns that part of the scope regulated by a legislative act, which serves the purposes of implementation of EU law.

The ruling evidently indicates that Polish legislation must remain in conformity with the domestic Constitution and that the requirement to transpose European obligations cannot derogate from expressly formulated constitutional provisions.[292] Consequently, the CT concluded that since the national law implementing the Framework Decision – by allowing Polish citizens to be prosecuted before foreign criminal courts – would have prejudiced the fundamental right of such citizens under Constitution Art. 55 to be free from extradition, the CT had no choice but to rule it unconstitutional. Though not said explicitly, Bem argued that the CT had thereby underlined the precedence of the 1997 Constitution over EU law.[293]

Nevertheless, the CT could be regarded as more Euro-friendly in its EAW ruling than its German counterpart that was later in its own decision on the EAW.[294] The CT decided – on the basis of Constitution Art. 190(3)[295] – that its ruling on the unconstitutionality of the national law implementing the EAW would only take effect after 18 months. Hofmański

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[290] In respect of the Polish practice, the CT referred to: *Zapewnienie skuteczności prawu Unii Europejskiej w prawie polskim. Wytyczne polityki legislacyjnej i techniki prawodawczej* [*Assurance of effectiveness of EU law in Polish law. Guidelines for legislative policy and lawmaking technique*], UKIE [Office of the Committee for European Integration], Warszawa (2003), at 32-33. See generally on this point, B. Kurcz & A. Łazowski, "Two Sides of the Same Coin? Framework Decisions and Directives Compared" (2006) 25 Ybk. Eur. L 177-204.

[291] *Dec. P 1/05*, 27 April 2005: OTK ZU 2005/4A, Item 42, at para. 2.4; [2006] 1 CMLR 965, at 980.

[292] L. Garlicki, "Chronique 2005: Pologne" (2005) XXI *Annuaire international de justice constitutionnelle* 655, at 664.

[293] K. Bem, "The European Arrest Warrant and the Polish Constitutional Court Decision of 27 April 2005," in E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant*, Wolf Legal Publishers, Nijmegen (2006), chap. 6, 125, at 128.

[294] *European Arrest Warrant*, 18 Juli 2005, 2 BvR 2236/04: BVerfGE 113, 273; [2006] 1 CMLR 378. See above, Chapter Three, at point E.3.

[295] When read with 1997 Act, s. 71(2). Constitution Art. 190(3) reads in part: "A judgment of the CT shall take effect from the day of its publication, however, the CT may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act."

argued[296] however that, in this respect, the CT incorrectly applied Constitution Art. 190(3) on the matter of constitutionality. On the basis of this paragraph, the CT is allowed to specify the date of loss of binding force of a normative act but it cannot – what in fact it was trying to do – suspend a constitutional guarantee (in Constitution Art. 55).[297] So for 18 months from the publication of the *EAW Decision*, the CT's intention was that Polish citizens should be surrendered on the basis of the EAW to other EU Member States, and after this time limit they should not.

However,[298] Hofmański proposed a number of possible solutions to this situation, the last of which – as suggested by the CT – was followed, *viz.*, in the interim period, the EAW would remain provisionally in force and would therefore allow the Polish parliament time to redraft Constitution Art. 55 to allow Poland to comply with the Framework Decision, as required by Constitution Art. 9.[299] This was achieved within the time limits when the Polish parliament voted[300] for an amended version of Constitution Art. 55[301] which now permits the execution of EAWs subject to two conditions (that do not seem to comply with the Framework Decision): viz., (i) the crime has been committed abroad; and (ii) it is recognised by as well as capable of being prosecuted under Polish law.

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[296] P. Hofmański, "Przekazanie obywatela polskiego innemu państwu członkowskiemu Unii Europejskiej na podstawie europejskiego nakazu aresztowania – glosa do postanowienia Sądu Najwyższego z 13.12.2005 r. (III KK 318/05) [Surrendering of Polish citizens to another Member State of the European Union on the basis of the European Arrest Warrant – gloss to a decision of the Supreme Court of 13 December 2005 (III KK 318/05)]," *Europejski Przegląd Sądowy* lipiec 2006, 44, at 45.

[297] Compare Constitution Art. 233(1): "The statute specifying the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit the freedoms and rights specified in Article 30 (the dignity of the person), Article 34 and Article 36 (citizenship), Article 38 (protection of life), Article 39, Article 40 and Article 41(4) (humane treatment), Article 42 (ascription of criminal responsibility), Article 45 (access to a court), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions), as well as Article 48 and Article 72 (family and children)."

[298] Hofmański (2006), at 45-46.

[299] Constitution Art. 9 (which, according to the CT in its previous case-law, is equally applicable to EC/EU law) states: "The Republic of Poland shall respect international law binding upon it."

[300] In May 2006, the President of the Republic presented to the parliament a bill to amend Constitution Art. 55. The wording was considered by the governing coalition as being too broad. Consequently, the government's own proposal was voted through by the *Sejm* on 8 September 2006 and by the Senate on 14 September 2006. See Act of 8 September 2006 on the Amendment of the Polish Constitution: Dz. U. 2006, Issue 200, Item 1471.

[301] Constitution Art. 55 now reads, in part: "(1) The extradition of a Polish citizen shall be prohibited, except in cases specified in paras. 2 and 3.

(2) Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:

1) was committed outside the territory of the Republic of Poland; and

2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request."

Unlike Bem, Kowalik-Bańczyk argued[302] that the CT in the EAW case "accepted that the Constitution itself was no longer an absolute framework for control – if it hinders the correct implementation of EU law, it should be changed." In support of her argument, she referred to the fact that the CT delayed the entry into effect of its decision. Łazowski[303] is of a similar persuasion, highlighting the CT's encouraging the revision of the Constitution in an inter-institutional dialogue with the Polish parliament as exhibiting a supportive attitude towards the EU.

Grzelak[304] is clear that the CT maintains the jurisdiction to control the constitutionality of national rules transposing EU law into the domestic system but agrees with Łazowski[305] that the CT's judgment is certainly not anti-European nor did it play down the importance of EU law. Quite the contrary, since the CT did not challenge the essence and need for the functioning of the EAW, by providing the maximum amount of time to apply the provision thereby allowing the legislature to amend the Constitution. Banaszkiewicz[306] also finds the CT's behaviour in this respect, which he describes as "the Judgment of Solomon," was dictated by its need to ensure fulfilment of Poland's EU obligations because the constitutional order, under Constitution Art. 9, is to observe international law binding on Poland. Implicitly, the CT found that such loyalty to significant obligations required temporary – within the 18-month time limit defined by Constitution Art. 190(3) – "sacrifice" of the Polish citizen's right to be tried in their own country. Yet, Banaszkiewicz[307] is extremely doubtful that this will amount to a precedent for "Judgments of Solomon" in the future. Nevertheless, the Polish Supreme Court ruled in December 2005[308] that the delay in the loss of binding force of the Code of Criminal Procedure, art. 607t(1) by the CT meant that – during the 18-month period of time – Polish courts could not refuse to execute EAWs issued by another EU Member State in relation to Polish citizens.

While generally, then, the CT may be reluctant to utilise its powers in the matter of constitutional review of domestic EC-harmonising measures, nevertheless (as with other constitutional courts) it has expressly refused to surrender its jurisdiction to examine indirectly the constitutionality of European secondary legislation. In this way, it has

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[302] K. Kowalik-Bańczyk, "Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law" (2005) 6 Ger LJ 1355, at 1361.

[303] A. Łazowski, "The Polish Constitution, the European Constitutional Treaty and the Principle of Supremacy," in A. Albi & J. Ziller (eds.), *The European Constitution and National Constitutions: Ratification and Beyond*, Kluwer, The Hague (2007), 171, at 178.

[304] Grzelak (2005), at 33.

[305] A. Łazowski, "Constitutional Tribunal on the Surrender of Polish Citizens under the European Arrest Warrant. Decision of 27 April 2005" 2005/1(3) EuConst 601, at 613.

[306] B. Banaszkiewicz, "Prawo polskie a prawo Unii Europejskiej w orzecznictwie Trybunału Konstytucyjnego [Polish law and EU law in the case-law of the Constitutional Tribunal]" *Europejski Przegląd Sądowy* grudzień 2005, 49, at 54.

[307] Banaszkiewicz (2005), at 54.

[308] Supreme Court, 13 December 2005, III KK 318/05: OSNKW 2006/4, Item 37.

confirmed the general approach in this respect displayed by the FCC both in *M GmbH*[309] and in its own (subsequent) case concerning the EAW.[310]

4. Refusals to refer

The present author is currently unaware of any CT reasoning which indicates a refusal to refer a question to the ECJ. Nevertheless, it is not beyond possibility that – in common with the central argument of this thesis – the CT would tend to follow the approach of its German counterpart and find ways to exclude the need for making a reference to the ECJ.

F. CONCLUDING OBSERVATIONS

In the light of the CT's reasoning in its post-accession case-law, it might be possible to reflect that the model of the CT is not an FCC-lite one but rather a considered reflection of the impact of EU law, grafted onto the stem of modern Polish constitutional law and practice.

The decisions of the CT in the *2003 Accession Treaty case* and the *European Arrest Warrant case* may have arguably taken the German constitutional jurisprudence in the *Solange* and *Maastricht* judgments to their logical conclusion.

In fact, the formulation of a nuanced approach to national constitutional supremacy in the face of European law was even more unlikely in Poland given the express wording of the supremacy clause in Constitution Art. 8 as well as Arts. 90 and 91. The warning shot on this issue, fired by the CT (as with the FCC in *Maastricht* – and now *Lisbon*), did not target the Accession Treaty itself but rather future changes (*e.g.*, the Lisbon Treaty). The *Accession Treaty* case evidently leaves intact the CT's jurisdiction to review the constitutionality of EU treaties and secondary law. The issue of reviewing harmonised secondary legislation – even though only referred in the *EAW Decision* to Framework Decisions in the Third Pillar – has ample opportunity of being repeated for Directives in the First Pillar. While academic discourse has discussed the possible constitutional review of Regulations under a rather tenuous pretext of actually being "normative acts" or "international agreements," it is quite conceivable that the CT could adopt the earlier (pre-*Lisbon*) perspective of the FCC on this point as enunciated in *Solange II* and accept their *de facto* exclusion from review provided that they do not infringe the essential core of sovereignty. The matter of Directives, however, falls more deeply within the possible review jurisdiction of the CT, under the guise of national harmonising legislation. Thus, while direct review and annulment of Directives are substantially excluded (according to European law and ECJ case-law), their indirect review and effective annulment in national law definitely remain an option.

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[309] *M GmbH v. Bundesregierung*, BVerfG 12 Mai 1989, 2 BvQ 3/89: (1989) 24 EuR 270; [1990] 1 CMLR 570.

[310] *European Arrest Warrant*, 18 Juli 2005, 2 BvR 2236/04: BVerfGE 113, 273; [2006] 1 CMLR 378.

And yet the CT has not pursued a jurisprudential policy vis-à-vis EU law that heightens the tension between the European and Polish (constitutional) legal orders. Indeed the CT actually appears to be at pains to ensure a nuanced approach to constitutional difficulties concerning EU law and has therefore been a much more faithful proponent of the relationship of co-operation advocated by the FCC in *Maastricht*.

As evidence of this approach, it will be recalled that the CT did not strike down any provision of the Accession or related EU treaties in its 2003 ruling. Moreover, in relation to the unconstitutionality of the national law implementing the EAW, it suspended the entry into force of its decision in order to allow the national legislator the full 18 months – as permitted under Polish constitutional law – to prepare and pass a provision to render constitutional surrender according to the EAW: in directing the focus onto the legislature, the CT thus exercised the only legitimate option open to it, i.e., "dialoguing with parliament" to amend the Constitution as opposed to the other impracticable or politically impossible options, viz., either, on the one hand, seeking a renegotiation, amendment or, at the very least, a derogation from the effect of the EAW or, on the other hand, complete withdrawal from the Union. These three options, as will be recalled, were posited by the CT in the *2003 Accession Treaty case* as the then only means by which Poland could maintain the legal integrity of its Constitution in the face of overbearing European integration.

An innate sensitivity of the CT on this issue (and sadly lacking with the German Court on the same matter in its own *EAW case*) was reiterated by Safjan – the then President of the CT and now the Polish judge at the ECJ[311] – when speaking extrajudicially.[312] Discussing the *Accession Treaty case*, he indicated that the CT wanted to show that it was possible to reconcile the positions consisting of the recognition of the primacy of the Constitution and the principle of the primacy of EU law. Undoubtedly, the CT as guardian of the Constitution had to respect Art. 8(1) according to which the Constitution is the supreme law of the Republic of Poland. In that case, he said, the CT could not recognise that any EU law rule enjoyed supremacy over the Constitution. Nevertheless he proffered a solution:[313]

> We have been pointing out that there are arguments which speak in favour of fulfilment of Article 8 in accordance with [EU] law yet, at the same time, we were showing the value of establishing a uniform legal system – legal space – in the European Union. We wanted to distinguish these two values and reconcile them on the basis of our system in the most possible rational way. We are saying this: the Constitution takes the precedence but simultaneously – taking into consideration Polish membership in the EU – we have to reckon with the fact that the Constitution might have to be changed in case of conflict between [an EU] and domestic norm. We recognise that the domestic legislator will have to decide eventually whether to amend the Constitution or – as a last resort – to withdraw from the EU, whereas by agreeing to Polish membership in the EU he would have to accept the amendment of

[311] On 13 January 2009, the EU Council of Ministers appointed Prof. Safjan as a judge at the ECJ: <http://register.consilium.europa.eu/pdf/en/09/st05/st05546.en09.pdf>. 21 March 2009.

[312] A. Wróbel, "Prymat prawa wspólnotowego nad konstytucją? [The primacy of Community law over the Constitution? – Interview with Marek Safjan]" *Europejski Przegląd Sądowy* kwiecień 2006, 4, at 4.

[313] Wróbel (2006), at 4.

> the Constitution in a case of collision. This is a clear indication given by the Constitutional Tribunal.

He subsequently acknowledged, from the CT's point of view, that it was very important to aim at the elimination of conflicts between European and domestic law in the first place and thus to do everything possible to interpret domestic system in the kind of way which would enable realisation of a uniform application of a European norm in the Polish legal system.[314]

In Safjan's opinion,[315] the CT established impassable limits in its interpretation of national law as, e.g., in the *EAW judgment* where an unequivocal provision of the Constitution (forbidding extradition of Polish citizens) could not be infringed by acknowledging supremacy of EU law. This indicated the CT's way of thinking and its commitment to the maintenance of Polish constitutional sovereignty thereby leaving it to the Polish parliament to decide whether to amend the Constitution or to make some other decision.

Moreover, asked whether the CT might consider making an Art. 267 TFEU (ex-Art. 234 EC) reference in a case, Safjan[316] would not exclude such possibility in advance when, e.g., the meaning and sense of a European norm had an influence on the meaning of a national provision implementing this norm and it would therefore be a precondition for the CT's reasoning on constitutional grounds. In this situation, the relationship of co-operation between the CT[317] and the ECJ seems to augur well for the future, distanced somewhat from the stark realities elucidated by the FCC in *Lisbon* and the earlier *EAW decision*, perhaps presaging a more lauded Central European approach that still remains to entice the HCC beyond the desultory crumbs it has so far offered in such transjudicial discourse.

While not admitting that it is a perfect pupil in EU law, the CT has arrived at its position much more timely and much less controversially than the FCC. The CT's relative openness to European integration was underlined in its *Lisbon* ruling and in marked contrast to the FCC's own decision on that Treaty. Having clearly accepted the FCC's notions of "conferral of competences" and "constitutional identity," together with its *Maastricht* canon of the Member States remaining "masters of the Treaties" and the EU itself being a "*Staatenverbund*," the CT nevertheless distanced itself from the stark realities (or eventualities) of the German position by emphasising that its protection of Polish constitutional identity involved an important balancing between the principle of the protection of national sovereignty in European integration and the principle of a favourable predisposition towards European integration and co-operation between States.

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[314] Wróbel (2006), at 4.

[315] Wróbel (2006), at 5.

[316] Wróbel (2006), at 8-9.

[317] And similarly the practice of the Czech Constitutional Court in respect of the Lisbon Treaty: (1) Czech Const. Ct. Decision of 26 November 2008: Case No. Pl. ÚS 19/08; and (2) Czech Const. Ct. Decision of 3 November 2009: Case No. Pl. ÚS 29/09.