When Sovereignty Means So Much: The Concept(s) of Sovereignty, European Union Membership and the Interpretation of the Constitution of the Republic of Poland

Mirosław Wyrzykowski

Abstract Sovereignty is the watchword in Polish constitutional debate on European integration in politics, diplomacy and in the courtroom. The following is an attempt at a description of how the notion perseveres in the public life of the country. The idea of sovereignty not only inspired the constitutional regulation of the possibility of and the procedures for accession to the EU (1), but it also recurs throughout constitutional controversies such as the case concerning the unconstitutionality of the European Arrest Warrant finally rendered constitutional by way of a constitutional amendment (2), or the case in which the Constitutional Tribunal considered the constitutionality of the Treaty of Accession (3). The *Treaty of Lisbon* decision of the Constitutional Tribunal attempted to deflate the outdated intuitions of state sovereignty but associated national sovereignty with the legal safeguard of the moral and social order established by the state in its law (4) or—as some insist—in its national culture (5). The notion of sovereignty and constitutional identity also appears to underpin the decision to admit and circumscribe the constitutional review of EU secondary legislation of 2011 (6). The 2011 attempt at a constitutional amendment to finally comprehensively regulate Polish involvement in the European Union bears testimony to the perennial character of the traditional understandings of the concept of sovereignty (7). It appears therefore that there is a perennial interplay between the societal concept(s) of sovereignty and their legal expression in the constitutional regulation of the position of EU law in the domestic legal system, the domestic understanding of the principle of delegated powers of the EU and the supremacy of the national constitution. A comprehensive 'European clause' thus deserves its place in the first chapter of the Constitution.

Professor, University of Warsaw.

M. Wyrzykowski (✉)
University of Warsaw, Warsaw, Poland
e-mail: m.wyrzykowski@wpia.uw.edu.pl

Court of Justice of the European Union - Cour de Justice de l'Union Européene, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law -La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*,
DOI: 10.1007/978-90-6704-897-2_14,

1 The Idea of Sovereignty

The issue of state sovereignty has been the axis of contention and serious controversies concerning Poland's membership in the European Union. It is important to note that such a pivotal character of the notion is contingent on conceiving state sovereignty in the classical sense, i.e. in the same way as it was conceived in the nineteenth century. Whilst this is perhaps not perennial, the persistence of such intuitions is easily explained by the accidents of modern history of the country. In the years 1795–1918, Poland was divided and its territory was partitioned between the empire of Russia, Prussia and Austria. The country might have survived in the hearts and minds of its people but was only returned to the political maps of Europe in 1918. The country was reconstructed as an independent and sovereign state in the years 1918–1939 only to become subject to German occupation from 1939–1945 and to semi-independence in the years 1945–1989. There is therefore no redundancy in the Preamble to the Constitution as it states that the Constitution is made '*for the existence and future of our Homeland,* [w]*hich recovered, in 1989, the possibility of a sovereign and democratic determination of its fate'*.

The first act of the debate concerning the essence of the constitutional regulation of Poland's membership in the structures of the European Union took place in the constitution-making process in the years 1990–1997.[1] Conscious of the importance of such a regulation for the constitutional organisation of the state, the Constitutional Committee of the National Assembly adopted an arrangement under which the Republic of Poland could, '*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*'. This constitutional device is fundamental as far as the consequences of such a '*delegation to an international organization or international institution*' are concerned. The clause was meant to be entrenched in the first chapter of the future Constitution. This is important in the Polish constitutional tradition. Primarily, the opening chapter of the Constitution spells out what is called 'fundamental constitutional principles of the system of government' bearing in mind that the Polish term for the 'system of government'—i.e. *ustrój*—is based on the metaphor of the state conceived as an organism. Accordingly, Polish constitutional scholarship has a technical term that is a little off the natural language in order to discuss the 'allocation' of some and not other provisions of *Chapter* I—*The Republic*. Secondly, the first chapter is often considered to preordain the meaning of the constitutional document as such. Indeed, the precepts of 'systemic interpretation' assign normative consequences to the structural position of the chapter within the document.

The very idea of 'allocating' the clause to the first chapter of the future Constitution thus inspired much controversy. The discussions that followed had

[1] Wyrzykowski 1999, p. 87.
.

both the principled and the political aspect. The general idea—and its actual verbalisation in constitutional argument—seems to have been that the constitutional disposition that was to regulate the essence of the sovereignty of the State was unacceptable as part of the catalogue of the fundamental constitutional principles of the system of government. The constitutional compromise was eventually hammered out and consisted in that the matter was to be regulated by the disposition of Article 90 of the Constitution and thus 'allocated' to *Chapter* III—*Sources of Law.*

Article 90 goes by the name of 'European clause' and covers also the position of the law enacted by relevant '*international organizations or international institutions*' within the domestic legal order. The 'European clause' entrenched in Article 90 of the Constitution of the Republic of Poland contains substantial, procedural, as well as enabling norms regulating Polish membership in the European Union. Primarily, Article 90 is the legal basis for making the decision to '*delegate the competence of organs of State authority in relation to certain matters*' onto *an international organization* or *an international institution.* The transfer of the exercise of state authority in certain matters onto an international organisation or institution can only be made on the basis of an international agreement. It is important to note that this kind of an international agreement can only be ratified in a special law-making procedure that is distinct from the usual procedure reserved for the ratification of international agreements. Two tracks of ratification have been provided and both illustrate the importance of the idea of sovereignty.

The Act of Parliament giving consent to the ratification of such an agreement providing for such a delegation '*to an international organization or international institution the competence of organs of State authority in relation to certain matters*' is validly made by both the *Sejm* and the Senate acting at the supermajority requirement of 2/3 voting at a quorum of half of their statutory membership. This procedure is thus singular because the supermajority requirement applies to both chambers of the Parliament. The supermajority required in the Senate is more challenging than that provided for voting constitutional amendments. Constitutional amendment can 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 but the Senate's involvement is less significant because an absolute majority of votes in the presence of at least half of the statutory number of Senators is required. This uniform double supermajority requirement in both chambers of the Parliament was the response to the concern that accession to the European Union should be sufficiently demanding of the political process. After all, a not unimportant part of the public was convinced that membership in the European Union was synonymous with limiting the sovereignty of the State.

The import of the notion of sovereignty also underscores the constitutional regulation of the alternative popular referendum procedure for giving consent to the ratification of an international agreement delegating '*to an international organization or international institution the competence of organs of State authority in relation to certain matters*'. Besides the parliamentary consent to such

ratification, the Constitution provides for the consent to be given in a national referendum (Article 90(3) of the Constitution) as ordered by the *Sejm* (Article 90(3) of the Constitution). The delegation-of-state-authority referendum procedure is regulated in a way that mimics the relevant procedure assigned for constitutional amendments. The parallel pertains both to the procedural aspect as well as to the aspect of democratic legitimacy. The latter further corroborates the importance of membership in the European Union in the area of the system of government. Article 125 regulates the institution of a nationwide referendum '*held in respect of matters of particular importance to the State*'; the referendum can be called by 20 % of Deputies, 20 % of Senators and the President of the Republic when the constitutional amendment pertains to Chapter I—*The Republic*, Chapter II *The freedoms, rights and obligations of persons and citizens*—and Chapter XII—*Amending the Constitution* (Article 235(6) of the Constitution). According to Article 125(3) of the Constitution, the '*result of a nationwide referendum shall be binding, if more than half of the number of those having the right to vote have participated in it*'. Indeed, this procedure was accomplished for the purpose of giving consent to the ratification of the Accession Treaty in May 2004; 74.45 % of voters were in favour of the Polish membership in the European Union and 58.85 % of those having the right to vote participated.

The notion of sovereignty was thus the basic term of reference for any constitutional argument over the years only to become a durable part of the political landscape that is present in all controversies concerning European integration. This observation was and still is true for controversies of political and legal nature. The Constitutional Tribunal adjudicates on the constitutionality of the international agreements that give rise to successive international obligations of the Republic in the process of European integration. All elements of the concise formula of the 'European clause' have been analysed by the Constitutional Tribunal. All of its decisions take the state and national sovereignty as their *Leitmotif*.

2 Constitutional Controversies

The first serious controversy concerning the relationship between European law and Polish Constitution was considered by the Constitutional Tribunal in 2005.[2] The case concerned the constitutionality of the implementation of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ('the Framework Decision') in the domestic legal order. The Constitutional Tribunal thus considered the constitutionality of the Code of Criminal Procedure in as much as it

[2] Judgment of the Constitutional Tribunal of 27 April 2005 (P 1/05). The operative part of the judgment was published on 4 May 2005 in the Official Journal No. 77, item 680; the judgment was published in the Judgments of the Constitutional Tribunal ZU No. 4/A/2005, item 42.

implemented the European Arrest Warrant and the procedure of surrender of persons between Member States. The preliminary reference filed with the Constitutional Tribunal concerned the constitutionality of surrendering a person of Polish citizenship to another state of the European Union for the purposes of a criminal prosecution in the Member State issuing the European Arrest Warrant. The constitutional problem that justified the preliminary reference lay in the absolute formulation of Article 55(1) of the Constitution. Article 55(1) stipulated that '*The extradition of a Polish citizen shall be prohibited*'. The Constitutional Tribunal was called to determine the meaning of the provision and the scope of the guarantee thus entrenched in the Constitution. The Constitutional Tribunal also considered whether surrendering a Polish citizen to a Member State of the EU is a form of extradition when such surrender is performed under the European Arrest Warrant.

The Constitutional Tribunal was faced with a dilemma as far as the consequences of its judgment were concerned. A finding that the implementation of the Framework Decision was unconstitutional would result in repealing the relevant provision of the Code of Criminal Procedure that regulates the surrender of a Polish citizen to a Member State of the European Union under the European Arrest Warrant. This would result in the European Arrest Warrant being henceforth inapplicable in the Polish legal system and the Polish citizens not being subject to surrender under the European Arrest Warrant. This would mean that the judgment of the Constitutional Tribunal would be directly violating the obligation of the State to fully and unconditionally implement the Framework Decision and would thus undercut the very idea of mutual assistance in civil and criminal matters between Member States of the European Union as specified in the Framework Decision. On the other hand, however, declaring the relevant regulation of the Code of Criminal Procedure constitutional would require a particularly strong justification. Considering Article 55(1) inapplicable to the surrender of the Polish citizen under the European Arrest Warrant would require proceeding on the assumption that calling extradition by another name is sufficient to withdraw the constitutional protection. The dilemma thus had the air of a *Zugzwang*. This was so particularly because of the wording of the constitutional guarantee forbidding all extradition of Polish citizens that was clear, unambiguous and precise as well as because the historical background of the very provision inevitably led to the proposition that the obligation to extradite a state's citizen constitutes the 'ultimate and definitive encroachment upon the sovereignty of a state.'

The Constitutional Tribunal was insensible neither to the obligation of conforming interpretation that complies with European Union law nor to this obligation's limits. The limits of conforming interpretation appear to be twofold. First of all, the obligation of conforming interpretation in compliance with European law is limited by the imperative of securing the rights of the individual. Conforming interpretation cannot introduce criminal responsibility or make it more severe. Surrendering a citizen under the European Arrest Warrant for the purposes of criminal prosecution in another country whilst the act committed is not a criminal offence in Poland can translate into a worsening of the position of such a

suspect. Secondly, the limits of conforming interpretation are determined by the text of the Constitution to be interpreted. The Constitutional Tribunal was thus captive of rather inevitable conclusions of the comparison between the institution of extradition and the institution of surrender, according to which the surrender of suspects performed by law enforcement agencies is nothing but a specific kind of extradition. The Constitutional Tribunal decided that the provision of the Code of Criminal Procedure which implemented the Framework Decision on the European Arrest Warrant and which was alleged to be unconstitutional was in fact inconsistent with Article 55(1) of the Constitution of the Republic of Poland.[3]

The decision was possible because the dilemma turned out to be in fact a trilemma. As the Constitution warrants deferring the repeal of an otherwise unconstitutional norm (Article 190(3)), the Constitutional Tribunal was able to declare the European Arrest Warrant unconstitutional and at the same time maintain its validity and applicability for 18 months. This meant two things. First of all, the implementation of the European Arrest Warrant was applicable for another 18 months even though it was deemed unconstitutional. The decision to maintain the applicability of an otherwise unconstitutional text was justified on the grounds of a number of constitutional directives, such as the Polish state's obligation to abide by its international obligations, the value of the Republic's credibility in the international arena for its deference to the *pacta sunt servanda* principle, the value of security and public order, as well as the value of the community's fundamental principles of the system of government and the rule of law in Europe that warrant the lawful operation of law enforcement agencies, administration of justice as well as the observance of the standards of the right to court. Eliminating the provision considered unconstitutional at the date of publication of the judgment would result in violating the international obligations of the Polish state. Secondly, deferred repeal of the provision allowed the time necessary for the political branches to be able to take relevant and necessary steps in order to avert the problems that could arise when the implementation of the Framework Decision in the domestic legal order would become void and inapplicable and the Polish state would thus contravene its obligation to give effect to the Framework Decision.

The choice of the course of action available to the political branches was as a matter limited to proceeding with a constitutional amendment. The constitutional

[3] Czapliński 2005b, pp. 107–112; Gierach 2005, pp. 196–204; Grajewski 2006, pp. 161–166; Hofmański 2005, pp. 113–117; Płachta and Wieruszewski 2005, pp. 117–125; Steinborn 2005, pp. 182–195; Lazowski 2011, p. 512.

amendment was thus, in fact, an indirect but nonetheless inescapable consequence of the Constitutional Tribunal's judgment in the case concerning the European Arrest Warrant.[4]

3 Constitutionality of the Treaty of Accession

Despite its earlier premonitions in the constitution-making process, the political disagreement concerning the national constitution and European law revealed its true force in 2005 when the Constitutional Tribunal had to adjudicate on the constitutionality of the Treaty of Accession of the Republic of Poland to the European Union (judgment of 11 May 2005, K 18/04). After the Accession Treaty was ratified in a national referendum, groups of Members of Parliament filed motions with the Constitutional Tribunal. The *memoranda* lodged with the Constitutional Tribunal alleged that the Treaty was inconsistent with the Constitution on a number of counts. On the one hand, the Treaty of Accession allegedly violated the very principle of a national constitution. On the other hand, the Accession Treaty allegedly violated fundamental rights guaranteed under the Constitution.

Primarily, the Treaty was considered to contravene the provisions of the Constitution that guaranteed the external independence of the Polish State, the sovereignty of the Nation, the supremacy of the Constitution in respect to all legal acts of domestic and international law as well as equality before the law. It was argued that accepting the jurisdiction of the European Court of Justice and accepting the primacy of European law was the first step that would set in motion a process of gradual, incremental and uncontrollable eradication of the attributes of sovereignty of the Republic of Poland. The principle of supremacy of an external system of law over the Constitution that was inherent in the Treaty was considered to strip the Nation of its supreme power. The principle of superiority of the external legal system was also alleged to amount to a transfer of the basic instrument of the common good to an alien entity because it is the Constitution that derives from the Nation and is the supreme law of the land. Furthermore, it was considered that the sovereignty of the Polish Nation was in peril when the state accepted to be bound by the law of a supranational organisation whose very

[4] The constitutional amendment introduced Article 55.2 which reads as follows: '*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 organization 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*'.

essence consisted in successively and successfully taking over more and more rights of sovereign states. It was argued, on the other hand, that the principle of primacy of European law was an instrument of extra-constitutional change of the role and character of the Constitutional Tribunal; the Constitutional Tribunal was to become an executor of the case-law of the European Court of Justice in the domestic legal system. Finally, it was argued that the supremacy of European law over the Constitution was in fact the first step on the road to amending the Constitution under the pressure of European law where such a constitutional amendment would contravene the principles of constitutional amendment provided by the constitution, such as the principle of a constitutional referendum in particular.

Two problems were elucidated as far as constitutional rights of the individual were concerned. First of all, the Treaties allegedly violated the constitutional order in as much as the European communities were empowered to enact norms with the purpose of combating discrimination on the grounds of sexual orientation. The Constitution of the Republic of Poland, on the other hand, stipulates that marriage is a union of a man and a woman (Article 18). Secondly, the right to vote and the right to stand in local elections that European law extends to all European citizens allegedly violated the principle that the rights of citizenship guaranteed under the Constitution are to be enjoyed exclusively by the citizens of the Republic of Poland. Whilst the wording of the Constitution does not suggest such a problem because it provides for '*inhabitants of the units of basic territorial division*' to '*form a self-governing community*' (Article 16(1)), extending the right to vote and to stand in local elections to all European citizens would mean that the Republic of Poland would cease to be the Constitution's '*common good of all its citizens*' (Article 1) and evolve into '*the common good of all European citizens*'.

The Constitutional Tribunal considered the Treaty of Accession to be consistent with the Constitution and formulated a number of principles that structure all legal arguments concerning Poland's membership in the European Union. Those principles are nothing but an add-on to the understanding of the contents of constitutional norms and constitute an important 'interpretation' of the European clause of Article 90 of the Constitution.[5]

First of all, the Constitution remains the highest and supreme law of the land in the Republic of Poland. This stipulation of Article 8(1), however, is accompanied by the stipulation of Article 9 of the Constitution. The constitutional legislator thus deliberately introduced the principle according to which the Republic of Poland shall respect international law binding upon it. Article 9 provides for the obligation to abide by all duly formed and applicable laws of international law. Article 9 also impliedly provides for the obligation to what Polish constitutional jurisprudence calls 'sympathize with'[6] international law. The latter principle is essentially a principle of loyalty that covers the obligation of conforming interpretation and

[5] Barcz 2005, pp. 169–184; Biernat 2005, pp. 185–206; Czapliński 2005, pp. 207–222; Wyrozumska 2005, pp. 224 ff.

[6] Polish—*przychylność.*

similar offshoots. Though the Polish term essentially evokes 'friendliness' and 'kindness', the term 'EU law-friendly interpretation' has also been translated as 'sympathetic interpretation' and, on second thought, there is a good ring to the translation as it evokes the idea of 'sympathetic resonance' in musical instruments.

Secondly, the Constitution entrenches the principle that the legal system biding on the territory of the Republic of Poland has many components.[7] Alongside the legal instruments made by domestic law-making authority, the Polish legal system provides for the validity and applicability of international law. It is important to note, however, that community law is not totally external to the Polish legal system. As far as primary law is concerned, it is produced by internally accepting the treaties made by all Member States. As far as secondary legislation is concerned, on the other hand, it is produced by representatives of the governments of all Member States. Within the territory of the Republic of Poland, therefore, the Polish legal system incorporates relatively autonomous subsystems of law that are produced in different law-making centres. Those subsystems should therefore coexist respecting the principle of 'sympathetic interpretation' and cooperative co-application. It is only outside of the multi-centric perspective that there can appear a *trompe-l'œil* effect that operates to reveal apparent potential conflicts of norms between the subsystems or apparent hierarchical coordination of the subsystems.

Thirdly, the constitutional regulation of the empowerment to '*delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters*' must be strictly construed. Therefore, the empowerment appears narrow. The totality of the competence of a particular state authority thus cannot be delegated.[8] Similarly, the delegation of state authority cannot pertain to the totality of '*certain matters*'. Finally, the competence of a state authority cannot be delegated if that competence constitutes the essence of the authority's existence under the Constitution and such delegation would make that authority redundant. Constitutional analysis therefore requires utmost precision in enumerating the matters for which the delegation is operative as well as in describing the scope of competence subject to 'delegation' under Article 90 of the Constitution.

Fourthly, the Constitution does not provide any grounds for 'delegating' '*to an international organization or international institution the competence of organs of State authority in relation to certain matters*' so that such a delegation could result in empowering the international organisation or institution to enact legislation or decisions that contravene the Constitution of the Republic of Poland. In particular, the transfer of competence cannot be so extensive as to deprive the Republic of Poland of the ability to function as a democratic and sovereign state.

Fifthly, the relative autonomy of legal subsystems integrated by the Constitution within the system of law valid and applicable within the territory of the Republic of Poland assumes that there exists a degree of interrelations between the

[7] Łętowska 2005, p. 4; Barcz 2006, p. 72.

[8] Kranz 2006, pp. 28–29; Mik 2006, p. 92.

subsystems as each subsystem is composed of internal and autonomous structure and hierarchy. There exists the possibility that European Union law could 'collide' with the Constitution. This situation could only arise, however, in cases of singular normative incongruity because the Constitution commands that conflict of norms be resolved through interpretation which respects the principle of relative autonomy of the European and Polish legal systems. Such a situation therefore exists in theory but can only be very rare in practice.

The sixth principle formulated by the Constitutional Tribunal holds that in cases of real normative conflict between the legal systems the Constitutional norms prevail. If the normative conflict is real, it cannot be resolved by assigning supremacy to community legislation over the Constitution of the Republic of Poland. According to the Constitutional Tribunal, the resolution of the real conflict cannot result in invalidation or substitution of the constitutional norm by the norm of the EU legal order and cannot result in circumscribing the validity of the constitutional norm to areas unregulated by community law. Whilst administration of justice and administrative authorities are compelled to respect the Constitution, relevant legislative authorities are bound to take steps to amend the Constitution or to amend community legislation or to take the decision to withdraw from the European Union in the most extreme situation.

Finally, the Constitutional Tribunal has noted that the constitutional regulation of the rights and freedoms of the individual constitute the minimum standard of protection and the maximum standard of interference by any public authority. The standards thus cannot be negotiated or overridden by community legislation. The Constitution continues to be the instrument of protection to the degree that rights and freedoms are constitutionally entrenched. What has been branded 'interpretation sympathetic to European law' is thus not a principle that could override the Constitution. Under no circumstance can the operation of the principle result in interpretations that would contravene the clear and unequivocal meaning of the Constitution or interpretations that would interfere with the minimum protection of the individual guaranteed by the Constitution. The Constitutional Tribunal does not allow for a situation whereby the constitutional norm's validity is endangered by the fact that the legal system of the European Union contains a norm that contravenes the Constitution.

The set of principles make up a theory of the constitutional regulation of the interoperation of the Polish legal system and the law of the European Union.[9] It has now crystallised and has become the canonical understanding of the constitutional limits of European integration. It has also become the canonical interpretation of the European clause of Article 90 of the Constitution at least as far as the notion of sovereignty and the empowerment of state authorities is concerned. This is not to say, however, that the Constitutional Tribunal managed to put an end to all discussion concerning the understanding of the aims and means of the Polish Republic's involvement in the European Union. The discussion lost none of its

[9] Biernat 2011, pp. 63 ff.

relevance. The negotiation and ratification of the Treaty of Lisbon gave a new lease of life to the controversy. This was particularly apparent when ratification was considered by the Polish Parliament and by the President of the Republic.

4 Treaty of Lisbon

The process of ratification of the Treaty of Lisbon by the Polish Parliament was structured by the internal political debate concerning the limits of European integration. Even though none of the strict negotiation conditions set forth in the negotiation mandate bestowed upon the government by the Parliament was incorporated in the project of the Reform Treaty signed in Lisbon, Poland joined the Treaty of Lisbon and proceeded with ratification procedures. Interestingly, however, parliamentary elections intervened before ratification and unexpectedly changed the political configuration. The elections brought about the victory of the liberal democratic party (i.e. the 'Civic Platform') that had been hitherto the major opposition party. The 'Law and Justice' party, on the other hand, took the place of the major opposition party. It was therefore the new parliament which had been responsible for negotiating and signing the Treaty of Lisbon. The political landscape was all the more interesting because the 'Law and Justice' lost the right to form the government but continued to be represented in the office of the President of the Republic. The parliamentary elections of autumn 2007 thus gave rise to what might be relevantly called "cohabitation between the two limbs of the dualist executive" in Poland as both political sides were in deep political conflict. The political and institutional landscape was not inconsequential for the ratification of the Treaty of Lisbon.

After long and strenuous deliberations in the Parliament, the law enabling the President to ratify the Treaty was voted and promulgated by the President. The Constitution, however, requires another official act for the ratification to be complete. The act of ratification belongs to the President and there is some latitude for the argument that there is a degree of discretion attached thereto. The President adopted the argument of the political party that negotiated and signed the Treaty of Lisbon but changed its feelings about the Treaty during the ratification procedure in the Parliament. This shift was motivated by political considerations of a rather internal nature. The President was thus reluctant to proceed with the act of ratification. This reluctance was very perplexing against the backdrop of the fact that the President had advertised negotiating and signing the Lisbon Treaty with a tremendous success. It was rather difficult to comprehend the reasons that were proposed to explain delaying the act of ratification.

Whilst it is never easy to explain the incomprehensible, it is always useful to resort to illustration. The most perplexing reason for delaying the act of ratification consisted in waiting for the results of the second national referendum in Ireland that was to decide the fate of the Irish ratification of the Treaty of Lisbon. What this meant was that the President of the Republic of Poland coordinated his

decision with the decision of the Irish people. The Constitution of the Republic of Poland assigns the President of the Republic the role of safeguarding the sovereignty of the country (Article 126(2)) and this task was apparently best exercised by coordinating his decision with that of a foreign sovereign, viz. the People of Ireland, in a situation when the Polish Nation had made the decision through its representatives, as the Parliament had voted the Act of Parliament enabling the ratification by the most stringent of supermajorities required by the Constitution of the Republic of Poland. The President of the Republic of Poland did finally ratify the Treaty after the Irish referendum affirmed the ratification in Ireland.

The presidential act of ratification, however, did not mark the end of the campaign against the Lisbon Treaty. A group of Deputies to the *Sejm* and a group of Senators filed a motion with the Constitutional Tribunal requesting that the Treaty of Lisbon be examined in respect to its conformity with the Constitution. Whilst constitutional arguments are always interesting in their own right, the motion filed had the additional formal appeal. Not only did all the parliamentarians responsible for the constitutional review request belong to the opposition 'Law and Justice' party but they belonged to the very party that was responsible for negotiating and signing the Treaty, the very party that supported the Act of Parliament enabling the ratification and the very party that supported the President of the Republic who finally had just ratified the Treaty of Lisbon and had voiced no constitutional concerns whatsoever, even though the President is assigned the constitutional mission of safeguarding the observance of the Constitution (Article 126(2)). The political motivation of the constitutional review request was blatant.

The justification of the constitutional review request was essentially limited to challenging the very principle of law-making by a qualified majority (both autonomously as well as in cooperation with the European Parliament) and to challenging the powers of the authorities of the European Union in the new institutional set-up, in the decision-making procedures as well as in the new treaty revision procedures. The authors of the constitutional review request argued that those mechanisms translated into a '*carte blanche* empowerment of the European Union to widen its attributions in contravention of the constitutional procedures that regulate such matters in Poland, as a Member State of the European Union'. The Treaty thus apparently allowed 'extending the attributions of the European Union in contravention with the constitutional requirements that regulate the delegation of sovereign competences of state authorities to the European Union'. Consequently, the principle according to which the Constitution is the highest law of the land as well as the regulations on the delegation of the competences of state authority to an '*international organization or institution*' were violated. The Constitutional Tribunal concluded that all the provisions of the Lisbon Treaty that were subject to review were constitutional. The position of the Constitutional Tribunal was justified by an analysis of the question of sovereignty and constitutional identity.[10]

[10] Wójtowicz 2011, pp. 4–11; Morawski 2011, p. 318; see also Sadurski 2006.

Regarding the question of sovereignty, the Constitutional Tribunal declared that the notion of sovereignty as an unlimited and supreme power in both internal as well as external affairs of a state is subject to evolutions that mirror the developments of the last centuries. Those developments are the consequence of the democratisation of decision-making within the state that follow the substitution of the principle of a monarchic sovereign with the principle of popular sovereignty. On the other hand, the principle of popular sovereignty itself is not unlimited.[11] First of all, the very structure of the principle of popular sovereignty and the idea of inalienable human dignity both require the recognition of a number of human rights that limit the power of democratic majorities. Secondly, the rise of the importance of international law as the regulation of international relations is the consequence of the development of institutionalisation of international community of peoples and the process of institutionalisation of the international community through globalisation as exemplified by European integration. Further, the Constitutional Tribunal considered the essence of state sovereignty. The essential attributes of sovereignty are: the jurisdiction over the state's territory and over the state's citizens, the exercise of powers in the area of international policy, deciding on war and peace, the discretion in recognising states and their governments, entertaining diplomatic relations, deciding on military alliances and on membership in international political organisations as well as implementing autonomous financial, budgetary and fiscal policy.

The Constitutional Tribunal considered the influence of European integration on the scope of state sovereignty. The Constitutional Tribunal noted that the legal system of the European Union is different from other legal constructs in international law. The competences of the European Union are wider and have a stronger influence on the state legal systems because of the normative character of most of its legal acts as well as their direct applicability within the legal systems of Member States. The Constitutional Tribunal noted that the Member States decided not to exercise some of their sovereign powers in internal and external arena so that such competences can be exercised in concert with other Member States. Such a delegation of authority might be durable but is not final. On the other hand, the relationship between exclusive and concurring competences is of a dynamic character. The arrangement therefore does not encroach on the sovereignty of Member States. The Member States are subject to nothing but the obligation to exercise their authority jointly in areas subject to cooperation which is structured by the supranational mechanisms put in place for the sake of such joint exercise of state sovereignty.[12] For as long as the states retain the full capacity of formalising the exercise of state authority—which is the correlate of the competence of competence—they remain sovereign subjects of international law. The states remain the subjects and actors of supranational integration; they retain the

[11] Lazowski 2011, p. 510.

[12] Piontek 2009, pp. 586–604.

'competence of competence' for as long as European integration is based on the model of an international organisation.

The Constitutional Tribunal could not but confirm the obvious statement according to which entering into international agreements and abiding by them does not strip the state of its sovereignty but indeed is its very affirmation. Membership in the European Union does not constitute a form of limited sovereignty but is in fact the emanation of the state sovereignty. The Constitutional Tribunal adapted the reasons for the decision to the general public and addressed the issue in concrete terms. In order to convince and comfort the Euro-skeptic public, the Constitutional Tribunal insisted on the fact that the state of Polish sovereignty after accession to the European Union cannot be considered in the abstract but rather needs to be analysed within the constitutional framework. European Union membership is warranted by the Constitution, and the Constitution is the very act of the sovereign Nation. The constitutional legislator thus commands that sovereignty can be exercised on the basis and within the limits of the European clause of Article 90 of the Constitution.

Sovereignty and independence of the Republic of Poland as a member of European Union is exercised according to the precepts of the Constitution itself. Sovereignty exercised through mechanisms of regional integration are thus the affirmation of the supreme right of the Nation to decide its fate. This principle is translated into the Constitution. The stipulation of the Preamble as well as relevant provisions of the Constitution that determine the democratic character of the state, the internal sovereignty (i.e. the supreme power) of the Nation, the obligation of the state to safeguard its independence and the inviolability of its territory, the obligation of the state to protect the rights and freedoms as well as the security of the individual, the obligation of the state to safeguard the national heritage of the country, and the obligation of the state to protect the environment according to the principle of sustainable development are all part and parcel of the Constitution as the supreme law of the land that determines the meaning of the European clause. According to the Constitutional Tribunal, those constitutional principles mean that the sovereignty of the Republic is essentially incarnate in the inalienable powers and obligations of the authorities of the state that constitute the very constitutional identity of the state.

The Constitutional Tribunal concluded that the competences of state authorities that are covered by the prohibition of 'delegation' inherent in the Constitution constitute the constitutional identity of the state. Constitutional identity of the state is therefore the notion that determines the scope of inalienable competences, i.e. competences that cannot be transferred to an international organisation or institution because they belong to the essential fundamentals of the system of government of a state. Such competences are not transferable under Article 90 of the Constitution. Whilst enumerating a catalogue of such untransferable competences is no easy matter, the Constitutional Tribunal indicated that the absolute prohibition of delegation is determined by all cardinal principles of the Constitution as well as all the provisions which regulate the rights and freedoms of the individual. Provisions such as the principle of human dignity and human rights, the

principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, the principle of optimal realisation of constitutional values as well as the prohibition of delegation of constitution-making authority and the 'competence of competence' are constitutive of the constitutional identity of the state.

Detailed determination of the essence of the constitutional identity is essential for a more complete understanding of the axiology of the Constitution.[13] It is also practically essential for the authorities of the Polish state (be they part of the judicial, legislative or administrative department) to be able to understand the principle of delegated powers in the European law. To understand the principle of delegated powers means to understand the limits of the powers delegated to the European Union. The Constitutional Tribunal chose to concentrate, however, on the Constitution when considering the constitutionality of the Treaty of Lisbon. This is understandable given its function in the system of government. The Constitutional Tribunal apprehends the meaning of state sovereignty through the lens of the essence of its constitutional identity. When considered against the backdrop of the wider European-constitutional debate in Poland, the Constitutional Tribunal's *dicta* concern only one aspect of sovereignty. The Constitutional Tribunal distilled the constitutional aspect of sovereignty and does not consider the vision of competing sovereignties.[14] Therefore the theory exposed by the Constitutional Tribunal inevitably appears to be oblivious of the complexity of integration processes. The Constitutional Tribunal does not take account of the level of integration achieved thus far and the exponential growth of European integration. The Constitutional Tribunal should thus be seen as exposing a defensive model of constitutionalism rather than an open and forward-looking constitutionalism. One is tempted to note that the former theory seems better suited to account for the normative and real functions of such principles as the principle of the common good, the principle of solidarity and the principle of subsidiarity. Even if the theory of open and forward-looking constitutionalism was nothing but a formulation of a reverie, its formulation might well be considered to allow for a fuller realisation of the needs of the citizenry as well as a realisation of the challenges of globalisation.[15]

[13] Morawski 2011, p. 318.

[14] T.T. Koncewicz, 'Commentary to the Judgment of the Constitutional Tribunal of 24 November 2010 (K 32/09)', [Glosa do wyroku Trybunału Konstytucyjnego z dnia 24 listopada 2010 roku (sygn. akt K 32/09)], manuscript on file with the author.

[15] T.T. Koncewicz, ibid.

5 Legal Safeguard in National Culture

Sovereignty as such was not the only bone of contention when the constitutionality of the Accession Treaty was considered. Sensitive issues of morality were also introduced during the evaluation of the constitutionality of the Treaty of Accession. It is to be noted that moral principles can be easily confused with questions of national sovereignty when such moral intuitions are believed to be part of the natural order of things within the community and it is true that the moral intuitions considered here are based on institutionalised religious belief rather than serious ethical consideration. The phenomenon can be exemplified by the arguments adduced against the constitutionality of Article 13 TEC as it stood at the time. Article 13 TEC warranted combating discrimination, which included discrimination on the grounds of sexual orientation. It was thus argued that the provision violated the constitutional guarantee that marriage is the union of a man and a woman (Article 18). The Constitutional Tribunal refused to give sufficient reasoning. The Tribunal noted that a constitutional amendment would have been required in order to reform the principles on which the legislative concretisation of marriage is based anyway. The Constitutional Tribunal also confirmed that such a modification cannot be validly made by a ratified international agreement, thus comforting the sentiments of national sovereignty. The judgment of the Constitutional Tribunal, however, did not end the strife.

Oversensitivity to the moral meaning of legal texts also explains the discussion of the Charter of Fundamental Rights of the European Union in Poland. Poland joined the United Kingdom as a signatory of Protocol[16] No. 30. The Protocol regulates the applicability of Chapter IV of the Charter (i.e. social and economic rights) by indicating how the chapter is to not be construed. The Protocol thus forbids interpreting the Charter in a way that extends the ability of European institutions to enforce any standards arising under Chapter IV. Article 1(1) reads as follows: '*The Charter 'does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms*'. Furthermore, the Protocol stipulates that '*In particular, and for the avoidance of doubt, nothing in Title IV* [Solidarity] *of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.*' This would be singularly unsurprising if Poland did not also adopt Declaration No. 62 which reads: '*Poland declares that, having regard to the tradition of social movement of "Solidarity" and its significant contribution to the struggle for social and labor rights, it fully respects social and labor rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union*'. The latter

[16] Wyrozumska 2009, pp. 80–113; Barcz 2009, pp. 25–38; Wyrzykowski 2009, pp. 25–38, 2010.

declaration is hardly surprising because the material scope and normative meaning of Chapter IV of the Charter of Fundamental Rights is identical with relevant provisions of the Polish constitutional charter. Declaration No. 62 is surprising when considered against the contents of Protocol No. 30.

The bewilderment caused by the ambiguity of the Polish negotiation position is easily quashed by considerations of symbolic strategy. Declaration No. 61 annexed to the Treaty of Lisbon proclaims that '*[t]he Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity*'. It thus seems that Protocol No. 30 was the vehicle that allowed the addressing of a problem that is beyond its ambit. The intention of the Polish negotiators was not to address any problems arising under Chapter IV of the Charter of Fundamental Rights. The negotiators rather proceeded to consecrate the social rights by way of ambiguity in order to express—at least on the psychological level—concerns about cultural self-determination. The concerns can be divided into three categories of fear. The first category of concerns covers the fear that the European Union might obligate Poland to amend the abortion regulation. It is well known, on the other hand, that the Polish regulation is only second to the Irish regulation in terms of restrictiveness in Europe. The second concern was equally burning and was that the European Union would step into regulate euthanasia. The third reason for concern was the fear that European Union law would step into obligate the Polish Republic to regulate same-sex partnerships. The collective consciousness is deeply marked by the heritage of Christianity; a part of the general public and the public opinion elevate those matters to an important component of national identity that is so fundamental as to justify any means in order to protect it.

6 EU Secondary Legislation 2011

In the judgment of the Constitutional Tribunal concerning the Accession Treaty (K 18/04) the Constitutional Tribunal stated that the 'European clause' of Article 90 as well as the Articles that regulate the position of international law within the domestic legal system cannot possibly authorise an act of 'delegation' of state authority to an international organisation or institution of such to go as far as to allow such an organisation or institution to make legislative or administrative acts that would be inconsistent with the Constitution of the Republic of Poland. The language of the statement of reasons for the judgment was arguably Aesopian. It did not allow for a conclusive argument that the Tribunal found admissible the constitutional review of EU secondary legislation. Commentaries and critical analyses of the judgment that followed its publication took both sides. Some indicated that it was seriously uncertain that the Constitutional Tribunal actually

enjoyed jurisdiction in this respect.[17] Others concluded that 'the Constitutional Tribunal does not shut out the possibility of constitutional review of EU secondary legislation'.[18] Of course, the problem does not come down to what the Constitutional Tribunal considered possible or not. The problem consists in the essential question of whether the Constitutional Tribunal is actually competent to exercise constitutional review of secondary legislation of the EU. The secondary question concerns the procedures that actually permit the exercise of such a theoretical competence. Generally, the discussion did not concern abstract constitutional review because abstract constitutional review procedures need to be directed against formal normative acts enumerated by the Constitution. The situation is clear. It was, however, considered possible that the procedure of constitutional complaint was available for such a construction if it is accepted that the notion of a 'normative act' against which the constitutional complaint is to be directed is understood materially to cover secondary EU legislation. The problem was resolved in 2011.[19] It did turn out that constitutional case-law actually abided by the famous *Chekhov's dictum*, according to which '*If in the first act you have hung a pistol on the wall, then in the following one it should be fired. Otherwise don't put it there.*'

In the judgment, the Constitutional Tribunal considered a constitutional complaint concerning the constitutionality of Article 41 of Council Regulation (EC) No 44/2001 of 22 December 2000 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. The constitutional complaint alleged that the Regulation was inconsistent with the right of access to court and the principle of equality before the law (Article 45(1) and Article 32(1) in conjunction with Article 45(1) of the Constitution of the Republic of Poland, respectively). The provision which was subject to constitutional review stipulates that a debtor against whom enforcement was sought should not at the stage of first instance proceedings be entitled to make any submissions on the application. Moreover, the proceedings at the first instance have the *ex parte* character, which was alleged to violate the right of access to court in the proceedings concerning the enforceability of a foreign judgment within the territory of the Republic of Poland. The Constitutional Tribunal performed the constitutional reviews and concluded that the Regulation was constitutional. The Regulation conformed to both the right of access to court and the right to equality before the law. The substance of the decision was by far less controversial than the question of competence of the Constitutional Tribunal for the case concerned as this relies on the proposition that EU secondary legislation is subject to constitutional review.

The Constitutional Tribunal had to take a stance on the problem of constitutional review of EU secondary legislation. The matter hinged on the meaning of the term 'normative act' used in Article 79(1) of the Constitution. Indeed, Article

[17] Barcz 2005, p. 175.

[18] Czapliński 2005a, p. 211.

[19] Judgment of the Constitutional Tribunal of 16 November 2011 (SK 45/09).

79(1) of the Constitution states that '[…] *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 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*'. The constitutional complaint procedure thus seems to obligate the Constitutional Tribunal to review the constitutionality of statutes and other normative acts. The question would seem to boil down to a semantic problem of whether a Council Regulation is a normative act; the matter, however, was discussed as if the problem was structured in a different language for the matter to fall within the scope of understanding of the notion of 'normative act' and for the scope of understanding of the notion to cover Council Regulations.

The reasoning of the Constitutional Tribunal did not have the benefit of *tabula rasa* as the matter had already been discussed in the legal literature. The opponents of the Constitutional Tribunal's jurisdiction in the matter rely on the argument that only statutes and normative acts enumerated in the Constitution can fall within the scope of understanding of the term 'normative act' employed in Article 79 of the Constitution with the proviso that they are not international agreements because international agreements are not normative acts issued by central organs of the state. Further, the opponents of constitutional review powers in respect of EU secondary legislation have advanced the argument that allowing jurisdiction of the Constitutional Tribunal in the case would violate the unconditional obligations made by the state because the Treaties foreclose the jurisdiction of Member States' courts—constitutional courts included—in respect of the validity or interpretation of EU law.[20] The argument is important because the consequence of the principle of primacy of EU law is that courts and constitutional courts of Member States cannot review the validity of EU legislation in any way, i.e. including invalidation or inapplicability. Since the judgment of the Constitutional Tribunal can result in repealing an act—or a part thereof—such a repeal would result in the unacceptable situation where the authority of one Member State considers inapplicable or invalid an act of EU law within its jurisdiction. Should an unconstitutional provision of EU law be invalidated or deemed inapplicable within the Polish legal system, Polish authorities would be acting in contravention of European Union law and the Polish state would be gravely responsible under Article 258 TFEU for violating EU law. Constitutional review of the Council Regulation is otherwise unnecessary because the Regulation in question had already been validated by the constitution as it was part and parcel of the *acquis communautaire* adopted by the Polish state at the date of accession to the European Union; the constitutional review of the body of law thus received within the domestic legal system should be deemed accomplished and exhausted by the sovereign act of accession to the

[20] The argument of the Public Prosecutor-General in the proceedings before the Constitutional Tribunal.

European Union within the procedures that are associated with such an accession.[21]

The Constitutional Tribunal adopted an original approach as is evidenced by the statement of reasons for the judgment. The reasoning originated in the crucial determination of the essence of the notion of a 'normative act' employed in Article 79 of the Constitution. This derives from the relationship between the constitutional norms that describe the general basis for the competence of the Constitutional Tribunal and the norm that regulates the constitutional complaint. The Constitutional Tribunal emphasised the importance of the constitutional complaint as an instrument of protection of the rights and freedoms of the individual, as well as the severability of the procedures of control of the hierarchical congruity of normative acts and the procedure of constitutional review based on the constitutional complaint. The Constitutional Tribunal also considered the arguments based on the structure of the Constitution. It was concluded that '*In the present case, the Constitutional Tribunal assumes that the ratione materiae scope of normative acts which may be subject to constitutional review, in the course of review proceedings commenced by way of constitutional complaint, has been set out in Article 79(1) of the Constitution, autonomously and independently from* [*the general competence of the Constitutional regulated in Article 188 of the Constitution*]'.[22] The Constitutional Tribunal thus considered that the norms of the Council Regulation have the character of generality and abstractness and therefore are addressed not only to Member States and their authorities but also to individuals (non-state actors). The Constitutional Tribunal concluded that 'an EU regulation bears the characteristics of a 'normative act' within the meaning of Article 79(1) of the Constitution'.[23] The conclusion is crucial because EU regulations can contain norms on the basis of which '*a court or organ of public administration*' can make in respect of an individual *'a final decision on […] freedoms or rights or on his obligations specified in the Polish Constitution*'.

It is important to note that the Constitutional Tribunal's *démarche* bears no marks of recklessness. First of all, the Constitutional Tribunal recurrently puts a special emphasis on the reasoning of the case under consideration. Secondly, the Constitutional Tribunal affirms that constitutional review of EU secondary legislation is special on two counts. Concluding that '*EU regulations, as normative acts, may be subject to constitutional review in the course of review proceedings commenced by way of constitutional complaint*' the Constitutional Tribunal also notes that '[t]*he fact that they are the acts of EU law, also constituting part of the Polish legal order, results in a special character of the review conducted in such a case by the Constitutional Tribunal*'.[24]

[21] The argument was presented in the proceedings by the Minister for Foreign Affairs.

[22] Paragraph 1.2 of the reasons.

[23] Paragraph 1.4 of the reasons.

[24] Paragraph 1.5 of the reasons.

The Constitutional Tribunal concluded that the Council Regulation was in conformity with the Constitutional provisions indicated in the constitutional complaint. One would expect that this circumstance would encourage the Constitutional Tribunal to remain vague on the point of possibility and legality of constitutional review of an EU Regulation. The Constitutional Tribunal, however, seized the opportunity to calm the excitement that surrounded the effective opening of constitutional review of the acts of EU institutions. The Tribunal took care to tailor narrowly the possibility of unconstitutionality.

Three interpretative directives chart the realm of unconstitutionality. The first directive relies on the assumption that unconstitutionality of EU legislation can result from a lower standard of human rights protection under EU law as compared to the standards of the Constitution of the Polish Republic, and its charter of rights and freedoms in particular. The Constitutional Tribunal relies on established case-law to conclude that '*the lower level of protection of the individual's rights that arises from the EU law, in comparison with the level of protection guaranteed by the Constitution, would be unconstitutional. The constitutional norms from the realm of the rights and freedoms of the individual set a threshold which may not be lowered or challenged as a result of the introduction of EU regulation. Interpretation "consistent with the EU law" has its limits. It may not lead to results which contradict the explicit wording of the constitutional norms and to results that are incompatible with the minimum of the guarantees provide[d] by the Constitution.*[25] The second directive, however, assumes that there is a degree of axiological convergence as between Polish and European law. The Charter of Fundamental Rights, the European Convention on Human Rights as well as the constitutional traditions of Member States set high standards of human rights protection within the European Union so as to establish the relationship of axiological communion. Under this directive therefore, the gist of the matter does not lie in that regulations be identical. The essential element of constitutionality lies rather in comparable standards of human rights protection. The third directive of interpretation regulates the way the constitutional review is to proceed. Constitutional analysis must be performed with all due diligence and prudence that takes account of the obligation of loyal cooperation and the principle of abiding by obligations where the mutual respect of European Union and its Member States is concerned, as well as the principle of mutual cooperation in the realisation of the tasks assigned by the Treaties. Indeed, the Treaty on European Union states that '*the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives*'. This obligation '*would be difficult to reconcile with […] granting powers to particular Member States which would allow them to declare the norms of EU law to be no longer legally binding*'.[26] Those directives of interpretation therefore limit the possibility that EU legislation be deemed unconstitutional.

[25] Paragraph 2.9 of the reasons.

[26] Paragraph 2.5 of the reasons.

Whilst the possibility of declaring unconstitutional EU secondary legislation is meagre, the possibility exists nonetheless. The Constitutional Tribunal considers the consequences of a judgment that would deem a norm of EU secondary legislation unconstitutional. The consequences of such an act of the Constitutional Tribunal are limited normatively and are characteristically downgraded rhetorically in the Polish version of the text. The consequences consist in that the judgment could '*rule out the possibility that the acts of EU secondary legislation would be applied by the organs of the Polish state and would have any legal effects in Poland. Therefore, the ruling of the Constitutional Tribunal would result in suspending the application of the unconstitutional norms of EU law in the territory of the Republic of Poland*'.[27] As is indicated in the reasons for the decision, the Constitutional Tribunal is not oblivious of the fact that such consequences cannot be reconciled with the obligations of a Member State of the European Union and that the state runs the grave risk of proceedings for violating its obligations arising under the Treaties. The Constitutional Tribunal thus indicates that the situation would be governed by the same normative structure that governed the invalidation of the domestic transposition of the European Arrest Warrant. The declaration of unconstitutionality is thus to be accompanied by a deferment of the coming into force of the judgment for up to 18 months, which allows the time and space for making relevant amendments to EU legislation or to the Constitution. The only difference consists in the fact that the European Arrest Warrant case concerned a domestic statute by which the domestic Parliament transposed the Framework Decision rather than European Union secondary legislation directly.

7 Polish Involvement in EU

The experiences of the years since accession to the European Union as well as the necessity to make room for the requirements of the Treaty of Lisbon nourished reflection on the necessity to amend the Constitution and its regulations on matters relating to European Union membership in particular. Both political actors and constitutional and European Union law scholars agreed. It was indicated that the legal basis for European Union membership should be upgraded to meet the demands of the reality of the system of government, to render more efficient the operation of national institutions within the institutions of the European Union as well as to accommodate the new enhanced role of national parliaments in European Union matters, to transpose the procedures for simplified revision of the treaties of the EU (*passerelle* revision procedures), to regulate the status of the citizens of the European Union within the Polish constitutional order, to provide for the membership in the Economic and Monetary Union and the potential

[27] Paragraph 2.7 of the reasons for the decision. The language downgrades the importance of the consequences of a partial invalidation of EU secondary legislation by employing the term 'only'.

introduction of the common currency in Poland, and, finally, to implement the domestic regulations for the procedure of withdrawal from the European Union. All those matters were the object of a legislative initiative of the President of the Republic. The proposed constitutional amendment was based on multiple studies and analyses and was presented to the *Sejm.*[28] The proposal was based on the idea of introducing a new chapter into the Constitution. Chapter Xa was to be devoted to a comprehensive regulation of the membership of the Republic of Poland in the European Union.

The proposal of the President of the Republic is interesting in that it indicates the axiological foundations of Poland's membership in the processes of European integration. Those axiological foundations were spelled out primarily in what was called the integration 'limitation clause'.[29] The integration 'limitation clause' stipulated that the Republic of Poland is a member of the European Union that respects the sovereignty and national identity of its Member States, that respects the principles of subsidiarity, of democracy, of the rule of law, of inalienable human dignity, of freedom and equality, and that guarantees the protection of freedoms and rights of the individual comparable to the protection of those freedoms and rights entrenched in the Constitution of the Republic of Poland.[30] Those are the values that lie in the heart of the Constitution of the Republic of Poland but are also present in the constitutions of other countries as well as in Article 2 of the Treaty on European Union. The confirmation of the high level of axiological convergence, and the convergence of Polish and European Union law in particular, has four basic functions according to the sponsors of the constitutional amendment.[31] First of all, it spells out the unequivocal constitutional basis for Poland's membership in the European Union. Secondly, it determines the overall directions of Polish policy in respect of the European Union in as much as it obligates domestic authorities to take necessary steps and measures at the European Union level to assure the protection of those fundamental values including—but not limited to—taking steps and measures necessary for making European Union respect those fundamental values. Thirdly, the provision pre-empts cases of normative conflict between the law of the Constitution and the law of the European Union. Finally, the provision sets constitutional limits on Poland's membership in the European Union. According to the proposal, the constitutional limits on European integration consist in that '*the Republic of Poland is not under the constitutional obligation to participate in the European Union if the Union fails to respect the values enumerated in Article 227a of the Constitution. Poland is also*

[28] *Sejm Report* No. 3598 of 12 November 2010 'Bill on the Constitutional Amendment of the Constitution of the Republic of Poland'.

[29] Article 227a of the Bill.

[30] Ibid.

[31] Cf. the justification of the Constitutional Amendment.

not obligated under the Constitution to give effect to the law of the European Union when it violates the fundamental values of Article 227a'.[32]

The constitutional amendment was considered in the Parliament and was adopted by the *Sejm*'s Extraordinary Subcommittee for Constitutional Amendment.[33] The European Union limitation clause adopted in the Subcommittee was modified in comparison to the original draft. The litany of the original draft read: '*European Union respects the principles of subsidiarity, of democracy, of the rule of law, of the respect for the inalienable human dignity, of freedom and equality and guarantees the protection of rights and freedoms comparable to the protection of those rights and freedoms afforded by the Constitution*'. It was replaced by a succinct formula according to which '*membership of the Republic of Poland in the European Union serves the purposes of the Constitution and does not infringe the principles the Constitution sets out in the Preamble, the principles enumerated in Chapter I devoted to the fundamental principles of the system of government or the rights and freedoms of the individual entrenched in the Constitution*'.

Whilst the idea of a constitutional regulation of membership in the European Union has never inspired much controversy, the details provide food for thought and contention. The formulation '*The Republic of Poland is a member of the European Union that respects sovereignty and national identity*' is a good example. On the one hand, the formulation can be interpreted as a descriptive statement that normatively confirms the character of the European Union. On the other hand, however, the formulation can give the impression that the Polish national constitutional legislator determines the fundamental characteristics of the European Union. This in turn could mean that Polish authorities could be enabled to review the degree to which sovereignty and national identity are respected as part of their day-to-day activity. As a result, the 'limitation clause' could be the basis for actions and measures that follow when it is detected that the European Union does not conform or no longer conforms to the constitutional definition of its character and does not respect the sovereignty or national identity. This construction could have far-reaching consequences particularly because Polish authorities, including the Constitutional Tribunal, routinely entertain the traditional intuition of the notion of sovereignty. The European Union membership limitation clause considered as the regulation of the limits of integration that cannot be transgressed is rendered a powerful instrument when it is construed as a conditional enabling norm contingent on the condition that the Union conforms to the parameters described in the limitation clause. According to this interpretation, the Republic of Poland is a member of the European Union for as long as the European Union respects national sovereignty and identity.

Whilst it might be difficult to draw any general conclusions from the vicissitudes of the notion of sovereignty in constitutional discussions in Poland, the

---

[32] Ibid.

[33] 'Bill on the Constitutional Amendment of the Constitution of the Republic of Poland', *Sejm Report* No. 4550 of 14 July 2011.

overview suggests that the importance of the issue should be reflected in the structure of the Constitution.

As the end of the term of the Parliament intervened, all legislative procedures were discontinued. It is to be expected, however, that the matter will be subject of parliamentary attention shortly. Since the political and ideological landscape has not been subject to any meaningful changes, it is also to be expected that the new constitutional amendment bill will by and large reflect the draft as already considered by the Parliament. It is also very likely that the future constitutional regulation of European Union membership of the Republic of Poland will be based on the limitation clause model. Finally, it is to be hoped that the European Union clause will be legislated as a fundamental principle of the system of government and thus part of the first chapter of the Constitution. This would be a very welcome constitutional instrument considering the fact that the European Union limitation clause provides the basis and the conditions for the Republic's membership in the European Union. Whilst it might be difficult to draw any general conclusions from the vicissitudes of the interpretation of the concept of sovereignty in Poland as discussed in this paper, the overview suggests that the importance of the issue should finally find an adequate reflection in the structure of the Constitution. The idea is not new—as it first appeared in the early 1990s—but it might well finally become the long-awaited constitutional reality.

References

Barcz J (2005) Glosa nr 1 do wyroku Trybunału Konstytucyjnego z dnia 11.5.2005 (zgodność Traktatu akcesyjnego z Konstytucja RP) K 18/04 [Commentary No. 1 on the judgment of the Constitutional Tribunal of 11 May 2005 (Constitutionality of the Accession Treaty) K 18/04]. Kwartalnik Prawa Publicznego [Public Law Q] 4/2005:169–184

Barcz J (2006) Pojęcie suwerenności w świetle współzależności między sferą ponadnarodową i państwową [The concept of sovereignty in the light of inter-dependence as between the supranational and national spheres]. In: Kranz J (ed) Suwerenność i ponadnarodowość a integracja europejska [National sovereignty and supra-nationality in European integration]. Prawo i Praktyka Gospodarcza Publishing, Warsaw, pp 55–79

Barcz J (ed) (2009) Fundamental rights protection in the European Union. C.H. Beck, Warsaw

Biernat S (2005) Glosa nr 2 do wyroku Trybunału Konstytucyjnego z dnia 11.5.2005 (zgodność Traktatu akcesyjnego z Konstytucja RP) K 18/04 [Commentary No. 2 on the judgment of the Constitutional Tribunal of 11 May 2005 (Constitutionality of the Accession Treaty) K 18/04]. Kwartalnik Prawa Publicznego [Public Law Q] 4/2005:185–206

Biernat S (2011) Członkostwo Polski w Unii Europejskiej w świetle orzecznictwa Trybunału konstytucyjnego [Membership of the Republic of Poland in the European Union in the light of the case-law of the European Union]. In: Biernat S, Dudzik S (eds) Doświadczenia prawne pierwszych lat członkostwa Polski w Unii Europejskiej [The legal experiences of the first years of membership of the Republic of Poland in the European Union]. Oficyna Wolters Kluwer Publishing, Warsaw, pp 63–105

Czapliński W (2005a) Glosa nr 3 do wyroku Trybunału Konstytucyjnego z dnia 11.5.2005 (zgodność Traktatu akcesyjnego z Konstytucja RP) K 18/04 [Commentary No. 3 on the Judgment of the Constitutional Tribunal of 11 May 2005 (Constitutionality of the Accession Treaty) K 18/04]. Kwartalnik Prawa Publicznego [Public Law Q] 4/2005:207–222

Czapliński W (2005b) Glosa I w związku z wyrokiem Trybunału Konstytucyjnego dotyczącym europejskiego nakazu aresztowania [Commentary No. 1 on the judgment of the Constitutional Tribunal concerning the European arrest warrant]. Państwo i Prawo [State Law] 9/2005:107–112

Gierach E (2005) Glosa do wyroku Trybunału Konstytucyjnego z dnia 27 kwietnia 2005 r. (sygn. akt P 1/05) [Commentary on the judgment of the Constitutional Tribunal of 27 April 2005 (case-call No. 1/05). Przegląd Sejmowy [Sejm Rev] 5/2005:196–204

Grajewski K (2006) Europejski nakaz aresztowania—konstytucyjność regulacji kodeksowej. Wyrok TK z dnia 27 kwietnia 2005 r. P 1/05—glosa [The European Arrest Warrant—the Constitutionality of the Regulation of the Code of Criminal Procedure. Judgment of the Constitutional Tribunal of 27 April 2005, P 1/05—a commentary]. Gdańskie Studia Prawnicze Przegląd Orzecznictwa [Legal Stud Gdansk Rev Case-Law] 1/2006:161–166

Hofmański P (2005) Glosa II w związku z wyrokiem Trybunału Konstytucyjnego dotyczącym europejskiego nakazu aresztowania [Commentary No. 2 on the judgment of the Constitutional Tribunal concerning the European arrest warrant]. Państwo i Prawo [State Law] 9/2005:113–117

Kranz J (ed) (2006) 'Suwerenność w dobie przemian' [Sovereignty in the Times of Change]. In: Suwerenność i ponadnarodowość a integracja europejska [National sovereignty and supra-nationality in European integration]. Prawo i Praktyka Gospodarcza Publishing, Warsaw, pp 15–54

Lazowski A (2011) Half full and half empty glass: the application of the EU Law in Poland (2004–2010). Common Mark Law Rev 48:503–553

Łętowska E (2005) 'Multicentryczność współczesnego systemu prawa i jej konsekwencje' [The multicentric character of the contemporary system of law and its consequences]. Państwo i Prawo [State Law]:4/2005:3–10

Mik C (2006) Powierzenie Unii Europejskiej władzy przez państwa człon kowskie i jego podstawowe konsekwencje prawne [The conferral of the exercise of state authority by Member States on the European Union]. In: Kranz J (ed) Suwerenność i ponadnarodowość a integracja europejska [National sovereignty and supra-nationality in European Integration]. Prawo i Praktyka Gospodarcza Publishing, Warsaw, pp 80–147

Morawski L (2011) Dwie wizje Unii Europejskiej a problem tożsamości narodowej [Two blueprints for the European Union and the problem of national identity]. Forum Prawnicze [Lawyers' Forum] 4–5:318

Piontek E (2009) Constitutional case-law of the Member States regarding the primacy of community law—conclusions for Poland. In: Piontek E, Karasiewicz K (eds) Quo vadis Europo? [Whither bound, Europe?], vol III. The Bureau of the European Integration Committee Publishing Office, Warsaw, pp 586–604

Płachta M, Wieruszewski R (2005) Glosa III w związku z wyrokiem Trybunału Konstytucyjnego dotyczącym europejskiego nakazu aresztowania [Commentary No. 3 on the judgment of the Constitutional Tribunal concerning the European arrest warrant]. Państwo i Prawo [State Law] 9/2005:117–125

Sadurski W (2006) European constitutional identity? Legal studies research paper, No. 06/37, Oct 2006

Steinborn S (2005) Glosa do wyroku Trybunału Konstytucyjnego z dnia 27 kwietnia 2005 r. (sygn. akt P 1/05) [Commentary on the judgment of the Constitutional Tribunal of 27 April 2005 (case-call No. 1/05)]. Przegląd Sejmowy [Sejm Rev] 5/2005:182–195

Wójtowicz K (2011) Zachowanie tożsamości konstytucyjnej państwa polskiego w ramach UE—uwagi na tle wyroku TK z 24.11.2010 r. (K 32/09) [Preserving the constitutional identity of the Polish State within the European Union—remarks inspired by the judgment of the Constitutional Tribunal of 24 November 2010 (K 32/09)]. Europejski Przegląd Sądowy [Eur Court Rev] 11:4–11

Wyrozumska A (2005) Glosa nr 4 do wyroku Trybunału Konstytucyjnego z dnia 11.5.2005 (zgodność Traktatu akcesyjnego z Konstytucja RP) K 18/04 [Commentary No. 4 on the judgment of the Constitutional Tribunal of 11 May 2005 (Constitutionality of the Accession Treaty) K 18/04]. Kwartalnik Prawa Publicznego [Public Law Q] 4/2005:224 ff

Wyrozumska A (2009) Incorporation of the charter of fundamental rights into the EU Law: status of the charter, scope of its binding force and application, interpretation problems and the Polish position. In: Barcz J (ed) Fundamental rights protection in the European Union. C.H Beck, Warsaw, pp 80–113

Wyrzykowski M (1999) Klauzula europejska—zagrożenie suwerenności? (suwerenność a procedura ratyfikacyjna członkostwa Polski w UE) [The European Clause—a threat to sovereignty?]. In: Czapliński W, Lipowicz I, Skoczny T, Wyrzykowski M (eds) Suwerenność a integracja europejska [European integration and sovereignty]. Centrum Europejskie Uniwersytetu Warszawskiego [The Centre for Europe of the University of Warsaw], Warsaw, pp 85–96

Wyrzykowski M (2009) Introduction: limits of power and limits of interpretation. In: Barcz J (ed) Fundamental rights protection in the European Union. C.H Beck, Warsaw, pp 5–38

Wyrzykowski M (2010) Die Verneinung der verfassungsrechtlichen Identitaet—Protokoll Nr. 30 zur Charta der Grundrechte der EU aus der Perspektive des polnischen Staatsbuergers [The negation of the constitutional identity—Protocol 30 to the charter of fundamental rights of the EU from the perspective of the citizen of the Polish state]. Paper delivered at the Luxembourgisches Forum, European Court of Justice, Luxembourg, 5 Sept 2010