

Accession Treaty Polish Constitutional Tribunal

Conformity of the Accession Treaty with the Polish Constitution.
Decision of 11 May 2005.

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INTRODUCTION

In the two years following Poland's accession to the European Union, the Polish Constitutional Tribunal delivered several judgments dealing with vital legal issues related to EU membership. The first decisions concerned the electoral law regarding the European Parliament¹ and the relationship between both chambers of the Polish Parliament in Union matters.² They were followed by highly controversial judgments on the conformity of the European Arrest Warrant³ and the Accession Treaty with the Polish Constitution.⁴ The most recent judgment in this respect deals with the rights of European Union citizens in municipal elections.⁵

Not surprisingly the judgments on the European Arrest Warrant and the Accession Treaty have attracted considerable attention. The relationship between national and European Union law is at the centre of both. The first deals with third pillar law and its status in the Polish legal order. The second touches upon

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¹ Judgment of 31 May 2004 in the case K 15/04 [Wyrok z dnia 31 maja 2004 r. Sygn. akt K 15/04] OTK Z.U. [Constitutional Tribunal Reports] 2004/4A, item 31.

² Judgment of 12 Jan. 2005 in the case K 24/04 [Wyrok z dnia 12 stycznia 2005 r. Sygn. akt K 24/04], OTK Z.U. 2005/1A, item 3. For an academic appraisal, see A. Łazowski, 'The Polish Parliament and EU Affairs: An Effective Actor or an Accidental Hero?', in J. O'Brennan and T. Raunio (eds.), *National Parliaments Within the European Union: From Victims of Integration to Purposive Actors?* (Routledge 2007) forthcoming.

³ Judgment of 27 April 2005 in the case P 1/05 [Wyrok z dnia 27 kwietnia 2005 r. Sygn. akt P 1/05] OTK Z.U. 2005/4A, item 42.

⁴ Judgment of 11 May 2005 r. in the case K 18/04 [Wyrok z dnia 11 maja 2005 r. Sygn. akt K 18/04] OTK Z.U. 2005/5A, item 49.

⁵ Judgment of 20 Feb. 2006 in the case K 9/05 [Wyrok z dnia 20 lutego 2006 r. Sygn. akt K 9/05] not yet reported. The rights of European citizens were also discussed in the judgment on the Accession Treaty.

the principle of supremacy in Community law, which undoubtedly is one of its most controversial concepts.⁶ Starting with the famous judgments in cases 26/62 *Van Gend en Loos* and 6/64 *Costa v. ENEL*,⁷ the European Court of Justice has constructed brick by brick this principle of supremacy, an exercise which recently has been 'codified' in Article I-6 of the Treaty establishing a Constitution for Europe. It reads: 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.'⁸

The principle of supremacy has been a major challenge to the highest national courts, especially when faced with conflicts between domestic constitutions and Community law. The judgment of the Court in case 11/70 *Internationale Handelsgesellschaft*, in which it declared the supremacy of Community law in relation to the member states' constitutions, has not been met with overall enthusiasm. On the contrary, it has led to varied academic opinions and to judgments of national supreme judicial authorities openly questioning the principle and its scope of application. The *Solange* saga of the *Bundesverfassungsgericht*⁹ and the recent jurisprudence of the Spanish Constitutional Tribunal denying (absolute) supremacy are examples in this respect.¹⁰ It does not come as a surprise that the principle is also questioned in some of the member states which acceded in 2004.¹¹

⁶ See, *inter alia*, M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford, Hart Publishing 2006).

⁷ ECJ, Case 26/62 *Van Gend en Loos*, ECR [1963] 1; ECJ, Case 6/64 *Flaminio Costa v. ENEL*, ECR [1964] 585. The other milestone judgments include ECJ, Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR [1970] 1125; Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal*, ECR [1978] p. 644; Case 103/88 *Fratelli Constanzo SpA v. Comune di Milano*, ECR [1988] 1839; Case C-224/97 *Erich Ciola v. Land Vorarlberg*, ECR [1999] I-2517.

⁸ Treaty establishing a Constitution for Europe, OJ [2004] C 310/1.

⁹ See, *inter alia*, K.J. Alter, *Establishing the Supremacy of European Law* (Oxford, Oxford University Press 2001) p. 64-123; J. Kokott, 'Report on Germany', in A-M. Slaughter, A. S. Sweet, J.H.H. Weiler (eds.), *The European Courts & National Courts. Doctrine and Jurisprudence* (Oxford, Hart Publishing 1998) p. 77-131.

¹⁰ Constitutional Court of Spain, Declaration on the consistency of the European Constitutional Treaty with the Spanish Constitution, DTC 1/2004, 13 Dec. 2004. For an academic appraisal, see, *inter alia*, F. Castillo de la Torre, 'Tribunal Constitucional (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe', 42 *CMLRev.* (2005) p. 1169; Alonso García R., 'The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy', 6 *German Law Journal* (2005) p. 1001; C.B. Schutte, 'Spain. Tribunal Constitucional on the European Constitution'. Declaration of 13 Dec. 2004, 1 *EuConst* (2005) p. 281.

¹¹ See, *inter alia*, Z. Kühn, 'The Application of European Law in the New Member States: Several (Early) Predictions', 6 *German Law Journal* (2005) p. 563; A. Sajó, 'Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy', 2 *Zeitschrift für Staats- und Europawissenschaften* (2004) p. 351.

This contribution deals with the judgment of the Polish Constitutional Tribunal on the conformity of the Accession Treaty¹² with the Polish Constitution.¹³ This decision, as well as the earlier one on the European Arrest Warrant, was received with mixed feelings in academic writing.¹⁴ Indeed, the judgments escape straightforward classifications and can not be analyzed in black and white terms. The emerging picture is very colourful, exposing a complexity of legal issues at stake. On the one hand, the decisions may be perceived as opening up a whole new phase of constitutional discourse in the *Solange* style. On the other hand, they show the true European commitment of the Constitutional Tribunal. One thing is certain – the Polish Constitutional Tribunal has decided to play its part in ‘co-operative constitutionalism’.¹⁵

¹² *OJ* [2003] L 236/17.

¹³ Judgment of 11 May 2005 r. in the case K 18/04 [Wyrok z dnia 11 maja 2005 r. Sygn. akt K 18/04] OTK Z.U. 2005/5A, item 49.

¹⁴ See, *inter alia*, K. Kowalik-Bańczyk, ‘Shall We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law’, 6 *German Law Journal* (2005) p. 1355; A. Łazowski, ‘Constitutional Tribunal on the Surrender of Polish Citizens under the European Arrest Warrant. Decision of 27 April 2005’, 1 *EuConst* (2005) p. 569; A. Wyrozumka, ‘Some Comments on the Judgments of the Polish Constitutional Tribunal on the EU Accession Treaty and on the Implementation of the European Arrest Warrant’, 27 *Polish Yearbook of International Law* (2004-2005) p. 5; D. Leczykiewicz, Trybunał Konstytucyjny (Polish Constitutional Tribunal), Judgment of 27 April 2005, No. P 1/05, 43 *CMLRev.* (2006) p. 1108; J. Komárek, ‘European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony’, *Jean Monnet Working Paper* No. 10/05 available at <<http://www.jeanmonnetprogram.org/papers/05/051001.html>>; A. Łazowski, ‘The Polish Constitution, the European Constitutional Treaty and the principle of supremacy’, in A. Albi and J. Ziller (eds.), *The European Constitution and National Constitutions* (The Hague, Kluwer Law International 2007) p. 171; J. Barcz, ‘Głosa do wyroku Trybunału Konstytucyjnego z 11.5.2005 r. (zgodność Traktatu akcesyjnego z Konstytucją RP) K 18/04’ [Case note on the Judgment of the Constitutional Tribunal of 11 May 2005 (Conformity of the Accession Treaty with the Polish Constitution) K 18/04], 5 *Kwartalnik Prawa Publicznego* (2005) p. 169; S. Biernat, ‘Głosa do wyroku Trybunału Konstytucyjnego z 11.5.2005 r. (zgodność Traktatu akcesyjnego z Konstytucją RP) K 18/04’ [Case note on the Judgment of the Constitutional Tribunal of 11 May 2005 (Conformity of the Accession Treaty with the Polish Constitution) K 18/04], 5 *Kwartalnik Prawa Publicznego* (2005) p. 185; W. Czapliński, ‘Głosa do wyroku Trybunału Konstytucyjnego z 11.5.2005 r. (zgodność Traktatu akcesyjnego z Konstytucją RP) K 18/04’ [Case note on the Judgment of the Constitutional Tribunal of 11 May 2005 (Conformity of the Accession Treaty with the Polish Constitution) K 18/04], 5 *Kwartalnik Prawa Publicznego* (2005) p. 207; A. Grzelak, ‘Europejski nakaz aresztowania – orzeczenie Trybunału Konstytucyjnego z punktu widzenia prawa Unii Europejskiej’ [European arrest warrant – judgment of the Constitutional Tribunal from the point of view of EU law] 2 *Europejski Przegląd Sądowy* (2005) p. 24; [R. Kwiecień, ‘Zgodność traktatu akcesyjnego z Konstytucją’ [Conformity of the Accession Treaty with the Constitution] 1 *Europejski Przegląd Sądowy* (2005) p. 40.

¹⁵ A. Stone Sweet, ‘Constitutional Dialogues in the European Community’, in A.M. Slaughter et al. (eds.), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford, Hart Publishing 1998) p. 325-326; Sajó, *supra* n. 11, p. 351.

THE POLISH CONSTITUTION AND EU LAW

The Polish Constitution was adopted in 1997 and replaced a jigsaw puzzle of constitutional acts, some of which dated back to the communist era.¹⁶ At the time of the drafting, the application for Union membership already had been submitted, and Poland expected to commence accession negotiations on short notice. This was one of the reasons why the drafters inserted into the new Constitution provisions on the application of international treaties and legal acts originating from international organizations. They have been tailored to facilitate application of Union law upon accession.¹⁷

When it comes to the relationship between Union law and Polish law, Article 8.1 Polish Constitution plays a central role. It declares that the Constitution shall be the supreme law of the land. It is followed by a provision, which proclaims that Poland shall respect public international law binding upon it (Article 9). Chapter III on sources of law is also of the highest importance. For the first time in the legal history of the country, the constitutional legislature has set forth an exhaustive catalogue of sources of 'universally binding legal acts' and the hierarchy between them. According to Article 87, these sources of law are the Constitution itself, ratified international treaties, acts of parliament, executive regulations as well as acts of local law (the latter only in the territory of the organ issuing the enactment).

Article 90 provides the legal framework for a transfer of powers in certain areas to international organizations. To this end, a special ratification procedure is envisaged. It allows for ratification of such an international agreement either with a permission granted to the President by Parliament in a statute, which is accepted

¹⁶ The Constitution of the Republic of Poland of 2nd April 1997 [Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku] Dziennik Ustaw [1997] No. 78, Item 483 (hereinafter referred to as Constitution). An English translation of the Constitution is available in A. Pol and W. Odrowąż-Sypniewski (eds.), *Polish Constitutional Law. The Constitution and Selected Statutory Materials*, 2nd edn. (Warsaw, Chancellery of the Sejm 2000) p. 25-91. All of the quotes from the Constitution inserted throughout this contribution originate from this book unless stated otherwise.

¹⁷ See, *inter alia*, J. Barcz, 'Membership of Poland in the European Union in the Light of the Constitution of 2 April 1997. Constitutional Act of Integration', 23 *Polish Yearbook of International Law* (1997-98) p. 21; S. Biernat, 'Constitutional Aspects of Poland's Future Membership in the European Union', 36 *Archiv des Völkerrechts* (1998) p. 398; C. Mik, 'Implementation of Primacy and Direct Effect Principles of Community Law in the Polish Constitutional System', 1-4 *Droit Polonais Contemporain – Polish Contemporary Law* (1998) p. 5; A. Łazowski, 'Poland', in A. Ott and K. Inglis (eds.), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (The Hague, T.M.C. Asser Press 2002) p. 299. For a general overview of impact of the EU membership on constitutions of Central and Eastern European Countries see A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge, Cambridge University Press 2005).

by both chambers with a two-thirds majority, or by the nation in a referendum. The decision on the choice of the procedure is in the hands of the *Sejm*. It was used for the first time for the ratification of the Accession Treaty 2003, when the *Sejm* decided upon the holding of a referendum.

Article 91.3 Polish Constitution deals with the status of the law of such an international organization in the Polish legal order. Its third paragraph reads:

if an agreement, ratified by the Republic of Poland, establishing an international organization so provides, laws established by it shall be applied directly and have precedence in case of a conflict with an act of Parliament.¹⁸

It is fairly clear that Community law will take supremacy in cases of conflicts with acts of the Polish Parliament and secondary legislation.¹⁹ Not clear however is the relationship between Community law and the Polish Constitution. This is one of the most important issues addressed by the Constitutional Tribunal in the discussed judgment.

FACTUAL BACKGROUND

As is so often the case, the judgment on the Accession Treaty is paradoxically a fundamental one given on the basis of a substantially weak application. Applications to review the Treaty had been submitted by three groups of members of the Polish Parliament, who are generally known for their EU-phobic and not knowledge-based views on the European Union. This is clearly reflected in their applications, which look more like populist political manifestos than as documents containing the legal argumentation necessary for an application to a constitutional court. All three groups argued that the Accession Treaty was contrary to the Polish Constitution, but their argumentation differed partly.

The authors of the first application submitted that the principle of supremacy of Community law as established in the jurisprudence of the European Court of Justice is contrary to Article 8.1 Polish Constitution, as the latter gives supremacy to the Constitution itself. Moreover, in their view, the recognition of Union law (an external legal system) amounted to a taking away of sovereign powers from the nation and their transfer to the external authorities contrary to Article 4.1

¹⁸ Translation by the author.

¹⁹ The original wording of this provision talked about the supremacy of EC law in relation to Polish legislation. See P. Winczorek, 'Kilka uwag w kwestii dostosowania Konstytucji RP do wymogów prawa europejskiego' [Few Remarks on Approximation of the Polish Constitution to Requirements of European Law], in E. Popławska, *Konstytucja dla rozszerzającej się Europy* [A Constitution for the Enlarging Europe] (Warszawa, Instytut Spraw Publicznych 2000) p. 187 at p. 191.

Polish Constitution. This Article states that 'Supreme power in the Republic of Poland shall be vested in the Nation'. They added that all decisions of state authorities taken in breach of the Polish Constitution must be considered null and void. They argued that the principle of supremacy leads to a gradual abolishment of sovereignty and that membership equals an unlimited transfer of the state's competences, contrary to Article 90.1 Polish Constitution, which allows only for limited transfers of power.²⁰ Their final argument dealt with the threats Union law poses for the status of real estate in the northern and western parts of Poland, i.e., in territories that belonged to Germany before the Second World War.

The second application followed the same school of thought. According to its authors, the sovereignty of the Polish nation disappeared as a result of the membership of the European Union. The latter, being the supranational organization, irreversibly takes away sovereign rights of states. The authors also argued that the principle of supremacy is contrary to Article 91.3 Polish Constitution. It was also said to be in breach of Article 188 Polish Constitution as it leads to a change in the jurisdiction of the Constitutional Tribunal. Furthermore, they questioned the conformity of the principle of non-discrimination enshrined in Article 13.1 EC with Article 18 Polish Constitution, which sets forth the principle of the protection of the family (understood as marriage between a man and a woman). Moreover, according to the applicants, membership has led to a revision of the Polish Constitution through the backdoor, i.e., without the use of the modification procedure spelled out in Article 235 Polish Constitution. Finally, the conformity of the preliminary ruling procedure (Article 234 EC) with the Polish Constitution was questioned.

The third application was the longest and most complex. First, the applicants submitted that the principle of supremacy is contrary to the Polish Constitution as it alienates powers of the nation to take sovereign and democratic decisions relating to Poland. Giving decision-making powers to the Council of the European Union results in Union law being adopted by an executive authority, hence, in an undemocratic fashion. Moreover, the powers of the Council reduce the powers of the Polish Parliament and thus breach the principle of division of powers between the executive, the legislature and the judiciary enshrined in the Polish Constitution. They lead to 'despotism of the European Union and autocracy of the Council'. Article 308 EC was also questioned. Finally, the applicants submitted that Article 19.1 EC on electoral rights of Union citizens was contrary to Article 62.1 Polish Constitution.

²⁰ Art. 90.1 Polish Constitution reads: 'The Republic of Poland may, by virtue on international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters.'

Since the applications had so much in common, the President of the Constitutional Tribunal decided to let the Tribunal consider them jointly. Moreover, the complexity and importance of the legal issues at stake resulted in the Constitutional Tribunal acting in a full court capacity.²¹

JUDGMENT OF THE CONSTITUTIONAL TRIBUNAL

The judgment in this case is not only one of the most important but also one of the most complex and lengthy decisions delivered by the Constitutional Tribunal in the twenty years of its history. In reply to all the arguments submitted by the applicants, the judges had to address a number of issues, which boils down to the following themes: the jurisdiction of the Constitutional Tribunal to adjudicate cases related to Union law; the position of European Union law in the Polish legal system as well as the principle of supremacy and its application regarding the Polish Constitution; the constitutionality of the transfer of powers to the European Union and its implications for the national legal system; and last, but not least, the voting rights of Union citizens in municipal elections.²²

The jurisdiction of the Constitutional Tribunal

The Constitutional Tribunal started off with an analysis of its jurisdiction to handle the submissions. According to Article 188 Polish Constitution, the Tribunal is equipped with powers to adjudicate the conformity of international treaties with the Polish Constitution. While only the President of the Republic has *locus standi* to request verification of the constitutionality of a treaty prior to its entry into force,²³ upon its entry into force, requests to this end may be submitted by different categories of applicants.²⁴ The Tribunal held that its jurisdiction in both procedures covers all ratified international treaties, irrespective of the ratification method used (with or without a referendum). However, the jurisdiction extends

²¹ The Constitutional Tribunal also may adjudicate in chambers. See Art. 25 of the Constitutional Tribunal Act 1997 (The Constitutional Tribunal Act (as amended) [Ustawa z dnia 1 sierpnia 1997 o Trybunale Konstytucyjnym], *Dziennik Ustaw* [1997] No. 102, Item 643 (hereinafter referred to as CTA). The English translation of the Constitution is available in A. Pol and W. Odrowąż-Sypniewski (eds.), *supra* n. 16, p. 385-416.

²² There were a number of other arguments discussed by the Constitutional Tribunal. Due to their irrelevance all were dismissed, hence they do not merit consideration in this paper.

²³ Art. 133.2 Polish Constitution and Art. 2.2 of the Constitutional Tribunal Act 1997.

²⁴ This, *inter alia*, includes the President, the Marshall of the *Sejm* (the lower chamber of the Polish Parliament), the Marshall of the *Senat* (the upper chamber of the Polish Parliament), groups of members of both chambers of the Parliament, the First President of the Supreme Court, and the Prosecutor General.

only to the substance of treaties, not to the validity of the ratification procedure; it is up to the Supreme Court to decide on this.

When it comes to the Accession Treaty, the jurisdiction of the Constitutional Tribunal covers the Treaty itself as well as all other acts which form an integral part of it (including, *inter alia*, the founding treaties). It does not extend however to the jurisprudence of the Court of Justice.²⁵

Regarding the power of the Constitutional Tribunal to seek preliminary rulings from the European Court of Justice, the Tribunal dismissed the argument of the non-conformity of Article 234 EC with the Polish Constitution. It held that the contested provision neither is a threat nor a limitation to the jurisdiction of the Constitutional Tribunal as set forth in Article 188 Polish Constitution. Interestingly, it did not rule out future references to the Court of Justice.²⁶

Concerning secondary Community legislation, the applicants had argued that the scope of legislative powers transferred to the European Union may lead to legislation limiting the fundamental rights of Polish citizens enshrined in the Polish Constitution. This would be contrary to Article 31.3 of the Constitution, which reads:

Any limitation upon the exercise of constitutional freedoms and rights may be 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.

First, the Constitutional Tribunal stated that this provision sets conditions for limitations of rights under Polish law and is addressed to Polish authorities. However, it added that this does not preclude adjudication on the conformity of Community regulations with Article 31.3 Polish Constitution.²⁷ The Constitutional Tribunal also noted that neither Article 90 nor Article 91 of the Polish Constitution could serve as legal basis for a transfer of powers to the European Union allowing adoption of legal acts contrary to the Polish Constitution. In this context, the Tribunal explicitly referred to the jurisprudence of the German Constitutional Tribunal and the Danish Supreme Court.²⁸

²⁵ Point 9 of the judgment.

²⁶ This, due to the very specific jurisdiction of the Constitutional Tribunal, may be a bit problematic in practice.

²⁷ Para. 18.5 of the judgment.

²⁸ Para. 4.5 of the judgment.

The principle of supremacy and the Polish Constitution

One of the most important issues approached by the Constitutional Tribunal was how to reconcile the reading of Article 8.1 Polish Constitution with the principle of supremacy of Community law. Clearly inspired by pluralist doctrines, the judges developed a concept of multi-centric circles, which characterize the co-existence of national legal systems and European Union law.²⁹ According to the Tribunal, the legal systems involved should function in mutual acceptance, conform interpretations and co-operative application. The applicability of such a complex legal system in Poland is envisaged by the Polish Constitution and has been approved by the sovereign in the referendum.³⁰ To this end, Article 9 Polish Constitution provides that Poland respects international law binding upon it. Moreover, ratified international treaties as well as the law of an international organization of which Poland is a member are formally recognized sources of law. The Constitutional Tribunal added that Community law does not have the character of an external legal system. On the contrary, since Poland has become a member state, it is fully involved in the creation of Community law at various institutional levels.

Concerning the principle of supremacy, the Constitutional Tribunal held that in case of conflict between the Polish Constitution and Community law, under no circumstances, primacy may be given to the latter. Such a conflict could neither lead to the annulment of a constitutional provision nor to its replacement by Community law: under Article 8.1 Polish Constitution, the Constitution remains the supreme law of the land. Nevertheless, the Constitutional Tribunal showed sympathy for the jurisprudence of the Court of Justice on the supremacy of Community law. The Tribunal argued that the Court's position is justifiable when the aims and goals of the European Community are taken into account, to which end the principle of supremacy serves, as a guarantor of the effectiveness of Community law. This however does not determine the decisions of member states' authorities in cases of conflicts between domestic constitutions and Union law. In case a conflict arises between Polish constitutional law and Community law, the judges of the constitutional court suggested that such a conflict could be solved in

²⁹ See E. Łętowska, 'Multicentryczność współczesnego systemu prawa i jej konsekwencje' [The plurality of the deciding centers in the modern law system and its consequences], *4 Państwo i Prawo* (2005) p. 3.

³⁰ In the first referendum the nation has approved the Polish Constitution, in the second, the Accession Treaty. For more on referendums in Poland as well as other countries of Central and Eastern Europe, see A. Albi, 'Referendums in the CEE Candidate Countries: Implications for the EU Treaty Amendment Procedure', in Ch. Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford and Portland Oregon, Hart Publishing 2004) p. 57.

three different ways: by modification of the Polish Constitution, by modification of Union law or by withdrawal from the European Union.

Somehow inspired by the *Solange* doctrine established by the *Bundesverfassungsgericht*, the Polish Constitutional Tribunal also set limits to the pro-European interpretation of the Polish Constitution. The rights and freedoms of citizens set forth in the Constitution are a minimum standard, which cannot be reduced by any provision of Community law. Therefore, consistent interpretation has its limits and may not lead to interpretation contrary to the Constitution.³¹

Transfer of sovereign powers

Another issue decided by the Constitutional Tribunal relates to the transfer of powers to the European Union. Article 90.1 Polish Constitution allows Poland to 'delegate to an international organization or international institution the competence of organs of States authority in relation to certain matters.' The Constitutional Tribunal rejected the applicants' argumentation that Union membership amounts to an unlimited transfer of powers and hence is contrary to the provision in question. The judges highlighted the role of the principle of attributed powers and its application in the Union framework. Moreover, they dismissed the argument based on Article 308 EC, strongly emphasizing the common market limitation enshrined therein as well as the unanimity requirement giving each member state a veto right.

The method used for approving the transfer of powers – which included a referendum – was also acknowledged by the Constitutional Tribunal. Overall, the referendum factor played an important role as the tool for the approval of membership by the nation.

Voting rights of Union citizens

The applicants had argued that EC provisions on the voting rights of Union citizens in municipal elections³² were contrary to Article 62 Polish Constitution. The latter gives Polish citizens the right to vote in all sorts of elections and refer-

³¹ One must acknowledge examples of pro-European interpretation of Polish law in the pre-accession phase. The Constitutional Tribunal argued that it was an inherent part of the approximation of national laws with the *acquis communautaire* – a *conditio sine qua non* for membership. See S. Biernat, 'Die "europäische" Rechtsprechung polnischer Gerichte vor dem Beitritt zur Europäischen Union', in J. Masing and W. Erbguth (eds.), *Die Bedeutung der Rechtsprechung im System der Rechtsquellen. Europarecht und nationales Recht* (Stuttgart, Richard Boorberg Verlag 2005) p. 191.

³² See, *inter alia*, P. Olivier, 'Electoral Rights under article 8B of the Treaty of Rome', 33 *CMLRev.* (1996) p. 473.

enda organized in the country. According to the applicants, the Union legislation in question transforms Poland into a common good of Union citizens and brings the sovereignty of Poland to an end. The Constitutional Tribunal dismissed all these arguments. Interestingly, in doing so, it followed an argumentation that was earlier used by the Legislative Council (a governmental advisory body).

Well ahead of accession, there had already been concerns on the conformity of Article 62 with Union law. In 1999, the Legislative Council declared that Article 62 contains a minimum guarantee of the rights of Polish citizens, but does not preclude extension of the voting rights in municipal elections to Union citizens by acts of Parliament.³³ Although revision of the provision remained to be called for, it remained in force and is, as is clear from the judgment, in conformity with Union law. The Constitutional Tribunal thus has ended a long lasting debate.³⁴

COMMENT

The judgment on the conformity of the Accession Treaty with the Polish Constitution has legal, political and social consequences. It not only sets forth a number of important principles, which define the relationship between Polish and Union law, but also ends an ongoing political and legal debate on the legality of Poland's accession to the European Union. In this respect, the judgment of the Tribunal was, in legal terms, the second and final step, the first being the decision of the Supreme Court confirming the validity of the accession referendum.³⁵ The Tribunal makes it clear that the decision on membership was taken by both the Polish authorities as well as the Polish nation in the accession referendum. It leads to the conclusion that the transfer of certain powers to the European Union was approved by the sovereign in accordance with the procedures set forth by the Polish Constitution. In order to address the concerns of the applicants, the Constitutional Tribunal engaged in a rudimentary explanation of the basic principles

³³ Opinia Rady Legislacyjnej o zgodności prawa wspólnotowego z Konstytucją RP [Opinion of the Legislative Council on the Conformity of Community Law with the Polish Constitution], 2 *Przegląd Legislacyjny* (1999) p. 154.

³⁴ See, *inter alia*, K. Wójtowicz, 'Proposed Changes in the Polish Constitution of 1997 ahead of Poland's Accession to the European Union', 25 *Polish Yearbook of International Law* (2001) p. 27 at p. 41-42; Winczorek, *supra* n. 19, p. 191-192.

³⁵ Uchwała Sądu Najwyższego z dnia 16 lipca 2003 r. w przedmiocie ważności referendum ogólnokrajowego w sprawie wyrażenia zgody na ratyfikację Traktatu dotyczącego przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej, wyznaczonego na dzień 8 czerwca 2003 r., w którym głosowanie przeprowadzono w dniach 7 i 8 czerwca 2003 r.. Sygn. III SW 144/03 [Resolution of the Supreme Court on the Validity of the Accession Referendum], *Dziennik Ustaw* No. 126/2003, Item 1170, reported in [2003] Euro.C.L.Y., p. 825.

underpinning the European Communities and the European Union, including the principle of attributed powers as well as the role of Article 308 EC. It also clarified the Union's institutional structure, the role of the Council of the European Union and the European Parliament. The Tribunal made it clear that from the moment of accession Polish authorities fully participate in the decision-making procedures of the Union. Moreover, it stressed that both chambers of the Polish Parliament are engaged in EU decision shaping under the terms of the special Act of Parliament on relations between the government and the Parliament in Union matters.

Another pivotal conclusion is that the Polish Constitutional framework is prepared to accommodate Union law and its application. The principle of supremacy of Community law and its relationship to Polish law is at the heart of the judgment. A clear distinction must be made between the application of the principle to the Polish Constitution and to other sources of Polish law.

When it comes to application of the principle of supremacy to acts of Parliament and executive regulations, the Tribunal's interpretation of Article 91.3 Polish Constitution is of the highest importance. The Tribunal clearly invites the Polish courts to give supremacy to Community law. The experience of the first two years of the membership proves that some of the Polish courts are able and willing to entertain claims directly based on Community law, with which Polish legislation is still not fully approximated. The judgment of the Warsaw Administrative Court in the General Electric case may serve as an example.³⁶

When it comes to the relationship between Community law and the Polish Constitution, the Tribunal concludes on the basis of Article 8 Polish Constitution that the Polish Constitution has absolute primacy. Bearing in mind the straightforward wording of Article 8, this conclusion does not come as a surprise. However, the conclusion that the Tribunal will screen conformity of secondary Community legislation with the Polish Constitution is certainly a reason for concern. It requires further clarification, particularly in the light of the consistent jurisprudence of the Court of Justice on the powers of national courts to deal with the validity of secondary legislation.³⁷

³⁶ Judgment of Voivod Administrative Court in Warsaw, Case III SA/Wa 2219/05 *General Electric Company Polska v. Naczelnik Drugiego Urzędu Skarbowego w Warszawie*, not yet reported. See also Judgment of Voivod Administrative Court in Łódź, Case I SA/Łd 980/05 *Anna X v. Dyrektor Izby Celnej w Łodzi*, not yet reported.

³⁷ ECJ, Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*, ECR [1987] 4199; ECJ, Case C-461/03 *Gaston Schul Douane-expediteur BV v. Minister van Landbouw, Natuur en Voedselkwaliteit*, ECR [2005] I-10513; ECJ, Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport*, ECR [2006] I-403.

In this context, it is also interesting to take a closer look at the three options for resolving conflicts between the Polish Constitution and Union law suggested by the Tribunal. One of them is revising the Constitution in order to accommodate a conflicting provision of Community law. This, according to the Tribunal, is a well-established practice in some of the member states. On this point, the Tribunal's approach is clearly consistent with its approach in the judgment delivered a few weeks earlier on the European Arrest Warrant framework decision, i.e., on secondary third pillar law to which the principle of supremacy of Community law does not apply. In that decision, it declared the act of parliament implementing the said framework decision unconstitutional, and thereby indirectly the framework decision itself, while at the same time suspending the effects of the judgment and giving the political authorities 18 months leave to change the Constitution. This approach shows a Union supportive face of the Constitutional Tribunal. At the same time, it proves the pragmatism of the judges and their support for a deeper involvement of national parliaments in the co-operative constitutionalism.³⁸

The question must however be asked whether this solution truly gives supremacy to the Polish Constitution. *Prima facie*, it certainly looks so. However, the conclusion may be different when one looks at it from the perspective of the effects of such constitutional revisions. It is arguable that if they are inspired by conflicting provisions of Union law, they amount to indirect supremacy of Union law. In other words, national law concedes its place to Union law, albeit on its own terms. Even if one prefers this option to granting direct supremacy to Union law over domestic constitutions, the effects are the same – (indirect or direct) supremacy of Union law. In theory, of course, the other two scenarios presented by the Constitutional Tribunal are also possible. However, despite their intellectual attractiveness, both seem to be highly unrealistic in practical terms. In cases of a conflict between Union law and the Polish Constitution, it seems unlikely that Poland will be politically capable of pushing forward the reforms of Union law necessary to accommodate its internal legal problems. Nor it will have the political power and will to withdraw from the European Union. The recent events related to the European Arrest Warrant prove that the Polish authorities are more likely to go for a revision of the Constitution. In 2006, Parliament amended Article 55 of the Constitution to accommodate the European Arrest Warrant in the Polish legal system.³⁹ Surprisingly enough, the revision is contrary to EU law as it provides for the double criminality requirement. The Constitutional Tribunal itself has

³⁸ The author is indebted to Dr. Anneli Albi for her comments on this issue.

³⁹ Ustawa z dnia 8 września 2006 r. o zmianie Konstytucji Rzeczypospolitej Polskiej [Amendment to the Polish Constitution] Dz. Urz. [2006] No 200, Item 1471.

suggested a future revision of Article 227 Polish Constitution, which deals with the powers and tasks of the National Bank of Poland. The Article will have to be revised when Poland decides and has accepted to introduce the Euro as its currency.⁴⁰

Another question that emerges from the judgment is whether ratification of the Treaty establishing a Constitution for Europe would require prior revision of the Polish Constitution. The question can be referred to the Tribunal by the Polish President prior to ratification or by other categories of applicants, including Polish courts, upon its entry into force. In its judgment, the Constitutional Tribunal rightly declined its jurisdiction to adjudicate on the conformity of the case-law of the Court of Justice with the Polish Constitution.⁴¹ For that reason, it required a fair degree of flexibility and finesse of the Tribunal to take a stand on the principle of supremacy. Now the codification of the principle in Article I-6 of the Constitution for Europe would bring the question of its compatibility with Article 8 of the Polish Constitution right into the open. Bearing in mind the Tribunal's strong stance on the supremacy of the Polish Constitution, it is submitted tentatively that modification of Article 8 is indeed necessary for ratification of the Constitution for Europe in its current shape. Of course, it may be argued that Article I-6 does not add much new, as it merely amounts to codification of the existing case-law. Nevertheless, in purely formal terms, it is the first time that the principle is spelled out in a provision of primary Union law. It is this formal aspect that constitutes the major difference and, as already mentioned, gives the Constitutional Tribunal the formal jurisdiction to address the issue.⁴²

CONCLUSIONS

It is a mere *cliché* to conclude that membership of the European Union has unprecedented consequences to national legal systems. This is equally so in the founding member states as well as in those states which have become members at a later stage. The accession of the eight Central and Eastern European countries had been preceded by an immense approximation effort that in certain cases even has led to creation of branches of domestic law. The preparatory work also covered the national constitutions. In the case of Poland, parts of the new Constitution of 1997 were tailored to accommodate Union law upon accession. The first years of membership have proved to be a testing time, and the discussed judgment of the

⁴⁰ Para. 18.7 of the judgment.

⁴¹ Para. 9 *in toto* of the judgment.

⁴² See S. Biernat, 'Poland', in A.E. Kellermann et al. (eds.), *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-)Candidate Countries. Hopes and Fears* (The Hague, T.M.C. Asser Press 2006) p. 434.

Constitutional Tribunal is certainly the most important development so far. The conclusions reached by the Tribunal provide the long awaited clarification of pivotal constitutional issues, which for years have been discussed in academic writings. And so far, it clearly puts the Tribunal in a Union friendly light, looking for various ways of securing the smooth co-existence of the Polish legal system and Union law.

