Chapter VII

Polish Constitutional Identity and the EU Challenges: European Law as a Tool for the Redrafting of the Polish Constitution

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Abstract

The paper aims at describing, in a synthetic but still systematic way, the impact that EU has for Polish legal system in general and constitutional order in particular. Considering category of the constitutional identity as determined in the jurisprudence of the Polish Constitutional Court, an attempt is made to demonstrate the way in which Polish constitutional order is altered beyond the procedures provided to this end by the Constitution and without proper involvement of the Polish Parliament. It is described, how delegation of certain powers to EU pursuant to specific provisions of the Polish Constitution has profoundly affected domestic balance of power between three branches in at least two different dimensions. However, regardless which dimension is concerned, it always results in the limitation of the powers of national legislature. This process demonstrates also decline of the modern politics and its displacement by its postmodern successor, where real political power is no-longer located on national level, but above, upon supra-national level.

Keywords: constitutional identity, Constitutional Court, delegation of powers, limitation of powers, Polish legal order

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1. Introduction

This paper aims to describe, in a synthetic but still systematic way, the impact that the EU has on the Polish legal system in general, and constitutional order in particular. Considering the category of the constitutional identity as determined in the jurisprudence of the Polish Constitutional Court, an attempt is made to show the way in which Polish constitutional order is altered beyond the procedures as provided to this end by the Constitution and without proper involvement of the Polish Parliament.

2. Incorporation of the EU law into the Polish legal system

When discussing the incorporation of EU law into the Polish legal system we must consider the two perspectives of this process. The first is the European perspective, whilst the second is the national, Polish perspective.

According to Article 291(1) of the TFEU, Member States shall adopt all measures of national law necessary to implement legally-binding EU acts. This provision is of special importance for directives, as they are binding only as to the result to be achieved, upon each Member State to which they are addressed, leaving to the national authorities the choice of form and methods to be adopted for this end. Therefore, the crucial element when it comes to the incorporation of European law into the Polish system is the constitutional framework determining the national system of the sources of law.

2.1. Constitutional framework

The Polish Constitution of 1997 was drafted ahead of time, in anticipation of gaining membership within the EU, and it provides a constitutional framework for the incorporation of EU law into the Polish legal system. This constitutional framework consists of several provisions relating to the constitutional hierarchy of law, determining the catalogue of legislative instruments that may contain generally binding rules of law, and the place of international law within this hierarchy.

Regardless of existing doctrinal controversies as to the nature of the EU as an organisation and doubts surrounding whether it is correct to consider it merely an international organisation, the Polish Constitution takes into account the Union itself and its law under the headings of international organisation[1] and international law respectively. Therefore, the first constitutional provision which is of importance in

1 Judgment of 11 May 2005 K.18/04, OTK ZU nr 5A/2005, item 49, section 8.5; and judgment of 31 May 2004, K 15/04, OTK ZU nr 5/A/2004, item 47.

this respect is Article 9, declaring that the Republic of Poland respects international law that is binding upon it. Article 87(1) determines sources of universally-binding law in Poland, listing Constitution, statutes, ratified international agreements, and acts of subordinate legislation issued by the executive upon the authorisation of the statutory delegation (*rozporządzenia*). The order of appearance, as portrayed in Article 87 paragraph (1) is, however, not fully instructive for proper determination of the place of international law within the Polish legal system. The said order is better and more precisely described in Article 91, providing that, after promulgation of a ratified international agreement in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), it constitutes part of the domestic legal order and is directly applicable, unless it is subject to some additional statutory enactment.

The actual power of such a ratified international treaty ultimately depends, however, on the way it was ratified.[2] If it was ratified by the President of the Republic upon prior specific statutory authorisation, as required by Article 89 of the Constitution, its provisions take precedence over statutes if they are not to be reconciliated with the domestic statutory provisions. This kind of ratification is required for the most important international treaties which concern broadly-understood security issues (peace, international alliances, political or military treaties) as well as issues requiring mandatory statutory regulation, including constitutional freedoms, rights or obligations of citizens, and membership in an international organisation, in addition to the treaties providing for a State's considerable financial obligations.

2.2. Law of the international organisation

The actual hierarchical position of international law in the Polish legal system much depends on the specific way in which a particular international treaty was ratified. Therefore, despite the already-outlined complex constitutional regulations determining the position of international law within the Polish legal system, matters pertaining to membership of the EU are addressed in a yet specific way, described in Article 90 of the Constitution. The difference between procedures from Articles 89 and 90 is that, whilst the first article relates to international treaties imposing certain international obligations on a State Party and thus limiting its sovereignty, the second article authorizes delegation of certain sovereign powers to an international entity establishing legal framework for integrative cooperation between Member States. Therefore, the international organisation or institution, within the meaning of Article 90, has an integrative character. As was explained by the Polish Constitutional Court, the characteristic feature of such an integrative treaty is that the exact content of the obligations accepted by a state in such a treaty might evolve in the course of the state's functioning. Consequently, after some time, the scope of the binding obligation of a Member State may differ in comparison to its content as

2 See Mistygacz, 2012, p. 139.

accepted at accession.[3] Otherwise speaking, the true effect of the delegation of a state's powers to an integrative organisation or institution is not known at the accession.[4]

The Article 90 of the Polish Constitution does not speak directly about the EU but authorises, in certain matters, delegation of the powers belonging to state's authorities to an international organisation or international institution. In theory it authorises delegation of powers to any other organisation designated to perform certain competencies of its Member States,[5] rather than only to the EU; in practice, however, this provision was included in the Constitution because of anticipated accession to the EU.[6] Indeed, Article 90 was only adopted twice as a procedure for ratification of the international treaty: the first time for the Accession Treaty and the second time for ratification of the Lisbon Treaty. However, each new attribution of power to the EU must (in theory) take place pursuant to Article 90.

Such a delegation, as described above in section 1 of Article 90, is possible only by virtue of international agreement which is to be ratified in a specific way upon a statute dedicated to this end and granting specific authorisation to the President of the Republic of Poland to ratify such an international agreement (authorizing statute). The said specificity first consists of qualified majorities as required for adoption of the authorising statute.[7] A statute authorising ratification of an international agreement providing for delegation of the powers of Polish state on the EU is to be adopted by a two-thirds majority vote in the presence of at least half of the statutory number of deputies in the lower chamber of the Polish Parliament (Sejm), and subsequently with an analogues majority in the Senate. This parliamentary procedure might be supplemented with an optional national referendum as performed according to specific rules provided for in Article 125 of the Constitution. Broadly speaking, it might be summarised that ratification of such an international treaty requires majorities like those which are required in case of the constitutional amendment, as specified in Article 235(4) of the Constitution.[8]

3 '… *The system of the European Union is dynamic in nature. It provides for the possibility of changes in the content of the law compared to the state at the time of accession. It also provides for the possibility that the principles and scope of the Union may evolve. At the time of accession, therefore, there is not absolute certainty about all elements of further development. At the same time, however, the competences delegated by the Member States ensure their influence on the actions and decisions of the whole system. This is an important guarantee of its correctness and acceptability*' (K.18/04, section 5.1).

4 Dobrowolski, 2013, section 3.3.

5 It had also been considered whether Art. 90 was appropriate for ratification of the statute of the Rome Statute of the ICC. See: Opinie w sprawie ratyfikacji przez Polskę Rzymskiego Statutu Międzynarodowego Trybunału Karnego, *Przegląd Sejmowy* nr 4/2001, pp. 129–172. Another case, when it was contemplated to be applied for the treaty with the USA concerning military installations on the Polish territory. See: Piotrowski, 2009; Kranz, Wyrozumska, 2009, pp. 20–49.

6 This was acknowledged by Winczorek, 2000, p. 115; Mik, 1999, p. 145.

7 See, in this respect, considerations by the Constitutional Tribunal undertaken whilst reviewing the constitutionality of Polish accession to the EU in judgement K 18/04, sections 3.2 and 4.3.

8 This majority is even higher in case of the voting in the Senate: Art. 235(4): A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of

2.3. Priority of EU law over statutory law (Acts of Parliament)

This much more complex and demanding procedure of ratification has one important effect. According to Article 91(3), the procedure states that, for the future, legal rules created in accordance with the international treaty so ratified are to be applied directly in the Polish legal system and have priority in application before domestic statutory provisions providing for different legal effects than the law enacted by the international organisation. It might be said that the ratification of a treaty delegating certain powers of a Member State to an international organisation or institution, according to the procedure specified in Article 90(1), provided by means of the procedure described in Article 90(2)-(4), has the same effect as if each piece of legislation adopted by such an organisation was subsequently ratified by the Polish president upon the virtue of a specific statutory authorisation.

The constitutional scheme, as provided by Article 90, is concluded with Article 91(3) stating that, in case of '*agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws*'. In this way, the priority of EU law over the domestic statutory law has its expressed authorisation in the Polish Constitution.[9]

Hence, the procedure specified in Article 90 provides: 1) a legal base for the Polish membership within the EU authorising access to the Treaties which constitute EU primary law; 2) a procedure enabling a kind of blanquette authorisation for the EU secondary law pursuant to Article 91(3) of the Constitution. The latter provision considers EU secondary law as '*legal adopted by the international organization*' granted with the competencies pursuant to Article 90, providing they are directly applicable *and* adopted within the scope of the powers so delegated by the Republic of Poland.

In practice, Article 91(3) is applicable to regulations and decisions within the meaning of TFEU Article 291 and *prima facie* not to indirectly-applicable directives requiring formal transposition to the national legal system. However, the 'prima facie' reservation is important, as Article 91(3) might appear to be of crucial importance after the expiring of the term for implementation of a directive, when the

at least half of the statutory number of deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of senators.
This argument was emphasised by the Constitutional Tribunal whilst reviewing the Accession Treaty upon which Poland joined the EU. See: judgement 18/04, sections 3.2, 4.6, and, in particular, 14.2, where the Court declared as follows: '*The will of the People as Sovereign was manifested in the sphere relevant here during the referendum authorizing ratification of the Treaty of Accession and the Act concerning its Conditions. Moreover – both in the representative and direct form (national referendum) – it finds expression in deciding on the fate of the basic regulations of the Treaty and in influencing the content of Community law – in the process of giving their opinion by the competent committees of the Sejm and the Senate and in shaping, within the parliamentary scheme, the position of the Government, which is constitutionally accountable to the Sejm*'.

9 It is worth mentioning that other international treaties, which were concluded otherwise than provided for in Art. 90, are incorporated into the Polish legal system upon Art. 91(1)–(2).

implemented law is applicable by the courts and administrative authorities. In such a situation, Article 91(3) might also authorise departure from the domestic legislation in case it would prevent the EU law as enacted in a particular directive, from taking its full effect.

It is, however, to be mentioned here that the Polish Constitutional Court has declared, upon the Polish accession, that Poland and other

> Member States retain the right to assess whether the Community (EU) legislative authorities, in adopting a particular act (law), acted within the framework of the delegated powers and whether they exercised their powers in accordance with the principles of subsidiarity and proportionality. If this framework is exceeded, acts (legislation) adopted outside of it are not covered by the principle of primacy of Community law.[10]

2.4. Implementation of directives

2.4.1. General remarks

When discussing the implementation process, it is often understood as consisting of three stages. The first is elaboration of the draft legislation, whilst the second consists of submission of the project to the Parliament and its legislative transposition to the binding domestic legislation. The third is notification of the transposition to the European Commission and the giving of the practical effects of the directives in the domestic legal system. At each stage of the process, the government is involved. The first and the third stages are fully dominated by the government, which is relatively less engaged at the second stage, although initiation of the transposition and participation of the government during the Parliamentary legislative process is still of substantial character.

It has been proposed, in Polish academic writings, that there be a discerning between two terms which are often used synonymously, namely differentiation between 'implementation' and 'transposition' of the EU law into the Polish legal system. The first is considered a very complex and general process of providing the effectiveness of the EU law within the Polish legal system, whereas transposition is to be understood in a more technical way as the enactment of domestic law transposing the EU law into national regulations intending implementation of the European law into the Polish legal system. Therefore, implementation, i.e. adoption of all measures of national law necessary to implement legally-binding acts of the EU as required by Article 291(1) of the TFEU, is of much broader meaning, including transposition, whereas the latter is but the second (out of three) stage of the earlier. The transposition must be proceeded by a drafting of the law to be enacted and then it must be notified to the Commission and put into full effect in the course of its execution. Looking at the situation from this perspective, implementation is a manifestation

10 Judgement K 18/04, section 10.2.

of a Member State's participation within the EU, whereas transposition is a specific domestic legislative process being determined by the need for implementation.[11]

The general institutional framework for implementation of EU law in the legal system of the Republic of Poland is regulated in the Act of 8 October 2010 on co-operation of the Council of Ministers with the Sejm and the Senate on matters related to the membership of the Republic of Poland in the EU[12] (Cooperation Act). The statute concerns a broad range of cooperation between executive and legislative powers in the field of European policy, including legal issues and the establishment of the obligation of the government to cooperate with both chambers of Parliament in matters related to Polish membership of the EU (Article 2), including the obligation of the government to inform the Parliament on issues pertaining to the functioning of the Republic of Poland within the EU (Article 3) and cooperation in the process of drafting European law (Articles 4-16). Chapter 4 of the statute (consisting of a single article, namely Article 18) is dedicated to cooperation in the legislative process enacting Polish law and implementing the law of the EU. It consists of four sections which determine the deadline for the Council of Ministers (the government) when it comes to submitting a draft law implementing European law, being at least 3 months before the expiry of the deadline for implementation and providing for some exemptions from this general rule.[13]

It also means that the government is the authority which has the stronger priority – when it comes to presenting legislative projects concerning the implementation of legislation – in comparison to other entities that, formally speaking, are generally granted legislative initiative pursuant to Article 118 of the Constitution (group of the deputies to Sejm, the Senate in its entirety, and the President of the Republic). Considering the text of the Constitution, the government has not been attributed there with the exclusive power to present legislative bills implementing EU law, *per analogiam* with its exclusive power in respect of the legislative bill of the budget and other related issues, as provided for in Article 221 of the Constitution or the legislative bill for the statutory authorisation for ratification of the international treaty, as it is strongly believed (though not stated in the text of the Constitution) amongst academic writers.[14] It seems, however, that for practical reasons it is very unlikely that other entities would attempt to compete with the government in this area, considering that it was the government which was involved in the European legislative process and, again, from the domestic perspective, it is in the best position for drafting legislation in this area. Therefore, the government is described as the most active (and not the only authorised) entity proposing legislative bills

11 Trubalski, 2016, pp. 70–73.

12 Dz. U. z 2010 Nr 213, item 1395; in force since 13 February 2011.

13 It is worth mentioning here also that Art. 18(4) of the Cooperation Act provides also for the government's obligation to submit to both chambers of the Parliament information on legislative bills whose deadline for implementation has expired or will expire within 3 months from the date of submission of the information. Such information must be provided at least once each 6 months.

14 See Mistygacz, 2012, p. 140 and the authors referred thereto, as well as Kruk, 1998, p. 23.

implementing the EU law.[15] The Rules of the Sejm still provide, in Article 95a, that beside governmental initiative as the one aiming to implement European law (section 2), it remains the case that the *Marszałek Sejmu* (the Speaker of the Sejm) can also declare a legislative bill submitted by other authorised entities as dedicated to the implementation of EU law (Article 95a(3) of the Rules of Sejm).

2.4.2. The Government

Implementation is conditioned with the preparation of the draft of statutory enactment transposing EU law into the national system and submitting this to the Parliament (the Speaker of the Sejm). Pursuant to the Act on the divisions of the central administration[16] (Act on Divisions), the Polish central administration is divided into 37 divisions of central administration (*działy administracji rządowej*)[17] and each minister (member of the Council of Ministers) is responsible for several divisions which might be attributed to them in a different way by the prime minister. The 8th division consists of the issues related to the membership of the EU. By virtue of Article 13(3) subsections 1-3, the minister in charge of this division coordinates the process of drafting statutes implementing EU directives, whilst also supervising the conformity of all governmental legislation to the EU law and providing opinions on the conformity, to the European law, of all the legislation being proceeded in the Parliament. The drafting of a particular piece of legislation for the sake of transposition is, however, the duty of ministers in charge of a specific division, the scope of which belongs to the subject of European regulation. The legislative draft so prepared is adopted by the Council of Ministers and then submitted to the Parliament.

2.4.3. The Parliament

Parliamentary procedure aimed at the transposition of EU law into the Polish legal system is essentially the same as for any statutory regulation being generally determined by the Constitution (Articles 118-124) and, in a more detailed way, by the Rules of the Sejm (*Regulamin Sejmu*) and the Rules of Senat (*Regulamin Senatu*).

2.4.3.1. The Sejm – the Lower Chamber

Despite the Rules of Sejm being adopted in 1992, the regulation was amended upon Poland's accession to the EU in February 2004,[18] introducing certain specific modifications of the standard legislative procedure. The special Chapter 5a was

15 Patyra, 2012, p. 158.

16 Ustawa z dnia 4 września 1997 o działach administracji rządowej (Dz.U. 1997 nr 141 item 943) hereafter Act on Divisions of the Central Administration (1997).

17 Art. 5 of the Act on Divisions of the Central Administration (1997).

18 Uchwała Sejmu Rzeczypospolitej Polskiej of 20 lutego 2004 o zmianie Regulaminu Sejmu Rzeczypospolitej Polskiej (M. P. Nr 12, item 182). In force since 31 March 2004.

introduced which is dedicated to specific rules applicable to the bills implementing EU law (so-called 'European bills'). The chapter consists of six articles (95a-95f) modifying general legislative procedure, as determined in Title II Chapters 1-3 and 14 of the Rules of Sejm (Article 95a(1)). It aims, first of all, to provide the fastest possible track for adoption of the implementing legislation.

The legislative procedure aimed at transposition of EU law into the Polish legal system starts with the ascribing of the 'European' character to the bill. In the case of a governmental bill, the character is determined by virtue of the formal declaration of the Government (Article 95a(2) of the Rules of Sejm), and in the case of other bills submitted to the Marszałek Sejmu (the Speaker of the Sejm), it is the Speaker who determines whether a legislative bill has the status of an implementation bill; indeed, this determination must be made before the Speaker will submit the bill for the first reading (Article 95a(3)).

By virtue of Article 119(1) of the Constitution, legislative procedure within the Polish Parliament is divided into three general stages, termed 'readings' (*czytania*). A special provision of the Rules of Sejm requires the Speaker to adopt a schedule for proceeding that would allow adoption of the statute within the time limits as required for implementation of a directive (Article 95b). The Speaker of the Sejm, whilst directing the draft law implementing the law of the EU, at the same time sets the schedule of work in the Sejm on the draft law, considering the deadlines for the implementation, as set for particular directives. This parliamentary schedule is to be observed when proceeded in the parliamentary committee (Article 95c). The proceeding of the implementing bill in the committee is modified in a way that hinders the proposing of amendments to, or a rejection of, the bill (Article 95d). The proceeding then provides, in Article 95e, for the second reading of the bill together with the committee's report on the bill, at the nearest plenary session of the Sejm. Similar abbreviated solutions are provided in Article 95f for the committee proceedings and subsequent plenary session in case the *Senat* (upper chamber of the Polish Parliament) was to adopt amendments to the legislation.

2.4.3.2. The Senate – the Upper Chamber

The Senate, in its Rules (*Regulamin Senatu*), also provides for quick proceeding with the implementing statutes as adopted by the Sejm. The Rules contain only two special provisions. One provides, in Article 68(1a), for non-mandatory, additional opinion regarding implementing statutes from the Commission of Foreign Affairs and the EU, whereas in subsection 2 it provides for flexible arrangements allowing quick proceeding as in the case of urgent legislation. Other incidental regulations from the Rules of the Senate provide only for ensuring that the Senate will never propose a piece of legislation which would be inconsistent with the EU law (Article 54(4a); Article 78a). The remainder of the legislative procedure transposing EU law into the Polish legal system is exactly the same as in every other statute, ending with the promulgation by the President of the Republic and subsequent publication of the

statute being transposed from European law, which is then notified to the European Commission.

When attempting to draw a general conclusion about the parliamentary stage of the implementation process, as determined in the Cooperation Act as well as the Parliamentary Rules of Procedure, it appears that Parliamentary powers were reduced to giving opinions on the drafts of EU legislation as submitted to both chambers by the Government within the time limits specified by the law, as well as giving an opinion on the positions that the Government intends to adopt with regard to the legislative process at the EU level.[19]

2.4.4. Notification and ongoing implementation process

The process of implementation does not end with the notification regarding transposition that has been completed, as the goal of the implementation is to give the full practical effect to European law. This is, however, the area where a state's authorities operate with the courts in the first place. It is also important to realise that, once the term for transposition expires, directives are supposed to be binding in the domestic legal order, as to the result to be achieved (Article 288(3) of the TFEU), as if they were directly effective.[20] Therefore, courts applying domestic law, as enacted in the fulfilment of the transposition duties, are bound to consider if the domestic law enables directives to take their full effect. As such, courts become the key actors in the implementation process after the date for transposition has expired. Particularly important here is the procedure of referral for preliminary ruling by the domestic court to the Court of Justice of the EU, as provided for in Article 267 of the TFEU. As was already demonstrated in Polish practice, such a referral for preliminary ruling might be of crucial importance when it comes to the scope of the powers of the EU, being an engine of a far-reaching extension of the EU competencies, disregarding domestic procedures in this respect. Therefore, judicial case law must also be considered whilst discussing the implementation of EU law in the domestic law.

3. European integration and its limits

Poland joined the EU on 1 May 2004, seven years after the adoption of the Polish Constitution of 2 April 1997. This is an important issue, because Article 90 of the Constitution expressly provided a formal base for Polish accession. For this very reason, European integration, since the very beginning, was a matter of applying constitutional provisions providing for a specific procedure applicable in such

19 Patyra, 2012, p. 155.
20 See Domańska, 2014, p. 25.

a situation. Article 90 of the Constitution, in its first section, provides as follows: '*The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in certain matters*'.

What is important here is qualification of the state competencies subject to delegation with the words '*in certain matters*'. As the transferable matters only '*certain*', they are not all the matters in which Polish authorities have competences. The question thus arises: if there are competencies, which are unalienable upon this constitutional provision when read *a contrario*? In such a way, a constitutional concept has emerged, according to which there are a certain number of state competencies that must not be transferred pursuant to Article 90, and as such are not transferrable at all. This number of non-transferrable state competencies was described in 2005 as the '*core of powers enabling sovereign and democratic determination of the destiny of the Republic*' in the judgement reviewing constitutionality of the Accession Treaty.[21] Following this, it was described as Polish 'constitutional identity' in the Judgement reviewing conformity to the Constitution of the Lisbon Treaty in 2010,[22] which will be presented in Section 3.

Article 90 of the Constitution, authorising transfer of a certain state's competencies to the EU, must also be observed in the case of any further delegation of state powers to EU institutions. As was emphasised in the judgement of the Constitutional Court on conformity to the Polish Constitution of the EU Accession Treaty,

> The Polish fundamental law giver, being aware of the importance of international treaties on the transfer of competences belonging to public authorities 'in certain matters' to an international organisation or an international institution (…), introduces significant safeguards against too easy or insufficiently legitimate transfer of competences outside the system of state authorities of the Republic of Poland. These safeguards apply to all cases of transfer of competences to the bodies of the Communities and the European Union.[23]

This thought was then developed by the Court in its judgement reviewing conformity to the Constitution of the Lisbon Treaty (K 32/09) given on 24 November in 2010.[24] According to this statement, Article 90 of the Constitution cannot be understood in such a way that it exhausts its meaning after a single application upon accession to the EU. The Constitutional Court has dismissed, as inadmissible, interpretation according to which, initial transfer of competencies to the EU, as it took

21 Judgement K 18/04, section 8.4. '*Of fundamental importance, from the point of view of sovereignty and the protection of other constitutional values, is the limitation of the possibility to delegate competences only to «certain matters» (and thus without infringing the 'core' of powers, enabling – in accordance with the preamble – the sovereign and democratic determination of the destiny of the Republic)*'.

22 Judgement of 24 November 2010, Sygn. akt K 32/09, OTK ZU nr 9/A/2010, item 108, section 2.2.

23 Judgement K 18/04, section 3.2.

24 Judgement K 32/09, section 2 (2.1–2.2).

place in 2004, has given an open way for further transfers, no longer obeying procedural requirements set out in Article 90. As the Constitutional Court emphasised, those requirements still apply to future changes in the Treaty on the EU if those changes result in the subsequent transfer of competencies to the EU. This means, in particular, that an international treaty aimed at delegating additional competencies to the EU or to some of its institutions, must not be ratified by means of procedure set forth in Article 89 of the Constitution for all international treaties interfering with the matters reserved for statutory regulation, but not involving transfer of states' sovereign competencies. (See paragraph 2.1. at p 227).

Therefore, as follows: the transfer of any new competencies of the state authorities to the EU requires the same full procedure as described in Article 90 of the Constitution and adopted for entering the EU. It is, however, disputable whether this constitutional position taken by the Constitutional Court is obeyed in practice. A spectacular manifestation of the ambiguity is the case of ratification of the Fiscal Treaty which will be discussed later.

4. The Accession Treaty and the Lisbon Treaty under constitutional review

4.1. General remarks

The Constitutional Court has reviewed the constitutionality of certain provisions of the Lisbon Treaty in judgement K 32/09, of 24 November 2010,[25] in which general theory on European integration, as regulated in the Polish Constitution, was developed – theory that has been in force since that time. However, five years earlier the impact of the European law on the Polish legal system had already been analysed in a detailed way in the judgement of 11 May 2005 (K 18/04) reviewing the conformity of the Accession Treaty to the Polish Constitution. The latter provided a complex account of the relationship between Polish law and EU law, taking into consideration the specific character of the EU as an organisation which is constantly expanding its competencies. The account also included issue of constitutional interpretation favourable to EU law, as well as the case of possible conflict between the Constitution and the EU law. The former has developed the concept of constitutional identity and declared the principle of protection of national sovereignty within the European integration process.

25 Judgement K 32/09, sections 2.1-2.2.

4.2. Judgement of 11 May 2005 (K 18/04) on the Accession Treaty

The Constitutional Court reviewed the conformity of the Accession Treaty of 16 April 2003 (including the Act on the determining conditions for the EU accession and its Final Act) to the Polish Constitution in the judgement of 11 May 2005 (K 18/04). The Accession Treaty was challenged by the three parallel motions submitted by three distinct groups of the members of Parliament. Under review was submitted the Accession Act in its entirety, as well as its particular provisions construed in conjunction with several TEU provisions.[26] Those provisions were examined against the preamble and 27 specific provisions[27] of the Polish Constitution.

The Constitutional Court has summarised[28] this complex and complicated motion for review as being based on two assumptions. The first is very general, i.e. that the Polish Constitution (Article 8 in particular) prevents accessing of the legal system of the EU, assuming supremacy of European law over the domestic law. The second is based on an assumption regarding conflict between a specific axiology of the Polish Constitution (including, in particular, protection of property, family, family agricultural farms) and norms stemming from primary and secondary European law. The Court has certainly affirmed the conformity of the Accession Treaty to the Constitution, giving some more general accounts about the relation between Polish and EU legal systems.

Discussing the supremacy of the Polish Constitution, as declared in its Article 8, the Constitutional Court pointed out that this Constitutional provision should be read in conjunction with Article 9 declaring that Poland is obeying ratified international law.[29] Therefore, it must be accepted that the Polish Constitution understands the Polish legal system as consisting of different kinds of legal rules. On the one hand, there are Polish legal provisions originating from legislative activity of the Polish Parliament and other domestic bodies, whilst on the other hand there is also ratified international law.[30] In this context, of particular importance are the '*international treaties on the transfer of competences belonging to public authorities «in certain matters» to an international organization or an international institution*'. Regarding the far-reaching consequences of such international treaties, the Constitution contains the following:

> significant safeguards against too easy or insufficiently legitimate transfer of competences outside the system of state authorities of the Republic of Poland. These

26 TEU's Art. 8, Art. 13, Art. 19(1), Art. 33, Art. 105, Art. 190, Art. 191, Art. 202 and Art. 203.

27 The specific constitutional provisions of the Polish Constitution are as follows: Art. 1, Art. 2, Art. 4, Art. 5, Art. 6, Art. 8(1), Art. 10, Art. 13, Art. 18, Art. 21(1), Art. 23, Art. 25(4), Art. 31, Art. 38, Art. 62(1), Art. 79(1), Art. 83, Art. 87, Art. 90(1), Art. 91(3) Art. 95, Art. 101(1), Art. 178(1), Art. 188 point 1, Art. 193, Art. 227(1), and Art. 235.

28 Judgement K 32/09, section 1.6.

29 Judgement K 32/09, section 2.1.

30 Judgement K 32/09, section 2.2.

> safeguards apply to all cases of transfer of competences to the bodies of the Communities and the European Union.[31]

Constitutional authorisation for delegation of competencies '*in certain matters*' requires a precise description of the fields and the scope of the competencies covered by the delegation. At the same time, it must be understood as a prohibition to delegate: i) the entirety of the competence of a given body, ii) competencies in the entirety of the matters in a given field, iii) essential competencies that determine the identity of a given state authority. It is hence not permitted – as the Court has emphasized – to preserve some less important competencies which would simulate that a given constitutional authority is still operating as it should operate according to the Constitution.[32] The Court stressed that '*actions by which the transfer of powers would undermine the sense of existence or functioning of any of the organs of the Republic would be in clear conflict with Article 8(1) of the Constitution*'.[33]

Continuing, the Court emphasised that the constitutional provision providing for the precedence in application of international agreements over domestic laws, resulting from Article 91(2) of the Constitution,

> does not directly (and in any respect) lead to the recognition of the analogous precedence of such agreements over the provisions of the Constitution. Thus, the Constitution remains – by virtue of its special power – «the supreme law of the Republic of Poland» over all international agreements binding the Republic of Poland. This also applies to ratified international agreements on the transfer of competence «in certain matters».

Moreover, the Court emphasised that '*By virtue of the supremacy of the Constitution resulting from Article 8 (1) of the Constitution, it enjoys, on the territory of the Republic of Poland, the priority of validity and application*'[34]. Therefore, the Court declared that

> Neither Article 90(1) nor Article 91(3) can provide a basis for delegating to an international organization (or an institution thereof) the authority to enact laws or make decisions that would be contrary to the Constitution of the Republic of Poland. In particular, the norms indicated here cannot serve to delegate powers to an extent that would make the Republic of Poland incapable of functioning as a sovereign and democratic state.

31 Judgement K 32/09, section 3.3.

32 '*There is no basis for the assumption that, in order to comply with this requirement, it would be sufficient to preserve in a few matters, if only for the sake of appearances, competencies within the competence of constitutional bodies*'. Judgement K 18/04, section 4.1.

33 Judgement K 18/04, section 4.1.

34 Judgement K 18/04, section 4.2.

In this respect, the Court mentioned that it is adopting a position akin to that taken by the German Federal Constitutional Court in the Maastricht case of 12 October 1993 (2BvR 2134, 2159/92) and in the Danish case of Carlsen v. Denmark of 6 April 1998 (I 361/1997).[35] Additionally, the Court stressed that the decision regarding delegation is also legitimised with qualified majorities that are required for the adoption of the authorising statute.[36]

It is worth mentioning here that the Court pointed out the integrative specificity of the Accession Treaty providing membership within the EU. It acknowledged that

> the Accession Treaty, compared to classical international agreements, shows certain peculiarities. While those agreements assumed predictability of elements of future functioning already at the time of the conclusion of the agreement, the European Union system is dynamic in nature. It provides for the possibility of changes in the content of the law compared to the state at the time of accession. It also provides for the possibility of evolution of the principles and scope of the Union's functioning. At the time of accession, therefore, there is no absolute certainty about all elements of further development. At the same time, however, the powers delegated by the member states ensure the influence of those states on the actions and decisions of the entire system. This is an important guarantee of its correctness and acceptability. After all, the decision for the Union to enter a new area of action, in order to achieve one of the objectives of the community, requires unanimity of the member states on the matter to be decided (Article 308 TEC). This ensures that changes in the area under consideration cannot take place despite the opposition of any state[37].

The Constitutional Court made some more general comments about the relationship between Polish and European law, pointing out that

> the very concept and model of European law has created a new situation in which autonomous legal orders exist side by side. Their interaction cannot be fully described by the traditional concepts of monism and dualism in the system: domestic law – international law.

Those legal orders, though autonomous, are in constant interaction, and collisions between them might occur, including conflict between Community law and the provisions of the Constitution. Such a possible conflict might be managed by the constitutional interpretation. However, at some point, a contradiction might appear between '*a norm of the Constitution and a norm of Community law, a contradiction that cannot be eliminated by the application of an interpretation that respects the relative autonomy of European law and national law*'. As the Constitutional

35 Judgement K 18/04, section 4.5.
36 Judgement K 18/04, sections 4.3 and 4.6.
37 Judgement K 18/04, section 5.1.

Court declared, due to the commonality of assumptions and values, such a situation arises exceptionally but still cannot be excluded.[38] The Court emphasised, in this context, that '*a «European law-friendly» interpretation has its limits. Under no circumstances can it lead to results that are contradictory to the clear wording of constitutional norms and impossible to reconcile with the minimum threshold of constitutional protection*'.[39]

If such a contradiction were to arise, according to the Polish Constitutional Court, it could not be solved

> in Polish legal system by acknowledging the superiority of the Community norm in relation to the constitutional norm. Nor could it lead to the loss of validity of the constitutional norm and its replacement by a Community norm, or to the limitation of the scope of application of that norm to an area not covered by the regulation of Community law.

This initial declaration of the Court sounds very much as if it declared the supremacy of the national constitutional order. However, the Court has developed its position in a quite different way, pointing up to the necessity of taking political action that would solve the problem of such a contradiction. The Court declared that, in the case of this kind of unreconcilable contradiction,

> it would be up to the Polish legislator to decide either on an amendment of the Constitution, or to bring about a change in Community regulations, or – ultimately – a decision to leave the European Union. This decision would have to be taken by the sovereign, i.e., the Polish Nation, or by the state authority which, in compliance with the Constitution, may represent the Nation.[40]

Thus, the Court has declared that unreconcilable contradiction between constitutional legal provisions and European law provisions exceeds the legal means of solving such a conflict of laws and requires political action resulting in the changing of one of the contradicting rules or the abandonment of the EU by the country. The Court explained that European legislation can never amount to an alternative way of changing the Polish Constitution.[41] This needs direct political action, as provided for in the procedure of constitutional amendments. One of the reasons for the aforementioned is that the '*Constitution in the area of individual rights and freedoms set a minimum and impassable threshold that cannot be lowered or questioned as a result of*

38 Judgement K 18/04, section 6.3; See also section 8.3 of the judgement: '*The Polish Constitution and Community law are based on the same set of common values*'.

39 Judgement K 18/04, section 6.4.

40 Judgement K 18/04, section 6.4.

41 Judgement K 18/04, section 6.4: '*Thus, the Constitutional Court does not recognise the possibility of questioning the validity of a constitutional norm by the mere fact of the introduction into the system of European law of a Community regulation contrary to it*'.

the introduction of Community regulations'. In this respect, the Constitution has the function of an ultimate warranty protecting the rights and freedoms expressly set out in the constitution.[42]

The Court has also redefined the true meaning of the supremacy of the Constitution in the Polish legal system, as declared in its Article 8, taking into account the new context as provided by the membership of the EU and more broadly by the ongoing process of European integration.

In the first place, priority of the Constitution means that the process of European integration is determined by the Constitution, which provides for its legal base,[43] within Article 90 in particular. The second dimension where the primacy of the Polish Constitution manifests itself is the constitutional review of the Treaty as provided by the Constitutional Court, and as also provided for in the Constitution in relation to ratified international treaties.[44] Finally, the third dimension in which the primacy of the Constitution manifests itself is the immunity of constitutional provisions from any possible direct modification of them by the European law. EU law has no power to modify the Polish Constitution in case of irremovable contradiction between European law provisions and the Constitutional provisions. In case of such a contradiction, it is for the sovereign Polish constitutional legislator to decide on the way it is to be solved.[45] It is clear in the judgement that the Constitutional Court was under no illusion that the process of European integration, if it is also to affect Poland, will entail changes to the Polish Constitution. In this way, the Polish Constitutional Court also had no illusions as to the primacy of European law being indispensable if the common European law is to become reality. It stipulated, however, that this inevitable process must take place in the way provided for by the Polish Constitution, upon the sovereign decision regarding self-limitation of the sovereign

42 Judgement K 18/04, section 6.4.

43 Judgement K 18/04, section 7: '*(…) the process of European integration related to the transfer of competences in certain matters to EU bodies is supported by the Constitution of the Republic of Poland itself. The mechanism of the Republic of Poland's accession to the European Union finds a clear legal basis in constitutional regulations. Its validity and effectiveness depend on the fulfilment of the constitutional elements of the integration procedure, including – the procedure of transfer of competences*'.

44 Judgement K 18/04, section 7: '*…the supremacy of the Constitution is confirmed by the constitutionally determined mechanism of constitutional review of the Accession Treaty and the acts constituting its integral components. This mechanism is based on the same principles on which the Constitutional Court may adjudicate on the compliance of ratified international agreements with the Constitution. In such a situation, the subject of control also becomes, albeit indirectly, other acts of primary law of the Communities and the European Union as annexed to the Accession Treaty*'.

45 Ibid., section 7: '*… the provisions (norms) of the Constitution, as a superior act and an expression of the Sovereign will of the Nation, may not lose their binding force or be altered by the mere fact of the emergence of an irremovable contradiction between certain provisions (community acts and the Constitution). In such a situation, the sovereign Polish constitutional legislator retains the right to decide autonomously the manner in which the contradiction is to be resolved, including possible amendment of the Constitution itself*'.

powers.[46] With this said, the Court also emphasised that still it is only possible to delegate competencies 'in certain matters' without infringement of the 'core matters' enabling self-determination of Poland.[47] This issue was subsequently developed in the judgement reviewing the constitutionality of the Treaty of Lisbon.

4.3. Judgement K 32/09 and protection of constitutional identity

The Polish Constitutional Court reviewed the constitutionality of certain provisions of the Lisbon Treaty in judgement K 32/09 held on 24 November in 2010.[48] Formally speaking, the constitutional review addressed Article 1 point 56 and Article 2 of the Lisbon Treaty, although its substance related, in fact, to the new content of Article 48 of the TEU in conjunction with Article 2(2) and Article 3(2), as well as Article 7 and Article 352 of the TFEU. Not surprisingly, the judgement found that the Lisbon Treaty conformed to the Polish Constitution. However, the deepening of the European integration as manifesting in the Treaty also inspired the Constitutional Court to develop the concept of constitutional identity as an element of the solemnly-declared constitutional principle protecting national sovereignty in the course of the European integration process.

4.3.1. Early appearance of the 'constitutional identity' concept

The original meaning of the 'constitutional identity' concept referred to the content of domestic law, and, more specifically, to the content of domestic judicial procedures, which – as the jurisprudence of the Constitutional Court began to emphasize – should be determined with respect for the *constitutional identity* of the judiciary. The concept first appeared in relation to preliminary proceedings in the course of which the Supreme Court decided whether to accept the cassation complaint for examination, following which the said concept was subsequently invoked whilst assessing the Supreme Court's legitimacy to refer legal questions to the Constitutional Court.[49] The concept of the constitutional identity of a court so understood, apart from the obvious requirement of impartiality and independence, was

46 Ibid., section 7: '*The principle of the primacy of Community law over national law is strongly emphasised by the case-law of the Court of Justice of the European Communities. This state of affairs is justified by the objectives of European integration and the needs of creating a common European legal area. This principle is undoubtedly an expression of the desire to guarantee uniform application and enforcement of European law. However, it does not – on an exclusive basis – determine the final decisions taken by sovereign member states in conditions of a hypothetical collision between the Community legal order and constitutional regulation. In the Polish legal system, decisions of this type should always be taken taking into account the content of Art. 8(1) of the Constitution. In accordance with Art. 8(1) of the Constitution, the Constitution remains the supreme law of the Republic of Poland*'.

47 Judgement K 18/04, section 8.4.

48 Judgement K 32/09, section 2 (2.1-2.2).

49 Decision of 16 March 2010 P 3/07, OTK ZU 3/A/2010, item 30.

described as prohibiting arbitrariness in the operation of the court and ensuring participation of interested parties in the proceedings, which is subject to the requirement of openness whereas the decision ought to contain reliable and verifiable reasons.[50] These requirements were closely associated with the necessity of respecting principles of procedural justice in the judicial procedure.[51] The constitutional identity of a court so understood has sometimes been described succinctly as aimed at preventing the transformation of a court into a bureaucratic institution,[52] incapable of satisfying the substantial right to a fair trial (the essence of that right) perceived in the context of the overall principle of a democratic state based on the rule of law implementing the principles of social justice.[53] However, the advancement of the European integration led the Constitutional Court to start using the expression as a means of protection of the national sovereignty in the course of the European integration process.

4.3.2. The 'constitutional identity' in its proper meaning

When considering the conformity of the Lisbon Treaty to the Polish Constitution, the Constitutional Court declared that, whereas joining of the EU must result in certain limitations of a state's sovereignty, by no means does it amount to its abolishment. Limitation of the national sovereignty resulting from European integration is compensated by the power of co-deciding within the EU. Moreover, according to the Constitutional Court, joining of the EU, as it took place according to the Constitution, must be understood as a manifestation and thus affirmation of the national sovereignty and hence reaffirms the primacy of the Polish Nation in deciding its own fate. This basic principle is manifesting itself in the preamble to the Constitution, as well as in several constitutional provisions in Articles 2, 4, 5, 8, 90, 104(2), and

50 Judgements of: 26 November 2019, P 9/18, OTK ZU A 2019, item 70, section 33; 4 April 2017 P 56/14, OTK ZU A/2017, item 25; 22 March 2017 SK 13/14, OTK ZU 19/A/2017, section 3.2; 27 October 2015 K 5/14, OTK ZU 9/A/2015, item 150, section 3.3; 22 October 2013 SK 14/13, 100/7/A/2013, section 3.2.1; 31 March 2009 SK 19/08, OTK ZU nr 3/A/2009, item 29, section 2; 26 February 2008, SK 89/06, OTK ZU nr 1/A/2008, item 7; 20 May 2008 P 18/07, OTK ZU nr 4/A/2008, item 61; 1 July 2008 SK 40/07, OTK ZU nr 6/A/2008, item 101; 19 September 2007 SK 4/06, OTK ZU 8/A/2007, item 98, section 5; 16 January 2006 SK 30/05, OTK ZU nr 1/A/2006, item 2; 31 March 2005 SK 26/02, OTK ZU 3/A/2005, item 29, section 4.4; 16 January 2006 SK 30/05, OTK ZU 1/A/2006, item 2; Decision of 16 March 2010 P 3/07, OTK ZU 3/A/2010, item 30.

51 Judgement of 26 February 2008 SK 89/06, OTZ ZU 1/A/2008, item 7, section 1.2.4.

52 See: judgements of: 1 July 2008 SK 40/07 OTK ZU 6/A/2008, item 101; 20 May *2008* P 18/07, 4/A/2008, item 61, section 5; 29 April 2008 SK 11/07, 47/3/A/2008; 2 October 2006 SK 34/06, OTK ZU 9/A/2006, item 118; 16 January 2006 SK 30/05, OTK ZU 9/A/2007, item 116; See also decisions by the Constitutional Court of: 29 March 2000 P 13/99, OTK ZU nr 2/2000, item 68; 12 April 2000 P 14/99, OTK ZU nr 3/2000, item 90; 10 October 2000 P. 10/00, OTK ZU nr 6/2000, item 195; 27 April 2004 P 16/03, OTK ZU nr 4/A/2004, item 36; 17 October 2007 P 29/07; See also dissenting opinion by judge Zdziennicki in case SK 26/02, OTK ZU 3/A/2005, item 29.

53 Judgement of 28 April 2009 P 22/07, OTK ZU 4/A/2009 item 55, section 4.

Article 126(1).[54] In those provisions, sovereignty is manifesting itself as a bundle of several inalienable states' competencies envisaging values upon which the Polish constitution has been founded and determining the constitutional identity of the Polish State.[55]

Therefore, according to the Constitutional Court, the concept of constitutional identity consists of a range of states' powers, which are non-transferrable pursuant to Article 90 of the Constitution and thus are not transferrable at all.

The matters covered by the absolute prohibition of transfer include, in particular:

- protection of human dignity and constitutional 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, as well as
- prohibition of the transfer of constitutional authority and
- prohibition of the transfer of competencies to create competencies.[56]

In such a way, Article 90 of the Constitution, authorising *prima faciae* the transfer of certain competencies to the EU, also appears to be the guarantee for the

54 Art. 2: principle of the democratic state based on the rule of law; Art. 4: the sovereignty of the Nation; Art. 5: duty to protect independence and integrity; Art. 8: supremacy of the Constitution; Art. 104(1): the Sejm as representation of the Nation; Art. 126(2): the President as the guardian of the Constitution, sovereignty, security and territorial integrity; and Art. 130 of the Constitution: presidential oath listing basic values to be protected by the Head of the State.

55 '… *sovereignty of the Republic and its independence, understood as the distinctiveness of Polish state's existence within its present borders, in the conditions of membership in the European Union on the principles laid down in the Constitution, signify an affirmation of the primacy of the Polish Nation to determine its own destiny. The Constitution is a legal expression of this principle. In particular provisions of the Preamble, Art. 2, Art. 4, Art. 5, Art. 8, Art. 90, Art. 104(2) and Art. 126(1), in the light of which the sovereignty of the Republic consists of the non-transferable competences of the state authorities which constitute constitutional identity of the state. The principle of sovereignty is reflected in the Constitution not only in the provisions of the Preamble. The expression of this principle is the very existence of the Basic Law, as well as the existence of the Republic understood as a democratic state based on the rule of law (Art. 2 of the Constitution). Art. 4 of the Constitution stipulates that the supreme power 'belongs to the Nation', which excludes its delegation to another superior. According to Art. 5 of the Constitution, the Republic shall safeguard the independence and inviolability of its territory and ensure the rights and freedoms of man and citizen. The provisions of Art. 4 and Art. 5 of the Constitution, in conjunction with the Preamble, delineate the fundamental relationship between sovereignty and the guarantee of the constitutional status of the individual, while at the same time excluding the renunciation of sovereignty, the recovery of which the Preamble to the Constitution affirms as a premise for the Nation to stand for itself*'. Judgement K 32/09, section 2.1.

56 '*the matters covered by the absolute prohibition on transfer include provisions defining the supreme principles of the Constitution and the provisions concerning the rights of the individual which determine identity of the state, including in particular: the requirement to ensure the protection of human dignity and constitutional 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, as well as the requirement to ensure better realisation of constitutional values and the prohibition on the transfer of constitutional authority and powers to create competences*'. Judgement K 32/09, section 2.1.

preservation of the constitutional identity of the Republic, as it sets the limits on the transfer of competencies laid out therein.

What was emphasised by the Court is that Article 90 of the Constitution cannot be understood in such a way that it exhausts its meaning after a single application. It is inadmissible to have the opinion that the initial transfer of competencies to the EU, as it took place pursuant to the Lisbon Treaty, gives an open way for further transfers, already disregarding requirements set out in Article 90. Those requirements still apply to future changes in the Treaty on the EU, if those changes result in the subsequent transfer of competencies to the EU.[57]

The concept of the protection of constitutional identity is rooted in the protection of the national sovereignty, which is considered a fundamental constitutional value. The preamble to the Constitution understands sovereignty as the power to determine the fate of Poland and the Polish nation determining the manner in which provisions of the Constitution concerning independence and sovereignty of the Polish State are to be interpreted. Conversely, however, the preamble also determines the construction of the provisions dealing with European integration (Articles 9, 90 and 91 of the Constitution). Therefore, Article 90 of the Constitution was construed not only as authorising the transfer of competencies from a state to the EU, but also as setting limits on that transfer. As such, Article 90 (determining the procedure for passing the law transferring competencies) was considered one of the special 'normative anchors' for the protection of sovereignty along with Article 8(1), providing for supremacy of the Constitution, as well as Article 91, providing for primacy of European law before statutory law, but not before the Constitution.[58]

All of those considerations led the Court to a solemn declaration of the constitutional principle of protection of sovereignty in the course of the European integration process. The principle requires the respecting of constitutional constraints for transferring competencies within the process of the European integration. Those constraints restrict such a transfer only to 'certain issues' requiring provision of proper balance between powers transferred and those which are non-transferrable and continuously belong to the state as the 'essence of sovereignty'.

Amongst the powers essential to Polish sovereignty, the Constitutional Court listed, alongside others,

- power to enact constitutional provisions and to review complicity with them,
- power to determine judicial system,

57 '*The Art. 90 of the Constitution remains guarantee for the preservation of the constitutional identity of the Republic and sets the limits to the delegation of powers it authorises. Art. 90 of the Constitution cannot be understood in such a way that it exhausts its meaning after a single application opening the way for further transfers, already disregarding requirements set out in Art. 90. Such an understanding of Art. 90 would deprive this Constitutional provision of its legal power. The Art. 90 must be applied to any subsequent changes to the provisions of the Treaties on which the European Union is founded which occur otherwise than by means of an international agreement, if those changes result in a transfer of competence to the European Union*'. Judgement K 32/09, section 2.1.

58 Judgement K 32/09, section 2.2.

- authority over the state's territory,
- control over the army and the public order & security authorities.

The principle of the protection of sovereignty in the process of European integration:

- requires so that allowed transfer of powers can only be done by means of a special legislative procedure as specified in Article 90 of the Constitution,
- forbids transfer of competencies in universal/general terms,
- forbids transfer of the entirety of the most important competencies,
- denies any kind of implied authorisation, of the organisation granted with states' powers pursuant to Article 90, to extend the number of powers so granted.

Extension of attributed competencies is only allowed by means of an international treaty properly ratified and authorised by means of the procedure provided for in Article 90 of the Constitution, including possible popular authorisation in the referendum.

Whilst declaring the principle of the protection of sovereignty within the process of European integration, the Constitutional Court also emphasised that the principle protecting national sovereignty in the European integration process must be reconciled with the principles of favouring the process of European integration, as well as the principle of cooperation between states (K 11/03). However, favourable construction of European law must not lead to results that would contradict express content of constitutional provisions or would be impossible to reconcile with minimal warranties as provided for by the Constitution (K 18/04).[59]

The Polish Constitutional Court also stressed that the concept of *constitutional identity* corresponds to the notion of *national identity* which, according to the first sentence of Article 4(2) of the TEU, is protected. This allowed the Court to qualify the EU as a structure that affirms national identity of Member States. Therefore, the Polish Court emphasised that Article 5(1)-(2) of the TEU has declared objectives, for the achievement of which the Union was established, as additional limits to the competencies conferred upon the EU and not as a factor allowing for gradual extension of the competencies originally attributed to the EU.

According to the Constitutional Court, the concept of the EU, as expressed in the Treaty of Lisbon, aims to respect both the principle of the preservation of sovereignty in the integration process, and the principle of favouring the process of European integration and cooperation between states.

The Constitutional Court expressed its conviction that fundamental principles of the Union, as enacted in the Treaty of Lisbon, forbid such an interpretation of the Treaty provisions, which would aim to overrule the national sovereignty of states or to jeopardise national identity in order to take over directly non-transferred national

59 Judgement K 32/09, section 2.2.

competencies. The Treaty, so understood, explicitly confirms the importance of the principle of preserving sovereignty in the process of European integration, which is fully in line with the culture of European integration as included in the Polish Constitution. Therefore, the challenged Lisbon Treaty provisions were held to be conformant to the Polish Constitution.

The Constitutional Court was very vocal on the protection of national sovereignty and constitutional identity in judgement K 32/09. It is, however, important to remember that the judgement was affirmative of the Lisbon Treaty, and this might be the reason why it caused no political controversies. The same constitutional principles, when applied in a different political context and declaring nonconformity of EU law to the Constitution in judgement K 3/21, caused serious political controversies between the EU and Poland, which will be described later.

5. The sovereign powers abandoned by the Constitutional Court

5.1. Untransferable? So what?

On 20 February 2012, a statute authorising ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Treaty) of 2 March 2012, was enacted pursuant to the procedure described in Article 89 of the Polish Constitution. This is not the procedure from Article 90 containing the delegation clause, but the general procedure applicable for ratification of international treaties not delegating powers to an international organisation or institution.[60] The Fiscal Treaty was concluded beyond the legal framework of the EU and is not published in its Official Journal. However, it is clearly declared, in its preamble, that the ultimate objective of the contracting parties is '*to incorporate the provisions of this Treaty as soon as possible into the Treaties on which the European Union is founded*'. The aforementioned statement acknowledges that the Fiscal Treaty intends to modify EU Treaties, but it was not adopted within the procedure formally set for revision of the Treaties in Article 48 of the TEU. However, the Fiscal Treaty is linked to EU law in an unprecedented way and its provisions could operate only within the context of European law using its terminology and mechanisms.[61] In fact, the Fiscal Treaty grants

60 The issue is analysed in a very careful and detailed way by Dobrowolski, 2013, pp. 41–57. Below I am following this analysis in this respect.

61 See Mik, 2012, pp. 82–83, 93–94.

additional competencies to the EU Commission,[62] hence international institutions within the meaning of Article 90 of the Constitution. Moreover, those competencies compete with the powers which the Polish Constitution has attributed exclusively to specific Polish authorities competent in the area of public finances.

According to the Polish Constitutional Court, Articles 216(5) and 220 of the Polish Constitution, which impose financial restrictions in case of excessive budgetary deficit, demonstrate that the Constitution protects not only balance within the public finances, but also '*political sovereignty of the legislature and, respectively, of the Government in determining budgetary expenditures. The ability to make political decisions as to the hierarchy and amount of these expenditures is an inalienable* (emphasis added – A.S.) *attribute of these authorities*'.[63] Thus, the Fiscal Treaty in Articles 3, 5 and 7 changes the constitutionally-defined scope of competencies of the Government and the Parliament, as the Constitution grants the exclusive power to fight excessive deficit in public finances to the Government (determining amount of the budgetary deficit) and the Parliament (in making decisions on the introduction of corrective programmes). Moreover, no substantial change is provided by Article 3(2) declaring that '*correction mechanism shall fully respect the prerogatives of national Parliaments*' whereas in fact it amounts to nothing more than a formal competence of the national Parliament to enact corrective measures in accordance with the principles set out by the relevant EU bodies. Therefore, by virtue of the Fiscal Treaty, exclusive competencies of the legislature to shape the structure of the budget and budgetary procedures were delegated to the EU, as well as the competence of the Government to independently determine, each year, the amount of budgetary deficit. There has thus been a transfer of sovereign powers ('*transfer of competences*') from these state authorities to EU authorities. This required procedure set out by Article 90 of the Constitution, but in fact statutory authorisation for the ratification of the Financial Treaty was provided according to easier procedure provided for (non-integrative) international treaties, as determined in Article 89 of the Constitution. Moreover, the Constitutional Court refused, in 2013, to consider a motion for constitutional review of the Fiscal Treaty on formal grounds,[64] that was subject to two dissenting opinions. Moreover, after two years' delay, it refused to consider[65] a motion for constitutional review of the statute authorising ratification of the Treaty on 13 January

62 It concerns the issues of the procedure of the so-called 'reversed majority' from Art. 7 of the Fiscal Treaty, affecting contracting states' powers to oppose decisions taken by the Commission, b) setting legal grounds for the so-called 'correction mechanism' as provided in Art. 3(1)(e), which grants new power to the Commission, c) duty to implement budgetary and economic partnership programme (Art. 5 of the Fiscal Treaty).

63 Judgement of 26 November 2001, K. 2/00. OTK ZU nr 8/2001, item 254.

64 Judgement of 21 May 2013 K 11/13, OTK ZU 2013, nr 4A, item 53.

65 Again, it took place on formal grounds – death of one of the senators supporting the motion for review, resulting in its frustration, as the motion for review submitted was no longer supported by a sufficient number of the Members of Parliament. Decision was explained in a detailed way, although the overall account of the proceeding strikingly suggests rather unwillingness to take a clear position in this respect – nevertheless this conclusion is arguable.

2015.[66] The Constitutional Court has manifested in this way its unwillingness to take a position on the aforementioned controversial issue. Most probably, if the Court were to review this issue on merits, it would have to rule on the unconstitutionality of the ratification procedure and perhaps the unconstitutionality of controversial provisions of the Fiscal Treaty. As such, it preferred to use subsequent opportunities refusing the review, which allowed it to take no official position, neither on conformity to the Constitution of the Fiscal Treaty nor on the statutory authorisation for its ratification.

5.2. Inalienability unprotected

This problem was, however, revisited in the next judgement of 26 June 2013 (K 33/12). The judgement provided a review of the conformity of the Act on the ratification of European Council Decision No 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the EU with regard to a stability mechanism for Member States whose currency is the Euro.[67] The amendment strictly related to the Fiscal Treaty integrating it, at least to some extent, into the TFEU. A constitutional review of the ratification statute was requested by a group of MPs in July 2012. They considered it incompatible with Article 90, which requires a qualified majority for the adoption of such a law,[68] whereas the ratification law was adopted by a simple majority.[69] The applicants argued that the Council Decision subject to ratification, as modifying primary EU law, created grounds for transferring – to an international organisation such as the European Stability Mechanism (ESM) – the competencies of state authorities. The applicants claimed that the Council Decision created legal conditions for conferring on that organisation the authority to decide on the terms of Poland's participation in the monetary union, as well as extending, with respect to Poland, the jurisdiction of the Court of Justice of the European Union and the Court of Auditors. This created a legal basis for narrowing the powers of the Parliament to determine budgetary policy and the powers of the Council of Ministers to conduct economic policy of the state, empowering the European Commission

66 Decision of 13 January 2015 K11/13, OTK ZU 1A/2015, item 3.

67 Ustawa z dnia 11 maja 2012 o ratyfikacji decyzji Rady Europejskiej 2011/199/UE z dnia 25 marca 2011 w sprawie zmiany Art. 136 Traktatu o funkcjonowaniu Unii Europejskiej w odniesieniu do mechanizmu stabilności dla państw członkowskich, których walutą jest euro (Journal of Law for 2011, item 748).

68 During legislative work, a draft resolution calling for ratification in accordance with Art. 90 of the Constitution was tabled (druk sejmowy No. 114/VII kadencja) but was rejected by the government majority.

69 The ratification process is described in: *Biuletyn Komisji do Spraw Unii Europejskiej i Komisji Spraw Zagranicznych nr 125/VII kadencja*; and *Sprawozdanie Stenograficzne z 14. posiedzenia Sejmu 10 maja 2012,* pp. 168-181. Controversies concerning chosen procedure for ratification: *Opinie w sprawie Decyzji Rady Europejskiej of 16-17 December2010 dotyczącej zmiany Art. 136 Traktatu o funkcjonowaniu Unii Europejskiej, w szczególności procedury jej stanowienia w UE oraz procedury jej ratyfikacji*, 'Przegląd Sejmowy' nr 2/2012, s. 147–176; oraz 'Przegląd Sejmow' nr 3/2012, pp. 177–215.

to determine the rules of the correction mechanism for the state's financial management. According to the applicants, the ratification Act was incompatible with Article 48(6) of the TEU, but this thread is less relevant for current deliberations, as it concerns the assessment of the legality of the TFEU amendment via Decision No 2011/199/EU.

When considering the application, the Court asked whether the transfer of competencies that will appear by virtue of an international agreement after future fulfilment of some additional conditions (here: necessary future acceptance of the Euro currency) should be considered in the same way, regarding constitutional conditions, as the transfer of competencies which takes place solely by virtue of the international agreement upon its mere ratification without any other conditions.[70] The Court also analysed the notion of 'competences of an organ of state authority' within the meaning of Article 90 of the Constitution.

The court then concluded that, in light of the content of the Council Decision, there are no grounds to conclude that the Act authorising ratification of the Council Decision on the amendment of Article 136(3) of the TFEU leads to a transfer of such competencies within the meaning of Article 90 of the Constitution. The Court emphasised that this provision does not mention either the competencies of an organ of state authority or their transfer to an international organisation. Indeed, taken literally, this provision merely confirms the competence of Member States whose currency is the Euro to conclude international agreements amongst themselves. The Court was unwilling to see the functional link between this provision and the 2012 Fiscal Treaty, which was integrated into the institutional system of the EU through the aforementioned provision. Instead, the Court emphasised that Poland (at that moment) has not been a member of the Eurozone and thus is not an addressee of this provision and will not participate in the creation of the ESM.[71] The Court therefore suggested that the amended Article 136 of the TFEU has no impact on the international status of Poland.

In addition, the Court took the view that the new provision of Article 136 of the TFEU does not identify the area in which competence is to be transferred under it, nor of the extent to which this transfer is to take place. There is also no indication of the authorities that would acquire new sovereign competencies vis-à-vis the Member States.

The Court found, then, a substantial difference between an international agreement immediately delegating powers and an agreement whereby those powers

70 Judgement of 26 June 2013, K 33/12, OTK ZU 5/A/2013, item 63, section 1.2.2: '*Against the background of the present case, an important issue arose as to whether the procedure for the enactment of a law giving consent to ratification, as envisaged in Art. 90 of the Constitution, is also required when the 'delegation of competences of state organs' in connection with the ratification of an international agreement may occur potentially, in the unspecified future. Indeed, the applicant alleged that the law 'creates' the grounds for the transfer of competences, and not that the transfer of competences occurred upon ratification of the Council decision*'.

71 Judgement K 33/12, section 7.3.2.

will be transferred automatically upon some additional condition in the foreseeable future. The Court therefore chose to refer to the literal wording of the new TFEU provision and completely disregarded its legal context, giving it an obvious functional meaning extending far beyond its literal wording. This is a completely different attitude from that which the Court usually adopts when reviewing constitutionality. One might even ask a question: if the Council Decision is so irrelevant for Polish authorities, confirming only their power to conclude international agreements, then what was the need for its ratification?

It is therefore not surprising that the judgment aroused a number of controversies and was far from being unanimous, with five dissenting opinions and far-reaching criticism. In addition to the substantive issues, demonstrating the applicability of Article 90, dissenting opinions also stressed the procedural issue, arguing that, where a specific procedure is appropriate for the ratification of an international agreement (and the TFEU was ratified by virtue of the procedure set in Article 90 of the Constitution), then the same procedure must be applied for ratification of amendments to the substance of that treaty.[72] The Court addressed the aforementioned allegation, holding that this principle cannot be considered as applicable to all legal acts and certainly does not apply to the interpretation of Article 90 of the Constitution,[73] supporting its position in this respect with reference to the principle of favouring the process of European integration and cooperation between states.[74]

6. Standing for the Constitution

It seems that, when speaking about protection of national law and constitutional identity of the Member State by the Polish Constitutional Court, we are thinking about constitutional judgements opposed to EU actions which contradict the national Constitution. First of all, such constitutional judgements demonstrate not only declaratory determination to protect national identity, including its constitutional dimension, but first of all those judgments which ruled on the non-conformity of the EU law to the national Constitution. It is very easy to be vocal on the protection of constitutional identity if non-conformity need not be declared. However, the Polish Constitutional Court had already declared such non-conformity three times.

72 See, in particular, dissenting opinion by judges Teresa Liszcz, Mirosław Granat and Marek Zubik (supported by Marek Kotlinowski and Zbigniew Cieślak).

73 Judgement K 33/12, section 6.6.2.

74 Judgement K 33/12, section 6.6.3.

6.1. Alleged biting

The first case when the Polish Constitutional Court declared that EU law is unconstitutional was in case P 1/05, as decided on 27 April 2005. The Constitutional Court examined the conformity to the Constitution of Article 607t § 1 of the Code of Criminal Procedure implementing the Council Framework Decision (2002/584) on the European Arrest Warrant (EAW) and surrender procedures between Member States. The introduction of the EAW raised doubts as to its compliance with the provision of Article 55(1) of the Constitution prohibiting the extradition of a Polish citizen. The Constitutional Court rejected both the possibility of a dynamic interpretation of the prohibition covered by the provision of Article 55(1) of the Constitution and attempts to treat extradition and the EAW differently in substance. Recognising that both institutions are in essence the same, the Constitutional Court declared the provision of Article 607t § 1 of the Code of Criminal Procedure as non-conformant to Article 55 paragraph (1) of the Constitution prohibiting the extradition of a Polish citizen abroad.[75] However, at the same time, the Constitutional Court perceived the necessity of fulfilling international obligations, including those resulting from Polish membership of the EU. Taking this into account, the Constitutional Court, pursuant to Article 190 paragraph (3) of the Constitution, postponed the expiring of the unconstitutional law provision for the maximum allowed time of 18 months, calling upon the Parliament to provide solutions allowing reconciliation between the constitutional prohibition of the extradition of a Polish citizen and the international obligation of the Polish state to provide for a legal mechanism allowing operation of the EAW. The Constitutional Court suggested, quite clearly, an amendment of the Polish Constitution in this respect,[76] emphasising at the same time that '*[t]he amendment of the Constitution has for years been used as a necessary measure to ensure the effectiveness of EU law in the national legal orders of Member States*'.[77] This position

75 Judgement of 27 April 2005 P 1/05, OTK ZU 4A/2005, item 42, section 4.4: '… *Art. 607t § 1 of the Code of Criminal Procedure, in so far as it permits the surrender of a Polish citizen to a Member State of the European Union on the basis of a European arrest warrant, is incompatible with Art. 55(1) of the Constitution*'.

76 '*The decision of the Constitutional Court declaring Art. 607t § 1 of the Code of Criminal Procedure unconstitutional causes this provision to lose its binding force. However, in the present case, this direct effect resulting from the judgment is neither equivalent to nor sufficient to ensure the compliance of the legal state with the Constitution. This objective can only be achieved through the intervention of the legislator. Indeed, taking into account Art. 9 of the Constitution, which stipulates that 'the Republic of Poland shall observe international law binding upon it', and the obligations arising from Poland's membership of the European Union, it is indispensable to amend the law in force in such a way as to enable not only full, but also constitutional implementation of Council Framework Decision 2002/584/JHA … . Thus, in order for this task to be accomplished, an appropriate amendment of Art. 55(1) of the Constitution cannot be ruled out, so that this provision provides for an exception to the prohibition on extradition of Polish citizens allowing their surrender on the basis of the EAW to other Member States of the European Union. If the Constitution is amended, bringing national law into conformity with EU requirements will also require the legislature to reinstate the provisions on the EAW that will be eliminated from the legal order as a result of the TK ruling*'. Judgment P 1/05, section 5 and 5.2 in particular.

77 Judgement P 1/05, section 5.7.

adopted by the Constitutional Court referred quite directly to the conclusions drawn from the judgement assessing the constitutionality of the Accession Treaty, where it was declared that, in case of unreconcilable contradictions between the Constitution and the EU law, Polish Legislative Power must made a decision, choosing one of three available options: changing the Constitution, initiating the procedure for changing EU law, or leaving the EU.[78] In effect, Article 55 of the Polish Constitution was amended in a way which removed contradiction with the Council Decision on the EAW, and no political turbulence occurred.

6.2. A new chapter in relations with the EU

Quite a different situation appeared, however, in 2021, when the Constitutional Court had to twice declare EU law irreconcilable with the Polish Constitution. In both cases, it was rather concerning construction of the Treaties as provided by the CJEU than the Treaty regulations themselves. Both judgements of the Constitutional Court were the result of political conflict between the Polish Government and the EU, and also provoked an infringement procedure initiated by the Commission.

This new situation started with the political change in Poland that took place in 2015 when the new coalition initiated ambitious reforms, including profound changes in the judicial system, starting with the Constitutional Court and then aiming at the Supreme Court and the common courts. Those political changes resulted in a regular political war between judges representing the old judicial system and its political reformers. Needless to say that the political constellation dominating European institutions was by no means enthusiastic about the political change in Poland.

It would be difficult to provide some concise outline of this political conflict between the judiciary and Parliamentary majority, having its specific propaganda and political narratives. Suffice to say it resulted in a series of preliminary referrals to the CJEU (as well as mass applications to the ECtHR), which were used by militant judges as a way to frustrate political reforms. Subsequent series of the judgments of the Luxemburg Court, at least to a certain degree, met the judicial expectations and provided those judges with an efficient tool for disregarding several statutory provisions. Those preliminary judgements were, however, directly touching the organisation and structure of the judicial system, hence why the competencies were never attributed to the Union. Moreover, they held that Polish courts are authorised to disregard judgements of the Constitutional Court as well as constitutional provisions by the common courts.

78 '*… if an irremovable contradiction were to arise between the provisions of the Constitution and those of Community law, a contradiction which cannot be resolved by an interpretation respecting the relative autonomy of European law and national law … [in] such a situation it would be up to the Polish Legislature to decide either to amend the Constitution, to bring about changes in Community regulations or – ultimately – to decide to withdraw from the European Union. This decision should be taken by the Sovereign, which is the Polish Nation, or by the body of state authority which, in accordance with the Constitution, can represent the Nation*'. Judgement K 18/04, sections 6.3–6.4.

This development resulted, however, in the reaction of the Constitutional Court, which responded in two judgements. One was initiated by the preliminary referral from the Supreme Court, whilst the other resulted from an application submitted by the Polish prime minister to the Constitutional Court. The first concerned the CJEU's decision on interim measures suspending operation of statutory regulations constituting a legal base for the functioning of the newly-established (and today already abolished) Disciplinary Chamber in the Polish Supreme Court. The second concerned the CJEU's preliminary judgement authorising Polish courts to disobey constitutional regulation and the normative effect of the judgements of the Constitutional Court.

6.3. Challenging CJEU interim measures (P 7/20)

In the judgement given on 14 July 2021 (P 7/20),[79] the Constitutional Court decided upon the preliminary referral that was made by the Supreme Court adjudicating in the (late) Disciplinary Chamber. The Supreme Court asked about the conformity of the second sentence of TEU Article 4 paragraph (3), read in conjunction with Article 279 of the TFEU, to the extent that it results in the obligation of an EU Member State to implement interim measures affecting the operation of the national judicial system, with Article 2 (the principle of the state based upon the rule of law and implementing principles of social justice), Article 7 (principle of legality), Article 8 paragraph (1) (supremacy of the Polish Constitution) and Article 90 paragraph (1) (restricting the scope of transferrable competencies only to some matters) in conjunction with Article 4 paragraph (1) (principle of the sovereignty of the Nation) of the Constitution. Briefly speaking, the Constitutional Court examined if it was conformant to the Constitution, imposing by the CJEU, the interim measures suspending the operation of legal provisions being the legal basis for operation of the Disciplinary Chamber in the Supreme Court, which took place in the CJEU decision of 8 April 2020 (C-791/19 R). The Constitutional Court (by majority) held that the CJEU, when imposing interim measures paralysing the activity of the Disciplinary Chamber, exceeded the scope of attributed powers acting *ultra vires* and infringing on Polish Constitutional provisions, as indicated in the referral for preliminary ruling. Formally speaking, the judgement was about the constitutionality of the EU Treaty law, but again it was in fact about the way the treaty provisions are interpreted and applied by the CJEU[80] ruling that the acts adopted by the CJEU *ultra vires* are not covered by the principles of primacy and direct application set out in Article 91 paras. (1)-(3) of the Constitution.

79 Judgement of 14 July 2021 P 7/20, OTK ZU A/2021, item 49.

80 Formally, the Constitutional Court held that the second sentence of Art. 4 para. (3) of the TEU, read in conjunction with Art. 279 of the TFEU, is non-conformant to Art. 2, Art. 7, Art. 8 para. (1) and Art. 90 para. (1) in conjunction with Art. 4 para. (1) of the Constitution of the Republic of Poland, and to that extent is not covered by the principles of primacy and direct application set out in Art. 91 paras. (1)-(3) of the Constitution, to the extent that the CJEU imposes *ultra vires* obligations on Poland, as the EU Member State, by issuing interim measures relating to the system and jurisdiction of Polish courts and Polish judicial procedure.

The Court has, in general, reaffirmed the conformity to the Polish Constitution of Article 4 paragraph (3) in conjunction with Article 279 of the TFEU. Thus, it confirmed the obligation of Poland, as an EU Member State, to implement interim measures as imposed by the CJEU. However, it emphasised that this legitimate power to impose interim measures is limited by the principle of attributed powers, the scope of which is determined by the principle requiring respect for constitutional identity of the Member State, as well as the principles of subsidiarity and proportionality. It follows, from the reasoning of the Court, that the Court of Justice of the EU is also bound by the principle of conferral. As a consequence, the CJEU may also exceed its competence. From the fact that the EU has only such competencies as were transferred to it by the Member States (Article 4 paragraph (1), Article 5 paragraph (1) of the TEU), and the Member States remain sovereign parties to the treaties, it follows that the final word on the limits of the delegated powers should rest with the Member State. Thus, according to the Constitutional Court, the CJEU was not granted the power to decide unanimously on the limits of competencies attributed to the EU. An opposite conclusion in this respect might even result in unauthorised and arbitrary exercising of powers that the Republic of Poland has never transferred to the Union.[81]

As a consequence, the Constitutional Court decided on the unconstitutionality of those Treaty provisions that may be considered as authorising the CJEU to impose obligations relating to the judicial system, jurisdiction, and the judicial procedure, being the scope of competencies belonging to the constitutional identity of the Republic of Poland and thus reserved for Constitutional regulation and never delegated to the EU.[82]

The Constitutional Court also emphasised that the interim measure resulting in suspension of national law constitutes, in principle, an automatic modification of a national legal system of a Member State. Therefore, it may happen that an interim measure, as adopted by the CJEU, will constitute a more far-reaching interference than a final judgment issued pursuant to Article 258 of the TFEU, which declares discrepancies between national law and EU law without direct interference in the national legal system.

81 '*It follows from the fact that the EU has only such competences as have been delegated to it by the Member States (Art. 4(1), 5(1) first sentence of the TEU), and from the fact that the Member States remain sovereign parties to the Treaties, that the final word on the limits of delegated competences should lie with the Member State. To hold that it is for the CJEU, in case of doubt, to determine the limits of delegated competences and the framework of constitutional identity on its own would go beyond the treaty jurisdiction of the CJEU and, in the extreme, could consequently lead to the arbitrary exercise of competences that the Republic has not delegated*'. Judgement P 7/20, section 6.5.

82 '*From Art. 8(1) of the Constitution, stating that it is the supreme law of the Republic of Poland, derives 'the supremacy and consequently the precedence of the Constitution over the law of the European Union, especially in exceptional situations connected with the need to protect the sovereignty of the state (U 2/20). The incompatibility with Art. 90(1) in conjunction with Art. 4(1) of the Constitution arises from the CJEU adjudicating in the area of the system and jurisdiction of judicial authorities, i.e. in areas which the Republic of Poland has not and cannot delegate to the EU*". Judgement P 7/20, section 6.10 (229–230).

6.4. Response to European authorisation of judicial disobedience to Constitution (K 3/21)

The second judgement K 3/21 of the Constitutional Court, as adopted in response to CJEU recent case law, was delivered on 7 October 2021 and provoked much controversy – both in Poland and abroad. Formally speaking, this application has challenged several provisions of the Treaty on EU.[83] In substance, however, the Court has acknowledged that it is by no means the very Treaty provisions which are at stake, but some specific way of their construction as provided by the CJEU in the recent judgements. The Court declared the inconsistency of the challenged Treaty provisions (or a specific way of their interpretation) with the Polish Constitution. In fact, it is not Treaty provisions which are important here, but the effect of some very intensive interpretation of what has been clearly envisaged already in the operative part of the judgement. This refers directly to the effects of the process of creating an '*ever-closer union between European nations*' in the course of which European integration reaches a '*new stage*' manifesting in the adoption of legal solutions outside the scope of attributed powers and the undermining of the constitutional identity of the Member State. The constitutional Court referred here to Article 1 of the TEU, declaring it in conjunction with Article 4(3) of the TEU as consistent with the Polish Constitution as long as the EU bodies act within the framework of delegated competencies and as long as this new, ever-closer stage of cooperation does not result in the Polish Constitution being deprived of its supremacy, i.e. priority in force and application over all other norms in the legal space on the territory of the Republic of Poland, and as long as Poland retains the functions of a sovereign and democratic state. If, however, by way of interpretation of the Treaties, the CJEU shapes such a stage of ever-closer cooperation in which the provisions of the EU law, created by way of interpretation of the Treaties by the CJEU beyond the limits of delegated competence, are placed above the Constitution, thereby causing a loss of sovereignty of the State and the Nation, then, to that extent, the '*ever closer union between the peoples of Europe*' will be inconsistent with the Constitution.[84]

The judgement, in its operative part, has three points. In the first point it was held that inconsistent with the Polish Constitution is EU law (precisely the EU law as construed by the Luxemburg Court) which:

- authorises European institutions to act beyond the scope of competencies attributed to them upon the Treaties,
- similarly, contrary to the Polish Constitution is EU law, which undermines the position of the Polish Constitution as a supreme law of superior force and priority in application,
- then, contrary to the Polish Constitution is EU law, which prevents Poland from operating as a sovereign and democratic state – what should be read as

83 Art. 1(1)-(2) in conjunction with Art. 4(3) of the TEU as interpreted by the CJEU, as well as Art. 19 in conjunction with Art. 2 of the TEU.

84 Judgement K 3/21, section 4.6.

prevents Polish Parliament from legislating in the area which was not transmitted to the EU.

The second point of the judgement refers to Article 19(1) of the TEU, which was held to be unconstitutional in so far as it:
- grants national courts the power to disregard provisions of the Constitution in the adjudication process,
- and grants national courts the power to apply statutory provisions that are no longer in force being repealed either by the Parliament or by the Constitutional Court when declared unconstitutional.

In the third point, the Constitutional Court held, as unconstitutional, EU law conferring *ultra vires* on national courts:
- power to review the legality of the procedure for the appointment of a judge, be it the legality of the resolution of the National Council of Judiciary (NCJ), or the very act of appointment of a judge by the president of the Republic of Poland taken directly upon the Constitution,
- power to decide that, due to the defects within the process of judicial nomination, refusing to recognise such a judge as being appointed to judicial office.

A brief comment on the third point is necessary. Polish law provides for judicial review of the legality of resolutions of the NCJ. In this point, the judgement challenges not the very legal possibility for a reviewing of the resolution by the NCJ, but the granting of this by the EU law. Polish law forbids, however, any challenging of the very decision on judicial appointment as taken by the president of the Republic directly upon the Constitution, as this would breach the principle of judicial irremovability.

Judgement K 3/21 of 7 October 2021 provoked much controversy. However, it is a quite simple application of the *principle of protection of constitutional identity in the process of European integration* as declared in judgement K 32/09, which caused no controversies at all. The arguments presented in judgement K 3/21 will be presented whilst discussing the constitutional construction of Articles 2 and 4 of the TEU.

7. Article 2 of the TEU in the Polish constitutional case law

The very nature of Article 2 of the TEU, which contains a listing of several 'values' fundamental to the EU, determines its function. This concerns, in particular, the 'rule of law' principle which expresses a general idea of a just, well-governed state, and changes its exact meaning depending on social, political, and legal circumstances. In actual fact, it means a particular constitutional concept that is believed to be operating, to a certain degree, in the current situation, but still much is to be done

in order to fulfil this political ideal. The idea of the rule of law determines, therefore, what is believed to be the proper course of the constitutional process.

According to the Polish Constitutional Court, all values listed in Article 2 of the TEU are also included in the Polish Constitution, in particular in Articles 7 (principle of legality), 30 (protection of human dignity), 31 (protection of individual freedom), 32 (principle of equality), 33 (equality between women and man) and 38 (protection of human life).[85] The Constitutional Court reiterated, following the European academic writings,[86] that the values enumerated in Article 2 of the TEU constitute interpretative guidelines when interpreting EU law, addressed primarily to EU bodies and institutions, but also to Member States.[87] At the same time, the Constitutional Court emphasised that the principle of the democratic state based on the rule of law, as expressed in Article 2 of the Polish Constitution, is identical in content[88] to the principles of democracy and the rule of law as established in Article 2 of the TEU. The Constitutional Court thus declared, in the U 2/20 judgment, that the content of Article 2 of the TEU, by referring to the content of the national constitutions, draws, to a significant extent, also on the content and interpretation of Article 2 of the Constitution of the Republic of Poland.[89]

The Constitutional Court, referring to academic writings,[90] emphasised that it is manifestly wrong to consider that the values of Article 2 of the TEU have a precise and single meaning. Quite the opposite, they are open to various sources of inspiration, including the Polish Constitution clearly referring to the idea of '*culture rooted in the Nation's Christian heritage and universal values*', as stated in its preamble.[91] The axiology, as expressed in Article 2 of the TEU (read in conjunction with its preamble), expresses values which are characteristic of the cultures of the Member States, by no means being created in the course of the TEU negotiations. Thus, the specificity in the way they are understood in the various European democracies must be respected. The recognition of these values as 'common' must not imply an agreement to give them a specific Community-meaning through a law-making construction applied by the EU bodies. '*The values constituting national identity cannot be imposed on any nation at all as a result of the interpretation of treaty law by the CJEU*'.[92]

The Constitutional Court also drew attention to the distinctiveness in understanding of the rule of law. If one applies this principle to the law-making activity of judges, then one can see that, whilst it is compatible with the British understanding of the *rule of law*, it is not compatible with the judges' continental understanding, for

85 Judgement K 3/21, section 8.1.
86 Schwarze, 2018; Blanke and Mangiamelli, 2013; Geiger, Khan and Kotzur, 2015.
87 Judgement K 3/21, section 5.2.
88 Art. 2: *The Republic of Poland shall be a democratic state based on the rule of law and implementing principles of social justice*.
89 Judgement K 3/21, section 8.1.
90 Banaszak, 2014, p. 9–22
91 Judgement K 3/21, section 8.1.
92 Judgement K 3/21, section 8.1.

which the separation of legislative and judicial power is of fundamental importance. It is clear that one of the foundations of the rule of law is judicial independence and impartiality. However, the manner in which judges are appointed, their relationship with the sovereign, and the guarantees of independence as provided to judges by the state, including immunities, disciplinary procedures, working conditions and organisation of judicial activity, are contingent upon national constitutional systems of the Member States and could not be subjected to any form of uniform assessment or criteria.[93]

The efficiency of judicial protection and the independence and impartiality of judges and the courts are fundamental components of the principle of a democratic state based on the rule of law, as declared in Article 2 of the Polish Constitution, as well as the principle of democracy and the rule of law listed by Article 2 of the TEU amongst the values on which the EU is based. The principles constitute, therefore, a common good of Polish *constitutional identity* and European legal culture. Resulting from the *rule of law*, the principle of legality is also the cornerstone of the European legal culture. Its interpretation by no means provokes controversies. Any public authority is obliged to refrain from activity for which there is no clear legal base and cannot presume its competence. These principles are an immanent part of the Polish *constitutional identity*.[94] Whereas the second paragraph of Article 19(1) of the TEU and Article 2 of the TEU obviously conforms to the Polish Constitution, it does not follow that every specific rule as derived from those provisions by the CJEU in the area of organisation of Polish courts and the appointment of Polish judges could also be considered as conformant to the Polish Constitution.[95] The rules on the appointment of judges in EU Member States are the exclusive competence of each sovereign state and not international courts. In particular, Article 2 of the TEU can in itself constitute neither authoritative nor sufficient grounds for establishing criteria for the appointment of judges or assessment of the correctness of this process.[96] Organisation of the judiciary, including the establishment of appropriate safeguards for the independence of judges and the impartiality of the courts, is the exclusive competence of Member States. Whereas Polish judges also apply EU law, they do it on the basis of the Polish Constitution and not on the basis of rules contrary to it.[97]

93 Judgement K 3/21, section 8.1.

94 Judgement K 3/21, section 4.2.

95 CJEU Judgement of 2 March 2021 C-824/18 (ECLI:EU:C:2021:153, section 148, 167), in which the CJEU: 1) authorised the Supreme Administrative Court (SAC) to conduct proceedings on the basis of a provision previously repealed by the Constitutional Court; 2) gave the SAC authority to conduct proceedings to examine the independence and autonomy of the NCJ, without any basis in the law; 3) obliged the SAC to make an arbitrary assessment of the independence and autonomy of a constitutional state body such as the NCJ.

96 Judgement K 3/21, section 8.1.

97 Judgement K 3/21, section 8.1.

8. Article 4 of the TEU in the Polish Constitutional case law

The appearance of Article 4 of the TEU is strictly linked to Article 2 and it is extremely difficult to separate the issues, especially if speaking about the limits of EU powers towards the Member States. In attempting to draw some demarcation line for the purpose of the structure of this report, it is worth mentioning that Article 4 of the TEU is more often invoked by the courts in order to explain loyal cooperation of the Member States and the need to give effect to the interpretation of EU law as provided by the CJEU. In a number of rulings, the Constitutional Court referred to Article 4(3) of the TEU in explaining the need for an 'EU law friendly' interpretation of national law including the Constitution,[98] and a similar approach has been taken in the Supreme Court.[99] As a parallel national base for this friendly rule of interpretation, the Constitutional Court indicated Articles 9 and 91(3) of the Polish Constitution. However, in the context of internal Polish dispute around the judicial reform, which has been experienced since 2018, Article 4 has found its important function in the dispute conducted by means of judicial decisions. The EU took this opportunity to intervene and broaden its political power, extending its pressure to the field of the organisation of the judicial system, based on Article 19 of the TEU but also using Article 4 to speak about sincere cooperation with respect of the CJEU decisions extending competencies of the EU (relevance of the EU law) to the fields of the judicial system.

The Constitutional Court, in its judgment of 7 October 2021 (K 31/21), indicated that the obligation to provide a European law-friendly interpretation of national law is closely related to the need for respect of the relative autonomy of European law and national law stemming from the explicit requirement of reciprocity, as had been included in Article 4(3) of the TEU under the Lisbon Treaty. From this requirement flows the obligation of the Constitutional Court and the CJEU to respect each other's spheres of jurisdiction and apply a mutually-friendly interpretation of EU law and the national Constitution.[100]

In the opinion of the Polish Constitutional Court, the full acceptance of the principles of primacy and direct effect of EU law by no means imply resignation from the supremacy of the Constitution.[101] The limits for creative interpretation by the CJEU

98 Judgment P 1/05; as well as Judgement of 16 March 2010 K 24/08, OTK ZU nr 3/A/2010, item. 22; 14 October 2009 Kp 4/09, OTK ZU nr 9/A/2009, item 134; 11 May 2005 K 18/04; 24 November 2010 K 32/09; 16 November 2011 SK 45/09; 20 April 2020 U 2/20; 14 July 2021 P 7/20; Decision of the Constitutional Court of: 19 December 2006, P 37/05, OTK ZU nr 11/A/2006, item. 177; 21 April 2020 Kpt 1/20.

99 Resolution of the bench of 7 Supreme Court Judges of 8 January 2020, I NOZP 3/19; Judgements of the Supreme Court of: 10 September 2020, III UK 124/19; of 26 May 2021, I NSKP 1/ 21; Decision of the Supreme Court of 26 March 2019, I NSZP 1/18.

100 Judgement K 3/21, section 1.5.

101 '*The priority of the application of EU law before Polish law, unspoken in the Treaties, conforms with the Constitution, as it can be derived from Art. 91 of the Constitution, but only on condition that it is applied within the scope of competences conferred upon the EU (Art. 4(1) TEU) and within the limits of the*

come, on the one hand, from the TEU itself declaring the principle of conferral. This fundamental principle restricts the creativity of the CJEU's interpretation exclusively to areas covered by EU law. On the second hand, the Treaty restricts the competence of the CJEU also with the principles of subsidiarity and proportionality as included in the second sentence of the TEU's Article 5(1). As for the scope of the competencies conferred upon the Union and its bodies, the principle of respect for constitutional identity and the fundamental functions of the state, as declared in judgment K 32/09, plays a fundamental role in its determination.[102]

If an unavoidable conflict between Polish law and EU law occurs, then the body applying the law must decide on the correct application of law provisions. If it is a Polish court, then its duty is to apply the Constitution as the supreme law of the Republic of Poland. Judges are bound by the Constitution and, on taking office, take an oath of allegiance to the Constitution. In contrast, EU bodies, including CJEU judges, are not bound by the Polish Constitution, but are still bound by the principle of respect for Member States' constitutional identity, as expressed in TEU Article 4(2).

As was stated by the Constitutional Court in an earlier judgment of 14 July 2021 P 7/20, reconciliation of the principle of primacy and direct application of EU law on the one hand, and the principle of supremacy and direct application of the Constitution on the other, is possible on condition of strict and honest compliance, in accordance with the principle of sincere cooperation, as well as with the principle of conferral established in Article 4(1) of the TEU. This also requires EU bodies to refrain from exceeding the boundaries of the powers conferred as laid down in Articles 4(1)-(2) and 5(1) of the TEU.[103] Thus, Article 1(2) of the TEU, which speaks of reaching a new stage in the process of creating an ever-closer union amongst the peoples of Europe, and Article 4(3) of the TEU, which formulates the principle of sincere mutual cooperation, are fully compatible with the Constitution, both taken separately and jointly. However, the Luxemburg case law pretending to interpret those provisions, but exceeding competencies conferred by the Republic of Poland are inconsistent with them and undermine the supremacy, primacy and bounding

principles of proportionality and subsidiarity (Art. 5(1) TEU), with respect for the Polish constitutional identity and fundamental functions of the state (Art. 4(2) TEU). Acceptance of the principles of primacy and direct effect of EU law by no means implies abandonment of the supremacy of the Constitution and the role of the Constitutional Tribunal as determined by the Constitution'. Judgement K 3/21, section 2.4.

102 '*European treaties, while not indicating how EU law is to be interpreted through a positive description, indeed do so by setting very clear limits on the interpretation and application of European law. The boundaries of interpretation therefore derive from the treaty itself. They are determined by the rule of conferral in Art. 4(1) TEU, limiting the CJEU's adjudicatory activity only to areas covered by EU law, and as determined by the principles of subsidiarity and proportionality (Art. 5(1), second sentence, TEU). The CJEU's adjudicatory discretion is also limited by the principle of respect for constitutional identity and the essential functions of the State enshrined in Art. 4(2) TEU*'. Judgement K 3/21, section 4.1.

103 '*… the removal of the conflict between the principle of primacy and direct applicability of EU law (on the one hand) and the principle of supremacy and direct applicability of the Constitution (on the other hand) is possible subject to strict and honest compliance, according to principle of sincere cooperation, with the principle of conferral laid down in Art. 4(1) TEU, which also implies that EU bodies refrain from acting outside the limits laid down in Art. 4(2) and 5(1) TEU*'. Judgement K 3/21, section 4.4.

character of the Constitution, and consequently jeopardising the functioning of Poland as a sovereign and democratic state. The Court emphasised that the norms created by the interpretation of the Treaties by the CJEU cannot be placed above the Constitution. A similar approach was also taken by the Supreme Court in a decision referring certain constitutional issues to the Constitutional Court.[104]

In case P 7/20, the court assessed, in light of the Constitution, the Treaty regulations on the basis of which an interim measure was issued by the CJEU in Case C-791/19. Article 4 of the TEU was also relevant to the decision. The Constitutional Court emphasised that it follows from the principles of sincere cooperation and effectiveness, as well as from the *pacta sunt servanda* principle, that a Member State of the EU is obliged to implement provisional measures ordered by the CJEU. However, in accordance with the principle of conferral (Article 4(1) of the TEU and the first sentence of Article 5(1) of the TEU), a provisional measure ordered by the CJEU must also remain within the limits of the competence conferred by the Member State of the EU respecting the constitutional identity of the Member State (first sentence of Article 4(2) of the TEU) and its essential functions (second sentence of Article 4(2) of the TEU); additionally, the CJEU must also comply with the principles of subsidiarity and proportionality (second sentence of Article 5(1) of the TEU).

The court also emphasised that, in the previous practice of the CJEU, amongst the numerous rulings establishing interim measures, there are none which concern the organisation of the system of judicial power of the Member States and the exercise of the judicial office, or the system or properties of other constitutional organs of the Member States.[105] Therefore, the Constitutional Court held that the interim measures ordered against the Republic of Poland on 8 April 2020 in Case C-791/19 violated the first sentence of Article 4(2) of the TEU by clearly and substantially encroaching on the area of constitutional regulation, thus violating the Polish constitutional identity embracing exclusive competence to organise the system of the national judiciary. In light of this, no authority may, according to the Constitutional Court, exempt Polish citizens, and in particular Polish judges, from the obligation to apply the Polish Constitution.[106] The Constitutional Court pointed to the CJEU's violation of the principle

104 Decision of the Supreme Court of 21 November 2019, II CO 108/19.

105 Judgement P 7/20, section 4.

106 '*The interim measures ordered against the Republic of Poland on 8 April 2020, contrary to the first sentence of Art. 4(2) of the TEU, clearly and substantially encroach upon the area of constitutional regulation, thus violating the Polish constitutional identity, of which the Polish judiciary is an immanent part. No authority can exempt Polish citizens, and in particular Polish judges, from the obligation to apply the Polish Constitution*'. Judgement P 7/20, section 6.8. '*Regarding clear excess beyond the limits of the principle of conferral (the first sentence of Art. 5(1) TEU) and the substantial infringement of the principles of subsidiarity and proportionality (the second sentence of Art. 5(1) TEU) with regard to the system and jurisdiction of Polish courts and the procedure before Polish courts, deriving from Art. 4(3), second sentence, of the TEU in conjunction with Art. 279 TFEU of the obligation to implement provisional measures such as those ordered by the CJEU's order of 8 April 2020 is incompatible with Art. 7 of the Constitution, which requires a public authority to act on the basis and within the limits of the law*'. Ibid, section 6.10.

of proportionality when ordering interim measures by indicating that, if the purpose of the interim measure ordered on 8 April 2020 in Case C-791/19 is to ensure that Polish courts are free to make preliminary references, then in order to guarantee this purpose, neither suspension of the Disciplinary Chamber of the Supreme Court, nor the suspension of specific judges, is necessary, proportionate, or legitimate. This can be clearly seen against the background of the case underlying the court's decision on interim measures. The issue there was to hold a judge criminally liable for public traffic safety offences and thus there is no reason to suspend operation of the disciplinary court in such a case, as the issue does not pertain to EU law. Moreover, according to Article 4(2) (third sentence), the issue pertains to the state duty of maintaining law and order as well as safeguarding national security and, as such, is excluded from EU regulation. This assessment is by no means different because of the fact that the person to be charged in this case is a judge. The immunity enjoyed by Polish judges has its source in Article 181 of the Constitution and not in EU law. The majority of EU Member States do not provide for formal immunity for judges, hence there are no grounds for assuming that the protection of the immunity of a Polish judge suspected of committing a traffic offence is an EU matter requiring the CJEU's judicial intervention.[107]

In summary, it could be said that, essentially, Article 4 of the TEU had been originally invoked in order to justify an EU-friendly approach in interpreting domestic law. However, as the tension between the EU and Poland appeared regarding changes in the judicial system, the Polish Constitutional Court emphasised the interrelation between the principle of sincere cooperation, pointing out its reciprocal effect requiring the EU to obey the limits of the conferred competencies. Observance of those limitations stemming from the principle of conferral, as declared in Article 5(1) and referred to in Article 4(1) of the TEU, must be additionally considered as obeying the request to respect national identities, inherent in Polish fundamental structures, political and constitutional, as declared in Article 4(2) of the TEU, despite

107 '*If the purpose of the interim measure ordered by the order of 8 April 2020 is to ensure that Polish courts are free to ask preliminary questions, it is neither necessary nor proportionate nor legitimate to suspend the Disciplinary Chamber of the Supreme Court or to suspend specific judges to ensure that purpose. This is evident from the case in which the preliminary question was referred. It concerns criminally liability for offences committed against safety in public roads traffic. There is no reason to suspend the Disciplinary Chamber of the Supreme Court in such a case and to stop referring similar cases to this Chamber. There is no EU element at all in such cases. Cases of traffic safety offences undoubtedly belong to the field of maintaining law and order, which is expressis verbis excluded from EU regulation (third sentence of Art. 4(2) TEU). This assessment could not be different by the mere fact that the person to be charged is a judge. Judicial immunity in Polish law is rooted in Art. 181 of the Constitution and not in EU law. Most EU member states do not provide for formal immunity for judges. This is the case in Belgium, Cyprus, Denmark, France, Germany, Greece, Ireland, Italy, Spain and Sweden (see G. Canivet, J. Joly-Hurard, La responsabilité des juges, ici et ailleurs, Revue internationale de droit comparé, no. 4/2006, pp. 1049-1093). Hence, there are no grounds for assuming that the protection of the immunity of a Polish judge suspected of committing an offence in communications is an EU matter and requires judicial intervention of the CJEU*'. Judgement P 7/20, section 6.9.

the criticism that was expressed in the academic writings, qualifying such an approach with the adjective ethnocultural, simplified, or exclusionary.[108]

The above-referenced content has described the position of the Polish Constitutional Court in relation to Articles 2 and 4 of the TEU, taken in reaction to judicial decisions made by the CJEU within the recent context of controversies surrounding Polish reforms of the judicial system. The reforms resulted in regular confrontations of concise but very influential elites of the Polish judiciary against the political majority. The struggle for reintroducing the former system of professional career that gave informal and hence uncontrolled power over the judicial nominations to this concise elite has been going on under the narrative of protecting judicial independence and the rule of law. Apart from those CJEU decisions regarding the Polish judiciary, which were taken in reaction to Commission infringement procedure, others were taken following application for preliminary ruling pursuant to Article 267 of the TFEU, by means of which the opposing judges have been seeking, from the Luxemburg Court, authorisation for their actions which were manifestly contrary to Polish law, including the Polish Constitution. Some of those referrals for preliminary judgement were successful and some of them were found manifestly inadmissible. Within the latter group there are decisions of the Supreme Court sitting in the Chamber of Labour and Social Security Law[109] which were asking for interpretation of Article 2 read in conjunction with Article 4 of the TEU. Despite the questions being left unanswered,[110] they presented a peculiar way of understanding the concept of *constitutional identity* as a fundamental constitutional structure inherent in the national identity of a given Member State. The Supreme Court has proposed there, to the CJEU, to accept that the meaning of the 'constitutional identity of a Member State', with regard to the right to court, may only be determined by means of dialogue between national courts and the CJEU within the procedure of preliminary question. The proposal was left unanswered, but it demonstrates the determination of the national (here Polish) judiciary to seek legitimacy of their actions beyond the national political structures, in direct cooperation with international courts, regardless of the legal boundaries set for the international courts in the international treaty law.

108 Ziółkowski, 2021, pp. 21–23 and the works there quoted.

109 The decisions were taken mainly on 15 July 2020 just after publication of the effect of presidential elections 2020, where the opposition candidate lost competition with the President Andrzej Duda who applied for his 2nd term. These are the decisions in cases seeking abolishment of the judicial nominations within the civil procedure, number: II PO 3/19, II PO 4/19, II PO 9/20; II PO 10/20; II PO 11/20; II PO 14/20; II PO 15/20; II PO 16/20 and II PO 18/20.

110 On 22 December 2022, the CJEU decided the questions registered as C-491/20, C-492/20, C-493/20, C-494/20, C-495/20, C-496/20, C-506/20, C-509/20 and C-511/20 were inadmissible For a summary of the decision see: http://www.sn.pl/en/actualities/SitePages/Actualities.aspx?ItemSID=117-0d89abd2-8bba-4029-999a-feb44dcfa88b&ListName=current_events.

9. Academic assessment of the EU law's impact on the Member States

Polish academic writings have never been under any illusion as to the enormous influence that European law has on Polish law. It was quite quickly pointed out that the content of approximately 80% of statutory regulations operating in Poland is determined by European law.[111] Similarly, the issue of the primacy of European law was not a subject of controversy, due to the clear disposition of Article 91(3) of the Constitution, as already discussed. The constitutional provision expressly provides for primacy of EU law over Polish statutory enactments in case of collision between national and European law. This regulation is all the more important due to the fact that the attempt to codify principles of application of EU law failed and was not included in the Treaty of Lisbon.[112]

Due to the content of Article 91(3) of the Constitution, the structural significance of the principle of primacy has not been questioned as far as statutory law is concerned, whilst significant doubts have been raised as to the primacy of European law over the Constitution. Piotr Winczorek, in the year of Polish accession to the EU, explicitly wrote that Article 91(3), assuming the precedence of law established by an international organisation over acts of Parliament, excludes the Constitution being an act of a higher rank than statutory enactment.[113] It is also stressed, in the doctrine, that the position excluding constitutional norms from the principle of primacy is not peculiar against the background of other Member States where (with the exception of Estonia and the Netherlands) constitutional courts do not accept the primacy of EU law over the Constitution.[114]

It has also been emphasised, from the outset in the doctrine, that the actions of Community institutions which do not fall within the limits of the attributed powers are not authorised in the Treaties and thus are inadmissible. The principle of primacy must not apply, therefore, to acts of Community law which exceed those limits, whilst the constitutional courts of the Member States have the right to review whether the institutions of the Union have exceeded the limit of the powers conferred.[115] Conversely, however, some authors spoke, very early on, of the possible acceptance of the primacy of Union law over the Constitution, provided that such

111 Sokolewicz, 2005, p. 68; Szymanek, 2005, pp. 347–351.

112 Safjan and Bosek, 2016, Legalis/el. The only reference to the principle of the primacy of application of Union law over national law in primary EU law was included in the merely political Declaration No 17 appended to the TFEU, which refers, in this respect, to the body of case law of the CJEU (Miąsik, 2022) and does not constitute any normative novelty, merely emphasising the importance of this case law (Safjan and Bosek, 2016).

113 Winczorek, 2004, p. 11.

114 Całka, 2016, pp. 51–52; Safjan and Bosek, 2016.

115 Działocha, 2004, p. 29. This position was still affirmed after adoption of the Lisbon Treaty. See: Biernat, 2011, pp. 59–60.

acts remained within the scope of the attributed powers and had sufficient democratic legitimacy,[116] though these were entirely isolated voices. Over time, however, it began to be emphasised that, in the operative dimension, within the scope of the powers conferred, the system *de facto* operates as if European law also enjoyed precedence over the Constitution, which 'significantly reduces the scope for conflict with national constitutional courts'.[117] This position is further supported by the already-described jurisprudence of the Constitutional Court (P 1/05; K 18/04), and by the doctrinal pronouncements of its then president.[118] This position also remains actual to the present day.[119]

10. Instead of conclusion

The delegation of certain powers to the EU pursuant to Article 90 of the Constitution has profoundly affected the domestic balance of power between three branches. This process has at least two different dimensions, although one common denominator – the decline of political power as possessed by the national legislature.

The first dimension reveals *de facto* priority of the Government (Council of Ministers) in determining much of the legislative process. As was stated in the literature, within the framework of the EU legislative procedures a changing of the constitutional roles characteristic for parliament and for the Government has been taking the place. An authorised representative of the Government is taking part in the creation of the European law which is to be implemented then by the national Parliament,[120] which is deprived of any substantial impact regarding the content of the law.[121] Gradual growth of the EU law resulted in national Parliaments being placed in the position of formal executor of the decisions taken within the European political process, party to which is the Government. Subsequently, it is the Government which submits draft law transposing EU Directives into the Polish Law. As the draft legislation is heavily determined by the directives subject to transposition, the Parliament appears to have considerably limited power to intervene in the merits of the law proposed.[122] Therefore, contrary to the classical relationships between Parliament and the Government, gradually the first appears to acquire more executive function, whereas the latter is much more focused on programming and taking (or at least influencing) political choices, which used to be the domain of the Parliament. The

116 Łętowska, 2005, p. 1141.
117 Miąsik, 2022.
118 Safjan, 2006, pp. 3–17.
119 Miąsik, 2022, and writtings there quoted.
120 Patyra, 2012, p. 156.
121 Kruk, 2006, p. 157.
122 Bałaban, 2007, p. 132 et seq.; Patyra, 2012, p. 156.

function of national legislature is becoming gradually reduced to the dimension of designating the Government, and after this the said legislature has only the task of implementing political decisions taken outside the national Parliament. The constitutional legitimacy for this process of *de facto* change in the constitutionally-determined relationships between Parliament and the Government appears to lie, first of all, in Article 90 of the Constitution authorising transfer of the powers of sovereign states' authorities to the EU. This transfer appears to be mainly at the expense of national legislative power, whereas the national Government acquires additional powers stemming from participation in the decision-making process at the EU level and then extended to the dominating position within the process of implementation of the European law in the national legal system. This reduction of the powers of the Parliament in the real operation dimension is hardly supplemented with extended obligation of the Government to provide Parliament with detailed information about the initiatives and the decision-making process within the EU.

The second dimension of this process relates to the position of the national judiciary, which considers itself to be less and less bound by the statutory law as provided by the Parliament. The system of judicial referrals under Article 267 of the TFEU for preliminary ruling started to be developed in a way which considerably limited the legislative power. First of all, courts have an instrument with which to correct the transposition process, i.e. by referring for preliminary judgements in the area covered by the EU law. However, EU axiology, as described in Article 2 of the TEU, appears to be a very useful means of broadening the scope of the power conferred formally on EU institutions, especially the Court of Justice of the EU. Political confrontation between the judiciary and political majority that has been experienced since 2015 in Poland demonstrated that close cooperation between national courts and the CJEU may result in practical deprivation of the legislative power of its inherent competencies, that were never conferred upon the EU.

The described decline of the importance of legislative power also demonstrates the decline of the modern politics and its displacement by its postmodern successor, where real political power is no longer located at the national level, but above, at the supranational level.

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Court of Justice of the EU

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