

THE INTEGRATION ACT OF POLAND WITH THE EUROPEAN UNION IN THE LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

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1. The accession of Poland to the European Union will be a complex legal act. The Union is a supranational organisation,¹ i. e. an organisation with an autonomous legal system distant from international and national law. The prevailing application of its law is ensured in the internal area of the Member States.² Accession to the European Union will involve deep changes in the competence of the state organs, as well as in Polish national law. The favourable fact is that the Constitution of the Republic of Poland gave firm legal grounds to this process, meeting the postulates of the Polish legal sciences, and taking into account the constitutional practice of EU Member States.³

Due to the complexity of the process of the accession of Poland to the EU, I would define the provisions of the Constitution concerning this issue as a constitutional integration act.⁴ The overall approach to those provisions is relevant, because only then will it be possible to propose a systematic interpretation of the Constitution, taking into account the European integration process. The objective of those constitutional provisions is, in fact, to facilitate the incorporation of Poland into European integration structures, instead of creating obstacles.

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¹Cf. J. Barcz: "Organizacja ponadnarodowa" [Supranational Organisation], *Sprawy Międzynarodowe* 1991, no. 708, p. 89 and following.

² This approach is accepted by the EU Member States. It was shaped by the judgment of the Court of Justice in the case *Costa v. ENEL* of 15 July 1964, p. 1251 and following. More extensively in: W. Czapliński: "Akty prawne Wspólnot Europejskich w orzecznictwie Trybunału Sprawiedliwości" [Legal Acts of the European Communities in the Judgments of the Court of Justice] [in:] M. Kruk (ed.), *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International and Community Law in Domestic Legal Order], Warszawa 1997, p. 188 and following.

³ See K. Działocha: "Podstawy prawne integracji Polski z Unią Europejską w pracach nad nową konstytucją" [Legal Grounds for the Integration of Poland with the European Union in Work on the New Constitution], *Państwo i Prawo*, 1996, no. 4-5, p. 9 and 10; W. Sokołewicz: "Ustawa ratyfikacyjna" [Ratification Act] [in:] *Prawo międzynarodowe...*, *op. cit.*, p. 119.

⁴ E.g. in German literature the constitutional grounds for the participation of Germany in the integration processes are determined as "a general act of the state integration authority", "Gesamtakt staatlicher Integrationsgewalt" [in:] H. P. Ipsen: *Europäisches Gemeinschaftsrecht*, Tübingen 1972, p. 60, 61.

Three fundamental elements form the constitutional act:⁵

1) The decision of the Polish state authorities on accession to an supranational organisation - the European Union.⁶ Such a decision will be expressed in the Treaty on the Accession of Poland to the EU, at an international level. On the other hand, at the national level, the specific requirements concerning the passing of the act of Sejm authorising the President to ratify this Treaty will ensure the firm democratic legitimacy of this decision.

2) As a result of this decision, the competence of the state authority in some issues will be “delegated” to the European Union, “such issues” being determined in the Treaty on the Accession to the Union, and having met the *acquis communautaire* of the EU, as well as including the dynamics of the integration processes.

3) The “delegation” of the competence of the state authorities organs will be accompanied by the renouncing of the exclusivity to exercise such competence in the national area for issues covered by “delegation”, and the opening the national area to the “foreign” law of the supranational organisation - the European Union; its application takes precedence over national law.

2.1. Article 89 item 1 the Constitution states that the ratification of the international agreement concerning “the Republic of Poland’s membership in an international organisation” requires “prior consent granted by statute”. However, in the event that on the basis of such an international agreement the “delegation” to the “international organization or international institution” of the competence of State authority organs in relation to certain matters (Article 90 item 1) is to be made by the Republic of Poland, the Constitution determines a special procedure of approving such an international agreement.

First - according to Article 90 item 2 of the Constitution, the act approving the ratification of such an international agreement is passed by the Sejm and the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies and Senators;

Second - the Sejm, by way of a resolution passed by an absolute majority of votes in the presence of at least half of the statutory number of Deputies,⁷ may order a national referendum for the approval of the ratification of such an international agreement.

Therefore, two separate procedures of approving the ratification of the international agreement with respect to the accession of Poland to a supranational organisation are involved: the approval may be given by means of an act concerning the international agreement⁸ or a national referendum.

⁵ Cf. details in my study “Constitutional and Legal Problems of the Application of the European Union Law in Poland in the Light of the hitherto Experiences of the Member States” [in:] *Prawo międzynarodowe...*, *op. cit.*, p. 206.

⁶ Article 90 item 1 of the Constitution determines “international organisation or international organ”. I was critical about this formulation, above, p. 208 and following, and presented an analysis of the concept of the “international organisation” or “international organ”. Since this analysis remains applicable after the Constitution entered into force, I do not discuss the issue in a more detailed manner, and use the expression “supranational organisation” or simply the “European Union”.

⁷ Cf. the objections of W. Sokołewicz, *op. cit.*, p. 123.

⁸ As far as acts of this variety are concerned, I would rather propose the term “act concerning the international agreement”. The term proposed by W. Sokołewicz (*op. cit.*, p. 93 and following): “ratification act” is not quite clear, since ratification remains in the domain of the President. On the other hand, this act fulfils at

2.2. The act concerning **international Treaty** on the accession of the Republic of Poland to a supranational organisation (Article 90 item 2 of the Constitution) is a qualified form of an act concerning an international agreement, referred to in Article 89 of the Constitution.⁹ Its specific characteristic is an extended scope of democratic legitimacy: in the case of the act referred to in Article 89 there arises a question of the normal procedure of its passing according to Article 120 (by a simple majority vote in the presence of at least half of the statutory number of Deputies); on the other hand, the passing of the act referred to in Article 90 item 2 is subject to special requirements.

This issue is of key importance. Within the framework of a supranational organisation, the law in general is set by organs composed of the representatives of the executive power of the Member States. The potential representations of the parliamentary type (such as the European Parliament of the EU) have relatively limited competence. This phenomenon is defined by the term “the deficiency of the democratic legitimacy of the supranational organisation”.

The acts concerning international agreements differ from the remaining acts due to some specific characteristics; there are also differences between the act defined in Article 89 and the act defined in article 90 item 2.

- With respect to acts concerning international agreements, the Government has the exclusive legislative initiative. Thus, the provisions of Article 118 item 1 are limited (in this range, the Deputies, the Senate and the President will not enjoy legislative initiative); the same holds true for Article 118 item 2, according to which a group of 100 000 citizens is entitled to legislative initiative. The exclusive competence of the Government univocally results from Article 146 of the Constitution. Pursuant to Article 146 item 4 s. 10, the Government, concludes, among others, international agreements requiring ratification. The concept of “concluding” the agreement is flexible, and covers, among others, carrying out negotiations and undertaking activities necessary for a given agreement to enter into force, including legislative initiative, insofar as the ratification of a given agreement must be preceded by approval stipulated in the act. The competence of the President in the domain of international relations is assessed in Article 133 of the Constitution. The role of the President as regards the conclusion of international agreements covers the ratification and revoking of international agreements (Article 133 item 1 s. 1) and requesting the preventive control of the constitutionality of the international agreement before its ratification (Article 133 item 2). On the other hand, “cooperation” with the Prime Minister and competent Minister stipulated in Article 133 item 3 as regards foreign policy may undoubtedly concern different kinds of consultations, while negotiating such important agreements as the Accession Treaty of Poland to the EU. Obviously, this does

least three functions: upon its basis, the Sejm and the Senate approve the conclusion of an international agreement (the function of democratic legitimacy); once passed, the act empowers the President to ratify the international agreement (authorising function); and, finally, such an act fulfils an important function which outlines the significance of a given agreement in the national legal system (Article 91 item 2) - function concerning the importance of an agreement in the Polish legal system. Thus, the proposed term - “act concerning an international agreement” - is the most general, and may correspond to all of its functions.

⁹ Therefore, I would rather not write about “two types” of such an act, as W. S o k o l e w i c z does, *op. cit.*, p. 121.

not justify the competence of the President as regards legislative initiative. The participation of the Sejm and the Senate with respect to such an act was determined *explicite* in Article 90 item 2 of the Constitution. It is also difficult to imagine that a “group of at least 100 000 citizens” represents legislative initiative in this respect. In the event that it would be a draft obligating the President not to ratify the agreement on the accession of Poland to the EU, then - at the very most - such initiative may be a political argument for the Sejm in favour of a national referendum.

- As far as the act on an international agreement is concerned, the right to amendments is limited. It may concern, to some extent, a formulation of the same text of the draft act; on the other hand, the introduced amendments may not infringe upon the text of the international agreement established in the way of negotiations. Such amendments would be equivalent to the necessary undertaking by the Government of new negotiations concerning the international agreement or the non-entering into a supranational organisation. The act concerning an international agreement in the form submitted by the Government is approved without amendments, or is rejected, which equals to a renouncement of Poland to be bound by a given international agreement, or not to enter the international organisation. The eventual objection of the Senate to the act concerning the international agreement remains an “internal issue” if the act is subsequently approved by Sejm. On the other hand, it may have an impact on the required majority. The Sejm would have to pass such an act by an absolute majority vote in the presence of at least half of the statutory number of Deputies, and if there is no objection, pass the act by a simple majority vote. However, it does not play any role in the case of acts concerning international agreements on the accession of Poland to a supranational organisation, since Article 90 item 2 stipulates stricter requirements.

- An act concerning an international agreement may also be classified to urgent proceedings (Art. 123 of the Constitution), but not when it concerns an international agreement on the accession of Poland to a supranational organisation. Art. 123 item 1 stipulates that acts regulating the characteristics of public authorities may not be classified as urgent. On the other hand, the “delegation” to a supranational organisation of the competence of the state authority organs “in relation to certain matters” undoubtedly constitutes a “regulation” of the “characteristics of the public authorities”. Irrespective of this, the fact of acquiring EU membership will also have an impact on other areas listed under Art. 123 item 1 - indirectly on elections (the Constitution will have to be complemented by decisions on the election of deputies to the European Parliament) and the scope of the application of “Codes”.

3. Approval for the ratification of the international Treaty on Poland’s accession to a supranational organisation may be also expressed in the form of a national referendum (Art. 90 item 3 and 4 of the Constitution). The Constitution clearly determines (Art. 90 item 4) that respective decisions will be taken by Sejm. Thus, the competence of the President referred to in Art. 125 item 2 of the Constitution is excluded since Art. 90 item 4 constitutes *lex specialis* with respect to Art. 125 item 2. The issue of the required quorum during a referendum to confirm that the binding approval was given is not clear. Art. 125 item 3 stipulates: “A result of a nationwide referendum shall be

binding, if more than half of the number of those having the right to vote have participated in it". Article 90 item 3 contains no provisions in this respect, and in general refers to Art. 125. Does this mean that the "approval" expressed by a national referendum for an international Treaty on Poland's accession to a supranational organisation requires the binding result of a referendum, i.e. participation of at least half of those persons who have the right to vote?

Provisions of Art. 235 item 6 of the Constitution, providing for a possibility to convene a "confirmatory referendum", if the act on an amendment to Constitution concerns provisions of Chapter I ("The Republic"), II ("The Freedoms, Rights and Obligations of Persons and Citizens") or XII ("Amending the Constitution"), are helpful in solving this issue. To enforce such an act, the "majority of voters" has to approve its amendment. In the event that the Constitution claims that a "majority" of persons voting in the national referendum is sufficient to enforce an act amending the Constitution with respect to regime issues and individual rights, it should be assumed that such a majority is also sufficient to give approval for the ratification of an international Treaty on Poland's accession to an international organisation.

3.1. According to Article 90 item 1 of the Constitution "The Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters". Those provisions determine an essence of the constitutional integration act. On this basis, the Republic of Poland renounced exclusive public power in areas stipulated in the international agreement and, at the same time, makes available, in an appropriate scope, its internal area to a supranational organisation, in particular by ensuring a direct application of the law of such an organisation in Polish national law.

3.2. The Constitution accurately formulates the object scope of "delegation", flexibly stating that the problem concerns the possibility of a delegation of the "competence of organs of State authority in relation to certain matters". Thus, it concerns the areas of legislative, executive and judicial power (Art. 10 item 1), exercised, respectively, by the Sejm and the Senate, the President, the Council of Ministers, as well as Courts and Tribunals (Art. 10 item 2). The extension and diversity of integration processes means that the Constitution accurately imposes no object or functional restrictions in this respect. The competence of the state organs in all these areas may become the object of "delegation". Neither does it have to be a "balanced delegation", in such a way so that the delegation of determined competence in the area of legislative power has to correspond to the appropriate delegation of the executive and judicial powers. "Delegation" may cover the competence of different areas of legislative, executive and judicial powers as well as to a different extent, which meets the needs of Poland's participation in integration processes. Areas, which are precisely concerned, are stipulated in the international agreement on Poland's accession to the given supranational organisation. Art. 90 item 1, on the other hand, sets out a relevant restriction, since "delegation" may only cover "certain matters" of the competence of state authorities organs. This formulation, on the one hand - as was mentioned - ensures the necessary

flexibility of interpretation; on the other hand, it delimitates “delegation” in general and in essence. In fact, it concerns the statement that overall state authority may not be subject to “delegation”.

3.3. On Poland’s side, “delegation” of the competence of the state authority organs in certain matters to a supranational organisation results in twofold legal effects. First - the Republic of Poland renounces its exclusive competence in the domain of the legislative, executive and judicial powers covered by “delegation”. Second - the Republic of Poland allows to apply “foreign” sovereign acts (i.e. acts set out by the supranational organisation) and commits itself to ensure the efficacy of those acts.

3.4. Without delving into the details of the evolution of the sovereignty concept,¹⁰ it should be emphasised that the Constitution guarantees to preserve the sovereignty of the Polish state in the integration processes.

First - it will not be easy to establish a relation between the restriction contained in Art. 90 item 1 of the Constitution, declaring that “delegation” may cover the competence of the state authority organs “in relation to certain matters”, and a statement that, in fact, overall state authority may not be subject to “delegation”. Such a statement should be interpreted in a flexible way, due to the diversity of integration processes. However, such a relation is subject to univocal democratic control: an international agreement, on the basis of which “delegation” will take place, requires the approval of the Sejm and the Senate before ratification, under the terms provided in Art. 90 item 2; the approval may also be given - providing the specially controversial cases - by way of a national referendum, according to Art. 90 item 3 and 4 of the Constitution.

However, irrespective of this special term “democratic control” it may be said that Art. 90 item 1 contains an univocal prohibition of the “delegation” by the Republic of Poland of overall state authority to a supranational organisation. Such “delegation”, i.e. the participation of the Republic of Poland in a supranational organisation transforming itself into a type of federal state would require an amendment to the Constitution under the terms provided in Art. 235.

Second - “delegation” does not cause the loss of sovereignty of the Polish state with respect to transferred competence. Polish public authority will only renounce its exclusive competence in those areas, but this does not mean a loss of sovereignty in those domains. Such a relevant aspect was clearly expressed in Art. 10 item 2 of the draft Constitution of 19 April 1996, stating that the delegation of “exercising of some of the powers of the state authorities” was in question. This declaration resulted *explicitly* in the fact that the Polish State does not transfer to a supranational organisation the powers themselves, but their exercise. Even if further works, due to linguistic reasons, abandoned the expression “the exercise” of powers or competence, this does not change the essence of the matter. It should be considered that delegation is not absolute and may be revoked. The state may also undertake activities in areas covering delegated competence. Obviously, wherever such a revocation of “delegation” or activities in areas covered by “delegation” would be contradictory to the international agreement,

¹⁰ Cf. W. S o k o ł e w i c z, *op. cit.*, p. 122 and the literature therein, footnote 82.

according to which the delegation of competence took place, the state risks being accused of the violation of international obligations and its own constitutional law. However, this does not change the fact that despite the delegation of competence to a supranational organisation, in such an approach sovereignty remains the state's attribute.¹¹

3.3. From the outset, the **legal qualification of "delegation"** gave rise to significant controversies in the Member States.¹² Initially, reference was made to constructions of private law. Thus understood, during the process of "delegation" the former manager of the powers (the state) would lose its right to the object of delegation, and such powers would be transferred to a supranational organisation. However, it soon became impossible to qualify the "delegation" process, in the strict understanding of private law. "Delegation" is a complex process of a special type, which develops at two levels: the international level (on the side of the supranational organisation) and the constitutional and legal level (on the state's side).¹³ The specific character of this process consists in the fact that as a result of transferring state powers, the established autonomous supranational organisation exerts an impact upon the internal legal order of the Member States. The obtained result significantly exceeds the sum of the delegated powers.¹⁴ On the other hand, on the state's side - as was mentioned above - the determined competence is not absolutely abandoned, although the exclusivity of its exercise is renounced.

3.4. The legal qualification of "delegation" does not explain, however, the overall process of the complicated **cooperation of the state with a supranational organisation**. The practice of the European Union demonstrates that even in those areas in which the competence of the European Union is especially broad, the legislative activity (complementary and executive) of the state is also targeted and necessary. The ensuing complicated process of the interrelations between the Member State and a supranational organisation is described in literature as a "balance of reasonable cooperation".¹⁵ Anew, relevant value of this problem is the subsidiarity principle, confirmed in the Maastricht Treaty.¹⁶

4.1. The character of primary law (Treaties establishing the supranational organisation, as well as the Accession Treaties), give rise to controversies; so-called traditionalists assume that whereas the supranational organisation is established by way of an international treaty, its primary law should forcibly be qualified exclusively as international law.¹⁷ Contrary to this, so-called autonomous supporters assume that the

¹¹ *Ibid.*, p. 122.

¹² See A. Rupperecht: *Die Integrationsgewalt. Eine staatsrechtliche und verfassungsrechtliche Studie zu Artikel 24 Absatz I des Grundgesetzes*, Hamburg 1969, p. 84 and following.

¹³ See K. Stern: *Das Staatsrecht der Bundesrepublik Deutschland*, vol. 1: *Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung*, München 1997, p. 387.

¹⁴ See H. P. Ipsen, *op. cit.*, p. 56

¹⁵ "Ein Gleichgewicht sinnvoller Kooperation", see Ch. Tomuschat: "Artikel 24GG" [in:] *Bonner Kommentar*, Hamburg 1985, p. 22.

¹⁶ See E. Popławska: "Organy i procedura stanowienia prawa wspólnotowego oraz udział w niej państw narodowych" [Organs and Procedure of Establishing the Community Law and the Participation of National States] [in:] *Prawo międzynarodowe i wspólnotowe...*, *op. cit.*, p. 176 and following.

¹⁷ See Ch. Rousseau: *Droit International Public*, vol. II: *Les Sujets du Droit*, Paris 1974, p. 465.

lic of Poland contains two provisions, which may be significant in this area. First - Art. 133 item 2 stipulates that the President of the Republic of Poland may, before ratifying an international agreement, apply to the Constitutional Tribunal for its conformity to the Constitution. Second - Art. 188, which determines the cognition of the Constitutional Tribunal, states in section 1 that the Tribunal adjudicates, among others, as regards the conformity of international agreements to the Constitution.

In the first case, there are no problems from the point of view of Community law. The preventive control of the constitutionality of an international agreement before its enforcing remains an "internal" issue of the state.

The other question is that its result may have impact on the pace of the fulfilment of one of the basic strategic goals of state foreign policy. Also, one should take into account the fact that the country entering the EU must adopt all the legal achievements of the organisation - *acquis communautaire* - with no objections. Thus, the presentation, even at the stage of preventive control, of some fundamental constitutional and legal remarks would exclude possible access to the EU.

More serious problems arise in the second case - the competence of the Constitutional Tribunal to decide cases of conformity of international agreements to the Constitution. There are no doubts that the Tribunal may examine the conformity to the Constitution of the international agreement which entered into force pursuant to Art. 188 s. 1.²⁶ Moreover, in the case of international agreements ratified with previous approval stipulated in the act, the Constitutional Tribunal will be able to choose: according to Art. 188 s.1 it may examine the conformity of the acts to the Constitution (as in the act concerning the international agreement, the control of the constitutionality of the agreement is of an indirect character), or it may examine the conformity to the Constitution of the same international agreement. It seems logical that if the Tribunal deals with examining the constitutionality of the international agreement, it should do so directly, more so considering that it has such an opportunity.²⁷

The Treaty on Accession to the European Union will - as an international agreement - be subject to the cognition of the Constitutional Tribunal according to Art. 188 s.l, that is the Constitutional Tribunal will be entitled to examine conformity to the Constitution. When performing such examination, the Constitutional Tribunal, however, will have to take into account the twofold nature of the EU primary law, including the Treaty on the Accession of Poland to the Union, which - regardless if it is an international agreement - upon its entering into force will be included into the EU primary law. The Constitutional Tribunal will have to include the principle of ensuring the effectiveness of the Community law in the national legal system. In conclusion, this leads - as in resolving subsequent constitutional and legal crisis in the Member States - to the necessity of a search for pragmatic solutions. This is reflected in an interpretation

²⁶ W. Sokolewicz, *op. cit.*, p. 125.

²⁷ From this point of view, the comment by W. Sokolewicz (*op. cit.*, p. 125), who maintains that the Constitutional Tribunal may not examine approval for the ratification of an international agreement, stipulated in the referendum, is of restricted practical meaning. The Constitutional Tribunal may examine the constitutionality of the international agreement itself, directly, without consideration of the form of approval.

of the Constitution “in a way favourable to the Community law”. By such an interpretation the Constitutional Tribunal sets a balance between the European Integration process and the provisions of the Constitution in such a manner, so as to ensure the effectiveness of Community law in the national legal system.

4.2. Contrary to the primary law of a supranational organisation, the law set by such an organisation, the secondary law is of a specific character and does not form part of international law, nor of the national law of the Member States. In the national legal systems, the effectiveness of secondary law is guaranteed by its so-called primacy of application. The initial attempts to justify the application of secondary law in the national legal system by referring to the traditional methods to ensure the effectiveness of international legal rules, first of all, with respect to transformation, were not accepted.²⁸ However, also in this initial period, dominated by so-called traditionalists, secondary law was deemed to be directly binding and applied in the national area; it was emphasised that no special transformation in this respect was required. The secondary law binds directly; it is also directly applied in the internal area of the Member State, remaining in a relation of mutual autonomy with respect to the national law. In fact, this is not absolute autonomy. Both legal systems remain in multiple relations²⁹ to each other.

The Constitutions of the Member States regulate the issue of applying the secondary law in their Constitutions only incidentally. The fundamental issues were decided by constitutional practice.³⁰ The introduction into the Constitution of the Republic of Poland of a special provision - Art. 91 item 3 - should be evaluated *explicite* as positive. According to the concept of this article: “If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws”.

This provision is of a special character. It does not regulate - contrary to item 1 and 2 of this Article - the application and importance of the international agreement in the national legal system, but it refers to the application of the law set up by the supranational organisation. The special character of this provision consists in the fact that it constitutes one of the fundamental elements of the Constitutional Integration Act. Pursuant to Art. 90 item 1, the Constitution delegates to the supranational organisation “the competence of organs of State authority in relation to certain matters”, whilst Art. 91 item 3 enables to open the national legal system to law set by such an organisation. The specific character of this phenomenon, with respect to mechanisms ensuring the efficacy of the norms of international law in the national legal system, consists in the fact that

²⁸ The secondary law had to be binding in the internal area of the state as transformed law, since Art. 189 of the EEC Treaty (numbering before Amsterdam) is subject to transformation. Contrary to the transformation of the primary law (international treaty), the transformation of the secondary law was determined as “anticipating transformation”, “automatic transformation” or “general transformation”. See J. Barcz: *Miedzy konstytucja a ponadnarodowoscia. Opcja integracyjna konstytucji RFN* [Between Constitution and Supranationalité The Integration Option of the German Constitution], Warszawa 1990, p. 446.

²⁹ See Ch. Tomuschat, *op. cit.*, p. 56 and 57.

³⁰ Cf. J. Barcz: *Stosowanie prawa Wspólnot zachodnioeuropejskich w państwach członkowskich. Problemy konstytucyjnoprawne* [Application of the Law of the West European Communities in the Member States. Constitutional and Legal Problems], Warszawa 1991, p. 108 and following.

we are faced with a complex process: the opening of the national legal system with respect to the law set by the supranational organisation, and renouncing the exclusive exercise of public power in the determined areas - accompanied by the delegation of the competence of state authority organs to the supranational organisation.

Therefore, three relevant constitutional and legal problems should be considered: a) the concept of the primacy of the application of secondary law, b) the possibility for the Constitutional Tribunal to examine conformity to the Constitution and c) the potential subordination of secondary law to the provisions of Art. 193 of the Constitution.

Ad a) Art. 91 item 3 stipulates accurately a "direct application" of secondary law, and, in the event of collision with the acts, its "precedence". There is no question of a rank, since the rules of the national and secondary law of the supranational organisation originate from independent, separate legal systems. Secondary law does not "cancel", "overcome" or "annul" the national rule, in the event of collision, but has so-called primacy of application.³¹

Pursuant to the constitutional integration act, Poland will open its legal system to the EU law, renouncing, to the appropriate extent, its exclusive public powers and ensuring the primacy of the application of the EU law. This formulation reflects accurately the essence of the discussed phenomenon. Thus, in the event of a collision with the rule of national law, Polish organs will be obliged to apply the EU law; however, this does not mean that Polish national law will become invalid. It will remain valid, but the scope of its application will be limited. This is of relevant importance in the context of the mentioned discussion on the sovereignty of the state with respect to EU membership. The delegation of the competence of state authority organs, in relation to certain matters, to a supranational organisation does not result in losing the sovereignty with reference to the delegated powers, but only in renouncing its exclusive exercise of public power in a given scope; at the same time, it allows for the application of the acts set by foreign public authority (supranational organisation). Thus, if the law of a supranational organisation is amended or cancelled, the rules of the national law, previously contradictory, will be applied to the appropriate extent by the national organs, since the factor limiting their application will disappear.

The Constitution drafts spoke accurately about the primacy of the application of secondary law "in the event of collision with the national law rules" (compare Art. 75 item 3 of the draft Constitution of June 19, 1996). The introduction into Art. 91 item 3 of the formulation that secondary law "shall have precedence in the event of a conflict with statutes" is not the best possible. It will only give rise to the issue of the conformity of secondary law to the Constitution, which has already been decided by the Member States in favour of guaranteeing efficacy to primary law. The scope of the cognition of the Constitutional Tribunal - as we shall see further - is scant, and such a formulation only provokes discussions over problems, which are decided at other levels.

³¹ According to some opinions, provisions of Art. 189 of the EEC Treaty (numbering before Amsterdam) contain a colliding rule - "real rule determining rank" - which, in the case of collision, would lead to an annulment of the applied national rule, cf. *Kommentar zum EEC-Vertrag* (hrsg. von E. Grabitz), München 1986 (chapter on article 189 of the Treaty).

The Republic of Poland enters the EU pursuant to the Constitutional integration act (of special democratic legitimacy). As far as secondary law, established by the Union organs, is concerned, the Republic of Poland will be able to influence its contents by the participation of its representatives in the Union organs. On the other hand, upon passing this law, it will be ensured - according to the primary law of the EU - primacy of application in the national legal system (also with respect to the Constitution); only the competent organs of the EU are empowered to its interpretation.

Ad b) The cognition of the Constitutional Tribunal with respect to the evaluation of the conformity of secondary law to the Constitution may be considered only to a rather small extent. The EU secondary law is not national law ("the statute" in the meaning of Art. 188 s. 1, nor "legal provisions issued by central State organs" in the meaning of Art. 188 s. 3), nor international law ("international agreement" in the meaning of Art. 188 s. 1 of the Constitution). The only possibility to control the constitutionality of secondary law is to refer to the institution of constitutional complaint (Art. 188 s. 5). According to Art. 79 item 1 of the Constitution "Everyone, whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution". The Constitutional Tribunal will have two possibilities: it may state that the EU secondary law is subject to the concept of the "normative act" in the meaning of Art. 79 item 1, and undertake an examination of the constitutional claim with respect to the conformity of secondary law to the individual rights of the citizens guaranteed in the Constitution. Such issues appeared in the constitutional jurisdiction of the Member States and were linked (especially in the 1970s and at the beginning of the 1980s) to a discussion on the necessity to guarantee individual rights, also under the European Communities. In effect, it was stated, that under the EC/ EU there occurs such an univocal development of individual rights, that it guarantees appropriate protection, and thus intervention of the Constitutional Tribunal is not necessary.³² Therefore, in the event that Constitutional Tribunal decides to follow this way, probably, it will have no other choice than join this trend in the judgment of the constitutional courts of the Member States. Other possibility is to recognise that the concept of the "normative act" in the meaning of Art. 79 item 1 does not extend to EU secondary law. It would also be relevant, due to the need to preserve uniform interpretation in the context of EU secondary law, and especially with respect to Art. 193 of the Constitution.

Ad c) According to Art. 193 of the Constitution "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court". Thus, the Community law does

³² Cf. J. Barcz: "Ochrona praw zasadniczych w ramach Wspólnoty zachodnioeuropejskiej. W sprawie kompetencji Federalnego Trybunału Konstytucyjnego RFN" [Protection of Fundamental Rights within the West European Community. Concerning the Competence of the Federal Constitutional Court in Germany], *Zeszyty Niemcoznawcze PISM* 1989 (IV), no. 2.

not give rise to doubts in this respect: the only competent organ to issue initial judgments as regards the validity and interpretation of the acts of the EU institutions is the EU Court of Justice.³³ Therefore, the Polish Court will address the legal question to the EU Court of Justice. The concept of the “normative act” in the understanding of Art. 193 does not extend to the EU secondary law. Due to the imperfect formulation of Art. 91 item 3 of the Constitution, the confirmation of such an interpretation will be undoubtedly one of the first problems that the Constitutional Tribunal will face after Poland’s entrance to the Union.³⁴

³³ See Art. 177 of the Treaty establishing the European Community (numbering before Amsterdam).

³⁴ E.g. one of the first judgments of the Austrian Constitutional Court, connected with Austrian membership in the EU, concerned precisely this problem - judgment in the case B 2300 (95-18 of 11 December 1995).