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THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND POLISH MUNICIPAL LAW IN THE LIGHT OF THE 1997 CONSTITUTION AND JURISPRUDENCE

Władysław Czapliński*

The problem of the relationship between international law and domestic law did not play any role in the policy of Central and Eastern European states in the communist period. With the exception of several articles - mostly by Polish international lawyers - scientific publications and research on the topic were relatively rare. An approach to the problem changed with the replacement of the communist regimes by democratic systems. Provisions dealing with the relationship between the two legal orders were introduced into the new constitutions of those states, emphasizing the priority of international law over regulations of domestic legal systems.[1] They deal with the priority of human rights treaties, international agreements, and the supremacy of general principles and generally accepted norms of international law. The constitutions provide for both systems: the incorporation of international law into domestic legal systems, and the transformation of international norms into municipal rules. In the former case international law is applied by domestic courts and state agencies *qua* international (i.e. foreign or external) law; in the latter, it changes its nature and is applied as domestic law. New constitutions introduced also a competence of constitutional courts who now supervise the conformity of international law with the constitutions, and of domestic acts with international law. [2] The aim of our paper is to present the development of the relationship between international law and municipal law in Poland, with special interest in the new Polish Constitution of 2 April 1997. It is important to emphasize that the problem belongs beyond any doubt to the area of constitutional law and not of international law, although the major part of research in this respect has been effectuated by international lawyers.

1. According to Art. 49 of the so-called March Constitution of 1921, and subsequently Art. 15 of the Provisional Constitution of 1947, the provisions about intema-

* Professor of International and European Law at the Institute for Legal Sciences of the Polish Academy of Sciences, Warsaw.

[1] See on this topic R. M u l l e r s o n et al. (eds.): *Constitutional Reform and International Law in Central and Eastern Europe,* The Hague 1998, *passim;* V. S. V e r e s h c h e t i n: "New Constitutions and the Old Problem of the Relationship between International Law and National Law", *EJIL* 1996, vol. 7, p. 20-41.

[2] See J. A. F r o w e i n, T. M a r a u h n (eds.): *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa,* Berlin-Heidelberg-New York 1998, p. 443 and following.

tional law in Polish municipal law were connected with the participation of the Parliament in the ratification process. Certain categories of treaties, including in particular treaties concerning the rights and duties of individuals, could be ratified by the President after prior approval by Parliament, such approval being given in the form of a ratification law. Duly ratified and published treaties acquired the status of laws of Parliament. In fact, the procedure amounted to transformation.

The situation changed radically after the passing of the Constitution of 22 July 1952 which did not contain any express provisions dealing with the place of international law within the Polish legal order, with the exception of Art. 30(1), conferring the right to ratify international agreements upon the Council of State, a collective presidential body. The constitutional gap caused a lively discussion among Polish authors. Some of them maintained that ratified and published international agreements acquired the power and rank of an Act of Parliament. According to others, ratification could not be treated as a law-making act, and no provision of the Constitution gave grounds for an assumption that transformation was needed. The dominant view was formulated by S. Rozmaryn who claimed that international treaties should be applied directly within the Polish legal order. They are international law instruments and do not rely upon acts of domestic law. The Parliament did not take part in the ratification process nor did any municipal legal act incorporate international agreements into domestic law. They are still valid as part of the internal legal order. Rozmaryn based his position on the lack of express constitutional regulation.[3]

The doctrinal dispute has not been resolved by the jurisprudence of the Polish courts. In the *Pannonia* case, decided on 22 November 1972 and upheld on 5 October 1974, the Supreme Court stated that the courts could apply only the agreements duly ratified and promulgated in the *Official Journal.* This decision was based upon the concept of transformation. The judgment in the *Warta* case of 18 May 1970 provided for the possibility of applying international norms (both treaty and customary rules), and, if necessary in the second stage, domestic law. The decision of the Supreme Court of 10 February 1981 concerning the application of Art. 22 of the Covenant on Civil and Cultural Rights denied any direct effect of the Covenants, and excluded any derogation from the provisions of municipal law incompatible with them. Finally, the decision of 25 August 1978 excluded the application of the ILO Convention No. 87 and Art. 22 CCPR by the courts. According to the Supreme Court Jurisdiction, judges are subordinated only to Parliaments statutes; as the conventions mentioned above were not clearly transformed into domestic law by an Act of Parliament, they could not be applied by the courts. In fact, the Court declared that those norms were not self-executing and required transformation.

One can conclude that notwithstanding the dominant opinion of international and constitutional lawyers, the courts under communist rule, for manifestly political reasons, did not accept the possibility of the direct application and effectiveness of intema-

[3] S. R o z m a r y n: *Ustawa w Polskiej Rzeczypospolitej Ludowej* [The Law in the People's Republic of Poland], Warszawa 1964, p. 329, 332 and 340.

tional law within Polish legal order. Individuals could not claim any right granted under the human rights treaties.

2. The political, economic and social transformation required the modification of the Constitution. The President was conferred with the competence to ratify treaties. If a given treaty imposed significant financial burdens or required changes in the valid legislation, the President had to seek an authorization of the Sejm (Lower House of the Parliament) prior to ratification. A constitutional custom has been established that the consent was to be given in the form of a ratification law. The Constitutional Law of 17 October 1992 on the organization of state authorities and division of competences (so-called Little Constitution) confirmed the President's competence to ratify treaties. Certain categories of treaties require the approval by Parliament in the form of a ratification law prior to ratification. The government could freely decide that an agreement should be ratified with the approval of Parliament or that consent was not needed. The decision of the government in this respect was not subjected to the control of the Constitutional Tribunal. In fact, the problems of the relationship between international and domestic law were left to practice. The decisions of the Constitutional Tribunal and the Supreme Court dealt with two important questions: the principles governing the validity and applicability of international law within Polish municipal legal order, and the rank of international norms in the hierarchy of sources of law.[4]

2.1. The problem of the validity of international law in Polish legal order.

The first judgment of the Constitutional Tribunal dealing with the new approach to international law after the change of the political system was passed on 7 January 1992. The case concerned the restriction of the competence of the Supreme Administrative Court to review certain administrative decisions regarding the officers of the Border Guard. The motion by the Ombudsman and the President of the Administrative Court stated that international human rights treaties to which Poland was party guaranteed to all individuals without any distinction or exception the access to justice and the right to a judicial review of the case concerning them. The Constitutional Tribunal declared itself not competent to control the conformity of domestic legislation with international law, according to Art. 1 of the law of 29 April 1985 on the Constitutional Tribunal. However, the constitutional judges invoked Art. 1 of the Constitution providing for the principle of legality or rule of law. International agreements concluded by Poland constituted an important element of the interpretation of Art. 1 since from the moment of ratification they constituted part of the legal system. The agreements should be applied *ex proprio vigore* unless they are not self-executing. Consequently, the Constitutional

[4] It is impossible to present all judicial decisions dealing with the relationship between international law and domestic law. We can refer, however, to detailed publications in this field - see, e.g. J. Oniszczuk: "Umowy międzynarodowe w orzecznictwie Trybunału Konstytucyjnego" [International Agreements in the Adjudications of the Constitutional Tribunal], *Państwo i Prawo* 1995, no. 7, p. 14 and following; M. Masternak-Kubiak: *Umowa międzynarodowa w prawie konstytucyjnym* [The International Agreement in Constitutional Law], Warszawa 1997, p. 142 and following; A. Preisner [in:] M. Kruk (ed.), *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International and Community Law in Domestic Legal Order], Warszawa 1997, p. 127 and following.

Tribunal did not draw any distinction between the origin of rules valid in the Polish legal order. Let us emphasize that the position of the Tribunal in this respect corresponded with the early practice of Western European states which treated international norms as an important factor of the interpretation of domestic legislation. The concept of the direct applicability of international agreements, and in particular of self-executing treaties, was elaborated later. On the other hand, it is interesting that the Tribunal developed its position towards a competence to control the conformity of international agreements to the Constitution. In its decision of 30 November 1994 the Tribunal decided that it was competent to control the conformity of the act of Parliament, allowing the President of the Republic to ratify a specific international treaty (so-called ratification law).[5] The ratification law is a normative act enacted by the Parliament, and it could be subjected to judicial control similarly to other domestic legal acts.

The decision of the Constitutional Tribunal of 20 October 1992 marks an important step in the jurisprudence. The case concerned the incompatibility with the Constitution of the provision of Article 15 of the Aliens Act of 29 March 1963 as amended on 19 September 1991. The Aliens Act provided for the detention of an alien subjected to expulsion on the basis of an administrative decision of the competent territorial state agency. The Tribunal decided that according to Art. 29 of the Aliens Act in matters within the scope of this act, international agreements binding Poland should be applied if they regulated certain questions in a different way from domestic law. Under those circumstances, the judicial review of an administrative decision on the detention for deportation could have taken place on the basis of Art. 9(4) ICCPR applied *ex proprio vigore* on the ground of Art. 29 of the Aliens Act. The Tribunal referred also to the respective provisions of international agreements including the European Convention on Human Rights of 1950 in order to establish the scope of different institutions introduced by the Aliens Act. The judgment of 20 October 1992 is important for another reason as well. It expressly confirmed the principle that the rights protected by the Constitution are granted not only to Polish citizens but also to aliens residing - even on a temporary basis - in the territory of Poland. Surprisingly, the Tribunal did not refer in this context to Art. 1 of the European Convention on Human Rights of 1950.

The judgment of the Penal and Military Chamber of the Supreme Court of 17 October 1991 was enacted in the extraordinary appeal proceeding dealing with one of the judgments on the legality of martial law proclaimed in Poland in 1981. The Supreme Court pronounced the accused innocent and stated that the introduction of martial law was contrary to the principle of the non-retroactivity of law as formulated in Art. 15 ICCPR (ratified by Poland in 1977). According to the Court, the regulation of Art. 15 was operative within the municipal legal system and it was self-executing.

Finally, one should refer to an interesting decision of the Administrative Chamber of the Supreme Court of 15 June 1993. The decision concerned the registration of an organization called the Union of the Former Members of the German Wehrmacht in the

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[5] On the nature of ratification law in the Polish legal order see in particular W. S o k o l e w i c z: "Ustawa ratyfikacyjna" [Ratification Law] [in:] M. K r u k (ed.), *Prawo międzynarodowe..., op. cit.*, p. 93 ff; M. M a s t e r n a k - K u b i a k: *op. cit.*, p. 73 and following.

Republic of Poland, composed of persons of Polish origin and nationality who lived in territories belonging to Germany before the Second World War or annexed by the Reich in 1939, and were enlisted in the German Army. After the war they resided in Poland and decided to organize themselves in order to protect their rights. The organization has been registered according to Polish law by the District Court in Bydgoszcz. The Minister of Justice objected to this decision instituting an extraordinary appeal proceeding. The Supreme Court cancelled the decision of the District Court for formal reasons and returned it for re-examination. The decision of the Supreme Court referred to the applicability of Art. 11(2) of the European Convention on Human Rights in the Polish legal system. Furthermore, the Court stated that the rule of law principle required that the Polish State observed international obligations contained in the duly ratified agreements and conventions; consequently, international legal norms can and should be directly applicable in domestic legal relations, and they do not require any transformation acts. The only condition thereto is a clear or implied intention of the parties to give such an effect to the agreement within the municipal legal order. However, with regard to human rights treaties the intention was clear, since it was hard to presume that the parties had no intention to apply them directly. This decision constituted in fact a step backwards in jurisprudence concerning the validity of international law. It made the direct application of international agreements dependent upon the clear or presumed will of the parties, and not upon the simple test of the fulfilment of necessary criteria (precise, clear and unconditional provisions). However, this trend was not upheld in the later decisions of the Supreme Court.

On the other hand, one should admit that the practice of Polish judicial organs is neither uniform nor consistent. Different state agencies - or even different chambers of the same court - apply international law in different ways. Let us refer here to the decision of the Supreme Administrative Court of 18 January 1994. The case concerned a claim by a Polish national of German origin to have his name changed from Jan to the original Hans. The claim was based upon general international law and upon the provisions of the Polish-German Treaty of 17 June 1991 on Good Neighbourliness and Friendly Cooperation.[6] The Court decided that since administrative agencies pass their decisions based upon domestic statutes, international agreements cannot become the autonomous basis of a decision. However, in the given case, the judges referred to relevant provisions of the Constitution and to the law of 1956 on the change of names, and stated that the right of a person to use one's name in the version of one's native language belongs to constitutional rights and justifies the change of a name if requested by a member of a minority. This judgment deserves attention since it mirrors a certain trend of the lower courts not to invoke international treaties as the basis of a decision but to refer to municipal normative acts.

[6] See W. C z a p l i ń s k i: "The New Polish-German Treaties and the Changing Political Structure of Europe", *AJIL* 1992, vol. 86, p. 169-171.

2.2. The rank of international law in the hierarchy of sources of law in Poland.

Surprisingly, in extensive jurisprudence concerning the validity of international law within the Polish legal order, only extremely rare decisions have dealt with the position of international law in the hierarchy of sources of municipal law.

In this context, the resolution passed by seven judges of the Civil Chamber of the Supreme Court of 12 June 1992 merits mention. The case concerned certain aspects of international adoption and the relationship between the Polish family code and the Convention on the Rights of the Child. The Court indicated that the place of international law within Polish municipal legal order was disputable. Even if the majority of authors maintained that international rules were valid *ex proprio vigore*, the contrary view could also be found both in legal writings and judicial practice. The importance of the latter should diminish, since the practice of the Parliament on the basis of Art. 32(g) of the Constitution required the approval of international agreements by Parliament in the form of a ratification law prior to ratification by the President. However, as the Constitution did not clearly establish the principle of the absolute priority of international law over domestic legislation, international treaties ratified on the basis of the consent of Parliament should have the rank of statutes with all the effects thereof.

In the light of the actual constitutional provisions the position of the Court was correct; however, it did not clearly prescribe methods of the resolution of conflicts between international agreements and subsequent domestic legislation. If the construction had been applied consistently, later domestic acts would have prevailed over earlier international agreements. From the point of view of the principle of rule of law such a solution should have been rejected.

3. The relationship between international law and domestic law in the light of the Constitution of 2 April 1997.

The present constitutional regulation marks an important step in comparison to former ones; however, it is far from fully satisfactory.

The constitutional provisions dealing with the relationship between international law and Polish domestic law start with Article 9 which states that the Polish Republic respects international law binding upon it. This provision covers all international law notwithstanding its origin (whether conventional or customary). It is of purely declaratory character, and situated in a chapter of the Constitution dealing with the principles of the political, social and legal system of Poland. In fact, this provision has been referred to as a possible basis of validity in the municipal legal order of those norms which have not been indicated in the remaining provisions of the Constitution as sources of Polish domestic law: i.e. customary law, non-ratified treaties and covenants, unilateral obligations, and binding norms elaborated by international organizations (if any).

Article 87 of the Constitution opens Chapter III concerning sources of law. According to it, duly ratified international agreements constitute the source of Polish law. There are two kinds of ratified treaties. Certain treaties can be ratified by the President directly on the basis of his personal prerogatives. The other categories of agreements can be ratified exclusively after prior approval by the Parliament, expressed in the form

of the so-called ratification law (Art. 89(1) of the Constitution). The Constitution extends the competence of the Parliament upon: treaties dealing with peace, alliances, political and military treaties: treaties concerning fundamental freedoms, rights and duties defined in the Constitution; membership in international organizations; treaties imposing important financial burdens upon the state budget; and international agreements reserved for regulation by the laws of Parliament. Every case of a ratification of the agreement by the President must be notified to the Parliament. It is interesting that although the competence of the Constitutional Tribunal has been extended so as to include the control of the compatibility of international agreements with the Constitution, and of domestic law with international agreements duly ratified, it does not cover the legality of the ratification itself. The competence of the Tribunal is limited to the control of the conformity of legal (legislative) acts, and not the legality of administrative acts (it seems to be indisputable that the nature of the Presidential act of ratification is administrative and not legislative).

The position of ratified international agreements in Polish legal order has been regulated in Art. 91(1) of the Constitution. According to this provision, ratified treaties, upon their publication in the *Official Journal* of the Polish Republic, form part of the domestic legal order and are directly applicable unless their application is dependent upon the adoption of an Act of Parliament. The wording of this Article has been modified in comparison to the draft presented by the Constitutional Commission of the Parliamentary Assembly. The draft situates ratified international agreements among sources of Polish domestic law, suggesting a required transformation of international agreements into domestic law (either by the law of Parliament or by the act of ratification by the President of Republic); the provision on direct applicability was meaningless. Furthermore, the Constitution suggests making a distinction between the position of the treaties ratified after their prior approval by the Parliament and other ratified treaties. The former should enjoy priority before laws (Acts of Parliament,) while the latter are subordinated to them. Such a construction presupposes the conformity of domestic legislation with international obligations, and the duty of the legislative bodies to adjust domestic norms to international law. It does not exclude a possibility of concluding a treaty contrary to domestic acts and even contrary to the Constitution; under such circumstances, however, the ratification law passed by the Parliament should introduce relevant amendments to municipal acts in force.

Summing up the above considerations, it should be emphasized that from the theoretical point of view ratified international agreements are incorporated into municipal law rather than transformed into domestic law.[7]

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[7] In fact, there are good arguments for both positions. Proponents of the transformation theory refer mostly to Art. 87 as listing international treaties as a source of domestic law; cf. R. S z a f a r z: "Skuteczność norm prawa międzynarodowego w prawie wewnętrznym w świetle nowej Konstytucji" [The Effectiveness of International Law Norms in Domestic Law in the Light of the New Constitution], *Państwo i Prawo* 1998, no. 1, p. 5. Other authors refer to the direct applicability of international agreements, provided for in Art. 91, as the basis of an incorporation of international law and an expression of a monistic view. Cf. A. W y r o z u m s k a: "Stosowanie prawa międzynarodowego w prawie krajowym" [The Application of International Law in Domestic Law] [in:] *Stosowanie prawa Unii Europejskiej w wewnętrznym porządku prawnym państwa* [The Application of European

The position of other international agreements in Polish domestic legal order remains unclear. In theory, agreements of this kind should not be directly applicable and should not concern issues listed in Art. 89(1); according to the Constitution, they do not comprise a source of Polish domestic law and are not directly applicable. In practice, numerous international agreements and compacts are concluded in a simplified form; they are neither published in the *Official Journal* nor (sometimes) translated. An example of such a treaty is the statute of the EBRD. Presumably, they are subordinated to laws of the Parliament; such a solution, however, would be contrary to Article 9 of the Constitution. On the other hand, it is unclear on what basis the agreements concluded in the simplified form should be applied in the Polish legal system. The Constitution neither incorporates them nor transforms them into domestic law. The position of those agreements should be regulated by the proposed law on the conclusion and implementation of international treaties (to be passed by the Parliament in the forthcoming months), or it should be left to the decision of the Constitutional Tribunal or the Supreme Court. It might be suggested that the agreements concluded in a simplified form require implementation by a specific domestic act (law of the Parliament). Finally, it is also possible to introduce a delegation by a general agreement ratified upon the prior approval of the Parliament or by the specific law of the Parliament for the Government to conclude an agreement in a simplified form, dealing with questions reserved for the competence of the Parliament according to Article 89, if the need to conclude such an instrument is urgent.[8]

It is important to notice that according to Art. 241 of the Constitution, the regulation of Art. 91 concerning the position of international instruments in Polish domestic legal order should be applied to international agreements concluded before the entry into force of the Constitution, provided that those agreements were ratified and published in the *Official Journal*, and that their content concerns matters referred to in Art. 89(1) of the Constitution (i.e. international agreements subjected to approval by the Parliament).

Finally, emphasis must be placed on the fact that the new Constitution granted the Constitutional Tribunal a power to control the conformity of international agreements in force to the Constitution, and of domestic acts of lower rank to international agreements. If the Tribunal decides that a specific regulation is contrary to international law, judicial and administrative decisions based on such decisions are void, and new proceedings in such matters should be initiated according to respective statutes.

4. Conclusions

The provisions of the Constitution of 1997 mark an important stage in the development of the relationship between Polish domestic law and international law. Although they constitute an object of scientific disputes among international and constitutional lawyers, they can serve as a basis for judicial and administrative decisions, requiring a higher standard of protection of individual rights.

Union Law in the Inner Legal Order of the State], Warszawa 1998, p. 30; A. W a s i 1 k o w s k i: "International Law and International Relations in the New Polish Constitution of 2 April 1997", *PolYBIL* 1997-8, vol. 23, p. 7.

[8] Agreements concerning the rights and (mainly jurisdictional) immunities of members of foreign armed forces stationing temporarily for the time of manoeuvres in the territory of Poland have been invoked in this context.