The Polish Constitutional Tribunal in the European Union

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1. Introduction

Poland does not have a very long tradition of constitutional justice, especially if compared with the United States or the Federal Republic of Germany. When Poland regained independence in 1918 there were indeed proposals for the establishment of a constitutional court, however, they were finally rejected. The direct application of the Constitution was also excluded, following the classical continental approach according to which the Constitution is addressed to the Parliament whereas the courts are expected to apply statutes (acts of Parliament) without controlling their constitutionality. The same approach was followed after the introduction of communism in Poland in 1944 and the enactment of the Constitution of the Polish People's Republic of 22 July 1952. According to the then prevailing doctrinal opinion, the constitution could indeed be applied directly by the courts, however, they were not allowed to check the constitutionality of statutes (acts of Parliament) or other sources of law enacted by the executive. No constitutional court was established.

The situation changed during the last decade of communism in Poland, when the first pre-democratic reforms were implemented. It is worth recalling that constitutional reforms introduced in the 1980s prepared the ground for the general political rupture of 1989–1991. In 1980 the Chief Administrative Court was established, thus introducing judicial review of administrative decisions, for the first time in the history of communist Poland. The Chief Administrative Court embarked upon judicial activism, creating from scratch numerous general principles of administrative law which became the yardstick of judicial review of the administration. The next step was the creation of the Constitutional Tribunal in 1985 and the office of the Ombudsman in 1987. The office of the Ombudsman was attributed with important legal instruments, such as the right to initiate civil
d\footnote{Article 12(4) Ombudsman Act 1987 [Ustawa z dnia 15 lipca 1987 r. O Rzeczniku Praw Obywatelskich, Dz.U. Nr 21, poz. 123].}, criminal\footnote{Article 12(5) Ombudsman Act 1987.} and administrative proceedings\footnote{Article 12(6) Ombudsman Act 1987.}, participate in them, bring recourses against judicial decisions (such as the revision) as well as extraordinary means of recourse (such as the extraordinary revision\footnote{Article 12(8) Ombudsman Act 1987.}), as well as to initiate judicial review of administrative acts.

It is submitted that the way in which the Polish Constitutional Tribunal functions within the European Union, and especially its relationship vis-à-vis the Court of Justice in Luxembourg, is to a large extent determined by the position of the Constitutional Tribunal within the constitutional and institutional framework in Poland. This holds true especially with regard to the prestige and respect which the Tribunal has among other judicial institutions. The Tribunal's constitutional position has evolved a great deal since it was established in 1985. It seems that this evolution is worthy to be recalled briefly in order to cast some light on the Tribunal's current position which – in turn – is one of the factors that determine the Tribunal's stance towards the doctrine of supremacy of European law.


Turning to the Constitutional Tribunal – our main object of interest in the present paper – it should be pointed out that its competences were very wide from the outset, eclipsing e.g. the limited powers of the French Constitutional Council. It could decide on the constitutionality of legislative measures (statutes and decrees) as well as on the constitutionality and legality of sub-legislative normative measures enacted by the central state authorities. Constitutional control could be initiated by numerous bodies – among them: the Presidency of the Parliament, a Parliamentary commission, 50 members of parliament, the Council of State or its president, the President of the Supreme Chamber of Control, the Ombudsman, the Council of Ministers, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Attorney General and many others. The Constitutional Tribunal could also control the constitutionality of an act *ex officio*. Finally, a preliminary reference procedure was established which enabled the Tribunal to adjudicate on the constitutionality of an act which was to be applied in court proceedings; however, not all courts were allowed to bring references – only the First President of the Supreme Court, the President of the Chief Administrative Court, the President of the State Economic Arbitration, as well as central and supreme organs of state administration could submit such questions. Further limitations upon the Constitutional Tribunal were imposed by the fact that the Parliament could reject the Tribunal's ruling on the unconstitutionality of a statute by qualified majority of 2/3 votes. The members of Tribunal were elected by Parliament and could be revoked if they violated their oath; this was an instrument of political control since the oath contained a pledge of allegiance to the political and socio-economic system of communist Poland.


The voluntary surrender of political power by the communists – with the simultaneous seizure of control over the economy – took place in Poland between 1989 and 1991. A major turning point in the process was the so-called Round Table Contract signed in Spring 1989 which provided for semi-democratic elections to the last Parliament of the Polish People's Republic (4 June 1989). The posts assigned to democratic election were won by the moderate opposition, allowing for further political reforms. These reforms had an impact also on the position of the Constitutional Tribunal which was itself constitutionalised only in 1991. The principle of parliamentary review of the Constitutional Tribunal’s judgment was retained and obtained a constitutional sanction. The competences of the Constitutional Tribunal were significantly enlarged by several novellisations of the Constitutional Tribunal Act 1985, as well as by the so-called “Small Constitution” - the Constitutional Act of 17 October 1992 on the Mutual Relationships Between the Legislative and

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5 Article 1 Constitutional Tribunal Act 1985 [Ustawa z dnia 29 kwietnia 1985 r. O Trybunale Konstytucyjnym, Dz.U. Nr 22, poz. 98]
6 Article 19(1) and Article 20(1) Constitutional Tribunal Act 1985.
8 Article 10 Constitutional Tribunal Act 1985.
13 Article 13(6) Constitutional Tribunal Act 1985 by virtue of which the judges swore to: “...be faithful to the Constitution of the Polish People's Republic and principles following from its provisions regarding the political and socio-economic system of the socialist State as well as the principles of legality and social justice...”.
15 Article 33a(2) of the Constitution of the Republic of Poland of 22.7.1952 as modified in 1991: “The decisions of the Constitutional Tribunal on the unconstitutionality of statutes are subject to review by the Parliament.”
Executive Powers of the Republic of Poland and on the Local Self-Government. Since 1991 the Constitutional Tribunal obtained the power of preventive control of acts of Parliament – this control could be initiated by the President who also had the right of a suspensive veto. Until 1992 both rights could be exercised in any order, however, under the “Small Constitution” the President could submit an act to constitutional review after an unsuccessful veto but could not veto an act unsuccessfully submitted to the Tribunal. The Constitutional Tribunal also obtained a new power – the right to issue a commonly binding, abstract interpretation of any legal provision. The right of requesting an abstract interpretative resolution was granted to the President, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Ombudsman, the President of the Supreme Chamber of Control and the Attorney General. The right of Parliament to revoke a judge of the Tribunal due to a breach of oath was retained, however, the oath did not contain any reference to any political system. The right to initiate ex post constitutional control was given also to Senate commissions and a group of 30 senators, following the establishment of the upper house of Parliament. The right to bring references for a preliminary ruling was also expanded in order to cover adjudicating panels of the Supreme Court and of second instance courts (previously the right was limited to the presidents of the supreme courts).

2.3 The Constitutional Tribunal Under the 1997 Constitution

The first full-fledged constitution in post-communist Poland was only enacted 8 years after the process of political, legal and socio-economic transformation had started back in spring 1989. The Constitution of the Republic of Poland of 2 April 1997 – a compromise between the post-communist parliamentary majority and a small minority of center-left opposition – affected the position of the Constitutional Tribunal, especially vis-à-vis the legislative power. On the one hand, the Tribunal lost the power to issue binding interpretations of statutes. On the other hand, the Tribunal’s judgments are no longer subject to parliamentary review, thereby liberating the judiciary from the supremacy of the legislature. However, this does not mean that the Tribunal’s judgments enter into force immediately – the Tribunal has been given the power to postpone the entry into force of its judgment by a maximum of 18 months in the case of statutes (acts of Parliament) and by a maximum of 12 months in the case of other normative acts (e.g. executive regulations). The Constitution does not specify what are the reasons that the Constitutional Tribunal ought to take into account when deciding to postpone the date on which a normative act loses force; commentators point to ‘consequences for the legal order in the state, the liberties and rights of man and citizen, the functioning of the organs of public authorities, public finance, the relations with other states and international community’.

The jurisdiction of the Tribunal has been set out in the Constitution as covering the

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16 Ustawa Konstytucyjna z dnia 17 października 1992 r. o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym, Dz.U. Nr 84, poz. 426.
20 Article 15(6) of the Constitutional Tribunal Act 1985 as of 1991 by which judges now swore to “…serve the Polish Nation faithfully, protect the Constitution and statutes…”.
23 Article 190(3) of the Constitution 1997: ‘A decision of the Constitutional Tribunal enters into force on the day of its publication, however the Constitutional Tribunal may determine a different day on which the normative act will lose its force. That period may not exceed 18 months with regard to statutes and twelve months with regard to other normative acts. In the case of decisions which are connected with financial expenses not provided for in the budgetary statute, the Constitutional Tribunal determines the day on which the normative act will lose its force after acquainting itself with the opinion of the Council of Ministers.’
following types of cases:
1) the compatibility of statutes (acts of Parliament) and international treaties with the Constitution;
2) the compatibility of statutes (acts of Parliament) with international treaties which, for their ratification, required consent expressed in a statute;
3) the compatibility of legal provisions, enacted by central state organs, with the Constitution, ratified international treaties and statutes;
4) the compatibility with the Constitution of aims or the activity of political parties;
5) the constitutional complaint.

The jurisdiction of the Constitutional Tribunal is thus strictly connected with the hierarchy of the sources of law as provided for in Chapter III of the Constitution. This hierarchy is as follows:
1) the Constitution;
2) ratified international treaties which, for their ratification, required consent expressed in the form of a statute (act of Parliament);
3) secondary law of international organizations (e.g. EC law)
4) statutes (acts of Parliament);
5) other ratified international treaties;
6) regulations (issued in order to execute statutes).

The Constitution places itself as the supreme law of the Republic of Poland, having primacy over all international law, including treaties founding international organizations, such as the UN Charter, the EC Treaty or EU Treaty. This follows clearly from Article 8(1) of the Constitution which unequivocally states: ‘The Constitution is the supreme law of the Republic of Poland.’ Furthermore, the Constitution has always direct effect, unless a constitutional provision states otherwise.

Ratified international treaties – but only those which have been ratified with the Parliament’s explicit consent expressed in a statute – are hierarchically the second source of law, placed directly under the Constitution but above any other national law. The Constitution gives international treaties, in principle, the force of direct effect in the national legal order.

Next comes the law created by international organizations – practically by the European Community and Euratom. Article 91(3) provides that: ‘If it follows from a treaty establishing an international organization, the law created by that organization is applied directly, with precedence in the case of conflict with statutes.’ Article 91(3) is the provision which effectively places secondary EC law within the national legal order – its place is below the Constitution and statutorily ratified international treaties but above statutes and sub-statutory national law. The concept of ‘law’ used in Article 91(3) is not clearly defined which might allow for an interpretation covering also the case-law of the Court of Justice or the fuzzy concept of the ‘acquis communautaire’. However, those two categories do not fall into the scope of ‘law’ as defined in Article 91(3) because their binding force does not follow from the EC Treaty but only – in the case of the ‘acquis’ - from the Act of Accession which is not the founding treaty.

Finally come national statutes (acts of Parliament) and – below them – other national normative acts.

3. The Polish Constitutional Tribunal and the European Union

3.1. Theoretical Considerations

What are the powers of the Constitutional Tribunal vis-à-vis the European Union and European
Communities in the light of the Constitution? The Constitution leaves no doubt as to its supremacy over all international law, including the EC Treaty, the EU Treaty and the whole body of secondary EC and EU legislation. However, supremacy of the Constitution does not necessarily translate into a jurisdiction of the Constitutional Tribunal to affirm the supremacy in practice. The scope of the Tribunal’s jurisdiction, as provided for by Article 188 of the Constitution includes the judicial review of international treaties; however, it does not explicitly mention the judicial review of the law of an international organization, that is – in practice – the secondary legislation of the European Community. Needless to say that this legislation very often comes into conflict with the fundamental rights and freedoms, especially the right to property and the freedom to pursue economic activity. Due to the fact that the Court of Justice is notoriously lax on these issues and does not grant sufficient protection, the jurisdiction of the Polish Tribunal – which maintains a very high standard of fundamental rights protection – is indeed necessary in order to ensure that the Constitution with its generous bill of rights remains effectively, and not only on paper, the supreme law of the land.

3.2. The Case-Law

Up to this moment, the Constitutional Tribunal has had two important occasions to pronounce itself on the position held by European Union and European Community law in the Polish legal system. The two cases are the European Arrest Warrant case, in which the Tribunal dealt with the legal force of European Union (Third Pillar) law, namely the framework decision on the European Arrest Warrant and the second case, the Accession Treaty case, decided two weeks later, in which the Tribunal dealt with the issue whether the entire Accession Treaty under which Poland had become a member of the EU on 1 May 2004 is in conformity with the Polish Constitution. This case gave the Tribunal the occasion to discuss in a somewhat wider manner the specific issues of the binding force of primary Union and Community law, secondary Union and Community law as well as the jurisprudence of the European Courts. Before we turn to the cases, it is perhaps worth mentioning that according to the style followed by the Polish Constitutional Tribunal, there is usually only one per curiam opinion written by one of the judges but approved by all of them. This kind of opinion often includes elements suggested by different judges, however, it is not indicated which one of them suggested a given paragraph. Therefore, unlike in the United States, there are no concurring opinions. However, in case there are dissenters, they may present their dissenting opinions. Since this was not the case in the two judgments we shall be dealing with, there is only one single opinion available in both of them and those opinions will be the subject of further analysis.

3.2.1. The European Arrest Warrant Case

Judgment of the Constitutional Tribunal of 27 April 2005 in Case P 1/05 concerning the constitutionality of Article 607t § 1 of the Code of Criminal Procedure (‘European Arrest Warrant Case’)

*The Polish Constitution contains an unconditional prohibition of extradition of Polish citizens abroad, regardless whether within the UE or to third countries.
*Art. 55(1) of the Constitution 1997: ‘The extradition of a Polish citizen is prohibited.’
*Before Poland became a member of the EU, the ministers of the Union acting within the 3rd Pillar adopted the Framework Decision no. 2002/584 of 13 June 2002 regarding the European Arrest Warrant and extradition procedures between the Member States

The line of ECJ case-law which uphold Community measures infringing fundamental rights commences with the infamous case of Liselotte Hauer who could not plant vine on her vineyard because the Council of the EEC was afraid that too much wine on the market would make the prices too low. The ECJ did not pay any attention to her fundamental rights of property and economic freedom, placing the interest of actual wine producers over the interest of consumers and the individual freedom of Ms Hauer.
• On 18 March 2004 the Polish Parliament adopted a statute introducing the European Arrest Warrant into Polish law (Article 607t(1) of the Code of Civil Procedure)
• The District Court in Gdańsk was considering the extradition of a Polish citizen to Holland and asked the Constitutional Tribunal if this would not violate her fundamental rights under Article 55(1) of the Constitution.
• The European Arrest Warrant is particularly controversial because it removes one of the fundamental guarantees of human rights in criminal law – the double criminality requirement which is the foundation of extradition law worldwide
• Furthermore, the European Arrest Warrant does away with another human right safeguard – the exclusion of political offences from extradition

The Constitutional Tribunal found that the provisions implementing the European Arrest Warrant violate the Constitution, since the surrender under the arrest warrant is not a distinct legal institution from "extradition". The Tribunal thus rejected a solution offered by a part of the Polish legal doctrine which argued that there was a distinction between "surrender" and "extradition" and thus the implementation of the framework decision did not require any amendments to the Constitution (such an interpretation of the Constitution was said to be "dynamic" and "pro-european").
• However, it delayed the entry into force of its judgment by 18 months, arbitrarily denying Polish citizens the protection of their fundamental right guaranteed in the Constitution
• Only during the first 8 months following the introduction of the EAW into the Polish Penal Code, Polish public prosecutors filed 486 applications for EAW to the courts and 379 warrants were issued. 16 Polish citizens were surrendered, mainly to Germany.

Argument raised by the Tribunal:
• Poland must observe the pacta sunt servanda principle
• Judicial restraint (the Tribunal does not make Polish foreign policy)
• Polish citizens’ fundamental rights will not be in danger if they are extradited to an EU country
• ‘Sanctions’ if Poland does not comply with the Framework Decisions

Legal effects of the judgment
• During the 18-month period Polish courts are under a duty to set aside Article 55 of the Constitution and surrender Polish citizens on the basis of the unconstitutional provision of the Code of Criminal Procedure violating their fundamental right
• Only if the Parliament does not amend the Constitution within that period will the unconstitutional provisions lose force

Legislative follow-up

On May 2006 the President presented to the Parliament a proposal of a bill amending art. 55 of the Constitution in the following way:

"Art. 55.
1. Extradition of a Polish citizen is prohibited, except for a situation foreseen by paragraph 2.
2. A Polish citizen can be surrendered to another country or to an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing an act enacted by an international organisation of which Poland is a member.
3. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden.
4. The courts shall adjudicate on the admissibility of extradition"
The President justified the amendment by a need to comply with international obligations (the entry into force of the amendment would prevent Poland from breaching Community law and ensure the continuous application of the European Arrest Warrant by the Polish courts). He said in Parliament that he was not enthusiastic about the EAW since it was a "supranational institution", however, its implementation was necessary for "pragmatic reasons".

The Parliamentary opposition supported the amendment proposed by the President. However, the party holding a majority in the Parliament ("Law and Justice") considered the amendment to be too broad in its scope. It therefore put forward a different proposal:

"Art. 55.
1. Extradition of a Polish citizen is prohibited, except for situations foreseen by par. 2 and 3.
2. Extradition of a Polish citizen is possible upon a request from another country or international judicial body if if such a possibility stems from an international treaty ratified by Poland or a statute implementing an act enacted by an international organisation of which Poland is a member, provided that the act covered by a request for extradition:
   1) was committed outside of the territory of Poland, and
   2) constituted an offence according to the laws of Poland or would have constituted an offence according to the laws of Poland if it were committed on the territory of Poland, both in the time of its commitment and at the time of the lodging of the request.
3. Extradition does not need to comply with the conditions foreseen by para. 2 point 1 and 2 if a request is lodged by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by its jurisdiction.
4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition whose execution would violate human rights and freedoms.
4. The courts shall adjudicate on the admissibility of extradition".

This proposal was adopted by the Sejm on 8 September 2006 and by the Senate on 14 September 2006.

3.2.2. The Accession Treaty Case

Judgment of the Constitutional Tribunal of 11 May 2005 case K 18/04 concerning the constitutionality of the ratification of the Accession Treaty

Accession Treaty Case

• The Tribunal held that the EU is not a ‘supranational organisation’ but a normal international organization within the meaning of international law
• Acts adopted within the Third Pillar of the EU are only ‘simplified intergovernmental agreements’, do not require ratification, do not have supremacy of application before national law; in Poland – they are not a source of law at all
• Under the Constitution, Poland may transfer its competences only in ‘some matters’ which means that it cannot transfer all competences of a constitutional organ, all competences in one field or the competences essential to a given constitutional organ
• The core of the constitutional competences of a given organ must be maintained
A transfer of competences to the EU which would not allow Poland to function as a sovereign state would be invalid under the Constitution.

Poland, as all other Member States, has the right to evaluate whether EU institutions are acting within the powers conferred to them by the treaties.

If the EU institutions go beyond those powers than such acts will not have supremacy over Polish statutes.

The Tribunal has the right to review EU law from the point of view of the protection of fundamental rights by the Polish Constitution.

In particular, the Tribunal will control whether EU acts do not limit the fundamental rights of Polish citizens to a greater extent than allowed by Article 31(3) of the Constitution; if this happens than those EU acts will not be applicable in Poland.

**Art. 31(3) of the Constitution**

‘Limitations on the enjoyment of constitutional freedoms and rights may can be instituted only by statute and are allowed only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, health or public morality or the freedoms and rights of other persons. Limitations may not violate the essence of the liberties and rights’.

Polish law does not recognise limitations for economic reasons as in EU law (eg CAP)

The Tribunal reaffirmed that the Constitution is the supreme law in Poland, above all international law, including the EC and EU Treaties.

In the case of a conflict between EU law and the Polish Constitution, Poland has **three choices**: (1) amend the Constitution; (2) influence an amendment of the EU law in question; (3) leave the EU.
ANNEX


• **Art. 8:** "(1) The Constitution shall be the supreme law of the Republic of Poland. (2) The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise".

• **Art. 9:** "The Republic of Poland shall respect international law binding upon it".

• **Art. 31(3):** "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

• **Art. 55 (former version):** (1) The extradition of a Polish citizen shall be forbidden. (2) The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden. (3) The courts shall adjudicate on the admissibility of extradition.

• **Art. 87 (1):** "The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.”

• **Art. 91 (2):** "An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes”

• **Art. 91(3):** "If an 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.”

• Under Articles 8 and 87(1), the Constitution is **superior with regard to ratified international treaties.** The Constitution is the absolutely supreme law of the Republic and has priority over international law and EC law

• Polish statutes are superior with regard to non-ratified international treaties (e.g. governmental agreements)

• EC regulations are applied directly

• EC regulations have priority over Polish statutes

• The EC treaty has priority over Polish statutes