

**Katarzyna Kos<sup>1</sup>**

## **Shaping the Relationship Between the Polish Constitution and European Union Law in the Adjudication of the Constitutional Tribunal<sup>2</sup>**

**Keywords:** constitution, European Union law, Constitutional Tribunal, Constitution, EU-friendly interpretation of the Constitution

**Słowa kluczowe:** konstytucja, prawo Unii Europejskiej, Trybunał Konstytucyjny, pro-unijna wykładnia Konstytucji

### **Abstract**

In the article, the issue of the relationship between the Polish Constitution and European Union law is analysed from the perspective of its shaping in the adjudication of the Constitutional Tribunal. Firstly, the constitutional regulations that define the relationship between the Constitution and EU law will be analysed. This part of the article also includes the issues relating to the legal basis of the most commonly used instrument that shapes this relationship – the EU-friendly interpretation of the Constitution. Secondly, the contexts in which the Constitutional Tribunal refers to EU law are examined. The case study that is undertaken focuses on the instruments that prevent conflicts between EU law and the Constitution, inter alia legislative and interpretative instruments. The application of these methods in recent controversial judgments Ref. no. P 20/07 and Ref. no. K 3/21 concerning the relationship between the Polish Constitution and the EU law will be analysed.

---

<sup>1</sup> ORCID ID: 0000-0002-9256-1600, M.A., Jagiellonian University in Cracow. E-mail: katarzyna.kos@uj.edu.pl.

<sup>2</sup> This paper has been prepared as part of the research project financed by the National Science Centre (Decision no. 2015/18/E/HSS/00353).

**Streszczenie****Kształtowanie relacji między polską Konstytucją a prawem Unii Europejskiej w orzecznictwie Trybunału Konstytucyjnego**

W niniejszym artykule kwestia relacji między polską Konstytucją a prawem Unii Europejskiej jest analizowana z perspektywy ewolucji jej kształtowania w orzecznictwie Trybunału Konstytucyjnego. W pierwszej kolejności przedmiotem analizy są przepisy konstytucyjne definiujące relację między Konstytucją i prawem UE. Ta część artykułu zawiera również rozważania na temat podstaw prawnych najpowszechniej wykorzystywanego instrumentu kształtującego tę relację – prounijnej wykładni Konstytucji. W kolejnych częściach artykułu badane są przypadki, w których Trybunał Konstytucyjny w swoim orzecznictwie odwołuje się do systemu prawa unijnego. Przeprowadzona analiza koncentruje się na instrumentach, które zapobiegają konfliktom między prawem UE i Konstytucją, w tym instrumentom wymuszającym aktywność legislacyjną oraz instrumentom interpretacyjnym. Przedmiotem analizy w artykule jest również ustosunkowanie się do ww. metod w ostatnich kontrowersyjnych orzeczeniach TK o sygn. akt P 20/07 oraz sygn. akt K 3/21 dotyczących relacji między polską Konstytucją i prawem Unii Europejskiej, które zasadniczo zrywają z dotychczasową tendencją orzeczniczą w tym zakresie.

✱

**I.**

Contemporary European constitutions have not been projected as legal acts that require other legal sources to be properly interpreted. On the contrary, these constitutions usually include the so-called supremacy clause which specifically excludes the influence of any other legal act for their interpretation. However, it cannot be denied that international law also impacts on a State's supreme legal order. It would seem, therefore, that the strongest influence comes from European Union (EU) law. The content of the constitutional provisions may change as a consequence of a decision by the EU law-maker or following adjudications by the Court of Justice of the EU (CJEU).

For years the Polish Constitutional Court constructed coherent vision of this relationship. In recent judgments concerning this issue the CT tries to convince that it joins in this adjudication and formulates conclusions which undermine this vision.

In the Art. I will analyse legal basis and adjudication of the CT on the issue of relationship between the Constitution and EU law. I will consider the cases, in which the CT directly or indirectly reviewed the constitutionality of EU law and specified various methods to avoid conflicts between the Constitution and EU law. The application of these methods in recent judgments file ref. no. P 20/07 and file ref. no. K 3/21 concerning the relationship between the Polish Constitution and the EU law will be also analysed.

## II.

The constitutional law-maker has expressed the supreme role of the Constitution but, simultaneously, it underlined the significance of respecting international law. In this part of the article, those provisions of the Constitution that are considered in defining the relationship between EU law and the Constitution will be analysed.

Indicating the legal basis of this interpretational paradigm, in the hitherto mentioned judgement file ref. no. K 18/04, the CT averred that the “Legal consequence of Art. 9 of the Constitution is a constitutional assumption that on the territory of the Republic of Poland, apart from legal norms (provisions) established by the domestic law-maker, there are valid regulations (provisions) created outside the Polish legislature system. Therefore, the constitutional law-maker consciously assumed that the Polish legal system will be multi-componential”. It was also noted that after the Polish accession to the EU, which took place in 2004, the paradigm of the supremacy of the Constitution should have been changed.

However, from the perspective of Polish constitutional law, considerations in the field of the relationship between the Constitution and EU law start from Art. 8 para. 1 of the Constitution. According to this provision, the Constitution is the supreme law of the Republic of Poland. This and any other provision does not stipulate an exception from this principle. It also

has to be clarified here that the Constitution does not refer directly to the EU<sup>3</sup>, so it does not create any exceptions in applying laws established by this organisation. To describe the relationship between the Constitution and EU law, Art. 91 para. 2 and para. 3 of the Constitution are also relevant<sup>4</sup>. These provisions concern the relationship between an international agreement ratified with prior consent granted by statute (in the case of EU law – a primary law) or a law established by an international organisation (in the case of EU law – a secondary law) and other legal sources. Therefore, both of these regulations resolve the conflict between EU law and the Constitution in favour of the Constitution.

On the other hand, constitutional regulations, which are treated as a basis for the directive of the EU-friendly interpretation of the Constitution, need to be considered. The first one is Art. 9 of the Constitution, which states that the Republic of Poland shall respect international law that is binding upon it. Furthermore, legal doctrine indicates Art. 90 of the Constitution needs to be considered, in which a clause is enshrined giving the right to delegate the competence of the organs of any State authority concerning certain matters to an international organisation or international institution.

The above regulations have defined the direction of the reasoning in shaping a dogmatic basis for the relationship between the Constitution and EU law. However, they do not answer the fundamental questions about the basis of the favouritism of the EU from amongst the other international organisations<sup>5</sup>. Further consideration is also required regarding the limits of EU-friendly interpretations of the Constitution.

### III.

The CT refers to EU law in various contexts. In a few CT judgements, the provisions in European legal acts have been subject to constitutional review.

---

<sup>3</sup> However, there were some attempts to anchor the EU law in the Constitution J. Jaskiernia, *Projekt klauzuli integracyjnej do Konstytucji RP*, "Państwo i Prawo" 2011, no. 1, pp. 3–17.

<sup>4</sup> K. Działocha, *Podstawy prounijnej wykładni Konstytucji RP*, "Państwo i Prawo" 2004, no. 11, p. 28.

<sup>5</sup> This favouritism can also be noticed when considering adjudications by the European Court of Human Rights in the interpretation of the Constitution.

Furthermore, the CT sometimes considers the meaning of a legal provision regarding definitions of notions enshrined in EU law. Moreover, the “European factor” is present when it is reconstructed as a standard of protection for rights and freedoms<sup>6</sup>.

Firstly, it should be noted that conflicts between the Constitution and EU law are not commonly identified in the constitutional review process. In the 2005 judgement concerning the compatibility between the Constitution and the 2003 Treaty of Accession, the CT predicted that because of common values and assumptions, this kind of conflict would only occur under exceptional circumstances<sup>7</sup>. It expressed how the supremacy of the Constitution meant that a conflict between the Constitution and EU law could not be resolved by adjudging the primacy of EU law. If the conflict is adjudged, Poland has three solutions: 1) amending the Constitution, 2) instigating amendments to the relevant EU law, and 3) exiting from the EU.

In the case concerning the application of the European Arrest Warrant (EAW) to Polish citizens, the CT adjudged<sup>8</sup> that the Code of Penal Procedure provision, which implemented the Council Framework Decision 2002/584/JHA of June 13, 2002 on the EAW, was inconsistent with Art. 55 para. 1 of the Constitution. The constitutional provision stated that the extradition of a Polish citizen shall be prohibited. Despite the Polish law-maker not using the notion of an ‘extradition’ to implement the EAW, the CT had no doubt that the above-mentioned provision of the Constitution had to be understood extensively. Thus, every type of repatriation of a Polish citizen from abroad was viewed as a form of ‘extradition’ under the Constitution. In the judgement, the CT deferred from cancelling the binding force of this unconstitutional provision by 18 months, which is the maximum time limit according to the Constitution. As the CT claimed, the most important reason for this

---

<sup>6</sup> Apart from the listed contexts, which are important in order to analyse the scope of EU-friendly interpretations of the Polish Constitution, it can also be noted that the constitutional review process in Poland also concerns the constitutional law-maker’s obligation to notify that there is a national legal act involved (CT judgement of March 11, 2015, file ref. no. P 4/14). See M. Laskowska, *Notyfikacja – Konstytucja – Trybunał Konstytucyjny*, [in:] *Skutki braku notyfikacji przepisów technicznych ustawy o grach hazardowych dla wymiaru sprawiedliwości Rzeczypospolitej Polskiej*, ed. M. Taborowski, Warszawa 2016, pp. 263–277.

<sup>7</sup> Judgement of the CT of May 11, 2005, file ref. no. K 18/04.

<sup>8</sup> Judgement of the CT of April 27, 2005, file ref. no. P 1/05.

decision was the necessity of fulfilling a constitutional obligation to observe international law. The CT added that “the institution of the EAW is of major significance also for the proper functioning of the administration of justice in Poland, and above all for the strengthening of internal security”<sup>9</sup>. What is worth noting is that as a consequence of the judgement file ref. no. P 1/05, Art. 55 of the Constitution was amended<sup>10</sup>.

In the above-mentioned case, the intervention of the legislator was necessary because the CT was unable to interpret the constitutional provision in an EU-friendly manner. In Art. 55 of the Constitution, a clear prohibition was enshrined in the text that excluded the claim that a mere change in the notion allowing for the repatriation of Polish citizens from abroad was possible. That is why the EU-friendly interpretation of this provision in this case was a *contra legem* interpretation.

In turn, in recent years there is a clear tendency to use the CT to question some competencies of the EU, thus the number of so-created conflicts have rapidly increased. In the two latest cases (file ref. no. P 20/07 and K 3/21<sup>11</sup>), the CT presented its view on tensions concerning the judicial system in Poland between Polish and EU’s authorities. It considered the European Treaties were partly unconstitutional and in this scope they cannot be applied in Poland. In the judgment file ref. no. P 7/20 it was adjudged that the Court of Justice of European Union acted *ultra vires* imposing obligations concerning the organization of the judiciary.

Albeit especially the judgment file ref. no. K 3/21 is widely commented<sup>12</sup>, its justification has not been published even 6 months after the announcement. In the literature it is indicated that it is unclear whether the

---

<sup>9</sup> Ibidem.

<sup>10</sup> Statute of September 8, 2006 on the amendment of the Constitution (Dz.U. item 1471).

<sup>11</sup> Judgements of the CT of July 14, 2021, file ref. no. P 7/20 and of October 7, 2021, file ref. no. K 3/21.

<sup>12</sup> M. Florczak-Wątor (*Nie*)skuteczność wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21. *Ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego*, “Europejski Przegląd Sądowy” 2021, no. 12, pp. 4–11, W. Wróbel, *Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych*, “Europejski Przegląd Sądowy” 2021, no. 12, pp. 19–26, A. Wyrozumska, *Wyroki Trybunału Konstytucyjnego w sprawach K 3/21 oraz K 6/21 w świetle prawa międzynarodowego*, “Europejski Przegląd Sądowy” 2021, no. 12, pp. 27–38, A. Kustra-Rogatka, *Kontrola konstytucyjności aktu prawa pierwotnego Unii Europejskiej w wyroku*

real subject of control was the state of European integration (legal provisions or reality – state of European integration – which the CT is not legitimate to review)<sup>13</sup>. There are also raised serious objections concerning the improper filling of positions of CT judges, being a formal defect of the judgment<sup>14</sup>.

From the perspective of this article the most important is that the CT did not propose any possibility of resolving the conflict between EU law and the Constitution. It did not refer to well-known possibility from the CT's *acquis communautaire*, as well as it did not offer any other solution. It seems that the assumption of constant conflict between two legal systems cannot be treated as the new legal tool which is useful in shaping the relationship between the Constitution and EU law. Therefore, it is unknown what legal consequence of the judgment was intended by the CT itself.

#### IV.

The CT also disposes of instruments to avoid potential conflicts between the Constitution and EU law.

One of these instruments is anchored in the presumption that EU law ensures the effective protection of fundamental rights at a level that is at least 'equivalent' to that of the Constitution. This presumption was inspired by the rule formulated by the European Court of Human Rights<sup>15</sup>. In the judgement concerning the constitutionality of Regulation EU<sup>16</sup>, the CT ruled that if making a constitutional complaint, the complainant needs to show that the protection of his or her fundamental rights is at a lower level with the EU regulation than that guaranteed by the Constitution. The above-mentioned presumption and this additional condition of the admissibility of a constitu-

---

*Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21, "Europejski Przegląd Sądowy" 2021, no. 11, pp. 4–10.*

<sup>13</sup> M. Florczak-Wątor, op.cit., pp. 6–8.

<sup>14</sup> See e.g. A. Kustra-Rogatka, op.cit., p. 7.

<sup>15</sup> *Bosphorus v. Ireland*, judgement of the ECHR of June 30, 2005, 45036/98.

<sup>16</sup> Judgement of the CT of November 16, 2011, file ref. no. SK 45/09. Provision of Council Regulation (EC) no. 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters was the subject of control.

tional complaint is aimed at avoiding any analysis of the problem of the relationship between the Constitution and EU law.

Another instrument strictly relates to the fact that the CT is granted the right to ask preliminary questions. This instrument has only been used once in the case concerning VAT on e-books<sup>17</sup>, which was higher than the VAT on printed books. The problem was to adjudge whether the regulation enacted by the EU law-maker violated the Constitution. The CT questioned the validity of the provisions of the Directive<sup>18</sup> by claiming that they infringed the principle of equal treatment (Art. 20 of Charter of Fundamental Rights of the European Union). Finally, the CJEU did not share the CT's reservations on the issue<sup>19</sup>. It considered the unequal treatment as 'duly justified'. This statement by the CJEU was in conflict with the CT's view. However, in conjunction with the withdrawal of the application in the proceedings before the CT, the CT did not then analyse the conflict arising from the CJEU's judgement with regard to the Constitution<sup>20</sup>. This is despite the fact that this preliminary question was perhaps a warning sign that, in this case, the CT could not have interpreted the Constitution in an EU-friendly manner.

It is claimed that in the judgment file ref. no. K 3/21, the CT interpreted the Treaty on European Union, noticing that it was not legitimate to do it<sup>21</sup>. In the literature it was presented the view that in this scope the CT shall ask preliminary question<sup>22</sup>. However, it is worth noticing that the CT exactly knew the interpretation of EU law, it tried to dispute adjudication of the CJEU. Therefore, preliminary question seems redundant in this case.

The most common references to EU law in the CT's adjudications concern the interpretation of the constitutional regulations<sup>23</sup>.

<sup>17</sup> See decision of the CT of July 7, 2015, file ref. no. K 61/13.

<sup>18</sup> Art. 98 (2) and point 6 of Annex III to, Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2009/47/EC of May 5, 2009 (OJ 2009 L 116, p. 18).

<sup>19</sup> Judgement of the CJEU of March 7, 2017, C-390/15.

<sup>20</sup> In the decision of May 17, 2017, file ref. no. K 61/13 the CT discontinued the proceedings.

<sup>21</sup> M. Florczak-Wątor, op.cit., p. 9.

<sup>22</sup> A. Kustra-Rogatka, op.cit., p. 9.

<sup>23</sup> S. Biernat, *Wykładnia prawa krajowego zgodnie z prawem Wspólnot Europejskich*, [in:] *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych*, ed. C. Mik, Toruń 1998, p. 123.



The first remarks about the need for a change of methods relating to constitutional interpretation were made in the CT's judgement even before Poland's accession to the EU<sup>24</sup>. Regarding the meaning of the constitutional notion of the "freedom of economic activity", the CT pointed out that "if numerous possibilities of interpretation are possible, the one which is closest to *acquis communautaire* should be chosen". It claimed that the requirement concerning an EU-friendly interpretation of the law also applied to constitutional provisions. Of note, in the judgement file ref. no. K 33/03, the above thesis was not confronted with the principle of the supremacy of the Constitution. Additionally, the CT did not consider whether the Constitution needed some limitations when applying this type of legal interpretation. These issues were most broadly analysed in the judgements file ref. no. K 18/04<sup>25</sup> and file ref. no. K 32/09<sup>26</sup>, which strictly concerned the relationship between Poland and the EU. In these rulings, the CT also indicated the limitations of EU-friendly interpretations of the Constitution. The CT found *contra legem* interpretations of the Constitution and interpretations infringing "constitutional identity" as inadmissible.

The most important and also the most legible aim when using the argument "from the EU law" is to strengthen pro-human rights interpretations of the Constitution. This is one possible explanation as to why the CT uses the definitions of notions from the CJEU's adjudications. For instance, in the case concerning the principles of establishing trade unions<sup>27</sup>, the CT defined the constitutional notion of an "employee" and, further, it quoted the definition formulated by the CJEU. It did not comment on the CJEU's definition and did not explain what was implied from this definition for the constitutional notion of an "employee". However, it is obvious that the definition that was claimed to be derived from the Constitution is nothing more than a generalisation of the CJEU's statement.

The CT's interpretational instruments also allow for the avoidance of a conflict between EU law and the Constitution. Consider the case concerning the relationship between the Treaty establishing the European Commu-

---

<sup>24</sup> Judgement of the CT of April 21, 2004, file ref. no. K 33/03.

<sup>25</sup> Judgement of the CT of May 11, 2005, file ref. no. K 18/04.

<sup>26</sup> Judgement of the CT of November 24, 2010, file ref. no. K 32/09.V.

<sup>27</sup> Judgement of the CT of June 2, 2005, file ref. no. P 1/13.

nity (TEEC) and the constitutional right to vote and the right to stand as a candidate at municipal elections. According to Art. 19 para. 1 of the TEEC, this right was granted to every citizen of the EU residing in a Member State. In turn, Art. 62 para. 1 of the Constitution states that a Polish citizen has the right to vote for organs of local self-government. The applicant argued that the constitutional provision established that an exclusive group of subjects could vote in local elections. The CT decided differently<sup>28</sup>. It ruled that not every “extension” of a constitutional right to other subjects would automatically lead to a violation of the Constitution. It added that Art. 19 of the TEEC realised the principle of equality, and that the consent of EU Member States for the freedom of movement and the freedom of domicile would not have any practical meaning without that particular right being in place. As a consequence, the CT adjudged that Art. 19 para. 1 of the TEEC was consistent with the Constitution.

In the cases file ref. no. P 7/20 and file ref. no. K 3/21 the CT even did not consider the possibility of EU-friendly interpretation. It was widely argued that the interpretation of Treaty on European Union presented by the CJUE infringed the constitutional identity, in which it was axiomatically qualified organization of the judiciary. The doctrine notices that recent judgments of the CT concerning the problem of the relationship between the Constitution and EU law introduce a tendency to treat EU-friendly interpretation as not obligatory<sup>29</sup>.

## V.

To conclude, for years in the CT adjudication there was a strong tendency to avoid conflicts between the Constitution and EU law. The principle of the supremacy of the Constitution has not been treated as an obstacle, thus allowing EU law to influence interpretations of the Constitution. It is assumed that the CT most often refers to EU law to find additional arguments to justify its judgements concerning the compatibility or incompatibility of a provision with the Constitution or even merely to enhance its justifications for its

---

<sup>28</sup> Judgement of the CT of May 11, 2005, file ref. no. K 18/04.

<sup>29</sup> M. Florczak-Wątor, *op.cit.*, p. 6.

judgements. However, the European context being considered when resolving constitutional problems permanently links the understanding of the Constitution with EU law. This tendency was broken by recent judgments of the CT. It was not analyzed the problem of EU-friendly interpretation of the Constitution, which leads to an observation that at present the CT treats it as not obligatory method of interpretation of the Polish Constitution. The concept of constitutional identity, undefined in the judgments, was used to achieve this result. Moreover, in the recent judgments the CT proposed a constant conflict between EU law and the Constitution. It is unknown what legal consequence of this approach was intended by the CT itself, but it cannot be treated as the new legal tool useful in shaping the relationship between the Constitution and EU law.

## Literature

- Biernat S., *Wykładnia prawa krajowego zgodnie z prawem Wspólnot Europejskich*, [in:] *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych*, ed. C. Mik, Toruń 1998.
- Działocha K., *Podstawy prounijnej wykładni Konstytucji RP*, "Państwo i Prawo" 2004 no. 11.
- Florczak-Wątor M. (Nie)skuteczność wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21. *Ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego*, "Europejski Przegląd Sądowy" 2021, no. 12.
- Jaskiernia J., *Projekt klauzuli integracyjnej do Konstytucji RP*, "Państwo i Prawo" 2011 no. 1.
- Kustra-Rogatka A., *Kontrola konstytucyjności aktu prawa pierwotnego Unii Europejskiej w wyroku Trybunału Konstytucyjnego z 7.10.2021 r.*, K 3/21, "Europejski Przegląd Sądowy" 2021, no. 11.
- Laskowska M., *Notyfikacja – Konstytucja – Trybunał Konstytucyjny*, [in:] *Skutki braku notyfikacji przepisów technicznych ustawy o grach hazardowych dla wymiaru sprawiedliwości Rzeczypospolitej Polskiej*, ed. M. Taborowski, Warszawa 2016.
- Wróbel W., *Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych*, "Europejski Przegląd Sądowy" 2021, no. 12.
- Wyrozumska A., *Wyroki Trybunału Konstytucyjnego w sprawach K 3/21 oraz K 6/21 w świetle prawa międzynarodowego*, "Europejski Przegląd Sądowy" 2021, no. 12.