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Counter-limits doctrine in the jurisprudence of the Constitutional Tribunal (until 2015)¹

Abstract

The analysis herein, while mainly descriptive, presents the main foundations of the Constitutional Tribunal's jurisprudence in matters of hierarchical control of the constitutionality of laws concerning the EU. It distinguishes some principles, concepts and constitutional theories which, according to the Constitutional Tribunal, set the limits of European integration. The main thesis of the paper is that, in this context, the basic and decisive rule is the supremacy of the Constitution, which does not have exceptions or limitations. A hypothesis was also formulated that the Solange II maxim does not reflect the actual state of European constitutionalism, in which the level of protection of fundamental rights is significantly increased while possible collisions between the level of protection of fundamental rights in the EU and the Member States should be solved by means of the clauses provided in Articles 51–54 of the EU Charter of Fundamental Rights.

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I. General notes

The objective of this paper is to briefly present the constitutional limits of European integration resulting from the provisions of the Constitution of the Republic of Poland and their interpretation by the Constitutional Tribunal. These limits are then conceptualized as an institution of constitutional law functionally equivalent to the institution of *controlimiti* developed in the case-law of the Italian Corte Costituzionale².

One common feature of these two institutions is to define the basic principles of the constitutional order, which defines the limits of transferring state sovereignty in the process of European integration. While in the case-law of the Corte Costituzionale these boundaries have been understood uniformly and consistently throughout the entire history of this doctrine as the basic, highest principles of the constitutional order and inviolable personal rights, the Polish Constitutional Tribunal sets these boundaries much more broadly (see below).

These differences are particularly justified by the fact that the Italian constitution does not include provisions which amount to integration standards or limitations, and therefore *controlimiti* is of an unwritten, strictly judicial nature, but is ultimately equipped with a constitutional rank resulting from active reinterpretation, especially of Article 11 of the Italian constitution³. Meanwhile, the Constitution of the Republic of Poland, which has no reference to the European Union or European Union law, contains provisions regarding international organization and international law, interpreted by the Constitutional Tribunal as referring directly to Poland's membership in the EU and to the relationship between EU law and Polish law, which obviously enriches the Polish doctrine of counter-limits with other, specific and defined constitutional principles and values (see below).

II. The constitutional foundations of the counter-limits doctrine

At the outset, we should point out that unlike the majority of the constitutions of EU Member States, the Constitution of the Republic of Poland does not use the terms 'European Union', 'EU law' or 'European integration'. Constitutional issues related to Poland being a Member State of the European Union – such as

² Cf. P. Faraguna, *Ai confini della Costituzione. Principi supremi e identità costituzionale*, Milano 2015; *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, ed. A. Bernardi, Napoli 2017.

³ A. Kustra, *Evolucja wykładni art. 11 Konstytucji Włoch z 1947 r. w orzecznictwie Sądu Konstytucyjnego*, 'Europejski Przegląd Sądowy' 2008, No. 9, p. 58–62.

the procedure and scope of transfer of 'some' competences, the constitutional status of the European Union and EU law in the Polish legal and constitutional jurisprudence of Polish courts and the Constitutional Tribunal with respect to EU law – are settled and analyzed based on and in the context of the constitutional norms that refer to international organizations and international law. Such provisions include norms referred to in the doctrine as integration standards⁴, namely Article 90 of the Constitution (defining the procedure for delegating the competences of an international organization) and Article 91 thereof (regulating the constitutional status of international law in the Polish juridical order, including the principle of this law's primacy over other laws and the principle of the direct application of international law in the Polish juridical order). Thus, there is no doubt that such standards also include Article 9 of the Constitution, which states the obligation of the Republic of Poland to comply with binding international treaties.

The Constitution lacks provisions which directly concern the European Union and EU law, but this does not mean that the issue of European integration is not a fundamental constitutional matter. Both the doctrine and judicial opinions recognize unanimously and unambiguously that said constitutional norms concern this issue because, firstly, the term 'international organization' used therein (Articles 90 and 91) also includes transnational organizations such as the European Union and, secondly, European Union treaty law falls within the scope of the term '(ratified, binding) international agreement' (Articles 9, 90 and 91) and EU derivation law qualifies as a 'law established by an international organization' (Article 91(3))⁵ As a result, the aforementioned constitutional norms referring *expressis verbis* to international agreements and international organizations constitute a normative basis for the formation of two constitutional standards, namely the standard on traditional international treaties and international organizations – such as the UN – and the EU standard concerning transnational law and supranational organizations that exemplify EU law and the European Union. This does not mean, however, that classical rules for the interpretation and application of international law apply to the European Union and EU law since both the doctrine and judicial opinions recognize and acknowledge specific, constitutive features or properties of the EU juridical order, which differentiate them from international law, such as the effectiveness, direct effect or primacy of EU law.

⁴ A. Kustra, *Przepisy i normy integracyjne w konstytucjach wybranych państw członkowskich UE*, Toruń 2009.

⁵ Cf. the judgment of the Constitutional Tribunal in Case K 24/04: 'the constitutional status of law established by the European Union bodies is similar to the status of standards included in ratified international agreements, referred to in Article 91 of the Constitution'.

However, the above provisions are not applied and interpreted by the Constitutional Tribunal in isolation from other provisions of the Constitution, especially when it comes to settling conflicts between EU law and Polish law or between the competences of European tribunals and the competences of the Constitutional Tribunal. The provision of Article 8 stating the absolute superiority and primacy of the Constitution to legal provisions in force on the territory of the Republic of Poland is a prime example – one of many – whose significance may be greater or lesser, depending on the context, such as the principle of democracy and the principle of sovereignty (Article 5), the principle of democratic law (Article 2), the principle of the unitary character of the state (Article 3) and the competences of the Constitutional Tribunal (Articles 188–197). The application of these provisions by the Constitutional Tribunal is characterized by the fact that in the argumentative layer they are used mainly if not exclusively either to indicate the limits of European integration in an institutional sense or to define the limits of ‘influence’ of EU law on the Polish constitutional juridical order, especially regarding the supremacy of EU law over Polish law.

The counter-limits doctrine of the Constitutional Tribunal is therefore based on two groups of provisions of the Constitution of the Republic of Poland. The first group includes the provisions of the Constitution referring directly to international law and international organizations, reinterpreted by the Constitutional Tribunal as also regulating the character and place of EU law and the European Union in the Polish constitutional jurisdiction (integration standards), while the other group comprises those which are not strictly integrative/limitative but are used by the Constitutional Tribunal to set the boundaries of European integration, especially including the impact of EU law on the Polish constitutional juridical order (non-integrative norms).

III. The limits of transferring competences of the Republic of Poland to the European Union

The issue of transferring the competences of the Republic of Poland to the EU as a special type of international organization of a supranational character is regulated by Article 90 of the Constitution. The procedure of transferring competences and their scope and boundaries poses significant constitutional problems. Article 90 provides that the transfer may take place in the following circumstances: 1) under international treaty, 2) the law approving the ratification of such an international agreement is adopted by a qualified majority in the parliament, 3) consent to the ratification of this agreement may be adopted by a nationwide referendum, 4) the Sejm [Polish lower house of Parliament] shall decide the choice of the mode of ratification or ratification referendum.

As the Constitutional Tribunal emphasized in Paragraph 3.2 of judgment K 18/04 of May 11, 2005, (judgment on the Treaty of Accession), ‘Ratification of such an agreement is made in a manner with clearly stricter requirements than the ratification of other agreements, made with the prior consent of the Sejm and the Senate expressed in the law. Said stricture consists of raising the threshold of the necessary majority in the Sejm and the Senate from the standard (relative) majority to a majority of two-thirds of the votes in both the Sejm and the Senate, or alternatively, (by a relevant resolution in the Sejm adopted by an absolute majority), on authorization for ratification, granted in the form of a nationwide binding referendum’. In the opinion of the Constitutional Tribunal, ‘the Polish constitutional legislative body, aware of the significance of agreements on delegating the exercise of the competences of public authority bodies in ‘certain matters’ to an international organization or international body ... introduces important safeguards against a transfer of competences which is too easy or is insufficiently legitimized outside the system of state authorities of the Republic of Poland. Said safeguards apply to all transfers of competences to the bodies of the Communities and the European Union’ (Paragraph 3.3 of judgment K 18/04)⁶.

While procedural problems related to the transfer of competences of the European Union do not raise any special objections or disputes⁷, the Constitution does not specify the scope of said transfer; it only provides that the Republic of Poland may delegate ‘the powers of state authorities in certain matters’, so the problem of a constitutionally acceptable scope of cases that may be transferred to the EU remains disputable. The jurisprudence of the Constitutional Tribunal shows that the spirit of the constitutional definition of ‘competences of state authorities in certain cases’ results in several limitations: firstly, the ‘prohibition of transfer of all competences of a given authority, transfer of competences in all matters in a given area, as well as a prohibition of transferring competence regarding the substance of cases defining the authority of a given state authority’ (K 18/04, Point 4.1); secondly, integration standards (Articles 90 and 91) ‘cannot give rise to the transfer to an international organization (or its authority) authorization to legislate or make decisions that would be contrary to the Constitution of the Republic of Poland’ and ‘cannot be used to transfer

⁶ For a broader view on the constitutional forms and conditions for the ratification of an international agreement, see the Constitutional Tribunal judgment in Case 33/12; 2; J. Kranz, A. Wyrozumska, *Powierzenie Unii Europejskiej niektórych kompetencji a traktat fiskalny*, ‘Państwo i Prawo’ 2012, No. 7, pp. 20–36.

⁷ However, for the political dispute over the mode of ratification of the Treaty of Accession with Croatia or the procedure for ratifying the so-called fiscal pact, e.g., M. Dobrowolski, *W sprawie trybu ratyfikacji przez Rzeczpospolitą Polską traktatu fiskalnego*, ‘Państwo i Prawo’ 2013, No. 6, pp. 41–57.

competences to the extent that would cause the Republic of Poland to cease to function as a sovereign and democratic state' (K 18/04; Point 4.5); thirdly, 'the subject of the transfer retains the trait of staying 'compliant with the Constitution' [treated integrally, together with the Preamble] as the 'highest law of the Republic' and the possible change ... of the subject of the transfer (transferred competences) requires compliance with the rigors of amending the Constitution specified in Article 235 of this law, i.e., respecting the norms of the Constitution as 'the supreme law of the Republic of Poland' (K 18/04, Point 84); fourthly, 'it is necessary ... to define the areas as precisely as possible and to indicate the scope of competences covered by the transfer' (K 18/04, Point 4.1; K 32/09, Point 2.5; K 33/12 6.3.2); fifthly: 'in the sphere of competences transferred, states relinquished the authority to take autonomous legislative action in internal and international relations, which does not lead to a permanent limitation of the sovereign rights of these states, because the transfer of competences is not irreversible and the relations between exclusive and competitive competences are of a dynamic nature' (judgment of the Constitutional Tribunal of November 24, 2010, K 32/09); sixthly, the Constitutional Tribunal shares the view expressed in the doctrine that 'constitutional identity is a concept that defines the scope of 'exclusion from the power to transfer the matter being part of ... the 'hard core'', which is essential for the foundations of the state system' (K 32/09, Point 2.1; K 33/12, Point 6.3.3); and seventhly, the Constitutional Tribunal is competent to assess the compliance of the scope and procedure of transferring competences with the Constitution, while 'the assessment of constitutionality may concern both the law itself (its contents) and the activities used to introduce this agreement into the Polish juridical order. The latter activities include various forms of consent to ratification' (K 18/04 Point 1.3).

The doctrine emphasizes that although the Constitution of the Republic of Poland does not contain inflexible provisions, such as Article 79 Paragraph 3 GG, the above-mentioned thesis of the Constitutional Tribunal's judgments clearly show that the transfer cannot lead to 'a loss of sovereignty, the establishment of a federal state in the EU, the disappearance of any of the constitutional state bodies or the deprivation of all constitutional powers guaranteed thereto'⁸ nor to a loss of constitutional or national identity⁹.

⁸ A. Kustra, *Przepisy i normy integracyjne...*, p. 75.

⁹ K. Wójtowicz, *Zachowanie tożsamości konstytucyjnej państwa polskiego w ramach UE – uwagi na tle wyroku TK z 24.11.2010 r.*, 'Europejski Przegląd Sądowy' 2011, No. 11, pp. 4–11.

IV. The Constitutional status of EU law in the juridical order of the Republic of Poland versus the principle of the supremacy of the Constitution (Article 8)

The problem of the place of EU law in the Polish legal system and mutual relations between EU law and Polish law were fully presented in the justification of the judgment of the Constitutional Tribunal regarding the Treaty of Accession. In this judgment, the Tribunal used three assumptions, namely the concept of the ‘multicomponent legal system’ applicable in the Republic of Poland, the principle of the autonomy of the ‘components’ of this system and the principle of the uniformity of the legal system. The special focus of the Constitutional Tribunal accepted that ‘the legal consequence of Article 9 of the Constitution is the constitutional assumption that in the Republic of Poland, apart from the norms (regulations) established by the national legislator, regulations (provisions) are also in force which were created outside the system of national (Polish) legislative bodies. Consequently, the constitutional legislator consciously accepted that the legal system in force in the Republic of Poland would be that of a multicomponent nature. In addition to legal acts laid down by national (Polish) legislative bodies, acts of international law also apply and are applied in Poland’ (K 18/04, Point 2.2). The Constitutional Tribunal further assumed that ‘Community law is not a fully external right applicable to the Polish state. In the part constituting the treaty law, it arises through the acceptance of treaties concluded by all Member States (including the Republic of Poland). However, in the part constituting a Community constitution (derivative) law, it is created with the participation of representatives of the governments of the Member States (including Poland), in the Council of the European Union and representatives of European citizens (including Polish citizens) in the European Parliament’.

The Constitution, following the regulations in Article 9, Article 87, Paragraph 1 and in Articles 90–91, recognizes this multicomponent structure of regulations in force in the Republic of Poland and provides for a special mode of implementation for it. Finally, the Constitutional Tribunal declares an important and completely correct view that ‘the constitutional Polish legislature stands on the uniformity of the legal system regardless of whether or not this system’s laws are the result of the action of the national legislature or were established as international regulations (of a different scope and nature) covered by the constitutional catalog of sources of law’. To a certain extent, this fundamental thesis dissents with the view that ‘the very concept and model of European law has created a new situation in which autonomous legal orders are applicable side by side. Their interaction cannot be fully described with the traditional concepts of monism and dualism in the system of internal–international law’ (K 18/04, Point 6.3). As a result, the position of the Constitutional Tribunal

regarding the place of EU law in the Polish legal order is ambiguous and inconsistent because it oscillates between soft monism – personalized in the concept of a multicomponent, but uniform Polish juridical order – and a soft duality based on the specific autonomy of both juridical orders¹⁰. This ambiguous position of the Constitutional Tribunal regarding the place of EU law in the Polish constitutional order was accepted in later jurisprudence¹¹. The Tribunal also accepted that ‘in the Republic of Poland, apart from the norms (regulations) laid down by the national legislature, regulations (provisions) are in force outside the system of national (Polish) government bodies’ (Point 2.1). In this judgment, the Constitutional Tribunal also stated – recalling the judgment on the Treaty of Accession – that ‘subsystems of legal regulations originating from various legislative centers should coexist on the basis of a mutually friendly interpretation and cooperative co-application. Any contradictions should be eliminated by applying an interpretation that respects the relative autonomy of European law and national law. This interpretation should also be based on the assumption of mutual loyalty between the EU institutions and the Member States’ (Point 2.6).

The Constitutional Tribunal points to the possibility of conflicts between these (autonomous) systems, especially ‘if there were an irremovable contradiction between the norm of the Constitution and the norm of Community law, being a contradiction which cannot be eliminated by applying an interpretation that respects the relative autonomy of European law and national law’ (K 18/04 Point 6.3). According to the Constitutional Tribunal, ‘this contradiction cannot be solved in any way in the Polish legal system by the recognition of the supremacy of the Community norm over the constitutional norm. Nor could it lead to the loss of the binding force of a constitutional norm and replace it with a Community norm or to limit the scope of application of that norm to an area which was not covered by the regulation of Community law’ (K 18/04 Point 6.4). This categorical statement leaves no doubt that the Constitutional Tribunal holds the

¹⁰ Cf. the monistic approach represented as part of Constitutional Tribunal judgment K 24/04, which states that ‘European Union law becomes, together with the progressive integration process, an ever more significant – in terms of quantity and quality – segment of law applicable in each Member State. Cf. as well that even in the spheres regulated by European Union law, the Constitution still remains ... ‘the highest law of the Republic of Poland’. Cf. Judgments of April 27, 2015, File Ref. Nos. P 1/05, OTK ZU No. 4/A/2005, item 42; May 11, 2005, K 18/04, OTK ZU No. 5/A/2005, item 49; and November 29, 2010, File Ref. No. K 32/09, OTK ZU No. 9/A/2010, item 108.

¹¹ Cf. especially the judgment on the Treaty of Lisbon and the judgment in Case SK 45/09, which summarized the current position of the Tribunal on the matter as follows: ‘today, the juridical order in Europe is – for EU Member States – a multicomponent order that includes treaty norms and was established by the EU institutions and norms in the national order. It is also a dynamic system: the relationship between the EU and national orders is subject to evolution along with changes in EU law’ (Point 2.1).

primacy of the Constitution over the primacy of Community law. The Tribunal justified this by stating that ‘norms of the Constitution in the area of individual rights and freedoms set a minimum and impassable threshold, which cannot be reduced or challenged as a result of the introduction of Community regulations’. In this respect, from the point of view of protection of the rights and freedoms explicitly defined in it, the Constitution plays its role as a guarantor in relation to all active entities in the sphere of its application. The ‘European-law-friendly’ interpretation has its limits. Under no circumstances can it lead to results which contradict the clear wording of constitutional norms and impossible agreement for the minimum guarantees provided for by the Constitution. Thus, the Constitutional Tribunal does not recognize the possibility of challenging the binding force of a constitutional norm by the mere fact of introducing a contradictory Community regulation into the system of European law.

In judgment SK 18/04, the Constitutional Tribunal emphasized the primacy of the Constitution in relation to the primacy of Community law, stating that ‘the principle of the primacy of Community law over national law is strongly exposed by the case-law of the Court of Justice of the European Communities’. This state of affairs is justified by the objectives of European integration and the need to create a common European legal space. This principle is undoubtedly an expression of striving to guarantee the uniform application and enforcement of European law. However, on an exclusive basis, it does not determine the final decisions taken by sovereign Member States in the conditions of a hypothetical clash between the Community juridical order and constitutional regulation. In the Polish legal system, decisions of this type should always be made taking into account the content of Article 8 Paragraph 1 of the Constitution, which states that the Constitution remains the highest law of the Republic (Point 7).

Summing up the significance of the Constitution of the Republic of Poland in the juridical order in force after accession, the Constitutional Tribunal stated, ‘the supremacy of the Constitution over the entire juridical order in the matter of sovereignty of the Republic of Poland manifests itself in several areas. Firstly, the European integration process related to the transfer of competences in some cases to Community (EU) authorities is lodged in the Constitution of the Republic of Poland. The mechanism of Poland’s accession to the European Union finds a clear legal basis in constitutional rules. The validity and effectiveness of this mechanism depends on the fulfillment of the constitutional elements of the integration procedure, including the procedure for delegating competences. Secondly, the supremacy of the Constitution is confirmed by the constitutionally determined mechanism of constitutional review of the Treaty of Accession and acts constituting its integral components. This mechanism was based on the same principles upon which the Constitutional Tribunal may adjudicate on the conformity of ratified international treaties to the Constitution. In

this situation, other acts of the primary Community and the European Union annexed to the Treaty of Accession are also subject to oversight, albeit indirectly. Thirdly, the provisions [norms] of the Constitution as an overriding act that expresses the sovereign will of the nation cannot lose their binding force or be changed by the very fact of an irremovable contradiction developing between certain provisions [Community acts and the Constitution]. In such a situation, the sovereign Polish constitutional legislature retains the right to decide independently how to resolve this contradiction, including the desirability of a possible amendment to the Constitution itself' (Point 7).

The position of the Constitutional Tribunal on the conflict between the exceptional and absolute EU principle of the primacy of EU law over national law – including the Constitution – resulting from Article 8 of the Constitution, which includes the principle of the Constitution's supremacy in Poland, is definitely monistic and corresponds to the principle of uniformity and multi-constitutionality of Polish law. The supremacy of the Constitution of the Republic of Poland over EU law (primary and secondary) is both absolute – in the sense that it does not suffer any restrictions – and unlimited, in the sense that it concerns both treaty law and secondary law. Although the Constitutional Tribunal refers to constitutional guarantees concerning civil rights and freedoms, it does not limit the impact of the principle of Constitutional supremacy on EU law to only these provisions of the Constitution, but it extends this principle to every case of explicit contradiction between EU law and other provisions of the Constitution. As a result, the EU principle of the primacy of EU law meets a strict boundary in the principle of the supremacy of the Constitution. Moreover, it does not seem that the interpretation of the Constitution (constitutional models) made by the Constitutional Tribunal in accordance with EU law fulfills the functions of the conflict of law rule, i.e., the directive which settles the contradictions between EU law and the Constitution, because this contradiction only reveals itself as a result of the interpretation process. From the jurisprudence of the Constitutional Tribunal, it seems that the only such rule without any exceptions or limitations is the constitutional principle of the supremacy of the Constitution (Article 8).

V. Principles, institutions, concepts and constitutional theories as determinants of the borders of European integration

In its jurisprudence, the Constitutional Tribunal refers to several principles, legal institutions, constitutional concepts and theories, which in its opinion define the boundaries of European integration in the procedural and institutional sense

(transfer of competences to the EU) and in the substantive sense (maintaining the balance between the subjectivity of the EU and the subjectivity of EU Member States). Some of them are used as a constitutional argument for the maintenance of the Tribunal's competence in the oversight of the constitutionality of EU law. These especially include the principle of sovereignty, the principle of the protection of fundamental rights, the principle of the protection of constitutional/national identity and the principle of supremacy of the Constitution (see above, Point III).

1. Sovereignty

The basic argument of the Tribunal, often used to justify and define the constitutional limitations of European integration, is undoubtedly the argument of the sovereignty of the state¹². The most developed concept of state sovereignty in terms of Poland's integration with the EU was presented by the Tribunal in the judgment of Case K 32/09 (ratification of the Treaty of Lisbon). The starting point is the conviction that the concept of sovereignty is subject to evolution as a result of both the processes of the democratization of modern states protecting human rights and international law, globalization and European integration. In the Court's opinion, 'Sovereignty is no longer perceived as an unlimited possibility of influence on other states or as an expression of power not subject to external influences; on the contrary, the freedom of state actions is subject to international legal restrictions. At the same time, however, from the point of view of the contemporary Polish doctrine of international law, sovereignty is an inherent feature of the state that allows us to distinguish it from other entities of international law. The attributes of sovereignty include: exclusive jurisdictional jurisdiction over a state's own territory and citizens, exercising foreign policy competences, deciding about war and peace, the freedom to recognize states and governments, establishing diplomatic relations, deciding on military alliances and membership in international organizations and conducting independent financial, budgetary and fiscal policies'. Referring these considerations to European integration, the Tribunal emphasized that 'in terms of competences transferred, states relinquished the powers to take autonomous legislative action in internal and international relations, but this does not lead to a permanent limitation of the sovereign rights of these states because the transfer of competences is not irreversible; relationships between exclusive and competitive competences are dynamic. Member States have only accepted the obligation to jointly perform state functions in the cooperation areas and as long as they maintain their full capacity to determine the forms of state functions, coexistent

¹² *Sovereignty and trans-nationality vs. European integration*, ed. J. Kranz, Warsaw 2006.

with the competence to ‘determine their own competences’, they will remain sovereign entities in the view of international law. There are complicated processes of interdependencies between the Member States of the European Union connected with entrusting the Union with some of the competences of organs of state authority. However, these states remain subjects of the integration process; they retain the ‘competence of competences’ while the form of international organization remains the model of European integration’.

Moreover, according to the Constitutional Tribunal, ‘incurring international obligations and exercising them does not lead to the loss or limitation of the state’s sovereignty, but is a confirmation of it, and belonging to European structures is not in fact a limitation of state sovereignty, but an expression of it. In order to assess the state of Poland’s sovereignty after joining the European Union, the resulting decisive importance is to create the basis for membership in the Constitution as an act of the sovereign power of the nation. The basis for membership in the European Union is, moreover, an international treaty ratified in accordance with constitutional rules with consent granted via a nationwide referendum. In Article 90, the Constitution allows the transfer of competences of state authorities only in certain cases, which in the light of Polish constitutional jurisprudence means a ban on the transfer of all competences of a given authority, the transfer of competences in all matters in a given area and the transfer of competence regarding the essence of matters determining the authority’s authority; a possible change of the mode and subject of the transfer requires compliance with the rigors of changing the Constitution’ (Point 2.1).

As a result, ‘accession to the European Union is perceived as a kind of limitation of the sovereignty of the state, which, however, does not mean abolishing it and is related to the compensating effect manifested as the possibility of shaping decisions taken in the European Union. ... Member States of the European Union retain sovereignty due to the fact that their constitutions, which are an expression of state sovereignty, retain their meaning’. Referring to the normative content of Article 4 of the Treaty on European Union (TEU), the Tribunal emphasized that ‘the interpretation of treaty provisions aimed at the abolition of state sovereignty or the or threats against national identity or taking over sovereignty of non-transferred powers beyond its limits, would be contrary to the Treaty of Lisbon. The treaty clearly confirms the importance of the principle of preserving sovereignty in the process of European integration, which is fully aligned with the determinants of the European integration culture formulated in the Constitution’ (Point 2.2).

2. Fundamental rights and civil liberties

The argument derived from the protection of fundamental rights is relatively rarely cited in the justifications of the judgments of the Constitutional Tribunal regarding European integration.

In the judgment on the Treaty of Accession (K 18/04), the Tribunal only emphasized that ‘the Constitution of the Republic of Poland and Community law are based on the same set of common values that set the nature of a democratic state under the rule of law and the catalog and content of fundamental rights. ... The consequence of the legal system axiology common to all countries is also the fact that the rights guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms and those resulting from the constitutional traditions common to the Member States form – pursuant to Article 6 Paragraph 2 of the TEU – the general principles of Community law This circumstance significantly facilitates the use and mutually friendly interpretation of national and Community law’ (Point 8.3).

However, the broader argument, based on the Solange II case-law reasoning, was presented by the Constitutional Tribunal in its judgment in Case SK 45/09. Right at the beginning, the Tribunal assessed the current legal status of the protection of fundamental rights in the EU, stressing the high priority of this protection both in EU law, confirmed by the Charter of Fundamental Rights, and in the constitutional order of the Member States. According to the Tribunal, the above ‘determines the substantial axiological convergence of Polish and EU law’. However, this does not mean ‘identical legal solutions in both juridical orders’ (Point 2.10). Next, in order to determine the future method of overseeing the compliance of EU law (treaty and secondary law) with the Constitution, the Tribunal presented the essential elements of the FTK case-law in matters of Solange II and the ECtHR in the Bosphorus case-law, consequently assuming that ‘there are premises for adopting a similar approach in overseeing the constitutionality of EU law in Poland’ (Point 8.4). This approach, based in part on the presumption of the conformity of EU law to the Constitution, has – according to the Tribunal – important procedural consequences. ‘In the event of lodging a constitutional complaint in which the conformity of a derivative act under the Constitution is challenged, the fulfillment of this obligation becomes eligible. The petitioner should then be required to indicate what constitutes a violation of his freedoms or rights, i.e., by presenting arguments for substantive non-compliance of the provisions forming the subject of the complaint with the provisions of the Constitution, while also duly substantiating that the contested act of derived EU law significantly reduces the level of protection of rights and freedoms compared to the one guaranteed by the Constitution. This credibility is

a necessary component of the requirement to accurately demonstrate the manner of violation of freedoms or rights' (Point 8.5).

3. Constitutional identity, national identity and the identity of the state

In the judgment on the Treaty of Lisbon, the Constitutional Tribunal referred to the category of constitutional identity or national identity as a normative concept which limits the scope of transfer of EU competences and as a constitutive element of the principle of state sovereignty. Moreover, the Constitutional Tribunal recognizes that the equivalent of the concept of constitutional identity in European primary law is the concept of national identity. In the first sentence of Article 4 (2) of the Treaty of Lisbon, the first sentence referring to the European Union states that 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional ...'. Constitutional identity is closely related to the concept of national identity, which also includes tradition and culture' (Point 2.1). Referring to the views of the doctrine, the Constitutional Tribunal stated that competences covered by the prohibition of transfer constitute constitutional identity and thus reflect the values on which The Constitution is based. Constitutional identity is therefore a concept which defines the scope of 'exclusion from the power to transfer the matter belonging ... to the «hard core», cardinal for the foundations of the system ..., the transfer of which would not be possible under Article 90 of the Constitution'. However, the Tribunal did not specify the nature and significance of the relationship of the constitutional identity, national identity and state identity.

Meanwhile, the meaning of the term 'national identity' as construed in Article 4 Paragraph 2 is controversial¹³ because it is unclear, firstly, whether national identity is a cultural phenomenon that needs to be defined by referring to a cultural, historical or linguistic context, or whether it is a legal concept that can be meaningfully defined in the context of the constitutional order of an EU Member State; and secondly, whether the term 'national identity' is a concept of EU law which requires an autonomous interpretation by the Court of Justice (CJ) or a 'common' concept of both juridical orders – the meaning of which must be jointly defined by the Constitutional Courts of the Member States – or

¹³ *National Constitutional Identity and European Integration*, eds. A.S. Arnaiz, C.A. Llivina, Cambridge-Antwerp-Portland 2013; *Constitutional Identity in the Age of Global Migration*, eds. J. Bats, L. Orgad, 'German Law Journal' 2017, vol. 18, No. 7, pp. 1587–1822; M. Balczyk, *Polski i niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej*, Wrocław 2017, M. Polzin, *Verfassungsidetität. Ein normatives Konzept des Grundgesetzes?*, Tübingen 2018.

whether it is a term that can only be interpreted by constitutional tribunals of the Member States.

According to Article 4 Paragraph 2 TEU, the national identity of the Member States is inextricably linked to their political and constitutional structures, which means, firstly, that national identity is defined in reference to the (basic) political and constitutional structures of the Member States – or, in other words, the content constituting the national identity is determined by referring to the national constitutional order¹⁴, thus excluding the wider context of culture, heritage, tradition, ethnicity, language or history, unless the constitutional order is treated as a cultural category¹⁵ – and secondly, that the term ‘national identity’ is not an EU law subject to the autonomous interpretation of the CJ, but is a common concept for the two legal systems, – the EU and the Member State – whose importance will be determined jointly by the CJ and Constitutional Tribunals of the Member States. Given that constitutional tribunals use the formula of national identity to determine the constitutional limitations on the transfer of competences to the EU and the scope of application of the primacy of EU law, including the justification of its jurisdiction to assess the constitutionality of EU derivative law, it is not difficult to see that this formula can generate conflicts over competences and jurisdiction, especially since the CJ seems to continue to adhere to the principle of the absolute primacy of EU law, while constitutional tribunals adhere to either an absolute principle of the supremacy of their Constitution – as with the Polish Constitutional Tribunal – or non-absolute, as with the Italian Corte Costituzionale.

It is clear from the case-law practice so far that both the Constitutional Tribunals of the Member States, albeit to a lesser extent and from a different perspective, point to these constitutional values, principles, laws, institutions and procedures that form the nucleus of national identity. The Constitutional Tribunals of the Member States seem to share a common understanding of national identity, which, in their opinion, requires the protection and respect of the ‘statehood of the Member States as such, the protection of the form of government and fundamental principles of the state system (e.g., federalism, regional and municipal government), the protection of democracy, the state’s rights and the essence of fundamental rights¹⁶’. According to the Constitutional Tribunal, ‘irrespective of the difficulties associated with establishing a detailed catalog of non-transferable competences, it is necessary to include in the matter of a total prohibition of these competences provisions which define the principles

¹⁴ A. von Bogdandy, S. Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, ‘Common Market Law Review’ 2011, vol. 48, Issue 5, p. 1429.

¹⁵ P. Häberle, *Europäische Verfassungslehre*, Baden-Baden 2011.

¹⁶ A. von Bogdandy, S. Schill, *Overcoming absolute primacy...*, p. 1439–1440.

of the Constitution and provisions regarding the rights of the individual that determine the identity of the state, including in particular the requirement of the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the rule of law, the principle of social justice, the principle of subsidiarity, the requirement to ensure better implementation of constitutional values, the prohibition of transferring authority and the competence to create competences' (judgment on the Treaty of Lisbon). There is no doubt here that the wider the constitutionally defined scope of the concept of 'national/constitutional identity', the wider the range of possibilities to contest the absolute principle of the primacy of EU law, to justify the absolute supremacy of the constitution against EU law or to limit the scope of competences transferred to the Union 'in some cases' – all the more so when the catalog of the elements of this identity is broad and open, as in the aforementioned judgment of the Constitutional Tribunal regarding the Treaty of Lisbon.

The provision of Article 4 Paragraph 2 TEU requires the European Union to respect national identity. That provision cannot be used to formulate either the absolute primacy of the constitutional values and principles that comprise the national identities of the Member States or the recognition by the Member States of the absolute primacy of EU law. This provision is intended to prevent disproportionate intrusion of EU law into domains covered by national identity¹⁷. As a result, the EU, as part of the obligation to respect the national identities of the Member States, should first of all identify and define those components of national identity that may be relevant to specific EU activities in the implementation of Treaty tasks; secondly, should consider these components when determining the structure and objectives of these measures; and thirdly, out of the effective means of implementing these tasks apply those that least restrict the national identity of the Member States.

4. Democracy and a democratic state of law

The Tribunal refers to the concept of a democratic state, the principle of democracy or a democratic state of law primarily as a limit on the transfer of competences for the benefit of the Union. For example, in a judgment on the Treaty of Accession, the CT stated that 'neither Article 90 Paragraph 1, nor Article 91 Paragraph 3 may constitute the basis for the transfer to an international organization (or its authority) of the authorization to legislate or to make decisions that would be contrary to the Constitution of the Republic of Poland. In particular, the normalization indicated herein cannot be used to transfer any competences that would result in the Republic of Poland ceasing to function as a sovereign

¹⁷ *Ibid.*, p. 1440.

and democratic state'. Furthermore, according to the Tribunal, the principle of democracy is one of the basic common values which constitute the basis for the Constitution and EU law (ruling on the Treaty of Accession), while acknowledging that 'the principle of a democratic rule of law remains, as its very name suggests, a rule referring to the functioning of states, while not necessarily to international organizations' (Treaty of Accession). In the opinion of the Tribunal, democracy is 'an expression of the principle of sovereignty' (Treaty of Lisbon) and one of the fundamental elements of state/constitutional/national identity, and is therefore a component of the hard core of matters which cannot be transferred to the Union (Treaty of Lisbon). As assessed by the CT, the process of European integration 'essentially' corresponds to 'both the standards of constitutionality and the requirements related to the democratic legitimacy of such activities' (Treaty of Lisbon). 'The boundary of competence transfer is also axiologically determined in the sense that the Republic and the 'organization' or 'organ' to which the competences have been transferred must combine 'a common system of universal values, such as a democratic system and respect for human rights' (Treaty of Lisbon). The Constitutional Tribunal also sees restrictions on the democratic legitimacy of the European Union, stating that 'the Treaty of Lisbon contains provisions to strengthen the position of national parliaments as the basis for strengthening the democratic legitimacy of the Union'. This aspiration was expressed in Article 12 of the Treaty on European Union, according to which national parliaments 'actively contribute to the proper functioning of the Union' by a) receiving from the Union institutional information and drafts of EU legislative acts, (b) upholding respect for the principle of subsidiarity, (c) taking part in the mechanisms for assessing the implementation of Union policies within the areas of freedom, security and justice, and by engaging in the political control of Europol and assessing the activities of Eurojust, d) participating in the procedures for amending the Treaties, (e) receiving information on applications to join the Union, and f) participating in parliamentary cooperation between national parliaments and the European Parliament'. Recognizing this emancipation of national parliaments, the Tribunal notes that 'it is up to the Polish Parliament to decide on the extent and implementation of European policy and on the intensity and consequences created by the Treaty of Lisbon, which it will pursue'.

VI. Competences of the Constitutional Tribunal within the scope of the constitutionality of EU law

The views of the Constitutional Tribunal on their own competence to assess and rule on the compliance of EU law with the Constitution have evolved significantly. Whereas in its previous judgments the Constitutional Tribunal considered

it inappropriate to decide on the constitutionality of primary EU law, with the exception of the accession treaty and secondary law, in newer judgments it has assumed that it is competent to assess the conformity of EU law to the Constitution and to adjudicate thereon. The Constitutional Tribunal expressed its restraint regarding the admissibility of adjudicating on the constitutionality of primary EU law in its judgment in Case K 18/04 (Treaty of Accession) stating that ‘the Constitutional Tribunal is not authorized to carry out an independent assessment of the constitutionality of primary European Union law’. On the other hand, such competence serves the Tribunal [as a tool] against the Accession Treaty as a ratified international treaty (Article 188 Point 1 of the Constitution)¹⁸. This position changed radically in the judgment in Case K 32/09 (Treaty of Lisbon), in which the Tribunal explicitly considered itself competent to assess the constitutionality of the Treaty of Lisbon, affirming the constitutionality of some provisions of the Treaty. The justification for its own cognition was justified by the Tribunal due to procedural considerations, namely that ‘the jurisdiction granted to the Constitutional Tribunal in Article 188 Point 1 of the Constitution to adjudicate in matters of «compliance of laws and international treaties with the Constitution» does not differentiate between said powers of the Tribunal depending on the mode of expressing consent for ratification. Therefore, the Constitutional Tribunal is competent to examine the constitutionality of international treaties ratified under prior consent expressed in the law’.

Similarly, the Constitutional Tribunal initially considered itself unfit to oversee the constitutionality of EU secondary law. In the decision of December 17, 2009 in Case U 6/08, the Tribunal stated that ‘pursuant to Article 188 Points 1–3 of the Constitution ... the Tribunal’s audit covers laws, international treaties and legal regulations issued by central state authorities. This framework for the Tribunal’s jurisdiction leaves certain issues outside the scope of its oversight, such as a law established by an international organization, referred to in Article 91 Paragraph 3 of the Constitution – i.e., secondary EU law. The lack of indication in the enumerative catalog provided in Article 188 Points 1–3 of the Constitution of the secondary EU law as an object of constitutional review prevents the Tribunal from ruling on its compliance with the Constitution’.

¹⁸ The final Judgment of the Constitutional Tribunal in Case 33/12, in which the Constitutional Tribunal stated that ‘by means of oversight of a law expressing consent for ratification, oversight of the international treaties is executed indirectly, under the assumption that if the agreement contains provisions contravening the Constitution, the law approving the ratification of such an agreement is also contrary to the Constitution (...). Obviously, it is not oversight of the constitutionality of an international treaty as construed in Article 188 Point 1 of the Constitution, but an analysis of its wording, as a condition necessary for the adoption of a law expressing consent to ratification, consistent with the Constitution’.

On the other hand, in the judgment in Case SK 45/09, the Tribunal took a different position, considering its competence for overseeing the EU regulation's compliance with the Constitution. Justifying this view, the Constitutional Tribunal noted that 'the situation in the present case is different than in Case U. 6/08, ended with the decision of December 17, 2009 (OTK No. 11/A/2009, Item 178). In the justification of that decision, the Tribunal expressed the *obiter dicta* opinion of the inadmissibility of a constitutional review of the standards of EU secondary law. However, the cited case was initiated at the request of a group of deputies and concerned the abstract oversight of norms. In such proceedings, the scope of the Court's cognition is comprehensively specified in Article 188 Points 1–3 of the Constitution.' Meanwhile, in the proceedings initiated by a constitutional complaint, 'a normative act, as construed by Article 79 Paragraph 1 of the Constitution, may be not only a normative act issued by one of the Polish authorities, but also, after fulfilling further conditions, an act issued by an international organization body of which the Republic of Poland is a member. This applies primarily to acts in the scope of European Union law, set up by the institutions of this organization. Such acts are part of the juridical order in force in Poland and they determine the legal boundaries of an individual.' In the Tribunal's view, 'an EU regulation demonstrates the features of a normative act as construed in Article 79 Paragraph 1 of the Constitution'. Thus, the Constitutional Tribunal concluded that 'EU regulations, as normative acts, can be subject to an audit of their compliance with the Constitution in proceedings initiated by a constitutional complaint. The fact that these are acts of EU law, although also constituting part of the Polish juridical order, affects the specificity of this oversight exercised by the Constitutional Tribunal'.

The Constitutional Tribunal also determined the potential effects of a possible declaration of unconstitutionality of the EU regulation. It assumed that 'in the scope of acts of Polish law, a consequence is the loss of the binding force of norms inconsistent with the Constitution (Article 190 Paragraphs 1 and 3 of the Constitution). With regard to EU secondary legislation, this kind of effect would not be possible because the Polish authorities do not decide on the binding force of such acts. The consequence of the ruling of the Constitutional Tribunal would only be to deprive EU secondary laws of the possibility of being applied by the Polish authorities and exerting legal effects in Poland. The consequence of the Constitutional Tribunal's judgment would therefore be to suspend the application of EU law norms that are inconsistent with the Constitution', which in turn could be a reason for the European Commission to initiate proceedings against Poland related to a violation of obligations under the treaties (Articles 258–260 Treaty on the Functioning of the European Union [TFEU]). According to the Tribunal, the ruling on the incompatibility of EU law with the Constitution should therefore be of an '*ultima ratio* nature and occur only

when all other methods of settling the conflict with the norms of the EU juridical order would fail', namely, 'a) introducing amendments to the Constitution, b) taking actions aimed at introducing changes in EU regulations or c) making a decision on withdrawing from the European Union. Such a decision should be taken by the sovereign, which is the Polish People, or a state authority that can represent the People in accordance with the Constitution'. The Tribunal stated that 'ignoring this last solution, which should be reserved for exceptional cases of the most serious and irremovable conflict between the foundations of the constitutional order of the Republic of Poland and EU law, it should be assumed that after the ruling of the Constitutional Tribunal on the incompatibility of specific norms of EU secondary law with the Constitution, it would be necessary to take immediate action to remove this condition.

The constitutional principle of Poland's favorable view of European integration and the Treaty principle of loyalty of the Member States to the Union require that the effects of the Tribunal's decision be postponed pursuant to Article 190 Paragraph 3 of the Constitution'. In this context, it is necessary to point to the general position of the Constitutional Tribunal expressed in the justification of the judgment of June 26, 2013 in Case K 33/12, which states that 'the Constitutional Tribunal is not competent to adjudicate on the validity of European Union acts'.

VII. Pro-Union interpretation ('favorably disposed' towards EU laws) of the Constitution/patterns of oversight of the constitutionality of law

In matters of 'integration', the Constitutional Tribunal referred to the problem of interpretation in the reconstruction of the constitutionality of law, defining one type of interpretation as 'an EU-friendly interpretation/understanding of its law.' This interpretation is updated in cases where there are many interpretative options and the interpreted provision needs to be given the meaning of 'the closest solutions adopted in the European Union' (K 12/00). In its judgment in Case K 33/03, the Tribunal stated that in the construction of the constitutionality pattern, an EU-friendly interpretation (construction) requires the following two indications: 'firstly, this interpretation can be made to be conditional on (and only on) Polish law lacking a clear indication of a different approach to the problem [strategy for solving it] ... , and secondly, if there are several possibilities of interpretation, the one closest to the Community achievement (*Acquis Communautaire*) should be chosen'. In the Tribunal's opinion, 'this obligation is aimed at ensuring compatibility of internal law and European law' (K 34/03), while 'the interpretation of applicable legislation should take into account the

constitutional principle of favoring the process of European integration and cooperation between countries' (K 11/03). An interpretation which is 'friendly to European law' has its limits. Under no circumstances can it lead to results which are contrary to the clear wording of constitutional norms or which do not agree with the minimum guarantees provided by the Constitution. Thus, the Constitutional Tribunal does not recognize the possibility of challenging the binding force of a constitutional norm by the mere fact of introducing a contradictory Community regulation into European legal system (K 18/04). On the other hand, in the judgment on the Treaty of Lisbon, the Tribunal stated that there is no 'possibility to amend the Constitution by way of an interpretation of friendly European integration'.

Apart from doubts about the unclear structure and content of the duty of a 'friendly' interpretation and groundlessly giving it a moral–ethical¹⁹ rather than a normative character, it seems that this is a classic case of consistent interpretation as a kind of systemic interpretation, that is, the obligation to interpret constitutional patterns in accordance with EU law. The CT jurisprudence shows that the interpretation which is 'friendly' to European law has its limits determined by the principle of the supremacy of the Constitution, and consequently, cannot lead to the implementation of the principle of supremacy of EU law versus the norms of the Constitution²⁰.

VIII. Judicial dialogue

Judicial dialogue, understood both formally – as institutionalized forms and methods of cooperation between courts and judges as parts of formally separate legal systems – and colloquially – as non-institutional methods of cooperation – can be viewed as one of the constitutional methods for resolving conflicts or disputes between the law of a Member State and European Union law, and – albeit arguably – between the jurisdiction of EU courts and the jurisdiction of constitutional tribunals of the Member States. The above systemic and jurisdictional conflicts exemplify the tension between the principle of the primacy of EU law and the principle of the supremacy of the Constitution (see Point III above) and a clear jurisdictional conflict between the jurisdiction of the CJ to examine and rule on the compliance of EU secondary law with the Treaties and the competence of the Constitutional Tribunal to examine the compliance of EU secondary law with the Constitution, and to adjudicate on the unconstitutionality of this law.

¹⁹ According to this criterion, the judgment of the Constitutional Tribunal in Case SK 45/09 should be considered 'unfriendly' or hostile to European law.

²⁰ A. Sołtys, *Obowiązek wykładni prawa krajowego*, Warszawa 2015, p. 691.

The position of the Constitutional Tribunal on the division of functions regarding the oversight of EU legal acts between the CJ and the CT is based on the assumption that ‘the Court of Justice safeguards EU law. On the other hand, the Constitutional Tribunal is to safeguard the Constitution’, which in the Tribunal’s opinion may lead to a conflict between the rulings of the Constitutional Tribunal and the Court of Justice. Next, the Constitutional Tribunal, citing the principle of the supremacy of the Constitution, stated that ‘it is obliged to construe its position in such a manner that in matters of the principle of the Constitutional dimension, it will preserve the position of the ‘last word judgment’ in relation to the Polish Constitution.’ Furthermore, it recognized that ‘the Court of Justice and the Constitutional Tribunal cannot be set against each other as competing courts. It is not only a matter of eliminating the phenomenon of duplication of two tribunals or a two-track approach to adjudicating on the same legal problems, but also dysfunctionality in the relations between the EU and the Polish juridical order.’ According to the Tribunal, ‘it is important recognize the indicated differences in the roles of both Tribunals and to assign the CJ competence in matters of the final interpretation of EU law and to ensure uniformity of its application in all Member States, as well as the sole discretion on the compatibility of secondary legislation with treaties and general principles of EU law.

Thus, the subsidiary character of the Constitutional Tribunal’s competence to examine the compliance of EU law with the Constitution should be considered in this context. Before deciding on the incompatibility of a secondary law with the Constitution, one should be sure as to the content of the EU secondary law norms which are the subject of oversight. To this end, a request for a preliminary ruling may be submitted to the Court of Justice under Article 267 TFEU with regard to the interpretation or validity of provisions that raise doubts’. Clearly, therefore, the Constitutional Tribunal admits that it is competent to pose a legal question to the CJ pursuant to Article 267 TFEU, which functionally serves as an effective tool to resolve potential competence and system conflicts. There is also no doubt that there exists a broad, though not always justified, form of horizontal dialogue, using in the argumentative sphere the jurisprudence of other constitutional courts regarding the constitutional boundaries of European integration, in particular the German Federal Constitutional Court. The judgment in Case SK 45/09 in essence was based on an analogy from the case-law of Solange II, which may raise doubts; however, due to the different constitutional regulations in both countries and the insufficient consideration of the consequences of adopting the Charter of Fundamental Rights – whose provisions may prove sufficient for the construction of conflict rules for resolving systemic and jurisdictional conflicts – and the consequences of the principle of national/constitutional identity as limiting the principle of the primacy of EU law and strengthening the principle of the supremacy of the Constitution, as

well as a high degree of convergence of constitutional rights and freedoms with EU fundamental rights and freedoms guaranteed by the European Union Convention on the protection of human rights and fundamental freedoms. It should also be noted that inasmuch as the Solange case-law may apply, if it is proven that the level of protection under EU law, including the CJ jurisprudence, has been so low since the Solange II ruling was issued that it does not conform to the necessary standard of protection according to the Basic Law, the Constitutional Tribunal assigns a much wider scope to Solange case-law when it states that it is only necessary to ‘substantiate’ that a ‘contested act of secondary EU law’ – and therefore not ‘the level of protection under EU law’, as in the Solange case-law – ‘significantly reduces the level of protection of rights and freedoms compared to the ones guaranteed by the Constitution’.

The constitutional and legal circumstances which confronted the Constitutional Tribunal in Case SK 45/09 are a classic situation of competition between legal systems and jurisdictional systems²¹, which – due to the lack of clear and transparent conflict-of-law rules or their mutual exclusion, as found in the case with respect to the primacy principle of EU law and the principle of the supremacy of the Constitution – leads to both systemic (in terms of substantive law) and jurisdictional (in institutional and legal terms) conflicts that cannot be reasonably solved without violating the autonomy of one of the subsystems of the ‘multi-component law system applicable in the Republic of Poland’, especially when we assume that according to what many theories and pluralistic ideas postulate, that the relations between EU law and the law of the Member States are not hierarchical and that EU law does not rest at the top of this system. When it comes to institutional conflict, the situation is obvious because the EU regulation, according to the law and jurisprudence of the CJ, cannot be the subject of decisions of national courts – including constitutional courts – and the determination of non-compliance with EU law is the exclusive competence of the CJ.

Meanwhile, in the judgment in Case SK 45/09, the Constitutional Tribunal recognized that an EU regulation can be investigated in terms of compliance with the Constitution and that it is the CT who is competent in this matter. The rationale of the jurisdiction of both Tribunals regarding the assessment of the correctness of the EU regulation and a resolution on this subject – apart from the relevant Treaty and constitutional provisions – designate to the competences of the CJ and the CT, respectively, two basic structural principles, namely, the principle of the primacy of EU law and the principle of the supremacy of the Constitution, sometimes considered as the basic collision rules. The problem lies in the fact that in this particular case, these conflict rules are mutually exclusive

²¹ A. Kustra, *Kolizje norm konstytucyjnych i wspólnotowych w ujęciu teoretycznoprawnym*, ‘Europejski Przegląd Sądowy’ 2007, No. 5, pp. 23–31.

because they justify the jurisdiction of both Courts to the same extent; they differ 'only' in the criterion of oversight (compliance with the Treaties and compliance with the Constitution) and in the consequences of finding non-compliance with the Treaties and non-compliance with the Constitution (invalidity or 'suspension of use').

IX. Recapitulation

The Constitutional Tribunal, like the vast majority of constitutional courts and tribunals, first and foremost classifies the principle of state sovereignty, the principle of protection of fundamental rights, the principle of constitutional identity, the principle of a democratic state of law, the principle of supremacy of the Constitution and the principle of the exclusive competence of the Constitutional Tribunal in the scope of deciding on constitutional compliance of the law in force in the Republic of Poland, including EU law. These constitutional principles, constituting the basic constitutional principles of the Republic of Poland, are related to other constitutional principles, such as the principle of an interpretation of the Constitution which is favorable to EU law, the principle of openness of the national legal order to international law (Article 9 of the Constitution) or the principle of a multi-component legal system in the Republic of Poland in relation to the principle of the uniformity of the legal system of the Republic of Poland and the principle of the autonomy of EU law and Polish law. The above principles determine the boundaries of integration with the European Union in the constitutional procedure of transferring competences to the European Union and they prevent the phenomenon of creeping EU competences, subjecting these processes to the oversight of the Constitutional Tribunal, which not only evaluates accession procedures and instruments of ratification, but also other acts of EU law in terms of their compliance with the Constitution, including the aforementioned principles.

The ontological status of the principles that set the constitutional boundaries of European integration is diverse. Among these principles/boundaries, there are rules qualified as the basic/supreme/highest constitutional principles of the state, such as the principle of the supremacy of the Constitution, the principle of sovereignty, the principle of democracy, the principle of the protection of fundamental rights or the rule of law, having a clear mandate in the provisions of the Constitution, and rules of constitutional principle, which are the result of an active interpretation by the Constitutional Tribunal of a complex of numerous constitutional provisions, such as the principle of respecting constitutional/national/constitutional identity. The relationship between these constitutional principles is, of course, extremely complex. It suffices, however, to

point out that both the principle of the supremacy of the Constitution and the principle of respecting the constitutional identity are potentially the most limiting for the process of European integration, especially as regards setting the absolute limits of this integration and the primacy of EU law. This stems from their nature and the functions they perform in the process of reconstructing the constitutional pattern in matters pertaining to EU law. Both of these principles have in substance the widest scope and, in essence, absorb other principles. The principle of the supremacy of the Constitution encompasses all provisions of the Constitution of the Republic of Poland, which means that any contradiction between EU law and any provision of the Constitution will always be resolved by the Constitutional Tribunal in accordance with the Constitution. The principle of respecting constitutional identity has a somewhat narrower scope, while still being broad and open. As a result, the equally complex problem of mutual relations between constitutional principles determining the boundaries of European integration – both in the institutional (transfer of competences) and in the normative sense (the impact of the EU primacy on the constitutional order) – is revealed.

The principles of European integration are confronted with the constitutional principle favoring international law (Article 9), reinterpreted by the Constitutional Tribunal as a principle favoring European integration. In its judgment SK 45/09, the Tribunal – pointing to various ways of avoiding the state of incompatibility between EU law and the Constitution – unequivocally stated that ‘the Constitution has been unequivocally guaranteed the status of the highest law of the Republic of Poland. At the same time, this regulation also carries an obligation to respect and favor the rules of international law if properly formulated and binding in the Republic of Poland (Article 9 of the Constitution). ‘... Any contradictions should be eliminated by applying an interpretation that respects the relative autonomy of European law and national law’. This interpretation should also be based on the assumption of mutual loyalty between the EU institutions and the Member States. This assumption generates – on the part of the Court of Justice – a duty to favor domestic legal systems, and on the part of the Member States the duty of the highest standard to respect EU standards’.

On the other hand, in the judgment No. K 33/12, the Constitutional Tribunal stated that ‘the Constitution specifies the relations between international and national law primarily in accordance with the principles of the common good, sovereignty, democracy, the rule of law and a favorable attitude towards international law. Based on these principles, we can deduce that Poland is opening up to the international order. The effect of transferring competences is usually a complex system of dependencies between the state, its authorities and the supranational organization. Therefore, the transfer of competences should always be assessed from the point of view of the principles shaping ‘the

constitutional identity'. Thus, the Tribunal seems to reduce the meaning of the provision of Article 9 of the Constitution in the context of the relationship between EU law and the Constitution of the Republic of Poland to the issue of interpretation as an instrument to ensure compliance of EU law with the Constitution, while omitting other, more important functions of Article 9, such as strengthening the position of international law, meaning that the EU, in the national order has an obligation to respect and enforce judgments of international courts – meaning the European courts, including the CJEU. Ultimately, therefore, the principle of favoring EU law has its limits in the supremacy of the Constitution over EU law.

This limit is confirmed by the statement of the CT of June 2, 2015 P 72/15, that an interpretation favorable to European law can in no case lead to results contrary to the clear wording of constitutional norms and unconformable minimum guarantees guaranteed by the Constitution.

The Polish doctrine of constitutional and European law is dominated by the position which approves CT jurisprudence regarding the constitutional boundaries of European integration²². On the other hand, the position of the Constitutional Tribunal is criticized in terms of the doctrine regarding the absolute supremacy of the Constitution over EU law, and in particular the admissibility of the Constitutional Tribunal reviewing compliance of EU law with the Constitution – especially the secondary law – as evidently contrary to the position of the Tribunal in the Foto-Frost case-law; this criticism intensified after the judgment was issued by the Constitutional Tribunal in Case SK 45/09 (EU regulation)²³.

In conclusion, it should be emphasized that the formula – or rather the Solange II maxim – on which the Constitutional Tribunal based its arguments in judgment SK 45/09 exhausted its persuasive capability, especially in view of the significant progress in the protection of fundamental rights at the level of the EU and the Council of Europe and the new possibilities offered by the Treaty of Lisbon (respecting the national identities of the Member States), as well as the horizontal provisions of the EU Charter of Fundamental Rights regarding the relations between EU law and the constitutions of the Member States.

²² Cf. K. Wójtowicz, *Sądy konstytucyjne wobec prawa Unii Europejskiej*, Warszawa 2012, passim.

²³ T. Jaroszyński, *Glosa do wyroku TK z dnia 16 listopada 2011 r. SK 45/09*, 'Państwo i Prawo' 2012, No. 9, p. 130–135; P. Bogdanowicz, P. Marcisz, *Glosa do wyroku TK z dnia 16 listopada 2011 r., SK 45/09*; 'Europejski Przegląd Sądowy' 2012, No. 9, p. 47–52. Cf. E. Etynkowska, *Glosa aprobująca do wyroku Trybunału Konstytucyjnego z dnia 16 listopada 2011 roku, sygn. akt SK 45/09*, 'Przegląd Prawa i Administracji' 2012, vol. XC, p. 122 and following.

Bibliography

- Bainczyk M., *Polski i niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej*, Wrocław 2017.
- Bogdandy A. von, Schill S., *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 'Common Market Law Review' 2011, vol. 48, Issue 5.
- Bogdanowicz P., Marcisz P., *Glosa do wyroku TK z dnia 16 listopada 2011 r., SK 45/09*, 'Europejski Przegląd Sądowy' 2012, No. 9.
- Constitutional Identity in the Age of Global Migration*, ed. J. Bats, L. Orgad, 'German Law Journal' 2017, vol. 18, No. 7.
- Dobrowolski M., *W sprawie trybu ratyfikacji przez Rzeczpospolitą Polską traktatu fiskalnego*, 'Państwo i Prawo' 2013, No. 6.
- Etynkowska E., *Glosa aprobująca do wyroku Trybunału Konstytucyjnego z dnia 16 listopada 2011 roku, sygn. akt SK 45/09*, 'Przegląd Prawa i Administracji' 2012, vol. XC.
- Faraguna P., *Ai confini della Costituzione. Principi supremi e identità costituzionale*, Milano 2015.
- Häberle P., *Europäische Verfassungslehre*, Baden-Baden 2011.
- I controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, ed. A. Bernardi, Napoli 2017.
- Jaroszyński T., *Glosa do wyroku TK z dnia 16 listopada 2011 r. SK 45/09*, 'Państwo i Prawo' 2012, No. 9.
- Kranz J., Wyrozumska A., *Powierzenie Unii Europejskiej niektórych kompetencji a traktat fiskalny*, 'Państwo i Prawo' 2012, No. 7.
- Kustra A., *Ewolucja wykładni art. 11 Konstytucji Włoch z 1947 r. w orzecznictwie Sądu Konstytucyjnego*, 'Europejski Przegląd Sądowy' 2008, No. 9.
- Kustra A., *Kolizje norm konstytucyjnych i wspólnotowych w ujęciu teoretycznoprawnym*, 'Europejski Przegląd Sądowy' 2007 No. 5.
- Kustra A., *Przepisy i normy integracyjne w konstytucjach wybranych państw członkowskich UE*, Toruń 2009.
- National Constitutional Identity and European Integration*, ed. A.S. Arnaiz, C.A. Lli-vina, Cambridge-Antwerp-Portland 2013.
- Polzin M., *Verfassungsidentität. Ein normatives Konzept des Grundgesetzes?*, Tübingen 2018.
- Sołtys A., *Obowiązek wykładni prawa krajowego*, Warszawa 2015.
- Sovereignty and trans-nationality vs. European integration*, ed. J. Kranz, Warsaw 2006.
- Wójtowicz K., *Sądy konstytucyjne wobec prawa Unii Europejskiej*, Warszawa 2012.

Wójtowicz K., *Zachowanie tożsamości konstytucyjnej państwa polskiego w ramach UE – uwagi na tle wyroku TK z 24.11.2010 r.*, 'Europejski Przegląd Sądowy' 2011, No. 11.

Wróbel A., *Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts*, 'ERA Forum' 2013, vol. 13, Issue 4.

SUMMARY

This study describes the constitutional foundations of the counter-levels doctrine developed by the Constitutional Tribunal referring to the relations between the Constitution of the Republic of Poland and European Union law and political relations between the Republic of Poland and the European Union as a supranational organization. In the study I identify constitutional principles, theories and concepts that serve the Constitutional Tribunal to define the limits and conditions for Poland's membership in the European Union and to determine the relationship between Polish constitutional law and European law. These principles, theories and concepts include the principle of supremacy of the constitution, the principle of Poland's opening to international law, the principle of sovereignty, the principle of civil rights and freedoms, the principle of constitutional identity, the principle of democracy and the rule of law and the principle of the (consistent) interpretation of Polish law in accordance with EU law. The study also considers the competences of the Constitutional Tribunal in relation to European Union law.

Keywords

consistent interpretation, supranational organisation, European Union, Constitutional Tribunal, counter-limits doctrine, constitutional identity, supremacy of the constitution, supremacy of the EU-law, secondary legislation, Solange-Case law