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Human rights compatibility of international acts in national and EU domestic constitutional law: old questions, new answers in a globalized world?

Human Rights Scrutiny of International Law by the Polish Constitutional Tribunal

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In order to determine the scope and the character of human rights scrutiny of international legal acts performed by Polish Constitutional Tribunal it is essential to determine in the first place [point 1] the relationship between two distinct and sometimes contravening constitutional principles, namely:

- the duty to respect international law (Article 9 of the Constitution) and
- the supreme power of the Constitution itself (Article 8).

The said analysis should be followed [point 2] by a more detailed study of competences of the Constitutional Tribunal with regard to such scrutiny, and of the possible limits to the exercise of such competences.

1. Duty to respect international law and the supreme power of the Constitution

1.1. General constitutional duty to respect international law (Article 9 of the Constitution)

Pursuant to Article 9 of the Constitution ‘the Republic of Poland shall respect international law binding upon it’. As a consequence, in addition to norms adopted by the national legislator there operate, within the territory of the Republic of Poland, regulations created outside the framework of national legislative organs, i.e. of international provenience (judgement of the Constitutional Tribunal of 11 May 2005, K 18/04 [The Accession Treaty]). The duty to respect international law is not limited to

* This paper presents the author’s personal opinions and ideas which do not engage in any way the Office of the Constitutional Tribunal or the Constitutional Tribunal of the Republic of Poland.

* Office of the Constitutional Tribunal of the Republic of Poland.
international treaties, but it also covers other sources of international law\(^1\). It is noteworthy that pursuant to the concept adopted by the Constitutional Tribunal (K 18/04 [The Accession Treaty]) EC law is not entirely external with regard to Polish State. This is because apart from the treaties which must be approved by all Member States, secondary law is being adopted with the involvement of Polish representatives in the Council and Polish MPs in the European Parliament. As a result, within the Polish State there operate several subsystems of legal norms adopted within various law-making centres (so-called multi-centre approach\(^2\)). These subsystems are supposed to coexist, to be interpreted with a mutual respect and to be applied in a cooperative way.

Interestingly, the Constitutional Tribunal also stated that the duty to respect international agreements and standards resulting from other international legal acts results from the principle of the rule of law (Article 2 of the Constitution) (see: judgement of 8 October 2002, K 36/00 [Professional status of policemen]).

The duty to respect binding international law extends to all State organs including courts. Hence, judges of Polish courts, including the Constitutional Tribunal, who are subject to the Constitution, are under a constitutional obligation to apply EC law binding upon Poland. Such an obligation is a result of the fact that Poland entered into international agreements upon which the EU is founded (K 18/04 [The Accession Treaty]).

Another remarkable aspect of the duty to abide with international law is the obligation to recognize and respect the jurisdiction and competence of various international organs including international courts. It is admitted in the doctrine that it implies the acceptance and enforcement not only of judgements international courts


(such as the Court of Justice of the EC and the European Court of Human Rights), but also of decisions of international organs such as the UN Security Council\(^3\). Such approach is corroborated by the case law of the European Court of Human Rights pursuant to which the European Convention of Human Rights should be read in the light of general principles of international law and relevant international agreements, but also of non-binding acts of Council of Europe organs and other bodies\(^4\).

1.2. Interpretation of ordinary legal acts and of the Constitution in conformity with the EC/EU law (so-called sympathetic interpretation)

The interpretation of binding national statutes should take into account the constitutional principle of sympathetic predisposition towards the process of European integration and the cooperation between States. This principle may be derived from Article 9 of the Constitution and from the Preamble which states ‘the need for cooperation with all countries for the good of the Human Family’. The principle of interpreting domestic law in a manner “sympathetic to European law”, is clearly phrased in the case-law of Polish Constitutional Tribunal (see e.g. judgements: of 21 April 2004, K 33/03 [Bio-components in gasoline and diesel]; of 11 May 2005, K 18/04 [The Accession Treaty]; of 27 April 2005, P 1/05 [European Arrest Warrant]). It even puts upon the Constitutional Court a duty to interpret relevant provisions of the Constitution in conformity with the EU law (see in this respect explicitly: judgement in the case K 33/03 [Bio-components in gasoline and diesel]; judgement of 17 July 2007, P 16/06 [Commercial agency contract]; implicitly: judgement of 13 September 2005, K 38/04 [Contracts in foreign languages]). There are, however, limits to this favourable interpretation, and they result from the supreme power of the Constitution in Poland (cf. below point 1.3).


\(^4\) Judgement of the European Court of Human Rights of 12 November 2008 in the case *Demir and Baykara v. Turkey*, application no. 34503/97.
1.3. Constitution is the supreme Law of the land (Article 8(1) of the Constitution) – limits of Constitutional duty to abide with international legal obligations

Pursuant to Article 8 of the Constitution ‘the Constitution shall be the supreme law of the Republic of Poland’. According to the case law of Polish Constitutional Tribunal the accession of Poland to the EU did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland (K 18/04 [The Accession Treaty]). Given its supreme legal force, the Constitution enjoys precedence of binding force and precedence of application within the Polish territory. The principle of interpreting domestic law in a manner favourable towards EU law has its limits. In no event may it lead to results contradicting the explicit wording of constitutional provisions or being irreconcilable with the minimum guarantee functions ensured by the Constitution. In particular, constitutional provisions concerning individual rights and freedoms establish a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of EC provisions. Such collision occurred with regard to EU framework decision on the European Arrest Warrant, and the Tribunal invalidated national provision implementing the framework decision (P 1/05 [European Arrest Warrant]). At the same time, however, the judgement postponed by 18 months the date of the loss of binding force of the unconstitutional statutory provision.

2. Powers of Polish Constitutional Tribunal and human rights scrutiny of international law

2.1. Powers expressly conferred upon the Constitutional Tribunal by virtue of Article 188 of the Constitution

2.1.1. Constitutional scrutiny of international agreements including treaties upon which the EU is founded

Article 188(1) states that Polish Constitutional Tribunal has a power to rule on the conformity of statutes and international agreements to the Constitution. As results from
decisions in the case K 18/04 [The Accession Treaty] even treaties upon which the EU is founded are subject to constitutional review.

2.1.2. Indirect international scrutiny of international treaties

Although the very Constitution is the basis of review of international agreements some academics claim that general principles of international law are incorporated in the Constitution. It is deemed to be so because the Preamble to the Constitution mentions ‘the need for cooperation with all countries for the good of the Human Family’ and states that the Constitution is based on ideals of ‘justice’ and ‘the obligation of solidarity with others’\(^5\). General principles of international law are thereby ‘constitutionalised’ with the result of empowering the Constitutional Tribunal to control the conformity of international agreements with the said general principles of international law.

Certainly, in the light of the Constitutional Tribunal’s case law the Preamble to the Constitution is not devoid of a normative character, albeit in the case K 18/04 [The Accession Treaty] the Tribunal stressed that the Preamble is not a source of legal norms \textit{sensu stricto}. At the same time, however, the Tribunal emphasised that the text of the Preamble indicates how to decode particular provisions of the Constitution. So far, the Tribunal has never controlled the conformity of an international treaty with regard to general principles of international law.

2.1.3. No direct power of constitutional scrutiny of legal acts adopted by international organizations including EC/EU secondary law

Article 188 of the Constitution which lists the competences of the Constitutional Tribunal does not provide the Tribunal with a power to control the legality of legal acts adopted by international organizations including EC/EU secondary law. It does, however, enable the Tribunal to control the constitutionality of legal provisions issued by central State organs (Article 188(3)). The decision K 18/04 [The Accession Treaty] \(^5\)

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\(^5\) Cf. P. Sarnecki, \textit{op.cit.}, p. 3 and 4.
underlines that secondary Community law is being adopted with the involvement of Polish representatives in EU institutions. Such position of the Tribunal is potentially capable of enabling, in the future, the constitutional control of EU secondary law on the basis of Article 188(3) of the Constitution. Interestingly, the same decision expressly mentions the possibility of constitutional review of *inter alia* EC Regulations as elements of the legal system in force in Poland.

Meanwhile, opposite tendency is discernible in the constitutional case law in Poland. While formally empowered to control the conformity of national statutes with international agreements, the Constitutional Tribunal refuses to exercise these powers upon the referral of a court that claims that a given statutory provision is contrary to the EC Treaty (decision of 19 December 2006 rendered *in pleno* in the case P 37/05 [Excise duty imposed on cars imported to Poland]). The reasons for such approach are twofold. Firstly, under the Constitution ordinary courts are bound to refuse the application of national statutory law contrary to the EC Treaty (Article 91), therefore such a conflict should be eliminated *via* application of law rather than through a constitutional review. Secondly, the Tribunal seeks to avoid divergent interpretation of the EC Treaty by the constitutional jurisdiction and the Court of Justice of the EC. The described decision proves that whenever there is no risk of undermining the primacy of Polish Constitution the Tribunal is inclined to limit the exercise of its powers in the sphere of application of EC law.

2.1.4. **The scope of constitutional complaint**

Polish Constitution empowers the Tribunal to adjudicate on constitutional complaints (Article 188(5)) which may be directed against a statute or another normative act (Article 79(1)). In such case the only basis of review is the Constitution. The Constitutional Tribunal applies in its case law a material concept of a normative act, which means that every general and abstract act creating legal norms is a normative act in the meaning of Article 79(1) of the Constitution, irrespective of its form. Moreover, in the judgement of 18 December 2007, SK 54/05 [Customs declaration] the Tribunal expressly ruled that international agreements, the provisions of which have
been a basis for a decision with regard to an individual, may be challenged by means of a constitutional complaint.

Such a wide understanding of the concept of a ‘normative act’ might result in the constitutional control of legal acts adopted by international organizations, including EC secondary law, whenever they are a basis for individual decisions of national public organs. There are, however, some limits to such an extensive approach. Firstly, EC directives would normally be exempt form the review, as they are transposed into national law, and then individual decisions are based on relevant national implementing provisions. Secondly, international agreements that were at stake in the decision SK 54/05 are in any case subject to constitutional review by virtue of Article 188(1) of the Constitution. It is not certain whether the Tribunal would apply the same wide understanding of a ‘normative act’ under Article 79(1) with regard to EC secondary law.

The above reasoning and provisos are also applicable, mutatis mutandis, to referrals to the Constitutional Tribunal by ordinary courts. This is because pursuant to Article 193 of the Constitution ‘any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court’.

2.2. Powers must safeguard the supremacy of the Constitution and the obligation to ensure its application

Human rights adjudication consists nowadays in resolving concrete conflicts between fundamental rights of an individual on one hand, and fundamental rights of other individuals or public interest on the other hand. Such ‘weighing’ of contravening rights and interests may lead to divergent results depending on which value is preferred, or given more significance, by the organ charged with the assessment. Consequently, one might claim that if proper human rights scrutiny is provided for by a court within the international or supranational system there is no need to control legal norms originating from such a system at national level. This is because one may not argue that
the assessment performed by a court at international or supranational level is *by its very nature* less adequate, inappropriate or erroneous.

This perspective, however, ignores the fact that ‘weighing’ of contravening rights and interests is a *dynamic process* and that no court, be it national or international, operates in a vacuum. Genuine dialogue between courts and judges on different levels is a necessary prerequisite for proper functioning of various legal systems of national and international origin operating within the same territory. No court, even of the highest rank, may be truly successful in terms of practical influence and authority, if it ignores the consequences of its decisions and conditions of the effective implementation of its rulings. This is particularly true with respect to international courts whose influence is to large extent dependent upon the proper cooperation with national courts.

For the above reasons, international human rights scrutiny should not be made in isolation from national legal context. Such reasoning may be seen, although worded in a veiled form, in the opinion of Advocate General Maduro in the *Kadi* case before the Court of Justice of the EC\(^6\). The opinion stressed that if the Court of Justice refrains to perform judicial review of EU legal acts implementing UN Security Council resolutions, the effective implementation of EU law in this field might be undermined\(^7\). In this respect, a reference was given to decisions of constitutional courts of Germany, the Czech Republic, Italy, Hungary and Poland which proved that that national measures for the implementation of Security Council resolutions would most probably not enjoy immunity from judicial review in these countries.

As far as Polish constitutional case law is concerned, national legal acts implementing EU secondary law are subject to constitutional review, just as other

\(^6\) Opinion of 16 January 2008, delivered in the case C-402/05 P *Kadi*.

\(^7\) ‘[A] decision by this Court to exclude measures such as the contested regulation from judicial review might create difficulties for the reception of Community law in some national legal orders’, at footnote 34 of the opinion. The Grand Chamber did assume its powers to perform fundamental rights scrutiny with regard to the measures at stake in its judgement of 3 September 2008. The Court, however, did not point out at possible difficulties for the reception of Community law in some national legal orders if it were to take a different position.
normative acts (judgements of the Constitutional Tribunal: of 27 April 2005, P 1/05 [European Arrest Warrant]; of 2 July 2007, K 41/05 [Money laundering; lawyers’ professional secrecy]). This practice of Polish Constitutional Tribunal seems to be firmly established. Consequently, although the Tribunal was keen on limiting in certain situations ‘international review’ of statutes, it does not envisage any limitation of the constitutional review whenever the Constitution empowers the Tribunal to perform such review.

As all State organs are under a constitutional duty to ensure its application and observance of its provisions there may be no exceptions to effective guarantees of fundamental constitutional rights, unless the very Constitution provides otherwise. One of the essential tasks of the Constitutional Tribunal is to ensure the observance of the Constitution by other State organs, and to safeguard the respect for human rights. Certainly, pursuant to Article 7 of the Constitution ‘public organs shall function on the basis of, and within the limits of, the law’. It results from this provision that actions of every State organ must be based on express provisions of the law granting specific powers to act. Such powers must not be presumed. At the same time, however, as the Constitution empowers the Constitutional Tribunal to perform constitutional review it is constitutionally bound to exercise this competence. In any event, pursuant to the very case law of the Constitutional Tribunal these powers are intact by the transfer of national powers to international organizations to which Poland has acceded, including the European Communities.

8 Cf. cases discussed above, in particular the judgement of 11 May 2005, K 18/04 [The Accession Treaty].

9 Article 90(1) of the Constitution states that ‘the Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters’.