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SUPREMACY OVER PRIMACY...? REFLECTIONS ON LEGAL CONTROVERSIES BETWEEN POLAND AND THE EUROPEAN UNION (2015–2023)[**]

Abstract: *The violation of the rule of law in Poland (2015–2023) was related to the relationship between national law, especially constitutional law; and international law, especially European Union (EU) law. This article focuses on the issue of constitutional review in the context of concepts such as sovereignty and conferral of competences, as well as the supremacy of the Constitution and the primacy of application of international rules and principles.*

Sovereignty, a qualitative feature of the State, operates within the law, not outside of it. EU (international) law does not limit sovereignty, but the sovereign nature of the State cannot justify violations of the applicable law. Situating the relationship between international (EU) law and the national constitution in the perspective of the supremacy of one order over the other leads in practice to a collision and/or a stalemate. Rather, we should be guided by the principle of primacy as an "existential requirement" for the functioning of the Union, and more broadly, of international law.

The primacy of application does not imply the supremacy of EU law over national law, nor the derogation of national law norms. Constitutional supremacy, on the other hand, is a principle of domestic law which does not have external legal effects and does not exempt a State from its international legal responsibility. The concepts of priority and supremacy coexist, but they fulfil different functions and express different perspectives – primacy does not prejudge supremacy, and supremacy does not exclude primacy.

What is problematic is not so much the review of constitutionality per se, but the scope of that review and its effects. Once a national court has found a conflict between EU law and the national Constitution, should we accept the effect of selective refusal to apply EU law on the grounds of constitutional supremacy and sovereignty? The answer to this question is negative.

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INTRODUCTION

Poland's entanglement in disputes with the European Union (EU), with international bodies or structures and with some of its neighbours, as well as questioning the foundations of international law (including EU law), took on a confrontational and exceptionally vivid character in the period between 2015 and 2023.[1] The violation of the rule of law in Poland was associated with a specific perception of the relationship between domestic law (especially constitutional law), and international law (especially EU law).[2]

In the period 2015-2023, as a result of the domination of the law by the politics of one party (specifically one man, the head of this party, who did not even hold the position of prime minister), a phenomenon known as "*Doppelstaat*"[3] appeared in Poland, i.e. the parallel functioning of two political and legal orders.[4] The practice of the Polish authorities amounted not only to a clear violation of the rule of law principle, but at the same time to a disturbance of the state system by the anarchisation of its institutions. Even after the change of government in December 2023, recovery is not just a matter of weeks.

Contrary to the official arguments,[5] the 2015-2023 dispute between the Polish authorities and the European Union was not so much about the conflict between EU law and the Polish Constitution, but about the incompatibility with that Constitution (and also with EU law) of Polish laws related to the so-called "judicial re-

[1] For more on the rule of law in Poland, *see* M. Ziółkowski, M. Zachariasiewicz, *Rule of Law in Poland*, in: A. Kornezov (ed.), *Mutual Trust, Mutual Recognition and the Rule of Law: National report*, Ciela Norma, Sofia: 2023, pp. 492–555; J. Barcz, A. Grzelak, R. Szyndlauer (eds.), *Problem praworządności w Polsce w świetle dokumentów Komisji Europejskiej. Okres „dialogu politycznego" 2016–2017* [The Rule of Law in Poland in the Light of European Commission Documents. The Period of Political Dialogue 2016-2017], Elipsa, Warszawa: 2020; J. Barcz, A. Grzelak, R. Szyndlauer (eds.), *Problem praworządności w Polsce w świetle orzecznictwa Trybunału Sprawiedliwości UE (2018–2020)* [The Rule of Law in Poland in the Light of the Case Law of the Court of Justice of the European Union (2018-2020)], Elipsa, Warszawa: 2021; J. Barcz, A. Grzelak, R. Szyndlauer (eds.), *Problem praworządności w Polsce w świetle orzecznictwa Trybunału Sprawiedliwości UE (2021)* [The Rule of Law in Poland in the Light of the Case Law of the Court of Justice of the European Union (2021)], Elipsa, Warszawa: 2022; *see also* W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, Oxford: 2019.

[2] *See more broadly* A. Wyrozumska, *Conflict between the Polish Constitutional Tribunal and the CJEU with regard to the reforms of the judiciary*, 60(4) Archiv des Völkerrechts 379 (2022).

[3] E. Fraenkel, *The Dual State. A Contribution to the Theory of Dictatorship*, Oxford University Press, Oxford: 2017.

[4] "Normative state" (*Normenstaat*) and a "prerogative state" (*Maßnahmenstaat*), which used both legal and extralegal violence.

[5] *White Paper on the Reform of the Polish Judiciary*, 7 March 2018, available at: https://tinyurl.com/k9kkbw2x (accessed 30 August 2024); *see also* UNHRC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on His Mission to Poland*, 5 April 2018, A/HRC/38/38/Add.1.

forms". In essence, the dispute was about disagreement over the form and evolution of European integration.[6]

This article is an attempt to explain (necessarily synthetically and selectively) the controversies related to such concepts as sovereignty, conferral of competences, as well as supremacy and the primacy of application of international legal rules and principles.

In this context, the case law of the Polish Constitutional Tribunal (PCT) and the legal doctrine in Poland should be viewed in the perspective of some general legal notions, and of its inspiration from the judgments of the German Federal Constitutional Court (GFCC) and of the deformations of the Polish judicial system after 2015.

Below are some examples illustrating the misunderstandings related to the relationship between international (in this case EU) law and national law:

a) the supremacy of the Polish Constitution resulting from its Art. 8(1) ("The Constitution shall be the supreme law of the Republic of Poland") is in conflict with the principle of the primacy of EU law, providing for the supremacy of its law over the law of the EU Member States (MSs), including the Constitution;
b) the supremacy of the Constitution results in the primacy of its validity and application on the territory of Poland;
c) the supremacy of the Constitution is tantamount to the preservation of the sovereignty of the State; and the sovereignty of Poland is expressed in the non-transferable competences of the State, which determine its constitutional identity; and accession to the EU implies a kind of limitation of the sovereignty of the State;
d) direct effect, direct application, and primacy are not immanent features of EU law, but merely the consequences of a domestic act of ratification, i.e. an emanation of the will of the sovereign;
e) international acts inconsistent with the Polish Constitution are not covered by the principles of primacy and direct applicability.

Also, the assumption that the conferral of competences upon the Union would constitute a premise for an implicit amendment of the Constitution, and that con-

[6] "They will not dictate to us in foreign languages what kind of system we should have in Poland!" (President of the Republic of Poland Andrzej Duda, 17 January 2020); "No one will force us to implement someone else's visions. (...) The rule of law and violations of the rule of law have become a propaganda baton in the European Union" (Prime Minister Mateusz Morawiecki in Sejm, 18 November 2020); "The European Commission operates using the methods of an organized criminal group, using illegal blackmail to force changes in the Polish legal order, contrary to Polish sovereignty" (Zbigniew Ziobro, Minister of Justice, at the press conference, 11 January 2023); "There is already a plan prepared, the implementation of which by the European Union, would lead (...) to the annihilation of the Polish state" (Jarosław Kaczyński, 11 November 2023).

tradictions between the constitutional norm and EU law leads to the invalidity of the constitutional norm, is unfounded.

1. THE STATE IN THE EUROPEAN UNION AND ITS LAW

1.1. The needs of international cooperation, the development of international law, and the entanglement of decision-making processes in the network of international governance pose a challenge to the traditional role of the State. Threats and needs become transboundary in nature, and integration within the EU expands the opportunities of MSs through its joint action. This results in the redistribution of power, influence, and interests between actors on the international scene.

The legal nature of the Union is referred to as supranational. It consists of the following elements:

a) the conferral of competences, which creates a multilevel legal order within which the Union becomes the legislative centre and exercises public authority;
b) a specific balance of diverse institutions (the Commission, the Council and the European Parliament) in the law-making process;
c) direct application of EU law, which leads to direct legal effects for natural and legal persons and involves the primacy of application of EU norms in national law,
d) exclusive jurisdiction of the Court of Justice of the EU (CJEU) with regard to the application and interpretation of EU law by its institutions and the MSs (national courts are at the same time Union courts), and the review of the legality of the acts of EU institutions. The CJEU acts as a constitutional court as well as a supreme court.

The functioning of the Union according to the above scheme is only possible if general principles of law are observed, such as mutual trust, loyal cooperation, rule of law, and primacy of application of EU law.[7]

1.2. EU law is characterized by the dynamics of its competences – it interferes on a formerly unknown scale with matters previously falling within the domestic jurisdiction of the MSs. A feature of the evolution of the Union is based on economic and political pressure to deepen cooperation – each stage of its development enforces specific consequences (spill-over; point of no return).

[7] *See* Art. 4(3) of the Treaty on European Union (TEU).

Entering into international obligations is an expression of a State's political will and the exercise of its competences. However, while the State decides freely at the time of binding itself to an international agreement, its application, interpretation, or termination are subject to restrictions which may diminish or exclude a State's freedom of action in certain areas.

The content of the Union's Treaties depends on the consent of all MSs, and the moment of their entry into force is determined by the Treaties, not by national law. The essence of the act (usually a statute) expressing consent to ratification is nothing other than the content of the treaty previously agreed upon by all parties. As a result, an individual State cannot unilaterally challenge the scope of competences conferred upon the Union (Art. 5 TEU) on the pretext that this scope was not covered by its consent.[8]

1.3. International law and national law coexist, interpenetrate, influence each other and in fact need each other. The nature of the EU is illustrated by the concept of "multilevel constitutionalism", which expresses the multitude of diversified but integrated sources of law.[9] This concept shifts the emphasis to the interdependence and the complementarity of legal norms of various origin. Different legal systems or sources may influence each other and be interrelated (interacting) – this means that achieving the intended goals is impossible without the cooperation of both systems.

EU law and domestic law are autonomous and distinct, but not separate, (competing) systems.[10] The autonomy[11] of a legal system, in short, is its own rules of recognition (legal validity) and of interpretation.

In the case of the EU, a conflict of norms should not be perceived as a classic contradiction between national law and international law, because we are dealing with one

[8] Polish Constitutional Tribunal, judgment of 24 November 2010, K 32/09: "It is not for the Constitutional Court to specify the content of the law giving consent to the ratification of an international agreement referred to in Article 90 of the Constitution, nor to define the rules for the participation of the Parliament and the Government in the implementation of the provisions of the Treaty of Lisbon" (para. III.2.6).

[9] I. Pernice, *Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making revisited*, 36(4) Common Market Law Review 703 (1999); I. Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15(3) The Columbia Journal of European Law 349 (2009); N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford University Press, Oxford: 1999.

[10] *See* J. Lindeboom, *The Autonomy of EU Law: A Hartian View*, 13(1) European Journal of Legal Studies 271 (2021); M. Konstantinidis, *Demystifying Autonomy: Tracing the International Law Origins of the EU Principle of Autonomy*, 25 German Law Journal 94 (2024).

[11] "[A]utonomy, which exists with respect both to the law of the Member States and to international law, stems from the essential characteristics of the European Union and its law. (...) That autonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it. That framework encompasses the founding values set out in Article 2 TEU, (...) the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU Treaties, which include, inter alia, rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas", Opinion 1/17 of the CJEU of 30 April 2019, EU:C:2019:341, paras. 109–110.

integrated system of norms, but which come from different sources and are adopted in different procedures. The supranational character of the Union is essential here.

In light of the case law of the CJEU,[12] EU law is integrated (*intégré*) into the national legal order and is applied directly, regardless of whether in a given country the relationship between international law and national law is defined as dualistic or monistic. In dualistic countries, EU law is applied directly,[13] as in the monistic system, which does not exclude the use of the dualistic method to State's other international obligations. However, the integration of EU law with national law does not mean the supremacy (hierarchy) of one system over the other.

Specific solutions (e.g. monism or dualism) are of a technical nature, since regardless of them a State is obliged to comply with the international law binding upon it, including the application of its domestic law in a manner that does not violate its international obligations. It has become an established general principle in international law that a State may not invoke its domestic law in order to fail to comply with its international obligations.

This principle is expressed, *inter alia*, in Art. 27 of the Vienna Convention on the Law of Treaties (VCLT): "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." According to Art. 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" (*pacta sunt servanda*). This is also reflected in the jurisprudence of the Permanent Court of International Justice (PCIJ) and International Court of Justice (ICJ),[14] as well as in EU law[15] and in some national constitutions. The

[12] Case 6/64 *Flaminio Costa v. E.N.E.L.*, EU:C:1964:66, pp. 593–594: "Le Traité de la C.E.E. a institué un ordre juridique propre intégré au système juridique des Etats membres (...) et qui s'impose à leur juridiction. (...) Cette intégration, au droit de chaque pays membre, de dispositions qui proviennent de sources communautaires, et plus généralement les termes et l'esprit du Traité, ont pour corollaire l'impossibilité pour les Etats de faire prévaloir, contre un ordre juridique accepté par eux sur une base de réciprocité, une mesure unilatérale ultérieure qui ne saurait ainsi lui être opposable, le droit né du Traité issu d'une source autonome ne pouvant, en raison de sa nature spécifique originale se voir judiciairement opposer un texte interne quel qu'il soit sans perdre son caractère communautaire et sans que soit mise en cause la base juridique de la Communauté elle-même."

[13] Case 34/73 *Fratelli Variola S.p.A. v. Amministrazione italiana delle Finanze*, EU:C:1973:101.

[14] For a set of judgments of international courts on this issue, *see* International Law Commission (ILC), *Articles on Responsibility of States for Internationally Wrongful Acts with comments* (2001), commentary on Article 3; *see also* R. Kwiecień, *The Permanent Court of International Justice and the Constitutional Dimension of International Law: From Expectation to Reality*, in: C.J. Tams, M. Fitzmaurice (eds.), *Legacies of the Permanent Court of International Justice*, Martinus Nijhoff, Leiden: 2013.

[15] Case 106/77 *Amministrazione delle finanze dello Stato v. Simmenthal SpA*, EU:C:1978:49; Case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)*, EU:C:2022:99 – "It follows from that case-law that, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law, including constitutional provisions, being able to prevent that" (para. 51).

principle of primacy of application, especially developed in EU law, is a reflection of the above provisions.

1.4. In practice, conflicts that arise between the norms of EU law and national (including constitutional[16]) law concern, for example, the limits of the competences conferred upon the Union, as well as a MS's constitutional identity or sovereignty. The primacy of application of EU law serves to overcome tensions in this regard.[17] This principle is not expressly formulated in the EU Treaties but has its source in the case law of the CJEU. This jurisprudence was accepted by MSs in the Declaration No. 17 concerning primacy (*Déclaration relative à la primauté*) attached to the Treaty of Lisbon of 2009:

> The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States (*priment le droit des Etats members*), under the conditions laid down by the said case law.

Primacy of application means the obligation to apply EU law in good faith and refrain from enacting national law that is inconsistent with EU law, as well as the prohibition to apply national law that is inconsistent with EU law.[18] The principle of primacy is common to both the Union and its MSs as part of an integrated legal order; and without it direct effect and the uniform application of EU law would be impossible. However, primacy does not concern the ranking of legal systems:

> The concept of primacy does not imply that there is a hierarchy between EU and national law. Instead, it means that, in case of a conflict, Member States have the obligation not to apply national law that is contrary to EU law. If the conditions for direct applicability are met, national authorities are obliged to apply the provision of EU law. If not, national authorities are obliged to interpret national law in conformity with EU law.[19]

[16] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, EU:C:1963:1.

[17] For developments in this regard, *see* Fraenkel, *supra* note 3.

[18] Art. 4.2 TEU: "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, inclusive of regional and local self-government. (...) 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."

[19] European Parliament, Committee on Legal Affairs and Committee on Constitutional Affairs, *Report on the implementation of the principle of primacy of EU law*, 7 November 2023, 2022/2143(INI), *Explanatory Statement* (2b).

The Spanish Constitutional Court rightly commented on the primacy of EU law, stating in 2004 that:

> Primacy is not set forth as a hierarchical superiority but as an 'existential requirement' of the Law of the Union, in order to achieve in practice the direct effect and equal application in all States (II.3). (...) The primacy of Union legislation (...) does not contradict the supremacy of the Constitution. Supremacy and primacy are categories which are developed in differentiated orders. (...) The former, in that of the application of valid regulations; the latter, in that of regulatory procedures. Supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to the consequent invalidity of the latter if they contravene the provisions set forth imperatively in the former. Primacy, however, is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons (II.4).20

2. SOVEREIGNTY

When it comes to the EU's specific legal nature and the relationship between its law and the law of the MSs, references to sovereignty often appear.[21] The rather inconsistent and arbitrary use of this notion sometimes leads to confusion.

Below, for the purposes of further reflection, I formulate my understanding of sovereignty. It consists primarily of the legal definition of that notion, which is not synonymous with the power of the State (*puissance, Herrschaft*), but a qualitative feature of this power: it does not imply some core of state competences, but is situated within the framework of (national and international) law and not outside it; and it does not identify legal capacity with the practical possibilities.

[20] Constitutional Court of Spain, declaration 1/2004 (unofficial translation), DTC 1/2004, 13 December 2004, available at: https://www.tribunalconstitucional.es/ResolucionesTraducidas/Declaration%201-2004.pdf (accessed 30 August 2024).

[21] *See* R. Kwiecień, *Does the State Still Matter? Sovereignty, Legitimacy and International Law*, XXII Polish Yearbook of International Law 45 (2012); J. Kranz, *Pojęcie suwerenności we współczesnym prawie międzynarodowym* [The Concept of Sovereignty in Modern International Law], Elipsa, Warszawa: 2015.

2.1. The essence of the State lies in the ability to perform its functions as a legislative and political centre of governance and management within the scope of its territorial, material. and personal competences, legally independent from other entities, but within the framework defined by law (international or national) and bearing responsibility (constitutional or international) for its actions.

The State, as a legal person, exercises its power (*puissance*) based on its competences. Competence means the ability, defined by law, of a public authority to produce legal effects through its own actions.[22] Competence is essentially a negation of omnipotence and arbitrariness. However, the State is not defined by the quantity (scope) of its competences, but by the qualitative nature of its power, i.e. its sovereignty, which distinguishes it from other subjects of international law.

2.2. The notion "sovereignty" is used today to mean, firstly, the sovereign capacity of the State (so-called internal sovereignty); and secondly, the legal status of the State in the international community (so-called external sovereignty). State power (*puissance*) is often described as supreme in an internal perspective and independent in an external perspective. These two points of view are closely related and together characterize the phenomenon of statehood.

The normative form of the notion of sovereignty is the principle of equal sovereignty of States. It is often referred to as the "sovereign equality" of States, although this phrase is inaccurate since it is not the equality of States that is sovereign, but that their sovereignty is equal. States are unequal in many respects, but equal in terms of sovereignty; that is, in the legal quality of their power (*puissance*) and their legal status.

The State's power is primary in nature, and the formal source of its competences is national law, and less frequently international (EU) law. Defining it as supreme refers to the domestic aspect, as it is obvious that the State does not have such power in external relations, i.e. towards other countries. The power of the State is not absolute and its limits are set by domestic law and international, including EU, law.

The internal aspect of sovereignty concerns the relationship between the people and the State, in particular the freedom of the people to decide their own destiny (self-determination), i.e. the creation of the State, the exercise of State power, and its control. The legitimising factor of State power is the people (referred to in this case as the sovereign – *pouvoir constituant*) and the legitimated object is State power

[22] *See* V. Constantinesco, *Compétences et pouvoirs dans les Communautés européennes*, Librairie générale de droit et de jurisprudence, Paris: 1974, pp. 70 and 83.

(*pouvoir constitué*). In fact, there is a reciprocal interaction – of the people on the State power and vice versa (the constitutional perspective).

The power of the State is characterized by the specific nature of its competences, described as exclusive, complete and autonomous.[23] Exclusive means a unitary and coercive State structure and legal system that creates and protects social order in relation to the territory, entities, and events subject to this power. The full nature of the competence is expressed in the fact that (unlike, for example, the competence of an international organisation) its scope *ratione materiae* is not predetermined. Autonomy implies the freedom of the State to legislate, enter into and meet international obligations, including the voluntary submission to the jurisdiction of international courts (in the case of foreign national courts, State immunity from jurisdiction applies).

In turn, the external aspect of State sovereignty concerns the State's international status and the relationship between domestic law and international law. International law is a creation of States, which gives it both its strength and weakness. It does not create a State but protects it, sets the limits of its activities, allows for resolving conflicts of competences between States, and promotes common values and international cooperation. This law also expresses the convergence of goals and interests. It does not eliminate the differences between States, but it is an element that civilizes international relations and, even if it is violated, it constitutes a framework and criterion for assessing the behaviour of States. Without international law, the existence of States and their cooperation would be based only on a factual power relationship.

International law proclaims the principle of equality of States in terms of their sovereignty, that is the legal status of each of them. From this status derives legal capacity and the ability to act within the international legal order (having rights and duties, and bearing legal responsibility). The consequence of their equal status as sovereigns is the obligation to comply with international law. This is an essential element of protecting of sovereignty and, moreover, promotes cooperation and coexistence of States.

This equal status is often defined as independence.[24] Its essence is that in international relations there is no subordination of the state to the authority of other actors.[25] However, the most common misunderstanding is that independence is wrongly understood as independence from law (both domestic and/or international).

The equality of States formulated in this way is a general principle of law, differing from a rule in that it expresses certain values (similar to the principle of *pacta sunt*

[23] *See* C. Rousseau, *Droit international public*, Editions Sirey, Paris: 1974, pp. 55–95.

[24] PCJI, *Régime douanier entre l'Allemagne et l'Autriche*, avis consultatif du 5 septembre 1931 (Recueil, série A/B, No. 41), opinion individuelle de D. Anzilotti, p. 57: "L'indépendance (...) n'est, au fond, que la condition normale des Etats d'après le droit international: elle peut être aussi qualifiée comme souveraineté (*suprema potestas*) ou souveraineté extérieure, si l'on entend par cela que l'Etat n'a au-dessus de soi aucune autorité, si ce n'est celle du droit international."

[25] J. Combacau, S. Sur, *Droit international public*, LGDJ, Paris: 2010, p. 236: "La souveraineté internationale ne comporte donc par elle-même aucun pouvoir. (...) La notion de souveraineté internationale

servanda). General principles of law[26] have a constitutional function in the sense that they constitute a keystone, allowing one to speak of a system of international (including EU) law.

In other words, international law (i.e. EU law) does not limit State sovereignty,[27] and violation of the law is not an expression of sovereignty, nor is the latter an excuse for its violation.

2.3. The development of international law has resulted in a reduction of State competences. This phenomenon is justified by pragmatic (e.g. trade, transport) and axiological-ideological (e.g. human rights, environmental protection) considerations.

Increasing or decreasing the scope of a State's competences (as well as its territory) is not related to its sovereignty. In some cases, a limitation of the State's "sovereign rights" is invoked. However, this term does not mean anything other than State competences. In turn, the conferral by States of certain competences upon an international organization does not make said organization a sovereign entity, and the transferring State does not become less sovereign.

Opinions about limited or regained (full) sovereignty, or dividing it into economic, cultural or military spheres are inaccurate, because sovereignty is a qualitative (not quantitative) notion and does not come down to a specific sum (or core) of State competences. In particular, it should not be equated with identical possibilities (Macht), since the principle of sovereignty does not determine the scope of a State's actions or the effectiveness of its governance. Governance consists of politically setting goals (policy), but their implementation (politics) depends on a number of considerations and is vulnerable to the international environment. For example, the capacity to conclude treaties or to send diplomatic representatives does not always equate to their real possibilities.

The category of State competences which, at a given moment and for this State, are not part of its international legal obligations, is called domestic jurisdiction (*domaine réservé*).[28] There is no common domestic jurisdiction of all States, because

(...) ne semble en rien différer de la notion d'indépendance, dont on sait qu'elle est une condition de l'apparition de l'Etat sur la scène internationale. Et il est vrai qu'elles ont exactement le même compas; toutefois elles appartiennent à deux ordres différents, l'indépendance à celui du fait, la souveraineté à celui du droit."

[26] *See* R. Kwiecień, *General Principles of Law: The Gentle Guardians of Systemic Integration of International Law*, XXXVII Polish Yearbook of International Law 235 (2017).

[27] PCIJ, *The S.S. "Wimbledon"*, judgment, 17 August 1923, PCIJ Series A, No. 1, p. 25: "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing, a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."

[28] "Le domaine réservé est celui des activités étatiques où la compétence de l'Etat n'est pas liée par le droit international. L'étendue de ce domaine dépend du droit international et varie suivant son développement"

its limits vary individually (for a concrete State and at a given time). Nicolas Politis rightly notes that "international law recognizes the existence of a *domaine réservé*", but "it ignores its content."[29] International law serves as the main reference for determining the limits of this domain and what is decisive in this regard is not the nature of a matter, but only the state of international regulations.[30]

An international legal obligation deprives the State of the possibility of invoking the domestic jurisdiction exception. However, the absence of such obligation does not mean that international law excludes a matter from its regulation, but only that at a given moment such regulation does not exist – a situation which may change. As the domestic jurisdiction continues to diminish, a sort of tension is perceptible between the application of international law on the one hand and the invocation of the sovereignty and the domestic jurisdiction of a State on the other.

While there are matters which are rarely the subject of international obligations, there is no catalogue of questions excluded in advance from international regulation. Some aspects of the political, economic and social system may be subject to such regulation, and in this case they are no longer part of domestic jurisdiction.[31] In turn, not every attempt to influence the *domaine réservé* of another State amounts to an unlawful act. Limitations on domestic state competences under international law do not constitute an interference into the domestic jurisdiction of the State (which also applies to relations between the EU and its MSs).[32]

While the notion of *domaine réservé* is one which reflects the sovereignty of States because it emphasizes that the absence of international obligations affirms the freedom of the State in the exercise of its powers, this freedom does not authorize arbitrariness.

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see Institute of International Law, *Annuaire de l'Institut de Droit international*, Bureau de la Revue de droit international, Gand: 1954, p. 293.

[29] N. Politis, *Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux*, Martinus Nijhoff Publishers, Leiden: 1925, p. 48.

[30] PCIJ, *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 7 February 1923, PCIJ Series B. No. 4, p. 24: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."

[31] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Rep 1986, para. 258: "A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law."

[32] *See* J. Kranz, *Notion d'intervention en droit international*, in: J. Kranz (ed.), *Entre l'influence et l'intervention. Certains aspects juridiques de l'assistance financière multilatérale*, Peter Lang Verlag, Frankfurt am Main: 1994, pp. 50–104.

2.4. A distinction must be also made between legal restrictions and illegal actions. In this context, the idea of violating or limiting sovereignty is sometimes raised. However, while competencies can be restricted, the question of limiting (violating) sovereignty is more complicated. It depends on its qualification only as a general principle of law or, in some cases also as a primary rule. In the former case, its violation should be preceded by an infringement of a specific legal rule (e.g. the prohibition of using armed force) and this variant seems more appropriate for both theoretical and practical reasons. In the second case, it would be enough to violate sovereignty qualified as a primary rule, which may lead to arbitrary conclusions and even possible abuses. An illustration of such a controversy are the opinions regarding the legal qualification of the so-called cyberattacks.[33]

In practice, this problem also concerns the qualification of the actions of States as lawful or unlawful. These questions, however, require a separate analysis that goes beyond the scope of this article.

2.5. To sum up, the sovereignty of the State as a legal notion results from the law – it does not imply independence from law (national or international); and the law and its observance are instruments for protecting sovereignty. Thus, "sovereignty does not mean freedom from law but freedom within the law."[34]

Contemporary international relations are based not so much on sovereignty per se as on the legal principle of equality of States in terms of sovereignty. Sovereignty is a fundamental organising concept of the international community and should be understood as a regulatory idea, necessary for the existence and functioning of the international legal system[35] from which it evolves.[36] European integration does not

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[33] *See* M.N. Schmitt, *The Law of Cyber Conflict: Quo Vadis 2.0?*, in: M.C. Waxman, T.W. Oakley (eds.), *The Future Law of Armed Conflict*, Oxford University Press, Oxford: 2022, pp. 103–121; M.N. Schmitt, *In Defense of Sovereignty in Cyberspace*, Just Security, 8 May 2018, available at: https://www.justsecurity.org/55876/defense-sovereignty-cyberspace/ (accessed 30 August 2024).

[34] J. Crawford, *Chance, Order, Change: The Course of International Law. General Course on Public International Law*, Martinus Nijhoff Publishers, Leiden: 2014, para. 98.

[35] Kwiecień, *supra* note 21, p. 49: "State sovereignty should therefore be regarded as a regulative idea (in the Kantian sense of the word) of international law: the idea without which it would be impossible for the structure and institutions of this law to exist and be explored"; S. Besson, *Sovereignty*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, Oxford University Press, Oxford: 2011, para. 1: "The principle of sovereignty (...) is a pivotal principle of modern international law. What counts as sovereignty depends on the nature and structure of the international legal order and vice-versa."

[36] N. Walker, *Late Sovereignty in the European Union*, in: N. Walker (ed.), *Sovereignty in Transition*, Oxford University Press, Oxford: 2003, pp. 27–28: "[T]he dynamic of transformation within late sovereignty will involve the continuous evolution rather than the demise of sovereignty"; Besson, *supra* note 35: "[T]he constitutional pluralism which characterizes the European legal order *lato sensu* seems difficult to reconcile with traditional conceptions of unitary sovereignty. This does not mean, however, that sovereignty is lost in Europe nor that we have moved beyond sovereignty and need to redefine it. All it reveals is that paradigms of sovereignty have changed and that new conceptions have emerged that conflict with prior ones."

seem to pose a challenge to the sovereignty of States – however, this view is subject to controversy due to the diversity of definitions of this concept.

2.6. In the Polish Constitution, the term "sovereignty" appears rarely and with not very clear meanings. For example: "the existence and future of our Homeland, which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate" (preamble); Members of Parliament vow "to safeguard the sovereignty and interests of the State" (Art. 104(2)); "The President of the Republic shall (...) safeguard the sovereignty and security of the State" (Art. 126(2)).

The concepts of supreme power and independence also appear: "Supreme power in the Republic of Poland shall be vested in the Nation" (Art. 4(1)); "The Republic of Poland shall safeguard the independence and integrity of its territory" (Art. 5); and "The Constitution shall be the supreme law of the Republic of Poland" (Art. 8(1)).

The references to sovereignty by the PCT do not dispel the ambiguities. For example, in accordance with the judgment of 11 May 2005 (K 18/04), Poland "sovereignly" ratified the EU Treaty or "sovereignly" transferred some competences to the Communities (marginal number 355). Furthermore, the Tribunal stated that Arts. 90(1) and 91(3) of the Constitution "do not authorise the transfer of competences to such an extent that it would signify the inability of the Republic of Poland to continue functioning as a sovereign and democratic State. With regard to this issue, the view of the Constitutional Tribunal remains, in principle, consistent with the position of the Federal Constitutional Court of Germany" [Maastricht-Urteil] (marginal number 289).

In its judgment of 24 November 2010 (K 32/09), the Tribunal found that: "the preservation of the primacy of the Constitution in the context of European integration must be considered tantamount to preservation of the sovereignty of the State" (1.3); "accession to the European Union is perceived as some sort of limitation of sovereignty of a given State, but it does not mean its loss" (2.1); "the sovereignty of the Republic of Poland is expressed in the inalienable competences of the organs of the State, constituting the constitutional identity of the State" (2.1); "The EU Member States retain their sovereignty due to the fact that their constitutions, being manifestations of the State's sovereignty, retain their significance" (2.1).

In turn, in the judgment of 7 October 2021 (K 3/21) the "deformed" PCT – meaning the PCT as reconstructed by the ruling PiS party in a manner widely perceived as both unconstitutional and well as in violation of EU law – emphasized that:

> Article 1, first and second paragraphs, in conjunction with Article 4(3) of the Treaty on European Union – insofar as (...) a) the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties; b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application; c) the Republic of Poland may not function as a sovereign and democratic State – is inconsistent with Article 2, Article 8 and Article 90(1) of the Constitution of the Republic of Poland.

3. BETWEEN PRIMACY AND SUPREMACY

3.1. In an interview on 7 November 2017, the President of the Republic of Poland lamented that "the Polish Constitutional Tribunal has so far never reached such a ruling that (...) in an absolutely unambiguous and absolutely decisive manner" would indicate "the supremacy of the Polish Constitution over EU law – just as the Constitutional Court in Germany did."[37] This opinion forces one to reflect on the meaning of certain concepts, especially *supremacy* and *primacy*.

The Polish legal order consists of norms of national origin and of international origin – it is a monistic system with a multi-component nature. Art. 91 of the Constitution provides as follows:

1. An international agreement that has been ratified, once it has been promulgated in the Journal of Laws of the Republic of Poland, shall form part of the domestic legal order [validity – J.K.] and shall be directly applicable, unless its application depends on the enactment of a statute.
2. An international agreement ratified upon prior consent granted by statute shall take precedence (*pierwszeństwo*) [primacy of application – J.K.] over statutes if a statute cannot be reconciled with the provisions of such agreement.
3. If it results from an agreement ratified by the Republic of Poland constituting an international organisation, the law enacted by it shall be applied directly, taking precedence [primacy of application– J.K.] in the event of a conflict with statutes.

[37] *Profesor Biernat o zawstydzających wypowiedziach doktora Dudy i magister Przyłębskiej* [Professor Biernat about the embarrassing statements of Doctor Duda and Magister Przyłębska], Monitor Konstytucyjny, 14 November 2017, available at: https://monitorkonstytucyjny.eu/archiwa/1894 (accessed 30 August 2024).

Thus, constitutional rules for the validity and application of international (EU) law were established, especially the principle of primacy of application in the event of a conflict with a statute. However, the situation is different in the case of a conflict with the Constitution.

In the Polish system, "[t]he Constitution shall be the supreme law of the Republic of Poland"[38] (Art. 8(1) of the Constitution); while at the same time "[t]he Republic of Poland shall respect international law binding upon it" (Art. 9). The meaning and reconciliation of these two provisions is not obvious. The wording of Art. 9 reaffirms a general principle of international law, i.e. the legal obligation for Poland to comply with its international obligations.

Both the Polish Constitution (Art. 91) and EU law use the term *pierwszeństwo* (primacy, precedence), while the Polish academia and case law of the PCT also refer to the concept of *nadrzędność* (supremacy, superiority), although neither the Constitution nor EU law uses the latter.[39] These are not identical concepts – they fulfil different functions and express different perspectives.[40] The former refers to the primacy of application of a legal norm, while 'supremacy' refers to the norm's validity and to its ranking in the national catalogue of sources of law. Confusion arises against this background, as primacy does not prejudge supremacy and supremacy does not exclude primacy.

3.2. In this context, it is worth taking a look at Art. 8 of the Constitution and the concept of supremacy used in the Polish academia and jurisprudence. In practice, this concept sometimes leads to confusing conclusions, especially in the context of the relationship between Arts. 8 and 9.

First, the conclusion could be drawn from Art. 8 that the adjective *najwyższy* (the highest) is identical with *nadrzędny* (supreme). However, the supremacy of the Constitution does not imply a hierarchy of validity (or superiority) in relation to international (EU) law, and does not concern ranking between legal systems.

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[38] In original: "Konstytucja jest najwyższym prawem Rzeczypospolitej Polskiej."

[39] In French *primauté* and *suprématie*, and in German *Anwendungsvorrang* and *Geltungsvorrang*.

[40] *See* P. Eleftheriadis, *The Primacy of EU Law: Interpretive, not Structural*, 8(3) European Papers 1255 (2023); J. Lindeboom, *Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment*, 21(5) German Law Journal 1032 (2020); Lindeboom, *supra* note 10; F. Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, 16(4) German Law Journal 1003 (2015), p. 1014; "The primacy of EU law over opposing claims of the supremacy of national constitutional courts is the *conditio sine qua non* to ensure that all member states remain equal in the EU"; T. Tuominen, *Reconceptualizing the Primacy – Supremacy Debate in EU Law*, 47(3) Legal Issues of Economic Integration 245 (2020), pp. 245–266; M. Avbelj, *Supremacy or Primacy of EU Law – (Why) Does it Matter?*, 17 European Law Journal 744 (2011); R. Kwiecień, *The Primacy of European Union Law Over National Law Under the Constitutional Treaty*, 6(11) German Law Journal 1479 (2005); F.C. Mayer, *Supremacy – Lost? – Comment on Roman Kwiecień*, 6(11) German Law Journal 1497 (2005).

Supremacy should be regarded as a principle that derives from national law and is not binding in the sphere of international (EU) law – something that national parliaments or constitutional courts are unable to change. Other States or international organizations are not bound by Polish law (including the Polish Constitution and judgments of Polish courts), as the (Polish) State does not have supreme authority over them.

What is important is that the supremacy of the Constitution does not derogate or suspend conflicting international rules or principles that remain in force at the international level. In turn, it does not follow from EU (international) law that it is hierarchically superior to national law, including constitutional law. Only the principle of primacy of application operates in this relationship.

Finally, even if the Constitution is the supreme law, not every action of state organs invoking the constitution mean that this action is legal and in accordance with the constitution. In Poland, the essence of the problem in the years 2015-2023 was the obvious inconsistency with the constitution of some statutes or judgments of the constitutional tribunal itself.

The second doubtful conclusion boils down to the fact that the supremacy allegedly deriving from Art. 8 would constitute (as an expression of sovereignty) an instrument for questioning the validity of the norms of EU (international) law and justifying their selective non-application, including the decisions of international courts. However the State bears legal responsibility for violations of EU (international) law, regardless of whether specific actions are deemed constitutional under domestic law.[41] Thus, the European Commission's complaints against Poland are the result of Poland's refusal to implement some CJEU rulings.[42]

A conclusion can and should be drawn that in the event of inconsistency of an international norm with the Constitution, the State is obliged to eliminate this conflict (considering that Art. 8 is not an obstacle to the amendment of the Constitution). Furthermore, Art. 8 does not counterbalance and relativise the obligation formulated in Art. 9, which can be regarded as an expression of the not-explicitly-formulated principle of primacy. According to the principle of primacy, State authorities apply an international norm by disregarding a national norm ("does not see" it) which

[41] ILC, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Art. 3: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." *See also* Art. 27 of the Vienna Convention on the Law of Treaties (signed on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331.

[42] In July 2023, the Commission, on the basis of Art. 258 of the Treaty on the Functioning of European Union (TFEU), brought an action against Poland (Case C-448/23 *European Commission v. Republic of Poland*, OJ C 304/17). Its subject matter became the interpretation of the Polish Constitution and the composition of the Constitutional Court in relation to the Polish Constitutional Tribunal, judgments of 14 July 2021, P 7/20 and 7 October 2021, K 3/21.

remains in force (no derogation effect). However, primacy of application does not imply (hierarchical) supremacy and, in particular, does not result in the derogation of national norms (including constitutional norms) or national court judgments.[43] In other words, the EU law claims primacy, but not supremacy.

Even if primacy does not create a ranking between specific systems of law, it does refer to general principles of law, associated values and *finalités*. Recognizing the legal and political diversity of the international community, the principle of primacy supports the universalism of international law. Consequently, primacy of application is the premise and foundation of international cooperation, enables the implementation of legal goals, ensures compliance with binding obligations, helps eliminate conflicts of norms, and allows for managing the relationship between autonomous but related legal systems. The principle of supremacy does not serve this function.

3.3. The collision between EU norms and domestic law is a well-known phenomenon. However, the constitution can be amended under the influence of EU (international) law, and in practice this is not an exceptional occurrence. A conflict with the constitution is thus not inevitable and can be resolved.

States shield their most important objectives, values and competences by referring in practice to sovereignty; to so-called constitutional identity or constitutional pluralism; to the observance of the scope of conferred competences (*ultra vires*); and to the national level of human rights protection.[44] Therefore, it is necessary to ask about the limits of the application of the principle of primacy (*inter alia* the question of *Kompetenz-Kompetenz*).

Conflicts in this context should be perceived from two perspectives: the compliance of States' actions with the international law (EU law) binding on them; and the compliance of the norms of this law with national law, especially constitutional law.

In the first case, the burden rests mainly on international courts (bodies), but States rarely submit to their jurisdiction (which consequently does not exclude the jurisdiction of national courts). The Union is a far-reaching exception in this regard, providing for the compulsory and exclusive jurisdiction of the CJEU regarding the legality and application of EU law by its institutions and by the MSs (Art. 19 TEU, Arts. 258-260, 263-269, 344 TFEU).

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[43] Avbelj, *supra* note 40, p. 750: primacy is "a trans-systemic principle, which regulates the relationship between the autonomous legal orders", while supremacy is "the feature of supreme legal acts in the legal orders of the Member States and of the EU."

[44] Constitutional identity concerns the limits of the constitutionally transferable, the *ultra vires* directs to the adherence to the limits of already transferred competences, *see* S. Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess*, Mohr Siebeck, Tübingen: 2016, p. 90.

In the second case, national authorities and courts, especially constitutional ones, have jurisdiction. The national law sometimes explicitly provides for the primacy of application of international (EU) law over statutes. However, primacy over the provisions of national constitutions is more complicated. What is problematic is not so much the review of constitutionality per se, but the scope of this control and its effects; i.e. the answer to the question of what to do after a national court finds a conflict between an international (EU) norm and the binding national constitution.

In the case of the Union's primary law (the Treaties) and its amendments, national control mechanisms apply, such as ratification and the opinion of the constitutional court. On the other hand, it is up to the CJEU to assess whether the acts of the institutions in the field of secondary law do not exceed the competences conferred upon the Union (*ultra vires*), since it concerns the content of the Treaties and their interpretation. The constitutional courts of the MSs do not have such competence, as this would lead to a differentiated application of EU law.

In exceptional situations, a constitutional court's review of the acts of EU institutions (secondary law) seems conceivable, but only in the context of an obvious and significant non-conformity with the constitution.[45] Nonetheless this review may lead to abuse, in particular when a national court – under the pretext of examining constitutionality – actually assesses and interprets the content of the EU Treaties as agreed upon by all MSs. For this reason, any such review should be preceded by a preliminary question directed to the CJEU.[46]

The concept of "constitutional identity" review has emerged in the practice of constitutional courts. The CJEU questions this referential standard because its content is not identically understood in every State and a unilateral definition of "constitutional identity" poses a threat to the uniform interpretation and application of EU law. Moreover, as a counterbalance the CJEU has formulated the concept of the Union's identity protected by its law.[47]

The concepts of constitutional identity and constitutional pluralism are closely related. Constitutional pluralists accept the constitutional identity review and hope that conflicts between the CJEU and constitutional courts can be resolved through dialogue, sincere cooperation, and mutual accommodation. This path has not worked however, as evidenced by the practice of constitutional courts in

[45] *See* BVerfG, Urteil des Zweiten Senats vom 5 Mai 2020 – 2 BvR 859/15, para. 111.

[46] An example of such manipulation, modelled on the GFCC doctrine, is the Polish Constitutional Tribunal, judgment of the 14 July 2021, P 7/20, para. 147: "When conducting an ultra vires review, the Tribunal assesses not the content of the CJEU decision of 8 April 2020, but only the compliance of the effect of this ruling with the Constitution of the Republic of Poland. (...) In doing so, the Constitutional Tribunal is in a position to assess the constitutionality of the act [statute] authorising the ratification of any international agreement subject to such ratification, including agreements specified in Art. 90 section 1 and Art. 91 section 3 of the Constitution."

[47] Case C-157/21 *Poland v. Parliament and Council*, EU:C:2022:98, paras. 145 and 265.

Poland, Romania and Hungary. Considering and analysing these dangers and abuses, Kelemen and Pech rightly advocate a return to the traditional understanding of the primacy of EU law.[48]

3.4. In this context, the question arises whether, if an EU norm is found to be inconsistent with the constitution, the MS may selectively refuse to apply EU law.

An answer has been outlined by the German Constitutional Court (GFCC).[49] The Court emphasises that the EU law applicable on German territory derives its binding force from German legal acts (*Rechtsanwendungsbefehl*), i.e. from Germany's consent to be bound by the EU Treaties. Consequently, according to the Court, the principle of primacy of application does not imply a renunciation of sovereignty or constitutional identity.[50]

In its jurisprudence, the GFCC has developed some referential standards (fundamental rights, *ultra vires*, constitutional identity) as limits for the principle of primacy. With regard to the effects of its review, the Court considers that an act of EU law found to be inconsistent with the mentioned criteria will be ineffective (inapplicable) in the territory of Germany (*Unanwendbarkeit*).[51] It also acknowledges that unilateral national review of the applicability of EU law norms is risky and may impede the functioning of the Union and its law. Simultaneously, the Court is of the opinion that if a MS gave up this type of control, it would lead to granting the EU freedom to define and expand its competences (*Kompetenz-Kompetenz*).[52]

It follows that a selective refusal to apply EU law seems permissible after a preliminary question has been submitted to the CJEU and only in exceptional and qualified cases; that is, when

> the action of an EU body contrary to its competences is manifest and leads to a structurally significant change in the structure of competences to the detriment of the competences of the Member States. A structurally significant change to the detriment

[48] R.D. Kelemen, L. Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, 21 Cambridge Yearbook of European Legal Studies 59 (2019); *see also* F. Fabbrini, A. Sajó, *The dangers of constitutional identity*, 25(4) European Law Journal 457 (2019).

[49] M. Ludwigs, P. Sikora, *Der Vorrang des Unionsrechts unter Kontrollvorbehalt des BVerfG*, 3 Europäisches Wirtschafts- und Steuerrecht 121 (2016); C. Calliess, *Primacy of Union Law and Control of Competences: Challenges and Reforms in the Light of the German Constitutional Courts PSPP-Ruling and the EU Commission's Treaty Infringement Proceeding*, 133 Berliner Online Beiträge 2 (2021).

[50] BVerfG, Urteil des Zweiten Senats vom 30 Juni 2009 (2 BvE 2/08 – Lissabon), paras. 339 and 343.

[51] *Ibidem*, paras. 241, 339; *see also* BVerfG, Urteil des Zweiten Senats vom 5 Mai 2020 – 2 BvR 859/15, paras. 109, 234.

[52] *Ibidem*, para. 111.

> of the competences of the Member States occurs if the excess of competences has a significant impact on the principle of delegated competences and the rule of law.[53]

At the same time however, such a refusal to apply EU law does not produce legal effects in relation to other MSs and does not affect the binding force of the norm in question on their territory.

The rightly criticized decision of the GFCC of 5 May 2020 violated EU law, but in a quite clever way. The Court based its judgment on the allegation of *ultra vires* (against the European Central Bank and the CJEU), but found no violation of German constitutional identity. By threatening not to enforce the CJEU's judgment (issued in response to a preliminary question), the German court consciously and deliberately left the door open to a compromise solution and closure of the case with both the government and the Bundestag as well as with the European Commission.

The doctrine of the German constitutional court reaches further than just EU law and grants primacy of application of the national constitution in a broader context.

Let us quote excerpts of some parts of the judgments:

> 67. The principle of the Constitution's openness to international law does not entail an unreserved constitutional duty to comply with all international treaties. It primarily serves as a guideline for the interpretation of fundamental rights, the constitutional principles under the rule of law, and ordinary law.
> 68. (...) The Basic Law (...) does not relinquish sovereignty in relation to the final authority that ultimately belongs to the Constitution [! – J.K.].
> 69. It does not follow from the principle of the Constitution's openness to international law that there is an unreserved constitutional duty to comply with all rules of international law.[54]

> 35. The Basic Law (...) does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted.[55]

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[53] *Ibidem*, para. 110.

[54] BVerfG, Order of 15 December 2015 – 2 BvL 1/12 (Treaty overrides by national statutory law are permissible under the Constitution). *See* A. Peters, *New German Constitutional Court Decision on "Treaty Override": Triepelianism Continued,* EJIL: Talk!, 29 February 2016, available at: https://tinyurl.com/2645bnnc (accessed 30 August 2024).

[55] BVerfG, Order of the Second Senate of 14 October 2004 – 2 BvR 1481/04 (*Görgülü* case). *See also* ECtHR, *Görgülü v. Germany* (App. No. 74969/01), 26 February 2004.

Not surprisingly, this line of reasoning finds imitators in autocratic countries. However, situations of this kind occur in democratic states only exceptionally and concern concrete and limited matters of minor importance, and are not part of a frontal and systemic undermining of the foundations of international (EU) law.[56]

Contrary to appearances, the German practice is actually within reasonable limits and the GFCC maintains restraint in its decisions. Referring to this doctrine is, to some extent, an abuse that serves illegitimate (extra-legal) purposes (*détournement*). Thus, the standards of reference used may, in one case, serve to protect certain values, and in another case be used to systematically undermine the structures and foundations of the Union. From a different perspective, in the case of appointing judges of constitutional courts, it is important not only who appoints them, but also from what group of candidates and for what purpose. In the Polish 2015-2023 practice it was about the political availability of these judges. Nevertheless, the question arises – how long and how efficiently can the EU function in the shadow of the German Court's doctrine and its possible effects?[57]

3.5. An illustration of the risks can be found in some of the rulings of the Polish Constitutional Tribunal prior to 2015.[58] In the judgment of 11 May 2005 (K 18/04 – The Accession Treaty), the Court stated that:

> The Constitution remains (...) "the supreme law of the Republic of Poland" in relation to all international agreements binding the Republic of Poland. (...) By virtue of the supremacy of legal force resulting from Article 8(1) of the Constitution, it enjoys primacy of validity and primacy of application on the territory of the Republic of Poland (marginal number 285).[59]

[56] Germany fell into the trap of its own doctrine in the context of the case it won against Italy before the ICJ (2012). Citing non-conformity with the constitution (*controlimiti* doctrine), the Italian constitutional court refused in 2014 to implement the ICJ judgment, *see* Italian Constitutional Court, judgment of 22 October 2014, No. 238/2014, available at: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf (accessed 30 August 2024).

[57] *See* J. Kranz, *Verfassung über alles oder wohin uns die Gralshüter führen*..., 60(4) Archiv des Völkerrechts 410 (2022).

[58] *See e.g.* Polish Constitutional Tribunal, judgments of 27 April 2005, P 1/05; of 11 May 2005, K 18/04; of 24 November 2010, K 32/09 and of 16 November 2011, SK 45/09.

[59] This thesis is repeated in the Polish Constitutional Tribunal, judgments of 16 November 2011. SK 45/09, pt. 2.2; of 24 November 2010, K 32/09, pt. 2.5. and 2.6 and of 7 October 2021, K 3/21.

However, the Tribunal came to the conclusion that in the case of an irreconcilable collision between a norm of the Constitution and a norm of Community law

> [i]t would be up to the Polish legislator to decide either to amend the Constitution, or to introduce changes to Community regulations, or – ultimately – to decide to withdraw from the European Union (marginal number 302).

This did not prevent the Court from concluding that:

> Member States retain the right to assess whether the Community (EU) legislative bodies, in enacting a particular act (legal provision), acted within the framework of the conferred competences and whether they exercised their competences in accordance with the principles of subsidiarity and proportionality. If this framework is exceeded, acts (provisions) issued outside of it are not covered by the principle of primacy of Community law (marginal number 329).

This thread is further developed in the PCT's judgment of 16 November 2011 (SK 45/09):

> It would be difficult to reconcile with this principle [of loyal cooperation – Article 4(3) TEU] if individual States were to be given the competence to decide to render EU law norms inapplicable. (III.2.5) (...) The consequence of this situation could be proceedings against Poland by the European Commission and an action before the Court of Justice against Poland for breach of obligations under the Treaties (Articles 258-260 TFEU). (...) The ruling on the incompatibility of EU law with the Constitution should therefore be of ultima ratio nature and occur only when all other means of resolving the conflict with the norms belonging to the EU legal order have failed. (...) It should be assumed that after the Constitutional Tribunal has ruled on the incompatibility of certain norms of EU secondary law with the Constitution, immediate measures should be taken to eliminate this situation" (III.2.7).

Thus the Polish Tribunal was not entirely satisfied with declaring that an unconstitutional act or EU (international) provision becomes inapplicable (unenforceable) on the territory of Poland. Instead, it expressly provides that it is the duty of the State to seek to eliminate the conflict that has arisen.[60] This seems a more satisfactory view than the doctrine of the *Bundesverfassungsgericht*.

[60] *See comparatively* Art. 218(11) TFEU: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended, or the Treaties are revised."

3.6. After 2015, the deformed Polish Constitutional Tribunal did not hesitate to give effect to the doctrine of the GFCC. Constitutional courts in Romania[61] and Hungary[62] also followed this path.[63]

The PCT has resorted to the so-called "insofar as" concept, according to which, based on the supremacy of the Polish Constitution, a norm (act) of EU law – with its content unilaterally interpreted (or rather invented) by this Tribunal – is partly consistent with the Constitution and partly inconsistent.[64] Applying legal acrobatics, it concluded in such a case that the norm (act) is non-existent and cannot be observed, let alone violated.[65]

Let us cite, for example, the judgment of 7 October 2021 (K 3/21), in which the Tribunal found that certain fundamental provisions of the TEU – Arts. 1, 4(3), 19(1) – are incompatible with the Polish Constitution, but only insofar as (to the extent that) by acting "outside the limits of the competences conferred" on it by Poland (*ultra vires*) the EU creates a situation in which the Constitution "is not the supreme law of the Republic of Poland, having primacy of validity and primacy of application."

In the same spirit the Tribunal emphasized that rules created outside the framework of Arts. 4(2) and 5(1) TEU "are not binding international law for the Republic of Poland, as stated in Article 9 of the Constitution" (III.16). Furthermore, "the judgments of the CJEU do not – in the light of the Treaties – constitute a source of

[61] Constitutional Court of Romania decision of 8 June 2021, No. 390, regarding the exception of unconstitutionality of the provisions of Articles 881 – 889 of Law No. 304/2004 on judicial organization, and of the Government Emergency Ordinance No. 90/2018 on measures to operationalize the Section for the investigation of offences in the Judiciary, paras. 74, 76; *see also* Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Eurobox Promotions and Others*, EU:C:2021:1034; Case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)*, EU:C:2022:99.

[62] *See e.g.* B. Bakó, *The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review in Hungary*, 78 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 863 (2018), pp. 863–902.

[63] However, in December 2021 the Hungarian Constitutional Court rejected Prime Minister Viktor Orbán's request for a review of a CJEU ruling, finding that: "the abstract interpretation of the Fundamental Law cannot be aimed at reviewing the judgement of the CJEU, nor does the Constitutional Court's procedure in the present case, by its very nature, extend to the review of the primacy of EU law", *see* Constitutional Court of Hungary decision of 7 December 2021, X/477/2021, available at: https://tinyurl.com/2p248fz3 (accessed 30 August 2024); *see also* Case C-564/19 *IS (Illégalité de l'ordonnance de renvoi)*, EU:C:2021:949 and Case C-808/18 *Commission v. Hungary*, EU:C:2020:1029.

[64] Polish Constitutional Tribunal, judgment of 24 November 2010, K 32/09, III.2.6: the Tribunal "is not called upon to assess a hypothetical application of the Treaty of Lisbon. (...) Conclusions relating to the potential application of the treaty in a manner inconsistent with the treaty go beyond the jurisdiction of the Constitutional Tribunal."

[65] *See* R. Manko, P. Tacik, *Sententia non existens*: *A new remedy under EU law?: Waldemar Zurek (W.Z.) (Case C-487/19)*, 59 Common Market Law Review 1169 (2022); Council of Europe, *Report by the Secretary General under Article 52 of the European Convention on Human Rights on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland*, 9 November 2022, SG/Inf(2022)39.

European Union law" (III.19), and "the values listed in Article 2 of the TEU have only an axiological significance and are not legal principles" (II.13).

In its judgment of 14 July 2021 (P 7/20) the PCT ruled that the adoption by the CJEU without a legal basis of interim measures relating to the system and procedure before Polish courts is inconsistent with the Constitution (Arts. 2, 7, 8(1) and 90(1) in conjunction with Art. 4(1)), and that to this extent is not covered by the principles of primacy and direct application set out in Art. 91(1-3) of the Constitution (III.6.2). The Court also found that "direct effect (direct application) and primacy are not inherent features of EU law, nor the result of EU case law, but are only the result of the national act of ratification, i.e. an emanation of the will of the sovereign acting on the basis of the national constitution" (III.7).

In the PCT's opinion, the suggestion that a conflict of norms could result in a change of the Constitution, a change of European law, or withdrawal from the EU is acceptable "only in academic rhetoric".[66]

According to the judgment of the PCT of 10 March 2022 (K 7/21), exceeding – in the jurisprudential dynamics – the limits of competences of the European Court of Human Rights means an attempt to impose its new content outside the procedure of treaty amendments. The assessment by national or international courts – on the basis of Art. 6(1) first sentence of the European Convention on Human Rights (ECHR) – of the compatibility with the constitution and the ECHR of laws concerning the organisation of the Polish judiciary is inconsistent with the Constitution (*inter alia*, with Art. 8). The effect of this judgment was to refuse to apply four judgments of the European Court of Human Rights (ECtHR).[67]

These examples from the jurisprudence of the deformed PCT prove the intention to openly confront and undermine the treaty foundations of the Union, the ECHR, and international law more broadly. Their importance and scale are incomparably greater than the few judgments of national constitutional courts refusing to apply the judgments of international courts.

3.7. International courts and domestic courts are not in a hierarchical relationship to each other. The constitutional court is sometimes referred to as the court of last resort,[68] but this opinion should be relativised, as it only does so within the frame-

[66] Polish Constitutional Tribunal, judgment of 7 October 2021, K 3/21, PCT communication, pt. IV(21).

[67] The Constitutional Tribunal "cannot allow the Convention norms – derived in the jurisprudential mode and entering into the national system without the ratification procedure – that are contrary to the Constitution to have any effects on Poland, either in the plane of international law or in the plane of national law. This would violate the Constitution and therefore the sovereignty of the Polish state."

[68] *See* R. Kwiecień, *The Court of Justice, the National Courts and the Controversy Over the 'Ultimate Arbiter' of the Constitutionality of Law in the European Union*, 8(1) Polish Review of International and European

work of its own autonomy. However, while a judgment of a national constitutional court has no effect in EU law, a judgment of the CJEU is binding on a State as long as it remains a member of the Union. In other words, the legal effects are not identical in each case.

In the press release following the judgment of the GFCC of 5 May 2020, the CJEU announced:

> In order to ensure that EU law is applied uniformly, the Court of Justice alone (...) has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect.[69]

Let us also note the CJEU decision of 21 December 2021:

> 254. Whilst it is for the national courts and tribunals and the Court to ensure the full application of EU law in all the Member States (...) the Court has exclusive jurisdiction to give the definitive interpretation of that law. (...) It is ultimately for the Court to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of that law; that scope cannot turn on the interpretation of provisions of national law or on the interpretation of provisions of EU law by a national court which is at odds with that of the Court. To that end, the preliminary-ruling procedure provided for in Article 267 TFEU, which is the keystone of the judicial system established by the Treaties, sets up a dialogue between one court and another, specifically between the Court of Justice and the courts of the Member States, having the object of securing the uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.[70]

Law 9 (2019); C. Calliess, *Struggling About the Final Say in EU Law: The ECB Ruling of the German Federal Constitutional Court,* Oxford Business Law Blog, 25 June 2020, available at: https://www.law.ox.ac.uk/business-law-blog/blog/2020/06/struggling-about-final-say-eu-law-ecb-ruling-german-federal (accessed 30 August 2024).

[69] Press release CJEU 58 (2020), 8 May 2020, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (accessed 30 August 2024).

[70] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Criminal proceedings against PM and Others*, EU:C:2021:1034.

Outside the EU, the question of execution of judgments is known in particular from the practice of the ECtHR.[71] "Probably the most sensitive issue when it comes to execution is resistance that derives from reliance on national (constitutional) identity."[72] However the very concept of constitutional identity must be subject to a narrow interpretation.[73]

Past practice shows that conflicts with the constitutional norms of the MSs are not frequent. Such disputes, especially in the context of international court rulings, are inevitable and can be tolerated if they do not lead to the destruction of the foundations and legal forms of international cooperation. Such a path leads inevitably to the Putinisation of international law.[74]

The allegation that, in ruling on the interpretation of EU law, the CJEU acts as a judge in its own case can be refuted with the argument that a national constitutional court, in ruling on the scope of competences conferred upon the Union, acts in a similar capacity. *Quis custodiet ipsos custodes?* If there is no good answer to this question, it does not mean that everything is allowed. "Executive, national and local authorities, national courts and national parliaments bear responsibility for implementing the Convention and complying with the judgments of the Court."[75]

3.8. In this context, it is worth signalling the problem of the relationship between obligations under international law and EU law. As just one example, let us note the case before the EU courts known as *Kadi*.[76]

The case was a delicate one because of the different and difficult to reconcile values – fundamental human rights versus security in the context of (the financing

[71] *See* Council of Europe, *Supervision of the execution of judgments and decisions of the European Court of Human Rights, Annual Reports*. *See also* L.R. Glas, *The European Court of Human Rights supervising the execution of its judgments*, 37(3) Netherlands Quarterly of Human Rights 228 (2019).

[72] S. O'Leary, *Execution of ECHR judgments and the Rule of Law* (Speech at the Conference on the Role of the Judiciary in Execution of Judgments of the ECtHR of 21 September 2023 in Riga), available at: https://www.echr.coe.int/documents/d/echr/speech-20230921-oleary-conference-role-judiciary-execution-riga-eng (accessed 30 August 2024).

[73] *See i.e.* ECtHR, *Savickis and Others v. Latvia* (App. No. 49270/11), 9 June 2022, joint dissenting opinion of Juges O'Leary, Grozev and Lemmens. For a slightly different example, *see* ECtHR, *Valiullina and Others v. Latvia* (App. Nos. 56928/19, 7306/20 and 11937/20), 14 September 2023, para. 208: "The Court considers that the questions pertaining to the need to protect and strengthen the State language go to the heart of the constitutional identity of the State, and it is not the Court's role to question the assessment made by the Constitutional Court in that regard unless it was arbitrary, which the Court does not find in the present case."

[74] *See* L. Mälksoo, *International Law and the 2020 Amendments to the Russian Constitution*, 115(1) American Journal of International Law 78 (2021).

[75] *See* Reykjavík Summit of the Council of Europe: United around our values. Reykjavík Declaration, (16–17 May 2023), Appendix IV, available at: https://rm.coe.int/reykjavik-declaration-en/1680aba1c4 (accessed 30 August 2024).

[76] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, EU:C:2008:461.

of) international terrorism. It concerned Y.A. Kadi and the Al Barakaat Foundation, both of which had been identified by the UN Security Council Sanctions Committee as linked to Osama bin Laden and Al Qaeda. Consequently, the Council of the EU – by way of a regulation and in implementation of the resolution of the Security Council – froze the funds of these entities. They brought an action for annulment of the regulation before the Court of First Instance on the grounds that it infringed their fundamental rights, including the right to property and the right to defence. The action was dismissed because of the binding nature of the resolutions of the Security Council and the primacy of their application.[77]

We are dealing here with a situation in which international law, including universal institutions like the UN, fails to provide adequate protection of human rights. In the discussed case, this concerned the lack of adequate remedies (judicial review) in the UN system. As an appellate instance court, the CJEU annulled the judgment of the Court of First Instance and the EU Council regulation on the grounds, inter alia, of violating the applicants' fundamental rights, which constitute an integral part of the general principles of EU law. According to the Court, its review concerned the compliance with EU law of an EU act (regulation) implementing a Security Council resolution, and not the UN Charter itself (para. 286).

The crux of the dispute concerned the relationship between the autonomous legal system of the EU and the universalist nature of the UN Charter.[78] The CJEU judgment gave primacy of application to EU law. This approach seems precarious.[79] The *Kadi* case demonstrates that some complications are delicate (as seen in the jurisprudence of the CJEU and ECtHR), and that the solution to the dilemmas related to the lack of adequate remedies cannot consist of accepting the risk known as *droit-de-l'hommisme*. Nevertheless, in ruling that the EU Council Regulation was in breach of EU law, the Court sustained reasonable limits on interpretation which should not hamper the fight against terrorism in the future.

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[77] Art. 25 of the UN Charter: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter" and Art. 103 of the UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail" (*prévaudront*).

[78] For a similar, although not identical, problem of the relationship of EU law to the law arising from treaties concluded by its MSs, *see* Case 284/16 *Slovak Republic v. Achmea BV*, EU:C:2018:158.

[79] *E.g.* G. de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 Harvard International Law Journal 1 (2010); B. Simma, *Universality of International Law from the Perspective of a Practitioner*, 20(2) European Journal of International Law 265 (2009), p. 292; B. Simma, D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17(3) European Journal of International Law 483 (2006).

CONCLUSIONS

Sovereignty, a qualitative attribute of the State, functions within the law, not outside it. EU (international) law does not infringe or limit sovereignty, and the sovereign nature of the State cannot justify violations of the applicable law.

Situating the relationship between international (EU) law and the national constitutions of the EU States in the perspective of the supremacy (superiority) of one order over the other leads to a collision or stalemate. Rather, one should be guided by the principle of primacy of application as an "existential requirement" for the functioning of the Union, and international law more broadly.

The principle of primacy of application does not imply the supremacy of EU (international) law over national law, nor the derogation of national law norms. Constitutional supremacy, on the other hand, is a principle of domestic law which does not have external legal effects and does not exempt a state from its international legal responsibility.

The concepts of primacy and supremacy coexist, but have different functions and express different perspectives – primacy does not prejudge supremacy, and supremacy does not exclude primacy.

What is problematic is not so much the review of constitutionality per se, but rather the scope of that review and its consequences. Once a national court has found a conflict between EU law and the national constitution, should we accept a selective refusal to apply EU law justified on the grounds of constitutional supremacy and sovereignty? The answer here is in the negative.

Both States and courts (national and international) should reasonably balance the interests at stake, including the effectiveness of the international judicial system. *Verfassung (Staat) über alles* does not seem to be the only and all-embracing perspective – the State and its constitution do not function in an international vacuum.

The example of Poland – governed from 2015 to 2023 by anti-European circles – and its deliberate politicisation of the judiciary has led to a model called *démocrature*. The decisions of the Polish Constitutional Court during this period demonstrate a far-reaching political servility. Consequently, this Tribunal, which is still functioning with an unchanged composition, should be considered a dummy court.