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THE POLISH CONSTITUTIONAL TRIBUNAL AND THE JUDICIAL EUROPEANIZATION OF THE CONSTITUTION

Abstract:
This article examines the process of the judicial Europeanization of the Polish Constitution. In Poland the judicial method of Europeanizing the Constitution is currently the primary way of adjusting constitutional norms to requirements resulting from EU law. The phenomenon of re-interpretation of constitutional provisions in light of the new and changing realities is a characteristic feature of contemporary constitutionalism. It has been a long time since most national constitutions have undergone significant textual changes. In Poland, the scope of judicial Europeanization of the Constitution is connected, to a great extent, with the inflexible procedure required for constitutional amendments. In this situation, these so-called "silent changes" of constitutional norms are the easiest and fastest way of reacting to requirements stemming from Poland's EU membership. In the Polish case not only have the norms regarding the political system of the state changed, but also constitutional standards relating to the protection of fundamental rights and freedoms have undergone the process of the Europeanization. To some extent, these changes relate to procedural norms as well.

Keywords: Europeanization, Constitution, Constitutional Tribunal, constitutional review, constitutional identity, EU-friendly interpretation of the Constitution

INTRODUCTION

Without a doubt European integration has changed both the procedural and substantive scopes and spheres of the functioning of contemporary constitutional courts in the European Union. It is now increasingly difficult to argue that constitutional law

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and EU law are completely separate and independent legal systems. More and more often, EU law is becoming a point of reference for constitutional courts in the process of their review of the hierarchical structure of norms. Such constitutional practice may, on the one hand, result in the need to draw a "demarcation line" between the scope of jurisdiction of a constitutional court and the European Court of Justice (ECJ), while on the other hand it updates the constitutional court's obligation to consider EU legal norms in the process of interpretation of national constitutional standards. An important issue in such constitutional practice is the interpretation of constitutional norms in line with EU law – the basic method of resolving normative conflicts between the national constitutional orders and the EU order.

Pro-European constitutional interpretation is a mechanism known as the "judicial Europeanization of the constitution", as it leads to "tacit modifications of the constitution", or changes of the content, rather than the language, of a constitutional norm. The widespread scale of this phenomenon results from a number of factors. For one thing, "tacit modifications" of constitutional norms are a much easier and time-efficient way to address legal problems arising from a country's EU membership than a formal constitutional amendment. Sometimes, in a country with a particularly rigid constitutional amendment procedure and in an unfavourable political setting, a constitutional court becomes the only entity capable of reconciling constitutional norms with the requirements of EU membership. This begs the question whether this kind of Europeanization of a constitution undermines the role of a constitution in the national legal order. Having this in mind, it should thus be emphasised that constitutional courts' determination of the clearest possible limits of pro-European interpretation is a task of a dual and utmost importance.

The present article analyzes the problem of judicial Europeanization of a constitution on the basis of the jurisprudence of the Polish Constitutional Tribunal (in Polish: *Trybunał Konstytucyjny*, hereinafter referred to as the CT). Following a short presentation of the definition and methods of Europeanization of a constitution in general, it elaborates on the EU-friendly interpretation of the constitution as the primary method of judicial Europeanization of the national basic law; then on the role of the CT in this respect and the boundaries of the judicial Europeanization of the Polish Constitution. Furthermore, I present various examples from the CT's jurisprudence wherein it interpreted the Polish basic law in an EU-friendly manner, bringing about "silent changes" of constitutional norms.

The analysis in this article is thus aimed both at conceptualizing the judicial Europeanization of the Constitution as well as evaluating the judicial practice of the CT in this respect. One basic conclusion flowing from this evaluation is that, in Poland at least, the scope of judicial Europeanisation of the Constitution is connected to a great extent with the inflexible procedure required for constitutional amendments. In this situation, the so-called "silent changes" of constitutional norms constitute an easier and faster way to react to the issues and problems arising out of Poland's EU membership.

1. DEFINITION AND METHODS OF EUROPEANIZATION OF A CONSTITUTION

The Europeanization of a constitution is observed when there is a change of particular aspects of a constitution which are related to the country's being an EU Member State. Europeanization of the basic law is also strictly connected to the phenomenon of the Europeanization of law in general.[1] Because of a constitution's specificity as the supreme normative act in the country, it can be argued that the basic laws of EU Member States are generally more resistant to such type of changes than normative acts of a lower rank, especially statutes. However, despite the specific character of a constitution, the process of its Europeanization is unavoidable.

The Europeanization of any national constitution can be conducted in two different ways; either by formal changes in the constitutional act as the result of an amendment or a revision according to a procedure provided for in the constitution itself, or via the route of a judicial interpretation of constitutional norms or arrangements to bring about compliance with EU legal norms. This latter path can be characterized as a material but "silent" change in the constitution, i.e. an amendment to the content of a given constitutional norm without changes in the wording of the constitutional provision(s) in question.

The scale of the process of Europeanization of national constitutions as a particular phenomenon of contemporary constitutionalism can be thus exemplified either by the number of constitutional amendments dictated by the necessity of adjusting to binding EU law, or by the Europeanization of basic laws as a consequence of judicial interpretations of constitutional norms. This latter method is at least equally, and perhaps even more, important in the process.

2. THE ROLE OF CONSTITUTIONAL COURTS IN THE PROCESS OF EUROPEANIZATION OF THE CONSTITUTION

A centralised (concentrated) model of reviewing the hierarchical conformity of legal norms is based on the presumption that the coherence of a legal system is guaranteed by a constitutional court's power to declare the defectiveness of a given norm, and thus the latter's derogation from the legal system. Although the "Community mandate" awarded to all national courts in *Simmenthal II* has significantly decentralised the broad concept of constitutional review, the position of a constitutional court as the "last word" on and legitimate guardian of a constitution remains untouched.

In Poland the CT has the unlimited power to directly apply the basic law. Despite the wording of the Art. 8(2) of the Constitution,[2] other courts' competences in this area

[1] *See further* N. Półtorak, *Europeanisation of public law as a consequence of the principle of the effectiveness of European Union law*, in: K. Wojtyczek (ed.), *Public Law: Twenty Years After, The Public Law after 1989 from the Polish Perspective*, Esperia Publications, London: 2012, pp. 199-244.

[2] "The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise."

are constrained. Thus the CT plays the key role in the process of judicial Europeanization of the Polish Constitution.

The CT noted the necessity of Europeanization of Poland's constitutional provisions shorty after the accession of the Republic of Poland to the EU. In the judgment of 12 January 2005 (case K 24/04), the CT stated that

> [d]evelopment of the European Union, in many cases, forces a new approach to legal issues and institutions which were shaped throughout many years (or centuries) of tradition, and enriched by jurisprudence as well as doctrine […]. The necessity for redefining certain institutions and terms is a result of the fact that in the new legal situation, which is an effect of European integration, some conflicts may appear between the common understanding of given constitutional provisions and the newly created need for an effective, and compatible with constitutional principles, influence in the EU forum.[3]

Currently, the CT's judgments are the major factor of the Constitution's Europeanization in Poland. Not only do they serve as a basis for the so-called "silent changes" in the constitutional norms but, what's more, they define the limits to this method of making changes in the Constitution. This was reflected in the judgment of 27 April 2005 (No. P 1/05),[4] concerning the constitutionality of implementation into the Polish legal system of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA). In that judgment the CT forced the legislator to amend the Constitution in the situation when its Europeanization could not be attained by an EU-friendly interpretation of a constitutional provision.[5] In this context it should be noted that the main method which is used by the CT to effectuate the "silent Europeanization" of the Polish constitution is the canon of adopting an "EU-friendly" interpretation of the basic law.

Right before Poland's accession the CT stated, in its judgment of 21 April 2004 (case no. K 33/03),[6] that: "the direct application of an international agreement" provided for in the Constitution encompasses, *inter alia*, the application of such agreement when determining the constitutional pattern for judicial review. The CT stated the canon of an EU-friendly interpretation requires bearing two guidelines in mind when determining the constitutional pattern. Firstly, such interpretation can be used only if Polish law does not explicitly indicate a different approach to the issue. Secondly, if

[3] Pt 6 of the judgment.

[4] OTK ZU 2005/4A/42.

[5] *See further* D. Leczykiewicz, *Trybunał Konstytucyjny [Polish Constitutional Tribunal judgment] 27 Apr. 2005 No. P 1/05,* 43 Common Market Law Review 1181 (2006); A. Nußberger, *Poland, the Constitutional Tribunal on the implementation of the European Arrest Warrant*, 6 International Journal of Constitutional Law 162 (2008); A. Lazowski, *Half full, half empty glass: The application of the EU law in Poland (2004-2010)*, 48 Common Market Law Review 503 (2011), p. 512; A. Lazowski, *Constitutional Tribunal on the surrender of Polish citizens under the European Arrest Warrant: Decision of 27 April 2005*, 1 European Constitutional Law Review 569 (2005); A. Wyrozumska, *Some comments on the judgment of the Polish Constitutional Tribunal on the EU Accession Treaty and on the implementation of the European Arrest Warrant,* 27 Polish Yearbook of International Law 5 (2004-2005).

[6] OTK ZU 2004/4A/31.

numerous possibilities of interpretation occur, the one which is closest to *acquis communautaire* should be chosen.[7]

The CT grounded its justification for applying an EU-friendly interpretation of constitutional provisions in the Preamble to the Polish Constitution and in the constitutional principle of favouring the process of European integration and co-operation between countries, which is inferred from Art. 9 of the Constitution.[8]

It is worth mentioning that "the principle of favouring the process of European integration and co-operation between countries" is itself a good example how the Constitution's Europeanization occurs by supplementing the catalogue of basic constitutional principles with an unspoken principle regarding Poland's membership in the process of European integration. In its judgment of 27 May 2003 (case no. K 11/03)[9] the CT stated that: "the only constitutionally correct and preferable [path] is such interpretation of law which serves for realization of a given constitutional principle."[10]

The principle of interpreting the Constitution in a manner sympathetic towards European law can be perceived as a directive aimed at acquiring a particular result of interpretation, that is, an interpretation of a constitutional principle in compliance with the EU law. If any collision between the plain meaning of the Constitution's provisions and EU law occurs, according to CT's approach the EU-friendly interpretation is regarded as the basic way of Europeanization of the Constitution.[11]

3. EUROPEANIZATION OF THE CONSTITUTION AND ITS BOUNDARIES

This EU-friendly interpretation of the Constitution, as formulated in the CT's judgments, has however its limits.

In its judgment of 11 May 2004, the CT stated that the EU-friendly interpretation "in no event may lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum functions realized by the Constitution."[12] The CT labelled such a *contra legem* result as an "irreconcilable inconsistency".[13] Irreconcilability is, in such a case, only a relative concept because it relates merely to

[7] Pt 9 of the judgment.

[8] Pursuant to Art. 9, "[t]he Republic of Poland shall respect international law binding upon it."

[9] OTK ZU 2003/5A/43.

[10] Pt 16 of the judgment.

[11] It should be noted, however, that the pro-European constitutional interpretation is not a simple translation of the principle of indirect effect of the EU law to the level of constitutional interpretation, performed by a constitutional court. The difference between the two principles lies, above all, in other bases of applicability (constitutional provisions, not the EU law) and differently-shaped boundaries of admissibility of such an interpretation directive (the definition of a *contra legem* result). Because of this uniqueness, the pro-European interpretation of a constitution may be considered as a stand-alone "interpretation ideology".

[12] Pt 6.4 of the judgment.

[13] *See* pt 6.3 of the judgment.

the impossibility of removing the collision between the wording of a constitutional provision and an EU legal norm by way of applying an EU-friendly interpretation of constitutional provisions. In case of such an irreconcilable collision, the CT, in its Accession Treaty judgment, pointed out three possible solutions to resolve such a collision. It stated that "it would be up to the Polish legislator to decide on amending the Constitution, causing modifications within Community provisions, or, ultimately, on Poland's withdrawal from the European Union."[14] It can thus be argued that the relative boundary of the Constitution's Europeanization can be found in a *contra legem* result of an EU-friendly interpretation. If such an "irreconcilable inconsistency" occurs, formal Europeanization is still possible, but in such a case amendment of the Constitution is necessary to adjust it to the EU law.[15]

The aforementioned judgment of 27 April 2005 (case no. P 1/05) on the European Arrest Warrant (EAW) serves as a good example of such an "irreconcilable inconsistency" between the provisions of the Constitution and EU law. However, in this case the collision did not have a direct character, as it occurred between a Polish constitutional provision which absolutely prohibited the extradition of Polish citizens, and a statutory provision of Polish criminal procedure which transposed the Council Framework Decision of 13 June 2002 on the EAW and the surrender procedure between Member States. The CT ruled that the reviewed statutory provision was inconsistent with the Constitution, but concomitantly postponed the date its ruling would take on binding force for the maximally-provided constitutional period of 18 months, in effect ordering the Parliament to amend Art. 55 of the Constitution.[16]

This example demonstrates the role of the CT in both establishing the boundaries of judicial Europeanization and in stimulating the process of *legislative* Europeanization of the Constitution.

The absolute boundary for Europeanization of the Constitution – whether judicial or legislative – is to be found in the concept of "constitutional identity".[17] In its judgment of 24 November 2010 (case no. K 32/09),[18] the CT ruled that certain competences may not be conferred, as they manifest the constitutional identity and thus reflect the values the Constitution is based on.[19] According to the CT, constitutional identity is

[14] Pt 6.4 of the judgment.

[15] *See further* A. Lazowski, *Accession Treaty Polish Constitutional Tribunal conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005,* 3 European Constitutional Law Review 152 (2007), Lazowski (*Half full, half empty*…), *supra* note 5, p. 507.

[16] Pt 5 of the judgment.

[17] For more on the concept of constitutional identity, *see* L. Besselink, *National and constitutional identity before and after Lisbon,* 6 Utrecht Law Review 44 (2010); P. Cebulak, *Inherent risk of the pluralist structure: Use of the concept of national constitutional identity by the Polish and Czech Constitutional Courts*, 8 Croatian Yearbook of European Law and Policy 487 (2012).

[18] OTK ZU/9A/108. *See further,* M. Wendel, *Lisbon before the Courts: Comparative Perspective,* 7 European Constitutional Law Review 107 (2011); Lazowski (*Half full, half empty*...), *supra* note 5, p. 510.

[19] It should be noted that the Polish Constitution does not contain so-called "unchangeable provisions", such as Art. 79(3) of the German Basic Law.

a concept according to which the competence to confer excludes competences in matters which constitute "the heart of the matter" i.e. are fundamental to the basis of the political system of a given state, the conferral of which would not be possible pursuant to the Art. 90 of the Constitution.[20] The CT indicated that a complete prohibition of conferral encompassed the following matters:

- decisions specifying the fundamental principles of the Constitution;
- decisions concerning the rights of the individual, which determine the identity of the state, including, in particular, the requirement of the protection of human dignity and constitutional rights;
- the principle of statehood;
- the principle of democratic governance;
- the principle of rule of law;
- the principle of social justice;
- the principle of subsidiarity;
- the requirement to ensure better implementation of constitutional values;
- the prohibition on conferring the power to amend the Constitution;
- the competence to determine competences.[21]

The CT stated that the guarantee of preserving the constitutional identity of the Republic of Poland is found in Art. 90 of the Constitution and in the limits on conferral of competences specified therein.[22] The equivalent of the concept of constitutional identity in EU primary law is the concept of national identity expressed in Art. 4(2) TUE.[23] The CT pointed out that the idea of confirming one's national identity, in solidarity with other nations and not against them, constituted the main axiological basis of the EU in the light of the Treaty of Lisbon. It stated that the constitutional identity remained in close relation with the concept of national identity, which also included traditions and culture.[24]

It should also be noted that the CT repeated the thesis about constitutional identity as an absolute boundary to the Europeanization of the Constitution in its Judg-

[20] Art. 90 of the Constitution serves as an "integration clause". The provision stipulates that: "(1) 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. (2) A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators. (3) Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125. (4) Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies."

[21] Pt 2.1 of the judgment.

[22] *Ibidem*.

[23] This provision stipulates that "[t]he Union shall respect the equality of Members States before the Treaties, as well as their national identities, inherent in their fundamental structures, political and constitutional."

[24] Pt 2.1 of the judgment.

ment of 26 June 2013 (case no. K 33/12), even though in that case it confirmed the constitutionality, under the Polish Constitution, of the amendment of Art. 136 of the Treaty on the Functioning of the European Union (TFEU) with respect to the stability mechanism for Member States whose currency is the euro (2011/199/EU), which amendment was also ratified by Poland.[25]

The meaning given by the CT to the constitutional identity concept seems to make it synonymous with the idea that there exists a so-called "hard core" of a constitution. Both notions pertain to an unchangeable content in a basic law, which consequently cannot be subjected to a conferral of competences to a supranational entity. Therefore, in the CT's jurisprudence the concept of constitutional identity is regarded as the *absolute* boundary line between the Europeanization of the Constitution and Polish state sovereignty.

4. EXAMPLES OF JUDICIAL EUROPEANIZATION OF THE POLISH CONSTITUTION

4.1. Redefinition of the legislative function of Parliament. The interpretation of Art. 95 of the Constitution in case K 24/04

A good illustration of effectuating the Europeanization of the Polish Constitution by application of an EU-friendly interpretation of constitutional provisions is contained in the CT's judgment in case no. K 24/04, regarding the constitutionality of one of the provisions of the so-called Co-operation Act.[26] This Act regulates the Cooperation of the Polish Council of Ministers with the *Sejm* (the lower chamber of Polish Parliament) and *Senat* (the upper chamber of Polish Parliament) on matters connected with Poland's membership in the European Union. This act imposed an obligation on the Polish government (i.e. the Council of Ministers) to present various types of documents and legislative proposals connected with Poland's membership in the EU to the Sejm and Senate or, in some cases, to their subsidiary organs (as authorised by the rules of procedure of the respective chambers). Yet, during the legislative procedure the government's obligation to seek the opinion of an organ authorized by the Senate's

[25] According to the applicant, the enactment in Poland of the Act on the ratification of the European Council Decision 2011/199/EU created a procedural basis for conferring competences vested in the organs of state authority, in relation to certain matters, upon an international organization – the ESM, and therefore the Act should have been enacted in accordance with the procedure set out in Art. 90 of the Constitution (i.e. by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies/Senators), and not in accordance with the procedure provided for in Art. 89(1) of the Constitution (*i.e.* by a simple majority vote taken in the presence of at least half of the statutory number of Deputies/Senators). The CT did not share the view of the applicant and stated that the amendment to Art. 136 of the TFEU did not concern competences vested in the organs of state authority, and therefore it was not a case of conferring such competences upon an international organization or an international authority.

[26] Cooperation of the Council of Ministers with Sejm and Senate on matters connected to Membership of the Republic of Poland in the European Union Act, Journal of Laws 2004, No. 52, item 515.

procedural rules on an EU legislative proposal, prior its consideration by the Council of the European Union, was omitted. The relevant provision imposed this obligation on the government only with respect to the lower chamber of the Parliament (the Sejm). A group of Senators challenged Art. 9(1) of the Cooperation Act before the CT, arguing that its failure to provide for the participation of an appropriate Senate organ in the process of pronouncing an opinion on the government's position resulted in the non-conformity of the Act with the Polish Constitution. The applicants alleged an infringement of the principle that legislative power in Poland is exercised by both parliamentary chambers (Arts. 10(1) and 95(1) of the Constitution). They argued that since Poland's accession to the EU limited the scope of domestic legislation to the benefit of EU legislation, the domestic legislative organs ought to be guaranteed the possibility of participating in the adoption of EU legislation, as was alleged to be the case in other EU Member States.[27]

The CT, in the considered judgment, agreed with the applicant's argumentation and declared the challenged regulation to be unconstitutional under Polish law. The CT stated that:

> [i]n the commonly accepted understanding, performing a legislative function is limited solely to adopting the domestic statutory law. In the pre-accession legal order, performance of this function meant that the parliament (…) controlled basically the entire law which was in force in Poland (…). The situation changed dramatically after the 1st of May 2004 – since that day the Polish Parliament lost a significant portion of its leverage on the shape of the law being in force in Poland.[28]

Having established this thesis, the CT went on to state that:

> [l]egislative competence must be understood by taking into account the new conditions of creating law. If legal acts adopted by the EU authorities will prevail on Polish territory, in part directly and in part after the implementation of them by the Polish parliament, then the right to pronounce an opinion on the EU legislative proposals becomes an important form of co-operation in the EU law-making process. By dint of the right to pronounce opinions about EU legislative proposals, the national parliament gains an influence over the process of the entire EU's development. At the same time, the participation of national parliaments in the process of adopting EU law constitutes an important factor of strengthening the credibility and democratic mandate of the EU organs.[29]

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[27] *See further,* Lazowski (*Half full, half empty*…), *supra* note 5, p. 515; A. Lazowski, *The Polish Parliament and the EU affairs: An effective actor or accidental hero?,* in: J. O'Brennar, T. Raunio (eds.), *National Parliaments within the Enlarged European Union: From Victims of Integration to Competitive Actors?,* Routledge, London and New York: 2007; W. Sadurski, *Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of the Central and Eastern Europe*, 7 Yearbook of Polish European Studies 33 (2003); A. Bodnar, *Poland: EU Driven Democracy?,* in: W. Sadurski, L. Morlino (eds.), *Democratization and the European Union: Comparing Central and Eastern European Post-Communist Countries*, Routledge, London and New York: 2010, pp. 19-44.

[28] Pt 6 of the judgment.

[29] *Ibidem*.

The CT ruled that the "failure to include the Senate (through an organ authorized by the Senate's rules of procedure) infringes the principle of exercising the legislative power by both the Sejm and Senate. As long as the constitutional legislator wishes to maintain a bi-cameral parliament, both chambers should be guaranteed equal participation in activities concerning the shaping of Poland's position in the field of adopting EU law."[30]

4.2. Rights of citizens of other EU Member States residing in Poland to vote and to stand as candidates in municipal elections. Interpretation of Art. 62 of the Constitution in judgment K 18/04

The expanded interpretation of Art. 62 of the Polish Constitution in judgment K 18/04 is another example of the judicial Europeanization of constitutional provisions. The initiators of the proceedings before the CT alleged that then-Art. 19 of EC Treaty[31] failed to conform to Art. 62 of the Polish Constitution, which guarantees right to elect, *inter alia*, their representatives to organs of self-government. According to applicants, this right – assigned to Polish citizens by the Constitution – was of an exclusive character, which meant that it could not be assigned to citizens of other countries, including citizens of other EU Member States.[32]

In referring to the allegation the CT held that the exclusivity of the constitutional right, understood in the way suggested by the applicants, did not find unambiguous confirmation in any constitutional provision.[33] In particular, not every "extension" of a given citizen's right to other individuals leads to a violation of the constitutional guarantee attached to this right. The CT pointed out that the rights provided for in Art. 19 of the EC Treaty, i.e. the right to vote and to stand as a candidate in municipal elections, is a derivative of the EU citizenship. It is also a practical expression of applying the principle of equality and non-discrimination, and also a consequence of the freedom of movement and freedom to domicile on the territory of any EU Member State.[34]

[30] *Ibidem*, pt 10.

[31] Pursuant to then-Art. 19 of the TUE: "[e]very citizen of the Union residing in the Member State of which he is not a national, shall have right to vote and to stand as a candidate in municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be subjected to detailed arrangements adopted by the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State."

[32] Pursuant to Art. 62 "(1) If, no later than on the day of vote, he has attained 18 years of age, a Polish citizen shall have the right to participate in a referendum and the right to vote for the President of the Republic of Poland as well as representatives to the Sejm and Senate and organs of local self-government. (2) Persons who, by a final judgment of a court, have been subjected to legal incapacitation or deprived of public or electoral rights, shall have no right to participate in a referendum nor a right to vote."

[33] It is worth mentioning that similar regulations were provided for in the constitutions of France and Spain, where both national constitutional courts saw the necessity to amend the national constitution prior to the ratification of the Maastricht Treaty.

[34] *See* pt 18.2 of the judgment.

4.3. "European policy" as a new area of foreign policy and internal affairs. The interpretation of Art. 146 of the Constitution given in the CT's decision in case no. Kpt 2/09

Another illustration of the phenomenon of judicial Europeanization of the Constitution is reflected in the interpretation of Art. 146 of the Constitution adopted in the CT's decision of 20 May 2009 (case no. Kpt 2/09),[35] which indicates that a new area of internal affairs and foreign policy was established together with Poland's accession to the EU.[36]

In the aforementioned decision, the CT settled a notorious dispute over the powers allocated to the former President Lech Kaczyński and the then-Prime Minister Donald Tusk. The dispute involved determination of the central constitutional organ of the state which is authorized to represent the Republic of Poland at the sessions of the European Council in order to present the stance of the state. The President held the view that he could decide on his own (regardless of the stance of the Council of Ministers) on his participation in the sessions of the European Council. In contrast, the Prime Minister held the view that he was authorized to designate all the members of the delegation of the Republic of Poland.[37]

After analyzing the scope of the government's competences provided in Art. 146 of the Constitution, the CT stated that "the policy of the Republic of Poland towards the European Union, being also related to Poland's EU membership, is not explicitly regulated in the Constitution, which is understandable due to the time of enactment of the Constitution."[38] The CT highlighted that questions concerning relations between the EU and its Member States must of necessity concern Art. 146(4)(9),[39] as the wording of this provision is so broad that it refers to all the states and international organizations, including those that Poland belongs to as well as others (regardless of the character and degree of a given organization). Nevertheless, the CT added that Polish relations with the European Union defy the constitutional boundaries of either "international policy" or "internal affairs". On one hand, EU law is regarded as a part of the national legal order and is applied by the organs of the Polish state. In this respect, the consequences of EU membership may be regarded as falling within the scope of "internal affairs". In contrast, Poland's relations with other Member States, institutions, and bodies display the characteristics of foreign policy. At the same time, it should be taken into account

[35] OTK ZU 2009/5A/78.

[36] *See further* Lazowski (*Half full, half empty*…), *supra* note 5, p. 517.

[37] The conflict erupted in the autumn of 2008, when President Kaczyński publicly announced at the very last moment his desire to participate in the summit as part of the composition of the Polish delegation. The President held that he had a prerogative to attend, without prior consultation with the Prime Minister. However, during the first few years of Poland's Membership in the EU no open conflicts were reported and the Polish delegation was chaired by the Prime Minister.

[38] Pt 1.7 of the decision.

[39] Pursuant to the Art. 146(4)(9) of the Constitution "[t]o the extent and in accordance with the principles specified by the Constitution and statutes, the Council of Ministers, in particular, shall exercise general control in the field of relations with other States and international organizations."

that some EU institutions and bodies are composed of the representatives of Member States. Thus, Poland's representatives participate in the adoption of EU decisions which, hence, do not have a fully external character with regard to the Republic of Poland.[40]

Referring to the issue of developing and taking ("presenting") the stance of Poland at sessions of the European Council, the CT stated that it is one of the essential elements of conducting foreign and European policy by the Council of Ministers (i.e. as affairs not reserved to other state organs within the meaning of Art. 146(2) of the Constitution).[41]

In conclusion it should be said that the CT created, in the above-considered decision, a separate category of "European policy", and assumed that it does not have a homogeneous character but, as a whole, falls into the constitutional concepts of "international policy" and "internal affairs" (Art. 146(1) of the Constitution[42]) and "the affairs of State" (Art. 146(2) of the Constitution[43]).

4.3.1. Freedom of economic activity in the context of European integration. Interpretation of Arts. 20 and 22 of the Constitution in the CT's jurisprudence

The process of judicial Europeanization has also encompassed constitutional provisions regarding the freedom of economic activity (Arts. 20 and 22 of the Constitution[44]). This phenomenon is a natural consequence of Poland's accession to the EU, especially with regard to the significance of the internal market freedoms.

Even before the accession, the issue of an EU-friendly interpretation of constitutional provisions regarding freedom of economic activity arose in the judgment of 28 January 2003 (case no. K 2/02).[45] This case concerned the compliance with the Constitution of statutory provisions forbidding some types of alcohol advertisements.[46] In the statement of reasons for its judgment the CT indicated that there was a necessity to interpret Polish laws in an EU-friendly manner, bearing in mind the forthcoming accession of Poland to the EU. In this case the CT first pointed out that applying the canon of EU-friendly interpretation during the process of determining the pattern for

[40] *Cf.* pt 1.7 of the decision.

[41] *Cf.* pt. 4.5 of the decision. Pursuant to Art. 146(2) of the Constitution "[t]he Council of Ministers shall conduct the affairs of State not reserved to other State organs or local self-government."

[42] Pursuant to Art. 146(1) of the Constitution "[t]he Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland."

[43] Pursuant to Art. 146(2) of the Constitution "[t]he Council of Ministers shall conduct the affairs of State not reserved to other State organs or local self-government."

[44] Pursuant to Art. 20 of the Constitution "[a] social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland." Pursuant to Art. 22 of the Constitution "[l]imitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons."

[45] OTK ZU 2003/1A/4.

[46] To be precise, a few provisions of the Society's Education and Prevention of Alcoholism Act, Journal of Laws 1982, No. 35, item 230 as subsequently amended.

constitutional review required that two guidelines be taken into account. Firstly, such canon of interpretation can be used only if Polish law does not explicitly indicate a different approach to the issue, and secondly, if several possibilities of interpretation are present, the one which is closest to *acquis communautaire* should be chosen.[47]

The CT stated that:

> [r]egardless of taking EU law into account in the process of determining the model for constitutional review based on reviewing in the light of *acquis communautaire* with respect to the prohibition of alcohol advertisements in national legal systems (since prohibitions of alcohol advertisements introduced in the legal systems of EU Member States have already been the subject of the ECJ case–law several times), there is also a possibility of subsidiary application of the EU law when EU law itself shapes the prohibition of certain products' advertisement.[48]

Therefore, not only were the challenged provisions of the Act 1982 taken into consideration, but also constitutional patterns (Arts. 20 and 22) were analyzed in the context of the *acquis communautaire*.[49] The CT found that the challenged limitations on advertising alcohol were justified in order to protect public health and argued that public health serves as an "important public reason" within the meaning of Art. 22 of Constitution, interpreted with respect to Community law.

Another judicial decision in which the CT applied the canon of an EU-friendly interpretation of the Constitution to the constitutional freedom of economic activity was in its judgment K 33/03. The challenged provisions were those in the Biocomponents used for Liquid Fuels and Liquid Biofuel Act.[50] The 2003 Act imposed on producers a duty to place on the market in a given calendar year biocomponents of fuels in precisely defined quantities, and in addition specified fines for violating this duty. The CT adjudicated that the challenged regulations were inconsistent with the Constitution. In justification, the CT pointed out that the legislator's competences to limit freedom of economic activity should be considered with regard to Poland's participation in the European internal market, and in none of the other EU Member States had an obligation to use biofuels been introduced. The CT invoked the ECJ judgment in the precedential case of C-120/78,[51] in which the ECJ held that there was no valid reason for a product to be lawfully produced or marketed in one Member State and not lawfully produced or marketed in another Member State (the principle of mutual recognition). Assuming that the challenged act addressed exclusively domestic producers, its enforcement would lead to discrimination *à rebours* (a significant deterioration of the legal situation of Polish producers).[52]

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[47] Pt 4.7 of the judgment.

[48] *Ibidem*, pt 4.8.

[49] *Ibidem*, pts 5 and 6.

[50] Journal of Laws 2003, No. 199, item 1934 as subsequently amended.

[51] *See* Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979], ECR 00649.

[52] Pt 13 of the judgment.

The issue of an EU-friendly interpretation of the constitutional freedom of economic activity was also considered in the judgment of 8 July 2008 (case no. K 46/07).[53] The subject of the CT's review in that case was – as it rarely happens – an entire statute (the Act on Large Scale Retail Facilities adopted on 11 May 2007). The Act introduced a new level of permit requirements which had to be complied with in order to develop large scale retail facilities, which the Act defined as any retail facility having an area greater than 400 square meters. Pursuant to the Act, as of 18 September 2007, the development of a large scale retail facility was understood to include within its meaning both the construction of a new commercial facility and the conversion of an existing non-retail facility to retail use, as well as the joining of two or more small commercial facilities into a large retail facility. Under the Act, it was necessary to obtain a separate permit approving such development from the local municipal authorities, specifically from the local mayor in consultation with the local city council. Moreover, the location of the planned development also had to comply with the local master plan or outline planning decision. The CT held that such severe limitations on the constitutional freedom of economic activities were not justified by any important public reason, within the meaning of Art. 22 of the Constitution, nor were they necessary to protect any constitutional value enumerated in Art. 31(3) of the Constitution.[54] The CT also claimed that the challenged provisions could lead to indirect discrimination because of the nationality criterion, since most of large scale retail facilities were owned by entrepreneurs from other EU Member States. In addition the CT claimed that the requirements provided for in the challenged Act did not reflect the Community concept of general interest, and the introduced limitations were disproportional. It was thus implied that the challenged Act might also violate Art. 43 of the EC Treaty.[55]

4.3.2. The principle of equal treatment and nondiscrimination and European anti-discrimination law – Art. 32 of the Constitution

The principle of equal treatment and non-discrimination, set forth in Art. 32 of the Constitution, is another constitutional provision which underwent Europeanization as a result of Poland's accession to the EU. The issue of non-discrimination was considered, *inter alia*, in the aforementioned CT's judgments regarding limitations placed on the freedom of economic activity in the context of discrimination between domestic entrepreneurs (case no. K 33/03) and entrepreneurs from other EU Member States (case no. K 46/07). The principle of equal treatment was also the subject of the CT's consideration in judgment no. K 18/04 in connection with the previously-discussed issue of interpretation of the citizenship concept contained in Art. 62 of the Constitution.

[53] OTK ZU 2008/6A/104.

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

[55] Pt 5 of the judgment.

Here it is worthwhile to consider more closely the CT's reflections included in its judgment of 7 November 2007 (case no. K 18/06),[56] which provides an example of a lack of coherence between the criteria for determining non-discrimination in the jurisprudence of the CT and the ECJ. The lack of sufficient Europeanization of the constitutional principle of equality arguably influenced the decision of the Regional Administrative Court in Poznań to stay the proceedings and to refer preliminary questions to the ECJ[57] which, as a consequence, resulted in the ECJ judgment of 19 November 2009 in the case of *Filipiak*.[58]

In judgment no. K 18/06, the CT reviewed provisions of the Act of 26 July 1991 on income tax payable by natural persons.[59] The CT held that, to the extent to which the tax provisions at issue did not allow taxpayers specified in Art. 27(9) of the Act on Income Tax to deduct social security and health insurance contributions from income derived from an activity pursued outside the Republic of Poland from the tax payable thereon when those contributions were deducted in the Member State in which the activity was pursued, such provisions were incompatible with the principle of equality before the law laid down in Art. 32 of the Constitution, in conjunction with the principle of social justice set out in Art. 2 of the Constitution.[60] In the same judgment, the CT decided to defer the date on which the provisions held to be unconstitutional would lose their binding force to a date other than that of publication of the judgment, namely to 30 November 2008.

In considering the Europeanization of the constitutional standard of the principle of equal treatment and non-discrimination, it is relevant to indicate that the Ombudsman (Commissioner for Citizens' Rights), as the applicant, argued that the challenged provision not only infringed the constitutional standard of equal treatment (Art. 32) but also infringed EU law, in particular because it was inconsistent with the freedom of movement for workers (Art. 45 of the TFEU; ex 39 and 48). In referring to the Ombudsman's position, the CT held that review of a statutory law's conformity with EU law is outside the scope of its cognition. Nevertheless, the CT additionally highlighted that the freedom of movement for workers imposed an obligation of equal treatment and non-discrimination of workers who are citizens of one of the EU Member States, and that the challenged provisions regulated the relations between Poland and Polish citizens (as taxpayers) working abroad. In this regard the CT held that the challenged statutory provision did not serve for the full realization of EU law, especially of the freedom of movement for workers, as it might discourage Polish citizens to work in other EU Member States.

The CT decided that the challenged provisions infringed the Constitution, but deferred their loss of binding force for 18 months in order to give the legislator time to

[56] OTK ZU 2007/10A/122.

[57] The decision of *Wojewódzki Sąd Administracyjny w Poznaniu* of 30 May 2008, case no. I SA 1756/07.

[58] C-314/08 *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu* [2009] ECR I-11049.

[59] The Journal of Laws 2000, No. 14, item 176.

[60] *See further* Lazowski (*Half full, half empty...*), *supra* note 5, p. 548.

fill the legal gap. The necessity to give a judgment with such a *pro futuro* effect was so as not to repeal the entire provision, which also referred to other situations of deducting contributions for health or pension insurance.

It should be noted that insofar as the unconstitutional legal gap could have been filled for a particular period of time (until a proper amendment would come into effect) by making EU law provisions directly applicable, the CT could have expressed this as a possibility in its reasoning. Yet it did not do so. This omission gave the Regional Administrative Court in Poznań the perfect opportunity to refer the case of Mr. Filipiak to the ECJ. The aforementioned hypothetical alternative decision of the CT would have cleared the courts' doubts as regards which provisions should have been applied during the interim period. On the other hand, it could be argued that the CT, by applying the delayed effect clause, seems to have "rather decided that filling the legal gap with EU law would not be regarded as a sufficient protection from the situation of so-called "derivative unconstitutionality."[61]

In the analyzed case the constitutional standard indicated by the applicant (principle of equal treatment and non-discrimination) finds its reflection in EU law (the prohibition of discrimination resulting from the freedom of economic activities and free movement of services). Therefore, the CT's apparent attempt to avoid taking a competitive approach in terms of overlapping jurisdictions (the CT's and the ECJ's), paradoxically led to just such competitiveness. The evidence of this competitiveness is the perception of the similarity of the criteria. The CT referred to the "Community law context" of the case and held that the Community freedom of movement for workers concerns the obligation of equal treatment and non-discrimination of workers who are nationals of one of the EU Member States; whereas challenged statutory provisions regulated legal relations between Poland and its nationals working abroad. Yet the CT also noted that reviewed provisions were not amenable to the full realization of workers' freedom of movement, since they might discourage people from working abroad.

In contrast, the ECJ's judgment leads to the conclusion that every taxpayer who is a resident in Poland but pursues his economic activity within another EU Member State affiliated with compulsory social security and health insurance schemes, and is not able to either deduct from the basis of his tax assessment in Poland the amount of the compulsory social security contributions paid in another Member State or to reduce the tax payable in Poland by the amount of the compulsory health insurance contributions paid in a Member State other than Poland, is treated in a discriminatory way with respect to workers not being residents of Poland but pursuing their economic activity in Poland.

The ECJ concurred with the CT's view on the lack of differentiation of the legal situation of Polish nationals working abroad. Yet concomitantly it pointed out that what had to be compared was the situation of Polish nationals who resided in Poland

[61] With this term, the Polish CT characterizes the situation in which the classical effect of the CT's judgment may cause a greater state of non-compliance with constitutional standards.

and pursued their economic activity in Poland with the situation of Polish nationals who resided in Poland but pursued their economic activity in another Member State. The taxation of both groups should be conducted according to the same rules, i.e. by applying the same rules with respect to tax deductions. As a result, the ECJ held that provisions of the Polish tax law violated the freedom of establishment and freedom to provide services under Arts. 43 and 49 of the EC Treaty.[62]

5. ADMISSIBILITY OF A CONSTITUTIONAL COMPLAINT CHALLENGING AN EU REGULATION. INTERPRETATION OF ART. 79(1) OF THE CONSTITUTION IN THE CT'S JUDGMENT IN THE CASE SK 45/09. IS IT STILL EUROPEANIZATION OF THE CONSTITUTION?

Initially, the Europeanization of the Constitution was defined as changes required in the Constitution related to EU membership. This definition certainly encompasses the interpretation of Art. 79(1) of the Polish Constitution, adopted by the CT in its controversial judgment of 16 November 2011 (SK 45/09).[63] The analyzed case was initiated by a natural person, who lodged a constitutional complaint against several provisions of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters as being in violation of the Polish Constitution.[64]

Due to the special character of the legal act, the constitutionality of which was challenged, the CT began by examining whether the EU secondary legislation might be the subject of constitutional review initiated in constitutional complaint proceedings (Art. 79(1) of the Constitution).

The scope of normative acts which might be subject to the CT's review is generally regulated in Art. 188, points 1-3 of the Constitution. With reference to the acts of the EU secondary legislation, it has been noted in the literature that these legal acts have neither the status of international agreements, nor may they be classified as provisions issued by central state organs. Therefore, it cannot be doubted that the aforementioned constitutional provisions do not indicate EU secondary law as a type of legal act which falls within the scope of the CT's jurisdiction. However, apart from Art. 188, points 1-3,[65] the scope of normative acts which might be subject to review of their conformity

[62] Pt 7.4 of the judgment.

[63] OTK ZU 2011/9A/97. *See further,* S. Dudzik, N. Półtorak, *"The Court of the Last Word": Competences of the Polish Constitutional Tribunal in the Review of European Union Law*, 15 Yearbook of Polish European Studies 225 (2012).

[64] OJ L 12/1 as subsequently amended.

[65] Art. 188 of the Constitution states "[t]he Constitutional Tribunal shall adjudicate regarding the following matters: (1) the conformity of statutes and international agreements to the Constitution; (2) the conformity of a statute to ratified international agreements whose ratification required prior consent

with the Polish Constitution are also set out in other constitutional provisions (i.e. Art. 79(1) of the Constitution as regards the constitutional complaint procedure and Art. 193[66] as regards legal questions introduced by courts). In these provisions, the constitutional legislator used the very general term of a "normative act", without referring to the catalogue enumerated in Art. 188, points 1-3. Owing to this broad formulation, even before Poland's accession to the EU some doubts appeared with respect to the issue of the autonomy of the scope of constitutional review initiated in abstract review proceedings (Art. 188, points 1-3), and those initiated in concrete review proceedings (constitutional complaint – Art. 79(1); and courts' own questions – Art. 193).

Following Poland's accession to the EU, the CT, in its judgment of 23 April 2008 (case no. SK 16/07)[67] (which however did not refer to the issue of Poland's membership in the EU) held that the subject of review in the constitutional complaint procedure is a normative act in the "material meaning", which means that the content of a given legal act, not its form, was decisive in determining whether it was of a normative nature. According to the CT's approach, the term "normative act" includes every legal act which contains norms that are general (are addressed to the public at large) and that set conduct which is, in principle, repetitive (an abstract legal act). The CT stated that "[s]uch evaluation of normativity takes into consideration the systemic relations of one act with other legal system's acts which are regarded as normative. If any doubts appear, the presumption of normativity is in operation, especially when it comes to the protection of rights and freedom of people and citizens".[68] On the other hand, the CT went on to state that:

> [t]he wording of Article 79(1) of the Constitution cannot be considered in isolation from other provisions of the basic law, especially those regulating the CT's competences. The scope *ratione materiae* of the CT's jurisdiction is determined by the Article 188 of the Constitution (…). This means that under the Constitution of 1997, and also in the constitutional complaint procedure, the CT can review only those normative acts which are enumerated in Article 188, points 1-3 of the Constitution.[69]

However, in judgment no. SK 45/09 the CT, sitting as a full bench, adopted the view that the scope of normative acts which might be subject to a review of their conformity to the Constitution in proceedings commenced by way of constitutional complaint had been set out in Art. 79(1) of the Constitution autonomously and independently from

granted by statute; (3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes; (4) the conformity to the Constitution of the purposes or activities of political parties; (5) complaints concerning constitutional infringements, as specified in Article 79, para. 1."

[66] Pursuant to Art. 193 of the Constitution "[a]ny 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."

[67] OTK ZU 2008/3A/45.

[68] Pt 2.1 of the judgment.

[69] *Ibidem*.

Art. 188, points 1-3.[70] Therefore the examination of constitutional complaints constituted a separate type of proceeding.[71]

The CT stated that arguments in favour of this approach were twofold. In the first place, such an approach is indicated by the systemics of the Constitution. Art. 188, which regulates the scope of the jurisdiction of the CT, stipulates in its point 5 that the CT shall adjudicate on constitutional complaints, as specified in Art. 79(1). This last-mentioned provision is also referred to in Art. 191(1)(6) of the Constitution, in the context of individuals or legal entities authorised to make application to the CT to instigate proceedings. This indicates that the constitutional legislator intended proceedings involving the examination of a constitutional complaint to be separate from other proceedings before the CT.

Secondly, the CT emphasized that the basic function of a constitutional complaint was the protection of constitutional rights and freedoms of individuals or legal entities. Therefore, it would be unjustified to narrow down its scope only to the normative acts enumerated in Art. 188 (1)-(3) of the Constitution. According to the CT a normative act within the meaning of Art. 79(1) of the Constitution may be not only a normative act issued by one of the organs of the Polish state, but also – upon fulfilling certain other requirements – a legal act issued by an organ of an international organisation, provided that Poland is a member thereof. This primarily concerns the acts of EU law which have been enacted by the institutions of that organisation. As the CT pointed out, such legal acts constitute a part of the current Polish legal system. The CT also stated that, taking into consideration the wording of Art. 288(2) of the TFEU, an EU regulation bears the characteristics of a normative act within the meaning of Art. 79(1) of the Constitution. The CT also pointed out that EU regulations might contain norms which could constitute the basis upon which a court or organ of public administration would make a final decision about the freedoms, rights or obligations of individuals or legal entities, as specified in the Constitution. The regulations may also constitute a legal basis for administrative decisions and court rulings in the Member States, including Poland. When participating in proceedings before national courts, individuals may rely on the norms of EU regulations and the rights derived therefrom. For these reasons the CT found that an EU regulation might be the subject of review proceedings commenced by way of a constitutional complaint, as specified in Art. 79(1) of the Constitution.[72]

The judgment in case no. SK 45/09 is, without a doubt, an example of the judicial "Europeanization" of the Constitution if the term is defined as any change in the interpretation of a constitutional provision which is related to Poland's membership in the EU. At the same time however, such a view is clearly contrary to the ECJ's jurisprudence, according to which the ECJ has a monopoly over the review of EU legal acts.[73]

[70] Pt 1.2 of the judgment.
[71] *Ibidem*.
[72] *Ibidem*, pt 1.3.
[73] *See* C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 04199.

Therefore, if it is assumed that the function of "Europeanization" is to adjust national law to the requirements stemming from EU law, the analyzed judgment must be categorized as a different phenomenon. However, it should be also highlighted that the controversial viewpoint of the CT was softened by the thesis it put forth in the final part of its reasoning. There the CT emphasized that the case was one of first impression, i.e. one in which the CT was asked to directly review the conformity of an EU regulation with the Polish Constitution for the first time. Therefore, the CT first had to determine the admissibility of the constitutional complaint, and only then its substantive validity. Due to that new situation, the CT decided to thoroughly examine the allegations, comparing the challenged EU provisions with the Polish constitutional standards. The CT also highlighted that there was a need to determine, for the future, the manner of constitutional review of EU law within the constitutional complaint procedure.[74]

The CT adopted the formula used in both the German Federal Constitutional Court (FCC) decision in the case of *Solange II*[75] and the European Court of Human Rights (ECtHR) judgment in *Bosphorus* case.[76] Hence the CT ruled that in the event of filing a constitutional complaint which challenges the constitutionality of EU secondary legislation, the complainant should be required to prove that the challenged act constitutes a considerable decline in the scope and/or standard of protection of rights and freedoms in comparison to the Polish constitutional standard of protection. Making this showing is an essential element of the requirement to demonstrate that rights or freedom have been infringed.[77] According to the CT this more specific requirement is justified by the character of acts of EU law, which enjoy a special status in Polish legal order and which come from legislative centres other than the organs of the Polish state. The CT pointed out that such a requirement is in accord with the allocation of the burden of proof in review proceedings commenced by the way of constitutional complaint. However, this is not tantamount to a possible indication (finding) that there has been an infringement of the Constitution, which is the task of the CT.[78] Moreover, the CT stated that, when the indicated requirements are not fulfilled by the complainant, the CT will issue a decision in which it refuses to proceed further with the action, or in which it discontinues proceedings, on the grounds that issuing such a ruling is inadmissible.[79]

It is worth highlighting that European constitutional courts operate nowadays in a multi-layered system of protection of individual rights, which is comprised of the national law system, the legal system of the Council of Europe, and the EU legal system. The adoption of the Charter of Fundamental Rights of the European Union (the Charter) and its entry into force under the Treaty of Lisbon (Art. 6(1) of the Treaty on the European Union), as well as the EU obligation to accede to the European Conven-

[74] Pt 8.2 of the judgment.
[75] *Bundesverfassungsgericht* decision of 22 October 1986, No. 2 BvR 197/83.
[76] ECtHR, *Bosphorus Airlines v. Ireland* (App. No. 45036/98), 30 January 2005.
[77] Pt 8.5 of the judgment.
[78] *Ibidem*.
[79] *Ibidem*.

tion on Human Rights (ECHR) (Art. 6(2) of the TEU), present new challenges for constitutional courts. One such challenge is the necessity to take into consideration the three standards for the protection of fundamental rights (the national, Strasbourg, and Luxembourg standards) in the course of interpreting and applying constitutional norms.

In this context, Arts. 51, 52(3) and 53 of the Charter are of the key importance. The judicial interpretation of Art. 51 of the Charter decisively impacts the actual scope of application of the human rights standards guaranteed at the level of EU law. Currently, the key ECJ decision regarding this issue is the *Åkerberg Fransson*[80] judgment. At the same time, Art. 53 of the Charter sets out the boundaries of the ECJ's discretion in determining the level of protection awarded to such standards vis-à-vis national law. The ECJ expressed the basic arguments in respect of this problem in its *Melloni*[81] judgment. Art. 52(3) of the Charter is the relevant point of reference in the discussion about the relationship between the EU standards of human rights protection and the standards developed in the jurisprudence of the ECtHR. As shown by the controversial ECJ opinion of 18 December 2014 on the EU's accession to the ECHR, this problem has yet to be resolved.

The CT judgment in case no. 45/09 was issued in 2011. At that time the Charter of Fundamental Rights of the European Union (the Charter) had already entered into force, but it was still two years before the ECJ was to deliver the *Åkerberg Fransson* and *Melloni* rulings. These rulings have caused some significant problems in the European constitutional jurisprudence.[82] On one hand, the German FCC made clear in its Counter-terrorism Database ruling of 24 April 2013[83] that it would not accept the broad interpretation of Art. 51(1) of the Charter given (or at least suggested) in the *Åkerberg* judgment.[84] On the other hand in its reply to the ECJ's *Melloni* judgment (judgment of 13 February 2014), the Spanish Constitutional Tribunal lowered the constitutionally-guaranteed standard of protection regarding extraditions on the basis of *in absentio* judgments. This decision was severely criticised by Spanish legal scholars, since the Constitutional Tribunal did not have to lower the general standard of protection. It could have simply accepted the exception resulting from the primacy of EU law (in

[80] Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson* [2013], ECR I-0000.

[81] Case C-399/11 *Stefano Melloni v. Ministerio Fiscal* [2013], ECR I-0000.

[82] For more on this issue, *see* J.H. Reestman, L. Besselink, *After Åkerberg Fransson and Melloni*, 9 European Constitutional Law Review 171 (2013); F. Fontanelli, *Hic Sunt Nationes*: *The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 Åklagaren v. Hans Åkerberg Fransson*, 9 European Constitutional Law Review 315 (2013); D. Thym, *Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice*, 9 European Constitutional Law Review 395 (2013); N. de Boer, *Addressing Rights Divergences under the Charter: Melloni*, 50 Common Market Law Review 1092 (2013); L. Besselink, *The Member States, the National Constitutions and the Scope of the Charter*, 1 Maastricht Journal 73 (2001).

[83] Judgment of 24 April 2013, case 1 BvR 1215/07.

[84] *See* Fontanelli, *supra* note 82, p. 320.

this context, the EAW Framework Decision[85]). Finally, in the most recent decision of 15 December 2015,[86] in its second EAW case, the FCC activated its competence for an "identity review" vis-à-vis EU law and refuted the ECJ's statements in its *Melloni* judgment to the effect that the constitutions of the Member States are not allowed to interfere with the EAW framework decision (cf. paras. 78, 82 f.).[87]

Taking the above into consideration, one has to acknowledge that the Polish example of atypical judicial Europeanization of its basic law and the recent decision of its German counterpart manifestly fall within the judicial trend to strengthen the standards of domestic constitutional protection in the context of constitutional issues connected with the current fundamental rights' revolution in Europe.[88]

6. FINAL REMARKS

The judicial Europeanization of the Constitution is currently the primary way by which Poland is adjusting its constitutional norms to the requirements resulting from EU law.

The scope of this phenomenon is connected, to a great extent, with the inflexible procedure required for amendments of the Polish Constitution.[89] In this situation, adopting so-called "silent changes" of constitutional norms are an easier and faster way of reacting to problems related to Poland's EU membership. In Poland, not only have the norms regarding the political system of the state changed, but also the constitutional standards regarding the protection of fundamental rights and freedoms have undergone the process of the Europeanization. To some extent, these changes are related to procedural norms as well.

The phenomenon of re-interpretation of constitutional provisions is a characteristic feature of contemporary constitutionalism. Prior thereto, it had been a long time since national constitutions underwent such significant changes. Hence, the judicial Europe-

[85] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision OJ L 190/1.

[86] Decision of 15 December 2015, case 2 BvR 2735/14.

[87] *See* M. Hong, *Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court, VerfBlog,* 18 February 2016, available at http://tinyurl.com/za3w4bv (accessed 20 April 2016).

[88] *See* J. Komárek, *The Place of Constitutional Courts in the EU*, 9 European Constitutional Law Review 421 (2013).

[89] The Polish Constitution has so far been amended only twice. The first amendment was passed by the Sejm in 2006, encompassing changes connected with the EAW and concerning the possibility of transferring a Polish citizen for trial or detention if the citizen in question had committed a crime and was wanted both in Poland and abroad. The second amendment was passed by the Sejm in 2009. It added section 3 to Art. 99 of the Constitution, pursuant to which "No person sentenced to imprisonment by a final judgment for an intentional indictable offence may be elected to the Sejm or the Senate."

anization of constitutions creates a number of questions without clear answers. Doubts concern such fundamental issues as determination of the boundaries of judicial Europeanization, and the way in which it should be implemented by constitutional courts. Another issue which emerges is the two-pronged question whether the "silent changes" of constitutions do not jeopardize the principle of certainly in the law, and whether they devaluate constitutions as the supreme law in domestic legal systems.

The issue of the boundaries of the "Europeanization" of constitutions has been discussed on a few occasions in the CT's jurisprudence. In judgment no. K 18/04, a relative boundary of Europeanization was established as being a *contra legem* result of an EU-friendly interpretation of Polish constitutional provisions. In judgment no. K 32/09, the concept of constitutional identity was regarded as an absolute boundary of Europeanization (both judicial and legislative).

The impact of the Constitution's Europeanization on the principle of legal certainty and the paradigm of the Constitution as the supreme law in domestic legal systems is, undoubtedly, enormous. It must be stated that the peril of erosion of these values is definitely present in Poland as well, but so far it seems to have only a potential character. To date the CT has rather wisely used the canon of an EU-friendly interpretation of constitutional provisions. Controversies did arise with respect to two re-interpretations of constitutional norms: the extension of the interpretation of the concept of citizenship contained in Art. 62 (judgment no. K 18/04) and the extension of the interpretation of the term "normative act" contained in Art. 79(1) (judgment no. SK 45/09).

The judgments presented in this article demonstrate that the CT has clearly defined both the relative and absolute boundaries of the Constitution's Europeanization, and has not hesitated to "force" the legislator to adopt formal amendments of constitutional provisions (e.g. the amendment of Art. 55 as a result of judgment no. P 1/05). The exception to the rule can be found in the judgment no. K 18/06, in which certain elements of the CT's statement of its reasons are not consistent with the viewpoint held by the ECJ in its *Filipiak* judgment. The only case of judicial "Europeanization" of the Constitution which stands in opposition to the ECJ's case law is the CT's judgment SK 45/09.

Yet it should be highlighted that the CT greatly softened the impact of the above judgment by pointing out the need to preserve caution and restraint when reviewing the compatibility of EU laws with the Constitution in the future.[90] The CT also took specific note of the different legal effects of a judgment declaring the unconstitutionality of an EU regulation, by pointing out that as regards acts of EU secondary legislation, there would be no possibility to declare a loss of their binding force. The consequence of such a CT judgment would be to rule out the possibility that a given act of EU secondary legislation would be applied by the organs of the Polish state and would have any legal effects in Poland.[91] The CT also stated that a judgment declaring non-conformity

[90] Pt. 2.5 of the judgment.
[91] *Ibidem*, pt 2.7.