

# The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context



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**Abstract** The report outlines the Polish constitutional culture and explores the interaction with EU and international law before the 2015–2018 illiberal turn in the country. The report recalls that the Communist Constitution had been political and its observance was fictional. After the transition in 1989 and in the new 1997

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The report is an analysis of the Polish Constitution and of the jurisprudence of the Polish Constitutional Tribunal before a serious systemic crisis, which formally began at the end of 2015. See selected judgments of the Polish Constitutional Tribunal: <http://trybunal.gov.pl/en/>. At that time, the first statutes limiting the systemic role of the Constitutional Tribunal were adopted, and three judges were elected to the Constitutional Tribunal in violation of the Constitution. Despite unfavourable legal and political circumstances, in 2016 the Constitutional Tribunal was able to issue three judgments declaring the statutory amendments to the legislation governing the Constitutional Tribunal unconstitutional. It was not until May 2018 that the judgments were officially published, which was contrary to the clear obligation provided for in Art. 190(2) of the Constitution (<http://konstytucyjny.pl/nieopublikowane-wyroki-tk-w-wersji-angielskiej>). The currently binding statutes concerning the Constitutional Tribunal were adopted in November and December 2016. Moreover, in 2017, the Parliament adopted new legislation relating to the Polish judiciary which, in the opinion of the vast majority of experts, raises grave constitutional concerns regarding judicial independence (cf. opinions of the Venice Commission <http://www.venice.coe.int/webforms/documents/?country=23&year=all>; Rule of Law Recommendations of the European Commission and its reasoned proposal under Art. 7(1) TEU for a Council Decision [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm); and selected judgments of the Polish Constitutional Tribunal: <http://trybunal.gov.pl/en/>). Many other statutes adopted since 2016 have raised serious constitutional concerns, e.g. Public Prosecutors' Law, Civil Service Law and the Law on Assemblies.

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A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, [https://doi.org/10.1007/978-94-6265-273-6\\_16](https://doi.org/10.1007/978-94-6265-273-6_16)

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Constitution, emphasis was on the direct application of constitutional provisions, the rule of law principle, the democratic and social state, a broad catalogue of rights and freedoms with the precise permissible grounds for their limitation, as well as institutional guarantees and judicial procedures against violations of those rights and freedoms. The Constitutional Tribunal carried out stringent review of legal provisions. The main grounds for declaration of unconstitutionality were violation of the rule of law, the right to a fair trial, the principle of proportionality and exceeding powers delegated to the executive. The Constitutional Tribunal also exercised review over EU and international treaties and measures implementing EU law. Although the Constitutional Tribunal stated that the Constitution was the supreme law of Poland, it respected the autonomy of EU law and the competences of the ECJ, adopting the approach of a consistent interpretation of Polish law with EU law. Some key examples of the case law include constitutional challenges regarding the Accession Treaty, the Brussels I Regulation, the European Arrest Warrant (EAW) and the ESM Treaty. The EAW judgment led to a constitutional amendment allowing the surrender of Polish citizens under certain circumstances. The conditions and grounds for limitation of rights are more restrictive than in EU law.

**Keywords** The Constitution of Poland • Constitutional provisions regarding EU and international co-operation • The Polish Constitutional Tribunal  
 Constitutional review • The rule of law, fundamental rights and their limitation  
 Constitutional safeguards and judicial review • The principles of proportionality, legal certainty and legitimate expectations • Defence rights, presumption of innocence • Constitutional review of EU law • Accession Treaty • European Arrest Warrant • ESM Treaty • International extradition treaties • Referendum

## 1 Constitutional Amendments Regarding EU Membership

### 1.1 *Constitutional Culture*

**1.1.1** The history of Polish constitutionalism dates back to the 16th century.<sup>1</sup> The crowning achievement was the Constitution of 3 May (*Konstytucja 3 Maja*), adopted by the Parliament (*Sejm Wielki*) in 1791. It is considered to be the second written constitution in the world and the first in Europe. The Constitution, formally enacted as Governmental Act (*Ustawa Rządowa*), introduced the principle of sovereignty of the people, the separation of powers into legislative, executive and judiciary and guaranteed a number of important individual liberties. It was influenced by views of the French philosophers J.J. Rousseau and C.L. Montesquieu. The Constitution was an attempt to reform the political system after many years of

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<sup>1</sup> Uruszczak 2010, p. 222.

political stagnation at the time of Poland's dependence on powerful neighbours. The Three Partitions of Poland (1772, 1793 and 1795), the territory of which was seized by the Russian Empire, Prussia and the Austrian Empire, effectively ended Polish national sovereignty until 1918. Although in effect for only a short time, the Constitution of 3 May became a symbol of Poland's national identity based on constitutional values and allowed its principles to survive for the upcoming years of foreign domination.<sup>2</sup>

Poland regained its independence after World War I in November 1918. During the time of the Second Polish Republic until the outbreak of World War II in 1939, three constitutions were adopted: the Little Constitution of 1919 (*Mala Konstytucja z 1919*), the Constitution of 1921 (*Konstytucja Marcowa*) and the Constitution of 1935 (*Konstytucja Kwietniowa*).

After World War II, the Polish Parliament controlled by Communists adopted the provisional Little Constitution in 1947 (*Mala Konstytucja z 1947*). On 22 July 1952 the Parliament enacted a Communist constitution, based on the Stalinist Soviet Constitution of 1936, and the name of the state was changed to the People's Republic of Poland. The sovereign was described as the working people of towns and villages, and the system was structured upon socialised ownership of the means of production and central planning. The structure of state organs was based on the principle of the uniformity of state authority. The political constitutional provisions were only a facade hiding the real system of government, subordinate to the principle of leadership of the Communist Party with limits on Polish sovereignty imposed by the USSR,<sup>3</sup> irrespective of the fact that the systemic role of the Communist Party was only formally introduced into the Constitution in 1976. The rights and freedoms of individuals were regulated in the final part of the Constitution, giving clear priority to social and economic rights. The Constitution of 1952 did not introduce institutional guarantees or judicial procedures against violations of rights and liberties, and therefore its observance was only fictional.<sup>4</sup> The nature of the Constitution was predominantly political and its role as the legal act having superior position in the system of national law was considerably reduced.<sup>5</sup>

A new chapter in the history of Polish constitutionalism started in 1989. Changes in the Constitution reflected the political and economic transition towards a democratic state and market economy. The amendment re-established the traditional name of the Polish state – the Republic of Poland (*Rzeczpospolita Polska*), restored the principle of the sovereignty of the Nation and introduced the principle of a democratic state ruled by law.<sup>6</sup>

The current Constitution, which is one of the newest constitutions in Europe, was adopted by the National Assembly on 2 April 1997 and approved by a national

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<sup>2</sup> Brzezinski 1991, pp. 60–70; see also Davies 2005, pp. 511 et seq.

<sup>3</sup> Garlicki 2010b, p. 15.

<sup>4</sup> Prokop 2011, pp. 24–25.

<sup>5</sup> Garlicki 2010b, p. 16.

<sup>6</sup> Prokop 2011, p. 27.

referendum held on 25 May 1997.<sup>7</sup> It entered into force on 17 September 1997. It falls within the category of basic laws of the state that were created after the fall of a Communist regime.<sup>8</sup> Accordingly, the Preamble emphasises that in 1989, the Homeland recovered the possibility of a sovereign and democratic determination of its fate. Article 13 provides that political parties and other organisations with programmes based upon totalitarian methods and the modes of activity of Nazism, Fascism and Communism, shall be prohibited.<sup>9</sup> The present Constitution remains within the category of constitutions that have a legal character and are enforceable in courts. The main approach to constitutional regulation relevant to the founders of the Polish Constitution, as in other countries of Eastern and Central Europe, was an emphasis on the legal nature of the norms contained in the basic law of the state.<sup>10</sup> According to Art. 8(2), provisions of the Constitution shall apply directly, unless the Constitution provides otherwise. Chapter II of the Constitution entitled ‘The Freedoms, Rights and Obligations of Persons and Citizens’ contains a wide catalogue of rights and freedoms which may be invoked directly on the basis of constitutional norms before the courts and administrative organs of the state.

**1.1.2** Compared to other European constitutions, the Polish Constitution is quite long. It is composed of a preamble and 13 chapters, including 243 articles. The legal commentary explains this unique feature as a consequence of seeking the widest possible democratic compromise during the creation of the basic law.<sup>11</sup>

The Polish Constitution contains provisions proclaiming the sovereignty of the Nation and the organisation of the State, as well as provisions limiting the power of public authorities by protecting the constitutional rights and freedoms, the rule of law and the separation of powers with due checks and balances. Chapter I entitled ‘The Republic’ contains provisions regarding the principle of a democratic state ruled by law (Art. 2), the principle of sovereignty of the Nation (Art. 4), the independence and territorial integrity of the state (Art. 5), the principle of legality (Art. 7), the principle of separation and balance between the legislative, executive and judicial powers (Art. 10), political pluralism (Art. 11) and the decentralisation of public power (Art. 15).

Having in mind the negative experience regarding the Constitution of 1952, the founders of the current Constitution gave priority to the provisions concerning human and citizens’ rights and freedoms as well as the ways to protect them, placing them before the provisions on the functioning of the state and its organs.<sup>12</sup>

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<sup>7</sup> The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, No. 78, item 483.

<sup>8</sup> Albi 2005, pp. 19–21.

<sup>9</sup> All translations of constitutional provisions are from the unofficial translation of the Polish Constitution provided by the Parliament available at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

<sup>10</sup> Grzybowski 2002, p. 12.

<sup>11</sup> Rakowska and Skotnicki 2007, p. 219.

<sup>12</sup> Sokolewicz 2001, pp. 19–20.

On the one hand, such solution proves that the state authorities have a subsidiary role in relation to the individual, and on the other hand it creates the highest guarantee and respect for individual rights and freedoms. Chapter II contains provisions devoted to general principles (Arts. 30–37), personal freedoms and rights (Arts. 38–56), political freedoms and rights (Arts. 57–63), economic, social and cultural freedoms and rights (Arts. 64–76), means for the defence of freedoms and rights (Arts. 77–81) and obligations (Arts. 82–86). Provisions concerning rights and freedoms of the individual are also found in the Preamble, and in Chapters I, IV and XI. It must be concluded that such provisions account for more than 25% of the Constitution.<sup>13</sup>

Further chapters of the Constitution concern sources of law (Chapter III), the Parliament (*Sejm*) and the Senate (Chapter IV), the President of the Republic (Chapter V), the Council of Ministers and government administration (Chapter VI), local government (Chapter VII), courts and tribunals (Chapter VIII), organs of state control and for defence of rights (Chapter IX), public finances (Chapter X), extraordinary measures (Chapter XI) and amendment of the Constitution (Chapter XII).

## 1.2 *The Amendment of the Constitution in Relation to the European Union*

**1.2.1** The Agreement establishing an association between the European Communities, its Member States and Poland (Europe Agreement) was signed in December 1991. Among various issues discussed in the course of preparatory work on the new Constitution was the so-called ‘integration clause’ or ‘European clause’ concerning the transfer of competences to international organisations and forming a legal basis for future accession to the European Union. The integration clause was included as Art. 90(1) in the Constitution of 1997. Article 90 is contained in Chapter III of the Constitution entitled ‘Sources of Law’. The discussion on the drafting of the provision concerned phrases such as ‘supranational organisation’, ‘transfer of the exercise of the competences’ and ‘public organs’.<sup>14</sup> Finally the expressions ‘international organization or international organ’, ‘transfer of competences’ and ‘organs of State authority’ were used. It must be emphasised that the Polish word ‘*przekazanie*’, used in Art. 90(1) of the Constitution may be translated alternatively as ‘transfer’, ‘delegation’ or ‘conferral’ of competences.<sup>15</sup>

<sup>13</sup> Jabłoński 2010, p. 80.

<sup>14</sup> Biernat 2007, p. 247; Wojtyczek 2007, p. 17; Działocha 1996, pp. 6–11.

<sup>15</sup> The unofficial translation of the Polish Constitution uses the word ‘delegation’. The word ‘conferral’ is used by the Constitutional Tribunal Publication Office in *Selected rulings of the Polish Constitutional Tribunal concerning the law of the European Union (2003–2014)*, vol. LI, Warsaw 2014. <http://trybunal.gov.pl/publikacje/wydawnictwa/art/7070-tom-li-selected-rulings-of-the-polish-constitutional-tribunal-concerning-the-law-of-the-european-un/>. The authors of the

According to Art. 90(1) of the Constitution, '[t]he Republic of Poland may, by virtue of international agreements, transfer to an international organization or international institution the competence of organs of State authority in relation to certain matters'. The procedure concerning ratification of such an agreement is specified in Arts. 90(2)–(4) of the Constitution. A statute granting consent for ratification of the agreement may be adopted by a two-thirds majority vote of the *Sejm* (lower chamber of the Polish Parliament) and the Senate or approved in a nationwide referendum. The resolution in respect of the choice of procedure for granting consent to ratification (by Parliament or national referendum) shall be taken by the *Sejm* by an absolute majority vote taken in the presence of at least one-half of the statutory number of Deputies. Accordingly, the ratification of international agreements concerning transfer of competences requires greater democratic legitimacy granted by the Parliament, or by the Nation, than other international agreements specified in Art. 89 of the Constitution (see Sect. 3.1.1). To date, the procedure specified in Art. 90 of the Constitution has been used twice, in both instances in relation to the European Union. Consent for ratification of the Accession Treaty signed in Athens on 16 April 2003 was given in a national referendum held on 7 and 8 June 2003 by 77.45% of voters. In accordance with the result of the referendum, the President ratified the Accession Treaty on 23 July 2003. Consent for ratification of the Lisbon Treaty was given by the *Sejm* and the Senate with a two-thirds majority vote and ratified by the President on 10 October 2008.

During preparatory work for the new Constitution, the provisions concerning the position of primary and secondary EU law within the system of sources of law applicable in the territory of Poland were also discussed. The drafters of the Constitution decided that the main sources of primary law – the EU Treaties – shall not be distinguished from other ratified international agreements in the Polish legal system (Arts. 91(1) and (2) of the Constitution). After promulgation, an international agreement constitutes part of the domestic legal order and applies directly, unless its application depends on the enactment of a statute. If such an agreement is ratified upon prior consent granted by a statute, in the case of a conflict of norms, the agreement has precedence over statutes (see Sect. 3.2.1). As for secondary EU law, Art. 91(3) of the Constitution states that '[i]f an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws'. In the course of parliamentary drafting work, Deputies and Senators opted not to establish the precedence of EU secondary law over 'norms of national law' (including the Constitution), in favour of 'statutes'.<sup>16</sup>

Since its adoption, the Constitution of 1997 has been amended only twice. The amendment of 8 September 2006 was directly related to membership in the

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present contribution share the view that the word 'transfer' corresponds best to the meaning of the word 'przekazanie'.

<sup>16</sup> Wojtyczek 2007, p. 25.

European Union and concerned the prohibition of the extradition of Polish citizens provided in Art. 55(1) of the Constitution.<sup>17</sup> The Constitution was amended in order to give effect to Council Framework Decision 2002/584 on the European Arrest Warrant<sup>18</sup> (see Sect. 1.2.3).

**1.2.2** Poland's Constitution is considered to be a 'rigid constitution' because the process of amendment prescribed in its Art. 235 is detailed and requires political consent. A bill to amend the Constitution may be submitted by at least one-fifth of the statutory number of Deputies, the Senate or the President. A bill to amend the Constitution shall be adopted by the *Sejm* by a majority of at least two-thirds of votes in the presence of at least one-half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least one-half of the statutory number of Senators. If a bill to amend the Constitution relates to the provisions contained in Chapters I, II or XII, all subjects authorised to submit the bill may require, within 45 days of the adoption of the bill by the Senate, that a confirmatory referendum be held. Such amendment of the Constitution shall be deemed to be approved if the majority of persons voting in the referendum express support for the amendment. The President shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland.

The amendment concerning Art. 55(1) of the Constitution related to Chapter II of the Constitution. It was adopted by a two-thirds majority of the Deputies and by an absolute majority of the Senators. A confirmatory referendum was not required.

**1.2.3** The direct reason for the amendment of Art. 55(1) of the Constitution was the judgment of the Constitutional Tribunal relating to the European Arrest Warrant (EAW).<sup>19</sup> The aforementioned provision originally stated that '[t]he extradition of a Polish citizen shall be forbidden'. The Constitutional Tribunal decided that Art. 607t§1 of the Code of Criminal Procedure, to the extent that it permitted surrender of a Polish national to a Member State of the European Union, was inconsistent with Art. 55(1) of the Constitution. The Tribunal analysed whether there was any difference between 'extradition' (*ekstradycja*), within the meaning of Art. 55(1) of the Constitution, and 'surrender' (*wydanie, przekazanie*) used in the EAW Framework Decision. Different views were presented in the legal literature.<sup>20</sup> The Tribunal stated that the essence (core) of extradition lies in the transfer of a prosecuted or sentenced person for the purpose of conducting a criminal prosecution or

<sup>17</sup> Statute amending the Constitution of the Republic of Poland of 8 September 2006, Journal of Laws 2006 No. 200, item. 1471.

<sup>18</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

<sup>19</sup> Judgment of the Constitutional Tribunal of 27 April 2005, ref. No. P 1/05.

<sup>20</sup> Płachta 2002, pp. 71–72; Kruszyński 2004, pp. 9–10.

executing a penalty imposed against them. The surrender of a prosecuted person on the basis of an EAW is in essence the same. Accordingly, it should be viewed as a particular form of extradition. The Tribunal pointed out that considering Poland's obligations as implied by EU membership, it is essential that the applicable law be changed such as to enable full implementation of Framework Decision 2002/584.

The bill to amend Art. 55 of the Constitution was submitted to Parliament by the President on 15 May 2006. The Deputies, in line with the aforementioned judgment of the Constitutional Tribunal, decided that the surrender of persons on the basis of an EAW must be viewed as a form of extradition in the meaning of Art. 55(1) of the Constitution.<sup>21</sup> According to the new Art. 55 of the Constitution:

1. The extradition of a Polish citizen shall be prohibited, except in cases specified in paras. 2 and 3.
2. Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:
  - (1) was committed outside the territory of the Republic of Poland, and
  - (2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.
3. Compliance with the conditions specified in para. 2 subparas 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.
4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.
5. The courts shall adjudicate on the admissibility of extradition.

**1.2.4** The current provisions including Arts. 90 and 91 of the Constitution are considered by some observers to be insufficient, considering further developments in the European legal order, especially those introduced by the Lisbon Treaty. Different proposals concerning the amendment of the Constitution relating to Poland's membership in the EU were formulated in the legal literature and were submitted to Parliament.<sup>22</sup> The most important proposals were presented by

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<sup>21</sup> Extraordinary Commission for consideration of the draft legislation presented by the President of the Republic of Poland concerning the amendment of the Constitution and Code of Criminal Procedure, Bulletin No. 972/V of 21 August 2006.

<sup>22</sup> Laskowska 2011, pp. 201 et seq.



President Bronisław Komorowski (on 16 November 2010, No. 3598) and by the Deputies (on 26 November 2010, No. 3687) and concerned the introduction of a new chapter Xa relating to Poland's membership in the EU in the Constitution.<sup>23</sup> The proposals were jointly considered by the Constitutional Committee and underwent two readings in the *Sejm*. They did not come into force due to a lack of political will on the part of the Deputies followed by the end of the VII term of office of the *Sejm* in November 2011.

The changes to the Polish Constitution related to membership in the European Union can be divided into the necessary and the desirable (see Sects. 1.5.2 and 2.13.4). In view of the future adoption of the euro, Art. 227 of the Constitution must be amended to guarantee the independence of the National Bank of Poland and ensure the competence of the European Central Bank associated with the issue of the common currency. Such amendment is necessary for compliance with Art. 131 TFEU.

### ***1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers***

**1.3.1** The rules regarding the transfer of competences of the organs of state authority to the European Union are specified in Art. 90 of the Constitution (see Sect. 1.2.1). The primacy of secondary EU law over statutes and the direct applicability of such law is governed by Art. 91(3) of the Constitution (see Sect. 1.2.1).

**1.3.2** The most comprehensive interpretation of Art. 90(1) of the Constitution was presented by the Constitutional Tribunal in the European Stability Mechanism (ESM) case,<sup>24</sup> where the Court stated that the essence of Art. 90 is to provide a guarantee for the sovereignty of the Nation and the state by providing formal restrictions to the transfer of competences vested in the organs of state authority. The transfer of competences is admissible under the following conditions: (1) the transfer is to an international organisation or organ; (2) the competences relate to certain matters and (3) consent is granted by the Parliament or alternatively by the sovereign acting by way of a nationwide referendum. This triad of constitutional restrictions must be preserved in order to maintain the conformity of the conferral with the Constitution. Taking into consideration its previous jurisprudence as well as views presented in legal commentaries, the Tribunal stated that Art. 90 shall be applied in the following situations: (1) the subject of the international agreement concerns competences on the basis of which the organs of state authority issue legal acts (in particular legislative acts); (2) the competence is conferred on an

<sup>23</sup> Chruściak 2013, pp. 59 et seq.

<sup>24</sup> Judgment of 26 June 2013, ref. No. K 33/12.

international (supranational) institution or organisation; (3) the effect of the conferral is that the organisation can exercise the competence to issue legal acts (in particular legislative acts) that are binding on individuals and state organs.

The Constitutional Tribunal has also developed the concept of ‘activation of competences’ as opposed to ‘transfer of competences’ in its jurisprudence. In the judgment concerning a declaration specified in the former Art. 35(2) TEU on acceptance of the jurisdiction of the European Court of Justice (ECJ) in the Third Pillar and in order to allow the submission of requests for a preliminary ruling by the Polish courts in the Third Pillar,<sup>25</sup> the Tribunal underlined that such competence was acquired by Poland by the Treaty of Accession, and that the declaration ‘means only activation of that competence, and not its emergence’.

The Polish Constitutional Tribunal acknowledged the view presented in the legal literature that absolute sovereignty has been replaced by a modern and revised approach. In its judgment on the constitutionality of the Treaty of Lisbon,<sup>26</sup> the Tribunal emphasised that ‘in the doctrine of international law, there is the view that the concept of absolute, unrestrained sovereignty is a thing of the past’. The Constitutional Tribunal stated that a distinction is drawn between, on the one hand, the limitation of sovereignty arising from the will of the state that is in accordance with international law and, on the other hand, the infringements of sovereignty which occur against the will of the state and which are inconsistent with international law. By incurring obligations, the state does not necessarily limit its freedom of activity, but at times extends its activity into fields where it has not acted before. The ability to incur international obligations is what international law implies in the legal character of the state, and what constitutes the identity of the state in international law. Therefore, this is not a factor that limits sovereignty, but it is rather a manifestation of sovereignty. The Constitutional Tribunal shared the view expressed in legal commentary that accession to the European Union is perceived as a sort of limitation of the sovereignty of a given state, but it does not mean the loss of sovereignty and is tied to a compensatory effect in the form of the possibility to partake in the decision-making processes of the European Union.

**1.3.3** In its judgment on the constitutionality of the Treaty of Accession,<sup>27</sup> the Tribunal determined the limits to the transfer of powers by stating that the conferral of competences ‘in relation to certain matters’ must be construed as a prohibition against conferring all competences vested in a given organ of state authority, and conferring all competences within a given scope, as well as a prohibition against conferring competences concerning matters that fall within the scope of powers of a given organ of state authority. Therefore, it is necessary to precisely specify the areas and the scope of competences that are subject to conferral. At the same time,

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<sup>25</sup> Judgment of 18 February 2009, ref. No. Kp 3/08.

<sup>26</sup> Judgment of 24 November 2010, ref. No. K 32/09.

<sup>27</sup> Judgment of 11 May 2005, ref. No. K 18/04.

Art. 90(1) of the Constitution may not constitute a basis for granting an international organisation (or an organ thereof) the competence to enact legal acts or make decisions that would be inconsistent with the Constitution, in particular to the extent that Poland could not function as a sovereign and democratic state ('core' powers). Further, in the judgment concerning the Lisbon Treaty, the Tribunal shared the view expressed in the legal commentaries that the concept of constitutional identity determines the scope of matters excluded from the competence to confer competences. The matters for which conferral is prohibited are the fundamental principles of the Constitution: the principle of independent statehood, democratic governance, rule of law, social justice, human dignity and protection of the rights and freedoms of the individual.

**1.3.4** According to Art. 8(1) of the Constitution, '[t]he Constitution shall be the supreme law of the Republic of Poland'. This principle is also upheld by Art. 91 of the Constitution that determines the position of primary and secondary EU law within the system of sources of law applicable in the territory of Poland (see Sect. 3.2.1). The most comprehensive interpretation of the supreme role of the Constitution over European Union law was presented in the judgment concerning the Treaty of Accession. The Constitutional Tribunal stated that given its supreme legal force, the Constitution enjoys primacy within the territory of the Republic of Poland. If an irreconcilable inconsistency were to appear between a constitutional norm and an EU norm, such a collision could in no event be resolved by assuming the supremacy of the EU norm over the constitutional norm. Furthermore, such collision could not lead to a situation where a constitutional norm loses its binding force and is substituted by an EU norm, nor could it lead to the application of the constitutional norm restricted to areas beyond the scope of EU law. This view was upheld by the Constitutional Tribunal in its judgments concerning the Lisbon Treaty and the Brussels I Regulation.

The principle of interpreting domestic law in a 'Europe-friendly' manner is clearly phrased in the case law of the Polish Constitutional Tribunal. However, there are limits to such interpretation and they result from the supreme power of the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum threshold which may not be lowered or questioned as a result of EU provisions. Undoubtedly, a ruling declaring the non-conformity of EU law with the Constitution should be an *ultima ratio* and ought to be delivered only when all other ways of resolving a conflict between Polish norms and the norms of the EU legal order have failed. In the event a 'Europe-friendly' interpretation is not possible, the Nation as the sovereign or an organ of state authority authorised by the Constitution to represent the Nation would need to decide to either amend the Constitution, seek modifications to the EU provisions or, ultimately, initiate Poland's withdrawal from the European Union.

The Brussels I judgment of the Polish Constitutional Tribunal was the first case in which the constitutional court of an EU Member State directly reviewed the

constitutionality of secondary EU law and issued a ruling on the merits.<sup>28</sup> The Constitutional Tribunal adjudicated that Art. 41, second sentence, of the Brussels I Regulation (Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)<sup>29</sup> was consistent with the right to a fair hearing and the equal rights of parties to court proceedings (Art. 45(1) in conjunction with Art. 32(2) of the Constitution). The admissibility of such control was closely related to the type of constitutional proceedings commenced by way of a constitutional complaint submitted by an individual (substantial review of norms).<sup>30</sup> According to Art. 79(1) of the Constitution, an individual may in a constitutional complaint challenge the conformity of a statute or other normative act (forming a basis for the court's judgment in his or her case) with the Constitution. According to the Constitutional Tribunal, 'normative act', within the meaning of Art. 79(1) of the Constitution, includes not only normative acts issued by one of the organs of the Polish state, but also – after fulfilling further requirements – legal acts issued by an organ of an international organisation. In view of the Tribunal, the regulation specified in Art. 288 TFEU may be regarded as a normative act within the meaning of Art. 79(1) of the Constitution. Allowing for the possibility of examining the conformity of EU secondary legislation with the Constitution, the Tribunal emphasised the need to maintain due caution and restraint in that regard, because of the principle of sincere cooperation referred to in Art. 4(3) TEU (see Sect. 2.8.4). The judgment in case ref. No. SK 45/09 opened a wide debate as to the limits of control of EU secondary law by the Constitutional Tribunal.<sup>31</sup> In the opinion of one group of authors, the Tribunal has no competence to control EU secondary law and should discontinue any such pending proceedings. The courts of the European Union have exclusive jurisdiction in that respect. By contrast, the authors belonging to another group share the view that the limits of control are determined by constitutional norms, as well as EU law. The Tribunal has competence to control EU secondary legislation (normative acts) only where the Constitution explicitly refers to the review of normative acts (i.e. within the framework of a constitutional complaint or questions of law referred by national courts). By virtue of the limitations imposed on the constitutional complaint procedure, the Tribunal would not be able to examine whether a given act was *ultra vires*, i.e. whether it was within the scope of competence conferred by Poland on the EU. If, however, an *ultra vires* action resulted in an infringement of Polish constitutional rights and freedoms, the complaint would have to be considered admissible. The Tribunal has no jurisdiction to declare

<sup>28</sup> Judgment of 16 November 2011, ref. no SK 45/09.

<sup>29</sup> [2001] OJ L 12/1.

<sup>30</sup> In its Order of 17 December 2009, ref. No. U 6/08, the Tribunal expressed the view that the constitutional review of norms of EU secondary legislation was inadmissible. The proceedings in that case were instituted by an application submitted by a group of *Sejm* Deputies and they concerned an abstract review of norms.

<sup>31</sup> Safjan 2012, pp. 339–367; Bogdanowicz and Marcisz 2012, pp. 47–53; Tatham 2013, pp. 252–259; Kawczyńska 2014, pp. 233–243; Dudzik and Półtorak 2012, pp. 245–255.

that the acts of EU institutions are invalid. However, as other national courts, the Tribunal may consider the validity of an EU act.<sup>32</sup> In case of doubt, it should ascertain the content of the norms of EU secondary legislation which are subject to review. This may be achieved by referring questions to the ECJ for a preliminary ruling, pursuant to Art. 267 TFEU, as to the interpretation or validity of provisions that raise doubts. It is also worth mentioning that one of the proposals concerning amendment of the Constitution submitted by a group of *Sejm* Deputies in November 2009 postulated the competence of the Constitutional Tribunal to adjudicate the conformity of secondary EU law with the Constitution (new Art. 188(1a)). Legal experts unanimously held that such amendment would be incompatible with EU law (see Sect. 1.2.4).

## 1.4 Democratic Control

**1.4.1** The participation of the national parliament in EU decision-making processes is regulated in the statute of 8 October 2010 on cooperation of the Council of Ministers with the *Sejm* and the Senate in matters related to the membership of the Republic of Poland in the European Union (hereinafter Cooperation Act).<sup>33</sup> It takes into account the provisions of the Treaty of Lisbon that strengthened democratic legitimacy within the EU. Cooperation between the executive and legislative powers covers five main areas: adoption of EU law and revision of the Treaties, adoption of national acts implementing EU law, lodging of complaints with the ECJ concerning breaches of the principle of subsidiarity by an EU legislative act, expressing opinions on candidates for certain posts in the EU and the participation of the representatives of the Polish Council of Ministers in the Council. According to the Cooperation Act, the Council of Ministers is obliged to provide the Parliament with information on Poland's participation in EU activities, transmit the documents of the EU which are subject to consultation with Member States, transmit Poland's draft positions on draft EU legislative acts, lodge complaints upon Parliamentary request to the ECJ concerning breaches of the principle of subsidiarity and present candidatures for certain posts in the EU.

The detailed rules concerning the participation of the Polish Parliament in EU decision-making are specified in the Rules of Procedure of the *Sejm* (Chapter XIIIa) and the Rules of Procedure of the Senate (Chapter VIIIa). There is a European Union Affairs Committee in each of the chambers that expresses the opinions of its members concerning drafts of EU legal acts and Poland's positions taken in the course of EU law-making procedures. Opinions expressed by the Committee should provide a basis for Poland's position. If a position taken or presented by the Polish

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<sup>32</sup> Case C-314/85 *Foto-Frost* [1987] ECR I-04199.

<sup>33</sup> Journal of Laws 2010, No. 213, item 1395.

Council of Ministers in the Council or in the European Council does not take such opinions into consideration, the minister is required to explain the reasons why.

**1.4.2** The Constitution provides for three types of nationwide referendum: (1) deciding on matters of particular importance to the state (Art. 125); (2) granting consent for ratification of an international agreement transferring the competences of organs of state authority to an international organisation or international organ (Art. 90(3)); and (3) amending Chapters I, II or XII of the Constitution (Art. 235(6)). In the first two cases the result of a nationwide referendum shall be binding if more than one-half of entitled voters have participated in the vote. The requirement regarding turnout is very demanding and may cause problems in fields where citizens are not very active.<sup>34</sup> During the parliamentary proceedings to adopt Art. 90(3) of the Constitution, the Constitutional Committee abandoned the idea of an obligatory referendum in cases concerning transfer of competences to an international organisation because it might have required the organisation of a referendum on a number of occasions.<sup>35</sup> In Poland there has only been one referendum related to EU matters, held on 7 and 8 June 2003, in which 58.85% of eligible voters participated. The Nation expressed its consent for the ratification of the Treaty of Accession by a 77.45% majority. A referendum concerning the adoption of the EU Constitutional Treaty was planned for October 2005, but this was abandoned due to the negative referendum results in France and the Netherlands.

## **1.5 The Reasons for, and the Role of, EU Amendments**

**1.5.1–1.5.2** The EU amendment to the Polish Constitution of 1997 is limited in its scope (see Sect. 1.2.3). The reason behind such disposition is the dispute about the necessity and scope of such amendments and the difficulty of the amendment procedure (see Sect. 1.2.2), especially in the *Sejm* where at least two-thirds of votes in the presence of at least one-half of the statutory number of Deputies is required. It is very difficult to obtain a political consensus between the governing coalition and the opposition (which mainly consists of Eurosceptics). The experts share the view that the Constitution in its present state allows Poland to fulfil its obligations arising from membership in the European Union.<sup>36</sup> However, in view of the future accession of Poland to the eurozone, the Constitution requires amendments

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<sup>34</sup> In Judgment of 27 May 2003, ref. No. K 11/03, the Constitutional Tribunal stated that if the ratification referendum specified in Art. 90(3) of the Constitution did not deliver a legally binding result for reasons of an insufficient turnout (i.e. fewer than 50% of citizens with the right to vote participated), the *Sejm* could adopt a resolution governing the choice of procedure for granting consent for ratification again and, therefore, could choose whether to hold another referendum or to initiate the parliamentary procedure.

<sup>35</sup> Chruściak 2003, pp. 52–53.

<sup>36</sup> Biernat 2004, pp. 63–85.

concerning the position of the National Bank of Poland and the Council for Monetary Policy (see Sect. 1.2.4). At present there is no political consensus for such an amendment.

**1.5.3** The role of national constitutions in a context where power is increasingly exercised at supranational and global level is still fundamental. The authors of the present contribution share the view expressed by the Constitutional Tribunal in the Lisbon Treaty case that ‘the EU Member States retain their sovereignty due to the fact that their constitutions, being manifestation of the state’s sovereignty, maintain their significance’. The need for amendments depends on the wording of the given constitution, the constitutional traditions of the particular state and its political situation. The Polish Constitution is characterised by openness towards the European Union.<sup>37</sup>

## 2 Constitutional Rights, the Rule of Law and EU Law

### 2.1 *The Position of Constitutional Rights and the Rule of Law in the Constitution*

**2.1.1** Chapter I of the Constitution entitled ‘The Republic’ (*Rzeczpospolita*) expounds the systemic principles that serve as the foundation of the Polish constitutional system (see Sect. 1.1.2). One of the most important principles is contained in Art. 2 of the Constitution, which states that ‘[t]he Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice’ (see Sect. 2.1.3). The Constitutional Tribunal has derived a number of general principles of law such as legal certainty, protection of acquired rights, protection of legitimate expectations, proportionality, non-retroactivity of law and sufficient *vacatio legis* from this clause.<sup>38</sup> The Constitution also enshrines other general principles of law, such as subsidiarity (Preamble), legality (Art. 7), proportionality in limitation of rights and freedoms (Art. 31 (3)), *nullum crimen sine lege*, *nulla poena sine lege* and the non-retroactivity of criminal law (Art. 42(1)).

Personal, political, economic, social and cultural freedoms and rights are contained within the comprehensive Chapter II entitled ‘The Freedoms, Rights and Obligations of Persons and Citizens’. The most fundamental principle is contained in Art. 30 of the Constitution, which states that ‘[t]he inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities’. In drafting these provisions the founders of the Constitution were inspired by the Universal Declaration of Human Rights of 1948,

<sup>37</sup> Biernat 2002b, pp. 439–45.

<sup>38</sup> See for example Judgment of 12 April 2000, ref. No. K 8/98.

the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights of 1966 and the European Convention on Human Rights of 1950 (ECHR) as well as the constitutions of other states.<sup>39</sup>

Rights and freedoms are enforceable in courts, unless the Constitution provides otherwise. According to Art. 77(2) of the Constitution, statutes shall not bar recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights. Institutional guarantees for the protection of rights and freedoms are specified in Chapter II of the Constitution. These include the right to a fair trial (Art. 45(1)), the right to compensation for any harm done by any action of an organ of public authority contrary to law (Art. 77(1)), the right to appeal against judgments and decisions made at first instance (Art. 78), the guarantee of at least two-stage court proceedings (Art. 176), the right to submit a constitutional complaint to the Constitutional Tribunal (Art. 79) and the right to apply to the Commissioner of Human Rights (Ombudsman) (Art. 80). Specific limitations are provided for in Art. 81 of the Constitution enumerating economic and social rights and freedoms that are enforceable only within the limits specified in a statute (minimum level of remuneration for work, full and productive employment, aid to disabled persons, consumer protection, ecological security and environmental protection).

**2.1.2** Article 31(3) of the Constitution provides the conditions under which limitations can be imposed upon the exercise of constitutional freedoms and rights.

Commentators point out that the general limitation clause provided in the Polish Constitution is stricter than the limitation clause provided in Art. 52(1) of the EU Charter of Fundamental Rights (the Charter). Limitations to constitutional rights and freedoms must meet the following cumulative conditions: may be specified only by statute, must be necessary and must have one of only six particular aims enumerated in Art. 31(3) of the Constitution:<sup>40</sup>

Article 31(3).

Any 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.

However, this does not mean an absolute prohibition on placing restrictions on constitutional rights and freedoms by governmental regulation, but a statute (Act of Parliament) in this respect must play a decisive role.<sup>41</sup> The jurisprudence of the Constitutional Tribunal holds that particular rights and freedoms (of social and

<sup>39</sup> Masternak-Kubiak 2010, p. 32. The provision contained in Art. 30 of the Constitution was also inspired by the Basic Law of the Federal Republic of Germany of 1949; see Zajadło 1998, p. 53.

<sup>40</sup> Wróbel 2013, p. 1348.

<sup>41</sup> Bosek and Szydło 2016, p. 780.



economic character) may be limited by governmental regulation (i.e. executive acts), issued on the basis of a specific authorisation contained in a statute (Art. 92(1) of the Constitution).<sup>42</sup>

Nevertheless, with regard to personal rights and freedoms, penal law and tax law, limitations may be imposed only by a statute adopted by the Parliament.<sup>43</sup>

Limitations to rights and freedoms in the Polish legal system may also stem from international agreements ratified upon prior consent granted by statute, or from EU regulations or EU decisions (that are applied directly in the national legal system).<sup>44</sup> According to Art. 91(2) and (3) of the Constitution, these acts shall have precedence over statutes.

The test of proportionality contained in the above Art. 31(3) is construed as the sum of three component principles: the principle of usefulness, the principle of necessity and a prohibition against excessive interference.

Notwithstanding the abovementioned clause, the Constitution contains provisions that exclude any restrictions to rights and freedoms (Art. 40) or allow restrictions to certain rights and freedoms only when introducing extraordinary measures (Art. 228).

The conditions that define the public interest that are enumerated in Art. 31(3) of the Constitution resemble those set out in the European Convention on Human Rights (compare Arts. 8–11) and the International Covenant on Civil and Political Rights (compare Arts. 12(3), 18(3), 19(3), 21(3) and 22(2)). It should be noted that the official Polish translations of the limitation clauses in the European Convention on Human Rights are somewhat ambiguous. They do not refer to ‘law’ as in the English or French versions (‘prescribed by law’ and ‘*prévue par la loi*’), rather they refer to statute (‘*przewidziane przez ustawę*’ i.e. ‘prescribed by statute’). This does not mean that the Convention excludes acts issued by executive authorities, but additional requirements may arise from the different national legal systems. If the system is based – as in Poland – on the principle of exclusivity of statutes to regulate the legal situation of individuals, the limitations contained in executive regulations (issued without statutory authorisation) may be regarded as contrary to national law.<sup>45</sup>

The conditions specified in the general limitation clause in the Polish Constitution are interpreted strictly. This means that if a limitation imposed on rights or freedoms is not justified by any of the six aims enumerated in Art. 31(3) of the Constitution, the limitation is prohibited, unless the specific provision of the Constitution provides otherwise.<sup>46</sup>

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<sup>42</sup> Judgment of the Constitutional Tribunal of 25 July 2006, ref. no. P 24/05.

<sup>43</sup> Judgment of the Constitutional Tribunal of 6 March 2002, ref. no. P 7/00.

<sup>44</sup> Bosek and Szydło (2016), pp. 782–783.

<sup>45</sup> Garlicki 2010a, p. 486.

<sup>46</sup> Garlicki 2003, p. 22.

The Polish Constitution contains other (specific) limitation clauses in addition to Art. 31(3) of the Constitution. Some are wider than the general limitation clause. For example, freedom of economic activity may be limited only for ‘important public reasons’ (Art. 22). Some of the limitation clauses are narrower than the general limitation clause. For example, the freedom to publicly express religion may be limited only where this is necessary for the ‘defence of State security, public order, health, morals or the freedoms and rights of others’ (Art. 53). As another example, limitations on the right to obtain public information and access to public documents may be imposed solely to ‘protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State’.

**2.1.3** According to Art. 2 of the Constitution, the Republic of Poland shall be a democratic state ruled by law. This provision enacts a constitutional principle equivalent to the rule of law or *Rechtsstaat*. It was introduced in December 1989 as an amendment to the Constitution of 1952. The Constitutional Tribunal has derived a number of principles of law from this clause, which also remained valid under the Constitution of 1997<sup>47</sup> (see Sect. 2.1.1). Article 2 of the Constitution and specific principles derived from the rule of law are frequently used by the Constitutional Tribunal, common and administrative courts in exercising judicial review. The constitutional provision in question is treated as *lex generalis*. In most cases the courts invoke more specific provisions aimed at the protection of rights and freedoms. According to the jurisprudence of the Constitutional Tribunal, Art. 2 of the Constitution may not form the sole legal foundation for a constitutional complaint submitted by an individual contesting the validity of a legal norm, if the Constitution provides for more specific provisions guaranteeing the protection of rights and freedoms.

The Constitution of 1952 did not contain guarantees for the protection of rights and freedoms such as the right to a fair trial. After the amendment of 1989, the Constitutional Tribunal inferred the right to access to a court from the principle of the rule of law.<sup>48</sup> The Constitution of 1997 contains a special provision in Art. 45(1) which stipulates that ‘everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court’. The Constitutional Tribunal has indicated in its jurisprudence that the right to a fair trial enshrined in this provision comprises the following: (1) the right of access to a court (the right to institute proceedings before a court – an impartial and independent organ of the state); (2) the right to proper court proceedings which comply with the requirements of a fair and public hearing; (3) the right to a court ruling (the right to have a given case determined in a legally effective way by a court); and (4) the right to have cases examined by a court with an adequate organisational structure and position. In recent case law, the

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<sup>47</sup> Garlicki 2010b, p. 61.

<sup>48</sup> Judgments of the Constitutional Tribunal ref. No. K. 3/91, ref. No. K. 8/91, ref. No. K. 4/94, ref. No. K. 11/95 and ref. No. K. 14/96.

Constitutional Tribunal has also emphasised the right to the effective enforcement of a final court ruling.

## ***2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law***

**2.2.1** To date, no cases of direct conflict between EU economic freedoms and fundamental rights have been brought before the Constitutional Tribunal. Such issues arise more frequently before common and administrative courts. A recent case concerned a conflict between the free movement of goods and protection of the life and health of individuals. The case related to the prohibition on registering passenger vehicles having their steering equipment on the right-hand side. In a series of judgments the Supreme Administrative Court upheld the decisions of the Minister of Transportation refusing registration of such vehicles taking into consideration the protection of road safety and protection of the health and lives of people.<sup>49</sup> The ECJ found that such restriction constituted a measure having equivalent effect to a quantitative restriction on imports within the meaning of Art. 34 TFEU.<sup>50</sup> In the opinion of the Polish Council of Ministers, the ban imposed on the registration of vehicles was justified by an imperative requirement in the public interest for the purpose of protecting the lives and health of road users. The ECJ accepted this reasoning but stated that the measure at issue was not compatible with the principle of proportionality. In the view of the Court, according to the present state of technology, measures exist that are less restrictive of the free movement of goods and which are capable of significantly reducing the risk which could be created by the use of vehicles with the steering wheel placed on the same side as the direction of traffic.

## ***2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law***

### **2.3.1 The Presumption of Innocence**

**2.3.1.1** According to Art. 42(3) of the Constitution ‘[e]veryone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court’. A restatement of this principle is found in Art. 5 of the Code of the Criminal

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<sup>49</sup> See for instance the Judgments of the Supreme Administrative Court of 26 January 2009 ref. No. I OSK 63/08, of 21 September 2010 ref. No. I OSK 1550/09, of 27 July 2011 ref. No. I OSK 1336/10, of 24 July 2012 ref. No. I OSK 1031/11.

<sup>50</sup> Case C-639/11 *European Commission v. Republic of Poland* [2014] ECLI:EU:C:2014:173.

Procedure, which additionally stipulates that ‘unresolvable doubts shall be resolved in favour of the accused’.

As mentioned in Sect. 1.2.3, the Constitutional Tribunal in the EAW case decided that Art. 607t§1 of the Code of Criminal Procedure that allowed the surrender of a Polish national under the EAW was inconsistent with Art. 55(1) of the Constitution. Article 55 of the Constitution was amended in September 2006 in order to give effect to Framework Decision 2002/584. Three additional reasons for mandatory refusal of the execution of an EAW that are not provided for in Framework Decision 2002/584 but are aimed at the protection of Polish citizens were introduced in paras. 2 and 4 of Art. 55 Constitution. These are: the principle of territoriality, the requirement of double criminality and the principle of protection of rights and freedoms of persons and citizens. Accordingly, the Polish Constitution and Art. 607p(1)–(5) of the Code of Criminal Procedure provide grounds for refusal to execute an EAW if this would ‘violate rights and freedoms of persons and citizens’. The dominant scholarly view is that the provision should be interpreted broadly and ought to comprise the rights which are guaranteed by the provisions of acts of international law that bind Poland, as well as the rights and freedoms protected by the Constitution.<sup>51</sup>

The issues of presumption of innocence, the right to defence and the right to a fair trial arose before the Constitutional Tribunal in a case concerning a Polish citizen accused of rape and assault in the city of Exeter in the UK in July 2006.<sup>52</sup> The Polish court decided to surrender the accused on the basis of an EAW issued by the British court under the condition that he would be transferred to Poland to serve his sentence. In June 2007, the accused filed a constitutional complaint, challenging the constitutionality of certain provisions of the Code of Criminal Procedure, insofar as they allow for the surrender of a person, even if it has not been determined that it is probable that the alleged offences have been committed by the person who is the subject of the EAW.

The Constitutional Tribunal stated that, on the basis of Art. 607p(1)(5) of the Code of Criminal Procedure, it should be possible to refuse to execute an EAW in cases where it is obvious for the court adjudicating on the execution of the warrant that the person who is the subject of the warrant has not committed the act on which the warrant is based. Such a decision may arise from findings made on the initiative of the person who is the subject of the EAW, his defence counsel, the prosecutor as a party to the proceedings, as well as findings made on the initiative of the court adjudicating on the execution of the warrant, or from findings arising from the facts which are known the court. At the same time, the Constitutional Tribunal emphasised that this position should not be regarded as tantamount to allowing the court adjudicating on the execution of the EAW to carry out detailed proceedings to receive evidence with regard to the guilt of the person who is the subject of the warrant. In the case of surrender to another EU Member State on the basis of an

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<sup>51</sup> Nita 2008, p. 93.

<sup>52</sup> Judgment of 5 October 2010, ref. No. SK 26/08.

EAW, the level of confidence in the legitimacy of the request for surrender should be higher than in the case of surrender on the basis of a ‘classic’ extradition request to another state which is not necessarily bound by at least the minimum level of guarantees provided by the ECHR.

**2.3.1.2** A court that receives an EAW-based request for surrender ‘shall decide on the surrender and provisional detention at a hearing in which both a public prosecutor and defence counsel may participate’ (Art. 607l§1 Code of Criminal Procedure). This provision does not mention the person indicated in the EAW. However, the dominant view in the legal literature is that exclusion of the person concerned from the hearing where the court decides on surrender or provisional detention would violate the right to a fair trial contained in Art. 45(1) of the Constitution and Art. 6 of the ECHR.<sup>53</sup> In practice, the courts grant the person indicated in the EAW a right to be heard even if the warrant is not accompanied by a request to interrogate the prosecuted person.

Polish courts present a somewhat restrained approach towards arrest warrants concerning Polish citizens. They consider the requirements specified in Art. 607p and Art. 607r of the Code of Criminal Procedure concerning grounds for mandatory or optional refusal to execute an EAW. According to the jurisprudence of the Supreme Court, they may also consider whether the warrant has been issued by a competent judicial authority and whether it contains the elements which are essential for declaring it to be in compliance with the formal requirements. A review may not, however, lead to substantive adjudication of whether there exist sufficient grounds for the execution of the warrant.<sup>54</sup> In some cases the courts decide to surrender the accused under the condition that he/she will be transferred to Poland to serve his/her sentence (see Sect. 2.3.5.1).

In 2014, the Ombudsman formulated an official request to the Supreme Court to adjudicate if the issuance of an EAW may in itself form a sufficient basis for a domestic court to decide on the provisional detention of an accused person without analysing any further evidence. The Ombudsman had received a significant number of complaints from citizens alleging that in such cases Polish courts apply provisional detention automatically without examining any evidence. One of the major arguments against this practice was the presumption of innocence of a person indicated in an EAW. In its order of 26 June 2014, the Supreme Court responded that domestic courts must not examine evidence forming the basis for the issuance of an EAW.<sup>55</sup> However, a refusal to decide on provisional detention may be based on the statutory grounds for refusal to execute the warrant, e.g. violation of the rights and freedoms of persons specified in Art. 607p§1(5) of the Code of Criminal Procedure. The Supreme Court rejected the view of the Ombudsman that a decision on the provisional detention of a person indicated in an EAW violates the presumption of innocence guaranteed by Art. 42(3) of the Constitution. According to

<sup>53</sup> Nita 2014; Jaworski and Sołtysińska 2010, p. 329.

<sup>54</sup> Judgment of the Supreme Court of 8 December 2008, ref. No. V KK 332/08.

<sup>55</sup> Order of the Supreme Court decided by a panel of 7 judges of 26 June 2014, ref. No. I KZP 9/14.

the Supreme Court, provisional detention is only a preventive measure, and the accused shall be presumed innocent until his guilt is determined by the final judgment of a court.

### 2.3.2 *Nullum crimen, nulla poena sine lege*

#### 2.3.2.1 According to Art. 42(1) of the Constitution

[o]nly a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.

As specified in Sect. 2.3.1.1, the amendment to the Constitution of 2006 introduced an additional requirement of double criminality in Art. 55(2) that was not provided for in Framework Decision 2002/584. Consequently, the extradition of a Polish citizen may be granted provided that

the act covered by a request for extradition constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

Article 607w of the Code of Criminal Procedure abolishes the rule of double criminality for 32 offences only in respect to non-Polish nationals. Therefore, if an arrest warrant concerns a foreigner, the fact that an act is not a criminal offence according to Polish law does not prevent the warrant from being executed, if it concerns an act punishable in the issuing state by a penalty of at least 3 years of imprisonment and constitutes one of the 32 types of offences. The requirement of the rule of double criminality for acts committed by Polish citizens constitutes an incorrect implementation of Framework Decision 2002/584. This issue has been pointed out by legal experts in the course of legislative work on the amendment of Art. 55 of the Constitution as well as in the legal commentary on the subject.<sup>56</sup> The European Commission has also indicated that this contradicts the Framework Decision.<sup>57</sup>

It has also been pointed out that Art. 607w of the Code of Criminal Procedure merely enumerates types of offences and contains imprecise and even ambiguous phrases. The crimes are not defined either in Art. 2(2) of Framework Decision 2002/584 or in the Code of Criminal Procedure, and thus the qualification of certain criminal acts may be seriously impeded.<sup>58</sup>

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<sup>56</sup> Steinborn 2013.

<sup>57</sup> Second evaluation report on the state of transposition of the Framework Decision on the European arrest warrant and the surrender procedures between Member States, MEMO/07/288, Brussels, 11 July 2007, p. 7.

<sup>58</sup> Steinborn 2013.

### 2.3.3 Fair Trial and *In Absentia* Judgments

**2.3.3.1** Article 45(1) of the Constitution stipulates the right to a fair trial that covers the right to a proper court proceeding which complies with the requirements of a fair and public hearing. It must be emphasised that the right to a fair trial may be subject to the limitations provided by Art. 31(3) of the Constitution (see Sect. 2.1.2).

According to Art. 479§1 of the Code of Criminal Procedure, ‘if an accused person upon whom a summons has been served, fails to appear at the main trial, the court may conduct the proceedings in the absence of the accused and, if his defence counsel also fails to appear, the court may render a judgment by default’. A judgment by default shall be served upon the accused. Within seven days, the accused may file an objection to the judgment by default, in which he should provide a statement of the reason for his failure to appear at the trial (Art. 482). With the transposition of Framework Decision 2009/299<sup>59</sup> into the Code of Criminal Procedure, the accused obtained two more procedural guarantees concerning judgments *in absentia*: a new basis for the re-opening of the proceedings (Art. 540b) and an additional ground for optional refusal to execute an EAW (Art. 607r§3).

The Constitutional Tribunal has considered trials *in absentia* in criminal and civil proceedings (see Sect. 2.3.5), as well as trials *in absentia* under the provisions of the Fiscal Penal Code.<sup>60</sup> Such proceedings may be conducted against a person who has committed a fiscal offence and who permanently resides abroad or whose place of residence in Poland is unknown. The Constitutional Tribunal has stated that Arts. 173–177 of the Fiscal Penal Code provide for sufficient guarantees for persons accused of a fiscal offence in view of the right to a fair trial (Art. 45(1) of the Constitution) and the right of defence (Art. 42(2) of the Constitution). The Tribunal added that these rights may be limited under the conditions specified in Art. 31(3) Constitution. In this case, the constitutional value which was considered to legitimise the limitation was the principle of legality in criminal law, understood as the obligation to prosecute crimes.

### 2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

**2.3.4.1** Poland does not provide the assistance of interpreters or legal aid to its extradited citizens or residents who are involved in trials abroad since this lies within the jurisdiction of the foreign courts. Assistance to extradited persons may be provided by Polish diplomatic and consular offices. The Ombudsman safeguards

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<sup>59</sup> Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L 81/24.

<sup>60</sup> Judgment of 9 July 2002, ref. No. P 4/01.

the liberties and rights of citizens as set forth in the Constitution and in other legal acts. His competence is limited to the territory of Poland, but he may conduct an inquiry concerning the performance of duties by Polish diplomatic and consular missions in providing assistance to extradited citizens.

**2.3.4.2** The Polish Ministry of Justice does not provide any statistical data on persons who have been surrendered by a Polish court and have subsequently been found innocent.

### **2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters**

**2.3.5.1** The issue of the enforceability of judgments in civil and commercial matters in view of the right to a fair and public hearing guaranteed by Art. 45(1) of the Constitution was the subject of a constitutional complaint in the Brussels I case (see Sect. 1.3.4). The applicant questioned the second sentence of Art. 41 of the Brussels I Regulation, according to which a debtor against whom enforcement is sought should not at the stage of first instance proceedings be entitled to make any submissions on the application. The Constitutional Tribunal stated that the legal construct of *ex parte* proceedings (i.e. where the defendant has not received notice and, therefore, is neither present nor represented) is justified by the special character, subject or function of such proceedings. In particular, it reflects the need to grant, even temporarily, legal protection quickly or to preserve the element of surprise. Without such proceedings, it would be impossible in many cases to fulfil the function of civil proceedings, namely to grant legal protection. This means that the interests of the two parties to the proceedings may justify postponing the exercise of the right to a hearing of one party to the proceedings at a later stage. The Tribunal concluded that such procedural solution implements the principle of the free movement of judgments within the EU (as part of cooperation in judicial matters among the Member States) and the principle of mutual trust in the administration of justice in the EU Member States, which also apply to rulings issued by Polish courts.

The amendment to the Code of Civil Procedure abolishing the declaration of enforceability for judgments and protection measures originating in another Member State entered into force on 10 January 2015. It is in line with Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>61</sup> and Regulation 606/2013 on mutual recognition of protection measures in civil matters<sup>62</sup>.

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<sup>61</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1.

<sup>62</sup> Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, [2013] OJ L 181/4.



The issue of mutual recognition of criminal judgments where the penalty imposed by the court of another Member State is excessively lengthy arose in the aftermath of the case referred to in Sect. 2.3.1.1. In January 2008, a British court sentenced a Polish citizen to double life imprisonment. Due to the reservation made in the EAW, he was transferred to Poland to serve his sentence. According to the Polish Criminal Code, the maximum penalty for rape is 12 years of imprisonment with a maximum penalty of 10 years for assault. Consequently, he requested that the court executing the judgment adjust the penalty to the conditions set forth in Polish law. In March 2009, the Polish Supreme Court refused his claim. In January 2011, Art. 607s§4 of the Code of Criminal Procedure was amended to allow domestic courts to amend a penalty in line with the maximum punishment available for the offence in question under Polish law, if the sentence imposed by a foreign court exceeds the upper limits of the potential sanction for the offence in question. In November 2011, the court of appeal adjudicated that in Poland, he must serve a 12-year prison sentence.

**2.3.5.2** In Poland there was no debate about the suitability of transposing mutual recognition from internal market matters to criminal law and civil and commercial disputes. In the view of the experts, the rules concerning mutual recognition pertaining to the free movement of goods cannot be easily transposed to criminal law, since criminal law involves vital rights and freedoms of the utmost importance to individuals, which must be safeguarded by very restrictive procedural guarantees.

**2.3.5.3** The experts share the view that the national courts maintain both roles. They provide judicial protection as well as perform the tasks imposed by EU law concerning mutual recognition and judicial cooperation in criminal, civil and commercial matters.

**2.3.5.4** The issue of proportionality with regard to the EAW has been raised in the legal literature and case law. The report of the European Commission of April 2011 indicated that Poland issued the greatest amount of arrest warrants between 2005–2009 (17,015).<sup>63</sup> A Centre for European Policy Studies report (cf. the Questionnaire) indicates that in 2005–2011, Poland issued 31% (24,577) of the total number of warrants in the European Union (78,785).<sup>64</sup> In legal writings it has been pointed out that the courts of Ireland, Great Britain and Germany are faced with a vast amount of Polish warrants in trivial cases such as ‘stealing a mobile phone or two chickens’.<sup>65</sup> In 2012, the High Court of Ireland relied on the principle of proportionality and refused to surrender a Polish national accused of possession of a small amount of marijuana.<sup>66</sup> Moreover, Polish circuit courts have postulated that it

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<sup>63</sup> Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 11.4.2011, COM(2011) 175 final, p. 12.

<sup>64</sup> Carrera, Guild and Hernanz 2013, p. 38.

<sup>65</sup> Górski 2010.

<sup>66</sup> Judgment of the High Court of Ireland of 8 February 2102 in case MJLR v. Ostrowski, (2012) IEHC 57.

should be possible, due to the principle of proportionality, to assess the seriousness of a crime and the possible penalty before issuing or executing an arrest warrant.<sup>67</sup> For instance, in 2010 the Circuit Court in Łódź relied on the principle of proportionality and Art. 49 of the Charter and refused to issue an arrest warrant for a person accused of non-payment of alimony. In 2011, the Circuit Court in Białystok based its refusal to issue an arrest warrant against a person accused of extortion of child benefits on the same argument.<sup>68</sup>

According to Art. 607b(1) of the Polish Code of Penal Procedure a warrant may not be issued in connection with criminal proceedings against a person prosecuted for an offence punishable by imprisonment for up to one year. A statute of 27 September 2013 that entered into force on 1 July 2015 introduced an additional obligation to refuse to issue an EAW ‘if it is not required in view of the interests of justice’.

## 2.4 *The Annulment of the Data Retention Directive by the ECJ*

**2.4.1** Article 47 of the Constitution stipulates that ‘[e]veryone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life’. According to Art. 49 of the Constitution, ‘[t]he freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute’. The constitutional right to privacy may be limited under the conditions specified in Art. 31(3) of the Constitution (see Sect. 2.1.2) e.g. for the protection of the security of the state or public order. According to Art. 51(2) of the Constitution, ‘[p]ublic authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law’.

The Data Retention Directive<sup>69</sup> was transposed by a statute of 24 April 2009 into Arts. 180a–180g of the Telecommunications Law. In legal commentary it has been pointed out that such provisions may significantly affect the right to privacy of ordinary citizens and allows for the conduct of full surveillance of society under the guise of combatting terrorism.<sup>70</sup> The provisions of the Telecommunications Law

<sup>67</sup> Order of the Circuit Court in Tarnów of 26 October 2004, ref. No. II KOP 17/04, Order of the Circuit Court in Łódź of 2 February 2011, ref. No. XVIII Kop 4/11, Order of the Circuit Court in Gdańsk of 17 March 2011, ref. No. XIV Kop 12/11. See in more detail Ostropolski 2013, pp. 22–23.

<sup>68</sup> See in more detail Gardocka 2011, pp. 47–50.

<sup>69</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

<sup>70</sup> Suchorzewska 2010, p. 206.

implementing the Directive will hopefully be rescinded by Parliament; however, the relevant bill has not yet been submitted.

In April 2013 the Court of Appeal in Warsaw adjudicated the case of a Polish journalist who had been placed under surveillance by the Central Anti-Corruption Bureau (CBA) after a series of articles concerning the operational activities of this authority.<sup>71</sup> The CBA obtained the phone records of 10 journalists retained by the telecommunication companies. In the view of the Court, the operations of the CBA were unfounded, disproportionate and violated the journalists' right to private and family life as well as the freedom and privacy of communication.

On 30 July 2014, the Constitutional Tribunal issued a judgment with regard to seven joined applications submitted by the Ombudsman and the Prosecutor General.<sup>72</sup> These applications concerned provisions on the conduct of operational surveillance activities and the disclosure of communications data to the Police, the Border Guard, the Military Police, authorities responsible for tax audits, the Internal Security Agency, the Military Counter-Intelligence Service, the Central Anti-Corruption Bureau and the Customs Service. The Constitutional Tribunal stated that the data were obtained confidentially and without any knowledge or involvement of the persons on whom the information was gathered. Further, the lack of independent supervision over that process posed a risk of abuse. The lack of such supervision may not only contribute to unjustified interference in the rights and freedoms of persons, but it may also pose a threat to the democratic mechanisms of the exercise of state authority. Therefore, the Constitutional Tribunal decided that certain provisions of the contested statutes were inconsistent with Art. 47 and Art. 49 in conjunction with Art. 31(3) of the Constitution.

## 2.5 *Unpublished or Secret Legislation*

**2.5.1** The constitutional principles of legality (Art. 7) and legal certainty derived from the rule of law (Art. 2) require that acts of universally binding law shall be promulgated in a proper manner.<sup>73</sup> According to Art. 88 of the Constitution, '[t]he condition precedent for the coming into force of statutes, governmental regulations and enactments of local law shall be the promulgation thereof'. Further, international agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of, and procedures for, promulgation of normative acts shall be specified by statute. According to Art. 2 of the Act on Publishing Normative Acts of 2000, 'promulgation of a normative act in a legal journal is obligatory'. The sources of universally binding law of the Republic of Poland are published in the Journal of Laws of the Republic of

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<sup>71</sup> Judgment of the Court of Appeal in Warsaw of 26 April 2013, ref. No. I ACa 1002/12.

<sup>72</sup> Judgment of 30 July 2014, ref. No. K 23/11.

<sup>73</sup> See further Biernat and Niedźwiedz [2012](#), pp. 112–113.

Poland (*Dziennik Ustaw*). According to the case law of the Constitutional Tribunal, in order to satisfy the requirements laid down in Art. 88(1) of the Constitution, the Journal of Laws shall not only be published but also shall be made available to the public by means of distribution. It is not relevant whether the individual has actually used the opportunity to acquaint himself with the normative act.<sup>74</sup>

On 1 May 2004 Poland acceded to the European Union, but the process of translation of EU legislation continued until 2006. Before the ruling in *Skoma-Lux*,<sup>75</sup> the case law of the Polish administrative courts was divergent. Some courts decided that legal acts published in one of the official languages of the EU may be enforceable against Polish citizens from 1 May 2004,<sup>76</sup> whereas other courts held this to violate the principle of certainty of law guaranteed in Art. 2 of the Constitution.<sup>77</sup> The current position of the Supreme Administrative Court is that acts of EU secondary law, in order to be enforceable against Polish citizens, must be formulated in the Polish language and published in the Official Journal.

On 12 May 2011, the ECJ issued its judgment in case C-410/09 in response to a preliminary question from the Polish Supreme Court concerning the enforcement of certain regulatory obligations envisaged in Commission Guidelines of 2002 that had not been published in Polish.<sup>78</sup> The ECJ stated that Art. 58 of the Accession Treaty does not preclude a national regulatory authority from referring to the Commission Guidelines imposing certain regulatory obligations on an operator of electronic communications services, notwithstanding the fact that those guidelines have not been published in the Official Journal in Polish, even though that language is an official language of the Union.

## ***2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-Retroactivity and Proportionality***

**2.6.1** The standard of protection of property rights, legal certainty, legitimate expectations, non-retroactivity and proportionality in the field of market regulation

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<sup>74</sup> Judgment of the Constitutional Tribunal of 21 December 1999, ref. No. K 4/99. The case related to the statute that entered into force on 1 January 1999 and was published in the Journal of Laws on 30 December 1998. The Journal of Laws was not distributed before the statute entered into force and thus individuals did not have the opportunity to acquaint themselves with the normative act. The Tribunal invalidated the provisions of the statute on a different constitutional basis and decided not to adjudicate upon conformity with Art. 88(1) of the Constitution.

<sup>75</sup> Case C-161/06 *Skoma-Lux* [2007] ECR I-10841.

<sup>76</sup> Judgment of the Provincial Administrative Court in Łódź of 27 April 2007, ref. No. III SA/Łd 564/06.

<sup>77</sup> Judgment of the Provincial Administrative Court in Bydgoszcz of 20 July 2005, ref. No. III I SA/Bd 275/05.

<sup>78</sup> Case C-410/09 *Polska Telefonía Cyfrowa* [2011] ECR I-03853.

is the same in Polish law irrespective of whether the obligations imposed on individuals arise from national legislation, measures implementing EU law or directly from EU acts.

For instance, the Constitutional Tribunal has declared that certain provisions of an executive regulation concerning the amount of fines for infringements of rules relating to fishing are inconsistent with the principle of legal certainty guaranteed by Art. 2 of the Constitution.<sup>79</sup> The fines were the consequence of Commission Regulation No 804/2007 of 9 July 2007 establishing a prohibition of fishing for cod in the Baltic Sea by vessels flying the flag of Poland.<sup>80</sup> As a result of the judgment, the Ministry of Agriculture annulled the fines imposed on Polish fishermen for illegal cod fishing that were based on the repealed act.

## 2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

**2.7.1** In the ESM case, the Constitutional Tribunal considered an application, submitted by a group of *Sejm* Deputies, which challenged a procedure for the enactment of the Act on the ratification of European Council Decision of 25 March 2011 amending Art. 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU).<sup>81</sup> The Tribunal stated that the amendment to Art. 136 of the TFEU did not concern competences vested in the organs of state authority, and therefore the ratification did not entail the transfer of such competences upon an international organisation or an international authority; therefore the Act was not inconsistent with Art. 90 of the Constitution (see Sect. 1.3.2).

Moreover, the Tribunal indicated that the provisions of the Treaty Establishing the European Stability Mechanism (ESM Treaty) did not bind Poland as a Member State which does not belong to the eurozone. The decision whether to adopt the ESM Treaty – and in accordance with what ratification procedure – would be taken by Poland upon accession to the eurozone. Also, the potential evaluation of the constitutionality of the ESM Treaty might occur only at the moment of accepting the binding force of this international agreement. Currently, Poland is not a party to the Treaty, as it has neither signed it nor commenced the ratification process. The issue of the ratification of the ESM Treaty will become one of the essential elements of any future political decision concerning accession to the eurozone, provided that the Treaty is still in force at that time. At the time of the judgment, the ESM Treaty did not impose any obligations on Poland and did not cause any changes in the way the Polish organs of public authority exercise their competence in financial matters.

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<sup>79</sup> Judgment of 7 July 2009, ref. No. K 13/08.

<sup>80</sup> [2007] OJ L 180/3.

<sup>81</sup> Judgment of 26 June 2013, ref. No. K 33/12.

**2.7.2** In March 2013, a group of Deputies and Senators challenged the constitutionality of the procedure for the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the Fiscal Compact). In the view of the applicants, the Fiscal Compact confers the competences of national authorities upon an international organisation, which means that the ratification statute should have been adopted in accordance with the Art. 90(1) procedure, rather than the Art. 89 procedure.<sup>82</sup> The proceedings before the Constitutional Tribunal were discontinued since after the parliamentary elections in 2015 the Members of the new Parliament did not uphold their motion.

**2.7.3** Poland has not been subject to a bailout or austerity programme. According to the well-established case law of the Constitutional Tribunal, the financial equilibrium of the state is a constitutional value taken into consideration in assessing the constitutionality of law.<sup>83</sup>

## **2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review***

**2.8.1** Between 2006 and September 2015, Polish courts submitted 81 requests for a preliminary ruling.<sup>84</sup> The most requests were submitted by Polish administrative courts, with 28 by the Supreme Administrative Court and 22 by provincial administrative courts.<sup>85</sup> The Supreme Court issued 10 requests, and the common courts 21 requests.<sup>86</sup> Poland is one of the largest EU countries, yet it is a Member State from which the ECJ receives one of the lowest number of requests for a preliminary ruling.<sup>87</sup> During this period, Polish courts only submitted questions with regard to the interpretation of EU primary and secondary law (mainly regulations and directives), but not with regard to the validity of EU measures. Problems with the application of EU law occur primarily in the field of customs, indirect taxes, social security, road transportation, veterinary matters, EU citizenship, agricultural law and intellectual property law.<sup>88</sup>

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<sup>82</sup> Case ref. No. K 11/13.

<sup>83</sup> Judgment of 19 December 2012, ref. No. K 9/12.

<sup>84</sup> Until 2006, Polish courts submitted only one request for a preliminary ruling; see Case C-313/05 *Brzeziński* [2007] ECR I-00519.

<sup>85</sup> List of cases available at: <http://www.nsa.gov.pl/pytania-prejudycjalne-wsa-i-nsa.php>.

<sup>86</sup> List of cases available at: <http://www.iws.org.pl/analizy-i-raporty/pytania-prejudycjalne-polskich-sadow-powszechnych>.

<sup>87</sup> According to the Annual Report of the Court of Justice, Polish courts submitted 14 requests in 2014, 11 in 2013, 6 in 2012, 11 in 2011 and 8 in 2010. Court of Justice of the European Union, Annual report 2014, Luxembourg 2015, p. 122.

<sup>88</sup> Biernat 2009, p. 29.

In July 2015 the Constitutional Tribunal decided to submit its first reference for a preliminary ruling concerning the validity of the provisions of Directive 2006/112 on the common system of value added tax (VAT Directive).<sup>89</sup> The questions formulated by the Tribunal concern the rate of VAT on books published in digital form and other electronic publications.<sup>90</sup> In its judgement of 7 March 2017 the Court of Justice stated that despite different VAT rates on electronic and printed publications, the contested provisions were valid.

**2.8.2** In Poland a declaration of invalidity of a statute or legal provision issued by a central organ of the state lies solely within the competence of the Constitutional Tribunal. As opposed to other constitutional courts, the Polish Constitutional Tribunal does not review rulings or decisions issued in individual cases, rather controls normative acts serving as legal grounds for a given ruling or decision. According to statistical data, in 2014 the Tribunal issued 69 judgments and in 36 cases (52%) declared at least one provision questioned by the claimants to be unconstitutional. The Tribunal declared legal provisions to be invalid in 39 cases (55%) in 2013, in 35 cases (52%) in 2012, in 25 cases (42%) in 2011 and in 37 cases (54%) in 2010.<sup>91</sup> The most common ground for a declaration of unconstitutionality of a legal norm was violation of the rule of law and legal principles derived from Art. 2 of the Constitution (see Sect. 2.1.1), the right to a fair trial, the principle of proportionality and the transgression of the authorisation contained in a statute in issuing a regulation by the executive. The Supreme Administrative Court and provincial administrative courts exercise control over the performance of public administration. According to statistical data, in 2013 provincial administrative courts examined 75,372 claims, which led to the annulment of administrative action in 17,149 cases. The success rate was approximately 24.36% in 2013, 22.3% in 2012, 22.5% in 2011 and 23% in 2010.<sup>92</sup> Based on these statistics, it must be concluded that the review of legality of national legislation, executive regulations and administrative action is more successful than the review of legality of EU measures in the EU courts.

The experts share the view that the EU courts represent a protective approach towards EU institutions and organs in actions for annulment and failure to act. The underlying motive is to ensure the effectiveness of EU decision-making. A very restrictive approach is also demonstrated in claims for damages against EU institutions submitted on the basis of Art. 340(2) TFEU, since in the view of the ECJ such claims may hinder the ability of the institutions to fully exercise their competences in the general interest. In the last 60 years, the EU courts have awarded damages in only 43 cases. However, in recent years, the ECJ has put more emphasis

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<sup>89</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L 347/1.

<sup>90</sup> Case C-390/15 *RPO* [2017] ECLI:EU:C:2017:174.

<sup>91</sup> Statistical data available at: <http://trybunal.gov.pl/publikacje/informacje-o-problemach-wynikajacych-z-dzialalnosci-i-orzecznictwa-tk/od-2003/>.

<sup>92</sup> Statistical data available at: <http://www.nsa.gov.pl/statystyki-wsa.php>.

on the protection of fundamental rights specified in the Charter.<sup>93</sup> Also in deciding actions for damages the EU courts underline that individuals may not bear the consequences of flagrant and inexcusable misconduct by the EU institutions.<sup>94</sup>

**2.8.3** The Polish Constitutional Tribunal does not take an overly active approach to review of the constitutionality of normative acts. In adjudicating a case, the Tribunal is bound by the limits of the application, question of law or complaint. The result of such constitutional review of the law is that the obligation to identify the grounds for the alleged unconstitutionality of a challenged provision is imposed on the participants in the proceedings (parties). Such a concept of constitutional judiciary is a derivative of the presumption of constitutionality of the law and the principle of stability of the legal order.

The administrative courts decide within the limits of a particular case, however without being bound by the claims and legal bases indicated in the complaint. The court is able to examine the content of a contested act or action of an administrative authority in terms of its compliance with substantive and procedural law. The Supreme Court and administrative and common courts may review the legality of regulations issued by the executive and may refuse to apply such a regulation in a particular case. However, they can not decide on the validity of a regulation since this lies solely within the competence of the Constitutional Tribunal. For statistical data on the proportion of validity challenges concerning domestic acts that have led to annulment and the main grounds for annulment, see Sect. 2.8.2.

**2.8.4** The Polish Constitutional Tribunal reviews domestic statutes implementing EU legislation in the same manner as other parliamentary statutes or legal acts issued by central organs of the state.<sup>95</sup> In its Brussels I judgment, the Constitutional Court recognised its competence to directly review EU secondary law in the constitutional complaint procedure (see Sect. 1.3.4). The Tribunal indicated that it would examine the conformity of norms of EU law with the Constitution in future constitutional complaints in a special way and adopted an approach similar to that of the German Constitutional Court in *Solange II*<sup>96</sup> or the European Court of Human Rights (ECtHR) in *Bosphorus*,<sup>97</sup> recognising a presumption of legality with

<sup>93</sup> Joined cases C-402/05 and C-415/05 *Kadi* [2008] ECR I-06351; Joined cases C-92/09 and C-93/09 *Volker und Marcus Schecke and Eifert* [2010] ECR I-11063; Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

<sup>94</sup> Case T-351/03 *Schneider Electric* [2007] ECR II-02237; Case T-47/03 *Sison v. Council* [2007] ECR II-00073; Case T-429/05 *Artegoda v. Commission* [2010] ECR II-00491; Case T-333/10 *Animal Trading Company* [2013] ECLI:EU:T:2013:451.

<sup>95</sup> See for example the Judgments of 27 April 2005 ref. No. P 1/05 (see Sect. 1.2.3) and of 5 October 2010 ref. No. SK 26/08 (see Sect. 2.3.1) concerning the constitutionality of certain provisions of the Code of Criminal Procedure implementing Council Framework Decision 2002/584 on the European Arrest Warrant.

<sup>96</sup> 19 BVerfGE 73, 339 [1986] (*Solange II*).

<sup>97</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.



regard to EU law. An individual submitting a constitutional complaint which challenges the conformity of an act of EU law with the Constitution is required to demonstrate that the legal act undermines the level of protection of rights and freedoms, in comparison with the level of protection guaranteed by the Constitution. It follows that the Polish constitutional court placed emphasis on examining whether a particular EU legal act offers an adequate level of protection of rights and freedoms, rather than taking the EU legal system in general into consideration.

**2.8.5** The Constitutional Tribunal in its jurisprudence has expressed the view that a level of protection of an individual's rights that arises from EU law that is lower than the level of protection guaranteed by the Constitution would be unacceptable.<sup>98</sup> The constitutional norms on the rights and freedoms of the individual set a threshold which may not be lowered or challenged as a result of the implementation of EU legal acts. At the same time, the Tribunal has underlined that the Charter, the ECHR and the constitutional traditions of the Member States set a high level of protection of fundamental rights in the EU. These circumstances prove a significant axiological similarity between Polish law and EU law. Therefore, the risk of a potential gap between the levels of protection of fundamental rights guaranteed in these legal systems is not high.

**2.8.6** The issue of equal treatment of individuals falling within the scope of EU law and national law has arisen in a few cases before the Constitutional Tribunal. For instance, in the Brussels I case the legal situation of the complainant (the debtor) was regulated by Council Regulation 44/2001 (see Sect. 1.3.4). Article 41 of this Regulation excludes a debtor from proceedings before a court of first instance in cases concerning the enforceability of a ruling issued by a court of another EU Member State. If the case had concerned the enforceability of a judgment from a non-EU Member State, the Polish Code of Civil Procedure would have applied. According to Art. 1151<sup>1</sup>§2 of the Code, a debtor, upon being served a motion for enforcement of a judgment, is allowed to present his or her position before the court of first instance.

## **2.9 Other Constitutional Rights and Principles**

**2.9.1** Similar issues concerning the implementation of EU law as reported in the Questionnaire arose in Poland in relation to the regional operational programmes within the European Regional Development Fund. The implementation systems for regional operational programmes were usually adopted in the form of a resolution issued by the governing bodies of a *voivodeship* (province) and regulated certain rights and freedoms of individuals in relation to the procedure for the selection of

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<sup>98</sup> Judgment ref. No. K 18/04 and ref. No. SK 45/09.

projects and the related appellate procedure. Such resolutions do not fulfil the constitutional requirements for determining the rights and obligations of individuals within the meaning of Art. 87 of the Constitution (enumerating the acts of universally binding law: statutes, executive regulations or enactments of local law). The Constitutional Tribunal declared that certain provisions of the Act of 6 December 2006 on rules for carrying out development policy were inconsistent with Art. 87 of the Constitution.<sup>99</sup>

## 2.10 Common Constitutional Traditions

**2.10.1** Analysis of the jurisprudence reveals that the ECJ, in assessing the common constitutional traditions<sup>100</sup> and legal principles common to the laws of the Member States specified in Art. 340(2) TFEU,<sup>101</sup> uses the method of evaluative comparative law (*wertende Rechtsvergleichung*). Therefore, even a legal principle that is recognised in a minority of national legal systems may be identified as forming part of EU law, if it best meets the requirements of the EU legal system. In the view of the experts, the following rights and values may be regarded as part of the common constitutional traditions of the Member States as set out in Art. 6(3) TEU and Art. 52(4) of the Charter: the principle of equality, the principle of proportionality, legal certainty and protection of legitimate expectations, the right to a fair trial, the protection of property, the freedom to express opinions, the right of defence, non-retroactivity of law and *nulla poena sine lege*.

**2.10.2** Recognising the general principles of Union law, the ECJ does not rely on the interpretation of the constitutional provisions of the Member States, but rather refers to the principles resulting from the constitutional traditions of the Member States. This way of formulating the general principles of Union law avoids the allegation that the domestic provisions or standards of certain Member States will determine the content of EU law, which would be tantamount to a reversal of the primacy of EU law over the law of the Member States.<sup>102</sup> In view of the protection of the rights of individuals, it would be suitable for the ECJ to refer to the ‘common constitutional traditions’ as a more direct source of EU law or even long-standing rights and values prescribed in the constitution of a given Member State, as long as this would not violate the primacy and autonomy of Union law.

<sup>99</sup> Judgment of the Constitutional Tribunal of 12 December 2011, ref. No. P 1/11.

<sup>100</sup> Opinion of Advocate General Kokott of 29 April 2010 in Case C-550/07 *Akzo Nobel Chemicals* [2010] ECR I-08301, para. 94.

<sup>101</sup> Opinion of Advocate General Poiares Maduro of 20 February 2008 in Joined cases C-120/06 P and C-121/06 *FIAMM and Fedon* [2008] ECR I-06513, para. 55.

<sup>102</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 01125, para. 3; Wróbel 2010, p. 50.

## **2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards**

**2.11.1** The Constitutional Tribunal represents the view that a lower level of protection of an individual's rights arising from Union law compared to the level of protection guaranteed by the Polish Constitution would be unacceptable (see Sect. 2.8.5). Further, in its jurisprudence the Supreme Court invokes the provisions of the Polish Constitution over the provisions of the ECHR, if the former offer a higher standard of protection for the individual.<sup>103</sup> Analysis of the jurisprudence of the Polish courts reveals that the Charter is invoked in exceptional cases and only as additional justification to the outcome determined on the basis of Polish law. The Charter is relatively frequently invoked by the parties to the proceedings; however, it is referred to without adequate justification or as additional argumentation in support of statements based on national law.<sup>104</sup>

## **2.12 Democratic Debate on Constitutional Rights and Values**

**2.12.1** At the time of the adoption of the European Arrest Warrant Framework Decision in 2002 there was no public deliberation in Poland since the country did not accede to the EU until May 2004. During the process of implementing the Decision through the Code of Penal Procedure by virtue of the Act of 18 March 2004,<sup>105</sup> there was academic and political debate, which led to the constitutional amendment discussed in Sects. 1.2.3 and 2.3.

At the time of adoption and implementation of the Data Retention Directive through the Telecommunications Law by virtue of the Act of 24 April 2009 there was no public deliberation concerning the defence of citizens' rights. However, on 13 May 2014 the Committee on Human Rights of the Senate organised an expert debate on the legal consequences of the judgment in the case *Digital Rights Ireland* and its impact on the use of telecommunications data by police and other public authorities for the purpose of preventing and combating crime.

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<sup>103</sup> In its Order of 9 September 1998, ref No. III RN 73/98, the Supreme Court held that a foreigner who does not have a valid passport, valid visa or permanent residence card but who has a valid certificate of registration of an application instituting proceedings for refugee status, resides lawfully within the territory of Poland and is entitled to a fair and public hearing within a reasonable time guaranteed by Art. 45(1) of the Constitution. The Supreme Court stated that this constitutional provision offers a wider scope of protection than Art. 6(1) of the ECHR that is limited to civil rights and obligations or criminal charges.

<sup>104</sup> Biernat 2012, pp. 74–78; Póltorak 2014, p. 17.

<sup>105</sup> Act of 18 March 2004 on the amendment of the Law – on the Criminal Code, the Law – on the Code of Penal Procedure and the Law – on the Code of Petty Offences (Journal of Laws No. 69, Item 626).

It is worth mentioning that one of the largest public debates in Poland, as well as public manifestations, took place in February 2012 and concerned the right to privacy of Internet users in view of the adoption of the Anti-Counterfeiting Trade Agreement (ACTA).

**2.12.2** Statutes implementing EU law are subject to preventive and subsequent control by the Constitutional Tribunal. At the stage of implementation of EU law, a statute may be subject to preventive control (i.e. before the statute enters into force). This can only be initiated by the President who may, before signing a statute, refer it to the Constitutional Tribunal for adjudication of its conformity to the Constitution (Art. 122(3) of the Constitution). For example, the President initiated control of the Act of 5 December 2008 concerning the organisation of the fish market implementing Council Regulation 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy.<sup>106,107</sup> He successfully challenged the conformity of the requirement that all fisheries products must first be marketed or registered with an auction centre, registered buyer or producer organisations with Art. 22 of the Constitution guaranteeing the freedom of economic activity. In the view of the Experts, the present system allows sufficient space for constitutional review at the stage of implementing EU law. However, if serious constitutional problems are identified, a Member State is still obliged to respect and ensure the full effectiveness of EU law in the domestic legal system. Otherwise, infringement proceedings as defined in Art. 258–260 TFEU may be initiated.

**2.12.3** The Experts support the recommendation to suspend the application of EU measures and carry out a review if important constitutional issues are identified by a number of constitutional courts. Moreover, if such unconstitutionality has been identified, it should be recognised as a defence on the part of the Member State in an infringement proceeding.

In the Brussels I case the Constitutional Tribunal considered the effects of a potential judgment that would find norms of EU secondary legislation inconsistent with the Constitution (see Sect. 1.3.4). In the context of acts of Polish law, inconsistency with the Constitution results in a declaration that the unconstitutional norms are no longer legally binding (Arts. 190(1) and (3) of the Constitution). With regard to acts of EU secondary legislation, such a result would be impossible, as it is not the organs of the Polish state that decide whether such acts are legally binding or not. The consequence of such judgment would be to rule out the possibility that the act of EU secondary legislation would be applied by the organs of the state and would have any legal effects in Poland. Therefore, the ruling of the Constitutional Tribunal would result in a suspension of the application of the unconstitutional norms of EU law in the territory of the Republic of Poland. The Constitutional

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<sup>106</sup> [2009] OJ L 343/1.

<sup>107</sup> Judgment of the Constitutional Tribunal of 13 October 2010 ref. No. Kp 1/09, OTK No. 8A/2010, item 74.

Tribunal also noted that such situation may lead to proceedings against Poland by the European Commission and an action before the ECJ for the infringement of obligations under the Treaties.

### **2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law***

**2.13.1** The Experts do not share the concerns about an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law.

**2.13.2** Not applicable.

**2.13.3** The Experts submit the view that the ECJ should have broader recourse to the referring court or tribunal and request clarification where the circumstances of the case are imprecise or the formulation of a preliminary question raises considerable doubts. All constitutional courts of EU Member States should have the right to submit observations to the ECJ in a preliminary ruling procedure initiated by one of the national courts, if the case involves issues of fundamental constitutional importance. The lack of such provision prevented the Czech Constitutional Court from submitting its observations in *Landtová*.<sup>108</sup>

The participation of constitutional courts in the preliminary ruling procedure would be advisable in the following situations:

(1) the threat of substantive differences between EU law and the constitutional law of the Member States (as in the case of *Landtová*);

(2) a conflict of the duty of a national court to file a legal question with the constitutional court of that Member State and its duty to submit a preliminary question to the ECJ.

**2.13.4** In the view of the Experts, it would be desirable if Poland were to withdraw from Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom, because the Protocol has more political than legal character.<sup>109</sup> The Experts would also recommend an amendment to the Constitution aimed at simplifying the procedure for implementing EU law into the national legal system and alleviating the strict standards governing the system of the sources of law (e.g. by using government decrees). The problem especially arises in relation to measures adopted in relation to the European Structural Funds (see Sect. 2.9.1).

<sup>108</sup> Case C-399/09 *Landtová* [2011] ECR I-05573.

<sup>109</sup> Biernat 2012, p. 86. Cf. OJ C 115, 9.5.2008, pp. 313–314.

### 3 Constitutional Issues in Global Governance

#### 3.1 *Constitutional Rules on International Organisations and the Ratification of Treaties*

**3.1.1** The rules regarding the transfer of competences of the organs of state authority to an international organisation or international organ are specified in Art. 90 of the Constitution (see Sect. 1.2.1). While Art. 90(1) of the Constitution does not use the word ‘European Union’, it was originally seen as the provision that provided the basis for Polish accession to the European Union. To date, it has not been applied to any international organisation other than the European Union, although such a possibility was considered with regard to Poland’s ratification of the Statute of the International Criminal Court, as well as in the context of an agreement with the United States of America concerning a missile defence system.<sup>110</sup>

The Council of Ministers is authorised to conclude international agreements requiring ratification and to accept and renounce other international agreements (Arts. 146(4)10 of the Constitution). The President, as a representative of the state in foreign affairs, ratifies and renounces international agreements (Art. 133(1)1 of the Constitution). The Constitution provides for three procedures for ratification of international agreements.

In the first procedure the Council of Ministers submits an international agreement which does not require consent granted by a statute (Art. 89(2)) to the President for ratification. The second procedure involves the Parliament and requires granting consent to ratification by statute. The *Sejm* and the Senate must pass bills by a simple majority vote, in the presence of at least one-half of the statutory number of their members. The choice of one of the above procedures is determined by the subject matter of the particular international agreement. Prior consent by statute is required for: (1) peace, alliances, political or military treaties; (2) freedoms, rights or obligations of citizens, as specified in the Constitution; (3) Poland’s membership in an international organisation; (4) considerable financial responsibilities imposed on the state; (5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute (Art. 89(1)).

The third procedure applies to international agreements transferring competences of the organs of state authority. Consent can only be granted by a statute or nationwide referendum (Art. 90(2) and (3)). The consent for ratification of an international agreement specified in Art. 90 of the Constitution has higher requirements and involves a greater degree of democratic control (see Sect. 1.2.1).

**3.1.2** Before the Constitution of 1997 there were no constitutional provisions determining the status of international agreements in the domestic legal order or the ratification procedures. The rules concerning the ratification of treaties and transfer

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<sup>110</sup> Wyrozumska and Kranz 2001, pp. 15–35; Wyrozumska and Płachta 2001, pp. 87 et seq.

of competences to international organisations were developed in the course of preparatory work for the Polish Constitution of 1997 (as to Art. 90, see Sect. 1.2.1). The purpose of these provisions was to determine the role of the Council of Ministers, the President and the Parliament in the ratification procedures and to strengthen democratic control upon the conclusion of international agreements. Article 89 is contained in Chapter III of the Constitution entitled ‘Sources of Law’. The intention of the drafters was to adopt a wide catalogue of international agreements which must be ratified through consent granted by statute as a general rule for the conclusion of agreements.<sup>111</sup> In legal commentary, it has been stated that the criteria formulated in Art. 89(1)(1)–(5) of the Constitution are far from clear and leave the Parliament a large margin of discretion in deciding whether an international agreement requires consent granted by statute.<sup>112</sup> However, it is impossible to identify the general guidelines indicating precisely which categories of international agreements shall be subject to ratification in accordance with Art. 89(1) of the Constitution, based on constitutional provisions. Each international agreement should be considered individually, as to its nature, subject matter and the circumstances surrounding its conclusion.<sup>113</sup>

**3.1.3** In the legal literature the view has been expressed that the rule that a nationwide referendum expressing consent for ratification of an international agreement by which competences are transferred to an international organisation is binding only if at least 50% of citizens eligible to vote participate, is too strict.<sup>114</sup> In 2010, the Parliament unsuccessfully considered proposals concerning the transfer of competences and other provisions with regard to Poland’s membership in the European Union (see Sect. 1.2.4).

**3.1.4** See Sects. 1.5.3 and 2.13.4.

## 3.2 *The Position of International Law in National Law*

**3.2.1** The Constitution of 1997 is the first basic law in Poland defining the position of international law in the domestic legal order. The general principle is expressed in Art. 9 of the Constitution and states that ‘[t]he Republic of Poland shall respect international law binding upon it’. It is the expression of the classic rule of *pacta sunt servanda*. In legal commentary and domestic case law the prevailing view is that the term ‘international law’ covers international treaties, international custom and general principles of international law. Article 9 of the Constitution is not a merely declaratory provision but rather obliges all state authorities to respect

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<sup>111</sup> Szymański 2010, pp. 504–505.

<sup>112</sup> Banaszak 2012.

<sup>113</sup> Wyrozumska 2006a, p. 177.

<sup>114</sup> Biernat 2002a, pp. 41–65.

international law in the performance of their duties, and to interpret Polish law in a manner consistent with international law.<sup>115</sup> This indicates the openness of the Polish legal system to international law.<sup>116</sup>

The position of international agreements in the national legal order is determined by Art. 91 of the Constitution. A ratified international agreement, after promulgation in the Journal of Laws, constitutes part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute (Art. 91(1) of the Constitution). Such provision refers to so-called self-executing or directly applicable norms. An international agreement ratified upon prior consent granted by statute has precedence over a statute if the agreement cannot be reconciled with the provisions of the statute. This concerns the primacy of application of international agreements by state authorities and domestic courts and it does not affect the validity of national law (Art. 91(2) of the Constitution). The Constitutional Tribunal has the sole competence to adjudicate on the conformity of a statute with ratified international agreements and to derogate from incompatible national law (Art. 188(2) of the Constitution). In the legal commentary and the jurisprudence of the courts, the dominant view is that an international agreement ratified without consent granted by statute does not have precedence over statutes.<sup>117</sup>

As specified in Sect. 1.2.1, Art. 91(3) of the Constitution determines the position of law enacted by an international organisation, if an agreement, ratified by the Republic of Poland, so provides. Accordingly, the law adopted by the international organisation shall be applied directly and have precedence in the event of a conflict with a statute. The jurisprudence of the Constitutional Tribunal clearly demonstrates that law enacted by an international organisation, in this case EU secondary law, does not have precedence over the Constitution.<sup>118</sup>

**3.2.2** Taking into consideration the interaction between international and national law, in legal commentary the prevailing view is that the monist system is predominant in Poland (incorporation doctrine).<sup>119</sup> This statement is based on Art. 91(1) of the Constitution. The jurisprudence of the national courts is not entirely clear on this matter, and there have been rulings based on a dualist approach (transformation doctrine).<sup>120</sup>

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<sup>115</sup> Biernat and Niedźwiedz 2012, p. 93.

<sup>116</sup> Wasilkowski 2006, pp. 9 et seq.

<sup>117</sup> Garlicki 2010a, p. 144; Wyrozumska 2006a, pp. 578–579.

<sup>118</sup> In case ref. No. SK 45/09 the Constitutional Tribunal directly adjudicated the conformity of Regulation (EC) No 44/2001 to the Polish Constitution and issued a judgment on the merits.

<sup>119</sup> Biernat and Niedźwiedz 2012, p. 121; Wyrozumska 1996, p. 24; Szafarz 1998, p. 3; Wasilkowski 1998, p. 86.

<sup>120</sup> Wyrozumska 2006a, pp. 592–599; Wyrozumska 2006b, pp. 45–50.



### 3.3 *Democratic Control*

**3.3.1** The foreign policy of Poland is conducted by the Council of Ministers (Art. 146(1) of the Constitution), which includes negotiating and signing international agreements. The Act on International Agreements of 2000 specifies that Parliament is involved when ratification of an international agreement requires the form of a statute under the provisions of Arts. 89(1) and 90 of the Constitution. Withdrawal from an international agreement ratified with the consent referred to in Arts. 89(1) and 90 of the Polish Constitution also requires consent granted by statute (Art. 22(2) of the Act on International Agreements). In the case of other international agreements, the involvement of the *Sejm* is limited to receiving information from the Prime Minister on any intention to submit an agreement to the President for ratification (Art. 89(2) of the Constitution; see Sect. 3.1.1).<sup>121</sup> However, according to Art. 15(4) of the Act on International Agreements, if the *Sejm* issues a negative opinion on the choice of such procedure within 30 days after notification, the Council of Ministers must reconsider its position on the matter. The Council of Ministers may decide to change its position and submit the agreement to the *Sejm* for consent granted by statute or decide to submit the agreement directly to the President. The President may ratify the agreement, share the view of the *Sejm* and return it to the Council of Ministers or submit the case to the Constitutional Tribunal for adjudication on the mode of ratification in conformity with the Constitution. Such procedure preserves the institutional balance in the ratification of international agreements.<sup>122</sup>

The Marshal of the *Sejm*, the Marshal of the Senate, 50 Deputies or 30 Senators may submit an application to the Constitutional Tribunal for control of the conformity of an international agreement to the Constitution (Art. 188(1) of the Constitution). This is the so-called subsequent control (*kontrola następcza*) of normative acts and relates only to international agreements that have been ratified and form part of the Polish legal system.<sup>123</sup> In legal commentary, the view has been expressed that both chambers of the Polish Parliament should have competence to initiate preventive control of international agreements.<sup>124</sup> However, this would require the amendment of the Constitution, since such control lies solely within the competence of the President.

The *Sejm* usually holds debates on current matters of foreign policy. On most occasions the debates relate to information submitted by the Council of Ministers

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<sup>121</sup> In view of Art. 12(3) of the Act on International Agreements, international agreements that do not require ratification are subject to approval by the Council of Ministers.

<sup>122</sup> Wyrozska 2006a, p. 194.

<sup>123</sup> In its Order of 21 May 2013, ref. No. K 11/13, the Constitutional Tribunal dismissed the application filed by 50 Deputies concerning the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact), since at the time of submitting the application the agreement had not yet been ratified.

<sup>124</sup> Wyrozska 2006a, p. 74.

on Poland's participation in the activities of the European Union and the ratification of international agreements.<sup>125</sup>

**3.3.2** A nationwide referendum is one of the ways for obtaining consent for ratification of an international agreement transferring competences of the organs of state authority to an international organisation or international organ (Art. 90(3) of the Constitution). This provision served as the basis for the referendum on the EU Accession Treaty in 2003. It cannot be excluded that the *Sejm* or the President may order a nationwide referendum as specified in Art. 125 of the Constitution to decide on matters of particular importance to the state.

### 3.4 *Judicial Review*

**3.4.1** As stated above, Art. 9 of the Constitution stipulates that the Republic of Poland shall respect international law binding upon it (see Sect. 3.2.1). This provision must be reconciled with Art. 8, which provides that the Constitution shall be the supreme law of the Republic of Poland. To this end, the Constitutional Tribunal acquired the competence to adjudicate upon the conformity of international agreements to the Constitution (Art. 188(1) of the Constitution). International agreements are subject to preventive control (*kontrola prewencyjna*) or subsequent control (*kontrola następcza*). The first type of control can be initiated only by the President who may turn to the Constitutional Tribunal before ratification of an agreement with a request to adjudicate upon its conformity to the Constitution (Art. 133(2) of the Constitution). Subsequent control may be initiated by the President, the Marshal of the *Sejm*, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Ombudsman. International agreements may also be questioned by the National Council of the Judiciary in cases related to the independence of the courts and judges (Art. 186(2) of the Constitution), by national courts referring a question of law (Art. 193 of the Constitution) and by individuals in cases of constitutional complaints (Art. 79 of the Constitution). Among the international agreements that have been submitted to the Tribunal for subsequent control are the Accession Treaty, Protocol No. 4 to the Association Treaty, the Lisbon Treaty, the Extradition Treaty between the United States of America and the Republic of Poland and the Fiscal Compact.<sup>126</sup> A judgment of the

<sup>125</sup> See as an example the list of Debates of the *Sejm*, 7th term available in English at: [http://oide.sejm.gov.pl/oide/en/index.php?option=com\\_content&view=article&id=14684&Itemid=717](http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14684&Itemid=717).

<sup>126</sup> In cases ref. No. K 18/04 (the Association Treaty), ref. No. SK 54/05 (Protocol No 4 to the Association Treaty), ref. No. K 32/09 (the Lisbon Treaty) and ref. No. SK 6/10 (Extradition Treaty) the Constitutional Tribunal decided that the contested international agreements were in conformity with the Constitution. Case ref. No. K 11/13 concerning the Fiscal Compact has not yet been decided.

Constitutional Tribunal in which it is held that an international agreement is inconsistent with the Constitution results in a declaration that the unconstitutional norms are no longer legally binding on the territory of Poland (Art. 190(1) of the Constitution). However, the Constitutional Tribunal may specify another date for the end of the binding force of an international agreement and postpone the effects of its judgment for a period not exceeding 12 months (Art. 190(3) of the Constitution). Such decision provides time to bring the agreement into conformity with the Constitution.

### ***3.5 The Social Welfare Dimension of the Constitution***

**3.5.1** In the period immediately following the political transformation in 1989, the IMF and the World Bank had a great influence on the radical economic reforms undertaken in Poland. The assessment of these reforms differs. On one hand they had a positive impact on the prompt creation of the basis of a market economy. On the other, they created some negative social consequences involving the impoverishment of certain social groups, such as employees of large state agricultural farms. These reforms took place before the adoption of the current Constitution which contains provisions on economic and social rights (Arts. 64–76). In a number of cases, the Constitutional Tribunal has accepted the admissibility of the temporary limitation of social rights during the economic crisis (which in Poland was less severe than in other countries).<sup>127</sup>

**3.5.2** See Sect. 2.7.3.

### ***3.6 Constitutional Rights and Values in Selected Areas of Global Governance***

**3.6.1** In its judgment of 21 September 2011, the Constitutional Tribunal decided that Art. 4(1) of the Extradition Treaty of 10 July 1996 between the United States of America and the Republic of Poland is consistent with Arts. 55(1) and (2) in conjunction with Art. 2 of the Constitution (see Sect. 3.4). The complainant, who held both American and Polish citizenship, contested the provision stipulating that ‘[n]either contracting State shall be bound to extradite its own nationals, but the executive authority of the requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so’. In the opinion of the complainant such provision was inconsistent with Arts. 55(1) and

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<sup>127</sup> See as examples the Judgments of 12 December 2012, ref. No. K 1/12 and of 19 December 2012, ref. No. K 9/12.

(2) of the Constitution, as the possibility of extraditing a Polish citizen did not result from the content of an international agreement, which only referred to the system of law and left the determination of the admissibility of extradition of a Polish citizen to the administrative discretion of an official, without any clear guidelines for such discretion. Moreover, it lacked sufficient specificity and was imprecise, and thus failed to comply with the principle of a state ruled by law, expressed in Art. 2 of the Constitution. The Tribunal stated that Art. 4(1) of the Extradition Treaty is an example of an optional clause which provides for the possibility to refrain from extraditing a country's own nationals. However, this provision should be interpreted taking into account Art. 1 of the Extradition Treaty, which gives rise to the obligation to extradite all persons sought for prosecution or found guilty of an extraditable offence, regardless of their nationality. Despite the complainant's claims, the Extradition Treaty implies a possibility to extradite a Polish citizen, and thus the requirement set out in Arts. 55(1) and (2) of the Constitution is met, namely that the extradition of a Polish citizen may be granted 'if such a possibility stems from an international treaty ratified by Poland'. In other words, the extradition of a Polish citizen is admissible not only when a ratified international agreement introduces such an obligation, but also when only such a possibility arises therefrom.

On 24 July 2014 the ECtHR issued judgments in the cases *Husayn (Abu Zubaydah) v. Poland* and *Al Nashiri v. Poland*, concerning allegations of torture, ill-treatment and secret detention of a Saudi Arabian national and a stateless Palestinian, both suspected of terrorist acts.<sup>128</sup> The applicants alleged that they were held at a CIA 'black site' in Poland. In both cases, the Court found that Poland had failed to comply with its obligation to furnish all necessary facilities for the effective conduct of an investigation under Art. 38 of the ECHR. According to the ECtHR, Poland had violated the applicants' rights by enabling the United States to secretly detain and torture the applicants on Polish territory, conducting an inadequate investigation into the acts of torture and ill treatment committed in Poland and allowing the applicants' transfer to Guantánamo despite the real risk they would be tortured and could be subjected to unfair trials and the death penalty by the United States. The Court held that these failures constituted violations of the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security, the right to respect for private and family life, the right to an effective remedy and the right to a fair trial. As regards Mr. Al Nashiri, the Court further held that there had been a violation of the right to life and abolition of the death penalty. Poland referred the case to the Grand Chamber of the ECtHR, contesting the judgment on procedural grounds. The appeal was rejected on 17 February 2015.

The Polish Constitution provides the same level of guarantees for the rights and freedoms of foreigners as for those of Polish citizens. According to Art. 37(1) of the Constitution all persons, being under the authority of the Polish State, shall enjoy

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<sup>128</sup> *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014.

the freedoms and rights ensured by the Constitution. A criminal investigation into CIA secret prisons is still pending before the Polish Prosecutor's Office. Mr. Abu Zubaydah and Mr. Al Nashiri have been granted the status of victim in the investigation. According to information provided by the Prosecutor's Office, the investigators are still collecting evidence and the investigation is taking longer than expected since US officials have not responded to requests for information. The Polish Government has also asked the US for diplomatic assurances with regard to Mr. Abu Zubaydah and Mr. Al Nashiri, who could face the death penalty in the US.

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