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**OVER OR UNDER THE CONSTITUTION?  
THE PLACE OF EU LAW IN THE POLISH LEGAL ORDER  
IN THE LIGHT OF THE JURISPRUDENCE  
OF THE CONSTITUTIONAL TRIBUNAL<sup>1</sup>**

1. The legal bases of Poland's accession to the European Union were worked out in the 1990s and undoubtedly they were a result of a compromise that was achievable in the course of works on the new Constitution in the then political context.<sup>2</sup> One of the most important issues faced by the legislator was the question of the relationship between European Union law and national law, including, first and foremost, the introduction to the Polish legal order the principle of the priority of EU law and the principle of its direct effect. It is worth mentioning that the precedence of European law over Polish law was not a matter that could be negotiated.

According to the *acquis communautaire*, the primacy of EU law has been the basic condition of accession of every country to the European Union. As a result, every Member State has an obligation to implement and enforce the principle of primacy of EU law. The failure to do so can be treated as a violation of the EU law and can result in negative consequences for the State.<sup>3</sup>

Nevertheless, while the priority of European law over statutory law is widely accepted by Member States, the priority of European law over the constitutional provisions is much more controversial. As in Poland, also in other Member States it is likely to encounter a negative attitude of Supreme Courts and Constitutional

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<sup>2</sup> About the principle of the priority of European law in the works on the new Constitution of 1997 see: M. Jabłoński, M. Zieliński, *Zasada pierwszeństwa stosowania prawa UE w pracach nad Konstytucją RP z 1997 r.*, [in:] *Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP*, ed. M. Jabłoński, S. Jarosz-Żukowska, Wrocław 2015, p. 17 and next.

<sup>3</sup> See: P. Ravluševič, *The Enforcement of the Principle of the European Union Law: Legal Doctrine and Practice*, *Jurisprudencija* 2011, No. 18 (4), s. 1374.

Courts. In fact only in the Netherlands and Estonia the priority of European law over the norms of the constitution has been formally guaranteed by law.<sup>4</sup>

2. From the point of view of the European Union, and above all in the light of the case law of the Court of Justice of the European Union, the principle of primacy of EU law has been well established and unquestioned. According to the jurisprudence of the Court, the EU legal order can be characterized, in particular, by the autonomy and uniformity of its application in all Member States, and therefore the basic condition of the effective functioning of EU law is the provision of its primacy over the national legal orders of Member States.<sup>5</sup>

It is worth noticing that the principle of the primacy of European law over domestic laws of EU Member States has been never explicitly included in Treaties referring to the functioning of the European Union or other acts of European law. However, there were some attempts undertaken in this regard. In 1996 the Cambridge Draft of the Amsterdam Treaty stipulated in its art I.1.6 that "In the event of conflict between provisions applicable under the legal orders of the Member States (hereinafter referred to as 'national provisions') and directly effective Community provisions, the latter shall prevail. To that end, a court or tribunal of a Member State shall refrain, if necessary on its own motion, from applying national provisions in all cases in so far as these conflict with any Community provisions applicable to matters of which the court or tribunal is seized". Nevertheless, the EU Member States did not agree for the introduction of that provision to the final version of the Amsterdam Treaty.

The next attempt to codify the principle of the primacy of EU law was undertaken during the works on the Treaty establishing the Constitution for Europe. The article I-6 of the Treaty provided that the constitution and the law adopted by the institutions of the European Union in exercising competences conferred on it should have primacy over the law of Member States. However, due to the unsuccessful ratification procedure the Treaty did not come into force. The provisions elaborated at that time were not repeated in the Treaty of Lisbon. Instead of that, the Treaty was annexed with the Declaration No. 17 concerning primacy which provided that "in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law".

What is more, there has been also an Opinion of the Council Legal Service of 22 June 2007 on the primacy of EC law attached as an annex to the Treaty, which declares that "It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this

<sup>4</sup> A. Capik, A. Łazowski, *Komentarz do art. 91*, [w:] *Konstytucja RP Komentarz*, v. II, ed. M. Safjan, L. Bosek, Warszawa 2016, s. 162; K. Wójtowicz, *Zasady stosowania prawa wspólnotowego w państwach członkowskich Unii Europejskiej*, Warszawa 2003, s. 120.

<sup>5</sup> A. Capik, A. Łazowski, *op. cit.*, s. 158.

principle is inherent to the specific nature of the European Community (...) The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice". Further it has been stated that "the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

It should be noted that the Treaty of Lisbon, in contrast to the previous treaties governing the functioning of the European Union, contains provisions relating to the division of competences between the EU and Member States, which can significantly contribute to avoiding conflicts between European law and the norms of internal national order. Namely, art. 2 of the Treaty on the Functioning of the European Union expressly states that, if the Treaties confer on the Union exclusive competence in a particular area, only the Union may legislate and adopt binding legislation in this regard. Member States may do so only under the authority of the Union or for the implementation of Union acts. The context is different with regard to the situation in which the Treaties confer on the Union a competence shared with Member States in a given area. In such case, both the Union and Member States may be entitled to adopt legally binding acts in this area, which may cause potential conflicts between the provisions of European and national law. Member States shall exercise their competence as far as the Union has not exercised its competence. Member States shall again exercise their competence to the extent that the Union has decided to cease its exercise of competence.

Despite not being codified the principle of the primacy of EU law has been well established by the jurisprudence of the European Court of Justice.

The basic assumption underlying the principle of the precedence of EU law was formulated by the Court in 1963 in the judgment in case 26/62 *Van Gend en Loos v Nederlandse administratie der belastingen*. The Court indicated that the European community constituted a new legal order in international law for which Member States limited, however in narrow areas, their sovereign rights, and which norms apply not only to Member States but also to individuals coming from these countries. In the judgment in Case 6/64 *Flaminio Costa v E. N.E.L.* of 17 July 1964, the European Court of Justice pointed out that, given the specific nature of the independent source of law created by the Treaties, the norms of national law of individual Member States could not be prioritized as it would deprive the European law its character and thus undermine the legal basis for the functioning of the Community legal order. Unlike ordinary international agreements, the EEC Treaty established its own legal order which was incorporated into the legal orders of Member States after its entry into force and which was binding for national courts.

The European Court of Justice in its jurisprudence has clearly stated that the principle of primacy of EU law applies both to the primary law of the European Union (Case *Flaminio Costa v E.N.E.L.*) and the secondary European law. The question of the priority of the regulations over domestic law was the subject of the judgment of the European Court of Justice of 1970 in Case *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, while the principle of precedence of EU law with regard to directives and framework decisions was referred to in the judgment of 7 July 1981 in Case *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel*. The Court has indicated that the binding nature of directives implies that national authorities cannot apply national legal acts (statutory and administrative) which do not comply with the provisions of directives.

The European Court of Justice has also stressed that the principle of primacy of EU law refers to all kinds of norms of national law, including not only statutes and norms of lower legal force but also constitutional norms (*Internationale Handelsgesellschaft*). The principle of the priority of EU law applies to provisions contained in *erga omnes* applicable acts as well as acts of an individual nature (judgment of 29 April 1999 in Case *Erich Ciola v Land Vararlborg*). In the judgment of 9 March 1978 in Case *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, the Court stated that any provision of national law or legislative, administrative or judicial practice which could lower the effectiveness of Community law by depriving national courts of the possibility not to apply national law would violate Community law.

As it has already been emphasized, the proper implementation of the principle of priority of European law is primarily affected by the application of this legal order by courts and bodies of state administration. All Member State authorities, including administrative bodies (Case C-103/88 *Costanzo*), are obliged to apply the principle of the precedence of EU law. A particular role in this regard has been assigned to national courts (Case 106/77 *Simmenthal*). According to the settled case-law of the European Court of Justice, national courts, which are obliged to apply the provisions of EU law, must ensure the full effectiveness of these norms and if necessary not to apply the provisions of national law contrary to EU law, even if they are formally binding. It should be also stressed that the obligation to apply the principle of precedence is an obligation which national courts should take into account *ex officio*.

3. The Constitution explicitly guarantees the precedence of European Union's secondary law only in relation to statutory law, without referring directly to the relationship between European law and the Polish Constitution. According to art. 91 p. 3, "if 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". However, the Constitution does not provide the Constitutional Tribunal with the competence

to review secondary European legislation. The Constitutional Tribunal has emphasized that the lack of the indication of EU secondary legislation as the subject of constitutional review in the catalogue presented in art. 188 p. 1–p. 3 of the Constitution makes it impossible for the Tribunal to adjudicate on the conformity of the said legislation to the Constitution. The lack of the Tribunal's jurisdiction in that respect entails that allegations concerning the conformity of the acts of EU secondary legislation to the Constitution may not be examined by the Tribunal.<sup>6</sup>

The above reasoning does not raise any doubts with regard to abstract constitutional review. However, on the basis of the Polish Constitution, a concrete constitutional review is also admissible, which is reflected, among others, in the institution of a constitutional complaint specified in art. 79 p. 1 which provides that "in accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution". In Polish legal doctrine, the opinions whether the acts of secondary European law can be subject to constitutional complaints are divided. As quoted above, the Constitution states that constitutional complaints may concern a statute or another normative act. In the opinion of the Constitutional Tribunal, a normative act within the meaning of art. 79 p.1 of the Constitution may be not only a normative act issued by one of the organs of the Polish state, but also – after meeting further requirements – a legal act issued by an organ of an international organization, provided that the Republic of Poland is a member thereof.<sup>7</sup> By considering the constitutional complaint regarding the Council Regulation (EC) No. 44/2001 of 22 December 2000 on the jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, the Constitutional Tribunal confirmed its competence to review the constitutionality of the secondary legislation of the European Union in the mode of constitutional complaint. In the above case, the Tribunal decided that the council Regulation did not violate the Constitution.

It should be emphasized that, having in mind that the institution of constitutional complaint is an instrument for the protection of constitutional rights and freedoms, it is irrelevant for a person whether the infringement of his/her rights or freedoms results from the Polish or European legal act. It is also pointed out that the constitutional review of European secondary law is admissible not

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<sup>6</sup> The decision of the Constitutional Tribunal of 17 December 2009, case No. U 6/08.

<sup>7</sup> See: The decision of the Constitutional Tribunal of 16 November 2011, case No. Sk 45/09; see also P. Bogdanowicz, P. Marcisz, *Szukając granic kontroli – glosa do wyroku TK z 16.11.2011 r. (SK 45/09)*, Europejski Przegląd Sądowy 2012, No. 9, p. 47 and next; T. Jaroszyński, *Rozporządzenie wspólnotowe jako przedmiot skargi konstytucyjnej*, Europejski Przegląd Sądowy 2007, No. 4, p. 26 and next.

only in case of constitutional complaint but also in regard to the questions of law which, according to art. 193, can be submitted to the Constitutional Tribunal by any court as to the conformity of a normative act with the Constitution if the answer to such question of law will determine an issue currently before such court.<sup>8</sup>

4. When it comes to the place of the European primary law, the Constitution does not directly refer to it, however, as the sources of that law have the form of ratified international agreements which require the prior consent of the parliament for its ratification, the general regulation concerning such agreements applies also to the primary law of the European Union. Two constitutional provisions are relevant here. Art. 90 provides that "(1) The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters. (2) A statute, granting consent for ratification of an international agreement referred to in para. 1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators. (3) Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125. (4) Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies." And according to art. 91 p. 2, "An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes". By determining the hierarchical precedence of the above group of international agreements over statutes, the constitution-makers directly provided in art. 188 p. 2 a possibility of reviewing the legality of statutory provisions from the point of view of their conformity to ratified international agreements the ratification of which required consent granted by statute. However, as the Constitutional Tribunal has pointed out, such a review may be carried out only if there are no other ways of eliminating the emergent conflict of laws (f. ex. if a norm of an international agreement does not have the character of a directly applicable norm) or this is vital from the point of view of the certainty of law (f. ex. if the scope of the application of an international norm completely overlaps with the scope of the application of a statutory norm, which would cause the latter norm to be normatively "void").<sup>9</sup>

<sup>8</sup> See more: M. Jabłoński, S. Jarosz-Żukowska, *Kontrola konstytucyjności prawa pochodnego UE w trybie skargi konstytucyjnej i pytań prawnych*, [in:] *Zasada pierwszeństwa...*, p. 55 and next. A. Chmielarz, *Kontrola konstytucyjności prawa pochodnego Unii Europejskiej – kilka uwag w związku z wyrokiem Trybunału Konstytucyjnego w sprawie o sygn. akt SK 45/09*, *Przegląd Sejmowy* 2012, No. 4, s. 9 and next.

<sup>9</sup> See: The decision of the Constitutional Tribunal of 19 December 2006, case No. P 37/05.

As a consequence, according to art.188 p.1 of the Constitution, the Constitutional Tribunal shall adjudicate the conformity of an international agreement to the Constitution. As the Constitution does not make any distinctions, the Constitutional Tribunal can review all types of international treaties, including those having the status of the primary European law. In practice, the Constitutional Tribunal adjudicated on the constitutionality the primary EU law twice - on the Treaty on Accession of the Republic of Poland to the European Union signed on 16 April 2003 in Athens<sup>10</sup> and the Treaty of Lisbon amending the Treaty on European Union and Treaty establishing the European Community signed in Lisbon on 13 December 2007.<sup>11</sup>

The judgement regarding the Treaty concerning the accession of the Republic of Poland to the European Union was issued on 11 May 2005 in case No K 18/04 initiated by three groups of deputies. While pointing out the reasons for the ruling, the Tribunal stated that the accession of Poland to the European Union did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland. The norms of the Constitution, which is the supreme act expressing the Nation's will, would not lose their binding force or be changed by the mere fact of an irreconcilable inconsistency between these norms and the provision of EU law. The Tribunal noticed that the competence to conduct constitutional review of European primary law has not been directly stated in the Constitution, however, the Constitutional Tribunal has the competence to adjudicate upon matters concerning the conformity of international agreements with the Constitution. Neither art. 90 p.1 nor art. 91 p. 3 authorize the delegation of the competence to issue legal acts or take decisions contrary to the Constitution, being the "supreme law of the Republic of Poland", to an international organization. The Tribunal noticed that the relative autonomy of both legal orders in no way signifies the absence of interaction between them. Moreover, there is a possibility of a collision between European law and the Constitution which would occur in the event that an irreconcilable inconsistency appeared between constitutional norms and EU law, which could not be eliminated by means of applying an interpretation respecting the mutual autonomy of both legal orders. Such a collision may in no event be resolved by assuming the supremacy of the European law over the Constitution. Further, it may not lead to the situation whereby a constitutional norm loses its binding force and is substituted by a Community norm. In such an event the Nation as the sovereign, or the body of State authority authorized by the Constitution to represent the Nation, would need to decide on: amending the Constitution, causing modifications within Community provisions or, ultimately, Poland's withdrawal from the European Union. The Constitutional Tribunal has emphasized that the principle of interpreting domestic law in a manner that is "favorable to European law", as

<sup>10</sup> The decision of the Constitutional Tribunal of 11 May 2005, case No. K 18/04.

<sup>11</sup> The decision of the Constitutional Tribunal of 24 November 2010, case No. K 32/09.

formulated within the Constitutional Tribunal's jurisprudence, has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realized by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.<sup>12</sup> The above judgement provides the most extensive and thoroughly argued analysis of the relation between Polish law and community law presented by the Constitutional Tribunal.

5. The Constitutional Tribunal has also emphasized that EU law do not have any legal effect in regard to provisions of Polish law falling within the scope of the constitutional identity of the Polish state which are excluded from the scope of EU law. „Constitutional identity” is determined by matters regarding fundamental basis of the State, which cannot be transferred under art. 90 of the Polish Constitution for the benefit of the EU bodies (Case No. K 32/09). They include, in particular, provisions laying down the general principles of the Constitution of the Republic of Poland and provisions concerning the rights and freedoms of individuals, such as the requirement to ensure the protection of human dignity and constitutional rights, the rule of law, the social justice, subsidiarity or democracy. The catalog of provisions constituting the constitutional identity has not been exhaustively defined and can therefore be extended in future. To sum up, the principle of precedence may have legal effects in the context of all Polish sources of law, except for the provisions of the Constitution of the Republic of Poland. In regard to matters constituting Polish constitutional identity, the impact of EU law is completely excluded.

Nevertheless, it should be borne in mind that, in accordance with art. 9 of the Constitution, Poland shall respect international law binding upon it. What is more, the potential recognition of a European legal norm as unconstitutional and refusal to apply it would entail proceedings against Poland for the infringement of European Union law according to art. 258 and next of the Treaty on the Functioning of the European Union. That is why, the Constitutional Tribunal has emphasized in its judgements that in principle, there should be preference for eliminating conflicts between national norms and international ones at the level of the application of law as a mechanism for eliminating conflicts of norms at the level of the application of law is more operational and flexible than the review of legality conducted by the Constitutional Tribunal.<sup>13</sup>

6. As it can be noticed, the aforementioned position of the Polish Constitutional Tribunal does not go with the jurisdiction of the European Court of Justice.

<sup>12</sup> The summary of the Constitutional Tribunal's judgement of 11 May 2005, Case No. K 18/04 in English has been published in: Selected rulings of the Polish Constitutional Tribunal concerning the law of the European Union, p. 50 and next.

<sup>13</sup> Decision of the Constitutional Tribunal of 19 December 2006, case No. P 37/05.



However, in great majority of cases the above official position of the Constitutional Tribunal has been based on theoretical consideration and interpretation of the constitutional provisions in question. Therefore, it is important to point out how the issue of the primacy of European law in relation to the Polish Constitution is dealt with in case of a real conflict between the provisions of EU law and the Constitution that cannot be solved by the interpretation of the Constitution favorable to EU law.

Such case took place in 2005 when the Constitutional Tribunal had to decide on the constitutionality of the European arrest warrant at the request of a court (case No. P 1/05). On 13 June 2002, the Council of the European Union issued Framework Decision on the European arrest warrant and the surrender procedures between Member States, which constitutes a source of EU secondary legislation. According to the definition provided by art. 1 (1) of the Framework Decision, the European arrest warrant is "a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order". In general, the obligation to execute a European arrest warrant also exist when a person to whom the warrant relates is a citizen of a Member State where the warrant was received. When Poland acceded to the European Union on 1 May 2004 it accepted the obligation to fully implement European law including the Framework Decision of 13 June 2002. As the framework decisions, as well as directives, are not directly applicable there was a need to transpose the content of the Framework Decision into Polish law which was done by amending the Code of Criminal Procedure without any accompanying alteration of the Constitution. The problem was that art. 55 of the Polish Constitution provided then that "the extradition of a Polish citizen shall be prohibited" without providing any exceptions. The case was initiated by the Regional Court in Gdańsk, which considered the public prosecutor's application for the surrender of a Polish citizen on the basis of a European arrest warrant for the purpose of conducting a criminal prosecution against her in the Kingdom of Netherlands.

In the judgement of 27 April 2005 the Constitutional Tribunal decided that the Code of Criminal Procedure, as it permitted the surrendering of a Polish citizen to another Member State of the European Union on the basis of the European arrest warrant and that way implemented secondary European law into Polish law, was inconsistent with art. 55 p. 1 of the Constitution. At the same time, the loss of the binding force of the challenged provision was delayed for 18 months following the day on which the judgement was published in the Journal of Laws. The Constitutional Tribunal pointed out that the judgement created an obligation for the legislator to undertake actions aiming at rapid elimination of the defects of legal regulations indicated by the Tribunal, if possible before the lapse of the time period stipulated in the judgement. The Tribunal also stated that, as a consequence of the judgement, the amendment of the Constitution might be required in order

to ensure the compatibility of domestic law with the EU law followed by the re-introduction of statutory provisions concerning the European arrest warrant<sup>14</sup>.

The appropriate amendment of art 55 of the Constitution was adopted on 8 September 2006. The new wording of art. 55 provided some exceptions from the ban on the extradition of a Polish citizen that would allow for the implementation of the European arrest warrant into Polish law<sup>15</sup>. The above case illustrates that despite the fact that theoretically EU law is claimed by the Constitutional Tribunal not to have the priority over the Constitution when the real conflict arose it was the Constitution that was amended to allow for the implementation of EU law.

7. Polish constitutional bases which legitimized the transfer of competences of national authorities on the European Union have been provided by the Constitution of the Republic of Poland adopted on 2<sup>nd</sup> April 2007<sup>16</sup>. Undoubtedly, the greatest controversy accompanying the adoption of the relevant provisions concerned the question whether the EU law should be under or over the Constitution in the hierarchy of universally binding law in Poland. On the ground of the final text of the Constitution the problem seems to be solved as its art. 8 expressly emphasizes the supremacy of the Constitution over all kinds of legal acts that are the source of binding law in Poland. The precedence given to the provisions of the Constitution of the Republic of Poland over European law has been also clearly visible in the case-law of the Polish Constitutional Tribunal.

However, the provisions of the Polish Constitution and their interpretation by the Polish Constitutional Tribunal are not entirely consistent with the principle of the primacy of European Union law reflected in the case law of the Court of Justice of the European Union. While the European Court of Justice has clearly stated in its rulings that if national law is incompatible with the provision of primary or secondary EU law, priority should be given to the EU law irrespective of the nature and form of the conflicting national legal norms. Accordingly, the primacy principle covers not only the statutory and sub-statutory provisions, but also the constitutional provisions of the Member States.

Despite *de lege ferenda* postulates to clearly define the position of European law in relation to the Constitution, no constitutional amendments have been introduced so far, despite the fact that thirteen years has already passed since Poland's accession to the EU. Consequently, the significant role is played in this regard by the Constitutional Tribunal which in its case law has several times referred to the position of European law in the system of sources of binding law in Poland and as a consequence to the admissibility of constitutional review of the norms

<sup>14</sup> The English translation of summary of the decision of the Constitutional Tribunal of 27 April 2005, Case No P 1/05, [in:] Selected ..., p. 41 and next.

<sup>15</sup> R. Sawicki, *Zmiany Konstytucji Rzeczypospolitej Polskiej w latach 1997-2011 w świetle projektów ustaw oraz uchwalonych nowelizacji*, Biuro Analiz i Dokumentacji Kancelarii Senatu, OT-605, October 2011, p. 6.

<sup>16</sup> The Official Journal of Laws "Dziennik Ustaw" 1997, No. 78, item 483.

of European law. The Tribunal has only accepted the priority of EU law in respect to statutory law, referring to art. 91 of the Constitution of the Republic of Poland. What is more, in its judgment of 11 May 2005 (case No. K 18/04) the Constitutional Tribunal has recognized, contrary to the opinion of the European Court of Justice, that the constitutional review of secondary EU law (f. ex. European regulations) is permitted under the Constitution of the Republic of Poland (Case No. SK 45/09).

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### **NAD CZY POD KONSTYTUCJĄ? MIEJSCE PRAWA UNII EUROPEJSKIEJ W POLSKIM SYSTEMIE PRAWNYM W ŚWIETLE ORZECZNICTWA TRYBUNAŁU KONSTYTUCYJNEGO**

Prawne podstawy członkostwa Polski w Unii Europejskiej zostały wypracowane w latach 90. w ramach prac nad nową Konstytucją Rzeczypospolitej Polskiej i były wyrazem kompromisu, który udało się wówczas osiągnąć. Jedną z najtrudniejszych kwestii, z jakimi musiał się zmierzyć ustrojodawca, była wynikająca z prawa europejskiego konieczność implementacji zasady pierwszeństwa prawa Unii Europejskiej oraz zasada jego bezpośredniego stosowania przez organy krajowe.

W tym kontekście przepisy Konstytucji RP i stanowisko Unii Europejskiej odzwierciedlone w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej nie były (i nadal nie są) spójne. O ile Europejski Trybunał Sprawiedliwości jasno stwierdził w swoich orzeczeniach, że jeśli prawo krajowe jest niezgodne z pierwotnym lub wtórnym prawem UE, należy przyznać pierwszeństwo prawu UE, niezależnie od charakteru i rodzaju sprzecznych z prawem unijnym krajowych norm prawnych. W związku z powyższym, zasada prymatu obejmuje nie tylko ustawy i przepisy podustawowe, ale także przepisy konstytucyjne państw członkowskich. Z drugiej strony, polska Konstytucja w art. 8 wyraźnie podkreśla nadrzędność Konstytucji nad wszelkimi rodzajami aktów prawnych, które są źródłem wiążącego prawa w Polsce. Konstytucja wyraźnie też gwarantuje pierwszeństwo europejskiego prawa pierwotnego (art. 91 ust. 2) i prawa wtórnego (art. 91 str. 3) wyłącznie w odniesieniu do ustaw, nie odnosząc się do relacji między prawem europejskim a polską Konstytucją. Mimo zgłaszanych *de lege ferenda* postulatów, aby jasno określić miejsce prawa europejskiego w przepisach Konstytucji, dotychczas nie wprowadzono odpowiednich zmian w ustawie zasadniczej, chociaż od przystąpienia Polski do UE minęło już trzynaście lat. W związku z tym istotną rolę odgrywa w tym zakresie Trybunał Konstytucyjny, który w swoim orzecznictwie wielokrotnie odnosił się do miejsca prawa europejskiego w systemie źródeł wiążącego prawa w Polsce i w konsekwencji dopuszczalności przeprowadzenia kontroli jego konstytucyjności.