DEVELOPMENTS

Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law

*By Krystyna Kowalik-Bańczyk**

Just one year after Polish accession to the European Union, the Polish Constitutional Tribunal was provided the opportunity to clarify its position regarding the supremacy of EC and EU law. In its two recent judgments, it joined the long tradition of a rather uneasy relationship between national Constitutional Courts and European Court of Justice (ECJ).[1] The uneasiness of this relationship results from an ever-unsolved dilemma[2] – which of the two judicial *fora* should have the last word in case of conflict between European norms and national constitution norms?[3] The solution given by European Court of Justice in a series of early judgments seems

* Doctor of Law, LLM MES (Bruges), DEA (Toulouse), PhD (Polish Academy of Science, Warsaw). Lecturer at European School of Law and Administration and at Centre for Europe, Warsaw University. Email: kowalikkrystyna@wp.pl

[1] See for instance judgments of the German Federal Constitutional Court: judgment of 29 May 1974, *Internationale Handelsgesellschaft mbH v. Einfuhr – und Vorratsstelle für Getreide und Futtermittel (Solange I),* 2 BVL 52/71; judgment of 22 October 1986, *Wünsche Handelsgesellschaft (Solange II),* 2 BVL 197/83; judgment of 12 October 1993, *Brunner v. Treaty on European Union,* 2 BVR 2134/92; judgment of 7 June 2002, *Banana Market,* 2 BVL 1/97. Italian Constitutional Court: *Frontini,* 183/73 [1973] Giurisprudenza Constitutionale, 2406. P. Craig, G. de Burca, *EU :Law: Texts, Cases and Materials,* (2003, 285-315); D. Simon, *Le système jurdique communautaire,* (2001, 455-458; J. Rideau, *Droit institutionel de l'Union et des Communautés européennes* (1995) Paris; I. Schübel, *La primauté du droit communautaire en Allemagne, une etude de la jurisprudence de la Cour constitutionnelle fédérale allemande et de la principale doctrine allemand, RMC* (1997. 621); Wł. Czapliński, *Prawo wspólnotowe a prawo wewnętrzne w praktyce sądów konstytucyjnych państw członkowskich*, KWARTALNIK PRAWA PUBLICZNEGO 2 (2004, 7).

[2] The dilemma is not really exposed by authors dealing with European Union law, as the supremacy of Community law seems an 'archetype" since *Costa v. ENEL* and *Simmenthal* judgments. However, for constitutional lawyers used to the idea of supremacy of national constitutions, the question is still open.

[3] In German doctrine this dilemma is referred as "the ultimate arbiter" issue – M. Aziz, *Sovereignty Lost, Sovereignty Regained? The European Integration Project and the Bundesverfassungsgericht,* during 2000-2001 European Forum, S. Bartolini, T. Risse, B. Strath (Dir.): *Between Europe and the National State: the Reshaping of Interests, Identities and Political Representation,* RSCAS-EUI, EUR 81, 15, 23-24 and the doctrine cited there.

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obvious.[4] It opted for an absolute supremacy of EC norms over national norms. On the other hand, the national Constitutional Courts usually accept the supremacy of EC law – but only as a consequence of transfer of some competences under strict conditions set by national constitutions. They thus accept the concept named by Neil Walker "constitutional pluralism", meaning that the states are no longer the sole source of constitutional authority.[5] However, national constitutions are still the "primary" source of any such authority.[6]

A. Does the principle of supremacy of EC law spread to EU law?

The principle of supremacy, or primacy of European Community law, is not expressly contained in any of the founding Treaties.[7] According to the constant jurisprudence of European Court of Justice, the primacy of Community law applies to all national norms, including constitutional norms.[8] Therefore, any conflict between a Community norm and a national norm that have the same scope of application should be solved by a non-application of conflicting national law, otherwise the postulate of unified application of European law might be endangered and the European Court of Justice consequently insists on this idea. On the other hand, the ECJ's jurisprudence has recognized the general principles enshrined in national constitutions of Member States as belonging to the primary law of EC/EU (as it is now explicitly stated in art. 6 TEU). By this second line of jurisprudence, the European Court of Justice underlined its will is not to clash with national constitutions but in principle to respect them. Therefore the possibility of 'real' conflict seems in reality a limited one – within the first pillar. Still, the rhetoric based on sovereignty[9] arguments is present in both old and new Member States of EU.

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[4] M. Aziz puts it: "*as the catechism provides, EC law prevails over national law*", (Sovereignty Lost, 1), recalling the judgment 6/64 *Costa v. ENEL*, [1964] ECR 585.

[5] N. Walker, *Late Sovereignty in the European Union*, 2000-2001 European Forum, S. Bartolini, T. Risse, B. Strath (Dir.): *Between Europe and the National State: the Reshaping of Interests, Identities and Political Representation*, RSCAS-EUI, EUR 82, 1.

[6] B. de Witte puts it: "The national courts see EC law as rooted in their constitution and seek a foundation for the primacy and direct effect of EC law in that constitution". *Direct Effect, Supremacy, and the Nature of the Legal Order* in THE EVOLUTION OF EU LAW, *1999* (w P. Craig, G. de Búrca, eds., 1999).

[7] It would have been solved by the Treaty on the Constitution for Europe, where it was defined in art. I-6, had it not been rejected by French and Dutch population.

[8] 11/70 *Internazionale Handelsgesellschaft*, ECR 1970, 1125.

[9] M. Aziz refers to this state of affairs in a very critical way, naming those taking part in the discussion "Polemicists disguised as legal scholars" (2000-2001, 7). She also – even more sarcastically - speaks about "constitutional patriotism", for instance, implying that as regards human rights protection, "there

It should be underlined that the jurisprudence defining the "supremacy" principle was concerned until recently with only the first pillar of European Union – at first EEC and now CE law. It seems that ECJ tried to introduce this principle also in the third pillar (cooperation in criminal matters) in its recent Pupino[10] judgment. There are however several arguments against this solution.[11] There is no loyalty clause in the Treaty on European Union, similar to that enshrined in art. 10 TCE. There is still the unanimity requirement for adopting almost all of third pillar instruments[12] and there are possible clashes – to much greater extent than in the case of Community law – with national constitutions. This was illustrated by one of the Polish Constitutional Tribunal judgments that will be further analyzed in detail.[13] There is as well the inconsistence among Member States as to the acceptance of ECJ's jurisdiction in third pillar.[14] However, it seems that the ECJ in Pupino excluded the possibility of option different than the absolute supremacy. It went along the same path as in any case concerning Community law, the only limit being the lack of direct effect of framework decision in question.[15] It implied that there is the same loyalty principle to be applied and that all the Member States are to follow the indications given in this judgment. It seems not fully justified as it is not clear whether the Member States that did not accept ECJ's jurisdiction are bound by this judgment.

The arguments of unified application of EU law (as analogy to the uniform application of EC law) cannot be simply repeated as if they were used in first pillar. The reasons for this reservation are twofold. First, because the Treaty itself allows for flexibility, it would be contrary to Member States' will to agree that whether they accept jurisdiction or not they are bound by answers to preliminary questions given in third pillar. Secondly, the scope of matters covered by cooperation in criminal issues often touches the very substance of 'constitutional' guarantees for individuals. As the cases of European Arrest Warrant clearly indicate, the Member States'

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is no place like home", (19). She suggests that because "our state fixation is based on ideology", there is no room for serious legal argumentation, (29-30).

[10] Judgment of 16 June 2005, C-105/03 *Criminal Proceedings against Maria Pupino*, Press Release no 59/05.

[11] W. Czapliński, *Pierwszeństwo to nie nadrzędność* , 6 .10.2004 RZECZPOSPOLITA (2004).

[12] The exceptions from this rule being: art. 34.2 c *in fine* and art. 34.4 TUE.

[13] Sygn. akt P 1/05, www.trybunal.gov.pl. It was followed by a similar judgment of German Federal Constitutional Court issued on 18th of July 2005, 2 BvR 2236/04.

[14] Only fourteen Member States deposited the declarations accepting ECJ's jurisprudence in the third pillar, according to art. 35.2 TEU.

[15] The Court went around the direct effect prohibition, invoking instead the consistent interpretation doctrine - it led to the same result: direct application of framework decision, so it was just an *Ettiketenschwindel*.

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courts are not ready to accept an absolute supremacy of EU law over their national constitutions.

B. Two cases on supremacy

Within two weeks appeared two very different judicial decisions of Polish Constitutional Tribunal: the judgment of 27th of April 2005 concerning Polish law implementing the European Arrest Warrant and the judgment of 11th of May 2005 on the validity of the 2003 Accession Treaty. Paradoxally, the first one – invalidating a provision of Polish Criminal Procedure Code – might be seen as a sign of respect for Polish international obligations stemming from the EU law. The second, confirming the validity of Accession Treaty of 2003, is a clear refusal of supremacy of this Treaty over national Constitution. Those judgments were not the very first judicial decisions of the Constitutional Tribunal raising questions of EU law,[16] but they were certainly the most comprehensive ones.

I. The European Arrest Warrant Judgment and the question of surrender of Polish citizens[17]

Framework Decision on the European Arrest Warrant (EAW) and the Surrender Procedures between Member States[18] of 13th June 2002 was implemented into Polish legislation by amendment of Polish Criminal Procedure Code of 1997, due to Polish accession to the European Union. Before the transposition a vivid discussion took place as to the possibility of surrender of Polish citizens to other EU Member States, as it seemed contradictory to art. 55 of the Polish Constitution of 1997.[19] There were several opinions that the Constitution should be amended,[20] as other-

[16] The constitutionality of accession procedure was controlled by the judgment K 11/03 of 27th May 2003, other judgments with European elements were: K 33/03 concerning the biocomponents of gasoline, K 15/04 on the participation of foreigners in the European Parliament and local elections, K 24/04 on the imbalance in division of competences between two chambers of Polish Parliament regarding European issues.

[17] Judgment of 27th April 2005, P 1/05, English and German Summary available at: www.trybunal.gov.pl

[18] 2002/584/JHA

[19] Art. 55 states: 1. *The extradition of a Polish citizen shall be forbidden. 2. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden. 3. The courts shall adjudicate on the admissibility of extradition.*

[20] P. Sarnecki, *Opinia na temat konstytucyjności projektu ustawy w sprawie nowelizacji kodeksu karnego, kodeksu postępowania karnego i kodeksu wykroczeń,* Druk 2031, 2 cited in Tribunal's reasoning, 17; P. Kruszyński, *Europejski Nakaz Aresztowania jako forma realizacji zasady wzajemnego wykonywania orzeczeń w ramach UE...,*

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wise it would be breached; others distinguished between "extradition" and "surrendering", arguing that there is no need for amendment[21] as the surrender procedure is not covered by art. 55 of the Polish Constitution. Finally, the Constitution remained unchanged and only the Criminal Procedure Code (CPC) was amended. Two new chapters were introduced: 'Chapter 65 a' concerning the situations when a Polish court issues an EAW, and 'Chapter 65 b', on situations when an EAW issued by a court of another Member State concerns a person present in Poland. No provision expressly allowed the surrender of Polish citizens from Polish territory. But art. 607 p of the Criminal Procedure Code that specifies the reasons for refusing to execute an EAW does not contain as one of such reasons the possession of Polish citizenship.[22] Articles 607 s CPC and 607 t CPC institute some restrictions as to the surrender of Polish citizens or persons enjoying the right of asylum in Poland. They distinguish two kinds of situations: issuing EAW for executing a previously imposed custodial sentence or detention order (art. 607 s) and issuing EAW for prosecuting the person for criminal offence (art. 607 t[23]). This last provision was the object of question of law referred by Regional Court of Gdańsk to the Polish Constitutional Tribunal under art. 193 of the Polish Constitution.[24] The Gdańsk Court obtained an application on issuing a surrender decision for Polish citizen Maria D., so that a criminal proceeding could be conducted against her in Netherlands. It thus had to apply art. 607 t of Criminal Procedure Code. It decided to stay the proceedings before it and asked for control of conformity of this aforementioned provision with art. 55 of the Polish Constitution. The Constitutional Tribunal thus checked the conformity of national statute implementing the Framework Decision with provision of national Constitution. It found that art. 607 t was not conform with art. 55.1

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cited in Tribunal's reasoning,. 12; and E. Zielińska, *Ekstradycja a europejski nakaz aresztowania. Studium różnic,* cited also there, 12.

[21] *Opinia z 14 sierpnia 2003 r. o projekcie ustawy o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks postępowania karnego,* 2 PRZEGLĄD LEGISLACYJNY 156 (2004). R. Ostrihansky, *Nakazać zakazane. Europejski nakaz aresztowania a konstytucja,* 10.10.2003 RZECZPOSPOLITA (2003), M. Płachta, *Europejski nakaz aresztowania (wydania): kłopotliwa „rewolucja" w ekstradycji,* 3 STUDIA EUROPEJSKIE 56-58 (2002). E. Piontek, *Europejski Nakaz Aresztowania,* 4 PAŃSTWO I PRAWO 40 (2004).

[22] By contrast, the corresponding provisions on extradition – art. 604 of Criminal Procedure Code, enlists such ground for refusal of extradition.

[23] The translation into English of this provision from www.trybunal.gov.pl is the following: *Where a European Arrest Warrant has been issued for the purposes of prosecuting a person holding Polish citizenship or enjoying the right of asylum in the Republic of Poland, the surrender of such a person may only take place upon the condition that such person will be returned to the territory of the Republic of Poland following the valid finalization of proceedings in the State where the warrant was issued.*

[24] According to art. 193 of Polish Constitution: *Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.*

of the Constitution. The loss of binding force of this provision was postponed for eighteen months following the day on which the judgment was published in the Journal of Laws (4th of My 2005).
This very short ruling was followed by twenty five pages of reasons – exposing a very uneasy relationship of Polish Constitutional Tribunal towards the idea of supremacy of European Union law. In crude terms it might be seen as a refusal of primacy for framework decisions in relation to Polish constitution. It seems, however, that the position of Polish Constitutional Court was a little bit more nuanced.

Attitude of Polish Constitutional Court towards the Idea of Supremacy of EU law – Mild Refusal or Hesitant Acceptance?

The Tribunal first analyzed if the notions of extradition and surrender could be viably distinguished taking account of the fact that the Polish Constitution's provisions were adopted earlier than the Framework Decision on European Arrest Warrant. The Tribunal stated that the Polish legislator meant in art. 55 of the Polish Constitution to cover all situations of 'giving' Polish citizens to other states. Thus, this absolute right enshrined in the Constitution is infringed by the provision of Criminal Procedure Code, as the article 607 t deprives Polish citizens of the very essence of right stemming from art. 55.
On the other hand, the Tribunal recognized the obligation to implement secondary European Union law, under art. 9 of Polish Constitution[25] and the provisions of Accession Treaty, but underlined that the national law provisions implementing EU acts are not automatically conform to the norms of Constitution. It recognized also the obligation to interpret domestic law consistently with EU law. There certainly was a very positive attitude towards such interpretation signaled by most of Polish supreme courts before the accession to EU.[26] It stated, however, that such "sympathetic" interpretation has its limits – one of them is not to worsen an individual's situation as to the scope of criminal liability.
The Tribunal therefore suggested that there must be an amendment of the national Constitution in order to avoid the potential for breach. As the Tribunal obviously is not able to undertake such changes, it strongly suggests to the Polish legislating power to "do something about it" and – preferably – to amend the Constitution so that the European Arrest Warrant could be applied towards Polish citizens. This suggestion, in my opinion, indicates that the Constitution Tribunal in fact recognized the supremacy of EU law. The provisions of Criminal Procedure Code were

[25] Art. 9 states: *The Republic of Poland shall respect international law binding upon it.*

[26] S. Biernat, "*European*" *rulings of Polish courts prior to accession to the European Union,* 1 (14) THE POLISH FOREIGN AFFAIRS DIGEST 127-149 (2005); P.K. Rosiak, *Prawo wspólnotowe w orzecznictwie polskich sądów i Trybunału Konstytucyjnego*, 4 KWARTALNIK PRAWA PUBLICZNEGO 229-240 (2002).

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declared unconstitutional, but the Tribunal suggested that this should be changed by amending the Constitution. It held that it could not interpret the Constitution so as to allow the surrender. It could not pretend that the provision was constitutional, as it had power to act only within the scope of its competences set by national constitution and by the question referred; however, the powers competent to bring the Polish law align with European Union law should do so as quickly as possible. It thus accepted that the Constitution itself was no longer an absolute framework for control – if it hinders the correct implementation of EU law, it should be changed. This presumption is confirmed by the fact that the Tribunal used its discretion to delay the entry into force of its judgment (the judgment causes the loss of validity of provisions declared unconstitutional). While using this discretion, the Tribunal has to balance the values infringed by prolonged application of unconstitutional provisions (in this case it means limitation of constitutional right) and values served by this delay. It maintained the unconstitutional provision of Criminal Procedure Code for the maximum possible period – eighteen months – thus leaving the legislator the longest scope of time available under the Constitution, for amending this situation. During this period all Polish courts have to apply the unconstitutional provision and cannot raise its inconformity with art. 55 of the Constitution. The Tribunal therefore used all the means available to it to milder its judgment and allow Poland continue fulfilling its EU obligations.
Taking into account those arguments, it seemed that in this judgment the Tribunal went further than the existing practice – it implicitly accepted the supremacy of EU law over constitutional norms. It however denied that supremacy only two weeks later in the judgment on Accession Treaty.

II. The Accession Treaty Judgment[27] *– who comes first?*

On 16th of April 2003 ten candidate countries signed with fifteen Member States of European Union a Treaty on Accession (hereafter the Accession Treaty). Under art. 90 par. 3 of Polish Constitution this Treaty was approved by the Polish society in a referendum held on 7th and 8th of June 2003, in which 77,45% of the participating voters voted for the accession. On 1st of May 2004 Poland became a Member of European Union. By virtue of the Accession Treaty, Poland is bound by the totality of European Union law, including the general principles stemming from jurisprudence of European Court of Justice.[28] The judgment of the Polish Constitutional

[27] Judgment of 11th of May 2005, K 18/04, English and German Summary available at: www.trybunal.gov.pl

[28] S. L. Kaleda, *Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine?*, 1 EUROPEAN LAW JOURNAL (ELJ) 102-122 (2004).

Tribunal was issued in response to three motions deposited by three groups of deputies of Sejm (the lower chamber of Polish Parliament) that were against Polish accession to the European Union on the conditions set in this Treaty.
According to the art. 188 of the Polish Constitution,[29] the Constitutional Tribunal can control the conformity of ratified international agreements concluded by the Republic of Poland with that Constitution. The judgment considered the relationship between the European Union law and several provisions of Polish Constitution of 1997. The control of Treaty on European Community and Treaty of European Union was raised because Accession Treaty obliged Poland to implement inter alia the founding Treaties. Three groups of deputies contested the conformity of the Accession Treaty provisions with the principles of sovereignty of the Polish Nation and supremacy of Constitution over all other legal acts existing in Polish legal order. More specifically, the applicants raised the possibility of lack of conformity with Polish constitution for the following provisions: art. 1 par. 1 and par. 3 of the Accession Treaty, art. 2 of the Act concerning the conditions of accession of the Republic of Poland and the adjustments of the Treaties on which the European Union is founded, art. 8 TCE establishing the European System of Central Banks and European Central Bank, art. 12 TCE on the prohibition of discrimination based on citizenship, art. 13 par. 1 TCE on the possibility to issue provisions on discrimination based on sex, ethnic origin, religion, opinion, disability, age or sexual orientation; art. 19 par. 1 TCE on right of voting for EU citizens in the local and European Parliament elections, art. 33 TCE on common agricultural policy, art. 190 TCE on EP elections, art. 191 on European political parties, art. 202 on Council of European Union, art. 203 TCE on the composition of this Council, art. 234 on preliminary question procedure, art. 249 TCE on secondary EC acts, art. 308 TCE on subsidiary EC competences, art. 6 par. 2 TEU, art. 17 of Charter of Fundamental Rights on the protection of property. The specific considerations of EU/EC Treaty provisions will not be analyzed here, as this was not the object of this article, instead focusing on the questions related to primacy of EU law.

None of the grounds for unconformity with the Constitution was uphold by the Constitutional Tribunal. In its ruling of 11th of May 2005 it either stated the conformity of the mentioned provisions with Polish Constitution or did not see the inconformity. Still, the sole fact of accepting the competence to control legality of Accession Treaty might be seen as problematic: it implicitly indicates that the Con-

[29] Art. 188 states: *The Constitutional Tribunal shall adjudicate regarding the following matters: 1) conformity of statutes and international agreements to Constitution, 2) the conformity of statute to ratified international agreements whose ratification required prior consent granted by statute, 3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes, 4) the conformity to the Constitution of the purposes or activities of political parties, 5) complaints concerning constitutional infringements, as specified in Article 79 (1).*

stitutional Tribunal considers that the national Constitution can be a basis for this type of control. However it is mainly the reasoning of the Constitutional Tribunal that seems quite particular and raises the serious question of acceptance (or rather lack of acceptance) of supremacy of European law over Constitution in Poland.

The Tribunal started its reasoning by stating that the accession to the European Union had not undermined the supremacy of the Polish Constitution over the whole legal order of the Republic of Poland. The possible conflict between Constitution provisions and European Community[30] provisions would not lead to the invalidity of such Constitutional norms or to its automatic change. In case of such a conflict, it would be for the Polish legislative powers to react and – possibly – to change the national Constitution. The European integration process is based on Polish Constitution, as the accession has a direct legal basis in this act and any transfer of competences has to be done according to those rules (that are stricter then the ones concerning 'usual' international agreements).

The applicants raised the claim that European Union is a supranational organization, whereas Polish constitution only allows accession to international organizations. However the Constitutional Tribunal did not agree with this line of argumentation stating that from purely linguistic point of view, none of the legal texts at the basis of European Union/EC uses the term "supranational organization". Therefore this argument was not upheld.

The applicants also raised the question of transfer of competences to the EU/EC – arguing that by acceding to the EU, the Republic of Poland lost its capacity of acting as an independent and sovereign state, Here again the Tribunal stated that art. 90 par. 1 of Polish Constitution, allowing for transfer of some competences under a set of very strict conditions, was not infringed by Polish accession to the EU and there can be no question of loss of Polish sovereignty. Article 8 of Polish Constitution states that the Constitution is the highest source of law in the Republic of Poland. On the other hand, article 9 of this same Constitution states that Poland respects international law provisions binding on it. Therefore, the Polish legislator clearly agreed that there would be two sets of rules existing on Polish territory – those created within the national legal system and those created outside of this system. But the Tribunal states further that the Constitution enjoys the full primacy as to its binding nature and its application. Any international agreement entered into by the Republic of Poland (even that accepted in referendum) does not prime over the Constitution.

[30] The expression used in the first paragraphs of the reasoning suggests that it only applies to EC law. However, the lecture of the whole texts indicates that the Court refers to the EC or EU interchangeably.

After this very strong statement, the Constitutional Tribunal explains that Community law constitutes a new model of law that cannot be explained by traditional ideas of monism or dualism (understood as a relationship: internal law-international law). The relative autonomy of the two legal orders -- national legal order and Community legal order -- does not imply that they do not influence each other. This autonomy does not eliminate the possibility of conflict, either. Such conflict or collision would take place if an irreconcilable discrepancy between constitutional norm and Community norm appears. Such collision – according to the clear statement of Constitutional Tribunal "cannot be solved by recognition of supremacy of Community norm towards the national constitutional norm". It cannot lead either to the invalidity of such national norm and its replacement by Community law or to the limitation of application of such norm within areas not covered by Community regulation. In such situations (of permanent and irreconcilable difference) the Nation, as a sovereign decision maker, or its constitutional representation have three possibilities. It could decide to change the Constitution, cause the change to Community norms or, as a last resort, decide that Poland should leave European Union.

The Constitutional Tribunal returned also to the argument raised in its EAW judgment. Namely, it underlined the limits of consistent interpretation of national law in line with European law. This time it stressed that such interpretation cannot take place if it leads to a result contradicting the wording of Constitution or if it is irreconcilable with the minimum guarantee functions provided by the Constitution. As far as individual rights and freedoms are concerned, the guarantees enshrined in the Constitution constitute an unsurpassable minimum that has to be respected in all circumstances. Therefore the Constitutional Tribunal in a way denied its judgment on EAW where it did exactly the opposite – it agreed on reduction of rights for individuals for the next eighteen months in order to respect obligations stemming from Accession Treaty. So it took it only two weeks to reverse its argumentation.

Last but not least, the Tribunal gave the final blow to the supremacy idea, stating that as the EC/EU function on the basis of principle of conferral of competences, so it is for Member States (i.e. Constitutional Courts) to assess whether or not the Community organs act within its competences and accordingly to the principles of subsidiarity and proportionality. Should this not be the case, the principle of primacy of EC law does not apply at all. Thus, the Constitutional Tribunal attributed to Member States the function of controlling the exercise of Community competences, the role usually played by the European Court of Justice.

The positive thing is that the Tribunal did not follow the arguments of anti-European deputies, but the general conclusion stemming from this judgment is not

a very optimistic one, at least from the point of view of European law specialists. The reasons for pessimism are twofold. First, the judgment will certainly inflate the discussion of the review of competences issue, without really giving the hope for uniformity of application of European law. The discussion as such is of course to be welcomed, but it seems that there would be a trend for confrontation rather then any constructive dialogue. Second, thought the Tribunal does not uphold the arguments raised by anti-European deputies, its reasoning is also based on fears: losing sovereignty, or not retaining 'enough' of it. From a historical point of view it might be understandable – and even though the reasoning of Tribunal seems not the right place to fight with such fears, it could be acceptable. The worrying feature, however, is that the Tribunal limits itself to arguments showing that Poland retains its sovereignty and not arguments regarding why and how it retains sovereignty.

According to Dr. R. Kwiecień, the Polish Constitutional Tribunal retreated from its original position taken in the judgment of European Arrest Warrant in which it stated that the functioning of European Arrest Warrant in Polish legal order should be a priority for legislator. Therefore, it suggested the possibility of changing art. 55 of Polish Constitution, if European law so required. In the Accession Treaty judgment this possibility was in fact excluded.[31]

C. Conclusions

Bruno de Witte remarked on the Van Gend en Loos judgment that its main novelty was not the discovery that EEC law could have direct effect, but instead that "the crucial contribution of the judgment was rather that the question of direct effect was to be decided centrally by the Court of Justice, rather than by various national courts according to their own views on the matter".[32] The same could be said about primacy. The judgment on Accession Treaty seems to return to this problem – opening the Pandora's box– as one of those various national courts gives a clear suggestion that it would rather 'decentralize' the system.

Polish Constitutional Tribunal declared in fact that the Polish Constitution has an absolute primacy over Community law. It denied thus the well-established practice of national Constitutional Courts and the ECJ not to name certain conflicting aspects of relation too openly. It might lead to the situation that Polish judges – and not only Constitutional Court – in order to comply with this Court's judgments –

[31] R. Kwiecień, *Zgodność Traktatu Akcesyjnego z Konstytucją* EUROPEJSKI PRZEGLĄD SĄDOWY, 1 (2005) 40.

[32] B. de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order,* in THE EVOLUTION OF EU LAW, (P. Craig, G. De Búrca, Eds., 1999),.

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will have to disregard some of Community measures because they conflict (in their opinion) with Polish Constitution.[33] And as European legal acts usually grant rights to individuals, they might in fact lose because of this "power show".

33 P. Kubicki, M. Margoński, *Prymat bezwzględny czy względny,* RZECZPOSPOLITA, 25.07.2005, C3.

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