BERICHTE UND URKUNDEN

International Law and Polish Municipal Law: Recent Jurisprudence of the Polish Supreme Judicial Organs

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The problem of the mutual relations between international law and municipal law is one of the most frequently discussed issues for both international and constitutional lawyers. In Poland, the discussion constituted a platform of confrontation between the official standpoint of the Communist authorities and liberal authors. The provisions of the new Polish constitutional law of 17 October 1992 on the organization of the state authorities and division of competences (provisional constitution)[2] and recent jurisprudence of the supreme judicial organs introduced new elements into the discussion.

In order to appreciate the place of international law within the Polish municipal legal system one should consider the historical development of this problem. According to Art. 49 of the so-called March Constitution of 1921, and subsequently Art. 15 of the provisional constitution of 1947, the place of international law within the Polish legal order was clear. It was strictly connected with the participation of the Parliament in ratification proceedings. Certain categories of treaties, namely treaties of alliance, boundary agreements, treaties concerning rights and duties of individuals, and agreements imposing financial obligations upon the Polish State, could be ratified by the President after being approved by the Parliament in the form of special ratification bills. The texts of the treaties had to be published in the Official Gazette. Though the procedure of ratification was formally not defined as a transformation, the

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[2] Dziennik Ustaw Rzeczypospolitej Polskiej (Official Journal) No.84, Item 426.

judicial practice established the rule that the validity of treaties in municipal law was independent of their validity in international relations – so in fact the ratification corresponded with the transformation.

The situation changed radically after the adoption of the Constitution of 22 July 1952. The Act did not contain any provision concerning the place of international law within the Polish domestic legal system. The provision of Art. 30.1 was the only one related indirectly to this problem. It conferred the competence to ratify international treaties upon the Council of State, a collective body composed of the members of the Parliament. However, the effects of ratification for the internal validity of treaties was not clear, in particular with respect to treaties dealing with the questions reserved for the competence of the Parliament. The competence of the Council of State did not cover the so-called administrative (interdepartmental) agreements which were not subject to ratification (the proportion of ratified to non-ratified agreements was estimated 1:10).

The transformation from the Communist system to the democratic one and the establishment of the post of the President of the State replacing the former collective Council of the State also introduced important changes in the relationship between international and municipal law. According to the amendment to the Constitution of 7 April 1990 (Art. 32.g), the President was competent to ratify and terminate international agreements. If a given treaty imposed significant financial obligations on the state or required changes in the valid legislation, the President was required to obtain the prior consent of the Sejm (lower chamber of the Parliament). The form of this consent was not specified – however, it was not a ratification law (*ustawa*) as the participation of the upper chamber of the Parliament (*Senat*) was not required. However, an exactly contrary solution (the requirement of the passage of the ratification law) was applied in practice[3]. The position of ratified agreements within the domestic legal order was therefore not precise; the same applied to unratified agreements and customary law.

Art. 33 al.1 of the constitutional law of 1992 (mentioned above) provides the President's competence to ratify international treaties. Ratification should be notified to the both Houses of Parliament. According to al.2, certain categories of international agreements require the acceptance by the Parliament in the form of a bill (*ustawa*) prior to the ratification.

[3] The Convention of 20 November 1989 on the Rights of the Child was ratified by the President after the earlier passing of the ratification bill by the Parliament – cf. Dziennik Ustaw 1991, No. 16, Item 182.

This reservation concerns the following: agreements concerning state boundaries, treaties providing financial burdens for the State, treaties requiring amendments to existing law in matters reserved for the Parliament. The categories of agreements mentioned in Art. 33 are not precise enough. In particular, the expression treaties providing financial burdens is not clear, as in fact every international obligation can cause financial burdens. It should be interpreted as providing direct, constant and important financial obligations. The *ratio legis* of this provision is to restrict a government's ability to borrow credits and loans without parliamentary control, which was constant practice under the Communist regime. The expression treaties concerning state boundaries should be also interpreted restrictively as treaties establishing state boundaries (it is hard to subject to the control of the Parliament every agreement dealing with the regime of the frontier, customs control etc.).

Although the provisional constitution does not specify the position of international law in the municipal legal system, the constitutional provisions should be interpreted as clearly establishing the position of international law in the Polish municipal legal system. International treaties duly ratified acquire the rank of a statute of Parliament with all the consequences that flow therefrom (e.g. they are subject to the principles *lex posterior* and *lex specialis*).

The ratification law can also be controlled by the Constitutional Court from the point of view of its conformity with the constitution, which opens the way to the review of conformity of international agreements with the constitution, and of the conformity of the instruments of lower rank with international obligations. According to Arts. 1 and 4 of the law on the Constitutional Court[4], the Court is competent to decide on the conformity of Parliament's statutes with the constitution and on the conformity of normative acts of lower rank with the constitution and statutes. According to the opinion dominant in the first period after the creation of the Court, the letter of the law on the Constitutional Court of 1985 excluded the possibility of deciding on the questions involving international conventions. Such an interpretation was strictly connected with the political situation in Poland. First after the democratization of political system the Court started to refer in its decisions to the conformity of Polish legislation with international law. The Court, however, did it ex-

[4] Law of 29 April 1985, final version published in Dziennik Ustaw 1991, No. 109, Item 470.

clusively in an indirect way, referring to Art. 1 of the Constitution[5] which states that the Republic of Poland is the democratic State governed by law. This provision should be interpreted taking into account all legal rules binding within the Polish domestic legal order, including provisions of international conventions[6]. It seems that after the entry into force of the provisional constitution of 17 October 1992, accepting the thesis that the place of international law is fixed by the rank of the ratification law, the competence of the Court to investigate the conformity of domestic legislation with international conventions duly ratified by the President with the prior consent of the Parliament cannot be put in question.

However, the constitutional law of 1992 does not contain provisions dealing with the position of international agreements not subject to ratification (intergovernmental agreements) and of customary international law. In our opinion, the problem of the rank of agreements which can be ratified without the approval by the Parliament under domestic law does not exist as these agreements are not directly applicable. Certain problems can occur with respect of customary rules, the place of which is also not precisely defined (one can refer here to such problems like the state responsibility or state immunity). In order to consider this question, one should discuss recent jurisprudence of the supreme judicial organs.

The dispute on the place of international law within the Polish municipal legal system has remained unresolved for several years[7]. Among international legal writers a dominant view was that international law binds within the domestic system *ex proprio vigore*, without a necessity of transformation. This opinion has not been universally accepted (a neces-

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[5] Added by the amendment of 29 December 1989.

[6] So the decisions of the Constitutional Court of 7 January 1992 (Case K 8/91), Orzecznictwo Trybunału Konstytucyjnego (further quoted: OTK) 1992, Part One, at 82–83; and of 11 February 1992 (Case R.14/91), *ibid.*, at 140. It is interesting that in one of the recent judgments dealing with the problem of the inconsistency between the Polish legislation and the Covenant on Civil and Political Rights (decision of 20 October 1992, Case K.1/92, not yet published) the Court did not consider the basis of its competence to consider conformity of domestic law with international conventions, taking it for granted. At the moment when the decision was taken, the provisional constitution was not yet in force. The decision is also extremely important from the point of view of its substance. The case concerned so-called deportation detention, and indirectly the personal scope of application of the constitutional provisions on fundamental rights. The Court stated that these rights concern generally not only Polish nationals but also aliens staying in Poland.

[7] See the review by the present author, Relations between International Law and the Municipal Legal Systems of European Socialist States, 14 Rev. Socialist Law 106–111 (1988), and Z. Kedzia, The Place of Human Rights Treaties in the Polish Legal Order, 2 EJIL 131 (1991).

sity to transform international legal norms has been emphasized in such fields like transport law, international private law, and administrative law). Judicial practice was not clear but the analysis of the decision of the Supreme Court in the *Pannonia* case[8] that no transformation was needed, even if the Court decided that a publication of an agreement in the Official Journal was an indispensable requirement of its validity. The Supreme Court sanctioned also the priority of international agreements over municipal legal instruments under the constitution of 1952[9].

This clear situation was changed by judicial practice dealing with application of the Covenants on human rights and the ILO conventions on trade unions freedoms in the 1980s. In the judgment of 10 February 1981[10] the Supreme Court stated that Art. 22 of the Covenant on Civic and Political Rights and Art. 8 of the Covenant on Economic, Social and Cultural Rights did not create direct rights and obligations for individuals. The jurisprudence under the state of emergency was not unified. Some courts of the first instance were ready to accept a direct effect of international law (Covenants on human rights) within the municipal legal system while other courts including the Supreme Court rejected such a possibility[11]. Although by the registration of the independent trade union Solidarność on 10 November 1980 the Supreme Court recognized the direct applicability of the ILO conventions Nos. 87 and 98 on the right of employees to organize trade unions, in following years both courts and state agencies at different fora declared these conventions not directly applicable in the domestic legal system. The most important case dealing with the application of the ILO convention No. 87 and Art. 22 of the International Covenant on Civil and Political Rights was decided by the Supreme Court on 25 August 1987[12]. The case dealt with the provisions of the Polish Trade Unions Act of 8 October 1982 which restricted the number of trade unions legally acting in every enterprise. The Court based the decision on the restrictive interpretation of certain provisions of

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[8] Judgment of 5 October 1974; OSPiKA 1974, No. 1, at 6 et seq., with comments by K. Skubiszewski, 32 Państwo i Prawo (further quoted as PiP) Nos. 8–9, at 255 (1977). The case concerned a railway accident in Czechoslovakia in which Polish nationals were killed.

[9] Cf. the judgment in the case *Warta SA* v. *T.N. et al.*, of 18 May 1970, Orzecznictwo Sądu Najwyższego. Izba Cywilna (further quoted as OSNCP) 1971, No. 5, at 86.

[10] Case No.I PR 91/80 (not published).

[11] Cf. 37 PiP No .9, at 148 et seq. (1982) with comments by J. Kochanowski/T. de Virion, *ibid.*, No. 1, at 106–107 (with comments by S. Maurer).

[12] Case I PRZ 8/87; OSNCP 1987, No. 12, Item 199, at 38 et seq.

the constitution stating that judges are subordinated only to parliamentary statutes (such an interpretation was possible as the status of international legal norms within the municipal legal system was not clearly defined). As the respective ILO conventions were allegedly not clearly transformed into domestic law by the act of the Parliament, they could not be applied by domestic courts. The decision of the Court was criticized in the Polish legal literature[13].

The changing attitude of the judicial organs with respect of the openness of Polish municipal law towards international legal rules can be observed only since the political transformation in Poland.

First reference must be made to the decision of the Constitutional Court of 7 January 1992, quoted above. The case concerned the restrictions imposed by the law of 12 October 1990 upon the judicial control of certain administrative decisions undertaken with respect of the officers of the Border Guard. The Ombudsman and the President of the Administrative Court claimed the respective provisions of this act were contrary to the Constitution and Arts. 14 and 26 of the Covenant on Civil and Political Rights. As indicated above, the Court declared itself not competent to control the conformity of domestic regulations with international law because of the formulation of the Constitutional Court Act of 1985. The Court took the Covenant into account, however, as an element in the interpretation of the provisions of the Constitution, and stated that the Republic of Poland is bound by the Covenants (and international agreements in general) since their ratification. In effect, international agreements should be applied by the domestic courts *proprio vigore* – unless one can conclude that the agreement in question is not self-executing. As just stated above in considering the basis of the review of conformity of domestic legislation with international law, the Constitutional Court did not draw any distinction between the origin of rules valid within the Polish legal order. In fact, it adopted the monist approach towards this question.

Another decision of the Constitutional Court passed on 19 June 1992[14] concerned the inconsistency with the Constitution of the resolution of

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[13] E.g. T. Zieliński referred to the doctrinal opinions that no transformation was needed in order to apply international agreements which should gain priority over acts of domestic law, in: 32 Palestra 6/99–101 (1988); K. Skubiszewski indicated that even in the lack of clear judicial practice international agreements could be directly applied within the Polish municipal legal order, in: 44 PiP 6/135 et seq. (1989). See also Kedzia (note 7), 134 with further references.

[14] Case U.6/92, OTK 1992, Part One, at 196ff.

the lower chamber of the Parliament (Sejm) on the publication of the list of the members of Parliament collaborating with the former secret police. The Court decided that the resolution did not protect human dignity and therefore it was contrary to Art. 1 of the Constitution, Art. 23 of the Civil Code and Art. 17 of the Covenant on Civil and Political Rights. The Court did not refer to the basis of validity of the Covenant within Polish legal order, but it indicated that Art. 17 of the Covenant contained the direct and precise obligation on the protection against acts directed against the human dignity. The Court took the validity of the Covenant within the domestic legal system for granted.

Finally the decision of the Constitutional Court of 20 October 1992 concerning the detention for deportation (referred to above) brought certain interesting elements to the discussion on the place of international treaties in the Polish legal order. The Court stated that Art. 29 of the Aliens Act of 29 March 1963 as amended on 19 September 1991 expressly allowed the application of international agreements binding Poland if they regulate matters in another way than municipal law. So Art. 9.4 of the Covenant on Civil and Political Rights providing for the judicial control over the arrest could be applied as international law is valid *proprio vigore* within the Polish legal system. The conclusion of the Court in this respect is a little surprising because the scope of directly applicable provisions of the Covenant has been widely extended. In addition thereto, one could argue that the Covenant would be applied on the basis of the delegation by the Aliens Act. However, neither the ratification nor the delegation (renvoy) transformed the Covenant into municipal law.

We turn now to the series of decisions enacted by the Supreme Court. The decision of 30 May 1990 by the Civil Chamber of the Court[15] dealt with rights of persons resettled on the basis of the Polish-Soviet agreement of 25 March 1957 on the terms and conditions of repatriation of persons of Polish ethnic origin from the USSR to Poland. The agreement – contrary to former ones concluded in September 1944 with the governments of the Lithuanian, Byelorussian and Ukrainian Soviet Republics – did not provide for any prestations and services by the Polish State in return for property left in the former Polish Eastern territories annexed by the USSR and subsequently ceded by the Polish communist government. The Supreme Court decided that the situation of persons repatriated under the agreement could not be worse than that of persons repatriated earlier. Further it stated that the Polish government obliged itself to

[15] Case III CZP 1/90, OSNCP 1990, Nos. 10–11, Item 129, at 37ff.

pay reparations for property left in the former Eastern territories; through this obligation the agreements of 1944 were incorporated into the Polish municipal legal system and individuals could derive their rights directly from these agreements. The Court indicated Art. 88.1 of the law of 29 April 1985 on the administration of land and expropriation. According to the Court, this provision referred to the 1944 agreements while specifying principles of indemnities for property left in the Eastern territories. It meant that these agreements were incorporated into the municipal legal system[16].

The position of the Court is not clear as far as the relationship between international law and Polish municipal law is concerned. A reference (renvoy) to international treaties is well known in Polish law[17]. It is hard to decide whether a transformation of international law is necessary or whether it binds ex *proprio vigore* within the municipal legal system. The Court seems to accept the direct applicability of the 1944 agreements within Polish municipal law when it states that the 1957 agreement gives raise to individual rights. The problem is that their relevant provisions are not self-executing. The Court does not draw any distinction between direct effect and direct applicability of international law.

The judgment of the Penal and Military Chamber of the Supreme Court of 17 October 1991[18] was enacted in the extraordinary appeal proceeding[19] dealing with one of the cases indicated above and concerning the conformity of the decree on martial law with the Covenants on Human Rights. The judgment of 1991 pronounced the accused innocent and stated that the proclaiming of the decree on martial law was contrary to the principle *lex retro non agit*, as formulated in Art. 15 of the Covenant on Civil and Political Rights. The Covenant was ratified by Poland in 1977. According to the Court, the regulation of Art. 15 is operative within the municipal legal system, and as a self-executing norm it creates direct rights and obligations for individuals and state agencies.

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[16] It is interesting that the Supreme Court decided earlier (on 12 July 1961 and 22 February 1971) in two similar cases that the agreements concluded by Poland with her eastern neighbours could not have any effect in Polish municipal law and were not directly applicable. Cf. Skubiszewski (note 13), at 144.

[17] Cf. e.g. Art. 1096 of the civil procedure code, Art. 1.2 of the law of 12 November 1965 on conflicts of laws.

[18] Case II KRN 274/91; OSNKW 1992, Nos. 3–4, Item 19, at 8ff.

[19] I.e. a special proceeding allowing the review of valid and final judicial decisions.

On 10 January 1992 the Supreme Court passed the resolution dealing with the right of the unemployed persons to establish trade unions[20]. The Court decided after having analysed the provisions of the Covenants on Human Rights and respective ILO Conventions ratified by Poland (Nos. 87, 98, 135 and 151) that the right to coalition is restricted to the employed persons. One should emphasize that the Court stated that the provisions of the Covenants are not precise enough as to create direct rights for individuals – and it referred to the ILO Conventions. It is interesting also that the Court did not hesitate to investigate the conformity of the provisions of the Polish Trade Unions Act of 23 May 1991 with the respective international conventions recognizing also beyond any doubt the superiority of these conventions over the domestic regulations.

The recent Resolution of 7 Judges of the Supreme Court of 12 June 1992[21] brought new elements into the discussion on the place of international law within the domestic legal order. The case concerned certain aspects of international adoption and the relationship between the Polish Family Code and Convention on the Rights of the Child. The Court indicated that the place of international law within the Polish municipal legal order was disputable[22]. Even if the majority of authors maintained that international rules were valid *ex proprio vigore*, the contrary view could also be found both in the legal writing and judicial practice. The importance of the latter should diminish as the practice of the Parliament on the basis of Art. 32.g of the Constitution (mentioned above) required the approval of international agreements by the Parliament in the form of the ratification bill prior to the ratification by the President. However, as the Constitution did not clearly establish the principle of absolute priority of international law over the domestic statutes, international treaties ratified on the basis of the consent of the Parliament should have the rank of the statutes with all the effects thereof. In our opinion, this statement

[20] Case I PZP 63/91, OSNCP 1992, Nos. 7–8, Item 129, at 65 et seq.

[21] Case III CZP 48/92, OSNCP 1992, No. 10, Item 179, at 62ff.

[22] The same problem was emphasized by the Constitutional Court in its decision of 20 October 1992 on the deportation detention. The Court stated that the place of international law within the domestic legal order remains unclear and the delegation provisions of the Aliens Act did not resolve all disputable questions. The decision is surprising because the Constitutional Court is the only state agency competent to interpret legislation in force – it is hardly understandable why the Court did not use the opportunity to define the place of international law, even repeating its previous opinion on the *proprio vigore* validity of international law.

of the Supreme Court remains fully actual under the provisional constitution of 17 October 1992.[23]

Conclusions

The decisions of the Constitutional Court and Supreme Court confirm the principle formulated by the Polish international legal writing that international law is valid *ex proprio vigore* within Polish municipal law, and no transformation is needed (in certain aspects these decisions seem to support the monist approach to international/municipal law). However, it must be stressed that such a solution has not been expressly formulated in the provisions of the constitutional law in force. It is worth emphasizing that the decisions of both Courts are in general consistent and they deal not only with the internal validity of human rights law but also with other international legal norms. The stance of the Court remains valid under the constitutional law of 17 October 1992. It is disputable whether the Supreme Court was right when it decided (in the judgment of 30 May 1990) that not self-executing norms are directly valid. *De jure ferendo* the principle of direct effect of international law should be introduced into a new Polish constitution. The two drafts prepared by the constitutional commissions of the two chambers of the Parliament in 1991 stated unanimously that international agreements duly ratified enjoy priority over the laws enacted by the Parliament and they should be applied by all courts and other state agencies. These and other draft constitutions (private drafts) have not been discussed by the Parliament. After its dissolution the elaborating of the new constitution has been suspended. However, the newly elected Parliament should – according to the statements of representatives of a new majority – treat the passing of a new constitution as a priority task[24].

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[23] The Court also ruled that the general principle of the superior interest of the child formulated in Art. 21 of the said Convention was directly applicable and constitutes the guideline for the interpretation and implementation of the Convention by the courts and other state agencies.

[24] Cf. lately A. Wasilkowski, The Position of International Legal Norms within the Domestic Legal Order and the Issue of Constitutionality, in: M. Piechowiak, R. Hliwa (eds.), The Draft Polish Constitution 1991 in the Light of Comparative Law (1993), at 108ff.; M. Masternak-Kubicka, Stosunek prawa miedzynarodowego do prawa krajowego w projektach konstytucji RP (The Relationship between International Law and Domestic Law in the Draft Constitutions of the Republic of Poland), 47 PiP 8/81ff. (1992); A. Michalska/J. Sandorski, Remarks on the Place of International Human Rights in the Constitution of the Republic of Poland, 19 PolYBIL 101ff. (1991/92).

Another conclusion can also be drawn from the judgment of 17 October 1991. The Court has recognized the priority of an earlier international treaty (the Covenant on Civil and Political Rights) over a later instrument of municipal law (the decree on martial law). This conclusion is consistent with Polish judicial practice. However, it is not clear whether it remains actual under the constitutional law of 1992 (we have just indicated that international treaties and statutes enacted by the Parliament are of the same rank). The decision of the Supreme Court can be regarded as an important element of the judicial practice confirming the openess of Polish municipal law towards international law. However, the priority of international agreements over the statutes of Parliament should be *de lege ferenda* expressly specified in a future constitution. The same principle should be formulated with respect to customary international law (as there is no hierarchy of norms in international law, and international agreements are placed on the same level as customary rules). The principle of priority of international treaties should be confirmed in the jurisprudence of the Constitutional Court.