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**THE COMMUNITY OF VALUES  
IN THE EUROPEAN UNION FROM THE PERSPECTIVE  
OF ARTICLE 90(1) OF THE CONSTITUTION OF THE  
REPUBLIC OF POLAND\***

**I. ARTICLE 90(1) OF THE CONSTITUTION OF  
THE REPUBLIC OF POLAND AS THE BASIS FOR POLAND'S  
ACCESSION TO THE EUROPEAN UNION**

Already in the course of work on the draft of the Constitution of the Republic of Poland currently in force, it was deemed necessary to include in it provisions enabling Poland's accession to the European Union. It was rightly assumed that the integrating ('supranational') character of the European Union, which distinguished it from classical international organisations, required that a provision reflecting the essence of EU accession be contained in the Constitution. This essence is the effect of the accession agreement which involves the transfer of competences of state authorities outside the constitutional apparatus of the State. In consequence, pursuant to Article 90(1) of the Constitution of the Republic of Poland, which became the constitutional basis for Poland's accession to the European Union, 'The Republic of Poland may, by virtue of international agreements, delegate to an international organisation or an international institution the competence of organs of State authority in relation to certain matters.' Both the content of and the procedure for such a transfer of competences under Article 90 were comprehensively analysed in the doctrine of constitutional law and the case-law of the Constitutional Tribunal. In this study, the emphasis will be on the implications of the provision of the constitutional Article 90(1) in the axiological sphere.

The first aspect that was highlighted in discussions on the draft and in early comments was that the regulation failed to indicate not only the name, but also the characteristics of the organisation or body to which competences may be delegated. The solution adopted in Article 23 of the German Basic Law allows the Federal Republic of Germany to participate in the development of the EU on condition that the latter respects the principles of democracy, the rule of law, social and federal principles and the principle of subsidiarity, and that it

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guarantees the protection of fundamental rights at a level comparable to the (German) Basic Law.

The interpretation of Article 90(1) of the Constitution of the Republic of Poland goes in a similar direction. Despite the lack in the provision of the characteristic features of entities to which the competences are to be transferred, it is not without importance what a particular international organisation or body represents in the axiological sphere. Poland cannot join an organisation whose activities would be contrary to the principles of the political system of the Republic of Poland expressed in the first chapter of the Constitution. These principles define the directions and the legal framework of the internal and external activities of the State. Therefore, one should agree with the doctrine that there must be a common system of universal values, such as a democratic system and respect for human rights, linking a given international organisation or body with the Republic of Poland. This excludes the possibility of delegating powers to an organisation whose activities are contrary to the principle of the rule of law proclaimed in the Constitution, universal human rights or international law that is binding in Poland.<sup>1</sup>

However, this is not all, since the question arises of what Poland should do if an organisation (including, of course, the EU) betrayed the principles of which this common system of values is made up. Article 90 of the Constitution of the Republic of Poland does not provide for a withdrawal, but most of the doctrine envisaged this possibility on the grounds of Article 56 of the Vienna Convention on the Law of Treaties.<sup>2</sup> As is well known today, the procedure for withdrawing from the Union is explicitly provided for in Article 50 of the Treaty on European Union.

In this situation, the regulatory gap in national law should be addressed. This is usually done using a construction of what is known as a 'contrary act' (see the German Federal Constitutional Court judgment of 12 October 1993 in the Brunner case), the adoption of which would result in withdrawal from the European Union (an international organisation) and the return of the competences previously transferred, back to the Republic of Poland. Such a complementary provision (addendum) to the Constitution was introduced into the Act on international agreements. According to Article 22a(2) of the Act, the submission to the President of the Republic of Poland of a draft decision to withdraw from the European Union requires prior consent granted by statute.<sup>3</sup>

This solution does not seem to be the right one. First of all, there is no rational argument for adopting a contrary act in a procedure other than that stipulated for adopting a specific statute to transfer competences (delegate powers), whose conditions are laid down in Article 90(2) and Article 90 (3) of the Constitution, and are much more difficult to fulfil in comparison to the requirements necessary for

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<sup>1</sup> Cf. K. Działocha, Artykuł 90, in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 1, Warsaw 1999: 5.

<sup>2</sup> Article 56(1) of the Vienna Convention on the Law of Treaties provides that: 'A Treaty which does not contain a provision on its expiry and does not provide for its termination or withdrawal from it shall not be subject to termination or withdrawal from it, unless: (a) it is established that the parties intended to allow the possibility of termination or withdrawal, or (b) the right of termination or withdrawal may be presumed to be in the nature of the Treaty.'

<sup>3</sup> Act on international agreements of 14 April 2000, Journal of Law of the Republic of Poland [JL RP] 2000, no. 39, item 443 as amended.

adopting an ordinary statute. The political consequences of withdrawal from the European Union are comparable to those resulting from accession to it. A simple majority of votes in the Sejm and Senate necessary for the adoption of a statute giving consent to the renunciation of international agreements (Article 89 of the Constitution), cannot replace a qualified majority of two thirds of votes in the Sejm and Senate or a referendum. The most serious seems to be the substantive argument. According to Article 90 (2) and (3), it is the Nation which decides by a referendum, or through its representatives requiring a qualified majority of two thirds in each of the chambers, that the systems of values in the Republic of Poland and those in the European Union are common to a degree allowing Poland to become a member of the Union with all the consequences that this entails. Can a simple majority, enough to pass a law, make a binding statement proclaiming that the community of values no longer exists, in spite of the fact that neither the provisions of the EU treaties nor the Constitution of the Republic of Poland have changed? It may happen, of course, that in the course of membership, the EU's or Poland's practice will depart from the understanding of the treaties or the Constitution that existed at the time of accession. Then, bearing in mind the constitutional status of such an act, it is all the more obvious that it is the Nation that has the right to make a decision subject to a special procedure, protecting its sovereignty under Article 90, and not by a through simple parliamentary majority. A similar solution was proposed by a team of scholars appointed by the Speaker of the Sejm in 2010.<sup>4</sup>

## II. THE NATURE OF THE OBLIGATIONS ARISING AS A CONSEQUENCE OF THE APPLICATION OF ARTICLE 90(1) OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

The second important point to take into account is that Article 90(1) requires the transfer of competences to be based on an international treaty. In the case of the accession to the EU, 'the conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State' (Article 49 of the Treaty on European Union<sup>5</sup> a similar situation was true when Poland joined the EU.

The need to integrate common values into the operation of the Union was stressed in December 2001 in the Declaration of the European Council of Laeken on the future of the EU. It was then considered appropriate to point out that: 'The Union is only open to those States that uphold fundamental values such as free elections, respect for minority rights and respect for the rule of law. [...] The existence of the European Union is sanctioned by its democratic values, the objectives it pursues and the powers and instruments at its disposal.'<sup>6</sup>

<sup>4</sup> Cf. *Zmiany w Konstytucji RP dotyczące członkostwa Polski w Unii Europejskiej. Dokumenty z prac zespołu naukowego powołanego przez Marszałka Sejmu*, Warsaw 2010.

<sup>5</sup> O.J. 2012 C 326/13.

<sup>6</sup> The European Commission Meeting in Laeken on 14–15 December 2001 Conclusions from the presidency, <<http://oide.sejm.gov.pl/oide/images/files/dokumenty/konkluzje/laeken200112.pdf>>.

When commenting on Article 6(1) of the pre-Lisbon Treaty on European Union, which reviewed the principles on which the Union was founded (freedoms, democracy, respect for human rights and fundamental freedoms and the rule of law), Cezary Mik noted that this provision had a twofold role. It listed the fundamental values that constituted the axiological foundation of the Union (known as the European identity) and pointed out at the same time that these values were the common values regarded as the binding agent of EU Member States.<sup>7</sup> Article 1 of the Accession Treaty provided that Poland (as well as other acceding countries) was to become a member of the EU and a party to the Treaties on which the Union is founded. Article 90 was also used for the ratification of the Lisbon Treaty.

The present Treaty on European Union (TEU) states in its preamble that its signatories were inspired by ‘the cultural, religious and humanist heritage of Europe, from which the universal values of inviolable and inalienable human rights as well as freedom, democracy, equality and the rule of law derive.’ It also reaffirmed the ‘commitment to the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.’

Of key importance is, of course, Article 2 TEU, according to which: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.’

The Charter of Fundamental Rights of the EU, which has the same legal value as the EU Treaties, states in the preamble that the Union is based on the principles of democracy (recital 2) whilst the Charter itself contains a catalogue of freedoms which undoubtedly meet the definition of a democratic standard (Article 6—the right to personal security, Article 7—respect for private and family life, Article 8—personal data protection, Article 10—freedom of conscience and religion, Article 11—freedom of expression and information, Article 12—freedom of assembly and of association).

### **III. THE OBLIGATION OF THE REPUBLIC OF POLAND TO RESPECT THE VALUES COMMON TO EUROPEAN UNION MEMBER STATES**

The question arises as to whether the Polish constitutional solutions and the practice resulting from them make it possible for Poland to fulfil the obligation following from the EU membership to respect democratic values common to the Member States.<sup>8</sup>

<sup>7</sup> Cf. C. Mik, W. Czaplinski, *Traktat o Unii Europejskiej. Komentarz*, Warsaw 2005: 69.

<sup>8</sup> For more see K. Wójtowicz, *Standardy demokratyczne Unii Europejskiej a Konstytucja RP – doświadczenia praktyki ustrojowej*, in: J. Jaskiernia, K. Spryszak (eds.), *Dwadzieścia lat obowiązywania Konstytucji RP. Polska myśl konstytucyjna a międzynarodowe standardy demokratyczne*, Toruń 2017.

If today we consider democracy to be a distinguishing feature of Western civilisation,<sup>9</sup> then we should bear in mind its liberal-democratic understanding which presupposes the existence of constitutional mechanisms for controlling power, the independence of the courts and of the judiciary,<sup>10</sup> respect for the rule of law, and human rights which also includes the rights of minorities.<sup>11</sup> In this sense, the participation of citizens in lawmaking, or, more broadly, in voting, that is essential in a democratic system, may be considered a right and effective way of exercising political power only if it is exercised freely, which means that an individual who votes through the ballot box enjoys freedom of conscience, the freedom of the press, of assembly and of association, in other words the freedoms that form the essence of a liberal state.<sup>12</sup>

A democratic State is not only one in which all its bodies operate efficiently and the law is respected by these bodies as well as by citizens. It is too, a State governed by the rule of law based on the principle of the separation of powers. None of the powers in a democratic State under the rule of law, nor any of the institutions existing in it, may treat the State as a tool for achieving their objectives, but as a measure of their own behaviour. A democratic rule of law [...] is a State in which there exists an autonomous system of law based on the Constitution, established in a democratic process, equipped with a guarantee of the observance and application of the law, and whose norms are identical or highly convergent with a generally accepted system of values.<sup>13</sup>

#### IV. THE CONSEQUENCES OF A MEMBER STATE'S FAILURE TO RESPECT THE COMMON VALUES IN THE LIGHT OF THE UNION TREATIES

The enumeration in Article 2 TEU of the common values of the Member States upon which the Union is founded is not a mere declaration impossible to enforce. On the contrary, these values must be respected and not only by the European Union and its institutions, but by all its Member States as well. This obligation is confirmed in particular in the content of two Treaty provisions. One concerns the pre-accession conditions to be met by a State aspiring to European Union membership. Pursuant to Article 49 TEU: 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union [...]. The conditions of eligibility agreed upon by the European Council shall be taken into account.'

In this connection, let us recall that as far back as 1961 the European Parliament, in its report on future accessions, stressed that candidate countries

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<sup>9</sup> Cf. C. Mik, W. Czapliński, op. cit.: 72.

<sup>10</sup> Cf. G. Sartori, *Teoria demokracji*, Warsaw 1994: 48–481.

<sup>11</sup> Cf. A. Rosas, L. Armati, *EU Constitutional Law. An Introduction*, 2nd edn., Hart Publishing, Oxford 2012: 128.

<sup>12</sup> Cf. N. Bobbio, *Liberalizm i demokracja*, Cracow 1998: 29.

<sup>13</sup> J. Sobczak, Art. 11, in: A. Wróbel (ed.), *Karta praw podstawowych Unii Europejskiej. Komentarz*, Warsaw 2013: 456–457.

should be required to respect democratic practices.<sup>14</sup> In 1997, the European Council clarified the content of a democratic standard in the candidate States. These are: power based on the principle of representation, an accountable executive, public authorities acting in accordance with the Constitution and laws, the separation of powers, free and fair elections held at reasonable intervals.<sup>15</sup> The fulfilment of these conditions is determined by the European Council in a special procedure, in which the Council expresses a unanimous opinion having consulted the European Commission and having obtained the consent of the European Parliament. It is therefore a political assessment and does not fall within the jurisdiction of the Court of Justice of the European Union.<sup>16</sup>

Poland became a member of the European Union on 1 May 2004, which means that it had then met the necessary requirements, including respect for democracy. And not only because the Constitution of the Republic of Poland states in Article 2 that: 'The Republic of Poland is a democratic state ruled by law' [...] but first of all, because the Polish constitutional practice, expressed primarily in the existing case-law of the Constitutional Tribunal, has given the concept of democracy a content consistent with the elements that make up the EU democratic standard. The Court recognised the principle of representation as the basis of a democratic state, stressing at the same time that in such a state institutions and democratic procedures ought to be shaped in such a way as to respect the requirements of the rule of law which, in turn, must meet certain substantive features. These include the separation of powers, the political freedoms of individuals, political pluralism and the protection of minorities. In particular, the Constitutional Tribunal emphasised respect for the principle of separation of powers, stating that in relationships between the legislative and the executive bodies different forms of mutual interactions and collaboration are possible and that there may even exist an area in which the powers of both authorities 'intersect' or 'overlap.' In contrast, the relations between the judiciary and the other two powers must be based on the principle of 'separation'. The indispensable element of the separation of powers is the independence of courts and the independence of the judges.<sup>17</sup>

The fact that a country meets the accession criteria does not mean that, once it becomes a member, it will continue to respect the common values. Should it violate them, the procedure laid down in Article 7 TEU may be implemented. It provides, *inter alia*, that on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 of

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<sup>14</sup> Cf. Report on the Political and Institutional Aspects of Accession to or Association with the Community, 19 December 1961, in: N. Ghazaryan, *The European Neighborhood Policy and the Democratic Values of the EU: A Legal Analysis*, Oxford–Portland, Oregon, 2014: 118.

<sup>15</sup> Cf. *Council Conclusions of 29 April 1997 on the application of conditionality with a view to developing a coherent EU strategy for its relations with the countries in the region*, in: *ibidem*: 119.

<sup>16</sup> This was brought to public attention by C. Kaddous, 'The European Union's common values and national identities: convergence or contradictions', in: *The EU between 'an Ever Closer Union' and the Inalienable Policy Domains of Member States*, Baden-Baden 2014: 85.

<sup>17</sup> Cf. P. Tuleja, Article 2, in: *Konstytucja RP*, vol. 1: *Komentarz art. 1-86*, Warsaw 2016: 237–240 and the case law of the Constitutional Tribunal discussed there.

the TEU. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations. Following this conclusion, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.

These proceedings are, as in the case of Article 49 TEU, of a political nature, except that, pursuant to Article 269 of the Treaty on the Functioning of the European Union (TFEU), it is the Court of Justice of the EU that has jurisdiction to rule on the legality of an act adopted by the European Council or the Council on the basis of Article 7, but only at the request of the Member State concerned and only with regard to compliance with the purely procedural provisions provided for in that Article.

In its Communication of 11 March 2014 ‘A new EU Framework to Strengthen Rule of Law’ the European Commission stressed, recalling, *inter alia*, the case law of the EU Court of Justice and the European Court of Human Rights, that ‘respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and *vice versa*. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process.’<sup>18</sup>

In turn, on 25 October 2016, pursuant to the provision of Article 295 TFEU, the European Parliament adopted a resolution on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights. It contains a request addressed to the Commission to submit by September 2017 a draft EU Pact for democracy, the rule of law and fundamental rights. This pact, in the form of an interinstitutional agreement establishing cooperation between the institutions of the Union and the Member States within the framework of Article 7 TEU, is to address the definition, development, monitoring and enforcement of the values and principles set out in Article 2 TEU (preventive and corrective element of Article 7 TEU.) It is intended to apply to all Member States, as well as to the three main EU institutions, and to combine in one single EU instrument the existing Commission framework concerning the rule of law and the Council dialogue on the rule of law.<sup>19</sup>

We are therefore seeing the institutions of the Union making efforts to ensure that Member States fulfil their Treaty obligations to respect the values on which the Union is founded.

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<sup>18</sup> *Communication from the Commission to the European Parliament and the Council, Strasbourg*, 11 March 2014. COM(2014)158 final: 4–5.

<sup>19</sup> *Mechanizmy na rzecz przestrzegania praworządności w Unii Europejskiej*, as at 22 February 2017, European Information and Documentation Centre, Sejm Library, OIDE materials: 4.

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In the sphere of values, the accession to the EU made pursuant to Article 90(1) of the Constitution of the Republic of Poland was consistent with the objective of this provision and had met the conditions for its application. Also afterwards, during the period of EU membership, Polish political practice did not deviate from the EU axiological standards. The way of understanding a democratic State of law, referred to in Article 2 of the Constitution of the Republic of Poland, was consistent with the content of the common values of the Member States that, as defined in Article 2 of the TEU, constitute the political foundation of the Union. The essence of the system of these common values is that the implementation by public authorities of the citizens' will expressed in free elections takes place with respect for the principles of the rule of law, which consist primarily of: the separation of powers with a particular emphasis on the independence of courts and judges, political pluralism, protection of individual rights, and respect for minority rights.

A failure to observe the values referred to in Article 2 of the Constitution of the Republic of Poland and Article 2 of the TEU would undermine the purpose and content of Article 90(1) of the Constitution and, in the light of the EU law the provisions of which are binding the Republic of Poland, could expose Poland to the control mechanism provided for in Article 7 of the TEU.

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THE COMMUNITY OF VALUES IN THE EUROPEAN UNION FROM THE PERSPECTIVE  
OF ARTICLE 90(1) OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

S u m m a r y

In the field of values, the accession to the European Union carried out pursuant to Article 90(1) of the Constitution of the Republic of Poland was in line with the purpose of this article and met the conditions for its application. Also later, already during membership in the European Union, Polish political practice did not differ from EU axiological standards. The understanding of a democratic State governed by the rule of law as referred to in Article 2 of the Constitution was consistent with the content of values common to the Member States, which, in accordance with Article 2 of the TEU, constituted the political foundation of the Union. The essence of the system of these common values is that the fulfilment by public authorities of the citizens' will expressed in free elections is carried out with respect for the principles of the rule of law. These principles include mainly: the separation of powers, with particular regard to the independence of the courts and the independence of judges, political pluralism, protection of individual rights and respect for minority rights. Failure to observe the values referred to in Article 2 of the Constitution and Article 2 of the TEU would undermine the purpose and content of Article 90(1) of the Constitution. According to the Constitution, and in the light of EU law binding on Poland, it could expose Poland to the control mechanism provided for in Article 7 TEU.