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THE DEFINITION OF INTERNATIONAL STANDARDS AND TREATIES AS THEIR SOURCES IN THE LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 2 APRIL 1997

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Abstract in original language
The Polish Constitution of April 2 ,1997 is the first polish constitutional act, which in compound way defines meaning of international law in domestic law system. It generates the systemic base of binding force of international treaties. New constitutional order is open and friendly to the international law. Force of the ratified international agreements and their position in the hierarchy of sources of law is strong and privileged, since in constitution are mechanisms like that set by article 91par.2: international agreement ratified upon prior consent granted by statute have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

Key words in original language
International standard; International treaty; The Constitution of the Republic of Poland of April 2,1997.

The term "international (European) standards" is not a strictly legal term, which prevents it from being exhaustively defined. The definition of the term "standard" is rather artificial. However, this does not make it useless since determining whether a norm, principle, or a set of norms is a standard may not only facilitate their classification but also allow for their evaluation. According to Z. Kmieciak, "references to European standards may serve the purpose of formulating opinions and proposals regarding the whole system of law, its individual branches, specific sets of regulations, or even their components, such as individual legal provisions.” [1]

In the encyclopedic sense, in the Polish language the term “standard” means “a type, a model, an example; every defined measure of quantity, quality, or value, such as certain average properties of a given product.”.[2] The dictionary of the Polish language similarly states that a standard is "an average norm, an average type, a model, a product that meets certain requirements, a template."[3] An analysis of the definition of the term

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[1] Z.Kmieciak: „Postępowanie administracyjne w świetle standardów administracyjnych”, Warszawa 1997, s.19.

[2] Mała Encyklopedia powszechna PWN 1969 s.997

[3] Słownik języka polskiego PWN Warszawa 1981 t.3 s. 318

"standard" in the English language shows that the term has the same meaning, namely something that is defined by an authority, a custom, or that is generally considered to be a model, and example to follow, such as binding rules or principles, or means to determine quantity, value, quality, etc.[4] What is considered a standard is something that has a certain value or some attributes that are required by law or determined by a custom. These fairly similar definitions show that a standard is a certain average model, a defining principle imposed by law, or a customary quality of an object.

An effort to transfer this general definition into the legal domain in search of a definition of international legal standards leads to the conclusion that they can be best defined as provisions that are certain model and average solutions which exist in a given international community. Of key importance in determining whether a given institution should be considered as a standard is to define its desirable attributes. Certainly, the key quality should be its universal character.[5] The regulations must be taken into account in such sources of international law as documents and common law and must be reflected in the domestic legal orders of the various states, often being one of the sources of such a standard, as the so-called firm traditions, in the member states of a given community (e.g. member states of the Council of Europe). There is a certain feedback mechanism where the states form certain international standards, which in turn influence the lawmakers and lead them to follow supranational trends whenever it is reasonable and possible. This results in the legal orders of members of a given international community becoming more and more similar. The area of influence of a given standard is the deciding factor in determining whether it is a universal (global) standard or a regional (e.g. European) standard. Thus, what makes a standard a European standard is its presence in the laws of international organizations covering Europe and in domestic legal orders of European states. The issue of uniformity of legal orders is linked to another attribute of international standards, namely the adequate level of generality of principles that constitute a standard. The attribute of generality of principles of international standards is related to the need to respect the differences between the systems of the individual states that share the same culture. An effort to find a common denominator requires certain generalizations, which leads to flexible solutions. Thus, standards are most often legal principles, as opposed to detailed norms, since recognizing a given principle as a standard usually leaves the lawmakers in the individual states much

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[4] Webster's Third New International Dictionary, Merriam-Webster 1993, s.2223: "something that is established by authority, custom or general consent as a model or example to be followed (…), standard applies to any authoritative rule, principle or measure used to determine the quantity, weight or extent, or esp. the value, quality, level or degree of a thing…"

[5] M.Piechowiak: „Powszechność praw człowieka. Zagadnienia filozoficznoprawne" w: „O prawach człowieka. W podwójną rocznicę paktów. Księga pamiątkowa w hołdzie Profesor Annie Michalskiej", Toruń 1996, s. 67.

discretion in selecting the instruments aimed at implementing the principle. What is also important is the selection of carriers of a given standards. Solutions that have a firm position in the doctrine, are reflected in the legal orders of the individual countries, and are recognized in the judicial decisions are usually based on binding legal documents. However, standards in statu nascendi usually appear in documents of declarative nature. Therefore, one can say that the a standard is the outcome of a certain process and cannot be regarded as a static phenomenon (institution). Thus, what is important in determining a standard's character is its source. According to T. Jasudowicz, standards can be divided into two categories: binding standards and recommended standards. The former are a part of the so-called hard law, which absolutely binds the state signatories of a given international treaty, while the sources of the latter should be looked for among soft-laws, such as recommendations, resolutions, and various declarations.[6]

Thus sources of standards can be defined as external outcomes of certain processes which have led to the creation of a given legal norm. R. Bierzanek[7] distinguishes formal and material sources of international law. The material sources are the forces that create legal norms, whereas the formal sources of law are the outcomes of the actions of these forces. Such material sources of European standards (which with regards to international law are referred to as internal, real, or more profound) remain outside of the scope of legal analysis, since the effects of these forces are non-formal and driven by such factors as politics, philosophy, and history. What remains of interest to the science of law is the formal sources of European standards.

As to the importance of European standards to domestic legal order, of great significance is the principle that "the state may not refer to domestic regulations to repudiate obligations imposed by international law." A state that takes an international obligation must make relevant modifications to its legal system and, while the relations between subjects of international law are governed by international law, the internal relations of a state are governed by domestic law which is affected by the relevant international legal norm. A state is free to choose the method that it uses to fulfill its obligations domestically. Yet, the decisive factor here is the practice of the state, which is greatly influenced by judicial decisions which, in turn, may

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[6] T.Jasudowicz: „Europejskie standardy bioetyczne. Wybór materiałów." Wstęp, Toruń 1998, s.II. Autor przypomina, iż owe standardy zalecane nie dysponują „formalnie mocą obowiązującą, stanowiąc właśnie li tylko zalecenia. Zarazem lekceważyć ich nie wolno, zważywszy, że- w praktyce, a i wedle litery swojej- stanowią bardzo dogodny i wystarczająco skuteczny sposób harmonizowania i ujednolicania prawa i praktyki krajowej Państw Członkowskich Rady Europy, zajmując istotne miejsce w procesie kształtowania mniej lub bardziej jednolitych standardów europejskich."

[7] R.Bierżanek w R.Bierżanek, J.Symonides: „Prawo międzynarodowe publiczne", Warszawa 1995, s. 68-69.

not only use, develop, and supplement the principles set by lawmakers but may also make up for the shortcomings if the lawmakers have not done their duties or have done them inadequately." [8]

Nowadays, the issue of thorough performance of international obligations grows in importance along with the growth of the area of interest of the international community in matters that used to be the domain of domestic law. A good object of analysis is the relations between the state and its citizens, which, besides domestic laws of states, is ever more influenced by international standards, as shown by the concept of the right to good administration which is currently taking shape. The infiltration of international standards is particularly dynamic in the area of protection of human rights as domestic laws more and more often adopt structures that continuously improve the position of individuals. With regards to Poland's ratification of the European Convention on Human Rights, E. Łętowska stated that it leads to "the introduction into the domestic law of the individualistic and liberal axiology of the convention, which highlights the fundamental rights and freedoms of individuals as a specially protected zone which the government may interfere with only in the narrow scopes defined in the Convention."[9]

The issue of including international standards in domestic legal orders is of particular importance in countries of the former Soviet block due to the pressure by the international public opinion which is or has been institutionalized in the case of countries aspiring to become members of the Council of Europe or the European Union.[10]

Implementation of a given international standard has a visible impact on the lawmakers who lose their discretion in creating laws. The legislator is required to formulate laws is such a way that they conform to relevant standards. What is more, if the international community considers a given standard to be one of the principles of a democratic state, the lawmakers are required to even follow its spirit in shaping the legal order of their states. The fact that an international standard is reflected in the legal order of a state means that it exerts influence not only on the lawmakers but also directly on the bodies which use the law, be they administrative or court

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[8] B.Banaszak: „Prawo konstytucyjne", Warszawa 2004, s.144.

[9] E.Łętowska: „Konwencja Europejska w Polsce i nowe myślenie o prawie", Kwartalnik Prawa Prywatnego 1992, nr 1-5, s.149.

[10] D.J. Galligan: „Administrative justice in the new european democracies : case studies of by administrative law and process in Bulgaria, Estonia, Hungary, Poland and Ukraine", red. D.J.Galligan, R.H. Langan II, C.S. Nicandrou, Oxford: Constitutional and Legislative Policy Institute: Centre for Socio-Legal Studies, 1998, s.532. Badając prawo administracyjne w tych państwach europejskich, zauważa on znaczącą rolę jaką ogrywa proces internacjonalizacji prawa administracyjnego, jako jeden z podstawowych czynników kształtujących kierunki rozwoju prawa administracyjnego tych państw.

bodies, which implies the need to each time refer to its content. Thus, the standard becomes an axiological criterion for the value system in a given legal order.

The key to defining the significance of a given standard in a domestic legal system and the "strength" of its influence is to determine the place of its carriers in this legal order.

The Constitution of the Republic of Poland of 2 April 1997 is the first Polish constitution to systematize the sources of law and, at the same time, to define fairly comprehensively the significance of international law in Poland's internal relations.[11] According to A. Wasilkowski, "the Constitution of 2 April 1997 is open to international law and friendly towards it."[12]

One of the key provisions which define the place of European standards in the Polish legal order is art. 9 of the Constitution which says that "the Republic of Poland observes the international law which is binding to it." This principle constitutes a declaration of a friendly attitude of the Polish legal order towards international law (by stating that the binding force of international law is beyond constitutional provisions), as reflected in the preamble of the Constitution which mentions "the need to cooperate with all countries for the good of the Human Family."[13] This confirms the aforementioned customary and treaty-based norm which prohibits justifying breaches of conventional international law by referring to the fact that the domestic law provides contradicting provisions.[14]

In my opinion, the statement that Poland "observes the [...] law" must be understood as meaning that Poland not only performs its duties as a subject of international law but also that international law serves as a legal basis for decisions of public authorities in Poland's internal relations.[15] The subjective scope of the provision is also important. The Polish legal doctrine

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[11] Patrz art.49 Konstytucji marcowej z 1921 r. i art.15 Małej Konstytucji z 1947 r.

[12] A.Wasilkowski: „Miejsce umów międzynarodowych wedle nowej Konstytucji RP (uwagi wstępne)", Przegląd Legislacyjny 1997, nr 2, s.30.

[13] O art.9 jako wyrażającym zasadę generalnej przychylności polskiego wewnętrznego porządku prawnego wobec prawa międzynarodowego wiążącego RP patrz m.in. R.Szafarz: „Skuteczność norm prawa międzynarodowego w prawie wewnętrznym w świetle nowej Konstytucji", Państwo i Prawo, 1/1998, s.4, A.Wasilkowski: „Miejsce umów międzynarodowych wedle nowej Konstytucji RP (uwagi wstępne)," Przegląd Legislacyjny nr 2/1997, s.30.

[14] Patrz K.Skubiszewski: "Przyszła Konstytucja RP a miejsce prawa międzynarodowego w krajowym porządku prawnym" PIP 1994, nr 3, M.Masternak-Kubiak: „Umowa międzynarodowa w prawie konstytucyjnym", Warszawa 1997, s.16, R.Kwiecień: „Miejsce umów międzynarodowych w porządku prawnym państwa polskiego," Warszawa 2000, s.116

[15] Patrz także C.Banasiński: „Pozycja prawa międzynarodowego w krajowym porządku prawnym (w świetle Konstytucji z 1997 r.), Przegląd Prawa Europejskiego 1997, nr 2, s.7.

emphasizes the fact that this principle covers all the sources of international law, i.e. not only international treaties but also universally recognized principles of international law and international customs.[16] The fact that the Constitution does not include provisions that clearly define their importance in Poland's legal system does not mean that Poland is not required to observe non-conventional norms of international law.

As for the meaning of art. 9 of the Constitution, the Supreme Administrative Court has expressed its opinion that art. 9 comprises a directive to state organs to create acts of domestic law in accordance to the totality of international law and to properly construe the domestic law so as to assure the greatest extent of its conformity to the content of international law. Moreover, the court emphasized that courts are free to use art. 9 of the Constitution directly, also with regards to sources of international law other than ratified treaties.[17] Similarly, the Constitutional Tribunal has decided that art. 9 of the Constitution is a provision which expresses a principle defining the system of government that is predominantly addressed to the lawmakers and defines the way they may use their competences to regulate certain spheres of public life. At the same time, the Constitutional Tribunal did not exclude the possibility of adopting the principle expressed in art. 9 as a stand-alone constitutional model for controlling a normative act.[18]

According to art. 87(1) of the Constitution, sources of universally binding law include only ratified international treaties which, once promulgated, become a part of the domestic legal order and are used directly, unless their use requires prior adoption of a statute (art. 91 (1)). Articles 89 and 90 divide treaties into three types. The first type is treaties which transfer competences of the national government in some matters to international organizations or organs, which are ratified with prior consent granted in the form of a statute adopted in accordance with a special procedure (art. 90 (2)) or in a referendum (art. 90 (3)). The second type is treaties ratified with prior consent granted in a statute adopted in accordance with a regular legislative procedure.[19] The third type of international treaties which are

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[16] Tak też m.in. A.Wasilkowski: „Miejsce umów..." s.31, podobnie S.Biernat: „Źródła prawa w Konstytucji Rzeczypospolitej Polskiej" w: Administracja publiczna u progu XXI wieku. Prace dedykowane prof. zw. dr hab. Janowi Szreniawskiemu z okazji Jubileuszu 45-lecia pracy naukowej, Przemyśl 2000, s.59, L.Garlicki: „Polskie prawo konstytucyjne", Warszawa 2005, s.145, W.Czapliński: „Wzajemny stosunek prawa międzynarodowego i polskiego prawa wewnętrznego w świetle przepisów Konstytucji z 1997 roku oraz orzecznictwa" w: „Konstytucyjne podstawy systemu prawa", red. M.Wyrzykowski, Warszawa 2001. Jak przypomina M.Masternak-Kubiak: „Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej", Kraków 2003, s.225, „podczas prac nad konstytucją utrzymywał się pogląd, by wymienić w art.9 elementy prawa międzynarodowego, szczególnie powszechne zasady prawa międzynarodowego", Patrz Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego nr XXI, s.112-113.

[17] Orzeczenie NSA z 26.8.99, V SA 708/99, OSP 2000/9/134.

[18] Postanowienie TK z 10.8.2001.08, Ts 56/01, OTK 2001/8/28.

[19] Zgodnie z art.241 ust.1 Konstytucji za umowy ratyfikowane za uprzednią zgodą wyrażoną w ustawie, do których stosuje się przepisy art. 91 Konstytucji, uznaje się umowy międzynarodowe ratyfikowane dotychczas przez Rzeczpospolitą Polską na podstawie obowiązujących w czasie ich ratyfikacji przepisów konstytucyjnych i ogłoszone w Dzienniku Ustaw, jeżeli z treści umowy międzynarodowej wynika, że dotyczą one kategorii

considered a source of universally binding law are treaties that can be ratified without a consent granted in the form of a statute. The fourth type of international treaties are treaties that do not require ratification and are not regarded as universally binding law. According to art. 89 (3) of the Constitution, "the principles and the procedure of concluding, ratifying, and terminating international treaties are defined in a statute." This statute is the statute on international treaties.[20]

Thus, the legal position of international treaties is depends on the procedure applied by Poland when taking on the obligations under the international treaty, which in turn depends on the content of the treaty, i.e. to what extent it applies to statutory matters. In the light of the above remarks, this gradation is justified only from the point of view of domestic law.[21]

Due to their important position in the system of sources of law in Poland, one must pay particular attention to the international treaties which constitute a basis for the Republic of Poland transferring to an international organization or an international organ its competences in some matters (Constitution of the Republic of Poland, art. 90, the so-called European clause). This is justified by the fact that such treaties pertain to constitutional matters, namely "competences of state authorities," and because consent to their ratification is granted in accordance to a special procedure.

The consent may be granted in one of two ways; the method is selected by the Sejm in its resolution passed with an absolute majority of votes and in the presence of at least a half of the statutory number of its members. The first way consists in adopting a statute that grants permission to the president to ratify the treaty. The legislative procedure is more stringent since the Sejm adopts the statute by a qualified majority of two third of all votes in the presence of at least a half of the statutory number of its members. The terms of the Senate vote are identical. The other way involves granting permission to the president by way of a national referendum.

Defining the place of these international treaties in the legal order of Poland is a fairly controversial matter.[22] There is no question that they should be

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spraw wymienionych w art. 89 ust. 1 Konstytucji. Patrz także R.Kwiecień: „Miejsce umów...", s.118-120.

[20] Ustawa z dnia 14 kwietnia 2000 r. o umowach międzynarodowych, Dz.U. z 2000, nr 39, poz. 443.

[21] Kwestię uzasadnienia zróżnicowania rangi prawnej poszczególnych umów międzynarodowych z punktu widzenia zasady pacta sunt servanda porusza L.Antonowicz: Projekt Konstytucji Rzeczpospolitej Polskiej ze stanowiska prawa międzynarodowego, Annales Universitatis Mariae Curie-Skłodowska, 1997, nr XLIV sec.G.

[22] Patrz też R.Szafarz: "Międzynarodowy porządek prawny i jego odbicie w polskim prawie konstytucyjnym, w: Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym, Warszawa 1997, s.34, R.Kwiecień: „Miejsce umów...", s.121.

considered as superior to statutes. This is clearly stated in art. 91 (3) of the Constitution. What is controversial is the mutual relation of such treaties and the constitution, since it is the European treaties (primary law) that are the most important treaties of this type. This matter has been the subject of European judicial decisions and doctrine since the 1960's. On the one hand, there is the principle of priority of the community law over domestic law; on the other hand, there is the principle of the superiority of the constitution. Since the 1970's, decisions of the Court of Justice have tended to stress the superiority of the community law over the constitutions of the member states. The principle of superiority of community law formulated in judicial decisions (such cases as Costa and Simmenthal), which consists in member states being deprived of the possibility to grant domestic measures priority over the community law is justified by the Court of Justice by the autonomous and unique nature of the community law, which results from the fact that the member states have transferred their competences in this area. However, this principle has been challenged by constitutional courts in such countries as Germany and Italy in the context of the Communities guaranteeing the protection of fundamental rights.

The Polish Constitutional Tribunal has made a statement in reference to this topic in its decision on the conformance to the Constitution of the Treaty signed on 16 April 2003 on the access of ten countries, to include Poland, to the European Union (the accession treaty), as well as on some provisions of the Treaty on establishing the European Community and the Treaty of the European Union (decision of the Constitutional Court dated 11 May 2005, K 18/04). In its decision regarding the conformance of the treaty provisions in question to the Constitution, the Tribunal emphasized, in particular, that considering the Constitution as "the supreme law of the Republic of Poland" (art. 8 (1) of the Constitution) goes along with respect in the Polish legal system for properly shaped norms of international law which are present in the territory of the Republic of Poland (art. 9 of the Constitution). The Tribunal recalled that primary laws are one of the categories of international treaties that are subject to ratification and that Poland's access to the European Union does not negate the status of the Constitution as the "supreme law of the Republic of Poland" (art. 8 (1)). In the territory of Poland, the Constitution enjoys priority of force and application, also with regards to all international treaties that are binding on Poland, to include treaties that transfer competences of state authorities to international organizations and, even more so, to secondary community laws. In reference to art. 91 (1) and (3) of the Constitution which establishes the priority of a ratified international treaty and of law adopted by international organizations on the basis of such a treaty over a Polish statute, the Constitutional Tribunal stated that in no way does it mean that such laws are supreme to the Constitution.

The Tribunal has pointed to the procedure to be followed in case of a conflict between the European law and the Constitution, because since Poland joined the European Union there are two autonomous legal orders,

the Polish one and the Union one, which are binding in parallel and which interact with one another. According to the Tribunal, if such a conflict does take place, the Republic of Poland shall make a sovereign decision to either adopt a relevant amendment to the Constitution or to cause relevant changes to the community laws, or to eventually withdraw from the European Union.

In the light of this position of the Constitutional Tribunal, to this category of international treaties applies the principle of priority of application before the domestic statutes, but not before the Constitution.

Another type of an international treaty, a “qualified" ratified one, is a treaty that requires a consent granted by way of a statute to be ratified. Art. 89 (1) of the Constitution stipulates the types of matters where such a prior consent is required. This is the case when the international treaty concerns:

1) peace, alliances, political pacts or military pacts;

2) civic freedoms, rights, or duties stipulated in the Constitution;

3) membership of the Republic of Poland in an international organization;

4) a significant financial burden to the Polish state;

5) matters which are regulated by a statute or in which the Constitution requires a statute.

This is a fairly long and not very precise list. According to K. Wójtowicz, “these criteria are not very precise and there are practical problems with their application, especially with regards to the criterion of <<matters which are regulated by a statute>> (...) As it turns out, there aren’t hardly any contemporary international treaties that do not affect <<matters which are regulated by a statute>> in one way or the other.”[23]

The special procedure required for Poland to be bound by such a treaty, which is due to its matter, justifies the higher rank of such a treaty in comparison with a treaty ratified following a simple procedure (without the statutory consent). According to Poland’s Constitution, international treaties that are ratified on the basis of a consent granted in a statute[24] hold a precisely defined place in the hierarchy of sources of law. According to art. 91 (2) of the Constitution, “an international treaty which is ratified on the basis of prior consent granted in a statute has a priority over a statute if the

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[23] K.Wójtowicz: „Prawo międzynarodowe w systemie źródeł prawa RP”, w: M.Granat (red.): System źródeł prawa w Konstytucji Rzeczypospolitej Polskiej, Nałęczów 2000, s.5 i nast.

[24] Także dotyczy to umów międzynarodowych ratyfikowanych za zgodą wyrażoną w referendum. Patrz B.Banaszak: „Prawo...”, s.146.

statute cannot be reconciled with the treaty." Thus, the legal power of such treaties is lower than that of the constitution. The situation is different with regards to regular statutes. The priority of such treaties is due to the fact that by adopting a statute in which it grants its consent to the ratification of a given treaty, "the Sejm restricts its own freedom of action in matters regulated by the treaty."

In the case of a conflict, the statutory norm must take second place to the norm stipulated in the treaty that has been ratified with prior statutory consent and decisions regarding possible conflicts are to be made by the Constitutional Tribunal. According to B. Banaszak, "the Constitution does not define the consequences of the principle of superiority of such treaties and it is not known whether application of a statutory provision which does not conform to a treaty of this type is only suspended or whether it becomes ineffective."[25] This question is discussed by R. Kwiecień[26] who says that "the relation between a ratified international treaty and a regular statute is not really hierarchical; instead, in case of a conflict, it is their application power that is different." He points to art. 91 (2) as a basis for placing treaties and statutes on the same level with regards to their legal power, and for making treaties more effective in cases of a material conflict.[27] Consequently, both legal acts remain in the legal order until the binding force of the statute is annulled by the Constitutional Tribunal.[28] W. Sokolewicz proposes to introduce a procedure for passing ratification statutes which is more stringent than the regular legislative process, due to the scope of the possible subject matter of such treaties and to their greater legal power compared to statutes.[29]

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[25] Ibidem, s.146.

[26] R.Kwiecień: „Miejsce umów...", s.173.

[27] R.Kwiecień: „Miejsce umów...", s.173, W tym znaczeniu autor mówi o umowach ratyfikowanych za zgodą parlamentu jako o źródłach prawa polskiego o randze „quasi-konstytucyjnej."

[28] C.Berezowski: „Wzajemny stosunek prawa międzynarodowego i krajowego", Państwo i Prawo 1962, nr 2, s.228, odnosząc się do francuskich rozwiązań konstytucyjnych pisał iż skoro „konstytucja francuska uznaje pierwszeństwo mocy (*autorité*) traktatu przed mocą ustawy, trzeba tutaj rozróżnić pierwszeństwo stosowania umowy przed stosowaniem ustawy. Umowa międzynarodowa nie uchyla w tym przypadku ustawy; w razie sprzeczności między umową a ustawą organ stosujący prawo zastosuje w danym konkretnym przypadku umowę międzynarodową. Obowiązek zastosowania umowy, nie zaś ustawy, istnieje tak długo, jak długo umowa sprzeczna z ustawą nie zostanie uchylona przez późniejsze prawo umowne lub zwyczajowe."

[29] W.Sokolewicz: „Ustawa ratyfikacyjna", w: „Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym", pod red. M.Kruk, Warszawa 1997, s.111.

The nature of such treaties is the same as that of treaties mentioned in art. 241 (1) of the Constitution.[30] Under the blank norm stipulated there, Poland's legal order was expanded to include ratified international treaties concluded on the basis of the present constitutional order, which were given the rank of international treaties ratified on the basis of consent granted in a statute, provided that they had been promulgated in the Journal of Laws and that their content indicates that at that time their ratification would have required the parliament's consent given in a statute.[31]

The third types of treaties, namely international treaties ratified by the president without the need for a prior consent granted in a statute, includes cases "where the parties, for example intending to enhance the importance of a treaty, want to give it this particular form," as well as cases where Poland has agreed to that due to the legal requirements of the other party or where the parties have agreed so due to special circumstances.[32]

The Constitution has no provisions that define the precise place of this type of international treaties in the hierarchy of sources of law. Moreover, the consequences of conflicts between domestic laws and the provisions of such treaties are not defined either. Representatives of the doctrine have expressed their opinions on this matter on many occasions.

As B. Banaszak points out, adopting additional provisions that define the position of ratified treaties in the hierarchy of sources of law was not necessary because "the very fact that they are not given priority before statutes and that they are ratified without the need for a consent granted in a statute or a referendum shows that their rank is lower than that of a statute."[33] He supports his proposal by pointing to art. 188 (2) of the Constitution which defines the competences of the Constitutional Tribunal, one of which is deciding on matters regarding the conformance of statutes to ratified international treaties that require prior consent granted in a statute. One must remember that the role of the Constitutional Tribunal is to make

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[30] W.Czapliński, A.Wyrozumska: „Sędzia krajowy wobec prawa międzynarodowego", Warszawa 2001, s.121-123. Odnosząc się do umów zawieranych przed wejściem w życie Konstytucji autorzy zauważają, iż „w praktyce okazuje się, że sądy nie badają czy umowa spełnia kryteria art.89 ust.1 i przyjmują założenie, że jeśli umowa była ratyfikowana przed wejściem w życie Konstytucji, to działa obecnie tak jak umowa zawarta za uprzednią zgodą wyrażoną w ustawie." Nie jest to, jak nazywają autorzy „uproszczenie," które odzwierciedla wolę ustawodawcy konstytucyjnego.

[31] R.Kwiecień: „Miejsce umów...", s.118 i 119.

[32] A.Wyrozumska: „Skuteczność norm prawa międzynarodowego w prawie wewnętrznym w świetle nowej Konstytucji", Państwo i Prawo 1998, nr 4, s.82, autorka wskazując kiedy będą zawierane tego typu umowy posiłkuje się §2(1) uchwały Rady Państwa i Rady Ministrów z 28 grudnia 1968, w sprawie zawierania i wypowiadania umów międzynarodowych.

[33] B.Banaszak: „Prawo...", s.147.

decisions on matters “of conformance of legal regulations adopted by central organs of the state to the Constitution, ratified international treaties, and statutes” (art. 188 (3) of the Constitution). Since the article makes a general reference to ratified international treaties, which include those ratified with prior consent granted in a statute or a referendum as well as those that do not require such a consent to be ratified, the latter have legal power which is superior to that of legal regulations adopted by central organs of the state. Thus, the legal rank of this type of international treaties is lower than that of statutes, but higher than that of ordinances.

W. Czapliński and A. Wyrozumska[34] similarly define the position of ratified treaties, by saying that “the Constitution leaves it to the practice” to define the place in the hierarchy of sources of law of international treaties ratified without prior consent granted in a statute. Taking into account the principle that treaties on matters regulated by a statute must be approved by the parliament, the power of such treaties may not be equal to that of statutes and they may at most hold a place between a statute and an ordinance.[35] W. Czapliński and A. Wyrozumska also argue that “if it was not for special circumstances, such treaties would normally be concluded by way of an approval, which is an act of the Council of Ministers.” However, they remark that this would be an unusual solution since normally "the lowest level occupied by ratified treaties in the hierarchy of legal acts in states is that of a statute.”[36]

On the other hand, L. Garlicki[37] says that they must not be given “not only a power that is higher than that of a statute (to the contrary, under art. 91 (2) of the Constitution), but even a power equal to that of a statute.” He says that this would bring about the risk of such a treaty changing the provisions of earlier statutes (which would be contrary to the provisions of art. 89 (1) (5)). Consequently, such treaties are considered binding law, albeit equal to subordinate law.

Nevertheless, the Constitution defines the basis for the binding force in the Polish legal order of the fourth type of treaties, those concluded in a simplified form. As W. Czapliński says, according to the Constitution, they are not regarded as sources of Polish law, and are neither incorporated by

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[34] W.Czapliński, A.Wyrozumska: „Sędzia krajowy...”, s.121.

[35] W.Czapliński, A.Wyrozumska: „Sędzia krajowy...”, s.110, autorzy piszą, że „besporne wydaje się również, że umowa ratyfikowana bez upoważnienia ustawy, w przypadku kolizji norm ma pierwszeństwo przed rozporządzeniem (art.188 pkt 3).”

[36] Patrz też podobnie R.Kwiecień: „Miejsce umów...”, s.173. Autor wskazuje iż umowy korzystają „niewątpliwie w pierwszeństwa przed aktami podustawowymi.” Pisze także iż „zgodnie z logiką regulacji konstytucyjnych, nie mogą zaś wchodzić w konflikt z aktami ustawowymi. Umowy dotyczące spraw uregulowanych w ustawie lub w których konstytucja wymaga ustawy, ratyfikowane są za uprzednią zgodą ustawową.”

[37] L.Garlicki: „Prawo konstytucyjne”, s.148.

the Constitution nor transformed into domestic law. Similarly, R. Szafarz[38] supports their non-receptive binding character in the Polish legal order.

International treaties (not subject to ratification) concluded by the Council of Ministers or the respective ministries are not universally binding law (to the contrary, under art. 87 (1) of the Constitution). Since they cannot be a basis for defining the rights and obligations of natural and legal persons according to art. 88 (3) of the Constitution, they do not need to be promulgated in the Journal of Laws and are promulgated according to a different procedure than ratified treaties, i.e. they are promulgated immediately in the Official Journal of the Republic of Poland titled "Polish Monitor." Their influence is limited to domestic law and they are binding only to organizational entities that are subordinate to the organ which concluded a given treaty. Of course, the fact that such treaties are not directly applied in the Polish legal system does not absolve the state from its obligation to perform its duties contracted in the international arena. According to the principle of pacta sunt servanda (see also art. 9 of the Constitution), in its internal relations the Republic of Poland must observe treaties concluded in a simplified form. This requires the organs of the state to introduce such changes in the domestic legislation that would assure the observance of these obligations (if necessary).

In conclusion, the dominant opinion of the majority of representatives of the Polish legal doctrine is that the current constitutional provisions defining the relations between the domestic law and international law are adequate. However, there are plenty of controversial issues, to include those mentioned in this paper. Still, the practice of the legal system does not raise so many controversies. In the last decade, the most important topics included those regarding the relations between the international treaties which constitute the primary laws of the European Union and the Constitution of the Republic of Poland, which were the subject matter of the aforementioned decision of the Constitutional Tribunal.

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[38] R.Szafarz: „Skuteczność norm prawa międzynarodowego w prawie wewnętrznym w świetle nowej Konstytucji", Państwo i Prawo 1998, nr 1. R.Kwiecień: „Miejsce umów...", s.120, również przyjmuje, iż w stosunkach wewnętrznych obowiązują one jako akty wyłącznie prawnomiędzynarodowe, na podstawie przestrzegania przez Polskę wiążącego ją prawa międzynarodowego.

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