

ON UNDERSTANDING STATE SOVEREIGNTY IN THE CONDITIONS OF MEMBERSHIP IN THE EUROPEAN UNION – A FEW REFLECTIONS AGAINST THE BACKGROUND OF CURRENT DETERMINANTS AND THE RELATIONSHIP BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND NATIONAL COURTS

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Summary. The corona virus pandemic poses an unexpected challenge to the European Union and its Member States. It is part of the public debate on the direction of the Union's institutional development – the Union may both strengthen cooperation and may begin to dominate centrifugal tendencies. Both the Community assistance program and the position on the “communitarisation” of planned debts will be of particular importance.

On May 5, 2020, the Federal Constitutional Court of the Federal Republic of Germany issued a judgement, the essence of which is to question the binding force of the judgment of the EU CJEU in Germany. We have dealt with similar decisions in the case of the Spanish Supreme Court. The German ruling in particular will be of particular importance as regards the relationship between EU law and the constitutional law of the member states.

In the article, the author discusses the most important rulings of the Polish Constitutional Tribunal to date and the resulting conclusions, including the obligation to provide a pro-EU interpretation of the Constitution of the Republic of Poland. The subject of the considerations was also the traditional understanding of state sovereignty and the need to verify it nowadays, which in fact has been taking place since the middle of the 20th century. The development of the EU will be the most important factor in its modern understanding.

The author emphasized the key importance of two factors: the need to strictly adhere to the principle of subsidiarity in order to limit the EU's regulatory tendencies and – on the other hand – the requirement to take the EU order (*acquis communautaire*) into account in the interpretation and application of national law, including the Constitution itself.

Key words: the challenges facing the EU in the pandemic, the judgment of the Federal Committee of the Federal Republic of Germany of 5 May 2020, pro-EU interpretation of national law and national constitutions, reducing the EU's regulatory trends by strictly adhering to the principle of subsidiarity

1. BASIC REMARKS

The emergence of the coronavirus pandemic has become an unexpected challenge for the European Union and its Member States. Out of necessity it does and will shape the context of political debates on a number of subjects, including the relationship between the law of Member States and the EU law, conditions under which the EU could carry out non-authority-related coordination in the scope of

the protection of health, the problem of distribution of EU budget funds and the role of the Central Bank or the problem of migrations outside the EU [Borrell and Breton 2020].¹ The issues of admissibility of the so-called communitarisation of bonds and the introduction of the EU tax, which, in my opinion, would put a question mark over the concept of confederation, are becoming ever more significant. They would be a step towards federalism, at the same time triggering national egoisms in the conditions of the actual absence of a European *demos*, a significantly diverse status of public finance and absence of a uniform legal and political culture in the Member States.² It would also have to lead to further and fundamental re-interpretation of the term “sovereignty.” The aim of this paper is to demonstrate the dilemmas in the Member States – EU relations in the context of the essence of state sovereignty – adopting a hypothesis of absence of a perspective for further-reaching non-economic integration. It involves putting a question mark over a statement according to which since the ruling of the Federal Constitutional Tribunal of the Federal Republic of Germany³ on the Maastricht Treaty “the framework of pan-national European federation has become a fact” [Weiler 2005, 66; Idem 2007, 17].

The FCT FRD ruling of 5 May 2020 becomes a reference point that is gaining particular significance⁴ and may affect the concept and directions of institutional development of the European Union, including also understanding of sovereignty of states in the context of its key aspect of the normative conflict (the so-called *kompetenz–kompetenz*), that is acknowledging “the last word” regarding the assessment of the scope of application of the EU law, thus also the position of the EU Court of Justice’s rulings in a given country.⁵ The FCT ruling falls unambiguously under the contestation of the CJEU’s case law activity, in particular the issue of violating the sphere of shared law-giving competence (Art. 4 TFEU⁶) and the limits of EU competences (Art. 5 TEU⁷). Let us recall that in the judgement in the Weiss case the FCT questioned, on procedural grounds, some decisions of the European Central bank concerning the buying-in of bonds of the Euro zone

¹ It involved i.a. a financial instrument in the amount of EUR 750 billion (in the form of loans and subsidies), which the Commission prepared in order to strengthen the internal market after the pandemic crisis [Borrell and Breton 2020].

² Let us remember that Secretary of the Treasury of the USA Alexander Hamilton believed that debts of former colonies that were at the brink of bankruptcy after the 1775–1783 should be “shared.” They were remodelled into government debt, which determined the transformation of confederation of states into a federation. However, nationality and culture of citizens of former colonies were considerably homogeneous.

³ Henceforth cited as: FCT FRD.

⁴ https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html [accessed: 06.05.2020] The ruling was supported by 7 out of 8 adjudicating judges.

⁵ The ruling was issued as a result of a few complaints: 2 BvR 859/15; 2BvR 1615/15; 2 BvR 2006/15; 2BvR 980 16. See <https://www.osw.waw.pl/pl/publikacje/analizy/2020-05-06/federalny-trybunal-konstytucyjny-w-kontrze-do-ebc-i-tsue> [accessed: 06.05.2020].

⁶ Journal of Laws of 2009, No. 203, item 1569.

⁷ Journal of Laws of 2004, No. 90, item 864.

states which were in a crisis in 2008 (in the amount of EUR 2.2 billion), alleging violation of proportionality. However, what is particularly significant, it alleged that the CJEU made gross errors in its judgement accepting the ECB's activity in the light of Art. 5 FEU. According to FCT, the CJEU went beyond its court competence vested in it by Art. 19 TEU. It pleaded that the Court in Luxembourg limited itself to examining whether the ECB made a mistake in evaluating proportionality of effects of the programme, omitting the fact of going beyond the bank's treaty competences. The German Constitutional Tribunal concluded that in matters of fundamental interests to Member States the evaluation of a national court must be done with utmost meticulousness. Therefore, the ECB does not have the competence to conduct economic policy that goes beyond treaty norms, while German authorities cannot participate in the acceptance and development of solutions that go beyond treaty and constitutional norms.⁸

Even though the FCT's judgement is not binding on the ECB or the EU Court of Justice, it does include a statement saying that the challenged decision of the EU Court of Justice does not apply on the territory of Germany, whereas an in-depth examination of compliance of EU acts and Luxembourg rulings is the responsibility of the German tribunal as a guardian of the Basic Law of the Federal Republic of Germany [Kelemen, Eeckhout, Fabbrini, et al. 2020, 6].⁹

The 9 January 2020 ruling of the Spanish Supreme Court also had a significant political dimension. The Court did not agree with the judgement of the CJEU in the case of a Catalan separatist Oriol Junqueras. In the Supreme Court's opinion, the Catalan separatist, despite having been elected to the European Parliament, will remain imprisoned and cannot, against the CJEU's stand, be protected by parliamentary immunity. Similarly, it questioned the CJEU's position in the case of a different separatist, Carlos Puigdemont, who was also given a criminal sanction. This is how Spain recognized the primacy of its own law over the provision of Protocol 6 to the Lisbon Treaty concerning European Union privileges and immunity [Bielecki 2020, 14]. On the other hand, the Spanish Constitutional Tribunal had assumed before that the principle of primacy of the Constitution cannot be reconciled with systems that grant priority of application to other legal orders, unless the Constitution itself provides so. It concluded that granting priority to the Union law over national sub-constitutional acts does not speak against the supremacy of the Constitution. Primacy (Spanish *primacia*) and supremacy (*supremacia*) are two categories of a different nature. The first one refers to the application of the law and does not have to refer to hierarchical relations, whereas supremacy refers to constituting the law while taking into account the concept of hierarchy of norms [Wójtowicz 2012, 92–93].

⁸ On tensions and differences of opinion between the court in Luxembourg and German courts see Haub 2015, 81–94.

⁹ For critique of the judgement see Kelemen, Eeckhout, Fabbrini, et al. 2020.

2. SELECTED STATEMENTS FROM JUDICIAL DECISIONS OF THE POLISH CONSTITUTIONAL TRIBUNAL ON THE RELATIONSHIP OF THE POLISH LAW WITH THE EU LAW – A SYNTHESISING APPROACH

In a fundamental judgement concerning the Accession Treaty, the Constitutional Tribunal¹⁰ cited Art. 8, sect. 1 and Art. 90, sect. 1 and 3 in order to confirm the supremacy of the Constitution in the area of sovereignty and to accentuate that there are no grounds to constitute the law and to take decisions which would be contrary to the Polish Constitution.¹¹ The supremacy of the Constitution as a guarantee of sovereignty is to be demonstrated on a few planes: 1) constitutional legitimization of European integration; 2) the very mechanism of inspection of the Accession Treaty and other ratified international agreements if ratification requires consent in the form of a statute or referendum; 3) circumstances in which constitutional norms cannot lose validity or be changed by the very fact of occurrence of a non-removable contradiction with the EU law: the legislator itself decides about how to resolve the discrepancies. A decision about the EU law being contrary to the Constitution must be *ultima ratio* in nature and occur only if other ways of conflict resolution have failed. As a consequence, there are three possibilities for Poland to respond: 1) amending the Constitution; 2) taking action in order to amend EU laws; 3) withdrawing from the Union.

An extension of reflections in question can also be found in the judgement concerning the Lisbon Treaty,¹² in which the CT presented a few observations: 1) entering into international obligations and their performance does not result in the loss or restriction of sovereignty, but is its confirmation; 2) accession to the EU may be perceived as “a certain restriction of sovereignty of a country,” but is compensated by the possibility of co-shaping decisions in the EU institutional framework; 3) the so-called “constitutional identity of a state” is specified by a group of “non-transferable” competences, which we refer primarily to supreme constitutional principles; 4) the essence of sovereignty should be brought down to a prohibition of transferring the legislative power and to the authority to create competences.

The affirmation of the Constitution’s position was the CT’s approval of admissibility of assessment of secondary legislation’s compliance with the Constitution, though only where the proceedings were initiated by a constitutional complaint. Concluding that the constitutional standard of protection of constitutional freedoms and rights cannot be undermined in acts of secondary legislation steered the CT towards an interesting interpretation and to assuming that the material scope of normative acts which might be inspected under a constitutional complaint (Art. 79, sect. 1) is independent of the range of cases included in Art. 188, sect.

¹⁰ Judgement of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK–ZU 2005, No. 5A, item 49.

¹¹ Journal of Laws of 2009, No. 114, item 946.

¹² Judgement of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK–ZU 2010, No. 9A, item 110.

1–3 of the Constitution.¹³ The Constitution itself maintains its supremacy and primacy towards all acts of law applicable in the territory of Poland. The Tribunal reserves to itself the position of the court “of the last word” in fundamental cases of a regime dimension. Unfortunately, the CT did not treat these issues homogeneously, it did not elaborate in the reasoning on the grounds for approval (or refusal) of accepting forms of an application and on a legal question when inspecting secondary legislation. It would be difficult to admit that a reasonable legislator treated sources of law in such a specific manner since EU normative are provided for in Art. 91, sect. 3 of the Constitution, whereas the *a maiori ad minus* reasoning also spoke for a more correct interpretation. I assume that the reason for the reserve were concerns about complications on the plane of the EU law and a concern about the risk and consequences of such decisions that are difficult to predict at the level of the state.

At the same time, the CT appreciated an increase of EU’s democratic legitimization as a consequence of an enhanced role of the European Parliament in the process of distribution of power.¹⁴ What is especially significant, it spoke about delimitation of competences between the ECJ/CJEU and national courts, including the Constitutional Tribunal, concluding that a division of competences and roles in jurisdiction is based on the following assumptions: 1) the interpretation of the community/EU law and establishing its validity (for secondary legislation) lies with the Luxembourg court; 2) application of this law, understood as application of a norm of the EU law to the facts established by a national court, rests with the national court; 3) principle of sincere cooperation of the EU and the Member States result in an obligation of cooperation between courts (Art. 4, sect. 3 TEU; Art. 267 TFEU); 4) autonomy of legal systems leads to a conclusion that the national court may give priority to an EU norm thus refusing to apply a national norm in a specific case, but it cannot conclude it has lost its validity, whereas the CJEU cannot annul norms of national legislation (application and validation aspects); 5) citing the *G. Köbler vs. Austria* case, it approved a Member State’s liability for damage for national judicial decisions issued with an obvious breach of EU legislation and the Luxembourg case-law.¹⁵

One may briefly sum up that the Polish Constitutional Tribunal stands on the ground of absolute supremacy of the Polish Constitution while accepting its pro-EU interpretation. Such a position is justified by a joint interpretation of norms of Art. 8, sect. 1 and Art. 9 of the Constitution, and, to a smaller extent, of the normative content of Art. 90 and Art. 91. However, statements in judicial decisions lack consistency as to admissibility of inspection of all EU given acts. In

¹³ Judgement of the Constitutional Tribunal of 16 November 2011, SK 45/09, ZU–OTK 2012, No. 1A, item 8. Previously, to the contrary, if the form of the application was used in an attempt to evaluate secondary legislation against the Constitution – decision of the CT of 17 December 2009, U 06/08, ZU–OTK 2009, No. 11/A, item 178.

¹⁴ Judgement of the Constitutional Tribunal of 31 May 2004, K 15/04, ZU–OTK 2014, No. 4, item 31.

¹⁵ Decision of the Constitutional Tribunal of 19 December 2006, P 37/05, ZU–OTK 2006, No. 1/A, item 177.

my opinion, the CT should also speak more extensively on the need of preventive inspection of primary legislation and should more often use its competences in terms of signalling decisions.

3. TRADITIONAL UNDERSTANDING OF SOVEREIGNTY AND CONTEMPORARY TRANSFORMATIONS IN EUROPE

“Sovereignty” is a basic term in international public law, since it specifies the essence of a state as a political organization in relationships with other countries or international law actors [Antonowicz 2000, 39–42, 95]. The Polish Constitution in force establishes the supreme power of the Nation, that is the so-called “internal sovereignty” (Art. 4, sect. 1 and refers to “sovereign and democratic determination of its [that is Homeland’s – J.C.] faith” (Introduction to the Constitution) and also refers to the tasks of the President of the Republic of Poland in terms of safeguarding the sovereignty of the state (Art. 126, sect. 2) [Dobrowolski 2014, 238–55].¹⁶ When it comes to the President’s task, one needs to quote P. Sarnecki’s view according to which this task does not involve fighting down “inclinations” to reorient the legal system, but it includes prevention of falling **into unilateral dependency** [emphasis – J.C.] on other states or transnational actors [Sarnecki 1999, 11].

I do recognize that sovereignty may be perceived as a situation where all actions of the state (including local government) are defined by decisions of its constitutional authorities. A constant process of limiting sovereignty understood in such a way can be noted, which results from globalization, deterritorialization of social phenomena or regionalism, which are expressed in norms of international and transnational law or even the law of e.g. sporting organizations. This may result in certain “confusion” of legal scholars and commentators and a terminological muddle triggered by the evolution of the position of a modern state which is entangled in international law relationships and factual relations. Let us highlight at that that the Polish study of constitutional law accentuates that **restriction of sovereignty** [emphasis – J.C.] may occur only on the basis of an express and specific constitutional regulation included in the clause of Art. 90, sect. 1 [Garlicki 2019, 73]. Whereas legal scholars and commentators make attempts to formulate more or less original concepts of sovereignty.

The first mainstream accommodates concepts that assume moving away from a traditional understanding of sovereignty towards recognizing that state sovereignty must be strictly related with the sovereignty of the nation (people) and with human rights. This was to take place in the conditions of a “Kant’s shift” in international law expressed in moving away from the law of states and towards the law of states, nations and human rights at the same time.

¹⁶ On state sovereignty as a constitutional principle and certain legal fiction see Dobrowolski 2014, 89–102.

It is noticeable that international law has become an instrument of protection of human rights and of protection of goods that are common to the entire international community. A postulate has been put forward according to which given the archaic nature of the traditional understanding of sovereignty, it is necessary to anchor it in a new basis. In this context former critique of the political model of the European Union is expressed too, which is constructed above nations and too often allows replacing “the consent of nations with the consent of governments.”¹⁷ In my opinion, however, such views disregarded¹⁸ the phenomena of a gradual increase of the role of the European Parliament in the EU decision-making process and the creation of pan-European political parties [Wójtowicz 2018, 140–47], which is becoming a timid and initially failed attempt on a reference to a European *demos*.¹⁹ They disregarded attempts to institutionalize the role of citizens, including by means of the European legislative initiative (Art. 11 TEU),²⁰ the limited participation of national parliaments in decision-making process (Protocols 1 and 2 of the Lisbon Treaty), the increasing of the role of the CJEU in protecting human rights [Plaňavová–Latanowicz 2000],²¹ or finally the binding nature of the Charter of Fundamental Rights at limited scopes of its validity and application (Art. 51 of the Charter). However, a basic question and a doubt at the same time arises – are the amendments introduced by the Lisbon Treaty a “qualitative breakthrough” in the normative, political and axiological understanding of the EU structure?

It needs to be pointed out that some scholarly studies take up interesting attempts to transfer a traditional, constitutional concept of the division of power in a state onto the ground of the EU organizational structure [Grzeszczak 2011]. I believe that a too far-reaching transfer of the concept of the process of distribution of power in Member States onto the European ground becomes risky, because the Union’s governance manner distorts the state-specific relationship between legislative bodies, political parties and implementing bodies. The European Parliament is not as reliable an expression of the will of the nation as a traditional national parliament is. In the context of the quoted proposals, one needs to agree with the position that assumes that a European nation does not exist, either in a political sense (community of citizens) or a cultural one (cultural and historical community) and EU citizens do not make up a community of faith or are guided by uniform cultural codes [Dobrowolski 2014, 238–55].

¹⁷ Clearly on the subject see Morawski 2011, 13 and literature quoted there.

¹⁸ The time of presenting them was not irrelevant.

¹⁹ Regulation No. 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations, OJ L 317 04.11.2014, p. 1 as amended. Act of 22 November 2018 on European political parties and European political foundations, Journal of Laws of 2019, item 37.

²⁰ Act of 4 April 2014 on European legislative initiative, Journal of Laws of 2014, item 575 as amended.

²¹ J. Plaňavová–Latanowicz wrote about the gradual, increasing role of the ECJ (now CJEU) in the protection of human rights. See Plaňavová–Latanowicz 2000.

Views on the changing of “norms and rules” of sovereignty which bring about a further question about adequacy of the traditional category of sovereignty can be encountered in the second mainstream. It involves noticing “a new quality” which is born where the mode of full sovereignty is undermined, and at the same time it is impossible not to question the idea of sovereignty as such [Jaskiernia 2006, 46].²² According to an interesting yet controversial concept of J. Jaskiernia “a post-sovereign state” is not a non-sovereign state, but is a mixture of factors of classical sovereignty with areas where this valour has been undermined by limitations of sovereignty triggered by transferring attributes of public authority onto a pan-national organization (exclusive competence of the EU or possibly shared competence of states and the EU). The “separating” function of sovereignty becomes a thing of the past, whereas relations between states are determined by cooperative interdependency between state sovereignty, national sovereignty, the integration process and mutual “complementariness” [ibid., 49–50]. These were views that deserve a careful though critical reflection, since they did not sufficiently take into account the cultural and political “foundation” and economic aspects of the Member States. For instance, reflections on sovereignty cannot omit the axiological aspect, including the role of Christianity in shaping the European identity and a certain binding link, as soon as we attempt to reflect on a potential European *demos*. He assumes that if references to Christianity in discussions on the European identity became a taboo, Europe would be in denial.²³

A problem arises in the context of the above opinion concerning classification of this state of affairs and means of restricting sovereignty or – which I believe to be more appropriate – **limitation of the very implementation of sovereignty** [emphasis – J.C.]. Therefore, does European integration lead to a restriction of rights of sovereign states, as indicated by the decisions of the ECJ in Luxembourg [Wójtowicz 2001, 164]²⁴ and by institutional practice in terms of constituting Polish law,²⁵ or perhaps is it about the process of transferring the very exercise of state authority onto the European level in exchange for compensatory participation in decision-making processes at the level of the entire Union? A dilemma of a post-sovereign state is to be expressed in recognising the phenomenon of erosion of classical sovereignty in the absence of clear rules on the extent to which such restrictions can be approved so as not to invalidate this concept at all. In the opinion of some, this context also accommodates sovereignty of the nation, restricted mainly as a result of evolution of the parliament’s traditional position [Milej and Schlezka 2005].

I believe that the concept of a Europe of “post-sovereign” states is certainly intellectually attractive, but does not address the essence of the problem. This

²² The author did not explain the difference between a norm and a rule.

²³ The shock that was caused by the fire at the Notre Dame Cathedral in Paris proves the existence of a cultural emotion of Europeans.

²⁴ I mean the decision in *F. Costa vs. ENEL*.

²⁵ Extensively see Haczkowska and Jabłoński 2015, 149–70.

problem is determined by economic phenomena, that is stopping the equalization of the level of economic development of states, weakening the economic and social standard of states of the so-called south, e.g. Italy, Spain or Greece against the entire EU, or constant contestation of the role of the Euro [Sarrazin 2013]²⁶ and the European Central Bank (where Hungary, Croatia and Bulgaria took a decision to enter the Euro area – sic!). It is also determined by social and cultural phenomena: presence of traditional national patriotism, reluctance towards refugees from other cultural spheres, restricted opportunities of young generations to improve their life conditions or, last but not least, disappearance of a traditional role of the Christian religion in schools with the growing popularity of Islam. We cannot ignore the constant and by no means weakening presence of national and state “elements,” e.g. in France, Germany, Italy or Poland. The process of the UK withdrawing from the EU, the EU’s distance towards Norway or Switzerland and especially the growing political and cultural role of Turkey which has not abandoned its reluctance towards Europe are their most emphatic expressions. Thus, we return to the issue of absence of a European nation.

The next mainstream of reflections on sovereignty in Europe accommodates the theory of divided sovereignty (infused with idealism) which recognizes sovereignty as a mix of competences which may be transferred by states onto other entities, including the European Union. The transfer of competences results in creating a community whose members act collectively with mutual benefit. According to C. Mik, the theory of divided sovereignty corresponds to the description of the operation of the EU and its integrational mechanism, since it assumes repartition of sovereignty in situations where states do not have exclusive competences. This concept, however, rejects the differentiation between the essence of sovereignty and its execution [Mik 2000, 268].²⁷

On the ground of constitutional law, we have encountered a significant concept by K. Wojtyczek which assumes admissibility of a particularly specified mechanism of transferring state competences while keeping its identity at the same time, including the essence of sovereignty. His methodology, precision of the conceptual grid and an assumption that the essence of statehood is determined axiologically and politically by most important constitutional norms are all noteworthy. The transfer of competences must have its limitations so as to maintain legal and cultural identity of the state and society. It was pointed out that the transfer of competences concerns all three features of national constitutions: it has an impact on the content of the constitution, it affects the form of the constitution (the need for amendments, pro-EU interpretation) and the understanding of its supreme legal force. When it comes to the last issues, K. Wojtyczek believed that

²⁶ The views of the former member of the management board of Bundesbank (expressed in the context of the 2008–2012 crisis) are shared by a number of economists and politicians, not only German, which was revealed by the differences of opinion on Eurobonds and the scope of inter-EU aid in the age of coronavirus.

²⁷ We must bear in mind the time distance against the date of its introduction.

the Constitution ceases to be a supreme legal act towards all acts of public authority and remains supreme in spheres not covered by the transfer of competences. He saw the need for a careful preventive inspection of all acts of transfer of competences in this context. Therefore, he assumed that state authority remains sovereign if the state retains the right to take an independent decision leading to repealing the act by which it vested the exercise of its competences in another entity (cf. Art. 50 TEU) [Wojtyczek 2008, 368–70].

4. AN ATTEMPT TO FORMULATE CONCLUSIONS ON SOVEREIGNTY IN THE TIME OF CURRENT CRITICAL POLITICAL, ECONOMIC AND LEGAL CHANGES

The first finding leads to an adoption of a conclusion that although “sovereignty of the state” and “sovereignty of the nation” cannot be the same concepts, certain links between them, sometimes even tensions, can be observed. National sovereignty is referred to a democratic political regime, in the conditions of which the nation (in the constitutional approach) decides by means of relevant transparent procedures about its fate, about the choice of representative bodies and about the inspection of power structures. Thus the nation “creates the state,” including by establishing the structure of a local government, necessary in a contemporary democratic state. The undertaken international obligations and EU legal acts, being a restriction in exercising aspects of sovereignty, significantly limit the decision-making freedom of public authorities and affect, but do not determine, the understanding of sovereignty in constitutional law [Kranz 1996; Ciapała 2003, 346–50].

However, it needs to be acknowledged, that the source of misunderstanding stems from a **too relaxed attitude towards observance of subsidiarity** [emphasis – J.C.] which should be interpreted much more restrictively by EU institutions, all the more so since the given law most often is a public law in nature: environmental protection law, agricultural law, pharmaceutical law, telecommunications law, migration law, etc. **The CJEU’s particular restraint in its decisions needs to be postulated in this context, especially when it comes to matters that might cause tensions in relations with Member States** [emphasis – J.C.].²⁸ Otherwise EU’s internal tensions will build up in the age of rapid and unpredictable transformations.

Secondly, the obligations adopted as part of primary legislation require that Member States be based on the rule of law, democracy and respect for human rights, which is expressed in Art. 2 TEU, which is attempted to be considered an “axiological binding link” of the entire European Union. In this context I believe that in order to shape the basis for European identity it would also be necessary to refer to the Christian identity, which was postulated in connection with works on

²⁸ The Polish CT pointed to the need for such restraint for its own decisions in a ruling assessing admissibility of inspection of secondary legislation – SK 45/09. See footnote 15.

the treaty establishing the Constitution for Europe and the Charter of Fundamental Rights.²⁹ Joseph H.H. Weiler wrote that resignation from a discussion on Christianity means also resignation from an attempt to stand face to face with Europe's past.

Thirdly, even though a certain restriction of internal sovereignty, that is standards of democracy in a liberal approach, would not be contrary to international public law, in the case of the EU we are dealing with a special situation: affirmation of democracy, rule of law, good governance, respect for human rights, including the rights of minorities. These factors cause "internal sovereignty" to become a determinant of the position of the state and its effectiveness in the decision-making process within the EU.

Let us remember that the FCT FRD believed the Union to be an association of states (*Staatenverbund*), which is an intermediate concept between a federation and a confederation [Czarny 2010, 142]. This brings a specific problem for the courts of the states: constitutional loyalty or Union loyalty?³⁰ This problem has not been resolved at the EU level, in particular with regard to the relationship between highest judicial bodies of the states and the CJEU. However, most states affirm the position of their own constitutions, while only Ireland, the Netherlands and Estonia recognize supremacy of the EU law over national constitutions. Even though the Polish Supreme Court aptly recognized that the judgement of the national court contrary to the CJEU's interpretation is defective which causes it to be recognized as unlawful,³¹ this cannot collide with the CT's fundamental statements on the supremacy of the Polish Constitution.

The fact that national constitutional courts, including the Polish Constitutional Tribunal, are competent to challenge the CJEU's decisions may lead to a destruction of the EU legal order. It is not, however, inevitable, because the fundamental importance lies in restrictive observance of subsidiarity under the fields of shared competence, a strict "pro-state" interpretation of the EU law, presumption of competence of Member State authorities, a shared system of fundamental values (Art. 2 TEU) and, last but not least, the farthest-reaching observance of the principles of independence of courts and impartiality of judges, "insulated" to the maximum extent from current politics. The presented comments cannot result in undermining the concept of sovereignty of states within the EU which is in a permanent "identity" crisis.³² This fundamentally questions the point of assuming *a priori* that we can and should pursue federalization [Góralczyk 2017].

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²⁹ What I mean here is a study by an orthodox Jew Joseph H.H. Weiler: Weiler 2003.

³⁰ Extensively on dilemmas of national courts see Śledzińska-Simon 2015, 199ff.

³¹ Judgement of the Supreme Court of 8 December 2010. More on this: Wiącek 2010, 60–61.

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O POJMOWANIU SUWERENNOŚCI PAŃSTWA W WARUNKACH CZŁONKOSTWA
W UNII EUROPEJSKIEJ – KILKA REFLEKSJI W KONTEKŚCIE WSPÓŁCZESNYCH
UWARUNKOWAŃ ORAZ RELACJI MIĘDZY TRYBUNAŁEM SPRAWIEDLIWOŚCI
UNII EUROPEJSKIEJ A SĄDAMI KRAJOWYMI

Streszczenie. Pandemia koronawirusa stanowi niespodziewane wyzwanie dla Unii Europejskiej i jej państw członkowskich. Wpisuje się w publiczną debatę na temat kierunku rozwoju instytucjonalnego Unii – Unia może zarówno zacieśnić współpracę, jak i mogą zacząć dominować tendencje odśrodkowe. Szczególną doniosłość będzie miał zarówno wspólnotowy program pomocowy, jak i stanowisko wobec „uwspólnotwienia” planowanych długów.

Dnia 5 maja 2020 r. Federalny Trybunał Konstytucyjny RFN wydał wyrok, którego istota sprowadza się do zakwestionowania mocy obowiązującej wyroku TSUE na terytorium Niemiec. Z podobnymi rozstrzygnięciami mieliśmy do czynienia w przypadku hiszpańskiego Sądu Najwyższego. Zwłaszcza niemieckie orzeczenie będzie miało szczególną doniosłość co do relacji prawa unijnego i prawa konstytucyjnego państw członkowskich.

W artykule autor omówił najważniejsze dotychczasowe orzeczenia polskiego Trybunału Konstytucyjnego i wynikające z nich wnioski, w tym obowiązek prounijnej wykładni samej Konstytucji RP. Przedmiotem rozważań było także tradycyjne pojmowanie suwerenności państwa i konieczność jego weryfikacji współcześnie, co w istocie dokonuje się od połowy XX w. Rozwój UE będzie najważniejszym czynnikiem sprawczym w jej nowoczesnym pojmowaniu.

Autor podkreślił kluczową doniosłość dwóch czynników: konieczności ścisłego przestrzegania zasady pomocniczości, aby ograniczyć nadmierne tendencje regulacyjne UE oraz – z drugiej strony – wymogu maksymalnego uwzględniania porządku prawa unijnego (*acquis communautaire*) w wykładni i stosowaniu prawa krajowego, w tym samej Konstytucji.

Słowa kluczowe: wyzwania stojące przed UE w dobie pandemii, wyrok FTK RFN z 5 maja 2020 r., prounijna wykładnia prawa krajowego i krajowych konstytucji, ograniczenie tendencji regulacyjnych UE poprzez ścisłe przestrzeganie zasady pomocniczości

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