7

European Integration

Ineffable Aspiration or the Object of Concern? About the Ambiguity of Europe in the Polish Constitutional Imaginary

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7.1 INTRODUCTION

One of the peculiarities of the Polish Constitution of 1997 is its syncretism. The combination of various, often divergent or even mutually contradictory (apparently or actually) elements is visible not only in constitutional arrangements for the political system but also in the provisions for fundamental rights or even the ontology of law. The Constitution combines the chancellery and the presidential systems, economic neoliberalism and the vision of a social state, the positivist structure of the sources of law and a jusnaturalist conception of human dignity. This far-reaching constitutional eclecticism resulted from the fragmentation and polarisation of the Polish political scene during the initial period of the political transformation. A difficult and arduous constitutional compromise must have been 'thrashed out'.[1] Although the work on the new constitution had already commenced in 1989, the Constitution was approved in a national referendum only in 1997.[2] It is therefore a relatively late constitution as compared to those adopted in other post-communist countries. The protracted constitution-making was still in progress when, firstly, European integration had already moved to a new level – marked by the creation of the EU in the Maastricht Treaty – and, secondly, Poland's membership of the EU had become a political goal generally supported by all the political forces that participated in drafting the constitution. European integration was not the main topic of fundamental political disputes at the time. For the politicians involved in the work on the constitution, of greatest importance, inter alia, were the content of the preamble, the separation of the State from the Catholic Church, the

[1] Tadeusz Mazowiecki's phrase used in an interview published in: Zbigniew Bujak, *Konstytucja starsza niż myślisz, czyli o tym co z historycznego dorobku państwa polskiego znajdziemy w naszej Konstytucji* (Wydawnictwo ZB, 2019), 160.

[2] For more on this subject, see Bujak, Konstytucja starsza niż myślisz, Ryszard Mojak, 'Geneza prawnoustrojowe zasady i prawne podstawy procedury tworzenia i uchwalenia Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.' (2018) *Gdańskie Studia Prawnicze* (No 4) 97.

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division of powers within the framework of a bicephalous executive (between the President and the Council of Ministers) and the concept of individual freedom. Nevertheless, the content of Article 90 – the Polish 'integration clause' – also aroused controversy, mainly due to the politically and historically sensitive issue of transferring the powers of State authorities to an international organisation. The tension between the will to actively participate in European integration and the fears of losing or limiting sovereignty is thus inscribed in the DNA of the Polish Constitution. Interestingly, the provision that is the constitutional basis for Poland's accession to the EU does not expressly indicate these two fundamental and, to some extent, opposing ideas: sovereignty and European integration.

The purpose of this chapter is to analyse Article 90 of the Constitution (in conjunction with other constitutional provisions on international law) as an element of the Polish constitutional imaginary. The notion of constitutional imaginary as formulated by Martin Loughlin will provide the theoretical framework for these considerations. Loughlin drew attention to the manner in which modern constitutions can harness the power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape and re-shape political reality.[3] Loughlin draws attention to three elements that shape the constitutional imaginary: thought, text and action. He claims that the core of the constitutional imaginary and its meaning is determined by an interaction between the concepts of ideology and utopia.[4] Perceived through the lens of Louglin's constitutional imaginary concept, Article 90 of the Polish Constitution turned out to be the provision that shapes intricate relations of two big ineffable ideas: sovereignty and European integration.

The three elements of Loughlin's constitutional imaginary will be the starting point for organising the analysis on Article 90 as a key constitutional provision related to EU membership (and other important constitutional provisions related, inter alia, to the application of international law in the Polish legal order). *Thought*, understood as vision (or visions) of constitutional order,[5] will be identified in this chapter with (rather fragmented) discussion on the vision of Poland's membership of the EU during constitution's drafting. *Text* will be related to academic interpretation of constitutional norms, whereas the dimension of *action* will cover the judicial interpretation of the constitutional text presented in the Constitutional Tribunal case-law regarding Poland's membership of the EU, the constitutional practice of applying (and not applying) Article 90 of the Constitution and the unsuccessful attempts to amend the Constitution and introduce a new 'European chapter' to it.

Loughlin points out that each of the elements that make up the constitutional imaginary are characterised by a tension between ideology and utopia. Ideology orders a pattern of action and is an expression of the fundamental symbolic structure

[3] Martin Loughlin, 'The Constitutional Imagination' (2015) 78 *Modern Law Review* 1, 3.
[4] Ibid., 11.
[5] Ibid., 5.

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of the association. The main function of ideology within the political domain is to perform the integrative role of maintaining its identity.[6] The primary function of utopia, in turn, is to present an imaginative variation of the prevailing interpretation of constitutional order.[7] 'Utopia is the "view from nowhere". Its role is to highlight the contingency of the existing order by offering a vision of what might be.'[8] In the constitutional imaginary, then, ideology is a technique of integration and utopia primarily a technique of subversion. Ideology conceals the gap in legitimacy claims, whereas utopian thought exposes it.[9] Loughlin points out that both ideology and utopia have a positive and negative dimension:

> The positive role of ideology is to achieve social and political integration through constitutional ordering, while for utopian thought the positive role seeks to elaborate and promote ideals that are implicit within a constitutional text. But on the negative side, ideology can operate primarily to mask the various forms of domination within constitutional arrangements, and, in striving for constitutional perfection, utopianism might simply amount to a flight from political reality.[10]

In my opinion, this dichotomy is somewhat relative. Indeed, ideology may contain certain utopian elements, and every utopia is to some extent ideological. With regard to the place of Europe and the vision of European integration within the framework of Polish constitutional imaginary, the ideology–utopia dichotomy can be identified, on the one hand, with liberalism and the vision of a 'return to Europe' and, on the other hand, with the idea of classically understood sovereignty and striving for a strong nation state. The lack of coherence between the extensive sphere of thought and the laconic and agonistic nature of the constitutional text has been reflected in the constitutional practice (action). The European integration has been perceived in the constitutional practice as both the ineffable aspiration and the object of serious concerns. Since 2004, for a long time, constitutional practice with regards to the EU was a syncretic collection of cautious friendliness towards EU law, emphasis on (formal) constitutional supremacy and narrowing down the interpretation of 'the conferral of competences'. Nevertheless, until recent years, the constitutional text had tended to be interpreted as facilitating rather than limiting Poland's participation in European integration. Therefore, the observed Eurosceptic turn in the political domain is not justified either in the sphere of thought or in the constitutional text. The recent constitutional practice disturbs the existing balance between ideology and utopia. Instead of promoting political unity and overcoming conflicts of interest, it establishes a new site of political conflict.[11]

[6] Ibid., 12.
[7] Ibid.
[8] Ibid., 12–13.
[9] Ibid., 13
[10] Ibid., 15.
[11] Ibid.

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7.2 THOUGHT: EUROPEAN INTEGRATION AND THE CONTESTED CONSTITUTIONAL COMPROMISE

The work on the Constitution commenced at a relatively early stage of the systemic transformation but lasted – for various reasons – an unexpectedly long time. Besides other fundamental issues, the question of Poland's future membership of the EU also turned out to be a subject of discussion and controversy.[12] The constitution-making work intensified in the period when Poland's integration with the EU was considered one of the key goals of State policy. All the major political parties declared their will to join the community structures as soon as possible. The pursuit of this goal was emphasised by the signing and subsequent ratification of the Association Agreement.[13] Nevertheless, the 'return to Europe' was not interpreted uniformly by all political parties. The political dispute mainly revolved around the understanding of State sovereignty.

A more detailed analysis of the constitutional provisions related to Poland's membership in the EU should be preceded by an overview of the political dispute over the Polish Constitution, which will help understand the origin of the current 'Eurosceptic' twist in the constitutional practice. The first freely elected Sejm (the lower chamber of the Polish parliament) did not manage to adopt a constitution (1991–1993).[14] The 1993 elections were won by parties burdened with communist heritage: Sojusz Lewicy Demokratycznej – SLD (Democratic Left Alliance) and Polskie Stronnictwo Ludowe – PSL (Polish People's Party). Nevertheless, they did not gain the two-thirds majority necessary to adopt a constitution. Therefore, they created a 'constitutional coalition' with opposition groups originating from post-Solidarity parties: the central-liberal Unia Wolności (Freedom Union) and the left-wing Unia Pracy (Labour Union). The right wing, divided between many parties, found itself outside the parliament but, before the elections planned for autumn 1997, it managed to unite and run for election under the name of Akcja Wyborcza 'Solidarność' (Electoral Action 'Solidarity').[15]

[12] Aleksandra Kustra, *Przepisy i normy integracyjne w konstytucjach wybranych państw członkowskich UE* (Toruń, 2009), 226; Mirosław Wyrzykowski, 'Konstytucyjne aspekty referendum europejskiego', in Eugeniusz Piontek (ed.), *Prawo polskie a prawo Unii Europejskiej* (Liber, 2003), 51.

[13] Kazimierz Działocha, 'Podstawy prawne integracji Polski z Unią Europejską w pracach nad nową konstytucją' (1996) (No. 4) *Państwo i Prawo* 5.

[14] The political consequence of the vote of no confidence in the minority government of Hanna Suchocka by the Sejm of the first term of office was the dissolution of both chambers of the Polish parliament (the Sejm and the Senate) by President Lech Wałęsa in 1993.

[15] AWS was formed in 1996 as a coalition of over thirty parties, uniting liberal, conservative and Christian-democratic forces. Marian Krzaklewski was its first chairman. After the establishment of AWS in 1996, Jarosław Kaczyński was one of its several vice-presidents (while remaining the chairman of the Christian democratic Porozumienie Centrum [PC – the Centre Agreement]). However, just before the elections in 1997, he left AWS, although the Centre Agreement itself remained in this coalition, and the main activists of his party ran from the Action lists. Jarosław

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The post-communist SLD–PSL government was losing in the polls along with the upcoming elections of 1997, and the right-wing parties questioned whether the parliament elected in 1993 had the legitimacy required to adopt a constitution, as they considered it unrepresentative. Moreover, they prepared their own constitutional draft promoted as 'civic'. Although the constitution could have been passed before the 1997 parliamentary elections,[16] the right contested the parliamentary 'constitutional compromise' and called for a boycott of the constitutional referendum scheduled for May 1997 or for a vote against the Constitution. Interestingly, this campaign was quite effective: according to a public opinion poll in February 1997, 34% of Poles and 25% of parliament members would support the 'civic' project. Up to 41% of Poles believed that the parliament should not pass the constitution before the 1997 elections.[17] As a result, the parliament had to lower the threshold for the validity of the constitutional referendum, lifting the minimum 50% turnover requirement. The constitution was accepted by a hair's breadth and with a very low turnout. Only 42.86% of those entitled to participate in the referendum actually voted, and only 53.45% of those who participated voted in favour of the Constitution. In eastern and southern Polish voivodeships (the highest-level administrative division of Poland), the percentage of 'no' votes exceeded 70%.[18] As a result, some right-wing parties, including Prawo i Sprawiedliwość – PiS (Law and Justice), which forms the current government, contested the Constitution as, in their view, passed without sufficient democratic legitimation. Presenting this broader background to the political dispute over the Constitution demonstrates the context of changes that took place in the constitutional practice following 2015. It also explains why European integration, initially of interest to a small section of politicians involved in constitution-drafting, at a certain point became the subject of a fierce debate in the National Constituent Assembly and beyond. This is also a historical aspect that should be accounted for when analysing why the final shape of the Polish 'integration clause' is how it is.

Of the seven drafts of the constitution submitted to the Constitutional Committee of the National Assembly in March and April 1993[19], only the so-called presidential draft contained an integration clause, that is, a provision enabling the conferral of

Kaczyński himself was elected to the Sejm in autumn 1997 from the list of Ruch Odbudowy Polski [Movement for Reconstruction of Poland] – a right-wing party founded in 1995 by Jan Olszewski.

[16] Four hundred and fifty-one members of the National Assembly were in favour of the Constitution; forty were against and six abstained.

[17] Adam Leszczyński, '*Czy konstytucję w 1997 r. uchwalono, nie uwzględniając postulatów prawicy? Sprawdzamy, jak było*' oko.press, 7 May 2017, https://oko.press/konstytucje-1997-r-uchwalono-uwzgledniajac-postulatow-prawicy-sprawdzamy-bylo/.

[18] Ibid.

[19] These were drafts of the Constitution prepared by the Senate, Sojusz Lewicy Demokratycznej (SLD), Unia Demokratyczna (UD), Polskie Stronnictwo Ludowe and Unia Pracy (PSL/UP), the President, Konfederacja Polski Niepodległej (KPN) and Porozumienie Centrum (PC). The Porozumienia Centrum project was withdrawn in May 1994.

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State authority competences to an external entity.[20] The draft stated that 'the law may authorise the signing of an international agreement which authorises an international (supranational) organisation or institution to exercise certain powers reserved by the constitution for organs of legislative and executive power. The act ratifying such an agreement requires its acceptance by a 2/3 majority of votes.'[21]

The Constitutional Commission of the National Assembly was composed of representatives of both the parliamentary majority and the remaining political forces represented in the parliament. It also established a team of experts.[22] European integration and the status of international law in the Polish legal system were discussed by two subcommittees: the Subcommittee on the Foundations of the Political and Socio-Economic System and the Subcommittee on Matters of Sources of Law. The main achievement of the former was to indicate the need for an 'integration clause' (i.e., a provision that might form the basis for Poland's membership in the EU). The latter resolved most of the problems concerning the status of international law within the Polish legal system.[23] Notably, the inclusion of an explicit legal basis for Poland's accession to the EU raised doubts within the Constitutional Committee. The Committee pondered whether to work on such a clause at all or whether to leave this issue to the ordinary law-making process for when there would be a real chance of EU accession. In that case, a relevant provision would have to be added via an amendment to the Constitution. The parliamentary majority formed by SLD and PSL opted for not settling this issue in the Constitution. They argued that Poland's accession to the EU could be carried out based on constitutional provisions for the ratification of international agreements without the need to explicitly regulate the 'conferral of competences'. They pointed out that Poland had acceded to the Council of Europe in this way in 1991.[24] Interestingly, K. Skubiszewski – an influential professor of international law and minister of foreign affairs between 1989 and 1993 – also opposed the regulation of issues directly related to Poland's future membership of the EU in the Constitution. In an article published in 1994, he indicated that the new Constitution should not regulate matters related to the law of international organisations and that these issues should be left to the decision of the ordinary law-maker after the accession.[25]

[20] Działocha, 'Podstawy prawne integracji Polski z Unią Europejską', 6.

[21] Article 16(3) of the draft submitted by President Lech Wałęsa. It is worth noting that one of the weaknesses of the proposed provision was that it did not consider the conferral of competences to judicial authorities. Nevertheless, this flaw was removed after the self-amendment was submitted by the chancellery of the President of the Republic of Poland. Kustra, Przepisy i normy integracyjne, 239.

[22] They were professors: Piotr Winczorek, Paweł Sarnecki, Maria Kruk-Jarosz, Wiktor Osiatyńskiego, Marian Grzybowski and Kazimierz Działocha.

[23] Kustra, *Przepisy i normy integracyjne*, 239.

[24] Ibid., 239–240, n. 477.

[25] Krzysztof Skubiszewski, 'Przyszła konstytucja RP a miejsce prawa międzynarodowego w krajowym porządku prawnym' (1994) (No. 3) *Państwo i Prawo* 11, 15.

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Within the Subcommittees, experts played a decisive role in shaping the proposals that were subsequently discussed at the Constitutional Committee's plenary sessions.[26] The working material entitled 'Preliminary draft of the catalogue of basic political principles that should be expressed in the Constitution of the Republic of Poland' contained, inter alia, point 9 on 'the transfer of some State sovereignty to international institutions'. Three variants were proposed, reflecting different visions of legitimation required for the EU accession:

> a) the Republic of Poland may, by law, transfer sovereign rights to interstate institutions; b) the Republic of Poland may, by means of a constitutional act, transfer supreme rights to interstate institutions; c) the transfer of the sovereign rights of the Republic of Poland to interstate institutions is allowed only by way of (or on the basis of) a nationwide referendum.

The draft also emphasised that adopting such a provision might be beneficial or even necessary for Poland's ambition to integrate with the EU.[27] Nevertheless, a comprehensive draft of the chapter 'Basics of the Political and Socio-economic System' prepared in December 1994, contained no provisions directly related to European integration but only provisions on the relationship between national and international law. Ultimately, the issue of European integration was undertaken by the second of the aforementioned subcommittees (i.e., the Subcommittee on Matters of Sources of Law). It proposed an integration clause according to which the exercise of certain powers of State authorities might be delegated to an international or supranational organisation by way of international agreement ratified after obtaining 2/3 majority of votes in the parliament or submitted for approval in a national referendum.[28]

Starting from spring 1995, the Constitutional Committee discussed the draft constitutional provisions on the EU accession. A point of contention was where to place the integration clause: in Chapter I, regarding the fundamental political principles or Chapter III, regarding the sources of law. The supporters of Chapter I sought to highlight Poland's pro-European policy,[29] whereas the supporters of Chapter III relied on the link between the place of EU law and other international law in the national legal order and the far-reaching consequences for the principle of State sovereignty. In the latter's opinion, bringing the integration clause to the fore of the Constitution would present 'a certain political awkwardness'.[30] Ultimately, it was decided to leave the integration clause in Chapter III.[31]

[26] Kazimierz Działocha, in an interview published in: Bujak, *Konstytucja starsza niż myślisz*, 198.
[27] Ryszard Chruściak, 'Procedury przystąpienia Polski do Unii Europejskiej w pracach nad Konstytucją' (2003) (No. 5) *Państwo i Prawo* 44, 45.
[28] Ibid., 46.
[29] Działocha, 'Podstawy prawne integracji Polski z Unią Europejską', 9; Kustra, *Przepisy i normy integracyjne*, 231.
[30] Działocha, 'Podstawy prawne integracji Polski z Unią Europejską', 9; Kustra, *Przepisy i normy integracyjne*, 231.
[31] Chruściak, 'Procedury przystąpienia Polski', 47–48.

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The Constitutional Committee accepted a version of the integration clause based on a proposal by the Council of Ministers. The ratification of an international agreement based on which Poland would confer competences to an international organisation required the two-thirds majority in both chambers of the parliament or consent by way of a national referendum.[32] The decision as to the mode of ratification was to be made by the Sejm by an absolute majority of votes.[33] Notably, the Committee pondered on making the referendum mandatory.[34] However, ratification by the parliament was considered as the default option due to the principle of the representative democracy in the Constitution and the subsidiary nature of direct democracy.[35]

The axiological rift between the desire to participate in the process of European integration and the fears related to the loss of some sovereignty were reflected in the constitution-making works.

First, a major concern was expressed about the proposed paragraph 2 of Article 9 in Chapter I regarding the observance by the Republic of Poland of binding international law. In the version adopted in the Constitutional Commission on 16 January 1997, this additional paragraph was to become an 'integration clause' under which 'the Republic of Poland may, on the basis of an international agreement, confer to an international organisation or an international body the competences of State authorities in certain matters'. At the final stage of editorial work, right-wing senator P. Andrzejewski submitted a motion to delete it. He stated that this provision raised the issue of 'making the sovereignty in the operation of the highest State authorities in Poland – including legislative, executive and judiciary authorities – dependent on the undefined scope of subordination to an international organisation or international body'.[36] This motion proves the fear held by some of the authors of the Constitution about overstating the 'return to Europe' in the Constitution. A similar motion was formulated by the right-wing non-parliamentary opposition in the 'Position of the Social Constitutional Commission of 26 February 1997 on fundamental issues related to the parliamentary draft of the constitution'. This position stated, inter alia, that 'it is necessary to unequivocally guarantee the sovereignty of the State. Upon cases of conferring some jurisdiction of the State to international bodies and organisations one cannot resign from the supremacy of the constitution, although such situations should be provided for by the constitution by establishing a careful and detailed procedure for making decisions, guaranteeing

[32] Ibid., 48.
[33] Ibid., 48–49.
[34] The supporters of such a solution emphasised that since it was a question of conferring constitutional powers of state authority, society's acceptance should be sought in a referendum, just like with the Constitution, see Ibid., 54.
[35] Ibid., 53–54.
[36] Chruściak, 'Procedury przystąpienia Polski', 51; see also Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego [Bulletin of the Constitutional Committee of the National Assembly], vol XLIII, 52 and 79.

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that the nation will not diminish its rights and that it will act according to its will. In the version proposed in the parliamentary draft of the Constitution, the provisions of Article 9(2) raise justified concerns regarding the abuse of the conferral of competences to international organisations'.[37] In the second reading of the draft of the Constitution, three amendments were submitted for Article 9, all of which related to the content of Article 9(2). One of them proposed deleting Article 9(2) and this motion was voted through.[38] As stated by then Freedom Union member of parliament, J. Zdrada, the discussion on the content of Article 9 was '... not even emotional, but worse. Many used false arguments in this discussion. They invented fears, as if not realising that the matter is somewhat different in international relations. It was alleged that this provision ... actually sells Poland out, giving up sovereignty, independence, etc.'[39] As mentioned earlier, the 'integration clause' ultimately ended up in Chapter III.

Second, there were numerous proposals for procedural restrictions on the conferral of competences to an international organisation. The authors of the constitution 'opened it up' to European integration but, being aware of the accusation made by the non-parliamentary right-wing opposition regarding a 'loss of sovereignty', they included in the integration clause far-reaching procedural limitations. Although they did not opt for an obligatory referendum, they required a qualified majority of two-thirds of the votes in both houses of the parliament. Notably, this solution meant that the procedure for ratifying the EU accession would be more rigid than that for amending the Constitution (which requires the two-thirds majority in the Sejm and only the absolute majority in the Senate; the referendum limited to the most important amendments is optional).[40] Moreover, if the Sejm was to opt for a referendum regarding the accession, a 50 per cent turnout would be mandatory for its validity. Taking into account the fact that, during the referendum regarding the Constitution, the decision was taken to abandon this requirement (and less than half of those eligible to do so actually participated), the requirements of the procedure for ratifying the EU accession through a referendum could have turned out very difficult to fulfil.

However, an ambivalent attitude towards Article 90 of the Constitution was demonstrated by some members of parliament, as evidenced by a statement issued by R. Bugaj – at the time a member of parliament for the Labour Union. In an interview conducted with Z. Bujak, he stated that

[37] Chruściak, 'Procedury przystąpienia Polski', 51; with reference to Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego [Bulletin of the Constitutional Committee of the National Assembly], vol. XLIII, 99–100.

[38] Chruściak, 'Procedury przystąpienia Polski', 51–53.

[39] Jerzy Zdrada, in Bujak, *Konstytucja starsza niż myślisz*, 275.

[40] Article 235 of the Constitution, which regulates the issue of passing the act on amending the Constitution, indicated the requirement to obtain a two-thirds majority in the Sejm and an absolute majority in the Senate (with a quorum of at least half of the statutory number of members of a given chamber of parliament).

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> . . . in fact, it was not needed and the problem could have been resolved differently. This is also an example of the ideological attitude of the Freedom Party [Unia Wolności]. It was a Freedom Party idea (to include an integration clause), and specifically promoted by Suchocka [a Polish political figure, lawyer and the Prime Minister of Poland between 8 July 1992 and 26 October 1993].[41]

When the interviewer stated that such an attitude was surprising, considering the fact that at the same time in Western Europe states entering the EU were introducing similar provisions to their constitutions, R. Bujak stated,

> Yes, but they're not exactly the same, and in any case we could have managed without this article. It protects sovereignty and makes it easier to seize it at the same time, thus creating a certain precedent. I think that we didn't need it, but also when we accepted it, we didn't think that such a conflict would break out around it, although this war was largely artificial. People were looking for a place to aim and shoot from as large a cannon as possible.[42]

To sum up, the tension between the willingness to participate in the process of European integration and the fear of losing sovereignty was noticeable in the constitution-making work. Europe appeared as an unspoken aspiration but also a subject of concern. Political conflicts within the so-called parliamentary constitutional coalition meant that the ultimately adopted wording of Article 90 was a result of a painstaking compromise. Moreover, the criticism of the Constitution by the non-parliamentary right-wing opposition also applied to the Polish 'integration clause'. Fears of a social reaction and the overarching goal of having the Constitution approved in a referendum prevented a stronger articulation of 'openness' to the EU. The broader formula of 'conferral of competences to an international organisation or body' was chosen and the 'conferral of competences' was removed from Chapter I of the Constitution. Therefore, Article 90 appears as, on the one hand, a provision that 'enables' opening up to Europe. Without it, the EU accession would be practically impossible.[43] On the other hand, the EU accession is in this provision subject to relatively tough procedural requirements geared towards the protection of national sovereignty.

7.3 TEXT: CONSTITUTIONAL SILENCE AND ITS INTERPRETATION

Jerzy Ciemieniewski, MP in the 1990s and later judge of the Constitutional Tribunal, stated that the Constitution of 1997 was written by constitutional practitioners, 'that is, people who, in their experience, have contact only with certain

[41] Bujak, *Konstytucja starsza niż myślisz*, 226.
[42] Ibid.
[43] Maria Kruk, 'Tryb przystąpienia Polski do Unii Europejskiej i konsekwencje członkostwa dla funkcjonowania organów państwowych', in Krzysztof Wójtowicz (ed.) *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne* (Wydawnictwo Sejmowe, 2006), 139.

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cases of the operation of constitutional norms and who regulate in this act the situations they encountered'.[44] 'This whole constitutional debate proceeded as if there had not been actually one good book on constitutional law, the philosophy of the state, and the philosophy of law. It was all extremely pragmatic and related to the specifics or to the wording of provisions.'[45] And this – in his opinion – was one of the main reasons for the casuistic nature of the Constitution of 1997.[46] He criticised the Polish Constitution for the lack of a coherent theoretical vision and for being too detailed.[47] Considering the 'integration clause', this thesis may only be regarded as half the story. In this case, framers of the Constitution adopted the rule: the less is more. It can be assumed that one of the reasons for such a decision was simply Poland's lack of experience in the field of constitutional aspects of EU membership. Accession to the EU in 1997 was still quite distant in time and uncertain. Moreover, the trend of amending national constitutions to take fuller account of the country's membership in the EU was only just beginning (just as integration within the framework of the still relatively recently established EU was still developing). Therefore, both the substantive and procedural layer of Article 90 (1) is rather terse. Political compromises in the case of this clause took the form of 'constitutional silence' rather than casuistry. The tension between aspiration and fear of losing sovereignty is left unsaid. Article 90 does not contain the words 'Europe' or 'sovereignty'. This 'constitutional silence' may also be described as 'constitutional abeyance'. It does not arise because the issue has been overlooked,[48] but rather expresses the need 'to condone, and even cultivate, constitutional ambiguity as an acceptable strategy for resolving conflict'.[49]

The integration clause in the Polish Constitution is intentionally unfinished. 'What is explicit in the text rests on implicit understandings; what is stated rests on what is unstated.'[50] Article 90 'establishes a framework within which – and over which – further political deliberation takes place.'[51] This makes the interpretation of the constitution-makers' understatements all the more important. This part of the chapter focuses on the academic interpretation of the constitutional text. This type of interpretation – due to its epistemic authority – is often used to justify certain actions within the framework of constitutional practice (although constitutional practice – on the basis of synergy – also influences academic interpretation).

[44] Jerzy Ciemieniewski in conversation with Zbigniew Bujak, in Bujak, *Konstytucja starsza niż myślisz*, 292.
[45] Ibid., 284.
[46] Ibid.
[47] Ibid., 284–285.
[48] Martin Loughlin, 'The Silence of Constitutions' (2018) 16 *International Journal of Constitutional Law* 922, 926.
[49] Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge Revivals, 1989), 11.
[50] Loughlin, 'The Silence of Constitutions', 927.
[51] Ibid., 935.

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Loughlin points out that constitutional text is often agonistic and contains the seeds of dissonance.[52] The tension between aspiration for Europe and fear of losing sovereignty is expressed again (after the completion of the constitution-making) in the academic interpretation of Article 90 of the Constitution. It shows the desire to establish a fragile balance between ideology and utopia. The ideology (fundamental symbolic structure) of the 'Integration clause' is the opening of the Constitution to Europe and the European system of values, while utopia is the Westphalian vision of sovereignty. On the one hand, it is pointed out that Article 90 plays the so-called role of legitimising (allowing) participation in integration processes. On the other hand, it is mentioned that it also functions as a safeguard of the Polish constitutional order and State sovereignty.[53] In its role as legitimiser, Article 90 is considered an expression of opening the Polish legal system to the power of international organisations. Legitimisation relates to two areas. First, the transfer of power to an international organisation. Secondly, the opening of the Polish legal order to the validity and application of legal norms created by other legal entities.[54]

The search for a balance between the roles of legitimisation and safeguard is visible in the academic search for an appropriate interpretation of the concept of the 'conferral of competences of State authorities'. The formulation that was eventually adopted was critically assessed by part of the legal doctrine.[55] It was pointed out that, in the act of conferring competences, 'the States only forego the exercise of relevant rights, although they remain [hereinafter] in their possession'.[56] The effects of 'conferral' are two-fold: first, Poland relinquishes the exclusivity of its authority in certain areas; secondly, it allows for the application of 'foreign sovereign acts, not originating from the Polish public authority' in these areas.[57]

In the discourse on the limits of conferring competences, it was emphasised that the constitution-makers did not use the 'politically delicate' term *sovereignty* in Article 90. C. Mik – a professor of European law – stated that in this decision one

[52] Loughlin, 'The Constitutional Imagination', 15.

[53] Maciej Szpunar, 'Art. 90', in Marek Safjan and Leszek Bosek (eds.), *Konstytucja RP. Komentarz, Tom II, Art. 87–243* (Duże Komentarze Becka, 2016), 125.

[54] Kustra, *Przepisy i normy integracyjne*, 319.

[55] Stanisław Biernat, 'Constitutional Aspects of Poland's Future Membership in the European Union' (1998) 36 *Archiv des Völkerrechts* 398, 406–408; Jan Galster, 'Konstytucyjnoprawne aspekty przystąpienia Polski do Unii Europejskiej', *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej* (1998), 72; Cezary Mik, 'Przekazanie kompetencji przez Rzeczpospolitą Polską na rzecz Unii Europejskiej i jego następstwa prawne' in Cezary Mik (ed), *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskie* (TNOiK, 1999), 150.

[56] Jan Galster, 'Konstytucyjnoprawne bariery przystąpienia Polski do Unii Europejskiej', in Cezary Mik (ed.) *Polska w Unii Europejskiej. Perspektywy, warunki, szanse i zagrożenia* (TNOiK, 1997), 28.

[57] Jan Barcz, 'Konstytucyjnoprawne problemy stosowania prawa Unii Europejskiej w Polsce w świetle dotychczasowych doświadczeń państw członkowskich', in Maria Kruk (ed.), *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* (Wydawnictwo Sejmowe, 1997), 203.

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can see the recognition of sovereignty as an inalienable property of the Polish state, a specific meta-competence (i.e., a general and primary competence), the competence to decide on the exercise of specific competences.[58] It was academic interpretation that filled with content the constitutional silence, especially with regard to the fear of losing sovereignty. The position expressed by K. Wojtyczek – a professor of constitutional law and author of a monograph on the conferral of competences – is representative in pointing out that

> State sovereignty now means not so much the exclusive jurisdiction of the State to decide on its affairs, but rather the presumption that the state has such competence and the right to decide to revoke this presumption to a certain extent. Sovereignty is now expressed primarily in the right to participate in international relations and various international organisations on an equal footing with all other states and in the participation in joint decision-making in the international arena.[59]

There is a noticeable departure from the Westphalian vision of sovereignty and inspiration from contemporary theory of law, which redefines this concept.[60]

Nevertheless, the academic interpretation of Article 90 – based largely on concepts developed in German legal doctrine[61] – also emphasises the function of the 'integration clause' as a safeguard of sovereignty. In addition to the protection of sovereignty as a fundamental constitutional category, constitutionalists also highlighted quantitative (the 'conferral of competences in *certain matters*'[62]) and qualitative limitations (the requirement to maintain the principle of a democratic state ruled by law and the requirement to respect fundamental rights and freedoms,[63] the

[58] Cezary Mik, 'Przekazanie kompetencji przez Rzeczypospolitą Polską na rzecz Unii Europejskiej i jego następstwa prawne (uwagi na tle art. 90 ust. 1 Konstytucji)', in Cezary Mik (ed.), *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej: IV Ogólnokrajowa Konferencja Prawnicza Toruń 19-20 listopada 1998 r.* (TNOiK, 1998), 150.

[59] Krzysztof Wojtyczek, 'Polska w europejskim systemie konstytucyjnym', in Paweł Sarnecki (ed.), *Prawo Konstytucyjne Rzeczypospolitej Polskiej* (C. H. Beck, 2005), 14.

[60] Neil Walker (ed.) *Sovereignty in Transition* (Bloomsbury, 2006); Neil Mc Cormick, *Questioning Sovereignty: Law, State, and Practical Reason* (Oxford University Press, 1999).

[61] Krzysztof Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym* (Wydawnictwo Uniwersytetu Jagiellońskiego, 2007), 183; Barcz, 'Konstytucyjnoprawne problemy', 203.

[62] Kazimierz Działocha, 'Komentarz do Art. 90', in Leszek Garlicki (ed.), *Konstytucja rzeczpospolitej Polskiej. Komentarz* (Wydawnictwo Sejmowe, 1999), 3–4; Mik, 'Przekazanie kompetencji', 151; Krzysztof Wójtowicz, 'Konstytucja Rzeczypospolitej Polskiej a członkostwo w Unii Europejskiej', in Ewa Popławska (ed.), *Konstytucja dla rozszerzającej się Europy* (Instytut Spraw Publicznych, 2000), 161; Bartosz Pawłowski, 'Opinia w sprawie projektu Traktatu ustanawiającego Konstytucję dla Europy' (2003) (No 5) *Przegląd Sądowy* 85.

[63] Działocha, 'Komentarz do Art. 90', 5; Mik, 'Przekazanie kompetencji', 154–155; Ryszard Mojak, 'Konstytucyjne podstawy integracji Polski z Unią Europejską', in Tadeusz Bojarski, Ewa Gdulewicz and Jan Szreniawski (eds.), *Konstytucyjny ustrój państwa: Księga jubileuszowa Profesora Wiesława Skrzydły* (Wydawnictwo UMCS, 2000), 174; Wójtowicz, 'Konstytucja Rzeczypospolitej Polskiej', 164; Jan Barcz, 'Członkostwo Polski w Unii Europejskiej a

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requirement of axiological consistency[64]) resulting directly or indirectly from the content of Article 90. From the outset, the possibility of terminating an international agreement on the basis of which competences have been conferred was also accounted for, and the procedure under which this would be executed was considered. Despite the lack of an explicit reference to the EU in Article 90, academics narrowly interpreted the constitutional expression referring to 'an international organisation or body'. A. Wyrozumska – professor of international law – pointed out that the practice of applying Article 90 should be limited only to organisations that may be defined as supranational.[65] In turn, K. Wojtyczek emphasised that Article 90 *de lege lata* precludes the transfer of power to a future European federation.[66]

A distinct element of the academic interpretation of the 'integration clause' is its procedural dimension. Even long before Poland's accession to the EU, loopholes in this respect were revealed.[67] Although there were some shortcomings, as noted by M. Kruk – Professor of constitutional law and expert of the Constitutional Commission – any attempts to overly concretise the procedure for conferring power at the constitutional level would lead to an overextension of Article 90.[68] The main controversies concerned the national referendum for the ratification of an international agreement, which is the basis for the conferral of competences. Most constitutionalists criticised the reference in Article 90 to Article 125 of the Constitution, which regulates 'a referendum on matters of particular importance to the State'.[69] The basic problem was the requirement arising from Article 125 to obtain at least a 50 percent turnout for a referendum to be considered valid. The Constitution did not explicitly regulate (neither in Article 90 nor in Article 125) what would happen if this turnout was not reached. The academics unanimously adopted an interpretation according to which, in such a case, it would be necessary for the Sejm to choose again the manner of ratification: another referendum or the parliamentary avenue requiring the two-thirds majority in both chambers. It was

Konstytucja', in Jan Barcz (ed.), *Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej* (Instytut Spraw Publicznych, 2002), 20; Wyrzykowski, 'Konstytucyjne aspekty referendum europejskiego', 54.

[64] Działocha, 'Komentarz do Art. 90', 5; Anna Wyrozumska, 'Ratyfikacja traktatu akcesyjnego w drodze referendum', in Jan Barcz (ed.), *Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej* (Instytut Spraw Publicznych, 2002), 89.

[65] Anna Wyrozumska, 'Prawo międzynarodowe oraz prawo Unii Europejskiej a konstytucyjny system źródeł prawa', in Krzysztof Wójtowicz (ed.), *Otwarcie konstytucji RP na prawo międzynarodowe i procesy integracyjne* (Wydawnictwo Sejmowe, 2006), 76.

[66] Wojtyczek, 'Polska w europejskim systemie konstytucyjnym', 16.

[67] Jan Barcz, *Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej* (Instytut Spraw Publicznych, 2002).

[68] Maria Kruk, 'Tryb przystąpienia Polski', 142.

[69] Kustra, *Przepisy i normy integracyjne*, 272.

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argued that this was the only rational interpretation of Article 90.[70] It was postulated that, in this respect, it would be desirable to amend Article 90 but not necessary.[71] Prof. Wójtowicz emphasised that the constitutional 'loophole' may in this case be filled in with a statute.[72] And so it happened – the Constitution was made more precise by the act of 8 March 2003 on a national referendum. This act was challenged before the Constitutional Tribunal, which will be discussed in Section 7.4.

However, at this point it should be noted that the academic interpretation of the procedural dimension of Article 90 proves that constitutionalists sought to ensure the effectiveness of the 'integration clause'. Even before its first application in 2003, they tried to discourage its interpretation that might lead to a 'decisional impasse' in terms of conferring competences. Due to problems related to the approval of the Constitution in 1997, inter alia, they were aware of the dangers posed by a referendum procedure requiring at least a 50 per cent turnout. Thus, they avoided such an interpretation that could end up torpedoing the legitimising role of the Polish 'integration clause'. At the same time, they also searched for a way to accommodate the role of the integration clause as a safeguard of sovereignty. If the 50 per cent turnout in the referendum could not be obtained, it would be necessary to reach the two-thirds majority in both houses (i.e., the procedure would be more difficult than that for a constitutional amendment).

7.4 ACTION: CONSTITUTIONAL PRACTICE BEFORE AND AFTER 2015: TOWARDS UTOPIA AND AGAINST CONSTITUTIONAL COMPROMISE?

7.4.1 *The Application and Non-application of the 'Integration Clause'*

The third element of the constitutional imaginary (i.e., action/constitutional practice) is most often built gradually and with consideration of thought and interpretation. This does not always mean that all the elements are consistent. In the case of Article 90, until the illiberal turn in Poland, the constitutional practice reflected an attempt to establish a fragile balance between ideology and utopia. Until the victory of Law and Justice in the parliamentary elections in 2015, Article 90 was primarily interpreted and applied in constitutional practice as a provision enabling integration, and not hindering or restricting it. So, the function of legitimisation prevailed, whereas the meaning of Article 90 as a safeguard of sovereignty was discussed mainly in theory (e.g., in lengthy justifications of the decisions of the

[70] Barcz, 'Członkostwo Polski w Unii Europejskiej a Konstytucja', 18; Maria Kruk, 'Konstytucja narodowa a prawo europejskie: Czy Konstytucja Rzeczypospolitej Polskiej wymaga zmiany', in Ewa Popławska (ed.), *Konstytucja dla rozszerzającej się Europy* (Instytut Spraw Publicznych, 2000), 185; Wójtowicz, 'Konstytucja Rzeczypospolitej Polskiej', 167–168.

[71] Barcz, 'Członkostwo Polski w Unii Europejskiej a Konstytucja', 18–19 and 40.

[72] Wójtowicz, 'Konstytucja Rzeczypospolitej Polskiej', 167.

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Constitutional Tribunal). The Eurosceptic politics of the executive authorities in recent years combined with the 'political capture of the Constitutional Tribunal' has made Europe in constitutional practice more of a concern than an aspiration.

This part of the chapter presents three components of constitutional practice in relation to Article 90 of the Constitution as an integration clause before the illiberal turn of 2015. The first component is the application of Article 90, and therefore the conferral of competences or political decisions not to confer, while opting for a default mode of ratifying an ordinary international agreement. The second component is the rulings by the Constitutional Tribunal involving interpretation of Article 90. The third component is related to the so far unsuccessful attempt to introduce a so-called European chapter to the Constitution, which would be an expression of a shift in the current perception of Europe in the Polish constitutional imaginary. Due to the importance of the illiberal turn for the shift in the perception of Europe within the Polish constitutional imaginary, analysis of constitutional practice post-2015 should be analysed separately, including cases of non-application of Article 90 and Eurosceptic rulings by the politically captured Constitutional Tribunal putting forward an illiberal reinterpretation of Europe.

The cases of application or decisions not to apply Article 90 of the Constitution are undoubtedly crucial for establishing constitutional practice with regard to where Europe stands within the Polish constitutional imaginary. To this day, Article 90 regarding the 'conferral of competences' has only been applied twice. The first case concerned the ratification of the Accession Treaty in 2003. The second case concerned the ratification of the Lisbon Treaty in 2009. In 2003, the Sejm decided to hold a ratification referendum for the Accession Treaty, whereas in 2008 the parliamentary procedure was chosen for the Lisbon Treaty. Meanwhile, the application of Article 90 was considered to ratify various international agreements (as well as other legal acts of international law) both related and unrelated to the EU but, ultimately, the ordinary procedure for ratifying international agreements was chosen, which proves the exceptional nature of Article 90.

With regard to the ratification of the Accession Treaty, it is worth noting that, at the beginning of 2002 (i.e., before completing the accession negotiations), a motion had already been submitted in the Sejm to hold an accession referendum. The motion implied that such a referendum would take place even before the signing of the Accession Treaty itself. After discussion, however, the Sejm rejected it as premature.[73] Although political arguments outweighed substantive arguments in the parliamentary discussion, the constitutionalists considered this decision as sound.[74] Finally, the Sejm passed a resolution to order a nationwide referendum

[73] Kustra, *Przepisy i normy integracyjne*, 270.
[74] Kruk, 'Tryb przystąpienia Polski', 147.

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to approve the ratification of the Accession Treaty on 17 April 2003, and the referendum itself was held on 7–8 June 2003. At the very beginning of the public discussion related to the ratification procedure of the Accession Treaty, the prevailing position was that the public should be given the opportunity to express its view on Poland's membership in the EU and a referendum should be held in this regard. The greatest concerns involved the minimum turnout requirement but these concerns turned out unfounded as 58.8 per cent of those entitled to vote participated. Of the voters, 77.45 per cent were in favour of Poland's accession to the EU (significantly more than during the referendum on the Constitution), while 22.55 per cent were against.[75] The Accession Treaty was ratified by President Aleksander Kwaśniewski on 23 July 2003 and, on 1 May 2004, Poland became an EU Member State. The sovereign statement made in the 2003 referendum can be interpreted as the strongest confirmation so far in the constitutional practice of liberal ideology and the social desire for a 'return to Europe'. The accession referendum can also be seen as public support for the liberal elements of the constitutional imaginary.

As regards the Lisbon Treaty, the Sejm decided not to hold a referendum, opting for the procedure requiring the 2/3 majority in both houses. The politicians (not only Polish ones) were sceptical about the referendum, bearing in mind how France and the Netherlands rejected the Constitution for Europe. The case of Ireland (where a second referendum was required) showed that this scepticism was at least partially justified.

Apart from the above-mentioned two cases of applying Article 90, until 2015, the ratification of an international agreement in this procedure – implying the conferral of State authority competences – was considered at least several times in the public debate. In each case, arguments that the ratification of a given international agreement did not really entail the conferral of competences prevailed.

Chronologically, the first discussion on the application of Article 90 concerned the ratification of the Rome Statute of the International Criminal Court. The ratification of the Statute took place in 2001 – before Poland's accession to the EU. At that time, experts considered the possibility of applying Article 90 to ratify non-EU legal acts to an extent greater than following 2004. After Poland's accession to the EU, public debate on the possibility of applying Article 90 only concerned the ratification of acts forming part of the broadly understood EU legal order: the so-called Spanish Protocol (amending the Protocol on transitional provisions to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community); the treaty on the accession of Croatia to the EU, the European Stability Mechanism and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so-called fiscal pact).[76]

[75] Wyrzykowski, 'Konstytucyjne aspekty referendum europejskiego', 271.
[76] Szpunar, 'Art. 90', 122–123.

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7.4.2 *Constitutional Tribunal's Case-law*

The second component shaping constitutional practice in terms of how Europe is perceived in the Polish constitutional imaginary is the jurisprudence of the Constitutional Tribunal. Until 2015, the Constitutional Tribunal consistently enabled the effective application of EU law, while at the same time emphasising the constitutionally determined limits of European integration. This case law is therefore an attempt to find a balance between the ideology of returning to Europe, active participation in multi-level constitutionalism and the utopia of traditionally understood sovereignty. This is particularly well illustrated by the manoeuvring of the Constitutional Tribunal between classically defined supremacy of the constitution and its pro-European interpretation.

Before Poland's accession to the EU, the Constitutional Tribunal ruled on the act on national referendum, brought by two groups of Eurosceptic members of parliament.[77] The impugned provision stipulated that, in the absence of a 50 per cent turnout in a referendum concerning the ratification of an international agreement under Article 90, the Sejm may again adopt a resolution selecting the method of ratification. The Constitutional Tribunal rejected the allegation that this provision bypasses the negative outcome of the referendum and considered it to be a technical arrangement which does not constitute a normative novelty.[78] This adjudication was the first signal that the Constitutional Tribunal perceives the importance of the legitimisation role of Article 90 of the Constitution.

The fundamental principles concerning the constitutional and legal dimension of Poland's membership in the EU were formulated by the Constitutional Tribunal in the ruling concerning the Accession Treaty.[79] Three groups of Eurosceptic members of parliament submitted independent motions to the Constitutional Tribunal, in which they questioned many provisions of the European Treaties. The Constitutional Tribunal rejected the applicants' arguments concerning, inter alia, the allegation that Poland's sovereignty would be violated following accession to the EU, underlined the obligation arising from EU membership to interpret the Constitution in a manner that would be friendly to European law, while also pointing out the limits of this interpretation (no *contra legem* interpretation). This ruling is an excellent illustration of the ambiguity of Europe in constitutional practice. On the one hand, the Constitutional Tribunal specified the consequences of Poland's membership in the EU for the legal system and the interpretation of the Constitution (the need to ensure the effectiveness of EU law). On the other hand, it highlighted the classically defined supremacy of the Constitution. In case of an irresolvable contradiction between the Constitution and EU law, Poland would

[77] Constitutional Tribunal, Judgment of 27 May 2003, Case K 3/11.
[78] Wyrzykowski, 'Konstytucyjne aspekty referendum europejskiego', 59.
[79] Constitutional Tribunal, Judgment of 11 May 2005, Case K 18/04.

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have to seek a change of EU law, amend the Constitution or, as an *ultima ratio*, leave the EU. Moreover, the ruling emphasised the role of Article 90 as a safeguard of sovereignty, pointing to the constitutional limits of transferring power to the EU. The Constitutional Tribunal stated that the concept of 'the conferral of competences in certain matters' should be understood as 'a prohibition of transferring all competences of a given body, transferring competences in all cases in a given field', and as a prohibition of transferring the 'hard-core' competences of a certain body ('competences as to the merits of a given matter, determining the prerogative of a given state authority body').[80]

The search for a balance between the aspiration to become an equal player in the multi-level constitutionalism of the EU and the protection of the supremacy of the Constitution is also visible in the ruling concerning the European Arrest Warrant.[81] An ordinary court made a reference asking whether the provision of the Polish Code of Criminal Procedure implementing the Framework Decision on the European Arrest Warrant complies with Article 55 of the Constitution, which at that time provided for the prohibition of extradition of Polish citizens without any exceptions. The Constitutional Tribunal ruled that the challenged provision was unconstitutional. Its argumentation was based on a statement that the European Arrest Warrant, despite its simplified procedure, is in fact a form of extradition, and the pro-European interpretation of Article 55 of the Constitution was not possible in that case. Yet, at the same time, the Constitutional Tribunal maintained the unconstitutional provision in force for the maximum period of 18 months and made clear that, during this time, Polish courts should still execute European Arrest Warrants. As a result of this ruling, Article 55 of the Constitution was amended before the 18-month period had elapsed.

Another important ruling concerned the Treaty of Lisbon. The case was initiated by two motions submitted by Eurosceptic parliamentarians (members of parliament and senators, respectively). The Constitutional Tribunal ruled that the Treaty of Lisbon complied with the Polish Constitution, but also once again spoke about the constitutional limits of European integration. Referring to the jurisprudence of the German *Bundesverfassungsgericht*, the Constitutional Tribunal stressed that constitutional identity marks the line that cannot be crossed when it comes to the transfer of power to the EU. Therefore, the ruling on the Treaty of Lisbon in its operative part expresses pro-European liberal ideology, while its justification reveals elements of the utopia of State sovereignty as traditionally understood, including the unconditional supremacy of the Constitution. Europe remains both an aspiration and a concern.

Much controversy was caused by the ruling concerning a constitutional complaint against Council Regulation 44/2001 on jurisdiction and the recognition and

[80] Ibid., para. 4.1.
[81] Constitutional Tribunal, Judgment of 27 April 2005, Case P 1/05.

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enforcement of adjudications in civil and commercial matters, that is, an act of EU secondary law.[82] The Constitutional Tribunal decided to review the challenged regulation, referring to the need to ensure effective protection of constitutional rights and freedoms. On the merits, it did not agree with the plaintiff's arguments and upheld the constitutionality of the Council Regulation. It also stressed that constitutional complaints against EU secondary law would have to 'duly adduce that the challenged EU secondary law act significantly lowers the level of protection of rights and freedoms as compared to the one guaranteed by the Constitution'. This reservation resembles the 'Solange II' formula of the German *Bundesverfassugsgericht*, although the very decision to review the constitutionality of the EU regulation in terms of its compliance with constitutional rights refers to 'Solange I'. Although this ruling did not directly concern Article 90 State sovereignty, it yet again revealed the tension between opening up to the EU legal system and maintaining control over the observance of constitutional standards of protection of fundamental rights by acts of EU law, one of the tokens of State sovereignty and constitutional supremacy.

In the case concerning the ratification of European Council Decision 2011/199/EU on the amendment of Article 136 of the Treaty on the Functioning of the European Union with regard to the stability mechanism for Member States whose currency is the euro, the key constitutional yardstick was indeed Article 90.[83] The allegations of the applicants (groups of members of parliament) concerned, inter alia, the way the decision was ratified. In their opinion, it should have been ratified pursuant to Article 90, implying the two-thirds majority in both houses or a national referendum, because this decision created grounds for conferring new State competences to the European Stability Mechanism. In the ruling of 26 June 2013, the Constitutional Tribunal rejected the arguments submitted by the applicants, referring to the CJEU ruling of 27 November 2012 in case C-370/12 (Thomas Pringle), indicating that the amendment to Article 136(3) of the TFEU does not confer any new competences to the European Union. Notably, five judges submitted dissenting opinions, arguing that the Constitutional Tribunal had adopted too narrow an interpretation of the concept of 'the conferral of competences', thus severely limiting the applicability of Article 90.[84] This ruling might be interpreted as one in which the Constitutional Tribunal narrowed down the applicability of Article 90 in order to not prevent the ratification in the political context in which the two-thirds majority would be unattainable. In that Parliament (with the majority formed by PO and PSL), PiS would not support the ratification probably.

To sum up, until 2015, constitutional practice regarding the perception of Europe in the jurisprudence of the Constitutional Tribunal was consistent with the layer of

[82] Constitutional Tribunal, Judgment of 16 November 2011, Case SK 45/09.
[83] Constitutional Tribunal, Judgment of 26 June 2013, Case K 33/12.
[84] Dissenting opinions were presented by judges: Zbigniew Cieślak, Mirosław Granat, Marek Kotlinowski, Teresa Liszcz and Marek Zubik.

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thoughts and interpretations of the Polish constitutional imaginary regarding this issue. It was characterised by a sometimes rather precarious balancing between multi-level constitutionalism and traditionally understood constitutional supremacy and sovereignty. Despite the visible elements of the utopia of sovereignty in the jurisprudence of the Constitutional Tribunal, the ideology of (cautious) friendliness towards EU law prevailed until 2015. The Constitutional Tribunal ensured the effectiveness of EU law even in decisions that emphasised Article 90's function of a safeguard rather than a legitimisation tool.

7.4.3 *The European Chapter*

Difficulties in finding a balance between the ideology of returning to Europe and the utopia of classically Westphalian sovereignty brought to the surface of public debate the issue of extending the constitutional regulations concerning Poland's membership in the EU and adding a new 'European chapter' to the Constitution. In 2009, Bronisław Komorowski (then Marshall of Sejm) appointed a team of experts, who a year later prepared a draft of the 'European chapter'. It was brought to Sejm as a presidential draft, due to the fact that in 2010 Komorowski became the President of Poland. PiS presented its own draft as well. Both drafts were based on the notion of 'concentrating' constitutional regulations relating to European integration within one chapter (the new Chapter Xa), but each of them presented a different vision of Europe in the Polish constitutional imaginary. The presidential draft ossified the relative balance between the ideology of returning to Europe and the utopia of Westphalian sovereignty, which had been created so far in constitutional practice. On the other hand, the draft proposed by PiS was the first harbinger of the Eurosceptic shift that took place after 2015. Those opposing visions of Europe are most clearly demonstrated by the different regulation of the potential Polexit (mainly in response to Article 50 TEU). Whereas the presidential draft adopted the concept of *actus contrarius*, the draft of PiS MPs, in turn, envisaged that decision on the withdrawal of the Republic of Poland from the organisation international, to which Poland has transferred competences, requires consent in an statute law passed by a simple majority of votes.[85] However, the draft of PiS MPs *de facto* copied and pasted the wording of the binding 'integration clause', whereas the presidential bill had, on the one hand, 'Europeanised' the constitution by introducing the name of the EU into the 'integration clause' while, on the other hand, it also contained some elements that could potentially be abused by Eurosceptics

[85] It was an attempt to rectify a mistake made in 2010. At that time, when adopting the so-called Cooperation Act (regulating the cooperation between the government and parliament in matters related to EU membership) the Act on international agreements of 2000 was also amended. Then Article 22a was added, which provides in paragraph 2 that 'The submission of a draft decision to withdraw from the European Union to the President of the Republic of Poland shall be made after obtaining the consent expressed in the statute law.'

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(such as the final part the proposed new 'integrational clause' in which it was stipulated that the EU 'ensures the protection of rights human being comparable to the protection of these rights in the Constitution').[86] Although none of the drafts were successfully passed, they constitute an important component of constitutional practice.

7.4.4 *The Constitutional Imaginary Post-2015*

Constitutional practice regarding the perception of Europe in the Polish constitutional imaginary began to undergo a fundamental change in 2015 when, for the first time since 2005, PiS won the parliamentary elections. From that moment on, the ruling coalition composed of right-wing parties has consistently tried to rebuild the systemic framework created by the Constitution and undermine the contested 'constitutional compromise'. Contrary to Orban's Fidesz party, Law and Justice, despite two parliamentary elections won in 2015 and 2019, does not have the necessary majority to amend the Constitution. Therefore, the adopted political strategy was to introduce changes to the system by means of ordinary acts, inconsistent with current constitutional practice. These acts are inconsistent with the rule of law and lead de facto to informal amendments to the Constitution. Academic conceptualisations reveal the multifaceted nature of this phenomenon, which is defined by various terms such as rule of law crisis,[87] constitutional crisis,[88] constitutional breakdown,[89] democratic backsliding,[90] statutory anticonstitutionalism[91] or even illiberal constitutionalism.[92]

The Eurosceptic turn in constitutional practice and the change in how Europe is perceived in the Polish constitutional imaginary are a reaction to the supranational dimension of rule of law crisis focused on the 'reform' of the judiciary. The current

[86] This passage has been criticized by experts, further on this issue see: Aleksandra Kustra, '"Euronowelizacja" w projektach ustaw o zmianie Konstytucji RP. Próba oceny' (2011) *Przegląd Sejmowy* 31, 41.

[87] Among many: Marcin Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' (2020) 12 *Hague Journal on the Rule of Law* 421; Aleksandra Kustra-Rogatka, 'Country Report. Poland Rule of Law Overview', https://democracy-reporting.org/en/office/EU/publications/country-report-the-rule-of-law-in-poland.

[88] Among many, Marcin Matczak, 'Poland: From Paradigm to Pariah? Polish Constitutional Crisis – Interpretations'; https://ruleoflaw.pl/poland-from-paradigm-to-pariah-polish-constitutional-crisis-facts-and-interpretations/; Aleksandra Kustra, 'Poland's Constitutional Crisis, from Court-packing Agenda to Denial of Constitutional Court's Judgments' (2016) 12 *Toruńskie Studia Polsko-Włoskie* 343.

[89] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

[90] Among many: Wojciech Przybylski, 'Explaining Eastern Europe: Can Poland's Backsliding Be Stopped' (2018) 29 *Journal of Democracy* 52.

[91] Maciej Bernatt and Michał Ziółkowski, 'Statutory Anti-Constitutionalism' (2019) 28 *Washington International Law Journal* 487.

[92] Timea Drinóczi and Agnieszka Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge, 2022).

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fragile balance between the ideology of returning to Europe and the fear of losing sovereignty has been shattered. Moreover, Europe is now not only becoming a matter of concern regarding loss of sovereignty, but also an obstacle to the realisation of illiberal democracy. However, it should be noted that, first of all, the Eurosceptic shift in how the EU is perceived did not happen overnight. Instead, it was a process of gradually rejecting the legitimising aspect of Article 90 and focusing on a fetishised Westphalian sovereignty. Secondly, there is an asymmetry in the two components of this constitutional practice (i.e., the decision on the application or non-application of Article 90 of the Constitution and the jurisprudence of the Constitutional Tribunal).

The superficial layer of decisions not to apply Article 90 following 2015 does not constitute a breakthrough in relation to current constitutional practice in this regard. The shift is visible in the political rhetoric of the government, which is beginning to approach Europe from a purely instrumental perspective. The EU is becoming a mere source of potential financial resources rather than a community of values. This thesis can be formulated on the basis of an analysis of the public debate regarding the mode of ratification of the Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of the European Union's own resources (Reconstruction Fund). In this case, Law and Justice attempted to ratify the Reconstruction Fund in an ordinary procedure without relying on Article 90, not so much considering current constitutional practice, but rather working along the lines of political pragmatism. Within the ruling coalition itself, the most Eurosceptic party 'Solidarna Polska' (led by Zbigniew Ziobro) was against the ratification of the Reconstruction Fund. The main goal was to minimise the need to seek the votes of the opposition (pro-European, but critical of the National Reconstruction Plan prepared by the government).

On the other hand, the jurisprudence of the Constitutional Tribunal on European integration is gradually shifting in tandem with the completion of the political capture of this institution. Therefore, it is difficult to treat 2015 as a threshold year in this case. The first symptoms of the Eurosceptic turn in jurisprudence are noticeable in 2019 when, with the end of the so-called old judges' term of office, the majority of judges chosen by the current parliamentary coalition began to form. It was then that, after a fairly long period of paralysis in the case of the judiciary (2017–2018), the politically captured Constitutional Tribunal began to rule again in cases with a strong political context.[93]

The Eurosceptic narrative has been interwoven with justifications for decisions formally concerning domestic law, nevertheless directly related to the supranational

[93] Aleskandra Kustra-Rogatka, 'An Illiberal Turn or a Cunter-constitutional Revolution? About the Polish Constitutional Tribunal before and after 2015', in M. Belov (ed.), *Courts and Judicial Activism under Crisis Conditions: Policy Making in a Time of Illiberalism and Emergency Constitutionalism* (Routledge, 2022), 117.

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dimension of the crisis of the rule of law. This concerns the rulings aimed to block the enforcement of the CJEU ruling of 19 November 2019 in the case of *AK vs Poland* (C-585/18, C-624/18 and C-625/18). The Constitutional Tribunal declared that a resolution of the joint chambers of the Supreme Court implementing the *AK* ruling was unconstitutional as it supposedly constituted an instance of law-making. The Constitutional Tribunal also resolved, at least formally, two 'jurisdiction disputes': one between the Sejm and the Supreme Court and the other between the President and the Supreme Court regarding the judicial review of judicial appointments. The latter decisions were in breach with the existing and rather restrained case law regarding how 'jurisdiction disputes' are to be understood. In practice, all these rulings were intended to delegitimise the resolution of the joint chambers of the Supreme Court, and indirectly also the judgment of the CJEU in the *AK vs Poland* case.[94]

The next stage of the Eurosceptic (or even anti-European) shift in the jurisprudence of the Constitutional Tribunal was formed by decisions directly related to EU law. These decisions are a manifestation of the negation of the previous jurisprudence of the Constitutional Tribunal in matters related to Poland's membership in the EU and the change of the current status of Article 90 in the Polish constitutional imaginary. In both rulings, the Constitutional Tribunal found that the norms of primary EU law were inconsistent with the Constitution insofar as they contained specific legal requirements as specified by the CJEU.

In the first case, the new Disciplinary Chamber of the Supreme Court asked the Constitutional Tribunal if the CJEU interim orders with regards to the judiciary in Poland are compatible with the Constitution. The Disciplinary Chamber *de facto* asked a question in its own case as the CJEU interim orders concerned a freeze of this specific Chamber for its potential lack of independence.[95] The Constitutional Tribunal stated that the second sentence of Article 4(3) of the TEU in conjunction with Article 279 of the TFEU 'to the extent that the Court of Justice of the European Union imposes *ultra vires* obligations on the Republic of Poland as a Member State of the European Union, issuing interim measures relating to the system and jurisdiction of Polish courts and the procedure before Polish courts' is inconsistent with several provisions of the Polish Constitution, including Article 90(1). The Constitutional Tribunal simply took the view that competencies regarding the organisation of the judiciary in Poland were not transferred to the EU, despite the now well-established interpretation of Article 19(1) TEU by the CJEU.

The second case was initiated by the Prime Minister, who sought for the CT to find that some of the core elements of the principle of primacy of EU standards of judicial independence – including the ordinary judges' competence to disregard a

[94] Ibid., 119–121.

[95] Jakub Jaraczewski, 'Polexit or Judicial Dialogue?: CJEU and Polish Constitutional Tribunal in July 2021', *Verfassungsblog*, 19 July 2021, https://verfassungsblog.de/polexit-or-judicial-dialogue/.

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domestic law that is not compatible with EU law and to use a prior domestic law that raises no such concerns in this regard – are incompatible with the Polish Constitution.[96] The Constitutional Tribunal, using the extensive formula 'insofar as', implying that a specific part of impugned provision is declared unconstitutional (referring, inter alia, to the ultra vires of the CJEU and the loss of sovereignty by Poland) ruled that Article 1 (in connection with Article 4(3) of the TEU, Article 2 of the TFEU and Article 19(1)(2) of the TFEU) is incompatible with various provisions of the Constitution, including Article 90(1). In the press release published after the final hearing, the CT also referred to the concept of constitutional identity and claimed that interpretation of the challenged Treaty provisions presented in the CJEU case law, directly relate to the Polish judiciary system 'which does not constitute competence subject to transfer under Article 90(1) of the Constitution and belongs to the Polish constitutional identity.[97] Moreover, the CT emphasised that also Article 2 TEU, which formulates a catalogue of values on which the EU is based, cannot constitute the source of the CJEU's competence to adjudicate on Polish judiciary system, as domestic judiciary systems do not belong to the common constitutional identity of the Member States, which use different methods of appointing judges.[98]

Both rulings indicate that, in constitutional practice, Europe is losing its previous ambivalence. The dominant element is polemicism towards the axiology of the EU legal system, which turns out to be an obstacle in the implementation of illiberal democracy. Nevertheless, this shift in the constitutional imaginary is revolutionary. It is inconsistent with the layer of thought, text and constitutional practice that was shaped until 2015. It can be interpreted as a return to the contestation of the 'constitutional compromise' of 1997. The fragile balance between the ideology of returning to Europe and the utopia of the Westphalian vision of sovereignty has been shattered. The Eurosceptic turn in the case law of the politically captured Constitutional Tribunal is an element of the strategy towards building an illiberal democracy.

7.5 CONCLUSIONS

Europe as an element of the Polish constitutional imaginary was perceived from the very beginning as both an aspiration and a subject of concern. Hence, Article 90 of the Constitution is characterised by tension between two unspoken ideas: European integration and sovereignty. The reconstruction of thought (i.e., the first dimension of the constitutional imaginary) affords a thesis that this ambiguity was already

[96] Ibid.

[97] Point 17 of the press release, https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej.

[98] Ibid., point 19.

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highlighted while the Constitution was being drafted. Article 90 is a compromise between the ideology of returning to Europe and the utopia of the Westphalian vision of sovereignty. Contestation of the 'constitutional compromise' by the non-parliamentary opposition meant that, at the final stage of work on the constitution, overt articulation of 'openness' to integration with the EU was avoided and the possibility of 'conferring competences' was abandoned as one of the fundamental principles of the system. Article 90 was intended by the authors of the Constitution to be, on the one hand, a provision 'facilitating' opening to Europe, and, on the other hand, an 'exceptional' provision, applicable only when jurisdiction was to be transferred to a supranational entity so, in practice, only the EU. The dimension of the text, reconstructed not only on the basis of the rather laconic wording of Article 90, but also its academic interpretation, is illustrated, in turn, by the interesting phenomenon of the academic filling in of the deliberate loopholes left by the authors of the Constitution. It demonstrates an attempt to establish a balance between the legitimising and safeguarding roles of Article 90. This applies both to the concept of the 'conferral of competences of State authority' and the procedural layer of the Polish 'integration clause'. With regard to the former, the academic interpretation was the first to fill the silence of the constitutional text with regard to fears of sovereignty loss. Commentators on Article 90, inspired by modern concepts of sovereign power, interpreted this constitutional abeyance in a post-Westwal spirit, while at the same time highlighting the qualitative and quantitative limitations of the transfer of competences to an international entity. On the other hand, with regard to the procedural aspect of the Polish 'integration clause', academic commentators avoided interpretations that could lead to a deadlock and torpedo the legitimising role of Article 90. The third element of the constitutional imaginary (i.e., action, identified with constitutional practice) indicates a turning point in the perception of Europe after the parliamentary elections were won by PiS in 2015. Until then, Article 90 had been interpreted and applied in constitutional practice primarily as a provision enabling Poland's membership in the EU, rather than limiting or hindering it. So, the legitimisation function prevailed, while the guarantee function was considered primarily in a theoretical dimension. This thesis is confirmed by an analysis of three components of constitutional practice until 2015: cases of application (as well as non-application) of Article 90, the interpretation of this provision in the jurisprudence of the Constitutional Tribunal concerning Poland's membership of the EU and in the drafts of the finally not adopted amendment to the Constitution providing for a separate chapter devoted to constitutional aspects of EU membership. What is noticeable in terms of the first of these components is the unique nature of Article 90 arising from the restrictive interpretation of the 'conferral of competences'. This provision has so far been applied only twice: the ratification of the Accession Treaty and the Treaty of Lisbon. The second component (i.e., the jurisprudence of the Constitutional Tribunal) has been characterised by a balancing act between multi-level constitutionalism and traditionally

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understood constitutional supremacy. Despite visible aspects of the utopia of Westphalian sovereignty, until 2015 an ideology of (cautious) friendliness towards EU law prevailed in the jurisprudence of the Constitutional Tribunal. The binding factor of the third component of constitutional practice until 2015 (i.e., draft amendments to the Constitution) was the concept of 'concentrating' constitutional regulations regulating participation in integration processes into one chapter (the new Chapter Xa). Nevertheless, the two submitted drafts presented a very different vision of Europe in the Polish constitutional imaginary. While the presidential bill ossified the relative balance created so far in constitutional practice between the ideology of returning to Europe and the utopia of Westphalian sovereignty, the Law and Justice bill was the first harbinger of the Eurosceptic turn that took place after 2015. This should be seen in a wider context of legal and political shifts taking place in recent years in Poland. Law and Justice has consistently tried to rebuild the systemic framework created by the Constitution and undermine the contested 'constitutional compromise'. Systemic changes are made by means of ordinary laws, which in fact lead to informal changes to the Constitution. The Eurosceptic turn is a reaction to the supranational dimension of the crisis of the rule of law centred on the 'reform' of the judiciary. Existing constitutional ideas about Europe have been swept away. There has been a gradual rejection of the legitimisation aspect of Article 90, focusing instead on a fetishised Westphalian sovereignty. First and foremost, Europe is starting to be an obstacle in the realisation of illiberal democracy. Nevertheless. there has been some asymmetry in the two components of constitutional practice after 2015. With regard to the decision not to apply Article 90 after 2015, the change is noticeable only in the political rhetoric of the government, which is starting to approach Europe in a purely instrumental fashion. On the other hand, the jurisprudence of the Constitutional Tribunal on European integration is gradually shifting in tandem with the completion of the political capture of the Constitutional Tribunal. The first symptoms of a Eurosceptic turn were decisions formally concerning the norms of domestic law, but in practice directed against the effective enforcement of the CJEU ruling that was unfavourable for the Polish government. Current constitutional practice (as well as the dimension of thought and text) has been fully negated in the recent adjudication made by the Constitutional Tribunal directly concerning the conformity of the EU primary law with the Constitution. In these unprecedented rulings, using the formula 'insofar as', the Constitutional Tribunal found several fundamental provisions of the TFEU and TEU to be unlawful, including Article 90(1) of the Constitution. The Eurosceptic turn in the case law of the politically captured Constitutional Tribunal is an element of the strategy of building an illiberal democracy. The dominant element is becoming polemical to the axiology of the EU legal system. Nevertheless, this phrase is inconsistent with the layer of thought, text, as well as constitutional practice shaped until 2015.

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