POLISH AND GERMAN CONSTITUTIONAL JURISPRUDENCE ON MATTERS OF EUROPEAN COMMUNITY LAW: A COMPARISON OF THE CONSTITUTIONAL COURTS' APPROACHES

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Summary: Germany and Poland are the two largest EU members in Central Europe. Although they are neighbouring countries, their historical situation and perspectives, and thus their expectations and motivations regarding EU membership, differ greatly. The two states' legal systems, on the other hand, are largely similar. This article aims to compare how the two countries' constitutional preconditions determine how their constitutional courts approach the integration of Community law. It also aims to point out similarities and differences between the courts' approaches. Furthermore, it seeks to illuminate the difficult relationship between constitutional courts and the European Court of Justice and indicate possible ways of mitigating these theoretical and practical difficulties in the future.

I. Introduction

Even in its preparatory stage, the integration of the Central European states which joined the European Union on 1 May 2004 was conducted in accordance with the rule of law principle, leading to the harmonisation of national legal orders with Community law. Until these states acceded, however, this took place exclusively through the national legislator, as EC law did not yet enjoy direct applicability, and the failure to implement it did not entail direct legal sanctions. Since accession, however, the law of the European Union forms an integral part of national legal orders, and secondary Community law has acquired legal force with regard to citizens and states, with the national legislator unable to directly influence its content.

Poland is not only the largest of the states that joined the European Union in 2004, but can also look back on a longer period of development leading to sovereignty than most of the other post-communist states of Central Europe. Due to this circumstance, my contribution will also focus on how the Polish Constitutional Court makes allowance for the preservation of national sovereignty and, at the same time, grants prior-

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ity to Community law. In this context, a comparison will be made with the approaches of the German Constitutional Court, which emerged from a previous period of democratisation in Central Europe, and which may be considered the archetype of Central European constitutional courts.[1]

II. A Brief Historical Overview of Polish Constitutional Jurisdiction

The development of constitutional jurisdiction in Poland did not begin until the rise of the *Solidarność* (Solidarity) movement in 1980, when the first claims for such jurisdiction arose.[2] On 26 March 1982, during the period of martial law, a constitutional amendment was passed which laid the foundations for the creation of a state tribunal and a constitutional court. After long debates, the Constitutional Tribunal Act was passed as late as 29 April 1985. However, the Act did not grant the Constitutional Tribunal (*Trybunał Konstytucyjny*) a final legal effect; rather, it could still be overruled by a two-thirds majority in the *Sejm*, which was the country's only parliamentary chamber at that time.[3] Using its predominance in the *Sejm*, the Communist Party could practically decide on its own concerning constitutional issues until the year 1989, and no independent judiciary was able to break the communist doctrine of the unity of state powers. Despite the political upheaval of 1989, the binding force of Constitutional Tribunal decisions was not put in place until 17 October 1997, when Poland's new constitution came into force. Only from that moment on did the *Trybunał Konstytucyjny* have all of the characteristics of a modern European constitutional court. Nevertheless, the *Trybunał* had already begun developing a culture of constitutional jurisprudence after 1989, using its decisions to support the Republic of Poland's development into a rule of law state.

III. Comparison of Preconditions Concerning EC Matters in the Constitutions of the Federal Republic of Germany and the Republic of Poland

In order to compare the approaches of German and Polish constitutional jurisprudence to Community law, it is first necessary to determine to what extent the constitutional foundations of these two states permit the adoption of one another's judicial approaches.

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[1] Cf Zdeněk Kühn, 'The Application of European Law in the New Member States: Several (Early) Predictions' (2005) 3 German Law Journal 6.

[2] Cabinet of the President of the Constitutional Tribunal, *The Constitutional Tribunal in Poland* (Biuro Trybunalu Konstytucyjnego, Warsaw 2002) 27.

[3] Ibid 27.

1. Competences of the constitutional courts

The BVerfG[4] and the *Trybunał Konstytucyjny* are competent to perform a final and generally binding review of the laws and other acts of public power submitted to them in constitutional complaint procedures (Art 93 para 1 No 4a GG;[5] Art 188 No 5 in conjunction with Art 79 para 1 PC[6]); to decide in disputes between constitutionally recognised state organs with respect to their powers (Art, 93 para 1 No 1 GG; Art 189 PC); to perform reviews of norms both abstract (Art 93 para 1 No 2 GG; Art 188 in conjunction with Art 191 PC) and concrete (Art 100 para 1 GG; Art 193 PC); and to carry out several other different kinds of procedures.[7] The Polish Constitution also expressly mentions the review of international treaties according to constitutional standards (Art 188 No 1). However, the BVerfG also decides on national laws ratifying international treaties, so that there are no factual differences in competence between the two constitutional courts. The BVerfG and the *Trybunał Konstytucyjny* thus have equal competences concerning international law.

2. Constitutional bases for the integration of Community law

a) Position and wording of the constitutional authorisation to transfer competences to Community organs

There are two provisions in the German *Grundgesetz* dealing with the transfer of sovereign powers to international institutions: Art 24 para 1 and Art 23 para 1 s 2 GG.[8] The first difference between these two authorising provisions is in their wording: Art 23 para 1 s 2 requires the consent of the *Bundesrat* in order to transfer national sovereign rights. Furthermore, there is a difference in the systematic position of the two provisions: in Art 24 para 1 the authorising provision stands alone, and refers abstractly to international institutions as the possible recipients of sovereign national powers, while the authorising provision in Art 23 para 1 s 2 applies exclu-

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4 Bundesverfassungsgericht (Federal Constitutional Court of Germany).

5 Grundgesetz (German Basic Law) of 23 May 1949.

6 Constitution of the Republic of Poland of 2 April 1997.

7 See the procedures listed in § 13 Bundesverfassungsgerichtsgesetz and Art 2 et seq of the Polish Constitutional Tribunal Act.

8 Art 24 para 1 GG: 'The Federation may by legislation transfer sovereign powers to international organisations.'

Art 23 para 1 GG: '1. With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union, which is committed to democratic, social and federal principles, the rule of law, and the principle of subsidiarity, and which guarantees a level of protection of basic rights essentially comparable to that afforded herein. 2. To this end, the Federation may transfer sovereign rights by law with the consent of the *Bundesrat*.'

sively to the national objective of European integration.[9] This authorising provision and, indeed, the entire Art 23 GG constitutes a special provision of Art 24 para 1 GG,[10] and takes priority over it.

The Polish Constitution, however, contains only one provision dealing with the transfer of sovereign powers to 'international organisations', ie Art 90 para 1.[11] This provision neither refers directly to the European Union nor is similar in its wording to Art 24 para 1 GG, because it permits the transfer of the competences of state organs to international institutions in 'certain matters' by virtue of international agreements, whereas Art 24 para 1 GG only refers abstractly to 'sovereign powers'. Finally, the systematic position of the Polish authorising provision in the sources of law chapter differs from the German provision's place in the chapter on the Federation and the states, which defines the foundations of the German state.[12]

b) Provision protecting the basic structure of the Grundgesetz

Art 23 para 1 s 1 GG also contains a provision which prevents the structure of the *Grundgesetz* from being changed.[13] It makes certain requirements of the European Union, which is bound by the basic constitutional structures of the Federal Republic of Germany and must provide a standard of fundamental rights protection which is basically comparable to that of the *Grundgesetz*. Such a provision expressly protecting the constitutional structure is not found in the Polish Constitution.

c) Provisions on the priority of international law

The Polish Constitution contains a provision establishing the principle of the priority of international treaties (Art 91 para 2) and laws established by international organisations (Art 91 para 3) over domestic law.[14]

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[9] Cf Rupert Scholz in Theodor Maunz and Günter Dürig (eds), *Grundgesetz Kommentar* (Beck, Munich September 2006) art 23 recital 36.

[10] Cf Claus Dieter Classen in Hermann Mangoldt, Friedrich Klein and Christian Starck (eds), *Kommentar zum Grundgesetz* (5th edn Vahlen, Munich 2005) art 23 para 1 recital 1; Scholz (n 9) art 23 recital 6, 49 et seq.

[11] Art 90 para 1 PC: 'The Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of state authority in relation to certain matters.'

[12] Before amendment of the current version of Art 23 GG, there was a provision declaring the reunification of Germany as a national objective. Its position was to be filled by an 'Article for European Unification'; see Scholz (n 9) art 23 recital 1; BGBl II 889.

[13] Bundestags-Drucksache 12/6000; Scholz (n 9) art 23 recital 5, 54 et seq.

[14] Art 91 para 2 PC: 'An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.'

Art 91 para 3 PC: 'If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.'

In its Art 25, the *Grundgesetz* only designates general rules of international law as an integral part of federal law, with priority over domestic law.[15] Laws established by international organisations are not explicitly mentioned in the *Grundgesetz*.

d) Modification of the Community's contractual basis

Art 23 para 1 s 3 GG delimits the transmission of sovereignty powers to the European Union by making a cross-reference to Art 79 para 2 and 3 GG. Firstly, by reference to Art 79 para 2, it requires a qualified majority vote (as in the case of a constitutional amendment) should an amendment of the contractual foundations of the European Union directly or indirectly affect the validity of the *Grundgesetz*.[16] Secondly, by reference to Art 79 para 3 GG, which in turn refers to the unalterable principles of Art 1 and 20 GG, it limits European integration under material law.

Unlike Art 23 para 1 s 3 GG, the Polish Constitution does not refer to a legislative procedure for constitutional amendments, yet its Art 90 para 2 imposes even higher requirements for parliamentary majorities. Indeed, both the procedure under Art 90 para 2 PC and the procedure for constitutional amendments require a two-thirds majority in the *Sejm*. Contrary to the constitutional amendment procedure pursuant to Art 235 PC, which requires only a simple majority in the Senate, the procedure under Art 90 para 2 PC requires a two-third majority in the Senate. However, such a legislative procedure largely corresponds to the German procedure under Art 79 para 2 GG, concerning ratification of the establishment or revision of international law principles involving a transfer of sovereignty powers. Unalterable provisions like those listed in Art 79 para 3 GG do not exist in the Polish Constitution,[17] although this does not mean that they cannot be defined by the Constitutional Tribunal.

3. Extent to which decisional principles can be transplanted from the German Constitutional Court to the Polish Constitutional Tribunal

It is questionable to what extent the differing constitutional foundations described above permit the adoption of German decisional principles by the Polish Constitutional Tribunal. The very similar procedural competences of both courts do not, at least, give any reason for differing jurisprudence concerning Community law matters.

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[15] Art 25 GG: 'The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.'

[16] Scholz (n 9) art 23 recital 78.

[17] Cabinet of the President of the Constitutional Tribunal (n 2) 30.

Differences concerning the specificity of authorisation provisions can only hinder the adoption of decisional principles if the legal culture taking over these principles has narrower legal boundaries. Since the authorisation provision of the Polish Constitution (Art 90 para 1 PC) is broader than that of the *Grundgesetz*, it therefore cannot be an obstacle to the adoption of decisional principles.

The non-existence of a provision in the Polish Constitution protecting the basic constitutional structure also means that requirements for protecting national constitutional values can be defined by the Constitutional Tribunal, which could also adjust its requirements to those given in Art 23 para 1 s 1 GG.

Differences concerning provisions on the priority of international law and laws made by international organisations (Art 25 GG; Art 91 para 2 and 3 PC) can be seen as merely declarative, since the priority of Community law is a customary principle of jurisprudence all over Europe, and is also applied in German jurisprudence.

The ratification procedures in the Federal Republic of Germany and the Republic of Poland for international treaties entailing the transmission of state competences to international organisations are almost identical, so that the constitutional preconditions for the EC law jurisprudence of their constitutional courts cannot differ, either.

The non-existence of unalterable constitutional principles in the Polish Constitution,[18] such as those given in Art 79 para 3 GG, does not necessarily imply a different approach to collisions between EC law and domestic constitutional law. After all, there is a hierarchy of constitutional values here, too, as in German legal culture.[19]

The constitutional differences between Germany's *Grundgesetz* and the Constitution of the Republic of Poland do not, therefore, form an obstacle to the adoption of BVerfG decisional principles by the *Trybunał Konstytucyjny*.

IV. Decisions by the German Constitutional Court Concerning EC Law and Comparison to the Polish Constitutional Tribunal's Approach

1. Relationship between Community law and national law

a) Priority of Community law versus supremacy of constitutional law

The European Community can only be an effective community of law if the applicability and interpretation of its law is consistent throughout the territory where it is valid.[20] Furthermore, a supranational community

[18] Ibid 30.

[19] See section IV 1 a) bb) et seq below.

[20] Cf Case 6/64 *Costa v E.N.E.L.*[1964] ECR 585.

of law is only possible when its law is superior to national law in the event of a collision.[21] From the ECJ's point of view, the superiority of Community law must also apply to national constitutional law.[22] As shown above, however, there are constitutional restrictions on the transfer of competences from the sphere of national sovereignty to the legislative organs of the European Community, whose legislation would then be superior to national constitutional law. This mutual entanglement[23] is a fundamental theoretical problem which needs to be solved by national constitutional courts and the ECJ.[24]

aa) Statements by the BVerfG

In the BVerfG's view, Community law is part neither of national law nor international law, but rather forms an independent legal system which flows from an autonomous legal source.[25] Already in 1974 the BVerfG stated that, in addition to the principles warranted by Art 79 para 3 GG, it regarded the fundamental rights chapter of the *Grundgesetz* as an essential part of the constitutional structure, one which cannot unconditionally be altered by authorising the transmission of sovereign powers to Community bodies.[26] By the constitutional amendment of 21 December 1992,[27] these principles became a constitutional precondition, as set forth in Art 23 para 1 s 1 GG.

Furthermore, the BVerfG perceives a limit to the application of Community law in Art 38 GG. In its *Maastricht* decision,[28] it requires that laws which open the legal system to Community law must have some attribute allowing effective and precise interpretation, in order to comply with the democracy principle. It further explains that later essential changes in the 'integration program' are no longer covered by the national law which ratified the Treaty.[29] Legislation by European organs and institutions that exceeds the limits of the sovereign powers devolved to them, says the

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[21] Cf Günter Hirsch, 'Europäischer Gerichtshof und Bundesverfassungsgericht - Kooperation oder Konfrontation?'(1996) Neue Juristische Wochenschrift 2457, 2458.

[22] Case 6/64 *Costa v E.N.E.L.* (n 20).

[23] Hirsch (n 21) 2458.

[24] Cf Gert Nicolaysen, 'Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht' (1991) 1 Europarecht Beiheft 10.

[25] BVerfGE 22, 293 (296); 31, 145 (173); 37, 271 (277).

[26] BVerfGE 37, 271 (280, 296); affirming 58, 1; 73, 339 (372, 375, 376); 75, 223 (235); 89, 155 (174). For further examples, see Hirsch (n 21) 2458.

[27] BGBl I 2068; Ondolf Rojahn in Ingo von Münch and Philip Kunig (eds), *Grundgesetz-Kommentar* (5th edn Beck, Munich 2001) art 23 recital 1.

[28] BVerfGE 89, 155.

[29] BVerfGE 89, 155 (156); cf Markus Heintzen, 'Die "Herrschaft" über die Europäischen Gemeinschaftsverträge - Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?' (1994) Archiv des öffentlichen Rechts 564, 570.

BVerfG, are not covered by the ratifying act.[30] Should European institutions act beyond the competences transferred to them (*ultra vires*), the Constitution would prevent the German state organs from applying such legal acts in Germany.[31]

bb) Statements by the Trybunał Konstytucyjny

The Polish Constitutional Tribunal regards Community law and national law as two autonomous legal orders which are in interaction with each other.[32] The *Trybunał Konstytucyjny* limits the transfer of competences to the extent that this 'would signify the inability of the Republic of Poland to continue functioning as a sovereign and democratic state'.[33] According to the *Trybunał*, neither Art 90 para 1 nor Art 93 para 3 PC authorise the transfer of the competence to issue legal acts or adopt decisions contrary to the 'supreme law of the Republic of Poland'.[34] The *Trybunał* emphasises that the constitution enjoys precedence in terms of binding force and application in the territory of the Republic, while the precedence of application of international agreements 'in no way signifies an analogous precedence of these agreements over the Constitution'.[35]

The EC and EU function based on, and within the limits of, the powers conferred to them by the Member States, pursuant to the Founding Treaties. Should a Community legal act exceed these limits, then the principle of the precedence of Community law 'fails to apply with respect to such legal acts'.[36] Indeed, the *Trybunał* stresses that the preconditions for limiting the freedoms under fundamental rights, as defined by Art 31 para 3, are directed only to the Polish legislator.[37] In the event of an insurmountable conflict between Community law and Polish constitutional law, the *Trybunał* sees no possibility of resolving such a problem by judicial means, but rather only by a modification of Community provisions, an amendment to the Constitution, or, ultimately, Poland's withdrawal from the European Union.[38]

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30 BVerfGE 89, 155 (156, 187).

31 Cf BVerfGE 89, 155 (188).

32 K 18/04 No 12.

33 K 18/04 No 8.

34 K 18/04 No 8.

35 K 18/04 No 11.

36 K 18/04 No 15.

37 Cf Miroslaw Wyrzykowski in Hartmut Bauer (ed), *Ius publicum Europaeum: Referate und Diskussionsbeiträge des XII. Deutsch-Polnischen Verwaltungskolloquiums vom 20.-22. September 2001 in Warschau* (Boorberg, Stuttgart/Munich 2002) 87ff.

38 K 18/04 No 13.

cc) Comparison

Both the BVerfG and the *Trybunał Konstytucyjny* regard the national constitution as the supreme source of law, whose basic structures are not violable by Community law. Both constitutional courts grant Community law priority exclusively over the provisions of non-constitutional sources, and both define limits to the application of Community law in the basic structures of the national constitution.

The BVerfG's jurisprudence distinguishes three levels of constitutional norms, differing in terms of their alterability by Community law: firstly, the principle framing the state's identity in Art 1 and 20 of the *Grundgesetz*; secondly, the fundamental rights chapter of the *Grundgesetz*, which cannot unconditionally be altered by authorising the transmission of sovereign powers to Community bodies;[39] and thirdly, the remaining constitutional provisions.

The *Trybunał Konstytucyjny* performs this trisection as well: firstly, there is the group of unalterable norms constituting state identity, whose limits may never be exceeded by the transfer of competences to Community organs; secondly, fundamental rights protection, which would require a constitutional amendment or a political solution in the case of a disaccord with Community law; and thirdly, the remaining constitutional provisions. Should EC organs act beyond their competences (*ultra vires*), both constitutional courts agree that the legal consequence would be the non-applicability of such legal acts.

b) Is international public power bound by national constitutional law?

Concerning the issue of whether the guarantee of judicial relief under Art 19 para 4 GG also refers to acts of public power by international institutions, the BVerfG has ruled that the *Grundgesetz* is valid only for 'the public power constituted by itself, confined to the arrangement of the German state', and consequently excludes the guarantee of judicial relief against public power 'not belonging to that arrangement'.[40] The BVerfG states that the legislator is authorised by Art 24 para 1 GG to transfer sovereign powers to international institutions, which also includes designating the appropriate judicial relief.[41]

As shown above, the *Trybunał Konstytucyjny* states that the preconditions for limiting the constitutional freedoms and rights regulated by Art 31 para 3 PC pertain to Poland's legislators, not those of the Commu-

[39] BVerfGE 37, 271 (280).

[40] BVerfGE 58, 1 (26).

[41] BVerfGE 58, 1 (28).

nity.[42] From this it may also be concluded that Community legal organs are not directly bound by national constitutional law. The *Trybunał* has made no statement concerning the guarantee of judicial relief.[43]

2. Decisions concerning the competences of national judiciaries

a) Competence to review Community legal acts

aa) Statements by the BVerfG

In its *Maastricht* decision, the German Federal Constitutional Court made the following statement concerning its competence to review Community legal acts exceeding an EC organ's assigned competence:

> If European institutions or organs were to administer or develop the Union Treaty in a way that would not be covered by the Treaty, the legal acts arising therefrom would not be binding within German sovereign territory. The German constitutional organs would be hindered from applying those legal acts in Germany in such a case. Accordingly, the BVerfG will examine whether legal acts by European institutions and organs are within the limits of sovereign competences, or are *ultra vires*.[44]

The BVerfG's competence to review Community legal acts means not only that there is a jurisprudence that maintains the consistency of the community of law and defines the substance and limits of the sovereign rights granted to Community organs, but also that the BVerfG itself may decide regarding the conformity of legal acts issued by Community organs with the competences conferred to them. Moreover, German constitutional organs other than the BVerfG are entitled to examine the legality of Community acts:[45] the BVerfG grants specialised courts the competence 'to review [...] where the non-applicability of EC law in Germany is alleged'.[46] However, it seems undisputed that the BVerfG has no competence to review EC law with regard to its compatibility with simple national law.[47]

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[42] K 18/04 No 23.

[43] Regulated in Art 77 para 2 of the Polish Constitution.

[44] BVerfGE 89, 155 (188).

[45] Hirsch (n 21) 2460.

[46] BVerfG EuZW 1995, 412 (413).

[47] Paul Kirchhof, 'Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht' (1991) 1 Europarecht Beiheft 11, 19.

bb) Statements by the Trybunał Konstytucyjny

The Polish Constitutional Court emphasises that the Member States retain the competence to assess

> whether or not, in issuing particular provisions, the Community (Union) legislative organs have acted within the delegated competences and in accordance with the principle of subsidiarity and proportionality. Should the adoption of provisions infringe these frameworks, the principle of the precedence of Community law fails to apply with respect to such provisions.[48]

Thus the *Trybunał Konstytucyjny* also affirms its competence to examine the conformity of acts by Community organs with the competences conferred to them. It does not authorise any state organs to exercise such a competence.

b) Competence to overrule Community legal acts

aa) BVerfG

According to the BVerfG, when national constitutional organs are authorised to review the legality of Community acts and are prevented from applying them in Germany,[49] there remains the question of whether they also have the competence to overrule these acts, or, rather, if the BVerfG alone has this competence. In its *Solange* I decision,[50] the BVerfG states the following: 'Domestic laws are protected against courts which aim to deny their validity for constitutional reasons. [...] Therefore, the fundamental idea of Art 100 GG requires protection of the validity of Community law from invalidation in the same way as domestic law.'[51] Pursuant to Art 100 para 1 GG,[52] this monopoly on decision was not overturned in the *Solange* II[53] or *Maastricht* decisions, either.[54]

bb) Trybunał Konstytucyjny

Art 193 of the Polish Constitution prescribes that courts may make submissions to the Constitutional Tribunal concerning legal questions

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[48] K 18/04 No 15.

[49] BVerfGE 89, 155 (188).

[50] BVerfGE 37, 271.

[51] BVerfGE 37, 271 (284).

[52] For details, see Dieter Grimm, 'Europäischer Gerichtshof und nationale Arbeitsgerichte aus verfassungsrechtlicher Sicht' (1996) Recht der Arbeit 66, 70.

[53] BVerfGE 73, 339.

[54] Cf Hirsch (n 21) 2461.

on the compatibility between normative acts and ratified international treaties, should a judicial decision depend on the answer to such questions. A 'must' provision like Art 100 para 1 s 1 GG does not exist in the Polish Constitution, nor can the Constitutional Tribunal's monopoly on decision be derived from Art 193 PC.

3. Relationship to the ECJ

According to Art 220 TEC, the ECJ holds the task of preserving Community law by consistent and binding interpretation of common legal sources. To this corresponds Art 234 para 3 TEC, which prescribes the obligation of the highest-level national courts - including constitutional courts - to submit questions to the ECJ for its binding decision.[55] At the same time, however, the constitutional courts of Germany and Poland reserve the final competence to review the validity of legal acts by Community organs, thus also including those of the ECJ. The relationship between constitutional courts and the ECJ is thus influenced by the fact that each side claims the competence to make binding decisions on the applicability of Community law, while denying such a competence to the other side. Does this mean a confrontation between the constitutional courts and the ECJ?

a) BVerfG

In its *Solange* I decision, the BVerfG insisted on its competence to review Community law regarding its conformity with German fundamental rights.[56] Although it abstained from exercising this competence in its *Solange* II decision, declaring the relevant submissions by the specialised courts inadmissible,[57] it emphasised that this abstention depended on the maintenance of a fundamental rights standard by Community organs, especially the ECJ.[58] In its *Bananenmarktordnung* decision,[59] the BVerfG clarified that only submissions claiming a general lack of adherence by the Community to the fundamental rights standard would be admissible.

While the BVerfG effectively expressed its misgivings concerning maintenance of the fundamental rights standard granted by the ECJ,[60] it acknowledged this standard as being 'essentially comparable' to that of

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[55] BVerfGE 52, 187 (201); Case 29/68 *Milch, Fett- und Eierkontor v Hauptzollamt Saarbrükken* [1969] ECR 165, 178.

[56] BVerfGE 37, 271 (281).

[57] BVerfGE 73, 339 (387).

[58] BVerfGE 73, 339 (340).

[59] BVerfGE 102, 147.

[60] Cf Claus Dieter Classen in Gerrit Manssen and Boguslaw Banaszak (eds), *Grundrechte im Umbruch* (Spitz, Berlin 1997) 66.

the BVerfG following the ECJ's development of the appropriate jurisprudential principles. At the same time, it issued a warning that any decline in this standard would lead to application of its ongoing competence to review and overrule Community legal acts.[61] In its *Maastricht* decision, the BVerfG additionally stated that, notwithstanding its *Eurocontrol* I decision,[62] its competence to review legal acts not only extends to the application of legal acts by German state organs, but also generally comprises fundamental rights protection in Germany.[63] Since the ECJ is also a Community organ, its decisions are likewise subject to the BVerfG's competence to review and overrule Community acts.[64]

The BVerfG acknowledges the ECJ's status as a lawful judge in the sense of Art 101 para 1 s 2 GG.[65] A violation of the right to judicial relief occurs when a court of last instance is obligated to submit a decision to the ECJ pursuant to Art 234 para 3 TEC, yet arbitrarily fails to fulfil this obligation. This obligation also applies to the BVerfG.[66]

In its *Maastricht* decision, the BVerfG refers to a 'relationship of cooperation' between itself and the ECJ.[67] This effectively consists in the fact that the BVerfG's role in ensuring the 'applicability' of Community legal acts in Germany is dependent on the ECJ's correct decisions concerning their 'validity'. Accordingly, the ECJ is obligated to take the BVerfG's legal opinion into consideration so that the former's decisions are granted a binding force in Germany, while the BVerfG is deterred from overruling ECJ decisions by the possible threat to the community of law. In this context, the BVerfG refers to a 'dividing line between interpretation within the Treaty and legislation that exceeds the limits of the Treaty and is not covered by the national law ratifying the Treaty',[68] and requests that the ECJ further interpret the TEC so as to make allowance for the limitation of sovereign rights and not extend the Treaty.[69]

b) *Trybunał Konstytucyjny*

In its decision on Poland's membership in the European Union, the *Trybunał Konstytucyjny* remarks that common legal provisions, espe-

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[61] Cf Grimm (n 52) 69.

[62] BVerfGE 89, 155 (175).

[63] BVerfGE 89, 155 (175).

[64] Cf Wolfgang Graf Vitzthum, 'Gemeinschaftsgericht und Verfassungsgericht - rechtsvergleichende Aspekte' (1998) Juristen Zeitung 161.

[65] BVerfGE 73, 339 (366).

[66] BVerfGE 37, 271 (282).

[67] BVerfGE 89, 155 (156).

[68] BVerfGE 89, 155 (209).

[69] BVerfGE 89, 155 (210).

cially EC regulations applicable in the territory of the Republic of Poland, can be reviewed according to the national standard of fundamental freedoms.[70] In this same decision, it also states that 'direct review of the conformity with the Constitution of particular decisions of the ECJ, as well as the "permanent jurisprudential line" derived from these decisions, does not fall within the Constitutional Tribunal's scope of jurisdiction (Art 188 PC)'.[71]

Firstly, it may be seen that the *Trybunał* reserves the right to review legal acts with reference to the national fundamental rights standard, which may be viewed as parallel to the *Solange* I decision. Supranational acts of public power can also be measured according to the national fundamental rights standard, paralleling the BVerfG's line in its *Maastricht* decision.[72] However, the assertion that 'direct review' of ECJ decisions does not fall within the 'scope of jurisdiction' of the *Trybunał* needs to be analyzed more precisely. On the one hand, this might be interpreted in the sense of *Solange* II, ie that the *Trybunał* may refrain from exercising its competence to review particular decisions. On the other, this might imply that the ECJ's task of further developing Community law is acknowledged, as the BVerfG likewise did in its *Kloppenburg* decision.[73] Under which conditions the *Trybunał* might abstain from its right to review supranational acts of public power remains an open question. In none of its decisions does the *Trybunał* refer to examining the Community's adherence to a fundamental rights standard, ie the precondition for the admissibility of a constitutional complaint under the BVerfG's *Bananenmarktordnung* decision.[74]

The *Trybunał* regards the ECJ's competence to bindingly interpret Community law in the preliminary ruling procedure pursuant to Art 234 TEC as part of the international treaties by which the Republic of Poland is bound.[75] Furthermore, it emphasises that a submission pursuant to Art 234 TEC does not constitute a threat or limitation to its competences, and that a submission by the *Trybunał* itself would constitute an exercise of its judicial competences.[76] The *Trybunał* does not, however, address the question of whether a national court's violation of Art 234 para 3 TEC constitutes a violation of the right to legal justice in the sense of Art 45 para 1 PC.

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[70] K 18/04 No 23.

[71] K 18/04 No 19.

[72] BVerfGE 89, 155 (175).

[73] BVerfGE 75, 223 (242).

[74] BVerfGE 102, 147.

[75] K 18/04 No 17 p 10.

[76] K 18/04 No 18 p 10.

c) Comparison

The *Trybunał Konstytucyjny* does not expressly call its relationship to the ECJ a 'relationship of cooperation', as the BVerfG does. Parallels between BVerfG and *Trybunał* decisions cannot be analyzed in detail, as the *Trybunał*'s jurisprudence is far less abundant than the BVerfG's due to Poland's relatively short period of membership in the European Union. The fundamental lines of jurisprudence do, however, reveal some parallels. Both constitutional courts grant themselves the final competence to review and overrule EC legal acts in their national territory according to standards embodied in the national constitution and Community treaties (or national laws ratifying those treaties), to abstain from reviewing particular facts in cases concerning fundamental rights protection, and to concede their competence to further develop Community law to the ECJ.

This relationship with the ECJ, which has already existed for more than a decade in the case of the BVerfG, cannot be called a confrontation, due simply to the fact that, although it has already lasted for so long, there have been no conflicting positions on particular decisions. Grimm sees a constitutional court submission to the ECJ pursuant to Art 234 TEC as an 'instrument of mitigation'.[77] Such a submission serves, on the one hand, as a warning to the ECJ that the constitutional court perceives a violation of the Treaty. On the other hand, it provides an opportunity for the ECJ to become informed of the legal viewpoints of the Member States and come to a decision in consultation with them. Yet the mere fact that 'warnings' and 'instruments of mitigation' may be deemed necessary by a constitutional judge in the event of differing legal viewpoints with a 'conflict potential' indicates that the current relationship among the courts does not represent a satisfactory solution for a community of law that is continuing to integrate more deeply.

V. How to solve the fundamental theoretical problem of priority?

The theoretical collision described above between the priority of Community law and national constitutional orders, with its corresponding difficulties with regard to delimiting the competences of constitutional courts and the ECJ and its potential for conflict, requires modification of the Community's legal foundations in order to achieve a satisfactory solution. Otherwise, continuing European integration and the success of the community of law will always depend on constitutional courts refraining from the exercise of their right to overrule Community legal acts, thus adding an element of uncertainty to the Union's functioning, espe-

[77] Grimm (n 52) 69.

cially considering the number of Member States and the often political nature of their constitutional court appointments. Art I-6 of the Draft Treaty establishing a Constitution for Europe, or the equivalent provision in the future EU Reform Treaty, would change the unwritten priority of EC law into a binding Community law provision, yet would not completely eliminate possible collisions between Community law and national constitutional law, since the priority of EC law would not thereby become a national constitutional principle of the Member States.[78] This could only happen through amendment of their national constitutions.

The problem of fundamental rights protection and constitutional courts' competence to review the standard of such protection could, however, at least be mitigated when the Fundamental Rights Charter adopted by the EU Summit of 23 June 2007 comes into force. In its *Solange* I decision, the BVerfG based its competence to review and overrule Community legal acts according to the fundamental rights standard of the *Grundgesetz* on the lack of a written charter of fundamental rights adopted by a parliament,[79] and merely refrained from exercising this competence in *Solange* II.[80] The coming into force of the Fundamental Rights Charter would mean that this argument for its competence to review Community legal acts is no longer valid.

The BVerfG regards the European Parliament's participation in the legislative process as merely a 'supporting function' for the democratic accountability of Community legislation, viewing the main pillar of such accountability in the feedback from Member State parliaments on acts by European organs.[81] Democratic accountability could be enforced by increasing the European Parliament's influence on EC legislation and policy.[82] The *Trybunał*, for its part, regards the European Parliament not as a legislative organ executing state power in the Republic of Poland, but rather as an 'organ which executes specified functions in the institutional structure of the EU'.[83] From this it may be inferred that both constitutional courts regards the legislative competences lacking to the European Parliament as a deficit of democracy, and therefore as an obstacle to deeper integration if not promptly addressed.[84] Strengthening the Euro-

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[78] Cf Matthias Herdegen, *Europarecht* (7th edn Beck, Munich 2005) § 11 recital 5; Klemens Fischer, *Der Europäische Verfassungsvertrag, Texte und Kommentar* (1st edn Nomos, Baden-Baden 2005) 130.

[79] BVerfGE 37, 271.

[80] BVerfGE 73, 339 (340).

[81] BVerfGE 89, 155 (185); cf Herdegen (n 78) § 8 recital 69.

[82] BVerfGE 89, 155 (186).

[83] K 15/04 No 6.

[84] Cf BVerfGE 89, 155 (186).

pean Parliament is required in order to remedy this deficit of democracy at the Community level.

VI. 'Influence' of the BVerfG on the *Trybunał Konstytucyjny*?

Firstly, it may be stated that the legal culture of Polish constitutional jurisprudence corresponds to the Central European constitutional culture whose archetype is the German Federal Constitutional Court.[85] Since the *Trybunał Konstytucyjny*'s array of competences and, therefore, its position in the state structure are equivalent to the BVerfG's, a transfer of the solutions already discussed and adopted by the BVerfG recommends itself. Also, the fact that Polish academic discussion, eg the recent debates concerning the decisions on the European Arrest Warrant, has pointed to parallels between the jurisprudence of the BVerfG and the *Trybunał Konstytucyjny* on Community law[86] may be interpreted as a sign that the BVerfG serves as a point of reference for Polish constitutional jurisprudence. However, one can only speculate as to the extent to which the BVerfG has guided Polish constitutional judges in matters of Community law. In the reasoning of the latter's decisions relevant to Community law, there is, in any case, no direct reference to BVerfG jurisprudence.[87]

VII. Conclusion

To recapitulate, far more parallels than differences may be found between the legal positions of the *Trybunał Konstytucyjny* and the BVerfG. Both constitutional courts, which operate on similar constitutional foundations, have similar approaches to the relationship between national law and Community law, the national judiciary's competences with regard to Community legal acts, and the relationship between constitutional courts and the ECJ. Solutions which are unsatisfactory in theory should be redressed by giving the Community clearer and more sustainable legal foundations, in order to minimise the potential for conflict arising from the contrary positions of the national constitutional courts and the ECJ. Only in this way can deeper, more comprehensive integration and possible further enlargement be managed without posing any threat to the community of law.

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[85] See Kühn (n 1) 6.

[86] Cf Adam Górski and Andrzej Sakowicz, 'Uwagi na tle wyroku Trybunału Konstytucyjnego z dnia 27 kwietnia 2005 r. (sygn. akt P 1/05) w sprawie zgodności art. 607t § 1 KPK z art. 55 ust. 1 Konstytucją' (2005) 1 Europejski Przegląd Sadowy 2.

[87] SK 33/03; K 15/04, K 18/04, K 24/04, P 1/05, P 8/05.