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”The Rule of (International) Law” in Poland – the Sign of Growing Democracy

I feel highly honoured to have been invited by the Catholic University in Santiago de Chile and to be able to make a presentation in this part of the conference.

Ladies and gentlemen, let me start with a few words about myself.

I carry out research on international public law. I have also been a member of the trade union “Solidarity” since the day it was established. Finally, I am a Pole, a member of the Polish national community, one of many such communities in Central and Eastern Europe which are involved in the process of rebuilding the democratic order after years of Soviet domination.

All these circumstances have defined the perspective of my presentation today.

I will start with the description of two events that took place in the years 1980 and 1981. In my opinion those events determined the course of European, and not only European, history. Partial summary of the course of this history has allowed me to give such a title to my presentation.

In August 1980 “Solidarity” is created. In September of the same year, when the public pressure to register the trade union “Solidarity” increased and the so-called people’s authority refused to register it, a man knocked on the door of my university office, a man seeking answers to simple questions. Why does the authority not respect the word it has given? Why don’t they fulfill their own obligations? Why does the authority not obey convention 87 of the International Labour Organization on the freedom of trade unions and the protection of union rights, which was ratified by Poland in 1957¹ ? And, more precisely, article 2, which reads as follows: „Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.” Public pressure, as well as the attitude assumed by the Supreme Court judges - dignified and in conformity with the

¹ (The Official) Journal of Laws of 1958 No. 29 item 125 (Dz. U. z 1958, nr 29, poz 125)

provisions of the convention² - brought the Supreme Court decision to register Union on the 10th of November 1980, after the previous denial made by a lower court.

At the moment of the registration of the union, its 10 million members discovered most literally and deeply the sense and practical meaning of the “*rule of law*”³ principle. The decision of the Supreme Court pointed at article 2 of convention 87 as the legal basis for its decision.

Now that we knew how the “*the rule of law*” works, the decision to introduce martial law – at variance with the International Covenant of Civil and Political Rights – was even more painful to us. Martial law was introduced by the decree of the Council of State – a collective President – on the 13th of December 1981. The public were particularly indignant at the decisions of courts which sentenced those accused of organizing strike actions on that day to protest against the introduction of martial law. It should be pointed out that the decree on the introduction of martial law was published in (The Official) Journal of Laws on the 14th of December 1981. The printing of (The Official) Journal of Laws, however, started three days later, on the 17th of December, and was completed on the 18th of December. Some courts did not receive the Journal until the beginning of January. And therefore judges who passed sentences on the basis of the Council’s decree on martial law were aware that they were applying retroactive regulations, violating the *lex retro non agit* principle, as they knew when (on what date) the decree on martial law had come into effect. They also knew that the absolute order to apply the *lex non retro agit* principle was imposed by the International Covenant of Civil and Political Rights (art. 15) ratified by Poland in

² Zob. <http://archsol.pl/pliki/SN10.doc>

³We – trade union members – inclined in fact to the narrow approach to the rule of law, as far as it concerns the elements of the rule. This narrow approach restricts itself to the characteristics of the rules, and of the rule making and rule-enforcement procedures in a legal system. – See; M. D. Welton, Islam, The West, and The Rule of Law, 19 Pace International Law Review (2007), s. 175-176. Author describes this narrow approach in the following way:– “Often depicted as formal legality (...) it insists that the rule of law means that legal rules, and the procedures that create, change, and enforce these rules, should have certain characteristics, namely: clarity, prospective applicability, stability, and publicity of rules; transparent law-making guided by clear and stable general rules; accessibility to the courts; basic procedural due process; and rule based restraints on the activities of law enforcement agencies. These are characteristics of legal rules and procedures that allow people to plan for the future with reasonable assurance that the rules of the road will not suddenly and secretly change. They are expressly not to be equated with other virtues such as democracy, justice, or human rights.” This is essentially a procedural, rather than substantive, approach to the rule of law.”

1976. Being aware of that, they sent to prison 1685 people⁴.

Both those events were – let me say it again – an excellent lesson on “*the rule of law*” principle and its role for the Polish society. On the necessity of applying international regulations, apart from national law, to define its essence. Its fundamental importance in normalizing social relations, and the results of ignoring it.

They also created an opportunity to note the inconsistent practices of courts which recognized the full effectiveness of the norm in the convention of the International Labour Organization at the moment of the registration of “Solidarity”, and failed to refer to that norm while sentencing people to prison for their strike activity on the day of introducing martial law.

This polar reaction of the courts was said to be – let’s put aside the political reasons - the result of the lack of information on the place of international law in the Polish legal order. Indeed, in the “Popular’ Constitution of 1952⁵ there was no trace of regulations that would allow applying international law, including international conventions, in the Polish legal order. Nor did it allow pointing out a mechanism of the translation or transformation of treaty norms into the norms of internal legal acts (statutes).

Under these circumstances, however, most of the doctrine stipulated that basically international agreements did not need to be translated, transformed since they were applied in the Polish People’s Republic *ex proprio vigore*⁶. In the prevailing opinion of the science of international law, ratified agreements became part of Polish law on the date of their being published in (The Official) Journal of Laws and were given priority when a conflict with the regulations of internal law occurred. However, some held the opinion that in the event of a conflict of a treaty norm with a norm of internal law, the latter takes priority, because the treaty is not a source of Polish law⁷.

After 1981 the problem of the place of international law in the Polish legal order became an important political issue raised in a public debate. It was an important

⁴ Do 3 lat pozbawienia wolności – 541 osób; na 3 lata pozbawienia wolności – 118 osób; powyżej 3 lat pozbawienia wolności, a poniżej 5 lat – 49 osób; na 5 lat – 5 osób; powyżej 5 lat, a poniżej 8 lat pozbawienia wolności – 8 osób.

⁵ The Constitution was in force since 22 July 1952 till 31 December 1989 - (The Official) Journal of Laws of 1952 No. 33 item 232 (Dz. U. z 1952, nr 33, poz 232)

⁶ S. , Rozmaryn, Skuteczność umów międzynarodowych PRL w stosunkach wewnętrznych (The Effectiveness of the International Treaties of the Polish People’s Republic in Internal Relations), 12 Państwo i Prawo (1962).

⁷ See – Decision of the Supreme Court - 1992.06.12; uchwała SN; sygn. III CZP 48/92, publ. OSNC 1992/10/179/.

element of the dispute between the authorities and the opposition. The dispute which – in the light of doctrinal opinions – emphasized the fault of ignoring, by the authoritarian regimes, the principle of “*the rule of law*”, as well as the basic human rights and citizens’ freedoms specified in international agreements. It, among other things, raised the question of power structure in the state, asked more and more frequently at the end of the 1980s.

The possibility to answer this question in practice, according to the will of the nation, opened in 1989. It was then that the Third Republic of Poland was born⁸. It was the time when the change of the system was initiated and the process of Poland's moving away from the authoritarian regime and towards representative democracy started⁹. Time of the first steps towards real respect for fundamental rights, for the rule of law, the essence of which is the respect for international obligations taken by the Republic of Poland.

This process was carried out – on the normative plane (which I am analyzing) – in stages and its content also reflected the process of building up a tissue of broadly understood *transitional justice*, so important in the political breakthrough¹⁰.

The first stage was the institutional change defined in the constitutional amendment of the 7th of April 1989¹¹. The amendment liquidated the Council of State, the organ of a collective president, and reintroduced the institution of a president. That didn't change the system yet, but was – as the further course of events showed – the first step on that way. This personalization of the institution was supplemented by the President's obligation to consult with the parliament all agreements to be ratified¹², which fact is crucial for our considerations. Both the changes clearly referred to the institutions of the Second Republic of Poland¹³, included in the provisions of the

⁸ See footnote No 13.

⁹ See M. Freeman, *Constitutional Frameworks and Fragile Democracies: Choosing between Parliamentarism, Presidentialism and Semi-Presidentialism*, 12 *Pace International Law Review* (2000).

¹⁰ See *Transnational Justice in the Twenty-First Century, Beyond Truth versus Justice* (ed. By Naomi Roht-Arriaza and Javier Mariezcurrena), Cambridge University Press 2006, s. 2; zob. też “*The rule of law and transitional justice in conflict and post-conflict societies*”, Report of the Secretary General, S/2004/616, (23 August 2004), par. 6; zob. też <http://www.idrc.ca/uploads/user-S/10829975041revised-boraine-ottawa-2004.pdf>

¹¹ (The Official) Journal of Laws of 1989 No. 19 item 101 (Dz. U. z 1989, nr 19 poz. 101)

¹² Art. 32g. 1. The President ratify and renounce international agreements. 2. „Ratification of an international agreements imposing on the State considerable financial responsibilities or necessity of legislative changes requires the form of a statute.

¹³ Nazwa podkreśla ciągłość z I Rzeczpospolitą (1454-1795), zlikwidowaną traktatami rozbiorowymi zawartymi pomiędzy Austrią, Prusami i Rosją w drugiej połowie XVIII wieku (1773-1795). Za formalny

Polish constitutions of 1921 and 1935. Both the constitutions required that the Parliament gave its consent to the most important ratification decisions of the President of the Republic specified in those constitutions. This change made it possible to interpret the fact of the publishing, in (The Official) Journal of laws, of a ratification document, an act of Parliament that allowed the ratification of an agreement, as well as the text of that agreement, as the *transformation* of the agreement into an act (an statute). This is how such a sequence of events was defined by the courts in the interwar period, thus giving effectiveness in the Polish legal order to the agreements ratified in this way¹⁴.

In the second stage were the first free elections in the socialist camp – to the upper house, and partly free – to the lower house of the Polish Parliament – which were held on the 4th of June 1989. The absolute victory for “Solidarity” candidates to both Parliament chambers led inevitably to stage number three.

The third stage was the change of the system. This was done by the constitutional act of the 29th of December 1989¹⁵. The act defined the set of basic ideas, fundamental values of the restored democratic order in the Republic of Poland. They were reflected by the basic principles of the political system. Their catalogue opened with the provision stating that “the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice”

This provision, along with the earlier constitutional regulation of April 1989, made the new democratic authority, in all its dimensions, accept without hesitation that the principle of the “*rule of law*” in the Republic of Poland includes the orders of international agreements¹⁶. Although their exact place in the Polish legal order was

początek II Rzeczypospolitej przyjmuje się 11 listopada 1918 roku. Wycofanie uznania dyplomatycznego dla Rządu RP na uchodźctwie przez United Kingdom and United States 6 lipca 1945 roku i w konsekwencji przez pozostałe kraje uważać należy za faktyczny koniec prawnomiędzynarodowy II Rzeczypospolitej. Przyjmuje się, że zamiana konstytucji (29.12.1989) i jej wejście w życie 31.12.1989 roku zapoczątkowało symbolicznie powstanie III Rzeczypospolitej.

¹⁴ Np. „Traktat będąc ratyfikowany i będąc należycie opublikowany (...) stał się aktem ustawodawczym, który ma moc obowiązującą w stosunkach wewnętrznych państwa”- wyrok SN, 14.12.1928, publ. Przegląd Prawa i Administracji 1930, s. 476; „Konkordat ze Stolicą Apostolską, ratyfikowany przez władze zgodnie z przepisami Konstytucji i ogłoszony w Dzienniku Ustaw jest nie tylko układem międzynarodowym, lecz ustawą mającą moc obowiązującą w stosunkach wewnętrznych /1929.10.23; wyrok SN, 23.10.1929, publ. Przegląd Prawa i Administracji 1930, s. 1.

¹⁵ (The Official) Journal of Laws of 1989 No. 29 item 125 (Dz. U. z 1989, nr 75 poz 444); zob. J. Cierniewski, The Constitutional Amendment Act of 29 December 1989 (Nowela konstytucyjna z 29 grudnia 1989 r.), Przegląd Sejmowy (The Sejm Review), 2009, vol. 17, s. 27-46; zob. <http://cejsh.icm.edu.pl/cejsh/cgi-bin/getdoc.cgi?09PLAAAA06538>

¹⁶ Konstytucja Rzeczypospolitej Polskiej [wprowadzenie Lech Falandysz], Warszawa 1997, s. 17.

still to be defined by the future constitution, the judicature of supreme courts (the Supreme Administrative Court, the Constitutional Tribunal) including the Supreme Court, agreed that the ratification of agreements by the President of the Republic of Poland under the rule of the new democratic constitutional order means “the transformation of a treaty into an act in the national law”¹⁷. So the Supreme Court referred to the practice of courts in interwar Poland.

The practice of applying law in the legal order of the Third Republic of Poland, as defined by the constitutional act of the 29th of December 1989, testified to the reliability of applying and developing the principle of the democratic state ruled by law, which was confirmed by Poland becoming a member of the European Council in 1991¹⁸, by signing the Europe Agreement (16.12.1991) with the European Community¹⁹, and commencing negotiations on the accession to the European Union in 1994. It should be pointed out that the statutes of both the Organizations required that the countries applying for the membership met clearly defined (axiological) criteria – of respecting „(...) principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law” (art. 6.1. The Treaty on European Union²⁰).

However, the crowning touch – on the normative plane – to the changes expected by the developing democratic order – including the definition of the place of international law in the national legal order – was provided by the constitution of the Republic of Poland which was accepted on the 2nd of April 1997²¹.

Let us then make a brief review of the provisions of the new constitution which define the features of the „*rule of (international) law*” in the Republic of Poland, those which would be of interest to us.

¹⁷ /1992.06.12; uchwała SN; sygn. III CZP 48/92, publ. OSNC 1992/10/179/; Zob. też /2005.06.21; wyrok SN; sygn. II PK 320/04, publ. OSNP 2006/3-4/50/. Zob. też. Z. Kędzia, The Place of Human Rights Treaties in the Polish Legal Order, 2 European Journal of International Law (EJIL), s. 135-137

¹⁸ Statute of the Council of Europe (5.05.1949) - Art. 3 “Every member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms (...) – (The Official) Journal of Laws of 1994 No. 118 item 565 - (Dz. U. z 1994, nr 118, poz. 565) - W następstwie przystąpienia do Rady Europy, Polska ratyfikowała – Konwencję o ochronie praw człowieka i podstawowych wolności –(The Official) Journal of Laws of 1993 No. 62 item 282 – (Dz. U z 1993, nr 61, poz. 282)

¹⁹ (The Official) Journal of Laws of 1992 No. 60 item 302 – (Dz. U. z 1992 r, nr 60, poz. 302)

²⁰ Zob. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>

²¹ (The Official) Journal of Laws of 1997 No.78 item 483 – (Dz. U. z 1997, nr 78, poz. 483); http://www.poland.pl/info/information_about_poland/constitution.htm Zob. też. V.S.Vereshchetin, New Constitutions and the Old Problem of the Relationship between International Law and National Law, 7 EJIL (1996), s. 29-41

To begin with, please note that chapter I of the Constitution, which includes the catalogue of the rules that describe the basic values of the democratic order, repeating – in article 2 - the rule that “the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice” ‘supplemented’ it by the rule (art. 9) according to which „The Republic of Poland shall respect international law binding upon it.”

Regardless of the general message of article 9 that “all the acts of internal law should conform to the entire, broadly understood international law, and not only to international agreements”²², article 9 stipulates, in its practical dimension, that the Parliament, in the course of its legislative activity, is bound by the content of the main stream of the Republic of Poland’s obligations – which result from international agreements it has ratified, including those that determine freedoms, as well as human and civil rights. Therefore, acts passed by the Parliament have to conform to the agreements signed.

However, further provisions of the constitution stipulate that the mechanism of fulfilling the obligations of the ratified agreements is not exhausted by a simple *translation* of a treaty obligations into the language and form of a national legal acts (statutes).

Experience of the authoritarian past made those preparing the new constitution include the provision that the international agreements most important for the Republic of Poland, i.e. agreements it has ratified, became an independent, autonomous source of national law²³. This tendency and belief were also noted by the Supreme Court before the constitution was adopted²⁴.

That experience also strengthened the belief that in the hierarchy of the sources of law those agreements should be higher in rank than statutes. This vision of the autonomous position of the ratified agreements, dominating over internal legal acts other than the Constitution, derived from both the authority of international regulations and from noticing their operational (judicial) features, embedded in the Polish public opinion. And more precisely, from the conviction of the self-executing nature of ratified agreement’s provisions, particularly those that define civil and

²² Konstytucja Rzeczypospolitej Polskiej, Komentarz, red. Wiesław Skrzydło, Zakamycze 1999, s. 17. Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP [red. J. Boć], Wrocław 1998, s. 33

²³ Por. Kędzia, jw., s. 138.

²⁴ Zob. /1992.06.12; uchwała SN; sygn. III CZP 48/92, publ. OSNC 1992/10/179/.

political rights and freedoms.

I can confirm that for many circles, also lawyers', such a regulation of the position of those agreements in the Constitution was the measure of how the democratic order was consolidated.

And that's what happened.

The Constitution, by qualifying ratified international agreements as a source of universally binding law of the Republic of Poland (art. 87), makes them an independent and autonomous source of law²⁵ – apart from the Constitution itself, statutes and regulations. Therefore, the constitution legislator *incorporates* ratified agreements, having in mind one of the basic methods of including international obligations in the national legal order.

The set of ratified agreements, in its essential dimension, has superiority (priority) over acts (statutes). This superiority relates to the agreements ratified with the consent of the Parliament²⁶. And this set, described in detail in the Constitution (art. 89.1) is very large. It includes agreements on: 1. peace, alliances, political or military treaties; 2. freedoms, rights or obligations of citizens, as specified in the Constitution; 3. the Republic of Poland membership in an international organization; 4. considerable financial responsibilities imposed on the State and 5. matters regulated by the statute or those in respect of which the Constitution requires the form of statute. It can be seen easily that the scale of negotiating agreements on ratification decisions with the Parliament is determined, with all due respect for the previous enumeration, by the category of treaties described in point 5. Practically very few ratified agreements are not included in this set.

What's more, if we consider the position of the agreements ratified with the consent of the Parliament, we will see that the Constitution, by normalizing the competencies of the Constitutional Tribunal, subjected to its control the compliance of signed agreements with the Constitution, but also the compliance of acts with ratified international agreements in this very way.

²⁵ Art. 87.1. "The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations."

²⁶ Art. 91.2 „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.”

Ratified agreements become “part of the national legal order” after they have been published in the Official Journal of the Republic of Poland (art. 91.1)²⁷. At that moment they add to – if they are self-executing in nature – the palette of norms which have to be applied directly by courts and other legal organs.

If we limit our attention to human and civil rights – the protection of which was, as I said before, the proto-cause of my presentation – the conviction about such a (self-executing) nature of treaty norms concerning human rights was articulated *expressis verbis* on the 15th of June 1993 by the Supreme Court which stated that “(...) it is obvious that the ratification of a convention on human rights by a country cannot have an aim other than its direct application in the internal legal order, and not making this application dependent on the assessment and decision of national organs”.

Naturally, the problem of applying the “rule of (international) law” in the Polish legal order is not exhausted by the thread of ratified treaties and the direct effectiveness of a modest, in fact, number of their provisions. Provisions which are very important, however, if one considers the significance of human and civil rights and freedoms.

The process of applying the “rule of (international) law” in the Polish legal order is also performed in a less spectacular, but very laborious preparation of many national legal acts – statutes that materialize treaty provisions. This is the only way to introduce into Polish law the provisions of agreements concluded in a way different from ratification. This way covers as a matter of course the non self-executing provisions of ratified agreements.

This process of application relates also to various binding unilateral acts of international organizations, the features of which are precisely defined by the Constitution.

The process of its application is expressed not only by the act of autonomy of ratified agreements or by the Parliament’s effort to prepare acts that execute contractual obligations. It is also expressed by “the court’s obligation to attempt an interpretation in favour of international law, i.e. such interpretation of internal Polish law that will guarantee its greatest compliance with the content of international law”, as stipulated

²⁷ Art. 91.1 „After promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.”

in art. 9 of the Constitution – regardless of the extent of the transfer of obligations in ratified and not ratified treaties into the tissue of national law, so also in the event of a delay in the transfer²⁸.

I am not going to develop this issue.

Focusing on ratified agreements and their role in shaping the legal order in Poland during the last 30 years highlights the way we have travelled to – thanks to God – the effort of building the democratic order in Poland.

In order to reassure those who will notice that such a distinctive status of agreements ratified by the President with the consent of the Parliament is obtained by treaties ratified after the constitution was accepted, I would like to say that the new Constitution defines very clearly the status of treaties ratified before its coming into effect. And so the treaties ratified and published in the Official Journal, if they belong to the set of treaties that can be ratified only with the consent of the Parliament, have the status mentioned before²⁹. Then this is the status of both convention 87 of International Labour Organisation and of the International Pact of Civil and Political Rights I have mentioned before.

And with this remark I could close my presentation.

However, I would like to share one more reflection with you. Reflection which – with full respect for today's presentation – is my personal perspective of the way we have travelled. This reflection appeared a few months ago.

Now, at the last MA seminar in May my student spoke about the problem of "Freedom of speech in the context of political discussion against the background of Polish and European standards". When she was summing up her excellent presentation, I realized that in the mid-1980s I had analysed the standards of human rights protection established by the European convention on human rights and fundamental freedoms, by analyzing the decisions of the European Court of Human Rights in Strasburg, which was exotic in nature, which originated in a different world and which bore no relation to the reality of the Polish People's Republic. In 2009 my

²⁸ Zob. też /1999.08.26; wyrok NSA; sygn. V SA 708/99, publ. OSP 2000/9/134.

²⁹ Art. 241.1. „International agreements, previously ratified by the Republic of Poland upon the basis of constitutional provisions valid At the time of their ratification and promulgated in Dziennik Ustaw, shall be considered as agreements ratified with priori consent granted by statute, and shall be subject to the provision of Article 91 of the Constitution if their connection with the categories of matters mentioned in article 89, para. 1 of the Constitution derives from the terms of an agreement.”

student made a comprehensive analysis not only of the judicature of the Court and of the doctrine opinions, but also of the Polish regulations and the rulings of Polish courts, including the Constitutional Tribunal, concerning that freedom. She spoke about the real dimension of the fulfillment of freedom in Poland, freedom indicated by an international agreement.

Thank you very much for your attention.