The judgment of Polish Constitutional Court in case Supronowicz (SK 45/09): the constitutional borrowing of “Solange” formula and its outcomes for the European judicial dialogue

Abstract

This article discusses the judgement of the Polish Constitutional Court of 16 November 2011 in the case SK 45/09. In the case the Court decided to review the constitutionality of an EU regulation. Due to controversies related to the cognition of constitutional courts of Member States in this matter the justification of the judgement in the case was as important as its sentencing part. Although the sentencing part resembles the judgement of the German Federal Constitutional Court in the Solange I case of 1974, in its justification the Polish Constitutional Court applied the formula that the German Federal Constitutional Court used in the Solange II case of 1984. The article analyses the reasons for such constitutional borrowing and its legal consequences. At the same time the article states a thesis according to which in the current community system of protection of fundamental rights an idea of constitutional identity is a better concept used to protect constitutional standards of such rights. 

Key words: Solange I, Solange II, constitutional review, EU secondary legislation, principle of supremacy, constitutional identity, Polish Constitutional Court.

Introduction

On 16th November 2011, Polish Constitutional Court (Trybunał Konstytucyjny, hereinafter: the TK) rendered the salient judgment in case Supronowicz SK 45/09 dealing with a constitutional complaint lodged by Ms. Anna Supronowicz. The facts were as follows. In its decision of 23rd December 2004, the Brussels’ Court of Appeal ordered Ms. Supronowicz to pay the amount of 12 500 EUR. The said fine was imposed in criminal proceedings against Ms. Supronowicz, in which she was convicted of an offence against the life and health of Mr. De Leeuw. The afore
mentioned amount of 12 5000 EUR was ordered to be paid as compensation for material and moral damage which Mr. De Leeuv suffered. Ms. Supronowicz lodged an appeal against the judgment of the Brussels Court, which was, however, dismissed. On May 11th 2006 Mr. De Leeuv requested the enforceability of the decision of the Belgian Court on the territory of Poland. Ms. Supronowicz lodged an appeal against the Polish court's decision declaring the Belgian decision enforceable. After unsuccessful appeals against this ruling, Ms. Supronowicz decided to lodge a constitutional complaint. In the complaint she requested the TK to determine the non-conformity of several provisions of the Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters\(^3\) (hereinafter: the Council Regulation No. 44/2001) to the Constitution (right to the fair trial – Article 45 and principle of equality – Article 32 of the Polish Constitution).

I. To dare or not to dare? Constitutional review of the EU secondary legislation

From the very beginning it was obvious that the case would be a precedent. First of all, the TK had to decide whether it had a competence to review the constitutionality of the EU secondary law. Leaving aside all controversies concerning this issue it should be noted that the catalogue of normative acts which may be challenged before the TK is generally regulated in Article 188 points 1-3 of the Polish Constitution. According to this provision the TK reviews: a) statutes b) international agreements c) legal provisions issued by central organs of State.

Acts of the EU secondary legislation neither have the status of international agreements nor may be classified as provisions issued by central state organs. Therefore, under the Article 188 points 1-3 of the Constitution it is definitely not possible to indicate the EU secondary law as falling within the scope of the TK’s jurisdiction.

However, in the judgment *Supronowicz* the TK decided that the examination of constitutional complaints constituted a separate type of proceedings\(^4\), and consequently the catalogue of normative acts, which might be challenged before the TK in constitutional complaint, had been set out autonomously and independently from Article 188(1)-(3)\(^5\).


\(^4\) Point 1.2. of the judgment.

\(^5\) Point 1.2. of the judgment.
As the basic function of constitutional complaint is the protection of constitutional rights and freedoms, according to the TK, it would be unjustified to narrow down the scope of normative acts which may be challenged in this type of proceedings. Therefore, a constitutional complaint may challenge not only legal acts issued by an organ of the Polish state, but also – after fulfilling further requirements – legal acts issued by an organ of an international organization, provided that Poland is a member thereof. This primarily concerns the EU secondary legislation. As the EU regulations might contain norms upon whose basis a court or an organ of public administration would make a final decision about constitutional rights or freedoms, they might be the subject of constitutional complaint.

II. The constitutional problem and the ruling

The complainant (Ms. Supronowicz) claimed that her constitutional right to a fair and public hearing was infringed by Article 41, second sentence, of the challenged Council Regulation No. 44/2001, in accordance with which a debtor against whom the enforcement was sought should not at the stage of the first instance proceedings be entitled to make any submissions on the application. The TK held that a fair judicial procedure should ensure that parties enjoyed procedural rights which were relevant to the subject of pending proceedings and implied that the principles of the trial are adjusted to the specific character of particular cases under examination. Constitutional guarantees related to the right to a fair trial may not be regarded as a requirement to provide – in every type of proceedings – the same set of procedural instruments, which would uniformly specify the position of the parties to proceedings and the scope of procedural measures available to them.

Taking this into consideration, the TK decided that the proceedings regulated in the Council Regulation No. 44/2001 aimed at balancing the rights and opposite interests of the applicant (creditor) and the debtor. To achieve that goal, the EU legislator provided for a two-state procedure. The procedure reflects a general assumption that underlies proceedings to determine the enforceability of a ruling issued by a court from another Member State, meant to reconcile the effect of the debtor’s surprise, which is indispensable in the proceedings, with respect for his/her right to a hearing. The TK highlighted also the fact that proceedings to determine the enforceability of a ruling of a court from another Member State were secondary in character in relation to the court proceedings which ended by issuing the ruling in the Member State of origin. In proceedings to determine the enforceability of the

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6 Para 1.3. of the judgment.
ruling, there is a presumption that, in proceedings before the court of the Member State of origin, both parties were granted procedural rights which corresponded to the guarantees of a fair procedure. The said presumption is based on mutual trust in the administration of justice in the EU Member States.

The TK pointed out that the right to a fair trial is not only guaranteed in national constitutions, but also arises from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and is guaranteed by Article 47 of the Charter of Fundamental Rights of The European Union (hereinafter: the Charter). The legal construct of ex parte proceedings, i.e. proceedings without the participation of the other party – being analogical to the construct adopted in Article 41, second sentence, of the Council Regulation No. 44/2001 at the first stage of proceedings to determine enforceability – occurs also in relation to some proceedings at a later stage, which have been regulated in the Polish Code of Civil Procedure. Particular attention should be drawn to special proceedings aimed at expedient examination of certain types of civil cases, i.e. injunction proceedings and proceedings concerning orders to pay. The character of proceedings without the participation of a defendant (debtor) is also shared, at the first stage, by proceedings concerning precautionary measures and proceedings to issue an enforcement clause. The exclusion of defendants (debtor) at the first stage of the above-mentioned proceedings has not been challenged before the TK so far.

Taking this into account, the TK stated that ruling out the possibility of making a statement by the debtor at the first stage of proceedings to determine the enforceability of a ruling of a foreign court, pursuant to challenged provision of Council Regulation No. 44/2001, did achieve the above-mentioned significant goals, was not arbitrary in character and did not infringe the right to a fair trial. On the one hand, the said procedural solution implements the principle of the free movement of judicial decisions within the EU and the principle of mutual trust in the administration of justice in the EU Member States, which also apply to rulings issued by Polish courts. On the other hand, it facilitates the effective enforcement of court rulings issued to applicants (creditors). Therefore, there are no grounds to conclude that the adopted model of proceedings to determine the enforceability of a ruling of a foreign court, with the existing restrictions imposed on a debtor in first instance proceedings, infringes the right to a fair trial, guaranteed by the Constitution.

As regards the alleged infringement of the principle of equality (in conjunction with the right to fair trial), the TK stated that – due to the special character of proceedings to determine the enforceability of a ruling of a foreign court, which were instigated by the creditor who had been awarded a ruling ordering compensation for him – it was admissible to differentiate between the procedural rights of one party and those of the other in first instance proceedings. In the view of the TK, it did not follow from the content of Article 41, second sentence, of the Council Regulation.
that the applicant (creditor) was excessively or unjustly privileged in comparison with the participant in the proceedings (the debtor).

To conclude, the TK – when decided to review the constitutionality of an EU legislation act (Council Decision No. 44/2001) followed German Federal Constitutional Court’s (Bundesferfassungsgericht, hereinafter: the GFCC) path charted in Solange I judgment. The outcome of both rulings has been the same: constitutional courts, without referring to the CJEU (ECJ) decided that the reviewed EU(EC) secondary acts were consistent with national constitutions. The TK, similarly to the GFCC, analyzed also the issue of potential preliminary reference to the CJEU and held that in the adjudicated case there was no doubt as to the conformity of the challenged Council Regulation with EU primary law. Hence, according to the TK — within the meaning of the Foto Frost doctrine — there was no need to refer to the CJEU for a preliminary ruling. What is worth mentioning, the TK — as the GFCC in Mangold decision — suggested that such preliminary ruling might be considered as a warning before declaring that the challenged EU law is unconstitutional, by claiming that such a move would probably have been necessary if the TK was to declare the EU act contrary to the Constitution.

For all these reasons, the Supronowicz judgment was undoubtedly a precedent. It was the first time since the Solange I judgment of the GFCC in 1974 that a domestic constitutional court had dared to carry out a constitutional review of a Community regulation.

III. Two in one. The TK mixes 1974 and 1986 “Solange” formulas of the GFCC?

The TK was definitely fully aware of the controversial character of the judgment. Therefore the ruling was softened by the reasoning, where the TK pointed out that the case Supronowicz was the first in which EU legislation was directly reviewed. Due to this new situation, the TK decided to examine the constitutional complaint thoroughly. However, it also emphasized the need to exercise caution and restraint when reviewing constitutionality of EU law in the future. Firstly, it pointed out different legal effects of a judgment declaring unconstitutionality of an EU regulation by pointing out that, with regard to acts of secondary EU legislation, the consequence of a TK’s ruling of this type would be merely non-application of such acts to the

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7 The order of the Second Senate of 6 July 2010, 2 BvR 2661/06.
9 A. Kustra, Reading the Tea Leaves... , p. 1554.
10 Para 2.5 of the judgment.
territory of Poland\textsuperscript{11}. Secondly, the ruling declaring non-conformity should have the character of *ultimo ratio* and ought to be made only when other ways of resolving the conflict have failed\textsuperscript{12}. Therefore, in its final remarks\textsuperscript{13} the TK noted the need to determine a higher standard of admissibility of constitutional complaints against acts of secondary EU legislation for the future. And here comes *Solange II* formula, as the TK repeated the reservation known from the GFCC decision of 22nd October 1986\textsuperscript{14} and the European Court of Human Rights\textsuperscript{3} (hereinafter: ECtHR) judgment of 30th January 2005 in *Bosphorus Airlines v. Ireland*\textsuperscript{15}. The TK decided that in constitutional complaint cases challenging the constitutionality of EU legislation, the complainant should be required to prove that the challenged legal act causes a considerable decline in the standard of protection of rights and freedoms in comparison with the constitutional standard of protection. It is an essential element of the procedural requirement to indicate the manner in which the rights or freedoms have been infringed\textsuperscript{16}. If the constitutional complaint does not fulfil it, the TK declared that in future cases it would either issue a decision refusing to proceed with further action or discontinue proceedings on the grounds that the constitutional complaint was inadmissible\textsuperscript{17}.

What is significant, is that the TK decided to review the constitutionality of the EU regulation and give a judgment on the merits of the case (as the GFCC did in 1974, when deciding the *Solange I* case) but in the same judicial decision adopted the *Solange II* formula for the future constitutional complaints concerning EU legislation. It is obvious that the EU system of fundamental rights protection in 2011 looked totally different that in the 70’s and even 80’s of the 20th century. At present, the Charter and the CJEU case-law form a well-developed catalogue of fundamental rights and an autonomous system of their protection. Therefore, the TK had actually two possibilities: either to adopt *Solange II* formula from the very beginning (which was probably expected form the majority of Polish legal scholars) or to give a judgment on the merits (as GFCC did in 1974 in *Solange I* judgment) with reservations regarding the admissibility of future constitutional complaints (adopting *Solange II* formula).

The TK chose the latter which confirms the sense of discussion about chapter 3 of Solange story. This term was used by Wojciech Sadurski, who pointed out that soon after the 2004 accession of eight from Central and Eastern Europe States to the

\begin{quote}
\textsuperscript{11} Para 2.7 of the judgment.
\textsuperscript{12} Para 2.7. of the judgment.
\textsuperscript{13} Para 8.2. of the judgment.
\textsuperscript{15} Grand Chamber Judgment, Bosphorus Airlines v. Ireland, App. 45036/98 (ECHR, 30th January 2005).
\textsuperscript{16} Para 8.5 of the judgment.
\textsuperscript{17} Para 8.5 of the judgment.
\end{quote}
EU, the constitutional courts of some of these countries questioned the principle of supremacy of EU law over national constitutional systems, on the basis of their being the guardians of national standards of fundamental rights protection. In doing so, they entered into the well-known pattern of behaviour favoured by a number of constitutional courts of the “older Europe”, which Sadurski called “chapter 3 of Solange story”\textsuperscript{18}.

Such judicial practice shows the importance of cross-constitutional interactions within the EU. Some of them, including the TK judgment in case Supronowicz, fit into the contemporary discussions concerning the phenomenon of “constitutional borrowings”\textsuperscript{19}, which are a specific type of legal borrowing; concerned with both: intra- as well as inter-system (extra-system) interactions\textsuperscript{20}. Constitutional borrowing can occur both at the stage of constitutional drafting as well as at the interpretative stage\textsuperscript{21}. Over the past few decades, the dialogue of constitutional courts has become a major venue for the migration of constitutional ideas\textsuperscript{22}. This trend is rapidly emerging as one of the central features of contemporary constitutional practice\textsuperscript{23}. Constitutional borrowing might include precedents, arguments, concepts, tropes, heuristics or even entire legal paradigms, such as the post-war/juridical human rights paradigm, which includes such elements as the proportionality method, human rights, judicial review, and a certain understanding of constitutional values\textsuperscript{24}. When borrowing consists in transplantation of legal ideas, in whole or piecemeal, from one context to another, it can be called a “legal transplantation” \textit{sensu stricto}\textsuperscript{25}. This kind of circulation of constitutional ideas goes far beyond mere comparative reasoning\textsuperscript{26}.


\textsuperscript{21} V. F. Perju, Constitutional Transplants, Borrowing, and Migration, [in:] Oxford Handbook of Comparative Constitutional…, p. 1330.


\textsuperscript{23} S. Choudhry, Migration as a New Metaphor in Comparative Constitutional Law, [in:] The Migration of Constitutional Ideas, S. Choudhry (ed.), Cambridge University Press 2006, p. 16.

\textsuperscript{24} F. Perju, Constitutional Transplants, Borrowing…, p. 1329.


\textsuperscript{26} Further on this issue see M. Bobek, \textit{Comparative Reasoning in European Supreme Courts}, Oxford University Press 2013.
The TK judgment in case Supronowicz serves as a good example of constitutional borrowing with so called “mutation effect”\(^\text{27}\) – the process of creative misunderstanding or conscious development of the original idea. The mix of the Solange I and II formula in Supronowicz judgment was undoubtedly a conscious choice. The TK wanted to highlight its status as ‘a court of the last word’, just like the GFCC did in 1974\(^\text{28}\). Nevertheless, it was unable to do this without taking into consideration the current standard of fundamental rights protection in EU law. This prejudged the combination of the Solange I ruling (constitutional review of an EU regulation) and the statement of reasons resembling the Solange II decision. The TK clearly wanted to avoid a simple repetition of a constitutional court’s conditional abdication of exercising its competences.

IV. Outcomes for the European judicial dialogue

What are the outcomes of the TK judgment for the European judicial dialogue? This question seems to be salient when the timing of the ruling is considered. The judgment was given in 2011, when the Charter had already entered into force. However, it was two years later, when the CJEU delivered the Åkerberg Fransson\(^\text{29}\) and Melloni\(^\text{30}\) judgments. In Åkerberg Fransson the CJEU – referring to the Article 51(1) of the Charter – regarded “scope of application”\(^\text{31}\) as the same as “implementation” and held that article 51 (1) of the Charter: confirms the Court’s case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European

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\(^{27}\) See H. Spector, Constitutional Transplants and the Mutation Effect, “Chicago-Kent Law Review”, 2008, Vol. 83, p. 129. H. Spector defined the mutation effect as process of continuing to extend the scope of holding, regardless of its factual basis, to cover situation, not even contemplated in the reasoning that grounded in the original decision (p. 130). Although, it must be stressed that according to A. Watson, – the “creator” of the term “legal transplants”, any „constitutional borrowing” is by definition a mutation, i.e. that there is never a mere copy, but always a creative part to the copying.


Union”32. That means that if national legislation, “falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures”33.

In Melloni judgment, not only given on the same day as Åkerberg Fransson but also prepared by the same Judge-Rapporteur, Prof. Marek Sajjan34, the CJEU considered, among others, the interpretation of the Article 53 of the Charter which states that: “nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”.

Before Melloni the Article 53 was regarded as a potential tool for Member States to assure that the Charter does not replace their national constitution and higher level of fundamental rights protections. Such standpoint opened the possibility to interpret Article 53 as a codification of the Solange approach, according to which the primacy of EU law was confirmed but conditioned upon a certain level of protection of the fundamental rights. The EU standard of protection had to be at least equivalent to the level of protection ensured by national constitutions35.

Nevertheless, in Melloni the CJEU rejected such interpretation of the Article 53 on the ground that it would contradict the principle of the supremacy of EU law, arguing that it was a distinct feature of the EU legal order36. It means that Member States may opt for higher standards of protection than those required by the Charter, but only if they can do so in a way that does not hinder their compliance with EU obligations or undermine the effectiveness of the EU law.37 In other words, application of the Melloni judgment may lead to a situation where the Charter will provide not the minimum, but the maximum standard of protection rights due to the principle of the supremacy of EU law. This is a controversial perspective, especially taking into account the fact that the Article 53 of the European Convention on the

32 Para 18.
33 Para. 19.
36 Para. 63-64.
Human Rights – on which the Article 53 of the Charter was patterned – is interpreted as guarantor of a minimum standard of protection by the ECtHR. It should not be surprising that the CJEU’s interpretation of Articles 51(1) and 53 of the Charter have already been widely discussed and got various feedback from national constitutional courts. On the one hand, the GFCC made clear in the Counter-terrorism Database ruling of 24th April 2013 that it would not accept the broad interpretation of article 51(1) of the Charter given (or at least suggested) in the Åkerberg judgment. On the other hand, in its reply to the CJEU’s Melloni judgment (judgment of 13th February 2014), the Spanish Constitutional Court lowered the constitutionally guaranteed standard of protection regarding extraditions on the basis of in absentio judgments. The decision was severely criticised by the Spanish academia, since the Constitutional Court did not have to lower the general standard of protection. It could have simply accepted the exception resulting from the primacy of EU law (in this context, the EAW Framework Decision).

These judgments prove that, contrary to the 70s and the 80s of the 20th century, national constitutional courts are currently no proponents of developing fundamental rights protection in the EU, and the Solange II formula in its initial meaning has become inadequate to the current state of political integration. The general standard of human rights protection in EU law is clearly substantially similar to fundamental rights protection enshrined in national constitutions. Nowadays, the devil is in the detail. The Charter, together with the principle of primacy, form a powerful tool,
which may be used to influence national standards of individual fundamental rights protection. It can be invoked both to justify the need for raising a protection standard and the need for lowering it. Therefore, constitutional courts are now paradoxically victims of their own reservations. It may take some time until constitutional courts ‘digest’ the Charter and the Melloni and Åkerberg judgments.

Taking into consideration the timing of the Supronowicz judgment, the non-standard application of Solange II formula was applied as a judicial declaration of power to resist. Åkerberg and Melloni judgments only affirm constitutional problems with the current fundamental rights revolution in Europe. In such a context the declaration of potential veto gives a constitutional court a salient argument in European judicial forum. As pointed out before, constitutional courts of relatively new Member States tend to return to the past and try to start from scratch (at least from their own point of view). These courts do not want to disregard earlier chapters of the story established by old Member States. They also want to, first, question the supremacy of European law due to fundamental rights concerns and then, to confer a constitutional "imprimatur" on supremacy (in the original Solange II formula, this was justified by the fact that the protection of rights at the EU level had reached standards equivalent to those required at the national level). The TK’s judgment in case Supronowicz is therefore another example of such an ironic return to the past.

As already mentioned, regardless of the specific circumstances of the TK’s judgment, there are no doubts that at the present stage of development of fundamental rights protection in the EU, the Solange doctrine (both formulas of Solange – from 1974 and from 1986) has become outdated. At present, the concept of constitutional identity provides

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47 W. Sadurski, Solange, chapter 3…, pp. 10-11.
a better defence in the battle concerning national particularities of constitutional rights protection. Constitutional identity is a conceptual instrument of defense against too far reaching supranationalization of the States’ legal orders, a defense of the substantive and functional existence of the State, which finds its particular expression in the basic political decisions and the core elements of its legal culture which is the value basis of the national constitution. The TK has invoked this notion previously, yet not in Supronowicz but in the earlier judgment concerning the constitutionality of Lisbon Treaty.

The constitutional identity review is recently perceived as another Solange, since – in the context of fundamental rights protection – it gives constitutional courts legitimation to declare absolute non-application of the EU law act, when it crosses the line of constitutionally protected hard-core of fundamental rights and freedoms. In such a way some commentators perceived among others the GFCC recent order of 15th December 2015, in which the GFCC reaffirmed its review powers in cases regarding EU law (including EU legislation). The factual basis of the case was similar to Spanish case initiated by Mr. Melloni and regarded the constitutionality of in absentio trial.

Conclusions

To sum up the Polish TK mixed two parts of Solange concept in one judgment to go back into square one of the European judicial dialogue regarding fundamental rights protection before the conditional approval of EU law supremacy. In a way it chose wrong (or at least currently insufficient concept for constitutional borrowing) and missed the opportunity of developing the constitutional identity review as the ultimate limit of EU law interference in constitutional standards of protection. On the other hand, two years before Åkerberg and Melloni the TK brought out the unfinished character of European story of multilevel system of fundamental rights protection. In this regard Polish mutation of Solange formula seems to be an important element of the current discussion concerning the impact of the Charter on national constitutions.

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