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THE POSITION OF CUSTOMARY INTERNATIONAL LAW IN THE POLISH LEGAL SYSTEM IN THE LIGHT OF ARTICLE 9 OF THE CONSTITUTION OF 1997

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INTRODUCTION

The Constitution, being – according to the principle of a state ruled by law – the basis for the binding force of all legal norms within the state, should comprise rules that allow for a precise definition of the place of the international legal norms within the national legal system.[1] In 1997, when the Constitution currently in force was adopted, the Polish constitution-maker made the legal system open to the provisions of international law – at least in part – for the first time in the post-war period. Article 9 of the Polish Constitution (1997) gives evidence to this openness. It states that "*The Republic of Poland shall respect international law binding upon it*". An expression "international law" used here should be understood as a set of norms binding in relations between subjects of this law, first of all between states and international organizations.[2]

I.

The fact that this provision is situated in Chapter I (entitled *The Republic*) of the Constitution proves that respecting international law is not only a constitutional obligation but also that it constitutes one of the principles

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[1] See K Wójtowicz, 'Receptivity of the Polish Constitution of the Republic of Poland of 1997 to international and supranational law' in P Korzec, J Urbanik, M Wyrzykowski (eds), *Polish Constitutionalism. A Reader* (2011) 135.
[2] See W Czapliński, A Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* (2nd ed. 2004) 5.

of the whole Polish legal system. It means that Article 9 has a full normative value equal to other supreme constitutional principles.[3]

Such an interpretation is shared by the Constitutional Tribunal which in the judgment P 1/05 pointed out that: "Article 9 of the Constitution is not only a grandiose declaration addressed to the international community, but also an obligation of state bodies, including the government, parliament and the courts, to observe the international law, which is binding for the Republic of Poland".[4] The Tribunal based its view on the assumption that when introducing Article 9 into the Constitution, the constitution-maker defined the legal system binding in the territory of the Republic of Poland as allowing for many constituent elements, thus determining that both the norms (provisions) established by the national legislator and the provisions established outside the system of Polish legislative bodies are binding in the Polish legal order.[5]

II.

Article 9 informs the international community, in a very general way, that Poland remains a state ruled by law also in the field of international relations. It should also be noted that the adopted principle enjoys a broader scope of binding force than the *pacta sunt servanda* principle of the *Vienna Convention*. Article 9 refers to all spheres of international law, and among them, to customary international law.[6]

In external relations Article 9 does not create new obligation, as the duty to act in accordance with international law results from the *bona fide* and *pacta sunt servanda* principles. Nevertheless, this provision means that Republic of Poland makes a solemn promise to the international community that all values on which international law is founded will be respected.[7] This conclusion is confirmed by the text of the Preamble to the Constitution where the need for cooperation with all countries for the good of the Human Family is emphasized.[8] There is no doubt that the values on which such cooperation should be founded are also expressed in norms of customary international law. As a result, Poland could be made internationally responsible for acts infringing norms of international customary law binding upon Poland

On the other hand, there are views in the Polish legal doctrine that Article 9 bears within it a declaration which is binding only within the ambit of international relations, without any direct legal effect in the national legal system. These latter effects would result only from detailed constitutional

[3] See K Wójtowicz, 'Prawo międzynarodowe w systemie źródeł prawa RP' in M Granat (ed), *System źródeł prawa w Konstytucji Rzeczypospolitej Polskiej* (2000) 67; see also P Sarnecki, 'Komentarz do art. 9' in L Garlicki (ed) V *Konstytucja Rzeczypospolitej Polskiej, Komentarz* (2007) 1-6.

[4] Case P 1/05 of 27 April 2005, para 5.5.

[5] Case K 18/04 of 11 May 2005, para 2.2.

[6] See Wójtowicz (n 1)135.

[7] See A Wasilkowski, 'Przestrzeganie prawa międzynarodowego /art. 9 Konstytucji RP/' in K Wojtowicz (ed), *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne* (2006) 12

[8] See K Wojtowicz in *Preambuła Konstytucji Rzeczypospolitej Polskiej*, vol. XXXII Studia i Materiały Trybunału Konstytucyjnego (2009) 83.

provisions or certain statutes which might specify the applicability of the declared principle. Consequently, the omission to include international custom in the sources of universally binding law might indicate the impossibility of applying such custom within the domestic legal system. This opinion is backed by the narrow, textual interpretation of Article 87 of the Polish Constitution which enumerates the sources of universally binding law. Besides the Constitution, only statutes, regulations and ratified international agreements are listed in this provision.

A different interpretation, however, seems to be more convincing. It is based on the normative character of Article 9 which is unquestionable. That is why the principle articulated by this provision may constitute a ground for imposing on state organs the duty to consider all sources of international law as binding, be it in the process of parliamentary law making or when applied by the organs of administration and the courts.[9]

In internal relations Article 9 performs several functions. First, it strengthens the position of international law in the domestic legal order in general. The duty to respect international law may serve as a tool of pressure on decision-making bodies in the State towards changing the legal system if existing regulations make it difficult to fulfil international obligations.[10], customary law included.

Second, Article 9 may be referred to in the process of interpretation of provisions of law. The Constitutional Tribunal in its judgment SK 45/09, stated that the Constitution has been explicitly guaranteed the status of the supreme law of the Republic of Poland. At the same time, that regulation is accompanied by the requirement of respect and favourable regard for the regulations of international law that are properly drafted and binding within the territory of Poland.[11] In the judgment concerning the Treaty of Accession (K 18/04), the Constitutional Tribunal emphasised that the subsystems of legal regulations which came from different law-making centres should co-exist on the basis of mutually acceptable interpretation and cooperative application.

In the internal hierarchy of norms and constitutional principles, the principle expressed by Article 9 occupies a position equal with the provision of Article 235 on constitutional amendments but higher than provisions placed in Chapter III of the Constitution, comprising Article 87 on the sources of law. In consequence the so-called closed system of sources of law may be understood as limited only to the content of Article 87 without prejudice to the scope of Article 9 which refers to international law as a whole.[12]

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[9] Wójtowicz (n 1) 136.

[10] See Wasilkowski (n 7) 12-13; M Masternak-Kubiak, *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej* (2003) 179ff.

[11] See Wasilkowski (n 7) 13.

[12] See W Sokolewicz, 'Komentarz do art. 235' in L Garlicki (ed) II *Konstytucja Rzeczypospolitej Polskiej, Komentarz* (2001) 16; K Działocha, 'Komentarz do art. 87' in L Garlicki (ed.) I *Konstytucja Rzeczypospolitej Polskiej, Komentarz*, (1999) 4-5.

III.

Before the adoption of the Constitution of 1997 the constitutional definition of international law status hitherto existing in Poland proved less than adequate. The new attitude of the democratic Polish State to the issue of international law was confirmed, first, at the international forum by the accession (in 1990) to the Vienna Convention on the Law of Treaties (of 1969) and, second, in the text of the Constitution of 1997. The reason that customary international law was excluded from Article 87 was presented during the preparatory stage. It was argued that the closed system of sources of law cannot include customary norms because they are not subject to the duty of promulgation and can lend themselves to ambiguities as to whether and to what extent they are binding.[13]

In the Polish legal doctrine, the view prevails that international customary law, being an unquestionable source of international law, should be applied by the organs of the Polish State, on condition that it is binding upon Poland. This opinion is supported by argument that Article 87 and other provisions of Chapter III of the Constitution should be understood as making up only part of the scope of Article 9, and in relation to only one category of sources of international law - ratified international agreements. International agreements are characterized by precisely defined content and the obligation of promulgation. Customary law does not have those features and, as a result, different rules determine its application. If the provisions of Chapter III were to restrict the scope of Article 9 to international agreements only, this Article would be superfluous, because the obligation to respect international agreements stems from Articles 26 and 27 of the Vienna Convention on the law of treaties, ratified by Poland and to which, in light of Article 241 par. 1 of the Constitution, the provisions of Chapter III should be applied.

The Judge, who according to Article 178.1 of the Constitution, is subject only to the Constitution and statutes, can base its judgment, by way of Article 9, on customary international law. It seems that the Polish Supreme Court, at least by implication, accepted this approach in its judgment of 11 January 2000, when without referring directly to Article 9, based its decision on the rules of customary international law with respect to the scope of the State's immunity.[14]

It should be noted, however, that the practice of application of customary law still is not significant, and probably will remain so, because in the era of progressive codification of customary international law (law of treaties, diplomatic law, consular law, law of the sea) less and less areas are left outside conventions. An important obstacle, making difficult the invoking of customary law in the domestic legal order, may result from the principle of the rule of law.

For example, in judicial proceedings an objection may be raised against the application of customary international law, founded on the argument that access to not promulgated norms of this law is too difficult for the parties. Certainly, the proper promulgation of provisions of law is one of

[13] See Wasilkowski (n 7) 15, Wójtowicz (n 1) 136.

[14] See A Wyrozumska, 'Prawo międzynarodowe oraz prawo Unii Europejskiej a konstytucyjny system źródeł prawa', in Wojtowicz (n 7) 39.

crucial requirements of any legal order founded on the principle of the rule of law.[15]

CONCLUDING REMARKS

The analysis of existing practice proves that Polish courts interpret domestic law in accordance with international law (so-called consistent interpretation) and rely on the assumption that it is not the legislator's intent to violate customary law, if the contrary is not established. In case of a conflict with statute the customary norm takes precedence but when there is a conflict with the constitution the judge may refuse to apply customary norm.[16]

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[15] See Wasilkowski (n 7) 15.
[16] See Masternak-Kubiak (n 11) 265.