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Verification of the constitutionality of treaties by the Constitutional Courts prior to their signature or ratification

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1. Preventive control within the attributions of constitutional courts.

In a majority of countries, control of norms by constitutional courts is executed *a posteriori* with regard to legal acts and norms which already came into force and became effective. Only in France (and partly in Romania due to French influence) is preventive control the basic form of activity of the Constitution Council. However, it should be attributed to the specific features of development of the French model of constitutional jurisdiction. In other countries, *a posteriori* control is predominant, even though it is sometimes supplemented by specific (usually strictly defined) procedures of prior control. Particularly in Hungary and Portugal, the avenues of prior control are well developed. On the other hand, in Spain, there used to be certain procedures of prior control, and only after some discouraging initial experience they were abolished in 1985 (the only exception today is the review of international treaties).

The advantages and disadvantages of prior control are frequently discussed. Its supporters (e. g. L. Favoreu) point to the fact that it prevents introduction of unconstitutional legal norms into the legal system. In this way it is possible to avoid problems relating to removal of such norms from the legal systems, and in particular to avoid revision of individual decisions which may had been made on the grounds of such unconstitutional norms before they are declared as such. Furthermore, undoubtedly the activities and decisions of the French Constitution Council demonstrate that systems based nearly exclusively on prior control are capable of functioning.

However, discussions are dominated by sceptics and opponents of prior control who argue that prior control can be based exclusively on evaluation of the text of a legal provision, without knowing how it will develop in the process of practical application. The actual contents of legal provision is only revealed by practice and only then can all its legal consequences be found. Such capability is only available to *a posteriori* control procedures, especially when initiated by courts (legal questions) or citizens (constitutional complaints). Prior control cannot be exercised taking into account all these nuances and may therefore lead to premature recognition of conformity of a regulation with the constitution (even though it may turn out that in practice the regulation became unconstitutional), or to declaring the regulation unconstitutional (when in practice it could be given a meaning fully compatible with constitution). Another important argument refers to political influence on prior control. By virtue of its nature, it can be initiated by a narrow circle of governing bodies only (state president, groups of MPs, government, etc.). Members of these bodies are always led by political reasoning which may result in the constitutional court becoming involved in political disputes, in fact making it the "third house" used by the president or by parliamentary opposition when they fail to vote their proposals through in parliament. In this respect numerous practical experiences could be quoted. Also the Polish experience has not always been encouraging.

The above comments refer to the general concept of procedures of the judicial review. It is generally recognised that such control should always focus on Statutes (Acts) of Parliament. As regards international treaties, the problem of their review is quite specific. On one hand, the

majority of constitutions expressly or in an implied manner require that international treaties be constitutional. On the other hand, under the international law the state is unconditionally required to comply with all international treaties which became effective - release from the obligation to comply with an international treaty cannot be claimed on the basis of its alleged unconstitutionality. The problem can be solved by submitting international treaties to prior control, to verify their constitutionality before signature or ratification. For this reason it is more common among constitutional courts to have the power of prior control over international treaties than over statutes and other norms of internal legal order.

2. Review of constitutionality of international treaties - comparative observations.

2.1 Currently, international treaties are primarily treated by constitutional courts as reference basis (*norme de référence*). This is particularly true of post-communist countries. In the past, these countries strongly rejected direct applicability of international law to local legal regulations. Only their new constitutions marked a breakthrough and, in effect, ratified international treaties were given priority over ordinary statutes. This meant the appearance of the problem of ensuring consistency between national statutes and international treaties, mainly those regarding human rights.

A more difficult problem is posed by the review of international treaties themselves, i.e. mainly assessment of their constitutionality. As a baseline, it should be remembered that in the majority of countries, the most important international treaties require ratification (usually by state president) which must be preceded by parliamentary approval in the form of s statute, so-called Consenting Act. Therefore, the control of treaties can be exercised in two ways: directly (when proceedings at constitutional court refer to a treaty or its individual provisions), or indirectly (when the object of constitutional court proceedings is the Consenting Act, and when the dispute is based on the assumption that a statute consenting to ratification of an unconstitutional international treaty is itself unconstitutional).

Direct review of the treaties must always be based on definite provisions of the Constitution because it is a general rule that constitutional court can only rule on cases and controversies assigned to its jurisdiction by the constitution. Various approaches have been adopted in this respect by Constitutions of different countries: in some countries the constitutional court is given the authority to rule on constitutionality of international treaties (e.g. France, Portugal, Spain, Austria, Poland, Hungary, Russia, Bulgaria, Lithuania and Ukraine), while in other countries constitutional courts do not have such powers (e.g. Germany, Italy, Romania, Czech Republic, Slovakia). Constitutions also stipulate whether constitutionality of international treaties is verified by the procedure of the prior review (France, Russia, Bulgaria, Lithuania, Ukraine), *a posteriori* only (Austria), or both (Spain, Portugal, Poland, Hungary).

Indirect review of international treaties, on the other hand, is always possible because, as a rule, jurisdiction of constitutional courts includes all statutes, i. e. also statutes approving the ratification of a treaty. It should only be clarified what is the permitted scope of such review, in

particular, whether it covers only the review of the provisions of the Consenting Act or whether it can also cover verification of constitutionality of the provisions of the international treaty in question. The answers to these questions usually cannot be found in the constitutional texts, therefore the problem is left for the constitutional court to decide.

In practice, verification of constitutionality of international treaties is performed rather cautiously by constitutional courts. However, in recent years, in particular with regard to the procedure of conclusion of the Maastricht Treaty, there have been several decisions of constitutional courts, and some of them have declared unconstitutionality of some provisions of the Treaty.

2.2 In **Germany** the jurisdiction of the Federal Constitutional Court (*Bundesverfasssungsgericht*) does not mention enhancing the direct review of constitutionality of international treaties. However, it is a well-established view that indirect review (i. e. the review in the form of verification of the Consenting Act) is permitted. Review over Consenting Act is constructed in a very broad manner, as it also covers assessment of provisions of the relevant international treaty. Since in Germany control of statutes is always exercised *a posteriori*, therefore the Consenting Statute can only be challenged at the BVerfG only after its coming into force or even after ratification and coming into force of the relevant international treaty. However, there in several decisions the BVerfG accepted the review of the Consenting Acts on the earlier stage, i. e. after its adoption by the Parliament but before the President of the Republic have signed this Act. So, the review of Consenting Act may be constructed as an a priori review, which constitutes the only instance of the prior control under the German system.

In the political reality, the review of international treaties (always exercised through the review of Consenting Acts) has always played a significant role in Germany. Even if only once has an international treaty been declared unconstitutional (and it was a politically insignificant 1934 treaty with Switzerland on prevention of double taxation), a large number of very important international treaties have been challenged by BVerfG. It may be said that the control of constitutionality of international treaties represents an important element of the activities of the German Court. As early as in the 50's the BVerfG was settling disputes relating to preparation of the European Defence Community treaty. Then, in 1955 it examined constitutionality of the Saara treaty. In early 70's the BVerfG ruled on constitutionality of treaties with the GDR, Poland and USSR and in the decision of July 31, 1973 the Court established defined a binding interpretations of the so-called basic treaty with the GDR. In early 90's the Court ruled on constitutionality of the act approving the Maastricht Treaty, and only after announcement of the court's decision confirming constitutionality of the Treaty (October 12, 1993) was the Treaty ratified.

2.3 In **France**, article 54 of the 1958 Constitution provides for direct review of constitutionality of international treaties. In line with the general pattern of French regulations, only prior control is permitted. Even when only one provision of a treaty is declared unconstitutional, the treaty cannot be ratified before proper amendment to the constitution has

been made. Until 1993 initiative on control of constitutionality of treaties belonged exclusively to the president of the Republic, the prime minister and the chairmen of the upper an lower houses of parliament. It was not available to deputies and senators (i.e. parliamentary opposition). Therefore, some MPs began to use the indirect way and they began to challenge - in the procedure provided for in Article 61 of the Constitution - constitutionality of statutes approving international treaties. The Constitutional Council confirmed its jurisdiction to decide such cases (ruling of July 17, 1980). Therefore, similar to Germany, a method of indirect review of international treaties was established in France, however it had to be exercised a priori only, since the Constitutional Council cannot rule on constitutionality of statutes which are already in force.

In 1992 the Constitution was amended, granting MPs the right to initiate direct review of international treaties pursuant to article 54 of the Constitution. Since then, both forms of review of international treaties became fully parallel.

Until the end of 1997 the Constitutional Council issued six decisions in the procedure of direct review of international treaties. The first rulings date back to the 70's (1970 and 1976). Later, decisions were pronounced on the constitutionality of Protocol 6 of the European Human Rights Convention abolishing the capital punishment (May 22, 1985) and on the Schengen treaty on discontinuation of border controls (July 25, 1991). However, the most important rulings of the Constitutional Council were those on constitutionality of the Maastricht Treaty. First, the president of the Republic requested the Council to review the Treaty, and the Council declared that several of its provisions cannot be ratified without amending the Constitution (April 9, 1992). After the required amendment has been adopted (June 25, 1992) the Treaty was challenged again, this time by a group of deputies. This time however, the Council declared that the Treaty was consistent with the amended constitution (September 2, 1992). Similarly, the Council rejected claims of alleged unconstitutionality of the act approving ratification of the Treaty (September 23, 1992).

Quite similar story happened in respect to the 1997 Treaty of Amsterdam. Both, the president of the Republic and the Prime Minister challenged the constitutionality of the Treaty before the Constitutional Council. In the decision of December 31, 1997, the Council declared two provisions of the Treaty incompatible with the constitutional principle of the national sovereignty. In effect, the ratification procedure had to be stopped before an appropriate constitutional amendment would be adopted.

2.4 Direct verification of constitutionality of international treaties exists also in **Spain**, both before and after their ratification and coming into force. Prior verification is expressly provided for in article 95, clause 1 of the Constitution which states that no international treaty inconsistent with the Constitution can be concluded until constitution is amended. The existence of such inconsistency is determined by the Constitutional court at the request of the government or one of the houses of parliament. Currently, this is the only procedure of a priori review which exists in Spain. As mentioned above, in the original version of the 1978 Constitution, a priori review of

certain categories of statutes was permitted as well, but this procedure was found too political and it was abolished in 1985. However it is interesting to notice that at the time of its abolishment there was no disagreement about maintenance of a priori review in regard to international treaties.

Verification of constitutionality of international treaties already in effect was expressly provided for in the draft of the Constitution. However, in the final text of article 161, clause 1, item a, of the Constitution there is no mention of international treaties. Nevertheless, the 1979 Constitutional Court Act (article 27, clause 2, item c) lists international treaties among other acts subject to verification of constitutionality. When an international treaty is considered unconstitutional, it is deemed null and void, at least with respect to its application in internal law.

The principal practical example of verification of an international treaty was provided in respect to the Maastricht Treaty. Application was submitted to the Constitutional Court by the government of Spain before ratification of the Treaty. The Court ruled that one of the Treaty's provisions (granting voting rights to foreigners) was inconsistent with the constitution and that the Treaty could not be ratified without amending the Constitution (ruling of July 1, 1992).

Both in France and Spain actions of constitutional courts forced constitutional amendments prior to ratification of the Maastricht Treaty. In Germany, the Court declared the Treaty consistent with the Constitution, but the necessary amendments had been introduced to the Constitution before. This did not prevent ratification of the Treaty by all of these states. However, the need to adopt constitutional amendments meant that approval of the Treaty by the opposition had to be obtained, because amendments required the opposition's votes. In this way, the advantages of prior verification were demonstrated, as the procedure enabled adjustment of the Constitution to the Treaty and guaranteed that after ratification and coming in force of the Treaty it would not be challenged on the grounds of its constitutionality.

2.5. In the **post-communist countries** (my analysis is limited to Poland, Hungary, Bulgaria, Romania, Czech Republic, Slovakia, Lithuania and Russia), there is no uniform model of verification of international treaties. As regards direct review, i.e. verification of the international treaty as such, it should be noticed that in some countries such control is not permitted at all (Romania, Czech Republic, Slovakia). However, it is more common for constitutional courts to have jurisdiction over constitutionality of international treaties. Such verification is usually performed *a priori*. Only in Poland and Hungary is verification of ratified treaties permitted. As regards indirect review, i.e. the verification of statutes consenting to ratification, there is no commonly accepted answer whether it is permitted. Usually there also is no relevant body of judicial precedents in this matter.

The **Russian** experience seems quite interesting in this respect. The 1991 regulations on the Russian Constitutional Court stipulated that it can rule on constitutionality of international treaties which have not been yet ratified or approved (article 165.1 of constitution). A slightly different approach was taken in the Constitutional Court Act (article 57, clause 1, item 1 and

article 74, clause item 2). The 1993 Constitution and, consequently the 1994 Constitutional Court Act limited the scope of verification of constitutionality of international treaties. Currently the Constitutional Court can only verify constitutionality of international treaties in the a priori procedure. Article 125, clause 2, item g) of the Constitution refers to "international treaties which have not became effective". The Constitutional Court Act establishes a broad circle of persons and entities authorised to initiate this kind of action at the Constitutional Court (article 89), submits the contents and procedures of conclusion of treaty, as well as authority to conclude the same, to verification (article 90 in conjunction with article 86), and defines consequences of declaring a treaty unconstitutional - such treaty cannot be ratified, approved and cannot come into force in any form (article 91).

Clearly, the current Constitutional Court of Russia is not in a position to directly verify constitutionality of international treaties which have already became effective - in the literature there are mentions that attempts have been made to obtain decision of the Court on constitutionality of the treaty establishing the CIS, but the Court refused to express its opinion. It is not quite clear whether indirect review of international treaties by means of verification of statute approving ratification of the treaty is permitted. Opinions presented in the literature are quite diverse. Some authors point out that if such review were permitted, it would open the way to verification of already effective treaties, contrary to the current limitation of the Court's jurisdiction.

In **Lithuania**, jurisdiction of the Constitutional court includes direct review of international treaties. However, the scope of such control is limited. Firstly, it only refers to treaties which have not been ratified. The Constitution says nothing on the review of the treaties after ratification; it should be noted, however, that such possibility is not excluded in the doctrine (article 105, clause 2, item 3 of Constitution and article 73, item 2 of Constitutional Court Act). Secondly, under the a priori review procedure, the Constitutional Court does not give rulings on international treaties. Instead, it only "presents its position", which is an approach similar to that taken by Russian regulations before 1993. Finally, the constitutionality of international treaties is conclusively decided upon by the Sejm (parliament) on the basis of opinion presented by the Constitutional Court (article 107, clause 3 of constitution), which represents an exception to the principle of finality of the Court's decisions.

In the Lithuanian practice only once an international treaty was submitted to the Court. In 1994, the president of the Republic requested the Court to take position as to the constitutionality of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the decision of January 24, 1995 the Court held that there was no collision between the two documents and the Convention was duly ratified by the Sejmas.

In **Bulgaria**, jurisdiction of the Constitutional court includes direct review of international treaties, however prior to their ratification only (article 149, clause 1, item 4 of the 1991 Constitution) - therefore *a posteriori* review is excluded, as confirmed by the Constitutional Court itself in its ruling of July 27, 1995. It should be assumed that since all

rulings on unconstitutionality are binding in Bulgaria, it would prevent ratification of a treaty which was declared unconstitutional. It is worth mentioning that in fact there have been applications made to the Constitutional Court for verification of constitutionality of international treaties (ruling of June 22, 1992 on Bulgaria-Turkey Treaty). The question yet to be answered is whether *a posteriori* verification of statute approving ratification is permitted. It seems that this option is not excluded by the Constitutional court itself (ruling of July 27, 1995).

The broadest scope of authority was enjoyed by Constitutional Court in **Hungary**. Under the 1989 regulation, international treaties could be verified in advance (article 1, item a of the 1989 Constitutional Court Act - if the Constitutional Court ruled that certain provisions of an international treaty were not consistent with Constitution, the treaty could not be ratified until the inconsistency was removed; article 36, clause 2 of the Act), and *a posteriori* (article 44 of the Act: if the Constitutional Court ruled that a treaty or any provision thereof were not consistent with the constitution, it could request the relevant state authority to remove such inconsistency. The requested authority had to comply with such request within a prescribed time - article 46; However, consequences of incompliance were not specified. Neither was it stated whether the relevant treaty becomes inapplicable within the system of internal law).

To sum up, it should be stated that in these states which allow the direct review of international treaties, the procedure of prior verification is more common than the a posteriori procedure. However, consequences of rulings on unconstitutionality are not always specified. Neither is it clear whether, and to what extent, indirect review of the treaties is permitted.

3. Verification of constitutionality of international treaties in Poland

3.1 In Poland, like in other states, there are several types of international treaties. According to the most general classification, international treaties are split into those ratified on the grounds of the Consenting Act, those ratified without the Consenting Act and those not requiring ratification. Only treaties ratified on the authority of a Consenting Act can refer to the most important issues (as currently listed in article 89, clause 1 of the 1997 Constitution). These treaties form an integral part of the internal law (article 91, clause 1) and are given priority before national statutes (article 91, clause 2). There is no need to discuss other types of international treaties at this point. It is sufficient to mention that as early as in the 70's the Supreme Court ruled that international treaties concluded without ratification cannot determine legal position of citizens.

The Polish Constitutional Court was established in the mid-80's. However, its jurisdiction initially excluded international treaties - the then-current regulations did not allow for verification of constitutionality of international treaties or for control of conformity of statutes with international treaties. In its decisions the Constitutional Court respected these limitations - as mentioned in the resolution of November 30, 1994 (W 10/94, 243), "the authority to assess international treaties as such remains outside its jurisdiction". In fact, no attempts have ever been

made to instigate at the Constitutional Court any proceedings directly referring to constitutionality of an international treaty.

However, questions were asked as to whether permitted was indirect review of international treaties exercised by means of verification of constitutionality of statutes approving ratification of such treaties. These questions were asked in a politically significant context, as they could be understood as preparations for challenging constitutionality of concordat with the Vatican signed in the fall of 1993. In the above-mentioned resolution of November 30, 1994 (237-240) the Constitutional Court ruled that a Consenting Act becomes unconstitutional also when international treaty contains self-executing provisions inconsistent with the Constitution. However, the Consenting Act cannot be deemed unconstitutional when international treaty contains provisions inconsistent with earlier international commitments or contains arrangements requiring introduction of changes in the national legislation, even when such changes might be inconsistent with constitutional provisions in force at the time of ratification. Therefore, a compromise solution was implemented, conditioning feasibility of indirect verification upon the nature of international treaty. Self-executing provisions might be controlled through verification of the Consenting Act, as ratification of international treaty results in their automatic entry into the internal law. Provisions requiring the state to introduce relevant changes in legislation are not subject to such review, because the concept of legislation changes may be deemed to include introduction of relevant amendments to the constitution first. If no constitutional amendment is adopted, then the statutes adopted for the purpose of performance of obligations stipulated in an international treaty can be reviewed as to their consistency with the constitution.

Indirect review defined in this manner is exercised within the general framework of the judicial review of statutes. Therefore, it could have taken the form of a priori review. However, it should be remembered that in Poland the a priori review of statutes can only be initiated by the President of the Republic. In practice, no statute approving ratification of an international treaty has ever been challenged - a priori or a posteriori - at the Constitutional Court.

3.2 The situation was substantially changed with the introduction of the Constitution of April 2, 1997. The new Constitution included the direct review of international treaties into the jurisdiction of the Constitutional Court. The Constitution provided also for review of statutes and all lower-rank regulations as to their compatibility with international treaties ratified on the authority of a Consenting Act (article 188, items 1-3 of Constitution).

As regards direct review of international treaties, it can take the form of a priori or a posteriori review. A posteriori review is the primary procedure - initiative can be taken by a broad range of actors (article 191, clause 1), all courts included (article 193). Rulings of the Constitutional Court are final, but their legal consequences are not clearly defined by the Constitution. Article 190, clause 3 states generally that any act declared contrary to the Constitution looses its binding force as of the date of official announcement of the Constitutional Court's ruling, unless a later date is stipulated by the Court itself. It should be assumed that with respect to a international treaty, the "loss of the binding force" means immediate inapplicability

of its provisions in internal law, and requires relevant state authorities to take actions for its amendment or termination. From this point of view, particularly useful can be the option of postponement of invalidity date of the unconstitutional treaty.

3.3 Prior control can cover only those international treaties which require their ratification (as mentioned above, other international treaties are not currently regarded as sources of law of the generally applicable character).

Prior review of the treaties can only be initiated by the President of the Republic (article 133, clause 3 of the Constitution), similar to the prior review of statutes adopted by the Parliament and submitted to the President of the Republic for signature (article 122, clauses 3-4). The president is never required to submit international treaty to the Constitutional Court. However, he may do so in respect of any treaty submitted to him for ratification (i.e. he cannot challenge a treaty at earlier stages of the procedure, e.g. immediately after its signature).

The Constitutional Court examines the motion of the President of the Republic in its full composition (at least nine members present out of 15) (article 25, clause 1, item d of the Constitutional Court Act of August 1, 1997). The parties to the proceedings are representatives of the President of the Republic, Attorney General, Minister of Foreign Affairs and Sejm (article 41, clause 2 of the Act). Proceedings are held in compliance with general principles of verification of norms - no specific requirements are provided for in the CCAct with regard to prior review of international treaties. Subject to verification are contents of international treaty, procedure of its conclusion and authority to conclude it (article 42 of the Act).

In the Constitution there is no specific definition of the consequences of the Constitutional Court's rulings. Therefore, it should be assumed that applicable is the general provision of article 190, clause 1 of the Constitution ("Rulings of the Constitutional Court are generally applicable and final"). Therefore, when a treaty is ruled unconstitutional, it cannot be ratified by the President of the Republic. In such situation it would be necessary either to amend the Constitution or to re-negotiate those provisions of the treaty which were deemed unconstitutional. When a treaty is ruled to be in conformity with the Constitution, it can be ratified by the President of the Republic. It seems however that the time of ratification is up to the president to decide. Ruling of constitutionality of international treaty enjoys the significance of case decided (*res judicata*). It must be remembered however that with regard to statutes, the Constitutional Court has not ruled out the possibility of the repeated (a posteriori) review of a statute when in practice it receive an unconstitutional meaning.

3.4 There are no constitutional restraints to challenging constitutionality of statutes approving ratification of international treaty. Just like any other, such statute is clearly within the Tribunal's jurisdiction. Verification can be performed by prior procedure (solely at the initiative of the President of the Republic), or *a posteriori*. When an approving statute is deemed unconstitutional under an a priori procedure, it cannot be signed by the President of the Republic, hence ratification of the international treaty is not possible. Similar are consequences of ruling on

the unconstitutionality of a statute already in force, if the President of the Republics does not perform the act of ratification as yet. The situation is somewhat more complex when the approving statute is challenged after the ratification took place. Then it is probably necessary to instigate separate proceedings against the international treaty.

The scope of verification of the approving statute is stipulated in resolution of the Constitutional Court of 1994, and it does not seem that provisions of his resolution became obsolete under the new Constitution.

3.5 The 1997 Constitution grants extensive options of challenging international treaties at the Constitutional Court, even though it does explain all problems. Treaties can be verified in advance but, since the initiative belongs solely to the President of the Republic, this procedure will be used rarely and only in relation to politically significant issues.