

**Dr Katarzyna Kos**

Jagiellonian University  
ORCID 0000-0002-9256-1600

---

## THEORIES AND LIMITATIONS OF EU-FRIENDLY INTERPRETATION OF THE POLISH CONSTITUTION<sup>1</sup>

**Abstract:** The article concerns the issue of the theories and limitations of an EU-friendly interpretation of the Polish Constitution. It discusses two theories, which are the basis for this method of an interpretation of the Constitution: “theory of the multicentricity of legal systems” and “theory of the Europeanisation of the Constitution”. The author notices that both of them focus on legal interpretations but do not satisfactorily explain the basis of the growing impact of EU law on understanding constitutional regulations. They propose a thesis concerning legal interpretations that are implied from observing reality and they attempt to indicate the necessity for EU-friendly interpretations of the Constitution. Thus, it is significant to formulate frames for applying this method of interpretation. The article systematizes limits of an EU-friendly interpretation of the Constitution, particularly concentrating on the prohibition of the *contra legem* interpretation, prohibition of interference in the “constitutional identity” and a guarantee of a higher standard of system of human rights. There are also problems that result from these limitations.

**Keywords:** EU-friendly interpretation, Constitutional Tribunal, constitutional identity

---

---

<sup>1</sup> This paper has been prepared as part of a research project financed by the National Science Centre (Decision No. 2015/18/E/HS5/00353).

## 1. Introduction

The necessity of an EU-friendly interpretation of the Polish Constitution is commonly emphasised.<sup>2</sup> This method of interpretation balances the supreme role of the Constitution and the influence of EU law on the national legal order. Even if this necessity exists, it should not be treated merely as an axiom which justifies the Constitutional Tribunal's (CT) decisions. We should ask what legal arguments speak for this interpretive direction and what the limits are when defining the Constitution in such a pro-European manner.

In the article, an EU-friendly interpretation of the Constitution will be analysed from the perspective presented in Polish legal doctrine. Secondly, I will systematize and consider the limitations of this interpretation, particularly the prohibition of a *contra legem* interpretation, prohibition of interference in the “constitutional identity” and the guarantee of a higher standard of system of human rights.

## 2. Theoretical Basis for EU-friendly Interpretation of the Constitution

In Poland there are mainly two theories which are the basis for an EU-friendly interpretation of the Constitution.<sup>3</sup> Although they are linked, in this text they will be analysed separately. There are some significant differences between these theories but what connects them is that they describe the phenomenon of the increasing influence of EU law on interpretations of the Constitution and highlight the necessity of EU-friendly interpretations of the Constitution. They also aspire to become normative theories of legal interpretation.

---

2 Laskowska, Taborowski, „Obowiązek wykładni przyjaznej prawu Unii Europejskiej – między otwartością na proces integracji a ochroną tożsamości konstytucyjnej”, 79-108; Bień-Kacała, „How to unfriend the EU in Poland? The rise and fall of EU-friendly interpretation of the 1997 Constitution”, 155-174; Koszowski, „Wykładnia prawa krajowego w zgodzie z prawem Unii Europejskiej przy uwzględnieniu zmian spowodowanych wejściem w życie Traktatu z Lizbony”, 57-71.

3 In Polish constitutional doctrine, there are also other theories that have been formulated in the European constitutional literature. However, they have not been applied to explain cases in the Polish constitutional review process. Kustra-Rogatka, “The Kelsenian Model of Constitutional Review in times of European Integration – Reconsidering the Basic Features”, 7-37.

The first theory regarding – but not limited to – the relationship between the Constitution and EU law that is described in the Polish legal literature is the theory of the multicentricity of legal systems. In Europe, it is widely known as the theory of “pluralism”<sup>4</sup> or of “multilevel”<sup>5</sup> legal systems. However, in its first incarnation, in Poland, the theory of multicentricity did not refer to any truly global theories. The theory of multicentricity assumes that the legal order is set by different and relatively independent law-making centres. When it comes to EU Member States, three legal orders should basically be taken into consideration: national law, EU law and law created by the Council of Europe. This theory breaks with the assumption of a hierarchical legal order (but some authors claim that it does not completely exclude this feature of the legal order)<sup>6</sup> and replaces this idea with the vision that “different centers may bindingly fill the same legal space”.<sup>7</sup> It is necessary to add here that this phenomenon influences legal interpretations. In this process, all legal provisions that regulate the same field have to be analysed. Therefore, “placement” in the hierarchy of legal acts is not the feature that chiefly determines the content of the legal norm. The core of the theory of multicentricity is that there are factually existing legal centres that regulate the same area and we cannot ignore any of these centres when interpreting provisions. However, although the EU Member States have agreed on the influence of the EU on the national legal order, their consent is not without its limitations. The theory of multicentricity does not attempt to define these limits. Moreover, it does not indicate any legal basis for multicentricity. That explains why it instead seems to be a description of the legal reality.<sup>8</sup> Furthermore, multicentricity is sometimes even directly marked as a phenomenon.<sup>9</sup> Again, the notion of a “phenomenon” brings to mind a description of reality rather than a normative theory of legal interpretation.<sup>10</sup>

---

4 McCormick, *Questioning Sovereignty*.

5 Mayer, *The European Constitution and the Courts. Adjudicating European Constitutional Law in a Multilevel System*; Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam”; Pernice, Kanitz, “Fundamental Rights and Multilevel Constitutionalism in Europe”, [www.rewi.hu-berlin.de/WHI/papers/whipapers704/papero704.pdf](http://www.rewi.hu-berlin.de/WHI/papers/whipapers704/papero704.pdf).

6 Kalisz, „Multicentryczność systemu prawa polskiego a działalność orzecznicza Europejskiego Trybunału Sprawiedliwości i Europejskiego Trybunału Praw Człowieka”, 36.

7 Łętowska, „Multicentryczność współczesnego systemu prawa i jego konsekwencje”, 4.

8 Łętowska, *ibidem*; she claims that contemporary multicentricity “is a fact and even necessity”.

9 Kalisz, *ibidem*, 36.

10 Kustra, „Polemika. Wokół problemu multicentryczności systemu prawa”, 85.

Nevertheless, Polish scholars believe that this theory has a normative character.<sup>11</sup> The justification for this belief is quite limited and is confined to the observation that the occurrence of different legal systems shall have an impact on the interpretation of law, especially as a limitation of the discretion of judicial authority.<sup>12</sup>

It is difficult to deny that the thus-described multicentricity has “some” influence on the national legal system. However, the same conclusions are implied from Article 9 and Article 91 of the Constitution. This may be the reason why the CT instead notes these provisions as the justification for including EU law in the constitutional review process rather than analysing the influence of multicentricity on the interpretation of the Constitution. The phenomenon of multicentricity would say more if it directly assumed some kind of reciprocal influence from these law-making centres. However, this condition has not been formulated. It would be difficult to apply, and it would limit the scope of EU-friendly interpretations.

The theory of multicentricity also provokes a question about the paradigm of the interpretation of the Constitution in the case of changes in reality. For instance, if at least some European constitutional courts ceased to respect the principle of the primacy of EU law when interpreting constitutional provisions, would it also influence the understanding of the Constitution?

More specified conditions for EU-friendly interpretations of the Constitution engage with the theory of the Europeanisation of the Constitution. This theory strengthens its links with the multicentric (multilevel) vision of the legal order.<sup>13</sup> However, contrary to the theory of multicentricity, it does not highlight the importance of different law-making centres for legal interpretations. Therefore, this theory purely concentrates on the unidirectional influence of EU law on an understanding of Member States’ constitutional provisions.

The theory of the Europeanisation of the Constitution refers to the process of normative amendments to the Constitution, as well as EU-friendly interpretations of the Constitution. In understanding the field of interpretative modifications of constitutional provisions, the notion of ‘Europeanisation’

---

11 Kotowski, „Zjawisko multicentryczności systemu prawa z perspektywy koncepcji integracyjnej”, 108, Łętowska, „Dialog i metody. Interpretacja prawa w multicentrycznym systemie prawa (cz. I)”, 5.

12 Romanowicz, „Dyskrecjonalność interpretacyjna sędziego w czasach multicentryzmu”, 429.

13 Ziółkowski, „Europeizacja konstytucji – rekonstrukcja znaczenia”, 28.

is defined as limiting the known methods of legal interpretation and its subordination to achieving consistency between the State's legal order and EU law (*effect utile*).<sup>14</sup> However, some Polish authors go further and assume that the judicial Europeanisation of the Constitution leads to its tacit modifications.<sup>15</sup> Therefore, they treat this tendency as a process that factually replaces the formal amendments of the Constitution because tacit modifications are much easier, more time-efficient and, in the case of "unfavorable political settings", this process is the only way to "address legal problems arising from a country's EU membership".<sup>16</sup> It seems to "tacitly" result in the Europeanisation of the Constitution not *via* the interpretation of its provisions, but rather by detouring from the constitutional procedure of amending the Constitution.

In strictly limiting the Europeanisation of the Constitution to interpretative theory, it is necessary to inquire about its basis. It seems an unsatisfactory explanation that the Europeanisation of the Constitution is an unavoidable process.<sup>17</sup> This remark merely accepts some factual circumstances without considering the reasons and consequences of this assumption.

The Polish legal literature provides some explanation in this regard. Hence, there are also views represented according to which the Europeanisation of the Constitution shall be treated as a normative theory of legal interpretation.<sup>18</sup>

The first argument for this statement is that Europeanisation is the "logical consequence" of the fact that EU Member States delegated some of their competences to the EU.<sup>19</sup> Therefore, it indicates a constitutional regulation that allows for the delegation of some of the State's competences to the EU as a basis for EU-friendly interpretations of the Constitution. Consequently, this argument may be simplified to cover the statement by the CT in the rulings Ref. No K 18/04 and K 32/09.

Secondly, it is argued that one of the most significant assumptions of the Lisbon Treaty was to shape the relationship between EU law and EU Member States' constitutional laws in a hierarchical manner.<sup>20</sup> This point

---

14 Ziółkowski, *ibidem*, 27.

15 Kustra, "The Polish Constitutional Tribunal and the judicial Europeanization of the Constitution", 194.

16 Kustra, *ibidem*.

17 Kustra, *ibidem*, 195.

18 Ziółkowski, *ibidem*, 33.

19 Ziółkowski, *ibidem*.

20 Ziółkowski, *ibidem*.

seems to suggest that the Europeanisation of the Constitution derives from changes in the EU legal system. In other words, the scope of Europeanisation is defined by the EU. This point of view seems incorrect. The problem with the Europeanisation of the Constitution remains as an issue of defining a relationship between the principle of the supremacy of the Constitution and the principle of the primacy of EU law.

Thirdly, it is claimed that the status and influence of EU law on the national legal order has become a constitutional regulation in most EU Member States.<sup>21</sup> In turn, this argument brings forth a question regarding whether a lack of constitutional regulations concerning EU membership weakens the impact of Europeanisation. The Constitution does not regulate this issue.

To sum up, both analysed theories tend to focus on legal interpretations but do not satisfactorily explain the basis of the growing impact of EU law on understanding constitutional regulations. They attempt to indicate the necessity for EU-friendly interpretations of the Constitution. They rely on the conclusions arising from the interpretation of constitutional provisions, which are considered in defining the relationship between the Constitution and EU law. Additionally, they imply some thesis for legal interpretations from the phenomenon relating to the growing influence of EU law on the legal orders of EU Member States.

### **3. Limitations of EU-friendly Interpretation of the Constitution**

In terms of the principle of the primacy of EU law as well as the principle of the supremacy of the Constitution, some limitations regarding EU-friendly interpretations of constitutional regulations have been formulated. Often, two aspects determine the boundaries of EU-friendly interpretations of the Constitution. However, it seems that the CT's adjudications also permeate two subsequent assumptions.<sup>22</sup>

---

<sup>21</sup> Ziółkowski, *ibidem*.

<sup>22</sup> Analysis on the evolution of the adjudication of the CT concerning the relationship between the Polish Constitution and European Union Law: Kos, "Shaping the Relationship Between the Polish Constitution and European Union Law in the Adjudication of the Constitutional Tribunal", 427-437; Report: *Primacy of EU law and jurisprudence of Polish Constitutional Tribunal*, STUDY Requested by the JURI committee, [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL\\_STU\(2022\)732475\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf) ;

The first limitation is a prohibition of a *contra legem* interpretation.<sup>23</sup> This derives directly from the legal theory and it is applicable when it comes to the interpretation of any legal act. By generalising and enhancing the above statement, an EU-friendly interpretation is permissible as long as it is still a “legal interpretation” and not a “tacit amendment” of the Constitution. When considering the issue from this perspective, the first assumption does not bring any clarification when it comes to the limitations of EU-friendly interpretations of the Constitution.

The second limitation could be labelled as a prohibition of interference in the “constitutional identity”.<sup>24</sup> This assumption derives from the principle of the supremacy of the Constitution and the provision that regulates the conditions for delegating the competence of organs of the State authorities to an international organisation or international institution. Therefore, this limitation is a dogmatic one. In the Polish legal literature, it is claimed that the Constitution may be interpreted in an EU-friendly manner as long as it is neutral in terms of the “constitutional identity” or it strengthens the “constitutional identity”.<sup>25</sup> Although this notion is difficult – or even impossible – to define unequivocally, it allows for a broad reinterpretation of the Constitution.<sup>26</sup> Probably, the “constitutional identity” is not an obstacle for resolving almost any of the constitutional problems relating to weighing up values in an EU-friendly manner.

With this in mind, an assumption can also be made that forbids the reinterpretation of the Constitution in the fields in which the competences have not been delegated to the EU, even if – from a constitutional point of view – they could have been. In my opinion, the above-mentioned issue is merely a kind of detailing of the principles, which is clearly accepted, yet has not been explicitly verbalised by the Polish legal doctrine. However, indirectly, it permeates from the CT adjudication. The CT has stated that

---

23 Judgement of the CT of 11 May 2005, 18/04. It is broadly accepted that an interpretation *contra legem* is the limit for European-friendly interpretations of any legal act (Holocher, Naleziński, “Konstytucyjne determinanty stosowania prawa Unii Europejskiej przez organy władzy sądowniczej w Rzeczypospolitej Polskiej”, 57).

24 Judgement of the CT of 24 November 2010, K 32/09; Sołtys, *Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym jako instrument zapewnienia efektywności prawa Unii Europejskiej*, 692.

25 Laskowska, Taborowski, *ibidem*, 104.

26 Interference of undefined by the CT “constitutional identity” was a major argument for unconstitutionality of the Treaty on European Union and Treaty on Functioning of the European Union in the judgment of the CT of 14 July 2021, P 7/20.

the principle of the primacy of EU law does not cover EU laws that have been passed when exceeding the EU's competence or that violate the principles of subsidiarity and proportionality.<sup>27</sup>

The fourth limitation concerns the situation when the Constitution guarantees (or when there is a high probability that it will guarantee) a higher standard of human rights protection than EU law does. This could be the reason behind, for instance, the preliminary question being asked of the CT in the case of VAT on e-books.<sup>28</sup>

Nevertheless, the above-mentioned four conditions, which exclude EU-friendly interpretations of the Constitution, are not easy to apply for specific constitutional problems related to EU law. Moreover, it is worth noting that, presumably, the above list does not contain all the limitations when interpreting the Constitution in an EU-friendly manner. There will be issues causing doubts in the field of the feasibility of EU-friendly interpretations of the Constitution. The CT will adjudge these issues *a casu ad casum*.<sup>29</sup>

This problem is also implied due to the fact that both the CT and Polish scholars do not confront the directive of the EU-friendly interpretation of the Constitution with other well-known directives of legal interpretation. For instance, whether “pre-existing notions”<sup>30</sup> in the Constitution can be reinterpreted in an EU-friendly manner has not been considered. Additionally, the lack of provisions relating to the EU in the Constitution means that instruments that aim to enhance the contemporary known dimensions of EU-friendly interpretations of the constitutional provisions are limited.

In turn, a consequence of the above is the flexibility for reinterpreting the Constitution. On the one hand, it allows for conflict avoidance between the Constitution and EU law regarding some general concepts concerning EU-friendly interpretations of the Constitution. On the other hand, it seems that this flexibility derives merely from the lack of tools that could more precisely describe the relationship between the Constitution and EU law.

---

27 Judgement of the CT of 11 May 2005, K 18/04.

28 Decision of the CT of 7 July 2015, K 61/13.

29 However, I do not identify this problem as a source of recent judgments of the CT concerning the relationship between the Constitution and EU law (Judgements of the CT of 14 July 2021, P 20/07 and of 7 October 2021, K 3/21).

30 ‘Pre-existing notions’ are the notions that have the same meaning assigned to them from the previous constitution, doctrine, or legislation in force at the time of the entry into force of the Constitution (Riedl, “Konceptcja pojęć zastanych w orzecznictwie Trybunału Konstytucyjnego”, 83-98).



On the margin of the above analysis, it is worth noting, that recent judgments of the CT do not deliver any further evolution of the EU-friendly interpretation of the Constitution. The authority has remained in crisis since 2015 when the status of some persons formally appointed as judges was questioned. In recent years the CT has been rather labeled as retreating from this concept of interpretation,<sup>31</sup> which has never been literally confirmed by the Tribunal itself. The analysed notion appears in one judgment concerning the relationship between the Polish Constitution and EU law.<sup>32</sup> However, the only reason why the CT reminds the concept is indicating that “EU-friendly interpretation of the Constitution has its limits”. The CT did not explain the limits taken into consideration. Hence, in the dissenting opinion, Judge Piotr Pszczółkowski claimed that in fact, the CT omitted the EU-friendly interpretation of the Constitution and absolutised the principle of the supremacy of the Constitution.

#### 4. Conclusions

In concluding, the contemporary vision of reciprocal relations makes it difficult to predict when the CT will decide to interpret the Constitution in an EU-friendly manner and when it will decide to apply other means to avoid this conflict. This issue is not well-structured by boundary conditions of EU-friendly interpretations of the Constitution, despite these conditions being intended to define when this directive of interpretation is excluded; as a result, the CT has to adjudge many problems *a casu ad casum*.

Both of the summarised theories which are the basis for an EU-friendly interpretation of the Constitution, the theory of the multicentricity of legal orders and the theory of the Europeanisation of the Constitution, do not in fact offer any deeper explanation concerning the EU-friendly interpretation of the Constitution. Conclusions implied from the constitutional provisions that are indicated as the legal basis for pro-European interpretations – from the constitutional review’s perspective – grant the same instruments to reinterpret the Constitution. Additionally, these two theories propose some thesis concerning legal interpretations that are implied from observing reality. This is the reason why in the case of EU-friendly interpretations

---

31 Bień-Kacała, *ibidem*.

32 Judgement of the CT of 7 October 2021, K 3/21.

of the Constitution it seems far more beneficial to refer to the instruments that are derived from legal principles. Without anchoring Poland's membership in the EU in the Constitution, these instruments are limited but there is still room to formulate some general directives specifying the scope of interpreting the Constitution and including EU law in this process.

### Bibliography

1. Holocher, Justyna, Naleziński, Bogumił. "Konstytucyjne determinanty stosowania prawa Unii Europejskiej przez organy władzy sądowniczej w Rzeczypospolitej Polskiej." *Rocznik Administracji Publicznej*, No. 4 (2018): 47-66.
2. Kalisz, Anna. "Multicentryczność systemu prawa polskiego a działalność orzecznicza Europejskiego Trybunału Sprawiedliwości i Europejskiego Trybunału Praw Człowieka." *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No. 4 (2007): 35-49.
3. Kos, Katarzyna. "Shaping the Relationship Between the Polish Constitution and European Union Law in the Adjudication of the Constitutional Tribunal." *Przegląd Prawa Konstytucyjnego*, No. 6 (2022): 427-437.
4. Koszowski, Maciej. "Wykładnia prawa krajowego w zgodzie z prawem Unii Europejskiej przy uwzględnieniu zmian spowodowanych wejściem w życie Traktatu z Lizbony." *Studia Prawa Prywatnego*, No. 2 (2012): 57-71.
5. Kotowski, Artur. "Zjawisko multicentryczności systemu prawa z perspektywy koncepcji integracyjnej." *Studia Prawnicze*, No. 4 (2015): 101-121.
6. Kustra, Aleksandra. "Polemika. Wokół problemu multicentryczności systemu prawa." *Państwo i Prawo*, No. 6 (2006): 85-95.
7. Kustra, Aleksandra. "The Polish Constitutional Tribunal and the judicial Europeanization of the Constitution." *XXXV Polish Yearbook of International Law* (2015): 193-216.
8. Kustra-Rogatka, Aleksandra. "The Kelsenian Model of Constitutional Review in times of European Integration – Reconsidering the Basic Features." *International and Comparative Law Review* 19, No. 1 (2019): 7-37.
9. Laskowska, Marzena and Taborowski, Maciej. "Obowiązek wykładni przyjaznej prawu Unii Europejskiej – między otwartością na proces integracji a ochroną tożsamości konstytucyjnej." In *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, edited by Dudzik, Sławomir and Półtorak, Nina, 79-108. Warsaw: Wolters Kluwer Polska, 2013.
10. Łętowska, Ewa. "Multicentryczność współczesnego systemu prawa i jego konsekwencje." *Państwo i Prawo*, No. 4 (2005): 3-10.
11. Łętowska, Ewa. "Dialog i metody. Interpretacja prawa w multicentrycznym systemie prawa (cz. I)." *Europejski Przegląd Sądowy*, No. 11 (2008): 4-8.
12. Mayer, Franz C. "The European Constitution and the Courts. Adjudicating European Constitutional Law in a Multilevel System." *Jean Monnet Working Paper* 9 (03), Heidelberg 2003.

13. MacCormick, Neil. *Questioning Sovereignty*. Oxford: Oxford University Press, 1999.
14. Pernice, Ingolf and Kanitz, Ralf. *Fundamental Rights and Multilevel Constitutionalism in Europe*, [www.rewi.hu-berlin.de/WHI/papers/whipapers704/papero704.pdf](http://www.rewi.hu-berlin.de/WHI/papers/whipapers704/papero704.pdf).
15. Pernice, Ingolf. "Multilevel Constitutionalism and the Treaty of Amsterdam." *Common Market Law Review* 36, (1999): 703-750.
16. *Primacy of EU law and jurisprudence of Polish Constitutional Tribunal, STUDY Requested by the JURI committee*, [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL\\_STU\(2022\)732475\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf).
17. Riedl, Krzysztof. "Koncepcja pojęć zastanych w orzecznictwie Trybunału Konstytucyjnego." *Przegląd Sejmowy* 130, No. 5 (2015): 83-98.
18. Romanowicz, Marcin. "Dyskrecjonalność interpretacyjna sędziego w czasach multicytryzmu." In *Dyskrecjonalność w prawie: materiały XVIII Ogólnopolskiego Zjazdu Katedr Teorii i Filozofii Prawa, Miedzeszyn k. Warszawy 22-24 września 2008 r.*, edited by Staśkiewicz, Wiesław and Stawecki, Tomasz, 427-432. Warsaw: LexisNexis Polska, 2010.
19. Sołtys, Agnieszka. *Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym jako instrument zapewnienia efektywności prawa Unii Europejskiej*. Warsaw: Wolters Kluwer Polska, 2015.
20. Ziółkowski, Michał. "Europeizacja konstytucji – rekonstrukcja znaczenia." In *Europeizacja konstytucji państw Unii Europejskich* edited by Kubuj, Katarzyna and Wawrzyniak, Jan, 21-34. Warsaw: Wydawnictwo Naukowe SCHOLAR, 2011.

