„Krytyka Prawa", tom 16, nr 4/2024, s. 421–455, ISSN 2080-1084, e-ISSN 2450-7938, © 2024 Author.

MICHAŁ ZIÓŁKOWSKI[1]

Heavy clouds, no rain.
Unmasking the Polish Constitutional Tribunal challenging the primacy of the EU law and the Court of Justice in case K 3/21[2]

Submitted: 20.09.2024. Accepted: 25.10.2024

Abstract

In 2021, the Polish Constitutional Tribunal (unconstitutionally composed) dropped a judicial bomb on the primacy of the EU law, a judicial dialogue with the Court of Justice, and a mechanism for providing the rule of law conditions by the Member States. The Tribunal, for the first time in history, recognised Articles 1(1), 2, 4(3) and 19(1) TEU unconstitutional. The text critically unpacks the Tribunal's reasoning. It provides doctrinal explanations and a broader interpretation of the judgement in the context of the Tribunal's past case law and the existing Polish debate about the judgment. One of the main arguments is that the current Tribunal is intellectually dishonest and abusive regarding constitutional law. It took advantage of recycling the previous constitutional case law, which was not so enthusiastic about the primacy of the EU law. The Tribunal follows strategies of illiberals or abusive constitutional actors, who conceal their real intentions and actions behind the veil of noble values and respected aims.

Keywords: Constitutional Court, Court of Justice, Constitution of Poland, principle of primacy, jurisdiction, judicial review, EU Treaties, judicial Independence, abusive comparativism.

[1] Michał Ziółkowski PhD – Kozminski University (Poland); e-mail: mziolkowski@kozminski.edu.pl; ORCID: 0000-0001-7019-7193.

[2] The article was created as part of the grant of the National Science Center. This research was funded by National Science Centre, Poland, Grant No. 2017/27/B/HS5/03043.

„Krytyka Prawa", tom 16, nr 4/2024, s. 421–455, ISSN 2080-1084, e-ISSN 2450-7938, © 2024 Author.

MICHAŁ ZIÓŁKOWSKI

Z dużej chmury mały deszcz.
Polski Trybunał Konstytucyjny kwestionujący pierwszeństwo prawa UE oraz wyroki Trybunału Sprawiedliwości UE w sprawie K 3/21

Streszczenie

W 2021 r. Trybunał Konstytucyjny (w niekonstytucyjnym składzie) podważył prymat prawa UE, dialog sądowy z Trybunałem Sprawiedliwości i mechanizmy zapewniania praworządności. Trybunał po raz pierwszy w historii uznał przepisy Traktatu o Unii Europejskiej za niekonstytucyjne. Artykuł ten krytycznie analizuje rozumowanie Trybunału w kontekście wcześniejszego orzecznictwa i polskiej debaty na temat wyroku. Zdaniem autora Trybunał wykazał się brakiem dogmatycznej dyscypliny i uczciwości intelektualnej. Dokonał bowiem swoistego recyklingu dawnego orzecznictwa konstytucyjnego, które choć nie było bardzo entuzjastycznie nastawione do prymatu prawa UE, to jednak nie dawało silnych podstaw do twierdzenia o niekonstytucyjności przepisów traktatu. Trybunał podążą tym samym drogą nadużyć konstytucyjnych oraz strategią nieliberalnych podmiotów, którzy skrywają swoje prawdziwe intencje i działania za zasłoną dogmatycznych konstrukcji oraz wartości konstytucyjnych, tyle że wykorzystują je w innym celu niż zostały pierwotnie zaprojektowane.

Słowa kluczowe: Trybunał Konstytucyjny, Trybunał Sprawiedliwości, Konstytucja RP, zasada pierwszeństwa, jurysdykcja, kontrola konstytucyjności, traktaty UE, niezależność sądownictwa, abuzywna komparatystyka.

Introduction

It took more than a year for the Polish Constitutional Tribunal (CT) to justify in writing the judicial bomb it dropped in 2021 on the primacy of the EU law, a judicial dialogue with the Court of Justice (CJEU) and a mechanism of providing the rule of law conditions by the Member States. At the beginning of November 2022, the CT finally released the complete justification of why it considered Articles 1(1), 2, 4(3) and 19(1) TEU unconstitutional.[3] The judgement is a part of the Polish judicial independence saga[4] revolving around the following questions: (i) do newly appointed judges in Poland lack the appearance of impartiality so that a part of the courts cannot be recognised as independent after 2018?;[5] (ii) do the treaties provide substantial standards of judicial independence and confer the power upon the CJEU to concretise the rule-of-law values concerning judiciary?;[6] (iii) should the courts in Poland follow the CJEU case law under Article 19 TEU, declaring judicial appointments

3 CT, 7 Oct. 2021, case K 3/21.

4 For details see, i.e., L. D. Spieker, *The conflict over the Polish disciplinary regime for judges – an acid test for judicial independence, Union values and the primacy of EU law: Commission v. Poland*, "Common Market Law Review" 2022, 59(3), pp. 777–812; A. Frackowiak-Adamska, *Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State: L and P*, "Common Market Law Review" 2022, 59(1), pp. 113–150; M. Bernatt, *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System*, CUP 2022; A. Ploszka, *It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional*, "Hague Journal on the Rule of Law" 2022, 15, pp. 15–74; K. L. Scheppele, D. V. Kochenov, B. Grabowska-Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 2021 *Yearbook of European Law*, pp. 54–58 and pp. 68–80; A. von Bogdandy *et al.* (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions*, Springer 2021; M. Bernatt, *Rule of Law Crisis, Judiciary and Competition Law*, "Legal Issues of Economic Integration" 2019, 46(4), pp. 345–362; W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019; A. Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, "German Law Journal" 2018, 19; T. T. Koncewicz, *Polish Judiciary In Times Of Constitutional Reckoning. Of Fidelities, Doubts, Boats And… A Journey*, "Gdańskie Studia Prawnicze" 2017, 38.

5 See consequences of the Case C-585/18, C-624/18 and C-625/18, *A.K. and Others v Sąd Najwyższy* [2019] ECJ. For approval, see: M. Krajewski, M. Ziółkowski, *EU judicial independence decentralized*, "Common Market Law Review" 2020, 57(4), pp. 1107–1138.

6 See, i.e., P. Bogdanowicz, M. Taborowski, *How to Save a Supreme Court in a Rule of Law Crisis: the Polish Experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18*, "European Constitutional Law Review", 16(2), pp. 306–327; M. Taborowski, *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego*, Warszawa 2019. See a nuanced approach: M. Krajewski, M. Ziółkowski, *op. cit.*

 DOI: 10.7206/kp.2080-1084.742

after 2018 void or unlawful?[7] The CT answers the questions in the negative,[8] whereas some courts in Poland (if independent)[9] and most scholars answer in the affirmative.[10]

The judgement raised exceptionally many questions among academics.[11] Is the CT completely wrong, on doctrinal constitutional grounds, by insisting on an absolute supremacy of the Constitution? Is the CT mistaken to recognise the CJEU case law under Article 19 TEU as a revolutionary step in the interpretation of the Treaty?[12] How does the CT differ from the concept of *ultra vires* review, as applied by the German Federal Constitutional Court (FCC)[13] in *PSPP/Weiss*,[14] by the Czech Constitutional Court in *Landtova or Lisbon Treaty*, by the French Conseil Constitutionnel in *Air France*,[15] or by the Danish Supreme Court in *Ajos*,[16] when it comes to contesting the primacy of the EU law?[17] How really different is the use of constitutional

---

7 See, i.e., R. Mańko, P. Tacik, *Sententia non existens: A new remedy under EU law?: Waldemar Zurek (W. Z.)*, "Common Market Law Review" 2022, 59(4), pp. 1169–1194; L. Pech, *Protecting Polish judges from Poland's Disciplinary "Star Chamber": Commission v. Poland (Interim proceedings)*, "Common Market Law Review" 2021, 58(1), pp. 137–162; For moderate criticism see: P. Bárd, A. Sledzinska-Simon, *On the principle of irremovability of judges beyond age discrimination: Commission v. Poland*, "Common Market Law Review" 2020, 57(5), pp. 1555–1584.

8 The case K 3/21 is consistent with the previously delivered cases P 7/20 (unconstitutionality of the CJEU preliminary reference), U 2/20 and Kpt 1/20 (unconstitutionality of the Polish Supreme Court decision following CJEU) – for criticism *see* i.e., B. Grabowska-Moroz, *How Was the 'Rule of Law' Dismantled in Poland and What Does It Mean for the EU?*, [in:] S. Sanz Caballero (ed.), *La Unión Europea y el reto del Estado de Derecho*, Thomson Reuters Aranzadi, 2022, pp. 277–294.

9 *See* Polish Supreme Court resolution of 23 January 2020, Case BSA I-4110-1/20. For details *see* M. Ziółkowski, *Two Faces of the Polish Supreme Court After "Reforms" of the Judiciary System in Poland: The Question of Judicial Independence and Appointments*, "European Papers" 2020, 1.

10 See, i.e., contributions of: P. Bogdanowicz, A. Nowak-Far, J. Łacny, W. Sadowski, S. Biernat, P. Filipek, A. Frąckowiak-Adamska, [in:] A. von Bogdandy *et al.*, *op. cit.*; M. Kawczyńska, *Combating the constitutional crisis in Poland – Can the European Union provide an effective remedy?*, "Hungarian Journal of Legal Studies" 2020, 61, pp. 229–253.

11 See. i.e., EU Law Live Symposium on the primacy of EU law and the implications of the Polish Constitutional Court's Decision in case K 3/21 and the Op-Eds by R. Repasi *et al.*, *Symposium – Introduction: The Polish Constitutional Tribunal Decision on the Primacy of EU Law: Alea Iacta Est. Now what?*, "International Journal of Constitutional Law" 2021, October 15.

12 The non-revolutionary nature was suggested earlier and without the link to the case K 3/21, i.e., by M. Krajewski, *Who Is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges*, "European Constitutional Law Review" 2018, 14.

13 S. Biernat, *How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland*, "German Law Journal" 2020, 21, 1104.

14 See, i.e., M. Bonelli, *Symposium – Part III – Let's take a deep breath: on the EU (and academic) reaction to the Polish Constitutional Tribunal's ruling*, "International Journal of Constitutional Law" 2021, 17; A. Thiele, *Whoever equates Karlsruhe to Warsaw is wildly mistaken*, "VerfassungBlog" 2021, October 10.

15 A. Turmo, *The Air France Decision: Testing the Power of the French 'Constitutional Identity' Exception to EU Law Primacy*, "EU law live Blog" 2021, November 10.

16 U. Neergaard, K. Engsig Sørensen, *Comparing Apples and Oranges: The Danish Ajos Case in Light of the Polish Judgment in K 3/21 and the German Ruling in Weiss*, "EU law live Blog" 2021, November 10.

17 I.e., N. Petersen, P. Wasilczyk, *The Primacy of EU Law and the Polish Constitutional Law Judgment*, Brussels 2022.

identity by the CT and other constitutional courts in the EU?[18] How to explain and translate the doctrinal details of the specific wording of the judgment's operative part for a broader international audience?[19] A full monograph would not be enough to reply to all these questions as the legal and political context of the judgement is so complex. The written justification has more than 150 pages (including separate and concurring opinions). It also touches upon all the 'major topics' of EU, including the principle of conferral, primacy, direct effect, subsidiarity, proportionality, identity and many more.

This article will try to address only the most important questions, leaving aside the political consequences of the judgement. The article's focus is classically doctrinal. In my view, a more dispassionate doctrinal perspective can be helpful in assessing the CT's legal arguments on their merits. The article focuses on the CT's jurisdiction, its challenge to the interpretation of the relevant EU law by the CJEU, and its views regarding the principle of conferral and primacy.

What looks innocent or similar from a distance of comparative law can reveal significant differences only at a much closer look involving the nuances of national law.[20] In my interpretation, the CT aims to justify its stance on two levels and address two audiences. Towards the external European audience, the CT attempts to present itself as a legally competent and equal partner in the judicial dialogue presenting its own view on an ever-closer union. Seen by the national audience, the CT is an agent of the government will be securing the judicial 'reforms' carried out in Poland in recent years. When one realises these two levels and roles the CT plays,[21] the 'European' mask and similarity to other courts in the EU falls. In my view, the CT is distinct in following the well-recognised strategy of illiberals[22] or

---

18 I unpack this claim in another article (deleted temporarily due to the double-blind review). See also: A. Śledzińska-Simon, M. Ziółkowski, *Constitutional Identity in Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?*, [in] Ch. Calliess, G. van der Schyff (eds.), *Constitutional identity in a Europe of Multilevel Constitutionalism*, Cambridge 2019.

19 B. Grabowska-Moroz, *op. cit*.

20 R. Uitz, *Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary*, "International Journal of Constituional Law" 2015, 13.

21 For details see an excellent study A. Kustra-Rogatka, *The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts*, "European Constitutional Law Review" 2023, 19(1), pp. 25–58.

22 M. Wyrzykowski, M. Ziólkowski, *lliberal constitutionalism and the judiciary*, [in] A. Sajó, R. Uitz, S. Holmes, (eds.), *Routledge Handbook of Illiberalism*, Routledge 2022, p. 518; compare with the concept illiberalism proposed by T. Drinóczi, A. Bień-Kacała, *lliberal Constitutionalism and the European Rule of Law*, [in:] T. Drinóczi, A. Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union*, London–New York 2021, pp. 30–43.

 DOI: 10.7206/kp.2080-1084.742

abusive[23] constitutional actors, who conceal their real intentions and actions behind the veil of noble values and respected aims.[24]

My next reflection about the judgment is rather sorrowful. The current CT was in a somewhat comfortable position since Poland's past (and pre-crisis) constitutional case law offered ready-to-use constitutional doctrines and arguments to contest the primacy and related principles of EU law. Thus, my criticism of the CT's judgment is different from the one offered by W. Sadurski and A. Gliszczyńska-Grabias.[25] The metaphor, which they used, of knocking on the EXIT-door is tempting also for me (to some degree). However, Case K 3/21 is, in my view, an intellectually dishonest undertaking of the current members of the CT who took advantage of recycling the previous constitutional case law, not so enthusiastic about the primacy of the EU law.

The article is doctrinal and interpretive, with some insights that could be useful for the comparative debate. It consists of the following sections. Section 2 summarises the judgement, the differences between the oral and written justifications, and subsequently, it clarifies the judgment's relation to the previous case law. Section 3 discusses the existing Polish debate about the judgment. Section 4 analyses the arguments concerning the CT's jurisdiction over the EU Treaties, the law-making role of the CJEU, the limits of its interpretation. Section 5 analyses the arguments concerning the principle of primacy and conferral. All the sections carefully reconstruct the arguments advanced by the CT and, subsequently, provide critical comments based on the well-established case law and constitutional doctrines in Poland.

The core problem with the operative part and justification

The doctrinal debate[26] became primarily focused on the nature of the operative part of the judgement, which was not typical or quite common for the constitutional courts. The courts usually annul or annul or declared void the contested provisions.

---

23 D. Landau, R. Dixon, *Abusive Judicial Review: Courts Against Democracy*, "University of California Davis Law Review" 2019, 53, p. 1313.

24 A. Sajó, *Ruling by Cheating*, Cambridge, 2021. See also P. Bard, B. Grabowska-Moroz, *The strategies and mechanisms used by national authorities to systematically undermine the Rule of Law and possible EU responses*, RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law 2020.

25 W. Sadurski, A. Gliszczyńska-Grabias, *Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland*, "European Constitutional Law Review" 2023, 19(1).

26 I.e., B. Grabowska-Moroz, *op. cit.*, pp. 277–294; P. Bárd, A. Bodnar, *The end of an era. The Polish Constitutional Court's judgment on the primacy of EU law and its effects on mutual trust*, "CEPS Policy Insights" 2021, 15/October. See also M. Florczak-Wątor, *(Nie)skuteczność wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21. Ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego*, „Europejski Przegląd Sądowy" 2021, 12, pp. 4–11; A. Kustra-Rogatka, *Kontrola konstytucyjności aktu prawa pierwotnego Unii*

The operative part (used in case K 3/21) is, however, more complex but not unusual for the CT in Poland. In the well-established case law, sophisticated forms of the operative parts of judgements had been elaborated. Interpretive[27] and declaratory or range[28] judgements are primary examples.[29] The many nuanced differences between the interpretive and declaratory or range judgments are a Polish national particularity. Focusing on such particularities does not clarify the essence of the judgment.

Instead, the judgement may be summarised as follows. Arguably, the CT intended the first point of the operative part of the judgement to be a rather general declaration concerning the relationship between the EU and Polish constitutional legal norms. The second and third point refer to the unconstitutionality of specific legal norms '*discovered*' (to use the CT's own words) by the CJEU in Article 19 TEU.

Operative part of the judgement

The first point of the operative part of the judgement may be summarised through the following statement:[30] Articles 1 and 4(3) TUE cannot be understood as a source of powers that have not been conferred upon the EU and as a source of the CJEU's power to interpret Treaties beyond the scope of the conferred powers. Otherwise, these articles would be unconstitutional. The critical issue is that this point of the judgement's operative part does not change anything in the legal order since the Treaties are not interpreted in a way suggested by the CT.[31] The first point of the operative part seems to be a political declaration[32] or expression of the CT's fears rather than an example of proper constitutional review where we need two legal norms (constitutional and sub-constitutional) having the same scope of application

Europejskiej w wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21, „Europejski Przegląd Sądowy" 2021, 11, pp. 4–11.

27 Its operative part is as follow: the provision X, interpreted as follows (…), is unconstitutional/constitutional.

28 Its operative part is as follow: the provision X, if understood as//as far as (…), is unconstitutional/constitutional.

29 It should be, however, noticed that the distinction between interpretive and declaratory judgement in Poland is conventional and depends on more doctrinal findings and the context of the case. The phrase "if understood as" or "insofar as" in the operative part are sometimes misleading. There were interpretive judgements in history when the Tribunal used different wordings of the operative part to declare that the interpretations of the provisions were unconstitutional. The interpretive nature of the judgement depends not only on the use of the phrase "if understood as". It depends on how the Tribunal explains the way of the wording of the operative part in the justification. The K 3/21 judgement may be classified as interpretive as well as declaratory.

30 *See* also A. Łazowski, M. Ziółkowski, *Knocking on Polexit's door? Poland, the Constitutional Tribunal and the battle over the primacy of EU law*, 2021. Available from: https://www.ceps.eu/knocking-on-polexits-door/.

31 M. Florczak-Wątor, *op. cit*., A. Kustra-Rogatka, *Kontrola konstytucyjności aktu…*

32 W. Wróbel, *Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych*, „Europejski Przegląd Sądowy" 2021, 12, pp. 19–26.

 DOI: 10.7206/kp.2080-1084.742

to be compared with each other. Apparently, the CT presumed or imagined[33] an interpretation of the Treaty, did not critically verify it with the recent CJEU judgements, the evolution of EU law, and doctrinal arguments, and then declared its own 'imaginary interpretation' to be unconstitutional.

The second and the third point of the operative part of the judgement may be summarised through the following statement. The ordinary Polish courts cannot follow the CJEU judgements concerning Article 19 TEU to question the independence of judicial authorities (such as the new National Council of the Judiciary or the CT itself). Neither can they undermine the effectiveness of judicial appointments in Poland. The operative part rejected only a specific interpretation of Article 19 TEU. It did not remove the provisions as such from the Polish legal order.[34] In other words, it questioned specific case law of the CJEU, no more, no less. Thus, it was a warning sent to the ordinary Polish courts and the CJEU.

Oral and written justifications

The oral justification from October 2021 was mainly focused on the principle of conferral. The 'conferral argument' became supported by referencing the rule of law as a set of general and more political values which need to be developed on a national constitutional level. The second core argument of the oral justification was the need to protect the constitutional identity.

The written justification from November 2022 is somewhat different. The main focus was placed on the CJEU's powers, concepts and limits placed upon the method of interpreting EU law. More references to the German FCC's approach and concepts appeared. The reference to constitutional identity became almost vanished. Thus, the CT pretends to be less confrontational. It included long passages emphasising that the CJEU is essential for the EU and how valuable the judicial dialogue is.

Article 1 and 4(3) TUE were declared unconstitutional as, supposedly, leaving too much interpretive power in the hand of the CJEU. The CT pointed out that the creative interpretation of Treaties by the CJEU, which could be qualified as law-making, is unconstitutional. The CT referred to the following arguments. First, the Polish Nation has never directly expressed its consent to the dynamic and creative interpretation of the CJEU. In the CT's view, neither the constitutional referendum in 1997 nor the accession referendum in 2004 in Poland could be

[33] A. Kustra-Rogatka, *Kontrola konstytucyjności aktu…*; A. Łazowski, M. Ziółkowski, *op. cit.*

[34] A. Łazowski, M. Ziółkowski, *op. cit.*; A. Kustra-Rogatka, *Kontrola konstytucyjności aktu…*; M. Florczak-Wątor, *op. cit.*

understood as providing such a consent.[35] Second, law in Poland, including binding international law, has to provide at least a minimum level of certainty, clarity, and predictability. In the CT's view, the CJEU's interpretation, which results in the creation of new legal principles or rules, does not fulfil these conditions.[36] Third, the Polish Constitution does not even allow to confer upon the CJEU a power either to create legal norms directly or indirectly (by reference to the nature or the spirit of EU law rather than the text of the Treaties). In the CT's view, such a conferral would be undemocratic (due to the lack of democratic legitimacy of the CJEU). It would also undermine the State's sovereignty (due to the loss of the State's control over law-making and the evolution of the Treaties). The fourth reason was that the constitutional principle of legality does not allow to presume powers of public authorities without direct legal basis in the legal text.

Article 19 TEU was declared unconstitutional as, supposedly, not providing sufficient legal basis for the CJEU case law concerning judicial independence. The CT referred to the following arguments. First, the CJEU 'discovered' in 2018 the power to review standards of judicial independence after many years of deference in the area of judicial appointments and the structure of national judiciary authorities. The 'discovery' (to use CT's own words) was made without a sufficient link to the wording of Article 19 TEU or the legal context. No amendments or Member State actions, which could justify such a change of interpretation by the CJEU, occurred. Secondly, the new interpretation became detached from the case law under Article 47 of the Charter. Third, the interpretation became relativistic since, in one case, CJEU was more willing to accept the government's influence over the judiciary system,[37] whereas in Polish cases, it did not.[38] The CT clearly suggested double standards. The fourth reason for the CT was that the CJEU acted in "an arbitrary way and ultra vires" when it "discovered" and "created" its powers to (i) review principles of judicial appointments in a Member State with the standard of judicial impartiality and independence; (ii) review whether future and possible judicial reforms in a Member State worsen the conditions of judges; (iii) impose on national courts an obligation to ignore national judicial reforms in case of an alleged inconsistency with Article 19 TEU; (iv) impose on national courts a power to apply past and non-binding national provisions if the new reforms of the judiciary were inconsistent with Article 19 TEU.[39] Such a 'creativity' transgressed the powers conferred upon the EU and put judges in Poland at risk of violating their own Constitution. Finally, the CT observed

35 Case K 3/21, para 4.2.

36 Case K 3/21, para 4.2.

37 Judgment of the Court (Grand Chamber) of 20 April 2021, *Respublika v Il-Prim Ministru*, case C-896/19.

38 Case K 3/21, para III.5.1.

39 Case K 3/21, para III.6.4. and III.8.1.

 DOI: 10.7206/kp.2080-1084.742

that the CJEU case law under Articles 2 and 19 TEU is based on a presumption of a coherent understanding of the rule of law, whereas – in the CT's views – one definition for all Members States has not been provided.

Comparing what had been said when the judgment was announced and what had been delivered in writing is crucial as major modifications between oral and written justifications became one of the recognised practices of the illiberal courts, including the CT in Poland. Just consider the abortion case in 2020.[40] At first, the judge-rapporteur suggested a constitutional identity argument in the oral justification, but then the argument disappeared in the written justification, replaced by bold statements concerning the choice of the constitution-makers. In my view, the CT had good reasons to postpone the publication of its written justification. It took time listen and adapt its justification to the legal debate. It also supported the governmental strategy in its struggles with the Commission.

Link to the previous case law

What the CT did in case K 3/21 naturally raises a question concerning the previous constitutional case law. Some Polish scholars seem to suggest the absence of such a link, or they avoid criticising the previous case law in the context of the current political events, which is also understandable. Most recently, the 2004–2015 case law of the CT in the EU matters was summarised as follows: "In the spirit of a friendly cooperation and respect to the obligation of fulfilling the duties arising from the membership to the Union, it was securing a practical primacy of the EU-law and its application on the territory of Poland."[41] I cannot agree more. Nevertheless, the word "practical" is crucial in that summary. This word conceals many doubts about the primacy of EU law that the previous CT harnessed.

The principle of primacy in Poland was working in practice well even though the CT never accepted the distinction between the formal supremacy of the Constitution and the practical primacy of EU law in Polish constitutional law.[42] Since the accession to the EU, the CT insisted on the 'hardest' possible version of the supremacy of the Constitution. It foresaw the possibility of a collision between the Constitution and the Treaties. Under some circumstances, it allowed for the full

40 Case K 20/20. See more: W. Sadurski, A. Gliszczyńska-Grabias, *The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill): "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K1/20*, "European Constitutional Law Review" 2021, 17, p. 130.

41 F. Zoll, K. Płudniak-Gierz, W. Bańczyk, *Primacy of EU law and jurisprudence of Polish Constitutional Tribunal Recent developments in the light of the Polish Constitutional Tribunal's case law*, European Parliament Policy Report, Brussels 2022.

42 See i.e., summary of doctrinal arguments given by K. Działocha, *Comments to Article 8*, [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej*, Warszawa 2016, pp. 288–230.

constitutional review of new EU treaties, the ultra vires review of amendments to the existing EU treaties (as a consequence of the *Kompetenz-Kompetenz* theory), the ultra vires review of EU secondary legislation (which left the door open to the review of all EU legal acts), the constitutional identity review, the sovereignty review and the fundamental rights review of all EU law acts. Finally, the CT refrained for a long time from any dialogue with the CJEU through the preliminary reference procedure. When a preliminary reference was finally made in 2015, it did not concern substantial constitutional law issues but the compliance of a VAT directive with the EU legislative procedure.[43]

The CT was always criticised for its approach to the EU Treaties by Polish scholars. Most of them accused the CT of misunderstanding the specific nature of the EU law[44], an outdated attachment to constitutional supremacy and sovereignty[45], and unwillingness to dialogue openly with the CJEU.[46] Discussing the Accession Treaty case in detail, A. Wyrozumska observed that the CT approach was "cautious".[47] The CT underlined supremacy[48] and foresaw (in theory) the possibility of an inconsistency between the Constitution and the EU Treaties[49] and the power to review

43 CT, 7 Juli 2015, K 61/13.

44 I.e., E. Piątek, *Zasada pierwszeństwa prawa wspólnotowego w orzecznictwie państwa członkowskich*, „Państwo i Prawo" 2009, 5, pp. 28–30; K. Kowalik-Bańczyk, *Tożsamość narodowa – dopuszczalny wyjątek od zasady prymatu?* [in:] S. Dudzik, N. Półtorak (eds.), *Prawo Unii Europejskiej a prawo państwa członkowskich*, Warszawa 2013, p. 90.

45 I.e., K. Wojtyczek, *Trybunał Konstytucyjny w europejskim systemie konstytucyjnym*, „Przegląd Sejmowy" 2009, 4, p. 177.

46 K. Kowalik-Bańczyk, *Sending Smoke Signals to Luxembourg – the Polish Constitutional Tribunal in Dialogue with the ECJ*, [in:] M. Claes *et al*. (eds.), *Constitutional Conversations in Europe: Actors, Topics, and Procedure*, Cambridge 2012; S. Dudzik, N. Półtorak, *The Court of Last Word. Competences of the Polish Constitutional Tribunal in the Review of European Union Law*, "Yearbook of Polish European Studies. Centre for Europe" 2012, 15, pp. 225–258.

47 A. Wyrozumska, *Some Comments on the Judgments of the Polish Constitutional Tribunal on the EU Accession Treaty and on the Implementation of the European Arrest Warrant*, "Polish Yearbook of International Law (2004–2005)", 31.

48 A. Wyrozumska pointed out: "Speaking on the nature of its competence, the CT noticed that the control mechanism provided for in the Constitution is a clear proof of the supremacy of the Constitution on an internal plane" (pp. 8–9).

49 According to Wyrozumska, "the CT perceives these issues in the following way: the Constitution is the supreme law of the RP, but Article 9 and Article 190(3) of the same Constitution, in individual cases, allow for ensuring the performance of international obligations which are in conflict with the Constitution. However, one cannot speak of any general primacy over the Constitution (…) The confirmation of the precedence of the binding force and the application of the Constitution over any ratified treaty and also other sources of international law (with a possibility under certain conditions to fulfil international obligations remaining in conflict with the Constitution) are of fundamental importance for the application of international law in the Polish law. This mechanism may not necessarily be viewed as a satisfactory basis for the primacy of the EC law" (p. 20).

 DOI: 10.7206/kp.2080-1084.742

the EU Treaties.[50] Referring later to Case P 1/05 (*European Arrest Warrant*) and K 18/04 (*Accession Treaty*), K. Kowalik-Bańczyk in 2005 concluded that the "Polish Constitutional Tribunal declared in fact that the Polish Constitution has an absolute primacy over Community law. It denied thus the well-established practice of national Constitutional Courts and the ECJ not to name certain conflicting aspects of relation too openly. It might lead to the situation that Polish judges – and not only the Constitutional Court – in order to comply with this Court's judgment, will have to disregard some of the Community measures because they conflict (in their opinion) with the Polish Constitution. And as European legal acts usually grant rights to individuals, they might in fact, lose because of this «power show»".[51] In a similar way, A. Łazowski criticised the CT for the approach to primacy and non-dialogue with the CJEU cases.[52] Commenting on the case P 37/05, Łazowski pointed out the vague CT's understanding of primacy and the CT's focus on the national perspective disregarding the CJEU case-law developments concerning the primacy and specific nature of EU law. Łazowski observed that the CT 'gives proof of support for the process of European integration, but on its own terms'.[53] According to Łazowski 'the Tribunal gives the lead to the European Court; (…) it reserves for itself the final word in matters of constitutional importance.'[54]

One may highlight now[55] that the previous CT was always closer to friendly cooperation[56] since it never openly questioned the fundamental principles, provisions, or institutions of EU law. Indeed, the principle of EU-friendly interpretation of law was always the CT's starting point, and the justifications were focused mainly on looking for arguments in favour of convergence between Polish constitutional norms and EU law. Nonetheless, it should be clearly pointed out that the CT developed specific judicial tools for future use that could be used, just in case, to

---

50 Wyrozumska observed: 'The judgment (…) confirms not only the possibility of the material control of the constitutionality of the treaty concluded by Poland, but also, according to the Court, of "the process serving to introduce this agreement into the Polish legal order (p. 11)

51 K. Kowalik-Bańczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, "German Law Journal" 2005, 6, pp. 1365–1366.

52 A. Łazowski, *Poland: Constitutional Tribunal on the Surrender of Polish Citizens under the European Arrest Warrant. Decision of 27 April 2005*, "European Constitutional Law Review" 2005, 1, pp. 569–581.

53 A. Łazowski, *Constitutional Tribunal on the Preliminary Ruling Procedure and the Division of Competences Between National Courts and the Court of Justice Order of 19 December 2006*, "European Constitutional Law Review" 2008, 4, p. 193.

54 *Ibidem*, p. 194. See also A. Łazowski, *The Polish constitution, the European constitutional treaty and the principle of supremacy*, [in:] A. Albi, J. Ziller (eds.), *The European Constitution and national constitutions: ratification and beyond*, The Netherlands Kluwer Law International, 2007, pp. 171–181.

55 S. Biernat, *op. cit.*, pp. 1115–1116.

56 See more on the details of the principal A. Sołtys, *The obligation to interpret national law in accordance with European Union law in the jurisprudence of Polish Constitutional Court – focus on limits*, "The European Journal of Public Matters" 2017, 1, p. 51.

question the primacy of EU law. By doing this the CT clearly, in my view followed the migrating foreign constitutional law concepts (i.e., *Verfassungsverbund* or *Solange II*).

I do not blame the past case law for the abuses committed by the current CT. However, it is difficult not to see that, without the previously careless transplant of 'constitutional identity',[57] the bold claims of the absolute primacy of the Constitution in Poland,[58] or the constitutional review of EU law,[59] the current (curbed[60] and captured[61]) CT would have been in a much more difficult position when it comes crafting a legal justification of its, arguably, political decisions. In my view, the principle of primacy over the constituional law has never been supported by the language and doctrines developed by the case law. The good reception of the principle in practice depended before 2015 on the will of the actual composition of the CT and outstanding education as well as the eminent experience of the judges of the past.

The doctrinal criticism

In my view, existing commentaries have been focusing on the not necessarily most critical part of the commented judgment. Scholars have hitherto tried to explain to the international audience the peculiarities of the wording applied by the CT in the judgment's operative part.[62] They also argued that the judgement could not produce any effect[63] in Poland. On the one hand, S. Biernat and B. Grabowska-Moroz relied on the normative framework of the primacy of EU law, constitution-friendly interpretation of the Polish Constitution or selected arguments from the pre-crisis case law to criticise the judgement in doctrinal terms. On the other hand, W. Sadurski and A. Gliszczyńska-Grabias[64] adopted a normative approach according to which the curbed and captured CT cannot act in a legally sound way and in good faith. They strongly criticised the CT from a supranational point of view,

---

57 The argument is unpacked by M. Ziółkowski, *Constitutional Identity in Poland: Transplanted and Abused*, [in:] K. Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe*, Hart 2023, pp. 127–148.

58 See i.e., critical remarks concerning the absolute understanding of primacy of the Constitution in the past case – K. Wojtyczek, *op. cit.*; K. Wójtowicz, *Constitutional Courts and European Union law*, Wroclaw 2014.

59 See i.e., critical remarks S. Dudzik, N. Półtorak, *op. cit.*, pp. 225–258.

60 See more: M. Bernatt, M. Ziółkowski, *Statutory Anti-Constitutionalism*, "Washington International Law Journal" 2019, 28(2), p. 487.

61 W. Sadurski, *Poland's Constitutional Breakdown…*, chapter 3.

62 B. Grabowska-Moroz, *op. cit.*, pp. 277–294; Bárd, Bodnar, *op. cit.*

63 W. Sadurski, A. Gliszczyńska-Grabias, *Is It Polexit Yet?…*

64 I.e., W. Sadurski, A. Gliszczyńska-Grabias, *Is It Polexit Yet?…*; B. Grabowska-Moroz, *op. cit.*; M. Florczak-Wątor, *op. cit.*; A. Kustra-Rogatka, *Kontrola konstytucyjności aktu prawa…*; W. Wróbel, *op. cit.*

 DOI: 10.7206/kp.2080-1084.742

which *a priori* excludes the constitutional review of the EU Treaties or the hard positivistic view on the supremacy of national constitutional law.

Scholars in Poland argued that the judgement was adopted in bad faith since the judicial dialogue between the apex national courts and the CJEU had been directly rejected by the CT.[65] The CT interpreted the provisions of primary EU law by itself for its own purposes, thereby encroaching upon the CJEU's jurisdiction.[66] Scholars criticised the CT for creating an artificial constitutional problem, which did not follow from the constitutional text, case law, and doctrine.[67] Moreover, scholars pointed to the CT's failure to apply an EU-friendly constitutional interpretation to avoid the conflict, whereas such an interpretation was possible.[68] Finally, Aleksandra Kustra-Rogatka[69] observed that the CT misused the ultra vires argument. The ultra vires argument is traditionally used against acts adopted in substantive violation of a specific legal basis which they formally invoke. However, the CT used the ultra vires argument against an EU Treaty (meaning that it was interpreted by the CJEU in a wrong way). Therefore, the CT was either fundamentally wrong (regarding what ultra vires review actually means), or the CT was ostentatiously insincere when declaring the unconstitutionality of the parts of EU Treaties, whereas in fact it intended to review the case law of the CJEU itself.

The common element of academic criticism is a firmly held belief that the CT had not the power to do what it did, and – consequentially – the judgement is an ultra vires act[70]. Alternatively, it is believed that the judgment produced no effect,[71] at least. The opinion according to which the judgement is invalid *per se* (due to the wrong composition of the court)[72] seems to be not commonly shared in Poland.[73]

The critique discussed so far is 'external' to the judgement as focusing on the CT's institutional deficiencies, violations of EU law, and previous Polish constitutional case law. In my view, it is also interesting to enter the CT's own 'imaginary' and assess its internal cogency, unveil the *ratio* of the judgement, analyse its inter-

---

65 A. Wyrozumska, *Wyroki Trybunału Konstytucyjnego w sprawach K 3/21 oraz K 6/21 w świetle prawa międzynarodowego*, „Europejski Przegląd Sądowy" 2021, 12, pp. 27–28; A. Kustra-Rogatka, *Kontrola konstytucyjności aktu prawa…*; A. Łazowski, M. Ziółkowski, *op. cit.*

66 M. Florczak-Wątor, *op. cit.*; A. Kustra-Rogatka, *Kontrola konstytucyjności aktu prawa…*; W. Wróbel, *op. cit.*; A. Łazowski, M. Ziółkowski, *op. cit.*

67 M. Florczak-Wątor, *op. cit.*; A. Kustra-Rogatka, *Kontrola konstytucyjności aktu prawa…*; A. Łazowski, M. Ziółkowski, *op. cit*.

68 W. Wróbel, *op. cit.*, pp. 24–26.

69 A. Kustra-Rogatka, *Kontrola konstytucyjności aktu prawa…*, pp. 8–9.

70 W. Sadurski, A. Gliszczyńska-Grabias, *Is It Polexit Yet?…*

71 M. Florczak-Wątor, *op. cit.*; A. Kustra-Rogatka, *Kontrola konstytucyjności aktu prawa…*

72 W. Sadurski, A. Gliszczyńska-Grabias, *op. cit.*

73 *See mutatis mutandis* i.e., P. Radziewicz, *On legal consequences of judgements of the Polish Constitutional Tribunal passed by an irregular panel*, „Review of European and Comparative Law" 2017, 31(4), pp. 45–64.

nal logic, integrity of arguments, and consistency between the operative part and the written justification. I believe it could help us to recognise better the real nature of the captured constitutional court.

Jurisdiction

The CT confirmed its constitutional power to review provisions of international treaties, including the EU Treaties. It started with an observation that the EU Treaties are living instruments, and their interpretation may be changed in time in accordance with the concept of an ever-closer union.[74] Such a change might provoke the question of whether the CT's constitutional jurisdiction depends on whether the EU integration entered into a new stage (like after the Lisbon Treaty it did). However, the CT failed to deliver any criteria for recognising such a new stage. The CT only pointed out that:

> 'The reason why the Constitutional Tribunal is forced to constitutionally review whether the [Polish – MZ] sovereignty in the still respected within the EU integration is a new state of affairs that has appeared as a consequence of the expansive interpretation of the treaties by the Court of Justice, which interfered with the structure of the Polish judiciary (…) While ruling on Cases No K 18/04 [Accession Treaty – MZ] and K 32/09 [Lisbon Treaty – MZ], the Constitutional Tribunal recognised the dynamic evolution of EU law; however, it could not have anticipated that the law-making judgements of the Court of Justice would interfere with the structure of the Polish judiciary (in particular – the question of judicial appointments).'[75]

The CT's claims of having complete jurisdiction over the Treaties were based on the following arguments. First, the CT referred to the direct wording of the Article 188 Constitution, which confers upon it the power to review ratified international treaties. The power covers both ex-ante (before ratification) and ex-post (after ratification and entering into force) review of international agreements. It also covers the EU Treaties since they are classified as ratified international agreements under Polish constitutional law. Second, the CT referred to the pre-crisis case law. In the past, the (legally composed) CT reviewed the Accession Treaty,[76] the Lisbon

74 Case K 3/21, para III.1.1.
75 Case K 3/21, para III.1.1. *in fine*.
76 Case K 18/04.

 DOI: 10.7206/kp.2080-1084.742

Treaty,[77] and an EU regulation.[78] The third argument was based on the direct wording of Articles 87 and 8 Constitution (primacy) and the concept of the hierarchy of legal norms. The CT argued that the EU Treaties should be constitutionally reviewed to secure the Constitution's highest position in the Polish legal system. Otherwise, in the CT's view, this system would not have been hierarchically structured. The fourth argument was intended to be comparative. The CT claimed that most of the constitutional courts shared the view regarding the highest hierarchical position of national constitutions. According to the CT, most courts also emphasised a prohibition to confer powers upon the EU that might violate national constitutions and the need to conform between EU law and national constitutions.[79]

Critique

The first two arguments of the CT are not controversial considering (i) the constitutional text, (ii) the original intention of the constitution-makers and (iii) the previous constitutional practice in Poland. Article 188 of the Constitution confirms the CT's jurisdiction over the EU Treaties in the *ex-post* procedure.[80] The clear intention of the constitution-makers in 1997 was not to exclude any treaties from constitutional review and to grant to the CT a margin of appreciation when interpreting its powers. Nothing prevents the CT from using this power from time to time.[81] The CT used the power to *ex-post* review several times before it was captured and curbed in 2015.[82]

---

77 Case K 32/08.

78 Case SK 45/09.

79 Case K 3/21, para III.1.3.

80 I am not convinced by the argument that the review of Treaties' is contrary to the K 18/04 case, as suggested by Sadurski and Gliszczyńska-Grabias, *Is It Polexit Yet?…*, pp. 170–173. In my view, their opinion is at least based on a different interpretation of what the Tribunal said in the case (para III.1.2. of K 18/04). This paragraph should be quoted with references to other parts of the judgement (and other judgements, i.e., the Lisbon case), where the CT distinguished two paralleled jurisdictions. The first is the jurisdiction of the CJEU, which has the power to review the EU acts. The second is the jurisdiction of the CT itself, which is based on the Constitution. And from the Polish constitutional point of view, the EU Treaties are examples of international treaties regardless of the nature and evolution of the EU itself. Moreover, the paragraph quoted by the Sadurski and Gliszczynska-Grabias expressed only the CT's view that there is a nominal and doctrinal difference between the review made by the CJEU and the review made by the CT. It does not mean that the CT limited its own jurisdiction and excluded EU Treaties. The Lisbon case provides, in my view, argument against Sadurski and Gliszczyńska-Grabias' claim.

81 I cannot entirely agree with Biernat, *op. cit*. that there is a fundamental difference between claiming the power to review of the Treaties and exercising the power. The second is a natural or at least possible consequence of the first.

82 I.e., *mutatis mutandis* case SK 6/10, para III.2.2. (ex-post review of international agreement on extradition between Poland and the US) or case SK 54/05, para III.1.2.

Constitutional scholars in Poland did not question it[83] before or even after the rule of law crisis started in Poland.[84] Finally, Polish constitutional law allows for the re-review of acts once declared as constitutional.[85]

I would criticise the judgment for different reasons than those presented by B. Grabowska-Moroz or W. Sadurski and A. Gliszczyńska-Grabias. In my view, the CT missed a doctrinally important distinction between how the Constitution is written (in which the review of the EU Treaties is allowed), how the Constitution was interpreted by the CT in the past (the review of the EU Treaties was relatively constrained, contextual, and the CT tried to interfering with EU law), and how the Constitution should be applied taking into account obligations stemming from EU law as part of international law recognised as binding by Article 9 of the Constitution (before declaring unconstitutionality of EU law, the CT should make a preliminary reference to the CJEU). In short, the CT's superficial fidelity to the constitutional text is uncoupled from to the constitutional history and the previous practice of its application.[86]

The review of the EU Treaties differs from that of other international agreements at least since the Accession Treaty case.[87] Despite the absence of 'European' provisions in the Polish Constitution, the CT always applied to the EU Treaties a rebuttable presumption of constitutionality. In my view, the CT extended this presumption in the Lisbon case by accepting the judicial evolution of the EU Treaties given the convergence of values between the EU and Polish constitutional order. The CT considered the common set of liberal constitutional values, a progressive constitutional transformation of the multilevel legal order and the good faith of the actors to be preconditions of constitutional pluralism. Such a strong presumption of constitutionality requires the CT to provide persuasive argument when the unconsti-

---

83 I.e., K. Działocha, *op. cit*.

84 Only a few EU law scholars in Poland tried to build doctrinal exceptions and justified the exclusion of the ratified EU Treaties from constitutional review. The scholars argued that the EU Treaties (once ratified and entered into force) achieved a special constitutional status, which is different from other ratified international agreement. They also argued that the constitutional review of the Treaties cannot produce any legal effect. However, this view was not universally accepted by the scholars and the CT. It has not been based on the constitutional text or the original intention of the constitution-makers. The Lisbon case, in my view, provides argument against those scholars.

85 The CT did it in the past in at least the following cases: (i) the act was amended; (ii) new evidence or arguments were advanced; (iii) there was a systemic change in the way the treaty was applied or interpreted. The power to again review of acts once declared constitutionally is strongly supported by theory and doctrine of constituional law. It is consistent with the living approach to the constitution, and lack of such power would mean rules of dead hand. The principle of res iudicata has its own special meaning in Poland when it comes to the constituional review.

86 I use the distinction between fidelity to the text and fidelity to the application in a sense similar to J. Balkin, *Living Oryginalism*, Harvard University Press, 2011.

87 Consequence of case K 18/04.

 DOI: 10.7206/kp.2080-1084.742

tutionality of the EU Treaties is declared. Perhaps, in Case K 3/21, the CT could state that the EU and Polish constitutional concepts regarding judicial independence are no longer convergent. But such a statement would never be convincing considering the common origins of these concepts in the European Convention of Human Rights and the case law of the European Court of Human Rights.[88]

The constitutional provisions in Poland express two legal norms. One is directly provided in the legal text (the power to review treaties). The other nom is derived as a logical and systemic consequence of the former. It provides substantial conditions under the review that could be exercised by the CT. The conditions became developed by the constitutional case law since the Accession Treaty case. Thus, the possibility of the review depends on the actions of the Members States (as Treaties Masters) and answering the question of whether we do really have a new international treaty content (new legal principles or rules), which has not been reviewed yet.[89] In my view, it means the jurisdiction should be exercised by the CT only in the following situations: (i) a new treaty, (ii) amendment, (iii) new practices or actions of the Member States, which create new legal principles or rules; (iv) series of CJEU cases, which fundamentally and substantially change interpretation or application of treaties (i.e., adding some new content to the treaties, like the principle of primacy was added in the past). However, such a change can often be observed only after some time. Moreover, the CT would have to provide a more detailed comparison of the old and the new, as well as evidence that the new has become well-established and uncontested. Proving such a fundamental constitutional change in the EU legal order justifying the constitutional review of the EU Treaties would be extremely difficult for the CT. A single judgment of the CJEU, even considered ground-breaking, does not seem sufficient. And yet, the CT did not explain in Case K 3/21 why it considered that a series of CJEU judgments created 'a new stage of EU integration' (or a 'new step in an ever-closer Union'). The CT took its crucial premise for granted.[90]

The constitutional provisions do not confer upon the CT the power to review judgements of either international or national courts. However, in Case K 3/21, the CT clearly acted as an 'appellate' court, which disapproved the interpretation of the CJEU and declared it null and void. That the CT referred to the EU Treaty

---

88 The CJEU test of appearance of judicial independence is based on the ECHiR case law – see M. Krajewski, M. Ziółkowski, *op. cit.*, pp. 1107–1138 and M. Leloup, *Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR*, "European Constitutional Law Review" 2021, 17, pp. 394–421.

89 The case K 33/12 (stability mechanism for the Member States whose currency was the euro) is best example.

90 Case K 3/21, para III.1.6.

provisions in the operative part of the judgment did not change the nature of its judgment. It was simply a misleading rhetoric strategy as the justification is based on the ultra vires argument.[91] If the Treaties were really the object of constitutional review in this case, the CT would not need to justify its jurisdiction by reference to argument that the CJEU acted ultra vires. Otherwise, the CT would declare the EU Treaties as 'ultra vires,' which would be nonsensical. In the end of the day, the one who acted ultra vires was clearly the CT.

In my view, constitutional provisions indirectly impose on the CT an obligation to make a preliminary reference to the CJEU at least when an established interpretation of the EU Treaties is at stake. Article 9 of the Constitution provides that all constitutional authorities (including the CT) have to act in accordance with international law. Therefore, the CT cannot violate the CJEU's monopoly on the interpretation of the Treaties.[92] Moreover, according to well-established case law,[93] the Constitution imposes on the CT an obligation to find a constitution-friendly interpretation of the EU Treaties and an EU-friendly interpretation of the Constitution before declaring a clash between them. The CT must ascertain whether the contested interpretation of the EU Treaties is really well-established by making a preliminary reference. Therefore, the CT was clearly wrong in case K 3/21, by claiming that there was no need for a preliminary reference.[94]

Comparative overview

In my view, the CT's references to German, Czech, French, Italian and Spanish constitutional courts are either purely ornamental or intentionally misleading.

None of these courts reviewed the constitutionality of the core provisions of the EU Treaties after they had been ratified and had entered into force.[95] The ex-ante review of the EU Treaties (made by the French CC) or the ex-post review of the newly ratified EU Treaties (i.e. made by the German FCC or Czech Constitutional Court) cannot support the CT view due to the differences in the legitimacy and

[91] Case K 3/21, para III.1.7. in conjunction with III.1.8.2.

[92] It is true the CT has never submitted the preliminary reference concerning the treaties. The only one reference concerned secondary law and taxes (decision of 7 July 2015, case K 61/13). It should be, however, underlined that the past CT was in somewhat different position when reviewing the treaties. The Accession case concerned the provisions that had well established case-law, which has not been recently changed, whereas the Lisbon case concerned a new treaty and amendments, which had not had new case law yet. Thus, there were no need for the past CT to preliminary refer. The case K 3/21 is different since the CT decided to review of the treaties as newly interpreted by the CJEU.

[93] *See* more A. Sołtys, *op. cit.*

[94] Case K 3/21, para III.1.4.

[95] For historical point of reference see i.e, J. Komárek, *The Place of Constitutional Courts in the EU*, "European Constitutional Law Review" 2013, 9(3), pp. 420–450.

 DOI: 10.7206/kp.2080-1084.742

the scope of ex-ante and ex-post review, as well as the different consequences of declarations of unconstitutionality. Moreover, some cases cited by the CT to support its point of view concerned secondary EU law. The PSPP case concerned a decision of the European Central Bank by German authorities' actions regarding this decision.[96] The Slovak Pensions case[97] concerned the CJEU's (mis)interpretation of the scope of application of the Council Regulation, but the object of constitutional review was an interpretation given by national courts and national acts. Again, the Sugar Quotas III[98] concerned national regulation and decisions, which implemented the EU law.

None of the courts claims direct jurisdiction over the CJEU case law. Even if the CJEU interpretation of EU law was key in the PSPP Case and Landtova saga, the courts had declared the unconstitutionality of either national acts or EU sub-constitutional law. It is also important to underline that the courts in Germany and Czechia were constitutionally allowed to review national judicial decisions (i.e., those following CJEU) and other national acts (i.e., enforcing the CJEU interpretation of EU law at the national level), whereas the CT in Poland is not.

The CT has a doctrinally different position and legitimacy regarding EU law as compared to the FCC or constitutional courts in Austria or France. The weaker position and legitimacy of the CT stem from the constitutional text, which does not refer to the EU integration at all. Thus, all EU law-related cases in Poland hinged on very general and vague Article 90 of the Constitution.[99] The CT has at its disposal just a few legal principles and rules to serve as a point of reference for the constitutional review of EU law, much fewer than other courts. Fidelity to the constitutional text and its application and rational self-restraint should imply limits for the CT when reviewing the EU law.

The consequences of the CT's judgments are also important to mention. The CT is in a more difficult position than its German or Austrian counterparts due to

---

96 *See* more i.e., N. Petersen, K. Chatziathanasiou, *Balancing Competences? Proportionality as an Instrument to Regulate the Exercise of Competences after the PSPP Judgment of the Bundesverfassungsgericht*, "European Constitutional Law Review" 2021, 17, pp. 314–334; F. Mayer, *The Ultra Vires Ruling: Deconstructing the GermanFederal Constitutional Court's PSPP decision of 5 May 2020*, "European Constitutional Law Review" 2020, 16, 733–769.

97 See more i.e., J. Komárek, *Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, "European Constitutional Law Review" 2012, 8, pp. 323–337.

98 Sugar Quotas III, ÚS 50/04, 8 March 2006.

99 See more on the history and development of the provision A. Kustra-Rogatka, *European integration – ineffable aspiration or the object of concerns? About ambiguity of Europe in the Polish constitutional imaginary*, 2022. doi: 10.2139/ssrn.4287385.

a particularly rigid constitutional regulation.[100] Acts declared unconstitutional acts are annulled *ipso iure* (Article 190 of the Constitution). In other words, there is no room for subtleties, which could be accepted in case of ex-post declaration of ratified international treaty (i.e., temporary suspension of an unconstitutional act, acceptance for limited enforcement of an unconstitutional act, order of the court prohibiting enforcement of an unconstitutional act within the specified scope). In contrast to other constitutional courts (i.e., German, or Austrian), the CT in Poland has no power to modify the consequences of the judgement. In particular, the provisions in Poland do not confer upon the CT power to decide when the unconstitutional act is annulled, voided or just without effect.[101] It only may extend the period when the unconstitutional act is in force. Thus, the CT should rather carefully follow the foreign courts since the CT is not a master of the consequences of its judgements.[102]

The law-making role of the Court of Justice

A major part of the written justification focused on the concept of legal interpretation, tools of judicial interpretation and judicial activism. Unfortunately, a clear view of the CT on these concepts is rather difficult to disentangle due to the lack of precise language, a clear structure of reasoning and the lack of one coherent methodological and normative approach. However, it is important to analyse the CT's fragmentary understanding of these concepts as they were used as a key challenge against the CJEU.

On the one hand, the CT seemed to accept at least a minimum of the creative role given to the courts when they interpret the law. The CT observed that 'law-making interpretation' by judges is nothing new, and it has always been a part of

100 For details see P. Tuleja, *The Polish Constitutional Tribunal*, [in:] A. von Bogdandy, P. Huber and Ch. Grabenwarter (eds.), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions*, Oxford 2020.

101 The problem appeared in case SK 45/09. The CT pointed out that unconstitutional EU secondary law remains in force, but it cannot be applied in Poland. Such a claim became strongly criticised as arbitrary by the scholars in Poland since there was no legal text or no intention of the Framers supporting it. The claim cannot be applied *per analogiam* to the unconstitutionality of the EU treaties. Their binding force is provided directly by the constitutional provisions. Thus, the only way is to use *per analogiam* the doctrine developed in case P 1/05 (in case of unconstitutionality of a treaty, Poland may change the constitution, withdraw a treaty, or induce a change of a treaty.

102 It should be also remembered that neither PSPP, Ajos, Slovak Pensions nor Sugar Quotas III judgements declared the treaty provisions void, whereas the case K 3/21 is to be like a unilateral reservation to the treaty made by the national court.

 DOI: 10.7206/kp.2080-1084.742

judicial practice.[103] The CT even cited Bible and referred to Plato, Aristoteles, Locke, Hegel, Montesquieu, and Kant. Moreover, the CT also observed (with some disgust) that contemporary scholars demonstrate a 'clearly visible affirmation for growing judicial freedom when interpreting the law (including the privilege of creating legal norms)'. This time, Hart and Dworkin were accused of generating these regrettable trends, and the US Supreme Court's Case *Obergefell v. Hodges* was provided as a worrying example of what may happen when judges create the law (sic!). The CT even cited *in extenso* Justice Scalia and called the said case 'a rape of the society'. Ultimately, the CT failed to explain how the set of random citations from different historical periods and legal systems (made without any reference to the context) is applicable and useful for the case.[104] The CT's insights tell a lot about the intellectual condition of its members nowadays.

On the other hand, the CT strongly opposed the creative role of judges and courts in Poland. According to the CT, the constitutional division of powers and the judges' lack of democratic legitimacy rule out the 'law-making activism of judges and Polish courts, outside the limits of rational and justified interpretation aimed to achieve common good'.[105] The CT accused independent courts following the CJEU case law under Article 19 TEU of activism and creative (law-making) judicial interpretation.

When it comes to the EU, the CT observed that (i) the CJEU autonomously created and applied rules of legal interpretation because the EU Treaties did not provide them; (ii) the CJEU made a reference to the spirit and nature of EU law as a main teleological rules of interpretation; (iii) the distinction between judicial declaration of what the law is and judicial creation of law became blurred in the CJEU case law.[106] According to the CT judicial interpretation of the CJEU was aimed to strengthen an ever-closer union and legal norms created by the CJEU had been usually accepted by the authorities of the Member States and *opinio communis doctoris,* so the norms became similar to legal customs as separate source of law. The important question is whether the Member States as the Master of the Treaties accept the law-making activism of the CJEU and to what extent. The CT emphasised that the law-making interpretation applied by the CJEU, has nowadays no limits, so it is the CJEU and not the Member States, who' autonomously and arbitrarily'

103 Case K 3/21, para III.4.1.

104 In my view this part of the reasoning is closer to badly made state of the art of random inspirations rather than professionally prepared judgement of constitutional court.

105 It is, however, unclear whether judges may be creative and lawmakers when they act in the aim of common good, or not. Again, the CT made a firm abstract statement, and added some reservation, which has not been developed in the written justification later.

106 Case K 3/21, para III.4.

decide on the EU integration, and on the future shape of the ever-closer union. The CT rejected the argument that it was the unwritten will of the Member States to give the CJEU such power over the integration and application of the treaties. The counterargument was simple: if it had been the will of Member States, they would have provided it directly in the text of the EU Treaties. Moreover, the CT pointed out that constitutional courts in the EU opposed the unlimited interpretive power of the CJEU. The German FCC case law was provided as an example. Finally, the CT underlined that 'Poland, acceding to the *acquis communautaire,* has never expressed its acceptance for the unconditional principle of primacy in the Polish legal system and unlimited creation of legal norms by the CJEU'.[107] According to the CT, the CJEU interprets the law (declaring the content of legal norms on the basis of legal text) but also creates the law (discovering the content of legal norms on the basis of the spirit of the legal text or the extra-legal permissions, i.e. the nature or the aim of a treaty). It seems that the CT recognised at least to some extent the creative nature of the interpretation provided by the CJEU.[108] The CT underlined the importance of a difference between the creation made within the scope of the principle of conferral and the creation crossing powers conferred upon the EU. The further shall be recognised as an ultra vires act of the CJEU.

Having these observations in mind, the CT pointed out that the CJEU interpretation should be limited, at least by three factors.[109] The first is the 'nature and essence of interpretation' (to use the CT's words), which means the interpretation always has to be linked to the legal text. To explain it, the CT referred to J. Raz's article and used a metaphor of performing music. For the CT, the legal interpreter has to follow legal text just like the performer follows musical notation. The second is the principle of conferral, subsidiarity, proportionality, and constitutional identity of a Member State, which shall not be violated by the CJEU's interpretation. The third factor is an inconsistency between the Court's interpretation and a national Constitution. In CT's view, the third factor is limited to Polish legal order only. The CT accepts that the CJEU's interpretation, even when it is justified and recognised as valid on the EU level, could be inconsistent with the Constitution in Poland and – thus – have no effect. According to the CT, Poland, in such a situation, would not violate the EU and Vienna Convention because Poland has to follow only international treaties, not the Court's interpretation crossing legal text and principle of conferral.

[107] Case K 3/21, para III.4.
[108] Case K 3/21, para III.1.7.
[109] Case K 3/21, para III.4.1. in fine.

 DOI: 10.7206/kp.2080-1084.742

Critique

The CT introduced distinction between the creation, application, and interpretation of EU law by the CJEU. Moreover, the CT implied distinction between acceptable and non-acceptable creation of legal norms. The CT seems to be wondering how creative judicial interpretation can be, and how to measure it? The problem with the reasoning of the CT is that it does not necessarily suit the CJEU powers. Moreover, the reasoning is not necessarily based on how constitutional provisions had been interpreted in Poland.

It is true the CJEU often underlines the distinction between the application and interpretation of the EU law. However, those observations are usually made in the particular context of preliminary reference proceedings. They should be understood in the context and aim of these proceedings, not as a part of the general theory of interpretation. Moreover, scholars observed that making a clear distinction between the application and interpretation of EU law[110] is hardly possible or not even necessary in some of the Member States.

The CT failed to deliver criteria for its accusations. When does the interpretation of the CJEU become excessively creative or political? Is it the matter of a reference to the 'spirit of law' by the CJEU? Or is it a matter of a reference to the nature or aim of the EU law in the CJEU judgement? The concept of the spirit of law, the concept of the nature of law or references to the aim of law have longstanding traditions. They have been subject to academic debates and judicial applications both at the EU and Polish constitutional law levels. These concepts in themselves do not tell us whether the interpretation is creative or not. For instance, academic debates on the 'small and big judicial jumps' in the CJEU case law[111] or political significance of the CJEU[112] could provide some relevant criteria for the assessment of judicial law-making. However, such an assessment would always have to be contextual and, consequently, not so useful for bold statements by the constitutional courts made at a high level of abstraction.

Moreover, the CT's test for the constitutionality of interpretation is almost always impossible to pass either by the CJEU or by any other international court.[113]

---

110 I.e., M. Broberg, N. Fender, *Preliminary references*, [in:] R. Schütze, T. Tridimas (eds.), *Oxford Principles of European Union Law*, Oxford 2018, pp. 981, 1007.

111 I.e., U. Sadl, *Old is new: the transformative effect of references to settled case law in the decisions of the European Court of Justice*, "Common Market Law Review" 2021, 58(6), pp. 1761–1788.

112 I.e., R. Mieńkowska-Norkien, *The Political Impact of the Case Law of the Court of Justice of the European Union*, "European Constitutional Law Review" 2021, 17, pp. 9–13, 25.

113 The CT's test consists of three levels. The first is linguistic demand and link between the interpretation and the text. The second is substantive demand that interpretation shall be consistent with principle of conferral, subsidiarity, and proportionality.

The CT expects the CJEU to interpret EU law in accordance with the national constitutions. Moreover, the CT expects the CJEU to always strictly follow the legal text just like an ordinary court. Be that as it may, it should be noted that the CJEU case law concerning judicial independence was linked to Article 19 TEU, the EU Charter of Fundamental Rights and the European Convention of Human Rights.[114]

Principle of primacy

According to the CT, the principle of primacy of EU law has rather weak legal basis and a limited scope of application. In my view, the CT's argumentation reminds a narrow and hard positivistic approach to law and legal interpretation. The CT referred to the judicial history of the principle primacy and emphasised that it was discovered by the CJEU in the spirit of EU law and the nature of the EU legal order. According to the CT, such a discovery was made without sufficient support in the text of the EU Treaties. At the same time, the CT did not find the well-established practice of the CJEU, other EU institutions, and Member States satisfying enough to declare a fully valid recognition of the principle of primacy. The CT underlined that the principle, as the CJEU discovered it in the past, became applied only within the field covered by the EU law and powers conferred upon the EU (i.e., customs, taxes, administration fees). Consequentially, the CT suggested that the principle has been unquestionably recognised as valid only within the application's narrow scope and context. The second CT's argument referred to the intentions of the Member States as the ultimate and highest lawmaker, which will have been taken (or even prevailing) in the interpretation of the legal text. The CT referred to the history of the pre-Lisbon efforts to express the principle of primacy in the legal text directly. The third argument was purely formalistic and based on the particular concept of sources of law. The CT referred to the history and scope of the declarations added to the Treaty of Lisbon, which finally referred to the principle of primacy. After diminishing the symbolic and practical role of the declaration, the CT observed that it has no binding force since it is not a source of law.

The arguments led the CT to the following conclusions that the principle of primacy: (i) has a different origin and force in comparison to other principles of the EU law due to the fact it has not been expressed directly in the legal text, and it intentionally has not been added to the Treaties by the Member States; (ii) has a narrow scope of application, which reflects only powers conferred upon the EU; (iii) cannot

[114] M. Krajewski, *Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma*, "European Papers" 2018, 3(1), pp. 400–405.

 DOI: 10.7206/kp.2080-1084.742

be applied in Poland to the Constitution, but only to the statutes and other sub-constitutional laws; (iv) cannot be applied to those general principles of the EU law, which are discovered by the CJEU without direct link to the wording of the Treaties. According to the CT the primacy of the EU law over the national statutes is constitutionally accepted in Poland due to the fact the constitutional text directly provides it. However, the CT made a new (comparing to the past case law) reservation that the EU law primacy over Polish statutes is constitutional 'only if it is applied the area of powers conferred upon the EU (…) and in conformity with the principles of proportionality, subsidiarity and with respect for the polish constitutional identity and fundamental aims of the state'[115].

Critique

Although the CT is right descriptively when it refers to the text of treaties, the conclusions obviously ignore the specific way the treaties have always been interpreted and developed by the CJEU and the way that developments became accepted by the Member States. The CT ignores the difference between the interpretation of the international agreement, which is often closer to the constitutional interpretation, and the interpretation of a regular statute, where the plain meaning of the text is often (but not always) crucial. The CT suggestion has not been supported by the comprehensive analysis of the CJEU case law and Member States' reactions but rather by selective references to a few landmark cases. It stopped in the early 90-ties. In this context, one could ask: how the Member States might recognise a narrow scope of the EU law primacy and limited power of the CJEU (as the CT would like to see it), when they do follow the CJEU interpretation of primacy, given in the opinion 2/13?[116] In other words, if the primacy had been recognised as weak and limited, there would have been no (CJEU) obstacle for the EU to join the European Convention. However, this example – just like many others – has not been taken by the CT into consideration.

The CT's argument is also hardly convincing since it focuses on the wording of the legal text and diminishes the role of the legal reasoning, as well as the well-established practice of institutional actors (Member States and EU institutions), who are addressees of the legal norms (institutional facts). The fact the principle is not directly expressed in the text should not mean for the CT (particularly in Poland) that the principle could not be interfered from the text or just recognised by relatively stable ad repetitive practices of constitutional authorities. The practice

115 Case K 3/21, para III.2.4. *in fine*.

116 Opinion of the Court (Full Court) of 18 December 2014.

– let's underline it! – which is a reflection of how the authorities understand the legal text. And the CT in Poland should perfectly know it since the constitutional case law is full of examples. Many of the principles or even all institutional choices have not been directly expressed but derived from the text and 'discovered' (to use the CT words): the principle of friendly interpretation towards EU law; the criteria deciding whether the international treaty should be ratified in a simple proceeding or after the parliamentary acceptance; the concept of legal consequences of the CT judgements, the concept of conferral or the concept of constitutional identity in Poland. These constitutional principles or concepts became the results of creative and activist interpretations made by the CT in the past with the analogous link to the legal text as the principle of primacy of the EU law was established.

The CT concealed that the previous case law had recognised the principle of primacy as a valid general principle of the EU law in Poland. It is true the previous CT emphasised the primacy of the EU law cannot be applied to the Constitution. It is also true the previous CT applied the (well-known in Germany) distinction between validity and applications of the primacy principle (the unconstitutional EU law is valid, but it cannot be applied in a country). It does not, however, means the previous CT questioned the validity of the principle itself.

The CT's argument is deeply insincere. It underlines how important the recognition and binding force of the principle is to be expressed in the text (when it comes to the EU primacy). At the same time, the CT has no problem with the recognition of numerous legal principles, which are not expressed in the legal text (when it comes to the Polish constitutional law). The principle of a democratic state ruled by law could be the best example. Due to the historical reasons and wording of the constitutional law in Poland, that principle became a source of unexpressed general principles discovered by the case law of the CT in an analogous way, the CJEU discovered some of the general principles in the spirit of the EU law or as a consequence of its nature. In other words, the CT accepts its own activist case law and recognises already discovered general principles of constitutional law, whereas it prevents the CJEU from the analogous judicial practice.

Finally, one might ask how it is possible for the CT not to recognise the principle of EU law primacy as fully valid, legitimised and binding and – at the same time – to argue that the principle is limited by other principles of the EU law, which had been directly expressed in the legal text (i.e. proportionality or national identity)? Either the principle of primacy is a desirable demand of the EU law, as the CT suggested (and – thus – it cannot be limited by the principles of the EU law due to the different legal natures of such a demand and the principles), or the principle of primacy is – indeed – a fully valid general principle of the EU law, which is only hard to acknowledge for the CT. In other words, if the principle of primacy had

 DOI: 10.7206/kp.2080-1084.742

been just demanded or good practice, there would be no need to limit it by general principles of the EU law. It leads to the second question: how it is possible for the CT to declare that the principle of primacy is limited by proportionality, subsidiarity, and identity (as the CT did), and – at the same time – to recognise completely different aim and scope of application of the principles. The principles of proportionality, subsidiarity or identity could hypothetically limit the principle of primacy only if they had (at least partially) common content or scope of application with the principle of primacy. Regardless of the detailed and nuanced understanding of the principle of primacy, one could argue that the principle primacy is different from other principles of the EU law because it rules the application of other EU law principles. In other words, the principle of primacy protects the efficient application of proportionality, subsidiarity, and identity.

* * *

I believe that my arguments will turn out to be sufficient to assess why and how the commented judgment differs from those delivered by other constitutional courts across the EU. The CT underlines the importance of sincere cooperation and demands sincerity from the CJEU just to cover the arbitrariness and incoherence of its own argumentation. It is not the first time[117] that the CT sought to fool European constitutionalists and conceal its actual intentions.[118] The CT tried to portray its judgement as a 'big EU constitutional case,' whereas it is simply a fake[119]. I also hope the arguments may help push our debate to a different level of criticism. The judgement does not need to be criticised only because unlawfully appointed members gave it[120] in the non-independent proceeding.[121] Both arguments seem

117 *See* the complex analysis of other cases i.e., by W. Brzozowski, *Whatever works Constitutional interpretation in Poland in times of populism*, [in:] F. Gárdos-Orosz, Z. Szente (eds.), *Populist Challenges to Constitutional Interpretation in Europe and Beyond*, Routledge 2021.

118 *See* i.e., CT, 17 Jul. 2021, case P 7/20. See in a broader context: Kustra-Rogatka, *The Hypocrisy of Authoritarian Populism…*, pp. 18–34.

119 I refer to a sense used by G. Halmai when he called constituional populists as fake: neither constituional nor popular – *Populism, authoritarianism and constitutionalism*, "German Law Journal" 2019, 20, p. 298.

120 See i.e., A. Chmielarz-Grochal, J. Sułkowski, *Appointment of Judges to the Constitutional Tribunal in 2015 as the Trigger Point for a Deep Constitutional Crisis in Poland*, "Przegląd Konstytucyjny" 2018, 2.

121 See i.e., M. Ziółkowski, *Konstytucyjna kompetencja sądu do ochrony własnej niezależności (uwagi na marginesie uchwały SN z 23.01.2020 r.)*, „Państwo i Prawo" 2020, 10, pp. 88–95.

to be clear after seven years of doctrinal debate in Poland[122] and *Xero Flor v. Poland*.[123] Case K 3/21 deserves criticism because it abuses well-established concepts and doctrines to mislead the European audience. It also petrifies and elevates what should have been abandoned many years ago (i.e., an absolute and rigid concept of supremacy of the Constitution).

The backsliding of constitutionalism in Poland has shown that almost every concept of constitutional law (including the identity, sovereignty or primacy) or institution (including the CT) can be reversed and used in an abusive way. It does not imply a lack of prospective and deliberative discussions. Therefore, in my view, it should be the first task of the CT in the future to overturn not only the case K 3/21 but also all the abusive comparative transplants and inspirations from the past the case had drawn.

References

Balkin J., *Living Oryginalism*, Harvard University Press, 2011. doi: 10.4159/harvard.9780674063037.

Bárd P., Bodnar A., *The end of an era. The Polish Constitutional Court's judgment on the primacy of EU law and its effects on mutual trust*, "CEPS Policy Insights" 2021, 15/October.

Bard P., Grabowska-Moroz B., *The strategies and mechanisms used by national authorities to systematically undermine the Rule of Law and possible EU responses*, RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law 2020. doi: 10.2139/ssrn.4093021.

Bárd P., Sledzinska-Simon A., *On the principle of irremovability of judges beyond age discrimination: Commission v. Poland*, "Common Market Law Review" 2020, 57(5), pp. 1555–1584. doi: 10.54648/COLA2020747.

Bernatt M., *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System*, CUP 2022. doi: 10.1017/9781108609548.

122 See i.e., M. Florczak-Wątor, *The capture of the Polish Constitutional Tribunal and its impact on the rights and freedoms of individuals*, [in:] J. Mackert, H. Wolf, B. S. Turner (eds.), *The Condition of Democracy Volume 2: Contesting Citizenship*, London–New York, 2021; M. Florczak-Wątor, *Constitutional change through unconstitutional interpretation*, [in:] M. Belov, A. Abat i Ninet (eds.), *Revolution, Transition, Memory, and Oblivion*, Edward Elgar Publishing 2020, pp. 209–230; A. Bień-Kacała, *Illiberal Judicialisation of Politics in Poland*, "Comparative Law Review" 2019, 25, pp. 197–213; L. Garlicki, *Constitutional Court and Politics. The Polish Crisis*, [in:] Ch. Landfried (ed.), *Judicial Power How Constitutional Courts Affect Political Transformations*, Cambridge, 2019; M. Wyrzykowski, *The Vanishing Constitution*, "European Yearbook on Human Rights" 2018; T. T. Koncewicz, *The capture of the polish constitutional tribunal and beyond: of institution(s), fidelities and the rule of law in flux*, "Review of Central and East European Law" 2018, 43, pp. 116–173.

123 App no 4907/18, Judgment of 7 May 2021, paras 255–275. For a critical comments towards the CT *see* i.e., M. Swed, *The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights*, "European Constitutional Law Review" 2022, 18, pp. 132–154.

Bernatt M., *Rule of Law Crisis, Judiciary and Competition Law*, "Judiciary and Competition Law" 2019, 46(4), pp. 345–362. doi: 10.54648/LEIE2019022.

Bernatt M., Ziółkowski M., *Statutory Anti-Constitutionalism*, "Washington International Law Journal" 2019, 28(2).

Biernat S., *How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland*, "German Law Journal" 2020, 21, 1104. doi: 10.1017/glj.2020.53.

Bień-Kacała A., *Illiberal Judicialisation of Politics in Poland*, "Comparative Law Review" 2019, 25, pp. 197–213. doi: /10.12775/CLR.2019.006.

von Bogdandy A. *et al.* (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions*, Springer 2021. doi: 10.1007/978-3-662-62317-6.

Bogdanowicz P., Taborowski M., *How to Save a Supreme Court in a Rule of Law Crisis: the Polish Experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18*, "European Constitutional Law Review", 16(2), pp. 306–327. doi: 10.1017/S1574019620000115.

Bonelli M., *Symposium – Part III – Let's take a deep breath: on the EU (and academic) reaction to the Polish Constitutional Tribunal's ruling*, "International Journal of Constitutional Law" 2021, 17.

Broberg M., Fender N., *Preliminary references*, [in:] R. Schütze, T. Tridimas (eds.), *Oxford Principles of European Union Law*, Oxford 2018, pp. 981, 1007. doi: 10.1093/oso/9780199533770.003.0035.

Brzozowski W., *Whatever works Constitutional interpretation in Poland in times of populism*, [in:] F. Gárdos-Orosz, Z. Szente (eds.), *Populist Challenges to Constitutional Interpretation in Europe and Beyond*, Routledge 2021. doi: 10.4324/9781003148944-13.

Chmielarz-Grochal A., Sułkowski J., *Appointment of Judges to the Constitutional Tribunal in 2015 as the Trigger Point for a Deep Constitutional Crisis in Poland*, "Przegląd Konstytucyjny" 2018, 2.

Drinóczi T., Bień-Kacała A., *lliberal Constitutionalism and the European Rule of Law*, [in:] T. Drinóczi, A. Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union*, London–New York, 2021. doi: 10.4324/9781003175353.

Dudzik S., N. Półtorak, *The Court of Last Word. Competences of the Polish Constitutional Tribunal in the Review of European Union Law*, "Yearbook of Polish European Studies. Centre for Europe" 2012, 15.

Działocha K., *Comments to Article 8*, [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej*, Warszawa 2016.

Florczak-Wątor M., *Constitutional change through unconstitutional interpretation*, [in:] M. Belov, A. Abat i Ninet (eds.), *Revolution, Transition, Memory, and Oblivion*, Edward Elgar Publishing 2020, pp. 209–230. doi: 10.4337/9781800370531.00021.

Florczak-Wątor M., *(Nie)skuteczność wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21. Ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego*, „Europejski Przegląd Sądowy" 2021, 12, pp. 4–11.

Florczak-Wątor M., *The capture of the Polish Constitutional Tribunal and its impact on the rights and freedoms of individuals*, [in:] J. Mackert, H. Wolf, B.S. Turner (eds.), *The Condition of Democracy Volume 2: Contesting Citizenship*, London–New York 2021. doi: 10.4324/9781003158370-11.

Frackowiak-Adamska A., *Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State: L and P*, 59(1), "Common Market Law Review" 2022, pp. 113–150. doi: 10.54648/COLA2022006.

Grabowska-Moroz B., *How Was the 'Rule of Law' Dismantled in Poland and What Does It Mean for the EU?*, [in:] S. Sanz Caballero (ed.), *La Unión Europea y el reto del Estado de Derecho*, Thomson Reuters Aranzadi, 2022, 277–294. doi: 10.2139/ssrn.4075224.

Halmai G., *Populism, authoritarianism and constitutionalism*, "German Law Journal" 2019, 20. doi: /10.1017/glj.2019.23.

Kawczyńska M., *Combating the constitutional crisis in Poland – Can the European Union provide an effective remedy?*, "Hungarian Journal of Legal Studies" 2020, 61, pp. 229–253. doi: 10.1556/2052.2020.00269.

Komárek J., *Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, "European Constitutional Law Review" 2012, 8, pp. 323–337. doi: 10.1017/S1574019612000193.

Komárek J., *The Place of Constitutional Courts in the EU*, "European Constitutional Law Review" 2013, 9(3), pp. 420–450. doi: 10.1017/S157401961200123X.

Koncewicz T. T., *Polish Judiciary In Times Of Constitutional Reckoning. Of Fidelities, Doubts, Boats And… A Journey*, "Gdańskie Studia Prawnicze" 2017, 38.

Koncewicz T. T., *The capture of the polish constitutional tribunal and beyond: of institution(s), fidelities and the rule of law in flux*, "Review of Central and East European Law" 2018, 43, pp. 116–173. doi: 10.1163/15730352-04302002.

Kowalik-Bańczyk K., *Sending Smoke Signals to Luxembourg – the Polish Constitutional Tribunal in Dialogue with the ECJ*, [in:] M. Claes *et al*. (eds.), *Constitutional Conversations in Europe: Actors, Topics, and Procedure*, Cambridge 2012.

Kowalik-Bańczyk K., *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, "German Law Journal" 2005, 6, pp. 1365–1366. doi: 10.1017/S207183220001436X.

Kowalik-Bańczyk K., *Tożsamość narodowa – dopuszczalny wyjątek od zasady prymatu?* [in:] S. Dudzik, N. Półtorak (eds.), *Prawo Unii Europejskiej a prawo państwa członkowskich*, Warszawa 2013.

Krajewski M., *Who Is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges*, "European constitutional law review" 2018, 14. doi: 10.1017/S1574019618000457.

Krajewski M., Ziółkowski M., *EU judicial independence decentralized*, "Common Market Law Review" 2020, 57(4), pp. 1107–1138. doi: 10.54648/COLA2020717.

Kustra-Rogatka A., *European integration – ineffable aspiration or the object of concerns? About ambiguity of Europe in the Polish constitutional imaginary*, 2022. doi: 10.2139/ssrn.4287385.

Kustra-Rogatka A., *Kontrola konstytucyjności aktu prawa pierwotnego Unii Europejskiej w wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21*, „Europejski Przegląd Sądowy" 2021, 11, pp. 4–11.

Kustra-Rogatka A., *The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts*, "European Constitutional Law Review" 2023, 19(1), pp. 25–58. doi: 10.1017/S1574019622000499.

Landau D., Dixon R., *Abusive Judicial Review: Courts Against Democracy*, "University of California Davis Law Review" 2019, 53.

Landfried Ch. (ed.), *Judicial Power How Constitutional Courts Affect Political Transformations*, Cambridge 2019. doi: 10.1017/9781108348669.

Leloup M., *Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR*, "European Constitutional Law Review" 2021, 17, pp. 394–421. doi: 10.1017/S1574019621000286.

Łazowski A., *Constitutional Tribunal on the Preliminary Ruling Procedure and the Division of Competences Between National Courts and the Court of Justice Order of 19 December 2006*, "European Constitutional Law Review" 2008, 4. doi: 10.1017/S1574019608001879.

Łazowski A., *Poland: Constitutional Tribunal on the Surrender of Polish Citizens under the European Arrest Warrant. Decision of 27 April 2005*, "European Constitutional Law Review" 2005, 1, pp. 569–581. doi: 10.1017/S1574019605005699.

Łazowski A., *The Polish constitution, the European constitutional treaty and the principle of supremacy*, [in:] A. Albi, J. Ziller (eds.), *The European Constitution and national constitutions: ratification and beyond*, The Netherlands Kluwer Law International, 2007.

Łazowski A., Ziółkowski M., *Knocking on Polexit's door? Poland, the Constitutional Tribunal and the battle over the primacy of EU law*, 2021. Available from: https://www.ceps.eu/knocking-on-polexits-door/

Mayer F., *The Ultra Vires Ruling: Deconstructing the GermanFederal Constitutional Court's PSPP decision of 5 May 2020*, "European Constitutional Law Review" 2020, 16, pp. 733–769. doi: 10.1017/S1574019620000371.

Mańko R., Tacik P., *Sententia non existens: A new remedy under EU law?: Waldemar Zurek* (W. Z.), "Common Market Law Review" 2022, 59(4). doi: 10.54648/cola2022076.

Mieńkowska-Norkien R., *The Political Impact of the Case Law of the Court of Justice of the European Union*, "European Constitutional Law Review" 2021, 17, pp. 9–13, 25. doi: 10.1017/S1574019621000080.

Neergaard U., Engsig Sørensen K., *Comparing Apples and Oranges: The Danish Ajos Case in Light of the Polish Judgment in K 3/21 and the German Ruling in Weiss*, "EU law live Blog" 2021, November 10.

Pech L., *Protecting Polish judges from Poland's Disciplinary "Star Chamber": Commission v. Poland (Interim proceedings)*, "Common Market Law Review" 2021, 58(1), pp. 137–162. 10.54648/COLA2021006.

Petersen N., Wasilczyk P., *The Primacy of EU Law and the Polish Constitutional Law Judgment*, Brussels 2022.

Piątek E., *Zasada pierwszeństwa prawa wspólnotowego w orzecznictwie państwa członkowskich*, „Państwo i Prawo" 2009, 5, pp. 28–30.

Petersen N., Chatziathanasiou K., Balancing Competences? *Proportionality as an Instrument to Regulate the Exercise of Competences after the PSPP Judgment of the Bundesverfassungsgericht*, "European Constitutional Law Review" 2021, 17, pp. 314–334. doi: 10.1017/S1574019621000201.

Piątek E., *Zasada pierwszeństwa prawa wspólnotowego w orzecznictwie państwa członkowskich*, „Państwo i Prawo" 2009, 5.

Ploszka A., *It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional*, "Hague Journal on the Rule of Law" 2022, 15, pp. 51–74. doi: 10.1007/s40803-022-00174-w.

Radziewicz P., *On legal consequences of judgements of the Polish Constitutional Tribunal passed by an irregular panel*, „Review of European and Comparative Law" 2017, 31(4), pp. 45–64. doi: 10.31743/recl.4064

Repasi R. *et al.*, *Symposium – Introduction: The Polish Constitutional Tribunal Decision on the Primacy of EU Law: Alea Iacta Est. Now what?*, "International Journal of Constitutional Law" 2021, October 15.

Sadl U., *Old is new: the transformative effect of references to settled case law in the decisions of the European Court of Justice*, "Common Market Law Review" 2021, 58(6), pp. 1761–1788. doi: 10.54648/COLA2021111.

Sadurski W., *Poland's Constitutional Breakdown*, Oxford 2019, doi: 10.1093/oso/9780198840503.001.0001.

Sadurski W., Gliszczyńska-Grabias A., *Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland*, "European Constitutional Law Review" 2023, 19(1). doi: 10.1017/S1574019622000396.

Sadurski W., Gliszczyńska-Grabias A., *The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill): "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K1/20*, "European Constitutional Law Review" 2021, 17, p. 130. doi: 10.1017/S1574019621000067.

Sajó A., *Ruling by Cheating*, Cambridge 2021. doi: 10.1017/9781108952996.

Scheppele K.L., Kochenov D.V., Grabowska-Moroz B., *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 2021 Yearbook of European Law. doi: 10.2139/ssrn.3706496.

Sołtys A., *The obligation to interpret national law in accordance with European Union law in the jurisprudence of Polish Constitutional Court – focus on limits*, "The European Journal of Public Matters" 2017, 1.

Spieker L. D., *The conflict over the Polish disciplinary regime for judges – an acid test for judicial independence, Union values and the primacy of EU law: Commission v. Poland*, 59(3), "Common Market Law Review" 2022, pp. 777–812. doi: 10.54648/COLA2022052.

Śledzińska-Simon A., *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, "German Law Journal" 2018, 19. doi: 10.2139/ssrn.3216482.

Śledzińska-Simon A., Ziółkowski M., *Constitutional Identity in Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?*, [in:] Ch. Calliess, G. van der Schyff (eds.), *Constitutional identity in a Europe of Multilevel Constitutionalism*, Cambridge 2019. doi: 10.1017/9781108616256.012.

Swed M., *The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights*, "European Constitutional Law Review" 2022, 18, pp. 132–154. doi: 10.1017/S1574019622000050.

Taborowski M., *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego*, Warszawa 2019.

Thiele A., *Whoever equates Karlsruhe to Warsaw is wildly mistaken*, "VerfassungBlog" 2021, October 10.

Turmo A., *The Air France Decision: Testing the Power of the French 'Constitutional Identity' Exception to EU Law Primacy*, "EU law live Blog" 2021, November 10.

Tuleja P., *The Polish Constitutional Tribunal*, [in:] A. von Bogdandy, P. Huber and Ch. Grabenwarter (eds.), *The Max Planck Handbooks in European Public Law, Volume III: Constitutional Adjudication: Institutions*, Oxford 2020. doi: 10.1093/oso/9780198726418.003.0012.

Uitz R., *Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary*, "International Journal of Constitutional Law" 2015, 13. doi: 10.1093/icon/mov012.

Wojtyczek K., *Trybunał Konstytucyjny w europejskim systemie konstytucyjnym*, „Przegląd Sejmowy" 2009, 4.

Wójtowicz K., *Constitutional Courts and European Union law*, Wroclaw 2014.

Wróbel W., *Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych*, „Europejski Przegląd Sądowy" 2021, 12, pp. 19–26.

Wyrozumska A., *Some Comments on the Judgments of the Polish Constitutional Tribunal on the EU Accession Treaty and on the Implementation of the European Arrest Warrant*, "27 Polish Yearbook of International Law (2004–2005)", 31.

Wyrozumska A., *Wyroki Trybunału Konstytucyjnego w sprawach K 3/21 oraz K 6/21 w świetle prawa międzynarodowego*, „Europejski Przegląd Sądowy" 2021, 12.

Wyrzykowski M., *The Vanishing Constitution*, "European Yearbook on Human Rights" 2018. doi: 10.1017/9781780688008.003.

Wyrzykowski M., Ziólkowski M., *lliberal constitutionalism and the judiciary*, [in:] A. Sajó, R. Uitz, S. Holmes, (eds.), *Routledge Handbook of Illiberalism*, Routledge 2022. doi: 10.4324/9780367260569-38.

Ziółkowski M., *Constitutional Identity in Poland: Transplanted and Abused*, [in:] K. Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe*, Hart 2023.

Ziółkowski M., *Two Faces of the Polish Supreme Court After "Reforms" of the Judiciary System in Poland: The Question of Judicial Independence and Appointments*, "European Papers" 2020, 1. doi: 10.5040/9781509960156.ch-005.

Ziółkowski M., *Konstytucyjna kompetencja sądu do ochrony własnej niezależności (uwagi na marginesie uchwały SN z 23.01.2020 r.)*, „Państwo i Prawo" 2020, 10, pp. 88–95.

Zoll F., Płudniak-Gierz K., Bańczyk W., *Primacy of EU law and jurisprudence of Polish Constitutional Tribunal Recent developments in the light of the Polish Constitutional Tribunal's case law*, "European Parliament Policy Report", Brussels 2022.

 DOI: 10.7206/kp.2080-1084.742