

STUDY

Requested by the JURI committee



Primacy of EU law and jurisprudence of Polish Constitutional Tribunal



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
PE 732.475- June 2022

EN

Primacy of EU law and jurisprudence of Polish Constitutional Tribunal

Recent developments in the light of
the Polish Constitutional Tribunal's
case law

Abstract

The approach taken by the jurisprudence of the Polish courts, especially the Constitutional Tribunal, concerning the principle of the primacy of the EU law in relation to the Polish law and in particular to the Polish Constitution has changed substantially since Polish accession to the EU. The in-depth analysis evaluates three distinct periods in the jurisprudence of Polish Constitutional Tribunal.

This study is commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee.

This document was requested by the European Parliament's Committee on Legal Affairs.

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Original: EN

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Manuscript completed in June 2022
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EXECUTIVE SUMMARY

Background

The discussion concerning the primacy of EU-law over the national law in Poland, especially the Polish Constitution has had a pivotal role in the rapid devolution of the Polish judiciary system, which started in 2015 with the election of the currently ruling party "Law and Justice" (*Prawo i Sprawiedliwość*). The will to impose much tighter control upon the judges has irreversibly merged the discussion with political issues.

Up to this time, the process of integration of Polish courts with EU law has not been easy, but it was fruitful. Despite the fact that Polish judges were reluctant to ask the Court of Justice of the European Union for preliminary rulings, the dominating consensus was that Polish law does, in general, share the same values as European *acquis communautaire* and as such, it is possible to interpret it in accordance with European provisions.

The situation changed rapidly in 2015 with the appointment of 3 judges in place of judges already appointed, which is believed by most scholars to be unlawful. In an attempt to amend the situation, the European Court of Human Rights in case Xero Flor corroborated that the participation of illegally elected judges in the judiciary process does not fulfil the requirement of a due process. The system further deteriorated with the creation of a Disciplinary Chamber, which was a threat to the independence of judiciary and clearly imposed political control over the judges. The culminating moment for the crisis was the judgment U2/20 in which the Constitutional Tribunal deemed a shared judgment of three chambers of the Polish Supreme Court as unconstitutional. This was not only a blatant trespassing of the Constitutional Tribunal's competences, but was directly aimed at stopping the implementation of judgments of the Court of Justice of the European Union in three joined cases C-585/18, C-624/18 and C-625/18, which were aimed at restoring the normal functioning of the justice system. This followed with a continuous denial to apply the rulings of the European Court of Justice urging the Disciplinary Chamber to abstain from ruling against the judges. The crisis culminated in the ruling K3/21, in which the Polish Constitutional Tribunal deemed as unconstitutional provisions allowing Polish judges to judge according to the provisions that have been removed from the system or to ignore provisions of the Constitution in order to uphold the conformity of the Polish legal system with that of the European Union. That ruling has been considered highly controversial, by prevailing opinion among legal scholars even as not existing¹ and is a blatant example of using the Constitutional Tribunal as a political tool to show dissatisfaction with the current state of the EU.

¹ P. Bogdanowicz, Opinia prawna na temat skutków prawnych orzeczenia Trybunału Konstytucyjnego w sprawie o sygn. akt K 3/21 dotyczącego niezgodności przepisów Traktatu o Unii Europejskiej z Konstytucją Rzeczypospolitej Polskiej w świetle prawa Unii Europejskiej, Fundacja im. Batorego, Warszawa 2021, p. 4; P. Filipek, „Na kolizyjnym kursie z Unią”, Rzeczpospolita from 10.10.2021, <https://www.rp.pl/sady-i-trybunaly/art19000641-pawel-filipek-na-kolizyjnym-kursie-z-unia>; T. Zalasinski, „Pozorowanie problemu konstytucyjnego (opinia)”, Gazeta Prawna from 26.10.2021 <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8278024-wyrok-tk-wyzszosc-prawa-krajowegokonstytucja-dr-tomasz-zalasinski.html>.

Policy recommendations

As the changes of the jurisprudence are driven by the undue impact on the judiciary, priority should be given to granting the independence of judiciary; there is a need to promote and secure judicial independence by:

- examination of the fulfilment of the mile stones by Poland in the process of the restoring of the independence of the judiciary system;
- providing a point of reference for the reviewing of the independence of judiciary and during the reconstruction of an independent judiciary system.

1. GENERAL REMARKS

KEY FINDINGS

The principle of the primacy of EU law over the national law was differently understood in varied periods of development of Polish law. The reasons behind such different understanding were varied, from political ones (currently) to lack of certainty of national courts (including the Constitutional Tribunal) on the relations of especially EU law and national constitution (within the very first judgments in this case shortly after EU accession). Currently, the attempts to question the primacy of EU law in Poland are not based on the willingness to reject the EU law as a whole, but rather form a part of internal political dispute on the national judiciary position.

The purpose of this study is to present the development of the case law of the Polish courts and in particular of the Constitutional Tribunal concerning the principle of the primacy of the EU law in relation to the Polish law and in particular to the Polish constitution.

The study is structured as follows: firstly, the principle of primacy of the EU – over the Member States law is briefly presented in the context of the ongoing dialogue between the Court of Justice and the most relevant national jurisprudence. In the face of the current change of the approach of Polish jurisprudence a general conclusion can be drawn that there is a tendency to influence the judiciary so that the case law strengthens the actual political narrative of the governing party. Consequently, general remarks as to the interplay between the political context and the jurisprudence on primacy of EU law over Member States law in Poland are made.

Secondly, an in-depth analysis of the Polish Constitutional Tribunal's jurisprudence is provided. Three stages of the development of case law are differentiated and discussed. However, after the transition period, the role played by the jurisprudence of the Constitutional Tribunal has evolved. Although the case law maintains the formal characteristics of legal statements, it has grown in similarities to political statements. Consequently, when discussing subsequent judgments, presentation of legal reasoning of the Polish Constitutional Tribunal was supplemented with the reference to the political background of the decisions taken, as well as the doctrinal and social response to such practice.

The conclusion and recommendations in the third part of the study are formulated considering not only the interplay between the impact of legal argumentation and the political context but also the majority opinion of the legal scholars as to the legal character of the analyzed case law.

1.1. The Court of Justice jurisprudence on primacy of EU Law over Member States law

The primacy of the EU law is a legal principle² which serves as a solution for the collision between the national legal system and the law of the European Union. From the perspective of the Union European law has a primacy of application within the legal systems of the Member States. This encompasses also

² J. Ziller, La primauté du droit de l'Union européenne, Publication for the Committee on Legal Affairs, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Luxembourg, 2022.

the priority in relation to national constitutions. The primacy of EU law has its restraints in Article 4 (2) of the Treaty on the European Union. According to this provision the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including the assurance of the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

The quoted provision expresses the borderline between the competences of the European Union and the Member States and also defines the scope which is not excluded from the competence of the Union, but in which sphere the Union must "respect" these features of the Member States which are essential for the preservation of their national identity. This criterion of national identity is reflected by the judgments of national constitutional courts – the latter tend to refer to the said criterion using the notion of the constitutional identity.³

The primacy of the EU law principle⁴ was established in the Court of Justice jurisprudence in 1964,⁵ and then extended in the 1970.⁶ The principle was tacitly recognized by the Member States, not, however, without a debate.⁷ The grounds for the primacy of EU law were sought in the consent of the Member State's constitution accord of the national sovereign.⁸ The focal point in the discussion was made in the *Solange II*, in which the German Constitutional Court recognized the primacy of EU law under the condition that EU law grants the same level of protection of fundamental rights as the German constitution.⁹ However, the European Union and the Member States share the values and principles upon which the EU law system is founded, which reduces the risk of discrepancies in this regard.

In the year 2007, in the 17. Declaration concerning primacy¹⁰ it was explicitly stated that "in accordance with the well-settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under

³ See e.g. in the context of French Decision No. 2021-940 QPC of 15 October 2021, *Société Air France* see: P. Gérard, W. Verrijdt, "Belgian Constitutional Court Adopts National Identity Discourse", *European Constitutional Law Review* (2017), Vol. 13, No. 1, p. 182-205.

⁴ For a jurisprudence overview see: R. Kwiecień, "The Primacy of European Union Law over National Law Under the Constitutional Treaty", *German Law Journal* (2005), Vol. 6, Iss. 11, p. 1479 – 1495; V. Trstenjak, "National Sovereignty and the Principle of Primacy in EU Law and Their Importance for the Member States", *Beijing Law Review* (2013), Vol. 4 No. 2, p. 71-76; Zilles, J., *La primauté du droit de l'Union européenne*, PE 732.474.

⁵ Judgment of the Court of Justice of 15 July 1964, *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

⁶ Judgment of the Court of Justice of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

⁷ See the dialogue between national courts (judgment of the 27 May 1971 of the Belgian Court of Cassation; judgment of the French Court of Cassation of 24 May 1975; *Administration des Douanes v Société 'Cafes Jacques Vabre' et SARL Wiegel et Cie*; judgment of the German Constitutional Court of 17 December 1970, *Solange I* and of 22 October 1986, *Solange II*; judgment of 1974 of the Italian Constitutional Court, *Frontini v Minister delle Finanze*; the judgment of the Lithuanian Constitutional Court of 14 March 2006, case no. 17/02-24/02-06/03-22/04; and the Court of Justice (inter alia: C-106/77, *Simmenthal* [1978] ECR 629; C-106/89 *Marleasing* [1991] ECR I-7321).

⁸ R. Kwiecień, "The Primacy of European Union Law over National Law Under the Constitutional Treaty", *German Law Journal* (2005), Vol. 6, Iss. 11, p. 1487-1488.

⁹ B. Davies, "Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and Solange in its Intellectual Context", *European Law Journal. Review of European Law in Context* (2015), Vol. 21, Iss. 4, p. 434-459; G. Beck, "The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor", *European Law Journal. Review of European Law in Context* (2011), Vol. 17, Iss. 4, p. 470-494.

¹⁰ 12007L/AFI/DCL/17, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 - A. Declarations concerning provisions of the Treaties - 17. Declaration concerning primacy, Official Journal 306, 17/12/2007 P.0256 – 0256.

the conditions laid down by the said case law." The principle applies within of the sphere of the EU competence.

The decisive problem is, however, not only the scope of the competences transferred to the European Union, but most of all the question who is entitled to decide whether a certain act falls within the scope of EU competences, as provided in Article 4 (2) of the TEU.¹¹ The constitutional courts of Member States consider themselves not only competent, but also bound to exercise the *ultra vires* review. Consequently, the issue of delimitation of the scope of the EU competences was brought to the attention in the following national judgments, see esp.:

- Belgium: Belgian Constitutional Court No. 62/2016, 28 April 2016;¹²
- Czech Republic: Ústavní soud, judgment of 31 January 2012, Pl. ÚS 5/12, Sect. VII. – Holoubec;
- Denmark: Højesteret, Case No 15/2014 – Dansk Industri (DI) acting for Ajos A/S v The estate left by A; Germany: BVerfG, Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13,¹³ BVerfG, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13,¹⁴ BVerfG, Order of the Second Senate of 18 July 2017 - 2 BvR 859/15,¹⁵ BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14,¹⁶ BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15;¹⁷
- Romania: Constitutional Court, Decision No. 390 of 8 June 2021¹⁸

1.2. The interplay between the political context and the jurisprudence on the primacy of EU Law over Member States law in Poland

The question of the primacy of EU law in the Polish debate does not give rise to a solely legal dispute. The legal discussion, in this case, becomes overshadowed by the deep political and legal crisis in Poland concerning the rule of law.¹⁹ The question of primacy of EU law must be seen through a prism of the political strategy based on the primacy of the government's will over the law and the decisions of the legitimated bodies and authorities.²⁰ Although in the analysed recent decisions of the Constitutional Tribunal the term "sovereignty" has been used as one of the central arguments, it must be seen rather as one of many apparent arguments, used just to explain why certain formally applicable provisions should not apply in the given circumstances. The decisions of the Constitutional Tribunal attempt to

¹¹ R. Kwiecien, „The Primacy of European Union Law over National Law Under the Constitutional Treaty”, German Law Journal (2005), Vol. 6, Iss. 11, p. 1486.

¹² P. Gérard, W. Verrijdt, „Belgian Constitutional Court Adopts National Identity Discourse”, European Constitutional Law Review (2017), Vol. 13, No. 1.

¹³ ECLI:DE:BVerfG:2014:rs20140114.2bvr272813.

¹⁴ ECLI:DE:BVerfG:2016:rs20160621.2bvr272813.

¹⁵ ECLI:DE:BVerfG:2017:rs20170718.2bvr085915.

¹⁶ ECLI:DE:BVerfG:2019:rs20190730.2bvr168514.

¹⁷ ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

¹⁸ The Official Gazette of Romania No. 612 of 22 June 2021. For an overview of the dispute between European Court of Justice and the Romanian Courts see e.g.: M. Moraru, R. Bercea, „The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19”, Asociația 'Forumul Judecătorilor din România, and their follow-up at the national level. European Constitutional Law Review (2022), 18(1), 82-113.

¹⁹ F. Zoll, L. Wortham, „Judicial Independence and Accountability: Withstanding Political Stress in Poland”, Fordham Int'l LJ. (2019), Vol. 42, p. 875.

²⁰ See e.g. M. Matczak, „Poland's Constitutional Crisis: Facts and Interpretations”, The Foundation for Law, Justice and Society. Policy Brief 2018, p. 6, https://monitorkonstytucyjny.eu/wp-content/uploads/2018/07/Matczak_Polands-Constitutional-Crisis-Facts-and-interpretations_0.pdf.

challenge the prior judicature and prior attitude towards primacy of EU law, or – rather – towards the independence of judiciary. **Therefore, this dispute should not be seen as a specific legal campaign against the EU-law, but it must be seen as a part of a campaign against the law which the ruling elite of the country does not accept for various reasons.**²¹ In the recent judgments of the Constitutional Tribunal related to the question of constitutionality of the primary sources of the European law, but also related to the question of the constitutionality of the European Convention of Human Rights, the legal problem has been artificially constructed with an intention to deprive the judges contesting the decomposition of the judicial system of a right to rely on various sources of law, including the Polish Constitution and international or supranational acts.²² The recent judgments of the Constitutional Tribunal in authors' opinion were intended to serve only the internal purposes²³ and should facilitate the disciplinary procedures against judges by eliminating the possibilities of a defence based on European law.

For the analysis of the judgments of the Constitutional Tribunal, but also of the regular courts (including the Supreme Court) **it is necessary to distinguish three stages or periods of the legal and political development.**²⁴

²¹ See e.g. that the academic article by a legal scholar and current Ministry of Education and Science P. Czarnek, uses the arguments on proper adoption of the Court of Justice judgments as counter arguments against the admissibility of the Supreme Court to issue the resolution BSA I-4110-1/20, see. P. Czarnek, „Glosa do uchwały składu połączonych Izb: Cywilnej, Karnej oraz Pracy i Ubezpieczeń Społecznych Sądu Najwyższego z 23 stycznia 2020 r., sygn. akt BSA I-4110-1/20”, *Przegląd Sejmowy* (2020), No. 3, p. 250.

²² W. Wróbel, „Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych”, *Europejski Przegląd Sądowy* (2021), No. 12, p. 19. The Author calls this process “a deconstitucionalization of law”.

²³ Similar view presented by: E. Łętowska, „O złudzeniu sprzeczności prawa Unii Europejskiej i polskiej Konstytucji w tle wyroku TK z 7 października”, *Monitor Konstytucyjny* from 22.10.2021 <https://monitorkonstytucyjny.eu/archiwa/19999>.

²⁴ For the legislation implementing the EU law such periods may be drawn a little differently, with some interest already before accession (period 1), substantial interest from 2004 to 2015 (period 2), and indifference from 2015 (period 3), F. Zoll, K. Południak-Gierz, W. Bańczyk, “The Struggle on Implementation of the *Acquis Communautaire* into Polish Civil Code”, *Nederlands Tijdschrift voor Burgerlijk Recht* (2022), No. 20, p. 154 (to be printed).

2. THE PRIMACY OF THE EU LAW IN THE FIRST PERIOD AFTER POLISH ACCESSION TO THE EUROPEAN UNION

KEY FINDINGS

During the first period after EU accession the primacy of EU law was observed and respected, but certain doubts kept arising. Firstly, it was characterised by scarcity of requests for preliminary rulings. Secondly, with respect to the primacy of EU law principle it was adjudicated by the Constitutional Tribunal that if a provision of the Constitution is against the EU law then needs to be revised provided that its European-friendly interpretation is not possible. The formal primacy of the Constitution was maintained but the practical primacy of EU law was observed. Still, the matter was viewed as purely theoretical, since EU law and Polish Constitution are founded upon the shared values determining the nature of a democratic state ruled by law and the same catalogue of fundamental rights.

2.1. Overall characteristics

The first period of the legal and political developments concerning primacy of the EU law in the Polish legal system started with Poland's accession to the European Union in 2004 and lasted until the autumn of 2015. European law started to have a direct effect within the Polish legal system with the Polish accession to the European Union. It was a period of a well-functioning division of power and an independent judiciary, even in the period of the first PiS-government in years 2005 – 2007²⁵ and the development of the program of this party, declaring the confinement of the position of the Constitutional Tribunal, due to the fact that it made the exercise of power by the “democratic elected government impossible”. In the first period, the question on the relation between the European law and the Polish law, including the Polish Constitution was deliberated rather at a theoretical level.²⁶ **In practice, a European reasoning in the argumentation of the Polish courts was generally missing.²⁷ The scarcity of the requests for preliminary rulings issued by the Polish courts was drawing attention in particular.**²⁸ These numbers were extremely low even in relation to other member states from Central Europe. It was the practical aspect of the principle of primacy of European law which was recognized in theory but it was absent in the practice of the Polish courts. It was,

²⁵ Państwowa Komisja Wyborcza, Wybory Prezydenta Rzeczypospolitej Polskiej 2005, <https://wybory2005.pkw.gov.pl/PZT/PL/WYN/W/index.htm>, Państwowa Komisja Wyborcza, Wybory do Senatu Rzeczypospolitej Polskiej 2005, <https://wybory2005.pkw.gov.pl/SNT/PL/WYN/M/index.htm>, Państwowa Komisja Wyborcza, Wybory do Sejmu Rzeczypospolitej Polskiej 2005, <https://wybory2005.pkw.gov.pl/SJM/PL/WYN/M/index.htm>.

²⁶ See: M. Jabłoński, S. Jarosz-Żukowska, „Kontrola konstytucyjności prawa pochodnego UE w trybie skargi konstytucyjnej i pytań prawnych” in: ed. M. Jabłoński, S. Jarosz-Żukowska, Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP, Wrocław 2015, p. 74.

²⁷ A. Wiewiórowska-Domagalska, „Refleksje na tle orzecznictwa sądów powszechnych w zakresie sprzedaży konsumenckiej”, Prawo w działaniu. Sprawy cywilne (2014), No. 20, p. 229.

²⁸ J. Sadowski, „Pytania prejudycjalne polskich sądów powszechnych”, Prawo w działaniu. Sprawy cywilne (2014), Vol. 20, p. 88. Between 1.05.2004 and 31.12.2009 there were solely 20 requests for a preliminary ruling.

however, not the aforementioned opposition against the European law,²⁹ but lack of awareness of its functioning and the role which the national judge has to play as a European judge.³⁰

2.2. Jurisprudence of the Polish Constitutional Tribunal

2.2.1. Judgment of 11 May 2005, ref. no. K 18/04

The description of this period should be started with a description of the views of the Constitutional Tribunal presented in the case K 18/04. The Polish Constitutional Tribunal decided in this case that the Polish Accession Treaty to the European Union does not violate the Polish Constitution.³¹ The Constitutional Tribunal received three applications from groups of deputies in which the provisions of the Treaty were questioned. The key **objection** raised was that **the Constitution does not allow an access to the legal system of the European Union, which assumed the primacy of Community law over Polish law**; because - as the applicants claim – it would lead to the violation of the constitutional principle of Art. 8 sec. 1, according to which "the Constitution is the supreme law of the Republic of Poland".

The Tribunal underlined that on the territory of the Republic of Poland, apart from the norms established by the national legislator, there are also regulations created outside the system of national legislative bodies. The constitution-maker consciously assumed that **the legal system in force has a multi-component character**. In addition to legal acts established by national (Polish) legislative bodies, also acts of international law are in force and applied in Poland. **These norms should coexist on the basis of a mutually friendly interpretation and cooperative co-application**. The Tribunal especially underlined that **Polish Constitution and EU law are based on the same set of common values determining the nature of a democratic state ruled by law and the catalogue and content of fundamental rights**, which reduces the risk of conflicts between them.

This judgment assumed that **the Polish Constitution is the superior legal act**, being over the whole legal order applicable in Poland. If any provision of European law would violate the Polish Constitution and the conflict could not be eliminated by means of interpretation, including the European-friendly interpretation, the government, acting on behalf of the sovereign nation will have three options: reach the revision of the Union's law, change its own constitution or withdraw from the Union.³²

2.2.2. Judgment of 27 April 2005, ref. no. P 1/05³³

In the year 2005 the Polish Constitutional Tribunal had to decide on the constitutionality of European law in relation to the secondary European law.³⁴ Technically, the subject matter of the test in this case

²⁹ A. Wiewiórowska-Domagalska, „Refleksje na tle orzecznictwa sądów powszechnych w zakresie sprzedaży konsumenckiej”, *Prawo w działaniu. Sprawy cywilne* (2014), No. 20, p. 206.

³⁰ F. Zoll, K. Południak-Gierz, W. Bańczyk, “The Struggle on Implementation of the Acquis Communautaire into Polish Civil Code”, *Nederlands Tijdschrift voor Burgerlijk Recht* (2022), No. 20, p. 154.

³¹ S. Biernat, “How far it is from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP judgment on Poland”, *German Law Journal* (2020), Vol. 21, Iss. 5, p. 1106 - 1107.

³² *Idem*.

³³ The judgment was issued prior to the Polish accession to the EU, as the latter took place on the 1st of May 2005.

³⁴ Judgment from 27.04.2005, P 1/05 (OTK-A 2005/4, pos. 42).

was a provision of the Polish Code of the Criminal Procedure, implementing the Framework decision of the EU on the European Arrest Warrant. The Polish Constitution forbade the extradition of a Polish citizen, irrespective whether the request for the extradition was issued by the state outside of the EU or being a member of the EU. The Framework decisions, issued according to the Treaty of Amsterdam, were a part of the Union's law, but not of the Community law. The Tribunal considered whether this distinction (which is today only of a historical relevance) may have an impact on the duty of the European friendly interpretation of law, including the constitution. **Finally, the Tribunal rejected such a distinction and assumed that also in this case the European-friendly interpretation had to be applied. It met, however, the borderline for the European-friendly interpretation in the clear language of the constitutional provision.**

The Constitutional Tribunal has stated that only it has an exclusive jurisdiction to decide on the relation between the rules on the European Arrest Warrant and the constitutional prohibition of the Polish citizens' extradition. **The Tribunal stated that a duty to implement European law has its source in the Constitution itself, but it does not guarantee by itself the conformity of the implemented law with the Polish Constitution. The fact that a national law is a result of the implementation of European law into the Polish legal system does not amend the substantive lack of the constitutionality of this law.**

Finally, the Constitutional Tribunal reached the conclusion that the European-based Code of Criminal Procedure violates the Polish Constitution. **In this sense, the Constitution has been recognized as an act having priority over European law.** The Tribunal in its reasoning indicated the way for suppressing the conflict, stating that since Poland is a member of the European Union such a conflict must be resolved. In this case the Constitutional Tribunal postponed (for 18 months) the enforcement of the judgment with the effect that for this period the questioned provision of the Code of Criminal Procedure maintained its effect. It was the time given to Polish legislator to adopt the Polish law to the European requirements.³⁵

Actually, albeit in this judgment the Constitutional Tribunal declared the primacy of the Polish Constitution over European law, it has also secured the application of European law until the Polish legislator suppressed the situation of the conflict between the Polish and European law by amending the constitution. **The Constitutional Tribunal stressed in this judgment the constitutional value of fulfilling all commitments resulting from the act of accession to the European Union. This judgment is an example of the full willingness to cooperate between the Republic of Poland and the European Union by seeking ways to eliminate contradictions³⁶ between the Polish Constitution and the European Union.** It was stressed that **the Constitution was the highest act of the law applicable in Poland**, but at the same time a space for **the practical primacy of European law was granted.**³⁷

³⁵ D. Leczykiewicz, "Trybunał Konstytucyjny (Polish Constitutional Tribunal), Judgment of 27 April 2005, No. P 1/05, on the Constitutionality of the European Arrest Warrant National Implementation (Case Comment)", *Common Market Law Review* (2006), Vol.43, p. 1187.

³⁶ Otherwise, it is sometimes perceived as a proof of primacy of Polish Constitution over EU law, P. Ruczkowski, „Problem pierwszeństwa prawa Unii Europejskiej przed prawem krajowym – kilka uwag na tle orzecznictwa Trybunału Konstytucyjnego”, *Rocznik Administracji Publicznej* (2018), No. 4, p. 145.

³⁷ The matter attracted significant attention of the legal scholars and, thus, the judgment was widely discussed in the Polish legal literature: W. Czaplinski, „Glosa do wyroku TK z dnia 27 kwietnia 2005 r., P 1/05”, *Państwo i Prawo* (2005), No. 9, 107-112; E. Gierach, „Glosa do wyroku TK z dnia 27 kwietnia 2005 r., P 1/05”, *Przegląd Sejmowy* (2005), No. 5, p. 196-204; K. Grajewski, „Europejski nakaz aresztowania – konstytucyjność regulacji kodeksowej. Glosa do wyroku TK z dnia 27 kwietnia 2005 r., P 1/05”, *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa* (2006), No. 1, p. 161-166; P. Hofmański, „Glosa do wyroku TK z dnia 27 kwietnia 2005 r., P 1/05”, *Państwo i Prawo* (2005), No. 9, p. 113-117; P. Kruszyński, „Glosa do wyroku

2.2.3. Judgment from 26 June 2013, ref. no. K 33/12

This judgment³⁸ dealt with the conformity of the ratification act of the decision of the European Council **2011/199/EU** on amending the Article 136 of the Treaty on the Functioning of the European Union on the European stability mechanism for the members of the Euro-zone with the Polish Constitution. **This decision was a result of the motion submitted by a group of members of the Parliament, questioning the constitutionality of the ratification act, due to the fact that by this ratification Poland has transferred to the international organization, namely to the European Stability Mechanism the competences restricted for the Polish government, concerning the conditions of the Polish participation in the Euro-zone and enlarging the competences in relation to Poland of the Court of Justice of the EU and the Court of Auditors, limiting the Polish sovereignty in the budgetary decisions and questioning the legality of the amendment to the Treaty itself.** The applicants also asked the Constitutional Tribunal to interpret how the Polish authorities are bound by the decisions of the European Council. The Constitutional Tribunal in its judgment dismissed the allegation of the unconstitutionality of the ratification act and decided to discontinue the procedure in the remaining part of the motion. **In this judgment the Constitutional Tribunal ruled that the assumption concerning the unconstitutional transfer of the competences restricted by the constitution for the authorities of the Republic of Poland did not take place.** This judgment confirmed, however, the competence of the Constitutional Tribunal to verify whether the constitutional limit for such transfer has been infringed. In this judgment the Constitutional Tribunal stressed that there is a principle of the interpretation of the Polish Constitution which supports the process of European integration. **The Constitutional Tribunal indicates in this decision that there is a limit to the European-friendly interpretation of the Constitution.** Such interpretation must not lead to results which are incompatible with the clear language of the provisions and minimum guarantees, determined by the constitution. The Constitutional Tribunal referred, however, to its previous ruling in the case K 24/04 in which it stated that the development of the European Union requires in many cases a new approach to the problems and legal institutions with the long tradition created by the doctrine and the case law, deeply rooted in the awareness of the lawyers. The necessity of a redefinition of certain legal concepts is evident, since European integration creates a new legal situation which may cause a conflict between the well-established old institutions of the Constitution and the need to act on the forum of the European Union in accordance with the constitutional principles.

2.3. Conclusions

The first period of the activity of the Constitutional Tribunal after the accession of Poland to the European Union can be characterized by the European-friendly³⁹ attempt to find a compromise between the quick evolution of European law, combined with the willingness to look at Polish law from the European perspective and certain limits provided by the constitutional law which cannot be crossed. However, even in the situation of an evident conflict, like in the European Arrest Warrant case,

TK z dnia 27 kwietnia 2005 r., P 1/05", *Paestra* (2005), No. 7-8, p. 289; M. Płachta, R. Wieruszewski, „Glosa do wyroku TK z dnia 27 kwietnia 2005 r., P 1/05”, *Państwo i Prawo* (2005), No. 9, p. 117-125; S. Steinborn, „Glosa do wyroku TK z dnia 27 kwietnia 2005 r., P 1/05”, *Przegląd Sejmowy* (2005), No. 5, p. 182-195.

³⁸ Judgment from 26.06.2013, K 33/12 (OTK-A 2013/5, pos. 63).

³⁹ 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), No. 12, p. 5.

the Constitutional Tribunal found a way to secure the practical application of the primacy of the European law by giving sufficient time for the government to adjust the Polish law⁴⁰ and practically suspending the conflicting provision of the Polish Constitution for 18 months with the purpose to find out a solution which would eliminate the existing contradiction.

In light of this case law the Constitution was seen as the highest source of Polish law, prevailing formally over European law. **For the Constitutional Tribunal it was, however, rather a theoretical exercise, since between the Polish Constitution and the European law there exists a coherence of shared values. In extreme situations it was always possible to find the way to restore the coherency of both systems.**⁴¹

⁴⁰ M. Jabłoński, S. Jarosz-Żukowska, „Kontrola konstytucyjności prawa pochodnego UE w trybie skargi konstytucyjnej i pytań prawnych” in: ed. M. Jabłoński, S. Jarosz-Żukowska, *Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP*, Wrocław 2015, p. 73, underline, thus, that the control made by the Constitutional Tribunal regarded not the EU act, but the implementing statute.

⁴¹ 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), No. 12., p. 5.

3. A PERIOD OF TRANSITION: THE ELECTIONS WON BY THE PARTY LAW AND JUSTICE AND THE GRADUAL DEGRADATION OF THE POLISH CONSTITUTIONAL TRIBUNAL

KEY FINDINGS

The struggle connected with the reform of judiciary and arising conflicts about the status and the functioning of Polish Constitutional Tribunal and judicial independence as well as primacy of EU law began when Law and Justice (PiS) party won election in 2015. The tension caused by the said changes, especially in relation to the procedure of the appointment of judges, the discussion on the principle of the primacy of EU law revived and grew in significance. Despite the reluctance of the ruling party, interim measures imposed by the Court of Justice were obeyed.

The second period started when the party of Jarosław Kaczyński, Law and Justice and its allies won presidential and parliamentary elections.⁴² The period of transition lasted only a little bit longer than one year, from November 2015 until December 2016, to the end of the presidency in the Constitutional Tribunal of Andrzej Rzepliński. The new parliament has elected five judges⁴³ for the seats which have already been occupied by the judges who have been elected by the previous parliament,⁴⁴ but have not been sworn in by Polish President Andrzej Duda. In this case, the **Constitutional Tribunal has ruled that law amended by the former parliament, which made it possible to elect two additional judges, was unconstitutional, but the election of three judges by the old parliament must not be contested and the President of the Republic is obliged to receive the oath from the judges.**⁴⁵ This has never happened and **the renewed election of the judges by the PiS-majority undermined tragically the legitimacy of the Constitutional Tribunal.**⁴⁶ In the first year of the Constitutional Tribunal's activity this flaw has been amended by the fact that the President of the Tribunal, who was in the last year of his office, could prevent the admission of the illegally appointed new-judges to participate in the fulfilment of the adjudicative functions. The deep crisis has, however,

⁴² S. Biernat describes it as the beginning of the process of violation of the constitution and destruction of the foundation of the democracy, "How far it is from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSCP judgment on Poland", *German Law Journal* (2020), Vol. 21, Iss. 5, p. 1109.

⁴³ Uchwała w sprawie wyboru sędziego Trybunału Konstytucyjnego, *Monitor Polski* 2015, pos. 1182; uchwała w sprawie wyboru sędziego Trybunału Konstytucyjnego, *Monitor Polski* 2015, pos. 1183; uchwała w sprawie wyboru sędziego Trybunału Konstytucyjnego, *Monitor Polski* 2015, pos. 1184; uchwała w sprawie wyboru sędziego Trybunału Konstytucyjnego, *Monitor Polski* 2015, pos. 1185; uchwała w sprawie wyboru sędziego Trybunału Konstytucyjnego, *Monitor Polski* 2015, pos. 1186.

⁴⁴ Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 8 października 2015 r. w sprawie wyboru sędziego Trybunału Konstytucyjnego, *Monitor Polski* 2015, pos. 1038; *Monitor Polski* 2015, pos. 1039; Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 8 października 2015 r. w sprawie wyboru sędziego Trybunału Konstytucyjnego, *Monitor Polski* 2015, pos. 1040; Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 8 października 2015 r. w sprawie wyboru sędziego Trybunału Konstytucyjnego, *Monitor Polski* 2015, pos. 1041; Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 8 października 2015 r. w sprawie wyboru sędziego Trybunału Konstytucyjnego, *Monitor Polski* 2015, pos. 1042.

⁴⁵ Judgment of the Constitutional Tribunal, 3 December 2015, K 34/15.

⁴⁶ P. Czarny, "Der Streit um den Verfassungsgerichtshof in Polen 2015-2016", *Osteuroparecht* (2018), Vol. 64, p. 6-7; A. Dziadzio, "Quis custodiet ipsos custodes? Die Auseinandersetzung um den Verfassungsgerichtshof in Polen", *Osteuroparecht* (2018), Vol. 64, p. 26-30; F. Zoll, L. Wortham, "Judicial Independence and Accountability: Withstanding Political Stress in Poland", *Fordham Int'l L.J.* (2019), Vol. 42, p. 893.

already started and the ruling majority was trying to prevent the enforcement of the judgment which has not fulfilled its expectations by not printing them in the Polish Official Journal.⁴⁷ It was also a period during which the parliament adopted a package of laws⁴⁸ depriving the general system of the judiciary of the fundamental, defining qualities of many attributes of its independence which has caused a reaction of the European Union⁴⁹ and of the Court of Justice⁵⁰. **The Court of Justice stated in several judgments the progressing destruction of the guarantees of independence, required also by the law of the European Union, in particular by Article 2 and Article 19 of the Treaty.** The government rejected in several statements the right of the European Union, including that of the Court of Justice to intervene in the process of reforming the Polish judiciary, claiming that it is an exclusive domain of the Polish government to determine the structure of Polish judiciary and this sphere is entirely outside of the competences transferred to the European Union by the Treaties.⁵¹

⁴⁷ K 34/15 - letter from the Chancellery of the Prime Minister of 10 December 2015 regarding the publication of the judgment K 34/15; response of the President of the Constitutional Tribunal to the letter of the Chancellery of the Prime Minister of 10 December 2015 regarding the publication of the judgment K 34/15, <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%2034/15>.

⁴⁸ Acts on the Constitutional Tribunal: Ustawa z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym, Dz.U. 2015, poz. 1064; changed by Ustawa z dnia 22 grudnia 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym, Dz.U. 2015 poz. 2217; Ustawa z 30 listopada 2016 roku o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym; Ustawa z dnia 13 grudnia 2016 r. – Przepisy wprowadzające ustawę o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym oraz ustawę o statusie sędziów Trybunału Konstytucyjnego, Dz.U. 2016, poz. 2074; Ustawa o zmianie ustawy – Przepisy wprowadzające ustawę o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym oraz ustawę o statusie sędziów Trybunału Konstytucyjnego, Dz. U. 2018 poz. 849 (some of the aforementioned acts has been already changed or repealed). Acts on the organization of judiciary: Ustawa z dnia 30 listopada 2016 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, Dz.U. 2016, poz. 2103; Ustawa z dnia 23 marca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, Dz.U. 2017, poz. 803; Ustawa z dnia 11 maja 2017 r. o zmianie ustawy o Krajowej Szkole Sądownictwa i Prokuratury, ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, Dz.U. 2017, poz. 1139; Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, Dz.U. 2017, poz. 1452. Acts on the Supreme Court: Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym, Dz.U. 2018, poz. 5 (changed five Times in 2018, three in 2019 and once in 2020). For an overview see: A. Pacholska, M. Ujma, „Pięć lat zmian w polskim sądownictwie z perspektywy bezpieczeństwa prawnego”, *Annales Universitatis Paedagogicae Cracoviensis. Studia de Securitate* (2020), 10(1) p. 133-139.

⁴⁹ See: European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)); Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final); Communication from the Commission to the European Parliament and the Council *A new EU Framework to strengthen the Rule of Law*, (COM/2014/0158 final).

⁵⁰ Judgment of the Court of Justice, Grand Chamber, 15 July 2021, *Commission v Poland*, known as “disciplinary regime of judges”, C-791/19, ECLI:EU:C:2021:596; judgment of the Court of Justice, Grand Chamber, 5 November 2019, *Commission v Poland*, known as “independence of the ordinary courts”, C-192/18, ECLI:EU:C:2019:924; judgement of the Court of Justice, Grand Chamber, 24 June 2019, *Commission / Poland*, known as “independence of the Supreme Court”, C-619/18, ECLI:EU:C:2019:531.

⁵¹ See e.g. the summary offered in the Grzeszczak R., *Opinia prawna w przedmiocie oceny ustawy z dnia 20 grudnia 2019 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw w świetle prawa Unii Europejskiej*, Kancelaria Senatu 2020, https://www.senat.gov.pl/gfx/senat/pl/senatekspertyzy/5411/plik/oe_279.pdf, p. 11.

Despite these reservations the government obeyed the interim decision of the Court of Justice⁵² concerning the discriminatory age for women of the forced retirement⁵³ and it has adjusted the law accordingly.⁵⁴

In this period the regular courts and the Supreme Court of Poland started to formulate requests for preliminary ruling concerning mostly status of the so called “new judges”⁵⁵ which means the judges appointed by the President in the procedures at Judiciary Council, elected, accordingly to the majority opinion of the doctrine and also by the majority of judges with the essential violation of the Polish constitution.

From the perspective of the majority of judges and the legal doctrine there was no contradiction between the European law and the Polish Constitution. The Polish act has been seen as being based on these same values, which were reflected by Article 2 and 19 of the Treaty on the European Union. The problem was the growing activity of the government beyond the boundaries set up by the Constitution. The government, while adopting the new law, was infringing the principles of the rule of law, embodied in the fundamentals of the Polish legal systems and those of the European law. These are the roots of the conflict in Poland. The majority of judges were trying to defend their independence. **At the end of the year, on 21st December 2016, a new president of the Constitutional Tribunal, Julia Przyłębska has been appointed by the President of the Republic, according to the majority of scholars with a grave violation of the procedure.⁵⁶ The Constitutional Tribunal was quickly losing its impartial position. The third period of its functioning after the Polish accession to the European Union has started.**

This fateful situation, combined with the visible links between the Tribunal and the ruling majority has undermined the standing of the Tribunal which eventually has become a part of the political conflict, without the ability of its authority to resolve the most essential disputes within the society. **The European Court of Human Rights in its rulings in case Xero Flor⁵⁷ attested the violation of the Article 6 of the European Convention of Human Rights by stating that the participation in a ruling of the judge of the Constitutional Tribunal who has been elected with such grave infringement of law does not fulfil the standard of the due process of law.**

⁵² Following three requests for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber), Poland), made by decisions of 30 August 2018 (C-585/18) and of 19 September 2018 (C-624/18 and C-625/18) a judgment of CJEU was issued on 5 November 2019, C-192/18.

⁵³ By the Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, the age of retirement of the Supreme Court judges was lowered to 60 for women and 65 for men, with 67 years being the previous age for both sexes.

⁵⁴ Controversial art. 69 § 1 was changed by Ustawa o zmianie ustawy - Prawo o ustroju sądów powszechnych, ustawy o Krajowej Radzie Sądownictwa oraz ustawy o Sądzie Najwyższym z dnia 12 kwietnia 2018 r. (Dz.U. z 2018 r. poz. 848).

⁵⁵ Judgment of the European Court of Justice of 29 March 2022, C-132/20; Judgment of the European Court of Justice of 22 March 2022, C-508/19, Judgment of the European Court of Justice of 6 October 2021, C-487/19.

⁵⁶ See in the general public works, e.g., M. Pach, “Powołanie, którego nie było”, [Konstytucyjny.pl](https://konstytucyjny.pl/powolanie-ktorego-nie-bylo-maciej-pach/) from 10 February 2017, <https://konstytucyjny.pl/powolanie-ktorego-nie-bylo-maciej-pach/>, as well as in the Senate’s legal expertise, e.g. M. Chmaj et al., Ekspertyza prawna w przedmiocie oceny prawnej orzeczenia TK z 22 października 2020 r., sygn. K1/20, Zespół doradców ds. kontroli konstytucyjności przy Marszałku Senatu X kadencji, 22 October 2020, p. 17, https://www.senat.gov.pl/download/gfx/senat/pl/defaultaktualnosci/1924/13159/1/ekspertyza_prawna_w_przedmiocie_oceny_prawnej_orzeczenia_tk_z_22_pazdziernika_2020_r..pdf; Raport Zespołu Ekspertów Prawnych Fundacji im. Stefana Batorego, Funkcjonowanie Trybunału Konstytucyjnego w latach 2014-2017, Warszawa 2018, <https://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Funkcjonowanie%20Trybunału%20Konstytucyjnego.pdf>.

⁵⁷ Xero Flor w Polsce sp. z o.o. v. Poland from 7 May 2021, no. 4907/18.

This formal controversy revolving around the legitimacy of the Constitutional Tribunal in Poland is an important factor in discussing the judgments of this Tribunal concerning the primacy of the European law over the national law and in particular the Constitution. **For some authors these deficiencies are so grave that the decisions of this Tribunal cannot be considered legally binding judgments and must be seen as non-existing, if the illegally appointed judge participated in the ruling**⁵⁸ (it will be the case with judgments rendered in the third period discussed in this report). For another group of authors despite the evident illegality of the judging panel, if the majority of judges were legally appointed, the judgment cannot be contested for this reason.⁵⁹ There are also some authors who do not question the composition of the Court.⁶⁰ In the study the authors would not discuss in detail the problem whether the formal composition of the judicial power (the problem concerns the regular judges and the judges of the Supreme Court who have been appointed in the procedure with the participation of the so called new-Judicial Council elected with the grave infringement of the Constitution as well) causes the inexistence of the judgments.

It is, however, important to have in mind that the discussed decisions issued in the third period of the Constitutional Tribunal's operation should be perceived (which follows the majority of the doctrine, disregarding contrary opinions) as not formally binding and, at least formally, it is not a part of the Polish legal order, unless one accepts the fact of the legality of the consequences resulted from the revolution of the PiS which has undermined the very foundation of the legal order in Poland.

⁵⁸ P. Bogdanowicz, Opinia prawna na temat skutków prawnych orzeczenia Trybunału Konstytucyjnego w sprawie o sygn. akt K 3/21 dotyczącego niezgodności przepisów Traktatu o Unii Europejskiej z Konstytucją Rzeczypospolitej Polskiej w świetle prawa Unii Europejskiej, Fundacja im. Batorego, Warszawa 2021, p. 5; W. Wróbel, „Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych”, Europejski Przegląd Sądowy (2021), No. 12, p. 21; T. Zalasinski, „Pozorowanie problemu konstytucyjnego (opinia)”, Gazeta Prawna from 26.10.2021, <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8278024.wyrok-tk-wyszosc-prawa-krajowegokonstytucja-dr-tomasz-zalasinski.html>.

⁵⁹ 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), No. 12., p. 10

⁶⁰ M. Tomaszewski, „Prezes TK: Wszyscy sędziowie Trybunału wybrani zostali zgodnie z prawem”, Niezależna from 13.08.2021, <https://niezalezna.pl/407370-prezes-tk-wszyscy-sedziowie-trybunalu-wybrani-zostali-zgodnie-z-prawem>.

4. THE THIRD PERIOD: THE JUDGMENTS OF THE CONSTITUTIONAL TRIBUNAL ON PRIMACY OF THE EU LAW IN THE TIME OF ITS DEEP INSTITUTIONAL CRISIS

KEY FINDINGS

During the third period the key factors that influence the perception of the principle of the primacy of the EU law over the national laws are: doubts about impartiality of the Constitutional Tribunal, active Disciplinary Chamber of the Supreme Court, use of the judicial discipline to threaten judicial independence. The primacy of EU law, scope EU competences, binding power of the interim measures as well as judgments of the Court of Justice of the European Union were questioned despite harsh criticism from both judges and legal scholars.

4.1. Overall characteristics: growing influence of the internal political dispute on the jurisprudence

With the appointment of Julia Przyłębska the functioning of the Constitutional Tribunal has changed in a dramatic way. **The judges elected by the old parliament were practically prevented from deciding in the cases important for the government, the unconstitutionally elected judges were admitted to the adjudicating panels.** The president of the Tribunal started frivolously changing the assignment to the cases.⁶¹ At the current moment all judges in the Tribunal are the nominees of the ruling majority in parliament, some of them were directly before the appointment the activists of the ruling majority, known for the extreme positions, also in relation to the European Union. The Constitutional Tribunal lost its position as neutral arbitrator in the matters of constitutionality of law⁶². In this framework the Constitutional Tribunal issued judgments in which the relation of the Polish law to the European law was re-examined. These judgments have been issued on request of the representatives of the government (the Prime Minister or Minister of Justice). By these applications the government was seeking to deprive the judges who did not want to subordinate to the unconstitutional policies of the arguments in the disciplinary procedures started against them.⁶³ In order to achieve the expected judgments, the artificial legal conflicts have been created. **The Tribunal was answering the question on the primacy of the European Law over the Constitution on the basis of non-existing conflicts⁶⁴ since the constitution shared this same set of fundamental**

⁶¹ As an example see: Ł. Starzewski, „Bezprawna manipulacja składem TK ws. kadencji RPO. Wniosek Rzecznika o wyłączenie Julii Przyłębskiej. EDIT: TK oddalił wcześniejszy taki wniosek”, from 12.04.2021, <https://bip.brpo.gov.pl/pl/content/manipulacja-skladem-tk-kadencja-rpo-wylaczenie-juli-przylebskiej>.

⁶² About the political character of current Tribunal, see, e.g., D. Mnich, „Polityczny kontekst orzecznictwa Trybunału Konstytucyjnego”, *Przegląd Prawa Publicznego* (2017), No. 7-8, p. 11. Similarly, A. Sulikowski, „Trybunał Konstytucyjny a polityczność. O konsekwencjach upadku pewnego mitu”, *Państwo i Prawo* (2016), No. 4, p. 14, who, however also sees the possibilities to upkeep such political status with also far-reaching social benefits upon restoration of the legitimacy of the Tribunal.

⁶³ L. Wortham, F. Zoll, „Weaponizing judicial discipline: Poland” in: ed. R. Devlin, Sh. Wildeman, *Disciplining judges: Contemporary challenges and controversies*, Northampton-Cheltenham 2021, p. 298.

⁶⁴ J. Kranz, „Polska pod rządami hybrydowej praworządności”, *Europejski Przegląd Sądowy* (2021), No. 9, p. 44.

values. Not only the law of the European Union has been challenged in this way, but also the European Convention on Human Rights.⁶⁵

4.2. Jurisprudence of the Constitutional Tribunal

4.2.1. Judgment of 20 April 2020, ref. no. U 2/20.

In the judgment U 2/20⁶⁶ the Constitutional Tribunal declared the judgment of the three joined chambers of the Supreme Court unconstitutional. This decision of the Supreme Court⁶⁷ implemented⁶⁸ the judgment of the Court of Justice of the European Union in three joined cases C-585/18, C-624/18 and C-625/18 and was an attempt to restore the normal⁶⁹ functioning of the justice system.⁷⁰ The decision of the Constitutional Tribunal in this case violates the scope of competences of this court.⁷¹ According to Polish law the Constitutional Tribunal is not entitled to review the decisions of neither the regular courts nor of the Supreme Court. The judgment of the Constitutional Tribunal in this case does not question formally the principle of the primacy of European law. **Quite the opposite, it alleges that the judgment of the Supreme Court does not correctly implement the judgment of the Court of Justice and violates the principles of friendly cooperation.** It declares the judgment of the joined chambers as unconstitutional, since it allows the courts to verify the acts of appointments of judges by the President of the Republic. **In fact, however, the purpose of this judgment was to prevent the implementation of the mentioned judgment of the Court of Justice. The quoted judgment of the Constitutional Tribunal crosses the line of the competences of this Tribunal. This reasoning is hard to follow. It was issued on request of the Prime Minister and served the political purpose of the government seeking to break down the opposition of the judges against the unconstitutional attempt of the government to undermine the principles of judicial independence.**

⁶⁵ The importance of the broad legal basis, e.g. on the right to fair trial based on both national, EU and ECHR legal systems has been welcome in the doctrine, R. Grzeszczak, *Opinia prawna w przedmiocie oceny ustawy z dnia 20 grudnia 2019 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw w świetle prawa Unii Europejskiej*, Kancelaria Senatu 2020, https://www.senat.gov.pl/gfx/senat/pl/senatekspertyzy/5411/plik/oe_279.pdf, p. 13. Interestingly, the standard of the ECHR legal system is also referred to as the reference standard in the Resolution of the Disciplinary Chamber of the Supreme Court from 10 April 2019, II DSI 54/18.

⁶⁶ Judgment of the Constitutional Tribunal from 20 April 2020, U 2/20.

⁶⁷ Resolution of the Supreme Court from 23 January 2020, BSA I-4110-1/20.

⁶⁸ Counter argument regards both the material ineffectiveness of CJEU judgment in areas beyond the scope of transferred competences, as well as the formal unavailability of the CJEU judgments to have anyway a binding force beyond the particular case, P. Czarnek, „Glosa do uchwały składu połączonych Izb: Cywilnej, Karnej oraz Pracy i Ubezpieczeń Społecznych Sądu Najwyższego z 23 stycznia 2020 r., sygn. akt BSA I-4110-1/20”, *Przegląd Sejmowy* (2020), No. 3, p. 252.

⁶⁹ Against this, claiming that it is the resolution of the Supreme Court that leads to anarchy of the Polish justice system, P. Czarnek, „Glosa do uchwały składu połączonych Izb: Cywilnej, Karnej oraz Pracy i Ubezpieczeń Społecznych Sądu Najwyższego z 23 stycznia 2020 r., sygn. akt BSA I-4110-1/20”, *Przegląd Sejmowy* (2020), No. 3, p. 250.

⁷⁰ A. Wyrozumska, „Wyroki Trybunału Konstytucyjnego w sprawach K 3/21 i 6/21 w świetle prawa międzynarodowego”, *Europejski Przegląd Prawa Sądowego* (2021), No. 12, p. 28.

⁷¹ A. Wyrozumska, „Odwracanie kota ogonem bez żadnego trybu, czyli o orzeczeniach Trybunału Konstytucyjnego w sprawach Kpt 1/20 i U 2/20” in: ed. J. Barcz et al., *Problem praworządności w Polsce w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej (2018–2020)*, Warszawa 2021, p. 498.

4.2.2. The judgment of 14 July 2021, ref. no. P 7/20

In the follow-up decision the application of European law and the competence of the Court of Justice to decide on questions concerning the Polish judiciary was challenged in an open way. This decision was an answer to the question of the Disciplinary Chamber of the Supreme Court. **The Disciplinary Chamber has been created as a part of the disciplinary system, being one of the central mechanisms to control judges.⁷² According to some authors this chamber was unconstitutional,⁷³ since it has got an autonomous position in relation to remaining parts of the Supreme Court, being an art of the special court prohibited by the Polish constitution. The Disciplinary Chamber is a core element of the weaponized disciplinary system⁷⁴, serving to overcome the opposition of the judges who do not accept the reforms of the judiciary, confining judicial independence.**

The disbanding of the Disciplinary Chamber was ordered by the Court of Justice of the EU **in the decision of the Grand Chamber of the Court of Justice (case C-791/19)⁷⁵. By this decision the Court of Justice ordered an interim measure obliging immediately the Republic of Poland to suspend the application of the numerous provisions of the law on the Supreme Court, forming a base for the functioning of the Disciplinary Chamber and to stop transferring the disciplinary cases to the judges who do not fulfil the standards of independence, as indicated in particular in the judgment of the Court of Justice in the joined cases C – 585/18, C – 624/18 and C – 625/18.**

The case at the Court of Justice has been launched by the alleged violation by Poland of Article 191 of the Treaty on European Union, resulting from admitting that the content of the judicial judgments could be qualified as a disciplinary offense; not securing the independence and impartiality of Disciplinary Chamber, endorsing to the president of the Disciplinary Chamber a right to the discretionary decide about the jurisdiction of the disciplinary courts of the first instance, assigning to the Ministry of Justice a right to appoint the disciplinary prosecutor and by determining that the process of assigning the defender does not stop the procedure against the defender and that said procedure can run despite the excused absence of the defendant. Finally, the Commission questioned the possibility of the disciplinary responsibility for rendering a request for preliminary ruling.

The question formulated to the Constitutional Tribunal could be seen as a part of the strategy to save the Disciplinary Chamber. The answer Disciplinary Chamber wanted to know from the Constitutional Tribunal was whether Article 4 III second sentence of the Treaty on European Union in connection with the Article 279 Treaty on the Functioning of the European Union to the extent that it imposes a duty on the Member State to fulfil the interim measures concerning the structure and jurisdiction of the Polish courts violates the Polish Constitution.

The Constitutional Tribunal stated that the Disciplinary Chamber was authorized to submit the request for the answer to the legal question by the Constitutional Tribunal. **The Constitutional Tribunal did not share the view that the Disciplinary Chamber cannot be considered as a court, because it has been created by the Polish legislator in the frame of a sovereign constitutional power. The**

⁷² On the status of Disciplinary Chamber see also: Judgment of the European Court of Human Rights, Case of Reczkowicz V. Poland from 22 July 2021, no. 43447/19.

⁷³ W. Wróbel, „Izba Dyscyplinarna jako sąd wyjątkowy w rozumieniu art. 175 ust. 2 Konstytucji RP”, *Palestra* (2019), p. 21.

⁷⁴ L. Wortham, F. Zoll, “Weaponizing judicial discipline: Poland” in: ed. R. Devlin, Sh. Wildeman, *Disciplining judges: Contemporary challenges and controversies*, Northampton-Cheltenham 2021, p. 294.

⁷⁵ Judgment of the European Court of Justice (Grand Chamber) of 15 July 2021, ECLI:EU:C:2021:596.

autonomous position of this Chamber in the structure of the Supreme Court does not make, in the eyes of the Constitutional Tribunal, a forbidden extraordinary tribunal.

The Constitutional Tribunal remodelled the question of the Disciplinary Chamber stating that the subject matter of this constitutional review is a rule arising from the Treaties obliging the member states to fulfil the interim measures imposed by the Court of Justice in relation to the organization of the authorities, in particular in the field of justice.

The Constitutional Tribunal decided in line with the intention of the applicant, stating that Article 4 III second sentence of Treaty in connection with the Article 279 of the Treaty on Functioning of the European Union violates the Polish Constitution to the extent that it imposes *ultra vires* the duties on the Republic of Poland by means of the interim decisions concerning the organization of the Polish courts and their procedure and as such does not enjoy the primacy of the European law. The asking Disciplinary Chamber is of the opinion that, the rule of the Treaty understood as giving a power for the interim measures in such a case violates the principle of the primacy of the Polish Constitution.⁷⁶

The Constitutional Tribunal assumes in this judgment that the authorities of the European Union act here *ultra vires*⁷⁷ and therefore Article 4 III second sentence in connection with the Article 279 so far as it allows to issue the interim measures concerning the organization and functioning of the Polish judiciary violates numerous provisions of the Polish Constitution.

The Constitutional Tribunal explained in its judgment that this judgment does not derogate the rule, since it's a supranational law, but it is also not necessary because the law adopted *ultra vires* does not exist at all from the beginning since it was issued outside of the competence. The Constitutional Tribunal explains as well that this judgment has an effect of being only a so-called interpreting judgment, which means a judgment determining under which conditions the examined rule can be regarded as constitutional. For the Constitutional Tribunal even the most European – friendly interpretation of the law cannot provide a basis for the suspension of the functioning of the Polish judicial institutions and judges themselves. An opposite assumption would violate the Polish constitutional identity and infringe the sovereignty of the state. The transfer of sovereignty to the international bodies, as previewed by the Polish Constitution, must be interpreted narrowly. The Constitutional Tribunal states that the interim measures in this field introduce unknown institutions into the Polish system, such as the suspension of entire courts, procedures and eventually judges.

The Constitutional Tribunal concludes that this judgment does not deny the validity of the primacy of European law and the principle of its direct application.⁷⁸

4.2.3. Doctrinal response to the judgment of 14 July 2021, ref. no. P 7/20.

The Constitutional Tribunal tries to justify its right to decide on the decisions of the Court of Justice. **The problem is that this Tribunal has no right to decide on the constitutionality of judgments, irrespectively of its effects. The interim measures are an act of the application of law and not of**

⁷⁶ Numerous opinions challenge, though, the primacy of the EU law over the national constitution, e.g. P. Ruczkowski, „Problem pierwszeństwa prawa Unii Europejskiej przed prawem krajowym – kilka uwag na tle orzecznictwa Trybunału Konstytucyjnego”, *Rocznik Administracji Publicznej* (2018), No. 4., p. 145.

⁷⁷ However in the doctrine it is doubted why it could be the Constitutional Tribunal that should assess the *ultra vires* activity of the EU authorities: J. Kranz, „Polska pod rządami hybrydowej praworządności”, *Europejski Przegląd Sądowy* (2021), No. 9, p. 42.

⁷⁸ Such position is in general criticised as leading to selective acceptance of primacy of EU law to otherwise benefit from the EU. J. Kranz, „Polska pod rządami hybrydowej praworządności”, *Europejski Przegląd Sądowy* (2021), No. 9, p. 44.

the creation of law. The sophisticated way of the argumentation in this case serves the overcoming of these statutory limitations on its own competence resulting from the Polish law.

This judgment is an example of the creation of arguments in the internal political discussion⁷⁹ concerning the systematic crisis of the judiciary caused by the legislative and executive parts of the government. The judgment creates artificial conflicts between the Polish legal system and European law. The Court of Justice tries to prevent the further collapse of the Polish judiciary which is a part of the European justice system, responsible for the application of European law. With the weaponized system of discipline, partially controlled formally or informally by the Ministry of Justice and Prosecutor General, with – according to the legal scholars – illegal and appointed in the frame of the highly disputed legal and factual circumstances Disciplinary Chamber⁸⁰, the Polish judges are not able to fulfil their function of European judges. The member state has exclusive power to regulate the system of justice, so far, the system observes the fundamental framework of the Art. 2 and Article 19 I of the Treaty on Functioning of the European Union. Since it extends it the Union must maintain its competence to react.⁸¹ The Constitutional Tribunal tried to convince that the existing system does not endanger the essential principle required by the rule of law. The Constitutional Tribunal trespasses the field that must be restricted for the Court of Justice who must decide whether a certain scheme of the judiciary is so sensitive to the improper impacts that it is not possible to fulfil the role of the independent European judiciary.

This judgment is also questionable due to the fact that interim measures have the Republic of Poland itself as addressee and the Republic of Poland does not have control over them. The Polish law is not able to prevent their enforcement and must not have an impact on the international obligation of Poland to comply with them.⁸² The way of sanctioning in case of denial to observe the interim measures is outside of Poland's control as well. **For these reasons this judgment can be only seen as a political manifestation for internal purposes without sufficient basis in the Polish law.**

4.2.4. Judgment of 7 October 2021, ref. no. K 3/21.

The most radical position of the Polish Constitutional Tribunal was taken in the judgment K 3/21.

In this judgment the Constitutional Tribunal decided that Article 1 in connection with the Article 4 III of the Treaty on European Union, to the extent in which the European Union established by the equal and sovereign states and creating continuously closer union among the nations of Europe, whose integration which takes place on the basis of the law of the European Union and through the interpretation rendered by the Court of Justice of the European Union reaches the level characterized by the activity of the European Union's authorities beside the competences transferred to them by the Republic of Poland, in so far as the Polish Constitution does not have a status any more of the highest act of the Republic and the Polish Republic cannot act as the independent state, violates the Polish Constitution. **For the Constitutional Tribunal Article 19 I of the Treaty of the European Union violates the Constitution to the extent in which, in order to guarantee the effectiveness of the**

⁷⁹ J. Kranz, „Polska pod rządami hybrydowej praworządności”, Europejski Przegląd Sądowy (2021), No. 9, p. 44.

⁸⁰ L. Wortham, F. Zoll, “Weaponizing judicial discipline: Poland” in: ed. R. Devlin, Sh. Wildeman, *Disciplining judges: Contemporary challenges and controversies*, Northampton-Cheltenham 2021, p. 291; W. Wróbel, „Izba Dyscyplinarna jako sąd wyjątkowy w rozumieniu art. 175 ust. 2 Konstytucji RP”, *Palestra* (2019), p. 32.

⁸¹ S. Biernat, “How far it is from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP judgment on Poland”, *German Law Journal* (2020), Vol. 21, Iss. 5, p. 1111-1112.

⁸² N. Półtorak, „Kilka uwag o skutkach wyroku Trybunału Konstytucyjnego w sprawie K 3/21 dla stosowania prawa unijnego przez polskie sądy”, *Europejski Przegląd Sądowy* (2021), No. 12, p. 13.

European Union's law, it entitles Polish courts to ignore⁸³ in the process of judging the provisions of the Polish Constitution or entitles to judge on the basis of the provisions which are not applicable any more, since they have been cancelled by the parliament or declared as not applicable by the Constitutional Tribunal. Further the Constitutional Tribunal declares as unconstitutional Article 191 in the scope in which it allows the Polish courts to verify the legality of the appointment procedure of judges and in particular to verify the acts of the President of the appointment of judges.

In its decision the Constitutional Tribunal states also that in this judgment the interpretation of the Treaty was not needed and it was also not needed to file a request for the preliminary ruling to the Court of Justice, but the Constitutional Tribunal interprets the content of the Treaty nonetheless⁸⁴. The Tribunal stresses also that these conclusions do not infringe the principle of the primacy of the European Union, if the European Union does not act *ultra vires*.⁸⁵

4.2.5. Doctrinal response to the judgment of 7 October 2021, ref. no. K 3/21.

This judgment was highly criticized in the doctrine and by many representatives of the legal doctrine it is regarded as non-existing⁸⁶. Despite the question of the impact of the participation in the decision-making process of the persons who have been elected on the already occupied places and therefore their status as judges is highly controversial, the content of the judgment does not fulfil the minimum of necessary conditions for a judgment.

It was already identified by scholars that the first part of the judgment deals even not with the apparent conflict of rules, but expresses the stage of discontent of the judges with the current development of the European Union. Such stage, or process, cannot be, as rightly stated Florczak-Wątor, a matter of the

⁸³ It was drafted (the adequate novelisation has not been finally legislated) that it is a disciplinary offense of the judge to reject applying the law if its unconstitutionality or infringement of the international convention has not been declared by the Constitutional Tribunal, drafted art. 107 § 1, draft no. 69 from 12 December 2019 Poselski projekt ustawy o zmianie ustawy - Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw.

⁸⁴ A. Wyrozumska, „Wyroki Trybunału Konstytucyjnego w sprawach K 3/21 i 6/21 w świetle prawa międzynarodowego”, Europejski Przegląd Prawa Sądowego, (2021), No. 12, p. 37, claims that it proves the dissenting position of the Constitutional Tribunal. M. Jabłoński, S. Jarosz-Żukowska, „Kontrola konstytucyjności prawa pochodnego UE w trybie skargi konstytucyjnej i pytań prawnych” in: ed. M. Jabłoński, S. Jarosz-Żukowska, Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP, Wrocław 2015, p. 77, underline that issuing such prior question would limit such adversarial position.

⁸⁵ According to N. Półtorak, the commented judgment clearly violates the principle of the EU-law's primacy: N. Półtorak, „Kilka uwag o skutkach wyroku Trybunału Konstytucyjnego w sprawie K3/21 dla stosowania prawa unijnego przez polskie sądy”, Europejski Przegląd Sądowy (2021) No. 12, p. 14.

⁸⁶ E.g., P. Bogdanowicz, Opinia prawna na temat skutków prawnych orzeczenia Trybunału Konstytucyjnego w sprawie o sygn. akt K 3/21 dotyczącego niezgodności przepisów Traktatu o Unii Europejskiej z Konstytucją Rzeczypospolitej Polskiej w świetle prawa Unii Europejskiej, Fundacja im. Batorego, Warszawa 2021, p. 5; T. Zalański, „Pozorowanie problemu konstytucyjnego (opinia)”, Gazeta Prawna from 26.10.2021, <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8278024,wyrok-tk-wyzszosc-prawa-krajowegokonstytucja-dr-tomasz-zalanski.html>; similarly W. Wróbel, „Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych”, Europejski Przegląd Sądowy (2021), No. 12, p. 21. About fundamental flaws - A. Kustra-Rogatka, „Kontrola konstytucyjności aktu prawa pierwotnego Unii Europejskiej w wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21”, Europejski Przegląd Sądowy (2021), No. 11, p. 7. About premises of invalidity, but lacking procedure to declare it - 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), No. 12., p. 10.

ruling by the Court⁸⁷. Between this observation⁸⁸ and in the Polish Constitution there is not a relation which could be in a conflict. The decision deals with several assumptions – that the process has a result of the *ultra vires* acting by the Union’s authorities or that Poland loses its sovereignty.⁸⁹ In this part the judgment is not technically able to produce any effects for the legal system. It is not possible even to find out how to eliminate the apparent conflict between the Polish and the European legal order.⁹⁰ It is not possible to indicate how the Polish law could be changed, if the Polish legislator would like to adjust to the European legal standards. It is only a theoretical possibility. So far, **the Constitutional Tribunal sees the process of European integration as depriving Poland of its sovereignty. If the Polish government would take this judgment seriously, it would not have another choice than to withdraw the Polish membership in the Union**⁹¹. But the government had no such intention and even by formulating the submission to the Constitutional Tribunal it was not an intention of the Prime Minister to quit the Union.

The Tribunal assumes certain contents of the Treaty, but does not want to file the request for the preliminary ruling, arguing that the judgment does not interpret the law, although clearly it does.⁹²

This judgment must be seen also in the context of the judgments concerning the apparent violation of the Article 6 of the European Convention of Human Rights.⁹³ This provision has been also declared under certain specific understanding, assumed by the Constitutional Tribunal, ignoring the fact that the Polish Constitution was drafted in full accordance with the European system of human rights. The Polish Constitutional Tribunal in the judgments of the last period attempted to pull Poland out of the system of European integration, not only in the framework of the European Union, but also of the basic European consent on the most fundamental legal principles. These judgments belong to the line of instrumentalization of the Constitutional Tribunal in defending the reforms of the Law and Justice government in Poland. Their legal analysis is not really possible without considering the political conflict in Poland. **The Constitutional Tribunal has become one of the instruments in this conflict.**⁹⁴ The authors of this study are of the opinion that the judgments of the last period will not produce effects for the Polish legal system. W. Wróbel, a judge of the Supreme Court of Poland, stresses that the Constitutional Tribunal does not have the power to derogate the rules of international law from the

⁸⁷ 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), No. 12, p. 11.

⁸⁸ N. Półtorak stresses that even this observation of the Polish Constitutional Tribunal is not right, since the doctrine on primacy of the European law has been developed in 1960s and 1970s of the previous century and at the time of the accession Poland was fully aware of the already existing state of affairs: N. Półtorak, „Kilka uwag o skutkach wyroku Trybunału Konstytucyjnego w sprawie K 3/21 dla stosowania prawa unijnego przez polskie sądy”, *Europejski Przegląd Sądowy* (2021) No. 12, p. 14.

⁸⁹ N. Półtorak rightly notes that following this interpretation of the *ultra vires* doctrine would force each Polish court before the application of the any act of the Union, whether it has been issued in frame of the competences validly transferred to the Union by the Republic of Poland: *idem*.

⁹⁰ *Idem*.

⁹¹ See on the infringement of the loyal cooperation principle - 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), No. 12., p. 8.

⁹² On the exclusive right to interpret the EU-law by the Court of Justice: N. Półtorak, „Kilka uwag o skutkach wyroku Trybunału Konstytucyjnego w sprawie K 3/21 dla stosowania prawa unijnego przez polskie sądy”, *Europejski Przegląd Sądowy* (2021) No. 12, p. 13.

⁹³ In reaction to the Xero Flor decision of the European Court of Human Rights (case 4907/18) the Constitutional Tribunal in the judgment 6/21 stated about itself that it is not a court in sense of the Article 6 of the Human Rights Convention. W. Wróbel stresses that it is correct in this sense that the Constitutional Tribunal of Poland lost the attributes of the independent judicial power - W. Wróbel, „Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych”, *Europejski Przegląd Sądowy* (2021), No. 12, p. 20.

⁹⁴ *Idem*.

Polish legal system, even if it regards them unconstitutional. It is the task of the legislative and executive power to restore the situation of constitutionality. The regular Courts and the Supreme Court have a duty to apply further the contested provisions.⁹⁵

4.3. Conclusions

The Polish conflict is unique even from the perspective of such regular conflicts which are inevitable within the system of the law of the European Union. The Polish legal system is devastated by the internal dispute and the crisis of the justice system. This internal conflict does not allow to include the argumentation scheme of the Polish Constitutional Tribunal into the all-European discussion on the primacy of European law and its limits. For the national courts to take part in such debate there must be no doubts as to the legitimacy of the judges and the independence of the courts. It is not the case of the Polish Constitutional Tribunal. The objections as to the independency of the Polish Constitutional Tribunal arise from its political position caused by the Polish internal dispute. Furthermore, in the case *Xero Flor* of the European Court of Human Rights the composition of the Polish Constitutional Tribunal has been questioned from the perspective of the right to the due process and the access to the impartial court. The position of the Polish Constitutional Tribunal is challenged also internally, both by the regular courts and the Supreme Court. According to the authors of this study there are no doubts that the criticism of the recent Constitutional Tribunal adjudications, both formal and material, is adequate.

The new statute of the Supreme Court adopted by the Polish parliament is a step in the right direction. Unfortunately, the necessary improvements by the Polish Senate have been rejected by the lower chamber (Sejm) with the consequence that the new law will, in the authors opinion, not be able to resolve the internal conflict within the judiciary.⁹⁶ According to the authors of this study, in this shape the new law is not able to restore the internal legitimacy of the judicial system. The legitimacy of the Constitutional Tribunal at this stage could be irreversibly damaged. In this shape the Polish Constitutional Tribunal is not able to deliver the arguments into the European debate. In certain sense one may argue that the arguments of the Constitutional Tribunal reverse the *Solange I* and *II* case law in this sense that the Constitutional Tribunal is seeking a way to reject the European standard of the impartiality of the courts and the independence of the judiciary, even though this standard is also protected by the Polish constitution. Hence, in the judgments of the "last period" as discussed in this paper it was not a real conflict between the Polish and European law, but it is an internal Polish political conflict with the artificially created legal dimension. Between the Polish Constitution and the values reflected by Article 2 and 19 of the TEU there is no controversy. The problem arises from an attempt to change the Polish constitutional system by the current government with the use of the Constitutional Tribunal, even though there is not a sufficient constitutional majority willing to support such a change. The European law and the Court of Justice must be seen as one of the obstacles to this internal unconstitutional revolution within the Polish system. It is the real origin of creation of the apparent conflict between the European Treaties and the Polish law.

⁹⁵ Ibidem, p. 22.

⁹⁶ The act was signed by the President on 13 June 2022 but it has not been published yet.

5. FINAL CONCLUSIONS

This study presents various stages in the development of the case law of the Polish Constitutional Tribunal in relation to the law of the European Union after the accession to the Union.

The first period, which lasted until the autumn of the year 2015 was characterized by the case law which determined the constitutional limits for European law. In the spirit of a friendly co-operation 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.

The second period is a short time after 2015 with the devastating conflict between the government and the Court, damaging essentially the role and authority of its institution.

The third period is a period of contesting the legitimacy of the Constitutional Tribunal, due to the fact of the unconstitutional election of the three judges, wrongful (according to numerous legal scholars)⁹⁷ appointment of the President of the Court, practices in assigning the cases and unjustified change of such assignments and also on postponing the decisions for not sufficient reasons⁹⁸ and finally leading to the cases which practically serve the control of the judgments of the Court of Justice without legal basis.⁹⁹

The future government will have a difficult task to deal with the consequences of the activity of the Constitutional Tribunal in this last period. In the authors opinion, this case law will remain without long-lasting effects. In the current situation, all Polish authorities and in particular courts are obliged to ignore judgments even of the Polish highest courts, if they openly violate the *acquis Communautaire*¹⁰⁰ and the Polish government should undertake all possible steps to restore the compliance with the EU law.

In the international context Poland cannot justify the lack of fulfilment of its international obligations with arguments based on the case law of internal courts or other authorities.¹⁰¹

⁹⁷ Pach, „Powołanie, którego nie było”, *Konstytucyjny.pl* from 10 February 2017, <https://konstytucyjny.pl/powolanie-ktorego-nie-bylo-maciej-pach/>; E. Krzemień, „Zoll: to atrapa Trybunału. OKO.press: zgoda, z jednym wyjątkiem”, *Okopress* from 22.12.2016, <https://oko.press/zoll-atrapa-trybunalu-oko-press-zgoda-jednym-wyjatkem/>.

⁹⁸ Prawo unijne a krajowe. TK ponownie nie zajmie się wnioskiem premiera, rozprawa spadła z wokandy, *Gazeta prawna* from 14.06.2022, <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8190699,prawo-unijne-prawo-krajowe-srodki-tymczasowe-tsue-tk-ustawa-dezubekizacyjna.html>.

⁹⁹ For W. Wróbel it is a consequence of the loss by the Polish Constitutional Tribunal the attributes of the independence judicial institution that the Polish courts shall abstain from submitting the questions to the Constitutional Tribunal since they cannot delegate any portion of the adjudication power to the institution which does not enjoy the judicial independence: „Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych”, *Europejski Przegląd Sądowy* (2021), No. 12, p. 21.

¹⁰⁰ N. Półtorak, „Kilka uwag o skutkach wyroku Trybunału Konstytucyjnego w sprawie K 3/21 dla stosowania prawa unijnego przez polskie sądy”, *Europejski Przegląd Sądowy* (2021) No. 12, p. 18.

¹⁰¹ A. Wyrozumska, „Wyroki Trybunału Konstytucyjnego w sprawach K 3/21 i 6/21 w świetle prawa międzynarodowego”, *Europejski Przegląd Prawa Sądowego*, (2021), No. 12, p. 31.

6. POLICY RECOMMENDATIONS

It is problematic to form policy recommendation because the current crisis in Poland means that the legal matter at hand becomes also a political one. Some Polish institutions refuse to recognize each other's authority (see relations between the judges, courts, Krajowa Rada Sądownictwa (National Council of the Judiciary), Constitutional Tribunal and its judgments). This leads to the crisis in the application of law and makes drawing conclusions as to the effects of particular judgments and doctrinal views problematic.

The recent judgment of the Polish Constitutional Tribunal should not be seen as a real input into the European discussion on the primacy of European law. The judgment: should with no doubts, according to the authors of this study, be perceived as producing no legal effects and, as a result, it should be of no consequences for the legal order of the Union, its institutional balance, and on the distribution of competences between EU and its Member State.

The Constitutional Tribunal in its, according to numerous legal scholars, illegal setting, was trying to provide justifications to the unconstitutional and proclaimed in violation of the treaties reform of the Polish judiciary. In prevailing opinion among legal scholars the discussed judgments of the third period did not produce legal effects within the Polish legal system whereas the contrary opinions should be disregarded as formally and materially flawed. They have also not impacted in any way the European law. The Polish legislator by adopting the law reforming the Supreme Court, including also an impartiality test for judges, has proved itself aware of the constitutional crisis created in Poland after the currently ruling party in Poland has taken over the power. Even though the new law, just signed by the President of Republic, is a step in the right direction, it does not repair the desolate situation caused by the government to the system of the Polish judiciary. It means, however, that the Polish legislator ignored the recent rulings of the Polish Constitutional Tribunal.

The principle of primacy of European law, even if explicitly stated in European law, would not be a factor in this discussion. Even if such a rule would be provided (it is not the case as the European Constitution has not been adopted), it would not help to overcome the existing crisis. In the existing structure of the European Union, without a conversion into the federal state,¹⁰² the conflict between the Court of Justice and the constitutional courts must be seen as a part of the inevitable legal reality. The Union has sufficient tools to deal with such conflicts. It is, however, necessary to ensure that these conflicts are real legal conflicts and that the constitutional courts, taking part in such discussions, are impartial and independent institutions, legally established and composed. If these courts do not comply with such requirements, the legal stability not only of the member states but also of the Union is endangered. The internal crisis in the Republic of Poland weakens the EU system of protection of individual rights, because a part of the EU jurisprudence system (namely Polish judiciary) does not meet the minimum requirements of independence. The Union must use in such cases the existing tools to help restore the rule of law in the affected countries. The use of the constitutional courts to legalize the massive infringements of the internal and European law is one of the most important threats to the rule of law, due to the immense power of the constitutional courts and lack of remedies against their judgments.

¹⁰² F. Zoll, „Über die neuen ideen für Europa : das neue Recht und die neue Justiz“ in: Europa: In Vielfalt geeint! : 30 Perspektiven zur Rettung Europas vor sich selbst, ed. G. Kirchhof, M. Keller, R. Schmidt, München : C. H. Beck 2020, p. 481-488.

Key focus should be on granting the independence of judiciary: provided that the changes of the jurisprudence are driven by the undue impact of the governing party on the body of the judiciary, there is a need to promote and secure judicial independence. **The practical recommendation at this moment is a duly examination of the fulfilment of the mile stones by Poland in the process of the restoring of the independence of the judiciary system.**¹⁰³ In this regard the ELI project on ELI-Mount Scopus European Standards of Judicial Independence is also worth mentioning as the aim of this initiative is to review, update and adjust the Mount Scopus International Standards of Judicial Independence to the reality of European jurisdictions, having in regard current challenges to judicial independence in some of the European countries.¹⁰⁴ The reviewed Mount Scopus International Standards of Judicial Independence will provide a point of reference for reviewing the independence of judiciary and during the reconstruction of an independent judiciary system.

¹⁰³ European Parliament resolution of 9 June 2022 on the rule of law and the potential approval of the Polish national recovery plan (RRF) (2022/2703(RSP)).

¹⁰⁴ <https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-mt-scopus/>. Project reporters are: S. Shetreet, S. Turenne, L. Wortham, F. Zoll.

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The approach taken by the jurisprudence of the Polish courts, especially the Constitutional Tribunal, concerning the principle of the primacy of the EU law in relation to the Polish law and in particular to the Polish Constitution has changed substantially since Polish accession to the EU. These changes were a side-effect of an internal political campaign of a party *Prawo i Sprawiedliwość* – “Law and Justice” aimed at strengthening their position as a ruling party.

This study is commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the JURI Committee.

PE 732.475
IP/C/JURI/IC/2022-025

Print ISBN 978-92-846-9446-4 | doi:10.2861/926048 | QA-08-22-135-EN-C
PDF ISBN 978-92-846-9445-7 | doi:10.2861/512298 | QA-08-22-135-EN-N