Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland†

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Introduction

The application submitted by Prime Minister Mateusz Morawiecki to the Constitutional Tribunal, in which he challenged the legality of the European Court of Justice judgments inconvenient to the current Polish government, came at a time when, after months (or even years) of wavering and hesitation, the EU finally began to enforce the Polish government's compliance with EU law and principles.

The 'judgment' of the Constitutional Tribunal was handed down with an uncharacteristic (for the Constitutional Tribunal these days) speed on 7 October 2021. In contrast, disclosure of full reasons for the decision has suffered unusual delay: as a matter of fact, they have not been published even as this Case Note is prepared for publication (*see* n. 7 below). (It is important to note that these proceedings have been invalid from the beginning, due to the incorrect composition of the judges' panel, as explained below, in the opening paragraph of the next part of this Case Note.) Polish and other European lawyers were

†Note from the editors: this case note was accepted shortly before publication of the written reasons in mid-November 2022, ⟨https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=22621&sprawa=24085⟩, visited 9 January 2023. Having considered these carefully, the authors are satisfied that their analysis remains valid.

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confronted with an unprecedented dictum, which in itself constitutes a gross violation of EU law and the Polish Constitution according to which Poland must comply with binding international law. It is difficult to find any similar negation of the rule of law, of the principle of sincere cooperation among member states and of the principle of effective judicial protection established by the European Court of Justice, uttered by a constitutional court of any other member state of the EU. It is also difficult to ignore the obvious distortion on which the entire judgment is based, that there is a substantial inconsistency between the EU treaties (interpreted in a manner not favoured by the Polish government) and the Polish Constitution. No such contradiction exists. None of the representatives of the Polish government, President, Prosecutor General or parliamentary majority managed to prove it during the hearings, nor has it been demonstrated by the Constitutional Tribunal.

The issuing of the 'judgment' was preceded by the heroic struggle of the former Ombudsman, Professor Adam Bodnar, and other experts representing the Ombudsman's office, who tirelessly and with the highest standards of legal knowledge and personal demeanour, answered several hostile questions from the bench. The statements of the Ombudsman's representatives before the Tribunal will probably go down in the history of the Polish judiciary as examples of the highest legal and moral attitude.

In this Case Note, the decision of the Constitutional Tribunal will be summarised (in the next part) and criticised (in the part after that) on its merits, in order to prove the violations of the law to which it leads. But we can anticipate the conclusions: the decision, faulty though it is, constitutes a warning to all Polish courts: common, administrative and the Supreme Court, whose judges would attempt to apply the rulings of the European Court of Justice. If they do so against the will of the Constitutional Tribunal (and Polish executive), they will be exposed to various repressive actions, including disciplinary proceedings. The weeks and months after the decision was issued confirmed this threat: Polish judges are being punished for adjudicating in accordance with the Polish Constitution and EU law.

The Constitutional Tribunal's decision, however, has one other aspect, crucial for the scope of rights and freedoms of Polish citizens who are EU citizens. By blocking the application by Polish courts of the case law of the European Court of Justice in the crucial area of the rule of law, it deprives citizens of the guarantee of the right to a fair trial, and therefore the right to an effective remedy and access to an impartial court, as defined in Article 47 of the Charter of Fundamental Rights (discussed in the final part of this Case Note).

Description of the decision

To begin with, we need to explain our terminology. While Decision K 3/21 is titled 'Judgment' ('*wyrok*', in Polish), it has no legal validity, as it was handed

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down by a full panel of the Constitutional Tribunal which included three persons who are not judges (Messrs Mariusz Muszyński, Justyn Piskorski and Jarosław Wyrembak) because they were 'appointed' to already filled positions (or succeeded persons appointed to already filled positions). One of us describes in some detail elsewhere the background and the developments of this lawless court-packing.[1] We should add that the Polish President and Government (and of course members of the Constitutional Tribunal) recognise those three persons as fully-fledged judges. But because we stand by our opinion about their unlawful appointments (an opinion recently vindicated by the European Court of Human Rights),[2] which in our view contaminates with invalidity all 'judgments' issued with their participation, we will refer to this questionable 'judgment' neutrally, as the 'Decision'.

The core of the Decision is the declaration of unconstitutionality under the Constitution of Poland, of several articles of the TEU, insofar as they produce certain effects discerned and disfavoured by the Constitutional Tribunal:

- First, Article 1(1) and (2) in connection with Article 4(3) TEU, insofar as the EU, established by equal and sovereign states, creates 'an ever closer union' and enters 'a new stage' (which is a formula used in Article 1 TEU) in which the following three consequences occur: (1) EU institutions act outside the scope of competences conferred upon them by Poland in the Treaties; (2) the Constitution ceases to be the supreme law of Poland having primacy over any other laws, and (3) Poland is unable to function as a sovereign and democratic state, are inconsistent with several articles of the Polish Constitution.[3]
- Second, Article 19(1), (2) of the TEU is inconsistent with several articles of the Constitution[4] insofar as it confers upon domestic courts a competence to bypass the Constitution, and with several other articles[5] insofar as it grants those courts a right to adjudicate on the basis of provisions which have lost their validity (having been either revoked by the parliament or invalidated by the Constitutional Tribunal).
- Third, Article 19(1), (2) and Article 2 TEU are inconsistent with several articles of the Constitution[6] insofar as they confer upon domestic courts a competence to

[1]W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) p. 61-66.

[2]ECtHR 7 May 2021, No. 4907/2018, *Xero Flor w Polsce sp. z o.o.* v *Poland*.

[3]With Arts. 2 (democracy, the rule of law, social justice), 8(1) (the Constitution is the supreme law of Poland) and 90(1) (mandating a transfer of some competences upon an international organisation), the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483).

[4]With Arts. 2, 7 (all public institutions act only on the bases and within the limits of law), 8(1), 90(1) and 178(1) (judicial independence).

[5]With Arts. 2, 7, 8(1), 90(1), 178(1) and 190(1) (finality of judgments of Constitutional Tribunal).

[6]With Art. 2, 8(1), 90(1), 179 (judges appointed by the President of the Republic on recommendation by the National Council of Judiciary) in conjunction with 144(3) (judicial nominations

> review the validity of particular judicial appointments (including judicial nominations of the President), the legality of judicial recommendations by National Council of Judiciary, and potential improprieties in the process of judicial appointment and ultimately a competence to refuse to recognise a person's appointment as a judge on that basis.

As already mentioned in the Introduction above, the Decision was handed down at the initiative of the Prime Minister, whose motion to the Constitutional Tribunal of 19 March 2021 was supported by all major institutions entitled to appear before the Tribunal (President, Prosecutor General, Minister for Foreign Affairs, and Speaker of the parliamentary lower chamber, the Sejm), except for the Ombudsman, who vigorously opposed it. The Decision and its reasons largely follow the Prime Minister's motion (subject to an exception, mentioned below). The Decision was joined by a majority of 10 out of 12 judges sitting as an *en banc* panel. Two persons – Judge Piotr Pszczółkowski and Mr Jarosław Wyrembak (occupying unlawfully a judicial seat on the Tribunal) – notified the Tribunal of their dissenting opinions, which are yet to be published.

The reasons (not yet published in their full written form, at the time of writing) delivered orally by Judge-Rapporteur Mr Bartłomiej Sochański, and in a semi-official 'Press Release', can be summarised as follows.[7]

First, in the hierarchical structure of sources of law, the Constitution takes precedence before ratified international treaties, such as the TEU, and so the Constitutional Tribunal has a competence to review their constitutionality. In conducting this review, the Tribunal considers both the substance of the Treaty provisions and also their interpretation by the European Court of Justice. In this process, the Tribunal does not conduct an independent interpretation of the Treaty but only determines their meaning.

by President do not require a countersigning by the Prime Minister), and 186(1) (National Council of Judiciary is a guardian of judicial independence).

[7]Note that we base our description of the Reasons for Judgment on our own notes of oral reasons delivered by Judge-Rapporteur (transmitted by live video on the Internet) on 7 October 2021, on semi-official Press Release (hereinafter 'Press Release') ⟨https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej⟩, visited 9 January 2023 (it is 'semi-official' because it is uploaded on the official website of the Tribunal, with approval (as such Press Releases always are) of the President of the Tribunal, and istreated as authoritative by the commentators; it does not amount, however, to fully-fledged formal Reasons), and also on an unofficial but very accurate transcript published in Archiwum Osiatyńskiego, ⟨https://archiwumosiatynskiego.pl/images/2021/10/Polish-CT-decision-of-7-Oct-motifs_PL.pdf⟩, visited 9 January 2023. It should be added that, judging from an earlier practice, the Press Release contains all the important reasons to be provided at a later stage.

Second, the Tribunal relied upon a Constitutional Tribunal judgment of 11 May 2005 (K 18/04) regarding the accession treaty which contained a warning that the constitutional limits of integration within the EU would be reached and exceeded if, as a result of conferring competences upon the EU, Poland ceases to be a sovereign and democratic state. A tacit implication (not stated in so many words but clearly implied by the first part of the Decision and its determination of unconstitutionality) is that, at the current stage of integration such a wrongful situation *has* been reached.

Third, the organisation of the judiciary or, more broadly, a system of justice, is not part of the competences conferred by Poland upon EU institutions. The latter institutions have no authority to presume tacit conferral of certain competences, nor to derive new competences from those expressly conferred upon them in the Treaties. However, as a result of case law by the European Court of Justice, the TEU's provisions began covering the organisation of the system of justice; hence such interpretations by the European Court of Justice constitute a *de facto* creation of new competences for the EU beyond those expressly conferred. This is inconsistent with Polish 'constitutional identity'. Neither Article 19 TEU nor Article 2 can be a basis for extending EU competences upon the system of justice. In particular, the catalogue of values in Article 2 (containing, as it does, the rule of law) has only an 'axiological meaning' and is not a set of legal principles.

Fourth, the Tribunal warned that in some unspecified future it may be reviewing not only the Treaty provisions but also the European Court of Justice's case law, being part of the EU 'normative order'. The reasons announced by the Tribunal *seem* to suggest (both oral reasons and Press Release are ambiguous about this point) that it may happen in future and that this function has not been performed in *this* Decision yet. But, having castigated the European Court of Justice's 'progressive activism' and its interference with exclusive competences of Polish authorities, the Tribunal makes it clear that such a review of European Court of Justice case law cannot be ruled out. Hence, as the Press Release states, the Tribunal will 'subject the [European Court of Justice's] rulings to direct assessment of their conformity to the Constitution [of Poland], including their elimination from the Polish legal order'.[8] This ominous warning concludes the reasons provided for Decision K 3/21.

The Decision was handed down as a self-styled 'response' to European Court of Justice Judgment C-824/18 of 2 March 2021, which figured prominently in the Prime Minister's motion seizing the Tribunal, and also in oral statements by the representatives of the institutions supporting the motion during the hearings before the Constitutional Tribunal. In this Judgment, answering to a request for preliminary ruling by the Supreme Administrative Court of Poland, the

[8]Press Release, *supra* n. 7, Part IV, para. 22.

Court of Justice found the procedure of nomination to positions of judges of the Supreme Court defective (due to the exclusion of judicial review of recommendations by the National Council of Judiciary), as a result of which there could be legitimate doubts as to the imperviousness of the newly appointed judges to external factors, in particular, to the direct or indirect influence of the legislature and the executive, as well as about their independence or impartiality.

Critical comments

Decision contrary to EU law

In scrutinising the EU Treaty, the Tribunal acted, unquestionably, contrary to EU law. No domestic court, constitutional or otherwise, has an ex post competence (years after ratification) to review, much less to invalidate, any articles of EU Treaties. To grant a court such a right would directly contradict the principle of the primacy of Treaties over domestic legal orders. When ratifying the accession Treaty, Poland had not made any reservations (which would be ineffective anyway, unless previously announced in a protocol approved by all other ratifying states), and the Treaty cannot be 'carved' in such a way in any member state. In order to support legal integration within the EU, the Treaties must be in force and legally effective uniformly in all member states. So, the constitutional scrutiny of the Treaties in any member state is contrary to EU law. Even if (arguendo) such scrutiny was allowed under *Polish* constitutional law (a point to which we will turn momentarily), a member state cannot appeal to its domestic law in order to qualify or restrict the effectiveness of EU law in that state. As the European Court of Justice stated recently in a 'Romanian judges case', reasserting its established case law,[9] the principle of the primacy of EU law 'requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States'.[10] Hence, 'a Member State's reliance on rules of national law, *even of a constitutional order*, cannot be allowed to undermine the unity and effectiveness of EU law'.[11]

But it is also contrary to *Polish* constitutional law. The Constitutional Tribunal in its Decision asserts its authority under Article 188(1) of the Constitution,

[9]*See* ECJ 17 December 1970, Case C-11/70, *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, para. 3; ECJ 26 February 2013, Case C-399/11, *Stefano Melloni* v *Ministerio Fiscal*, para. 59.

[10]ECJ 18 May 2021, 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'*, para. 244.

[11]Ibid., para. 245, emphasis added.

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which provides that the Tribunal adjudicates about the conformity of, *inter alia*, international agreements with the Constitution. Furthermore, it alleges to rely on the key judgment of the Tribunal (from a time well before its political capture of 2015-16), namely K 18/04 of 11 May 2005, regarding the constitutionality of ratifying the accession treaty. But the extension of an Article 188(1) competence to EU Treaties is on its face contrary to the principle established by that landmark judgment. That judgment stated that the 'Constitutional Tribunal is not authorized to conduct independent review of the constitutionality of primary law of the European Union. However, it has authority regarding the Accession Treaty qua a ratified international agreement (Article 188(1)) of the Constitution'.[12] But the Decision of October 2021 did not review, nor establish, the unconstitutionality of the *Accession Treaty*, but the *EU Treaty* directly. It therefore constitutes 'an independent review of the constitutionality of the primary law of the EU' – hence an action expressly disallowed by the Tribunal in its K 18/04 judgment. So much for the current Tribunal's claim that it is not overruling its prior case law re the relationship between EU law and the Polish Constitution.

So there are two other, perhaps more charitable (though, as we will show, in reality even more problematic), ways of reading the subject-matter of the Decision of October 2021: (1) either that it applies to some specific *judgments of the* European Court of Justice ; or (2) that it is a judgment belonging to a category of *interprétation conforme*, and thus provides for a prescribed interpretation of the TEU articles invoked by the motion of the Prime Minister. Before we briefly discuss these two other readings it is important to emphasise that they are distinct from each other. Scrutiny of a judgment (or of a line of judgments) itself is not *eo ipso* an interpretive judgment: it considers those judgments as an (alleged) novel source of law, and treats them as such.

The accuracy of the first reading, that the Decision's intention is to target a particular (line of) case(s) of the European Court of Justice, is confirmed by the prominence, throughout the Decision, of judgment C-284/18 of 2 March 2021 in which the European Court of Justice negatively assessed a procedure of appointing Supreme Court judges. *Politically* speaking, it is this judgment that caused a particular irritation by Polish authorities because court-packing was a centrepiece of political capture of the highest appellate court in Poland, tasked *inter alia* with confirmation of the validity of elections. *Legally* speaking, this judgment figures most prominently in the Prime Minister's motion, as then echoed in the reasons for Decision K 3/21. But while this reading may be accurate as the most plausible way of *explaining* Decision K 3/21, it is at the same time the least successful way of *justifying* it. Neither under EU law nor under Polish constitutional law does the Constitutional Tribunal have an authority to set aside

[12]Judgment of the Polish Constitutional Tribunal of 11 May 2005, K 18/04, Part III.1.2.

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judgments of the European Court of Justice. EU law, as applied and interpreted by the European Court of Justice, maintains primacy over domestic law. To establish any domestic court as a sort of super-court over the European Court of Justice would be inconsistent with primacy. This is the EU side of the coin. Turning now to Polish law, the Constitution contains an exhaustive and limited catalogue of subject matter ('target acts', as we may call it) that the Constitutional Tribunal may review (Article 188), and an authority to review judgments of the European Court of Justice (or judgments of any other court, for that matter) is *not* listed. In oral reasons, summarised by the Press Release, the Tribunal attempts to defend having such authority by claiming that European Court of Justice rulings 'are formulated in the way which assigns the norms of the [EU] Treaties with a specific meaning, including statements imposing obligations' and '[w]ithin that meaning, they are also subject to a review of conformity to the Polish Constitution, carried out by the Constitutional Tribunal'.[13] The non-sequitur of the last sentence is breathless in its ambition. *Any* court 'assigns the norms' of a law being applied in a concrete case 'with a specific meaning'. To claim an authority of constitutional review on *that* basis would expand the power of review in a virtually limitless fashion. It also goes well beyond an established constitutional principle in Poland that the list of competences of the Constitutional Tribunal cannot be expanded by 'adding' further implied competences.

So that reading of the Decision is a non-starter. What about the other reading, that it is an *interprétation conforme* type of judgment? Before we consider this reading, we must observe that the Tribunal expressly *renounces* that reading in two ways, so there should be a strong presumption against adopting this reading. First, in its reasons, the Tribunal urges that its Decision concerns the conformity of the *norms* of EU law (rather than its interpretation) and, in a rather puzzling statement, announces that it 'does not provide an autonomous interpretation of EU law' but rather that the Tribunal's 'thought process ... merely consists in determining the substance of those norms and in verifying their conformity to the Constitution'.[14] What can it mean is anyone's guess. How can one 'determine the substance of the norms' without interpreting them? But even if one attributes to the Constitutional Tribunal an implicit doctrine of '*clara non sunt interpretanda*', the very fact of there being a controversy around those norms suggests that the norms at issue are not '*clara*'. An interpretation-free determination of the substance of the norms as general and complex as those invoked in the motion is simply not available to any judge.

[13]Press Release, *supra* n. 7, Part III para. 16.
[14]Ibid., Part I para. 2.

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But there is an even stronger reason to believe that Decision K 3/21 does not belong to the category of interpretive judgments: a literal reading of the operative part of the Decision. It declares the unconstitutionality of several articles of TEU but does so *without* an 'if understood as' proviso. That proviso *was* present in the motions by Prime Minister but the Tribunal removed it, changing importantly the sense of 'unconstitutionality' at stake (to a degree that one may perhaps argue that in its Decision the Tribunal went beyond the scope of the motion – something that Polish Constitutional Tribunal is statutorily prohibited from doing).[15] The language of the operative parts of the Decision clearly and self-consciously avoids any hints that it provides for a prescribed, or rejects a banned, *interpretation*. Rather, it uses a style of 'insofar as'. The implication is: since the Court declares this unconstitutionality in an unconditional way (not: 'if understood as . . . '), then the wrongful conditions abhorred by the Tribunal *have* taken place, in its view. Note again that it is *not* an interpretive judgment. While a distinction between 'if interpreted as . . . ' and 'insofar as . . . ' may seem pedantic to non-lawyers, it is in fact fundamental from a legal point of view. The Decision as announced, in its operative parts, simply and unconditionally 'removes' from the Polish legal system some parts of the impugned EU Treaty articles, rather than upholding them under the condition that they are understood in a way prescribed by the Constitutional Tribunal.

But it is true that the distinction does not make any difference from at least one point of view: neither reading is within the authority of the Constitutional Tribunal. Just as the Constitutional Tribunal is *ultra vires* if it scrutinises some parts of EU Treaty, so it would be *ultra vires* if it mandated a proper interpretation of the Treaty, because the ultimate, unquestionable authoritative interpreter of the EU is one court, and one court only: the European Court of Justice. And the deep (if repressed) realisation of that fact may explain a bizarre statement, noted above, that the Tribunal does not provide an 'autonomous interpretation' of the EU Treaty but 'merely' determines its substance. In this context the explanation provided by the Tribunal as to why, when faced with a problem regarding the interpretation of EU law, the Tribunal failed to raise a question of preliminary reference, is disingenuous. The Tribunal basically said: the European Court of Justice is indeed tasked with the interpretation of EU law but it is *we*, the Tribunal of Poland, who must have 'the last word as regards the conformity of any norms, including EU norms, to the Constitution of the Republic of Poland'.[16] But on its face, this is question-begging because it is the interpretation *of EU law* (hence, a domain of European Court of Justice) which has inclined the

[15]Statute of 16 November 2016 on organisation of and proceedings before the Constitutional Tribunal, Art. 67.

[16]Press Release, *supra* n. 7, Part 1 para. 4.

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Constitutional Tribunal to find an inconsistency of that law with the Polish Constitution.

An EU-law unfriendly decision

It is both an established rule of European Court of Justice case law as well as of Polish case law that, when interpreting domestic law which *prima facie* may give rise to inconsistency with EU law, the domestic court should try as best it can to interpret the law in a way consistent with EU law, in order to remove any possible perception of incompatibility. In the already cited 'Romanian judges' case, the European Court of Justice put it (encapsulating its long line of cases) in the following way:

> the principle that national law must be interpreted in conformity with EU law, by virtue of which the national court is required, to the greatest extent possible, to interpret national law in conformity with the requirements of EU law, is inherent in the system of the Treaties, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of EU law when it determines the dispute before it.[17]

The requirement of interpretation avoiding a possible collision applies to any domestic law, sub-constitutional and constitutional alike, and to any domestic court, including constitutional tribunals. This principle had been fully endorsed by the Polish Constitutional Tribunal in its early decisions regarding EU law. In an already quoted judgment, K 18/04 on the accession treaty, the Tribunal invoked the primacy of the Constitution in Poland (Article 8.1) but at the same time noted that this constitutional provision is 'in direct vicinity' of the Constitution's Article 9 principle of compliance with binding international law.[18] It added that 'Community law' is not quite external to Polish law because it is co-created by Poland; hence, those different legal systems existing in Poland should 'coexist based on the principle of friendly interpretation and cooperative coexistence'.[19] It announced that its interpretation must be 'EU law friendly', though it added that such an interpretation has its limits, namely when its results would be either contrary to explicit constitutional rules or undermine minimal 'protective functions' ('*funkcje gwarancyjne*') of the Constitution. In another important early judgment regarding relations between EU and Polish law, namely on the unconstitutionality of a Polish law implementing the European Arrest Warrant, the Tribunal used an unusual device of postponing the effectiveness

[17]*Asociația 'Forumul Judecătorilor din România'*, *supra* n. 10, para. 246.
[18]K 18/04, *supra* n. 12, Part III.2.1.
[19]Ibid., Part III.2.2.3.

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of its finding of unconstitutionality by 18 months, doing so, *inter alia*, on the basis of the need to protect Poland's international credibility as a state respecting the '*pacta sunt servanda*' principle.[20]

No such 'EU-law friendly' interpretation or '*pacta sunt servanda*' maxim are visible, even remotely, in the October 2021 Decision. On the contrary, it reads as if based on an implicit presumption of inconsistency between the Constitution and EU Treaties. Perhaps it is best reflected in the recital of the three phenomena which posit, according to today's Constitutional Tribunal, the unconstitutionality of Article 1 paras 2 and 3 and Article 4(3) of the TEU (these points are characterised in the Tribunal's reasons as having 'fundamental significance').[21] These 'new stage' phenomena are construed in a categorical and antagonistic way, without any attempt at 'EU-law friendly' interpretation. We shall review them now in the same order as they appear in the Tribunal Decision.

First, according to the Tribunal, EU institutions acted *ultra vires*, beyond the scope of conferral by member states, and thus the scope of their competences. The main evidence produced within the Reasons for the Decision is about the alleged intrusion of EU institutions upon the organisation of the system of justice – which is said to belong to the exclusive competences of member states and specifically to not have been conferred upon EU institutions by Poland. 'Those [conferred] competences comprise neither the functioning of the judicial system nor the organisational structure thereof'.[22] Yet, neither the relevant Treaty provisions nor the interpretation thereof by the European Court of Justice imply such conferral; rather, what matters is that when exercising its exclusive or any other competence, member states must comply with the principles of EU law voluntarily accepted by member states. To claim otherwise signifies a complete disregard for the place of member states within the EU legal order. The fact that a particular competence (say, organisation of justice) belongs firmly to the states does not mean that it is invisible to the fundamental principles of the EU Treaty, such as the rule of law (Article 2). And at the same time there is no understanding of the rule of law, even in the narrowest sense of the word, which does not place judicial independence at its very core. So 'reforms' in a member state which undermine judicial independence, as in Poland after its 2017 statutes, are inconsistent with EU Treaties, not because a new competence has been usurped by EU institutions, but because Poland has flagrantly breached the very principles it had affirmed when acceding to the EU. As the European Court of Justice stated in the judgment on the independence of the Supreme Court of Poland of 24 June 2019, 'although ... the organisation of justice in the Member States falls within the

[20]Judgment of the Polish Constitutional Tribunal of 27 April 2005, P 1/05, Part II 5.2.
[21]Press Release, *supra* n. 7, Part II para. 7.
[22]Ibid., Part II para. 10.

competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law'.[23] And let us now add, this all assumes, arguendo, that 'organisation of the judiciary' is indeed an exclusive domain of member states. Even if the details of the organisation of the judicial system are indeed a domain of member states, the judiciary is not invisible to EU law because, even when acting in their exclusive competence, member states are bound by EU law. In particular, by agreeing to the principle of effective legal protection in Article 19, member states, when ratifying the EU Treaty, explicitly conferred upon the Union an authority to see to it that legal protection in a member state is indeed 'effective', and that national courts, when adjudicating under the EU law, meet the institutional conditions inherent in the principle of effective legal protection, as well as the right to a fair trial as announced in Article 6 ECHR (the Convention being cross-referenced in Article 6.3 TEU) and Article 47 of the EU Charter of Fundamental Rights.

Second, the Tribunal deplores, in its list of the characteristics of the 'new stage', that the Constitution is no longer the supreme law of the Republic of Poland. It is hard to know what to make of this assertion. To counter the claim about an erosion of the supremacy of the Constitution, one may offer, in a cursory way, the following counter-arguments: (1) the accession of Poland to the EU in 2004 was fully voluntary and was managed at every stage in conformity with the Constitution; (2) a conferral of certain state competences upon the EU (going beyond the usual international treaties) occurred on the basis of a constitutional provision (Article 90(1)) included in the Constitution specifically with the planned accession in mind; (3) Poland is free at any stage to initiate, in accordance with its Constitution, a procedure of exit, under Article 50 TEU. In all these fundamental respects, the Constitution controls the entry, membership and putative exit of Poland from the EU. And it should be added that the principle of the primacy of EU law over domestic (including constitutional) law had been well known and operative well *before* Poland acceded to the EU: hence, constitutionally, Poland voluntarily accepted an exception to the principle of the unconditional primacy of its Constitution over any other law. But it is a weak exception because it can at any stage be renounced by exit from the EU; it may be seen as a rational collective self-constraint justified by a calculation of the benefits and costs of membership.

These points are also relevant to the third, final complaint regarding the 'new stage' of the EU, namely that at this new stage, Poland 'may not function as a sovereign and democratic state'. The hyperbole of this assessment is extraordinary (and it echoes the conditions of Judgment K 18/04 of 2005, which established

[23]ECJ 11 July 2019, Case C-619/18, *Commission* v *Poland*, para. 52.

that such a situation would place the Polish Constitution at odds with the Treaties).[24] In contrast to the Tribunal's view, Poland's sovereignty is *affirmed* by the three indicia just listed: its accession was fully voluntary ; the transfer of competences is consistent with the Constitution ; and exit remains an option. Poland was and is exercising its sovereign rights to choose to belong to the EU or to leave. When it comes to democracy, an assessment that democracy is diminished by the oversight of European institutions over the conduct of state institutions is an assertion in search of an argument. Suffice to say that a massive capture of state institutions (courts, prosecutor's office, electoral commission, civil service, media boards and public media, public support for civil society) by the ruling coalition, with a complete violation of checks and balances and scrutiny by an independent constitutional court in Poland after 2015, shows that dramatic erosion of democracy goes hand in hand with resistance against European oversight, whether by the EU or the Council of Europe. European institutions are supporters, not foes, of Polish democracy.

Abuse of constitutional identity

In the Reasons, the Judge-Rapporteur appealed to the concept of constitutional identity. When asserting that the issue of 'the organisational structure of courts' belongs to the exclusive competence of Poland (we have discussed this claim above), the Reasons assert that 'The subject matter belongs to the Polish constitutional identity, which has been pointed out by the Constitutional Tribunal a number of times before . . . '.[25] It is worth tracing back the cross-reference provided by the Reasons: it is to a 'Decision' (also invalid, because Mr Justyn Piskorski unlawfully participated in the panel) 7/20 of 14 July 2021 which in many ways prefigured Decision K 3/21 under discussion here. In Decision P 7/20, the Tribunal found unconstitutionality in several articles of the TEU,[26] insofar as they authorise the European Court of Justice to impose interim measures in respect of breaches of the rule of law. In the reasons for the judgment (also, accessible so far only from a lengthy Press Release) the Tribunal referred to 'constitutional identity' by saying: 'EU law-friendly interpretation has become an established principle and practice in the Republic of Poland but it reaches its limits when Polish constitutional identity is being violated'.[27]

[24]Ibid., Part III 4.5.

[25]Press Release, *supra* n. 7, Part III para. 17.

[26]Art. 4(3) TEU in conjunction with Art. 279 TFEU.

[27]Press Release of the Polish Constitutional Court of 14 July 2021 (in Polish), ⟨https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/11588-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-

As one can see from these two appeals to 'constitutional identity', in Poland the concept has played the role of protecting authoritarian, constitutionally questionable regulations from any oversight by European law. It is no doubt contrary to the letter, structure and spirit of EU law to interpret constitutional identity in this way. These three grounds will be briefly considered in turn.

To start with, the wording of Article 4 TEU suggests that constitutional identity is applied only to the most fundamental structural characteristics of a state. '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'.[28] As one can see, constitutional identity inheres in the 'fundamental structures' having political and constitutional character. *A contrario*, it cannot be discerned solely in the detailed, specific, and in particular *statutory* regulations, such as those which both these Decisions attempted to exempt from European norms. In particular, what was at stake in Decision K 3/21, under discussion here, was a detailed regulation that immunised administrative decisions by the KRS (National Council of Judiciary) to recommend to the President judicial nominations, from effective judicial review. *This* is what European Court of Justice judgment C-824/18 of 2 March 2021 (to which Decision K 3/21 'responded') found defective. It had no 'fundamental structure, political and constitutional' character. No *constitutional* rule of the Republic of Poland was engaged by this matter. Under a purely textual interpretation, therefore, it has not matched any of the indicia of constitutional identity in Article 4 TEU; the 'constitutional' in 'constitutional identity' is being lost.

The second ground for rejection of constitutional identity in the context in which it was invoked by the Tribunal is systemic: the structure of the TEU. The Article 4 reference to constitutional identity comes *after* a reference, in Article 2, to the rule of law. At the very least it means that both these values have to be coordinated and reconciled with each other: constitutional identity cannot be interpreted in a way that would be offensive to the rule of law. But an even stronger interpretive point can be made: that the rule of law has primacy over constitutional identity if, in specific circumstances, there is a clash between the two values. It means that constitutional identity cannot be invoked if the consequence is a reduction of the value of the rule of law.

Third, and most importantly, the invocation of constitutional identity in this context is also contrary to the very *spirit* of the concept of constitutional identity in the normative architecture of the EU. Its main rationale is to protect those

sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa⟩, visited 9 January 2023.

[28]Art. 4(2) TEU, first sentence (emphasis added).

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fundamental, political and constitutional structures of member states which should be preserved: not just tolerated but cherished because they reflect genuine, deep identities of societies and peoples which make up the EU. Monarchy in the United Kingdom, *laïcité* in France, federalism in Germany – these are some examples of dimensions of constitutional identity which the EU respects and protects. It is because they are defining of the nature of those states, just as (to take opposite arrangements) republicanism in Italy, an established religion in Sweden or a unitary state in Denmark define fundamental 'political and constitutional' identities in those other states. All those alternative structures, which correspond to different European traditions, are perfectly compatible with Article 2 values. But statutory assaults upon the rule of law in Poland post-2016 are not embodiments of Polish constitutional identity. Neither the establishment of a politically controlled, inquisitorial chamber of persecution of independent judges (the subject-matter in Decision P 7/20 which tried to disable interim measures related to the Disciplinary Chamber) nor the exemption of judicial nominations from judicial review (the subject-matter in Decision K 3/21) can be seen as part and parcel of constitutional identity. In K 3/21 the Tribunal attempts to insulate the system of judicial nominations from oversight under European norms, and more specifically, to protect a system introduced to legalise the status of persons appointed as judges in blatant violation of the applicants' right to court. It is the right to court (as proclaimed in Article 45 (1) of the Polish Constitution) which is part of Polish constitutional identity, and not its breach. It is a travesty of constitutional identity to claim that Polish constitutional identity is best given effect by a steady erosion of the rule of law.

While to engage in a broader discussion of the conception of constitutional identity would go well beyond the scope of this Case Note, a short broader reflection is in order. It is hard not to observe that constitutional identity has become a favourite argumentative tool of populist-authoritarian politicians, judges and scholars who oppose a vigorous control of national laws and practices under the norms of EU law.[29] This is regrettable. Constitutional identity, as characterised above, need not be seen as opposed to legal and political integration, and as placing obstacles upon 'a new stage in the process of creating an ever closer union among the peoples of Europe'.[30] Quite to the contrary, as an ideal celebrating the richness of European *positive* traditions, constitutional identity in fact *facilitates* 'an ever closer union' by reassuring EU citizens that their most cherished

[29]For a sharp critique of a recent Romanian Constitutional Court's judgment which used the concept of constitutional identity eight times to limit the effectiveness of ECJ judgments in Romania, *see* B. Selejan-Gutan, 'A Tale of Primacy Part II: The Romanian Constitutional Court on a Slippery Slope', *Verfassungsblog*, 18 June 2021, ⟨https://verfassungsblog.de/a-tale-of-primacy-part-ii⟩, visited 9 January 2023.

[30]Art. 1, TEU, 2nd sentence.

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traditions and structures are not threatened by the integration. But this ideal, in the hands of nationalist politicians and lawyers, can easily be weaponised against EU integration, contrary to the letter, structure and spirit of the Treaty, as the recent Decisions of the Polish Constitutional Tribunal demonstrate, just as it was also demonstrated by the Hungarian Constitutional Court's invocation in 2016 of constitutional identity to reject that country's proposed role in refugee allocation,[31] or by the Romanian Constitutional Court, which used the concept of constitutional identity eight times in a single judgment to limit the effectiveness of European Court of Justice judgments in Romania.[32] So construed, 'constitutional identity' becomes a trump card to protect from scrutiny anything that the government of the day wants to do, no matter what its international and European obligations are. To be sure, the government may be under pressure from, and genuinely expressing the sentiments of, the majority: in this way, it may argue that it respects the *national* identity of its people (who, for example, do not favour absorption of any refugees into their state). But it is not *constitutional* identity, with the 'constitutional' understood as imposing legal constraints upon the 'will of the People'.

The impact of Decision K 3/21 on citizens' rights

From a broader social perspective, it *may seem* that the Tribunal's judgments on general legal issues, if not related to some very specific, tangible conditions experienced by particular individuals, have little significance for the citizens – the ordinary 'us'. In the case at hand, the general narrative of the Polish government consciously emphasised the existence of an alleged political and ideological dispute between the EU and Poland, suggesting that the position of the Polish Tribunal is a defence of the Polish Constitution. In reality, however, the consequences of the Decision may be devastating for the legal situation of individuals in Poland, and beyond.

The Decision of the Tribunal, if taken into account by the courts adjudicating in Poland, will deprive parties to any court dispute pending in the area indicated by the scope of this Decision, of the possibility to rely on European Court of Justice jurisprudence and the binding interpretation of EU law. Thus, the very essence of the guarantee set out in Article 47 of the EU Charter, which states in its relevant part that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a

[31] *See* G. Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law', 43(1) *Review of Central and East European Law* (2018) p. 222.

[32] *See* Selejan-Gutan, *supra* n. 29.

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tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law', will be denied. According to the principles expressed in the case law of the European Court of Justice, every person has the right to obtain an effective remedy before an appropriate court, and it is the duty of the member state to ensure effective judicial review of compliance with the provisions of EU law.[33] Importantly, this right was only *confirmed* in the Charter, as the guarantee under Article 47 had already been a principle of EU law, as it formed part of the common constitutional traditions of the member state, and was thus protected under Articles 6 and 13 of the ECHR. As noted by a Polish constitutional law scholar, Marcin Górski, 'The right to an effective remedy before a court is a meta-norm of the Charter, because ... the implementation of other rights and freedoms guaranteed in the Charter is determined by the effectiveness of the right guaranteed by Article 47 of the Charter'.[34] It should also be emphasised that the normative breadth of the right to an effective remedy before a court goes beyond the mere formal accessibility of a court, but also includes, *inter alia*, the effectiveness of the exercise of the judicial function by a given court.[35]

At the same time, any judicial practice that limits the effectiveness of EU law is inconsistent with the requirements resulting from the very nature of this law. As noted by the European Court of Justice, the principle of the primacy of EU law requires member states to ensure the full effectiveness of the various rules of EU law. Thus, domestic law cannot diminish the effectiveness of these various rules within its territory.[36] In turn, as recognised by the European Court of Justice in another judgment:

> any provision of a national legal system and any legislative, administrative or judicial practice that might impair the effectiveness of EU law by withholding from the national court with jurisdiction to apply that law the power to do everything necessary at the moment of its application to set aside national legislative provisions that might prevent EU rules which have direct effect, such as Article 46(3) of Directive 2013/32 read in conjunction with Article 47 of the Charter, from having full force and effect are incompatible with those requirements, which are the very essence of EU law.[37]

[33]ECJ 15 May 1986, Case C-222/84, *Marguerite Johnston* v *Chief Constable of the Royal Ulster Constabulary*, para. 19.

[34]M. Górski, 'Prawo do skutecznego środka prawnego w art. 47 Karty Praw Podstawowych UE – znaczenie i deficyty', 8 *Europejski Przegląd Sądowy* (2016) p. 44.

[35]*Marguerite Johnston* v *Chief Constable of the Royal Ulster Constabulary*, *supra* n. 33.

[36]ECJ 24 June 2019, Case C-573/17, *Popławski*, paras. 53-54.

[37]ECJ 29 July 2019, Case C-556/17, *Alekszij Torubarov* v *Bevándorlási és Menekültügyi Hivatal*, para. 73.

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In the case of the Polish Tribunal's Decision, the limitation of the effectiveness of the right to an effective remedy and to a fair trial occurs unequivocally.

An ominous cascade of consequences of the Tribunal's Decisions may, therefore, occur. This will eventually include the possibility of challenging any judgment handed down based on the Decision of 7 October 2021. The actions of Polish courts following the Decision will be burdened with all the defects and unlawfulness described by us in this Note, and a breach of the guarantee of the right to a fair trial can be basically perceived as twofold: first, the Tribunal's Decision itself deprives individuals of the possibility for domestic courts to take into account, while examining their complaints, the arguments relating to European Court of Justice case law (issued within the thematic scope of the Decision), and second, by accepting the Decision, the national courts will also become directly and unequivocally responsible for the violations of individuals' rights and freedoms. The same observations can be applied to all other EU citizens whose legal matters would fall within the Polish jurisdiction. All of this is only exacerbated by a general legal chaos and lawlessness that can bring devastating effects for the rights of citizens of Poland.

Conclusions

The Decision under discussion in this Note was represented by the initiators of the review and by official or pro-government propaganda, as being about the primacy of the Constitution over the EU law. It was applauded by those same entities for reasserting the primacy of the Constitution over EU Treaties. But this is unpersuasive. The talk about 'primacy' of one law over another presupposes a clash. However, there is no clash whatsoever between the Treaties and the Polish Constitution. The Constitution is fully consistent with the Treaties in all aspects which emerged in the procedure leading up to Decision K 3/21.

To be sure, there *is* a clash – but it is not between the Treaty and the Constitution, but rather between the Constitution *and* the Treaties on one hand, and unconstitutional legislation and the practice of subjecting Polish judiciary to political interference on the other hand. EU Treaties support constitution-based arguments that these statutes (about the Supreme Court, the common courts, and the National Council of Judiciary) violate the principles of the rule of law, independence of the judiciary, and right of access to impartial courts, among other things. The Constitution and the EU Treaties (and the EU Charter of Fundamental Rights, and also the European Convention on Human Rights, for that matter) are aligned with each other in protection of these principles and rights. As the Ombudsman at the time, Adam Bodnar, put it, with characteristic lucidity, the authorities in Poland in fact demand the exclusion of EU scrutiny, with 'the aid of the Constitution of

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Poland', not in order to protect the Constitution but in order to protect the regulations which violate that very Constitution.[38]

In scholarly comments on the decisions of the Constitutional Tribunal, the question contained in the title of our Note, 'Is It Polexit Yet?' has been tackled continually. The answers offered remain divided. Professor Piotr Bogdanowicz begins his legal opinion on the consequences of the Decision by stating: 'The judgment of the Constitutional Tribunal in the case no. K 3/21 has no legal effect'.[39] However, there is no doubt that this Decision constitutes a legal denunciation of Poland's loyalty towards the EU and Poland's respect for EU law and principal values. It is therefore, as noted by Professor Laurent Pech, a 'gradual Polexit from the EU legal order'.[40] Both in the legal and political sense, it eventually opens the door for Poland to fully leave the EU.

[38]Memorandum ('Pismo procesowe') by the Polish Ombudsman to the Constitutional Tribunal of 13 July 2021, Case K 3/21, para. 10, p. 3.

[39]Expert Opinion of P. Bogdanowicz for Batory Foundation, ⟨https://www.batory.org.pl/wp-content/uploads/2021/10/P.Bogdanowicz_Opinia-prawna_nt.skutow.orzeczeniaTK.ws_.TUE_-1.pdf⟩, visited 9 January 2023.

[40]J. Henley, 'Legal Polexit': Poland Court Rules EU Measures Unconstitutional', *The Guardian*, 14 July 2021, ⟨https://www.theguardian.com/world/2021/jul/14/legal-polexit-poland-court-rules-that-eu-measures-are-unconstitutional⟩, visited 9 January 2023.