

Oral grounds for the judgment of the Constitutional Tribunal (Poland) in the case K 3/21

*Assessment of the conformity to the Polish Constitution
of selected provisions of the Treaty on European Union*

Julia Przyłębska (president):

Judgment in the name of the Republic of Poland.

The Constitutional Tribunal, composed of the present bench, having considered – in the presence of the applicant, as well as the President of the Republic of Poland, the *Sejm*, the Minister of Foreign Affairs, the Prosecutor General, and the Commissioner for Human Rights, at the hearings on 13 July, 31 August, 22 and 30 September, as well as 7 October 2021 – the Prime Minister’s application to assess the conformity of:

- 1) the first and the second subparagraphs of Article 1, in conjunction with Article 4(3) of the Treaty on European Union – construed in the way that it enables and/or compels a law-applying authority to refrain from applying the Constitution of the Republic of Poland or requires the said authority to apply provisions of law in the way that is inconsistent with the Constitution – to Article 2, Article 7, Article 8(1) in conjunction with Article 8(2), Article 90(1) and Article 91(2) as well as Article 178(1) of the Constitution of the Republic of Poland;
- 2) the second subparagraph of Article 19(1), in conjunction with Article 4(3) TEU – construed in the way that, for the purpose of ensuring the effective legal protection, a law-

applying authority is competent and/or obliged to apply provisions in the way that is inconsistent with the Constitution, including a provision which has, on the basis of a ruling by the Constitutional Tribunal, ceased to have effect due to being inconsistent with the Constitution – to Article 2, Article 7, Article 8(1) in conjunction with Article 8(2) and Article 91(2), Article 90(1), Article 178(1) as well as Article 190(1) of the Constitution of the Republic of Poland;

- 3) the second subparagraph of Article 19(1), in conjunction with Article 2 TEU – construed in the way that it authorises a court to review the independence of judges appointed by the President of the Republic of Poland as well as to review the National Council of the Judiciary’s resolution to refer a request to the President of the Republic to appoint a judge – to Article 8(1) in conjunction with Article 8(2), Article 90(1) and Article 91(2), Article 144(3)(17) as well as Article 186(1) of the Constitution of the Republic of Poland,

adjudicates as follows.

1. The first and the second subparagraph of Article 1, in conjunction with Article 4(3) TEU – insofar as the European Union, established by equal and sovereign states, creates “an ever closer union among the peoples of Europe”, the integration of whom – happening on the basis of EU law and through the

interpretation of EU law by the Court of Justice of the European Union – enters “a new stage” in which:

- a) the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties;
 - b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application;
 - c) the Republic of Poland may not function as a sovereign and democratic state – is inconsistent with Article 2, Article 8 and Article 90(1) of the Constitution of the Republic of Poland.
2. The second subparagraph of Article 19(1) TEU – insofar as, for the purpose of ensuring effective legal protection in the areas covered by EU law – it grants domestic courts (common courts, administrative courts, military courts, and the Supreme Court) the competence to:
- a) bypass the provisions of the Constitution in the course of adjudication – is inconsistent with Article 2, Article 7, Article 8(1), Article 90(1) and Article 178(1) of the Constitution;
 - b) adjudicate on the basis of provisions which are not binding, having been revoked by the *Sejm* and/or ruled by the Constitutional Tribunal to be inconsistent with the Constitution – is inconsistent with Article 2, Article 7, Article 8(1), Article 90(1) and Article 178(1), and Article 190(1) of the Constitution.
3. The second subparagraph of Article 19(1) and Article 2 TEU – insofar as, for the purpose of ensuring effective legal protection in the areas covered by EU law and ensuring the independence of judges – they grant domestic courts (common courts, administrative courts, military courts, and the Supreme Court) the competence to:
- a) review the legality of the procedure for appointing a judge, including the review of

the legality of the act in which the President of the Republic appoints a judge – are inconsistent with Article 2, Article 8(1), Article 90(1) and Article 179 in conjunction with Article 144(3)(17) of the Constitution;

- b) review the legality of the National Council of the Judiciary’s resolution to refer a request to the President of the Republic to appoint a judge – are inconsistent with Article 2, Article 8(1), Article 90(1) and Article 186(1) of the Constitution;
- c) determine, by the domestic court, the defectiveness of the process of appointing a judge and, as a result, to refuse to regard a person appointed to a judicial office in accordance with Article 179 of the Constitution as a judge – are inconsistent with Article 2, Article 8(1), Article 90(1) and Article 179 in conjunction with Article 144(3)(17) of the Constitution.

Moreover, the Tribunal decides to discontinue the proceedings as to the remainder.

The ruling was adopted by a majority vote.

The judgment is duly signed.

Dissenting opinions have been given by judges Piotr Pszczółkowski and Jarosław Wyrembak.

Please be seated.

Judge-rapporteur, Bartłomiej Sochański, will present oral grounds for the judgment.

Please.

Bartłomiej Sochański (judge-rapporteur):

Thank you.

The Prime Minister’s application concerns the relationship between the provisions of the Treaty and the principle of supremacy of the Polish Constitution, so in essence it concerns Polish sovereignty.

The Prime Minister’s reference to the first and the second subparagraphs of Article 1 TEU, in connection with Article 4(3) TEU, brings the constitutional problem presented by the applicant down to the definition of the constitutional

limits of, and I quote, “an ever closer union among the peoples of Europe” referred to in the second subparagraph of Article 1 TEU. This is obviously related to a loyal or sincere assurance that the obligations which flow from the Treaties will be performed, as mentioned in Article 4(3) TEU, in the so-called, and I quote, “new stage in the process of European integration”.

The starting point for this bench was the judgment of the Constitutional Tribunal of 11 May 2005 – also in its full membership, chaired by Prof. Marek Safjan, in the case K 18/04 – in which the Tribunal took the view that overstepping the limits of integration, namely the said “close union”, would mean a transfer of the state’s competences to such an extent that the Republic of Poland could not function as a sovereign and democratic state.

When expressing this view in 2005 in a ruling on the constitutionality of the Treaty of Accession, the Constitutional Tribunal emphasised that, in principle, this judgment was in line with the position of Germany’s Federal Constitutional Court and the Supreme Court of the Kingdom of Denmark.

The present bench of the Tribunal agrees with this assertion, accepts it as its own and makes it the starting point for further considerations. It also gives this view a normative expression in point 1 of the operative part of the judgment, what you have just heard.

However, the Tribunal started to examine the Prime Minister’s application by confirming its own jurisdiction to examine the case, as this was also the subject-matter of the dispute. In this respect, the Tribunal unambiguously states that its right, task and obligation is to adjudicate on the compliance of statutes and international agreements with the Constitution, as expressed in Article 188(1) of the Constitution. No doubt, the constitutionality of international agreements also encompasses EU Treaties.

After all, the Tribunal’s power to examine the Treaties has already been established in its case-law, especially in the mentioned judgment in the case K 18/04, but also in the case K 32/09,

as well as in other judgments, including the cases K 37/05, SK 45/09, and recently the case P 7/20.

Conversely, in the judgment in the case U 2/20, the Tribunal examined the compliance of Polish law with the Treaty, *nota bene* also with Article 4(3) TEU.

When examining the compliance of EU Treaties with the Constitution – be they rules arising directly from the Treaties or rules in the meaning assigned to them by the Court of Justice’s interpretation – the Tribunal is not making an independent interpretation of EU law by any means. The Tribunal respects the exclusive jurisdiction of the Court of Justice in this field. The reasoning of the Polish Constitutional Tribunal is exclusively subject to the establishment of the content of these rules and the examination of their compliance with the Constitution of the Republic of Poland.

The Tribunal found no grounds for submitting a request for preliminary ruling to the Court of Justice in this case. The Tribunal considers that requesting the Court of Justice on the constitutionality of the Treaty is irrelevant and unnecessary. The Court of Justice has the exclusive jurisdiction to interpret EU law, while the Constitutional Tribunal is the “court of last resort” in terms of compliance of all rules, including EU rules, with the Constitution of the Republic of Poland.

On the side-line of these statements, there is still an obvious doubt arising from the previous hearing of 30 September as to the extent to which the Court of Justice is an independent court within the meaning of Polish constitutional standards – in particular those which apply to the appointment of judges by the executive, or the unlimited number of terms of office of judges of the Court of Justice.

It is worth briefly reiterating at this point that Article 179 of the Polish Constitution provides for the appointment of judges for an indefinite term, while Article 180(1) guarantees the irremovability of judges. However, judges of the Constitutional Tribunal may only be appointed,

on the basis of Article 194(1) of the Constitution, for a single, nine-year term. Precisely this provisions ensure that, after being nominated, Polish judges do not need to seek the favour of the executive to be possibly reappointed.

Moving on to the merits, the Tribunal finds that the answer to the first question regarding the first and the second subparagraph of Article 1 TEU is of fundamental importance to today's judgment. The essence of this provision is that the sovereign Members States – by conferring competences to attain common objectives on the European Union – agree that the law created by the European Union should operate directly in the Member States, thereby breaking away from the previous understanding of legal sovereignty of the States. Consequently, none of the Member States exercises its powers in an absolutely sovereign manner, because their exercise by each Member State must – in a certain sense – be limited by the competences conferred on the European Union.

However, it should be emphasised that the European Union, as the holder of these competences, must exercise them while respecting the national and constitutional identities of the Member States and in accordance with the principles of proportionality and subsidiarity, as expressed in Articles 4(2) and 5(1) TEU.

Bearing all this in mind with regard to the first and the second subparagraphs of Article 1 TEU, which refer to, and I quote again, “a new stage in the process of creating an ever closer union among the peoples of Europe”, the Constitutional Tribunal clearly and explicitly states that, as long as the European Union institutions function within the competences conferred upon them, and as long as this new and ever closer stage of cooperation does not result in the deprivation of the Polish Constitution of its superiority – namely its precedence as regards its binding force and application before all other rules in the legal space – Poland retains the functions of a sovereign and democratic state.

It also clearly arises from this assertion that, if this “new stage of ever-closer union” reaches

a point in which European rules, especially those inferred from the Court of Justice's interpretation, are situated beyond the limits of the competences conferred on the Union and above the Polish Constitution – thereby causing a loss of sovereignty of the Republic of Poland – then such a stage of this “ever closer union” is inconsistent with the Polish Constitution.

The areas of competence conferred by the Member States on the European Union is essentially regulated by the Treaties, in particular Articles 3(1) and 4(2) of the Treaty on the Functioning of the European Union. Such competences do not include the organisation or the structure of the judiciary. The organisation or the structure of State bodies, including courts, does not lie within the competence “in relation to certain matters”, as referred to in Article 90(1) of the Constitution.

There is also no doubt that the Member States, as sovereign parties to the Treaties – while specifying the limits of the competences conferred to the Union – have not authorised the EU institutions either to presume competences or to infer new competences from the existing ones.

The distinction between the area of competences conferred on the Union and the area of competences remaining exclusively with the Member States is also important for specifying the limits of applicability of the so-called principle of primacy of Union law. It is obvious that EU law can operate in the Republic of Poland on the basis of Article 91 of the Constitution – and not under the Court's case-law – and be applied directly and have precedence over statutes and only within the competences conferred on the Union, which the Tribunal has also stated several times in its judgments in the cases K 18/04, K 32/09 and most recently P 7/20.

In turn, allowing any international organisation, including the European Union and its institutions, to create rules addressed to the Republic of Poland outside the area of the competences conferred on this organisation, and to give these rules attributes of direct

applicability and precedence not only over domestic statutes, but also over the Constitution, means a loss of sovereignty. The Tribunal categorically states that no authority of the Republic of Poland can agree to such a state of affairs.

This position in no way contradicts the wording of Article 9 of the Constitution. This Article provides that “the Republic of Poland shall respect international law binding upon it”. What Poland shall “respect” is therefore the “binding” international law, namely the law which, with respect to the European Union, is enacted within the limits of the competences conferred on it in the Treaties, and within the limits of respect for the constitutional identity and fundamental structures of the State, as well as the principles of proportionality and subsidiarity, as I mentioned earlier. However, regulations created beyond these limits do not constitute a binding international law for the Republic of Poland, as referred to in Article 9 of the Constitution.

An important line setting the limit of constitutionality of the European integration is also the democratic legitimacy of the European Union institutions, to which the judgment of the Constitutional Tribunal of May 2005 cited above aptly draws attention. This democratic legitimacy of the European Union institutions to enact norms that are applicable in the Republic of Poland only exists to the extent to which the Polish sovereign – namely the Nation – agrees to this. In principle, it should be remembered that Polish citizens, after all, like citizens of other Member States, do not essentially have any influence on the appointment of the executive bodies of the European Union or judges of the Court of Justice.

According to Article 87(1) of the Constitution, the Polish legal system has a hierarchical structure. Within this hierarchy, international agreements ratified with prior consent granted by statute, such as the Treaty on the European Union, are located below the Constitution, which is the supreme law in the Polish legal system. As part of the Polish legal system, from the moment of its ratification and publication in the

official journal, an international agreement must be in compliance with the Constitution. Therefore, the Treaty on European Union, like any international agreement ratified with prior consent granted by statute, became a part of the Polish legal system on the date of its announcement in the official journal and as a result of its ratification. However, in the hierarchy of sources of law, the Treaty on the European Union is located below the Constitution, just like any ratified international agreement and, like any part of the Polish legal system, it must be consistent with the Constitution.

The second and third points of the operative part of the judgment apply to the second subparagraph of Article 19(1) TEU, which provides that the Member States ensure effective legal protection in the fields covered by Union law. From such wording of this provision, the Court of Justice infers its power to adjudicate on the structure of Polish courts.

In his application, the Prime Minister refers to various judgments of the Court of Justice, including C-619/18, C-192/18, C-585/18, C-624/18, C-625/18 etc. as confirmation of this interpretation. In addition the Prime Minister also refers to the judgment of the Supreme Administrative Court of 6 May 2021 in the case II GOK 2/18, all this to confirm that such an interpretation does indeed exist and to confirm the content of that interpretation of Article 19(1) TEU by the Court of Justice.

Therefore, a few remarks need to be made on the authority of judgments of the Court of Justice. Of course, views on this are divided in the legal doctrine, but undoubtedly judgments of the Court of Justice are not mentioned in the Treaties as a source of Union law.

The Tribunal states that judgments made by the court in Luxembourg are of a hybrid form, partly of continental law and partly of Anglo-Saxon common law. However, they are formulated in such a way as to give the Treaty norms a specific meaning, including in the form of statements of a binding nature, namely referring to obligations and prohibitions. In this

sense, they are also respected by their addressees, an example of which is even the cited case-law of the Polish courts: the Supreme Administrative Court and recently also the Supreme Court. It is also in this sense that these norms are subject to review by the Constitutional Tribunal with regard to their compliance with the Constitution.

Specifically, the Treaty norms interpreted by the Court in Luxembourg, which are subject to examination by the Tribunal in these proceedings, namely the second subparagraph of Article 19(1) TEU, apply directly to the structure of the courts of the Republic of Poland, namely a matter which is primarily not a competence that can be delegated on the basis of Article 90(1) of the Constitution, since it rests with the Polish constitutional identity, to which the Tribunal already drew attention in the previously cited case-law.

Article 19(1) TEU, from which the Court of Justice infers its competence to adjudicate on the structure of Polish courts, is essentially an obligation of Member States, which is not the same as the delegation of competence in this area to the European Union institutions, especially the Court of Justice. The Treaty obligation of a Member State is not equivalent to the competence of the institutions, bodies, offices or agencies of the Union. Inferring the Court of Justice's competence to examine the organisation and structure of the justice system in a Member State from the second subparagraph of Article 19(1) TEU is nothing more than the creation of new competence by the Court of Justice.

Article 2 TEU, which was referred to by the Prime Minister, contains a list of values on which the Union is based and, similarly, does not constitute a source of competence of the Court of Justice to adjudicate on the structure of the Polish courts. The values listed in Article 2 TEU are of axiological significance. They are not legal rules. The judicial system in Member States is not at all part of their common constitutional identity, which have different methods of appointing judges. The value of rule of law

referred to in Article 2 TEU (in Polish “the principle of the state ruled by law”), does not stipulate how judges should be appointed, but rather the requirement for them to be independent and impartial.

However, independence is not inherently linked to the method in which a judge is appointed and cannot be examined *ex ante* and *in gremio*, namely before the act of appointment takes place and equally with respect to all judges. The independence of a judge is related to a particular case in which that judge is adjudicating.

Both the current and previous Polish Constitutions have formulated and continue to formulate a framework of legal guarantees for judicial independence. These constitutional standards cannot be replaced by interpretative guidelines of the Court of Justice expressed at so high level of abstraction.

The interpretation of the Polish Constitution by the Constitutional Tribunal, as well as the interpretation of Article 2 and the second subparagraph of Article 19(1) TEU by the Court of Justice should result in identical conclusions. This is because Article 2, Article 45, Article 78 and Article 176(1) of the Polish Constitution provide for a decidedly higher standard of protection of the right to an independent and impartial court than the provisions of European law, including Article 47 of the Charter, or Article 6(1) and Article 13(1) of the European Convention on Human Rights.

Therefore, there is room for sincere and mutual cooperation between Poland and the European Union, including a sincere dialogue between the Constitutional Tribunal and the Court of Justice, especially on this subject.

It is sometimes formulated in the legal doctrine based on the case-law of the Constitutional Tribunal – which was quite often also repeated in this courtroom – that in the case of an irremovable conflict between EU law and the Polish Constitution, there are three possible options to solve it. I shall not repeat them because they are known. However, such an assertion

could be considered acceptable in academic rhetoric, but in practice it is incorrect. First of all, an irremovable conflict appears very rarely, if at all, outside the theory of the law. The obvious only way out in the event of a conflict of norms legislated by people is therefore a mutual sincere dialogue, which arises from both the principle of loyalty and European culture.

The Tribunal has a special role in the Polish system of supreme public authorities. While upholding the Constitution – the legal act founding the Polish normative system – it also upholds the rudiments of security and legal order, and therefore essentially upholds the sovereignty of the Polish State.

According to the well-established position, the Court of Justice and its case-law not only develop, but also co-create the legal order of the European Union and consequently also of the Member States, including the Republic of Poland. Since all EU law – as it is hierarchically subordinated to the Constitution of the Republic of Poland – is subject to the jurisdiction of the Tribunal, it should be argued that not only normative acts in the meaning specified in the Court of Justice’s case-law, but this case-law itself, as part of the normative order of the European Union, may be subject, from the point of view of compliance with the supreme legal act in Poland, namely the Constitution, to the Tribunal’s review.

So far, the Tribunal – in the spirit of the principles of loyal cooperation, dialogue, mutual respect, as well as mutual assistance – has refrained from exercising this constitutional competence, and continues to do so. However, if the Court of Justice does not refrain from its “progressive activism” – involving, in particular, encroaching upon the exclusive competence of the Polish authorities, undermining the position of the Constitution as the supreme law in the Polish legal system, questioning the universal validity and finality of the Tribunal’s judgments, and finally casting doubt upon the status of the Tribunal’s judges – the Tribunal does not rule out the possibility that it will use the

said competence and will directly assess the constitutionality of judgments of the Court of Justice, including their removal from the Polish legal order.

Thank you.

Julia Przyłębska (president):

Thank you, judge-rapporteur, for presenting the oral grounds for the judgment.

Translated by Roman Wojtasz

Edited by Patryk Wachowiec, Rule of Law in Poland (RULEOFLAW.pl)