

The judgment of the Constitutional Tribunal of 7th October 2021, K 3/21. The case study on declaring the unconstitutionality of UE Treaties

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Summary: The judgment of the Constitutional Tribunal of 7th October 2021 (K 3/21) represents the attitude of Polish authorities to the principle of priority of EU law. The constitutional court has developed the conception that this organ is entitled to check the conformity of EU law to Polish constitution and to adjudicate that a treaty is in contrary to the constitution. Indicated verdict is an example of these ideas. It seems that such a judgment would cause a set of very serious legal effects, for example changing the constitution or terminating an invalid international agreement. It means that the verdict generated very serious legal consequences or threats. Fortunately, the verdict has not been realized, and its consequences remain undone. It is the effect of contemporary position of Polish Tribunal and their explanation of the judgment. Mainstream lawyers scholars and academics treat this as a political statement of judges of the Tribunal.

Keywords: judgement, Constitutional Tribunal, political statement, legal effects of a Tribunal's verdict.

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1. Basic political and constitutional principles

The Polish Constitution, in its 8th article, similarly to almost all the European Union states, declares that “the Constitution shall be the supreme law of the Republic of Poland”. It means that the fundamental law is the base of the whole legal system, and all legal acts mustn’t be contrary to its provisions. The law protects the applying, force and functioning of the art. 8 and the supremacy of the constitution. Article 188 provides that the Polish Constitutional Tribunal is entitled to adjudicate the conformity of a treaty with the Constitution. If the Tribunal finds an inconsistency, a valid legal acts is deprived of its binding force and is not a part of the Polish legal system any longer.

The ninth article of the Polish Constitution proclaims that the Republic of Poland shall respect international law binding upon it. This principle refers to all sources of international law, including treaties, customs, basic unwritten rules and principles,¹ and law established by international organizations. The state is supposed to obey international law in both external and internal affairs.

All the authorities are obliged to respect both indicated principles. Both provisions of the Constitution and of the agreements are directly applicable. But in some circumstances, Article 8th and Article 9th of the Constitution might remain in opposition to each other. Such a situation would occur when a treaty violates constitutional provisions. It is a kind of trap or deadlock. There is no possibility to realize and obey simultaneously a constitutional and international provision. Fulfilment of the Constitution results in disturbing a treaty, and conversely, compliance with the international agreement violates the Constitution.

2. The contradiction between the principle of priority of EU law and the principle of supremacy of the Constitution

The problem becomes much more complicated when we look at European Union treaties. These acts declare the principle of priority (primacy/supremacy) of EU Law over national law of the member states, including their Constitutions. The principle of the primacy of European Union law is based on the assumption that where a conflict arises between a norm of EU law and a norm of law of an EU Member State (national law), EU law will prevail. It applies to all internal state

¹ BANASZAK, B. *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warsaw: C. H. Beck, 2009, pp.76–77.

norms (acts) regardless to their place in the hierarchy of legal sources, even constitutional regulations.² The principle was elaborated by European Court of Justice and is a vital part of the European law. The remote basis of the principle is the art. 288 of the Treaty on the Functioning of the European Union. The principle of primacy is one of the most important rules of EU law system. It is a kind of conflict rule which forbids both applying and establishing national provisions which are in contrary to EU law. A contradiction between domestic and European law doesn't automatically determine that national norm stops being. It remains a part of national law order until it would be derogated by lawgiver, but it mustn't be applied by organs of authorities especially courts and organs of administrations.

The Polish Constitution³ contains provisions which allow applying the European principle of priority. The article 91 par. 2 and 3 states that an international agreement ratified upon prior consent granted by statute and the laws provided by the international organization shall have precedence over statutes if such an agreement or laws cannot be reconciled with the provisions of such statutes. But these norms refer only to statutory laws and don't pertain to constitutional regulations. Thus, the Constitution doesn't provide any suggestions what shall be done in case of contradiction of its regulations and EU laws.

The Polish Constitutional Tribunal is entitled to adjudicate that European laws (including Treaties) are in contrary to the Constitutional regulations. But such a jurisdiction would cause more problems and questions than brings reasonable solutions. From the very beginning of binding of the Polish Constitution, scholars and lawyers have been wondering of the effects of the verdict of the Tribunal which declares unconstitutionality of an international treaty.

Generally a tribunal verdict which declared unconstitutionality of legal norms result in annulling legal acts which are in contrary to the constitution e.g. statutes, regulations (internal legal acts). But such solution is not so obvious if the tribunal declares the invalidity of a treaty. Interstate agreements are a part of international law, and bind not only internally (in Poland) but also externally. Countries are not supposed to single-sidedly declare that a treaty doesn't bind because it is in contrary to their constitutions.⁴

² Całka, E. Zasada pierwszeństwa w prawie Unii Europejskiej. Wybrane problemy. *Studia Iuridica Lublinensia*. 2016, vol. XXV, no 1, p. 48.

³ Constitution of the Republic of Poland of 2 April 1997.

⁴ Masternak-Kubiak, M. *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej*. Kraków: Zakamycze, 2003, p. 292; Szmulik, B. *Sądownictwo konstytucyjne. Ochrona konstytucyjności prawa w Polsce*. Lublin: Uniwersytet Marii Curie – Skłodowskiej w Lublinie, 2001, p. 98.

Polish scholars and lawyers were reflecting on problems of effects of a verdict of the tribunal declaring unconstitutionality of a treaty. They found few possible and alternative solutions:

- 1) terminating, renouncing an international agreement;
- 2) starting the procedure of changing an international agreement;
- 3) changing the Constitution.

All of them are very difficult or even impossible to conduct. The problem of effects of Tribunals verdicts become more complicated after joining the Republic of Poland to European Union. Poland agreed to respect the principle of priority (primacy) of EU Law over Polish law. The European Union demands from Polish authorities to obey that rule. To avoid problems, the theory of interpretation of domestic law (including the Constitution) in accordance with EU law has been developed.⁵ Contemporary, it is the most popular instrument which allows resolving disputes. This conception enables to find a compliance.

Fortunately, the problem hasn't occurred only in Poland. Almost all of European Union members struggle with this issue, and theoretically and practically try to solve the contradiction. The European principle of supremacy of EU law was (is) questioned especially in Germany, France, Spain, Italy, Denmark⁶. The courts assume that EU law order is a separate legal system which is independent of internal (domestic) laws. Members of EU shall ensure effectiveness of European law, and it's applying. It is possible to indicate few strategies which were developed by members of UE to avoid collision between EU law and constitutions:

- 1) Some states decided to change their constitution and established provisions which provides that EU law prevail upon their internal law, order including constitutions (for example: the Republic of Ireland⁷). These states formally resigned from the principle of supremacy of its constitution in the light of the European Law.
- 2) Some countries conditionally accept the supremacy of European law and do not allow their courts and Tribunals to adjudicate the conformity of constitutions and EU Treaties. Simultaneously, these states reserve some constitutional areas (e.g. core of constitution, or human rights and freedoms, national identity)⁸ that mustn't be violated by EU law. In such situations, organs of

⁵ SOLTYS, A. *Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym jako instrument zapewniania efektywności prawa Unii Europejskiej*. Warsaw: Wolters Kluwer, 2015, *passim*.

⁶ CZAPLIŃSKI, W. *Prawo wspólnotowe a prawo wewnętrzne w praktyce sądów konstytucyjnych państw członkowskich*. Wybrane Zagadnienia), *Kwartalnik Prawa Publicznego*. 2004, vol. 2, p. 8.

⁷ *Ibid.*, pp. 12–13.

⁸ Kustra, A. *Sądy konstytucyjne a ochrona tożsamości narodowej i konstytucyjnej państw członkowskich Unii Europejskiej*. In: Dudzik, A., Półtorak, N. (ed.). *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*. Warsaw: Wolters Kluwer, 2014, pp 59–78.

- authority (especially courts) are allowed to deny applying EU law (Germany and Italy). Tribunals of these states indicate that the rule of supremacy refers only to areas (competences) which were transferred to UE and its bodies.
- 3) French consumption. To avoid serious collisions, French authorities decided to amend the Constitution. Such situation took place in 1992 when the Constitutional Council found that the constitution of the French Republic is in contrary to Maastricht Treaty. According to this conclusion, the lawgiver added a special chapter (XV) to the Constitution. Additional provisions referred to UE treaties and removed contradiction.⁹
 - 4) Polish concept built on the verdict K 3/21.

3. Historical issues on checking validity of international law

The Polish Tribunal was fully aware of problems arisen around conformity of treaties to the Constitution. Declaring unconstitutionality of a binding international agreement might cause a lot of serious problems. Polish Tribunal avoided to issue verdicts which referred to these matters. If it was unavoidable, the constitutional court did everything except declaring unconstitutionality of a treaty. There are two interesting verdicts which are worth to mention.

First was issued 11th of May 2005 (K 18/04), The case referred to conformity the rule of the principle of priority (primacy) of EU Law over internal law with the 8th article of Polish constitution which declares that the constitution shall be supreme law. The constitutional court confirmed that the constitutional provisions are supreme law and simultaneously adjudicated that there is no contradiction between these rules. The Tribunal claimed that Polish law and European law are different legal systems and their basic principles regulates different issues. Beside the principle of (primacy) of EU Law is unwritten rule which was developed by European Court of Justice and such unwritten principle can not violate written constitution.

The second verdict referred to the European Arrest Warrant¹⁰. This institution simplifies cross-border judicial surrender procedure for the purpose of prosecution or executing a custodial sentence or detention order. It has replaced the

⁹ KUBUJ, M. O pierwszeństwie prawa Unii Europejskiej w orzecznictwie najwyższych francuskich sądów: nowe idee czy stare dylematy? In KOZŁOWSKI, A. (ed.). *Rządy prawa jako wartość uniwersalna : księga jubileuszowa Profesora Krzysztofa Wójtowicza*, Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa, 2022, pp. 694–695.

¹⁰ The European Arrest Warrant was established by an EU framework decision in 2002 (2002/584/JHA of 13 June 2002).

lengthy extradition procedures that used to exist between EU Member States. The aim of the EAW is to ensure that open borders and free movement in the Union are not exploited by those seeking to evade justice.

The tribunal found that EAW is in contrary to the Polish constitution, I was the judgement of 27th of April 2005 (P 1/05). The EAW allows transferring a Polish citizen to another EU country in order to realize criminal matters. The constitution in the article 55th prohibited an extradition of such a person. The tribunal didn't declare invalidity of European law but the Polish code of criminal procedure. Regulations of the code realized European law on EAW. The tribunal didn't check the conformity of the constitutional provisions with treaties. But the judgement led to obvious conclusion that European law on arrest warrant are in contrary to the Polish constitution.

In this situation, Authorities decided to amend the art. 55 of the supreme act. Previously, the extradition of a Polish citizen had straightly been forbidden. Under the European law, Poland were (is) supposed to surrender a person to another EU country based on European Arrest Warrant. The amendment of the article 55 was established on 8 September 2009. This is the example of French concept of applying European law.

Previously at the very beginning of the XXIth century the Tribunal didn't issue any verdict that any international agreement is in contrary to the constitution. The situation has changed in 2021, when the tribunal issued the judgment that article 6(1), first sentence, of the Convention for the Protection of Human Rights and Fundamental Freedom is inconsistent with a number of provisions of the constitution. This verdict is crucial because the constitutional court for the first time decided that a provision of binding international agreement is in contrary to the constitution. It was a kind of precedent. The judgment mentioned in the title of this article was the second verdict of this type. It refers directly to European Treaties.

4. The judgment of the Constitutional Tribunal of 7th October 2021, K 3/21¹¹

The background of the judgement was a dispute over the position and legitimacy of the National Council of Justice. This body indicates to the President of the Republic of Poland candidates for judges occupations. Basing on this, the

¹¹ The English version of the verdict is available at: <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>. The author of the article doesn't publish the sentence of the judgment because it is too

principle of independence and Polish authorities must not punish old judges for contesting legitimacy, independence of new judges and their verdicts.

In this situation, the Prime Minister decided to issue an application lodged with the Constitutional Tribunal to assess the conformity of the UE Treaty (especially the Art. 1, Art. 4 unit. 3, Art. 19) to a set of provisions of the Polish Constitution. The Premier wanted that the tribunal checked not the whole provisions but their meaning, understanding and interpretation presented by European Court of Justice in cases of Polish Judges. The problem is that, indicated by the prime Minister, norms (regulations) don't emanate from provisions of o the Treaty on European Union. The Premier claimed that European provisions force or encourage Polish judges and courts not to obey the Constitution and violate its provisions. But truth is that there is no case, no trial where a Polish judge or a court decided to apply European Law with the simultaneous infringement o the Constitution. Besides, the Prime Minister claimed that sued provisions of the Treaty allowed European organs of authorities to operate outside the frames determined by European law. And "the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties". Basing on this motion, the Tribunal issued on the 7th October 2022 the verdict K 3/21. As a side note, it should be appointed that the justification for the judgment is 200 pages long!¹⁴

In this case, the Tribunal adjudicated that the contested provisions of the Treaty are in contrary to The Constitution of the Republic of Poland. The verdict is a terrible mess. Firstly, it should be noted that the Tribunal confirms the statement that this organ is entitled to adjudicate conformity of European treaties and different types of law to the constitution. In this regard, it means that the Tribunal priorities the supremacy of the Constitution over European law, including treaties. The verdict shapes Polish attitude to relations between the principle of primacy of UE Law and the principle of supremacy of the domestic constitution. In the light of Tribunals verdict, it is possible to questionnaire accordance each European provision with constitutional regulations. Formally, the verdict seemed to undermine one of the basic rules of functioning UE. Secondly, according to the Art. 190 unit. 3 of the Constitution of the Republic judgements of the tribunal on unconstitutionality of a legal act results in cancellation of invalid regulations.

If Polish authorities treat the verdict seriously, it would be a disaster. The jurisdiction opens the straight way to abandon the European Union. There was no possibility to find conception which allows merging simultaneous obeying treaties and the constitution in the light of the jurisdiction. Changing the constitution

¹⁴ There is no english transcription of justification of the verdict. The Polish version is available at: <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=22621&sprawa=24085>

would be a solution, but these days there were not a sufficient majority and agreement in the parliament to realize this idea. Nobody took into consideration such concept. Hopley the verdict didn't catch on. It haven't caused any legal effects. The judgment hasn't introduced any changes in the legal system, especially any regulations hasn't been annulled or changed. Polish authorities didn't begin procedures of changing or terminating treaties or the constitution. Nobody mentioned that Poland shall abandon European Union. The verdict hasn't changed interpretation of any legal regulations. It has no influence on applying law and activity of organ of authority. Courts perceive this jurisdiction as it has never been issued. The verdict is treated as a political statement of the Tribunal, which was supposed to support the argumentation of authorities in political and legal dispute over the position of neo-judges. The tribunal advocates the conception that neo-National Council of Justice is valid and that old judges are not supposed to question the legitimacy of new judges.

Contemporary, the position of the Tribunal and their judges is very week. It is an effect of previous conflicts that had arisen around this institution. Because of this nobody, especially members of political opposition and professional lawyers (including academics) treat the Tribunal verdict seriously. Because of the confusing and puzzling character of the sentence and justification of the judgment, authorities weren't even able to use it in legal disputes. This verdict is an example of the situation, when the historical and theoretical conceptions of legal effects of tribunal's jurisdictions are good for nothing. Nobody has predicted that the tribunal's verdict on unconstitutionality of a treaty would cause no legal effects.

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