# Partial unconstitutionality of European law regulations: judgments of the Polish Constitutional Tribunal in cases P 7/20, K 3/21, K 6/21, and K 7/21

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**Abstract**: This paper attempts to analyse four controversial rulings of the Polish Constitutional Tribunal, which partially invalidated provisions of European legal acts (refs. P 7/20, K 3/21, K 6/21 and K 7/21). The author explains the context behind the issuance of such rulings, the arguments raised during the proceedings and the final text of the sentences. Finally, the author examines the implications and practical effects of the rulings on the jurisprudence of Polish courts. Through the thorough study of the Tribunal’s judgments, the reader can acquire a comprehensive knowledge of the relationship between Polish domestic law relating to the system and organization of the judiciary and European law.

**Keywords**: Constitutional Tribunal, independence of the judiciary, constitutional judiciary, European law, principle of primacy, Court of Justice of the European Union, European Court of Human Rights

## I. Introduction

The Constitutional Tribunal is a judicial institution established by Articles 188 to 197 of the Polish Constitution which is tasked with, among others, adjudicating the conformity of statutes and international agreements to the Constitution.[[1]](#footnote-1) The Tribunal enjoys the distinctive political position of a so-called “negative legislator,” as it is the only judicial entity explicitly empowered by the Constitution to strike down legal provisions functioning in the Polish legal order on a statutory level. As such, the Tribunal’s judgments are of universally binding application.[[2]](#footnote-2) Since its inception in 1982, the Tribunal’s position has gradually evolved. At the very beginning, the Tribunal has confined itself to issuing concise, dichotomous “rulings with simple implications.”[[3]](#footnote-3) In such decisions, the Tribunal ruled that a challenged provision is either consistent or inconsistent with a higher-level norm.[[4]](#footnote-4) However, with the evolution of case law, the Tribunal has realised the need to hand down other types of rulings. The first of such are the so-called ‘interpretative’ judgments, in which the Tribunal adjudicates the constitutionality of a particular interpretation of a provision (‘Article A…, understood that it… is consistent/inconsistent with Article B…’).[[5]](#footnote-5) Such a form of decision allows the Tribunal to eliminate one of the conflicting interpretations of the same provision, that violates a higher-level norm, without abrogating the entire provision. The other, more nuanced type of ruling is the so-called “limited” judgment, in which the Tribunal rules on the constitutionality of a particular scope of application of a given provision (“Article C …, in so far that it applies to/includes/omits/etc. … is consistent/inconsistent with Article D …”).[[6]](#footnote-6) In issuing a “limited” judgment, the Tribunal decodes a certain norm from the challenged legal provision and then evaluates that decision.[[7]](#footnote-7)

Since 2015 the Tribunal has become the subject of a constitutional crisis, which has been widely described and commented on in both doctrine and journalism. The point of this essay is not to go into detail about the details of the dispute. The reader should, however, be made aware that due to the appointment of so-called doppelganger Judges (persons appointed to an already occupied judicial post), the Tribunal has been widely considered to have an improper composition.[[8]](#footnote-8) The Polish Supreme Court has recently held, that “a body, in which persons appointed to posts already filled sit, is not the body described in the Constitution as the Constitutional Tribunal, and as such decisions issued by such a body do not have the effect, referred to in Article 190(1) of the Constitution.”[[9]](#footnote-9) The position of transnational, European tribunals on the matter will be addressed in further parts of the paper. Furthermore, the Tribunal has been criticised as having become a political tool in the hands of the now-former Law and Justice government of Poland.[[10]](#footnote-10) For the purposes of this paper, I avoid the widespread, highly politicised terms surrounding the Tribunal, such as “the Culinary Tribunal” or “the neo-Tribunal”, although the reader should be aware of their usage.

In 2021, in the midst of the ongoing constitutional crisis, the Tribunal issued four controversial rulings, in which it found that the provisions of three distinct acts of European law—that is the Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU) and the European Convention on Human Rights (ECHR)—are partially incompatible with the Polish Constitution. This new approach represented a significant departure from a well-grounded line of jurisprudence, that the Tribunal has aligned with in the past.[[11]](#footnote-11) The goal of this paper is to analyse those four rulings, explain the context behind their issuance, and consider the implications of such decisions.

## II. Interim measures (case P 7/20)

The background for the first of the aforementioned rulings is deeply intertwined with the new Act on the Supreme Court of December 8, 2017, which, among others, established new disciplinary rules for judges in Poland.[[12]](#footnote-12) This statute created two new chambers of the Court, among them being the Disciplinary Chamber, which was vested with the exclusive jurisdiction to adjudicate all disciplinary cases. The impartiality of the judges appointed to this Chamber was met with scepticism, primarily from the other, “old” Chambers of the Supreme Court, which began to request preliminary rulings from the Court of Justice of the EU.[[13]](#footnote-13) On November 19, 2019, in response to three such requests, the CJEU opened the proverbial floodgates, ordering the national courts to verify the Disciplinary Chamber’s independence and impartiality.[[14]](#footnote-14) Furthermore, the European Commission initiated an anti-infringement procedure against the Polish government in relation to the new act on the Supreme Court. The complaint eventually made its way to the CJEU, whereupon the Commission applied for interim measures against Poland, which the Grand Chamber of the Court granted on April 8, 2020. The Polish Government was immediately ordered to “suspend the application of [national law provisions] forming the basis of the jurisdiction of the Disciplinary Chamber” and to “refrain from referring the cases pending before the [Disciplinary Chamber] before a panel that does not meet the requirements of independence defined … in the judgment of 19 November 2019.”[[15]](#footnote-15) On the very next day, one of the judges directly affected by the CJEU’s ruling—Justice Małgorzata Bednarek of the Disciplinary Chamber—raised the following question before the Constitutional Tribunal:

“whether the second sentence of Article 4(3) of the Treaty on European Union … in conjunction with Article 279 of the Treaty on the Functioning of the European Union …, insofar as it results in an obligation of an EU member state to execute interim measures relating to the shape of the system and functioning of the constitutional organs of the judiciary of that state, is consistent with Articles 2, 7, 8(1) and 90(1) in conjunction with Article 4(1) of the Constitution of Poland?”[[16]](#footnote-16)

Under the second sentence of Article 4(3) of TEU “The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union,”[[17]](#footnote-17) while Article 279 of the TFEU authorises the CJEU to “prescribe any necessary interim measures” it may deem appropriate in a pending case.[[18]](#footnote-18) Justice Bednarek questioned whether the CJEU’s mandate to issue measures relating to the national judiciary in Poland violates several provisions of the Polish Constitution, particularly: Article 2—the principle of a democratic state ruled by law; Article 7—the principle of legality; Article 8(1)—the principle of supremacy of the Constitution; and finally Article 90(1), which regulates the rules of delegating competences of national institutions to an international organization, read in conjunction with Article 4(1)—the principle of sovereignty of the nation.[[19]](#footnote-19) The main argument against the CJEU’s mandate was that Poland never delegated competences relating to the judiciary upon the Union, and as such those matters remain within the scope of national law.

In the proceedings before the Tribunal, Justice Bendarek’s point of view was supported by the National Public Prosecutor’s Office (led by the incumbent Minister of Justice) as well as by the Ministry of Foreign Affairs. Meanwhile, the Marshal of the Sejm and the Commissioner for Human Rights argued for the dismissal of the case. On July 14, 2021, the Tribunal, sitting in a 5-judge panel, laid down its judgment, finding that the challenged provisions of EU law, “insofar as the CJEU imposes *ultra vires* obligations on the Republic of Poland, as a member state of the European Union, by issuing interim measures relating to the system and jurisdiction of Polish courts and the rules of procedure before Polish courts” is inconsistentwith the above-mentioned articles of the Polish Constitution, and as such the principles of primacy and direct effect, as explained in Article 91(1) to (3), do not apply.[[20]](#footnote-20) The Tribunal itself noted that this is a limited (“insofar”) judgment, as:

“the declaration of partial unconstitutionality of an EU legal act does not lead to an outright derogation of such a norm [since] the Tribunal cannot derogate an EU legal act (because such a decision cannot be made by any member state) … the judgment has a limited character and at its core is similar to an interpretative judgment. Thereby it removes one of the possible interpretations of the provisions under review, without eliminating, in substance, the norm set forth in the provisions (editorial units) under review.”[[21]](#footnote-21)

In reviewing the challenged norm, the Tribunal decided that the EU exceeded its competences under the principle of conferral expressed in Article 5(1) of the TEU and as such the interim measures prescribed in case C-791/19 R had no effect.

## III. Case K 3/21—The primacy of EU Law

On March 2, 2021, the CJEU laid down its prejudicial ruling in another case relating to the judiciary in Poland, particularly the case of five persons who were denied judgeship by the National Council of the Judiciary.[[22]](#footnote-22) In the decision the Court questioned, inter alia, the changes to the procedure of appointing judges. The Court further referred to the principle of primacy of EU law and ordered the national courts to, if necessary, to disapply those provisions and apply the provisions previously in force. Such a decision was met with a swift reaction of the Polish Prime Minister—Mr. Mateusz Morawiecki—who on 29th March 2021 filed the following complaint with the Tribunal:

“I hereby ask for an examination of the compatibility of:

1. the first and second subparagraphs of Article 1 in conjunction with Article 4(3) of the [TEU], understood in that they authorize or oblige a body applying the law to refrain from applying the Constitution of Poland, or order the application of laws in a manner inconsistent with the Constitution—with Articles 2; 7; 8(1) in conjunction with Articles 8(2), 90(1) and 91(2); as well as Article 178(1) of the Constitution of Poland;
2. the second subparagraph of Article 19(1) in conjunction with Article 4(3) of the TEU, understood in that for the sake of ensuring effective legal protection, a body applying the law is authorized or obliged to apply legal provisions in a manner inconsistent with the Constitution, including the application of a provision that, by virtue of a ruling of the Constitutional Tribunal has ceased to be in force—with Articles 2; 7; 8(1) in conjunction with Articles 8(2) and 91(2); as well as Articles 178(1) and 190(1) of the Constitution of Poland;
3. the second subparagraph of Article 19(1) in conjunction with Article 2 of the TEU, understood in that it authorizes a court to review the independence of judges appointed by the President … and to review a resolution of the National Council of the Judiciary [NCJ] regarding a request to the President … for the appointment of a judge—with Article 8(1) in conjunction with Articles 8(2), 90(1) and 91(2); as well as Articles 144(3)(17) and 186(1) of the Constitution of Poland.”[[23]](#footnote-23)

In the first part of his motion the Prime Minister, somewhat echoing the notion present in Judge Bednarek’s judicial question, asked the Tribunal to rule on the constitutionality of the principle of primacy of EU law, derived from the first and second subparagraphs of Article 1 of the Treaty, read in conjunction with Article 4(3)—that is, the principle of sincere cooperation. Although the principle of primacy is not explicitly formulated within any binding provision of EU law, it has been laid out in CJEU case law nearly a decade ago. As the Court made clear in the Simmenthal case:

“a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means”[[24]](#footnote-24)

Furthermore, whether an EU law measure is valid within a member state—as noted by the CJEU in the Internationale Handelsgesellschaft case—cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state, or the principles of its constitutional structure.[[25]](#footnote-25) The Polish Supreme Court has relied on such notions to disqualify judges appointed by the National Council of the Judiciary under the new regulations, most notably in the landmark Resolution of the Three Chambers.[[26]](#footnote-26) However, the Prime Minister found this age-old principle to “raise wide-reaching and justified constitutional doubts”[[27]](#footnote-27) and challenged its validity under the same Articles of the Constitution as Justice Bednarek, additionally referring to the provision of Article 178(1)—that is the principle of subordination of the judges to the statutes and the Constitution. He further questioned the provision of Article 19(1) of the TEU, which states that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”[[28]](#footnote-28) The Prime Minister argued it should be read in conjunction with both the principle of sincere cooperation contained in Article 4(3) of TEU, as well as with the principle of rule of law contained in Article 2 of the Treaty. The CJEU derived from these provisions, among others, the principle of judicial independence as well as the principle of effective judicial protection, which again—were used to question the legality of the appointment of new Judges in Poland, even despite the Constitutional Tribunal’s rulings to the contrary (e.g. case P 7/20).[[29]](#footnote-29) The Prime Minister argued—among the usual contentions—that such rules violate: Article 190(1)—the principle of general applicability of the Constitutional Tribunal’s rulings; Article 144(3)(17)—establishing the presidential prerogative of judicial appointments; and Article 186(1)—formulating the NCJ’s role in safeguarding the independence of courts and judges.

In case K 3/21 the Prime Minister was supported by the President, the Prosecutor General, the Minister of Foreign Affairs, and (in part) by the Marshal of the Sejm. The sole opposing party was the Commissioner for Human Rights. The Tribunal laid down its en bancruling on October 7, 2021, with two dissents and three concurrences. In the sentence, which reads more like a journalistic piece than a judgment of a national court, the Tribunal ruled that:

„The Constitutional Tribunal ... having examined … the motion of the Prime Minister …

rules :

1. that the first and second subparagraphs of Article 1 in conjunction with Article 4(3) of the [TEU], insofar as the European Union established by equal and sovereign states forming an “even closer union among the peoples of Europe” whose integration—taking place on the basis of EU law and through its interpretation by the [CJEU]—is reaching a “new stage”, in which:
2. the bodies of the European Union operate beyond the limits of competencies delegated by the Republic of Poland in the treaties,
3. the Constitution is not the supreme law of the Republic of Poland, which has priority of effectiveness and application,
4. the Republic of Poland cannot function as a sovereign and independent nation

—are inconsistent with Articles 2, 8 and 90(1) of the Constitution of Republic of Poland.”[[30]](#footnote-30)

In the further part of the sentence, the Tribunal mostly agrees with the second and third points of the Prime Minister’s motion, ruling that the second subparagraph of Article 19(1) of TEU read independently as well as in conjunction with Article 2 of the Treaty is inconsistent with the Polish Constitution. This, once again, was a limited judgment.

## IV. K 6/21—The independence of the Constitutional Tribunal

Having “dismantled” the provisions of EU Law, which the CJEU used to undermine the justice system reforms in Poland, the government took to eliminate analogous provisions of other international treaties from the Polish legal order. This became necessary after the European Court of Human Rights issued its ruling in Xero Flor, in which it unanimously found the Constitutional Tribunal’s composition to be defective under Article 6 § 1 of the Convention.[[31]](#footnote-31) In response to that ruling, the Polish Prosecutor General who simultaneously held the post of the Minister of Justice—Mr. Zbigniew Ziobro—challenged the above-mentioned provision, which guarantees a right to a fair trial, before the Constitutional Tribunal. In his motion, the Prosecutor General wrote:

“I hereby ask for a finding that:

1. the first sentence of Article 6 § 1 of [the ECHR], insofar as the term “tribunal” used in this provision encompasses the Constitutional Tribunal …, is inconsistent with Articles 2, 8(1), 10(2), 173 and 175(1) of the Constitution of the Republic of Poland;
2. the first sentence of Article 6 § 1 of [the ECHR], insofar as it equates the guarantee of *a hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of the civil rights of a subject and obligations or of any criminal charge against them* arising out of this provision with the competence of the Constitutional Tribunal to rule on the hierarchical consistency of provisions and legal acts enumerated in the Constitution of Poland, and as such allows to extend the requirements arising out of Article 6 of the ECHR to proceedings before the Constitutional Tribunal is inconsistent with Articles 2, 8(1), 79(1), 122(3) and (4), 188(1) to (3) and (5) and 193 of the Polish Constitution;
3. the first sentence of Article 6 § 1 of [the ECHR], insofar as it covers the assessment by the European Court of Human Rights of the legality of the process of selecting the judges of the Constitutional Tribunal to determine whether the Constitutional Tribunal is an independent and impartial tribunal established by law is inconsistent with Articles 2, 8(1), 89(1)(3) and 194(1) of the Polish Constitution.”[[32]](#footnote-32)

Among those reference provisions not enumerated in earlier parts of the paper are the following Articles of the Polish Constitution: Article 10(2)—the principle of separation of powers; Article 79(1)—granting all citizens the right to a constitutional complaint; Article 89(1)(1)—requiring the statutory ratification of treaties regarding Poland’s membership in international organizations; Article 122(3) and (4)—explaining the Tribunal’s role in the so called “preventative” control of constitutionality of statutes; Article 173—establishing the courts and tribunals as an independent branch of power; Article 175(1)—entrusting the administration of justice in Poland to the Supreme Court, as well as to the common, administrative, and military courts; Article 188(1) to (3) and (5)—enumerating the jurisdiction of the Tribunal; Article 193—establishing the basis for issuing judicial questions to the Tribunal; and finally Article 194(1) of the Constitution—concerning the composition of the Tribunal. Such a selection of reference provisions aims to articulate the Prosecutor General’s view, that the Constitutional Tribunal is not a typical court, tasked with the administration of justice, but rather a “quasi-court”,[[33]](#footnote-33) and as such should not be examined under the conditions of Article 6 § 1 of the Convention.

The Prosecutor General’s motion was once again supported by the President, and (in part) by the Marshal of the Sejm. The Commissioner for Human Rights opposed the motion, while the Minister of Foreign Affairs filed a rather cautious, nonindicative opinion. The Tribunal, however, sitting in a
5-judge panel, unanimously ruled that the word “tribunal” contained in Article 6 § 1 of the Convention does not encompass itself, and as such the ECtHR has no competence to question its composition.[[34]](#footnote-34)

## V. K 7/21—Judges elected by the “neo” National Council of the Judiciary

Following the decision in Xero Flor, the European Court of Human Rights laid down two other judgments relating to the judiciary reforms in Poland. First, the Court issued its decision in Broda, in which it ruled that by prematurely terminating the mandates of two Chief Judges of their respective Courts, the Polish government once again violated Article 6 § 1 of the Convention.[[35]](#footnote-35) Furthermore, in Reczkowicz, the Court echoed the CJEU’s ruling and found that the Supreme Court’s Disciplinary Chamber was not a “tribunal established by law” under the aforementioned provision.[[36]](#footnote-36) Those two judgments led to another, final challenge to the Convention by the Prosecutor General’s Office, which contested that:

“… the first sentence of Article 6(1) of [the Convention], insofar:

* as it empowers the European Court of Human Rights to create, under domestic law, a judicially protected legal right to hold an administrative office in the organizational structure of the common judiciary of the Republic of Poland is inconsistent with Articles 8(1), 89(1)(2) and 176(2) of the Constitution of the Republic of Poland;
* as the condition “tribunal established by law” contained in this provision does not include, being the basis for the establishment of a court, generally applicable provisions of the Constitution of Poland, the statutes, as well as final and generally applicable provisions of the Polish Constitutional Tribunal, is inconsistent with Articles 89(1)(2); 176(2); 179 in conjunction with Article 187(1) in conjunction with Article 187(4); as well as with Article 190(1) of the Polish Constitution;
* as it allows the national or international courts to assess the compatibility with the Constitution of the Republic of Poland and with the [Convention] of statutes regarding the organization of the judiciary, the jurisdiction of the courts and the act regarding the [NCJ], in order to establish the compliance with the condition of “a tribunal established by law”, is inconsistent with Art. 188(1) and (2) of the Polish Constitution.”[[37]](#footnote-37)

The text of the complaint was later amended as to the third dash, as the ECHR published another landmark decision regarding the judiciary in Poland on November 8, 2021.[[38]](#footnote-38)

The Prosecutor General enjoyed the support of the President, the Marshal of the Sejm and the National Council of the Judiciary (as amicus curiae). The Commissioner for Human Rights was the sole dissenter, while the Minister for Foreign Affairs once again filed the same nonindicative opinion. The Tribunal’s five-judge panel once again unanimously agreed with the government.[[39]](#footnote-39)

## VI. Conclusions

All of the four decisions of the Tribunal analysed in this paper included the so-called “doppelganger Judges”—that is persons appointed to seats already filled by other judges—on the bench, in violation of both national and international law. As such, the legitimacy of the Court to issue any decisions in such a panel has been questioned (by the vast majority of Polish doctrine as well as by the CJEU and ECHR themselves). Per the Batory Foundation “according to the rule of primacy of EU law over national law, even that of constitutional rank, the courts should disregard the judgment of the Tribunal.”[[40]](#footnote-40) And yet, despite this widespread interpretation, the four decisions of the Tribunal have been widely cited by other courts, particularly by the Polish Supreme Court. The first ruling in P 7/20was cited in court decisions over 120 times (according to the “Lex” Legal Information System), with over 90% of such citations being made by the Supreme Court. Some Justices deny the Tribunal’s rulings any binding force. “Such interpretative judgments of the Constitutional Tribunal, which don’t result in the loss of the binding force of provisions, do not bind independent courts, particularly the Supreme Court.”[[41]](#footnote-41) Voices to the contrary, though less prevalent, can also be found. “The Constitutional Tribunal’s rulings are generally binding, which results in an inability of a subsequent application by a Court of a regulation which the Tribunal found to be incompatible with the Constitution.”[[42]](#footnote-42)

Following the decisions in cases P 7/20 and K 3/21, the European Commission filed another complaint against Poland with the CJEU, that the country has “failed to fulfil its obligations under the general principles of autonomy, primacy, effectiveness and uniform application of EU law and the principle of the binding effect of judgments of the Court of Justice.”[[43]](#footnote-43) The Commission also called on the Court of Justice to declare that, “since the Tribunal does not satisfy the requirements of an independent and impartial tribunal previously established by law as a result of irregularities in the procedures for the appointment of three judges … Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.”[[44]](#footnote-44) Meanwhile, the European Court of Human Rights once again undermined the position of the Polish Tribunal in 2023, affirming the decision in Xero Flor, and denying the Tribunal the character of a “tribunal established under law.” The ECtHR disregarded the decisions in K 6/21 and K 7/21, declaring the adjudicating panel as improperly staffed. “At the same time [The Court] has no doubt that the Constitutional Court should be regarded as a ‘tribunal’ within the meaning of Article 6 § 1. In the present case, the fact that the bench of the Constitutional Court … included Judge M. Muszyński … is by itself capable of vitiating the legal force to be attached to that judgment.”[[45]](#footnote-45)

In summary, the decisions in cases P 7/20, K 3/21, K 6/21 and K 7/21 did not resolve the conflict between the Government of Poland and the international organizations that Poland is a part of (EU, Council of Europe). One could even argue that the aforementioned decisions resulted in a deepening of the conflict, “allow[ing] the PiS government not only to remove an obstacle to promoting their often-unconstitutional policies but to actively use the Constitutional Tribunal for political ends.”[[46]](#footnote-46) Meanwhile, the judges who disagreed with the Tribunal continued to apply the principle of primacy and deny the Tribunal’s rulings any binding force. At the same time, the anti-infringement proceedings are still pending, and the constitutional crisis is far from over—even despite the appointment of a new government.

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