

The Polish Constitutional Tribunal undermined the foundations of the European Union

The Constitutional Tribunal issued a decision on 7 October 2021 on Prime Minister Mateusz Morawiecki's motion regarding the constitutionality of the interpretation of certain provisions of the Treaty on European Union – the interpretation of the independence of the judiciary, which has been formed in recent years by the Court of Justice of the EU and invoked by Polish courts when adjudicating on cases related to the rule of law crisis in Poland.

In case K 3/21, the Constitutional Tribunal held that the first and second subparagraphs of Article 1, in connection with Article 4(3) and the second subparagraph of Article 19(1) and Article 2 of the Treaty on European Union, in the meaning in which these provisions have been interpreted by the Court of Justice of the European Union in rulings regarding the independence of the courts and the impartiality of judges, are unconstitutional.

1. Yesterday's decision is not a judgment of the Constitutional Tribunal, because it was issued **to a political order, by a politically subordinated body that lacks the attributes of independence and impartiality, the members of which included people elected to that body to fill positions that had previously been filled, as judges of the Constitutional Tribunal.** Such a situation means that 'judgments' issued by that body breach the right to have a case heard by a court established by statute, and therefore breach Article 6(1) of the European Convention on Human Rights (see judgment of the ECtHR of 7 May 2021 in *Xero Flor w Polsce sp. z o.o. v Poland*, application no. 4907/18).
2. For the same reason (issuing a decision with the involvement of people elected to positions that had already been filled), **the bench of the Tribunal that issued the 'judgment' is burdened with a very significant defect** in the form of a breach of the article of the Polish Constitution specifying the membership of the Constitutional Tribunal and the method of electing its judges (Article 194, para. 1), and therefore the 'judgment' does not have the effect of Article 190, paras. 1 and 3 of the Polish Constitution. This is also confirmed by the case law of the Supreme Court (see the decision of the Supreme Court of 16 September 2021, case ref. I KZ 29/21 and the decision of the Supreme Court of 29 September 2021, case ref. V KZ 47/21).
3. Notwithstanding these reservations with respect to the 'judgment' that was passed, it should be adamantly stated that the operation in Poland of the fundamental norms of European Union law that are binding on Member States has been undermined. **The Constitutional Tribunal questioned the principle of loyal cooperation and the primacy of EU law over national law. Polish citizens have been deprived of the same right to the protection of their rights before the courts as all other citizens of EU Member States.**
4. The Constitutional Tribunal assessed the compatibility of the judgments of the Court of Justice of the EU with the Polish Constitution under the guise of examining the constitutionality of the interpretation of the provisions of the Treaty on European Union. We would like to emphasise that, in accordance with the Polish Constitution, the Constitutional Tribunal does not have the right to conduct such an examination. **Even if yesterday's judgment had been passed by a correctly formed bench, this could not have led to any ruling of the CJEU being overturned or invalidated or the interpretations of EU law adopted by the CJEU being overturned, nor could it have resulted in the provisions of the Treaty on European Union being overturned.**
5. The ruling of 7 October 2021, like the Prime Minister's motion itself, essentially leads to the effect of **preventing Polish courts from applying interpretations of European Union law established by the Court of Justice of the EU.**

The Constitutional Tribunal cannot take away the binding force of the provisions of the Constitution of the Republic of Poland itself, which explicitly provides that ratified treaties are positioned higher in the hierarchy of legal norms than ordinary statutes, and if a statute is in conflict with the Constitution and treaties, the court should be guided by the higher order law. Therefore, it should be concluded that the **Tribunal overstepped the extent of its jurisdiction and the framework specified by the content of Articles 188 and 189 of the Constitution of the Republic of Poland and interfered with the sphere of adjudication of the courts, because it deprived the courts of the power to exercise the above possibility to disregard a provision of a statute in the event that the court finds that it is inconsistent with a ratified international agreement.**

6. It unambiguously arises from the above that the **contested provisions of the Treaty on European Union remain in force within Poland, as does the constitutional principle according to which, if a statute is inconsistent with the Treaty on European Union, the Treaty takes precedence.** As long as notice of termination of the Treaty on European Union has not been given, it is a part of the Polish legal order and a judgment of the Constitutional Tribunal cannot change this.
7. The actual objective of the proceedings before the Tribunal was to obtain a formal document that would give the government legitimacy not to perform rulings of the CJEU regarding the operation of the standard of judicial impartiality and the independence of the judiciary.
8. The effect of the Constitutional Tribunal's 'judgment' will be to create a chilling effect on judges by initiating disciplinary proceedings. **It will be possible to discipline impartial judges** through the disciplinary commissioners, who are dependent on the political authorities, and the Disciplinary Chamber, which is not a court, **for failing to comply with the decisions of the Polish Constitutional Tribunal if they apply CJEU rulings that contain an interpretation of the treaty provisions contested by the Constitutional Tribunal.**
9. This dispute, which was artificially created by the Polish government, was not about a conflict between the Polish Constitution and treaty provisions or CJEU rulings. There is no conflict between the right to an independent and impartial court, as referred to in EU law, and the same civic right under the Polish Constitution. The problem is not EU law, but the statutes passed by the ruling majority in Poland within the framework of the so-called 'reform' of the judiciary. It is these laws, and not EU law, which are in breach of the Polish Constitution, and it is their conflict with EU law that the Court in Luxembourg has already found in 12 judgments in cases initiated both by the European Commission and by Polish courts. This alleged **conflict was incited in order to become free of the restrictions arising from EU law by subordinating the Polish courts to the political authority, while the decision of the Constitutional Tribunal has the purpose of serving exclusively political purposes and is intended to safeguard the actions of the authorities and the unconstitutional 'reform' of the judiciary conducted by the Law and Justice (PiS) party.**

We would like to emphasise that yesterday's 'judgment' of the Constitutional Tribunal only leads to the perpetuation of the state of breach of international law, involving Poland's failure to perform its obligations under the EU treaties.

As long as notice of termination of the Treaty on European Union has not been given, it is a part of our law, and no judgment of the Constitutional Tribunal can change this. European Union law takes precedence over national law and all decisions of the Court of Justice of the EU are binding on all authorities of the Member States, including the national courts.

We would also like to reiterate that, according to the ruling of the Constitutional Tribunal of 11 May 2005 on the Treaty of Accession (K 18/14), if the Constitutional Tribunal actually found some provision of the Treaty on European Union to be unconstitutional, we would enter a path which only has three options – amending the Polish Constitution, causing the modification of the Treaty on EU with the consent of all Member States, or – finally – deciding to give notice of termination of the Treaty and to leave the European Union.

The Polish Prime Minister, by submitting the motion to the Constitutional Tribunal, and the Constitutional Tribunal, by issuing its 'judgment' yesterday, have just set us, Polish citizens, on this path.