Symposium | Introduction | The Polish Constitutional Tribunal Decision on the Primacy of EU Law: Alea Iacta Est. Now what?

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[**Editor's Note:** I-CONnect is pleased to feature a symposium on the recent decision by the Polish Constitutional Tribunal on the primacy of EU law. This introduction will be followed by four posts exploring different aspects of the decision and its impact.]

—Antonia Baraggia and Giada Ragone, University of Milan, Italy

On October 7, 2021 the captured Polish Constitutional Tribunal (CT) made an unprecedented move in the long-lasting arm-wrestling between Poland and the EU: it openly challenged the primacy of EU law and its interpretation by the Court of Justice of the European Union.

As is well-known, since 2015, the Polish government has been repeatedly warned by the EU that the reforms of the judiciary implemented in Poland jeopardize the principles descending from the rule of law, in particular the independence of the judiciary. Other grounds for clashes came with the management of the migratory crisis and Poland's refusal to implement the EU emergency relocation plan, the introduction – following a decision by the CT – of a near total ban on abortion and the declarations by many local authorities of being free from "LGBT ideology".

Judgement K 3/21 is the culmination of this enduring battle over respect for the EU's values and principles but also over state sovereignty, and it shows how far apart the EU and Polish authorities are. In the ruling, the majority of the CT stated that Article 1, first and second paragraphs, in conjunction with Article 4(3), Article 2 and Article 19(1), second subparagraph of the Treaty on European Union are inconsistent with the 1997 Constitution.

Among the other reasons, the Court affirmed that under the provisions mentioned: 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. As Agnieszka Bień-Kacała notes in this Symposium, the ruling contrasts with the previous Polish constitutional case-law on EU law: indeed, back in 2010, the Constitutional Tribunal recognized the unique position of the Lisbon Treaty and its compliance with the Constitution.

To properly understand what this decision means for the EU, it must be read in context and it is a multifaceted context characterized by contrasting tensions: on one side the growing narrative advanced by Poland and Hungary, which challenge the EU authority in several areas and see EU interference as a constraint over the expression of national sovereignty and identity; on the other, what has been defined as a Hamiltonian moment for the EU, marked by the establishment of the NextGenEU program, which provides economic support for Member States that have been severely hit by the Covid-19 pandemic and paves the way for a new step in the EU integration process.

How can such opposite forces be reconciled? What impact will the Polish decision have on the precarious equilibrium in Europe today? Is it merely a repairable fracture? If so, how?

The blog posts in this symposium explore a number of important issues, from different perspectives, posed by the Polish decision, such as, the context in which the decision has been made, the nature of the challenge, the role of legal scholarship, the possible reaction of the EU institutions and the systemic impact of the case.

The legal debate about the Polish decision

One of the issues that has heated the legal debate has been the interpretation of the Court decision as an indirect trigger of Article 50 (2) TEU, the first step towards a "Polexit". In more general terms, the rule-of-law backsliding in Poland, with that constant challenge to EU institutions over respecting the EU's fundamental values, has been seen as a *de facto* Polexit.

Such an understanding of the current situation in Poland as an informal, legal exit from EU Treaties is – as both Matteo Bonelli and Maciej Krogel argue in this Symposium – unhelpful, unclear and ambivalent.

At the same time the decision has been compared with other cases that have questioned the supremacy of the EU law, namely Landtová, Ajos and the recent PSPP case heard by the German Constitutional Court.

However, we need to step very carefully in equating the decision by the Polish CT and the PSPP decision of the BVerfG as the two cases are substantially different on several grounds:

1. In the PSPP decision, the German Court challenged a very specific, technical aspect of one ECB program, while the Polish Court is challenging the compatibility of the EU's fundamental principles with the Polish Constitution.
2. The PSPP case was brought by 1750 citizens, while the Polish case originated with an application from the Prime Minister of Poland, an expression on the same government that effectively controls the Court. The government's instrumental use of the CT seems quite evident. As Julian Scholtes argues in this Symposium, this is not a case of constitutional pluralism but of constitutional solipsism: "It abuses constitutional pluralism and its conceptual arsenal as a means of disengaging from, rather than engaging with, the EU constitutional order."

3. Related to this, the Polish Court is unlawfully composed, not independent from the political branch and does not even meet the independence standard under Article 6 of the ECHR.

In the light of all these aspects, any comparison with the PSPP case seems to be misleading.

What's next?

In the coming months we will see how the EU institutions react. In particular, are political mechanisms – such as those provided by Article 7 TEU – still options? On the one hand, these instruments have often been considered weak and ineffective; on the other hand, they do leave room for dialogue between the parties, before triggering the nuclear option of the suspension of membership rights.

Of course the infringement procedure under Article 258 TEU is likely to be one of the preferred tools to be deployed. Besides these "old" instruments, what about the application of the new rule of law conditionality mechanism? On October 11, the CJEU started hearings in cases C-156/21 and C-157/21 brought by Poland and Hungary on the legality of the rule of law conditionality regulation (Reg. 2020/2092). Decisions in these cases will probably follow in early 2022. The application of rule of law conditionality would then be a likely in the Poland case and probably a key case to test of the new mechanism. However, even the application of rule of law conditionality may not be so straightforward. As Bonelli argues, the Commission under the Regulation mechanism should prove that the Constitutional court ruling affects the sound financial management of the EU budget or it has a direct link to protecting EU financial interests. Last but not least, the Commission will probably suspend approving the Polish Recovery plan until the rule of law breaches have been fixed by Poland, with significant economic consequences for Polish citizens, civil society and businesses.

Systemic impact(s)

It is clear that judgement K 3/21 has opened a crack in the EU legal order and challenged the future of the EU as a political and legal construct. This is even more serious because it comes at a time when the EU is dealing with the accession process in the Western Balkans and one of the key membership conditions required to candidates is respect for the fundamental values of the EU project. But how can the EU demand to candidates what it cannot uphold vis-à-vis its own Member States?

The future of the EU is at stake.

It is true that conflicts over ultimate authority always emerge in constitutional orders and in international law as well. Moreover, the debate on the Constitutional Courts' jurisdiction over the Treaties is rich and long-standing. However, the EU is now dealing with deeper tensions that pose challenges to the very nature and purpose of the integration project.

Its Member States, its institutions and the legal scholarship should take this case as a chance to commence broader reflection on the deep roots of the contingent events that are shaking the EU project.

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