



The Court of Justice of the European Union in the Case Law of the Polish Constitutional Court: The Current Breakdown in View of Polish Constitutional Jurisprudence Pre-2016

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Accepted: 20 November 2022 / Published online: 5 December 2022
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Abstract

The current crisis in the relationship between the Polish Constitutional Court and the Court of Justice of the European Union (ECJ) is of crucial significance for the process of regional integration based on the values of liberal democracy taking place in the EU. The constitutional crisis in Poland that began in the end of 2015 has challenged the systemic position of the Polish Constitutional Court. It resulted in a new model of constitutional adjudication, and in this new model the Constitutional Court, stripped of its counter-majoritarian power, cannot be perceived as the guardian of liberal democracy. This article postulates that the assessment of the present case law of the Polish Constitutional Court in European matters is made through the prism of the Constitutional Court's jurisprudence pre-2016 (i.e. before the constitutional crisis). Based on that assumption, the current reversal in the case law of the Polish Constitutional Court concerning the ECJ is analysed and assessed. It is argued that the root cause of the constitutional crisis in Poland is the departure from the principles of liberal democracy in the jurisprudence of the Constitutional Court, which are foundational—in light of the assumptions of the integration process—for the axiological identity of the EU and its Member States. This article also shows how the principles and concepts developed in the Polish constitutional jurisprudence pre-2016 could have served to avoid the current conflict with the ECJ, and how those notions are misused in the current jurisprudence of the Polish Constitutional Court.

Keywords Poland · Constitutional tribunal · Liberal democracy · Primacy of EU law · Judicial independence · Rule of law

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1 Introduction

The current breakdown in the relationship between the Polish Constitutional Court and the Court of Justice of the European Union ('ECJ'), or more broadly between Poland and the European Union, is of crucial significance for the process of regional integration based on the values of liberal democracy taking place in the EU. As has been shown by the case of Poland, these processes are not linear, and the values of liberal democracy, which constitute their fundamental premises, can be questioned. The constitutional crisis in Poland is the first such significant breakdown in the relationship between the Court of Justice and a constitutional court of a Member State—the first such significant fracture in the architecture of the composite constitutional order of the European Union.¹ In this sense, the current jurisprudence of the Polish Constitutional Court is no longer an issue of local interest, but becomes a kind of laboratory test for the processes of constitutionalization of EU law. It can be argued that the root cause of the current constitutional crisis in Poland is the departure in the jurisprudence of the Constitutional Court from the principles of liberal democracy, which are foundational—in light of the assumptions of the integration process—for the axiological identity of the EU and its Member States. To enrich the ongoing debate, this article substantiates the above thesis by analyzing the current jurisprudence of the Polish Constitutional Court through the prism of the jurisprudence of the Polish Constitutional Court pre-2016. The jurisprudence of the Polish Constitutional Court pre-2016 was a laborious forging of constitutional framework incorporating the values of liberal democracy—an axiological edifice identical to the constitutionalism of the EU. This meant, in particular, that the primary goal of the constitutional interpretation of law was to protect the rights of the individual by guaranteeing the principle of the rule of law. The current jurisprudence of the Polish Constitutional Court in European matters breaks with these assumptions. In this context, it is striking that such jurisprudence invokes the case law of the Constitutional Court pre-2016 as a crucial, supporting argument. That argument of the current Polish Constitutional Court—as will be explored here—remains entirely unfounded. The same words (principles, concepts) gain different meanings and significance in a different constitutional axiological context. The analysis of the current jurisprudence of the Polish Constitutional Court becomes an excellent (though gloomy) lesson of how much the real, performative meaning of words in the constitutional discourse depends on the axiological assumptions that underpin them. This is another universal lesson emerging from the Polish case.

This article is structured in four sections. The first section presents a synthesis of the pre-2016 Constitutional Court case law on the ECJ (point 2). In addition to a dogmatic analysis of the presented case law, the argument is constructed from the perspective of the theory of EU law—in that respect the reviewed case law of the

¹ As to the constitutional crisis in Poland, see i.a. Tuleja (2020), pp. 658–672; Sadurski (2019a); Sadurski (2018), pp. 1–71; Wyrzykowski (2016), pp. 159–176; Garlicki (2016), pp. 63–78; Łętowska and Wiewiórowska-Domagalska (2016), pp. 79–93; Koncewicz (2016), pp. 1753–1792; Radziejewicz, Tuleja eds (2017), Wyrzykowski (2017), pp. 372–437; Wyrzykowski (2019), pp. 417–422; Koncewicz (2018), pp. 116–173; Garlicki and Derlatka (2019), pp. 151–168; Matczak (2019), pp. 407–410; Matczak (2020), pp. 421–450; Wiącek (2021) pp. 15–33.

Constitutional Court will be conceptualized in the light of constitutional pluralism (point 3). The following part of the article (point 4) focuses on the recent case law of the Polish Constitutional Court, which has resulted in a breakdown in its relationship with the ECJ. This shift in the direction of the Constitutional Court's case law is presented in the broader context of the constitutional crisis in Poland that began in 2015. Two areas for the analysis are distinguished on the basis of the current case law of the Polish Constitutional Court: firstly, the EU standard of judicial independence following the ECJ's judgment of 19.11.2019² and its (non)implementation in the Polish legal system; and secondly the scope of application of EU law as regards the organization and functioning of the national judiciary following the ECJ's rulings of 8.04.2020³ and 2.03.2021.⁴ The article ends by offering conclusions (point 5).

2 The ECJ in the Polish Constitutional Court's Jurisprudence Pre-2016

The position of the Polish Constitutional Court in relation to the ECJ was established primarily in rulings issued in the initial years following Poland's accession to the EU. The Judgment on the Accession Treaty,⁵ Decision P 37/05,⁶ and the Judgment on the Treaty of Lisbon⁷ expressed the Constitutional Court's views on the role of the ECJ within the system of European Union law, as well as in relation to the national courts. This position of the Constitutional Court was confirmed in its subsequent jurisprudence.⁸

The indispensable context for the Polish Constitutional Court's position with respect to the ECJ was the stance taken by the Constitutional Court with regard to the relationship between EU law and the Polish Constitution. The Constitutional Court unambiguously confirmed the supremacy of the Polish Constitution over EU law. In its Judgment on the Accession Treaty, the Constitutional Court emphasized that even after Poland's accession to the EU the Polish Constitution remains, pursuant to its Article 8(1), the supreme law in Poland, and enjoys precedence of binding force as well as precedence of application.⁹ The Constitutional Court also clearly

² See Case C-585/18, C-624/18 and C-625/18 A.K. et al. v. Sąd Najwyższy, ECLI: EU:C:2019:982.

³ See Case C-791/19 R European Commission v. Republic of Poland, ECLI: EU:C:2020:277.

⁴ See Case C-824/18 A.B. and Others v. Krajowa Rada Sądownictwa and Others, ECLI: EU:C:2021:153.

⁵ Judgment 11 May 2005, K 18/04, Judgment on the Accession Treaty.

⁶ Decision 19 December 2006, P 37/05, Decision P 37/05.

⁷ Judgment 24 November 2010, K 32/09, Judgment on the Treaty of Lisbon.

⁸ In particular by Cases SK 45/09, P 40/13, K 61/13 and P 4/14.

⁹ It should be noted in this context that the Polish Constitution, which predates Poland's accession to the EU (the Constitution was passed in 1997), declares that the Constitution is the highest law of the Republic of Poland (Article 8(1)). As to the relationship between Polish law and EU law, it stems from the provisions of the Polish Constitution that EU law has priority in the event of a conflict with *statutes*. In particular according to the Constitution's Article 91(2) and (3), an international agreement ratified upon prior consent granted by statute has precedence over *statutes*. If an agreement, ratified by Poland, consti-

stated that the Member States retain the competence-competence (*Kompetenz-Kompetenz*),¹⁰ and it is the Constitutional Court that—in matters of principle concerning issues of a constitutional nature—should retain the position of ‘the court of last resort’.¹¹ This firm stand on the supremacy of the Polish Constitution over EU law, and the Constitutional Court’s ‘last word’ in any potential dispute with the ECJ, was softened by its formulation of the principle of ‘favourable predisposition towards the process of European integration’.¹² That principle was clearly designed to mitigate any potential conflict between the EU law and the Polish Constitution and provide practical tools to avoid it.¹³

As regards the role of the ECJ in the EU legal system, it was explicitly confirmed in the jurisprudence of the Polish Constitutional Court pre-2016 that the ECJ is the only court competent to rule on the validity and interpretation of EU law.¹⁴ According to the Constitutional Court the division of competences between national courts and the ECJ as regards the interpretation and application of EU law is such that the interpretation is vested in the ECJ, while the application—understood as the application of an EU norm to the facts of a case as determined by a court—is entrusted to a national court, which in a given case shall be bound by the ECJ’s case law.¹⁵ In the Judgment on the Accession Treaty, the Constitutional Court rejected allegations of the non-compliance of Article 234 of the EC Treaty with the Polish Constitution. Having recognised that the ECJ is the only court competent to rule on the validity and interpretation of EU law, the Constitutional Court pointed out the limits on the interpretation by the ECJ. In the view of the Constitutional Court, this interpretation should fall within the scope of functions and competences delegated to the EU by the Member States. It should be based upon the assumption of mutual loyalty between the EU institutions and the Member States. This assumption generates a duty—on the part of the ECJ—to be sympathetically disposed towards national legal systems, and a corresponding duty for the Member States to show the highest standard of respect for EU norms.¹⁶ In this context the most controversial

Footnote 9 (Continued)

tuting an international organization so provides, the laws established by it have precedence in the event of a conflict with *statutes*. This was the crucial part of the normative context explaining the Constitutional Court’s stance pre-2016, wherein it rejected the principle of primacy of EU law in cases of norms of a constitutional rank.

¹⁰ See Judgment on the Accession Treaty and the Judgment on the Treaty of Lisbon.

¹¹ See Constitutional Court Decision 19 December 2006, P 37/05 and Judgment 16 November 2011, SK 45/09. As to the Constitutional Court’s position on the relationship between the Polish Constitution and EU law pre-2016, see: Kowalik-Bañczyk (2005); Sadurski (2006); Łazowski (2011); Wyrzykowski (2013), pp. 235–243; Safjan (2015) pp. 380–381; Biernat and Kawczyńska (2019), pp. 755–757; Biernat (2020a).

¹² See, i.a., Judgment 17 May 2003, K 11/03, Judgment on the Accession Treaty, Judgment on the Treaty of Lisbon.

¹³ See comments below as to that principle in the context of the conforming interpretation.

¹⁴ See in particular Judgment on the Accession Treaty, Judgment 18 February 2009, Kp 3/08, Decision 13 April 2010, P 35/09, Decision 19 December 2006, P 37/05 and Judgment 26 June 2013, K 33/12.

¹⁵ See Decision 19 December 2006, P 37/05.

¹⁶ See the Judgment on the Accession Treaty.

case in the pre-2016 jurisprudence of the Polish Constitutional Court on EU matters was Judgment SK 45/09. In that judgment the Polish Constitutional Court allowed for the constitutional control of secondary EU law. At the same time however, it noted that such control should be treated as independent, but also subsidiary, to the jurisdictional competence of the ECJ. As the Constitutional Court clearly stated, a ruling of the non-compliance of EU law with the Polish Constitution should be the *ultima ratio* and should occur only when no other ways to resolve a conflict in issue with the norms of the EU's legal order are possible.¹⁷

A key issue from the point of view of the relationship between the Polish Constitutional Court and the ECJ was the position of the Constitutional Court with respect to the possibility of filing a request for a preliminary ruling with the ECJ. The Constitutional Court allowed for such a possibility.¹⁸ At the same time, it formulated a reservation, in accordance with which if the Constitutional Court decides to request a preliminary ruling concerning the validity or content of an act (provision) of EU law, it shall do so 'only in cases in which *in compliance with the Constitution* it would apply Community [EU] law' [emphasis added]. Such a reservation implied the conclusion that a ECJ judgment issued as the result of a preliminary procedure could not—according to the Constitutional Court—lead to a breach of the principle of supremacy of the Polish Constitution.

A crucial argument of the Constitutional Court's jurisprudence pre-2016 regarding European matters was the reference to the shared constitutional values of Poland and the EU. The pronouncements of the Constitutional Court on a common constitutional axiology of both Poland and the EU are worth citing in detail. It can be argued that they constitute the expression, in the Polish constitutional jurisprudence, of the notion of the EU's composite constitutional order.¹⁹ According to the the Constitutional Court: 'The values expressed in the Constitution and the Treaty of Lisbon determine the axiological identity of Poland and the European Union [...] The basis of full axiological compatibility comprises identical axiological inspiration of the Union and the Republic of Poland [...] identical focus on the observance of the principles of freedom and democracy, human rights and fundamental freedoms, as well as social rights, and also the efforts to enhance the democratic character of institutions and the effectiveness of their activities'.²⁰ As has been emphasized by the Constitutional Court, the Constitution and EU law are based on the same shared values defining the nature of the democratic state, the rule of

¹⁷ The approach of the Polish Constitutional Court in Judgment SK 45/09 was modelled on the position taken by the German Constitutional Court in the Solange II, see BVerfG 22 October 1986, 2 BvR 197/83, *Solange II* and by the European Court of Human Rights in *Bosphorus*, EctHR 30 June 2005, No. 45036/98, *Bosphorus v. Ireland*. See Cloots (2015), p. 259.

¹⁸ See Judgment on the Accession Treaty. The first request for a preliminary ruling was referred by the Polish Constitutional Court in a decision dated 7 July 2015 (K 61/13). See Case C-390/15 Proceedings brought by Rzecznik Praw Obywatelskich (RPO), ECLI:EU:C:2017:174. The request of the Constitutional Court concerned the validity of EU law—specific provisions on VAT.

¹⁹ As to this notion *supra* note 38 below.

²⁰ See Judgment on the Treaty of Lisbon. See also the Judgment SK 45/09, where the Constitutional Court talked about 'the similarity of the values expressed in the Constitution and the treaties' and 'substantial axiological convergence of Polish and EU law'.

law, and the catalogue and content of fundamental rights. This, in the view of the Constitutional Court, significantly simplifies the ‘mutual application and mutually friendly interpretation of national and Community [EU] law’.²¹ Two observations should be made in light of such statements. First, it can be argued that the reference to the ‘axiological identity’ of Poland and the European Union, emphasised by the Constitutional Court, constituted the basis (legitimacy)—from the point of view of the constitutional legal order—for dialogue between the Polish Constitutional Court and the ECJ. This dialogue could be carried out by reference to objectives, principles, and values—with the aim to form and strengthen an axiologically coherent legal space in the context of the interconnections between national and supranational legal systems, and thereby eliminate conflict at the level of norms (rules). Secondly, a conforming interpretation—in particular of constitutional norms in light of the general principles of EU law—seemed to be especially significant in this regard.²² The obligation of conforming interpretation, being subject to the limitations determined by the Constitutional Court,²³ was perceived in its case law as an instrument of dialogue with the ECJ in the context of the complex relationships between the national and the EU legal systems.²⁴ In the view of the Constitutional Court, in the Polish territory there exist legal subsystems, all of them binding, coming from various centres of legislation. They should coexist on the basis of mutually friendly interpretations and cooperative application.²⁵ As has been reiterated by the Constitutional Court, any contradictions between EU and Polish law should be eliminated using an interpretation respecting the autonomy of both European law and national law.²⁶

²¹ See Judgment on the Accession Treaty.

²² In this context, it should be noticed that in the case law of the Constitutional Court pre-2016 one could trace the growing importance of methods of interpretation referring to the theory of argumentation. See Tuleja (2006), pp. 227–228. It can be argued that argumentative methods of reasoning can best serve effective dialogue within the EU interpretative community.

²³ According to the Constitutional Court it could not lead to results that are contrary to the clear wording of constitutional norms and irreconcilable with the minimum guarantees contained in the Constitution. See Judgment on the Accession Treaty, Judgment on the Treaty of Lisbon, Judgment 26 June 2013, K 33/12.

²⁴ See, i.a., Judgments: 2 July 2007, K 41/05; 17 July 2007, P 16/06; 16 July 2009, Kp 4/08; 12 January 2005, K 24/04; 5 October 2010, SK 26/08; 13 April 2010, Decision P 35/09. See also Judgment on the Accession Treaty, Judgment on the Treaty of Lisbon and Judgment 16 November 2011, SK 45/09.

²⁵ See Judgment on the Accession Treaty. See also Judgment on the Treaty of Lisbon and Judgment 16 November 2011, SK 45/09.

²⁶ See Judgment 16 November 2011, SK 45/09.

3 The Jurisprudence of the Polish Constitutional Court Pre-2016 and Constitutional Pluralism

It can be argued that the relationship between the ECJ and the Polish Constitutional Court pre-2016 can be best conceptualized via the lens of constitutional pluralism.²⁷ The assumptions of constitutional pluralism can be traced in the Constitutional Court's rulings pre-2016. On the one hand, the Court confirmed the supremacy of the Polish Constitution over EU law and proclaimed that it is the Member States that retain the competence-competence. On the other hand, the jurisprudence of the Polish Constitutional Court pre-2016 provides a good example of 'openness' in its constitutional dialogue with the ECJ. As has been argued above, the crucial element in the jurisprudence of the Polish Constitutional Court pre-2016 concerning its relation with the ECJ has been the recognition of the axiological consistency (identity) of the legal systems: the Polish constitutional system and the EU one. A strongly confirmed 'axiological consistency (identity)' of the Polish Constitution and EU law mitigated the categorical statement on the supremacy of the Polish Constitution. At the same time, the jurisprudence of the Constitutional Court provided concrete instruments to preserve and enhance that 'axiological consistency (identity)', such as the preliminary ruling procedure and conforming interpretation. It is argued here that the position of the Constitutional Court can best be conceptualized in the paradigm of constitutional pluralism, in its 'dialogical version', which most clearly articulates the importance of the dialogue between the competing, yet cooperating, legal systems, so long as such dialogue remains conditioned by their common axiology.

The Polish Constitutional Court's jurisprudence pre-2016 concerning EU matters can be best conceptualized in the paradigm of constitutional pluralism, since it fulfilled the crucial condition of this concept, i.e. compliance with the principles of liberal democracy. Such a conclusion relates to the observation that the basic premise of a pluralistic vision of the relationship between the national and EU law systems is the assumption that the structure of European integration remains within the universal framework of the commonly-shared principles and values of liberal democracy which underlie contemporary constitutionalism.²⁸ In other words, the pluralistic vision of European integration assumes that the societies of the Member States remain organized on the basis of the values articulated in

²⁷ Constitutional pluralism occupies a prominent place within the key concepts and paradigms used to explain the nature and complexity of the EU as a supranational (transnational) law (as to the definition and various concepts of transnational law see Avbelj (2018)). The common feature of the theories covered by the notion of 'constitutional pluralism' is the recognition of the possibility of co-existence of many legal systems forming the European constitutional order, while rejecting a hierarchical relationship between them. Constitutional pluralism assumes that competing 'constitutional claims of final authority' are equally legitimate, and that conflict between them remains, in the normative sense, undecidable (as to the general assumptions and basic concepts of the constitutional pluralism see in synthetic approach Jaklic (2014); see also Davies and Avbelj eds (2018)). At the same time, such a diagnosis is often accompanied by proposals aiming at minimizing the prospect of potential conflicts, which – in the light of doctrines of constitutional pluralism – are inscribed in the relationship between the EU and national orders. See postulates of the concepts of 'legal dialogists' (using the terminology of Karl Tuori, see Tuori (2014)), p. 34, i.e. M.P. Maduro, M. Kumm and K. Tuori.

²⁸ See Avbelj (2017), pp. 56–57.

Article 2 TEU.²⁹ These Article 2 values (principles) refer to the constitutional principles constituting the common heritage of European constitutional traditions, rooted in liberal and democratic traditions.³⁰ This means: recognizing the primacy of the individual and the need to protect her/his rights; recognizing the principle of the rule of law as the basis for the functioning of the legal system; and adherence to the principle of democracy as legitimizing all public authority. At the same time, it is important that these three systemic assumptions of liberal democratic states remain closely related. It is assumed that decisions legitimized by democratic procedures, but infringing on the rule of law, and in particular interfering with the sphere of individual rights in violation of this principle, are not admissible. Such assumptions found their expression in the consolidation of the role of constitutional courts, whose fundamental role in the political system of liberal democracies is to control the constitutionality of acts of power—in other words to ensure that the decisions of the majority are made and implemented within the limits of the constitution, and thus that the constitution protects against abuses of power by a democratically elected majority. In this sense, liberal constitutionalism seeks to protect freedom through the establishment of the rule of law.³¹ What remains crucial, from the point of view of securing the values constituting the axiological foundations of the constitutional legal order in the liberal legal culture, is the principle of separation of powers.³² Together with the requirement to respect fundamental rights, it is an instrument for setting limits on the exercise of public authority.³³ It is worth noting that in the jurisprudence of the ECJ, the principle of separation of powers is recognized as one of the elements of the rule of law.³⁴

²⁹ Such an assumption is justified by, i.a., the pre-accession requirements to be met by states aspiring to the membership in the EU, referring in particular to values specified in Article 2 TEU. See Article 49 TUE. See in this context Avbelj (2017), pp. 56–57.

³⁰ Among many analyses devoted to constitutionalism in the EU legal order, see the synthetic analysis of constitutionalism (in the EU) through the prism of liberal and democratic constitutionalism made by Robert Schütze: Schütze (2017), pp. 71–96.

³¹ “Government of laws, and not of the men”—see J. Harrington quoted in Glynn (1965), p. 13.

³² In the doctrine, the meaning of this principle is defined in the functional separation version and in the institutional cooperation version. The principle of the separation of powers in the functional separation version means that each governmental institution must not be given more than one governmental function. In accordance with the principle of the division of powers in the institutional cooperation version each governmental function should be distributed over more than one institution which ensure a system of check and balances. More on this subject see Schütze (2017), pp. 86–88.

³³ The latter function refers to the essence of liberal constitutionalism. See in classic terms, Locke (2005), para 107.

³⁴ See Joined Cases C-174/98 P & C-189/98 P *Niderlandy and van der Wal v. Commission*, ECLI:EU:C:2000:1, para. 17; Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission*, ECLI:EU:C:2010:512, para 54; Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2010:811, para 58; Case C-477/16 *PPU Openbaar Ministerie v. Ruslanas Kovalkovas*, ECLI:EU:C:2016:861, para. 36; Case C-452/16 *PPU Openbaar Ministerie v. Krzysztof Marek Poltorak*, ECLI:EU:C:2016:858, para. 35; Joined Cases C-585/18, C-624/18 & C-625/18 *A.K. et al. v. Sąd Najwyższy*, ECLI:EU:C:2019:982, para. 124; Case C-824/18 *A.B. and Others*, ECLI:EU:C:2021:153, para. 116 and 118; Joined Cases C-83/19 C-127/19, C-195/19, C-291/19, C-355/19 & C-397/19, *Asociația ‘Forumul Judecătorilor Din România’ and Others*, ECLI:EU:C:2021:393, para. 195; Order of the Vice-President of the Court, 14 July 2021, C-204/21 R, *Commission v. Poland*, ECLI:EU:C:2021:593, para. 84.

The principles of liberal democracy found expression in the Polish Constitutional Court jurisprudence pre-2016, developed on the basis of the Constitution of 1997, which had been passed following Poland's transition to democracy in 1989.³⁵ The systemic and axiological grounds of the Constitution were: the principle of the rule of law; the democratic and social state; fundamental rights and freedoms, with specific permissible grounds for their limitation; as well as institutional guarantees and the availability of judicial procedures to protect against infringements of those rights and freedoms. The Constitutional Court carried out a constitutional review of the legal provisions—the main grounds for a declaration of unconstitutionality were violations of the rule of law, the right to a fair trial, the principle of proportionality, and exceeding the powers delegated to the executive.³⁶ It should be emphasized that in the jurisprudence of the Constitutional Court pre-2016, one of the elements of the rule of law principle was the principle of separation of powers. In this respect, the Court stated that the principle of separation of powers presupposes a specific determination of the relationship between the judiciary and other authorities. While various forms of mutual influence and cooperation are possible in the relations between the legislative and executive branches, the relationship between the judiciary and other authorities has to be based on the principle of 'separation', and an indispensable element of the principle of separation of powers is the independence of courts and judges.³⁷

From this perspective it can be argued that the above-cited statements of the Constitutional Court concerning the 'axiological identity' of Poland and the EU were firmly grounded and justified. The Court's jurisprudence pre-2016, including its jurisprudence concerning EU matters, expressed the development of (the principles of) liberal democracy in Poland—being at the same time the axiological aim and aspiration of the constitutionalism of the EU. The position of the Constitutional Court provided a solid basis for dialogue with the ECJ, where such dialogue remained within the process of building the composite constitutional order of the EU.³⁸

³⁵ See Biernat and Kawczyńska (2019) and the literature cited therein.

³⁶ See Biernat and Kawczyńska (2019), pp. 745–746.

³⁷ See the Constitutional Court Judgment of 29 November 2005, P 16/04. See also Judgment of 18 February 2004, K 12/03; Judgment of 19 July 2005, K 28/04 and Judgment of 14 April 1999, K 8/99.

³⁸ The notion of a *composite constitutional order* is understood here as revealing the interdependence of the legal orders of the EU and the Member States, which has been indicated as a distinguishing feature of European constitutionalism. In such an understanding, the EU regulations of a constitutional nature (the EU constitution) are perceived as a complementary constitution, which—together with the constitutions of the member states—creates a European constitutional space (see von Bogdandy (2010), p. 24; Peters (2001), p. 209, in other words—*composite constitutional order*). This latter term is attributed to Ingolf Pernice (see Pernice and Mayer (2000), pp. 623–647; see also Della Cananea (2003). It is used in a slightly different meaning by Besselink (2016), *passim*.

4 The Constitutional Crisis and the Current Breakdown in the Relationship Between the Polish Constitutional Court and the ECJ

4.1 Background

The pre-2016 vision of the ECJ in the jurisprudence of the Polish Constitutional Court has been challenged by the constitutional crisis in Poland dating from the end of 2015.³⁹ In 2015 the parliamentary election in Poland was won by the PiS (Law and Justice) party. Following eight years of governance by the liberal PO (Citizens' Platform) party, PiS ran on the slogan of a 'change for the better', focused on strengthening control over the State and the economy as well as a greater and more equitable redistribution of the benefits of the transformation. This political message appeared to be particularly effective in view of the sentiment—strong among the less economically successful and adaptable groups—that the economic gains were benefiting only certain privileged parts of the society and that the State was malfunctioning, serving the elites rather than the average people.⁴⁰ At the same time the PiS rhetoric appealed to a sense of community built around ideas and experiences rooted in the Polish history, like adherence to tradition and religion. This proved particularly effective in the election, which was held at the peak of the migration crisis (October 2015).⁴¹ The appeal to social justice and sense of community, combined with a heightened and manipulated fear of attacks on 'traditional values', proved to be an effective political message and gained support within a large part of society. Following its election victory, the PiS party began implementing the social agenda it had proclaimed during the election campaign, at the same time beginning to consolidate and increase the areas of its political power. The subsequent changes in the legal system were aimed in particular at increasing the influence of the ruling party on the judicial branch, including the Constitutional Court.⁴²

³⁹ As to the constitutional crisis in Poland, see the literature cited in note 1.

⁴⁰ It should be noted that at the beginning of the transformation Poland was one of the poorest countries in the region (see: The World Bank, World Development Indicators). After a neoliberal shock therapy instituted by the first democratic government, subsequent governments (including the government led by PiS between 2005 and 2007) essentially preserved the liberal economic model.

⁴¹ As to the reasons and factors shaping democratic backsliding in Poland, see the thorough analysis in Adamski (2019), pp. 635–641; Sadurski (2018); Matczak (2020), pp. 421–450.

⁴² See for the synthetic analysis the Commission Staff Working Document, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Poland, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, Brussels, 30 September 2020 SWD (2020) 320 final, p. 3–11; the Commission Staff Working Document, 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2021 Rule of Law Report, The rule of law situation in the European Union, Brussels, 20 July 2021 SWD(2021) 722 final, p. 2–15; as well as the Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law

Consequently, the systemic position of the Constitutional Court has significantly changed since 2015/2016. Successive legislative amendments, as well as changes within the composition of the Court,⁴³ have had a profound impact on the current position of the Constitutional Court in the Polish legal order and undermined the role of said Court as part of the system of checks and balances required by constitutional democracies.⁴⁴ The analysis of the jurisprudence of the Court post-2015 reveals that the function of the Polish Constitutional Court can now be defined *à rebours*, that is, its decisions serve to confirm the constitutionality of legal acts adopted by the parliamentary majority, and additionally—in the face of protests by minorities and criticism from European institutions—legitimizing them.⁴⁵ This role of the Constitutional Court differs significantly from its model paradigm. A constitutional court deprived of its counter-majoritarian power does not meet the requirements of a liberal democracy. In other words, its role is incompatible with the paradigm of a liberal democracy, which guarantees the protection of individual rights by subjecting the decisions of the democratically-elected majority to review by independent courts.

In this new constitutional environment, it seemed to be only a matter of time until there would be a shift in the direction of the Constitutional Court's case law in European matters, leading to an unprecedented crisis in the relationship between the EU and a Member State.

Footnote 42 (Continued)

situation in Poland, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2022 Rule of Law Report, The rule of law situation in the European Union, Brussels, 13 July 2022 SWD (2022) 521 final, p. 3–12.

⁴³ By 2020, 14 out of 15 judges of the Constitutional Court have been nominated by the parliamentary majority of the ruling coalition. For three judges the process of the appointment was burdened with serious legal irregularities. This latter issue was raised before the European Court of Human Rights (Case No. 4907/18, *Xero Flor w Polsce sp. z o.o. v. Poland*). In its judgment of 7th May 2021 the European Court of Human Rights concluded that Poland violated Article 6(1) of the European Convention on Human Rights by denying the applicant the right to a 'tribunal established by law' on account of the participation in the proceedings before the Constitutional Court of a judge whose election was vitiated by grave irregularities that impaired the very essence of that right. As to that judgment and the reactions to it in the jurisprudence of the Constitutional Court see Płoszka (2022), pp. 6–22.

⁴⁴ See Tuleja (2020), pp. 658–672; Sadurski (2019a); Garlicki (2016), pp. 63–78; Łętowska and Wiewiórowska-Domagalska (2016), pp. 79–93; Sadurski (2019b); Radziejewicz (2017); Chmielarczyk-Grochal and Sułkowski (2018); Granat (2021); Pech et al. (2021); Commission Staff Working Document, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Poland, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, Brussels, 30 September 2020 SWD (2020) 320 final, p. 3–4; Venice Commission's opinions CDL-AD(2020)017; CDL-AD(2017)031; CDL AD(2016)026.

⁴⁵ See the documented analysis in Pyziak-Szafnicka (2020). See also Biernat (2020b), p. 820. In 2020, the widespread social protests have been raised by the Constitutional Court's Judgment on Abortion (Judgment of 22 October 2020, K 1/20). As has been commented, the judgment revealed the change within the functions of the Court 'from an independent controller of the constitutionality of the law to a handyman of the ruling parliamentary majority for projects whose odium is not intended to fall on parliament' – see Łętowska (2020).

4.2 The EU Standard of Judicial Independence: the ECJ's Judgment of 19.11.2019 and Its (Non)Implementation

The first direct challenge to the earlier-existing relationship between the Polish Constitutional Court and the ECJ can be identified in Case U 2/20. In its judgment of 20.04.2020 (Case U 2/20), the Polish Constitutional Court examined the request of the Prime Minister questioning the Resolution of the Combined Chambers: Civil, Criminal and Labour and Social Security Law of the Polish Supreme Court of 23.01.2020.⁴⁶ The Resolution of Three Chambers of the Supreme Court, was issued in response to the judgment of the ECJ of 19.11.2019⁴⁷ in which the ECJ prescribed the requirements to be fulfilled by courts in democratic states so that—in the light of Article 6 of the European Convention on Human Rights and Article 47 of the Charter—they could be considered impartial and independent. Consequently, the Supreme Court confirmed the legal mechanisms enabling the removal from adjudication of judges appointed at the request of the new National Council of the Judiciary.⁴⁸ In the light of the Resolution of Three Chambers of the Supreme Court, this method of appointing judges—due to doubts as to the status and lawfulness of the actions of the new National Council of the Judiciary⁴⁹—raised concerns as to their independence and impartiality. The provision of procedural instruments enabling, in concrete cases, the removal from adjudication of judges appointed at the request of the new National Council of the Judiciary became necessary—in the view of the Supreme Court—for the implementation of the ECJ's judgment of 19.11.2019. In its judgment of 20.04.2020 (Case U 2/20), the Polish Constitutional Court ruled that the Resolution of Three Chambers of the Supreme Court was inconsistent with the Constitution, with the TEU (Article 2 and Article 4(3)), and with the European Convention on Human Rights (Article 6(1)). In particular, the Constitutional Court

⁴⁶ Resolution of the combined Civil, Criminal and Labour and Social Security Law Chambers of the Supreme Court 23 January 2020, BSA I 4110 1/20.

⁴⁷ Case C-585/18, C-624/18 and C-625/18 A.K. et al. v. Sąd Najwyższy, ECLI:EU:C:2019:982.

⁴⁸ I.e. the National Council of the Judiciary as formed in accordance with the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary. Under the new legal regime it was the legislative branch that gained the decisive influence on the composition of the National Council of the Judiciary. See further Filipek (2018).

⁴⁹ The criteria for assessing the independence of the new National Council of the Judiciary were indicated in the ECJ's judgment in Joined cases C-585/18, C-624/18 & C-625/18, A.K. et al. v. Sąd Najwyższy, ECLI:EU:C:2019:982; the ECJ has left this assessment to the domestic court, see para. 139–145. It should be noted that already in 2018 the European Network of Councils for the Judiciary (ENCJ) suspended the membership of the Polish National Council of the Judiciary due to the concerns relating to its independence and on 28 October 2021 the ENCJ General Assembly voted to expel it. In this context it should also be noted that in its judgment of 25 March 2019, K 12/18 the Constitutional Court was reviewing the status of the new National Council of the Judiciary. The Court ruled that the provisions referring to the method of appointing judges to the new National Council of the Judiciary is consistent with the Polish Constitution.

ruled that the Resolution was inconsistent with the Polish Constitution inasmuch as it undermines the final nature of the appointment of a judge by the President.⁵⁰

In the context of this analysis, the crucial question is how to assess the judgment of the Constitutional Court from the point of view of the Court's pre-2016 case law. This becomes all the more necessary inasmuch as a number of the principles set out in the rulings of the Court pre-2016 regarding the relationship between EU law and domestic law were referred to in the judgment in Case U 2/20. They were however used as arguments to essentially negate the implementation of the ECJ's judgment of 19.11.2019. The key argument of the Constitutional Court was that under the Polish Constitution the Resolution of Three Chambers of the Supreme Court could not undermine the President's constitutional prerogative to 'appoint the judges'—as enshrined in the Polish Constitution (Article 179)—by enabling the evaluation of the procedure preceding the appointment of a judge by the President. However, such an interpretation of the provisions of the Polish Constitution is only one of its possible readings. In light of its case law pre-2016, it can be argued that the Constitutional Court should here have applied a conforming interpretation, i.e. have employed an argument that would ensure the effective implementation of the judgment of the ECJ of 19.11.2019 and the values indicated therein, as expressed in Article 2 TEU, and in particular the principle of the rule of law. In the case U 2/20 this would have implied the necessity to adopt such an interpretation of Article 179 of the Constitution, according to which it is possible to evaluate the procedure preceding the appointment of a judge by the President. The justification for such an interpretation could be found in, *inter alia*, the constitutional principles guaranteeing judicial independence and impartiality construed in line with Article 2 TEU as well as Article 19(1) TEU and Article 47 of the Charter and their interpretations by the ECJ. Such an interpretation would be consistent with the position expressed in the Resolution of Three Chambers of the Supreme Court. As was stated in the Resolution, it cannot be argued that any defect in the nomination process stands corrected by the presidential act of appointment to the office of a judge; such an interpretation would unreasonably limit the right to a fair trial before an independent and impartial court. The constitutional powers of public authorities cannot be interpreted in such a way that the interpretation undermines fundamental constitutional principles. It is worth emphasizing that adopting the above interpretation would be consistent with the jurisprudence of the Constitutional Court pre-2016,⁵¹ as well as with the obligation of a conforming interpretation established by the ECJ, an obligation

⁵⁰ Article 179 of the Polish Constitution states that judges 'are appointed by the President of the Republic of Poland, at the request of the National Council of the Judiciary, for an indefinite period'. One should also mention here the Constitutional Court Judgment of 4 March 2020, P 22/19 in which the Court stated that the provision of the Code of Criminal Procedure applied with the effect to recuse a judge appointed upon a request by the new National Council of the Judiciary is inconsistent with the Constitution.

⁵¹ Shaping the relationship between the Constitutional Court and the ECJ on the basis of the principles of dialogue in the composite constitutional order of the EU. See Sect. 2 above.

which also binds constitutional courts.⁵² Such an interpretation would also avoid a conflict between the Polish constitutional provisions and Article 47 of the Charter. As indicated in the Resolution of Three Chambers of the Supreme Court, in the territory of the EU the independence and impartiality of courts must be real, and their independence and impartiality cannot be uncontestedly decreed by the mere fact of being appointed to the office of judge by the President.

When adopting a different interpretation, i.e. concluding that, in light of the provisions of the Constitution, it is not possible for judges to evaluate the procedure preceding the appointment of a judge by the President, the Constitutional Court referred to the principle of the rule of law, the principle of democracy, and the principle of sincere cooperation between the EU and the Member States. The Court also stated that the Resolution of Three Chambers of the Supreme Court breached the standard of judicial independence and impartiality as provided for in the jurisprudence of the ECJ. At the same time, the Constitutional Court used a number of arguments referring to the model of cooperation in the relationship between the ECJ and the Constitutional Court as shaped in the jurisprudence of the Polish Constitutional Court pre-2016⁵³—however, it can be concluded that its statements were a facade to hide the true meaning and implications of the ruling. Such an assessment is justified by the fact that the principles invoked did not serve to develop a ruling most fully conducive to the effectiveness of EU law in the domestic legal order (in particular, the implementation of the judgment of the ECJ of 19.11.2019 and the values indicated therein, expressed in Article 2 TEU), but to justify a judgment with quite the opposite effect, causing a collision between Polish constitutional provisions and the principle of effective judicial protection, fundamental to the EU community of law (Article 47 of the Charter, Article 19 (1) TEU) and related to the values expressed in Article 2 TEU, in particular the rule of law.⁵⁴

The Resolution of Three Chambers of the Supreme Court resulted in another proceeding before the Polish Constitutional Court, initiated by the Marshal of the Sejm,⁵⁵ which questioned the possibility for the Supreme Court to issue that Resolution in view of the conflict of powers between the Sejm and the Supreme

⁵² In the light of the obligation of conforming interpretation, the Constitutional Court—faced with the choice of several possible interpretations of a provision of the Constitution—should choose the one that will ensure the implementation of EU law in the optimal way. In its pre-2016 case law the Constitutional Court recognized and applied the obligation of conforming interpretation. See Sect. 2 above.

⁵³ The Constitutional Court stated *inter alia*: ‘The Constitutional Tribunal remains the court of «last word» [...] guarding not only the Constitution, but also the Treaties constituting the European Union»; ‘The constitutional principle of a democratic state ruled by law—Article 2 of the Constitution—is identical in its content to the principles of the rule of law and democracy, established—as common values of the Member States—in Article 2 of the TEU. The principle of a democratic state ruled by law undoubtedly belongs to the common constitutional *acquis* of the Member States (*acquis constitutionnel*).’; ‘[the principle of sincere cooperation regulated in Article 4(3) of the TEU] implies, in the first place, the obligation of national authorities to seek legal solutions that enable conflict-free functioning of regulations shaped by various legislative centers within the multicentric legal system characteristic for the European Union’.

⁵⁴ See in this context the comments below (point 4.2 in fine) on the “abusive constitutional borrowing”.

⁵⁵ The Sejm is the lower chamber of the Polish parliament.

Court and between the President and that court. In a decision dated 21.04.2020 (Case Kpt 1/20), the Constitutional Court stated that the Supreme Court—also in connection with the ruling of an international court—does not have the competence to provide a law-making interpretation of legal provisions leading to a change in the normative status with respect to the system and organization of the judiciary. In the opinion of the Constitutional Court, introducing changes in this respect falls within the exclusive competence of the legislator. The Constitutional Court also indicated that the appointment of a judge is the exclusive competence of the President, which he performs at the request of the National Council of the Judiciary personally, definitively, and without the participation and interference of the Supreme Court. The decision of 21.04.2020 was preceded by the decision of the Constitutional Court of 28.01.2020 in a case in which the Constitutional Court suspended the application of the Resolution of Three Chambers of the Supreme Court.⁵⁶

Bearing in mind the arguments indicated above in the context of the Constitutional Court's judgment in Case U 2/20, it can be concluded that the decision of 21.04.2020 (Kpt 1/20) is manifestly contrary to the case law of the Constitutional Court pre-2016. It should also be noted that while in the judgment in Case U 2/20 the Constitutional Court argued that the Supreme Court—by adopting the Resolution of Three Chambers—had improperly implemented the ECJ's judgment of 19.11.2019, without questioning the judgment of the ECJ itself,⁵⁷ the decision of 21.04.2020 is much more confrontational.⁵⁸ What is important in the context of this analysis is that when justifying its position the Constitutional Court referred to the principle of primacy of the Polish Constitution, developed in the case law pre-2016.⁵⁹ In view of the comments set out above, it must be concluded that this reference was not justifiable. The case law of the Constitutional Court pre-2016, when deciding on the primacy of the Constitution, was issued within the assumptions of a composite constitutional order of the EU. i.e. with recognition of the axiological identity of the EU and national legal orders and the need to shape their relations through a cooperative (dialogue-based) model. The confrontational character of the decision

⁵⁶ As a result, a 'double track' has been created in the Polish legal system—the Constitutional Court decision questioning the legality of the Resolution of 3 Chambers of the Supreme Court has not been generally accepted (see e.g. the decision of the Criminal Chamber of the Supreme Court, 25 June 2020, I KZP 1/20).

⁵⁷ As indicated above, the Court used a number of arguments that referred to the model of cooperation in the relation between the ECJ and Constitutional Court shaped in the jurisprudence of the Constitutional Court pre-2016.

⁵⁸ The Constitutional Court stated directly that 'in the justification of the resolution of January 23, 2020 [...] the Supreme Court adopted, approved and detailed, as well as transferred to the Polish legal system the statements of the ECJ judgment of November 19, 2019 providing for the so-called EU standard of independence and impartiality of courts. The Supreme Court ignored the provisions of the Constitution and the binding case law of the Constitutional Tribunal, adopting content that was obviously contrary to them.'; 'The judgment of the ECJ, which does not have the treaty based powers in matters concerning the system and organization of the judiciary of the Member States, may not be treated by the Supreme Court as a basis for authoritative actions in areas falling within the exclusive, constitutional competence of organs other than the Supreme Court, i.e. the Sejm and the President of the Republic of Poland'.

⁵⁹ The Constitutional Court referred here to the Judgment on the Accession Treaty and Judgment on the Treaty of Lisbon. As to these judgments see Sect. 2 above.

of 21.04.2020 (Kpt 1/20) clearly breaks with these premises, notwithstanding the references of the Constitutional Court to the concepts of a democratic state ruled by law, and the principle of the rule of law as protected constitutional values.

One could argue that the employment by the Polish Constitutional Court of the notions constituting the core of the liberal constitutional order—like rule of law, democracy, separation of powers, and the right to a fair trial—has been acontextual and anti-purposeful, since their application in the discussed cases has served only to reach results which are not consistent with the core imperative of liberal constitutionalism i.e. strengthening the effective protection of an individual by safeguarding the system of checks and balances as the major factor determining the distribution of political power. Consequently, such references by the Constitutional Court can be perceived as an example of an abusive constitutional borrowing, being a part of a broader phenomena of abusive judicial review. These notions, as recently elaborated in comparative constitutional law scholarship,⁶⁰ shed new light on analysis of the argumentation of the Constitutional Court. The abusive constitutional borrowing is defined as the use by the courts of Western liberal democratic constitutional ideas, norms, and institutions in order to carry out processes of constitutional change that are actually anti-democratic in nature.⁶¹ When exercising such abusive constitutional borrowing, judges draw on concepts and doctrines designed to protect liberal democracy in an abusive way that subverts their underlying meaning and turns them into tools to actually undermine liberal democracy.⁶² The abusive judicial review is understood as interpretation by judges that intentionally undermines the minimum core of constitutional democracy.⁶³ It should be noted that abusive judicial review is deemed to pose a particular threat to liberal democratic orders, inasmuch as it is the courts which—in the structure of a liberal democracy—are designated as the main defenders of constitutional democracy that are being called upon to engage in a form of democratic hedging.⁶⁴ In particular, it is the constitutional courts that play an important role in protecting democracy from the threat of democratic backsliding.⁶⁵ The failure

⁶⁰ See in particular Landau and Dixon (2020), pp. 1313–1387; Dixon and Landau (2019), pp. 489–496.

⁶¹ Dixon and Landau (2019), pp. 489–490.

⁶² See Landau and Dixon (2020), p. 1326. In particular, “abusive borrowing” is the borrowing of liberal democratic ideas in one of the following ways: (i) highly superficial, or involving the form but not substance of constitutional democratic norms; (ii) highly selective, picking and choosing certain elements of liberal democratic constitutionalism; (iii) highly acontextual, ignoring differences in political or social context; or (iv) that inverts the purpose of democratic norms and ideas so that they have the opposite effect to previously. See Landau and Dixon (2020), pp. 1332–1333; Dixon and Landau (2021), pp. 36–55.

⁶³ See Landau and Dixon (2020), pp. 1317, 1322–1334. As one of the examples of abusive judicial review the authors discuss the practice of the Polish Constitutional Court. See Landau and Dixon (2020), pp. 1337–1338, 1348, 1352.

⁶⁴ See Landau and Dixon (2020), p. 1317. “Democratic hedging” refers to the use of courts “as a hedge against excessive concentration of power.” See Issacharoff (2011), p. 1002; See generally Issacharoff (2015).

⁶⁵ See Issacharoff (2011), p. 1001, 1010–1012; Dixon and Landau (2015), p. 637; Issacharoff (2015) arguing that strong constitutional courts serve as a bulwark against vulnerability to external threats as well as internal consolidation of power.

of a constitutional court to exercise this function may thus become a crucial factor accelerating the processes of erosion of the liberal democratic order.⁶⁶

4.3 The Organization and Functioning of the National Judiciary—EU Matter(s)?

The subsequent rulings which confront the current position of the Polish Constitutional Court with the jurisprudence of the Constitutional Court pre-2016 have been initiated by, respectively, the Disciplinary Chamber of the Supreme Court (P 7/20) and the Prime Minister (K 3/21). Both judgments refer to a matter of fundamental importance for the relationship between Poland and the EU—whether the organization and functioning of the national judiciary are subject (or not) to EU standards of justice. Although the judgment in case K 3/21 has caught particular attention, it is worth putting it in the context of the emerging line of jurisprudence of the Constitutional Court in the matter of concern here.

In case P 7/20 the Supreme Court (Disciplinary Chamber) asked the Constitutional Court whether Article 4(3) second sentence TEU, in conjunction with Article 279 TFEU—to the extent that it results in an obligation on a Member State to implement provisional measures relating to the system and functioning of its constitutional judicial organs—is consistent with the provisions of the Polish Constitution. The question of the Supreme Court (Disciplinary Chamber) was issued as a result of a ruling of the ECJ⁶⁷ in which it ordered Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges. It should be noted here that the Disciplinary Chamber of the Supreme Court has been established within the context of changes to the Polish justice system that are contested in view of the requirement for judicial independence. Those concerns have been reflected in a number of requests for preliminary rulings filed with the ECJ concerning, in particular: the retirement age of judges⁶⁸; disciplinary proceedings against judges⁶⁹; the correctness of the appointment procedure for the post of a Supreme Court judge⁷⁰; and the Disciplinary Chamber of the Supreme Court.⁷¹ In this latter case, the ECJ issued a judgment setting the criteria to evaluate the independence and impartiality of a court in view of EU standards.⁷² The

⁶⁶ Landau and Dixon (2020), pp. 1334–1345.

⁶⁷ See Case C-791/19 R *European Commission v. Republic of Poland*, ECLI:EU:C:2020:277.

⁶⁸ See Case C-522/18 *DŚ v. Zakład Ubezpieczeń Społecznych Oddział w Jaśle*, ECLI:EU:C:2020:42; Case C-537/18 *YV v. Krajowa Rada Sądownictwa*, ECLI:EU:C:2020:136.

⁶⁹ See *Joined Cases C-558/18 & C-563/18 Miasto Łowicz and Prokurator Generalny v. Skarb Państwa – Wojewoda Łódzki et al.*, ECLI:EU:C:2020:234; Case C-623/18 *Prokuratura Rejonowa w Słubicach v. BQ*, ECLI:EU:C:2020:800.

⁷⁰ See Case C-487/19 *W.Ż. (Chambre de contrôle extraordinaire de la Cour suprême—Nomination)*, ECLI:EU:C:2021:798 and Case C-508/19 *Prokurator Generalny (Chambre disciplinaire de la Cour suprême—Nomination)*, ECLI:EU:C:2022:201.

⁷¹ See *Joined Cases C-585/18, C-624/18 & C-625/18 A. K. and Others v. Sąd Najwyższy*, ECLI:EU:C:2019:982.

⁷² See comments above concerning Case U 2/20.

independence and impartiality of the Disciplinary Chamber of the Supreme Court was negatively assessed in the ECJ judgment *Commission v Poland*, C-791/19.⁷³

A day before the issuance of the judgment of the ECJ in *Commission v Poland*, C-791/19, the Constitutional Court ruled⁷⁴ that the ECJ, when granting interim measures relating to the system and jurisdiction of Polish courts and the procedure before Polish courts, acted *ultra vires*. In this respect Article 4(3) second sentence TEU, in conjunction with Article 279 TFEU was deemed inconsistent with the provisions of the Polish Constitution and not covered by the principles of primacy and direct application of EU law as set out in the Polish Constitution. According to the Constitutional Court, the interim measures granted by the ECJ, contrary to Article 4(2) TEU, Article 4(3) first sentence TEU and Article 5(1) TEU, clearly and significantly infringed on the domain of Polish constitutional regulation. The system and functioning of Polish courts and the procedure before Polish courts belong to the constitutional core of the Republic of Poland, which cannot be transferred to an international organization. According to the Constitutional Court, the European Union cannot replace the Member States in creating regulations concerning the system of courts and systemic, procedural and social guarantees of the independence of courts and the impartiality of judges. The ECJ is neither the supreme body nor a court of higher instance above the national courts and has no power to take any acts of authority against the national courts and judges of the Member States.

The widely commented case K 3/21 was initiated by the Prime Minister of the Republic of Poland who, immediately following the ECJ's judgment in case A.B.,⁷⁵ filed a request to the Constitutional Court challenging the (potential) results of that judgment on the Polish legal system.⁷⁶ The Constitutional Court, in its judgment of 7 October 2021, ruled⁷⁷ that Article 1, first and second paragraphs, in conjunction with Article 4(3) TUE is inconsistent with the Polish Constitution insofar as the European Union—on the basis of EU law and through its interpretation by the ECJ—enters ‘a new stage’ of integration; one in which: (i) the EU authorities act outside the scope of the competences conferred upon them by Poland in the Treaties; (ii) the Constitution is no longer the supreme law of Poland, which takes precedence as regards its binding force and application; and (iii) Poland may not function as a sovereign and democratic state. Moreover, the Constitutional Court questioned Article 19(1) second subparagraph TEU, declaring it unconstitutional insofar as it grants domestic courts the competence to bypass the provisions of the Polish Constitution in the course of adjudication or adjudicate on the basis of provisions which are not binding, having been revoked by the Sejm and/or ruled by

⁷³ Case C-791/19 *Commission v. Poland*, ECLI:EU:C:2021:596. See also the judgment of the European Court of Human Rights in *Reczkowicz v. Poland* in which the Court found that the Disciplinary Chamber of the Supreme Court was not a ‘tribunal established by law’ within the meaning of the European Convention (ECtHR 22 July 2021, No. 43447/19, *Reczkowicz v. Poland*).

⁷⁴ See Judgment 14 July 2021, P 7/20.

⁷⁵ Case C-824/18 *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2021:153.

⁷⁶ See also in this context Joined cases C-585/18, C-624/18 & C-625/18, *A.K. et al. v. Sąd Najwyższy*, as commented above.

⁷⁷ The unprecedented content of the ruling of the Constitutional Court justifies presenting its operative part in detail.

the Constitutional Court to be inconsistent with the Polish Constitution. Finally, the Constitutional Court found Article 19(1) second subparagraph and Article 2 TEU to be unconstitutional insofar as they grant domestic courts the competence to review the legality of the procedure for appointing a judge, including the review of the legality of the act in which the President appoints a judge. In general, the judgment of the Constitutional Court accepted the arguments provided in the request of the Prime Minister of the Republic of Poland initiating proceedings.

In the justification of its ruling⁷⁸ the Constitutional Court pointed out that the essence of the Prime Minister's application concerns the relationship between treaty provisions and the principle of the primacy of the Polish Constitution, and thus—Polish sovereignty. The indicated constitutional problem boils down to defining the constitutional boundaries of 'an ever closer union between the peoples of Europe', as provided for in Article 1 second paragraph of the TEU. If such a new stage of integration results in the norms of EU law, especially those derived by the ECJ, being located outside the limits of powers conferred by the Republic of Poland and 'above' the Polish Constitution, thus causing the loss of sovereignty, then such a stage of 'an ever closer union' violates the Constitution. In the view of the Constitutional Court, the scope of competences conferred by the Member States on the EU is basically regulated in the treaties, and among these competences there is none related to the organization or system of the judiciary. Deriving the competence to control the organization and system of the judiciary in a Member State from Article 19 paragraph 1, second paragraph of the TEU constitutes the creation by the ECJ of new competences. The delimitation of the area of competences conferred, and those remaining at the exclusive disposal of the Member States, is also important for defining the boundaries of the so-called principle of primacy of EU law. The Constitutional Court concluded that not only the normative acts as defined in the jurisprudence of the ECJ, but also the jurisprudence itself, as part of the EU normative order, are subject to the constitutional review exercised by the Constitutional Court. If the practice of 'progressive activism of the ECJ' is not discontinued, the Constitutional Court will be legitimately entitled to exercise such review and directly assess the constitutionality of the ECJ's rulings, 'including removing them from the Polish legal system'. It should be emphasized in the context of this analysis that the arguments of the Constitutional Court have been construed with reference to the jurisprudence of the Constitutional Court pre-2016. Numerous references to that case law were used to justify the position of the Constitutional Court's questioning, in particular, the understanding of the principle of primacy of EU law and principle of effective legal protection presented in the jurisprudence of the ECJ regarding matters concerning the Polish judiciary.

⁷⁸ The full statement of reasons for the judgment in case K 3/21 was published on 16 November 2022, after more than a year after the date of its issuance.

The Constitutional Court's judgment in case K 3/21 has met with a widespread critical response, both in Poland⁷⁹ and abroad.⁸⁰ Shortly after the ruling, the Vice-President of the ECJ issued an order imposing a daily penalty for Poland in the amount of €1,000,000 for not suspending the application of the provisions of national legislation relating, in particular, to areas of the jurisdiction of the Disciplinary Chamber of the Supreme Court.⁸¹ The judgment of the Constitutional Court in case K 3/21 also became a bone of contention in negotiations between Poland and the EU concerning the National Recovery Plan (the approval of the NRP has been a condition to benefit from the EU Reconstruction fund). On 22 December 2021 the European Commission launched an infringement procedure against Poland because of serious concerns with respect to the Polish Constitutional Court's case law, i.e. its rulings in cases P 7/20 (as commented above) and K 3/21. The Commission considered that these rulings of the Constitutional Court were in breach of the general principles of autonomy, primacy, effectiveness and uniform application of EU law and the binding effect of rulings of the ECJ. Bearing in mind the position taken by EU authorities and experts in reaction to the Constitutional Court's judgment in case K 3/21, the scale and intensity of its legal and political significance and consequences should be assessed as unprecedented for the relationship of the EU and its Member State.

In the context of this analysis it should be pointed out that the ruling of the Constitutional Court issued in case K 3/21 was consistent with the positions already taken by the Court in case P 7/20 as well as cases U 2/20 and Kpt 1/20, as were commented on above. From this perspective it can be reasonably predicted that this stance will be confirmed in three other proceedings currently pending before the Constitutional Court concerning the impact of EU law on the organization and functioning of the national judiciary (Cases K 7/18, K 5/21 and K 8/21).⁸²

⁷⁹ See the Statement of Retired Judges of the Polish Constitutional Court dated 10 October 2021; the Resolution No. 04/2021 of the Committee of Legal Sciences of the Polish Academy of Sciences dated 12 October 2021; the Statement of Deans of Law Faculties of Polish Universities, all opposing the ruling. See also the commentary to the Statement of Retired Judges of the Polish Constitutional Court prepared by its two signatories: Biernat and Łętowska (2021).

⁸⁰ See the debate held in the European Parliament with the participation of the Polish Prime Minister which took place on 19 October 2021 ended with the European Parliament resolution of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law (2021/2935(RSP)). As to the doctrinal analysis see, i.a. EU Law Live Symposium on the EU law implications of the Polish Constitutional Court Decision in case K 3/21 with comments of Craig et al. (2021) at Eulawlive Symposium: The Primacy of EU Law and the Implications of the Polish Constitutional Court's Decision in Case K 3/21; Biernat and Łętowska (2021); Comments Editorial (2021).

⁸¹ Order of the Vice-President of the Court, 27 October 2021, C-204/21 R Commission v. Poland.

⁸² The case K 7/18 was initiated by the Prosecutor General who, following preliminary questions submitted to the ECJ by the Supreme Court (C-522/18 and C-537/18) filed a request with the Constitutional Court to examine the compliance of Article 267 TFEU with the Constitution so far as it allows the submission of preliminary questions regarding the organization of the national judiciary. The request of the Prime Minister in case K 3/21 was further supported by the application to the Constitutional Court filed by the group of deputies of governing party (case K 5/21). The applicants in particular questioned the powers of the ECJ to 'control national regulations concerning the composition, method of appointment, powers, system and competences of constitutional authorities of the Member States, in particular the courts' and to apply interim measures in cases including the judiciary of the Member States. In Case 8/21 the Prosecutor General questioned the EU competences to impose the financial penalties for failure

In the doctrine, as well as in the submissions filed during the course of the proceedings,⁸³ a number of arguments were raised challenging the position of the applicants and, subsequently, the Constitutional Court's judgments in cases P 7/20 and K 3/21. Notwithstanding the formal arguments pointing out that the Constitutional Court should not engage in a substantive review of the motions filed,⁸⁴ the reasoning referred to principles fundamental for EU law and the relationship between the ECJ and national judiciaries. As has been argued⁸⁵ with reference to the jurisprudence of the ECJ,⁸⁶ although the organization of the administration of justice falls within the competence of Member States, when exercising it they are obliged to comply with obligations stemming from EU law, in particular with the principle of effective judicial protection. Contrary to the position of the applicants, the organization of the judiciary is not, viewed in the light of EU obligations, the exclusive domain of the Member States.⁸⁷ If national courts are to decide on questions relating to the application or interpretation of EU law, they must therefore comply with the requirements of the institutional guarantees set out in the principle of effective judicial protection. These guarantees are an integral part of the judicial protection of any rights which individuals derive from EU law. They remain at the heart of the rule of law, which is the cornerstone of the European legal space based on mutual trust and mutual recognition of judicial decisions.⁸⁸ Moreover, as has been indicated⁸⁹ the Constitutional Court judgments favorable to the request of the applicants would be irreconcilable with the ECJ's jurisprudence concerning the right of the courts to issue a request for a preliminary ruling.⁹⁰ It has also been

Footnote 82 (continued)

to comply with the prescribed interim measure as well as the EU competences to issue the interim measures relating to the system and functioning of the constitutional organs of the Republic of Poland.

⁸³ See the submissions of the Ombudsman as referred to below.

⁸⁴ See, as to the case P 7/20: the submission of the Polish Ombudsman dated 15 May 2020; as to the case K 7/18: the submission of the Polish Ombudsman dated 27 September 2018; Biernat and Kawczyńska (2018), p. 3.

⁸⁵ See, as to the case P 7/20, the submission of the Polish Ombudsman dated 14 April 2021.

⁸⁶ Case C-619/18 *Commission v. Poland*, ECLI:EU:C:2019:531, para. 52; Joined Cases C-585/18, C-624/18 & C-625/18 *A.K. et al. v. Sąd Najwyższy*, ECLI:EU:C:2019:982, para. 75; Case C-192/18 *Commission v. Poland*, ECLI:EU:C:2019:924, para. 102; Joined Cases C-558/18 & C-563/18 *Miasto Łowicz and Prokurator Generalny v. Skarb Państwa—Wojewoda Łódzki et al.*, ECLI:EU:C:2020:234, para. 36; Case C-824/18, *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2021:153, para. 68.

⁸⁷ See, as to the case K 7/18, Safjan and Düsterhaus (2019), p. 211.

⁸⁸ See, as to the case P 7/20, the submission of the Polish Ombudsman dated 14 April 2021.

⁸⁹ See, as to the case K 7/18: the submission of the Polish Ombudsman dated 16 October 2018, p. 10–11; Biernat and Kawczyńska (2018), p. 6; as to the case P 7/20: the submission of the Polish Ombudsman dated 14 April 2021.

⁹⁰ See, in respect of the case K 7/18, the submission of the Polish Ombudsman dated filed 16 October 2018, p. 10–11; Biernat and Kawczyńska (2018), p. 6. In this context see in particular the ECJ's judgments: Joined Cases C-188/10 & C-189/10 *Aziz Melki and Sélim Abdeli*, ECLI:EU:C:2010:363, para. 57; Case C-416/10, *Križan et al. v. Slovenská inšpekcia životného prostredia*, ECLI:EU:C:2013:8, para. 73; Case C-112/13 *A v. B et al.*, ECLI:EU:C:2014:2195, para. 46; Case C-614/14 *Ognyanov*, ECLI:EU:C:2016:514, para. 25; Case C-585/18, C-624/18 and C-625/18 *A.K. et al. v. Sąd Najwyższy*, ECLI:EU:C:2019:982, para. 103; Case C-824/18, *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2021:153, para. 93–95.

pointed out that the legal regime established as a result of changes made with respect to the Constitutional Court, the National Council of the Judiciary, and the Supreme Court—changes made in breach of the standards of the Polish Constitution as well as the requirements prescribed under EU law and the European Convention on Human Rights—is not part of the constitutional identity of the Republic of Poland. Constitutional identity with respect to the right to a fair trial results from Article 45.1 of the Polish Constitution, and the essence of that right (being the right to an impartial and independent court) corresponds to the EU principle of effective judicial protection. As has been pointed out by commentators, the purpose of the proceedings before the Constitutional Court was not to resolve any existing, real, irremovable contradiction between the standards of the Polish Constitution on the one hand and those of EU law on the other. The real aim was to provide cover for ordinary national legislation which lowered the standard of judicial independence below the level required by both the Polish Constitution and EU law. In this sense, the illusion of a contradiction between EU law and the Polish Constitution was artificially created.⁹¹ The permanent nature of the shortcomings of the national judicial authorities leads to an effect that is unacceptable from the perspective of the autonomy and effectiveness of EU law.⁹²

Nor can the position of the Polish Constitutional Court be justified in view of the jurisprudence of other apex courts of EU Member States which have been engaged in a conflicting track with the ECJ. It should be noted in this context that the references to the case law of the constitutional courts of, i.a., Germany, Czech Republic, France, Spain as well as the Supreme Court of Denmark was part of the grounds in case P 7/20 and K 3/21.⁹³ According to the Constitutional Court its judgment fits within this line of judgments questioning the supremacy of the EU law and allowing for the judicial control of EU *ultra vires* acts. Such argumentation is entirely unfounded when one takes into account the context, merits, and effects of the constitutional conflicts as invoked by the Constitutional Court. Firstly, most of them remained in the declaratory stage. Notwithstanding the claim to the supremacy of a national constitution over EU law made by the constitutional courts, in concrete cases they managed to avoid a real conflict between the national constitutions and EU law.⁹⁴ Secondly, for the reasons indicated above (context, merits, and the effects of the constitutional conflicts), the cases where there was a real conflict between

⁹¹ See commentary to the statement of retired judges of the Constitutional Tribunal by Stanisław Biernat, Ewa Łętowska: Biernat and Łętowska (2021).

⁹² See, as to the case P 7/20, the submission of the Polish Ombudsman dated 14 April 2021.

⁹³ The references to the jurisprudence of the apex courts of EU Member States questioning the supremacy of the EU law constituted the substantial part of the request of the Prime Minister in case K 3/21.

⁹⁴ A model example of the avoidance of such a conflict in the course of judicial dialogue between the the Court of Justice and the constitutional court (here: Italian Constitutional Court) is the Tarrico saga. See the ECJ's judgment in Case C-105/14, Criminal proceedings against Ivo Taricco and Others, ECLI:EU:C:2015:555, which triggered the request for the preliminary ruling issued by the Italian Constitutional Court. In response to the stance of the Italian Constitutional Court the ECJ delivered its judgment in Case C-42/17, Criminal proceedings against M.A.S. and M.B., ECLI:EU:C:2017:936.

the Court of Justice and the apex courts of Member States⁹⁵ cannot be compared with the dispute between the Polish Constitutional Court and the Court of Justice. Generally, the conflicting judgments of the apex courts in other Member States concerned strictly-defined contentious issues that arose in the interpretations of the domestic constitution and EU law, mainly in particular areas of substantive law.⁹⁶ In *Holubec* case⁹⁷ the controversy referred to the pension rights of Czech citizens in a specific context after the dissolution of Czechoslovakia. The specifics of this first case in which the doctrine of *ultra vires* was actually applied by a national court were related to the very particular context of the Czechoslovak pension saga.⁹⁸ In the *Ajos* case⁹⁹ the dispute concerned the prohibition against discrimination on grounds of age. According to the Danish Supreme Court, the Danish Accession Act did not allow for unwritten general EU law principles, such as the prohibition against discrimination on grounds of age, to be applied directly and take precedence over national law in a dispute between private parties. In the *PSPP* judgment of the German Federal Constitutional Court of 5 May 2020¹⁰⁰—which was of particular relevance for the argumentation of the Polish Constitutional Court—the core of the dispute was the interpretation of the EU principle of proportionality. Notwithstanding its highly controversial rhetoric and questionable argumentation, the ruling of the German Federal Constitutional Court was in fact a call for more engagement on the part of the ECJ in the scrutiny of the proportionality of the ECB's acts.¹⁰¹ In sharp contrast to the above jurisprudence, the core of the dispute in the discussed cases of the Polish Constitutional Court was the Court's challenge of the axiological foundations of the EU as expressed in Articles 2 and 19(1) of the TEU, in particular the rule of law and effective judicial protection for the individual, as well as the resulting guarantees of judicial independence. These principles can be considered as

⁹⁵ See in particular the conflicts between the ECJ and, respectively, the Constitutional Court of the Czech Republic, the Supreme Court of Denmark and the German Federal Constitutional Court, as referred to below.

⁹⁶ See Biernat and Łętowska (2021).

⁹⁷ See the judgement of the Constitutional Court of the Czech Republic of 31 January 2012, Pl. ÚS 5/1 issued following the ECJ's judgment in Case C-399/09, *Marie Landtová v Česká správa sociálního zabezpečení*, ECLI:EU:C:2011:415.

⁹⁸ And, as one of the commentators has suggested, “judicial weariness and judicial ego”. See the analysis of the extra legal factors of this dispute in Bobek (2014), pp. 54–89.

⁹⁹ See the judgement of the Danish Supreme Court of 6 Dec. 2016 in Case 15/2014, *Dansk Industri (DI) acting for Ajos A/S v. the estate left by A, UfR 2017.824 H* issued following the ECJ's judgment in Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*, Judgment of the Court (Grand Chamber), ECLI:EU:C:2016:278.

¹⁰⁰ 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, ECLI:DE:BVerfG:2020:rs2020050 5.2bvr085915 issued following the ECJ's judgment in Case C-493/17 Proceedings brought by Heinrich Weiss and Others, ECLI:EU:C:2018:1000.

¹⁰¹ In this sense it was—paradoxically—a call for “more ECJ” and cannot be compared with the context and results of the rulings of the Polish Constitutional Court. For more on this point, see the comments of the judge of the German Federal Constitutional Court, Ulrich Maidowski after issuing the *PSPP* judgment at <https://dprv.eu/index.php/rueckblick>.

core to the EU's (constitutional) identity.¹⁰² The dispute over the content and scope of these principles that is taking place between the Polish Constitutional Court and the Court of Justice is therefore unprecedented vis-à-vis the other constitutional conflicts in the EU. For the first time the very axiological foundations on which the EU is based, as expressed in the Treaties and the jurisprudence of the Court of Justice, have been called into question. The axiological nature of this conflict is key to distinguishing the Polish case from the primacy disputes in other Member States. Moreover, when justifying the variance of the discussed case law of the Polish Constitutional Court with the conflicting rulings of other Member States apex courts one must also point out that before such conflicting judgments were issued by those courts, the Court of Justice had the opportunity to take its stance by issuing preliminary rulings.¹⁰³ Furthermore, the divergences between the jurisprudence of the constitutional courts of other Member States and the case law of the CJEU were of a temporary nature and were usually eliminated through changes in domestic law or the practice of legal (and political) actors. They did not result in a Member State challenging their fundamental duties of loyalty to the EU.¹⁰⁴

When looking at the above discussed cases from the perspective of the Constitutional Court's jurisprudence pre-2016—which is the perspective of this analysis—the following reasoning can be added to the arguments presented above. From the Constitutional Court's jurisprudence pre-2016 it can be inferred that it is the Constitutional Court, as the guardian of (the supremacy) of the Constitution, that shall decide—from the perspective of the Polish Constitution—on the scope of the interference of EU law into the Polish legal system. It was also confirmed in the Constitutional Court's jurisprudence pre-2016 that in case of a collision between the rulings of the Court and the ECJ, the Constitutional Court shall retain the position of 'the court of last resort'. However, an indispensable element of such jurisprudence was the Constitutional Court's reference to the 'axiological identity' of Poland and the EU. As was stressed in the Court's jurisprudence, the Constitution of the Republic of Poland and EU law are based on the same shared values defining the nature of a democratic state, rule of law, and the catalogue and content of fundamental rights. The basis of full axiological compatibility encompasses the identical axiological inspiration of the EU and the Republic of Poland. The statements of the Constitutional Court concerning the 'axiological identity' of Poland and the EU were firmly grounded and justified in view of its jurisprudence pre-2016, including the jurisprudence concerning EU matters, which expressed the development of (the principles of) liberal democracy in Poland. From such a perspective, it can be argued that in order to remain consistent with its case law pre-2016 the Constitutional Court

¹⁰² As to "the very identity of the European Union" see the judgments of the ECJ issued on 16th February 2022 in cases: C-157/21, Republic of Poland v. European Parliament and Council of the European Union, ECLI:EU:C:2022:98 and C-156/21, Hungary v. European Parliament and Council of the European Union, ECLI:EU:C:2022:97.

¹⁰³ See notes 97, 99 and 100 above.

¹⁰⁴ See Biernat and Łętowska (2021). See in this respect the follow-up of the cases referred to above. Contrary to the Polish case, none of these conflicts resulted in a permanent clash between EU and national law.

should remain open to the emerging line of judgments of the ECJ concerning the standards of justice in the EU, construed through the prism of Article 2 TEU.¹⁰⁵ That would require that the Constitutional Court accepts that the axiological basis of the organization of the administration of justice in a Member State falls within the scope of EU law, and it would not question the scope of application of EU law as determined in the (future) rulings of the ECJ. Any potential doubts in this respect should be resolved on the basis of preliminary proceedings.¹⁰⁶ Such a position could be achieved by a consistent interpretation of the relevant constitutional provisions as viewed through the notion of the axiological identity of Poland and EU.¹⁰⁷ From the Polish constitutional perspective, this interpretation could be supported by the principle of favourable predisposition towards the process of European integration. Such an approach would express the Constitutional Court's trust in the axiological foundation of the EU's composite constitutional order. In view of this proposed argumentation, the requests for Constitutional Court rulings in the cases discussed above could not be granted positive consideration. The decision on whether or not the organization and functioning of the national judiciary are subject to the EU standards of justice would have to be left to the ECJ.

5 Conclusions

The analysis proposed in this article has been focused on the position of the Polish Constitutional Court in relation to the ECJ. The cut-off date for such analysis has been determined by the constitutional crisis in Poland, whereby the systemic position of the Constitutional Court has been challenged. As has been argued, the constitutional crisis (which began at the end of 2015) resulted in a new model of

¹⁰⁵ See in particular the ECJ's judgments: Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117; Joined Cases C-585/18, C-624/18 & C-625/18 A.K. and Others v. Sąd Najwyższy, ECLI:EU:C:2019:982; Case C-216/18 PPU LM, ECLI:EU:C:2018:586; Case C-284/16, *Slovakische Republik v. Achmea BV*, ECLI:EU:C:2018:158; Case C-619/18 R *European Commission v. Republic of Poland*, ECLI:EU:C:2018:1021; Case C-619/18 *European Commission v. Republic of Poland*, ECLI:EU:C:2019:531; Case C-192/18 *European Commission v. Republic of Poland*, EU:C:2019:924; Case C-791/19 R *European Commission v. Republic of Poland*, ECLI:EU:C:2020:277; Joined Cases C-558/18 & C-563/18 *Miasto Łowicz and Prokurator Generalny v. Skarb Państwa—Wojewoda Łódzki et al.*, ECLI:EU:C:2020:234; Case C-824/18 A.B. and Others v. *Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2021:153; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 & C-397/19 *Asociația "Forumul Judecătorilor din România" and Others v. Inspecția Judiciară and Others*, ECLI:EU:C:2021:393; Case C-791/19 *European Commission v. Republic of Poland*, ECLI:EU:C:2021:596.. In accordance with the EU law standard elaborated by the ECJ, while the organization of the administration of justice falls within the competence of the Member States, when exercising it, they are required to comply with the obligations arising for them from EU law, in particular from the treaty principle of effective judicial protection requiring the judicial independence.

¹⁰⁶ It should be noted that in case the Constitutional Court provides preliminary questions to the ECJ, issues around their admissibility might appear when they are sent by a judicial panel composed of person(s) whose legitimacy to sit on it is questioned. See the judgment of the European Court of Human Rights in Case No. 4907/18, *Xero Flor w Polsce sp. z o.o. v. Poland*, referred to in note 43.

¹⁰⁷ The ideas of effective legal protection, independence of the judiciary as well as separation of powers are part of the normative framework of the Polish Constitution.

constitutional adjudication in Poland—in this new model the Constitutional Court, stripped of its counter-majoritarian power, cannot be perceived as the guardian of liberal democracy. Such a change in the role of the Constitutional Court has resulted in a shift in the direction of the Court's case law in European matters, in particular with respect to the ECJ. The jurisprudence of the Polish Constitutional Court after 2015 remains in line with the policy of the Polish authorities to question, on the grounds of national sovereignty, the ECJ's evolving case law on the EU standards of justice, centred on particular aspects of the rule of law. It has been argued here that the point of reference for the assessment of any rulings of the Constitutional Court in the regarded area can/should be provided by the jurisprudence of the Constitutional Court pre-2016.

The case law of the Polish Constitutional Court referring to the ECJ has developed over the course of more than a decade. The crucial viewpoint in the position of the Constitutional Court was, on the one hand, to stress the need to preserve the supremacy of the Polish Constitution over EU law, and—on the other—to recognise the role of the ECJ in the legal system of the European Union and remain open to a dialogue between the two Courts. This openness to a dialogue with the ECJ was confirmed in the Constitutional Court's case law regarding the preliminary ruling procedure and recognition of a conforming interpretation as a means of effecting a constitutional discourse between the ECJ and the Constitutional Court. It should be noted that, notwithstanding some controversies, the jurisprudence of the Constitutional Court pre-2016 with respect to the ECJ was coherent and consistent, based on clearly articulated principles and concepts, like the supremacy of the Constitution, the axiological identity of Poland and the EU, and the recognition of the role of the ECJ as the only court competent to rule on the validity and interpretation of EU law. As has been argued here, the relationship between the ECJ and the Constitutional Court pre-2016 can be conceptualized through the lens of constitutional pluralism, in particular in its 'dialogical version'. The important condition for such a conclusion was recognition that the Constitutional Court's jurisprudence pre-2016 fulfilled a crucial requirement of the constitutional pluralism, i.e. compliance with the principles of liberal democracy. From this perspective the statements of the Constitutional Court concerning the 'axiological identity' of Poland and the EU were firmly grounded and justified. The Polish Constitutional Court's jurisprudence pre-2016, including the Court's jurisprudence concerning EU matters, expressed the development of (the principles of) liberal democracy in Poland—being at the same time the axiological aim and aspiration of the constitutionalism of the EU. The jurisprudence of the Constitutional Court provided the solid basis for dialogue with the ECJ, whereby such a dialogue remained within the process of building the composite constitutional order of the EU.

From the perspective of the Polish Constitutional Court's jurisprudence pre-2016, one can identify and assess the current shift in the Court's case law as regards European matters, and in particular the ECJ. Such a development leads to the conclusion that the standards and principles elaborated in the Constitutional Court jurisprudence pre-2016 with respect to the role of the ECJ have been undermined. That is notwithstanding the numerous references to the jurisprudence of the Constitutional

Court pre-2016 in the current case law of the Court. The same words and concepts (such as the primacy of the Constitution; the principle of protection of state sovereignty in the process of European integration; the constitutional identity; the principle of sincere cooperation between the EU and the Member States)—when deprived of the shared axiological context—gain different meanings and lead to different results. In the jurisprudence of the Constitutional Court pre-2016 they were expressing the pluralist vision of the EU legal order, based on the assumption of the axiological identity of the EU and national legal orders i.e. commonly-shared values of liberal democracy. Only based on such an assumption could the relationship between the two Courts—the Polish Constitutional Court and the ECJ—avoid a conflicting track and be shaped through a cooperative (dialogue-based) model. After 2015 the same constitutional concepts have been engaged in the process of legitimizing the acts adopted by the parliamentary majority and as tools to confront the EU institutions, including the ECJ. Moreover, as has been argued above, the employment by the Polish Constitutional Court of the notions constituting the core of the liberal constitutional order, such as the rule of law, democracy, separation of powers, and the right to a fair trial, may be deemed to constitute an example of abusive constitutional borrowing, being a part of a broader phenomena of abusive judicial review. This aspect of the erosion of the liberal democratic constitutional order—bearing in mind the position and role of a constitutional court within its structure—raises particular concerns. The recent judgments of the Constitutional Court discussed herein have brought about a serious threat not only to the relationship between the Polish Constitutional Court and the ECJ, but to the position of Poland as an EU Member State. Such changes can and should be analysed and assessed in view of the change of the systemic position of the Constitutional Court within the constitutional system in Poland. In particular, as has been argued the current jurisprudence of the Constitutional Court and, more generally, its relationships to other state authorities, breaks with the assumptions of liberal constitutionalism and liberal democracy which were foundational for the jurisprudence of the Polish Constitutional Court pre-2016. These factors decisively determine the position of the ECJ in the current case law of the Polish Constitutional Court, as well as the expectations as to the future direction of its rulings with respect to EU matters.

Funding Project financed under the program "DIALOG" of the Polish Minister of Science and Higher Education in the years 2019–2022.

Declarations

Conflict of Interest The submission has not been published before and is not under consideration for publication anywhere else.

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References

- Adamski D (2019) The social contract of democratic backsliding in the “new EU” countries. *Cmlrev* 3:623–666
- Avbelj M (2017) Pluralism and systemic defiance in the EU. In: Jakab A, Kochenov D (eds) *Enforcement of EU law and values: ensuring member states’ compliance*. Oxford University Press, pp 44–61. <https://doi.org/10.1093/acprof:oso/9780198746560.003.0004>
- Avbelj M (2018) *The European Union under Transnational law: a pluralist appraisal*. Hart Publishing. <https://doi.org/10.5040/9781509911530>
- Besselink LFM (2016) The place of national parliaments within the European Constitutional Order. In: Lupo N, Fasone C (eds) *Interparliamentary cooperation in the composite European Constitution*. Hart Publishing, pp 23–38. <https://doi.org/10.5040/9781782257004.ch-001>
- Biernat S (2020a) How far is it from Warsaw to Luxembourg and Karlsruhe: the impact of the PSPP judgment on Poland. *GLJ* 21:1104–1115. <https://doi.org/10.1017/glj.2020.53>
- Biernat S (2020b) Trybunał Konstytucyjny wypowiada posłuszeństwo prawu Unii Europejskiej [The Constitutional Tribunal withdraws adherence to European Union law]. In: Bodnar A, Płoszka A (eds) *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego [Around the crisis of the rule of law, democracy and human rights. Jubilee book dedicated to Professor Mirosław Wyrzykowski]*. Wolters Kluwer, Warszawa, pp 817–834
- Biernat S, Kawczyńska M (2018) Though this be Madness, yet there’s Method in’t: Pitting the Polish Constitutional Tribunal against the Luxembourg Court. *Verfassungsblog*, 26 October 2018, <https://verfassungsblog.de/though-this-be-madness-yet-theres-method-int-the-application-of-the-prosecutor-general-to-the-polish-constitutional-tribunal-to-declare-the-preliminary-ruling-procedure-unconstitut/>. <https://doi.org/10.17176/20181027-092857-0>. Accessed 6 Jun 2022
- Biernat S, Kawczyńska M (2019) The role of the Polish Constitution (Pre-2016): development of a liberal democracy in the European and International Context. In: Albi A et al (eds) *National constitutions in European and Global Governance: democracy, rights, the rule of law*. TMC Asser Press, pp 745–793
- Biernat S, Łętowska E (2021) This was not just another ultra vires judgment! *Verfassungsblog*, 27 October 2021, <https://verfassungsblog.de/this-was-not-just-another-ultra-vires-judgment/>. <https://doi.org/10.17176/20211027-182911-0>. Accessed 6 Jun 2022
- Bobek M (2014) Landtová, Holubec, and the problem of an uncooperative court: implications for the preliminary rulings procedure. *Eur Const Law Rev* 10:54–89. <https://doi.org/10.1017/S1574019614001047>
- Chmielarz-Grochal A, Sułkowski J (2018) Appointment of judges to the Constitutional Tribunal in 2015 as the trigger point for a deep constitutional crisis in Poland. *Przegląd Konstytucyjny* 2:91–119
- Cloots E (2015) *National identity in EU law*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198733768.001.0001>
- Comments Editorial (2021) Clear and present danger: Poland, the rule of law and primacy. *CMLR* 58:1635–1648
- Commission Staff Working Document (2020) Rule of Law Report, Country Chapter on the rule of law situation in Poland, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, Brussels, 30 September 2020 SWD (2020) 320 final
- Commission Staff Working Document (2021) Rule of Law Report, Country Chapter on the rule of law situation in Poland, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2021 Rule of Law Report, The rule of law situation in the European Union, Brussels, 20 July 2021 SWD (2021) 722 final

- Commission Staff Working Document (2022) Rule of Law Report, Country Chapter on the rule of law situation in Poland, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2022 Rule of Law Report, The rule of law situation in the European Union, Brussels, 13 July 2022 SWD (2022) 521 final
- Craig P, Hillon Ch, Kochenov D, Krupitz D and Kirst N, Lindeboom J, Atik J and Groussot X, Repasi R, Casolari F (2021) at Eulawlive Symposium: The Primacy of EU Law and the Implications of the Polish Constitutional Court's Decision in Case K 3/21, <https://eulawlive.com/symposia/the-primacy-of-eu-law-and-the-implications-of-the-polish-constitutional-courts-decision-in-case-k-3-21/>. Accessed 6 Jun 2022
- Davies G, Avbelj M (eds) (2018) Research handbook on legal pluralism and EU law. Cheltenham, Northampton
- Della Cananea G (2003) L'Unione Europea. Un ordinamento composito. Laterza, Roma/Bari
- Dixon R, Landau D (2015) Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment. *Int J Const Law* 13:606–638
- Dixon R, Landau D (2019) 1989–2019: from democratic to abusive constitutional borrowing. *Int J Const Law* 17:489–496
- Dixon R, Landau D (2021) Abusive constitutional borrowing, OUP 2021
- Filipek P (2018) The new National Council of the Judiciary and its impact on the Supreme Court in the light of the principle of judicial independence. *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 16:177–196
- Garlicki L (2016) Die Ausschaltung des Verfassungsgerichtshofes in Polen? (disabling the constitutional Court in Poland?). In: Szymt A et al. (eds) Transformation of law systems in Central, Eastern and South-Eastern Europe in 1989–2015, pp 63–78
- Garlicki L, Derlatka M (2019) Constitutional Court of Poland. 1996–2018. In: Arnold R, Rytel-Warzocho A, Szymt A (eds) Development of Constitutional Law Through Constitutional Justice. In: XX International Congress of European and Comparative Constitutional Law, Gdańsk. 2019, pp 151–168
- Glynn WB (1965) The meaning of the separation of power. Martinus Nijhoff, The Hague
- Granat M (2021) A weapon the Government Can Control: NON-FINAL final judgments of the Polish Constitutional Court. *Verfassungsblog*, 15 January 2021. <https://verfassungsblog.de/a-weapon-the-government-can-control/>. <https://doi.org/10.17176/20210125-191350-0>. Accessed 6 Jun 2022
- Issacharoff S (2011) Constitutional courts and democratic hedging. *Georget Law J* 99:961–1012
- Issacharoff S (2015) Fragile democracies: contested power in the era of constitutional courts. Cambridge University Press
- Jaklic K (2014) Constitutional pluralism in the EU. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198703228.001.0001>
- Koncwicz TT (2016) Of institutions, democracy, constitutional self-defence and rule of law: the judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond. *CMLREV* 53:1753–1792
- Koncwicz TT (2018) The capture of the Polish Constitutional Tribunal and beyond: of institution(s), fidelities and the rule of law in flux. *Rev Cent East Eur Law* 43:116–173
- Kowalik-Bañczyk K (2005) Should we polish it up? The Polish Constitutional Tribunal and the idea of supremacy of EU Law. *German Law J* 6:1355–1366
- Landau D, Dixon R (2020) Abusive judicial review: courts against democracy. *UC Davis Law Rev* 53:1313–1387
- Łazowski A (2011) Half full and half empty glass: the application of EU Law in Poland (2004–2010). *CMLREV* 48:503–553
- Łętowska E (2020) A tragic constitutional court judgment on Abortion. *Verfassungsblog*, 12 November 2020. <https://verfassungsblog.de/a-tragic-constitutional-court-judgment-on-abortion/>. <https://doi.org/10.17176/20201112-200210-0>. Accessed 6 Jun 2022
- Łętowska E, Wiewiórowska-Domagalska A (2016) A 'good' change in the Polish Constitutional Tribunal? *Osteuropa Recht* 1:79–93
- Locke J (2005) Two treaties of government. Cambridge University Press
- Matczak M (2019) Poland's rule of law crisis: some thoughts. *Hague J Rule Law* 11:407–410. <https://doi.org/10.1007/s40803-019-00117-y>
- Matczak M (2020) The clash of powers in Poland's rule of law crisis: tools of attack and self-defense. *Hague J Rule Law* 12:421–450. <https://doi.org/10.1007/s40803-020-00144-0>

- Pech L, Wachowiec P, Mazur D (2021) Poland's rule of law breakdown: a five-year assessment of EU's (in)action. *Hague J Rule Law* 13:1–43. <https://doi.org/10.1007/s40803-021-00151-9>
- Pernice I, Mayer FC (2000) De la constitution composée de L'Europe. *Revue Trimestrielle De Droit Européen* 36:623–647
- Peters A (2001) *Elemente einer theorie der verfassung Europas*. Duncker & Humblot, Berlin
- Ploszka A (2022) It never rains but it pours. The Polish Constitutional Tribunal declares the European Convention on Human Rights Unconstitutional. *Hague J Rule Law*. <https://doi.org/10.1007/s40803-022-00174-w>
- Pyziak-Szafnicka M (2020) Trybunał Konstytucyjny á rebours. *Państwo i Prawo* 5:25–45
- Radziejewicz P (2017) On legal consequences of judgments of the Polish Constitutional Tribunal passed by an irregular panel. *Rev Eur Comp Law* 31:45–64
- Radziejewicz P, Tuleja P eds (2017) *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego, czerwiec 2015–marzec 2016* [Constitutional Dispute over the Limits of Organizational Structure and Procedures of the Constitutional Tribunal, June 2015–March 2016]. Wolters Kluwer
- Resolution No. 04/2021 of the Committee of Legal Sciences of the Polish Academy of Sciences dated 12 October 2021, <https://knp.pan.pl/index.php/wykaz-dokumentow-knp-pan-podjetych-w-2021-r/246-m>. Accessed 6 Jun 2022
- Sadurski W (2006) Solange constitutional courts in Central Europe—Democracy—European Union. *EU Work Pap Law* 40:1–37
- Sadurski W (2018) How democracy dies (in Poland): A case-study of anti-constitutional populist backsliding, *Sydney Law School Research Paper*, pp 1–71
- Sadurski W (2019a) Poland's constitutional breakdown. *Oxford University Press*
- Sadurski W (2019b) Polish constitutional tribunal under PiS: from an activist court, to a paralysed tribunal, to a governmental enabler. *Hague J Rule Law* 11:63–84. <https://doi.org/10.1007/s40803-018-0078-1>
- Safjan M (2015) Central and Eastern European Constitutional Courts Facing New Challenges: ten years of experience. In: Bobek M (ed) *Central European Judges under the European Influence: The Transformative Power of the EU Revisited*, pp 380–381
- Safjan M, Düsterhaus D (2019) The EU Citizens' right to have rights and the Courts' duty to protect it. In: Lenaerts K et al (eds) *An ever-changing union? Perspectives on the future of EU law in Honour of Allan Rosas*. Hart Publishing, pp 201–212
- Schütze R (2017) *Constitutionalism and the European Union*. In: Barnard C, Peers S (eds) *European union law*. Oxford University Press, Oxford
- Statement of Deans of Law Faculties of Polish Universities, an English version: <https://ruleoflaw.pl/statement-of-deans-of-law-faculties-k3-21/>. Accessed 6 Jun 2022
- Statement of Retired Judges of the Polish Constitutional Court dated 10 October 2021, an English version: *Verfassungsblog*, 11 October 2021. <https://verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional-tribunal/>. <https://doi.org/10.17176/20211011-181701-0>. Accessed 6 Jun 2022
- Submission of the Polish Ombudsman dated 16 October 2018 in case K 7/18
- Submission of the Polish Ombudsman dated 14 April 2021 in case P 7/20
- Submission of the Polish Ombudsman dated 27 September 2018 in case K 7/18
- Submission of the Polish Ombudsman dated 15 May 2020 in case P 7/20
- Tatham AF (2013) *Central European courts in the face of EU membership. The influence of the German Model in Hungary and Poland*. Martinus Nijhoff Publishers, Leiden
- Tuleja P (2006) Podstawowe problemy związane z interpretacją Konstytucji Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego [Basic problems related to the interpretation of the Constitution of the Republic of Poland in the Constitutional Tribunal's case law]. In: Zubik M (ed) *Księga XX-lecia Orzecznictwa Trybunału Konstytucyjnego* [Constitutional Tribunal—20th Anniversary Jubilee Book], pp 205–233
- Tuleja P (2020) The Polish Constitutional Tribunal. In: von Bogdandy A et al. (eds) *The Max Planck handbooks in European Public Law, volume III: constitutional adjudication: institutions*, pp 658–672
- Tuori K (2014) Transnational law. On legal hybrids and legal perspectivism. In: Maduro M, Tuori K, Sankari S (eds) *Transnational law. Rethinking European law and legal thinking*. Cambridge University Press
- Venice Commission. Opinion CDL AD(2016)026

- Venice Commission. Opinion CDL-AD(2017)031
- Venice Commission. Opinion CDL-AD(2020)017
- von Bogdandy A (2010) Founding principles. In: von Bogdandy A, Bast J (eds) *Principles of European Constitutional Law*. Beck Publishing and Hart Publishing, Munich and Oxford, pp 11–54
- Wiącek M (2021) Constitutional crisis in Poland 2015–2016 in the light of the rule of law principle. In: von Bogdandy A, Bogdanowicz P, Canor I, Grabenwarter C, Taborowski M, Schmidt M (eds) *Defending checks and balances in EU Member States. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol 298. Springer, Berlin. https://doi.org/10.1007/978-3-662-62317-6_2
- Wyrzykowski M (2013) When Sovereignty Means so Much: The Concept(s) of Sovereignty, European Union Membership and the Interpretation of the Constitution of the Republic of Poland. In: The ECJ of the European Union (ed), *The ECJ and the Construction of Europe/Law Cour de Justice et la Construction de l'Europe*, pp 235–243
- Wyrzykowski M (2016) Bypassing the constitution or changing the constitutional order outside the constitution. In: Szmyt A et al. (eds), *Transformation of law systems in Central, Eastern and South-Eastern Europe in 1989–2015*, pp 159–176
- Wyrzykowski M (2017) Antigone in Warsaw. In: Zubik M (ed) *Human rights in contemporary world. Essays in Honour of Professor Leszek Garlicki*, Warsaw, pp 372–437
- Wyrzykowski M (2019) Experiencing the unimaginable: the collapse of the rule of law in Poland. *Hague J Rule Law* 11:417–422. <https://doi.org/10.1007/s40803-019-00124-z>

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