time to see whether the general interpretative posture when rights are implicated remains circumspect or might morph into something more muscular—a question already troubling the courts below.[23]

Dean R. Knight
Associate Professor,
Faculty of Law and New Zealand Centre for Public Law, Victoria University of Wellington

Poland—Constitutional Tribunal Judgment K 3/21—A continued assault on the integrity of the EU legal order

Constitutionality; EU law; European Court of Justice; Poland; Treaty interpretation

In 2021, in response to increased pressure from the EU for its continuous assault on judicial independence, the *Prawo i Sprawiedliwość* (PiS) government decided to utilise its subordinated Constitutional Tribunal (CT) to immunise itself from EU scrutiny. In June the CT found Court of Justice (CJEU) interim relief orders regarding the organisation of national judicial systems to be ultra vires and non-binding in Poland.[1] This, however, turned out to be insufficient and on 7 October the CT went further and challenged the compatibility with the Polish Constitution of some key treaty provisions, viz. arts 1, 2, 4(3) and 19 TEU, as interpreted by the CJEU.[2] The ruling continues PiS' assault on the integrity of the EU legal order and deserves inspection.

The case was initiated in March 2021 by the Prime Minister in response to the CJEU's earlier *AB* ruling.[3] There, the CJEU reiterated the art.19(1) TEU obligation of Member States and their courts to ensure the effective application of, and protection under, EU law.[4] This could not be ensured without an independent judiciary.[5] Accordingly, the CJEU found contrary to EU law the PiS regime's new procedure for appointing Supreme Court judges as it put into question their independence and impartiality.[6] The CJEU also found the prohibition on national judges issuing preliminary reference questions over the new appointments regime in violation of arts 4(3) TEU and 267 TFEU as it precluded judicial dialogue with the CJEU—such cooperation being necessary for ensuring the uniform and effective application of EU law.[7]

This piece will first consider the content of the K 3/21 ruling, and secondly its harmful impact.

[23] See, e.g. *Borrowdale v Director General of Health* [2021] NZCA 520 and *Four Midwives v Minister for Covid-19 Response* [2021] NZHC 3064.

[1] Constitutional Tribunal, Judgment of 14 July 2021, P 7/20. See also Oskar Polański, "Poland—another episode of 'rule of law backsliding'—Judgment P 7/20 and a threat to the integrity of the EU legal order" [2022] P.L. 153, 155–156.

[2] Constitutional Tribunal, Judgment of 7 October 2021, K 3/21.

[3] *AB v Krajowa Rada Sadownictwa* (C-824/18) EU:C:2021:153; [2021] 3 C.M.L.R. 5.

[4] *AB* [2021] 3 C.M.L.R. 5 at [68], [143], [148].

[5] *AB* [2021] 3 C.M.L.R. 5 at [115]–[116].

[6] *AB* [2021] 3 C.M.L.R. 5 at [150].

[7] *AB* [2021] 3 C.M.L.R. 5 at [90], [107], [140]–[141].

The tribunal's reasoning

The CT's rejection of EU primary law came in two steps.

First, the CT found EU interferences to have undermined Poland's sovereignty.[8] The tribunal claimed that the EU's process of integration has led it to assume competences which had not been conferred on to it. In so doing, the EU was found to undermine the Constitution as the supreme source of law in Poland by creating new binding obligations to which the state had not agreed, thereby undermining its ability to autonomously govern itself. Therefore, the CT found art.1(1) and (2) read in conjunction with art.4(3) TEU—the treaty provisions facilitating the process of integration—to be incompatible with the Polish Constitution *insofar as* they undermined Poland's sovereignty and democracy.

Secondly, the CT turned to the allegedly new competence to govern the organisation of national justice systems.[9] It found arts 2 and 19(1) TEU incompatible with the Polish Constitution *insofar as* they required national judges to ignore provisions of the Constitution, to apply statues which were no longer in force, or when they allowed national judges to review the propriety of judicial appointments. The CT held that national courts could not act in line with this newly-created competence as the treaty provisions relied on by the CJEU do not govern the organisation of national justice systems.[10] It thus concluded that the CJEU's new competence, derived from mere art.2 TEU values—which do not prescribe how judges are to be appointed[11]—interpreted in light of art.19(1) TEU, was illegitimate.

Thus, in claiming to protect Poland's sovereignty and democracy, and denouncing the alleged competence creep on the part of the EU, the CT found incompatible with the Polish Constitution, and non-binding,[12] precisely the same treaty provisions relied on by the CJEU to review the ongoing judicial reforms in Poland.

Unsurprisingly, the ruling is loaded with erroneous interpretations of EU law and the Polish Constitution.[13] For the purposes of illustrating its harmfulness, however, attention will be given to its impact.

A challenge to the EU

Claims in legal scholarship, in response to the K 3/21 ruling, have ranged from outright rejection of the ruling to arguments that it represented a radical and devastating repudiation of EU law.

[8] Constitutional Tribunal, "Press release after the hearing: K 3/21: Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union", *https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej* [Accessed 25 January 2022], paras 9 and 12.

[9] Constitutional Tribunal, "Press release after the hearing: K 3/21: Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union", para.17.

[10] Constitutional Tribunal, "Press release after the hearing: K 3/21: Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union", para.10.

[11] Constitutional Tribunal, "Press release after the hearing: K 3/21: Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union", para.19.

[12] Constitutional Tribunal, "Press release after the hearing: K 3/21: Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union", para.13.

[13] See Stanislaw Biernat and Ewa Lętowska, "This Was Not Just Another Ultra Vires Judgment! Commentary to the statement of retired judges of the Constitutional Tribunal" (*Verfassungsblog*, 27 October 2021), *https://verfassungsblog.de/this-was-not-just-another-ultra-vires-judgment/* [Accessed 25 January 2022].

Thus, on one side of the spectrum Kochenov argued that this ruling cannot be valid given the fact that the CT—owing to its improper composition—is not a court of law.[14] At the other end of the spectrum, Hofmann claimed that Poland has completely rejected the supremacy of EU law, and in questioning the bindingness of core EU treaty provisions has notified the EU of its intention to withdraw from it.[15] The situation, however, is not as simple as that. The ruling has been published and as such it has very real legal consequences in the Polish legal sphere, and by extension, the EU's legal sphere.[16] On the other hand, the ruling does not represent an outright rejection of supremacy (through an unconditional rejection of core EU treaty provisions), but a conditional rejection of it. In other words, by using the "insofar as" formula, the CT found incompatible with the Constitution specific CJEU interpretations of the treaties.[17]

That is not to say, however, that the ruling did not present a serious challenge to the integrity of the EU legal order. Indeed, while the ruling did not unconditionally reject the treaties—such an act would undoubtedly signal Poland's withdrawal from the EU legal sphere—its covert rejection of treaty provisions "insofar as" they have certain vague implications has provided the regime with a *carte blanche* for rejecting EU law.[18] It has equipped the regime with a legal basis for not complying with EU law in the future, whenever it undermines Poland's "sovereignty". We may also note that the CT threatened the CJEU with rejecting the applicability of its entire jurisprudence if it continued with its "activism".[19]

Accordingly, the challenge in K 3/21 is arguably unlike any other. Indeed, even in the infamous *PSPP* judgment where the *Bundesverfassungsgericht* refused to comply with a CJEU decision and usurped the court's role in reviewing the validity of EU law,[20] the German court did not provide a legal basis for *continuous* deviations from EU law and stopped at disapplying a specific provision of EU law.[21] While this decision was undoubtedly damaging to the EU—and the *Bundesverfassungsgericht* may engage in such ultra vires reviews in the future—the

[14] Such arguments are based on the European Court of Human Rights' findings in *Xero Flor*. See *Case of Xero Flor w Polsce sp zoo v Poland* (4907/18), unreported, 7 May 2021 at [289]–[291]; Dimitry Kochenov, "Mad in Poland" (*EU Law Live*, 22 October 2021), *https://eulawlive.com/op-ed-mad-in-poland-by-dimitry-kochenov/* [Accessed 25 January 2022].

[15] Herwig C.H. Hofmann, "Sealed, Stamped and Delivered: The Publication of the Polish Constitutional Court's Judgment on EU Law Primacy as Notification of Intent to Withdraw under Art 50 TEU?" (*Verfassungsblog*, 13 October 2021), *https://verfassungsblog.de/sealed-stamped-and-delivered/* [Accessed 25 January 2022].

[16] Christophe Hillion, "Last station before 'Polexit'?" (*EU Law Live*, 28 October 2021), *https://eulawlive.com/op-ed-last-station-before-polexit-by-christophe-hillion/* [Accessed 25 January 2022].

[17] Maciej Krogel, "After the decision of the captured Polish Constitutional Tribunal: jurists trying to have and eat their cake" (*IConnect*, 17 October 2021), *http://iconnectblog.com/2021/10/symposium-part-iv-after-the-decision-of-the-captured-polish-constitutional-tribunal-jurists-trying-to-have-and-eat-their-cake/* [Accessed 25 January 2022].

[18] See Jakub Jaraczewski, "Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal" (*Verfassungsblog*, 12 October 2021), *https://verfassungsblog.de/gazing-into-the-abyss/* [Accessed 25 January 2022]; Marta Lasek-Markey, "Poland's Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls" (*European Law Blog*, 21 October 2021)*https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/* [Accessed 25 January 2022].

[19] Constitutional Tribunal, "Press release after the hearing: K 3/21: Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union", para.22.

[20] BVerfG, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15 at [164]; Franz C. Mayer, "The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP Decision of 5 May 2020" (2020) 16 E.C.L. Review 733, 748.

[21] See Alexander Thiele, "Whoever equates Karlsruhe to Warsaw is wildly mistaken" (*Verfassungsblog*, 10 October 2021), *https://verfassungsblog.de/whoever-equals-karlsruhe-to-warsaw-is-wildly-mistaken/* [Accessed 25 January 2022].

key difference is therefore the long term impact which the K 3/21 ruling has, but *PSPP* does not.

The current situation is therefore bleak. PiS is using its subordinated CT to constantly expand its anti-EU arsenal. With every such decision, the EU's capacity to govern the scope and applicability of legal norms within its legal space is being weakened. It is unclear whether—and for how long—the EU's legal order can withstand such a continuous assault.

Oskar Polański[*]
PhD Researcher, *European University Institute*

Singapore—A(nother) sea change for equality law on the horizon?

Constitutional law; Discrimination; Equality; Obiter dicta; Singapore; Statutory interpretation

In *Syed Suhail bin Syed Zin v Attorney General* (*Syed Suhail* (2020/CA))[1], the Singapore Court of Appeal re-examined how art.12(1), the Singapore Constitution's equal protection clause, should apply to executive actions. Departing from the prior "deliberate and arbitrary" test, the Court of Appeal set out a two-limbed framework. This asks: (a) whether the relevant persons were equally situated and subject to *differential treatment*; and (b) if so, whether this treatment was justified by legitimate reasons. As a recent case note by Benjamin Joshua Ong describes, *Syed Suhail* (2020/CA) is now the "leading case" on equality law in Singapore.[2] But a more recent—and unassuming—High Court judgment threatens to throw a spanner in the works of this purportedly landmark case.

Syed Suhail v Attorney General (*Syed Suhail* (2021/HC))[3] was a judicial review in the Singapore High Court seeking various declarations that the claimants'—all of whom were of Malay ethnicity—prosecutions were contrary to their rights to equal treatment under the law under art.12(1) of the Constitution. The arguments were formulated solely by reference to publicly available statistical data—the plaintiffs arguing that they were statistically more likely to be investigated and/or prosecuted for capital drug offences, and this in turn shows they were unlawfully discriminated against.

The case was roundly rejected by the High Court—the judge describing it as being based on "speculative assertions [and] conjecture cloaked in general interest". However, an important obiter comment from the judge has the potential to make a sea change to equality law in Singapore; specifically, the judge's acceptance of the submission that the Singapore Constitution's equal protection provision prohibits not just direct discrimination but also indirect discrimination. In her

[*] A special thank you goes to Maciej Krogel for his helpful comments.
[1] *Syed Suhail bin Syed Zin v Attorney General* [2021] 1 SLR 809 CA.
[2] B.J. Ong, "Singapore—Can delaying an execution due to COVID-19 amount to unconstitutional discrimination?" [2022] P.L. 156.
[3] *Syed Suhail v Attorney General* [2021] SGHC 274 HC. The appellant in *Syed Suhail* [2021] 1 SLR 809 was amongst the plaintiffs in this case.