

Warsaw, 17 January 2020


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Ms Ksenija Turković
The European Court of Human Rights
President of the First Section
Council of Europe
67075 Strasbourg-Cedex
France

Ref. *Xero Flor w Polsce sp. z o.o. against Poland*
Application no. 4907/18

Pursuant to the letter of Mr Abel Campos, the Section Registrar of the First Section of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 16 December 2019, granting leave to make written submission to the Court by 20 January 2020, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, hereby respectfully presents its written comments on the case of *Xero Flor w Polsce sp. z o.o. against Poland* (application no. 4907/18).

On behalf of the Helsinki Foundation for Human Rights,


Dr Piotr Kładoczny

Secretary of the Board



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Xero Flor w Polsce sp. z o.o. v. Poland
Application no. 4907/18

WRITTEN COMMENTS
BY
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

EXECUTIVE SUMMARY:

- The case of *Xero Flor w Polsce sp. z o.o. v. Poland* concerns, among others, the applicant's allegation that participation of one unlawfully elected person in the adjudicating panel of the Constitutional Tribunal which considered its constitutional complaint violated his right to have a case heard by the tribunal established by law.
- The Constitutional Tribunal in Poland has limited jurisdiction – it is authorized only to review constitutionality of legal provisions and not their interpretation. Therefore, the constitutional complaint cannot be directed against judgments or decisions and moreover the Constitutional Tribunal's rulings do not lead to an automatic quashing of the final decisions and judgments issued in the complainant's case.
- Nevertheless, a constitutional complaint may be considered as an important mechanism of human rights protection. Successful complaint may allow the complainant to request reopening of the proceedings or to demand compensation for damage inflicted by an unconstitutional law. Moreover, in some cases constitutional complaint may be the only legal means by which an individual can effectively seek protection of his/her rights.
- At the moment, legality of election of three persons adjudicating in the Constitutional Tribunal is questioned. The reason for that is the fact that they were elected to the positions which were filled by the judges elected by the Sejm of 7th term on the legal basis which were found by the Constitutional Tribunal to be in conformity with the Constitution.
- The logical consequence of the judgments of the Constitutional Tribunal issued in 2015 and 2016 is that the election of the three said persons was invalid and because of that they are not legal judges of the Tribunal. Such an interpretation is shared by many legal scholars, courts, the Ombudsman and some international bodies.

I. INTRODUCTION

1. The Helsinki Foundation for Human Rights ("HFHR") submits these written comments pursuant to the leave granted by the President of the First Section of the European Court of Human Rights ("ECtHR" or "Court") on 16 December 2019.
2. HFHR is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of an open society in Poland and abroad. As part of its work, the HFHR represents parties and prepares submissions in proceedings before national and international courts and tribunals. The HFHR has long-standing expertise in submitting third party interventions to the ECtHR and in representing victims of human rights violations in proceedings before the Court. We have submitted *amicus curiae* briefs not only in cases brought against Poland (e.g. *A.K. v. Poland*, no. 904/18; *Grzęda v. Poland*, no. 43572/18), but also in cases taken against other states involving legal problems important for the

protection of human rights in Poland (e.g. *Levada Centre against Russia*, no. 16094/17; *Baka v. Hungary*, no. 20261/12; *Ástráðsson v. Iceland*, no. 26374/18).

3. The HFHR believes that the present case concerns problems of the utmost importance for the protection of the rule of law in Poland. The unlawful personal and structural changes in the organization of the Constitutional Tribunal ("CT", "Tribunal") in 2015-2016 led to a serious constitutional crisis which resulted in significant weakening of the mechanisms of protection of human rights and the rule of law. In particular, the authority of the CT and its ability to carry out its functions effectively and independently were severely damaged. Moreover, the present case provides an opportunity for the Court to clarify the question of applicability of Article 6 of the Convention to the proceedings before the constitutional courts of a limited jurisdiction, such as the Polish Constitutional Tribunal.

4. These written comments are divided into three sections. The first section analyses the role of the constitutional complaint as a mechanism of human rights protection in Poland. The second one briefly describes the origins and course of the "constitutional crisis" related to the unlawful election of three judges of the CT. The last section presents the selected views expressed in the case law of Polish courts and by the Polish legal scholars with regards to legality of election of the said three judges of the CT.

II. CONSTITUTIONAL COMPLAINT AS A MECHANISM OF HUMAN RIGHTS PROTECTION

5. System of constitutional adjudication in Poland is based on a centralized model. This means that, as a rule, the constitutionality of legal norms is reviewed by a central legal body, the CT, which issues final and universally binding judgments. The Tribunal, among the Tribunal of State and courts, is one of the organs of the judicial power, however the Constitution distinguishes its function from the functions performed by courts. According to Article 175 of the Constitution only the courts implement the administration of justice understood by the CT as "settling disputes about the law"¹.

6. The proceedings before the CT may have a form an abstract review (initiated upon the motion of authorized entities under Article 191 of the Constitution) or a concrete review. The latter is initiated by constitutional questions of courts or constitutional complaints of individuals.

7. According to the Constitution, a constitutional complaint is not only a mechanism of initiation of proceedings before the Constitution but also, among, for example, the right to compensation for harms done by unlawful actions of public authorities or the right to appeal against first instance judgments and decisions, one of several "means for the defence of freedoms and rights".

8. Basic rules concerning the mechanism of constitutional complaint are provided in Article 79 para. 1 of the Constitution: "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution". Further provisions concerning the mechanism of constitutional complaint are provided in the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal ("AOCT")², which regulates, among others, deadline for lodging the complaint and the requirement of professional representation of a complainant.

9. Constitutional complaint may be lodged by any individual (regardless of his/her citizenship) whose constitutional rights were violated. The most important procedural requirement provided in the Constitution and AOCT is the necessity of exhaustion of ordinary remedies before lodging

¹ See e.g. judgment of the CT of 2.07.2008, ref. no. K 38/07, para 57; judgment of the CT of 1.12.2008, ref. no. P 54/07, para 46.

² The Act of 30.11.2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal (Journal of Laws 2019, item 2393).

the complaint – on the other hand, submission of extraordinary remedies, such as cassation, is not required. The constitutional complaint must be lodged to the CT within 3 months from the date of delivery of a final decision or judgment to the complainant. The complaint must be prepared and lodged by a professional lawyer – as a rule legal advisor or attorney-at-law.

10. With regards to the subject of a constitutional complaint, the Constitution adopted a so-called “narrow model” of complaint, what means that it may be directed only against a legal provision on the basis of which a court or organ of public administration has made a final decision or judgment and not against these final decisions or judgments as such. From that perspective, a Polish model of constitutional complaint significantly differs from, for example, model adopted in Germany or the Czech Republic where the complainant may challenge constitutionality of both legal provision as well as its application in the judgment issued in his/her case.³ Furthermore, the constitutional complaint may concern only the question of constitutionality of a normative act and not, for example, conformity of statute with international treaty.

11. Also the legal effects of judgments of the CT issued in the proceedings initiated via constitutional complaint are relatively limited. The Constitutional Tribunal is not authorized to review constitutionality of judgments or to quash allegedly unconstitutional rulings. Consequently, judgment of the CT which finds that the provisions challenged in the constitutional complaint were unconstitutional, does not automatically invalidate final decisions or judgments issued in the complainant’s case. The only direct legal effect of the Tribunal’s ruling is a repeal of an unconstitutional law. Moreover, according to Article 190 para. 4 of the Constitution, a judgment of the CT on the unconstitutionality of law on the basis of which a final decisions or judgments were issued, forms a basis for reopening of the proceedings. Therefore, a successful complainant, as well as other persons affected by an unconstitutional provision, may request reopening of the proceedings in their cases. Details concerning the motions for reopening of proceedings and the course of procedure in this regard are provided in statutes regulating each type of procedure (for example the Code of Civil Procedure, the Code of Criminal Procedure etc.). The legal effects of the CT’s judgments may be further modified by the decision of the Tribunal to postpone the loss of binding force of an unconstitutional provision (in this situation, as a rule, proceedings cannot be reopened before the loss of binding force of a provision) or to issue a so-called “application judgment”.⁴ In the latter the CT specifies in the operative part of the judgment its consequences, what may include also exclusion of possibility of reopening of the proceedings.⁵

12. It is therefore clear that in the proceedings concerning a constitutional complaint the CT does not act simply as a court of third instance and does not directly resolve a dispute between parties to the earlier proceedings. Moreover, the legal effects of judgments of the CT have more of a systemic dimension and do not provide an immediate remedy of harms suffered by a complainant. This does not mean, however, that the mechanism of constitutional complaint has no importance from the perspective of the rights of individuals.

13. First of all, one has to keep in mind that if violation of constitutional rights of individual results from the content of law and not merely from its wrongful application, a constitutional complaint may be the only legal means by which such individual can effectively seek protection of his/her rights. That is because the competence of ordinary courts to refuse to apply allegedly unconstitutional provision is questioned by many legal scholars and courts, including the CT. It is argued that courts are bound by all statutes which were legally promulgated unless the CT strikes them out as unconstitutional. If a court has doubts concerning the constitutionality of relevant

³ See e.g. W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer 2005, p. 25; M. Granat, K. Granat, *The Constitution of Poland: A Contextual Analysis*, Hart Publishing 2019.

⁴ J. Jaworski, *Wyroki aplikacyjne Trybunału Konstytucyjnego*, “Zeszyty Naukowe Sądownictwa Administracyjnego” 2014, no. 3, p. 89-98.

⁵ See e.g. judgment of the CT of 24.10.2007, ref. no. SK 7/06.

provision, it cannot refuse to apply it but should refer a constitutional question to the CT.⁶ After the emergence of the so-called “constitutional breakdown” (see below) the idea of “dispersed constitutional review” gained more supporters,⁷ however courts still apply it very rarely. Because of that, in practice in many cases successful constitutional complaint may constitute necessary prerequisite for enforcing rights of individuals in the proceedings before ordinary courts.

12. Second, as already mentioned, judgment of the CT declaring unconstitutionality of law may serve as a basis for reopening of proceedings before courts or administrative organs. Therefore, although the CT does not resolve a concrete dispute between parties to proceedings which preceded lodging the complaint, its judgment may have a significant impact on the outcome of reopened proceedings. Moreover, in some judgments the CT granted complainants a so-called “privilege of benefit” which entitled them to reopen proceedings despite postponement of a loss of binding force of unconstitutional provision. In this context the CT explained in one of its judgments that “The essence of the constitutional complaint as a means of concrete constitutional review is that its effect must be – if the complaint is successful – the change of the final decision, which led to the violation of the complainant's rights and freedoms guaranteed by the Constitution (Article 79 of the Constitution). Restricting the legal effects of the Tribunal's judgment with respect to the complainants exclusively for the future would be contrary to the very essence of the proceedings in the so-called concrete review of constitutionality of law”⁸. Thus, the CT notes an important link between the subject of constitutional adjudication and the concrete case of the complainant.

13. Third, according to Article 417¹ § 1 of the Civil Code “If the damage has been inflicted by issuing a normative act, one may demand its redress after it has been acknowledged in an appropriate proceeding that this act contradicts the Constitution, a ratified international treaty or a statute”⁹. Judgment of the CT is therefore a necessary prerequisite to demand compensation for harms suffered by an individual because of the unconstitutional law.

14. Fourth, according to the case-law of the ECtHR, in some cases constitutional complaint may constitute a “domestic remedy” within the meaning of Article 35 § 1 of the Convention. This is the case when “1) the individual decision, which allegedly violated the Convention, had been adopted in direct application of an unconstitutional provision of national legislation; and 2) procedural regulations applicable for revision of such type of individual decisions provide for the reopening of the case or quashing the final decision upon the judgement of the Constitutional Court in which unconstitutionality had been found”.¹⁰ Therefore, in these circumstances individuals would be obliged to lodge a constitutional complaint before submitting application to the ECtHR.

15. The question of applicability of Article 6 of the ECHR to the proceedings before the CT initiated by the constitutional complaint had not been extensively discussed in the Polish legal scholarship. In this context it is worth to mention the paper of Professor Adam Wiśniewski published in 2004. The author argued that Article 6 is applicable to the proceedings concerning constitutional complaint because “[t]aking into account construction of a Polish constitutional complaint, its strict connection with rights and freedoms protected by the Constitution on the one hand and its relation with a concrete ruling issued in the case concerning these rights and freedoms on the

⁶ See e.g. K. Działocha, *Komentarz do Art. 8 Konstytucji* [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. I, Warszawa 2016, p. 316-318; L. Garlicki, *Bezpośrednie stosowanie Konstytucji* [in:] *Konferencja naukowa: Konstytucja RP w praktyce*, Warszawa 1999, p. 29-32; P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Kraków 2003, p. 373.

⁷ See e.g. L. Garlicki, *Sądy a Konstytucja Rzeczypospolitej*, “Polskiej Przegląd Sądowy” 2016, no. 7, p. 20-23; R. Balicki, *Bezpośrednie stosowanie Konstytucji*, “Krajowa Rada Sądownictwa” 2016, no. 4, p. 18-19.

⁸ Judgment of the CT of 31.03.2005, ref. no. SK 26/02, para 165; see also: judgment of the CT of 27.10.2004, ref. no. SK 1/04, para 69.

⁹ Translation of the Civil Code by T. Bil, A. Broniek, A. Cincio and M. Kiełbasa, LEX/el.

¹⁰ *Szott-Medyńska and Others v. Poland*, 9.10.2003, app. no. 47414/99.

other, it must be concluded that as a rule the outcome of proceedings before the Constitutional Tribunal will be decisive for rights and duties of the complainants”.¹¹

III. THE ORIGINS AND THE COURSE OF THE CONSTITUTIONAL CRISIS IN POLAND

16. The direct cause of the constitutional crisis in Poland was the unlawful election of three judges of the CT in Autumn 2015.

17. Article 194(1) of the Constitution of the Republic of Poland (“Constitution”) provides that “[t]he Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years”. The Constitution sets out no details of the election process. Before 2015, this process was governed by the Rules of Procedure of the Sejm, which provided, among other things, that motions proposing a candidate for CT judges must be filed to the Speaker of the Sejm no later than 30 days before the end of the term of the judge to be replaced by the candidate. However, the new 2015 Constitutional Tribunal Act¹² (“CTA”) changed certain rules of the election procedure. First, it provided that motions proposing candidates for CT judges must be submitted to the Speaker no later than 3 months before the expiration of the relevant judge’s term of office. Second, an intertemporal provision of the CTA, Article 137, set a different deadline for the submission of candidates chosen to replace the five judges whose terms ended in 2015. Such candidates were to be submitted within 30 days from the CTA’s entry into force.

18. In order to understand the controversy posed by the above provision, one needs to compare the end date of the parliamentary term with the end dates of the terms of office of the five CT judges. The parliamentary term is 4 years, but the exact duration of each Sejm differs in every case. That is because the term starts on the day of the first parliamentary sitting and continues until the day preceding the first sitting of the “new” Sejm. Both dates are set by the President, who enjoys certain scheduling flexibility. The term of office of three CT judges (“November judges”) ended on 6 November 2015, while two others (“December judges”) concluded their terms on 2 and 8 December 2015. Since the first sitting of the 7th Sejm took place on 8 November 2011, it was clear that term of office of two “December judges” would inevitably end during the next (8th) Sejm. The three “November judges” were expected to end their terms within four years from the first sitting of the 7th Sejm, but, depending on the President’s scheduling of the dates of parliamentary elections and first sitting of the new Sejm, the “November judges” could theoretically end their terms already after the beginning of the new Sejm.

19. Article 137 was criticized by many legal commentators who argued that the 7th Sejm could lawfully elect only three “November judges” whereas the two “December judges” should have been elected by the new Sejm¹³. Unfortunately, the Sejm adopted the CTA and elected all five judges in October 2015. However, the President did not take oath from the new judges awaiting a response of the new Sejm.

20. The term of the 8th Sejm began on 12 November 2015. Almost immediately, the new ruling party took steps to invalidate the election of five judges by the previous Sejm. On 25 November 2015, the Sejm adopted five resolutions in which it declared the election of five judges by the 7th Sejm as devoid of legal force. The resolutions did not indicate the reasons for such declaration while the explanations attached to their drafts referred to some unspecified violations of the

¹¹ A. Wiśniewski, *Polska skarga konstytucyjna a Europejska Konwencja Praw Człowieka*, “Gdańskie Studia Prawnicze” 2004, vol. XII, p. 314; see also: M. Szwed, *Orzekanie przez wadliwie powołanych sędziów jako naruszenie prawa do sądu w świetle wyroku Europejskiego Trybunału Praw Człowieka z 12.03.2019 r., 26374/18, Guðmundur Andri Ástráðsson przeciwko Islandii*, “Europejski Przegląd Sądowy” 2019, no. 7, pp. 47-48; M. Wiącek, *Pytanie prawne sądu do Trybunału Konstytucyjnego*, Warszawa 2011, pp. 346–350 (author argues, using similar arguments, that Article 6 of the ECHR is applicable to the proceedings before the CT initiated by the constitutional questions of courts).

¹² Act of 25.06.2015 on the Constitutional Tribunal (Journal of Laws of 2015, item 1064).

¹³ See, e.g., J. Zajadło, T. Koncewicz, *Jak (nie) wybierać sędziów Trybunału Konstytucyjnego*, Wyborcza.pl, 23.06.2015,

https://wyborcza.pl/1.75968.18188072.Jak_nie_wybierac_sedziow_Trybunalu_Konstytucyjnego.html (accessed on: 19.12.2019).

Sejm's Rules of Procedure. Moreover, it must be emphasised that the law does not authorize the Sejm to invalidate the election of judges of the CT. On the contrary, judges of the CT must be independent and so their tenure must be strictly respected.

21. On 30 November 2015 the CT issued an interim measure in which it requested the Sejm to refrain from electing of judges of the CT until the final decision by the CT in the case concerning constitutionality of the CTA is issued. There are serious doubts as to whether the Tribunal has a competence to issue such orders.¹⁴ The Sejm did not comply with the Tribunal's decision and on 2 December 2015 it elected five new judges who gave the oath of office to the President at the night of the day of the election.

22. However, the very next day (3 December 2015), the CT issued the abovementioned judgment concerning the constitutionality of the CTA (ref. no. K 34/15). The CT held that constitutional provision according to which "the Constitutional Tribunal consists of 15 judges, elected individually by the Sejm" shall be understood as requiring that election is done not by any Sejm, but by the Sejm of this term of office coincides with the date of expiry of the term of office of a CT judge. According to the CT, different interpretation could lead to unacceptable consequences: "the mechanism provided for in art. 137 of the Constitutional Tribunal Act could be used not only for the judges of the Tribunal, whose term of office expired in 2015, but also for those positions that will be vacated in the following years. That would be a dangerous precedent." For this reason, the intertemporal provision, insofar as it allowed for the election of "December judges", was unconstitutional because, as already mentioned, it was clear the terms of their predecessors would end during the term of office of the next Sejm. However, in the part pertaining to the election of the "November judges", the intertemporal provision was consistent with the Constitution because their terms ended during the term of office of the previous Sejm.

23. Moreover, in the same judgment the CT reviewed constitutionality of the CTA provision, according to which judges of the CT elected by the Sejm must give an oath to the President. It ruled that such a provision is not unconstitutional but only when understood as imposing an obligation on the President to immediately take the oath of office from the lawfully elected judges.

24. Unfortunately, the President did not take the oath from lawfully elected CT judges. Instead, he took the oath from the three persons elected by the 8th Sejm. President's actions led to a serious controversy about the legal status of the appointees. Politicians of the ruling party argued that they were fully-fledged CT judges, lawfully elected and sworn. However, in light of the CT judgment, the persons concerned (often called as "double-judges") had no legal standing as judges because they were assigned to already filled posts. The latter conclusion was presented as an official position of the then President of the CT, who recognized the lawfulness of election of two judges but refused to allocate cases to the remaining three.

25. The ruling majority tried to force the President of the CT to allow three judges to adjudicate by the means of legislative amendments of the CTA. The new law, adopted in December 2015 ("December Act")¹⁵, provided, among others, that the minimum number of judges composing the full bench would be increased from 9 to 13 (what would practically mean that the full bench could not be composed without participation of unlawfully elected persons) and that the rulings of the CT would have to be made by a qualified majority of 2/3 instead of a simple majority as required before. Moreover, the December Act entered into force on the day of its publication what was aimed at preventing the CT from reviewing its constitutionality. In March 2016 the Tribunal, acting on the basis of the Constitution and those provisions of the December Act which were not questioned, ruled that the December Act was unconstitutional in its entirety¹⁶. However, the politicians of the ruling party did not accept the judgment, considering it to be unlawful. In particular, the Prime Minister refused to publish the ruling in the Journal of Laws what led to

¹⁴ See e.g. M. Zubik, M. Wiącek, *Kompetencje sądu konstytucyjnego a granice swobody orzekania przez sędziów Trybunału Konstytucyjnego*, "Przegląd Sejmowy" 2009, no. 4, p. 38–39.

¹⁵ Act of 22.12.2015 amending the Act on the Constitutional Tribunal (Journal of Laws of 2015, item 2217).

¹⁶ Judgment of the CT of 9.03.2016, ref. no. K 47/15.

further escalation of conflict. The Constitutional Tribunal treated the December Act as unconstitutional and issued judgments without complying with the new procedural rules provided therein, while the Prime Minister consequently refused to publish them. In July 2016 the Parliament adopted a new Constitutional Tribunal Act¹⁷, which, among others, explicitly obliged the President of the CT to allocate cases to unlawfully elected persons. However, in August 2016 ruled that also this law was inconsistent with the Constitution.¹⁸

26. This stage of the constitutional crisis ended in December 2016, when the newly appointed President of the CT recognized the legality of election of three persons and allocated cases to them. From then on, the so-called "double judges" take part in adjudication of cases what leads to serious controversies.

IV. SELECTED VIEWS ON THE LEGALITY OF ELECTION OF THREE PERSONS TO THE CT

27. It must be underlined that in the operative part of the K 34/15 judgment the Constitutional Tribunal did not explicitly invalidate the resolutions of the Sejm concerning the election of judges of the CT. It only ruled that the legal norm on the basis of which "November judges" were elected by the Sejm of the previous term of office was consistent with the Constitution, while the legal norm which formed the basis for election of the "December judges" was unconstitutional. However, the CT clarified the legal effects of the ruling in its statement of reasons. It observed that a duty of a newly elected judge of the CT to give an oath to the President does not have a merely ceremonial role. That is because although the judge's term of office begins on the date of the election by the Sejm (or a later date if the election process takes place before the vacancy occurs), judge cannot participate in adjudication before giving an oath to the President. Therefore, without an oath the procedure for the election of judges is not finished. Five judges elected by the 7th term Sejm did not give an oath what means that the invalidation of the legal basis for the election of two of them resulted in the necessity of interrupting and closing the procedure concerning their election and the necessity of electing two judges by the 8th Sejm. With regards to three "November judges" elected by the 7th Sejm, on the other hand, the procedure had to be finalized and so the President had to take their oath.

28. The statement of reasons of the abovementioned judgment may indicate that the process of election of two "December judges" should have taken place after publication of the CT ruling. Nevertheless, as already mentioned, the President of the CT recognized the legality of election of two judges by the 8th Sejm done prior to the judgment and allocated cases to them.

29. With regards to three "November judges" the situation was slightly more complicated because, as already mentioned, in November 2015 the Sejm adopted resolutions which declared that the election of five judges by the 7th Sejm was devoid of legal force. The legality of these resolutions was not the direct subject of the K 34/15 judgment but in the statement of reasons to this ruling the CT held that they were merely a political statement of the Sejm, devoid of any legal effects. According to the CT, resolutions could not affect the election of judges by the 7th Sejm because the Sejm does not have a power to change, invalidate or declare lack of legal force of election of the CT judges.

30. The constitutionality of the "November resolutions" and the resolutions of the 8th Sejm concerning election of judges of the CT was the subject of the subsequent proceedings before the CT. However, in the decision of 7 January 2016 (ref. no. U 8/15) the CT discontinued the proceedings. It explained that the said resolutions did not have a normative character (ie. they did not set new binding legal norms) and as such are not subject to the constitutional review by the CT. Nevertheless, in the statement of reasons to the decision, the CT underlined that there were no grounds to hold that the election of judges by the 7th Sejm was devoid of legal force. It is worth to note that three judges of the CT, including the then President of the CT, submitted dissenting

¹⁷ Act of 22.07.2016 on the Constitutional Tribunal (Journal of Laws of 2016, item 1157).

¹⁸ Judgment of the CT of 11.08.2016, ref. no. K 39/16.

opinions in which they argued that the decision to discontinue the proceedings was unjustified because the resolutions had normative character – they introduced new unconstitutional legal rule on the basis of which the Sejm attempted to invalidate the election of judges done by the Sejm of the previous term of office.

31. Therefore, there is no ruling of the CT which explicitly invalidates the election of three judges by the 8th Sejm. Nevertheless, the logical consequence of the K 34/15 is that such election was unlawful and devoid of any legal effects. That is because, first, three “November judges” were elected by the 7th Sejm lawfully and thus were constitutionally protected against removal and, second, two persons may not be elected to the one position of the CT judge. For similar reasons, election by the Sejm of, for example, second Ombudsman without lawful removal of the one legally elected, would also be illegal and devoid of legal effects.

32. As already mentioned, that was also the official position of the CT and its President until the appointment of the new President in December 2016. For example, in the judgment K 47/15 the Tribunal explicitly held that at the moment there were only 12 judges authorized to participate in adjudication. In the judgment K 39/16 the CT ruled that the provision which obliged the President of the CT to allocate cases to three persons “elected” by the 8th Sejm was unconstitutional because their election was made for non-vacant seats.

33. The new President of the CT recognized the legality of the election of three persons and allocated cases to them what raised controversies among some of the other, lawfully elected, judges. For instance, in one of the dissenting opinions justice Sławomira Wronkowska-Jaśkiewicz stated that the said three persons were elected to the CT with violation of Article 190 of the Constitution and such legal flaw was not, and could not be, cured by the Sejm.¹⁹ Because of that, they are unauthorized to take part in adjudication. Similar arguments were raised in the dissenting opinion of justice Stanisław Rymar to the judgment in the case P 56/14.²⁰

34. Also the Ombudsman did not recognize the legality of election of three persons to the CT. He consistently requests the CT to recuse the unlawfully elected persons from panels to which his motions for the constitutional review were allocated and withdraws his motions in case his requests are rejected. In one of such submissions, the Ombudsman, referring to the case-law of the CT and the views expressed in the legal scholarship, stated that the “double judges” were not validly elected and thus are not authorized to participate in adjudication panels of the CT.²¹

35. The legality of election of three persons was questioned in some judgments of courts, although in most cases only as *obiter dicta*. For instance, in the decision of 21 May 2019 (ref. no. III CZP 25/19) the Supreme Court noted that the judgment of the CT in the case ref. no. K 12/18 (concerning the statute reforming the National Council of Judiciary) was issued in a panel composed solely of judges elected by the current ruling majority, including one person elected to an already taken seat. In the same tone, in the judgment of 5 December 2019 (ref. no. III PO 7/18) the Supreme Court noted that the CT judgment in the case ref. no. K 5/18 was issued with participation of unlawfully elected judges. Particularly interesting is the judgment of the Regional Administrative Court in Warsaw of 20 June 2018 (ref. no. V SA/Wa 459/18) in which the court held that in the light of the CT judgments in the cases ref nos. K 34/15, K 47/15 and K 39/16, Mariusz Muszyński, one of three persons elected by the 8th Sejm in December 2015, could not have been validly elected and consequently he is not authorized to adjudicate in the CT. Because of that, according to the Regional Administrative Court, judgment of the CT issued by a panel composed with participation of such person may be considered invalid or even legally non-existent. However, neither the Constitution, nor any other law, authorize the administrative court (nor any other body) to review the legality of the CT judgments and so they must be considered

¹⁹ Judgment of the CT of 16.03.2017, ref. no. Kp 1/17, dissenting opinion of judge Sławomira Wronkowska-Jaśkiewicz.

²⁰ Judgment of the CT of 4.04.2017, ref. no. P 56/14, dissenting opinion of judge Stanisław Rymar.

²¹ The Ombudsman's submission to the Constitutional Tribunal of 9.04.2018 concerning the withdrawal of the Ombudsman's request for a constitutional review in case no. K 27/16.

legally effective, regardless of procedural flaws. It is worth to note, that one of the judges of the adjudicating panel submitted dissenting opinion in which he argued that the judgment of the CT was legally non-existent and as such could not form the basis for reopening of the proceedings. Controversies over legality of election of three persons to the CT were noted also in the judgment of the Supreme Administrative Court of 11 September 2019 (ref. no. I FSK 158/18).

36. Similar opinions were expressed by the legal scholars. For example, Professor Piotr Radziewicz stated that “the Sejm may not retroactively invalidate or rebut the appointment of a CT judge performed by the Sejm of the previous term thus taking over for its own competence the possibility of filling a vacancy in the Tribunal as if it has never been filled. The Sejm which would do so should be considered an unauthorised (incompetent) body and would manifestly violate constitutional standards”²². From that perspective, election of three judges by the 8th term Sejm was defective and including the elected persons into adjudicating persons was unjustified²³. In the same tone, Professor Monika Florczak-Wątor argued that three persons elected by the 8th term Sejm are not judges and because of that they are not authorized to adjudicate²⁴. Also according to Professor Wojciech Sadurski “the election of three out of the five judges of the CT ‘elected’ on 2 December 2015 was, in light of the Constitution and the CT case law, irregular because the seats had already been filled by the three correctly elected judges in October 2015”²⁵. Such interpretation is shared by many other prominent legal scholars, although there were also different views expressed. For instance, Professor Bogusław Banaszak²⁶ and Professor Jarosław Szymanek²⁷ argued that because the President did not take an oath from five judges elected by the 7th term Sejm, the procedure for their election was not finished and as such should have been discontinued after the parliamentary election. From that perspective, election of five judges by the 8th term Sejm would be legal as it would be no already filled posts.

37. Irregularities in the election of three persons to the CT were noted also by some international bodies. For instance, the Commissioner for Human Rights of the Council of Europe urged the Polish authorities to recognize “the legitimacy of the election of the three judges in October 2015 by the previous Sejm and their swearing into office”²⁸. Moreover, the Commissioner expressed the view that “independence and credibility of the Constitutional Tribunal have been seriously compromised”²⁹. The UN Special Rapporteur on the independence of judges and lawyers on his mission to Poland underlined that “The participation of judges unlawfully elected by the current Sejm in the work of the Constitutional Tribunal (...) casts serious doubts about the independence and legitimacy of the Tribunal as a whole”³⁰. In this context it is also worth to note four recommendations of the European Commission regarding the rule of law in Poland in which the Commission called the Polish authorities to “restore the independence and legitimacy of the

²² P. Radziewicz, *On Legal Consequences of Judgements of the Polish Constitutional Tribunal Passed by an Irregular Panel*, “Review Of Comparative Law” 2017, vol. XXXI, p. 55.

²³ *Ibid.*, p. 53-55.

²⁴ M. Florczak-Wątor, *O skutkach prawnych orzeczeń TK wydanych z udziałem osób nieuprawnionych do orzekania* [in:] R. Balicki, M. Jabłoński (eds.), *Państwo i jego instytucje: konstytucja, sądownictwo, samorząd terytorialny*, Wrocław 2018, pp. 300-302.

²⁵ W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019, p. 63.

²⁶ B. Banaszak, Legal opinion of 24.11.2015, ref. no. BAS-69/15A, available at: http://www.sejm.gov.pl/media8.nsf/files/WBOI-A4LGYH/%24File/69-15A_Banaszak.pdf (last accessed on: 14 January 2020).

²⁷ J. Szymanek, Legal opinion of 23.11.2015, ref. no. BAS-69/15A, available at: http://www.sejm.gov.pl/media8.nsf/files/WBOI-A4LGY2/%24File/69-15A_Szymanek.pdf (last accessed on: 14 January 2020).

²⁸ Commissioner for Human Rights of the Council of Europe, Report following the Visit to Poland from 11 to 15.03.2019, CommDH(2019)17, para. 10, available at: <https://rm.coe.int/report-on-the-visit-to-poland-from-11-to-15-march-2019-by-dunja-mijato/168094d848> (last accessed on: 14 January 2020).

²⁹ *Ibid.*

³⁰ Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, A/HRC/38/38/Add.1, para. 45, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/084/27/PDF/G1808427.pdf> (last accessed on: 14 January 2020).

Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed and by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected"³¹.

38. At the same time it is worth to underline that the Polish courts and the legal scholars seem to agree that judgments of the CT issued with participation of unlawfully elected persons are not *sententia non existens* and therefore they are legally binding³². The main reasons for that are that there is no procedure for the review of legality of judgments of the CT (the Constitution provides that the judgments of the CT are final) and that all the CT judgments are promulgated in the Journal of Laws.

V. CONCLUSIONS

39. The constitutional complaint, as designed by the Polish Constitution, is an important mechanism of the human rights protection. Although the CT is not authorized to quash judgments of ordinary courts or to award the complainant financial compensation, successful complaint and invalidation of the challenged provision may lead to reopening of the judicial or administrative proceedings. Therefore, in some cases a constitutional complaint may be a necessary prerequisite for enforcing rights of individuals in the proceedings before ordinary courts. However, in the recent years the effectiveness and legitimacy of the CT had been significantly restricted due to controversies over legality of election of some of its members. Election of three persons to the position of judge of the CT in December 2015 is considered by many legal scholars, courts and the Ombudsman as illegal. The reason for that is that the said three persons were elected on the seats which were already taken by the judges elected by the 7th term Sejm on the legal basis which was by the CT to be consistent with the Constitution. The violation of law in the process of election of three persons in December 2015 was so grave that, according to a dominant view, they were not successfully elected and so they cannot be considered as judges of the CT.

This amicus curiae brief was drafted by Dr Marcin Szwed, a lawyer of the Strategic Litigation Programme of the Helsinki Foundation for Human Rights

³¹ Commission Recommendation (EU) 2018/103 of 20.12.2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, para. 53, OJ L 17, 23.01.2018, p. 50; cf. Commission Recommendation (EU) 2016/1374 of 27.07.2016 regarding the rule of law in Poland, para. 74, OJ L 217, 12.08.2016, p. 53; Commission Recommendation (EU) 2017/146 of 21.12.2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, para. 65, OJ L 22, 27.01.2017, p. 65; Commission Recommendation (EU) 2017/1520 of 26.07.2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146, para. 53, OJ L 228, 2 September 2017, p. 19.

³² See e.g. M. Florczak-Wątor, *O skutkach prawnych...*, p. 307-313; P. Radziejewicz, *On Legal Consequences...*, p. 56-59; M. Gutowski, P. Kardas, *Spory ustrojowe a kompetencje sądów (Granice bezpośredniego stosowania konstytucji)*, „Palestra” 2017/12, p. 42; judgment of the Supreme Administrative Court ref. no. I FSK 158/18 (see above); judgment of the Regional Administrative Court in Warsaw ref. no. V SA/Wa 459/18 (see above); decision of the Supreme Court of 28.03.2019, ref. no. III KO 154/18.