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Warsaw, 30 March 2022

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TO:

**The Secretary of the Committee of Ministers
Council of Europe**

Avenue de l'Europe

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**COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
CONCERNING
THE EXECUTION OF ECtHR JUDGMENT IN THE CASE
XERO FLOR W POLSCE SP. Z O.O. V. POLAND (APPLICATION NO. 4907/18)**

To the attention of:

1. Mr Jan Sobczak

Plenipotentiary of the Minister of Foreign Affairs for cases and procedures before the
European Court of Human Rights

Agent of the Polish Government

2. Mr Marcin Wiącek

Commissioner for Human Rights

EXECUTIVE SUMMARY:

- On 7 May 2021 the European Court of Human Rights issued a judgment in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (app. no. 4907/18). The Court ruled that participation of an unlawfully elected person in a panel of the Constitutional Tribunal which discontinued the proceedings initiated by a constitutional complaint led to a violation of Article 6 ECHR (right to a tribunal established by law).
- After the announcement of the *Xero Flor* judgment domestic authorities questioned its validity and binding force. Moreover, the Prosecutor General submitted a motion to the Constitutional Tribunal to declare that Article 6 ECHR, insofar as it is applicable to the Constitutional Tribunal, violates the Constitution.
- On 24 November 2021 the Constitutional Tribunal issued a judgment declaring that Article 6 ECHR, insofar as it is applicable to the Constitutional Tribunal, violates the Constitution. Even before this judgment the Tribunal issued a decision in which it held that the *Xero Flor* judgment is legally non-existent.
- The judgment of the Constitutional Tribunal of 24 November 2021 may be seen as an attempt to circumvent the limitations of the Tribunal's jurisdiction which includes only review of law and not individual judgments. Despite controversies, the Constitutional Tribunal continued this approach to the ECtHR rulings in the judgment of 10 March 2022 which may be seen as a response to the Court's judgments in cases such as *Broda and Bojara v. Poland* and *Reczkowicz v. Poland*.
- This case law of the Constitutional Tribunal constitutes a major threat to the effectiveness of the whole system of implementation of the Court's rulings. That is because it leads to establishment of a procedural mechanism by which domestic authorities could question legal force of any judgment of the ECtHR.
- As a result of these actions and omissions the *Xero Flor* judgment has not been implemented yet. Unlawfully elected persons continue to adjudicate in the Constitutional Tribunal.

RECOMMENDATIONS:

- The competent domestic authorities must ensure that unlawfully elected persons do not participate in adjudicating panels of the Constitutional Tribunal.
- The domestic authorities must refrain from any comments which question the legal force and binding character of the *Xero Flor* judgment and other ECtHR rulings.
- All final judgments of the ECtHR must be duly implemented and cannot be questioned in the domestic proceedings. Public authorities must not challenge validity of the ECtHR's judgments via motions to the Constitutional Tribunal.
- The Constitutional Tribunal must not review the constitutionality of the ECtHR judgments either openly or under the disguise of the constitutional review of the ECHR as an international treaty.
- Judges who apply standards developed by the ECtHR in *Xero Flor* and other judgments, including those, which were subsequently found to be inconsistent with the Constitution (based on a legal norm inconsistent with the Constitution) must not face disciplinary charges. For that purpose, the reform of Article 107 § 1 of the Act on the organisation of common courts would be advisable.

1. Introduction

1. The Helsinki Foundation for Human Rights (“HFHR”) of Warsaw respectfully submits this communication to the Committee of Ministers of the Council of Europe (“CoM”) concerning the execution of the judgment issued by the European Court of Human Rights (“ECtHR”) in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (application no. 4907/18).

2. The HFHR is a Polish non-governmental organisation established in 1989. Its principal objectives include the promotion of human rights, the rule of law and the development of an open society in Poland and abroad. The HFHR actively disseminates human rights standards based on the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, “ECHR”) and works to ensure the proper execution of ECtHR judgments. One of the areas of the HFHR’s activity is the protection of the rule of law. In this regard, the HFHR submitted, among others, *amicus curiae* opinion to the ECtHR in the case of *Xero Flor w Polsce sp. z o.o. v. Poland*, the implementation of which is the subject of this opinion.

3. This submission concerns only aspects related to the implementation of judgment on the general level.

2. Judgment of the ECtHR

4. The Applicant in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* was a company which submitted a constitutional complaint to the Constitutional Tribunal. The Constitutional Tribunal eventually discontinued the proceedings on formal grounds. However, the decision in this regard was issued in the panel which included Mr Mariusz Muszyński, a person who was elected to the position of a judge of the Constitutional Tribunal with violation of law in 2015. The violation of law resulted from the fact that the seat to which Mr Muszyński was elected had been already occupied by a person elected on a legal basis which was found to be consistent with the Constitution by the Constitutional Tribunal, but which was questioned, without justified reasons, by the ruling party.

5. The ECtHR ruled that there was a violation of a right to a tribunal established by law guaranteed under Article 6 § 1 ECHR. The Court held that despite limitations of the Constitutional Tribunal’s jurisdiction, the proceedings initiated by the constitutional complaint fall within the scope of Article 6 § 1 ECHR. This finding allowed the ECtHR to consider the merits of the case. It therefore analysed the circumstances leading to the election of Mr Muszyński to his position and found that this person was elected with “manifest breach of domestic law”. The ECtHR based its findings in this regard on the case-law of the Constitutional Tribunal – in particular judgment of 3 December 2015 (K 34/15). The ECtHR specified that the breached provisions of domestic law: “concerned a fundamental rule of the election procedure, namely the rule that a judge of the Constitutional Court was to be elected by the Sejm whose term of office covered the date on which his seat became vacant” (§ 277). In addition, the organs of legislative and executive power violated the law by trying to force the Constitutional Tribunal to

recognise status of unlawfully elected persons and refusing to publish some of the Tribunal's rulings. The Court therefore concluded that "the actions of the legislature and the executive amounted to unlawful external influence on the Constitutional Court. It finds that the breaches in the procedure for electing three judges, including Judge M.M., to the Constitutional Court on 2 December 2015 were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a "tribunal established by law". Due to the fact these irregularities were not reviewed and remedied by any domestic court, the Court ruled that there was a violation of Article 6 § 1 ECHR.

6. The Polish Government did not request the referral of the case to the Grand Chamber of the ECtHR under Article 43 ECHR. Therefore, the judgment became final on 7 August 2021.

3. Actions of the domestic authorities after announcement of the Court's judgment

7. Immediately after the announcement of the Court's judgment, the domestic authorities started to question its legitimacy and validity.

8. For example, Elżbieta Witek, Marshal of the Sejm, said that the ruling of the Court "is a dangerous precedent and unlawful interference with the sovereignty of the Polish State".¹ Sebastian Kaleta, Vice-Minister of Justice, said that "It is obvious that it is impossible for the European Court of Human Rights to deal with the appointment of judges to the Constitutional Tribunal, because this is not the competence of this Court - and it is also worth pointing out that not all states that are party to the European Convention on Human Rights, have constitutional tribunals".² President of the Constitutional Tribunal, Julia Przyłębska, said that "The European Court of Human Rights has issued a judgment on the composition of the Polish Constitutional Tribunal without a legal basis and outside its competences. This constitutes a manifest violation of the law and has no basis in international law constituting the status of the Court in Strasbourg. The unlawful interference by the ECtHR with the powers of the Sejm of the Republic of Poland in the area of electing judges of the Constitutional Tribunal and the powers of the President of the Republic of Poland to take the oath from a person elected by the Sejm has no effect in the Polish legal order".³

9. In the decision of 15 June 2021, issued in the case concerning constitutionality of provisions of the EU law which obliged Poland to implement CJEU interim measures

¹ Quoted in: K. Kowalczyk, *Marszałek Sejmu: orzeczenie ETPCz jest bezprawną ingerencją w suwerenność Państwa Polskiego*, Polska Agencja Prasowa, 7 May 2021, <https://www.pap.pl/aktualnosci/news,867810,marszalek-sejmu-orzeczenie-etpcz-jest-bezprawnaingerencja-w-suwerennosc> (last access: 29 March 2022).

² Quoted in: *Kaleta: Wyrok ETPC nie niesie ze sobą żadnego skutku prawnego wobec Trybunału Konstytucyjnego*, Dziennik Gazeta Prawna, 7 May 2021, <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8157961.kaleta-wyrok-etpc-nie-niesie-ze-sobazadnego-skutku-prawnego-wobec-trybunalu-konstytucyjnego.html> (last access: 29 March 2022).

³ Quoted in: *Prezes Trybunału Konstytucyjnego: wyrok Europejskiego Trybunału Praw Człowieka bezprawny*, Polska Agencja Prasowa, 7 May 2021, <https://www.pap.pl/aktualnosci/news%2C867480%2Cprezes-trybunalu-konstytucyjnego-wyrok-europejskiego-trybunalu-praw> (last access: 29 March 2022).

regarding organisation of the judiciary, the Constitutional Tribunal rejected the request for recusal of unlawfully elected person. In the reasoning to this decision the Constitutional Tribunal for the first time referred to the *Xero Flor* judgment. It held that: “In the opinion of the Constitutional Tribunal, the judgment of the ECtHR of 7 May 2021, in so far as it refers to the Constitutional Tribunal, is based on assumptions proving ignorance of the Polish legal system, including fundamental principles defining the position, organisation and role of the Polish constitutional court. In this respect, it [the ECtHR’s judgment] was issued without a legal basis, with the ECtHR exceeding the powers entrusted to it, and constitutes an unlawful interference with the domestic legal order, in particular in matters that are beyond the competence of the ECtHR; for these reasons, it must be considered a non-existent judgment. (...) In its judgment of 7 May 2021, the ECtHR illegally exceeded its jurisdiction in assessing the legality of the composition of the Constitutional Tribunal. This is an unprecedented intrusion into the competences of the constitutional organs of the Republic of Poland - the Sejm, which elects a judge, and the President, to whom the elected judge takes the oath. The conclusions undermining the correct election of judges of the Constitutional Tribunal by the Sejm of the 8th term of office in 2015, on which the ECtHR based its decision, prove the lack of knowledge of the Polish legal system and the jurisprudence of the Constitutional Tribunal”.

10. In addition, on 27 July 2021 the Prosecutor General, Mr Zbigniew Ziobro (who is at the same time the Minister of Justice due to the legal merger of this two offices) submitted a motion to the Constitutional Tribunal to declare Article 6 § 1 ECHR, insofar as it is applicable to the proceedings before the Constitutional Tribunal, inconsistent with the Constitution. The proceedings in this case are discussed in the section below.

4. The proceedings before the Constitutional Tribunal

11. In his motion to the Constitutional Tribunal, the Prosecutor General asked the Tribunal to declare:

- 1) Article 6 § 1, first sentence, of the ECHR – “insofar as the term ‘tribunal’, used in that provision, comprises the Constitutional Tribunal of the Republic of Poland” – inconsistent with Article 2, Article 8(1), Article 10(2), Article 173 and Article 175(1) of the Constitution;
- 2) Article 6 § 1, first sentence, of the ECHR – “insofar as the said provision equates the guarantee that an individual case is to be considered within a reasonable time by an independent and impartial tribunal established by law, in the determination of the individual’s civil rights and obligations or of any criminal charge against him/her, with the Constitutional Tribunal’s jurisdiction to adjudicate on the hierarchical conformity of the provisions and normative acts indicated in the Constitution of the Republic of Poland, and thus permits the application of the requirements arising from Article 6 of the ECHR to proceedings before the Constitutional Tribunal” – inconsistent with Article 2, Article 8(1), Article 79(1), Article 122(3) and (4), Article 188(1)-(3) and (5) as well as Article 193 of the Constitution;

- 3) Article 6 § 1, first sentence, of the ECHR – “insofar as it comprises the European Court of Human Rights’ review of the legality of the process of electing judges to the Constitutional Tribunal so that it could be determined whether the Constitutional Tribunal is an independent and impartial tribunal established by law” – inconsistent with Article 2, Article 8(1), Article 89(1)(3) and Article 194(1) of the Constitution.⁴

12. As regards point 1 of the request (including the Constitutional Tribunal within the definition of “court” pursuant to Art. 6 paragraph 1 sentence 1 of the ECHR), the motion firstly drew attention to the functioning, under the Constitution of the Republic of Poland, of two separate divisions of the judiciary - courts and tribunals (p. 31). Both divisions perform different tasks - in particular, only courts administer justice. According to the Prosecutor General, “The distinction of separate divisions of the judiciary is not a matter of Constitutional semantics, but aims to secure the tripartite division of powers” (p. 32). It would be unacceptable to disturb this division by assigning other bodies, including tribunals, tasks related to the administration of justice. According to the Public Prosecutor General, “If, therefore, the notion of a court from Art. 6 paragraph 1 of the ECHR includes the Constitutional Tribunal referred to in Chapter VIII of the Polish Constitution, such constitutes a violation of the systemic order, the framework of which is set out in Art. 10 paragraph 2, Art. 173 and Art. 175 paragraph 1 of the Constitution” (p. 32). The unconstitutional change of the division into courts and tribunals, would violate the principle of the primacy of the Constitution, which could not be justified by the wording of Art. 9 of the Constitution (“the Republic of Poland shall comply with the international law that is binding upon it”). Moreover, in the opinion of the Public Prosecutor General, “no judgment issued outside the content of an international agreement or modifying such agreement without the consent of the state, as well as a provision of the agreement modified in this way, which concern constitutional matters and revise the principles of the Polish political system, is protected by Art. 9 of the Constitution” (p. 33). The Prosecutor General also argued that treating courts and tribunals identically breaches specificity and legal security, because, “When a norm of international law unexpectedly evolves, revising the current perception of the constitutional order, including the role of the Constitutional Tribunal and its position in relation to other courts, the legal system ceases to be predictable for those availing themselves of the standards who lose the ability to interpret their rights and attendant duties of state authorities.” (p. 34).

13. With regards to the complaint raised in point 2 of the motion (covering the proceedings before the Constitutional Tribunal with guarantees of Art. 6 paragraph 1 of the ECHR), the Prosecutor General drew attention to the specificity of proceedings before the Constitutional Tribunal, which consist of reviewing the law and not resolving specific disputes between entities. Even in the case of constitutional complaints and legal questions, proceedings before the Constitutional Tribunal “are not a resolution of an

⁴ The motion of the Prosecutor General (in Polish) is available at: <https://ipo.trybunal.gov.pl/ipo/dok?dok=124186a3-1771-4e05-85c2-b9d09e8ca6ea%2FK621wns20210727ADO.pdf> (last access: 29 March 2022).

individual case of a civil or criminal nature and not a continuation of such proceedings" (p. 35). The mere fact that a Constitutional Tribunal judgment laid the foundation for reopening proceedings in specific cases "does not make the proceedings before the Constitutional Tribunal a proceeding in individual civil and criminal cases, or make the Tribunal a court that implements the guarantees of Art. 6 paragraph 1 of the ECHR" (p. 37). Also in this context, the Prosecutor General drew attention to the inability to modify systemic norms resulting from the Constitution by means of judgments issued outside the content of international agreements (p. 37) and to the violation of legal certainty and legal security (p. 38). The prosecutor further alleges that Art. 6 paragraph 1 of the ECHR has been modified contrary to the will of the state, which is contravenes the principle of *pacta sunt servanda*.

14. Finally, as regards point 3 of the *petitum* (ECtHR's review of the Constitutional Tribunal judicial election process), the Public Prosecutor General pointed out that "It is the Constitution and legislator that determine the form of the Constitutional Tribunal, and it is up to the Sejm to elect its members" (p. 39). Under the current legal framework, there are no mechanisms to assess the legality of the election of Constitutional Tribunal judges. Any such mechanisms would have to have a constitutional basis (p. 40). The ECtHR also does not have the jurisdiction to make such an assessment, which, according to the Prosecutor General, "is entitled only to adjudicate and assess human rights violations by a party to the ECHR on the basis of the unambiguously formed content of the norm, to which the state has acceded. The content of the norm may be interpreted in accordance with the principles of treaty interpretation. Even if it is a dynamic interpretation, it cannot transform the essence of the normative content of the provision, and, especially, cannot extend the competences of the ECtHR beyond the scope acceded to by the state party, while being bound by the convention" (p. 41). Granting the ECtHR competence to assess the validity of electing CT judges would also interfere with the competence of the Sejm to elect judges of the Constitutional Tribunal, as it would create "a procedure unknown to Polish law for verifying this selection by the court" (p. 42). In the Public Prosecutor General's view, the norm granting ECtHR jurisdiction to review legality of CT judge election would also infringe on individuals' legal security. The Constitutional Tribunal is elected by the Sejm, and "Its operation and form cannot be controlled by an external body, because such would destroy the constitutionally established system of state bodies and their structure, consequently making it difficult for individuals to unambiguously recognize their legal situation" (p. 44).

15. In course of the proceedings before the Constitutional Tribunal, the Sejm and the President agreed with the Prosecutor General that including the Constitutional Tribunal within the scope of Article 6 § 1 ECHR violates the Constitution. The position of the Minister for Foreign Affairs was relatively ambiguous. The Commissioner for Human Rights argued that the proceedings before the Constitutional Tribunal should be discontinued because the purpose of the Prosecutor General's motion is to question specific judgment of the ECtHR and the Tribunal does not have a power to review constitutionality of rulings of domestic or international courts. However, the

Commissioner held that had the Tribunal not decide to discontinue the proceedings, Article 6 § 1 ECHR should be found to not to be inconsistent with the Constitution.

16. In November 2021 the HFHR published a thorough analysis of the formal admissibility and merits of the Prosecutor General's motion.⁵ According to the HFHR, the motion of the Public Prosecutor General was inadmissible and so the proceedings before the Constitutional Tribunal should have been discontinued. The Constitutional Tribunal's jurisdiction includes only the constitutional review of legal norms rather than e.g., court judgments. Meanwhile, the Public Prosecutor General's motion, although it formally concerned Art. 6 § 1 of the ECHR, actually aimed to challenge a specific ruling – the judgment of the ECtHR in the case of *Xero Flor w Polsce sp. z o.o. v. Poland*. Although the Constitutional Tribunal has long held the position that if a given provision is understood uniformly in settled judicial decisions, it should be assumed that it has such meaning and may be subject to constitutional review in this respect, the Prosecutor General failed to prove, in the matter at bar, the existence of such an established, uniform interpretation. On the contrary, he pointed to only one specific judgment, while presenting arguments which, in the Prosecutor General's own opinion, would prove that it was incorrect. HFHR also emphasized that if Polish authorities disagreed with the ECtHR judgment in the Xero Flor case, they should have applied for the Grand Chamber to examine the case. Leaving aside the question of formal admissibility of the motion, the HFHR's argued that the Prosecutor General presented no convincing arguments that purport the challenged provision's unconstitutionality. The mere fact that the Constitutional Tribunal is not a court within the meaning of the Polish Constitution does not mean that recognizing it as a court within the meaning of Art. 6 of the ECHR violates the Constitution. The concepts used by the ECHR are autonomous in nature, which means they need not have the exact same construction as identical terms in national law. The concept of "court" must be interpreted primarily in light of the purpose and function of Art. 6 paragraph 1 of the ECHR. We could only speak of a possible inconsistency of the referenced provision with the Constitution if including the proceedings before the Constitutional Tribunal within the scope of Art. 6 of the ECHR led to some unconstitutional consequences, e.g. it prevented the Constitutional Tribunal from performing its constitutional functions or granted it additional powers in a constitutionally unacceptable manner. However, such effects do not occur. Contrary to the Public Prosecutor General's assertions, under Art. 6 § 1 of the ECHR, it does not follow that the Constitutional Tribunal became a court within the meaning of the Polish Constitution or that it acquired competence to administer justice. It only follows that in the proceedings before this body, provisions flowing from Art. 6 paragraph 1 of the ECHR, such as independence, impartiality or legality of the constitution of the body examining the case, must be fulfilled. It cannot be argued that such requirements violate the Constitution, as they also result from the Constitution itself. The Polish Constitution also requires that the Constitutional Tribunal be independent and that

⁵ HFHR analysis (in English) is available at: <https://www.hfhr.pl/wp-content/uploads/2021/11/Poland-Public-Prosecutor-General-unconstitutionality-of-the-art6-para1-ECHR.pdf.pdf> (last access: 29 March 2022).

its judges are elected in accordance with the law. HFHR also disagreed with the argument that the interpretation adopted by ECtHR in the *Xero Flor* case would lead to Poland being subject to international obligations not resulting from the ECHR.

17. Another expert opinion was prepared by the “Bingham Centre for the Rule of Law”.⁶ It concerned the question of applicability of Article 6 ECHR to the constitutional courts. The authors of the opinion argued, among others, that “*Xero Flor* did not establish novel principles of law, but instead applied the pre-existing principle that it is necessary that judicial appointments are in compliance with the national constitution’s own rules that guarantee the rule of law and separation of powers in order for the tribunal composed of such appointees to count as a “tribunal established by law” within the autonomous meaning of Article 6 § 1 ECHR”.

18. On 23 November 2021 (no. K 6/21) the Constitutional Tribunal ruled that:

- 1) Article 6 § 1, first sentence, of the ECHR – insofar as the term ‘tribunal’ used in that provision comprises the Constitutional Tribunal of the Republic of Poland – is inconsistent with Article 173 in conjunction with Article 10(2), Article 175(1) and Article 8(1) of the Constitution of the Republic of Poland.
- 2) Article 6 § 1, first sentence, of the ECHR – insofar as it grants the European Court of Human Rights the jurisdiction to review the legality of the process of electing judges to the Constitutional Tribunal – is inconsistent with Article 194(1) in conjunction with Article 8(1) of the Constitution.⁷

19. In the reasoning to the judgment the Constitutional Tribunal reiterated that in the light of its earlier case law the Constitutional Tribunal may assess the constitutionality of provision understood in a way it is applied in practice provided that this practice is uniform and not questioned. The Constitutional Tribunal admitted that not all of these conditions were met in the case at hand because so far the interpretation questioned by the Prosecutor General had been adopted only in one judgment – *Xero Flor*. Nevertheless, the Tribunal held that due to the significance of the ECtHR and its rulings as well as the fact that the Court’s judgments may have *de facto* a law-creation effect, the Tribunal must have a competence to assess a legal norm derived by the ECtHR from the Convention in particular judgments. Therefore, the Prosecutor General’s motion was found formally admissible.

20. With regards to the merits of the case, the Constitutional Tribunal underlined that although it belongs to the judicial power, it is not a “court” within the meaning of the

⁶ O. Garner, P. Wachowiec, *Expert analysis of the applicability of Article 6 of the European Convention on Human Rights to the constitutional courts of the States Parties, requested by the Polish Commissioner for Human Rights in the context of the case K 6/21 pending before the Polish Constitutional Tribunal*, Bingham Centre for the Rule of Law, 4 November 2021, https://binghamcentre.biicl.org/documents/125_bingham_centre_expert_analysis_on_the_applicability_of_article_6_echr_to_constitutional_courts_update.pdf (last access: 29 March 2022).

⁷ Translation of the operative part of the judgment into English is available on the website of the Constitutional Tribunal: <https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11711-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny> (last access: 29 March 2022).

Polish Constitution and does not administer justice. It does not resolve legal disputes in concrete, individual cases and it does not assess facts, but reviews constitutionality of legal norms. Also in the proceedings initiated by the constitutional complaint the Tribunal does not assess an individual situation of a concrete complainant but merely reviews consistency between challenged normative act and given constitutional standards of review. Moreover, the judgments of the Constitutional Tribunal produce *extra omnes* legal effects, unlike the rulings of courts which are effectively only *inter partes*. Due to this specificity, the Constitutional Tribunal is not a “court” and the proceedings before it are not a judicial proceedings.

21. The Constitutional Tribunal reiterated that Article 6 § 1 ECHR is applicable only to cases concerning “criminal charges” and “civil rights and obligations” of individuals. The proceedings before the Constitutional Tribunal do not fall within any of these categories. The Constitutional Tribunal is not a “tribunal” within the meaning of Article 6 § 1 ECHR. According to the Constitutional Tribunal, the ECtHR wrongly ignored this specific position of the Tribunal and erroneously assumed that the proceedings concerning constitutional complaint constitute a continuation of judicial proceedings. The Constitutional Tribunal does not review judgments of courts, does not quash them and does not solve the individual case of the complainant. It is true that judgment of the Constitutional Tribunal may form a basis for reopening the proceedings before court but this is irrelevant because according to the case law of the ECtHR proceedings concerning reopening of the case do not fall within the scope of Article 6 § 1 ECHR. Therefore, according to the Constitutional Tribunal, by applying this provision to the proceeding initiated by the constitutional complaint the ECtHR departed from its previous case law without any convincing reasons.

22. The Constitutional Tribunal also held that Constitution does not allow the ECtHR, or any other organ, to assess the legality of election of the Tribunal’s judges. By questioning the legitimacy of such election, the ECtHR exceeded its competences and therefore its ruling should be considered as legally non-existent (*sententia non existens*). Moreover, the findings of the ECtHR with regards to alleged unlawful character of the election of three judges of the Constitutional Tribunal are unfounded. It ignored the Tribunal’s ruling issued in October 2017 in which it was held that all persons currently adjudicating in the Tribunal were lawful judges. The Constitutional Tribunal also underlined that there are no grounds to question independence of its judges – in particular, the manner of appointment of a judge does not affect its independence.

23. With regards to the consequences of the judgment, the Constitutional Tribunal held that it does not lead to complete repeal of Article 6 § 1 ECHR but only to elimination of specific legal norms which were derived from it by the ECtHR. According to the Tribunal, elimination of such norm does not violate Article 27 and 46 of the Vienna Convention on the Law of Treaties, according to which states may not rely on their domestic law to justify breaches of binding international treaties. That is because while ratifying the ECtHR Poland did not agree to grant the ECtHR a competence to assess status of the Constitutional Tribunal and its judgments. In the last sentence of the reasoning, the Constitutional Tribunal underlined that its judgment should be communicated to the

Committee of Ministers of the Council of Europe for the purpose of implementation of its legal consequences for the obligations of Poland as a party to the ECHR.

24. The Constitutional Tribunal judgment was issued unanimously in a panel which did not include any of the unlawfully elected persons. One judge submitted a concurring opinion in which he pointed out certain weaknesses in the Tribunal's argumentation.

5. Consequences of the Constitutional Tribunal's judgment

25. Theoretically, the legal consequence of the Constitutional Tribunal's judgment is the repeal of a legal norm found to be unconstitutional. This means that Article 6, to the scope of declared unconstitutionality, could not be applied by domestic courts to, for example, verify the binding force of the Constitutional Tribunal's judgments. At the same time, looking from the international perspective, Poland is still bound by duty to respect the Convention and the ECtHR's judgments because it has not withdrawn from the Convention. Therefore, as a result of the Constitutional Tribunal's ruling, a serious discrepancy between domestic law and international obligations arouse.

26. It is difficult to predict whether the Constitutional Tribunal's judgment will achieve the abovementioned goal of dissuasion of ordinary judges from relying on the ECHR to question legal force of the Constitutional Tribunal's judgments issued in flawed personal composition. It is worth to note in this context that one can find some rulings of Polish courts which, relying on *Xero Flor* judgment, questioned binding force of the Constitutional Tribunal's judgments issued with unlawfully elected persons.⁸ There is a risk, however, that judges who invoke standards developed by the Court in *Xero Flor* would face disciplinary charges. According to Article 107 § 1 point 3 of the Act on the organisation of common courts actions aimed at questioning of effectiveness of judicial appointment or "the mandate of a constitutional body of the Republic of Poland" constitute a disciplinary offence. This provision, together with other changes in the system of disciplinary responsibility of judges introduced in a controversial law adopted in December 2019 (so-called "Muzzle Law")⁹, was criticised, among others, by the Venice Commission.¹⁰ Nevertheless, it has not been repealed yet and so there is a risk that it could form a basis for disciplinary actions against judges who question legitimacy of the Constitutional Tribunal and its rulings. This situation is particularly worrisome, taking into account that the system of disciplinary responsibility of Polish judges is deeply flawed and threatens the independence of judiciary.

27. HFHR would like to underline that the Constitutional Tribunal does not have a power to review judgments of the ECtHR or any other national or international court – its

⁸ District Court in Gorzów Wielkopolski, judgment of 23 April 2021, No. I C 1326/19 (the judgment is not yet final); Supreme Court, decision of 16 September 2021, No. I KZ 29/21.

⁹ The Act of 20 December 2019 amending the Act - Law on the System of Common Courts, the Act on the Supreme Court and some other acts (Journal of Laws of 2020, item 190, as amended).

¹⁰ Joint urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (Dgi) of the Council of Europe on amendments to the Law on the Common Courts, the Law on the Supreme Court, and some other laws, 16 January 2020, CDL-PI(2020)002, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2020\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002-e) (last access: 29 March 2022).

jurisdiction is limited to constitutional review of legislative acts. Therefore, it would be inconsistent with the Constitution to introduce a formal procedure for the review of legality of the ECtHR's rulings. However, the Constitutional Tribunal attempted to circumvent these limitations through the review of the ECtHR's judgment under disguise of reviewing the ECHR as an international treaty. In our view, such approach still constitutes a transgression of competences by the Constitutional Tribunal.

28. HFHR believes that the judgment of the Constitutional Tribunal is not only wrong and issued without proper legal basis, but may also threaten the effectiveness of whole system of implementation of the Court's rulings. That is because it leads to establishment of a procedural mechanism by which domestic authorities could question legal force of any judgment of the ECtHR.

29. In this regard we would like to draw the Committee's attention to the fact that on 10 March 2022 the Constitutional Tribunal issued yet another judgment concerning Article 6 of the Convention (no. K 7/21).¹¹ It ruled that the challenged provision is inconsistent with the Constitution insofar as:

"(1) under the phrase "civil rights and obligations", it comprises the judge's subjective right to hold a managerial position within the structure of common courts in the Polish legal system"

"(2) in the context of assessing whether the requirement of "tribunal established by law" has been met:

(a) it permits the European Court of Human Rights and/or national courts to overlook the provisions of the Constitution and statutes as well as the judgments of the Polish Constitutional Tribunal

(b) makes it possible for the European Court of Human Rights and/or national courts to independently create norms, by interpreting the Convention, pertaining to the procedure for appointing national court judges

(c) authorises the European Court of Human Rights and/or national courts to assess the conformity to the Constitution and the ECHR of statutes concerning the organisational structure of the judicial system, the jurisdiction of courts, and the Act specifying the organisational structure, the scope of activity, *modus operandi*, and the mode of electing members of the National Council of the Judiciary".

30. Once again, even though formally the Constitutional Tribunal reviewed the ECHR, its actual intent was to challenge validity and legal force of specific judgments of the ECtHR, namely: *Broda and Bojara v. Poland* (29 June 2021, app. nos. 26691/18 and 27367/18), *Reczkowicz v. Poland* (22 July 2021, app. no. 43447/19), *Dolińska-Ficek and Ozimek v. Poland* (8 November 2021, app. nos. 49868/19 and 57511/19), *Advance Pharma sp. z o.o. v. Poland* (3 February 2022, app. no. 1469/20). In the official press release the

¹¹ Translation of the operative part of the judgment into English is available on the Constitutional Tribunal's website: <https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11822-dokonywanie-na-podstawie-art-6-ust-1-zd-1-ekpcz-przez-sady-krajowe-lub-miedzynarodowe-oceny-zgodnosci-z-konstytucja-i-ekpcz-ustaw-dotyczacych-ustroju-sadownictwa-wlasciwosci-sadow-oraz-ustawy-dotyczacej-krajowej-rady-sadownictwa> (last access: 29 March 2022).

Constitutional Tribunal stated the legal effects of this judgment include “the elimination of the indicated norms from the legal system, and consequently the four rulings delivered on those grounds by the ECtHR, namely: the judgment of 29 June 2021 in the case of *Broda and Bojara v. Poland*; the judgment of 22 July 2021 in the case of *Reczkowicz v. Poland*; the judgment of 8 November 2021 in the case of *Dolińska-Ficek and Ozimek v. Poland*; the judgment of 3 February 2021 in the case of *Advance Pharma sp. z o.o. v. Poland*; for the Polish state, those judgments lack the attribute specified in Article 46 of the Convention (the obligation to execute judgments)”.¹²

6. State of implementation of the ECtHR’s judgments – conclusions

31. The Polish authorities have not taken any actions aimed at implementation of the *Xero Flor* judgment.

32. Mr Mariusz Muszyński has not been removed from the Constitutional Tribunal and he continues to take part in adjudication. The same problem concerns two other persons elected with violation of law. In this context we would like to remind that that two of the three persons elected by the Sejm in December 2015 in violation of the Constitution died before the end of the nine-year term of office, and the Sejm has already elected their successors: Mr Justyn Piskorski and Mr Jarosław Wyrembak. However, the status of these successors is the same as status of Mr Muszyński. The death of their predecessors did not result in a vacancy in the Constitutional Tribunal – we still have three lawful judges, from whom the President did not take the oath and whose term has not been legally terminated. Therefore, their participation in adjudication can lead to violation of a right to a tribunal established by law.

33. Despite the judgment of the ECtHR, unlawfully elected persons continued to participate in adjudicating panels of the Constitutional Tribunal. According to the official database of the Constitutional Tribunal,¹³ after the announcement of the *Xero Flor* judgment Mr Muszyński participated in issuing:

- 1 judgment of the Constitutional Tribunal initiated by an abstract motion of competent state authority¹⁴ (two including recent judgment concerning Article 6 ECHR),
- 1 judgment initiated by legal question of court¹⁵,
- 5 decisions concerning preliminary review of formal admissibility of constitutional complaints¹⁶ (in all cases constitutional complaints were found admissible).

In the same period Mr Piskorski participated in issuing of:

¹² Ibid.

¹³ Database includes only information about judgments to which written reasonings have already been published.

¹⁴ Constitutional Tribunal, judgment of 13 May 2021, no. K 15/16.

¹⁵ Constitutional Tribunal, judgment of 23 February 2022, no. P 10/19.

¹⁶ Constitutional Tribunal, decision of 10 June 2021, no. Ts 188/19; Constitutional Tribunal, decision of 10 June 2021, no. Ts 171/20; Constitutional Tribunal, decision of 10 June 2021, no. Ts 111/20; Constitutional Tribunal, decision of 9 July 2021, no. Ts 142/19; Constitutional Tribunal, decision of 9 July 2021, no. Ts 131/20.

- 4 rulings (three judgments, one decision) in cases initiated by abstract motions of competent authorities,¹⁷
- 3 judgments in cases initiated by legal questions of courts,¹⁸
- 11 rulings (one judgment, ten decisions) in cases initiated by constitutional complaint,¹⁹
- 9 decisions concerning preliminary review of formal admissibility of constitutional complaint.²⁰

Finally, Mr Wyrembak participated in issuing of:

- 2 judgments in cases initiated by abstract motions of competent authorities,²¹
- 2 rulings (one judgment, one decision) in cases initiated by legal questions of courts,²²
- 11 rulings (three judgments, eight decisions) in cases initiated by constitutional complaints²³,
- 1 decision concerning preliminary review of formal admissibility of constitutional complaint.²⁴

7. Other factors negatively affecting independence of the Constitutional Tribunal and legality of its functioning

¹⁷ Constitutional Tribunal, judgment of 13 May 2021, no. K 15/16; Constitutional Tribunal, decision of 15 July 2021, no. K 6/18; Constitutional Tribunal, judgment of 27 July 2021, no. K 10/18; Constitutional Tribunal, judgment of 25 November 2021, no. Kp 2/19.

¹⁸ Constitutional Tribunal, judgment of 16 June 2021, no. P 10/20; Constitutional Tribunal, judgment of 14 July 2021, no. P 7/20; Constitutional Tribunal, judgment of 23 February 2022, no. P 10/19.

¹⁹ Constitutional Tribunal, decision of 11 May 2021, no. SK 104/20; Constitutional Tribunal, decision of 29 June 2021, no. SK 55/20; Constitutional Tribunal, judgment of 30 June 2021, no. SK 37/19; Constitutional Tribunal, decision of 14 July 2021, no. SK 15/21; Constitutional Tribunal, decision of 15 July 2021, no. SK 3/18; Constitutional Tribunal, decision of 19 October 2021, no. SK 72/20; Constitutional Tribunal, decision of 27 October 2021, no. SK 40/20; Constitutional Tribunal, decision of 14 December 2021, no. SK 3/21; Constitutional Tribunal, decision of 14 December 2021, no. SK 81/20; Constitutional Tribunal, decision of 14 December 2021, no. SK 22/20; Constitutional Tribunal, decision of 15 February 2022, no. SK 45/21.

²⁰ Constitutional Tribunal, decision of 29 June 2021, no. Ts 113/20; Constitutional Tribunal, decision of 29 June 2021, no. Ts 32/20; Constitutional Tribunal, decision of 28 October 2021, no. Ts 190/19; Constitutional Tribunal, decision of 28 October 2021, no. Ts 144/20; Constitutional Tribunal, decision of 28 October 2021, no. Ts 75/21; Constitutional Tribunal, decision of 28 October 2021, no. Ts 115/21; Constitutional Tribunal, decision of 28 October 2021, no. Ts 93/18; Constitutional Tribunal, decision of 28 October 2021, no. Ts 75/21; Constitutional Tribunal, decision of 15 December 2021, no. Ts 23/19.

²¹ Constitutional Tribunal, judgment of 27 July 2021, no. K 10/18; Constitutional Tribunal, judgment of 25 November 2021, no. Kp 2/19.

²² Constitutional Tribunal, judgment of 16 June 2021, no. P 10/20; Constitutional Tribunal, judgment of 26 October 2021, no. P 11/20;

²³ Constitutional Tribunal, judgment of 12 May 2021, no. SK 19/15; Constitutional Tribunal, decision of 1 July 2021, no. SK 7/17; Constitutional Tribunal, decision of 15 July 2021, no. SK 3/18; Constitutional Tribunal, decision of 15 July 2021, no. SK 32/15; Constitutional Tribunal, judgment of 22 July 2021, no. SK 82/19; Constitutional Tribunal, judgment of 22 July 2021, no. SK 60/19; Constitutional Tribunal, decision of 28 July 2021, no. SK 42/19; Constitutional Tribunal, decision of 27 October 2021, no. SK 6/20; Constitutional Tribunal, decision of 25 November 2021, no. SK 11/16; Constitutional Tribunal, decision of 9 February 2022, no. SK 17/21; Constitutional Tribunal, decision of 15 February 2022, no. SK 45/21.

²⁴ Constitutional Tribunal, decision of 22 February 2022, no. Ts 116/19.

34. HFHR is aware that the judgment in the *Xero Flor* case concerned only violation of Article 6 ECHR due to a presence of unlawfully elected person in adjudicating panel of the Constitutional Tribunal which discontinued proceedings initiated via constitutional complaint of a company. However, we would like to draw the Committee's attention to the fact that problems with regards to the Constitutional Tribunal are not limited to the presence of unlawfully elected persons. There are also many other factors which may raise doubts as to the compliance of functioning of this body with standards derived from Article 6 ECHR.

35. First of all, there are serious controversies around the way Mrs Julia Przyłębska, current President of the Constitutional Tribunal, who according to some Polish lawyers, was appointed to this position with violation of law²⁵ assigns judges to adjudicating panels. In the letter to Julia Przyłębska of 17 April 2017, eight Court judges noted the practice of "making unlawful and arbitrary changes of the composition of Court's panels that have already been designated according to the complexity of the case and alphabetical order"²⁶. The authors of the letter argued that, within the first 5 months after the election of the Court's new leadership, judges were changed in 84 cases and 24 of such changes concerned rapporteurs directly responsible for drawing up a draft version of the ruling. Furthermore, the letter directly referred to the composition of judicial panels concerning motions to recuse a particular judge from ruling in a case. According to the authors, the vast majority of requests to recuse a judge (approximately 83%) were examined by the same six judges appointed by the new ruling majority. Some of those rulings concerned Commissioner for Human Rights requests to recuse from the judicial panels persons appointed to the Constitutional Tribunal without the legal base. All of them have been denied. The problem of reshuffling judicial panels was once again raised by the judges of the Constitutional Court in December 2018²⁷. Their list indicated a significant disproportion between the number of cases allocated to judges appointed by the Sejm since the end of 2015 and that assigned to judges appointed earlier. Data compiled by judges of the Court proved that in 2017-2018, judges appointed after 2015 were significantly more often assigned to cases designated with the symbol "K" (involving requests to determine the compatibility of laws or ratified international agreements the Constitution) as compared to judges elected by the Sejm of previous terms. Once again, the letter pointed out 19 cases in which the President of the Court issued an order to change the composition of the judicial panel. What is important all of the discussed changes concerned only judges appointed by previous ruling

²⁵ M. Ziółkowski, *Przywracanie praworządności w TK po kryzysie konstytucyjnym: wybór i powołanie Prezesa TK* (Archiwum im. Wiktora Osiatyńskiego 2019) at p. 7-23, https://archiwumosiatsynskiego.pl/images/2019/10/AO_Prezes-TK_ekspertyza_MZio%CC%81%C5%82kowski-1.pdf (2.02.2022)

²⁶ Letter of judges of the Tribunal to the President of the Tribunal, 6 April 2017, <http://monitorkonstytucyjny.eu/archiwa/224> (2.02.2022); M. Wolny, M. Szuleka, *A tool of the government. The functioning of the Polish Constitutional Court in 2016-2021*, Helsinki Foundation for Human Rights 2021, at p. 18-20.

²⁷ Letter of judges of the Tribunal to the President of the Tribunal, 5 December 2018, https://oko.press/images/2018/12/List-Se%CC%A8dzio%CC%81w-TK_5.12.2018-r..pdf (2.02.2022).

coalitions and judge Piotr Pszczółkowski (who in fact was appointed by the Law and Justice but became a vocal critic of the new Tribunal's leadership). Furthermore, the practice of reshuffling panels composition was also confirmed in two situations. Both of them concerned persons who were appointed to the Constitutional Tribunal without valid legal basis. One of them, Jarosław Wyrembak, in the e-mail to the Chair of the Senate Rule of Law, Human Rights and Petitions Committee indicated that he was removed from the judicial panel of a case concerning the status of the National Council of the Judiciary (case no. K 12/18) in the result of his declaration regarding submitting a dissenting opinion²⁸. He indicated that the President of the Court replied to his statement by informing him that he could at most vote against the majority since "dissenting opinions are not allowed". On the other hand, Mariusz Muszyński in his dissenting opinion to the case no. K 9/16 noted that the authority of the President of the Court to designate judicial formations also implies the power to modify panels, even in situations that are not specifically addressed by the law.

36. Second, the media informed multiple times about secret meetings between Mrs. Przyłębska and the leader with the ruling party. According to the media report, shortly after Mrs. Przyłębska election to the position of the President of the Court, she has met in the Constitutional Tribunal with Mariusz Kamiński, the minister supervising secret services²⁹. The official reasons for that visit indicated that he wanted to congratulate Julia Przyłębska for her appointment to the position of the Constitutional Tribunal President. The visit took place, despite the ongoing (at that moment) proceedings before the Constitutional Tribunal concerning the boundaries of the President of Poland's right to pardon. The ruling issued in that case by the Constitutional Tribunal³⁰ was favourable from the perspective of M. Kamiński. Moreover, the Constitutional Tribunal initiated proceedings on the alleged dispute over authority between the Supreme Court and the President in that case, forcing the Supreme Court to suspend proceedings in that field.³¹ Moreover, according to press reports, party leaders regularly visited also Julia Przyłębska in her private flat.³² This concerns Mateusz Morawiecki, at the time of the visits Deputy Prime Minister of Poland, and Jarosław Kaczyński, the President of the Law and Justice party. Furthermore, in a media interview, Mr Kaczyński himself called Mrs. Przyłębska his "social discovery of recent years" whom he "very much enjoys visiting".³³ In December

²⁸ Letters of Jarosław Wyrembak to Julia Przyłębska, <https://monitorkonstytucyjny.eu/archiwa/11474> (2.02.2022).

²⁹ K. Izdebski, (Zbyt) bliskie spotkania polityków z sędziami, <https://mojepanstwo.pl/aktualnosci/590> (31 January 2022).

³⁰ Constitutional Tribunal, judgment of 17 July 2018, No. K 9/17.

³¹ The proceedings concerning alleged dispute over authority have not been finalised yet despite the lapse of almost 5 years since they had been initiated.

³² Wroński P., Kordzińska A., Centrum dowodzenia w domu Przyłębskiej. Ujawniamy sekretne spotkania prezesa PiS, premiera i szefowej Trybunału, <https://wyborcza.pl/7,75398,24815201,centrum-dowodzenia-w-domu-przylebskiej-ujawniamy-sekretne-spotkania.html> (2.02.2022).

³³ Onet.pl, Jarosław Kaczyński w „Pytaniu na śniadanie”: moim odkryciem towarzyskim ostatnich lat jest Julia Przyłębska, <https://wiadomosci.onet.pl/kraj/jaroslaw-kaczynski-w-pytaniu-na-sniadanie-moim-odkryciem-towarzyskim-ostatnich-lat/2wffq9> (2.02.2022).

2019, the media revealed that Julia Przyłębska met with the leadership of Law and Justice and the President of the Republic of Poland during a secret meeting in one of the presidential residences.³⁴ According to the news reports, the meeting was devoted to the changes in the judiciary introduced by the so-called “Muzzle Law” and the adoption of “a strategy to tackle a criticism from the EU institutions”. The Press Office of the Constitutional Tribunal on one hand indicated that the President of the Tribunal is not participating in the leadership meeting of political parties. On the other, it admitted that the President of Tribunal takes part „in many different meetings organized by the Chancellery of the President, Prime Minister, Sejm, Senate as well as by other state bodies³⁵”. The media informed also about a secret meeting between Mrs. Przyłębska and Mr. Kaczyński in January 2020 before the announcement of the Supreme Court’s resolution concerning the status of judgments issued by judges appointed upon the motion of the reorganised National Council of Judiciary.³⁶ According to the media coverage, Jarosław Kaczyński subsequently met with Sejm’s speaker – Elżbieta Witek and Julia Przyłębska. Symptomatically, on the same day when the alleged meeting took place, Mrs. Witek submitted a request to the Constitutional Court to resolve alleged jurisdictional disputes between the Supreme Court and the President of the Republic of Poland, as well as between the Supreme Court and the Sejm. The actual purpose of the request was to allegedly prevent the Supreme Court from issuing the resolution. In September 2021 the media revealed the e-mails of Michał Dworczyk (Head of the Chancellery of the Prime Minister) indicating that the Prime Minister of Poland was consulting with Julia Przyłębska the appointment of the new President of General Counsel to Republic of Poland, as well as the selection of the person who will be acting President of Supreme Court Chamber of Public Affairs and Extraordinary Control³⁷.

37. Third, in 2019 the Sejm elected two new judges of the Constitutional Tribunal: Ms Krystyna Pawłowicz and Mr Stanisław Piotrowicz. Although no formal violations of law were committed in the process of their election, these two persons were in the past well known and controversial politicians of the ruling party who actively participated in adoption of many reforms of the system of justice which led violations of the ECHR and the EU law. Even though there is no constitutional prohibition to elect ex-politician to the position of a judge of the Constitutional Tribunal, this election may negatively affect perception of the Constitutional Tribunal by public opinion as independent, impartial and apolitical. Similar controversies may concern election of Bogdan Świączkowski in 2022

³⁴ Ruszkiewicz S., Prezes TK Julia Przyłębska naradzała się z władzami PiS i prezydentem w Belwederze, Wp.pl, <https://wiadomosci.wp.pl/prezes-tk-julia-przylebska-naradzala-sie-z-wladzami-pis-i-prezydentem-w-belwederze-6472252063086209a> (2.02.2022).

³⁵ Ruszkiewicz S., Prezes TK Julia Przyłębska naradzała się z władzami PiS i prezydentem w Belwederze, wp.pl, <https://wiadomosci.wp.pl/prezes-tk-julia-przylebska-naradzala-sie-z-wladzami-pis-i-prezydentem-w-belwederze-6472252063086209a> (31.01.2022).

³⁶ Onet.pl, Stan po Burzy. Kaczyński spotkał się z Przyłębską w jej mieszkaniu, <https://wiadomosci.onet.pl/kraj/uchwala-sn-jaroslaw-kaczynski-spotkal-sie-z-julia-przylebska/t6p72yt> (31.01.2022).

³⁷ Wyborcza.pl, Afera Dworczyka. Jak Prezes Julia rekomendowała Morawieckiemu szefa Prokuraturii Generalnej, <https://wyborcza.pl/7,75398,27578043,afera-dworczyka-jak-prezes-julia-rekomendowala-morawieckiemu.html> (31 January 2022).

who was in the past, among others, undersecretary in the Ministry of Justice, head of the Internal Security Agency, the National Prosecutor and the deputy Prosecutor General. Therefore, he was not an independent judge or scholar but a prosecutor and official with close links to the current Minister of Justice.

38. Fourth, the abovementioned doubts around the independence and impartiality of the Constitutional Tribunal are further strengthened by the data concerning the actions of the ruling majority taken before the Constitutional Tribunal. In the recent report³⁸, the HFHR analysed the request to examine the constitutionality of law submitted to the Constitutional Tribunal by the ruling majority. According to the study findings, between 2017 and 2021, there was an unprecedented increase in the number of requests submitted to the Constitutional Court by the Government and parliamentarians of the ruling majority. Between 2017 to 2021, the Prime Minister and members of the Law and Justice parliamentary grouping submitted 17 requests for the constitutional review of legal acts. This figure should be augmented by three applications addressed to the Constitutional Court by the Speaker of the Sejm, also a member of the ruling parliamentary majority, and a certain number of motions addressed by another leader of the ruling majority – Public Prosecutor General (Minister of Justice). By comparison, between 2010 and 2016, members of the Sejm and senators brought 79 cases before the Constitutional Court, about 94% of which were initiated by requests from politicians of opposition parties at the time. None of the proceedings was initiated by the government³⁹. Furthermore, the HFHR indicated that the Constitutional Court examined the requests of the ruling majority at a surprisingly fast pace. According to the study, in each case initiated by the members of the ruling majority and examined by the CT, the Constitutional Tribunal provided judgment earlier than it would appear from the average time of the proceedings.

39. Fifth, the issue of Constitutional Tribunal independence and impartiality cannot be discussed without referring to Tribunal's case law. In recent years it has become generally favourable to the Government.⁴⁰ The Tribunal is now being used by the ruling authorities as a useful tool to achieve their political aims. Such an instrumental treatment of the Constitutional Tribunal by the ruling politicians takes two forms. The Constitutional Tribunal is sometimes used to legitimize controversial reforms passed by Parliament. Such a step was taken, among others, with regards to the Act on Assemblies⁴¹ or the Act amending the rules for the election of judges-members of the National Council of the Judiciary. The latter case is particularly interesting – the Constitutional Tribunal first declared the existing solutions to be unconstitutional and indicated in the written reasons

³⁸ M. Wolny, M. Szuleka, *A tool of the government. The functioning of the Polish Constitutional Court in 2016-2021*, Helsinki Foundation for Human Rights 2021, p. 31-34.

³⁹ *Ibidem*.

⁴⁰ See e.g. M. Wolny, M. Szuleka, *A tool of the government. The functioning of the Polish Constitutional Court in 2016-2021*, Helsinki Foundation for Human Rights 2021, p. 31-35, <https://www.hfhr.pl/wp-content/uploads/2021/09/TK-narzedzie-w-rekach-wladzy-EN-FIN14092021.pdf> (accessed: 28 January 2022).

⁴¹ Constitutional Tribunal, judgment of 16 March 2017, No. Kp 1/17.

of the judgment that the Constitution does not require that members of the NCJ be elected by judges themselves.⁴² The Parliament changed the law and granted the competence to elect judges-members of the NCJ to the Parliament. In the second judgment, the Constitutional Tribunal ruled that the new method of election was consistent with the Constitution.⁴³ In both judgments, the Constitutional Tribunal departed from the position expressed in its previous case-law and the dominant view among the Polish legal doctrine that judges-members of the NCJ should be elected only by judges themselves. Overall, after Julia Przyłębska assumed the position of the President of the Constitutional Tribunal, virtually none of the controversial reforms implemented by the current government was struck down by the Constitutional Tribunal. Secondly, the Constitutional Tribunal is sometimes used to declare unconstitutional those legal norms and their interpretations which are inconvenient for the Government. For this purpose, the Tribunal often issues the so-called “scope judgments” in which the declared unconstitutionality do not concern the entire provision but only a certain scope of its application, or interpretative judgments which declare that a specific understanding of the provision is inconsistent with the Constitution. Although the Constitutional Tribunal issued these types of rulings also before 2016, currently one can clearly see abuses in this area. In its judgments, the Constitutional Tribunal sometimes seeks to challenge the judgments of national courts or even international courts, although formally its powers are limited only to the review of provisions, and not their application. Equally alarming is the Constitutional Tribunal’s judgment concerning the Supreme Court’s resolution on the assessment of the legality of appointment and independence of judges⁴⁴. The Constitutional Tribunal decided that it had jurisdiction to examine the constitutionality of the resolution, as it was de facto normative in nature. The Constitutional Tribunal also questioned the interpretation of the scope of the president’s powers to apply the right of pardon⁴⁵, adopted in another resolution of the Supreme Court in the context of criminal charges against one of ministers in the “Law and Justice” Government. Thus, the proceedings before the Constitutional Tribunal have become a tool for the politicians of the ruling party with which they can achieve political goals that would be difficult to achieve by other means such as changing the legislation.

40. Finally, the Constitutional Tribunal is also used to question validity of rulings of international courts and their consequences. In addition to abovementioned judgments concerning Article 6 of the Convention, the Constitutional Tribunal issued also judgments concerning obligation under the EU law to implement interim measures of the CJEU concerning organisation of judiciary⁴⁶ and concerning provisions of the Treaties which allowed domestic courts to review independence of other judges⁴⁷. Moreover, proceedings concerning financial sanctions imposed by the CJEU for non-implementation

⁴² Constitutional Tribunal, judgment of 20 June 2017, No. K 5/17.

⁴³ Constitutional Tribunal, judgment of 25 March 2019, No. K 12/18.

⁴⁴ Constitutional Tribunal, judgment of 20 April 2020, No. U 2/20.

⁴⁵ Constitutional Tribunal, judgment of 17 July 2018, No. K 9/17.

⁴⁶ Constitutional Tribunal, judgment of 14 July 2021, No. P 7/20.

⁴⁷ Constitutional Tribunal, judgment of 7 October 2021, No. K 3/21.

of the CJEU interim measures concerning organisation of judiciary are now pending before the Constitutional Tribunal.⁴⁸

41. One should note that these irregularities in functioning of the Constitutional Tribunal were noted also by the EU bodies. In December 2021 the European Commission informed that it decided to launch an infringement procedure in connection to the situation around the Constitutional Tribunal. There were two problems noted by the Commission. First concerned the case law of the Constitutional Tribunal which undermined the primacy of the EU law. Second concerned doubts of the Commission “on the independence and impartiality of the Constitutional Tribunal”. The Commission noted that “the process of appointment to the Constitutional Tribunal of three judges in December 2015 occurred in breach of fundamental rules forming an integral part of the establishment and functioning of the system of constitutional review in Poland. The gravity of this breach gives rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judges concerned. This is also shown by other irregularities and deficiencies such as the election of the President and Vice-President of the Constitutional Tribunal, which raised serious concerns as to the impartiality of judges of the Constitutional Tribunal when handling individual cases. Whereas the Constitutional Tribunal is called upon to rule on questions relating to the application or interpretation of EU law, the Commission considers that it can therefore no longer ensure effective judicial protection by an independent and impartial tribunal previously established by law, as required by Article 19(1) TEU, in the fields covered by EU law.”⁴⁹

8. Recommendations of the HFHR

42. HFHR believes that to fully implement judgment of the Court in *Xero Flor*, following steps must be taken.

43. First, the competent domestic authorities must ensure that unlawfully elected persons do not participate in adjudicating panels of the Constitutional Tribunal. The *Xero Flor* case concerned proceedings initiated by constitutional complaint, but in the HFHR opinion also some proceedings concerning legal questions of courts may affect “civil rights and obligations” within the meaning of Article 6 § 1 ECHR. However, in our opinion unlawfully elected persons should not participate in any types of proceedings concerning review of constitutionality of law, regardless of the form of their initiation.

44. Second, the domestic authorities must refrain from any making comments which question the legal force and binding character of the *Xero Flor* judgment and other ECtHR rulings.

45. Third, all state authorities must accept that all final judgments of the ECtHR must be duly implemented and cannot be questioned in the domestic proceedings. Public

⁴⁸ Case registered as No. K 8/21.

⁴⁹ The European Commission, press release of 22 December 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070 (last access: 29 March 2022).

authorities must not challenge validity of the ECtHR's judgments via motions to the Constitutional Tribunal.

46. Fourth, The Constitutional Tribunal must not review the constitutionality of the ECtHR judgments either openly or under the disguise of the constitutional review of the ECHR as an international treaty.

47. Finally, judges who apply standards developed by the ECtHR in *Xero Flor* and other judgments, including those, which were subsequently found to be inconsistent with the Constitution (based on a legal norm inconsistent with the Constitution) must not face disciplinary charges. For that purpose, the reform of Article 107 § 1 of the Act on the organisation of common courts would be advisable.

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