



HELSINKI FOUNDATION
FOR HUMAN RIGHTS

Judgments delivered by irregular judicial formations of the Polish Constitutional Court.

A review of the cases decided by the Constitutional Court in 2017–2022 and the available options for the legal regulation of the effects of judgments delivered by formations of the Constitutional Court that include unlawfully elected persons



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Author

dr Marcin Szwed

Collaborators

Maciej Kalisz, dr Piotr Kładoczny, Aleksandra Nail, Maciej Nowicki, Małgorzata Szuleka, Marcin Wolny

Scientific review

dr hab. Jan Podkowiak

Graphic design and typesetting

Dagmara Derda

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Table of contents

1.	Introduction	5
1.1.	Xero Flor judgment	5
1.2.	Public debate on the defective composition of the Constitutional Court	6
1.3.	Scope of the report	7
1.4.	Other problems	8
2.	A statistical and substantive analysis of the jurisprudence of the Constitutional Court in 2017–2022	10
2.1.	Participation of unlawfully elected persons in issuing judgments of the Constitutional Court in 2017–2022 – a statistical analysis	11
2.2.	Key lines of authority expressed in the judgments issued by formations of the Constitutional Court comprising unlawfully elected persons	16
2.3.	Substantive analysis of judgments delivered by formations of the Constitutional Court comprising unlawfully elected persons	18
2.4.	Constitutional Court’s orders issued with the participation of unlawfully elected persons	23
2.5.	Judgments delivered by formations of the Constitutional Court comprising no unlawfully elected persons, 2017–2022	24
3.	Possible legislative approaches to the issue of the status of judgments issued by Constitutional Court’s formations comprising unlawfully elected persons and the consequences of following such approaches	27
3.1.	Legislative regulation of the legal effects of judgments issued by Constitutional Court’s formations comprising unlawfully elected persons – four concepts	28
3.1.1.	Declaring the judgments non-existent	29
3.1.2.	Introducing a procedure for the resumption of proceedings before the Constitutional Court	30
3.1.3.	Declaring judgments of the Constitutional Court unlawful	30
3.1.4.	Making no attempt to determine the effects of irregular judgments in legislation	30

4.	The consequence of declaring judgments issued in formations of the Constitutional Court comprising unlawfully elected persons to be non-existent	31
4.1.	The need to decide the cases in which a non-existent judgment was delivered ..	32
4.2.	Consequences of declaring the non-existence of injunctive judgments	33
4.2.1.	Judgments of the Constitutional Court that declare the reviewed subject-matter incompatible with a standard of review but do not lead to the loss of binding force of any legal norms	34
4.2.2.	The problem of judgments declaring a legislative omission	35
4.2.3.	The problem of simple and extensional judgments confirming the non-compliance of the reviewed subject-matter with a standard of review	38
4.2.4.	The problem of interpretation judgments	53
4.3.	Declaring the judgments of the Constitutional Court non-existent – a summary ...	54
5.	Procedure for the resumption of proceedings before the Constitutional Court	56
6.	Declaring a judgment of the Constitutional Court unlawful	58
7.	Legislature’s decision not to challenge the validity/existence of judgments of the Constitutional Court	58
8.	Summary	60

1. Introduction

As soon as the 8th Sejm adopted, in November 2015, resolutions invalidating the election of five Constitutional Court's judges and electing five others in their place, doubts were raised as to the legality of the legislature's action. Despite the Constitutional Court's successful challenge to the constitutionality of the provisions of the Constitutional Court Act relating to the election of the surplus judges¹, the ruling parliamentary majority continued to usurp the right to fill all the five vacant seats on the Court's bench, not just those to be assigned during the term of the 8th Sejm. This was reflected in the laws the majority adopted to regulate the activities of the Constitutional Court and in steps taken to apply those laws, in particular the election of further persons to fill the already occupied seats on the Court's bench². Them having been allowed to engage in judicial decision-making following the takeover of the Constitutional Court has been one of the reasons that has led to the questioning of the role of the Constitutional Court as an independent, impartial and lawfully established guardian of the Constitution³.

1.1. Xero Flor judgment

The irregular composition of the Constitutional Court was confirmed by the European Court of Human Rights in its judgment *Xero Flor in Poland sp. z o.o. v. Poland*.⁴ At that time, the ECtHR held that the participation in the composition of the Constitutional Court of a person elected to an already occupied seat leads to a violation of Article 6 of the Convention.

In a decision issued in a procedure for supervising the implementation of the ECtHR judgment⁵, the Committee of Ministers of the Council of Europe indicated that, as far as individual measures are concerned, the authorities should consider how to ensure the applicant company may benefit from *restitutio in integrum*. Referring further to general measures, the CoM stated, *inter alia*, that authorities should address the status of decisions made with the participation of unlawfully elected persons in constitutional review proceedings triggered by constitutional complaints.

1 Judgment of the Constitutional Court of 3 December 2015, case no. K 34/15.

2 See, for example, P. Tuleja, P. Radziejewicz (ed.), *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego: czerwiec 2015 – marzec 2016*, Warszawa 2017.

3 See, for example, W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019; M. Pyziak-Szafnicka, "Sąd Konstytucyjny á rebours", *Państwo i Prawo* 2020 (5), pp. 25-45.

4 ECtHR, *Xero Flor in Poland sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021.

5 Decision of the Committee of Ministers of the Council of Europe of 8 December 2022, No CM/Notes/1451/H46-24, <https://hudoc.exec.coe.int/eng?i=004-58569>.

At the same time, the Committee did not explicitly determine what individual and general measures would be necessary, i.e., for example, whether a reopening of proceedings before the Constitutional Court or even the annulment of all rulings would be required. Accordingly, the Council of Europe's bodies leave a certain degree of discretion to the Polish authorities in deciding what measures will be most appropriate in this regard. However, this discretion is not unlimited: the authorities must, on the one hand, ensure the effective implementation of the ECtHR judgment, and, on the other hand, be mindful not to create new human rights violations in the process.

1.2. Public debate on the defective composition of the Constitutional Court

The discussion on how to rebuild the rule of law has been ongoing in Poland for quite some time. In this context, different views have also been presented as to the regulation of the effects of Constitutional Court rulings made by its judicial formations that include unlawfully elected persons. For example, a team of experts for Strategie 2050 Institute affiliated with the *Poland 2050* movement, proposed that the Constitutional Court itself should be tasked with reviewing the lawfulness of such decisions.⁶ The authors of the report concluded that “it would be inadvisable to automatically eliminate all the rulings of the present defective Constitutional Court, as it would certainly shake the certainty of legal transactions”. In their view, review efforts would need to focus on rulings denying constitutional complaints, as well as “rulings on ‘political’ cases and those issued by judicial formations the composition of which has been subject to tinkering”. Further proposals for a reform were put forward by the Stefan Batory Foundation’s Team of Legal Experts. Article 7 (1) of the proposal for the new Constitutional Court Act drafted by the Team of Legal Experts⁷ (“the Batory Foundation’s Proposal”), which was also presented⁸, provides that the Constitutional Court’s rulings issued with the participation of defectively elected judges “shall not have the effects specified in Article 190 (1) and (3) of the Constitution of the Republic of Poland”. The proposal deals in the same way with the orders of the Constitutional Court issued in cases of jurisdictional disputes. In turn, in accordance with Article 7 (3) of the proposal, any steps in proceedings concluded by judgments and orders deemed to be “without a constitutional effect” will need to be repeated. However, the proposal does not seek to automatically invalidate all orders to discontinue proceedings and those issued in the preliminary review procedure by judicial formations containing unlawfully elected persons; instead, it merely enables the appellants to re-submit their constitutional complaints.

6 M. Radwan-Röhrenschef, D. Sześciło, M. Zagłoba, S. Zakroczyński (ed.), *System kontroli konstytucyjności prawa w Polsce, Jak wyjść z zapaści? Diagnoza i rekomendacje ekspertów Instytutu Strategie 2050*, <https://strategie2050.pl/wp-content/uploads/2021/12/System-kontroli-konstytucyjnos%CC%81ci-prawa-w-Polsce.pdf> (accessed on: 15 March 2023).

7 A proposal for a law introducing the Constitutional Court Act prepared by the Stefan Batory Foundation Team of Legal Experts available at <https://www.batory.org.pl/wp-content/uploads/2022/11/Spoleczny.projekt.ustawy.o.Trybunale.Konstytucyjnym.pdf> (accessed on: 15 March 2023).

8 Ibid.

The proposal also seeks to preserve the legal force of judgments and decisions rendered by courts and other authorities on the basis of judgments of the Constitutional Court delivered in defective formations as part of proceedings concerning referrals of questions on a point of law and constitutional complaint proceedings.

The purpose of this report was not to review the above concepts for remedying the situation in the Constitutional Court, nor to formulate any new holistic proposal in this respect. This report also does not aim to comment, from a theoretical point of view, on the legal status of judgments handed down by irregular judicial formations of the Constitutional Court. We therefore refrain from making any strong judgements as to whether there are sufficient theoretical grounds to conclude that such rulings are non-existent. The mission we set for ourselves was merely to identify the possible legislative approaches to the regulation of the effects of judgments of the Constitutional Court that have been delivered with the participation of defectively appointed judges, and to determine the possible consequences arising from the adoption of each approach. Notably, the legal analysis presented in this report does not address, and is detached from, the political conditions and limitations of the process of restoring the rule of law in Poland.

1.3. Scope of the report

The report consists of two parts. The first one presents an analysis of the Constitutional Court's jurisprudence from 2017 to 2022. The reason for adopting such a time span was that the first judgment of the Constitutional Court delivered by the Court's formation comprising a defectively elected judge was issued in 2017. The discussion featured in the report focuses on jurisprudence rendered in formations that included defectively elected judges. For the purpose of this report, we consider that both the individuals (M. Muszyński, L. Morawski, H. Cioch) elected as Constitutional Court judges by the 8th Sejm on 2 December 2015 to occupy the seats properly filled by judges elected by the 7th Sejm, and two persons (J. Piskorski, J. Wyrembak) elected to fill the seats subsequently vacated by two of those unlawfully elected persons have been "defectively elected". Indeed, we consider that there are insufficient reasons to differentiate the assessment of the status of these two categories of individuals – the President of Poland is still under the obligation to take the oath of office from the properly elected judges – and that it is not permissible to fill the seats occupied by them before the expiry (or lawful termination) of their judicial terms.⁹ By contrast, we address to a much narrower extent the conclusions of the analysis of the rulings issued by formations of the Constitutional Court that did not include these individuals. In both cases, the primary thrust of inquiry is on statistical data, but we also present a brief substantive analysis of the Court's jurisprudence in order to provide the readers with an overview of the fundamental questions decided by the Court during the period in question.

⁹ See similarly, for example, M. Szwed, "The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights", *European Constitutional Law Review* 2022, vol. 18, issue 1, pp. 141-142.

The second part of the report discusses different approaches to judgments of the Constitutional Court issued in formations comprising unlawfully elected persons, as well as the effects of the admission of each of such judges. We point to four theoretical concepts that might be used by the legislature to regulate the matter in question. The first three are declaring all judgments non-existent, introducing a procedure for the resumption of proceedings before the Constitutional Court and declaring the Constitutional Court's rulings unlawful. The fourth concept envisages that the legislature should refrain from regulating the consequences of judgments of the Constitutional Court rendered in irregular formations and that laws should be enacted to reinstate certain provisions found to be unconstitutional in those rulings or to amend (or repeal) the norms considered by the Constitutional Court not to be in breach of the Constitution. We have placed the greatest emphasis on examining the consequences of declaring the judgments non-existent, as this is the most far-reaching approach leading to the most serious consequences. The other approaches are discussed in a far more concise manner – the emphasis is on how they differ from the non-existence approach as well as their advantages and disadvantages. In discussing the legal and practical consequences of adopting each theoretical concept, we have been guided primarily by the findings of scholarly writings and case law on the legal effects of judgments of the Constitutional Court.

1.4. Other problems

The report does not include an analysis of the legal consequences of orders (*postanowienia*) issued by the irregular formations of the Constitutional Court. Our decision not to discuss this issue was primarily based on the fact that orders to discontinue proceedings are purely formal measures that do not trigger any changes in the legal system. Declaring such orders non-existent would therefore only cause organisational difficulties being a consequence of the necessity for the Constitutional Court to re-examine a significant number of cases but would not have a negative impact on legal security. The nature of orders issued in cases of jurisdictional disputes is, quite obviously, different. However, in the reviewed period (2017–2022), only one such ruling was rendered by a composition comprising defectively elected judges.

Another topic that is beyond the scope of the report is whether it is permissible for other courts to disregard, in the course of examination of specific cases, the effects of judgments handed down by irregular judicial formations of the Constitutional Court. This issue is extremely important, but, as it has already been pointed out, the key objective of the report was to consider the possible legislative – rather than judicial – approaches to the judgments in question.

Finally, we would like to point out that the HFHR recognises that the problems surrounding the current functioning of the Constitutional Court are not just about the presence of unlawfully elected persons. There are indeed concerns resulting, for instance, from reports of irregularities in the appointment of formations by the President of the Constitutional Court, as to whether the

Court, even when working in formations without unlawfully elected persons, can be regarded as a tribunal that is independent, impartial and established by law. This report, however, only deals with the problem of the participation of defectively elected judges in the passing of Constitutional Court's judgments.

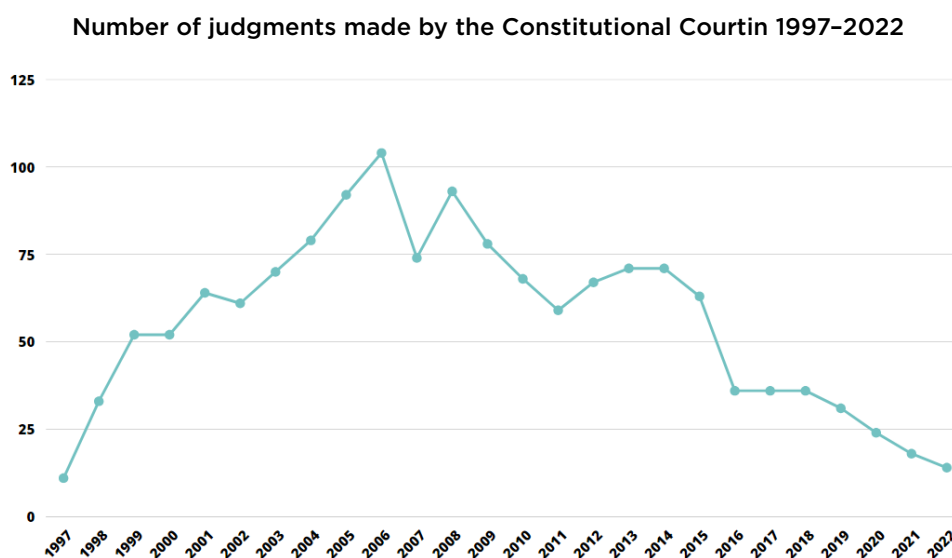
2. A statistical and substantive analysis of the jurisprudence of the Constitutional Court in 2017–2022



2.1. Participation of unlawfully elected persons in issuing judgments of the Constitutional Court in 2017–2022 – a statistical analysis

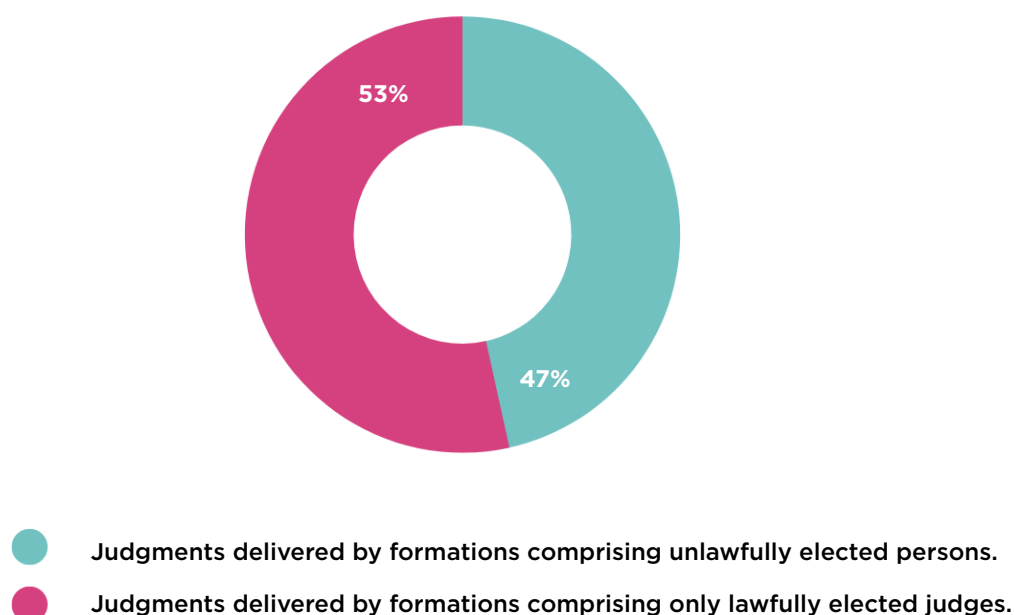
Individuals unlawfully elected as judges of the Constitutional Court were allowed to hear and decide cases after Julia Przyłębska became President of the Constitutional Court on 21 December 2016. On 23 February 2017, the Constitutional Court issued its first judgment in a formation that included which two unlawfully elected persons (case no. K 2/15).

In 2017–2022, the Constitutional Court issued 159 judgments. The number of judgments handed down annually in the period under review was significantly lower than in earlier years.



Of the 159 judgments handed down in the reporting period, 85 were delivered by irregular judicial formations.

The share of judgments issued by formations comprising unlawfully elected persons in the total number of judgments of the Constitutional Court (2017–2022)

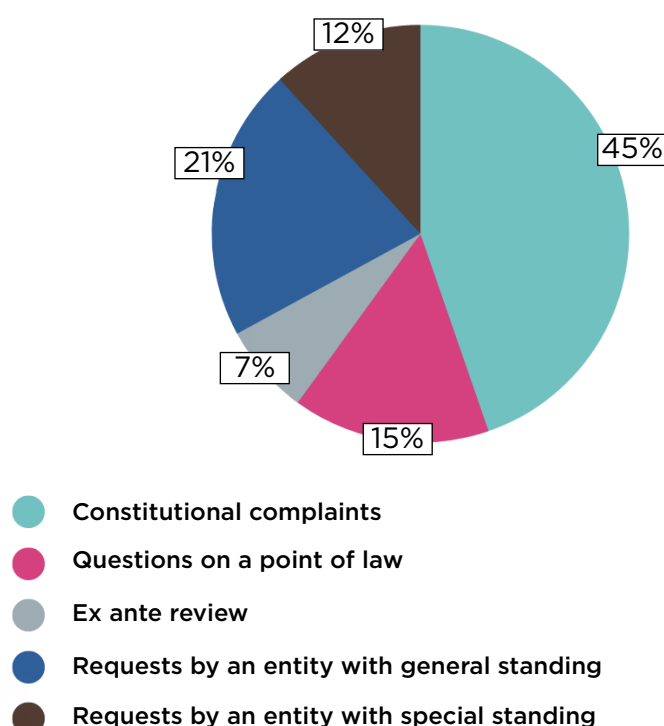


In 2017–2018, the percentage of judgments issued with the participation of unlawfully elected persons was lower than 50%. Since 2019, the majority of judgments have been handed down by formations that include unlawfully elected persons. The all-time high number of such judgments was recorded in 2021 when unlawfully elected persons took part in the issuing of approximately 78% of all judgments.

Year	Total number of judgments	Number of judgments issued by formations of the Constitutional Court comprising unlawfully elected persons	Percentage of judgments issued by formations of the Constitutional Court comprising unlawfully elected persons
2017	36	17	47%
2018	36	13	36%
2019	31	19	61%
2020	24	13	54%
2021	18	14	78%
2022	14	9	64%

Of 85 judgments issued in irregular formations, 38 were issued in proceedings initiated by a constitutional complaint, 13 in proceedings started by a question on a point of law, 6 in proceedings commenced by the President’s request for an ex ante constitutional review, 18 in proceedings launched by a request for an abstract constitutional review from a body with the “general standing” before the Constitutional Court (3 judgments based on a request from the Prosecutor General, 8 judgments based on a request from the Ombudsman, 2 judgments based on a request from the Prime Minister), 10 in proceedings initiated by a request for an abstract constitutional review from a body with the “special standing” before the Constitutional Court.

Judgments issued by Constitutional Court’s formations comprising unlawfully elected persons: breakdown by the initiating entity



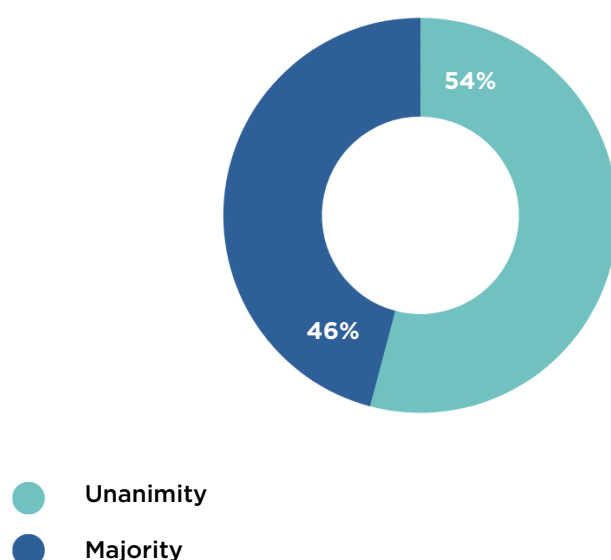
There were very few (three) cases in which unlawfully elected persons would constitute the majority of the judicial formation issuing the judgment.

Number of unlawfully elected persons sitting in a formation	Number of judgments
One in a three-judge formation	6
Two in a three-judge formation	-
Three in a three-judge formation	-
One in a five-judge formation	39
Two in a five-judge formation	21
Three in a five-judge formation	3
One in an en-banc formation	-
Two in an en-banc formation	11
Three in an en-banc formation	5

By contrast, much more frequently a defectively elected judge presided over, or served as a judge-rapporteur in, a formation of the Constitutional Court that delivered a judgment. This occurred in 22 and 20 cases, respectively.

In the majority of cases (46 out of 85), judgements delivered by formations including unlawfully elected persons were unanimous.

Judgments issued by Constitutional Court’s formations comprising unlawfully elected persons: breakdown by the type of majority



The judgments of the Constitutional Court only state whether they were given unanimously or by a majority of votes. In the latter case, however, there is no information on the specific majority that the judgment was issued (i.e. how many judges voted in favour of the decision and how many against it). However, some conclusions in this respect can be drawn from reading separate (dissenting) opinions of judges.

However, one should be cautious in drawing such conclusions as a judge who has voted against a decision is not obliged to submit a dissenting opinion. Information on separate opinions in judgments delivered by a majority of votes in formations comprising unlawfully elected persons is presented in the table below.

Case number	Judicial formation	Disposition	Dissenting opinions
U 1/16	Three-judge (one unlawfully elected person)	Constitutionality affirmed	One dissenting opinion (by S. Wronkowska-Jaśkiewicz, regarding the presence of an unlawfully elected person)
K 3/16	En-banc, 12-judge (three unlawfully selected judges)	Constitutionality affirmed	Three dissenting opinions (by P. Pszczółkowski, M. Pyziak-Szafnicka, P. Tuleja)
K 16/17	Five-judge (one unlawfully elected person)	A finding of unconstitutionality	Two dissenting opinions (W. Sych, L. Kieres).
K 31/16	En-banc, 11-judge (three unlawfully selected judges)	A finding of unconstitutionality	One dissenting opinion (M. Muszyński)
Kp 2/19	En-banc, 11-judge (two unlawfully selected judges)	A finding of unconstitutionality	Three dissenting opinions (by Z. Jędrzejewski, P. Pszczółkowski, J. Stelina)
K 10/18	Five-judge (two unlawfully elected persons)	Constitutionality affirmed	Two dissenting opinions (by Z. Jędrzejewski, J. Wyrembak)
K 34/16	En-banc, 11-judge (two unlawfully selected judges)	Constitutionality affirmed	One dissenting opinion (by S. Wronkowska-Jaśkiewicz, regarding the presence of an unlawfully elected person)
Kp 2/18	En-banc, 13-judge (three unlawfully selected judges)	A finding of unconstitutionality	One dissenting opinion (by M. Muszyński)
P 10/20	En-banc, 14-judge (two unlawfully selected judges)	Constitutionality affirmed	Two dissenting opinions (by L. Kieres, P. Pszczółkowski)
P 22/19	Five-judge (one unlawfully elected person)	A finding of unconstitutionality	One dissenting opinion (by J. Stelina)
SK 19/15	Five-judge (one unlawfully elected person)	A finding of unconstitutionality	One dissenting opinion (by K. Pawłowicz)
SK 3/17	Five-judge (two unlawfully elected persons)	Constitutionality affirmed	One dissenting opinion (by M. Muszyński)
SK 53/20	Five-judge (two unlawfully elected persons)	A finding of unconstitutionality	One dissenting opinion (by J. Piskorski)
SK 9/18	Five-judge (two unlawfully elected persons)	A finding of unconstitutionality	One dissenting opinion (by J. Piskorski)
Kp 1/19	En-banc, 15-judge (three unlawfully selected judges)	A finding of unconstitutionality	One dissenting opinion (by M. Muszyński)

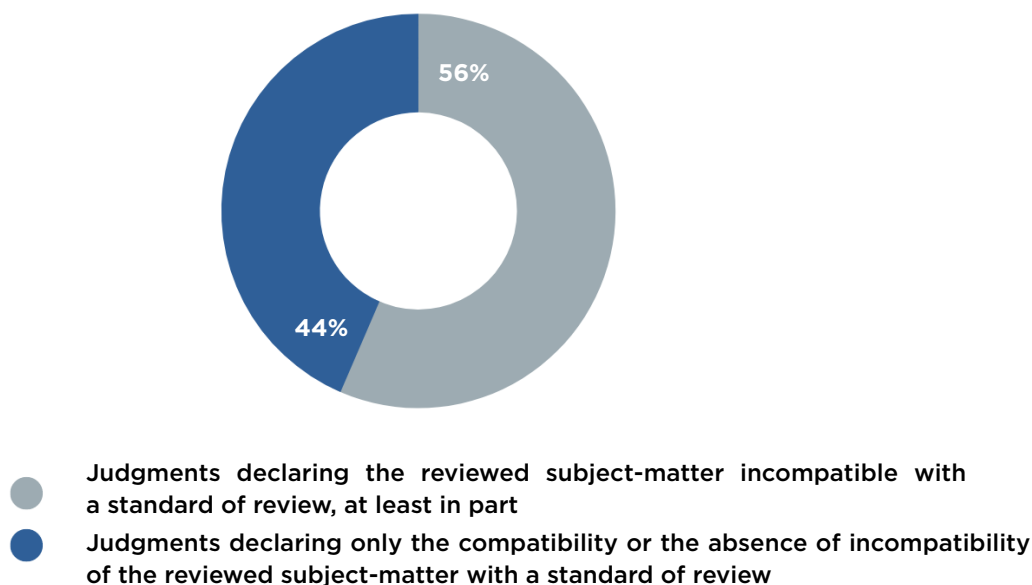
P 10/19	Five-judge (two unlawfully elected persons)	A finding of unconstitutionality	One dissenting opinion (by J. Stelina)
SK 32/19	Five-judge (one unlawfully elected person)	Constitutionality affirmed	Two dissenting opinions (by A. Zielonacki, Z. Jędrzejewski)
P 2/18	Five-judge (one unlawfully elected person)	Constitutionality affirmed	One dissenting opinion (by P. Pszczołkowski)
K 4/17	Five-judge (one unlawfully elected person)	A finding of unconstitutionality	One dissenting opinion (by M. Muszyński)
Kp 1/17	En-banc, 11-judge (three unlawfully selected judges)	Constitutionality affirmed	Four dissenting opinions (by L. Kieres, P. Pszczołkowski M. Pyziak-Szafnicka, S. Wronkowska-Jaśkiewicz)
Kp 4/15	En-banc, 12-judge (three unlawfully selected judges)	A finding of unconstitutionality	Two dissenting opinions (by M. Pyziak-Szafnicka and S. Wronkowska-Jaśkiewicz - purely on procedural grounds, i.e. on account of judges Rymar, Tuleja and Zubik being not allowed to hear cases)
SK 113/20	Five-judge (two unlawfully elected persons)	Constitutionality affirmed	Four dissenting opinions (by P. Pszczołkowski - as to the operative part of the judgment, Z. Jędrzejewski, M. Muszyński, J. Wyrembak - as to the statements of grounds)
K 2/15	Five-judge (two unlawfully elected persons)	A finding of unconstitutionality	One dissenting opinion (by M. Pyziak-Szafnicka, regarding the presence of an unlawfully elected person in the formation)
Kp 1/18	En-banc, 12-judge (two unlawfully selected judges)	A finding of unconstitutionality	Three dissenting opinions (by J. Przyłębska, Z. Jędrzejewski, M. Warciński)
P 1/18	En-banc, 12-judge (three unlawfully selected judges)	A finding of unconstitutionality	Two dissenting opinions (by M. Muszyński, S. Rymar)
P 19/19	Five-judge (one unlawfully elected person)	Constitutionality affirmed	One dissenting opinion (by K. Pawłowicz)
SK 14/18	Five-judge (two unlawfully elected persons)	A finding of unconstitutionality	One dissenting opinion (by S. Rymar)
SK 2/17	Five-judge (two unlawfully elected persons)	A finding of unconstitutionality	One dissenting opinion (by M. Muszyński)
SK 3/13	En-banc, 13-judge (three unlawfully selected judges)	Constitutionality affirmed	One dissenting opinion (by M. Muszyński)
SK 60/19	Five-judge (one unlawfully elected person)	Constitutionality affirmed	One dissenting opinion (by A. Zielonacki)
U 2/20	En-banc, 14-judge (two unlawfully selected judges)	A finding of unconstitutionality	Two dissenting opinions (by J. Wyrembak - as to the operative part of the judgment, Judge Muszyński opposed the standards of review used but joined the majority)

SK 78/21	Three-judge (one unlawfully elected person)	A finding of unconstitutionality	One dissenting opinion (by J. Wyrembak)
K 3/21	En-banc, 12-judge (three unlawfully selected judges)	A finding of unconstitutionality	Five dissenting opinions (by P. Pszczółkowski, J. Wyrembak, Z. Jędrzejewski - only as to the operative part of the judgment, M. Muszyński, A. Zielonacki - only as to the statements of grounds)

2.2. Key lines of authority expressed in the judgments issued by formations of the Constitutional Court comprising unlawfully elected persons

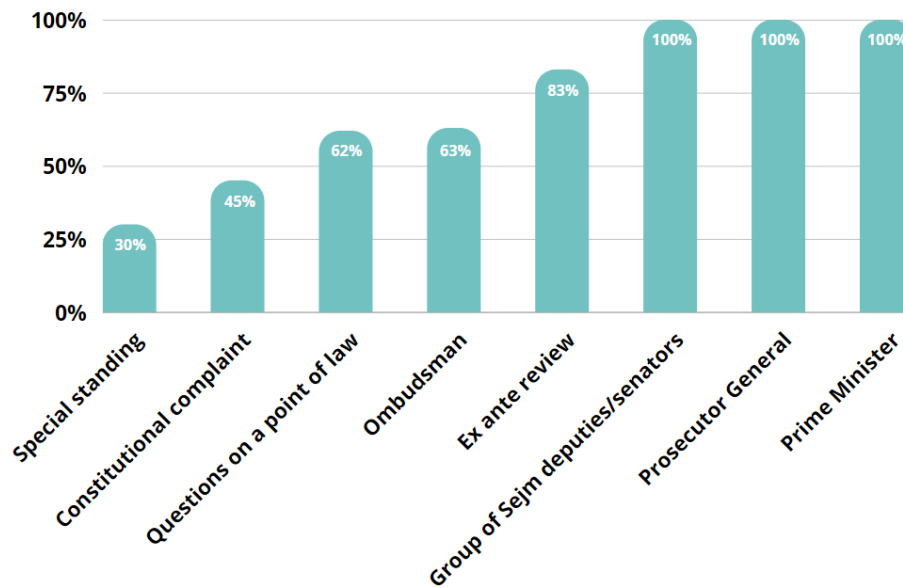
During the period in question, the Constitutional Court formations comprising unlawfully elected persons issued 48 judgments in which at least some of the reviewed subject-matters have been found incompatible with the applicable standard of review and 37 judgments which only confirmed the compatibility of the reviewed subject-matter with the standard of review (“affirmative judgments”) or the absence of incompatibility of the reviewed subject-matter with the standard of review (judgments finding the standard of review inadequate).

Judgments delivered by Constitutional Court’s formations comprising unlawfully elected persons: breakdown by the direction of disposition



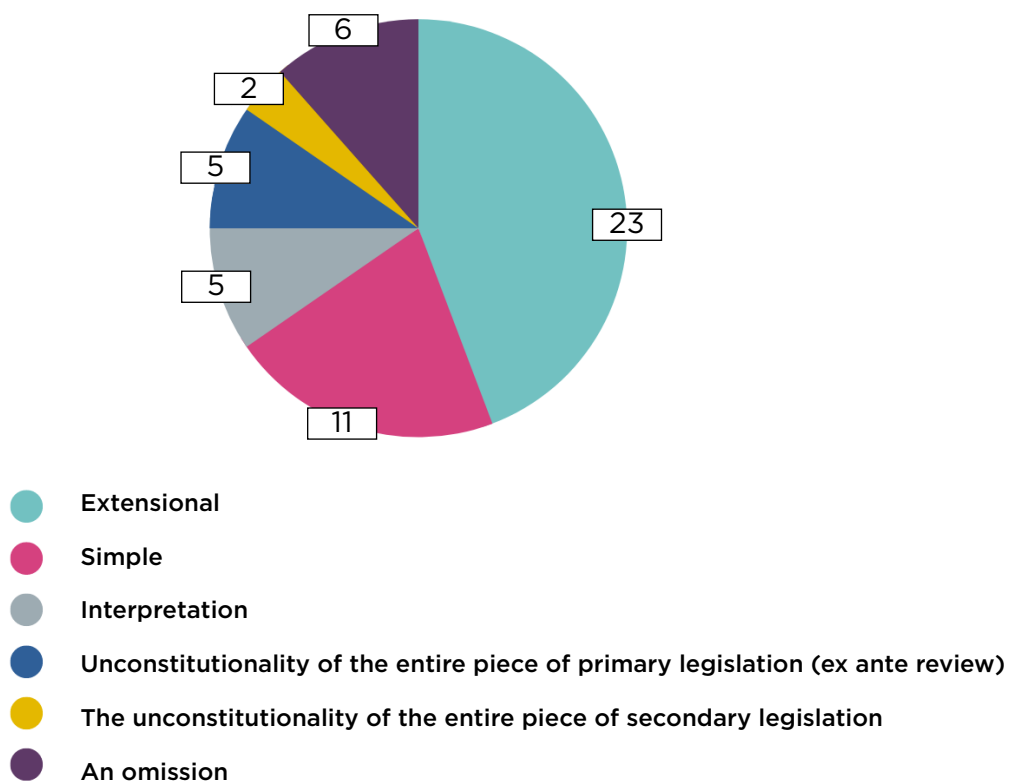
The percentage of judgments finding the reviewed subject-matter to be at least partially incompatible with the standard of review varied depending on the party initiating review, although notably the number of applications submitted by the different parties also varied considerably (e.g. the Prime Minister submitted one request while the Ombudsman – eight).

Percentage of judgments declaring the reviewed subject-matter incompatible with a standard of review: breakdown by entity initiating the proceedings (irregular formations)



The chart below presents a breakdown of details concerning the judgments finding the incompatibility of the reviewed subject-matter with the standard of review (as some judgments include different types of dispositions, e.g. those related to extensional unconstitutionality and omissions, the total number of judgments finding the subject-matter of review incompatible with the standard is higher than the total number of judgments in the pie chart).

Types of judgments declaring the subject-matter of the review incompatible with a standard of review (irregular formations)



2.3. Substantive analysis of judgments delivered by formations of the Constitutional Court comprising unlawfully elected persons

As already indicated above, in 2017–2022, the Constitutional Court formations with unlawfully elected persons handed down 85 judgments. A full and in-depth substantive analysis of the judgments would go beyond the confines of this concise report. However, we would like to draw attention to several categories of cases which, in our view, may be relevant for the assessment of the Constitutional Court’s adjudicatory activity during the reported period.

While sitting in irregular formations, the Constitutional Court has more than once considered cases related to the justice reforms introduced by the Government. Among these, one may particularly distinguish the rulings legitimising the reforms introduced and declaring unconstitutional the norms enabling challenges to the status of defectively appointed judges or the reorganised National Council of the Judiciary.

	Judgment	Regulations under review	Disposition
1.	Judgment of 20 June 2017, no. K 5/17	Provisions of the Act on the National Council of the Judiciary ¹⁰ (“NCJ”) applicable to the election of judges-members of the NCJ by the judicial community	A finding of unconstitutionality
2.	Judgment of 24 October 2017, case no. K 1/17	Provisions of three new laws on the functioning of the Constitutional Court ¹¹	Constitutionality affirmed
3.	Judgment of 24 October 2017, case no. K 3/17	Provisions of the Act on the Supreme Court ¹² and the Rules of Procedure of the Supreme Court ¹³ applicable to the procedure of selecting candidates for the position of the President of the Supreme Court	A finding of unconstitutionality
4.	Judgment of 25 March 2019, case no. K 12/18	Provisions of a law amending the Act on the National Council of the Judiciary ¹⁴ that introduced new rules for the election of judges-members of the National Council of the Judiciary and govern the procedure for appealing against resolutions of the National Council of the Judiciary	Election of judges-members of the NCJ by the Sejm was found to be in conformity with the Constitution; the Supreme Administrative Court’s competence to review the lawfulness of resolutions of the NCJ regarding Supreme Court judicial appointments was found to be unconstitutional

¹⁰ Article 11 (3) and (4) of the Act read in conjunction with Article 13 (1) and (2), Article 11 (2) and in conjunction with Articles 12 (1) and 13 (3) (Journal of Laws 2016 items 976 and 2261).

¹¹ Article 13 (1) (2), Article 13 (2) (1), Article 13 (3), Article 18 (2), Article 21 (2) and Article 19 of the Act of 13 December 2016 – Provisions introducing the Act on the Organisation and Rules of Procedure of the Constitutional Court and the Act on the Status of Judges of the Constitutional Court (Journal of Laws item 2074); Article 26 (2) of the Act of 30 November 2016 on the Status of Judges of the Constitutional Court (Journal of Laws item 2073).

¹² Article 16 § 1 (1) and (3) of the Act of 23 November 2002 on the Supreme Court (Journal of Laws of 2016 items 1254, 2103 and 2261 and of 2017, items 38 and 1452).

¹³ Resolution of the General Assembly of the Judges of the Supreme Court of 14 April 2003 on the rules of procedure for the election of candidates for the position of the President of the Supreme Court.

¹⁴ Article 9a and Article 44 (1a) of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts, Journal of Laws of 2018, item 3.

5.	Judgment of 4 March 2020, case no. P 22/19.	Provisions of the Code of Criminal Procedure ¹⁵ insofar as they allow the examination of a request for the exclusion of a judge on account of their defective appointment by the President on the application of the reorganised NCJ	A finding of unconstitutionality
6.	Judgment of 20 April 2020, case no. U 2/20	Resolution of three chambers of the Supreme Court of 23.01.2020 (case no. BSA I-4110-1/20) on the legal effects of the participation of defectively appointed judges in judicial formations	A finding of unconstitutionality
7.	Judgment of 14 July 2021, case no. P 7/20	The provisions of the Treaty on the European Union read in conjunction with the Treaty on the Functioning of the European Union ¹⁶ insofar as they enable the CJEU to apply ultra vires the interim measures concerning the judiciary	A finding of unconstitutionality
8.	Judgment of 7 October 2021, case no. K 3/21	Provisions of the Treaty on the European Union ¹⁷ insofar as they e.g. enable courts to examine the legality of judicial appointments	A finding of unconstitutionality
9.	Judgment of 23 February 2022 case no. P 10/19	Provisions of the Code of Civil Procedure ¹⁸ , insofar as they provide grounds for the disqualification of a defectively appointed judge and for an assessment of the lawfulness of a judicial appointment, and the provisions of the Act on the Supreme Court ¹⁹ insofar as the fact that a judge was appointed in a competitive process initiated by a non-countersigned President's announcement may be regarded as a premise for the disqualification of the judge, and insofar as they may provide a basis for the Supreme Court to rule on the status of a judge	A finding of unconstitutionality
10.	Judgment of 10 March 2022, case no. K 7/21.	Article 6 (1) ECHR ²⁰ in the context of its interpretation adopted in the ECtHR judgments Reczkowicz and, subsequently, Broda and Bojara	A finding of unconstitutionality

15 Article 41 § 1 read in conjunction with Article 42 § 1 of the Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws of 2020, item 30).

16 Article 4 (3), second sentence, of the Treaty on European Union (Journal of Laws 2004, No. 90, item 864/30, as amended) read in conjunction with Article 279 of the Treaty on the Functioning of the European Union (Journal of Laws of 2004, no. 90, item 864/2, as amended).

17 Article 1, first and second paragraphs, read in conjunction with Article 4 (3), Article 19 (1), second paragraph and Article 2 of the Treaty on European Union.

18 Article 49 § 1 of the Act of 17 November 1964 Code of Civil Procedure (Journal of Laws of 2021, item 1805, as amended).

19 Article 31 (1) and Article 1 read in conjunction with Article 82 (1) and Article 86, Article 87 and Article 88 of the Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2021, item 1904).

20 Convention for the Protection of Human Rights and Fundamental Freedoms at Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, p. No. 61, item 284, as amended).

There has been much controversy over certain rulings of the Constitutional Court relating to the protection of human rights and the Ombudsman's term of office.

	Judgment	Regulations under review	Disposition
1.	Judgment of 16 March 2017, case no. Kp 1/17	An act amending the Assemblies Act²¹ introducing the concept of "recurrent assembly"	Constitutionality affirmed
2.	Judgment of 22 October 2020, case no. K 1/20	The provisions of the Act on family planning, protection of the human foetus and conditions permitting termination of pregnancy²² insofar as they concern the so-called "embryopathological ground" for a lawful abortion	A finding of unconstitutionality
3.	Judgment of 26 June 2019, case no. K 16/17	A provision of the Code of Administrative Offences²³ introducing a punitive sanction for the unreasonable refusal to provide a service	A finding of unconstitutionality
4.	Judgment of 15 April 2021, case no. K 20/20	Provision of the Act on the Ombudsman²⁴ insofar as it allowed the Ombudsman to perform their role after the expiry of the term of office until the election of the new Ombudsman	A finding of unconstitutionality (the challenged provision was set to lose its effect after three months)
5.	Judgment of 16 June 2021, case no. P 10/20	Certain provisions of a law reducing the retirement pensions of individuals recognised as officers in the service of the totalitarian state²⁵	Constitutionality affirmed

That said, the Constitutional Court also issued many decisions that caused no major controversy. The table below presents 14 examples of such judgments on issues relevant to the protection of individual rights and freedoms.

	Judgment	Regulations under review	Disposition
1.	Judgment of 20 April 2017, case no. K 10/15	The provisions of the laws on the national²⁶ and local²⁷ referendum insofar as they excluded the possibility of reopening proceedings in cases concerning the referendum campaign	A finding of unconstitutionality
2.	Judgment of 14 December 2017, case no. K 17/14	Several pieces of parliamentary and executive legislation governing searches of persons, the conduct of body searches and searches of vehicles by public officers	A finding of unconstitutionality (the challenged acts and regulations were set to lose their effect after 18 and 12 months, respectively)

21 Act of 13 December 2016 amending the Act - Law on Assemblies, Journal of Laws of 2017, item 579 ("Assemblies Act").

22 Article 4a (1) (2) of the Act of 7 January 1993 on family planning, protection of the human foetus and conditions permitting termination of pregnancy (Journal of Laws No 17, item 78, 1995 No 66, item 334, of 1996 No. 139, item 646, of 1997. No. 141, item 943 and No. 157, item 1040, of 1999. No 5, item 32 and of 2001 No. 154, item 1792).

23 Article 138 of the Act of 20 May 1971 - Code of Administrative Offences (Journal of Laws of 2019, item 821).

24 Article 3 (6) of the Act of 15 July 1987 on the Ombudsman (Journal of Laws of 2020, item 627).

25 Article 22a (2) of the Act of 18 February 1994 on pension allowances for the officers of the Police, Internal Security Agency, Foreign Intelligence Agency, Military Counter-intelligence Service, Military Intelligence Service, Central Anti-corruption Bureau, the Border Guard, the Parliamentary Guard, State Protection Service, State Fire Service, the Customs and Tax Service and the Prison Service and their families (Journal of Laws of 2020, item 723).

26 Article 44 (3), second sentence, of the Act of 14 March 2003 on the national referendum (Journal of Laws of 2015, item 318).

27 Article 35 (3), third sentence, of the Act of 15 September 2000 on the local referendum (Journal of Laws of 2016, item 400).

3.	Judgment of 14 December 2017, case no. K 36/15	A provision of the Act on vehicle operators ²⁸ insofar as it required a person to pay a fee for the replacement of the driving license in a situation where the need for the replacement resulted from actions of a local authority	A finding of unconstitutionality
4.	Judgment of 23 May 2018, case no. SK 8/14	A provision of the Act on the protection of classified information ²⁹ insofar as it provided for the service on the applicant of a copy of the judgment, issued by an administrative court, on the security clearance regarding access to classified information without these sections of the statements of grounds that does not have to be redacted to protect classified information	A finding of unconstitutionality
5.	Judgment of 11 December 2018, case no. P 133/15	A provision of the Labor Code ³⁰ insofar as it did not confer on a worker covered by pre-retirement protective arrangements and employed for a fixed term, the right to request that the court declare the termination of the contract of employment to be ineffective and, in the event of termination, to reinstate the worker on their employment under the original terms of employment	A finding of unconstitutionality
6.	Judgment of 16 January 2019, case no. P 19/17	A provision of the Act on competition and consumer protection ³¹ that failed to provide for the possibility of appealing a court order granting permission to the President of the Office of Competition and Consumer Protection to search a business undertaking's premises and property in cases of competition-restricting practices and in the course of investigative and antitrust proceedings	A finding of unconstitutionality
7..	Judgment of 26 June 2019, case no. SK 2/17	A provision of the Act on family allowances ³² that excluded the right to a nursing allowance if the caregiver of a person with a disability was eligible for a benefit on account of their partial incapacity for work	A finding of unconstitutionality (the challenged provision was set to lose its effect after six months)

28 Article 3 (6) of the Act of 5 January 2011 on vehicle operators (Journal of Laws of 2017, item 978).

29 Article 38 (3) of the Act of 5 August 2010 on the protection of classified information (Journal of Laws of 2018, items 412 and 650).

30 Article 50 §3 of the Act of 26 June 1974 – Labour Code (Journal of Laws of 2018, item 917, as amended).

31 Article 105n (4), second sentence, of the Act of 16 February 2007 on competition and consumer protection (Journal of Laws of 2018, items 798, 1637, 1669 and 2243).

32 Article 17 (5) (1) (a) of the Act of 28 November 2003 on family allowances (Journal of Laws of 2018, items 2220 and 2354 and of 2019, items 60, 303, 577, 730 and 752).

8.	Judgment of 25 September 2019, case no. SK 31/16	A provision of the Act on retirement pensions and disability benefits financed by the Social Insurance Fund ³³ governing the initial date of payment of benefits on account of incapacity for work	A finding of unconstitutionality
9.	Judgment of 26 November 2019, case no. P 9/18	A provision of an act amending the Act on the National Court Register ³⁴ , insofar as it excluded the obligation to serve on a party to proceedings the order to make an entry in the register of debtors and did not provide them with the possibility of appealing against a judicial officer's order concerning the entry	A finding of unconstitutionality
10.	Judgment of 10 June 2020, case no. K 3/19	A provision of an act amending the Act on housing cooperatives ³⁵ that stipulated that all members of a housing cooperative who did not have a title to their cooperative premises were to forfeit their cooperative membership by operation of law	A finding of unconstitutionality (the challenged provision was set to lose its effect after 12 months)
11.	Judgment of 24 February 2021, case no. SK 39/19	The provision of the Act on local taxes and charges ³⁶ understood as meaning that a link between land, a building or structure and the conduct of a business activity within the meaning of the provisions on the real property tax may only be determined based on the possession of land, the building or structure by a business undertaking or another entity conducting a business activity	A finding of unconstitutionality
12.	Judgment of 30 June 2021, case no. SK 37/19	A provision of the Act on special rules for the preparation and implementation of public highway investment projects ³⁷ understood as failing to provide for the appropriate application of the provisions of the Act on real estate management governing the return of expropriated properties	A finding of unconstitutionality

33 Article 129 (1) of the Act of 17 December 1998 on pensions and disability benefits financed by the Social Insurance Fund (Journal of Laws of 2018, items 1270 and 2245 and of 2019, items 39, 539, 730 and 752).

34 Article 49 of the Act of 26 January 2018 amending the Act on the National Court Register and certain other acts (Journal of Laws, items 398 and 650 and of 2019, items 55 and 1214).

35 Article 4 of the Act of 20 July 2017 amending the Act on Housing Cooperatives, the Act - Code of Civil Procedure and the Act - Law on Cooperatives (Journal of Laws, item 1596).

36 Article 1a (1) (3) of the Act of 12 January 1991 on local taxes and charges (Journal of Laws of 2019, item 1170).

37 Article 23 of the Act of 10 April 2003 on special rules for the preparation and implementation of public highway investment projects (Journal of Laws of 2020, item 1363 and of 2021, item 784).

13.	Judgment of 20 December 2022, case no. SK 66/21	The provisions of the Act on the keeping of municipalities in a clean and orderly condition ³⁸ envisaging the obligation of the local government body to impose a pre-determined administrative fine which may not be adjusted	A finding of unconstitutionality
14.	Judgment of 20 December 2022, case no. SK 78/21	The provisions of the Regulation of the Minister of Justice on the incurring by the State Treasury of the costs of unpaid legal aid provided by court-appointed lawyers ³⁹ , which differentiated the rates of fees of court-appointed and privately retained defence lawyers	A finding of unconstitutionality

2.4. Constitutional Court's orders issued with the participation of unlawfully elected persons

The HFHR established that, as part of the preliminary review proceedings conducted in 2017–2022, the single-judge formations of the Constitutional Court issued a total of 710 orders refusing or partially refusing to proceed with a constitutional complaint or request submitted by an entity having special standing. Only 75 orders of this type (10.5%) were issued by individuals elected as Constitutional Court's judges to fill already occupied seats.

In the same period, three-judges formations of the Constitutional Court issued 338 orders dealing with interlocutory complaints against the Constitutional Court's orders refusing to proceed with a constitutional complaint or motion submitted by an entity having the limited standing. On 149 occasions, at least one member of the relevant judicial formation was an unlawfully elected person.

In 2017–2022, the Court issued 313 orders discontinuing proceedings. On 172 occasions, the adjudicating formation included an individual elected as a Constitutional Court's judge to fill an already occupied seat.

The HFHR performed no detailed analysis of the reasons for discontinuing the proceedings before the Constitutional Court. Some orders discontinuing the proceedings have been issued in cases where the Constitutional Court was obliged to discontinue the proceedings, e.g. as a result of the withdrawal of the request by the applicant. In several cases of obligatory discontinuance, the immediate reason for the withdrawal of the request was the composition of the judicial formation assigned to examine the case. For example, the Ombudsman referred to such reasons while withdrawing his requests in cases K 7/16 and K 19/16.

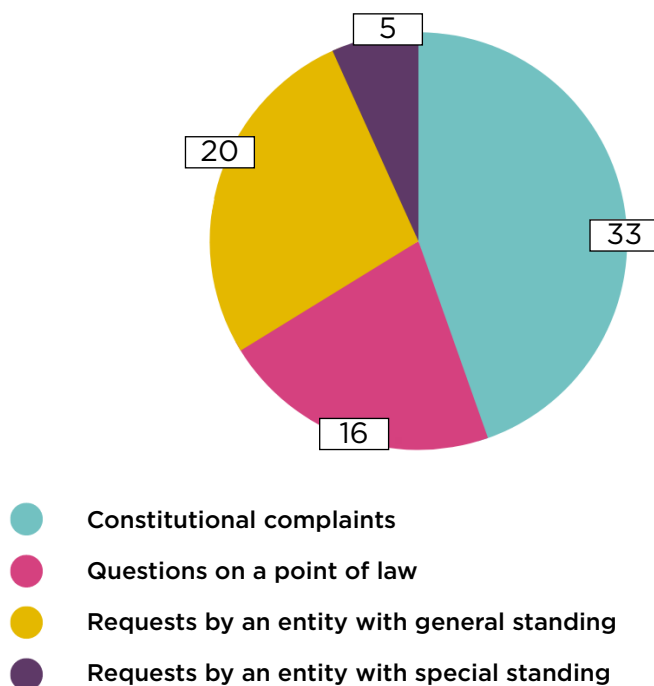
³⁸ Article 9xb (2), Article 9zc (1) and Article 9zf of the Act of 13 September 1996 on the keeping of municipalities in a clean and orderly condition (Journal of Laws of 2022, item 2519).

³⁹ § 17 (1) (2) and § 17 (2) (3) of the Regulation of the Minister of Justice of 3 October 2016 on the incurring by the State Treasury of the costs of unpaid legal aid provided by court-appointed lawyers (Journal of Laws of 2019, item 18, as amended).

2.5. Judgments delivered by formations of the Constitutional Court comprising no unlawfully elected persons, 2017–2022

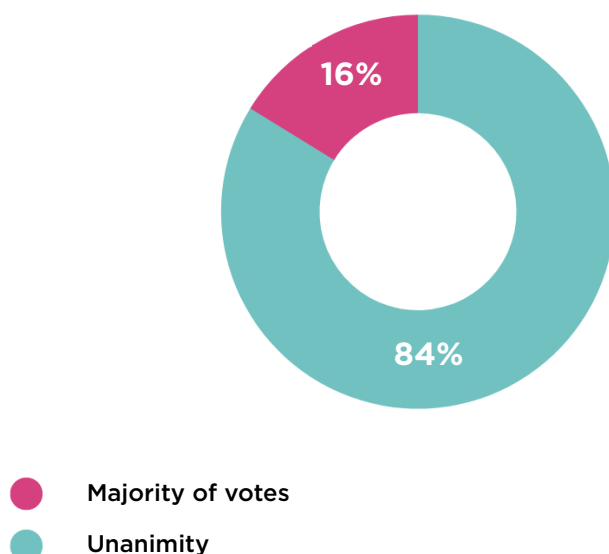
In 2017–2022, 74 judgments of the Constitutional Court were issued by its formations that did not include any unlawfully elected persons. The majority of such rulings were made in proceedings initiated by a constitutional complaint.

Judgments delivered by formations of the Constitutional Court without the participation of unlawfully elected persons: breakdown by the type of procedure



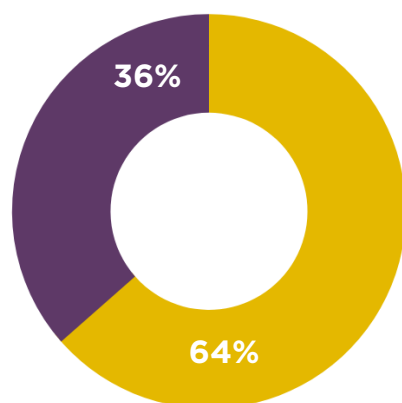
The vast majority of those judgments were unanimous.

Judgments delivered by formations of the Constitutional Court without the participation of unlawfully elected persons: breakdown by the manner of adopting the disposition



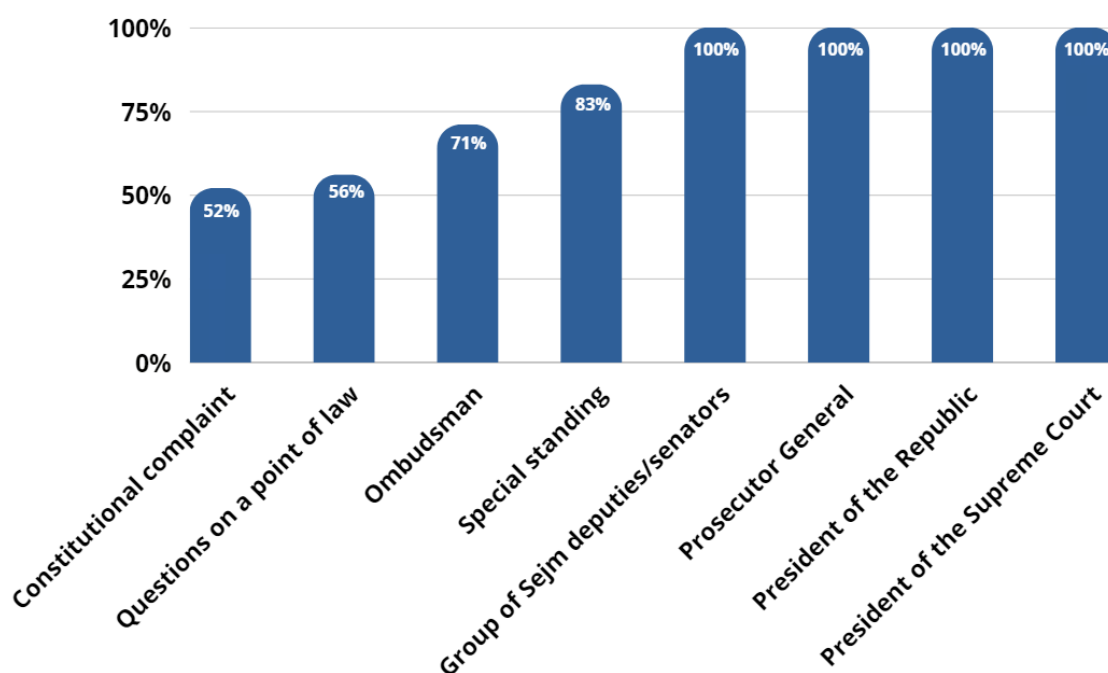
During the period in question, regular formations of the Constitutional Court issued 47 judgments in which at least some of the reviewed subject-matters have been found incompatible with the applicable standard of review and 27 judgments which only confirmed the compatibility of the reviewed subject-matter with the standard of review or the absence of incompatibility of the reviewed subject-matter with the standard of review.

Judgments delivered by formations of the Constitutional Court without the participation of unlawfully elected persons: breakdown by the direction of disposition



- Judgments declaring the reviewed subject-matter incompatible with a standard of review, at least in part
- Judgments declaring the compatibility or the absence of incompatibility of the reviewed subject-matter with a standard of review

Percentage of judgments declaring the reviewed subject-matter incompatible with a standard of review: breakdown by entity initiating the proceedings (regular formations)



The HFHR has not engaged in a substantive analysis of the cases decided by the formations of the Constitutional Court that included no unlawfully elected persons that would be as detailed as that performed in respect of rulings delivered in irregular formations. However, some of the judgments handed down in such formations notably dealt with issues very similar to those addressed in judgments handed down in irregular formations. In this context, attention should be drawn, for example, to the judgment of 24 November 2021 (case no. K 6/21) concerning the extensional unconstitutionality of Article 6 (1) ECHR (in relation to the standard invoked by the ECtHR in *Xero Flor*) or the judgment of 2 June 2020 (case no. P 13/19) that declared the unconstitutionality of provisions of the Code of Civil Procedure as regards their applicability to the examination of motions for the disqualification of defectively appointed judges.

3. Possible legislative approaches to the issue of the status of judgments issued by Constitutional Court's formations comprising unlawfully elected persons and the consequences of following such approaches



3.1. Legislative regulation of the legal effects of judgments issued by Constitutional Court's formations comprising unlawfully elected persons – four concepts

In the view of the HFHR, there are four approaches the legislature can choose to address the question of the status of judgments rendered in improper formations of the Constitutional Court.

3.1.1. Declaring the judgments non-existent

The most far-reaching solution would be to declare the non-existence of all judgments handed down by irregular formations of the Constitutional Court. The concept of the non-existence of rulings has been discussed in the literature⁴⁰ as well as in jurisprudence⁴¹, albeit primarily in the context of the rules of civil procedure. The non-existence concept has been analysed in relation to Constitutional Court judgments by, inter alia, Zaradkiewicz. According to this author, “there is no justification for the view that even a defective ruling of the Constitutional Court, being ‘final’ within the meaning of Article 190 (1) of the Constitution, is necessarily valid, universally effective and enforceable”.⁴² Accordingly, a ruling of the Constitutional Court made in proceedings with a serious and irremediable defect can be considered non-existent, regardless of it being correct on the merits. A non-existent ruling cannot be considered an effective disposition of the proceedings or lead to a derogation of norms.⁴³ Although Zaradkiewicz’s analysis pertained to the Constitutional Court’s judgment of 3 December 2015 (case no. K 34/15), which was delivered by a composition comprising only lawfully elected judges, the scholarship has also expressed an opinion that judgments delivered with the participation of defectively elected judges should be deemed non-existent.⁴⁴ However, some experts in constitutional law have argued against the

40 See for example Ł. Błaszczak, *Orzeczenia nieistniejące (sententia non existens) w sądowym postępowaniu cywilnym* in: Ł. Błaszczak (ed.), *Wokół problematyki orzeczeń*, Toruń 2007, pp. 7-29; E. Gapska, *Ewolucja koncepcji orzeczeń prawnie nieistniejących w postępowaniu cywilnym* in: H. Dolecki, K. Flaga-Gieruszyńska (ed.), *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych. Materiały konferencyjne Ogólnopolskiego Zjazdu Katedr Postępowania Cywilnego Szczecin-Niechorze 28-30 września 2007*, Warszawa 2009, pp. 351-364; A. Góra-Błaszczkowska, *Nieistnienie orzeczenia - kilka uwag na temat praktycznych konsekwencji uznania orzeczenia za nieistniejące* in: *Ewolucja polskiego...*, pp. 183-188; K. Markiewicz, “Problem sententia non existens na tle orzecznictwa Sądu Najwyższy”, *Rejent* 2002 (11), pp. 92-117.

41 See, for example, order of the Supreme Court of 17 November 2005, case no. I CK 298/05; order of the Supreme Court of 31 August 2018, case no. I CSK 300/18; order of the Supreme Court of 10 July 2015, case no. III CZP 44/15.

42 K. Zaradkiewicz, *Analiza niektórych aspektów postępowania przed Trybunałem Konstytucyjnym w sprawach K 34/15 oraz K 47/15*, Warszawa 2016, p. 15, <https://s.tvp.pl/repository/attachment/6/f/7/6f75facb88b173db40787cffbae86b7b1464258507745.pdf> (accessed on: 15 March 2023).

43 *Ibid.*, p. 18.

44 See, for example, P. Polak, “Związanie sądu wyrokiem Trybunału Konstytucyjnego wydanym w nieprawidłowo umocowanym składzie (refleksje na tle wyroku Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 20 czerwca 2018 r., sygn. akt V SA/Wa 459/18)”, *Zeszyty Naukowe Sądownictwa Administracyjnego* 2020 (3), pp. 62-85; D. Szumiło-Kulczycka, K. Kozub-Ciembroniewicz, “Konsekwencje uchybień w obsadzie TK (uwagi na tle orzeczenia w sprawie K 1/20)”, *Państwo i Prawo* 2021 (8), pp. 97-98.

possibility of declaring such dispositions to be non-existent.⁴⁵ Irrespective of the assessment of arguments in favour of either concept, it should reasonably be assumed that declaring Constitutional Court judgments non-existent would result in the assumption that they are, and have been, devoid of any legal effect – and the legislature following the non-existence approach would merely be stating this fact. Such a legislative declaration would not even be necessary as the effect of non-existence occurs by operation of law.

3.1.2. Introducing a procedure for the resumption of proceedings before the Constitutional Court

Another approach is to introduce a procedure for the resumption of proceedings before the Constitutional Court. The Constitutional Court has hitherto taken the view that the provisions of the Code of Civil Procedure on the resumption of proceedings are inadmissible in relation to its proceedings⁴⁶, although, according to Ziółkowski, the Court's reasoning in this respect is not entirely convincing⁴⁷. The view on the inadmissibility of the resumption of proceedings before the Constitutional Court was presented, among others, by Mączyński and Podkowiak who argued: "The fact that a ruling is unappealable means that there is no procedure for challenging the ruling that concludes proceedings in a case and results in the case being decided on the merits by way of filing means of appeal against the ruling or demanding that the case be reconsidered and that no such proceeding may be introduced (...) The fact that a ruling is irrebuttable means that it is not legally possible for the Constitutional Court to change it (in particular, by revoking it)"⁴⁸. On the other hand, according to these authors, "[t]he question remains as to the possibility of challenging rulings that terminate proceedings on formal grounds (e.g. orders to discontinue proceedings on the grounds that they are superfluous or inadmissible)"⁴⁹. However, Wiącek supported the admissibility of introducing a procedure for resuming proceedings before the Constitutional Court provided that it would be available only in exceptional cases.⁵⁰ The resumption procedure would be based on the assumption that judgments delivered in irregular formations would remain in force until a new judgment has been delivered by the Court. Further effects would depend on how a case would be disposed of in the resumed proceedings. If the Constitutional Court were to revoke the ruling declaring the reviewed subject-matter compatible with the standard of review and declare the former incompatible, the reviewed subject-matter would lose its legal force. If otherwise, the provision previously declared unconstitutional would be "revived".

45 See P. Radziejewicz, "On Legal Consequences of Judgements of the Polish Constitutional Tribunal Passed by an Irregular Panel", *Review of European and Comparative Law* 2017 (4), pp. 56–59; 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. Konstytucje – sądownictwo – samorząd terytorialny*, Wrocław 2008, p. 299; M. Wiącek, *Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle* in: A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski, M. Schmidt (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions*, Springer 2021, pp. 31–32.

46 See order of the Constitutional Court of 17 July 2003, case no. K 13/02.

47 M. Ziółkowski, *Niedopuszczalność wznowienia postępowania przed Trybunałem Konstytucyjnym* in: *Na straży państwa prawa. Trzydzieści lat orzecznictwa Trybunału Konstytucyjnego*, Warszawa 2016, pp. 479–483.

48 A. Mączyński, J. Podkowiak, *Komentarz do art. 190 Konstytucji RP* in: M. Safjan, L. Bosek (eds.), *Konstytucja RP. Komentarz*, vol. II, Warszawa 2016, p. 1193.

49 *Ibid.*

50 M. Wiącek, *Constitutional Crisis...*, p. 30.


3.1.3. Declaring judgments of the Constitutional Court unlawful

The third possible approach would be to introduce a procedure for the Constitutional Court to declare that judgments handed down in irregularly constituted formations are unlawful. A declaration of the unlawfulness of a judgment issued by an irregular formation of the Constitutional Court would not lead to a reversal of the effects of the judgment, e.g. by reinstating a norm incorrectly declared unconstitutional. However, such a declaration might have a bearing on subsequent judicial actions or proceedings, e.g. as a prerequisite for the formulation of claims for damages. In this respect, the procedure in question would to an extent resemble an action for a declaration of unlawfulness of a final and unappealable judgment under Articles 424¹–424¹² of the Code of Civil Procedure.

3.1.4. Making no attempt to determine the effects of irregular judgments in legislation

The final conceivable approach would be for the legislature to refrain from explicitly defining in legislation the status of the judgments handed down by Constitutional Court's formations comprising unlawfully elected persons. Instead, the legislature would enact laws aimed at reinstating norms unjustly revoked by the judgments delivered by the Constitutional Court's irregular formations or revoking or amending norms that the Constitutional Court, when proceeding in such formations, found not to violate the Constitution. At the same time, entities having the constitutional standing to do so would be able to appeal to the Constitutional Court against newly enacted laws or provisions left in force by the new legislature that had been held by the Constitutional Court to be compatible or not incompatible with the Constitution. In this way, the Constitutional Court could, incidentally, also refer to the relevance of jurisprudence formed at a time when the Court's independence and the lawfulness of its operation were the subject of serious controversy.

In the following sections of the report, we will refer to the consequences of adopting each of the above-mentioned approaches. The starting point and the subject of the most elaborate discussion will be the most far-reaching option, namely the approach that involves declaring Constitutional Court judgments non-existent.



4. The consequence of declaring judgments issued in formations of the Constitutional Court comprising unlawfully elected persons to be non-existent

The HFHR analysed the consequences of declaring that the Constitutional Court's judgments delivered in formations comprising unlawfully elected persons are non-existent. We have made two basic assumptions in this respect.

- If the Constitutional Court's judgments were to be deemed non-existent, this would mean that the proceedings before the Constitutional Court have never ended and are still pending;
- A non-existent judgment declaring the reviewed subject-matter incompatible with the standard of review could not have the effect of setting the norm aside.

Once again, we wish to emphasise that our objective is not to assess here whether or not the claim of the non-existence of Constitutional Court judgments has a theoretical basis. This report is merely intended to discuss the consequences of a finding of the non-existence of judgments issued by judicial formation comprising unlawfully elected persons, subject to the above assumptions.

4.1. The need to decide the cases in which a non-existent judgment was delivered

The basic consequence of declaring Constitutional Court judgments non-existent would be the necessity to decide the cases in which a non-existent judgment had been rendered, since, as already indicated, such cases would need to be considered unfinished. However, in some situations, the only decision that could be made by the Constitutional Court in such a scenario would be an order to discontinue the proceedings. The above conclusion applies to the following categories of cases.

First, the category of rulings issued with the participation of judges elected to fill the already occupied seats includes 13 cases **initiated by a question on a point of law**. Presumably, in all these proceedings, the Constitutional Court's ruling was followed by another ruling given by the court referring the question. In such a situation, the proceedings before the Constitutional Court should be discontinued due to the absence of what is known as the "functional ground", which requires that the resolution of the case pending before the referring court must depend on the Constitutional Court's answer to the question on a point of law.

Second, attention should be drawn to the rulings made in the context of **ex ante review** establishing that a law is compatible/not incompatible with the Constitution. Among the judgments made by formations comprising unlawfully elected persons, we identified only one such judgment (case no. Kp 1/17 concerning recurrent assemblies). Following this judgment, the President signed an amendment to the Assemblies Act. In our view, it would be inadmissible to conduct new ex ante review proceedings before the Constitutional Court concerning a law that has already come into

force. On the other hand, it would be permissible to re-examine a law that the Constitutional Court has declared unconstitutional in ex ante review proceedings. However, the effects of such re-examination could prove problematic (see further below).

More problems arise with regard to provisions losing their legal force, as some of the regulations affected by judgments made with the participation of unlawfully elected persons have already been repealed or substantially modified by the legislature (see further section 2.2.3).

Under the law currently in force, the Constitutional Court cannot examine the constitutionality of provisions that have lost their legal force unless “the issuance of a ruling in proceedings initiated by a constitutional complaint is necessary for the protection of constitutional rights and freedoms”⁵¹. However, let’s not forget that a provision, even if repealed, does not necessarily have to lose its force: it can, for example, be applied to a specific type of case based on intertemporal regulations.⁵² It cannot, therefore, be presumed that the repeal or amendment of a provision occurring between the date of the Constitutional Court’s non-existent judgment and the date of the Constitutional Court’s reconsideration of the case will always result in the necessity to discontinue the proceedings – this issue would have to be examined by the Constitutional Court on a case-by-case basis.

If a judgment of the Constitutional Court that confirms the compliance of the reviewed subject-matter with a standard of review is declared non-existent, this will only result in the case having to be decided by a regularly constituted judicial formation.

Declaring the non-existence of judgments in which the Constitutional Court has ruled that the reviewed subject-matter is incompatible with the standard of review would have even more far-reaching consequences. In these cases, the finding that a judgment of the Constitutional Court is non-existent not only would require the re-examination of the case but also could sometimes lead to the conclusion that the norm declared unconstitutional by the Constitutional Court has never been repealed. For the sake of simplicity, we will refer to such a situation as the “revival of a norm”, although we realise that this wording is not entirely correct, because if a judgment of the Constitutional Court declaring a norm unconstitutional has never existed, the norm is not “revived” for it has been a part of the legal system all along.

4.2. Consequences of declaring the non-existence of injunctive judgments

As already noted, during the reported period, the Constitutional Court’s judicial formations comprising unlawfully elected persons issued **48 judgments declaring the reviewed subject-matter to be incompatible with a standard of review**. These judgements were generally perceived

51 See Article 59 (3) of the Act of 30 November 2016 on the Organisation and Procedure of the Constitutional Court (Journal of Laws of 2019, item 2393).

52 See A. Mączyński, J. Podkowiak, Komentarz do art. 188 Konstytucji RP, in: M. Safjan, L. Bosek (eds.), Konstytucja RP. Komentarz, vol. II, Warszawa 2016, pp. 1138–1139.

as binding by the authorities, hence their issuance led to many different consequences. These consequences depend, first and foremost, on the type of disposition concerned.

4.2.1. Judgments of the Constitutional Court that declare the reviewed subject-matter incompatible with a standard of review but do not lead to the loss of binding force of any legal norms

Let us note at this point that some judgments of the Constitutional Court, even if delivered by regular formations, do not lead to the repeal of norms that have been declared unconstitutional. This is the case, first, with **five judgments declaring a law unconstitutional as part of the ex ante review procedure**. The laws reviewed in these judgments never came into force.⁵³ If such judgments were declared to be non-existent, there will be no normative change; the only thing that would happen is that the case needs to be re-examined in a regular formation. In a situation where the Constitutional Court found the challenged legislation to be constitutional (or not unconstitutional), the President would be obliged to sign it into law. This could, however, lead to some problems if, in the meantime, other legislation on the same topic comes into force.

It is also questionable whether any legal norms have overruled the **four rulings** on the rule of law crisis in Poland, namely the judgments concerning a joint resolution of three chambers of the Supreme Court (U 2/20), Article 6 of the ECHR (C 7/21) and EU treaties (C 3/21, P 7/20).

The resolution of the three chambers of the Supreme Court challenged by the Constitutional Court continues to be treated by the Supreme Court as binding, and its conclusions have also been confirmed in the subsequent case law of the Supreme Court (e.g. in the resolution of a panel of seven judges of the Supreme Court of 2 June 2022, case no. I KZP 2/22). A finding that a judgment of the Constitutional Court does not exist will not change anything in this regard.

Notably, the judgments concerning the ECHR and the EU Treaties have had no effect on the external sphere of Poland's relations with the Council of Europe and the EU. According to Article 27 of the Vienna Convention on the Law of Treaties⁵⁴, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. Accordingly, a mere declaration by the Constitutional Court that certain norms derived from the ECHR or the Treaties are unconstitutional does not absolve Poland from its obligation to comply with those norms. The judgments of the Constitutional Court are also not binding on the ECtHR and the CJEU and do not affect these courts' interpretation of the legislation that forms a basis for their rulings.

⁵³ On the one hand, pursuant to Article 122 (4) of the Constitution, “If, however, the unconstitutionality concerns particular provisions of a law, and the Constitutional Court does not rule that they are inseparably connected with the whole law, the President of the Republic, after consulting the Speaker of the Sejm, shall sign the law leaving out the provisions deemed unconstitutional or returns the law to the Sejm to remove the incompatibility”. Yet, on the other hand, in all the judgments issued by formations with unlawfully elected judges that we examined, the unconstitutionality concerned the whole law or provisions inextricably linked to the whole. Therefore, we do not consider the consequences of declaring the non-existence of a hypothetical Constitutional Court's judgment pronouncing the unconstitutionality of only certain provisions of a law that are not inextricably linked to the law as a whole.

⁵⁴ The Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, Journal of Laws of 1990, No 74, item 439.

Also, the internal impact of the rulings in question is unclear; there, arguably, may even be no impact at all. In effect, declaring these rulings non-existent would not lead to any complications.

Finally, no norms were repealed by **the judgment of 22 July 2020, case no. K 4/19**. In that judgement, the Constitutional Court declared unconstitutional a provision stating that changes to the taxation of wind power plants, which were unfavourable for municipalities, were to take effect retroactively from 1 January 2018, but, under Article 190 (3) of the Constitution, postponed the expiry of the provision by 18 months.⁵⁵ At the same time, the Constitutional Court indicated in the statement of grounds that “it would not be until the legislature fails to execute the judgment of the Constitutional Court and the unconstitutional regulation is repealed by virtue of this ruling that the condition of Article 190 (4) of the Constitution would be fulfilled and the State Treasury’s liability for damages would arise”. To implement the judgment of the Constitutional Court, the Sejm enacted the Act of 17 November 2021 on the compensation of revenue lost by municipalities in 2018 in connection with the change in the scope of taxation of wind power plants (Journal of Laws 2022, item 30). The act entered into force on 5 February 2022, i.e. precisely 18 months after the Constitutional Court’s judgment was published in the Journal of Laws. Hence, there has been no repeal of the norms declared unconstitutional by the Constitutional Court, nor has there been any realisation of the other effects associated with the Constitutional Court’s finding of unconstitutionality. Also in this situation, declaring the Constitutional Court’s judgement non-existent would, arguably, change nothing.

4.2.2. The problem of judgments declaring a legislative omission

The finding of the non-existence of judgments declaring unconstitutional legislative omissions may prove more complicated. In the reporting period, the Constitutional Court’s formations comprising unlawfully elected persons issued four judgments declaring omission and two judgments declaring both legislative omission and extensional unconstitutionality. These judgments are discussed in the table below:

	Judgment	Regulations under review	Disposition	Follow-up legislative action
1.	Judgment of 23 February 2017, case no. K 2/15	A provision of the Act on the Foreign Service ⁵⁶ to the extent that it omitted reimbursement of tuition fees for children who, due to the special conditions of the host country, were not able to attend a free public kindergarten, a kindergarten class at a public primary school or to use another form of pre-school education for the purpose of compulsory annual pre-school preparation	A finding of unconstitutionality	A new Act on the Foreign Service was adopted ⁵⁷ (effective as of 16 June 2021), which contains provisions on the reimbursement of fees for pre-school education

55 Article 17 (2) of the Act of 7 June 2018 amending the Act on renewable energy sources and certain other acts (Journal of Laws, item 1276).

56 Article 29 (4) (4) of the Act of 27 July 2001 on Foreign Service (Journal of Laws of 2017, item 161).

57 Act of 21 January 2021 on the Foreign Service (Journal of Laws of 2023, item 406).

2.	Judgment of 14 December 2017, case no. K 17/14	Provisions of 10+ pieces of parliamentary and executive legislation governing body searches, searches of a person, premises and vehicles, and the lack of a mechanism for judicial review of such steps	A finding of unconstitutionality (the challenged acts and regulations were set to lose their effect after 18 and 12 months, respectively)	New provisions were adopted to govern the issues reviewed by the Constitutional Court
3.	Judgment of 11 December 2018, case no. P 133/15	A provision of the Labor Code insofar as it did not confer on a worker covered by pre-retirement protection under Article 39 of that Act, to whom the fixed-term employment contract was terminated in breach of the provisions on termination of such contract, the right to request that the court declare the termination of that contract to be ineffective and, in the event of termination, to reinstate the worker on their employment under the previous terms of employment	A finding of unconstitutionality	None
4.	Judgment of 11 March 2021, case no. SK 9/18	A provision of the Code of Execution of Criminal Sentences ⁵⁸ insofar as it did not specify the duration of the forced treatment or forced rehabilitation of a convicted person who was found to be dependent on alcohol and insofar as it did not provide for an appeal against the compulsory treatment or compulsory rehabilitation order	A finding of unconstitutionality	A law ⁵⁹ was enacted that amended the provision reviewed by the Constitutional Court (effective as of 1 January 2023)
5.	Judgment of 27 April 2022, case no. SK 53/20	Provisions of the Code of Criminal Procedure ⁶⁰ insofar as they did not provide for the possibility of lodging an interlocutory appeal against an ordinance of the president of the court which states no conflict of interest between several suspects represented by the same defence lawyer	A finding of unconstitutionality	None
6.	Judgment of 7 June 2022, case no. SK 68/19	Provisions of the Law on the Advocate Profession ⁶¹ insofar as they did not give persons performing the duties of assistant counsel to the State Treasury Solicitors' Office the right to enter the list of advocates, by way of recognition of their academic title and experience	A finding of unconstitutionality	None

58 Article 117 of the Act of 6 June 1997 – Code of Execution of Criminal Sentences (Journal of Laws of 2021, item 53).

59 Act of 5 August 2022 amending the Act – Code of Execution of Criminal Sentences (Journal of Laws of 2022, item 1855).

60 Article 85 § 2 of the Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws of 2021, item 534) read in conjunction with Article 85 § 3 of the same Act.

61 Article 66 (1) (5) (b) of the Law of 26 May 1982 – Law on the Advocate Profession (Journal of Laws of 2022, item 1184).

The prevailing view expressed in scholarly writings⁶² and judgments of the Constitutional Court⁶³ is that judgments declaring a legislative omission do not have the repealing effect⁶⁴; they merely oblige the legislature to eliminate the gaps in the reviewed provision identified by the Court. However, there is a position in jurisprudence that the loss of the presumption of constitutionality of the norm in question should be taken into account even before such judgments are implemented by the legislature.⁶⁵

Moreover, the Constitutional Court on its own occasionally draws attention to the need for the courts to consider the fact that a provision is unconstitutional because of an omission occurring therein. This happened, for example, in the judgment in case P 133/15 (designated as item 3 in the table), in whose statement of grounds the Constitutional Court stated that “[b]y the time a law implementing the Court’s judgment enters into force, it is incumbent on the bodies applying the law, including in particular the courts, to adopt such a method of interpreting the provisions of the Labour Code as to ensure a constitutionally effective means of judicial protection for employees covered by special protection related to the permanence of their employment relationship and working and pay conditions. The legislative solution, which deprived some of the employees belonging to this category of the right to claim reinstatement on the ground that they were employed under a fixed-term employment contract, has lost its presumption of constitutionality upon the pronouncement of the Court’s judgment”.

A finding of the non-existence of judgments declaring a legislative omission would not, of course, deprive the courts of the capacity to give a pro-constitutional interpretation of legislation, but it may weaken the arguments for adopting such an interpretation. Further research of jurisprudence would be required to determine exactly how the discussed judgments finding legislative omission, which were delivered by irregular formations of the Constitutional Court, affect (or have affected up to the point of their execution) the practical application of the legislation. However, such an investigation falls beyond the scope of this report.

62 See, for example, M. Florczak-Wątor, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne*, Poznań 2006, p. 135; A. Kustra, *Wznowienie postępowania w następstwie stwierdzenia niekonstytucyjności pominięcia prawodawczego* in: M. Bernatt, J. Królikowski, M. Ziółkowski (eds.), *Skutki wyroków Trybunału Konstytucyjnego w sferze stosowania prawa*, Warszawa 2013, p. 211; A. Mączyński, J. Podkowik, *Komentarz do art. 190...*, p. 1213.

63 See, for example, judgment of the Constitutional Tribunal of 16 November 2010, case no. K 2/10; judgment of the Constitutional Tribunal of 27 June 2013, case no. K 36/12.

64 See, differently, J. Podkowik, “Charakter i skutki prawne wyroków stwierdzających niekonstytucyjność pominięcia prawodawczego”, *Zeszyty Naukowe Sądownictwa Administracyjnego* 2017 (2), p. 35.

65 See, for example, judgment of the Supreme Administrative Court of 2 June 2017, case no. I OSK 108/17; judgment of the Supreme Administrative Court of 20 February 2019, case no. II OSK 694/17; judgment of the Supreme Court of 7 May 2009, case no. III UK 96/08.

Furthermore, it should be noted that scholarly writings⁶⁶ and, at least some, constitutional decisions⁶⁷ allow for the reopening of proceedings resulting from judgments of the Constitutional Court declaring a legislative omission. The Constitutional Court drew attention to this circumstance in its judgment SK 68/19 (No. 6), holding that it had the official knowledge of “the position expressed by some of the judicial formations of administrative courts, according to which – as a result of a judgment of the Court stating the unconstitutionality of a legislative omission – the examined provision gains normative content which it did not have before, and thus such a judgment of the Constitutional Court constitutes grounds for the resumption of judicial proceedings before administrative courts”. Declaring the judgments non-existent would make it impossible to resume proceedings based on such judgments.

4.2.3. The problem of simple and extensional judgments confirming the non-compliance of the reviewed subject-matter with a standard of review

There would be even more problems in establishing the non-existence of simple and “classic” extensional judgments finding the reviewed subject-matter incompatible with a standard of review.

Leaving aside the rulings mentioned above, as well as specific “interpretation judgments”, which will be addressed below, the Constitutional Court issued a total of **30 judgments** declaring the unconstitutionality of norms whose repealing effect has generally been recognised by state authorities. If one were to accept that these rulings were non-existent, the argument could arguably be made that they did not in fact lead to the repeal of the norms deemed to be unconstitutional.

a) Judgments declaring the reviewed subject-matter incompatible with a standard, followed by a legislative amendment to the provisions concerned:

We have found that in **16 cases** the provisions reviewed by the Constitutional Court had since been amended or repealed. Apparently, in such a situation, it would have to be assumed that since these provisions (either as editorial subdivisions or the legal norms derived therefrom) could not be effectively repealed by a non-existent judgment of the Constitutional Court, they would remain in force until the entry into force of the repealing or amending laws.

Making this assumption, however, leads to further uncertainties. Indeed, the question arises as to how the fact that the provisions addressed by the non-existent Constitutional Court judgment remain in force impacts (1) the validity of judgments and decisions issued by bodies applying legal norms formed in view of the non-existent Constitutional Court ruling; (2) the judicial and administrative disposition of pending cases, the facts of which relate to events prior to the

⁶⁶ See, for example, A. Mączyński, J. Podkowiak, Komentarz do art. 190..., pp. 1218-1219; J. Podkowiak, Charakter i skutki..., p. 41; A. Kustra, Wznowienie postępowania..., pp. 205-221; M. Ziółkowski, “Głosa do postanowienia z 29 IV 2010, IV CO 37/09”, Państwo i Prawo 2011 (11), p. 129-132. Differently, M. Florczak-Wątor, Orzeczenia Trybunału..., p. 204.

⁶⁷ See, for example, judgment of the Supreme Court of 27 April 2016, case no. IV KO 9/16; judgment of the Supreme Court of 10 March 2009, case no. II OPS 2/09.

entry into force of an amendment passed by the Sejm. Let us address these concerns by briefly outlining the 16 cases involving legislation amended or repealed in the wake of the judgment of the Constitutional Court.

	Judgment	Regulations under review	Disposition	Follow-up legislative action
1.	Judgment of 20 April 2017, case no. K 10/15	The provisions of the laws on the national and local referendum insofar as they excluded the possibility of reopening proceedings in cases concerning the referendum campaign	A finding of unconstitutionality	A law was enacted ⁶⁸ that amended both laws (it became effective on 1 September 2018). The new legislation refers only to the exclusion of the possibility of lodging cassation appeals (instead of any legal remedies)
2.	Judgment of 20 June 2017, case no. K 5/17	Provisions of the Act on the National Council of the Judiciary applicable to the election of judges-members of the NCJ by the judicial community	A finding of unconstitutionality	The Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (effective as from 17 January 2018) introduced new rules for the election of the members of the NCJ
3.	Judgment of 28 June 2017, case no. P 63/14	A provision of the Act on court bailiffs and enforcement ⁶⁹ insofar as it provided for the collection of a proportional fee of 15% of the value of the enforced performance (but not less than 1/10 and not more than 30 times the average monthly wage) from the amounts paid by the debtor directly to the bailiff	A finding of unconstitutionality	The Act of 22 March 2018 on court bailiffs ⁷⁰ (effective as from 1 January 2019), repealed the 1997 Act on court bailiffs and enforcement in its entirety, bailiff fees are currently regulated in the Act of 28 February 2018 on the costs of court bailiffs' proceedings ⁷¹
4.	Judgment of 24 October 2017, case no. K 3/17	Provisions of the Act on the Supreme Court and the Rules of Procedure of the Supreme Court applicable to the procedure of selecting candidates for the position of the President of the Supreme Court	A finding of unconstitutionality	The Act of 18 December 2017 on the Supreme Court ⁷² entered into force on 3 April 2018. The Rules of Procedure of the Supreme Court are currently laid down by the President in a regulation
5.	Judgment of 14 December 2017, case no. K 17/14	Provisions of 10+ pieces of parliamentary and executive legislation governing body searches, searches of a person, premises and vehicles, and the lack of a mechanism for judicial review of such steps	A finding of unconstitutionality (the challenged acts and regulations were set to lose their effect after 18 and 12 months, respectively)	New provisions were adopted to govern the issues reviewed by the Constitutional Court

68 Act of 20 July 2018 amending the Act on the local referendum and the Act on the national referendum (Journal of Laws, item 1579).

69 Article 49 (1), first sentence, of the Act of 29 August 1997 on bailiffs and enforcement (Journal of Laws of 2016, items 1138 and 2261 and of 2017, item 85).

70 Act of 22 March 2018 on court bailiffs (Journal of Laws, item 771).

71 Act of 28 February 2018 on the costs of court bailiffs' proceedings (Journal of Laws, item 770).

72 The Act of 18 December 2017 on the Supreme Court (Journal of Laws of 2018, item 5).

6.	Judgment of 14 December 2017, case no. K 36/15	A provision of the Act on vehicle operators insofar as it required a person to pay a fee for the replacement of the driving license in a situation where the need for the replacement resulted from actions of a local authority	A finding of unconstitutionality	On 25 February 2019, the Minister of Infrastructure issued a regulation ⁷³ according to which there newly issued driving licences no longer include the holder's residence address, and previously issued driving licences „shall not be exchanged in the event of a change in the document holder's residence address”
7.	Judgment of 28 June 2018, case no. SK 4/17	A provision of the Regulation of the Minister of Justice of 24 April 2013 ⁷⁴ on the determination of the rates of experts' fees, flat-rate tariffs and the manner of documenting the expenses necessary for issuing an expert opinion in criminal proceedings and the passage “... the function of a court expert for not less than one term and/or...” contained in § 4 of that regulation”	A finding of unconstitutionality (the challenged provision was set to lose its effect after six months)	The Regulation of the Minister of Justice of 14 February 2019 ⁷⁵ (entered into force on 23 February 2019) amended the wording of the 2013 Regulation to implement the judgment of the Constitutional Court
8.	Judgment of 6 December 2018, case no. SK 19/16	A provision of the Act on industrial property ⁷⁶ providing for interim relief in cases involving infringement of patents, protective rights, etc. that involve compelling a third party to provide information	A finding of unconstitutionality	On 1 July 2020, a law ⁷⁷ entered into force giving a different wording to the provision reviewed by the Constitutional Court. At present, it stipulates that an interim relief involves “a request to provide information”
9.	Judgment of 5 March 2019, case no. K 12/18	A provision of the Act on the National Council of the Judiciary granting the Supreme Administrative Court the authority to consider appeals against resolutions of the NCJ regarding proposals for an appointment to a judicial post at the Supreme Court	A finding of unconstitutionality	The Act of 26 April 2019 ⁷⁸ (effective as from 23 May 2019) introduced a provision stating explicitly that “There shall be no right to appeal in individual cases concerning the appointment to a judicial post at the Supreme Court”

73 Regulation of the Minister of Infrastructure of 25 February 2019 amending the regulation on templates for documents confirming entitlements to operate vehicles (Journal of Laws of 2019, item 406).

74 § 2 of the Regulation of the Minister of Justice of 24 April 2013 on the determination of the rates of experts' fees, flat-rate tariffs and the manner of documenting the expenses necessary for issuing an expert opinion in criminal proceedings (Journal of Laws of 2017, item 2049).

75 Regulation of the Minister of Justice of 14 February 2019 amending the regulation on the determination of the rates of experts' fees, flat-rate tariffs and the manner of documenting the expenses necessary for issuing an expert opinion in criminal proceedings (Journal of Laws, item 347).

76 Article 286 (1) (3) of the Act of 30 June 2000 – Law on industrial property (Journal of Laws of 2017, item 776).

77 Act of 13 February 2020 amending the Act – Code of Civil Procedure and certain other acts (Journal of Laws, item 288).

78 Act of 26 April 2019 amending the Act on the National Council of the Judiciary and the Act – Law on the system of administrative courts (Journal of Laws, item 914).

10.	Judgment of 8 May 2019, case no. K 45/16	A provision of the Act on hunting ⁷⁹ , insofar as it provided that the leaseholder or manager of a hunting district was exempted, as a consequence of the refusal to consent to the construction of facilities or performance of damage-prevention measures, from liability for damage caused by hunting that is not causally connected to such refusal of consent	A finding of unconstitutionality	The Act of 14 October 2021 ⁸⁰ (effective as of 8 December 2021) amended Article 48 (3), eliminating shortcomings identified by the Constitutional Court
11.	Judgment of 30 October 2019, case no. P 1/18	A provision of the Code of Administrative Procedure ⁸¹ in its wording in force until 2 July 2019, insofar as it differentiated the legal effects of sending a pleading depending on the location of a postal operator within the European Union by providing that the time limit for the performance of a procedural step may only be complied with if a pleading is posted at a Polish post office of the designated postal operator	A finding of unconstitutionality	The provision had been amended even before the Constitutional Court's judgment was made public. According to a law ⁸² that came into force on 2 July 2019, the time limit was met not only if a pleading was posted at a Polish post office of a designated operator, but also if it was posted at a postal service provider in a country of the EU, EFTA or in Switzerland. The Act of 18 November 2020 on the electronic service of process (effective as from 5 October 2021) introduced further amendments. The provision, as it stands now, stipulates that the time limit is deemed to have been met if the pleading has been "sent to the electronic delivery address of public administration body and the sender has received the proof of receipt referred to in Article 41 of the Act of 18 November 2020 on the electronic service of process".

79 Article 29 (1) and Article 48 (3) of the Act of 13 October 1995 – Law on hunting (Journal of Laws of 2018, item 2033 and of 2019, items 125 and 730).

80 Act of 14 October 2021 amending the Act – Law on hunting (Journal of Laws, item 2112).

81 Article 57 (5) (2) of the Act of 14 June 1960 – Code of Administrative Procedure (Journal of Laws of 2018, item 2096 and of 2019, items 60, 730 and 1133).

82 Act of 16 May 2019 amending the Act – Code of Administrative Procedure (Journal of Laws, item 1133).

12.	Judgment of 20 November 2019, case no. K 4/17	The provisions of the Act on therapeutic activities and its amendments ⁸³ , insofar as they obliged the local government unit that is the founder of an independent public healthcare establishment to cover the net loss constituting the economic effect of the introduction of universally binding provisions that have obligatory financial consequences for the operation of the independent public healthcare establishment	A finding of unconstitutionality (the challenged provision was set to lose its effect after 18 months)	On 14 October 2021, a law ⁸⁴ entered into force to implement the judgment of the Constitutional Court, it amended the wording of the provision declared unconstitutional by the Constitutional Court
13.	Judgment of 26 November 2019, case no. P 9/18	A provision of the Act amending the Act on the National Court Register and certain other acts insofar as, in matters concerning entries referred to in Article 55 (4) and (5) of the Act of 20 August 1997 on the National Court Register, it excluded the obligation of a court to serve on a party to the registration proceedings the order to make an entry in the register of insolvent debtors together with a statement of grounds, and it also deprived the party to the registration proceedings of the right to lodge an appeal against the judicial officer ordering to make the entry	A finding of unconstitutionality	Pursuant to the Act of 26 January 2018 ⁸⁵ , the aforementioned Article 55 of the Act on the National Court Register was repealed as of 1 December 2021
14.	Judgment of 2 December 2020, case no. SK 9/17	A provision of the Act on judicial costs in civil matters ⁸⁶ specifying the amount of the fixed fee payable on account of the filing of an appeal against a decision of the National Appeals Chamber	A finding of unconstitutionality	The Act of 11 September 2019 ⁸⁷ (effective s from 1 January 2021) amended the provision declared unconstitutional by reducing the amount of the fee in question
15.	Judgment of 11 March 2021, case no. SK 9/18	A provision of the Code of Execution of Criminal Sentences insofar as it obliged the court to order treatment or rehabilitation of a convicted person who was found to be alcohol-dependent	A finding of unconstitutionality	The Act of 5 August 2022 amending the Act - Code of Execution of Criminal Sentences and certain other acts (effective as from 1 January 2023) amended the provision reviewed by the Constitutional Court

83 Article 59 (2) of the Act of 15 April 2011 on therapeutic activities (Journal of Laws of 2018, items 2190 and 2219 and of 2019, items 492, 730 and 959) read in conjunction with Article 55 (1) (6) and Article 61 of that act and with Article 38 (1) of the Act of 10 June 2016 amending the Act on therapeutic activities and certain other acts (Journal of Laws, item 960).

84 Act of 11 August 2021 amending the Act on publicly financed health services and certain other acts (Journal of Laws, item 1773).

85 Act of 26 January 2018 amending the Act on the National Court Register and certain other acts (Journal of Laws, item 398).

86 Article 34 (1) of the Act of 28 July 2005 on judicial costs in civil matters (Journal of Laws of 2020, items 755, 807 and 956).

87 Act of 11 September 2019 - Provisions implementing the Act - Law on public procurement (Journal of Laws, item 2020).

16.	Judgment of 20 December 2022, case no. SK 66/21	The provisions of the Act of 13 September 1996 on the keeping of municipalities in a clean and orderly condition that specify the amount of administrative fines	A finding of unconstitutionality	The provisions were amended by the Act of 7 July 2022 ⁸⁸ - currently, they refer to the provisions of the Code of Administrative Procedure governing the imposition of fines
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The table above shows that the discussed category of Constitutional Court judgments impacted a substantial variety of provisions. Declaring each of them non-existent may therefore lead to different results.

At the outset, we would like to note **two judgments** the recognition of which as non-existent would, quite obviously, bring no negative consequences on the respect of the rights of individuals and will not jeopardise legal certainty.

The first one is judgment **K 5/17** concerning the procedure for the election of judicial members of the National Council of the Judiciary and the uniform nature of their terms of office (item 2 in the table above). Leaving aside the fact that this judgment is highly controversial and has had detrimental consequences for the respect of the independence of the judiciary, simply stating that it does not exist would not change anything. The former provisions would not be reinstated as they were repealed by an amendment adopted in December 2017. The present NCJ operates under the new legislation. Moreover, and notably, it was not the Constitutional Court judgment itself that shortened the term of office of the independent NCJ – this was done directly by the legislature.

The second “no consequence” ruling is judgment **K 3/17** (item 4 above) relating to the rules for the election of the President of the Supreme Court. It should be pointed out in its context that the new Act on the Supreme Court establishes a different procedure for the selection of candidates for the post of the President of the Supreme Court. A finding that the above judgment does not exist would not bring the old rules back to life.

Similarly, the declaration of the non-existence of judgment **K 12/18**, relating to the Supreme Administrative Court’s review of the NCJ’s resolutions (item 9) should not pose a major threat. However, a finding of non-existence of that Constitutional Court judgment would lead to a contradiction between the two provisions. The amended Article 44 (1), second sentence, of the Act on the NCJ stipulates: “An appeal shall not be allowed in individual cases concerning the appointment to a judicial office at the Supreme Court”, while paragraph 1a, which would no longer be “repealed” if the judgment of the Constitutional Court was to be declared non-existent, stipulates that an appeal to the Supreme Administrative Court is allowed.

88 Act of 7 July 2022 amending the Act - Law on water management and certain other acts (Journal of Laws, item 1549).

It would accordingly be necessary to somehow resolve this conflict – perhaps by applying the *lex posteriori derogat legi priori* rule (the more recent provision would be, in this case, the amended one). However, an even more preferable option would be to refuse to apply the second sentence of Article 44 (1) on the grounds that it is incompatible with the constitutional right to a court.

A similar situation would arise if judgment **SK 4/17** (item 7), concerning the fees of court experts, were to be declared non-existent. The non-existence of the Constitutional Court’s judgment would have led to a situation in which the question of experts’ fees is governed by two conflicting provisions: the unconstitutional § 2, which did not make the amount of the fee dependent on the expert’s workload, and the new § 2a, which introduced the workload criterion. Arguably, the more recent § 2a would need to be considered legally binding.

More problems may arise from the declaration of non-existence of judgments rendered in cases **P 63/14** (item 3), **SK 19/16** (item 8), **P 1/18** (item 11), **P 9/18** (item 13), **SK 9/11** (item 14), **SK 9/18** (item 15) and **SK 66/21** (item 16). What these judgments have in common, in our view, is that they were generally pertinent and aimed at protecting the rights of the individual (although, of course, sometimes a regulation that is unfavourable from the perspective of the rights of one person may be favourable for another - see, for example, judgment SK 19/16). Moreover, they were delivered under the procedure of concrete review.

A declaration of non-existence of these judgments could, in certain circumstances, lead to negative consequences such as the possibility of challenging final judgments issued on the basis of legal norms formed in consideration of these judgments of the Constitutional Court. It is worth noting, however, that the Batory Foundation’s Proposal, which was based on the concept of the non-existence of judgments issued in irregular formations of the Constitutional Court, includes a provision that would address such concerns. Article 7 (4) of the proposal reads as follows: “If, on the basis of a judgement referred to in paragraph 1, delivered in proceedings initiated by a constitutional complaint or a court’s referral of a question on a point of law, proceedings have been resumed or a judgement or an administrative decision has been delivered in an individual case, the effects on the judgements of the Constitutional Court referred to in paragraph 1 shall not be deemed to affect the validity of the judgement in the individual case.

The above provision of the proposal would, for example, prevent any attempts of challenging the validity of decisions and judgments in which administrative authorities or courts recognised the effectiveness of posting a pleading at a post office of a postal operator in an EU country before 1 July 2019 (judgment **P 1/18**, item 11). As it seems, it would also be impossible to question any judicial decisions revoking interim relief orders issued on the basis of the reviewed provision of the Industrial Property Law (judgment **SK 19/16**, item 8).⁸⁹ However, this does not mean that a finding of non-existence of this type of ruling would be entirely problem-free. In

89 It is worth noting, however, that the wording of Article 7 (4) set out in the Batory Foundation’s Proposal refers only to judgments, not orders.

particular, it would arguably be inadmissible to resume proceedings based on the judgments of the Constitutional Court that have been declared non-existent. It could also be more difficult to claim compensation for damage caused by the enactment of a normative act that has been declared unlawful. Such lawsuits can be imagined, for example, in relation to judgment **SK 19/16** (item 8) relating to the infringement of business secrets. Indeed, it appears that as a result of declaring certain judgments non-existent, the prejudication requirement under Article 417¹ § 1 of the Civil Code is nullified.

Finally, it is worth noting that in some cases the restitution of constitutionality following a Constitutional Court judgment may have taken place in proceedings other than renewal proceedings or an action for damages. Such legal concepts as unjust enrichment or declaratory action may be used.⁹⁰ To accurately ascertain the consequences of declaring Constitutional Court judgments non-existent, it would therefore be necessary to establish precisely what proceedings seeking to reverse the effects of the unconstitutional provision have been or are still pending.

Judgments **K 10/15** (item 1), **K 17/14** (item 5), **K 36/15** (item 6), **K 45/16** (item 10) and **K 4/17** (item 12) are even more problematic. In the same way as the rulings mentioned in the preceding paragraphs, these judgments should also be regarded as generally pertinent and beneficial from the perspective of the rights of the individual. Furthermore, as with the previously discussed set of rulings, a declaration of the non-existence of these Constitutional Court judgments would deprive the parties of the possibility of resuming the proceedings. However, unlike the former, these judgments were made under the abstract review procedure, which means that court rulings delivered in proceedings resumed on the basis of these Constitutional Court's judgments or made based on legal norms formed in consideration of these judgments would not be protected by Article 7(4) of the Batory Foundation's Proposal. This is because the provision in question applies only to cases commenced by a constitutional complaint or a referral of a question on a point of law.

It should therefore be considered whether a declaration of the non-existence of rulings of this type could lead to a challenge to the legality of certain court judgments. For example, the non-existence of the Constitutional Court's ruling on the resumption of referendum proceedings (**K 10/15**, item 1), could raise the question of the validity of the referendum proceedings resumed on the basis of the Constitutional Court's judgment. On the other hand, a finding of the non-existence of judgment **K 17/14** (item 5) concerning the rules for conducting body searches could affect the legality of judgments awarding compensation to claimants who suffered damage caused by state authorities taking action against them in reliance on acts declared unconstitutional by the Constitutional Court. Another problematic issue could be the non-existence of the judgment in case **K 45/16** (item 10) concerning the principles of liability for damage caused by hunting. This could affect the lawfulness of judgments issued after the resumption of proceedings before the

⁹⁰ See, for example, J. Podkowik, *Niekonstytucyjność prawa i jej skutki cywilnoprawne*, Warszawa 2019, pp. 335–403.

Constitutional Court and judgments given by the courts in the period between the declaration of unconstitutionality and the entry into force of the new provisions. Indeed, in the latter situation, the ruling was based on a state of law formed in reliance on a non-existent Constitutional Court's ruling. It is worth noting, however, that the aforementioned amendment envisaged the application of the new provisions to proceedings initiated and not concluded before the date of its entry into force, which to a certain extent limits the negative effects that would be associated with declaring a Constitutional Court judgment non-existent. Judgment **K 4/17** (item 12), on the other hand, concerned the protection of the financial autonomy of local government units that involves ensuring that they have adequate resources to carry out their assigned tasks. The Court postponed the loss of force of the provisions by 18 months – they ceased to be effective on 28 May 2021. The amendment implementing the Constitutional Court's judgment entered into force on 14 October 2021, so the period during which the law formed by the Constitutional Court's judgment was in force was relatively short. Nevertheless, it cannot be ruled out that there have been local government units initiating proceedings to seek damages against the State Treasury invoking the unconstitutionality of the legislation or using the unjust enrichment theory.

Such cases would relate to court judgments made in civil proceedings after the Constitutional Court's ruling. If such rulings were to become final and unappealable, the only way to challenge them would be through the filing of extraordinary means of appeal. A cassation appeal could be such a mean (assuming, of course, that it would be at all admissible in a given case). The appellant could argue that the court's reliance on a non-existent Constitutional Court's ruling that declared a legal norm unconstitutional should be considered a violation of substantive law (as the legal norm "shaped" by the non-existent ruling would have been applied) or, if the Constitutional Court's ruling concerned a provision of procedural law, a violation of procedural rules. Eligible entities could also consider filing an extraordinary appeal (*skarga nadzwyczajna*) with the Supreme Court. On the other hand, a declaration of the non-existence of a Constitutional Court judgment would not, arguably, lead to the possibility of resuming civil proceedings concluded on the basis of the law formed in consideration of the non-existent Constitutional Court's judgment. The party requesting the resumption of the proceedings would have to show that as a result of the court's reliance on the non-existent Constitutional Court's judgment, an already existing legal ground has been modified. However, none of them refers directly to such a situation.

In contrast, it is difficult to ascertain what effect a finding of the non-existence of judgment **K 36/15** (on driving licence fees, item 6) could have. That judgment was published in December 2017 and the regulation that waived the fees and abolished the obligation to exchange the driving licence in the event of a change of address entered into force in March 2019. During these 15 months, the authorities should not have required drivers to pay for the issuance of a new driving licence if the change of address was due to the actions of local authorities. However, the only basis for refraining from collecting the fee was the repeal of the norm by the Constitutional Court. Against this background, the question could therefore be raised as to whether the authorities could claim the previously unpaid fees following a finding of the non-existence of the judgment.

a) **Judgments of the Constitutional Court that declared the reviewed subject-matter incompatible with a standard of review followed by no legislative changes**

Not all rulings made by the Constitutional Court with the participation of unlawfully elected persons have been implemented by the legislature through repealing or amending the laws reviewed by the Constitutional Court. The HFHR found that no changes in the law were made in **14 cases**. The judgments in question are presented in the table below:

	Judgment	Regulations under review	Disposition
1.	Judgment of 1 June 2017, case no. U 3/17	A regulation of the Council of Ministers repealing the regulation on the creation of the municipalities of Szczawa and Grabówka ⁹¹	A finding of unconstitutionality
2.	Judgment of 23 May 2018, case no. SK 8/14	A provision of the Act on the protection of classified information insofar as it provided for the service on the applicant of a copy of the judgment, issued by an administrative court, on the security clearance regarding access to classified information without these sections of the statements of grounds that does not have to be redacted to protect classified information	A finding of unconstitutionality
3.	Judgment of 16 January 2019, case no. P 19/17	A provision of the Act on competition and consumer protection that failed to provide for the possibility of appealing a court order granting permission to the President of the Office of Competition and Consumer Protection to search a business undertaking's premises and property in cases of competition-restricting practices and in the course of investigative and antitrust proceedings	A finding of unconstitutionality
4.	Judgment of 26 June 2019, case no. SK 2/17	A provision of the Act on family allowances that excluded the right to a nursing allowance if the caregiver of a person with a disability was eligible for a benefit on account of their partial incapacity for work	A finding of unconstitutionality (the challenged provision was set to lose its effect after six months)
5.	Judgment of 26 June 2019, case no. K 16/17	A provision of the Code of Administrative Offences introducing a punitive sanction for the unreasonable refusal to provide a service	A finding of unconstitutionality
6.	Judgment of 3 July 2019, case no. SK 14/18	A provision of the Act on the complaint against the excessive length of legal proceedings ⁹² insofar as it did not provide that provisions of that act should be applied mutatis mutandis to proceedings for the issuing of an enforceability clause to a ruling made in a case conducted under the Code of Civil Procedure	A finding of unconstitutionality
7.	Judgment of 25 September 2019, case no. SK 31/16	A provision of the Act on retirement pensions and disability benefits financed by the Social Insurance Fund governing the initial date of payment of benefits on account of incapacity for work	A finding of unconstitutionality

91 Regulation of the Council of Ministers of 28 May 2015 repealing the regulation on the creation of the municipalities of Szczawa and Grabówka (Journal of Laws, item 2312).

92 Article 1(2) of the Act of 17 June 2004 on the complaint about a violation of a party's right to have their case heard in pre-trial proceedings conducted or supervised by a prosecutor and court proceedings without undue delay (Journal of Laws of 2018, item 75).

8.	Judgment of 4 March 2020, case no. P 22/19	Provisions of the Code of Criminal Procedure insofar as they allow the examination of a request for the exclusion of a judge on account of their defective appointment by the President on the application of the reorganised NCJ	A finding of unconstitutionality
9.	Judgment of 10 June 2020, case no. K 3/19	A provision of the Act on housing cooperatives that stipulated that all members of a housing cooperative who did not have a title to their cooperative premises were to forfeit their cooperative membership by operation of law	A finding of unconstitutionality (the challenged provision was set to lose its effect after 12 months)
10.	Judgment of 22 October 2020, case no. K 1/20	A provision of the Act on family planning, protection of the human foetus and conditions permitting termination of pregnancy insofar as they concern the so-called “embryopathological ground” for a lawful abortion	A finding of unconstitutionality
11.	Judgment of 15 April 2021, case no. K 20/20	Provision of the Act on the Ombudsman insofar as it allowed the Ombudsman to perform their role after the expiry of the term of office until the election of the new Ombudsman	A finding of unconstitutionality (the challenged provision was set to lose its effect after three months)
12.	Judgment of 12 May 2021, case no. SK 19/15	The provision of the Act on geology and mining ⁹³ that stated: “Owners (perpetual usufructuaries) of properties located outside the boundaries of a projected or existing mining area or sites of geological works shall not be parties to proceedings governed by this section”	A finding of unconstitutionality
13.	Judgment of 23 February 2022, case no. P 10/19	Provisions of the Code of Civil Procedure and the Act on the Supreme Court insofar as they provide grounds for the disqualification of a defectively appointed judge and for the assessment of the lawfulness of the appointment of a judge	A finding of unconstitutionality
14.	Judgment of 20 December 2022, case no. SK 78/21	The provisions of the Regulation of the Minister of Justice on the incurring by the State Treasury of the costs of unpaid legal aid provided by court-appointed lawyers ⁹⁴ , which differentiated the rates of fees of court-appointed and privately retained defence lawyers	A finding of unconstitutionality

First and foremost, attention should be drawn to the **four judgments** which, if declared non-existent, would result in changes beneficial to the rights of the individual.

Judgment **K 1/20** (item 10) on abortion certainly falls into this category. The current law, which restricts access to legal abortion owing to a judgment issued by an irregular composition of the Constitutional Court, may lead to violations of Article 8 ECHR.⁹⁵ Finding the Constitutional Court’s judgment non-existent and “reviving” the embryopathological ground would lead to the necessity of discontinuing ongoing criminal proceedings in cases of suspected performance of

93 Article 41 (2) of the Act of 9 June 2011 – Law on geology and mining (Journal of Laws of 2020, items 1064 and 1339 and of 2021, item 234).

94 § 17 (1) (2) and § 17 (2) (3) of the Regulation of the Minister of Justice of 3 October 2016 on the incurring by the State Treasury of the costs of unpaid legal aid provided by court-appointed lawyers (Journal of Laws of 2019, item 18, as amended).

95 In July 2021, the ECtHR reported that it had received more than 1,000 complaints regarding restrictions on access to legal abortion in Poland following the Constitutional Court’s judgment – see the press release of 8 July 2021, ECHR 217 (2021), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7074470-9562874&filename=Notification%20of%20applications%20concerning%20abortion%20rights%20involving%20Poland.pdf> (accessed on: 24 April 2023).

an abortion or aiding a woman in terminating a pregnancy (under Article 152 §§ 1 and 2 of the Criminal Code, respectively) in a situation where there has been a “severe and irreversible impairment of the foetus or an incurable disease threatening its life”. It would also be possible to challenge final and unappealable judgments. However, as it seems, in such a case there would be no modification of the grounds under Article 4 § 4 of the Criminal Code (“If, according to a new law, the offence covered by the judgment is no longer punishable, the conviction shall be erased by operation of law”) because, formally speaking, we would not be dealing with a “new law” (a declaration of the non-existence of the Constitutional Court judgment would mean that the judgment never existed, so the embryopathological ground would still stand). In such a situation, a cassation appeal would have to be lodged to challenge any final convictions. The possibility of resuming proceedings could also be considered, although it is problematic whether any of the grounds for resumption set out in the Code of Criminal Procedure would apply in this respect.

In principle, a declaration of the non-existence of judgments concerning the disqualification of judges appointed at the request of the new National Council of the Judiciary (judgments **P 22/19**, item 8, and **P 10/19**, item 13) would also have a positive effect. However, the negative effects of these judgements are already being mitigated as at least some courts are relying directly on EU law, the ECHR or the joint resolution of three chambers of the Supreme Court.

The effects of the finding of the non-existence of the judgment concerning the Ombudsman’s term of office (**K 20/20**, item 11) could also be assessed positively. However, the revival of that provision found unconstitutional by the Constitutional Court would not lead to any practical changes. In particular, it would not call into question the term of office of the newly established Ombudsman. At the same time, the provision challenged by the Constitutional Court was, arguably, relevant and necessary. It clearly defined who performs Ombudsman’s duties after the expiry of their term of office, which, under the current law, remains uncertain.

In the case of one judgment, a declaration of non-existence would, in our view, have no effect whatsoever. The judgment in question is **U 3/17** (item 1), in which the Constitutional Court found a regulation repealing a regulation on the creation of two municipalities to be unconstitutional. It is unclear whether judgments of the Constitutional Court declaring unconstitutional a repealing act would lead to a “revival” of the act repealed by that act.⁹⁶ In judgment **U 3/17**, the Constitutional Court did not address these issues, and the Council of Ministers considered that the revival did not take place⁹⁷, so the municipalities have never been created.

96 See, for example, A. Mączyński, J. Podkowiak, Komentarz do art. 190..., p. 1212; M. Wiącek, Skutki stwierdzenia niekonstytucyjności przepisów nowelizujących in: *Leges ab omnibus intellegi debent*. Księga XV-lecia Rządowego Centrum Legislacji, Warszawa 2015, pp. 366–372; P. Tuleja, Przywrócenie mocy obowiązującej, czyli tzw. odzyskanie przepisów prawa in: P. Tuleja, M. Florczak-Wątor, S. Kubas (eds.), *Prawa człowieka, społeczeństwo obywatelskie, państwo demokratyczne. Księga jubileuszowa dedykowana profesorowi Pawłowi Sarneckiemu*, red. Warszawa 2010, pp. 192–202; M. Florczak-Wątor, *Orzeczenia Trybunału...*, pp. 142–147.

97 See the letter of a Secretary of State in the Ministry of the Interior and Administration to the Ombudsman, no. BMP-0790-6-3/2022/LW, https://bip.brpo.gov.pl/sites/default/files/2022-11/Odpowiedz_MSWiA_gminy_22.11.2022.pdf (accessed on: 16 March 2023).

By the same token, a declaration of the non-existence of the Constitutional Court's judgment would change little in this respect as it would only confirm that the Council of Ministers is not obliged to create municipalities.

Unfortunately, a declaration of the non-existence of Constitutional Court's judgments in the remaining **9 cases** would either lead to effects that are unfavourable to the individual or would produce consequences that are difficult to determine, resulting in a state of legal uncertainty.

In **7 cases**, provisions that violate constitutional rights and freedoms, which would likely be considered unconstitutional also by a lawfully constituted Constitutional Court, would be restored. In this context, mention should be made of judgments concerning the right to a court (**SK 8/14**, item 2, **P 19/17**, item 3, **SK 14/18**, item 6 and **SK 19/15**, item 12), the principle of equality (**SK 2/17**, item 4 and **SK 78/21**, item 14) and the right to social security (**SK 2/17**, item 4 and **SK 31/16**, item 7).

Declaring the judgments in question to be non-existent would lead to a situation in which the norms providing for the obligation to file an interlocutory appeal, discontinuance of proceedings or denial of an allowance to the detriment of individual rights and freedoms would continue to be valid. Of course, in some cases, the negative effects of these provisions could be mitigated by a pro-constitutional interpretation. However, in some situations, mainly where the Constitutional Court has used the simple formula, such an interpretation would need to be *contra legem* and it would therefore be necessary to resort to a measure known as "diffused constitutional review". Such measures, while needed, would not eliminate all threats to the legal security of individuals and could also lead to divergent jurisprudence.

In addition, it would not be possible to resume proceedings concluded with judgments based on norms that the Constitutional Court declared unconstitutional in non-existent judgments. It would also be difficult to claim damages for any loss suffered as a result of the application of provisions declared unconstitutional in a non-existent Constitutional Court's judgment.

On the other hand, it is impossible to discard the possibility of claiming damages for a loss suffered as a result of a court or authority issuing a ruling or decision based on the law formed by a non-existent judgment of the Constitutional Court.⁹⁸ However, as it seems, a successful action for damages would require obtaining an earlier judicial confirmation that the final ruling or decision is unlawful.

98 On the possibility of claiming damages for a loss caused by an unlawfully issued (but not necessarily non-existent) judgment of the Constitutional Court, see, for example, M. Ziółkowski, *Odpowiedzialność odszkodowawcza za niezgodne z prawem działanie władzy publicznej. Studium z prawa konstytucyjnego*, Warszawa 2021, pp. 470–484; J. Podkowiak, *Niekonstytucyjność...*, p. 352.

The consequences of declaring **judgment K 3/19** (item 9) non-existent may be negative albeit difficult to assess unequivocally. In this judgment, the Constitutional Court declared unconstitutional a provision according to which all members of housing cooperatives who did not have legal title to their cooperative premises would lose their membership in the cooperative by operation of law. That provision was to lose its force after 12 months and, since the judgment was not implemented within this period, the provision ceased to be effective. We have found that the judgment is still not implemented and that persons deprived of their cooperative membership are still unable to recover it.⁹⁹ The Ministry of Development and Technology is still working on a bill that would implement the judgment of the Constitutional Court.¹⁰⁰ However, it cannot be ruled out that some persons who have been deprived of their membership in housing cooperatives under the unconstitutional provisions have already brought actions for damages against the State Treasury. A declaration of the non-existence of that Constitutional Court judgment could deprive them of the possibility of receiving damages owing to the removal of the underlying legal decision from legal circulation.

The consequences of the finding of the non-existence of judgment K 16/17 (item 5), which concerns the punishability of an unjustified refusal to provide a service, may be particularly complicated and problematic from the perspective of the individual's rights. These difficulties would arise from the fact that a declaration of non-existence would lead to a "revival" of a provision establishing an administrative offence. This would thus be the opposite situation to that concerning abortion. In the latter case, the finding of the non-existence of the judgment would narrow the scope of a norm of criminal law. In the case of a denial of services, declaring the Constitutional Court's ruling non-existent would have the effect of extending such a norm.

Two questions arise in this context. First, does a declaration of the non-existence of a judgment of the Constitutional Court affect the validity of judgments and orders made in individual cases of administrative offences after the announcement of the Constitutional Court judgment? Second, could a finding of the non-existence of a judgment of the Constitutional Court be a basis for punishing persons whose conduct fulfils the criteria of the offence set out in a provision declared unconstitutional by the Constitutional Court?

Arguably, the declaration of the non-existence of a Constitutional Court judgment will not, in itself, result in the possibility of resuming the proceedings with a detriment to the defendant owing to the appropriate application of the provisions of the Code of Criminal Procedure. For similar reasons, it is also difficult to imagine the submission of a successful cassation appeal in such a case. Only qualified entities (the Prosecutor General and the Ombudsman) can lodge this type of appeal within just three months of a ruling becoming final and unappealable.

99 See the Ombudsman's submission to the Minister of Development and Technology, 20 June 2022, no. IV.510.20.2020.KD https://bip.brpo.gov.pl/sites/default/files/2022-06/Do_MRiT_TK_spoldzielnie_mieszkaniowe_20.06.2022.pdf (accessed on: 16 March 2023).

100 See the Bill amending the Act on housing cooperatives, the Act - Law on cooperatives and the Act on ownership of premises, list designation UB2 <https://legislacja.gov.pl/projekt/12346401> (accessed on: 16 March 2023).

At this point, one may discuss two scenarios related to the possibility of convicting a person on the basis of a provision whose legal force has been restored due to the non-existence of a Constitutional Court's judgment.

The first one involves the commission of an offence after the pronouncement of judgment K 16/17 but before the moment the judgement is declared non-existent. As it seems, the declaration of the non-existence of a judgment has a retroactive effect, which means that a provision whose unconstitutionality has been declared in a non-existent Constitutional Court's judgment is deemed to have been in force for the whole time. In this situation, the question arises whether it would be permissible to punish a person who unreasonably refused to provide services already after the issuance of the Constitutional Court's non-existent judgment but before its non-existence is established. As it seems, such a punishment, due to the principle of the citizen's trust in the state and its laws, would be unacceptable. Furthermore, it could be considered that the person who committed such an offence acted in justified ignorance of the punishability of the act, which, according to Article 7 § 1 of the Code of Administrative Offences, excludes liability.

The second scenario involves an offence committed after the declaration of the non-existence of the judgment of the Constitutional Court. Such a case is slightly less problematic than the one discussed above but still raises certain concerns. In particular, one may wonder whether the mere promulgation of an act declaring the Constitutional Court's judgment non-existent is capable of reviving the norm defining the administrative offence, thus fulfilling the requirement of the principle of *nullum crimen sine lege certa*. Currently, the provision is listed unchanged in the Journal of Laws. Only a footnote has been added to it stating that a judgment of the Constitutional Court declared it partially unconstitutional to the extent stated. Once the finding of non-existence has been declared, the individual will know that Constitutional Court judgments made with the participation of unlawfully elected persons are no longer in effect, but will still need to determine whether the judgment referred to in the footnote to Article 138 of the Code of Administrative Offences is also non-existent, and whether the finding of non-existence of the judgment revives the norm declared unconstitutional. In this context, the individual may indeed have concerns about the applicable law. Thus, it seems that at least until a version of the Code of Administrative Offences without a mention of the Constitutional Court's judgment issued in the case in question is published in the Journal of Laws, persons fulfilling the elements of the offence stipulated in Article 138 of the Code of Administrative Offences should not be punished due to the existence of an excusable error as to punishability (Article 7 § 1 of the Code of Administrative Offences).

4.2.4. The problem of interpretation judgments

The Court also issued five interpretation judgments, presented in the table below.

	Judgment	Operative part
1.	Judgment of 20 June 2017, case no. K 5/17	Article 13 (3) of the Act of 12 May 2011 on the National Council of the Judiciary, understood as meaning that the term of office of the members of the National Council of the Judiciary elected from among the judges of common courts is individual in character, is incompatible with Article 187 (3) of the Constitution
2.	Judgment of 20 December 2017, case no. SK 37/15	Article 3 (2) (2) of the Act of 30 August 2002. – Law on proceedings before administrative courts (Journal of Laws of 2017, items 1369 and 1370), understood as excluding the possibility of submitting an appeal to the administrative court against a decision on interlocutory appeal against an order issued as a result of a statement of objection referred to in Article 84c (1) of the Act of 2 July 2004 on freedom of business activity (Journal of Laws of 2017, item 2168), is inconsistent with Article 45 (1) and Article 77 (2) of the Constitution of the Republic of Poland
3.	Judgment of 24 February 2021, case no. SK 39/19	Article 1a (1) (3) of the Act of 12 January 1991 on local taxes and charges (Journal of Laws of 2019, item 1170) understood as meaning that the link between land, a building or structure and the conduct of a business activity is determined solely by the possession of land, a building or structure by a business undertaking or another entity conducting a business activity, is inconsistent with Article 64 (1) in conjunction with Article 31 (3) and Article 84 of the Constitution of the Republic of Poland
4.	Judgment of 12 May 2021, case no. SK 22/16	Article 37 (1) of the Act of 27 March 2003 on spatial planning and development (Journal of Laws of 2018, item 1945 and of 2019, items 60, 235 and 730), understood as allowing to determine a property's designated use in a less favourable manner than in has been done in the local zoning plan adopted before 1 January 1995, is incompatible with Article 64(2) of the Constitution of the Republic of Poland
5.	Judgment of 30 June 2021, case no. SK 37/19	Article 23 of the Act of 10 April 2003 on special rules for the preparation and implementation of public highway investment projects (Journal of Laws of 2020, item 1363 and of 2021, item 784) understood in the sense that it does not provide for mandatory application of the provisions of Chapter 6, Section III of the Act of 21 August 1997 on real property management (Journal of Laws of 2020, item 1990 and of 2021, item 11 and 234), is inconsistent with Article 21 (2) of the Constitution of the Republic of Poland read in connection with Article 64(2) of the Constitution

In our view, a finding of the non-existence of judgment K 5/17 (item 1) would not give rise to any particular complications.

As for the remaining judgments, concerns are sometimes expressed as to whether a negative interpretation judgment provides grounds for the resumption of proceedings. However, the prevailing view is that it does.¹⁰¹ If, in practice, the proceedings based on judgments referred to above as items 2–5 were resumed, then, in the event of the adoption of the measure proposed in Article 7 (4) of the Batory Foundation's Proposal, the issued judgments would be protected, because in all these cases we are dealing with a concrete review. As in the case of the other judgments discussed above, once the non-existence of these judgments was established, it would no longer be possible to resume judicial and administrative proceedings.

101 See, for example, M. Wiącek, "Wyrok Naczelnego Sądu Administracyjnego z dnia 19 października 2018 r., II FSK 1023/18. Glosa", *Orzecznictwo Sądów Polskich* 2020 (10), pp. 160–166; A. Mączyński, J. Podkowiak, *Komentarz do art. 190...*, pp. 1218–1219; M. Florczak-Wątor, *Orzeczenia Trybunału...*, pp. 203–204; B. Banaszak, "Wyroki interpretacyjne Trybunału Konstytucyjnego a orzecznictwo sądów administracyjnych i Sądu Najwyższego", *Zeszyty Naukowe Sądownictwa Administracyjnego* 2013 (6), pp. 15–20. Differently, M. Hermann, *Wyroki interpretacyjne Trybunału Konstytucyjnego z perspektywy teoretycznoprawnej. Instrument ochrony ładu konstytucyjnego czy środek zapewniania jednolitości orzecznictwa?*, Warszawa 2015, pp. 68–70.

In our opinion, the determination of the non-existence of the above-mentioned judgments should not prevent the authorities and courts applying the relevant provisions from adopting a pro-constitutional interpretation similar to that indicated in the Constitutional Court judgments. Of course, it can be expected that some authorities would not adopt such an interpretation once the Constitutional Court's judgment obliging them to do so is declared non-existent.

4.3. Declaring the judgments of the Constitutional Court non-existent – a summary

In conclusion, there are certain advantages that could arise from embracing the concept of the non-existence of judgments delivered by judicial formations of the Constitutional Court comprising unlawfully elected persons. These advantages, in our view, are as follows:

- **The judgments made with the participation of unlawfully elected persons would be unequivocally established as not being valid judgments of the Constitutional Court.**
- **The effects of certain Constitutional Court rulings that negatively impact the state of respect for human rights and the rule of law would immediately be eliminated.**

However, the discussed solution would also involve substantial risks:

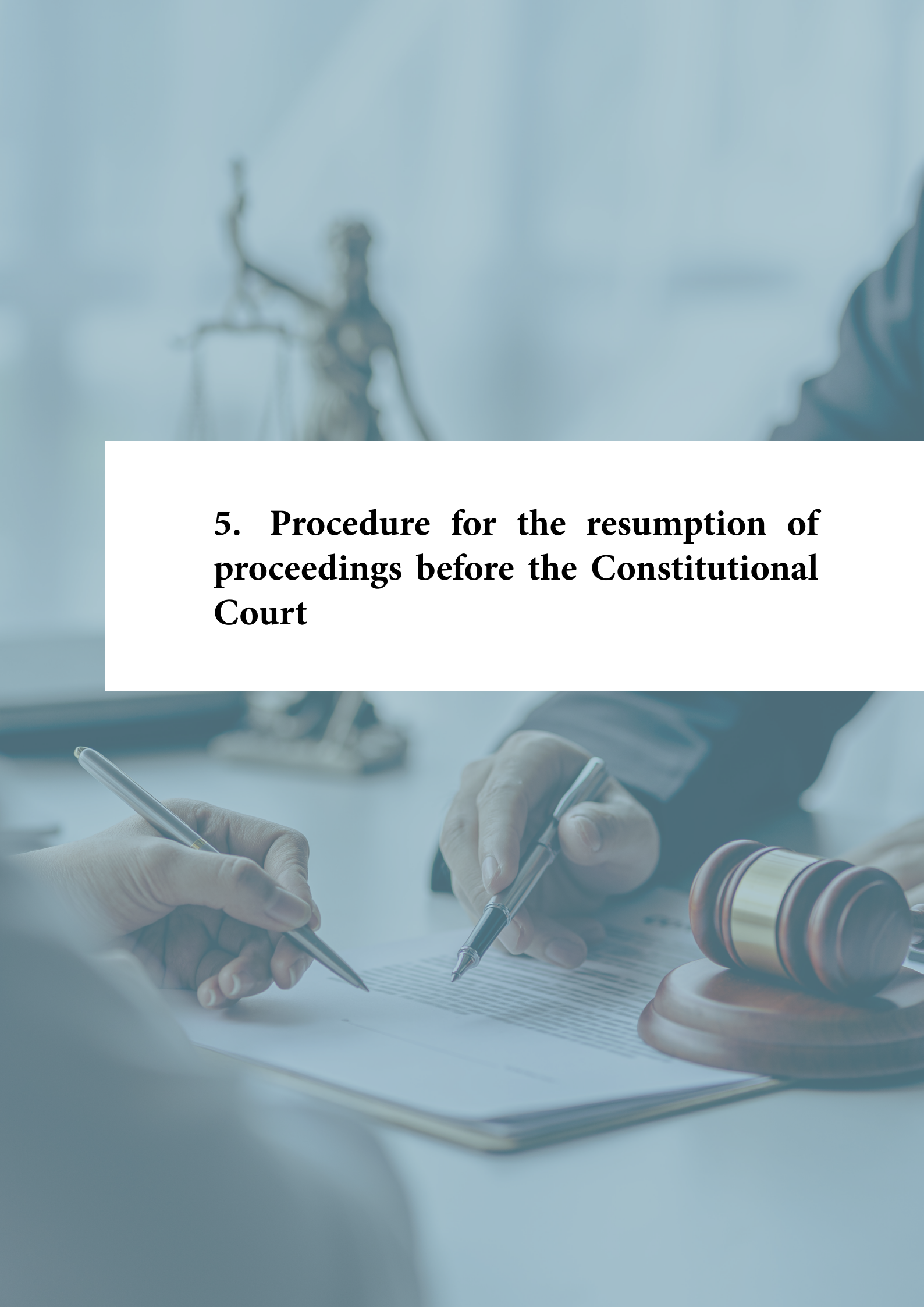
- **Many norms unfavourable from the point of view of individual rights and freedoms and, in some cases, even unequivocally contrary to the Constitution would be revived, and with retroactive effect.**
- **It is likely that any judgments based on norms formed in consideration of the non-existent Constitutional Court judgments that are not covered by Article 7 (4) of the Batory Foundation's Proposal would be susceptible to legal challenges;**
- **There would be much ambiguity as to the specific legal consequences of declaring individual judgments non-existent;**
- **In some cases, the revival of a provision that has been declared unconstitutional would lead to the existence of two conflicting sets of legal rules;**
- **This solution would overlook other significant flaws related to how the Constitutional Court's formations are formed, including those relating to manipulative practices of the president of the Constitutional Court, the fact that certain judges are not admitted to hear and decide cases¹⁰² and the fact that certain Court's formations include judges who are subject to disqualification.**

The above means that embracing the notion of the non-existence of Constitutional Court judgments would lead to far-reaching consequences that would sometimes be capable of jeopardising legal security and legal certainty.

¹⁰² See, for example, M. Wolny, M. Szuleka, *Narzędzie w rękach władzy. Funkcjonowanie Trybunału Konstytucyjnego w latach 2016–2021*, Warszawa 2021, pp. 18–28. See, differently, M. Ziółkowski, "Przesłanki wyznaczania sędziów do składu orzekającego Trybunału Konstytucyjnego i konsekwencje ich naruszenia", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2020 (3), pp. 33–49.

For this reason, should the legislature decide to adopt the approach discussed here, it should take measures to immediately amend the provisions that have been correctly declared unconstitutional in non-existent Constitutional Court's judgments, as well as to protect anyone who has acted in reliance on the law formed in consideration of a non-existent Constitutional Court's judgment. However, it would notably be extremely difficult to provide full protection against the negative effects of the declaration of the non-existence of Constitutional Court's judgments. This would require, for example, an appropriate determination of the temporal effects of newly enacted "protective provisions".

We would like to further emphasise that, although this report is not intended to examine the merits of embracing the concept of Constitutional Court's judgements made with the participation of unlawfully elected persons being non-existent, the theoretical basis of this concept does raise valid objections. We could only speak of the non-existence of a ruling in extreme circumstances where it is apparent at first sight that a particular act cannot be considered to produce legal effects. It is not so in the present case, however, as it is not clear whether the presence of one or even several defectively elected judges in a formation of the Constitutional Court leads to the non-existence of the ruling. For example, in civil procedure, an unauthorised person's participation in an adjudicating formation is not ground for declaring the ruling non-existent but merely a ground for the resumption of proceedings due to its invalidity (Article 401 (1) of the Code of Civil Procedure). In addition, it is difficult to disregard the fact that Constitutional Court's judgments made in formations with defectively elected judges were nevertheless usually respected by the authorities and, as pointed out above, could be the basis for the acquisition of certain rights by individuals. In these circumstances, the legislature's declaration that these judgments are non-existent could be considered an abuse.



5. Procedure for the resumption of proceedings before the Constitutional Court

As indicated above, the predominant view in both scholarly writings and Constitutional Court's jurisprudence is that proceedings before the Court may not be resumed. The above contention is supported both by the interpretation of Article 190 (1) of the Constitution (the final and definitive character of Constitutional Court's judgments) and by practical considerations related to the fact that Constitutional Court judgments, as opposed to judgments of other courts having an *inter partes* effect, are applicable *erga omnes*, leading to specific changes in the legal system.

Leaving aside the interpretation of Article 190 (1) of the Constitution, the HFHR's view is that the postulate for a resumption procedure would first require a determination as to whether such a procedure would be an emergency measure that would only apply to the period from December 2016 until the Constitutional Court's independence is restored, or whether it would operate on a permanent basis. Arguably, the latter option would be more consistent, but in this situation, the question would arise as to the form of the grounds allowing resumption. However, if the former option were to be chosen, it would be necessary to decide whether resumption should be admissible only for judgments delivered by formations comprising unlawfully elected persons or also in other cases where, for example, an adjudicating formation may have been manipulated by the president of the Constitutional Court, or when the Constitutional Court may have exceeded its competence.

Irrespective of the temporal scope of, and the grounds for, resumption, it would also be necessary to address the consequences to which the resumption and the Constitutional Court's subsequent different ruling could lead. In the case of affirmative judgments (confirming the compliance of the reviewed subject-matter with a standard of review), there would generally be no such problems.¹⁰³ The situation would be different, however, for proceedings originally terminated by injunctive judgments, in which affirmative judgments would be issued upon resumption. Indeed, in these cases, the "revival" of the provisions concerned could lead to the problems that we have discussed at length above. However, it is unclear whether revival would occur with a retroactive or future effect.

Finally, it would also be necessary to decide whether the Constitutional Court should have the authority to resume proceedings *ex officio* or perhaps only at the request of an eligible entity. If the latter option is chosen, it would be necessary to determine the list of parties entitled to submit a request for resumption. For example, it would have to be decided whether proceedings initiated by constitutional complaints can be resumed only at the request of the complainant or also at the request of other entities, e.g. those with general standing. Adopting the former solution could, in practice, mean that proceedings concluded with a finding of unconstitutionality would not be reopened, as the complainant party would likely have no interest in challenging a favourable outcome.

103 See, for example, M. Ziótkowski, *Niedopuszczalność wznowienia...*, pp. 479–483.

6. Declaring a judgment of the Constitutional Court unlawful

Declaration of the non-existence of judgments and introduction of a procedure for the resumption of proceedings before the Constitutional Court would involve the possibility of reviving norms that the Constitutional Court declared unconstitutional in judgments delivered by irregular formations. This, in turn, could at times lead to the profound complications described above. To avoid problems of this kind, the legislature could choose to introduce a procedure for reviewing Constitutional Court judgments that would not bring the effect of reviving norms declared unconstitutional. The Court, acting *ex officio* or on request, would therefore only find that a judgment had been made in breach of law. However, it would be necessary to consider in detail the consequences of such a determination. It could certainly constitute a ground for claiming damages for the loss suffered as a result of the unlawful judgment issued by the Constitutional Court, but in practice it would still be difficult to demonstrate all the prerequisites for the compensatory liability. Judgments of the Constitutional Court rarely constitute a direct source of a loss sustained by an individual. More frequently, such a loss may be caused by another unlawful ruling or decision (based on a state of law shaped in consideration of an unlawful judgment of the Constitutional Court) or, alternatively, by an unconstitutional legal provision.

7. Legislature's decision not to challenge the validity/existence of judgments of the Constitutional Court

The final solution that could be considered involves the legislative refraining from addressing the validity or existence of Constitutional Court's judgments. Instead, other measures could be taken. First of all, the legislature could enact laws to reintroduce the norms declared unconstitutional by the Constitutional Court in doubtful circumstances. Obviously, it would be for the legislator to decide in which cases this kind of legislative action is needed. In this way, the negative effects of certain rulings of the current Constitutional Court could be quickly eliminated.

The newly enacted legal rules could, of course, be challenged before the Constitutional Court under the general rules of constitutional review. Moreover, any laws found by irregular formations of the Constitutional Court to be compatible with the Constitution and left in force by the new legislature could also be submitted for the Constitutional Court's review. There is even a strong argument that such new constitutional review requests may invoke the same standard of review

as the one used in the proceedings before the irregularly constituted Constitutional Court.¹⁰⁴ If such requests were received by the Court, it would be able not only to the constitutional review of the contested norms but also, indirectly, to comment on the meaning of judgments given at a time when it was deprived of the attribute of independence.

Such a solution would have the following advantages:

- There would be no automatic reinstatement of norms which have been declared unconstitutional by the Constitutional Court's formations comprising unlawfully elected persons and are detrimental to individuals – it is the legislature who would decide which norms should be reinstated;
- There would be no problems related to the revival of provisions as any re-instated rules would formally be adopted from scratch. At the same time, the legislature would be given the opportunity to develop appropriate intertemporal arrangements;
- Eliminating the effects of certain Constitutional Court's rulings through legislative action could be less time-consuming than conducting all proceedings anew;
- The potentially dangerous precedent of the legislature determining the effects of Constitutional Court judgments would be avoided.

However, the above solution would not be free of drawbacks:

- There would be no unequivocal dissociation from the unconstitutional actions of the sitting Constitutional Court (although, of course, it cannot be ruled out that a condemnation of violations of the Constitutional Court's independence may be included in an appropriate resolution of the Sejm or even in the recitals of normative acts aimed at restoring the rule of law);
- The failure to remedy the consequences of the violation of the rights of persons whose complaints were dismissed by the Constitutional Court working in a defectively constituted formation and the lack of clear grounds for the assertion of indemnification (e.g. by claiming damages) by persons whose rights were violated by a judgment issued by an irregular composition of the Constitutional Court;
- For extensional and interpretation judgments, there would be no elimination or modification of the provision as an editorial subdivision or any part thereof – in this context, the question arises as to how the legislator could reverse the effects of an irregular judgment of the Constitutional Court.

104 M. Florczak-Wątor, *O skutkach prawnych...*, pp. 311–312.

8. Summary



The crisis affecting the Constitutional Court due to the presence of defectively elected judges in the Court's judicial formations has led to profound complications. According to the case law of the ECtHR, the fact that the Constitutional Court hears and decides constitutional complaints in formations comprising persons not qualified to adjudicate may lead to a violation of Article 6 ECHR. Arguably, the conclusion can also be made that violations of human rights may be caused, at least in some situations, by courts relying on the law formed by a defective Constitutional Court's ruling. Given the above, there is clearly a need to restore the lawful operations of the Constitutional Court in order to ensure respect for the rights of the individual.

However, while the need to disqualify unlawfully elected persons is obvious, it can be much more difficult to determine the legal consequences of judgments handed down by irregular formations. Under the Constitution, judgments of the Constitutional Court are universally effective and final. Thus, if the Constitutional Court declares a legal norm unconstitutional, the norm is eliminated from the legal system and, as a rule, there is no avenue of appeal against such a ruling. Nevertheless, the question arises whether such effects can also be attached to judgments rendered by irregular formations. If we decided that they cannot, what practical implications would there be?

This report shows that the problem discussed can hardly be solved by the application of any perfect solution, i.e. one that has a strong theoretical basis and leads to clear and unproblematic consequences. Declaring all judgments delivered by formations comprising defectively elected judges non-existent could jeopardise legal certainty, inter alia due to the automatic and retroactive revival of all laws declared unconstitutional by the Constitutional Court, often rightly so. These consequences could be somewhat avoided by adopting alternative approaches, such as an ex officio review by the Constitutional Court of all proceedings involving defectively elected judges or the introduction of a procedure for resuming proceedings at the request of an eligible party. However, also in such cases, questions may arise as to the constitutionality of the accepted solutions (the principle of the final and definitive character of Constitutional Court judgments) and doubts may arise as to the specific legal effects of Constitutional Court's judgments issued in the review or renewal procedure. The latter concerns will be most relevant in a situation where a judgment declaring a norm unconstitutional would be changed to a judgment declaring compatibility or the absence of incompatibility. The most conservative approach would be for the legislature to dispense with regulating the effects of judgments handed down by irregular formations of the Constitutional Court and take legislative action to restore legal norms wrongly repealed by the Court. This approach, too, is not without flaws, as it ignores the situation of persons whose rights have been violated as a result of, for example, an irregular composition of the Constitutional Court discontinuing constitutional complaint proceedings. In addition, the reinstatement of repealed norms may not always be so straightforward, given that the Constitutional Court's interpretation and extensional judgements may bring about normative changes without making any changes to the wording of the legislation.

It is evident that none of the scenarios analysed here are free of disadvantages. Accordingly, perhaps the most appropriate course of action would be to adopt mixed measures that take into account the strengths of the various proposals while avoiding their weaknesses. For example, it is possible to imagine the introduction of a resumption procedure involving the re-examination of cases terminated by a refusal to allow the complaint to proceed, an order to discontinue the proceedings or possibly even a judgment declaring the compatibility or lack of incompatibility with the Constitution provided that the above rulings have been issued by an irregular formation. Indeed, such judgments, unlike injunctive judgments, do not have far-reaching legal effects, so challenging them would not cause undue complications. Furthermore, the possibility of resuming proceedings in cases lost by the complainant is crucial from the perspective of the rights of the individual. On the other hand, in the case of proceedings terminated by an injunctive judgment of the Constitutional Court (on the incompatibility of the reviewed subject-matter with the standard of review), it would be permissible for the Constitutional Court to declare the judgment unlawful but without the effect of reviving the provision concerned. At the same time, nothing would stand in the way of the legislator taking the above-mentioned corrective measures directed at the reinstatement of certain provisions wrongfully repealed by the Constitutional Court.

However, if the legislature were to opt for any of the more far-reaching approaches, it would seem that it should explicitly regulate the consequences of the declaration of the non-existence of judgments or the resumption of proceedings and adopt measures to protect legal certainty against the consequences associated with the revival of norms.

In conclusion, the HFHR believes that the process of rebuilding the independence of the Constitutional Court and restoring the lawfulness of its operations must respect legal certainty. Indeed, the restoration of the rule of law may not legitimise infringements of human rights and freedoms, or any violations of the rule of law and its crucial component, legal certainty. For this reason, it is important that any legislative action designed to achieve such an objective is preceded by a sound legal impact analysis and embraces appropriate solutions to protect the confidence and good faith of individuals.

INDEX OF ILLUSTRATIONS

Cover: Indomercy, Adobe Stock

Chapter II: Ekaterina Bolovtsova, Pexels

Chapter III: Marek Stokowski, Adobe Stock

Chapter IV: LIGHTFIELD STUDIOS, Adobe Stock

Chapter V: ArLawKa, Adobe Stock

Chapter VIII: ktsdesign, Adobe Stock



HELSINKI FOUNDATION
FOR HUMAN RIGHTS

Helsinki Foundation
for Human Rights
Wiejska 16
00-490 Warsaw

phone (22) 556 44 40
fax: (22) 556 44 50
hfhr@hfhr.pl
www.hfhr.pl