Hague Journal on the Rule of Law
https://doi.org/10.1007/s40803-022-00174-w

ARTICLE

It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional

Adam Ploszka[1,2]

Accepted: 8 May 2022
© The Author(s) 2022

Abstract
This article deals with a new development in the jurisprudence of Poland's Constitutional Tribunal: the Tribunal's finding that art. 6 of the European Convention on Human Rights is incompatible to some extent with the Polish Constitution. The Tribunal ruled thus for the first time in its judgment of 24 November 2021 in case ref. K 6/21 in a reaction to the European Court of Human Rights judgment in the case of Xero Flor v. Poland (application no. 4907/18). The article critiques this judgment both from the national and international perspective. I argue that contrary to the intention of the Prosecutor General, who is also the Minister of Justice and who initiated the proceedings leading to this judgment, this judgment does not affect the obligation to enforce the Xero Flor judgment. As the Constitutional Tribunal, in commented judgment, fails to fulfil one of its essential functions, protecting citizens' rights and freedoms, this judgment should be perceived as proof of the instrumentalisation of the Constitutional Tribunal for internal political purposes. This ruling, however, formed the basis for a new line of jurisprudence, as the Convention was again challenged before the Constitutional Tribunal by the Prosecutor General in reaction to subsequent ECtHR judgments. Constitutional Tribunal in its judgment of 10 March 2022 in case ref. K 7/21 ruled again on European Convention on Human Rights incompatibility with Polish Constitution.

Keywords Poland · Constitutional Tribunal · Constitutional review · European Convention on Human Rights

✉ Adam Ploszka
a.ploszka@wpia.uw.edu.pl

1 European University Institute, Fiesole, Italy

2 Faculty of Law and Administration, Centre for Human Rights, University of Warsaw, Warsaw, Poland

Published online: 04 June 2022

1 Introduction

Poland is in the midst of a deep crisis of the rule of law and human rights.[1] The Polish Constitutional Tribunal has recently added another chapter to this drama. In a judgment delivered on 24 November 2021,[2] the Polish Constitutional Tribunal declared Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, (better known as the European Convention on Human Rights—hereinafter ECHR) to be incompatible with the Polish Constitution to the extent that the term 'court' used in art 6 of the ECHR includes the Constitutional Tribunal, and insofar as it confers competence on the European Court of Human Rights (hereinafter ECtHR) to review the legality of the election of judges to the Constitutional Tribunal. Proceedings in this case were initiated by the Prosecutor General, who is also the Minister of Justice.

This judgment constitutes a clear reaction to the European Court of Human Rights judgment in the case of Xero Flor v. Poland[3] in which the Strasbourg Court held that any judgment or decision of the Polish Constitutional Tribunal made with the participation of a person elected to fill a seat already occupied (commonly referred to as a quasi-judge or *sędzia dubler*), violates the right to a fair trial guaranteed to everyone by article 6 of the ECHR, since the Constitutional Tribunal cannot in such a case be regarded as the 'court established by law' referred to in that provision.

The Secretary General of the Council of Europe, Marija Pejčinović Burić, described the Constitutional Tribunal's judgment as 'unprecedented', which 'raises serious concerns'.[4] It is not something new that the States Parties to the European Convention on Human Rights oppose execution of some of the Strasbourg Court's judgments.[5] However, the Polish Constitutional Tribunal, by declaring that the ECHR is incompatible with the Constitution, in fact goes even further than Russian Constitutional Court, which 'only' declares that it will be constitutionally impossible to enforce[6]: the Anchugov and Gladkov judgment,[7] as well as Neftyanaya Kompaniya Yukos v Russia[8] judgment.

---

[1] Among many others see especially: Sadurski (2019a, b).

[2] Case reference: K 6/21. The positions of the participants in the proceedings and the judgment itself are available (in Polish only) at the following link. https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%206/21.

[3] European Court of Human Rights, Xero Flor w Polsce sp. z o.o. v. Poland, application no. 4907/18, Judgment, 7 May 2021.

[4] Council of Europe Press Release: Secretary General reacts to judgment from Poland's Constitutional Tribunal, Strasbourg, 24 November 2021, https://www.coe.int/en/web/portal/-/council-of-europe-secretary-general-reacts-to-today-s-judgment-from-poland-s-constitutional-tribun-1.

[5] Cf., in particular, the discussion on the impossibility of enforcing ECtHR judgment in cases of: Hirst v. the United Kingdom (no. 2), Application no. 74025/01, Judgment, 06 October 2005 in United Kingdom in: Bates (2012) and Bryan (2013). See also comment to judgment of the German Federal Constitutional Court on the ECHR judgment in the case of Görgülü v. Germany, application no. 74969/01, 26 February 2004: Keller and Walther (2019).

[6] Cf: Mälksoo (2016) and Fleig-Goldstein (2017).

[7] European Court of Human Rights, Anchugov and Gladkov v. Russia, applications nos. 11157/04 and 15,162/05, Judgment, 4 July 2013.

[8] European Court of Human Rights, OAO Neftyanaya Kompaniya Yukos v. Russia, application no. 14902/04, judgment. 20 September 2011.

The judgment will be analysed in detail in this paper, which is structured as follows. In the first and second part I outline the broader context of the Polish Constitutional Tribunal judgment. In particular I discuss the doubts concerning the independence of the Polish Constitutional Tribunal as well as reactions to the ECtHR judgment in the Xero Flor case. In the third part, I briefly characterize this controversial judgment. In the fourth and fifth part I criticize the ruling both from the domestic constitutional law perspective as well as the public international law perspective. An English translation of the judgment and its substantiation is not available on the Tribunal's website, I have therefore used my own translation of the Polish original of the judgment.

2 The independence of the Polish Constitutional Tribunal

Although case notes on judgments of constitutional courts do not usually contain remarks on the independence of the court that delivered the judgment, in this case it is necessary.

The Constitutional Tribunal was the first victim of the rule of law crisis in Poland, subject to the 'hostile takeover' of the Law and Justice party.[9] The process leading to a reduction in the independence of the Constitutional Tribunal has been described in detail elsewhere and there is no need to repeat it here.[10] Nevertheless, in order to prove the thesis that the judgment should be perceived as an obvious consequence of the earlier deprivation of the Tribunal's independence, I here outline the changes made in the Court's operation, at least since 2015.

Yet, the changes made in 2015 cannot be explained without looking back to the years 2005–2007, when the Law and Justice party held power in Poland for the first time. During that period, an independent Constitutional Tribunal declared a number of reforms made by Parliament unconstitutional. The Tribunal was therefore seen by Law and Justice members of the party, including its leader—Jarosław Kaczyński—as the main obstacle to the effective exercise of power.[11] 'Obstruction' on the part of the Constitutional Tribunal, amounting in fact to the exercise of its functions, was described by Law and Justice Members of the party as 'legal impossibilism'.[12]

The attack on the Constitutional Tribunal was the first move after the victorious 2015 parliamentary elections. This was done with the involvement of key state institutions controlled at that time by the Law and Justice party. However, it is worth remembering that what made this attack possible was the earlier unsuccessful attempt of 'court-packing' of the Constitutional Tribunal made just before the 2015 parliamentary election by the outgoing parliamentary majority. In addition

[9] This term was used by Wyrzykowski (2019), p. 417.

[10] The process and its impact on the independence of the Tribunal was described and analyzed in: Wyrzykowski (2017), Koncewicz (2018), Chmielarz-Grochal and Sułkowski (2018), Garlicki and Derlatka (2019), Bodnar (2018), Wiącek (2021).

[11] Cf. Sadurski (2007).

[12] Cf. Zajadło (2017).

to electing 3 judges, which the outgoing Parliament was competent to do, it also elected two additional judges to be chosen only by the Parliament of the next term. However, the election of these two judges was challenged by the Constitutional Tribunal. The Law and Justice attack also took form of 'court-packing'. Parliament in addition to the election of two judges, unlawfully elected three judges to the Constitutional Tribunal to replace the judges already duly elected. The President also unlawfully refused to swear in the original three judges of the Constitutional Tribunal. The Prime Minister, again unlawfully, refused to publish the judgments of the Constitutional Tribunal, which confirmed that the re-election of judges was flawed. At the end of this stage of the crisis Julia Przyłębska, elected by Law and Justice as a judge of the Constitutional Tribunal, was appointed by the President of Poland as President of the Constitutional Tribunal (the validity of her appointment has been questioned).[13] Przyłębska allowed these quasi-judges, to adjudicate cases. Judgments handed down with the participation of quasi-judges raises doubts as to their legitimacy.[14] Unlawfulness of the election of judges was important but at the same time was only one of the elements of the process that lead to loss of the independence by Constitutional Tribunal.

Julia Przyłębska's presidency of the Constitutional Tribunal opens a dark period in the Constitutional Tribunal's history. She was publicly accused of illegal manipulation of the composition of the Constitutional Tribunal in such a way as to reach verdicts that were in line with the government's political thinking.[15] In one well-known case (P 4/18), concerning a further reduction of pensions of people who worked in institutions and agencies responsible for state security of the People's Republic of Poland, the composition of the bench appointed to hear the case was changed six times. Two of these changes concerned judges acting as rapporteurs.[16]

[13] In a nutshell, after the end of the term by the previous Constitutional Court President—Andrzej Rzeplinski, Przyłębska was nominated by the President of Poland as the so-called acting Constitutional Court President, which position was arguably unconstitutional, as there was a constitutionally recognized vice-president. This allowed her to convene a General Assembly of Constitutional Court Judges, to which she also allowed quasi-judges to participate. At this assembly, judges elected by the Law and Justice party voted to elect her as a candidate for President of the Tribunal, while the rest of the judges refused to vote, questioning her authority to convene the assembly. This in turn meant that the necessary quorum was not present. All the shortcomings of Przyłębsk's election were described more extensively in: Sadurski (2019a, b), p. 65–67.

[14] Cf. Radziewicz (2017), Gliszczyńska-Grabias and Sadurski (2021).

[15] In April 2017, eight judges of the Constitutional Court sent a public letter to Julia Przyłębska pointing out the practice of taking cases away from judges, which involved changing the designated full formations of the Court to five-member and three-member formations. This letter is available at: https://monitorkonstytucyjny.eu/archiwa/224.

In a renewed letter, this time from seven judges of the Constitutional Court, dated 5 December 2018, allegations of manipulation of the Constitutional Court's formations were reiterated, pointing to further examples of manipulation. This letter is available at: https://oko.press/images/2018/12/List-Se%CC%A8dzio%CC%81w-TK_5.12.2018-r..pdf. These allegations are also confirmed by the correspondence with Ms Przyłębska that one of the judges, Jarosław Wyrembak, elected by the Law and Justice party, presented to the Senate. This correspondence is available at the following link: https://monitorkonstytucyjny.eu/archiwa/11474.

[16] This information is available on the website of the Constitutional Court.

Przyłębska herself does not refrain from official, but in particular unofficial, contacts with the Government and Law and Justice leaders.[17] These contacts not only are incompatible with the rules of professional ethic of a judge of the Constitutional Tribunal but also negatively affects the image of the Tribunal. The fact of such unofficial contacts was confirmed by Jarosław Kaczyński, the Law and Justice leader, in a TV interview delivered on May 2019 when he declared: "I have many friends who aren't involved in politics. (…) My great 'social discovery' is Julia Przyłębska, the president of the Constitutional Tribunal (…) I like to meet with her very much".[18]

The hostile takeover of the Constitutional Tribunal has enabled a whole series of legislative changes which have lowered the standards of human rights and altered the constitutional order, without formally amending the Constitution.[19] All of these changes, if they were questioned before the Constitutional Tribunal, were found to be constitutional by the Constitutional Tribunal. In each of these cases, the majority, if not the entire bench, were judges elected by Parliament in which Law and Justice Party had a majority. This series of judgments proved that the Court has ceased to be seen as part of the mechanism for the control of power, but has become part of the system of power, as correctly pointed out by Wojciech Sadurski.[20] Recent judgments of the Constitutional Tribunal concerning the relationship between national and EU law,[21] the composition of the National Council of the Judiciary,[22] the term of office of the Human Rights Commissioner,[23] the possibility to refuse to provide a service on grounds of the service provider's freedom

[17] It is worth noting in this context that the ECHR communicated to the Government of Poland a complaint filed by one of the NGOs working in Poland for transparency: Sieć Obywatelska Watchdog Polska against Poland, Application no. 10103/20. The complaint alleged that freedom of speech was violated by the refusal to provide access to the schedules of, among others, President Julia Przyłębska, which documented such meetings in 2017.

[18] Broadcast entitled: "Jaroslaw Kaczyński on life, family and love for animals" was broadcast on public chanell in breakfast television on 13 May 2019. It is available at the link below. https://pytanienasniadanie.tvp.pl/42603220/jaroslaw-kaczynski-o-zyciu-rodzinie-i-milosci-do-zwierzat.

[19] Cf. Halmai (2019), Florczak-Wątor (2021).

[20] This thesis has been proven by: Sadurski (2019a, b).

[21] Cf note: 48 and 50.

[22] In the first judgement of the Constitutional Tribunal of 20 June 2017 issued in the case no. K 5/17, on the motion of Prosecutor General, the Constitutional Court concluded that the individual nature of the term of office of judges-members of the NCJ was unconstitutional. This formed the basis for amending the law regarding the NCJ including i.a. introduction of the changes the election of judges members of the NCJ so that they are elected by the legislature. In the second judgment of the Constitutional Tribunal of 25 March 2019 issued in the case no. K 12/18, on the motion of NCJ, the Constitutional Tribunal found Article 9a of the 2017 Amending Act, granting the Sejm the competence to elect judicial members of the NCJ for a joint four-terms of office and stipulating that the joint term of new members of the NCJ begins on the day following the day of their election, compatible with the Constitution.

[23] In its judgment of 15 April 2020, issued in the case no. K 20/20, issued upon the motion of a group of Law and Justice MPs, the Constitutional Court recognised the provision allowing performance of duties by the previous ombudsman after expiry of his term of office as unconstitutional. This allowed the removal from office of Adam Bodnar, an independent ombudsman who had criticised the government.

of conscience and religion,[24] and abortion[25] have only confirmed Sadurski's initial observations.

All the above led to a situation that any commented judgment of the Polish Constitutional Tribunal was in fact easy to predict, taking into account the changes in its operation and jurisprudence.

3 The Xero Flor Judgment and the Reactions to it

The commented judgment of the Constitutional Tribunal was a clear reaction to the judgment of the European Court of Human Rights in the Xero Flor case, which tackled the issue of quasi-judges.

Without discussing the case in detail, for the purpose of this paper merely outlining this judgment is sufficient. The Xero Flor case started long before the Constitutional Crisis began. In 2012, the Applicant company brought an action for compensation against the State Treasury for damage caused by wildlife. Due to the lack of a satisfactory resolution, the company filed a constitutional complaint to declare unconstitutional the Regulation of the Minister of the Environment on the procedure for estimating damage and compensation payments for damage to crops. In July 2017, the Constitutional Tribunal, ruling in a five-person panel, whose judge rapporteur was Mariusz Muszyński, one of the quasi-judges, decided to discontinue the proceedings. The company filed a complaint with the European Court of Human Rights, in which it claimed *inter alia* that Poland had violated the company's right to have a case heard by a court established by law and in accordance with the law because the Constitutional Tribunal's bench included Mariusz Muszyński—a quasi-judge.

In a Xero Flor judgment of 7 May 2021[26] the ECtHR held that article 6 of the European Convention on Human Rights applies to proceedings before the Constitutional Tribunal concerning a constitutional complaint. The ECtHR held that the decision of the Constitutional Tribunal to discontinue the proceedings was decisive for the right asserted by the company. Turning to the merits of the applicant company's complaint, the ECtHR decided that in the course of the appointment of Mr. Muszyński a fundamental rule on the law of the election of Constitutional Tribunal judges had been violated, and that the appointment itself had been made to fill a vacancy that had already been filled. Applying the test set out in Guðmundur Andri Ástráðsson v. Iceland,[27] the ECtHR held that the applicant company had been deprived of the right to have its case heard by a legally constituted court.

[24] In a judgment of 26 June 2019, ref. no. K 16/17, delivered at the motion of the Prosecutor General the Constitutional Tribunal declared unconstitutional a provision of the Misdemeanours Code that was applied in cases of discrimination in access to services.

[25] The Constitutional Tribunal, in the judgment of 22 October 2020, ref. K 1/20 issued upon the motion of a group of Law and Justice MPs, declared unconstitutional the provision of the Act on permitting the performance of abortion for embryopathological reasons. As a result, the Court limited the already very limited access to legal abortion.

[26] See supra note 3.

[27] Grand Chamber of European Court of Human Rights, Guðmundur Andri Ástráðsson v. Iceland, application no. 26374/18, Judgment, 1 December 2020.

Immediately after this judgment was announced, on the same day, the President of the Constitutional Tribunal Julia Przyłębska, presented her opinion in the ongoing public debate, saying:

> The European Court of Human Rights without legal basis and outside its competence issued a judgment on the composition of the Polish Constitutional Tribunal. This constitutes a flagrant violation of the law and finds no basis in the acts of international law construing the status of the Court in Strasbourg. (…) The unlawful intervention by the ECHR on the competence of the Sejm of the Republic of Poland in the field of election of judges of the Constitutional Tribunal and the competence of the President of the Republic of Poland to take the oath from a person elected by the Sejm, has no effect in the Polish legal order[28]

In a similar vein, an official statement was issued by the Speaker of the Sejm, the lower house of the Polish Parliament:

> Today's ruling sets a dangerous precedent and constitutes unlawful interference in the sovereignty of the Polish State. The European Court of Human Rights, a judicial body established to protect the law, is usurping powers it does not have. This dangerous new practice will definitely not have a positive impact on respect for the case-law of the European Court of Human Rights.[29]

Three days later, Mariusz Muszyński, the quasi-judge affected by the ECHR ruling in the Xero Flor case, commented on the case in a daily newspaper. Mr Muszyński essentially shared Ms Przyłębska's argument, adding that the judgment '*stinks of politics rather than justice*'. However, he also pointed out that:

> A State may therefore refuse to execute a judgment (...) Of course, in a rule of law reality it would be rational if such a refusal had its origin not only in a political decision from the area of foreign policy. For it is there, and not in the area of justice, that the questions of the relationship between states and international tribunals lie. Therefore, the basis for such a decision should be a review of the constitutionality of the treaty (here: the ECHR) forming the basis for such a decision.[30]

Muszyński also indicated the provisions of the Polish Constitution with which the judgment is supposed to be incompatible.

The Xero Flor judgment has formed the basis of an application made by the Ombudsman for another quasi judge to be excluded from Constitutional Tribunal hearing one

[28] Julia Przyłębska's statement is available at: https://www.tvp.info/53689825/europejski-trybunal-praw-czlowieka-wydal-wyrok-ws-polski-prezes-tk-julia-przylebska-komentuje.

[29] Statement by the Speaker of the Sejm on the ECHR precedent-setting judgment on the status of judges, delivered on 7 May 2021. https://www.sejm.gov.pl/sejm9.nsf/komunikat.xsp?documentId=804094FBC164BFEBC12586CE005EE176.

[30] Mariusz Muszyński, Komentarz subiektywny w sprawie Xeroflor, Rzeczpospolita, 10 may 2021. https://www.rp.pl/opinie-prawne/art8594331-mariusz-muszynski-komentarz-subiektywny-w-sprawie-xeroflor.

of the cases concerning the functioning of the so-called Disciplinary Chamber of the Supreme Court. It is worth adding that the Ombudsman had previously submitted such requests, although they had been rejected. By a decision of 15 June 2021[31] the Tribunal, composed of three judges, Ms Przyłębska presiding, dismissed the Ombudsman's application. In its reasoning, the Constitutional Tribunal stated that:

> In the opinion of the Constitutional Tribunal, the judgment of the ECtHR of 7 May 2021, to the extent to which it refers to the Constitutional Tribunal, is based on the ECtHR demonstrating ignorance of the Polish legal order, including the fundamental systemic assumptions defining the position, system and role of the Polish Constitutional Tribunal. To that extent, it was issued without legal basis, in excess of the ECHR's competence, and constitutes an unlawful interference in the domestic legal order, in particular in issues which are beyond the ECHR's jurisdiction; for these reasons it must not be regarded as a judgment (*sententia non existens*).

Since that decision was given in the context of a motion for the exclusion of a quasi-judge, the Prosecutor General took advantage of the hint presented by Mariusz Muszyński and submitted a motion to the Constitutional Tribunal. In this motion, the Public Prosecutor General demanded that the Constitutional Tribunal recognize the incompatibility of the scope and interpretation of article 6, paragraph 1, sentence 1 of the European Convention on Human Rights (on which the European Court of Human Rights relied when issuing the said judgment), with a number of norms of the Constitution of the Republic of Poland.

It is worth to notice that in the Polish legal system the Prosecutor General, based on Article 191 of the Constitution of the Republic of Poland, has the competence to lodge to the Constitutional Tribunal a motion in any case remaining within the competences of the Constitutional Tribunal as defined in Article 188 of the Constitution of the Republic of Poland. Here, the Prosecutor General indicated, point 1 of the Article 188 which enables the Tribunal to rule on: 'the conformity of statutes and international agreements with the Constitution'.

Despite the internal[32] and external[33] criticism that motion has received, in the course of the proceedings before the Constitutional Tribunal it was supported by the

[31] Constitutional Court decision of 15 June 2021, Ref. P 7/20.

[32] See: Position of the Legal Expert Group of the Stefan Batory Foundation on the pending case K 6/21 of the Constitutional Tribunal. https://www.batory.org.pl/oswiadczenie/stanowisko-zespolu-ekspertow-prawnych-fundacji-im-stefana-batorego-dotyczace-oczekujacej-na-rozstrzygniecie-trybunalu-konstytucyjnego-sprawy-o-sygn-k-6-21/.

Position No. 1 of the District Bar Council in Warsaw of 18 November 2021. https://www.ora-warszawa.com.pl/aktualnosci/wiadomosci/stanowisko-okregowej-rady-adwokackiej-w-warszawie-w-sprawie-postepowania-zawislego-przed-trybunalem-konstytucyjnym-w-sprawie-z-wniosku-prokuratora-generalnego-o-stwierdzenie-zakresowej-i-interpre/.

[33] See: Bingham Centre for the Rule of Law, Expert analysis of the applicability of Article 6 of the European Convention on Human Rights to the constitutional courts of the States Parties, requested by the Polish Commissioner for Human Rights in the context of the case K 6/21, https://binghamcentre.biicl.org/publications/expert-analysis-of-the-applicability-of-article-6-of-the-european-convention-on-human-rights-to-the-constitutional-courts-of-the-states-parties-requested-by-the-polish-commissioner-for-human-rights-in-the-context-of-the-case-k-621 and Garner and Lawson (2021).

Polish Parliament, the Ministry of Foreign Affairs and the President of the Republic of Poland. Only the Human Rights Commissioner, who is not a government institution, explicitly opposed it, requesting that the case be declared inadmissible on the grounds, inter alia, that the Tribunal lacks jurisdiction to rule on the matter.

4 Judgment in a Nutshell

In a judgment delivered on 24 November 2021, the Polish Constitutional Tribunal declared Article 6, paragraph 1, first sentence of the ECHR to be incompatible with the Polish Constitution in two aspects. First: to the extent that the term 'court' used in art 6 of the ECHR includes the Constitutional Tribunal, which in the Constitutional Tribunal's view was found to be incompatible with article 173 of the Polish Constitution, which declares that both courts and tribunals 'shall constitute a separate power' in connection with Article 10(2),[34] Article 175(1)[35] and Article 8(1)[36] of the Constitution of the Republic of Poland. Second: Article 6 confers competence on the European Court of Human Rights to review the legality of the election of judges to the Constitutional Tribunal, which was found incompatible with Article 194(1), which confers the competence to elect TK judges on the Sejm,[37] in conjunction with Article 8(1) of the Constitution.[38]

The written reasoning of the judgment was published in March 2022[39] although it should have been published at least by 24 December 2021.[40] The Tribunal opens its reasoning by dealing with the argument, raised in the course of the proceedings by the Ombudsman, that it was not competent to rule on the case, as the motion did not concern the law as such, but an application of law, which is the judgment of the Strasbourg Court in the Xero Flor case.

According to the Constitutional Tribunal, the subject of the judgment was a legal norm created as a result of a law-making interpretation of the first sentence of Article 6(1) of the EHCR by the ECtHR in the Xero Flor case.[41] This interpretation,

[34] This provision declares that: 'Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals'.

[35] This provision declares that: 'The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts'.

[36] This provision declares that: 'The Constitution shall be the supreme law of the Republic of Poland'.

[37] This provision declares that: 'The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office'.

[38] The judgment was published in the Journal of Law on 26 November 2021 under item 2161.

[39] The written reasoning (in Polish) of this judgment is available at the link below: https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%206/21.

[40] According to art 108(3) of the Law of 30 November 2016 on the organisation and procedure before the Constitutional Tribunal [PL. Ustawa o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym], Journal of Laws 2019, item 2393, 'The Court shall, no later than one month after the day on which the decision is pronounced, prepare a written statement of reasons for the decision. The statement of reasons shall be signed by the Judges of the Court who voted on the decision'.

[41] Point III.1 and III.3 and III.6.1 of the judgment reasoning.

although made in the concrete case, is binding on the States Parties on the basis of Article 32 of the Convention and, because of the position and authority of the ECtHR, is generally respected by domestic courts. As the Constitutional Tribunal declared: 'Every judgment of the ECtHR constitutes an exclusive, final and authentic interpretation of the provisions of the Convention and thus acquires, *ipso facto*, a normative character'.[42] At the same time the Constitutional Tribunal came to the conclusion that the ECtHR's interpretation in the Xero Flor concerns matters which are not regulated by the Convention (as the ECtHR acted ultra vires) and to which Poland, by ratifying the ECHR, did not consent.[43]

According to the Constitutional Tribunal, there is no other mechanism to verify this interpretation than the control of the Constitutional Tribunal, which, as the 'court of last resort', is obliged to uphold the fundamental systemic principles expressed in the Constitution, i.e. the constitutional identity of Poland and the principle of supremacy of the Constitution. For these reasons, the Tribunal found that it is competent to review the norms applied by the ECHR in the Xero Flor judgment.[44]

Central to the Constitutional Tribunal's decision was whether it was a court within the meaning of Article 6 of the Convention. The Constitutional Tribunal made, in this regard, reference to ECtHR case law, which provides that the application of Article 6(1), first sentence, of the Convention to proceedings before constitutional courts is limited to exceptional situations. Article 6 of the Convention, in the Constitutional Tribunal's opinion, does not guarantee the right of access to a court competent to annul or set aside a normative act and does not apply to the resumption of proceedings following a finding by a national court of a violation of the Constitution. It may be applied insofar as the proceedings from an extraordinary remedy (which is the Polish constitutional complaint) are similar in nature and scope to the ordinary appeal proceedings and the constitutional court is empowered to take effective remedies relating to the individual situation of the applicant.[45] The conclusion was that without any doubt the Constitutional Tribunal is not a court within the meaning of art 6 of the ECHR and therefore guarantees derived from Article 6 of the Convention do not apply to proceedings before the Constitutional Tribunal. Although the Constitutional Tribunal is a constitutional body with judicial power it does not exercise the administration of justice, nor does it decide individual cases or deal with the assessment of facts, but instead it carries out the hierarchical control of norms. This provision was read in conjunction with Article 175(1) of the Constitution, in accordance with which the Supreme Court and common, administrative and military courts have an exclusive competence to exercise the administration of justice in the Republic of Poland. Even when examining constitutional complaints, the Constitutional Tribunal decides only on the law, and not on the individual rights of the applicant. It is also not another court instance, nor does it replace courts (it does not control the application of the law in a specific case). The Constitutional

[42] Point III. 3.2.1. of the judgment reasoning.

[43] Point III. 3.2.2. of the judgment reasoning.

[44] Point III.3 of the judgment reasoning.

[45] Point III.6.3 of the judgment reasoning.

Tribunal pointed out that its judgment favourable to the applicant does not automatically lead to the final decision being overturned, but only allows the proceedings to be resumed. Thus, despite the fact that there are certain similarities between the Constitutional Tribunal and common courts and between proceedings before the Constitutional Tribunal and common courts, the Constitutional Tribunal cannot be regarded as a court or proceedings before it as judicial proceedings, neither within the meaning of Article 45 of the Constitution nor Article 6 ECHR.[46] To conclude this part of the reasoning, the Constitutional Tribunal came to the conclusion that the ECtHR in the Xero Flor judgment came to the wrong conclusion that the Constitutional Tribunal performs such a task, when in reality it does not. Recognition by the ECtHR that the Constitutional Tribunal adjudicates individual cases violates the constitutional provisions regulating the position of the Constitutional Tribunal.[47]

With regard to the second point of the judgment, the Tribunal held that in the Polish constitutional order there is no mechanism allowing any authority to assess the legality of the selection of judges of the Constitutional Tribunal. The Sejm, together with the President, has exclusive competence in this regard. Sejm's participation in the selection procedure also serves to legitimize the Constitutional Tribunal democratically. The Constitutional Tribunal underlined additionally that the independence of judges is not derived from the manner in which a judge was elected, but results from internal independence, understood as a judge's psychological and intellectual independence.[48]

The Tribunal also pointed out that the ECtHR applied the three-step test developed in Ástráðsson v. Iceland inconsistently with its aim and objectives. In particular, the ECtHR concluded unjustifiably that the election of the judges to the Constitutional Tribunal violated Polish law. In the opinion of the Polish Constitutional Tribunal, the interpretation in this respect of the previous case-law of the Constitutional Tribunal, which was the basis of the Xero Flor judgment, was erroneous. The ECtHR, in the opinion of the Constitutional Tribunal, also failed to recognize that in the course of the proceedings before the Constitutional Tribunal the applicant did not request the exclusion of a judge. It challenged the validity of his selection only in its application to the ECtHR, which is supposed to show that the applicant did not previously have doubts about the independence of the quasi-judge.[49]

Therefore, the ECtHR, by assessing the legality of the selection of the judge of the Constitutional Tribunal adjudicating on the case of the applicant company, created a procedure, unknown to the Polish Constitution, for the control of the composition of the Constitutional Court and, unauthorized, encroached upon the competences of the constitutional organs of state authority, the Sejm and the President, which constitutes a violation of Article 194(1) of the Constitution and the principle of supremacy of the Constitution. Concerning the consequences of the judgment, the Constitutional Tribunal declared that the judgment is in the nature of a scope.

[46] Cf. point III.4 and III. 6 of the judgment reasoning.

[47] Cf. point III.6.2 of the judgment reasoning.

[48] Cf. point III.5 and III.6.5 of the judgment reasoning.

[49] Point III.6.5 of the judgment reasoning.

This means that the ECtHR ruled that certain norms, indicated in the operative part, derived from Article 6 paragraph 1, first sentence, of the Convention, violating the provisions of the Constitution, and thus are not binding.[50]

The Constitutional Tribunal is also of the opinion, that the ECtHR while delivering the Xero Flor judgment, violated itself art 6 (1) of the Convention by an unauthorized (and consequently erroneous) interpretation of provisions of the Polish Constitution as well as violating the Convention's principle of subsidiarity by its non-application. Consequently, the Constitutional Tribunal came to conclusion that the Xero Flor judgment given as a result of ultra vires activity of the ECtHR cannot have the significance of a judgment; it is therefore a non-existent judgment (*sententia non existens*) and as such has no effect (it lacks the attribute of enforceability). Therefore, refusal to enforce such a judgment would not constitute a violation of the Constitution.[51]

Concerning the consequences of the judgment, the Constitutional Tribunal declared that the judgment is in the nature of a scope. This means that the ECtHR ruled that certain norms, indicated in the operative part, derived from Article 6 paragraph 1, first sentence, of the Convention, violating the provisions of the Constitution, and thus are not binding.[52]

A concurring opinion to written reasoning by Judge Zbigniew Jędrzejewski was annexed to the judgment. The judge Jędrzejewski, although supporting the direction of the judgment, complained that the grounds of the judgment contain abbreviations which may mislead the reader of the text, in-depth arguments and inconsistencies.

5 Critique

The Constitutional Tribunal judgment was met with enthusiasm by the Government. The Ministry of Justice, which initiated the proceedings as Prosecutor General the following day, issued a press release in which we read:

> The judgment [of the Constitutional Tribunal] will put a barrier to precedent-setting and usurpatory attempts to interfere in the Polish political system, a power never delegated to the ECtHR by the Convention (…). As the ECtHR exceeded its powers, its judgment in the Xero Flor case should be declared *non-existent* in the part relating to the Constitutional Tribunal.[53]

This opinion could not be more wrong. On the contrary, it is not the ECtHR's judgment but the judgment of the Constitutional Tribunal that should be regarded as a manifestation of the usurpation of competences. The Constitutional Tribunal

[50] Point IIII.8 of the judgment reasoning.

[51] Point III.6.5 of the judgment reasoning.

[52] Point IIII.8 of the judgment reasoning.

[53] Ministry of Justice Press Release: 'European Court of Human Rights cannot judge the legality of the election of Polish judges' [PL: Europejski Trybunał Praw Człowieka nie może oceniać legalności wyboru polskich sędziów], dated 25.11.2021, available at: https://www.gov.pl/web/sprawiedliwosc/europejski-trybunal-praw-czlowieka-nie-moze-oceniac-legalnosci-wyboru-polskich-sedziow.

exceeds the scope of jurisdiction as defined in Article 188 of the Constitution of the Republic of Poland, since the competences of the Court are limited exclusively to the control of constitutionality of legal norms, and not of judicial decisions, including the judgments of the ECtHR. The Constitutional Tribunal de facto has ruled on an act of the application of law not the law itself, although *de iure* Court has ruled Article 6, paragraph 1, first sentence of the ECHR. This was perfectly visible in the argumentation presented in the substantiation of the Constitutional Tribunal's judgment, where the Tribunal argued against the different arguments raised by the ECtHR in the Xero Flor judgments.

In accordance with the established case-law of the Constitutional Tribunal there is only one possibility, in the process of judicial review, where the Constitutional Tribunal can acknowledge how the legal provisions are interpreted in practice. This is when such practice is of a nature that is 'permanent, universal and stabilised', especially in the case law of the Supreme Court or the Supreme Administrative Court.[54] Clearly, a single judgment does not satisfy this requirement. In the Xero Flor judgment ECtHR ruled on the issue of quasi-judges in Polish Constitutional Court for the first time. Moreover, the Constitutional Tribunal, while allowing for acknowledgement of how the legal provisions are interpreted in practice, never referred to the ECtHR as the body that determines the practice of law. Quite the contrary; the Constitutional Tribunal, in a well-known judgment concerning the constitutionality of the Treaty of Accession of the Republic of Poland to the European Union, delivered in a full composition of the Tribunal, underlined that the Tribunal has no competence to assess the constitutionality of the case-law of the Court of Justice of the European Communities or any jurisdictional body of the European Communities. This is because it is clearly outside the cognition of the Constitutional Tribunal, strictly defined in Article 188 of the Constitution. The Tribunal stressed that this statement applies both to specific judgments and to the 'constant line of case-law of the European Court of Justice', interpreted from specific judgments.[55] This line of argumentation can undoubtedly also be applied to the case law of the ECtHR.

The Constitutional Tribunal in the reasoning of the judgment tried to address this argument. In fact, however, it did so in a rather inept manner. First, the Tribunal itself explicitly acknowledged that not all of the conditions of 'permanent, universal and stabilised' interpretation of law were met directly in the present case.[56] At the same time the Constitutional Tribunal recognizes that they were fulfilled indirectly, without clearly explaining what this indirectness consists in. The Tribunal attempted to justify this conclusion on the basis of the significance of the ECtHR judgments. In the end the Tribunal formulated additional prerequisites for the admissibility of such control which are: the rank (importance) of the case and a sufficiently high status of the adjudicating court. It is not entirely clear whether these additional prerequisites

[54] Cf: in particular: Constitutional Tribunal judgment of 27 October 2010, ref. no. K 10/08, § III.1, Constitutional Tribunal judgment of 28 October 2003, ref. no. P 3/03, § IV.2; Constitutional Court decision of 17 July 2014, ref. no. P 28/13, § II. 3.2; Constitutional Court decision of 24 May 2012, ref. Ts 115/10.

[55] Constitutional Tribunal judgment of 11 May 2005, ref. no. K 18/04, § III.9.1.

[56] Point IIII.3.2. of the judgment reasoning.

are to be used in addition to the existing ones or instead of them. These criteria are far from precise and, together with the recognition by the Tribunal that each ECtHR judgment constitutes an exclusive, final and authentic interpretation of the provisions of the Convention[57] allows the Constitutional Tribunal to cover any judgment of the ECHR or the CJEU. This is directly contrary to the literal wording of the Constitution, which has not granted such broad authority to the Constitutional Tribunal.

The Constitutional Tribunal's reasoning is incomprehensible to some extent. The Tribunal has focused its argumentation strongly on the hierarchical control of norms, which is supposed to distinguish it from an ordinary court. As a side note, it is worth mentioning that this argument, which seems to be crucial one, was raised by the Government of Poland in the proceedings before the ECtHR, but did not prove decisive for the outcome.[58] Following this line of argumentation the Tribunal sought to demonstrate that its rulings do not have a direct effect on the rights and freedoms of individuals. This attempt cannot be considered successful. It should be agreed that the main purpose of proceedings before the Constitutional Tribunal is to control the constitutionality of legal norms. However, the review of constitutionality may be initiated before the Polish Constitutional Tribunal in individual, specific cases, whether by courts, in a procedure of preliminary request, or by citizens, by way of a constitutional complaint. A judgment of the Constitutional Tribunal, favourable for the applicant, may lead to the resumption of the proceedings in the case of constitutional complaint or be decisive in the direction of the judgment of the court that formulated the legal question. Furthermore, the Constitutional Tribunal may directly intervene in pending court proceedings. This can be proved by the recently communicated ECHR case of Abdelhakim Youssfi against Poland (Application no. 12730/21).[59] In this case, initiated by a constitutional complaint in family law matters, the Constitutional Tribunal issued an interim measure by virtue of which it stayed the enforcement of the 2018 decision on the child's enforced return to the father.

The Constitutional Tribunal reference to the interpretation of provisions of the Constitution in the context of the interpretation of the ECHR given in the Xero Flor judgment seems to misunderstand the key principle of ECHR interpretation. As the ECtHR stated in its early jurisprudence the concepts used in the wording of ECHR, like the concept of 'Tribunal' used in art 6, has an autonomous meaning.[60] On this ground, in accordance with the jurisprudence that has developed over the past 30 years, art 6 may be applied to constitutional courts, as the outcome of

[57] This is obviously far from truth—the best example being the judgments delivered consecutively by the Chamber and the Grand Chamber on the same case.

[58] See § 178 of the Xero Flor judgment.

[59] European Court of Human Rights, Abdelhakim Youssfi against Poland, Application no. 12730/21. Communicated case.

[60] See: Grand Chamber of European Court of Human Rights, Guðmundur Andri Ástráðsson v. Iceland, supra note 28 § 219 and following which the court refined and clarified the relevant case-law principles. Cf. also: Letsas (2004).

constitutional disputes is decisive for civil rights or obligations.[61] Based on that line of jurisprudence, the ECtHR in Xero Flor came to the conclusion that the Polish Constitutional Tribunal may also be covered by this notion. In the written reasoning, the Polish Constitutional Tribunal indicated the contrary, that although it did not question the autonomous meaning of the concept of a 'Tribunal' used in art 6 of the Convention, it nevertheless pointed out that this concept also implies an obligation on the part of the ECtHR to examine carefully in each case whether the organization of the constitutional court and the proceedings before it complied with the conditions for the admissibility of applying the standard of Article 6(1) of the Convention to it.[62]

In this regard it is worth underlining that, according to Article 32(1) ECHR, the ECtHR has exclusive jurisdiction to hear all cases concerning the interpretation and application of the ECHR. So concerning ECHR, the ECtHR is in fact a 'court of last resort', not the Polish Constitutional Tribunal. It is therefore illegitimate to question the manner in which the ECtHR has covered the Polish Constitutional Court with the autonomous concept of a 'tribunal'. What is particularly ironic in this context is that the Constitutional Tribunal itself in earlier jurisprudence, when interpreting i.a. the constitutional guarantees of the right to court, emphasized the autonomous meaning of the notions used in the Constitution and its exclusive role in interpreting the Constitution.[63]

The Constitutional Tribunal also came to the conclusion that there are no mechanisms allowing assessment of the validity of the selection of judges of the Tribunal. This claim cannot be considered true. The Constitutional Tribunal, before its hostile takeover, in one of the series of judgments concerning the Constitutional Tribunal itself,[64] in case of K 34/15 of 3 December 2015, ruled i.a. on the constitutionality of the election of quasi-judges and on the lack of procedures to challenge their election by the Sejm. This judgment provides the basis for challenging the re-election of the double judges, and was recalled in the Xero Flor judgment.

To conclude, two procedural circumstances should be noted. The judgment was delivered by a panel of five judges and not by the Tribunal in full composition, although the judgment is undoubtedly precedential. Interestingly, the Constitutional Tribunal itself acknowledged the precedential character of the judgment in the written substantiation.[65] The irregularities in the operation of the Constitutional Tribunal referred to above may indicate that this can be explained by lack of agreement among the remaining judges as to the direction of the ruling. Although it is difficult to assume that the judgment of the Constitutional Tribunal delivered in full

[61] See for example: European Court of Human Rights, Süssmann v. Germany, application no. 20024/92, judgment, 16 September 1996, §§ 34–41; European Court of Human Rights, Pauger v. Austria, application no. 16717/90, judgment, 28 May 1997 §§ 47–49; European Court of Human Rights, Pierre-Bloch v. France, application no. 24194/94, judgment, 21 October 1997, § 48.

[62] Point III.6.2 of the judgment reasoning.

[63] In the context of the right to a court cf. the judgment of the Constitutional Tribunal of 25 June 2012., case ref. K 9/10 and the judgment of the Constitutional Tribunal of 6 November 2012., case ref. K 21/11.

[64] See § 23–63 of the Xero Flor judgment.

[65] Points: III.3.2.1. and III.3.2.4 of the judgment reasoning.

composition would be different, probably it would not be unanimous. The expected dissenting opinions annexed to judgment could in that situation serve as a starting point for a future revision of this judgment.

Second, three members of the bench which delivered the commented judgment were on the judges panel that issued the Decision of 15 June 2021 in a case ref. P 7/20, referred to above. Moreover, the same judge was the judge rapporteur in both that case and this one. In addition, Julia Przyłębska presided over both those formations of the Tribunal (in case P7/20 and in the commented judgment) notwithstanding the fact that, in her above-quoted statement on the day of the announcement of the Xero Flor judgment, she had already given her assessment of that judgment and its compatibility with the Constitution. This clearly raises doubts as to the objectivity of judge's ruling in this case.

6 The Consequences of the Judgment

Regarding the consequences of the Constitutional Tribunal judgment, the Ministry of Justice in the press release cited above declared that: 'the Xero Flor case should be declared *non-existent* in the part relating to the Constitutional Tribunal'. While it is difficult to agree with such a thesis from the domestic law point of view, it is completely wrong from the point of view of international law.

It is worth noting in this context that the Prosecutor General's motion, which initiated the proceedings, was lodged with the Constitutional Tribunal on 28 July 2021. It was thus submitted during the time period in which the Polish Government has a right to file its request in the proceedings before European Court of Human Rights for referral of the Xero Flor case to the Grand Chamber in accordance with Article43 of the ECHR (the deadline was 7 August). The Polish Government did not exercise this right, which led directly to the situation when the judgment in the Xero Flor case was becoming final in accordance with Article 44 of the ECHR. The fact that the Government did not lodge this motion should be, in normal circumstances, interpreted as an admission by the Government of the Republic of Poland that it agrees with the judgment or does not see a chance to win the case in front of the Grand Chamber of ECtHR.

Notwithstanding, the judgment in Xero Flor became final on 7 August 2021. As a consequence, in accordance with Article 46(1) ECHR, the Polish authorities fall— under the obligation to comply with the judgment. The Prosecutor General, as one of the Polish state institutions, alongside the Sejm of the Republic of Poland and the Constitutional Tribunal itself, from that time fell under the obligation to execute the Xero Flor case. This meant that the motion should have been withdrawn by the Prosecutor. Parliament, with the participation of the President, should have amended the law concerning status of quasi-judges to bring it into line with the Xero Flor judgment (most preferably by excluding the possibility of their further adjudication) and the Constitutional Tribunal should have discontinued the proceedings. However, none of this happened.

Based on these circumstances, we can read that the clear intention in initiating proceedings before the Constitutional Tribunal was to obtain a judgment that will serve as a pretext not to enforce the Xero Flor judgment.

This intention finds a confirmation in the Action Report sent by the Polish Government on April 2022 to the 1436th meeting of Committee of Ministers concerning the domestic execution of the Xero Flor judgment.[66] Analysis of this report provides some interesting findings. In the context of individual measures, the Government, even before Constitutional Tribunal judgment, on 4 November 2021 made a payment to the applicant company of the costs and expenses awarded by the ECtHR. The Government pointed out—relying on established Supreme Court case-law exclusively—that there was no possibility of reopening the proceedings in this case. In the context of general measures, concerning the functioning of the Constitutional Tribunal, the Government indicated that because of the Constitutional Tribunal's judgment no other general measures appeared necessary. It is impossible not to notice in this report the inconsistency in the Government's actions. On the one hand, following the Constitutional Tribunal, the Government recognizes the ECtHR judgment in the Xero Flor case as non-existent and therefore unenforceable, while on the other hand it pays the costs to the applicant company.

Regardless, in accordance with Article 27 of the Vienna Convention on the Law of Treaties, to which Poland is a party, a state may not invoke arguments referring to internal law in order to justify or excuse its failure to comply with an international obligation. Therefore, the judgment of the Constitutional Tribunal cannot in any way affect the scope of Poland's obligations.

The actions of the Polish Government and the Constitutional Tribunal in this regard are completely inconsistent with the unanimously adopted (including with the support of the Polish government) Copenhagen Declaration of 2018. In this declaration state parties to the ECHR, including the current Polish Government, i.a. reiterates 'strong commitment to the full, effective and prompt execution of judgments.'[67] It is therefore reasonable to ask why the Government, at the hands of the Prosecutor General, decided to lodge this motion, which not only prevents Government from achieving its goal, but also contributes to the deepening of the legal chaos and crisis of the rule of law caused by the improper composition of the Constitutional Tribunal.

The answer can lie in domestic considerations alone. This judgment should be seen as one of the whole series of earlier judgments in which the Constitutional Tribunal has found unconstitutional the provisions of European Union law that provide the basis for the Court of Justice of the European Union judgments or interim measures in the cases concerning the organization and the independence of the

[66] Action report (11/04/2022)—Communication from Poland concerning the case of Xero Flor w Polsce sp. z o.o. v. Poland, DH-DD(2022)420.

[67] https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf.

judiciary,[68] as well as national law and its application, which serves as basis for implement the CJEU judgments.[69]

The government, using the hands of the Constitutional Tribunal, is attempting to maintain the judicial reforms introduced in Poland from 2016 onwards. The ultimate goal of the Government reforms in the field of the judiciary seems to be subordination of the judiciary to Government. This is part of the government's broader agenda to subordinate all independent decision-making institution in Poland. The Government actions to limit the independence of the judiciary not only took the form of legislative changes to but also of disciplinary proceedings initiated against judges.[70] In this regard the domestic legislation that forms the legal grounds for disciplinary proceedings was changed several times. One of the main changes, which entered into force on 14 February 2020, was referred to in the media as the 'muzzle law'. This legislation, inter alia, added new categories of disciplinary offences. Among others, the judge is liable for 'challenging the existence of a judge's official status, the effectiveness of a judge's appointment, or the legitimacy of a constitutional organ of the Republic of Poland'.[71] This provision, read together with the ConstitutionalTribunal judgment, allows for the disciplinary responsibility of the judges that is applied to

[68] In the judgment of 14 July 2021, case ref. P 7/20 Constitutional Court finds that the second sentence of Article 4(3) of the Treaty on European Union, read in conjunction with Article 279 of the Treaty on the Functioning of the European Union, which were the basis for interim measures imposed by CJ EU on Poland, to be inconsistent with the Constitution of the Republic of Poland to the certain scope (described in that judgment). This was a reaction to CJEU order of 8 April 2020 in case C-791/19 R, concerning suspension of certain legislation regarding the disciplinary regime for judges.

In the second judgment of 7 October 2021 delivered in case ref. K 3/21 the Constitutional Court finds several provisions of EU Law also to be inconsistent with the Constitution of the Republic of Poland to the certain scope (Article 1, first and second paragraphs, in conjunction with Article 4(3) of the Treaty on European Union as well as Article 19(1), second subparagraph, of the Treaty on European Union and Article 2 of the Treaty on European Union. This was in turn a reaction to a whole series of CJEU judgments on changes made in the field of judiciary in Poland, especially C-619/18 –*Commission v Poland* (judgement of 24 June 2019, ECLI:EU:C:2019:615); C-192/18 –*Commission v Poland* (Judgement of 5 November 2019, ECLI:EU:C:2019:924); as well as joint cases C-585/18, C-624/18 and C-625/18 – *A.K.* et al. *v Krajowa Rada Sądownictwa* (judgement of 19 November 2019, ECLI:EU:C:2019:982); C-824/18 – *A.B.* et al. *v Krajowa Rada Sądownictwa* et al. (Grand Chamber judgement of 2 March 2021, ECLI:EU:C:2021:153).

[69] In the first judgment of 20 April 2020, ref. no. U 2/20, the Constitutional Court, for the first time, in violation of its previous case law, recognized its competence to review a Supreme Court resolution that implements CJEU judgments, that is, the act of applying the law and not the law. In this respect, the Constitutional Court issued a judgment stating that the Resolution of a formation of the combined Chambers _(Civil, Criminal and Labour and Social Insurance Chambers of the Supreme Court of 23 January 2020) is unconstitutional.

In the second decision of 21 April 2020, ref. no. Kpt 1/20, also contrary to previous case law on the understanding of significant competence disputes, the Court stated on the basis of the same Supreme Court resolution that there is a competence dispute between the Supreme Court and the Sejm and the Supreme Court and the President. It resolved these disputes to the disadvantage of the Supreme Court, which by issuing this resolution allegedly violated the competences of the bodies for appointing judges and in fact undermined the supremacy of the Constitution over EU law.

[70] See: Kościerzyński (eds.) (2020).

[71] Cf Article 1(37) of the Act Amending the Law on the System of Common Courts, the Law on the Supreme Court and Certain Other Acts of 20 December 2019. (Journal of Laws of 2020, item 190).

the Xero Flor judgment.[72] In the clear absence of Government actions to enforce the Xero Flor judgment of the Constitutional Tribunal means implementation of that judgment by common courts is made very difficult if not impossible.

Turning again to the international consequences of the Constitutional Tribunal judgment in case K 6/21. In response to this judgment the Council of Europe Secretary General reacted by formally asking (based on Article 52 of the ECHR) Poland to explain how it ensures the effective implementation of its obligations under the European Convention on Human Rights**.**[73] Whatever answer the Polish Government sends, the Council of Europe does have limited tools to react to this unprecedented violation of the Convention obligation by Poland, although those instruments laid down in Articles 46 and 47 of the European Convention on Human Rights should undoubtedly be used. Fortunately, the ECHR is also part of the EU's legal order.[74] The EU, contrary to the Council of Europe can use financial arguments to influence Poland to obey the Xero Flor judgment. The likelihood of such a scenario is indicated by recent case law of the Court of Justice of the EU, in particular the Euro Box Promotion judgment, in which the Court explicitly extended the European Union requirement of judicial independence to constitutional courts for the first time.[75] The judgment gives an additional argument for the European Commission in the debate on the rule of law which it is conducting with Poland at various levels, allowing the commented judgment of the Constitutional Court to be addressed as well.[76]

Last but not least, a consequence of the Constitutional Tribunal's judgment, and the Polish Government and Constitutional Tribunal seem completely unconscious of this, is the possibility for the ECtHR to revise the previous standard specified in the Szott-Medyńska decision[77] relating to the necessity of using (to the extent specified in the decision) of an constitutional complaint before lodging an individual application to the ECtHR. As a consequence of this judgment, which held that the guarantees of the right to a court do not apply to the Polish Constitutional Tribunal, the constitutional complaint could and should no longer be regarded as an effective domestic remedy within the meaning of Article 35 as well as art 13 of the ECHR. It is worth citing the appropriate part of the Constitutional Tribunal's written reasoning here:

> The Constitutional Court stresses that the fact that the guarantees of Article 6(1) of the Convention do not apply to the Court does not mean that the proceedings before the Court need not meet a certain standard. However, interna-

[72] Cf more: Gajda-Roszczynialska and Markiewicz (2020).

[73] Council of Europe Press Release: Secretary General asks Poland how it intends to ensure effective implementation of ECHR, Strasbourg 7 December 2021 https://www.coe.int/en/web/portal/-/secretary-general-asks-poland-how-it-intends-to-ensure-effective-implementation-of-echr.

[74] Cf. Article 6(3) of the Treaty on European Union, as well as art 52(3) of the Charter of Fundamental Rights of the European Union.

[75] CJEU, C-357/19 and others, Euro Box Promotion, judgment, 21 December 2021. Cf. more: Filipek Taborowski 2021.

[76] On the state of this debate, cf. Pech et al. (2021).

[77] Decision as to the admissibility of the application lodged Dorota Szott-Medyńska and others against Poland, no. 47414/99.

tional standards are not necessary in this case. The source of these standards is the Constitution, which in Article 7 bases the state system on the rule of law, and requires that every public authority act on the basis and within the limits of the law.[78]

It is significant that the Constitutional Tribunal does not indicate in the passage above the right to a court guaranteed by the Polish Constitution in Article 45 as a standard for proceedings before the Constitutional Tribunal. It is worth noting in this context that, according to the established case law of the ECtHR, while it is not necessary for the authority hearing the applicant's case to be a judicial body in order to satisfy the standard of an 'effective domestic remedy', it must nevertheless satisfy standards of independence[79] and guarantee procedural rights.[80] The Constitutional Tribunal's fulfillment of these requirements must be at least questionable.

The likelihood of a scenario in which the Szott-Medyńska standard will be revised is demonstrated by a recent judgment of the ECtHR in a case of Advance Pharma sp. z o.o v. Poland (the ruling became final on May 5, 2022).[81] In this case ECtHR dismiss the Government's argument as to non-exhaustion of domestic remedies on account of the applicant's failure to lodge a constitutional complaint contesting the rules governing the procedure of appointment to the Supreme Court. ECtHR came to conclusion about lack of sufficiently realistic prospects of success for a constitutional complaint based on the grounds suggested by the Government in that case. In justifying its judgment, the ECtHR referred, inter alia, to the case commented on.[82]

7 Concluding Thoughts

Law students in the first year of law school in Poland, as well as in many European countries, are obliged to pass a Roman law course. One of the basic principles of Roman law, as recalled by modern legal systems, is that you cannot be the judge in your own case: *nemo judex in causa sua.* In the case commented on, the Constitutional Tribunal became so caught up in protecting its own position that it seems to have forgotten this principle. Thus, the Tribunal allowed itself to be used by the Government, which sought a ruling from the Constitutional Tribunal in order to avoid executing the Xero Flor ruling, and more importantly to have a tool to put pressure on judges of common courts in Poland. Admitting that the Convention,

[78] Point III.6.3 of the judgment reasoning.

[79] Cf: European Court of Human Rights, Khan v. the United Kingdom, application no. 35394/97, judgment 12 May 2000, §§ 44–47.

[80] Cf. European Court of Human Rights, Chahal v. the United Kingdom, application no 22414/93, judgment 15 November 1996, §§ 152–154; European Court of Human Rights, De Souza Ribeiro v. France, application no. 22689/07, judgment 13 December 2012§ 79; European Court of Human Rights, Allanazarova v. Russia, application no 46721/15, 14 February 2017, § 93.

[81] European Court of Human Rights, Advance Pharma sp. z o.o v. Poland, application no 1469/20, judgment, 3 February 2022.

[82] See § 319–321 of the Advance Pharma case.

and indirectly also constitutional guarantees of the right to a court, do not apply to proceedings before the Constitutional Tribunal leads at least to a lowering of the level of protection of individual rights and freedoms. As Ewa Łętowska pointed out correctly, that was '*honest (though embarrassing) coming-out of the Polish Constitutional Tribunal*'.[83] This judgment is in complete contradiction with the Constitutional Tribunal's earlier, i.e. pre-2015, approach to standards under the European Convention on Human Rights. At that time, the reference to ECtHR case-law was crucial in an assessment of cases pending before the Constitutional Tribunal.[84]

The judgment of the Constitutional Court is precedent-setting. Just before it was issued, on 7 November 2021, the Prosecutor General had again challenged the first sentence of Article 6(1) of the European Convention on Human Rights in three scopes corresponding to three consecutive judgments of the European Court of Human Rights concerning judicial reforms made by law and justice: in the case of Dolińska-Ficek and Ozimek v. Poland,[85] in the case of Broda and Bojara v Poland,[86] as well as of 22 July 2021 in the case Reczkowicz v. Poland[87] (Application no. 43447/19). Unlike in the Xero Flor case, in the Reczkowicz case the Government first requested its referral to the Grand Chamber but then withdrew its request.[88]

The judgment in this case was delivered by the Constitutional Tribunal on 10 March 2022, slightly ahead of the ECHR's announcement of its judgment in Grzęda v. Poland,[89] which, in part, also dealt with the subject matter with which the Constitutional Court was confronted in this case. Without much surprise, again, it fully agreed with the Prosecutor General's motion, and the Polish Constitutional Tribunal declared again that Article 6(1) of the ECHR is incompatible with the Polish Constitution in the following aspects. First, under the phrase "civil rights and obligations", it comprises the judge's subjective right to hold a managerial position within the structure of common courts in the Polish legal system. Secondly, in the context of assessing whether the requirement of "tribunal established by law" has been met: (a) it permits the European Court of Human Rights and/or national courts to overlook the provisions of the Constitution and statutes as well as the judgments of the Polish Constitutional Tribunal, (b) makes it possible for the European Court of

[83] Łętowska (2021).

[84] Cf, in particular: Constitutional Tribunal judgment of 12 January 2000, case ref.: P 11/98; Constitutional Tribunal judgment of 19 December 2002, case ref.: K 33/02; Constitutional Tribunal judgment of 18 October 2004, case ref.: P 8/04; Constitutional Tribunal judgment of 18 January 2006, case ref.: K 21/05; Constitutional Tribunal judgment of 24 October 2007, case ref.: SK 7/06; Constitutional Tribunal judgment of 6 October 2009, case ref.: SK 46/07; Constitutional Tribunal judgment of 19 July 2011, case ref.: K 11/10.

[85] European Court of Human Rights, Dolińska-Ficek and Ozimek v. Poland, applications nos. 49868/19 and 57,511/19, judgment, 8 November 2021.

[86] European Court of Human Rights, Broda and Bojara v Poland, application nos.: 26691/18 and 27,367/18, judgment, 29 June 2021.

[87] European Court of Human Rights, Reczkowicz v. Poland, application no. 43447/19, judgment, 22 July 2021.

[88] Cf. Press Relase of 22 November 2021 issued by the Registrar of the Court, ref: ECHR 351 (2021).

[89] European Court of Human Rights, Grzęda v. Poland, application no. 43572/18, Grand Chamber judgment, 15 March 2022.

Human Rights and/or national courts to independently create norms, by interpreting the Convention, pertaining to the procedure for appointing national court judges and (c) authorises the European Court of Human Rights and/or national courts to assess the conformity to the Constitution and the ECHR of statutes concerning the organisational structure of the judicial system, the jurisdiction of courts, and the Act specifying the organisational structure, the scope of activity, modus operandi, and the mode of electing members of the National Council of the Judiciary.

We must not overlook that the judge rapporteur for this judgment was Mariusz Muszyński, the same quasi-judge to which the ECHR judgment in the Xero Flor case was referred. The reasoning adopted by the Constitutional Tribunal in this case corresponded with that described and criticized in this piece.[90]

This modus operandi of the Polish Government, in which the Constitutional Court serves as a tool to avoid the execution of certain ECtHR judgments, will probably be repeated more than once as, since July 2019, the ECtHR has communicated to Poland over 40 applications related to various aspects of the 'reform' of the domestic judicial system aimed to limit the independence of the judiciary.[91] Each subsequent judgment of this type brings the prospect of Poland leaving the democratic club of member states of the Council of Europe closer.

Acknowledgements I am very grateful to Prof. Gabor Halmai and Alyson Price for their very helpful comments on the manuscript.

Funding Open access funding provided by European University Institute - Fiesole within the CRUI-CARE Agreement.

Open Access This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article's Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article's Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit http://creativecommons.org/licenses/by/4.0/.

References

Bates E (2012) British Sovereignty and the European Court of Human Rights. Law Q R 128:382–411

Bodnar A (2018) Protection of human rights after the constitutional crisis in Poland. Jahrbuch Des Öffentlichen Rechts Der Gegenwart 66:639–662

Bryan G (2013) Lions under the throne: the constitutional implications of the debate on prisoner enfranchisement. Camb Int Law J 2:274–286

[90] Press release of the Constitutional Court following the judgment in case K 7/21 https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11822-dokonywanie-na-podstawie-art-6-ust-1-zd-1-ekpcz-przez-sady-krajowe-lub-miedzynarodowe-oceny-zgodnosci-z-konstytucja-i-ekpcz-ustaw-dotyczacych-ustroju-sadownictwa-wlasciwosci-sadow-oraz-ustawy-dotyczacej-krajowej-rady-sadownictwa.

[91] Cf. Ploszka (2021).

Chmielarz-Grochal A, Sułkowski J (2018) Appointment of Judges to the Constitutional Tribunal in 2015 as the Trigger Point for a Deep Constitutional Crisis in Poland. Constit Rev 2:91–119

Filipek P, Taborowski M, (2022) From Romania with love: the CJEU confirms criteria of independence for constitutional courts, VerfBlog, 2022/2/14, https://verfassungsblog.de/from-romania-with-love/, https://doi.org/10.17176/20220215-001215-0

Fleig-Goldstein RM (2017) The Russian Constitutional Court versus the European Court of human rights: how the strasbourg court should respond to Russia's refusal to executive ECtHR judgments. Colum J Transnat'l l 56:172

Florczak-Wątor M (2021) The capture of the Polish Constitutional Tribunal and its impact on the rights and freedoms of individuals. In: Macker J, Wolf H, Turner BS (eds) The Condition of democracy, vol 2. Contesting Citizenship, Berlin

Gajda-Roszczynialska K, Markiewicz K (2020) Disciplinary proceedings as an instrument for breaking the rule of law in Poland. Hague J Rule of Law 12:451–483

Garlicki L, Derlatka M (2019) Constitutional Court of Poland. 1996-2018. In: Arnold R, Rytel-Warzocha A, Szmyt A (eds) Development of Constitutional Law Through Constitutional Justive. In: XX International Congress of European and Comparative Constitutional Law, Gdansk. 2019, pp 151–168

Garner O, Lawson R (2021) On a road to nowhere: the Polish Constitutional Tribunal assesses the European Convention on Human Rights, VerfBlog, 2021/11/23, https://verfassungsblog.de/on-a-road-to-nowhere/, https://doi.org/10.17176/20211123-205349-0

Gliszczyńska-Grabias A, Sadurski W (2021) The judgment that wasn't (but which nearly brought Poland to a standstill):'Judgement' of the Polish Constitutional Tribunal of 22 October 2020, K1/20. Eur Const Law Rev 17(1):130–153

Halmai G (2019) The making of "illiberal constitutionalism" with or without a new constitution: the case of Hungary and Poland. In: Landau D, Lerner H (eds) Comparative constitution making. Edward Elgar Publishing, pp 302–323

Keller H, Reto W (2019) The Bell of Görgülü Cannot Be Unrung—Can It? The Global Community Yearbook of International Law and Jurisprudence, pp 83–114

Koncewicz TT (2018) The capture of the polish constitutional tribunal and beyond: of institution (s), fidelities and the rule of law in flux. Rev Cent East Eur Law 43:116–173

Kościerzyński J (2020) Justice under pressure—repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019. Iusticia, Warsaw

Letsas G (2004) The truth in autonomous concepts: How to interpret the ECHR. Eur J Int Law 15:279–305

Łętowska E (2021) The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal, VerfBlog, https://verfassungsblog.de/the-honest-though-embarrassing-coming-out-of-the-polish-constitutional-tribunal/, DOI: https://doi.org/10.17176/20211130-191829-0.

Mälksoo L (2016) Russia's constitutional court defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-П/2015. Eur Const Law Rev 12:377–395

Pech L, Wachowiec P, Mazur D (2021) Poland's rule of law breakdown: a five-year assessment of EU's (In)action. Hague J Rule Law 13:1–43. https://doi.org/10.1007/s40803-021-00151-9

Ploszka A (2021) (In)Efficiency of the European Court of human rights priority policy. the case of applications related to the Polish rule of law crisis. In: Bodnar A, Urbanik J (eds) Περιμένοντας τους Βαρβάρους. Law in the days of constitutional Crisis. Studies Offered to Mirosław Wyrzykowski, Warsaw, pp 539–553

Radziewicz P (2017) On legal consequences of judgements of the Polish Constitutional Tribunal passed by an irregular panel. Rev Comp Law 31:45–64

Sadurski W (2007) Porządek konstytucyjny. In: Kolarska-Bobińska L, Kucharczyk J, Zbieranek J (eds) Demokracja w Polsce 2005–2007. Fundacja Instytut Spraw Publicznych, Warszawa, pp 13–71 https://www.worldcat.org/title/demokracja-w-polsce-2005-2007/oclc/191222326

Sadurski W (2019a) Polish constitutional tribunal under PiS: from an activist court, to a paralysed tribunal, to a governmental enabler. Hague J Rule Law 11:63–84

Sadurski W (2019b) Poland's constitutional breakdown. Oxford University Press

Wiącek M (2021) Constitutional crisis in Poland 2015–2016 in the light of the rule of law principle. In: von Bogdandy A, Bogdanowicz P, Canor I, Grabenwarter C, Taborowski M, Schmidt M (eds) Defending checks and balances in EU Member States. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol 298. Springer, Berlin. https://doi.org/10.1007/978-3-662-62317-6_2

Wyrzykowski M (2017) Antigone in Warsaw. In: Zubik M (ed) Human rights in contemporary world. Essays in Honour of Professor, Warsaw, pp 372–437

Wyrzykowski M (2019) Experiencing the unimaginable: the collapse of the rule of law in Poland. Hague J Rule of Law 11:417

Zajadło J (2017) Pojęcie „imposybilizm prawny" a polityczność prawa i prawoznawstwa. Państwo i Prawo 72:17–30

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.