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Semi Final D

Judicial Ethics and Professional Conduct

Legality of procedure of electing judges of the Constitutional Tribunal as a guarantee of independence and impartiality of a judge

Reflections on Xero Flor vs Poland Case (4907/17)

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We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not someday depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the law system as we know that there are standards of conduct, both in and out of court, designed to maintain confidence in those expectations.

-- Mr Justice Thomas, a judge of the Supreme Court of Queensland[1]

Introduction:

"Let's have a look at what is going on around the Tribunal. Reparative acts, judgements. This has all been provoked by a political game whose aim is to annul a mechanism which is called the separation of powers. We will pay with the remnants of our legal culture, with trust, with an atmosphere that is spreading now."

Professor Ewa Łętowska, Radio TOK FM, 11 August 2016[2]

Courts and tribunals as organs of the judiciary were established, among other things, to settle disputes. With the creation of this body, the question arises of what requirements should be met by the person who will hold the position of judge. In public perception, it would be desirable to be a person distinguished not only by great legal knowledge but, equally important, by a sense of justice and a moral compass. But what will be the significance of a judge's competence if the procedure leading to his or her appointment is invalid. Will it not raise concerns about the stability of the judicial system and undermine democratic values? Is it enough to be the "right person" to practice the "profession", or must the procedural standards of appointment be met and maintained?

If we can say that there are objective standards for the appointment of judges that are followed throughout the democratic world, then it seems obvious that if one acts against the established procedures, violating them, then the results of those actions can be questioned and challenged.

[1] Thomas, Judicial Ethics in Australia, 2nd edition, 1997, at p. 9.

[2] Radio TOK FM, Prof. Łętowska: Zapłacimy za TK. Zniszczeniem zaufania i resztek kultury prawnej. W tym demontażu chodzi o jedno, availableat:
http://www.tokfm.pl/Tokfm/1,103454,20530202,prof-letowska-zaplacimy-za-tk-zniszczeniem-zaufania-i-resztek.html#BoxNewsImg

The idea of this paper arose in response to the latest and crucial judgments of the European Court of Human Rights in cases of Xero Flor versus Poland[3] and Guðmundur Andri Ástráðsson versus Iceland[4].

We believe that under the 2015 reforms amending the Constitutional Tribunal Act, the actions taken by this body can be considered politically motivated. These actions have a significant impact on other court cases and exacerbate the crisis of the judiciary in Poland, as confirmed by the decision of the European Court of Human Rights, which held that the Polish Constitutional Tribunal (TK) in Xero Flor versus Poland case was not "a court established by law" within the meaning of Article 6 of the Convention. The ECtHR also held that complaints about recent judicial reforms in Poland should be given priority, which is significant and may be a milestone in similar cases.

By way of introduction, it would be appropriate to outline the origins of the constitutional crisis in Poland. In August 2013, after the first reading, the draft Act on the Constitutional Court was moved for further consideration by a parliamentary committee. The works lasted for over a year and half. This Act was adopted by the Sejm (lower house of Polish Parliament) at the end of June 2015 [5]. The wording of Article 137 of the Constitutional Tribunal Act of 25 June 2015 allowed that the current Sejm could choose five judges retiring in 2015 within 30 days of the act's entry to force. It included two judges of the Constitutional Tribunal whose terms of office expire during the term of the next Sejm. A committee explained that these modifications of the procedure of appointing judges to the Constitutional Tribunal were necessary due to the fact that Tribunal's work might have been blocked for approximately 6 months. They claimed that it is hard to imagine that the new Parliament will choose these judges during its first session. Consequently, the governing party called Civic Platform had appointed 5 judges that would replace judges whose tenures had to expire in November and December 2015. The Sejm did it before the end of the parliamentary term. However, only the former election was fully in compliance with the Constitution, as it required the Parliament to replace only those Constitutional Court judges whose mandate expired during the Sejm's term of office. This was confirmed by the Constitutional Tribunal in the judgment of 3 December 2015 (no. K 34/15).

Despite this, the newly elected President of the Republic of Poland, who came from the then opposition party (Law and Justice), did not accept their oath of office.

The election in November 2015 was won by the opposition political party (Law and Justice). The new legislature of the Sejm, signed by the President, adopted the Act amending the Act on the Constitutional Tribunal at an exceptionally rapid pace. The fast pace of legislative work did not in

[3] Judgment of European Court of Human Rights in case of Xero Flor v. Poland (4907/18) http://hudoc.ECtHR.coe.int/eng?i=001-210065

[4] Judgment of European Court of Human Rights in case of Guðmundur Andri Ástráðsson versus Iceland (26374/18) http://hudoc.ECtHR.coe.int/eng?i=001-206582

[5] Act on the Constitutional Court of 25 June 2015 http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150001064

itself prejudge its unconstitutionality, although it could be assessed negatively from the point of view of parliamentary culture and good parliamentary manners.[6]

Sejm revised its law on the Constitutional Tribunal on 19 November 2015[7] which has given the opportunity to choose 5 judges once again, despite the selection by the previous Sejm and expiration of the tenures of office of the President and Vice-President of the Constitutional Tribunal within three months of the act's entry into force. The governing majority once again initiated the procedure of electing five judges. This was an unprecedented move because the Sejm never had voided decision adopted by the previous Sejm.

The action taken caused that the constitutional conflict has escalated rapidly and citizens started protesting against recent judicial reforms.

In response to the events in Poland, a number of international institutions have expressed their concerns on the changes in regard to the Constitutional Tribunal and emphasised that it is a fundamental element of protecting the rule of law and a guarantee of human rights protection system.

One might venture to say that Polish Constitutional Tribunal transformed into a powerful tool in the hands of the government and turned a new page in the struggle for independence and impartiality of judges.

Unlawfully appointed judges of the Constitutional Tribunal has been subject to many disputes for over five years in the Polish and European space. In light of the above, we would like to explore possible solutions to this issue.

The first chapter of our paper includes a basic description of the standard procedure for the election of a judge of the Polish Constitutional Tribunal. It also contains the comparative examination based on the laws applicable in Germany, France and Italy.

The second chapter is devoted to the analysis of crucial judicial decisions made at domestic and European levels. The analysis indicates the methods developed by ECtHR, which should have the application for similar cases.

Deliberations in the third chapter will come down to an assessment of what impact on the society could have a perception of the Constitutional Tribunal as dependent and partial due to pressure from authorities and will concern the effect of ECtHR judgment in Xero Flor vs Poland on society and judgements of ordinary courts.

The final chapter contains the assessment of the election procedure of a judge of the Polish Constitutional Tribunal regarding other existing models. It is concluded with an attempt to point out

[6] English fragments of judgement K 35/15 are quoted after the official translation on the Constitutional Tribunal's website. The translation is available at: http://trybunal.gov.pl/en/hearings/judgments/art/8792-nowelizacja-ustawy-o-trybunale-konstytucyjnym/

[7] The Act of 19 November 2015 amending the Constitutional Tribunal Act, English version available at: https://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act/archive

some proposals of changes in the system of electing judges of the Constitutional Tribunal that would strengthen its position as well as the level of public confidence in this authority.

1. Status of Polish Constitutional Tribunal

The Polish Constitutional Tribunal is defined as a part of the judiciary. However, the Constitutional Tribunal does not administer justice. The Constitution separate functions and competencies between courts and tribunals. Consequently, the Constitutional Tribunal can not be regarded as a court that ensures that the individuals can exercise their right to a court except the constitutional complaint as a means to protect the rights and freedoms of individuals. The Constitutional Tribunal adjudicates on compliance with the Constitution of legislation and international agreements (also their ratification), on disputes over the powers of central constitutional bodies and on compliance with the Constitution of the aims and activities of political parties.

In many countries, there are various systems for the selection and appointment of judges of the Constitutional Tribunal. There is no single model that would apply to all countries. However, there are some characteristic features that are commonly accepted, for example, the term of office, which is usually longer than those of public authorities on the assumption that this will safeguard the independence of the judge. The other is that a judge cannot be reelected.[8]

1.1. Polish procedure

In the current legal framework, the authority to nominate judges to the Constitutional Tribunal has been conferred upon the Presidium of the Sejm or a group of fifty MPs.[9] Accordingly to the art. 194 (1) of the Constitution of the Republic of Poland the Constitutional Tribunal judges are appointed individually by Sejm for a 9-year term,[10] voting by an absolute majority in the presence of at least half of the statutory number of MPs.Fifteen judges are forming Constitutional Tribunal. They are chosen among people who are known for their extraordinary legal knowledge. The elected judges take an oath of office before the President of the Republic, but this is only a ceremonial act without any influence on the act of electing or appointing judges to the Constitutional Tribunal by Sejm.[11] Article 173 of the Constitution states that Courts and Tribunals are separate and independent from other authorities. It constitutes the triple division of powers. The judges cannot be members of political parties, trade unions or participate in any public activity which violates the rule of impartiality and independence.

[8] Piotr Radzewicz, Zasady i procedura wyboru sędziów polskiego Trybunału Konstytucyjnego
[9] Article 30 of The Standing Orders of the Sejm of the Republic of Poland, English version available at:http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14798&catid=7
[10] The Constitution of the Republic of Poland, english version available at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm
[11] Andrzej Zoll, The Method of Appointing Judges to the Constitutional Tribunal, Ruch Prawniczy, EkonomicznyiSocjologiczny – zeszyt 1 – 2016

However, due to the fact that procedure of appointing judges has a strictly political character, the question arises of political involvement of a nominee.

Nevertheless, article 194 of the Constitution creates a crucial rule to protect judicial independence – the inability to pursue reelection.

Furthermore, there are other conditions: a candidate must have qualifications required for the office of a judge of the Supreme Court or the Supreme Administrative Court, be distinguished by their knowledge of the law, not be a member of any political party or trade union or carry out public activities incompatible with the principles of the independence of courts and judges, not taking additional employment except as academic.[12]

The abovementioned requirements should in theory, protect judges' independence and impartiality but is it enough?.[13]

1.2. Comparative perspective

In the literature on the subject, it is indicated that "(…) there are two crucial issues related to the appointment of judges. The first is related to the criteria applied to the appointment (…). The second issue consists of the body, and the procedure within that body, in charge of appointing members of the judiciary. On this topic, international standards do not explicitly determine which body within a State has the power to appoint judges or the exact procedure to be followed. However, it is important to bear in mind that any appointment procedure must guarantee judicial independence, both institutional and individual, and impartiality, both objective and subjective. This requirement derives from the principle of separation of powers and of checks and balances, which constitute indispensable safeguards to this end."[14].

Regarding the selection of candidates for judges existing international standards are only to some extent accommodated by polish law. However, these standards apply only to the candidates for judicial offices in common courts, administrative courts, Supreme Court and Administrative Supreme Court. When it comes to the candidates to the Constitutional Tribunal, these standards give way to political will of the majority.

According to the Draft Universal Declaration on the Independence of Justice (so-called: *Singhvi Declaration*), "Candidates chosen for judicial office (…) shall have equality of access to judicial office. (…) In selecting judges, there shall be no discrimination based on race, colour, sex, language, religion,

[12] Act on the Status of the Judges of the Constitutional Tribunal, English version available at: https://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act
[13] The Constitution of the Republic of Poland, English version available at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm
[14]International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioners Guide No. 1, Geneva 2007, p. 41, available at: https://www.refworld.org/pdfid/4a7837af2.pdf

political or other opinions, national, linguistic or social origin, property, income, birth or status (…). The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects. (…) Any methods of judicial selection shall scrupulously safeguard against judicial appointments for improper motives. (…) Participation in judicial appointments by the Executive or the Legislature or the general electorate is consistent with judicial independence so far as such participation is not vitiated by and is scrupulously safeguarded against improper motives and methods. To secure the most suitable appointments from the point of view of professional ability and integrity and to safeguard individual independence, integrity and endeavour shall be made, in so far as possible, to provide for consultation with members of the judiciary and the legal profession in making judicial appointments or to provide appointments or recommendations for appointments to be made by a body in which members of the judiciary and the legal profession participate effectively."[15]. With regards to promotion, posting, and transfer, the *Singhvi Declaration*, states that: "(…) Where the law provides for the discretionary assignment of a judge to a post on his appointment or election to the judicial office such assignment shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist. (…) The promotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to upholding the rule of law. No promotions shall be made from an improper motive. (…) Except pursuant to a system of regular rotation or promotion, judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge."[16]

These provisions undoubtedly will not automatically remove the state of uncertainty about the independence of the Constitutinonal's judges, but may form the basis for future modifications.

1.2.1 GERMANY

In Germany, both houses of Parliament (Bundestag and Bundesrat) participate in electing judges to the Federal Constitutional Court for a 12-years term. The judges should be elected no earlier than three months before the predecessor's term of office expires. Each house of the Parliament appoints half of them by a two-thirds majority. The Bundestag elects eight judges directly while the

[15] Draft Universal Declaration on the Independence of Justice (*Singhvi Declaration*), p. 2, available at:https://www.icj.org/wp-content/uploads/2014/03/SR-Independence-of-Judges-and-Lawyers-Draft-universal-declaration-independence-justice-Singhvi-Declaration-instruments-1989-eng.pdf
[16] Ibidem, p. 3.

election in the Bundesrat is two-tier. If the Parliament fails to elect judges at the time, the Federal Constitutional Court has been granted significant competence to fill a vacancy.[17]

To become a judge of the Federal Constitutional Court, a candidate is obliged to have reached the age of 40, be eligible for the election to the Bundestag, be qualified to hold judicial office or be a holder of *Diplomjurist* degree, be not a member neither of the Bundestag, the Bundesrat, the Federal Government nor of any of the corresponding organs of a Land and not taking any other professional occupation except the service as a professor. There is also a requirement that at least three persons in every senate of the Federal Constitutional Court have a minimum of three years of experience in sitting in the highest instances of the judiciary.

Until 2015 this procedure was completely different. The Bundestag delegated a special committee to elect judges to Federal Constitutional Court. The election of the Bundestag's judges by a committee and not the Parliament's plenum in the light of Article 6 of the Federal Constitutional Court Act was considered as being unconstitutional. A committee could not replace this vital decision.[18]It undoubtedly caused some constitutional problems, and to solve it, the Act on the Federal Constitutional Court had been changed.

Comparing the above to the Polish model, the German one provides an opportunity for more than just a parliamentary majority to participate in the selection of a judge.[19]

1.2.2. FRANCE

In France, there is no election to the Constitutional Council. The Constitutional Council's composition is governed by article 56 of the French Constitution, which sets the nine members. Additionally, article 57 provides that the members of The Constitutional Council shall be incompatible with that of the Minister or Member of the Houses of Parliament and states that an Institutional Act determines other incompatibilities.[20]

Accordingly to this Institutional Act, one-third of the Council is replaced every three years. Three of them are appointed by the President of the Republic, the President of the National Assembly, and the Senate's President, respectively. A section 8 of the Ordinance states that the Constitutional Council members shall be replaced no later than eight days before the expiry of their term of office.

The Constitutional Council members cannot link their office with the membership of the Government or the Economic, Social and Environmental Council, and also that of the Defender of

[17] Act on the Federal Constitutional Court, english version available at: http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=2

[18] Martin HEIDEBACH, The election of the German Federal Constitutional Court's judges – A lack of democracy?

19 Andrzej Zoll, The Method of Appointing Judges to the Constitutional Tribunal, Ruch Prawniczy, EkonomicznyiSocjologiczny – zeszyt 1 – 2016, p. 45

[20] Constitution of 4 October 1958, English version available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf

Rights or other elective offices. Professional incompatibilities affecting Members of Parliament shall also apply to members of the Constitutional Council. [21]

Until 2008 these institutions could appoint judges directly. This process was concerned in theory[22] as being purely personal and political. However, the constitutional reform introduced the Question Prioritaire de Constitutionalité (QPC) procedure which means that parties could argue that law violated their constitutionally guaranteed rights or freedoms. The court was obliged to issue a decision on this subject immediately.[23]

Implementation of this innovative procedure caused the nominees to be accepted by an appropriate commission in both houses of Parliament.

There is one significant exception to the abovementioned rules. Former presidents of the French Republic have the right to sit on the Constitutional Council for life.

Despite the above modifications, the public space continues to be filled with discussion about the independence of this body.

1.2.3. ITALY

The judges' nomination to the Constitutional Court of the Italian Republic is a delicate balance designed to assure that the judges are as impartial and independent as possible. This means that this system is mixed. The power to nominate the members of the Court in regard to Article 135 of the Constitution of the Italian Republic belongs to the President of the Republic, five both houses of Parliament, the Supreme Court of Cassation, the Council of State, and the Court of Audit. The judges are appointed for a 9-year term of office.[24]

This is the other possible solution in preventing the constitutional court vacancies from being filled predominantly by one political fraction.

Furthermore, there are obligations to ensure the judges' independence. Members of the Constitutional Court may not engage in any other professional activity, even research activities. They refrain from publicly expressing their opinions, and they cannot be reelected.[25]

An Italian mechanism of electing judges to the Constitutional Court provides a balance resulting in the independence of Constitutional Court judges. The main reason for this is the participation of various entities in a procedure of election.

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[21] ORDINANCE N° 58-1067 CONSTITUTING AN INSTITUTIONAL ACT ON THE CONSTITUTIONAL COUNCIL, English version available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/en_ordinance_58_1067.pdf

[22] Alain Lancelot, The French Constitutional Council

[23] Ruth Levush, The Constitutional Council and Judicial Review in France

[24] The Constitution of Italian Republic, English version available at: https://www.cortecostituzionale.it/documenti/download/pdf/The_Constitution_of_the_Italian_Republic.pdf

[25] The Italian Constitutional Court, English version available at: https://www.cortecostituzionale.it/documenti/download/pdf/The_Italian_Constitutional_Court.pdf

2. Crucial decisions

2.1. Domestic judgements. The judgements of Constitutional Tribunal.

One of the most significant decisions, in this case, was the Constitutional Tribunal judgement of December 2015 (no. K 34/15). On 3 December 2015, the Constitutional Tribunal considered that the election of all five judges by the seventh term Sejm at once was partially unconstitutional. Insofar as it allowed for the appointment of three judges whose tenures expired in November 2015, the provision was constitutional on the grounds that it was done on a legal basis and did not raise any constitutional doubts. However, insofar as it allowed for the election of judges whose tenures expired in December 2015, it was – in the Tribunal's view – in violation of the Constitution.

The Tribunal ruled that Article 137 of the Constitutional Tribunal Act insofar as it relates to the judges of the Tribunal, whose terms of office expired on 2 and 8 December 2015 respectively, is incompatible with Article 194(1) of the Constitution.

However, the most important conclusion of this judgement was the rule that a judge of the Tribunal is chosen by the Sejm during the parliamentary term in the course of which the vacancy occurs.[26]

According to the abovementioned statements, the eighth term Sejm was entitled to the election of two judges ("December judges") whose election by the previous Sejm was considered as unconstitutional.

This fundamental rule was confirmed in its four subsequent rulings (see in particular judgements of: 9 December 2015, no. K 35/15; 11 August 2016, no. K 39/16 and the decision of 7 January 2016, no. U 8/15).

After the abovementioned judgements, very important decisions were also taken at the international level.

2.2 **Case of Guðmundur Andri Ástráðsson versus Iceland**

In the final judgment in case of Guðmundur Andri Ástráðsson, the Grand Chamber of the ECtHR established the scope of and meaning to be given to the concept of a "tribunal established by law" accordingly to the Article 6(1) of the European Convention on Human Rights (Convention) which provides a right to a fair trial.[27] The Grand Chamber of the ECtHR pointed out that Article 6(1) of the Convention may be attached to the principle of legal certainty and the guarantee of irremovability of judges. This judgment also stated that not every irregularity in the process of appointing judges should result in a violation of aforementioned Convention rights, and therefore formulated a three-step test

[26] The Constitutional Tribunal Act, no. K 13/15, English version available at: https://trybunal.gov.pl/en/hearings/judgments/art/8866-ustawa-o-trybunale-konstytucyjnym

[27] The ECtHR judgement in the case of Guðmundur Andri Ástráðsson versus Iceland (no. 26374/18)

that should be fulfilled when deciding whether the deviations from the rules of procedure of appointing judges are so severe that they violate the Convention principle of the right to "a court established by law".[28]

This decision clarified that when a breach of domestic law in the process of appointment of judges is at stake, it may result in a panel adjudicating with the participation of an incorrectly appointed judge.[29]

The ECtHR analysed the individual components of that concept and considered how they should be interpreted so as to reflect its purpose best and, ultimately, ensure that the protection it offered was truly adequate.

This has an enormous significance because the verification should begin with the question: are there laws governing the establishment and functioning of the court? If the court is not established by law, the examination should be discontinued because nothing else needs to be checked, there is no object of inspection and the test should come to an end.[30]

In the three-step test, the ECtHR analysed the individual components of the concept of "established by law" and considered how they should be interpreted.[31]

2.3.**Scope of the requirement of "tribunal established by law". Three-step threshold test.**

With reference to the previous section, the ECtHR formulated a legal definition of “tribunal”, which means that a “tribunal” must be composed of judges selected based on merit to ensure that judges who fulfilled the requirements of technical competence and moral integrity were appointed. The Court noted that the higher a tribunal was placed in the judicial hierarchy, the more demanding the applicable selection criteria should be.

The phrase "established", Court referred to the fundamental implications for the proper functioning and the judiciary's legitimacy in a democratic State governed by the rule of law, which was to protect the judiciary against unlawful external influence, in particular from the executive. Consequently, it found that the process of appointing judges might be open to such undue interferences by law and therefore called for strict scrutiny. Breaches of the law regulating the judicial appointment process might render the participation of the relevant judge in the examination of a case “irregular”.

“By law” which means that this requirement in no way sought to impose uniformity in practices of the member States. The main role of that requirement is that the relevant domestic law on judicial

[28] Hermeliński Wojciech, Nita-Światłowska Barbara , Orzeczenie sądowe wydane z udziałem sędziego powołanego wadliwie a naruszenie prawa do sądu gwarantowanego przez art. 6 ust. 1 Konwencji o ochronie praw człowieka. Glosa do wyroku ETPC z dnia 1 grudnia 2020 r., 26374/18

[29] Marcin Szwed, Adjudication by Unlawfully Appointed Judges as a Violation of the Right to a Fair Trial in the Light of the Judgment of the European Court of Human Rights of 12 March 2019, Application no. 26374/18, Guðmundur Andri Ástráðsson v. Iceland

[30] Paweł Filipek, Only a Court Established by Law Can Be an Independent Court

appointments should be couched in unequivocal terms to the extent possible to not allow arbitrary interferences in the appointment process.

The Court examined the interaction between the requirement that there is a "tribunal established by law" and the conditions of independence and impartiality. This close interrelationship cause that there is an obligation to systematically inquire whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned fundamental principles and compromise the court's independence in question.

To assess whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law and whether state authorities had struck the balance between the competing principles, the Court developed a threshold test made up of three criteria, taken cumulatively.

The first step of the test: There must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be authentically recognisable. Nevertheless, the absence of such a breach does not rule out the possibility of a violation of the right to a tribunal established by law. Under specific circumstances where a judicial appointment procedure that is seemingly in compliance with the domestic rules may nevertheless produce results that are incompatible with the object and purpose of that right.

The second step of the test: The breach must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law". It takes a major role to ensure the ability of the judiciary to carry out their duties free of excessive interference and thereby to preserve the rule of law and the separation of powers. In this way, breaches that do not influence the legitimacy of the appointment process must be considered as not eligible to be examined by the relevant threshold. On the other hand, breaches that entirely disregard the most fundamental rules in the appointment or breaches that may otherwise undermine the purpose and effect of the "established by law" requirement must be considered to violate that requirement.

The third step of the test: The review of a breach conducted by national courts on the basis of a domestic rule on judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself. The assessment by the national courts of the legal effects of such a breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom.[32]

2.4.**Case of Xero Flor versus Poland**

This case is historic for a host of reasons. It is the first time the ECtHR has elaborated on the status of a judge of a constitutional court, finding that such a person was appointed unlawfully. Such

[32] The ECtHR judgement in case of Guðmundur Andri Ástráðsson versus Iceland (no. 26374/18)

a participation caused a violation of Article 6(1) of the Convention, namely, the right to a fair trial before an independent tribunal established by law. It is the first major ruling of the ECtHR in a case directly related to the backsliding of the rule of law in Poland, as the established violation of the right to fair trial resulted directly from the political takeover of the Polish Constitutional Tribunal.

The ruling was based on the case of a Polish entrepreneur who sought compensation from the State Treasury due to a damage caused by boar and deer, which destroyed a field of rolled grass owned by his company. In doing so, the applicant was awarded a minuscule compensation because an act of secondary law set rates for damage to turf fields at a much lower level than rates for fields of wheat or corn. After losing thecase in all instances, the applicant turned to the Constitutional Tribunal, asking it to review the conformity of laws that put him at a disadvantage with the Polish Constitution. However, the Tribunal dismissed his case ruling in a panel that included a judge M.M, the vice-president of the Tribunal, whose election was very controversial, as the Polish Parliament elected three judges of the Tribunal in place of the judges validly elected by the Sejm of the previous tenure.

Firstly, the ECtHR raised the question of admissibility of applying Article 6(1) of the Convention in this case while the Constitutional Court did not even administer justice in the sense of deciding on individual civil rights and obligations or the merits of a case.

The ECtHR highlighted awareness of the unique role and status of a constitutional tribunal, whose task is to ensure that the legislative, executive and judicial authorities comply with the Constitution, and which, in those states that have made provision for a right of individual petition, affords additional legal protection to citizens at national level in respect of their fundamental rights guaranteed in the Constitution.

Under Polish Constitution, a constitutional complaint – accordingly with Article 79 of Polish Constitution – can be lodged to challenge the constitutionality of a statute or other normative act which constituted the legal grounds for a final individual decision whereby a court or an administrative authority determined constitutional rights and obligations. These provisions could be understood as a remedy against violations of constitutional rights and freedoms linked to a specific judicial decision which infringed the abovementioned rights and freedoms. It should be noted that the constitutional complaint can be lodged only against provisions and not against a judicial decision as such. So this complaint can only be held in a situation in which the violation of constitutional rights and freedoms has resulted from the application of legal provisions that can be questioned as unconstitutional. However, the only direct effect of the Constitutional Tribunal judgement – in the meaning of Article 190 of the Polish Constitution – is the repeal of the provision, which has been found unconstitutional. This type of judgement do not quash an individual decision but grant the party the right to reopen the proceedings.

Consequently, two indications are allowing for recognition of such a complaint as an effective remedy within the meaning of the Convention:

- the individual decision which allegedly violated the Convention had been adopted in direct application of an unconstitutional provision of national legislation;
- procedural regulations apply to the revision of such individual decisions provided for reopening a case or the quashing of a final decision following a judgment of the Constitutional Tribunal finding its unconstitutionality.

An applicant had sought compensation before civil courts, but because it was unsuccessful, lodged a constitutional complaint. However, judges of the Constitutional Tribunal decided, by the majority, to discontinue the proceedings. The decision was final.

Regarding the preceding, the Tribunal held that the proceedings before the Constitutional Tribunal was directly decisive for the civil right asserted by the applicant company. It had found accordingly that Article 6(1) of the Convention was applicable to the proceedings before the Constitutional Court in the instant case and there were no inadmissible on any other grounds listed in Article 35 of the Convention at the same time.

After examination, accordingly to the three-step threshold, EctHR found a violation of the right to a tribunal established by law.

Consequently, EctHR also found that the election of three judges to the Constitutional Court on 2 December 2015 was conducted in breach of Article 194 § 1 of the Constitution, namely the rule that a judge should be elected by the Sejm whose term of office covers the date on which his seat becomes vacant.

Furthermore, accordingly to the purpose of the law breached, the ECtHR examined whether a particular defect in the judicial appointment process was of such a weight as to amount to a violation of the right to a "tribunal established by law", whether it sought to prevent any excessive interference by the executive or the legislature with the judiciary, and whether the breach undermined the essence of the right to a "tribunal established by law". The Court considered that the legislative and executive organs failure to abide by the relevant Constitutional Court judgments regarding the validity of the election of the court's judges undermined the purpose of the "established by law" requirement to protect the judiciary against unlawful external influence. The Court stated that the right to "a tribunal established by law" is a reflection of the very principle of the rule of law and, as such, it plays an important role in keeping the separation of powers and the independence and legitimacy of the judiciary as obviously required in a democratic society.

The Court also reiterated that one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires that when the courts have finally determined an issue, their ruling should not be called into question. In the present case, the legislative and executive authorities failed

to respect their duty to comply with the relevant judgments of the Constitutional Court, which determined the controversy relating to the election of judges of the Constitutional Court, and thus their actions were incompatible with the rule of law. Their failure in this respect further demonstrates their disregard for the principle of legality, which requires that State action must be in accordance with and authorised by the law.

The judgement in this case has become a source of discussion on the legal status of Constitutional Tribunal judges elected as above, which will be discussed in further detail in the chapter entitled "An impact of judgement in the case of Xero Flor v. Poland".

3. **Independence and impartiality**

3.1 **The situation of the Constitutional Tribunal**

The cases mentioned in the previous chapters are significant due to their individual character. Previous court cases regarding the rule of law in Poland, heard both by domestic courts and Court of Justice of the EU, invoked essential issues – the independence of judges and prosecutors opposing the government, the status of Disciplinary Chamber of the Supreme Court, the length of the term of the ombudsman. The Xero Flor case concerning a small entrepreneur seeking compensation for damage from the State Treasury shows how even mundane situations may be the basis for evaluating the actions of public authorities in terms of the rule of law.[33]

Having regard to the mechanisms mentioned in the first chapter which may weaken the independence and impartiality of judges, it is possible to imagine a situation in which candidate for a judge to the Constitutional Court hasno experience in applying the law, but the decisive role in his appointment is being played by the support of the authorities. Requirements, in our view, are imprecise and unclear as, it has never been explained, for example, how to interpret the requirement of being distinguished by knowledge.

Apart from the requirement that a candidate may not have already been a Constitutional Tribunal judge it would seem to us necessary to introduce another negative condition to minimise the risk of having judges with any political involvement. [34]

Unfortunately, it must be acknowledged that the cumulative effect of the changes introduced in 2015-2016 and the continued adjudication by "irregular judges" marginalised the significance of the Tribunal's jurisprudence in the Polish legal order.

The number of cases filed with the Tribunal and those decided by the Tribunal decreased significantly. Before the constitutional crisis, the Tribunal accepted about 500-600 cases annually. In 2016, this number rapidly decreased to 360 cases, and then in 2017, it was down to 282 cases. Once

[33] Jakub Jaraczewski, From boars to courts – the landmark ECtHR case Xero Flor v. Poland
[34] Andrzej Zoll, The Method of Appointing Judges to the Constitutional Tribunal, Ruch Prawniczy, EkonomicznyiSocjologiczny – zeszyt 1 – 2016

known for its efficiency (in 2014 alone, the Tribunal rendered 119 judgments and in 2015 – 173), the Court has become a slow-motion institution. In 2016 and 2017 the Court issued 99 and 89 judgments, respectively. In 2018 the number of judgments has dropped to 72.[35] It should therefore be noted that there is a clear downward trend.

The reasons for this will be explained in subsequent sections of this chapter.

3.2 **Lack of certainty**

As mentioned previously, the unlawful appointment of judges may lead to a decrease in trust in the institution, which is constitutionally designed to uphold the rule of law. Practice has shown that the panels are unpredictable, although there is no statutory basis for making changes in them.

Article 38 of the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings states that the President of the Constitutional Tribunal in justified cases can appoint other Judge-Rapporteur, excluding alphabetical order.[36]

Formally, therefore, there is no possibility to change the composition of the judicial panel while adjudication is in progress.

But in practice there has even been a view expressed by one of the "irregular" judges that it is possible to change the composition of the panels by, for instance, "changing the rapporteur for the case due to the panel's disapproval of the draft judgment as presented.[37]

The effect of all this is that the Tribunal is being steered from within to minimize the uncertainty of the outcome and to meet the expectations of the authorities. Apparently, the judges whom the ruling party designates to sit on the tribunal receive preferential treatment.[38]

The position of the Panel of Experts at Stefan Batory Foundation, in the field of manipulating the composition of the judicial panels, confirmed that these types of actions taken by the President of Constitutional Tribunal are unlawful proceedings, motivated only by the desire to influence the content of the decision.[39]

3.3 **An objective test of independence and impartiality**

[35] Statistics available at: https://trybunal.gov.pl/publikacje/informacje-o-problemach-wynikajacych-z-dzialalnosci-i-orzecznictwa-tk/od-2003/
[36] Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before, english version available at: https://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act
[37] The Constitutional Tribunal Order K 9/16, https://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/10139-zasady-stosowania-kontroli-operacyjnej-przez-sluzby-policyjne-i-sluzby-specjalne/
[38] Tomasz Koncewicz, From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court
[39] The position of the Panel of Experts at Stefan Batory Foundation in the field of manipulating the composition of the judicial panels, https://www.batory.org.pl/wp-content/uploads/2020/10/Stanowisko-ZEP-ws.-rozstrzygniecia-TK-10.2020.pdf

In order to examine judges independence and impartiality, The Court of Justice of the European Union established an objective test. In the judgement, in joined cases, C-585/18, C-624/18 and C-625/18, the CJEU reiterated that "impartiality" within the meaning of Article 6(1) of the Convention could be tested in various ways. Firstly, we may apply a subjective test, which takes into account the personal beliefs or behaviour of a particular judge, examining whether the judge in a particular case has shown any indication of personal bias or prejudice. Then, according to an objective test, we have to examine whether the tribunal itself, especially his composition, offered sufficient guarantees to exclude legitimate doubt in respect of its impartiality. It must be determined whether, quite apart from the judge's conduct, there are ascertainable facts that may raise doubts about their impartiality. Even appearances may be of particular importance. A key issue is a trust that a tribunal in a democratic society must generate in the public and particularly in the parties to the proceedings.

The concepts of independence and objective impartiality are closely linked, which generally means that it requires joint examination.[40]

In the light of the above principles, it is necessary to examine whether the model of formation of a particular court, in particular the legal basis of its operation, the scope of its jurisdiction, its composition, the manner in which judges are appointed, makes such a court and the judges who sit on it, meet the requirements of independence and impartiality.

3.4.**An impact of judgement in the case of Xero Flor v. Poland.**

The Xero Flor judgment may have a social awakening effect in the sense that more people will be willing to fight for their rights and freedoms after all internal remedies have been exhausted before the national courts.

Above all, the judgment is of great significance for the Polish justice system. It was passed in a specific case, the defects it identifies - causing the Constitutional Tribunal's panel to fail to meet the requirement of a properly constituted court - are objective in nature. For this reason, any panel of the Constitutional Tribunal, which includes at least one person elected to a seat already vacant, also fails to meet this requirement. This results in a fundamental legal defect in any judgment issued by such a panel.

The ECtHR judgment requires such action on the part of the national authorities that the Constitutional Tribunal returns to adjudication in panels that meet the requirements of both the ECtHR and the Polish Constitution.

The question also arises as to the legal consequences of judgments of the Constitutional Tribunal issued in an unlawful panel. Since every judgement of the Constitutional Tribunal issued by

[40] The Court of Justice of the European Union in judgment in joined cases C-585/18, C-624/18 and C-625/18, https://curia.europa.eu/juris/document/document.jsf;jsessionid=887F92E821C678B8AE36BD4886610FA3?text=&docid=220770&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=25142710

a person not authorised to sit on its panel is fundamentally flawed, every court in Poland, on the basis of the principles of direct application of the Constitution (Article 8 section 2) and observance of international law (Article 9), will be able to decide not to take it into account. It will be able to do so both *ex officio* and at the request of a party to the proceedings.

A legal defect in a decision of the Constitutional Tribunal will also constitute an independent ground for an appeal against a court ruling. On the other hand, any individual whose legal situation will be affected by a defective ruling will also be able to lodge an individual complaint to the ECtHR with respect to rights and freedoms covered by the Convention. This will expose our state to a number of further court proceedings in Strasbourg. There is also a need to reckon with the payment of just satisfaction if it is granted.

In a letter to the Senate Committee on Human Rights, the Rule of Law and Petitions, the Polish Ombudsman indicates that the proper implementation of the judgment is urgent as it serves to restore the full guarantee of the right to a tribunal established in accordance with the law and, consequently, to protect the rights of the parties to proceedings before the Constitutional Tribunal, as well as before national courts, in any case in which the decision of the Constitutional Tribunal is legally relevant, but was made by an improperly convened panel. The Ombudsman emphasizes that the lack of appropriate action by national authorities threatens legal certainty and the stability of judicial decisions, and will heighten legal chaos in the country[41].

Unfortunately, the Constitutional Tribunal referring to the Xero Flor judgment, argues that the judgment of the ECtHR of 7 May 2021 (Xero Flor case), in so far as it relates to the Constitutional Tribunal, is based on theses that prove the ignorance of the Polish legal system, including fundamental systemic assumptions defining the position, foundations and role of the Polish Constitutional Tribunal. In its opinion, it was issued without a legal basis, exceeding the competencies entrusted to it by the ECtHR, and constitutes unlawful interference with the domestic legal order, in particular in matters which are beyond the competence of the ECtHR, in conclusion submitting that this judgment must be regarded as non-existent.[42]

The standpoint expressed by the Polish Tribunal in a broader context may have further consequences, as the opinion that such a judgment does not exist threatens Poland's position as a High Contracting Party to the Convention.[43]

It seems that there is a significant difference in the understanding of the Xero Florjudgment. On the one hand, the Tribunal considers the ECtHR judgment as non-existent, and on the other hand, the Commissioner for Human Rights encourages the ordinary courts to disregard the judgments of the

[41] https://www.rpo.gov.pl/pl/content/rpo-do-senackiej-komisji-wykonac-wyrok-etpc-xero-flor
[42] The Constitutional Tribunal Order P 7/20, english version available at: https://ruleoflaw.pl/wp-content/uploads/2021/06/20819_P-7_20_eng.pdf
[43] Rick Lawson: "Non-Existent". The Polish Constitutional Tribunal in a state of denial of the ECtHR Xero Flor judgment

Constitutional Tribunal made in conditions such as in the Xero Flor case. This situation may have an impact on the ongoing election of a new Human Rights Commissioner in Parliament, which has not yet been completed due to political deadlock. [44]

It should be noted that national courts have also begun to question the relevance of Constitutional Court judgments rendered in an unlawful composition. [45]

Undoubtedly, reliance on a judgment of the Constitutional Court, which was delivered in an unlawful composition, could lead to disadvantaging the litigants by creating a state of legal uncertainty and failing to protect their right to a fair trial as expressed in Article 6 of the Convention.

As a result of the judgment in Xero Flor v. Poland, the ECtHR decided to notify the Government of Poland of another complaint alleging a violation of rights in connection with the introduced judicial reforms and to invite it to present its observations. The ECtHR also decided that complaints concerning these aspects should be given priority[46].

Conclusions:

Bodies preparing reports and recommendations on states whose actions violate the rule of law, among which are: The Human Rights Committee, the UN Special Rapporteur on the Independence of Judges and Lawyers, the Commissioner for Human Rights of the Council of Europe, the Parliamentary Assembly of the Council of Europe, and the European Commission, have expressed deep concern about the constitutional crisis in Poland, developing rapidly after the October 2015 political elections.

The "war over the Constitutional Tribunal" has undoubtedly developed into the most serious political crisis in Poland in many years, polarizing opinion on both sides. [47]

In our opinion, the Xero judgment proves that the action of state authorities on the basis of the existing law and in accordance with its norms, transparency of procedures and stability of jurisprudence are of fundamental importance for the protection of individual rights and freedoms.

There is no doubt that independence and impartiality of the court and the independence of the judiciary are fundamental to a democratic state governed by the rule of law and comply with the requirements of international law.

If a judge is selected in a procedure perceived as invalid, there is a great risk that it will be perceived as such in all other cases in which the judge will be involved. The ECtHR judgment itself provides no answers as to how this problem should be resolved.

[44] Intervention by Adam Bodnar, the Commissioner for Human Rights
https://www.rpo.gov.pl/pl/content/rpo-do-senackiej-komisji-wykonac-wyrok-etpc-xero-flor
[45] The judgement of District Court in Gorzow Wielkopolski (no. I C 1326/19)
[46] For example, in the case Juszczyszyn v. Poland (no. 35599/20) concerning the National Council of the Judiciary, there is a complaint about the establishment of this legal body in violation of the Constitution.
[47] Aleks Szczerbiak, Who is winning Poland's 'constitutional tribunal war'?

In this paper we have tried to present possible solutions to guarantee the legitimacy of the election of a Constitutional Tribunal judge, pointing for example to a minimum four-year period during which a candidate for judge would not perform any political function.

Additionally, based on the Italian example, a list of bodies entitled to propose candidates for Constitutional Tribunal judges could be modified.

In the polish jurisprudential literature, we have various proposals including: the General Assembly of Justices of the Supreme Court, the General Assembly of Justices of the Supreme Administrative Court, the National Council of the Judiciary, the Polish Bar Council, the National Council of Legal Advisors, the National Council of Notaries, and Law Faculty councils authorised to award a degree of Doctor in Law with habilitation.

There are also proposals to change the election procedure as follows: six months prior to the expiration of the term of office of a judge of the Constitutional Tribunal, the Speaker of the Sejm should request the qualified entities to present, within one month, the candidate together with the necessary data as well as the candidate's declaration of consent and a declaration that he or she has the right to be elected. After receiving the applications, the Speaker of the Sejm should publicly announce the names of the candidates. Two months before the expiration of the term of the outgoing judge, the Speaker of the Sejm should convene a convention consisting of one delegate from each parliamentary grouping. After hearing all the candidates, the convention shall select from among them three candidates to fill the vacancy in the Constitutional Court. No parliamentary group can have a majority, so all groups are forced to reach an agreement. The three candidates are presented to the Sejm, which elects a judge. If none of the candidates obtains an absolute majority of votes, only the two candidates with the highest number of votes take part in the second round of voting. If a judge's seat becomes vacant in the middle of the term, the term is shortened accordingly, which does not change the essential features of the procedure.[48]

At the same time, it seems to us that the proposal from part of the political scene to introduce the possibility of electing a judge of the Tribunal by a two-thirds majority is not appropriate given the balance of power in Parliament and the problems we see, for example, with the election of the Ombudsman.

An interesting solution had also been prepared by “IUSTITIA” - the Polish Judges Association – which assumed that the Constitutional Tribunal had become a tool in the hands of politicians. They considered that it is necessary to amend the Polish Constitution and replace the Constitutional Tribunal with the new, non-political Tribunal of the Republic of Poland.

[48] Andrzej Zoll, The Method of Appointing Judges to the Constitutional Tribunal, Ruch Prawniczy, EkonomicznyiSocjologiczny – zeszyt 1 – 2016

They also considered that the new National Council of the Judiciary should select the judges for this court in half, and in the other half they should be elected by the citizens in a general election. They also propose a four-year grace period from political involvement. The premise of this proposal is that members of the Constitutional Court should be elected by judges, not by politicians. [49]

To sum up, our position is that the appointment of a judge to sit on the Tribunal should not raise any doubts, not even the slightest. It is therefore difficult to agree with the statement that there is no need to introduce any changes. On the contrary, we should improve the process of selecting judges for the Constitutional Tribunal. Seeing no need to amend the Constitution, we believe that it would be reasonable to introduce: at least a four-year grace period from political involvement, an obligation for judges to serve in the highest instances of the judiciary following the German model, and the creation of a mechanism of authorized bodies that will have the right to propose candidates who remain outside the political sphere.

In our opinion, such legislative actions will raise the standing of the Tribunal`s rulings and strengthen the public's trust in the state authorities.

[49] The Polish Judges Association "IUSTITIA" position
https://www.iustitia.pl/83-komunikaty-i-oswiadczenia/4021-stanowisko-ssp-iustitia-z-28-pazdziernika-2020-roku-dotyczace-statusu-trybunalu-konstytucyjnego