COMMISSIONER FOR HUMAN RIGHTS

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Written comments of the Commissioner for Human Rights of the Republic of Poland in the case *Xero Flor w Polsce sp. z o.o. v. Poland*

(Application No. 4907/18)

1. Pursuant to Rule 44 (3) (a), (5) and (6) of the Rules of the European Court of Human Rights (**ECtHR**) and on the basis of the leave granted by the President of the First Section, the Commissioner for Human Rights (**CHR**) wishes to submit the written observations related to the present case.

I. General Observations

2. In the *Xero Flor* case pending before the ECtHR, there are a number of legal issues arising from the subsequent pleas in law raised by the complainant. The CHR, however, wishes to confine the written comments to the matter of the participation in the Constitutional Tribunal of unauthorized persons, who were appointed in a flagrant breach of law.

3. The aim of the Commissioner's intervention is to seek clarification of the rules stemming from the European Convention on Human Rights (**ECHR**) on the appointment of persons acting as judges and the staffing of judicial bodies, such as the Polish Constitutional Tribunal (**CT**) which may influence the legal status of individuals and affect the exercise of their rights and freedoms. Therefore, the essential, systemic subject matter of the *Xero Flor* case is the assessment of the lawfulness of the appointment and the legitimacy of the composition of the CT adjudicating panel with the participation of persons such as M.M.

4. The Constitutional Tribunal is a judicial body, although it is not a "court" within the meaning of the 1997 Constitution of the Republic in Poland. Article 175 Constitution entrusts the administration of justice to the Supreme Court, ordinary courts, administrative courts and military courts – it does not mention the Constitutional Tribunal in this context. Although there are significant differences between

the "courts" and the Constitutional Tribunal, the Tribunal is nevertheless covered by the guarantees of Article 6 (1) ECHR because: (1) the principle of judicial independence applies equally to the courts and the Tribunal (Art. 178 (1) and 195 (1) Constitution); (2) both types of authorities are to adjudicate solely on the basis of law and not the political considerations; (3) they are both entrusted with the task of ruling on cases arising from the application of law or lawmaking process; (4) they adjudicate on the basis of formalized procedures established by law, which are – in principle, adversarial in nature[1].

5. The European Court of Human Rights has held that the constitutional complaint falls under the obligation to exhaust domestic remedies[2]. Insofar as it is at the top of the chain of judicial settlement of disputes in Poland, the body which handles such remedies must comply with the requirements laid down in Article 6 (1) ECHR, i.e. it must be an independent and impartial tribunal established by law. The latter also covers the process of appointment of judges, including the requirement that the rules governing the appointment of judges are laid down by domestic legislation and that they are strictly observed.

6. The Commissioner would like to first set out the circumstances of the election of the members of the Tribunal back in 2015, then address the requirement that the tribunal is established by law and comment on the criterion of a flagrant violation of law in the process of appointment to judicial office. In the concluding part the CHR will discuss the consequences resulting from the defective appointments to the CT.

II. Circumstances of the appointment of three members of the Constitutional Tribunal in December 2015

7. According to the Constitution, the Constitutional Tribunal is composed of 15 judges elected by the Sejm, a lower chamber of the Parliament, for a non-renewable nine-year term of office (Art. 194 (1)). The constitutional provisions on the CT (Articles 188–197) do not provide a detailed description of the organisation of the Tribunal or the way it operates; these matters are left to the ordinary legislation. Yet, the issues of personal status of CT members regulated by the Constitution embrace: the criteria for candidates and the procedure for the appointment to the Constitutional Tribunal; a single term of office, the guarantee of judicial independence; guarantees of working conditions; prohibition of political and public activities incompatible with judicial independence; as well as judges' immunity.

8. The current problems of the lawfulness of certain nominations to the Constitutional Tribunal and, accordingly, the legitimacy of adjudicating panels in which the judges unlawfully appointed participate and the legal force of their decisions are rooted in the 2015 elections to the CT. In 2015, five judicial positions were due to be vacated in the Tribunal: three on 6 November, one on 2 December, and another one on 8 December. Beforehand, in June 2015 the 7th term Sejm (2011–2015) adopted a new Act on the Constitutional Tribunal, whose Art. 137 read as follows:

[1] See i.a. L. Garlicki, *Polskie prawo konstytucyjne*. Zarys wykładu, 5th ed., Warszawa 2018, p. 377 and 405.
[2] ECHR, judgment of 9.10.2033, 47414/99, *Szott-Medyńska v Poland*, HUDOC.

> In the case of judges of the Tribunal whose term of office expires in 2015, the deadline for submitting the application referred to in Article 19 (2) shall be 30 days from the entry into force of this Act[3].

The Act entered into force on 30 August 2015 and allowed the 7th term Sejm to elect all judges whose term of office was to begin in 2015 – including those whose term of office was to begin after the 2015 parliamentary elections and during the new (8th term) Sejm.

9. Consequently, on 8 October 2015 the 7th term Sejm elected five new judges to the Constitutional Tribunal: (a) three, whose term of office was beginning on 7 November, i.e. during the 7th term Sejm , and (b) additional two judges, whose term of office was beginning, respectively, on 3 and 9 December 2015, that is, during the 8th term Sejm.

10. At its inaugural session, the 8th term Sejm (2015–2019) adopted an amendment to the Act, which – by way of introducing new Art. 137a – provided to repeat the election procedure for all five positions at the Constitutional Tribunal vacant in 2015[4]. Then, during its second session, on 25 November, the Sejm adopted five identical resolutions in which it declared that the previous Sejm's resolutions of 8 October on the election of the five CT judges had no legal force, and at the same time, it called on the President of the Republic to refrain from taking the oath from those judges[5]. The resolutions of the Sejm did not indicate and indeed did not possess any legal basis for their adoption. These resolutions therefore clearly violated the principle of legality (Article 7 Constitution), which is the concretisation of the rule of law (Article 2). The President indeed refused to swear in all five those persons, which is a constitutional requirement to take up the judicial post at the Constitutional Tribunal.

11. On 2 December 2015, in disregard of interim measures adopted by the Constitutional Tribunal, which was at that time reviewing the constitutionality of the arrangement on elections to the CT as adopted in the June Act (case K 34/15), the Sejm elected five new judges[6]. Instantly, a few hours later, at night, the President of the Republic took an oath from four newly elected persons[7]. The President did so knowing that in a few hours, on 3 December 2015, the Constitutional Tribunal is due to deliver its ruling on the constitutionality of the election of the five judges back in October 2015. In acting in this way, the President deliberately aimed to impede the full effectiveness of the judgment.

12. Indeed, the Constitutional Tribunal delivered the ruling in the case K 34/15 on 3 December 2015[8]. The Tribunal stated that the 7th term Sejm was empowered to elect three judges, whose term of office was to begin during the term of that Sejm, but not the other two, who were to take office during the next term of the 8th term Sejm. This finding of the Constitutional Tribunal was subsequently confirmed in its decision of 7 January 2016 (case U 8/15). In the light of the Tribunal's ruling, the 8th term Sejm unlawfully appointed three persons (M. Muszyński, L. Morawski and H. Cioch) to the positions of previously duly appointed judges. Furthermore, the 8th term Sejm was not authorised to determine on its own the noncompliance of the statutory basis for the election to the Constitutional

[3] Act of 25.06.2015 on the Constitutional Tribunal. Dz. U. [Official Journal of the Republic of Poland] 2015, No. 1064; unofficial translation by the CHR.
[4] Act of 19.11.2015 amending the Act on the Constitutional Tribunal. Dz. U. 2015, No. 1928.
[5] See five resolutions published in Monitor Polski [Official Journal] 2015, Nos. 1131–1135.
[6] See five resolutions published in Monitor Polski 2015, Nos. 1182–1186.
[7] The oath from the fifth person was taken by the President on 9.12.2015, that is, when the term of office of the judge's predecessor ended.
[8] Official English translation of the CT ruling was published on CT website: http://trybunal.gov.pl/en/hearings/judgments/art/8866-ustawa-o-trybunale-konstytucyjnym (accessed 19.01.2020).

Tribunal with the Constitution, as the power to review constitutionality of legislation is reserved for the Tribunal itself (Art. 188 Constitution).

13. Despite the judgement of the Constitutional Tribunal, the President continued to refuse to swear in the previously appointed judges. The President claimed that all fifteen positions in Tribunal were already occupied. He also included those persons whom he had unlawfully sworn in. Thus, he was attempting to derive legal effects from his own actions taken against the law.

14. The presidential refusal to swear in the judges elected by the 7th term Sejm while providing for the taking up of the office of the three judges nominated by the 8th term Sejm without a valid legal basis (who are sometime referred to as "duplicate-judges") seriously threatened the legitimacy of the Constitutional Tribunal and consequently the effectiveness of the constitutional review. At that time, the operation of the Tribunal was significantly reduced: three legally appointed judges could not take their position at the Tribunal, and meanwhile the then President of the Tribunal, did not allocate cases to the three wrongfully appointed judges. As a consequence, the Constitutional Tribunal was composed *de facto* of 12 judges and, in addition, there were two groups of three people each: the judges lawfully elected by the 7th term Sejm and the persons wrongfully elected by the 8th term Sejm.

15. In the subsequent judgment of 9 December 2015, the Constitutional Tribunal assessed the compliance with the Constitution of the amendment to the Act on the Constitutional Tribunal adopted on 19 November 2015 (case K 35/15)[9]. It held Art. 137a unconstitutional to the extent that it provided for the re-election of the three judges by the new Sejm, and replacing the judges who had already been elected. The Tribunal also clarified that the term of office of the CT judges begins on the date of their election and not on the date of their oath. It therefore confirmed that, despite the fact that the three judges properly elected by the 7th term Sejm had not been allowed to assume the office of Judge of the Tribunal as a result of the President's failure to swear them in, their seats were not vacant and could not be filled again. On the basis of the Tribunal's judgment, the only acceptable solution is for the President to fulfil his constitutional obligation and swear in these judges.

III. Tribunal "established by law"

16. The Commissioner considers that the three persons appointed in 2015 to the positions of judges of the Constitutional Tribunal, that had already been taken by judges lawfully appointed by the 7th term Sejm – had not been successfully appointed as judges, because the process of their appointment was carried out in a flagrant violation of law. The same applies to those persons who subsequently took over these positions in their place, since those positions were still not vacant.

17. Inasmuch as the prerequisite of a tribunal "established by law" is rooted in the rule of law[10], the requirement that the judge is appointed in accordance with the law, implements the same principle. The Commissioner is of the opinion, presented as well in the previous *amicus curiae* brief submitted to ECtHR in the *Ástráðsson v. Iceland* case – that the expression "established by law" refers not only to the legal basis for the very existence of the tribunal, but also to its composition in each case which is pending before it[11]. This necessarily brings the process of appointing judges into the concept of a tribunal "established by law" within the meaning of Article 6 (1) ECHR. The CHR would like to point out that the Polish Constitutional Tribunal itself recognized in 2007 that the

[9] Official English translation of the CT ruling was published on CT website: http://trybunal.gov.pl/en/hearings/judgments/art/8792-nowelizacja-ustawy-o-trybunale-konstytucyjnym/ (accessed 19.01.2020).
[10] ECtHR, judgment of 28.11.2002, 58442/00, *Lavents v Latvia*, HUDOC, para. 82.
[11] *Lavents v Latvia*, para. 114.

right to a proper composition and status of judicial authorities that adjudicate the case forms a substantive element of the constitutional right to a court (Art. 45 (1) Constitution)[12].

18. The European standard of a "tribunal" requires that the judicial authority is established in compliance with the intention of the legislature[13]. The legal basis of the tribunal, its jurisdiction, as well as its composition should be regulated in advance by legal provisions[14]. The law in force should equally provide for the criteria and the procedure for the appointment of judges, and a judge must in fact be appointed in accordance with these legal rules[15].

19. All the above requirements are expressly intended to avoid arbitrary influence on the judicial bodies by other branches of government. Accordingly, the principle of the lawfully appointed judge, is in fact meant to safeguard judicial independence from excessive, unlawful interference of the political power[16]. The Commissioner also attaches a great value to ensuring that the substantive criteria and procedural rules applicable to the appointment of judges are laid down in national legislation in such a way that judges and judicial bodies are able to perform their judicial functions in an objective and impartial manner.

20. The requirement that the provisions relating to the selection of candidates and appointment to judicial posts should be strictly observed[17] serves two basic purposes. First, it creates a genuine basis for the independence and impartiality of the person appointed as a judge, who can carry out his or her judicial activities with the confidence that he or she has taken up the office by reason of professional qualifications, on the basis of objective criteria and in a duly completed procedure. This prevents the creation of dependence between the candidate to be appointed as judge and other persons, especially politicians, who may have engaged in efforts for the selection of that particular judge. A judge must not owe his or her professional career to other persons, who in future might expect that judge to handle a specific case allocated to him or her on grounds other than the established facts of the case and the applicable law.

21. Secondly, the strict observance of legal rules during the appointment procedure builds the public trust in the administration of justice and thus enhances the democratic legitimacy of the judiciary. It also increases the level of acceptance of judicial decisions in the society and thereby improves the effectiveness of judicial mechanisms. Furthermore, it provides the parties involved in the proceedings with the confidence that the cases are decided by impartial judges who are not favouring any of the parties and who are not guided by illegitimate considerations. It is not only essential that judges are independent and impartial, but also that the procedure for their appointment appears to be so – otherwise, the confidence of the parties and the public in the independence and impartiality of the tribunal and courts might be eroded[18].

22. The Commissioner considers that a flagrant violation of domestic legal rules on the appointment of judges amount to a clear breach of the Article 6 (1) ECHR. In such a case, the infringement of that Article can be determined without the need to examine other elements, in

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[12] See Constitutional Tribunal, judgment of 24.10.2007, case SK 7/06, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=1816&sprawa=4377 (accessed 19.01.2020), para. 3.2.
[13] *Lavents v Latvia*, para. 114; see also General Court of the European Union, judgment of 23.01.2018, T-639/16 P, *FV v Council of the European Union*, EU:T:2018:22, para. 72.
[14] *Lavents v Latvia*, para. 114; GCEU, *FV*, para. 68.
[15] Compare GCEU, *FV*, para. 74.
[16] See ECtHR, judgment of 20.10.2009, 4313/04, *Gorguiladzé v Georgia*, HUDOC, para. 69; ECtHR, judgment of 27.10.2009, 30323/02, *Pandjikidzé v Georgia*, HUDOC, para. 105; GCEU, *FV*, para. 68.
[17] See also e.g. GCEU, *FV*, para. 74–75.
[18] GCEU, *FV*, para. 75.

particular, any further guarantees of a fair trial. It constitutes an autonomous breach because it has the nature of a primary violation of the right provided for in Article 6 (1) ECHR. The failure to establish the tribunal by the law in force makes further examination under that Article aimless, as there can no longer be a fair trial before an authority lacking the attribute of being a tribunal[19].

IV. Flagrant violation of law in the process of appointing members of the CT

23. The Commissioner of Human Rights submits that a person appointed as a judge in flagrant breach of the domestic law should not be allowed to exercise judicial functions. Hence, a judicial authority of which such a person is an adjudicating member, should not be deemed to be a tribunal established by law within the meaning of the Convention.

24. An appointment process in flagrant breach of the law means a process that is manifestly contrary to the explicit legal rules enacted to govern it. A manifest violation consists in a striking discrepancy between the way in which the appointment process should be conducted in accordance with the applicable rules, and the way it actually took place. It involves conduct contrary to express legal injunctions or prohibitions.

25. According to the consistent case-law of the European Court of Human Rights, the failure to comply with the rules on the establishment and jurisdiction of judicial bodies may amount to a violation of Article 6 (1) of the ECHR[20], provided that the violation of the applicable domestic law is "flagrant"[21]. The CHR shares the opinion that instances of flagrant violation must be fundamental in nature and form an integral part of the appointment process in the assessment and selection of judges[22].

26. The threshold of a flagrant breach of law indicates that the appointment process violated the applicable rules in a manner that would have had a substantial impact on whether the process would have been completed at all (if someone was appointed), or what its outcome would have been (who would have been appointed). This threshold refers to the nature and seriousness of the infringement in the process of nomination. It is a rigorous category separating ordinary irregularities from infringements which are so fundamental that the decision made in such a deficient process becomes unacceptable. A flagrant violation of the law amounts to the nullification of the results of the process of appointment and denies legitimacy to the person who was so appointed.

27. The CHR submits that it is reasonable to presume that any infringement of a fundamental legal rule amounts to a flagrant breach of law. This includes constitutional provisions, essential standards of Article 6 (1) ECHR, as well as core principles of European Union law: effective judicial protection (Art. 19 (1) subpara. 2 TEU) and the right to a fair trial (Art. 47 EU Charter of Fundamental Rights). Such a presumption is particularly justified where the breach has already been established by a final judicial decision of the Constitutional Tribunal, the Supreme Court, the ECtHR or the CJEU.

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[19] The European Court of Human Rights has ruled that such a body cannot, in any event, guarantee a fair trial to the persons subject to its jurisdiction; see *Pandjikidzé v Georgia*, para. 121.

[20] ECtHR judgment of 5.10.2010, 19334/03, *DMD Group A.S. v. Slovakia*, HUDOC, para. 61.

[21] *Lavents v Latvia*, para. 114; see also ECtHR judgment of 31.05.2011, 59000/08, *Kontalexis v. Grece*, HUDOC, paras. 41, 44; ECtHR judgment of 4.03.2003, 63486/00, *Posokhov v. Russia*, HUDOC, paras. 39, 43; ECtHR judgment of 2.05.2019, 50956/16, *Pasquini v. San Marino*, HUDOC, paras. 102, 104; ECtHR judgment of 13.04.2006, 73225/01, *Fedotova v. Russia*, HUDOC, para. 42; see also ECtHR, judgment of 9.07.2010, 6945/04, *Ilatovskiy v Russia*, HUDOC, para. 40.

[22] ECtHR, judgment of 12.03.2019, 26374/18, *Guðmundur Andri Ástráðsson v Iceland*, HUDOC, para. 115.

28. In the Chamber ruling in the *Ástráðsson v Iceland* case (now pending before the Grand Chamber), the Court indicated that it takes into account whether the facts before the Court demonstrate that a breach of the domestic rules on the appointment of judges was deliberate or, at a minimum, constituted a manifest disregard of the applicable national law[23]. A similar approach of having regard to the intentional nature of the breach has been also adopted in the case law of the European Union courts. The ECtHR itself invoked the General Court ruling in the case *FV v Council of the European Union*.

29. The concept of investigating the true aims of actions taken by public authorities is clearly set out in the CJEU judgment C-619/18 on the Polish Supreme Court[24]. The Court has compared the declared objectives of the amendments introduced by the national legislator in relation to the termination of judges' professional activity with the actual wording of the legal rules adopted, as well as their real implications[25]. The Court concluded that doubts on the true objectives of the changes made cannot be dispelled by the arguments put forward by the government[26].

30. The process of appointing judges of the Constitutional Tribunal is essentially different from the process of appointing other judges (common courts, Supreme Court, etc.), in that the Constitution places a decisive role in this respect on the legislative body: the Sejm. This is related to the special role of the Tribunal as a body checking the hierarchical concordance of legal norms, in particular the compliance of ordinary laws with the Constitution. The Tribunal, on that account frequently referred to as a "negative legislator", may thus decide to deprive a legislative act adopted by the Parliament of its binding force. In this way, it can significantly influence the law in force in Poland, and its rulings may also have a significant impact on the pursuit of political aims and programmes. This in turn justified the assignment of the staffing of the Constitutional Tribunal to a strictly political body.

31. The constitutional mandate of the Sejm to elect judges of the Constitutional Tribunal is, however, binding on the Sejm as to the scope of the entrusted competence and does not allow it to step beyond the constitutional limits and arbitrarily shape the staffing of the Tribunal. The competence to select persons for judicial positions at the CT does not result in the competence to cancel or invalidate previous elections. The Constitution did not entrust the Sejm with such unlimited power.

32. Therefore, the Commissioner wishes to point out that both the Sejm's resolutions of 25 November 2015 on depriving of legal force the previous Sejm's resolutions on the election of five judges of the Constitutional Tribunal, as well as the resolutions of 2 December 2015 appointing new judges in their place – were adopted without the required legal basis. Their adoption was a manifest breach of law. In the light of the Tribunal's judgment of 3 December, solely the election of two judges for the positions vacated during the term of office of the 8th term Sejm was permissible and should have been carried in a proper procedure.

33. The failure of the President of the Republic to take an oath from lawfully elected judges was a breach of the Constitution and also amounts to a flagrant violation of law in the process of staffing the Constitutional Tribunal. Likewise, the President's rushed and nightly swearing-in of new persons, despite the binding decision of the Constitutional Tribunal on interim measures, was

[23] ECtHR, *Ástráðsson*, para. 102.
[24] CJEU, judgment of 24.06.2019, C-619/18, *Commission v Poland (independence of the Supreme Court)*, EU:C:2019:531.
[25] CJEU, *Independence of the Supreme Court*, paras. 80 et subseq.
[26] CJEU, *Independence of the Supreme Court*, para. 87.

a flagrant breach of law. The President intentionally led to a situation where the implementation of a binding judgment of the Constitutional Tribunal, delivered a few hours later, was made impossible or extremely difficult. The President has rendered the judgment of the Tribunal ineffective and has unlawfully stepped into the sphere reserved for the administration of justice, thereby infringing the principle of the separation of powers.

34. The deliberate and intentional infringements of law by the 8th term Sejm and the President of the Republic should result in the disregard of arguments relating to the principle of irremovability of judges, the principle of legal certainty and the stability of judicial decisions. By their own actions, the legislative and executive authorities have deprived the existing legal mechanisms of their effectiveness: the constitutionality control of the law and the binding force of the Tribunal's decisions. There were no other mechanisms in place at that time to effectively prevent the illegitimate effects and the improper staffing of the Constitutional Tribunal. The Commissioner wishes to emphasize that an intention to bypass or violate the applicable law cannot be rewarded by acceptance of the situation thus created (*ex iniuria ius non oritur*). The 8th term Sejm and the President of the Republic themselves created the situation of a persistent and systemic breach of the rule of law in Poland dismantling the constitutional safety valves.

V. Consequences of a flawed composition of the Constitutional Tribunal

35. The changes initiated in the Constitutional Tribunal by the introduction in 2015 of unlawfully appointed persons who are not authorized to adjudicate, have brought profound changes to the functioning of the CT. The reputation of the body, built up over decades, has been destroyed; the legitimacy of the CT judgments handed down with the participation of the "duplicate-judges" was called into question.

36. The political authorities have achieved two goals that they clearly intended to pursue. First, they incapacitated the body that could perform an assessment of the constitutionality of the legislation adopted, and thereby put a stop to further negative developments, that were indeed implemented in the following years. The "negative legislator" was thus neutralized and the genuine constitutional review mechanism was switched off.

37. This has opened the way for further developments, including major changes in the judiciary, which remain unconstitutional. Yet, the legislature and the executive are no longer concerned that they would be challenged by the Constitutional Tribunal, following its capture and remaining under their overwhelming political influence. As a consequence, we are witnessing *de facto* changes of the Constitution in Poland through the enactment of ordinary legislation.

38. Secondly, the political power has gained an additional instrument to formally legitimize unconstitutional legislation adopted by the Parliament. This is demonstrated by the judgment of 25 March 2019 in the case K 12/18, in which the CT was to check the constitutionality of the amended legislation on the National Council of the Judiciary (**NCJ**). Despite the blatant violation of the Constitution in the formation of the new NCJ (e.g. the interruption of the constitutionally guaranteed term of office of previous judges-members of the NCJ; the election of new judges-members by the legislature in excess of the its constitutional mandate), the Tribunal recognized the compatibility of the amended law with the Constitution. It did not draw attention to the fundamental concerns expressed in the opinions of the Venice Commission, documents of the European Commission or the positions of the European Network of Councils for the Judiciary, which eventually suspended the NCJ's membership in the ENCJ. Many of these concerns have been also reflected in the judgment of

the Court of Justice of the European Union (**CJEU**) of 19.11.2019, case C-585/18, C-624/18 and C-625/18 *A.K. and others*.

39. The changes also affected further aspects of the operation of the Constitutional Tribunal. The Commissioner would like to point to some of them. The CHR repeatedly submitted requests to exclude persons wrongfully appointed as judges from the composition of the CT adjudicating panels. The requests were made in total of sixteen cases (K 17/14, SK 8/14, K 2/15, K 10/15, K 36/15, SK 37/15, K 3/16, K 9/16, K 16/16, K 24/16, K 1/17, K 16/17, SK 4/17, SK 31/17, U 1/17, P 9/18). These applications were then considered with the participation of the persons to whom they related. Legal issues were therefore decided by the persons directly concerned by the decision in a clear breach of the principle of *nemo iudex in causa sua*. In this way, a consistent CT case-law has been established, refusing to exclude persons not entitled to adjudicate, alleging the lack of a legal basis for the exclusion of illegitimate judges.

40. Further irregularities in the functioning of the Constitutional Tribunal relate to the manipulation of the composition of the panels by the President of the CT, including the replacement of a judge, even if the judge-rapporteur, in a situation where the reports an intention to take a position on the case that is not shared by incumbent President of the Tribunal. This demonstrates a clear intention to staff adjudicating panels for the determination of cases that are important to the political authorities in such a way, that the ruling delivered meets the expectations of the government. This development was documented i.a. in letters to the Senate of the Republic of Poland by a CT judge, Jarosław Wyrembak[27]. Similarly, he pointed to the cases of the President of the Tribunal setting the Tribunal's agenda in consideration of the political calendar (e.g. the upcoming parliamentary elections).

41. The changes in the Constitutional Tribunal are perceived negatively by a large part of the society. The Tribunal does not appear to be a guardian of the Constitution, but more a body that is to meet the political expectations of those in power. It does not guarantee the upholding of constitutional standards. It has lost public credibility and is referred to as a facade body, that is bearing the same name as before, but no longer fulfilling the role entrusted to it by the Constitution.

42. The negative perception of the Constitutional Tribunal is reflected in the drastic decline in judicial efficiency of this body and the falling number of decisions delivered; the decrease in the number of legal references asked by the ordinary courts; or the drop in the number of constitutional complaints submitted by the litigants.

43. Given the manipulation of the composition of the Tribunal's adjudicating panels and the participation in them of unlawfully appointed judges, which does not guarantee the fairness of the CT proceedings and the legal stability of its rulings – the Commissioner for Human Rights had to withdraw from the Tribunal his applications concerning legislation on important areas affecting the rights of individuals: e.g. (a) the application related to the surveillance of individuals and operational supervision on the basis of the Police Act (case K 9/16); (b) the application concerning legal remedies against the excessive use of direct coercive measures and firearms by law enforcement officers (case K 7/16); (c) the application on the "fruits of the poisoned tree" and Article 168a Code of Criminal Procedure (CCP) in the light of the right of defence (case K 27/16); (d) the application on the use of

[27] The documents provided by J. Wyrembak were made available on the Senate's website and were discussed by the Senate Committee on Human Rights, the Rule of Law and Petitions on 3.12.2019, https://www.senat.gov.pl/prace/komisje-senackie/posiedzenia,196,1,komisja-praw-czlowieka-praworzadnosci-i-petycji.html (accessed 19.01.2020).

the fruits of the poisoned tree in operational control and Article 168b CCP (case K 24/16); (e) the application concerning the Anti-terrorist Act (case K 35/16).

44. In the current situation, the lack of a Constitutional Tribunal which is properly staffed and operates in accordance with constitutional rules resulted in that the CHR was *de facto* deprived of one of its most essential legal instruments – the mechanism of cooperation with the CT in ensuring the protection of human rights by making use of the prerogative to initiate *in asbtracto* constitutional review. Lack of effective constitutional review affects also citizens willing to initiate the review by constitutional complaints.

VI. Conclusions

45. Three judges who had been legally appointed by the 7th term Sejm in October 2015 were not admitted to adjudicate since they had not been sworn in by the President of the Republic. They were unlawfully replaced with three other persons by the 8th term Sejm. The lawfulness of the previous appointments by the 7th term Sejm was confirmed by a ruling of the Constitutional Tribunal itself. There was no proper legal basis to repeat the procedure in respect of the three judicial positions. The legislative provision that authorized the re-election of the judges was recognized by the CT as unconstitutional.

46. Persons appointed in 2015 to the positions of judges of the Constitutional Tribunal which were already filled beforehand, as well as all subsequent persons who took the position after them, were elected and appointed in a flagrant breach of law. Thus, their status of judges of the CT could be questioned. The acts of their appointment rise serious doubts. It can be argued that they remain legally ineffective, and these persons have no right to adjudicate in the Constitutional Tribunal; each adjudicating CT, in which they sit, can be seen as unlawfully composed, and that it does not meet the prerequisite for a tribunal to be established by law. Any decision delivered by such an authority could be challenged as flawed and, accordingly, could be deemed not to bear any legal effects.