

# A TOOL OF THE GOVERNMENT

## THE FUNCTIONING OF THE POLISH CONSTITUTIONAL COURT IN 2016–2021



*A tool of the government. The functioning of the Polish Constitutional Court in 2016-2021*

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Warsaw, September 2021

First edition

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Legal status as of 28 August 2021

**Publisher**

Helsinki Foundation for Human Rights

ul. Wiejska 16

00-490 Warszawa

This report was prepared as part of a project of the Helsinki Foundation for Human Rights, *Monitoring of the Human Rights System in Poland*. The project is implemented with a grant from the Active Citizens Programme – National Fund financed by the EEA Funds.

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# Introduction

The changes to the method of selecting Constitutional Court's judges and the Court's operational framework introduced in 2015 became a direct cause of the constitutional crisis that has persisted in Poland to this day.

Until the end of 2016, the Constitutional Court was a crucial element of the human rights protection system in Poland. The Court was the only body entitled to examine the compatibility of laws with the Constitution as a supreme instrument. Decisions issued by the Constitutional Court played a key role in many areas of fundamental rights protection and the development of standards of a democratic state. Against the background of more than 30 years of achievements of the Constitutional Court and its judges, the decline of the Court as an independent institution is becoming all the more evident.

Since Julia Przyłębska took the helm of the Constitutional Court at the end of 2016, the Court's authority has eroded and its independence has been severely curtailed and subordinated to political will. The Constitutional Court has become an active participant in the ongoing dispute between the Polish Government and the European Union concerning changes in the justice system, taking on the role of the maker of rulings which rubber stamp introduced changes that threaten the independence of judges in ordinary courts. These rulings are made under the pretence of a dispute between the values guaranteed by the Polish Constitution and EU laws but are in fact geared towards the legal isolation of Poland within the EU.

From an institution whose systemic task was to scrutinise the lawmakers, the Constitutional Court has become a mere substitute for the Parliament. The real purpose of the Court's rulings is to deal with issues that are inconvenient for those in power and that should be adopted through amendments to the legislation rather than judicial decisions. Examples

of such rulings are those concerning access to abortion or protection against discrimination in access to goods and services.

The Helsinki Foundation for Human Rights (the “HFHR”) has been monitoring the changes introduced to the functional framework of the Constitutional Court and its work since the onset of the constitutional crisis. So far, the HFHR has published two reports on the Constitutional Court.<sup>1</sup> This report is a follow-up to that research. It is based on an analysis of publicly available data and the jurisprudence of the Constitutional Court. This report differs from the previous publications in that it does not include data obtained through access to public information requests as the Constitutional Court has denied all such requests submitted by the Helsinki Foundation for Human Rights.

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1 Szuleka M., Wolny M., Szwed M., The Constitutional Crisis in Poland, [https://www.hfhr.pl/wp-content/uploads/2016/09/HFHR\\_The-constitutional-crisis-in-Poland-2015-2016.pdf](https://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf) and Wolny M. „Pracuje tak, jak powinien”? Trybunał Konstytucyjny w 2017 r., : <https://www.hfhr.pl/wp-content/uploads/2018/03/HFPC-Pracuje-tak-jak-powinien-raport-TK-2017.pdf> (PL).

# 1. Summary

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- Since June 2015, the *Sejm*, the lower house of the Polish Parliament, has adopted seven new laws or amendments to laws on the functioning and procedure before the Constitutional Court. Initially, the most controversial changes concerned the manner of electing the judges of the Constitutional Court. The new legislation adopted from December 2015 onwards was also aimed at taking political control over the Court's activities.
- Changes to the procedure for the election of Constitutional Court judges and the ruling majority's disregard for Constitutional Court rulings have resulted in three persons having been elected to the Court as judges without a valid legal basis. Defects in the process of appointing these persons to the Constitutional Court's bench lead to a violation of parties' right to have their case heard by an independent body established by law. Since 2017, there have been more than 300 Constitutional Court's decisions issued with the involvement of persons elected to the Constitutional Court without a legal basis.
- Since 2017, public opinion polls have been consistently showing a negative assessment of the Constitutional Court's activities. At the end of 2020, after the Court's ruling on access to abortion, 59% of the respondents had a negative view of the Court's work.<sup>2</sup> The perception of the Constitutional Court's work may be significantly influenced by its controversial rulings as well as by some judges' close ties with politicians of the ruling majority.
- Since 2017, there has been a steady decline in the number of cases received by the Constitutional Court across all categories, with the exception of constitutional complaints. As far as the inflow of cases is concerned, the greatest fall has been recorded in the number of submitted questions on points of law

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2 Centrum Badań Opinii Społecznej, Oceny działalności instytucji publicznych, nr 38/2021, [https://www.cbos.pl/SPISKOM.POL/2021/K\\_038\\_21.PDF](https://www.cbos.pl/SPISKOM.POL/2021/K_038_21.PDF) (accessed 17 August 2021).

and requests for the hierarchical review of the conformity of laws, referred to in Article 191 (1) (1)-(5) of the Constitution. While in the years 2010-2016, the Court annually received, on average, 57 cases allocated to the “K” and “U” docket categories (requests to verify the constitutionality of legal acts), in the years 2017-2020 this number decreased to a mere 25. At the same time, the number of rulings issued by the Court is also decreasing. In 2020, the Court issued 24 judgments as compared to 36 judgments pronounced in 2018 and 63 delivered in 2015.

- Since 2017, the number of requests for the constitutional review of legislation submitted by the government and parliamentarians of the ruling majority (20 in total) has increased. By comparison, between 2010 and 2016, members of the Sejm and senators brought 79 cases before the Constitutional Court, about 94% of which were initiated by requests from politicians of the then opposition. Three requests came from representatives of the Polish People’s Party, which was then part of the ruling parliamentary majority, and one from politicians from the Civic Platform. This practice is controversial insofar as the ruling majority has the freedom to develop the legal system and if certain legislative arrangements are deemed to fall short of a standard described by the Constitution, it is sufficient for the majority to amend the law rather than initiate the constitutional review process. The above argument is especially relevant in view of the fact that, at least in theory, the ruling majority should not be certain as to the final outcome of the case brought before the Constitutional Court.
- Over the past four years, the jurisprudence of the Constitutional Court has begun to be used to rubber-stamp changes made to the constitutional system by the ruling majority. The Constitutional Court has approved the most controversial changes to the laws relating to the judiciary or those that affected the ruling party’s vested interests, e.g. the pardon of one of the members of the ruling majority. Moreover, a new trend has recently emerged whereby the Constitutional Court is used by the ruling majority to resolve controversial and socially objectionable matters that have not been resolved through amendments to the legislation, such as the tightening of the rules on access to abortion. Last but not least, with the conflict between the Polish Government and the European Commission intensifying, the Constitutional Court is being



used to settle the ostensible dispute between national constitutional regulations and the law of the European Union.

- The activities of the Constitutional Court demonstrate that it has ceased to be an independent institution upholding the Constitution and a cornerstone of the human rights protection system. Proceedings before the Constitutional Court in its current form are fraught with the risk of infringements of the individual's right to have their case heard by an independent body established by law.
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## 2. The dispute over the Constitutional Court

<b>30 August 2015</b>	The Constitutional Tribunal Act, adopted in June 2015 by the Seventh Sejm's majority (the coalition of the Civic Platform and the Polish People's Party), comes into force. The law contains transitional provisions allowing for the election of five new judges of the Constitutional Court at once to replace the three judges whose term of office ends in November 2015 and the two judges whose term of office expires in December 2015.
<b>8 October 2015</b>	The Seventh Sejm elects five new judges of the Constitutional Court.
<b>25 October 2015</b>	Parliamentary elections. Law and Justice party wins 37.58% of the vote and gains an outright majority in the Sejm and Senate.
<b>20 November 2015</b>	An amendment to the Constitutional Court Act, adopted in November 2015, enters into force, introducing changes to the transitional provisions for the election of five judges whose term of office expired in 2015.
<b>2 December 2015</b>	On the night of 2 to 3 December 2015, the Eighth Sejm passes resolutions to elect five judges of the Constitutional Court. President takes oaths from four of them.
<b>3 December 2015</b>	The Constitutional Tribunal issues a judgment on the transitional provisions of the June Act.
<b>9 December 2015</b>	Constitutional Court issues a judgment on the November amendment to the Constitutional Court Act.
<b>22 December 2015</b>	The Eighth Sejm adopts an amendment to the Constitutional Court Act, revising, inter alia, the procedure and working rules of the Court. The changes include an increase in the minimum number of judges sitting as the full Court as well as the obligation to decide cases by a two-thirds majority and consider cases on a first-come, first-served basis (with no exceptions).
<b>13 January 2016</b>	The European Commission launches an infringement procedure against Poland related to rule of law concerns.
<b>9 March 2016</b>	The Constitutional Court issues a judgment on the amendment to the Constitutional Court Act of December 2015, considering the entire Act to be unconstitutional.

1 August 2016	An amendment to the Constitutional Court Act, adopted in July 2016, enters into force. The law affirms the admission of all Constitutional Court judges sworn in by the President and limits the Court's procedural and organisational independence.
11 August 2016	The Constitutional Court enters a judgment declaring certain provisions of the July amendment unconstitutional.
30 November– 13 December 2016	The Sejm adopts a package of three laws on the status of Constitutional Court judges, the procedure and organisation of proceedings before the Court and other procedural arrangements (including a procedure for electing the President of the Constitutional Court).
19 December 2016	The term of office of the incumbent President of the Constitutional Court, Prof. Andrzej Rzepliński, ends.
20 December 2016	President Andrzej Duda appoints Julia Przyłębska as Acting President of the Constitutional Court. Immediately afterwards, she convenes the General Assembly of the Judges of the Constitutional Court.
20 December 2016	Despite the lack of a resolution of the General Assembly of Judges of the Constitutional Court presenting candidates for the position of Court's President, President Andrzej Duda appoints Julia Przyłębska to the post. One of the first decisions taken by Julia Przyłębska is to allocate cases to three persons elected as judges of the Constitutional Court without a valid legal basis.
3 January 2017	Article 12 (3) of the Constitutional Court Organisation and Procedure Act comes into force, allowing the President of the Constitutional Court to authorise a judge of the Constitutional Court to exercise certain powers of the President of the Constitutional Court.
16 March 2017	Constitutional Court passes a judgment on an amendment of the Assemblies Act.
17 April 2017	Eight judges of the Constitutional Court send a letter to Julia Przyłębska, inquiring about the management of the Constitutional Court's work.
26 June 2017	The term of office of then-incumbent Constitutional Court Vice-president Stanisław Biernat came to an end. Mariusz Muszyński took over as Vice-President of the Constitutional Court.
August 2017	First media reports emerge on contacts of certain judges of the Constitutional Court with politicians of Law and Justice and politicians' visits on the premises of the Constitutional Court.
24 October 2017	In a case brought by the Ombudsman, the Constitutional Court rules on a package of three laws on the Constitutional Court adopted by the Sejm in 2016. The Court declares them to be compatible with the Constitution.

The image shows a vertical timeline with five entries. Each entry consists of a date in a dark purple box on the left and a corresponding event description on the right. The entries are connected by a vertical line with circular markers at each date point. Dashed horizontal lines separate the entries.

<b>25 March 2019</b>	The Constitutional Court issues a judgment on an amendment to the National Council of the Judiciary Act, the law introducing a key change in the justice system, which affects the legality of the status of judges appointed by the Council.
<b>3 December 2019</b>	The term of office of three judges of the Constitutional Court elected by the Sixth Sejm in 2010 ends. The Sejm fills the vacant seats by appointing judges Krystyna Pawłowicz, Stanisław Piotrowicz and Jakub Stelina.
<b>22 October 2020</b>	The Constitutional Court rules on access to abortion. The judgment sparks mass public protests, the largest in Poland since the regime change in 1989.
<b>7 May 2021</b>	The European Court of Human Rights issues a judgment in the case of Xero Flor v. Poland, holding that the fact that a person incorrectly appointed as a judge of the Constitutional Court was involved in the delivery of the judgment in the case of the applicant company constitutes a violation of the right to a court established by law.
<b>28 July 2021</b>	The Minister of Justice and Prosecutor General petitions the Constitutional Court to examine the constitutionality of the first sentence of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms insofar as this provision uses the term "tribunal" with reference to the Constitutional Court.

## 3. Situation in the Constitutional Court

Concerns over the independence of the Constitutional Court have been growing since Julia Przyłębska became President of the Constitutional Court at the end of 2016. The thrust of these concerns is the manner of election of the President and Vice-President of the Tribunal, contacts between some of the judges and Government and ruling party officials, the rules for allocating cases to judges and the fact that three persons elected as judges of the Constitutional Court have been adjudicating without a valid legal basis. The works of the Constitutional Court are also marred by a growing conflict between individual judges.

### **3.1. APPOINTMENT OF JULIA PRZYŁĘBSKA AS PRESIDENT OF THE CONSTITUTIONAL TRIBUNAL AND HER MANAGEMENT OF THE COURT'S WORK**

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The term of office of the former President of the Court, Prof. Andrzej Rzepliński, expired in December 2016. In November and December 2016, the Sejm adopted a package of three laws governing the working rules and procedure of the Constitutional Court. A key change introduced by the new legislation concerned the procedure for electing the President of the Constitutional Court. Newly legislated provisions enabled the bypassing of the constitutional position of the Vice-president of the Court and the appointment of an acting President as a substitute for the President of the Court.

On 20 December 2016, the day after the end of the term of office of Professor Andrzej Rzepliński, the President of the Republic of Poland appointed judge Julia Przyłębska as Acting President of the Court. Thirty minutes later, Julia Przyłębska convened the General Assembly of Judges of the Constitutional Court to select candidates for the post of the

Court's President. The three persons selected as judges of the Constitutional Court without a valid legal basis were among the judges attending the Assembly.

Out of the 11 judges participating in the Assembly, only the judges elected by the ruling coalition took part in the election of the new President of the Constitutional Court. Together with the three persons elected as judges of the Court without a valid legal basis, they nominated two candidates for the post of President of the Constitutional Court: Julia Przyłębska and Mariusz Muszyński. However, these candidates were not supported by the resolution of General Assembly of Judges of the Constitutional Court presenting the candidates to the President of Poland.

Despite the absence of an affirmative resolution of the General Assembly, Julia Przyłębska presented candidates for the post of the Court's President to the President of the Republic of Poland based on the minutes of the Assembly's deliberations. On these grounds, the President of the Republic of Poland appointed Julia Przyłębska as President of the Constitutional Court on 20 December 2016.<sup>3</sup> Immediately afterwards and despite having no legal basis for doing so, Julia Przyłębska authorised Mariusz Muszyński, one of the three persons elected as judges of the Court without a valid legal basis, to act as her substitute in exercising the powers of the Acting President of the Court. The actions of Julia Przyłębska and Mariusz Muszyński aimed at weakening the position of the Vice-President of the Court, Prof. Stanisław Biernat, and taking full control over the activities of the Constitutional Court.

The means of electing Julia Przyłębska as President of the Court has been repeatedly contested in analyses of the Court's work. This issue may also arise in the case law of international courts, most notably the European Court of Human Rights.<sup>4</sup>

Further changes made in the Constitutional Court in 2017 concerned the composition of the Court's staff. Thirty-five members of the Court's legal teams were dismissed and 29

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3 Wolny M., „Pracuje tak, jak powinien”? – raport o działaniach Trybunału Konstytucyjnego w 2017 roku, <https://www.hfhr.pl/publication/pracuje-tak-jak-powinien-raport-o-dzialaniach-trybunalu-konstytucyjnego-w-2017-roku/> (accessed 2 September 2021).

4 Application no. 1819/21 concerning the case K.B. and others v. Poland; application no. 3801/21 concerning case A.L.-B. and others v. Poland; application no. 3639/21 concerning the case K.C. and others v. Poland.

new staff were recruited over the course of a year.<sup>5</sup> At the same time, Julia Przyłębska decided the three persons elected as judges of the Court without a valid legal basis should be admitted to perform judicial duties. Around that time, the Prosecutor General challenged the 2010 election of judges Marek Zubik, Piotr Tuleja and Stanisław Rymar, claiming that they had been elected jointly, which allegedly violated the procedure of election of judges to the Constitutional Court as set out in Article 194 (1) of the Constitution. That challenge resulted in the exclusion of those judges from adjudication in certain cases. By order of Julia Przyłębska, members of the media were restricted from recording and photographing hearings before the Constitutional Court.<sup>6</sup>

Julia Przyłębska's stewardship of the Court has sparked a number of controversies and has been contested by the Court's judges themselves. In May 2017, eight judges of the Court asked Julia Przyłębska about the justification for the removal from the Court's database of judgments issued in cases concerning laws regulating the work and procedure of the Court which were found to be partially or fully unconstitutional.<sup>7</sup> Moreover, in December 2018, seven judges of the Constitutional Court wrote another letter to Julia Przyłębska, objecting to the violations of the provisions of the Constitutional Court Organisation and Procedure Act, especially with respect to the structure of judicial formations and assignment of cases to judges. In their letter, the judges argued that the Court's judicial formations were chosen by Julia Przyłębska in a discretionary manner (see → **Appointment of judicial panels, page 18**).<sup>8</sup>

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5 Wolny M., „Pracuje tak, jak powinien”? – raport o działaniach Trybunału Konstytucyjnego w 2017 roku, <https://www.hfhr.pl/publication/pracuje-tak-jak-powinien-raport-o-dzialaniach-trybunalu-konstytucyjnego-w-2017-roku/> (accessed 2 September 2021).

6 Flis D., Przyłębska zakazała filmowania rozpraw TK. RPO: to ograniczenie konstytucyjnego prawa do informacji, *Oko.press*, <https://oko.press/przylebska-zakazala-filmowania-rozpraw-tk-rpo-ograniczenie-konstytucyjnego-prawa-informacji/> (accessed 2 September 2021).

7 The letter of eight judges of the Constitutional Court, <https://monitorkonstytucyjny.eu/archiwa/224> (accessed 2 September 2021).

8 Pankowska M., Julia Przyłębska łamie ustawę o TK. Dramatyczny list 7 sędziów Trybunału, *Oko.press*, <https://oko.press/julia-przylebska-lamie-ustawe-o-tk-dramatyczny-list-7-sedziow-trybunalu/> (accessed 2 September 2021).

### 3.2. CONTACTS BETWEEN JUDGES OF THE CONSTITUTIONAL COURT AND THE POLITICAL GOVERNMENT

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In mid-2017, the media began to report on visits by representatives of the ruling parliamentary majority to the sections of the Constitutional Court's building that used to be accessible only by the judges and staff of the Court.<sup>9</sup> According to news accounts, judges were visited by the Minister of Justice Zbigniew Ziobro and Secretary of State at the Ministry of Justice Marcin Warchoł, as well as the Minister of the Interior and Administration Mariusz Kamiński. The latter official had a direct interest in the proceedings before the Constitutional Court concerning the limits of the presidential right of pardon. Moreover, in 2019 the media reported on regular visits by Law and Justice leader Jarosław Kaczyński to Julia Przyłębska's private flat.<sup>10</sup> Even before this information was published in the press, Jarosław Kaczyński was asked about his private social interactions during an interview on national breakfast television. At that time, Mr Kaczyński said that Julia Przyłębska, President of the Constitutional Court, was his “social discovery of recent years” whom he “very much enjoys visiting”.<sup>11</sup>

In December 2019, the media revealed that Julia Przyłębska met with the leadership of Law and Justice and the President of the Republic of Poland during a secret meeting in one of the presidential residences.<sup>12</sup> According to the news reports, the meeting was devoted to the changes in the judiciary introduced by the so-called “muzzle law” and the

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9 Wprost.pl, Wybrani przez PiS sędziowie TK utrzymują kontakty z politykami? TK odpowiada: To normalne, <https://www.wprost.pl/kraj/10070079/wybrani-przez-pis-sedziowie-tk-utrzymuja-kontakty-z-politykami-tk-odpowiada-to-normalne.html> (accessed 2 September 2021).

10 Wroński P., Kordzińska A., Centrum dowodzenia w domu Przyłębskiej. Ujawniamy sekretne spotkania prezesa PiS, premiera i szefowej Trybunału, Wyborcza.pl, <https://wyborcza.pl/7,75398,24815201,centrum-dowodzenia-w-domu-przylebskiej-ujawniamy-sekretne-spotkania.html> (accessed 2 September 2021).

11 Onet.pl, Jarosław Kaczyński w „Pytaniu na śniadanie”: moim odkryciem towarzyskim ostatnich lat jest Julia Przyłębska, [https://www.onet.pl/?utm\\_source=wiadomosci.onet.pl\\_viasg\\_wiadomosci&utm\\_medium=referal&utm\\_campaign=leo\\_automatic&srcc=ucs&pid=5050c92f-8aed-4ac4-94c7-6c3dc8a4138c&sid=b177a2c9-166f-4113-9b28-185bbe554807&utm\\_v=2](https://www.onet.pl/?utm_source=wiadomosci.onet.pl_viasg_wiadomosci&utm_medium=referal&utm_campaign=leo_automatic&srcc=ucs&pid=5050c92f-8aed-4ac4-94c7-6c3dc8a4138c&sid=b177a2c9-166f-4113-9b28-185bbe554807&utm_v=2) (accessed 2 September 2021).

12 Ruskiewicz S., Prezes TK Julia Przyłębska naradzała się z władzami PiS i prezydentem w Belwederze, Wp.pl, <https://wiadomosci.wp.pl/prezes-tk-julia-przylebska-naradzala-sie-z-wladzami-pis-i-prezydentem-w-belwederze-6472252063086209a> (accessed 2 September 2021).



adoption of “a strategy to tackle a criticism from the EU institutions”.<sup>13</sup> The press office of the Constitutional Court refused to confirm that the meeting had taken place, informing the journalists that the President of the Constitutional Court “does not attend party meetings”.<sup>14</sup> A similar answer was given to the Helsinki Foundation for Human Rights in response to its access to public information request in this regard.<sup>15</sup> However, the press office admitted that the President of the Constitutional Court “participates in various meetings, including those organised by the Chancellery of the President of Poland”.<sup>16</sup>

The topic of contacts between the ruling majority’s officials and the President of the Constitutional Court resurfaced in January 2020 after three chambers of the Supreme Court sitting en banc issued a resolution regarding the impact of judicial appointments made by the National Council of the Judiciary in its “new” composition on the validity of judicial proceedings. According to media accounts, Chairman Jarosław Kaczyński first met with the Speaker of the Sejm, Elżbieta Witek, and then with Julia Przyłębska.<sup>17</sup> On the same day, Ms Witek submitted a request to the Constitutional Court to resolve alleged jurisdictional disputes between the Supreme Court and the President of the Republic of Poland, as well as between the Supreme Court and the Sejm. The actual purpose of the request was to allegedly to prevent the Supreme Court from issuing the resolution.

### **3.3. ALLOCATION OF CASES TO PERSONS ELECTED AS JUDGES OF THE CONSTITUTIONAL COURT WITHOUT A VALID LEGAL BASIS**

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One of the first decisions taken by Julia Przyłębska as President of the Constitutional Court was to designate the three persons elected by the Sejm in December 2015 without a valid legal basis (Mariusz Muszyński, Lech Morawski and Henryk Cioch) as judges allowed to

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13 *Ibidem*.

14 *Ibidem*.

15 Constitutional Tribunal, response to the freedom of information request.

16 Ruszkiewicz S., Prezes TK Julia Przyłębska naradzała się z władzami PiS i prezydentem w Belwederze, Wp.pl, <https://wiadomosci.wp.pl/prezes-tk-julia-przylebska-naradzala-sie-z-wladzami-pis-i-prezydentem-w-belwederze-6472252063086209a> (accessed 2 September 2021).

17 Onet.pl, Stan po Burzy. Kaczyński spotkał się z Przyłębską w jej mieszkaniu, <https://wiadomosci.onet.pl/kraj/uchwala-sn-jaroslaw-kaczynski-spotkal-sie-z-julia-przylebska/t6p72yt> (accessed 2 September 2021).

decide cases submitted to the Court. The last two jurists, who passed away in July and December 2017, were replaced by Justyn Piskorski and Jarosław Wyrembak. The new appointees, despite challenges being made to their status as judges of the Constitutional Court, were also admitted to hearing cases.

In 2017-2021,<sup>18</sup> these persons sat on hundreds of panels of the Constitutional Court that examined constitutional complaints or requests for the constitutional review of laws. During the period in question, Mariusz Muszyński alone made 113 rulings on the preliminary examination of requests and complaints submitted to the Constitutional Court. In 70 cases, the formation of the Court which included Mr Muszyński decided not to proceed with a complaint or request or dismissed an interlocutory appeal against the decision not to proceed. A total of five persons elected to the Constitutional Court for already occupied positions sat on the Court's panels that refused to proceed with a case or dismissed the complainant's interlocutory appeal against such refusal, in total in as many as 210 cases.

At the stage of the constitutional review proper, persons elected for already occupied positions participated in the examination of 173 cases in 2017–2021<sup>19</sup>, or in 51% of the cases disposed of by the Constitutional Court at this procedural stage. In 67 of these cases (which corresponded to 50% of the total number of judgments handed down during the period in question), the Court ruled on the compatibility of the contested provisions with higher-ranking norms.

One of such cases was the matter of the constitutional complaint brought by a company named Xero Flor sp. z o.o. In July 2017, a five-member panel of the Constitutional Court including Mariusz Muszyński acting as judge rapporteur decided to discontinue the proceedings in the Xero Flor case. The company submitted an application to the European Court of Human Rights, complaining, among other things, that Poland violated its right to have a case heard by a court established by law due to the fact that the Constitutional Court panel included Mariusz Muszyński, who was elected to the Constitutional Court judgeship that had already been filled by another person.

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18 As of 11 August 2021.

19 As of 11 August 2021.

In the judgment of 7 May 2021,<sup>20</sup> the ECtHR held that Article 6 of the European Convention on Human Rights applies to constitutional complaint proceedings before the Constitutional Court. The ECtHR accepted that the appointment of Mr Muszyński had breached the fundamental principle of the election of Constitutional Court judges, namely that they should be elected in accordance with the law and that he was appointed to a position that had already been occupied.

The ECtHR did not provide any guidance on how the judgment in the discussed case should be executed. However, the relevant literature indicates that it should lead at least to the exclusion of Mr Muszyński and two other persons elected to the already occupied positions from the examination of constitutional complaints and questions on points of law.<sup>21</sup> Moreover, the ECtHR's recent communication on the violation of Article 8 of the Convention as a result of the Constitutional Court's judgment on access to abortion<sup>22</sup> may also suggest that, in the ECtHR's view, the Constitutional Court should meet the requirements for a court established by law also in cases initiated by a request made by legally qualified entities.

In response to the Strasbourg judgment in *Xero Flor*, the Prosecutor General requested the Constitutional Court to declare Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms unconstitutional insofar as the term “tribunal” is understood to refer to the Constitutional Court.<sup>23</sup> In his request, the Prosecutor General concludes that guarantees under Article 6 of the ECHR, such as the right to have an individual's case heard within a reasonable time by an independent, impartial and lawfully established body, do not apply to the Constitutional Court.

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20 The ECHR judgment of 7 May 2021 in the case *Xero Flor v. Poland*, application no. 4907/18.

21 M. Szwed, TK w składzie z „dublerami” nie jest sądem. Dlaczego ten wyrok ETPCz jest przelomowy, <https://oko.press/etpcz-trybunal-konstytucyjny-w-skladzie-z-dublerami-nie-jest-sadem/> (accessed 2 September 2021).

22 Application no. 1819/21 case *K.B. and others v. Poland*; application no. 3801/21 *A.L.-B. and others v. Poland*; application no. 3639/21 *K.C. and others v. Poland*.

23 Constitutional Court, case no. K 6/21.

### 3.4. APPOINTMENT OF JUDICIAL PANELS

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A crucial problem related to the functioning of the Constitutional Court is the rules governing the allocation of cases to individual judges.

In principle, cases brought to the Court should be allocated to judges in alphabetical order, based on the alphabetical list of judges names and the type and number of cases as well as case filing chronology. The law adopted in November 2016<sup>24</sup> allowed the President of the Constitutional Court to derogate from these rules in “particularly justified cases”.

In the letter sent in April 2017 to Julia Przyłębska, eight judges of the Constitutional Court noted the practice of taking cases away from judges, which involved changing already appointed full panels of the Court into 5-or 3-member formations.<sup>25</sup> According to the statistics compiled by the judges for the purposes of the letter, such a situation occurred in 21 cases between January and April 2017.<sup>26</sup> In addition, the judges also drew attention to the practice of changing the judges appointed to hear a case in a 5- or d 3-member panel. The authors of the letter argued that, within 5 months of the election of the Court’s new leadership (i.e. from the end of December 2016), judges were changed in 84 cases and 24 of such changes concerned rapporteurs directly responsible for drawing up a draft version of the ruling.

The allegations of improper appointment of judicial panels were reiterated in a letter from seven judges of the Constitutional Court dated 5 December 2018,<sup>27</sup> who pointed to

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24 The Act of 30 November 2016 on the organization and the proceedings before the Constitutional Tribunal (Journal of Laws of 2019, item 2393).

25 A. Rzepliński, the former President of the Constitutional Court, decided to change the composition of the bench in case no. K 44/16, due to the decision of judges Z. Jędrzejewski, J. Przyłębska and P. Pszczółkowski who refused to participate in the hearing of the case by the full bench of the Constitutional Court. Their refusal blocked the possibility to issue the judgment in the full panel of Constitutional Court. In the judgment in this case the Court stated that in all circumstances it was obliged to perform its Constitutional duties (see the judgment of the Constitutional Court of 7 November 2016, case no. K 44/16).

26 The letter of eight judges of the Constitutional Court of 17 April 2017, available: <https://monitor.konstytucyjny.eu/archiwa/224> (2 September 2021).

27 The letter of seven judges of the Constitutional Court of 5 December 2018, [https://oko.press/images/2018/12/List-Se%CC%A8dzio%CC%81w-TK\\_5.12.2018-r..pdf](https://oko.press/images/2018/12/List-Se%CC%A8dzio%CC%81w-TK_5.12.2018-r..pdf) (accessed 2 September 2021).

19 cases<sup>28</sup> in which the President of the Court issued an order to change the composition of the panel, introducing new judges in place of those already appointed. All the discussed changes affected only the judges appointed by previous ruling coalitions and Judge Piotr Pszczółkowski, who was appointed by Law and Justice but voiced critical opinions on how the new leadership runs the Court. As a result, the composition of court panels has changed in a relatively large number of cases. A peculiar record was achieved in case no. P 4/18, which concerned changes in the retirement allowances of former officers of Communist secret services,<sup>29</sup> in which the composition of the panel appointed to hear a question on a point of law was changed no less than six times, including two changes of the judge rapporteur<sup>30</sup>.

In turn, according to Jarosław Wyrembak's correspondence<sup>31</sup> with the Chair of the Senate Rule of Law, Human Rights and Petitions Committee, he was removed from a case concerning amendments to the National Council of the Judiciary Act (no. K 12/18) as a result of him having indicated that he would submit a dissenting opinion. Mr Wyrembak recalled that the President of the Court replied to his statement by informing him that he could at most vote against the majority since "dissenting opinions are not allowed". On 16 January 2020, Julia Przyłębska decided to remove Jarosław Wyrembak from the panel hearing with the case and appointed Justyn Piskorski as the new judge-rapporteur in the case.

The practice of reshuffling the composition of the Court panels was also confirmed by Mariusz Muszyński in his dissenting opinion in case no. K 9/16. He noted that the authority of the President of the Court to designate judicial formations also implies the power to determine panels in situations that are not specifically addressed by the law. As examples

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28 U 2/16 (3 modifications of the judicial panel), SK 18/16 (2), K 1/17, P 7/17 (3), SK 8/16, K 24/16 (2), K 27/16 (2), P 10/16 (2), K 19/16, K 26/16 (2).

29 Act of 16 December 2016 amending the Act on pensions for officers of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Prison Service and their families (Journal of Laws item 2270).

30 E. Siedlecka, W Trybunale Przyłębskiej kłóca się o dezubekizację, <https://siedlecka.blog.polityka.pl/2021/05/18/w-trybunale-przylebskiej-kloca-sie-o-deubekizacje/> (accessed 2 September 2021).

31 Letters of Jarosław Wyrembak to Julia Przyłębska, <https://monitorkonstytucyjny.eu/archiwa/11474> (accessed 2 September 2021).

of such situations, he pointed to adjustments to the composition of a panel made to deal with the excessive workload of judges-rapporteurs, prolonged holiday or sick leaves, the appointment of a second rapporteur or a change of rapporteur as a result of the panel's disapproval of the submitted draft of the judgment. In his view, “[s]imilar situations have been known in the practice of the Court since the beginning of its operations”.<sup>32</sup> Referring to this problem in the context of case no. K 20/20, the Ombudsman pointed out that the practice of changing panel compositions “does not meet the standard of procedural fairness derived from Articles 2 and 7 of the Constitution. Indeed, the principle of procedural fairness would be infringed if, without any legal basis or indication of reasons, at any stage of the proceedings, the composition of the bench were to be changed in a totally arbitrary manner.”<sup>33</sup>

### **3.5. UNEVEN DISTRIBUTION OF THE CASELOAD BETWEEN JUDGES**

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Until April 2017, the Constitutional Court had 7 judges elected by the Sejm of previous terms: Stanisław Biernat, Leon Kieres, Małgorzata Pyziak-Szafnicka, Stanisław Rymar, Piotr Tuleja, Sławomira Wronkowska-Jaśkiewicz. The terms of all these judges expired by July 2021. According to these judges (and Judge Piotr Pszczółkowski), they were ignored by Julia Przyłębska in the appointment of panels.

In a letter to Julia Przyłębska of 17 April 2017, eight Court judges noted the practice of “making unlawful and arbitrary changes of the composition of Court’s panels that have already been designated according to the complexity of the case ... and in alphabetical order”.<sup>34</sup> A similar letter was sent by seven judges in December 2018. The lists of judges and the data prepared by the authors of the letter show a significant disproportion between the number of cases allocated to judges appointed by the Sejm since the end of 2015 and that assigned to judges appointed earlier.

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32 Constitutional Court judgment of 22 March 2018, case no. K 9/16.

33 Case no K 20/20; the Commissioner for Human Rights motion to exclude judge J. Przyłębska from the adjudicating panel, [https://bip.brpo.gov.pl/sites/default/files/Wniosek\\_wylaczenie\\_J.Przylebskiej\\_8.04.2021.pdf](https://bip.brpo.gov.pl/sites/default/files/Wniosek_wylaczenie_J.Przylebskiej_8.04.2021.pdf) (accessed 2 September 2021).

34 The letter of eight judges of the Constitutional Court, <https://monitorkonstytucyjny.eu/archiwa/224> (accessed 2 September 2021).

Data compiled by judges of the Court show that in 2017-2018, judges appointed after 2015 were significantly more often assigned to cases designated with the symbol “K” (involving requests to determine the compatibility of laws or ratified international agreements with the Constitution) as compared to judges elected by the Sejm of previous terms.

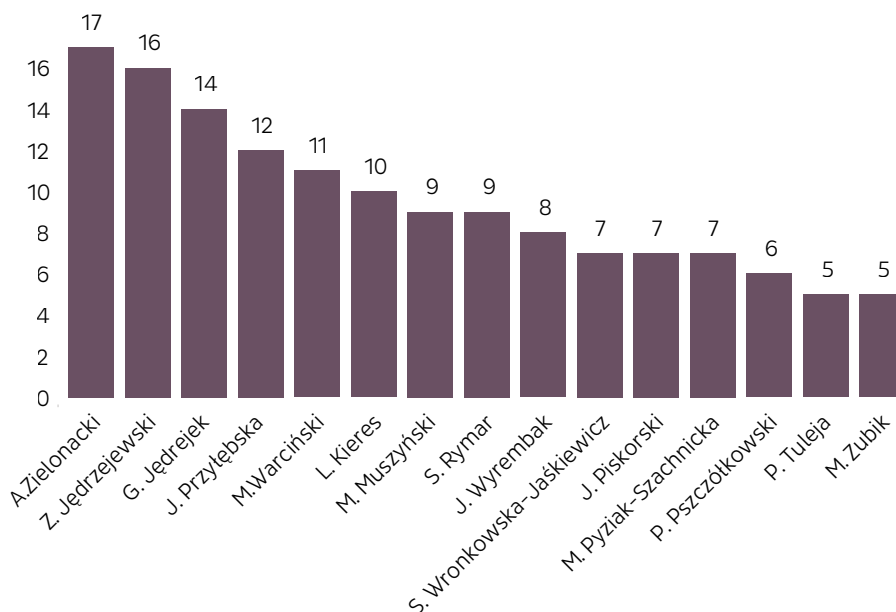


Chart 1. Judges appointed to hear the „K” type cases in 2017-2018<sup>35</sup>

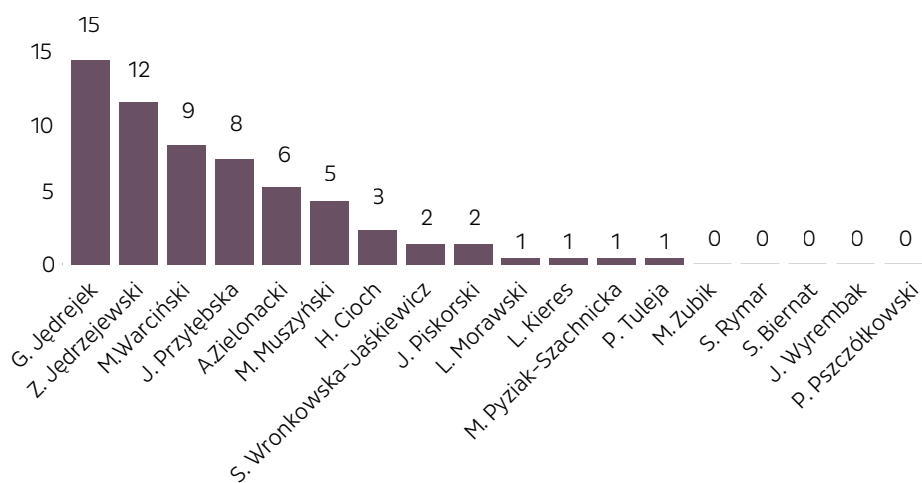
Data available in the database of Constitutional Court jurisprudence indicate that the trend of favouring “new” judges in the allocation of cases has continued, which coincided with an increase in the number of “new” judges and the expiry of the terms of judges appointed in previous terms of the Sejm.

### **3.6. CONSIDERATION OF REQUESTS TO RECUSE A JUDGE**

Referring to the request of the Prosecutor General to review the constitutionality of the resolutions appointing three judges of the Constitutional Court in 2010, those judges of

35 Based on the letter of 7 judges of the Constitutional Court of 5 December 2018, [https://oko.press/images/2018/12/List-Se%CC%A8dzio%CC%81w-TK\\_5.12.2018-r..pdf](https://oko.press/images/2018/12/List-Se%CC%A8dzio%CC%81w-TK_5.12.2018-r..pdf) (accessed 2 September 2021).

the Constitutional Court who wrote a letter to Julia Przyłębska in April 2017<sup>36</sup> observed that the President of the Constitutional Court departed from the rules governing the appointment of panels hearing requests to recuse a judge from ruling in a case. The authors of the letter noted that four consecutive requests for a judge's recusal<sup>37</sup> had been examined by the same panel. The chart below shows the frequency of appointing individual judges to examine recusal requests during a selected period. In effect, the vast majority of requests to recuse a judge were examined by the same six judges, including President of the Court Julia Przyłębska. This directly affected the formation of the Court panels, and thus also potentially the judgments issued by those panels.



*Chart 2. Persons examining requests to recuse judges of the Constitutional Court in the period from 15 February 2017 to 6 June 2018.*<sup>38</sup>

### 3.7. METHOD OF APPOINTING NEW CONSTITUTIONAL COURT JUDGES

Since the beginning of 2016, the Sejm has elected a total of 12 judges to replace the Constitutional Court judges whose terms of office have expired or have been terminated.

<sup>36</sup> The letter of eight judges of the Constitutional Court, <https://monitorkonstytucyjny.eu/archiwa/224> (accessed 2 September 2021).

<sup>37</sup> Issued in the cases Kp 4/15 and Kp 1/17.

<sup>38</sup> The letter of seven judges of the Constitutional Court, [http://doc.rmf.pl/rmf\\_fm/store/Sklady\\_orzekajace\\_pismo\\_28.06.2018\\_r.-2.pdf](http://doc.rmf.pl/rmf_fm/store/Sklady_orzekajace_pismo_28.06.2018_r.-2.pdf) (accessed 2 September 2021).



For many reasons, the process of selecting new judges has been controversial. First, the Sejm elected another two persons to the Constitutional Court without a valid legal basis (Jarosław Wyrembak and Justyn Piskorski, elected to replace the late Lech Morawski and Henryk Cioch, who had been themselves elected to already occupied positions).

Second, concerns were raised about the independence of the candidates, some of whom were parliamentarians or politicians of the ruling coalition. In this context, the greatest controversy accompanied the election of Judges Stanisław Piotrowicz and Krystyna Pawłowicz. In 2015-2019, both were members of Law and Justice sitting on the Sejm Committee for Justice and Human Rights, a body responsible for legislating almost all changes to the justice system.

Thirdly, the process of candidates' selection and assessment by a parliamentary committee was not accompanied by an in-depth discussion of their academic achievements or qualifications to perform a judicial function. For example, the parliamentary papers presenting reasons for nominating Grzegorz Jędrejek and Andrzej Zielonacki for the position of judges of the Constitutional Court contained no more than a single page with a description of their professional careers.<sup>39</sup> In some cases, the pace of judges' election was also surprisingly fast, e.g. judges Grzegorz Jędrejek and Jakub Stelina were elected by the Sejm on the same day when their nominations were submitted. In the case of the election of Judge Jakub Stelina,<sup>40</sup> the members of the Justice and Human Rights Committee were given a mere one hour's notice before the Commission session that they would be assessing his candidacy and not that of a previously proposed candidate.

The appointments of Judges Pawłowicz and Piotrowicz have not been properly debated. During the Committee's hearing<sup>41</sup> of the prospective judges, the parliamentarians were given only one minute to put questions to each of the candidates. When one of the candidates finally began answering the questions of his choice, parliamentarians decided

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39 Sejm paper no. 1310, available: <https://orka.sejm.gov.pl/Druki8ka.nsf/0/F87ECC4CE2839A3EC12580D000283F81/%24File/1310.pdf> (accessed 2 September 2021). oraz Sejm paper no. 1584, <https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1584> (accessed 2 September 2021).

40 The hearing of Sejm's Justice and Human Rights Committee of 21 November 2019, <https://www.sejm.gov.pl/Sejm9.nsf/biuletyn.xsp?sknr=SPC-3> (accessed 2 September 2021).

41 The hearing of Sejm's Justice and Human Rights Committee of 20 November 2019, <https://www.sejm.gov.pl/Sejm9.nsf/biuletyn.xsp?sknr=SPC-2> (accessed 2 September 2021).

to proceed to the vote on the nominations without even giving the other candidate an opportunity to speak. In effect, the Committee members affiliated with the ruling majority gave a favourable opinion on the candidates, without any assessment as to whether, in fact, the candidates met the criteria for the post of a judge of the Constitutional Court.

### **3.8. IMPARTIALITY OF JUDGES OF THE CONSTITUTIONAL COURT**

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One of the problems visibly affecting the functioning of the Constitutional Court are violations of the principle of judges' impartiality in the adjudication of cases.

In this respect, particular concerns have been raised by the fact that judges Krystyna Pawłowicz and Stanisław Piotrowicz took part in the examination of cases relating to changes to the justice system, the same changes they were developing and legislating as parliamentarians until 2019. Nevertheless, both judges were not recused from the ruling on key submissions made in cases relating to the “reforms” of the judiciary. Stanisław Piotrowicz presided over the Court panel hearing a case concerning the CJEU's interim measures suspending the operations of the Disciplinary Chamber of the Supreme Court. Krystyna Pawłowicz was the rapporteur in a case concerning a jurisdictional conflict between the Supreme Court, the Sejm and the President of Poland related to the resolution of three Chambers of the Supreme Court on the status of the Disciplinary Chamber and the National Council of the Judiciary.

Concerns have also been raised about the involvement of persons elected as judges of the Constitutional Court without a legal basis in proceedings regarding the laws on the Constitutional Court adopted in November and December 2016.<sup>42</sup> A key aspect of these proceedings was the assessment of the constitutionality of the arrangements which provided the President of the Constitutional Court with a legal basis for the admission of three persons elected to already occupied positions. Although the said arrangements directly affected their legal situation, Mariusz Muszyński and Henryk Cioch were not recused from the case, which was requested by the Ombudsman.<sup>43</sup>

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42 Constitutional Court judgment of 24 October 2017, case no. K 1/17.

43 Constitutional Court judgment of 24 October 2017, case no. K 1/17, available: [https://www.rpo.gov.pl/sites/default/files/K%201\\_17%20postanowienie%20TK.pdf](https://www.rpo.gov.pl/sites/default/files/K%201_17%20postanowienie%20TK.pdf) (2 September 2021).

Another controversial practice involved the appointment of three persons elected without a valid legal basis to rule on the recusal of the above judges in the cases in question. For example, Henryk Cioch was one of the persons who ruled not to exclude Lech Morawski and Mariusz Muszyński from the adjudicating panel.<sup>44</sup> Ruling in another case, Mr Muszyński decided against the recusal of Henryk Cioch.<sup>45</sup>

The attitude of certain judges of the Court towards litigants, and in particular the Ombudsman, Professor Adam Bodnar, should also be regarded as problematic. For example, Mariusz Muszyński has repeatedly criticised the Ombudsman's work in his dissenting opinions<sup>46</sup> and in doing so has resorted to using ad personam fallacies. Furthermore, Judge Krystyna Pawłowicz took part in the proceedings attended by the Ombudsman despite the fact that, while serving as a parliamentarian, she repeatedly used insults to undermine the office of the Ombudsman.<sup>47</sup>

Another problem was the public activity of certain judges of the Constitutional Court, which may be indicative of a lack of impartiality on their part. For example, Judge Krystyna Pawłowicz, commenting on the CJEU's decision to apply interim measures in a case concerning the Turów power plant, called the CJEU ruling "a thuggish aggression against Poland", and compared the ruling of the EU court to the activities of "a brazen gangster", calling the CJEU Vice President "a political and judicial saboteur".<sup>48</sup> These outspoken remarks did not result in any disciplinary proceedings being initiated by the Constitutional Court administration.

On the other hand, Judge Pawłowicz also took part in the examination of a request for the constitutional review of the Act on family planning, protection of the human foetus and conditions permitting termination of pregnancy. The case was brought by a group of

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44 Constitutional Court judgment of 15 February 2017, case no. K 2/15.

45 Constitutional Court judgment of 5 October 2017, case no. Kp 4/15.

46 Constitutional Court judgment of 6 June 2018, case no. K 35/16.

47 The hearing of Sejm's Justice and Human Rights Committee of 10 September 2019, <https://www.sejm.gov.pl/sejm8.nsf/biuletyn.xsp?sknrn=SPC-193> (accessed 2 September 2021).

48 The motion to exclude K. Pawłowicz from the adjudicating panel in the case P 7.20. On 17 June 2021 the Constitutional Court excluded judge Pawłowicz from the adjudicating panel in that case. The judgment is available at <https://monitorkonstytucyjny.eu/archiwa/18533> (accessed 2 September 2021).

parliamentarians in 2019. However, in the previous parliamentary term, the Sejm submitted a similar request, which was signed, among others, by Ms Pawłowicz, at the time a parliamentarian of the ruling coalition.<sup>49</sup> This problem was highlighted by the European Court of Human Rights when it communicated to Poland applications related to the Constitutional Court's ruling<sup>50</sup> on reproductive rights.

In another case, the ECtHR negatively assessed the Constitutional Court's interpretation of provisions of the Polish Constitution in the context of a resolution of the combined Chambers of the Supreme Court, which the Constitutional Court reviewed. The Strasbourg Court criticised the Constitutional Court for the latter's failure to carry out a comprehensive, balanced and objective analysis of the circumstances raised in the case. In addition, the ECtHR considered that the legal assessment presented by the Constitutional Court was arbitrary.<sup>51</sup> It also presented a critical opinion on the practice of the Constitutional Court aimed at suspending the Supreme Court's power to issue resolutions.<sup>52</sup> The ECtHR held that "that this kind of interference with a judicial body, aimed at incapacitating it in the exercise of its adjudicatory function in the application and interpretation of the Convention and other international treaties, must be characterised as an affront to the rule of law and the independence of the judiciary".<sup>53</sup>

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49 Polsatnews.pl, Krystyna Pawłowicz nie powinna orzekać ws. aborcji?, <https://www.polsatnews.pl/wiadomosc/2020-10-28/krystyna-pawlowicz-nie-powinna-orzekac-ws-aborcji/> (accessed 2 September 2021).

50 Application no. 1819/21 K.B. and others v. Poland; application no. 3801/21 A.L.-B. and others v. Poland; application no. 3639/21 K.C. and others v. Poland.

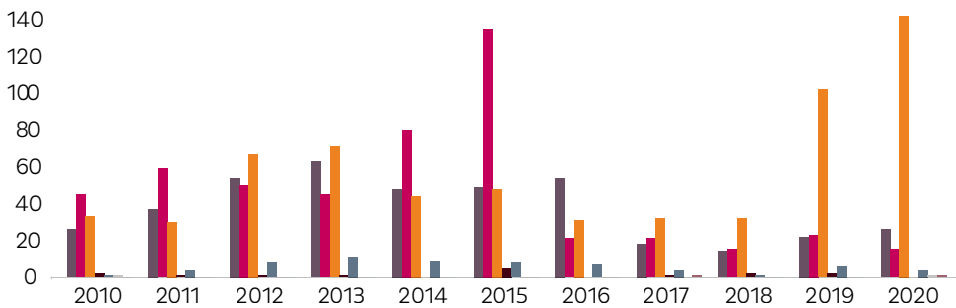
51 ECHR judgment of 22 July 2021 in the case *Reczkowicz v. Poland*, application no 43447/19, § 261.

52 Constitutional Court judgment of 28 January 2020, case no. Kpt 1/20.

53 ECHR judgment of 22 July 2021 in the case *Reczkowicz v. Poland*, application no 43447/19, § 263.

## 4. The work of the Constitutional Court – statistical data

In 2016-2020, there was a significant decline in the number of cases received by the Constitutional Court across all categories, with the exception of constitutional complaints.



	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
“K” requests	26	37	54	63	48	49	54	18	14	22	26
Questions on points of law (“P”)	45	59	50	45	80	135	21	21	15	23	15
Const. complaints (“SK”)	33	30	67	71	44	48	31	32	32	102	142
Preventive review (“Kp”)	2	1	1	1	0	5	0	1	2	2	0
“U” requests	1	4	8	11	9	8	7	4	1	6	4
Political parties (“Pp”)	1	0	0	0	0	0	0	0	0	0	1
Jurisdictional disputes (“Kpt”)	0	0	0	0	0	0	0	1	0	0	1

Chart 3. Inflow of cases to the Constitutional Court in 2010-2020<sup>54</sup>

54 Based on data published the Constitutional Court’s website.

As far as the inflow of cases is concerned, the greatest fall has been recorded in the number of submitted questions on points of law and requests for the hierarchical review of the conformity of laws, referred to in Article 191 (1) of the Constitution. While in the years 2010–2016, the Court annually received, on average, 57 cases allocated to the “K” and “U” docket categories, in the years 2017–2020 this number decreased to a mere 25.

The figures for questions on points of law submitted by ordinary courts also reflect a negative trend. In 2010–2016, the Constitutional Tribunal received on average ca. 50 questions on points of law per year. In the last four years, this number has fallen to an average of 18 questions per year. Again, this situation can be explained by the declining confidence in the Constitutional Court among the members of the judiciary. In the HFHR’s survey of judges conducted in 2019,<sup>55</sup> almost all respondents expressed substantial doubts about the Court’s independence. As many as 26 of the surveyed 40 judges declared that they would not submit a question on a point of law to the Constitutional Court owing to doubts about its independence. Several judges said they might submit a question but only after thorough consideration. What is more, six respondents went a step further and argued that a ruling of a politically dependent Constitutional Court should not constitute grounds for reopening a case. Another reason for the decrease in the number of questions question on points of law may be a considerable time that the Court needs to consider such a submission. In this context, let us recall the case concerning changes in the retirement allowances of former officers of Communist secret services<sup>56</sup>, which were challenged by a Warsaw regional court in 2017 and which, despite the passage of 4 years from the case having been referred to the Constitutional Court, has still not been decided.

Constitutional complaints are the only area in which the Constitutional Court has noted a significant increase in the inflow of cases. After the initial decrease in the number of such cases to a low level of 32 in 2017–2018, the following two years saw a record increase (up

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55 The results of the study were described in the report of M. Szuleka, M. Kalisz, M. Wolny, *The Time of Trial. How do changes in justice system affect Polish judges*, [https://www.hfhr.pl/wp-content/uploads/2019/07/czas-proby-EN\\_EMBARGO\\_24072019.pdf](https://www.hfhr.pl/wp-content/uploads/2019/07/czas-proby-EN_EMBARGO_24072019.pdf) (accessed 2 September 2021).

56 Act of 16 December 2016 amending the act on pensions for officers of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Prison Service and their families (Journal of Laws item 2270).

to 142 cases in one year). It remains an unanswered question whether this trend will be maintained in 2021, given a sharp increase in the number of critics of the Constitutional Court's work.<sup>57</sup>

## 4.1. EXAMINATION OF CASES

The statistics on the number of cases heard by the Constitutional Court after 2016 are also worrying, especially when compared to the median number of cases recognised in the period 2010–2016. A significant decrease in the annual number of examined cases has been observed in almost every category of proceedings falling under the Constitutional Court's jurisdiction.

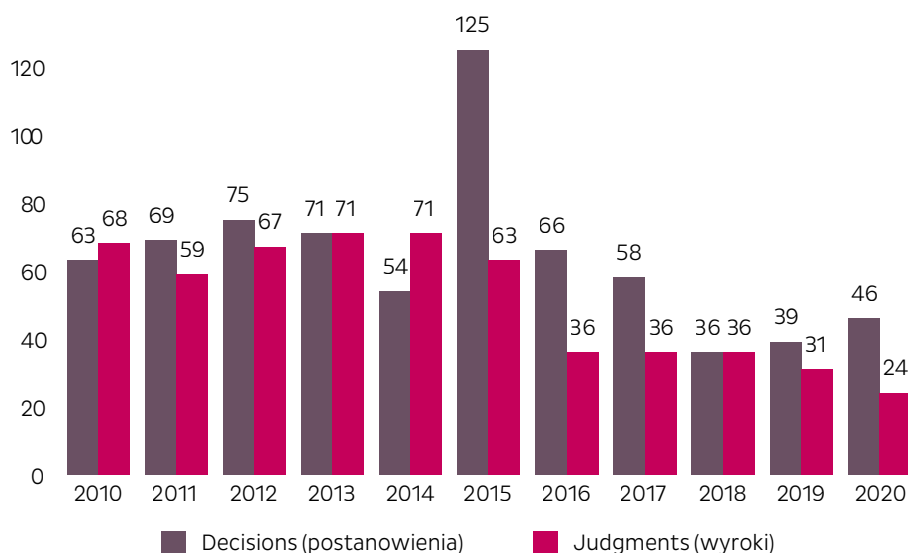


Chart 4. Rulings of the Constitutional Court broken into decisions and judgments, 2010–2020<sup>58</sup>

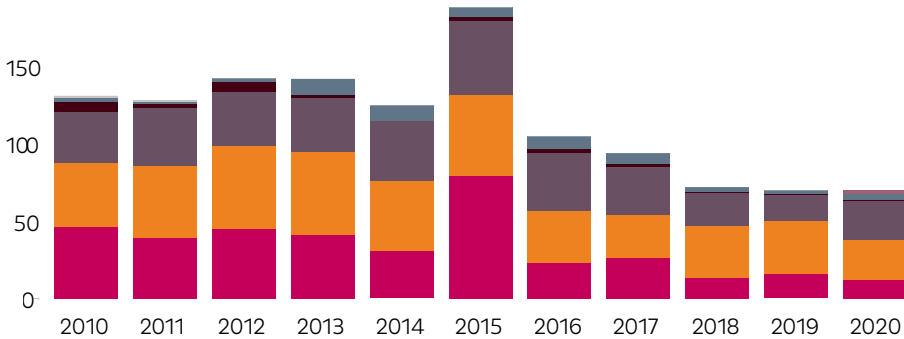
While in 2010–2016, the Court was able to dispose of as many as 79 questions on points of law, between 2017 and 2020 the annual number of examined cases of that type was not higher than 26. A comparably grim outlook emerges in respect of constitutional

57 According to the CBOS survey from November 2020, the percentage of people who assessed the work of the Constitutional Tribunal negatively increased to 59%. See: CBOS, Assessments of the activities of the parliament, the president and the Constitutional Tribunal, Research report no.150 / 2020, p. 7, available at: [https://www.cbos.pl/SPISKOM.POL/2020/K\\_150\\_20.PDF](https://www.cbos.pl/SPISKOM.POL/2020/K_150_20.PDF) (accessed August 11, 2021).

58 Based on data published on the Constitutional Court website.

complaints. Over the past four years, the Court has been unable to examine on merits more than 34 constitutional complaints. This figure corresponds to the lowest result recorded in this category between 2010 and 2016 and is significantly out of line with the median number of constitutional complaints disposed of during that period.

Moreover, an analysis of the Court’s entire body of jurisprudence reveals that the number of rulings handed down by the Constitutional Court in 2019 and 2020 (70 cases per year) is the lowest since 1999. The above numbers are all the more puzzling given the exceptional consensus among the panels that presently examine cases submitted to the Constitutional Court, which is reflected in the limited number of dissenting opinions submitted.



	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Questions on points of law ("P")	46	39	45	41	31	79	23	26	13	16	12
Const. complaints ("SK")	42	47	54	54	45	53	34	28	34	34	26
"K" requests	33	37	35	35	39	48	37	31	21	17	25
Preventive review ("Kp")	6	3	6	2	0	2	3	2	1	1	1
"U" requests	3	1	2	10	10	6	8	7	3	2	4
Political parties ("Pp")	1	1	0	0	0	0	0	0	0	0	0
Jurisdictional disputes ("Kpt")	0	0	0	0	0	0	0	0	0	0	2

*Chart 5. Rulings of the Constitutional Court in 2010-2020 by types of cases<sup>59</sup>*

<sup>59</sup> Based on data published on the Constitutional Court website.



## 4.2. EXAMINATION OF REQUESTS SUBMITTED BY THE RULING MAJORITY

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Between 2017 and 2021, there was an unprecedented increase in the number of requests submitted to the Constitutional Court by the Government and parliamentarians of the ruling majority. This trend is unusual for two reasons. The first one is that in past, ruling coalitions did not submit so many requests to the Court as this instrument was predominantly used by opposition parties. The second reason is that the ruling majority notably has the freedom to develop the state of the law, and if those in power decide that a particular legal arrangement does not comply with the standard described by the Constitution, it is sufficient for them to amend the law in question, and not necessarily to apply for a review of its constitutionality. The above argument is especially relevant in view of the fact that, at least in theory, the ruling majority should not be certain as to the outcome of the proceedings brought before the Constitutional Court.

In the period from 2017 to 2021, the Prime Minister and members of the Law and Justice parliamentary grouping submitted 17 requests<sup>60</sup> for the constitutional review of legal acts. This figure should be augmented by three applications addressed to the Constitutional Court by the Speaker of the Sejm, also a member of the ruling parliamentary majority. This category should certainly include also the requests submitted to the Court by the Prosecutor General, another member of the ruling majority. In the same period, only two applications came from parties officially considered a part of the opposition.

By comparison, between 2010 and 2016, members of the Sejm and senators brought 79 cases before the Constitutional Court, about 94% of which were initiated by requests from politicians of opposition parties at the time. Three requests came from representatives of the Polish People's Party, which was then part of the ruling parliamentary majority, and one from politicians from the Civic Platform. Moreover, the vast majority of requests submitted by representatives of parliamentary groups to the Constitutional Court at that time did not lead to a declaration of unconstitutionality of the challenged norms. The Court

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60 Motions in the cases: K 13/17, K 7/17, K 10/17, K 12/17, K 2/19, K 16/19, K 21/19, K 1/20, K 25/20, K 23/20, K20/20, K 18/20, K 5/20, U 2/20, K 11/20, K 3/21, K 5/21.

found partial merit in just 9 requests examined between 2010 and 2016 and declared the challenged regulations unconstitutional.

However, the situation changed in the period between 2017 and 2020. Of the 10 cases initiated by members of Law and Justice that the Court has examined so far, as many as fifty per cent resulted in a finding that the challenged regulations were unconstitutional. What is important is that the remaining proceedings in this category can hardly be considered a setback for Law and Justice. None of the cases was concluded by a ruling that would declare the challenged normative acts to be compatible with the Constitution. Virtually every time, the Constitutional Court did not rule on the merits because of the principle of the discontinuation of Parliament's work or due to the fact that the request has been withdrawn or no longer upheld. Only in a case concerning the grounds for invalidity of proceedings (initiated to reverse the effects of the joint resolution of three Chambers of the Supreme Court),<sup>61</sup> did the Court decide to discontinue the proceedings because the entire resolution of the Supreme Court was declared unconstitutional in case no. U 2/20<sup>62</sup>.

Judgments delivered upon the requests of the ruling majority served, *inter alia*, as a pretext for introducing certain changes in the law. This was the case, for example, with the amendments concerning the method of electing the President of the Supreme Court<sup>63</sup> or members of the National Council of the Judiciary<sup>64</sup>. In the latter case, the Court even suggested in its ruling that it would find permissible the ruling majority's plans to transfer the authority to select the judicial members of the NCJ from the judiciary to the Sejm.<sup>65</sup>

At times, applications to the Constitutional Court were intended to serve as a method of solving the Law and Justice party's day-to-day political problems, for example, one of impeding the reversal of changes made by that party to the justice system. In this

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61 Constitutional Court judgment of 2 February 2020, case no. K 5/20.

62 Constitutional Court judgment of 20 April 2020, case no. U 2/20.

63 Constitutional Court, case no. K 3/17.

64 Constitutional Court, case no. K 5/17.

65 The judgment included a fragment unrelated to the subject of the case: "While Art. 187 paragraph. 1 point 3 of the Constitution clearly indicates that the KRS members are elected by the Sejm, and senators by the Senate, and there are no constitutional guidelines in this respect in relation to judges of the NCJ members. This means that the Constitution does not determine who can elect judges on the National Council of the Judiciary. For this reason, it should be stated that, within the limits of legislative freedom, this issue may be regulated in various ways".

context, a mention should be made of the requests concerning the joint resolution of three Chambers of the Supreme Court<sup>66</sup>, the disclosure of letters endorsing candidates to the National Council of the Judiciary<sup>67</sup>, the constitutional review of the EU Treaties<sup>68</sup> and the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>69</sup>. To some extent, the case concerning the Ombudsman's activities after the end of his term of office can also be included in this category.<sup>70</sup>

Finally, one can distinguish requests of a symbolic nature, submitted under the pretences of taking action but actually being merely an attempt to wait out an ongoing public debate. This category of cases brought before the Constitutional Court certainly includes the requests concerning the Istanbul Convention<sup>71</sup>, jurisdictional immunity of foreign states in the context of compensation for war crimes<sup>72</sup>, and even the first request concerning abortion<sup>73</sup>.

Moreover, it should be noted that the Constitutional Court examined the requests of the ruling majority at a surprisingly fast pace. Between 2017 and 2021, the average time between the filing of a constitutional complaint and the conclusion of the proceedings was 841 days. The average duration of cases classified as the “K” and “U” categories was 376 days. Cases concerning questions on points of law were on average resolved within 559 days, counted from the time of filing to the date of the ruling. Presidential requests for preventive (a priori) constitutional review were on average examined within 346 days.<sup>74</sup>

The representatives of the ruling parliamentary majority did not have to wait so long to obtain a final ruling in the cases they initiated. Furthermore, questions on points of law referred by “new” judges of the Supreme Court (those appointed as a result of “reforms”

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66 Constitutional Court, case no. U 2/20.

67 Constitutional Court, case no. K 16/19.

68 Constitutional Court, case no. K 3/21.

69 Constitutional Court, case no. K 6/21.

70 Constitutional Court, case no. K 20/20.

71 Constitutional Court, case no. K 11/20.

72 Constitutional Court, case no. K 25/20 and case K 12/17.

73 Constitutional Court, case no. K 13/17.

74 The average time of examination of a case for judgments issued in cases brought to the Constitutional Court after 1 January 2017. It includes period between the receipt of the case by the Constitutional Court until the issuance of a judgment.

of the justice system) were also generally dealt with more quickly. Details are presented in the table below:

Case number	Subject-matter	The number of days elapsing from the registration of the case to the issuance of the ruling on the case
K 1/17	Constitutional Court Act	270
K 3/17	Supreme Court Act; rules for the selection of President of the Supreme Court	237
K 10/17	Code of Civil Procedure – a review of the validity of the process of electing a judge, a Vice-president and the President of the Constitutional Court	68
K 5/17	National Council of the Judiciary Act, term of office of judicial members of the NCJ	70
K 9/17	Interpretation of the presidential power of pardon	382
K 12/18	Election of judicial members of the NCJ by the Sejm	118
U 2/20	The joint resolution of Chambers of the Supreme Court	56
K 1/20	Family planning and the protection of human life	338
K 20/20	Exercise of the Ombudsman's duties after the end of the term of office	212
P 13/19	Reclusion of a Supreme Court judge based on the Code of Civil Procedure due to a defective appointment	351
P 22/19	Reclusion of a Supreme Court judge based on the Code of Criminal Procedure due to a defective appointment	82

*Chart 6. Average duration of the examination of requests submitted to the Constitutional Court by the ruling majority*

All this may lead to the conclusion that the role of the Constitutional Court has changed after 2016. Once an institution responsible for protecting the constitutional order of the state and the rights and freedoms of the individual, the Court has turned into a device of the ruling parliamentary majority.<sup>75</sup>

75 M. Pyziak-Szafnicka, Constitutional Court á rebours, Państwo i Prawo 2020, no. 5, pages 25-45.

# 5. The jurisprudence of the Constitutional Court in 2017-2021

Between 2017 and 2021, the Constitutional Court issued several rulings of key importance for Poland's constitutional system, the country's position within the EU and fundamental rights and freedoms of the Polish people. Many of these rulings have significantly undermined the hitherto granted protection of rights and freedoms and deepened the ongoing crisis of the rule of law.

## **5.1. RULINGS OF THE CONSTITUTIONAL COURT AND EU LAW**

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The question of mutual relations between European Union law and the Polish Constitution is a crucial aspect that has strongly marked the jurisprudence of the Constitutional Court in recent years. The direct cause of this state of affairs was the ongoing dispute between the Polish Government and the European Union regarding the consequences of changes in the area of justice introduced in Poland. The main thrust of this dispute was the successive changes introduced to the system of common courts and the Supreme Court driven primarily, if not exclusively, by the intention to subordinate the judiciary to the executive power.

This process has resulted in many decisions of the Court of Justice of the European Union issued as a result of questions referred for a preliminary ruling by, inter alia, Polish courts, as well as the infringement procedures initiated by the European Commission. The vast majority of CJEU judgments disapprove of measures introduced into the Polish legal

system as jeopardising the independence of the judiciary and thus failing to guarantee effective judicial protection to individuals to the extent required under EU law.

Clearly, these rulings undermined the consistent progress of the process of the ruling coalition's takeover of the judiciary. In order to mitigate this risk, the ruling majority has been instrumentally using the Constitutional Court to legitimise steps taken for the above purpose.

### **Proceedings before the Constitutional Court concerning the constitutionality of EU law**

In 2021, two requests have been made to the Constitutional Court to review the compatibility of specific provisions of the Treaty on European Union with the Polish Constitution.

The first of these requests, submitted to the Constitutional Court by the Prime Minister in March 2021, seeks to review the constitutionality of Articles 4 (3) and 19 TEU insofar as they authorise or oblige a body applying the law to derogate from the provisions of the Constitution of the Republic of Poland or instruct such a body to apply legal provisions in a manner inconsistent with the Constitution and empower a court to review the independence of judges appointed by the President of the Republic of Poland and review a resolution of the National Council of the Judiciary on requesting the President of the Republic of Poland to appoint a judge.

Meanwhile, in June 2021, a group of parliamentarians submitted a request for a review of the constitutionality of Article 279 of the Treaty on the Functioning of the European Union interpreted in a way that allows the Court of Justice of the European Union to issue interim measures ordering Member States to determine, inter alia, the composition of court panels and appointment of judges (case no. K 5/21).

Both requests aim to undermine the principle of primacy of EU law and to limit the national application of CJEU judgments relating to the “reforms” of the judiciary. The proceedings in both cases are still pending.

## 5.2. CONSTITUTIONAL COURT PROCEEDING ON INDIVIDUAL CHANGES TO THE JUSTICE SYSTEM AND EU LAWS

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The Constitutional Court has ruled several times in recent years on changes to the justice system. Some of these changes (such as the creation of the Disciplinary Chamber of the Supreme Court or the modifications of the composition and functioning of the National Council of the Judiciary) have been a matter litigated before the Court of Justice of the European Union. In proceedings pending before the Constitutional Court, entities whose independence is being challenged request the constitutional review of specific provisions of EU law, seeking to negate the effects of CJEU rulings.

This was the case with the CJEU's order imposing interim measures<sup>76</sup> on Poland in April 2020, in which the CJEU obliged Polish authorities to suspend the application of the provisions of the Supreme Court Act governing the work of the Supreme Court's Disciplinary Chamber. One day after the CJEU's order, the Disciplinary Chamber referred a question on a point of law to the Constitutional Court, asking whether the provisions of the Treaty on European Union, insofar as they may have the effect of obliging a Member State to implement CJEU interim measures, are compatible with the Constitution.

On 14 July 2021, the Constitutional Court delivered its judgment<sup>77</sup> in this case, subscribing to the view presented by the Disciplinary Chamber of the Supreme Court and holding that the CJEU had acted *ultra vires vis-a-vis* the Republic of Poland as a Member State of the European Union because it issued interim measures that seek to impose obligations relating to the system and jurisdiction of, and a procedure before, Polish courts. While negating the CJEU's authority to impose the interim measures, the Constitutional Court completely disregarded the order of the Vice President of the CJEU suspending the operation of the Disciplinary Chamber of the Supreme Court.<sup>78</sup>

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76 CJEU ruling of 8 April 2020, case no. C-791/19, *European Commission v. Poland*.

77 Constitutional Court judgment of 14 April 2021, case no. P 7/20.

78 Order of the Vice-President of the Court of 14 July 2021, *European Commission v Republic of Poland*, case C-204/21 R, ECLI:EU:C:2021:593.

The Constitutional Court is additionally hearing other proceedings initiated by the Disciplinary Chamber in cases concerning, among other things, the following:

- the constitutionality of certain provisions of the Supreme Court Act relating to the Disciplinary Chamber (case no. P 3/20),
- the constitutionality of provisions of the Code of Criminal Procedure insofar as they allow for an examination of the circumstances in which a judge was duly appointed by the President of the Republic of Poland (case no. P 2/20),
- the constitutionality of provisions of the Code of Criminal Procedure construed as allowing the examination of a request to recuse a judge based on the complaint that the judge has been defectively appointed by the President of the Republic of Poland upon nomination by the National Council of the Judiciary in its present composition (case no. P 22/19).

### **Judgment on the joint resolution of three Chambers of the Supreme Court**

In 2019, the Court of Justice of the European Union delivered a judgment on a question referred for a preliminary ruling by the Supreme Court concerning the independence of the Disciplinary Chamber and the impact of the involvement of the new, politicised National Council of the Judiciary on the status of the judges the Council appoints. In the judgment, the CJEU set out the criteria which should guide the national court in assessing the independence of judges. On 5 December 2019, the Supreme Court delivered a judgment implementing the CJEU decision, holding that the Disciplinary Chamber of the Supreme Court is not a court within the meaning of EU law, and the current NCJ is not an impartial and independent body.<sup>79</sup>

This issue was then raised in a joint resolution of three Chambers of the Supreme Court,<sup>80</sup> in which the Supreme Court referred to the procedural consequences of the appointment of a judge nominated by the National Council of the Judiciary composed primarily of persons elected by the ruling parliamentary majority.

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79 The Supreme Court judgment of 5 December 2019, case no. III PO 7/18.

80 Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber (case BSA I-4110-1/20), available: [http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1\\_20\\_English.pdf](http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf).



The Supreme Court's resolution was criticised by the ruling majority, which initiated two proceedings before the Constitutional Court on the matter.

In the first proceedings, the Speaker of the Sejm filed a request to the Constitutional Court to resolve the alleged jurisdictional disputes between the Supreme Court and the Sejm of the Republic of Poland, as well as between the Supreme Court and the President of the Republic of Poland. Raising the argument of jurisdictional disputes in fact served to negate the authority of the Supreme Court to resolve a question on a point of law concerning the independence of the National Council of the Judiciary and the judges appointed by the Council.

The second proceedings were initiated by the request of the Prime Minister who sought the constitutional review of the joint resolution of three Chambers of the Supreme Court despite the fact that resolutions of the Supreme Court are not directly specified in the catalogue of sources of law subject to review by the Constitutional Court.

In both proceedings, similar arguments were raised regarding the primacy of the Constitution over EU law. Both requests noted that the Constitution formulates the standard of judicial independence in a different way than the Union's bodies do. The requesting parties thus argued that it is the standard imposed by the Constitution that should guide the assessment of arrangements implemented in the justice system, and not the EU standard.

The Constitutional Court agreed with this view in two rulings issued in April 2020. In a judgment<sup>81</sup> on the alleged jurisdictional dispute, the Court held that the TEU and TFEU “do not endow the EU with any competence regarding the organisation, system and functioning of the courts of a Member State”. In its judgment, the Constitutional Court completely ignored arguments based on Article 19 TEU as a source of the right to effective judicial protection.

Deciding the case concerning the constitutionality of the joint resolution of three Chambers of the Supreme Court, the Constitutional Court pointed out that the contested

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81 Constitutional Court judgment of 21 April 2020, case no. Kpt 1/20.

resolution of the Supreme Court had disregarded Article 8 (1) of the Constitution (which provides that the Constitution is the supreme law of the Republic of Poland) thereby violating the EU principle of cooperation.

### **5.3. CONSTITUTIONAL COURT'S JURISPRUDENCE IN MATTERS RELEVANT TO THE PROTECTION OF FUNDAMENTAL RIGHTS**

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Since 2017, the Constitutional Court has issued a number of rulings on cases fundamentally important for the human rights system in Poland and the guarantees of protection of these rights. In cases concerning the freedom of assembly, prohibition of discrimination in access to goods and services and access to abortion, the Constitutional Court was used by the ruling majority either to legitimise the changes introduced or to remove from the legal system provisions that are important for the protection of human rights, which, for various political reasons, have not been amended in the course of parliamentary works.

#### **Discrimination based on sexual orientation – the Printer's Case**

The matter, known as the “Printer's Case”, dates back to 2015 when an employee of a printing company from Łódź refused to print promotional materials for the LGBT Business Forum Foundation. By judgment of a District Court, the printer was convicted under Article 138 of the Petty Offences Code, which prohibited a professional from refusing, deliberately and without a justifiable reason, to provide a service that the professional is obliged to provide. The judgment in the printer's case, later upheld by a regional court, was precedent-setting as it confirmed that LGBT persons cannot be discriminated against in accessing services on the basis of their orientation.

In December 2017, the Prosecutor General submitted a request to the Constitutional Court to declare Article 138 of the Petty Offences Code unconstitutional. The Prosecutor General argued that the contested provision was inconsistent with the constitutional principle of proportionality and that civil law measures were sufficient to achieve the aims of that provision. In addition, the Prosecutor General expressed the opinion that

the challenged provision “may impose on a professional person a duty to act contrary to conscience or religion, and the professional’s failure to discharge the duty may result in them being prosecuted for a petty offence”.

In June 2019, the Constitutional Court ruled that the relevant part of Article 138 of the Petty Offences Code is unconstitutional.<sup>82</sup> The Court shared some of the arguments raised by the Prosecutor General and held that the notions of “being obliged to provide a service” or an “unjustified refusal to provide a service” are vague and may lead in practice to an interpretation too broad to be warranted by constitutional principles and values.

### **Access to abortion**

On 22 October 2020, the Constitutional Court, sitting en banc, issued a judgment on the constitutionality of a provision of the Act on family planning, protection of the human foetus and conditions permitting termination of pregnancy that permitted abortion for embryopathological reasons. The Court ruled that this provision was unconstitutional.

The proceedings were initiated by a group of parliamentarians of the ruling majority. In their request, they argued that the discussed provision of the Act on family planning, protection of the human foetus and conditions permitting termination of pregnancy, insofar as it allows termination of pregnancy due to the results of prenatal tests or other indications showing a high probability of severe and irreversible impairment of the foetus, was incompatible with the constitutional values of equality before the law and legal protection of life. The originators of the request indicated that the provision “validates eugenic practices in relation to the right to life of children who have not yet been born and makes protection of the right to life of unborn children subject to their state of health, which constitutes prohibited direct discrimination”. They also pointed to the unconstitutionality of the provision of the Act defining the point in time of pregnancy up to which an abortion may be performed in the circumstances provided for by the Act.

The Constitutional Court considered certain elements of this reasoning valid. In the judgment, the Court referred to a view previously expressed in the constitutional

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82 Constitutional Court judgment of 25 June 2019, case no. K 16/17.

jurisprudence, according to which human life is a value regardless of a human being's stage of development and, as such, must be protected by the legislator. Moreover, the Court held that the unborn child is a human being who enjoys inherent and inalienable dignity. On that basis, the Court resolved a conflict between two interests protected by the law, namely the welfare of an unborn child and the welfare of other people, and in particular, the mother. The Court held that the likelihood of an irreversible impairment of the foetus may pose a risk to the life and health of the mother but noted that the existence of a risk to the health of the mother constituted a separate legal ground for abortion. The Constitutional Court held that the fact that a foetus is impaired cannot in itself constitute an independent ground for permitting termination of pregnancy.

The judgment of the Constitutional Court has in practice closed off access to legal abortion. According to the statistics of the Ministry of Health, out of the 1110 abortion procedures were carried out in 2019, 1074 were related to the high probability of a severe and irreversible damage to the foetus.<sup>83</sup> The ruling of the Constitutional Court provoked mass social protests.

In response to the judgement of the Constitutional Court, more than a thousand women have submitted applications to the European Court of Human Rights claiming potential violations of the European Convention on Human Rights as a result of the Court's decision denying access to abortion. In July 2021, the European Court of Human Rights communicated 12 of these cases to Poland. In their applications to the ECtHR, the women complain about a potential violation of Article 8 of the Convention (right to privacy and family life) caused by the pronouncement of an unlawful judgment by the “irregularly composed” Constitutional Court.<sup>84</sup>

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83 Puls Medycyny, Oficjalne dane o legalnej aborcji w Polsce: 1110 zabiegów przerwania ciąży w 2019 r., available: <https://pulsmedycyny.pl/oficjalne-dane-o-legalnej-aborcji-w-polsce-1110-zabiegow-przerwania-ciazy-w-2019-r-999603> (2 September 2021).

84 Application no. 1819/21 concerning the case K.B. and others v. Poland; application no. 3801/21 concerning case A.L.-B. and others v. Poland; application no. 3639/21 concerning the case K.C. and others v. Poland.


## 6. Conclusions


A review of the Constitutional Court's activities between 2017 and 2021 leads to the following conclusions:

- The Constitutional Court has lost its standing as an independent institution upholding the Constitution. The activities of the Constitutional Court are largely subordinated to the partisan interests of the ruling coalition;
- The Constitutional Court has also ceased to play a meaningful role within the human rights protection system. Until 2017, constitutional complaints submitted to the Constitutional Court in individual cases contributed significantly to the improvement of human rights protection standards. Over the last four years, the number of judgments handed down in cases based on constitutional complaints has fallen and the duration of the examination of such complaints has increased considerably.
- The participation in the Court's judicial activities of three persons elected as judges of the Constitutional Court without a valid legal basis constitutes a violation of individuals' right to have their cases heard by an independent court established by law. It is to be expected that this problem will be a key element in the judgments of international tribunals, including the ECtHR, in cases involving the functioning of the Constitutional Court.
- Public speeches by some of the judges appointed to the Constitutional Court and their reported close ties with representatives of the ruling majority cannot be reconciled with the requirements of impartiality.
- The jurisprudence of the Constitutional Court in matters crucial for the ruling majority is, in most cases, in line with the majority's expectations. The Constitutional Court, once an independent guardian of the Constitution, has become a vehicle for a constitutional interpretation aligned with partisan political interests.



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