

Warsaw, 9 February 2022

17.9./2022/PSP

**The European Court of Human  
Rights**  
**President of the First Section**  
Council of Europe  
67075 Strasbourg-Cedex  
France

**Ref. Sieć Obywatelska Watchdog Polska**  
**Application no. 10103/20**

Pursuant to the letters of Ms Renata Degener, the Section Registrar of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 21 January 2022 granting leave to make written submission to the Court by 11 February 2022, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Sieć Obywatelska Watchdog Polska (application no. 10103/20).


On behalf of the Helsinki Foundation for Human Rights,



*Małgorzata Szuleka*

Secretary of the Board

Helsinki Foundation for Human Rights



*Dr Piotr Kładoczny*

Vice President of the Board

Helsinki Foundation for Human Rights

**WRITTEN COMMENTS**  
**BY**  
**THE HELSINKI FOUNDATION FOR HUMAN RIGHTS**  
***Sieć Obywatelska Watchdog Polska v. Poland***  
**Application no. 10103/20**

- The case of *Sieć Obywatelska Watchdog Polska v. Poland* concerns motion of the applicant NGO for the access to public information related to meetings of the President and Vice-President of the Constitutional Tribunal. The Constitutional Tribunal denied access to such information and the administrative courts dismissed complaints of the applicant.
- HFHR believes that to fully understand importance of the information requested by the applicant it is crucial to take into account controversies about the independence and impartiality of the Constitutional Tribunal.
- Those controversies concern, among others, presence of unlawfully elected persons in the Constitutional Tribunal's works and arbitrary setting of adjudicating panels by the President of the Constitutional Tribunal. Moreover, the recent case law of the Tribunal is generally favourable to the ruling parties and is even sometimes used by the ruling authorities to achieve its political aims. Finally, the media informed about suspicious secret meetings between the Tribunal's authorities and ruling politicians.
- Actions of Polish NGOs aimed at verification of information concerning functioning of the Constitutional Tribunal must be perceived as form of protection of public interest. Public opinion must be able to assess whether the Constitutional Tribunal is truly independent body because politicized constitutional court may quickly become a tool in the hands of the Government. Thanks to actions of NGOs many of such irregularities, which otherwise could remain hidden from the eyes of the public opinion, could be revealed.
- HFHR faced certain difficulties in obtaining access to information concerning changes in the composition of the Constitutional Tribunal's adjudicating panels. Even though such action was aimed at verification of controversies around alleged arbitrary actions of the Constitutional Tribunal's President in that sphere, the HFHR was denied access to the requested information.

## **I. INTRODUCTION**

1. This third-party intervention is submitted by the Helsinki Foundation for Human Rights ("HFHR"), pursuant to the leave granted by the President of the Section on 21 January 2022.

2. The present written comments are divided into five sections (excluding introduction and conclusions). In the first part, we explain the importance of the controversies about the independence and impartiality of the Constitutional Tribunal for the present case. In the second part we address the general problems of the controversies around the close

relations between the Constitutional Tribunal's leadership relations with key politicians. The third part concentrates on the problem of the arbitrary composition of judicial panels. The fourth brings attention to the jurisprudence of the Constitutional Tribunal. Finally, the last part briefly describes our experiences with access to information concerning the Constitutional Tribunal.

## **II. SIGNIFICANCE OF THE CONTROVERSIES ABOUT THE INDEPENDENCE AND IMPARTIALITY OF THE CONSTITUTIONAL TRIBUNAL**

3. HFHR is aware that the present case does not concern directly the question of independence of the Constitutional Tribunal and so it is not the task of the Court to give a binding statement on this particular issue. Nevertheless, we believe that to fully understand the importance of the information requested by the applicant it is crucial to present the important facts related to the current functioning of the Constitutional Tribunal. This would be significant also from the perspective of the case law of the Court, according to which while assessing whether denial of access to information amounts to interference with Article 10 of the Convention one must take into account, among others, the purpose of the information requested and nature of information (*Magyar Helsinki Bizottság v. Hungary* [GC], 8 November 2016, No. 18030/11, §§ 157-170). With regards to the nature of information, the Court clarified that "the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, inter alia, the disclosure provides transparency on the manner of conduct of public affairs and matters of interest for society as a whole and thereby allows participation in public governance by the public at large." (*ibid.*, § 161).

4. As will be presented below, there are strong grounds to question independence and legality of functioning of the Constitutional Tribunal. These doubts are expressed not only by Polish lawyers and NGOs but also international bodies. Importantly, the European Commission has recently decided to launch an infringement procedure against Poland for violations of EU law by the Constitutional Tribunal. What is important, the subject of these proceedings is not limited to the problem of questioning the primacy of the EU law by the Constitutional Tribunal. The Commission also expressed "serious doubts on the independence and impartiality of the Constitutional Tribunal and considers that it no longer meets the requirements of a tribunal previously established by law, as required by Article 19(1) TEU". In the press release the Commission referred to the problem of unlawful election of three persons adjudicating in the Tribunal and to "other irregularities and deficiencies such as the election of the President and Vice-President of the Constitutional Tribunal, which raised serious concerns as to the impartiality of judges of the Constitutional Tribunal when handling individual cases". The Commission concluded that "Whereas the Constitutional Tribunal is called upon to rule on questions relating to the application or interpretation of EU law, the Commission considers that it can therefore no longer ensure effective judicial protection by an independent and

impartial tribunal previously established by law, as required by Article 19(1) TEU, in the fields covered by EU law”.<sup>1</sup>

5. Taking into account this crisis around the Constitutional Tribunal, there is a particularly important role of NGOs, especially those specialised in human rights protection and monitoring of actions of public authorities, to exercise some form of supervision over the actions of this body. It is obvious that in the democratic system society must have access to information about functioning of one of the most important constitutional bodies whose influence on the legal system is unquestionable. Public opinion must be able to assess whether the Constitutional Tribunal is truly independent body because, as our recent practical experiences showed, politicized constitutional court may quickly become a tool in the hands of the Government. Thanks to actions of NGOs many of such irregularities, which otherwise could remain hidden from the eyes of the public opinion, could be revealed.

### **III. CONTROVERSIES AROUND CONSTITUTIONAL TRIBUNAL'S LEADERSHIP'S RELATION WITH KEY POLITICIANS**

6. The crisis around the Constitutional Tribunal is related to the unlawful election of three persons to the seats of judges of the Constitutional Tribunal in December 2015. HFHR is certain that the Court is aware of these facts as they were examined in detail in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (7 May 2021, No. 4907/18). Therefore, there is no need to present these issues in detail in the present opinion. Instead, we will focus on the consequences of the said crisis and other important factors which may affect the perception of the Constitutional Tribunal as an independent and impartial organ.

7. One of the most important problems concerning the Constitutional Tribunal is its personal composition. In particular, despite the Court's ruling in *Xero Flor*, three unlawfully elected persons still take part in adjudication of cases. However, even leaving this question aside, the election of some other judges, even though formally lawful, also may raise certain doubts. This concerns especially two judges who in the past were active politicians of the ruling party and participated in the adoption of controversial acts related to the reform of the organization of the judiciary. Certainly, the presence of such persons may negatively affect perception of the Constitutional Tribunal as independent, impartial, and politically neutral in the eyes of society.

8. Yet another factor that must be taken into consideration while assessing the independence and impartiality of the Constitutional Tribunal is the actions of the current President of the Constitutional Tribunal, Julia Przyłębska. Mrs. Przyłębska was appointed in December 2016 as a President of the Constitutional Tribunal. According to some Polish lawyers it happened with violation of the law<sup>2</sup>. However, controversies

---

<sup>1</sup> Press release available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_7070](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070) (accessed 28 January 2022).

<sup>2</sup> M. Ziółkowski, *Przywracanie praworządności w TK po kryzysie konstytucyjnym: wybór i powołanie Prezesa TK* (Archiwum im. Wiktora Osiatyńskiego 2019) at p. 7-23, [https://archiwumosiatsynskiego.pl/images/2019/10/AO\\_Prezes-TK\\_ekspertyza\\_MZio%CC%81%C5%82kowski-1.pdf](https://archiwumosiatsynskiego.pl/images/2019/10/AO_Prezes-TK_ekspertyza_MZio%CC%81%C5%82kowski-1.pdf) (2.02.2022)

around Mrs. Przyłębska are not limited to the way she was appointed to her position. The vast majority of them concerns her relations with top politicians of the ruling party.

9. According to the media report, shortly after Mrs. Przyłębska election to the position of the President of the Court, she has met in the Constitutional Tribunal with Mariusz Kamiński, the minister supervising secret services<sup>3</sup>. The official reasons for that visit indicated that he wanted to congratulate Julia Przyłębska for her appointment to the position of the Constitutional Tribunal President. The visit took place, despite the ongoing (at that moment) proceedings before the Constitutional Tribunal concerning the boundaries of the President of Poland's right to pardon. The ruling issued in that case by the Constitutional Tribunal<sup>4</sup> was favourable from the perspective of M. Kamiński. Moreover, the Constitutional Tribunal initiated proceedings on the alleged dispute over authority between the Supreme Court and the President in that case, forcing the Supreme Court to suspend proceedings in that field.<sup>5</sup>

10. Moreover, according to press reports, party leaders regularly visited also Julia Przyłębska in her private flat.<sup>6</sup> This concerns Mateusz Morawiecki, at the time of the visits Deputy Prime Minister of Poland, and Jarosław Kaczyński, the President of the Law and Justice party. Furthermore, in a media interview, Mr Kaczyński himself called Mrs. Przyłębska his "social discovery of recent years" whom he "very much enjoys visiting".<sup>7</sup>

11. 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>8</sup> According to the news reports, the meeting was devoted to the changes in the judiciary introduced by the so-called "muzzle law"<sup>9</sup> and the adoption of "a strategy to tackle a criticism from the EU institutions". The Press Office of the Constitutional Tribunal on one hand indicated that the President of the Tribunal is not participating in the leadership meeting of political parties. On the other, it admitted that the President of Tribunal takes part „in many different

---

<sup>3</sup> K. Izdebski, (Zbyt) bliskie spotkania polityków z sędziami, <https://mojepanstwo.pl/aktualnosci/590> (31 January 2022).

<sup>4</sup> Constitutional Tribunal, judgment of 17 July 2018, No. K 9/17.

<sup>5</sup> The proceedings concerning alleged dispute over authority have not been finalised yet despite the lapse of almost 5 years since they had been initiated.

<sup>6</sup> 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> (2.02.2022).

<sup>7</sup> Onet.pl, Jarosław Kaczyński w „Pytaniu na śniadanie”: moim odkryciem towarzyskim ostatnich lat jest Julia Przyłębska, <https://wiadomosci.onet.pl/kraj/jaroslaw-kaczynski-w-pytaniu-na-sniadanie-moim-odkryciem-towarzyskim-ostatnich-lat/2wffq9> (2.02.2022).

<sup>8</sup> 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> (2.02.2022).

<sup>9</sup> The Act of 20 December 2019 amending the Act - Law on the System of Common Courts, the Act on the Supreme Court and some other acts (Journal of Laws of 2020, item 190, as amended).

meetings organized by the Chancellery of the President, Prime Minister, Sejm, Senate as well as by other state bodies<sup>10</sup>.

12. The media informed also about a secret meeting between Mrs. Przyłębska and Mr. Kaczyński in January 2020 before the announcement of the Supreme Court's resolution concerning the status of judgments issued by judges appointed upon the motion of the reorganised National Council of Judiciary.<sup>11</sup> According to the media coverage, Jarosław Kaczyński subsequently met with Sejm's speaker – Elżbieta Witek and Julia Przyłębska. Symptomatically, on the same day when the alleged meeting took place, Mrs. 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 prevent the Supreme Court from issuing the resolution.

13. In September 2021 the media revealed the e-mails of Michał Dworczyk (Head of the Chancellery of the Prime Minister) indicating that the Prime Minister of Poland was consulting with Julia Przyłębska the appointment of the new President of General Counsel to Republic of Poland, as well as the selection of the person who will be acting President of Supreme Court Chamber of Public Affairs and Extraordinary Control<sup>12</sup>.

#### **IV. THE PROBLEM OF RESHUFFLING JUDICIAL PANELS**

14. The issue of Constitutional Tribunal independence and impartiality requires also discussing the problem of allocating cases to particular judges of the Constitutional Tribunal. Especially since Mrs. Przyłębska has been repeatedly accused of arbitrary setting adjudicating panels of the Constitutional Tribunal.

15. According to Art. 38 (1) of the Act on organization and proceedings before the Constitutional Tribunal, the President of the Constitutional Tribunal should select the member of the judicial panels, including the presiding judge and case rapporteur, based on the alphabetical order and taking into account the types, number and sequence of case receipt to the Court. Moreover, in justified reasons, the President of the Constitutional Tribunal is able to select the rapporteur with disregard to the statutory criteria.

16. In the 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 alphabetical order”<sup>13</sup>.

---

<sup>10</sup> 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> (31.01.2022).

<sup>11</sup> 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> (31.01.2022).

<sup>12</sup> Wyborcza.pl, Afera Dworczyka. Jak Prezes Julia rekomendowała Morawieckiemu szefa Prokuraturii Generalnej, <https://wyborcza.pl/7,75398,27578043,afera-dworczyka-jak-prezes-julia-rekomendowala-morawieckiemu.html> (31 January 2022).

<sup>13</sup> Letter of judges of the Tribunal to the President of the Tribunal, 6 April 2017, <http://monitorkonstytucyjny.eu/archiwa/224> (2.02.2022); M. Wolny, M. Szuleka, *A tool of the government*.

The authors of the letter argued that, within the first 5 months after the election of the Court's new leadership, judges were changed in 84 cases and 24 of such changes concerned rapporteurs directly responsible for drawing up a draft version of the ruling.

17. Furthermore, the letter directly referred to the composition of judicial panels concerning motions to recuse a particular judge from ruling in a case. According to the authors, the vast majority of requests to recuse a judge (approximately 83%) were examined by the same six judges appointed by the new ruling majority. Some of those rulings concerned Commissioner for Human Rights requests to recuse from the judicial panels persons appointed to the Constitutional Tribunal without the legal base. All of them have been denied.

18. Moreover, the problem of reshuffling judicial panels was once again raised by the judges of the Constitutional Court in December 2018<sup>14</sup>. Their list indicated 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. Data compiled by judges of the Court proved 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 the Constitution) as compared to judges elected by the Sejm of previous terms. Once again, the letter pointed out 19 cases in which the President of the Court issued an order to change the composition of the judicial panel. What is important all of the discussed changes concerned only judges appointed by previous ruling coalitions and judge Piotr Pszczółkowski (who in fact was appointed by the Law and Justice but became a vocal critic of the new Tribunal's leadership).

19. Furthermore, the practice of reshuffling panels composition was also confirmed in two situations. Both of them concerned persons who were appointed to the Constitutional Tribunal without valid legal basis. One of them, Jarosław Wyrembak, in the e-mail to the Chair of the Senate Rule of Law, Human Rights and Petitions Committee indicated that he was removed from the judicial panel of a case concerning the status of the National Council of the Judiciary (case no. K 12/18) in the result of his declaration regarding submitting a dissenting opinion<sup>15</sup>. He indicated 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 the other hand, Mariusz Muszyński in his dissenting opinion to the case no. K 9/16 noted that the authority of the President of the Court to designate judicial formations also implies the power to modify panels, even in situations that are not specifically addressed by the law.

---

*The functioning of the Polish Constitutional Court in 2016-2021*, Helsinki Foundation for Human Rights 2021, at p. 18-20.

<sup>14</sup> Letter of judges of the Tribunal to the President of the Tribunal, 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) (2.02.2022).

<sup>15</sup> Letters of Jarosław Wyrembak to Julia Przyłębska, <https://monitorkonstytucyjny.eu/archiwa/11474> (2.02.2022).

## V. THE JURISPRUDENCE OF THE CONSTITUTIONAL TRIBUNAL

20. The abovementioned doubts around the independence and impartiality of the Constitutional Tribunal are further strengthened by the data concerning the actions of the ruling majority taken before the Constitutional Tribunal. In the recent report<sup>16</sup>, the HFHR analysed the request to examine the constitutionality of law submitted to the Constitutional Tribunal by the ruling majority. According to the study findings, 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. Between 2017 to 2021, the Prime Minister and members of the Law and Justice parliamentary grouping submitted 17 requests 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, and a certain number of motions addressed by another leader of the ruling majority – Public Prosecutor General (Minister of Justice). 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. None of the proceedings was initiated by the government<sup>17</sup>.

21. Furthermore, the HFHR indicated that the Constitutional Court examined the requests of the ruling majority at a surprisingly fast pace. According to the study, in each case initiated by the members of the ruling majority and examined by the CT, the Constitutional Tribunal provided judgment earlier than it would appear from the average time of the proceedings.

22. Moreover, the issue of Constitutional Tribunal independence and impartiality cannot be discussed without referring to Tribunal's case law. In recent years it has become generally favourable to the Government.<sup>18</sup> The Tribunal is now being used by the ruling authorities as a useful tool to achieve their political aims. Such an instrumental treatment of the Constitutional Tribunal by the ruling politicians takes two forms.

23. First, the Constitutional Tribunal is sometimes used to legitimize controversial reforms passed by Parliament. Such a step was taken, among others, with regards to the Act on Assemblies<sup>19</sup> or the Act amending the rules for the election of judges-members of the National Council of the Judiciary. The latter case is particularly interesting – the Constitutional Tribunal first declared the existing solutions to be unconstitutional and indicated in the written reasons of the judgment that the Constitution

---

<sup>16</sup> M. Wolny, M. Szuleka, *A tool of the government. The functioning of the Polish Constitutional Court in 2016-2021*, Helsinki Foundation for Human Rights 2021, p. 31-34.

<sup>17</sup> *Ibidem*.

<sup>18</sup> See e.g. M. Wolny, M. Szuleka, *A tool of the government. The functioning of the Polish Constitutional Court in 2016-2021*, Helsinki Foundation for Human Rights 2021, p. 31-35, <https://www.hfhr.pl/wp-content/uploads/2021/09/TK-narzedzie-w-rekach-wladzy-EN-FIN14092021.pdf> (accessed: 28 January 2022).

<sup>19</sup> Constitutional Tribunal, judgment of 16 March 2017, No. Kp 1/17.



does not require that members of the NCJ be elected by judges themselves.<sup>20</sup> The Parliament changed the law and granted the competence to elect judges-members of the NCJ to the Parliament. In the second judgment, the Constitutional Tribunal ruled that the new method of election was consistent with the Constitution.<sup>21</sup> In both judgments, the Constitutional Tribunal departed from the position expressed in its previous case-law and the dominant view among the Polish legal doctrine that judges-members of the NCJ should be elected only by judges themselves. Overall, after Julia Przyłębska assumed the position of the President of the Constitutional Tribunal, virtually none of the controversial reforms implemented by the current government was struck down by the Constitutional Tribunal.

24. Secondly, the Constitutional Tribunal is sometimes used to declare unconstitutional those legal norms and their interpretations which are inconvenient for the Government. For this purpose, the Tribunal often issues the so-called “scope judgments” in which the declared unconstitutionality do not concern the entire provision but only a certain scope of its application, or interpretative judgments which declare that a specific understanding of the provision is inconsistent with the Constitution. Although the Constitutional Tribunal issued these types of rulings also before 2016, currently one can clearly see abuses in this area. In its judgments, the Constitutional Tribunal sometimes seeks to challenge the judgments of national courts or even international courts, although formally its powers are limited only to the review of provisions, and not their application. A good example here may be the judgment declaring the unconstitutionality of Article 6 of the Convention insofar as it is applicable to the proceedings before the Constitutional Tribunal<sup>22</sup> – a judgment which may be perceived as an attempt to “invalidate” the Court’s ruling in *Xero Flor w Polsce sp. z o.o. v. Poland*. Equally alarming is the Constitutional Tribunal’s judgment concerning the Supreme Court’s resolution on the assessment of the legality of appointment and independence of judges<sup>23</sup>. The Constitutional Tribunal decided that it had jurisdiction to examine the constitutionality of the resolution, as it was *de facto* normative in nature. The Constitutional Tribunal also questioned the interpretation of the scope of the president’s powers to apply the right of pardon<sup>24</sup>, adopted in another resolution of the Supreme Court in the context of criminal charges against one of ministers in the “Law and Justice” Government. Thus, the proceedings before the Constitutional Tribunal have become a tool for the politicians of the ruling party with which they can achieve political goals that would be difficult to achieve by other means such as changing the legislation.

## **VI. HFHR’S OWN EXPERIENCES WITH REGARDS TO ACCESS TO INFORMATION ON THE FUNCTIONING OF THE CONSTITUTIONAL TRIBUNAL**

---

<sup>20</sup> Constitutional Tribunal, judgment of 20 June 2017, No. K 5/17.

<sup>21</sup> Constitutional Tribunal, judgment of 25 March 2019, No. K 12/18.

<sup>22</sup> Constitutional Tribunal, judgment of 6 November 2021, No. K 6/21.

<sup>23</sup> Constitutional Tribunal, judgment of 20 April 2020, No. U 2/20.

<sup>24</sup> Constitutional Tribunal, judgment of 17 July 2018, No. K 9/17.

25. Considering the scale of controversies around independence and impartiality of the Constitutional Tribunal, HFHR regularly takes actions aimed at establishing facts related to the current functioning of the Constitutional Tribunal. Unfortunately, similarly to the applicants in the present case, the Foundation also faced certain difficulties with regards to getting access to public information concerning the Constitutional Tribunal.

26. The reports on the irregularities in setting adjudicating panels by the President of the Constitutional Tribunal (see above) encouraged HFHR to submit, under the Act on freedom of access to public information, a motion to the Constitutional Tribunal regarding, among others, the case numbers in which the President of the Constitutional Tribunal selected the case rapporteur with disregard to the statutory criteria. Moreover, the HFHR indicated that it would like to be informed about the case numbers of cases in which the President of the Constitutional Tribunal decided to change the composition of the judicial panel.

27. Initially, the President of the Constitutional Tribunal informed HFHR that the request to access the demanded information should be made under the Act on the organization and proceedings before the Constitutional Tribunal rather than under the Act on access to public information. The HFHR successfully challenged that view in Voivodeship Administrative Court in Warsaw<sup>25</sup>.

28. Nevertheless, the Constitutional Tribunal once again denied HFHR access to the requested information indicating that HFHR had failed to demonstrate particular public interest in sharing the aforementioned information. HFHR challenged this decision indicating that the requested information is connected with publicly discussed problem of lack of CT's independence, manifesting in close relations between its authorities and key political leaders, as well as the conclusions of the aforementioned open letters of some of the Tribunal's judges. The proceedings concerning the Constitutional Tribunal decision is pending before the Voivodeship Administrative Court in Warsaw.

29. As a sidenote, the Constitutional Tribunal may have a chance to impose further restrictions on the right to access to public information in Poland. In February 2021 the First President of the Supreme Court filed a motion to the Constitutional Tribunal to declare that several key provisions of the Act on freedom of access to public information are inconsistent with the Constitution. According to the First President, the challenged act is too vague and excessively restricts right to privacy of public officials. In the HFHR opinion, the First President's motion ignores importance of such constitutional principles as freedom of speech, freedom of press and freedom of public debate. Declaring current model of freedom of access to public information unconstitutional may also hamper the supervision of the civil society over exercise of public authority by the officials.

---

<sup>25</sup> The judgment of Voivodeship Administrative Court in Warsaw of 19 January 2021, case no. II SAB/Wa 662/20.

## VII. CONCLUSIONS

30. HFHR believes that there are many factors which contribute to reasonable doubts of the public opinion about the independence and impartiality of the Constitutional Tribunal. As prof. Małgorzata Pyziak-Szafnicka, retired judge of the Constitutional Tribunal, aptly noted: “Over the past three years, the Constitutional Tribunal has certainly not acted as a defender of the parliamentary minority. The function of the Tribunal is now understood *à rebours*, that is, its decisions serve to confirm the constitutionality of legal acts adopted by the parliamentary majority (...)”.<sup>26</sup> This negative assessment is justified by many facts presented in these written comments. It is also shared by some foreign legal scholars. For example, P. Castillo-Ortiz classified the Constitutional Tribunal as one of “inverted constitutional courts”. Such courts: “rather than exercising constitutional checks on political actors, illiberal constitutional courts become devices used by illiberal actors to rid themselves of constitutional checks in the context of hybrid regimes”.<sup>27</sup>

31. Considering the scale of above controversies and confirmed irregularities, actions of NGOs aimed at verification of information concerning current functioning of the Constitutional Tribunal must be perceived as aimed at protection of public interest. Public opinion has a right to know whether one of the most important organs of judiciary satisfies constitutional and international standards of independence and impartiality. Unfortunately, HFHR own experiences show that at the moment access to public information related to the Constitutional Tribunal is rather difficult. This access may be even more restricted in the near future by the expected ruling of the Constitutional Tribunal on the constitutionality of Act on freedom of access to public information.

---

<sup>26</sup> M. Pyziak-Szafnicka, *Trybunał Konstytucyjny à rebours*, „Państwo i Prawo” 2020, no. 5, p. 43-44 (translation – HFHR).

<sup>27</sup> P. Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, “European Constitutional Law Review”, vol. 15, issue 1, p. 67.