



RULE OF LAW AND JUDICIAL INDEPENDENCE

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GENERAL ASSUMPTIONS

- ▶ Understanding of the rule of law and judicial independence
- ▶ National perspective
- ▶ Starting point - Rule of law crisis in Poland



Rule of law and judicial independence

- ▶ *'While there is no abstract definition of the rule of law in the Court's case-law, the Court (note: the European Court of Human Rights) has developed various substantive guarantees which may be inferred from this notion. These include the principle of legality or foreseeability, the principle of legal certainty, the principle of equality of individuals before the law, the principle that the executive cannot have unfettered powers whenever a right or freedom is at stake, the principle of the possibility of a remedy before an independent and impartial court and the right to a fair trial. Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State'*
- ▶ R. Spano, Conference on *The Rule of Law in Europe: Vision and Challenges*, available at: https://echr.coe.int/Documents/Speech_20210415_Spano_Seminar_Rule_of_Law_ENG.pdf.

World Justice Project

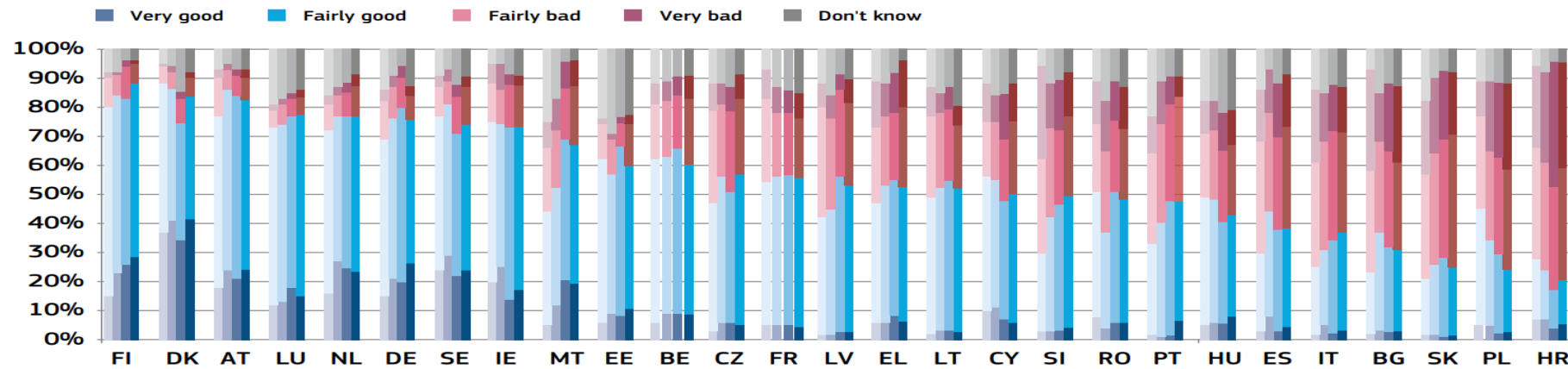
- ▶ Poland was ranked 36th out of 140 countries.



Source: World Justice Project

European Commission – Justice Scoreboard

‘From what you know, how would you rate the justice system in terms of the independence of courts and judges?’



Source: Justice Scoreboard

Problems of the Polish justice system

- the changes within the Constitutional Tribunal
- the method of appointing judges to the ordinary courts and the Supreme Court
- the creation of new chambers of the Supreme Courts
- the increased influence of the executive and legislative branches on the functioning of the judiciary
- the changes of the model of disciplinary proceedings
- the method of conducting the legislative process in the area of justice system.



Effectiveness of the tools and proceedings on the national level

- ▶ The constitutional complaint
- ▶ The control by the Criminal Chamber of the Supreme Court
- ▶ The proceedings before the ordinary courts
- ▶ Implementation of the European judgments by the courts and the State

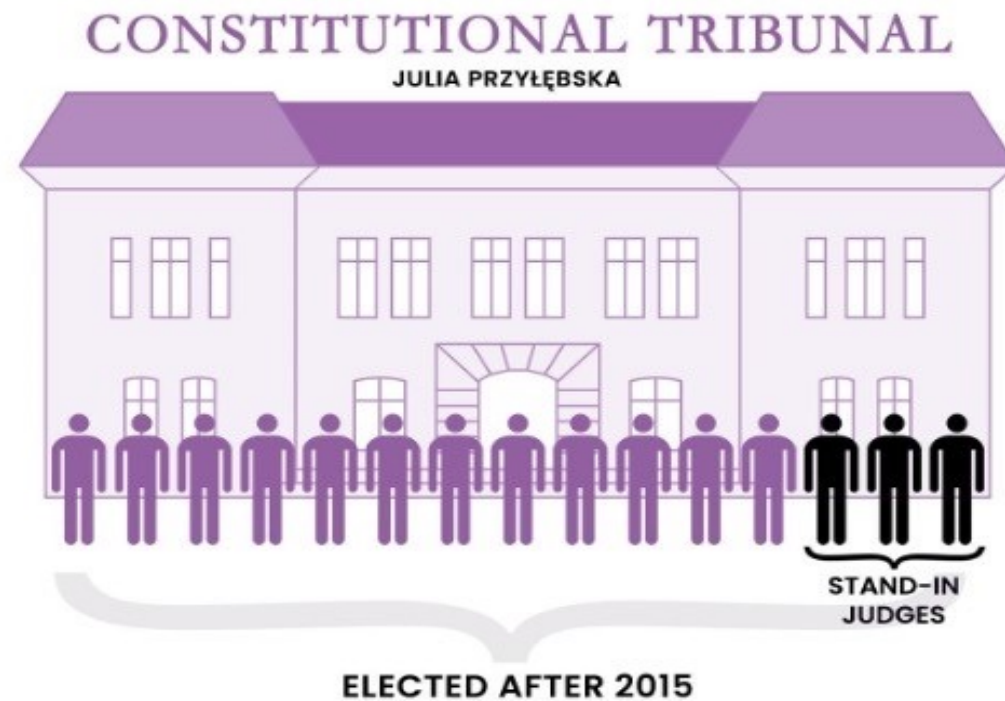


Effectiveness of the constitutional complaint

Article 79 of the Constitution:

'In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been breached, is entitled to appeal to the Constitutional Tribunal regarding compliance with the Constitution of the statute or other normative act on the basis of which a court or body of public administration has passed a final judgment on his freedoms or rights or on his obligations specified in the Constitution.'

Current status of the Constitutional Court



Source: Free Courts Foundation

Constitutional Court

- ▶ **Judgment in *Xero Flor v. Poland***
- ▶ *‘The Court finds that the election of the three judges, including Judge M.M. (Mariusz Muszyński – author’s explanation), to the Constitutional Court on 2 December 2015 was carried out in breach of Article 194 § 1 of the Constitution, namely the rule that a judge should be elected by the Sejm’*
- ▶ *‘The Court considers that the actions of the legislature and the executive amounted to unlawful external influence on the Constitutional Court. It finds that the breaches in the procedure for electing three judges, including Judge M.M., to the Constitutional Court on 2 December 2015 were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a “tribunal established by law”.’*
 - ▶ *Xero Flor v Poland* of May 7, 2021 (application 4907/18), para. 268 of the ruling.



Practical aspects

- ▶ Domestic remedies before submitting an application to the ECtHR
- ▶ Possibility of protecting constitutional rights at the national stage
- ▶ Binding effect of judgments delivered by the Constitutional Court



Advance Pharma v. Poland

- ▶ At this juncture the Court will revert to the Government's argument as to non-exhaustion of domestic remedies on account of the applicant company's failure to lodge a constitutional complaint contesting the rules governing the procedure of appointment to the Supreme Court. Having regard to all the above considerations that led the Court to reject the Constitutional Court's position on the manifest breach of the domestic law and its interpretation of Article 6 of the Convention, **in the particular circumstances of this case the Court does not see sufficiently realistic prospects of success for a constitutional complaint based on the grounds suggested by the Government.**
- ▶ It also considers that **the effectiveness of that remedy must be seen in conjunction with the general context in which the Constitutional Court has operated since the end of 2015 and its various actions aimed at undermining the finding of the Supreme Court resolution as to the manifest breach of domestic and international law due to the deficient judicial appointment procedure involving the NCJ. § 319).**

Supreme Court

Name of the Applicant	Date of the judgement	Violation	Chamber of the Supreme Court
Reczkowicz v. Poland	22/07/2021	Art. 6 ECHR	Disciplinary Chamber
Dolińska- Ficek and Ozimek v. Poland	8/11/2021	Art. 6 ECHR	Extraordinary Control and Public Affairs Chamber
Advance Pharma v. Poland	3/02/2022	Art. 6 ECHR	Civil Chamber

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- ▶ Lack of decision of the ECtHR related to the Criminal Chamber
 - ▶ However....

Communicated cases



Published on 20 June 2022

FIRST SECTION

Application no. 17162/21
Ryszard CZAJKOWSKI against Poland
and 8 other applications
(see list appended)
communicated on 1 June 2022

SUBJECT MATTER OF THE CASES

The applicants were defendants in criminal proceedings. All of them, after having been convicted at two instances, lodged cassation appeals with the Supreme Court. On dates specified in the appendix, the Supreme Court either dismissed or refused to entertain their cassation appeals. In each case the formation of the Criminal Chamber of the Supreme Court was composed of judges appointed to that court by the President of Poland pursuant to the recommendation of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, "the NCJ"), as established under the Amending Act on the NCJ and certain other statutes of 8 December 2017 (*ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw*; "the 2017 Act").

The applicants complain that their cases were examined by judicial formations of the Criminal Chamber of the Supreme Court, which included judges appointed on the NCJ's recommendation, in breach of their right to an "independent and impartial tribunal established by law", as guaranteed by Article 6 § 1 of the Convention.



Published on 24 April 2023

FIRST SECTION

Application no. 9087/22
Grzegorz GAJKOWSKI against Poland
and 14 other applications
(see list appended)
communicated on 5 April 2023

SUBJECT MATTER OF THE CASES

The applicants were defendants in criminal or lustration proceedings. All of them, after having been convicted or found to have lied in their lustration declarations at two instances, lodged cassation appeals with the Supreme Court (*Sąd Najwyższy*). On the dates specified in the appendix, the Supreme Court dismissed their cassation appeals. In each case the formation of the Criminal Chamber of the Supreme Court was composed of judges appointed to that court by the President of Poland pursuant to the recommendation of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, "the NCJ"), as established under the Amending Act on the NCJ and certain other statutes of 8 December 2017 (*ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw*; "the 2017 Act").

The applicants complain that their cases were examined by judicial formations of the Criminal Chamber of the Supreme Court, which included judges appointed on the NCJ's recommendation, in breach of their right to an "independent and impartial tribunal established by law", as guaranteed by Article 6 § 1 of the Convention.

Ordinary courts

▶ Advance Pharma v. Poland

▶ Par. 364.

„As already noted above, the Court’s conclusions regarding the incompatibility of the judicial appointment procedure involving the NCJ with the requirements of an “independent and impartial tribunal established by law” under Article 6 § 1 of the Convention will have consequences for its assessment of similar complaints in other pending or future cases (see paragraph 227 above). The deficiencies of that procedure as identified in the present case in respect of the newly appointed judges of the Supreme Court’s Civil Chamber, and in Reczkowicz (cited above) in respect of the Disciplinary Chamber of that court, and in Dolińska-Ficek and Ozimek (cited above) in respect of the Chamber of Extraordinary Review and Public Affairs have already adversely affected existing appointments and are capable of systematically affecting the future appointments of judges, not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts (see also paragraphs 127 and 142 above). It is inherent in the Court’s findings that the violation of the applicant’s rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges so appointed. In this situation and in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State is required”.

Communicated case



Published on 25 July 2022

FIRST SECTION

Application no. 48534/20
Julita ZIELIŃSKA against Poland
and 11 other applications
(see list appended)
communicated on 4 July 2022

SUBJECT MATTER OF THE CASES

The applicants were parties to civil proceedings concerning various claims or had criminal proceedings instituted against them. All applicants had their cases examined by a court of first or second instance in a formation including judges appointed to those courts by the President of Poland pursuant to the recommendations of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, “the NCJ”) as established under the Amending Act on the NCJ and certain other statutes of 8 December 2017 (*ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw*; “the 2017 Act”).

The applicants complain that their cases were examined by judicial formations of the ordinary courts including newly appointed judges which gave rise to a violation of their right to an “independent and impartial tribunal established by law”, in breach of Article 6 § 1 of the Convention.

In addition, in the case *Navrot v. Poland* (51529/21) the applicant complains about unreasonable length of civil proceedings and lack of effective remedy in this respect, and the applicants in the case *Lubomirska and Puzyna v. Poland* (18422/21) about the unreasonable length of administrative proceedings.



Implementation of the European standards



The risk of non-implementation of the ECtHR's judgments

- ▶ The opinion of the ECtHR about the decision of the Constitutional Court
 - ▶ Art. 206, *Juszczyszyn v. Poland*

▶ The Court notes that the Constitutional Court found in its judgment of 10 March 2022 (no. K 7/21) that Article 6 § 1, first sentence, of the Convention in so far as, in the context of assessing whether the requirement of “tribunal established by law” had been met, (a) permitted the Court or national courts to disregard the provisions of the Constitution and statutes as well as the judgments of the Polish Constitutional Court, and (b) made it possible for [the Court] or national courts to independently create norms, by interpreting the Convention, pertaining to the procedure for appointing national court judges, was incompatible, *inter alia*, with Article 176 § 2 (organisation and jurisdiction of courts are determined by statute), Article 179 (judges are appointed by the President upon recommendation of the NCJ) in conjunction with Article 187 § 1 (composition of the NCJ) in conjunction with Article 187 § 4 (organisation, activity and procedures of the NCJ are determined by statute) as well as Article 190 § 1 of the Constitution (binding force of the Constitutional Court’s judgments). It further found that Article 6 § 1, first sentence, of the Convention in the same context was incompatible with Article 188 (1-2) (jurisdiction of the Constitutional Court) and Article 190 § 1 of the Constitution in so far as it authorised [the Court] or national courts to assess the conformity with the Constitution and the Convention of statutes concerning the organisation of the judicial system, the jurisdiction of courts, and the statute specifying the organisation, the scope of activity, working procedures, and the manner of electing members of the NCJ.

Juszczyszyn v. Poland

- ▶ Par. 207.
- ▶ This judgment of the Constitutional Court was given by a bench including Judge M.M., in an apparent attempt to prevent the execution of the Court's judgments in *Broda and Bojara*, *Reczkowicz*, *Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.* (all cited above) under Article 46 of the Convention. In this connection, the Court notes that it held in *Xero Flor w Polsce sp. z o.o.* (no. [4907/18](#), 7 May 2021, §§ 289-291) that there had been a violation of Article 6 § 1 as regards the applicant company's right to a "tribunal established by law" on account of the presence on the bench of the Constitutional Court of Judge M.M., whose election it found to have been vitiated by grave irregularities. In the light of the *Xero Flor* judgment, the presence of the judge mentioned above on the five-judge bench of the Constitutional Court which gave the judgment of 10 March 2022 (no. K [7/21](#)) necessarily calls into question the validity and legitimacy of that judgment (see *Grzęda*, § 277; see also *Reczkowicz*, § 263 *in fine* and *Dolińska-Ficek and Ozimek*, § 319, all cited above).

Remedies

- ▶ Complaints to the ECtHR
- ▶ Requests for interim measures to the ECtHR
- ▶ Preliminary questions to the CJEU
- ▶ Direct application of constitutional and European law by the national courts



NEXT STEPS

