

The retired judges of the Constitutional Tribunal on the judgment of 10 March: another scandalous example of judgments breaching the Constitution

Declaration of the retired judges of the Constitutional Tribunal of 13 March 2022

The retired judges of the Constitutional Tribunal feel morally obliged to publicly express their decidedly critical stance with respect to the judgment issued by the Constitutional Tribunal on 10 March 2022 in case K 7/21.

In that judgment, the Tribunal ruled that the first sentence of Article 6(1) of the European Convention on Human Rights (ECHR) is incompatible with the Constitution of the Republic of Poland to the extent to which it constituted the grounds for the European Court of Human Rights (ECtHR) issuing several judgments against Poland in 2021–2022. These are judgments confirming that Poland has breached the right to a fair trial by an independent and impartial court established by law as a result of the introduction and application of various provisions regarding the judicial system. According to the Constitutional Tribunal, the consequence of its judgment is the removal of the norms it has itself interpreted from Article 6 of the ECHR, as well as the said judgments of the ECtHR, from the Polish legal system.

The retired judges of the Constitutional Tribunal state that the judgment in question is another scandalous example of judgments breaching the Constitution. It applies, *inter alia*, to the obligation to observe international law which is binding on the Republic of Poland (Article 9 of the Constitution of the Republic of Poland). Contesting Article 6 ECHR for the second time in a short space of time (previously in the judgment of 24 November 2021, K 6/21) constitutes a drastic judgmental excess. Numerous judgments in recent years, in which incompatibility of judgments of the CJEU and the ECtHR with the Constitution was ruled, not only extend beyond the jurisdiction of the Constitutional Tribunal, but testify to the intention to eliminate

external control of legislation that breaches the constitutional right to a hearing in court (Article 45) and the principles of the independence of the courts (Article 173) and the impartiality of judges (Article 178). This exacerbates the crisis of the constitutional state, including primarily the principle of a democratic state governed by the rule of law and the principle of the separation of powers, and causes the increasing isolation of Poland in Europe.

Furthermore, the retired judges of the Constitutional Tribunal would like to draw attention to the further circumstances surrounding the K 7/21 judgment:

Firstly, the judgment was issued several days after the start of the Russian Federation's aggression against Ukraine. In this context, it is worth recalling the embarrassing fact that Poland has become the second country after Russia in which the binding force of the provisions of the ECHR and judgments of the ECtHR have been questioned. Furthermore, this happened precisely on the same day that Russia announced its intention to withdraw from the Council of Europe and hence from the ECHR.

Secondly, the judgment was issued at a time of a protracted, fierce conflict with the European Union over allegations of breaches of the rule of law in Poland. Since the fundamental rights guaranteed by the ECHR form part of EU law as general principles of law (Article 6(3) TEU), the judgment is another example of the process of first negating and then destroying the foundations of the European Union.

Thirdly, the judgment was issued by a five-person bench, while the rapporteur was a person elected to the Constitutional Tribunal to a judicial office that had already been filled and therefore not by a judge, as arises directly from the judgments that directly apply to that person, i.e. the judgment of the Constitutional Tribunal of 3 December 2015 in case K 34/15, as well as the judgment of the ECtHR of 7 May 2021 in the Xero Flor case (4907/18). This circumstance means that the judgment is defective, which results in its non-existence in domestic and international legal transactions.

Stanisław Biernat

Teresa Dębowska-Romanowska

Kazimierz Działocho

Lech Garlicki

Mirosław Granat

Wojciech Hermeliński

Adam Jamróz

Stefan Jaworski

Leon Kieres

Biruta Lewaszkiewicz-Petrykowska

Wojciech Łączkowski

Ewa Łętowska

Marek Mazurkiewicz

Andrzej Mączyński

Janusz Niemcewicz

Małgorzata Pyziak-Szafnicka

Stanisław Rymar

Ferdynand Rymarz

Andrzej Rzepliński

Jerzy Stępień

Piotr Tuleja

Sławomira Wronkowska-Jaśkiewicz

Mirosław Wyrzykowski

Bohdan Zdziennicki

Andrzej Zoll

Marek Zubik