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Position of the Legal Expert Panel of the Batory Foundation - Letter to the Committee of Ministers of the Council of Europe on the execution of ECHR judgments on the rule of law in Poland.

TO:

The Committee of Ministers

Council of Europe

67075 STRASBOURG CEDEX

France

We are writing to the Committee of Ministers of the Council of Europe in connection with its 1468th execution meeting scheduled for June 2023.

In a number of recent judgments against Poland the European Court of Human Rights (hereinafter « the Court») found, against the background of a so-called « reform » of the judicial system carried out in Poland by the current parliamentary majority since 2015, various violations of the right to a fair hearing before an impartial and independent tribunal established by law.¹

Subsequently, the Constitutional Tribunal (hereinafter « the Tribunal »), packed with political nominees, gave rulings in cases K 6/21 and K 7/21. In its ruling of 24 November 2021 in case K 6/21 it responded to the motion of the Prosecutor General. The motion had sought to prevent the execution of the Court's judgment in the case of Xero Flor v. Poland of 7 May 2021. The Tribunal was of the view that the requirements of a fair hearing did not apply to the constitutional complaint proceedings because the Tribunal - in its own view - was not a 'court'. In a ruling K 7/21 of 10 March 2022, the Tribunal expressed the view that the first sentence of Article 6(1) of the European Convention on Human Rights (hereinafter « the Convention ») was incompatible with the Polish Constitution insofar as it allowed complaints about practical application of « laws concerning the system of the judiciary, the jurisdiction of courts and the law concerning the « new » National Council of the Judiciary » (as established under the Law of 8 December 2017²) to be effectively raised in applications lodged with the Court under Article 35 of the Convention.

The ruling issued in case K 6/21 deprived Polish citizens of the right to have their constitutional complaints examined by an independent and impartial constitutional Tribunal. In turn, the ruling in case K 7/21 is an attempt to deprive citizens of the right to have reviewed whether Polish courts as appointed under the Law of 8 December 2017 meet the constitutional and Convention standards of independence and have been established by law.

The communication from the Polish Ministry of Foreign Affairs of 5 April 2023 concerning execution of the Court's judgments in cases³ of Broda and Bojara, Reczkowicz and Xero Flor w Polsce sp. z o.o. v. Poland, made available

¹ Xero Flor w Polsce sp. z o.o. v. Poland, no. 4907/18, 7 May 2021; Reczkowicz v. Poland, no. 43447/19, 22 July 2021; Broda and Bojara v. Poland, nos. 26691/18 and 27367/18, 29 June 2021; Dolińska-Ficek and Ozimek v. Poland, nos. 49868/19 and 57511/19, 8 November 2021.

² Ustawa z 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Dz. U. z 2018 r., poz. 3).

³ **1468th meeting (June 2023) (DH) - Rule 8.2a - Communication from the authorities (05/04/2023) concerning the cases of Broda and Bojara, Reczkowicz and Xero Flor w Polsce sp. z o.o. v. Poland (Applications No. 26691/18, 43447/19, 4907/18) [anglais uniquement]**

Leading | Government Observation | 26691/18 43447/19 4907/18 | Pending | Enhanced Procedure | Judgment date: 29/06/2021 | Final judgment date: 29/09/2021

and public under Rule 8.2a of the Rules of the Committee of Ministers for the purposes of supervision of the execution of the Court's judgments, calls for our strongest disagreement.

This communication essentially relies on the two rulings summarised above. Both these rulings and the position of the Government submitted for the purposes of the execution proceedings must be seen as an attempt to justify an unprecedented refusal to comply with the Court's judgments by Poland. No provision of the Polish Constitution or internal law can validly serve as a legal basis for the Constitutional Tribunal reviewing judgments and decisions of international courts established under international conventions binding for Poland, including the Convention. Hence, these rulings have been issued in procedure for which there is no legal basis in national law.

Secretary General of the Council of Europe, in her Report summarising the reply of the Polish Government to her letter of March 2022, sent under Article 52 of the Convention ⁴ reiterates that « [i]t is a fundamental principle of international law, codified in Article 26 of the Vienna Convention on the Law of Treaties, that a treaty is binding on the parties to it and must be implemented by them in good faith. A party to a treaty is precluded from invoking the provisions of its internal law as justification for its failure to perform a treaty (Article 27 of the Vienna Convention on the Law of Treaties). These principles fully apply to the Convention” and are further concretised in its Articles 1, 19 and 32. In particular, under Article 46 (1) of the Convention, the States obliged to execute the final judgments of the European Court in cases to which they are parties, and so remains Poland.

We fully share this assessment as to the position of the Polish Government being in breach of international law.

The persistent refusal of the current Polish authorities expressed during the execution proceedings, based on rulings of the packed constitutional Tribunal, to comply with the Court's judgments demonstrates their manifest intention to breach Poland's obligations arising under the Convention. It also results in protection of individual rights conferred by the Polish Constitution and by the Convention being deprived of all effectiveness.

The former judges of the Constitutional Tribunal, in their position paper of 13 March 2022, described the ruling of 10 March 2022 as a "drastic abuse of judicial powers « . ⁵ We fully share this conclusion.

We hope that expression of our concerns about the continuing failure of the Polish Government to abide by the Court's judgments shall shed light on the serious threat it represents both for the Convention system and the effective protection of human rights in Poland.

Kind regards,

Legal Experts Panel of Stefan Batory Foundation

dr hab. **Piotr Bogdanowicz**, Chair of European Law, Faculty of Law and Administration, University of Warsaw

Łukasz Bojarski, President of the Management Board, Institute of Law and Society INPRIS, former member of the National Council of the Judiciary

Jacek Czaja, President of the Law Society in Lublin, former Deputy Minister of Justice

Prof. **Monika Florczak-Wątor**, PhD, Professor at the Chair of Constitutional Law, Jagiellonian University, Head of the Centre for Interdisciplinary Constitutional Studies, Jagiellonian University

Agnieszka Frąckowiak-Adamska, PhD, Professor at the Chair of International and European Law at the Faculty of Law, Administration and Economics of the University of Wrocław

⁴ **Report by the Secretary General under Article 52 of the European Convention on Human Rights on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland, SG/Inf(2022)39 of 9 November 2022.**

⁵ <https://konstytucyjny.pl/26-sedziow-tk-w-stanie-spoczynku-wyrok-z-10-03-2022-r-jest-gorszacy-ekscesem-orzecznictwem-zblizajacym-nas-do-rosji/>

Jarosław Gwizdak, lawyer, social activist, board member of the Institute for Law and Society INPRIS

Wojciech Jasiński, Ph.D., assistant professor in the Incubator of Excellence - Digital Justice at the Faculty of Law, Administration and Economics of the University of Wrocław

dr **Piotr Kładoczny**, Chair of Criminal Law, University of Warsaw, Vice-President of the Board of the Helsinki Foundation for Human Rights

Magda Krzyżanowska-Mierzewska, legal advisor, case-lawyer and Head of Division in the Secretariat of the European Commission of Human Rights and the Registry of the European Court Human Rights (1993 - 2018)

Prof. Dr. **Marcin Matczak**, Professor in the Department of Philosophy of Law and the Science of State at the University of Warsaw, partner in the Domański Zakrzewski Palinka law firm sp. k.

Sławomir Patyra, Ph.D., Professor at the Maria Curie-Skłodowska University in Lublin, Head of the Department of Constitutional Law, legal advisor

Prof. **Tomasz Pietrzykowski**, professor at the Faculty of Law and Administration of the University of Silesia in Katowice, director of the Research Centre for Public Policy and Regulatory Issues

Anna Rakowska, PhD, professor at the Chair of Constitutional Law, University of Łódź, advocate

Dr hab. **Anna Śledzińska-Simon**, Assistant Professor at the Chair of Constitutional Law, University of Wrocław

Maciej Taborowski, PhD, Professor at the Institute of Legal Studies of the Polish Academy of Sciences, advocate at Hoffman, Taborowski i Wspólnicy Adwokacka Spółka Partnerska

Tomasz Zalański, Ph.D., Member of the Management Board of the Zbigniew Hołda Association, Domański Zakrzewski Palinka sp.k. Law Firm, Judge at the State Tribunal