

The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights

ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp. z o.o. v Poland*

Marcin Szwed*

INTRODUCTION

This case note analyses the judgment issued by the European Court of Human Rights on 7 May 2021 in Application No. 4907/18, *Xero Flor w Polsce sp. z o.o. v Poland*.¹ In this judgment, the European Court of Human Rights ruled that the participation of an unlawfully elected person on the panel of the Polish Constitutional Tribunal that discontinued proceedings on the constitutional complaint filed by a private applicant led to a violation of Article 6 of the ECHR.

The Strasbourg Court's judgment is of fundamental importance for several reasons. First, it clarified the scope of applicability of Article 6 to constitutional courts and contributed to the Court's case law on the right to a tribunal established by law, which has been developing rapidly since the landmark ruling in *Ástráðsson v Iceland*.²

*Assistant Professor at the University of Warsaw.

¹ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp. z o.o. v Poland* (hereinafter: *Xero Flor*).

²ECtHR (GC) 1 December 2020, No. 26374/18, *Guðmundur Andri Ástráðsson v Iceland*, paras. 243–252; ECtHR 9 February 2021, *Xhoxhaj v Albania*, No. 15227/19; ECtHR 22 July 2021, No. 43447/19, *Reczkowicz v Poland*; ECtHR 8 November 2021, Nos. 49868/19 and 57511/19, *Dolińska-Ficek and Ozimek v Poland*; ECtHR 3 February 2022, No. 1469/20, *Advance Pharma sp. z o.o. v Poland*.

European Constitutional Law Review, 18: 132–154, 2022

© The Author(s), 2022. Published by Cambridge University Press on behalf of European Constitutional Law Review. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

doi:10.1017/S1574019622000050

Second, it confirmed the unlawfulness of the election of three persons to the Constitutional Tribunal and obliged the Polish authorities to ensure that the national constitutional court functions in accordance with the law. It may also contribute to the development of case law in Polish courts on the legal effects of rulings of the Constitutional Tribunal issued by irregularly composed panels. The Court's judgment may also influence the future case law of the European Court of Justice on the status of the Polish Constitutional Tribunal and its rulings.

This case note is divided into three parts. The first part presents the genesis and course of the crisis over the Constitutional Tribunal. Since this has already been the subject of many studies, including some published in English,³ I will refer to it only briefly. The second part summarises the facts of the case and the main findings of the Court. The third part assesses the judgment, focusing in particular on arguments used by the European Court of Human Rights to justify the applicability of Article 6 of the ECHR to the proceedings before the Constitutional Tribunal. This section also discusses the consequences of the judgment and the recommended manner of its implementation.

THE BACKGROUND

The facts of the *Xero Flor* case are related to the crisis over the Polish Constitutional Tribunal. This crisis began with a political dispute over the lawfulness of the election of five judges by the Sejm (Polish Lower House) of the seventh term (2011–2015) shortly before the expiry of that term.

In June 2015, the Sejm of the seventh term, dominated by the Civic Platform party, passed a new act on the Constitutional Tribunal. One of its transitional provisions stipulated that the Sejm was to elect five judges to the Constitutional Tribunal to replace judges whose terms ended in 2015. The terms of office of three judges of the Constitutional Tribunal were due to expire in November 2015, which could have fallen within either the seventh or eighth term of the Sejm, depending on the dates of parliamentary elections and of the first sitting of the new Sejm, which would be set by the President. However, two other judges were due to see their terms expire in December 2015, which, regardless of

³See W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); W. Sadurski, 'Polish Constitutional Tribunal under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', 11 *Hague Journal on the Rule Law* (2019) p. 63; E. Łętowska and A. Wiewiórowska-Domagalska, 'A "Good" Change in the Polish Constitutional Tribunal?', 1 *Osteuropa Recht* (2016) p. 79; M. Szuleka et al., *The Constitutional Crisis in Poland* (Helsinki Foundation for Human Rights 2016), (https://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf), visited 9 March 2022.

the election calendar, would certainly be during the eighth term of the Sejm. Unsurprisingly, the new law caused considerable controversy, as it led to an encroachment on the competences of the new Sejm, depriving it of the possibility to elect at least two judges.

Regardless of public criticism, the Sejm of the seventh term elected all five judges. However, Andrzej Duda, the newly elected President, who assumed office in August 2015, supported by the then opposition Law and Justice party (PiS), did not receive the oath from any of the newly elected judges, which prevented them from taking up their judicial duties immediately.

The parliamentary elections of October 2015 were won by the conservative Law and Justice party. Its politicians argued that the election of all five judges by the previous Sejm was unlawful. They also criticised the position of the Constitutional Tribunal, seeing it as a *de facto* third chamber of parliament, which could block laws passed by a democratically elected parliament.⁴

On 25 November 2015, the Sejm passed, without a proper legal basis, resolutions declaring that the election of judges by the Sejm of the seventh term was devoid of legal effect. On 2 December the Sejm elected five new judges, who immediately took their oaths before the President. The next day, the Constitutional Tribunal ruled that the provision granting the Sejm of the seventh term the power to elect two additional judges for posts which became vacant in December was unconstitutional.⁵ However, the same provision, insofar as it related to the successors of judges whose term of office expired in November, did not violate the Constitution.

Formally, the Constitutional Tribunal did not repeal the resolutions adopted by the newly elected Sejm. These resolutions were the subject of other proceedings before the Constitutional Tribunal, which were eventually discontinued. The Constitutional Tribunal found that the resolutions declaring lack of legal effects of election made by the Sejm of the seventh term were merely political declarations, while the resolutions on the election of new judges were only individual acts of application of law, and as such could not be the subject of constitutional review in Poland.⁶

Subsequently, a peculiar stalemate occurred in the Constitutional Tribunal. The three judges elected in accordance with the Constitution could not adjudicate

⁴See e.g. J. Wojciechowski, 'Trybunał Konstytucyjny to trzecia izba parlamentu', *NaszDziennik.pl*, 24 November 2015, (<https://naszdziennik.pl/polska-kraj/147695,trybunal-konstytucyjny-to-trzecia-izba-parlamentu.html>), visited 9 March 2022; A. Gajcy and M. Szuldrzyński, 'Kaczyński: Nie chcę większości w TK' (interview with J. Kaczyński, chairman of the 'Law and Justice' Party), *Rzeczpospolita*, 17 January 2016, (<https://www.rp.pl/tk-kaczynski#ap-5>), visited 9 March 2022.

⁵Constitutional Tribunal 3 December 2015, No. K 34/15.

⁶Constitutional Tribunal 7 January 2016, No. U 8/15.

since they had not taken their oaths before the President. At the same time, the three persons elected in their place by the Sejm of the eighth term were not allowed to adjudicate by the then president of the Constitutional Tribunal, who correctly argued that an election to a position already occupied by another properly elected judge of the Constitutional Tribunal was unlawful and legally ineffective. In the following months, the ruling party undertook numerous actions aimed at forcing the president of the Constitutional Tribunal to recognise the legal status of the three persons elected by the Sejm of the eighth term. These included adopting unconstitutional statutes aimed at forcing the president of the Constitutional Tribunal to recognise their status.⁷ Moreover, the Prime Minister refused to publish some of the Constitutional Tribunal's rulings in the Journal of Laws, thereby preventing their entry into force.

This phase of the conflict ended in December 2016, when the nine-year term of office of the then president of the Constitutional Tribunal, Andrzej Rzepliński, expired. In his place, the President appointed – in violation of the law, as many lawyers argued⁸ – Judge Julia Przyłębska, one of the two judges elected lawfully by the Sejm of the eighth term. The new president of the Tribunal immediately recognised the legal status of the three unlawfully elected persons and included them in adjudicating panels. From then on, the Constitutional Tribunal ceased to be an obstacle to the implementation of controversial changes by the government.⁹ Its function, as one of the retired judges of the Constitutional Tribunal aptly noted, ‘is now understood à rebours, that is, its decisions serve to confirm the constitutionality of legal acts adopted by the parliamentary majority’.¹⁰

FACTS OF THE CASE

The applicant in the case under study was Xero Flor w Polsce sp. z o.o. – a limited liability company producing roll-out lawns. The company brought a civil suit for compensation of damage caused by wild animals. Throughout the proceedings before domestic civil courts, the company argued that the regulation applicable in its case was inconsistent with the Constitution. However, the courts did not decide to refer a legal question to the Constitutional Tribunal on this matter. After

⁷See Tribunal 9 March 2016, No. K 47/15; Tribunal 11 August 2016, No. K 39/16.

⁸See e.g. 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), visited 9 March 2022.

⁹Sadurski, ‘Polish Constitutional Tribunal . . .’, *supra* n. 3, at p. 77-81.

¹⁰M. Pyziak-Szafnicka, ‘Trybunał Konstytucyjny à rebours’, 5 *Państwo i Prawo* (2020) p. 25 at p. 43-44 (author’s translation).

being unsuccessful in the ordinary courts and the Supreme Court, the company decided to challenge the constitutionality of the regulation via a complaint to the Constitutional Tribunal.

On 5 May 2017 the Constitutional Tribunal decided to discontinue the proceedings on formal grounds. However, this decision was issued by a panel composed of, among others, Mariusz Muszyński, one of the three persons elected unlawfully in December 2015. The fact that the Constitutional Tribunal had proceeded under an irregular personnel composition was noted by two judges of the bench, who filed dissenting opinions.

After the Constitutional Tribunal proceedings were discontinued, Xero Flor filed an individual application to the European Court of Human Rights. It argued, first, that Article 6 § 1 of the ECHR had been violated, as the domestic courts had not properly justified their decision not to refer the legal question to the Constitutional Tribunal. Second, the company stated that the discontinuation of proceedings by a Constitutional Tribunal bench which included an unlawfully elected person violated its right to a constitutional tribunal established by law guaranteed under Article 6 § 1. It also claimed that its right to protection of property had been infringed (Article 1 of Protocol No. 1 to the ECHR) in connection with the rules concerning compensation for damage caused by wild animals.

JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

On 7 May 2021, the European Court of Human Rights, First Section, unanimously ruled that Poland had violated Article 6 § 1 of the Convention due to the courts' failure to justify not referring the legal question to the Constitutional Tribunal and the participation of unlawfully elected persons on the Constitutional Tribunal's panel. By a 6–1 majority, the Court decided that there was no need to examine the complaint under Article 1 Protocol No. 1.

The most important part of the judgment concerned the violation of the right to a tribunal established by law. In this regard the European Court of Human Rights had to first assess whether Article 6 § 1 of the ECHR could be applied to the proceedings before the Constitutional Tribunal. The case law of the Court made it clear that proceedings before constitutional courts might fall within the scope of Article 6 only if 'their outcome is decisive for the determination of the applicant's civil rights and obligations'.¹¹ The Court had previously issued many judgments in which it had applied Article 6 to proceedings before constitutional courts initiated by a citizen's constitutional complaint. However, most such judgments had concerned jurisdictions in which the constitutional complaint could be

¹¹ECtHR 12 June 2001, No. 39914/98, *Trickovic v Slovenia*, para. 39.

assessed not only against legal provisions of general application but also for its individual application, and the constitutional court had competence to quash individual judgments or decisions.¹² The Polish Constitutional Tribunal has no such competences – it reviews only the constitutionality of general and abstract legal norms, not their application in individual and concrete cases. Even the constitutional complaint mechanism, considered in Poland as a form of so-called concrete constitutional review, does not deviate from this model. Nonetheless, the European Court of Human Rights held that the proceedings before the Constitutional Tribunal fell within the scope of Article 6. The Court noted, among other factors, that according to its case law, a constitutional complaint before a national (constitutional) court can under certain circumstances be an effective remedy which must be used by an individual before submitting an individual application under the ECHR. Moreover, in the case at hand the question of the constitutionality of the challenged provisions was crucial from the perspective of the applicant's case before domestic bodies. Furthermore, a judgment of the Constitutional Tribunal declaring nonconformity of the challenged regulation with the Constitution could give the applicant an opportunity to reopen the proceedings before the ordinary courts. All in all, the European Court of Human Rights ruled that the proceedings before the Constitutional Tribunal 'were directly decisive for the civil right asserted by the applicant company' (para. 209 of the judgment).

Having established that the proceedings before the Polish Constitutional Tribunal fell within the scope of Article 6 § 1, the Court assessed the composition of the Constitutional Tribunal according to the right to a tribunal established by law. It applied a test developed in a landmark ruling in the case of *Ástráðsson v Iceland*.¹³ Under this, violations of domestic law in the judicial appointment process may result in violation of the right to a tribunal established by law if they are manifest, concern norms of fundamental importance to the appointment process, and their effects must not have been sufficiently reviewed and remedied by domestic courts. First, the Court had no doubts that the judge in question was elected with 'manifest breach of domestic law'. This position relied heavily on the abovementioned judgments of the Constitutional Tribunal, in particular that of 3 December 2015. The Court concluded that in the light of these rulings, the election of three persons in December 2015 had to be considered defective, as they were elected to seats already occupied by judges correctly elected by the previous Sejm. Second, the Court noted that the breach 'concerned a fundamental

¹²See e.g. ECtHR 3 March 2000, No. 35376/97, *Křemář and Others v the Czech Republic*; ECtHR 26 September 2002, No. 45448/99, *Becker v Germany*; ECtHR 18 February 2016, No. 10722/13, *A.K. v Liechtenstein (No. 2)*.

¹³*Ástráðsson, supra* n. 2, paras. 243-252.

rule of the election procedure, namely the rule that a judge of the Constitutional Court was to be elected by the Sejm whose term of office covered the date on which his seat became vacant' (para. 277). The Court also noted that even after the Tribunal's ruling of 3 December 2015, the authorities persisted in defying the law: the President failed to take an oath from legally elected judges, the Parliament enacted laws aimed at forcing the then President of the Constitutional Tribunal to include incorrectly selected persons in adjudicating panels, and the Prime Minister refused to publish judgments which declared these laws unconstitutional. All these actions were inconsistent with the principle of the rule of law. Since the two elements of the *Ástráðsson* test were satisfied and the violations of law could not be 'reviewed and remedied' by any organ, the Court ruled that Article 6 § 1 was violated as regards the right to a tribunal established by law.

A partly concurring, partly dissenting opinion to the judgment was filed by the Polish judge, Krzysztof Wojtyczek. K. Wojtyczek agreed with the finding of a violation of Article 6, although he noted certain inconsistencies in the Court's approach to the applicability of this provision to the proceedings before constitutional courts. Moreover, he criticised the Court for its decision to not to examine the complaint brought under Article 1 of Protocol No. 1 to the Convention.

As the Government did not decide to request a referral of the case to the Grand Chamber, the judgment became final on 7 August 2021.

COMMENTS

Applicability of Article 6 § 1 to the Constitutional Tribunal

Importantly, the European Court of Human Rights found that the proceedings before the Constitutional Tribunal initiated by the constitutional complaint fell within the scope of Article 6 § 1. As already mentioned, earlier case law did not give a clear answer to whether this article was applicable to proceedings before constitutional courts which, like the Polish Constitutional Tribunal, can only review the constitutionality of legal norms, but not individual judgments or decisions. In many decisions, especially older ones, the Court had held that proceedings limited solely to the examination of the constitutionality of laws were not covered by Article 6.¹⁴ In other judgments, the European Court of Human Rights, when confronted with this question, had refused to give an unequivocal answer,¹⁵ while in *Voggenreiter v Germany*, which concerned proceedings before

¹⁴See e.g. ECtHR (dec.) 13 September 2001, No. 48077/99, *Bakarić v Croatia*; ECtHR (dec.) 9 December 1999, No. 33576/96, *Szyskiewicz v Poland*.

¹⁵See e.g. ECtHR 21 July 2015, No. 70597/11, *Meimanis v Lithuania*, paras. 43-54.

the German Federal Constitutional Court, it held that Article 6 is applicable also when 'the Constitutional Court examines an appeal lodged directly against a law if the domestic legislation provides for such a remedy'.¹⁶ These inconsistencies in the Court's case law were noted by judge Krzysztof Wojtyczek in his concurring opinion to *Xero Flor*. The problem of applicability of Article 6 § 1 to the Constitutional Tribunal was also analysed in Polish legal literature; legal scholars were divided, although the dominant view seemed to be that its proceedings in cases of constitutional complaints and legal questions fell within the scope of Article 6 § 1.¹⁷ The Tribunal itself, however, had once held that Article 6 § 1 was not an adequate standard of review for assessment of the provision of one of the amendments to the Constitutional Tribunal Act adopted by the Sejm after elections in 2015. The provision in question was aimed at granting the Sejm power to elect three judges of the Constitutional Tribunal to posts already occupied by lawfully elected judges. The Constitutional Tribunal ruled that such provision was inconsistent with the Constitution but not with Article 6 of the Convention because, due to specificity of its competences, the Constitutional Tribunal does not constitute a 'tribunal' within the meaning of this provision.¹⁸

Nevertheless, the interpretation adopted by the European Court of Human Rights in *Xero Flor* is correct. Even though the Constitutional Tribunal is not a court within the meaning of Polish law and its competences are limited to review of legal norms, in the proceedings initiated by constitutional complaints there are sufficient links between the protection of rights of the concrete individual and the subject of proceedings before the Constitutional Tribunal.¹⁹ The Constitution itself classifies a constitutional complaint as one of the remedies for the protection of human rights and freedoms.²⁰ Given controversies about the competence of Polish courts to exercise so-called dispersed constitutional review (by ordinary courts in individual cases),

¹⁶ECtHR 8 January 2004, No. 47169/99, *Voggenreiter v Germany*, para. 33.

¹⁷See e.g. A. Wiśniewski, 'Polska skarga konstytucyjna a Europejska Konwencja Praw Człowieka', 12 *Gdańskie Studia Prawnicze* (2004) p. 311 at p. 314-315; M. Wiącek, *Pytanie prawne sądu do Trybunału Konstytucyjnego* (Wydawnictwo Sejmowe 2011) at p. 349-358; M. Szwed, 'Orzekanie przez wadliwie powołanych sędziów jako naruszenie prawa do sądu w świetle wyroku Europejskiego Trybunału Praw Człowieka z 12.03.2019 r., 26374/18, Guðmundur Andri Ástráðsson przeciwko Islandii', 7 *Europejski Przegląd Sądowy* (2019) p. 42 at p. 47-48. Differently: A. Syryt, *Oddziaływanie prawa międzynarodowego na sądownictwo konstytucyjne – perspektywa konstytucyjna* (Wydawnictwo Instytutu Wymiaru Sprawiedliwości 2019) p. 269-270.

¹⁸Constitutional Tribunal 9 December 2015, No. K 35/15.

¹⁹Wiśniewski, *supra* n. 17, at p. 314.

²⁰Helsinki Foundation for Human Rights, *Written comments in the case of Xero Flor w Polsce sp. z o.o. v Poland*, p. 2, available at (https://www.hfhr.pl/wp-content/uploads/2020/01/1656_001.pdf), visited 9 March 2022.

when a legal act violates constitutional rights, a constitutional complaint may in fact be the only effective remedy available to individuals. Moreover, in the course of the proceedings initiated by a constitutional complaint, the Constitutional Tribunal may suspend the effectiveness of a final judgment issued in the complainant's case.²¹ A judgment declaring a provision unconstitutional allows the successful complainant, as well as all other individuals whose cases were finally resolved on the basis of the challenged provision, to request the reopening of proceedings before ordinary courts or other competent bodies.²² Also, the European Court of Human Rights has always held that in certain situations Polish constitutional complaint may be a domestic remedy which must be exhausted before lodging an individual application under the Convention.²³ It would, therefore, seem inconsistent to hold that proceedings before the Constitutional Tribunal have a purely abstract character and are not decisive for the rights and obligations of an individual.

The considerations of the European Court of Human Rights in *Xero Flor* were limited to the proceedings before the Constitutional Tribunal initiated by a constitutional complaint. Nevertheless, it may be argued that Article 6 also applies to cases initiated by referrals of domestic courts.²⁴ In the past the European Court of Human Rights has applied Article 6 to proceedings before constitutional courts initiated in this way.²⁵ Equally, some types of procedures will most likely be excluded from the scope of Article 6. These include, in particular, proceedings initiated by abstract motions of competent bodies (e.g. the Ombudsman), as these bodies act in the public interest, not their own, and it would be difficult to identify a specific person to be the subject of the right to a court. However, formally abstract motions may also be submitted by specific entities, such as churches and religious associations, but only in the area of their activity. Such entities, as 'non-governmental organisations' within the meaning of Article 34 of the ECHR, may be applicants in proceedings before the European Court of Human Rights.

²¹Art. 79 of the Act of 30 November 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, Journal of Laws 2016, item 2072 (English translation available at https://trybunal.gov.pl/fileadmin/content/dokumenty/Akty_normatywne/Am._in_force_6II2019_The_Act_on_the_Organisation_of_the_Constitutional_Tribunal_and_the_Mode_of_Proceedings_Before_the_Constitutional_Tribunal_en.pdf), visited 1 February 2022).

²²Art. 190(4) of the Constitution of Poland.

²³See e.g. ECtHR (dec.) 9 October 2003, No. 47414/99, *Szott-Medyńska and others v Poland*.

²⁴M. Szwed, 'What Should and What Will Happen After Xero Flor. The judgement of the ECtHR on the composition of the Polish Tribunal', *Verfassungsblog*, 9 May 2021, <https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/>), visited 9 March 2022; Wiącek, *supra* n. 17, at p. 349-358.

²⁵See e.g. ECtHR 23 June 1993, No. 12952/87, *Ruiz-Mateos v Spain*.

Therefore they could possibly rely on Article 6 in the context of proceedings before the Constitutional Tribunal.²⁶

Unlawfulness of the election of three persons

Leaving aside the applicability of Article 6, the main problem in the *Xero Flor* case was the violation of the right to a tribunal established by law due to the participation of an unlawfully elected person on the adjudicating panel of the Constitutional Tribunal. As already mentioned, the European Court of Human Rights dealt with this complaint by applying the test developed in *Ástráðsson v Iceland*.

One should, however, note a difference between *Xero Flor* and *Ástráðsson*. In the latter, the domestic Supreme Court itself unequivocally stated that the law had been violated in the process of judicial appointments. In Poland, the Constitutional Tribunal had not directly stated in the operative part of its ruling that the election of three persons in 2015 was unlawful. As already mentioned, the resolutions declaring the election of judges by the previous Sejm ineffective, and those relating to the election of new judges, were the object of separate constitutional review proceedings before the Constitutional Tribunal which were eventually discontinued.

Even though the Constitutional Tribunal did not, due to its limited jurisdiction, declare the resolutions relating to the election of three judges unconstitutional, there were sufficient factual and legal arguments for the European Court of Human Rights to hold that the said group of three judges had been elected unlawfully. The Court aptly noted that in the light of the Constitutional Tribunal's findings in the judgment of 3 December 2015 (K 34/15) and in its subsequent rulings, the election of three persons in December 2015 had to be considered defective, as they were elected to seats already occupied by judges correctly elected by the previous Sejm.

As a sidenote, the unlawfully elected person whose presence rendered the Constitutional Tribunal's panel in *Xero Flor* defective was Mariusz Muszyński. However, two other persons elected unlawfully on the same sitting of the Parliament died in 2017 before the expiration of their nine-year terms of office, and the Sejm has already elected their successors. It seems plausible to argue that the death of unlawfully elected persons did not result in a vacancy in the

²⁶O. Garner and P. Wachowiec, 'Expert analysis of the applicability of Article 6 of the European Convention on Human Rights to the constitutional courts of the States Parties, requested by the Polish Commissioner for Human Rights in the context of the case K 6/21 pending before the Polish Constitutional Tribunal' (Bingham Centre for the Rule of Law 2021) p. 19-20, (https://binghamcentre.biiicl.org/documents/125_bingham_centre_expert_analysis_on_the_applicability_of_article_6_echr_to_constitutional_courts_update.pdf), visited 9 March 2022.

Constitutional Tribunal – there were still three lawful judges who had not taken their oaths and whose terms had not expired. It therefore seems that in the light of *Xero Flor*, the participation of those two persons on adjudicating panels of the Constitutional Tribunal may also lead to violation of the Convention.²⁷

Implementation of the judgment

The Court did not comment on the manner of implementation of the judgment. Nevertheless, it seems evident that the proper implementation of the judgment would be to bar unlawfully elected persons from adjudication – at least in proceedings initiated by constitutional complaints, but, as will be discussed below, preferably in all cases. Otherwise, their continued presence on adjudicating panels of the Constitutional Tribunal will lead to further violations of the ECHR.

It is up to the member state concerned to decide how to stop unlawfully elected persons from adjudicating. When taking such decisions, domestic authorities would have to carefully assess whether, in the light of domestic law, such persons have the legal status of judges and are thus protected by the principle of irremovability.

It would, of course, be an oversimplification to suggest that the Court's finding of an Article 6 violation automatically means that the three unlawfully elected persons are not judges at all. In the light of *Ástráðsson*, 'manifest breaches of domestic law' in the procedure of appointment of a judge, which may lead to violation of the right to a tribunal established by law, are not limited to those irregularities which, in the light of domestic law, render the act of appointment null and void.²⁸ Consequently, the Court's finding does not necessarily mean that acts of appointment (election) are legally non-existent. They may be legally effective in terms of domestic law but tainted with such defects that issuing judgments by judges appointed in such a way would violate the right to a tribunal established by law, however paradoxical this result may seem.

The professional status of such persons must therefore be assessed through the prism of national law and not the Convention alone. According to the information provided by the Government of Iceland to the Committee of Ministers of the Council of Europe,²⁹ after the Court's judgment in *Ástráðsson*, unlawfully appointed Icelandic judges were prevented from adjudication but they were not formally removed from their office. Instead, new competitions were held

²⁷Szwed, *supra* n. 24.

²⁸*Ástráðsson*, *supra* n. 2, paras. 280-286.

²⁹Action Plan of the Government of Iceland for the case of *Guðmundur Andri Ástráðsson v Iceland*, 7 July 2021, DH-DD(2021)700, ([https://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)700E](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)700E)), visited 9 March 2022.

for vacant seats in the Court of Appeals and three out of the four unlawfully appointed judges were appointed once again – this time fully in accordance with the law. The fourth judge did not reapply. In its Action Plan submitted to the Committee of Ministers, the Icelandic Government explained that although this judge remained inactive due to the risk of violation of Article 6, he could not be formally removed from his office because his status was protected by the Constitution.³⁰ Obviously, this approach does not violate the Convention. The important thing is that the unlawfully appointed person does not adjudicate; their professional status is a matter of domestic law.

The question remains whether the status of the three persons elected to the Constitutional Tribunal is similar to that of the Icelandic judges, or whether they are not judges at all and thus not protected against removal. This problem goes beyond the scope of this article, which focuses mainly on the ECHR and not Polish domestic law. Nevertheless, it is worth briefly exploring it.

As already mentioned, in Poland there is no judgment of the Constitutional Tribunal or any other court or body explicitly stating that the resolutions for the election of these persons are null and void or legally non-existent. The reason is simple: unlike ‘normative’ resolutions of the Sejm (i.e. resolutions that lay down general and abstract legal norms such as the Sejm’s rules of procedure), which can be reviewed by the Constitutional Tribunal, resolutions in individual matters (such as the election of an official) cannot be reviewed by any organ. Nevertheless, one can argue that manifest, obvious violations of law by the Sejm cannot be considered even as ‘resolutions’ and as such do not produce any legal effects. From that perspective, the election of three persons in December 2015 is tainted with an obvious defect – they were elected to seats that were already occupied. All the organs involved in the process of their election, as well as those persons themselves, should have been aware that their elections were fundamentally flawed.

Therefore, there are grounds to claim that they were never elected to the positions of judges of the Constitutional Tribunal and thus are not protected by the right to irremovability. Still, in order to ensure respect for the rule of law, it would be preferable to provide them with right to appeal to court against their removal. However, *Xero Flor* would also be implemented if they were not fully removed but, for example, moved into retirement or barred from adjudication in other ways.

The Court did not clarify whether it was necessary to reopen the proceedings before the Constitutional Tribunal in the applicant’s case. However, in *Ástráðsson* the Grand Chamber underlined that the ‘finding of a violation in the present case may not as such be taken to impose on the respondent State an obligation under

³⁰Ibid.

the Convention to reopen all similar cases that have since become *res judicata* in accordance with Icelandic law'.³¹ This suggests that reopening would not be necessary. Also, reopening proceedings before the Constitutional Tribunal would not be easy. Article 190(1) of the Constitution provides that judgments of the Constitutional Tribunal are final, which is interpreted by legal scholars and the Tribunal itself as precluding the reopening of cases or other forms of challenge to its rulings.³²

Risk of non-implementation of the judgment

As noted above, the judgment of the European Court of Human Rights should be implemented by preventing the three unlawfully elected persons from adjudicating. However, it is highly likely that it will remain unimplemented for a long time. This conclusion is based on, among other things, the statements of ruling party politicians³³ and, above all, the ruling of the Constitutional Tribunal of 24 November 2021.³⁴

The Constitutional Tribunal held that Article 6 § 1 is unconstitutional insofar as it is applicable to proceedings before the Constitutional Tribunal and authorises the European Court of Human Rights to assess the legality of election of the Constitutional Tribunal's judges. According to the Tribunal,³⁵ Article 6 § 1 can apply only to proceedings before 'courts' within the meaning of the Polish Constitution. The Tribunal is not a court – it does not solve concrete cases between individuals (or individuals and the state) but exercises constitutional review of legal acts. Moreover, in the view of the Constitutional Tribunal the *Xero Flor* judgment departed from earlier European Court of Human Rights case law, in which Article 6 applied only exceptionally to proceedings before

³¹*Astráðsson, supra* n. 2, para. 314.

³²See, however, M. Wiącek, 'Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle', in A. von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht), vol 298 (Springer 2021) p. 15 at p. 30 (arguing that 'the Parliament would be empowered to introduce a procedure under which, in certain exceptional circumstances, the Tribunal's judgments might be challenged').

³³For example, Elżbieta Witek, Marshal of the Sejm, stated that the ECtHR judgment in *Xero Flor* was 'an unlawful interference with the sovereignty of the Polish state': K. Kowalczyk, 'Marszałek Sejmu: orzeczenie ETPCz jest bezprawną ingerencją w suwerenność Państwa Polskiego', Polska Agencja Prasowa, 7 May 2021, (<https://www.pap.pl/aktualnosci/news,867810,marszalek-sejmu-orzeczenie-etpcz-jest-bezprawna-ingerencja-w-suwerennosc>), visited 9 March 2022.

³⁴Constitutional Tribunal 24 November 2021, No. K 6/21.

³⁵Description of the reasoning of the Constitutional Tribunal was made on the basis of the oral statement of reasons presented by the judge-rapporteur (a written statement of reasons was not available at the time of writing).

constitutional courts. Therefore, the Tribunal argued, the European Court of Human Rights had created a new legal norm, to which Poland had not agreed at the moment of ratification of the Convention. The Constitutional Tribunal also underlined that no domestic or international organ may assess the legality of election of its judges. According to the Tribunal, the European Court of Human Rights had therefore wrongly held that a judge in the *Xero Flor* case was elected unlawfully; such unlawfulness was never declared by Polish legal organs. Therefore, in the eyes of the Tribunal, there was no ground to state that the first criterion of *Ástráðsson* test had been met.

The Constitutional Tribunal's judgment seems incorrect for many reasons. First, the Tribunal may have exceeded its jurisdiction defined in the Constitution. International treaties ratified upon consent granted by statute, including the ECHR, can be a subject of constitutional review – in the hierarchy of legal sources they are above ordinary statutes, but still must conform to the Constitution. However, in the analysed case the Tribunal only theoretically reviewed Article 6 § 1 – in fact both the Prosecutor General's motion which initiated the case, and the oral reasoning presented by the Tribunal, focused primarily on questioning the Court's interpretation of one particular ruling (*Xero Flor*), which was not even challenged to the Grand Chamber by the Polish Government.³⁶ This was problematic because the Constitutional Tribunal does not have competence to assess the legality of judgments of domestic and international courts; its jurisdiction is limited to constitutional review of legal acts. Because of these limitations, it would be difficult to implement in Poland, in a manner consistent with the Constitution, a formal procedure similar to the one adopted in Russia, where the Constitutional Court has been granted a competence to examine the constitutional permissibility of implementation of the rulings of the European Court of Human Rights.³⁷ Even leaving aside the formal inadmissibility of the motion, the Constitutional Tribunal's ruling is substantively unconvincing. It seems to completely ignore the fact that concepts used in the Convention have an autonomous character; that is, they do not have to have the same meaning as notions used in domestic law.³⁸ The notion of a 'tribunal' under the Convention does not have to be understood in exactly the same way as

³⁶M. Szwed, 'The motion of the Public Prosecutor General to declare unconstitutional Art. 6 para. 1 of the ECHR', Helsinki Foundation for Human Rights, paras. 12-19, (<https://www.hfhr.pl/wp-content/uploads/2021/11/Poland-Public-Prosecutor-General-unconstitutionality-of-the-art6-para1-ECHR.pdf.pdf>), visited 9 March 2022.

³⁷See e.g. J. Kahn, 'The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg', 30(3) *European Journal of International Law* (2019) p. 933.

³⁸See e.g. G. Letsas, 'The Truth in Autonomous Concepts', 15 *European Journal of International Law* (2004) p. 279 at p. 282.

‘court’ under the Constitution, but this alone does not make the Convention unconstitutional. It could be unconstitutional if, for example, it widened or limited the competences of the Tribunal in a way that was inconsistent with the Constitution, but that was not the case here. The consequence of the application of Article 6 to proceedings before the Constitutional Tribunal is that this body must satisfy the requirements of the said provision. There is nothing unconstitutional in this because the same guarantees are either explicitly provided or can be derived from the Constitution. Furthermore, in the light of earlier case law and the views of Polish legal scholars, it is hard to perceive *Xero Flor* as a revolution in the Court’s case law and the arbitrary imposition of a new legal norm on Poland.³⁹

Legal effects of judgments issued with the participation of unlawfully elected persons

The Constitutional Tribunal’s ruling will probably be presented by the Polish Government as an official excuse not to implement the *Xero Flor* judgment, but it may also be used to dissuade judges from using Article 6 to question the legal force of Tribunal judgments issued by irregular panels. And indeed, before the announcement of the Constitutional Tribunal’s judgment, there were some attempts to invoke Article 6 in that context. Two decisions were particularly important.

The District Court in Gorzów Wielkopolski issued the first of these on 23 April 2021.⁴⁰ The District Court was to apply the provisions of the Hunting Law, which had been declared partially unconstitutional by the Constitutional Tribunal. The ruling of the latter, however, had been issued by a panel which included one of the incorrectly elected persons. The District Court, referring to *Xero Flor*, held that the judgment was issued by a tribunal which was not established by law and, consequently, must be disregarded. The court therefore independently reviewed the constitutionality of the Hunting Law, concluding that it violated the Constitution.

The Supreme Court issued a similar decision on 16 September 2021.⁴¹ It emphasised that in the light of Article 190 section 1 of the Constitution, judgments of the Constitutional Tribunal are final and universally binding. This does

³⁹See also M. Szwed, ‘Wyrok TK w sprawie Konwencji Praw Człowieka jest błędny i nie wywiera skutków poza Polską’, *OKO.press*, 28 November 2021, (<https://oko.press/wyrok-tk-w-sprawie-konwencji-praw-czlowieka-jest-bledny-i-nie-wywiera-skutkow-pozza-polska/>), visited 9 March 2022.

⁴⁰District Court in Gorzów Wielkopolski 23 April 2021, No. I C 1326/19 (at the moment of submission of this article the ruling was not yet final).

⁴¹Supreme Court 16 September 2021, No. I KZ 29/21.

not, however, apply to a judgment issued by a panel which included incorrectly elected persons. To hold that such rulings – despite their flaws – are final and universally binding, would violate the Constitution. Although the Supreme Court did not rely solely on Article 6, Xero Flor played an important role in its reasoning.

It is too soon to consider the interpretation adopted by the two courts as a representation of established case law. It is also hard to speculate whether it will endure after the Tribunal's ruling of 24 November 2021. This may depend on many factors; for example, whether judges who apply this interpretation will be effectively held to disciplinary responsibility, or the outcome of infringement proceedings concerning the Constitutional Tribunal's situation, initiated recently by the European Commission.⁴²

The problem of the legal effects of those rulings of the Constitutional Tribunal that were issued with the participation of unlawfully elected persons has been analysed by Polish legal scholars but, so far, they have arrived at no consistent view. Initially, the dominant view was that, regardless of procedural flaws, judgments of the Constitutional Tribunal published in the official journal are binding.⁴³ This interpretation was supported mainly by Article 190(1) of the Constitution. More recently, the idea that judgments passed by wrongly composed panels do not legally exist has gained more popularity among legal scholars,⁴⁴ but still there is no coherent theory.

One may also wonder whether questioning the legal force of all irregular judgments of the Constitutional Tribunal is actually an appropriate action with legal basis in the Convention. The refusal of a court to comply with a judgment of the Tribunal that declared a certain legal norm to be unconstitutional would imply the possibility of applying a norm repealed by such a judgment. In some circumstances, such an action might be in conflict with the principle of legal certainty. Individuals should be able to act with confidence in the legal status of the Journal of Laws; requiring them to analyse

⁴²Press release available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070, accessed 9 March 2022.

⁴³P. Radziejewicz, 'On Legal Consequences of Judgements of the Polish Constitutional Tribunal Passed by an Irregular Panel', 4 *Review of European and Comparative Law* (2017) p. 45 at p. 56-59; M. Florczak-Wątor, 'O skutkach prawnych orzeczeń TK wydanych z udziałem osób nieuprawnionych do orzekania', in R. Balicki and M. Jabłoński (eds.), *Państwo i jego instytucje. Konstytucje – sądownictwo – samorząd terytorialny* (Wydawnictwo Uniwersytetu Wrocławskiego 2018) p. 299; Wiącek, *supra* n. 32, at p. 31-32.

⁴⁴R. Piotrowski, 'Nowa regulacja przerywania ciąży w świetle Konstytucji', 8 *Państwo i Prawo* (2021) p. 62 at p. 77; D. Szumiło-Kulczycka and K. Kozub-Ciembroniewicz, 'Konsekwencje uchybień w obszarze TK (uwagi na tle orzeczenia w sprawie K 1/20)', 8 *Państwo i Prawo* (2021) p. 81 at p. 97-98.

the legality of officially promulgated judgments of the Constitutional Tribunal would undermine legal security.⁴⁵

One way of solving this problem would be to recognise that as a rule, judgments issued by unlawful panels produce legal effects. However, in individual cases courts could depart from such rulings and apply removed provisions, if this was justified by the need to protect human rights guaranteed by the ECHR or the Constitution. Of course, this approach entails certain threats, including, in particular, the emergence of dangerous discrepancies in the case law of various courts that could ultimately undermine the protection of Convention rights.⁴⁶

Another issue is the possibility of reopening proceedings before ordinary courts which ended with final rulings based on provisions that had been declared unconstitutional by the Constitutional Tribunal in a legally flawed judgment. If one holds that unlawful Tribunal decisions do not produce any legal effects, the reopening of proceedings should be excluded. Such an interpretation may be problematic, as it could negatively affect an individual who initiated proceedings before the Constitutional Tribunal in good faith.⁴⁷

Potential for further litigation

The Court's judgment in *Xero Flor* was limited to violations of Article 6 resulting from the presence of an unlawfully elected person in adjudicating panels of the Constitutional Tribunal. However, the constitutional crisis led to many other problems which may be addressed in future rulings from the European Court of Human Rights.

First, the violation of the right to a tribunal established by law may be caused by factors other than unlawful appointments or elections of judges. In the past, the European Court of Human Rights has found violations of Article 6 in cases

⁴⁵Cf Wiącek, *supra* n. 32, at p. 31-32 (the author argues that the principle of legal certainty completely forbids Polish courts from reviewing the legality of the Tribunal's judgments; in my opinion, this is too far-reaching a statement).

⁴⁶Cf e.g. ECtHR (GC) 29 November 2016, No. 76943/11, *Lupeni Greek Catholic Parish and Others v Romania*, para. 116.

⁴⁷See e.g. Supreme Administrative Court 11 September 2018, No. I FSK 158/18, where the court held that, although the judgment of the Tribunal was issued by an unlawful panel, it may serve as a basis for reopening proceedings before administrative courts. Cf P. Polak, 'Związanie sądu wyrokiem Trybunału Konstytucyjnego wydanym w nieprawidłowo umocowanym składzie (refleksje na tle wyroku Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 20 czerwca 2018 r., sygn. akt V SA/Wa 459/18)', 3 *Zeszyty Naukowe Sądownictwa Administracyjnego* (2020) p. 62 at p. 80-83.

concerning, for example, irregularities in the allocation of cases to judges.⁴⁸ The current President of the Tribunal has repeatedly been accused of non-transparent practices in setting the adjudicating panels of the Tribunal.⁴⁹ There is no domestic authority capable of examining whether the panel adjudicating in a given case was determined in accordance with the law.⁵⁰ However, the mere fact of a completely non-transparent or arbitrary setting of panel composition could enable the European Court of Human Rights to conclude that there was an infringement of the right to a tribunal established by law.⁵¹

Second, doubts may arise whether, irrespective of the presence of unlawfully elected persons, the Constitutional Tribunal is actually an ‘independent tribunal’ within the meaning of Article 6 § 1. The European Court of Human Rights defines the independence of a court as the ‘necessary personal and institutional independence that is required for impartial decision making, and it is thus a prerequisite for impartiality’.⁵² Going by the Court’s case law, a very important factor for assessing the independence of a given body is the existence of formal guarantees of protection against external pressure, such as irremovability of its members.⁵³ However, the Court takes into account not only whether the guarantees are formally expressed in law, but whether they are respected in practice.⁵⁴

Formally, the Constitutional Tribunal is undoubtedly an independent body. The Constitution explicitly protects its independence and that of its judges. It also guarantees appropriate working conditions and remuneration for judges, and grants them immunity to protect them from being arrested and held criminally responsible without the consent of the Constitutional Tribunal itself. It also guarantees their irremovability. A factor that could negatively affect perceptions of

⁴⁸See ECtHR 12 April 2018, Nos. 36661/07 and 38433/07, *Chim i Przywieczerski v. Poland*, paras. 138-142.

⁴⁹Letter of judges of the Tribunal to the President of the Tribunal, 6 April 2017, (<http://monitorkonstytucyjny.eu/archiwa/224>), visited 9 March 2022; 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), visited 9 March 2022; M. Wolny and M. Szuleka, *A Tool of the Government. The Functioning of the Polish Constitutional Court in 2016–2021* (Helsinki Foundation for Human Rights 2021) p. 18-20.

⁵⁰With regard to the Polish regulations concerning setting adjudicating panels in the Tribunal see in particular: M. Ziółkowski, ‘Przesłanki wyznaczania sędziów do składu orzekającego Trybunału Konstytucyjnego i konsekwencje ich naruszenia’, 3 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* (2020) p. 33.

⁵¹See ECtHR 5 October 2010, No. 19334/003, *DMD GROUP, a.s. v Slovakia*, paras. 62-72.

⁵²*Astráðsson, supra* n. 2, para. 234.

⁵³ECtHR 9 February 2021, No. 15227/19, *Xboxhaj v Albania*, para. 289.

⁵⁴R. Spano, ‘The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary’, *European Law Journal* (2021) at p. 9.

the judges' independence is the method of their election. Competence in this regard belongs solely to the Sejm, without the participation of any other organs, especially the independent National Council of Judiciary. Nevertheless, the case law of the European Court of Human Rights clearly shows that judges appointed by a legislative body can still be independent, 'provided that, once elected or appointed, they are free from influence or pressure and exercise their judicial activity with complete independence'.⁵⁵

However, the question arises as to whether the Tribunal is independent not only formally, but also in practice. Its current functioning may suggest that it is no longer independent of the executive and legislative authorities. This impression is further strengthened by the fact that in recent years the Prime Minister has several times significantly delayed the publication of Constitutional Tribunal judgments in the Journal of Laws. The media has also reported on contacts between ruling party politicians and judges of the Constitutional Tribunal, and friendly relations and meetings between the current President of the Constitutional Tribunal and the Chairman of the Law and Justice Party.⁵⁶ In the light of all these factors, it may well be argued that the Constitutional Tribunal does not create the appearance of independence.⁵⁷ On the contrary, it is commonly perceived as a discredited body, incapable of impartial performance of its constitutional functions.⁵⁸

Third, at least in some cases, applicants may successfully argue that the Constitutional Tribunal which considered their case was not sufficiently impartial. The risk of violation of impartiality is related primarily to the presence of judges who in the past were active politicians of the ruling party. Two of the people elected in 2019 were not merely rank-and-file members of parliament, but leading figures of the ruling party, known for their controversial public statements; they could even be perceived as 'faces' of the controversial reforms. Polish law does not prohibit the election of an active politician, even a deputy or senator, to the position of a judge of the Constitutional Tribunal (although, of course, one cannot be an MP and a Tribunal judge at the same time). However,

⁵⁵*Xhoxhaj*, *supra* n. 53, para. 295.

⁵⁶Wolny and Szuleka, *supra* n. 49, at p. 14-15. Recently the ECtHR communicated an application lodged by a Polish NGO which was denied access to information about meetings of the President of the Tribunal with government officials and leaders of the ruling party (No. 10103/20, *Sieć Obywatelska Watchdog Polska v Poland*).

⁵⁷Wolny and Szuleka, *supra* n. 49.

⁵⁸Even the European Parliament has recently noted that the Constitutional Tribunal 'has been transformed from an effective guardian of the Constitution into a tool for legalising the illegal activities of the authorities': European Parliament, resolution of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law, (2021/2935(RSP)), (https://www.europarl.europa.eu/doceo/document/TA-9-2021-0439_EN.pdf), visited 9 March 2022.

their presence on panels adjudicating, for example, politically controversial cases or cases of particular importance to the ruling party could sometimes raise legitimate doubts about their impartiality.

A fourth potential area of litigation involves the impact of Tribunal judgments on cases pending before the courts. Applicants, even those who were not parties to proceedings before the Tribunal, could argue that their rights were violated because an ordinary court relied on a judgment of the Constitutional Tribunal issued in violation of the law. Such a complaint could be brought, in particular, if, as a result of the Tribunal's ruling, the scope of permissible interferences with rights had been extended to the detriment of individuals. This might occur when the Tribunal examines a conflict between two rights, or a right and a constitutionally protected value, and must decide which of them is given priority. In this way, it may eliminate provisions which are found to be too favourable to some groups at the expense of others. A good example is the judgment declaring unconstitutional a provision that made it legal to carry out abortions in cases of foetal defects.⁵⁹ The judgment, issued by a panel involving three incorrectly elected persons, led to a significant restriction of access to a legal abortion,⁶⁰ which could be perceived as an interference in the private lives of women. For such an interference to comply with Article 8 of the ECHR, it must, among other criteria, be made in accordance with the law. In applications communicated by the European Court of Human Rights in July 2021,⁶¹ groups of Polish women alleged that the interference with their Article 8 rights did not meet this requirement, because the judgment was issued by a panel which included incorrectly elected persons, the president of the Constitutional Tribunal was appointed in violation of the law, and one of the judges was not impartial.⁶² These objections seem to be justified. Formally, there is a legal basis for the interference. The ECHR requirement of 'lawfulness' cannot, however, be understood so narrowly. The law in question should not only be promulgated, but also enacted properly and in accordance with acts of a higher rank. It would be inconsistent with the principle of legality

⁵⁹Constitutional Tribunal 22 October 2020, No. K 1/20.

⁶⁰For the analysis of the Tribunal's judgment and its legal effects see e.g. A. Gliszczyńska-Grabias and W. Sadurski, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill): "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K 1/20', 17(1) *EuConst* (2021) p. 130.

⁶¹No. 1819/21 and three other applications, *K.B. and others v Poland*; No. 3801/21 and three other applications, *A.L.- B. and others v Poland*; No. 3639/21 and three other applications, *K.C. v Poland*.

⁶²This concerned the abovementioned former MP who, according to the applicants, lacked impartiality because before she was elected as a judge she signed a motion to declare provisions concerning access to abortion unconstitutional. Proceedings concerning this motion were eventually discontinued; however, after new parliamentary elections a group of MPs submitted a new – but substantively the same – motion.

to hold that a restriction of the rights of an individual was made ‘in accordance with the law’ on the basis of an act issued, for example, by an unauthorised body. In most cases, the European Court of Human Rights does not independently assess whether the provision on which the interference is based was enacted in accordance with national law; rather, it follows the case law of national courts. Nevertheless, the fact of the unlawful election of three persons to the Tribunal has already been established in *Xero Flor*. Although that judgment concerned Article 6, its findings as to the infringement of domestic law should also be relevant to the assessment of ‘legality’ under Article 8. It may, therefore, be argued that the right to privacy was not interfered with ‘in accordance with the law’, as the law in question was shaped by a defectively constituted body.

Complaints concerning the impact of unlawfully issued judgments on the rights of individuals may also appear in other contexts. Particularly interesting is the question of reopening proceedings after the verdict of a defectively composed Tribunal. A Tribunal judgment stating that a legal norm is inconsistent with an act of a higher rank constitutes a basis for reopening proceedings in a case concluded with a judgment or decision issued on the basis of this repealed norm. The question arises as to whether reopening proceedings on the basis of a judgment issued in violation of the law may lead to a violation of the Convention, particularly Article 6, which protects the right not to have a final court ruling called into question.⁶³

Finally, the *Xero Flor* judgment may have an impact outside Poland. Although the ruling is not revolutionary, it clarifies the scope of application of Article 6. This in turn may facilitate the lodging of applications concerning problems related to the course of proceedings before national constitutional courts. Such applications need not necessarily concern controversies about the legality of appointment of judges of constitutional courts; after all, such problems do not often occur in Europe. Applicants may also challenge the alleged lack of impartiality or independence of constitutional courts, or the unfairness of proceedings before such bodies. In this context one may observe that by the nature of constitutional courts, their composition⁶⁴ and rules of conduct are often regulated differently to other courts. This applies in particular to those bodies whose powers and positions, as with the Polish Constitutional Tribunal, differ from ordinary courts. However, in earlier jurisprudence, the European Court of Human Rights has already noted the particularity of constitutional courts. This translates, for example, into different standards regarding reasonable length of proceedings,⁶⁵ the degree of procedural

⁶³ECtHR (GC) 28 October 1999, No. 28342/95, *Brumărescu v Romania*, paras. 61-62.

⁶⁴See e.g. P. Castillo-Ortiz, ‘The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions’, 39(6) *Law and Philosophy* (2020) p. 617 at p. 634-635.

⁶⁵ECtHR 4 September 2014, No. 68919/10, *Peter v Germany*, para. 40.

formalisms⁶⁶ and limits to the number of interested entities that may participate in proceedings.⁶⁷ One may expect that the Court will continue this line by adjusting Article 6 standards to the specificity of constitutional courts.

CONCLUSION

The *Xero Flor* judgment confirmed that the election of three persons to the positions of judges of the Constitutional Tribunal in December 2015 was unlawful. Their participation in the examination of constitutional complaints thus led to a violation of the applicants' 'right to a court established by law' guaranteed in Article 6 § 1 of the ECHR.

The analysed judgment must be assessed positively. Although the earlier case law of the Court did not provide a clear answer as to whether constitutional courts with such jurisdiction and competences as the Polish Constitutional Tribunal fell within the scope of Article 6 § 1, there were many strong arguments to hold that they did. Once the Court concluded that Article 6 did apply, the finding of a breach of this provision was rather obvious, as in the light of the case law of the Constitutional Tribunal itself, it was difficult to question the unlawfulness of the election of three persons in December 2015.

Even though it is very likely that the judgment will not be implemented immediately, its importance cannot be denied. First, it will probably lead persons whose rights were violated by the activities of the Constitutional Tribunal to submit new applications to the European Court of Human Rights. These violations may concern not only the parties to the Tribunal proceedings (that is, persons who lodged a constitutional complaint) but also those persons whose cases were determined by an ordinary court which applied a provision shaped by a judgment of the Tribunal issued in violation of the law. From that perspective, the crisis over the Tribunal may be seen as a systemic problem which threatens the protection of human rights in Poland. Second, the *Xero Flor* judgment and the future case law of the European Court of Human Rights may affect the practice of domestic courts, which may be less willing to ask legal questions of the Tribunal. They may even begin to undermine the binding force of unlawfully issued Tribunal judgments, if compliance with them might – in the realities of a specific case – lead to a violation of the ECHR.

The *Xero Flor* judgment is also important because it is the first ruling of an international court concerning the Constitutional Tribunal crisis. In particular, the European Court of Justice has not yet had the opportunity to deal with this

⁶⁶ECtHR 31 March 2020, Nos. 55997/14, 68143/16 and 78841/16, *Dos Santos Calado and others v Portugal*, para. 112.

⁶⁷ECtHR (dec.) 6 February 2003 r., No. 71630/01, *Wendenburg and others v Germany*.

issue. This may seem surprising, especially since the Tribunal has recently issued decisions which threaten the effectiveness of EU law.⁶⁸ However, the European Commission has launched infringement proceedings for violations of EU law in the context of the functioning of the Constitutional Tribunal. These proceedings concern both the questioning of the primacy of the EU in recent case law of the Tribunal, as well as doubts about the independence and impartiality of the Tribunal and its irregular personnel composition. The Commission concluded that the Constitutional Tribunal can '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'.⁶⁹ The application of Article 19(1) TEU to the Constitutional Tribunal seems correct.⁷⁰ Several years before the *Xero Flor* ruling, the European Court of Justice responded to the preliminary reference submitted by the Constitutional Tribunal⁷¹ and by this accepted its status as a 'court'. Moreover, there is no doubt that the Tribunal may rule 'on questions concerning the application or interpretation of EU law'⁷² within the meaning adopted in the judgment of the Luxembourg Court in *Associação Sindical dos Juizes Portugueses*. It may, for example, assess the constitutionality of EU law directly (even though such practice conflicts with the principle of primacy of the EU law) or of domestic law implementing EU law. Even in those situations where both subjects and standards of review are limited to domestic law, the Tribunal may sometimes have to interpret EU law, and its decisions may directly or indirectly affect the protection of rights guaranteed in EU law. This is especially so since the content of many rights guaranteed in EU law is very similar or even identical to their counterparts provided in the Polish national constitution. It may well be argued, then, that the Constitutional Tribunal must meet the requirements of effective judicial protection derived from Article 19(1) TEU.



⁶⁸See Constitutional Tribunal 14 July 2021, No. P 7/20; Constitutional Tribunal 7 October 2021, K 6/21; J. Jaraczewski, 'Gazing into the Abyss. The K 3/21 decision of the Polish Constitutional Tribunal', *Verfassungsblog*, 12 October 2021, (<https://verfassungsblog.de/gazing-into-the-abyss/>), visited 9 March 2022.

⁶⁹Press release, *supra* n. 42.

⁷⁰See also L. Pech et al., 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In) Action', 13 *Hague Journal on the Rule of Law* (2021) p. 1 at p. 6-8 and p. 24.

⁷¹ECJ 7 March 2017, Case C 390/15, *Rzecznik Praw Obywatelskich*, ECLI:EU:C:2017:174.

⁷²ECJ 27 February 2018, Case C 64/16, *Associação Sindical dos Juizes Portugueses*, para. ECLI:EU:C:2018:117.