

**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**

4 November 2021



## Executive Summary

This expert analysis considers the applicability of Article 6 of the European Convention on Human Rights (ECHR) to the constitutional courts of the States Parties. Article 6 ECHR guarantees the right to a fair trial before a tribunal established by law for individuals whenever their civil rights and obligations or criminal liabilities are in question. The States Parties to the Convention have explicitly granted the European Court of Human Rights the competence to interpret and apply this provision. As a result it has the authority to review the internal arrangements of the judiciary under Article 6 ECHR. A court or tribunal must, among other requirements, be independent and impartial, free of undue influence from the executive, and composed of appointees of the highest merit who have been selected in accordance with the domestic rules.

In settled case-law dating back to the 1990s, the Strasbourg Court has been clear that, despite their special role, constitutional courts will fall within the scope of a “tribunal” whenever they exercise judicial functions. The Court’s case-law regarding constitutional courts in Germany, France, Austria and Switzerland, amongst others, has clarified that constitutional courts will be subject to the obligations of Article 6 ECHR whenever their proceedings are decisive for individual rights and obligations or capable of affecting the outcome of the dispute before ordinary courts. The condition of a “tribunal established by law” includes judicial appointments, and requires that such appointments are in conformity with domestic law.

The expert analysis concludes that the Polish Constitutional Tribunal falls under the definition of a “tribunal” whenever the exercise of its function in determining the hierarchical compliance of provisions and normative acts with the Constitution is decisive for civil rights and obligations, thus bringing it within the remit of Article 6 in such cases. The legality of appointments to the Tribunal in accordance with Poland’s own constitutional rules are essential for compliance with the right to a fair trial.



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# 1. Introduction

## The background facts

On 7 May 2021, the European Court of Human Rights (ECtHR) gave its Chamber judgment in *Xero Flor w Polsce sp. z o.o. v. Poland*.<sup>1</sup> The Court found that there had been two violations of the applicant's right to a fair trial under Article 6 § 1 of the European Convention on Human Rights (ECHR). First, there had been a violation of the right to a fair hearing as a result of the Polish courts not answering arguments that the law applied in the case had been incompatible with the Constitution, and therefore failing in their duty to provide reasoned decisions. Secondly, the Strasbourg court also found that there had been a violation of the right guaranteed by Article 6 § 1 ECHR to a "tribunal established by law" due to irregularities in the appointment of one of the judges of the Constitutional Tribunal that heard the applicant's case. The Polish Government decided not to request that the case be referred to the Grand Chamber and the judgment therefore became final on 7 August 2021.<sup>2</sup>

On 24 November 2021, the Polish Constitutional Tribunal will hear the K 6/21 application lodged by the Prosecutor General of Poland. The application has requested compliance testing with provisions of the Polish Constitution of: (1) the extent to which the term "tribunal" as used in Article 6 § 1 ECHR includes the Constitutional Tribunal; (2) the equation in Article 6 § 1 ECHR of the guarantees of an individual case being examined within a reasonable time by an independent and impartial tribunal established by law when deciding on civil rights and obligations or merits of a criminal accusation with the competence of the Constitutional Tribunal to adjudicate on the hierarchical compliance of provisions and normative acts, as specified in the Constitution; and (3) the inclusion under Article 6 § 1 ECHR of assessment by the ECtHR of the legality of the process of selecting judges of the Constitutional Tribunal.

On 31 October 2021, the Polish Commissioner for Human Rights requested the Bingham Centre for the Rule of Law to prepare an expert analysis of the applicability of Article 6 of the ECHR to the constitutional courts of the States Parties to the Convention, in the context of the case K 6/21 pending before the Polish Constitutional Tribunal, to which the Commissioner is a party. In responding to the request, this analysis considers all three questions of whether the Polish Constitutional Tribunal, as an example of a constitutional court, falls within the definition of a tribunal under Article 6 ECHR, whether its proceedings concern civil rights and obligations and criminal liabilities, and whether its composition can be subject to review. All three questions are interrelated in the task of providing an analysis of the applicability of Article 6 ECHR to constitutional courts specifically in the context of the K 6/21 proceedings.

## Structure of this expert analysis

Section 2 of the analysis presents the overall legal framework relevant to the applicability of Article 6 ECHR to constitutional courts of the States Parties. The first sub-section presents the background of Poland as a High Contracting Party to the ECHR; the second sub-section describes the fundamentals of the binding operation of the Convention and the European Court of Human Rights; the third sub-section outlines the recent re-affirmation of these commitments in the 2018 Declaration of Copenhagen; and the fourth sub-section explains the relevance of the Vienna Convention on the Law of Treaties.

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<sup>1</sup> Application No. 4907/18.

<sup>2</sup> Under Article 44 ECHR.

Section 3 outlines general considerations on the right to a fair trial under Article 6 ECHR. The first sub-section details the importance of the right to a fair trial; the second sub-section explains the wide concept of a “court” or “tribunal” within the meaning of Article 6 ECHR; the third sub-section details the application of this wide concept to encompass constitutional courts; and the fourth sub-section describes the obligation to appeal to a constitutional court or tribunal in the context of the requirement to exhaust domestic remedies.

Section 4 discusses the applicability of Article 6 ECHR to proceedings before the Constitutional Tribunal of Poland. The first sub-section explains the application of the wide concept of “court” or “tribunal” to include the Polish Constitutional Tribunal in *Xero Flor*; the second sub-section discusses the ECtHR’s inclusion of judicial appointments within the requirements of the right to a “tribunal established by law” under Article 6 ECHR; and the third sub-section considers whether these Article 6 ECHR requirements apply to all forms of proceedings before the Constitutional Tribunal.

Section 5 concludes the expert analysis, and summarises our view on the applicability of Article 6 ECHR to constitutional courts.

## 2. Overall legal framework

### Poland as a High Contracting Party to the European Convention on Human Rights

The Republic of Poland became a member of the Council of Europe, by ratifying its Statute, on 26 November 1991. In doing so it accepted, as is set out in Article 3 of the Statute, the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and it undertook to collaborate sincerely and effectively in the realisation of the aims of the Council of Europe. When discussing Poland’s application for membership of the Council of Europe, the Parliamentary Assembly of the Council of Europe expressed a favourable opinion, noting, *inter alia*, that the constitutional amendment of 7 April 1989 “paved the way for a series of reforms which are ... removing the obstacles which prevented Poland from acceding to the European Convention on Human Rights”.<sup>3</sup> Of course, the Polish Constitution has changed since, but the important thing to note is that the Parliamentary Assembly based its consent to the Polish accession to the Council of Europe on the understanding that there were no more contradictions between the ECHR and the Polish Constitution. Any later changes in the domestic law could not affect that situation.

Indeed, on 26 November 1991 Poland signed the Convention for the Protection of Human Rights and Fundamental Freedoms – commonly known as the European Convention on Human Rights (hereafter referred to as ECHR or the Convention). Poland ratified the Convention on 19 January 1993 and, as a result, the Convention entered into force for Poland on that date.<sup>4</sup> As the European Court of Human Rights (ECtHR or the Court) has noted: “... ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention. If that should not be the case, the State concerned has the possibility of entering a reservation in respect of the specific provisions of the Convention (or Protocols) with which it cannot fully comply by reason of the continued existence of the law in question.”<sup>5</sup> Poland did not make any reservations. No issues of potential contradiction between the Convention and the Polish Constitution were

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<sup>3</sup> PACE, Report “Poland’s application for membership of the Council of Europe” (Doc. 6289 of 19 September 1990), para. 7 See also Opinion 154 of 2 October 1990.

<sup>4</sup> Over the years Poland also ratified all protocols to the Convention, with the exception of Protocols 12 and 16.

<sup>5</sup> ECtHR, decision of 23 January 2002, *Slivenko and Others v. Latvia* (appl. no. 48321/99), § 60.

identified or even raised at any stage during the process leading up to the ratification by Poland of the Convention.

### The Convention and the European Court of Human Rights

Article 1 ECHR provides that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” In order to ensure the observance of the engagements of the High Contracting Parties, Article 19 of the Convention provides for the establishment of the European Court of Human Rights. The Court’s jurisdiction extends, according to Article 32 ECHR, to all matters concerning the interpretation and application of the Convention.

Pursuant to Article 46 § 1 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Thus, upon ratification of the Convention, a State assumes the unequivocal legal obligation to comply with the final judgments of the Strasbourg Court, and hence to apply the Convention standards as interpreted by the Court.

“Final judgments” are defined in Article 44 ECHR: these are the judgments of the Grand Chamber, as well as judgments of a Chamber if reference of the case to the Grand Chamber has not been requested within three months or if such a request has been rejected. The possibility to request a referral of a case to the Grand Chamber, after a Chamber has delivered judgment in that case, is introduced in Article 43 ECHR. This procedure allows any party to that case to argue that “a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance”(paragraph 2) is at stake. If such a request for referral has been accepted, the judgment of the Chamber will be set aside in order to be replaced by a new – and final – judgment of the Grand Chamber.<sup>6</sup> Clearly there will be situations in which a party to a case – the applicant or the respondent government – strongly disagrees with the findings of a Chamber. The referral procedure of Article 43 is meant exactly for that situation. If, however, a party does *not* avail itself of its right to request a referral, it must be assumed that it acquiesces in the Chamber judgment which, accordingly, becomes “final” and binding. Any other conclusion would undermine the principle of legal certainty and indeed the very system set up for the collective enforcement of the engagements undertaken by the High Contracting Parties.

The execution of judgments is supervised by the Committee of Ministers. Subject to this process of monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46, provided that such means are compatible with the conclusions set out in the Court’s judgment.<sup>7</sup> In its case-law the Court has underlined the importance of the effective execution of its judgments, in good faith and in a manner compatible with the “conclusions and spirit” of those judgments.<sup>8</sup> If the Committee of Ministers finds that a State refuses to abide by a final judgment in a case to which it is a party, it may resort to infringements proceedings (Article 46 § 4, ECHR).

### The Copenhagen Declaration (2018)

Over the years, the Member States of the Council of Europe have held a series of high-level conferences to review the effectiveness of the Convention system. The most recent of these

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<sup>6</sup> ECtHR, judgment of 12 July 2001, *K. and T. v. Finland* (appl. no. 25702/94), § 140.

<sup>7</sup> ECtHR, judgment of 29 May 2019, *Ilgar Mammadov v. Azerbaijan (infringement proceedings)* (appl. no. 15172/13), §§ 147-156; judgment of 22 June 2004, *Broniowski v. Poland* (appl. no. 31443/96), § 192.

<sup>8</sup> ECtHR, judgment of 11 October 2011, *Emre v. Switzerland (no. 2)* (appl. no. 5056/10), § 75.

conferences was held in Copenhagen, in 2018. In the Declaration that was adopted on this occasion, the Member States “reaffirm(ed) their deep and abiding commitment to the Convention” (para. 1). They observed that nowadays the Convention is incorporated into the domestic legal order of the States Parties (para. 8) and underlined “the responsibility of national authorities to guarantee the rights and freedoms set out in the Convention” (para. 9). In this connection, the Declaration called upon the States Parties “to continue strengthening the implementation of the Convention at the national level ... in particular by ... creating and improving effective domestic remedies” (para. 16). As to the role of the Court, the Declaration states that

26. The Court ... authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions.

Thus the Court’s role to give authoritative interpretations of the Convention, as set out in Article 32 ECHR, was once again acknowledged at the highest political level.

### The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties of 23 May 1969, to which the Copenhagen Declaration refers, was first relied upon by the Court in 1975: the Vienna Convention’s rules on interpretation guided the Court in the case of *Golder* in its interpretation of Article 6 ECHR.<sup>9</sup> The Vienna Convention – to which the Republic of Poland acceded on 2 July 1990 – also contains several provisions which are relevant for present purposes:

#### **Preamble, third paragraph**

*Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised,

#### **Article 26 - *Pacta sunt servanda***

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

#### **Article 27 - Internal law and observance of treaties**

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies. Indeed, according to the well-established international legal principles of State responsibility, all State organs can breach international law.<sup>10</sup> This is reflected in the case-law of the Strasbourg Court, according to which no distinction is made as to the type of rule or measure concerned; no part of the Member States’ “jurisdiction” is excluded from scrutiny under the Convention: “It is, therefore, with respect to their ‘jurisdiction’ as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called on to show compliance with the Convention”.<sup>11</sup>

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<sup>9</sup> ECtHR, judgment of 21 Feb. 1975, *Golder v. UK* (appl. no. 4451/70), § 29 et seq.

<sup>10</sup> Articles on the Responsibility of States for International Wrongful Acts (ARSIWA, 2001), Article 4: “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions...”.

<sup>11</sup> ECtHR, judgment of 30 January 1998, *United Communist Party of Turkey a.o. v. Turkey* (appl. no. 19392/92), § 29.



## 2. The right to a fair trial (Article 6 ECHR) – general considerations

### The importance of the right to a fair trial (Article 6 ECHR)

The right to a fair trial, enshrined in Article 6 ECHR, holds a prominent place in the case-law of the European Court of Human Rights. It is important in a quantitative sense, in that this is the right most often invoked in Strasbourg – well over 25% of the violations found by the European Court concern Article 6. The right to a fair trial is also important in a substantive sense, both for the individual and for the society at large. It is one of the core elements making up the rule of law, the acceptance of which, as was noted above, is one of the conditions for membership of the Council of Europe.<sup>12</sup> The Court has always acknowledged that it is of “fundamental importance in a democratic society that the courts inspire confidence in the public”.<sup>13</sup> Almost forty years ago, in 1982, the Court observed that “in order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation”.<sup>14</sup> Reflecting the importance of the right to a fair trial, the Court has emphasised time and again that “Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements”.<sup>15</sup>

The guarantees that make up the right to a fair trial apply in all cases about disputes (“*contestations*”) over civil rights and obligations or where criminal charges are determined. According to well-established case law, for Article 6 § 1 in its civil limb to be applicable, there must be a “dispute” regarding a “right” which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right, but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, as mere tenuous connections or remote consequences are not sufficient to bring Article 6 § 1 into play.<sup>16</sup> It is important to point out that several key concepts, such as “civil rights and obligations” and “criminal charge” have an “autonomous” meaning – that is, they have a particular meaning under the ECHR, of which the European Court of Human Rights is the definitive and authoritative interpreter.<sup>17</sup>

### The wide concept of a “court” or “tribunal” within the meaning of Article 6 ECHR

According to the Court’s settled case-law, which goes back to the 1980s, the concept of a “tribunal” has an autonomous meaning: whether a particular body qualifies as a “tribunal” within the meaning of Article 6 ECHR does not depend on its categorisation under domestic law. Instead, the concept of a “tribunal” within the meaning of Article 6 ECHR is characterised in the substantive sense of the term by the nature of its judicial function, that is to say, determining matters within its competence on the basis of legal rules and after

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<sup>12</sup> See also Venice Commission, *Rule of Law checklist* (doc. CDL-AD(2016)007rev, 2016), pp. 20-28.

<sup>13</sup> See over the years for instance ECtHR, judgment of 24 May 1989, *Hauschildt v. Denmark* (appl. no. 10486/83), § 48; judgment of 26 February 1993, *Padovani v. Italy* (appl. no. 13396/87), § 27; judgment of 3 July 2012, *Mariusz Lewandowski v. Poland* (appl. no. 66484/09), § 41; judgment of 16 February 2021, *Meng v. Germany* (appl. no. 1128/17), § 42.

<sup>14</sup> ECtHR, judgment of 1 October 1982, *Piersack v. Belgium* (appl. no. 8692/79), § 30.

<sup>15</sup> See, among many other authorities, ECtHR, judgment of 27 February 1992, *Tusa v. Italy* (appl. no. 13299/87), § 17; judgment of 30 April 2020, *Keaney v. Ireland* (appl. no. 72060/17), § 87.

<sup>16</sup> See, among many other authorities, ECtHR, judgment of 2000, *Athanassoglou a.o. v. Switzerland* (appl. no. 27644/95), § 43; judgment of 25 September 2018, *Denisov v. Ukraine* (appl. no. 76639/11), § 44.

<sup>17</sup> See, among many other authorities, ECtHR, judgment of 28 June 1978, *König v. Germany* (appl. no. 6232/73), § 88.

proceedings conducted in a prescribed manner.<sup>18</sup> It follows from the Court's substantive approach that the concept of a "tribunal", within the autonomous meaning of Article 6 § 1 ECHR, covers a wide variety of bodies exercising a judicial function. Hence the requirements of Article 6, for instance those relating to impartiality, apply also to juries.<sup>19</sup> In a similar vein the Court has held that the right of access to a court, which is included in Article 6 ECHR, is not necessarily to be understood as access to a court of law of the classic kind, integrated within the standard judicial machinery of the country; thus, the "tribunal" may be a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees.<sup>20</sup> Likewise it has been accepted that, under certain circumstances, arbitral tribunals have to afford the safeguards provided for under Article 6 § 1 of the Convention.<sup>21</sup>

### The composition of a "court" or "tribunal" within the meaning of Article 6 ECHR

According to Article 6 ECHR a "court" or "tribunal" must satisfy a series of further requirements. It should be established by law, which implies that its composition should be in accordance with the law too;<sup>22</sup> it should be independent, in particular from the executive, and impartial; there should be guarantees against outside pressure; and the duration of its members' terms of office is taken into account as well.<sup>23</sup> Procedural safeguards must exist in order to ensure that judicial autonomy is not jeopardised by undue external or internal influences. Hence decisions affecting the careers of judges – such as a transfer to a lower ranking court by way of disciplinary measure – should in principle be subject to judicial review.<sup>24</sup>

In a recent judgment the Grand Chamber added that it is inherent in the very notion of a "tribunal" that it is composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law. The Court went on to underline the paramount importance of a rigorous process for the appointment of ordinary judges to ensure that the most qualified candidates – both in terms of technical competence and moral

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<sup>18</sup> See e.g. ECtHR, judgment of 22 October 1984, *Sramek v. Austria* (appl. no. 8790/79), § 36; judgment of 30 November 1987, *H. v. Belgium* (appl. no. 8950/80), § 50; judgment of 29 April 1988, *Belilos v. Switzerland* (appl. no. 10328/83), § 64.

<sup>19</sup> See, among many other authorities, ECtHR, judgment of 10 June 1996, *Pullar v. UK* (appl. no. 22399/93), § 30; judgment of 9 May 2000, *Sander v. UK* (appl. no. 34129/96), § 22.

<sup>20</sup> ECtHR, judgment of 8 July 1986, *Lithgow a.o. v. UK* (appl. no. 9006/80), § 201.

<sup>21</sup> ECtHR, judgment of 20 May 2021, *Beg S.p.a. v. Italy* (appl. no. 5312/11), § 143.

<sup>22</sup> See e.g. ECtHR, judgment of 28 February 2002, *Lavents v. Latvia* (appl. no. 58442/00), § 114. Only a French version of this judgment exists, but it is worth including the passage in full: "La Cour rappelle qu'en vertu de l'article 6 § 1, un « tribunal » doit toujours être « établi par la loi ». Cette expression reflète le principe de l'Etat de droit, inhérent à tout le système de la Convention et de ses protocoles. En effet, un organe n'ayant pas été établi conformément à la volonté du législateur, serait nécessairement dépourvu de la légitimité requise dans une société démocratique pour entendre la cause des particuliers. L'expression « établi par la loi » concerne non seulement la base légale de l'existence même du tribunal, mais encore la composition du siège dans chaque affaire (...). La « loi » visée par cette disposition est donc non seulement la législation relative à l'établissement et à la compétence des organes judiciaires, mais également toute autre disposition du droit interne dont le non-respect rend irrégulière la participation d'un ou de plusieurs juges à l'examen de l'affaire. Il s'agit notamment des dispositions relatives aux mandats, aux incompatibilités et à la récusation des magistrats (...). Le non-respect, par un tribunal, des dispositions susvisées, emporte en principe violation de l'article 6 § 1 (voir *Zand c. Autriche*, requête no 7360/76, rapport de la Commission du 12 octobre 1978, DR 15, p. 70, §§ 68-71, et *Rossi c. France*, requête no 11879/85, décision de la Commission du 6 décembre 1989, DR 63, p. 105). La Cour a donc compétence pour se prononcer sur le respect des règles du droit interne sur ce point. Toutefois, vu le principe général selon lequel c'est en premier lieu aux juridictions nationales elles-mêmes qu'il incombe d'interpréter la législation interne, la Cour estime qu'elle ne doit mettre en cause leur appréciation que dans des cas d'une violation flagrante de cette législation (...)."

<sup>23</sup> See e.g. ECtHR, judgment of 29 April 1988, *Belilos v. Switzerland* (appl. no. 10328/83), § 64.

<sup>24</sup> ECtHR, judgment of 9 March 2021, *Bilgen v. Turkey* (appl. no. 1571/07), § 96,

integrity – are appointed to judicial posts. It goes without saying, the Court observed, that the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be. It is further evident that non-professional judges could be subject to different selection criteria, particularly when it comes to the requisite technical competencies. In the Court’s view, such merit-based selection not only ensures the technical capacity of a judicial body to deliver justice as a “tribunal”, but it is also crucial in terms of ensuring public confidence in the judiciary and serves as a supplementary guarantee of the personal independence of judges.<sup>25</sup>

Over the years, the composition of tribunals has been the subject of many complaints. For instance the European Court found violations of Article 6 ECHR in over 100 cases as regards the composition of State Security Courts in Turkey;<sup>26</sup> it found violations as regards the composition of courts martial in the UK;<sup>27</sup> and it found violations in a whole variety of cases where the participation of one or more judges in the examination of a case was contrary to domestic law.<sup>28</sup>

### Constitutional courts as “tribunals” within the meaning of Article 6 ECHR

Against this background it does not come as a surprise that constitutional courts and tribunals are also capable of falling within the scope of the concept of a “tribunal” within the meaning of Article 6 ECHR.<sup>29</sup> Although the specific functions of constitutional courts and tribunals differ from country to country, they do enjoy a special role and status. Yet, it is clear from long established Strasbourg case-law going back to the 1990s that this in itself is not a sufficient ground to deny the applicability of Article 6 § 1 to proceedings before these bodies.<sup>30</sup>

Indeed, there are many examples in its case-law where the Strasbourg Court reviewed the proceedings before constitutional courts and tribunals under Article 6 ECHR:

- proceedings brought by individuals and references from domestic courts to the German *Bundesverfassungsgericht*;<sup>31</sup>
- proceedings before the Austrian *Verfassungsgerichtshof*;<sup>32</sup>
- proceedings before the French *Conseil constitutionnel*;<sup>33</sup>
- public-law appeals (*staatsrechtliche Beschwerde*) before the Swiss *Bundesgericht*;<sup>34</sup>
- constitutional appeals (*ústavní stížnost*) before the Czech *Ústavní soud*;<sup>35</sup>

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<sup>25</sup> ECtHR, judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (appl. no. 26374/18), §§ 220-222.

<sup>26</sup> Starting with ECtHR, judgment of 9 June 1998, *Incal v. Turkey* (appl. no. 22678/93), §§ 65-73.

<sup>27</sup> Starting with ECtHR, judgment of 25 February 1997, *Findlay v. UK* (appl. no. 22107/93), §§ 70-80.

<sup>28</sup> E.g. ECtHR, judgment of 30 May 2013, *Zeynalov v. Azerbaijan* (appl. no. 31848/07), §§ 29-32, with further references.

<sup>29</sup> This is indeed the assumption of the Venice Commission, *Rule of Law checklist* (doc. CDL-AD(2016)007rev, 2016), p. 28: “The right to a fair trial imposes the implementation of all courts’ decisions, including those of the constitutional jurisdiction”.

<sup>30</sup> ECtHR, judgment of 27 July 2000, *Klein v. Germany* (appl. no. 33379/96), § 29.

<sup>31</sup> ECtHR, judgment of 16 September 1996, *Süssmann v. Germany* (appl. no. 20024/92), §§ 34-41; judgment of 1 July 1997, *Pammel v. Germany* (appl. no. 17820/91), § 53; dec. of 4 October 2001, *Teuschler v. Germany* (appl. no. 47636/99); dec. of 12 May 2009, *Greenpeace e.V. v. Germany* (appl. no. 18215/06).

<sup>32</sup> ECtHR, judgment of 28 May 1997, *Pauger v. Austria* (appl. no. 16717/90), §§ 47-49.

<sup>33</sup> ECtHR, judgment of 21 October 1997, *Pierre-Bloch v. France* (appl. no. 24194/94), § 48.

<sup>34</sup> ECtHR, judgment of 3 March 2000, *Kraska v. Switzerland* (appl. no. 13942/88), § 26.

<sup>35</sup> ECtHR, judgment of 3 March 2000, *Krčmář a.o. v. the Czech Republic* (appl. no. 35376/97), § 36; judgment of 21 June 2005, *Milatová a.o. v. the Czech Republic* (appl. no. 61811/00), § 36.

- proceedings through which domestic courts could raise questions of constitutionality (*cuestión de inconstitucionalidad*)<sup>36</sup> as well as individual *amparo* proceedings<sup>37</sup> before the Constitutional Court of Spain;
- constitutional appeals before the Croatian *Ustavnom sudu*.<sup>38</sup>

All this is not to say that the applicability of Article 6 ECHR to constitutional courts has never been contested. Especially in the mid-1990s the Strasbourg Court dealt with cases in which some respondent governments argued that Article 6 ECHR did *not* apply to ‘their’ constitutional courts. In essence two arguments were advanced. The first argument was that by reason of their nature, structure and jurisdiction, constitutional courts fell outside the ambit of Article 6 § 1. This argument on its own has never been successful. The approach by the European Court in dealing with a case that involved the Slovenian Constitutional Court is characteristic:

36. The Court recalls that it is fully aware of the special role and status of a Constitutional Court, whose task is to ensure that the legislative, executive and judicial authorities comply with the Constitution and which, in those States that have made provision for a right of individual petition, affords additional legal protection to citizens at national level in respect of their fundamental rights guaranteed by the Constitution (...).

37. The Court has had to examine the question of the applicability of Article 6 § 1 of the Convention to proceedings in a Constitutional Court in a number of cases and has consistently held that Constitutional-Court proceedings do not in principle fall outside the scope of Article 6 § 1 (...).<sup>39</sup>

The second argument against the applicability of Article 6 to constitutional courts is that they do not rule on the "civil rights and obligations" of individuals or determine criminal cases. Rather they have to ensure, so the argument goes, that general constitutional law is complied with, and they do so by carrying out a review at an “abstract” level. If correct, this argument would lead to the conclusion that Article 6 ECHR is not applicable to the proceedings at hand. The Strasbourg Court has not ruled out the possibility that Article 6 does not apply to some proceedings before constitutional courts, but determines on a case-by-case basis whether the argument is well-founded in the particular case.

In the case of *Ruiz Mateos* (1993) a law provided for the expropriation of a group of companies listed in its annex. The shareholders of the companies argued that this was a concrete and specific measure, despite its status as a formal law. The applicants emphasised that they could not contest the expropriation in the civil courts unless the law was declared invalid; yet such a ruling could only be made by the Constitutional Court, following referral of the matter to it by an ordinary court. In this specific situation, the Strasbourg Court noted that the annulment, by the Constitutional Court, of the contested provisions would have led the civil courts to allow the claims of the applicants. In the present case, the civil and the constitutional proceedings even appeared so interrelated that to deal with them separately would be artificial and would considerably weaken the protection afforded in respect of the applicants’ rights. The Court noted that, by raising questions of

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<sup>36</sup> ECtHR, judgment of 23 June 1993, *Ruiz-Mateos v. Spain* (appl. no. 12952/87), §§ 35, 55-60.

<sup>37</sup> ECtHR, judgment of 25 November 2003, *Soto Sanchez v. Spain* (appl. no. 66990/01), § 35.

<sup>38</sup> ECtHR, decision of 12 October 2010, *Jankoović v. Croatia* (appl. no. 43440/98), pp. 6-7.

<sup>39</sup> ECtHR, judgment of 12 June 2001, *Tričković v. Slovenia* (appl. no. 39914/98), §§ 36-37.

constitutionality, the applicants were using the sole – and indirect – means available to them of complaining of an interference with their right of property. As a result, Article 6 applied.<sup>40</sup>

Three years later, in the case of *Süssmann* (1996) the applicant complained about a reduction in his supplementary pension. Whilst litigating in Germany he had lodged an appeal in the Federal Constitutional Court (*Bundesverfassungsgericht*) concerning certain amendments to his pension fund's rules. In Strasbourg, he argued that the Federal Constitutional Court had failed to deal with his case within a reasonable time. The German government argued that Article 6 ECHR did not apply to these proceedings. The European Commission of Human Rights, which still existed at the time, took a different view: it decided that a State which establishes a constitutional-type court is under a duty to ensure that litigants enjoy in the proceedings before it the fundamental guarantees laid down in Article 6. The Court ruled that the relevant test is "whether the result of the Constitutional Court proceedings is capable of affecting the outcome of the dispute before the ordinary courts". The Court continued:

42. The dispute as to the amount of the applicant's pension entitlement was of a pecuniary nature and undeniably concerned a civil right within the meaning of Article 6 (...) the only avenue through which Mr Süßmann could pursue further determination of that dispute was by means of an appeal whereby he alleged a breach of his constitutional right of property. The Federal Constitutional Court proceedings therefore concerned a dispute over a civil right.

(...) In the present case, if the Federal Constitutional Court had found that the amendments to the civil servants' supplementary pensions scheme infringed the constitutional right of property and had set aside the impugned decisions, Mr Süßmann would have been reinstated in his rights. Thus he would have received the full amount of his initial supplementary pension.

44. The Federal Constitutional Court proceedings were therefore directly decisive for a dispute over the applicant's civil right.<sup>41</sup>

The Court therefore concluded that Article 6 § 1 was applicable to the proceedings in issue. The same approach was followed in later cases, for instance in 2001 as regards proceedings before the Constitutional Court of Slovenia:

39. The Court notes that the proceedings complained of concerned the applicant's claim for an advance on his military pension. The Court reiterates that under its settled case-law the relevant test in determining whether proceedings come within the scope of Article 6 § 1, even if they are conducted before a Constitutional Court, is whether their outcome is decisive for the determination of the applicant's civil rights and obligations (...).<sup>42</sup>

It is clear, therefore, that the mere fact that proceedings have taken place before a constitutional court does not suffice to remove them from the ambit of Article 6 § 1. What matters is that their outcome is "decisive" for "civil rights and obligations" or "capable of affecting the outcome of the dispute before the ordinary courts".

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<sup>40</sup> ECtHR, judgment of 23 June 1993, *Ruiz-Mateos v. Spain* (appl. no. 12952/87), §§ 35, 55-60.

<sup>41</sup> ECtHR, judgment of 16 September 1996, *Süssmann v. Germany* (appl. no. 20024/92), §§ 42-44.

<sup>42</sup> ECtHR, judgment of 12 June 2001, *Tričković v. Slovenia* (appl. no. 39914/98), §§ 36-39.

## The obligation to appeal to a constitutional court or tribunal in the context of the requirement to exhaust domestic remedies

In light of the foregoing it is understandable that governments have argued that individuals should submit complaints to the constitutional court or tribunal of their country in order to meet the requirement to exhaust domestic remedies (Article 35 § 1, ECHR). The argument was made, for instance, by the governments of Turkey<sup>43</sup>, Albania<sup>44</sup>, Germany<sup>45</sup> (even as recently as 2021)<sup>46</sup> and indeed, and relatively frequently, Poland.<sup>47</sup> The success of these preliminary objections depends on the availability and effectiveness of the remedy in the particular case.

## 4. The applicability of Article 6 ECHR to proceedings before the Constitutional Tribunal of Poland

### The *Xero Flor* judgment and the wide concept of court or tribunal

In the *Xero Flor* judgment,<sup>48</sup> the European Court of Human Rights reiterated and applied its long established wide concept of a “court” or “tribunal” under Article 6 ECHR to the Polish Constitutional Tribunal. The Polish government did not request a rehearing of the case before the Grand Chamber. This must be assumed to demonstrate acquiescence to the judgment, regardless of any political criticism of the outcome.

191. The Court reiterates that according to its well-established case-law on this issue, the relevant test in determining whether proceedings come within the scope of Article 6 § 1 of the Convention, even if they are conducted before a constitutional court, is whether their outcome is decisive for the determination of the applicant’s civil rights and obligations (...).<sup>49</sup>

194. It is true that, in accordance with the Constitution, the Constitutional Court does not administer justice. However, the Constitution defines the Constitutional Court as a judicial authority charged principally with reviewing the constitutionality of the law. Its judges enjoy independence in the exercise of their office (see Article 195 § 1 of the Constitution). According to the Court’s settled case-law, a “tribunal” is characterised in the substantive sense of the term by its judicial functions, that is to say, determining matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner. It must also satisfy a series of further

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<sup>43</sup> For instance ECtHR, decision of 29 January 2019, *Elçi v. Turkey* (appl. no. 63129/15), §§ 39-56.

<sup>44</sup> For instance ECtHR, decision of 1 December 2009, *Jakupi v. Albania* (appl. no. 11186/03).

<sup>45</sup> For instance ECtHR, judgment of 22 March 2012, *Ostermünchner v. Germany* (appl. no. 36035/04), § 51.

<sup>46</sup> ECtHR, decision of 7 September 2021, *Köhler v. Germany* (appl. no. 3443/18).

<sup>47</sup> ECtHR, decision of 11 June 2002, *Paśławski v. Poland* (appl. no. 38678/97): “The Government further submitted that the constitutional complaint was ‘the most proper’ remedy in the present case. It was introduced in domestic law on 17 October 1997, when the new Polish constitution entered into force. The Government pointed out that if the applicant had been dissatisfied with the outcome of the proceedings before civil courts he could have lodged a complaint with the Constitutional Court. Had he won the case, the Constitutional Court could have quashed the impugned legislation breaching the applicant’s Convention rights and he would be able to apply for the reopening of his case under Article 401 of the Code of Civil Procedure. The civil courts would then be able to award him compensation as the impugned legislation would no longer be in force”. In the Court’s case-law there are many examples of the Polish government making the similar arguments: *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003; *Pachla v. Poland* (dec.), no. 8812/02, 8 November 2005; *Wiącek v. Poland* (dec.), no. 19795/02, 17 January 2006 and *Tereba v. Poland* (dec.), no. 30263/04, 21 November 2006; *Łaszkiwicz v. Poland*, no. 28481/03, § 68, 15 January 2008; *Liss v. Poland* (dec.), no. 14337/02, 16 March 2010; and *Urban v. Poland* (dec.), no. 29690/06, 7 September 2010; *Hösl-Daum and Others v. Poland* (dec.), no. 10613/07, § 42, 7 October 2014.

<sup>48</sup> ECtHR, judgment of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland* (appl. no. 4907/18).

<sup>49</sup> *ibid*, § 191 (references omitted).

requirements, such as “independence, in particular of the executive; impartiality; duration of its members’ terms of office” (...). The Court has no doubt that the Constitutional Court should be regarded as a “tribunal” within the autonomous meaning of Article 6 § 1.<sup>50</sup>

The ECtHR outlined the arguments put forward by the Polish government, which the Prosecutor General now seeks to re-argue before the Constitutional Tribunal in the first two grounds of the application in K 6/21:

“The Constitution deliberately distinguished between courts and tribunals (compare Article 10 § 2 and Article 173) and conferred on them separate functions and competences. The Constitution used separate names to define those bodies and...included provisions common to both groups (Articles 173-174) as well as ones specific to the courts (Articles 175-185), to the Constitutional Court (Articles 188-197) and to the Tribunal of States (Articles 198-201).<sup>51</sup>

However, as was noted above, the Strasbourg Court adopted as long ago as the 1980s a substantive, functional approach, whereby the nomenclature used is not determinative of a body qualifying as being subject to protection of the right to fair trial under Article 6 § 1 ECHR. Crucially, the ECtHR also does not recognise an exclusive demarcation between the judicial roles of “deciding on the rights and obligations of a given entity of a civil nature” – what the Polish government referred to in the *Xero Flor* proceedings as “administering justice” – and the role of a constitutional court of adjudicating on the hierarchical compliance of provisions and normative acts, as specified in the Constitution. Indeed, it is recognised that the latter role of adjudicating on constitutionality may be necessary to ensure the former role of deciding upon the rights of individuals of a civil nature:

“To begin with, the Court notes that under Polish law, a constitutional complaint can be lodged to challenge the constitutionality of a statute or other normative act which constituted the legal grounds for a final individual decision whereby a court or an administrative authority determined constitutional rights and obligations (see Article 79 of the Constitution). It also observes that Article 79 of the Constitution, which regulates the right to a constitutional complaint, is located in the sub-chapter entitled “Means of defending freedom and rights” of Chapter II of the Constitution entitled “The freedoms, rights and obligations of persons and citizens”, which would suggest that it was intended to serve as a remedy against violations of constitutional rights and freedoms. In addition, it is a remedy that is linked to a concrete judicial or administrative decision whose legal basis allegedly infringed those rights and freedoms”.<sup>52</sup>

On the specific facts in *Xero Flor*, namely the claim that the determination of compensation through a statutory ordinance violated the requirement for restrictions on the constitutional right to property to be regulated by statute (Article 64 § 3 of the Constitution), the ECtHR found that the determinative condition for applicability of Article 6 ECHR (i.e. the outcome being decisive for civil rights and obligations) had been fulfilled. In line with its well-established case-law, outlined above, the Court ruled:

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<sup>50</sup> *ibid*, § 194 (references omitted).

<sup>51</sup> *ibid*, § 178,

<sup>52</sup> *ibid*, § 196.

In view of the foregoing, the Court considers that the impugned constitutional issue was inseparably linked with the applicant company's claim and was therefore relevant for the determination of its civil rights.<sup>53</sup>

...the Government have not shown that a decision declaring the provision in question unconstitutional [Paragraph 5 of the Ordinance] would have had no effect on the applicant company's right to compensation.<sup>54</sup>

Having regard to the foregoing, the Court holds that the proceedings before the Constitutional Court were directly decisive for the civil right asserted by the applicant company. It finds accordingly that Article 6 § 1 was applicable to the proceedings before the Constitutional Court.<sup>55</sup>

The European Court of Human Rights' application of its case-law on the position of constitutional courts under Article 6 ECHR to the Polish Constitutional Tribunal in *Xero Flor* led to the conclusion that the tribunal is indeed covered by the requirement to uphold the right to a fair trial when it issues judgments on the constitutionality of provisions that may have a direct effect on the civil rights and obligations of claimants. The conclusion to be drawn from this judgment for the proceedings in case K 6/21 is that the Polish Constitutional Tribunal must be regarded as fulfilling the *prima facie* definition of a "tribunal" for the purposes of Article 6 ECHR on the basis of its definition and the nature of its functions under the Polish Constitution.

### The consideration of judicial appointments in *Xero Flor*

Having established that the Polish Constitutional Tribunal fulfilled the definition of a "tribunal" under Article 6 ECHR, the European Court of Human Rights went on to consider whether the requirement of a "tribunal established by law" had been breached by the process of appointments to the Constitutional Tribunal. The Strasbourg Court applied the three-step threshold test that it had developed in its earlier case-law<sup>56</sup> for such a determination: (1) was there a manifest breach of the domestic law?; (2) if so, the breach must be assessed in light of the object and purpose to ensure the ability of the judiciary to perform its duties free of undue interference; and (3) how effective was the review, if any, conducted by national courts as to the legal consequences of a breach of a domestic rule on judicial appointments?<sup>57</sup>

In its application of the first-stage of the test to the Polish Constitutional Tribunal, the ECtHR found that there had been a manifest breach of domestic Polish law on judicial appointments:

268...[T]he Court finds that the election of the three judges, including Judge M.M., 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* whose term of office covers the date on which his seat becomes vacant.<sup>58</sup>

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<sup>53</sup> *ibid.*, § 203.

<sup>54</sup> *ibid.*, § 207.

<sup>55</sup> *ibid.*, § 209.

<sup>56</sup> This test was established in ECtHR, judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (appl. no. 26374/18) § 243.

<sup>57</sup> ECtHR, judgment of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland* (appl. no. 4907/18) §§ 249-251.

<sup>58</sup> *ibid.*, § 268.



The Strasbourg Court based this finding of a breach upon the judgments of Poland's own Constitutional Tribunal on the appointments procedure. The ECtHR found that, functionally, the effect of the 2015 and 2016 Tribunal judgments were not simply to find certain norms in legislation incompatible with the Constitution, but to find materially on the facts that the appointments of the three judges who did not take up their seat were valid, and consequently the subsequent appointments were invalid.

260. The Court finds that the Constitutional Court's judgment of 3 December 2015 (no. K 34/15) was of key significance in setting out the legal principles applicable to the controversy surrounding the disputed election of the Constitutional Court judges.

267. In this context, the Court attaches particular importance to the Constitutional Court's judgment of 11 August 2016 (no. K 39/16). In this judgment, the Constitutional Court found that the statutory rule requiring the President of the Constitutional Court to admit to the bench the three judges elected on 2 December 2015 would amount to an act contrary to the earlier binding judgments of the same court (...). In this way, the Constitutional Court clearly indicated, contrary to what the government have claimed, that the effect of the series of Constitutional Court judgments was recognition of the validity of the elections of the three judges on 8 October 2015.

It is important to note that the ECtHR also recognised that the Act of 25 June 2015 by the seventh-term *Sejm*, which allowed for the election of two judges whose terms of office were scheduled to end after parliamentary elections, was also unconstitutional.

[I]t [the Constitutional Tribunal] declared the legal basis of the election of the other two judges on 8 October 2015 unconstitutional, since it had permitted the outgoing *Sejm* to fill the seats that had become vacant after the *Sejm*'s mandate had expired. That finding was based on the rule deriving from Article 194 § 1 of the Constitution that a judge of the Constitutional Court shall be elected by the *Sejm* whose term of office covers the date on which his seat becomes vacant. In this regard, the Court notes that the seventh-term *Sejm* transgressed its powers when electing two judges to the seats which were vacated in December 2015.

Therefore, it may be extrapolated that if the counter-factual situation had occurred whereby all five of the judges nominated by the seventh-term *Sejm* had taken their seats, then that composition of the Constitutional Tribunal would at least not have fulfilled the first stage of the cumulative three-stage *Guðmundur* test set out above.

Next, the ECtHR found that the second-stage of the test concerning prevention of undue interference had also been breached by the manner in which the judicial appointments had been conducted.

279. The Court notes that the election of the three judges on 2 December 2015 and their swearing-in took place just before the Constitutional Court was to deliver its judgment in case no. K 34/15. In its view, the precipitate actions of the eight-term *Sejm* and the President of the Republic, who were aware of the imminent decision of the Constitutional Court, raise doubts about irregular interference by those authorities in the election process for constitutional judges.<sup>59</sup>

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<sup>59</sup> *ibid*, § 279.

281. The Court considers that the legislative and executive organs' failure to abide by the relevant Constitutional Court judgments regarding the validity of the election of the court's judges undermined the purpose of the "established by law" requirement to protect the judiciary against unlawful external influence.<sup>60</sup>

Finally, the Court found the third-stage of the cumulative test – whether the right to a "tribunal established by law" was effectively reviewed by the domestic courts and whether remedies were provided – had been fulfilled by virtue of the fact that "there was no procedure under Polish law whereby the applicant company could challenge the alleged defects in the election process for judges of the Constitutional Court...[c]onsequently, no remedies were provided".<sup>61</sup> The ECtHR therefore concluded that there had been a violation of Article 6 § 1 of the Convention because

the applicant company was denied its right to a "tribunal established by law" on account of the participation in the proceedings before the Constitutional Court of Judge M.M., whose election was vitiated by grave irregularities that impaired the very essence of the right at issue.<sup>62</sup>

The assessment of judicial appointments in determining whether a right to a fair trial has been breached under Article 6 ECHR is an essential component of determining whether a tribunal has been "established by law". This part of the determination in *Xero Flor* was not novel, as the Court's Grand Chamber had found in *Guðmundur Andri Ástráðsson* that the disregard by a Minister of the procedural rule to base a decision on judicial appointment on sufficient investigation and assessment amounted to a grave irregularity which impaired the essence of the right to a tribunal established by law.<sup>63</sup> The Strasbourg Court summarised the reasoning connecting judicial appointments to Article 6 in *Xero Flor*:

245. As regards the phrase "established", the Court referred to the purpose of that requirement, which was to protect the judiciary against unlawful external influence, in particular from the executive, but also from the legislature or from within the judiciary itself. In this connection, it found that the process of appointing judges necessarily constituted an inherent element of the concept "established by law" and that it called for strict scrutiny.<sup>64</sup>

The ECtHR incorporates the review conducted by national courts into the three-stage test:

251. ...the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself. The assessment by the national courts of the legal effects of such a breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom.

This explains why the assessment of judicial appointments for the purposes of Article 6 § 1 ECHR by the ECtHR does not run contrary to the constitutions of the States Parties, but

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<sup>60</sup> *ibid.*, § 281.

<sup>61</sup> *ibid.*, § 288.

<sup>62</sup> *ibid.*, § 290.

<sup>63</sup> ECtHR, decision of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*. (application no. 26374/18).

<sup>64</sup> ECtHR, judgment of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland* (appl. no. 4907/18) § 245.

instead acts as a supplement to domestic procedures that ensure an independent and impartial judiciary so that all individuals can be guaranteed a fair trial.

### Is Article 6 ECHR applicable to all forms of proceedings before the Constitutional Tribunal?

*Xero Flor* may be regarded as unequivocal confirmation that Article 6 ECHR applies to Constitutional Tribunal proceedings when they concern the civil rights or criminal liability of individuals. The question arises, however, of whether this means that the right to a fair trial applies for all forms of proceedings that may take place before the Tribunal. In line with its earlier case-law, the ECtHR confirmed the applicability of Article 6 ECHR to the different means by which an individual may see a complaint come before the Constitutional Tribunal:

189. In that connection, it matters little whether the Constitutional Court considered the case following a question being referred for a preliminary ruling (...), or following a constitutional appeal being lodged against judicial decisions (...)

190. The same is true where the Constitutional Court examines an appeal lodged directly against a law, if the domestic legislation provides for such a remedy (...).<sup>65</sup>

These situations do not, however, exhaust the proceedings that are possible before the Polish Constitutional Tribunal to adjudicate upon the hierarchical compliance of provisions and normative acts with the Constitution. Article 191 § 1 identifies specific subjects who may make applications to the Constitutional Tribunal regarding matters in Article 188.<sup>66</sup> The only substantive condition is specified in the second paragraph: “the subjects ... above, may make such application if the normative act relates to matters relevant to the scope of their activity”.<sup>67</sup> Article 192 further specifies that, in relation to matters under Article 189 on disputes over authority between central constitutional organs of the State, the President of the Republic, the Marshal of the *Sejm*, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court and the President of the Supreme Chamber of Control may make applications. Finally, a further example of a similar function may be found in Article 122 § 3 of the Constitution, as cited by the Prosecutor General, whereby “the President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for adjudication upon its conformity to the Constitution”.<sup>68</sup>

These examples of “abstract review” could theoretically be regarded narrowly as unconcerned with any specific civil rights or criminal liability of individuals, as they are divorced from proceedings taking place within the “normal” courts. The application of the European Court of Human Rights’ condition for constitutional courts to fall under Article 6 ECHR, that such proceedings are “directly decisive” for the rights asserted by a legal person, may mean that, when the Constitutional Tribunal is engaged in a form of review that is *purely* concerned with the “hierarchical compliance of provisions and normative acts, as specified in the Constitution”, then it may be argued that its operation does not fall within the ambit of Article 6 ECHR and its guarantee of the right to a fair trial before an independent and impartial tribunal for natural and legal persons. However, it cannot be excluded that non-State actors, namely trade unions and religious organisations, while initiating constitutional

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<sup>65</sup> *ibid*, § 189 and 190.

<sup>66</sup> The Constitution of the Republic of Poland, Article 191 § 1.

<sup>67</sup> *ibid*, Article 191 § 2.

<sup>68</sup> *ibid*, Article 122 § 3.

review may also seek the determination of at least civil matters. If so, these proceedings may also be viewed as falling within the scope of Article 6 ECHR.

## 5. Conclusion

The Polish ratification of the European Convention of Human Rights in 1993 without filing reservations presupposes that any law in force in its territory must be in conformity with the Convention. Ratification also implies acceptance of the jurisdiction of the European Court of Human Rights to all matters concerning the interpretation and application of the Convention. Like the other High Contracting Parties, Poland undertook to abide by the final judgments of the Court. As happened in *Xero Flor*, if a party does not request a re-hearing before the Grand Chamber, it must be assumed that it acquiesces to the final judgment. The Strasbourg Court has insisted in its case-law on the right to a fair trial under Article 6 ECHR that a duty is imposed on the Contracting States to organise their judicial systems so as to meet its requirements, and this also concerns questions of internal organisation.

In case-law going back to the 1980s, the ECtHR has established the autonomous meaning of the concept of a “tribunal” under Article 6 ECHR, which depends upon its judicial function. Accordingly, in numerous cases the Strasbourg court has found that constitutional courts and tribunals are capable of falling within this definition. Despite their special role and status in many jurisdictions, including abstract review of the compliance of domestic law with the constitution, the Court has held that proceedings before constitutional courts will fall under Article 6 ECHR when they are decisive for civil rights and obligations or capable of affecting the outcome of the dispute before the ordinary courts. Consequently, when the Polish Constitutional Tribunal engages in assessment of the hierarchical compliance of provisions and normative acts with the Constitution in cases where the civil rights and obligations of individuals will be affected by the outcome – as in *Xero Flor* – it unequivocally falls under the definition of a “tribunal” for the purposes of Article 6 ECHR.

The European Court of Human Rights has also established that the requirement for a “tribunal established by law” under Article 6 ECHR can be affected by the process by which judicial appointments are made. The *Xero Flor* judgment applied a pre-existing three-stage threshold test: (1) a manifest breach of domestic law; (2) a breach that affects the judiciary’s ability to perform its duties free of undue interference; and (3) the existence of review by national courts as to the legal consequences of such a breach. *Xero Flor* did not establish novel principles of law, but instead applied the pre-existing principle that it is necessary that judicial appointments are in compliance with the national constitution’s own rules that guarantee the rule of law and separation of powers in order for the tribunal composed of such appointees to count as a “tribunal established by law” within the autonomous meaning of Article 6 § 1 ECHR.

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