



Information Note on the Court's case-law

May 2021

Xero Flor w Polsce v. Poland

Judgment 7.5.2021 [Section I]

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Article 6

Constitutional proceedings

Article 6-1

Tribunal established by law

- Grave irregularities vitiating election of Constitutional Court judge sitting on the panel which examined the applicant company's constitutional complaint: *violation*

Facts – The applicant company – a leading producer of turf – sought compensation for damage to its turf caused by game from a state-owned forest district. Under domestic law (the Hunting Act), the procedure for the assessment of damage and payment of compensation of crops was to be regulated by the Minister of the Environment, and the relevant Ordinance of the Minister limited the amount of compensation to a percentage amount of the total calculated value. The parties disputed the amount of compensation owed. Before the domestic courts, the applicant company unsuccessfully argued, among other things, that the law and application of the Ordinance was unconstitutional. The applicant company later lodged a constitutional complaint: those proceedings were discontinued by a majority decision of the Constitutional Court composed of a panel of five judges, including M.M.

The applicant company complained before the Court that one of the judges, M.M., on the bench of the Constitutional Court which had examined its constitutional complaint had not been elected in accordance with the domestic law:

During its last session in October 2015, the seventh-term *Sejm* (lower house of Parliament) had adopted resolutions electing five judges to replace those whose term of office was coming to an end (for three of those judges, their term of office came to an end *during* the seventh-term of the *Sejm*). The President of the Republic did not receive an oath from them. In November 2015, and among other things, the new eighth-term *Sejm* adopted resolutions on the "lack of legal effect" of the previous *Sejm's* election of those five judges ("the November resolutions"), and in December, it elected five new judges to the Constitutional Court, including M.M. The President received an oath from those judges.

In a judgment of 3 December 2015, upheld in a series of subsequent rulings, the Constitutional Court found various constitutional incompatibilities and held that the election by the new eighth-term *Sejm* of three of the judges, including Judge M.M., to seats, that had been already filled in October by the seventh-session *Sejm*, was invalid.

The eighth-term *Sejm* subsequently adopted new legislation which included a provision to the effect that the judges in issue should be included in adjudicating benches and assigned cases. The Constitutional Court found that this provision was unconstitutional. Legislation with similar provisions was subsequently passed, entering into force in 2017, and M.M. was admitted to the bench of the Constitutional Court. In a judgment of October 2017, the Constitutional Court held that the new legislative provisions were compatible with the Constitution.

Law – Article 6 § 1:

(a) Applicability

The proceedings before the Constitutional Court had been directly decisive for the civil right asserted by the applicant company. Indeed, had the Constitutional Court found that the provision of the Ordinance, which had constituted the basis of the final decision in the case, had infringed the applicant company's constitutional right of property, the company would have been able to request that the competent court reopen the civil proceedings under the Constitution and the Code of Civil Procedure. In the renewed examination of the case, the courts would have had to disregard the normative act which had been declared unconstitutional and examine the applicant company's claim for compensation exclusively under the Hunting Act, while having regard to the general principle in civil law of full compensation for damage. Article 6 § 1 was accordingly applicable to the proceedings before the Constitutional Court in the instant case.

(b) Merits

The Court examined whether the irregularities encountered in the judicial election procedure in December 2015 had had the effect of depriving the applicant company of its right to a "tribunal established by law", in the light of the three-step test formulated in *Guðmundur Andri Ástráðsson*:

(i) Whether there was a manifest breach of the domestic law

Firstly, in its judgment of 3 December 2015, the Constitutional Court had found that the November resolutions had had no legal effect on the resolutions of the seventh-term *Sejm* on the election of judges, since neither that *Sejm* nor the subsequent *Sejm* had had any power to alter an earlier decision on the election of a Constitutional Court judge. In a subsequent decision, the Constitutional Court had added that there had been no legal regulations allowing any State organ, including the *Sejm*, to declare a resolution of the *Sejm* on the election of a Constitutional Court judge invalid. In the light of those findings, there had been a breach of domestic law as regards the adoption of the November resolutions.

Secondly, and in agreement with the relevant series of Constitutional Court rulings, the Court found that the election of the three judges, including Judge M.M., to the Constitutional Court had been 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 covered the date on which his seat becomes vacant. In addition, as established by the Constitutional Court, the election of the three judges had concerned seats at the Constitutional Court that had already been filled by the judges duly elected by the seventh-term *Sejm*. The resolutions of the eighth-term *Sejm* on the election of the three judges had therefore constituted a second breach of the domestic law in respect of the election procedure for Constitutional Court judges.

Thirdly, the Constitutional Court had held that the President of the Republic had been under an obligation to immediately receive the oath from a Constitutional Court judge elected by the *Sejm*. The President had refused to receive the oath of office from the three judges duly elected by the seventh-term *Sejm*, and at the same time, had received those of the judges elected by the eighth-term *Sejm* immediately. Those acts and omissions had to be regarded as a contravention of the domestic law in respect of the election process for Constitutional Court judges.

The Court was unable to accept the Government's argument that those Constitutional Court rulings had had no relevance for the validity of Judge M.M.'s election. In particular, referring to the Constitutional Court's judgment of October 2017, the Government had

asserted that the final verification of the election of a Constitutional Court judge took place at the stage of taking the oath before the President, and had emphasised the importance of that act. However, that judgment, without relying on any substantive grounds, had disregarded and/or contradicted the earlier judgments of the Constitutional Court. In the circumstances, the later judgment of October 2017 could not cure the fundamental defects in the election of those three judges, including M.M., as identified in clear terms in the Constitutional Court's earlier rulings, nor could it legitimise their election. Furthermore, the panel of five judges which had given that later judgment included two judges (including M.M.) elected by the eighth-term *Sejm* whose very status had been at stake in the proceedings. In view of the foregoing, the judgment of October 2017 carried little, if any, weight in the assessment of the validity of the impugned election of Constitutional Court judges.

The three contraventions at issue had to be regarded as manifest breaches of the domestic law for the purposes of the first step of the test.

(ii) Whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges

The breaches of domestic law had concerned a fundamental 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. That fundamental rule deriving from the constitution had been recognised by the Constitutional Court in its judgment of 3 December 2015 and confirmed in its four subsequent rulings.

The election of the three judges in December 2015 and their swearing-in had taken place just before the Constitutional Court had delivered its judgment. The precipitate actions of the eighth-term *Sejm* and the President, who had been aware of the imminent decision of the Constitutional Court, raised doubts about irregular interference by those authorities in the election process for constitutional judges.

The breaches of a fundamental rule had been further compounded: firstly, by the eighth-term *Sejm* and the President persisting in defying the finding of the Constitutional Court in its relevant rulings; and secondly, by the legislature attempting – by means of legislative acts – to force the admission to the bench of the three judges, including Judge M.M. In that connection, the Court was particularly concerned by the fact that the Constitutional Court had declared statutory provisions aimed at forcing the judges' admission to the bench unconstitutional in two judgments and that the Prime Minister had refused to publish those judgments, in contravention of the constitutional provision stating that judgments of the Constitutional Court shall be published immediately. Moreover, the eighth-term *Sejm* had continued defying the Constitutional Court's rulings and eventually adopted legislation which had ultimately led to the three judges' admission to the bench of the Constitutional Court.

In failing to respect their duty to comply with the relevant judgments of the Constitutional Court, the actions of the legislative and executive authorities had been incompatible with the rule of law. Their failure in that respect further demonstrated their disregard for the principle of legality, which requires that State action must be in accordance with and authorised by the law. Further, the authorities' failure to abide by the relevant Constitutional Court judgments was also linked with their challenging the role of the Constitutional Court as the ultimate arbiter in cases involving the interpretation of the Constitution and the constitutionality of the law. That aspect of the case had also to be regarded as undermining the purpose of the "established by law" requirement; and the same could be said of the Prime Minister's refusal to publish the judgments.

The actions of the legislature and the executive had therefore amounted to unlawful external influence on the Constitutional Court. The breaches in the procedure for electing the three judges, including M.M., to the Constitutional Court had been of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a “tribunal established by law”.

(iii) Whether the allegations regarding the right to a “tribunal established by law” were effectively reviewed by the domestic courts, and whether remedies were provided: 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. Consequently, no remedies had been provided.

Conclusion: violation (unanimously).

Article 41: Claim dismissed in respect of pecuniary damage. No claim for non-pecuniary damage.

The Court also held, unanimously, that there had been a violation of Article 6 § 1 as regards the right to a fair hearing, on account of the reasons given by the courts for the refusal to refer a legal question to the Constitutional Court being insufficient.