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THE JUDGMENT OF THE STRASBOURG COURT IN *XERO FLOR V. POLAND:* THE CAPTURE OF THE POLISH CONSTITUTIONAL COURT CONDEMNED BY A EUROPEAN COURT, AT LAST!

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Once again, after the much-discussed *Ástráðsson v. Iceland* case, the European Court of Human Rights (ECtHR) attracted the spotlight on it by handing out a ruling on judicial independence. In *Xero Flor w Polsce sp. z o.o. v. Poland* (hereafter, *Xero Flor*) the first section of the Strasbourg Court unanimously found that the Republic of Poland breached Article 6(1) of the European Convention of Human Rights (ECHR) as regards both the right to a fair hearing and the right to a tribunal established by law.
The case originated from a civil action by the turf-producing company Xero Flor against the State Treasury for the damages caused to the applicant's cultivation by the animals of a game breeding area managed by the State Forests Holding. The applicant company asked compensation of such damages before the Zielona Góra Regional Court, which it requested also to refer to the Constitutional Court three questions concerning the compatibility with the Polish Constitution of the domestic provisions applicable to the case (notably, the Haunting Act and the Ordinance of the Minister of Environment on the assessment procedures and payment of compensation in respect of damage to crops). The

national court decided to award only partial compensation to Xero Flor and considered that there was no need to submit any questions to the Constitutional Court. The proceedings continued before the Court of Appeal and the Supreme Court, which equally disagreed with the applicant's request for further compensation and the constitutional arguments raised. Xero Flor then lodged a constitutional complaint before the Constitutional Court, which, by a majority of three to two judges, decided to discontinue the proceedings, finding that "the complainant had challenged how provisions had been applied and had failed to demonstrate how their content had infringed its constitutional rights and freedoms" (para. 100).

At this point, the applicant's case intertwines with the political capture of the Polish Constitutional Court and the events leading to the unlawful election of three judges on 2 December 2015. The affair is familiar to everyone who follows rule of law backsliding in Poland closely (see Koncewicz and Sadurski for in-depth analyses). In October 2015, the seventh-term *Sejm* (the Polish Parliament) elected five judges to the Constitutional Court, replacing three judges whose posts were due to expire on 6 November 2015 and two judges whose posts were due to expire in early December of the same year. Only the former election was fully in compliance with the Constitution, which requires the Parliament to replace only those Constitutional Court judges whose mandate expires during the Sejm's term of office (Article 194(1) of the Polish Constitution). This was confirmed by the Constitutional Court in the judgment of 3 December 2015.

A few days later, the Law and Justice Party (PiS) won the elections and, on 25 October 2015, the eight-term Sejm was elected. That Parliament amended the Act on the Constitutional Court requiring its judges to take oath before the President of the Republic within thirty days of election in order to officially start the term of office. Yet, the President refused to take the oath of the judges appointed by the seventh-term Sejm (the so-called "October judges"). The eighth-term Sejm also adopted resolutions depriving of legal effects the October election, thus not only the appointment of the two judges whose terms were due to expire in

December but also that of the other three judges that had been lawfully elected. The newly elected five judges (so-called "December judges") immediately took oath before the President of the Republic. Such reforms and elections were deemed unconstitutional by the judgment of the Constitutional Court of 9 December 2015. In the meantime, the Parliament kept electing new judges whenever the old ones retired for the natural end of their mandate.

End of the story? Not really. In the following months, other reforms further altered the functioning of the Constitutional Court, for instance by requiring judges who took the oath before the President of the Republic to be included in adjudicating benches and assigned cases by the acting President of the Constitutional Court. Those amendments were ruled unconstitutional by the Constitutional Court's rulings of March and August 2016. However, the government refused to publish those judgements.

On 19 December 2016, the term of office of the President of the Constitutional Court ended and the President of the Republic appointed one of the two lawfully elected December judges as the acting President. The latter admitted the other three, unlawfully elected December judges to the bench. With that episode, the full capture of the Court was achieved. In the following years, with the retirement of other judges, the PiS gradually filled all posts at the Constitutional Court with loyal judges (see Sadurski's book for further analysis).

This escalation attracted criticisms by the European and international institutions, being perceived as a first systemic threat to the rule of law in Poland (see the Opinion of the Venice Commission of 14-15 October 2016 and the European Parliament resolution of 13 April 2016).

However, natural and legal persons bear the brunt as always in this kind of situations. This became clear with the Constitutional Court's judgment declaring the unconstitutionality of abortion for severe and irreversible fetal anomaly.

The case of Xero Flor is another, although different, paradigmatic example. One of the three "December judges" unlawfully elected – judge M.M.– sat in the five-judges panel of the Constitutional Court that dismissed the case of Xero Flor. Therefore, the latter complained before

the Strasbourg Court a breach of its right to a tribunal established by law under Article 6(1) ECHR. The ECtHR sided with the applicant. It found Article 6(1) ECHR applicable to the proceedings before the Constitutional Court because the outcome was decisive for determining the applicant's rights. Indeed, if the Constitutional Court had found the Ordinance to be in breach of the applicant's constitutional right of property, the civil proceedings could have been reopened and the Ordonnance not applied (para. 208). Then, the Strasbourg Court relied on the three-step threshold test developed in the *Ástráðsson* judgment (see the insightful analysis of judge Spano and the relative discussion on this blog) and found the appointment of three "December judges" in violation of the right to a tribunal established by law, as guaranteed under Article 6(1) of the Convention. First, by relying on the judgments of the (not-yet-captured) Constitutional Court of 2015 and 2016, the ECtHR found a "manifest breach of the domestic law" in the election procedure of the three December judges. Remarkably, the ECtHR made a distinction between those judgments of the Constitutional Court and that of October 2017 (i.e., post-capture), which disregarded the previous rulings "without relying on any substantive grounds" and therefore "carries little, if any, weight in the assessment of the validity of the election of Constitutional Court judges on 2 December 2015" (paras. 271-273). Second, the ECtHR considered that the breach pertained to "a fundamental rule of the election procedure", which was enshrined in Article 194(1) of the Constitution and confirmed by the case-law of the Constitutional Court (para. 277). The situation was further worsened by the persistent efforts of the Parliament, the Government, and the President of the Republic to disregard and refuse to publish the Constitutional Court's judgments and force admission to the bench of the three "December judges." In the third step of the *Ástráðsson* test – namely, the review and remedy by national courts of the breach – the Court limited itself to acknowledging that the Government recognized "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" (para. 288).

The applicant was also successful in its other claim of breach of Article 6(1)

ECHR, namely the right to a fair hearing, as the national courts failed to give proper reasons for not referring to the Constitutional Court the preliminary question concerning the constitutionality of the Ordonnance that limited the applicant's right to compensation (paras. 170-173).

However, the Court's finding that the right to a tribunal established by law was violated is more relevant for the safeguard of the rule of law in Europe, for a threefold reason.

First, it is the first time that a European court declares unlawful the Polish reforms capturing the Constitutional Court. It is also the first time that the composition of an EU Member State's constitutional tribunal is found illegal. So far, the Court of Justice of the EU (CJEU) has never had the opportunity to rule on the matter. The European Commission has criticized the measures in its recommendations under the Rule of law Framework and in the Reasoned Proposal under Article 7(1) TEU, but none of them led to sanctions or to direct infringement actions (see for an assessment of the EU's response: Pech, Wachowiec, Mazur). Hopefully, this judgment will be a reference point for the European Commission's present and future initiatives in defense of the rule of law in Poland, such as infringement procedures under article 258 TFEU, the Rule of law report 2021 and the rule of law conditionality mechanism. Moreover, it could also be relied on by national authorities examining rule of law deficiencies in Poland for the purpose of the executions of EU instruments of judicial cooperation, such as the European arrest warrant in the context of the two-step test developed by CJEU in *LM* (C-261/18 PPU).

Second, the Strasbourg Court applied to Poland the three-step threshold test developed in *Ástráðsson* to assess whether problems in a judicial appointment procedure entailed a violation of the right to a tribunal established by law. That test was thus confirmed as the relevant Convention standard for assessing irregularities in judicial appointment procedures. Since Article 47 of the EU Charter corresponds to Article 6(1) ECHR, we should expect the Court of Justice to build upon this Strasbourg case-law. In its judgment in *Simpson* (C□542/18 RX-II and C□543/18 RX-II), the CJEU already took into account the case law of the ECtHR on the right to a tribunal established by law, including the first *Ástráðsson* judgement

(the one delivered by the ECtHR's second section in 2019). However, in *Repubblika* (C-896/19) the CJEU addresses an issue of judicial appointment in terms of judicial independence and thus missed an opportunity to frame the case as one concerning the right to a tribunal established by law. Yet, the test of independence and establishment by law are different, even though closely interrelated. The recent opinions of Advocate Generals Bobek and Tanchev valued the *Ástráðsson* judgment and the relative test. Hence, it will be interesting to see whether and to what extent the Court of Justice will rely on *Ástráðsson* and *Xero Flor* in the future.

Finally, this judgment may be only the first in a long series. Indeed, several cases concerning reforms to the Polish judiciary are currently pending before the ECtHR, and after this judgment we can expect even more new ones may be brought. The ECtHR will likely become another major judicial actor in the fight against rule of law backsliding in Europe. This confirms the relevance of the judicial route in that fight – at least as long as the political one is precluded by the lack of will –, with all the consequences, good and bad, that may derive from it.

As regards the direct consequences of the judgement, there is not much room for celebration. With or without the three "December judges", the Polish Constitutional Court is already captured, and the nomination procedure is fully in the hand of the parliamentary majority. It is true that the ECtHR compelled Poland to pay the applicant the reimbursement of cost and expenses. Poland is also required to take general measures to remedy the violation found by the Court, which should logically include precluding adjudication, of not only judge M.M. but also the other two judges unlawfully elected to Constitutional Court in December 2015. Yet, the Polish government immediately showed the slightest intention to comply with the judgment. One could have easily expected as likely consequences the disregard or – at worst – a challenge of legality of the ECtHR judgment before the Constitutional Court. Instead, the Constitutional Court decided itself to blatantly nullify the Strasbourg ruling. In an interlocutory decision taken on 15 June, it hold that the *Xero Flor* judgment must be considered "non-existent" because it "was issued

without a legal basis, exceeds the competence of the ECtHR and constitutes an unlawful interference with the national legal order". It thus seems that, as feared, the PSPP judgment of the German Constitutional Court has become a model for European autocratic countries who wants to openly revolt against European and International law. Hopefully, the Committee of Minister of the Council of Europe will take advantage of Article 46 ECHR to start the procedure for forcing execution of the judgment. In the long term, such disregard by Poland of ECtHR rulings may also impact on the mutual trust between EU Member States and become a further ground for refusing execution of the EU instruments of judicial cooperation.

That said (which is of no minor relevance), the judgment remains historic, for the reasons set out above. Everyone interested in the protection of the rule of law in Europe – and the notion and the scope of that concept – should stay tuned for further developments.