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The Question of Non-Independent Apex Courts as Effective Remedies to be Exhausted

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Abstract

This article discusses the question of whether non-independent apex courts should be considered effective remedies that must be exhausted before lodging a complaint before the European Court of Human Right (Court). It first analyses the special position of domestic apex courts in the European Convention on Human Rights (ECHR) framework and argues that a domestic court cannot be considered an effective remedy if it is not duly independent. Then, it shows how the Court has so far evaded taking a clear position on this issue. Finally, the article argues that the Court should deal with such issues of independence under the exhaustion criterion. It shows how such an approach is in line with existing case law and corresponds to the logic inherent in Article 35 ECHR. In doing so, the Court would, moreover, stress the systemic importance of domestic judicial independence for the proper functioning of a subsidiary Convention mechanism.

Keywords

exhaustion of domestic remedies – non-independent apex courts – effective remedies – subsidiarity – rule of law

1 Introduction

In the last couple of years, the European Court of Human Rights (Court, ECtHR, or Strasbourg Court) – in tandem with the European Court of Justice (ECJ) – has taken a central role in the fight against the deterioration of the rule of law in Europe. In a number of increasingly strongly worded judgments, both Courts have denounced various parts of the Polish judicial reforms and have found violations of the right to an independent tribunal established by law regarding the Constitutional Tribunal, several chambers of the Supreme Court, as well as the Council of the Judiciary. Whereas those judgments are no doubt noteworthy for what they mean for the 'tail' of the proceedings before the Strasbourg Court, they also raise novel and important questions under its 'head'. More specifically, those judgments bring to the fore the thorny question of what the consequences of such structural deficiencies must be in terms of admissibility and whether those apex courts should still be regarded as effective remedies that must be exhausted before appealing to the Strasbourg Court.

That question is not merely an academic musing but is important in practice too. The question of which remedies are to be exhausted is crucial for any applicant that wants to bring an admissible case before the Court. The duty to exhaust domestic remedies is inherently linked to the time limit of four months, mentioned in Article 35(1) ECHR.[1] This time limit starts to run as soon as the final effective remedy has taken a decision. The Court does not shy away from declaring applications inadmissible for violation of the four-month time limit, if the applicant first exhausted a domestic remedy that the Court deems ineffective.[2] Clarity on the requirement to exhaust apex courts as a domestic remedy is therefore of high practical relevance.

As of yet, the Court has not taken a clear position on this important issue. Rather, as will be shown in the article, the few times that this issue has been brought up before the Court, it sidestepped the question entirely. Yet, as mentioned below, that does not seem like a position that can be sustained much longer. In this light, this article adopts a normative, forward-looking point of view and makes a novel argument on how the Court could and in fact should take the step to assess issues of judicial independence under the exhaustion requirement. To do this, the article will give an overview of the

1 For the difficulties this may raise, see G Ravarani, 'L'épuisant épuisement des vois de recours internes', in *Liber Amicorum Robert Spano*, J Kjølbro, S O'Leary, and M Tsirli (eds), (Anthemis 2022) 587.

2 As a recent example *Van de Cauter v Belgium* 18918/15 (ECtHR, dec, 8 June 2021).

relevant existing jurisprudence, frame it within the broader topics of judicial independence, subsidiarity, and exhaustion of domestic remedies, and come to a normative argument. Yet, given the space constraints that a special issue necessarily implies, not all of those topics can be discussed in their full breadth. Rather, this article is intended primarily as a piece to introduce a new argument, and which provides an invitation for further critical reflection and a basis for further scholarship.

To do this, the rest of this article will be structured as follows. Section 2 discusses the special place that domestic apex courts take up in the functioning of the Convention system. Section 3 then discusses the argument, so far not explicit in the Court's case law, that courts that do not fulfil the requirements of being independent and established by law cannot be seen as effective remedies that need to be exhausted. Section 4 shows how the Court has so far evaded taking a clear position on the matter whenever arguments along those lines were raised before it. Section 5 argues that the Court should nevertheless take the step to assess questions of judicial independence under the exhaustion requirement, but should do so in a measured and context-sensitive manner.

2 The Special Place of Apex Courts in the Convention System

Domestic apex courts – whether they be Supreme Courts, Constitutional Courts, or Supreme Administrative Courts – take up a special place within the Convention system. This becomes readily apparent from some practical occurrences, such as the existence of the Superior Courts Network or the fact that the Court often hosts delegations of domestic apex courts. The Court clearly wants to keep close personal ties with those courts and their judges.

There are also more substantive connections between the domestic apex courts and the ECtHR. First, there is the advisory opinion mechanism of Protocol No 16, which is only open to a country's highest judicial bodies. Moreover, the ECtHR affords a special position to apex courts to retain consistency in domestic case law.[3] It is up to them to unify possible divergences in interpretation between hierarchically lower courts in order to ensure a European Convention on Human Rights (Convention)-compliant case law. Finally, apex courts have a crucial task in the procedural turn that has taken shape in the Court's case law. Where the domestic apex courts have analysed the case before them in a comprehensive and convincing manner, on the

3 This has long been established case law. See *Zielinski and Pradal v France* [GC] 24846/94 (ECtHR, 28 October 1999) para 59.

basis of the relevant Convention case law and its principles, the Court only substitutes its own views when there are very weighty reasons.[4]

The underlying idea of this privileged position of apex courts, both within the Convention framework and the Court's case law, is one of subsidiarity and shared responsibility.[5] Because of the particular position within their respective legal orders, apex courts find themselves in a position to help to ensure Convention compliance within the entire judicial system. As the top of the judicial pyramid, they can enforce the Convention standards onto the courts below them. They are, in other words, the beacon that must lead lower courts into the right direction.

Precisely because they are positioned at the top of the judicial pyramid, apex courts are, moreover, ordinarily the final actor that analyses a particular case before it goes to Strasbourg. It is mostly on their reasoning that the Court will have to formulate a response.[6] They are, in other words, the *interlocuteurs naturels*[7] of the Strasbourg Court; the privileged conversation partner in the judicial dialogue between the national and Convention legal systems. This also means that in a system built on subsidiarity, they are the final and most important line of defense.

The importance of apex courts within the Convention framework is therefore undeniable. While all domestic courts are of course vital to the proper application of the Convention in day-to-day cases, and therefore to the proper functioning of the idea of subsidiarity, from a systemic point of view, apex courts are the most consequential. As the top of their respective judicial pyramids, they provide a single focal point, a kind of hinge between the national and European systems. That hinge works in both directions, based on different, somewhat opposite movements.[8] From the supranational to the national level, they help with the spread, enforcement, and consolidation of Convention standards in the domestic jurisprudence, administrative practice, and legislation. From the national to the European level, they operate as a filter, a final remedy that can authoritatively indicate the specificities and particular

4 For example, *Karoly Nagy v Hungary* [GC] 56665/09 (ECtHR, 14 September 2017) para 62. See, for an excellent recent example, *Executief van de Moslims van België and Others v Belgium* 16760/22 (ECtHR, 13 February 2024) paras 107–124.

5 *Willems and Gorjon v Belgium* 74209/16 (ECtHR, 21 September 2021) para 64.

6 LL Guerra, 'Dialogues Between the Strasbourg Court and National Courts', in *Judicial Dialogue and Human Rights*, A Müller (ed), (Cambridge University Press 2017) 401.

7 G Raimondi, 'La convention européenne des droits de l'homme et les cours constitutionnelles et suprêmes européennes', in *Liber Amicorum Jean Spreutels*, A Alen and others (eds), (Larcier 2019) 273.

8 In such sense also D Kosař and others, *Domestic Judicial Treatment of European Court of Human Rights Case Law* (Routledge 2020) 38.

sensitivities of the legal system to the Strasbourg Court. In this sense, they are of pivotal, even systemic importance to the functioning of the Convention system. At the same time, it is then equally important that the apex courts are truly effective remedies, both *de jure* and *de facto*.

In view of the above, it is no wonder that the special place of domestic apex courts is also stressed when it comes to the topic of exhaustion of domestic remedies.[9] The duty to exhaust domestic remedies is a fundamental feature of the Convention protection system, inherently connected to its subsidiary nature.[10] The highest judicial bodies are normally the final national interlocutor before an appeal is lodged before the Strasbourg Court. It is then particularly important in the light of the principle of subsidiarity that any Convention related claim is clearly made at that point,[11] also referred to as the idea of vertical exhaustion of remedies.[12] The Court indeed declares cases inadmissible for failure to exhaust domestic remedies in case the applicant did not maintain their claim up until the highest domestic court, even when they mentioned it expressly before the lower courts.[13]

3 The Question of Non-Independent (Apex) Courts as Remedies to be Exhausted

The topic of this contribution is the question whether non-independent apex courts are remedies that must be exhausted before an appeal can be lodged before the ECtHR. Implicit therein is the underlying question whether a domestic court must be sufficiently independent in order to qualify as an *effective* remedy in terms of Article 35(1) ECHR. That is a point that the Strasbourg Court – to the best of my knowledge – has never made explicit. The topic of effectiveness of domestic remedies is extremely casuistic and case dependent, but normally concerns questions of a wholly different nature, such as whether the remedy in question had the power to prevent or compensate the alleged Convention violation. In fact, as will be discussed in the next

9 See L Glas, 'The Age of Subsidiarity? The ECtHR's Approach to the Admissibility Requirement That Applicants Raise Their Convention Complaint Before Domestic Courts' (2023) 41(2) *Netherlands Quarterly of Human Rights* 67, 84.

10 *Vučković v Serbia* [GC] 17153/11 (ECtHR, 25 March 2014) para 69.

11 See *Gjinarari v Albania* 52610/19 (ECtHR, dec, 22 November 2022) para 20; *Jankovic and Others v Croatia* 23244/16 (ECtHR, dec, 21 September 2021) para 65.

12 M Villiger, *Handbook on the European Convention on Human Rights* (Brill 2022) 59.

13 For example, *Kočegarovs and Others v Latvia* 14516/10 (ECtHR, dec, 18 November 2014) para 139; *Virolainen v Finland* 29172/02 (ECtHR, dec, 7 February 2006).

section, the few times that an applicant has made the substantive connection between (a lack of) judicial independence and the effectiveness of a remedy, the Court has simply avoided the matter.

Nevertheless, intuitively it is quite easy to understand that one may harbor doubts whether non-independent courts can be seen as a truly effective remedy. The requirements for a court to be independent and established by law are the two basic guarantees in the right to a fair trial that ensure that judges can rule free from any undue interference coming from actors inside or outside the judiciary. They are the structural guarantees that reassure individuals that a judge rules solely on the basis of the law, free from either fear or favour.[14]

When one takes a closer look at the case law of the Strasbourg Court, there are in fact quite some indications that domestic remedies are only effective when they are sufficiently independent. In *Merit v Ukraine*, the Court held that a prosecutor could not be considered an effective remedy, since the status of the prosecutor in the domestic law and his participation in the criminal proceedings against the applicant did not offer adequate safeguards for an independent and impartial review of the applicant's complaints.[15] Similarly, within the scope of Article 13 ECHR, the Court verifies whether domestic remedies are sufficiently independent and offers sufficient procedural guarantees when the remedy in question is not judicial in nature.[16] It held in *Shirkhanyan v Armenia*, for example, that prison authorities could not be seen as an effective remedy since they would not have a sufficiently independent standpoint to satisfy the requirements of Article 13 ECHR.[17] In similar vein, the procedural obligations under Articles 2 and 3 ECHR require the investigation to be conducted by an independent body.[18] In specific instances, such as in expulsion cases, the Court even explicitly dictates that Article 13 ECHR requires that the individual has the possibility to challenge the deportation order before an appropriate body that offers adequate degrees of independence and impartiality.[19]

Another indication can be found in a different admissibility criterion. Article 35(2)(b) ECHR holds that the Court shall not deal with applications which have already been submitted to another procedure of international investigation

14 *Bilgen v Turkey* 1517/07 (ECtHR, 9 March 2021) para 79.
15 *Merit v Ukraine* 66561/01 (ECtHR, 30 March 2004) para 62.
16 *Khan v the United Kingdom* 35394/97 (ECtHR, 12 May 2000) para 47; *Leander v Sweden* 9248/81 (ECtHR, 26 March 1987) para 81; *Silver and Others v the United Kingdom* 5947/72 (ECtHR, 25 March 1983) para 116.
17 *Shirkhanyan v Armenia* 54547/16 (ECtHR, 22 February 2022) para 134.
18 *Mocanu and Others v Romania* [GC] 10865/09 (ECtHR, 17 September 2014) para 320.
19 *Umoru v Italy* 37442/19 (ECtHR, dec, 18 May 2021) para 43; *MK and Others v Poland* 40503/17 (ECtHR, 23 July 2020) para 143.

or settlement. The idea behind this rule is one of *lis pendens*, aiming to avoid several international bodies simultaneously dealing with applications that are substantially the same.[20] The Court has nevertheless made clear that that rule only applies to mechanisms that are independent and impartial in accordance with Article 6 ECHR.[21] In other words, other international remedies which are not independent cannot lead the Court to declare a complaint inadmissible.

The above examples arguably concern rather specific situations, and one may interject that assessing the independence of a domestic court is a qualitatively different exercise than assessing the independence of prosecutors or prison authorities. Yet, what the above case law does show is that the Court assesses the effectiveness of a certain remedy in light of its apparent independence, irrespective of which Convention provision it looks at this issue from. In that respect, that basic connection between independence and effectiveness that seemingly underlies those various judgments may equally be transposed to domestic judicial bodies. Moreover, in recent judgments the Court does implicitly make such a connection between the independence of judicial bodies and their effectiveness as domestic remedies as well. In *Lypovchenko and Halabudenco*, the Court held that the remedies before the so-called MRT Courts were not to be exhausted as it deemed them ineffective owing to the absence of any indication that those courts were part of a judicial system operating on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention.[22] In the same vein, in *Tuleya*, the Court dismissed the Polish objection of non-exhaustion of domestic remedies, given that a complaint about activities of the disciplinary officers would have been examined by the National Council of the Judiciary – a body composed of judges –, since according to a series of its own judgments the council inherently lacked independence from the legislative and executive powers.[23]

In my understanding of the case law as just set forth, there are then several and concordant indications that the Court considers a remedy – even a judicial one – effective only when it is sufficiently independent. This would, in turn, mean that a non-independent court cannot be seen as a remedy that must be exhausted. While that understanding would be relevant for courts of every level, it is for apex courts that it gains the most practical relevance and tangible importance. The reason for this is that it is settled case law of the Court that problems relating to the elements of the right to a fair trial,

20 *Radomilja and Others v Croatia* [GC] 37685/10 (ECtHR, 20 March 2018) para 119.

21 *Selahattin Demirtaş v Turkey* [GC] 14305/17 (ECtHR, 22 December 2020) para 185.

22 *Lypovchenko and Halabudenco v The Republic of Moldova and Russia* 40926/16 (ECtHR, 20 February 2024) para 99.

23 *Tuleya v Poland* 21181/19 (ECtHR, 6 July 2023) para 399.

including the independence of the courts, may subsequently be rectified via an appeal to a hierarchically higher court that does meet those conditions.[24] Since such a step is in principle not possible for apex courts, the question of (non-)exhaustion presents itself at its sharpest there, which is why they are the focus of this article.

4 The ECtHR's Lack of Response to the Question of Exhaustion of Non-Independent Apex Courts

The two previous sections highlighted the role of systemic importance that domestic apex courts play within the Convention system and held that courts that are not independent cannot be seen as effective remedies. The following two sections will bring those two issues together and discuss the particularly difficult question concerning the possible exhaustion of non-independent apex courts as domestic remedies. For the longest time that may have seemed like an exclusively academic, essentially hypothetical question. Yet, with the decaying rule-of-law standards throughout Europe, often with apex courts among the first victims, it has become increasingly more concrete. Over the course of the last few years, arguments along those lines have been taking shape, first mostly in academic writing, but later also in applications before the ECtHR. Yet, as will be shown, the Court has avoided taking a clear stance on this issue.

The first examples concern Hungary. Legal scholarship has criticised the Strasbourg Court for its willingness to consider the Hungarian Constitutional Court as an effective remedy that needs to be exhausted, while ignoring the deterioration of the rule of law in Hungary which raises doubts over that court's independence and impartiality.[25] Yet, despite this academic criticism, it does not seem that any express arguments along those lines have been raised by applicants before the ECtHR.

24 See, among others, *Urgesi and Others v Italy* 46530/09 (ECtHR, 8 June 2023) para 96; *Miroslaw Garlicki v Poland* 36921/07 (ECtHR, 14 June 2011) para 115.

25 A Kadar, 'Another Turn of the Screw – Further Restrictions for Hungarian Applications to the ECtHR' (Strasbourg Observers, 24 September 2019): <https://strasbourgobservers.com/2019/09/24/another-turn-of-the-screw-further-restrictions-for-hungarian-applications-to-the-ecthr/>; D Karsai, 'Role of the Constitutional Courts in the System of the Effective Domestic Remedies – A New Approach on the Horizon? Criticism of the Mendrei v. Hungary Decision' (Strasbourg Observers, 15 October 2018): <https://strasbourgobservers.com/2018/10/15/role-of-the-constitutional-courts-in-the-system-of-the-effective-domestic-remedies-a-new-approach-on-the-horizon-criticism-of-the-mendrei-v-hungary-decision/>.

Similar arguments have also been made concerning Turkey after the failed coup in 2016. In its wake, thousands of civil servants, including judges, had been dismissed. Quite quickly the Turkish Government established a new commission of inquiry that was supposed to act as a filter for the thousands of claims that started to come in. Soon after the commission started operating, the Strasbourg Court noted in its *Köksal* decision that it should be seen as a remedy that needs to be exhausted.[26] However, in legal scholarship, strong doubts were raised about the independence of the commission and its effectiveness as a domestic remedy.[27] Contrary to the cases in Hungary, such arguments have since been raised before the Strasbourg Court. In the recent judgment of *Telek*, the Turkish Government argued that the case was inadmissible, since the claims of the applicants were still pending before the commission of inquiry. As a response, the applicants argued that the commission should not be seen as an effective remedy. One of their arguments in this respect was that the way in which the members of the commission had been appointed raised serious doubts about its independence and impartiality.[28] However, the Court did not respond to this argument, but rather found that the cases of the applicants had already been pending for years before the commission and that they should not be expected to wait until it finally reached a decision.[29]

These indications in the case law concerning Turkey notwithstanding, this type of argument only really started to be raised after the judicial reforms in Poland. These reforms have already been discussed countless times by a wide range of actors and here is not the place to do all of that again. Suffice it to say that at this point, serious doubts persist as to the independence of the judicial system in Poland and several of its key actors, including some of the apex courts. In such circumstances, it is no wonder that the question of whether those bodies are still remedies that need to be exhausted has started to increasingly pop up in the ECtHR's judgments.[30] So far there have been five judgments in which this issue was raised to some degree.

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26 *Köksal v Turkey* 70478/16 (ECtHR, dec, 6 June 2017).

27 T Ruys and E Turkut, 'Turkey's Post-Coup 'Purification Process': Collective Dismissals of Public Servants Under the European Convention on Human Rights' (2018) 18(3) *Human Rights Law Review* 539; K Altıparmak, 'Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?' (2017) *Human Rights Joint Platform*.

28 *Telek and Others v Turkey* 66763/17 (ECtHR, 21 March 2023) para 87.

29 Ibid paras 93–95.

30 See in this sense M Leloup, 'The Duty to Exhaust Remedies with Systemic Deficiencies' (Verfassungsblog, 8 February 2022): <https://verfassungsblog.de/the-duty-to-exhaust-remedies-with-systemic-deficiencies/>.

The first, *Solska and Rybicka*, is an already somewhat older judgment that stems from before any of the ECtHR's judgments concerning the judicial reforms in Poland. In this case, the applicants argued that domestic law did not provide them with any effective remedy, considering that the Constitutional Tribunal was no longer an independent and effective body.[31] However, the Court dealt with the matter in a different way and therefore did not consider it necessary to examine the arguments relating to the alleged lack of effectiveness and independence of the Constitutional Tribunal.[32]

The three later cases stem from after the ECtHR's *Xero Flor* judgment. In that milestone judgment, the Court had ruled that the Polish Constitutional Court, in its current composition, cannot be seen as a tribunal duly established by law.[33] In both *Advance Pharma*, *Juszczyszyn*, and *Pajak*, the applicants relied on the *Xero Flor* ruling to counter the Polish Government's claim of non-exhaustion and to argue that the Polish Constitutional Tribunal could not be seen as an effective remedy. In *Juszczyszyn*, the Court – identical to *Solska and Rybicka* – dealt with the question in a different manner and then held that it did not consider it necessary to examine the applicant's arguments relating to the status of the Constitutional Tribunal.[34] In *Advance Pharma* and *Pajak*, it applied a different strategy. It held that the question of the effectiveness of a complaint to the Constitutional Tribunal should be joined to the merits and examined at a later stage.[35] Yet, as rightfully pointed out by Judge Wojtyczek in his dissenting opinion, in this particular case the effectiveness of the constitutional complaint did not depend on the merits of the case and was dealt with in considerations that are independent from other matters. In doing so, the Court managed to again abstain from deciding on the issue.

In a final, noteworthy development, the Court has somewhat engaged with this argument in the most recent judgment of *Przybyszewska*.[36] In this case as well, the applicants raised several arguments as to why the Polish Constitutional Tribunal – before which their complaints were still pending – could not be considered an effective remedy, to wit that it was no longer independent and that their cases had already been pending before it for too long. The Court gave three arguments as to why the Constitutional Tribunal

31 *Solska and Rybicka* 30491/17 (ECtHR, 20 September 2018) para 62.
32 Ibid para 70.
33 *Xero Flor w Polsce sp zoo v Poland* 4907/18 (ECtHR, 7 May 2021).
34 *Juszczyszyn v Poland* 35599/20 (ECtHR, 6 October 2022) para 153.
35 *Advance Pharma sp Z oo v Poland* 1469/20 (ECtHR, 3 February 2022) para 238; *Pajak v Poland* 25226/18 (ECtHR, 24 October 2023) para 149.
36 It should be noted that this judgment came out after the first round of reviews for this article.

could indeed not be seen as an effective remedy that needed to be exhausted. First, it had in the past declared inadmissible two very similar complaints and the Strasbourg Court held that there were strong doubts as to whether it would declare the complaints of the applicants admissible. Second, bearing in mind the number of years that had already passed since the complaints were lodged, the Court found it no longer constituted a swift remedy. Third, it recalled the fact that it had already established grave irregularities in the election of the judges of the Constitutional Tribunal. It therefore 'agree[d] with the applicants that the effectiveness of their constitutional complaint also has to be seen in conjunction with the general context in which the Constitutional Court had operated since the end of 2015'.[37] While that final argument is exactly the type of reasoning that this article is about, its exact weight in the Court's conclusion in this case remains unclear, and did not seem to be of decisive importance.

Thus, while the question of the possible exhaustion of non-independent apex courts has already been raised a few times before the Court, it has so far managed – either directly or indirectly – to avoid taking an unequivocal stance on the matter. So far, it has simply sidestepped this complex issue. To a degree, one can understand that the Court wants to keep kicking this can down the road as long as possible. There might even be considerations of self-interest at play, since the Court may not want to lose the final filter at the national level and receive more cases, even if it may be poorly equipped to do so.[38] Be that as it may, this sort of argument will not subside.[39] In fact, given that the Strasbourg Court has since *Xero Flor* also ruled that three separate chambers of the Polish Supreme Court could not be seen as tribunals duly established by law, one can expect that such questions will only be raised more often. It is then imperative that the Court develops a clear stance on this issue.

37 *Przybyszewska v Poland* 11454/17 (ECtHR, 12 December 2023) paras 48–53.

38 I thank the reviewer for pointing this out.

39 For example, in the case of *Pietrzak v Poland* 72038/17 (ECtHR, 28 May 2024), the applicants also argued in their written observations in reply to the Government that the Polish Constitutional Tribunal should no longer be seen as an effective remedy that had to be exhausted. Observations on file with author. The judgment in this case came out after the paper had been accepted for publication. In the judgment, the Court does not engage with the applicant's argument that the Polish Constitutional Tribunal is not an effective remedy that needed to be exhausted because it could not be considered as an independent tribunal established by law.

5 Bringing the Tail to the Head: Judicial Independence Under the Admissibility Requirements

This final section argues that, despite its understandable reticence, the Court should nevertheless take the step to deal with questions of judicial independence under the admissibility requirements. Immediately, it is acknowledged that that is no small question and that the stakes are high here. Concluding that a certain apex court is no longer an effective remedy that must be exhausted would essentially require the applicants to simply ignore it and is tantamount to removing that court within the broader system of Convention protection. From the perspective of the Convention, the national judicial pyramid would lose its apex; one clear *interlocuteur naturel* would be replaced by a bunch of hierarchically lower courts. When Convention related matters are at stake, the apex court in question would thus simply be sidelined. In this sense, such a decision would simultaneously also significantly damage the position and authority of the apex court within its domestic judicial system.[40] The decision on whether an apex court is an effective remedy is thus one with important, even systemic, consequences.

In light of those considerations, this final section of the article will discuss three separate issues. First, how such a decision by the Court squares with the principle of subsidiarity. Second, whether such an assessment should not be completed during the merits stage, rather than the admissibility stage. Third, it will stress that such an assessment should in any case be conducted in a measured and context-sensitive way.

One could argue that disqualifying domestic apex courts via the requirement of the exhaustion of domestic remedies, as a key element in the Convention protection system which is inherently connected to the idea of subsidiarity,[41] may in itself come into tension with the idea of subsidiarity. This is not in the least because sidelining the domestic apex court in such a way would seriously reconfigure the domestic jurisdictional system, potentially making the functioning of the judicial system less predictable and coherent. To come back to the phrasing used in the beginning of this article, such a decision would remove the actor that is most important for the application of the principle of subsidiarity from a systemic point of view.[42]

40 See on this point also *Kovačević v Bosnia and Herzegovina* 43651/22 (ECtHR, 29 August 2023) Dissenting Opinion of Judge Kucsko-Stadlmayer, para 14.

41 See *Gjinarari* (n 11) para 20; *Jankovic and Others* (n 11) para 65.

42 See section 2.

In this respect, it should first be noted that the Court can and has in the past assessed the independence of domestic apex courts.[43] Their particular position in no way exempts them from scrutiny and they are held to the same standards as any other court. More fundamentally, assessing the independence of domestic apex courts via the exhaustion requirement would in fact fit with a broader evolution within the Convention system, one which stresses the importance of procedural subsidiarity instead of substantive subsidiarity.[44] Former President of the Court Spano has argued in a 2018 article that the ideas of subsidiarity and process-based review can only function properly if the national decision-makers are structurally capable of fulfilling that task and if the foundations of the domestic legal order are intact. As such, states that do not respect the rule of law and do not ensure the impartiality and independence of their judicial systems, cannot expect to be afforded deference under process-based review.[45] In a later article he wrote that it is self-evident that the principle of subsidiarity within the Convention system is devoid of any meaningful content if the member states do not secure in law and practice the existence of independent, impartial, and effective courts so as to safeguard fundamental rights.[46] In other words, the idea of subsidiarity is then understood in a primarily institutional sense, in which the Court requires a proper domestic institutional architecture which safeguards the independence of the domestic courts.

This link between subsidiarity and the importance of guaranteeing domestic judicial independence has also popped up in other legal literature,[47] and has recently even found its way into the Court's case law. In the Grand Chamber judgment of *Grzęda* the Court stressed, in a phrase later repeated in other judgments, that the subsidiary nature of the Convention system cannot function properly without duly independent national judges.[48] In other words,

43 Just look at many of the Polish judgments that have been mentioned in this article.

44 For the different conceptions of subsidiarity, see S Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary About Human Rights?' (2016) 61(1) *The American Journal of Jurisprudence* 69.

45 R Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18(3) *Human Rights Law Review* 473, 493.

46 R Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary' (2021) 27(1) *European Law Journal* 211, 223.

47 F Krenc and F Tulkens, 'L'indépendance du juge. Retour aux fondements d'une garantie essentielle d'une société démocratique', in *Intersecting Views on National and International Human Rights Protection: Liber Amicorum Guido Raimondi*, R Chenal, I Motoc, LA Sicilianos, and R Spano (eds), (Wolf Legal Publishers 2019) 397.

48 *Grzęda v Poland* [GC] 43572/18 (ECtHR, 15 March 2022) para 324; *Juszczyszyn* (n 34) para 333; *Tuleya* (n 23) para 451. In the same sense regarding the reasonable time requirement, see *Van den Kerkhof v Belgium* 13630/19 (ECtHR, 5 September 2023) para 98.

substantive subsidiarity would presuppose a domestic institutional and procedural framework that operates in line with the Convention's foundational principles of the rule of law and democracy.[49] By declaring that non-independent apex courts should no longer be seen as effective remedies that must be exhausted, the Court would take a significant step further towards the enforcement of such ideas and would give much more bite to this connection between the ideas of judicial independence and procedural subsidiarity.

It is clear that if the Court would indeed adopt such an approach, it would take up a strong, essentially constitutional role, not only towards the protection of judicial independence of domestic courts, but towards the effective enforcement of Convention rights throughout the entire Council of Europe.[50] By focusing on the independence of domestic judges in light of the exhaustion of domestic remedies, it would highlight the vital role those bodies play in enforcing the fundamental rights, as foot-soldiers of the Convention.[51] In this regard it would resemble the ECJ's recent jurisprudential evolution concerning Article 19(1)(2) TEU[52] and the protection of domestic judges as EU judges.[53]

Beyond those considerations related to the principle of subsidiarity, some might wish to interject that an assessment that may entail such broad effects in the domestic judicial system should not be tackled in the admissibility stage but should rather be decided at the merits. Yet, one can find plenty of examples in which earlier rulings by the Court on questions concerning the exhaustion of domestic remedies have brought about similar broad, even systemic consequences. The 2007 judgment of *Salah Sheekh*, for example, caused strong turmoil in the Netherlands, since the Court held that the Administrative Jurisdiction Division of the Council of State, the country's highest administrative court, was not an effective remedy that needed to be exhausted. Since, on the basis of the prevailing jurisprudence by that court, the arguments by the applicant would in practice have had virtually no

49 For a recent and similar argument that democracy and the rule of law are normative foundations for the application of subsidiarity in both the procedural and substantive dimensions, see A Zysset and B Çali, 'Exhausting Domestic Remedies or Exhausting the Rule of Law? Revisiting the Normative Basis of Procedural Subsidiarity in the European Human Rights System' (2023) 14(2) *Transnational Legal Theory* 157.

50 See F Krenc, '« Dire le droit », « rendre la justice ». Quelle Cour européenne des droits de l'homme?' (2018) *Revue Trimestrielle des Droits de l'Homme* 311.

51 For this metaphor, originally regarding domestic courts in the framework of the European Community, see I Maher, 'National Courts as European Community Courts' (1994) 14(2) *Legal Studies* 226, 242.

52 Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU).

53 K Lenaerts, 'On Checks and Balances: The Rule of Law Within the EU' (2023) 29(2) *Columbia Journal of European Law* 25.

prospect of success, he was allowed to skip it.[54] A similar effect can be found in a string of cases against Russia concerning a ban on holding assemblies. In the 2010 *Alekseyev* judgment, the Court held that the Russian courts could not provide adequate redress under Article 13 ECHR since the law did not impose a legally binding time frame for the authorities to give a final decision on the organisation of a public event.[55] In the 2017 *Lashmankin* judgment, the Court confirmed this approach and upheld an additional argument regarding the effectiveness of the courts, since they could not assess the necessity and proportionality of the measures by the executive.[56] Then, in the 2018 *Alekseyev* judgment, the Court declared part of the complaints inadmissible for being lodged out of time, since the applicants had first appealed to the Russian courts, rather than immediately appealing to the ECtHR,[57] thereby forcing all other applicants to ignore the Russian courts in future similar cases. In situations where the domestic remedies are not sufficiently swift, the Court may similarly declare them ineffective, thereby allowing the applicants to skip them and immediately lodge their complaint to the Court.[58] Recently, in *Kovačević*, a case about the right to vote, the Court adopted a similar approach to the constitutional court of Bosnia and Herzegovina. In that judgment, the majority agreed with the applicant that an appeal to the constitutional court was bound to fail in view of the court's earlier decisions. As such, the applicant was correct in not exhausting it as a domestic remedy.[59]

What those examples show is that it is not novel for the Court to issue decisions on the exhaustion of domestic remedies, the consequences of which are to essentially remove a judicial body – even an apex court – or an entire range of bodies from the Convention protection system and mandate individuals to bypass them.[60] Such consequences are in fact simply inevitable in the logic of a system that requires to only exhaust *effective* remedies. Yet, what is different for the topic of the present contribution is that the notion of effectiveness is not looked at in terms of the chances of success, the swiftness of proceedings, or the scope of review by the national courts,

54 *Salah Sheekh v the Netherlands* 1948/04 (ECtHR, 11 January 2007) paras 119–127.
55 *Alekseyev v Russia* 4916/07 (ECtHR, 21 October 2010) paras 97–100.
56 *Lashmankin v Russia* 57818/09 (ECtHR, 7 February 2017) paras 356–360.
57 *Alekseyev and Others v Russia* 14988/09 (ECtHR, 27 November 2018) paras 14–16.
58 See, for example, regarding reasonable length of proceedings, *Parizov v FYROM* 14258/03 (ECtHR, 7 February 2008) paras 37–47; *Van den Kerkhof* (n 48) paras 55–85. Regarding enforcement of parental rights to have contact with their children, see *IS v Greece* 19165/20 (ECtHR, 23 May 2023) paras 62–67.
59 *Kovačević* (n 40) para 32.
60 For another recent example, see *SP and Others v Russia* 36463/11 (ECtHR, 2 May 2023) paras 66–68 and 107.

but rather from a more structural dimension, namely whether the court in question is independent and established by law. However, as argued earlier, there are concordant indications that the Court already considers the notion of effectiveness to equally include such a structural dimension.[61] In such an understanding, the potential approach of the Court to tackle questions of judicial independence under the admissibility step, does not seem entirely exceptional or excessive.

On the basis of the above considerations, it is argued here that the Court should indeed take the step to deal with questions of judicial independence via the requirement of the exhaustion of effective domestic remedies. To use the terminology of this special issue, it should make stronger use of the 'head' to address structural or systemic issues in the contracting parties. The exact way in which this is done may vary depending on the facts and procedural lead-up to the case and on the specific complaints raised by the applicant.

Yet, as acknowledged at the beginning of this section, and as evidenced by the above considerations, such a development in the approach of the Court is no small feat and the stakes are high here. Because of that, it is argued here that the Court should adopt a measured approach in this regard. As is the general rule with the exhaustion of remedies,[62] mere doubts about the independence of an apex court cannot be understood as a sufficient reason to refuse to exhaust it. In other words, there must be strong and concordant indications that the domestic court in question cannot act as an independent, and thereby effective remedy. This may require, depending on the case in question, a detailed, *in concreto* assessment. Even a previous judgment by the Strasbourg Court finding a violation of the right to a tribunal established by law may not suffice in this regard. Take the Polish Constitutional Tribunal, for example. In *Xero Flor*, the ECtHR found a violation of the right to a tribunal established by law because of a defective appointment procedure for three out of its 15 judges. Yet, the Tribunal can render certain judgments with a bench of five or even three justices.[63] That means that after the *Xero Flor* judgment, it was still possible to constitute a bench of lawfully appointed judges. A measured approach then dictates that the applicant is required to make use of the self-correcting measures that are present in the judicial system, for example by asking for the recusal or the withdrawal of judge(s) whose independence is in doubt. Such a point of view also aligns with some recent judgments by the Court in which it held that a party to a judicial process who has doubts about

61 See section 3.

62 *Vučković* (n 10) para 74.

63 Article 25 Polish Constitutional Tribunal Act.

the impartiality of a judge,[64] or about the lawfulness of the appointment of a judge participating in the hearing, which could adversely affect the 'established by law' quality of the tribunal, will generally be expected to raise those questions before the court.[65] In other words, the individuals must thus show the requisite diligence[66] and employ the procedural resources available to try to ensure the independence of the judicial body in question.

However, in circumstances in which such self-correcting measures cannot be of any help – think, for example, of the Polish Disciplinary Chamber of the Supreme Court in which all judges have been appointed in a way that violates the right to a tribunal established by law –[67] or when they are not effective in practice – for example, when the judges in question systematically refuse to comply with requests for recusal – the Court should take the step, on the basis of all that was mentioned above, to assess whether the national court in question was an effective remedy or not and draw the necessary conclusions of that assessment.

It is important that that assessment is encompassing and context-sensitive, and that it takes on board more than just the facts of the case at hand but looks into the broader legal and political framework. For decades now, the Court has indeed held that realistic account must be taken not only of the existence of formal remedies in the legal system of the contracting party concerned but also of the general legal and political context in which they operate.[68] Such a contextual analysis is, furthermore, something that the Strasbourg Court is doing more and more in rule of law related cases,[69] following in the footsteps of the ECJ.[70] For its analysis it can rely, among other things, on the case law of other international bodies, specifically the ECJ, on opinions and documents of national or international political or advisory bodies,[71] or on the case law of the apex court in question.[72]

64 *Sperisen v Switzerland* 22060/20 (ECtHR, 13 June 2023) para 45.

65 *Ugulava v Georgia* (*No 2*) 22431/20 (ECtHR, 1 February 2024) para 39; *Sevdari v Albania* 40662/19 (ECtHR, 13 December 2022) para 110.

66 *Croatian Golf Federation v Croatia* 66994/14 (ECtHR, 17 December 2020) para 112.

67 *Reczkowicz v Poland* 43447/19 (ECtHR, 22 July 2021).

68 Among others *Kurić v Slovenia* [GC] 26826/06 (ECtHR, 26 June 2012) para 286.

69 See, for example *Juszczyszyn* (n 34); *Tuleya* (n 23)

70 See, for example, Case C-817/21 *Inspecţia Judiciară* (ECJ, 11 May 2023), ECLI:EU:C:2023:391; Case C-585/18 *AK* [2020] ECR I-20.

71 Consider, for example, the Venice Commission or the Rule of Law Reports by the European Commission.

72 Consider, for example, the very critical judgment of the Polish Constitutional Tribunal (K 6/21, 24 November 2021) which held that parts of Article 6(1) ECHR violate the Polish Constitution.

If the Court concludes, on the basis of that analysis, that the apex court in question cannot be seen as an effective remedy that must be exhausted, that decision also has immediate effects for all future cases. The fact that the Court based its analysis on broad, contextual considerations should be taken to mean that its conclusion can be extrapolated to other cases. After such a decision, future applicants are expected, in fact required, to skip the domestic court in question and immediately lodge their applications to the Court. Only when structural measures have been taken to comply with the Court's judgment or to repair the effectiveness of the self-correcting measures, may applicants again be required to exhaust the remedy in question.

The above considerations lead – as mentioned already – to a quite measured approach, in which the bar for disqualifying a domestic apex court as an ineffective remedy that should not be exhausted, is put high. That bar will likely only be met in quite exceptional situations. That brings us to the final question that some may have at the end of this section: why bother? What is the added benefit of having the Court adopt such a big, contentious step via the admissibility criterion, when it has already shown its teeth in finding violations of Article 6(1) ECHR concerning domestic apex courts?

First, from a normative point of view, there are certainly arguments to be made for the Court to take a more constitutional approach towards judicial independence and to also enforce this more via the admissibility step and the exhaustion of domestic remedies. Especially in a time where the foundations of the separation of powers and the rule of law are under threat around Europe, it might make sense for the Court to intensify its scrutiny of the domestic institutional architecture and to stress a procedural understanding of subsidiarity by helping to guarantee the independence of the domestic remedial system. Of course, that would imply a larger evolution in other areas of the case law as well, which will not occur overnight, but for which the development argued for in this article may already indicate a significant step. Second, and closely related, from a more pragmatic point of view the approach under the admissibility step may be much more effective on the ground. As mentioned throughout the article, Poland has so far been found to violate the Convention multiple times because of its judicial reforms and the new composition and functioning of some of its apex courts. Yet, the country does not seem keen to properly execute these judgments any time soon.[73] By

73 See the execution reports regarding the abovementioned Polish cases at: <https://hudoc.exec.coe.int/>. See also UA Kos, 'Signalling in European Rule of Law Cases: Hungary and Poland as Case Studies' (2023) 23(4) *Human Rights Law Review*. Of course, the situation changed significantly since the last elections in Poland.

declaring these bodies ineffective remedies that should not be exhausted, the Court would essentially mandate the applicants to simply ignore them and remove that court within the broader system of Convention protection. In this way, this approach would significantly hamper the position and authority of those bodies within the domestic judicial system, more than a traditional judgment on the merits finding a violation of Article 6(1) ECHR might. In this sense, that approach may also help to neutralise an important actor for illiberal regimes for abusive constitutionalism.[74]

6 Conclusion

This article made a novel argument concerning the question whether non-independent apex courts are effective remedies to be exhausted. While the Court has so far avoided to take a clear stance on this issue (section 4), it is inevitable that this question will arise again in the future. After discussing the systemic importance of apex courts in the Convention system (section 2) and establishing the connection between a court being independent and established by law and its being an effective remedy (section 3), this article argued that the Court should indeed take the step, provided it does so in a measured and context-sensitive manner, to indicate that non-independent apex courts are not remedies to be exhausted (section 5).

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74 On the issue with further references, see P Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' (2019) 15(1) *European Constitutional Law Review* 48.