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The Constitutional Tribunal of the Republic of Poland  
Trybunał Konstytucyjny Rzeczypospolitej Polskiej

Anglais / English / Englisch / английский

## **Cooperation of Constitutional Courts in Europe - current situation and prospects for the future**

### **National report**

#### **I. Constitutional courts between the constitutional law and the European law**

##### **1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?**

Under the Constitution of the Republic of Poland there is no *expressis verbis* obligation imposed on the Constitutional Tribunal to take into account the European law in the exercise of its competencies defined by the Constitution. What is more, the Constitution does not refer to such terms as the “Law of the European Union” or the „Union law.” Instead, it uses the notions of „international law”/ „international agreements”; in consequence, the European law must be qualified as a part of the international law, and any references to the European law in the rulings of the Constitutional Tribunal are based on the provisions of the Constitution regarding international law or international agreements. The obligation to take the European law into account is not imposed by the law on the Constitutional Tribunal, either, and by other ordinary acts of law.

Adopted on April 2, 1997, i.e., prior to Poland’s accession to the European Union, the Constitution of the Republic of Poland, unlike most of the constitutions of the EU member states, does not use the notion of the „European Union”, „the Union law” or the „European integration” (the draft amendments to the Constitution prepared in 2010, whereby the contents of the so-called integration clauses were to be included, were not passed). The constitutional issues connected with Poland’s membership in the European Union, particularly the procedure and scope of the delegation of „some” competences, the constitutional status of the European Union or the European law in the Polish legal and constitutional system, and the competences of Polish courts and the Constitutional Tribunal vis a vis the EU laws, are analyzed and assessed by the Constitutional Tribunal based on and in the context of those constitutional norms which regard international organizations and international law. Such provisions include norms which are referred to as the integration standards, i.e., Art. 90 of the Constitution (setting forth a procedure for competency delegation upon an international organization) and Art. 91 of the Constitution (which regulates the constitutional status of the international law in the Polish legal system, including the principle of primacy of that law over acts of law and the principle of direct application of the international law in the Polish legal system). There is no doubt that such

standards are also included in Art. 9 of the Constitution which imposes an obligation on the Republic of Poland to observe binding international agreements.

Therefore although the Polish legal system does not directly obligate the Constitutional Tribunal to „take European laws into account” during its exercise of constitutional competences, that obligation may be validated by the contents of the above-mentioned provisions of the Constitution, in particular Art. 9 of the Constitution of the Republic of Poland which reads that „the Republic of Poland shall respect international law binding upon it.” As the Republic of Poland is the addressee of that provision, so is the constitutional court. Although the respect for the international law is not tantamount to taking it into account, but once certain assumptions have been adopted, the notion of respect for the international law also embraces its taking into consideration. Moreover, it is necessary for the Constitutional Tribunal to make allowances for the European law in the cases where the Tribunal examines – in the context of Art. 90 and 91 of the Constitution – issues of Poland’s membership in the European Union or the status of the European law in general, or of its individual sources, e.g., EU regulations, in the Polish legal system (e.g., the judgment of July 30, 2013, U 5/12).

The very notion of „taking into consideration” is ambivalent, however, because both the exercise of control over the European law in terms of its conformance to the Constitution, to do which the Constitutional Tribunal is authorized by the provision of Art. 188 Point 1 of the Constitution, and the control over the compliance of the acts of law and other normative acts passed by central government bodies with the European law (Art. 188 Point 2 and 3) is, in a sense, taking the European law into consideration. *De iure* and *de facto* the European law is taken into consideration by the Constitutional Tribunal not only as a benchmark and subject to control, but also, on the Tribunal’s own initiative, as an interpretation directive or a „source of inspiration” when the Constitution and the Polish law is construed. Under the doctrine stemming from the obligation to make allowance for the European law in the control of the compliance of a law with the Constitution is the Tribunal’s duty to interpret the Constitution in accordance with the European law. The position taken in that respect by the Constitutional Tribunal is not unequivocal. On the one hand, in its judgment on the case K 32/09 the Tribunal ruled that: „The institution of the devolvement of competences does not make it possible to amend the Constitution by way of its interpretation favorable to the European integration.” On the other hand, in its judgment SK 45/09 the Constitutional Tribunal held that: „Any contradictions should be eliminated by way of an interpretation respecting a relative autonomy of the European law and national law. Moreover, that interpretation should rest on an assumption of mutual loyalty between the EU institutions and the member states. That premise generates an obligation on the part of the Court of Justice to display goodwill towards national legal systems, and on the part of member states – a duty of a highest degree of respect for EU norms.”

**2. Are there any examples of references to international sources of law, such as:**

- a) the European Convention of Human Rights,**
- b) the Charter of Fundamental Rights of the European Union,**
- c) other instruments of international law at European level,**
- d) other instruments of international law at international level?**

The Tribunal refers to international sources of law (ratified international agreements and conventions) both when those sources are a model of control and when the international sources of law are subject to control if the law is constitutional. The former type of reference to international law, i.e., to the sources of the international law as the control models, is most common in the Tribunal's adjudication practice, in which case it refers to the international sources of law on the initiative of an applicant who identifies an international agreement as a control model in its application, which is a rule, or less commonly though not sporadically, on its own initiative. In the latter case, the international law is neither a control model nor subject to control, but it is nevertheless invoked and analyzed by the Tribunal as an additional interpretation argument.

It is necessary to bear in mind, however, that in the case of a constitutional complaint international agreements cannot constitute the proper control model. The Tribunal's jurisdiction over constitutional complaints does not cover the examination of the compliance of the disputed normative act with an individual's rights or freedoms referred to in ratified international agreements. Art. 79 of the Constitution clearly stipulates that a complaint appeal may only refer to "constitutional rights or freedoms". It does not matter if any rights stem for the complainant from an international agreement, as they are not subject to protection under the procedure of a constitutional complaint (cf. the judgment of June 8, 1999, ref. no. SK 12/98, OTK ZU no. 5/1999, item 96; the decision of April 18, 2000, SK 2/99, OTK ZU no. 3/2000, item 92; the judgment of May 7, 2002, ref. no. SK 20/00, OTK ZU no. 3/A/2002, item 29; the judgment of December 14, 2005, ref. no. SK 61/03, OTK ZU no. 11/A/2005, Item 136; the decision of June 8, 2009, ref. no. SK 26/07; OTK ZU no. 6/A/2009, item 92; the decision of July 21, 2009, ref. no. SK 61/08; OTK ZU no. 7/A/2009, item 120).

All ratified international agreements without exception, including the treaties on which the EU rests, are within the jurisdiction of the Constitutional Tribunal, i.e., they are the subject to control if an act of law is constitutional (e.g. the Accession Treaty – the Tribunal's judgment of May 11, 2005, K 18/04; the Lisbon Treaty, K 32/09).

The Tribunal recognized as a matter of principle the possibility to control the constitutionality of international agreements under a proceeding initiated by a constitutional complaint. In its judgment of December 18, 2007 re. the case ref. no. SK 54/05, the Tribunal stated that "the admissibility of control over an international agreement under a proceeding initiated by a constitutional complaint will be decided *a casu ad casum* by individual features of a specific disputed international agreement, and in particular, if it was a normative basis of the final decision about the rights, freedoms or obligations of the complainant" (OTK ZU no. 11/A/2007, Item 158, Clause 1.2. of Part III of the statement of reasons).

Under that procedure subject to the jurisdiction of the Constitutional Tribunal are not only ratified international agreements but also acts of law enacted by an international organization (Art. 91 Par. 3 of the Constitution), including the European Union's derivative legislation (case SK 45/09). Therefore a constitutional complaint may regard any act of international law which meets jointly the following two prerequisites: firstly, it includes normative contents, and secondly, it was the legal grounds of a final ruling about the complainant's rights, freedoms and obligations defined in the Constitution.

When the applicant or complainant refers to the provisions of ratified international agreements as a model, sometimes the Tribunal recognizes such model as inadequate and discontinues the proceedings. It is especially the case when the charges expressed in a complaint or application regarding nonconformity with agreements are tantamount to the charges of the lack of conformity to the Constitution, and particularly, when they do not go beyond the quoted contents of the constitutional model. Then the Tribunal resorts to a formula that „the assessment of the conformity of the disputed provision with the constitutional model formulated in Art. (...) of the Constitution makes the statement by the Tribunal unnecessary in respect of the assessment of the indicated provision with invoked legal and international models (e.g., the judgment of November 4, 2010, K 19/06, OTK ZU no. 9/A/2010, item 96, point 11; see also judgment of October 18, 2004, P 8/04, point 11I 5.).

The European Convention for the Protection of Human Rights and Fundamental Freedoms is that source of international law which is most frequently taken into consideration by the Constitutional Tribunal. Which is mainly due to the fact that applicants and complainants most frequently indicate the provisions of that Convention as a control model among the sources of international law. As mentioned above the Tribunal regularly takes international law into account also on its own initiative, usually on the grounds (case U 10/07) that the Convention plays an essential and special role in determining a standard catalogue of fundamental rights and freedoms in a democratic state. In the Tribunal's opinion that special role of the European Convention stems from the fact (case U 10/07) that states parties to the Convention not only committed themselves to observe a catalogue of rights and fundamental freedoms included in the Convention but also undertook to comply with the judgments of the European Court of Human Rights which adjudicates based on the Convention and the Protocols that supplement it. The Court's judicial decisions determine the normative contents of rights and fundamental freedoms that are formulated in a compact way, which is understandable, in the Convention and the Protocols. The judicial decisions of the European Court determine common normative contents of rights and fundamental freedoms the regulation of which (also by constitutions) sometimes significantly differs in various states.

The Tribunal has been consistent in its decisions that any breaches of the Convention's provisions cannot be the grounds of a constitutional complaint. It follows from Art. 79 Par. 1 of the Constitution that the freedoms or rights the protection of which is demanded by the complainant must have their source in the same constitution. It unequivocally follows from the wording used in Art. 79 Par. 1 of the Constitution referring to: "constitutional freedoms or rights" (the Tribunal's judgment of February 6, 2002, SK 11/01). For the same reason there is/exists a formal obstacle to the adjudication about the conformance of the provisions of the law to the norms of international conventions under the proceeding of a constitutional complaint. Therefore the proceedings in that respect are discontinued due to the inadmissibility of adjudication (Art. 39 Par. 1 Point. 1 of the law on Constitutional Tribunal)" (judgment of 17.12.2003, SK 15/02).

The recognition by the Tribunal that it has no jurisdiction to control the conformance of the Polish law to the Convention and consistent discontinuance of respective proceedings due to the inadmissibility of adjudication does not, however, mean that the Tribunal avoids any substantive assessments. For example, in its judgment of December 17, 2003, SK 15/02, the Tribunal stated that „both the guarantees of the right to trial, fair penal proceedings, presumption

of innocence, protection of the right to privacy, equality before the law and non-discrimination which are invoked by the complainant referring to the provisions of the International Covenant on Civil and Political Rights, and the right to a fair court trial envisaged by the European Convention have their counterparts in the provisions of the Constitution. It should be emphasized that the contents and meaning of those rights, especially the right to court and the protection of private life, are in principle understood by the Polish Constitution in accordance with the judicial decisions of the European Court of Human Rights. The position developed in the European judicial decisions in respect to the convention's guarantees of individual rights and freedoms is always taken into consideration when specific constitutional norms are interpreted. There is no doubt that the assessment formulated in respect of the above indicated constitutional models is applied within full scope in respect of the invoked international standards.

The Tribunal sometimes refers to the Convention on its own initiative. In the statement of reasons in the case of December 6, 2004, SK 29/04, the Tribunal directly stated that „due to a fundamental role that personal freedom plays in the system of the international protection of human rights, the problem of admissibility and control of detention's legality has traditionally been a subject of detailed regulations which are part of the system of international agreements, i.a., (...) the Convention for the Protection of Human Rights and Fundamental Freedoms (Dz. U. of 1993, No 61, item 284 as amended; hereinafter: the Convention). Although they have not been referred to as control models - which is unnecessary in the light of the Tribunal's decisions taken so far whenever respective constitutional provisions exist – it is impossible not to take into account the views expressed in the legal doctrine and judicial decisions shaped by them during law interpretations regarding detentions. They consolidate the position taken by the Tribunal in the judgment and statement of reasons.” (like in the judgment of June 9, 2010, SK 52/08).

When a querying court or an applicant refer to the provisions of the Convention as a control model, the Tribunal takes a position more „favorable” to the Convention, i.e., it recognizes as admissible an adjudication about the hierarchic control of the conformity of the Polish law to the Convention. However, the Tribunal's position is more complex than that for the following reasons:

- if it follows from an application's substantiation that when referring to the provisions of the ratified international agreement (e.g., Art. 9, Art. 10 in connection with Art. 17 of the ECHR) the applicant did not go further than to quote the contents of the Constitution as a model (i.e., Art. 54 Par. 1 in the context of the definiteness of the criminal law provisions (Art. 42 Par. 1 of the Constitution)), then the Tribunal recognizes that „the charges formulated based on the above-mentioned norms are identical”, and consequently: „an assessment if the disputed provision conforms to the constitutional model formulated in Art. 54 Par. 1 of the Constitution makes it unnecessary for the Tribunal to make a statement as regards the assessment if the identified provision conforms to legal international models that have been referred to” (vide, e.g., judgment of November 4, 2010, K 19/06, OTK ZU no. 9/A/2010, item 96, point 11; also vide judgment of October 18, 2004, P 8/04, point III 5, judgment of July 19, 2011, K 11/10, point 4.2.2.), which justifies the recognition by the Tribunal of the invoked Convention's provisions as an inadequate control model; however, that position is not tantamount to saying that in such cases the Tribunal does not broadly refer to the adjudications of the European Court of Human Rights regarding specific provisions of the Convention (vide especially point 3 of the statement of reasons of

judgment of July 19, 2011, K 11/10); similarly in the judgment of July 10, 2008, P 15/08, when examining an accusation of nonconformance of Art. 52 § 1 point 2 of the Code of Petty Offences with Art. 11 of the Convention, the Tribunal stated that: „in its arguments the querying court rightly invokes Art. 11 of the Convention and judicial decisions of the ECHR. The standards stemming from the Convention may and should be followed when creating a constitutional model which determines if a breach of the Constitution by the controlled norms has occurred. However, when invoking Art. 11 of the Convention as a model for the examination, the querying court did not in fact go beyond the contents included in the constitutional model (Art. 57 of the Constitution) which provides for the freedom of assembly. An assessment of the disputed provision in the light of Art. 57 of the Constitution which would take into consideration the standards formulated in the Convention and the ECHR's judgments makes the additional assessment of the disputed provision from the point of view of Art. 11 of the Convention unnecessary. That is why the Constitutional Tribunal discontinued the proceeding in part which regarded a charge of the infringement of Art. 11 of the Convention.”

- sometimes the Tribunal makes a broad reconstruction of the contents and limits of a right guaranteed by the Convention corresponding to the right guaranteed by the Constitution, even though the applicant or querying court do not construe a convention model; this is what happened, for example, in the case of an application by the First President of the Supreme Court to examine the conformance of Art. 122a of the law of July 3, 2002 – Aviation Law (Dz. U. of 2006 No. 100, item 696, as amended) to Art. 38, Art. 31 Par. 3, Art. 2, Art. 26 and Art. 30 of the Constitution of the Republic of Poland in which the Tribunal decided that the provision did not conform to Art. 2, Art. 30 and Art. 38 in connection with Art. 31 Par. 3 of the Constitution of the Republic of Poland, but in the statement of reasons it broadly highlighted the convention standard regarding the right to protection of life, recognizing at the same time that a similar/concurrent standard is provided for in the Constitution of the Republic of Poland (vide, e.g., point 2.4 and 2.5, point 7.4. of the statement of reasons of the judgment of September 30, 2008, K 44/07).

- an interesting, but also controversial position was taken by the Tribunal in its judgment of July 3, 2008, K 38/07 re. an application by the Human Rights Defender (the Ombudsman) to examine the conformance of Art. 236 § 2 of the Law of June 6, 1997 – Code of Penal Procedure (Dz. U. No. 89, item 555, as amended) to Art. 45 Par. 1 and Art. 77 Par. 2 of the Constitution. By stating that the disputed provision does not conform to the constitutional models referred to in the application, the Tribunal also held, i.a. that: „The analysis by the Constitutional Tribunal of a foreign internal law and also of the judicial decisions in respect to public international law – due to the rapprochement between contemporary legal systems – must be preceded by a reservation that it is necessary to meet various preconditions and to be aware of various contexts. It was earlier on that the Constitutional Tribunal specified particular circumstances in which one may resort to nonlinguistic methods of legal interpretation (cf. judgment of June 28, 2000, ref. no. K. 25/99, OTK ZU No. 5/2000, item 141). The role of those methods is subsidiary to linguistic and logical interpretation, however, even if by means of that method a text is found to be synonymous, its interpreter may sometimes “go beyond” its determined meaning. However, a strong axiological substantiation is required which will mainly invoke constitutional values. It is also necessary to note that if the Tribunal invokes a foreign internal law it is necessary to determine if the use of alien models is adequate to the interpretation of the Polish law. One should be particularly careful in „selecting” a legal system which is to be invoked. In the

discussed case it will be appropriate to reach for the legal solutions that function in Germany and to the rulings of the European Court of Human Rights (hereinafter: ECHR).” When presenting its position on admissibility of invoking a „foreign law” or „foreign models” the Tribunal then referred to a few judgments by the ECHR regarding Art. 8 of the Convention.

The provisions of the Charter of Fundamental Rights of the European Union are relatively less frequently taken into consideration in the judgments of the Constitutional Tribunal. That may be due to the so-called British-Polish protocol to the Charter of Fundamental Rights of the European Union. But it is worth mentioning that as early as 2005 the Tribunal referred to the same Charter which was not binding at the time in the case P 9/04 stating that: „also under Art. II-109 Par. 1 third sentence of the Treaty promulgating the Constitution for Europe (Charter of Fundamental Rights of the European Union): „...if the law, which came into effect after the commitment of an act prohibited on the pain of penalty, provides for a more lenient penalty, that penalty shall apply ” (EU O. J. of 2004, C 310 vol. 47). Although that provision is still not binding, but its contents give rise to no doubts and indicate tendencies that predominate in that matter. The imperative to apply provisions more favorable to the defendant is a principle which the defendant may and should have the right to invoke.” The provisions of the Charter of Fundamental Rights of the European Union were broadly commented upon in the Tribunal’s judgment in the case SK 45/09 where, while examining the conformance of the EU Regulation to the Constitution, the Constitutional Tribunal stated, i.a., that the „ Charter of Fundamental Rights, the Convention and also constitutional traditions of member states set a high standard of the protection of fundamental rights (human rights) in the European Union. The foregoing decide about a significant axiological concurrence between the Polish and EU law. Which does not mean that legal solutions adopted by both legal systems are identical. One cannot expect that the EU laws would include norms that completely overlap with the norms of the Polish law. That is due to the way the EU laws are enacted, with the participation of all member states, but also to a different nature of both legal systems that are compared (on the one hand, the law of a state , and on the other hand, the law of an international organization).”

The Constitutional Tribunal broadly allowed for the provisions of the Treaties on which the EU rests, also as the control benchmarks of the law’s constitutionality. In the recent case of June 26, 2013, K 33/12, where it stated that „the law of May 11, 2012 ratifying the Decision 2011/199/UE of March 25, 2011 by the European Council amending Art. 136 of the Treaty on the Functioning of the European Union in respect of the stability mechanism for member states whose currency is Euro (Dz. U. item 748) does not conform to Art. 90 in connection with Art. 120 first sentence *in fine* of the Constitution of the Republic of Poland and to Art. 48 Par. 6 of the Treaty on European Union.” Prior to that it analyzed the EU laws as subject to control, especially in the statement of reasons in the judgment of May 11, 2005, ref. no. K 18/04, in respect to the constitutionality of the Accession Treaty and in the judgment of November 24, 2010, ref. no. K 32/09, in respect to the constitutionality of the Lisbon Treaty.

In its judicial decisions the Constitutional Tribunal took into consideration some Council of Europe’s Conventions, including the European Convention on the Legal Status of Children Born Out of Wedlock (SK 20/05) or the European Convention on Extradition promulgated in Paris on December 13, 1957 ( SK 6/10).

In respect of the sources of (classical) international law the Tribunal takes into account international agreements and conventions on human rights. However, they are referred to sporadically due to the fact that the acts of classical international law are seldom invoked as the control models of the Polish law. The case no. P 10/06 is an example of comparative argumentation frequently used by the Constitutional Tribunal where in the aftermath of the analysis of the Polish law the Tribunal concluded that: „the foregoing notwithstanding it is worth mentioning that also Art. 10 Par. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to which Poland is a party, provides directly that the protection of the reputation (as well as other human rights) should be treated as the grounds for restriction of the freedom of expression. A similar principle is expressed in Art. 19 Par. 3 letter a of the International Covenant on Civil and Political Rights (ICCPR) adopted by the UN General Assembly. It should also be noted that the UN Universal Declaration of Human Rights states in its Art. 12 that no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honor and reputation, and everyone has the right to the protection of the law against such interference or attacks. It actually repeats Art. 17 Par. 1 and 2 of the ICCPR. It should be emphasized that unlike the norms regarding freedom of speech and expression (Art. 19), Art. 17 of the Covenant does not refer to any possible admissibility of restrictions of protection against "attacks on honor or reputation " on the grounds of the freedom of speech and expression. Accordingly, under the Covenant's Art. 5 one cannot presume that freedom of expression may at all restrict the protection of honor and reputation. Those standards of the international law which, regardless of the assessment of the legal nature of the Universal Declaration of Human Rights, are binding upon the Republic of Poland (Art. 9 of the Constitution) and also give grounds to an unequivocal conclusion that honor and reputation may be the grounds to restrict the freedom of speech. Moreover, it also follows from the ICCPR that the protection of reputation and honor should enjoy certain priority over the protection of freedom of speech. To sum up that part of the discussion one may say that the objective which is the basis of the regulation included in Art. 212 § 1 of the Penal Code has been constitutionally legitimate. What is more, in the light of the acts of international law the protection of reputation against "arbitrary attacks" on reputation and honor is the responsibility of public authorities, including the legislator. And it is in the context of that obligation that one should first of all perceive Art. 212 § 1 and 2 of the Penal Code.” Not uncommon are also examples when the Constitutional Tribunal took into consideration the conventions by the International Labor Organization (e.g., the judgment of July 12, 2010, P 4/10 regarding Convention No. 135).

Quite frequent are also examples of cases where the Constitutional Tribunal stated in its judgment that an act of law did not conform to the provisions of the international law. Recently, it was the judgment of March 16, 2011, K 35/08, where the Tribunal stated that the „Decree of December 12, 1981 on martial law (Dz. U. No. 29, item 154) did not comply with Art. 7 of the Constitution of the Republic of Poland in connection with Art. 31 Par. 1 of the Constitution of the Polish People's Republic passed by the Legislative Diet on July 22, 1952 (Dz. U. of 1976, No. 7, item 36) and Art. 15 Par. 1 of the International Covenant on Civil and Political Rights which was laid down for signatures in New York on December 19, 1966 (Dz. U. of 1977, No. 38, item 167).”

**3. Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?**

No such obligations exist, but in its adjudication practice the Constitutional Tribunal takes into account the judiciary decisions of European courts of justice, and especially the judgments of the European Court of Human Rights (ECHR). It should be noted at this point that the obligation of a state-party to the Convention to enforce the ECHR's judgment stating that the Convention has been infringed by the statutory provisions of that state may be in the form of a judgment by the Constitutional Tribunal which carried several controls of the conformance of the statutory law to the Convention and established the occurrence of such conformance or non-conformance in its judgment (vide, e.g., judgments of May 5, 2004, P 2/03, and of February 20, 2007, P 1/06). However, a distinction should be made between a judgment by the Tribunal issued in the aftermath of the ECHR's judgment with regard to the same complainant, no matter if it regards an abstract or concrete control, and a judgment passed in the so called parallel cases, i.e., regarding other complainants or other states. It should be emphasized, however, that in cases originated by a constitutional complaint the Tribunal's position will be that the „contents and meaning of those rights, especially the right to a court trial and protection of privacy are in principle interpreted by the Polish Constitution in conformity with the judgments of the ECHR. A position developed in European judicial decisions in respect to the guarantees of an individual's rights and freedoms which are referred to in the complaint is always taken into consideration whenever the relevant constitutional norms are construed. There is no doubt whatsoever that the assessment formulated in respect to the above mentioned constitutional models is fully applied in respect to the invoked international standards.”

As mentioned above, under Art. 79 of the Constitution a constitutional complaint regards the infringement of constitutional rights and freedoms and does not apply to the norms of international conventions even if they are counterpart to the guarantees included in the Constitution. That is why there is a formal obstacle to passing decisions on the conformity of the provisions of the law with the norms of international conventions under proceedings of a constitutional complaint. Paradoxically, under the those proceedings it is inadmissible for the Constitutional Tribunal to pass judgments on a statute's conformity with the Convention, whereas a constitutional complaint lodged by a complainant who was granted the status of the aggrieved party in a proceeding before the ECHR is a natural means of enforcing the ECHR's judgment that the statute does not conform to the Convention, especially when the legislator failed to amend the statute in order to enforce the ECHR's judgment.

The Tribunal does not notice the foregoing limitations in the proceedings generated by a court's legal query. An interesting opinion on ensuring that the Council of Europe's laws and the ECHR's judgments are effective was presented by the Constitutional Tribunal in its judgment of March 7, 2005, P 803/03, where it stated, i.a., that the „control exercised by the European Court of Human Rights does not *per se* pertain to the assessment of the internal legal system of a state that infringed a human right, but to the specific fact of the violation of a human right set forth in the Convention, in respect of a concrete person. So it is not actually a control assessing the provisions (norms) which make up a state's legal system. It examines the fact of violating the rights and freedoms of a person, i.e., his individual rights, although it may also follow from the control carried in that way that the internal legal system includes norms the application of which

brought about the infringement of human rights *in concreto* in the case examined by the ECHR. The obligation of the state's internal bodies to appropriately take into account the ECHR's particular judgments in their operation also commits the Constitutional Tribunal to do so when exercising its control over the constitutionality of norms and application rules as well as contents of the provisions of the Polish law against the principles of the Convention and the standards formulated by the ECHR, to eliminate any potential conflicts between them (cf. the Tribunal's judgment of October 18, 2004, ref. no. P 8/04, OTK ZU No. 9/A/2004, item 92). However, the Tribunal's jurisdiction covers the assessment of the constitutionality of legal norms and not the appropriateness of their application in legal transactions in individual cases, which is within the competency of general and administrative courts." The Tribunal expressed the following position in respect of the requirement imposed on the internal law to respect standards stemming from the ECHR's judgments in the statement of reasons of the foregoing verdict of October 18, 2004, ref. no. P 8/04: „The respect for Poland's international commitments and care about the coherence of its legal system (shaped both by the internal law and – to a degree admissible by the Constitution – by international agreements and the supranational laws) require that there is no discrepancy between the law (contents of the provisions, legal principles and standards) shaped by various centers which pass judgments about binding law, bodies that apply and interpret the law. The ECHR's decision about an individual case (here: Werner v. Poland) holding (in the aftermath of a control proceeding conducted in Strasburg) that Poland infringed the standard set forth in Art. 6 Par. 1 of the European Convention (the right to a fair trial) in respect to the originator of that proceeding must therefore have impact on the Constitutional Tribunal's assessment of regulations. The point is to control the regulations the application of which was recognized as the infringement of human rights in the case of Werner v. Poland. The ECHR's control is not *per se* tantamount to the assessment of the internal legal system of a state which committed that infringement, but to the fact of the violation of human rights of a specific person. Therefore, it is not a control assessing the provisions and norms which are part of that system. It covers the examination of the fact of infringing human rights and freedoms, i.e., of individual rights. However, the result of such control may be that the internal legal system comprises norms the application of which has resulted in the violation of human rights *in concreto* in the case assessed by the ECHR, and also (although that issue is outside the scope of the ECHR's judgment) the application of which *pro futuro* may result in such violations. 2.2. The effects of the judgment establishing the violation of human rights exhaust themselves directly in the way the obligations of the applicant and the state, whose authorities committed the violation, are shaped in the very judgment by the ECHR stating the infringement of human rights. That applies, in the first place, to the determination if any human right stemming from the European Convention has been violated in the case of the applicant. Secondly, its direct consequence is an indemnity (discretionary) awarded for such infringement. That is the *expressis verbis* content of every ECHR's judgment about the infringement of human rights. Outside the scope of such judgment are any amendments to the internal system (the legal system, operation of state bodies) preventing such infringements in the future to be adopted by the state to which the judgment pertains. Drawing of conclusions from an ECHR's judgment is an internal affair which is up to the authorities of individual state, its courts, tribunals, or legislature: the examination of the scope, adequacy, necessity and proportionality of undertaken remedies (in respect to the amendments to the provisions of the law, application of the law and its interpretation). In that context it is of exceptional importance to determine the indispensable scope of impact of the ECHR's judgment

on the internal legal system in order to bring about changes that will prevent any future violations of human rights. The point is to determine to which scope of situations the ECHR's judgment applies (actual situations or those created by law) so that any amendments to internal law have an indispensable and adequate scope."

The above judgments pertained, however, to situations shaped by the ECHR's judgment in a case which was different than the one that was the subject matter of the Tribunal's judgment. Therefore it is necessary to examine a problem of the commitment of states by the Court's judgments on the so-called parallel cases where it is necessary to differentiate those to which other states are parties from those to which the Republic of Poland is a party, but where the complainant is a different entity than a party to a proceeding pending before a court or tribunal, and where in each situation the cases are identical or alike in terms of their subject matter.

The fact that the judgments of the Court are taken into consideration by national courts is not due to their binding power (legal or actual), but is an element of a broader obligation to observe the provisions of conventions which a national court should interpret in accordance with the Court's adjudications. As states are not bound by judgments passed in cases to which other states are parties, and consequently, there is no legal obligation to execute such judgments, it should be presumed that a state is under no duty to apply relevant individual or general remedies in order to „execute" such judgment of the Court.

The same applies to cases in which Poland is a defendant but which regard rights and obligations of another complainant as indicated by the above quoted statement of reasons in the Constitutional Tribunal's judgment of October 18, 2004, ref. no. P 8/04. The Tribunal clearly holds that a judgment passed in the „Polish" case „influences the assessment of the provisions by the Constitutional Tribunal" which probably means that it takes into account the same verdict during the control of the Polish law's constitutionality.

#### **4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?**

The judgments by European courts of justice influence the Constitutional Tribunal's judgments. Firstly, in the cases where a provision of the European law is a control model, the Tribunal determines the meaning of that provision based on the relevant adjudication of a respective European court; the Constitutional Tribunal is bound by the interpretation of the provision of the European law made by a European court of justice (cf. e.g., the judgment in the case K 32/12 in whose statement of reasons the Tribunal states, i.a., that „7.4.1. The position of the Constitutional Tribunal corresponds with the position taken by the Court of Justice of the European Union (CJEU) in the statement of reasons of the judgment of November 27, 2012 re. Pringle. It should be emphasized that when assessing the constitutionality of the law ratifying the decision the Tribunal deemed as binding the statement by the CJEU that the amendment to Art. 136 Par. 3 of the Treaty on the Functioning of the European Union (TFUE) does not vest the European Union with any new competency (motif 73 of the judgment), so as the decisions of the CJEU regarding the validity and interpretation of the Council's decisions."; vide, however, the judgment in the case SK 3/12 where the Tribunal concluded that although „it is not bound by the decisions of the ECHR, the obligation to take into account the consequences of a relevant

decision by the same Court to the operation of the state's internal bodies commits it to take into account, within the framework of exercised control over the constitutionality of the norms and standards formulated by the ECHR in order to eliminate any potential collisions between them. The norms included in the Convention and the line of the ECHR's adjudications may therefore be invoked as an element of argumentation and thus contribute to the assurance of relative homogeneity of the decisions made by the law protection bodies adjudicating based on the provisions of the national and international law (cf. the Tribunal's judgments of April 23, 2008, ref. no. SK 16/07, OTK ZU No. 3/A/2008, item 45 and October 6, 2009, ref. no. SK 46/07, OTK ZU No. 9/A/2009, item 132), which, i.a., stems from the fact that in the Tribunal's opinion only the European courts of justice have competence to interpret the European law (e.g., case P 35/09). Secondly, the influence of the European courts of justice on the adjudications of the Constitutional Tribunal results from the Tribunal's position that in the European legal space a common standard of the protection of fundamental rights is gradually being shaped which calls for the reconstruction of both the European standards, based on the judgments of European courts, and a constitutional standard, based on the Tribunal's judgments, and for a comparative analysis of those standards by the Tribunal (e.g., case Kp 3/08 where the Tribunal stated that „By interpreting the discussed fragment of Art. 45 Par. 1 of the Constitution one may invoke Art. 6 Par. 1 first sentence of the Convention for the Protection of Human Rights and Fundamental Freedoms (Dz. U. of 1993, No. 61, item 284, as amended; hereinafter: the Convention) whereby everyone "is entitled to a fair and public hearing within a reasonable time", and also broad adjudications by the European Court of Human Rights shaped by the same provision.”). The Constitutional Tribunal frequently pointed out that Art. 45 Par. 1 of the Constitution, to the extent it applies to the right to an appropriate shaping of court proceedings, takes into account the contents of Art. 6 Par. 1 first sentence of the Convention (vide, the judgment of April 2, 2001, ref. no. SK 10/00, OTK ZU No. 3/2001, item 52, the judgment of September 7, 2004, ref. no. P 4/04, OTK ZU No. 8/A/2004, item 81, the judgment of February 19, 2008, ref. no. P 49/06, OTK ZU No. 1/A/2008, item 5). Thirdly, the Constitutional Tribunal recognizes the principle of the European law's effectiveness and in consequence holds that „one of the important ways to follow it is to fulfill the judgments of the Court of Justice of the European Union” (case P 35/09).

**5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?**

The Constitutional Tribunal refers to the judgments of European courts of justice (about 90 judgments and decisions), but more frequently to the adjudications of the European Court of Human Rights. Viewed as most significant are the references to the judgments of the ECHR in matters regarding temporary arrest, protracted court proceedings, appeals of court verdicts, right to defense, right of ownership or right to vetting proceedings. References to the adjudication output of the Court of Justice were made mainly in respect to Poland's accession to the European Union, terms of Poland's membership in the EU, binding of the Republic of Poland by the EU law, including the principle of primacy of the EU law, and recently – the case of the European Stability Mechanism.

## **6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?**

A rare example of such discrepancies between the judgments of the Constitutional Tribunal and the adjudications of the European Court of Human Rights is the question of the duty to authorize and of criminal liability for failure to perform that duty. In the judgment of September 29, 2008, SK 52/05 the Constitutional Tribunal concluded that, firstly, the authorization does not infringe journalists' freedom to receive and impart information in the manner defined in Art. 31 Par. 3 of the Constitution. The authorization allows informers to exercise their freedom to express ideas, providing legal protection of their honor and reputation, and thus it not only does not contravene the constitutional norms, but is rather their guarantee, and secondly, criminal liability for the infringement of that obligation – on the pain of a fine or restriction of freedom – cannot be deemed as discouraging or constraining the exercise of the freedom of expression, if such authorization is required only in respect of direct quotations. The ECHR expressed a different opinion in its judgment of July 5, 2011 on the *Wizerkaniuk v. Poland* case, stating that a criminal proceeding initiated against the complainant and a criminal sanction levied on him, without due care for the precision and the subject matter of the published text and in spite of his unquestioned due diligence to ensure that the published text reflects the actual statement by the parliamentary deputy, was incommensurate with the circumstances, and thus infringed Art. 10 of the Convention. It is also noteworthy that in its statement of reasons the Tribunal while recognizing that „the provisions of the law applicable to that case may have negative consequences preceding the publication so that they may bring about a situation that journalists would avoid asking insightful questions in fear that their interlocutor may later prevent the publication of the entire text by refusing his authorization or would select interlocutors that are viewed as cooperating, to the detriment of the quality of political debate, shared the opinion expressed by Justice Rzepliński in his dissenting opinion to the discussed judgment of the Constitutional Tribunal that those provisions may therefore have a discouraging effect on the practice of the journalistic profession as regarding the crux of decisions about the very nature and contents of newspaper interviews.”

Another example of an obvious though rare discrepancy between the judgment of the Court of Justice of the European Union and the adjudications of the Constitutional Tribunal is the question of the competency to control the legality of the derivative law of the European Union. The CJEU is consistent in claiming that national courts have no competency to control if the EU derivative law is appropriate or not (cf. the judgment in the case C-314/85 *Foto-Frost*). Whereas in its judgment SK 45/09 the Constitutional Tribunal not only established and substantiated its competency to control the conformance of an EU regulation to the Constitution, but also made such assessment stating in the conclusion of the judgment that „Art. 41 second sentence of the Council Regulation (EC) No. 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EU O. J. L 12 of 16.01.2001, p. 1, as amended) conforms to Art. 45 Par. 1 and Art. 32 Par. 1 in connection with Art. 45 Par. 1 of the Constitution of the Republic of Poland.” Another example of discrepancy may be found in different opinions expressed by both courts in respect of the primacy of the EU law over the Constitution. The Court of Justice of the EU is consistent in upholding its view that the EU law enjoys primacy also over the constitution (e.g., the case 11/70 *Internationale Handelsgesellschaft*,

List of Judg. S.1125, case 106/77Simmenthal). Whereas, it has been the position of the Constitutional Tribunal that the Constitution enjoys absolute primacy over the EU law (statement of reasons in the case of May 11, 2005, K 18/04). It was recently corroborated by the Tribunal in the judgment of November 16, 2011, SK 45/09 where it stated that „one of the constitutional principles of the EU law is the principle of the primacy of the EU law (earlier on the Community law) over the laws of member states (...). It follows from Art. 91 Par. 3 of the Constitution that in the case of any collision with Polish acts of law the norms included in EU regulations have precedence. The Constitution of the Republic of Poland enjoys supremacy and primacy over all acts of law binding in the Polish constitutional system, including also the EU law.” That positioning of the Constitution stems from Art. 8 Par. 1 of the Constitution („The Constitution shall be the supreme law of the Republic of Poland.”) as it was corroborated by earlier judgments of the Constitutional Tribunal.

**7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?**

Polish courts broadly take into account the judgments of European courts of justice, but there is no evidence that they do so due to the authority of the Constitutional Tribunal or in connection with the fact that those judgments are taken into account by the Tribunal.

**8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?**

The European Court of Human Rights frequently referred to the judgments by the Constitutional Tribunal in the statements of reasons of its judgments. The decisions of the ECHR were undoubtedly influenced by the following judgments of the Constitutional Tribunal: 1) of January 18, 2006 which was taken into account by the ECHR in its judgment of May 3, 2007 on *Bączkowski v. Poland* in whose statement of reasons it was stated, i.a., that „the Court realizes that under the applicable provisions of the Constitution the said provisions became null and void after the date of the events which are the subject matter of this case (...). However, the Court is of the opinion that the judgment by the Constitutional Tribunal on the lack of conformance of the disputed provisions to the freedom of assembly guaranteed by the Constitution may reinforce its own position on the illegality of the interference which is the subject matter of the complaint.”, 2) of January 12, 2000 and October 10, 2000 as well as October 2, 2002 and May 12, 2004 which were broadly discussed and taken into consideration in the ECHR’s judgment of February 22, 2005 in the case *Hutten-Czapska v. Poland* where while sharing the views of the Constitutional Tribunal the Court stated, i.a., that „it was the duty of the Polish authorities to eliminate or, at least, to find a measure aimed at an immediate remedying of the situation which contravened the premises of the fundamental right of ownership of the complainant in keeping with the judgments of the Constitutional Tribunal.”, 3) of October 24, 2007, SK 7/06 and October 6, 2009, SK 46/07, taken into account in the ECHR’s judgment of November 30, 2010 re. *Henryk Urban and Ryszard Urban v. Poland* in which the Court, sharing the views of the Constitutional Tribunal as to the substance of the case, also stated that „the internal law provides that it is possible to resume a criminal proceeding if such requirement stems from the Court’s judgment (see Par. 27 above).

However, in the light of the reasons underlying the infringement decision in the said case, and bearing in mind the principle of legal safety invoked in its judgment by the Constitutional Tribunal, and also its own judgments (vide Par. 64-65 below), the Court holds that in this case there are no grounds that would require the Court to order the resumption of the proceeding in the case brought by the complainants,, 4) of March 7, 2007, K 28/05, taken into account by the ECHR in its judgment of October 16, 2012, *Kędzior v. Poland*, in which while sharing the position of the Constitutional Tribunal, the Court concluded, i.a., that the „judgment by the Constitutional Tribunal which clearly appealed to lower instance courts not to limit the rights to a court trial of incapacitated persons was legally binding in spite of uncompleted legislative procedure and the unwillingness on the part of national courts to enforce that judgment. In that situation the complainant was deprived of a clear, practical and effective possibility to have access to courts in respect of its application to have his legal capacity reinstated. Therefore, generally speaking, the system was not sufficiently clear and consistent.”, 5) of October 26, 2005 (ref. no. K [31/04](#)), of May 11, 2007 (ref. no. K [2/07](#)), of May 28, 2008 (ref. no. K [2/07](#)) and of October 20, 2010 (ref. no. P [37/09](#)) which were broadly reported and taken into account in the judgment of November 13, 2013 re. the case of *Joanna Szulc v. Poland* where the ECHR stated, i.a., that „Some practices of the Institute of National Remembrance (IPN), such as the adoption of the classification prepared by a totalitarian security service, were condemned by the Constitutional Tribunal (vide point 57 above). The Court also noted that had the complainant been allowed right away access to all essential documents there would not have been any problems with illegal leaks from the IPN archives and the complainant would have been able to refute the charges levied against her.”

## **II. Interactions between constitutional courts**

### **1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?**

The Constitutional Tribunal refers to the judgments of the European constitutional courts and also non-European courts, such as the US Supreme Court (cases K 26/00, K 39/07, K 44/07, P 1/08, P 1/10, K 31/11, K 37/11). The purpose of the comparative analysis is to 1) reconstruct the contents of the constitutional norms, especially when it comes to the so-called integration norms of the Constitution; in matters regarding the Accession Treaty, the Lisbon Treaty or the control of constitutionality of regulations, the Constitutional Tribunal regularly invokes the judgments by the German Federal Constitutional Court, and most frequently the Solange judgments, 2) reconstruct the contents of the constitutional law (case Kp 1/04 regarding freedom of assembly), 3) substantiate a thesis that in the European legal space a common, approximate or identical standard of the protection of a specific fundamental right has been shaped, including the constitutional standard (e.g., case SK 48/05 re. the safety belts), 4) put forward additional arguments that would substantiate that the decisions of the Constitutional Tribunal were pertinent (e.g., the case K 6/09 re. the pensions of former security service officers), 5) show analogy (case SK 45/09).

### **2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?**

It follows from the cursory analysis of judgments that in the EU matters the Constitutional Tribunal most frequently and broadly refers to the judgments of the German Federal Constitutional Court. Which does not mean, however, that the Tribunal solely invokes the judgments originating in the German language area. On the contrary, in many cases those references have a broader „geographical” scope; e.g., in respect to the Lisbon Treaty (case K 32/09) the Tribunal devoted a separate fragment of its statement of reasons to the judgments by European constitutional courts in which it reported the judgments by the French Council of State, the Constitutional Court of the Czech Republic, the Constitutional Court of Latvia and the Hungarian Constitutional Court.

**3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?**

In its judgments the Constitutional Tribunal invoked the judgments of other constitutional courts in all the above-mentioned areas.

**4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?**

It seems that the judgments of other constitutional courts may be significantly affected by the judgment in the case SK 45/09 where the Tribunal recognized its competency to control the constitutionality of the EU derivative law.

**5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?**

The cooperation between the Constitutional Tribunal and other constitutional courts is mainly in the form of common conferences: the regular (the annual conference with the Constitutional Court of Lithuania) and irregular ones. There is also scholarly cooperation between justices who are involved in research.

**III. Interactions between European courts in the jurisprudence of constitutional courts**

**1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?**

Such references do not influence the judgments by the Constitutional Tribunal, with the exception of the case SK 45/09, where the Tribunal invoked the judgment of the ECHR re. *Bosphorus* holding that: „There are reasons to adopt a similar approach to the control of the constitutionality of the EU law in Poland.”

**2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?**

There is no convincing evidence that the judgments of the Constitutional Tribunal had a significant impact on the shaping of formal relations between the ECHR and the Court of Justice of the EU. Presumably, the judgment in the case SK 45/09 may have such influence on the shaping of those relations in the future, i.e., after the EU has acceded to the Convention.

**3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?**

The Constitutional Tribunal did not examine any cases where such discrepancy would be of any significance.