

Information Documents

SG/Inf(2022)39

9 November 2022

**Report by the Secretary General under Article 52 of the
European Convention on Human Rights on the
consequences of decisions K 6/21 and K 7/21 of the
Constitutional Court of the Republic of Poland**

I. Introductory remarks

1. On 7 December 2021, I wrote to the Minister for Foreign Affairs of the Republic of Poland, Mr Zbigniew Rau, requesting explanations concerning the manner in which the internal law of Poland¹ ensures the effective implementation of Articles 6 and 32 of the European Convention on Human Rights (“the Convention”) following the judgment of the Constitutional Court of 24 November 2021 in the case K 6/21, to be provided no later than 7 March 2022 (Appendix I). In doing so, I availed myself of the competence granted to the Secretary General of the Council of Europe under Article 52 of the Convention.

2. My request was triggered by the above-mentioned judgment, stating that Article 6, paragraph 1 of the Convention, as interpreted by the European Court of Human Rights (“the European Court”), is incompatible with the constitution. Article 6, paragraph 1 of the Convention sets out that “[i]n the determination of their civil rights and obligations or any criminal charge against them, everyone has the right to a fair hearing by an independent and impartial tribunal established by law”. In its judgment, the Constitutional Court found that Article 6, paragraph 1 of the Convention was inconsistent with the constitution insofar as the term “tribunal” used in that provision comprised the Constitutional Court and insofar as it granted the European Court jurisdiction to review the legality of the process of electing the Constitutional Court’s judges. The judgment was rendered upon a request filed by the Prosecutor General with the Constitutional Court to review the constitutionality of the standards derived by the European Court in application of Article 6, paragraph 1 of the Convention in the case of *Xero Flor w Polsce sp. z o.o. v. Poland*² (see further below, paragraph 8).

3. The Minister for Foreign Affairs replied to this request by letter dated 8 March 2022 (Appendix II).

4. On 10 March 2022, the Constitutional Court delivered its judgment in the case K 7/21. In that judgment, it concluded that Article 6, paragraph 1 of the Convention as interpreted by the European Court was incompatible with the constitution insofar as:

- it extended the term “civil rights and obligations” to the individual right of a judge to hold an administrative function in the structure of the ordinary judiciary in the internal legal system;
- in the determination of whether a “tribunal” is “established by law” it permitted the European Court: (a) to ignore the provisions of the constitution, statutes and the judgments of the Constitutional Court; (b) to create independently norms pertaining to the procedure for domestic judicial appointments; (c) to review statutes concerning the court system and competence of the courts, as well as the statute governing the National Council of the Judiciary, from the perspective of their compatibility with the constitution and the Convention.

This judgment was also rendered upon a request filed by the Prosecutor General with the Constitutional Court to review the constitutionality of the standards derived by the European Court in application of Article 6, paragraph 1 of the Convention in the cases of *Broda and Bojara*³ and *Reczkowicz*⁴ (see further below, paragraph 8).

¹ All references made to national authorities and internal laws in the following are, unless otherwise indicated, to those of the Republic of Poland.

² *Xero Flor w Polsce sp. z o.o. v. Poland*, Application No. 4907/18, [judgment](#) of 7 May 2021 (available only in English). All judgments by the European Court referred to in the main body of this document are rendered against Poland, unless otherwise indicated.

³ *Broda and Bojara v. Poland*, Application Nos. 26691/18 and 27367/18, [judgment](#) of 29 June 2021 (available only in French).

⁴ *Reczkowicz v. Poland*, Application No. 43447/19, [judgment](#) of 22 July 2021 (available only in English).

5. On 16 March 2022, I requested the Minister for Foreign Affairs to provide additional explanations on the manner in which the internal law ensured the effective implementation of Articles 6 and 32 of the Convention in the light of this new judgment of the Constitutional Court (Appendix III).

6. In his letter dated 23 June 2022, the Minister for Foreign Affairs furnished additional explanations (Appendix IV). Thereafter, I asked the Minister to provide a courtesy English translation of the relevant judgments of the Constitutional Court, notably that of 24 November 2021 in the case K 6/21 and that of 10 March 2022 in the case K 7/21, by the end of July 2022. The government duly transmitted the requested translation of the two judgments (Appendices V and VI).

7. The present report focuses on the assessment of the information provided by the government on how the internal law ensures the effective implementation of the Convention requirements in light of the above-mentioned judgments of the Constitutional Court. It should not be seen as prejudging any possible decisions in related cases pending before the European Court.

8. It is recalled that the European Court already delivered several judgments relevant for the purposes of the present report. These might be summarised as follows:

- *Xero Flor w Polsce sp. z o.o.*⁵, finding a violation of the right to a “tribunal established by law” on account of the participation of Judge M.M., whose election by the eighth-term Sejm (the lower house of the bicameral parliament) in December 2015 was vitiated by grave irregularities in the Constitutional Court’s panel that rejected the applicant’s constitutional complaint in 2017;
- *Broda and Bojara*⁶, finding a violation of the right of access to court on account of the premature termination, based on temporary legislation in force between August 2017 and February 2018, of the applicants’ term of office as vice-presidents of a regional court, without any possibility of examination by a body exercising judicial duties;
- *Reczkowicz*⁷, *Dolińska-Ficek and Ozimek*⁸ and *Advance Pharma sp. z o.o.*⁹, finding violations of the applicants’ right to a “tribunal established by law”, *inter alia*, on account of the fact that the judges of the Disciplinary Chamber, Extraordinary Review Chamber and Civil Chamber of the Supreme Court that dealt with the applicants’ cases were appointed through a deficient procedure involving the National Council of the Judiciary, a body which since 2018 had offered no sufficient guarantees of independence from the legislative or executive powers.

9. In the meantime, an important influx of applications raising issues of judicial independence – similar to those examined in *Reczkowicz*, *Dolińska-Ficek and Ozimek* and *Advanced Pharma sp. z o.o.* – has been registered by the European Court. On 25 April and 25 July 2022 respectively, the European Court notably communicated to the government 57 such applications.¹⁰ On 25 July 2022, the European Court also communicated the application of *Botor*¹¹ which raises similar questions as those dealt with in the *Xero Flor w Polsce sp. z o.o.* judgment.

⁵ *Xero Flor w Polsce Sp. z o.o. v. Poland*, Application No. 4907/18, [judgment](#) of 7 May 2021 (available only in English).

⁶ *Broda and Bojara v. Poland*, Application Nos. 26691/18 and 27367/18, [judgment](#) of 29 June 2021 (available only in French).

⁷ *Reczkowicz v. Poland*, Application No. 43447/19, [judgment](#) of 22 July 2021 (available only in English).

⁸ *Dolińska-Ficek and Ozimek v. Poland*, Application Nos. 49868/19 and 57511/19, [judgment](#) of 8 November 2021 (available only in English).

⁹ *Advance Pharma sp. z o.o. v. Poland*, Application No. 1469/20, [judgment](#) of 3 February 2022 (available only in English).

¹⁰ For more details, see the press releases [ECHR 136 \(2022\)](#) of 25 April 2022 and [ECHR 248 \(2022\)](#) of 25 July 2022.

¹¹ For more details, see the press release [ECHR 249\(2022\)](#) of 25 July 2022 and the [communication](#) on 7 July 2022 of the application *Botor v. Poland* (no. 50991/21, available only in English) which was lodged on 11 October 2021.

10. The European Court's final judgments mentioned above are currently pending before the Committee of Ministers for supervision of their execution pursuant to Article 46 of the Convention. In June 2022, at its first examination of the case *Xero Flor w Polsce sp. z o.o.*, the Committee of Ministers noted with grave concern the declaration of partial unconstitutionality of Article 6, paragraph 1 of the Convention by the Constitutional Court in its judgment of 24 November 2021. It reiterated that the provisions of national law could not justify a failure to perform obligations stemming from international treaties which the state had chosen to ratify. The Committee of Ministers insisted upon the unconditional obligation assumed by Poland under Article 46 of the Convention to abide by the judgments of the European Court and urged the authorities to inform it about the possible steps towards an appropriate solution for the execution of the present judgment. The next examination of this case is envisaged for December 2022.¹²

11. In its Resolution 2316 (2020)¹³ on the functioning of democratic institutions in Poland, the Parliamentary Assembly noted that the constitutional crisis that had ensued from the irregular composition of the Constitutional Court in December 2015 remained of concern and should be resolved. The Parliamentary Assembly was especially concerned about the potential impact of the Constitutional Court's "apparently illegal composition on Poland's obligations under the [Convention]"¹⁴. It also deplored, *inter alia*, "the abuse of disciplinary proceedings against judges."¹⁵

12. In the report following her visit in March 2019 to Poland, the Council of Europe Commissioner for Human Rights regretted the persisting controversy surrounding the election and the status of the Constitutional Court's new President and several of its new judges.¹⁶ She also called for recognition of the legitimacy of the election of three judges in October 2015 by the previous Sejm and their swearing into office.¹⁷

13. Other Council of Europe bodies have equally expressed their concerns in respect of the issues addressed in the present report, including the European Commission for Democracy through Law (Venice Commission)¹⁸ and the Group of States against Corruption (GRECO)¹⁹.

¹² [1436th meeting \(DH\)](#), June 2022 - H46-18 Xero Flor w Polsce sp. z o.o. v. Poland (no. 4907/18).

¹³ Parliamentary Assembly Resolution 2316 (2020) is accessible [here](#).

¹⁴ *Ibid*, paragraph 6.

¹⁵ *Ibid*, paragraph 11.

¹⁶ The Commissioner's report of 28 June 2019 (CommDH(2019)17, available only in English) is accessible [here](#). The response given by the government to that report is accessible [here](#).

¹⁷ *Ibid*. It is recalled that the constitutional crisis in Poland was triggered, *inter alia*, by the lawful election of three judges to the Constitutional Tribunal by the Sejm in October 2015. The government refused to recognise these three judges and the President of the Republic declined to swear them in. On the other hand, the President of the Constitutional Court refused to admit three judges who were unlawfully elected to the bench in December 2015. One week before the expiry of the constitutional term of the President of the Constitutional Court on 20 December 2016, the Parliament adopted a law granting the President of the Republic the power to nominate the "acting President" of the Constitutional Court. On the basis of this new law, the President of the Republic nominated one of the judges elected by the parliamentary majority as the acting President of the Constitutional Court. This new acting President of the Constitutional Court immediately accepted the three judges elected to the bench in December 2015.

¹⁸ For example, in the opinion concerning amendments to the Act on the Act of 25 June 2015 on the Constitutional Tribunal of Poland ([CDL-AD\(2016\)001](#)), adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016.

¹⁹ For example, in the Addendum to the Second Compliance Fourth Round Evaluation Report on Poland ([GrecoRC4\(2018\)11](#), adopted at its 80th Plenary Meeting on 22 June 2018) and, most recently, in the Interim Compliance Fourth Round Evaluation Report on Poland ([GrecoRC4\(2021\)18](#), adopted at its 88th Plenary Meeting on 22 September 2021).

II. Explanations provided by the government on the manner in which internal law ensures effective implementation of Articles 6 and 32 of the Convention in light of the Constitutional Court's judgments in cases K 6/21 and K 7/21

14. In their letters of 8 March 2022 and 23 June 2022 (Appendices II and IV), the government provided information on the content of the Constitutional Court's judgments at issue and explanations on how, in their view, internal law ensured the effective implementation of the Convention in light of these two judgments.

15. The government recalled that, in the judgment in the case K 6/21 delivered on 24 November 2021, the Constitutional Court found unconstitutional the application of Article 6, paragraph 1 of the Convention to the Constitutional Court and the process of election of its judges. The government explained that the Constitutional Court indicated that it could not be considered to be a "tribunal" within the meaning of Article 6, paragraph 1 of the Convention, as its function was to review hierarchical compatibility of legal norms and not to administer justice in individual cases. According to the Constitutional Court, extending the meaning of a "tribunal" to include the Constitutional Court and to apply it to the process of election of its judges would require an amendment to the Convention in the form of an additional protocol.

16. The government highlighted that the Constitutional Court observed that the legislator provided for the monopoly of parliament in electing the judges of the Constitutional Court. While stressing that the Constitutional Court had not questioned the achievements or the role of the European Court in developing and raising human rights standards in member states, it argued that the decisions pertaining to the election of judges to the Constitutional Court cannot be subject to external control. The government noted that the judgment of 24 November 2021 was limited in scope, as it did not relate to a legal provision of the Convention (Article 6, paragraph 1 in the case at hand) but rather to a specific norm derived from that provision, as interpreted by the European Court. Lastly, the government referred to the judicial dialogue between the European Court and constitutional courts of member states. In the government's view, the European Court's judgment in the case of *Varvara v. Italy*²⁰ and the subsequent judgment by the Italian Constitutional Court no. 49/2015 of 14 January 2015²¹ represented such a judicial dialogue. The government concluded that the above explanations left no doubt that internal law continuously ensured the effective implementation of Articles 6 and 32 of the Convention.

17. Similarly, the government recalled that, in the subsequent judgment of 10 March 2022 regarding the case K 7/21, the Constitutional Court declared Article 6, paragraph 1 of the Convention unconstitutional only insofar as:

- the European Court considered the right of a judge to hold an administrative position within the common court system as a "civil right";
- in the assessment of whether the requirements of a "tribunal established by law" are complied with, the Convention permitted the European Court and domestic courts to disregard provisions of the constitution, statutes and judgments of the Constitutional Court; it allowed for the creation of new norms governing the appointment of judges; and provided the European Court and domestic courts with a competence to assess compliance with the constitution and the Convention of statutes governing the organisation of the national judicial system, the jurisdiction of courts and the position and functioning of the National Council for the Judiciary.

²⁰ *Varvara v. Italy*, Application No. 17475/09, [judgment](#) of 29 October 2013.

²¹ The decision is available at the website of the Italian Constitutional Court in Italian and in [English](#) translation.

18. The government explained that the Constitutional Court considered at length the relationship between international law and internal law, including the relation between international agreements and the national constitution, as well as the status of the European Court's judgments. In doing so, the Constitutional Court highlighted the supremacy of the constitution *vis-à-vis* international law in general and the Convention in particular: the Convention, as an international agreement ratified by Poland, takes precedence over statutes but is lower than the constitution in the hierarchy of the sources of law. The Constitutional Court therefore considered that it was vested with the competence to verify the Convention's compatibility with the constitution. The Constitutional Court further referred to concrete situations where constitutional courts or supreme courts of other member states had modified the scope of judgments by international courts.²² In the process of this reflection, the Constitutional Court arrived at the conclusion that the European Court had acted beyond its legal authority (*ultra vires*) by creating new norms on the basis of the Convention in cases such as *Broda and Bojara* and *Reczkowicz*. It recalled in this respect that the interpretation of the Convention by the European Court could not replace formal treaty amendments. In addition to the above explanations, the government indicated that a legislative process was ongoing to amend the relevant laws taking on board the recent rulings delivered by the European Court. The legislative amendments were aimed at placing Poland's standards of judicial independence and the impartiality of judges at the highest level. The government indicated that the "Act amending the Act on the Supreme Court" and some other laws were passed on 9 June 2022 and subsequently signed by the President. The government concluded that the above explanations left no doubt that internal law continuously ensured the effective application of Article 6 and 32 of the Convention.

²² For example, the authorities referred, *inter alia*, to the judgment of the Federal Constitutional Court of Germany of 14 October 2004 in the case of "Görgülü" (2 BvR 1481/08) and the judgment of the Supreme Court of Spain of 9 January 2020 in the case of "Oriol Unqueras".

III. Assessment of the explanations provided by the government in light of relevant standards under the Convention and general international law

Relevant provisions of the Convention and general principles of international law

19. It is a fundamental principle of international law, codified in Article 26 of the Vienna Convention on the Law of Treaties, that a treaty is binding on the parties to it and must be implemented by them in good faith. A party to a treaty is precluded from invoking the provisions of its internal law as justification for its failure to perform a treaty (Article 27 of the Vienna Convention on the Law of Treaties). These principles fully apply to the Convention.

20. The High Contracting Parties are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention (Article 1 of the Convention). One of the rights set out in Section I is the right to a fair trial (Article 6 of the Convention), which includes in its paragraph 1 the right to “an independent and impartial tribunal established by law”.²³ Poland has been a High Contracting Party to the Convention since 1993.

21. States are in principle free to choose the most appropriate means for ensuring within their internal law the effective implementation of the provisions of the Convention.²⁴ At the same time, the European Court was established with the express purpose of ensuring “the observance of the engagements undertaken by the High Contracting Parties in the Convention and its Protocols” (Article 19 of the Convention). When ratifying the Convention, state parties agreed to, and became bound by, the mechanism providing the European Court with the competence to examine and decide on the way state parties ensure those rights and freedoms within their jurisdiction. In this respect, the Venice Commission indicated that “[u]pon becoming a party to the Convention, the state parties expressly accept the competence of the [European Court] to interpret, and not only apply, the Convention.”²⁵

22. The High Contracting Parties are obliged to respect the jurisdiction of the European Court in “all matters concerning the interpretation and application of the Convention and the Protocols thereto” that are properly brought before it (Article 32, paragraph 1 of the Convention). The High Contracting Parties are also obliged to respect the fact that, “[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide” (Article 32, paragraph 2 of the Convention). As a result, the European Court is vested with jurisdiction to establish the scope of the binding obligations assumed by state parties under the Convention and its Protocols.

²³ The importance of judicial independence to the rule of law is underlined in the Committee of Ministers' Recommendation [CM/Rec\(2010\)12](#) to member states on judges: independence, efficiency and responsibilities. The preamble to this Recommendation states that “the independence of judges ... is an inherent element of the rule of law, and indispensable to judges' impartiality and to the functioning of the judicial system”. The Recommendation “is applicable to all persons exercising judicial functions, including those dealing with constitutional matters.” Member states are called upon to apply the provisions of the Appendix to the Recommendation. Paragraph 46 of the Appendix states that “[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers.”

²⁴ *Sisojeva and Others v. Latvia*, Application No. 60654/00, Grand Chamber [judgment](#) of 15 January 2007, paragraph 90.

²⁵ Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation ([CDL-AD \(2016\)016](#), adopted by the Venice Commission at its 107th Plenary Session, 10-11 June 2016).

23. Should a High Contracting Party disagree with the judgment delivered by a Chamber of the European Court, it has the right to request a referral of the case to the Grand Chamber under Article 43, paragraph 1 of the Convention. The Grand Chamber “shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance” (Article 43, paragraph 2 of the Convention). This is the most natural manner of dialogue between the High Contracting Party and the European Court enabling the latter to consider the case on the basis of further or different arguments.²⁶ It may be noted that Poland did not request a referral of any of the relevant Chamber judgments by the European Court.

24. The High Contracting Parties are further obliged to execute the final judgments of the European Court in cases to which they are parties (Article 46, paragraph 1 of the Convention). The Committee of Ministers supervises the High Contracting Parties’ execution of judgments (Article 46, paragraph 2 of the Convention).

25. Articles 19, 32 and 46 of the Convention reflect the High Contracting Parties’ recognition of the European Court as an independent judicial body with the final authority to ensure consistent interpretation and application of the Convention across all High Contracting Parties.

Whether the internal law of Poland ensures the effective implementation of relevant provisions of the Convention

26. The Constitutional Court has ruled that under internal law, it is not a “tribunal” within the meaning of Article 6, paragraph 1 of the Convention. According to the Constitutional Court, the Convention requirements of a “tribunal established by law” as interpreted by the European Court, including the manner of appointment of its judges, therefore do not apply to the Constitutional Court. Similarly, it excluded the application of Article 6 guarantees to certain rights of judges holding administrative positions in the judicial system and to the assessment of the judicial appointment-process as regards the whole domestic judiciary. According to established case law of the European Court, constitutional disputes may come within the scope of Article 6, paragraph 1 of the Convention if their outcome is decisive for civil rights or obligations.²⁷ Where this is the case, the guarantees contained in Article 6, paragraph 1 of the Convention, including the guarantee of judicial independence, apply to a constitutional court. The applicability of the same guarantees to the rights of judges holding administrative positions and to the judicial appointment-process is also well-grounded in the European Court’s jurisprudence. The explanations given by the government of the manner in which its internal law ensures the effective implementation of Articles 6 and 32 of the Convention refer to and rely on the findings of the Constitutional Court. It can only result from these explanations that Poland’s internal law allowed for explicitly declining to apply the European Court’s interpretation of the Convention and is thus not in conformity with Article 32 of the Convention. This in turn implies a failure by Poland to respect its obligation under Article 1 of the Convention to guarantee the right to a fair trial for everyone within its jurisdiction.

²⁶ *Al-Khawaya and Tahery v. the United Kingdom*, Application Nos. 26766/05 and 22228/06, [judgment](#) of 20 January 2009 and [judgment](#) of the Grand Chamber of 15 December 2011; *Lautsi and Others v. Italy*, Application No. 30814/06, Grand Chamber [judgment](#) of 18 March 2011.

²⁷ Details of the European Court’s case law on this matter are set out in paragraphs 188-191 of its [judgment](#) in the case of *Xero Flor w Polsce sp. z o.o. v. Poland*, Application No. 4907/17, 7 August 2021 (available only in English).

27. In declining to apply the European Court's interpretation of Article 6, paragraph 1 of the Convention, the Constitutional Court further asserts that the relevant judgments of the European Court are not binding on Poland. However, the obligation incumbent on the state to implement the Convention or to abide by a judgment of the European Court, with all the consequences stemming from Articles 1 and 46 of the Convention, is not removed in cases where a constitutional court finds that the interpretation of the Convention by the European Court may raise issues of compliance with the constitution. The obligation to implement *bona fide* the Convention implies that every effort should be made to reach an interpretation that would ensure the convergence of positions.²⁸ Only in the most extreme cases may this require amending the constitution in order to ensure compliance with the Convention.²⁹

28. Poland remains thus obliged to take the general and/or individual measures to put an end to the violation found by the European Court, to redress as far as possible the situation existing before the breach and to prevent similar violations in the future. Whilst Poland "remains free to choose the means by which it will discharge its obligation", these means must be "compatible with the conclusions set out in the Court's judgment."³⁰

²⁸ See, for example, the Committee of Ministers' [Resolution](#) DH(97)576 of 25 May 1993 in relation to the case of *Kokkinakis v. Greece*, Application No. 14307/88, [judgment](#) of 25 May 1993.

²⁹ See the Committee of Ministers' [Resolution](#) of 3 October 1972 in relation to the *Belgian Linguistics* case, Application Nos. 1474/62, 1677/62, 1691/62, 1994/63 and 2126/64, [judgment](#) of 23 July 1968, in which the underlying structural problem was resolved, *inter alia*, by revision of the constitution. See also the Committee of Ministers' [Resolution](#) CM/ResDH(2022)253, adopted on 22 September 2022, closing the supervision of the case of *Paksas v. Lithuania* (Application No. 34932/04, Grand Chamber [judgment](#) of 6 January 2011). In that case, the Committee of Ministers' supervision was discontinued following a constitutional amendment adopted in response to the European Court's judgment.

³⁰ *Scozzari and Giunta v. Italy*, Application Nos. 39221/98 and 41963/98, Grand Chamber [judgment](#) of 13 July 2000, paragraph 249.

IV. Concluding remarks

29. As a result of the findings of unconstitutionality in the judgments K 6/21 and K7/21 of the Constitutional Court, the European Court's competence as established in Article 32 of the Convention was challenged and the implementation of Article 6, paragraph 1 of the Convention – as interpreted by the European Court in the cases of *Xero Flor w Polsce sp. z o.o.*, *Broda and Bojara*, *Reczkowicz*, *Dolińska-Ficek and Ozimek* and *Advanced Pharma sp. z o.o.* – has so far not been carried out. The ensuing obligation of Poland to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction is not, at this stage, fulfilled.

30. To ensure the implementation of its international obligations under Article 1, Article 6, paragraph 1 and Article 32 of the Convention, action is required by Poland. This action coincides with Poland's obligation to abide by the judgments of the European Court in the cases of *Xero Flor w Polsce sp. z o.o.*, *Broda and Bojara*, *Reczkowicz*, *Dolińska-Ficek and Ozimek* and *Advanced Pharma sp. z o.o.* In a nutshell, Poland has an obligation to ensure that its internal law is interpreted and, where necessary, amended in such a way as to avoid any repetition of the same violations, as required by Article 46 of the Convention. Poland has not been released from its unconditional obligation under Article 46 of the Convention to abide by the European Court's judgments fully, effectively and promptly.

31. The forum where this issue will need to be addressed is the Committee of Ministers when supervising Poland's execution of the judgments by the European Court, pursuant to Article 46 of the Convention. The next examination by the Committee of Ministers of the case *Xero Flor w Polsce sp. z o.o.* as well as those of *Broda and Bojara* and *Reczkowicz* is scheduled for the 1451st Ministers' Deputies (Human Rights) meeting (6-8 December 2022). In this framework, an appropriate solution shall be sought to ensure that in Poland the right to a "tribunal established by law" – as enshrined in Article 6, paragraph 1 of the Convention and as interpreted by the European Court – is fully applied. Without prejudice to the decisions that the European Court may give in any pending or future litigations relating to the same issues, this framework should be privileged as it offers the benefit of solutions being considered and pursued under the collective shared responsibility for the efficiency of the Convention system of all state parties represented in the Committee of Ministers. The rising number of similar applications pending before the European Court reveals an actual shortcoming within the national legal order, affecting a whole class of persons whose right to a "tribunal established by law" might be affected by deficient judicial appointments. The fact that they are all potential applicants might represent a threat to the future efficiency of the Convention system.³¹

32. The present report shall also serve as a basis for further engagement with the authorities of the Republic of Poland in a constructive dialogue, with a view to ensuring that everyone within its jurisdiction is secured fully and effectively the rights and freedoms enshrined in the Convention, including the right to "an independent and impartial tribunal established by law" under Article 6, paragraph 1 of the Convention.

³¹ See, for example, *Karanović v. Bosnia and Herzegovina*, Application No. 39462/03, [judgment](#) of 20 November 2007 (available only in English), paragraph 27.

Appendices

Appendix I – Letter of the Secretary General of the Council of Europe to the Minister for Foreign Affairs of the Republic of Poland of 7 December 2021

Council of Europe
The Secretary General

Strasbourg, 7 December 2021

Dear Minister,

I should like to refer to Article 52 of the European Convention on Human Rights, which states that "on receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention".

I hereby avail myself of the competencies conferred on me by that provision and have the honour to request that your Government furnish the explanations called for in the appendix.

I would be grateful to receive these explanations no later than 7 March 2022.

Yours sincerely,


Marija Pejčinović Burić

Mr Zbigniew Rau
Minister for Foreign Affairs
Republic of Poland

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Appendix**Request for an explanation in accordance with Article 52 of the European Convention on Human Rights**

The Secretary General of the Council of Europe,

Referring to Poland's engagements under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention") and its additional Protocols;

Referring further to Article 6, paragraph 1 of the Convention, as interpreted by the long-standing case-law of the European Court of Human Rights, according to which, in the determination of his civil rights and obligations or of any criminal charge against him, the High Contracting Parties shall secure to everyone within their jurisdiction a fair hearing by an independent and impartial tribunal established by law;

Recalling that under Article 32 of the Convention, the European Court of Human Rights has exclusive competence to authoritatively interpret the Convention;

Considering recent developments in the domestic law, notably the judgment of the Constitutional Court of 24 November 2021 in the case K 6/21;

Acting in accordance with Article 52 of the Convention;

Invites the Republic of Poland

to furnish explanations concerning the manner in which the internal law ensures the effective implementation of Articles 6 and 32 of the Convention following the judgment of the Constitutional Court of 24 November 2021 in the case K 6/21.

Appendix II – Letter of the Minister for Foreign Affairs of the Republic of Poland to the Secretary General of the Council of Europe of 8 March 2022



Warsaw, 8 March 2022

Republic of Poland
Minister
of Foreign Affairs

Zbigniew Rau

DPT.432.345.2021/15

Ms Marija Pejčinović Burić

Secretary General of the Council of Europe

Dear Secretary General of Council of Europe,

In response to your letter of 7 December 2021 r. concerning the manner in which the internal law ensures the effective implementation of Articles 6 and 32 of the Convention following the judgment of the Constitutional Tribunal of 24 November 2021 in the case K 6/21, I should like to present the following information.

The judgment of Constitutional Tribunal of 24 November 2021 was adopted as a result of examination of the Prosecutor General's motion of 27 July 2021. The written justification of the instant judgment was published on 16 February 2022.

In its judgment of 24 November 2021, the Constitutional Tribunal found that:

1. Article 6 § 1, first sentence of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as amended by Protocols Nos. 3, 5 and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, no. 61, item 284 as amended) is inconsistent with Article 173 in conjunction with Article 10 § 2, Article 175 § 1, and Article 8 § 1 of the Polish Constitution in so far as the term 'court' used in the said provisions also covers the Constitutional Tribunal.
2. Article 6 § 1, first sentence of the Convention invoked in point 1 in so far as it confers on the European Court of Human Rights the competence to review the legality of appointing judges of the Constitutional Tribunal, is inconsistent with Article 194 § 1 in conjunction with Article 8 § 1 of the Constitution.

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www.gov.pl/dyplomacja

Firstly, the Constitutional Tribunal has assumed that, since in line with Article 32 of the Convention the European Court of Human Rights has jurisdiction to hear all cases relating to the interpretation and application of the Convention and its protocols, it therefore holds jurisdictional monopoly evidenced *inter alia* by the fact that the interpretation of the Convention established by the European Court of Human Rights in the judicial process, although made on the basis of an individual case and binding only in this case, is in fact binding for all international and domestic bodies applying the Convention. The European Court of Human Rights' individual rulings are therefore binding *erga omnes* in the sense that when adjudicating an individual case, the European Court of Human Rights interprets the Convention, and the interpretation is then binding on all member states. Bearing in mind the fact that Polish courts, including the Supreme Court, refer to the judgment of the European Court of Human Rights of 7 May 2021 as the ground for their decisions, the Constitutional Tribunal held that in the present case the condition of a unified, consistent, and common practice of applying the law was satisfied.

Secondly, the Constitutional Tribunal has noticed, that the norms the European Court of Human Rights derived from Article 6 § 1, first sentence of the Convention in its judgment of 7 May 2021 concern a matter which, in the view of the Constitutional Tribunal, is not regulated by the Convention. The Convention is an international agreement on the protection of human rights which are referred to in its first chapter as well as in additional protocols, and which States Parties are obliged to secure to every person within their jurisdiction. The European Court of Human Rights was established in order to ensure that States Parties comply with their obligations, and the scope of its competences, as laid down in the Convention, sets limits which the Court must respect so that its actions are not *ultra vires*. One of such actions is the interpretation, presented in the judgment of 7 May 2021, of Article 6 § 1, first sentence of the Convention in relation to the Constitutional Tribunal, which negated the basic constitutional principles set out in the Constitution of the Republic of Poland. By ratifying the Convention, Poland did not consent to the European Court of Human Rights' jurisdiction in this respect, and there is no other verification mechanism apart from the control exercised by the Constitutional Tribunal. It is the duty of the Constitutional Tribunal to defend Poland's constitutional identity and to this end the Tribunal controls whether a norm whose content was shaped by the case-law of the European Court of Human Rights falls within the Polish constitutional system in the light of the principle of supremacy of the Constitution laid down in its Article 8 § 1 (the Constitution is the supreme law of the Republic of Poland).

Thirdly, the Constitutional Tribunal has underlined that it does not question the achievements of the European Court of Human Rights or its role in developing and raising human rights standards in states-parties to the Convention. However, due to the importance of the case, its precedential nature and the high status of the adjudicating authority, the conditions for admissibility of review of a rule

derived by the European Court of Human Rights from the first sentence of Article 6 § 1 of the Convention have been met.

In the light of the provisions of the Constitution and the Constitutional Tribunal's case-law, as well as the vast majority of representatives of the jurisprudence of constitutional law, there is no doubt that the Constitutional Tribunal is not a court within the meaning of Article 175 of the Constitution, although it is undoubtedly an organ of the judiciary which is a separate and independent authority from other authorities. The exclusive competence referred to in the jurisprudence as a monopoly in the administration of justice is vested in the Supreme Court, common, administrative and military courts. On the other hand, the basic task of the Constitutional Tribunal is to review the hierarchical compatibility of legal norms within the framework of which it does not decide, unlike ordinary courts, individual cases and does not assess the facts, but examines the existence of a relationship of conformity of legal norms of different ranks, and eliminates norms incompatible with the system of applicable law if necessary, even adjudicating in the so-called concrete review initiated by a constitutional complaint. The Constitutional Tribunal rules only on the law and not on the complainant's individual rights or freedoms. It does not become an additional judicial instance, nor does it replace the courts because it does not control the application of the law in a particular case. A judgment of the Constitutional Tribunal delivered in this manner does not automatically lead to the revocation of the decision in connection with which the complaint was brought, but only allows the reopening of the proceedings, the annulment of the decision or other ruling in accordance with the rules and procedures laid down in the provisions

Despite certain elements common to proceedings before common courts, the Constitutional Tribunal cannot be regarded as a court, and proceedings before it, as judicial proceedings both within the meaning of Article 45 § 1 of the Constitution, which establishes the right to a court, and the first sentence of Article 6 § 1 of the Convention, which constitutes its equivalent. Pursuant to Article 194 § 1 of the Constitution, judges of the Constitutional Tribunal are elected for a single, 9-year term of office, individually from among persons distinguished by their legal knowledge. Therefore, the legislator provided for a monopoly of the Sejm in the election of judges of the Constitutional Tribunal, and the resolution of the Sejm on the election of a judge is not subject to external control, in particular judicial review. The election procedure is complemented by taking an oath before the President, which is not a ceremony of a purely symbolic nature, but an event with specific legal effects.

The Judge Rapporteur has pointed out that the obligation contained in Article 9 of the Constitution (The Republic of Poland shall respect international law binding upon it) cannot be implemented in isolation from Article 8 § 1 of the Constitution. The Constitution has absolute priority in terms of its binding force and application. Any norm of international law created in the process of applying the law by an international organ outside the content of the agreement and modifying this

agreement without the consent of the state, interfering with the constitutional order, does not benefit from protection under Article 9 of the Constitution. As an act that is *ultra vires*, such a norm is not binding on the Republic of Poland.

In the justification for its judgment of 24 November 2021, the Constitutional Tribunal has underlined that every judgment of the European Court of Human Rights is an exclusive, final and authentic interpretation of the provisions of the Convention, thus becoming an instrument for setting norms. The Constitutional Tribunal has noted on many occasions that by passing its judgment of 24 November 2021 it did not attempt to infringe the European Court of Human Rights' monopoly of jurisdiction, and that subject to review were not the norms resulting directly from Article 6 § 1, first sentence of the Convention but the norms derived from the said provision under the European Court of Human Rights' case-law. The Constitutional Tribunal therefore derogated the normative content included in the operative part of the judgment but did not question Article 6 § 1, first sentence of the Convention. The said provision, as an element of an international agreement signed by the Republic of Poland, is still part of domestic legal order and may be used as grounds for applications filed with the European Court of Human Rights by Polish citizens. However, it is unfounded to interpret Article 6 § 1, first sentence of the Convention in a way that expands the provision of this Article, effectively resulting in a modification that can only be made through an amendment to an international agreement, and in the case of the Convention by adoption of another protocol by the States Parties. The Constitutional Tribunal pointed out that the norms created by the European Court of Human Rights interfere with and negate the basic constitutional principles set out in the Constitution of the Republic of Poland.

In its written grounds, the Constitutional Tribunal has elaborated on the reasons why the interpretation of Article 6 § 1, first sentence of the Convention wherein the European Court of Human Rights assumed that the term "tribunal" used in the said provision also includes the Constitutional Tribunal, is erroneous. It was pointed out that the Constitutional Tribunal does not call into question the autonomous understanding of the term "tribunal" as used in Article 6 § 1, first sentence of the Convention. Also, a reference has been made to the case-law of the European Court of Human Rights, which construes that a "tribunal" in the conventional meaning is a body authorised to make independent, binding decisions, which is established by law and operates in a manner that ensures independence and impartiality. However, this autonomous understanding of the term "tribunal" implies the European Court of Human Rights' obligation to examine thoroughly in every individual case whether the system of the constitutional court and the proceedings before that court comply with the conditions that must be met in order for a reference to the standard laid down in Article 6 § 1 of the Convention to be applicable to the Constitutional Tribunal. It has to be assumed that in the case of *Xero Flor*, the European Court of Human Rights did not carry out such a thorough examination after all, as it is thoroughly incorrect and contrary to the Court's earlier rulings on exceptional measures to

conclude that a procedure before the Constitutional Tribunal determined the civil rights of the applicant company. The judgment in which the Constitutional Tribunal declares legitimacy of a constitutional complaint does not result in the challenging of a final ruling on the grounds of the rules and procedures applicable to a corresponding civil procedure. Since the Polish Constitutional Tribunal does not deal with the *contentieux subjectif*, it cannot be considered a tribunal within the meaning of Article 6 § 1 of the Convention.

Regarding the legal status of judges of the Constitutional Tribunal and the procedure of their election, it has been pointed out that the Polish legal system does not provide for mechanisms to enable any organ to review the legality of electing the Constitutional Tribunal's judges. The Constitutional Tribunal has ruled that it is not within the remit of the European Court of Human Rights to review independence of the Constitutional Tribunal's judges, since that independence has its sources in the Constitution and statutes. The judges, including those of the Constitutional Tribunal, have a source of their independence laid down in Article 178 § 1 of the Constitution, which stipulates that judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes. The Tribunal stated that the norm derived from the first sentence of Article 6 § 1 of the Convention and applied by the European Court of Human Rights as a basis for its self-assumed remit to review the legality of electing judges of the Constitutional Tribunal is inconsistent with Article 194 § 1 of the Constitution in conjunction with the principle of constitutional supremacy laid down in its Article 8 § 1 as regards two higher-level norms for the review, namely, Article 2 (The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice) and Article 89 § 1 point 3 (Ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute, if such agreement concerns the Republic of Poland's membership of an international organization) of the Constitution.

Again, it should be emphasized that the Constitutional Tribunal, when issuing a judgment limited in its scope (*wyrok zakresowy*) of 24 November 2021, ruled that only certain norms indicated in the operative part of the judgment, derived from Article 6 § 1, first sentence of the Convention infringe the provisions of the Constitution of the Republic of Poland, and therefore are not binding. In the remaining scope, the provision of Article 6 § 1 of the Convention, as an element of an international agreement to which the Republic of Poland is a party, is still part of the domestic legal order and may be the basis for applications lodged by Polish citizens with the European Court of Human Rights.

It should be pointed out that the said ruling of the Constitutional Tribunal is a limited judgment (*wyrok zakresowy*), *i.e.* one in which the Constitutional Tribunal decides the conformity or non-conformity of an act to the Constitution in a specific (subjective, objective or temporal) scope of its application. Consequently, the attribute of constitutionality or non-constitutionality is not attached to

the entire legal act or its editorial unit (a provision), but to its fragment, and more precisely to a norm (norms) derived from this provision.

It should also be noted that not only the Polish Constitutional Tribunal debates with the European Court of Human Rights' judgments. An example of a dialogue between the European Court of Human Rights and a state-party's constitutional court is a judgment of the Italian Constitutional Court no. 49/2015¹, wherein it confirmed the supremacy of Constitution over the Convention and found that, firstly, making an interpretation in line with the Constitution is more important than being bound by the interpretation made by the European Court of Human Rights and, secondly, it limited the impact of European Court of Human Rights's judgments in domestic legal order to "established case-law".¹

In conclusion, the above leaves no doubt that Polish law continuously ensures the effective implementation of Article 6 and Article 32 of the Convention.

Enclosed you will find a copy of the Constitutional Tribunal's judgment of 24 November 2021 together with written reasoning (in Polish). The written reasoning of the judgment is currently being translated into English and will be communicated to Secretary General immediately after conclusion of the translation. At the same time, it should be ensured that further information on the judgment of the Constitutional Tribunal in the case K 6/21 will be provided to the Committee of Ministers of the Council of Europe under the mechanism of implementation of the judgments of the European Court of Human Rights.

Yours faithfully,



¹ Judgment of the Constitutional Court of 14 January 2015 no. 49/2015, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf (accessed on 29.01.2022).

Appendix III – Letter of the Secretary General of the Council of Europe to the Minister for Foreign Affairs of the Republic of Poland of 16 March 2022

Council of Europe
The Secretary General

Strasbourg, 16 March 2022

Dear Minister,

I refer to your letter of 8 March in reply to my letter of 7 December 2021 requesting an explanation, in accordance with Article 52 of the European Convention on Human Rights, of the manner in which Poland's internal law ensures the effective implementation of Articles 6 and 32 of the Convention following the judgment of the Constitutional Court of 24 November 2021 in the case K 6/21.

I should like to thank you for the explanations provided in your letter, which I will examine very carefully.

In view of the significant developments subsequent to my previous letter, namely the judgment of the Constitutional Court of 10 March in the case K 7/21, I should be grateful if your Government would provide additional explanations on the way in which the internal law ensures the effective implementation of Articles 6 and 32 of the Convention in the light of this judgment.

I would be grateful to receive these additional explanations no later than 16 June 2022.

Yours sincerely,


Marija Pejčinović Burić

Mr Zbigniew Rau
Minister for Foreign Affairs
Republic of Poland

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Appendix IV – Letter of the Minister for Foreign Affairs of the Republic of Poland to the Secretary General of the Council of Europe of 23 June 2022



Republic of Poland
Minister
of Foreign Affairs
Zbigniew Rau

Warszawa, 23 June 2022

**Her Excellency
Marja Pejčinović Burić
Secretary General
Council of Europe**

Your Excellency,

In response to your letter of 16 March 2022, concerning the additional explanations regarding the manner in which the internal law ensures the effective implementation of Articles 6 and 32 of the Convention following the judgment of the Constitutional Tribunal of 10 March 2022 in the case K 7/21, I should like to present the following information.

The judgment of Constitutional Tribunal of 10 March 2022 was adopted as a result of examination of the Prosecutor General's motion of 9 November 2021. In its judgment the Constitutional Tribunal found that:

Article 6 § 1, first sentence, of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, amended by Protocols Nos. 3, 5 and 8 as well as supplemented by Protocol No. 2 (Journal of Laws – Dz. U. of 1993 No. 61, item 284), insofar as:

1) under the phrase "civil rights and obligations", it comprises the judge's subjective right to hold a managerial position within the structure of common courts in the Polish legal system

– is inconsistent with Article 8 § 1, Article 89 § 1 point 2 and Article 176 § 2 of the Constitution of the Republic of Poland,

2) in the context of assessing whether the requirement of "tribunal established by law" has been met:

a) it permits the European Court of Human Rights and/or national courts to overlook the provisions of the Constitution and statutes as well as the judgments of the Polish Constitutional Tribunal,

b) makes it possible for the European Court of Human Rights and/or national courts to independently create norms, by interpreting the Convention, pertaining to the procedure for appointing national court judges

– is inconsistent with Article 89 § 1 point 2, Article 176 § 2, Article 179 in conjunction with Article 187 § 1 in conjunction with Article 187 § 4 as well as Article 190 § 1 of the Constitution,

c) authorises the European Court of Human Rights and/or national courts to assess the conformity to the Constitution and the Convention of statutes concerning the organisational structure of the judicial system, the jurisdiction of courts, and the Act specifying the organisational structure, the scope of activity, *modus operandi*, and the mode of electing members of the National Council of the Judiciary

– is inconsistent with Article 188 points 1 and 2 as well as Article 190 § 1 of the Constitution.

The ruling was unanimous.

In a substantial part of its written reasons, published on 22 April 2022, the Constitutional Tribunal deliberated on the relationship between international law and domestic law, the position of international agreements in the Constitution of the Republic of Poland, the status of judgments adopted by the European Court of Human Rights in the Polish legal order and the law-making function of international courts.

The Constitutional Tribunal has pointed out that the relationship between international law and domestic law is determined autonomously by the state in its constitution with the use of different legal concepts. In the Polish legal system, the effectiveness of international law is ensured by interpreting domestic law in accordance with international law, making an international legal norm directly applicable in domestic law (Article 91 of the Constitution of the Republic of Poland) and safeguarding the above with appropriate conflict-of-laws rules, as well as by transposition into domestic law by enacting a domestic regulation that reflects international commitments. The Constitutional Tribunal has emphasised that in substantive terms, the emergence of an international commitment that would be in conflict with domestic law has never had a direct effect, namely, it has never resulted in making a domestic legal act void, and neither has it rendered such an act ineffective. A direct effect materialises at the level of international commitments, whereas in order to declare void a domestic legal act found non-compliant with an international commitment, due steps must be taken by relevant state organs, based on the provisions of domestic law founded on the Constitution.

The Constitutional Tribunal has also observed that the globalisation and integration processes taking place worldwide make a significant impact on the international legal order. Such evolving phenomena give rise to a range of coexistent legal orders, each having a complex structure of its own. In some areas, the result is also a gradual conglomeration of international law and domestic law, referred to as the internationalisation of domestic law. These circumstances give way to a significant potential for conflicts of laws, and it must be left to constitutional courts to adjudicate on these in order to prevent legal chaos. The risk of the latter is not purely theoretical. The Constitutional Tribunal has referred to concrete situations where constitutional courts or supreme courts modified the contents of international judgments or commitments (norms) ensuing or derived therefrom, and even refused to enforce such judgments. The examples include a number of judgments of domestic courts of

the member states of the Council of Europe (the judgment of the Federal Constitutional Court of Austria in the case B 267/86; the judgment of the Federal Supreme Court of Switzerland of 7 January 1994 in the case 120 Ia 43; the judgment of the Federal Constitutional Court of Germany in the case 2 BvR 1481/04, Görgülü; the judgment of the Supreme Court of the United Kingdom of 9 December 2009 in the case R v. Horncastle and others; the judgment of the Constitutional Tribunal of Italy, case no. 238/2012; the judgment of the Supreme Court of Spain of January 2020, the case of Oriol Unqueras; the judgment of Federal Constitutional Tribunal of Germany of 5 May 2020, the case no. 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16; the judgments of the Polish Constitutional Tribunal, the cases nos. P 7/20, K 3/21 and K 6/21).

In such cases constitutional courts (or domestic supreme courts) argue that domestic law is not adjusted to the objective set by the judgment, the international court that passed the judgment acted beyond the power of its legal authority (judgment *ultra vires*), the judgment contradicts a fundamental constitutional rule, etc. In other words, the refusal applies to situations where the problem of allowing refusal is considered systemically serious, and the execution of the judgment would significantly undermine the structure of the national legal system (constitutional foundations of statehood).

International agreements have played an increasingly important role at present, often amounting to norm-making treaties; as a result, more and more areas of state activity have become subjected to control by international courts, both in terms of law making and application. Consequently, the law-making activity of international courts has had a growing impact on sovereign state authorities. The Constitutional Tribunal has pointed out that the law-making activity of these courts results in a new normative content of the provisions. This implies a risk that the new normative content of a provision distorts that provision to an extent where it loses the shape in which the state would have accepted it had it known the new content at the time of concluding a treaty.

The Constitutional Tribunal has also underlined that the control of constitutionality it carried out was not about supervising the whole of the European Court of Human Rights' activities but referring to a particular constitution-based context, namely, an answer to the question whether, given the referenced constitutional standards concerning the ratification of an international agreement, the European Court of Human Rights was entitled to create the norm in question on the basis of the content of the provision of the international agreement complained about.

The Constitutional Tribunal has also indicated its awareness of the fact that the European Court of Human Rights is attempting, through its case-law, to attribute to itself the right to a broader interpretation than results from the wording of that provision. However, the Constitutional Tribunal considers that such an action by the European Court of Human Rights encroaches on the rights of parties (States Parties) entitled to an authentic interpretation, as the wording of Article 32 of the Convention does not give it such a basis.

In the written reasoning of the judgment the Constitutional Tribunal has also reiterated that the main instrument of interpretation used by the European Court of Human Rights is a dynamic functional interpretation. It seeks to develop the standards of rights protection enshrined in the Convention because of the need to ensure its effectiveness in a changing reality. This follows from the recognition of the Convention as a “living instrument,” *i.e.* an act whose meaning and content evolve with a changing world. This leads—in the context of the general wording of Convention provisions—to a need for their dynamic understanding suited to current socio-political, cultural and legal conditions, all of which change over time.

The Constitutional Tribunal has agreed with the view that there is a common, evolving catalogue of human protection standards in a democratic European society but stressed that the mere existence of such a catalogue, or even of a “democratic society,” does not explain the European Court of Human Rights’ right to reconstruct the normative content of legislation in such a way as to arbitrarily break down the individualities involved in cultural and national differences or the political organisation of states.

The Constitutional Tribunal has indicated that the interpretation of the Convention by the European Court of Human Rights cannot replace formal treaty amendments. This is the case when, by officially making a dynamic interpretation of the Convention, the European Court of Human Rights in fact unilaterally and progressively influences the content of the provisions and the legal institutions they provide for and enshrines qualitatively new norms. In this way, not only does it create them, but it leads to substantial modifications of the authentic text (the content of the provisions), increasingly at a level which could not have been foreseen by the authors of the Convention or even by other countries later to accede to it, including Poland. Since the Convention is an instrument for the protection of human rights, the exercise by the European Court of Human Rights of its power of authority, whose sole purpose is to monitor compliance by States Parties to the Convention with the standards laid down therein and which include the formation of norms by means of an adjudicating procedure, must strike a reasonable balance with the freely limited sovereignty in that respect.

The Constitutional Tribunal has also emphasised that, despite the rightly growing importance of human rights in modern legal systems, as reflected today in the doctrinal and political assessments of the Convention’s role, which may translate into the aspirations of the European Court of Human Rights and its judges, that body remains solely one set up by States Parties on the basis of an international agreement. Its role and sphere of activity are defined by that act. Any attribution to it of a different role in relations with Poland can only be achieved by amending the Convention in accordance with the appropriate constitutional procedure and not by the European Court of Human Rights’ own judicial law-making.

Attention should also be paid to the completed work in the Polish parliament concerning the draft act amending the act on the Supreme Court and some other acts. The ongoing legislative process, taking into account the recent European Court of Human Rights and the Court of Justice of the European Union rulings in cases concerning the examination of the status of judges in Poland, opened up the possibility of adopting legal solutions that would be in line

with the case-law of both the Polish Constitutional Tribunal and the above-mentioned international courts. The proposed amendments are intended to place Poland's standards of judicial independence and the impartiality of judges at the highest level guided by the rule of law. The act amending the act on the Supreme Court and some other acts was passed on 9 June 2022 and subsequently signed by the President of the Republic of Poland.

In conclusion, the above leaves no doubt that Polish law continuously ensures the effective application of Article 6 and 32 of the Convention. Enclosed you will find a copy of the Constitutional Tribunal's judgment of 10 March 2022 (case no. K 7/21) together with written reasoning (in Polish). The written reasoning of the judgment is currently being translated into English and will be communicated to Secretary General immediately after conclusion of the translation. At the same time, it should be ensured that any further information on the judgment of the Constitutional Tribunal in the case K 7/21 will be provided to the Committee of Ministers of the Council of Europe under the mechanism of implementation of the judgments of the European Court of Human Rights. It is also justified to continue the dialogue between the European Court of Human Rights and the constitutional courts of the States Parties to the Convention on the essence of legal systems. This may contribute to a better understanding of the Polish legal system at the constitutional and statutory level.

Please accept, Excellency, the assurances of my highest consideration.

A handwritten signature in blue ink, consisting of a large, stylized initial 'L' followed by 'w' and 'k'.

Appendix V – Courtesy English translation of the Constitutional Court’s judgment K 6/21 of 24 November 2021

9/A/2022

JUDGMENT

dated 24 November 2021

Ref. No. K 6/21*

Judgment in the name of the Republic of Poland

The Constitutional Tribunal, composed of:

Julia Przyłębska - Presiding Judge
Zbigniew Jędrzejewski
Bartłomiej Sochański
Wojciech Sych - Reporting Judge
Michał Warciński,

Recording Clerk: Michał Rylski,

having considered, at the hearing on 24 November 2021 – in the presence of the applicant and the President of the Republic of Poland, the Sejm, the Minister of Foreign Affairs, and the Polish Ombudsman [also referred to as the Polish Commissioner for Human Rights] – the application of the Public Prosecutor-General, lodged to assess the conformity of:

- 1) Article 6(1), first sentence, of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws – Dz.U. of 1993 No. 61, item 284) – “insofar as the term ‘tribunal’, used in that provision, comprises the Constitutional Tribunal of the Republic of Poland” – to Article 2, Article 8(1), Article 10(2), Article 173 and Article 175(1) of the Constitution;
- 2) Article 6(1), first sentence, of the Convention referred to in paragraph 1 – “insofar as the said provision equates the guarantee that an individual case is to be considered within a reasonable time by an independent and impartial tribunal established by law, in the determination of the individual’s civil rights and obligations or of any criminal charge against him/her, with the Constitutional Tribunal’s jurisdiction to adjudicate on the hierarchical conformity of the provisions and normative acts indicated in the Constitution of the Republic of Poland, and thus permits the application of the requirements arising from Article 6 of the ECHR to proceedings before the Constitutional Tribunal” – to Article 2, Article 8(1), Article 79(1), Article 122(3) and (4), Article 188(1)-(3) and (5) as well as Article 193 of the Constitution;
- 3) Article 6(1), first sentence, of the Convention referred to in paragraph 1 – “insofar as it comprises the European Court of Human Rights’ review of the legality of the process of electing judges to the Constitutional Tribunal so that it could be determined whether the Constitutional Tribunal is an independent and impartial tribunal established by law” – to Article 2, Article 8(1), Article 89(1)(3) and Article 194(1) of the Constitution;

* The operative part of the judgment was published on 26 November 2021 in the Journal of Laws, item 2161.

a d j u d i c a t e s as follows:

1. Article 6(1), first sentence, of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, amended by Protocols Nos. 3, 5 and 8 as well as supplemented by Protocol No. 2 (Journal of Laws of 1993 No. 61, item 284, as amended) – insofar as the term ‘tribunal’ used in that provision comprises the Constitutional Tribunal of the Republic of Poland – is inconsistent with Article 173 in conjunction with Article 10(2), Article 175(1) and Article 8(1) of the Constitution of the Republic of Poland.

2. Article 6(1), first sentence, of the Convention referred to in paragraph 1 – insofar as it grants the European Court of Human Rights the jurisdiction to review the legality of the process of electing judges to the Constitutional Tribunal – is inconsistent with Article 194(1) in conjunction with Article 8(1) of the Constitution.

Moreover, the Tribunal d e c i d e s:

to discontinue the proceedings as to the remainder.

The ruling was unanimous.

STATEMENT OF REASONS

I

1. In an application dated 27 July 2021 the Public Prosecutor-General questioned the conformity of:

first, Article 6(1), first sentence, of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as amended by Protocols Nos 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284; hereinafter: Convention) – “insofar as the term ‘tribunal’, used in that provision, comprises the Constitutional Tribunal of the Republic of Poland” – to Article 2, Article 8(1), Article 10(2), Article 173 and Article 175(1) of the Constitution;

second, Article 6(1), first sentence, of the Convention – “insofar as the said provision equates the guarantee that an individual case is to be considered within a reasonable time by an independent and impartial tribunal established by law, in the determination of the individual’s civil rights and obligations or of any criminal charge against him/her, with the Constitutional Tribunal’s jurisdiction to adjudicate on the hierarchical conformity of the provisions and normative acts indicated in the Constitution of the Republic of Poland, and thus permits the application of the requirements arising from Article 6 [of the Convention] to proceedings before the Constitutional Tribunal” – to Article 2, Article 8(1), Article 79(1), Article 122(3) and (4), Article 188(1)-(3) and (5) as well as Article 193 of the Constitution;

third, Article 6(1), first sentence, of the Convention “insofar as it comprises the European Court of Human Right’s review of the legality of the process of electing judges to the Constitutional Tribunal so that it could be determined whether the Constitutional Tribunal is an independent and impartial tribunal established by law” – to Article 2, Article 8(1), Article 89(1)(3) and Article 194(1) of the Constitution.

1.2. In support of his application to the Constitutional Tribunal concerning the constitutionality of Article 6(1), first sentence, of the Convention, the Public Prosecutor-General noted that the European Court of Human Rights (hereinafter: ECtHR), whose achievements and role

in the development and raising of standards of justice in the States Parties to the Convention is indisputable, has in its recent case-law taken a view that “poses a threat [...] to the coherence of the internal legal systems of the States Parties and to mutual trust between them in guaranteeing a fair trial to persons within their jurisdiction” (reasons for the application, p. 3). A judgment which “[distorts] the original[] meaning of the provisions of the Convention, which is not grounded[] in the will of the States Parties” (reasons for the application, *ibid.*) is, in the Public Prosecutor-General’s view, the ECtHR judgment of 7 May 2021 in *Xero Flor w Polsce Sp. z o.o. v. Poland* (application no. 4907/18).

Justifying the competence of the Tribunal to rule in the case, the Public Prosecutor-General noted that, although the judgment of 7 May 2021 is of an individual character, “nevertheless, given the general context in which this judgment was delivered, and – even more importantly – its subject matter and content, it should be considered that it constitutes an attempt by the law-applying authority to shape a completely new convention standard in qualitative terms – while disregarding the will of the States Parties, and in particular without respecting the fundamental – constitutional – norms of the political system of the Republic of Poland. Therefore, the significance of this – only seemingly individual – decision of the ECtHR authorises, in the Public Prosecutor-General’s view, the Constitutional Tribunal to assess the conformity to the Polish fundamental law of the normative content deduced in the ruling in question from the normative provisions indicated in the request for relief set out herein” (reasons for the application, p. 4).

Then, the Public Prosecutor-General, referring to the case-law of the Tribunal, indicated what conditions must be met for the Tribunal to review a norm resulting from the application of law (stability, repetitiveness, commonness of the practice of understanding and applying a legislative provision, which determines its actually unequivocal reading, in particular if the practice was developed as a result of the activity of the Supreme Court, whose resolutions should be taken into account in case-law). It concluded that “the normative ‘novelty’ deduced by the ECtHR from Article 6(1), first sentence, of the Convention can be seen against the background of its to-date case-law regarding said norm. There are many elements to the Convention standard of the right to a fair trial, but from the perspective of this case only two aspects arising from the first sentence of paragraph 1 of the provision under review will be key: the scope of its application and the requirement of a statutory basis for the tribunal” (reasons for the application, p. 5). The Public Prosecutor presented the ECtHR case-law in this respect and the views of legal scholars.

1.3. In support of the allegations put forward in paragraph 1 of the request for relief of his application, the Public Prosecutor pointed out that the extension of the term “tribunal” as used in Article 6(1), first sentence, of the Convention to the Constitutional Tribunal violates the constitutional order whose framework is provided by Articles 10(2), 173 and 175(1) of the Constitution. The Constitution, in its Articles 10(2) and 173, clearly distinguishes two separate branches of the judiciary: courts and tribunals, with the legislator’s intention being that only the former are to exercise the administration of justice (Article 175(1) of the Constitution); tribunals have been established to perform other tasks and exercise other competences, and a different approach “would lead to the intersection of the competences of the constitutional authorities”, “placing them in the position of confrontation for hierarchical superiority” and “would constitute (...) a disturbance of the constitutional balance, an element of which is the separation not only of individual authorities, but also the separation of centralised constitutional judiciary” (reasons for the application, p. 32).

The consequence of “modifying the constitutional understanding of the division of judicial power into courts and tribunals is a violation of the principle of supremacy of the Constitution (...) referred to in Article 8(1) thereof” (reasons for the application, pp. 32-33),

which is not supported by the obligation to observe international law set out in Article 9 of the Constitution. The provisions of international law, including the Convention, are of a sub-constitutional nature, and therefore any ruling issued outside the content of an international agreement or modifying that agreement without the consent of the state, as well as the modified provision of the agreement, which addresses constitutional matters, revising the principles of the political system of the Republic of Poland, are not supported by Article 9 of the Constitution (see the reasons for the application, p. 33).

In the Public Prosecutor-General's view, "putting courts and tribunals at the same level contrary to the legislator's intention leads to undermining the foundations of a democratic rule-of-law state, which is based on legal certainty and security" (reasons for the application, p. 33). The Public Prosecutor-General argues that a violation of Article 2 of the Constitution consists both in an independent modification of a treaty norm, i.e. which is not authorised by a normative provision, while "the principle of democracy (...) requires that the entire process of creating, interpreting and applying the law be based on democratic requirements" (reasons for the application, pp. 33-34), as well as the formation by the ECtHR, on the basis of Article 6(1), first sentence, of the Convention, of a norm which modifies the content of the institution of the Constitutional Tribunal in a manner inconsistent with the provisions of the Constitution and the laws relating thereto, which leads to a violation of the principle of the definiteness of law, from which it follows that it should be comprehensible for the addressees, precise and unambiguous.

1.4. Referring to the allegations put forward in the second paragraph of the request for relief of the application, the Public Prosecutor-General pointed out that, contrary to what the ECtHR held in its judgment of 7 May 2021, proceedings before the Constitutional Tribunal are not proceedings in individual civil and criminal cases, and the Tribunal is not a court purported to give effect to the guarantees arising from Article 6(1) of the Convention. The convention norm created by the ECtHR in its case-law, which attributes to the competences of the Constitutional Tribunal a meaning other than that which follows from Article 79(1), Article 122(3) and (4), Article 188(1)-(3) and (5) and Article 193 of the Constitution, thus constitutes a violation of the aforementioned provisions of the Constitution which set out those competences. Consequently, in the Public Prosecutor-General's view, the modification of the content of the constitutional understanding of the competences of the Tribunal violates the principle of supremacy of the Constitution (Article 8(1) of the Constitution) and the principle of legal certainty and security as set forth in Article 2 of the Constitution, and an independent (not authorised by a normative provision) modification of a treaty norm is irreconcilable with the principle of democracy, which requires the entire process of creating, interpreting and applying the law to be based on democratic requirements.

1.5. In support of the allegation put forward in the third paragraph of the request for relief of the application, the Public Prosecutor-General emphasised that in the present legal state, the Sejm has a "monopoly" in electing Constitutional Tribunal judges (Article 194(1) of the Constitution) and there are no instruments to review the legality of their appointment. Article 6(1), first sentence, of the Convention, insofar as challenged, thus interferes with the systemic model of electing Tribunal judges by creating a procedure for such election to be reviewed by an international court, which is unknown to the Polish law.

Pursuant to Article 89(1)(3) of the Constitution (which provision was referred to in the application), the Convention is an international agreement concerning the freedoms, rights or duties of citizens set forth in the Constitution. Thus, it is not an act from which norms could be derived, on the basis of which the ECtHR would be entitled to assess the correctness of the formation of constitutional public authorities (here: Constitutional Tribunal). The consequence

of the correct classification of the Convention is therefore that the ECtHR is only entitled to adjudicate and assess human rights violations by a party to the Convention on the basis of the unambiguously formed content of the norm to which the State has consented.

The justification for the alleged violation of Articles 2 and 8(1) of the Constitution is analogous to the justification put forward for the allegations set out in the first and second paragraphs of the request for relief of the application.

2. In a pleading dated 24 August 2021, the Ombudsman (hereinafter: Ombudsman) notified his intention to participate in the proceedings before the Constitutional Tribunal in case no. K 6/21, and requested that the proceedings be discontinued due to the inadmissibility of the ruling. As a procedural precaution, should the proceedings not be discontinued, he requested a ruling to the effect that Article 6(1), first sentence, of the Convention, to the extent indicated in the Public Prosecutor-General's application, was not inconsistent with the constitutional standards referred to in the application.

2.1. In a pleading dated 4 November 2021, the Ombudsman provided reasons for the above view.

2.1.1. In the Ombudsman's view, the Public Prosecutor-General's application, although formulated as a request to review a Convention provision, is in fact a request to review a specific judgment of the ECtHR. However, the Constitutional Tribunal is not empowered to review the practice of law application unless the same is permanent, common and stable. The applicant failed to demonstrate that the present case deals with such a situation. The Ombudsman also pointed out that the ECtHR is not a central state authority within the meaning of Article 188(3) of the Constitution, but an authority acting on the basis of an international agreement. Thus, even more so, its judgments are not subject to constitutionality review. Nor is the Tribunal vested with legal basis for pronouncing on the scope of the jurisdiction of international courts, this being a consequence of the principle of universal international law that a state may not invoke arguments referring to domestic law to justify or excuse its failure to comply with an international obligation. The Ombudsman also stressed that the ECtHR, under Article 32 of the Convention, has exclusive jurisdiction to interpret the provisions of the Convention, and that in the event of a dispute as to the scope of its jurisdiction, it is for the ECtHR to resolve the dispute. Poland, by acceding to the Convention, agreed to confer on the ECtHR the powers set forth therein. The ECtHR exercised this competence by interpreting Article 6 of the Convention in *Xero Flor*. Furthermore, Poland did not challenge the judgment of 7 May 2021 in the manner provided for in the Convention, i.e. it did not file a request for the case to be examined by the Grand Chamber of the ECtHR. The Ombudsman also pointed out that the binding effect of the judgment of 7 May 2021 derives from Article 46(1) of the Convention, which is not challenged in the present case, meaning that Poland would remain obliged to comply therewith, in accordance with the international obligations to which it is a party.

In the Ombudsman's view, this justifies discontinuance of the proceedings on the ground that the judgment is inadmissible.

2.1.2. In support of his alternative request for a finding that Article 6(1), first sentence, of the Convention, to the extent set out in the application, is not inconsistent with the standard of review referred to therein, the Ombudsman argued that the differences between ordinary courts and tribunals did not justify putting the Constitutional Tribunal against courts. The Ombudsman listed the situations in which the Tribunal, in the exercise of its powers, may be considered a court in the substantive sense. This is the case, among others, in deciding constitutional appeals and legal questions. Moreover, both courts and tribunals are to be independent and their judges are to be independent. What they have in common is a similar procedure, initiation of proceedings on request rather than at their initiative, and the forms of decision-making: judgments and decisions. In the Ombudsman's view, these are circumstances

for which the courts and the Constitutional Tribunal should be subject to the same requirements. Since the Tribunal, in the light of the Constitution, exercises a judicial function, it should, in particular, maintain impartiality and be established in accordance with the law.

The Ombudsman, referring to the ECtHR's case-law, presented the understanding of the term "tribunal" under the Convention. He emphasised that this understanding, which has essentially remained unchanged, had crystallized as early as in the 1980s, long before Poland acceded to the Convention, and was known to the Polish authorities pre- and post-accession. The failure to make a reservation means that the national authorities did not see any inconsistency between the national law and the Convention standards.

The Ombudsman argued that in numerous cases, including those involving Poland, the ECtHR has indicated that it may analyse proceedings before the constitutional court of a State Party, including those initiated by means of a constitutional appeal or a legal question, in the light of the requirements arising from Article 6 of the Convention. Since the proceedings before the Tribunal may be subject to review by the ECtHR with respect to the enforcement of the right to a fair trial, the Constitutional Tribunal must conform to the requirements of an independent and impartial tribunal established by law.

Turning to the allegation concerning the interpretation in the light of which Article 6(1) of the Convention allows for the assessment of the legality of the process of electing Constitutional Tribunal judges, the Ombudsman noted that the case decided in the judgment of 7 May 2021 fell within the competence of the ECtHR, entrusted to it by the States Parties in the light of Article 19 read together with Article 32 of the Convention. The argument that the ECtHR is interfering with the model of electing Tribunal judges is incorrect; the ECtHR did not designate an entity other than the Sejm with the power to elect Tribunal judges, nor did it appoint another judge in place of the person whose participation it found unlawful. The ECtHR only ruled that the procedure for the election of the three judges of the Tribunal did not respect the provisions of national law, without questioning the content of those provisions. The fact that there are no formal instruments under national law for reviewing the legality of the appointment of Tribunal judges does not, in the Ombudsman's view, preclude an international court from carrying out such an assessment when hearing an individual action brought before it. On the other hand, the effects of a judgment finding a violation of the right to a court as a result of the improper composition of the bench of the Tribunal are confined exclusively to the sphere of international law and do not result, in particular, in the removal from office of the person whose participation in the bench was found to be in violation of Article 6(1) of the Convention.

2.2. In a pleading dated 15 November 2021, the Ombudsman indicated that he had received an expert report on the application of Article 6 of the Convention to the constitutional courts of States Parties. In the Ombudsman's view, it should be included in evidence in the case at hand. The expert report was enclosed with the pleading.

3. In a pleading dated 9 November 2021 the Minister of Foreign Affairs presented the "Position of the Minister of Foreign Affairs of 29 August 2021 [c]oncerning the proceedings before the Constitutional Tribunal in case ref. KP 6/21."

In the pleading, the Minister of Foreign Affairs referred to extensive passages of Judge K. Wojtyczek's dissenting opinion to the ECtHR judgment of 7 May 2021, in particular those concerning the admissibility of the application of Article 6(1) of the Convention to proceedings before the constitutional courts of States Parties. He stressed that the ECtHR judgments did not constitute a form of abstract review of the conformity of national law to the Convention, but were merely a determination of whether, in the given circumstances of a particular case, the effect of the application of those provisions to the applicant was or was not conforming to the

Convention. The judgment does not directly result in reversal or annulment of either the judgment (case) in respect of which it was issued, or any other judicial decisions, administrative acts or normative acts. The ECtHR finds that the Convention has been violated and, if applicable, determines the amount of just satisfaction. The enforcement of the judgment is the responsibility of the respondent State, and the adequacy of that enforcement is subject to the review of the Committee of Ministers.

4. In a pleading dated 15 November 2021, the President of the Republic of Poland (hereinafter: President) presented his view in the case. The President sought a declaration that: 1) Article 6(1), first sentence, of the Convention, insofar as the term ‘tribunal’, used in that provision, comprises the Constitutional Tribunal of the Republic of Poland, is inconsistent with Articles 8(1), 173 and 175(1) of the Constitution; 2) Article 6(1), first sentence, of the Convention, insofar as the said provision equates the guarantee that an individual case is to be considered within a reasonable time by an independent and impartial tribunal established by law, in the determination of the individual’s civil rights and obligations or of any criminal charge against him/her, with the Constitutional Tribunal’s jurisdiction to adjudicate on the hierarchical conformity of the provisions and normative acts issued by central state authorities to the Constitution of the Republic of Poland, and thus permits the application of the requirements arising from Article 6 of the Convention to proceedings before the Constitutional Tribunal, is inconsistent with Article 8(1), Article 79(1), Article 122(3), Article 188(1)-(3) and (5), and Article 193 of the Constitution; 3) Article 6(1), first sentence, of the Convention, insofar as it comprises the European Court of Human Right’s review of the legality of the process of electing judges to the Constitutional Tribunal so that it could be determined whether the Constitutional Tribunal is an independent and impartial tribunal established by law, is inconsistent with Article 8(1), Article 89(1)(3) and Article 194(1) of the Constitution.

4.1. The President explained the competence of the Constitutional Tribunal to rule on the present case. He also presented in detail the constitutional position of the Tribunal in the system of judicial power in Poland, in the context of Article 6(1), first sentence, of the Convention, as well as the case-law of the ECtHR, in which Article 6 of the Convention was considered adequate for the assessment of proceedings before the constitutional courts of the States Parties.

On the basis of his findings, the President concluded that the proceedings before the Constitutional Tribunal, which became the grounds for the judgment of 7 May 2021, did not fulfil any of the positive grounds which, in the to-date ECtHR case-law, would allow the Polish Constitutional Tribunal to be classified as a judicial body falling within the scope of Article 6(1), first sentence, of the Convention. In the light of the Constitution the Tribunal is not a court and the proceedings before it are not judicial in the sense of administration of justice. Accordingly, there is no basis for applying to it the standard set out in Article 6(1), first sentence, of the Convention.

4.2. Referring to the allegation that the ECtHR’s interpretation of Article 6(1), first sentence, of the Convention had been incorrect in its review of the legality of the election of Tribunal judges, the President stressed that this was a fundamental issue directly related to the operation of *ultra vires*. It is up to the legislator and the legislature to determine the shape of a constitutional tribunal, and it is up to the Sejm to elect its members. As the law currently stands, there are no instruments to review the legality of the procedure for appointing Tribunal judges. However, if there were such instruments, the competence would lie with the national authorities and not with bodies external to the Polish state, including the ECtHR.

5. In a pleading dated 18 November 2021, the submission on behalf of the Sejm of the Republic of Poland was presented by its Speaker. He sought a declaration that Article 6(1), first sentence, of the Convention, insofar as it comprises the ECtHR's review of the legality of the process of electing judges to the Constitutional Tribunal so that it could be determined whether the Constitutional Tribunal – in proceedings initiated by a constitutional appeal – is an independent and impartial “tribunal established by law”, is inconsistent with Article 194(1) of the Constitution in relation to the principle of legal certainty derived from Article 2 of the Constitution. In addition, he requested that the proceedings be discontinued in respect of the allegations set out in paragraphs 1 and 2 of the request for relief of the application on the ground that the judgment was inadmissible. In the Speaker's view, “a separate (distinct) review of the constitutionality of the terms specified in the quoted paragraphs of the request for relief is not possible in the proceedings before the Constitutional Tribunal in the present case” (reasons for the submission, p. 21).

5.1. As regards the allegation put forward in paragraph 3 of the request for relief of the application, the Speaker pointed out that the ECtHR in its recent case-law had in fact created a standard, which may raise serious constitutional doubts, authorising the assessment of the manner in which the Sejm exercises its creative function with respect to constitutional judges. In this context, in the Speaker's view, it is desirable that the Constitutional Tribunal expressly preclude the issue of assessing the constitutionality of the peculiar normative superstructure over Article 6 of the Convention, which is a manifestation of the ECtHR's practice of progressive activism. With respect to the Polish Constitutional Tribunal, this amounts to an encroachment onto the exclusive competences of the authorities of the Polish state and casting doubt on the choice made by the Polish Sejm. The Speaker also made a reservation that the scope of the challenge as set out in paragraph 3 of the request for relief should be narrowed due to the lack of possibility to review Article 6(1), first sentence, of the Convention in relation to proceedings before the Constitutional Tribunal other than those initiated by a constitutional appeal. He also pointed out that, among the standards of review indicated in the application in respect of this allegation, Article 194(1) read together with Article 2 of the Constitution was adequate. The proceedings in the scope of conformity to Article 8(1) and Article 89(1)(3) of the Constitution shall be discontinued due to inadmissibility of giving a judgment.

5.2. It follows from the explicit constitutional regulations, the structure of the Constitution, as well as the analysis of the tasks and competences of the Tribunal that it belongs to the organs of judicial power, but is not a tribunal in the light of the Constitution. This view is supported by constitutional law scholars. The Sejm is also inclined to accept the view that proceedings before the Tribunal, including proceedings initiated by the filing of a constitutional appeal, neither are – under the Polish constitutional system – judicial proceedings, nor constitute a direct continuation of judicial proceedings.

5.3. In view of the clear provision of the Constitution on the exclusivity of the Sejm with respect to the election of Constitutional Tribunal judges, it would be constitutionally inadmissible to introduce a solution at the sub-constitutional level that would result in the sharing of the creative function of the Sejm with any other organ, let alone a full delegation of the exercise of the creative function to another organ. In other words, in light of the Constitution, only the Sejm may decide on the composition of the Constitutional Tribunal's members (by exercising creative or constitutional functions). Any form by which any national or international (supranational) body co-decides on who is a constitutional judge and who is not must be considered contrary to Article 194(1) of the Constitution.

5.4. The inconsistency with the principle of legal certainty of the normative superstructure of Article 6(1), first sentence, of the Convention, which empowers the ECtHR to review the correctness of the election of Constitutional Tribunal judges by the Sejm, is manifested in the fact that it intensifies the state of uncertainty as to the position of the Tribunal judges. Meanwhile, it follows from the principle of legal certainty, which is a constituent element of the principle of citizens' confidence in the state and the laws made, that citizens of the Republic of Poland have the right to know, without prior analysis of judicial decisions or reading decisions of international (supranational) tribunals, who is a judge of the Polish Constitutional Tribunal and who has no such status.

II

At a hearing held on 24 November 2021, the litigating parties reiterated the views presented in their pleadings.

III

The Constitutional Tribunal has concluded as follows:

1. Subject matter of review

In his application to the Constitutional Tribunal, the Public Prosecutor-General challenged Article 6(1), first sentence, of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as amended by Protocols Nos 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended; hereinafter: Convention): "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Public Prosecutor-General made the subject matter of review not the literal wording of the cited provision, but the standards derived therefrom by the European Court of Human Rights (hereinafter: ECtHR) in its judgment of 7 May 2021 in *Xero Flor w Polsce Sp. z o.o. v. Poland* (application no. 4907/18; hereinafter: ECtHR judgment of 7 May 2021, judgment of 7 May 2021). The Public Prosecutor-General therefore requested a review of the constitutionality of Article 6(1), first sentence, of the Convention, first, "insofar as the term 'tribunal', used in that provision, comprises the Constitutional Tribunal of the Republic of Poland"; second, "insofar as the said provision equates the guarantee that an individual case is to be considered within a reasonable time by an independent and impartial tribunal established by law, in the determination of the individual's civil rights and obligations or of any criminal charge against him/her, with the Constitutional Tribunal's jurisdiction to adjudicate on the hierarchical conformity of the provisions and normative acts indicated in the Constitution of the Republic of Poland, and thus permits the application of the requirements arising from Article 6 [of the Convention] to proceedings before the Constitutional Tribunal" and, third, "insofar as it comprises the European Court of Human Rights' review of the legality of the process of electing judges to the Constitutional Tribunal so that it could be determined whether the Constitutional Tribunal is an independent and impartial tribunal established by law."

2. ECtHR judgment of 7 May 2021

2.1. ECtHR judgment of 7 May 2021 (official translation available at: <https://hudoc.echr.coe.int/eng/?i=001-211749>) was delivered on the following facts:

Xero Flor Spółka z o.o. (hereinafter: the company or the applicant), an agricultural turfgrass producer, sought compensation for damage to turf crops caused by game animals from a state forest. Under the hunting law, the procedure for estimating the damage and the amount of compensation were regulated by a regulation of the Minister of Environment, which limited the amount of compensation to a fraction of the total estimated value of the compensation due. The company sought full compensation. In the proceedings before the ordinary courts, it unsuccessfully alleged, *inter alia*, unconstitutionality of the relevant provisions of law and application of the said regulation. Ultimately, the company filed a constitutional appeal with the Constitutional Tribunal. The proceedings before the Tribunal were discontinued on the grounds that the judgment was inadmissible – by a majority vote of a five-judge panel. Two judges filed dissenting opinions.

In its application to the ECtHR, the applicant company alleged a violation of its right to a fair trial as enshrined in Article 6(1) of the Convention on the grounds of the refusal of the ordinary courts hearing its case to refer a legal question to the Constitutional Tribunal. It also argued that one of the judges sitting on the panel of the Tribunal was unconstitutionally elected as he had taken an already filled office. Thus, its right to a tribunal established by law, which also derives from Article 6(1) of the Convention, was violated.

2.2. With regard to the first allegation, the ECtHR held that there had been a violation of Article 6(1) of the Convention due to inadequate reasons given by the ordinary courts for refusing to refer a legal question to the Constitutional Tribunal.

2.3. As regards the alleged violation of the right to a tribunal established by law due to the unconstitutional election of the judge sitting on the panel of the Constitutional Tribunal, the ECtHR first reviewed the successive laws on the Constitutional Tribunal in respect of the provisions on the appointment of judges, provided a time schedule of appointment of the Tribunal judges in 2015 and discussed the Constitutional Tribunal's judgments in which the subject matter of review was, *inter alia*, the successive provisions regulating the procedure for appointing judges (see judgments dated: 3 December 2015, ref. K 34/15, OTK ZU no. 11/A/2015, item 185 and 9 December 2015, ref. K 35/15, OTK ZU no. 11/A/2015, item 186; decisions dated: 9 March 2016, ref. K 47/15, OTK ZU A/2018, item 31 and 11 August 2016, ref. K 39/16, OTK ZU A/2018, item 32, and the order of 7 January 2016, ref. U 8/15, OTK ZU A/2016, item 1).

2.4. The ECtHR then addressed the issue of whether Article 6(1) of the Convention in its civil limb may be applied to proceedings before the Polish Constitutional Tribunal. Following a cursory analysis of the constitutional position of the Constitutional Tribunal and the institution of the Polish constitutional appeal (see paragraphs 192-207), it reached the conclusion that the proceedings before the Tribunal had a direct and definitive impact on the civil right asserted by the applicant. If the Tribunal were to find that the provision of the regulation that formed the basis of the final decision in the case violated the applicant's constitutional right to property, the company could seek review of the case by a competent court in the course of civil proceedings, in accordance with the Polish Constitution and the Code of Civil Procedure. In the course of re-examining the case, the courts would have to reject the normative act declared unconstitutional and consider the applicant company's claim for compensation solely on the basis of the hunting law, bearing in mind the general principle of civil law providing for full compensation for damage (see paragraph 208). Article 6(1) of the Convention is therefore, in the ECtHR's view, applicable to the proceedings before the Tribunal.

2.5. The ECtHR then examined whether the irregularities that occurred in the process of appointing judges in December 2015 had the effect of depriving the applicant company of its right to a “tribunal established by law.” To this end, it referred to the three-step test formulated in the Grand Chamber judgment of 1 December 2020 in *Guðmundur Andri Ástráðsson v. Iceland* (application no. 26374/18), which clarified the scope and meaning of the term “tribunal established by law.” It therefore examined, firstly, whether there had been a flagrant breach of domestic law in relation to the composition of the bench, secondly, whether the breaches of domestic law related to a fundamental principle of the judicial appointment procedure, and thirdly, whether the allegations concerning the “right to a tribunal established by law” had been properly considered by the domestic courts and whether remedies had been provided.

Turning to the first criterion, the ECtHR first determined whether there had been a breach of domestic law in the appointment of the judge whose participation in the Constitutional Tribunal’s panel was challenged by the applicant company (see paragraphs 255-275). It found, again citing the judgments of the Constitutional Tribunal on successive provisions governing the appointment of judges, that the three judges appointed by the Sejm in December 2015, including the judge ruling on the applicant company’s constitutional appeal, had been appointed in breach of Article 194(1) of the Constitution, namely the requirement that a judge should be elected by the Sejm whose term of office covers the date on which his/her seat becomes vacant. It stressed, in line with the case-law of the Tribunal, that the resolutions of the eighth-term Sejm invalidating the election of judges by the seventh-term Sejm had been passed without legal basis and therefore in breach of domestic law. Consequently, the resolutions of the eighth-term Sejm on the election of three judges of the Court concerned positions that had already been filled and therefore constituted a second breach of the provisions of domestic law on the procedure for electing judges to the Tribunal. The third breach of domestic law in this respect, according to the ECtHR, was caused by the President’s refusal to take the oath from three judges duly elected by the seventh-term Sejm, while at the same time immediately taking the oath from the three judges elected by the eighth-term Sejm. In light of the case-law of the Tribunal, which was cited by the ECtHR, the President was obliged to take the oath of office immediately from a Constitutional Tribunal judge elected by the Sejm. In that light, the ECtHR did not agree with the Government’s argument that the Tribunal’s judgments relied upon by the ECtHR had no relevance to the question of the validity of the election of the judge hearing the applicant company’s case. In particular, the ECtHR held that the Constitutional Tribunal judgment of 24 October 2017, ref. K 1/17, relied upon by the Government, could not cure the fundamental defects in the process of electing the three judges or legitimise their election. The ECtHR also noted that the panel that gave the judgment included two judges elected by the eighth-term Sejm, whose status as Tribunal judges had been at stake in those proceedings. Accordingly, the ECtHR held that the judgment in case ref. K 1/17 carried little, if any, weight in the assessment of the validity of the challenged election of Constitutional Tribunal judges.

The three breaches identified above were found by the ECtHR to be flagrant breaches of domestic law for purposes of the first step of the three-step test.

In the second step of the test, the ECtHR found that the breaches of domestic law concerned a fundamental rule of the judicial appointment procedure: the requirement that a judge of the Tribunal should be elected by the Sejm whose term of office covers the date on which his/her seat becomes vacant. This essential requirement was indicated in the Tribunal’s judgment in case ref. K 34/15 and affirmed in its subsequent four rulings. The ECtHR in particular negatively assessed the actions of the legislature and executive following successive Tribunal judgments on the election of judges, including the failure of the Sejm and the President of the Republic of Poland to recognise the findings made by the Tribunal in its

judgments and the attempts by the legislature, by means of successive legislative acts, to force the admission to the Tribunal's bench of the three judges elected in December 2015, and finally the refusal of the Prime Minister to publish the Tribunal judgments. The ECtHR considered the actions of the legislature and executive as incompatible with the principle of the rule of law and the principle of legality. It held that they amounted to unlawful external influence on the Tribunal. The breaches of the procedure for electing three judges in December 2015 were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a "tribunal established by law" (see paragraphs 276-287).

In the third step of the test, the ECtHR found that there was no procedure in Polish law under which the applicant company could challenge the alleged procedural defects in the process for electing Constitutional Tribunal judges. As such, no remedies were provided (see paragraph 288).

The ECtHR concluded that the applicant company had been denied its "right to a tribunal established by law" on account of the participation in the proceedings before the Constitutional Tribunal of the judge, whose election was vitiated by grave irregularities that impaired the very essence of the right at issue. In this regard, therefore, there was a violation of Article 6(1) of the Convention (see paragraph 289).

2.6. In its application to the ECtHR, the applicant company also alleged a violation of Article 1 of Protocol No. 1 to the Convention because it could not obtain full compensation for the damage sustained to its property. The ECtHR ruled that it was not necessary to examine the complaint in this regard. It also dismissed the applicant company's claim for monetary compensation relating to just satisfaction.

2.7. This ECtHR judgment is relevant to the proceedings before the Tribunal in case ref. K 6/21 only insofar as it relates to the rule derived from Article 6(1), first sentence, of the Convention, relating to the right to a tribunal established by law in the context of the status of the Constitutional Tribunal and the assessment of the correctness of the election of its judges.

3. Competence of the Constitutional Tribunal to rule in the present case

It is undisputed that in the present case the subject matter of the Tribunal's review are legal norms which do not derive directly from Article 6(1), first sentence, of the Convention, but which are derived from that provision as a result of the jurisprudential activity of an international judicial body. In other words, the normative interpretation of Article 6(1), first sentence, of the Convention by the ECtHR in relation to a particular case heard by the Tribunal (the practice of law application) was reviewed by the Tribunal.

3.1. This circumstance calls for explanation of the competence of the Constitutional Tribunal to rule in the present case. As a rule, the practice of law application in the form of interpretation of provisions of law by the bodies applying the law in an individual case is not subject to review by the Tribunal. According to the Tribunal's established case-law, this does not apply, however, to a situation where "a uniform and consistent practice of law application has unquestionably determined the interpretation of a given provision, and at the same time the accepted interpretation is not questioned by legal scholars, [then] the subject matter of constitutionality review is the legal norm decoded from a given provision in accordance with the established practice" (decision of 21 September 2005, ref. SK 32/04, OTK ZU No. 8/A/2005, item 95 and the case-law cited therein). In order for the Tribunal to review a norm, which is the result of the application of law, the following conditions must therefore be met: stability, repetitiveness, commonness of the practice of understanding and application of the provision, which determines a de facto unambiguous reading of the provision, particularly

if the practice was formed as a result of the activity of the Supreme Court, whose resolutions should be taken into account in the judiciary (see judgment of 8 December 2009, ref. SK 34/08, OTK ZU No. 11/A/2009, item 165 and the case-law cited therein).

3.2. In the Tribunal's view, although not all of the above conditions have been met expressly in the present case, it is competent to review the standards derived from Article 6(1), first sentence, of the Convention by the ECtHR. This is supported by the following arguments:

3.2.1. Case ref. K 6/21 is undoubtedly precedent-setting. Although the review of international agreements, including special ones, i.e. those ratified with prior consent expressed in a statute (see Article 188(1) in conjunction with Article 89 of the Constitution), is within the competencies of the Constitutional Tribunal, the subject matter of review in proceedings before the Tribunal for the first time is the Convention, which is a monument of international law, and strictly speaking one of its most significant provisions – Article 6(1). So far, this provision, as a counterpart of Article 45(1) of the Constitution, has only played the role of a review standard, setting the standards that should be met by the provisions of domestic law on one of the fundamental human rights, which is the right to a tribunal. The Constitutional Tribunal, when reviewing the conformity of Polish law to Article 6(1) of the Convention, each time referred to the ECtHR case-law and the interpretation of this provision, made against the background of individual cases decided by the ECtHR. It should be emphasised here that the case-law of the ECtHR and the role it has played in developing and raising the standards of justice of the States Parties to the Convention are unquestionable. Precisely because of the position and authority of the ECtHR, its individual decision can already be regarded as shaping a universally binding interpretation of the provisions of the Convention. This arises primarily from Article 32(1) of the Convention, which establishes the ECtHR's jurisdictional monopoly over its interpretation and application, giving it the position of the sole authority to determine in a binding manner the scope of obligations arising for States under the Convention and the Additional Protocols. This monopoly covers all the procedures that can be brought before the ECtHR (interstate cases, individual applications, the enforcement of the judgment and the advisory opinion), including the question of the jurisdiction of the ECtHR – according to Article 32(2) of the Convention, if a dispute arises in this area, the only body appointed to resolve it is the ECtHR itself. Legal scholars submit that a jurisdictional monopoly has two aspects. The internal aspect concerns the exclusive competence of the ECtHR to hear an application (case) at its various stages and to decide procedural issues in the proceedings. The external aspect is expressed in the fact that the interpretation of the Convention established by the ECtHR in the process of adjudication, although made against the background of an individual case and binding only in that case (Article 46(1) of the Convention), is in fact binding on all international and national bodies applying the Convention. This means that States Parties to the Convention, especially national courts and other law enforcement authorities, have an obligation to take into account the current case-law of the ECtHR, as well as to interpret domestic law in accordance with Convention standards. Therefore, the State's obligations are indeed far broader than Article 46(1) of the Convention alone would suggest. ECtHR judgments are binding *erga omnes* in the sense that the ECtHR interprets the Convention on the basis of an individual case, which is then binding on all Member States (see I. Kondak, komentarz do art. 32 Konwencji [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 19-59 oraz Protokołów dodatkowych*, Vol. II, ed. L. Garlicki, P. Hofmański, A. Wróbel, Warszawa 2010, Legalis, Nb 9).

Every ECtHR judgment thus constitutes an exclusive, final and authentic interpretation of the provisions of the Convention and thus acquires, *ipso facto*, a normative character. The interpretation of the provisions of the Convention also establishes a binding *ex tunc* interpretation. This circumstance is clear from the case-law of the ECtHR, which the Tribunal

bases on the interpretation applied in previous judgments, following the common law. In the judgment of 7 May 2021, the standards derived from Article 6(1) of the Convention in relation to the Constitutional Tribunal are the result of the ECtHR's previous law-making interpretation of that provision.

The first standard challenged in the present case makes it necessary to consider the Tribunal adjudicating in the field of human rights and civil freedoms as the "tribunal" referred to in Article 6(1) of the Convention, which is supposed to be the result of the previous interpretation of that provision in the judgments repeatedly cited by the ECtHR in the reasons for its judgment of 7 May 2021 (see paragraphs 188-191). In addition, in paragraph 200 thereof, the ECtHR lists cases in which the Tribunal's judgments were the reference for assessing the admissibility of an application to the ECtHR, to confirm the qualification of the Tribunal as a domestic court under Article 6(1) of the Convention.

The second of the standards challenged by the applicant, concerning the ECtHR's review of the composition of the Constitutional Tribunal, was derived by the ECtHR from Article 6(1) of the Convention on the basis of the interpretation applied in the *Guðmundur Andri Ástráðsson* judgment, in which the ECtHR clarified the scope and meaning to be given to the term "tribunal established by law" and developed a test (discussed in paragraph 2.5 of this part of the reasons), which it then applied in the judgment of 7 May 2021. The result of this three-step test is, according to the ECtHR, to be decisive for the correctness of the appointment of a Tribunal judge.

The interpretation of Article 6(1) of the Convention adopted by the ECtHR in its judgment of 7 May 2021 is widely respected. Domestic courts refer to this judgment, indicating it as the basis of their decisions (cf. e.g. the Supreme Court decision of 16 September 2021, ref. I KZ 29/21, unpublished; the decisions of the Regional Court in Kraków dated: 10 October 2021, ref. I C 846/20, unpublished, and 11 October 2021, ref. I Cz 311/21, unpublished).

Thus, the Tribunal found that the prerequisite of a uniform, consistent and common practice of law application was, implicitly, met in the case.

3.2.2. Another circumstance relevant to the assessment of the Tribunal's competence to rule in the present case is that the standards derived by the ECtHR from Article 6(1), first sentence, of the Convention in its judgment of 7 May 2021 concern a matter which is not regulated by the Convention. This means that the Republic of Poland, by joining the Council of Europe in 1991 and then ratifying the Convention in 1993, did not agree to be bound thereby.

The Convention is an international agreement for the protection of human rights concluded by Member States of the Council of Europe. This is an agreement referred to in Article 89(1)(2) and Article 91(1) and (2) of the Constitution, i.e. its ratification by Poland required consent expressed in a statute, and its provisions constitute part of the domestic legal order and are directly applicable with precedence over statute – in the event of a conflict between the provisions of the Convention and the statutory provisions. Chapter I of the Convention lists the rights and freedoms that States Parties are obliged to ensure to every person within their jurisdiction (Article 1 of the Convention). This list is successively supplemented by additional protocols to the Convention. In order to ensure compliance with the obligations arising for States Parties under the Convention and its Protocols, the Convention established the ECtHR (Article 19 of the Convention), whose system and proceedings before it are regulated in Chapter II of the Convention. Under Article 32 of the Convention, the ECtHR has jurisdiction to hear all cases concerning the interpretation and application of the Convention and its Protocols. The ECtHR is therefore only a body for the application of law (it administers international justice) and the interpretation of standards.

The scope of competence of the ECtHR under the Convention sets limits that the body may not exceed. In the international adjudicatory process there is no place for actions involving the creation of new standards, nor for extending by interpretation the application of the existing

standards to new constitutional areas of States Parties to the Convention (extending the competence of the ECtHR to this area). Such actions, as lacking grounds in the Convention, go beyond the political and legal authority that the ECtHR has received from States Parties to the Convention. They are therefore *ultra vires* actions and the resulting judgment is devoid of enforceability and the refusal of the State to enforce it will not amount to a breach of the Constitution. In the context of the present case, the ECtHR, in its judgment of 7 May 2021, made such an unlawful interpretation of the Convention – specifically its Article 6(1) – which broadened the content of that provision, leading in fact to a modification that may only be made by way of an amendment to an international agreement (in the case of the Convention by the adoption by the States Parties of a subsequent additional protocol), and thus with the consent of the State Party concerned. Moreover, the standards created by the ECtHR through this judgment interfere with (or, more precisely, negate) the fundamental constitutional principles expressed in the Constitution. There is no mechanism for their verification other than the review of the Constitutional Tribunal. In doing so, the Tribunal emphasises that this review does not concern the ECtHR judgments, nor does it seek to interpret the provisions of the Convention. Nor does the Tribunal examine the substance of the standard itself, which is essentially the same for all Council of Europe states. The Tribunal reviews the constitutionality of a provision of an international agreement (here: Convention) in the sense given to it by the ECtHR in its adjudicating process. In such a situation, the Constitutional Tribunal has the constitutional role of “court of last resort.” In fulfilling its role, the Tribunal is obliged to uphold the sovereignty of the Republic of Poland and cannot allow the ECtHR, using its jurisdiction in the field of international human rights, to interfere with the legal system of Polish constitutional bodies. Poland, by ratifying the Convention, did not consent to the jurisdiction of the ECtHR in this regard. The Tribunal’s obligation is to defend the Polish constitutional identity. It does so by means of reviewing whether the standard with the content shaped in the ECtHR case-law fits into the Polish constitutional system from the perspective of the principle of supremacy of the Constitution, expressed in its Article 8(1). The role of the Polish constitutional tribunal shaped in such a way results from the Tribunal’s case-law concerning the admissibility of the review of acts of the bodies and institutions of the European Union, in particular the rulings of the Court of Justice of the European Union (CJEU). The Tribunal emphasised that it is obliged to protect the Constitution, which is the supreme law of the Republic of Poland, and if there is a conflict between the rulings of the CJEU and the Constitutional Tribunal, the latter is obliged to understand its position in such a way, that in fundamental matters, of the constitutional dimension, it will retain the position of the “court of last resort” (see the judgment of 14 July 2021, ref. P 7/20, OTK ZU A/2021, item 49 and, referred thereto judgments of: 27 April 2005, ref. P 1/05, OTK ZU No. 4/A/2005, item 42, 11 May 2005, ref. K 18/04, OTK ZU No. 5/A/2005, item 49, 24 November 2010, ref. K 32/09, OTK ZU No. 9/A/2010, item 108, 16 November 2011, ref. SK 45/09, OTK ZU No. 9/A/2011, item 97 and decision of 19 December 2006, ref. P 37/05, OTK ZU No. 11/A/2006, item 177, and judgment of 7 October 2021, ref. K 3/21). As a rule, this view remains valid also against the background of the present case with respect to the ECtHR and is fully endorsed by the Tribunal in the present composition.

3.2.3. The Tribunal further notes that it is not an obstacle to ruling on the Public Prosecutor-General’s application that the Tribunal commented on the ECtHR’s judgment of 7 May 2021 in the reasons for its order of 15 June 2021, ref. P 7/20 (OTK ZU A/2021, item 30), considering it as a *sententia non existens* (non-existent judgment). The above-mentioned order is of an incidental nature; it was issued in connection with an application for disqualification of a judge, and therefore does not rule on the constitutionality of the standards challenged in this case.

3.2.4. The Tribunal reiterates the precedential nature of this case. In this connection, while upholding the existing line of jurisprudence on the admissibility of review of acts of law application, the Tribunal found it necessary to formulate additional grounds for the admissibility of such review, which in particular circumstances allow the Tribunal to extend its jurisdiction to the review of constitutionality of the standards created by way of law application. In light of the foregoing, these are the level (importance) of the case and the correspondingly high status of the adjudicating court.

The circumstances set out above are sufficient to conclude that the grounds for the admissibility of the Tribunal's review of the standards derived by the ECtHR from Article 6(1), first sentence, of the Convention, as indicated in the Public Prosecutor-General's application, are satisfied in the present case.

4. Structure of the Constitutional Tribunal

The major issue addressed in the Public Prosecutor-General's application concerns the qualification of the Constitutional Tribunal by the ECtHR in relation to the interpretation of Article 6(1), first sentence, of the Convention, according to which the ECtHR assumed that the term "tribunal" used in the cited provision comprises the Tribunal. An assessment of this allegation must be preceded by an analysis of the constitutional position and structure of the Polish constitutional tribunal.

Pursuant to Article 10(2) *in fine* of the Constitution, the Constitutional Tribunal is, in addition to courts, an organ of judicial power. However, it is not a court within the meaning of Article 175 of the Constitution, and the Tribunal's activities cannot be described as "administration of justice" in the sense of deciding individual civil, criminal or administrative cases. In accordance with the express disposition contained in Article 175(1) of the Constitution, the Supreme Court, ordinary courts, administrative courts and military courts, which exercise the administration of justice in the Republic of Poland, have exclusive competence in this respect. The distinctive character of the Tribunal results from the systematics of the Constitution, which in Chapter VIII distinguishes between courts and tribunals, granting the latter specific competences, different from those of ordinary courts. This view is undisputed among Polish constitutional law scholars (see L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2021, p. 410; Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warszawa 2003, p. 89 *et seq.*; B. Banaszak, komentarz do art. 173 Konstytucji [in:] *Konstytucja RP. Komentarz*, Warszawa 2012; A. Mączyński, J. Podkowik, komentarz do art. 175 i art. 188 Konstytucji [in:] *Konstytucja RP. Tom II. Komentarz do art. 87-243*, ed. M. Safjan, L. Bosek, Warszawa 2016; L. Garlicki, komentarz do art. 175 [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. IV, Warszawa 2005, pp. 1-13).

The Constitutional Tribunal also has no doubts about its constitutional position. In the light of its case-law, "[T]he legislator clearly [...] distinguishes between courts and tribunals (Articles 10 and 173 of the Constitution), as well as enumerates the bodies that are courts, including the Supreme Court, ordinary courts, administrative courts, military courts and the ad hoc court (Article 175 of the Constitution). This means that the Constitutional Tribunal is not a court within the meaning of Article 175 of the Constitution, although it is undoubtedly an organ of judicial power which is a separate and independent authority from other authorities" (see judgment of 9 December 2015, ref. K 35/15, OTK ZU No. 11/A/2015, item 186). Referring to the exclusive competence of the courts in the administration of justice within the meaning of the Constitution, the Constitutional Tribunal speaks in this context of the "monopoly of the courts" (see judgment of 6 October 1998, ref. K 36/97, OTK ZU No. 5/1998, item 65) and states that "the constitutionally defined list of bodies exercising the administration of justice is closed and may not be extended" (judgment of 12 December 2001, ref. SK 26/01, OTK ZU No. 8/2001, item 258).

The Constitutional Tribunal is therefore an organ of judicial power that has been excluded from the administration of justice, but it has competences that other organs of judicial power do not have. Its basic task is to review the hierarchical conformity of legal standards, i.e. to decide whether legal standards of a lower rank conform to those of a higher rank, in particular to the Constitution, and if necessary to eliminate the nonconforming standards from the applicable system of law (L. Garlicki, *op. cit.*). Because of this power, the Tribunal is sometimes referred to as a negative legislator. It is distinguished from ordinary courts, which are required to apply the applicable law, beyond a reasonable doubt. The Constitutional Tribunal, unlike ordinary courts, does not decide individual cases, but it is a “court of law” that examines the existence of relations of compatibility of legal standards of different ranks and – as a rule – does not make an assessment of facts. From a systemic perspective, therefore, the Tribunal’s activities are twofold. “On the one hand, the Constitutional Tribunal acts in a similar manner and on similar principles as the courts, but the effects of its actions – as regards the review of hierarchical conformity of standards – are produced in the same sphere as the actions of the legislative authority (they consist in making changes in the system of law). On the other hand, its activity consists in reviewing the effects of the activity of law-making organs and in the protection of freedoms and rights of humans and citizens, which is an activity typical for law-protection organs, while it is not – according to the constitutional systematics – an organ of state control and law protection” (A. Mączyński, J. Podkowik, komentarz do art. 188 Konstytucji [in:] *Konstytucja RP. Tom II. Komentarz do art. 87-243*, ed. M. Safjan, L. Bosek, Warszawa 2016, Legalis, Nb 22).

The role and position of the Constitutional Tribunal thus defined by the Constitution corresponds to the model of the Polish constitutional appeal provided for in Article 79 of the Constitution. This provision is part of the so-called narrow model of constitutional appeal – an appeal against a normative act. The material scope of the appeal is clearly limited by the wording of the provision to normative acts, and only such acts on the basis of which a court or a public administration authority has finally decided on the freedoms or rights of the appellant, or on his/her obligations set forth in the Constitution. In this model (so-called specific review), the Tribunal rules only on the law and not on individual rights or civil freedoms. It does not become an additional judicial level or substitute for the courts – it does not review the application of the law in a particular case or the decisions that have shaped the rights or obligations of the appellants. A Tribunal judgment, issued in this manner, which is favourable to the appellant does not automatically lead to the quashing of the appealed ruling but only enables the re-opening proceedings, or quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings (Article 190(4) of the Constitution).

Proceedings before the Tribunal demonstrate certain elements in common with proceedings before ordinary courts. The Tribunal is guaranteed by the Constitution and by law the independence inherent to courts and the independence of its judges, and its decisions are made in the manner typical of judicial proceedings and in the forms typical of the judiciary, such as judgments and orders. However – given the specificity of the Tribunal’s competences defined in the Constitution – these similarities prevent the Tribunal from being considered a court and the proceedings before it from being considered judicial proceedings.

5. Status of a Constitutional Tribunal judge

Pursuant to Article 194(1) of the Constitution, the Constitutional Tribunal is composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office. The legislature thus determined that the Tribunal is an organ composed of judges (and not members, as in the case of the Tribunal of State; see Article 199 of the

Constitution), and thus emphasised that it belongs to the organs of judiciary and its related separateness and independence from other authorities. Thus, it also guaranteed the constitutional status of a Tribunal judge in the context of the general guarantees conferred on judges of courts administering justice, in particular immunity from removal from judicial office.

The basic provision concerning the status of a Constitutional Tribunal judge is Article 195(1) of the Constitution, which provides that judges of the Constitutional Tribunal, in the exercise of their office, are independent and subject only to the Constitution. This provision is the exclusive source of the independence of a judge of a Polish constitutional tribunal. Its legislative structure and normative content is similar to Article 178(1) of the Constitution which concerns judges exercising the administration of justice. This similarity is a consequence of the Tribunal belonging to the judiciary and the unification of all judges in the state (see A. Mączyński, J. Podkowik, komentarz do art. 195 Konstytucji, *ibid.*, Nb 2). However, unlike ordinary court judges, who in the exercise of their office are subject “only to the Constitution and statutes” (and members of the Tribunal of State – cf. Article 199(3) of the Constitution), the legislator provided that a Constitutional Tribunal judge should be subject “only to the Constitution.” This is not accidental. It highlights a fundamental difference between the status of judges of ordinary courts (exercising the administration of justice) and the status of judges of a constitutional tribunal (which is an organ of judiciary but which does not administer justice in the sense of deciding civil or criminal cases). The fact that a Tribunal judge is subject “only to the Constitution” means that only the basic law, as “the supreme law of the Republic of Poland”, in accordance with Article 8(1) of the Constitution, may be the standard of reference when a judge is exercising the competences of the Tribunal (A. Mączyński, J. Podkowik, *ibid.*, Nb 24).

Also, the procedure for filling judicial positions in the Tribunal is separate from the appointment of judges of ordinary courts. The legislature provided for the exclusive right (monopoly) of the Sejm in this respect albeit failing to specify in detail the principles or procedure for electing Tribunal judges, leaving this to the legislature. It is a constitutional requirement that a candidate for judge be distinguished by the knowledge of law. Act of 30 November 2016 on the Status of Constitutional Tribunal Judges (Journal of Laws of 2018, item 1422; hereinafter: the Act on the Status of Constitutional Tribunal Judges), in Article 3, clarified that a candidate must also meet the requirements necessary to hold office as a judge of the Supreme Court or a judge of the Supreme Administrative Court. Article 2(2) of the Act on the Status of Constitutional Tribunal Judges reiterates constitutional norms, stating that Tribunal judges are elected by the Sejm for a nine-year term of office, and adds that the rules of electing and the related procedural timeframe are set forth in the Sejm Rules of Procedure. Candidates for the office of a judge of the Tribunal are nominated by at least 50 deputies or the Presidium of the Sejm. A Sejm resolution on the election of a judge is adopted by an absolute majority of votes in the presence of at least half the total number of deputies. The resolution is not subject to external review, particularly judicial review. It should be emphasised that although the Sejm has the exclusive function of creating judges of the Tribunal, the Constitution does not confer on the Sejm any further powers relating to the status of a judge, particularly those relating to the termination of a judge’s term of office, in particular the possibility of dismissing a judge or extinguishing his or her mandate. The role of the Sejm was systemically limited to the election of Tribunal judges (see A. Mączyński, J. Podkowik, komentarz do art. 194 Konstytucji, *ibid.*, Nb 49).

The final element of the election procedure is when a Tribunal judge takes an oath before the President. Refusal to do so is tantamount to resignation from the position of a Tribunal judge (Article 4 of the Act on the Status of Constitutional Tribunal Judges). In light of the Tribunal’s jurisprudence, the oath of office “is not merely a solemn ceremony of a symbolic nature, following the traditional inauguration of a term of office. The event serves

two important functions. First, it is a judge's public pledge to behave in accordance with the text of the oath of office. By doing so, a judge declares to be personally liable for performing his or her duties impartially and diligently in accordance with his or her conscience and with respect for the dignity of his or her office. Second, taking the oath of office allows a judge to take the office, i.e. to carry out the mandate entrusted to him or her. These two important aspects of the oath demonstrate that it is not merely a solemn ceremony, but an event that produces specific legal effects" (judgment in case ref. K 34/15). Pursuant to Article 5 of the Act on the Status of Constitutional Tribunal Judges, the official relationship of a Tribunal judge is established upon taking the oath of office. After taking the oath, a judge shall immediately appear in the Tribunal to take up his or her duties, and the Chief Justice of the Tribunal assigns cases to him or her and creates conditions for him or her to perform his or her duties as a judge. Pursuant to Article 6(1) of the Act of 30 November 2016 on the Organisation and Proceedings before the Constitutional Tribunal (Journal of Laws of 2019, item 2393; hereinafter: uotpTK), the General Assembly is composed of incumbent judges of the Tribunal who have taken the oath of office before the President. As such, a judge is a person elected by the Sejm who has taken the oath before the President. "Only the oath to the President of the Republic of Poland is an act that determines the possibility of taking judicial action and, as such, determines the procedure for completing the creation of a person as a Constitutional Tribunal judge. A judge who has not taken the oath of office cannot assume his or her duties" (Tribunal judgment of 24 October 2017, ref. K 1/17, OTK ZU, A/2017, item 79).

The above analysis makes it clear that the Constitution sets a high standard for the election of Tribunal judges. According to the Constitution, Tribunal judges are elected by the Sejm and the oath is taken before the President. Both these bodies – as they are elected by universal suffrage – have unquestionable democratic legitimacy. Thus, by participating in the procedure of creating Tribunal judges, they provide them with the necessary democratic legitimacy. Thus, the basic principle of the system of the Republic of Poland, arising from Article 2 of the Constitution – the principle of democracy – is given effect. In light of the Constitution, the power to judge on behalf of the Republic of Poland requires democratic legitimacy and solid justification in the will of the sovereign (Article 4 of the Constitution).

6. Assessment of grounds of appeal

The above-mentioned findings are the starting point for assessing whether the norms challenged in the Public Prosecutor-General's application, derived from Article 6(1), first sentence, of the Convention, conform to the mentioned standards of review.

6.1. Before proceeding to assess this ground of appeal on the merits, the Tribunal reiterates that it does not interpret Article 6(1), first sentence, of the Convention. This would amount to an encroachment upon the jurisdictional monopoly of the ECtHR, as established by Article 32 of the Convention. The Tribunal only reviews the conformity of the norm deduced by the ECtHR from Article 6(1), first sentence, of the Convention to the provisions of the Constitution indicated in the application of the Public Prosecutor-General, in accordance with the competence set out in Article 188(1) of the Constitution.

6.2. The standard of review in the proceedings before the ECtHR, which ended with the judgment of 7 May 2021, was Article 6(1), first sentence, of the Convention. The ECtHR held that this provision could be used to assess whether the proceedings before the Constitutional Tribunal on the constitutional appeal that gave rise to the judgment of 7 May 2021 met the Convention standard of the right to a tribunal established by law. Indeed, it found that the proceedings before the Tribunal were directly decisive for the civil right asserted by the applicant. Indeed, according to the ECtHR's case-law, if the outcome of the proceedings is

decisive for the determination of the applicant's civil rights and obligations, the proceedings fall within the scope of Article 6(1) of the Convention, even if they are conducted before a constitutional court (see the reasoning of the ECtHR judgment of 7 May 2021, paragraphs 191 and 209).

With reference to the foregoing, the Tribunal emphasises that it does not question the autonomous understanding of the term "tribunal" as used in Article 6(1) of the Convention. It is familiar with the ECtHR's case-law which accepts that a tribunal within the meaning of the Convention may be considered an authority which has the power to make binding decisions itself, has been established by law and acts in a manner which ensures independence and impartiality. It does not matter whether the authority in question is regarded as a tribunal under national law (see L. Garlicki, *Pojęcie i cechy „sądu” w świetle orzecznictwa Europejskiej Konwencji Praw Człowieka* [in:] *Trzecia władza. Sądy i Trybunały w Polsce*, ed. A. Szmyt, Gdańsk 2009, s. 141-143). Thus, there may be a situation that an authority that is not recognised as a tribunal in the domestic order will be recognised as such by the ECtHR because of its characteristics and the type of cases it handles. This follows from the substantive definition of a "tribunal" in Article 6(1) of the Convention, according to which a tribunal is characterised by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (see *Belilos v. Switzerland*, ECtHR judgment of 29 April 1988, application no. 10328/83).

The Constitutional Tribunal notes, however, that the autonomous understanding of the term "tribunal" also implies an obligation on the part of the ECtHR to examine carefully, on a case-by-case basis, whether the structure of a constitutional tribunal and the proceedings before it comply with the conditions which determine the admissibility of applying the standard of Article 6(1) of the Convention to it.

6.3. Article 6(1) of the Convention expressly provides for the right to a tribunal in an individual civil or criminal case. In the light of the unquestionable constitutional provisions, the constitutional position and competences of the Constitutional Tribunal, as set out therein, do not allow it to be regarded as a court adjudicating on civil rights and obligations or on the merits of criminal charges (see paragraph 4 of this part of the reasons). "There is no doubt that proceedings before the Constitutional Tribunal are neither criminal nor civil proceedings within the meaning of Article 6 of the ECHR" (L. Bosek, M. Wild, komentarz do art. 79 Konstytucji [in:] *Konstytucja RP. Tom I. Komentarz do art. 1-86*, ed. M. Safjan, L. Bosek, Warszawa 2016, Legalis, Nb 13). The relevant literature points out that the nature of the ECtHR's standards concerns the administration of justice, which the Constitutional Tribunal does not do. While in substantive aspects, on review, the Tribunal may use the due process standard of Article 6 of the Convention as a reference for conducting its conformity review, the guarantees of that provision themselves do not apply to the Tribunal (see A. Syryt, *Oddziaływanie prawa międzynarodowego na sądownictwo konstytucyjne w Polsce – perspektywa konstytucyjna*, Warszawa 2019, p. 269).

The Constitutional Tribunal is not a tribunal within the meaning of Article 6(1) of the Convention. As such, the norm derived therefrom, which extends the term "tribunal" to the Tribunal contravenes the provisions of the Constitution, which define the constitutional position of the Polish constitutional tribunal. In the light of Articles 173 and 10(2) of the Constitution, the courts and tribunals, although listed together as organs of judicial power, have different competences, but the monopoly in the administration of justice in the sense of deciding individual civil, criminal or administrative cases, and therefore those to which Article 6(1) of the Convention refers, is only vested in the Supreme Court, ordinary courts, administrative courts and military courts, as expressly provided in Article 175(1) of the Constitution. The Constitutional Tribunal conducts a hierarchical review of norms, as a result

of which regulations that are inconsistent with higher-rank norms are derogated from the system of law. In accordance with Article 190(1) of the Constitution, judgments of the Constitutional Tribunal are of universally binding application and final. This means that even judgments issued following specific review, i.e. after a constitutional appeal or a legal question has been examined, have an *erga omnes* character (universal effect), which fundamentally distinguishes the Tribunal from courts, whose decisions always have merely an *inter partes* effect (they only concern the parties to judicial proceedings).

The specificity of hierarchical review of norms is evident in particular in the manner of review initiated by constitutional appeals, as well as legal questions. A Tribunal judgment allowing the constitutional appeal does not have the effect of challenging the final decision, but is the basis for re-opening proceedings, or for quashing the decision or other settlement on principles and in a manner specified in provisions applicable to the given proceedings (Article 190(4) *in fine* of the Constitution). In answering a legal question of a court, the Tribunal does not decide the case pending before that court in connection with which the question was posed, but rules whether the provision the court wishes to apply in the case is constitutional.

In this light, the ECtHR's finding that the proceedings before the Constitutional Tribunal were decisive for the applicant's civil rights is incorrect. The ECtHR reasoned in its judgment of 7 May 2021, referring to the arguments presented by the Polish Government, that it is fully aware of the special role and status of the Constitutional Tribunal. Its analysis of the constitutional position and competences of the Tribunal, although referring to the correct legal basis, led to an erroneous conclusion, demonstrating *de facto* a lack of knowledge of the Polish legal system, including constitutional provisions, which define the structure and competences of the Constitutional Tribunal (see paragraphs 192-208). The ECtHR, taking note of the Government's arguments concerning the Tribunal's position and competences, held that a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. Accordingly, there is no doubt that the Constitutional Tribunal should be considered a "tribunal" in the autonomous sense of Article 6(1) of the Convention (paragraph 194).

Wrong conclusions were also drawn from the analysis of the model of the Polish constitutional appeal. The ECtHR found, in analysing Xero Flor's constitutional appeal, that the dispute in the proceedings before the ordinary courts concerned the right to compensation for lost property and therefore a civil right within the meaning of Article 6(1) of the Convention. Once the proceedings before the ordinary courts had been terminated, the only avenue through which the applicant company could pursue further determination of that dispute was a constitutional appeal. While these findings are correct, the ECtHR went on to say that the proceedings before the Constitutional Tribunal could accordingly be regarded as a continuation of the proceedings before the ordinary courts involving a dispute over a civil right (paragraph 204). This assumption is the result of incorrect interpretation of the constitutional provisions and lack of knowledge of the specifics of the Polish constitutional appeal. As it has been repeatedly mentioned, when examining constitutional appeals, the Tribunal is neither an appellate authority nor an authority for extraordinary review of judicial decisions, and the proceedings before it cannot be regarded as a continuation of judicial proceedings. The Constitutional Tribunal is a court of law, not a court of fact. Judgments of the Constitutional Tribunal produce effects exclusively in the normative sphere, i.e. they do not quash judgments and other rulings issued on the basis of the regulations challenged in the proceedings before the Tribunal, but they only repeal regulations that the Tribunal has considered to be unconstitutional.

A constitutional appeal in Poland (and in many other legal systems) is an extraordinary appeal, paving the way to reopening of terminated judicial proceedings. The Constitutional

Tribunal notes that the ECtHR failed to clarify why, in its judgment of 7 May 2021, it had decided to depart from its jurisprudential line on extraordinary appeals. In *Bochan v. Ukraine* (application no. 22251/08; a similar view was also expressed in *Moreira Ferreira v. Portugal*, application no. 19867/12), the ECtHR expressed the view that extraordinary appeals seeking the reopening of terminated judicial proceedings do not normally involve the determination of civil rights and obligations or of any criminal charge and therefore Article 6 of the Convention is deemed inapplicable to them. It allowed for the application of Article 6(1) of the Convention insofar as the extraordinary appeal proceedings were similar in nature and scope to the ordinary appeal proceedings. However, such a situation does not exist with regard to the Polish constitutional appeal. Moreover, the ECtHR accepts that Article 6 of the Convention does not apply to the reopening of proceedings following its finding of a violation of the Convention. In this light, one can assume that it also does not apply to the reopening of proceedings following a domestic court's finding of a violation of the Constitution. The view taken by the ECtHR in the judgment of 7 May 2021 is also hardly conceivable in the context of previous case-law on the application of Article 6 of the Convention to the review of the constitutionality of laws. According to the established case-law of the ECtHR, Article 6 of the Convention does not guarantee the right of access to a court competent to annul or quash a normative act (see, *inter alia*, *Ruiz-Mateos and Others v. Spain*, application no. 14324/88; *Gorizdra v. Moldova*, application no. 53180/99). This has also been the consistent approach in cases against Poland (see, *inter alia*, *Walicki v. Poland*, application no. 28240/95; *Wardziak v. Poland*, application no. 28617/95; *Tkaczyk v. Poland*, application no. 28999/95; *Szyskiewicz v. Poland*, application no. 33576/96; *Biziuk and Biziuk v. Poland*, application no. 12413/03). In its judgment of 7 May 2021, the ECtHR, while finding the proceedings before the Constitutional Tribunal directly decisive for the civil right asserted by the applicant company, contradicted its previous views, without explaining why it rejects them in this case.

In this light, the fact of applying by the ECtHR in its judgment of 7 May 2021 of the three-step test formulated in its 1 December 2020 judgment in *Guðmundur Andri Ástráðsson v. Iceland* to assess whether the applicant company was deprived of its right to a "tribunal established by law", was incorrect. Indeed, the Constitutional Tribunal is not a tribunal referred to in Article 6(1) of the Convention.

For the foregoing reasons, the rule recognising the Constitutional Tribunal as a tribunal deciding individual disputes within the meaning of Article 6(1), first sentence, of the Convention breaches the provisions of the Constitution that establish the constitutional position of the Polish Constitutional Tribunal, namely Articles 10(2), 173 and 175(1), as interpreted jointly. The Constitutional Tribunal also accepted the allegation of the Public Prosecutor-General, according to which the consequence of "modification of the constitutional understanding of the division of the judiciary into courts and tribunals is the violation of the principle of supremacy of the Constitution (...), referred to in its Article 8(1)" (reasons for the application, pp. 32-33). This principle is protected by the Tribunal, whose duty it is to hinder attempts of the international body of law application to shape a completely new convention standard in terms of quality, to which Poland, as a State Party to the Convention, did not consent. In this context, the Tribunal points out that the obligation of the Republic of Poland to observe binding international law, enshrined in Article 9 of the Constitution, cannot be fulfilled in isolation from Article 8(1) of the Constitution. Indeed, the Constitution has absolute primacy of validity and application and Article 9 of the Constitution is in no way an exception to the principle of its supremacy. Thus, any norm of international law, created in the process of application of law by an international body outside the content of the agreement or modifying this agreement without the consent of the state, interfering with the constitutional order, does not enjoy the protection of Article 9 of the Constitution. This is because it is not an act of international law binding the Republic of Poland.

The Constitutional Tribunal emphasises that the fact that the guarantees of Article 6(1) of the Convention do not apply to it does not mean that the proceedings before the Tribunal need not meet a certain standard. However, international standards are not needed in this case. The source of these standards is the Constitution, which – basing in Article 7 the system of state on the rule of law – requires that each public authority act on the basis and within the limits of the law, and this implies the fairness of proceedings before a given authority and the necessity to provide its participants with procedural guarantees characterising a democratic rule-of-law state, the source of which is Article 2 of the Constitution.

6.4. Allowing the allegation contained in paragraph 1 of the request for relief of the application of the Public Prosecutor-General makes it unnecessary to examine the allegation set out in paragraph 2 thereof. In view of the declaration of the unconstitutionality of the norm considering the Tribunal as a tribunal within the meaning of Article 6(1) of the Convention, it is unnecessary to assess whether the proceedings before the Tribunal may be covered by the guarantees stemming therefrom. In fact, this provision does not apply to proceedings before the Constitutional Tribunal.

For these reasons, the Tribunal decided to discontinue the proceedings with respect to the allegations formulated in paragraph 2 of the request for relief of the application due to the fact that the delivery of the judgment was not necessary (Article 59(1)(3) of the uotpTK).

6.5. In paragraph 3 of the request for relief, the Public Prosecutor-General alleged that Article 6(1), first sentence, of the Convention was unconstitutional insofar as it comprises the ECtHR's review of the legality of the process of electing judges to the Constitutional Tribunal.

The Tribunal has already addressed this issue in the reasoning of its order in ref. P 7/20, dismissing the application for the disqualification of a judge based on the ECtHR judgment of 7 May 2021. The Constitutional Tribunal in its current composition upheld the view expressed in the cited order, according to which the ECtHR's review of the legality of the composition of the Tribunal by way of its interpretation of Article 6(1), first sentence, of the Convention constitutes "an unprecedented encroachment onto the jurisdiction of the constitutional authorities of the Republic of Poland – the Sejm, which elects the judge, and the President, before whom the elected judge takes the oath." The ECtHR's action in this regard, under the guise of exercising its jurisdiction under the Convention, is considered by the Tribunal as a violation of Article 6(1) of the Convention by its unauthorised (and consequently erroneous) interpretation and a violation of the conventional principle of subsidiarity by its non-application. The ECtHR encroached into the sphere covered by the exclusive competence of the national constitutional authorities (the Sejm and the President), which have a monopoly on the appointment of judges to the Tribunal, and also undermined, without legitimate reasons, the case-law of the Constitutional Tribunal, in particular the judgment in case ref. K 1/17, concerning the legal basis for the election of its judges. Consequently, a judgment rendered beyond competences (*ultra vires*) cannot have the value of a judgment; it is a non-existent judgment (*sententia non existens*) and as such is devoid of effect (it is unenforceable). In this context, the Constitutional Tribunal wishes to emphasise that it sees no obstacles in applying the structure of non-existent judgments to judgments handed down by the ECtHR in situations where they were handed down in flagrant breach of the conditions that give them the character and effect of a binding judgment. In particular, it does not contradict the content of Article 9 of the Constitution. Adopting this structure means disregarding in the adjudicating process the consequences of a final judgment of the ECtHR, arising from Article 46(1) of the Convention (as rightly held by the Supreme Court in its decision of 3 November 2021, ref. IV KO 86/21, unpublished). Refusal to enforce such a judgment will not constitute a violation of the Constitution.

Analysis of the legal status of Constitutional Tribunal judges and their election process (see paragraph 5 of this part of the reasons) leaves no doubt that there are no organs or mechanisms in the Polish legal system that would enable verification of the legality of the election of Tribunal judges. Moreover, it was the Constitutional Tribunal itself that found it inappropriate to do so, in its *en banc* decision issued in ref. U 8/15, discontinued the proceedings on the review of the constitutionality of the resolutions of the Sejm of the eighth term concerning the election of Tribunal judges. In the judgment in ref. K 35/15, reviewing, inter alia, Article 137a of the Constitutional Tribunal Act of 25 June 2015, concerning the time limit for filing an application for nomination as a candidate for judge of the Tribunal, it ruled, in turn, that Article 6(1) of the Convention (as well as Article 45(1) and Article 180(1) and (2) of the Constitution) is an inadequate standard of review (not inconsistent) in relation to this regulation, as it concerns “the protection of the rights of the individual in proceedings before the tribunals exercising the administration of justice and the status of judges adjudicating in those courts. The Constitutional Tribunal is not a tribunal within the meaning of these regulations and does not exercise the administration of justice. Therefore, these regulations could not be applied to the review of the regulations adopted in the Act of 19 November 2015.” This judgment was also referred to by the ECtHR in its judgment of 7 May 2021, but, for reasons that are not clear to the Tribunal, it omitted this circumstance in its arguments.

The ECHR’s ruling that the applicant’s case involved a violation of the right to a tribunal established by law as a result of unlawful election of one of the judges hearing its constitutional appeal was based on the Constitutional Tribunal judgments – the judgments in ref. K 34/15, K 35/15, K 47/15 and K 39/16 and decision ref. U 8/15. The ECtHR stated that judgment ref. K 34/15 was of key significance in setting out the legal principles applicable to the controversy surrounding the disputed election of the Constitutional Tribunal judges (paragraph 260). At the same time, for reasons that are not clear to the Tribunal, the ECtHR, referring to the Tribunal’s judgment in ref. K 1/17, in which the Tribunal, inter alia, referred to the aforementioned judgments concerning the legal bases for the election of the Tribunal judges and commented on their legal status, held that it carried little (if any) weight in the assessment of the validity of the election of Constitutional Tribunal judges on 2 December 2015 (paragraph 273). Moreover, the ECtHR stated that the judgment in ref. K 1/17 contradicted the earlier Tribunal judgments which confirmed the validity of the election of three judges by the seventh-term Sejm and which declared unconstitutional the provision requiring that three judges elected by the eighth-term Sejm be admitted to the bench. In this light, in the ECtHR’s view, the judgment in ref. K 1/17 could not cure the fundamental defects in the election of those three judges, including the one deciding the applicant company’s case, nor could it legitimise their election (paragraph 272).

The ECtHR’s analysis of the Tribunal’s case-law and the conclusions drawn therefrom are illegitimate and incorrect. In particular, the ECtHR failed to provide arguments why it had not taken into account the views expressed by the Tribunal in its judgment in ref. K 1/17, as well as numerous decisions dismissing applications for disqualification of Tribunal judges in which the Tribunal referred to their legal status.

In the judgment in case ref. K 1/17 the Tribunal extensively addressed the issue of the validity of the election of Tribunal judges by the seventh-term and eighth-term Sejm. It pointed out, first of all, that the applicant in the case, the Ombudsman, had misread the content of the provisions he was challenging. This is because he concluded that they concern judges who were elected to the Tribunal on 2 December 2015, and he repeated in his argument a false argument that the Constitutional Tribunal had ruled on the election of Tribunal judges in cases ref. K 34/15, K 35/15 and U 8/15. The Constitutional Tribunal, accepting the view taken in the reasoning of the decisions concerning the disqualification of Tribunal judges dated: 15 February 2017, ref. K 2/15 (OTK ZU A/2017, item 7), 8 March 2017, ref. K 24/14

(unpublished), 19 April 2017, ref. K 10/15 (OTK ZU A/2017, item 27), and 27 July 2017, ref. U 1/17 (unpublished), indicated that – contrary to the applicant’s assertions – the Tribunal had not yet made a binding decision on the legal status of any of the Tribunal judges. In particular, in judgment ref. K 34/15 it was accepted, *inter alia*, that Article 137 of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws, item 1064; hereinafter: the 2015 CT Act) “insofar as it relates to Tribunal judges whose term of office expires on 6 November 2015, is consistent with Article 194(1) of the Constitution” and in turn “insofar as it relates to Tribunal judges whose term of office expires on 2 and 8 December 2015, respectively, is inconsistent with Article 194(1) of the Constitution.” As is clear from the wording of this part of the operative provisions, the Tribunal ruled not on the election of judges, but on the hierarchical conformity of Article 137 of the 2015 CT Act to Article 194(1) of the Constitution. Article 137 of the 2015 CT Act only concerned the time limit for the nomination of candidates for Tribunal judges who were to take their office after the expiration of the terms of five Tribunal judges in November and December 2015. In the judgment in question, the Tribunal recalled that neither in the operative provisions nor in the reasons for the Tribunal’s judgment ref. K 34/15, did the Tribunal take into account the election of five persons as Tribunal judges by the eighth-term Sejm on 2 December 2015 and their oath taken before the President. As of 3 December 2015 the Tribunal consisted of 15 judges. The Sejm held that the election made on 8 October 2015 was devoid of legal force. The issue of the constitutionality of Article 137 of the 2015 CT Act was not relevant during the election of judges on 2 December 2015, as it did not form the basis for the assessment by the eighth-term Sejm of the election made on 8 October 2015. The Tribunal also did not refer in its judgments ref. K 34/15 and K 35/15 to which Sejm resolutions on the election of Tribunal judges are correct, and who is correctly elected to the office of a Tribunal judge. This view was reaffirmed by the Tribunal in its decision ref. U 8/15. The decision discontinued the proceedings initiated by an application to examine the constitutionality of the resolutions on the basis of which the Sejm elected Tribunal judges. The Tribunal expressly declined its jurisdiction to decide such matters. In the reasoning for judgment in case ref. K 1/17 the Tribunal also addressed the argument that the judges in question had been elected to fill positions already filled: “If one were to accept the applicant’s reasoning, one would have to conclude that the majority of the Tribunal judges were elected to positions already filled, because the election took place during the term of office of the incumbent judge in whose place the election was made. Only the oath to the President of the Republic of Poland is an act that determines the possibility of taking up judicial duties, and as such it determines the procedure for concluding the appointment of a given person to the position of a Constitutional Tribunal judge. A judge who has not taken the oath of office cannot assume his or her duties.”

It appears from the Tribunal’s analysis made in case ref. K 1/17 that the Tribunal’s to-date decisions have not shaped the legal status of any of its judges who took the oath of office before the President.

The Constitutional Tribunal in the present composition endorses the above-mentioned view. It further points out that the judgment in case ref. K 34/15 was issued on 3 December 2015, *i.e.* already after the President had taken the oath of office from new Constitutional Tribunal judges elected by the Sejm. Therefore, it cannot apply to this act. Nor can judgments in cases ref. K 34/15 and K 35/15 have the effect of retroactively overturning the results of the vote by the Sejm. The ECtHR did not assess the fact that, prior to the judgment of the Constitutional Tribunal in case no. K 34/15, the vast majority of Polish legal scholars, as well as the jurisprudence of the Constitutional Tribunal (*cf.* decision of 23 June 2008, ref. Kpt 1/08, OTK ZU No. 5/A/2008, item 97) took the view that the President, in administering the oath of office to future judges, is not merely a “notary” but is performing an act constituting the

function of a judge (cf. K. Weitz, komentarz do art. 179 Konstytucji [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP. Tom II. Komentarz do art. 87-243*, Warszawa 2016, Nb 15).

The Tribunal has consistently upheld its view that the composition of the Tribunal in every case before it is properly staffed and that all judges on its panel are lawfully elected. It further strongly states that no national or international body has the power or any basis to undermine the status of Tribunal judges, and any attempt to do so amounts to a violation of the constitutional rules.

The Tribunal also points out that the ECtHR has no basis for examining the independence of Tribunal judges since it derives from the Constitution and statutes. In the already cited judgment in case ref. P 7/20, in its considerations on the Polish constitutional identity, of which the Polish judiciary forms part, the Tribunal, referring to its previous case-law, extensively addressed the issue of constitutional and statutory guarantees of independence of Polish courts and independence of Polish judges and the interpretation of the term judicial independence. These guarantees also fully apply to Constitutional Tribunal judges. The source of the independence of a Tribunal judge is Article 195(1) of the Constitution, which provides that Constitutional Tribunal judges, in the exercise of their office, are independent and subject only to the Constitution (see paragraph 5 of this part of the reasons). Constitutional and statutory guarantees of judicial independence include irremovability (permanent nature of office), permanent nature of remuneration and retirement status. The constitutional guarantee of a judge's independence from the appointing authority is primarily the permanent nature of his or her office; irremovability makes judges free from dependence on the appointing authority (or any other entity). The procedural guarantee of judicial independence is the institution of the disqualification of a judge, which has its roots in Roman law and has always been present in Polish civil, criminal and administrative proceedings, as well as in proceedings before the Constitutional Tribunal (see Articles 39-41 of the uotpTK). Judicial independence is therefore always assessed in the light of the circumstances of the specific case before the court. The Constitutional Tribunal notes here that in the proceedings before the Tribunal the applicant company did not avail itself of the possibility of filing an application for disqualification of a judge, and challenged the judge's independence due to an alleged defect in the judge's election only in its application to the ECtHR.

The independence is therefore not derived from the manner in which a judge was elected to the office. Since judicial independence takes effect after election as a judge, in the course of holding office, it is not possible to formulate grounds for independence or to evaluate it *ex ante*. Whether a judge will be independent is not determined by how he or she has been appointed, but primarily by his or her internal independence and impartiality. In the justification of the resolution of 8 January 2020, ref. I NOZP 3/19 (OSNKN No. 2/2020, item 10), which has the force of a legal principle, the Supreme Court, having considered a legal issue arising in connection with examination of an appeal against a resolution of the National Council of the Judiciary concerning nomination of a candidate for the office of a judge to the President, indicated, referring to the views of legal scholars, that internal independence – which constitutes the core of the guarantee of judicial independence – is understood as the personal attitude of a judge, and its essence lies in the judge's psychological and intellectual independence. "Independence is a conscious choice to rely on one's own effort, an intellectual effort to establish the facts, to find an adequate provision of law to be applied, to interpret that provision taking into account all possible interpretative options, to decode the legal norm taking into account not only the literal content of the provision, but also the assumed axiology – all these things are done by a judge either alone, when he or she sits in a single panel, or together with other judges who sit with him or her in the panel, but then only with their participation, without external interference. As such, judicial impartiality is a kind of intellectual attitude also in the sense that it consists in consciously freeing oneself from any prejudice, sympathy or

antipathy towards the parties, in rigorously guiding oneself in hearing the case and deciding the dispute solely on the merits. The judge's character, attitude, and ethical and moral qualities, including courage, honesty, and inner integrity, assist in consciously choosing the values to which an independent judge adheres in the adjudicating process. Therefore, it can be said that independence depends on the judges themselves. A judge with character is independent, a judge who does not have character is not independent."

Moreover, in its case-law, the ECtHR has repeatedly stressed that the mere fact that a judge has been appointed by the executive or legislative authority does not amount to a violation of the right to an independent tribunal, as long as, after his or her appointment, the judge is free from pressure in the performance of his or her judicial functions (see, e.g., judgments of: 9 November 2006, 65411/01, *Sacilor Lormines v. France*; 3 July 2007, 31001/03, *Flux v. Moldova* (No. 2); 18 October 2018, 80018/12, *Thiam v. France*). The departure from this line of jurisprudence in the judgment of 7 May 2021, in which the ECtHR held that the manner in which a Tribunal judge is elected determines his or her independence, was not explained by the ECtHR and, in the Tribunal's view, has no rational justification. This circumstance also demonstrates that the ECtHR violated Article 6(1) of the Convention by misinterpreting and, consequently, misapplying it in its judgment of 7 May 2021.

It should also be noted that in its judgment of 7 May 2021 the ECtHR applied the three-step test formulated in the *Guðmundur Andri Ástráðsson* case, already cited several times in the present case, contrary to its purpose and basic assumptions. As discussed above, it unjustifiably concluded that the election of new Tribunal judges by the Sejm and the taking of the oath of office before the President had amounted to a violation of Polish law. As such, it is inappropriate to conclude that any violation affected the election of judges. Finally, the finding that the applicant had no opportunity before the Constitutional Tribunal to apply for the disqualification of a judge is untrue, since it had such a right but did not exercise it.

Accordingly, the Tribunal held that the rule derived from Article 6(1), first sentence, of the Convention, on the basis of which the ECtHR had conferred on itself the competence to review the legality of the election of Constitutional Tribunal judges, was inconsistent with Article 194(1) in respect of the principle of supremacy of the Constitution as expressed in Article 8(1) thereof.

7. Discontinuance of proceedings

7.1. First, the Tribunal decided to discontinue the proceedings with respect to the allegation set out in paragraph 2 of the request for relief of the application, as explained above (see paragraph 6.4 of this part of the reasons).

7.2. Second, the standard of review invoked in respect of each of the three allegations formulated by the Public Prosecutor-General was Article 2 of the Constitution. The arguments put forward in support of the violation of this provision were the same for all allegations. In the Public Prosecutor-General's view, as a result of the modification of the constitutional position and competences of the Constitutional Tribunal through the jurisprudential activity of the ECtHR, the legal certainty and security as defined in Article 2 of the Constitution were undermined. In addition, an independent (not authorised by any normative act) modification of a treaty norm is incompatible with the principle of democracy, which requires that the entire process of creating, interpreting and applying law meet democratic requirements.

According to the Constitutional Tribunal, the review of the conformity of Article 6(1), first sentence, of the Convention to the principles of legal certainty and legal security and democratism derived from Article 2 of the Constitution is superfluous due to a declaration of

non-conformity to the constitutional standards that are more specific in nature. The purpose of the proceedings was achieved, and considerations of procedural economy support discontinuance of the proceedings with respect to the review of conformity to a general standard.

7.3. Third, Public Prosecutor-General made Article 89(1)(3) of the Constitution the standard of review with regard to the allegation formulated in paragraph 3 of the request for relief of the application; said provision stipulates that “ratification of an international agreement by the Republic of Poland, as well as denunciation thereof, shall require prior consent granted by statute – if such agreement concerns: (...) the Republic of Poland’s membership in an international organization.” Justifying the violation of this standard, it pointed out that the Convention is an international agreement concerning the freedoms, rights or duties of citizens set forth in the Constitution, and only to that extent did the States Parties to the Convention consent the jurisdiction of the ECtHR. This consent, however, does not include the power to review the correctness of the formation of constitutional organs of public authority (here: Constitutional Tribunal), because a norm with such content was not consented to by the State Party.

The Tribunal notes that the content of the constitutional standard invoked by the Public Prosecutor-General does not stem from Article 89(1)(3) of the Constitution, but from Article 89(1)(2) of the Constitution. This is because the latter refers to agreements concerning the freedoms, rights or duties of citizens as defined in the Constitution.

Notwithstanding this, in the Tribunal’s view, Article 89(1) of the Constitution is not an adequate standard of review in relation to the allegation concerning the norm allowing the ECtHR to review the legality of the process of electing Constitutional Tribunal judges. This provision sets out the national procedure for ratifying international agreements and giving consent to ratification, indicating in five points the categories of international agreements whose ratification must be preceded by consent expressed in a statute. The content of this standard is thus not adequate to the formulated allegation, and therefore the proceedings were discontinued due to the inadmissibility of issuing a judgment (Article 59(1)(2) of the uotpTK).

8. Effects of judgment

8.1. The judgment rendered in the present case is of a scope nature. This means that the Tribunal ruled that certain norms derived from this provision, as indicated in the operative part of the judgment, violate the provisions of the Constitution, and therefore have no binding effect. The Tribunal therefore derogated from the normative content described in the operative part of this judgment without challenging Article 6(1), first sentence, of the Convention. This provision, as an element of an international agreement to which the Republic of Poland is a party, within the scope indicated by the Tribunal in this judgment, continues to be part of the domestic legal order and may be the basis of applications lodged by Polish citizens with the ECtHR.

8.2. The Tribunal emphasises that the decision on the scope of the unconstitutionality of the two norms derived by the ECtHR from Article 6(1) of the Convention may in no way be reviewed under Articles 27 and 46 of the Vienna Convention on the Law of Treaties of 23 May 1969 (Journal of Laws of 1990, No. 74, item 439). These provisions stipulate that the States Parties to the treaty (here: Convention) may not invoke provisions of their internal law as justification for their failure to perform a treaty or that the act of being bound by a treaty is invalid due to a violation of their internal law regarding competence to conclude treaties. The Constitutional Tribunal judgment in the present case has no relation to the disposition of these

provisions. It follows from this judgment that the Republic of Poland is not obliged to submit the system and proceedings before the Tribunal as well as the legality of the election of Tribunal judges to a review by the ECtHR. The Republic of Poland, as a party to the Convention, decided to submit to the ECtHR jurisdiction the case-law of Polish ordinary courts and of the Supreme Court in cases covered by the Convention, and in this respect the Republic of Poland honours its obligations. However, the status of the Constitutional Tribunal and the status of its judges, including the principles of their appointment, are determined exclusively by the Constitution and are not subject to the case-law of the ECtHR.

8.3. This judgment should be communicated by the Polish Government to the Committee of Ministers of the Council of Europe in order to give effect to its implications for the obligations of the Republic of Poland as a State Party to the Convention.

Dissenting Opinion
of Judge Zbigniew Jędrzejewski
to the reasons for the Constitutional Tribunal judgment
of 24 November 2021, ref. K 6/21

Under Article 106(3) of the Act on the Organization and Proceedings before the Constitutional Tribunal of 30 November 2016 (Journal of Laws of 2019, item 2393), I present a separate opinion to the reasoning of the Constitutional Tribunal judgment of 24 November 2021, ref. K 6/21.

1. By judgment dated 24 November 2021 issued in case ref. K 6/21, the Constitutional Tribunal held that “Article 6(1), first sentence, of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as amended by Protocols Nos 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended:;) insofar as the term tribunal used in that provision comprises the Constitutional Tribunal of the Republic of Poland – is inconsistent with Article 173 in conjunction with Article 10(2), Article 175(1) and Article 8(1) of the Constitution of the Republic of Poland.

2. Article 6(1), first sentence, of the Convention referred to in paragraph 1 – insofar as it grants the European Court of Human Rights the jurisdiction to review the legality of the process of electing judges to the Constitutional Tribunal – is inconsistent with Article 194(1) in conjunction with Article 8(1) of the Constitution.

I fully support the dispositive provisions and the form of the operative provisions of the Constitutional Tribunal judgment. However, I have reservations regarding the content of the reasoning, which has not been properly elaborated, and therefore contains mental shortcuts likely to mislead the recipient of the text, shallow arguments and inconsistencies. I believe that the way some parts of the reasoning are formulated, both with regard to the admissibility of adjudication and the review of constitutionality, has the effect of undermining the argumentation explaining the reasons for the ruling.

2. My comments regarding the reasoning address several issues in particular.

2.1. First, I believe that the presentation of the view of the European Court of Human Rights (hereinafter: ECtHR) in *Xero Flor w Polsce Sp. z o.o. v. Poland* (application

no. 4907/18) is imprecise. The Constitutional Tribunal formulates the description in such a way that in some passages one has the impression that it considers or at least accepts that there were irregularities in the process of electing judges of the Constitutional Tribunal in December 2015. Only in further arguments does it correctly clarify that there were no defects in this respect.

2.2. Second, the Constitutional Tribunal, in order to clarify the admissibility of the adopted scope of the challenge, refers to the principles of interpretation of the European Convention on Human Rights (hereinafter: ECHR) in a selective manner and as such likely to be misleading as regards the essence of the institution. While the Constitutional Tribunal's choice of method of operation is correct and even necessary in the case under review, the manner of execution required adjustments. In order to fully clarify this issue and its relevance in examining case ref. K 6/21, it was necessary to refer more broadly to the nature and effect of the ECtHR's judgments and the role of this Court in shaping the content of the Convention norms. Moreover, the argument lacked a general reference to the theory of interpretation, which would have made it easier to understand the references to commentaries on the ECHR cited in the reasoning.

2.3. Third, although to a certain extent it is justified for the Constitutional Tribunal to refer to the common law system as an inspiration for the ECtHR's actions, the comparison indicated in the reasoning for the judgment, that the ECtHR relies on the interpretation applied in earlier judgments, following the common law jurisprudence, is too vague and general. It does not explain the substance of the issue. The Constitutional Tribunal did not present the principles of creating law by precedents, which, by the way, is done according to specific rules, and not just from the fact that a country belongs to a particular legal culture (i.e. common law or civil law).

Combining an in-depth discussion of the ECtHR's judgments and its activities related to the interpretation of the ECHR with the findings on the law-making activity of courts as in the common law system would better ground the view of the Constitutional Tribunal adopted in case ref. K 6/21. Perhaps it would also make it possible to revise the thesis that the ECtHR is merely a law enforcement body, especially since it is nevertheless an international body. Therefore, legal structures inherent in national law cannot be transposed to the activities of this body.

2.4. Fourth, the failure to examine in more detail the issues related to the nature of the ECtHR's activities and the effects of its judgments causes the Constitutional Tribunal, in the reasoning for the judgment ref. K 6/21, to entertain its doubts with regard to the possibility of ruling on the constitutionality of norms under Article 6(1) of the ECHR. It finds, for example, that in the case "the prerequisite of a uniform, consistent and common practice of law application [is], implicitly, met." Although the Tribunal ultimately conducts a review of the constitutionality of the challenged norms, this prudent, ambiguous approach to the Tribunal's possibility of deciding the case before it is undermined by the reasoning.

2.5. Fifth, the Constitutional Tribunal, in pronouncing on the overstepping of competences by the ECtHR, refers to its own case-law on the European Union. One should agree with the Constitutional Tribunal that the findings concerning specific review standards, including the supremacy of the Constitution or the limits of sovereignty, may be applied not only in determining the relations between the EU and the state, but also in shaping the relations between Poland and other international organisations or bodies. However, the reasoning for the Constitutional Tribunal judgment lacks a clearer indication that the ECtHR and ECHR are not the order of the European Union. The Constitutional Tribunal should explain in the reasoning

why it applied certain standards developed for the process of integration into the European Union to the standards resulting from the ECHR.

2.6. Sixth, there are passages in the reasoning that suggest that in Poland courts and tribunals are institutions that operate in a similar manner and on similar principles. Although the Constitutional Tribunal is correct to indicate, at the outset of Section III.4 “Structure of the Constitutional Tribunal”, the separate nature of the two branches of the judiciary and to emphasise that this view is not disputed among Polish constitutional law scholars, one cannot understand why, in the further part of the argumentation, it attempts to emphasise the importance of the common elements with the courts. In my view, even when certain institutions appear in courts and tribunals, they originate from different legal regulations.

It follows from the reasoning of the judgment that the Tribunal is guaranteed by the Constitution and statutes the independence inherent to courts and the independence of its judges, and that it makes decisions in the manner typical of judicial proceedings and in the forms typical of the judiciary, i.e. in the form of judgments and decisions. This framing of the issue, however, is incorrect. The independence of the Constitutional Tribunal does not result from the fact that courts are independent, but from the fact that in Article 173 of the Constitution, the legislature makes it clear that “Courts and Tribunals shall constitute a separate power and shall be independent of other branches of power.” The independence is attributed to both courts and tribunals. The independence of the Constitutional Tribunal is therefore an intrinsic feature of the Tribunal and there should be no reference to independence of courts to demonstrate the independence of tribunals.

In addition, it should be noted that while judgments are appropriate for courts and tribunals, decisions are a form of adjudication appropriate for a variety of bodies, including those outside the judiciary (see, e.g. public administrative bodies, executive bodies).

Nor can the relationship between courts and tribunals be accepted by looking for their common elements. It should be recalled that in accordance with Article 197 of the Constitution the organisation of the Constitutional Tribunal, as well as the mode of proceedings before it, shall be specified by statute. If the legislator in Article 36 of the Act of 30 November 2016 on the Organisation and Proceedings before the Constitutional Tribunal (Journal of Laws of 2019, item 2393) held that to the extent not regulated by the Act, the provisions of the Code of Civil Procedure apply to the proceedings before the Tribunal accordingly, this is not an argument supporting that the proceedings before the Constitutional Tribunal are judicial proceedings. Ultimately, this is also confirmed by the Constitutional Tribunal.

The Constitutional Tribunal in the reasoning of the judgment ref. K 6/21 prudently held that despite its similarities to courts, due to the specificity of its constitutionally defined competences, the Constitutional Tribunal cannot be considered a court and the proceedings before it as judicial proceedings. I believe it would be appropriate to add to this conclusion that it is not only the competence of the Constitutional Tribunal that prevents the same from being considered a court. This is determined by the linguistic, systemic and functional interpretation of the provisions of the Constitution. The rational legislator deliberately separated courts from tribunals to emphasize their separateness, and the nature of these bodies, their constitutional role, competences and procedures should be analysed from this perspective.

The search for common elements between courts and tribunals, and in a manner not supported by constitutional provisions, undermines the reasoning of the judgment, which makes it clear that the Constitutional Tribunal is separate from courts.

2.7. Seventh, one cannot agree with the thesis expressed in the reasoning of the Constitutional Tribunal that the systemic status of a Constitutional Tribunal judge has been guaranteed by the legislator in the context of the guarantees enjoyed by judges of courts

administering the justice, in particular their irremovability from the judiciary. It should be made clear that the constitutional status of a Constitutional Tribunal judge is separate from that of professional judges and is set out in Articles 195 and 196 of the Constitution. Nowhere does the legislature refer to the status of court judges to determine the status of Constitutional Tribunal judges. As such, the status of Constitutional Tribunal judges cannot be considered to be guaranteed within the status of court judges. This is a separate legal regulation for the purpose of exercising, by Constitutional Tribunal judges, the competences of the body of which they are members. Furthermore, it should be pointed out that the guarantee of irremovability applies to professional judges. The legislature did not repeat it with regard to Constitutional Tribunal judges, which is related to the term of office of the Tribunal judges.

It is also impossible to agree with the thesis presented in the reasoning of the Constitutional Tribunal judgment, and taken from the literature, that there is a similarity between judges of courts and judges of the Constitutional Tribunal, which is a consequence of the fact that these bodies belong to the judicial power and that all judges in the state are unified. I believe there is no legal basis for this view. The judges of the various judicial branches of Government have not been unified. One should not put an equal sign between a professional judge and a Constitutional Tribunal judge, because this equality of status has no constitutional basis. They are not similar entities from the perspective of the principle of equality (Article 32(1) of the Constitution).

For this reason, I consider it unnecessary to cite, in the part concerning the assessment of the allegations, the statements from the judgment of the Constitutional Tribunal ref. P 7/20. Leaving aside here the assessment of their relevance and correctness, it must be stated that the mentioned case concerned the independence of judges of courts (professional judges). Reference to a given judgment is incomprehensible and creates conceptual confusion, which also undermines the arguments put forward in the reasoning.

Moreover, in the same place of the reasoning (i.e. the assessment of the allegations) it is unnecessary and misleading to describe the guarantees of the Constitutional Tribunal judges and at the same time to refer to the guarantees of the judges of courts.

2.8. Eighth, my reservations relate to the manner in which the statements are phrased in assessing the allegations raised by the applicant. In particular, the Constitutional Tribunal should have explained why, in addition to hierarchical review of the law, i.e. reviewing the constitutionality of Article 6(1) of the ECHR, it assesses the ECtHR's action from the perspective of observance of the ECHR by this body.

Of course, the Constitutional Tribunal is correct to consider that in *Xero Flor Sp. z o.o. v. Poland* the ECtHR acted outside the Convention. However, the reasoning lacked an explanation as to why the assessment of the ECtHR's jurisprudential activity was relevant to the review of the constitutionality of the standard under Article 6(1) of the ECHR.

At the same time, if such a review has already been carried out, it should be acknowledged that the Constitutional Tribunal did not sufficiently emphasise that the ECtHR although, analysing Polish constitutional institutions, referred to legal grounds, it based its assessment of the nature of the Constitutional Tribunal not on provisions, but on a selective interpretation of the Constitutional Tribunal decisions, which in the Polish system are not a source of universally applicable law. The Constitutional Tribunal only held that "its analysis of the constitutional position and competences of the Tribunal, although referring to the correct legal basis, led to an erroneous conclusion."

Moreover, I find inconsistent the statement that the judgment in *Xero Flor Sp. z o.o. v. Poland* does not exist, that is, has no effect, while at the same time the norm shaped by this judgment could have been the subject of proceedings before the Constitutional Tribunal, and therefore the ECtHR judgment produced some effects.

2.9. Ninth, I find unclear the statement in paragraph III.8 “Effects of the judgment” that the Constitutional Tribunal did not challenge Article 6(1), first sentence, of the ECHR.

I understand that the Constitutional Tribunal wanted to ensure in some way that the ECHR and its Article 6(1) are still in force. However, it should have phrased it differently. In fact, a ruling declaring unconstitutional the norms arising from Article 6(1) ECHR means that Article 6(1) of the Convention was challenged by the Tribunal, only not in its entirety. Tribunal derogation will be extended to the norm derived from this provision, and not to the editorial unit as a whole.

2.10. Finally, attention should be drawn to the use of certain phrases in the reasons for the judgment that are not correct from the point of view of theory of law. As an example, the right to a court is not a civil right under the ECHR. It is a personal right that also functions as a means of protecting civil rights or as a means of verifying the validity of charges in a criminal case brought against the applicant (cf. Article 6(1) ECHR). Nor, under the Convention, is a civil right a property right. Indeed, it should be emphasised that while human rights are rights that are primary to state power, enjoyed by every person by virtue of possessing the dignity of the human person, regardless of his or her national or social affiliation, civil rights are rights that are enjoyed by persons who are citizens of a state. Making a human right a civil right is only possible if the law expressly so provides (see M. Granat, *Prawo konstytucyjne w pytaniach i odpowiedziach*, Warszawa 2012, pp. 106-107). Neither the right to a court of law nor the right to property were reserved only for citizens. I believe that since the case concerns a normative act that is part of the international system for the protection of human rights, it is important to maintain adequate precision of terms if the Constitutional Tribunal is pronouncing on certain human rights.

3. In conclusion, I find that the number of the deficiencies contained in the reasons for the judgment ref. K 6/21 has caused that it did not fully reflect the circumstances that were taken into account by the Constitutional Tribunal in making its ruling. As such, the reasoning does not provide a fair explanation of the reasons for the judgment adopted. Meanwhile, since – as the Tribunal itself points out – the ruling is precedent-setting and concerns an international agreement and one of its most essential provisions, i.e. Article 6(1), which is a monument of international law, the reasoning in such an important case should be based on certainty, consistency and reliability of arguments.

In light of the above circumstances, I have made a dissenting opinion.

Appendix VI – Courtesy English translation of the Constitutional Court’s judgment K 7/21 of 10 March 2022

24/A/2022

JUDGMENT
10 March 2022
case K 7/21*

In the name of the Republic of Poland

the Constitutional Court, sitting as:

Stanisław Piotrowicz — presiding
Mariusz Muszyński — rapporteur
Krystyna Pawłowicz
Wojciech Sych
Andrzej Zielonacki,

reporting clerk: Michał Rylski,

having heard, with the attendance of the petitioner, the President of the Republic of Poland, the Sejm and the Minister of Foreign Affairs, in open-court hearings on 19 and 25 January and 10 March 2022, the Attorney General’s petition to review the compatibility of:

the first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms made at Rome on 4 November 1950, as amended by Protocols 3, 5 and 8 and supplemented by Protocol 2 (Dz.U.1993.61.284), in the scope wherein:

- (a) it empowers the European Court of Human Rights to create in national law a judicially protected individual right in a judge to hold an administrative function in the organizational structure of the common judiciary of the Republic of Poland — with Article 8(1), Article 89(1)(2) and Article 176(2) of the Constitution of the Republic of Poland;
- (b) the condition ‘tribunal established by law’ as contained in said provision fails to recognize the universally binding provisions of the Constitution of the Republic of Poland and ordinary statutes, as well as universally binding judgments of Polish Constitutional Courts as a basis for the establishment of a court — with Article 89(1)(2), Article 176(2), Article 179 in conjunction with Article 187(1) in conjunction with Article 187(4), and Article 190(1) of the Constitution;
- (c) permits domestic or international courts to conduct a binding review of the constitutionality and compatibility with said Convention of statutes concerning the court system and competence of courts, as well as the statute governing the National Council of the Judiciary in order thus to determine whether the ‘tribunal established by law’ condition is satisfied — with Articles 188(1) and 188(2) of the Constitution

* Holding published on 21 March 20220 in Polish Journal of Laws: Dz.U.643.

h o l d s:

The first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms made at Rome on 4 November 1950, as amended by Protocols 3, 5 and 8 and supplemented by Protocol 2 (Dz.U.1993.61.284, as amended), in the scope wherein:

- (1) it extends the term 'civil rights and obligations' to an individual right in a judge to hold an administrative function in the structure of common judiciary in Polish legal system**
 - is incompatible with Article 8(1), Article 89(1)(2) and Article 176(2) of the Constitution of the Republic of Poland;**
- (2) in the determination of whether the 'tribunal establish by law' condition is satisfied —**
 - (a) it permits the European Court of Human Rights or domestic courts to ignore the provisions of the Constitution, statutes, and judgments of the Constitutional Court;**
 - (b) it enables the European Court of Human Rights or domestic courts, in the process of interpreting the Convention, to create independently norms pertaining to the procedure for domestic judicial appointments**
 - is incompatible with Article 89(1)(2), Article 176(2), Article 179 in conjunction with Article 187(1) in conjunction with Article 187(4) and Article 190(1) of the Constitution;**
 - (c) empowers the European Court of Human Rights or domestic courts to review statutes concerning the court system and competence of the courts, as well as the statute governing the National Council of the Judiciary for compatibility with the Constitution and with the Convention**
 - is incompatible with Articles 188(1) and 188(2) and Article 190(1) of the Constitution.**

The judgment was unanimous.

REASONS

I

1. By letter of 9 November 2021, the Attorney General (hereinafter also the 'petitioner') petitioned for review of the compatibility of the first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms made at Rome on 4 November 1950, as amended by Protocols 3, 5 and 8 and supplemented by Protocol 2 (Dz.U.1993.61.284, as amended), in the scope wherein:

it empowers the European Court of Human Rights to create in national law a judicially protected individual right in a judge to hold an administrative function in the organizational structure of the common judiciary of the Republic of Poland — with Article 8(1), Article 89(1)(2) and Article 176(2) of the Constitution of the Republic of Poland;

the condition 'established by law' as contained in said provision fails to recognize universally binding provisions of the Constitution and ordinary statutes, as well as universally binding judgments of Polish Constitutional Courts as a basis for the establishment of a court — with Article 89(1)(2), Article 176(2), Article 179 in

conjunction with Article 187(1) in conjunction with Article 187(4), and Article 190(1) of the Constitution;

permits domestic or international courts to conduct a binding review of the constitutionality and compatibility with the Convention of statutes concerning the court system and competence of the courts, as well as the statute governing the National Council of the Judiciary in order to determine whether the 'tribunal established by law' condition is satisfied — with Article 188(1) of the Constitution

In the Attorney General's view, the aforementioned norms were shaped in the case-law of the ECtHR, in particular *Broda and Bojara v. Poland* (applications no. 26691/18 and no. 27367/18, judgment of 29 June 2021) and *Reczkowicz v. Poland* (application no. 43447/19, judgment of 22 July 2021). The Attorney General argued that, although the nature of the aforementioned judgments was individual, the context in which they were handed down, their object and contents prompt the conclusion that they constitute an attempt at shaping a qualitatively completely novel Convention standard, ignoring the will of the member states and failing to respect the constitutional norms specifying the system of government of the Republic of Poland. The significance of said ECtHR judgments empowers the Constitutional Court to review the constitutionality of the normative content derived by said judgments from Article 6(1) of the Convention.

The Attorney General noted that in *Broda and Bojara v. Poland*, judgment of 29 June 2021, the ECtHR concluded that there existed a right in the holders of the office of vice-president of court to hold such office until the expiry of the term or until the expiry of their judicial term and that such persons could justifiably argue that domestic law protected them from arbitrary removal from the position of vice-president of a court prior to term. In the Attorney General's view, for the ECtHR to derive on its own, from the norms of domestic law, the judicially protected individual right of a judge to hold an administrative function in the organizational structure of the Republic of Poland's common judiciary constitutes a new normative scope of Article 6(1) of the Convention. For it means that the ECtHR henceforth holds a new power — quasi-legislative — consisting in the ability, on the basis of Article 6(1) ECHR, to rule on the existence of substantive individual rights in domestic law independently from the provisions of that law, even those of constitutional standing. Such normative scope could not be reconciled with the constitutional tests specified in the petition for review.

The Attorney General noted that the constitutional problem in this case pertains not only to the scope of application of Article 6 of the Convention but also the requirement that the tribunal be 'established by law', as arising from said provision. The Attorney General provided an overview of the existing understanding of the phrase 'tribunal established by law' on the basis of the ECtHR's case-law and subject literature. The Attorney General concluded that in the most recent case-law the term 'law' in Article 6(1) of the Convention includes legal provisions determining the manner of creation and the powers of the judicial authorities, as well as any other such provisions of domestic law as will, if violated, result in the irregularity of the participation of one or more of the judges in deciding the case.

Citing *Guðmundur Andri Ástráðsson v. Iceland* (application no. 26374/18), the Prosecutor General noted that the ECtHR held that the participation of a judge appointed to the post in violation of domestic provisions constitutes a violation of the first sentence of Article 6(1) of the Convention whether or not the domestic legal system recognizes the efficacy of such appointment.

The Attorney General concluded that the approach taken in *Guðmundur Andri Ástráðsson v. Iceland* was used in the ECtHR's judgment in *Reczkowicz v. Poland*, of 22 July 2021, concerning the composition of the National Council of the Judiciary. In the Attorney General's view, the judgment in *Reczkowicz v. Poland* led to the creation of a legal norm on the basis of Article 6(1) of the Convention: (a) whereas the 'tribunal established by law' condition set forth in said provision does not include universally binding provisions of the Constitution and ordinary statutes forming the basis for the establishment of the court, nor

final and universally binding judgments of Polish Constitutional Court; (b) permits domestic or international courts to conduct a binding review of the constitutionality and compatibility with the Convention of statutes concerning the court system and competence the courts, as well as the statute governing the National Council of the Judiciary in order to determine whether the 'tribunal established by law' condition is satisfied. Evidence of the applicability of this scope of the first sentence of Article 6(1) of the Convention is also found in the Supreme Court (hereinafter 'SC')'s order in *I KZ 29/21*, of 16 September 2021, issued by the Criminal Chamber. Said order, relying on the first sentence of Article 6(1) of the Constitution as understood in the judgment in *Reczkowicz v. Poland*, refused to apply the provisions of statutes and judgments of the Constitutional Court and engaged in an independent review of the constitutionality of ordinary statutes, as well as their compatibility with the Convention. The SC found the appointment of a justice of the SC's Criminal Chamber by the President of the Republic of Poland to be defective. The SC also concluded that the participation of said justice in the handing down of the court decision under appeal constituted an absolute reversible error in the form of improper composition of the court.

The Attorney General's view is that the international agreement that is the Convention has not effected such transfer of competence to an international organization as to empower the entities specified in the Convention to create laws of direct applicability in the Republic of Poland's legal order. In such meaning Convention Rights are immutable and although dynamic interpretation is something understandable in the process of application of the law, from the perspective of the Constitution it cannot modify the nature of an international agreement. There is, therefore, a line between the interpretation of the terms of an agreement and a modification of its contents that is not preceded by the consent of the states-parties and leads to bypassing the constitutional process of delegation of powers to an international organization.

The Attorney General concluded that the status of judges and therewith any such individual rights as they might be entitled to, belong, in the Republic of Poland, to statutory matter (*matière réservée à la loi*) (Article 176(2) of the Constitution), which must additionally be interpreted through the prism of the provisions of the Constitution as the supreme law of the Republic of Poland. By contrast, the ECtHR analysed the provisions of Polish systemic statute on the court system in a manner ignoring the established canons of interpretation, including without limitation the need for this process always to refer to the provisions of the Constitution, which are interpreted by the decisions of the Constitutional Court. In the Attorney General's view, omitting the body of decisions of the Constitutional Court from the process of analysis of the provisions of a systemic statute concerning the courts is incompatible with the principle of supremacy of the Constitution, which demands the inclusion of constitutional provisions in the interpretative process.

The Attorney General concluded that the norm arising from Article 179 of the Constitution settles the question that the organizational lawmaker based the judicial-creation system on the act of appointment, which necessitates the co-operation of two constitutional organs. In the Attorney General's view, the consequence of the grounding of the President of the Republic's powers directly in constitutional norms is the impossibility of review in any proceedings whatsoever, including without limitation administrative or judicial-administrative proceedings.

The Attorney General noted that from Article 176(2) of the Constitution it follows that the constitutional lawmaker has entrusted the shaping of the court system and competence of the courts to Parliament, which exercises that power through a statute, which benefits from the presumption of constitutionality. Simultaneously, the constitutional legal basis for Parliament's powers means that any regulation of this matter on an international-agreement level — if it were at all to be admissible — would need to be preceded by the statutory approval for ratification due to Article 89(1)(5) of the Constitution.

Because matter reserved to statute includes the process for the appointment of judges, the essential framework of which is regulated directly by the Constitution, the provision disputed herein is incompatible with Article 179 in conjunction with Article 187(1) in conjunction with Article 187(4) of the Constitution. In the existing jurisprudence of the Constitutional Court and other courts it has been held that there is no mechanism for the review of Presidential prerogative. If the first sentence of Article 6(1) of the Convention allows the ECtHR to examine whether the 'tribunal established by law' condition by evaluating the process of judicial appointments but without accounting for the constitutional mechanisms in this regard (ignoring the relevance of the nature of Presidential prerogative) or with liberal (arbitrary) interpretation (based on a resolution of combined Chambers of the Supreme Court), then it is incompatible with Article 179 in conjunction with Article 187(1) in conjunction with Article 187(4) of the Constitution.

In the context of Article 190(1) of the Constitution the Attorney General asserted that neither domestic (such as the Supreme Court), nor international bodies may negate the consequences stemming from the system of sources of law from a judgment of the Constitutional Court, including without limitation in respect of either upholding or dislodging the presumption of constitutionality of any disputed provisions. Neither on its own authority, nor in reliance on arguments taken from the decisions of the Supreme Court, may the ECtHR deny the binding force of the Constitutional Court's decisions, let alone choose which judgments it approves of and which — deeming them to be arbitrary — it can play down.

The Attorney General noted that in *Reczkowicz v. Poland* the ECtHR derived competence-creating norms and organizational norms from Article 6(1) of the Convention. Firstly, the ECtHR arrogated to itself the power to judge the merits of Polish Constitutional Court's decisions. Secondly, it used the Convention provision to legitimize the actions of Polish courts consisting in disputing the basic foundations of Poland's constitutional order. Consequently, the Attorney General concluded that the norms derived by the ECtHR from Article 6(1) of the Convention strike at the foundations of the Republic of Poland's constitutional order, violating Poland's constitutional identity.

The Attorney General noted that the ECtHR and with it the Supreme Court in *I KZ 29/21* (order of 16 September 2021), opting to discredit the decisions of the Constitutional Court, ignored significant doubts relating to the judgment of the Supreme Court's Labour and Social Insurance Chamber in III PO 7/18, of 5 December 2019, as well as the resolutions of a panel of combined Chambers of the Supreme Court — Civil, Criminal and Labour and Social Insurance Chambers — in *BSA I-4101-1/20*, of 23 January 2020. For the ECtHR to rely on those judgments for arguments alleging a violation of the procedure for judicial appointments may attest — in the Attorney General's view — to a failure to understand the foundations [or: basics (transl.)] of Poland's constitutional order. However, the taking advantage of the 'shortcomings' of *Reczkowicz v. Poland* by Polish Supreme Court in the order of 16 September 2021 bears the marks — in the Attorney General's view — of consciously disputing the foundations of the Republic of Poland's constitutional order.

The Attorney General emphasized that the object of review in this case are not the judgments of the ECtHR as acts of application of the law. Nor is the essence of the right established by Article 6(1) of the Convention; this object are the legal norms the ECtHR has derived from that provision when adjudicating in *Broda and Bojara v. Poland* and *Reczkowicz v. Poland*. Said norms either establish legal institutions nonexistent in Polish law or significantly collide with the constitutional order and the order of competence in the sphere of organization of Poland's justice system and constitutional review.

In a letter dated 13 January 2022, the Attorney General supplemented the third *tiret* of the petition with Article 188(2) of the Constitution as the test, and, in consequence, prayed that the test be worded as follows: 'permits domestic or international courts to conduct a binding review of the constitutionality and compatibility with said Convention of statutes concerning the court system and competence of courts' as well as the statute governing the

National Council of the Judiciary in order thus to determine whether the “tribunal established by law” condition is satisfied — with Articles 188(1) and 188(2) of the Constitution.’

In the letter dated 13 January 2022 the Attorney General also supplemented the statement of reasons for the petition. The Attorney General explained that if the ECtHR, in evaluating the ‘tribunal established by law’ standard, invokes the judgments of the Supreme Court pointing to the incompatibility of statutes with Article 6(1) of the Convention, the provision on the competence of the Constitutional Court in Article 188(2) of the Constitution is violated.

In the context of the ECtHR’s judgment in *Dolińska-Ficek and Ozimek v. Poland* (applications no. 49868/19 and 57511/19) the Attorney General observed that it reaffirms the contents of the legal rule arising from the first sentence of Article 6(1) of the Convention already expressed in the ECtHR’s judgment of 22 July 2021 in *Reczkowicz v. Poland*. Indirectly, the ECtHR also confirmed the normative scope of that provision in respect of administrative functions in the judiciary determined in the judgment of 29 June 2021 in *Broda and Bojara v. Poland*.

The Attorney General, citing a fragment of the judgment in *Dolińska-Ficek and Ozimek v. Poland*, observed that the ECtHR therein announced that whenever it is to analyse the matter of ‘tribunal established by law’ in the context of the procedure for judicial appointments with the participation of the National Council of the Judiciary in the shape given to it by the 2017 amendment, the provisions of the Constitution and judgments of the Constitutional Court will consistently be ignored and the ECtHR (or domestic courts invoking Article 6 of the Convention) will independently review the constitutionality of statutes. Accordingly, the Attorney General concluded that the normative scope of the first sentence of the Convention, covered by the Attorney General’s petition of 9 November 2021, has already been unequivocally shaped.

In the view of the Attorney General, the ECtHR in *Dolińska-Ficek and Ozimek v. Poland* ignored Article 188 of the Constitution, which provides *in. al.* for the exclusive competence of the Constitutional Court to adjudicate on the constitutionality of statutes. Moreover, the ECtHR ignored the provisions of the Constitution concerning the Presidential prerogative in judicial appointments.

2. In a letter dated 14 January 2022, the Sejm took the position that the first sentence of Article 6(1) of the Convention:

- (1) in the scope in which it empowers the ECtHR to create in national law a judicially protected individual right in a judge to hold an administrative function in the organizational structure of the common judiciary of the Republic of Poland is incompatible with Article 8(1), Article 89(1)(2) and Article 176(2) of the Constitution of the Republic of Poland;
- (2) in the scope in which, as part of the ECtHR’s examination of alleged violation of the right to a ‘tribunal established by law’, it permits the creation of competences the Republic of Poland has not ceded to that body, is incompatible with Article 89(1)(2) in conjunction with Article 176(2) of the Constitution;
- (3) in the scope in which it enables the ECtHR to evaluate the regularity of the process of appointment of judges by the President of the Republic of Poland acting upon the application of the National Council of the Judiciary and on the basis of that evaluation decide whether the ‘tribunal established by law’ condition is satisfied, is incompatible with Article 179 in conjunction with Articles 187(1) and 187(4) of the Constitution;
- (4) in the scope in which it enables the ECtHR to evaluate the judgments of the Constitutional Court and dispute their attributes, and on the basis of that evaluation decide whether the ‘tribunal established by law’ condition is satisfied, is incompatible with Article 190 of the Constitution;

(5) in the scope in which it permits domestic or international courts to conduct a binding review of the constitutionality and compatibility with the Convention of statutes concerning the court system and competence of courts, as well as the statute governing the National Council of the Judiciary, and on the basis of that evaluation decide whether the 'tribunal established by law' condition is satisfied, is incompatible with Article 188(1) of the Constitution.

The Sejm asserted that the Convention, being an international agreement ratified with prior approval given by statute, is a normative act that may be the object of review by the Constitutional Court.

The Sejm, in its analysis of the allegations of unconstitutionality from the first *tiret* of the prayers of the petition, concluded that the Convention does not empower the ECtHR to make a binding interpretation of domestic law. The ECtHR has repeatedly asserted in its case-law that the role in this regard belongs to the organs of the respondent state and first of all the courts. Moreover, ECtHR decisions are made in the context of specific circumstances of a given case; hence, in the different circumstances of a different case the ECtHR's judgment can be different. In this respect, in principle, the ECtHR's decisions must not be regarded as a form of abstract review of domestic law or abstract determination of the normative scope of the Convention's provisions. The determination of the normative content of the first sentence of Article 6(1) of the Convention on the basis of the ECtHR's decisions must, therefore, proceed in line with said conclusions.

The Sejm noted that even should one accept the assumption that the Convention is a 'living instrument', the dynamic interpretation of its provisions by the ECtHR with the 'tacit approval' of states party to the Convention cannot be unconditional and cannot be left without any reflection or response from the Convention's states-party. The absolute limit of the ECtHR's judicial activity are the provisions of the Constitution.

In the Sejm's opinion, the point of departure in the ECtHR's adjudication should be the relevant provisions of domestic law and their interpretation by domestic courts. The ECtHR must also follow all rules of interpretation applicable in the relevant legal system. Accordingly, the application of Article 6 of the Convention required reference to relevant provisions of the substantive law of the Convention's state-party in a meaning discerned by domestic courts. The ECtHR could ignore the legal view of the domestic organ, but for the purposes of the application of Article 6 of the Convention it could not recognize rights and claims having no substantive-law basis in the legal order of the Convention's state-party. For the essence of the right to court from the perspective of Article 6 of the Convention is not to create new substantive rights but guarantee an effective judicial remedy in respect of rights created by the domestic legislature. The Sejm observed that the break with this premise of the application of the first sentence of Article 6(1) of the Convention in the ECtHR's judgment in *Broda and Bojara v. Poland* is a significant normative novelty. Even though there is no individual right in a judge to hold functions in the organizational structure of the Republic of Poland's justice system, the ECtHR alone created such an individual right subsequently to examine opportunities for its protection in the light of the standards of the first sentence of Article 6(1) of the Convention.

The Sejm concluded that it was desirable for TK to make an equivocal judgment of the matter of the constitutionality of the *sui-generis* normative superstructure over Article 6 of the Convention being a manifestation of the ECtHR's activism. With regard to the Constitutional Court, that superstructure means a foray into the exclusive competence of the organs of the Polish state to determine whether the holding of specific administrative functions in the organizational structure of the common judiciary is to have the nature of an individual right or of a power that is instrumental relative to the principles of organization of the state apparatus and its various elements. In stripping away the state's right to make such a choice on the state's own, the ECtHR acted *ultra vires*.

In the Sejm's opinion, the essence of the problems raised in the Attorney General's petition comes down to the evaluation whether, in the light of the Constitution, the ECtHR may shape the matter of an international agreement of which the ratification by the Republic of Poland requires prior approval given in a statute and statutory matter, to which the court system and competence of the courts and procedure before them belong. The constitutional problems being raised are contained in the normative scope of the constitutionality tests specified in the letter initiating the proceedings.

The Sejm observed that the ECtHR's legislating activity, manifesting itself in the creation of an individual right in a judge to hold specific functions in the organizational structure of the justice system, entails a modification of the Republic of Poland's international obligations without submitting them to the rigours arising from Article 89 of the Constitution. For analogous reasons, the disputed Convention norm the contents of which have been shaped by interpretation of Article 6 of the Convention violates Article 176(2) of the Convention, which provides that the court system and competence of the courts and the procedures before them are to be defined by statutes. In the Sejm's view, an international agreement ratified with approval given by statute, takes precedence before a statute incompatible with it. In no case, however, does it have legal force superior to that of the Constitution. Nor do the decisions made by international judicial bodies modifying or elaborating on the contents of an international agreement adopted by the Republic of Poland have any such power.

The Sejm, in analysing the allegations of unconstitutionality from the second *tiret* of the petition, referred in the first order to the disputed norm's incompatibility with Article 89(1)(2) in conjunction with Article 176(2) of the Constitution, concluding *in al.* that allegations of violation of Article 89(1)(2) of the Constitution must be examined in two aspects. The first consists in the creation by the ECtHR of specific competence that the Republic of Poland has not delegated to the ECtHR. In the light of the Constitution, the transfer of competence of state organs is possible only in certain matters and only in the procedure specified in Article 90(1) of the Constitution. However, the Constitutional Court has unequivocally held that — even in the qualified procedure under Article 90(1) of the Constitution — a blanket approval for the transfer of competence or transfer of a competence to create competences [*Kompetenz-Kompetenz*, power to create powers (transl.)] is not admissible. The Sejm emphasized that in ratifying the Convention Poland did not transfer any competences to the ECtHR with the use of Article 90(1) of the Constitution. All the more so, the Republic did not transfer a competence to create such competences. The violation of Article 89(1)(2) of the Constitution can be considered also in one more aspect. The Constitution has imposed on Parliament the duty to shape the court system and the competence of the courts. Entrusting the regulation of the pertinent matter to Parliament in the form of statute means that the regulation of this matter by international agreement (or by a normative superstructure over Article 6 of the Convention), if it could at all be regarded as admissible, would have to be preceded by ratification approval given on the path of Article 89(1)(5) of the Constitution, which deals with the regulation by international agreement of matters for which the Constitution requires a statute.

The Sejm concluded that in Polish legal system the key issues relating to the court system are regulated on the constitutional level, while a specific scope of matter has been delegated for regulation by statute, which means the necessity that a given matter be regulated solely by Polish Parliament. Hence, it is constitutionally inadmissible for the ECtHR to intervene in matters relating to the court system or status of judges by way of law-making interpretation of the term 'tribunal established by law' referred to in the first sentence of Article 6(1) of the Convention.

The Sejm concurred with the petitioner's view that the norm empowering the ECtHR to evaluate the process of judicial appointments — in a manner ignoring the provisions of the Constitution and statutes, as well as judgments of the Constitutional Court — violates the

provision concerning approval for the ratification of a specific kind of international agreement. The Sejm concluded that to infer from the Convention norms that were not covered by the ratification procedure constitutes a violation of Article 89(1)(2) and one cannot exclude that it is an action taken *ultra vires*.

The Sejm noted that the Republic of Poland has not transferred to the ECtHR the competence to evaluate the regularity of judicial appointments or to review and evaluate the decisions of the Constitutional Court, let alone to curtail their universally binding force. In the light of the Constitution it is not possible to transfer a competence to create competences, nor has any such transfer to the ECtR ever — in any form — taken place.

The Sejm also noted that the Constitution requires the court system and competence of the courts to be regulated by acts of universally binding law enacted by Parliament, whereas ECtHR decisions creating norms are not sources of universally binding law. The Convention, as an international agreement ratified with prior approval given by statute, although it is placed above a statute in the hierarchy of sources of law, is not a statute. The principle of exclusivity of the statute means that a specific matter must be regulated solely by a normative instrument being a statute, not by a normative act of at least statutory rank.

The Sejm added that its position refers only to norms resulting from the law-making interpretation of the first sentence of Article 6(1) of the Convention by the ECtHR in a specific case (*Reczkowicz v. Poland*). It does not involve evaluation of the constitutionality of the ECtHR's judgment, for that type of review is not within the Constitutional Court's constitutional remit.

Referring to the incompatibility of the disputed norm with Article 179 in conjunction with Articles 187(1) and 187(4) of the Constitution, the Sejm concluded that the essential framework of the mechanism of judicial appointments is regulated on the constitutional plane, whereas the exercise of the Presidential prerogative by the President of the Republic of Poland cannot be reviewed by any authority. The Constitution does not provide for any mechanism for the evaluation of the process of judicial appointment. Such type of mechanism, if it were to exist, would have to be regulated on the constitutional plane.

In the constitutional procedure for judicial appointments the constitutional lawmaker provided for the participation of only two organs of the state, viz. the National Council of the Judiciary and the President of the Republic of Poland. The competences of the two authorities are precisely delineated. In the context of the analysed petition, it must be unequivocally decided by the Constitutional Court whether the Constitution provides for the participation and intervention of the ECtHR in the procedure for the appointment of judges by the President at the NCJ's application. In the Sejm's view, any subsequent intervention by ECtHR in the process of judicial appointments is constitutionally inadmissible.

The Sejm argued that the ECtHR's evaluation of the regularity of appointment to judicial post takes place on the basis of a competence created by the ECtHR by way of law-making interpretation of the first sentence of Article 6(1) of the Convention to engage in the judicial evaluation of that appointment and thereby to co-decide on the exercise by the President of the Republic of Poland and by the National Council of the Judiciary of the powers specified in Article 179 of the Constitution. The Constitution does not provide for the participation of international or supranational courts or tribunals in the procedure for judicial appointments. The ECtHR's embarking on an examination of the regularity of a judicial appointment means that the President and the NCJ's exclusivity in the scope referred to in Article 179 of the Constitution is violated. In the Sejm's opinion, the ECtHR's foray — without constitutional or statutory basis — in the sphere of exclusive competence of the President and the NCJ in respect of judicial appointments means that the exercise of their competence by those authorities is conditional upon a sort of acceptance or negation of the regularity of the selection by the ECtHR, whose participation in the procedure for judicial appointments was not foreseen by the constitutional lawmaker.

In the Sejm's opinion the ECtHR may not be evaluated, negated or disputed Parliament's shaping of the method of election of NCJ members. Nor is the ECtHR competent to make its own — binding on the Republic and at the same time different from the one made by the Polish Constitutional Court — interpretation of the constitutional provision defining the method of deciding on the composition of the NCJ.

The Sejm added that in the Polish legal system the key issues relating to the court system are regulated on the constitutional level, while a specific scope of matter has been delegated for regulation by statute. The sole organ competent to make an interpretation — binding on the Republic of Poland — of Article 187(1) of the Constitution is the Constitutional Court. Also the organ having the exclusive competence to review the constitutionality of statutes enacted by Parliament on the basis of Article 187(4) of the Constitution is the Constitutional Court. The Constitution has not provided for any participation of the ECtHR in this regard.

The Sejm, referring to the incompatibility of the disputed norm with Article 190(1) of the Constitution, concurred with the petitioner's view that neither domestic nor international bodies may negate the consequences of the decisions of the Constitutional Court. The ECtHR cannot deny the decisions of the Constitutional Court their binding force, nor evaluate and choose which of the judgments of the Constitutional Court it approves of and accepts and which ones it decides to be arbitrary or insufficiently justified. Nor may the ECtHR ignore the status of the statements of reasons of the Constitutional Court's judgment, which do not have universally binding force.

The Sejm noted that the Constitution vests the decisions of the Constitutional Court with two special attributes, namely universally binding force, and finality. These two qualities create a principal difference between the decisions of the Constitutional Court and the decisions of the courts, including without limitation the Supreme Court (including without limitation the interpretative resolutions). It is, therefore, not admissible to place the decisions of the Constitutional Court and court decisions on the same footing.

The Sejm concluded that as a result of the ECtHR's handing down of a decision that ignores constitutional provisions and the decisions of the Constitutional Court a state of far-reaching legal uncertainty emerges. The existing legal state of affairs shaped on the basis of the decisions of the Constitutional Court — including without limitation those concerning the interpretation of Article 187(1)(2) of the Constitution — is in a conflict with the determinations made by the ECtHR with the omission of the Constitutional Court's decision (in particular the findings made by the Constitutional Court in cases *K 5/17*, *K 12/18*, *U 2/20* and *Kpt 1/20*).

In the Sejm's view, the ECtHR, when determining whether the 'tribunal established by law' condition is met, cannot place the binding force of the Constitutional Court's determinations contained in the holding of a judgment with the Constitutional Court's statements made merely in the statement of reasons of another judgment, let alone *obiter-dictum* statements.

In its analysis of the allegations of unconstitutionality from the third *tiret* of the prayers of the petition, the Sejm concluded *in al.* that the constitutional problem formulated in the third *tiret* of the prayers of the petition comes down to answering the question whether the competence foreseen by Article 188(1) of the Constitution for the constitutional court to judge the constitutionality of statutes is exclusive or shared.

The Sejm expressed the view that the constitutional lawmaker has ordained the exclusivity of the Constitutional Court's adjudication in matters of the constitutionality of statutes, as well as compatibility of statutes with international treaties ratified with prior approval given by statute. The granting of the above power to the Constitutional Court at once attests to the constitutional lawmaker's choice in favour of a concentrated model of constitutional review. This is accompanied by vesting the Constitutional Court's judgments with the special qualities referred to in Article 190 of the Constitution. In the Sejm's opinion, this position finds support in numerous constitutional provisions.

The Sejm added that the Attorney General's petition, although lodged in the abstract-review procedure, shows a direct link to specific decisions *coram* the Supreme Court. Against this background, it will be expedient to note that from the perspective of the Constitutional Court's exclusivity in the adjudication of cases set out in Article 188(1) of the Constitution, the defect with which the resolution of the combined chambers of the Supreme Court is fraught is of qualified nature. Namely, the Supreme Court found a specific provision of the Act on the National Council of the Judiciary to be unconstitutional in a situation when its constitutionality had previously been affirmed by a Constitutional Court decision. Thus, the Supreme Court's decision contains a different outcome than the prior decision of the Constitutional Court.

Considering the foregoing, the Sejm prayed to find that the first sentence of Article 6(1) of the Convention, in the scope in which it permits domestic or international courts to conduct a binding review of the constitutionality and compatibility with the Convention of statutes concerning the court system and competence of courts, as well as the statute governing the National Council of the Judiciary, and on the basis of that evaluation decide whether the 'tribunal established by law' condition is satisfied, is incompatible with Article 188(1) of the Constitution.

3. The President of the Republic of Poland, in a letter dated 18 January 2022, took the position that the convention pertains to matters set out in Article 89(1)(2) of the Constitution and thus civil rights, freedoms or obligations set out in the Constitution. The President emphasized that under the existing Constitution judicial appointments are defined as Presidential prerogative. The President of the Republic's orders of appointment to judicial post are acts of direct application of constitutional norms. Submitting the orders of the President of the Republic dealing with appointment to judicial post to judicial review, whether by domestic or international courts, would entail the loss of the character of independence by the judicial branch because it would be dependent on the evaluations and decisions of other judicial bodies, which, in reliance on procedures and criteria unknown to and inadmissible under the Constitution, could undermine the status of any specific person as a holder of the authority to judge. At the same time, the provisions governing judicial appointments do not foresee any verification of the President's appointment orders. The act of appointing a judge has the character of finality and is not subject to any review, whether 'in the course of instances' or otherwise. Nor is it subject to verification by judicial review.

The President of the Republic asserted that the consequence of the new state of legal affairs grounded in the ECtHR's decisions is the possibility of change (modification) of the contents of the constitutional competence of the President of the Republic, consisting in stripping away a judge's jurisdiction right.

In the President's view, the introduction into the legal system of such rules of conduct (i.e. normative contents), including without limitation inferred from the interpretation of the provisions of international treaties binding on the Republic of Poland, as result in a change (modification) of the contents of the constitutional competence of the President of the Republic to appoint judges upon application by the NCJ, violates the principle of supremacy of the Constitution.

The President asserted that such violation of Poland's Constitution by the ECtHR and by domestic courts, disapproved of in the Attorney General's petition to the Constitutional Court, cannot by any means be accepted by the President of the Republic, whose basic constitutional tasks include having care that the Constitution is followed.

4. In a letter of 18 January 2022, the Minister of Foreign Affairs stated that no right to hold a public post entailing the administration of justice is guaranteed by the Convention. To express opinions about the appropriateness of a choice made by domestic organs or such criteria as should be taken into account is not the task of the ECtHR. The Minister of Foreign

Affairs also analysed the text of the judgment of the ECtHR's Grand Chamber in *Guðmundur Andri Ástráðsson v. Iceland*, of 1 December 2020.

The Minister of Foreign Affairs, furthermore, observed that the ECtHR's judgments are declaratory by nature, leaving states with a choice of means to apply in the domestic legal system in order to meet the obligations arising from Article 46 of the Convention. An ECtHR judgment, in principle, is limited to a finding of Convention violation and decision concerning the amount of compensation, if any. What such a judgment does not trigger is a direct cassatory or annulatory effect either on the decision (case) in the context of which it was handed down, or — *a fortiori* — other judicial decisions, administrative acts or normative acts. The implementation of the judgment (determination of the method by which to implement it) belongs to the respondent state, and only the adequacy of the implementation is subject to evaluation by the Committee of Ministers. When the ECtHR judgment has become final, in accordance with the rules adopted by the Committee of Ministers for the supervision of the implementation of the judgments, the respondent state has the obligation to submit to the Committee of Ministers, within 6 months, a plan of action it intends to take, or alternatively a report on actions already taken with a view to the implementation of the ECtHR's final judgment. The information submitted by the state in the aforementioned documents is subsequently analysed by the competent organs of the Council of Europe and delegations of states sitting in the Committee of Ministers, which may submit comments or request additional clarification and adopt such decisions as may be appropriate to that end. In principle, the Committee's supervision of the implementation of the ECtHR's judgment takes place in special sessions in the human-rights format, currently called four times a year. Within its powers, the Committee of Ministers may take a number of actions that are political or legal by nature.

5. The National Council of the Judiciary, pursuant to Article 63⁵(1) of the Act of 17 November 1964 — Code of Civil Procedure (Dz.U.2021.1805, as amended) in conjunction with Article 186(1) of the Constitution and Article 36 of the Act of 30 November 2016 on the Organization of and Procedure Before the Constitutional Court (Dz.U.2019.2393) in conjunction with Article 3(2)(1) of the Act of 12 May 2011 on the National Council of the Judiciary (Dz.U.2021.269), took the position that the first sentence of Article 6(1) of the Convention is incompatible with the provisions of the Constitution in the scope in which it:

- (a) empowers the ECtHR to create in national law a judicially protected individual right in a judge to hold an administrative function in the common judiciary of the Republic of Poland, which is incompatible with Article 8(1) Article 89(1)(2) and Article 176(2) of the Constitution of the Republic of Poland;
- (b) the condition 'established by law' as contained in the first sentence of Article 6(1) of the Convention fails to recognize universally binding provisions of the Constitution and ordinary statutes, as well as universally binding judgments of Polish Constitutional Courts as a basis for the establishment of a court, which is incompatible with Article 89(1)(2), Article 176(2), Article 179 in conjunction with Article 187(1) in conjunction with Article 187(4), and Article 190(1) of the Constitution;
- (c) permits domestic or international courts to conduct a binding review of the constitutionality and compatibility with said Convention of statutes concerning the court system and competence of courts, as well as the statute governing the NCJ in order thus to determine whether the 'tribunal established by law' condition contained in the first sentence of Article 6(1) of the Convention is satisfied, which is incompatible with Article 188(1) of the Constitution.

The NCJ concluded that the appointment or dismissal of the president of a common court is an organizational and order-keeping action taken as part of the administration of the justice system, i.e. an action taken with a view to ensuring the proper course of the court's international functioning, directly connected with the court's exercise of the tasks of the justice

system and performance of other tasks in the area of legal protection, taken, however, by the Minister of Justice on statutory authority.

In the NCJ's view, the systemic position of the president (or vice-president) of a common court does not rest on a constitutional legal basis, whereby it is regulated by way of statutes governing the system of the various types of courts.

In the NCJ's view, the NCJ as a constitutional public authority, due to bringing together in its composition the representatives of the legislative, executive and judicial branches and the enumeration in Article 10(2) of the Constitution of entities composing the judicial branch, does not constitute an 'additional' entity belonging in the judicial branch.

6. The Civil Rights Ombudsman (hereinafter 'CRO'), by letter dated 2021, acceded to the proceedings before the Constitutional Court and took the position that the proceedings must be discontinued due to the inadmissibility of entering a judgment. In the event the Constitutional Court did not concur with that position, the CRO prayed to find that the first sentence of Article 6(1) of the Convention, in the scope in which:

- (a) it empowers the ECtHR to create in national law a judicially protected individual right in a judge to hold an administrative function in the organizational structure of the common judiciary of the Republic of Poland is not incompatible with Article 8(1) Article 89(1)(2) and Article 176(2) of the Constitution of the Republic of Poland;
- (b) the condition 'established by law' as contained therein fails to recognize universally binding provisions of the Constitution and ordinary statutes, as well as universally binding judgments of Polish Constitutional Courts as a basis for the establishment of a court is not incompatible with Article 89(1)(2), Article 176(2), Article 179 in conjunction with Article 187(1) in conjunction with Article 187(4), and Article 190(1) of the Constitution;
- (c) it permits domestic or international courts to conduct a binding review of the constitutionality and compatibility with said Convention of statutes concerning the court system and competence of courts, as well as the statute governing the NCJ in order thus to determine whether the 'tribunal established by law' condition is satisfied is not incompatible with Article 188(1) of the Constitution.

By letter of 17 January 2022, laying out the reasons for the position taken, the CRO concluded that the proceedings should be discontinued. For the object of the Attorney General's petition is a specific manner of interpretation of the disputed provisions of the Convention made in several individual cases before the ECtHR. Such review is inadmissible due to the constitutionally defined scope of competence of the Constitutional Court, which does not provide for any review of acts of application of the law. The manner in which the prayers of the petition are drafted, by addressing the challenge to a delineated scope of the disputed Convention provisions makes a direct reference to the outcome of the ECtHR's interpretation in *Reczkowicz v. Poland* (22 July 2021), *Broda and Bojara v. Poland* (29 June 2021) and *Dolińska Ficek and Ozimek v. Poland*. In the CRO's view, the three ECtHR decisions are the *de-facto* object of the dispute in this case, and not the Convention provision stated in the prayers. The Constitutional Court does not have the competence to review acts of application of the law or to make universally binding interpretations of provisions in reference to specific sets of facts.

Moreover, in the CRO's opinion, the first sentence of Article 6(1) of the Convention as disputed by the Attorney General in a scope formula does not meet the requirement of there being a stable, commonly held and harmonious interpretation similar to the one identified in the prayers of the petition.

The CRO noted the impossibility of derogation of acts of international law on the basis of acts of state organs from the perspective of the rules of that law. The CRO asserted that there is no such competence either in the Constitutional Court or any other public authority in the Republic of Poland. From the perspective of constitutional axiology and the duty defined

in its Article 9 for the public authorities of the Republic of Poland to comply with international law, any violation of international obligations and deviation from Article 9 of the Constitution could be justified only by the necessity of offering broader protection to individual rights and freedoms in the face of a restriction.

The CRO concluded that irrespective of any incompatibility with the Constitution, the binding force of ECtHR judgments in the sphere of international law arises from Article 46(1) of the Convention, which is not in dispute in the present case.

The CRO pointed out the legal significance of the ECtHR judgment in *Xero Flor v. Poland* (application no. 4907/18). In the CRO's view, it follows from that judgment that a member of the Constitutional Court's panel in the present case was elected to the Court in manifest violation of the law.

The CRO argued that — in the context of allegations that the ECtHR has exceeded its competence to interpret the provisions of the Convention by giving Article 6(1) of the Convention a new meaning — even the currently established, broader than original, interpretation of the possibility of exclusion of the right to court in the case of holders of public offices started by the judgment in *Vilho Eskelinen* is narrower than a literal reading of Article 6(1) of the Convention would suggest. In this context, the CRO observed that the judgment in *Broda and Bojara v. Poland* is one of the many cases in which the ECtHR has applied Article 6 of the Convention to disputes between state authorities and judges, basing the application of the right to court on the fact of violation of the judges' individual and person interests, even within the boundaries of a service relationship founded on the principle of loyalty in matters strictly linked to the exercise of state authority. The CRO noted that the concept of civil rights and obligations under the Convention is autonomous and independent from terms such as the Polish-law notion of an individual right (*prawo podmiotowe*) or legal interest (*interes prawny*).

The CRO observed that the application of acts of international law in Polish legal order within the limits of the contextual and teleological interpretation of such acts violates neither Article 8 nor Article 89(1)(2) of the Constitution, as the need to embark on such kind of interpretation constitutes one of the principles of international public law having the status of customary law.

The CRO noted that even if there is no right in a judge to hold any specific position within the administrative structure of the judiciary under Polish law, there still exists a broad spectrum of other civil rights linked to a judge's legal interest in the assurance of stability of such a judge's service relationship in that regard, which are protected under Polish law.

In the CRO's view, for the petitioner to be content with restricting the constitutional test in the second *tiret* of the prayers of the petition only to Article 89(1)(2), Article 176(2), Article 179 in conjunction with Article 187(1), in conjunction with Article 187(4) and Article 190(1) of the Constitution is incorrect due to the axiology of Polish constitutional order, in the light of which the greatest importance in the context of the cases concerned in the present case should be placed on review conducted with Article 45(1) of the Constitution as the test, which was left out by the petitioner.

The CRO asserted that neither provisions allowing specific rules and principles concerning the court system and competence of courts to be interpreted from provisions of international law, nor direct regulation of such matters in such kind of provisions are incompatible with Article 176(2) of the Constitution.

The CRO noted that it is not true that the ECtHR in *Reczkowicz v. Poland* ignored the Constitution, statutes, and the Constitutional Court's universally binding judgments. Determinations arising from such sources of law were taken by the ECtHR into account, although within specific confines of their effectiveness and with allowance for the regularity of their enactment. The petitioner's challenge in this regard is formulated too broadly.

The CRO observed that the Constitutional Court's pronouncement on the constitutionality of a legal provision does not automatically mean that such a provision should be regarded as compatible or incompatible with international regulation.

In the CRO's view, the Constitutional Court should follow the principle of sympathy to international law (Article 9 of the Constitution) and interpret the Constitution in a manner sympathetic to the Convention, also being mindful of how, in the light of Article 32 of the Convention, the Court in Strasbourg is the sole body empowered to make binding determinations of the scope of a state-party's obligations under the Convention. In the CRO's opinion, this, however, does not change the fact that ECtHR judgments have limited effectiveness in domestic law. In this connection, Article 6(1) of the Convention in the scope formulated by the petitioner must not be regarded as incompatible with the Constitution.

The CRO noted that the challenge in the form encapsulated by the third *tiret* of the prayers of the Attorney General's petition is incorrect because it proceeds from a mistaken assumption. This is because the interpretation offered by courts in individual cases does not enjoy the quality of 'binding' interpretation within the meaning assigned by the petitioner, i.e. violating the competence of the Constitutional Court to adjudicate on the constitutionality of the provisions of specific legal acts. The courts' interpretations are individual and specific, applicable only within the strict confines of a concrete legal dispute.

Granting the petitioner's challenge would have to rely on proof that Article 6(1) of the Convention — in the meaning interpreted by the ECtHR — vests domestic courts with the right to make universally binding interpretations, binding on courts in other cases, which said provision clearly does not do.

By letter of 24 January 2022, the CRO referred to the Attorney General's letter of 13 January 2022. The CRO asserted that under the Constitution the competence specified in its Article 188(2) and the competences arising from its Article 91(2) co-exist without excluding one another. Due to the co-existence of the two competences and the differences among their essential features, one could not possibly conclude that Article 6(1) of the Convention, in the scope it empowers the courts to test statutes against the provisions of said Convention as an international agreement ratified by statute, is incompatible with the Constitution.

The CRO concluded that the challenge formulated in the third *tiret* of the petition of 9 November 2021 in the modified wording specified in the Attorney General's letter of 13 January 2022 is not correct and Article 6(1) of the Convention in the scope so formulated is not incompatible with Article 188(2) of the Constitution.

Responding to the Attorney General's remarks on the ECtHR judgment in *Dolińska-Ficek and Ozimek v. Poland*, the CRO asserted that said judgment could not possibly be regarded as affirming ('indirectly') the normative scope of Article 6(1) of the Convention as determined in the judgment in *Broda and Bojara v. Poland*. The CRO noted that in the text of the judgment in *Dolińska-Ficek and Ozimek v. Poland*, the ECtHR mentioned the judgment in *Broda and Bojara v. Poland* only as an example of application of Article 6(1) of the Convention within the framework of application of the criteria identified in *Vilho Eskelinen* for disputes relating to judges' employment disputes, without referring to the question of whether the findings and the interpretation made in that judgment were binding on the ECtHR in *Dolińska-Ficek and Ozimek v. Poland*. In the CRO's view, neither does it follow from the judgment in *Dolińska-Ficek and Ozimek* that the ECtHR gave the interpretation used in that judgment a normatively binding character relative to future decisions. The ECtHR when adjudicating a specific case has no such power, and the Convention system is not based on the rules of judicial precedent. The CRO cited Supreme Court judgments denying to apply Article 6(1) of the Convention in a manner concurring with the interpretation to which the petitioner refers in the text of the allegations. Considering the foregoing, in the CRO's opinion, that interpretation cannot at present possibly be regarded as being harmonious, stable and commonly held.

II

The main hearing took place on 19 January 2022, 25 January 2022 and 10 March 2022. It was attended by the participants, except for the Civil Rights Ombudsman (duly cited). The participants sustained the positions taken in their written pleadings.

In the main hearing on 19 January 2022 the representative of the President of the Republic additionally prayed that the judgment be given a positive formulation ('is compatible' or 'is not incompatible'). In the main hearing on 10 March 2022 said representative additionally moved to consider deferring the judgment due to the international situation (Russia's aggression against Ukraine).

III

The Constitutional Court considered as follows:

1. Introductory remarks.

1.1. The object of the Attorney General's (hereinafter also the 'Petitioner') petitioner are norms derived from the first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms made at Rome on 4 November 1950, as amended by Protocols 3, 5 and 8 and supplemented by Protocol 2 (Dz.U.1993.61.284, as amended; hereinafter also the 'Convention').

The Petitioner challenged the constitutionality of the first sentence of Article 6(1) of the Convention in the scope in which:

- (1) said provision empowers the European Court of Human Rights (hereinafter also the 'ECtHR') to create in national law a judicially protected individual right in a judge to hold an administrative function in the organizational structure of the common judiciary of the Republic of Poland;
- (2) the condition 'tribunal established by law' as contained in said provision fails to recognize the universally binding provisions of the Constitution of the Republic of Poland and ordinary statutes, as well as universally binding judgments of Polish Constitutional Courts as a basis for the establishment of a court;
- (3) said provision permits domestic or international courts to conduct a binding review of the constitutionality and compatibility with the Convention of statutes concerning the court system and competence of courts as well as the statute governing the National Council of the Judiciary in order to determine whether the 'tribunal established by law' condition is satisfied.

1.2. The Attorney General's petition cited as basis Article 191(1)(1) in conjunction with Article 188(1) of the Constitution. Thus, it initiated the constitutional review of the law before Constitutional Court on the abstract path (meaning the absence of a direct link between the Court's adjudication and any individual case). The Attorney General identified such norms arising from Article 6(1) of the Convention as invited the Attorney General's doubts as to their compatibility with specific constitutional tests and, being the organ task with acting as the guardian of legality, brought the relevant petition. The legal basis cited for initiating the constitutional review indicates the intentions of the Petitioner, who, in the exercise of constitutional powers, asks the Constitutional Court to exercise the competence given to it by the constitutional lawmaker to adjudicate on the compatibility of international treaties with the Constitution.

1.3. The Convention for the Protection of Human Rights and Fundamental Freedoms, as an international agreement, can be the object of review in proceedings before the Constitutional Court. This follows directly from Article 188(1) of the Constitution. The latter's wording suggests that no such agreement, irrespective of whatever role it may fill in the

system of international law, and irrespective of the procedure by which Poland becomes bound by it, can be excluded from the cognizance of the Constitutional Court, if it is international law binding on Poland.

In creating the catalogue of sources of law in the Constitution of 1997 the lawmaker consciously set a specific position for international treaties in that system, and through the act of ratification made some international treaties a source of universally binding law (Article 87(1) of the Constitution). In the case of the Convention for the Protection of Human Rights and Fundamental Freedoms, which the Republic of Poland was bound by in 1993, inclusion into the catalogue of sources of law followed on the basis of Article 241(1) of the Constitution ('International agreements, previously ratified by the Republic of Poland upon the basis of constitutional provisions valid at the time of their ratification and promulgated in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), shall be considered as agreements ratified with prior approval granted by statute, and shall be subject to the provisions of Article 91 of the Constitution if their connection with the categories of matters mentioned in Article 89, para. 1 of the Constitution derives from the terms of an international agreement.').

It is beyond any debate, therefore, that the Petitioner was in a position to challenge the norms of the Convention, because the power to do so arises unequivocally from the Constitution. Moreover, one should add that in the existing jurisprudence the norms arising from the Convention have already been successfully challenged in proceedings before the CC (see *K 6/21*, judgment of 24 November 2021, OTK ZU A/2022, item 9).

Here, it must also be pointed out that the norms reviewed in *K 6/21*, even though also derived from the first sentence of Article 6(1) of the Convention, did not fit within the scope of the challenge we are dealing with in the case at hand. For this reason, there is no superfluity of adjudication necessitating discontinuance.

2. The principles behind the Constitutional Court's determination of the scope of the challenge.

2.1. Given as the Convention for the Protection of Human Rights and Fundamental Freedoms is an international agreement and on the basis of Article 188(1) of the Constitution may be the object of constitutional review by the Constitutional Court, the CC had to begin with determining the proper scope of the challenge arising from the Attorney General's Petition.

Before discussing this process, the Court finds it expedient to explain the general principles for determining the scope of challenge in proceedings in the matter of hierarchical review of the compatibility of the law with the Constitution, including without limitation the principles relating to the reconstruction of the constitutional test, especially in a situation when the object of the review is an international agreement.

2.2. Although Article 188(1) of the Constitution provides for the Constitutional Court's adjudication in matters of compatibility of statutes and international treaties with the Constitution, in practice the object of review before the Constitutional Court may be formulated variously. In Article 188(1) of the Constitution the constitutional lawmaker employed terms denoting types of normative acts. Still, there can be no doubt that the object of the Court's adjudication may be not only a normative act as a whole (all the more so considering that, in practice, the review of a whole act occurs somewhat rarely and, in principle, refers to the constitutionality of the competence to enact it or the procedure used) but also a part of it expressed, in terms of redaction, in the form of one or more legal provisions or, in substantive terms, covering legal norms. It has come to be generally held that legal norms are the actual object of the Constitutional Court's review whenever the Court rules on the compatibility of the contents of the reviewed object with the constitutional test. The legal norm is decoded on the basis of a specific legal provision contained in a specific

normative act. The Constitutional Court's decisions always refer to a specific provision, i.e. editorial subdivision of a normative act, being the textual basis of a legal norm. Hence, the object of the pleading that initiates the proceedings before the Constitutional Court are provisions from which specific norms arise. A constitutional challenge must refer to a norm linked to a specific, concrete legal provision (cf. A. Mączyński, J. Podkowiak, commentary on Article 188 of Polish Constitution, [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP, t. 2, Komentarz do art. 87–243*, , Warszawa 2016, ¶ 77).

This view is supported also by existing CC jurisprudence, whereby, 'in proceedings before the Constitutional Court the object of review may be a normative act, a part of a normative act, or a legal provision, which, however, always has to be understood as the examination of the constitutionality of the norms expressed therein. For the Constitutional Court rules upon the constitutionality or unconstitutionality of legal norms. It must be reminded that it is between norms ordered by competence ties or content ties the relationship of incompatibility can exist,' (see Constitutional Court, *P 15/13*, order of 19 November 2014, OTK ZU nr 10/A/2014, item 115).

If reviewing the competence to issue the normative act or the procedure for its enactment, the Constitutional Court rules either upon the compatibility of such act with the Constitution or upon the compatibility of a provision enacted in a specific procedure with the Constitution.

2.3. In the case at hand, the Petitioner challenged neither the Convention as a whole, nor its provisions understood as editorial subdivisions of a normative act; this follows from the presentation of the challenges in the prayers of the petition. Instead, the Attorney General problematized the constitutionality of several legal norms derived from Article 6(1) of the Convention, as attested by addressing the challenge to a scope whereby it can be discerned what rule of conduct (norm) arising from such editorial unit is the target. For there can be no doubt that, in line with principles of legal interpretation, from a single legal provision more than one legal norm can be derived.

From Article 67 of the Act of 30 November 2016 on the Organization of and Procedure Before the Constitutional Court (Dz.U.2019.2393; hereinafter the 'PBCCA') it follows that the Court is bound in its adjudication by the scope of challenge identified in the petition, legal question or constitutional complaint (Article 67(1)). The scope of the challenge comprises the identification of the disputed normative act or part of act (identification of the object of review) and formulation of the challenge of incompatibility with the Constitution, a ratified international agreement or statute (specification of the test) – (Article 67(2)). At the same time, the CC should examine in the course of the proceedings all of the relevant circumstances in order to achieve the comprehensive explanation of the case (Article 69(1) PBCCA) and is not bound by the evidentiary motions of the participants of the proceedings but may also admit *ex officio* all evidence it deems to be useful to the explanation of the case (Article 69(3) PBCCA).

From the above it can be inferred that the CC, although it should not modify the scope of the challenge, is allowed to reconstruct it on the basis of the prayers and reasons of the pleading that initiates the proceedings. One of the stages of the examination of the hierarchical compatibility of norms is for the Constitutional Court to interpret the provision specified as the object of the review and the provision serving as the test for the review. This means that it is up to the Constitutional Court — within the scope covered by the prayers of the initiator of the proceedings — to make the final determination of the object of the review and of the test. In order to distil the legal norm from the disputed editorial unit of a normative act, the Court relies to the widest extent possible on generally accepted methods of legal interpretation (without limiting itself to any single method). It often considers the reviewed editorial unit's meaning arising from the practice, especially from the decision-making history.

It also draws upon the literature, not infrequently invoking commentaries, academic publications or the opinions of legal experts.

Irrespective whether the challenge targets a given editorial unit of a normative act or a scope, when reviewing the constitutionality of the specified contents the Court decodes the object of the challenge and distils the normative contents challenged by the initiator of the proceedings. In this way, the Court verifies that the norm specified in the petition (or legal question or constitutional complaint) has the specified content. Then, it confronts the norm derived (i.e. interpreted) from the disputed provision with the constitutional test. Always the object of review in any such case is a specified legal norm arising from the provisions and not any act of application of that norm.

The initiator of the proceedings before the Court, by identifying specific editorial units of a normative act as the object of review, must also decode from them norms having a hierarchical relationship with other norms of the legal system. This decoding [literally: reconstruction (transl.)] may be based on linguistic, systemic and functional interpretation, as well as different types of legal reasoning. Given that the petitions lodged with the Constitutional Court pursuant to Article 191 of the Constitution initiate *ex-post* constitutional review, the Court, when decoding the legal norms, should also consider the manner in which the disputed normative acts are applied. This is because the practice is what makes possible the complete determination of the rules of conduct derived from the provisions.

The above contexts must also be considered by the Constitutional Court when decoding the object of the review. In the case of a petition, which is a form of abstract initiation of review, the Constitutional Court no longer has to demonstrate that it is ruling upon a given norm that has served as the basis of the final disposal of the complainant's case or that the outcome of a case pending before the referring court depends on the Constitutional Court's ruling. Thus, it has a broader opportunity to determine the proper scope of the challenge than in cases initiated by constitutional complaints or legal questions.

When decoding the object of the challenge, and thus a legal norm, the Constitutional Court confirms the existence of a given norm of general and abstract nature. The Court does so by the interpretation of an editorial unit being the object of its review and only later does it confront such norms, which may be used in the process of application of the law, with the test. In this sense one has to concur with the thesis, solidified by the CC's existing decision-making history, that the practice of application of the law, or the interpretation itself, is not the object of the proceedings before the CC, even though that thesis is essentially of scarce functional significance during the adjudication. For it requires one first to narrow down what is to be understood by the notions of 'practice of application of the law' and 'interpretation of the law'.

Here, the Constitutional Court recalls that in both of these cases we can analyse the problem from the perspective of the process and from the perspective of the outcome of that process. If we understand the application of the law as the determination of the legal consequences (effects) of certain facts by the authorized state organ, and the result of that is a specific legal act, then it must be concluded that where the Constitutional Court considers the compatibility of the contents of legal norms with the Constitution, reviewing the manner of application of that norm in a specific case and the act of application of the law are outside the remit of the Constitutional Court's review. Otherwise the Constitutional Court would be one more link in the judicial chain hearing individual cases in the course of instances or on extraordinary paths.

If, however, the initiator of the proceedings lays the challenge of violation of the competence to issue an act being the carrier of legal norms or the procedure of enactment (of course, within the spectrum of acts the CC is authorized to review), the Constitutional Court enters the sphere of application of the law, although not in the context of reviewing the application of the act undergoing review but only in the sense of analysing the activities

leading up to the establishment of a given act or norm, irrespective of their external shape (e.g. statutes, resolutions or court rulings).

Where interpreting the law, if we assume that doing so is a process leading up to the determination of the contents of a legal norm contained in a legal provision, as well as the outcome of that process, such outcome being a legal norm with specific contents, then the Constitutional Court is unquestionably authorized to review its compatibility with the Constitution in the aspect of the compatibility of the contents. The Court also may — if the challenge targets the procedure by which the norm was enacted — examine the process of interpretation itself and determine whether it was compatible with constitutional principles. This is all the more justified concerning that one of the kinds of interpretation is systemic interpretation, which *in.al.* addresses the necessity of ensuring the hierarchical consistency of the law and consistency with legal principles, including without limitation the constitutional principles.

Accordingly, given as the Constitutional Court must ultimately specify — on the basis of the pleading initiating the constitutional review — what norm it will be reviewing and to that end the Court decodes that norm on the basis of the petitioner's (complainant's, referring court's) challenge by embarking on interpretation, there is no doubt that in *ex-post* review the Court considers the way in which a given norm is applied by public authorities (see *K 6/21*, judgment of 24 November 2021).

The Constitutional Court also draws upon court decisions and literature in order to explain the disputed legal solutions, whether or not they are uniformly [or: harmoniously (transl.)] understood. Nor could one deny that the contents of legal norms are distilled through the process of interpretation while applying the law.

The Constitutional Court's present panel approves of this position and affirms that if a specific way of understanding of a statutory provision has become settled in a self-evident manner and especially if it has found unequivocal and authoritative expression in the decisions of the Supreme Court or of the Supreme Administrative Court, then one has to conclude that the provision has — in practice — taken such contents as our country's highest judicial instances have found in it (see in particular the Constitutional Court's judgments in *PP 11/98*, of 12 January 2000, OTK ZU 1/2000, item 3; *K 33/99*, of 3 October 2000, OTK ZU 6/2000, item 188; *P 3/03*, of 28 October 2003, OTK ZU 8/A/2003, item 82; and e.g. CC judgments in *SK 22/99*, of 8 May 2000, OTK ZU 4/2000, item 107; *P 3/01*, of 6 September 2001, OTK ZU 6/2001, item 163; *K 42/07*, of 3 June 2008, OTK ZU 5/A/2008, item 77; *K 10/08*, of 27 October 2010, OTK ZU 8/A/2010, item 81; *K 6/21*, of 24 November 2021).

The Constitutional Court also agrees that the object of review may be a legal norm decoded from a provision in accordance with settled practice, if that practice is uniform [or: harmonious (transl.)] and consistent (see, in lieu of many, e.g. *SK 32/04*, order of 21 September 2005, OTK ZU 8/A/2005, item 95, and the decisions cited therein, as well as *K 6/21*, judgment of 24 November 2021). This method of decoding a norm from a provision is one of the forms of determination, by the Constitutional Court, of the contents of the legal norm under review.

Notwithstanding the foregoing, however, the Constitutional Court notes that if in the process of adjudication on the compatibility of the contents of a legal norm with the constitution one must identify the norm under review, which can be done by reconstructing the object of the challenge, which includes interpretation, then the Constitutional Court — having the freedom of action in the given scope — may follow different methods, including without limitation the analysis of the ordinary practice of application of the norm. If the Constitutional Court can ascertain the existence of a given norm in the legal system and therewith the possibility (potentiality) of that norm's application, then the constitutional review of that norm is admissible. The sole condition in such a case is only that the relevant norm must be derived from one or more editorial units of a normative act that falls within the

cognition of the Constitutional Court. Only by adopting this reasoning (approach) can the Constitutional Court achieve the full exercise of its competence and the protection of the principle of constitutionalism.

The above findings apply both to domestic law and the international law binding on the Republic, which, pursuant to constitutional provisions, may be the object of review by the Constitutional Court.

3. International law in proceedings before the Constitutional Court.

When the object of review in proceedings before the Constitutional Court is a norm of international law, the Court, during reconstruction of the object of the challenge — by applying the above-discussed general methods of operation in the process of review — must also consider the specificity of that legal system along with its principles. Because the review of norms of international law has more and more frequently been coming up before the Constitutional Court for ruling, the Court has deemed it expedient, for the sake of a better explanation of its conduct in the present case, to recall several general matters linked to the essence of international law and the relationship between domestic law and international law, as well as the specificity of the Convention being reviewed in these proceedings.

3.1. The essence of international law and its relationship with domestic law

The Constitutional Court recalls that international law and domestic law are two self-contained legal systems with significant differences between them (cf. W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa, 1999, 1ff).

Every domestic legal system, of course, is characterized by its own specificity, but one can say that a common characteristic of domestic legal systems is the hierarchical ordering of sources of law. In Poland the catalogue of sources of law is specified by Article 87 of the Constitution (although it must be added that a regulation of the President of the Republic with the power of a statute, which is not listed in Article 87 but is mentioned in Article 234 of the Constitution and recognized as a source of universally binding law equal to a statute also is a source of law). The hierarchical precedence of sources of law is ordained by Article 8(1) of the Constitution (the principle of supremacy of the Constitution) but to a certain extent also by Articles 188(1) to 188(3) of the Constitution, identifying the relationships among the various normative acts in the procedure of adjudication on hierarchical compatibility.

By contrast, international law is, generally speaking, a non-hierarchical system. All provisions/norms of that law essentially have the same binding force (exceptions: Article 103 of the Charter of the United Nations, and peremptory norms). There exists no formal catalogue of sources of law, but the catalogue of bases for the ICJ's adjudication specified in Article 38(1) of the Statute of the International Court of Justice (hereinafter the 'ICJ', Dz.U.1947.23.90) is generally accepted as such (international treaties, international custom, general principles of law, court decisions and scholars' opinions, provided that the order of enumeration is of no significance but merely constitutes an arrangement in the order of degree of definiteness). All sources are *aequidinate*, albeit the former three types are regarded as principal and the latter two as subsidiary [or: auxiliary (transl.)] sources. This distinction suggests that the subsidiary group should be used if there is no source from the principal group (see e.g. W. Czapliński, A. Wyrozumska, *ibidem*, 17–18; J. Gilas, *Prawo międzynarodowe*, Toruń 1999, 50–70; cf. A. Klafkowski, *Prawo międzynarodowe publiczne*, Warszawa 1966, 29–39). Outside of this catalogue, unilateral acts of states and certain resolutions of international organizations are identified as sources of law (see e.g. W. Czapliński, A. Wyrozumska, *ibidem*, 90–109; J. Gilas, *ibidem*, 71–78).

The Court also recalls that domestic law is created by a special legislative organ (Parliament or other public authorities empowered to do so). Legal rules enacted in the constitutional procedure are binding on other subjects (recipients of the domestic order).

By contrast, international law, binding on states, is created by those states (directly, or indirectly through international organizations) for their own use. In other words, this law is of consensual nature and derives from the will of the states (see Permanent Court of International Justice, *S.S. Lotus (France v. Turkey)*, judgment of 7 September 1927, P.C.I.J., Series A, No. 10; this was affirmed by subsequent decisions, see *in. al.* PCIJ, *Chorzów Factory (Germany v. Poland)*, judgment of 13 September 1928, P.C.I.J., Series A, No. 17, p. 28; International Court of Justice, *Fisheries (United Kingdom v. Norway)*, judgment of 18 December 1951, I.C.J. Reports 1951, pp. 124, 143; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, I.C.J. Reports 1996, §§ 21, 22, 52; cf. also L. Ehrlich, *Prawo narodów*, Lwów 1927, 86). This is the effect of sovereignty, which constitutes the regulatory idea of international law. For this reason states — outside of exceptional cases (e.g. peremptory norms, so-called tacit consent) — are bound only by those provisions (norms) they have participated in creating or consented to be bound by in the manner prescribed by relevant procedures.

International law, in principle, binds in a state's external relations. Domestic law regulates the internal functioning of the state. Here, the Constitutional Court notes that the two systems had functioned in parallel (separately) until such time as the problem of their mutual relationship and impact emerged. The latter was caused primarily by two factors:

- firstly, issues traditionally belonging to the scope regulated by domestic law became the matter of international-law arrangements;
- secondly, the democratization and constitutionalization of the functioning of the state has compelled the participation of a variety of domestic organs in consenting to be bound by international law.

Nowadays, domestic law is where the authority for the state's organs to act in external relations is found, whether in respect of goals to be met or accepting international obligations. Also domestic law defines the manner, place and role of an international obligation (legal norm) in the domestic legal order if there is need to apply or perform it in that sphere.

Traditionally, legal theory has known two concepts answering the question of the relationship between the systems — dualism (Triepel, Anzilotti) and monism (Kelsen, Kunz, Scelle). In the dualist concept the transposition of an international obligation into domestic law requires an appropriate act of transformation, changing a norm of international law into a domestic one. In the monist concept the two systems are elements of one order, hence there is no need for any transformative act, because incorporation is automatic (cf. A. Klafkowski, *ibidem*, 46–50; J. G. Starke, *Monism and Dualism in The Theory of International Law*, 17 British Yearbook of International Law 1936, 68–69 and 75ff; cf. A. von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: on the Relationship between International and Domestic Constitutional Law*, 6 Journal of International Constitutional Law 2008, 397–413).

The Court emphasizes that both concepts have influenced the practice of states but neither has come to dominate it. Domestic solutions draw partially upon dualism and partially upon monism, usually generating a mixed system. However, the concrete shape (solution) is decided by the state itself, generally in the constitution. This is also affected by the source of international law from which the obligation (legal norm) originates.

For this reason, the Court recalls that in Polish legal system the effectiveness of international law is ensured by:

- interpretation of domestic law in accordance with international law;
- admission of an international norm to direct application in domestic law, which includes without limitation securing this by appropriate rules of conflict;
- transposition into domestic law through the enactment of an act of domestic law reflecting the international obligation (realizing its purpose).

The constitutions also determine the role such a norm of international law is to have in the domestic legal order. They identify whether it is or is not a domestic source of law, and if it is one, then what place it occupies in the hierarchy of the domestic system of sources of

law. This opens the constitutional perspective of examination of international law, although, on the other hand, the Court is conscious that this possibility is weakened by the fact that international law has generated its own mechanism mandating the assurance of compliance with international obligations (assurance of effectiveness of international law) in the domestic legal order (cf. W. Czapliński, A. Wyrozumska, *ibid.*, 385–388). That mechanism rests on the general legal principle of *pacta sunt servanda*, as well as the principle of primacy of international law, which is settled in international law. Its confirmation is found *in al.* in Article 27 of the Vienna Convention on the Law of Treaties, viz.: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a agreement. This rule is without prejudice to article 46.' This applies to the entirety of the multicomponent international law (different regimes of international law), irrespective of its constitutional grounding. Here, it is worth emphasizing that these principles applies only to such international law as the state is bound by, which is reflected by Article 9 of Polish Constitution (cf. Constitutional Court, *P 1/05*, judgment of 27 April 2005, OTK ZU 4/A/2005, item 42, ¶ 5.5).

And while this systemic solution of international law often collides with the detailed structures contained in domestic constitutions, it confers an initial advantage on international law over domestic law.

The Court recalls that in Polish Constitution that advantage has partially been accepted and articulated in some of its provisions (cf. Article 9, Article 87 and Articles 188(2) and 188(3)), including without limitation rules of conflict (Articles 91(1) and 91(2) of the Constitution). This, however, applies only to selected sources of international law and — in the adopted standard — does not extend to the Constitution (see Article 91(2) of the Constitution), which is the highest normative act in the state and is directly applicable unless it, itself, provides otherwise (Article 8(2) of the Constitution).

The Court also emphasizes that this advantage operates in a specific, solely formal way. The substantive [or: material (transl.)] emergence of an international obligation with which domestic law is incompatible has never had a direct effect, i.e. nullification of such a domestic legal act or abolishment of its effects. There has been (and still is) no automatism here. The effect of this advantage only concerns the plane of international law. The achievement of an effect in the domestic order, i.e. nullification of a domestic act of law found to be incompatible with the international obligation, necessarily requires the appropriate action of the competent organs of the state, taken on the basis and under the procedures of domestic law, including without limitation compliance with the Constitution. Until such time — irrespective of the legal state of affairs in international law — in principle, any acts of domestic law (normative acts or acts of applying the law) are valid and have the attribute of domestic legality (unless the contrary clearly follows from a specific legal obligation or constitutional effect assigned thereto). Only in the sphere of international law does such a suspended or unperformed obligation change its character and position in the system — it transforms into a new obligation in the area of state liability, which, however, is subject to different rules of treatment — from (dialogue) negotiation with a view to abolishing the obligation to hypothetical use of compensatory measures or sanctions to enforce compliance.

For this reason, in the Court's opinion, this kind of structure does not visit any difficulty upon the possibility of *de-facto* rejection (for various reasons) of certain international obligations by the states; rather, it pertains to the potential consequences of such rejection.

The Court notes also that on the break of the 20th and 21st centuries the advantage enjoyed by international law on this basis began to erode. Another (third) model of the relationship between international and domestic law took shape. It emerged in consequence of changes occurring throughout the world in the last couple of decades, viz. the processes of globalization and integration. In their effect a fragmentation (segmentation) of the international order took place, as a result of which multiple co-existing regimes with complex structures emerged (legal pluralism). The gradual (point-by-point) welding of international law with domestic law began, both in the axiological and in the normative (substantive-law)

dimension, whether instrumental or structural. This process has been termed the constitutionalization of international law and internationalization of domestic law.

The above has had the effect of a 'natural' erosion of the formal hierarchy (pyramid) of systems, resulting in the deconstruction of the old dispute about primacy and the rules existing in international law for its resolution (formal advantage of international law). This is supported by the lawmakers' focus on political dialogue and, in consequence, the mutual running-in (harmonization) of legal orders through appropriate legislative processes or creation of rules of conflict.

Of course, that does not eliminate conflicts completely. The fact that the regimes (including without limitation the domestic one) regulate often similar or outright the same sets of facts, given the natural aspiration of any legal regime to the ability to have the final say (priority of norms) in the substantive, procedural and institutional views, continues to generate a conflict potential that cannot be altogether eliminated by the aforementioned methods. Only the safety margin can be enlarged thanks to them.

Considering the foregoing, the Constitutional Court remains conscious that the new situation, although mitigating, does altogether not exclude, in extreme situations, a conflict based on the activities of adjudicatory organs (courts) empowered in each of the systems. This is not only the effect of the intensity of complication of international relations but also of the aspirations of each of the organs to be the 'master of the system'.

The Court notes also that in the new environment the position of constitutional courts, too, as organs tasked with being the guardians of the hierarchical consistency of the various systems of domestic law, has been strengthened. While their activities in the area of international law have previously been restrained, the new situation has sparked a concept that comes to their assistance by undermining the existing instruments guaranteeing to international law its advantage, which in effect puts in order and justifies the possibility of rejection of international obligations (including without limitation court decisions). Scholars have termed this construct the 'constitutional right to resistance' – (see A. Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 2 Vienna Online Journal on International Constitutional Law 2009, 195).

The opportunity to exercise the 'right to resistance' shows in situations in which, when domestic and international standards collide, the fundamental elements of the constitutional order have to be protected because a norm or act of international law are manifestly incompatible with constitutional standards (cf. T. Cottier, D. Wüger, *Auswirkungen der Globalisierung auf das Verfassungsrecht: Eine Diskussionsgrundlage*, [in:] B. Sitter-Liver (ed.), *Herausgeforderte Verfassung: Die Schweiz im globalen Konzert*, Freiburg 1999, 241–281, 263–64; A. von Bogdandy, *ibidem*; A. Nollkaemper, *The Rapprochement between the Supremacy of International Law at International and National Levels*, [in:] H. Ruiz Fabri, R. Wolfrum, J. Gogolin (eds.) *Select Proceedings of the European Society of International Law* vol. 2, Oxford 2008, 239–254. Cf. also: T. Vesting, *Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung*, 63 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 2003, 41–69 (63). M. Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, [in:] S. Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge 2006, 256–293; A. Peters, *ibidem*, 170–198; M. Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, [in:] N. Walker (ed.), *Sovereignty in Transition*, Oxford 2003, 501–537; Ch. Joerges, *Re-Conceptualizing the Supremacy of European Law: A Plea for a Supranational Conflict of Laws*, [in:] B. Kohler-Koch, B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union*, Lanham 2007, 311–327).

The Court emphasizes that this view does not have the character of only a theoretical concept. It manifests itself in practice, with situations having arisen and still arising when constitutional courts or supreme courts modify the contents of international judgments (including without limitation those of the European Court of Human Rights or the Court of

Justice of the European Union) or the obligations (norms) arising from them or created on their basis, or outright refuse to implement them (cf. *in al.* Federal Constitutional Court of the Republic of Austria, judgment in *B 267/86*; Federal Court of the Swiss Confederation, *120 Ia 43*, judgment of 7 January 1994; Federal Constitutional Court of the Federal Republic of Germany, judgment in *2 BvR 1481/04, Görgülü*; Supreme Court of the United Kingdom, *R v. Horncastle and Ors*, judgment of 9 December 2009; Constitutional Court of the Republic, judgment in *238/2012*; Supreme Court of Spain, *Oriol Junqueras*, judgment of January 2020; Federal Constitutional Court of the Federal Republic of Germany, *2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16*, judgment of 5 May 2020; Constitutional Court of the Republic of Poland, judgments in *P 7/20, K 3/21* and *K 6/21*, and more).

Constitutional Courts (or, alternatively, supreme courts) base their decisions on arguments such as, for example, maladaptation of domestic law to the goal set by such a judgment (systemic incompatibility), the international court exceeding its competence (an *ultra-vires* judgment) or the incompatibility of the judgment with a fundamental constitutional norm (constitutional values, constitutional identity), or similar. In other words, refusal involves situations in which the problem justifying the refusal is regarded as systematically serious and the implementation of the judgment would significantly undermine the edifice of the domestic legal system (constitutional foundations of statehood).

In the Court's view, the rectitude of such conduct is also supported by the fact that — due to rising standards of rule of law — in respect of the various international legal systems nowadays existing alongside domestic law, only domestic law has one principal advantage among the rest — it meets democratic standards and is completely (fully) in possession of democratic legitimacy. The latter — unlike international courts — is enjoyed by domestic constitutional courts.

The Court also notes that, in the Polish perspective, when adjudicating on international obligations, similarly to when reviewing domestic law, '[j]udges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution,' (Article 195(1) of the Constitution). Due to the construct of Article 8 of the Constitution (supremacy of binding force and primacy of application), this creates sufficient potential for the Constitutional Court to act to protect the Constitution and uphold the guarantee of an advantage over norms originating from other legal system, in the context of the duty for them to be compatible with the Constitution of the Republic of Poland.

3.2. The constitutional place of ratified international treaties

One of the sources of international law entering the composition of the domestic system of sources of law are international treaties to which the state binds itself through the ratification procedure (Article 87(1) of the Constitution).

In accordance with Article 87(1) of the Constitution, ratified international treaties are a source of universally binding law in the Republic of Poland. In turn, Article 91(1) of the Constitution provides that a ratified international agreement, following promulgation in Polish Journal of Laws, becomes directly applicable unless its application depends on the enactment of a statute. From Article 91(2) of the Constitution, moreover, it follows that an agreement ratified by consent granted by statute takes precedence before a statute if the statute cannot be reconciled with the agreement. This is a primacy of application. The above-cited constitutional provisions show how a small section [or: how small a section (transl.)] of international law is a direct element of domestic law (monism).

In turn, Articles 188(1) to 188(3) of the Constitution puts international treaties in the role of both an object and a test in the review of legislation. On its basis the Constitutional Court rules upon 'the conformity of statutes and international agreements to the Constitution' (Article 188(1)), 'the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute' (Article 188(2)), and 'the conformity of

legal provisions issued by central State organs to (...) ratified international agreements and statutes (...)’ (Article 188(3)).

The Constitutional Court notes that all these provisions also apply to the Convention for the Protection of Human Rights and Fundamental Freedoms, which, in accordance with Article 241 of the Constitution, is such a ratified international agreement.

3.3. The status of the judgments of the European Court of Human Rights in the light of the Constitution.

The Constitutional Court recalls that the obligation for Poland to comply with the Convention arises from universal international law (*pacta sunt servanda*) and Article 9 of the Constitution. Compliance itself consists in safeguarding at law and in the operation of the organs of the state the international standards set forth by the Convention. The comparison and judgment belongs to the European Court of Human Rights, whose jurisdiction Poland recognized in a declaration of 16 March 1993 with the reservation that applications may refer to ‘any act, decision or event occurring after 30 April 1993’.

According to the principle of subsidiarity, the responsibility for giving effect to the rights and freedoms contemplated by the Convention rests on the domestic authorities. If the latter fail in their duty, the applicant may procure review. In turn, according to the principle of solidarity, the ECtHR’s judgment becomes part of the Convention *acquis* and a binding component of the Convention system. It builds a standard.

The ECtHR adjudicates on the violation of the human-rights standards protected by the Convention through judgments.

Here, however, the Constitutional Court notes that the ECtHR’s judgment in respect of a specific case is only of declaratory character. It declares the violation of a specific Convention standard (and awards compensation, if any). It does not have a direct cassatory or annulatory effect on an act of domestic law, i.e. act of application of law (e.g. court judgment) or legal provision (cf. Supreme Court, *I CSK 304/16*, judgment of 6 September 2017, statement of reasons) deemed to be a violation of the Convention by the actions of the state. Those continue to be an element of the domestic legal order unless and until eliminated from the legal system by the competent organs of the state under the relevant procedure and in accordance with their respective competence. Nor does a judgment of the ECtHR affect their domestic (constitutional) legality. Until their hypothetical elimination they continue to be legal acts in the light of Article 7 of the Constitution.

The choice of the method by which to implement the ECtHR’s judgment belongs to the state (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, no. 32772/02, 30 June 2009, § 61; *Marckx v. Belgium*, no. 6833/74, 13 June 1979, § 58), and the duty to implement falls within the constitutional command to comply with the international law binding on Poland (Article 9 of the Constitution), which is supported by Article 46(1) of the Convention: ‘The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.’

The ECtHR itself has held that the non-implementation or inadequate implementation of its judgment constitutes a new and separate violation of the Convention. But it is a general violation — of an international obligation (the Convention). Hence, it is a problem in relations among the Council of Europe member states but does not constitute a violation actionable by an application to the ECtHR.

3.4. The law-making activity of international courts

The Constitutional Court recalls that, in principle, the task of international courts is to adjudicate concrete cases (resolve disputes by judgments or issue opinions). And although such decisions do not *de iure* create international law, the phenomenon term ‘developing upon international law’ is an important aspect of adjudication. Namely, adjudicatory activities *de facto* take on a law-making character. This is compelled by the specificity of international law,

which, as a system, is often characterized by indeterminacy, vagueness or imprecision of the contents of the provisions (cf. D. Kennedy, *Theses about International Law Discourse*, 23 German Yearbook of International Law 1980, 378–379; M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, Helsinki 1989, 17–20; see also Constitutional Court, *K 6/21*, judgment of 24 November 2021).

That specificity is caused by different factors such as the essence of the text of treaty provisions employing complicated specialist terminology, the existence of several co-equal diverging language versions of a treaty (so-called authentic texts), or, lastly, the specificity of the problem at hand or the need to close a legal gap, alternatively to find the way out of a conflict of norms. Also, the lack of unequivocal understanding of a legal act (treaty) or individual provision very often constitutes the effect of conscious conduct of the states, who, by the general or indeterminate language of a treaty (provision) more easily reach the consensus enabling its adoption.

Adjudication on the basis of such provisions is very difficult. For this reason, international courts have to adjudicate in an active manner, and their operation is practically the creation of a textually concretized norm (cf. H. Lauterpacht, *The Function of Law in the International Community*, Oxford 1933, 68). In this manner, international judgments become actual lawmaking, i.e. developing international law (cf. H. Lauterpacht, *The Development of International Law by the International Court. Being A Revised Edition of 'The Development of International Law by the Permanent Court of International Justice'*, London 1934, 155–226; Lauterpacht illustrated this on numerous examples).

Systemic and functional interpretation and focus on the assurance of systemic consistency and effectiveness take on a fundamental significance in this process.

The normative content of the provisions itself, by contrast, is shaped by dynamic interpretation, whereby the judge — when inferring [or: deriving (transl.)] — examines the current status of the provision in the perspective of the development of the socio-political situation and international relations. This interpretation finds its roots in Article 31(3) of the Vienna Convention on the Law of Treaties, which allows not only the literal meaning of the words and their context but also other elements, expressly stating that they are to be taken into account not 'as the context' but 'together with the context'. This also means the subsequent manner of application of the treaty (see Permanent Court of Arbitration, *Russian Claim for Interest on Indemnities*, 11 November 1912, cf. A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*, Warszawa 2006, 348). In this manner, judicial dynamic interpretation may even lead to the modification of the contents of the treaty (provision), although in such a case the agreement of the parties is required (see Article 31(3)(b) of the Vienna Convention on the Law of Treaties). In practice, such agreement is usually given in tacit form (by not objecting).

In the Constitution Court's opinion, as recently as 100 or 50 years ago, when international courts dealt with a relatively narrow area of state activity, in particular the performance of contractual obligations, such type of conduct posed no discernible problem. Nowadays, international treaties are often norm-making treaties and can subject a number of domestic sets of facts to the cognition of international courts, including without limitation law-making and law-applying areas of functioning of the state. This has the result that the impact of the law-making activity of international courts on sovereign state authority is increasingly felt. This refers not only to the impact of norms created by international courts on international law itself, viz. defining specific state conduct in that system, but also the domestic effects of norms created in this manner, norms that, after all, come to life on the adjudicatory plane and thus with the omission of procedures proper both in the process of creation and acquisition of the characteristics of an act of law (the state's acceptance to be bound by it).

The outcome of this law-making process in international courts is a new normative content of provisions the domestic parliament had indeed agreed in the past to be bound by but did so without knowing the new normative content, decoded by the international court.

And, in principle, without such agreement such provisions would not have been binding on the state, and the state would not need to comply with them.

It is also possible that the new normative content of a provision transforms the provision so significantly as for it to lose the shape the state would have agreed to at the stage of concluding the treaty, if it had known it. Moreover, the outcome of the lawmaking activity may even cross the boundaries of ordinary politico-legal will (decision) and reach such normative content as to which the states would not have been able to consent at the stage of becoming bound (ratification) because a given content of such norm would have conflicted with the states' constitutional orders (see Constitutional Court, *K 6/21*, judgment of 24 November 2021).

Such an interpretative framework and freedom of an international court spark the question of matters of state control and acceptability of such an interpretative dynamic and the resulting legal norm and potential decision.

3.5. Decisions of international courts as a source of (knowledge of) the law.

The Constitutional Court notes that a norm of international law created by an international court has two dimensions:

- firstly, it creates the law in a concrete dispute and becomes the basis for a concrete ruling;
- secondly, it goes beyond the disputed set of facts becomes the (potential or actual) basis (norm) used in future decision-making cases in the relevant (e.g. conventional) legal regime (cf. A. v. Bogdandy, I. Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 2010, 12, and the literature cited therein; also see Constitutional Court, *K 6/21*, judgment of 24 November 2021).

In this manner it reveals its general and abstract nature, and the judicial activity acquires the characteristics of lawmaking, whereby it enters the scope of action attributed to the political power (cf. M. Shapiro, *Judges as Liars*, 1 (17) Harvard Journal of Law and Public Policy 1994, 155).

The above conclusion is attested by the status of international judicial decisions, which have for years been recognized as a subsidiary source of international law, as one can learn from any course-book on the subject (cf. L. Ehrlich, *ibidem*, 85–86; J. Gilas, *ibidem*, 57–62; W. Czapliński, A. Wyrozumska, *ibidem*, 25). Of course, it is not the concrete decision itself (international law is not a law of precedent; the doctrine of *stare decisis et non quieta movere* does not obtain, and the mutual invocation by international courts of each other's decisions comes down to highlighting and upholding a trend rather than any source character in the decisions themselves), but it is precisely the concrete legal norm created by the decision that may be the source of international law, viz. constitute a command of concretely defined conduct by the subjects of that order in other factual situations than the one in which the norm was revealed (created). Especially norms revealed through its own prior decision-making history are heeded by any court ruling upon similar cases, creating a line of judgments (see CC in *K 6/21*, judgment of 24 November 2021; justice M. Muszyński's dissent from statement of reasons of the CC's judgment in *K 1/20*, of 22 October 2020, OTK ZU nr 4/A/2021).

In other words, the decision itself is not so much the formal direct source of law as a non-binding source of knowledge about the binding law, i.e. the created legal rule (cf. A. Pellet, commentary on Article 38, [in:] A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (ed.), C. J. Tams, T. Thienel, *The Statute of the International Court of Justice, A Commentary*, Oxford 2006, 677, ¶¶ 301–319; G. J. H. v. Hoof, *Rethinking the Sources of International Law*, Antwerp 1983, 169; M. Jacob, *Precedents: Lawmaking through International Adjudication*, 12 (5) German Journal of International Law 2011, 1005–1032.

Hence, the Constitutional Court notes that from the perspective of the process of creation and interpretation of the law, the decisions of international courts can be termed 'carriers of a norm' and consequently regarded as an object of review alike to domestic acts of law, particularly if taken jointly with the treaty provision from which the reviewed norm was derived by adjudication.

3.6. Interpretation of the Convention by the European Court of Human Rights.

In accordance with Article 32 of the Convention concerning the ECtHR's jurisdiction extends to, 'all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.'

The Constitutional Court emphasizes that this provision means that the ECtHR is competent to interpret the Convention and its protocols in the context of problems it encounters while hearing cases brought by states (Article 33), individual applications (Article 34) or references from the Committee of Ministers (Article 46) and when giving advisory opinions (Article 47) (cf. U. Karpenstein, F. C. Mayer, [in:] commentary on Article 32 of the Convention, *Konvention zum Schutz der Menschenrechte und Grundfreiheiten*, München 2022). The language of the provision, however, conditions the character of this competence by limiting it to specified proceedings (cf. J. Meyer-Ladewig, M. Nettesheim, S. v. Raumer, [in:] commentary on Article 32 of the Convention, *Europäische Menschenrechtskonvention*, Baden-Baden 2017).

In the Constitutional Court's view, this provision does not mean the attribution to the ECtHR of a general and exclusive interpretative freedom, nor the extension of the consequences of the interpretation to the likeness of an authentic (state) interpretation, let alone authorization of liberal lawmaking activities, but it deals with the right to make procedural (legal-operative) interpretations, i.e. to interpret the provisions for a specific adjudicatory purpose. This means the creation of an individual-concrete norm to examine or solve a specific case.

This view finds confirmation in the scholarship, which details it on concrete examples. We read that this power applies especially to answering the question of whether the subject truly intended to lodge an application or not, whether the subject should be looked upon as a victim or as a complainant (applicant), whether the application meets the requirements, etc. (cf. U. Karpenstein, F. C. Mayer, *ibidem*, commentary on Article 32 of the Convention).

Here, the Constitutional Court is conscious of the fact that the ECtHR engages, on the adjudicatory path, in attempts to ascribe to itself a power to interpret that is broader in scope than it occurs from the language of the provision (e.g. *Shamayev and Ors v. Georgia and Russia*, appl. 36378/02, judgment, ¶ 293, *Slivenko and Ors v. Latvia*, appl. 48321/99, 57). The Constitutional Court, however, believes that by such the ECtHR usurps the rights of the subjects (states-party) authorized to give an authentic interpretation, because the language of Article 32 does not supply the ECtHR with any such basis.

The Constitutional Court avails itself of the opportunity to emphasize that such conduct is one of the many activities by which the ECtHR attempts to expand its imperative powers over states, acting around or even contrary to the Convention and deriving new powers for itself by adjudication or through the provisions of the Rules of Courts (see e.g. ascribing to the ECtHR a right to order interim measures on the basis of Article 39 of the Rules of Court, or so-called pilot judgments pursuant to Article 61 of the Rules of Court).

The Constitutional Court recalls that the main instrument of interpretation used by the ECtHR is functional interpretation conducted in a dynamic manner. Its purpose is to strive to develop the standards of legal protection contained in the Convention due to the needs for it to be effective in a changing reality. This follows from the recognition of the Convention as a *living instrument* (report of the UN Commission on Human Rights of 14 December 1976; ECtHR, *Tyrer v. United Kingdom*, appl. no. 5856/72, judgment of 25 April 1978, ¶ 93; likewise

academia: M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2017, 289–292), and thus an act modifying its meaning and contents along with a changing world. This results — in the context of the generality of the language of the Convention's provisions — with a need for a dynamic understanding of them, in accordance with the current socio-political, cultural and legal circumstances changing over time.

The specificity of such a path of reasoning is that the ECtHR as the organ interpreting and applying the provisions of the Convention judges when and in what scope to redefine the terms contained in the provisions. In consequence of the above, there has arisen in the body of the ECtHR's decisions a concept of *implied rights*, rights derived from the provisions of the Convention, and a concept of autonomous terms.

In the Constitutional Court's opinion, all of this, however, sparks the question of the limits of such modifications. The Constitution Court agrees with the view that in a democratic European society there exists a certain common and evolving catalogue of standards of human protection, but the Court also emphasizes that the existence alone of such a catalogue or even of the 'democratic society' does not explain the ECtHR's right to remake the normative contents of the provisions in such a way that the process leads to the arbitrary breaking of the individualities arising from cultural and national differences or the states' models of governance (cf. L. Garlicki, *Wartości lokalne a orzecznictwo ponadnarodowe – „kulturowy margines oceny” w orzecznictwie strasburskim*, 4 Europejski Przegląd Sądowy 2008, 4–13). The Court moreover recalls that such differences often have constitutional support and are thus backed by an act of higher standing than a ratified international agreement, which the Convention continues to be from Poland's constitutional perspective.

The Court understands that human rights evolve along with people's increasing expectations and changes in their views and behaviours but believed that the adaptation of the Convention's standards to factual changes by way of interpretation should be characterized by prudence and moderation and have rational limits. In the contrary scenario such activity becomes a process of legislating from the bench, which Kelsen pictured as a jeer at the theory of interpretation (cf. H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, Wien 1934, 74 and 95). In the ECtHR's proceedings this especially takes place when it relies not on legal facts but on its own views of the situation and on the justices' personal imaginations as to the trends and directions in the development of social relations.

The Constitutional Court also recalls that the interpretation of the Convention by the ECtHR must not substitute for formal treaty amendments. That happens when, officially by dynamic interpretation of the Convention, the ECtHR in reality bears in a unilateral and evolutionary way on the contents of the provisions and of the legal institutions contained therein and plants in them qualitatively novel norms. In this way not only does the ECtHR create such norms, it also leads to significant modifications of the authentic text (language of the provision), more and more often on such a level as could not possibly have been foreseen by the authors of the Convention or even the states acceding to it in later years, such as Poland (cf. e.g. the consequences of the following judgments: *Goodwin v. United Kingdom*, application no. 28957/95; *Schalk and Kopf v. Austria*, application no. 30141/04; *Haas v. Switzerland*, application no. 31322/07). It corresponds, by contrast, with the justices' vision as to the directions of the development of the world.

The Constitutional Court grants that such activity can have its reasons. Those, however, are extralegal, i.e. social or political reasons. On the formal side, that is no longer ensuring the greater harmonization of standards in the forum of application of the Convention, but it is often intervening in domestic (constitutional) legal contexts. And yet, even tendencies to a certain convergence cannot mean full uniformization (cf. L. Garlicki, *ibidem*, 4–13. A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie ETPC*, Gdańsk 2008, 187; M. A. Nowicki, *ibidem*, 295).

In other words, dynamic interpretative activity must not lead achieving such a normative effect on the Convention level as would require a formal amendment of the Convention (cf. ECtHR, *Soering v. United Kingdom*, application no. 14028/88, judgment of 7 July 1989, second paragraph of ¶ 103; *Öcalan v. Turkey*, application no. 46221/99, judgment of 12 May 2005, application no. 46221/99, ¶¶ 164–165, and judge Garlicki's separate opinion, ¶ 4), let alone the achievement of an effect incompatible with the assumptions of the state's system of governance on the constitutional level with the expectation that the state would be bound by it. The Constitutional Court is of the view that such activity by the ECtHR constitutes an interference with a state's sovereignty and the will of a democratic society manifested through the action of the parliament (see *K 6/21*, judgment of 24 November 2021).

In the Constitutional Court's opinion, such situations — as a practical phenomenon — open the field to the examination, in the light of the Constitution, of the admissible limits of the lawmaking effects of the ECtHR's decisions issued within the framework of the latter's formal powers. The functioning of the Convention system cannot be based solely on trust. The Convention system should operate on the basis of legal procedures and constitutional limits of a state's consent to be bound by the Convention, as expressed in the ratification procedure.

This is all the more warranted considering that, to Poland, the effect of a Convention norm shaped in this way has a dualist character:

- Firstly, its effect is the individual decision, viz. a judgment creating a specific international obligation. But the specificity of the Convention is not about an individual case or damages. Since the Republic of Poland has the duty to comply with the international law she is bound by, the state, in implementing such a judgment, also examines its effects for the system *in generalis*. And the state makes the appropriate changes. Hence, in this dimension, constitutional review is the state's instrument to verify not only the quality in the sphere of application of international law but also the quality of transformation of its legal order through domestic legislative procedures, by keeping such activities within the constitutional boundaries.
- Secondly, the effect of the judgment may be the transformation of a norm derived in an individual case in a general and abstract norm not only constituting the potential basis for future decisions of the ECtHR in similar cases but, in consequence of the practice of state organs — due to the language of Articles 91(1) and 91(2) of the Constitution — directly entering the domestic legal circulation with priority of application before statutes.

One of the features of the latter situation is that not only the creation of the norm but also its entry into the domestic circulation bypasses the domestic legislative procedure.

In the Constitutional Court's opinion such a process, in principle, comes short in a twofold way — from the perspective of the principle of democracy and the principle of legitimacy of the law. And it is, after all, because of this shortcoming that not only the decisions of the ECtHR but international courts' judgments in principle are not vested with the attribute of direct effectiveness in the domestic legal system but only have the attribute of enforceability (cf. Article 46 of the Convention). It is this quality that enables state control at the stage of the transposition of the effects (both normative and concrete) into the domestic law, because the rules of that process are always defined by the domestic constitution (cf. *A. v. Bogdandy*, I. Venzke, *ibidem*, 47).

For this reason, the Constitutional Court maintains the position that one of the forms of such state control — at least in the light of the Constitution — is the option to verify the constitutionality of the norms created as a result of the ECtHR's lawmaking activities on which the particular judgment is based. This is, in the Constitutional Court's view, particularly important in Polish realities, because norms shaped in this way are also part of the domestic

legal order, wherein they enjoy priority before domestic (statutory) norms (primacy of application).

The Constitutional Court also emphasizes that the point of constitutional review in this meaning is not any supervision of the ECtHR's general activity but the specific constitutional context, viz. answer to the question whether, in connection with identified constitutional tests pertaining to the ratification of an international agreement, the ECtHR had the right to create the identified norm on the basis of the disputed provision (text) of an international agreement.

The Constitutional Court exercises this form of review completely irrespective of whether such norm has, in practice, subsequently been used solely as the basis for the examination and evaluation of an applicant's individual and concrete situation, as a result of which process the ECtHR has adopted a decision vested with the attribute of enforceability (Article 46 of the Convention) in the domestic legal order, or its [the norm's (transl.)] effects have reached further and it has been recognized in the decision-making practice of domestic organs as part of the normative system binding in Poland (in the general and abstract meaning) and, in consequence of that, constitutes the legal basis for the conduct of such organs. This is because the two contexts compose the constitutional perspective and thus empower the Constitutional Court to examine the problems laid before it.

The Constitutional Court also notes that, notwithstanding the foregoing, the constitutional review of the norms of the Convention constitutes an expression and type of court-to-court dialogue (CC-ECtHR) that will enable the formulation of constitutional postulates addressed to what is, after all, a 'living' and constantly evolving Convention system.

3.7. The Constitutional Court's adjudication on Convention norms.

The essence of the principle of constitutionalism is the imperative that the law give effect to substantive and formal values. This means that when adjudicating on constitutionality one has to consider the whole of principles and values arising from the constitution. If the superordinate norm defines the form, content and procedure for the emergence (taking shape) of the subordinate norm, then it is possible on the basis of the superordinate norm to review both the lawmaking activity and the outcome of it (cf. S. Wronkowska, *O praktycznych aspektach tak zwanej hierarchii w systemie prawa*, [in:] A. Choduń, S. Czepita (eds.), *W poszukiwaniu wspólnego dobra. Księga jubileuszowa Profesora Macieja Zielińskiego*, Szczecin 2010, 432). From this it follows that such a normative act must be regarded as compatible with the Constitution as has been established by an authorized subject in a procedure conforming to the provisions of the law, with contents conforming to superordinate acts (cf. Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warszawa 2003, 162). In Poland's legal system there is no place for normative acts conflicting with the Constitution.

Referring the above to the Constitutional Court's adjudication on the constitutionality of international treaties, and thus of the Convention, the Constitutional Court has concluded that since, on the one hand, in accordance with Article 9 of the Constitution, the Republic of Poland complies with the international law binding on her, and, on the other hand, in accordance with Article 87(1) of the Constitution, a ratified international agreement (such as the Convention) is a source of universally binding law, there must exist ways of verifying such an agreement's compatibility with the Constitution. This is attested by the fact that the constitutional lawmaker has provided for the appropriate verification mechanism in Article 188(1) of the Constitution. In so doing, the constitutional lawmaker did not restrict the Constitutional Court's competence to the faculty of reviewing the constitutionality of the contents of the norms contained in such an agreement but allowed also for review in the whole constitutional context, including without limitation confrontation with the entirety of values and principles arising from the Constitution.

The Convention is a ratified international agreement. When reviewing the constitutionality of a norm of international law, the Constitutional Court must distil that norm

from a concrete provision of the agreement. Hence, apart from examining the pleading that initiates the proceedings, the Constitutional Court must reach to international law and discern whether the relevant norm exists in that legal system. It can employ different methods to this end, including without limitation analysis of the decisions of international courts.

Reaching to court decisions is warranted, since that is where the normative narrowing down of the provisions takes place and norms created thereby are subsequently followed in judicial practice (cf. A. Wyrozumska, *Prawotwórcza działalność sądów międzynarodowych i jej granice*, [in:] A. Wyrozumska (ed.), *Granice swobody orzekania sądów międzynarodowych*, Łódź 2014, 11).

In the Convention system, in the Constitutional Court's opinion, attesting to such a role of ECtHR decisions is not only judicial practice but also the construct of so-called pilot judgments, adopted in the ECtHR's Rules of Court (cf. Rule 61, *Rules of Court*, 1 February 2022, rules_court_eng.pdf).

In this context, in keeping with the specificity of international law and international court decisions, the Constitutional Court's position is that the Constitutional Court's review may extend to both the contents of the norm itself and the process of its creation on the judicial path, including without limitation the competence to shape the norm. This applies both to the concrete and individual norm constituting the basis of an individual judgment (decision), which is subsequently enforceable against the state as bound to act in accordance with the principles of the Constitution, and to a norm formed in that manner and having taken on a general and abstract character through continued adjudicatory activity, thus supplying the legal basis for future decisions.

The Court also emphasizes that while in the process of constitutional review the finding that a norm is unconstitutional does not have a direct effect on acts of application of the law previously having arisen on the basis of that norm, in the case of a norm of international law unconstitutionality may affect not only the normative contents of the provision themselves but also the enforcement of decisions handed down on the basis of the abrogated norm, viz. the performance itself of the obligation arising from an international agreement.

The Court also recalls that the specificity of becoming bound by a treaty (ratification) results in such a treaty — ratified by one political power created by elections — falling significantly outside the factual corrective reach of the subsequent political power (head of state, parliament, cabinet). The binding effect on the state, therefore, is absolute (unlike in the case of statutes) and touching on the essence. This is particularly visible in a situation when a treaty, as is the case with the Convention, subordinates the state to the jurisdiction of a court placed above it (the ECtHR). What then occurs is the attribution to such a court of functions close to those traditionally held by domestic constitutional bodies. In such a situation, the option of constitutional review is the only means enabling the existence of the state's ultimate authority (sovereignty) and supremacy of the Constitution to be manifested.

The Constitutional Court also notes that the international court's lawmaking activity is only one of the criteria of evaluation by which the Constitutional Court is to arrive at an answer to the question of whether a norm of an international agreement (convention, treaty) is compatible or incompatible with the Constitution. The object of such review always continues to be a Convention norm. It and only it is the direct target and not the international court's activity itself. The importance of the latter is that it provides the Constitutional Court with arguments in support of the unconstitutionality of the international-law norm. This is connected with the fact that the contents of the norm shaped in the process of application may diverge from the literal language of the provision, and the organs applying the law, especially courts, may in the process of applying the law derive from normative acts such contents (norms) as cannot be reconciled with the norms, principles or values the Constitution demands to be respected, and, if transposed into the sphere of domestic law, may destabilize the legal system and social life. And yet, all concepts of laws, even as diametrically opposed to one another as those of Habermas or Luhmann (see, more extensively: J. Habermas,

Faktizität und Geltung, Frankfurt a/Main 1992; N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt a/Main 1995) are in agreement that the law's main role is stabilization (see A. v. Bogdandy, I. Venzke, *ibidem*).

The only way to solve the above problem is that the Constitutional Law is to retain the legal responsibility for the legal basis and domestic effects of international courts' decisions. This means that the impact of international law and international-law judgments (here: provisions of the Convention, and norms created by the ECtHR's decisions) on the state's obligations and on the domestic legal system will be defined according to constitutional law. The Constitution guides and channels the 'normal' political process and constitutes the central mechanism stabilizing the separation and interaction of law and politics. This type of function (legislative filter) is missing from the international order. By reviewing international (judicial) norm-making activities, the Constitutional Court puts them in a framework of rule of law.

In this way, from the perspective of international law, there emerges the constitutional protection of democratic self-determination, and from the constitutional perspective the principle of constitutionalism, which is one of the elements of the rule of law, is given effect. Compliance with the Constitution is the characteristic of a legal system, and if in a given state — as is the case with Poland — the order is founded upon a hierarchically structured system of normative acts in which the Constitution is an act of supreme legal force, this means that there must also exist mechanisms safeguarding such an order. The direct mechanism by which to achieve the aforementioned goal is precisely the Constitutional Court's competence arising from Article 188(1) of the Constitution.

4. Reconstruction of the object of review and of the constitutional problems

The above-outlined general assumptions confirm the admissibility of the Constitutional Court's review of norms arising from the Convention derived on the judicial path (cf. *K 6/21*, judgment of 24 November 2021).

Accordingly, taking advantage of the instruments available to it, the Court reconstructed the object of review and the constitutional problems in the case at hand. In so doing, the Court accounted for the specificity of international law and the circumstance that among the tests the petitioner had identified both ones pertaining to the constitutionality of the contents of the norm and those pertaining to the requirements for the introduction of a norm to the domestic legal system (Article 8(1) and Article 89(1)(2) of the Constitution).

The Court noted that the Attorney General challenges the first sentence of Article 6(1) of the Convention, but the object of the proceedings are three different norms arising from that provision and derived by the decisions of the European Court of Human Rights.

The first disputed norm refers to how the Conventional term 'civil rights and obligations' contains a judge's right to hold an administrative function in the structure of the common judiciary in Polish legal system (a function as an individual right).

The ECtHR shaped this norm by its judgment of 29 June 2021 given in *Broda and Bojara v. Poland* (applications no. 26691/18 and 27367/18). By that judgment, the ECtHR confirmed that in Article 6(1) of the Convention there exists a guarantee (a right) for persons holding the office of vice-president of a court to hold the function to term or until the expiry of their term as a judge, and that such persons could justifiably claim that domestic law had protected them from arbitrary dismissal from the position of vice-president of the court prior to term (e.g. ¶ 109, ¶ 111). Thus, the ECtHR derived from the language of Article 6(1) of the Convention an individual right under private law consisting in a guarantee of holding an administrative function (that of a vice-president of a court) in the organizational structure of the common judiciary, consequently safeguarded by the Convention.

The constitutional problem relating to the first challenge refers primarily to the ECtHR's ability to shape individual rights for individuals in a Convention state-party by giving a specific content to the provisions of the Convention irrespective of the legal state of affairs, even constitutional provisions, binding in that state.

This problem sparks a doubt as to compatibility with:

- the principle of supremacy of the Constitution, by supplanting the constitutional provisions governing the status of an individual with individual rights incompatible with those provisions, created on the Convention level by the ECtHR's lawmaking activity (Article 8(1) of the Constitution);
- constitutional rules governing the procedure for becoming bound by an international agreement concerning the freedoms, rights or obligations of citizens as specified in the Constitution (Article 89(1)(2) of the Constitution), especially the ability to shape the contents of Convention norms outside of the ratification procedure (including without limitation through the lawmaking activities of an international organ);
- the constitutional principle that the court system and competence of courts and the procedure before them are to be governed by statutes and not by international agreements or lawmaking acts of other organs of the state or organs of international organizations (Article 176(2) of the Constitution).

The essence of the second disputed norm is that the contents of the 'tribunal established by law' condition contained in the first sentence of Article 6(1) of the Convention are missing the command for the ECtHR or domestic courts mandatorily to take into account the universally binding provisions of the Constitution of the Republic of Poland and statutes, as well as final and universally binding judgments of Polish Constitutional Court, which — in line with the Constitution — define the characteristics of a court.

In consequence, the disputed norm allows the ECtHR to ignore the provisions of the Constitution of the Republic of Poland, statutes and final and universally binding judgments of Polish Constitutional Court when examining whether the 'tribunal established by law' condition is met. At the same time, the norm authorizes the ECtHR, in the process of interpreting the Convention, to create norms concerning a given state's procedure for judicial appointments.

This norm has been shaped by the ECtHR's lawmaking activities manifested in *Reczkowicz v. Poland* (application no. 43447/19, judgment of 22 July 2021) and *Dolińska-Ficek and Ozimek v. Poland* (applications no. 49868/19 and 57511/19, judgment of 8 November 2021). Its permanence, as well as its features, were confirmed by the judgment in *Advance Pharma sp. z o.o. v. Poland* (application no. 1469/20, judgment of 3 February 2022), which made significant references (direct and indirect) to the line established by the two aforementioned judgments.

The first elements of that norm, however, were constructed in *Guðmundur Andri Ástráðsson v. Iceland* (application no. 26374/18, judgment of 12 March 2019) and the Grand Chamber's judgment in the same case (1 December 2020), from which all three decisions make numerous borrowings.

Here, it must be explained that in *Reczkowicz v. Poland* the ECtHR found a violation of Article 6(1) of the Convention through incompatible domestic solutions such as the constitutional procedure for the appointment of the judge-members of the National Council of the Judiciary (e.g. ¶¶ 225ff), the NCJ's constitutional characteristics (place within the state's system of governance and nature of relations with other organs) (e.g. ¶¶ 274, 276), judicial appointments to the Disciplinary Chamber on the NCJ's application (e.g. ¶¶ 232ff., ¶¶ 274–275), the constitutional character of a structural part of the Supreme Court (Disciplinary Chamber of the Supreme Court) and its characteristics as a 'court' (e.g. ¶¶ 256ff, 262, 264, 274–277).

In this manner, the ECtHR created — contrary to domestic provisions of constitutional and statutory rank, as well as judgments of the Constitutional Court — a positive norm creating the legal status (legal framework of the system and functioning) of organs of state such as the National Council of the Judiciary and Disciplinary Chamber of the Supreme Court.

In *Dolińska-Ficek and Ozimek v. Poland*, too, the ECtHR found a violation of Article 6(1) of the Convention. It relied on the normative findings of *Reczkowicz v. Poland*, applying

them as the basis for the evaluation of another organizational part of Poland's Supreme Court (Chamber of Extraordinary Review and Public Affairs), as attested also by direct invocations of *Reczkowicz* (e.g. ¶¶ 66, 368). In this manner the norms showed their general and abstract character, indicating that by then a decision-making line had come to existence in international law.

The ECtHR subsequently applied that norm in *Advance Pharma sp. z o.o. v. Poland*, relying on it to evaluate the status of the Civil Chamber of the Supreme Court and of part of its justices. This is confirmed not only by the general reasoning on the merits but also numerous direct invocations of both of the previous cases, contained both in the introductory part (e.g. ¶ 71 or ±226, where the 94 applications from Poland pending before the ECtHR and still up for ruling were linked to existing decisions as 'concerning the various aspects of the judicial reform commenced in 2017', as well as ¶ 227) and in the merits part (e.g. ¶¶ 303, 309, 310, 313ff, 364, etc.).

Lastly, the ECtHR confirmed the existence of a norm by addressing to Poland, on 8 February 2022, an interim measure (Article 39 of the Rules of Court) concerning the immunity of Włodzimierz Wróbel, Justice of the Supreme Court; there, the ECtHR directly invoked *Reczkowicz v. Poland*.

The constitutional problems relating to the norm under the second challenge are linked to how the shape taken by the first sentence of Article 6(1) of the Convention invites reservations concerning its compatibility with:

- constitutional principles governing the procedure for becoming bound by international agreements concerning the freedoms, rights or obligations of citizens as specified in the Constitution (Article 89(1)(2) of the Constitution), especially in the context of the ability to shape the contents of Convention norms outside of the ratification procedure (including without limitation through the lawmaking activities of an international organ);
- the constitutional principle that the court system and competence of courts and the procedure before them are to be governed by statutes and not by international agreements or lawmaking acts of other organs, including without limitation organs (here, the ECtHR) of international organizations (Article 176(2) of the Constitution);
- constitutional principles governing the constitutional shaping of the court as an organ of the judicial branch and at the same time an organ of the justice system, whose composition includes judges appointed the President of the Republic upon the application of the National Council of the Judiciary, which is shaped on the basis of constitutional and statutory provisions;
- the constitutional principle of finality of the judgments of the Constitutional Court, as well as their universally binding force, which entails compliance with the normative state of affairs shaped by those judgments, a state that should be perceived as final, legal and binding, also to the ECtHR.

The content of the third disputed norm derived by the ECtHR from the first sentence of Article 6(1) of the Convention is the ability for the ECtHR or domestic courts to engage in the review of the constitutionality and compatibility with the Convention of the statutes concerning the court system and competence of courts, as well as the statute governing the competence, procedure for the selection of members, the organization and procedure of the National Council of the Judiciary, in order to determine whether the 'tribunal established by law' condition is satisfied.

Similarly to the previous norm, also this one has gained its final shape in the ECtHR's judgment in *Reczkowicz v. Poland* and solidified its existence in *Dolińska-Ficek and Ozimek v. Poland* and *Advance Pharma sp. z o.o. v. Poland*. The disputed norm derived from the first sentence of Article 6(1) of the Convention is also applied by Polish courts. This is confirmed by identical reasoning on the merits, as well as general mutual invocation of judgments (see above).

The above-identified norms invites doubts as to its compatibility with the constitutional principles dealing with the hierarchical review of legislation, especially those manifested through the powers of the Constitutional Court (Articles 188(1) and 188(2) of the Constitution).

The constitutional problem, therefore, consists in whether it is possible for the competence in respect of the constitutional review of statutes to be shaped outside of constitutional norms and for the powers in that regard to be given to organs and bodies other than the Constitutional Court functioning in Poland's (domestic) legal order.

All three norms may be reviewed not only from the substantive (content) perspective but also from the competence perspective (i.e. review of the lawmaking activities of the ECtHR, which has shaped the disputed norms arising from the first sentence of Article 6(1) of the Convention).

As noted earlier on, the existence of the norms disputed in this case is revealed by the contents of the aforementioned ECtHR judgments, with their specific structure coming of assistance in this process — an ECtHR judgment constitutes a holistic and formally complete logical inference demonstrating the gradual arrival at the conclusion (decision), which is the result of the reasoning. The ECtHR arrives at it through the rationale (motives) and the identification (or creation) therein of a specific norm derived from the Convention provision taken as the basis for ruling. The decision itself is of declaratory nature and has to be implemented by the state on the basis of the command contained in Article 46 of the Convention, which means that the goal set by the Convention has to be achieved.

This manner of shaping of ECtHR judgments demonstrates the specificity of the role of the rationale. Here, the deductive dimension shapes the effect and direction of the ultimate ruling. The ECtHR does not only evaluate the state's conduct, it must previously shape the norm against which such conduct is subsequently to be tested. Thus, from the whole contents of the judgment — constituting an inference leading to a conclusion — one can in the context of that conclusion learn the contents of the created legal norm. The norm is highlighted by certain general and abstract formulations [expressions, phrasings (transl.)], reflecting development upon the specific provision of the treaty (Convention) and the development of the international legal order as a whole.

Moreover, this moment of lawmaking revealed by the logic of the inference is outright part of the requirements placed on the contents of all lawmaking judgments (more extensively see e.g. A. Ross, *Theorie der Rechtsquellen: ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen*, Leipzig–Wien 1929; M. Kriele, *Theorie der Rechtsgewinnung entwickelt am Problem der Verfassungsinterpretationen*, Schriften zum Öffentlichen Recht 1976, vol. 41). The juridical arguments contained in the inference are to legitimize, at least partially, the legal norms being created. The better the rationale, the more legitimacy is conferred on the judgment of what is ultimately an organ with weak legitimacy.

As regards the functional interpretation offered, such contents also reveal arguments going beyond the perspective of the classic canon of interpretative methods. They show the dynamic of the process of reasoning and the relationship between the rules of interpretation and the will of the judges, i.e. they unmask the quasi-legislative political decisionism (concerning the role of the rationale in the judgments of international courts, see e.g. A. v. Bogdandy, I. Venzke, *ibidem*, 11–28).

In the present case, an additional element identifying the normative effect of the ECtHR's case history is the fact that the norms shaped in *Reczkowicz v. Poland* (judgment of 22 July 2021) and confirmed in *Dolińska-Ficek and Ozimek v. Poland* (judgment of 8 November 2021) subsequently found application as domestic legal norms benefitting from the domestic status of the Convention (Article 87 of the Convention).

As a marginal note, the Constitutional Court notes that the above happened in spite of significant doubts concerning the direct applicability of the provisions of the Convention in the domestic order. This is because the aforesaid regulations do not meet the technical

requirements placed before the provisions of international agreements vested with the attribute of direct applicability (self-executable), even though they originate from the human-rights area. They have the character of an international standard of indeterminate content, with the individual as beneficiary, they are binding on the Convention's state-party, and their guarantor and institution giving them a specific content is the ECtHR. What is *de facto* applicable is, therefore, the norm derived in the decision.

The appropriate transposition of these norms into the domestic order took place on the basis of Article 91(2) of the Constitution. This is shown by a number of decisions of domestic courts, whether the Supreme Court or common courts, made after the ECtHR's judgments were handed down.

The first example is the order of a panel of the Supreme Court's Criminal Chamber in *I KZ 29/21*, of 16 September 2021. By that order, the Supreme Court quashed the order entered in *KO 6/21* on 16 June 2021, whereby a different panel of the Supreme Court's Criminal Chamber had declined to accept the convict's motion to reopen the proceedings. As the basis for quashing the disputed order, the panel in *I KZ 29/21* cited the fact that the court in *I KO 6/21* had been 'improperly composed' (Article 439(1)(2) of the Code of Criminal Procedure). In so doing, it relied on a resolution of three chambers of the Supreme Court, of 23 January 2020, which had been found unconstitutional by the Constitutional Court and thus eliminated from the legal order. Importantly, it [the SC panel in *I KZ 29/21* (transl.)] made repeat recourse to Article 6(1) of the Convention, which, in its opinion directly enabled such actions as:

- rejecting, on its basis, a judgment of the Constitutional Court published in the Journal of Laws;
- reviewing the proceedings in *I KO 6/21* in the light of the standard of the right to a court shaped by Article 6(1) of the Convention (p. 21 of the order) in the perspective of the court's composition (p. 22 of the order), in reliance on numerous decisions from the ECtHR, including without limitation *Reczkowicz v. Poland* (p. 24 of the order);
- standalone application of Article 6(1) of the Convention with contents determined for it by the judgment in *Reczkowicz v. Poland* as a 'superordinate norm' pursuant to Article 91(2) of the Constitution (p. 27 of the order), while at the same time rejecting Articles 29(2) and 29(3) of the Act on the Supreme Court as binding on the court (in wording established by the Act of 20 December 2019 amending the Law on the System of Common Courts, the Act on the Supreme Court, and certain other Acts; Dz.U.2020.190).

The above is holistically reflected by a fragment of the rationale of the order of the Criminal Chamber of the Supreme Court in *I KZ 29/21*, ending the inference offered in it (p. 29 *in fine* of the order). Therein we read: 'In consequence, the need to comply with the Convention standard of fair trial in the aspect of access to an independent and impartial tribunal established by law requires, with the application of Article 91(2) of the Constitution of Poland, the disapplication of the provisions of Articles 29(2) and 29(3) of the Act on the Supreme Court and, in further consequence, reversal of the disputed order, to safeguard the convict's right to the guarantee of Article 6(1) ECHR in further proceedings. Here, it must be submitted that the aforementioned provisions of Articles 29(2) and 29(3) of the Act on the Supreme Court are currently covered also by the interim order of the CJEU in *C-204/21 R*, of 14 July 2021 (letter d of the order). That order is effective and must be respected by the Supreme Court, and the Constitutional Court's judgment in *P 7/20*, of 15 July 2021, is fraught with the same defect as the judgment in *U 2/20*(...), and if only for that reason — as discussed above — it fails to trigger the effect of Article 190(1) of the Constitution of the Republic of Poland.'

We also meet with reliance on the norms created by the aforementioned ECtHR judgments (or even on the judgments themselves) in the orders of common courts, such as

the Regional Court in Cracow in *IC 846/20*, of 10 October 2021 (p. 2); *ICz 311/21 p-1*, of 11 October 2021 (p. 2); *IC 2121/15*, of 21 October 2021 (pp. 4–5); and *IC 311/21 p-1*, of 11 October 2021 — not published.

The norm created by the ECtHR judgment in *Reczkowicz v. Poland* is also referenced in the *obiter dictum* of the statement of reasons for the Supreme Court's order in *IV KO 86/21*, of 3 November 2021, as existing but not applied due to (as at the time of the Supreme Court's order) the lack of finality in the light of Articles 42–44 of the Convention and due to Poland's appeal to the Grand Chamber of the ECtHR (p. 10 of the order).

To recapitulate the foregoing, the domestic adjudicatory process saw the application of legal norms derived by the European Court of Human Rights from Article 6(1) of the Convention in *Reczkowicz v. Poland* and subsequently affirmed in *Dolińska-Ficek and Ozimek v. Poland* and the recently published *Advance Pharma sp. z o.o. v. Poland*. This was enabled by Article 91(2) of the Constitution.

Therefore, the identified (reconstructed) object of review exists.

5. Review of constitutionality of disputed legal norms arising from the Convention.

5.1. The first challenge.

5.1.1. The first challenge refers to the norm that from the term 'civil rights and obligations' — employed in the first sentence of Article 6(1) of the Convention — follows a right in a judge to hold an administrative function within the structure of the common judiciary in Polish legal system. In this matter the Constitutional Court ruled in ¶ 1 of the holding.

In the Court's view, in this context, the challenge gives rise to the question where it is possible for the ECtHR — by making erroneous references to domestic law — to shape individual rights not arising from Polish Constitution or statutes and to attach to a right created in such a way the requirement that the state provide it with guarantees relating to the right to court.

The petitioner selected as the test Article 8(1) of the Constitution (the principle of supremacy of the Constitution), Article 89(1)(2) of the Constitution (international agreements relating to the freedoms, rights or obligations of citizens as defined in the Constitution, the ratification of which requires prior approval by statute) and Article 176(2) of the Constitution (the requirement that the court system and competence of the courts and the procedure before them be regulated by statute).

As regards the first challenge, the Constitutional Court finds that there does not exist in Polish law an individual right in a judge to hold any function in the organizational structure of the justice system of the Republic of Poland. Neither the Constitution nor statutes provide for any such right (cf. ¶ 5 of judge K. Wojtyczek's separate opinion in *Broda and Bojara v. Poland* and the Constitutional Court's literature and cases cited therein).

The Constitutional Court recalls that in the Constitution the right of admission to public service is safeguarded and shaped by its Article 60. The latter provides that Polish citizens enjoying the full use of public rights have access to public service on the same terms. That right, however, does not extend to the possibility of serving in specific administrative or organizational roles in the structures of public authorities (such as the right to be the president of a court).

Nor does Article 60 of the Constitution guarantee admission to public service or retention in it irrespective of any circumstances; it only provides the right to apply to be admitted to public service and to remain in that service on terms equal for everyone (see judgments of the Constitutional Court in *K 28/97*, of 9 June 1998, OTK ZU 4/1998, item 50; and in *SK 14/98*, of 14 December 1999, OTK ZU 7/1999, item. 163). Nor does it confer any right of promotion on those admitted into public service. The right of access to public service must be referred to the various kinds of positions in public service, including higher than the

one held by the person applying for a promotion. This right extends not only to applying for admission into public service in general but also to applying for a specific position within the service (see CC judgments in *SK 43/06*, of 29 November 2007, OTK ZU 10/A/2007, item 130; *SK 57/06*, of 27 May 2008, OTK ZU 4/A/2008, item 63).

Considering the foregoing, the Constitutional Court emphasizes that a Polish citizen in full use of public rights has no individual right to demand admission into public service. The citizen cannot invoke Article 60 of the Constitution to demand assurance of access to public service by employment in a specific position or by being enabled to serve in a specified public function (see B. Banaszak, commentary on Article 60, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, 360; Constitutional Court judgments in *K 21/99*, of 10 May 2000, OTK ZU 4/2000, item 109; and *SK 57/06*, of 27 May 2008).

In the Constitutional Court's view, neither does any individual right to hold office, such as a right to hold an administrative function in a court for the duration set by the term, arise from Article 180(1) of the Constitution, which deals with the irremovability of a judge from office, with which — somewhat surprisingly — the ECtHR attempted to link such a right (see ¶ 106 of the judgment in *Broda v. Bojara v. Poland*), embarking for that purpose on its own interpretation of Article 180(1) of the Constitution in order to derive the legal norm.

The Constitutional Court rejects such an understanding of the Constitution not only due to the fact that the interpretation of the Constitution does not belong to the ECtHR but also because of the mistaken reasoning. The Constitutional Court recalls that the constitutional principle of irremovability of a judge is a safeguard of judicial independence and consists in the fact that the judge cannot be removed from office by a discretionary decision. This principle is linked to Article 179 of the Constitution, from which it arises that judges are appointed for indefinite durations. Thanks to that, they have the assurance of freedom to administer justice and perform such other tasks belonging to the judiciary as may be entrusted to them, without fear of being removed from office as a result of their activities. Hence, the guarantee of irremovability means the prohibition of making such decisions as would, on account of their character or author, constitute a violation of judicial independence. This principle applies to the status of a judge (adjudicatory activities) and not any administrative functions exercised by judges (see e.g. judgments of the Constitutional Court in *K 7/10*, of 8 May 2012, OTK ZU 5/A/2012, item 48; *P 37/14*, 22 September 2015, OTK ZU 8/A/2012, item 121; *P 20/04*, 7 November 2005, OTK ZU 10/A/2005, item 111).

The tenor of the Constitution precludes the existence in Poland's legal system of any constitutional individual right in a judge to hold an administrative function in the structure of the common judiciary. Due to the fact that the Constitution is the supreme law in the Republic of Poland, there cannot exist in the legal system any such subordinate norms, even arising from ratified international treaties, as would be incompatible with the Constitution or create — ignoring the Constitution — additional standards dealing with the status of a judge.

In *Broda and Bojara v. Poland*, the ECtHR created — ignoring the provisions of domestic law, including those of the Constitution — a specified individual right under the first sentence of Article 6(1) of the Convention. The ECtHR did so not only in defiance of its own previous line of judgments (cf. *Baka v. Hungary*, application no. 20261/12, ¶ 101, and *Denisov v. Ukraine*, application no. 76639/11, ¶ 45) but also in defiance of logic and its own assumption (cf. *Broda and Bojara v. Poland*, ¶ 95 and ¶ 4 of the separate opinion of Judge Wojtyczek) that the starting point has to be the concrete provisions of the relevant domestic law and their interpretation by domestic courts (cf. *Károly Nagy v. Hungary*, application no. 56665/09, ¶ 62, and *Regner v. Czech Republic*, application no. 35289/11, ¶ 100).

Nor did the ECtHR adopt any methodology to follow, because it did not even specify any particular provision from which the relevant right could directly arise, but it simply derived from the very term 'civil rights and obligations' the view that a judge's right to hold an administrative function in the structure of the common judiciary in Polish legal system is an element of that system and thus subject to the protection of Article 6(1) of the Convention.

Here, as a marginal note, the Constitutional Court points that even if such a right did exist, due to its public-law character it would not be a civil right. And thus it would not fit within the perspective of Article 6(1) of the Convention.

5.1.2. The Constitutional Court found the first sentence of Article 6(1) of the Convention in the normative scope derived by the ECtHR to violate the principle of supremacy of the Constitution arising from Article 8(1). By virtue of that constitutional provision, all legal acts, whether from the scope of legislation or application of the law, should conform to the Constitution. The consequence of the supremacy of the Constitution in this meaning is that any norms incompatible with the Constitution should be eliminated from the legal system. This means that if a given matter is the object of constitutional regulation, it is not freely possible to create law contrary to such regulation.

The Constitutional Court recalls that the principle of supremacy of the Constitution applies also to international agreements binding on the Republic of Poland, including without limitation those of which the ratification requires prior approval by statute. For this reason, all international agreements must be compatible with the Constitution, which is the highest law of the Republic. The above finds confirmation not only directly in constitutional provisions (Article 8(1) and Article 188(1) of the Constitution) but also in the decisions of the Constitutional Court (see, for Article 8 of the Constitution, in particular the CC judgments in *K 18/04*, of 11 May 2005, OTK ZU 5/A/2005, item 49; and *K 32/09*, 24 November 2010, OTK ZU 9/A/2010, 108).

Considering the foregoing, the Constitutional Court found that the norm arising from the first sentence of Article 6(1) of the Convention had to be juxtaposed with the principle of supremacy of the Constitution. If, in turn, the disputed norm extends the term 'civil rights and obligations' to a judge's individual right to hold an administrative function in the structure of the common judiciary in Poland's legal system, whereas the Constitution expressly defines the status of a judge and does not define it through administrative functions exercised by the judge, then such a Conventional norm violates the principle of supremacy of the Constitution.

While giving shape to the contents of the disputed norm, the ECtHR omitted the constitutional standards concerning access to public service and concerning the status of a judge, and thus a lawmaking act consisting in supplanting the constitutional lawmaker took place. If the subordinate (Conventional) norm regulates a constitutional matter divergently, it is incompatible with Article 8(1) of the Constitution.

5.1.3. The Constitutional Court also judged the norm disputed in the first challenge to be incompatible with Article 89(1)(2) of the Constitution. Article 89(1) of the Constitution makes the admissibility of the ratification of an international agreement conditional on Parliament's consent (in the form of statute) whenever such an agreement contains certain contents specified in said Article. In the literature it is noted that Article 89(1) of the Constitution — despite the literal wording suggesting that the ratification of an international agreement should practically always be preceded by statutory approval — should be held to a narrowing interpretation. For it is held that ratification with approval by statute must be regarded as an exception from the rule (see M. Wiącek, commentary on Article 89, [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP*, t. 2, *Komentarz do art. 87–243*, Warszawa 2016, and the literature cited therein). This approach is supported by the enumerative listing of the cases requiring such so-called big ratification.

One of the groups of agreements requiring ratification with prior approval given by statute are those concerning 'freedoms, rights or obligations of citizens, as specified in the Constitution' (Article 89(1)(2) of the Constitution). Commentators on this provision explain that it deals with those agreements which contain provisions directly restricting the freedoms or rights of citizens or imposing obligations on them, or provisions binding the Republic of Poland to introduce such type of regulation in her territory. The *ratio* of this provision is that the status of an individual cannot be shaped without the participation of Parliament (see M. Wiącek, *ibidem*, ¶ 23).

Accordingly, ratification of an international agreement preceded by approval granted by statute constitutes, in principle, the manner in which to introduce into Poland's legal system international legal norms pertaining to the freedoms and rights of an individual. The Constitutional Court recalls that, in principle, it is admissible for the contents of norms arising from international treaties dealing with human rights to evolve after ratification, as a result of the dynamic interpretation and lawmaking activities of international courts. However, in the Constitutional Court's opinion, should the contents of the international-law norm shaped through such a process become incompatible with the provisions of the Constitution or of statutes, then such a norm has to be viewed as introduced into Polish legal system in violation of Article 89(1)(2) of the Constitution because in the former event that would be inadmissible and in the latter event the process would have contravened the constitutional procedure (ratification).

Such a situation is what we are dealing with in the present case. In the Constitutional Court's view, the norm from the first sentence of Article 6(1) of the Convention, as shaped by the decisions of the ECtHR, which consists in how the term 'civil rights and obligations' as referred to in that provision is to include the individual right for a judge to hold an administrative function in the structure of the common judiciary in Polish legal system, has been introduced into the domestic legal order bypassing the procedure referred to in Article 89(1) of the Constitution, even though it deals with rights regulated in the Constitution; moreover, it modified the Constitution.

Hence, in the Constitutional Court's opinion, with regard to the disputed norm, it had to be concluded that neither the ECtHR's action (lawmaking activity), nor its outcome (the norm shaped by the ECtHR's action) fall within the limits of constitutionally admissible dynamic interpretation of the provisions of the Convention. Accordingly, the disputed norm had to be judged to be in violation of Article 89(1)(2) of the Constitution.

5.1.4. The norm identified in the first challenge is also incompatible with Article 176(2) of the Constitution, from which it arises that the court system shall be regulated by statute; this is because the ECtHR derived that norm arbitrarily from the language of the Convention, in contravention of said constitutional provision.

The Constitutional Court recalls that, in line with the constitutional lawmaker's assumption, the purpose of Article 176(2) of the Constitution is the imperative that the matter specified in it (i.e. the court system and competence of courts and procedure before them) be regulated by provisions of universally binding law — statutes. The selected formula (statute) is an expression of the requirement that all important normative determinations in the sphere of judicial legal protection — being of particular importance to the protection of rights and freedoms — come from Parliament. Only an act of Parliament gives such rights and freedoms their guaranteeing character and equips them with the democratic legitimacy proper to their rank, as well as making it possible to ensure the greater stability of the law, which is necessary from the point of view of the effective realization of the right to court.

Of course, the constitutional specification — in principle — of the statute as the appropriate act for certain regulatory matter does not preclude the delegation of some of such statutory matter — in accordance with constitutional principles — for determination by other normative acts. In the Court's view, however, one ought to remember that in the CC's decisions to date it has been held that the greater the degree in which the matter concerns issues that are fundamental to the individual's position, the more complete the statutory regulation must be and the less room remains for referrals to executive legislation (see e.g. CC judgments in *K 34/99*, of 28 June 2000, OTK ZU 5/2000, item 142; and *U 5/06*, of 16 January 2007, OTK ZU 1/A/2007, item 3). The Constitutional Court has also emphasized that statutes regulating court procedure must define the rights and obligations of the parties and the method for challenging the decisions in a precise manner (see CC judgments in *P 11/02*, of 19 February 2003, OTK ZU 2/A/2003, item 12; *P 68/07*, of 16 December 2008, OTK ZU 10/A/2008, item 180). This requirement must be applied *mutatis mutandis* to statutes

regulating the court system and competence of courts. In this context, particular significance belongs to the satisfaction of the requirements of statutory authorization to issue a regulation (*rozporządzenie*), as arising from Article 92(1) of the Constitution.

The Court also emphasizes that, as regards regulating the court system and competence of courts, the formula of a statute has another important context. This matter not only touches on the legal position of the individual, it is also especially important from the point of view of the constitutional principle of the separation of powers (Article 10 of the Constitution) and the principle of separation and independence of the courts as an element of the judicial branch (Article 173 of the Constitution). This is because the constitutional requirement for regulation to be by statute makes it possible to mitigate excessive interference from the executive with the functioning of the judicial branch and emphasizes the organizational separation of the two branches. It is for this reason that all fundamental elements of the court system, competence of courts and procedure before them should be defined by statute and the legislative branch should be responsible for their shape (see the Constitutional Court's judgment in *K 45/07*, of 15 January 2009, OTK ZU 1/A/2009, 3).

This constitutional formulation corresponds with the formula of Article 6(1) of the Convention referring to the assurance of a right to fair trial before a 'tribunal established by law'. This requirement encompasses the entirety of the organization of the court system, including without limitation the scope of competence allotted to the various types of courts, as well as the establishment of any specific court and the demarcation of its territory (competence by reason of place). In this case the purpose is to ensure that the organization of the court system in a democratic society does not depend on the discretion of the judiciary but is established through legal provisions enacted by Parliament (see e.g. Commission in *Zand v. Austria*, application no. 7360/76, decision of 12 October 1978, §§ 68–69; Commission, *G. v. Switzerland*, application no. 16875/90, decision of 10 October 1990; ECtHR, *Mounir El Motassadeq v. Germany*, application no. 28599/07, decision of 4 May 2010; ECtHR, *DMD GROUP, a.s. v. Slovakia*, application no. 19334/03, judgment of 5 October 2010, § 60; cf. P. Grzegorzczuk, commentary on Article 176, [in:] *Konstytucja RP...*, and the literature cited therein).

Hence, the Court emphasizes that when shaping the court system and the competence of the courts the lawmaker has two fundamental duties:

- firstly, to do so in such a way that the adopted solutions ensure that effective is given to other constitutional mandates, such as the right to court (Article 45 of the Constitution) and separation and independence of the judicial branch (Article 173 of the Constitution);
- secondly, to respect the elements of the court system established on the constitutional level (Article 175, Article 183 and Article 184 of the Constitution), as well as regulation referring to the scope of competence of the courts (Article 101, Article 177 and Article 184 of the Constitution).

Here, the Constitutional Court recalls that in its decisions to date Article 176(2) of the Constitution has been used as a test primarily with regard to the admissibility of regulating specific issues from the scope of the court system, court competence and procedure before courts by acts inferior to statutes. It has not, by contrast, been analysed in the context of the extent to which a given matter may be regulated by international agreements. From this point of view the present inference being offered by the Constitutional Court is a significant legal *novum*.

The Constitutional Court, moreover, is aware that in line with Article 89(1)(5) of the Constitution there may in the future arise a political situation in which the statutory lawmaker faces the need to consider giving approval to the ratification of such an international treaty as would regulate matters already covered by existing statutory regulation or matters covered by the requirement of so-called exclusivity of the statute. The last-mentioned term, following the entry into force of the Constitution of 1997, is understood to mean that the source of a

legal norm binding in Poland should be a statute (i.e. a statute directly or an act issued on the basis or with the participation of a statute). Hence, in the Court's view, it is necessary for the present judgment to identify the constitutional framework in this regard.

The Constitution contains different provisions with referrals to statutes, whereby it achieves different functions depending on the redaction of the various provisions. One can conclude that the constitutional lawmaker's referrals to statutes are intended to develop upon and concretize the constitutional provisions, as well as ensuring that the Constitution is followed. In this way the principle of constitutionalism is given effect in the substantive dimension. Such constitutional provisions include those that require the system and organization of the organs of the state to be regulated by statute.

In the subject area of the constitutional mandate of regulation by statute, the literature also distinguishes the institution of so-called qualified exclusivity of the statute. The content of this institution is the constitutional lawmaker's mandate that a specific matter be regulated by an act of Parliament and the participation of the executive branch be either altogether excluded or limited only to secondary and technical matters. The goal of such an approach is to heighten the standard of legislative propriety applicable to the provisions regulating such a matter and to increase their legitimacy by the operation of an organ elected by universal vote and thus subject to the voters' political control (see the Constitutional Court's judgment in *K 16/13*, of 10 December 2013, OTK ZU 9/A/2013, 135). The literature on the subject identifies the qualified exclusivity of the statute as pertaining in particular to such substantive areas as: (1) limitation of the freedoms and rights of individuals; (2) giving shape to the obligations of individuals; (3) matters of significant importance to the state's system of governance; (4) organization and operating procedures of public authorities (cf. M. Wiącek, *ibidem*, ¶ 74, and the literature cited therein).

From the above findings it follows that referrals made by the Constitution to a statute, in principle, concern the implementation of a constitutional mandate by way of statute. Alternatively, though with great caution, they may be referred to acts inferior to statutes, albeit strictly linked with statutes by the concrete constitutional solution — Article 92(1) of the Constitution (i.e. to executive regulations issued in reference to statutes); however, in any such case, in the Constitutional Court's view, it is always necessary to determine whether a scope of matters has been properly delegated to executive legislation.

In the Constitutional Court's opinion, constitutional referrals to statutes cannot, however, be regarded (interpreted) as referring in a general way also (by default) to international agreements. Nor is that admissible even with regard to agreements ratified with prior approval by statute. This position is supported by the following arguments:

- Firstly, if the rational lawmaker wanted to enable the court system and its organization to be regulated by an international agreement, that would be expressly stated in this or any other provision of the Constitution. For it must be emphasized that the Constitution makes numerous referrals to international agreements (the shaping of the law by agreements) and differentiates the possibility of the relevant issues being regulated by agreements and by statutes (see e.g. Article 25(4), Article 27, Articles 55(2) and 55(3), Article 56(2), Article 59(4), Article 116(2), Article 117, and Article 229). This means that in those cases in which the constitutional lawmaker intended to make a referral to regulation by international agreement, that was done in an express way. Moreover, in several cases the constitutional lawmaker made referrals both to statutory and international-law regulation, which attests to the fact that the constitutional lawmaker distinguishes between the two sources of law and ascribes different meanings to them.
- Secondly, the obligation to comply with the international law binding on Poland does not mean that such law may freely supplant the statutory lawmaker and the normative acts created by that lawmaker (statutes). The method for binding Poland to international law is defined by the Constitution; hence, in each specific scope

- constitutional requirements must be met, such as those concerning the fact that only a ratified international agreement can be universally binding law.
- Thirdly, neither does the duty to interpret statutes in accordance with the international law mean that specific matters belonging to statutory exclusivity may automatically be regulated by international law. Interpretation is not an instrument by which to modify the essence of a provision.
 - Fourthly, any hypothetical transfer of the competence of domestic authorities (thus also the competence to enact law in a specified scope and of specified content) may take place solely on the basis of an international agreement ratified under Article 90 of the Constitution. ‘Ordinary’ ratification, even with approval by statute, will not suffice here. It must be noted, however, that matters relating to problems linked to the exercise of the functions of the state and organization of its organs constitute an element of Poland’s constitutional identity and thus, in principle, cannot be transferred for shaping outside of the state (see e.g. the Constitutional Court in *K 32/09*, judgment of 24 November 2010).
 - Fifthly, the statute formula is to provide the judicial branch with an appropriate level of democratic legitimacy and exclude influence from the executive branch. These tasks are not achieved by an international agreement, not even one that requires ratification with prior approval by statute. Of course, we can say that an agreement ratified in such a manner ‘is linked to statute’, but, the Constitutional Court recalls, that is only a formal link, not a link dealing with the contents. Here, the statutory lawmaker only grants (or refuses) approval for becoming bound by the agreement and has no influence on the shape and content of its provisions. That content — as an element of foreign policy — is shape within the boundaries of its constitutional powers by the executive branch (the cabinet), and the ratification itself is done by the President (with the countersignature of the President of the Council of Ministers).

In the light of the foregoing, in the Court’s opinion, it is unequivocal that the linguistic, systemic and functional interpretations of Article 176(2) of the Constitution all speak to the fact that said provision references the so-called qualified exclusivity of statute. Accordingly, the ability to shape the court system, competence of courts and procedure before them, within the constitutional meaning, by way of international agreements does not fall within the remit.

Here, the Court explains, moreover, that the limitation derived from Article 176(2) of the Constitution has for its context the system of governance, for such is the character of that provision. It does not deal with the aspect of safeguards for the rights of individuals or the level of those standards, given effect by the assurance of the right to court. The assurance of the guarantees of this kind is achieved by different constitutional provisions (tests) (e.g. Article 45(1) of the Constitution). In this context substantive regulation by international agreement is admissible, although the ratification procedure from Article 89(1) of the Constitution must be fulfilled. The Court recalls, however, that Article 45(1) of the Constitution itself is not the test in the present case.

The intention of Article 176(2) of the Constitution is to ensure the exclusivity of the state authority (Parliament) in the process of the shaping of the court system and competence of courts, and thus the part of the judicial branch that exercises one of the functions of the state, i.e. the administration of justice. True, these matters (i.e. Article 176(2) and Article 45(1) of the Constitution) are functionally interlinked, because the court system has to guarantee giving effect to the right to court. What is, however, not admissible, is to attempt to invert this context and interfere with the shaping of the court system and court competence from the perspective of the right to court (entering the role of the statutory lawmaker, even a negative one), as we observe in the ECtHR’s conduct. The Conventional review of the safeguards of the right to court may pertain only to the court’s operation in a concrete case

and may not lead to the abstract review of the authority of part of the domestic judiciary within the state's system of governance and its domestic organization.

In the Constitutional Court's view, the ECtHR's conduct, in essence, constitutes an attempt to redefine the contents of the constitutional separation of powers in Poland and interfere with the constitutional competences and authority of the organs. In so doing it ventures beyond the essence of the Convention and beyond the Conventional functions of the ECtHR. The matters specified in Article 176(2) of the Constitution may not be shaped by any act of international law, let alone the lawmaking activity of any organ (whether foreign or domestic); that may only be done by Polish legislature. Only in the case of the judgments of the Constitutional Court, which have universal binding force and are final, that organ may shape the court system by ruling on the constitutionality of the statutes regulating the manner. In this context, however, even the Constitutional Court decides only on the shape of the statute and the existence of its various provisions and does not create any new normative acts or legal norms, ones not existing in the Constitution.

5.1.5. In summary, as to the first challenge, the Constitution Court finds that the first sentence of Article 6(1) of the Convention, in the scope in which it extends the term 'civil rights and obligations' to an individual right in a judge to hold an administrative function in the structure of the common judiciary in Polish legal system, is incompatible with the test specified for the review, in how it:

- contrary to the constitutional provisions dealing with the right of access to public service creates an individual right on the Convention level, which results in a hierarchical violation of the structure of the system of the sources of law, whereby it is incompatible with the principle of supremacy of the Constitution (Article 8(1) of the Constitution);
- creates the contents of a Convention norm outside of the procedure of ratification of an international agreement referred to in Article 89(1)(2) of the Constitution and thus without the state's consent, whereby the path specified for becoming bound by provisions of international law becomes violated, because the ECtHR, acting in a lawmaking manner, supplants the procedure for the amendment of an international agreement, which, to the extent of any hypothetical (constitutionally admissible) supplementation of statutory contents should be ratified using the appropriate constitutional procedure;
- contrary to the constitutional requirement that the court system be regulated by statute creates — by way of the ECtHR's lawmaking activity — in the contents of the provisions of the Convention an individual right to hold positions within the administration of Polish courts, whereas such a right finds no support either in the Constitution or in statutes (Article 176(2) of the Constitution).

5.2. The second challenge.

5.2.1. The constitutional problem relating to the second challenge concerned the scope of the term 'tribunal established by law'. The Constitutional Court ruled upon it in ¶ 2(a) of the holding.

The Constitutional Court found unconstitutional two norms derived from the first sentence of Article 6(1) of the Convention, of which the first allows the ECtHR or domestic courts, when determining whether the 'tribunal established by law' condition is met, to ignore the provisions of the Constitution, statutes, and judgments of Polish Constitutional Court, and the second enables the ECtHR or domestic courts, in the process of interpreting the Convention, to create on their own norms relating to the procedure for the appointment of judges to domestic courts.

In reviewing the constitutionality of the norms identified in the second challenge, the Constitutional Court noted that although the interpretation of Conventional terms is of autonomous character, and the interpretation of the Convention (within the scope permitted

by Article 32) belongs to the ECtHR, the external limits of that interpretation are set by the mutual consent of the states party to the Convention to be bound by it and — at least in Poland — also by the provisions of the Constitution.

In accordance with Article 87(1) of the Constitution, a ratified international agreement is part of universally binding law, and Articles 188(1) to 188(3) of the Constitution (dealing with the Constitutional Court's competence to review the hierarchical compatibility of the law) set its place in the domestic legal order. Accordingly, when determining whether a court is 'established by law', it is necessary to take national law as basis, which will constitute the point of reference in this regard. Here, neither the ECtHR, nor domestic courts may decode the domestic law dealing with the tribunal established by law in a manner that is unbound and arbitrary. The determination whether a court is established by law has to be based on universally binding domestic law and universally binding decisions of the Constitutional Court (Article 190(1) of the Constitution).

5.2.2. The Constitutional Court recalls that in the ECtHR's case-law to date, the term 'tribunal established by law', as referred to in the first sentence of Article 6(1) of the Convention, has been linked to the principle that the organization of the judiciary and the competence of a court in a democratic state cannot depend on the discretion of the executive but must be regulated by law enacted by the parliament. This understanding is formal in terms of character, but at the same time it expresses respect for the principle of separation and balance of powers. From this it follows that an organ not called upon to serve as a court by the lawmaker's will does not have the legitimacy required in a democratic state for judging (see e.g. the ECtHR's judgment in *Coëme and Ors v. Belgium*, applications no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, judgment of 22 June 2000, § 98; *Savino and Ors v. Italy*, applications no. 17214/05, 20329/05 and 42113/04, judgment of 28 April 2009, § 94; *Oleksandr Volkov v. Ukraine*, application no. 21722/11, judgment of 9 January 2013, §§ 150–151).

Therefore, the original norm arising from the first sentence of Article 6(1) of the Convention in the scope concerning the requirement of a tribunal established by law dealt with the guarantee that the judgment will be given by a court panel shaped in accordance with the domestic provisions concerned with the court system.

Expressis verbis, Article 6(1) of the Convention requires that the court be 'established by law'. However, similarly to the case of Article 176(2) of the Constitution, it does not follow from Article 6(1) of the Convention that the lawmaker is to regulate every detail dealing with the court by way of a statute (cf. report of the European Commission on Human Rights in *Zand v. Austria*, of 12 October 1978). The lawmaker may authorize the executive to regulate the details of the justice system, although such a course should be taken only on an exceptional basis (cf. L. Garlicki, *Pojęcie i cechy „sądu” w świetle orzecznictwa Europejskiej Konwencji Praw Człowieka*, [in:] A. Szmyt (ed.), *Trzecia władza. Sądy i trybunały w Polsce, Materiały Jubileuszowego L Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Konstytucyjnego*, Gdańsk 2008, 146; cf. ECtHR, *Lavents v. Latvia*, application no. 58442/00, judgment of 28 November 2002, ¶ 114). The statutory delegation to the executive branch of the competence to regulate certain matters concerning the organization and competence of the justice system cannot be too far-reaching (cf. ECtHR, *Coëme and Ors v. Belgium*, judgment of 22 June 2000, ¶ 98) and should be supported by a guarantee of the availability of judicial review of the implementation of it, in order to prevent hypothetical unlawful or arbitrary actions. Furthermore, the scope of competence to regulate left with the executive must also be perceived against the background of the constitutional principles of the system of sources of law.

The requirement that the court be 'established by law' does not only mean a statutory basis for the court's existence but also a requirement that the organization and functioning of the court be determined by statute (cf. the report of the European Commission on Human Rights in *Piersack v. Belgium*, of 13 May 1981). Accordingly, this calls for the competence

(jurisdiction, exceptions from general rules of venue) of the court and the rules of the procedure before it, as well as rules of composition of the court and assignment of cases to judges (cf. P. Hofmański, A. Wróbel, commentary on Article 6, [in:] L. Garlicki, P. Hofmański, A. Wróbel (eds.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, vol. 1, *Komentarz do artykułów 1–18*, Warszawa 2010, ¶ 127).

The Constitutional Court emphasizes that this standard of the ECtHR's reasoning had functioned for a number of years. A breakthrough, however, came with *Guðmundur Andri Ástráðsson v. Iceland* (application no. 26374/18, judgment of 12 March 2019; hereinafter '*Ástráðsson*'). Coming up before the ECtHR for ruling at the time was the problem whether a violation of domestic law during the process of appointment would automatically have affected a judge's ability to administrate justice and whether the participation of such a judge in future cases would violate the guarantee that the court must be 'established by law'. To answer such a question, the ECtHR recapitulated its position then-to date and formulated a test for the 'tribunal established by law' composed of three detailed principles:

- The first principle consisted in that the scope of the 'established by law' guarantee must be interpreted widely. It also extends to the process of appointment of judges within the framework of the domestic system (¶ 98 of the rationale in *Ástráðsson*).
- The second principle noted that the finding that a given court, due to its composition, fails to meet the requirement of being 'established by law', is in itself — in principle — sufficient to affect the fairness of the procedure and thus the effect of the right to court (¶ 100 of the rationale in *Ástráðsson*).
- The third principle called upon subsidiarity and mandated that account be taken of the findings of domestic courts both in respect of the existence of procedural violations in the appointment procedure and in respect of the gravity of such violations (¶ 100 of the rationale in *Ástráðsson*).

Therefore, according to *Ástráðsson*, the term 'established by law' from the first sentence of Article 6(1) of the Convention refers to a process of appointment of judges within the domestic justice system that must be conducted in accordance with the rules of domestic law in force as at the time of the appointment. To facilitate the evaluation whether the irregularities visited upon the appointment process entail a violation of the right to a tribunal established by law, the ECtHR developed a detailed test composed of three criteria to be examined jointly: (1) the first criterion consists in that the violation of domestic law must be evident, i.e. objective and verifiable; (2) the second criterion deals with that the violation must be material enough to undermine the court system's ability to exercise its functions without excessive interference; (3) the third criterion consists in that an important roles belongs to the review, by the domestic courts, of the legal consequences of a violation from the perspective of rights arising from the Convention.

Here, the ECtHR noted that it would usually defer to the determinations made by the domestic courts unless arbitrary or manifestly ill-founded. The ECtHR held that adjudication by a judge whose appointment to the post took place in violation of domestic provisions, irrespective whether the domestic legal system recognizes the effectiveness of such an appointment, constitutes a violation of the right to a fair trial before a tribunal established by law (first sentence of Article 6(1) of the Convention).

Explaining the meaning of the term 'flagrant violation of domestic law', the ECtHR observed that it covered only violations of such of the applicable domestic provisions dealing with the establishment of the 'tribunal' as were of a fundamental nature and constituted the integral whose of the system of creation and functioning of the court system (¶ 102 of the rationale in *Ástráðsson*).

The ECtHR also noted that in the 'tribunal established by law' test one had to consider whether the facts indicated that a violation of domestic provisions concerning the appointment of judges had taken place and whether that was an intentional or flagrant violation of the domestic law in force (¶ 102 of the rationale in *Ástráðsson*). One also has to determine

whether the violation has generated a realistic risk that other public authorities, especially organs of the executive branch, had abused excessive freedom [sic], undermining the integrity of the appointment process in a scope not provided for [sic] by domestic provisions (¶ 103 of the rationale in *Ástráðsson*).

At the same time, it does not follow from the ECtHR's judgment in *Ástráðsson* that there exists a Conventional requirement that all decisions made with the participation of an irregularly appointed judge be found invalid.

The ECtHR affirmed the above findings by handing down a Grand Chamber judgment in that case on 1 December 2020. The norm derived from the first sentence of Article 6(1) of the Convention, referencing the link between the irregularity of the process of appointment of judges and the term 'tribunal established by law' and the fair-trial standard. Thus, the right to a tribunal established by law was found to extend to the process of appointment of judges. The ECtHR noted that in order to determine whether the court could be regarded as independent, account had to be taken, among other things, of the manner of appointment of its members (see ¶¶ 233ff. of the rationale of the ECtHR's judgment of 1 December 2020 in *Ástráðsson*).

The ECtHR also found that the right to a 'tribunal established by law' must be interpreted in conjunction with other requirements of the rule of law, such as the principles of legal certainty and of the irremovability of judges. The right, however, should not be understood in an excessively expansive manner whereby any irregularity in the procedure for appointing a judge can violate Article 6 of the Convention. In each case it has to be determined whether the irregularities in a given judicial-appointment procedure were of such gravity as to result in a violation of the right to a 'tribunal established by law'. That determination had to be based on domestic law. The ECtHR, however, made the reservation that Article 6 of the Convention can be violated in the case of a judicial appointment that seemingly complies with the relevant domestic provisions but is incompatible with the object and purpose of this right as arising from the Convention.

Here, the Constitutional Court notes, however, that in *Ástráðsson* the ECtHR made the reservation that the requirement of a 'tribunal established by law' was not an attempt to impose on the states party to Convention uniform solutions in respect of the appointment of judges. The ECtHR acknowledged the diversity of the judicial-appointment systems in the various states. It explained that the adoption of a model assuming the decisive influence of the executive branch could not in itself deprive a given court of the attribute of being 'established by law'. What is important is to preclude arbitrary interference, including without limitation by the executive branch, with the process of appointment of judges. The ECtHR also highlighted the standalone character of the 'tribunal established by law' standard. It pointed out, however, that although the latter is interconnected with the requirement of independence and impartiality, the requirement that the case be heard by a 'tribunal established by law' in itself pertains to a completely different sphere of the evaluation of the right to a fair trial (see ¶¶ 231–232 and 280 of the rationale in *Ástráðsson*).

5.2.3. Against the background of the above paths of reasoning, the Constitutional Court finds that the nature of the Conventional standard of a tribunal established by law is primarily formal and refers to the determination whether the requirements arising from domestic law for a given organ to be able to be regarded as a court are met.

In the Constitutional Court's view, from the judgment in *Ástráðsson* general norms are derived pointing that the term 'tribunal established by law' includes without limitation certain requirements pertaining to the process of appointment of judges and that such irregularities (violations of the law) in that process can have impact on the rights arising from the Convention in all matters heard and/or decided in the future with the participation of irregularly appointed judges. In practice, this means that the ECtHR has recognized the possibility of the existence of a category of judges whose appointment was fraught with such violations as to undermine the merit of the process of appointment and the essence of the

right to a tribunal established by law (see ¶ 259 of the rationale of the ECtHR's judgment of 1 December 2020 in *Ástráðsson*). From this it would follow that the original violation impacts all future judicial actions of such a judge, even in the absence of a link — in time or substance — between the appointment and the specific case decided before the court.

At the same time, the ECtHR did not state in categorical terms that the participation of an irregularly appointed judge in the panel automatically makes the judicial proceedings unfair. Every case requires a careful balancing act among the conflicting values. The satisfaction of the guarantees of Article 6 of the Convention requires a determination of the legality of the judge's appointment and estimation of the gravity of the violations found and balancing of the conflicting values. The violations have to pertain to domestic law and arise in the process of appointment of the judges. Therefore, the ECtHR linked a violation in the judicial-appointment process under domestic law with the term 'tribunal established by law'. Violations of domestic law can take place on two levels — as violations of statutory provisions and provisions specifically applicable to the process of appointment, and as a violation of general constitutional provisions. In *Ástráðsson* the Grand Chamber consistently employs the term 'domestic law' as the norm of reference.

The ECtHR also noted that the term 'law' within the meaning of the first sentence of Article 6(1) of the Convention extends to legal provisions defining the method of establishment and competences of judicial organs and all other such provisions of domestic law as, if violated, will render unlawful the participation of the judges in the adjudication of the case (see the ECtHR's judgment of 12 March 2019 in *Ástráðsson* and the Grand Chamber's judgment in that case, of 1 December 2020).

The Constitutional Court observes that, despite the lawmaking expansion of the contents of Article 6(1) of the Convention, the ECtHR in *Ástráðsson* did not yet aspire to be able to directly review the provisions of domestic law concerning the process of judicial appointments for compatibility with the right to court. On the contrary, it made domestic law the point of reference (test) for the evaluation of the legality of the relevant nominations and filled the term 'tribunal established by law' with content in that way.

And although the ECtHR's attribution to itself — in reliance on Article 6(1) of the Convention — of the competence to review the compliance with domestic law of the process of judicial appointments as an element of the right to a fair trial in the context of meeting the standard of a tribunal established by law elicits doubts from the Constitutional Court (again, the question surfaces of the possibility itself of an international organ intervening through human rights in the elements of a state's system of governance and thus attributing to the international community on the Convention level the right to override the state's sovereignty on the constitutional level), it must be noted that the norm from *Ástráðsson* did not expressly allow domestic law to be ignored in the review of the appointment process, nor did it allow the ECtHR to create norms in this regard, not even by deriving them from the Convention.

5.2.4. The Constitutional Court has noticed, however, that in *Reczkowicz v. Poland* — *nota bene* invoking the principles of *Ástráðsson* — the ECtHR has gone even further, expanding the contents of the norm created therein out of Article 6(1) of the Convention even further. For it created two norms, of which the first allows the ECtHR or domestic courts, when determining whether the 'tribunal established by law' condition is met, to ignore the provisions of the Constitution, statutes, and judgments of Polish Constitutional Court, and the second enables the ECtHR or domestic courts, in the process of interpreting the Convention, to create on their own norms relating to the procedure for the appointment of judges to domestic courts. Therefore, in *Reczkowicz v. Poland* — in reference to the test formulated in *Ástráðsson* — the ECtHR, instead of examining whether the judges had been appointed in compliance with the Constitution and domestic statutes, relied on court decisions selected (arbitrarily) by itself, especially the decisions of the Supreme Court disputing the legality of the appointments of judges and their status (see ¶¶ 234ff. 252–254, and 259–263ff), as well as its own

imaginings based on untrue information circulated through the media (e.g. the fourth paragraph of ¶ 263), compounded by a lack of knowledge of Polish law and Polish Constitutional Court's judgments (e.g. ¶¶ 261 and 274) and ignored the facts that:

- Firstly, in Polish law as at present there exists no procedure for the review of the legality of the appointment of judges by the President upon application of the National Council of the Judiciary. If so, domestic courts, including without limitation the Supreme Court, were not entitled to examine and dispute the legality of judicial appointments, and the Supreme Administrative Court was not in a position to attempt to block the appointments (*nota bene* by invoking an erroneous legal basis). Hence, the decisions of these courts violate the law.
- Secondly, courts in Poland are not formally empowered to make law and especially not universally binding law. This means that, in Poland, the product of the adjudicatory activities of the courts (court decisions) is not a source of law and especially not of universally binding law. Accordingly, it cannot provide the basis for the determination of whether a court is 'established by law'. If, however, the practice of judicial application of the law in Poland begins to take on a legislative nature, the norms derived from the lawmaking activities of the courts may be the object of the Constitutional Court's derogative determination as violating Parliament's competence.
- Thirdly, not only had the Polish not consented to the contents of the norms being derived from the first sentence of Article 6(1) of the Convention allowing the omission of domestic provisions, even those of the Constitution, in the evaluation of the legality of the process of judicial appointments, and the creation of norms in that regard by the ECtHR or domestic courts, it was not even capable of giving any such consent.

To explain the above, the Constitutional Court recalls the appointment of a judge is a prerogative of the President of the Republic, which, in the current constitutional dispensation, is not subject to review (see e.g. the Constitutional Court's judgments in *K 18/09*, of 5 June 2012, OTK ZU 6/A/2012, item 63; *K 8/17*, of 26 June 2019, OTK ZU A/2019, item 34; *P 22/19*, of 4 March 2020, OTK ZU A/2020, item 31; *P 13/19*, of 2 June 2020, OTK ZU A/2020, item 45; order in *SK 16/08*, of 29 November 2010, OTK ZU 9/A/2010, item 123). Therefore, no such review procedure can be created either on the Convention or on the statutory level.

The Constitutional Court emphasizes that in the current legal state of affairs nor is there any procedure allowing for the review of the legality of the personal composition of the National Council of the Judiciary. That composition is shaped on the basis of constitutional provisions (Article 187(1) of the Constitution). In accordance with Article 187(4) of the Constitution, the organization, scope of activities and operating procedure of the National Council of the Judiciary, as well as the method of election of its members, are defined by statute. This means that only the legal basis for the creation of the composition of the National Council of the Judiciary, and only in respect of the elected members, can be subjected to constitutional review before the Constitutional Court, as that will be the constitutional review of a statute. In reference to currently applicable procedures in this regard the Constitutional Court, in *K 12/18*, judgment of 25 March 2019 (OTK ZU A/2019, item 17) upheld the constitutionality of the provisions dealing with the procedure for the election of the judge-members of the National Council of the Judiciary. Therewith it upheld the presumption of constitutionality of that process. Until their repeal by the lawmaker or until the presumption of constitutionality of the relevant provisions is struck by the Constitutional Court, the legal basis for that election cannot be disputed in the process of application of the law on any level, whether domestic or international.

Moreover, the Constitutional Court recalls that in Polish legal system there are no procedures for challenging the legality of any specific personal composition of the National Council of the Judiciary, nor of its members. Were any such procedures to exist, they would

have to be established on the constitutional level, because any verification of the legality of a constitutional organ of the state may only be based on procedures established in the Constitution.

In turn, the invocation by the ECtHR of decisions of Polish courts, done in a selective manner, while ignoring the entire *acquis* of the Constitutional Court on the status of judges and manner of their appointment, is an example of creation of norms nonexistent in domestic law dealing with the process of appointment of Polish judges. Moreover, the Constitutional Court recalls that the ECtHR — even though it was aware of the legal status of the resolution of the Supreme Court in *BSA I-4110-1/20*, of 23 January 2020, did not account for the circumstance that said resolution, although deemed a normative act, had been derogated from the legal system by the Constitutional Court's judgment in *U 2/20*, of 20 April 2020, (OTK ZU A/2020, item 61), as unconstitutional. On the contrary, the ECtHR took it upon itself to challenge those consequences, terming that activity — constituting, after all, the Constitutional Court's exercise of its constitutional competence expressly written in Article 188 of the Constitution — as an 'affront to the rule of law and the independence of the judiciary' (cf. ¶ 260ff of the rationale of the ECtHR's judgment in *Reczkowicz v. Poland*, in particular the second paragraph of ¶ 263 *in fine*). *Nota bene*, in this manner the ECtHR has indirectly reviewed the compatibility of the Constitution with the Convention, thus inverting the hierarchy of the two acts.

The Constitutional Court recalls that in, in accordance with Article 190(1) of the Constitution, its decisions are final and universally binding. Therefore, if a judgment, published in the *Monitor Polski* Official Journal of the Republic of Poland, has had the effect of derogating an unconstitutional normative act from the system, then that state of affairs is binding on all public authorities, which — in accordance with Article 7 of the Constitution — are to act on the basis and within the limits of the law. Refusal to recognize the effects of a CC judgment constitutes a violation of Article 190(1) of the Constitution.

From the perspective of constitutional review, for the determination of the existence of the violation itself, it is irrelevant whether such refusal is by a domestic or an international organ. In the latter case, it is an absolute condition if such an organ's imperative acts are to take effect for the Republic of Poland or in her territory. Moreover, if an international court refuses to recognize such effects, it does so against the principle of respecting the domestic jurisdiction in the matters of the system of governance of the state, which exists at international law (cf. K. Grzybowski, *Trybunały międzynarodowe a prawo wewnętrzne*, Warszawa 2012, 204–205, reprint). Not only does this principle not permit the interference of any other domestic law with the matters of the system of governance of any state, it in principle rejects the jurisdiction of international courts in this regard. The only exception is the state's consent through an expressly accepted international obligation, in the scope specified in that consent. Poland's consent to the jurisdiction of the ECtHR in the scope of human rights (here: right to court) does not signify consent for disputing the constitutional effects of the judgments of the Constitutional Court, all the more so considering that Article 190(1) of the Constitution was adopted 4 years after submitting to the ECtHR's jurisdiction.

The ECtHR's arbitrary evaluation of the legality of the composition of the CC's panel in *U 2/20* (cf. ¶ 263 of the judgment in *Reczkowicz v. Poland*) is irrelevant here. As an international court, the ECtHR is not competent to review the judgments of the CC either as to content or as to the procedure, or as to the composition of the panel — on which the Constitutional Court spoke in its judgment in *K 6/21* (see the judgment in *K 6/21*, of 24 November 2021). Furthermore, contrary to the ECtHR's allegations, none of the justices of the CC's panel were elected defectively to the Court, which, in the ECtHR's opinion, was supposed to trigger doubts as to the legality of the Constitutional Court's judgment. As noted repeatedly by the CC, there is in Polish legal system no procedure for challenging the legality of the election of a justice of the Constitutional Court, no organ authorized to review such election and no judgment of the CC dislodging an individual appointment resolution. Yes, two

such petitions had been submitted, but in both cases the Constitutional Court refused to carry out a direct review of the constitutionality of the election of the justices of the Constitutional Court (resolutions) due to the lack of jurisdiction to do so, and discontinued the cases (see the Constitutional Court's orders in *U 8/15*, of 7 January 2016, OTK ZU A/2016, item 1; and *U 1/17*, of 12 March 2020, OTK ZU A/2020, item 11).

Nor is there any judgment dislodging the legal bases of the enactment of the resolutions. In particular, that did not happen in the CC judgments dealing with the constitutional review of statutory provisions in *K 34/15*, *K 35/15* or *K 39/16*, which the ECtHR invokes. In those judgments the CC carried out the abstract review of the provisions of the Acts on the Constitutional Court challenged by the petitioners. None of the provisions were linked to the election of CC justices held on 2 December 2015.

The election held on 2 December 2015 was based on three legal provisions:

- the procedure for nominating candidates itself was initiated pursuant to Article 30(3)(5) of the Standing Orders of the Sejm in the wording following the amendment of 26 November 2015 (M.P.1136);
- the direct legal basis for the election resolutions (see M.P.2015.1182, 1183, 1184) was Article 194(1) of the Constitution and Article 17(2) of the Act of 25 June 2015 on the Constitutional Court (Dz.U.1064 and Dz.U.1928).

Neither the Standing Orders of the Sejm, nor any of the provisions supplying the direct legal basis for the appointment of the justices of the CC have ever been derogated, all the more so considering that one of those bases is a constitutional norm applied directly (Article 194(1) of the Constitution). Any review of that basis would entail reviewing the constitutionality of a constitutional norm, which would be absurd in the extreme.

The Constitutional Court has explained this matter repeatedly in a number of orders denying the exclusion of a justice of the CC or dismissing a motion to exclude (unpublished, in principle, except for the order denying the motion in *P 7/20*, of 15 June 2021 — see: M.P.2021.557), including without limitation in 27 orders issued in connection with motions to exclude lodged in years 2017 to 2021 by the Civil Rights Ombudsman. This is also what the Constitutional Court affirmed in the judgment in *K 6/21* (see the rationale of the judgment in *K 6/21*, of 24 November 2021).

Completely as a marginal note, it has to be recalled that, as the CRO is correct in observing in the motion of 28 December 2021 to exclude justice Mariusz Muszyński, derogation of the legal basis alone does not mean the automatic expiry of the acts of application of the law previously made on that basis (see the CRO's motion of 28 December 2021 on the case record). Those can only be derogated *ex-post*, if the legal system has the relevant procedures. In Polish law, as was discussed above, there are no procedures enabling the derogation of a resolution electing a justice of the Constitutional Court.

Nor does the norm deriving from the first sentence of Article 6(1) of the Convention as created by the ECtHR in *Xero Flor v. Poland* constitute a mechanism for the review of the legality of the election of the justices of the Constitutional Court. Irrespective of the fact that it was based on a false evaluation of the facts and law (i.e. on CC judgments in *K 34/15* and *K 35/15*, with findings of unconstitutionality of statutory legal norms completely unrelated to the election of the justices on 2 December 2015), in the judgment in *K 6/21*, of 24 November 2021, the Constitutional Court held that, '[t]he first sentence of Article 6(1) of the convention cited at ¶ 1, in the scope in which it affords to the European Court of Human Rights the competence to evaluate the legality of the election of the justices of the Constitutional Court, is incompatible with Article 194(1) in conjunction with Article 8(1) of the Constitution.' This means that the legal norm constituting the basis for the ECtHR's judgment in *Xero Flor* does not constitute international law binding upon Poland, and, in consequence, that judgment does not benefit from the attribute of executability in the light of Article 46 of the Convention.

The Constitutional Court emphasizes that neither is it possible to hold that the Polish state has consented, by ratification of the Convention, to the inclusion in the first sentence of

Article 6(1) of the Convention, of a norm allowing domestic provisions, even the provisions of the Constitution, to be ignored in the evaluation of the legality of the process of appointment of judges and allowing the creation of norms in that regard by the ECtHR or domestic courts. Poland could not possibly have given any such consent because — as determined during the evaluation of the previous challenge — the matter of the appointment of judges belongs to the constitutional lawmaker and to a certain extent (of secondary importance) is concretized in a statute (auxiliary norms). For the court system, in line with Article 176(2) of the Constitution, is to be governed exclusively by statute.

Thus, if the ECtHR has created a norm out of the first sentence of Article 6(1) of the Convention outside of the procedures of international law pertaining to the amendment of the Convention, in the Constitutional Court's view that is an action incompatible with the constitutionally grounded rules for becoming bound by international agreements.

5.2.5. Considering the allegations raised in certain pleadings (cf. the CRO's position) that the Constitutional Court here engages in the interpretation of a provision contrary to the tenor of Article 32 of the Convention, which confers the authority to do so on the ECtHR, the Constitutional Court emphasizes that the object of its review in this point was not the interpretation of the term 'tribunal established by law'. That interpretation is universally known and has also been recalled in this statement of reasons. The Constitutional Court, by virtue of the Attorney General's petition, had to examine whether the norms derived from Article 6(1) of the Convention and finding application in the Court's decisions, allowing the provisions of the Constitution and statutes, as well as the final and universally binding judgments of the Constitutional Court in the analysis of whether the 'tribunal established by law' condition is satisfied, as well as enabling the ECtHR to create on its own, in the process of interpretation of the Convention, norms pertaining to the procedure for the appointment of judges to domestic courts, are compatible with the Constitution.

The Constitutional Court, during the constitutional review of the disputed norms, identified what norms arose from Article 6(1) of the Convention. The Constitutional Court emphasized that the 'tribunal established by law' condition, although interlinked with other elements of the right to a fair trial, has a standalone character and refers to the provisions (the law, statutes) of the respondent state. The tribunal established by law is a different category and different perspective of evaluation than an independent court, and in this scope the Constitutional Court conducted the constitutional review of the Conventional norms; the two categories must not be conflated.

The Constitutional Court arrived at the conclusion that the challenge offered by the Attorney General in ¶ 2 of the prayers of the petition deals with the creation by Article 6(1) of the Convention of a competence to determine what is the court system and what is not in a state party to the Convention with the omission of domestic law. On the basis of such conduct an organ applying the Convention may create for itself, in arbitrary way, a standard for evaluating what is and what is not the law in force in Poland, even in the scope relating to the determination of the system, organization and principles of operation of state organs (courts), in which scope the constitutional lawmaker has provided for the exclusivity of statutory regulation. In this manner the guaranteeing function of Article 6(1) of the Convention is relativized and ceases to meet its assumed objectives. If the evaluation of whether a court was established by law is based not on the applicable domestic law but on the ability at each time to create a reference system through the general norm from Article 6(1) of the Convention, in spite of the existing domestic solutions, both on the constitutional and on the statutory level, such a competence is incompatible with the Constitution.

Therefore, leaving aside semantic considerations pertaining to the term 'tribunal established by law', the Constitutional Court found that the point of reference for this element of the right to a fair procedure is the domestic law, including without limitation the Constitution and statutes. If a norm of international law allows domestic law to be ignored in the evaluation of whether the 'tribunal established by law' condition is satisfied, that constitutes a violation

of the Constitution. Norms of international law, and especially those arising from the Convention, cannot shape either a universal court system for the states party to the Convention, nor the competence of their courts or detailed rules concerning the procedures for the appointment of judges. That is a matter belonging to the competence of the state and arising from its functions. It constitutes an element of the constitutional identity and is an expression of the sovereignty of the state. The test in this regard is Article 176(2) of the Constitution, specifying the exclusivity of statutory regulation in matters of the court system, competence of courts and procedure before them. And if domestic law establishes the principle of exclusivity of the statute in the regulation of the court system, evaluations made in the context of Article 6(1) of the Convention must take this fact into account (cf. P. Hofmański, A. Wróbel, *ibidem*, ¶ 126).

The Constitutional Court once again recalls that the referrals to statute contained in the Constitution refer, in principle, to statute. Constitutional provisions referring to the regulation of specified matters by statute must not be regarded as simultaneous referrals for the relevant matters to be shaped by international agreements.

Since the court system and competence of courts, which are decisive to the shape of the judiciary, belong to elements defining the function of the state, and the administration of justice is one of the express of the state's sovereignty, then also the exclusivity of statutory regulation must in this case be dealt with in strict terms, as that qualified exclusivity of statute.

The statute confers legitimacy on the provisions by enacting them through the act of a democratically enacted legislature. Although certain matters defined by statute or for which the Constitution requires the enactment of a statute (Article 89(1)(5) of the Constitution) may be the subject of an international agreement ratified with approval given by statute, one has to conclude that parliamentary approval for ratification does not confer on such an act as powerful democratic legitimacy as the enactment of a statute with its specific contents influenced only by Parliament. The admissibility of the regulation of certain matters by international agreement cannot be analysed in abstraction from constitutional principles and values and the from the logic and axiology of the Constitution to which the Civil Rights Ombudsman's pleading makes a reference. That logic and axiology are precisely what does not permit the expansion of the contents of the Convention onto matters dealing with the organization of the organs of the state, including without limitation the courts.

Considering the foregoing, the Constitutional Court finds that the first sentence of Article 6(1) of the Convention, in the scope in which in the evaluation of whether the 'tribunal established by law' condition is satisfied: (1) allows the ECtHR or domestic courts to ignore the provisions of the Constitution, statutes and decisions of Polish Constitutional Court; (2) enables them, in the process of interpreting the Convention, to create norms relating to the procedure for the appointment of judges to domestic courts — is incompatible with Article 89(1)(2), Article 176(2), Article 179 in conjunction with Article 187(1) in conjunction with Article 187(4) and Article 190(1) of the Constitution.

5.2.6. In summary, Article 89(1)(2) of the Constitution provides that the ratification of an international agreement or its repudiation by the Republic of Poland requires prior approval by statute if the agreement concerns freedoms, rights or obligations of citizens as specified in the Constitution. The Convention, by virtue of the constitutional provisions dealing with the adaptation, was recognized as the aforementioned international agreement. Since it deals with the freedoms, rights or obligations of citizens as defined in the Constitution, there can arise from it no norms venturing outside of the scope it covers [sic], in respect of which the statutory approval for ratification was granted. Therefore, if from the first sentence of Article 6(1) of the Convention a norm is derived that authorizes the ECtHR or domestic courts to review the process of appointment of judges and a norm authorizing the omission of the provisions of the Constitution and of statutes, as well as final and universally binding judgments of the Constitutional Court, such norms constitute a violation of the constitutional provision concerning the ratification of a specific type of international agreement. This is

because said norms are created not on the constitutional but on the Conventional level, through the ECtHR's activities.

It must also be noted that the Convention was ratified when the 'small constitution' of 1992 was in force (the Constitutional Act of 17 October 1992 on the Mutual Relations between the Legislature and the Executive of the Republic of Poland and on the Local Government, Dz.U.84.426, as amended). Thus, at the time of becoming bound by the agreement, the conditions for the verification of its constitutionality had not yet materialized. However, by introducing Article 241 to the Constitution, the constitutional lawmaker imposed on the Convention specific normative boundaries and in that scope affirmed its compatibility with the Constitution. Therefore, all the more so considering that in connection with the dynamic interpretation of the Convention a norm of dubious constitutionality had taken shape, it became necessary to conduct the relevant review.

The Constitutional Court, therefore, emphasizes that Article 176(2) of the Constitution provides that the court system and competence of courts, as well as the procedure before them are regulated by statutes. The constitutional lawmaker expressly entrusted the shaping of the court system and court competence to Parliament. This standard is also approved in the ECtHR's decisions. Considering the foregoing, the norms derived from the first sentence of Article 6(1) of the Convention, allowing the ECtHR or domestic courts — without the constitutional review of the provisions of statutes by Polish Constitutional Court or while ignoring the judgments of the Constitutional Court in this regard — to examine whether the 'tribunal established by law' condition is met through their own evaluation of the procedure for the appointment of judges, even though the procedure is defined in the Constitution and developed in ordinary statutes.

Article 179 of the Constitution provides that judges are appointed by the President of the Republic upon application from the National Council of the Judiciary, for an indefinite duration. This is the point of departure for the analysis of the judicial-appointments process. The President's power is the prerogative of that office and does not require the countersignature of the President of the Council of Ministers. In the existing jurisprudence of the Constitutional Court and other courts it has been held that there is no mechanism for the review of Presidential prerogative, because the appointment of judges is not an act from the scope of administrative law. Nor can one — as the ECtHR did — categorize for this reason the President's exercise of the prerogative as a 'flagrant violation of the rule of law' (*Dolińska-Ficek and Ozimek v. Poland*). The ECtHR is not an organ empowered to review the President's exercise of the President's constitutional prerogative. The President of the Republic may appoint judges upon the application of the National Council of the Judiciary. The composition of that Council is defined by the constitutional lawmaker in Article 187(1) of the Constitution. With regard to the elected members of the Council, the freedom to determine the terms of the election was left to the statutory lawmaker (Article 187(4) of the Constitution). If the first sentence of Article 6(1) of the Convention allows the ECtHR to examine whether the 'tribunal established by law' condition, as referred to in that provision, by evaluating the process of judicial creations but without paying attention to the constitutional mechanisms in this regard or with their arbitrary interpretation, then such a norm is incompatible with Article 179 in conjunction with Article 187(1) in conjunction with Article 187(4) of the Constitution.

In accordance with Article 190(1) of the Constitution, the Constitutional Court's decisions are final and have universally binding force. The condition for acquiring the latter is promulgation in the relevant official journal. Neither domestic nor international organs can negate the effects of a promulgated CC judgment, i.e. its impact on the system of sources of law, in particular with regard to upholding or dislodging the presumption of constitutionality of the disputed provisions and their continued binding force or derogation from the domestic legal system. If from the first sentence of Article 6(1) of the Convention one can derive a norm allowing the ECtHR or domestic courts, in examining whether the 'tribunal established by law' condition is satisfied, to ignore the judgments of the Constitutional Court reviewing

the constitutionality of the provisions dealing with the court system or competence of course, as well as provisions dealing with the composition of the National Council of the Judiciary, which co-participates in the process of judicial appointments by submitting the relevant applications to the President of the Republic, such a norm violates the principle of the finality of CC judgments and their universal binding force.

5.3. The third challenge.

5.3.1. In the third challenge the petitioner disputed the norm empowering the ECtHR or domestic judgment to engage in the review of the constitutionality and compatibility with the Convention of the statutes concerning the court system and competence of courts, as well as the statute governing the National Council of the Judiciary, in order to determine whether the 'tribunal established by law' condition is satisfied. In this matter the Constitutional Court ruled in ¶ 2(c) of the holding.

The Constitutional Court emphasizes that in this case, too, the constitutional problem focuses around the derivation of a norm created by the ECtHR on the basis of the conventional term 'tribunal established by law'.

The norm was given shape in the judgment in *Reczkowicz v. Poland* and affirmed by the judgments in *Dolińska-Ficek i Ozimek v. Poland* and *Advance Pharma sp. z o.o. v. Poland*. When deriving it from the Conventional provision, the ECtHR rejected the obligation of mandatory linking of the 'tribunal established by law' standard to Polish legal provisions and universally binding judgments of the Constitutional Court co-shaping the law on the court system and status of judges. By contrast, expressly disputing the findings made by Polish Constitutional Court, the ECtHR created in this regard separate rules of conduct allowing it to dispute the merits of the CC's decision and the legality of the panel, as well as to expound the ECtHR's own view of the constitutionality of the legal norms and normative acts disputed before the Constitutional Court. To that competing determination it afforded a role superordinate to that of the CC's judgments.

5.3.2. In accordance with Article 188(1) of the Constitution, the Constitutional Court adjudicates on the compatibility of statutes and international agreements with the Constitution. In the light of Article 188(2) of the Constitution, the Constitutional Court adjudicates on the compatibility of statutes with international agreements requiring ratification with prior approval granted by statute. Leaving aside here the dispute arising among legal scholars as to the admissibility of diffuse constitutional review of legislation in Polish legal system, the Constitutional Court focused on the challenge concerning the compatibility of the disputed Conventional norm with Articles 188(1) and 188(2) of the Constitution, thus juxtaposing it with the Constitutional Court's competence to adjudicate on the hierarchical consistency of the law.

The Constitutional Court observed that the norm arising from the first sentence of Article 6(1) of the Convention enables the ECtHR — and, as the practice shows, also other entities, including without limitation domestic organs — to evaluate the compatibility with the Constitution and with the Convention of statutes dealing with the court system and with the National Court of the Judiciary in order to verify the 'tribunal established by law' condition as an element of the right to a fair procedure. That evaluation is of binding nature because, in reliance on the relevant norm, the organs engage in their own constitutional review of statutes and disapply them, even when the outcome conflicts with the outcome of the Constitutional Court's review made in the form of a promulgated judgment. Moreover, there is the belief that other domestic and international organs will recognize such constitutional review of statutes conducted by the ECtHR or by domestic courts on the basis of the Conventional norm of such shape.

The Court recalls that in Polish legal system there is a clear indication of which organ is empowered to adjudicate on the compatibility of statutes with the Constitution and ratified international agreements, where the ratification followed prior approval given by statute. In

using the term 'adjudicate', the constitutional lawmaker decided that the activity of this organ should be understood as deciding on something in a binding way. The provision of Article 188 of the Constitution must also be read together with Article 190(1) of the Constitution, which sets forth the effects of the CC's adjudication of cases referred to in Article 188 of the Constitution. Article 190(1) provides that the Constitutional Court's decisions are universally binding and final. Therefore, for the Constitutional Court to adjudicate specific cases means to determine, in the form of a final decision as referred to in Article 190(1) of the Constitution, the existence of the relationship of either compatibility or incompatibility between the object of the review and the test.

In turn, considering the principle of legality, in accordance with which the organs of public authority shall act on the basis and within the limits of the law (Article 7 of the Constitution), Polish legal system is built in such a way that competence is not to be presumed. In the Constitutional Court's view, given that the constitutional lawmaker entrusted specific competences to a given organ of public authorities and has not spoken on the the admissibility of the exercise of that competence by a different organ, it must be presumed that the latter may not exercise the powers of the former. Not only is this view consistent with the principle of legality, it gives effect the rule of law in its substantive dimension, because it contributes to the assurance of legal certainty and security (Article 2 of the Constitution). The lawmaker may shape the competences of the organs of public authorities in so far as supported by the principle of legality (competences specified expressly and not presumed) and not violating the principle of separation and balance of the powers or interfering with the essence of the competences that define the relevant organ, for which it was established.

Accordingly, the Constitutional Court finds that the constitutional lawmaker expressly assigned to the Constitutional Court the competence to adjudicate the matters of compatibility of statutes with the Constitution and with international agreements ratified with prior approval by statute. The Constitution also defines the character and effect of the Constitutional Court's adjudication. Any interference with the competences shaped in this way would necessarily have to lead to a constitutional amendment.

Furthermore, the competence arising from Articles 188(1) and 188(2) of the Constitution has been assigned to the Constitutional Court (*Trybunał Konstytucyjny*) exclusively. In the specified scope (i.e. in respect of statutes and ratified international agreements) it is not shared with organ organs, including without limitation courts (let alone international courts). This follows not only from the linguistic but also the systemic interpretation (the constitutional lawmaker made the conscious decision to have two separate groups within the judicial branch — *sądy* and *trybunały*, as reflected by the constitutional taxonomy) and the functional interpretation (the constitutional lawmaker entrusted different tasks and competences to *sądy* and *trybunały*; they exist for different purposes and function in different ways). Organs cannot derive the competence to adjudicate in the scope covered by Articles 188(1) and 188(2) of the Constitution from Article 8(2) of the Constitution (direct applicability of the Constitution) or other constitutional provisions (cf. e.g. R. Hauser, J. Trzcíński, *O formach kontroli konstytucyjności prawa przez sądy*, 2 Ruch Prawniczy, Ekonomiczny i Socjologiczny 2008, 17).

The above also finds support in the model of constitutional review of legislation adopted in Polish legal system. It is a model of concentrated review, which consists in a separate judicial organ, usually termed a constitutional court, is equipped with powers in this regard. When introducing the institution of constitutional review of legislation into Polish constitutional law, the European model was used (more extensively cf. Z. Czeszejko-Sochacki, *ibidem*, 49). The literature emphasizes that the model of constitutional review of legislation ultimately adopted and currently binding under the 1997 Constitution, has the following characteristics from the point of view of fundamental solutions dealing with its organization: (1) the Constitutional Court is a single-instance, organizationally and functionally separate organ of the judicial branch tasked with adjudicating on the compatibility of the law with the

Constitution; (2) the effect of the decisions of the Constitutional Court is, first of all, the elimination of an unconstitutional legal provision, norm or act from the legal order (cf. R. Hauser, J. Trzciński, *ibidem*, 10, and the subject literature cited therein). The Constitutional Court's decisions are effective *erga omnes*, because the effect of such a decision concerns the entire legal system and not individual cases.

In the Constitutional Court's view, if other organs were to have the parallel competence to adjudicate on the compatibility of statutes and international agreements with the Constitution, meaning the possibility of different outcomes with regard to the same normative provisions, norms or acts, that would both constitute a violation of the essence of the competences arising from Articles 188(1) and 188(2) of the Constitution and interfere with the finality of the Constitutional Court's decisions (Article 190(1) of the Constitution). The exercise of such powers would also undermine legal certainty and security, values flowing from the principle of a democratic state ruled by law (Article 2 of the Constitution).

The Constitutional Court also emphasizes that the constitutional lawmaker has provided for mechanisms to ensure the hierarchical consistency of the law. That was done by giving a large group of subjects, both from the sphere of public authority on the state tier and on the local-government tier, as well as representatives of the Nation (members of the Sejm and senators) or of the civil society (e.g. religious denominations or the representatives of employees or employers) the right to lodge a petition with the Constitutional Court. Moreover, in individual cases the institutions of constitutional complaint (Article 79) and legal question (Article 193) were established. The last-mentioned measure fills any hypothetical deficits arising for courts in relation to their not having been given the power to conduct their own review of the constitutionality of the law.

The Constitutional Court emphasizes that the existence in the legal system of such a norm derived from the provisions of international agreements or statutes as would allow for the modification of the constitutional competences of the Constitutional Court is inadmissible due to the fact that those competences are defined by the Constitution and no other normative act. Notwithstanding the duty for the Republic of Poland to comply with the international law she is bound by, which arises from Article 9 of the Constitution, that duty cannot lead to a situation of modifying the contents of the Constitution outside of the procedures adopted for that purpose.

5.3.3. From the contents of Article 6(1) of the Convention, the ECtHR derived a norm subsequently used both by itself and by domestic courts in numerous cases concerning the alleged violation of that Convention by Poland in respect of the right to a fair procedure due to the court's not having been established by law.

The Constitutional Court emphasizes that the nature of said norm is that of a competence norm. Its essence is to authorize the ECtHR or domestic court to conduct the compatibility review outside of the contents of the binding domestic provisions of a state party to the Convention when examining whether the 'tribunal established by law' requirement is met. Additionally, such an evaluation can ignore the decisions, having preliminary force, issued by the authorized domestic organ and making a binding determination of the consistency of statutory provisions with the Convention. And this is despite those decisions containing determinations on matters of the system of governance belonging to the elements of the constitutional identity and demarcating the boundary of the state's right to self-determination in the fundamental areas of its activity (here: the administration of justice and the related court system). By contrast, the disputed norm allows such determinations to be made outside of the relevant state's constitutional order.

The Constitutional Court recalls that the contents of Article 6(1) of the Convention had initially been decoded in such a way that the satisfaction of the 'tribunal established by law' condition was determined on the basis of the normative acts of respondent member state facing allegations of having violated the Conventional provisions dealing with the standard of the right to a fair trial before a court of law. This condition, although influencing the

determination of whether Article 6(1) of the Convention was violated — was separate from the other conditions guaranteeing the right to court and in reliance on it it was determined whether the executive did not have an arbitrary and dominant influence on the judiciary. That determination was made on the basis of analysing whether the shape of the court was consistent with domestic law (i.e. first of all the provisions enacted by Parliament in respect of the court system).

The creation of a norm that, in respect of the 'tribunal established by law' condition, vests the organ making that determination with the competence to engage in its own, unbounded review of the constitutionality of domestic law dealing with the relevant state's justice system, despite the existence of domestic, constitutional mechanisms for such evaluation, violates the constitutional competences of the constitutional Court in respect of the constitutional review of the law, including without limitation exclusive competence to review the statutes dealing with the organization of the court system and with the National Council of the Judiciary. It is especially flagrant when such a norm enables the ECtHR — as in *Reczkowicz v. Poland* or *Dolińska-Ficek and Ozimek v. Poland* — to engage in a review of such compatibility not only with tests relating to human rights but primarily tests relating to the principle of rule of law and the principle of separate and balance of powers (see e.g. ¶¶ 257–258 of the rationale of the judgment in *Reczkowicz v. Poland*).

5.3.4. In summary, the Constitutional Court notes that ECtHR has derived competence-creating norms and organizational norms from Article 6(1) of the Convention. The ECtHR has decided that in reliance on Article 6(1) of the Convention it can conduct its own review of Polish statutes concerning the court system and its organization, as well as the status of a judge but also that it has the competence — due to the need for safeguarding the effectiveness of the right to have one's case heard by a tribunal established by law — to examine the merits of the correctness and legality of the decisions of Polish Constitutional Court. In this way, it also supplied the argument that the norm from Article 6(1) of the Convention creates the competence basis for domestic courts to review the constitutionality of the law and judge the legality of the Constitutional Court's decisions.

Such competences, shaped on the Conventional level, are flagrantly incompatible with both the position of the Constitutional Court in the system of governance as defined by the Constitution, which positions it to be the sole organ authorized in Poland's legal system to review the compatibility of statutes with the Constitution (Article 188(1) of the Constitution) or with an international agreement ratified with prior approval granted by statute (Article 188(2) of the Constitution), as well as the principle of finality and universal binding force of the Constitutional Court's judgments (Article 190(1) of the Constitution).

Considering the foregoing, the Constitutional Court finds that the norm derived from the first sentence of Article 6(1) of the Convention, thanks to which the ECtHR creates competences for itself or for domestic courts in the scope covered by the challenge, encroaches in that scope on the constitutional lawmaker's competences. In that manner takes place the inadmissible creation of rules supplanting the constitutional competences of the organs of public authority (here: right to review the constitutionality of legislation, and right to review the correctness and legality of the Constitutional Court's decisions). For this reason the Constitutional Court finds such a norm to be incompatible with Articles 188(1) and 188(2) of the Constitution and, in consequence, also to violate Article 190(1) of the Constitution.

6. General conclusions.

The problem submitted to constitutional review in the present case is unquestionably a very serious one. This is already demonstrated by the object and nature of the challenge, because:

- on the one hand, it concerns the individual's right to court, viz. one of the fundamental human rights developed by the European civilization;

- on the other hand, it concerns the ability to shape that right not only outside of the centre of domestic (Polish) lawmaking, but also without the state's consent or any form of legal dialogue with the state, even in contravention or circumvention of its constitution, with the ECtHR simultaneously intervening from this perspective in the state's constitutional system of governance (organization of the various branches of government), their competences and interrelations, i.e. the shape and contents of the principle of constitutional separation of powers.

Hence, the problem involves the relationship between human rights and political sovereignty. From the constitutional perspective, it unquestionably deals with the essence and core of the Constitution, namely an element of Poland's constitutional identity.

The gravity of the situation is emphasized by the fact that this is happening by virtue of verification of Poland's compliance with the Convention on the Protection of Human Rights and Freedoms and thus an act that has acquired a fundamental dimension in the European reality since the end of the 20th century.

By design, the Constitutional Court of the Republic of Poland avoids collision with the international order. In today's pluralistic legal reality, it employs in the resolution of situations of conflict between constitutional norms and international law the principle of interpreting the Constitution sympathetically to international law, or system solutions for resolving such conflicts. In particular, said sympathy refers to the relationship between the state's constitutional order and the Convention system, the standards of which have been adopted as the minimum standards in the process of creating the Constitution.

However, in the case at hand it was not possible to avoid conflict or even take a restrained approach to the case. The reasons were two:

- Firstly, the source of the incompatibility is the ECtHR's flagrantly defective conduct in the process of creation of norms derived from Article 6(1) of the Convention. Here, the ECtHR has shown a complete lack of knowledge of the essence of Poland's legal system on the constitutional plane and on the statutory plane, which is also highlighted by the separate opinions of the ECtHR judge, K. Wojtyczek (Polish national judge). Not only does the ECtHR 'discover' in Poland's legal system contents that this system does not have, it derives from Article 6(1) of the Convention a succession of normative contents contravening Poland's constitutional standards. Additionally, to its own adjudicatory ends, the ECtHR attributes to certain organs of the state competences they do not have in the light of the Constitution and negates the activities of other organs of the state — based directly on the express provisions of the Constitution — judging them to be illegal and contrary to the rule of law. In effect, the ECtHR creates and at once applies norms constituting the manifest and flagrant contravention of the content scope of the provisions of the Convention that Poland consented to when becoming bound by the Convention. That conduct also constitutes a violation of the Constitution of the Republic of Poland.
- Secondly, by acting in the above-described manner, the ECtHR interferes with the essence of the Convention itself, which is to provide safeguards for the individual rights stipulated in it. The ECtHR creates in the provisions of the Convention normative contents by which it aspires to transform the Convention into an act providing the ECtHR with broad control, not authorized by Poland not legitimized by the consent of Polish Sejm, over the functioning of the Polish state in the areas of its system of governance.

The Constitutional Court recalls that since the Convention is an act from the scope of protection of human rights, the exercise of the imperative powers attributed to the ECtHR — the purpose of which is solely the control of the compliance by states party to the Convention with the standards agreed in it, one of the elements of which is the derivation of norms in the decision-making procedure — should be characterized by a reasonable balance in juxtaposition with Poland's sovereignty being willingly limited in this aspect.

Despite the meritoriously increasing standing of human rights in modern legal systems, which is nowadays reflected in academic and political evaluations of the role of the Convention, and which may translate into the aspirations of the ECtHR and of its judges, that organ continues to be only an organ created by the states party by virtue of an international agreement. Its role and scope of activity are defined by that agreement. Any attribution to the ECtHR of a different role in relations with Poland may take place only on the path of amendment of the Convention on the appropriate constitutional path and not through the ECtHR's own lawmaking adjudication.

In the current state of the law, even given the deepest respect for the Convention's axiology, in the formal aspect, for the Republic of Poland, both the Convention for the Protection of Human Rights and Fundamental Freedoms and the ECtHR are placed in the hierarchy of systems below (respectively) the Constitution and the Constitutional Court. In the Republic of Poland's legal order, of which the Convention is also part, the Constitutional Court is the ultimate guardian of human rights and the sole guardian of supremacy of the Constitution. In a multicomponent legal system, irrespective whether it is a system built hierarchically or heterarchically, it is the Constitutional Court who has the ultimate say on the constitutional limits of the application of law originating either from the domestic lawmaking centre or from the other centres.

The above requires the ECtHR not only to respect constitutional standards but also to act within the boundaries of the Conventional tasks placed before it. The Constitution does not allow for the Convention's infringement procedure to be used as a key to unauthorized interference with Poland's system of government and especially to create on the judicial path norms allowing constitutional contents to be redefined, be it in the substantive dimension (separation of powers, rule of rule, competences of the organs of the state) or the institutional dimension (the notion of a court, the notion of a legal act, Presidential prerogative) or creating contents nonexistent in it or individual rights conflicting with it. In other words, the Constitution is not subject to any balancing, and the ECtHR, in its use of such tools as the right to make a binding interpretation of the Convention in the context specified in its Article 32, must know the constitutional limits of dynamic interpretation and its limits under international law.

The guardian of the Constitution is the Constitutional Court, which cannot allow Conventional norms conflicting with the Constitution, derived by way of adjudication and entering the domestic system without the ratification procedure, to have any effect on Poland, whether in international or in domestic law. That would violate the Constitution and therewith the sovereignty of the Polish state.

7. Effects of the judgment.

The Constitutional Court found unconstitutional the legal norms derived from Article 6(1) of the Convention and identified in the holding. The effect of this judgment is their elimination from the normative system as norms binding on the organs of the state and providing a basis for them to act.

The above has two contexts — the international-law context and the domestic context.

The former originates from the fact that the norms shaped by the ECtHR originate from the provisions of an international agreement — the Convention for the Protection of Human Rights and Fundamental Freedoms. In these circumstances, the effect of the Constitutional Court's judgment is the elimination of such norms from the contents of the Convention provision — at least with regard to Poland. In consequence, they do not form part of the scope of Article 6(1) of the Convention as international law binding on the Republic of Poland (Article 9 of the Constitution).

In the effect of the foregoing, the adjudications made on their basis, viz. four ECtHR judgments: *Broda and Bojara v. Poland*, applications no. 26691/18 and 27367/18, of 29 June 2021; *Reczkowicz v. Poland*, application no. 43447/19, of 22 July 2021; *Dolińska-Ficek and*

Ozimek v. Poland, applications no. 49868/19 and 57511/19, of 8 November 2021; and *Advance Pharma sp. z o.o. v. Poland*, application no. 1469/20, of 3 February 2020, do not hold for the Polish state the attribute foreseen in Article 46 of the Convention (duty of executability) as having been issued on a basis falling outside of the scope of the state's legal obligations. Since an ECtHR judgment has proclaimed the existence of a duty to meet a Convention standard turning out to be unconstitutional in numerous contexts, it cannot constitute an obligation for Poland.

The Constitutional Court's judgment does not constitute a violation by Poland of the international law binding upon her (see Article 9 of the Constitution; Article 27 on the Vienna Convention on the Law of Treaties), because it does not eliminate any provision from the Convention but only constitutes the demarcation of a constitutional limit to the — permitted, in principle — dynamic of the ECtHR's lawmaking leeway and applies solely to the disputed norms created out of Article 6(1) of the Convention.

Here, the Constitutional Court once again recalls that international law is consensual by nature and derives solely from the will of the states. Poland has made a concession within the area of its sovereignty, affording to the ECtHR imperative powers of adjudicatory and interpretative nature. However, this consent is not unlimited in terms of content. The substantive (content of norms) and formal (procedure for becoming bound) framework here is provided by the Constitution of the Republic of Poland, of which the Constitutional Court is the guardian. For this reason, the ECtHR may exercise them until such time as Poland expresses a constitutionally justified objection in the matter, e.g. in the form of the judgment of the Constitutional Court. This type of principle is known to the ETPC (see separate opinion of judge Garlicki in *Öcalan v. Turkey*, application no. 46221/99, ¶ 4).

This judgment, following promulgation in the Journal of Laws, should also be accounted for in all cases decided before the ECtHR related to the reform of the court system in Poland initiated in 2017 (see *Advance Pharma v. Poland*, judgment of 3 February 2022, ¶ 226). This follows not only from its essence defined by Article 190(1) of the Constitution, which affects the domestic legislation and domestic legal system, but also the contents of the obligation from Article 6(1) of the Convention compatible with the Constitution and the international-law principle that international courts respect the public law of a state. Any future ECtHR judgment issued on the basis of norms found unconstitutional in the CC's judgment in *K 7/21* will not be executable in Poland.

Indeed, the Constitutional Court cannot in a formal way order any other organs of the state to act in any specified manner. Nonetheless, here the Court recalls that the promulgation of this judgment in the Journal of Laws should redefine the conceptions of the state of international obligations binding on the Polish state. For this reason, the organs of the state competent for the conduct of foreign policy — for the avoidance of misunderstandings in the scope of perception of certain international obligations of Poland — should determine if it will not be expedient to take action to notify international partners, including without limitation the relevant Convention partners, as well as Convention states party, of the limits of Poland's being bound by the contents of Article 6(1) of the Convention and on the unwarranted — taken outside of the state's consent expressed through the ratification procedure — actions of the ECtHR toward Poland.

This type of activity in the international field will supplement the domestic activity of the Constitutional Court and prevent the perception that Poland has consented (tacitly) to a new international obligation with contents incompatible with the Constitution, which — in line with the principle that the manner of application of a provision is the best commentary on the meaning of its contents (see Permanent Court of Arbitration, *Russian Claim for Interest on Indemnities*, 11 November 1912; A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*, Warszawa 2006, 348) — attempts were made to impose on her outside of the international-law and constitutional procedures for the amendment of treaties, through the application of the Convention.

The domestic context, in turn, arises from the fact that the Convention, as a ratified international agreement, is a source of law and the norms derived from it have entered the domestic legal order and become the basis of a series of court judgments.

In this context, the effect of the Constitutional Court's judgment of unconstitutionality of legal norms is their loss of binding force understood as a legal event terminating the obligation to comply with legal norms binding on its recipient. Polish model of constitutional review has opted for the model of nullifiability of the normative act, which can be inferred from Article 190(3) of the Constitution. Here, the effects of the constitutional lawmaker's determinations are not distinguished on the basis of whether the object of control was the contents of the norm, the method in which it was shape, or the competence to establish it. Article 190(3) of the Constitution specifies the consequences of a judgment of the Constitutional Court, including without limitation a judgment of unconstitutionality. The effect is that with the day of promulgation of the Constitutional Court's decision in the relevant official journal or with the lapse of the time set by the Constitutional Court and on condition of the lack of amendment by the lawmaker during the deferral period, the unconstitutional norm is eliminated from the system of sources of law. In this manner the lawmaker gives effect to the principle of stabilization of the legal relationships shaped under the rule of provisions deemed unconstitutional. At the same time, in Article 190(4) of the Constitution, the constitutional lawmaker allows under certain conditions the possibility of elimination of acts of application of the law issued on the basis of unconstitutional norms. This is because said provision mandates that the Constitutional Court's decision finding the incompatibility with the Constitution, international agreement or statute of a normative act on the basis of which a final and unappealable court ruling, final administrative decision or determination in other cases have been shall be the basis for reopening the proceedings, reversal of the decision or other determination on terms and using the procedure proper to the relevant proceedings.

Hence, if there are in the legal circulation acts of application of the law issues on the basis of norms inferred from the first sentence of Article 6(1) of the Constitution found unconstitutional in this judgment and there are procedures for dislodging such acts on the basis of proceedings referred to Article 190(4) of the Constitution, such acts may be dislodged through the relevant procedure.

As from the time of promulgation of the judgment of the Constitutional Court, any actions of organs of the state on the basis of norms found to be unconstitutional will constitute a violation of Article 7 of the Constitution.

Considering the foregoing, the Court rules as per the holding.