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The Constitutional Tribunal of the Republic of Poland

Trybunał Konstytucyjny Rzeczypospolitej Polskiej

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"Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles"

Constitutional Tribunal of the Republic of Poland

National Report

I. The role of the constitutional court in defining and applying explicit/implicitconstitutional principles.

1. Does the constitutional court or equivalent body exercising the power of constitutional review (hereinafter referred as the constitutional court) invoke certain constitutional principles (e.g. separation of powers; checks and balances; the rule of law; equality and non-discrimination, proportionality, reasonableness, human dignity, etc.) in the process of constitutional adjudication? To what extent does the constitutional court go in this regard? Does the constitution or any other legal act regulate the scope of constitutional decision-making in terms of referring to specific legal sources within the basic law that the constitutional court may apply in its reasoning?

When exercising constitutional review the Constitutional Courtapplies mainly the following principles: protection of human dignity, which is the source of inviolable and inalienable human rights and freedoms, principle of equality and non-discrimination, prohibition of excessive interference, proportionality principle and prohibition to violate the spirit of human rights, the rule of law, the principle of separation of powers, principles of exclusivity of statutes and democracy. Also the Supreme Court, common courts, military courts, as well as by the Supreme Administrative Court and regional administrative courts abide by these principles. These courts interpret statutes and other legislative acts in accordance with the Constitution and refuse to apply secondary legislation that is unconstitutional. Court judgementsdelivered in individual cases affect to a large extent decisions issued by administrative bodies. Pursuant to Article 188 of the Polish Constitution, only the Constitutional Court has the power to adjudicate upon constitutionality of legislative

acts. However, there are instances when other courts issue rulings in which they refuse to apply statutes on the grounds that they do not comply with the Constitution. Such rulings are issued on the basis of the principle of legal supremacy of the Constitution, set forth in Article 8, and on the basis of the principle that judges are bound by the Constitution and statutes, laid down in Article 178(1). Rulings referred to above used to be rather rare, but since the beginning of the constitutional crisis in September 2015 such judgements become more frequent and they are supported by a growing number of legal theorists and practitioners (cf. resolution of the General Assembly of Judges of the Polish Supreme Court of 26 April 2016[1]). At times point is made that since in Poland there are attempts at preventing the Constitutional Court from carrying out constitutional review of laws, this task should be taken over by other courts. The principles listed hereinabove are expressly laid down in the Constitution, but they are given substance in the rulings of the Constitutional Court.

2. What constitutional principles are considered to be organic in your jurisdiction? Are there any explicit provisions in the constitution setting out fundamental principles? Is there any case-law in respect of basic principles? How often does the constitutional court make reference to those principles?

The rule of law plays a significant role in the jurisprudence of the Constitutional Court. It was introduced to the Constitution of the People's Republic of Poland in December 1989 and served as a basis of the political transformation. Before the current Constitution was adopted in 1997, this principle provided the basis for constitutional review. The Constitutional Court inferred from it principles that were not explicitly expressed in the Constitution: protection of human dignity, prohibition of disproportionate interference in human rights, individual human rights, including the right to protect life and the right to fair trial and the principle of separation of powers. These principles were later enshrined in the Constitution that is currently in force. Article 2 of the current Constitution stipulates that "the Republic of Poland is a democratic state ruled by law and implementing the principles of social justice". Assuming that the principle of trust of citizens with regard to state authorities and to legislation that they pass is the foundation of the rule of law, the Constitutional Court inferred from the principle of the rule of law a host of detailed principles. Among other elementary constitutional principles there are also the principle of separation and balance of powers

[1] http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemID=193&ListName=wydarzenia

(Article 10) and the principle of democratic state (Article 2). Human rights are based on the principle of inherent and inalienable human dignity that constitutes the source of human rights and freedoms. Human dignity is inviolable, and it is a duty of public authorities to respect it and protect it (Article 30). The most basic safeguard of human rights is the right to fair trial (Article 45(1)).

The Constitutional Court issued numerous rulings in which it interpreted and fleshed out these principles. The following list includes examples of rulings regarding the interpretation of the principles referred to above: principle of the rule of law (ruling of the Constitutional Court of 9 June 1998, case no. K 28/97, OTK ZU 4/1998, item 50; ruling of 8 January 2013, case no. K 18/10, OTK ZU no. 1A/2013, item 2; ruling of 4 June 2013, P 43/11, OTK ZU no. 5A/2013, item 55; ruling of 19 November 2008, case no. Kp 2/08, OTK ZU no. 9A/2008, item 157; ruling of 12 May 2009, case no. P 66/07, OTK ZU no. 5A/2009, item 65; ruling of 28 October 2009, case no. Kp 3/09, OTK ZU no. 9A/2009, item 138; ruling of 15 July 2013, case no. K 7/12, OTK ZU no. 6A/2013, item 76; ruling of 14 September 2001, case no. SK 11/00, OTK ZU no. 6/2001, item 166), principle of protection of human dignity (ruling of the Constitutional Court of 7 March 2007, case no. K 28/05, OTK ZU no. 3A/2007, item 24; ruling of the Constitutional Court of 30 September 2008, case no. K 44/07, OTK ZU no. 7A/2008, item 126), principle of separation of powers (ruling of the Constitutional Court of 15 January 2009, case no. K 45/07, OTK ZU 1A/2009, item 3; ruling of the Constitutional Court of 13 June 2013, case no. P 35/12, OTK ZU 5A/2013, item 59; ruling of the Constitutional Court of 7 November 2013, case no. K 31/12, OTK ZU no. 8A/2013, item 121) right to fair trial (ruling of the Constitutional Court of 10 July 1999, case no. SK 12/99, OTK ZU no. 5/2000, item 143; ruling of the Constitutional Court of 24 October 2007, case no. SK 7/06, OTK ZU no. 9A/2007, item 108), proportionality principle (e.g. ruling of the Constitutional Court of 2 July 2009, case no. K 1/07, OTK ZU no. 7A/2009, item 104; ruling of the Constitutional Court of 31 January 2013, case no. K 14/11, OTK ZU no. 1A/2013 item 7).The aforementioned constitutional principles are the essence of the constitutional regime of Poland.

3. Are there any implicit principles that are considered to be an integral part of the constitution? If yes, what is the rationale behind their existence? How they have been formed over time? Do they originate from certain legal sources (e.g. domestic constitutional law or the constitutional principles emanating from international or

European law; newly-adopted principles or ones re-introduced from the former constitutions)? Has academic scholars or other societal groups contributed in developing constitutionally-implied principles?

As it was described above, the principle of the rule of law and its interpretation in the rulings delivered by the Constitutional Court played an important role in establishing the set of constitutional principles. Inferring other fundamental principles of the constitutional regime from the rule of law was a source of controversy among legal scholars and practitioners. Some of them considered deriving those principlesas legislative activity, which was beyond the scope of the Constitutional Court's powers. However, a majority of them supported the rulings of the Constitutional Court and deemed them to be a valid source of constitutional norms; those norms were later enshrined in the Constitution of 1997. Fundamental constitutional principles that were inferred from the principle of the rule of law are now *explicitly* laid down in the Constitution. Hence, there is no need to derive them (*Ableitung*) from Article 2 of the Constitution. However, some binding constitutional principles still are not explicitly expressed in the Constitution. They are derived from the principle of the rule of law (Article 2), the principle of protection of human dignity (Article 30) and the rule of separation and balance of powers (Article 10).

More specifically, the Constitutional Court derives the following from the principle of the rule of law:the principle of protection of trust of citizens with regard to state authorities and laws that they pass (cf. ruling of 8 January 2013, case no. K 18/10; ruling of 4 June 2013, P 43/11), prohibition of retroactive laws (cf. ruling of 19 November 2008, case no. Kp 2/08; ruling of 12 May 2009, case no. P 66/07), obligation to keep an adequate period of *vacatiolegis*(cf. ruling of 28 October 2009, case no. Kp 3/09, ruling of 15 July 2013, case no. K 7/12); principle of protection of acquired rights; principle of certainty of laws (ruling of 14 September 2001, case no. SK 11/00).

The Constitutional Court infers a separate right to protect dignity from Article 30. Human dignity is protected by a host of constitutional rights and freedoms. However, if they fail to address a situation in which human dignity is compromised, an individual may directly invoke Article 30 of the Constitution (ruling of the Constitutional Court of 7 March 2007, case no. K 28/05, ruling of the Constitutional Court of 30 September 2008, case no. K 44/07, ruling of the Constitutional Court of 28 October 2015, case no. K 21/14, OTK ZU no. 9A/2015, item 152).

The principle of separation of powers, laid down in Article 10, constitutes basis for applying more detailed provisions regulating relations between individual powers. In particular between the legislature, the executive and the judiciary (ruling of the Constitutional Court of 15 January 2009, case no. K 45/07; ruling of the Constitutional Court of 13 June 2013 r., case no. P 35/12; ruling of the Constitutional Court of 7 November 2013, case no. K 31/12). First, the jurisprudence of the Constitutional Court gave substance and meaning to those principles, and only later they became subject matter of research carried out by legal scholars.

4. What role does the constitutional court has played in defining the constitutional principles? How basic principles have been identified by the constitutional court over time? What method of interpretation (grammatical, textual, logical, historical, systemic, teleological etc.) or the combination thereof is applied by the constitutional court in defining and applying those principles? How much importance falls upon travauxpreparatoires of the constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do universally recognised legal principles gain relevance in this process?

The Constitutional Court plays a key role in giving substance to constitutional principles. Before the Constitutional Court began to issue its rulings, a commonly held belief was that the Constitution of the People's Republic of Poland was a statute and that its provisions were interpreted in the same way as provisions of other statutes. At the same time legal scholars and courts pointed out that the general nature of the provisions set forth in the Constitution of the People's Republic of Poland often made their direct application impossible. Constitutional principles could only be implemented by statutes.

Application of the provisions of the Constitution was one of the matters addressed by the Constitutional Committee of the National Assembly. The result of the Committee's work are Article 8(1) and Article 8(2) of the Polish Constitution, which stipulate respectively that the Constitution is the supreme law of the Republic of Poland, and that the provisions of the Constitution apply directly, unless the Constitution itself provides otherwise. On the basis of Article 8 of the Constitution the Constitutional Court specifies that all of its provision are legal norms.

The Constitutional Court also stresses the specific character of interpretation of provisions of the Constitution during constitutional review. First, interpretation is applied to

the provisions that give the general form to constitutional principles that are the foundation of the entire legal system. Rather abstract nature of these principles decides about the character of interpretation. Second, the Constitutional Court determines their substance for the purposes of constitutional review. Constitutional review is a different process than application of law by courts or other bodies. Its purpose is to indicate the manner of adopting statutes and other legislative acts and their limits.

Despite the unique character of this process, the Constitutional Court applies rules of interpretation generally accepted among the Polish legal scholars. Linguistic interpretation plays a significant role in establishing the content of the provisions of the Constitution. However, quite often rules of linguistic interpretation are insufficient to unambiguously determine the substance of the constitutional provisions. Furthermore, even if it is possible to flesh out those provisions using linguistic interpretation, one should verify it by applying rules of systemic and teleological (functional) construction. The latterkind of interpretation is of special importance for the provisions of the Constitution that include program norms, which set forth the purpose and tasks of the public authority bodies.

The specific character of interpreting constitutional provisions applies to (inter alia) manner of defining notions laid down in the Constitution. The Constitutional Court deems that if those notions have a fixed meaning in separate branches of law and in the Polish legal culture, their meaning can be used as a basis to define constitutional principles. In this way the Constitutional Court established in its rulings the substance of the notion of "ownership" (Article 64 of the Constitution). When the Constitutional Court analysed the wording of Article 64 of the Constitution, it often cited attributes of ownership as defined in the civil law. A good example might be the ruling of the Constitutional Court of 25 May 1999, case no. SK 9/98, in which it was assumed that "the essence of ownership is expressed in Article 140 of the Civil Code" (ruling of the Constitutional Court of 25 May 1999, case no. SK 9/98, OTK ZU no. 4/1999, item 78).

At the same time the Constitutional Court underlines that general constitutional notions may not be defined with the use of more detailed definitions set forth in the statutes. It would be a breach of the principle of supremacy of the Constitution. For this reason the Constitutional Court refers to the so-called autonomy of constitutional notions. It means that even if a given term has a fixed meaning in one branch of law, it may be defined differently in the Constitution. The autonomy of constitutional notions is justified by the fact that the Constitution occupies a special place in the legal system (see: ruling of the Constitutional

Court of 27 April 2005, case no. P 1/05; OTK ZU no. 4A/2005, item 42; Journal of Laws no. 77, item 680 of 4 May 2005).

Also argumentative theories of interpretation play an important role in interpreting the Constitution. The Constitutional Court treats constitutional principles as optimisation requirements (as defined by R. Dworkin and R. Alexy) and establishes their content in line with the principle of proportionality. Principle of conflict is the basis to establish the final character of constitutional principles. It relates first and foremost to interpretation of provisions on human rights. Conflicts are resolved pursuant to Article 31(3) of the Constitution, according to which "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights". In many of its rulings the Constitutional Court stressed that the majority of constitutional rights is not absolute and that they may be limited, provided that those limitations are proportionate - in order to protect principles set forth in Article 31(3) of the Constitution.

Legal theorists and the Constitutional Court in its rulings refer to preparatory works on the draft Constitution to resolve some doubts regarding interpretation. In particular they invoke opinions of legal experts (professors of law) put down in minutes from meetings of the Constitutional Committee of the National Assembly. However, citing the Committee's work is rather rare, and it is not treated as a conclusive argument helping to resolve doubts regarding interpretation of the Constitution.

5. What is a legal character of the constitutional principles? Are they considered to be the genesis of the existing constitutional framework? What emphasis is placed upon the fundamental principles by the constitutional court in relation to a particular constitutional right? Are basic principles interpreted separately from the rights enumerated in the constitution or does the constitutional court construe fundamental principles in connection with a specific constitutional right as complementary means of latter's interpretation? Can the basic principles in your jurisprudence constitute a separate ground for unconstitutionality without their connection with a concrete constitutional norm? Is there any requirement in law placed upon the judicial acts of enforcement of constitutional principles?

Before the political transformation of 1989 it was stressed by Polish legal theorists and practitioners that if the Constitution of the People's Republic of Poland was a statute, it contained legal norms - like any other statute. It was assumed that unambiguous orders and prohibitions regarding public authority bodies could be inferred from the provisions of the Constitution of the People's Republic of Poland. On the other hand it was pointed out that the general character of constitutional provisions sometime makes inferring legal norms impossible. The legislators tried to resolve the dispute on the nature of constitutional provisions and their application by setting forth in Article 8(2) that the provisions of the Constitution apply directly, unless the Constitution provides otherwise. It is based on the assumption that all constitutional provisions are the basis for establishing legal norms (rules). Their normative character is varied; constitutional provisions may have the form general directives or unambiguous rules.

The notion of principles of law is of key importance in establishing the normative character of the provisions of the Constitution. It is assumed both in the jurisprudence and among legal scholars that the provisions of the Constitution include principles of law. Principles of law are norms of special importance and role in the legal system. Their importance stems from the fact that they are laid down in the Constitution, while their role is determined by the fact that they are the foundation of the entire legal system. In the Polish theory of law there are various definitions of principles of law. The debate regarding constitutional principles tackles mainly two issues: inferring legal norms from the principles of law and the normative character of these principles themselves. Both issues are closely connected to the jurisprudence of the Constitutional Court, because constitutional principles are the basis of constitutional review.

The Constitutional Court and legal theorists infer detailed principles from the provisions of the Constitution that provide for individual principles of law. An example might be the aforementioned principle of the rule of law and the proportionality principle in limiting human rights. The Constitutional Court inferred from the principle of the rule of law (inter alia) the principle of protection of acquired rights, prohibition of retroactive law, applying adequate *vacatiolegis* and other. These principles were not expressly laid down in the Constitution. Their binding character is based on the assumption that they are necessary to implement more general norms or values. There are instances when several binding principles explicitly set forth in the Constitution justify the binding character of a more general principle. For instance, the Constitution sets forth the principle of democratic state, the

principle of representation and principles of the electoral law: the suffrage is universal, equal, direct, secret and proportional. On the basis of these principles the Constitutional Court assumes that the constitutional principle of free elections is in force, which allows the voters to freely participate in the elections and guarantees that they will be held in accordance with stable and previously accepted and known rules. The Constitutional Court stressed that "the principle of free elections is a very complex criterion that involves numerous factors directly connected not only to the electoral law itself, which should be examined in a comprehensive manner, also taking into account specific situation and specific needs, including those regarding changes in the election system. Its important components are also: authentic freedom of speech and gatherings, media governance in the country in general, access to the local media market, transparent procedures of obtaining necessary funds to run a campaign, adequate and genuine guarantee that voting rights are protected, etc. "are indeed optimum and highly recommendable" (see: ruling of the Constitutional Court of 3 November 2006, case no. K 31/06, OTK ZU 10A/2006, item 147; see also: ruling of the Constitutional Court of 20 July 2011, case no. K 9/11, OTK ZU no. 6A/2011, item 61).

Therefore, the basic principles are explicitly laid down in the Constitution, while the Constitutional Court and legal theorists use them to infer more detailed principles. The jurisprudence of the Constitutional Court is crucial in giving binding substance to individual constitutional principles. It stems from the powers of the Constitutional Court and general character of these principles. The legal nature of constitutional principles needs to be defined in particular with regard to principles regarding constitutional human rights and freedoms. These principles, despite their general wording, should unambiguously express the substance of these rights and define relations between individuals and public authority bodies. The Constitutional Court should establish a standard of protection of individual rights that is not only unambiguous, but also effective. Its effectiveness is based (inter alia) on assuming optimizing character of constitutional principles that guarantee human rights and freedoms. It means that these principles should be adhered to in the highest possible degree. Optimization requirement to observe constitutional principles and optimization prohibition to limit these rights are addressed in the first place to the legislators. Optimization principles are the basis for formulating final rules that are basis for constitutionality review and establish a constitutional standard of human rights protection.

In Poland there are no other legal acts in force that would be on a par with the Constitution. The Polish legal system does not provide for statutes that would be implementing acts for the Constitution and would rank higher than ordinary statutes.

6. What are the basic principles that are applied most by the constitutional court? Please describe a single (or more) constitutional principle that has been largely influenced by constitutional adjudication in your jurisdiction. What contribution does the constitutional court has made in forming and developing of such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.

The following constitutional principles that are most frequently invoked in the jurisprudence of the Constitutional Court: the principle of the rule of law, the principle of separation of powers, the principle of equality, the right to protect ownership, the right to fair trial and the proportionality principle as a precondition of admissible interference in human rights.

It is an opportune moment to cite several examples from the jurisprudence of the Constitutional Court that illustrate how the Constitutional Court fleshes out these principles.

The Constitutional Court devoted a lot of attention to examine the principle of the rule of law. The position of the Constitutional Court in this respect is well illustrated by the deliberation included in the ruling of 13 April 1999, case no. K 36/98 (OTK ZU no. 3/1999, item 40): „It should be reminded with regard to Article 2 of the Constitution (...) that the wording of this provision expresses an intent to adopt the current shape and understanding of the clause on the democratic state based on the rule of law as it was shaped by constitutional practice and jurisprudence in the years 1990-1997. This clause should still be understood as a collective expression of several rules and principles which may not have been laid down *expressisverbis* in the text of the Constitution, but which immanently stem from axiology and from the essence of democratic state based on the rule of law. Many rules and principles once "found" by the Constitutional Court in the clause on democratic state based on the rule of law are today expressly laid down in the provisions of the new Constitution. In this case it is no longer necessary to invoke the general norm stipulated in Article 2 of the Constitution, and detailed constitutional provisions may be the basis for constitutional review (e.g. Article 38, Article 45 or Article 51). However, numerous norms that contribute to the essence of "democratic state based on the rule of law" were not separately expressed in detailed provisions of the Constitution. These norms still may and should be inferred from Article 2 of the Constitution. When there is no detailed constitutional norm or when it is necessary to harmonize individual norms, the clause on democratic state based on the rule of law may be point of reference for constitutional review.

It refers to (inter alia) the principle of protection of citizens' trust with regard to state authorities and to legislation that they pass. For a long time the Constitutional Court has treated this principle as an obvious attribute of a democratic state based on the rule of law and there are no reasons to reject this norm on the basis of the new constitution. The Constitutional Court inferred from this principle further detailed rules that regard mainly the situations when numerous subsequent amendments are made to the legal system in force. The legislative power is obliged then to carefully take into account, by means of generally accepted law making procedure, including in particular using interim regulations, maintenance of acquired rights and protection of on-going interests (ruling of 2 March 1993, K. 9/92, OTK in 1993, part I, pp. 71–72; ruling of 25 November 1997, idem, pp. 448–449). In order to respect the clause of the democratic state based on the rule of law, the legislators must take into account at subsequent modifications of the legal system the legal and actual consequences that it generated after the new regulations came into force. Since democratic state based on rule of law is a state where the citizens' trust in the state authorities and the law that they pass is protected, the law maker when amending the law cannot lose sight of interests of entities that gave the legal system the shape it had before amendment. It means first and foremost prohibition of retroactive laws, in particular when it negatively affects those interests - in particular rights acquired in accordance with provisions in force to date (rulings of 25 June 1996, K 15/95, OTK ZU no. 3/1996, p. 196 and of 17 December 1997, K 22/96, OTK ZU no. 5-6/1997, p. 511; ruling of 15 September 1998, K 10/98, OTK ZU no. 5/1998, p. 407).

The new constitution does not include a separate provision providing for maintenance of acquired rights. In any case it may not give grounds to argumentum *a contrario* and assuming that since numerous principles and rules previously inferred from the clause on democratic state based on the rule of law has been currently expressed in detailed provisions of the Constitution, omitting in these principles other principles and rules expresses the intent of the legislators to deprive them of their constitutional rank. The clause on democratic state based on the rule of law carries some general meaning, established in the constitutional law, jurisprudence and subject matter literature in the countries of our cultural area. Including this clause in Article 2 of the Constitution was an expression of intent to introduce into our legal systems all the elements that constitute a democratic state based on the rule of law. That is why - after the new Constitution entered into force - the Constitutional Court did not have any doubts that fundamental elements of this clause, such as the principle of citizens' trust in public authorities, prohibition of retroactive laws and protection of on-going interests have

kept the constitutional rank, although they were not expressly laid down in the provisions of the Constitution."

The Constitutional Court frequently took a position on the principle of separation of powers. A good example illustrating the Court's stance is the ruling in case no. P 16/04. The Constitutional Court stressed there that "in accordance with the established jurisprudence of the Constitutional Court, the principle of separation of powers implies that the system of public authorities should include internal checks and balances that prevent concentration and abuse of power, and that guarantee exercise of authority in line with the People's will, as well as respecting rights and freedoms of individuals. The requirement to "separate" powers means (inter alia) that each of the three powers should be vested with material powers that correspond to their essence, and more importantly - that each of these powers should keep minimal competence that determines their essence. The legislators on their part cannot infringe on the "material scope" of a given power when they are granting competence to individual state institutions (ruling of the Constitutional Court of 29 November 2005, case no. 16/04, OTK ZU no. 10A/2005, item 119).

The ruling of 24 October 2007, case no. SK 7/06, contains an extended summary of the Constitutional Court's jurisprudence with regard to the right to fair trial (Article 45(1) of the Constitution). The Constitutional Court reminded in it that "the right to fair trial includes in particular: 1) the right to initiate court proceedings, 2) the right to court procedure established in accordance with principles of equity, transparency and consisting of two stages and 3) the right to obtain a final and binding court decision. The scope of application of the guarantees set forth in the analysed constitutional provision is determined by the definition of the term“case”. When the Constitutional Court was establishing the meaning of this notion, it referred to Article 175 of the Constitution (the principle of monopoly of courts in the administration of justice). According to the jurisprudence to date, the notion of a case is closely connected to the notion of the system of justice and it encompasses resolving legal disputes on one hand, and deciding whether criminal charges are justified and imposing penalties on the other. Broadly speaking, the notion of case applies to all situations when it is necessary to decide about the rights of a given entity with regard to its counterparts or with regard to public authority, when at the same time the nature of given legal relationship excludes the possibility of the other party to this legal relationship to decide about the legal situation of the entity at its own discretion (see: ruling of 10 May 2000, case no. K. 21/99, OTK ZU no. 4/2000, p. 555). Please note that the notion of case includes also disputes on whether discontinuance of criminal proceedings was justified."

Additionally, the fourth element that the Constitutional Court inferred from Article 45(1) of the Constitution in this ruling was "the right to adequately organise the system and position of bodies in charge of examining cases". The Constitutional Court put emphasis on court independence, and independence and impartiality of judges. It also stressed that Article 45(1) of the Constitution must be interpreted in the context of provisions laid down in Chapter 8 of the Constitution that regulates the system of courts. It also underlined that "An independent court consists of persons who were granted independence by law; not only by way of verbally declaring that such attribute exists, but by organising the conditions of judges' service in order to really and effectively guarantee this independence".

Earlier rulings of the Constitutional Tribunal, issued in connection with the equality principle, remained relevant under the Constitution of 1997. In particular it is worth recalling the ruling of 9 March 1988 in case no. U 7/87 (OTK ZU 1988, item 1), in which the Constitutional Court defined the constitutional principle of equality. According to the Constitutional Court, "the constitutional principle of equality before the law (legal equality) (...) means that all entities governed by law (entities to which legal norms apply) that have a given material (relevant) attribute to an equal extent must be treated equally. It means they must be treated on the basis of the same norms, without negative or positive discrimination (...). Equality also means accepting that law will be applied differently to various entities (governed by law), because equal application of law to the same entities in one respect usually means treating the same entities differently in another.(...) different application of law to defined groups (classes) of entities should be justified, i.e. it must be based on accepted assessment criteria for classification of entities governed by law. Equality before law is also the grounds for choosing one, and not the other criterion for differentiating among entities governed by law. It means deciding that one, and not the other attribute is a material trait, and by the same token justified in the regulated domain (field)".

As time went by, the Constitutional Court developed its jurisprudence, allowing for the so-called affirmative action (see: ruling of 29 September 1997, case no. K 15/97, OTK ZU no. 3 4/1997, item 37).

Subsequent rulings of the Constitutional Court focused primarily on establishing whether the legislators applied relevant reasoning when differentiating among the groups of entities governed by law. In particular, the Constitutional Court assessed whether this differentiation was: 1) reasonably justified, 2) proportional 3) relevant to other constitutional principles or values (see: ruling of the Constitutional Court of 3 September 1996, case no. K 10/96, OTK ZU no. 4/1996, item 33, cited in (inter alia) ruling of 3 October 2006 r, case no.

K 30/05, OTK ZU no. 9A/2006, item 119, ruling of 23 November 2010, K 5/10, OTK ZU no. 9A/2010, item 106 or in the ruling of 19 February 2013, case no. P 14/11, OTK ZU no. 2A/2013, item 17).

Even before the Constitution of 1997 entered into force the Constitutional Court laid down conditions that together add up to the so-called proportionality test. It consists of three questions that must be answered in order to decide whether the prohibition of excessive interference in the rights of an individual was not breached: "1) will the legislative act allow to achieve the intended outcome; 2) is this legislative act necessary to protect the public interest that it is connected to; 3) are the benefits of the legislative act be proportionate to burdens that it imposes on citizens (so-called proportionality, referred to in, for instance, ruling of the Constitutional Court of 26 January 1993, U.10/92, OTK 1993, p. 32)". The aforementioned proportionality test remains relevant also in connection with Article 31(3) of the current Constitution.

The Constitutional Court also took position with regard to the proportionality principle in numerous subsequent rulings. It is worthwhile invoking the deliberation of the Constitutional Court contained in the ruling of 31 January 2013, case no. K 14/11 (OTK ZU no. 1A/2013, item 193). The Constitutional Court had to resolve whether it was possible to infer from Article 2 of the Constitution a proportionality principle identical to the one that describes relations between public authorities and individual, but with respect to relations among public authority bodies. The Constitutional Court decided that it was not possible to apply the reasoning set forth in Article 31(3) of the Constitution to matters regulating the position (autonomy) of local government units. In the opinion of the Constitutional Court adopting a position to the contrary would lead to an unusual situation in which "one public authority may invoke with respect to another public authority a narrowly defined prohibition of excessive interference, which is currently applied to protect an individual against actions of the said public authority". The Constitutional Court is of the opinion that encroachment of public authorities in the domain of individual's freedom may authorise the Constitutional Court to interfere with the legislators' activity (pursuant to Article 31(3) of the Constitution), but there is no justification for the Constitutional Court to take similar measures in order to protect units of local government. However, in case no. K 14/11 the Constitutional Court did not exclude the possibility to infer from Article 2 the proportionality principle in connection withinterfering in the position of the local government. At the same time it stressed a specific nature of this principle. In such cases the proportionality principle arising from Article 2 of the Constitution (i.e.prohibition of excessive interference) must be interpreted in the context

of detailed constitutional provisions that lay down the foundations for the functioning of the local government.

The Constitutional Court applies the proportionality principle in two meanings. It infers the three-questions proportionality test from Article 31(3) of the Constitution to investigate the possibility of limiting human rights and freedoms. From Article 2 it infers a more generally formulated prohibition of excessive interference of state authorities in the domain reserved in Constitution for local government or in the rights of individual granted to them also by way of ordinary statutes.

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

1. Do the constitutional principles enjoy certain degree of superiority in relation to other provisions in the basic law? How are constitutional principles and other constitutional provisions related to international law and/or to the European Union law? Are there any provisions in international or the European Union law that are deemed superior than the national constitutional principles? If yes, how such higher international provisions are applied with regard to the national constitutional principles? What is the prevailing legal opinion among both academic scholars and practitioners in your jurisdiction about attaching higher value to certain constitutional principles over other provisions of basic law?

Article 8(1) of the Constitution of the Republic of Poland defines the Constitution as the supreme law of the country. Among the legal theorists and in the Constitutional Court's jurisprudence, this provision is understood to mean that no other legislative act can be superior or equal to the Constitution. For example, international agreements do not have the same legal rank as the Constitution. According to Article 91(1), an international agreement becomes part of the Polish legal system after its ratification, and its place in the hierarchy of legislative acts depends on the method of said ratification. International agreements concerning topics which are of particular importance to the sovereignty and security of the

country, freedom and human rights, the country's financial responsibilities or issues which should be regulated by statutes, in order to be ratified require for ratification a prior consent granted by statute. They are ranked lower than the Constitution, but higher than statutes. This is reflected in Article 91(2) of the Constitution, which explicitly states that the provisions of such an agreement take precedence over statutes if its provisions cannot be reconciled with said statutes. If an international agreement is ratified without a prior consent granted by statute, its provisions do not take precedence over statutes.

On the other hand, Article 91(3) of the Constitution states that if an international agreement, ratified by the Republic of Poland and establishing an international organization, so provides, the laws that it establishes are applied directly and have precedence over statutes. This provision was introduced in 1997, primarily with Poland's future membership in the EU in mind. It follows from the above that an unconstitutional provision of an international agreement neither repeals the provisions of the Constitution nor can result in a refusal to apply them. An international agreement that is inconsistent with the provisions of the Constitution should not be ratified, and if it was ratified and became part of the Polish legal system, it is subject to a review of the Constitutional Court. If such an agreement is found by the Constitutional Court to be inconsistent with the Constitution, it ceases to be a part of the national law (cf. the ruling of the Constitutional Court of 21 September 2011, case no. SK 6/10, OTK ZU no. 7A/2011, item 73, in which the Court states that: "the elimination of an international agreement which is inconsistent with the Constitution from the Polish legal order may only be carried out in accordance with principles expressed therein, i.e. by repealing or amending the international agreement by competent authorities, or as a result of a ruling issued by the Constitutional Tribunal determining the unconstitutionality of the agreement").

These provisions do not refer directly to the law of the European Union. The constitutional basis for Poland's accession to the EU was Article 90 of the Constitution which states that the Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of state authority in relation to certain matters. Consent for ratification of such an agreement must be expressed by means of statute passed both by the Sejm and Senate, in both cases, by a two-thirds majority vote in the presence of at least half of the number of Deputies or Senators, respectively. These conditions are more stringent than those provided for amending the Constitution. According to the Constitutional Court, the accession to the EU does not mean that the primary and secondary law of the EU takes precedence over the Constitution (case no. K 18/04). If any of the EU laws or the acts which implement these laws is inconsistent with

the Constitution, the inconsistency can be only eliminated by means of a revision of the provisions of the Constitution and not by refusing to apply them (case no. P 1/05). The Constitutional Court's jurisprudence concerning the relations between the national law and the EU law was presented in the previous report[2].

Although neither the provisions of international law nor the provisions of the EU law are on a par with the Constitution, they are relevant to its interpretation. In accordance with Article 9 thereof, the Republic of Poland respects international law which is binding for the country. This provision reflects the principle that the interpretation of Polish law should favour the EU law. This principle plays a significant role in interpreting the provisions of the Constitution and statutes. Should any doubts as to how to understand the provisions of the Constitution arise, they ought to be resolved in a way that ensures consistency of the two legal systems (cf.: the ruling of the Constitutional Court of 21 April 2004, case no. K 33/03, OTK ZU no. 4A/2004, item 31). There are many examples in the jurisprudence of the Constitutional Court of how the EU law and international law influence the interpretation of the Constitution. The impact of the Convention for the Protection of Human Rights and Fundamental Freedoms and the jurisprudence of the ECtHR is the most significant. It is well-demonstrated in the rulings of the Constitutional Court concerning the relation between Article 10 of the Convention and Article 54(1) of the Constitution. In the ruling issued in the case no. SK 70/13, the Constitutional Court stressed that "Article 54(1) of the Constitution protects all forms of expression protected by the law which allow individual to proclaim and manifest their opinion. Ensuring the existence of conditions which facilitate free exchange of opinions does not imply condoning all forms of expression. As a rule, freedom of expression does not apply to statements which are unequivocally insulting. At the same time, the freedom of expression cannot be limited to information or opinions which are received favourably or perceived as inoffensive or neutral (cf.: the ruling of the Constitutional Court of 23 March 2006, case no. K 4/06). The substance of Article 54 of the Constitution is embodied in the currently accepted democratic standard of the "freedom of expression", and in particular, in a generally defined, but at the same time more broad in its scope, Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed on 4 November 1950 in Rome, and later amended according to the provisions of the Protocols no. 3, 5 and 8 and supplemented with the Protocol no. 2 (Journal of Laws 1993, No. 61, item

[2] See in *Coopoeration of Constitutional Courts in Europe – current situation and prospects for the future*, The Constitutional Tribunal of the Republic of Poland, National Report, 2014,https://www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/LB-Pologne-EN.pdf

284, as amended; hereinafter referred to as the Convention), which mentions explicitly ‘information’ and ‘ideas’” (cf. the ruling of the Constitutional Court of 12 February 2015, case no. SK 70/13, OTK ZU no. 2A/2015, item 14 or the ruling of the Constitutional Court of 21 September 2015, case no. K 28/13, OTK ZU no. 8A/2015, item 120).

2. How are the constitutional principles related to each other? Is there any hierarchy within those principles? What approach has the constitutional court taken in terms of determining a hierarchy within the constitution? Is it possible to conclude from the jurisprudence of the constitutional court that it has given principal status to some constitutional principles over the rest of the basic law?

The Constitution does not contain explicit information about the internal hierarchy of its own provisions, but both the legal theorists and the jurisprudence of the Constitutional Court in its jurisprudence recognize this hierarchy. It is assumed that the provisions included in the first chapter of the Constitution which define the foundations of Polish statehood and some of the provisions of the second chapter concerning human rights are of special importance. Such provisions include the rule of law principle, the separation and balance of powers principle, as well as the principle of the protection of human dignity and the principle of equality. These principles are specified in more detail in other provisions of the Constitution. They also play an important role in the interpretation of said provisions.

In particular, the teleological interpretation of various provisions of the Constitution refers to the principles which occupy a place of special importance in its text. An example of such a reference can be found, among others, in the Constitutional Court's ruling of 15 January 2009 in which the Court emphasised that “(...) since the principle of separation and balance of powers is one of the most basic provisions of the Constitution in the context of the hierarchy of its provisions (which is reflected in its hierarchical structure and in the special mode set for amending chapter 1 thereof), it follows therefore that other provisions of the Constitution relating to the status of the bodies of the judiciary should be interpreted in a manner ensuring that their content is appropriate in the context of the superior character of this principle. All the more so, considering that this principle is reinforced by the provision of the preamble of the Constitution, which requires the powers to cooperate with each other and identifies this “cooperation” as one of the foundations of the Constitution” (the ruling of the Constitutional Court of 15 January 2009, case no. K 45/07, OTK ZU no. 1A/2009, item 3, Journal of Laws no. 9, item 57 of 22 January 2009).

On the other hand, in the ruling of 20 March 2006, the Constitutional Court stated that "although it is not absolute, the constitutional right to protection of privacy is of a special character in the system of constitutional rights and freedoms. As it has already been mentioned, this stems from the fact that the said value is deeply rooted in the dignity of the person. This is also confirmed by Article 233(1) of the Constitution, which clearly narrows down the legislator's freedom to limit that right, even in times of martial law and states of emergency. Having regard to these general guidelines that arise from the placement and rank of the right to the protection of privacy among the constitutionally protected rights and freedoms, one should assess regulations that introduce exceptions to protection of privacy" (see the ruling of 20 March 2006, case no. K 17/05, OTK ZU no. 3/A/2006, item 30, part III, point 3).

3. How is the constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the basic law? How the constitution was established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the basic law? Has the constitutional principles ever been subjected to change in your jurisdiction? If yes, what were the reasons behind it?

The process of amending the Constitution is regulated by the provisions of Article 235 of the Constitution. According to this article, a bill amending the constitution can be submitted by at least one-fifth of the statutory number of Deputies (in the Polish parliament there are 460 Deputies), the Senate or the President of the Republic. Amendments to the Constitution are made by means of a statute adopted by both the Sejm (lower chamber) and Senate (upper chamber). A bill is adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators. If a bill to amend the Constitution relates to the general provisions of Chapter I, human and citizen rights of Chapter II or Article 235 concerning amendments to the Constitution, the entities which have the right of legislative initiative can request a referendum on said issues. The amendment to the Constitution is accepted if the majority of those voting in the referendum express support for such amendment. It is the only mode of

amending the Constitution. The Constitution does not explicitly provide for any unamendable provisions.

4. Should constitutional amendment procedure be subjected to judicial scrutiny or should it be left entirely up to the political actors? What is the prevailing legal opinion in this regard among academic scholars and other societal groups in your jurisdiction?

The Polish Constitution, due to its amendment mode, is considered to be a rigid one. Its rigidity increases also due to the configuration of political forces in the parliament. Despite several amendment initiatives, only two amendments have so far been introduced to the Constitution. The first amendment was a result of the Constitutional Court's ruling of 27 April 2005 (case no. P 1/05, OTK ZU no. 4A/2005, item 42). In this ruling, the Constitutional Court stated that the contested Article 607t of the Act of 6 June 1997 – the Code of Criminal Procedure, which introduced to the Polish legal system the institution of the European Arrest Warrant, was incompatible with the prohibition of extradition expressed in Article 55 of the Constitution. However, when ruling on the unconstitutionality of the Article 607t, the Constitutional Court stressed the fact that Poland is obligated to fulfil its international obligations and that the European Arrest Warrant is important for proper administration of justice. Therefore, the Constitutional Court, under Article 190(3) of the Constitution, decided that the contested provision will cease to be binding 18 months from the publication of the ruling. In this way the Court provided legislators with time to remove the inconsistency between the contested provision and Article 55 of the Constitution. The amendments introduced by the legislators consisted in adding to Article 55 of the Constitution exceptions to the prohibition of extradition of a Polish citizen.

The second amendment to the Constitution was initiated by the Deputies. As a result of their actions, Article 99(3) was added to the Constitution, which defined the conditions for restricting the right to stand for election in parliamentary elections (Act of 7 May 2009 on the Amendment of the Constitution of the Republic of Poland, Journal of Laws, no. 114, item 946). The added provision stated that "no person sentenced to imprisonment by a final judgement for an intentional indictable offence may be elected to the Sejm or the Senate." Frequent references were made to the society's desire for "the law not to be made by criminals" in the course of legislative work, as before the above-mention restriction was introduced, a person convicted by a final judgement could be elected to the parliament. The amendment was accompanied by a transitional provision according to which the restriction

was to apply to the term of the Sejm and Senate following the term during which the bill came into force.

These examples demonstrate that it is difficult to talk about any specific tendencies in terms of amendments.

5. Does the constitution in your jurisdiction provide for constitutional overview of the constitutional amendment? If yes, what legal subjects may apply to the constitutional court and challenge the constitutionality of the amendment to the basic law? What is the legally-prescribed procedure of adjudication in this regard?

The Constitutional Court has never received a request for a review of constitutionality of any constitutional amendments. The Court has never, not even *obiter dicta,* ruled on the issue of admissibility of performing such a review.

6. Is the constitutional court authorised to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds? In the absence of explicit constitutional power, has the constitutional court ever assessed or interpreted constitutional amendment? What has been the rationale behind the constitutional court's reasoning? Has there been a precedent when the constitutional court had elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? What is legal effect of a decision of the constitutional court finding the constitutional amendment in conflict with the constitution? Please, provide examples from the jurisprudence of the constitutional court.

Despite the lack of rulings of the Constitutional Court on the issue of the review of constitutionality of constitutional amendments, the issue itself is discussed in the literature of the subject. Legal theorists and practitioners are rather sceptical when it comes to assessing the possibility of the Constitutional Court carrying out a material review. Articles 188(1), 188(2) and 188(3) of the Constitution explicitly state that the review of the Constitutional Court can concern the issue of conformity of various norms representing different levels in the hierarchy of the legal system. Such a review cannot be horizontal, and a constitutional review of constitutional amendments would be exactly that. On the other hand, it is allowed

for such a review to be performed with a focus on the procedural aspect. Legal theorists indicate that under the Constitutional Court Act, the Court does not only control the hierarchy of legal provisions, but also compliance with the legislative procedure. As such a review applies to statutes and the Constitution is also a statute, the review of the Constitutional Court should therefore be permitted also in this case.

7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of constitutional court's power to check amendments to the basic law? Do academic scholars or other societal groups advocate for such development? How the judicial review is observed in this regard? Would the expansion or recognition of constitutional court's authority encourage the realisation of constitutional ends or threaten its viability? Please, elaborate on existing discussion in your jurisdiction.

As there are no relevant rulings and constitutional practice, the answer to the above-quoted question is negative. Enhancing of the position of the Constitutional Court can be only tackled in terms of the fact that due to the rigidity of the Constitution, which is not subject to frequent changes, the Court actively interprets many of its provisions in order to adapt them to the changing social and legal environment. It is done foremost with the aim of ensuring the Constitution's compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms and the EU law. However, due to the on-going constitutional crisis which began last year, it is difficult to say whether this tendency will remain unchanged.