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CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

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of the Conference of European Constitutional Courts by
The Constitutional Tribunal of the Republic of Poland

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

1. **The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?**

The procedure for appointing judges to the Constitutional Tribunal is governed by Article 194(1) of the Constitution of the Republic of Poland of 2 April 1997 (hereinafter: the Constitution) and by Article 5(2) and (4) of the Constitutional Tribunal Act of 1 August 1997 (hereinafter: the Constitutional Tribunal Act). Pursuant to the above-mentioned provisions, the judges of the Tribunal (15 judges in total) are appointed individually for a period of 9 years. They are appointed by the first house of the Polish Parliament – the Sejm. The second house – the Senate – is not involved in the procedure; neither is the government.

The candidates for the office of a judge of the Tribunal are nominated by at least 50 Deputies or the Presidium of the Sejm[1] (Article 5(4) of the Constitutional Tribunal Act). After the Justice and Human Rights Committee has given its opinions on the candidates, the Sejm elects a judge of the Tribunal by an absolute majority of votes in the presence of at least half of the total number of Deputies.

The procedure for appointing judges to the Tribunal is often criticised due to the fact that the act of appointing the judges falls solely within the remit of a political body. In the public and academic debate, there are proposals to introduce mechanisms which would ensure greater social control over the process of electing judges to the Tribunal. In March 2010, a group of Deputies presented a bill to amend the Constitutional Tribunal Act, according to which the right to nominate candidates for the office of a judge is to be vested in a special College of Electors, composed of the representatives of the highest judicial bodies, representatives of the faculties of law at Polish universities and the representatives of the Law Studies Committee of the Polish Academy of Sciences[2].

Pursuant to the constitutional principle of independence of judges of the Constitutional Tribunal (Article 195 of the Constitution), the judges of the Tribunal may be dismissed neither by the Parliament nor by any other organ of the state. The mandate of a judge of the Tribunal may expire before the end of the term due to: -> his/her resignation from the office of a judge of the Tribunal; -> any opinion of a

1 The Presidium of the Sejm is a body within the Sejm, comprising the Marshal of the Sejm and Vice-Marshals of the Sejm.

2 At the time of replying to this Questionnaire (October 2010), the work on the bill has not been completed in the Sejm.

medical board certifying his/her permanent inability to perform the duties of a judge of the Tribunal because of his/her illness, disability or weakness; -> conviction by a valid court judgement, or -> a legally valid disciplinary decision sentencing him/her to removal from the office of a judge of the Tribunal, made during disciplinary proceedings before the disciplinary court composed of the judges of the Tribunal.

The expiry of the mandate, due to one of the above circumstances, must be stated by the General Assembly of the Judges of the Constitutional Tribunal. The expiry of the mandate of a judge of the Tribunal also occurs due to his/her death. Then the expiry of the mandate is pronounced by the President of the Tribunal (see: Article 11 of the Constitutional Tribunal Act).

2. **To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?**

The Tribunal enjoys considerable autonomy as regards drawing up and implementing its budget.

The draft plan of income and expenses of the Tribunal is adopted by the General Assembly of the Judges of the Constitutional Tribunal (Article 18(1) of the Constitutional Tribunal Act). Such a draft plan is then included by the Minister of Finance in the draft state budget (Article 18(1) of the Constitutional Tribunal Act, Article 139(2) of the Act on Public Finances). Neither the Minister of Finance nor the government have a possibility of interfering with the content of the draft plan of income and expenses of the Tribunal, adopted by the General Assembly.

The budget of the Constitutional Tribunal constitutes one of the separate parts of the state budget (Article 114(1) in conjunction with Article 139(2) of the Act of 27 August 2009 on Public Finances), which is adopted for a financial year by the Parliament in the form of a budgetary act (Article 219(1) of the Constitution). Therefore, ultimately it is the Parliament that decides on the shape of the Tribunal's budget, determining the amount of state income and expenses (including those of the Constitutional Tribunal) in the budgetary act.

During the debates on the draft state budget held by the Sejm Public Finances Committee and by the Senate Budget and Public Finances Committee, a representative of the Tribunal presents the Tribunal's stance on its income and expenses.

The competence to implement the budget of the Tribunal has been granted to the President of the Constitutional Tribunal (Article 18(2) of the Constitutional Tribunal Act). The scope of competence of the President of the Tribunal in that regard is specified by the Act of 2009 on Public Finances.

3. **Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?**

From the point of view of the Constitution, it is permissible for the Parliament to amend the Constitutional Tribunal Act. However, it should be noted that the amendments may not clash with the provisions of the Constitution which directly determine some of the issues pertaining to the organisation, functioning and the scope of competence of the Tribunal.

As regards the organisation and the functioning of the Tribunal, the Constitution specifies the composition of the Tribunal, the term of office of the judges and the procedure for appointing the judges (Article 194(1)), as well as the method of appointing the President and the Vice-President of the Tribunal (Article 194(2)). The Constitution regulates the basic issues related to the status of a judge, including the guarantees of his/her independence, political neutrality and his/her remuneration consistent with the dignity of the office and the scope of duties (Article 195), as well as the scope of immunity and a permissible way of waiving it (Article 196). The Constitution also determines the scope of competence of the Tribunal[3]. A possible amendment to the above-mentioned constitutional provisions requires the enactment of a bill to amend the Constitution, pursuant to Article 235 of the Constitution and with adherence to specific procedural restrictions[4].

The Constitutional Tribunal Act of 1997 has so far been amended six times. The amendments concerned minor issues, and not fundamental ones. The Parliament has no legal obligation to consult the Tribunal as to the content of bills to amend the Constitutional Tribunal Act. Nevertheless, in practice, the Tribunal has been consulted in that regard, and a representative of the Tribunal has been allowed to participate in the work on the bills by presenting the Tribunal's stance at the sessions of competent parliamentary committees.

4. **Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?**

Pursuant to Article 188(3) of the Constitution, the Constitutional Tribunal may review "legal provisions issued by central State organs". The term "legal provisions" is broadly interpreted and comprises all legal acts which contain norms of an abstract and general character – and which thus have a normative character ("normative acts").

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3 The Constitution confers on the Tribunal the competence to: conduct review of hierarchical conformity of norms (Article 188(1)-(3)), carry out the assessment of conformity to the Constitution of the purposes or activities of political parties (Article 188(4)), adjudicate on constitutional complaints submitted by individuals (Article 188(5)), settle disputes over powers between central constitutional organs of the state (Article 189) as well as determine whether or not there exists an impediment to the exercise of the office by the President of the Republic of Poland (Article 131(1)).

4 Inter alia: the requirement of a two-third majority vote in the Sejm taken in the presence of at least half the statutory number of Deputies as well as the requirement of adopting the bill in the same wording by the Senate, by an absolute majority of votes in the presence of at least half of the statutory number of Senators, within a period no longer than 60 days after the adoption of the bill by the Sejm.

Both houses of the Parliament (the Sejm and the Senate) may be categorised as "central State organs". Their rules of procedure (specifying the internal organisation and conduct of work – Article 112 of the Constitution) undoubtedly belong to the category of "normative acts". Therefore, they may be subject to review by the Tribunal.

So far the Tribunal has twice adjudicated on the constitutionality of some of the provisions of the Rules of Procedure of the Sejm of 30 July 1992 and the Sejm resolutions amending those Rules of Procedure. In one of the two cases, the Tribunal assessed the constitutionality of the provisions of the Rules of Procedure concerning the conduct of work on bills to amend the Constitution[5], and in the other case– the provisions of the Rules of Procedure regarding the organisation of Deputies and Senators into parliamentary clubs and groups[6]. Moreover, the Tribunal has twice reviewed the Sejm resolutions on appointing parliamentary investigative committees. In both cases it adjudicated that they were partly unconstitutional, due to the fact that the scope of their activity exceeded the limits set out in the Constitution[7].

Also, the rules of procedure of the government (Council of Ministers) may be subject to review by the Constitutional Tribunal. The Rules of Procedure of the Council of Ministers, adopted in the form of a resolution of the Council of Ministers, falls within the scope of the term "legal provisions issued by central State organs", as referred to in Article 188(3) of the Constitution. In practice, the Rules of Procedure of the Council of Ministers have never been challenged and referred to the Constitutional Tribunal.

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

The catalogue of legal acts subject to review by the Tribunal, as well as the catalogue of legal acts which may constitute higher-level norms for review, varies depending on the type of review.

In the case of a subsequent review (a posteriori review)[8] carried out upon application by one of the authorities indicated in Article 191(1)(1)-(5) of the Constitution[9] - the objects of review and admissible higher-level norms for review may be legal acts specified in Article 188(1)(1)-(3) of the Constitution. Pursuant to that provision:

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5 The judgement of the Constitutional Tribunal of 17 November 1992, Ref. No. U. 14/92.
6 The judgement of the Constitutional Tribunal of 26 January 1993, Ref. No. U. 10/92.
7 The judgements of the Constitutional Tribunal of: 22 September 2006, Ref. No. U 4/06, and 26 November 2008, Ref. No. U 1/08.
8 That is: review of a legal act after its publication in the relevant official gazette.
9 These are: the President of the Republic of Poland, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights (Ombudsman), the National Council of the Judiciary, the constitutive organs of units of local self-government, the national organs of trade unions as well as the national authorities of employers' organisations and occupational organisations, churches and religious organisations.

"The Constitutional Tribunal shall adjudicate regarding the following matters:

1) the conformity of statutes and international agreements to **the Constitution**;
2) the conformity of a statute to **ratified international agreements whose ratification required prior consent granted by statute**;
3) the conformity of legal provisions issued by central State organs to **the Constitution, ratified international agreements and statutes** […]".

Article 188(1)(1)-(3) of the Constitution sets out a catalogue comprising of legal acts that are subject to review and admissible higher-level norms for review, which is also relevant to the proceedings initiated before the Tribunal by a question of law, which may be referred to the Tribunal by a court (whether a common, administrative or military one, or the Supreme Court), according to the rules set out in Article 193 of the Constitution.

In the case of an a posteriori review conducted by the Tribunal due to the receipt of a constitutional complaint (Article 79 of the Constitution) - the object of proceedings may be any normative act which has been the basis of a final (judicial or administrative) decision concerning the individual and infringes on his/her constitutional rights and freedoms. As a higher-level norm for review, the complainant may indicate only those **provisions of the Constitution which establish** his/her **freedom (right)**, infringed by the application of the challenged normative act. Higher-level norms for review here may not be other legal acts (including – international agreements), even if they refer to the rights and freedoms of the individual (inter alia the European Convention for the Protection of Human Rights and the International Covenants on Human Rights).

A preventive review (a priori review)[10], which may be initiated solely by the President, may concern parliamentary bills before they are signed by the President (the first sentence of Article 122(3) of the Constitution) or international agreements before their ratification (Article 133(2) of the Constitution). In both cases, a higher-level norm for review may only be **the Constitution**.

6. **a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.**

In principle, the Tribunal's judgement which states the non-conformity of the normative act under examination (or part thereof) is tantamount to the automatic elimination of the said act (or part thereof) from the legal system[11]. However, it may be the case that the repealing of the defective regulation alone, by the Tribunal, may

10 That is: review of a legal act before its publication.
11 See: the answer to point III.1 and 2 of this Questionnaire

prove insufficient for restoring the coherence and efficacy of the legal system. Then the legislator should either enact a new normative act or amend relevant acts which have already been in force.

No constitutional or statutory provisions provide for a special procedure or time-scale for such legislative measures.

A special procedure has only been set out in the Rules and Regulations of the Senate (Articles 85a to 85f of the Resolution of the Senate of the Republic of Poland of 23 November 1990 – the Rules and Regulations of the Senate[12]). In accordance with that procedure, judgements of the Tribunal are referred, by the Marshal of the Senate, to the Senate Legislation Committee. Next the Committee examines whether it is necessary to take legislative measures in the given area (e.g. in order to eliminate loopholes and inconsistencies in the legal system). After considering the matter, the Committee submits, to the Marshal of the Senate, a motion to adopt a legislative initiative or informs the Marshal of the Senate that there is no necessity for taking legislative measures. On the basis of the motion of the Legislation Committee, the Senate may refer an appropriate legislative initiative to the Sejm. However, the Sejm may reject the initiative of the Senate.

The Tribunal has no legal instruments at its disposal which would enable it to force the legislator to take legislative measures. The Tribunal may only defer the date at which the provision, on the unconstitutionality (illegality) of which the Tribunal has adjudicated, loses its binding force (the first sentence *in fine* of Article 190(3) of the Constitution). In this way, the Tribunal gives the legislator time for introducing amendments. In the case of statutes, such period of deferment may not exceed 18 months, counted from the day of publication of the relevant judgement, and with regard to other types of normative acts under examination – it may be no longer than 12 months.

In order to draw the legislator's attention to the need for amending defective normative solutions, the Tribunal additionally is entitled to: -> express, in the reasoning for its judgement, the need for enacting amendments which would restore the integrity of the legal system; -> issue signalling decisions and -> include relevant observations in the annual publication entitled *Information on Substantial Problems Arising from the Activities and Jurisprudence of the Constitutional Tribunal.* Signalling decisions, addressed to a competent authority with legislative powers, indicate the inconsistencies and loopholes found in the law, the removal of which is indispensable for ensuring the integrity of the legal system (Article 4(2) of the Constitutional Tribunal Act). Such signalling decisions are not legally binding on the addressee. *Information on Substantial Problems Arising from the Activities and Jurisprudence of the Constitutional Tribunal* is annually presented in the Sejm and Senate (Article 4(1) of the Constitutional Tribunal Act).

12 These provisions, collected in Section IXa entitled "Execution of Judgements of the Constitutional Tribunal", were added to the Rules and Regulations of the Senate, pursuant to Article 1(3) of the resolution of the Senate of 9 November 2007.

Introducing amendments to the law which would restore the integrity of the legal system, after the Tribunal has repealed defective regulations, has constituted a serious problem for years. The legislator's ineptitude in that regard hinders the effectiveness of the Tribunal's judgements and has a negative impact on the authority of the law. Nevertheless, it should be noted that recently the situation has been improving. The introduction of a special procedure in the Senate – which is aimed at monitoring the jurisprudence of the Tribunal and at preparing specific legislative initiatives based on that monitoring - should be evaluated as very positive.

Also, as regards the monitoring of the jurisprudence of the Tribunal, increasing activity has been noted on the part of the Government Legislation Centre (RCL), which carries out its activities under the authority of the Prime Minister. Within the Centre, a special group has been created to conduct a day-to-day analysis of the jurisprudence of the Tribunal and to draft proposals for appropriate legislative changes. However, the instances of delay and arrears of work are still numerous. There are judgements that still have not been executed (the longest delay is in the case of the judgement of 3 June 1998, Ref. No. K 34/97, concerning the succession of assets of the State Workers' Holiday Fund).

6. b) Parliament can invalidate the constitutional court's decision: specify conditions.

The judgements of the Tribunal could be subject to rejection by the Sejm during the period from 1985 (the year of establishing the Constitutional Tribunal) until 1997 (the year of enactment of the present Constitution). This was a consequence of the assumption, adopted in the communist doctrine of the constitutional law, that the Sejm was the supreme organ of state authority, superior to all other organs of the state (including courts and tribunals). Pursuant to Article 7 of the Act of 29 April 1985 on the Constitutional Tribunal (no longer binding today), the Sejm had the competence to reject a given judgement of the Tribunal on the unconstitutionality of a statute if - in the view of the Sejm – the said statute did not infringe on the Constitution. The resolution of the Sejm on the rejection of the Tribunal's judgement required a majority vote of at least two-thirds in the presence of at least half of the statutory number of Deputies. The Sejm had no competence to reject a judgement of the Tribunal if it stated the unconstitutionality of a legal act of lower rank than a statute (such judgements were final).

The situation changed with the entry into force of the Constitution of 1997. Since then the Sejm has had no power to reject the Tribunal's judgements. In accordance with Article 190(1) of the Constitution of 1997, all judgements of the Tribunal have become final in the sense that they may not be challenged or rejected by any other organ of public authority. They are of universally binding application, which entails that they bind all organs of public authority – including the Sejm.

Only temporarily, during the period of 2 years from the date of entry into force of the Constitution of 1997, it was possible for the Sejm to reject the judgements of the

Tribunal on the non-conformity of a statute to the Constitution (Article 239(1) of the Constitution). The above-mentioned transitional regulation was limited in its scope to the judgements concerning the statutes adopted before the entry into force of the Constitution, and, in addition, could not apply to the proceedings initiated in response to questions of law submitted to the Constitutional Tribunal by a court. At present that regulation is no longer applicable.

7. Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?

The relations of the Tribunal with other organs of public authority are determined by the constitutional principles of separation of powers and of independence of the judiciary. However, these principles do not exclude certain forms of cooperation which are exhaustively specified in the Constitution and the Constitutional Tribunal Act.

Since the Tribunal has no competence to initiate proceedings, the fulfilment of its constitutional function is contingent upon the activity of other organs of public authority, which are constitutionally competent to initiate review proceedings13. Initiating the proceedings may be regarded as the basic form of cooperation between the Tribunal and other organs of public authority, as far as the protection of the superiority of the Constitution is concerned.

The Tribunal has the possibility of relying on the assistance of other organs of public authority during the examination of a case. Pursuant to Article 21(1) of the Constitutional Tribunal Act: "Courts and other organs of public authority shall be obliged to render assistance to the Tribunal and, at its request, present records of proceedings related to the proceedings before the Tribunal". In order to prepare the hearing in a proper manner, the presiding judge may summon organs of public authority or organisations (not involved in the proceedings) to participate in the proceedings if he/she considers their participation to be expedient for due consideration of the case (Article 38(4) of the Constitutional Tribunal Act). Moreover, the Tribunal may request the Supreme Court and the Chief Administrative Court for information on the interpretation of the legal provision under examination in the jurisprudence of courts (Article 22 of the Constitutional Tribunal Act).

What is particularly valuable to the Tribunal is its cooperation with the Public Prosecutor-General and the prosecutors representing the Public Prosecutor-General's Office. In accordance with Article 27(5) of the Constitutional Tribunal Act, the Public Prosecutor-General is a participant in the proceedings before the Tribunal, regardless of the procedure deemed proper for examining a given case. Therefore, the Prosecutor-General may present written observations at the written stage of proceedings, and then may take part in the hearing[14]. The stances presented by the Public Prosecutor-General are usually of high substantive merit.

13 Cf. the answer to point I.5 of this Questionnaire.

14 Pursuant to Article 29(5) of the Constitutional Tribunal Act: "The Public Prosecutor-General or his/her deputy shall participate in cases examined by the Tribunal sitting in full bench. A prosecutor of the Public Prosecutor-General's Office shall participate in cases examined in other compositions of the bench".

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

1. **What are the characteristic traits of the contents of organic litigations (legal disputes of a constitutional nature between public authorities)?**
2. **Specify whether the Constitutional Court is competent to resolve such litigation**
3. **Which public authorities may be involved in such disputes?**
4. **Legal acts, facts or actions which may give rise to such litigations: do they relate only to disputes on competence, or do they also involve cases when a public authority challenges the constitutionality of an act issued by another public authority? Whether your constitutional court has adjudicated upon such disputes; please give examples**

Pursuant to Article 189 of the Constitution, the Constitutional Tribunal shall settle disputes over powers only between central constitutional organs of the state[15]. A central organ of the state is an authority whose competence regards the entire territory of the state; by contrast, a constitutional organ is an authority whose existence and competence regarding specific activities arise directly from the Constitution.

In accordance with to Article 53(1) of the Constitutional Tribunal Act, the dispute over powers between two or more central constitutional organs of the state may arise where two (all) of the said organs of the state consider themselves competent to decide in the same case, issue a given legal act or undertake given legal activities (the so-called positive powers dispute) or where neither (none) of the said organs of the state consider themselves competent in the same case (negative powers dispute).

The dispute over powers may occur only where there is a discrepancy between the views of two or more aforementioned organs of the state as to the **powers** of one of them. The object of adjudication may therefore only be the **question about powers**: about their existence or lack thereof, about their scope (content), about the distinction between the powers of one organ of the state and the powers of another state organ. There is no possibility of questioning, in this procedure, other aspects of the activities of the organs of the state (proper exercise of powers, rightness of undertaken activities and legality of enacted legal acts)[16].

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[15] Disputes over powers between organs of units of local self-government, as well as disputes over powers between organs of these units and organs of government administration are settled by administrative courts, provided a separate statute does not state otherwise (cf. Article 4 of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts).

[16] The constitutionality (legality) of normative acts issued by one of the organs of the state, to the extent set out in Article 188(1)-(3) of the Constitution, may be challenged by another organ of the state, in accordance with an appropriate procedure for review of hierarchical conformity of norms. Examples: The Polish Ombudsman may challenge the constitutionality of a statute adopted by the

The dispute over powers must be **real** – which means that there must be explicit evidence in a given case proving that two (or more) aforementioned organs of the state have regarded themselves competent (lacking competence) to resolve the case (both of the organs of the state have undertaken some action, issued statements, taken a stance, etc). The dispute may not have a merely hypothetical (potential) character.

5. Who is entitled to submit proceedings before the Constitutional Court for the adjudication of such disputes?

The following persons may make application to the Constitutional Tribunal in respect of disputes over powers between central constitutional organs of the state: the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Chief Administrative Court and the President of the Supreme Chamber of Control (Article 192 of the Constitution). The organ of the state initiating the proceedings does not need directly to be the party to a given dispute over powers[17].

6. What procedure is applicable for the adjudication of such dispute?

The examination of an application for settling a dispute over powers is carried out in accordance with the same procedure as that for the examination of an application for review of hierarchical conformity of norms. There are no procedural differences. The first stage of proceedings is conducted in writing. The copies of a given application are provided to the participants in the proceedings (the central constitutional organs of the state having a dispute over powers and the Public Prosecutor-General). The participants may present their arguments in writing. After the written part of the proceedings, a hearing is held, during which the participants voice their arguments, refer to the arguments of the other participants, as well as answer the questions posed by the judges of the Tribunal.

Parliament (e.g. the constitutionality of the Act of 17 December 1998 on Old Age Pensions and Disability Pensions from the Social Insurance Fund to the extent it concerns the universal pensionable age of men and women, Ref. No. K 63/07) or the constitutionality of a regulation for implementation of a statute (e.g. the Regulation of the Minister of National Education of 8 September 2006 amending the Regulation concerning the terms and methods of grading, classifying and promoting pupils and students and conducting tests and examinations in state schools, Ref. No. U 5/06). However, such cases may not be categorised as disputes over powers within the meaning of Article 189 of the Constitution and Article 53(1) of the Constitutional Tribunal Act.

[17] In the case Kpt 1/08, the First President of the Supreme Court made application to the Tribunal, despite the fact that the alleged dispute concerned the President of the Republic of Poland and the National Council of Judiciary.

In the cases concerning disputes over powers, the Tribunal always adjudicates in full bench[18]. The ruling is in the form of a decision. Its operative part is published in the Official Gazette of the Republic of Poland – *Monitor Polski*.

7. What choices are there open for the Constitutional Court in making its decision (judgment). Examples.

The Tribunal resolves a dispute over powers by issuing a decision in which it indicates the organ of the state which is competent to take specific action (resolve a given case). The Tribunal specifies the scope of powers of the organ of the state and the way of "separating" those powers in relation to the powers of other state organs (see below the comments on the decision in the case Kpt 2/08).

Examples:
So far the Tribunal has twice adjudicated on a dispute over powers (cases Kpt 1/08 and Kpt 2/08).

In the case **Kpt 1/08**, the First President of the Supreme Court referred to the Tribunal for it to settle a dispute over powers which – in his opinion – arose between the President of the Republic of Poland and the National Council of the Judiciary of Poland (KRS) with regard to appointing judges. The dispute arose when the President of the Republic refused to appoint a few judges (in January 2008), although the candidacies were evaluated positively and presented to him by the National Council of the Judiciary. The refusal to appoint the positively evaluated candidates was – according to the First President of the Supreme Court – tantamount to independent "evaluation" of the candidates by the President of the Republic, despite the fact that the power to evaluate candidacies had been granted to the KRS. The Tribunal refused to examine the case in respect of its substance, as it did not consider the case to be a real dispute over powers. Both of the two organs of the state exercised their constitutional or statutory powers within the scope of their competence (the decision of 23 June 2008, Ref. No. Kpt 1/08).

[18] Pursuant to Article 25 of the Constitutional Tribunal Act, the full bench of the Tribunal adjudicates in the cases: -> of disputes over powers arising between central constitutional organs of the state, -> to determine temporary impediments to the exercise of the office of the President of the Republic of Poland, -> on the conformity to the Constitution of the purposes and/or activity of political parties, -> upon the application of the President of the Republic of Poland for the determination of conformity to the Constitution of a statute prior to its signing or an international agreement prior to its ratification (*a priori* review), and -> of a particularly complicated nature. The review of conformity of statutes or ratified international agreements to the Constitution and of conformity of statutes to ratified international agreements whose ratification required prior consent granted by statute – is carried out by a bench of five judges. The review of constitutionality (or legality) of other normative acts, the consideration of complaints in relation to the refusal to proceed with constitutional complaints or applications submitted for preliminary examination, as well as adjudication as regards challenging a judge – are conducted by a bench of three judges. A preliminary examination of constitutional complaints and of applications by subjects of limited standing to bring proceedings - is carried out by one judge (Article 36 of the Constitutional Tribunal Act).

In the case **Kpt 2/08**, the Tribunal dealt with a dispute over powers which arose between the President of the Republic of Poland and the Council of Ministers (the government) in the context of distribution of powers as regards representing the Republic of Poland at a session of the European Council. The problem primarily concerned the issue which organ of the state was competent to determine and present the stance of the Republic of Poland, and whether the President of the Republic might decide to participate in such a session. In the decision of 16 May 2009 (Ref. No. Kpt 2/08), the Tribunal adjudicated that the President of the Republic – as the supreme representative of the Republic of Poland - may decide to participate in a session of the European Council, if he finds it useful for the realisation of the tasks of the President of the Republic specified in Article 126(2) of the Constitution[19]. However, this does not mean that the President alone may determine and present the stance of the Republic of Poland, since - pursuant to Article 146(1) of the Constitution- the internal affairs and foreign policy of the Republic of Poland are conducted by the Council of Ministers. It is the Council of Ministers that exercises general control in the field of relations with foreign states and international organisations (Article 146(4)(9) of the Constitution). Moreover, the Council also conducts the affairs of the state which are not reserved to other state organs (Article 146(2) of the Constitution). As no constitutional or statutory provisions have stated that the powers to determine and present the stance of the Republic of Poland at the forum of the European Union are granted to any other organ of the state (e.g. the President of Poland), it should be assumed that the said powers fall within the scope of competence of the Council of Ministers. On behalf of the Council of Ministers, the stance of the Republic of Poland is presented by the President of the Council of Ministers (the Prime Minister), who ensures the implementation of the policies adopted by the Council of Ministers (e.g. Article 148(4) of the Constitution), or by a member of the Council of Ministers competent in that regard (e.g. the Minister of Foreign Affairs). However, the Tribunal emphasised that Article 133(3) of the Constitution imposed an obligation on the President of the Republic, the Prime Minister, and the minister competent in that regard, to cooperate with each other in respect of foreign policy. In the context of sessions of the European Council, the said cooperation should involve, *inter alia*, informing the President about the subject of a given session and about the agreed stance of the Council of Ministers in that regard, informing the Council of Ministers by the President of the Republic about his intention to participate in a given session, making arrangements as to the form and extent of such participation (including the President's potential participation in the presentation of the stance of the Republic of Poland determined by the Council of Ministers) as well as observing the agreed arrangements.

[19] That is: ensuring observance of the Constitution, safeguarding the sovereignty and security of the state as well as the inviolability and integrity of its territory.

8. **Ways and means for implementing the Constitutional Court's decision: actions taken by the public authorities concerned afterwards. Examples.**

There is no special procedure for implementing the rulings of the Tribunal, and the Tribunal has no legal instruments which would enable it to force the organs of the state to act in accordance with the operative part of its decision.

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

1. **The Constitutional Court's decisions are:**
   a) **final;**
   b) ~~**subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;**~~
   c) **binding** ***erga omnes;***
   d) **binding** ***inter partes litigantes.***

2. **As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:**
   a) **repealed;**
   b) ~~**suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;**~~
   c) ~~**suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;**~~
   d) ~~**other instances.**~~

Pursuant to Article 190(1) of the Constitution, the judgments of the Constitutional Tribunal are of universally binding application and are final. They may be neither challenged nor appealed. They are of universally binding application, which means that the binding effect is both *erga omnes* as well as *inter partes litigantes.*

At the moment of publication of a judgement of the Constitutional Tribunal in the relevant official gazette, the defective normative act is repealed. However, the Tribunal may specify, in the operative part of its judgement, another date when the said normative act loses its binding force - i.e. "defer" the effect of derogation (the first sentence of Article 190(3) of the Constitution)[20]. However, until the loss of its binding force, due to the lapse of the period of deferment (or alternatively – due to earlier intervention of the legislator), the defective act must still be applied[21]. If the Tribunal preserves the binding force of a defective act during the period of deferment, it may not "suspend" the application thereof.

3. **Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?**

The consequence of the universally binding application of judgements of the Tribunal[22] is the fact that these judgements are binding on all courts. Hearing the

[20] See the answer to point I.6a of this Questionnaire.
[21] It is the courts that in the end adjudicate about the possibility of non-application of a given legal act during the period of deferment. Although the constitutional principle that judges are subject to the Constitution and statutes (Article 178(1) of the Constitution) may seem to allow for refusal to apply an act of lower rank than a statute, still – from the point of view of this principle – a possibility of refusal to apply a legal act equivalent to a statute is highly dubious.
[22] See the answer to point III.1 and 2 of this Questionnaire.

cases pending before them, courts are obliged to take into account the relevant judgement of the Tribunal (and in particular the new legal situation ensuing from that judgement). This regards the court which has referred a question of law as to the conformity of a normative act which is to be the basis for adjudication (Article 193 of the Constitution), as well as other courts which have not referred a question of law, but for which the adjudication of non-conformity leads to a modification of the normative situation that is relevant to a pending case.

4. **Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found– as a result of *a posteriori* and/or *a priori* review?**

5. **What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.**

A judgement of the Constitutional Tribunal adjudicating the non-conformity of a given normative act under examination to a higher-level act entails that the act under examination is repealed – i.e. it is eliminated from the legal system[23]. Therefore, the judgement of the Tribunal itself has the effect of derogation – in that regard, there is no need for any action on the part of the legislator.

However, such action may prove to be necessary (desirable) if, as a result of derogation by the Tribunal, discrepancies and loopholes arise in the legal system[24].

6. **Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.**

The re-introduction (to the legal system) of the legislative solution which has already been adjudicated as unconstitutional by the Tribunal – is constitutionally inadmissible.

At least two arguments may be put forward in support of that thesis. Firstly, pursuant to Article 8(1) of the Constitution, the Constitution is the supreme law of the Republic of Poland. Two obligations arise from that principle for organs of public authority (including the legislator): a positive obligation – i.e. the obligation to undertake action aimed at the fulfilment of constitutional provisions; and a negative obligation – i.e. the obligation to refrain from actions which could infringe on constitutional provisions. Secondly, judgements of the Tribunal are final and are of universally binding application[25]. Consequently, if the Tribunal has already adjudicated that a

[23] See the answer to point III.1 and 2 of this Questionnaire.
[24] See the answer to point I.6a of this Questionnaire.
[25] See the answer to point III.1 and 2 of this Questionnaire.

given way of regulating a certain issue constitutes an infringement of the Constitution, then the repetition of the same solution in a new regulation will mean a breach of obligations arising from the principle of the primacy of the Constitution and the infringement of the principle that the Tribunal's judgements are final and are of universally binding application.

However, in practice it does happen at times that the legislator repeats, in new regulations, the solutions which have previously been deemed unconstitutional by the Tribunal. Such a regulation is at risk of being repealed again by the Tribunal in a judgement adjudicating its unconstitutionality. For instance, in the judgement of 29 April 1998 (Ref. No. K 17/97), the Tribunal stated the non-conformity to the constitutional principle of a democratic state ruled by law (Article 2 of the Constitution) in the case of provisions of the Act of 8 January 1993 on the VAT and the excise duty, which permitted cumulative administrative and penal sanctions towards the same person for the same prohibited act being a fiscal offence or fiscal crime. In the new Act of 11 March 2004 on the VAT, the legislator repeated the defective solution. The Tribunal once again adjudicated the unconstitutionality of the solution in the judgement of 4 September 2007 (Ref. No. P 43/06).

7. **Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?**

No constitutional or statutory legal instruments have been provided for in order to enable the Tribunal to enforce the implementation of its rulings by other organs of public authority.

However, the Tribunal often decides to provide executive organs with some guidelines as to the way of implementing a ruling. These guidelines are included in the reasoning of judgements (*inter alia* in the section of the reasoning devoted to the "effects of judgements"). These guidelines, being *obiter dicta*, may concern the fact which legal provisions are applicable after the derogation of the defective regulation (or part thereof), which transitional rule to apply, which actions should be undertaken by executive organs, etc. The effectiveness of such guidelines depends on the authority of the Tribunal and the extent to which executive organs are open to cooperation with the Tribunal.