

The motion of the Public Prosecutor General to declare unconstitutional Art. 6 paragraph 1 of the ECHR

HFHR analysis of the motion to the Constitutional Tribunal of 27 July 2021
(file ref. no. K 6/21)

I. INTRODUCTION

1. On 27 July 2021 the Public Prosecutor General submitted a motion to the Constitutional Tribunal to review the constitutionality of Art. 6 paragraph 1, first sentence, of the Convention for the Protection of Human Rights and Fundamental Freedoms¹ (hereinafter: "Convention" or "ECHR") to the extent that said provision applies to proceedings before the Constitutional Tribunal.
2. This motion is clearly unprecedented. Poland ratified the ECHR in 1993, nearly 30 years ago, and during that time the conformity of Convention provisions with the Polish Constitution has never been questioned. On the contrary, the ECHR and the jurisprudence of the European Court of Human Rights (hereinafter: "ECtHR") were an inspiration for the authors of Poland's 1997 Constitution, who strove to ensure that the constitutional standards of human rights protections in Poland did not deviate from European standards.² The Constitutional Tribunal has also repeatedly referred to ECtHR rulings in its jurisprudence with the assumption that convention standards serve as a certain reference point in construing provisions of the Constitution.³
3. Today, the ECHR is undoubtedly the most important human rights document in Europe. That nearly all European countries, with the exception of Belarus and the Vatican, are parties to the convention is evidence of its importance. EU law also refers to human rights protection standards resulting from the Convention.⁴ Therefore, one can safely argue that no European state can today sincerely reject Convention provisions and its underlying values.
4. The ECHR is also a legal act that is extremely important from the point of view of citizens. Every year, thousands of Polish citizens submit complaints to the European Court of Human Rights regarding, inter alia, problems such as excessive length of court proceedings, excessively

¹Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, as amended by Protocols no. 3, 5 and 8 and supplemented by Protocol no. 2 (Journal of Laws of 1993, no. 61, item 284, as amended) - hereinafter referred to as the "ECHR", "Convention".

²See e.g., J. Jaskiernia, *Funkcje Konstytucji RP w dobie integracji europejskiej i radykalnych przemian politycznych*, Toruń 2020, p. 356.

³See e.g., J. Podkowik, *Stosowanie Konwencji o ochronie praw człowieka i podstawowych wolności przez Trybunał Konstytucyjny – perspektywy i granice jednolitości orzecznictwa*, in: „Studia i Analizy Sądu Najwyższego. Materiały Naukowe”, vol., „Jednolitość orzecznictwa. Standard – instrumenty – praktyka» Materiały z konferencji naukowej Warszawa, Sąd Najwyższy, 21 listopada 2013 r.”, pp. 107-110.

⁴See art. 52 paragraph 3 of the Charter of Fundamental Rights (Official Journal EU C 202 of 2016, p. 389) and Art. 6 paragraph 3 of the Treaty on European Union (Official Journal EU C 202 of 2016, p. 13).

lengthy pre-trial detention, violations of freedom of speech or unjust placement in a psychiatric hospital.⁵ On the basis of such complaints, the ECtHR issued a number of ground-breaking decisions, which contributed to positive changes in Polish law.

5. In this situation, the motion of the Public Prosecutor General to review the constitutionality of a key ECHR provision, i.e., Art. 6, which guarantees the right to court and a fair trial, must raise concern. Therefore, it is reasonable to analyse the arguments presented in the motion and consider the possible effects of a Constitutional Tribunal finding that Art. 6 of the Convention, to the extent challenged by the Public Prosecutor General, is unconstitutional.

II. SCOPE OF THE APPLICATION

6. The Public Prosecutor General moved the Constitutional Tribunal to find that Art. 6 paragraph 1 sentence 1 of the ECHR:
 - 1) to the extent to which the term "court" encompasses the Constitutional Tribunal of the Republic of Poland is inconsistent with Art. 2, Art. 8 paragraph 1, Art. 10 paragraph 2, Art. 173 and Art. 175 paragraph 1 of the Constitution of the Republic of Poland;
 - 2) in the scope in which it equates the guarantee resulting from this provision that an individual case will be examined within a reasonable time by an independent and impartial court established by law when ruling on the rights and obligations of a given entity of a civil nature or on the validity of any accusation brought against such in a criminal case with the competence of the Constitutional Tribunal to adjudicate on the hierarchical compliance of provisions and normative acts specified in the Constitution of the Republic of Poland, and thus allows the proceedings before the Constitutional Tribunal to be covered by the resulting requirements, is inconsistent with Art. 6 of the ECHR with Art. 2, Art. 8 paragraph 1, Art. 79 paragraph 1, Art. 122 paragraph 3 and 4, Art. 188 points 1-3 and 5 and Art. 193 of the Polish Constitution;
 - 3) to the extent that it covers review by the European Court of Human Rights of the legality of the process of electing Constitutional Tribunal judges in order to determine whether the Constitutional Tribunal is an independent and impartial tribunal established by the Act pursuant to Art. 2, Art. 8 paragraph 1, Art. 89 paragraph 1 point 3 and Art. 194 paragraph 1 of the Constitution of the Republic of Poland.
7. Before analysing the admissibility of such a formulation of complaints and their substantive legitimacy it should be noted that the Public Prosecutor General's motion relates only to scope of application of the provision. This means the motion does not question the constitutionality of the entire provision, but only certain legal norms derived from it. In the case at hand, this scope concerns only the applicability of Art. 6 paragraph 1 of the ECHR to proceedings before the Constitutional Tribunal. The judgment of the Constitutional Tribunal may therefore only refer to this issue, and not to, for example, guarantees under Art. 6 of the ECHR in so far as they relate to proceedings before common courts.

⁵For example, in 2020, the ECtHR assigned 1628 Polish complaints to adjudication panels, found 1698 complaints inadmissible or decided to remove them from the list, 124 cases were communicated to the Polish government, and a judgment was issued in 23 cases - see ECtHR, *Analysis of statistics 2020*, p. 48, https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf (last accessed 4 November 2021).

III. CONTEXT OF THE APPLICATION

8. When analysing the Public Prosecutor General motion, it is impossible to disregard the context in which it was submitted. This motion may be deemed a response to the ECtHR judgment in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* issued in May 2021.⁶
9. In this judgment, the ECtHR found that Art. 6 paragraph 1 of the ECHR may be used to review proceedings before the Constitutional Tribunal initiated by a constitutional complaint, provided that they concern civil rights and obligations in the sense adopted in the jurisprudence of the ECtHR. As a consequence of recognizing that Art. 6 may be applicable in such cases, is the assumption that the Constitutional Tribunal must meet the standards resulting from this provision, including the standard of proper constitution ("the right to a tribunal established by law") when examining constitutional complaints. The ECtHR found the Constitutional Tribunal did not meet this standard in the case of proceedings instituted by a constitutional complaint of *Xero Flor w Polsce sp. z o.o.* because it issued a decision to discontinue the proceedings in the panel attended by one of the individuals defectively elected in December 2015. This irregularity was, in the opinion of the ECtHR, so serious that it even resulted in a breach of the essence of the right to a court established by law.
10. The judgment of the ECtHR met with criticism from the Marshal of the Sejm,⁷ the President of the Tribunal⁸ and the Constitutional Tribunal itself, who, in the reasoning of one of its rulings stated that it was a non-existent judgment and had no effect in Poland.⁹
11. Despite this criticism, the government did not request a referral of the case to the Grand Chamber of the ECtHR. Art. 43 paragraph 1 of the Convention grants such an option, according to which, "Within three months from the date of the judgment by a Chamber any party to the proceedings may, in exceptional cases, request that the case be referred to the Grand Chamber." It is difficult to understand why the government did not use this power, since it considers the ECtHR's interpretation erroneous. Notably, the Polish government applied for examination by the Grand Chamber of a later ECtHR ruling, *Reczkowicz v. Poland*¹⁰ although this request was eventually withdrawn¹¹. Moreover, in the present case the Public Prosecutor General decided to challenge Art. 6 paragraph 1 of the ECHR to the Constitutional Tribunal even before the deadline for submitting an motion for examination of the case by the Grand Chamber had expired.

⁶Judgment of the ECtHR of 7 May 2021 in the case of *Xero Flor w Polsce sp. z o.o. v. Poland*, application no. 4907/18.

⁷See K. Kowalczyk, *Marszałek Sejmu: orzeczenie ETPCz jest bezprawną ingerencją w suwerenność Państwa Polskiego*, Polska Agencja Prasowa, 7 May 2021, <https://www.pap.pl/aktualnosci/news,867810,marszalek-sejmu-orzeczenie-etpcz-jest-bezprawna-ingerencja-w-suwerennosc> (last accessed 4 November 2021 r.).

⁸See *Prezes Trybunału Konstytucyjnego: wyrok Europejskiego Trybunału Praw Człowieka bezprawny*, Polska Agencja Prasowa, 7 May 2021, <https://www.pap.pl/aktualnosci/news%2C867480%2Cprezes-trybunalu-konstytucji-wyrok-europejskiego-trybunalu-praw> (last accessed 4 November 2021).

⁹Decision of the Constitutional Tribunal of 15 June 2021, file ref. no. P 7/20.

¹⁰ECtHR judgment of 22 July 2021 in *the case of Reczkowicz v. Poland*, application no. 43447/19; M. Mikowski, K. Kostrzewa, S. Otfinowska, *Polska odwołała się od wyroku ETPC w sprawie adwokat Joanny Reczkowicz*, Polska Agencja Prasowa, 25 October 2021, <https://www.pap.pl/aktualnosci/news%2C981319%2Cpolska-revoked-sie-from-the-judgment-etpc-in-case-attorney-joanny-reczkowicz.html> (last accessed 4 November 2021).

¹¹ ECtHR, press release of 22 November 2021, ECHR 351 (2021), <http://hudoc.echr.coe.int/eng-press?i=003-7188910-9760525> (last accessed: 23 November 2021).

IV. FORMAL ADMISSIBILITY OF THE APPLICATION

12. In the light of the Constitution, the ECHR is, of course, an act of a lower rank than the Constitution of the Republic of Poland. In reality, however, the relations between international treaties of such importance and meaning as the ECHR and national law are much more complex than would appear from a simple reference to the hierarchical structure of the system of legal sources. This is evidenced by the fact that in the past the ECtHR has repeatedly found human rights violations resulting from defective national provisions of the Constitution;¹² sometimes it is even perceived as a kind of European constitutional court.¹³ Therefore, it would be advisable to avoid unnecessary conflicts between it and national constitutions by adopting an international law-friendly interpretation of the constitution.¹⁴ However, this does not change the fact that formal provisions of international agreements, including those ratified with prior consent by statute, may be subject to review by the Constitutional Tribunal in terms of their compliance with the Constitution.
13. There is also no doubt that it is permissible to challenge a provision not only in its entirety, but also with the use of a scope formula ("to the extent to which ..."). This practice has been around for years and has never been questioned. It seems, however, that the scope of the provision indicated by the Public Prosecutor General was incorrectly formulated. The wording of points 1 and 2 of the *petitum* may give the impression that the proceedings before the Constitutional Tribunal on the review of hierarchical compliance of standards always fall within the scope of application of Art. 6 paragraph 1 of the ECHR. However, the judgment in the *Xero Flor* case only shows that Art. 6 paragraph 1 of the ECHR may only be applied to proceedings before the Constitutional Tribunal initiated by a constitutional complaint, provided that they concern civil rights and obligations of an individual. However, the ECtHR did not comment on the possibility of applying Art. 6 of the ECHR to proceedings on legal questions (although it may be expected that this would be admissible) or abstract motions (which seems unacceptable).¹⁵ Thus, it seems, the Public Prosecutor General is raising a complaint about a legal norm that is overly broad in relation to the one that the ECtHR actually drew in the aforementioned judgment.
14. Regardless of the way in which the scope of the challenge is formulated in the motion under review, it should be remembered that the subject of review in the proceedings before the Constitutional Tribunal may only be a legal norm, not its application. Therefore,

¹²See e.g., the judgment of the ECtHR of 20 May 2010 in the case of *Alajos Kiss v. Hungary*, application no. 38832/06; judgment of the ECtHR (Grand Chamber) of 22 December 2019 in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, applications no. 27996/06 and 34836/06; judgment of the ECtHR (Grand Chamber) of 6 January 2011 in the case of *Paksas v. Lithuania*, application no. 34932/04. See also A. Bodnar, *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w Polsce. Wymiar instytucjonalny*, Warsaw 2018, pp. 179-185.

¹³See e.g., Ch. Grabenwarter, *The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights*, "ELTE Law Journal" 2014, issue 1, p. 103. See also: the judgment of the ECtHR (Grand Chamber) of 23 June 2016 in the case of *Baka v. Poland*, application no. 20261/12, concurring opinion of judges P. Pinto de Albuquerque and D. Dedova, points 1, 23-25.

¹⁴Compare e.g., P. Kapusta, *Wykładnia Konstytucji RP przychylna prawu międzynarodowemu i prawu UE*, w: J. Jaskiernia, K. Spryszak, *Dwadzieścia lat obowiązywania Konstytucji RP. Polska myśl konstytucyjna a międzynarodowe standardy demokratyczne*, Toruń 2017, pp. 482-487.

¹⁵See also M. Szwed, *What Should and What Will Happen After Xero Flor: The judgment of the ECtHR on the composition of the Polish Constitutional Tribunal*, "VerfassungsBlog", 9 May 2021, <https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/> (last accessed 4 November 2021).

it is unacceptable to review an administrative decision or a court judgment, including a judgment of an international court. This does not mean that the jurisprudence of the courts is of no consequence for construing the provision's constitutionality. For years, the Constitutional Tribunal has been presenting the view that "if a specific way of understanding a provision of an act has already become clearly established, and especially if it has found an unambiguous and authoritative expression in the jurisprudence of the Supreme Court or the Supreme Administrative Court, it should be considered that this provision - in its practical application - acquired exactly the content found in it by the highest court instances of our country" (see, for example, the judgment of the Constitutional Tribunal of 28 October 2003, ref. no. P 3/03). At the same time, the Tribunal clarifies that such an interpretation must be "permanent, universal and unambiguous (...) the possibility of a constitutional review depends on the determination whether the uniform and indisputable practice of applying the law has given the questioned provisions an unambiguous meaning, and therefore normative content, as if the legislator it had done so itself. However, even in such a situation, the cognition of the Constitutional Tribunal does not include - obviously - judicial interpretations."¹⁶

15. It follows from the above that it would be unacceptable to use the Constitutional Tribunal to resolve discrepancies in judicial practice concerning the interpretation of a given provision.¹⁷ For this reason, the Constitutional Tribunal has repeatedly refused to review complaints in which allegations referred to a specific understanding not settled in the jurisprudence of the courts. For example, in the decision of 7 December 2012 (case ref. no. Ts 28/11), the Constitutional Tribunal noted that "the applicants themselves emphasize that the interpretation of the challenged provision was not settled and cite divergent judgments of the courts to support this thesis. As they state, "the divergence of positions is therefore obvious." Therefore, in the case at hand, it cannot be concluded that the understanding of the challenged provision, questioned by the complainants, found an unambiguous and authoritative expression in the jurisprudence." In another decision, the Tribunal concluded that "the subject of the constitutional complaint is primarily the adoption in the complainant's case of an unfavourable interpretation of the challenged provisions. Thus, this complaint is, in fact, a complaint against the application of the law, and the application of the law by courts - even if erroneous - remains beyond the Constitutional Tribunal's jurisdiction."¹⁸ It is also worth noting the decision of 5 July 2010 (file ref. no. Ts 69/10), in which the Constitutional Tribunal notes that "the way in which the allegations are formulated (especially the polemics with the arguments of the court adjudicating in this case) requires the view that applicant expects the Constitutional Tribunal to review an individual decision, which contradicts the Constitutional Tribunal's jurisdiction referenced in Art. 188 of the Constitution." Similar conclusions are also contained in the latest jurisprudence of the Constitutional Tribunal. For example, in the decision of 15 July 2021 (ref. no. K 6/18 - a decision issued with the participation of a defectively elected individual) issued on the basis of the Prosecutor General's motion, the Constitutional Tribunal stated that, "The mere adoption of a resolution by the Supreme

¹⁶Decision of the Constitutional Tribunal of 17 July 2014, file ref. file P 28/13.

¹⁷See e.g., A. Mączyński, J. Podkowik, *Komentarz do art. 188 Konstytucji* in: M. Safjan, L. Bosek (ed.), *Konstytucja RP. Komentarz*, vol. II, Warsaw 2016, pp. 1143-1144. See also the decision of the Constitutional Tribunal of 5 November 2012, file ref. no. Ts 247/11,

¹⁸Decision of the Constitutional Tribunal of 24 May 2012, file ref. no. Ts 115/10.

Court does not yet imply developing a uniform and established interpretation of a specific norm. The burden of proof regarding the existence of such an interpretation rests on the applicant who - in the present case - decided to apply to the Constitutional Tribunal on 31 July 2018, slightly more than a month after the adoption of this resolution. Applicant provides no evidence to support the thesis about its positive reception. In the Tribunal's opinion, the obligation to provide such evidence rests with the applicant who aims to rebut the presumption of constitutionality of the challenged norm. As already indicated, the applicant must prove the existence of a specific circumstance, and while the legal findings are each time the subject of the Tribunal's findings, all facts should be stated and justified by the entity initiating the proceedings before the Constitutional Tribunal."

16. In the present case, the Public Prosecutor General has not shown, however, that a constant, repeatable and unambiguous line of jurisprudence has developed that would give Art. 6 paragraph 1 of the ECHR, the meaning indicated in the *petitum* of the motion. On the contrary, he argues in his motion that the interpretation of the Convention adopted in the *Xero Flor* judgment constitutes a departure from the hitherto line of jurisprudence (see in particular p. 7 of the motion, where the applicant cites the statement of judge K. Wojtyczek that "the exclusion of the applicability of Article 6 to constitutional review of legislation seems to be the rule, whereas judgments and decisions declaring Article 6 applicable to constitutional review of legislation appear rather to be an exception, justified by certain specific grounds," and this, it seems, is an unjustified deviation.¹⁹ The Public Prosecutor General has in no way demonstrated that the interpretation adopted in the *Xero Flor* judgment is permanent and repetitive. Such is impossible as the motion was submitted to the Constitutional Tribunal only 2.5 months after the issuing of this judgment by the ECtHR, without waiting for a line of jurisprudence to coalesce and without providing ECtHR an opportunity to clarify its jurisprudence through a possible judgment of the Grand Chamber. Moreover, the Public Prosecutor General himself indicates that this judgment is of an individual character (p. 4 of the motion) and that the subject of the motion is "the specific scope of regulation of Art. 6 paragraph 1 first sentence of the Convention, flowing from the ECtHR decision dated 7 May 2021 *Xero Flor w Polsce Sp. z o.o. v. Poland*)." In the his opinion, however, the Constitutional Tribunal is authorized to assess the constitutionality of the normative content extracted from Art. 6 in the indicated, specific and individual judgment due to its meaning: "due to the general context in which the judgment was issued, and even more importantly, its subject and content, it should be considered an attempt by the court [a body applying the law] to formulate a completely new qualitative Convention standard - disregarding the will of the state-parties and, in particular, without respecting the fundamental, constitutional, systemic norms of the Republic of Poland." (p. 4 of the motion) At the same time, the Public Prosecutor General does not justify more broadly, and in particular does not refer to any judgments of the Constitutional Tribunal, why the significance of the judgment should justify admissibility of the constitutional review of the interpretation adopted therein by the Constitutional Tribunal if the judgment

¹⁹It is worth noting that K. Wojtyczek submitted a concurring opinion on this matter, which means that he voted in favor of finding Poland in violation of Art. 6 paragraph 1 of the ECHR, although he did not agree with some of the statements presented in the reasoning to the judgment (only with regard to the discontinuation of the proceedings as to the allegation of violation of Art. 1 of Protocol No. 1 to the ECHR, K. Wojtyczek did not agree with the ruling by the majority of the adjudicating panel).

of the Constitutional Tribunal is of an individual nature and does not express a constant, repeatable and unambiguous line of jurisprudence.

17. The request of the Public Prosecutor General should therefore be deemed an inadmissible attempt to challenge a specific judgment of the ECtHR, merely cloaked in the guise of reviewing a legal norm. It should be emphasized once again that if the Polish authorities disagreed with the judgment of the ECtHR, they should at least attempt to ask the Grand Chamber to review the case.
18. The risks of finding admissible motions such as the one under review here should also be highlighted. In such case, an adequately narrow formulation of the scope of challenge would make it possible to question any judgment of a domestic or international court, even individual and not yet final, with which the author of the motion did not agree. Such a practice, however, would have nothing to do with reviewing the constitutionality of norms in the manner provided for in the Constitution of the Republic of Poland. It could also be treated as acting in bad faith based on the abuse of the power to submit a motion to the Constitutional Tribunal for the review of norms.²⁰ It would also transform the Constitutional Tribunal into an instrument employed by those in office to achieve their political ends.²¹
19. Therefore, the Public Prosecutor General's motion should be found inadmissible, and the proceedings before the Constitutional Tribunal should be discontinued pursuant to Art. 59 paragraph 1 point 2 of the Act of 30 November 2016 on the organization and procedure before the Constitutional Tribunal (Journal of Law 2019, item 2393).

V. MERITS OF THE MOTION

A. INTRODUCTION

20. Apart from the motion's formal inadmissibility, this analysis reviews below the Public Prosecutor General's arguments and considers if they support the claim that Art. 6 paragraph 1 of the ECHR, to the extent indicated in the *petitum* of the application, violates the Constitution.
21. As already indicated in Part II herein, the Public Prosecutor General alleges Art. 6 paragraph 1 sentence 1 of the ECHR violates the Constitution in three scopes: (1) the application of the concept of a court to the Constitutional Tribunal, (2) the inclusion of proceedings before the Constitutional Tribunal concerning the hierarchical compliance of norms with the requirements resulting from Art. 6 paragraph 1 of the ECHR and, (3) granting the ECtHR the jurisdiction to "assess the legality of the process of electing judges of the Constitutional Tribunal in order to determine whether the Constitutional Tribunal is an independent and impartial tribunal established by law." Points 1 and 2 of the *petitum* concern the same problem - the applicability of Art. 6 paragraph 1 of the ECHR to proceedings before the Constitutional Tribunal. Covering the proceedings before the Constitutional Tribunal with guarantees under Art. 6 of the ECHR is a consequence of recognizing this body as a "court" within the meaning of Art. 6. It therefore seems that the scope of the appeal defined in

²⁰On the impact of bad faith on the unconstitutionality of acts by government authorities, see L. Garlicki, *Niekonstytucyjność: formy, skutki, procedury*, „Państwo i Prawo” 2016, no. 9, pp. 17-19.

²¹Compare e.g., M. Pyziak-Szafnicka, *Trybunał Konstytucyjny á rebours*, „Państwo i Prawo” 2020, no. 5, pp. 43-44.

points 1 and 2 is the same, despite being broken down into two separate allegations. The scope defined in point 3, on the other hand, actually concerns a different issue and requires a separate analysis.

B. STANDARDS OF REVIEW AND ARGUMENTATION IN THE APPLICATION

22. With regard to the review specified in point 1 of the *petitum*, the motion enumerates a number of standards for reviewing Art. 2, Art. 8 paragraph 1, Art. 10 paragraph 2, Art. 173 and Art. 175 paragraph 1 of the Constitution of the Republic of Poland. In the case of point 2 of the *petitum*, the list of standards of review is even broader: Art. 2, Art. 8 paragraph 1, Art. 79 paragraph 1, Art. 122 paragraph 3 and 4, Art. 188 points 1-3 and 5 and Art. 193 of the Polish Constitution; In turn, the standards of review in point 3 of the *petitum* are as follows: Art. 2, Art. 8 paragraph 1, Art. 89 paragraph 1 point 3 and Art. 194 paragraph 1 of the Constitution of the Republic of Poland.
23. As regards point 1 of the *petitum* (including the Constitutional Tribunal within the definition of "court" pursuant to Art. 6 paragraph 1 sentence 1 of the ECHR), the motion firstly draws attention to the functioning, under the Constitution of the Republic of Poland, of two separate divisions of the judiciary - courts and tribunals (p. 31). Both divisions perform different tasks - in particular, only courts administer justice. According to the Prosecutor General, "The distinction of separate divisions of the judiciary is not a matter of Constitutional semantics, but aims to secure the tripartite division of powers" (p. 32). It would be unacceptable to disturb this division by assigning other bodies, including tribunals, tasks related to the administration of justice. According to the Public Prosecutor General, "If, therefore, the notion of a court from Art. 6 paragraph 1 of the ECHR includes the Constitutional Tribunal referred to in Chapter VIII of the Polish Constitution, such constitutes a violation of the systemic order, the framework of which is set out in Art. 10 paragraph 2, Art. 173 and Art. 175 paragraph 1 of the Constitution" (p. 32). The unconstitutional change of the division into courts and tribunals, would violate the principle of the primacy of the Constitution, which could not be justified by the wording of Art. 9 of the Constitution ("the Republic of Poland shall comply with the international law that is binding upon it"). Moreover, in the opinion of the Public Prosecutor General, "no judgment issued outside the content of an international agreement or modifying such agreement without the consent of the state, as well as a provision of the agreement modified in this way, which concern constitutional matters and revise the principles of the Polish political system, is protected by Art. 9 of the Constitution" (p. 33). The Prosecutor General also argues that treating courts and tribunals identically breaches specificity and legal security, because, "When a norm of international law unexpectedly evolves, revising the current perception of the constitutional order, including the role of the Constitutional Tribunal and its position in relation to other courts, the legal system ceases to be predictable for those availing themselves of the standards who lose the ability to interpret their rights and attendant duties of state authorities." (p. 34).
24. As regards point 2 of the *petitum* (covering the proceedings before the Constitutional Tribunal with guarantees of Art. 6 paragraph 1 of the ECHR), the Prosecutor General draws attention to the specificity of proceedings before the Constitutional Tribunal, which consist of reviewing the law and not resolving specific disputes between entities. Even in the case

of constitutional complaints and legal questions, proceedings before the Constitutional Tribunal "are not a resolution of an individual case of a civil or criminal nature and not a continuation of such proceedings" (p. 35). The mere fact that a Constitutional Tribunal judgment laid the foundation for reopening proceedings in specific cases "does not make the proceedings before the Constitutional Tribunal a proceeding in individual civil and criminal cases, or make the Tribunal a court that implements the guarantees of Art. 6 paragraph 1 of the ECHR" (p. 37). Also in this context, the Prosecutor General draws attention to the inability to modify systemic norms resulting from the Constitution by means of judgments issued outside the content of international agreements (p. 37) and to the violation of legal certainty and legal security (p. 38). The prosecutor further alleges that Art. 6 paragraph 1 of the ECHR has been modified contrary to the will of the state, which is contravenes the principle of *pacta sunt servanda*.

25. Finally, as regards point 3 of the *petitum* (ECtHR's review of the Constitutional Tribunal judicial election process), the Public Prosecutor General points out that "It is the Constitution and legislator that determine the form of the Constitutional Tribunal, and it is up to the Sejm to elect its members" (p. 39). Under the current legal framework, there are no mechanisms to assess the legality of the election of Constitutional Tribunal judges. Any such mechanisms would have to have a constitutional basis (p. 40). The ECtHR also does not have the jurisdiction to make such an assessment, which, according to the Prosecutor General, "is entitled only to adjudicate and assess human rights violations by a party to the ECHR on the basis of the unambiguously formed content of the norm, to which the state has acceded. The content of the norm may be interpreted in accordance with the principles of treaty interpretation. Even if it is a dynamic interpretation, it cannot transform the essence of the normative content of the provision, and, especially, cannot extend the competences of the ECtHR beyond the scope acceded to by the state party, while being bound by the convention" (p. 41). Granting the ECtHR competence to assess the validity of electing CT judges would also interfere with the competence of the Sejm to elect judges of the Constitutional Tribunal, as it would create "a procedure unknown to Polish law for verifying this selection by the court" (p. 42). In the Public Prosecutor General's view, the norm granting ECtHR jurisdiction to review legality of CT judge election would also infringe on individuals' legal security. The Constitutional Tribunal is elected by the Sejm, and "Its operation and form cannot be controlled by an external body, because such would destroy the constitutionally established system of state bodies and their structure, consequently making it difficult for individuals to unambiguously recognize their legal situation" (p. 44).

C. INCLUDING CT PROCEEDINGS WITHIN THE APPLICATION OF ART. 6 PARAGRAPH 1 ECHR AND THE CONSTITUTIONAL SEPARATION OF COURTS AND TRIBUNALS

26. One of the basic arguments underlying the Public Prosecutor General's arguments is the unconstitutionality of Art. 6 paragraph 1 of the ECHR, to the extent challenged, allegedly resulting from the constitutional separation of two judiciary bodies, the courts and tribunals. There is no doubt that the Constitution does in fact establish such a division, just as the fact that courts and tribunals exercise different powers cannot be questioned. It is also clear that the Constitutional Tribunal, when adjudicating proceedings concerning

hierarchical compliance of norms, is not a court within the meaning of Art. 45 nor the provisions of Chapter VIII of the Constitution, and does not administer justice.

27. However, the very fact that in light of Art. 6 paragraph 1 of the ECHR, the Constitutional Tribunal could be deemed a court, while according to the Constitution it is not a court, does not mean that we are dealing with a violation of the Constitution by the Convention. When interpreting the Constitution and the Convention the concepts in both these acts have autonomous meanings.²² This means that these concepts must be interpreted primarily in light of their relevant objectives and functions under a given legal act, and not through the prism of provisions contained in other legal acts. Under the Constitution, the autonomy of concepts results from the supreme nature of the constitution. Interpreting the Constitution by statute would lead to distortions and make its content dependent on the will of the ordinary legislator. On the other hand, in the case of the ECHR, interpreting the concepts through the prism of the state legislation would not make sense, because firstly, 47 states are parties to the Convention, and secondly, it would allow states to easily circumvent its provisions or even evade international obligations by enacting national legislation with specific content.²³ It is worth noting that the concept of "court" is not the only autonomous concept under the ECHR – the same character have also, for example, the notion of "person of unsound mind" (Art. 5 paragraph 1 let. e ECHR),²⁴ "home" (Art. 8 ECHR),²⁵ "property" (Art. 1 of Protocol No. 1),²⁶ or, within the scope of Art. 6 paragraph 1, the concept of "civil rights and obligations"²⁷ or "criminal charge."²⁸
28. Autonomous concepts must be interpreted using a purposeful, functional and systemic interpretation, and not through references to other legal acts. The need to apply such methods of interpretation is evidenced by doubts as to whether the concept of "court," appearing in various provisions, can always be understood in the same way even within a Constitutionally-based review. While there is no doubt, as has already been pointed out, that the Constitutional Tribunal is not a court within the meaning of Art. 45 or the provisions of Chapter VIII of the Constitution, it seems that the Constitutional Tribunal could be considered a "court" within the meaning of Art. 79 paragraph 1 of the Constitution. Pursuant to this provision, an individual may challenge in a constitutional complaint only a normative act "pursuant to which a court or a public administrative body has finally adjudicated" on the complainant's freedoms or rights. In a literal interpretation of this provision the complainant would be unable to challenge before the Constitutional Tribunal excessively restrictive and potentially unconstitutional provisions of the act regulating proceedings before the Constitutional Tribunal after said Tribunal's prior refusal

²²See e.g., G. Letsas, *The Truth in Autonomous Concepts*, "European Journal of International Law" 2004, vol. 15, no. 2, p. 282; S. Wronkowska, *Kilka uwag o językowym aspekcie wykładni konstytucji*, in: M. Hermann, S. Sykuna (eds.), *Wykładnia prawa. Tradycja i perspektywy*, Warsaw 2016, pp. 81-84.

²³Cf. G. Letsas, *The Truth...*, pp. 281-282.

²⁴See e.g., judgment of the ECtHR (Grand Chamber) of 4 December 2018 in the case of *Ilmseher v. Germany*, applications no. 10211/12 and 27505/14, para. 127.

²⁵See e.g., the judgment of the ECtHR of 14 March 2017 in the case of *Yevgeniy Zakharov v. Russia*, application no. 66610/10, paragraph 30.

²⁶See e.g., judgment of the ECtHR (Grand Chamber) of 27 August 2015 in the case of *Parrillo v. Italy*, application no. 46470/11, para. 211.

²⁷See e.g., judgment of the ECtHR (Grand Chamber) of 12 March 2018 in the case of *Nait-Liman v. Switzerland*, application no. 51357/07, par. 106.

²⁸See e.g., the judgment of the ECtHR (Grand Chamber) of 8 July 2019 in the case of *Michalache v. Romania*, application no. 54012/10, par. 54.

to accept the complaint for review, as the final ruling in this case would be the ruling of the Constitutional Tribunal and not a court. However, the doctrine rightly points out that, bearing in mind the function and significance of a constitutional complaint, in the context of Art. 79 of the Constitution, a broader understanding of the term "court" should be adopted, one that also encompasses the Constitutional Tribunal.²⁹ The Constitutional Tribunal (CT) itself drew attention to the legitimacy of such interpretation in its decision of 25 January 2004 (ref. No. Ts 109/04): "The *ratio legis* of said provision and the directive of interpretation adopted in CT jurisprudence requires that uncertainty concerning constitutional rights shall be interpreted in favour of the individual and thus indicate the legitimacy of a broad interpretation of the concept of "court" as used in Art. 79 of the Constitution, which also includes the Tribunals. In conclusion, it should be stated that the "final decision" pursuant to the definition in Art. 79 paragraph 1 of the Constitution, may include a judgment of the Constitutional Tribunal issued as part of the preliminary review of a constitutional complaint." While later jurisprudence presents divergent views,³⁰ in the decision of 4 November 2014 (ref. no. Ts 62/14), the Constitutional Tribunal, referring to the above-cited decision in case Ts 109/04, again stated that "The above argumentation proves that the interpretation of Art. 79 paragraph 1 of the Constitution allows recognition, in certain cases, that a decision of the Constitutional Tribunal issued as part of the preliminary review of a constitutional complaint on the subjective rights of an individual is a final judgment." However, although the Constitutional Tribunal may sometimes be deemed a "court" within the meaning of Art. 79 of the Constitution does not mean that it can be recognized as a "court" within the meaning of Art. 45 or the provisions of Chapter VIII of the Constitution. For the same reasons, recognizing the Constitutional Tribunal as a "court" within the meaning of Art. 6 paragraph 1 of the ECHR does not mean that its position within the Constitution changes and that, following the judgment in the *Xero Flor* case, it has transformed from a tribunal into a court that administers justice.

29. By the way, focusing solely on the linguistic interpretation and formulating theses about the ECHR's incompatibility with the Constitution due to the difference between courts and tribunals in the Polish legal system seems to be flawed also due to the fact that in the English and French versions (i.e., the original languages of the Convention) Art. 6 paragraph 1 uses the term *tribunal* and not *court/cour*. It does not mean, however, that the scope of this provision covers only "tribunals" in the sense adopted by the Polish Constitution. On the other hand, it cannot be stated that it is possible to determine whether Art. 6 paragraph 1 of the ECHR may be applied to proceedings before the Constitutional Tribunal purely based on the semantic interpretation.
30. The inconsistency of the Convention with the Constitution cannot therefore result solely from the fact that it uses the term "court" in a different sense than that assumed under Art. 45 or the provisions of Chapter VIII of the Polish Constitution. The challenged norm may be deemed unconstitutional only if, as a result of adopting this different meaning, a contradiction in content arises between the Convention and the constitutional norm. Such could occur, in particular, if such adoption would unacceptably narrow or broaden the

²⁹See e.g., M. Wiącek, *Formalne przesłanki skargi konstytucyjnej (w świetle orzecznictwa TK)*, „Państwo i Prawo” 2011, z. 9, pp. 26-28; B. Naleziński, J. Królikowski, J. Sułkowski, *Skarga konstytucyjna* in: M. Romańska (ed.), *Pozainstancyjne środki ochrony prawnej*, Warsaw 2013, pp. 44-45.

³⁰See e.g., the decision of the Constitutional Tribunal of 5 January 2010, file ref. no. Ts 237/09;

powers of the Constitutional Tribunal resulting from the Constitution. Therefore, in order to correctly assess whether a legal norm challenged by the Public Prosecutor General is inconsistent with the Constitution, it is necessary to establish its actual content and the effects thereof.

31. The Prosecutor General seems to claim that the consequence of adopting a broad understanding of the concept of "court" by extending it also to the Constitutional Tribunal (although, let us emphasize once again, the case of *Xero Flor* only includes Art. 6 paragraph 1 of the Constitutional Tribunal in a situation where this body examines constitutional complaints concerning civil rights or obligations), the division into courts and tribunals is disturbed and the courts are deprived of a monopoly on the administration of justice. On page 38 of the motion, the Prosecutor General suggests that the ECtHR's judgment leads to a modification of the Constitutional Tribunal's constitutional powers. "The norm based on Art. 6 paragraph 1, first sentence, of the ECHR, which changes the Constitutional Tribunal's scope of jurisdiction obligate this body to the guarantees of the right to a fair trial under the Convention, violates legal certainty (...)." The Prosecutor General also considers alleged violations of the systemic order, which would occur as a result of adopting such an interpretation of Art. 6 paragraph 1 of the ECHR.
32. If Art. 6 paragraph 1 of the ECHR did actually require that the Constitutional Tribunal be entrusted with the competences of the administration of justice (and such were taken from the courts in this respect), we could speak of a disturbance of the systemic order and a violation of the Constitution. The problem with that argument is, however, that extending the guarantees specified in this provision to the Constitutional Tribunal does not result in such consequences; the Prosecutor General simply misinterprets the challenged norm.
33. Art. 6 paragraph 1 of the ECHR guarantees individuals the right to a trial, which results in the following elements: the right of access to a court, the right to an independent court, the right to an impartial trial, the right to trial by a court established by law, the right to a fair trial, the right to a public trial, the right to review within a reasonable time and the right to execute the judgment.³¹ However, this provision does not regulate in detail the competences of courts, levels, types, procedures, etc. It only sets certain minimum standards that should be guaranteed in all court proceedings.
34. Recognizing that Art. 6 paragraph 1 of the ECHR applies to some proceedings before the Constitutional Tribunal is neither an expansion nor a narrowing of the Constitutional Tribunal's powers. Assuming that the Constitutional Tribunal, adjudicating on constitutional complaints concerning civil rights and obligations, is a court pursuant to Art. 6 paragraph 1 of the ECHR does not make it a court within the meaning of Polish law nor does it acquire jurisdiction to administer justice. It only means that guarantees resulting from the Convention must be met in such type of proceedings before the Constitutional Tribunal. To prove a provision so construed is unconstitutional, it would be necessary to show that requiring the Constitutional Tribunal provide such guarantees would violate the Constitution for some reason. This is an impossible task, because the very same guarantees flow from the Polish Constitution itself.

³¹See e.g., M. Szwed, *Nadmierny formalizm procesowy jako naruszenie art. 6 paragraph 1 Konwencji o ochronie praw człowieka i podstawowych wolności*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2020, no. 2, p. 124; P. Hofmański, A. Wróbel, *Komentarz do art. 6 EKPC*, in: L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, vol. 1, Warsaw 2010, pp. 248-249.

35. The first guarantee specified in Art. 6 paragraph 1 of the ECHR is the right to an independent court. It is difficult to argue that the obligation to guarantee and respect the independence of the Constitutional Tribunal resulting from this provision violates the Constitution, since the Constitution itself, stipulates *expressis verbis* that the Constitutional Tribunal is to be an independent body (Art. 173) and that its judges be independent (Art. 195, paragraph 1 of the Constitution).
36. The second guarantee resulting from Art. 6 paragraph 1 of the ECHR is the right to have a case reviewed by an impartial court. Although the Constitution does not expressly formulate the principle of the impartiality of the Constitutional Tribunal, as correctly pointed out by W. Brzozowski, "It can be argued, however, that the requirement of impartiality is an indispensable feature of the judiciary. Moreover, the Constitutional Tribunal itself, following the findings of legal science, recognizes impartiality as one of the components of the concept of judicial independence, and the Constitution also requires such of the Constitutional Tribunal judges (Art. 195, paragraph 1 of the Constitution)."³² The legislator has noted the need to ensure the Constitutional Tribunal's impartiality and to regulate in detail the grounds and procedure for excluding a CT judge from proceedings (Art. 39-41 of the Act on the organization and procedure of proceedings before the Constitutional Tribunal). In this situation, it cannot be said that the following Art. 6 paragraph 1 of the ECHR, the subjective right to have a constitutional complaint examined by the Constitutional Tribunal meeting the impartiality standard violates the Constitution.
37. Art. 6 paragraph 1 of the ECHR also gives rise to the right to have a case heard by a court established by law. Such may be violated if, inter alia, the composition of the court includes individuals appointed (elected) to the post of judge in violation of the law³³ or when the composition of the court has been designated in violation of the law.³⁴ As in the case of impartiality and independence, there is no doubt that such a requirement is based in Art. 7 of the Constitution, which lays out the principle of legalism. This principle binds all state bodies, including, of course, the judiciary. Thus, it also includes the Constitutional Tribunal, which must act "on the basis and within the limits of the law" when exercising its constitutional powers. However, even aside from that, it is difficult to argue that a Convention guarantee, the content of which is primarily the obligation to comply with domestic law, could violate the Constitution. Such an argument would have to be based on the assumption that the Constitutional Tribunal is not bound by law, and this would be absurd for obvious reasons.
38. It follows from the above that the requirements of independence, impartiality and establishment by law resulting from the Convention also have constitutional grounds. However, it may be considered whether they are, similarly as under Art. 6 paragraph 1 of the ECHR, elements of some subjective individual vested right, or are mere norms of a constitutional order. It seems, however, that in the context of proceedings before the Constitutional Tribunal initiated by way of a constitutional complaint, these guarantees may be derived from Art. 79 paragraph 1 of the Constitution. Although this provision, read

³² W. Brzozowski, *Wyłączenie sędziego Trybunału Konstytucyjnego od udziału w postępowaniu*, „Państwo i Prawo” 2013, z. 1, p. 37.

³³ See e.g., judgment of the ECtHR (Grand Chamber) of 1 December 2020 in the case of *Guðmundur Andri Ástráðsson v. Iceland*, no. 26374/18, paras 243-252.

³⁴ See e.g., the judgment of the ECtHR of 12 April 2018 in the case of *Chim and Przywieczerski v. Poland*, applications no. 36661/07 and 38433/07, paras 138-142.

literally, only formulates the right to lodge a constitutional complaint and gives the legislator the power to regulate the principles for implementing this right, such a narrow reading would be incorrect. This is because only the Constitutional Tribunal, independent of the legislative and executive branches, impartial and acting in accordance with the law, can properly review the constitutionality of normative acts. Violation of these requirements would not only violate provisions concerning the constitutional order, but would also infringe on an individual's right to a constitutional complaint. However, even if the requirements of independence, impartiality and lawfulness were considered only systemic in nature, such does not support the statement that the individual rights expressed in Art. 6 paragraph 1 of the ECHR would violate the Constitution. The key point is that, both under the ECHR and Polish law, the Constitutional Tribunal must be independent, impartial and legally constituted. Therefore, the Convention does not impose any obligations on the legislator that would paralyze the functioning of the Constitutional Tribunal or expand its competences.

39. In addition to the above-discussed requirements regarding independence, impartiality and legality, Art. 6 paragraph 1 of the ECHR also requires the right to a fair and public hearing of a case within a reasonable time. The aim is therefore to provide parties to court proceedings with certain procedural rights. In this respect, the Constitution does not explicitly define the standards that the proceedings before the Constitutional Tribunal should meet. It only stipulates that the act is to regulate the principles of lodging constitutional complaints (Art. 79 paragraph 1 of the Constitution) and the procedure before the Constitutional Tribunal (Art. 197 of the Constitution). This does not mean, however, that the legislator has absolute freedom in this respect and it should secure protections ensuing from Art. 2 of the Constitution, i.e., the general principle of procedural justice and the principle of reliable and efficient operation of public institutions, derived from the Preamble to the Constitution. As M. Wiącek points out, it is of particular importance to ensure appropriate procedural standards in proceedings before the Constitutional Tribunal conducted under the concrete review procedure as "[s]uch proceedings have a direct impact on shaping the legal situation of an individual whose case underlies a constitutional complaint or a question of law. As a consequence, this procedure should meet the requirements of a fair procedure, and therefore the adequacy of Art. 45 of the Constitution to evaluate individual regulations of proceedings before the Constitutional Tribunal cannot be excluded."³⁵ Wiącek further notes that the specific nature of Constitutional Tribunal proceedings means not all right-to-trial guarantees under Art. 45 of the Constitution may apply here as "[i]n a sense, we can speak of an "appropriate" application of the aforementioned guarantees in proceedings before the Constitutional Tribunal, which requires consideration of the specifics (essence) of these proceedings."³⁶ According to him, guarantees of impartiality, reasonable time and internal openness may apply, while it will not be possible to guarantee principles of dual-instance procedures and the right to appeal.³⁷ Nor is it necessary to guarantee the right to a public hearing in every case.³⁸ This interpretation seems to be apposite. ECtHR also applies Art. 6 paragraph 1 of

³⁵ M. Wiącek, *Pytanie prawne sądu do Trybunału Konstytucyjnego*, Warsaw 2011, p. 345.

³⁶*Ibid.*, p. 350.

³⁷*Ibid.*

³⁸*Ibid.*

the ECHR to evaluate proceedings before constitutional courts, while noting the specificity of these bodies. For example, respecting the allegation of excessive length of proceedings before constitutional courts, the ECtHR emphasized that “a constitutional court’s role as guardian of the Constitution makes it particularly necessary for such a court to take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms.”³⁹ The Tribunal also points out that the specificity of constitutional courts may justify introduction of more extensive formal requirements when submitting constitutional complaints as compared to the requirements for an appeal,⁴⁰ as well as the introduction of simplified justifications (containing only references to relevant domestic provisions) of decisions refusing to accept constitutional complaints for review.⁴¹ The *erga omnes* effectiveness of constitutional court judgments may also justify limiting the number of entities admitted to participate in a case based on their legal interest.⁴² Also, the lack of a public hearing before the constitutional court will not always violate Art. 6 paragraph 1 of the ECHR - such a hearing will not be necessary if the case concerns only legal or factual issues that can be resolved only on the basis of acts and written statements of the parties.⁴³ It is therefore clear from the above that the obligation to respect the *omnes* guarantee of fair proceedings before the Constitutional Tribunal arising from Art. 6 paragraph 1 of the ECHR, is, to a significant extent, reflected in the constitutional standards and current statutory solutions, and cannot be considered an unconstitutional constraint on the Constitutional Tribunal’s jurisdiction.

40. However, even if we find that certain procedural standards under the ECHR are further reaching, this fact alone is not tantamount to a Constitutional violation. The Constitution has left the legislator a certain margin of discretion in determining the rules of procedure before the Constitutional Tribunal and nothing prevents the legislator from introducing more guarantees for the parties to the proceedings in order to fulfil said legislator’s international obligations.
41. Considering the above, it is difficult to resist the impression that the real reason for referring the request to the Constitutional Tribunal in the present case was not the Public Prosecutor General’s conviction that the legal norm providing that the proceedings before the Constitutional Tribunal would be covered by guarantees under Art. 6 paragraph 1 of the ECHR, but the Public Prosecutor General’s disagreement with the assumptions on which the judgment of the ECtHR in the *Xero Flor* case was based, and more precisely - with the conclusion that one of the individuals adjudicating in the Constitutional Tribunal was elected illegally. However, the Constitutional Tribunal is not called upon to assess whether a particular judgment of the ECtHR is factually correct, including whether it is based on truthful findings. Therefore, if the author of the motion alleges that Art. 6 paragraph 1 of the ECHR in the challenged scope is inconsistent with the Constitution, it must prove that it is the legal norm defined in such manner that is unconstitutional, and not that the violation of the Constitution occurred as a result of its incorrect application resulting from

³⁹ECtHR judgment of 4 September 2014 in the case of *Peter v. Germany*, application no. 68919/10, par. 40 - own translation.

⁴⁰See ECtHR judgment of 31 March 2020 in the case of *Dos Santos Calado et. al v. Portugal*, no. 55997/14, 68143/16 and 78841/16, para. 112.

⁴¹Decision of the ECtHR of 7 May 2019 in the case of *Fraile Iturralde v. Spain*, application no. 66498/17, par. 37.

⁴²Decision of the ECtHR of 6 February 2003 in the case of *Wendenburg v. Germany*, application no. 71630/01.

⁴³See judgment of the ECtHR of 21 July 2015 in the case of *Meimanis v. Latvia*, application no. 70597/11, paragraph 49.

the ECtHR's reliance on incorrect, in the Prosecutor's opinion, findings as to the fact of violation of domestic law in the election of Constitutional Tribunal judges. In the present case, however, the Public Prosecutor General did not do so, which makes his request unfounded.

D. CLAIMED INTERPRETATION VS. LEGEM ART. 6 PARAGRAPH 1 OF THE ECHR

42. The Public Prosecutor General's bases another argument on the allegation that the challenged norm was interpreted by the ECtHR by going outside the bounds of the Convention, which led to Poland being subject to an obligation that it did not consent to when acceding to the ECHR, as well as a breach of the principle of legal security.
43. It seems, therefore, that the core of this allegation is the Public Prosecutor General's statement that the ECtHR's interpretation in the *Xero Flor* judgment runs *contra legem*, i.e., is inconsistent with the Convention (on p. 38 of the motion, the Public Prosecutor General directly refers to the modification of the norm of the Treaty "without a normative foundation"). However, if the ECtHR's interpretation of ECHR Art. 6 paragraph 1 actually has no basis in the Convention, such may be the basis for questioning this interpretation, and not the constitutionality of allegedly misinterpreted Convention. Moreover, the motion at hand was not formulated as an interpretative motion (the use of the formula: "to the extent to which" and not "understood as"), so theoretically it is based on the assumption that the challenged norm exists. And if so, it is difficult to accuse the ECtHR that it interpreted *contra legem*.
44. The wording of such an objection proves once again that, in fact, the Public Prosecutor General is not actually questioning the legal norm as much its application in a specific case. However, as correctly pointed out by M. Zubik, "the Polish constitutional court, unlike the German Federal Constitutional Court, is not, as a rule, a court of facts, including those concerning Poland's international relations. Thus, it will be unlikely for the Constitution to contain its [the Tribunal's] jurisdiction to assess the legality of particular actions of EU bodies, including the judgments of the CJEU."⁴⁴ This view also fully applies as to the Constitutional Tribunal's lack of jurisdiction to review ECtHR judgments.
45. However, apart from the above, the Public Prosecutor General's statements on the ECtHR's allegedly exceeding the Treaty's scope and the unexpected course of evolution of the interpretation of Art. 6 paragraph 1 of the ECHR in the *Xero Flor* judgment, are completely unfounded. It is true that the ECtHR jurisprudence did not provide an unambiguous answer as to whether proceedings before constitutional courts with powers such as the Constitutional Tribunal (i.e., limited essentially to the review of legal norms and not their application in a specific case) could also fall within the scope of Art. 6 paragraph 1 of the ECHR.⁴⁵ Nevertheless, it is difficult to rationally argue that the development and clarification of jurisprudence by an international court would be inconsistent with the Constitution. After all, the interpretation of national law by national courts is also subject to evolution. Denying the ECtHR the possibility to develop judicial standards would

⁴⁴ M. Zubik, *Prawo konstytucyjne współczesnej Polski*, 2nd edition, Warsaw 2021, p. 62.

⁴⁵ See e.g., M. Szwed, *Orzekanie przez wadliwie powołanych sędziów jako naruszenie prawa do sądu w świetle wyroku Europejskiego Trybunału Praw Człowieka z 12.03.2019 r., 26374/18, Guðmundur Andri Ástráðsson v. Iceland*, „Europejski Przegląd Sądowy” 2019, no. 7, pp. 47-48.

significantly weaken the Convention's effectiveness and make it impossible to apply it in a changing reality.

46. In light of the case law preceding the *Xero Flor* judgment, the issue of the applicability of Art. 6 paragraph 1 of the ECHR to proceedings before the Constitutional Tribunal was open, but not completely ruled out. Therefore, we were not dealing here with a complete overrule of the earlier theses expressed by the ECtHR, but only with the resolution of a specific problem that had not been properly explained before. ECtHR jurisprudence on the applicability of ECHR Art. 6 paragraph 1 to constitutional courts has developed over many years. For example, one of the key judgments in this regard, *Ruiz-Mateos v. Spain*, was issued as early as 1993.⁴⁶ Moreover, the views in favour of the necessity to apply Art. 6 paragraph 1 of the ECHR to review proceedings before the Constitutional Tribunal concerning constitutional complaints were also expressed in the Polish legal literature, e.g., in an article by A. Wiśniewski of 2004.⁴⁷ A comprehensive analysis of the applicability of Art. 6 to the proceedings before the Constitutional Tribunal concerning constitutional complaints and questions of law was also presented by M. Wiącek in his book published in 2011.⁴⁸ Therefore, it cannot be argued that the interpretation adopted by the ECtHR in the *Xero Flor* case was completely unforeseen. On the contrary, there were rational grounds for adopting it, which were, moreover, clearly articulated in the ECtHR judgment (see paragraphs 192-208). However, it seems unnecessary to present at this point a broader analysis of the merits of the arguments cited by the ECtHR, because, as we have already indicated, the Constitutional Tribunal is not a body appointed to assess the merits of the judgments of international bodies.
47. The Public Prosecutor General's claim regarding the alleged violation of the legal security of citizens is also defective. The motion states that "When a norm of international law unexpectedly evolves, revising the current perception of the constitutional order, including the role of the Constitutional Tribunal and its position in relation to other courts, the legal system ceases to be predictable to the addressees of norms who lose the ability to read their rights and attendant obligations of state bodies" (p. 34). First, however, as indicated herein, the ECtHR did not revise the constitutional position of the Constitutional Tribunal in the *Xero Flor* judgment, but only interpreted the autonomous concept of a court within the meaning of ECHR Art. 6. Secondly, the Public Prosecutor General fails to explain in any way how, as a result of including the proceedings before the Constitutional Tribunal within the scope of Art. 6 paragraph 1 of the ECHR, the legal security of individuals might be prejudiced. After all, it seems that the application of Art. 6 to review Constitutional Tribunal proceedings is beneficial to individuals, as it provides them with international protection in the event of, for example, excessive length of proceedings before the Constitutional Tribunal or Constitutional Tribunal proceedings with illegally elected judges. Furthermore, in the judgment in the *Xero Flor* case, the ECtHR does not indicate the need to reopen Constitutional Tribunal proceedings, which involved judgments with defective judicial panels. As such, it is difficult to speak of any threat to the legal security of citizens also in this respect. It is also impossible to argue that the adoption of the interpretation set out in the judgment in the *Xero Flor* case imposed some unforeseen duties on state authorities.

⁴⁶ECtHR judgment of 23 June 1993 in the case of *Ruiz-Mateos v. Spain*, application no. 12952/87.

⁴⁷ A. Wiśniewski, *Polska skarga konstytucyjna a Europejska Konwencja Praw Człowieka*, „Gdańskie Studia Prawnicze” 2004/12.

⁴⁸ M. Wiącek, *Pytanie prawne...*, pp. 349–358.

As indicated above, the same requirements as to the obligation to guarantee and respect the independence, impartiality and legality of the Constitutional Tribunal's actions result from Polish law, specifically from the Polish Constitution.

E. ECHR'S JURISDICTION TO REVIEW THE LEGALITY OF ELECTION OF CT JUDGES

48. Point 3 of the Public Prosecutor General's *petitum* argues that Art. 6 paragraph 1 of the ECHR is unconstitutional to the extent it allows the ECtHR to assess the legality of the election of Constitutional Tribunal judges. However, this allegation is also defective.
49. It is unnecessary to analyse here in detail the illegal election of three individuals (the so-called "doubles") to the Constitutional Tribunal by the Sejm of the 8th term of office. This issue has already been extensively analysed elsewhere. Secondly, the subject of Constitutional Tribunal proceedings in the present case is not the correctness of the ECtHR's findings as to the infringement of domestic law in the process of electing the above-mentioned judges, but the alleged incompatibility of the norm allowing the ECtHR to review the legality of that choice. Therefore, it is apposite to consider instead whether any grounds exist for recognizing that such definition of a legal norm is unconstitutional.
50. The Public Prosecutor General's first argument for unconstitutionality is lack of procedures in the current legal order to allow for a direct review of the legality of the Sejm's resolutions on the election of a Constitutional Tribunal judge (p. 40 of the motion). Indeed, such procedures do not exist at present, as reflected, inter alia, in the Constitutional Tribunal's decision to discontinue proceedings in case U 8/15.⁴⁹ However, want of procedures does not mean that any and all violations of the law in the course of judicial election may be ignored. If such were the case, constitutional provisions regarding, for example, the number of CT judges, their terms of office and the rules of election would have no meaning whatsoever. Therefore, the inability to formally repeal a resolution on election does not mean that a resolution with serious defects becomes fully lawful. Lack of a review procedure does not exclude the possibility of finding resolutions adopted in a patently gross violation of the law using the so-called legally non-existent acts. Finally, the lack of procedures in domestic law does not preclude an international court from reviewing violations in the election of Constitutional Tribunal judges. It should be emphasized here that the ECtHR does not play the role of an appeal body or an administrative court appointed to review and possibly repeal resolutions deemed illegal. Its role is only to assess whether, in a specific case, the state has failed to fulfil its obligations under the Convention. One such obligation is to ensure that bodies constituting "courts" in the autonomous meaning adopted under Art. 6 paragraph 1 of the ECtHR are "established by law," which assumes, inter alia, ensuring that its judges are lawfully elected. The ECtHR must therefore be able to examine whether, in a given case, the selection of judges was in fact lawful. By the way, the ECtHR may review compliance by state authorities with state law not only in the context of ECHR Art. 6 paragraph 1. Many ECHR provisions impose the requirement to act "in accordance with the law" as one of the basic conditions for permitting interference with rights and freedoms, which presupposes the duty of respecting domestic laws. Obviously, in line with the subsidiarity principle, the Tribunal will rely in this respect primarily on the findings of domestic authorities. This was also the case in the case of *Xero*

⁴⁹See decision of the Constitutional Tribunal of 7 January 2016, file ref. no. U 8/15.

Flor - the ECtHR referred mainly to the judgment of the Constitutional Tribunal in the case K 34/15⁵⁰ and the subsequent jurisprudence, according to which the legal basis for the election of three judges by the Sejm of the 7th term was consistent with the Constitution. The consequence of such a finding is that election of three new individuals could not be lawful, as you cannot elect two different individuals to the same post. Such an assessment is hardly controversial today. Doubts may only concern whether Constitutional Tribunal judgments issued with the participation of individuals so elected have legal effect or whether they can be considered the so-called non-existent judgments.⁵¹ However, the legal norm challenged by the Public Prosecutor General does not refer to this issue. In the *Xero Flor* judgment itself, the ECtHR did not refer to the problem of the legal consequences of the Constitutional Tribunal judgments issued by courts with partially defectively elected judges.

51. Interestingly, the Public Prosecutor General, in arguing that the legality of the Sejm's resolutions regarding election of Constitutional Tribunal judges cannot be reviewed, does not consider in its motion the basis on which the Sejm declared the November 2015 election by the 7th term Sejm of five Constitutional Tribunal judges devoid of legal force.⁵² After all, the relevant legislation was clearly a form of control of the legality of that election. As noted by the Constitutional Tribunal in the judgment of 3 December 2015 (file ref. no. K 34/15) and the decision of 7 January 2016 (file ref. no. U 8/15), the resolutions adopted in December 2015 constituted a non-binding political position of the Sejm and could not affect the legal force of resolutions on elections adopted by the Sejm of the previous term of office. However, the Public Prosecutor General refers his arguments regarding lack of procedures for the legal review of CT judge elections not to the aforementioned five Sejm resolutions, but instead to the ECtHR's review of Constitutional Tribunal judgment in case K 34/15, regarding the lawfulness of the election of three judges to positions occupied by judges previously elected by the Sejm of the 7th term pursuant to a legal norm recognized as constitutional.
52. The Public Prosecutor General also claims that Constitutional Tribunal operation and form "cannot be reviewed by an external body, because it destroys the constitutionally established system of state bodies" (p. 44). Such a statement seems astonishing. The Convention imposes obligations on states that must be respected by all state authorities. If, on the other hand, these authorities do not act in accordance with the standards flowing from the ECHR, a breach of the Convention may occur and, ultimately, when the breach cannot be remedied via domestic proceedings, the state's liability may be enforced at the international level. In this respect, the Constitutional Tribunal is not some exceptional body which would be exempt from the obligation to comply with the Convention and the actions

⁵⁰Judgment of the Constitutional Tribunal of 3 December 2015, file ref. no. K 34/15.

⁵¹On this subject, see P. Radziejewicz, *On Legal Consequences of Judgements of the Polish Constitutional Tribunal Passed by an Irregular Panel*, "Review of European and Comparative Law" 2017, no. 4, pp. 45-64; M. Florczak-Wątor, *O skutkach prawnych orzeczeń TK wydanych z udziałem osób nieuprawnionych do orzekania* in: R. Balicki and M. Jabłoński (ed.), *Państwo i jego instytucje. Konstytucje – sądownictwo – samorząd terytorialny*, Wrocław 2018, pp. 307-312; P. Polak, *Związanie sądu wyrokiem Trybunału Konstytucyjnego wydanym w nieprawidłowo umocowanym składzie (refleksje na tle wyroku Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 20 czerwca 2018 r., sygn. akt V SA/Wa 459/18)*, „Zeszyty Naukowe Sądownictwa Administracyjnego 2020”, no. 3, pp. 77-83.

⁵²Decisions of 25 November 2015 declaring invalid the resolution of the Sejm of the Republic of Poland of 8 October 2015 on the election of a Constitutional Tribunal judge, published in Monitor Polski of 23 October 2015, published in Monitor Polski, item 1038-1042.

of which would be excluded from ECtHR review in terms of violating the freedoms and rights set out in the ECHR.

VI. EFFECT OF RECOGNIZING ECHR ART. 6 PARAGRAPH 1 UNCONSTITUTIONAL TO THE EXTENT PROPOSED BY THE PROSECUTOR GENERAL

53. In discussing the effects of a possible Constitutional Tribunal judgment declaring ECHR Art. 6 paragraph 1 unconstitutional in the scope contested by the Public Prosecutor General, one should separately refer to the internal sphere (i.e., the effects on the application of the Convention in Poland) and the external sphere (effects on the application of the ECHR by the ECtHR in Polish cases).
54. In the external sphere, the Constitutional Tribunal's ruling will produce no legal effects. In particular, it will not deprive the ECtHR of the ability to apply Art. 6 paragraph 1 of the ECHR in cases concerning Constitutional Tribunal activities. As long as Poland is a party to the ECHR, it must comply with said treaty and cannot invoke its domestic law, including the Constitution, to justify violating treaty provisions (see Art. 27 of the Vienna Convention on the Law of Treaties).⁵³ On the other hand, the judgment may cause image-related effects reinforcing the international community's conviction that the Polish Constitutional Tribunal is not an independent body operating fully in accordance with the law and international standards. One can also expect reasonable comparisons to the situation in Russia, which introduced a procedure of constitutional admissibility for execution of ECtHR judgments by following the Russian Constitutional Court's jurisprudence.⁵⁴ The Russian Constitutional Court has jurisdiction in this respect.
55. In the domestic sphere, as indicated by legal scholars, "The consequence of a negative judgment is denying Polish authorities the ability to apply such acts and exert legal effects thereof in Poland."⁵⁵ Therefore, theoretically if the Constitutional Tribunal ruled that Art. 6 paragraph 1 of the ECHR is unconstitutional to the extent indicated by the Public Prosecutor General, Polish courts could not apply said provision to review proceedings before the Constitutional Tribunal. It seems the author of the motion is trying to achieve precisely such an effect to prevent the coalescence of a jurisprudence line that permits questioning legal force of the Constitutional Tribunal judgments issued with the participation of individuals not entitled to adjudicate.
56. However, it is possible that this effect would not be achieved. Firstly, given the situation in the Constitutional Tribunal, the judgments of this body are sometimes questioned.⁵⁶ Although, according to the information presented on the Constitutional Tribunal's website,

⁵³See e.g., M. Florczak-Wątor, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne*, Poznań 2006, p. 147; M. Grzybowski, *Prawo międzynarodowe i wspólnotowe jako wzorzec i przedmiot kontroli norm*, w: M. Zubik (ed.), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, Warsaw 2006, p. 342.

⁵⁴See e.g., J. Kahn, *The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg*, "The European Journal of International Law" 2019, vol. 30, no. 3, pp. 933-959.

⁵⁵A. Mączyński, J. Podkowik, *Komentarz do art. 188 Konstytucji* in: M. Safjan, L. Bosek (ed.), *Konstytucja RP. Komentarz*, vol. II, Warsaw 2016, p. 1212. Podobnie: M. Grzybowski, *Prawo międzynarodowe...*, p. 340; M. Florczak-Wątor, *Orzeczenia...*, pp. 148-149.

⁵⁶Examples of such questioning of the legal force of CT judgments issued with the participation of defectively elected individuals have already appeared in common court jurisprudence (see e.g., the judgment of the District Court in Gorzów Wielkopolski of May 24, 2021, file ref. no. I C 1326/19 - judgement not final) and the Supreme Court (see the decision of the Supreme Court of 16 September 2021, file ref. no. I KZ 29/21).

the composition appointed to examine the Prosecutor General's motion does not include defectively elected individuals, there may still arise general reservations as to Constitutional Tribunal independence and whether the President of the Constitutional Tribunal was duly elected. Moreover, taking into account the arguments presented in point IV of this opinion, it would not be unfounded to claim that the Constitutional Tribunal would exceed its jurisdiction by adjudicating the constitutionality of a norm challenged by the Prosecutor General.⁵⁷ Secondly, ECHR Art. 6 paragraph 1 is not the only provision pursuant to which it is possible to question the legal effects of Constitutional Tribunal judgments issued with the involvement of unlawfully selected individuals. For example, recently the ECtHR communicated to the Polish government a number of complaints by Polish citizens regarding difficulties in access to abortion after the Constitutional Tribunal judgment of 22 October 2020 (file ref. no. K 1/20).⁵⁸ The applicants alleged that their right to privacy was violated in an unlawful manner, as the restriction of access to abortion resulted from a judgment of the Constitutional Tribunal issued in violation of the law (violation of the principle of impartiality, unlawful election of the Constitutional Tribunal's President, participation in the adjudication panel of unlawfully elected individuals). It cannot be ruled out that similar allegations will appear in the future in the context of other ECHR provisions that require legality in the event of interference with freedoms or laws. Such allegations could be raised in a situation where, as a result of an unlawful Constitutional Tribunal judgment that extends interference with individual freedoms.

57. However, even apart from the issue of court jurisdiction to review the binding nature of those CT judgments issued with the participation of individuals not entitled to adjudicate, the situation in which the state questions the constitutionality of a binding international obligation is quite problematic. It can be expected that the ECtHR will receive further complaints from citizens affected by the actions of the Constitutional Tribunal, and the ECtHR, continuing its jurisprudence, may issue new judgments finding Poland in violation of ECHR Art. 6. At the same time, the Polish government, citing the Constitutional Tribunal judgment, will likely refuse to execute the judgment, at least in the general aspect (i.e., restoring Constitutional Tribunal activities to a lawful status).
58. Theoretically, the conflict between the Constitution and international law can be resolved by amending the Constitution - or renegotiating or terminating an international treaty.⁵⁹ In practice, however, given that the conflict in the present case is entirely fictitious, it would be difficult to take any of these measures. Amending the Constitution would be problematic not only because of the provisions of Art. 235 requirements as to the qualified majority necessary to pass such amendment, but also because it is difficult to determine what the change would involve. As indicated above, the constitutional standard regarding the obligation to guarantee and respect the independence, impartiality and lawfulness of Constitutional Tribunal activities can, in principle, be deemed compliant with Convention

⁵⁷It is also worth noting that a court issuing a judgement in gross violation of its jurisdiction may also lead to a violation of Art. 6 paragraph 1 of the ECHR, i.e. the right to a court established by law - see e.g. the judgment of the ECtHR of 20 July 2006 in the case of *Sokurenko and Strygun v. Ukraine*, applications no. 29458/04 and 29465/04, paras 26-29; ECtHR judgment of 22 June 2000 in *Coëme and others v. Belgium*, applications no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, paras 107-108.

⁵⁸The cases are registered as: *KB and others v. Poland* (application no. 1819/21 et al.), *AL-B. and others v. Poland* (no. 3801/21 et al.), *KC and others v. Poland* (no. 3639/21 et al.) and *ML v. Poland* (no. 40119/21).

⁵⁹See M. Masternak-Kubiak, *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej*, Kraków 2003, pp. 302-303.

standards. Introducing a provision into the Constitution that would state outright that the Constitutional Tribunal is to act in accordance with the law or that only legally elected persons may adjudicate in the Constitutional Tribunal seems pointless. The renegotiation of the ECHR is also probably not an option. It follows from the Public Prosecutor General's motion that it would not be enough to clarify Art. 6 paragraph 1 of the ECHR by adding an excerpt stating that this provision is also applicable to constitutional courts, because the problem is not so much the ambiguity of the challenged norm, but its content (including the Constitutional Tribunal within the scope of Art. 6 paragraph 1 of the ECHR). This provision would therefore have to be based on a clarification that Art. 6 paragraph 1 of the ECHR does not apply to constitutional courts with competences such as the Polish Constitutional Tribunal. However, this would require the initiation of negotiation activities and convincing other state-parties to the ECHR that the conclusion of such an amending protocol would be justified, which seems completely unrealistic. For image and political reasons, it would also be difficult to imagine the termination of the ECHR by Poland.

59. In this situation, the Constitutional Tribunal judgment finding that Art. 6 paragraph 1 of the ECHR violates the Constitution would probably only be an argument for the Polish authorities to continue to maintain the Convention violation by tolerating the issuance of Constitutional Tribunal judgments with the participation of unlawfully elected individuals. Such a state of affairs would raise doubts in terms of compliance with Art. 9 of the Constitution, according to which Poland shall comply with binding international law.

VII. SUMMARY

60. The Public Prosecutor General's request is formally inadmissible and substantively unfounded.

61. Its inadmissibility stems from the fact that it only ostensibly concerns the constitutional review of a legal norm. The motion refers to one specific judgment of the ECtHR and points out that the interpretation adopted therein is unjustified. Moreover, on the one hand, Public Prosecutor General challenges Art. 6 paragraph 1 of the ECHR, while clearly suggesting that the challenged provision, interpreted correctly, does not cover Constitutional Tribunal proceedings. In essence, this conclusion is aimed at a constitutional review not of a legal norm, but of the ECtHR judgment in the *Xero Flor* case, with which the Public Prosecutor General disagrees. However, the Constitutional Tribunal has no competence to assess the constitutionality of judgments, neither those issued by Polish courts, nor of those issued by international courts. The only way to assess the correctness of the interpretation adopted by the ECtHR would be to submit a request to the Grand Chamber for the case to be heard. However, the Polish government failed to take advantage of this option.

62. The motion is substantively groundless because the Public Prosecutor General provides no convincing arguments supporting the thesis that ECHR Art. 6 paragraph 1 is unconstitutional in the challenged extent. In particular, he does not note that terms appearing in the ECHR and the Constitution must be construed autonomously, in the light of the function and purpose of both legal acts. This means said terms in the ECHR will not always have to be interpreted in the same way as the identical terms appearing in the Constitution of the Republic of Poland. It is impossible for their definitions to be identical

in any case, because the ECHR is an international treaty to which 47 states are parties, whose legal systems differ significantly from each other. The mere different definition of the term "court" does not, however, prejudge that Art. 6 paragraph 1 of the ECHR violates the Constitution. For this to happen, it would have to be shown that including the proceedings before the Constitutional Tribunal within the scope of this provision would lead to unconstitutional consequences. The Public Prosecutor General seems to suggest that such an unconstitutional consequence would be to extend Constitutional Tribunal jurisdiction and thus disturb the constitutional division into courts that administer justice and tribunals that do not administer justice, but this theory is false. Including the Constitutional Tribunal within the scope of Art. 6 paragraph 1 of the ECHR does not modify its jurisdiction but requires Polish authorities to guarantee that said provision's guarantees will apply in proceedings before this body (at least those initiated by means of a constitutional complaint). The Public Prosecutor General should therefore explain why, for example, the Constitutional Tribunal's guarantees of independence and impartiality or the requirement to duly fill the Constitutional Tribunal's bench would violate the Constitution. However, such would be likely impossible, because the same guarantees derive from provisions of the Constitution of the Republic of Poland.

63. Also incorrect are the Prosecutor General's suggestions that the interpretation adopted by the ECtHR in the *Xero Flor* judgment is *contra legem* and leads to imposition on Poland of obligations to which it did not agree upon accession to the Convention. Although prior to *Xero Flor* the applicability of ECHR Art. 6 paragraph 1 to Constitutional Tribunal proceedings was not clear, there were many arguments in favour of that thesis. This was also reflected in the views of Polish doctrine. In no way is this some completely unforeseen direction of interpretation.
64. The judgment finding Art. 6 paragraph 1 of the ECHR unconstitutional in the scope contested by the Public Prosecutor General, would also be difficult to implement and would most likely not lead to solving any real problems. It could, however, deepen the crisis in the Polish judiciary and lead to a further deterioration in Poland's relations with the Council of Europe and the European Union.

The opinion was prepared in Polish by Dr Marcin Szwed, lawyer at the Helsinki Foundation for Human Rights.