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To my Parents and Brothers

Lech Jamróz

THE CONSTITUTIONAL TRIBUNAL IN POLAND IN THE CONTEXT OF CONSTITUTIONAL JUDICIARY

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LIST OF ABBREVIATIONS

CCP	- Code of Civil Procedure
CCrP	- Code of Criminal Procedure
CT, the Tribunal	- the Constitutional Tribunal
Dz.U.	- Dziennik Ustaw [Journal of Laws of the Republic of Poland]
EU	- the European Union
General Assembly, Assembly	- the General Assembly of the Judges of the Constitutional Tribunal
l.g.u.	- local government unit
M.P.	- Monitor Polski, Official Journal of the Republic of Poland
NCJ	- National Council of Judiciary
Office	- the Office of the Constitutional Tribunal
OTK	- Orzecznictwo Trybunału Konstytucyjnego [Adjudication (Rulings) of the Constitutional Tribunal]
OTK ZU	- Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy [Adjudication (Rulings) of the Constitutional Tribunal. Official Collection]
Procedural rules, the Procedural Rules of CT	- the Procedural Rules of the Constitutional Tribunal of 3 October 2006
PPR	- the Polish People's Republic
PUWP	- the Polish United Workers' Party
RP	- the Republic of Poland
SAC	- the Supreme Administrative Court
Statute	- the Statute of the Office of the Constitutional Tribunal

the Act, the Act on CT	- the Act on the Constitutional Tribunal
the Constitution, the Constitution of RP	- the Constitution of the Republic of Poland of 2 April 1997
USSR	- the Union of Soviet Socialist Republics

INTRODUCTION

Experts on constitutional law have been analyzing the issues of constitutional judicial system for many years. Also in Poland a great number of excellent academic works in this field have been published. They were both monographs and specific papers (articles, studies, glosses, etc.) and were devoted to constitutional judiciary and the Constitutional Tribunal. A considerable number of legal comparative and monographic papers have been published, where the functions and activities of constitutional courts in European countries were discussed.

It is not surprising since the existence of a body (bodies) controlling the constitutionality of the provisions of law is an indispensable element of a modern democratic rule of law. Also the judicial practice of the constitutional court is very inspiring. Not only is its substantive activity (solving the questions of the constitutionality of regulations) interesting, but its procedural aspects as well.

This monograph, *The Constitutional Tribunal in Poland in The Context of Constitutional Judiciary* was prepared in the English language, for it is possible to notice a considerable disproportion in the number of academic publications in Polish on the Constitutional Tribunal and constitutional judiciary (there are plenty of them), and publications in foreign languages (they are far less numerous). Moreover, publication in English increases the potential number of readers and helps the users of this language collect necessary information on Polish constitutional institutions.

This paper is addressed to a wide group of readers; to all who study the issues of constitutional judiciary (theoreticians, practitioners, undergraduate students and doctoral students). The author's intention was to make this book a practical source of knowledge and may also be useful for undergraduate and doctoral students of foreign universities who are staying in Poland within the framework of student exchange programs or various academic internships. They quite frequently,

following their interests and preparing research papers, take the issues of Polish constitutional law. This monograph is intended to be an extension of general information on Polish constitutional law.

This monograph aims at demonstrating the issues of constitutional judiciary from the perspective and accomplishments of the Polish Constitutional Tribunal. It is intended to present the specificity of functions of the Constitutional Tribunal in a synthetic way. As the result of this assumption, a broad reference to the practice of the Polish Tribunal, of course on the grounds of the currently valid regulations, turned out indispensable.

This monograph includes such fields as the adaptation process of the idea of constitutional judiciary in Poland, as well as the organization and the functions of the Constitutional Tribunal. It was also necessary to present general information on forming constitutional judiciary in the world (genesis and legitimacy) as well as its models, taking into consideration fundamental two of them: the model of judicial control and the model of concentrated control.

The text is based on the legal state of 30 November 2014

Author

Chapter I

THE CONSTITUTIONAL TRIBUNAL AS AN AUTHORITY FOR PROTECTION OF THE CONSTITUTION AND INDIVIDUAL RIGTHS

1. The genesis of constitutional court. Legitimacy of constitutional tribunals in a democratic state

The Constitutional Tribunal in the Republic of Poland is a constitutional authority. Its composition, functions and competences are regulated by the provisions of the Constitution of 2 April 1997, in particular Articles 188-197 of the Constitution of the Republic of Poland. The organization of the Constitutional Tribunal as well as its procedures are determined by the Act of 1 August 1997.[1] The legislator was obliged to pass this law by the provision of Article 197 of the Constitution.

The Constitutional Tribunal is foremost an agency of protection of the constitution as a special law, since it is the law of the supreme power of validity, which regulates the most important substances and is passed in a special qualified way. In the light of a modern democratic state's standards, it is not only about a formal protection of the constitution as a legal act of the supreme power of validity, from which results the whole legal order expressed in lower acts of law of the power of validity lower than the constitution: laws (statutes) and regulations, but also about the protection of the constitutional substance, important content regulated by the constitution, which no other act of law should infringe. Hans Kelsen (1881-1973), one of the founders of the modern concept of rule of law, proposing institutional protection of the Constitution in

1 Dz.U. No 102, item 643 as amended.

the form of a separate independent constitutional court, claimed that the concept of constitution as a supreme regulation gains a particular importance for it determines the whole legal and state order as well as decides on the essence of the community constituted thereby". It is the constitution whence the whole hierarchical legal order, which "makes a firm, and therefore possibly lasting, foundation of the whole state order", is derived. These assumptions referring to a democratic state based on the construction of the rule of law result in the necessity of a procedure of making the constitution, separated form that statutory, but also of placing in the constitution (beside the norms for making laws) the norms determining the substance of laws (constitution in its broader, substantive sense).

The point is that the modern constitutions, beside defining the system of state authorities, also contain a catalogue of fundamental rights and freedoms. "*The most important, though perhaps not the only, sense of such a catalogue consists in the fact that it contains rules, guidelines and restrictions referring to the substance of future laws*", emphasized Kelsen. Inconformity to the constitution would consist in not only infringement of the legislative procedure specified in the constitution, but also infringement of certain individual rights and freedoms, such as equality before law, freedom of expression, freedom of conscience and confession as well as freedom of property. Inconformity of a law to the constitution may be of not only formal but also of substantive nature.[2]

The justification of the need for the institutional protection of the constitution in its both formal and substantive sense, was connected with the examination of its special nature. First, with admitting that the constitution is not only a document containing general rules, values and ideas as well as formal requirements of the procedure of law making, but constitutes an act of law in reference to the whole constitutional act. Otherwise, it could not be a basis of validity for the whole legal order, of which the constitution is a foundation. The idea of the regulatory (normative) nature of the constitution is connected with the need for coherence of the whole legal order in its formal sense, since the validity

2 H. Kelsen, *Istota i rozwój sądownictwa konstytucyjnego*, Warszawa 2009, p. 21-22.

of acts of law "inferior" to the constitution should result directly (laws) or indirectly (basic acts) from the constitution. In the case of laws the constitutional legitimacy refers foremost to competences (the competence of the parliament) and procedure (legislation procedural requirements). However, the recognition of a special substantive nature in reference to laws meant that specific contents of the constitution were a substantive requirement to make ordinary laws. The legislator could not infringe this particular matter. The legislator could not make laws inconsistent with the constitutional regulation not only in the field of the competence of constitutional authorities and legislative procedures determined in the constitution but also infringe or restrict individual freedoms and rights in a manner inconsistent with the constitution.

Formal and substantive qualities of the constitution as a special act of law restricted the legislator's freedom of making laws, specified the constitutional status of the parliament, and, consequently, also modified the forming model of European democracy.

The special nature of the constitution, its primacy over ordinary laws made by the parliament as well as the proposal of an institution capable of controlling the compliance with the constitution undermined the primacy of laws and the dominating position of the parliament. They undermine the classical conception of representation, which was fully formed in European countries in the 19th century (its genesis is much older). In accordance with this conception parliamentarians were representatives of the sovereign (nation, people). In practice, parliamentarians, not bound *de facto* with the will of the sovereign, believed that they express this will, which resulted in shaping the real conception of representation. This occurred in leading European countries paving the direction of the constitutional evolution.

Despite essential constitutional differences between various European states, the aforesaid constitutional quality as well as the views of the dominating doctrine were common. The sovereignty of parliament was actually replaced with the sovereignty of nation; the parliament was granted substantive discretion in making laws. The constitutions in those countries were not against it. M. Granat aptly observes that the classical conception of representation under discussion consisted in the

fact that "the will of the majority of the people is identified with the will of the parliament; the will expressed by the parliament is identified with the will of the people". It is this legal fiction of representation that constituted the essence of the classical conception of representation in France. Thus, passing a law was an authoritative assertion of its compliance with the will of the people and the parliament regarded itself as the supreme guard of the constitution.[3]

The conception of the sovereignty of parliament developed in the 19th century with various intensity also in other European countries, despite the fact that the first "wave of constitutionalization" embraced a few European countries as early as the beginning of the 19th century (Sweden 1809, Spain 1812, Norway 1814, the Netherlands 1815) and the subsequent period of constitutionalization in the years 1830-48 initialized with the Constitution of Belgium in 1831 covered East European countries (Romania, Bulgaria, Serbia, Greece). The third wave of constitutionalization occurred after the First World War and was connected with the rationalization process of competences of supreme state authorities. In parliamentary systems, including parliamentary monarchies, occurred an reinforcement of the position of the parliament.[4] The conception of the sovereignty of parliament has been formed from the 18th century on and the lack of a formal constitution, i.e. the lack of one consolidated written legal act, to which a special importance would be ascribed, contributed to the enforcement of the role of parliament and the primacy of acts of law.[5] These conditions as well as the difference between the system of law sources and the continental model (separation of legislation and law application) as well as a high importance of courts of law, resulted in the fact, that in Great Britain no form of a separate, institutionalized constitutional control has been formed. For this role was fulfilled by courts.[6]

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3 M. Granat, *Od klasycznego przedstawicielstwa do demokracji konstytucyjnej (ewolucja prawa i doktryny we Francji)*, Lublin 1994, p. 17, p. 171, *passim*.

4 A. Jamróz, *Demokracja współczesna. Wprowadzenie*, Białystok 1993, p. 152-153, including also the bibliography.

5 Thus also: P. Mikuli, *Zdekoncentrowana sądowa kontrola konstytucyjności prawa. Stany Zjednoczone i państwa europejskie*, Kraków 2007, 2nd edition, p. 13-14.

6 A. Breczko, *Rola sądownictwa w ochronie konstytucji na tle ogólnych rozważań o systemie prawnym Wielkiej Brytanii*, (in:) Z zagadnień współczesnych państw demokratycznych, (ed.

The views on a special role of the constitution as the supreme legal act, with which other legal acts, including a law (statute) should comply (formally and substantively), undermined not only the primacy of a law and the principle of the legislator's discretion in determining the statutory substance but also the conception of a sovereign parliament all the more that such views were connected with the proposition of a separate constitutional body, independent from other authorities, which would be entitled to examine the compliance of laws (and other inferior acts) with the constitution. For it is necessary for respecting the hierarchical legal order at the top of which is the constitution.

Explaining the need for the constitutional control of legal acts, especially laws, H. Kelsen underscored: "*As long as a constitution knows no aforesaid guarantee of nullification of the regulations inconsistent therewith, it is devoid of the nature of an act of full binding validity (…). A constitution not providing nullification of acts, particularly laws, inconsistent therewith, technically means not more than a nonbinding wish (…). For the legal order cares about the possibility of elimination of any act which is inconsistent with a norm of a level inferior to the constitution*."[7]

Granting the constitution as the supreme act of law primacy in the legal order resulted in the conception of sovereignty of parliament (parliament always expresses the will of the sovereign) being replaced with the conception according to which "*whereas in a classical representative system each will is expressed by the representatives is a will of the nation, in the representation with the control over the constitutionality of law it is only the will which is consistent with the constitution*", as M. Granat maintains, concluding that the old democracy based on classical representation has been replaced with constitutional democracy, based on the primacy of the constitution, which is the source of competences of the supreme state bodies, including the parliament.[8]

A. Jamróz, St. Bożyk), Białystok 2006, p. 261-264, *passim.*

7 H. Kelsen, *Istota i rozwój…, op. cit.,* p. 63.

8 M. Granat, *Od klasycznego przedstawicielstwa*…, *op. cit.*, s. 382-390.

Sharing these views it seems that the conception of constitutional democracy may be treated in a still sharper way, still more underscoring the special nature of the constitution in the context of this conception. It seems that it reduces the importance of the conception of representation, since the constitutional court does not derive its decisive competences from general elections. The legitimation of constitutional courts (constitutional tribunals) results directly from the constitution, which a special manifestation of the sovereign's will. Thus, it is possible to agree with P. Tuleja's opinion that "the legitimization of the Constitutional Tribunal also finds its foundation in the principle of sovereignty", and "thus control of the constitutionality of law serves to guarantee the sovereign's will."[9]

Introduction of constitutional courts able to repeal laws passed in parliaments and consequently eliminate them from the valid legal order, evoked a surge of criticism from the opponents of this institution in a democratic state. Especially it was raised that a constitutional court consisting of around dozen nominated judges cannot question the will of the nation expressed in the law by the parliament including a few hundred representatives of the people chosen in general and free elections. Thus the constitutional court cannot repeal the laws democratically passed.

Thus presented argumentation, seemingly doctrinally brilliant and convincing, cannot be, however, treated as sufficient if we take into consideration the legal nature of the constitution in a modern democratic state and what are its relations with the sovereign (people) being the source of the common public power in a democratic society. K. Wojtyczek aptly observes (having posed rhetorical questions), that in a democratic state the parliament has no right to pass laws inconsistent with the constitution. "*It is important to note that in a country with a written democratic constitution this act determines the limits on the substance of the mandate granted to the members of parliament by the sovereign. Deputies are not elected to exercise unlimited power on*

9 P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy),* Kraków 2003, p. 180.

behalf of the sovereign but only to exercise power within the limits of the constitution", concludes K. Wojtyczek.[10]

I fully agree with this opinion. In the debate between the supporters of sovereign parliament underscoring that it is a representative, according to the classical conception of representation, the general will of the people (sovereign), and the champions of the institution of constitutional court, the former usually forget what the constitution as the supreme legal act in the modern democratic state is. They particularly forget that parliament is one of the fundamental institutions functioning on the basis of the constitution and within the limits of the constitution, like other constitutional bodies. Laws in the system of hierarchical statutory law, on top of which is the constitution, remain the fundamental legal act nor requiring a substantive authorization initiating a legal regulation in a particular sphere of social relations; the principle of the legislator's discretion still remains a manifestation of the primacy of a law in the democratic order. However, the legislator's discretion and the primacy of a law cannot infringe the principle of the supremacy of the constitution. It determines the competences of a parliament (as well as other constitutional bodies), and also determines the procedure of law making and determines the substantive limits of their passing (especially in the sphere of individual rights).

Thus, it is possible to claim that parliament derives its legislative power directly from the constitution. Article 4 para 2 of the Constitution of the Republic of Poland of 1997 providing that "the people exercises power through its representatives or directly" is not in opposition to so understood principle of the supremacy of the constitution. The people, who are the source of the sovereign power (Article 4 para 1 of the Constitution of the RP) exercise power through their representatives, i.e. the parliament exercises the power vested therein by the sovereign within the boundaries of the constitution, which is the supreme law of the Republic of Poland (Article 8 para 1), operating on the basis and within the limits of law (Article 7).

10 K. Wotyczek, *Sądownictwo konstytucyjne w Polsce. Wybrane zagadnienia*, Warszawa 2013, p. 268; including also the literature referring to the issue in point.

In the system of statutory law, where the constitution is on top of the hierarchical legal order, it is this supreme act of law that is an expression of the universal highest will of the sovereign (the people), which nowadays is a civil society. Relations between the sovereign and the constitution, which, in the aforesaid meaning, is a manifestation of its will, affect considerably the doctrinal structure of the constitution as the supreme legal act in the law system in the meaning defined above.

Recognition that the constitution in the "constitutional democracy" is the "supreme law", the highest normative act being a manifestation of the universal supreme will of the sovereign, also requires recognizing that the sovereign's direct participation in the procedure of adopting the constitution through universal voting (referendum) is indispensable. The universal voting over the draft prepared and adopted beforehand by the constitutional assembly by qualified majority should be a final and constitutive act. This means that without the referendum, which is a "*conditio sine qua non*" and without which the constitution could not enter into force, the legitimation of the constitution which it receives from the sovereign would be uncompleted. For it would be impossible to recognize that the constitution binds the legislator, limits him and creates a possibility of repeal laws if there were not in this matter a position of the sovereign himself accepting the draft of the constitution submitted in the referendum. It is worth mentioning that procedural requirements of the referendum approving the draft of the constitution should be in accordance with the requirements resulting from the principle of majority, namely the turnout exceeding the half of the entitled to vote, and the position approving the draft of the constitution supported by absolute majority of the citizens participating in the voting. Acceptance of such requirements makes the constitutional doctrine, on which the constitutional democracy is based, coherent: so understood full democratic legitimation of the constitution is justified by the view that constitutional bodies of public power, including the parliament and the constitutional court derive their power from the constitution, which is relatively durable and universal direct manifestation of the sovereign's will.

It also important to add that so understood democratic legitimation of the constitution justifies restrictions on extraconstitutional

manifestations of the sovereign's will, for example in the form of an attempt to repeal the constitution through referendum, even at overwhelming majority voting for such a repeal, or in the form of other direct manifestation of the sovereign's will incompatible with the constitution. The direct manifestation of the sovereign's universal will in the constitutional referendum not only makes the constitutional doctrine coherent but also gives it a certain "moral legitimacy".[11]

In the context of the above considerations it is important to state that the Constitution of the Republic of Poland of 1997 should not be dated 2 April, when it was adopted by the National Assembly but 25 May of that year, for this was the date of its adoption by the people (the sovereign) in a constitutional referendum crowning the constitutional procedure. The referendum was of creative, not declaratory nature. Without an effective referendum in accordance with democratic requirements the Constitution of 1997 could not enter into force.

The specific legitimation of the constitution in the light of the constitutional democracy, in turn guaranteeing the constitutional democracy, allows constitutional authorities, including constitutional courts, not only to solve the problem of the justification of the power of the constitutional court in confrontation with the classical idea of representation, which was already mentioned, but also to resolve the dilemma concerning the place of the constitutional court in classical schemes of division of power in a democratic state.

Hans Kelsen, closely analyzing the positions of the constitutional court in a democratic state, came to the conclusion that although its activity refers to repealing laws, so it is in a way a negative legislator, the essence of its activity consists in the applying of the constitution; like general activity of courts, it consists in the applying of law. Thus, the constitutional court is a judicial body. The fundamental question, however, is the position of this authority in relation to the parliament and the government. As to the reconciliation of this institution with the

11 In the discussed question of the full legitimation of the constitution in the constitutional democracy I share the views of A. Jamroz; see: A. Jamróz, *Demokracja konstytucyjna – kilka konsekwencji dla system prawa,* (in:) Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 i Konstytucja Rzeczypospolitej Polskiej z 1997, Białystok 2001, p. 21-23.

principle of power division, it, according to Kelsen, does not infringe the principle of power division. In this principle the point is a division of power among different bodies in order to prevent its concentration in one body and to guarantee the harmony of actions of various bodies with law (the constitution). "*If so, the institution of constitutional judicial system is not only not against the principle of power division but on the contrary, it constitutes its confirmation*", concluded Kelsen.[12]

In the modern Polish legal literature K. Wojtyczek, writing about the Constitutional Tribunal in the system of power division, aptly justifies the compliance of the constitutional status with the classical principle of power division but emphasizes the independence of this institution and the discretion of the Tribunal members. He also underscores that the point is that the Tribunal is one of elements of an extensive and dynamic constitutional system, which should be well balanced. Therefore the Tribunal should not operate in isolation, and, simultaneously, should adjudicate under the public opinion's control and under the professional control of lawyers and political elites.[13] This position could by accepted with an assumption that the public opinion's control should be understood as professional analyses and legal assessments formulated in the way established in the legal and academic environment, and as to the control of political elites, that such control will be exercised with respect of law, independence of the Tribunal and without pressure on the Tribunal's decisions. Experience of recent years prove that our reservations referring to the understanding of this control are not groundless. In particular this refers to political pressure on the Tribunal and its adjudication, as well as (what is of lesser importance) the criticism of the Tribunal's rulings by lawyers without a necessary substantive knowledge or politically inspired in a summary way.

Introduction of constitutional judicial system as a permanent institution of the democratic system with the principle of the supremacy of constitution as the supreme act of law and the manifestation of the supreme will of the sovereign, from which the authority of the supreme

12 H. Kelsen, *Istota i rozwój…, op. cit.,* p. 40-41.
13 K. Wojtyczek, *Sądownictwo konstytucyjne…, op. cit.,* p. 276-281.

bodies of public power, not only changed the nature of the democratic system but, as it is aptly observed, completed the construction of the state based on the rule of law.[14]

Also other fundamental consequences of the functioning of a constitutional court under the supremacy of the constitution are pointed at. It is underscored, namely, that in such circumstances the stress on respecting the principles of democracy alone onto the state based on law, which makes a stage perfecting and complementing the democratic state.[15] M. Granat, discussing the debate thereon which took place in France, claims that this actually means that for the authors spreading such theses the state based on the rule of law is of greater importance than the democratic system itself.[16]

These observations have to be classified. It may be added that not only the constitutional position of constitutional courts in the forming constitutional democracy in democratic states of continental Europe, but also adjudication of these courts fundamentally contributed to the fact that democratic systems have evolved towards democratic states based on the rule of law.

2. Models of constitutional court

The way of constitution protection by a specialized constitutional body presented above, usually called a constitutional tribunal, excluded from the structure of the judicial system, independent and appointed with the participation of political bodies, is sometimes called a Kelsen model. Its fundamental characteristic is that it assumes separation of the control exercised by the tribunal from the judiciary in individual cases, because "the question of the compliance of the norms is here an independent case solved with a separate judgment by a specialized body

14 J. Rivero, *Fin d'un absolutisme*, „Pouvoirs" No 13, « Le Conseil Constitutionnel » of 1986.
15 L. Favoreu, *De la démocratie ã l'Etat de droit*, « Le Dèbat » No 64 of 1991.
16 See: M. Granat, *Od klasycznego przedstawicielstwa…, op. cit.,* p. 162-153. There one can find the debate in French legal literature. See also: J. Zakrzewska, *Spór o konstytucję*, Warszawa 1993, p. 91.

in a particular procedure, and the judgment results in effects completely different from judgments issued by courts in individual cases.[17]

Z. Czeszejko-Sochacki calls this way of constitution protection an Austrian model. Following the views accepted in the science of law, he reminds (which also others mention) that the original form of the Austrian Constitutional Tribunal resulting from the Constitution of 1 October 1920 (The Federal Constitutional Law) was amended in 1929 and after World War II came further amendments consisting in the extension of competences in election control (1958), examination the conformity of international agreements with home law (1964) as well as in agreements between the federal authorities and federal Lands (1974). Underscoring the importance of H. Kelsen for determination of doctrinal foundations of the constitutional tribunal, as well as development and "introduction" into the constitution the chapter "Guarantees of the constitution and administration", the author reminds that the prototype of the Austrian constitutional tribunal was the the Court of the Reich introduced into the fundamental law of the state of 21 December 1867, and "the doctrinal justification for the origin on the European continent a particular form of judicial control of constitutionality was provided by the Vienna school of legal positivism" led by Georg Jellinek, Hans Kelsen, Adolf Merkel and Karl Renners.[18]

As far as in the interwar period the idea of comprehensive constitution protection by a separate constitutional tribunal appointed for this purpose was not accepted, since any judicial mechanisms of such protection were rejected, after World War II it was just this model of comprehensive constitutional protection by a specialized body began to spread, referring to the Austrian Kelsenian model of constitution protection. In Austria the Constitutional Tribunal was reactivated as early as 1946. Such a body is provided in the constitutions of Italy (1947), the Federal Republic of Germany (1949), later on Cyprus (1960), Turkey (1961) and Yugoslavia (1963). Further going restrictions of the parliament with the strong authority of the

17 K. Wojtyczek, *Sądownictwo konstytucyjne…, op. cit.,* p. 25.

18 Z. Czeszejko-Sochacki, *Sąd konstytucyjny w systemie ustrojowym Austrii*, (in:) Sądy konstytucyjne w Europie, vol. I, Austria, Francja, Niemcy, Włochy, (ed. J. Trzciński), Warszawa 1996, p. 12-13.

Constitutional Council, which could conduct an examination of the conformity of laws with the constitution before their promulgation was provided by the Constitution of the French Republic of 4 October 1958.[19] The institution of constitutional tribunal was subsequently introduced by the constitutions of Greece (1975), Spain (1978) as well as Portugal (1982) and Belgium (1983), even though in the two latter states the judicial bodies of constitution protection differed in the scope of their competences from the already formed model of the West European constitutional tribunal.

"It is well-grounded, therefore, to state that in the past forty years the existence of judicial forms of constitution protection has become universal, although in a very diversified institutional shape" wrote L. Garlicki in the mid-1980s.[20] A different situation, resulting from the lack of written constitution of rigid nature, has formed in the United Kingdom as well as in Scandinavian countries (we'll return to this issue).

Thus, in modern solutions referring to constitution protection in Western Europe dominates a model of protection exercised through a constitutional tribunal, based on the original Austrian model (according to some, a Kelsenian model), definitely different from the Anglo-Saxon model, although it is possible to note certain convergences between them. L. Garlicki writes even about "a convergence tendency".[21]

Constitutional Tribunals as separate, independent state authorities are characterized by its status of a constitutional body, an independent position confirmed in particular the independence of its legal status, the competences they enjoy on the principle of exclusiveness and concentration connected with the verification of "constitutional legality" of other state authorities' operations; their judgments are binding and ultimate; they enjoy a considerable degree of intra-organizational autonomy.[22]

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19 The Constitution adopted in the referendum of 28 October 1958 and announced in the *Journal Officiel de la Republique Française,* no 234 of 05 Oct 1958, is dated 4 October or the day of its promulgation by the President of the Republic.

20 L. Garlicki, *Sądownictwo konstytucyjne w Europie Zachodniej*, Warszawa 1987, p. 47.

21 L. Garlicki, *Sądownictwo konstytucyjne…, op. cit.,* p. 53.

22 Ibidem, p. 55-57

K. Wojtyczek puts this question in quite a similar way. Noting that in practice modern separate constitutional courts (constitutional tribunals) based on the Kelsenian model (Austrian, European, continental) differ from one another, the type of ideal tribunal, based on the Kelsenian construction, is characterized by the fact that the control it exercises is: concentrated, limited, abstract, sequent or preventive, absolute, of one instance; it is exercised in a separate specific procedure, and the solution of a constitutional question is separate from a particular case (an actual state of affairs in reference to which the constitutional question appeared). Let's explain that limitations of control consist in the fact that the competence of a constitutional court refers to particular legal acts (regulations) and usually it is about particular entities pointing at these acts. The control being absolute means that the judgment of unconstitutionality results in the loss of legal force by a particular act (regulation) of law. Furthermore, the abstract nature of control, consists in the fact that it is usually launched by particular political authorities and its subject-matter is an act of law (legal regulation) "*in abstracto*", in isolation from a particular case (from a particularly applied norm). However, as early as 1929 in Austria concrete control was introduced, i.e. control of a regulation (norm) connected with a particular case (applied in a particular case). Modern structures of tribunals also accept concrete control.[23]

A model of the European constitutional tribunal is also outlined by Z. Czeszejko-Sochacki in his "Sądownictwo konstytucyjne w Polsce na tle porównawczym" ("Constitutional Judiciary in Poland against a Comparative Background"). Referring to positions of outstanding experts in this matter in Western-European literature, Z. Czeszejko-Sochacki states that both a subjective aspect (a separate constitutional court) and an objective aspect (its substantive judicial functions) are important for the definition of the constitutional tribunal as a constitutional court. Independence, important for the constitutional tribunal as a constitutional court, manifests itself in a functional

23 K. Wojtyczek, *Sądownictwo konstytucyjne…, op. cit.,* p. 24-27.

approach (separateness of the subject of activity) as well as in an organizational approach (independence of organizational structures).[24]

It seems that determining the essence of European constitutional tribunals it is foremost important to point at the specificity of the control exercised by these tribunals; the specificity making this type of control especially from the American model of examining constitutionality. The occurrence of concrete control in the case of tribunals in certain countries is less important, which does not mean of little significance from the point of view of the legal order and society. Adopting this approach, not denying the above presented origins of the constitutional tribunal (in Austria) and H. Kelsen's contribution, it is important to underscore that this institutionalized type of control developed in continental Europe, and the hierarchical model of statutory law based on the primacy of constitution as the supreme normative act was of great importance for its origins.

Therefore, it seems the most accurate to adopt for this type of constitutional control the term "European" or "continental" model of constitutional control, or the model adopted "in continental Europe" in contrast to not only the American model but also the Anglo-Saxon model (the British model). From this point of view the proposal of renowned French constitutionalists seems the most accurate. They maintain that the model of constitutional control in continental Europe (they use the term "the European model") is characterized by:

- concentrated control exercised by the court situated beyond the structure of common judiciary, possessing monopoly on assessing the constitutionality of laws;
- abstract control of norms (legal regulations), even though not excluding concrete control;
- control initiated by particular public or political authorities as an "*a priori*" control (before the promulgation of an act of law) or an "*a posteriori*" control (after an act of law is announced and enters into force);

24 Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Wyd. Trybunału Konstytucyjnego, Warszawa 2003, p. 83-88.

– absolute nature of the judgment of the constitutional court; the judgment revokes a legal act (regulation), leads it out of the legal order, is of objective and universal nature ("*erga omnes*").[25]

E. Zwierzchowski presents a view close to the aforementioned approach referring to the characteristics of the "European" model of constitutional control in the form of a separate constitutional institution of constitutional tribunals, comparing the European model ("constitutional review") with the American one and, still broader, with the Anglo-Saxon model of constitutionality control ("judicial review"). Observing the constitutional changes in the post-war Europe, in particular in the states of Middle and Eastern Europe, which at the beginning of the 1990s entered the path of democracy, he comes to the conclusion that on the European ground are more examples of passing from the Anglo-Saxon "judicial review" (control of constitutionality by common judiciary) to the European "constitutional review" (constitutional tribunals). The thing which because of the origins and dissemination may be called a European model of constitutionality examination "is in this geographical area easier assimilable than the American model, indeed difficult to implement and apply", concludes the Author.[26] It is worth adding that the aforementioned lack of "assimilability" results from the difference between the legal systems (continental-European and Anglo-Saxon, including American), which manifests itself in particular in different sources of law, separation of making and applying law in the continental European model as well as the connected therewith role of courts in the Anglo-Saxon model, exceeding the formal application of laws.

In the American model of constitutional control, a constitutional dispute appears in the context of the case before the court and consists in examining the constitutionality of the norm being a legal foundation for resolving the case. Thus, there is no separate body examining the question of constitutionality (resolving a constitutional dispute; the

25 L. Favoreau (*coordonnateur*), P. Gaïa, R. Ghevontian, J.-L. Mestre, D. Pfersmann, A. Roux, G. Scoffoni, *Droit constitutionnel*, Paris 1999, p. 228-230.

26 E. Zwierzchowski, *Europejskie modele scentralizowanej kontroli konstytucyjności aktów prawnych*, (in:) Prawo i kontrola jego zgodności z Konstytucją, Warszawa 1997, p. 75-76.

initiative of launching proceedings referring to the constitutionality of a norm appertains exclusively to the litigants in the case before the court). Thus, it is an incidental control, integrally connected with the case before the court. Consequently, the judicial decision on the question of constitutionality involves the statement of the unconstitutionality of the norm which were to be applied and (as a final judgement) results only in procedural effects for the litigants in the case ("*inter partes*"); Its consequence, thus, is not revoking a legal regulation of much richer legal substance than the norm which was constructed on the grounds of this regulation.[27] Thus, examining the constitutionality of normative acts (legal regulations) is deconcentrated, concrete (refers to a particular case before the court) and relative ("*inter partes*" and not "*erga omnes*" effects).[28]

The aforesaid approach to the American model of constitutionality control is close to the synthesis of the American model of judicial protection of the constitution presented earlier by L.Garlicki in the work quoted before. This model is namely of universal nature in its objective sense, meaning that it is not confined to examining the accordance of a law with the constitution but refers to all normative acts and official actions on all levels of power. Any infringement of the binding hierarchy of legal regulations or acting without a proper legal basis is regarded as the violation of the constitution. The control is exercised on the basis of uniform procedure and the examination of constitutionality is embedded in the whole of control actions of the judiciary. The control is also of a concrete nature exercised on the occasion of hearing a particular case by courts as well as the accusation of unconstitutionality when it is raised by one of the litigants. Thus, the problem of constitutionality is of a subsidiary nature as one of legal problems resolved in the course of judicial proceedings. Finally, the control of constitutionality is relative since judicial resolutions are binding between the litigants only ("*inter partes*"). Recognizing unconstitutionality of a legal norm courts treat such a norm as non-existent and omit it releasing judgments in the case considered. On the

27 Compare: E. Zwierzchowski, *Europejskie modele…, op. cit., p.* 74-75.
28 E. Zwierzchowski, *Sądownictwo konstytucyjne*, Białystok 1994, p. 41-42.

other hand, this does not cause revocation of the norm with the "*erga omnes*" effect.[29]

In legal literature it is most frequently underscored that the Marbury vs. Madison judgment of the Supreme Court of the United States in 1803 was of fundamental importance for the origins of the system of judicial control of constitutionality ("judicial review") in that country. However, the beginnings of this institution were earlier. It was inspired by certain judgments of English courts in the 17th century. Later, after the independence, the judicial control of the constitutionality of state laws was introduced by the state of New Jersey, and then Virginia, Rhode Island and North Carolina. Moreover, the Supreme Court at its very beginning issued some judgments which questioned the constitutionality of some state laws. The problem of the judicial control of constitutionality of laws by courts was noticed by the authors of the Constitution of the United States. "*Taking the above into account, the concept of "*judicial review*" was basically nothing new, created by the Supreme Court in 1803, but in a way the extension of previous solutions resulting from "*common law*"*, as states P. Mikuli.[30]

In the Marbury vs. Madison case the Supreme Court found the law on which the plaintiff based his claim, infringes the federal Constitution, foremost the constitutional principle determining the position of the federal Supreme Court. The Supreme Court ruled that the unconstitutional federal law has no legal effects and therefore cannot be applied in the case in point.

In its subsequent judgments the Supreme Court confirmed its extensive supervisory rights to examine state acts of law issued on the basis of the federal Constitution, federal laws and international agreements. In this way, especially in the case Cohens vs. Virginia (1821), the Supreme Court stated clearly that it had the right to examine "federal cases" resolved by state courts. Thus, the Supreme Court ruled that the federal Constitution takes precedence over the then prevailing "concept of sovereignty of the peoples of particular states", as P. Mikuli

29 L. Garlicki, *Sądownictwo konstytucyjne…, op. cit.,* p. 23-24.
30 P. Mikuli, *Zdekoncentrowana sądowa kontrola…, op. cit.,* p. 20-21.

asserts.[31] L. Garlicki, concisely discussing the importance of the decision in the Marbury vs. Madison case, treated as "the fundament of the modern idea of constitutionality control" maintains that the essence of that judgment was a recognition that the Constitution is the supreme law of the country, that all other acts have to be in harmony therewith, "and from the essence of law application results the court's obligation to refuse to apply a norm of a lower rank if it is against the norm of a higher rank, thus to refuse to apply a norm which is against the constitution".[32]

It seems that L. Garlicki aptly claims that although the idea of protection of the constitution in a separate institutional form has been formed on the grounds of the continental, European, legal system, the idea of protection of the constitution as the supreme act of law, but the protection of the constitution in the process of law application, was formed earlier on the American soil.

Thoroughly analyzing the constitutional position of the Supreme Court of the United States, within which the constitutionality control exercised thereby was formed, L. Garlicki found that what was of importance for shaping the function of constitutionality control was the fact that the judicial function of the Supreme Court became practically also a legislative function. The judicial function was exercised on the grounds of statute law and common law. In that system of law sources common law (based on precedents) played a particular role. However, in judicial practice the creative function of the Supreme Court on the grounds of common law and its interpretative function in relation to statute law become similar to and complement each other.

A real legal norm is a norm created by judges considering a particular case. Common law is a basis then but on the grounds of legislature. In many aspects of community life occurs a statutory normative regulation but "a law, in order to become an element of the legal system, must be integrated into common law, considered in its light." Statutory law refers to notions, expressions, institutions and doctrines formulated by precedent law (common law); common law determines the rules of law

31 P. Mikuli, *Zdekoncentrowana sądowa kontrola…, op. cit.,* p. 24
32 L. Garlicki, *Sądownictwo konstytucyjne…, op. cit.,* p. 22

interpretations, fills in gaps in statutory law, but it is the legislature that determines the way of legal order modification and affects the ideology of judicial law application. Common law is to statutory law what "specific law" is to "general law". American courts, especially the federal Supreme Court "retain considerable freedom of action" both in relation to statutory law as well as common law. The real wording of the act of law is determined by courts which affects the process of Constitution interpretation by the Supreme Court in the legal system, in which there is no objective division of the matter between statutory law and common law, which is a motivation factor for legislative actions. The Supreme Court, enjoying an extensive discretion in the interpretation of statutory law, employs common law establishing the normative substance of laws and other legal regulations.[33]

The observations presented above on the American system of law and the particular role played by courts therein allow us to understand the American model of constitution protection better.

The American model of constitution protection has no counterpart in the United Kingdom despite the similarity of the legal systems because of the role of common law as a source of law and particular role of courts in the Anglo-Saxon tradition from the point of view of their legislative role, and foremost their particular prestige. The obstacle was the doctrine of sovereignty of Parliament, which had formed since the early 18th century, commonly accepted already in the 19th century, which excludes a possibility of judicial control over legislature, and excludes the right of courts to refuse to apply a law as unconstitutional. All in all, the idea of unconstitutionality could refer to a constitution in its formal sense only, which the legislator should respect and the executive branch of power is absolutely bound thereby. Anyway, the lack of a constitution in the form of a single act of law of the force superior to laws (like on the European continent) results in the situation where one should talk about constitutional law, i.e. substantially distinct part of law rather than a constitution. In

33 L. Garlicki, *Sąd Najwyższy Stanów Zjednoczonych Ameryki. Konstytucja, polityka, prawa obywatelskie*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1982, p. 90-92; *passim*. Also literature on the issue to be found there.

this situation, the problem of constitutionality of laws in the British legal system in the sense adopted on the European continent becomes aimless. Moreover, as particularly L. Garlicki underscores, courts in the United Kingdom do not enjoy monopoly on constitutional law; the Parliament has a dominating position; the Parliament whose majority is strongly connected with the executive and which can correct judicial decisions through appropriate legislative changes, and also exclude particular matters from the jurisdiction of courts so that the judicial interpretation of law not contradict the legislator's will.[34]

The American model of constitution protection it its pure form has not catch on in any other continental European states but certainly affected the evolution of the doctrine and legal solutions in Europe. This influence, especially the Anglo-Saxon tradition of constitutional position of courts, are especially present in Scandinavian countries. In Norway the Supreme Court issued its first judgment on unconstitutionality of a law as early as 1841. Finally, the competence of the Supreme Court to examine the constitutionality of laws was confirmed in 1890, when the Supreme Court refused to apply an unconstitutional law referring to the obligation of obtaining a license limiting the sale of wine.[35]

In Scandinavian countries (except Finland) the judicial examination of constitutionality of laws formed *via facto* within judicial decisions and is based on no (except Sweden since 1979) constitutional grounds.

Also Greece has distant traditions of judicial examination of constitutionality of laws. In 1872 the Cassation Court first did this in a ruling, and in the late 19th century the right of courts to refuse to apply unconstitutional laws, and in 1927, following the Constitution of Crete of 1907, the Greek Constitution was complemented with a regulation entitling courts to not applying unconstitutional laws. Such competences were also extended over the Council of State (superior administrative court) in 1931 as a result of this body's judgment. Principles of judicial examination of constitutionality were introduced,

34 L. Garlicki, *Sądownictwo konstytucyjne…, op. cit.,* p. 27-28. Also the literature on the problem to be found there.

35 For more: P. Mikuli, *Zdekoncentrowana sądowa kontrola…, op. cit.,* p. 27-30.

after several years of political turmoil in this country, the Constitution of Greece of 1975.

In turn, in Portugal it was relatively early, in the constitution of 1911, that courts were granted competences to examine laws, which was later confirmed in the constitution of 1933. After the first period of democratization of the system in the 1970s, in 1982, as the result of amending the Constitution, the Constitutional Tribunal was created. The Tribunal exercises control both abstract and preventive. However, a little later (in 1989) the control powers of common courts were extended. In this way, beside the institutionalized constitutional court (the Constitutional Tribunal) reflecting the solutions typical of continental Europe, constitutional control, in accordance with the Portuguese tradition, is also exercised by courts.[36]

These observations demonstrate that in modern Europe the idea of protection of the constitution as the supreme normative act is today universally accepted and well-grounded. Its genesis is often quite remote, foremost in reference to the tradition of judicial control of constitutionality. In modern Europe operate now two models of protection of the constitution.

36 For more: A. Łabno-Jabłońska, *Iberyjska droga do demokracji. Studium prawnokonstytucyjne*, Warszawa 1996.

Chapter II

THE CONSTITUTIONAL POSITION OF THE CONSTITUTIONAL TRIBUNAL

1. The origins and evolution of the Constitutional Tribunal in Poland

As mentioned in the previous chapter, the first constitutional court was founded in Australia in 1920 and it was Hans Kelsen's contribution. He formed his own theory of legal norms, whose fundamental assumption was the hierarchy of these norms. A necessary element of this theory, an element cementing its whole structure was to be a specialized state body which was expected to protect the constitution as a set of legal norms of the supreme force. Kelsen's innovatory theory did was realized in 1920 but was still treated as a manifestation of modern (even avant-garde) constitutionalism. Therefore, despite being well-known in Europe, it did not meet a universal acceptance.

Kelsen's views and idea reached also Poland, which in the late 1918 regained independence after 123 years of existence under the partition of neighboring states. As early as the original period of political changes, or rather reconstruction of statehood, the draft of a new constitution was prepared. As it was aptly assessed, the constitution would contribute to enforcing the structures of the state and will be the foundation for stabilization of the political system of the state and its development. The Constitution was adopted relatively soon, in 1921 (the so-called March Constitution).[1] In the process of preparing the Constitution various constitutional concepts clashed but the text

1 The Act of 17 March 1921, The Constitution of the Republic of Poland (Dz.U. No 44, item. 267; No 79, item 550; No 101, item 935).

eventually adopted was the most broadly inspired by the constitutional concept of the Third French Republic determining the parliamentary system of government with the dominating position of the Sejm. This model ultimately resulted in the fact that Hans Kelsen's theory and its actual effect in the form of a separate independent constitutional court, failed to gain an approval in the Legislative Sejm, which adopted the Polish constitution. The French concept of the system of state authorities did not provide for any extra-parliamentary control of the constitutionality of laws.

Article 38 of the March Constitution provided that: "No act of law can contradict this Constitution or infringe it". However, it lacked determining mechanisms guaranteeing obeying the superiority of the Constitution. Simultaneously almost all recognized representatives of the science of Polish constitutional law noticed a shortage of procedures of the protection of the Constitution. However, they disputed what model of this protection should be created: should it be the Anglo-Saxon model, where the control of constitutionality is incidental and concrete and is exercised by courts (this model was rejected relatively early: 1917-18), or should it be the Austrian model with a separate Constitutional Tribunal (which also failed to come true as the result of the works of the Constitutional Commission of the Legislative Sejm).[2]

The thorough amendment of the March Constitution performed in 1926 was aimed at weakening the extremely parliamentary system of government through considerable strengthening of President's competences, but also failed to provide for mechanism of the control of constitutionality of laws by an independent authority.[3] However, some specific projects of creating a Constitutional Tribunal appeared, especially on the part of political circles of the national democracy; they may be also found in texts of outstanding representatives of the

2 It is worth mentioning here that the so called judicial control of constitutionality of law was not envisaged by the earlier, first written constitution on the European continent, i.e. the Polish Government Law of 3 may 1791 (a.k.a. the Constitution of 3 May) either.

3 The Act of 2 August 1926 amending and complementing the Constitution of the Republic of 17 March 1921 (Dz.U. No 78, item 442).

doctrine. Champions of the idea of extra-parliamentary protection of the constitution made a relatively numerous group in the 1920s.[4]

A pioneer of the idea of the Constitutional Tribunal in Poland was professor W.L. Jaworski, who as early as 1921 put forward such a proposal and, in 1928, prepared his own draft of constitution determining the competences of the Tribunal to control the conformity of laws with the Constitution and other normative acts with the Constitution and laws.[5]

The next Polish constitution of 1935 (the so-called April Constitution) also failed to adopt an idea of a separate Constitutional Tribunal,[6] and the post-war period, for various reasons, mainly doctrinal and political, was all the more not conducive thereto.[7] All post-war acts of law of a constitutional rank, including the Constitution of 1952 (the so-called July Constitution)[8] created a unitary system of power, whose fundamental substratum was the principle of the superior authority of the Parliament. This principle nullified the need for extra-parliamentary institutions and forms of control of the constitutionality of laws. This constitutional idea, modeled on Soviet solutions (the Constitution of the USSR of 1936) and assigning the constitution foremost an ideological, doctrinal, and not normative, meaning led to the situation that in nearly all the so-called socialist states, like in the USSR itself, the control of the constitutionality of law was regarded unnecessary.[9] The revision of the Constitution of the PPR performed in 1976 granted the Council

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4 M. Starzewski in his *Środki zabezpieczenia prawnego konstytucyjności ustaw* (Warszawa 2009, p. 247, reprint of the original of 1928) names here the following professors: Ehrlich, Głąbiński, Komarnicki, Kulczycki, Makowski and Peretiatkowicz. Also H.Zahorski should be added. M.Starzewski himself was a supporter of another concept: he believed that examining the constitutionality of laws is an obligation of everyone who is to exercise the law, i.e. in particular courts, but also other authorities and society itself. See: ibidem, p. 233-242, *passim*.

5 A. Gwiżdż, *O Trybunale Konstytucyjnym w Drugiej Rzeczypospolitej,* (in:) Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej, Studia i Materiały, t. IV, (ed. J. Trzciński, A. Jankiewicz), Warszawa 1996, p. 69-90.

6 The Constitutional Law of 23 April 1935 (Dz.U. No 30, item 227).

7 W. Sokolewicz, *Trybunał Konstytucyjny – geneza, organizacja, funkcjonowanie,* Zeszyty Naukowe WSHiP, Seria Prawo, 2001, No 5, p. 58-59.

8 The Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952 (Dz.U. No 33, item 232).

9 The only exception was the Yugoslavian Constitutional Tribunal established in 1964, whereas the Czechoslovak Tribunal existed theoretically from 1968, because appropriate statutory regulations entered into force in 1991. It is worth underscoring that both those countries were federations and this fact justified the foundation of the Constitutional Tribunal.

of State the competence to "guard the conformity of law with the Constitution".[10] The rights of the Council of State in this matter were not, however, specified, and therefore this competence failed to be implemented in practice.

A breakthrough for the institutional protection of the constitution was the amendment to the Constitution of the PPR of 1982, by virtue of which the Constitutional Tribunal was incorporated into the supreme state authorities.[11] This was the result of, as cogently asserts E.Zwierzchowski, a deep crisis of the early 1980s as well as the authorities seeking to gain public trust. One of the measures of influence in this matter was to be bringing to life new institutions, i.e. among other things, constitutional judiciary implemented by the Constitutional Tribunal.[12]

By virtue of the provisions of the amended Constitution (Article 33a) the Constitutional Tribunal was granted a competence to decide on conformity of laws and other normative acts issued by supreme and central state authorities with the Constitution (para 1). Judges of the Tribunal were elected by the Sejm from among people of outstanding knowledge of law (para 4); their status was defined as independence and subjection to the Constitution alone (para 5). Launching the activity of the Constitutional Tribunal, however, turned out impossible because the Sejm had failed to adopt an appropriate law which would determine jurisdiction, organization and procedure before the Tribunal (para 6). Despite the fact that the first draft of this law had been developed even a little earlier than the amendment of the Constitution, it was not until 1985 that it was finally adopted, and 1 January 1986 that it entered into force.[13] The Polish Constitutional Tribunal issued its first judgment on 28 May 1986.

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10 Article 30 para 1 point 3 of the Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952 (consolidated text: Dz.U. of 1976, No 7, item 36).

11 The Act of 26 March 1982 on the amendment of the Constitution of the Polish People's Republic (Dz.U. No 11, item 83).

12 See: E.Zwierzchowski, *Geneza i proces kształtowania skargi konstytucyjnej w Polsce,* (in:) Prawo, administracja, obywatele, (ed. J. Mieszkowski, B. Kudrycka), Białystok 1997, p. 406. The reformatory amendments to the Constitution of the PPR in this matter referred to, for example, reactivation of administrative judiciary (1980) and the State Tribunal (1982).

13 The Act of 29 April 1985 on the Constitutional Tribunal (Dz.U. No 22 item 98).

In this judgment the Constitutional Tribunal recognized that despite the fact that the principle of retroactivity was not expressed directly in the Constitution of the PPR, it is a fundament of the legal order in the state. In the view of the Tribunal, the principle is based on such values as legal security and certainty of legal transactions as well as respect for acquired rights; hence one should derogate from it exceptionally, for very important reasons. Moreover, pointing at the formal criterion of derogation, the Tribunal stated that it should always result from the wording of the law and not from the sub-statutory act.[14]

The fundamental function of the Constitutional Tribunal as an authority for protecting the Constitution was, however, considerably limited. As the consequence of the constitutional definition of the Sejm as the supreme body of state authority, every judgment on inconformity to the Constitution had to be considered by the Sejm.[15] Thus, it was not final, and in contrast to judgments asserting conformity of laws with the Constitution as well as those judgments which asserted inconformity with the Constitution or laws of "other normative acts". These, according to the wording of constitutional provisions, were "binding".

In accordance with the provisions of Article 1 of the Act of 1985, the Constitutional Tribunal decided on conformity to the Constitution of legislative acts, i.e. laws and decrees approved by the Sejm, as well as on conformity with the Constitution or legislative acts of other normative acts issued by the Council of State, supreme and central authorities of the state administration as well as other supreme and central state authorities. In addition, the Constitutional Tribunal was granted a competence to decide on cases of legal questions.[16]

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14 The Judgment of the Constitutional Tribunal of 28 may 1986, sign. U 1/86 (OTK 1986, item 2, p. 46-47).

15 Article 7 para 4 of the Act of 1985 provided that: "Resolutions of the Sejm on cases of dismissing a judgment of the Tribunal are adopted by majority of at least 2/3 votes in the presence of at least a half of the general number of deputies".

16 In accordance with Article 10 para 1 of the Act of 1985, legal questions could be submitted by adjudicating bodies in administrative, judicial, arbitration proceedings, in cases of offences and fiscal crimes and offences, if the resolution of the case in such proceedings depended on the answer. Legal questions could refer to issues of conformity of a legislative act with the Constitution or another normative act with the Constitution or a legislative act.

During the initial period of the Constitutional Tribunal, the proceedings before this body was regulated by the Act on the Constitutional Tribunal and, what is characteristic of then political circumstances, the Resolution of the Sejm of PPR of 31 July 1985 on the specific procedures before the Constitutional Tribunal.[17] Despite the fact that a considerable part of judgments are not ultimate (the decisions asserting unconstitutionality of the provisions of laws were then subject to voting in the Sejm), the Tribunal gained authority through its adjudicating activity. In retrospect it is also possible to state that it managed to gain a relatively independent position in the then structure of authority bodies, where yet the Sejm dominated, in which political directives established by the authorities of the PUWP were formally decisive.[18] From the very beginning the adjudication of the Tribunal gained major importance and contributed to forming the legal culture whose fundamental directive is to protect the supremacy of the constitution.

Another stage of strengthening the constitutional position of the Tribunal began in 1989, when, along with the process of the fundamental change of the political system, the competences of the Constitutional Tribunal were extended. By virtue of Article 1 point 10 of the so-called April Amendment, the Tribunal was endowed with the competence of establishing the universally binding interpretation of laws.[19] However, a key act for the Tribunal, as it soon turned out, was the so-called December Amendment, adopted a few months later, which considerably strengthened its powers. It was the time when the principles of political pluralism was restituted in the Polish system of supreme constitutional principles, which was associated with endowing

17 Dz.U. No 39, item 184. It is worth underscoring that it was a peculiar resolution of "external" nature, for it normed the procedure before another constitutional body. A proper legal act determining such a matter is a law (the source of universal law).

18 In practice the leaders of PUWP rarely forwarded directives to the Sejm; the prevailing practice was a (political) orientation of the Council of Ministers and particular members of the government, i.e. Prime Minister, vice-premiers, important ministers were usually members of the top management of PUWP, including the Political Office of PUWP.

19 The Act of 7 April 1989 on the Amendment of the Constitution of the Polish People's Republic (Dz.U. No 19, item 101).

the Tribunal with the right to decide "on inconformity with the Constitution of aims or activities of political parties".[20]

The fundamental purpose of the December Amendment was to change the principles of the political system of the state. The constitutional provisions were extended with such fundamental principles as: the principle of the sovereignty of the people, the principle of democratic rule of law realizing the principles of social justice, the principle of political pluralism, and the principle of freedom of economic activity as well as protection of the right to ownership. The December Amendment entering into force (1 January 1990), in connection with its determination of new supreme principles of the system, marked the beginning of the stage of intensive adjudicating activity of the Constitutional Tribunal.

The Tribunal based many of its resolutions on the interpretation of new Article 1 of the Constitution of RP (the principle of democratic rule of law and state of justice). It assumed that it was a foundation of the whole constitutional order and consequently should be a fundamental interpretative guideline in the process of interpreting the Constitution and a basis of legislative actions of the legislator. It was so important a statement because some fundamental principles (values) were not explicitly established in the Constitution, i.e. for example, the principle of natural dignity of human, the right to life, the right of citizens to privacy and its protection, the right to justice, and the principles concerning the so-called decent legislation: prohibition of making retrospective provisions; obligation to respect the rights rightly acquired, requirement of sufficient definiteness of provisions of law.[21] Of course, the boundaries of the interpretation of Article 1 of constitutional provisions determined the rules of interpretation.

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20 Article 1 point 4 of the Act of 29 December 1989 on the Amendment of the Constitution of the Polish People's Republic (Dz.U. No 75, item 444).

21 What is important is the relation between the principles specified and not specified directly in the Constitution. For usually "*principles expressed directly in the Constitution (regardless of other formal qualities and substance) have priority before the rules derived therefrom*". See: W.Sokolewicz, *Uwaga 8 do art. 2 Konstytucji RP,* (in:) Konstytucja Rzeczypospolitej Polskiej. Komentarz, (ed. L. Garlicki), Tom V, Warszawa 2007. However, as the same author states further, the principles not expressed directly (so-called derivative principles) "*cannot be generally refused the ability of becoming, in certain circumstances, an independent source of individual*

The extended competences of the Constitutional Tribunal regulated in laws amending the Constitution of PPR were confirmed by the so-called Small Constitution of 1992.[22] It is worth underscoring that it was only this legal act that terminated the principle of uniformity of power, within which the Sejm occupied a dominating position in the structure of authorities. Simultaneously, there still existed a regulation that decisions of the Constitutional Tribunal on inconformity of laws with the Constitution were subject to consideration by the Sejm.

The then valid Constitution of the Republic of Poland of 2 April 1997 played the most important role for establishing the position of the Constitutional Tribunal.[23] This statement is justified by the following reasons: establishment of the principle of finality of the rulings of the Constitutional Tribunal (Article 190 para 1)[24] and introduction of the institution of constitutional complaint (Article 79), i.e. a specialized legal measure serving "everybody" for protecting his freedom and constitutional rights. In this way the activity field of the Constitutional Tribunal was considerably extended and oriented to the area of freedom and rights, of course in the context of protecting the Constitution. At present adjudicating on constitutional complaints is in the Tribunal's practice even bigger part of its activity. Beside the amendments specified above the Constitution of 1997 deprived the Constitutional Tribunal the competence of universally binding interpretation of laws.

In conclusion: three basic periods of the Constitutional Tribunal may be distinguished: the first, including the period 1986-89, the second embracing the period from 1990 till 16 October 1997; and the third, which began the following day (the binding Constitution

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rights". See: ibidem, *Uwaga 17 do art. 2 Konstytucji RP* (in:) Konstytucja Rzeczypospolitej…, *op. cit.*

22 The Constitutional Act of 17 October 1992 on Mutual Relations Between the Legislative Power and Executive Power of the Republic of Poland and on Local Government (Dz.U. No 84, item 426).

23 Dz.U. No 78, item 483.

24 According to transition provisions of the Constitution of RP (Article 239 para 1) within 2 years of the Constitution entering into force, rulings of the Tribunal on inconformity of laws adopted before its entering into force was not final and was subject to consideration by the Sejm. This means that the definite finality of rulings of the Constitutional Tribunal, i.e. the finality of every ruling of the Tribunal dates from 18 October 1999. In practice, however, in 18 decisions under this provision the Sejm considered only 5 (three times passed a resolution of rejecting the ruling and in two cases agreed to the Tribunal's decision).

entering into force) and still lasts. The fundamental accomplishment of the Constitutional Tribunal in the early years of its existence was recognizing that the rights included in the constitution are not only the principles of the system, which the state (government) should obey but also normative consequences could and should be derived therefrom.[25] It is worth adding that establishing the normative value of the Constitution of PPR was sometimes exceptionally complicated in the face of ambiguity and vagueness of its provisions. All in all, generally the legal function of the constitution was at that time questioned and in practice did not play a serious role. Despite this fact, the Tribunal participated in creating this fundamental function of the constitution. Implementation of the effect of the Constitution as a supreme normative act in the state ruled by law was successful, which is proved by, suffice it to say, the practice of first heard cases. The main point reference in the process of the interpretation of the constitution in the early 1990s became the principle of democratic rule of law. The Constitutional Tribunal "derived" from it other constitutional principles (values), which were not *expressis verbis* specified in the text of the Constitution.

Generally speaking, the activity of the Constitutional Tribunal in the period 1986-97 coincided with the period of fundamental changes in the political system of the country, heading towards its intended total democratization. As the result of these changes the original model of the Constitutional Tribunal was also modified.[26]

2. The Constitutional Tribunal in the Constitution of 1997

The Constitutional Tribunal was counted in the Constitution among the bodies of judicial power beside courts and the State Tribunal (Article 10 para 2). The legislative power is exercised by the Sejm and the Senate (it is a bicameralism in an extremely asymmetric version),

25 W. Zakrzewski, *Prawa i wolności obywateli Rzeczypospolitej Polskiej*, (in:) Zarys prawa konstytucyjnego, ed. W. Skrzydło, Lublin-Rzeszów 1993, s. 55.

26 See. Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warszawa 2003, p. 64-65.

and the executive power the President of RP and the Council of Ministers (the government). According to constitutional regulations, the Council of Ministers, led by its President, conducts domestic and foreign policies of the state, and among its fundamental tasks are providing internal and external safety (Article 146). The Council of Ministers also enjoys a privilege of the presumption of competence in the affairs of state policies not reserved for other state authorities or local government (Article 146 para 2). Simultaneously the President was endowed with constitutional tasks to "ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory" (Article 126 para 2). The constitutional status of the President of RP is confirmed by defining him as "the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority." (Article 126 para 1) as well as granting him an extensive range of his own powers (the so-called prerogatives).

Relations of the Constitutional Tribunal with other constitutional bodies are extremely limited due to the principles of separateness and independence of Tribunals and courts (article 173). In the context of jurisprudence representatives of the legislative power, the executive power and other authorities beyond these areas of power may initiate proceedings before the Constitutional Tribunal (which will be discussed in the subsequent chapters). As far as the organization of the Tribunal is concerned, the influence of the Parliament is considerable: it may shape specifically the organization and mode of the Tribunals work through amendments to the Act on the Constitutional Tribunal.[27] The Sejm also possesses the competence of individual selection of the Tribunal judges. The President, on the other hand, appoints the President and Vice-president of the Constitutional Tribunal from among candidates proposed by the General Assembly of Tribunal Judges. In the presence of the President the newly elected judge takes the oath, which means the commencement of his term. The President of the Constitutional Tribunal informs the Sejm and the Senate, annually,

27 It is worth reminding that in Poland, unlike, for example, in France or Spain, occur no organic laws, the amendment of which requires different (more difficult) procedures.

on the Constitutional Tribunal's behalf, on basic problems resulting from the activity and jurisprudence of the Tribunal.

The Constitution dedicates a separate chapter (VIII: "Courts and tribunals") to the Constitutional Tribunal. This is an important difference because until 1997 the Constitutional Tribunal was placed in the systematics of the constitution in a separate chapter, but outside the bodies of the judiciary.[28] The Tribunal, however, should functionally distinguished from courts and the State Tribunal.

The Supreme Court, common courts, administrative courts and military courts exercise justice, i.e. resolve particular legal disputes which emerged in the practice of applying law, whereas the State Tribunal is a specialized constitutional body whose competences include adjudicating in cases of constitutional liability of people holding the highest offices in the State. The State Tribunal, like the aforementioned courts, resolves authoritatively cases the subject of which is a dispute on the application of law. The typology of modern functions of constitutional courts is quite extensive.

The fundamental job of constitutional tribunals (courts) is protecting the constitution and securing its primacy in the system of normative acts. The Tribunal protects the supremacy of the constitution in such a way that it examines the constitutionality of provisions of law (e.g. conformity with the constitution); also guards the hierarchy of normative acts (e.g. conformity of regulations with laws). By virtue of Article 188 of the Constitution has a competence to 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.

As the result of the examination, in the case of finding nonconformity of a provision of law (legal norm) the provision is repealed. The activity

28 Initially jointly with the State Tribunal and the Supreme Audit Office, from 1989 on also with the Ombudsman, and from 1992 on, additionally, with the National Broadcasting Council.

of the Tribunal is focused on the protection of the constitution but not only in a formal sense, through eliminating the provisions which do not conform thereto, but also through the protection of its substance. In this way the Tribunal fulfills the function of the guarantor of observance of fundamental individual freedoms and rights. This function is usually exercised in the form of a constitutional complaint but not exclusively. It is also important to underscore that hierarchical examination of legal norms in effect results in the control of the authorities themselves and eliminating their potential abuse. In the literature it is possible to find another typology of the Tribunal's functions.[29]

The provision of Article 1 of the Act refers directly to Article 10 of the Constitution providing that the Constitutional Tribunal is "a body of the judicial power". The interpretation of this provision is clear: the Tribunal belongs to the judicial power. Nevertheless, various views are presented in the literature referring to the situation of the Tribunal in the system of State authorities. The principal criterion of distinguishing positions of representatives of the doctrine is the range of competences of the Tribunal.[30] For comparative reasons it is important to remind that the situation of "a constitutional court", and especially its relation to the judicial power takes various forms in particular countries. For example, in Austria, Italy and Spain this body is separated from the judicial power in the constitutional systematics. Unlike in Germany, where the Federal Constitutional Tribunal is treated as an element of the judicial power with, of course, autonomous competences.[31]

Making general characteristics, it is possible to specify both common qualities and qualities distinguishing the Constitutional Tribunal from courts. The most important common quality is cooperation in the

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29 For example: 1) the function of protecting individual freedoms and rights (exercised especially through the control of conformity of legislature to the Constitution; also the institution of constitutional complaint; 2) the creative function (or forming the substance of the legal order); 3) the constitutional function (intervention in relations between State authorities: resolving competence disputes and vesting in the Marshal of the Sejm temporary substitution of the President of RP. See: Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce…, op. cit.,* s. 163.

30 Some recognize the Tribunal as a special body of state control, which consists in examining constitutionality and application of law, whereas others, not questioning counting the Tribunal among the authorities of judicial power, assert that some tasks of the Tribunal are part of the area of "exercising justice". For more see: Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym*, Warszawa 1999, p. 8-9.

31 For more see: an Appendix 8 to this text.

protection of individual rights (of course taking into consideration their separate competences). In this context it is important to see especially connections of the institution of constitutional complaint and legal questions of courts with the protective function exercised by courts. Moreover, among common qualities are, for example, independence from the other branches of power (legislative and executive), organizational isolation, the principle of the judge's independence, launching proceedings on application, sentences and decisions as fundamental forms of rulings. Among the qualities distinguishing the Tribunal from courts it is possible to specify: separate procedure of appointing judges, tenure, immunity to judicative supervision of the Supreme Court, the lack of connections with the National Council of the Judiciary, the lack of the right to appeal.

The aforementioned provision of Article 1 of the Act continues specifying that it is a body "appointed to examine conformity with the Constitution of normative acts and international agreements as well as performing other tasks defined in the literature of the Constitution". The range of competences of the Polish Constitutional Tribunal is relatively extensive. Let us repeat: **the Tribunal is foremost competent to adjudicate in the question of the hierarchical control of legal norms. It is implemented through resolving appropriate applications as well as legal questions (questions of law) and constitutional complaints**. The aforementioned Article 188 of the Constitution specifies an additional competence, namely adjudicating regarding the conformity to the Constitution of the purposes or activities of political parties (point 4 of this article). Moreover, the Tribunal is constitutionally entitled to settle disputes over authority between central constitutional organs of the State (Article 189). The competences of the Tribunal is complemented by the right to adjudicate on the question if the Marshal of the Sejm should temporarily perform the duties of the President of the Republic (Article 131 para 1). The Act includes yet another competence of the Constitutional Tribunal, which is so-called signalization. It consists in presenting competent legislative authorities observations on defects and loopholes in law, the elimination of which is necessary to secure the coherence of the legal system.

The literature has formulated a few vivid terms reflecting the activity of the Constitutional Tribunal. The Tribunal hears disputes on the substance of law and therefore is defined as "the court of law" or "the court judging law", and as often as that the Kelsenian term "negative legislator" is used. The terms applied here render the essence of the activity of the Tribunal as a body examining and eliminating provisions of law from the system of law in the case of finding them not conform to hierarchically superior provisions. It is not a decisive authority in individual cases and therefore it does not exercise justice. Actually, however, part of the competences of the Constitutional Tribunal exceeds the main task of examining hierarchical conformity of norms: settling competence disputes, adjudicating on conformity to the Constitution purposes and activities of political parties, adjudicating on impediments in the President exercising his office and on vesting in the Marshall of the Sejm a temporary office of the President, issuing signalizing decisions. A specific presentation of particular competences of the Tribunal will be in the subsequent chapters of this paper.

The basic part of cases considered by the Constitutional Tribunal consists in settling legal disputes (applications for the examination of norms, constitutional complaints, legal questions, applications for settling competence dispute, applications for examining the constitutionality of purposes or activities of political parties). From the provisions specified in the document initiating proceedings the Tribunal reconstructs a certain normative substance (establishes the substance of legal norms) and then examines it according constitutional (or hierarchical superior) models specified by the applicant/complainant. Finally, the Tribunal issues its decision and if it is a judgment, this settles the case substantially. In this way the legal dispute (conflict) is authoritatively resolved. The two remaining competences of the Tribunal, i.e. adjudicating on a temporary incapability of the President of his service as well as issuing signalizing decisions are beyond the category of settling legal disputes. The former refers to rather assessment of the actual circumstances that have occurred (incapability of exercising his office by the Head of the State) and taking a final decision thereon, whereas the latter is all the more not based on dispute:

the Tribunal signalizes the need for legal changes by authorities legitimized thereto.[32]

In reference to the control models of constitutionality of law specified in point 2 of Chapter 1, the Polish Constitutional Tribunal exemplifies the so-called European (continental) model. The Tribunal exercises the control of constitutionality exclusively[33] and therefore it is defined as concentrated. The Tribunal foremost performs the so-called abstract control of legal regulations (norms), which means that the control procedure is launched by the entity constitutionally entitled and has no direct connection with another judicial procedure in progress. It involves comparing the substance of a legal provision, usually a law (the object of examination) with the substance of the hierarchically higher provision (the constitution as a control model) and issuing a decision on conformity or nonconformity of the provision under examination.

Nowadays the abstract control is complemented with the so-called concrete control, which, as the term applied suggests, is launched in connection with another judicial procedure concerning an individual act of applying law. The point is the institution of legal question, especially the institution of constitutional complaint, which has become, also in Poland, a fundamental way of initiating proceedings in a constitutional court.

The Polish Constitutional Tribunal has competences to conduct both *ex post* control of the provisions of law and preventive control. The *ex post* control, which refers to valid legal acts (regulations) is a fundamental variation of the control of constitutionality, which is also confirmed by the statistics. The *ex post* control is initiated by entities specified in the Constitution and it is a big group of the entitled. On the other hand, the so-called preventive control (examination) is launched by the President exclusively. This competence of the head of the state is defined in Article 133 para 3 of the Constitution. The object of the

32 For more see: K. Wojtyczek, *Sądownictwo konstytucyjne w Polsce. Wybrane zagadnienia*. Warszawa 2013, p. 88-90.

33 The only exception concerns the courts which are competent to adjudicate on the conformity of sub-statutory acts.

preventive control may be an act of law (statute) before its signing or an international agreement before its ratification. This President's prerogative corresponds strictly with his responsibility to "ensure the observance of the Constitution", which was established in Article 126 para 2 of the Constitution. Statistically the President initiates this procedure of the examination of constitutionality relatively rarely. However, his activity in this field is noticeable.[34]

It is worth adding that in Poland occur no other institutionalized parliamentary forms of the so-called preventive control of constitutionality (as it happens for example in Finland, Norway and Sweden). If at the stage of adopting laws appears a doubt about the conformity of its provisions to the Constitution, it cannot be authoritatively resolved. Opinions on the matter are presented to, for example, the Legislative Commission of the Sejm, but the Sejm is autonomous in its work and may also pass a law to which constitutional doubts have been reported. As the result of adopting by the parliament the law enjoys the privilege of presumption of constitutionality. A ruling of the Constitutional Tribunal on unconstitutionality exclusively refutes this presumption.

Finally, it is important to mention one more significant element of the Constitutional Tribunal's activity. Namely, in accordance with Article 42 of the Act, control of constitutionality of normative acts or a ratified international agreement takes into consideration three aspects: substantial, procedural and that referring to powers (competences). The object of control in the case initiated by an entitled applicant may concern any of these aspects, both separately and jointly. Substantial control is examination of conformity of a legal regulation (legal norm) with the regulation (norm) of superior rank. The object of procedural control is the question of meeting requirements determining procedures of issuing a particular legal act (e.g. a regulation or a law). The Tribunal is also entitled to control competences to issue a normative act or to sign

34 In this respect 2009 was a record year, in which the President turned to the Tribunal ten times whereas in other years the number of applications did not exceed five. For more on preventive control: M. Florczak-Wątor, *Prewencyjna kontrola konstytucyjności ustaw,* (in:) Konstytucja i sądowe gwarancje jej ochrony. Księga jubileuszowa Profesora Pawła Sarneckiego, Zakamycze 2004, p. 65-95.

and ratify an international agreement. This regulation demonstrates the extensive range of cognition of the Constitutional Tribunal.

3. Organization of the Constitutional Tribunal

3.1. Composition

According to the wording of Article 194 para 1 of the Constitution, "the Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of law. No person may be chosen for more than one term of office." The general condition of being "distinguished by their knowledge of law" by the persons applying for the status of judge of the Tribunal was better specified in the Act on the Tribunal.

A judge of the Tribunal may be a person who has qualifications required to occupy the position of judge of the Supreme Court or the Supreme Administrative Court (Article 5 para 3 of the Act). Obtaining the status of judge of the Supreme Court is possible, in accordance with the wording of Article 22 §1 of the Act on the Supreme Court, if the person interested meets the following expectations: 1) has a Polish citizenship and enjoys full civil and public rights; 2) is of impeccable character; 3) graduated from a faculty of law in Poland and obtained the title of magister (master's degree) or abroad recognized in Poland; 4) is distinguished by a high level of legal knowledge; 5) is capable in respect of health to perform the responsibilities of a judge; 6) has at least ten years' experience working as a judge, public prosecutor, president, vice-president, senior counselor or counselor of the General Attorney of the Treasury or of performing in Poland the profession of a barrister, solicitor or a notary. In the provision of §2 an exception is established providing that certain requirements "do not concern a person who worked for a Polish higher school, in the Polish Academy of Sciences, a research institute or another academic institution, having

the title of professor or an academic degree of doctor habilitated of legal sciences."[35]

The first four conditions specified above occur analogously in relation to the candidate for the office of judge of the Supreme Administrative Court. The others are: 1) being distinguished by a high level of knowledge on public administration, administrative law and other fields of law connected with the activity of public administration authorities; 2) being at least 40 years old; 3) working for at least ten years as a judge, public prosecutor, barrister, solicitor or notary. The requirements specified in point 2 and 3 do not refer to persons with the title of professor or the academic degree of doctor habilitated of legal sciences.[36]

In practice a definite majority of the Constitutional Tribunal has been so far constituted by professors of various areas of law, who often also have professional experience in applying law (as judges, public prosecutors, barristers, solicitors). We should add that everybody who meets the aforesaid conditions may apply for the position of judge of the Constitutional Tribunal, regardless of whether he/she is a relatively young person or an elderly person. It is substantive and health predispositions that decide.

The Polish variant assumes selection of all Tribunal judges by the Sejm. The way of making the composition of a constitutional court is one of the more important questions. For since the essence of the Tribunal's activity is protection of the Constitution as well as protection of fundamental human rights, the members of this body should not only have the best legal qualifications but also be selected in accordance with democratic standards. Only a democratically made composition of the Tribunal secures a proper legitimacy for this body. This, in turn, should transfer into a respect for this authority both by society as well as political assemblies. The democratic way of making the Tribunal has to remain closely related to its independence from other state authorities.

35 The Act of 23 November 2002 on the Supreme Court (Dz.U. of 2002, No 240, item 2052 as amended).

36 The Act of 25 July 2002. The Law on the Organization of Administrative Courts (Dz.U. of 2002, No 153, item 1269 as amended).

The selection of the judges of the Tribunal by the Sejm (i.e. by a certain political majority) does not disavow the independence of the Tribunal. It is certainly not a solution without drawbacks yet seems optimal. Anyway, recent proposals of changes in the procedure of selecting judges of the Constitutional Tribunal more often concern not so much the fact of the exclusive part of the Sejm alone as modification of the procedures of candidate selection as well as securing greater influence of academic circles on this matter. Summing up, it seems reasonable to add that there is no such model of composing constitutional courts which would be free from a fault in the form of objection against the influence of the political factor on the selection. This type of objection may be raised both where the composition of a constitutional court depends on a number of state authorities as well as where the selection is performed by the parliament only. Proposals, which were formulated also in Poland in connection with the reform of the mechanism of selection of judges are also not free form faults.

Candidates for the position of judge of the Constitutional Tribunal are presented by at least 50 deputies or the Presidium of the Sejm. In fact, however, the practice went into the direction of presenting the candidates by groups of deputies.[37] Details of the procedure of selecting judges of the Tribunal are determined by the Rules of the Sejm.[38] In the procedure of selection of a judge of the Tribunal the decisive element is presenting candidates and their verification in the Sejm Committee for Justice and Human Rights. There occurs a presentation of both the candidate and his achievements proving fulfilling the conditions to take the office of judge of the Tribunal. The Committee terminates its work preparing a report, in which it recommends or not passing an appropriate resolution by the Sejm. The resolution by the Sejm on an appointment of a judge of the Tribunal is passed by absolute majority in the presence of at least half of the overall number of deputies (Article 5 para 4 of the Act). Consequences of the election of the judges of the Tribunal by the Sejm are a probability of politicization of voting for candidates

37 This assertion included in: Z. Czeszejko-Sochacki, L. Garlici, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym,* 1999 is still valid. See: *ibidem*, p. 58.

38 The Resolution of the Sejm of the Republic of Poland of 30 July 1992 (M.P. of 2012, item 32 as amended).

and a possibility of rejecting part of the nominated candidates in the situation of the lack of inter-party agreements on forming the majority. The term of a judge of the Tribunal is counted from the date of his/her selection by the Sejm, whereas taking the responsibilities of judge is possible only after taking the oath before the President of the Republic of Poland.[39] Refusal of taking the oath is tantamount to resignation from the position of judge of the Tribunal (Article 5 para 6 of the Act).

It worth reminding that the Constitution of RP of 1997, currently in force, prolonged the term of a judge of the Tribunal from 8 to 9 years. After its entering into force (17 October 1997) part of the judges worked under the 8-year term because they were selected on the basis of the previous Act of 1985 on the Constitutional Tribunal, whereas other ("new") judges were to be appointed for the term of nine years.

3.2. Status of Tribunal judges

The status of a judge of the Constitutional Tribunal is determined by the scope of powers vested in him and his responsibilities. Among the fundamental principles determining the status of a judge of the Tribunal are: a) judge's independence; b) subjection to the Constitution; c) non-political character; d) remuneration and working conditions commensurate with the dignity of the office and the scope of responsibilities; e) incompatibility of offices; f) judicial immunity; g) personal immunity; h) retirement after leaving the office.[40]

Judge's independence is, beside independence of courts (and tribunals), one of the necessary elements of the democratic state ruled by law. There are numerous definitions of judge's independence but generally it means inadmissibility of any intervention from outside or any pressure on the judge in order to resolve a given case in a certain way.[41] The fundamental component of independence of Tribunal judges is their subjection to the Constitution (Article 195 para 2). This

39 The text of the oath is as follows: "I do solemnly swear that in discharging the duties which have been vested in me as a judge of the Constitutional Tribunal, I shall faithfully serve the Polish Nation, safeguard the Constitution and perform all such duties impartially and with the utmost diligence".

40 For more see: M. Zubik, *Status prawny sędziego Trybunału Konstytucyjnego*, Warszawa 2011.

41 B. Banaszak, Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warszawa 2009, p. 785.

means that the exclusive point of reference for the responsibilities performed by a judge within the framework of the office exercised, especially the substantive activity (adjudication), is the provisions of the Constitution.[42] Article 195 para 3 of the Constitution determines the scope of the co-called non-political character: during the period of exercising their office judges "shall not belong to a political party, a trade union or perform public activities incompatible with the principles of the independence of the courts and judges." In practice active politicians are rarely selected for the office of judge. Regulations do not exclude it, since the specified principle of non-political character of their job is what judges should obey from the moment of their selection. As a result, it is only the selection for this office causes the necessity of resignation from the membership in a political party.

Moreover, the regulation quoted formulates another principle regulating the status of Tribunal judge. It is the so-called principle of incompatibilities, the substance of which excludes exercising other offices by a judge of the Tribunal during his/her term. The essence of this prohibition is obvious. It is about eliminating an opportunity of the judge acting "a dual role". It is particularly important in reference to judges. This is a natural result of the principle of division of powers. In practice almost all persons who exercise or exercised the office of judge of the Tribunal are representatives of academic circles. Research and didactic activity is basically the only acceptable additional activity, which the judges of the Tribunal can conduct.

The judge of the Constitutional Tribunal is entitled to immunity. Article 196 of the Constitution establishes actually two separate immunities. One is a formal immunity, which excludes a possibility of holding him/her criminally liable unless the Constitutional Tribunal gives its consent. Arresting the judge of the Tribunal also requires the Tribunal's consent. The other one is a personal immunity (of inviolability), which manifests itself in the prohibition of detaining or arresting the judge, except when caught red handed, if his detention is

42 It is otherwise in the case of judges adjudicating in courts, who are independent but are subjected to the provisions of the Constitution and laws (statutes) (Article 178 para 1 of the Constitution).

necessary to secure a proper course of proceedings. The detention of a judge should be immediately reported to the President of the Tribunal who may order an immediate release of the detained.

After the end of his/her term, the judge passes to the "state of rest", which means that formally he remains a judge but cannot perform the responsibilities of a judge. The official status of "judge of the Constitutional Tribunal in the state of rest" is a formal title. The judge who has terminated performing his responsibilities is entitled to a salary of the judge in the state of rest. He/she also enjoys part of a judge's rights (e.g. immunities). The term of the judge of the Constitutional Tribunal lasts 9 years and the judge cannot be appointed again.

The prohibition of selection for the next term (Article 194 para 1 of the Constitution) is a fundamental guarantee of a Tribunal judge's independence. Another guarantee of independence is a prohibition of removing from the post during the term. The law, on the other hand, determines the cases of expiry of the term of the Tribunal judge before its due date. According to Article 11 para 1,the decision of the expiry of the term is taken by the General Assembly as the result of: 1) resignation from the position of judge; 2) permanent incapability of performing the responsibilities of a judge because of an illness, infirmity or collapse; 3) valid conviction by a sentence of a court; 4) a valid disciplinary ruling on a penalty of removing from the post of Tribunal judge. Since the beginning of this authority four judges have resigned during serving their terms (all in the 1990s). The case of resignation from the position of Tribunal judge, i.e. after the selection by the Sejm and taking the oath in the presence of the President of RP but before actual beginning of serving the term, i.e. before taking up his duties, should be classified separately. Such a situation took place once only, in 2007.[43] In turn, the expiry of the term as the result of the judge's death is stated by the President of the Tribunal (Article 11 para 2). The President of the

43 The sentence of 13 October 2010, (sign. II PK 72/10) of the Supreme Court stated that resignation from the position of judge of the Constitutional Tribunal results in the loss of the status of judge. The adjudicating board emphasized that the only case of passing the judge of the Tribunal into the state of rest before the end of a full term, is a permanent incapability of performing the responsibilities because of the state of health. See: Monitor Prawa Pracy 2011, No 2, p. 89-90.

Tribunal passes the act stating the expiry of the term to the Marshal of the Sejm.

Conditions of disciplinary liability of the Tribunal judge, its procedures and punishments are determined in the Act in Articles 8-10. The judge of the Tribunal is disciplinarily liable "for infringing provisions of law, impairing the dignity of his office or other unethical behavior, which may undermine trust in him. In the disciplinary proceedings adjudicate the Tribunal of five judges of the Tribunal (the first instance) and the full Tribunal (the second instance). Both the disciplinary spokesman and the judges adjudicating in the first instance are selected by lot by the General Assembly. The Act determines three disciplinary punishments: 1) reminder, 2) reprimand, 3) removal from the position of Tribunal judge. The disciplinary rulings are not subject to cassation in the Supreme Court. The disciplinary rulings of the Constitutional Tribunals are final (binding).

3.3. Bodies of the Constitutional Tribunal

The Act provides that the bodies of the Constitutional Tribunal are the General Assembly and the President of the Tribunal.

The General Assembly consists of all the judges of the Tribunal. In the light of Article 14 para 1 of the Act among the competences of this authority are: 1) adopting the rules of procedure of the Tribunal; 2) election of candidates for President and Vice-President of the Tribunal; 3) adopting the statute of the Tribunal Office; 4) adopting plans of incomes and expenses of the Tribunal; 5) approval of information on important problems resulting from the activity and the adjudication of the Tribunal; 6) other activities determined by the Act or the rules of procedure (President of the Tribunal is, for example, an institution of the second instance in disciplinary procedures and asserts the expiry of the term). The Act regulates the most important procedural issues connected with the operating of the General Assembly. It is chaired by the President or the Vice-President of the Tribunal; resolutions are adopted by simple majority[44] and only when two thirds of the overall

44 Unless the law provides otherwise, for instance Article 7 para 3 in connection with para 1: The consent for holding criminally liable or arresting a judge (or the so-called waiver of immunity)

number of the Tribunal judges take part therein, including the President and the Vice-President.[45]

The Act requires that the President of the Tribunal summon the General Assembly at least once a year, where the activity of the Tribunal as well as problems resulting from its adjudication are presented.[46] It is a glamorous session of the General Assembly and it has become a rule that the most prominent persons in the state (the President of the Republic, the President of the Council of Ministers, the Marshal of the Sejm, the Marshal of the Senate as well as the representatives of the supreme authorities of the judicial power, i.e. the First President of the Supreme Court and the President of the Supreme Administrative Court, the Public Prosecutor General, the Minister of Justice, the President of the Supreme Audit Office, the Ombudsman, the Commissioner for Children's Rights) as well as invited guests.

The President of the Constitutional Tribunal is appointed by the President having selecting him from among two candidates presented by the General Assembly. The General Assembly vote thereon by secret ballot and as a result, the candidatures of two judges with the highest rate of support are presented to the President of RP. The judge appointed by the President performs the function of president until the end of his term in the Tribunal. The President of the Tribunal is a representative of the Tribunal outside and performs actions determined in the Act and the rules of procedure. Among the statutory powers are, for example: 1) summoning and chairing the General Assembly; 2) stating the expiry of the term of the judge as a result of his death; 3) passing the act stating the expiry of the term to the Marshal of the Sejm; 4) issuing a decision on an immediate dismissal of the judge caught red handed while committing a crime.

Powers of the President of the Tribunal resulting from the rules of procedure are, for example: 1) proposal of a draft of annual report on important problems resulting from the activity and adjudication

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is decided on by the General Assembly by the majority of two thirds votes of the judges participating in the Assembly.

45 Provision §4 of the rules of procedure specifies that the quorum is the presence of at least 10 judges, including the President or the Vice-President of the Tribunal.

46 In practice it is held once a year in spring (usually in April).

of the Tribunal (§ 2 point 1 a); 2) applying to the General Assembly for appointing and dismissing the head of the Office (§2 point 1 b); 3) securing organizational and administrative conditions of the work of the Tribunal through supervision over the activity of the head of the Office (§11para 2 point 1); 4) submitting to the General Assembly for approval the program of research and analytical tasks on the Tribunal's adjudication or the adjudication of other courts performed by the Office of the Tribunal (§2 point 1 d); 5) applies to the General Assembly for preparation of an annual program of visits and working visits with constitutional courts (§2 point 1 e); 6) approves of an application of the head of the Office for adopting by the General Assembly a resolution on the budget of the Tribunal (§2 point 2 a); 7) approves of a report submitted by the head of the Office on the implementation of the Tribunal's budget for the past year, whose ultimate approval appertains to tasks of the General Assembly.

Within the framework of his substantive activity the President of the Tribunal, for example: 1) assign cases for consideration to the judge-rapporteur; 2) appoints members of the adjudicating bench; 3) chairs the full Constitutional Tribunal; 4) ordains the announcement of judgments and decisions of the Tribunal; 5) ordains publication of the rulings of the Tribunal in an official journal.

However the Vice-President of the Tribunal is not an institution of the Tribunal. His office consists in substituting the President during his absence as well as performing other responsibilities resulting from the division of tasks established by the President. Appointment of the Vice-President is analogous to the procedure of appointment of the President of the Tribunal. One of the fundamental responsibilities vested in the Vice-President is becoming familiar up to date with the all cases concerning the management of the works of the Tribunal (§12 point 3 of the rules of procedure).

3.4. The Office of the Constitutional Tribunal

The fundamental organizational principles of the Office of the Tribunal are defined in §15 of the rules of procedure of the Tribunal. In accordance with §15 point 1 of the rules of procedure the Office of

the Constitutional Tribunal secures administrative, organizational and financial service for the Tribunal and its specific responsibilities and organization is determined by the Statute of the Office (hereinafter the Statute[47]). The Office is managed by a Head appointed and dismissed by the General Assembly at the motion of the President of the Tribunal (Article 17 para 2 of the Act). The Head of the Office is subordinate to the President of the Tribunal or to the Vice-President of the Tribunal acting as a substitute of the former, whereas himself is a superior of all employees of the Office and is responsible for their actions. The basic job of the Head of the Office is managing the Office, i.e. securing his proper and effective functioning. If necessary the Head of the Office presents conclusions referring to the organization of the Office. The principal responsibilities of the Head of the Office concern the issues of the budget and property of the Constitutional Tribunal. Namely he is obliged to develop a draft of the Tribunal budget and is responsible for its implementation. In justified cases ("if necessary") he has the right to propose changes in the executive scheme of the Tribunal budget. The Head of the Office is accountable for the property in the management of the Tribunal. Moreover, the Head of the Office is obliged to submit the General Assembly an annual report on the implementation of the Tribunal budget as well as the activity of the Office, and also to inform up to date the President and the Vice-President of the Tribunal about the problems referring to the operating of the Office.

Specific competences of the Head of the Office are determined in the provisions of §4 of the Statute, these being: 1) he issues ordinances, commands and decisions referring to the operating of the Office; 2) is a representative of the Office outside, as well as to the President and the Vice-President of the Tribunal, as well as the General Assembly; 3) periodically informs the President of the Tribunal about the work of the Office and accomplishment of its tasks; 4) annually presents the General Assembly a report on the operations of the Office; 5) may authorize the employees managing organizational cells of the Office or

47 The Statute of the Office of the Constitutional Tribunal: see: appendix to the Resolution of the General Assembly of the Constitutional Tribunal of 4 February 2002 amended by the Resolution of 18 May 2004 and the Resolution of 2 March 2011. Consolidated text according to the legal situation of 2 March 2011.: see: http://trybunal.gov.pl/0-trybunale/akty-normatywne/statut-biura-trybunału/ (last accessed: 20 February 2014).

those occupying independent posts to make decisions on his behalf as well as to representing the Office in particular cases; 6) may appoint committees or counseling bodies to examine, consider or develop certain issues, establishing their composition, tasks and means of action; 7) on the basis of every authorization of the President, he/she may represent the President in particular issues.

The organizational structure of the Office of the Tribunal is expanded and consists of both administrative and auxiliary units as well as substantive units, which means those whose tasks are directly connected with the Tribunal's fulfillment of its constitutional functions.[48] Within the Office operates the director of the Office for administration and the Presidential Team, which deals with presidential affairs, protocol service, cooperation with foreign institutions, organization of conferences, seminars and lectures, propagating the activity of the Constitutional Tribunal, supervision over the content of the Tribunal's website.

The internal structure of the Office includes the Secretariat of the Tribunal, which deals with executing the President's ordinances referring to the affairs sent in for consideration by the Constitutional Tribunal and keeping judicial files, as well as the Library of the Tribunal, which gathers and shares its collection, provides scientific information and conducts a publishing activity. Beside the Presidential Team three more teams work. One is the Press and Information Team, which provides press service and shapes the medial image of the Tribunal; it also performs the responsibilities connected with the implementation of the law on access to public information.[49] The other one is the Adjudication and Study Team, whose main tasks are: examining the Tribunal's adjudication, preparing information on important problems resulting from the Tribunal's adjudication and analytical-research works. The third, the Team for Preliminary Examination of Constitutional Complaints and Applications, performs activities strictly connected with the adjudicating activity of the Tribunal because it

48 Compare: the data on the official website of the Constitutional Tribunal: http://www.trybunal.gov.pl/trybunal/Biuro_TK/biuro_tk.htm (last accessed: 20 February 2014).

49 Within this Team works the Spokesman for the Office of the Constitutional Tribunal.

deals with the initial selection of letters addressed to the Tribunal and those marked as constitutional complaints or application. For among its tasks are: an initial qualification of individual cases sent in to the Tribunal, keeping files of the cases concerning constitutional complaint as well as applications of the entities mentioned in Article 191 para 1 points 3-5 of the Constitution,[50] as well as providing information on the procedure of filing a constitutional complaint.[51]

The structure of the Office of the Tribunal also includes the Departments: Financial-Accountancy (with the chief-accountant as its head), Administrative-Economic and Information Technology (led by their respective heads), as well as the Constitutional Tribunal Guard (with the Guard Commander).

50 They are so-called entities specifically legitimized. These issues will be broader discussed in point 3.1.1. of the following Chapter.

51 §9 of the statute provides that preparatory operations (preliminary control/examination) connected with accepting applications and initiate proceedings referring to the applications of the entities discussed in Article 32 para 2 of the Act and executing the judges' orders referring thereto are among the powers of this Team. The fundamental tasks of the Team of Preliminary Examination of Constitutional Complaints and Applications include: 1) performing activities connected with accepting and initiating proceedings referring to constitutional complaints; 2) initial division of letters into judicial letters and the others; 3) keeping registration and files of cases concerning constitutional complaints and performing appropriate technical-office activities, including electronic ones; 4) preparing drafts of documents and ordinances as well as executing the judges' orders referring to constitutional complaints, in particular on the issues determined by Article 49 of the Act on the Constitutional Tribunal; 5) providing information on formal conditions connected with a constitutional complaint; 6) answering letters and petitions addressed to the Constitutional Tribunal; 7) introducing data referring to the cases concerning constitutional complaints to the information data base of the Office; 8) preparing periodical information for the judges of the Constitutional Tribunal on adjudication concerning a constitutional complaint – at the stage of preliminary examination; 9) passing the rulings of the Constitutional Tribunal for publication in the Official Collection; 10) cooperation with the Secretariat of the Constitutional Tribunal.

Chapter III

EXAMINATION PROCEDURE OF HIERARCHICAL CONFORMITY OF LEGAL REGULATIONS (NORMS)

1. Rules of procedure

The rules of proceeding before the Constitutional Tribunal are determined by the provisions of the Constitution and the Act on the Constitutional Tribunal. The whole procedure may be called specific for it is autonomous (separate). In the catalogue of rules regulating this procedure we find the rules which are known from the procedures of other types of procedures (e.g. judicial or administrative), but there are also such which are exclusively connected with the Tribunal's proceedings. They are those which decide on its specificity. Moreover, all the rules of proceedings determined by the provisions of the Constitution and the Act have gained, in connection with the nature of the Tribunal's operating, a particular substance and range of application.

The Act regulates both the proceedings of the control of the constitutionality of law as well as other types of proceedings (adjudicating on political parties' affairs, settling constitutional disputes). One whole chapter of the Act (Chapter 2) is dedicated to these issues. It is generally important to underscore the cohesion of the rules of procedure in relation to particular types of proceedings, because at the head of this chapter are "General provisions" (Articles 19-40). Certain differences, of course, also occur and result from the nature of particular proceedings.

It is impossible to understand the rules of procedure before the Tribunal without taking into consideration the adjudicating practice of

the Tribunal. Therefore below some fundamental rules of procedure are presented, complemented with the Tribunal's opinions referring to their essence in Tribunal proceedings.

1.1. The principle of disposition

One of the fundamental principles of procedure in the Tribunal is the principle of disposition. This principle is not a constitutional principle. It is derived from civil proceedings and is considered indispensable and the most characteristic of its supreme principles.[1] It means that the Tribunal cannot launch proceedings on its own initiative or *ex officio*. The proceedings before the Tribunal may be initiated by a constitutionally entitled entity only.[2] This principle refers to all types of proceedings, i.e. 1) examination of legal regulations; 2) settling powers (competence) dispute; 3) examination of the conformity of purposes and operations of political parties to the Constitution; 4) vesting temporary substitution for the President of RP in the Marshal of the Sejm. The subjective scope in these particular types of proceedings is diversified. The one which is understood the most extensively is that relating to the applications within the so-called abstract control of regulations. This issue will be analyzed in the next point of this chapter.

The principle of disposition has also its broader dimension. One of its consequences is the right of the entity to withdraw his application, constitutional complaint or legal question before the beginning of the proceedings (Article 31 para 2 of the Act). Another consequence is the necessity of determining the limits of legal protection by the entity initiating the proceedings; which is also binding for the Tribunal.

In accordance with Article 66 of the Act, the Tribunal adjudicating is bound by the limits of the application, legal question or complaint. This means that the Tribunal in principle has neither a power nor an obligation of extending or reducing on its own initiative the limits of challenging the application, legal question or constitutional complaint

1 J. Jodłowski, *Zasada dyspozycyjności (rozporządzalności),* (in:) Postępowanie cywilne, J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, Warszawa 2000, p. 133.

2 Article 31 of the Act provides that initiating proceedings before the Tribunal occurs on request (application), legal question or constitutional complaint of an authorized entity.

(so-called binding as for the subject of examination), and also does not enjoy discretion of deciding on the conformity to the models not specified by the applicant (so-called binding as for the models of examination). It is one of the key rules of proceedings before the Tribunal, which, simultaneously remarkably affects the constitutional position of the Polish Tribunal. In one of its rulings the Tribunal specified: "*The consequence of this rule is both impossibility of independent determining by the Constitutional Tribunal the subject of examination, as well as replacing the complainant in the obligation of determining the way of the infringement of constitutional rights or freedoms by the provisions questioned in the complaint. This also refers to the situation, in which the complainant restricts himself to specifying and potential quotation of the provision of the Constitution without, however, specifying the arguments to confirm the thesis posed in the complaint.*"[3] The entity initiating the proceedings is obliged to precisely determine the editorial units of the normative act (particular provisions), being the grounds for reading the substance of the legal norm in question. What can be challenged is a part of the regulation, the whole regulation, a few regulations as well as the whole act of law.[4]

Summing up, the principle of disposition spreads not only over the operation of initiation of the proceedings (lodging an application) and its termination (withdrawal of the application), but it also means binding the Tribunal with the limits of this application. The opposite interpretation would be "*deviation from the limits of cognition determined by the complainant (applicant) subject and basis of the examination of constitutionality*".[5] As a result, the Constitutional Tribunal cannot on its own initiative modify the subject of the examination or the models of the examination.

1.2. The principle *falsa demonstration non nocet*

Complementing the information on the principle of disposition as well as the principle of binding by the limits of the application

3 The Decision of 25 October 1999, sign. SK 22/98 (OTK ZU 1999 No 6, item 122, p. 693).
4 See the Judgment of 11 July 2012, sign. K 8/10 (OTK ZU 2012 No 7A, item 78).
5 See the Decision of 20 October 2003, sign. U 2/02 (OTK ZU 2003 No 8A, item 81, p. 957).

(prohibition of modifying by the Tribunal the subject of examination and the models of examination), another problem has to be mentioned. Namely, in order to establish the subject of examination the Tribunal should take into consideration normative substance of the regulation challenged by the complainant. Proper examination of the subject should include not only the *petitum* of the complaint but also its justification. For it may happen that the initiator of the examination specifies in the *petitum* erroneously the regulations, from which he derives a legal norm, simultaneously specifying it in the justification in a way raising no doubts. Such an error cannot result in negative consequences for the complainant. On the contrary, the Tribunal should examine the questioned norm.[6] For the Tribunal applies the principle *falsa demonstration non nocet*, which means that what matters is the essence of the case and not its formal designation. It is worth adding that this principle also refers to an erroneous specification of an examination model.[7]

This means that in exceptional cases the Tribunal is authorized to examine the regulations questioned by the applicant (complainant) also from the point of view of the models he failed to specify directly. It is possible only when the Tribunal decides that the constitutionality of the questioned regulations must be examined in reference to the specified by him constitutional regulations but also other constitutional norms which the complainant failed to specify directly. The practice of the Constitutional Tribunal is justified because the Tribunal is a body appointed for hierarchical control of legal norms. Both the subject of control and the model of control is certain normative substance (contained in the provisions).

Such interpretation is a resultant of the essence of the control of constitutionality of law. The subject as well as the model of control are actually not particular, quoted by the complainant, provisions, but

6 See K. Wojtyczek, *Zasada skargowości w procedurze kontroli norm przed polskim Trybunałem Konstytucyjnym*, Przegląd Sejmowy 2003, No 1, p. 36.

7 See, for example, the Judgment of 12 July 2005, sign. P11/03 (OTK ZU 2005 No 7A, item 80). J. Królikowski analyzed the practice of application of this principle. See: Idem, *Zasada falsa demonstratio non nocet w postępowaniu przed Trybunałem Konstytucyjnym*, Zagadnienia Sądownictwa Konstytucyjnego 2011, No 1.

legal norms which can be derived from these provisions. Thus, it is apt to say that the provision is actually a unit referred to as an auxiliary factor in order to specify an area of normative substance containing the challenged norms. The Tribunal also opts for this understanding of examining the normative substance of the regulations under complaint (i.e. substantive, including examination of norms). The Tribunal examines the normative act only in the part specified by the applicant "*in the sense that it makes the subject of the examination the normative substance questioned by the applicant, which may be expressed in a few editorial units of the legal text.*" It is also the result of an assumption that "*the subject of the Tribunal's control is actually legal norms (expressed in editorial units of the legal text)*".[8] In conclusion, it is possible to assert, in simple terms, that although the Tribunal does control "legal norms", the consequence thereof is repealing a "legal regulation".

1.3. The principle of the burden of proof

In the proceedings before the Tribunal the principle of the burden of proof is of great importance. The objective of turning to the Tribunal by an authorized entity is obtaining a judgment of unconstitutionality of the regulation. However, since the valid regulations enjoy a presumption of constitutionality, and moreover, the Tribunal alone cannot complete the subject of the challenge as well as the models of examination, consequently indeed "the refutation of the presumption of constitutionality of the challenged normative act is the role of the complainant".[9] The burden of proof of the unconstitutionality of the regulation (or else its hierarchical incompatibility) rests on the complainant. The applicant (complainant) is also obliged to formulate allegations and provide the Tribunal with arguments and evidence supporting the theses of the unconstitutionality of the challenged normative act.

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8 See the Judgment of 10 November 2009, sign. P 88/08 (OTK ZU 2009 No 10A, item 146, p. 1582).

9 M. Grzybowski, P. Tuleja, *Skarga konstytucyjna jako środek ochrony praw jednostki w polskim systemie prawa* (in:) Sądy i trybunały w konstytucji i w praktyce, (ed. W. Skrzydło), Warszawa 2005, p. 116.

The literature emphasizes that the principle of burden of proof in the proceedings before the Tribunal, applied in every case in the above-specified identical range (the rule according to which the burden of proof and argumentation rests on the thesis of unconstitutionality) may lead to a lack of possibility of comprehensive examination of the case.[10] According to K. Wojtyczek, in judicial-constitutional proceedings, in certain situations, especially assessing the constitutionality of legal regulations introducing reduction of constitutional rights, the rules of burden of proof (and the burden of argumentation) should be modified.[11] The problem is very complicated. The drawbacks of the general rule of the burden of proof manifest themselves the most often in the cases of constitutional complaints. However, a potential transformation of the general principle of the burden of proof and the burden of argumentation should server foremost providing better protection for constitutional rights and freedom of an individual, and in effect providing greater effectiveness of the constitutional complaint as a special measure for protection of these rights.

The Act (Article 19) also provides that the Constitutional Tribunal during the proceedings should "examine all important circumstances in order to comprehensively explain the case". Thus, basically the Tribunal is not bound with the conclusions of evidence of the participants in the proceedings and "may *ex officio* accept the evidence which it recognizes as purposeful to explain the case."

1.4. The adversarial principle

Proceedings before the Constitutional Tribunal are conducted with taking into consideration the adversarial principle. In general this principle means a possibility of presenting contradictory positions

10 P. Tuleja, *Postępowanie przed Trybunałem Konstytucyjnym w sprawie hierarchicznej kontroli norm,* Przegląd Sejmowy 2009, No 5, p. 37.

11 This author, referring to the rule of necessity, proposes an assumption that the burden of proof should be based on the thesis of the existence measures, which equally effectively as the measures applied, would allow for achieving the goal and, simultaneously, would be less burdensome for an individual. See: K. Wojtyczek, *Ciężar dowodu i argumentacji w procedurze kontroli norm przez Trybunał Konstytucyjny*, Przegląd Sejmowy 2004, No 1, p. 22 +. This author's conclusion that the modified rules should be clear exceptions to the general principle is apt. See: ibidem, p. 26.

referring to the subject of the case by the entities participating in the hearing. In the classic understanding the principle assumes the existence of a dispute between the two parties.

In proceedings before the Tribunal this principle has a special dimension and not always takes its classic form.[12] Foremost, all "participants" of the proceedings, and not "parties" take part in the proceedings. "The main" participants (the Act, however, does not use such an expression) are: the applicant and the entity who issued the normative act. The Act determines, however, a wider circle of entities who are counted in the category of participants in the proceedings (e.g. in every case the Public Prosecutor General is a participant).

Each of the participants in the proceedings has the right to participate actively, especially to present their positions on the case. In the proceedings whose subject matter is examination of regulations (norms) a dispute between the applicant and the entity which issued the challenged normative act. The participants formulate their positions on the problem of the conformity of the regulation (norm) under examination and, in most cases, they are divergent positions, i.e. the entity which issued the legal act defends the thesis of its constitutionality whereas the applicant wants to disprove this thesis. However, there are cases where actually no dispute occurs for all participants in the proceedings (especially the entity which issued the normative act in question) agree with the applicant's allegations. It is worth noting that the adversarial principle assumes in advance that there must exist an entity which "defends" the constitutionality of the normative act. It imposes upon certain entities the status of "participant in the proceedings" even though it does not force them to take a particular position in the case in point.

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12 It is also possible to say that it is partly applicable in proceedings before the Tribunal. In the literature one may find also an opinion of "the lack of sufficient grounds to formulate a general thesis that the judicial-constitutional proceedings are based on the adversarial principle". An exception is only proceedings in the competence (power) dispute. See: M. Laskowska, *Zasada kontradyktoryjności a postępowanie przed Trybunałem Konstytucyjnym,* (in:) Konstytucja i władza we współczesnym świecie. Doktryna-prawo-praktyka. Prace dedykowane prof. W. Sokolewiczowi na siedemdziesięciolecie urodzin, (ed. M. Kruk, J. Trzciński, J. Wawrzyniak), Warszawa 2002, p. 518-519.

The specificity of adversarial process in the proceedings before the Constitutional Tribunal also manifests itself, as K. Wojtyczek aptly observed, in the fact that the participants in the proceedings, except the entity lodging the constitutional complaint, "*do not assert claims which they could freely dispose, but act in the public interest*".[13]

The adversarial principle refers not only to proceedings on examination of legal regulations (norms) but also other types of proceedings: those concerning the constitutionality of purposes or activities of political parties and those concerning settling a power (competence) dispute.

1.5. The principle of single-instance

Proceedings conducted in the Constitutional Tribunal are single-instance proceedings. This quality definitely distinguishes the Tribunal from the other entities of the judicial power (i.e. courts and the State Tribunal). The participants in the proceedings have no rights to challenge the issued rulings. The only exception in this matter is a possibility of filing a complaint about a refusal to act on the constitutional complaint or an application for examination of regulations lodged by the entities defined in Article 191 para 1 point 3-5 of the Constitution. In this event, however, the point is an initial stage of dealing with certain applications and constitutional complaints (the so-called preliminary examination).[14]

Rulings of the Constitutional Tribunal are of absolute nature, which means they are universally binding. This is, anyway, provided by the provision of Article 190 para 1 of the Constitution, where, in addition, the finality of the Tribunal's rulings is confirmed.

1.6. The principle of collegiality

Another characteristic procedural principle is collegiality of operating (adjudicating) of the Constitutional Tribunal. Depending on particular types of proceedings or a type of a normative act under

13 K. Wojtyczek, *Sądownictwo konstytucyjne…, op. cit.,* p. 165.
14 For more see: point 4.1 of this Chapter.

examination, the Tribunal works in its full bench of five or three people. This matter is regulated by the provisions of Article 25 of the Act.

Sitting in full bench, the Tribunal adjudicates on: 1) power (competence) disputes between the central constitutional State authorities; 2) assertion of impediment in the President exercising his responsibilities and vesting temporary performance of his responsibilities in the Marshal of the Sejm; 3) conformity to the Constitution of purposes and activities of political parties; 4) the so-called preventive examination (of laws and international agreements) initiated by the President; 5) special intricacy (on the initiative of the President of the Tribunal or an appointed bench, or in cases, in which the special intricacy is connected with financial outlays not envisaged in the budget law, or else when the adjudicating bench intents to abandon the legal view expressed in the ruling issued by the whole bench.

Sitting in a bench of five judges, the Tribunal adjudicates on the conformity to the Constitution of laws or ratified international agreements as well as on the conformity of laws with the international agreements the ratification of which required a prior consent expressed in the Act.

Sitting in a bench of three judges, the Tribunal adjudicates on: a) conformity of other normative acts to the Constitution, ratified international agreements and laws; b) complaints about a refusal of acting on applications for assertion of conformity of the normative act to the Constitution, ratified international agreements or laws as well as constitutional complaints; c) exclusion of a judge.

Only in the cases of initiating acting on a constitutional complaint, or some applications, or refusal thereof, the Tribunal adjudicates as a one-person bench. However, it is important to remember that here the point is a stage of preliminary examination, which has a different aim. Basically, substantive resolving the problem of constitutionality of a regulation is not the point, which is the selection of cases.

1.7. The principle of transparency

The fundamental principle on which the proceedings in the Tribunal is based is the principle of transparency. Article 23 of the Act provides that the sessions of the Tribunal are public, unless a specific provision of the law provides otherwise. A condition for excluding transparency is the State security or protection of secret information (with the secrecy clause: "secret" or "top secret"). The decision on excluding transparency of the proceedings is taken by the chairperson of the adjudicating bench. Naturally, like it is in typical court cases, transparency refers to a stage of the proceedings. Nowadays the sessions of the Tribunal are even broadcast live through the official Tribunal's website.[15] The rules of procedure of the Tribunal provides, however, that in the event of the chairperson of the Tribunal's adjudicating bench asserting that recording or broadcasting of the course of the hearing hinders its conducting, he/she may not allow the representatives of the radio, television and press to do their job (§40 para 1).

2. Appropriate application of the Code of Civil Procedure

First of all it is important to specify that, in accordance with Article 20 of the Act on the Tribunal, in the affairs not regulated thereby referring to the proceedings before the Tribunal, the relevant provisions of the Code of Civil Procedure (hereinafter referred to as CCP) is applied.[16]

The provision of Article 20 of the Act on the Tribunal defining the rule of appropriate application of the provisions of CCP is undoubtedly useful. It contributes to the "completion" of the Act. For the loopholes in the Act on the Tribunal refer to not only the procedure before the Tribunal itself but also constitutional or organizational issues.

However, from the perspective of people initiating proceedings before the Tribunal, as well as from the perspective of the Tribunal, it

15 See at: www.trybunal.gov.pl/rozprawy/transmisja-rozpraw/
16 The Act of 17 November 1964, The Code of Civil Procedure (Dz.U. Nr 43, item 296).

is the range of the "appropriate application" of the provisions of CCP in reference to the substantive activity of the Tribunal that is of the greatest importance. It is worth underscoring that this range is not, which is obvious, specifically defined. Consequently, the role of the Tribunal (especially the president of the adjudicating bench of the Tribunal) is to provide an appropriate interpretating of the Act on the Tribunal. He is also obliged to qualify certain provisions of CCP as relevant to the proceedings in connection with examination of the cases the subject of which is resolving the problem of constitutionality.

On the other hand, the existence of so general a reference is not convenient to the Tribunal and my cause difficulties.

Without going into detailed discussion, it is worth explaining that "appropriate application" of the provisions of CCP may occur only when the provisions of the Act fail to regulate a particular question (subsidiarily in relation to the Act), because the Act is a *lex specialis* to CCP. Moreover, appropriate application of the provisions of CCP means that this application cannot by against the rules referring to proceedings before the Tribunal, resulting directly or indirectly from the provisions of the Act.[17] Thorough analysis of the matter of appropriate application of CCP in the proceedings before the Tribunal, including especially the range of the appropriate application in these proceedings, is not necessary for the purposes of this book.[18]

Here it is important to take into consideration the way of understanding of the statutory reference to CCP as well as the criteria which should be included at the subsidiary application of the CCP provisions. Considering this question in one of its decisions, the Tribunal asserted that the expression of "appropriate" application of the provisions of the Code of Civil Procedure forces to take into account, as for the range and the way of using the institution and the procedures regulated in this code, the specificity and functions of proceedings before the Tribunal, including especially dissimilarity of settling

17 For more on the rules of "appropriate" application the provisions of law see: J. Nowacki, *Odpowiednie stosowanie przepisów prawa*, Państwo i Prawo 1964, No 3, p. 367 +.

18 For more there upon see: M. Hauser, *Odesłania w postępowaniu przed Trybunałem Konstytucyjnym,* Warszawa 2008, pp. 318. See especially p. 84 +.

civil cases and adjudicating on the conformity of acts of law with the Constitution (legal norm control). What clearly results therefrom is that the provisions regulating judicial civil proceedings may be applied only as far as the specificity of the Tribunal's adjudication allows therefore as well as the nature of the affairs under the Tribunal's cognition.[19]

The principle of "appropriate application" of the provisions of CCP concerns all stages of the procedure, i.e. from the moment of initiation until the issuance of the ruling. In practice the Tribunal usually applies "appropriately" the provisions of CCP regulating:

- rules of procedural representation (including the obligation of producing the authorization to represent the applicant/complainant);
- possibility of granting further power of attorney (the so-called substitution for another barrister or solicitor);
- rule of expressing statements of will by legal persons (the requirement of taking a resolution thereupon);
- rule of delivery of letters in the proceedings before the Tribunal;
- rule of calculating dates (deadlines);
- institution of suspending the proceedings before the Tribunal.

Nevertheless, it is not possible to apply "appropriately" the provisions of CCP regulating, for example, a principal intervention (Article 75 CCP), or a side intervention (Article 76 CCP).

Beside the general reference to CCP the Act on the Tribunal sometimes includes relevant reference in specific questions. The examples thereof may be Articles 26, 48 and 32 of the Act.[20]

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19 Information on important problems resulting from the operating and adjudication of the Constitutional Tribunal, Warsaw 2006, p. 51. Also compare: the Decision of 17 July 2003, sign. K 13/02 (OTK ZU 2003 No 6A, item 72, p. 847).

20 The Code of Civil Procedure is not the only normative act to which the Act on the Tribunal refers. For example, Article 5 para 3 on the qualifications required to occupy the position of judge of the Tribunal, it refers to the laws on the Supreme Court and the Supreme Administrative Court, whereas the provision of Article 57 para 1 on the examination of the conformity of the activities of political parties to the Constitution establishes reference to appropriate application of the provisions of the Code of Criminal Procedures. These regulations will be more extensively discussed in the further parts of this study.

The provisions of Article 26 of the Act determine the circumstances of excluding a judge by virtue of law from deciding on the case, whereas the provision of point 3 of the Article also refers to "other reasons justifying the exclusion of the judge, specified in Article 48 of the Code of Civil Procedure". Article 48 para 2, in turn, concerns the question of establishing a barrister or solicitor "*ex officio* on the basis of the Code of Civil Procedure" on the request of the entity submitting a constitutional complaint. Furthermore, Article 32 refers to the criteria of "procedural letter".

Summing-up the criteria of applying the reference included in Article 20 of the Act on the Tribunal, each case of an "appropriate" application of the provisions of CCP must fit the statutory determined condition of the lack of specific regulation in the Act on the Tribunal, where the matter is a real and not apparent lack of a regulation, i.e. such a situation where the application of the methods of regulation interpretation reveals a legal loophole. Moreover, the proceedings of the Tribunal in cases referring to the constitutionality of regulations are specific and separate proceedings, which results in each case of "appropriate" application of CCP having to include its specificity.

3. Types of proceedings

On the basis of the constitutional powers of the Constitutional Tribunal it is possible to distinguish three fundamental types of proceedings before this body:

- proceedings connected with the examination of legal regulations (norms);
- proceedings connected with the examination of purposes and activities of political parties;
- proceedings for settling a power (competence) dispute.

The fundamental function of the Tribunal is examining legal regulations (norms). The activity of the Tribunal consists foremost in settling the cases initiated by: filing an appropriate application for examining a regulation, lodging a constitutional complaint or

producing a legal question. In all these procedures (application, complaint, as well as in the case of a legal question) the essence of the Tribunal's operation is identical, which is examining a regulation which, consequently, may lead to confirming its conformity to the superior regulation or an assertion of such unconformity and repealing its binding force. Identical is also the objective the aforementioned legal institutions (application, constitutional complaint, legal question) serve; it is protection of the superiority of the Constitution (protection of the hierarchy of legal norms). Simultaneously the protection of fundamental individual freedoms and rights is implemented.

The institutions specified differ from each other in many respects. There are considerable differences referring to their subjective scope, objective scope and models of examination (control). In the case of constitutional complaints and legal questions occur also certain characteristic conditions which determine their essence. Therefore both the circle of entities entitled to use the specified institutions, the object of the challenge, the model of examination performed by the Tribunal, as well as the aforementioned conditions, require a separate analysis. It is all the more desirable because now a very reach collection of the adjudication of the Tribunal, which has considered and settled these questions several times, is available.

Two subsequent types of proceedings, i.e. those connected with the examination of purposes or activities of political parties and those for settling a power (competence) dispute do not concern the hierarchical examination of regulations, except the Tribunal's power to determine the constitutionality of the statutes of political parties. Proceedings in these cases are of separate nature though basically they are based on the fundamental principles of proceedings discussed in point 1 of this chapter. These two types of proceedings, in respect of their specificity require separate consideration, to which Chapter IV will be dedicated.

3.1. Adjudicating on constitutionality and legality of legal norms

3.1.1. Application

Submitting an application to the Constitutional Tribunal for examining constitutionality (or legality) of a legal provision results from the essence of the constitutional judicial system. The Tribunal is entitled to examine the constitutionality (or legality) of the currently valid law.[21] Adjudicating on the cases of this type of applications is an example of the so-called abstract control, i.e. not connected with any particular application of the regulation in question in any individual case. Submitting an application is, as mentioned above, one of three forms of initiating proceedings in the Tribunal, beside filing a constitutional complaint and producing a legal question. In this sense they are equivalent institutions. The Constitutional Tribunal confirmed many times that an application which comes from an entitled entity fulfills a double function: first, it initiates proceedings before the Tribunal, and, second, determines the limits of adjudication.[22]

For the application addressed to the Tribunal to be recognized as an application referring to the examination of constitutionality or legality of normative acts, it should meet requirements of a procedural document. Moreover, among its indispensable elements (formal requirements of the application), in accordance with Article 32 para 1 of the Act, are counted: 1) specification of the authority which issued the questioned normative act; 2) specification of the questioned normative act or its part; 3) formulating an objection of the questioned normative act failing to conform to the Constitution, a ratified international agreement or a law; 4) justification of the objection with reference to the evidence supporting thereof.

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21 The exceptions in this matter are: 1) the so-called preventive examination of statutory legal norms or those included in an international agreement on the application from the President of RP (the law is yet to enter into force); 2) possibility of the Tribunal's examination of the provisions formally repealed (the law has already expired), but still resulting in legal effects; the power of the Tribunal resulting from Article 39 para 3 of the Act (for more: point 4.2. of this Chapter).

22 See, for example, the Decision of 20 October 2004, sign. Tw 16/04 (OTK ZU 2004 No 5B, item 261, p. 772).

As for the matter of the charge of unconstutionality the Tribunal stated that "the essence of the objection is individualization of the relations between the examined normative act specified in the application and the basis for the examination or the model specified by the applicant. An accurate formulation of the objection is a fundament of the assessment if there are no negative procedural conditions preventing from a substantive examination of the application, as well as determines the limits to the application, which simultaneously are (…) limits to the cognition of the Constitutional Tribunal in the given case".[23]

The right to submit an application for a hierarchical control of norms are granted to the entities specified in Article 191 of the Constitution. The provisions of this article, however, introduce two categories of entities.[24] The first of them includes the entities which are generally legitimized to apply for the examination of norms, i.e. regardless of whether the questioned provision concerns them directly or not (the so-called general, unlimited legitimation).[25] The group of these entities includes: the President of RP, the Marshal of the Sejm, the Marshal of the Senate, the President of the Council of Ministers, 50 deputies, 30 senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the President of the Supreme Audit Office, the Ombudsman (Article 191 para 1 point 1 of the Constitution). In one of its rulings the Tribunal recognized that "*the power of a small group of the supreme state authorities to initiate proceedings before the Constitutional Tribunal is an essential component of these authorities' constitutional status, and its implementation is inseparably connected with the role which the particular institution play in the system of state authorities. In this light the mere fact of granting the right to initiate*

23 See, for example, the Decision of 28 October 2004, sign. Tw 23/04 (OTK ZU 2004 No 5B, item 266, p. 781).

24 For more see, for example, W. Johann, *Legitymacja do występowania z wnioskami przed Trybunałem Konstytucyjnym,* (in:) Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego, (ed. M. Zubik), Warszawa 2006.

25 As Z. Czeszejko-Sochacki aptly observed, for the Tribunal to recognize the application capability of a generally legitimized entity and, as a result, examined the constitutionality of a particular normative act, "*the applicant's general conviction on the unconstitutionality of the normative act questioned by him is sufficient…*", and the Tribunal has no legal grounds to examine and assess the reasons why the applicant lodged the application. See: Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne…, op. cit.*, p. 207.

proceedings before the Constitutional Tribunal to the entities specified in Article 191 para 1 points 3-5 of the Constitution, makes an important exception."[26]

The second category is entities which have limited legitimation (the so-called substantial legitimation). In other words, they are entitled to the so-called special (sometimes called specific) legitimacy,[27] because they can file such an application if the normative act refers to affairs under their scope of operation.[28] They are: bodies being units of territorial local government, national institutions of trade unions as well as national authorities of organizations of employers and professional organizations, as well as churches and other religious congregations (Article 191 para 1 points 3-5). An entity substantively legitimized is also the National Council of the Judiciary, which may apply to the Tribunal in the case of conformity to the Constitution of normative acts in the scope of their reference to the independence of the judiciary and judges (Article 191 para 1 point 2 in connection with Article 186 para 2 of the Constitution). This simultaneously means that the National Council of the Judiciary is the only individually specified entity of limited (substantive) legitimation to apply to the Tribunal.

All the entities specified in this article are entitled to initiate proceedings in the case of the hierarchical examination of norms, i.e.: 1) conformity of laws and international agreements to the Constitution; 2) conformity of laws tp ratified international agreements, the ratification of which required prior consent expressed in the Act; 3) conformity of the provisions of law issued by the central state authorities to the Constitution, ratified international agreements and laws (Article 191 para 1 in connection with Article 188 of the Constitution).

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26 The Decision of 12 February 2003, sign. Tw 72/02 (OTK ZU 2003 No 2B, item 78).

27 Sometimes another expression is used: „limited application capability". See, for example, the Decision of 9 June 2004, sign. Tw 2/04 (OTK ZU 2004 No 5B, item 258, p. 763).

28 For more see, for example: J. Szymanek, *Szczególna legitymacja procesowa kierowania wniosków do Trybunału Konstytucyjnego,* (in:) Transformacja systemów wymiaru sprawiedliwości, vol. II, Proces transformacji i dylematy wymiaru sprawiedliwości, (ed. J. Jaskiernia),Toruń 2011; J. Zaleśny, *Legitymacja szczególna zaskarżenia aktów normatywnych do Trybunału Konstytucyjnego,* (in:) Piętnaście lat Konstytucji z 1997 roku. Inspiracje, uregulowania, trwałość, (ed. J. Kuciński), Warszawa 2012, p. 184-196.

The division into entities generally legitimized and those specifically legitimized matters exclusively at the moment of initiating proceedings in the Constitutional Tribunal. Namely, if the application was submitted by a generally legitimized entity, the President of the Tribunal, having stated that it meets the basic formal requirements (the requirements of procedural documents, content requirements, includes an appropriate number of attachments), passes it to the adjudicating bench, appointed by him, and designates a judge-rapporteur.[29] Such an application is not subject to verifying procedure because it is foremost the Tribunal that controls the applicant's complaint capability.

If, alternatively, the application was submitted by an entity specifically legitimated, it is subject to detailed checking procedure; namely the so-called preliminary examination.[30]

In its long adjudicating practice the Constitutional Tribunal has characterized in detail the entities legitimized specifically (substantively). It has also many times formulated particular guidelines in order to help potentially interested entities to efficiently initiate the proceedings.

In reference to the units of legislative authorities of local governments (municipality council, *poviat* council or provincial *sejmik*) the Tribunal decided that they do not have to prove their legal interest, because initiating cases by these entities is determined by public interest. Besides, the Tribunal confirmed that performing the preliminary examination it is foremost important to make sure that in the particular case the particular council *(sejmik)* questions a normative act under the scope of its operation. Thus, it has to be such a case that: 1) expresses the interest of a community of public nature, i.e. the case concerning public and not individual good; 2) refers to the constitutionality of a legal regulation in the sense of Article 188 of the Constitution, or consequently such a public interest which is connected with the constitutional legal order, legal security and other constitutional principles and values expressed in the process of making regulations; 3) allows for identification of the aim of the application

29 If justified, two judges-rapporteurs may be designated. Such cases occurred sporadically.
30 For more about the stages of the proceedings see the subsequent subchapter of this Chapter.

with essential qualities of the entity, to which the Constitution grants such a limited legitimacy.[31] Consequently, the aim of the application has to refer to a public interest connected with the local nature of the council (*sejmik*) as a territorial representation of a self-governing community. The Tribunal also decided that the public interest should have, simultaneously, local attributions, so that it is possible to tell the difference between the limited legitimacy of these entities from the general legitimacy of the entities specified in Article 191 para 1 point 1 of the Constitution.[32]

As far as the entity meeting purely formal requirements is concerned, the Tribunal has many times reminded the obligation of adopting by the legislative body of the local government a resolution on an application to the Constitutional Tribunal, the content of which should express the will to eliminate from the legal order a regulation which, in the opinion of this body, does not conform to the Constitution, a ratified international agreement or a law.[33] Moreover, the Tribunal emphasized that the content of the resolution of the legislative body of the local government should be convergent with the content of the application addressed to the Tribunal. The "minimal convergence", which should characterize both the resolution and the application includes: 1) specification of the subject of the proceedings (the questioned regulation) by appropriate (concrete – L.J.) designation of the normative act; 2) expressing of the will to eliminate this regulation from the legal order; 3) formulating an objection (charge) of non-conformity to the provisions of a superior normative act, e.g. in the case of a law with the Constitution or a ratified international agreement.[34] In conclusion: the legislative body of the local government is obliged to attach a copy of its resolution, which is a basis of the application. Furthermore, the resolution "*may be adopted before preparing the application, jointly with the application (as an attachment to thereto)*

31 See: *Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2001 roku*, Warszawa 2002, p. 26.
32 See: the Decision of 19 August 2008 r., sign. Tw 28/08 (OTK ZU 2008 No 4B, item 135).
33 Compare: the Decision of 16 January 2001, sign. Tw 55/00 (OTK ZU 2002 No 1B, item 29).
34 Compare: the Decision of 10 March 2004, sign. Tw 30/03 (OTK ZU 2004 No 1B, item 9).

or after its preparation in the form of draft, but all the same before submitting the application to the Constitutional Tribunal."[35]

In reference to the national authorities of trade unions as well as national authorities of organizations of employers and professional organizations the Tribunal foremost stated that economic self-governments are beyond the operation of Article 191 para 1 point 4 of the Constitution.[36] A typical example of a professional organization are any professional self-governing bodies. Moreover, the Tribunal explained the sense of the adjective "national" (nationwide). The Tribunal namely stated in one of its rulings that "*only such an organization may have national bodies, which covers with its operation the area of the whole country. The mere registration and, what follows, granting a legal personality does not decide on the capability of an organization of employers of applying to the Constitutional Tribunal*".[37] On the other hand, the examination of the legitimation of a trade union to apply to the Tribunal cannot be reduced to reading its name or the declaration included in the statute but has to consist in "*substantive assessment if this organization is indeed of nationwide nature*."[38]

According to the Tribunal's adjudication the decision if a particular organization is a trade union depends on the content of the record referring thereto in the register of trade unions. However, in order to recognize their legitimacy it is necessary to fulfill an objective condition (i.e. the normative act has to refer to the scope of their operations). Therefore, as Z.Czeszejko-Sochacki cogently summed up, "*only the*

35 See: the Judgment of 20 February 2002, sign. K 39/00 (OTK ZU 2002 No 1A, item 4, p. 45).

36 See, for example, the Decision of 4 March 2003, sign. Tw 65/02 (OTK ZU 2003 No 2B, item 74). In the justification of another ruling the Tribunal explained: *"Trade unions and organizations of employers are organizations grouping people being one of the parties of the employment relationship. Professional organizations, on the other hand, group people performing permanently and for commercial purposes a singled (so called "liberated") profession, so the people who also provide their work but are not in the subordinate relationship"* and that is why *"there are no grounds to embrace economic self-government with the scope of operation of Article 191 para 1 point 4 of the Constitution"*. See: the Decision of 8 December 2004, sign. Tw 43/04 (OTK ZU 2004 No 5B, item 275, p. 803).

37 See: the Decision of 28 September 2004, sign. Tw 23/04 (OTK ZU 2004 No 5B, item 266, p. 783).

38 See: the Decision of 12 February 2003, sign. Tw 72/02 (OTK ZU 2003 No 2B, item 78, p. 195).

joint fulfillment of both these conditions (objective and subjective) gives a basis for initiating proceedings before the Constitutional Tribunal".[39]

Analogously the applying legitimacy of churches and religious congregations is interpreted (Article 191 para 1 point 6 of the Constitution). In this case also the fulfillment of both objective and subjective conditions is required. Meeting the subjective condition is connected with obtaining the status of church or religious congregation. The confirmation of this status is an entry in a relevant register of churches and religious congregations, whereas the question of representing a church or a religious congregation in the proceedings before the Tribunal is decided by internal rules of these entities. In accordance with the constitutional principle of autonomy of churches and religious congregations, defining its internal structure, including the bodies entitled to represent their legal interests is the exclusive competence of these units. The objective condition is fulfilled as the result of proving that the normative act being an object of objection is part of affairs under the scope of operation of churches and religious congregations.

3.1.2. Constitutional complaint

Legal literature contains many definitions of constitutional complaint. Certainly, the constitutional complaint is an extraordinary legal measure, which may be used by a natural person or a legal person in proceedings before the Constitutional Tribunal in order to defend "*fundamental civil rights in the case of their infringement by the acts of state authorities or their inaction*."[40] It is also underscored that a "*constitutional complaint has a form of a claim, to which an individual in relation to the state is entitled, of protecting his/her fundamental rights in special proceedings before the constitutional court*."[41]

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39 Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne*…, *op. cit.,* p. 209.

40 B. Banaszak, *Skarga konstytucyjna i jej znaczenie w zakresie praw podstawowych,* (in:) Podstawowe prawa jednostki i ich sądowa ochrona, ed. L. Wiśniewski, Warszawa 1997, p. 175.

41 Z. Czeszejko-Sochacki, *Skarga konstytucyjna w prawie polskim*, Przegląd Sejmowy 1998, No 1, p. 31.

Genesis of constitutional complaint has European sources, to be more precise German ones. The term "constitutional complaint" (*Verfassungsbeschwerde*) was first used in legal literature in the 1850s, which was influenced by the solutions proposed in the draft of the constitution of the Reich in 1849.[42] Especially "*a citizen's complaint to the court of the Reich aiming at protection of the rights guaranteed in this constitution*"[43] provided in the draft of the constitution of the Reich of 1849 may be recognized as a prototype of the constitutional complaint. However, for the draft of that constitution never entered into force, literature also contains a position recognizing as a prototype of constitutional complaint the institution of complaint introduced into the Austro-Hungarian constitutional law of 1867 enabling the citizens to appeal to the Court of the Reich because of the infringement of their constitutional rights. This complaint could not be applied in relation to legislative acts.[44]

The origins of protection of individual constitutional rights reach the period when constitutional courts were yet to begin their operation; therefore the prototypes of constitutional complaint made it possible to launch the procedures of protecting individual rights before courts, without any special, established procedure. Despite the fact that nowadays the institution of constitutional complaint is connected with constitutional judicial system (adjudication on the matter of constitutional complaints is a prerogative of constitutional courts), it actually emerged independently from the appearance of separate constitutional judiciary.[45] Undoubtedly, however, the development of constitutional judiciary affected considerably the formulation of the institution of constitutional complaint. Moreover, adjudication by constitutional courts on the cases of constitutional complaints is currently a leading function of constitutional courts. This is what

42 B. Banaszak, *Modele skargi konstytucyjnej* (in:) Skarga konstytucyjna, ed. J. Trzciński, Warszawa 2000, p. 10-11.

43 B. Banaszak, *Modele skargi…, op. cit.,* p. 11.

44 E. Zwierzchowski, *Sądownictwo konstytucyjne*, Białystok 1994, p. 167-168. B. Szmulik claims that the complaint of 1867 is "*a proper prototype of modern constitutional complaint*" See: B. Szmulik, *Skarga konstytucyjna. Polski model na tle porównawczym*, Warszawa 2006, p. 13. In this context what is also worth mentioning is the constitutional complaint provided by the Bavarian constitution of 1818.It was, however, actually a kind of petition to the king, and therefore it is difficult to recognize it as a prototype of modern constitutional complaint.

45 Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne…, op. cit.*, p. 239.

demonstrate statistics illustrating the activity of constitutional courts (tribunals) as well as the Polish Tribunal.[46]

Thus, creating separate constitutional courts formed the separate nature of the European model of constitutionality control and considerably affected the forming of the institution of constitutional complaint, which could not remain outside the framework of the coherent constitutional control. Appointing the first Constitutional Tribunal (in the Constitution of Austria of 1920), competent to adjudicate on the vertical control of legal norms, considerably influenced all procedures of initiating examinations. In the countries where prototypes of constitutional complaint had already existed, its legal status had to be formed within the framework of coherent constitutional control of a constitutional court. However, in the countries with no seeds of constitutional complaint (e.g. Poland), the operating of a constitutional court stimulated the introduction of constitutional complaint as a certain way of initiating examinations of state (public power) acts by the constitutional court.

The Polish Tribunal obtained the power of adjudicating on constitutional complaints no sooner than by virtue of the Constitution of RP of 1997. In accordance to Article 79 para 1 of the Constitution, "everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon whose basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution." The provision of paragraph 2 of this article excludes the possibility of applying the institution of constitutional complaint in the case of the right to refuge and granting a status of refugee, determined in Article 56 of the Constitution. The provisions of Article 79 para 1 form the model of the Polish constitutional complaint, which, according to the criteria accepted in literature, is classified as the so-called narrow model.

46 For example, in 2013, 331 constitutional complaints in the general number of 480 cases considered by the Tribunal, were passed to the Tribunal after the preliminary examination. Compare also: Appendix 3 to this paper.

In modern democratic states, which adopted the institution of constitutional complaint, it is possible to observe differentiation of its model. In general, constitutional complaint occurs either in the form of a broad or a narrow model and this division refers to both the subjective aspect (i.e. the question: Who can lodge a complaint?), as well as the objective one (i.e. what can be an object of objection applying this institution). However, simplifying, it is possible to state that differences between the broad model and the narrow one actually concern the objective criterion. This is because from the perspective of the quality of the standards of human and civil rights protection the most important is the objective scope of the constitutional complaint. All the same, both the subjective scope of the complaint and the scope of control models is quite similar (yet not identical) in the solutions adopted in particular states and, consequently, the fundamental classification criterion for constitutional complaints is their objective scope.

The broadest model of constitutional complaint is defined with: 1) a broad scope of entities possessing legitimacy to lodge a constitutional complaint; 2) a broad objective scope; 3) a broad catalogue of constitutional models (i.e. protection covers all constitutional rights and freedoms). In the light of the Constitution of RP, the Polish model of constitutional complaint is characterized by: a broad subjective scope, a narrow objective scope and a broad catalogue of constitutional models.

The broad subjective scope of constitutional complaint stems from the phrase: "everyone whose constitutional freedoms or rights have been infringed…". It is important, however, that the scope of entities entitled to employ a constitutional complaint is determined by not only the wording of constitutional and statutory norms referring to a particular constitutional court, but also results from constitutional adjudication and the influence of the doctrine of law. A constitutional complaint in Poland may be filed by: natural persons: citizens and non-citizens (in the case of the latter it is about a few rights); in the scope of the rights, which they, due to their nature, are entitled to: legal persons of civil law (e.g. associations and other social organizations, cooperatives, trade unions, political parties, religious congregations) and of commercial

law (especially business entities, companies).[47] Also legal persons of public law are entitled to lodge a constitutional complaint (only a few of them and in reference to certain rights).[48] Limitations in applying this institution of law refer then to: foreigners and the stateless (the restriction resulting from Article 79 para 2 of the Constitution) as well as legal persons acting within a broad framework of the public sector, e.g. local government units,[49] state legal persons or companies with a Treasury share[50] and independent public institutions of healthcare.[51] Thus, legal persons of public law are not entitled to complaint capability, although every single time it is thoroughly analyzed by the Constitutional Tribunal for particular factual circumstances.

Adoption of the broad objective scope means that the object of a constitutional complaint are: legal acts (general and abstract), individual acts, and even sentences of common and administrative courts. Thus, it is about legislative acts and acts of law application. The object of the complaint may also be inaction of bodies of public administration and courts, and also, according to the recent trend, inaction of the legislator.[52]

The model of constitutional complaint of a narrow objective scope concerns protection of all individual rights and freedoms included in the

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47 L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2007, p. 364.

48 In the justification of one of its decisions the Tribunal asserted that local government units, as legal persons of public law, could effectively lodge a complaint having met two criteria: they would have to prove that they are addressees of constitutional norms expressing subjective rights within the scope of the acceptable basis of the complaint, and would have to refer to protection of the rights they are entitled to, being emanations of subjective rights and freedoms protected by the Constitution. See: the Decision of 7 December 2005, sign. Ts 83/05 (OTK ZU 2005 No 6B, item 259, p. 737-738).

49 Certain cases initiated by local government units were so complicated that the full bench of the Constitutional Tribunal dealt with them in a substantive examination (hearing). See: the Decision of 22 May 2007, sign. SK 70/05 (OTK 2007 No 6A, item 60).

50 The Tribunal allows on rare occasions for complaint legitimacy of those entities, but exclusively in the scope of their property rights protection, if the companies operated within the area of private law. See: for example, the Judgment of 21 March 2005, sign. SK 24/04 (OTK ZU 2005 No 3A, item 25).

51 Refusing complaint legitimacy to this type of entities, the Tribunal accepted, however, a possibility of lodging a complaint "*in the situation where through reducing the legal person's rights connected with implementation of public responsibilities, reduction of these units' rights occurs*". See: the Decision of 6 February 2001, sign. Ts 148/00 (OTK ZU 2001 No 3, item 72, p. 414).

52 It is important to remember, however, that in the countries where occurs a broad subjective scope of complaint (e.g. Germany) the provisions of the Constitution determining the scope of acts are very general.

Constitution and usually are also characterized by similar approach to the subjective scope. Within the framework of this model it is possible to distinguish, for instance, complaints against individual acts or against the so-called acts of law application. Such a model occurs in Slovenia and Slovakia (nevertheless, here also occur essential differences between the Slovenian solution and the Slovakian solution). Another variation of constitutional complaints of a narrow objective scope are the scopes which are exclusively against general acts, which were the basis for individual judgments. Such solutions can be found both in Hungary and Poland.

The Polish solution enables initiating a complaint procedure against a provision of law, and excludes an application of a constitutional complaint in the situation of a faulty (infringing constitutional freedoms or rights) application of law by a body of public administration. It is not without a reason that in legal literature it is recognized as a remarkable limitation of the effectiveness of constitutional complaint as a legal measure serving to protect constitutional freedoms and rights, which are opposed to the requirements of (modern) constitutionalism.[53]

Concluding the reflections on the typology of constitutional complaint, it is worth referring, in accordance with the adopted typology determined by the three criteria specified above, the specific understanding of constitutional complaint in Spain (constitutional *amparo*). It is possible to use the institution of *amparo* in relation to a part of constitutional rights.[54] However, also in this case the practice expanded the application of *amparo* to the rights and freedoms which had not been specified in the constitution and in the organic law. On the basis of judicial decisions, *amparo* expanded on the freedoms and rights resulting from those which are directly specified (guaranteed),

53 See: for example A.Łabno, *Skarga konstytucyjna jako środek ochrony praw człowieka. Przyczynek do dyskusji,* Przegląd Prawa Konstytucyjnego 2012, No 4, p. 41-45, *passim* and page 58.

54 In Spain constitutional rights occur in two categories: fundamental rights and public freedoms are protected in the procedure of constitutional complaint (*amparo*), whereas civil rights and obligations are excluded therefrom. For example, the right to private ownership and inheritance as well as the freedom of entrepreneurship are not protected (Articles 33 and 38 of the Constitution of the Kingdom of Spain).

for instance, the freedom of founding political parties resulting from the freedom of association (Article 22 of the Constitution).[55]

In Poland all freedoms and rights specified in the Constitution (except Article 56 enacting the right of refuge) may be protected by the institution of complaint.

Constitutional complaint differs from other legal measures in specific qualities. First, proceedings in the case of a constitutional complaint are special proceedings, which are conducted before the constitutional court, so not before a judicial authority. Second, the objective of these proceedings is protection of fundamental rights (or freedoms and rights) guaranteed in the Constitution. Third, the basis of these proceedings is the infringement of one of these fundamental rights (i.e. constitutional) by public authorities.[56]

Proceedings before the Polish Constitutional Tribunal in the cases of constitutional complaints are characterized by specific legal solutions. First of all, a constitutional complaint is subject to the so-called preliminary examination. Secondly, a constitutional complaint has to be prepared on behalf of the complainant by a barrister or a solicitor (the so-called barrister-solicitor compulsion). Thirdly, within the framework of complaint proceedings the Tribunal may issue a so-called temporary decision. Fourthly, the proceedings on a constitutional complaint may be joined by Ombudsman and Commissioner for Children's Rights. Fifthly, there is a possibility to recognize a complaint and to pass a judgment at the so-called classified session (with no necessity to conduct a hearing).

As specified above, the first, obligatory stage of Tribunal procedure in complaint cases is a preliminary examination. Only those complaints will be transferred for consideration in the hearing (i.e. for a

55 A. Łabno, *Trybunał Konstytucyjny w Hiszpanii,* (in:) Sądy konstytucyjne w Europie, ed. J. Trzciński, Vol. 3, Warszawa 1999, p. 27.

56 Infringement may result from an act of the public authorities: an individual act (the broad model of complaint) or normative act (the narrow model of complaint) towards a particular entity, whose constitutional right or freedom was infringed and which is therefore entitled to protection in the proceedings before the constitutional court. This protection consists in repealing the negative effects of this act of the public authorities, if the constitutional court stated that the act has infringed any of the aforesaid fundamental rights (freedoms) constitutionally guaranteed.

purely substantive assessment), which fulfill all substantive conditions and formal requirements of complaint defined in the Constitution and the Act (they will by analyzed below in the subchapter "Stages of proceedings before the Constitutional Tribunal") as well as those complaints which come from entitled entities. What is examined is, thus, the complainant's meeting all the constitutional and statutory requirements.

In accordance with Article 50 para 1 of the Act, the Tribunal may issue a temporary decision on suspending or withholding a judgment on the case to which the complaint refers, if the execution of the sentence, decision or another resolution could result in irreversible effects connected with a considerable damage to the complainant or if an important public interest or another important interest of the complainant justifies it. If during the preliminary examination the Tribunal issues a temporary decision, it is necessary to immediately deliver it to the complainant and a competent judicial (court) or executive authority (Article 50 para 2 of the Act). The Tribunal repeals a temporary decision if the reasons for which it was issued expire (Article 50 para 3 ofthe Act). The procedural rules of the Tribunal specify that the temporary decision should be attached with a justification, which should also be delivered to the complainant and the competent authority (§ 20 of the Procedural Rules).

In turn, Article 51 of the Act orders to inform the Ombudsman and the Commissioner for Children's Rights about the initiation of the complaint proceedings. The Ombudsmen may, within 60 days of the date of receiving the information, report their participation in the proceedings. The role of the Ombudsmen consists in supporting the argumentation in favor of the objections. The Ombudsmen, however, are not entitled to formulate complaints on behalf of third parties because of the condition of "personal interest").

The Act also allows for resolving a constitutional complaint in a classified session "if the positions of the participants in the proceedings presented in writing clearly show that the normative act on the basis of which a court or an institution of public administration finally decided on the constitutional freedoms, rights or responsibilities of

the complainant, is unconstitutional". The ruling issued under this procedure has to be published (Article 59 para 2 of the Act). This regulation is not often applied in practice.[57]

Constitutional complaint is characterized by both substantive and formal conditions. Among the substantive conditions are: 1) the complainant's personal interest; 2) the complainant's legal interest; 3) the complainant's real interest and 4) the principal of subsidiarity, while the formal conditions are: a) a deadline for filing the complaint; b) a form of the complaint and 3) the required content of the complaint.[58]

The entity submitting a complaint must prove his/her "personal interest", i.e. demonstrate that he/she is personally interested in eliminating the infringement of the freedoms and rights he/she is entitled to. The condition of "personal interest" makes complaint different from the so-called *actio popularis*. Showing the legal interest consists in proving that the infringement of freedoms or rights concerns directly the complainant's legal situation. Therefore an indispensable condition of accepting the case for substantive examination is the complainant specifying a particular right (or freedom) which has been infringed. Meeting the condition of "real interest" involves proving a real infringement of law (the fact that did occur), and not only the infringement which may happen in the future or is hypothetical.

Another key substantive requirement of constitutional complaint is the principle of subsidiarity. Namely, an effective initiation of a complaint procedure is possible not before the exhaustion of other legal measures to which the complainant was entitled earlier. The point is exercising the complaint measures to which the complainant is entitled during the procedures of one instance, especially the exhaustion of the course of the instance. The principle of subsidiarity confirms the exceptional nature of the institution of constitutional complaint and excludes a possibility of its parallel use along with other measures of legal protection or, all the more, instead thereof. In Poland the principle of subsidiarity is confirmed in a statutory statement: "constitutional

57 It usually occurs twice or three times a year.

58 Such a "terminological stereotype" defining its substantive and formal requirements is proposed by B. Banaszak. See: B. Banaszak, *Modele skargi…,op. cit*., p. 14-20.

complaint (…) may be lodged after the exhaustion of a legal path, if this path is provided for…"[59]

The right to lodge a constitutional complaint is granted to the entity who, according to Article 79 para 1 of the Constitution, possesses a final judgment of a court or an institution of public administration on the constitutional rights, freedoms or responsibilities the complainant is entitled to. Constitutional complaint is a legal measure serving to question the legal grounds (a particular provision of a normative act) for this "final judgment". The "final judgment" may, on the other hand, result from civil, criminal or administrative proceedings. The aforementioned constitutional requirement is fulfilled if the complainant has just exhausted the legal path to which he was entitled in order to repeal the unfavorable judgment of the court or the institution of public administration. It important to emphasize, however, that the condition of "final judgment and the condition of "exhaustion of the legal path" are not identical, even though simultaneously they are interconnected regulations. For it may happen that the final judgment under Article 79 para 1 of the Constitution is a judgment issued by the first instance, whereas the final resolution under Article 46 para 1 of the Act is a judgment concluding the proceedings on the case.[60]

If a constitutional complaint is a consequence of the resolution of an individual case in civil proceedings, the deadline of its submission is counted from the date of delivering the complainant the decision of the civil court of the second instance approving of the judgment issued in the first instance. There is no necessity to lodge a cassation complaint. It is analogously in criminal proceedings: the judgment of a criminal court of the second instance, which does not repeal the judgment of the court of the first instance, comes into force and means that the complainant's legal path has been exhausted. He does not have to apply for a cassation to the Supreme Court. During the criminal proceedings incidental decisions may also be issued, for example, concerning a temporary detention or a prisoner's complaint about overcrowded cells and

59 Article 46 para 1 of the Act.
60 The Decision of Constitutional Tribunal of 14 July 2004, sign. Ts 82/03 (OTK ZU 2004 No 3B, item 178, p. 534-535).

exposition to viral infections. Despite initial skepticism in this matter, the Constitutional Tribunal, for a few years, has consistently been opting for recognizing this category of rulings as "final" in the understanding of Article 79 of the Constitution.[61] The question of exhaustion of the legal path within the framework of administrative proceedings is somewhat different. Meeting the condition of "final ruling" within the framework of these proceedings first requires obtaining a valid decision as the result of two-instance administrative proceedings, and then filing a complaint against this decision to an administrative court. In judicial-administrative proceedings the complainant also has to exhaust the legal path: a judgment, negative for the complainant, of a provincial administrative court on an administrative decision issued in his case should be appealed to the Supreme Administrative Court. Only the ruling of the SAC is understood as a "final ruling" in accordance with Article 79 para 1 of the Constitution.

A fundamental formal requirement is the deadline of constitutional complaint submission. In particular countries it is from one month to one year and is statutorily regulated. In Poland this question is regulated by Article 48 para 1 of the Act, which provides that a constitutional complaint should be filed "… within three months of the delivery of a valid judgment, final decision or another final solution to the complainant." It is a final date, after which no right to complaint occurs (i.e. a complaint cannot be effectively lodged) and is not subject to restoration. However, in one case it is possible to suspend the course of the period for submitting the complaint.[62] In

61 In the early years of considering complaints, the Tribunal stated that incidental decisions could not be recognized as "final decisions on rights, freedoms or constitutional responsibilities" due to the fact that they were not decisions concluding the proceedings in the case and because such cases are not of independent nature; they are connected with the fundamental proceedings. The Tribunal also recognized that they may also be repealed as the result of another application submitted by the person that they concerned. Currently the Tribunal presents a different view, namely, that the essence of a "final ruling" is its connection with a freedom or a right constitutionally protected, and not a connection with other (principal) proceedings. This means, simultaneously, that currently the definition of "case" is broader than initially. See, for example, the Judgment of 24 July 2006, sign. SK 58/03 (OTK ZU 2006 No 7A, item 85).

62 Article 48 para 2 of the Act provides that if the complainant submitted to a district court relevant for his place of residence an application for establishing for him a barrister or a solicitor as a legal counsel *ex officio* (in the situation of inability to bear the costs of legal assistance), until the court has decided on this application, the time limit provided for lodging a complaint does not run. It is the only exception of prolongation of a statutory time limitation for filing a constitutio-

the states where constitutional complaint occurs, there is a requirement of a written form defined constitutionally or statutorily. The Polish Law introduces this requirement in Article 47. In accordance with the guidelines specified there, a constitutional complaint should meet the requirements of procedural letter[63] and include: 1) precise specification of a law or another normative act on the basis of which the court or an authority of public administration ruled finally on freedoms, rights or responsibilities specified in the Constitution and in relation to which the claimant demands a statement of unconstitutionality; 2) specification which constitutional freedoms or rights, and how, according to the claimant, the rules have been infringed; 3) justification of the complaint with a precise description of facts. Among the formal requirements for filing a complaint is also an obligation of attaching to the complaint a sentence, decision or another resolution issued on the basis of the normative act questioned, with the date of delivery of such a resolution (Article 47 para 2 of the Act).

Another statutory requirement of complaint is the so-called barrister-solicitor compulsion, which manifests itself with the necessity of preparing by a qualified entity, which is a barrister or a solicitor, both a constitutional complaint as well as a potential complaint about the refusal of initiating the course of the complaint procedure. The compulsion is not valid if the claimant is a judge, a public prosecutor, a notary, a professor or doctor habilitated of legal sciences. The persons named in the regulation may prepare a complaint personally. Each written presentation of additional argumentation supporting the complaint, should be performed by a barrister or a solicitor, or by persons of equal procedural powers.[64] Technically the content of a constitutional complaint must have the proxy's signature, and

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nal complaint and, simultaneously, the only event of suspending the course of this time limitation.

63 In accordance with Article 30 para 1 of the Act: "Procedural letters shall be applications and statements of the participants in the proceedings, submitted to the Tribunal in the course of the proceedings out with hearings." In accordance with Article 126 of CCP the basic requirements of a procedural letter are, for example: a) specification of the addressee (the court); b) first name and family name and designation of the applicant's place of residence; c) content of the application with statements and evidence to support the quoted circumstances; d) specification of the signature of the files if the letter is another one within the framework of the proceedings.

64 See: M. Pruszyński, *Zakres przymusu adwokackiego w postępowaniu skargowym przed Trybunałem Konstytucyjnym*, Biuletyn Trybunału Konstytucyjnego 1999, No 2-3 (8-9), p. 92.

simultaneously the special power of attorney of the complainant should be attached to the complaint and from its content the power of preparing a constitutional complaint should be derived.[65] It is no sooner than the a hearing in the Constitutional Tribunal that it is possible to present the complaint and the arguments specified therein by the claimant him/herself.

The statutory requirements of acceptability of a constitutional complaints quoted above are derivatives of its constitutional normative structure, defined in Article 79 para 1 of the Constitution. Failing to meet these requirements results in failing to initiate the course of proceedings referring to the constitutional complaint, because they are treated by the Tribunal as *sine qua non* requirements. On the other hand, if after initiating the course of the complaint procedure turns out that it fails to fulfill the statutory conditions necessary for a substantive consideration of the case, the Tribunal should discontinue the proceedings at a classified session or during the hearing depending on the moment the circumstances justifying the discontinuance emerge.[66]

A negative, substantive condition of examination of a constitutional complaint is its evident groundlessness. The Tribunal's assertion that the complaint is obviously groundless results in issuing a decision on refusal to proceed with the complaint any longer (Art. 49 in connection with Article 36 para 3 of the Act). The term "evident groundlessness" has not been defined in the Act and the semantic field of this notion should be constructed on the basis of the Tribunal's practice. For example, the Tribunal treats as evidently groundless a complaint in which the complainant presents his arguments referring to the question of infringing his freedoms or rights completely irrationally and illogically or presents a complaint in which he explains the infringement of freedoms and rights in such a way that it fails to correspond with the objection to the regulation presented in the complaint. Also

65 This condition is fulfilled by the complainant's power of attorney to represent him before the Constitutional Tribunal.

66 Complaint cases discontinued by the Tribunal at the stage of substantive examination as the result of adopting by the adjudicating benches an assessment of acceptable complaints other than during the preliminary examination, are not rare. Compare: for example, the Decision of CT of 3 February 2005, sign. SK 7/03 (OTK ZU 2005, no 2A, item 19); the decision of CT of 18 July 2005, sign. SK 25/04 (OTK ZU 2005, no 7A, item 85).

the specification of the bases of the complaint, incoherent with the objections, expressing certain rights or freedoms, is an example of an evident groundlessness of the complaint.[67]

In order to systematize the information presented above referring to substantive and formal requirements of a constitutional complaint it is worth adding that only a few of the deficiencies recognized during the preliminary examination may be completed. Only formal deficiencies may be completed (it is provided by Article 49 in connection with Article 36 para 2 of the Act). The category of formal requirements include those defined in Article 47 para 1 and 2 of the Act. A constitutional complaint should be also attached by other documents (being also obligatory formal requirements), the lack of which must be absolutely completed. It is about: 1) the power of attorney to prepare a constitutional complaint;[68] 2) a copy of the ruling of a public authority, with the issue of which the complainant connects the infringement of constitutional rights or freedoms he is entitled to; 3) a copy of decisions issued in connection with the complainant's exhaustion of appealing or complaining measures to which he was entitled, including a ruling issued by the first instance authority.

Formal deficiencies of the complaint are, like in the case of applications, recognized as removable. Failing to complete the formal requirements within 7 days of the date of delivery of the judge's order issued on this matter or the Tribunal's statement that the complaint is evidently groundless, automatically results in a decision to refuse to proceed any action in the case of this complaint.

In constitutional complaints the subject of examination may only be "a law or another normative act", and more precisely a provision (or provisions) of a law or another normative act, which has been applied by a court or a public administration authority while issuing

67 For more see: J. Królikowski, J. Sułkowski, *Znaczenie przesłanki oczywistej bezzasadności dla dostępności skargi konstytucyjnej jako środka ochrony konstytucyjnych praw i wolności*, Przegląd Sejmowy 2009, No 5, p. 98 +.

68 If the complainant used the services of a proxy *ex officio*, it is necessary to attach the copy of the district court's decision on establishing this proxy as well as the decision of a barristers' or solicitors' self-governing body appointing a particular barrister or solicitor as a proxy *ex officio*. In the case of legal persons it is necessary to attach an up-to-date extract from the appropriate register.

a final ruling on rights, freedoms or responsibilities determined in the Constitution of RP. This directly results in the fact that the objection to unconstitutionality reported by the complainant may be addressed to a provision of a law or another normative act exclusively. Thus, the acts of law without the normative force are not subject to examination (not only in the procedure of constitutional complaint). The subject of examination in the procedure of constitutional complaint may be a law or any normative act with the power of a law (a law in a substantive sense).[69] The Tribunal applies substantive criteria also in reference to the category of "normative acts".[70] Among the Tribunal's many statements on understanding the normativity of acts of law, one may find numerous guidelines for proceeding in the situation of a lack of sufficient certainty if a particular act of law may be subject to the Tribunal's cognition or not. The Tribunal asserted, for example, that as for the protection of human and civil rights and freedoms, if a legal act includes "any normative content", it is impossible to exclude this act from the examination of constitutionality or legality. In such situations it is even necessary to apply a special "presumption of normativity" of acts of law.[71]

In the Tribunal's opinion, any act of law which establishes legal norms of general and abstract nature, possesses the value of normativity. As a result, the character of legal norms included in the act of law is of decisive importantce, and not its form (simplifying: its name: L.J.).[72] It is important to add that a sort of intermediate situation is possible, i.e. in an extensive act of law only a few of its provisions are of a normative nature. In such a situation the Tribunal's examination covers the provisions which include a certain normative substance only.

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69 In accordance with Article 234 of the Constitution of RP, the President is entitled, if certain conditions specified there occur, to issue ordinances of the power of a law. The Constitutional Tribunal often examined such "laws in substantive sense", as: decrees of the power of laws, issued by the Polish Committee of National Liberation in 1944-47, and decrees with the power of laws issued by the Council of State in 1952-89. However, an important condition is that these acts were still valid (have effects despite their formal repealing).

70 K. Działocha analyzed this issue thoroughly in his article *Pojęcie aktu normatywnego w ustawie o Trybunale Konstytucyjnym*, Studia Prawnicze 1989, No 2-3, p. 2 +.

71 See: the Judgment of 12 July 2001, sign. SK 1/01 (OTK ZU 2001 No 5, item 127, p. 742.

72 See: the Ruling of 7 July 1988, sign. U. 15/88 (OTK 1989, item 10, p. 146-147).

The Constitutional Tribunal, thus, applied an extensive interpretation of the expression "another normative act"; nevertheless, the most serious doubts still concern the recognition of acts of local law as an acceptable subject of examination in a complaint procedure. The adjudicating practice proves that although the Tribunal does not exclude it definitely, it more frequently opts against this practice.[73] The doctrine of law has not developed a single position upon the question discussed.[74]

Until recently, in face of no adjudicating practice in this matter, the literature more often questioned the possibility of the Tribunal's examination of constitutionality of so-called acts of derivative (secondary) law of the European Union,[75] although a few presented a more liberal position and did not exclude such a possibility.[76] This question, however, has ben resolved and the Tribunal accepts such a possibility under the procedure of the so-called concrete control (examination) (applying the institution of legal question or constitutional complaint). In the justification of the judgment on case SK 45/09 the Tribunal stated that the EU regulation manifests, due to the "general range" of application, the characteristics of a normative act in the sense of Article 79 para 1 of the Constitution. It is of general

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73 Compare, for example, the Decision of 6 October 2004, sign. SK 42/02 (OTK ZU 2004 No 9A, item 97).

74 For acknowledging the possibility of examination of acts of local law under the procedure of constitutional complaint opt, for example: F. Rymarz, J. Repel as well as W. Kręcisz and W. Zakrzewski. See: F. Rymarz, *Problem prawa miejscowego jako przedmiot skargi konstytucyjnej*, Przegląd Sądowy 1999, No 5, p. 7; J. Repel, *Przedmiotowy zakres skargi konstytucyjnej,* (in:) Skarga konstytucyjna, ed. J. Trzciński, Warszawa 2000, p. 97; W. Kręcisz, W. Zakrzewski, *Skarga konstytucyjna a kontrola konstytucyjności prawa miejscowego*, Przegląd Sejmowy 1998, No 5, p. 62-63. Against this position are, for example: Z. Czeszejko-Sochacki and J. Trzciński. See: Z. Czeszejko-Sochacki, *Skarga konstytucyjna - niektóre dylematy procesowe*, Przegląd Sejmowy 1999, No 6, p. 40-41; J. Trzciński, *Uwagi do art. 79 Konstytucji,* (in:) Konstytucja Rzeczypospolitej Polskiej. Komentarz, ed. L. Garlicki Vol. I, Warszawa 1999, p. 15; L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2007, p. 137.

75 See: for example: Z.Czeszejko-Sochacki, *Skarga konstytucyjna w prawie polskim*, Przegląd Sejmowy 1998, No 1, p. 48; S. J. Jaworski, *Skarga konstytucyjna jako środek ochrony konstytucyjnych praw i wolności*, Zamość 2003, p. 16.

76 See: K. Wójtowicz, *Konstytucja Rzeczypospolitej Polskiej a członkostwo w UE,* (in:) Konstytucja dla rozszerzającej się Europy, ed. E. Popławska, Warszawa 2000, p. 171; L. Garlicki, *Kilka uwag o konstytucyjnych aspektach przystąpienia Polski do Unii Europejskiej,* (in:) Konstytucja, wybory, parlament. Studia ofiarowane Zdzisławowi Jaroszowi, (L. Garlicki, ed.), Warszawa 2000, p. 70; K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym. Wybrane zagadnienia prawnokonstytucyjne,* Kraków 2007, p. 327.

and abstract nature, so it may contain norms, which will become a basis for the final judgment of the court or a body of public administration on constitutional freedoms, rights or responsibilities of individuals.[77]

In accordance with the position of the Tribunal, the subject of examination may also be a provision (of a normative act) of substantive, procedural or constitutional nature.[78] On the other hand, the lack of a regulation, or the so-called "legislative negligence", cannot be blamed. The legislator's negligence, consisting in not issuing a normative act and not regulating a particular issue, even despite the constitutional obligation in this matter, remains beyond the Tribunal's cognition.[79] The Tribunal, however, may adjudicate on the "legislative omission". A legislative omission occurs when the law under examination lacks certain legal norms and, consequently, the constitutionality of the whole law, due to, for example, the respect for the principle of equality, may raise doubts. It is possible to talk about a legislative omission only in the event of a qualitative identity (or at least a profound similarity) of the legislative matters normed in one regulation as well as those remaining beyond its regulation. Simultaneously, however, adjudicating on a legislative omission, the Tribunal cannot exceed its competences and infringe the legislator's powers.[80]

Moreover, it is important to mention requirements concerning the models of constitutionality examination. A model of examination in complaint proceedings are constitutional freedoms or rights. In the Constitution of RP the catalogue of freedoms and rights is included in its Chapter Two. The constitutional freedoms and rights are divided into three categories: 1) personal (Articles 38-56); 2) political (Articles 57-63); 3) economic, social and cultural (Articles 64-76). The specified groups of rights (freedoms) are preceded by general principles: inherent

77 See: the Judgment of 16 November 2011, sign. SK 45/09 (OTK ZU 2011 No 9A, item 97). The Tribunal decided that an indispensable elements of constitutional complaint questioning the conformity of an act of derivative law of the EU to the Constitution is substantiation of reducing by this act the level of human rights protection in comparison with the standard determined by the Constitution. See: ibidem, p. 1510).

78 See: the Judgment of 17 November 2009, sing. SK 64/08 (OTK ZU 2009 No 10A, item 148).

79 See: for example the Judgment of 9 October 2001, sign. SK 8/00 (OTK ZU 2001 No 7, item 211, p. 1033).

80 Compare: *Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2008 roku,* Warszawa 2009, p. 21.

and inalienable dignity of a human person (Article 30), freedom of a human (Article 31) and equality before the law (Article 32). In order to effectively demand an examination of a constitutional complaint, it is necessary to specify what particular right (freedom) was infringed and in what way was infringed as the result of a public authority issuing a final judgment (decision) in an individual case of the complainant. In the complaint proceedings a model of examination may be foremost a particular provision of Chapter Two of the Constitution (establishing a particular subjective law), yet also any other provision of the Constitution, as far as it determines the form of constitutional freedoms, rights and responsibilities of the citizens. A model may be a provision being a direct source of freedom or right of subjective nature as well as the provision, from which a particular freedom or right can be "extracted". In practice, the complainant indeed usually refer to particular rights or freedoms (e.g. the right to sue).

Establishing the existence of a particular freedom or right may, on the other hand, justify the Tribunal examining constitutional provisions specified in Chapter One (entitled "The Republic")[81], as well as the provisions of the Preamble to the Constitution, i.e. normative statements which have another function and do not determine particular freedoms (rights).[82]The so-called program norms cause quite considerable problems in the Tribunal's adjudicating work and this is the majority of regulations on economic, social and cultural regulations. They are constitutional provisions which formulate a particular law but its scope (implementation) depends on the legislator's decision. The normative structure of a provision of a program nature results in the fact that it

81 The Tribunal the most often express its opinion on Article 2 of the Constitution, which defines the Republic of Poland as "a democratic state ruled by law and implementing the principles of social justice" and Article 30 (the principle of human dignity) and Article 32 (the principle of human equality). Despite the fact that it more often opted against recognition of those provisions of the Constitution as an independent model, it did not exclude totally a possibility of such application thereof. Each case requires a separate thorough analysis.

82 There is a dispute in the doctrine if the Preamble to the Constitution has a normative attribute. Not analyzing this more extensively, to simplify, we assume after J.Trzciński, that at least a few provisions of the Preamble, for instance, the expression formulating the principle of subsidiarity or the principle of social solidarity, have normative attributes and could play a role of the basis of a constitutional complaint (i.e. a model for examination of constitutionality). See: J. Trzciński, *Zakres podmiotowy i podstawa skargi konstytucyjnej* (in:) Skarga konstytucyjna, ed. J. Trzciński, Warszawa 2000, p. 64.

is not clear what is an exact level of guarantee of the subjective law: constitutional or statutory? Establishment of this level of guarantee of a particular right is important inasmuch as it is exclusively constitutional and not statutory rights may be a model for the challenged provision. The Constitutional Tribunal generally assumes that "*a statutory implementation of the constitutional social right can never be below the minimum determined by the essence of a particular right*".[83] A program norm may, thus, be a model for complaint examination, if the complainant proves that the infringement concerned the constitutionally guaranteed freedoms and rights guaranteed to him in the scope in which the constitutional legislator and not an ordinary legislator decided on their form (content/substance).

As demonstrated, no full understanding of the essence of constitutional model may occur without the analysis of the Constitutional Tribunal's practice in the issues in question. It is "safer" to specify in the complaint a right (freedom) directly expressed in the Constitution, whereas provisions of another nature (e.g. constitutional) or provisions of the Preamble should be referred to as auxiliary ones in order to strengthen the argumentation. The same observation concerns regulations established in international normative acts. They cannot be a model in complaint proceedings, unless they determine an identical freedom (right),[84] which are guaranteed by the Constitution of RP. It is the only exception. Because proceedings before the Constitutional Tribunal is characterized by the principle of binding with the limits of the application (complaint or legal question), the Tribunal cannot independently determine a constitutional model.

3.1.3. Legal question (question of law)

Adjudication on legal questions is the other, beside adjudicating on constitutional complaints, manifestation of the co-called concrete control/examination, or that performed in connection with an

83 See: the Judgment of 8 May 2000, sign. SK 22/99 (OTK ZU 2000 No 4, item 107, p. 513).

84 To be more precise, the point is that the structure of a normative freedom (right) established by an international agreement (for instance, the Convention on Human Rights Protection and Fundamental Freedoms) should be identical with its constitutional structure. In this way, the identical scope of the protection of a particular freedom (right) is secured.

individual act of law application. However, whereas it is possible to use a constitutional complaint only after finishing individual judicial or administrative proceedings, and also having exhausted all acceptable means of challenge, the use of the institution of legal question may occur during the judicial proceedings only, and to be more precise, before the court passes its judgment.

The Constitutional Tribunal has had the power of deciding on legal questions since its beginning. It was already regulated in the Act of 1985 in Article 10. The valid regulation of the institution of legal questions differs considerably from its original version, which foremost had a different subjective scope; legal questions could be submitted by adjudicating benches in such proceedings as administrative, judicial, arbitral, in cases of offences and in cases of fiscal crimes and offences.

Since 1997 the institution of legal questions has been enjoying a constitutional status and was established in Article 193 of the Constitution of RP, which provides that: "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court." The characteristics of this institution should take into consideration such conditions as: subjective scope, objective scope and functionality, as the most peculiar in this procedure, which identifies the essence of the legal question.

In accordance with the constitutional provision specified above, the right to present a legal question to the Tribunal is granted to "any court". In the doctrine a single position has been established, which specifies that it is exclusively about the courts in the understanding of Article 195 of the Constitution of RP, i.e. the authorities which exercise the judicial power.[85] The function of administering justice is fulfilled by the Supreme Court, common courts, administrative courts, military courts and, in the event of war, extraordinary courts[86]. Also

85 See, for example: A. Wasilewski, *Pytania prawne do Trybunału Konstytucyjnego*, Przegląd Sądowy 2000, No 5, p. 4.

86 The structure of the common judiciary in Poland looks as follows: district courts (as the bottom rung), regional courts (higher rung) and courts of appeal (the highest rung). The Supreme Court shall exercise supervision over common and military courts regarding judgements. The

the State Tribunal should be included into this catalogue, for this body may exercise the judicial power, although in within certain limits (i.e. only when adjudicates on the legal-criminal liability of the President of the Republic of Poland as well as on crimes committed by the highest state officials in connection with their posts or within the scope of their office).[87] On the other hand "courts" in the understanding of Article 193 of the Constitution are not disciplinary and arbitral courts.[88]

The subject of challenge in the procedure of legal question is a "normative act". The category of "normative act" contains basically all forms of acts of law universally binding, but the practice of the Tribunal shows that they are usually laws (statutes), and more seldom sub-statutory acts. The understanding of normative act in the doctrine and the Tribunal's decisions was already analyzed and presented in the previous point (3.1.2.). It is important to remind that for many years, as far as examination of regulations (norms) is concerned, the Tribunal has been applying an extensive interpretation of the expression. The point is a substantive understanding of a "normative act" and is also applied in the adjudicating procedure on legal questions. However, since the Constitutional Tribunal performs the so-called vertical examination of normative acts, in the case of direct and independent application of the Constitution to resolving a particular case by the court initiating the legal question procedure is unacceptable. The Constitution of RP cannot be a subject of examination in the proceedings before the Constitutional Tribunal at all. It may be and usually is a model of examination.

The constitutional essence of a legal question demonstrates, however, that the subject of examination may only be the normative act which is to be a basis of resolving a particular case before the court which initiates the proceedings in the Tribunal. This means that in

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Supreme Court shall also perform other activities specified in the Constitution and statutes. Compare the scheme of the judicial power in Poland, see: Appendix 8 to this text.

87 See, for example: R. Hauser, A. Kabat, *Pytania prawne jako procedura kontroli konstytucyjności prawa*, Przegląd Sejmowy 2001, No 1, p. 31; Czeszejko-Sochacki Z., Garlicki L., Trzciński J., *Komentarz do ustawy…, op. cit.* p. 49; M. Wiącek, *Pytanie prawne sądu do Trybunału Konstytucyjnego,* Warszawa 2011, p. 85. However, A. Wasilewski opted against recognition of the legitimacy of the State Tribunal; see A.Wasilewski, *Przedstawianie pytań prawnych Trybunałowi Konstytucyjnemu przez sądy (art. 193 Konstytucji RP),* Państwo i Prawo 1999, z. 8, p. 27.

88 See: Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy…, op. cit.* p. 49.

practice the presentation of a legal question is possible when the case is sufficiently explained and the court is going to issue its judgment thereupon soon. Submitting a legal question is acceptable only when the doubts of the court are obvious, objective and serious and to such a degree that it is not possible to resolve them independently applying an interpretation of regulations in accordance with the Constitution.[89] The Tribunal in the proceedings in the case of a legal question fulfills a subsidiary function in the sense that in the event of doubts referring to the constitutionality of a regulation, the court should, first of all, take an independent attempt at pro-constitutional interpretation.[90]

In connection with the phrase "Any court may refer a question of law…" the literature has considered extensively the question if it is a norm of obligatory nature or empowering nature. The problem can be reduced to the decision if the doubts of the court referring to the constitutionality of the regulation have to, in a way automatically, result in producing a legal question, or perhaps the court enjoys discretion in this case and may not refer to the Tribunal with the legal question. A single view thereupon does not exist, even though a view of the "obligation" of the court to produce a legal question on the constitutionality of a law is more frequent.[91] This interpretation is also applied by the Constitutional Tribunal.[92] The court, on the other hand, is not obliged to pose a legal question if the subject of challenge is a sub-statutory norm.[93]

The decision of the court on posing a legal question to the Constitutional Tribunal is subject to a formal procedure and requires issuing a separate decision thereupon (it should be done analogously in the case of withdrawal of a legal question). A result of employing a

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89 Compare: the Judgment of 13 September 2011, sign. P 33/09 (OTK ZU 2011 No 7A, item 71).

90 Compare: the Decision of 4 October 2010, sign. P 79/08 (OTK ZU 2010 No 9A, item 111).

91 See, for example: R. Hauser, A. Kabat, *Pytania prawne jako procedura…, op. cit.,* p. 36; A. Wasilewski, *Przedstawianie pytań prawnych…, op. cit.,* p. 30; M. Wiącek, *Pytanie prawne sądu do…, op. cit.,* p.273.Unlike W.Sanetra, *Sąd Najwyższy w systemie wymiaru sprawiedliwości,* Przegląd Sądowy 1999, No 7-8, p. 13.

92 In its justification of case P 8/00 the Tribunal acknowledged that „*a proper way to resolve a doubt concerning the conformity of a specific statutory regulation applicable to the case to the general constitutional norm is to pose a legal question to the Tribunal*". See: the Decision of 4 October 2000 (OTK ZU 2000 No 6, item 189, p. 1017.

93 See, for example: R. Hauser, A. Kabat, *Pytania prawne jako procedura…, op. cit.,* p. 38; A. Wasilewski, *Pytania prawne do…, op. cit.,* p. 7.

legal question is the necessity of suspending the proceedings in the case considered by the court until the end of the proceedings in the Tribunal (some courts also apply a practice of postponement of hearings).

What is the most characteristic of legal questions is the condition of functionality, which has to be fulfilled so that the Tribunal could issue a substantive judgment (ruling). Functionality of a legal question means that the court posing the question must demonstrate that the resolution of the case before this court depends on the answer to the legal question. This dependence must be based on a relation between the substance of the regulation questioned by the court and the facts referring to the case which the court is recognizing.[94]

The subject of a legal question may become such a regulation the elimination of which from the legal order may result in a different judicial resolution for which it may be a basis. The subject of challenge may be even a norm different from that being the legal grounds for the resolution, if only its relevance for the case before the court is proved.[95] The burden of proving the fulfillment of the functional condition rests on the court initiating the proceedings.

Article 193 of the Constitution provides directly that a model of examination in the cases initiated by a legal question may be the Constitution, a ratified international agreement or a law. This is an exhaustive enumeration.

Formal requirements of a legal question are analogous to formal requirements of an application for the examination of regulations submitted within the procedure of abstract examination. They are specified in Article 32 of the Act. Foremost, it is necessary to preserve the requirements of a judicial letter, as well as: 1) specifying the body which issued the questioned normative act; 2) defining this normative act or its part; 3) formulating the objection of inconsistency with a particular model; 4) justifying the objection with the evidence to support it. Formal, statutory requirements of legal question are also: 5) specifying to what extent the answer thereto may affect the

94 *Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2010 roku,* Warszawa 2011, p. 11.

95 Compare: the Judgment of 12 May 2011, sign. P 38/08 (OTK ZU 2011 No 4A, item 33).

resolution of the case in connection with which the question was posed; 6) specifying the body before which the proceedings are taking place; 7) designation of the case. If a legal question contains formal deficiencies or was submitted without the files of the case in connection with which it was formulated, the President of the Tribunal issues an ordinance to complete them by a certain date (§24 of the rules of proceedings). Failure to meet any of the formal requirements makes the substantive assessment of the objections impossible and results in the Tribunal issuing a decision on the discontinuation of the proceedings.

The most generally speaking, a legal question serves to implement two basic aims: first, it is an institution for protecting the superiority of the Constitution, and second, it is a mechanism conducive to protecting individual freedoms and right. In such a general approach to the function, legal question is not different from constitutional complaint, which also implements specified aims. A broader view enables us to point at the specific aims of legal question. It is about implementing such fundamental constitutional principles as: reliability of court operations, mutual cooperation of judicial authorities and cooperation with the legislative authorities.[96] The institution of legal questions also realizes the essence of the constitutional principle of the rule of law, not only formally but is foremost its substantive guarantee.

4. Stages of proceedings before the Constitutional Tribunal

The procedure of adjudication in the Constitutional Tribunal is peculiar. Regardless of the type of proceedings it has attributes which make it different from typical judicial procedures. The procedure of examination of cases is based on a few fundamental principles which are common for all types of proceedings. They were presented in point one of this Chapter. Foremost, however, it is a multi-stage procedure, which, additionally in certain types of proceedings, takes a still more extended form. Characterizing the procedure of adjudication in the

96 Compare: M. Wiącek, *Pytanie prawne sądu…, op. cit.,* p. 56-60, *passim.*

Tribunal it is important to distinguish its three stages: preliminary, examinational (i.e. substantive, during the hearing) as well as the stage of ruling.

4.1. Preliminary proceedings

The preliminary proceedings (stage) precedes the proper substantive proceedings. It is expected to find if all conditions have been fulfilled, which is necessary to pass the case for examination during the hearing. In the case of most proceedings before the Tribunal the preliminary stage is actually reduced to the verification if the initiator of particular proceedings is legally entitled thereto (examination of judicial legitimacy) and the verification if formal conditions have been met. This happens, for example, in reference to preventive examination on the President's application, in cases on examining the conformity of the aims and activities of political parties to the Constitution, in cases on resolving a competence dispute, and in cases of legal questions. However, in reference to some cases, namely applications for examining rules submitted by so-called legitimized entities specifically as well as constitutional complaints, the preliminary stage takes a very extensive form. In the case of these cases an obligatory stage of the procedure in the so-called preliminary examination.[97] At this stage of the proceedings the cases are identified on the basis of the signatures of the case: "Tw" (repertory of applications) and "Ts" (repertory of constitutional complaints).[98]

The stage of **preliminary examination** is one of the most interesting issues connected with the Polish Tribunal. In practice a considerable part of cases before the Tribunal are subject to preliminary examination.[99] The procedure of preliminary examination

97 *A contrario*, the preliminary examination does not concern: applications of entities with unlimited (general) application legitimacy, applications of the National Council of Judiciary with a limited application legitimacy, legal questions, applications of the President submitted under the procedure of the so-called preventive examination. It does not concern applications referring to the examination of the conformity to the Constitution of purposes and activities of political parties and applications for resolving competence disputes.

98 Compare the types of signatures of cases before the Tribunal, see: Appendix 1 to this book.

99 Taking into consideration the statistical criterion it is definitely the majority of cases resolved by the Tribunal. For example, in 2013 staggering 361 of 480 initiatives of entitled entities were ca-

of applications and constitutional complaints is basically analogous, and in the case of constitutional complaints it is complemented with additional regulations. This is the result of the wording of the Act because in accordance with its Article 49: "Constitutional complaint is subject to preliminary examination; Article 36 is applicable respectively".

Preliminary examination is, thus, regulated by Article 36 of the Act on the Constitutional Tribunal, as well as by the rules of procedure of the Tribunal. Preliminary examination (of both applications and constitutional complaints) is for their selection. Its purpose is to pass for substantive consideration (i.e. to the hearing) only the applications (complaints) which meet all the criteria (substantive conditions and formal requirements) determined by the Constitution and the Act. First of all, the Tribunal in the preliminary examination checks the fulfillment of the subjective condition: if the application (complaint) was submitted by an entity entitled thereto.

Formally, the stage of preliminary examination commences with the moment of submitting of the application (complaint) to the Tribunal, which usually occurs by mail. It is concluded either positively for the applicant (complainant), i.e. referring the case to the hearing,[100] or negatively, with a decision on a refusal to give the application (constitutional complaint) a further course, or a decision on not taking into consideration or leaving without examination a complaint about a refusal to give the application (or constitutional complaint) a further course, if such a complaint is lodged. The Tribunal performs an preliminary examination in a one-person bench, the challenge thereof is considered by a three-person bench. At this stage the Tribunal always rules at a classified session and in the form of decision. The wording of the objection should, however, directly refer to the foundations of

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ses being subject to preliminary examination, and those which were not subject thereto were the remaining part or 119. Also compare: Appendix 2 to this book.

100 Formally it occurs either as the result of issuing an order of the Tribunal judge on presenting the complaint to the President of the Tribunal in order to appoint an adjudicating bench in substantive examination (i.e. during the hearing), or as the result of issuing by the Tribunal, this time as a three-person bench, a decision on taking into consideration the objection to the refusal of taking any further action on the complaint.

the refusal of launching an action on the application (complaint). The three-person bench's decision maintaining the previous decision on the refusal of giving the application (complaint) a course is final and unchallengeable.

The stage of preliminary examination is characterized, thus, by two-instance procedure, which is a clear exception in the Tribunal's activity. This two-instance procedure does not oppose Article 190 para 1 of the Constitution which establishes the principle of finality of the Tribunal's rulings, because decisions issued in the preliminary examination serve another goal, namely the selection of applications and complaints and essentially are not substantive resolutions. All in all, if the Tribunal has any doubts if the application (complaint) may be passed to the hearing or not, the Tribunal should rather allow the application to the substantive stage of examination in the hearing. The Tribunal's practice demonstrates that the efficiency of the aforementioned objections is not very high.

Article 36 para 2 provides that if the Constitutional Tribunal (one-person bench) decides that the application (constitutional complaint) fails to meet the formal conditions, it calls for their completion within 7 days of the delivery of the notification (the judge's decision thereupon). Failure to complete the missing data or an a conclusion that the application (complaint) is evidently groundless, leads automatically to issuing a decision on refusing to continue the proceedings.

At the stage of preliminary examination of applications the Tribunal very often applies the provision of Article 36 para 2 of the Act and calls the applicant to eliminate formal errors. Among the most frequent formal errors are: a) failure to submit the application with the required number of five copies of necessary annexes; b) failure to submit the resolution or the decision of a relevant body representing the applicant on the question of filing an application; c) failure to submit the up-to-date statute of the entity entitled to file an application; d) failure to submit an extract from the minutes (in order to assert that the resolution/decision was taken in accordance with the statute requirements); e) failure to refer to the provision of law (e.g. a statute) demonstrating that the normative act questioned concerns the affairs

under the applicant's scope of operation; f) failure to submit the up-to-date extract from the court register; g) failure to specify a representative authorized to file the application and to represent the entity before the Constitutional Tribunal; h) failure to specify in what matter the challenged provision fails to conform to the specified constitutional model; i) lack of a formulated objection against the unconstitutionality of the normative act challenged; j) failure to specify in what way in relation to the applicant, the regulations challenged by him infringe the constitutional models specified by him (e.g. constitutional principles).

The most frequent formal errors of complaints are: 1) missing specification of the particular constitutional freedoms and rights have been infringed or missing specification of the way of the infringement; 2) missing specification of the final ruling deciding on constitutional rights, freedoms and obligations; 3) failure to deliver the special power of attorney to prepare the complaint by the representative on behalf of the complainant or the decision of the court on establishing a proxy; 4) failure to deliver copies of the final ruling of the court of a public administration authority.

In conclusion, preliminary examination of applications examines foremost the fulfillment of a substantive condition (i.e. if the normative act concerns the applicant's scope of operation, and as a result, if the application was filed by an entitled entity), the fulfillment of strictly formal (statutory) requirements as well as if no condition of "evident groundlessness" occurs. The practice of the Tribunal in preliminary examination of applications is very rich. The specifically legitimized entities apply to the Constitutional Tribunal relatively frequently, on average a few dozens of times a year.[101] The President of the Tribunal refers the applications which fulfill all the conditions "for consideration at a hearing by a competent bench and shall determine the date for the said hearing" (Article 37 of the Act).

In order to efficiently demand consideration of the application, the entity submitting the application is obliged to at least substantiate the fact that the normative act the constitutionality (or legitimacy)

101 Compare: Appendix 3 to this book.

of which he questions "concerns their scope of operation." It is an underspecified phrase and consequently it is worth reaching the Constitutional Tribunal's statements which explain its essence. For example, the Tribunal asserted that this means that "*an application to the Constitutional Tribunal has to be directly connected with the legal interest of a particular organization as such or with the legal interest of members of the organization to the representation of which this organization is appointed. Such organizations are not, however, legitimized to submit to the Constitutional Tribunal application on national and social problems in general, which naturally concern the legal interest of all citizens or groups much larger than the ones which the particular organization represents*".[102] In its other ruling the Tribunal specified that "this legitimation is granted only in reference to a clearly, narrow category of acts of law strictly connected with the subject of activity of the legitimated entity".[103]

As for the preliminary examination of constitutional complaints, it serves to verify the complainant's fulfillment of the statutory requirements of the complaint, being derivatives of its constitutional structure (in particular meeting the deadline, the complainant's entitlement to submit complaints, formal requirements and if the condition of "obvious groundlessness" occurs).

It is also important to add that the letter is classified as a constitutional complaint and entered into a relevant repertory ("Ts"), if it satisfies the barrister-solicitor compulsion. Otherwise it is not treated as a constitutional complaint at all, is not forwarded for a preliminary examination and is entered into the "PW" register. Preliminary qualification (selection) of letters marked as a constitutional complaint yet not meeting its basic requirements (e.g. barrister-solicitor compulsion) is dealt with by the employees of the Team for Preliminary Examination of Constitutional Complaints and Applications.[104]

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102 See: the Decision of 24 September 1996, sign. T. 35/96 (OTK 1996 No 5, item 45, p. 383).
103 See: the Decision of 28 June 2000, sign. U. 1/00 (OTK ZU 2000 No 5, item 149).
104 For instance, in 2008, out of 2,522 letters considered by the Team, 88 cases were entered into the "PW" register, whereas 405 complaints were forwarded for the preliminary examination. Compare: Appendix 4 to this book.

As for applications addressed to the Tribunal on the cases not connected with examination of legal regulations (norms) and legal questions, the preliminary stage of the proceedings is basically reduced to a stricter formal examination of the letter which initiates the proceedings.

4.2. Examination proceedings (at the hearing)

In accordance with Article 37 of the Act, applications and legal questions, for which no formal obstacles occur, are forwarded by the President of the Tribunal for examination by a relevant bench and appoints the date of the hearing. The procedure with constitutional complaints is analogous if they meet formal requirements and are not, of course, groundless. Examination proceedings are basically part of the hearing. By virtue of Article 38 of the Act, the bench chairperson appointed by the President issues orders aimed at its proper preparation and may, in particular: a) order delivering the participants relevant letters submitted during the proceedings; b) call the participants to produce their position on the case in writing within a prescribed period; c) order producing by the participants documents and other materials necessary to clarify the matter; d) call other bodies or organizations whose participation he recognizes as purposeful for the proper clarification of the case to take part in the proceedings.

In accordance with Article 60 of the Act, the hearing cannot be held sooner than 14 days of the delivery of the notice on the date of the hearing. The applicant's presence at the hearing is obligatory. If the applicant or his representative fails to appear at the hearing, the Tribunal discontinues the proceedings or postpones the hearing. If the participants in the proceedings who are obliged to participate in the hearing are absent, the Tribunal may postpone the hearing and, simultaneously, appoint a new date of the hearing. If the Prosecutor General or his representative and other participants in the proceedings fail to show up, it does not usually stop the examination of the matter.

The hearing begins with the case being called, after which the applicant and then the other participants in the proceedings present

their positions and evidence to support them. The chairperson of the bench gives the floor to each participant in the proceedings.

It is at the hearing that the substantive resolution of the case occurs, if, of course, the conditions of issuing a substantive resolution (judgment) are fulfilled. However, it is worth reminding that the entity is entitled to withdraw his application, legal question or constitutional complaint by the beginning of the hearing and it is binding to the Tribunal. In such cases the Tribunal issues decisions on discontinuation of the proceedings on the case. If the entity discloses such an intention on the beginning of the hearing, it is also a circumstance resulting in issuing a decision on discontinuation of the proceedings (in accordance with Article 37 para 2 in connection with Article 37 para 1 point 2).

Also in the case of two subsequent statutory conditions, the Tribunal is obliged to discontinue the proceedings in the case, even if the condition emerges only at the hearing. They are specified in Article 39 para 1 point 1 and point 3; namely the Tribunal should discontinue the proceedings at a classified session, if the issuing of a ruling is unnecessary or unacceptable (point 1) and if the normative act in the scope in question has lost its valid force before the Tribunal issued the ruling (point 3).

It is not necessary to adjudicate if in face of the change of the legal situation the cause of the constitutional complaint was lodged disappears. Also when the question of unconstitutionality of the regulation has been finally resolved (i.e. in the case of objective identity), occurs the condition *ne bis in idem* resulting in recognition of adjudication as unnecessary.[105] This concerns the situation where the wording of the complaint refers to circumstances or aspects which were already taken into consideration while the Tribunal examined a previous case (the same regulations have been assessed before with the

105 The Constitutional Tribunal considers the condition *ne bis in idem* as an institution aiming at stabilization of the situations resulting from the prior final ruling. In the case of its occurrence, the Tribunal "*judges in pragmatic terms, assesses the purposefulness of further proceedings and ruling on the question which has already been clearly and finally resolved by this body. In this situation a proper basis of discontinuation of the proceedings is the redundancy of adjudication*". See: the Decision of 28 June 2006, sign. SK 25/06, (OTK ZU 2006 No 6A, item 76).

same examination models).[106] However, reference to new arguments, evidence or circumstances may be grounds for examining the conformity of even the same regulations with the same constitutional examination models; of course in the situation where the Tribunal assessed these regulations as constitutional.

Unacceptability of issuing the ruling occurs in the situation where the complainant specifies as the object of examination a particular regulation (normative act) which was not a basis for the final resolution of the court (or a public administration body) on his rights and if the complainant directs his objection not against a legal regulation (legal norm) but its faulty application. The Tribunal issues a decision on refusal of taking further action on the complaint because of its unacceptability also in the situation where the complainant refers in the complaint to the regulations which cannot be examination models in the complaint proceedings, because no individual freedom, right or responsibility results therefrom. The unacceptability of judging is also the result of the situation where the negative judicial condition occurs in the form of *res iudicata*. It occurs when the Constitutional Tribunal decided on the unconstitutionality of the normative act examined.

The conditions of redundancy and unacceptability of issuing a ruling usually cause no considerable interpretative problems. What is much more complicated is the problems of "the expiry of the binding force" of a normative act (regulation), which is discussed in Article 39 para 1 point 3 of the Act.

Evaluation of the expiry of the binding force of a normative act is of key importance for the result of the proceedings on the constitutionality of a particular normative act (regulation). If the Tribunal decides that the normative act in the scope questioned has lost its binding force, it is a negative circumstance for the proceedings and the proceedings on the matter have to be discontinued. The expiry of the binding force of the regulation questioned by the complainant may occur both before

106 The Constitutional Tribunal signalled that it is not definitely resolved in practice if the condition *ne bis in idem* results in discontinuation of the proceedings because of unacceptability or redundancy of the ruling. The bench in case SK 4/03 decided that in the case of the condition *ne bis in idem*, using the formula of unacceptability of substantial ruling could raise certain doubts. See: the Decision of 12 December 2005, (OTK ZU 2005 No 11A, item 143).

the hearing as well as during the hearing, but in the both cases it results in issuing a decision on the discontinuation of the proceedings.[107] Discontinuation of the proceedings appertains to the category of the rulings concluding the proceedings on the case. It is also final and, as such, is not subject to appeal.

However, as for the circumstance included in Article 39 para 1 point 3 of the Act, the Article 39 para 3 shows that this regulation is not applicable if issuing a ruling on the normative act the binding force of which has expired before the ruling, is necessary to protect constitutional rights and freedoms. The establishment or issuance a ruling on the regulation with the expired binding force is necessary to protect constitutional rights and freedoms may cause problems and is usually not possible at the stage of preliminary examination, because this requires full examination.

The issue of "the expiry of the binding force" of a normative act has many times been a subject of interpretation of the Constitutional Tribunal. In the early period of its activity the Tribunal held the position that repealing or amendment of a normative act is tantamount the expiry of the binding force of this act. The Tribunal considered the repealing of a normative act, by principle, as the grounds for discontinuation of the proceedings due to the invalidity of the legal norm.[108]

In its subsequent rulings the Tribunal departed from this view. In the justification of case W. 5/94 the Tribunal stated that repealing or amendment of the regulation is not always tantamount to the expiry of the binding force of this regulation. The Tribunal acknowledged that in order to resolve if a regulation has lost totally its binding force in the sense that it cannot be applied at all, the wording of the derogating (or transitive) norm.[109] In another case considered at that time the Tribunal held the position that if it was still possible to apply the repealed

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107 For more on discontinuation of the proceedings in connection with the circumstance in Article 39 para 3 of the Act, compare P. Radziewicz, *Umarzanie postępowania przez Trybunał Konstytucyjny ze względu na utratę mocy obowiązującej przepisu przed wydaniem orzeczenia*, Przegląd Sejmowy 2006, No 2, p. 10 +.

108 The normative basis for discontinuation, in this situation, of the proceedings by the Tribunal was Article 4 para 2 of the Act of 1985 on the Constitutional Tribunal. See: for example, the Decision of 21 September 1987, sign. P. 3/87 (OTK ZU 1987), item 5, p. 65-66).

109 The Resolution of 14 September 1994, sign. W.5/94 (OTK 1994, part II, item 44, p. 171).

regulation to any situation in the past, the presence or the future, such a regulation has not yet lost its binding force totally; thus there are no grounds for discontinuation of the proceedings.[110]

The Tribunal's adjudication has consolidated the position that the interpretation of the expression "a normative act the binding force of which has expired" included in Article 39 para 1 point 3 of the Act should head for the decision if the regulation (or legal norm) challenged has been eliminated from the legal order not only in its formal-legal sense but also if it still can have particular effects on the citizens, other persons or entities of law and if it can be applied in practice.[111] The expiry of the binding force of the regulation must be, according to the Tribunal, real and not just formal or apparent. This view should be also referred to an amendment of a legal regulation.[112]

The question of telling the difference between the repealing (amendment) of regulations and the expiry of their binding force is of crucial importance, especially in reference to the constitutional complaint. Since the regulation, despite of being formally repealed, may still be applied, we cannot exclude a situation where on its basis a final ruling on constitutional rights, freedoms or responsibilities issued by an authorized body will take place.

Summing up, in accordance with the established adjudication line of the Constitutional Tribunal, ruling on the constitutionality of the repealed normative acts (regulations) is acceptable if one of the two following situations occurs: 1) the challenged regulations, despite their repealing, may still be applied on the grounds of an intertemporal norm referring to a particular question; whether the repealing of the challenged regulation (or legal norm) has really occurred should be established on the basis of the substance of the derogated or transitional norm; 2) the issuing of a ruling is necessary to protect the constitutional freedoms and rights.[113]

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110 The Ruling of 26 September 1995, sign. U.4/95 (OTK 1995, part II, item 27, p. 26).
111 See: the Decision of 13 October 1998, sign. SK 3/98 (OTK ZU 1998 No 5, item 69, p. 434).
112 Compare: the Decision of 21 October 2003, sign. K 10/02 (OTK ZU 2003 N 8A, item 88, p. 1027).
113 Compare: the Decision of 6 December 2006, sign. SK 25/05 (OTK ZU 2006 No 11A, item 169, p. 1754).

Presenting the stage of examination proceedings it is important to specify entities entitled to present their positions on the case initiated before the Tribunal. The Act on the Constitutional Tribunal uses in this matter the nomenclature known from civil non-litigious proceedings; it calls them "participants in the proceedings" and not their "parties".

In accordance with Article 27 of the Act participants of the proceedings before the Tribunal are: 1) the entity which submitted the application or the constitutional complaint; 2) the authority which issued the act the application or the constitutional complaint concerns, or the State Treasury Solicitors' Office, if the Council of Ministers appointed the Office to represent it or ministers in the proceedings before the Tribunal; 3) the court which submitted a legal question to the Tribunal, if it reported its participation in the proceedings initiated as the result of this legal question and appointed an authorized representative from among the judges of this court; 3) a statutory body of the party – in cases on establishment the constitutionality of purposes or activities of political parties; 5) the central constitutional body of the state which the competence dispute concerns; 6) Prosecutor General; 7) representatives of the Sejm, the President and the Minister of Foreign Affairs in cases on the constitutionality of international agreements ratified with a prior consent expressed in the law; 8) representatives of the President and the Minister of Foreign Affairs: in cases on establishing the constitutionality of other ratified international agreements; 9) the Ombudsman, if reported his participation in the proceedings referring to a constitutional complaint; 10) the Commissioner for Children's Rights, if reported his participation in the proceedings initiated on the application of the Ombudsman or in the proceedings on a constitutional complaint concerning the rights of children.

The participants of the proceedings are obliged to submit to the Tribunal any explanations referring to the case as well as reporting evidence necessary for its exhaustive explanation. They are also entitled to review the case files and to prepare and receive copies or excerpts from the files.

Summing up, it is only in the so-called examination proceedings that occurs the proper, i.e. strictly substantive examination of the

application, the legal question or the constitutional complaint submitted. The Tribunal examines the regulations questioned by the applicant in reference to the models specified by him. For this purpose it analyzes the normative meaning of the regulations (the object of the objection and the models). It becomes familiar with the positions of the participants in the proceedings and may also, as already mentioned, "may *ex officio* accept the evidence which it recognizes as purposeful to explain the case" (Article 19 para 2 *in fine*).

The hearing takes on a special importance in the case of constitutional complaint, because it is only at the hearing that it is possible to present the complaint and the arguments specified therein by the complainant himself (as we remember, the initiation of complaint proceedings occurs as the result of filing the complaint by the complainant but through a barrister or a solicitor).

If the Tribunal recognizes the case as sufficiently explained, the chairperson of the bench closes the hearing. Closing the hearing, the chairperson of the bench informs on retiring to deliberate and on the date and place of the announcement of the ruling. However, if, having closed the hearing, the bench recognizes that the issuance of the ruling is not possible, it may reopen the closed hearing.

4.3. Adjudicating

The Tribunal issues a ruling after a classified conference of the bench judges. The conference includes a discussion and voting on the ruling as well as on the fundamental motives of the resolution and preparation of the ruling. In especially complicated cases or for other important reasons the issuance of the ruling may be postponed for the period not exceeding 14 days. This period is counted from the date of the closing of the hearing. The ruling is passed by majority. It is worth reminding that the Tribunal adjudicating benches may be three-person, five-person or fifteen person (the full Tribunal bench).

The judge of the bench who disagrees with the majority, may, before the announcement of the ruling, report his dissenting opinion. The dissenting opinion is marked in the ruling. It has to be in writing and

may refer to both the sentence of the ruling as well as the justification of the ruling. Regardless of this, in any case the ruling must be signed by all the judges of the bench, including those reporting their dissenting opinions.

It is also worth remembering that examining the case the Tribunal is not bound by any deadlines. The issuance of the judgment (ruling) is possible only after it has been comprehensively examined. The Constitution provides only one exception to this rule. In accordance with Article 224 para 2, if the President turns to the Tribunal for an opinion on the constitutionality of a budget law or a law on the provisional budget before it is signed, the Tribunal decides on this matter within 2 months of the day the application was submitted in the Tribunal.

In accordance of the principle of accusational procedure, the Tribunal, while adjudicating, is bound with the limits of the application, the legal question or the constitutional complaint. The judgment, on the other hand, may refer to the whole normative act, as well as to its particular provisions. What is decisive is the scope of objection; it may also cover the whole normative act (to be precise: the whole normative act may be challenged, which means, that the applicant accuses this act of procedural or competence inconformity).

The Constitution of 1997 in Article 190 uses the term "ruling" of the Tribunal. However, Article 174 shows that "The courts and tribunals shall pronounce judgments in the name of the Republic of Poland". This is a confirmation of the fact that judgments are the fundamental forms of the Tribunal's rulings. The Act (Article 70), on the other hand, specifies two forms of the rulings of the Constitutional Tribunal: judgments and decisions.

Judgments are passed on: 1) constitutionality of laws and international agreements with the Constitution; 2) conformity of law to the ratified international agreements, the ratification of which required a prior consent expressed in the law; 3) conformity of provisions of law issued by the central state authorities to the Constitution, ratified international agreements and laws; 4) constitutional complaints; 5) constitutionality of purposes or activities of political parties.

Decisions are issued on: 1) resolving competence (power) disputes between the central constitutional authorities of the State; 2) an obstacle in exercising the office by the President of the Republic of Poland; 3) vesting temporary performance of President's duties in the Marshall of the Sejm; 4) other affairs not requiring a judgment. The judgments and decisions specified in Article 70 are of substantive nature, i.e. they resolve the problems specified there as for their essence. They are also final and unappealable.[114]

Among the decisions which conclude the proceedings on the case but simultaneously do not resolve it substantively are: a decision on discontinuation of the proceedings in connection with the occurrence of one of the negative circumstances specified in Article 39 para 1 (i.e. redundancy, unacceptability, expiry of the binding force of the regulation challenged, withdrawal of the application); a decision on refusal to consider an objection to a previous decision on the refusal to proceed on an application or constitutional complaint.

During the main proceedings the Tribunal may also pass decisions of a different nature. They resolve incidental cases, which are in connection with the main proceedings; for example: a decision on the costs of the proceedings (Article 24 of the Act provides for a refund of the costs of the proceedings in favour of the person submitting a complaint to the authority which issued the normative act questioned by the complainant); a temporary decision on constitutional complaints (Article 50 of the Act); a decision on the correction of a ruling (Article 73 para 1); a decision resolving doubts about the substance of the ruling; a decision on a temporary regulation of disputable questions in the case of resolving a competence (power) dispute (Article 54); a decision on refusal to proceed on an application or constitutional complaint (Article 36 para 3); a decision on not examining a complaint against a refusal to proceed on an application or constitutional complaint if it was submitted after the deadline (Article 36 para 5).

114 Compare: Appendices 5 and 7 to this book.

Academic literature devotes a great deal of attention to the rulings of the Constitutional Tribunal, their character and legal effects.[115] For these problems are apparently uncomplicated, especially if the judgments with so-called simple legal effects, or those confirming conformity or asserting inconformity of the regulation under examination to a hierarchically superior regulation are taken into consideration. However, legal effects of rulings are much broader and considerably diverse. As the result of analyses conducted by constitutional law researchers various classifications of the Tribunal's rulings were proposed.[116] Here are some basic types of the Tribunal's rulings according to their legal effects.[117]

The first type of rulings are the already mentioned judgments of the so-called simple legal effects. It is the most classic form of ruling. Among them are also the judgments which contain the expression "the regulation conforms" and "the regulation fails to conform". Thus, they are affirmative (conformity of the regulation) or negating (inconformity) judgments. Beside these stylistic forms, the Tribunal one more: "the regulation does not fail to conform". This refers to the situation where the Tribunal asserted inadequacy of the examination model and as a result it is not possible to substantively resolve the question of the constitutionality of the regulation, which was the subject of the objection.

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115 For example: Z. Czeszejko-Sochacki, *Orzeczenia Trybunału Konstytucyjnego: pojęcie, klasyfikacja i skutki prawne*, Państwo i Prawo 2000, No 12; M. Safjan, *Skutki prawne orzeczeń Trybunału Konstytucyjnego*, Państwo i Prawo 2003, No 3; L. Garlicki, *Uwagi o charakterze prawnym orzeczeń Trybunału Konstytucyjnego*, Acta Universitatis Wratislaviensis, Prawo CCLVII, Wrocław 1997; Z. Czeszejko-Sochacki, *Skutki prawne orzeczenia przez Trybunał o niekonstytucyjności aktu normatywnego*, Przegląd Sejmowy 1996, No 3; M. Florczak, *Skutki prawne odroczenia przez Trybunał Konstytucyjny utraty mocy obowiązującej aktu normatywnego*, Przegląd Sejmowy 2003, No 2; A. Józefowicz, *Skutki prawne orzeczenia Trybunału Konstytucyjnego o niezgodności aktu normatywnego z Konstytucją,* Państwo i Prawo 1995, No 1.

116 Sometimes a dualistic division is proposed: judgments on simple conformity or inconformity with the superior model and judgments of a complicated structure, among which are limited judgments; judgments of a specific understanding of a normative act or its part as well as judgments on legislative omission. See: *Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2012 roku*, Warszawa 2013.

117 I use the classification presented in the monograph of M.Florczak-Wątor, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne*, Poznań 2006 (p. 90-131, *passim*).

Relatively often the so-called interpretative judgments are pronounced. They are judgments in the sentence of which the Tribunal confirmed conformity or asserted inconformity of a regulation in its particular understanding to a specified constitutional model. The Tribunal applies the following expressions: a regulation "understood as…"; "understood in such a way that…". Such a judgment is based on the technique of interpretation in accordance with the Constitution. It aims at eliminating the variants of understanding of the regulation examined which are incompatible with the constitutional model. Interpretative judgments illustrate precisely the operation of the Tribunal as an authority of legal norm control; the Tribunal examines the normative substance of the regulation.[118]

So-called limited judgments are very close to interpretative judgments. If the Tribunal asserts in the sentence of the judgment conformity or inconformity of the regulation within a certain scope of its application (subjective, objective or temporal). Such judgments are identified on the Tribunal's application of such expressions as: "within the scope in which it concerns…", "within the scope, in which it refers to…", "within the scope in which excepts…", "within the scope in which omits…", "within the scope which excludes…". As demonstrated, the question of constitutionality becomes resolved in reference to the normative substance expressed by the regulation or to the normative substance the regulation omits. A special variation of limited judgments are so-called fragmentary judgment, in which the Tribunal states that "the regulation in part…" conforms or fails to conform to the specified model.

Another type are so-called applicative judgments. They are the rulings on unconstitutionality of a normative act in the sentence of which the Tribunal additionally resolves on the legal effects (of this ruling), for the facts shaped before the day of its announcement. This may consist in exclusion, reduction or extension of certain effects (e.g. compensation claims). This is perfectly exemplified by the judgment

118 For more on intepretative judgments see, for instance: J. Trzciński, *Wyroki interpretacyjne Trybunału Konstytucyjnego*, Państwo i Prawo 2002, No 1; A. Józefowicz, *Orzeczenia interpretacyjne Trybunału Konstytucyjnego*, Państwo i Prawo 1999, No 11.

issued on case SK 7/06.[119] In this judgment the Tribunal found the office of trainee judge unconstitutional, and simultaneously excepted the possibility of invalidation, by virtue of Article 190 para 4, of trainee judges' operations performed by the time of the judgment, or resuming the proceedings in the cases previously concluded by trainee judges.

On the other hand, the judgments with a clear constitutional basis are the judgments with a deferring clause. In the sentence of such a judgment the Tribunal finds unconstitutionality of a normative act (regulation) and simultaneously establishes date of its expiry other than the day of the announcement of the ruling. This is an exception to the general rule of the Tribunal's rulings coming into force. Article 190 para 3 provides that a maximum period of deferring cannot exceed 18 months for a law (a provision of a law), and 12 months for another normative act.

It is possible to add preventive judgment and signaling decisions to the catalogue of judgment types. Preventive judgments are passed within the framework of a preventive examination or proceedings initiated by the President towards laws or international agreements which are not binding yet. The Tribunal's ruling on inconformity challenged in this procedure entitles the President to refusal to sign a law (ratification of an international agreement). However, if the unconstitutionality concerns particular provisions of the law, and the Tribunal does not rule that they are inseparably connected with the whole act of law, the President, having consulted the Marshal of the Sejm, signs the law without the provisions recognized as unconstitutional (Article 121 para 4 of the Constitution). Such a situation occurs sporadically.

The last category of decisions are so-called signaling decisions. They will be discussed in the next Chapter where the signaling function of the Tribunal is singled out.

The issuance by the Tribunal a ruling concluding the proceedings on the case exercises the attribute of unappealability. No legal possibility of undermining the ruling through submitting an appeal application. The unappealability of the ruling is connected with the

119 The Judgment of 24 October 2007 (OTK ZU 2007 No 9A, item 108).

Tribunal's application of the principle *ne bis in idem*. Identification of the subject of the case means no need for proceedings and results in its discontinuation, whereas referring to new arguments, evidence or circumstances is a basis for examining the conformity of even the same regulations with the same constitutional models.

The Tribunal's ruling cannot by changed or repealed by the Tribunal itself either, which means that the ruling concluding the proceedings on the case cannot by challenged. The proceedings before the Tribunal cannot be resumed on the basis of Article 190 para 4 of the Constitution. Repealing or changing the ruling is possible in the case of the decision which do not conclude the proceedings on the case only, and exclusively as the result of the changed circumstances (Article 75 para 2 of the Act).

Legal effects of rulings are quite diversified depending on if the Tribunal issued a judgment of the so-called simple legal effects, or a judgment of another type. On the basis of the judgment stating unconformity of the provision of a normative act with the Constitution, an international agreement or a law, the entity is entitled to submit an application for resuming the proceedings validly completed (repealing of a final decision or another resolution), if its basis was this provision.

The situation is a little different in the case of interpretative judgments and limited judgments, the effect of which is not a repealing of a regulation (removal of the regulation from the law system), but excluding its particular understanding. In this case a concrete normative substance (legal norm) is recognized as unconstitutional. Such a judgment, thus, is an obligation to be taken into consideration the fact that a certain normative substance (norm) cannot be applied by public authorities any more, because it has been eliminated from the legal order. As a result, if the final ruling which was the basis for filing a constitutional complaint was issued on the basis of the norms recognized as unconstitutional, it provides the grounds for resuming the proceedings in accordance with Article 190 para 4 of the Constitution.

As the result of passing a judgment with a deferring clause, the unconformity of the normative act (regulation) is resolved on the day of its announcement. Despite the fact that the judgment comes into force

after the period specified in its sentence, at that time the authorities applying law should take it into consideration in their operations and restrain themselves from resolving cases on its basis.

Chapter IV

SPECIFIC PROCEEDINGS

1. Adjudication on the constitutionality of purposes and activities of political parties

The so-called December amendment of 1989 that endowed the Constitutional Tribunal with the power to adjudicate on the constitutionality of purposes or operations of political parties. One of its provisions contains a statement that the Tribunal is entitled to adjudicate on unconstitutionality of purposes or operations of political parties. In the current legal situation the Tribunal adjudicates on conformity to the Constitution of purposes or activities of political parties (Article 188 para 4 of the Constitution). Thus, although the edition of the provisions specified is diversified (formerly: "adjudication on unconstitutionality", and now "adjudication on the cases of conformity to the Constitution"), it is actually an identical competence (power).

Specific rules of considering applications for examination of constitutionality of purposes or activities of political parties are normed by Articles 55-58 of the Act on the Constitutional Tribunal. Furthermore, Articles 14, 21 and 42-44 of the Act on Political Parties specify the conditions of initiating a case of this type in the Constitutional Tribunal.[1]

The examination model in cases of examining purposes or operations of political parties is the Constitution. It is important to explain that the regulations do not specify which constitutional norms may particularly

1 The Act of 27 Juny 1997 on Political Parties (consol. text: Dz.U. of 2011, No 155, item 924).

be examination models. Therefore, it must be assumed that it may be any provision of the Constitution, as long as, of course, it substantively refers to a political party, i.e. determines limits of acceptable purposes or activities of the party or defines their prohibitions, or else violates other constitutional values.[2] Undoubtedly among the fundamental provisions which can be applied as models are Articles 11 and 13 of the Constitution. Article 11 guarantees freedom of founding and operating of political parties, and also specifies general rules of assembling in political parties and their functioning: voluntariness and equality of Polish citizens in order to affect the shaping of the State's policies with democratic methods (para 1) and openness to public inspection of financing the parties (para 2). Article 13, on the other hand, specifies a catalogue of prohibitions of the existence of political parties (and other organizations). First, they cannot refer in their programs to totalitarian methods and practices of nazism, fascism and communism. Second, they cannot, in their program or through their actions, assume or accept racial and ethnic hatred and, third, assume violation in order to win power or influence on the policies of the State. The fourth negative circumstance is a prohibition of concealing the structures or membership.

The legitimation to apply for examination of purposes of a political party is granted to the Regional Court in Warsaw, whereas the legitimation to apply for examination of the activity of a political party to the entities specified in Article 191 para 1 of the Constitution (to entities legitimized to apply for an abstract examination of norms). The Regional Court in Warsaw (hereinafter referred to as the Court) is a court keeping records of political parties. In situations where it is entitled to act on the cases of political parties, i.e. when it examines the party's application for registration or when examines an application for a change of the entry because of the change of the status of the

2 Tribunal Judge, Professor Marek Zubik specified, for example, that purposes and rules of operating of political parties may contain such decisions that will infringe at least partly such constitutional values as human dignity (Article 30) or "*regulations-barriers, absolutely prohibiting certain actions, e.g. prohibition of discrimination (Article 32 para 2), or will violate fundamental values being foundations of a democratic state with the rule of law (e.g. Artiles 1, 3 and 5)*". See: a dissenting opinion on the decision on case Pp 1/10 (OTK ZU 2011 No 3A, item 27, p. 425-426).

party; is also entitled to initiate a case in the Constitutional Tribunal. In accordance with Article 14 para 1 of the Act on Political Parties, in the event of doubts about the constitutionality of purposes or rules of operation of a political party determined by the statute or the program of the party, the Court suspends its recording proceedings and applies to the Constitutional Tribunal for examining the constitutionality of the purposes of the political party.[3]

It is also worth noting that the provisions contain a certain incoherence since whereas the Constitution mentions adjudication on the constitutionality of "purposes or activities" of political parties, the Act on parties talks about the Court's doubts about the constitutionality of "purposes and rules of operation". In accordance with Article 56 of the Act, "applications on constitutionality of the purposes of political parties specified in the statute or the program are examined by the Tribunal according to the rules and in the procedure provided for examination of applications referring to conformity of normative acts with the Constitution."

Here emerges another interesting issue: the examination of purposes or rules of operation realizes itself through examining the statute, the party program or another document on the basis of which the party operates submitted in the recording proceedings. As early as 6 October 1993 the Constitutional Tribunal stated in its resolution that "*establishing purposes of political parties on the basis of the statute and the program is an activity similar to establishing normative meanings of acts of law, which is the basic scope of the operations of the Constitutional Tribunal*" and, despite the fact that "*statutes and programs do not contain legal norms*", "*the statements placed in statutes and programs are of the nature of obligation*."[4]

If, as the result of an application, the Constitutional Tribunal issues a ruling on the contradiction of purposes (or rules of operation) of a political party with the Constitution, the Court refuses to enter the party

3 In its Decision of 6 April 2011, sign. Pp 1/10 the Constitutional Tribunal stated that this provision "*is of a categorical nature; an application to the Constitutional Tribunal for examination of constitutionality of the purposes of a political party is obligatory*". (See: OTK ZU 2011 No 3A, item 27, p. 414).

4 Sign. W 15/92 (OTK of 1993, vol. II, item 49, p. 477).

into the register and this decision is unappealable. Another circumstance, the result of which may be the Court's application to the Constitutional Tribunal for examining the constitutionality of the purposes and rules of operation of a political party is determined by Article 21 of the Act on political parties: "introducing to the statute changes incompatible with the provisions of Article 8 on political parties".[5] Adjudicating on the basis of Article 14 para 1 as well as Article 21 of the Act on political parties is an example of the so-called preventive examination, the purpose of which is to prevent an unconstitutional occurrence.

The decision of 16 July 2003 of the Constitutional Tribunal demonstrated that preventive examination is abstract and actually is close to examination of conformity of normative acts to the Constitution. Characterizing the essence of preventive examination in cases of political parties it stated that its nature shows that it "*cannot lead to a ban on a party; its only aim is preventing the entry to the register of the parties which fail to meet certain legal criteria, or preventing an introduction to the party statute of changes which fail to meet these conditions*".[6]

Adjudicating on the activities of political parties is an example of the examination of facts which have occurred and therefore it is called repressive (consequent) examination. Activity (operation) is an untypical subject of examination of the Polish Constitutional Tribunal. It is an exception because the fundamental function of the Tribunal is deciding "on the law" and not "on facts". Such a step beyond the area of legal norm examination, despite its justification in the provisions of law, raises doubts. First of all, it is pointed out that in accordance with Article 57 of the Act "the burden of proving unconstitutionality rests on the applicant, who should for this purpose produce or report the evidence of the unconstitutionality". The Tribunal is not equipped with additional legal instruments enabling it to conduct proper, independent evidence proceedings. Exceptionally, however, in the case

5 The provision of Article 8 is: „Political parties form their structures and rules of operation in accordance with the principles of democracy, especially through securing transparency of these structures, appointed party authorities through election and adopting resolutions by majority of votes."

6 Sign. Pp 1/02 (OTK ZU 2003 No 6A, item 71, s. 842-843)

of constitutionality of a political party's operation, it may, as Article 58 of the Act provides, "have the Prosecutor General, in order to collect and preserve evidence, conduct an investigation within a certain scope". In such an investigation relevant provisions of the Code of Criminal Procedure (hereinafter referred to as CCrP), and the scope of proceedings delegated to the Prosecutor General is binding and should be specified in the decision of the Tribunal. The Prosecutor General must not extend this authorization in his actions to perform his duties.

The legal result of the Tribunal's stating the unconstitutionality of "the purposes or the operation of a political party" is an immediate issuance by the Court of a decision on a deletion of the party from the register (Article 44 of the Act on political parties). This decision is unappealable. The deletion of the party from the register deprives it of a legal personality and means its liquidation. However, quite problematic is the question if an infringement of any constitutional norm by a party results in its liquidation. The doctrine associates such a result with the infringement of Article 13 of the Constitution only, but sometimes also with Article 11 of the Constitution.[7] The Constitutional Tribunal holds a position that "*as a rule, only such an activity of a political party which is against Article 13 of the Constitution is a sufficient, and simultaneously necessary, condition of the ban on its further existence.*"[8]

Since adjudication on operations of political parties is close to abstract examination, the legitimacy to apply is granted to the entities entitled to initiating an abstract examination. This results from the interpretation of Article 191 para 1 and 188 of the Constitution. In practice, however, they are the so-called generally legitimated entities. As far as the so-called specifically legitimated entities, as we remember, they are entitled to the legitimacy only when the normative act concerns

7 See: for example: W. Sokolewicz, *Uwaga 27 do art. 11 Konstytucji RP,* (in:) Konstytucja Rzeczypospolitej Polskiej. Komentarz, (ed. L. Garlicki), Tom V, Wyd. Sejmowe, Warszawa 2007, p. 40; J. Jaskiernia, *System partyjny RP w świetle standardów Rady Europy*, (in:) Partie polityczne: permanentne problemy, (ed. J. Kornaś), WSEiA, Kielce 2005, p. 76-79 *passim*; M. Granat, A. Gorgol, J. Sobczak, *Ustawa o partiach politycznych. Komentarz* (ed. M. Granat), C.H. Beck, Warszawa 2003, s. 47-48; Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym, Wyd. Trybunału Konstytucyjnego*, Warszawa 2003, p. 304-308, *passim*.

8 See: point 7.2 of the justification of the Decision of 24 November 2012, sign. Pp 1/08 (OTK ZU 2010 No 9A, item 115).

cases within the scope of their activity. However, the National Council of the Judiciary would be legitimated only if the case was normative acts concerning the independence of courts and judges. This is what the limits on its legitimacy consists in. Thus, Z.Czeszejko-Sochacki's doubts about the actual capability of initiating proceedings before the Tribunal in the case of activities of political parties by the entities legitimated specifically and NCJ are justified.[9]

Concluding this point of our reflections, it is possible to state that the Tribunal's exercising of the competence (power) defined by Article 188 point 4 of the Constitution is characteristic, and some of its rules exceptional. This happens because: 1) it may be preventive examination (examination of the purposes of a party) or consequent examination (examination of the activity of the party); 2) in the cases of examination of the purposes (or rules of operation) the Tribunal is entitled to examine the statute or the program of the party (or another document), despite the fact that they are not normative acts; 3) examining the activity of a political party the Tribunal goes beyond its role of a "court for laws" and becomes a "court for facts"; 4) in the cases on examination of the operations (activities) of political parties, the Tribunal applies relevant provisions of CCrP; 5) in the cases of examination of the operation the Tribunal may have the Prosecutor General conduct an investigation within the certain scope.

In the adjudicating practice of the Constitutional Tribunal five times only the proceedings on the constitutionality of the purposes or the operations of a political party have been initiated. They were applications for both preventive and consequent examination.

In the first of the cases (sign. Pp 1/99) the applicant, the Regional Court in Warsaw, applied to the Constitutional Tribunal for examining the constitutionality of the rules of the operation of the party Christian Democracy of the Third Republic of Poland.[10] What raised doubts of the Court was one of the provisions of the statute of that party, which authorized the chairperson of the party to appoint and dismiss regional chairpersons of the party, which, in the opinion of the Court, was

9 Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne…, op. cit.,* p. 310, footnote 658.
10 The Judgment of 8 March 2000, sign. Pp 1/99 (OTK ZU 2000 No 2, item 58).

against Article 11 of the Constitution. The Tribunal, however, did not find an inconformity in this case.

In another case (sign. Pp 1/02), also on the application of the Court, the Tribunal was to decide if the rules of operation, resulting from the changed statute of the party Self-defense of the Republic of Poland were constitutional.[11] The grounds for the application was the introduction to the statute too far-going powers of the chairman of the party. The following raised objections: 1) lack of a statutory procedure of dismissing the chairman of the party; 2) transparency of the elections of the chairman; 3) the rule of non-eligibility of all party bodies (apart from its chairman); 4) the chairman's powers to: a) deciding on the membership in the party; b) suspending and excluding any party member; c) statutory changes of the established procedure of accepting new members. These and other provisions of the statute violated, in the opinion of the Court, the fundamental principles of democracy. The Constitutional Tribunal discontinued the proceedings on this case as the result of the Court's withdrawal of the application which initiated the proceedings. The decision of the Tribunal, in turn, resulted from the party's withdrawal of the application for the registration of the change in the statute.

The third case also referred to the party Self-defense of the Republic of Poland, but was an example of consequent examination. It was a case under the signature Pp 1/07, initiated by the Marshal of the Sejm. The applicant turned to the Constitutional Tribunal for examining if the operation of the party is not against the provisions of the Constitution of the Republic of Poland. The applicant's main objection concerned using by the party bills of exchange signed by the candidates for mandates in representative bodies of the Republic.[12] The applicant specified Article 11 of the Constitution and Article 104 para 1 of the Constitution (the principle of a free parliamentary mandate) as a model of examination.

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11 The Decision of 16 July 2003, sign. Pp 1/02 (OTK ZU 2003 No 6A, item 71).

12 According to the applicant the support from the party Self-defence for candidates starting from its electoral lists depended on their prior signature of a blank bill along with a bill declaration. The chairman of the party announced publicly, however, that the bill sum is connected with the use of the party badge and not with holding the mandate of a deputy or a senator.

In the first decision issued in this case, the Tribunal ordered the Prosecutor General, in order to collect and preserve evidence, conduct an investigation on the operation of the political party Self-defense of the Republic of Poland, establishing ten questions to clarify within 60 days of the date of the decision delivery.[13] Afterwards, as the result of an application submitted by the Prosecutor General, the Tribunal prolonged the period of the conclusion of the investigation.[14] However, eventually also in this case no substantive resolution was issued. The Constitutional Tribunal discontinued the proceedings on the case as the result of the Marshal of the Sejm's loss of legitimacy to apply to the Constitutional Tribunal. The Constitutional Tribunal maintained its previous adjudicating line in this matter recognizing that "*the termination of the office-term results in the discontinuation of the actions taken by the Sejm in pleno, a group of deputies as well as by its authorities*."[15] The Tribunal recognizes in such cases that in the date of the ruling the entity who submitted the application does not exist and this results in the discontinuation of the proceedings.

The so-called Self-defence bills were the best known and the most widely commented on case within the area of the adjudicating function of the Tribunal on the constitutionality of purposes or operations of political parties. In connection with the discontinuation of the proceedings on the case with the sign. Pp 1/07, the Marshal of the Sejm of the next term reinitiated the proceedings on the same case. However, also this time the Tribunal discontinued the proceedings on the case, concluding that the applicant failed to produce the objections and to report evidence that the party infringed Article 13 of the Constitution with its activity, i.e. he failed to fulfill the obligations resulting from Article 57 para 2 of the Act on the Tribunal.[16]

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13 The Decision of 25 April 2007, sign. Pp 1/07 (OTK ZU 2007 No 4A, item 47).

14 The Decision of 11 July 2007, sign. Pp 1/07.

15 The Decision of 17 December 2007, sign. Pp 1/07 (OTK ZU 2007 No 11A, item 165). The Tribunal stated in addition, that the Marshal of the Sejm, despite of being a constitutional authority of the Sejm, is not an autonomous state authority and therefore his constitutional powers expire with the termination of the Sejm term.

16 The Decision of 24 November 2012, sign. Pp 1/08 (OTK ZU 2010 No 9A, item 115). The ruling was passed with two dissenting opinions.

The last case with which the Tribunal dealt until recently, concerned the activity of the political party National Revival of Poland. The grounds for submitting the application by the Court was the fact that the party applied for registration of additional graphic symbols which it is going to use, and which would characterize the views (proposals) propagated by the party. The application referred to such symbols as, for example: "The Cross and the Sword" and "The Celtic Cross". Also in this case the Tribunal discontinued the proceedings because of the unacceptability of the issuance of the judgment. This happened as the result of the recognition that a negative procedural condition in the form of failing to complete formal deficiencies of the application by applicant (the Court).[17]

Summing up the practice of the Constitutional Tribunal in the scope under discussion: first, the Tribunal has recognized cases of this type five times; second, only considering the first case (Pp 1/99) the Tribunal issued a judgment, i.e. examined the case substantively; the proceedings on the other cases were discontinued; third, the Tribunal has carried out a preventive examination three times (Pp 1/99, Pp 1/02, Pp 1/10) and consequent examination twice (Pp 1/07, Pp 1/08); fourth, never has a ban on a political party as the result of a ruling of the Constitutional Tribunal occurred.

2. Resolving competence (power) disputes between central constitutional state authorities

In accordance with Article 189 of the Constitution, the Constitutional Tribunal resolves competence (power) disputes between central constitutional state authorities. This provision contains a norm authorizing to resolve competence disputes between the public authorities of certain category. The point is that the cognition of the Tribunal includes adjudicating on the operations (or negligences – the so-called negative competence dispute) of the bodies of the supreme but also identical status: they are central (state and those

17 The Decision of 6 April 2011, sign. Pp 1/10 (OTK ZU 2011 No 4A, item 27).

individually defined) and constitutional (established by the provisions of the Constitution). They are foremost the bodies of government administration as well as other central constitutional state authorities (these being, for example: the President, the Sejm, the Senate, the Supreme Audit Office). Both criteria specified above are met by, for example, the Commissioner for Children's Rights despite the fact that the only provision referring to this authority is the laconic Article 72 para 4: "The competence and procedure for appointment of the Commissioner for Children's Rights shall be specified by statute." The Constitutional Tribunal is not, on the other hand, authorized to resolve competence disputes between the bodies of local self-governments and the bodies of government administration, because this is vested in administrative courts, according to Article 166 para 3 of the Constitution. This provision corresponds with another constitutional regulation, Article 184 sentence 1: "The Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration".

Resolving competence disputes by the Constitutional Tribunal is, simultaneously, an exception to the rule of adjudicating on the constitutionality and legality of legal norms. Whereas in this fundamental function the goal of the Tribunal is eliminating unconstitutional legal norms, in the case of resolving constitutional disputes the goal is eliminating actions of the state authorities (central and constitutional) inconsistent with constitutional provisions or even principles (for example, the principle of division and balance of powers). Although in the cases of competence disputes the Tribunal also interprets provisions (particularly of the Constitution and also laws), it is always strictly connected with the a conflict (a positive or negative dispute) which arose around the application of law, whereas the fundamental job of the Tribunal is to "resolve a competence dispute". It consists in the Tribunal's examination of a particular action (or negligence) of two or more state authorities and recognizing them as conforming (or failing to conform) to the binding regulations. As the result of exercising the competence (power) specified in Article 189 of the Constitution, the Tribunal carries out a comprehensive analysis of regulations and interpretation of legal norms, which determine the tasks, functions and

competences (powers) of state authorities; explains the substance of the binding regulations (norms). It should be also added that it is the only case where the Tribunal compares with each other the provisions of a legal act of the same level of importance (constitution or a law).[18]

The entities entitled to submit an application for resolving a competence dispute are: the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the President of the Council of Ministers, the First President of the Supreme Court, the President of the Supreme Administrative Court and the President of the Supreme Audit Office. As we can see, this catalogue is narrower than the catalogue of the entities generally legitimated to submit an application to the Tribunal for an abstract examination of norms. It is important that the application for resolving a competence dispute may be submitted by a specified constitutional state authority. This cannot be done by entities which are not state authorities (organizations or groups of deputies or senators) as well as the Prosecutor General and the Ombudsman. The constitutional provisions concerning competence dispute are very concise. Further specification of this question can be found in the Act. Namely, in accordance with the provision of its Article 53 para 1, a competence dispute occurs "when two or more central constitutional state authorities recognized themselves as competent to resolve the same case or issued a resolution thereupon (a positive competence dispute) or when these authorities recognized themselves incompetent to resolve a certain case (a negative competence dispute)".

As for the procedure of the Tribunal's examination of the cases of competence disputes, an application, like in any other cases in the Constitutional Tribunal, should be submitted in writing and specify the questioned action or negligence as well as the provision of the Constitution or the Law, which had been infringed in connection with the dispute (Article 53 para 2 of the Act). Initiating the proceedings before the Tribunal results in significant consequences: first, the proceedings before the bodies which are parties to the dispute are

18 As already presented in Chapter II, along with the Constitution of RP of 1997 entering into force the Constitutional Tribunal was deprived of the power to exercise universally valid interpretation of laws.

suspended (obligatorily). Second, the Tribunal, having become familiar with the positions of the participants in the proceedings, may make a decision on a temporary regulation of the controversies, especially on the suspension of executive actions, if it is necessary to prevent serious damages or if it arose from a particularly important public interest.[19]

Participants in the relevant proceedings before the Constitutional Tribunal are: the entity which submitted the application for resolving a competence dispute, the central constitutional state authority which the competence dispute concerns and the Prosecutor General.

In its previous activity the Constitutional Tribunal has had an opportunity to adjudicate on the cases initiated on the grounds of Article 198 of the Constitution (competence dispute) twice. Thus, the practice of the Tribunal is symbolic. The first case is the one registered as Kpt 1/08, which was initiated by the First President of the Supreme Court,[20] whereas the other is a case registered under the signature Kpt 2/08 initiated by the President of the Council of Ministers.[21]

In the case with the signature Kpt 1/08 on resolving a competence dispute between the President of the Republic of Poland and the National Council of Judiciary about the power to give an opinion on candidates for the post of judge of the Constitutional Tribunal, it eventually discontinued the proceedings without issuing a substantive ruling. This decision was caused by the statement that a competence dispute did not occur because, as the Tribunal recognized, one cannot identify a refusal of appointing by the President for the position of judge with issuing an opinion on the candidate, to which the National Council of Judiciary is entitled. In the case being the basis of submitting the application the President endowed with the prerogative of appointing judges at the application of the NCJ (Article 144 para 3 point in connection with Article 179 of the Constitution of RP), failed to exercise it in certain cases. In the applicant's opinion, in this way the President gave an (negative) opinion on the candidates presented

19 It is the second type of "temporary decision", for, as already specified, also in the cases on constitutional complaints it is possible to issue a temporary decision. It is necessary to note that both the purposes and the conditions of "temporary decisions" are in both cases similar.

20 The Decision of 23 June 2008 (OTK ZU 2008 No 5A, item 97).

21 The Decision of 20 May 2009 (OTK ZU 2009 No 5A, item 78).

to him, stepping into the area of the exclusive power of the NCJ to give an opinion and present candidates for judges to the President of RP. The Constitutional Tribunal did not share the argumentation presented thereto. The Tribunal stated that the facts that have occurred demonstrate the pretended nature of the occurrence of a competence dispute, which makes the jurisdiction of the Tribunal unacceptable.

In the case of the signature Kpt 2/08 on resolving the competence dispute between the President of the Republic of Poland and the President of the Council of Ministers concerning the definition of the central constitutional state authority which is authorized to represent the Republic of Poland at the meetings of the European Council in order to present the position of the state, the Tribunal issued the only, so far, substantive ruling. The Tribunal confirmed the occurrence of a positive competence dispute. On the basis of the interpretation of the provisions of the Constitution of RP (particularly the tasks ascribed to these authorities) the Constitutional Tribunal also separated their powers (competences).

In order to complete the aforementioned information it is worth adding that although in its adjudicating practice of the Tribunal, formally only two cases referred directly to a competence dispute, it is possible to specify numerous cases where occurred the context of competence conflict between central constitutional state authorities. They were the so-called application cases referring to examination of constitutionality and legality of legal norms. This was, for example, in the cases which concerned determining an acceptable scope of the Senate's amendment to the laws adopted by the Sejm. The Tribunal's recognition that the scope of the Senate's amendments was too extensive resulted simultaneously in recognizing that they were unacceptable due to the fact that the Senate had exceeded its powers to "pass amendments to laws", thereby the Senate infringed the regulations on legislative initiative, and consequently, the Senate usurped the powers of the Sejm.[22]

22 Compare the first case of this type, i.e. the Ruling of 21 November 1993, sign. K5/93 (OTK 1993, part 2, item 39) and, for example, the subsequent: the Ruling of 9 January 1996, sign. K 18/95 (OTK ZU 1996 No 1, item 1); the Ruling of 22 September 1997, sign. K 25/97 (OTK ZU

Another example is the case initiated by a group of deputies and the National Council of Judiciary, in which the Tribunal examined if the provision of Article 20 point 1 of the Law on the Organization of Common Courts, authorizing the Minister of Justice to create or liquidate, by regulation, courts as well as to establish their seats and relevant areas conformed to Article 176 para 2 of the Constitution.[23] This constitutional regulation provides that "*The organization and competence of courts as well as proceedings before courts are determined by laws*". The applicants formulated an objection that the statutory authorization is actually a power to determine the local competence of the new founded courts, and as a result, it intervenes in the sphere which is constitutionally reserved the legislative power. According to the applicants, the cases referring to the organization of judiciary are part of legislature and therefore they should be passed by the parliament as a competent authority. It is worth reminding that this case was lodged after the Minister of Justice issued an ordinance concerning the reform of the organizational structure of common courts.[24] Eventually, however, the Tribunal did not share the applicants' arguments and did not state the unconstitutionality of the provision of the law specified by the applicants.

Thus, it would not be correct to absolutely separate the aforementioned functions of the Constitutional Tribunal, i.e. adjudicating on the cases referring to examination of constitutionality and legality of legal norms from resolving competence (power) dispute, because they make a coherent structure of a general competence of the Constitutional Tribunal. Generically and procedurally they are, of course, separate cases, but the applications in which the complainant questions the competence to issue a legal norm, i.e. those which concern the so-called competence (power) aspect of examination of constitutionality, actually concern a resolution of, in a way, competence dispute. It is worth adding that a competence dispute may concern both

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1997 No 3-4, item 35); the Judgment of 20 July 2006, sign. K 40/05 (OTK ZU 2006 No 7A, item 82); the Judgment of 19 September 2008, sign. K 5/07 (OTK ZU 2008 No 7A, item 124).

23 Compare: the Judgment of 27 March 2013, sign. K 27/12 (OTK ZU 2013 No 3A, item 29).

24 See: the Ordinance of the Minister of Justice of 5 October 2012 on the liquidation of some district courts (Dz.U. of 2012, No 194, item 1121).

the bodies representing the same segment of power, as well as the bodies of its different segments.

The Constitutional Tribunal resolves competence disputes in its full bench in the form of decision. The ruling of the Tribunal, as well as in any other case considered by this body has a universally binding force and is final.

3. The remaining functions of the Constitutional Tribunal: adjudicating on a temporary incapability of the President to hold the office and a signaling function

The function of resolving competence disputes between central constitutional state authorities is not the only one the essence of which is reduced not as much to hierarchical examination of legal norms as to the assessment of particular facts. In accordance with Article 131 para 1 of the Constitution, if the President of RP cannot temporarily exercise his office, he reports it to the Marshal of the Sejm, who, temporarily, takes over the responsibilities of the head of state. Furthermore, if the President is not able to inform the Marshal of the Sejm about the inability to exercise his office, the Marshal of the Sejm is obliged to submit an application to the Constitutional Tribunal for: finding an obstacle in exercising the office by the President and recognizing a temporary inability to exercise the office by the President and temporal vesting the responsibilities of the President of RP in the Marshal of the Sejm. This regulation refers to the specific situation where the President is alive but cannot perform his responsibilities and could not inform the Marshal of the Sejm about the substitution before. So far the provision of Article 131 para 1 has never been applied.[25]

25 The catastrophe of the airplane with the President of RP, which happened on 10 April 2010 fulfilled another condition. Namely, in the event of the death of the President of RP, the Marshal of the Sejm performs temporarily his responsibilities until a new President of RP is elected (Article 131 para 1 point 1 of the Constitution). This procedure excludes any activity of the Constitutional Tribunal.

The signaling function is, in turn, one of the functions of the Constitutional Tribunal, which has no direct support in a constitutional regulation. It results from Article 4 para 2 of the Act: "The Tribunal shall submit to the competent law-making bodies observations concerning found inconsistencies and gaps in the law, removal of which would be indispensable to ensure the integrity of the legal system of the Republic of Poland."

This function, almost in the identical form, was also specified in the first act of 1985. The purpose of this provision is granting the Tribunal a mechanism enabling it to notify to legislative bodies incoherence in the system of law due to a defect or a legal loophole. In the justification to one of the rulings the Tribunal stated that the subject of signaling may be, however, not only a loophole in law but "*any deficiencies and defects of the legislation and practices which manifest themselves in the context of adjudication*" in the Tribunal. Elimination of a regulation from the legal system should be preceded by other measures which could restore the state of constitutionality, and one of these measures may be just the possibility of referring to relevant authorities with the signaling of the necessity of a legislative intervention.[26]

The essence of signaling does not consist in resolving a particular dispute; it is of somewhat protective nature, broadly understood. The Tribunal's exercising of this power is, however, limited. Foremost, the Tribunal may issue a signaling decision exclusively in connection with the case which was the subject of consideration. In accordance with §54 para 1 of the rules of procedure it may occur during the consideration of an application, a legal question or a constitutional complaint, regardless of the stage of the proceedings in the Tribunal. Moreover, a signaling decision may be issued by either the bench examining a particular case; or the full bench of the Tribunal. It is also issued on a justified application of the President of the Tribunal (para 2). Third, such a decision may be issued only if the elimination of a deficiency or a loophole is necessary for securing the coherence of the legal system, and not in any case of its occurrence.

26 See: the Judgment of 27 October 2004, sign. SK 1/04 (OTK ZU 2004 No 9A, item 96).

Finally, it is worth adding that the essence of signaling decisions is reduced to the specification of the need for particular changes in law. Thus, the Tribunal should exercise this power very cautiously, in order not to give an impression that it usurps the right to propose legislative changes, to which it is not entitled. Such an action would be an example of circumvention of regulations (e.g. those on the entities enjoying the right to legislative initiative). Another problematic question arises: the Tribunal issues signaling decisions on its own initiative, while the rule is that the Tribunal acts on request (an application). This is also one of the reasons why the signaling decisions in the Tribunal's practice are hardly ever issued: on average a few times a year.[27]

27 In the period 1998-2013 the Tribunal issued jointly 40 signaling decisions. Mostly one or two rulings of this type were issued yearly, except 2009 with seven ones. Compare: Appendix 6.

CONCLUDING OBSERVATIONS

In the democratic constitutional model exist certain principles, which simultaneously should be perceived as fundaments of the State's functioning. Among the most important ones, in the formal-legal approach, are: binding the State with law, the supremacy of the constitution, the specified catalogue of the sources of law with the specified hierarchy of universally binding acts (laws), mechanisms and institutions of human rights protection with, foremost, independent judiciary and its accompanying procedures. As part of the guarantee of the observance of the supremacy of the Constitution as well as individual freedoms and rights also operates the constitutional judicial system.

It is true to say that nowadays the idea of constitutional judiciary has become common throughout the world. Of course, it occurs in various models. What matters, however, is that today examination of legislative acts of the parliament raises no serious controversies. The principle of superiority of the parliament has been supplemented (and in a way weakened) by the recognition of the principle of the supremacy of the constitution.

The constitutional judiciary is also subject to evolution. The classic, original function of the constitutional court involving the protection of the constitutions (repealing the legal norms which failed to conform thereto) with the course of time has been complemented with additional functions, such as the protection of fundamental constitutional values as well as constitutional individual rights, and, to a degree of course, participation in shaping state policies. New challenges which the constitutional judiciary faces are also connected with the progressive process of European integration and the problems resulting therefrom (e.g. the question of power to examine acts of derivative law issued by the authorities of the European Union). Finally, constitutional courts are not unfamiliar with the problems with which judicial bodies have

to cope. Here it is important to underscore a considerable increase in the number of cases, which is also one of the factors which affect prolonging the period of waiting for the examination of the case.

The most generally speaking, the distinguishing of the examination model of the conformity of law with the constitution[1] occurs after considering the following circumstances: first, which authority (authorities/bodies) examine the constitutionality; second, what the subject of the examination is and what its effects are; third, what legal measures are applied to resolve the question of constitutionality.

In Poland the Constitutional Tribunal plays the role of the authority protecting the supremacy of the Constitution. It is a singled authority, not connected with the parliament and independent. It belongs to the constitutional authorities of the "judicial power." It is an example of the so-called European model of constitutionality of law control; it is an image of the so-called centralized control, which dominates in most of the European countries. Concluding the previous reflections, it is possible to point at a few significant qualities of the Polish understanding of constitutionality control.

The fundamental function of the Tribunal includes foremost examination of the constitutionality of normative acts (usually laws). For this purpose the Tribunal examines relevant applications as well as constitutional complaints of individuals and legal questions of courts. They are three forms of initiating proceedings before the Tribunal. As for examination of applications, the Tribunal performs it within the framework of the so-called preventive examination and *ex post* examination. Initiating the ex post examination is performed on the application of an entitled entity; an extensive catalogue of these entities has been specified in Article 191 para 1 of the Constitution. The subject of the examination of constitutionality and legality in the *ex post* examination procedure may be only an "normative act", and the

1 An average period of case examination by the Constitutional Tribunal is now 19 months (data for 2013). Taking into consideration the nature of cases (examination of constitutionality requires a thorough analysis of the problem and development of a position by the adjudicating bench of the Tribunal) as well as the procedures required (e.g. necessity of taking a stand on the case by other state authorities), it must be recognized that the period is close to optimal.

model of examination may be a superior normative act, including the Constitution.

The preventive examination embraces a narrower scope: only the President of RP is authorized to initiate it and the subject of examination in the Tribunal may be a law exclusively (before its signing) or an international agreement (before the act of its ratification).

Thus, generally, both the number of entities initiating the proceedings before the Tribunal and the scope of their powers are limited.

The Polish constitutional complaint is classified as an example of a narrow model of constitutional complaint. It is its objective scope that determines it. A complaint may concern a law or another normative act only; it does not grant an opportunity of a direct challenge of an individual act of law application (e.g. a sentence of the court). Another fundamental criterion of classification of constitutional complaint is its subjective scope. The Constitution of RP grants the right to submit a constitutional complaint to "anyone, whose constitutional freedoms or rights has been violated." The expression "anyone" should be understood broadly. If an individual is a beneficiary of a certain constitutional freedom (or a constitutional right), he is entitled to constitutional complaint against the regulation which infringes this freedom (right).

Thus, the complaint capability of natural persons, as well as other entities of law, such as legal persons of civil law (commercial law – especially companies), social organizations, trade unions, political parties, associations and cooperatives, raises no doubts. In the previous adjudicating practice of the Tribunal the most serious doubts were raised by the question of complaint capability of legal persons acting, as a rule, within the framework of the public sector, especially local government units, state legal persons or companies with the share of the Treasury, as well as independent public institutions of health care.

The position of the Tribunal is not homogeneous in reference to each of these entities. The Tribunal consistently refuses a complaint legitimacy to the units of local government (they may, on the other

hand, initiate proceedings in the Tribunal *via* application). Independent public institutions of health care are granted the right to constitutional complaint in the situation where the limitation of the rights of a legal person connected with the implementation of public tasks simultaneously led to reducing individual (natural persons') rights. The Tribunal has also taken into consideration the complaint capability of independent public institutions of health care, as well as companies with the share of the Treasury, in order to protect the right to ownership (and other property rights) to which they are entitled.

Effective initiation of complaint proceedings depends also on fulfilling other criteria. Namely, it is necessary that the complainant demonstrate a personal interest, a legal interest and a current interest. The complainant should substantiate that through issuing a ruling of a public authority on the basis of the regulation the constitutionality of which he questions, it came to a concrete and individual violation of the constitutional rights or freedoms to which he is entitled. Moreover, constitutional complaint is a subsidiary legal measure. Namely, a complaint may be effectively lodged only having exhausted the legal measures to which the complainant is entitled within the framework of a certain procedure (civil, criminal, administrative).

The constitutional structure of complaint is the essential factor determining the effectiveness of this legal measure. The Polish understanding of this institution (constitutional and statutory conditions) is narrow, hence its effectiveness is limited. This state is mitigated, to certain extent, the Tribunal's adjudicating activity, for it proves the search for an extensive interpretation of regulations determining the restrictive conditions of complaint.

In general, it is possible to state that the whole approach to concrete examination is narrow. It is demonstrated in the constitutional structure of legal question. Particular problems concern especially the phrase "if the answer to the legal question determines the resolution of the case before the court" (the so-called functionality of legal question).

The competences (powers) of the Constitutional Tribunal, however, go beyond pure adjudication on the hierarchical (vertical) conformity of normative acts. For the Constitutional Tribunal decides on the existence

of an obstacle in holding the office of President of RP and vests in the Marshal of the Sejm temporary responsibilities of the President. The Tribunal also resolves competence disputes between central constitutional state authorities. Moreover, the Tribunal adjudicates on constitutionality of the purposes and operations of political parties. The powers specified here are an exception to the rule of the Tribunal's deciding "on the law" (its legality and constitutionality), for they refer to adjudicating on concrete facts. In this way the Tribunal becomes partly "a court of facts", which exceeds the original assumptions of Hans Kelsen, the founder of the concept of constitutional judiciary implemented by a singled authority. Thus, although the Tribunal is not an authority "administering justice", actually some of its powers may be counted among this category. Here the point is a right to adjudicate on constitutionality of the activities of political parties.

The Constitutional Tribunal has no powers to assess the constitutionality of the acts of law application, to resolve interpretative disputes and examining accuracy of the interpretation of the provisions of law. Simultaneously, however, examining the constitutionality of a regulation includes a homogeneous practice of its application because it is the practice that may reveal the real substance of the legal norm. Assessment of the way of operation and efficacy of the bodies applying the law and verification of the objections to excessive length remain beyond the cognition of the Tribunal. The Tribunal does not adjudicate on a legislative negligence either, but has adjudicated on a "legislative omission" (the so-called limited judgments).

The Tribunal does not work "*ex officio*", but exclusively on request of entitled entities. The result of the principle of "accusatorial procedure" is binding the Tribunal with the limits of the application (complaint or legal question), which were determined by the entity entitled. As a rule, the Tribunal adjudicates on the basis of the presented objections to unconstitutionality and the accompanying arguments. The role of the entity initiating the proceedings is substantiation of the accusation of the unconstitutionality of the regulation.

The rulings of the Tribunal are universally binding and final. This makes it impossible to appeal against the ruling or to undermine it. In

the proceedings before the Tribunal the two-instance principle, known from judicial proceedings, is not applicable. Exceptionally, however, the provision of the law authorizes an applicant (complainant) to appeal against the decision of refusing to proceed on the application (constitutional complaint) through submitting a complaint (the stage of the preliminary examination of constitutional complaints and some applications).

Examining cases, the Tribunal applies "appropriately" the provisions of the Code of Civil Procedure "relevantly" and, in accordance with a statutory condition, as an auxiliary measure, whereas in the examination of the operation of a political party "relevant" and auxiliary application of the provisions of the Code of Criminal Procedure takes place. The Tribunal may examine a constitutional complaint in a classified session, which is an exception to the examination of cases in hearings. The most characteristic quality is a possibility of ruling on the provisions which have lost their valid force, if it is necessary to protect constitutional freedoms and rights of the applicant/complainant. The Tribunal sees the difference between a formal loss of validity and the fact if the provision (formally) repealed still has legal effects.

It is important to underscore that now the prevailing majority of the cases under examination are the ones initiated within the framework of the so-called concrete examination, i.e. constitutional complaints and legal questions. Consequently, also the number of the judgments issued in these proceedings is dominating. Nevertheless, the cases initiated within the framework of the so-called abstract examination (application cases) usually concern principal cases, not only from the individual point of view but also from the perspective of effective and proper functioning of the state.

As for the evaluation of the effectiveness of the Constitutional Tribunal, it is important to clearly emphasize that the adjudicating of this authority played a considerable role in forming the legal system in Poland during the period of political transformation. The adjudication achievements of those years is very rich and later on has been a point of reference several times. For example, suffice it to remind the creative interpretation of the principle of "state based on the rule of

law" and "democratic state", as well as the broad interpretation of the expression "normative act". Undoubtedly also it is in connection with the operation of the Tribunal that the sphere of protection of rights and freedoms has increased. The Tribunal has many times repealed regulations which failed to conform to such constitutional models as, for example, dignity, equality, the right to sue, the right to property, the freedom of expression, inviolability, the right to social security, or which infringed the conditions of acceptable restrictions on freedoms and rights (expressed in Article 31 para 3 of the Constitution). Still, the most often specified model has invariably remained the principle of democratic state based on the rule of law implementing the principles of social justice (Article 2).

The Tribunal also contributed to the consolidation of constitutional rules determining the status of state authorities and precisely specified mutual relation between these bodies. Here it is possible to name, for instance, the rulings confirming the independence of the National Bank of Poland, independence of courts, statements on the constitutional status of the President of the Republic of Poland, the President of the Council of Ministers, the National Council of Judiciary. A great number of rulings also concerned the role of the Senate in the legislation procedure, as well as the legislative procedure itself (the Tribunal formulated many rules of the so-called correct legislation).

The Constitutional Tribunal also fulfills the function of the guarantor of observing the hierarchy of law sources. This refers not only to the relation of the law to the Constitution but frequently also relations the ordinance (regulation) – the law. After Poland's accession to the European Union an additional area appeared, which is the so-called "European" adjudication of the Tribunal. In its previous practice, the Tribunal expressed its opinion on the situation of legal acts issued by the European Union authorities, the range of acceptable examination of the constitutionality of these acts in the Tribunal, and also confirmed the supreme validity of the Constitution of the Republic of Poland.

On 11 July 2013, the President of RP exercised his right to legislative initiative and submitted to the Sejm a new bill on the Constitutional Tribunal. The bill aims at making the operation of the

Tribunal more effective and, simultaneously, secure individuals stable protection of their constitutional rights.

The submission of the bill is connected with many problems which manifested in the activity of the Constitutional Tribunal. The purpose of the regulation proposed is in particular: 1) to shorten the average time of examination by the Tribunal; 2) to set in order the procedures of examining the cases and to revise the rule of too large reference to the provisions of the Code of Civil Procedure; 3) to establish a catalogue of entities legitimated to nominate candidates for Tribunal judges (i.e. candidates from among which the Presidium of the Sejm or a group of at least 50 deputies finally points at the candidature on which the Sejm will vote); 4) to specify the status of retired judges.

It is difficult to predict if the new Act on the Constitutional Tribunal will be adopted by the end of the VII term of the Sejm (autumn 2015). If it fails to happen, then, in accordance with the principle of discontinuation of parliamentary works, known in constitutional law, the works on the bill in the Sejm of the next term will have to commence again, i.e. with submitting the bill by the entitled entities. Currently, the bill is at the stage of works in the Committee for Justice and Human Rights and in the Legislative Committee of the Sejm of RP (i.e. after the so-called first reading of the bill). It is not certain if the law will be passed during the current term of the parliament, and if this happens, it is difficult to predict what final form the bill will take. For there as on this paper omits this issue.

BIBLIOGRAPHY

Literature

Banaszak B., *Skarga konstytucyjna i jej znaczenie w zakresie praw podstawowych,* (in:) Podstawowe prawa jednostki i ich sądowa ochrona, (ed. L. Wiśniewski), Warszawa 1997;

Banaszak B., *Modele skargi konstytucyjnej,* (in:) Skarga konstytucyjna, (ed. J. Trzciński), Warszawa 2000;

Banaszak B., Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warszawa 2009;

Breczko A., *Rola sądownictwa w ochronie konstytucji na tle ogólnych rozważań o systemie prawnym Wielkiej Brytanii,* (in:) Z zagadnień współczesnych państw demokratycznych, (ed. A. Jamróz, St. Bożyk), Białystok 2006;

Czeszejko-Sochacki Z., *Sąd konstytucyjny w systemie ustrojowym Austrii,* (in:) Sądy konstytucyjne w Europie, t. I, Austria, Francja, Niemcy, Włochy, (ed. J. Trzciński), Warszawa 1996;

Czeszejko-Sochacki Z., *Skarga konstytucyjna w prawie polskim*, Przegląd Sejmowy 1998, No 1;

Czeszejko-Sochacki Z., *Skarga konstytucyjna - niektóre dylematy procesowe*, Przegląd Sejmowy 1999, No 6;

Czeszejko-Sochacki, *Orzeczenia Trybunału Konstytucyjnego: pojęcie, klasyfikacja i skutki prawne*, Państwo i Prawo 2000, No 12;

Czeszejko-Sochacki Z., *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warszawa 2003;

Czeszejko-Sochacki Z., Garlicki L., Trzciński J., *Komentarz do ustawy o Trybunale Konstytucyjnym*, Warszawa 1999;

Działocha K., *Pojęcie aktu normatywnego w ustawie o Trybunale Konstytucyjnym*, Studia Prawnicze 1989, No 2-3;

Favoreau L., *De la démocratie ã l'Etat de droit*, «Le Dèbat» No 64 z 1991;

Favoreau L. (coordonnateur), P. Gaïa, Ghevontian, J.-L. Mestre, D. Pfersmann, A. Roux, G. Scoffoni, *Droit constitutionnel*, Paris 1999, 2 éd.;

Florczak M., *Skutki prawne odroczenia przez Trybunał Konstytucyjny utraty mocy obowiązującej aktu normatywnego*, Przegląd Sejmowy 2003, No 2;

Florczak-Wątor M., *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne*, Poznań 2006;

Florczak-Wątor M., *Prewencyjna kontrola konstytucyjności ustaw,* (in:) Konstytucja i sądowe gwarancje jej ochrony. Księga jubileuszowa Profesora Pawła Sarneckiego, Kraków 2004;

Garlicki L., *Sąd Najwyższy Stanów Zjednoczonych Ameryki. Konstytucja, polityka, prawa obywatelskie*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1982;

Garlicki L., *Sądownictwo konstytucyjne w Europie Zachodniej*, Warszawa 1987;

Garlicki L., *Uwagi o charakterze prawnym orzeczeń Trybunału Konstytucyjnego,* Acta Universitatis Wratislaviensis, Prawo CCLVII, Wrocław 1997;

Garlicki L. (ed.), *Konstytucja, wybory, parlament. Studia ofiarowane Zdzisławowi Jaroszowi,* Warszawa 2000;

Garlicki L., *Kilka uwag o konstytucyjnych aspektach przystąpienia Polski do Unii Europejskiej,* (in:) Konstytucja, wybory, parlament. Studia ofiarowane Zdzisławowi Jaroszowi, (ed. L. Garlicki), Warszawa 2000;

Garlicki L., *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2007;

Garlicki L. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Tom V, Warszawa 2007;

Garlicki L. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Tom I, Warszawa 1999;

Granat M., *Od klasycznego przedstawicielstwa do demokracji konstytucyjnej (ewolucja prawa i doktryny we Francji)*, Lublin 1994;

Granat M., Gorgol A., Sobczak J., *Ustawa o partiach politycznych. Komentarz* (ed. M. Granat), Warszawa 2003;

Grzybowski M., Tuleja P., *Skarga konstytucyjna jako środek ochrony praw jednostki w polskim systemie prawa*(in:) Sądy i trybunały w konstytucji i w praktyce, (ed. W. Skrzydło), Warszawa 2005;

Gwiżdż A., *O Trybunale Konstytucyjnym w Drugiej Rzeczypospolitej,* (in:) Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej, Studia i Materiały, t. IV, (ed. J. Trzciński, A. Jankiewicz), Warszawa 1996;

Hauser M., *Odesłania w postępowaniu przed Trybunałem Konstytucyjnym,* Warszawa 2008;

Jamróz A., *Demokracja współczesna. Wprowadzenie*, Białystok 1993;

Jamróz A., *Demokracja konstytucyjna – kilka konsekwencji dla systemu prawa,* (in:) Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 i Konstytucja Rzeczypospolitej Polskiej z 1997, Białystok 2001;

Jamróz A., Bożyk St. (ed.), *Z zagadnień współczesnych państw demokratycznych,* Białystok 2006;

Jaskiernia J., *System partyjny RP w świetle standardów Rady Europy* (in:) Partie polityczne: permanentne problemy, (ed. J. Kornaś), Kielce 2005;

Jaskiernia J. (ed.), *Transformacja systemów wymiaru sprawiedliwości, t. II, Proces transformacji i dylematy wymiaru sprawiedliwości,* Toruń 2011;

Jaworski S. J., *Skarga konstytucyjna jako środek ochrony konstytucyjnych praw i wolności*, Zamość 2003;

Jodłowski J., Resich Z., Lapierre J., Misiuk-Jodłowska T. (ed.), *Postępowanie cywilne,* Warszawa 2000;

Jodłowski J, *Zasada dyspozycyjności (rozporządzalności),* (in:) Postępowanie cywilne, J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, Warszawa 2000;

Johann W., *Legitymacja do występowania z wnioskami przed Trybunałem Konstytucyjnym,* (in:) Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego, (ed. M. Zubik), Warszawa 2006;

Kruk M., Trzciński J., Wawrzyniak J. (ed.), *Konstytucja i władza we współczesnym świecie. Doktryna-prawo-praktyka. Prace dedykowane prof. W. Sokolewiczowi na siedemdziesięciolecie urodzin,* Warszawa 2002;

Józefowicz A., *Skutki prawne orzeczenia Trybunału Konstytucyjnego o niezgodności aktu normatywnego z Konstytucją,* Państwo i Prawo 1995, No 1;

Józefowicz A., *Orzeczenia interpretacyjne Trybunału Konstytucyjnego*, Państwo i Prawo 1999, No 11;

Kelsen H., *Istota i rozwój sądownictwa konstytucyjnego*, Warszawa 2009;

Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 i Konstytucja Rzeczypospolitej Polskiej z 1997, Białystok 2001;

Konstytucja i sądowe gwarancje jej ochrony. Księga jubileuszowa Profesora Pawła Sarneckiego, Kraków 2004;

Kornaś J., *Partie polityczne: permanentne problemy,* Kielce 2005;

Kręcisz W., Zakrzewski W., *Skarga konstytucyjna a kontrola konstytucyjności prawa miejscowego*, Przegląd Sejmowy 1998, No 5;

Królikowski J., *Zasada falsa demonstratio non nocet w postępowaniu przed Trybunałem Konstytucyjnym*, Zagadnienia Sądownictwa Konstytucyjnego 2011, No 1;

Królikowski J., Sułkowski J., *Znaczenie przesłanki oczywistej bezzasadności dla dostępności skargi konstytucyjnej jako środka ochrony konstytucyjnych praw i wolności*, Przegląd Sejmowy 2009, No 5;

Laskowska M., *Zasada kontradyktoryjności a postępowanie przed Trybunałem Konstytucyjnym,* (in:) Konstytucja i władza we współczesnym świecie. Doktryna-prawo-praktyka. Prace dedykowane prof. W.

Sokolewiczowi na siedemdziesięciolecie urodzin, (ed. M. Kruk, J. Trzciński, J. Wawrzyniak), Warszawa 2002;

Łabno A., *Trybunał Konstytucyjny w Hiszpanii,* (in:) Sądy konstytucyjne w Europie, ed. J. Trzciński, T. 3, Warszawa 1999;

Łabno A., *Skarga konstytucyjna jako środek ochrony praw człowieka. Przyczynek do dyskusji,* Przegląd Prawa Konstytucyjnego 2012, No 4;

Łabno-Jabłońska A., *Iberyjska droga do demokracji. Studium prawnokonstytucyjne,* Warszawa 1996;

Mieszkowski J., Kudrycka B. (ed.), *Prawo, administracja, obywatele,* Białystok 1997;

Mikuli P., *Zdekoncentrowana sądowa kontrola konstytucyjności prawa. Stany Zjednoczone i państwa europejskie,* Kraków 2007, wyd. 2;

Naleziński, B. *Wstępna kontrola skarg konstytucyjnych w postępowaniu przed TK,* (in:) Prawa człowieka. Społeczeństwo obywatelskie. Państwo demokratyczne, Księga Jubileuszowa dedykowana Profesorowi Pawłowi Sarneckiemu, (ed. P. Tuleja, M. Florczak-Wątor, S. Kubas), Warszawa 2010;

Nowacki J., *Odpowiednie stosowanie przepisów prawa*, Państwo i Prawo 1964, No 3;

Popławska E. (ed.), *Konstytucja dla rozszerzającej się Europy,* Warszawa 2000;

Pruszyński M., *Zakres przymusu adwokackiego w postępowaniu skargowym przed Trybunałem Konstytucyjnym*, Biuletyn Trybunału Konstytucyjnego 1999, No 2-3 (8-9);

Radziewicz P*., Umarzanie postępowania przez Trybunał Konstytucyjny ze względu na utratę mocy obowiązującej przepisu przed wydaniem orzeczenia*, Przegląd Sejmowy 2006, No 2;

Repel J., *Przedmiotowy zakres skargi konstytucyjnej,* (in:) Skarga konstytucyjna, (ed. J. Trzciński), Warszawa 2000;

Rivero J., *Fin d'un absolutisme*, „Pouvoirs" No 13, «Le Conseil Constitutionnel» z 1986 ;

Rymarz F., *Problem prawa miejscowego jako przedmiot skargi konstytucyjnej*, Przegląd Sądowy 1999, No 5;

Safjan M., *Skutki prawne orzeczeń Trybunału Konstytucyjnego*, Państwo i Prawo 2003, No 3;

Sanetra W., *Sąd Najwyższy w systemie wymiaru sprawiedliwości,* Przegląd Sądowy 1999, No 7-8;

Skrzydło W. (ed.), *Zarys prawa konstytucyjnego,* Lublin-Rzeszów 1993;

Skrzydło W. (ed.), *Sądy i trybunały w konstytucji i w praktyce,* Warszawa 2005;

Sokolewicz W., *Trybunał Konstytucyjny – geneza, organizacja, funkcjonowanie,* Zeszyty Naukowe WSHiP, Seria Prawo, 2001, No 5,

Sokolewicz W., *Uwaga 8 do art. 2 Konstytucji RP, Uwaga 17 do art. 2 Konstytucji RP* [w:] Konstytucja Rzeczypospolitej Polskiej. Komentarz, (ed. L. Garlicki), Tom V, Warszawa 2007;

Sokolewicz W., *Uwaga 27 do art. 11 Konstytucji RP,* (in:) Konstytucja Rzeczypospolitej Polskiej. Komentarz, (ed. L. Garlicki), Tom V, Warszawa 2007;

Starzewski M., *Środki zabezpieczenia prawnego konstytucyjności ustaw*, Warszawa 2009, s. 247 (reprint oryginału z 1928);

Szmulik B., *Skarga konstytucyjna. Polski model na tle porównawczym*, Warszawa 2006;

Szymanek J., *Szczególna legitymacja procesowa kierowania wniosków do Trybunału Konstytucyjnego,* (in:) Transformacja systemów wymiaru sprawiedliwości, t. II, Proces transformacji i dylematy wymiaru sprawiedliwości, (ed. J. Jaskiernia), Toruń 2011;

Trzciński J. (ed.), *Sądy konstytucyjne w Europie, t. I, Austria, Francja, Niemcy, Włochy,* Warszawa 1996;

Trzciński J., *Uwagi do art. 79 Konstytucji,* (in:) Konstytucja Rzeczypospolitej Polskiej. Komentarz, (ed. L. Garlicki), Tom I, Warszawa 1999;

Trzciński J. (ed.), *Skarga konstytucyjna,* Warszawa 2000;

Trzciński J., *Zakres podmiotowy i podstawa skargi konstytucyjnej,* (in:) Skarga konstytucyjna, (ed. J. Trzciński), Warszawa 2000;

Trzciński J., *Wyroki interpretacyjne Trybunału Konstytucyjnego*, Państwo i Prawo 2002, No 1;

Trzciński J., Jankiewicz A. (ed.), *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*, Studia i Materiały, t. IV, Warszawa 1996;

Tuleja P., *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Kraków 2003;

Tuleja P., *Postępowanie przed Trybunałem Konstytucyjnym w sprawie hierarchicznej kontroli norm,* Przegląd Sejmowy 2009, No 5;

Tuleja P., Florczak-Wątor M., Kubas S. (ed.), *Prawa człowieka. Społeczeństwo obywatelskie. Państwo demokratyczne. Księga Jubileuszowa dedykowana Profesorowi Pawłowi Sarneckiemu,* Warszawa 2010;

Wasilewski A., *Przedstawianie pytań prawnych Trybunałowi Konstytucyjnemu przez sądy (art. 193 Konstytucji RP),* Państwo i Prawo 1999, z. 8;

Wasilewski A., *Pytania prawne do Trybunału Konstytucyjnego*, Przegląd Sądowy 2000, No 5;

Wiśniewski L. (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997;

Wiącek M., *Pytanie prawne sądu do Trybunału Konstytucyjnego,* Warszawa 2011;

Wojtyczek K., *Zasada skargowości w procedurze kontroli norm przed polskim Trybunałem Konstytucyjnym*, Przegląd Sejmowy 2003, No 1;

Wojtyczek K., *Ciężar dowodu i argumentacji w procedurze kontroli norm przez Trybunał Konstytucyjny*, Przegląd Sejmowy 2004, No 1;

Wojtyczek K., *Przekazywanie kompetencji państwa organizacjom międzynarodowym. Wybrane zagadnienia prawnokonstytucyjne,* Kraków 2007;

Wojtyczek K., *Sądownictwo konstytucyjne w Polsce. Wybrane zagadnienia.* Warszawa 2013;

Wójtowicz K., *Konstytucja Rzeczypospolitej Polskiej a członkostwo w UE,* (in:) Konstytucja dla rozszerzającej się Europy, (ed. E. Popławska), Warszawa 2000;

Zakrzewska J., *Spór o konstytucję*, Warszawa 1993;

Zakrzewski W., *Prawa i wolności obywateli Rzeczypospolitej Polskiej* [w:] Zarys prawa konstytucyjnego, (ed. W. Skrzydło), Lublin-Rzeszów 1993;

Zubik M. (ed.), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, Warszawa 2006;

Zubik M., *Status prawny sędziego Trybunału Konstytucyjnego*, Warszawa 2011;

Zwierzchowski E., *Sądownictwo konstytucyjne*, Białystok 1994;

Zwierzchowski E. (ed.), *Prawo i kontrola jego zgodności z Konstytucją*, Warszawa 1997;

Zwierzchowski E., *Europejskie modele scentralizowanej kontroli konstytucyjności aktów prawnych*, (in:) Prawo i kontrola jego zgodności z Konstytucją, (ed. E. Zwierzchowski), Warszawa 1997;

Zwierzchowski E., *Geneza i proces kształtowania skargi konstytucyjnej w Polsce,* (in:) Prawo, administracja, obywatele, (ed. J. Mieszkowski, B. Kudrycka), Białystok 1997.

Acts of Law

Government Law of 3 May 1791; (Constitution of 3 May 1791)

Act of 17 March 1921 Constitution of the Republic of Poland (Dz.U. No 44, item 267; No 79, item 550; No 101, item 935);

Act of 2 August 1926 amending and complementing the Constitution of the Republic of 17 March 1926 (Dz.U. No 78, item 442);

Constitutional Law of 23 April 1935 (Dz.U. No 30, item 227);

Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Dz.U. of 1993 No 61, item 284 as amended);

Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952 (Dz.U. No 33, item 232);

Constitution of the French Republic of 4 October 1958 (*Journal Officiel de la Republique Française*, No 234 of 5 October 1958);

Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952 (consolidated text: Dz.U. of 1976 No 7 item 36);

Act of 26 March 1982 on the Change of the Constitution of the Polish People's Republic (Dz.U. No 11, item 83);

Act of 7 April 1989 on the Change of the Constitution of the Polish People's Republic (Dz.U. No 19, item 101);

Act of 29 December 1989 on the Change of the Constitution of the Polish People's Republic (Dz.U. of 1989 No 75, item 444);

Constitutional Law of 17 October 1992 on Mutual Relations Between the Legislative Power and the Executive Power of the Republic of Poland and on Local Government (Dz. U. No 84, item 426);

Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No 78, item 483 as amended);

Act of 17 November 1964 Code of Civil Procedures (Dz.U. No 43, item 296);

Act of 29 April 1985 on the Constitutional Tribunal (Dz.U. No 22 item 98);

Act of 27 June 1997 on Political Parties (consolidated text: Dz.U. of 2011 No 155, item 924);

Act of 27 July 2001 Law on Common Courts Organisation (Dz.U. of 2001, No 98, item 1070 as amended)

Act of 25 July 2002 Law on the Organization of Administrative Courts (Dz.U. of 2002 No 153, item 1269 as amended);

Act of 23 November 2002 on the Supreme Court (Dz.U. of 2002 No 240, item 2052 as amended);

Ordinance of the Minister of Justice of 5 October 2012 on closure of some district courts (Dz.U. of 2012 No 194, item 1121);

Resolution of the Sejm of the PPR of 31 July 1985 on the specific procedure before the Constitutional Tribunal (Dz.U. No 39, item 184);

Resolution of the Sejm of the Republic of Poland of 30 July 1992 Procedure Rules of the Sejm of the Republic of Poland (M.P. of 2012, item 32, as amended);

Resolution of the General Assembly of the Judges of the Constitutional Tribunal of 3 October 2006 on the Procedure Rules of the Constitutional Tribunal (M.P. of 2006, No 72, item 720);

Statute of the Office of the Constitutional Tribunal: appendix to the Resolution of the General Assembly of the Judges of the Constitutional Tribunal of 4 February 2002, amended by the Resolution of 18 May 2004 and the Resolution of 2 March 2011.Consolidated text according to the legal situation of 2 March 2011.

Adjudication (Rulings) of the Constitutional Tribunal and other courts

decision of 21 September 1987, sign. P.3/87 (OTK ZU 1987, item 5);
ruling of 7 June 1988, sign. U.15/88 (OTK 1989, item 10);
resolution of 6 October 1993, sign. W 15/92 (OTK z 1993 vol. II, item 49);
ruling of 21 November 1993, sign. K 5/93 (OTK 1993 vol. 2, item 39);
resolution of 14 September 1994, sign. W.5/94 (OTK 1994, vol. II, item 44);
ruling of 26 September 1995, sign. U.4/95 (OTK 1995, vol. II, item 27);
ruling of 9 January 1996, sign. K 18/95 (OTK ZU 1996 No 1, item 1);
decision of 24 September 1996, sign. T. 35/96 (OTK 1996 No 5, item 45);
ruling of 22 September 1997, sign. K 25/97 (OTK ZU 1997 No 3-4, item 35);
decision of 13 October 1998, sign. SK 3/98 (OTK ZU 1998 No 5, item 69);
decision of 25 October 1999, sign. SK 22/98 (OTK ZU 1999 No 6, item 122);
judgment of 8 March 2000, sign. Pp 1/99 (OTK ZU 2000 No 2, item 58);
judgment of 8 May 2000, sign. SK 22/99 (OTK ZU 2000 No 4, item 107);
ruling of 28 June 2000, sign. U.1/00 (OTK ZU 2000 No 5, item 149);
judgment of 4 October 2000, sign. P 8/00 (OTK ZU 2000 No 6, item 189);
decision of 16 January 2001, sign. Tw 55/00 (OTK ZU 2002 No 1B, item 29);
decision of 6 February 2001, sign. Ts 148/00 (OTK ZU 2001 No 3, item 720);
judgment of 12 July 2001, sign. SK 1/01 (OTK ZU 2001 No 5, item 127);
judgment of 9 October 2001, sign. SK 8/00 (OTK ZU 2001 No 7, item 211);
judgment of 20 February 2002, sign. K 39/00 (OTK ZU 2002 No 1A, item 4);
decision of 12 February 2003, sign. Tw 72/02 (OTK ZU 2003 No 2B, item 78);
decision of 4 March 2003, sign.Tw 65/02 (OTK ZU 2003 No 2B, item 74);
decision of 16 July 2003,sign. Pp 1/02 (OTK ZU 2003 No 6A, item 71);
decision of 17 July 2003, sign. K 13/02 (OTK ZU 2003 No 6A, item 72);
decision of 20 October 2003, sign. U 2/02 (OTK ZU 2003 No 8A, item 81);
decision of 21 October 2003, sign. K 10/02 (OTK ZU 2003 N 8A, item 88);
decision of 10 March 2004, sign. Tw 30/03 (OTK ZU 2004 No 1B, item 9);
decision of 9 June 2004, sign. Tw 2/04 (OTK ZU 2004 No 5B, item 258);
decision of 14 July 2004, sign. Ts 82/03 (OTK ZU 2004 No 3B, item 178);
decision of 28 September 2004, sign. Tw 23/04 (OTK ZU 2004 No 5B, item 266);
decision of 6 October 2004, sign. SK 42/02 (OTK ZU 2004 No 9A, item 97);
decision of 20 October 2004, sign. Tw 16/04 (OTK ZU 2004 No 5B, item 261);

judgment of 27 October 2004, sign. SK 1/04 (OTK ZU 2004 No 9A, item 96);

decision of 8 December 2004, sign. Tw 43/04 (OTK ZU 2004 No 5B, item 275);

decision of 3 February 2005, sign. SK 7/03 (OTK ZU 2005 No 2A, item 19);

judgment of 21 March 2005, sign. SK 24/04 (OTK ZU 2005 No 3A, item 25);

judgment of 12 July 2005, sign. P 11/03 (OTK ZU 2005 No 7A, item 80);

decision of 18 July 2005, sign. SK 25/04 (OTK ZU 2005 No 7A, item 85);

decision of 7 December 2005, sign. Ts 83/05 (OTK ZU 2005 No 6B, item 259);

decision of 12 December 2005, sign. SK 4/03 (OTK ZU 2005 No 11A, item 143);

decision of 28 June 2006, sign. SK 25/06, OTK ZU 2006 No 6A, item 76);

judgment of 20 July 2006, sign. K 40/05 (OTK ZU 2006 No 7A, item 82);

judgment of 24 July 2006, sign. SK 58/03 (OTK ZU 2006 No 7A, item 85);

judgment of 6 December 2006, sign. SK 25/05 (OTK ZU 2006 No 11A, item 169);

decision of 25 April 2007, sign. Pp 1/07 (OTK ZU 2007 No 4A, item 47);

decision of 22 May 2007, sign. SK 70/05 (OTK 2007 No 6A, item 60);

decision of 11 July 2007, sign. Pp 1/07 (unpublished);

decision of 17 December 2007, sign. Pp 1/07 (OTK ZU 2007 No 11A, item 165);

judgment of 24 October 2007, sign. SK 7/06 (OTK ZU 2007 No 9A, item 108);

judgment of 19 September 2008, sign. K 5/07 (OTK ZU 2008 No 7A, item 124);

decision of 23 June 2008, sign. Kpt 1/08 (OTK ZU 2008 No 5A, item 97);

decision of 20 May 2009, sign. Kpt 2/08 (OTK ZU 2009 No 5A, item 78);

judgment of 10 November 2009, sign. P 88/08 (OTK ZU 2009 No 10A, item 146);

judgment of 17 November 2009, sign. SK 64/08 (OTK ZU 2009 No 10A, item 148);

decision of 4 October 2010, sign. P 79/08 (OTK ZU 2010 No 9A, item 111);

decision of 6 April 2011, sign. Pp 1/10 (OTK ZU 2011 No 3A, item 27);

judgment of 12 May 2011, sign. P 38/08 (OTK ZU 2011 No 4A, item 33).

judgment of 13 September 2011, sign. P 33/09 (OTK ZU 2011 No 7A, item 71);

judgment of 16 November 2011, sign. SK 45/09 (OTK ZU 2011 No 9A, item 97);

judgment of 11 July 2012, sign. K 8/10 (OTK ZU 2012 No 7A, item 78);

decision of 24 November 2012, sign. Pp 1/08 (OTK ZU 2010 No 9A, item 115);

judgment of 27 March 2013, sign. K 27/12 (OTK ZU 2013 No 3A, item 29);

judgment of the Supreme Court of 13 October 2010, sign. II PK 72/10 (Monitor Prawa Pracy 2011, No 2).

Other written sources

Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego, Warszawa 2006;

Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2008 roku, Warszawa 2009;

Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2010 roku, Warszawa 2011;

Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2012 roku, Warszawa 2013.

Internet sources

http://trybunal.gov.pl/rozprawy/transmisja-rozpraw/

http://trybunal.gov.pl/o-trybunale/biuro-trybunału/

http://trybunal.gov.pl/0-trybunale/akty-normatywne/statut-biura-trybunału/

http://trybunal.gov.pl/sprawy-w-trybunale/statystyka/skarga-konstytucyjna-1997-2000/

http://trybunal.gov.pl/sprawy-w-trybunale/statystyka/skarga-konstytucyjna-2001-2007/

http://trybunal.gov.pl/fileadmin/content/dokumenty/ds.pdf

http://trybunal.gov.pl//podstawowe-informacje/typy-sygnatur/

http://trybunal.gov.pl/fileadmin/content/dokumenty/statystyka_tabela.pdf

APPENDICES

Appendix 1:

Types of signatures[1]

K: applications for statement of the constitutionality of laws or ratified international agreements as well as the conformity of laws to international agreements, the ratification of which required a prior consent expressed in the law;

Kp: applications of the President of RP for statement of the constitutionality of laws before their signing or international agreements before their ratification;

P: legal questions referring to the conformity of a normative act to the Constitution, ratified international agreements or a law;

Kpt: applications referring to resolving competence (power) disputes between central constitutional authorities of the State;

Pp: applications referring to statement of the constitutionality of purposes or operations of political parties;

U: applications for statement of the conformity of provisions of law issued by central state authorities to the Constitution, ratified international agreements or laws;

SK: constitutional complaints;

M: applications of the Marshal of the Sejm for statement of an obstacle in exercising the power of the President of RP as well as of vesting in the Marshal of the Sejm a temporary performance of the responsibilities of the President of RP.

S: signaling decisions

Ts: constitutional complaints at the stage of preliminary examination

Tw: applications from entities specifically legitimized at the stage of preliminary examination

Before the Constitution of 2 April 1997 entered into force, also:

Kw, Uw: cases initiated on the Constitutional Tribunal's own initiative

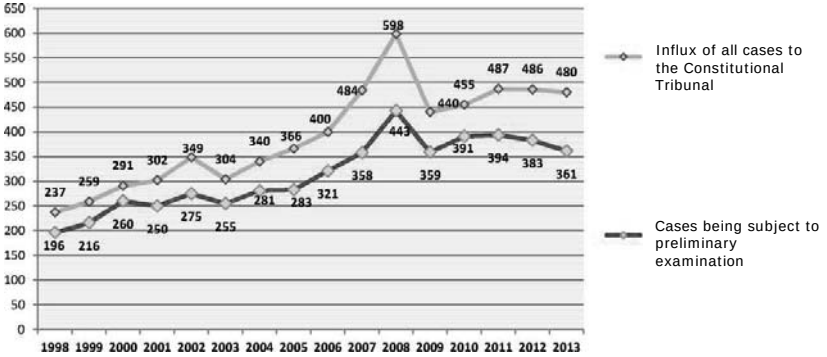
W: resolutions and decisions on applications for universally binding interpretation of laws

1 Data available at: http://trybunal.gov.pl/podstawowe-informacje/typy-sygnatur/

Appendix 2

Dynamics of the number of cases in the Constitutional Tribunal in the period 1998[1] - 2013[2]

Influx of cases to the Constitutional Tribunal in the period 1998-2013. Cases subject to preliminary examination against the background of the general number of cases.



Initiation of the proceedings before the Tribunal occurs on the basis of an application, a legal question or a constitutional complaint (Article 31 para 1 of the Act on the CT).

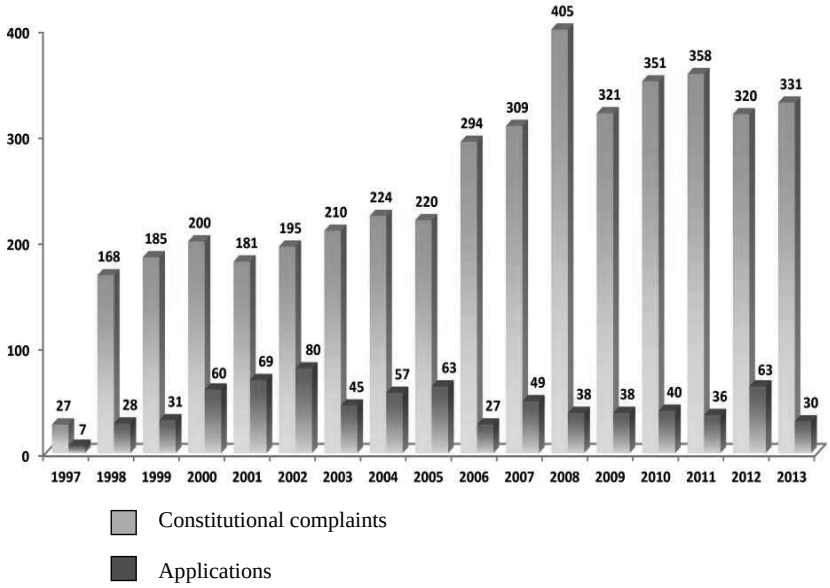
The general number of cases lodged into the Tribunal also includes the applications of the entities defined in Article 191 para 1 points 3-5 of the Constitution as well as the constitutional complaints, which were accepted for preliminary examination.

1 The year 1998 was the first full year of the effect of the Constitution of RP of 2 April 1997. The graph referring to the cases preliminarily examined presents the data since 17 October 1997, i.e. the day when the Constitution came into force

2 Data available at: http://trybunal.gov.pl/fileadmin/content/dokumenty/ds.pdf

Appendix 3

Cases being subject to preliminary examination[1]



Preliminary examination is obligatory for applications from entities with limited powers to initiate abstract examination of norms and all constitutional complaints (Articles 36 and 49 of the Act on the CT).

1 Data available at: http://trybunal.gov.pl/fileadmin/content/dokumenty/ds.pdf

Appendix 4

Influx of letters to the Team for Preliminary Examination of Constitutional Complaints and Applications (before the end of 2008)[1]

Year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Overall influx	1213	2891	2293	2281	2444	2536	2601	2298	2094	2178	2309	2522
Cases in repetitory Ts*	27	168	185	200	181	195	210	224	220	294	309	405
Cases in repetitory Tw**	--	--	--	--	--	80	45	57	63	27	49	38
Cases in register PW ***	566	650	423	292	351	207	212	127	135	112	89	88
Cases in register PO ****	467	1293	990	1004	1093	1164	1138	954	741	819	868	934
Others*****	153	780	695	785	819	890	996	936	935	926	994	1057

* *Repetitory Ts – constitutional complaints under preliminaryexamination*

** *Repetitory Tw: applications under preliminary examination*

*** *Register PW: letters addressed to the Constitutional Tribunal as constitutional complaints, but not prepared by a barrister or a solicitor*

**** *Register PO: letters of general nature (complaints, applications, petitions)*

***** *Others: letters referring to the cases already registered passed to other bodies of the CT*

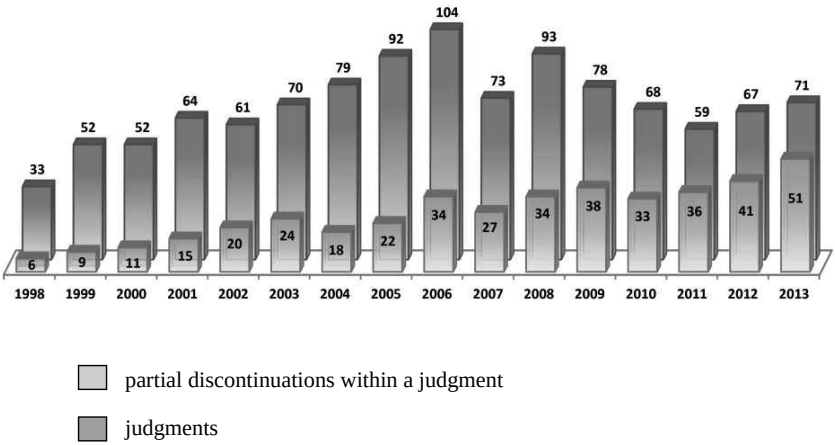
1 Data available at: http://trybunal.gov.pl/sprawy-w-trybunale/statystyka/skarga-konstytucyjna-1997-2000/ http://trybunal.gov.pl/sprawy-w-trybunale/statystyka/skarga-konstytucyjna-2001-2007/

Appendix 5

Resolutions of the Constitutional Tribunal[1]

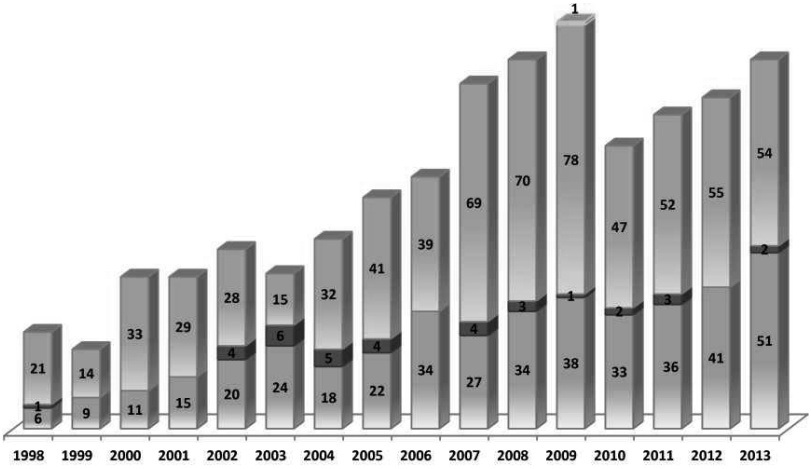
Judgments and decisions issued by the Constitutional Tribunal at the stage of substantial examination

Judgments



1 Data available at: http://trybunal.gov.pl/fileadmin/content/dokumenty/ds.pdf

Decisions



decisions on resolving competence (power) disputes between the central constitutional authorities of the State (one case in 2009)

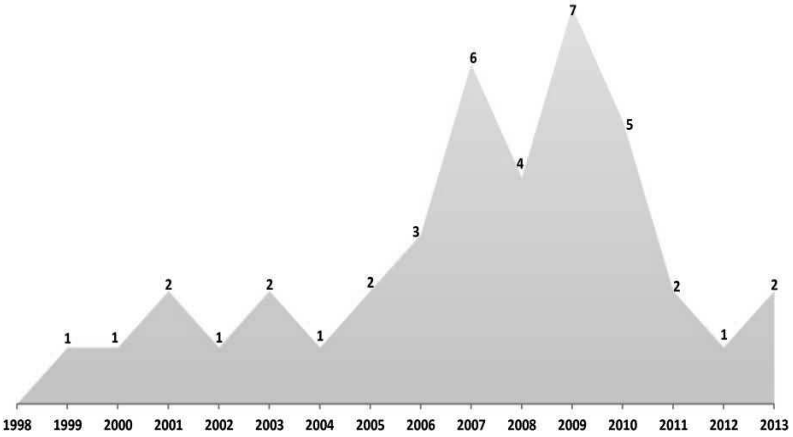
decisions on discontinuation of the proceedings

decisions on partial discontinuations of the proceedings passed before passing a judgement

decisions on partial discontinuation of the proceedings passed within a jugdement

Appendix 6

Signaling decisions[1]



Signaling decisions are issued on the basis of Article 4 para 2 of the Act on the CT, in order to present relevant legislative authorities observations on deficiencies and loopholes in law, the removal of which is indispensable to secure coherence of the legal system of the RP.

1 Data available at: http://trybunal.gov.pl/fileadmin/content/dokumenty/ds.pdf

Appendix 7

Rulings of the Constitutional Tribunal concluding proceedings at the stage of substantial examination in the period 1986[1]-2013[2]

Signature	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
K, Kw	1	2	1	8	11	7	15	15	13	22	22	37	32	29	37	47	40	43	36	48	41	34	41	34	30	33	31	32	742
U, Uw	5	-	17	17	11	7	13	8	7	7	6	14	15	10	7	7	9	8	9	5	8	10	5	6	3	1	6	9	230
P	1	5	2	-	1	1	-	6	3	1	5	3	3	9	15	13	15	15	19	26	34	41	53	60	46	37	43	40	497
SK	-	-	-	-	-	-	-	-	-	-	-	-	5	18	25	26	29	24	51	55	59	60	65	49	30	37	40	42	615
Kp	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	3	1	-	1	8	5	2	2	2	25
Pp	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	-	-	1	-	-	-	1	-	-	1	1	-	-	5
Kpt	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1	-	-	-	-	2
Total number of rulings	7	7	20	25	23	15	28	29	23	30	33	54	55	66	85	93	93	91	116	137	143	146	166	158	115	111	122	125	2116
W	-	-	-	-	7	12	10	14	18	16	15	9	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	101
S[1]	-	5	12	7	2	6	2	2	2	4	3	1	-	1	1	2	1	2	1	2	3	6	4	7	5	2	1	2	86

1 In the first years of its activity (1987, 1988) the Tribunal reported observations on deficiencies or loopholes in law including them in its judgments

2 Data available at: http://trybunal.gov.pl/fileadmin/content/dokumenty/statystyka_tabela.pdf

Appendix 8

The structure of judicial power in Poland