HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:
THE RELATIONSHIP OF INTERNATIONAL, SUPRANATIONAL AND NATIONAL CATALOGUES IN THE 21ST CENTURY

QUESTIONNAIRE FOR THE XVIIIth CONGRESS
OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

I. GENERAL PART: CATATOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I.I lnternational catalogues of human rights (ECHR, UDHR and ICCPR)

- *In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?*

International agreements ratified upon prior consent granted by statute which concern human rights constitute a source of universally binding law. In the event of a conflict of norms, such international agreements are overridden by the Constitution of the Republic of Poland (as they are at a lower position than the Constitution, in the hierarchy of the sources of law in the Polish constitutional order), but they take precedence over statutes (i.e. Polish parliamentary acts). Article 91(2) of the Constitution explicitly states that an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

Pursuant to Article 89(1)(2) of the Constitution, ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, requires prior consent granted by statute - if such an agreement concerns freedoms, rights or obligations of citizens, as specified in the Constitution. In accordance with Article 91(1) of the Constitution, after the promulgation of a ratified international agreement, the said agreement constitutes part of the domestic legal order and is applied directly, unless its application depends on the enactment of a statute.

- *What mechanism is used to invoke the international treaties in national court decision-making?*

Before the Constitutional Tribunal of the Republic of Poland, international agreements ratified with prior consent granted by statute are invoked as higher-level norms for constitutional review, without any limitations in this respect, in the applications of competent authorities and other parties specified in the Constitution as well as in questions of law referred by Polish courts. By contrast, in citizens' constitutional complaints lodged with the Constitutional Tribunal, international agreements may not be invoked as autonomous higher-level norms for constitutional review, since constitutional complaints may be filed only with reference to an infringement of rights and freedoms enshrined in the Constitution. However, persons filing constitutional complaints with the Tribunal often make indirect (supplementary) reference to the ECHR and the ECtHR's case law, when they believe that the substance of constitutional law is analogous to the substance of certain ECHR provisions. Such practice is fully accepted by the Constitutional Tribunal.

When the initiator of review proceedings correctly indicates a provision of a ratified international agreement as a higher-level norm for constitutional review, then the Tribunal assesses the conformity of the challenged provision(s) with that higher-level norm for constitutional review. Where certain provisions of, for instance, the ECHR are indicated concurrently with corresponding provisions of the Polish Constitution, the Tribunal sometimes makes do only with the evaluation of conformity to the provisions of the Constitution. This occurs in situations where a given provision of Polish law is inconsistent with the Constitution, and the Tribunal concludes that there is no need for a

further hierarchical review of conformity to the higher-level norm for review from the ECHR, as the aim of the Tribunal's review proceedings – namely, the elimination of the unconstitutional provision from the Polish legal system – has already been attained.

International agreements ratified upon prior consent granted by statute constitute a source of universally binding law and – when they comprise norms that are fit for direct application – they may be applied directly by Polish courts in the course of adjudicating on citizens' cases. When a Polish court concludes that a given provision of national law is inconsistent with a ratified international agreement, the court should request the Constitutional Tribunal to determine the unconstitutionality of the challenged national-law provision. This power of a Polish court is independent of its power to make a referral for a preliminary ruling to be issued by the Court of Justice of the EU (hereinafter: the CJEU). At the same time, the Constitutional Tribunal encourages Polish courts to interpret national law – where there is a possibility of a few interpretations – in a manner that is favourable to the Polish Constitution and/or to EU law.

- *Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.*

International catalogues of human rights – and primarily the ECHR – must be adhered to by all Polish state authorities, including the Parliament. If international agreements ratified upon prior consent granted by statute contain norms that are suitable (i.e. are sufficiently precise) for direct application, then they may be directly applied by state authorities in the course of determining citizens' cases. At the same time, individuals may directly invoke rights arising from international catalogues of human rights. Then they make an assertion that, in view of a given international human right, a determination issued by a competent court should comprise certain particular content. In most instances, individuals concurrently invoke an analogous right arising from the Constitution.

I.II Supranational catalogues of human rights (the Charter)

- *Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by "radiating" through the national catalogues (a substantive point of reference in other states)?*

Applicants invoke provisions of the Charter as higher-level norms for constitutional review before the Constitutional Tribunal, however – due to various formal considerations – no judgment has so far been issued by the Tribunal where a constitutional review was based on the Charter. At the same time, so far the legal character of the Charter has not been determined in the case law of the Constitutional Tribunal. Provisions of the Charter are invoked by national courts in the course of their application of law.

- *Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?*

Yes. The CJEU's case law concerning human rights affects the interpretation of constitutional rights and freedoms by the Constitutional Tribunal and Polish common courts.

- *Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is it conditioned by making a request for preliminary ruling with the Court of Justice of the EU?*

The answer to the question is contingent on the legal character of the Charter, which has not so far been determined in the case law of the Constitutional Tribunal.

I.III National human rights catalogues

- *Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?*

The catalogue of human rights is primarily set out in Chapter II of the Polish Constitution, entitled "The Freedoms, Rights and Obligations of Persons and Citizens". The catalogue is divided into subchapters concerning the following: general principles; personal freedoms and rights; political freedoms and rights; economic, social and cultural freedoms and rights; as well as means for the protection of freedoms and rights.

- *What is the historical background of the creation of the national catalogue of human rights in your country? ls the respective legislation in your country based on other legislation (previous or foreign), or is it original?*

Chapter II of the Polish Constitution, comprising the catalogue of constitutional rights and freedoms, constitutes part of the Constitution since the enactment thereof in 1997. This has been the first comprehensive constitution comprising such a catalogue since the change of the political system ensuing from the fall of communism in Poland. The adopted (modern) catalogue of constitutional rights and freedoms was not directly based on another specific legal system, but it bears some affinity to the ECHR and the constitutional catalogues of rights of certain other European states.

- *What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?*

The catalogue of constitutional rights and freedoms which is set out in the 1997 Constitution has not undergone significant changes. However, the constitutional rights and freedoms are subject to interpretation by the Constitutional Tribunal, which develops its case law by continuing to adjudicate on incoming cases where higher-level norms for constitutional review are constitutional rights and/or freedoms. This way, the Tribunal's case law is in a sense developed and the constitutional catalogue of human rights is updated.

I.IV The mutual relationship between different catalogues of human rights

- *Can you give examples from the case law of your court related to the use of any of the international catalogues?*

Yes. The Constitutional Tribunal very often makes reference to international catalogues of human rights, and in particular to the ECHR (see examples below in the special part of this Questionnaire), but also e.g. to the International Covenant on Civil and Political Rights (hereinafter: the ICCPR).

- *Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded*?

International catalogues of human rights are not hierarchical with respect to one another in the Polish constitutional order.

Should there be a clash between the Polish constitutional catalogue of human rights and one of international human rights catalogues, then what takes precedence is the constitutional catalogue. In addition, for instance, in the judgment of 16 November 2011, ref. no. SK 45/09, when making reference to the decision of the German Federal Constitutional Court in the case *Solange II* and to certain rulings of the ECtHR, the Polish Constitutional Tribunal stated that, in the Polish legal system, EU secondary legislation would be subject to constitutional review only when it would considerably lower the level of the protection of rights and freedoms in comparison with the level of protection guaranteed by the Constitution. In the said judgment, the Tribunal pointed out that:

"With regard to the standard of protection of human rights in EU law and the review of EU secondary legislation, the Federal Constitutional Court of Germany has presented

its stance. In the aforementioned ‘Solange II’ decision, the said court stated that as long as (*solange*) the European Communities, in particular thanks to the case law of the Court of Justice, generally ensure effective protection of fundamental rights which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the German Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court of Germany will not review secondary Community legislation by the standard of the fundamental rights contained in the Basic Law. The principle established in the said decision was maintained in the subsequent rulings. In the above-mentioned order in the case *Bananenmarktordnung*, the Federal Constitutional Court stated that a submission by a national court of justice or of a constitutional complaint which puts forward an infringement by secondary European Community Law of the fundamental rights guaranteed in the Basic Law is admissible only if its grounds state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has resulted in a decline below the standard of fundamental rights required unconditionally by the Basic Law since the ‘Solange II’ decision. This requires, in each instance, a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in the “Solange II” decision. Otherwise, the Federal Constitutional Court leaves a submission by a national court of justice or a constitutional complaint without any substantive examination thereof.

In the case law of the European Court of Human Rights (ECtHR), there has been a presumption that the protection of human rights by EU law and by the Court of Justice of the European Union can be considered to have been equivalent to the protection provided for by the ECHR (cf. in particular the judgment of 30 June 2005, application no. 45036/98, *Bosphorus*). In view of the ECtHR, the level of protection should only be ‘comparable’ and not ‘identical’ to that guaranteed by the ECHR. The actions of EU Member States are compliant with the ECHR as long as the European Union protects human rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the ECHR provides. The indicated presumption concerns cases where obligations to apply EU law leave no room for the independent exercise of discretion by the Member States (cf. the judgment of 21 January 2011, application no. 30696/09, *M.S.S.*). It follows from the above that the ECtHR is competent merely in exceptional cases to assess whether the actions, or the lack thereof, on the part of the EU institutions and bodies comply with the ECHR – namely where the presumption of equivalent protection is rebutted and the protection of human rights at the EU level is manifestly deficient. The Bosphorus doctrine has been maintained in the subsequent case law of the ECtHR. In the judgments of 10 October 2006, the case of *Cooperative des Agriculteurs de Mayenne* (application no. 16931/04) and of 9 December 2008, the case of *Societe Etablissements Biret* (application no. 13762/04), the ECtHR found the applications to be inadmissible on the grounds that the applicants had not shown that the protection of human rights at the EU level was manifestly deficient.

There are premisses to take an analogical approach with regard to reviewing the constitutionality of EU law in Poland. In the judgment concerning the Treaty of Lisbon (Ref. No. K 32/09), the Constitutional Tribunal presented the view that the said Treaty enjoyed a special status in the legal order of the Republic of Poland, which affected the way of examining its conformity to the Constitution. The Treaty of Lisbon was ratified by the President of the Republic of Poland, upon consent granted by statute, and enacted in accordance with the requirements specified in Article 90 of the Constitution. Ratifying the Treaty, the President of the Republic, being obliged to ensure observance of the Constitution, manifested his conviction that the ratified legal act was consistent with the Constitution. Based on the above grounds, the presumption of constitutionality

of the Treaty may only be ruled out after determining that there is no such interpretation of the Treaty and no such interpretation of the Constitution which allow to state the conformity of the provisions of the Treaty to the Constitution.

An analogical approach to the examination of conformity to the Constitution also regards the legal acts of the EU institutions. The legal acts prior to Poland's accession to the EU were adopted, pursuant to the Treaty of Accession, in the Polish legal system on the day of the accession (cf. Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, with regard to the conditions of EU membership, Journal of Laws – Dz. U. of 2004 No. 90, item 864). Subsequent legal acts were issued when Poland was already a Member State of the EU, usually with the participation of the representatives of the competent authorities of the Polish state. What further justifies the assumption about a special status of EU secondary legislation, which is an analogical approach to that taken by other constitutional courts are the following aforementioned arguments: the great significance of fundamental rights in the EU legal order; the constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration; as well as the principle of loyalty of the Member States towards the Union.".

- *Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary)?*

There is no such procedure. First of all, the Constitutional Tribunal is required to rely on higher-level norms for constitutional review invoked by the initiator of review proceedings, and it may not – on its own initiative – invoke more higher-level norms in this respect. The judicial practice of the Tribunal shows that the Tribunal usually reviews a given statutory provision first in the light of higher-level norms for constitutional review that arise from the Polish Constitution (if they are indicated), and then in the context of higher-level norms for constitutional review that arise from a given international agreement comprising a catalogue of human rights (if they are indicated). When the initiator of review proceedings correctly indicates a provision of a ratified international agreement as a higher-level norm for constitutional review, then the Tribunal assesses the conformity of the challenged provision(s) with that higher-level norm for constitutional review. Where certain provisions of, for instance, the ECHR are indicated concurrently with corresponding provisions of the Polish Constitution, the Tribunal sometimes makes do only with the evaluation of conformity to the provisions of the Constitution. This occurs in situations where a given provision of Polish law is inconsistent with the Constitution, and the Tribunal concludes that there is no need for a further hierarchical review of conformity to the higher-level norm for review from the ECHR, as the aim of the Tribunal's review proceedings – namely, the elimination of the unconstitutional provision from the Polish legal system – has already been attained. However, there are no formal obstacles for the Tribunal to conduct a hierarchical review of conformity of domestic provisions to any correctly invoked (by the initiator of review proceedings) provision of an international catalogue of human rights. It occurs quite frequently that the Tribunal reviews challenged provisions in the light of the Constitution and the ECHR concurrently.

II. SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

II.I Right to life

- *What is the original wording of the provision protecting this right in your national catalogue?*

Pursuant to Article 38 of the Constitution, the Republic of Poland ensures the legal protection of the life of every human being.

- *Is it possible to restrict the right? If so, how and under what conditions?*

Yes. In its judgment of 30 September 2008, ref. no. K 44/07, the Constitutional Tribunal summed up its previous case law on the admissibility and rules of limiting the right to the legal protection of life. It was pointed out that:

"The right to the legal protection of life is not absolute in character. As the Constitutional Tribunal noted in the case K. 26/96, '[t]he statement that human life, at each stage of development, is a constitutional value and is subject to protection, does not mean that the intensity of that protection at each stage of life and in all circumstances should be the same. The intensity and type of legal protection is not a simple consequence of the value of the protected interest. The intensity and type of legal protection are influenced by numerous factors of a different nature, apart from the value of the protected interest. Those factors must be taken into account by the ordinary lawmaker when deciding on the type and intensity of legal protection. Nevertheless, that protection should always be sufficient from the point of view of the value under protection' (similarly the Tribunal's judgment of 23 March 1999, ref. no. K 2/98). In some circumstances, especially after taking account of a certain situational context which is related to an insurmountable – in any other way – conflict of the right to life of each of two people, law may provide for exemption from penalising actions consisting in taking someone's life (e.g. decriminalisation of necessary defence). The above statement does not mean the acceptance of peculiarly construed axiological relativism. Making reference again to the reasoning of the Tribunal presented in the case ref. no. K. 26/96, it should be noted that: 'The ordinary lawmaker is (…) authorized to lay down potential exceptions, whose occurrence, in consideration of the conflict of interests which are constitutional values, rights or freedoms, necessitates the sacrifice of one of the conflicting interests. The lawmaker's consent to sacrifice one of the conflicting interests – due to the conflict of one constitutional interest with another constitutional interest, right or freedom – does not deprive the sacrificed interest of the attribute of a constitutional interest eligible for protection'.

In the same judgment, the Constitutional Tribunal permitted the restriction of the legal protection of life, where it is necessary due to the need to protect or implement other constitutional values, rights or freedoms. Given that assumption, the Tribunal also indicated general criteria that may justify the legalisation of taking someone's life, noting that it is necessary to determine: '(a) whether the interest the violation of which the legislator legalises constitutes a constitutional value; (b) whether the legalisation of the violation of that interest merits justification in the context of constitutional values (…); (c) whether the legislator complies with the constitutional requirements for resolving such a conflict, and in particular – whether the legislator adhered to the requirement of preserving proportionality'.

Ordinary legislation comprises commonly accepted provisions that permit actions which may result in taking someone's life not only to directly save one's life or another person's life, but also in other situations. It suffices to recall provisions on averting an immediate danger in the state of necessity, on self-defence, or on the use of weapons by police officers or the functionaries of other uniformed services. However, different evaluation should be assigned to norms which explicitly authorise the state to purposefully and intentionally take someone's life – especially if there is no such need in view of the protection of other rights and freedoms, or when this concerns a person who,

with his/her actions, did not necessitate such a reaction. Thus, what follows from Article 38 of the Polish Constitution, which guarantees the legal protection of the life of every human being, is *inter alia* a prohibition against introducing the death penalty into ordinary legislation as well as other legal institutions providing for the intentional and purposeful taking of someone's life by state authorities (see P. Sarnecki, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. III, Warszawa 2003, commentary on Art. 38, p. 6; A. Zoll, "Nowa kodyfikacja karna w świetle Konstytucji", *Czasopismo Prawa Karnego i Nauk Penalnych* No. 2/1997, p. 97 *et seq.*).

The well-established case law of the Constitutional Tribunal emphasises the prerequisites and model of the assessment of the constitutionality of legal solutions which set out ways of resolving conflicts among constitutionally protected interests, in the light of Article 31(3) of the Constitution. The said provision formulates cumulatively rendered prerequisites for the admissibility of limitations to the exercise of constitutional rights and freedoms. These are as follows: the statutory form of a restriction; necessity to introduce the restriction in a democratic state; a functional relation of the restriction to the implementation of the values mentioned in Article 31(3) (the protection of the state's security, public order, the natural environment, health, public morals, and the freedoms and rights of other persons); as well as a prohibition against violating the essence of freedoms and rights (see, *inter alia*, the Tribunal's judgments of: 24 March 2003, P 14/01, OTK ZU No. 3/A/2003, item 22; 6 March 2007, SK 54/06, OTK ZU No. 3/A/2007, item 23). The assertion that restrictions may be introduced only when they are necessary in a democratic state gives rise to the following questions: can such a regulation bring intended results; is such a regulation necessary for the protection of the public interest which the regulation concerns; do the effects of the introduced regulation remain appropriately proportionate to any burdens imposed on citizens by the regulation (see *inter alia* the Tribunal's ruling of 26 April 1995, K. 11/94, OTK in 1995, part I, item 12 as well as the Tribunal's judgment of: 28 June 2000, K. 34/99, OTK ZU No. 5/2000, item 142 and P 14/01, and recently the Tribunal's judgment of 3 June 2008, K 42/07, OTK ZU No. 5/A/2008, item 77).

Devised on the basis of Article 31(3) of the Constitution, the methodology of evaluation is also applicable to solutions limiting the legal protection of life, though with two vital reservations. Firstly, the prerequisite of necessity must be interpreted particularly restrictively, in the way that is consistent with the criterion of 'absolute necessity' established in the ECtHR's case law in the context of Article 2 of the ECHR (…). Every case of restricting the legal protection of human life – in relation to general standards – must be regarded as an *ultima ratio* measure. Secondly, due to the fundamental character of the right to life in constitutional axiology, not every value indicated in Article 31(30 of the Constitution may justify solutions undermining the said right. Without any need for further arguments, it may be stated that, in a democratic state ruled by law, where the state implements the principles of social justice and protects life as well as the inalienable dignity of the person, it would definitely be unacceptable to restrict the legal protection of human life for the purpose of safeguarding interests that are lower in the constitutional hierarchy, e.g. ownership and other property rights, public morals, the protection of natural environment or even the protection of other people's health. Therefore, a restriction of the right to the legal protection of human life depends on the occurrence of a situation where it is beyond any doubt that the said right may not be reconciled with analogous rights of other persons. That prerequisite may generally be referred to as the requirement of the symmetry of the following two interests: the one being sacrificed and the one being saved.".

In the judgment of 30 September 2008, ref. K 44/07, when applying Article 31(3) of the Constitution, the Tribunal held that one could not agree with the thesis that the challenged provision permitting the destruction of a flying aircraft used as a means for

carrying out a terrorist attack, where terrorists are not the only people aboard, 'is indispensable for the protection of a threatened interest that is constitutionally protected and which is not placed in the constitutional hierarchy at a lower position than the value that is being sacrificed, and the effects of the provision remain appropriately proportionate to the burdens imposed. Above all, the scope of the application of the provision is not limited to the situation where it is necessary to deprive persons aboard the *RENEGADE* aircraft of their lives so as to protect the lives of other people. What may also be taken into account is the protection of material goods, infrastructure facilities, etc.

However, if – which may be regarded as a typical situation – a decision to destroy a civil aircraft must be justified by the need to protect the lives of other people who are on the ground in the area that may probably be affected, then a question arises whether Article 38 of the Constitution allows state authorities, in accordance with a procedure specified by statute, to legally sacrifice the lives of persons aboard the aircraft so as to save the lives of other people. Can it be deemed that the lives of the passengers of an aircraft hijacked by terrorists which are most likely doomed to an inevitable end are of a lesser value than the lives of other people, in particular those jeopardised by a terrorist attack? The Constitutional Tribunal has no doubt that human life is not subject to any value judgments on account of an individual's age, state of health, expected life span, or any other criteria. All people – including the passengers of a plane flying in the airspace of a given state – have the right to have their lives protected by that state. The self-granted authorisation of the state to kill those persons, even if only for the protection of the lives of other people, remains in contradiction with the right at issue. That said, it is necessary to emphasise that the assessment of the threat for the persons on the ground is, by and large, always hypothetical, whereas for the persons on board the decision to shoot down the aircraft is a real and irreversible threat, which, in fact, means certain death. The awareness of the passengers of a civil aircraft hijacked by terrorists that the aircraft may be deliberately destroyed by air defence forces may weaken the passengers' will to fight to save their lives in the face of the threat posed by the terrorists.".

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

Yes. In its judgment of 30 September 2008, ref. no. K 44/07, the Constitutional Tribunal summed up its previous case law on the substance of the right to the legal protection of life. The Tribunal held that:

"Human life is the highest value in our civilisation and legal culture. Furthermore, according to the Constitution, such a legal value as human life is not subject to any differentiation. Both Polish and foreign constitutional case law emphasises the significance of the right to the legal protection of life as the most fundamental right of the individual, conditioning the possession and realisation of any other rights and freedoms. However, the significance of the right to life goes beyond the individual-subjective context thus understood. As the Constitutional Tribunal stressed in its judgment of 28 May 1997, ref. no. K. 26/96, the protection of human life also remains in close connection with the principle of a democratic state ruled by law. 'Such a state can only exist as a commonwealth of people, and only people may be the legitimate carriers of rights and obligations laid down in such a state. Life is the fundamental attribute of a human being. Hence, the deprivation of life annihilates the human being as the carrier of rights and obligations. If the essence of the principle of a democratic state ruled by law is a set of fundamental directives inferred from the essence of law enacted in a democratic manner, and providing for the minimum level of fairness thereof, then the primary directive in a state ruled by law must be the respect for the value without which it is impossible to recognise a person as a carrier of rights, i.e. human life from its beginning'.

In the case law of the Constitutional Tribunal as well as in the legal doctrine, what may be considered as a well-established view is that the constitutional requirement of the protection of life, or – to render it differently – the right to the legal protection of life, can be construed in two ways. The legal protection of life, guaranteed in Article 38 of the Constitution, should be understood, above all, as a prohibition against depriving a person of his/her life. In this 'defensive' context, the legal protection of life is a consequence of 'the right to life', which is vested in every person.

As the Constitutional Tribunal noted in its judgments of 23 March 1999, ref. no. K. 2/98 and of 8 October 2002, ref. no. K 36/00, regardless of the said 'defensive' content of the right to life, it also follows from Article 38 of the Constitution that public authorities are obliged to undertake positive actions aimed at the protection of life. By contrast, in the case K. 26/96, the Tribunal held that '[t]he protection of human life cannot be solely understood as the protection of the minimum biological functions which are necessary to exist, but should also be construed as guarantees to ensure normal development and the acquisition and maintenance of a normal psycho-physical condition that is appropriate at a given age of development (stage of life)'. The indicated positive aspect of the right to the legal protection of life comprises the positive obligations of the state, which are also recognised in the case law of the ECtHR and other European constitutional courts. With the risk of the emergence of terrorist or military threats or social unrest of other nature, what also constitutes an element of the right to the legal protection of life is the obligation to secure citizens (Ger. *Schutzpflichten*)".

In the above-mentioned judgment, the Tribunal pointed out that in international law, analogous provisions to Article 38 of the Constitution may primarily be found in Article 2 of the ECHR and Article 6(1) of the ICCPR.

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

No significant differences have been noted. The Constitutional Tribunal relies on the convention standard within the scope of the right to the legal protection of life, developed in the case law of the ECtHR. For instance, in the aforementioned judgment of 30 September 2008, ref. no. K 44/07, in the light of the right to the protection of life as enshrined in Art. 2 of the ECHR, the Tribunal evaluated the provision permitting the shooting down of a flying aircraft used for a terrorist attack, aboard of which apart from the terrorists there are also other people. It was pointed out that:

"The right to life is regarded in the ECtHR's case law as the most fundamental one out of all human rights, as a basic value in democratic societies which is safeguarded by all relevant conventions (see the ECtHR's judgment of 27 September 1995 in the case of *McCann and Others v. the United Kingdom*, A/324, *EHRR* 97, p. 34, § 147). Although the ECtHR has not taken a stance, in the light of Article 2 of the ECHR, on the legal ways of resolving a conflict of interests in extreme situations, in the relation of 'a life for a life', certain conclusions may be formulated on the basis of the ECtHR's views on legal means undermining the lives and/or other interests of supposed terrorists.

Firstly, the ECtHR – just like the Polish Constitutional Tribunal and other European constitutional courts – formulates a thesis about states' positive obligations which arise from Art. 2 of the ECHR (see *inter alia* the following cases: *Marx v. Belgium*, A/31, § 45; *Young, James and Webster* v. *The United Kingdom*, A/44, § 49). The right to life comprises the obligation to secure the individual (see *inter alia* K. Blau, *Neuere Entwicklungen in der Schutzpflichtdogmatik des EGMR am Beispiel der Fall „Vo/Frankreich"*, „Zeitschrift für Europarechtliches Studien" 2005, p. 397 *et seq.*). In accordance with the case law of the ECtHR, states should take all available and reasonable steps to ensure the protection of the right to life with their jurisdictions (see the rulings in the following cases of: *Ergi v. Turkey*, of

28 July 1998, application no. 23818/94, *Velikova v. Bulgaria*, of 18 May 2000, application no. 41488/98, *Kelly and Others v. the United Kingdom of 4 May 2001*, application no. 30054/96). However, states enjoy a certain margin of appreciation when it comes to the fulfilment of their obligations in the situation of a terrorist threat (see B. Knehis, *Recht auf Leben und Terrorismusbekämpfung. Anmerkungen zur jüngsten Judikatur des EMGR zu Art. 2 EMRK*, [in:] *Kontinuität und Wandel der EMRK* (ed. Ch. Grabenwarter, R. Thienel), Kehl 1998, p. 21 *et seq.*). The ECtHR is not *a priori* in favour of any model solution to a conflict of values where public security is in juxtaposition with the rights and freedoms of individuals. The ECtHR states that the required degree of security depends on the circumstances of a specific case (see the judgment in the case of *Ärzte für das Leben v. Austria* of 21 June 1988, application no. 10126/82). This is related to the consistent line of the Strasbourg case law with regard to the rendering of the principle of proportionality in the light of the ECHR being 'a living instrument', which may not be determined on the basis of an *a priori* scale (see the ECtHR's judgment of 25 April 1978 in the case of *Tyrer v. the United Kingdom*, § 31).

Secondly, the prerequisites for the legality of taking someone's life are construed by the ECtHR extremely restrictively. What constituted a clear manifestation of such assessment was the judgment in the case of *McCann v. the United Kingdom*, where three members of the IRA (McCann, Farrell and Savage), suspected of plotting to bomb a British military base in Gibraltar, were shot down by the British secret service (afterwards it turned out that the three IRA members had carried neither weapons nor explosives. Then the ECtHR stressed that Art. 2 of the ECHR must be interpreted in a strict way and national law ought to precisely specify circumstances where a person may be deprived of his/her life by public authorities.

Thirdly, the ECtHR stringently evaluates and rarely rules in favour of the admissibility of pre-emptive measures taken by states (see the ruling in the case of *Osman v. the United Kingdom* of 28 January 1998, application no. 13452/94; K. Blau, *op.cit.*, p. 405). Hence, it is stated, in the literature on the subject, that the use of defence forces against the *RENEGADE* aircraft does not meet the requirements of admissibility specified in the light of Article 2 of the ECHR, and – in the event of challenging, before the ECtHR, a provision that is analogous to § 14(3) of the German *Luftsicherheitsgesetz*, the outcome would be similar to the one in the proceedings conducted and concluded before the German Federal Constitutional Court.

Even further reaching conclusions arise from the published results of the work carried out by the Venice Commission of the Council of Europe, where the right to life is explicitly referred to as an absolute right (see points III.7 and IV.9 of the Venice Commission's Opinion of 4 April 2006 as well as the ECtHR's ruling of 18 December 1996 in the case of *Aksoy v. Turkey*, § 62).".

II.II Freedom of expression

- *What is the original wording of the provision protecting this right in your national catalogue?*

Pursuant to Article 54(1) and (2) of the Constitution of the Republic of Poland, "[t]he freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone", and "[p]reventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station.".

- *Is it possible to restrict the right? If so, how and under what conditions?*

Yes. In its judgment of 12 February 2015, ref. no. SK 70/13, the Constitutional Tribunal summed up its previous case law as regards the admissibility and rules of limiting the freedom of expression. It was pointed out that:

"Despite the exceptionally strong position of the freedom of speech in the constitutional axiology, the said freedom is not absolute in character and may be subject to restrictions.

In its judgment ref. no. P 12/09, the Constitutional Tribunal confirmed that the freedom to express opinions, which is enshrined in Article 54 of the Constitution, is not absolute in character and may be subject to restrictions, upholding the principle of proportionality. When assessing the constitutionality of a regulation imposing a restriction on a constitutional right or freedom, it should be considered whether it meets formal criteria – i.e. whether it fulfils a premiss that a restriction may only be introduced by statute; in the case of a reply in the affirmative to that basic question, the so-called test of proportionality should be carried out (see the judgment of the Constitutional Tribunal of 13 March 2007, ref. no. K8/07, OTK ZU No.3/A/2007, item 26). In accordance with the well-established case law of the Constitutional Tribunal in the context of Article 31(3) of the Constitution, while assessing the allegation of the lack of proportionality it is required to provide answers to three questions concerning the analysed norm, namely: 1) can it bring the effects intended by the legislator (the usefulness of a norm); 2) is it indispensable (necessary) for the protection of a public interest to which it is related (necessity to take action by the legislator); 3) are its effects appropriately proportionate to the burdens or restrictions imposed on citizens (proportionality in the strict sense). Such limitations may not violate the essence of freedoms and rights.

Having regard to the fact that the freedom of speech is a particularly protected value, any interference with the freedom by means of a criminal-law regulation requires precision and caution on the part of the legislator as well as courts (see the Tribunal's judgment of 19 July 2011, ref. no. K 11/10, OTK ZU No. 6/A/2011, item 60). Due to the character of criminal law as the *ultima ratio* in restricting the freedom of expression, the legislator – when applying the test of proportionality – should pay special attention to the principle of usefulness and the principle of the mildest measure (see the Tribunal's judgment of 6 July 2011, ref. no. P 12/09).".

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

Yes. In its judgment of 12 February 2015, ref. no. SK 70/13, the Constitutional Tribunal summed up its previous case law on the freedom of expression. It was pointed out that:

"Article 54(1) of the Constitution guarantees that 'everyone' has the freedom to express his/her opinions and to acquire and disseminate information. In its previous case law, the Tribunal made numerous references to that provision, indicating that Article 54(1) of the Constitution, which regulates – to put it succinctly – the freedom of speech, *de facto* provides for three separate, albeit interrelated freedoms of the individual; these are as follows: the freedom to express opinions; the freedom to acquire information; and the freedom to disseminate information (…). In its rulings, the Tribunal stressed the fundamental significance of those three freedoms merged together as 'the freedom of speech' or 'the freedom of expression', not only from the point of view of the individual's freedom, to which the individual is entitled due to his/her human nature and which is closely linked with his/her dignity, but also from the point of view of the mechanisms of a democratic society (see the Tribunal's judgment of 23 March 2006, ref. no. K 4/06, OTK ZU No. 3/A/2006, item 32).

Voicing opinions in the public realm entails, *inter alia*, externalising observations, views, proposals, predictions and conjectures with regard to the activity of public authorities and public officials or political parties, as well as voicing ideas about possible solutions to various political or social problems.

An 'opinion', within the meaning of Article 54(1) of the Constitution, should be construed as broadly as possible, not only as the expression of personal observations about facts and phenomena from all spheres of life, but also as a presentation of convictions, conjectures, predictions and judgments regarding controversial matters, and the communication of information concerning both actual and presumed facts. At the

same time, it is not important in what form opinions are expressed, and so this may be in speech or in writing, or by means of images and sounds, as well as an overt manifestation of one's attitude, e.g. by wearing certain clothes in a particular situation (see the Tribunal's judgment of 12 May 2008, ref. no. SK 43/05).

Article 54(1) of the Constitution protects all forms of expression that are not in violation of law and which allow individuals to externalise and share their views. Creating conditions for the free exchange of opinions does not imply permission for any forms of expression. In principle, the freedom of expression does not comprise forms of expression that are clearly insulting. However, at the same time, the freedom of expression may not be limited to information and opinions that are regarded as favourable or perceived as harmless or neutral (see the Tribunal's judgment of 23 March 2006, ref. no. K 4/06). The normative content of Article 54 of the Constitution falls within the scope of the contemporary, democratic standard of 'the freedom of expression', and in particular the general and broad wording of Article 10 of the ECHR, done at Rome on 4 November 1950, as amended by its Protocols Nos. 3, 5 and 8 as well as supplemented by its Protocol No. 2 (Journal of Laws – Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the ECHR), which explicitly mentions 'information' and 'ideas' (see the Tribunal's judgment of 20 February 2007, P 1/06 and of 6 July 2011, ref. no. P 12/09).

Article 54(1) of the Constitution also comprises the right to a political debate, which constitutes an essential component of the democratic legal system. A free public debate in a democratic state is one of the most important guarantees of civil freedoms and liberties. What serves the protection of that value is a number of guarantees clearly set forth in Article 54 of the Constitution.

Providing appropriate guarantees for the exercise of the freedom of expression in a public debate is necessary with respect to both the individual's personal as well as political realm. In its judgment ref. no. P 3/06, the Constitutional Tribunal stressed that, in a democratic state, a public debate is focused primarily on matters related to the functioning of public institutions and the activity of persons performing public duties which involve taking decisions that are vital for wider social groups. For the freedom of such a debate, it is necessary to move further and further away the boundaries of the freedom of expression with regard to persons performing public duties.".

In the above-mentioned judgment, the Tribunal primarily made reference to the ECHR and the ECtHR's case law.

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

No significant differences have been noted. The Constitutional Tribunal makes use of the convention standard pertaining to the protection of the freedom of expression, as developed in the ECtHR's case law. In the aforementioned judgment of 12 February 2015, ref. no. SK 70/13, the Tribunal declared the constitutionality of the provision which penalises the act of insulting a public official not in public. In that judgment, the following issues arising from the ECtHR's case law were indicated:

"Firstly, the ECtHR draws attention to the status of the author of opinions. In this context, it was emphasised, *inter alia*, that opinions expressed by the representatives of the mass media constitute an element of the media's role as a public controller (see I.C. Kamiński, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna*, Warszawa 2010, p. 210 and the case law cited therein pertaining to: *Janowski v. Poland*, § 33; *Busuivoc v. the Republic of Moldova*, § 64; *Mamére v. France*, § 27). The ECtHR also pointed out special guarantees for conducting a free public debate in the context of 'opinions voiced by the members of national parliaments and other public authorities whose members are chosen in elections, where those opinions are expressed on

behalf of their voters. Political parties as well as parliamentarians take a stance, representing their voters and presenting the voters' views and concerns. What merits the most stringent review by the Strasbourg Court is interference with opinions voiced by a politician (or a political party) belonging to the opposition' (I.C. Kamiński, *Ograniczenia swobody…,* p. 155; see the judgment of 23 April 1992, *Castells v. Spain*, application no. 11798/85, §§ 42-43). Elaborating on the subject matter in the case of *Otegi Mondragon* v. *Spain* (the judgment of 15 March 2011, application no. 2034/07), the ECtHR confirmed that the freedom of speech is particularly important for an elective representative of society, who represents his/her voters, cares about their problems and protects their interests (§ 50).

Secondly, the ECtHR draws attention to the status of the person affected by offensive speech. As regards the position for the 'victim' of the offensive speech, in the foreground there is the status of politicians, who – in the view of the ECtHR – should show more tolerance for opinions voiced about them than private individuals. The ECtHR broadly understands the notion of 'a politician', referring it not only to parliamentarians (see e.g. the judgment of 6 April 2006 in the case of *Malisiewicz-Gąsior v. Poland*, § 65) and members of government (see e.g. the judgment of 19 May 2005 in the case of *Turhan v. Turkey*, § 25), but also to local authorities (see the judgments of: 21 July 2005 in the case of *Grinberg v. Russia*, § 32; 11 April 2006 in the case of *Brasilier v. France*, § 41; 2 February 2010 in the case of *Kubaszewski v. Poland*, § 43), candidates for those positions (see e.g. the judgment of 9 January 2007 in the case of *Kwiecień v. Poland*, § 50 – local elections), political party activists as well as trade union members (see L. Garlicki, commentary on Art. 10, [in:] L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1-18*, (ed) L. Garlicki, Warszawa 2010, p. 640).

The ECtHR deems that when it comes to safeguards against verbal attacks, public officials take a place 'between' politicians and private individuals. What will ultimately determine whether particular interference with the freedom of speech was justified is the following: the circumstances of a particular case; the type and severity of an administered penalty; and the motives of the author of critical remarks (see the judgment of 21 January 1999 , *Janowski v. Poland*, application no. 25716/94; delivered in the context of the case concerning municipal guards who were insulted while on duty) – (see I. Kamiński, *Swoboda wypowiedzi w orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu*, Kraków 2006, p. 207).

The political context in which an executive authority of local self-government functions was clearly stressed in the ECtHR's judgment of 18 September 2012 in the case of *Lewandowska-Malec v. Poland,* application no. 39660/07. The judgment was delivered with relation to the conviction of a female municipal-council member for a letter in which she had criticised the mayor of that municipality (Pol. *gmina*). When analysing rulings with regard to that female applicant, the ECtHR drew attention to the fact that domestic courts 'concentrated on the literal meaning of the impugned assertion and analysed it without having regard to the wider message which the applicant had tried to convey in her letter'. The said 'wider message' – in the view of the ECtHR – should have been analysed taking into account the fact that 'the limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals, as the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large (see *Lingens*, § 42; *Oberschlick v. Austria* (no. 2), (…) § 29; *Mamère v. France*, no. 12697/03, § 27, ECHR 2006-XIII; *Kwiecień v. Poland*, no. 51744/99, § 47, 9 January 2007). Politicians must display a greater degree of tolerance, especially when they themselves make public statements that are susceptible to criticism. (…) the applicant's statement contained harsh words about the mayor. However, it was precisely the task of an elected representative to ask awkward questions about those who exercise public office and to be hard-hitting in her

criticism of fellow politicians responsible for the management of the public purse. The latter must be expected to display a greater degree of tolerance than private individuals when exposed, in a political setting, to scathing remarks about their performance or policies (see, *mutatis mutandis, Lombardo and Others*, § 54; *Kubaszewski*, both cited above, § 43)'.

In the judgment of 1 July 1997, in the case *Oberschlick v. Austria* (application no.20834/92), which was issued with regard to a politician having been called 'an idiot' by a journalist in his comment on the politician's speech. As the ECtHR indicated, Article 10 of the Convention protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see I.C. Kamiński, *op.cit.*, p. 120). In the view of the ECtHR, in certain circumstances, even the use of an offensive expression such as 'an idiot' falls within the scope of acceptable freedom of expression, as politicians' actions or words that are radical or shocking may evoke a harsh response (see *ibidem*). Thus, state authorities should refrain from interference which is to guarantee a civilised and well-mannered public debate, due to the fact that in a democratic society a political discussion should be held in a broad and open way (see *ibidem*, pp.120-121).

Thirdly, the ECtHR assigns considerable significance to the nature of an opinion, and in particular whether the opinion constituted an element of a public debate. Undoubtedly, the case law of the ECtHR stresses the need to determine if a given utterance is part of a public debate. "Since what constitutes the essence of 'a democratic society' is a public debate, then that debate may not be prevented from being expressive or heated, especially when it concerns controversial issues. Thus, there always arises not only a clash between the legal situation of the author of remarks and that of the 'victim' of the remarks, but also the question of the public versus private context of the remarks. This is usually sorted out on the basis of the 'indispensability' of a restriction. (…) The unique nature of the protection of 'one's good name' (to a large extent overlapping with the realm of relations among private parties) additionally relativises the application of those rules, having regard in particular to: the status of the author of remarks; the status of 'the victim' of the remarks; the nature of the remarks; the form thereof, and grounds for the formulation thereof" (L. Garlicki, commentary on Art. 10, [in:] *Konwencja…*, p. 639).

In the circumstances where remarks were made by the author solely to vent his/her frustration and were aimed at undermining the dignity of a given person, the ECtHR held that it was admissible to restrict the freedom of speech of that author (cf. the judgment in the case of *Skałka v. Poland*; similarly, the judgment in the case of *Łopuch v. Poland*, *Janowski v. Poland*). In the judgment of 6 February 2001 in the case of *Tammer v. Estonia*, the ECtHR additionally stressed that if the used words were not 'justified by considerations of public concern' nor did they bear 'on a matter of general importance', then it would accept the stance of domestic courts in accordance with which resorting to insulting language was not necessary to express a negative opinion (see I.C.Kamiński, *Ograniczenia* ..., p.151). In the case of *Janowski v. Poland*, the ECtHR noted that the applicant was convicted of insulting the municipal guards by calling them "oafs" and "dumb" during an incident which took place in a square. This was witnessed by bystanders and concerned the actions of the municipal guards who insisted that street vendors trading in the square move to another venue. In the view of the ECtHR, the applicant's remarks did not therefore form part of an open discussion of matters of public concern; neither did they involve the issue of freedom of the press since the applicant, although a journalist by profession, clearly acted as a private individual on this occasion. The ECtHR also pointed out that the applicant's conviction was based on his utterance of the two words which were judged to be insulting by both trial and appeal courts, not the fact that he had expressed critical opinions about the guards or alleged that their actions were unlawful (§ 32; see also M.A. Nowicki, commentary on Art. 10 of the ECHR,

[in:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, 6th edition, Warszawa 2013, p. 779).

Fourthly, in different context, the ECtHR also referred to the broadly construed form of expression. In the aforementioned judgment in the case of *Skałka v. Poland*, where insults about the judges of the Penitentiary Division of the Katowice Regional Court were formulated in a letter to the President thereof, the ECtHR deemed that due to the internal exchange of letters of which nobody of the public took notice, the administered penalty was disproportionately severe. However, at the same time, the ECtHR stressed in many of its rulings that it is necessary to protect controversial opinions that fall within the scope of a debate on public matters. From this point of view, special significance is assigned to opinions expressed via the mass media (see the judgment in the case of *Oberschlick v. Austria*).

Fifthly, the ECtHR also draws attention to the issue of imposing a penal sanction for the use of offensive speech. In the case of *Otegi Mondragon v. Spain*, the ECtHR emphasised that the imposition of an imprisonment sentence for an offence committed in the context of a political discussion only in extreme cases – such as spreading hatred and inciting to violence – could be reconciled with the convention guarantees of the freedom of expression. In the case of *Otegi Mondragon*, convicted for one year of imprisonment, the conviction served as a deterrent – even though the convict was a politician, his passive electoral right was suspended for the period of his punishment. The ECtHR held that the imposition of the sentence was – when juxtaposed with the intended aim – disproportionate.

Making reference to the above-presented standard, the Polish Constitutional Tribunal acknowledges that the criteria signalled by the ECtHR should be taken into account when assessing conduct that matches the characteristics set out in Article 226(1) of the Polish Penal Code in terms of how socially detrimental it is. In the Tribunal's view, interference with the freedom of speech arising from Article 226(1) of the Polish Penal Code is not excessive, provided that courts consider the circumstances of a given incident, the extent to which it is socially detrimental, the criteria for determining a penalty as prescribed by law, with a view to the significance of a public debate and the danger of excluding from the public debate a person penalised with criminal measures.

An analysis of the ECtHR's case law leads to the conclusion that the level of protection against offensive remarks depends on the status of the person affected by the remarks. However, Art. 226(1) of the Polish Penal Code, which is linked with the definition of a public official included in Art. 115(13) of the said Code, erases the distinction – adopted by the ECtHR – between public officials who are politicians and those public officials who are not involved in politics. It should be noted that, in the light of Art. 226(1) of the said Code, the enhancement of the protection of a public official who is also a politician is justified when offensive remarks are analysed in the context of duties performed by the public official and also in the context of an impact such offensive remarks may have on the activity of a given institution (even potentially). In the case of public officials who are not politicians such an impact will be more noticeable; however, in the case of public officials who are politicians, this requires a more in-depth analysis.".

II.III Right to privacy/right to respect for private life/right to private life

- *What is the original wording of the provision protecting this right in your national catalogue?*

Article 47 of the Constitution of the Republic of Poland states that: "Everyone shall have the right to legal protection of his/her private and family life, of his/her honour and good reputation and to make decisions about his/her personal life".

- *Is it possible to restrict the right? If so, how and under what conditions?*

Yes, this is possible on the basis of Article 31(3) of the Constitution. Please see remarks about Article 31(3) in point II.II.

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

Yes. In the judgment of 19 June 2018, ref. no. SK 19/17, the Constitutional Tribunal summed up its previous case law pertaining to the right to privacy. It was pointed out that:

"Pursuant to Art. 47 of the Constitution, 'everyone shall have the right to legal protection of his/her private and family life, of his/her honour and good reputation and to make decisions about his/her personal life'. Art. 47 of the Constitution regulates two separate legal institutions: firstly, the individual's right to the legal protection of the spheres of life indicated in the first part of the provision; secondly, the freedom to decide with regard to matters indicated in the latter part of the provision. The former must be accompanied by a statutory regulation enshrining privacy, family life, honour and good reputation. By contrast, the latter means a prohibition against interference with the individual's freedom to determine his/her private life. The said freedom also manifests the freedom of the person (Art. 31(1) of the Constitution) as well as personal liberty guaranteed by Art. 41(1) of the Constitution. Both constitutional norms included in Art. 47 of the Constitution are commonly referred to as 'the right to privacy' (see the judgment of 5 March 2013, ref. no. U 2/11, OTK ZU No. 3/A/2013, item 24). What should also be borne in mind is that respect for privacy is closely related to the constitutional requirement of the protection of the dignity of the person (Art. 30 of the Constitution) – see the Tribunal's judgment of 16 May 2018, ref. no. SK 18/17, OTK ZU A/2018, item 25).

The Tribunal pointed out that the right to privacy refers, *inter alia*, to: data concerning citizens' financial situations (see the judgment of 24 June 1997, ref. no. K 21/96, OTK ZU No. 2/1997, item 23, and the judgment of 20 November 2002, ref. no. K 41/02, OTK ZU No. 6/A/2002, item 83); information on the state of health (see the judgment of 19 May 1998, ref. no. U 5/97, and the judgment of 5 March 2013, ref. no. U 2/11); data processed within the vetting procedure concerning persons' involvement in the organisational structures of the former communist regime (see the judgment of 11 May 2007, K 2/07, OTK ZU nr 5/A/2007, item 48); data concerning blood relations or the lack thereof (see the judgment of 13 July 2004, ref. no. K 20/03, OTK ZU No. 7/A/2004, item 63); data concerning potential bone marrow donors (see the judgment of 22 July 2014, ref. no. K 25/13, OTK ZU No. 7/A/2014, item 76); data provided for the purpose of public statistics (see the judgment of: 13 December 2011, ref. no. K 33/08, OTK ZU No. 10/A/2011, item 116; 18 December 2014, ref. no. K 33/13, OTK ZU No. 11/A/2014, item 120); consent to the taking of samples of genetic material (see the judgment of 11 October 2016, ref. no. SK 28/15, OTK ZU A/2016, item 79).

As noted by the Tribunal, the contemporary understanding of the realm of private life with regard to personal data leads to protecting all personal data, regardless of the content thereof; this could be not only information that puts the individual at risk of being ashamed or embarrassed, but also such content that is completely irrelevant from the point of view of morals or social conventions' (the judgment of 12 November 2002, ref. no. SK 40/01, OTK ZU No.6/A/2002, item 81). Consequently, the realm of the individual's privacy, enshrined on the basis of Art. 47 of the Constitution, also comprises information about the state of health, since the protection of medical data is of primary importance for the possibility of the individual's exercise of the right to respect for his/her private and family life (see the Tribunal's judgment of 26 February 2014, ref. no. K 22/10, OTK ZU No. 2/A/2014, item 15).".

The Tribunal primarily makes reference to the ECHR and the ECtHR's case law (see below).

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

No significant differences have been noted. The Constitutional Tribunal makes use of the convention standard pertaining to the right to privacy, as developed in the ECtHR's case law. For instance, in its judgment of 20 March 2006, ref. no. K 17/05, the Tribunal extensively analysed the question of the privacy of a public person. It was pointed out that:

"The scope of the protection of public life in the context of public activity was also the subject of analyses in the ECtHR's case law, due to the guarantee of the protection of private life as provided for in Article 8 of the ECHR. In the ECtHR's case law, the clash between the right to privacy, on the one side, and the right to information, on the other, has been analysed in the context of the need for a public debate. It is the need for a public debate that is primarily to determine, with a view to acquiring information, the possibility of interfering with the realm of privacy. It could be said that, from that perspective, any activities aimed at disclosing information on public persons would merely constitute unjustified 'curiosity'. The ECtHR has adopted a broad interpretation of the notion of 'private life', making reference to the definition of personal data which is included in the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (see in particular the statement of reasons for the judgment of 4 May 2000 in the case of *Rotaru v. Romania*, application no. 28341/95; § 43). What is also worth noting at this point is the well-known judgment of 18 May 2004 in the case of *Éditions Plon v. France* (application no. 58148/00, § 43 *et seq*.) in which – in relation to the publication of memoirs by a doctor of the late French President, the ECtHR noted that the French authorities had not had a wide margin of appreciation as regards limitations to the freedom of expression. The ruling clearly indicates the fact that the European standard is the tendency to expand the scope of transparency when it comes to public life. By contrast, in the case of *von Hannover v. Germany*, in the judgment of 24 June 2004, application no. 59320/00, the ECtHR stressed that the judicial authorities of the Federal Republic of Germany had not provided appropriate protection of the right to privacy with regard to the applicant, which was ruled to be an infringement of Article 8 of the ECHR. As it follows from the statement of reasons, the ECtHR drew a distinction between the presentation of facts during a public debate in a democratic society, which *inter alia* refers to politicians within the scope of their public duties, and the presentation of facts concerning the private life of an individual who does not perform any public duties (§ 63). Therefore, it was stated in the judgment that it was possible to extend the right of the public to obtain information also to comprise, in a sense, the realm of the private lives of public persons, including politicians. In the view of the ECtHR, participation in a public debate constitutes the key criterion in the case of balancing out the two values: the protection of private life and the freedom of expression. It was also emphasised that the public has the right to be informed, which is a basic right in a democratic society and in particular circumstances it may even – as pointed out in the reasons for the judgment in the case of *Éditions Plon* – comprise the aspects of the private lives of public persons, including politicians.

Public persons, and especially politicians, must – as stated in the judgment of *Lingens v. Austria* (of 8 July 1986, § 42) – accept, with regard to themselves, a much broader – than in the context of private individuals – scope of the freedom of expression. Indeed, by virtue of their roles, when assuming public duties, those persons accept the existence of public scrutiny of their conduct not only on the part of journalists but also by the public at large.".

II.IV Freedom of religion

- *What is the original wording of the provision protecting this right in your national catalogue?*

Pursuant to Article 53 of the Constitution:

"1. Freedom of conscience and religion shall be ensured to everyone.

2. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.
3. Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate.
4. The religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby.
5. The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others.
6. No one shall be compelled to participate or not participate in religious practices.
7. No one may be compelled by organs of public authority to disclose his/her philosophy of life, religious convictions or belief.".

- *Is it possible to restrict the right? If so, how and under what conditions?*

Yes, it is. In its judgment of 10 December 2014, ref. no. K 52/13, the Constitutional Tribunal summed up its previous case law on the topic of the admissibility and rules of limiting the freedom of religion. It was pointed out that:

"The meaning and scope of the freedom of religion as well as its close relation to the inherent and inalienable dignity of the person determine the way of regulating permissible restrictions on the manifestation of that freedom. Article 53(5) of the Constitution stipulates that the freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the protection of national security, public order, health, morals or the rights and freedoms of others.

Article 53(5) of the Constitution in a detailed way sets out the so-called formal grounds (the statutory character of the said restriction) and substantive grounds (necessity to protect national security, public order, health, morals or the rights and freedoms of others) for the admissibility of restricting the freedom of religion. What follows from the normative structure of Article 53(5) of the Constitution is that possible restrictions may affect only the manifestation of religion. (…)

The genesis and shape of the limitation clause in Article 53(5) of the Constitution are clearly inspired by Article 9(2) of the ECHR. The last-mentioned provision stipulates that the freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 9(2) reflects the intentions of the authors of the ECHR that grounds for interference with the freedom to manifest one's religion ought to be special in character, taking account of the significance and unique nature of the guaranteed freedom so as to ensure that the said freedom will be realised within the broadest possible scope (…). This way, the limitation clause in Article 9(2) of the ECHR has been formulated in a narrower way than in the case of clauses that specify grounds for restricting other rights and freedoms protected under the ECHR. An analogical purpose was to be fulfilled by Article 53(5) of the Constitution. The intention of the authors of the Constitution was to maintain a maximum relation between the constitutional provisions on the individual's rights and freedoms and the relevant wording of the ECHR (L. Garlicki, "Przesłanki ograniczania konstytucyjnych praw i

wolności (na tle orzecznictwa Trybunału Konstytucyjnego)", *Państwo i Prawo* 10/2001, p. 6).".

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

Yes. In its judgment of 10 December 2014, ref. no. K 52/13, the Constitutional Tribunal summed up its previous case law on the interpretation of the freedom of religion. It was pointed out that:

"The freedom of belief, in the Polish constitutional order – referred to as the freedom of religion, is a fundamental (basic) freedom of the individual. Even the Preamble to the Polish Constitution emphasises the significance of faith as a source of truth, justice, good and beauty.

The obligation to respect the freedom of religion is closely related to the protection of the inherent and inalienable dignity of the person, which constitutes a source of freedoms and rights of persons and citizens (Article 30 of the Constitution). The dignity of the person is a transcendent value (see the judgment of the Constitutional Tribunal (full bench) of 5 March 2003, ref. no. K 7/01, OTK ZU No. 3/A/2003, item 19, part III, point IV of the statement of reasons). It constitutes the axiological basis and prerequisite of the entire constitutional order (see L. Garlicki, commentary on Art. 30, [in:] *Konstytucja Rzeczypospolitej Polskiej*. *Komentarz*, Vol. 3, L. Garlicki (ed), Warszawa 2003, pp. 2-3).

Arising from the European civilisation as one of the basic aspects of freedom enjoyed by the individual, the freedom of belief (religion) evolved gradually, in the course of long-term philosophical, cultural and legal processes. At present, the freedom of belief, considered jointly with the freedom of conscience, takes a central place in the catalogues of basic rights and freedoms of the individual.

Article 18 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, stipulates that everyone has the right to freedom of thought, conscience and religion. The said right comprises freedom to change one's religion or belief, and freedom – either alone or in community with others and in public or private – to manifest one's religion or belief in teaching, practice, worship and observance of customs (rites). The freedom of belief construed in this way is also expressed in Article 18(1) of the ICCPR. Article 18(2) of the ICCPR stresses that no one may be subject to coercion which would impair his/her freedom to have or to adopt a religion or belief of his/her choice. By contrast, Article 18(3) of the ICCPR provides that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. A guarantee of the freedom of thought, conscience and religion is also expressed in Article 9 of the ECHR and Article 10 of the Charter of Fundamental Rights of the European Union.

Provisions that guarantee the freedom of belief are common in constitutions of democratic states (see P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku*, Warszawa 2008, pp. 126-127; J. Szymanek, "Wolność sumienia i wyznania w Konstytucji RP", *Przegląd Sejmowy* 2/2006, pp. 39-40). The Polish Constitutional Tribunal, in its judgment (full bench) delivered on 2 December 2009, ref. no. U 10/07 (OTK ZU No. 11/A/2009, item 163, part V, point 3.1 of the statement of reasons), emphasised that the freedom of belief (religion) constitutes an essential element (a fundamental principle) of a democratic state ruled by law. In the said judgment, the Tribunal extensively presented the genesis and contemporary understanding of the freedom of belief. Those findings remain valid.

In the Polish constitutional order, the guarantee of the freedom of religion (belief) is provided for in Article 53 of the Constitution, which is the basic higher-level norm for the review in the present case. Paragraph one of the said provision reads as follows: 'Freedom

of conscience and religion shall be ensured to everyone'. However, the constitutional subject-matter concerning the freedom of conscience and religion comprises two aspects: an institutional aspect which pertains to relations between the state and churches as well as other religious organisations (such relations are regulated, primarily, in Art. 25 of the Constitution); and an aspect that refers to guarantees of the individual's freedom of conscience and religion, which arise from Article 53 of the Constitution. Articles 25 and 53 of the Constitution are complementary in character and should be examined as a certain whole (see the judgments of the Constitutional Tribunal (full bench) of: 2 December 2009, ref. no. U 10/07, part V, point 5 of the statement of reasons; and 8 June 2011, ref. no. K 3/09, OTK ZU No. 5/A/2011, item 39, part III, point 3.4.1 of the statement of reasons). (…)

In ordinary legislation, the constitutional guarantee of the freedom of religion (belief) is confirmed and expressed by statutes that determine relations between the state and churches as well as other religious organisations (in the context of relations with the Roman Catholic Church, this also includes the Concordat singed between the Holy See and the Republic of Poland; Journal of Laws – Dz. U. of 1998 No. 51, item 318), as well as the Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Belief (Journal of Laws – Dz. U. of 2005 No. 231, item 1965, as amended).

The constitutional distinction between freedoms and rights enjoyed by persons and citizens entails that in the case of the freedoms (or 'liberties'), the Constitution emphasises a prohibition on interference, by public authorities and third parties, in the realm of activity guaranteed to the individual (see K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, pp. 24-28). In its case law, the Tribunal stresses that the constitutional liberties imply not only freedom from unjustified legal requirements and prohibitions restricting the freedom of the individual, as well as freedom from unjustified use of coercive measures, but also freedom from other unauthorised forms of interference in the realm of the individual's legally protected interests, intended to restrict the individual's freedom to make decisions within a given scope (see the judgment of the Constitutional Tribunal of 7 February 2006, ref. no. SK 45/04, OTK ZU No. 2/A/2006, item 15, part III, point 6 of the statement of reasons).

Article 53 is one of the most extensive provisions of the Constitution when it comes to the guarantee character of the rights and freedoms of the individual. Cited by the applicant, paragraph two of the said provision stipulates that the freedom of religion includes the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing rites or teaching. Within the meaning of that provision, the freedom of religion also comprises the possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services. Concurrently, the presentation of elements making up the freedom of religion in Article 53(2) of the Constitution is general in character. Its role is to exemplify the aspects of the said freedom. The wording of Article 53(2) of the Constitution does not rule out exercising the freedom of religion in yet other ways.

The Constitutional Tribunal deems that Article 53(1) and Article 53(2) of the Constitution imply a prohibition against actions, including those that have legal effects, which would in an unjustified way interfere (hinder) the practice of a particular religion. Respect for the freedom to manifest one's religious beliefs is a prerequisite for the effective guarantee of the freedom of religion.".

The above-mentioned judgment of the Tribunal made explicit reference to: Article 18 of the Universal Declaration of Human Rights (UDHR), Article 18(3) of the ICCPR, Article 9 of the ECHR, and Article 10 of the Charter.

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

No significant differences have been noted. The Constitutional Tribunal makes use of the convention standard pertaining to the freedom of religion, as developed in the ECtHR's case law. For instance, in its judgment of 10 December 2014, ref. no. K 52/13, the Tribunal extensively referred to the subject matter of the freedom of religion, when examining the permissibility of ritual slaughter. It was pointed out that:

"The freedom of belief is provided for in the catalogue of basic rights expressed in the Convention for the Protection of Human Rights and Fundamental Freedoms. Cited by the applicant, Article 9(1) of the ECHR stipulates that everyone has the right to freedom of thought, conscience and religion. The said right comprises the freedom to change one's religion or belief and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief, in worship, teaching, practice and observance.

In the ECtHR's case law, it is stressed that the freedom of thought, conscience and religion is one of the cornerstones of a pluralist democratic society. As regards its religious aspect, the said freedom is one of the crucial elements that make up the identity of believers and their way of life, but it is also a value for atheists, agnostics, sceptics as well as persons who are indifferent to religious matters. The ECtHR deems that although the freedom of belief is primarily a matter of one's conscience, it also implies the freedom to manifest one's religious beliefs. Indeed, words and actions are a testimony to one's religious beliefs. In accordance with the ECtHR's case law, the state has the duty to remain a neutral and impartial guarantor of the free practice of different religions. The said duty is incompatible with any competence on the part of the state to assess the validity of given religious beliefs or ways of manifesting them (see *inter alia* the ECtHR's judgment of 25 May 1993 in the case of *Kokkinakis v. Greece*, application no. 14307/88 as well as the judgments of the Grand Chamber of the ECtHR of: 10 November 2005 in the case of *Leyla Şahin v. Turkey*, application no. 44774/98; 7 July 2011 in the case of *Bayatyan v. Armenia*, application no. 23459/03, as well as the case law cited therein). (…)

Taking the above into consideration, the ECtHR (the Grand Chamber) in the case of *Cha'are Shalom Ve Tsedek v. France* held that animal slaughter performed in accordance with the method prescribed by Judaism constitutes a rite covered by the right to manifest one's religion in observance, guaranteed in Article 9 of the ECHR (§ 74 of the ECtHR's judgment).

The ECtHR pointed out that Article 9(1) of the ECHR 'lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance'. The ECtHR stated that: 'It is not contested that ritual slaughter, as indeed its name indicates, constitutes a rite (…), whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect (Fr. *élément essential*) of practice of the Jewish religion' (§ 73 of the judgment). The ECtHR noted that: 'by establishing an exception to the principle that animals must be stunned before slaughter, French law gave practical effect to a positive undertaking on the State's part intended to ensure effective respect for freedom of religion' (§ 76 of the judgment).

The Constitutional Tribunal agrees with the view that subjecting animals to particular methods of slaughter prescribed by religious rites so as to obtain acceptable food constitutes an element (way) of manifesting the freedom of religion and is subject to protection under Article 9 of the ECHR (see also the judgment of the Austrian Constitutional Court of 17 December 1998, B 3028/97, VfSlg 15.394; M.A. Nowicki, *Wokół konwencji europejskiej. Komentarz do europejskiej konwencji praw człowieka*, Warszawa 2013, p. 753).".

II.V Prohibition of discrimination

- *What is the original wording of the provision protecting this right in your national catalogue?*

The following provisions of the Constitution of the Republic of Poland concern the prohibition of discrimination:

"Article 32

1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Article 33

1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.

2. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.".

- *Is it possible to restrict the right? If so, how and under what conditions?*

Yes. In its judgment of 23 October 2007, ref. no. P 10/07, the Constitutional Tribunal summed up its previous case law on the admissibility and rules of limiting the prohibition of discrimination. It was pointed out that:

"The principle of equality means that all subjects of rights and obligations that, to the same extent, share a certain essential (relevant) characteristic should be treated equally, by applying the same criteria, i.e. should be neither favoured nor discriminated against (see the Tribunal's judgment of 5 November 1997, K. 22/97, OTK ZU Nos. 3-4/1997, item 41). When the legislator treats differently the subjects of rights and obligations sharing a certain essential characteristic, then he introduces an exception to the principle of equality. However, such an exception is not tantamount to an infringement of Article 32 of the Constitution. The exception is admissible in the following circumstances: (1) the criterion for differentiation remains reasonably related to the purpose and substance of a given regulation; (2) the significance of the interest for the sake of which differentiation is introduced remains appropriately proportionate to the significance of the interests which will be violated as a result of the introduced differentiation; (3) the criterion for differentiation remains related to other constitutional values, principles or norms that justify the different treatment of similar subjects of rights and obligations.

Therefore, what is of primary importance for the consideration of the principle of equality is to determine the existence of 'an essential characteristic' which would entail recognising compared subjects of rights and obligations as similar or different. The recognition of a similarity between the said subjects makes it possible to conduct an analysis as to whether similar subjects are treated similarly by the provisions of law. Only the determination that law does not provide for the similar treatment of similar subjects (i.e. law provides for differentiation in this respect) leads to the posing of the question whether such differentiation is admissible in the light of the principle of equality.".

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

Yes. For instance, in its judgment of 7 May 2013, ref. no. SK 11/11, the Constitutional Tribunal summed up its previous case law on the interpretation of the prohibition of discrimination. It was pointed out that:

"Arising from Article 32 of the Constitution, the principle of equality and a prohibition against discrimination, on their own, constitute only general principles, which, in a sense, have the character of the right of 'the second level', i.e. one that is granted with relation to specific legal norms, and not in isolation – 'independently' (see the decision of the

Constitutional Tribunal of 24 October 2001, ref. no. SK10/01, OTK ZU No.7/2001, item 225). In the opinion of the Constitutional Tribunal, this primarily entails that 'all persons are equal as regards their «dignity, rights and freedoms», which are referred to in other provisions of the Constitution, and that no discrimination is admissible when it comes to the exercise of the rights and freedoms'. Thus, equality and the prohibition against discrimination are not abstract and absolute in character, but they always function in a certain situational context, and they must be referred to prohibitions or requirements, or to the granting of entitlements to certain individuals (groups of individuals) in comparison with the status of other individuals (groups).".

The Tribunal directly indicates that the prohibition of discrimination constitutes a norm arising also from international law, including the ECHR as well as the ICCPR (see below).

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

No significant differences have been noted. The Constitutional Tribunal makes use of the convention standard pertaining to the prohibition of discrimination and arising from the international-law catalogues of human rights. For example, in its judgment of 11 May 2005, ref. no. K 18/04, the Tribunal made extensive reference to the prohibition of discrimination, adjudicating, *inter alia*, with regard to the Treaty establishing the European Community (the EC Treaty). It was pointed out that:

"The Constitutional Tribunal wishes to emphasise that the prohibition on discrimination based on nationality, race, sex and other personal characteristics is a canon of both international and national fundamental legal rules. The Republic of Poland is obliged to observe this prohibition given its membership of the United Nations and the Council of Europe, including, in particular, ratification of the ECHR and the ICCPR. Furthermore, this prohibition constitutes a legal consequence of the constitutional principle of equality before the law (Article 32(1)) and has been directly introduced in Article 32(2) of the Constitution ('No one shall be discriminated against in political, social or economic life for any reason whatsoever.'). As regards the criterion of sex, the principle of equal treatment (and the prohibition on discrimination inevitably inherent therein) has been directly expressed in Article 33 of the Constitution.

When formulating the principles set out in Articles 32 and 33 of the Constitution and when expressing – in the same legal act – the obligations of the Polish State in Article 6(1) and (2), the Polish constitution-maker treated those provisions as compatible with each other as well as binding together with the same force as constitutional norms.

Articles 12 and 13 of the EC Treaty do not introduce – in comparison with Articles 32 and 33 of the Constitution – any normative novelty. They do not create a new legal situation in substantive terms. Their feature is merely that they are treaty provisions of Community law. Hence, they are binding on a larger territorial scale, i.e. in the territories of all EU Member States.".

II.VI Right to liberty[1]

[1].The Constitution of the Republic of Poland distinguishes between 'the right to liberty', construed as the freedom to act as one wishes, and 'the right to personal liberty', i.e. the freedom to move freely and change locations, which the individual may be deprived of e.g. when arrested. The Polish Constitution in detail regulates instances where it is admissible to deprive the individual of personal liberty, namely Art. 41 of the Constitution stipulates that:

"1. Personal inviolability and personal liberty shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute.

2. Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation. Any deprivation of liberty shall be immediately made known to the family of, or a person indicated by, the person deprived of liberty.

3. Every detained person shall be informed, immediately and in a manner comprehensible to him/her, of the reasons for such detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case. The

- *What is the original wording of the provision protecting this right in your national catalogue?*

Pursuant to Article 31 of the Constitution:

"1. Freedom of the person shall receive legal protection.
2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.
3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

- *Is it possible to restrict the right? If so, how and under what conditions?*

Yes, this is possible on the basis of Article 31(3) of the Constitution. Please see remarks concerning Article 31(3) in point II.II.

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

The Tribunal seldom, and in little detail, discussed the subject matter. The reason for this is that the Constitution of the Republic of Poland sets out special provisions concerning various aspects of liberty, and therefore there is rarely a need to discuss the relatively general notion of 'the right to liberty'. The Tribunal has addressed the subject matter only in a few rulings. In its judgment of 7 March 2007, ref. no. K 28/05, the Constitutional Tribunal drew attention to the following:

"In the light of the Polish legal doctrine and the case law of Polish courts, the provisions of Article 31(1) and (2) of the Constitution fulfil two basic functions. On the one hand, they 'supplement provisions specifying particular constitutional freedoms' (the judgment of 20 December 1999, K 4/99, OTK ZU No. 7/1999, item 165; cf. L. Garlicki, commentary on Art. 31, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (ed), Warszawa 2003, pp. 11-12; K. Wojtyczek, "Ochrona godności człowieka, wolności i równości przy pomocy skargi konstytucyjnej w polskim systemie prawnym", [in:] *Godność człowieka jako kategoria prawa*, K. Complak (ed), Wrocław 2001, pp. 207-208). On the other hand, what is of fundamental importance in the case under examination, they also constitute a basis of an autonomous, subjective right to liberty. The essence of the right amounts to 'a freedom to act as one wishes and chooses' (L. Wiśniewski, "Prawo a wolność człowieka. Pojęcie i konstrukcja prawna", [in:] *Podstawowe prawa jednostki i ich sądowa ochrona*, L. Wiśniewski (ed), Warszawa 1997, p. 54). It is stressed in the doctrine that 'the said liberty refers – on the one hand – to the external realm of activity (every person can decide how to run his/her affairs and how to act, i.e. can determine how s/he impacts the external world), and – on the other hand – the term refers to the realm of the security and sovereignty of the individual (which delineates the boundaries within which the external world may impact the individual's situation)' (L. Garlicki, commentary on Art. 31, *op.cit.*, p. 8). As stated by the Constitutional Tribunal in its judgment of 18 February 2004, ref. no. P 21/02, 'the positive aspect of «the individual's freedom» consists in the fact that individuals may determine their conduct within a given realm by choosing such forms of activity as are most suited to them, or they may refrain from undertaking any activity. The negative aspect of «the individual's freedom»

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detained person shall be set free unless a warrant of temporary arrest issued by a court, along with specification of the charges laid, has been served on him/her within 24 hours of the time of being given over to the court's disposal.
4. Anyone deprived of liberty shall be treated in a humane manner.
5. Anyone who has been unlawfully deprived of liberty shall have a right to compensation.".
The reply concerns the right to liberty *sensu largo,* and not the right to personal liberty.

consists in the legal obligation of anyone to refrain from interference with the realm reserved for the individual' (OTK ZU No. 2/A/2004, item 9).".

It is worth adding that in its judgment of 19 October 2010, ref. no. P 10/10, the Tribunal explicitly took a stance on the right to liberty:

"The provisions of Article 31(1) and (2) comprise the constitutional principle of the protection of freedom, which not only constitutes a principle of the constitutional order and of the system of the legal protection of rights and freedoms, but it is also the basis of an autonomous subjective right which is referred to as 'the right to liberty' (where 'liberty' is understood as a freedom to decide to act as one chooses; cf. L. Garlicki, commentary on Art. 31, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (ed.), Vol. III, Warszawa 2003, p. 5). The subjects of the liberty are no doubt individuals, but also – to some extent – legal entities under private law (cf. L. Garlicki, *op.cit.*, s. 10). In the case law of the Constitutional Tribunal, it is assumed that the provisions of Article 31(1)-(2) 'supplement provisions specifying particular constitutional freedoms' and it is justified to use Article 31(1)-(2) independently as a higher-level norm for constitutional review where the Constitution lacks more detailed provisions (cf the judgments of: 20 December 1999, ref. no. K 4/99, OTK ZU No.7/1999, item 165; 7 March 2007, ref. no. K 28/05, OTK ZU No. 3/A/2007, item 24; 2 July 2007, ref. no. K 41/05, OTK ZU No. 7/A/2007, item 72; 10 July 2007, ref. no. SK 50/06, OTK ZU No. 7/A/2007, item 75; 6 October 2009, ref. no. SK 46/07, OTK ZU No. 9/A/2009, item 132).".

As it has already been mentioned, the Tribunal extensively refers to specific freedoms of the individual, and the right to liberty is mentioned only in situations where a given freedom is not explicitly expressed in the elaborate constitutional catalogue. Thus, the right to liberty is rarely indicated as a higher-level norm for constitutional review.

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

  No differences have been noted in this respect.