A REVIEW OF THE CONSTITUTIONALITY OF THE ECTHR CASE LAW IN THE CONTEXT OF THE STATES PARTIES' OBLIGATION UNDER ART. 46(1) ECHR: A STUDY BASED ON THE EXAMPLE OF POLAND

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ABSTRACT

International courts are part of institutional solutions that are an answer to the necessity to solve various new problems affecting global society. However, for state, democracy and the rule of law this kind of role of the case law of international courts creates a problem. On the one hand it exists in competition to national judicial power and can verify its actions, and on the other hand it influences the content of provisions contained in international agreements, which is a clear example of the development of law (as to its substance) which bypasses the legislative power.

Therefore, judgements of international tribunals have no direct effects, and their execution takes place by the actions of proper state organs on the basis of their national (constitutional) powers. This guarantees that the state has an impact on the manner in which aforementioned judgments are executed, and that it indicates the boundaries within which the state undertakes to abide by such a judgment.

The possibility of the constitutional review of judgments delivered by international courts plays an important role in the process of their execution. It indeed deals with answering the question of whether broadly understood effects of a judgment can lead to a breach of the Constitution.

A constitutional review is particularly advisable in the case regarding judgments of the ECtHR. They are indeed a tool by means of which the ECHR constitutes a living instrument. Thus, the probability of violating constitutional boundaries is higher than in the case of an ordinary international agreement.

The consequence of this phenomenon in Poland is the activation of a review mechanism, such as that allowed by the existing legal system. It is a constitutional control of judgements of the ECtHR, although only in the formula of control of norms on which the judgement is based.

In ongoing practice, the CT has made such a control twice, in the case ref. no. K 6/21 and K 7/21. And twice the CT decided that norms derived by judgements of ECtHR from art. 6 ECHR, are contrary to the Constitution. Poland has not executed judgments of the ECtHR based on unconstitutional norms.

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https://doi.org/10.55073/2025.2.111-143

KEYWORDS
review of the constitutionality
ECtHR case law
international obligations
Constitution
Constitutional Tribunal

1. Introduction

International courts are institutions rooted in the history of international law. Although for centuries their impact on global reality had been overrated, significant changes took place in that regard at the turn of the 20th and 21st centuries. On the one hand, the number of such courts has increased over the years; and on the other hand, they went beyond their ordinary role of an arbiter solving specific disputes which had arisen from international-law contracts and joined the process of the strategic development of international law.

They owe this last change to the increased number of agreements aimed at the creation of laws and to the specificities of their judgments, which not only make up a simple act declaring an infringement of an international obligation, or setting a dispute related to a classic contract, but also serve as a subsidiary means for the determination of rules of law[2]. In the literature, these are even presented as one of the sources of international law.

It is certainly misleading to suggest that the judgments of international courts are normative. These acts are not formal sources of law and do not constitute a direct legal basis for action. They merely indicate that a judgment is based on an existing norm with a specific content. In this way, the feature of a source of law is only of a cognitive[3] and auxiliary character. A judgment does not create but solely reveals a legal norm, or confirms its existence.

One of international courts which, by means of its judgments, significantly impacts the standards of law in the States of contemporary Europe is the European Court of Human Rights (the ECtHR), a body of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),which was founded in Rome on 4th November 1950 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto (...)'[4].

The ECtHR has been operating since the mid-20th century. Its significance results have been possible due to the emergence of three prerequisites:

1. the efforts made by the ECtHR to redefine, by way of its case-law, its treaty-based position, to acquire the status of a quasi-constitutional court for Europe;
2. the transformation of the ECHR's character from a simple legal act into a so-called living instrument, and the progressive effects of case law based on that concept;

2 | Art. 38(1)(d) of the Statute of the International Court of Justice.
3 | Cf. Pellet, 2006, p. 677; Hoof, 1983, p. 169.
4 | Art. 19.

3. the redefinition of the conception of judgments, from those of a determining character into possible judgments interfering with the legal system by way of a direct requirement that specific changes be made to the law.

What is meant in the first context is breaking the will of States, by way of case law, as regards to them being bound by the ECHR, the beginnings of which reach back as early as the latter years of the 20th century[5]. The second one concerns the evolution related to the understanding of the content of ECHR-based obligations, which – considering their general formulation – makes it possible not only to re-interpret the normative content in accordance with socio-political, cultural or legal conditions that are changing with the passage of time[6], but also to encroach with judgments on spheres of a systemic or political character[7]. Finally, what is concerned in the third context are so-called pilot judgments, which are not envisaged in the ECHR but have been developed in the case-law practice[8]. They received their official basis in 2012 in the Rules of the ECtHR[9]. Their delivery is not even based on specified cases but depends on the will of the adjudicating panel of the ECtHR. Although one may have doubts as to the legality of such an action[10], some representatives of scholarship even refer to this as the formalisation of that institution[11].

For states bound by such a unique treaty-based regime, the existence of the ECtHR plays an existential role. This court is namely an external body of supervision over state authority, acting on the basis of the law via international treaties, the content of which it shapes by itself in an increasingly liberal manner. At the same time, it is vested with the powers enabling it to assess ex post actions of a state with the expectation that those actions will be cancelled, and that national law will be amended. In this way, it impacts the independence of such states to conduct foreign and internal policy, thereby impacting their sovereignty. Hence, not only does it create a ECHR-based narrative but even conducts a case-law policy. Considering these quickly rising legislative ambitions of the ECtHR, we are one step away from the situation where its judgment will reveal the existence in ECHR-based standards of a norm violating the core (foundation) of the constitutional ordre public of a State Party to ECHR. Thus, the following question is natural: if a state, while concluding an agreement with the ECHR, had known what normative content the ECtHR would ascribe to a provision in a judgment delivered many years after the accession to ECHR, would this state have agreed on that accession?

This is a serious problem, all the more so as the fact that the norms of the ECHR clash with those of the Constitution is no longer a theoretical issue. In recent years it has become

5 | Judgment of the ECtHR, Belilos v Switzerland; Report of the Commission of Human Right, Metropolitan Chrysostomos and Georgius Papachrysostomou; judgment of the ECtHR, Loizidou v Turkey. More: Frowein, 1999, p. 145.
6 | Report of the Commission of Human Rights and judgment of the ECtHR, Tyrer v United Kingdom, para. 93.
7 | Judgment of the ECtHR, *Verein KlimaSeniorinnen v Schweiz.*
8 | The pilot judgment was created on the basis of the case *Broniowski v Poland,* see para. 189.
9 | Art. 61 Para. 1.
10 | The question arises about the scope of the content of the Rules. It may not create obligations for State Parties to ECHR; nor may it create bases for the ECtHR to infer new ECHR-based obligations of State Parties in its case law.
11 | Kamiński, Kownacki and Wierczyńska, 2011, p. 101.

a real case for example in Poland. The ECtHR issued a series of judgments concerning the judiciary system and the Constitutional Tribunal (CT) in Poland[12].

As a result of these judgements, at the request of the Prosecutor General, Art. 6 of ECHR was subject to constitutional review in the national forum. The proceedings resulted in two judgments of the CT declaring within a certain scope the non-conformity of Art. 6 of ECHR to the Constitution.[13] The CT inferred the said non-conformity, by applying the judgments of the ECtHR as an instrument revealing the norms contained within the content of a provision, which were the basis of those judgments. It held that those norms were inconsistent with the Constitution. Consequently, the judgments of the ECtHR, being delivered on an unconstitutional legal basis, were deprived of the attribute of enforceability and up until the change of power in Poland, which took place on 13th December 2023, they had not been executed.

Although the aspect of refusal to execute judgments of the ECtHR is not entirely unknown in its history[14], a new dimension emerged from the legal and political perspective. What is of concern here is the possibility and manner of conducting the review of the constitutionality of those judgments rather than the refusal to execute them from the perspective of the political power. This corresponds to the blunt opinion expressed by Martti Koskenniemi a dozen years ago – It is high time that 'international adjudication' were made the object of critical analysis instead of religious faith[15].

This text will attempt to answer the question about the possibility, manner and consequences of conducting such a review. The analysis will be conducted using the basis of Poland's example.

2. The systemic position of judgments of international courts from a theoretical perspective

The specificities concerning the operation of international courts are based on the terminology typical of the national justice system. Judgments are the crucial kind of decisions delivered by international courts[16]. Such a perspective often leads to common simplifications and mistakes, as a result of which international courts are automatically treated as national courts or even as an extension of the national justice system, and their judgments are seen as acts constituting an element of national legal relations.

12 | E.g., judgments of ECtHR: Xeroflor v Poland; Broda and Bojara v Poland; and Dolińska-Ficek and Ozimek v Poland.

13 | Judgments of the CT, K 6/21 and K 7/21.

14 | Judgement of the ECtHR, Hirst v the United Kingdom. The United Kingdom refused to execute the judgment due to a breach of the state's 'constitutional tradition'. The ECtHR tried to enforce this action by the pilot judgment in the case Greens and M.T. v the United Kingdom. The execution of the judgment ended in a compromise in 2017.

15 | See Koskenniemi, 2008, pp. 127–152.

16 | As a rule, international courts adjudicate in the form of judgments and advisory opinions. Sometimes the catalogue of their operation embraces the possibility of delivering interim orders (measures).

This is not true. Above all, any judgment by an international court is an act of an international body. It thus belongs to the system of international law. Such a judgment is an international obligation of the so-called second rank, that is, the obligation to execute it does not follow from its own power, but solely from the power of another obligation – a provision of an agreement binding on the state. This is a result of the *pacta sunt servanda* principle. If an agreement does not contain a provision imposing on the state the obligation to execute a judgment, then a judgment is not an international-law obligation, but merely a recommendation. This shows that both with regard to the legal character of a judgment and the obligation to execute it by the state, the crucial role is taken by the provisions of the treaty which establishes such a court.

The status of a judgment by an international court in the national legal system is a reflection of the relationship between international law and national law as defined by each state (as a rule) at the level of the state's constitution. The need for such a general solution arises from the fact that although the two regimes are formally distinct, at the substantive level international law often sets standards that require not only the mere action of state authorities within their national competences, but increasingly the amendment of existing national law.

This enforces the existence of systemic constructions of an organising nature. Indeed, in such instances, the state may adopt a dualist or monist construction (or alternatively a mixed one) and appropriately apply tools of reception or incorporation (soft incorporation or hard incorporation).

In dualist legal systems, the obligation to enforce a judgment is reinforced by the principle of the primacy of international law. It directs the state to ensure the effectiveness of international law in the domestic legal order and to achieve the objective indicated by that law, regardless of the obstacles and consequences for the domestic legal system.

However, this principle does not operate automatically. The emergence of an international obligation (judgment) does not give rise to direct effects at a national level. For those effects to arise the action of proper state organs is necessary, undertaken on the basis of and in accordance with the procedures of national law.

If monist solutions are adopted, what may even take place is the attribution of the national feature of enforceability to a judgment of an international court, although this requires a proper imperative arising from a provision. The judgment will then take advantage of the legal force of a treaty-based norm which was incorporated into the national legal order.

3. The systemic position of judgments of international courts from the perspective of the Constitution of the Republic of Poland[17]

The Constitution is perceived as favourable towards international law. Its solutions are based on the dualist conception of relations with international law, which is partially

17 | English version of the Constitution see: Trybunał Konstytucyjny: The Constitution of the Republic of Poland [Online]. Available at: https://trybunal.gov.pl (Accessed: 14 July 2024).

broken by monism. The adopted standard is defined by Art. 9 (dualism), Art. 87 and Art. 91(1) and (2) (monism). The first provision introduces at a constitutional level the imperative addressed to Poland to abide by international law binding with it. It is of a general character, which refers to all kinds of international-law obligations. The second provision places within the catalogue of the sources of law universally binding in Poland's territory one of the sources of international law, namely international agreements, although only those which become binding on the state by way of ratification[18]. The third one assigns to those agreements the attribute of direct applicability and introduces a conflict-of-law rule in accordance with which ratified international agreements, albeit those which are ratified with prior consent granted by statute, have the primacy of application in the event of a conflict with a statute[19].

The Constitution does not in any way directly refer to international courts[20] in a practical sense. No one should be misled by the fact that Poland's submission to the case law of international courts is based precisely on ratified international agreements. This has no impact on the position of international courts, as:

1. it is not an international agreement, but the Constitution that creates judicial power and the Polish justice system (Art. 10 and Art. 175 Constitution);
2. the direct application of ratified international agreements refers to substantive provisions of such an agreement, and not to institutional constructions[21].
3. ratification itself only triggers, in relation to an international agreement, the aforementioned effect of Art. 87 and Art. 91(1) of the Constitution, and the statutory consent to ratification adds to this agreement the attribute of primacy in the event of a conflict with a statute (Art. 91(2) of the Constitution). Nothing else is involved, because ratification is solely a matter of the procedure in accordance with which a state becomes bound by an agreement. As a procedural element, neither does it create nor impact the character of judgments delivered by a court established on the basis of such an agreement.

Therefore, no judgment of international courts is a judgment within the meaning of the national system of law, despite the fact that the name of this act is identical to acts delivered by national courts. Indeed, it has not been delivered in the name of the Republic of Poland, which is directly required from national courts and tribunals by Art. 174 of the Constitution. A judgment of an international court is still a form of obligation arising from the system of international law. Hence, from the perspective of the Constitution, it is embraced by the imperative to abide by international law (Art. 9). It is at the discretion of the national legislator to decide in what way and within what scope this obligation will be fulfilled. The determination of the legal framework of the fulfilment of an obligation takes place at a statutory level[22]. The state's freedom may be limited only by a provision contained in the agreement establishing an international court and obliging a judgment to be executed[23].

18 | Art. 87.
19 | Art. 91.
20 | Apart from Art. 55.
21 | More Muszyński, 2023a, pp. 5–36.
22 | The legal system of the State Party to ECHR should vest in organs of public authority, including organs of the judicial power, the proper powers to assess a judgment of the ECtHR as well as to 'analyse' and 'execute' it under the conditions of a specific case. Cf. Łętowska, 2011a, p. 9.
23 | Art. 39 of the Statute of the International Tribunal for the Law of the Sea.

This shows that the obligation to execute judgments from international courts based on the constitutional imperative of the observance by Poland of international law binding upon itself is not absolute in its character. The fact that it is not absolute is reflected in the dimension of the state's sovereign right to shape its legal system, which will define the manners and limits of executing judgments. This does not exclude the possibility of reviewing them either[24], it only makes one think about the consequences thereof.

4. The execution of the ECtHR judgments from the perspective of Art. 46 of the ECHR

Art. 34 of ECHR states that the ECtHR examines individual applications concerning a violation of individual rights set forth in ECHR. Rulings take the form of a judgment. Under Art. 46(1) of the ECHR, the State Party is obliged to undertake to abide by the final judgement, which in common terms means an international-law imperative to execute a judgment. The fulfilment of this obligation is supervised by the Committee of Ministers of the Council of Europe[25].

The judgment itself is of a declaratory and affirmatory nature[26]. It identifies a specific infringement of the ECHR by a state and has the effect of obliging the state to remedy the violation[27]. The ECHR does not concretise the manner of performance of the obligation. This action remains within the state's discretion. The ECtHR does not prescribe a specific way in which judgments should be enforced, although case law confirms that the measures taken must be adequate[28]. From this perspective, the state's executive autonomy is possibly limited and monitored[29].

It is only in the case of the increasingly common pilot judgments that the ECHR formulates the so-called remedial instructions[30].

In turn, from the perspective of the Constitution, such a judgment remains outside the national legal order[31]. It is not an 'enforcement title' that is subject to compulsory execution in the state's territory. It does not have a direct effect in national legal relations, nor does it bind universally as a source of law[32]. It does not change the applicant's situation in national law. It is an assessment of an individual case examined from the perspective of

24 | Judgment of the CT, K 7/21.
25 | Art. 46(2). In 2001 the Committee of the Council of Ministers stated for the first time that the execution of judgments of the ECtHR constituted a condition for the membership of the European Council. See the so-called interim resolution ResDH (2001)80 of 26.06.2001 concerning the execution of the judgment *Loizidou v Turkey*.
26 | Cf. the judgment of the ECtHR, *Marckx v Belgium*, para. 58.
27 | Cf. Garlicki, 2005, p. 125.
28 | Judgment of the ECtHR, *Burdov v Russia* (no. 2), para. 125.
29 | Judgment of the ECtHR, *Scozzari and Giunta v Italy*, para. 249.
30 | There also appear cases outside the formula of pilot judgments; the first one in the judgment of ECtHR, *Assanidze v Georgia*, paras. 202–203.
31 | Grzegorczyk, 2006, p. 7.
32 | Radziewicz, 2012, p. 2.

the ECHR, an act of application that the state must execute[33] through proper actions, thus eliminating the effects of a violation of the ECHR. This should be viewed through the lens of whether it is possible, because a mere execution of a judgment in an individual case additionally depends on the specificities of the violation.

Accordingly, in the case of a legal action (e.g. there is a judgment of a national court held by the ECtHR to have been delivered in breach of the right to a court), an act constituting the breach as well as its effects should be eliminated from legal relations. In the case of an actual action (e.g. the proceeding of the police vis-à-vis a detainee recognised as torture), what is meant is the simple discontinuation of an action. However, while the latter is easy, for the rectification of damage indicated in the first case to occur, there must exist a formal and defined possibility under national law (procedure) of competent state organs to take a specific action. Moreso as the ECHR itself does not directly impose on states the obligation to introduce specific legal regulations to national legislatures.

In this way, an ECHR-based obligation to execute a specific judgment of the ECtHR is affected by the specificities of the national system of law. The execution of a judgment in Poland may differ from the execution of a similar judgment in another state. Anyway, there are also situations where the elimination of a determined infringement is impossible. This follows from the specificities of the system or of the infringement itself. In the first case, the state might not have proper legal solutions enabling the elimination of the infringement, while in the second one the matter of the case makes it impossible, because how can, for example, an infringement of the right to a court be eliminated which was caused by a past failure to act? In those cases, the ECHR itself envisages a substitute measure. The ECtHR may order the state to pay compensation[34].

Aside from the execution of a judgment in an individual case of the so-called victim of a violation, there also exists a general, i.e. systemic, dimension of its effects. It is a derivative of the judgment and, by way of the obligation stipulated in Art. 1 of the ECHR, it extends the effects of the obligation to execute a judgment.

Art. 1 of the ECHR constitutes a classic, treaty-based imperative for the state to shape its law in accordance with ECHR. The very notion used therein 'shall secure' is not defined by the ECHR. Undoubtedly, it is an obligation of the state. It follows from the case law of the ECtHR that this is a twofold obligation: a negative and a positive one. The negative one means that the state must refrain from violating human rights, whereas the positive one constitutes the imperative to act in favour of those rights. Both obligations may require in certain situations that legislative measures be taken[35].

The effect of Art. 1 of the ECHR is therefore similar to the effect of a national norm of a programme nature, which orders the achievement of a certain objective or commits the public authority to achieving it. It is not a right of an individual. Nor does such a norm indicate how an objective is to be achieved.

Were it not for the imperative contained in Art. 1 of ECHR, then, as a matter of principle, the state could function without the systemic execution of judgments. Possible repetitive cases of infringements would only be the state's problem, and in practice they would reach the ECtHR, which would solve the case during the course of individual

33 | Łętowska, 2011b, p. 35.
34 | Art. 41 of ECHR.
35 | This refers to all judgments of the ECtHR, even those formally directed at other states (e.g., Kamiński, Kownacki and Wierczyńska, 2011, p. 135).

proceedings[36]. However, the situation becomes complicated when a judgment of the ECtHR refers to a case where an infringement of the ECHR does not follow from an individual act of application of law, so there is no mistake concerning the proceedings of an organ, but the infringement has its source in the national system of law. Each subsequent action of such an organ in the same situation will result in the same infringement. Thus, what arises is the issue of a systemic reaction of the state and consideration of necessary legislative changes.

In other words, the execution of a judgment from a systemic perspective consists of analysing case law and translating the results of the analysis into legislative procedures so as to guarantee a level of national law that conforms to the standard of respect for human rights[37]. This reflects the treaty-based obligation formulated precisely in Art. 1 of the ECHR. In this way, the said provision specifies the obligation to execute judgments of the ECtHR contained in Art. 46(1) of the ECHR, thereby strengthening its general dimension. Despite concerns regarding the formal possibility of delivering so-called pilot judgments by the ECtHR, their formula as such expresses at the level of case law this general dimension of the obligation.

5. The execution of the ECtHR judgments in Polish law

A judgment of the ECtHR is an international obligation. On the basis of the constitutional obligation to comply with international law binding upon it, Poland has created certain direct solutions in its domestic legal system in relation to the execution of ECHR judgments. The solutions are not comprehensive. There are solely single provisions that are present in certain procedures for court proceedings. They include the following: Art. 540(3) of the Code of Criminal Procedure[38]; Art. 272(3) of the Act on Procedure before Administrative Courts.

The reopening of proceedings is the institution applied in each of these procedures. The court proceeds on the basis of the premise related to an assessment. It verifies whether, in relation to a judgment delivered by the ECtHR, there is a 'need' to reopen proceedings. What is thus concerned is the impact of a judgment of the ECtHR on the essence of the case. At the same time, a judgment of the ECtHR does not change its declaratory and external effect vis-à-vis national law. Such a premise does not exclude the said reopening, but it does not eliminate the possibility of a refusal to do so either[39].

36 | ECtHR infers that from Art. 46(1) of ECHR. See e.g. the judgment of the ECtHR, *Scozzari and Giunta v Italy*, para. 249; the judgment of the ECtHR, *Christine Goodwin v United Kingdom*, para. 120; the judgment of the ECtHR, *Lukenda v Slovenia*, para. 94. *In the context of systemic or structural infringements, the potential influx of future cases is also an important factor as regards preventing from the accumulation of repeating cases on the docket of the ECtHR. (judgement of ECtHR, Hutten-Czapska v Poland, para. 236 and Kurić and others v Slovenia, para. 414).*

37 | It may also consist in changing the court or administrative practice and in creating guidelines for certain organs, etc.

38 | This provision is also applied in minor offences proceedings (by Art. 113 of the Code of Minor Offences Procedure).

39 | Cf. Łętowska, 2011b, p. 42.

However, the literal construction of the provision, as adopted in the criminal procedure, provides much room for interpretation with regards to both the *ratione materiae* and the *ratione personae*. This translates into diverse disputes, including questions of whether it is possible for a judgment of the ECtHR to affect other national criminal proceedings which have not been the subject of a declaration of a violation of the ECHR, but which are 'almost identical'? There have been attempts to answer this question both in scholarship and in practice. The authors largely seem to accept this possibility[40]. In turn, in the adjudicative dimension, the Supreme Court (SC) was in favour of this conception, by delivering in a panel composed of 7 judges a resolution of 26th June 2014, in which it created the so-called construction of identical infringements[41]. However, the character of a principle of law was not assigned to this resolution[42]. As a result, criminal jurisprudence, despite such a (non-binding) stance of the SC, is not uniform. There are also contrary decisions.[43]

Certainly, such a stance is faulty, both from an international-law perspective as well as from a national (systemic) one, as:

a. firstly, as is highlighted by the adjudicating panel of the SC, the resolution is based on the necessity to give rise to a broad effect envisaged in Art. 1 of ECHR. This is a misunderstanding. Art. 1 of the ECHR is not a right of the individual. This is a task that is realised by way of political and legislative initiatives;
b. secondly, if a national court examines other national judgments and independently comes to the conclusion that there was a potential infringement of the ECHR, then it infringes on the ECHR itself, as it substitutes, in a specific case, the only body that is competent in that regard, i.e. the ECtHR;
c. thirdly, the literal construction of the provision undoubtedly refers to the accused, in favour of whom such a judgment by the ECtHR was delivered, namely, the person who lodged an application for the reopening of proceedings.

In practice, by way of interpretation, the SC attempts to ascribe to this provision the effect identical to that of the provision allowing to reopen proceedings after the delivery of a judgment by the CT. The SC refers to the similar literal wording of both provisions. However, in the case of a judgment of the CT, the normative context is different – a legal defect of the legal provision which has been unequivocally determined. Moreover, the result of a judgment of the CT is of a general and not an individual nature since it is the case with a judgment by the ECtHR. This follows directly from Art. 190(1) of the Constitution. The consequence of this is a broad catalogue of subjects competent to reopening proceedings, which is discussed – with indication of the proper statutory procedures – by Art. 190(4) of the Constitution. By wanting to provide consistency between the effect of a judgment of the ECtHR and of a judgment of the CT, the SC attempts to provide an extending interpretation, acting *contra legem*.

What does not make it easier to understand the scope of such a provision is the divergence between the criminal procedure and the procedure before administrative courts where, by applying the same construction, the legislator links the reopening with

40 | See Zabłocki, 2013, p. 32; Bojańczyk, 2001, p. 131; Wąsek-Wiaderek, 2012, pp. 352–353 and 389.
41 | I KZP 14/14. See the dissenting opinion drafted by Judge Kozielewicz, 2014, p. 15. There have also been two critical commentaries on the resolution: Kmiecik, 2015; Zbrojewska, 2014.
42 | Muszyński, 2023b, pp. 184–185.
43 | See e.g. the order of the SC, III KO 118/12; the order of the SC, I KO 1/21.

a specific case of the applicant by literally mentioning it in the wording of the provision, thereby unequivocally preventing it from providing an extending interpretation.

In turn, there is no solution in the civil procedure enabling the reopening of proceedings after the delivery of a judgment by the ECtHR. Indeed, in 2012 there were legislative attempts for the introduction of such solutions, but they were not realised. It is acknowledged that this is a result of the political need to guarantee legal stability[44].

However, this results in a diversified national adjudicative practice. As early as in the first case resulting from the judgment of the ECtHR[45] a national court (the Civil Chamber) refused to reopen proceedings[46]. In the aftermath, a resolution of the 7th November 2010 was taken by a panel composed of 7 judges of the Civil Chamber[47].

In opposition to the above, there have also been attempts to rely on other procedures, even ones that clearly contravene the essence of judgments of the ECtHR. In this case, the SC in the judgment of 28th November 2008 stated that a judgment of the ECtHR may be considered identical to the premise of unlawfulness of a non-appealable judgment or a final decision. The purpose of it is to make it possible to sue the State Treasury for the redress of a damage under Art. 417^1(2) of the Civil Code.

In the same period, the Labour, Insurance and Public Affairs Chamber of the SC acted in an entirely different way, by reopening the proceedings on the basis of the judgment of the ECtHR in the case *Tobor v Poland* (2007)[48].

Also scholarship is divided in that regard[49]. Given the lack of a national solution, the proponents of strengthening the gravity of ECtHR judgments even go so far as to provide such an interpretation of Art. 46 of the ECHR in accordance with which it constitutes an independent basis for the reopening of proceedings. In this way, they try to attribute to this provision the feature of direct applicability contrary to international-law and constitutional rules.

To finish this issue, it should be stated that, from the perspective of the ECHR, any potential reopening of proceedings is only one of the possible measures of executing a judgment of the ECtHR, which does not mean that it is always an adequate or the most suitable one. Indeed, the case law of the ECtHR supports such an action[50], but those considerations are not binding for the State[51]. This is, in turn, specified by national law.

A systemic execution consists of triggering the legislative procedure. What seems appropriate here is the initiative of the government, as proceeding before international courts belongs to the sphere of international policy, which the Constitution classifies in Art. 146 as a power of the Council of Ministers.

44 | Łętowska, 2011b, p. 41.
45 | Podbielski and PPU Polpure v Poland.
46 | The order of the SC, V CO 16/05.
47 | See the resolution of the SC, III CZP 16/10, item 38.
48 | Order of the SC, item 196.
49 | More: Łętowska, 2011b, pp. 58–59.
50 | See *inter alia* the judgments of the ECtHR, *Paykar Yev Haghtanak Ltd v Armenia*, para. 58; *Lungoci v Romania*, para. 56; *Yanakiev v Bulgaria*, para. 90; *San Leonard Band Club v Malta*, para. 70. Moreover, it may prevent the State Party to ECHR from a repeated infringement of individual rights. (cf. the judgment of the ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* (no. 2).
51 | Judgment of the CT, SK 57/05.

6. Judgments of the ECtHR as a source of interpretation of national provisions provided by courts

When executing ECtHR judgments, it's important to consider the possibility of interpreting national provisions through the ECHR, supported by Art. 9 of the Constitution and the principle of favouring international law.

The source of international-law content impacting the content of national provisions may be all sources of international law. However, in the case of ECHR, judgments by the ECtHR play an exceptional role. These judgments attribute specific normative content to the provisions of the ECHR. Their role in that regard follows not only from the fact that the ECtHR is the only competent body that can interpret the ECHR, but also from the fact that the ECHR is composed of provisions that constitute general clauses. Hence, the ECtHR adjudicates in an active way, always creating the normative content of a provision[52]. As a result, its judgments contain – apart from a determining element – an abstract element. We can find it in the reasons. While it cannot be used for purposes related to the direct application of the provisions of ECHR, because in this context international law requires the existence of clear and specific wording of a provision[53], it may be used by courts to interpret national law in conformity to the ECHR. This consists of shaping the understanding of a national provision by referral to an ECHR-based provision which corresponds to this national provision and to the context of this provision that has been developed by a judgment of the ECtHR.

It is noteworthy that the interpretation of national provisions in the light of the ECHR shaped by judgments of the ECtHR has its boundaries:

firstly, it cannot lead to results that contradict the literal wording of norms of a national provision;

secondly, it cannot lead to the shaping of the content of a provision so that it becomes inconsistent with the legal standards of the Constitution and prevents the realisation of the guaranteeing functions of the Constitution;

thirdly, it is impossible to shape the content of national law by means of an ECHR-based norm, as revealed by a judgment of the ECtHR, which as a result of constitutional review was held as being unconstitutional.

What is required in the first case is the intervention of the legislator, while in the second and third cases this is a forbidden act due to the fact that ECHR has a lower rank in the hierarchy than the Constitution. Only an action taken by the constitution-maker and a potential amendment to the Constitution can be an alternative.

It is also noteworthy that, by applying the content of the ECHR, as revealed by judgments of the ECtHR, to interpret national law, the object of an interpretative action of a national court is constantly an applied national provision. By way of interpretation only the understanding of such a provision may be altered, but neither the ECHR nor a judgment by the ECtHR may serve as a tool for its derogation or as the legal basis for an action by a national court.

52 | Garlicki, 2023, p. 5.

53 | Advisory Opinion of Permanent Court of International Justice, case: Jurisdiction of the Courts of Danzig, PCIJ Series B–No 15, pp. 17–18.

7. The ECHR as a subject of review of the CT and the role of judgments of the CT in this procedure

The CT also acts in the legal situation described above that defines the framework of action of State organs in the context of executing judgments by the ECtHR. Hence, the question arises whether – and if so, then when, in what way, and within which limits – it may impact the practice of executing judgments by the ECtHR, that is, an international-law and constitutional obligation of the state.

The powers of the CT are regulated by the Constitution. Among those powers, adjudication on the hierarchical conformity of law is the fundamental one. What is relevant from the perspective of this analysis are the provisions concerning the constitutional review of law, in which the Constitution serves as the higher-level norm for review, and a ratified international agreement is the subject of review, in particular Art. 188 p. 1-3.

However, the catalogue of the powers of the CT does not comprise judgments of international courts as the subject of its adjudication. What is closest to this context is the provision referring to the very act of creating an international court, its powers, as well as the scope of its powers, that is, (as a rule) a ratified international agreement.

A constitutional provision literally stipulates that an international agreement is the subject of review. In the practice of the CT, there is no doubt as to the fact that what may be the subject of its adjudication is not only the whole act, but also its part, expressed in editing units, in a formal way as a legal provision, or in a substantive way, i.e. in the form of a legal norm[54].

Regardless of whether it is the whole act, or its editing unit, or a specific norm in its provision that is challenged, the CT, when examining the content of an act, reconstructs the subject of review and extracts therefrom proper normative content. Decoding takes place by way of interpretation and in accordance with the established practice when this practice is uniform and consistent[55]. However, in this latter context, there are cases where constitutionality is examined in a situation where the normative content was ascribed to a provision by way of a one-time action of an organ[56]. What is simply concerned is the following situation: if the CT is able to indicate the existence of a given norm in the legal system, and consequently the possibility of its application, then the review of constitutionality is allowed.

A norm inferred in this way is confronted by the CT with constitutional higher-level norms for review.

In the CT's practice, precise legal norms reconstructed on the basis of a specific legal provision contained in a specific legal enactment – and not provisions or legal enactments – are most often the actual subject of review[57]. While adjudicating on a norm, the

54 | An entire normative act is challenged in a situation where the criterion of review is the power and observance of the mode required by provisions of law to issue an act or to conclude and ratify an agreement, which in the case of an international agreement is decidedly rare.

55 | E.g. the order of the CT, SK 32/04 and jurisprudence referred to therein, and the judgment of the CT, K 6/21.

56 | From the national perspective see e.g. the judgment of the CT, K 10/08 and from the international one see the judgment of the CT, K 6/21.

57 | See the order of the CT, P 15/13.

CT always refers to a specific provision, i.e. an editing unit of the challenged act, which is the textual basis of the examined norm.

If the review refers to an act which is an international agreement, the CT must also consider the specificities of international law. The ECHR is such an international agreement. Therefore, despite political efforts to attribute to it the rank of an international-law foundation of the legal systems of the states of Europe, from the formal-law perspective, it may be the subject of the CT's review as regards its conformity to the Constitution (Art. 188(1)).

While adjudicating on the norms of ECHR, the CT must extract them from a specific provision. For this purpose, it may apply different methods of action. In particular it may refer to the case law of the ECtHR, which – as a subsidiary source of international law[58] – indicates the legal norm (applied by the ECtHR) contained in the editing unit (provision) on the basis of which a judgment was delivered. Considering the specificities of the ECHR, this also follows from the fact that the ECHR's provisions are editing units that are complicated in terms of construction, being blurred and imprecise. They need to be specified, which occurs at the level of case law[59]. In this way, the adjudicating activity acquires a law-creating character[60].

However, if a judgment leads to a normative specification of provisions, and even to a confirmation of the existence of a norm, then a norm revealed in this way may also become the subject of a review. From this perspective, a judgment by the ECtHR should be treated as a 'means of conveying a norm' and consequently as an element of the subject of review as is the case with national provisions or legal enactments, in particular, jointly with the provision from which a norm under examination has been inferred in this way.[61]

The above reasoning is strengthened by the interpretative autonomy of the ECtHR vis-à-vis the ECHR. In accordance with Art. 32, solely the ECtHR is competent with regard to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Arts. 33, 34, 46 and 47. Thus, it is this Court that ascribes to it, by means of its judgments, specific normative content[62]. Hence, a legal norm inferred in this way, serving to examine or settle a specific case, may be the subject of a constitutional review. In this case, the CT does not reconstruct the norm on its own, nor does it impact its content, but examines the norm inferred by the ECtHR from an editing unit of the ECHR in the context of its conformity to the Constitution. The CT assesses norms serving as the basis for a judgment of the ECtHR as defined in this judgment.

In this way, the CT becomes a constitutional guardian of the boundaries within which the content of the ECHR's provisions may be altered, because although in the democratic societies of European States there exists a certain common and evolving catalogue of standards protecting the human being, its very existence, just as the existence of a 'democratic society', does not justify the ECtHR's right to reconstruct the normative content of

58 | Cf. Pellet, 2006, p. 677; Hoof, 1983, p. 169.
59 | Cf. the issue concerning the lack of precision of provisions contained in international agreements: Lauterpacht, 1958, pp. 155–226; Lauterpacht indicated that based on numerous examples.
60 | Cf. Shapiro, 1994, p. 155.
61 | The judgment of the CT, K 7/21.
62 | Cf. Karpenstein and Mayer, 2022.

the ECHR's provisions in a way that leads to an arbitrary breaking of individualities, which follow from cultural and national differences or even from the systemic constructions of states[63]. Indeed, these differences often have a constitutional foundation, so they are based on an act that is ranked higher than a ratified international agreement, and the ECHR is still such an agreement, at least from the perspective of the Constitution.

Therefore, the CT guards those boundaries, since ascribing normative content to provisions of the ECHR by way of adjudication may not replace formal amendments to the treaty and circumvent the possible review of constitutionality of those amendments which are envisaged for that procedure[64]. The vision of the ECtHR judges as to the direction in which the world is developing has its boundaries around the constitutional system of the States Parties. In other words, a dynamic action aimed at the creation of norms by means of interpretation instruments and case law may not lead to the creation of a normative effect at the level of ECHR that would require a formal amendment to the ECHR[65]. Interpretation and case law may not turn into an unlimited creation of law which causes an effect that contradicts the assumptions of the state's system at the constitutional level, and it may not be expected that this will be binding on states.

In the Polish system of law, this is all the more justified as the result of the ECHR-based norm shaped in this way is of a hybrid character. By way of a judgment, a specific international-law obligation is created that needs to be fulfilled. But, as normative content, it also has a real impact on national legal relations in connection with Art. 9 and 91(1) and (2) of the Constitution.

Indeed, the provisions of the ECHR cannot be directly applied. Nevertheless, their content, as shaped by a judgment, may serve as a reference for the interpretation of national provisions in the process of the application of law.[66] Hence, it is necessary to conduct the constitutional review with regards to the constitutionality of transferring into national law the normative effects of judgments delivered by the ECtHR, even if this refers only to the interpretative perspective, because the rules of shaping national law are always indicated by the national constitution[67].

This kind of constitutionality review is possible at three levels:

1. by examining the constitutionality of norms of national law that have emerged in the legislative process as a result of the execution of a judgment of the ECtHR by way of the enactment of law by the parliament or another legislative organ;
2. by way of a constitutional review of binding provisions of national law whose content is extracted by organs applying national law, with consideration given to the interpretative impact of a judgment of the ECtHR on such provisions (an *in concreto* review, by way of a question of law or constitutional complaint);
3. by a direct review of the constitutionality of norms contained in an editing unit of the ECHR, revealed by a judgment of the ECtHR.

63 | Cf. Garlicki, 2008, pp. 4–13.
64 | Art. 133(2) of the Constitution.
65 | Cf. the judgment of the ECtHR, Soering v United Kingdom, para. 103.2; the judgment of the ECtHR, *Öcalan v Turkey*, paras. 164–165 and separate opinion to this judgment drafted by judge Garlicki, para. 4.
66 | Cf. Garlicki, 2023, p. 4. Garlicki does not differentiate between fulfilling the standards of a provision (Art. 91(1) of the Constitution) from fulfilling the technical and systemic requirements for possessing the attribute of direct applicability.
67 | Bogdandy and Venzke, 2010, p. 47.

The first two cases are the most common forms in which the Constitutional Tribunal exercises its powers of hierarchical control of norms. Such reviews may be initiated by the bodies referred to in Art. 191(1), Art. 193 and Art. 79(1) of the Constitution, i.e. by means of an application the CT, a question of law or a constitutional complaint.

Neither case is special because both refer to the review of national enactments, legal provisions or norms. Thus, this is a standard procedure, and the only novelty can be related to the fact that the normative content under examination of a national provision stems from the ECHR. Hence this context which is the subject of extensive analyses in scholarship will not be discussed here. This does not give rise to any doubts and does not lead to any direct consequences in the perspective of the execution of judgments of the ECtHR. Namely, their normative effects are examined which are reflected in the content of national provisions. This kind of review is rare. Furthermore, in this case the result would not directly affect the execution of a judgment of the ECtHR, but would rather concern its national effects[68].

The latter formula arouses the strongest political emotions, that is, the direct review of the ECHR's norms, and is often diminished in the public discussion to the notion of 'the review of a judgment of the ECtHR'. This follows from the fact that, in the practice of the CT, there have been two such cases, in which the CT deemed Art. 6 of ECHR inconsistent with the Constitution within the scope of a specific norm inferred in the judgment of the ECtHR. Moreover, the result of such judgments of the CT was a failure to execute the judgments of the ECtHR by the then-government. The reasons for the judgment were based on the assessment that an ECtHR judgment based on an unconstitutional norm arising from an editing unit of the ECHR may not be executed by state organs, as this would lead to the introduction into the system of national law of an unconstitutional legal standard or to the perpetuation of a legal situation that is inconsistent with the Constitution.

8. The review of ECHR in the practice of the CT

On 24th November 2021, the CT delivered a unanimous judgment in the case K 6/21. In this case the subject of constitutional protection was the position of the CT itself. The applicant who lodged an application against Poland with the ECtHR alleged that the CT, by giving a judgment in his case[69], acted in violation of the ECHR-based right to a court, because the panel of the CT was formed in breach of national law, so the CT was not a court established by law within the meaning of the ECHR. The ECtHR in its judgment concurred with the allegation of the applicant and stated that Poland infringed on Art. 6(1) of ECHR[70].

68 | However, while two apps lodged by the Prosecutor General, though referring to a different situation, showed that a decision of this kind may be made at a political level, it is quite hard to imagine such a situation when it is a court that asks a question of law which contests the content of a national provision as shaped by way of a post- ECHR interpretation. It is similar in the case of a potential constitutional complaint.

69 | The order of the CT, SK 8/16.

70 | See the judgment of the ECtHR, *Xeroflor v Poland*.

Upon the application lodged by the Prosecutor General, the CT examined Art. 6(1) of the ECHR within the normative scope determined by the judgment of the ECtHR. In its judgment, the CT concurred with the application of the Prosecutor General and adjudicated in two matters[71]:

1. firstly, it rejected the possibility of treating the CT as a court within the meaning of ECHR (Art. 6(1) first sentence of ECHR (...) insofar as the notion of a court, applied in this provision, embraces the CT, is inconsistent with Art. 173 in conjunction with Art. 10(2), Art. 175(1) and Art. 8(1) of the Constitution);
2. secondly, it negated the possibility of examining by the ECtHR the procedure for the creation of the judges of the CT (Art. 6(1) first sentence of ECHR (...) insofar as it vests with the ECtHR the power to assess the legality of the election of the judges of the CT is inconsistent with Art. 194(1) in conjunction with Art. 8(1) of the Constitution).

In the first context, the CT negated the assessment of the ECtHR from several perspectives:

1. it inferred its stance from the logic of the constitutional system. It highlighted that in the light of the Constitution (Art. 173 and Art. 10(2)), there exist in Poland two kinds of organs of court authority: courts and tribunals. And although they are enumerated jointly, they have different powers and specificities. The monopoly regarding the implementation of the administration of justice, that is, the determination of individual civil, criminal or administrative matters, which are those matters to which Art. 6(1) of ECHR refers, is exercised solely by courts, i.e. the SC, common courts, administrative courts and military courts, which is directly envisaged in Art. 175(1) of the Constitution;
2. it referred to the difference between the quality and results of the jurisprudence of tribunals and courts. It highlighted that in accordance with Art. 190(1) of the Constitution, its judgments are universally binding and final. This refers to decisions delivered in each mode of review conducted by the CT. In turn, decisions of courts implementing the administration of justice have an *inter partes* effect. Judgments of the CT do not have a direct effect in the cancellation of a non-appealable court decision, a final decision or another determination, but – if a normative act on which these decisions were based was held unconstitutional – it only constitutes a premise that enables the CT to reopen proceedings, to quash a decision or another determination based on the principles and mode specified in provisions regulating given proceedings. This applies to all persons who have received determinations based on an unconstitutional provision, and not only to initiators of proceedings before the CT. Moreover, a new decision in an individual case does not have to be at all favourable to such a person. Hence, the assessment of the ECtHR that proceedings before the CT decided about any civil rights of a specific complainant is untrue;
3. it indicated a false understanding of the model of the Polish constitutional complaint. It highlighted that proceedings before the CT were not a continuation of proceedings before the common courts. The CT is not an appellate body, nor is it an organ that can undertake extraordinary reviews of court decisions. The CT's judgments have effects exclusively in the normative sphere, i.e. they do not

71 | Judgment of the CT, K 6/21, item 9.

quash decisions and other determinations delivered on the basis of provisions challenged in proceedings before the CT, but solely repeal provisions which were held unconstitutional by the CT;

4. it suggested that the judgment of the ECtHR had political motives. It alleged that the ECtHR had departed (without explanation) from the hitherto line of the case law referring to an extraordinary means of appeal[72], and had changed its stance in the case of guarantees arising from Art. 6(1) with regards to the access of a court competent to adjudicate on the law[73].
5. In turn, as for the possibility of the ECtHR to conduct an assessment of the legality of the election of the judges of the CT on the basis of Art. 6 of ECHR, the CT held that the norms inferred in the judgment were unconstitutional, as:
6. the interpretation provided by the ECtHR constitutes an unprecedented encroachment on the constitutional powers of organs of authority of the Republic of Poland – the Sejm, which elects a judge, and the President, before whom an elected judge takes an oath. At the same time, this interpretation is unlawful and faulty and infringes on the principle of subsidiarity of ECHR. The ECtHR encroached on a sphere which falls into the category of an exclusive constitutional power of national organs (Sejm and President) and undermined the jurisprudence of the CT in that matter, in particular, the judgment in the case K 1/17. Consequently it transgressed its powers.
7. in the light of the Constitution, there do not exist procedures or mechanisms which would be able to verify the legality of the election of the judges of the CT, thus it is all the more so difficult to create said procedures by way of the interpretation of international agreements that are binding in Poland;
8. the ECtHR misleads as to the effects of certain judgments of the CT. Contrary to the ECtHR's claims, the CT has not only never assessed the election of judges, but has even repeatedly deemed itself incompetent to make such an assessment[74]. In turn, in the judgments indicated by the ECtHR as those referring to the election of the judges of the CT, the CT did not adjudicate on the election of the judges of the CT, but only on certain norms contained in different CT Acts. Those were not even the provisions on the basis of which the judges were elected on 3rd December 2015[75];
9. what is unacceptable is also the rejection by the ECtHR of the findings made by the CT in the judgment in the case K 1/17, where the CT broadly referred to the issue of the validity of the election of the judges of the CT by the Sejm of the 7th and 8th term.

On 10th March 2022, the CT delivered a unanimous judgment in the case K 7/21, in which it again stated that Art. 6(1) of ECHR was unconstitutional. The applicant in the case was again the Prosecutor-General, who alleged that in the judgments of the ECtHR[76]

72 | E.g. cases Bochan v Ukraine and Moreira Ferreira v Portugal.
73 | E.g., cases: Ruiz-Mateos and others v Spain, Gorizdra v Moldova, Wardziak v Poland, Tkaczyk v Poland, Szyskiewicz v Poland, Biziuk and Biziuk v Poland.
74 | Orders of the CT, U 8/15 and U 1/17.
75 | Judgments of the CT: K 34/15, K 35/15, K 47/15, and K 39/16.
76 | Judgments of ECtHR: Broda and Bojara v Poland and Reczkowicz v Poland.

norms infringing on the state's constitutional legal order were inferred from Art. 6(1). The CT adjudicated that[77]:

1. Art. 6(1), first sentence, of the ECHR insofar as the notion 'civil rights and obligations' embraces the right of a judge to hold an administrative function in the structure of common courts in the Polish legal system – is inconsistent with Art. 8(1), Art. 89(1)(2) and Art. 176(2) of the Constitution;
2. the possibility inferred by ECtHR from Art. 6(1) of ECHR to overlook the Constitution, statutes and judgments of the CT by the ECtHR or national courts in the process of interpreting the ECHR while assessing the fulfilment of the requirement of 'a court established by law' as well as the possibility to independently create norms referring to the procedure or appointment of judges of national courts is inconsistent with Art. 89(1)(2), Art. 176(2), Art. 179 in conjunction with Art. 187(1) in conjunction with Art. 187(4), and with Art. 190(1) of the Constitution;
3. such an understanding of Art. 6(1) of the ECHR that authorises the ECtHR or national courts to provide an assessment of the conformity to the Constitution and the ECHR of the Acts concerning the organisational structure of the judicial system, jurisdiction of courts, and the act specifying the organisational structure, the scope of activity, *modus operandi*, and the mode of electing members of the National Council of the Judiciary is inconsistent with Art. 188(1) and (2) as well as Art. 190(1) of the Constitution.

The CT explained that inferring from an ECHR-based phrase 'civil rights and obligations' the judge's subjective right to hold a managerial position within the structure of common courts in the Polish legal system is inconsistent with the indicated higher-level norms for review, because:

1. it constitutes creation at the ECHR level of a right which is not envisaged by the Constitution (provisions on the right to access to public service);
2. the creation of a new right takes place outside the constitutional mode envisaged for the amendment of an international agreement, that is, without the state's consent, and takes place in breach of the constitutional requirement for the regulation of the organisational structure of the judicial system in a statute.
3. With regard to the second excerpt of the operative part, according to the CT, if the ECtHR infers a norm from Art. 6(1), first sentence, of the ECHR that authorises it to assess the process of appointing national judges, overlooking universally binding provisions of the Constitution, acts, as well as final and universally binding judgments of the Polish CT, then such a norm is inconsistent with the indicated higher-level norms for review, because it infringes on the constitutional:
4. obligation of granting consent to the ratification of a specific kind of an international agreement, as it is created by way of the ECtHR's activity that is aimed at the creation of law;
5. powers of the CT as well as the constitutional principle of the finality of judgments delivered by the CT;
6. powers of the President of the Republic of Poland to appoint national judges.

With regards to the third part of the operative part, according to the CT, if the ECtHR inferred from Art. 6(1) of ECHR norms pertaining to powers and the constitutional system, allowing to assess both the constitutionality of the Polish acts concerning the

77 | Judgment of the CT, K 7/21.

judicial system, and its organisational structure, as well as the status of a judge, and to provide a substantive assessment of the correctness and legality of the judgments of the CT, then this norm is inconsistent with the indicated higher-level norms for review, because it infringes on:

1. the systemic (constitutional) position of the CT, in accordance with which it is the only organ in the Polish legal system that is competent to assess the conformity of acts to the Constitution and international agreements ratified upon prior consent granted by statute;
2. the constitutional principle of the finality and the universal character of judgments of the CT.

The CT highlighted that, as a rule, it avoids conflicts with the international order by applying the principle of a favourable approach of the Constitution towards international law or a number of conflict-of-law solutions. However, in the case under examination this was impossible, as the source of the problem was a manifestly faulty action of the ECtHR in the process of the creation of norms inferred from Art. 6(1) of ECHR. The action of the ECtHR is based on the lack of understanding for Poland's legal system, which results in the creation of normative content enabling the ECtHR to unlawfully interfere with the constitutional system of the Polish State. It also accused the ECtHR of taking action in order to redefine the content of constitutional institutions, both in the substantive scope (the principles of the division of powers, the principle of the rule of law, the powers of state organs), and in the institutional one (the concept of a court, the concept of a legal enactment, the President's prerogative), or of creating content that does not exist in the Constitution or that is inconsistent with that Constitution.

9. The review of constitutionality and the obligation of executing judgments of the ECtHR

The above unequivocally indicates that the review of constitutionality of the ECHR's provisions from the perspective of a judgment of the ECtHR, and according to some, a *de facto* review of such a judgment, is already taking place. Thus, yet another adjudicative boundary has been broken in the powers of the CT itself, based on the interpretation of the constitutional provisions regulating its powers.

This action will undoubtedly impact Poland's obligation contained in Art. 46(1). Although the Constitution is a superior act to the ECHR and therefore its Art. 8 cannot be restricted by inferior acts, the question of the admissibility of such a review in the context of this obligation is worth asking. Especially since it is supported by Art. 9 of the Constitution (imperative to abide by international law).

The existence of a number of doubts undermining the absolute and rigid character of the obligation to execute a judgment is suggested by the very formula of the content of the imperative arising from Art. 46 of ECHR. The literal imperative to 'abide by' the judgment constitutes a formula that is undoubtedly broader in linguistic terms than the

simple and specified imperative to 'execute' a judgment[78]. Such a formula seems to have been introduced on purpose, as in this way it corresponds to the declaratory and affirmatory essence of judgments of the ECtHR. It also has a more abstract character that also provides the state with greater freedom with regards to attaining the objective indicated by the judgment. In turn, the commonly used concept (word) 'execution' is a specified and unequivocal formula of compliance. It constitutes a direct imperative that is also binding as to the content of acting.

This leads to the conclusion that the formulation of the obligation contained in Art. 46 (1) ECHR is largely fluid. On the part of the state fulfilling this obligation, there is considerable discretion in implementing the imperative 'to abide by the final judgment' of the ECtHR, which is also confirmed by the fact that the Committee of Ministers of the European Council was given the power to 'supervise its execution'. We can see the difference between Art. 46(1) and Art. 46(2) of the ECHR. This difference leads to the conclusion that the Committee of Ministers, on the basis of the competence resulting from Art. 46(2), supervises the execution of judgements by the State within the framework of the obligation to abide by final judgment[79].

With regards to the constitutional context of the obligation, it should be noted at the outset that Art. 9 of the Constitution constitutes one of the constitutional principles of the state's functioning. It formulates a general principle of law *pacta sunt servanda* and refers the said principle to the conduct of the state in international relations[80]. It embraces not only legal (normative) enactments but also acts of the application of international law.

The very creation of such an imperative at constitutional level highlights the will of the constitution-maker to adopt an obligation that is parallel to the obligation arising from international law. The provision is thus not only a reflection of the dualism of the systems of national and international law, but also exposes their formal equivalence. As a result, it puts a stress on the independence of both obligations, which have two separate equal sources[81].

However, such a perspective has further consequences. If the imperative contained in Art. 9 of the Constitution is independent, then international law does not create it, but – in accordance with its content – triggers it if a specific obligation arises that is binding on Poland. It is international law that defines the scope of such an obligation, which in this case is materialised by way of reference to specific obligations arising from Art. 46(1) of the ECHR.

However, on the other hand, if this is in its essence a constitutional obligation, then it must operate in the full scope of the system of the Constitution. Indeed, an international

78 | It means 'to accept or obey an agreement, decision, or rule'. See: Cambridge Dictionary (online version).

79 | It is the same wording in both language version: English and French.
Art. 46.1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
Art. 46. 1. Les Hautes Parties contractantes s'engagent à se conformer aux arrêts définitifs de la Cour dans les litiges auxquels elles sont parties. 2. L'arrêt définitif de la Cour est transmis au Comité des Ministres qui en surveille l'exécution.

80 | Judgment of the CT, P 1/05, item 42.

81 | On the essence of dualism, see: Verdross, 1914, p. 1011.

obligation that is inconsistent with the Constitution cannot reach national legal relations through Art. 9 of the Constitution.

Art. 9 itself does not determine its own mechanism of review or instruments enabling it to impact international-law obligations that are, for instance, similar to the statutory reservation envisaged in Art. 91(1) of the Constitution. Therefore, other provisions of the Constitution form a natural protection from the absolute nature of an international-law obligation. In particular, the possibility to conduct the constitutional review of international agreements by the CT within the scope that is allowed by Art. 188 of the Constitution. Simply, if the entrance of an agreement into national relations takes place on the basis of the Constitution, then it is impossible to demand a resignation from the constitutional review of international law that is envisaged and accepted by the Constitution. Namely, what is impossible is a partial application of the Constitution by state organs and a partial exclusion thereof if the Constitution itself does not provide for this. It is not even possible in the form of an obligation at the level of an international agreement[82]. This is also confirmed by the norm arising from Art. 190 of the Constitution, which does not differentiate between the effects of decisions concerning unconstitutionality, depending on whether a national or an international act is concerned.

In the aforementioned cases K 6/21 and K 7/21, the CT referred to the context of constitutional review in relation to the obligation to execute a judgment of the ECtHR. In the first case, it held that the judgment of the ECtHR was delivered outside the ECHR-based framework (*ultra vires*), and therefore it cannot have the attribute of a judgment with regards to Poland within the meaning of Art. 46(1) of the ECHR. The CT declared it to be the so-called non-existent judgment (*sententia non existens*), which as a result does not have any effects (it is deprived of the attribute of enforceability). At the same time, it stressed that it accepts the application of the construction of non-existent decisions to determinations delivered by the ECtHR in a situation where they are delivered in gross violation of the requirements for the attribution to them of the character and effects of a binding determination. A refusal to execute such a judgment does not constitute an infringement on Art. 9 of the Constitution either.

In turn, in the case K 7/21, the CT stated that the effect of its judgment determining the unconstitutionality of certain norms arising from Art. 6 of the ECHR is the cancellation of the indicated norms from the scope of Poland's obligations (limitation of the normative content of Art. 6 of ECHR). As a result, determinations delivered on their basis[83] do not have the attribute envisaged in Art. 46(1) of the ECHR (the obligation of execution) for the Polish State.

The limitation of the normative content of Art. 6 of ECHR does not constitute an infringement by Poland of the international law binding upon it, as it does not refer to the obligation of being bound by the ECHR as such, which was assumed by Poland upon the ratification of the said act, but indicates a boundary in the dynamics of the ECtHR's

82 | Even Art. 90 of the Constitution does not discuss exclusion, but delegation to an international organisation or international institution the competence of organs of state authority in relation to certain matters. In the light of the jurisprudence of the CT concerning the issue of national identity, one may also have doubts whether this might refer to the powers to conduct constitutional review.

83 | I.e. 4 judgments of the ECtHR: Broda and Bojara v Poland; Reczkowicz v Poland; Dolińska-Ficek and Ozimek v Poland; Advance Pharma sp. z o.o. v Poland.

freedom to create laws, and it should be treated as the states' opposition to the attempt of ascribing new content to an international provision and of enforcing it on Poland *per facta concludentia*, in breach of the procedure for amending treaties.

The CT also stated that state organs responsible for conducting international policy should assess whether or not – in order to avoid misunderstandings regarding the perception of international obligations by Poland – it was justified to take action aimed at informing proper international partners, including the proper ECHR-based bodies, on the constitutional boundaries, as revealed in that judgment, within which Poland is bound by the content of Art. 6(1) of the ECHR.

Finally, according to the CT, if there exist in legal relations acts of the application of law issued on the basis of norms inferred from Art. 6(1), first sentence, of the ECHR which were held as being unconstitutional in the judgment K 7/21, and if there are procedures for appealing against those acts then, in the light of Art. 190(4) of the Constitution, such acts may be challenged.

The above unequivocally indicates that the answer to the question about the admissibility of the constitutional review of ECHR's provisions, also from the perspective of their normative content, as shaped by judgments of the ECtHR, is affirmative. Such a review may be conducted. Only when its secondary result is the refusal to execute a judgment will a problem arise, as from the perspective of international law such an obligation will still be in place. This, in turn, poses the question about the effects on international-law of such a refusal, which takes place at national level.

10. A refusal to execute a judgment of the ECtHR and the state's responsibility under international law

The features of judgments of the CT are specified by Art. 190(1) of the Constitution. Those features are: a 'universally binding' force and 'final' character.

However, the CT is not competent to formally order in its judgment other state organs to act in a specific way. The results of the determination of unconstitutionality arise from the law. They are as follows:

1. firstly, the obligation to take legislative action if a loophole emerges in the law after the delivery of a judgment;
2. secondly, the possibilities of action that are indicated by Art. 190(4) of the Constitution[84].

The effect of a judgment is triggered after the promulgation thereof in a proper journal of laws. To apply each of the indicated possibilities, an action of a subject vested with proper powers (the first case) or rights (the second case) is necessary.

The effect of judgments of the CT defined in this way is focused on the national forum. It is so even in the case of the constitutional review of ECHR-based norms within the scope of their content as specified by a judgment of the ECtHR.

84 | It constitutes the basis for the reopening of proceedings, quashing a decision or another determination in accordance with the principles and in the course specified in provisions proper for given proceedings.

However, providing an assessment of the constitutionality of an international agreement does impact the sphere of foreign policy. Indeed, by adjudicating on the unconstitutionality of a provision of the ECHR, the CT provides (in the name of the state) a unilateral redefinition of the scope of Poland's international obligations within the treaty-based system of the European Council. By promulgating a judgment, other state organs acquire knowledge of the above fact, and the universally binding character of such a judgment changes their vision of the status of Poland's international obligations, as well as to impose on them the obligation to act in accordance with the content of the said judgment. As a result, what arises in the sphere of the state's foreign policy is the third obligation to act. This is an imperative, which is directed at state organs competent to conduct foreign policy, to analyse the possibilities to redefine the framework of the state's functioning in international relations. In particular it is about considering what action needs to be taken after the delivery of such a judgment so as to properly inform international partners about the situation that has emerged and to propose appropriate solutions, which take into account the decision of the CT.

This is an obligation of organs that aim to avoid the triggering of the international responsibility procedure against the state, which follows from the fact that it is possible to raise the allegation of violating an international obligation. Indeed, if the refusal to execute a judgment of the ECtHR from a national (constitutional) perspective does not automatically eliminate an ECHR-based obligation, undertaken to abide by the judgment, then it opens the possibility of Poland facing responsibility for a wrongful act at an international-law level.

In this case, the situation is not mitigated by the fact that the execution of a judgment of the ECtHR is blocked by a judgment of the CT. Therefore, state organs competent in matters of foreign policy should immediately take action to evade such responsibility. They have at their disposal all instruments existing in the state's foreign policy, including the submission of proposals for amending treaties, and even the withdrawal from a treaty. Only an amendment to the Constitution is an alternative here.

In my opinion, this is not a major problem. What may also be helpful in such a complicated legal situation is the unique nature of international responsibility. As opposed to national-law responsibility, it is not absolute. This means that it may be subject to valuation by way of negotiations of the interested parties, both as regards its gravity and scope, as well as even its very existence. What is more, essentially, the state's responsibility is not triggered in international law upon a failure to fulfil an obligation by the state committing a wrongful act, but only after the commission of a wrongful act is established by proper bodies or institutions[85]. Even if a subsequent determination of an infringement of the law had a reverse effect (since the moment of an infringement). This also refers to the case of a failure to execute a judgment of the ECtHR resulting from a judgment of the CT, which constitutes a classic wrongful act that emerged as a result of the refusal to fulfil an obligation arising from Art. 46(1) of the ECHR, that is a classic breach of a treaty. In this case, too, the moment at which such a wrongful act occurs is clear. It is not the actual refusal of the state, nor the event of a persistent lack of execution. The emergence of a wrongful act depends on the declaration of this fact (formula failure 'to fulfil its obligation under para.

85 | If there is not such an organ, the problem of responsibility is solved by satisfaction in the form of undertaken retaliation measures. But what decides then is force, so there lacks a formal and objective perspective to assess culpability and responsibility.

1' – it means a lack of obligation 'to abide by the final judgment') by the competent bodies based on the ECHR, which is stipulated by Art. 46 in para. 2-5 of the ECHR[86]. This means that from the point of view of Art. 46(4) ECHR (construction 'to abide by'), there are many ways to 'execute a judgment', as referred to in Art. 46(2) ECHR. In fact, it is not so much about the judgement itself, which is declarative and affirmative, but about fulfilling the ECHR standard, which is only indicated in judgement[87].

According to these provisions, the Committee of Ministers of the Council of Europe supervises the execution of a judgment. It assesses whether the State's action can be recognised as an adequate abidance by the judgment. In certain cases, it may request the assistance of the ECtHR. If the ECtHR finds that the State 'has failed to fulfil its obligation under para. 1' (it means 'to abide by final judgment'), it refers the case to the Committee of Ministers for consideration of the measures to be taken to ensure such fulfilment.

Among Polish scholars, Art. 46(1) of ECHR is recognised as a provision formulating the legal basis for sanctioning states that do not execute judgments[88]. This is supposed to be confirmed by the fact that the Committee of Ministers is vested with instruments which enable it to exert pressure on states.

But the content of this provision may as well be described as one indicating that the execution of a judgment may be evaded or that its effects may be limited or adjusted to the CT's judgement. Indeed, what also follows from the said provision is that:

1. the execution of a judgment of the ECtHR (in formula 'to abide by') is a legal obligation of a 'blurred' character[89]. It should be 'adequate' only[90]. However, any failure or refusal 'to abide by a final judgment' is of a political, and not legal nature, at least at the first stage. The Committee of Ministers, which is an organ shaped politically, is indeed the main acting subject. The ECtHR merely plays an auxiliary role in that procedure, in which it legitimises the actions of the Committee of Ministers. Yet, even in a critical case, the Committee of Ministers has the freedom to select in which form it will influence the state. This creates a margin of discretion for states, making negotiations possible and in this way protecting the sovereignty of states[91];
2. the role of States Parties with the ECHR is unique. At a certain point states start participating in the proceedings via their representatives in the Committee. Dialogue with states, who do indeed understand the challenges of sovereignty that have been revealed in the constitutional order, may conclude a case quite quickly. States take decisions which are subsequently manifested by the Committee. It suffices that if during voting the level of two thirds of the members of

86 | Especially art. 46(4) ECHR. Compare: Art. 46 (1), Art. 46(2) and Art. 46(4) ECHR.
87 | Apart from the issue of compensation (Art. 41 ECHR).
88 | Cf. Ciżyńska-Pałosz, 2020, p. 14.
89 | Cf. Garlicki, 2007, pp. 126–127.
90 | See the judgment *Burdov v Russia*, para. 125.
91 | The Committee of Ministers, in its decision taken at its 1468th Meeting of 5-7 June 2023 in the framework of the execution of the judgments of the so-called 'Reczkowicz group', expressed the Deputies' grave concern regarding the Polish authorities' persistent reliance on the CT's judgment K 7/21 to justify non-execution of judgments and underlined that such an approach not only contradicted Poland's voluntarily assumed obligation under Art. 46 of ECHR to abide by the Court's final judgments but also its obligation under Art. 1 to secure the rights and freedoms as defined in ECHR.

the Committee of Ministers will not be reached, then responsibility will not be triggered;

3. the whole procedure is open to negotiation when the state refuses to execute a judgment. If the state invokes constitutional issues, then in this dimension, given the good will of the parties, it will be possible to find a solution to the problem. 'Abidance by the judgement' does not have to be the execution of a judgment, and certainly not a complete literal execution thereof.[92] One may be tempted to look for a partial solution or even to formulate the conclusion that the Committee is competent enough to grant consent to a different way of fulfilling the ECTHR standard, or at least not to raise the problem. It is possible to put an end in this way to the problem of responsibility;
4. among Polish scholars, it is even claimed that providing the Committee of Ministers with repressive measures, which may be used against the state, actually aims to prevent categorical demands that a judgment be executed rather than to strengthen pressure exerted by this Committee. It is thus a deterring measure rather than a real one. It serves to prevent situations where a State Party to the ECHR decides to withdraw therefrom[93]. This proves that there is also room for negotiation from that perspective.

What is revealed in this way is the truth that an adjudication by the ECtHR on human rights is, in fact, highly governed by political rules.

11. Conclusion

International courts are part of institutional solutions that are an answer to the necessity to solve different new problems of global society. In principle, they are to aid the effective realisation of common objectives. They also serve the mission of international law to serve justice in a universal forum. Scholars call this the exercise of international public authority[94].

For state, democracy and the rule of law, however, this kind of role for the jurisprudence of international tribunals poses a problem that has two contexts:

1. first, the power exercised by an international court is competitive to national judicial power, as the former is capable of verifying the actions of the latter, although from a limited perspective.
2. second, the authority of an international court is competitive to that of the national legislative power. This is clearly visible in Poland, where ratified agreements may be a directly applied source of universally binding law. Consequently, any attempts at impacting the content of provisions contained in those agreements by means of decisions of the international courts constitute an evident example of the progressive development of law (as to its substance) which bypasses the Sejm.

92 | See the execution by GB of the judgment of the ECtHR in the case *Hirst*. See: Ciżyńska-Pałosz, 2020, pp. 16–21.
93 | Kamiński, Kownacki and Wierczyńska, 2011, p. 94.
94 | Bogdandy and Venzke, 2010, p. 3.

Indeed, the legislative power in the state is the emanation of the nation. As a matter of principle, this is the most legitimised kind of the state's power. In turn, national judicial power acts in a close relationship with legislative power, as the latter creates for the former the legal conditions for its operation and determines the mode of its creation. Judicial power also delivers judgments in the name of the state.

In turn, the creation of international courts is based on the activity of the executive power of the state (government). Hence, adjudication by international courts, and in particular, the creation of law by way of adjudication is separated from democratic legitimisation. It does not even have this legitimisation at such a minimum level as national courts do. Therefore, decisions by international courts are still not directly an element of national legal relations and do not have any direct legal effects for national relations. This is the case despite pressure which has been exerted for many years by leftist scholars seeking justification for the introduction of the direct effectiveness of those decisions in the conceptions of the multicentricism of law[95]. The state notices these shortcomings and all the time filters those decisions by means of the dualist conception determining the relations between international and national law[96].

Therefore, the execution of judgments of international courts takes place by way of an action taken by proper state organs on the basis of their national (constitutional) powers. This guarantees that the state has impact on the manner in which aforementioned judgments are executed, and that it indicates the boundaries within which the state undertakes to abide by such a judgment. Only those bodies may execute the said judgments that are allowed to do so under national law. They may do so only within the scope indicated by the law. It is only the constitution-maker, or alternatively the legislator, that determines who is competent to do so and when.

The possibility of the constitutional review of judgments delivered by international courts plays an important role in the process of their execution. Even indirect execution, as is the case in the instance of Poland, is based on the evolution of the understanding of the constitutional powers of the CT. It indeed deals with answering the question whether broadly understood effects of a judgment can lead to a breach of the Constitution. This is important, as in a democratic rule-of-law state it is impossible to function in violation of the Constitution, even if the instrument of violation is the judgment of an international court.

Constitutional review is particularly advisable when such adjudication develops international provisions, which is undoubtedly the case as regards judgments of the ECtHR. They are indeed a tool by means of which the ECHR constitutes a living instrument. Thus, the probability of violating constitutional boundaries by provisions of the ECHR developed by judgements of the ECtHR is higher than in the case of an ordinary international agreement.

The dynamism of the evolution of the ECHR influenced by judgments of the ECtHR, which more often transgresses the boundaries of rational restraint and political neutrality, requires defensive dynamism in the state's policy as a reaction to this phenomenon. In Poland the result of this phenomenon is the triggering of the supervisory mechanism in the form that is allowed by the existing legal system. This is the constitutional review of

95 | Łętowska, 2011a, p. 18.
96 | Muszyński, 2022, pp. 41.

judgments of the ECtHR, though solely in the formula of reviewing norms on which such a judgment was based.

If the unconstitutionality of an ECHR-based norm is determined on the basis of which a judgment of the ECtHR was delivered, two effects arise: the lack of the possibility to execute such a judgment by the state in the national forum; the danger that the state will have to face international responsibility.

Therefore, appropriate actions taken by constitutional state organs are necessary.

However, it is worth stressing that the ECHR is favourable to such extreme situations.

This is proved by two facts. The first one is the way of executing a judgement in formula 'to abide by'. It is the fulfilment of the ECHR's standard and not a literal execution of judgement. The second is that ascribing responsibility to the state on account of a refusal to execute a judgment is not automatic but conditional on the determination of this fact by the Committee of Ministers. This indicates the gravity of the political component, thus making it easier to reach an agreement to find the proper solution to the conflict between the Constitution and ECHR-based standards. This follows from the fact that international law in its entirity is a flexible system of law, both in the interpretative and the executive context. It is there to facilitate agreement, and not to lead to confrontation.

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