73/7/A/2011

JUDGMENT
of 21 September 2011
Ref. No. SK 6/10[*]

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Maria Gintowt-Jankowicz – Presiding Judge
Zbigniew Cieślak
Mirosław Granat
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Małgorzata Pyziak-Szafnicka
Stanisław Rymar
Andrzej Rzepliński – Judge Rapporteur
Piotr Tuleja
Andrzej Wróbel
Marek Zubik,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 21 September 2011, in the presence of the complainant, the Sejm, the President of the Republic of Poland, the Minister of Foreign Affairs and the Public Prosecutor-General, a constitutional complaint submitted by Mr Randy Craig Levine, in which he requested the Tribunal to examine the conformity of:

Article 4(1) of the Extradition Treaty between the United States of America and the Republic of Poland, signed at Washington on 10 July 1996 (Journal of Laws - Dz. U. of 1999 No. 93, item 1066, as amended), to Article 55(1) and (2) in conjunction with Article 2 as well as Article 78 of the Constitution of the Republic of Poland,

adjudicates as follows:

Article 4(1) of the Extradition Treaty between the United States of America and the Republic of Poland, signed at Washington on 10 July 1996 (Journal of Laws -

---

[*] The operative part of the judgment was published on 12 October 2011 in the Journal of Laws - Dz. U. No. 217, item 1293.

Dz. U. of 1999 No. 93, item 1066 as well as of 2002 No. 100, item 921), **is consistent with Article 55(1) and (2) in conjunction with Article 2 of the Constitution of the Republic of Poland as well as is not inconsistent with Article 78 of the Constitution.**

Moreover, the Tribunal decides:

pursuant to Article 50(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654)**, to revoke the preliminary decision of 1 October 2009, ref. no. Ts 203/09, which suspended the enforcement of the decision of 24 August 2009 issued by the Minister of Justice on the extradition of and partial refusal to extradite a person sought by a foreign state** (Ref. No. PR VI Oz 597/08/E)**.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. The subject of the review

1.1. In the constitutional complaint of 19 August 2009, supplemented with the procedural letter of 20 October 2009, the complainant requested the Tribunal to determine the non-conformity of Article 4(1) of the Extradition Treaty between the United States of America and the Republic of Poland, signed at Washington on 10 July 1996 (Journal of Laws - Dz. U. of 1999 No. 93, item 1066, as amended; hereinafter: the Extradition Treaty with the USA), to Article 55(1) and (2) in conjunction with Article 2 as well as Article 78 of the Constitution.

Challenged Article 4(1) of the Extradition Treaty with the USA stipulates that: “Neither Contracting State shall be bound to extradite its own nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so”.

2. The admissibility of the constitutional complaint

2.1. Before carrying out the substantive assessment of allegations raised in a given constitutional complaint, the Constitutional Tribunal examines whether there are no negative premisses that would lead to the obligatory discontinuation of proceedings (see *inter alia* the decisions of the Constitutional Tribunal of: 21 November 2001, Ref. No. K 31/01, OTK ZU No. 8/2001, item 264; 20 March 2002, Ref. No. K 42/01, OTK ZU

No. 2/A/2002, item 21; 28 May 2003, Ref. No. SK 33/02, OTK ZU No. 5/A/2003, item 47; 21 October 2003, Ref. No. SK 41/02, OTK ZU No. 8/A/2003, item 89).

2.1.1. Pursuant to Article 79(1) of the Constitution:

"In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution".

In accordance with Article 47(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), a constitutional complaint should include *inter alia*:

"a precise identification of the statute or another normative act on the basis of which a court or another organ of public administration has given ultimate decision in respect of freedoms or rights or obligations determined in the Constitution and which is challenged by the person making the complaint for the confirmation of non-conformity to the Constitution".

By contrast, Article 47(2) of the Constitutional Tribunal Act imposes on a complainant the obligation to submit his/her complaint together with the judgment, order or another ruling, given on the basis of the challenged normative act, with the indication of the date it was served on the complainant.

2.1.2. What follows from the said regulations is that the subject of a constitutional complaint may only be the provisions of a statute or another normative act upon which basis a court or organ of public administration has made a final decision infringing – in the view of a complainant - his/her rights or freedoms specified in the Constitution. Therefore, one may not effectively challenge the conformity of the provisions of a statute or another normative act to the Constitution unless they were previously applied in a specific case concerning the complainant. Consequently, when examining a given constitutional complaint, the Constitutional Tribunal is obliged to determine whether, on the basis of the challenged normative act, a court or organ of public administration has made a final decision on the complainant's rights, freedoms or obligations specified in the Constitution.

2.1.3. In the case under examination, the complainant challenges the conformity to the Constitution of one of the provisions of an international agreement – Article 4(1) of the Extradition Treaty with the USA. The Constitutional Tribunal has stated that, in principle, there is a possibility of reviewing the constitutionality of international agreements in proceedings commenced by way of constitutional complaint. In its judgment of 18 December 2007, in the case SK 54/05, the Tribunal held that: "the admissibility of reviewing an international agreement in proceedings commenced by way of constitutional complaint will be determined, on a case-by-case basis, by individual features of a given challenged international agreement, including above all else whether it was a normative basis of a final decision on a complainant's rights, freedoms or obligations" (OTK ZU No. 11/A/2007, item 158, part III point 1.2. of the statement of reasons).

The subject of a constitutional complaint may therefore be any act which jointly meets the two requirements: firstly, it contains normative content, and secondly, it

constituted the basis of a final decision on the complainant's rights, freedoms or obligations specified in the Constitution.

2.2. Before examining whether Article 4(1) of the Extradition Treaty with the USA fulfils the above-indicated requirements, the Tribunal has deemed it necessary to determine what position the agreement occupies by in the Polish legal order.

2.2.1. The Extradition Treaty with the USA was signed at Washington on 10 July 1996, i.e. at the time when the Act of 17 October 1992 on mutual relations between the legislative branch and the executive branch in the Republic of Poland as well as on the local self-government (Journal of Laws - Dz. U. No. 84, item 426, as amended; hereinafter: the Small Constitution) was in force, and when certain provisions of the Constitution of 1952 were still binding (Journal of Laws - Dz. U. of 1976 No. 7, item 36, as amended). In accordance with Article 33 of the Small Constitution, which was binding at that time, the said agreement was ratified by the President of the Republic of Poland on 20 January 1997; it entered into force on 18 September 1999 (the government statement of 31 August 1999 on the exchange of ratification documents related to the Extradition Treaty between the United States of America and the Republic of Poland, signed at Washington on 10 July 1996; Journal of Laws - Dz. U. No. 93, item 1067), and it was published on 20 November 1999 in the Journal of Laws (No. 93, item 1066).

2.2.2. As a result of concluding the Agreement on extradition between the European Union and the United States of America in Washington on 25 June 2003 (*OJ L 181, 19.7.2003, pp. 27-33; Polish special edition: chapter 19, vol. 6, pp. 161-167;* Corrigendum to the Agreement on extradition between the European Union and the United States of America, *OJ L 193 22.7.2008, pp. 20-26;* hereinafter: the Agreement on extradition between the EU and the USA), *the Republic of Poland concluded,* in Warsaw on 9 June 2006, an *agreement* with the United States of America on the application of the Extradition Treaty between the United States of America and the Republic of Poland signed 10 July 1996, pursuant to Article 3(2) of the Agreement on extradition between the United States of America and the European Union signed at Washington 25 June 2003 (hereinafter: the Agreement with the USA of 9 June 2006). The Sejm enacted a statute authorising the ratification of the Agreement with the USA of 9 June 2006 (Journal of Laws - Dz. U. No. 235, item 1697). The President of the Republic of Poland ratified the said Agreement on 4 June 2007, and it was promulgated on 10 May 2010 (Journal of Laws - Dz. U. No. 77, item 501). The Agreement with the USA of 9 June 2006 entered into force on 1 February 2010 (the government statement of 12 January 2010 on the legal effectiveness of the Agreement between the United States of America and the Republic of Poland on the application of the Extradition Treaty between the United States of America and the Republic of Poland signed 10 July 1996, pursuant to Article 3(2) of the Agreement on Extradition between the United States of America and the European Union signed at Washington 25 June 2003, signed at Warsaw 9 June 2006; Journal of Laws - Dz. U. No. 77, item 502). The Agreement with the USA of *9 June 2006* did not repeal the Extradition Treaty with the USA, but merely amended some of its provisions (see Article 1 of the Agreement with the USA of *9 June 2006*). In the Agreement with the USA of *9 June 2006*, there is no provision repealing the Extradition Treaty with the USA, and its

title as well as Article 3(2) of the Agreement on extradition between the EU and the USA prove that the Contracting States did not intend to derogate from the binding Extradition Treaty with the USA, but wanted merely to adjust it to the new legal situation resulting from the conclusion of the Agreement on extradition between the EU and the USA. The Agreement with the USA of *9 June 2006* did not change the content of challenged Article 4(1) of the Extradition Treaty with the USA. At the time of adjudication, the same norm that the complainant has challenged is in force, but it is expressed in Article 4(1) of the Annex to the Agreement with the USA of *9 June 2006.*

What applies to the complainant's situation is Article 4 of the Agreement with the USA of *9 June 2006*, pursuant to which: "This Agreement shall not apply to requests made prior to its entry into force". The review in the present case, which has been commenced by way of constitutional complaint, is specific in character. This means that the subject of adjudication by the Tribunal may only be such a normative act upon which basis a court or organ of public administration has made a final decision on rights, freedoms or obligations specified in the Constitution. In the present case, the complainant has indicated that the basis of the relevant final decision was Article 4(1) of the Extradition Treaty with the USA. For these reasons, in the operative part of this judgment, the Tribunal has indicated Article 4(1) of the Extradition Treaty with the USA.

2.3. Article 241(1) of the Constitution stipulates that: "International agreements, previously ratified by the Republic of Poland upon the basis of constitutional provisions valid at the time of their ratification and promulgated in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), shall be considered as agreements ratified with prior consent granted by statute, and shall be subject to the provisions of Article 91 of the Constitution if their connection with the categories of matters mentioned in Article 89, para. 1 of the Constitution derives from the terms of an international agreement".

The said provision unambiguously determines the legal status of international agreements ratified in accordance with constitutional provisions which were previously in force. The constitution-maker transformed the international agreements which: 1) were ratified by the Republic of Poland upon the basis of constitutional provisions valid at the time of their ratification; 2) were promulgated in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*); 3) are connected with the categories of matters mentioned in Article 89(1) of the Constitution.

2.3.1. The Extradition Treaty with the USA was ratified by the Polish President on 20 January 1997. Pursuant to previously binding Article 33 of the Small Constitution of 1992: "1. The President shall ratify and terminate international agreements, and notify the Sejm and the Senate about that fact. 2. The ratification and termination of international agreements concerning the borders of the State or defence alliances as well as agreements causing a financial burden for the state or necessitating changes in national legislation shall require prior consent granted by statute".

Consequently, Article 33 of the Small Constitution provided for two procedures for the ratification of international agreements by the President, depending on the content of an international agreement. After an authorising statute has been enacted, the President ratified international agreements concerning state borders or defence alliances as well as

agreements causing a financial burden for the state or necessitating changes in national legislation. The other international agreements were ratified solely by the President. Regardless of the type of the ratification procedure, the President was obliged to notify the Sejm and the Senate about every case of ratification of an international agreement. At the same time, in Article 33(2) of the Small Constitution, the constitution-maker enumerated international agreements the ratification of which required prior consent granted by statute. Therefore, only international agreements concerning state borders or defence alliances as well as agreements causing a financial burden for the state or necessitating changes in national legislation could be ratified with prior consent granted by statute.

2.3.2. The Extradition Treaty with the USA did not concern state borders or defence alliances; nor did it cause a financial burden for the state to the extent that it could be classified as an international agreement the ratification of which required prior consent granted by statute. Also, the Extradition Treaty with the USA did not necessitate any changes in national legislation, as Article 541(1) of the Act of 19 April 1969 – the Polish Code of Criminal Procedure (Journal of Laws - Dz. U. No. 13, item 96, as amended; hereinafter: the Code of Criminal Procedure) stipulated that the provisions of Part XII entitled "Procedure in criminal cases in international relations", and thus also provisions regulating extradition, should not be applied if an international agreement to which Poland was a party stipulated otherwise.

In conclusion, the Constitutional Tribunal states that the Extradition Treaty with the USA was ratified in compliance with Article 33 of the Small Constitution.

2.3.3. The Extradition Treaty with the USA was promulgated in the Journal of Laws on 20 November 1999, i.e. after the entry into force of the Constitution. Therefore, the following question arises: does Article 241(1) of the Constitution refer only to ratified international agreements which were promulgated before the entry into force of the Constitution or also to ratified international agreements which were promulgated after the Constitution entered into force?

2.3.4. The Tribunal states that it does not follow from the content of Article 241(1) of the Constitution that it applies only to ratified international agreements which were promulgated before the entry into force of the Constitution. A functional interpretation enforces such understanding of the indicated provision of the Constitution. The aim of Article 241(1) of the Constitution was to adjust all previously ratified international agreements to the regulation of the new Constitution. For that reason, Article 241(1) of the Constitution applies to international agreements which were ratified before the entry into force of the Constitution and were promulgated in the Journal of Laws either prior to or after the Constitution's entry into force, provided that they concern the categories of matters mentioned in Article 89(1) of the Constitution. Article 241(1) of the Constitution is also interpreted this way by the Supreme Administrative Court in the judgment of 2 March 2006, ref. no. I OSK 441/05, as well as by legal scholars (see L. Garlicki, comments on Article 241, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 1, L. Garlicki (ed.), Warszawa 1999, pp. 3-7 and M. Laskowska, *Dostosowanie prawa do Konstytucji Rzeczypospolitej Polskiej z 1997 r.*, Warszawa 2010, pp. 84-89).

2.3.5. The Tribunal concludes that the Extradition Treaty with the USA meets each of the three conditions set out in Article 241(1) of the Constitution, namely: it was ratified

by the President of the Republic of Poland on the basis of Article 33 of the Small Constitution, it was promulgated in the Journal of Laws, it concerns the categories of matters mentioned in Article 89(1) of the Constitution, i.e. civil freedoms specified in the Constitution (Article 89(1)(2) of the Constitution) – the Polish citizen's freedom from extradition. In the context of the binding Constitution, the Extradition Treaty with the USA is therefore an agreement ratified with prior consent granted by statute.

2.4. The Constitutional Tribunal has also found it necessary to consider the legal effect of the entry into force of the Constitution of 2 April 1997, and its Article 55 in the version which was binding until 6 November 2006, i.e. before the entry into force of the Act of 8 September 2006 amending the Constitution of the Republic of Poland (Journal of Laws - Dz. U. No. 200, item 1471; hereinafter: the Act amending the Constitution), on the binding force of the Extradition Treaty with the USA in the Polish legal order.
Pursuant to Article 55 of the Constitution, in the version which was binding until 6 November 2006:
"1. The extradition of a Polish citizen shall be forbidden.
2. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden.
3. The courts shall adjudicate on the admissibility of extradition".

In other words, Article 55(1) of the Constitution, in the version which was binding until 6 November 2006, clearly prohibited the extradition of a Polish citizen. By contrast, pursuant to Article 4(1) of the Extradition Treaty with the USA: "Neither Contracting State shall be bound to extradite its own nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so".

2.4.1. The Constitutional Tribunal states that in the Constitution of 2 April 1997 the constitution-maker has not included a principle that results in the "automatic" derogation of normative acts - and in particular international agreements - which are inconsistent with the Constitution. Therefore, the Constitution of 2 April 1997 has not led to the derogation of Article 4(1) of the Extradition Treaty with the USA from the legal system.

2.4.2. The elimination of an international agreement which is inconsistent with the Constitution from the Polish legal order may only be carried out in accordance with principles expressed therein, i.e. by repealing or amending the international agreement by competent authorities, or as a result of a ruling issued by the Constitutional Tribunal determining the unconstitutionality of the agreement. None of this has occurred in the case of Article 4(1) of the Extradition Treaty with the USA.

2.5. When assessing whether Article 4(1) of the Extradition Treaty with the USA contains normative content, the Tribunal relies on the following requirements devised in its jurisprudence:

1) it is the content, and not the form, of a legal act that is a criterion for the assessment of its normative character (a substantive definition),

2) the assessment of the legal character of the act is carried out by taking into account a systemic connection between that act and other acts of the legal system which are undoubtedly regarded as normative acts,
3) the presumption of the normative character of legal acts in case of doubts as to the legal character of a given act under review.

2.5.1. Doubts as to the normative character of certain legal acts are an indispensable feature of a legal system. In particular, the contemporary legal system is characterised by a considerable diversity of socially significant legal acts whose legal character is sometimes difficult to define. Moreover, the Constitutional Tribunal maintains the view that, if any normative content is found in a given legal act issued by an organ of public authority, then there are no grounds to exclude it from the review of its constitutionality or legality, especially when the case involves the protection of the rights and freedoms of persons and citizens, which in a way constitutes the presumption of the normative character of legal acts. Otherwise, such acts would remain outside the scope of the review of their constitutionality or legality (see also the following judgments of: 12 July 2001, Ref. No. SK 1/01, OTK ZU No. 5/2001, item 127, part III point 3 of the statement of reasons as well as 22 September 2006, Ref. No. U 4/06, OTK ZU No. 8/A/2006, item 109, part III points 1.5-1.6 of the statement of reasons).

2.5.2. Applying the above-mentioned requirements to challenged Article 4(1) of the Extradition Treaty with the USA, the Constitutional Tribunal states that the said provision expresses the elements of a legal norm which authorises the executive authority of the Requested State (for Poland: the Minister of Justice - the Public Prosecutor-General, or a person designated by him/her; for the United States of America: the Secretary of State or a person designated by the Secretary of State – on the basis of Article 25 of the Extradition Treaty with the USA) to extradite its own nationals sought for prosecution or found guilty of extraditable offences by the authorities of the Requesting State, if, in its discretion, it be deemed proper and possible to do so. Thus, in Article 4(1) of the Extradition Treaty with the USA, the Contracting States set out the following elements of a legal norm: a competent authority, an action which is to be taken by the said authority, a person subject to the action, the circumstances of applying the norm and premisses which the competent authority needs to take into account. Also, it should be noted that, in the current legal system, Article 4(1) of the Extradition Treaty with the USA is linked to both Article 55 of the Constitution as well as Article 615(2) of the Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws - Dz. U. No. 89, item 555, as amended), the normative character of which raises no doubt.

2.6. Pursuant to Article 79(1) of the Constitution, the infringement of constitutional rights or freedoms results from issuing a final decision by a court or organ of public administration on the basis of unconstitutional provisions of a statute or another normative act. What follows from the content of the said provision is that a constitutional complaint is admissible only when a complainant indicates a final decision which s/he relates to the infringement of constitutional rights or freedoms. The indication of the final decision makes it possible to verify the legal interest of the complainant, in the context of requesting the Constitutional Tribunal to determine the constitutionality of a normative act that constitutes the legal basis of the said final decision (see the decisions of the Constitutional

Tribunal of: 17 June 1998, Ref. No. Ts 22/98, OTK ZU No. 5/1998, item 76, and 8 September 1999, Ref. No. Ts 87/99, OTK ZU No. 7/1999, item 182).

2.6.1. The term "final decision" is autonomous with regard to terms used in the statutory provisions of procedural law. This entails that, when determining its meaning, one may not make direct reference to terms specified in the context of statutory procedural regulations. The phrase "final decision" appears in none of the binding statutes which regulate procedural issues. The Constitutional Tribunal has pointed out that the phrase "final decision" is a term which is as general as possible in character and which refers to any type of final determination arrived at in any type of proceedings before courts and organs of public administration (see the decision of 5 December 1997, Ref. No. Ts 14/97, OTK ZU No. 1/1998, item 9).

There is a well-established view in the jurisprudence of the Constitutional Tribunal that a final decision is a determination which, in a legally effective way, specifies the legal situation of a complainant as regards his/her rights or freedoms set out in the Constitution (see the decision of the Constitutional Tribunal of 7 September 1998, Ref. No. Ts 67/98, OTK ZU No. 5/1998, item 75 and the subsequent ones).

The bench adjudicating in the present case shares the view of the Constitutional Tribunal which was expressed in the decision of 24 November 2004, ref. no. Ts 57/04, that: "(...) the premiss of issuing a final decision in a given case (Article 79(1) *in fine* of the Constitution) may not be regarded as tantamount to the premiss of exhausting all legal means (Article 46(1) of the Constitutional Tribunal Act). These regulations are closely related, but they are not identical. The requirement that a court or organ of public administration should issue a decision concerning constitutional rights, freedoms or obligations of a complainant is set out in Article 79(1) of the Constitution. What stems from that Article is the obligation, provided for in Article 47(2) of the Constitutional Tribunal Act, to submit a constitutional complaint together with «the judgment, order or another ruling». By contrast, the requirement to «try all legal means» has been established in Article 46(1) of the Constitutional Tribunal Act, within the scope of the legislator's competence to specify rules for submitting constitutional complaints, and therefore the legislator could exclude the application of that requirement in a situation where no legal means are provided for. It should be assumed that as regards specifying the rules for submitting constitutional complaints, Article 46(1) of the Constitutional Tribunal Act determines only a time-limit for submitting them as well as the meaning of the term «final decision», from the service of which the time-limit for submitting the constitutional complaint runs. Pursuant to the Act, in the event of the lack of appellate measures, the requirement to try all legal means is irrelevant, and a complainant may submit a constitutional complaint on the basis of a decision concerning his/her rights, freedoms or obligations set out in the Constitution. However, it should not be assumed that the «ordinary» legislator has the right to modify the constitutional requirements of admissibility of a constitutional complaint, and in particular that he may modify the premisses which were precisely specified in the Constitution itself. Indeed, the Constitutional Tribunal has emphasised a number of times that statutes need to be interpreted in the light of the Constitution, since interpreting the Constitution by making reference to the content of terms used in statutes would contradict the significance of the

Constitution as «the supreme law»" (OTK ZU No. 5/B/2004, item 300).

2.6.2. As it has already been stated by the Tribunal, a constitutional complaint is admissible only when a complainant indicates a final decision which has infringed his/her constitutional rights or freedoms. The indication which determination the complainant considers to be the final one partially outlines the scope of the constitutional complaint, and thus binds the Tribunal, pursuant to Article 66 of the Constitutional Tribunal Act. This entails that the Tribunal may not fulfil the obligation to indicate the final decision in the constitutional complaint for the complainant (see the decision of 17 November 1999, Ref. No. Ts 87/99, OTK ZU No. 7/1999, item 183).

2.6.3. What follows from the constitutional complaint of 19 August 2009 is that the complainant holds the view that his constitutional rights or freedoms were infringed in relation to the decision of 28 July 2009, issued by the Court of Appeal in Kraków, the 2nd Criminal Division (Ref. No. II AKz 296/09), which upheld the decision of 9 June 2009, issued by the Circuit Court in Kraków, the 3rd Criminal Division (Ref. No. III Kop 48/09). By contrast, in his procedural letter of 20 October 2009, the complainant stated that the final decision concerning his rights was the decision of 24 August 2009 issued by the Minister of Justice on the extradition of and partial refusal to extradite a person sought by a foreign state (Ref. No.PR VI Oz 597/08/E; hereinafter: the decision of the Minister of Justice). Due to its character and content, the procedural letter of 20 October 2009 is not a separate (new) constitutional complaint lodged with the Constitutional Tribunal, but it is a letter by means of which the complainant modified the constitutional complaint of 19 August 2009. In the said letter, the complainant wrote as follows: "With regard to the way in which the complainant's rights or freedoms have been infringed, I primarily point out that due to the fact that on 24 August 2009 the Minister of Justice issued his decision on the extradition of and partial refusal to extradite the complainant to the USA, I supplement the constitutional complaint [underlined by the complainant], explicitly indicating the decision of 24 August 2009 (Ref. No. PR VI Oz 597/08/E), issued by the Minister of Justice, as the final decision on the complainant's rights and obligations".

2.6.4. In accordance with the dispositive principle and the principle stating that the Tribunal may adjudicate only upon an application, which are binding in proceedings before the Constitutional Tribunal, the Tribunal is obliged to regard the complainant's letter of 20 October 2009 as the substantive modification of the complaint, consisting in the indication of the decision of 24 August 2009 issued by the Minister of Justice as the final decision in the complainant's case. Therefore, it is vital for these proceedings to determine whether the decision indicated by the complainant is actually the final decision within the meaning of Article 79(1) of the Constitution.

2.7. Extradition proceedings

2.7.1. The provisions of the Code of Criminal Procedure provide for three stages of extradition proceedings. The first stage – where the authority of a foreign state (the requesting state) files a request for extradition – takes place before a public prosecutor. The prosecutor questions a person mentioned in the extradition request and, to the extent this is possible, secures evidence available in Poland. The prosecutor files the case with a circuit court that has territorial jurisdiction in that regard, and this marks the beginning of the

second stage of extradition proceedings. At the third and last stage, extradition proceedings are conducted by the Minister of Justice, who may extradite the person sought by the foreign state or may refuse to grant extradition (see S. Steinborn, [in:] *Kodeks postępowania karnego. Komentarz*, Vol. 2, J. Grajewski (ed.), Warszawa 2010, pp. 733-734).

Pursuant to the provisions of the Code of Criminal Procedure, during its session, the circuit court shall issue an order on the admissibility of the extradition of the person sought. Before such an opinion is issued, the said person should be given an opportunity to submit explanations, orally or in writing. If extradition is sought in order to institute criminal proceedings, upon the well-founded request of the said person, evidence-taking proceedings should be conducted with respect to the evidence available in Poland (Article 603(1) of the Code of Criminal Procedure). The defence counsel for the said person shall have the right to participate in the session (Article 603(2) of the Code of Criminal Procedure).

Pursuant to Article 604(1), extradition shall be inadmissible if: 1) the person sought for extradition is a Polish citizen or has been granted the right of asylum in the Republic of Poland; 2) the act bears no characteristics of a prohibited act, or if a relevant statute stipulates that the act shall not constitute an offence or that the perpetrator of the act shall not commit an offence or shall not be subject to penalty; 3) the limitation period has elapsed; 4) criminal proceedings have been validly concluded with regard to the same act committed by the same person; 5) the extradition would contravene Polish law; 6) there are grounds for fearing that in the state moving for extradition, a death sentence may be issued for the extradited person or later executed; 7) there are grounds for fearing that in the state moving for extradition, the extradited person may be subject to torture; 8) extradition of a person suspected of the commission of a crime for political reasons but without the use of force.

By contrast, in accordance with Article 604(2) of the Code of Criminal Procedure, extradition may be refused, in particular, if: 1) the person sought for extradition has permanent residence in Poland; 2) the criminal offence was committed on the territory of the Republic of Poland, or on board a Polish vessel or aircraft; 3) criminal proceedings are pending with regard to the same act committed by the same person; 4) the offence is subject to prosecution on a private charge; 5) pursuant to the law of the requesting state, the offence committed is subject to the penalty of deprivation of liberty for a term not exceeding one year, or to a lesser penalty or such a penalty has been actually imposed; 6) the nature of the offence referred to in the extradition request is military or fiscal in character, or political in character but other than the one mentioned in Article 604(1)(8), as well as 7) the requesting state does not guarantee reciprocity in this matter.

2.7.2. Where the Republic of Poland is bound by a ratified international agreement, as in the present case, pursuant to Article 615(2) of the Code of Criminal Procedure, the provisions enumerated above (Part XIII of the Code) shall not apply if the international agreement to which the Republic of Poland is a party or a legal act which regulates the functioning of an international criminal court stipulates otherwise. As the Supreme Court stated in the decision of 29 August 2007 (Ref. No. II KK 134/07, OSNwSK No. 1/2007, item 1887): "Article 615(2) of the Code of Criminal Procedure stipulates that the

provisions of Part XIII of the Code (including also Article 611b of the Code) shall not apply if an international agreement to which the Republic of Poland is a party stipulates otherwise. This is related to the constitutional principle of primacy of an international agreement ratified by Poland over a statute, when the latter is incompatible with the former".

Despite the fact that the Code of Criminal Procedure has been amended, the view presented by the Supreme Court in the decision of 29 July 1997 (Ref. No. II KKN 313/97, OSNKW No. 9-10/1997, item 85) is still valid: "the legislator has granted the freedom of adjudication to the court adjudicating on an extradition request filed by a foreign state in the sense that the court has the jurisdiction to determine whether it specifically follows from the binding provisions of law, including bilateral and multilateral international treaties, if it is admissible or not to extradite the person sought by the requesting state".

2.7.3. Therefore, the courts adjudicating in the complainant's case had to apply the provisions of the Code of Criminal Procedure, taking into account the stipulations of the Extradition Treaty with the USA.

2.7.4. The person sought for extradition by the requesting state has the right to appeal against an order on the admissibility of extradition issued by the court before the case is referred to the Minister of Justice for him/her to grant or refuse extradition (Article 603 of the Code of Criminal Procedure). However, the review of a court examining the appeal is solely to determine whether there are any obstacles to extradition which result in the inadmissibility of the request for extradition of the person sought by the requesting state, as enumerated in Article 604(1) of the Code or in a relevant international agreement, for the circumstances indicated in Article 604(2) of the Code, on the basis of which extradition may be refused, may not constitute the grounds for the court to adjudicate that extradition is legally inadmissible (see M. Płachta, [in:] J. Grajewski, L. K. Paprzycki, M. Płachta, *Kodeks postępowania karnego. Komentarz*, Vol. 2, Kraków 2003, pp. 604-606; S. Steinborn, *op.cit*., pp. 751-752; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz do art. 468-682,* Vol. 3, P. Hofmański (ed.), Warszawa 2007, pp. 593-594, as well as the decision of the Court of Appeal in Lublin, dated 12 November 2007, Ref. No. II AKz 339/07, Lex No. 357215).

2.7.5. Pursuant to Article 603(3) of the Code of Criminal Procedure, if the court adjudicates that extradition is inadmissible in a given case, then the extradition may not take place. However, if the court determines that the extradition is admissible, the Minister of Justice extradites the person sought by the authorities of the requesting state or refuses to extradite the person on the grounds of the so-called relative obstacles to extradition enumerated in Article 604(2) of the Code of Criminal Procedure or obstacles of a different character, including political or humanitarian ones (see M. Płachta, *op cit*., p. 595; S. Steinborn, *op.cit*., p. 742; P. Hofmański, E. Sadzik, K. Zgryzek, *op.cit*., p. 585).

2.7.6. The legislator used the verb "to decide" in Article 603(5) and Article 603a(5) of the Code of Criminal Procedure with regard to actions taken by the Minister of Justice in the course of extradition proceedings, which might *prima facie* suggest that the Minister of Justice shapes the legal situation of the person sought. In order to determine the implication of "deciding" in that regard on the part of the Minister of Justice, in the light of Article 603(5) and Article 603a(5) of the Code of Criminal Procedure, reference should be

made to the well-established practice of the legal model of extradition proceedings, adopted in the Polish legal system, and the purpose of such proceedings.

In the resolution of 17 October 1996 (Ref. No. I KZP 27/96, OSNKW No. 1-2/1997, item 1), issued by a bench of seven Justices, the Supreme Court held that: "Also, one may not agree with the arguments (...) that an order on the admissibility of extradition does not close proceedings, within the meaning of Article 463(1) of the Code of Criminal Procedure, as it is not binding for the Public Prosecutor-General [at present: the Minister of Justice]; not to mention the fact that Article 463(1) of the Code [at present: Article 519, first sentence, of the Code] does not impose any requirements on the binding character of the order challenged by means of a cassation appeal. Moreover, there is a need to clarify the meaning of the term «binding» more precisely, as used in Article 533(2) of the Code [at present: Article 603(3) of the Code]. By stipulating that a legally effective court order on the legal inadmissibility of extradition is binding, the said provision only determines that, in such a case, the Public Prosecutor-General [at present: the Minister of Justice] may not decide to extradite the person sought. However, it would be inappropriate to draw a conclusion to the contrary on the basis of Article 533(2) of the Code of Criminal Procedure [at present: Article 603(3) of the Code] that the Public Prosecutor-General [at present: the Minister of Justice] is in no way bound by a court order on the admissibility of extradition. The Public Prosecutor-General [at present: the Minister of Justice] is not bound by the said order in a sense that despite the admissibility of extradition has been confirmed by the court, for other reasons than legal ones, s/he may refuse to extradite the person sought. Nevertheless, the said order is binding in a different sense; namely, the Public Prosecutor-General [at present: the Minister of Justice] may not – contrary to the opinion of the court – on the basis of his/her own different assessment of legal premisses, deem that extradition is legally inadmissible in a given case. Indeed, the issue of determining the legal admissibility of extradition has been included within the scope of jurisdiction of the court, by virtue of the regulation in force".

The above interpretation provided by the Supreme Court with regard to the provisions of the Code of Criminal Procedure is still valid.

2.7.7. The Constitutional Tribunal states that, in the context of the version of the Code of Criminal Procedure which is currently in force, if the court issues an order on the inadmissibility of extradition, the Minister of Justice may not extradite the person sought by the authorities of the requesting state. A court order on the admissibility of extradition also binds the Minister of Justice in the sense that s/he may not, contrary to the court order, deem that the extradition is legally inadmissible. However, in such a situation, the Minister of Justice may extradite the person sought by the authorities of the requesting state or may refuse to do so.

2.7.8. What follows from the above considerations is that the model of extradition proceedings, adopted in Polish law, entails that the admissibility of extradition in a given case is determined by courts (Article 55(5) of the Constitution as well as Article 603 in conjunction with Article 604(1) of the Code of Criminal Procedure), and then a decision on the relevant extradition request is made by the executive authority – the Minister of Justice.

The characteristics of the said proceedings have been aptly described by Z. Cybichowski: "Extradition has two aspects: a legal one and a political one; the former

comprises the objective assessment of legal issues, with regard to which a court is the most competent; the latter concerns foreign relations, and here the decision should be made by the government. An extradition request which is legally inadmissible should not be taken into account for political reasons; however, politics may require that a legally admissible request be rejected, e.g. in the case of the outbreak of a revolution in the requesting state or in retaliation for an unlawful action taken by that state" (Z. Cybichowski, *Prawo międzynarodowe. Publiczne i prywatne*, Warszawa 1932, pp. 528-529).

2.7.9. Granting courts the jurisdiction to examine whether there are no absolute obstacles to the extradition of a given person to the authorities of the requesting state, and granting the Minister of Justice the power to decide whether to extradite the person sought by the authorities of the requesting state, or whether to refuse to do so, ensures the effective realisation of the objective of extradition proceedings, which is to extradite the person sought as expeditiously as possible so that the person could be put on trial before a court of the requesting state which has the territorial jurisdiction and the jurisdiction ratione materiae in a given case.

2.7.10. In conclusion, the Constitutional Tribunal states that the actual extradition of a person sought by the authorities of the requesting state is directly preceded not by court proceedings, but by *sui generis* proceedings conducted by the Minister of Justice, on the basis of the provisions included in the Code of Criminal Procedure. A court decision on the inadmissibility of extradition rules out the extradition. By contrast, a court decision on the admissibility of extradition results in a situation where the Minister of Justice may not, in disregard of the court ruling and on the basis of his/her own different assessment of legal premisses, state that extradition is inadmissible in a given case; however, the Minister may refuse to grant extradition due to the occurrence of the so-called relative obstacles to extradition, enumerated in Article 604(2) of the Code of Criminal Procedure, or obstacles to extradition enumerated in Article 604(2) of the Code of Criminal Procedure, or obstacles of a different character, including political or humanitarian ones.

2.8. In the jurisprudence of the Constitutional Tribunal, there is a well-established view that a decision issued by an organ of public authority is final in character when an appellant has exhausted all appellate measures, and no proceedings are pending in the course of which the said decision may be changed or revoked. The Constitutional Tribunal may only be involved when all procedures to resolve the case have been exhausted. Thus, a constitutional complaint fulfils the premiss provided for in Article 79 of the Constitution only when there are no more possibilities of subjecting a judgment, decision or another determination to review provided for in a given procedure (see the decisions of the Constitutional Tribunal of: 5 December 1997, Ref. No. Ts 14/97; 21 January 1998, Ref. No. Ts 27/97, OTK ZU No. 2/1998, item 19; 20 May 1998, Ref. No. Ts 76/98, OTK ZU Annex/1999, item 53; 1 September 1998, Ref. No. Ts 107/98, OTK ZU Annex/1999, item 79).

2.8.1. With regard to the case of the complainant, the Court of Appeal in Kraków, in its decision of 28 July 2009 (Ref. No. II AKz 296/09), upheld the decision of 9 June 2009 (Ref. No. III Kop 48/09) on the admissibility of extraditing the complainant to the USA for the purpose of prosecution in the case *07-80128-CR-Hurley*, concerning fraud,

as well as the inadmissibility of extraditing him to the USA for the purpose of prosecution in the case *05-80089-CR-Cohn*, regarding a false statement and perjury. Subsequently, the Minister of Justice issued his decision on the extradition of and partial refusal to extradite the person sought (the complainant) to the foreign state (the decision of 24 August 2009, Ref. No. PR VI Oz 597/08/E).

2.9. Aiming for the most complete protection of the constitutional rights and freedoms, the Tribunal states that, in extradition proceedings, both the decision of a court of appeal ruling on an appeal against a decision issued by a circuit court as well as the decision issued by the Minister of Justice may be regarded as a final decision within the meaning of Article 79 of the Constitution. In extradition proceedings, a ruling issued by a court ultimately determines the legal situation of the person sought, as regards the admissibility of extraditing the person sought by the requesting state, and the decision of the Minister of Justice finally resolves whether the person sought will actually be extradited to the requesting state, or whether the said person will not be surrendered.

Depending on which of the determinations the complainant indicates as the final decision in his case – the lapse of the three-month time-limit for submitting a constitutional complaint will be counted from the moment of service of either the decision of the court of appeal on the complainant's appeal or the decision of the Minister of Justice regarding the extradition of the person sought by the foreign state. Hence, the complainant may challenge the constitutionality of legal provisions on the basis of which the court adjudicated on the admissibility of extradition as well as legal provisions on the basis of which the Minister of Justice issued his decision on the extradition of the said person to requesting state.

2.10. When examining the issue of admissibility of the extradition of the complainant after the Supreme Court considered the cassation appeal filed by the Public Prosecutor-General, the Circuit Court in Kraków, the 3rd Criminal Division, in its decision of 9 June 2009 (Ref. No. III Kop 48/09), indicated Article 4 of the Extradition Treaty with the USA as the basis for its determination. Also, the Court of Appeal in Kraków, while examining the complainant's appeal against the decision of the court of the first instance, made reference in the statement of reasons for its ruling to Article 4 of the Extradition Treaty with the USA (the decision of 28 July 2009, Ref. No. II Akz 296/09). The Minister of Justice did not at all indicate the legal basis of his decision of 24 August 2009 on the extradition of and partial refusal to extradite a person sought by a foreign state (Ref. No. PR VI Oz 597/08/E)

2.11. The legal basis of the final determination in the case

2.11.1. In accordance with the well-established jurisprudence of the Tribunal, the subject of its review proceedings commenced by way of constitutional complaint is the legal basis of the final determination issued by a court or an organ of public administration in a complainant's case. The term "legal basis" has an autonomous meaning in the context of constitutional provisions regulating the institution of a constitutional complaint. Due to the character of a constitutional complaint, it may not be regarded as identical to the

provision which constituted the normative (competence, procedural) basis of the final determination. Such narrowed-down understanding of the term “legal basis” would result in negating the essence of a constitutional complaint. The said complaint is a means of protecting the constitutional rights and freedoms of the individual, which serve the elimination of the unconstitutional normative act from the legal system. One may state that a challenged normative act was, in a constitutional sense, the basis of a final determination when the said determination – with the same subject and scope of the case – would be or could be different in the case where a given legal norm challenged by the complainant was not binding. At the same time, it is not crucial whether a given organ of public authority, before which the resolved case was carried out, explicitly referred to the provision challenged by the complainant or whether used the said provision as a substantive premiss of the application of law in a given case (see the decisions of the Constitutional Tribunal of: 9 November 1999, Ref. No. Ts 19/99, OTK ZU No. 7/1999, item 181; 6 February 2001, Ref. No. Ts 139/00, OTK ZU No. 2/2001, item 40).

2.11.2. As the Tribunal has stated in point 2.5.2 of part III of the statement of reasons for the judgment in the present case, Article 4(1) of the Extradition Treaty with the USA contains the elements of a legal norm which authorises an executive authority (for Poland: the Minister of Justice - the Public Prosecutor-General, or a person designated by him/her; for the United States of America: the Secretary of State or a person designated by the Secretary of State) to extradite their own nationals sought for prosecution or found guilty of extraditable offences by the authorities of the Requesting State, if in its discretion, it be deemed proper and possible to do so. The courts adjudicating on the extradition of the complainant had also to apply Article 4(1) of the Extradition Treaty with the USA, which follows from Article 55(2) of the Constitution as well as from Article 615(2) of the Code of Criminal Procedure.

2.11.3. To conclude, the Constitutional Tribunal has stated that challenged Article 4(1) of the Extradition Treaty with the USA constituted the basis of the decision of the Minister of Justice, which the complainant indicated as the final decision in his case, and therefore the said provision may be subject to constitutional review in proceedings commenced by constitutional complaint.

3. The issue of conformity of Article 4(1) of the Extradition Treaty with the USA to Article 55(1) and (2) in conjunction with Article 2 of the Constitution

3.1. In the opinion of the complainant, Article 4(1) of the Extradition Treaty with the USA is inconsistent with Article 55(1) and (2) of the Constitution, as the possibility of extraditing a Polish citizen does not result from the content of an international agreement, which only refers to the system of law and leaves the determination about the admissibility of extradition of a Polish citizen at the administrative discretion of an official, without any clear premisses of such discretion. Moreover, Article 4(1) of the Extradition Treaty with the USA lacks sufficient specificity and is imprecise, and thus it fails to comply with the principle of a state ruled by law, expressed in Article 2 of the Constitution. Any restrictions on a prohibition against extradition must be stated explicitly, in accordance with constitutional standards, in particular since such a serious restriction of the sovereignty of

the state is directly linked to the most far-reaching restriction on the civil right to be tried in one's own country and the actual deprivation of a Polish citizen of support provided by his/her homeland. The international agreement referred to in Article 55(2) of the Constitution must indicate whether it is possible to extradite a Polish citizen in a way which does not raise any doubts. Moreover, the complainant alleged that Article 4(1) of the Extradition Treaty with the USA was inconsistent with the principle of the stability of law, as the content of the challenged provision of the Extradition Treaty with the USA did not allow to state whether it provided for a possibility of extraditing a Polish citizen as an exception to a prohibition against the extradition of Polish citizens, as well as what premisses should be taken into account by an administrative authority when taking such a decision.

3.2. Article 55(1) and Article 55(2) stipulate as follows:
"The extradition of a Polish citizen shall be prohibited, except in cases specified in paras 2 and 3" (Article 55(1));
"Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:
1) was committed outside the territory of the Republic of Poland, and
2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request" (Article 55(2)).

Article 55(1) and Article 55(2), which are currently in force, stem from amendments to the Constitution introduced by the Act amending the Constitution. In its previous version, Article 55 of the Constitution did not provide for the extradition of a Polish citizen.

3.3. The Constitutional Tribunal states that in Article 55(1), in 2006, the constitution-maker expressed a prohibition against extradition, but also indicated exceptions thereto, referring to Article 55(2) and (3) of the Constitution. Therefore, Article 55(1) may not be properly interpreted, if the provisions to which the constitution-maker refers are overlooked. As it follows from Article 55(2) of the Constitution, the extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if all the following requirements are met:

1) such a possibility stems from an international agreement ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member;
2) the act covered by a request for extradition was committed outside the territory of the Republic of Poland;
3) the act covered by a request for extradition constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law

in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

3.4. As the Tribunal has proved in point 2.3 of that part of statement of reasons, the Extradition Treaty with the USA, in the light of the Constitution which is currently in force, is an international agreement ratified with prior consent granted by statute, and thus it fulfils one of the premisses provided for in Article 55(2) of the Constitution: "extradition of a Polish citizen may be granted (...) if such a possibility stems from an international treaty ratified by Poland (...)".

3.5. In the *petitum* of the complaint, the complainant indicated Article 55(1) and (2) in conjunction with Article 2 of the Constitution as higher-level norms for the review of Article 4(1) of the Extradition Treaty with the USA.

The Constitutional Tribunal has on a number of occasions emphasised that Article 2 of the Constitution may not constitute an independent higher-level norm for constitutional review in proceedings commenced by way of constitutional complaint, as no specific rights or freedoms explicitly arise therefrom. For the protection of constitutional rights and freedoms in the course of review proceedings commenced by way of constitutional complaint, the basis should not be looked for in a general clause of a democratic state ruled by law, but in specific provisions of the Constitution which provide for particular rights and freedoms. Nevertheless, the Tribunal does not rule out indicating Article 2 of the Constitution as a higher-level norm for constitutional review in proceedings commenced by way of constitutional complaint, when – in conjunction with the said provision - a complainant mentions another constitutional norm establishing a right or freedom (see the judgments of the Constitutional Tribunal of: 12 December 2001, Ref. No. SK 26/01, OTK ZU No. 8/2001, item 258; 6 February 2002, Ref. No. SK 11/01, OTK ZU No. 1/A/2002, item 2; 16 December 2003, Ref. No. SK 34/03, OTK ZU No. 9/A/2003 item 102).

In the present case, in the *petitum* of the complaint, the complainant indicated Article 2 of the Constitution with regard to the allegation of infringing Article 55(1) and (2) of the Constitution, i.e. those provisions of the Constitution which establish a subjective right granted to every Polish citizen. Moreover, in the substantiation for the complaint, he argued that Article 4(1) of the Extradition Treaty with the USA was inconsistent with Article 55(1) and the principle of stability of law, expressed in Article 2 of the Constitution, due to "insufficient specificity" and "imprecision". Therefore, the Constitutional Tribunal concludes that Article 2 of the Constitution may fulfil the function of an auxiliary higher-level norm for the review in the present case.

3.6. The complainant alleges that no possibility of extraditing a Polish citizen arises from the content of the Extradition Treaty with the USA, which merely refers one to the legal system and leaves determining the admissibility of the extradition of a Polish citizen at the administrative discretion of an official, and – in addition – provides no clear premisses of such discretion. In the opinion of the complainant, an international agreement

referred to in Article 55(2) of the Constitution must, in a way that raises no doubt, indicate whether it is possible to extradite a Polish citizen. However, Article 4(1) of the Extradition Treaty with the USA lacks sufficient specificity and is imprecise, and thus it fails to comply with the principle of a state ruled by law, expressed in Article 2 of the Constitution. In the opinion of the complainant, any restrictions on a prohibition against extradition must be formulated explicitly, in particular since such a serious restriction of the sovereignty of the state is directly linked to the most far-reaching restriction on the civil right to be tried in one's own country and the actual deprivation of a Polish citizen of support provided by his/her homeland.

3.7. Poland is a party to numerous, bilateral and multilateral, international agreements concerning extradition. The agreements usually have a similar structure: first of all, they provide for a general obligation to take into account request for extradition; further on, they specify the premisses of considering extradition requests and obstacles to extradition; finally, they set out a procedure in cases concerning extradition requests regulated under an international agreement.

3.8. The Extradition Treaty with the USA matches the said characteristics. Pursuant to Article 1 of the Treaty: "The Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities in the Requesting State seek for prosecution or have found guilty of an extraditable offense".

The subsequent provisions of the Extradition Treaty with the USA specify premisses determining such an obligation. Article 2 and Article 3 of the Extradition Treaty with the USA set out a catalogue of offences the commission of which constitutes the basis of extradition, whereas Articles 4 to 8 of the Extradition Treaty with the USA indicate possible obstacles to extradition. By contrast, Articles 9 to 22 of the Extradition Treaty with the USA regulate certain aspects of proceedings concerning requests for extradition submitted on the basis of the Treaty.

3.8.1. Obstacles to extradition specified in extradition treaties may be absolute or relative in character. In the case of absolute obstacles to extradition, the Extradition Treaty with the USA states that "extradition shall not be granted"; by contrast, in the case of obstacles which are relative in character, it stipulates that "the Requested State may refuse extradition" (Article 6) or that "neither Contracting State shall be bound to" (Article 4(1)). In the Extradition Treaty with the USA, the following constitute absolute obstacles to extradition:

1) an offence of a political or military character (Article 5);

2) the person sought has been tried and convicted or acquitted with final and binding effect in the requested state for the same offence (the principle of *ne bis in idem*) (Article 7) as well as

3) prosecution or execution of a sentence has become barred by the statute of limitations of the requesting state (Article 8)

By contrast, the following have the character of relative obstacles to extradition:

a) the nationality of the person sought (Article 4) as well as

b) the fact that an offence is punishable by death under the laws in the requesting state (Article 6).

Pursuant to reviewed Article 4(1) of the Extradition Treaty with the USA: “Neither Contracting State shall be bound to extradite its own nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so”.

What follows from that provision is that nationality is not an absolute obstacle to extradition, and only the requested state may refuse to extradite its own national.

3.8.2. What follows from the stance presented by the Minister of Foreign Affairs in the present case (the letter of 12 July 2010, ref. no. DPT-224/2010/61210/JTW/78698) is that among the international agreements signed by Poland, the following contain an optional clause in accordance with which Polish nationality constitutes only a relative obstacle to extradition, apart from the Extradition Treaty with the USA: the European Convention on Extradition, done at Paris on 13 December 1957 (Journal of Laws - Dz. U. of 1994 No. 70, item 307) – Article 6(1)(a): “A Contracting Party shall have the right to refuse extradition of its nationals”; the Treaty between Australia and the Republic of Poland on Extradition, done at Canberra on 3 June 1998 (Journal of Laws - Dz. U. of 2000 No. 5, item 51) – Article 3(2), first sentence: “Each of the Contracting Parties shall have the right to refuse extradition of its nationals” as well as the Treaty between Great Britain and the Republic of Poland for the Mutual Extradition of Fugitive Criminals done at Warsaw on 11 January 1932 (Journal of Laws - Dz. U. of 1934 No. 17, item 135, as amended) – Article 4: “Each Party reserves the right to refuse or grant the surrender of its own subjects or citizens to the other Party”. In the case of the other bilateral extradition treaties entered into by Poland, Polish nationality constitutes an absolute obstacle to extradition.

3.8.3. For many years the United States have aimed at restricting or eliminating the possibility of refusing to extradite a given person solely on the basis of his/her nationality (see M.J. Garcia, Ch. Doyle, *Extradition To and From the United States: Overview of the Law and Recent Treaties*, CRS Report for Congress 2010, p. 13)

In the above-mentioned letter of 12 July 2010, the Minister of Foreign Affairs indicated that a prohibition against refusal to consider an extradition request due to the nationality of a person referred to in a request for extradition is explicitly stated in bilateral agreements concluded by the United States with: Argentina, Belize, Estonia, India, Jordan, Latvia, Lithuania, Paraguay, Peru, Romania, the Republic of South Africa, Sri Lanka, Trinidad and Tobago, the United Kingdom, Italy, Zimbabwe, as well as Switzerland, although in the context of the last one of the mentioned international agreements, extradition may be refused on the grounds of nationality if the requested state has jurisdiction to carry out criminal proceedings with regard to a person sought for extradition and a given extraditable offence.

The agreements concluded by the United States with Chile, Portugal, Slovakia and Venezuela contain the so-called simple optional clauses, which indicate that: “Under the stipulations of this Convention, neither of the Contracting Parties shall be bound to deliver up its own citizens or subjects”. The said agreements do not explicitly confirm the power of particular countries to extradite their own nationals, and at the same time they do not

introduce the fact of holding the nationality of the requested state as an absolute obstacle to extradition.

The clauses the wording of which is fundamentally identical to Article 4(1) of the Extradition Treaty with the USA occur in extradition treaties concluded by the United States with Australia, Korea, Spain (1970), Malaysia and New Zealand.

Similar clauses to the one contained in Article 4(1) of the Extradition Treaty with the USA, also occurs in extradition agreements concluded by the United States with Austria, Brazil, Cyprus, the Netherlands (1988) and Mexico, although in the content of those clauses there is reference to national law, e.g.: "Neither Party shall be bound to extradite its own nationals, but the executive authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper to do so and provided the law of the Requested State does not so preclude" (Treaty between the United States of America and Austria).

Agreements concluded by the United States with Bulgaria and Malta contain indirect solutions. They introduce a catalogue of offences, in the context of which there may be no refusal to extradite a given person on the grounds of his/her nationality, and additionally they confirm the power of the executive authority to grant consent to extradite its own nationals for offences falling outside of the scope of that catalogue.

Agreements concluded by the United States with Belgium, France, Luxembourg as well as Hungary provide for a mutual lack of obligation to extradite a given country's own nationals, and at the same time they authorise the United States to extradite their own nationals, e.g.: "Neither Contracting State shall be bound to extradite its own nationals, but the Executive Authority of the United States shall have the power to extradite such persons if, in its discretion, it be deemed proper to do so" (the Extradition Treaty Between the United States of America and the Kingdom of Belgium).

Different and detailed solutions are contained in agreements concluded by the United States with Japan, Bolivia and Greece. All of them, however, provide for extraditing their own nationals in certain circumstances.

Among the enumerated states which have signed extradition treaties with the United States, *inter alia* Brazil, Bulgaria, Malta and Italy exclude or restrict in their constitutions the admissibility of extraditing their own nationals.

3.9. Article 4(1) of the Extradition Treaty with the USA is an example of an optional clause which provides for the possibility of refraining from extraditing a country's own nationals. However, the said provision should be interpreted taking into account Article 1 of the Extradition Treaty with the USA, which gives rise to the obligation to extradite all persons sought for prosecution or found guilty of extraditable offences, regardless of their nationality. Despite the complainant's claims that the Extradition Treaty with the USA implies a possibility of extraditing a Polish citizen, and thus the requirement set out in Article 55(1) and (2) of the Constitution is met, namely that the extradition of a Polish citizen may be granted "(...) if such a possibility stems from an international treaty ratified by Poland (...)".

The constitution-maker does not require that a ratified international agreement necessitate the extradition of a Polish citizen. A requirement that suffices for a Polish

citizen to be extradited, within the meaning of the Constitution, is a regulation contained in a ratified international agreement where such a possibility is implied. In other words, the extradition of a Polish citizen is admissible not only when a ratified international agreement introduces such an obligation, but also when only such a possibility arises therefrom.

What follows from Article 1 of the Extradition Treaty with the USA is the obligation to extradite all persons sought for prosecution or found guilty of an extraditable offence; however, Article 4(1) of the said Treaty provides a ground for evading the said obligation, as nationality is not an absolute obstacle to extradition.

3.10. The complainant also alleges that Article 4(1) of the Extradition Treaty with the USA lacks sufficient specificity and is imprecise, and thus it infringes the principle of the stability of law, arising from Article 2 of the Constitution.

3.10.1. The requirement of specificity of legal provisions, understood as a requirement to formulate those provisions in a way that ensures a sufficient degree of precision when it comes to establishing their significance and legal consequences; it is regarded as one of the elements of the principle of protection of citizens' trust in the state, arising from Article 2 of the Constitution (see, in particular, the rulings of the Constitutional Tribunal of: 19 June 1992, Ref. No. U 6/92, OTK in 1992, part I, item 13; 1 March 1994, Ref. No. U 7/93, OTK in 1994, part I, item 5; 26 April 1995, Ref. No. K 11/94, OTK in 1995, part I, item 12 as well as the judgments of 17 October 2000, Ref. No. SK 5/99, OTK ZU No. 7/2000, item 254 and of 24 February 2003, Ref. No. K 28/02, OTK ZU No. 2/A/2003, item 13). Although the principle of specificity requires that terms lacking sufficient specificity should be used with great caution in legislation, it is impossible to completely rule them out (see the resolution of the Constitutional Tribunal of 6 November 1991, Ref. No. W 2/91, OTK in 1991, item 20 as well as the judgments of: 15 September 1999, Ref. No. K 11/99, OTK ZU No. 6/1999, item 116; 14 December 1999, Ref. No. SK 14/98, OTK ZU No. 7/1999, item 163 and 17 October 2000, Ref. No. SK 5/99).

In the case W 2/91, the Tribunal already stated that:
"the use of (...) imprecise terms in law may not *a priori* be regarded as legislative omission. Frequently the construction of a legal certain norm by means of such terms constitutes the only reasonable solution. Procedural norms safeguard the appropriate application of such a norm, which requires the indication of premisses that underlie the application of a legal norm constructed by means of such an imprecise term in a particular case".

In the judgment of 28 October 2009, in the case Kp 3/09, which summed up extensive jurisprudence (OTK ZU No. 9/A/2009, item 138, part III point 6.2. of the statement of reasons), the Constitutional Tribunal (full bench) noted that:
"The constitutional norm imposing the adherence to the principle of adequate specificity of legal regulations is a legal principle. This imposes on the legislator the obligation to optimise in the law-making process. The legislator should strive for the complete fulfilment of the requirements constituting this principle. Therefore, the degree of specificity of particular regulations is subject to relativisation, on a case-to-case basis, with

regard to the actual and legal circumstances which concern the regulation being made. This relativisation is a natural consequence of vagueness of the language in which legal texts are drawn up as well as of the variety of matters that are subject to regulation. For the above reasons, the legislator is obliged to make legal provisions which would be as specific as it is possible in a given case, in respect of both the content as well as the form. The two dimensions of specificity of law comprise criteria which were pointed out on numerous occasions in the jurisprudence of the Constitutional Tribunal, namely: precision of a legal regulation, clarity of a provision and its legislative correctness. These criteria constitute the so-called test of specificity of law, which should be applied to every examined regulation".

Precision of a legal regulation should be understood as a possibility of decoding unambiguous legal norms (as well as their consequences) from provisions, by means of interpretative rules applied in a given legal culture. In other words, the requirement of specificity of legal provisions should be understood as a requirement to formulate the provisions in such a way that they would ensure a sufficient degree of precision when it comes to determining their meaning and legal effects.

Clarity of a provision is to guarantee its communicativeness to its addressees. In other words, this is about comprehensibility of a provision on the basis of general language. The requirement of clarity means an imperative to create provisions which are comprehensible to their addressees who have the right to expect, from a reasonable legislator, that the norms enacted will not raise doubts as to the obligations they impose or the rights they grant.

The criteria for correctness of legal provisions are relatively the easiest to diagnose. Correctness means that a provision meets the requirements of appropriate legislation, which are set out in the Rules on Legal Drafting. These are requirements pertaining to the technical aspect of legal drafting and are of secondary character in relation to the first two criteria, i.e. the requirement of correctness is to guarantee such wording of legal norms which will ensure their precision and clarity (*ibidem* as well as the rulings of the Constitutional Tribunal cited therein).

At the same time, the Tribunal pointed out that: "In order to regard a regulation as unconstitutional, when an applicant challenges its specificity, it is not sufficient to state abstractly that the wording of the law is vague. Not in every case, imprecise wording and vague content of a provision justify eliminating it from the legal system, by decision of the Constitutional Tribunal. In the opinion of the Tribunal, it may be justified to rule the provision lacking in clarity and precision as unconstitutional as long as its deficiencies are so considerable that the discrepancies arising from them may not be eliminated by means of ordinary measures, aimed at eliminating inconsistencies in the application of law. Rendering a provision invalid, due to the fact that it lacks in clarity and precision, should be regarded as a last-resort measure, applied when other methods of ruling out doubts as to the content of the provision, in particular by interpreting it, will prove insufficient" (*ibidem,* part III point 6.3.1. of the statement of reasons as well as the rulings of the Constitutional Tribunal cited therein).

Also, the Tribunal stated that: "The assessment of the constitutionality of a normative act always has to have a complex character. In the case of specificity, the complexity of that process is observed at two levels. Firstly, with reference to the analysis

of specificity alone, the aforementioned aspects of the test of adequate specificity of law (precision, clarity, appropriateness) need to be taken into account in the first place, and then, in the right proportion, they should be referred to the character of the regulation under review. The other level is the axiological context, in which the constitutional review of norms is conducted. This context comprises the interpretation of the entirety of constitutional rules, principles and values, with which the norm under review needs to be confronted; the interpretation of the norm has been derived from the provision which was previously subject to formal review (in respect of specificity)" (*ibidem*).

3.10.2. An international agreement, regardless of when it was concluded and regardless of its subject and the procedure for its introduction into the legal system, must be consistent with the Constitution and is subject to the jurisdiction of the Tribunal (Article 188(1) of the Constitution). Thus, what follows from the Constitution is the obligation vested in all organs of public authority of the Republic of Poland, taking part in a procedure for binding the Republic of Poland with an international agreement, to ensure that its provisions should be consistent with the Constitution. In particular, the said obligation is addressed to the Council of Ministers as a body authorised to conclude international agreements requiring ratification as well as accept and renounce other international agreements (Article 146(4)(10) of the Constitution).

However, while reviewing the constitutionality of international agreements, the Constitutional Tribunal must take into account their character. In that regard, the Tribunal shares the stance presented during the hearing by the representatives of the Minister of Foreign Affairs that the following features distinguish an international agreement from acts of domestic law: firstly, when drafting the content of an agreement, contracting states do not have complete freedom as regards determining the said content – indeed, it follows from the essence of the agreement that it is a compromise which takes into account the interests and values of sovereign states as long as they are willing to be bound by the agreement; secondly, an international agreement not only reconciles the interests of contracting states, but it is also constructed in such a way that it could be applied in at least two legal systems, taking into account such values and traditions. Thirdly, when interpreting an international agreement, one should rely on the methods of interpretation and semantic tools developed as part of the doctrine of autonomous interpretation in international law so that the contracting states can work out their agreed intentions. This way, a situation is avoided where an international agreement has different content in each of the states applying it. Fourthly, an international agreement has a double effect: it may grant rights or impose obligations, also with regard to citizens who are not parties to such an agreement (an effect in the domestic law), as well as it obliges contracting states to take particular actions in order to loyally fulfil the accepted obligation.

The Tribunal states that the necessity to reconcile different cultures and legal systems that arises therefrom entails that the principle of specificity of legal provisions, understood in the same strict sense as in the context of national provisions, could become an impediment to concluding international agreements with other states. Taking into account the fact that international agreements are consensual sources of law, the Constitutional Tribunal states that the principle of specificity of legal provisions, which arises from Article 2 of the Constitution, has appropriate application merely to the

provisions of international agreements. When assessing the conformity of international agreements to the principle of specificity of legal provisions, one should in particular bear in mind the need to cooperate with other states, which is mentioned in the Preamble to the Constitution: "(...) aware of the need for cooperation with all countries for the good of the Human Family (...)".

3.10.3. Referring the above findings to the allegation of unconstitutionality of Article 4(1) of the Extradition Treaty with the USA, in the context of the higher-level norms for the review indicated by the complainant - Article 55(1) and (2) in conjunction with Article 2 of the Constitution, the Tribunal states that Article 4(1) of the Treaty may not be interpreted in isolation from the other provisions of the Treaty. Indeed, the said provision does not constitute an autonomous basis of extraditing a Polish citizen. The extradition of a Polish citizen is only possible when other premisses of admissibility of a request have been fulfilled and a legally effective court ruling has been issued, stating that none of the obstacles to extradition set out in Article 604(1) of the Code of Criminal Procedure has occurred.

The Tribunal also states that, due to political determinants related to the extradition of a person sought by the authorities of the requesting state, the participation of the Minister of Justice in extradition proceedings is a consequence of the constitutional power of the Council of Ministers to carry out foreign policy (Article 146(1) and Article 146(4)(9) of the Constitution) as well as the separation of powers (Article 10 of the Constitution).

At the same time, the Tribunal notes that granting the executive authority of the requested state the power to extradite its own nationals, in Article 4(1) of the Extradition Treaty with the USA, "(...) if, in its discretion, it be deemed proper and possible to do so", does not mean entrusting this authority with a discretionary power that is absolute in character and is isolated from any criteria for the legitimacy of action. Indeed, the said provision provides for the consent of the Minister of Justice to the extradition of a Polish citizen only when this is "possible", as well as "proper".

The Constitutional Tribunal shares the stance of the Minister of Foreign Affairs (the letter of 12 July 2010, ref. no. DPT-224/2010/61210/JTW/78698) that the term "possibility" refers both to the admissibility of considering an extradition request in the light of the premisses of and obstacles to extradition set out in the Extradition Treaty with the USA and the Code of Criminal Procedure, as well as to an actual possibility which depends, for instance, on the fact whether the person sought is subject to the jurisdiction of the requested state or on the state of health of the person.

By contrast, describing extradition as "proper" refers to the realm of sovereign powers of the requested state that decides to extradite a given person, which may be affected by other considerations than merely legal ones. The admissibility of extradition of the person sought by the requesting state is determined by the court, on the basis of the provisions of extradition treaties that are binding for Poland and Article 604(1) of the Code of Criminal Procedure, and subsequently the extradition request is considered by the executive authority – the Minister of Justice. In the case where the court rules extradition to be inadmissible in a given case, the Minister of Justice may not extradite a person sought by the requesting state. However, if the court determines that the extradition is admissible, the Minister of Justice may extradite the person sought by the requesting state

or may refuse to extradite the person due to relative obstacles to extradition enumerated in Article 604(2) of the Code of Criminal Procedure, or other obstacles of a different character, including political or humanitarian considerations.

3.11. It has been inapt for the complainant to allege that the Republic of Poland as a party to the Extradition Treaty with the USA, did not want extradition for its citizens, as the said Treaty entered into force after the enactment of the Constitution, which provided for an absolute prohibition against the extradition of Polish citizens, and amendments to the Constitution, which were made to introduce an exception to the general prohibition against the extradition of Polish citizens, were related to regulations concerning a European arrest warrant.

The Extradition Treaty with the USA was signed at Washington on 10 July 1996, i.e. at the time when the Small Constitution was in force and when certain provisions of the Constitution of 1952 were still binding, which did not regulate a prohibition against the extradition of Polish citizens. Thus, at the moment of concluding the Extradition Treaty with the USA and the ratification thereof, the Polish legal system lacked a binding norm which would absolutely prohibit the extradition of Polish citizens. By contrast, the amendment to the Constitution made by the Act amending the Constitution - although it ensued from the judgment of the Constitutional Tribunal of 27 April 2005 in the case P 1/05 (OTK ZU No. 4/A/2005, item 42), in which the Tribunal adjudicated on the unconstitutionality of Article 607t(1) of the Code of Criminal Procedure, insofar as it allowed for the surrender of a Polish citizen to a Member State of the European Union on the basis of a European arrest warrant - it was not limited merely to the implementation of the European arrest warrant.

In the explanatory note for the Bill amending the Constitution, the President, who submitted the Bill, indicated that the amendment to the Constitution "would also concern the surrender of a Polish citizen on the basis of a request filed by the International Criminal Court" (the Sejm Paper No. 580/5th term of the Sejm, p. 3). In his expert opinion on the said Bill and the Bill amending the Code of Criminal Procedure (the Sejm Paper No. 580 and 581), commissioned by the Bureau of Research of the Chancellery of the Sejm, P. Hofmański pointed out that "extradition may take on three different forms:

– surrendering a person to a foreign state (regulated in chapter 65 of the Code of Criminal Procedure),
– surrendering a person to another Member State (regulated in chapter 65a of the said Code) as well as
– bringing a person before the International Criminal Court (regulated in chapter 66a of the said Code)" ("Opinia o projekcie ustawy o zmianie Konstytucji RP oraz o projekcie ustawy o zmianie ustawy – Kodeks postępowania Karnego (Druki nr 580 i nr 581) z 1 czerwca 2006 r.", [in:] *Nowelizacja art. 55 Konstytucji RP przez Sejm V kadencji, Druki sejmowe nr 580, 876*, Biuro Analiz Sejmowych Kancelaria Sejmu 2006, Issue No. 1, p. 20; likewise: A. Grzelak, an expert on legislation, "Opinia prawna w sprawie projektów ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej oraz o zmianie ustawy Kodeks postępowania karnego (druki nr 580 i 581) z 8 czerwca 2006 r.", [in:] *Nowelizacja art. 55 Konstytucji RP*

przez Sejm V kadencji, Druki sejmowe nr 580, 876, Biuro Analiz Sejmowych Kancelaria Sejmu 2006, Issue No. 1, pp. 22-23).

The said expert opinions were discussed at the meetings of an Extraordinary Commission appointed to examine the draft statutes amending the Constitution of the Republic of Poland and the Code of Criminal Procedure (see *Biuletyn z posiedzenia Komisji Nadzwyczajnej do rozpatrzenia przedstawionych przez Prezydenta RP projektów ustaw o zmianie Konstytucji Rzeczypospolitej Polskiej oraz o zmianie ustawy – Kodeks postępowania karnego (nr 2)*, Issue No. 972/5th term of the Sejm, dated 21 August 2006).

The content of binding Article 55 of the Constitution proves that the purpose of the Act of 8 September 2006 amending the Constitution of the Republic of Poland, adopted by the Polish Parliament, was not merely to make it possible to apply the institution of the European arrest warrant in the Polish legal order. This way the constitution-maker followed a trend which had been clearly visible in the contemporary world, namely the facilitation of the prosecution of persons sought for offences other than political ones, who avoid punishment by fleeing to another country. The said tendency entails placing emphasis by the international community, including the United Nations, the Council of Europe and the European Union, on a need to counteract the culture of impunity. It has *inter alia* been assumed that the fact that a person sought is a citizen of a given requested state should not constitute an absolute obstacle to the extradition of the person, as long as other premisses specified in the law of the requested state do not preclude the extradition. Such an approach makes it possible that the case is adjudicated on by a court which has jurisdiction over the area where the alleged offence was committed as well as to a greater extent takes into account the interest of persons affected by the offence. This is alluded to in the Preamble to the Extradition Treaty with the USA, which stipulates that the contracting states thereto desire to: "provide for more effective cooperation between the two States in the suppression of crime and to facilitate the relations between the two States in the area of extradition (...)".

3.12. In conclusion, the Constitutional Tribunal states that Article 4(1) of the Extradition Treaty with the USA is consistent with Article 55(1) and (2) in conjunction with Article 2 of the Constitution.

4. The issue of conformity of Article 4(1) of the Extradition Treaty with the USA to Article 78 of the Constitution

4.1. In the opinion of the complainant, Article 4(1) of the Extradition Treaty with the USA is inconsistent with Article 78 of the Constitution, since neither directly, nor by means of reference to the principles of administrative proceedings, does it provide the possibility of appealing against a discretionary decision issued by "the executive authority", i.e. the Minister of Justice - the Public Prosecutor-General. By contrast, the possibility of lodging an appeal against a decision made at first stage is particularly important where the decision is arbitrary and discretional in character. With the assumption that the adjective "possible", as mentioned in Article 4(1) of the Extradition Treaty with the USA, refers to the legal system, the adjective "proper", included therein, refers to issues which are strictly political and discretionary. The Minister of Justice, as an authority

with the power to extradite a person sought, needs to indicate why – in his/her opinion – extraditing the given person is proper. Leaving a discretional decision without any possibility of review by an authority of higher instance would result in complete arbitrariness and a sense of impunity when it comes to determining the future fate and life of a Polish citizen.

Pursuant to Article 78 of the Constitution:
"Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute".

The said premiss expresses the principle that an individual (each party) has the right to appeal against judgments and decisions made at first stage in order to verify (review) their validity. The judgments and decisions referred to in Article 78 of the Constitution should be construed as any individual determinations that affect the legal situation of the individual. The right to appeal against judgments and decisions made at first stage is granted to each party to proceedings, and its essence is the possibility of verifying any individual determinations issued in the first instance. The right to appeal against judgments and decisions made at first stage is one of the means of protecting rights and freedoms, and thus it has a procedural character in relation to the rights and freedoms set out in the preceding sections of chapter II of the Constitution. At the same time, the said right is not absolute, as pursuant to Article 78, second sentence, of the Constitution, the legislator may introduce exceptions thereto.

The Constitution does not specify the character of those exceptions; it indicates neither the scope ratione personae nor the scope ratione materiae within which a departure from the right is admissible. However, this does not mean that the legislator enjoys complete freedom as regards outlining the catalogue of such exceptions. First of all, it should be taken into account that they may not lead to the infringement of other constitutional norms. However, they may not overturn the general principle itself which, in the context of ordinary legislation, would in fact become a departure from one-stage proceedings introduced in various procedures. Therefore, it should be deemed that any departures from the principle set out in Article 78 of the Constitution need to be caused by special circumstances which would justify depriving a party to proceedings of an appellate measure (see the judgment of 12 June 2002, Ref. No. P 13/01, OTK ZU No. 4/A/2002, item 42, point 2 in part III of the statement of reasons). The Constitutional Tribunal shares the view expressed in its judgment of 16 November 1999 in the case SK 11/99 that: "the constitutional categorisation of particular appellate measures provided to a party by the legislator must take into account the entirety of regulations that determine the course of given proceedings. In particular, it is necessary to both make reference to the type of case determined in given proceedings, the structure and character of the authorities making the determination, as well as ultimately the consequences of the effects of other constitutional principles and norms, and especially the constitutional principle of the right to a fair trial" (OTK ZU No. 7/1999, item 158, point 2 in part III of the statement of reasons).

4.2. As the Tribunal has determined in point 2.7 in part III of the statement of reasons for the judgment in the present case, the actual extradition of a person sought by

the authorities of the requesting state is directly preceded not by court proceedings, but by *sui generis* proceedings conducted by the Minister of Justice, on the basis of the provisions included in the Code of Criminal Procedure. The determination of the issue by the Minister of Justice – as an executive authority – is not, therefore, an administrative decision within the meaning of the Code of Administrative Procedure. Moreover, the Code of Criminal Procedure does not provide for an appeal against such a determination.

The person sought for extradition by the requesting state has the right to appeal against the order on the admissibility of extradition issued by the court before the case is referred to the Minister of Justice for him/her to decide in that regard (Article 603 of the Code of Criminal Procedure). The appeal concerns the legal admissibility of extradition. Thus, the court determines whether there are no obstacles to extradition enumerated in Article 604(1) of the Code of Criminal Procedure or in a relevant international agreement. By contrast, the circumstances indicated in Article 604(2) of the Code of Criminal Procedure, on the basis of which extradition may be refused, may not constitute the grounds for the court to adjudicate that extradition is inadmissible. The court's order on the inadmissibility of extradition entails that the extradition may not take place. The order on the admissibility of extradition does not determine a decision on extradition that will be taken by the Minister of Justice, who enjoys considerable freedom in that regard.

4.3. The complainant alleges that Article 4(1) of the Extradition Treaty with the USA is inconsistent with Article 78 of the Constitution, since neither directly, nor by means of reference to the principles of administrative proceedings, does it provide for the possibility of appealing against the discretionary decision issued by the Minister of Justice.

4.4. Analysing that allegation, the Constitutional Tribunal concludes that a decision on extradition issued by the Minister of Justice is not an administrative decision, but a decision taken on the basis of the Code of Criminal Procedure, possibly in conjunction with the specific provisions of ratified international agreements.

4.5. Pursuant to challenged Article 4(1) of the Extradition Treaty with the USA: "Neither Contracting State shall be bound to extradite its own nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so". What does not follow from that decision is that a party has no possibility of appealing in court against a decision on extradition issued by the Minister of Justice. A possible allegation of non-conformity to Article 78 of the Constitution could be raised by the complainant with regard to relevant provisions of the Code of Criminal Procedure, and not with reference to Article 4 of the Extradition Treaty with the USA, which authorises the Minister of Justice to extradite Polish citizens sought for prosecution or found guilty of extraditable offences by the authority of the requesting state if, in its discretion, it be deemed proper and possible to do so. As it is known, in the present case, the complainant has not challenged the provisions of the Code of Criminal Procedure which constituted the basis of the legally effective ruling issued by the Court of Appeal in Kraków (Ref. No. II AKz 296/09).

4.6. In conclusion, the Constitutional Tribunal rules that Article 4(1) of the Extradition Treaty with the USA is not inconsistent with Article 78 of the Constitution.

5. Revoking the preliminary decision

5.1. By the preliminary decision of 1 October 2009, ref. no. Ts 203/09, the Constitutional Tribunal suspended the enforcement of the decision of 24 August 2009 (Ref. No. PR VI Oz 597/08/E) issued by the Minister of Justice on the extradition of and partial refusal to extradite a person sought by a foreign state – Mr Randy Craig Levine, until Mr Levine's constitutional complaint has been considered.

5.2. The Constitutional Tribunal states that due to the fact that Article 4(1) of the Extradition Treaty with the USA, which has been challenged by Mr Levine, has been ruled to be consistent with the Constitution, there have ceased to be grounds for the preliminary decision of 1 October 2009 (ref. no. Ts 203/09).

For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Wojciech Hermeliński
to the Judgment of the Constitutional Tribunal
of 21 September 2011, Ref. No. SK 6/10

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654; hereinafter: the Constitutional Tribunal Act), I submit this dissenting opinion to the judgment of the Constitutional Tribunal of 21 September 2011 in the case SK 6/10, insofar as it rules that Article 4(1) of the Extradition Treaty between the United States of America and the Republic of Poland, signed at Washington on 10 July 1996 (Journal of Laws - Dz. U. of 1999 No. 93, item 1066, as amended; hereinafter: the Extradition Treaty with the USA), is consistent with Article 55(1) and (2) in conjunction with Article 2 of the Constitution, as I hold the view that: the above provision is inconsistent with Article 55(1) and (2) in conjunction with Article 2 of the Constitution.

I substantiate my dissenting opinion as follows:

In the constitutional complaint of 19 August 2009, supplemented by a procedural letter of 20 October 2009, by way of which the review proceedings in the case under examination were commenced, the complainant requested the Tribunal to rule Article 4(1) of the Extradition Treaty with the USA to be inconsistent with Article 55(1) and (2) in conjunction with Article 2 as well as Article 78 of the Constitution.

Challenged Article 4(1) of the Extradition Treaty with the USA stipulates that: “Neither Contracting State shall be bound to extradite its own nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so”.

The following were indicated as higher-level norms for the review: Article 55(1) and (2) in conjunction with Article 2 of the Constitution as well as Article 78 of the Constitution.

The Constitutional Tribunal has adjudicated that Article 4(1) of the Extradition Treaty with the USA is consistent with Article 55(1) and (2) in conjunction with Article 2 of the Constitution as well as it is not inconsistent with Article 78 of the Constitution. Moreover, on the basis of Article 50(3) of the Constitutional Tribunal Act, it decided to revoke the preliminary decision of 1 October 2009, ref. no. Ts 203/09, which suspended the enforcement of the decision of 24 August 2009 issued by the Minister of Justice on the extradition of and partial refusal to extradite a person sought by a foreign state (Ref. No. PR VI Oz 597/08/E).

I disagree with the judgment insofar as it rules Article 4(1) of the Extradition Treaty with the USA to be consistent with Article 55(1) and (2) in conjunction with Article 2 of the Constitution.

Article 55(1) of the Constitution in its previous version, i.e. in the version which was binding until 6 November 2006, provided for an absolute prohibition against the extradition of a Polish citizen. By contrast, pursuant to challenged Article 4(1) of the Extradition Treaty with the USA: "Neither Contracting State shall be bound to extradite its own nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so". Therefore, the Extradition Treaty with the USA provided for the possibility of extraditing Polish citizens, despite the fact that until 6 November 2006, at the constitutional level, there had been an absolute prohibition against the extradition of Polish citizens.

The above-mentioned incongruity was noticed in the statement of reasons for the judgment of the Constitutional Tribunal.

In the view of the Constitutional Tribunal, in the Constitution of 2 April 1997, the constitution-maker has not introduced a principle providing for the "automatic" derogation of normative acts, in particular international agreements, which are inconsistent with the Constitution. Thus, the Constitution of 2 April 1997 did not derogate Article 4(1) of the Extradition Treaty with the USA from the Polish legal order.

Casting aside doubts as to whether such derogation could have taken place, given that the Extradition Treaty with the USA, signed on 10 July 1996 (i.e. prior to the entry into force of the Constitution of 1997), was published in the Journal of Laws of 1999 No. 93, item 1066 (i.e. after the entry into force of the Constitution), it should be stressed that even accepting the stance of the Constitutional Tribunal in that regard, it should be noted that – under the Constitution of 1997 in its previous version – the challenged provision remained non-compliant with the protection of Polish citizens against extradition, guaranteed in Article 55 of the Constitution in its previous version.

Indeed, under Article 55 of the Constitution in its previous version, the extradition of Polish citizens was absolutely prohibited.

In accordance with the interpretation adopted by the Constitutional Tribunal, Article 4(1) of the Extradition Treaty with the USA sets out the elements of a legal norm which authorises an executive authority (for Poland: the Minister of Justice - the Public Prosecutor-General, or a person designated by him/her; for the United States of America: the Secretary of State or a person designated by the Secretary of State) to extradite its own nationals sought for prosecution or found guilty of extraditable offences by the authorities of the requesting state, if in its discretion, it be deemed proper and possible to do so. The courts adjudicating on the extradition of the complainant had also to apply Article 4(1) of the Extradition Treaty with the USA, which follows from Article 55(2) of the Constitution as well as from Article 615(2) of the Code of Criminal Procedure.

In my view, when assessing the conformity of the challenged provision to the indicated higher-level norms for the review, one should take into account the stages of the

procedure aimed at executing an extradition request. As it has been known, extradition proceedings comprise several stages. They are the same, regardless of the fact whether an extradition request concerns carrying out criminal proceedings against a given person, imposing an adjudicated penalty, or applying a preventive measure. The following three stages can be indentified here: quasi-preliminary proceedings, court proceedings as well as proceedings conducted before the Minister of Justice. As regards the assessment of constitutionality of the challenged provision, the following are of relevance: the second stage - court proceedings and the third stage – proceedings before the Minister of Justice.

An authority which executes an extradition request lodged with Poland, on the basis of the Extradition Treaty with the USA, is both a court adjudicating within the scope of the second stage of extradition proceedings as well as the Minister of Justice, who acts within the scope of the third stage.

Article 4(1) of the Treaty indicated above mentions “the Executive Authority” (“Neither Contracting State shall be bound to extradite its own nationals, but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so”), and in the light of Article 25 of the Treaty, the executive authority is the Minister of Justice (“For the United States of America, the executive authority shall be the Secretary of State or a person designated by the Secretary of State. For Poland, the executive authority shall be the Minister of Justice-Attorney General[1] or a person designated by the Minister of Justice-Attorney General”).

However, it is impossible to accept the interpretation which would assume that Article 4(1) of the Extradition Treaty with the USA is solely addressed to the Minister of Justice. Adopting the assumption that Article 4(1) of the Extradition Treaty with the USA is solely addressed to the Minister of Justice would have to lead to the conclusion that the said authority may modify a legally effective court ruling issued in a given case concerning the admissibility of extradition at the second stage of extradition proceedings. However, this would be contrary to the wording of Article 55(5) of the Constitution, pursuant to which: “The courts shall adjudicate on the admissibility of extradition”.

The appropriate interpretation of the allegation raised in the constitutional complaint under examination requires taking into account the above assumption.

As it has been indicated in the statement of reasons for the judgment issued by the Constitutional Tribunal, in the opinion of the complainant, Article 4(1) of the Extradition Treaty with the USA is inconsistent with Article 55(1) and (2) of the Constitution, since the possibility of extraditing a Polish citizen does not follow from the content of the international agreement, which merely refers to the system of law and leaves the determination about the admissibility of the extradition of a Polish citizen at the administrative discretion of an official, without any clear premisses of such discretion. Moreover, Article 4(1) of the Extradition Treaty with the USA lacks sufficient specificity and is imprecise, and thus it fails to comply with the principle of a state ruled by law,

[1] The term ‘Attorney General’ used in the Extradition Treaty between the United States of America and the Republic of Poland is equivalent to the term ‘Public Prosecutor-General’ used in the English translation of the Constitution of the Republic of Poland, as the two terms denote the same authority.

expressed in Article 2 of the Constitution. As it has been indicated in the statement of reasons, in the complainant's opinion, any restrictions on a prohibition against extradition must be stated explicitly, in accordance with constitutional standards, in particular that such a serious restriction of the sovereignty of the state is directly linked to the most far-reaching restriction on the civil right to be tried in one's own country and the actual deprivation of a Polish citizen of support provided by his/her homeland. The international agreement referred to in Article 55(2) of the Constitution must indicate whether it is possible to extradite a Polish citizen in a way which does not raise any doubts. Moreover, the complainant has alleged that Article 4(1) of the Extradition Treaty with the USA is inconsistent with the principle of the stability of law, as the content of the challenged provision of the Extradition Treaty with the USA does not allow to state whether it provides for a possibility of extraditing a Polish citizen as an exception to a prohibition against the extradition of Polish citizens, as well as what premisses should be taken into account by an administrative authority when taking such a decision.

Therefore, the allegations raised by the complainant refer to Article 4(1) of the Extradition Treaty with the USA as a legal basis for executing an extradition request both in court proceedings as well as at the stage of proceedings before the Minister of Justice.

The wording of Article 55(1) and (2) of the Constitution results from an amendment to the Constitution, introduced by the Act of 8 September 2006 amending the Constitution of the Republic of Poland (Journal of Laws - Dz. U. No. 200, item 1471). What follows from relevant Sejm reports is that the above amending Act was aimed at enforcing the judgment of the Constitutional Tribunal of 27 April 2005, ref. no. P 1/05 (OTK ZU No. 4/A/2005, item 42), by providing for a possibility of extraditing Polish citizens on the basis of a European arrest warrant. However, the Act amending the Constitution provided for a greater departure from a prohibition against the extradition of Polish citizens, as it did not limit extradition (on the basis of the above-cited judgment of the Constitutional Tribunal in the case P 1/05, the European arrest warrant constitutes extradition within the meaning of the Constitution) to relations with the other Member States of the European Union.

Article 55(1) of the Constitution, in its current version, guarantees that, in principle, the extradition of Polish citizens shall be prohibited (cf. the judgment of the Constitutional Tribunal of 5 October 2010, ref. no. SK 26/08, OTK ZU No. 8/A/2010, item 73; see also B. Nita, "Ograniczenia ekstradycji po zmianie art. 55 Konstytucji RP a europejski nakaz aresztowania", *Przegląd Sejmowy* Issue No. 2/2008, p. 93 and the subsequent pages; B. Nita, "Ograniczenia w przekazywaniu na podstawie europejskiego nakazu aresztowania w demokratycznym państwie prawnym (część II)", *Europejski Przegląd Sądowy* Issue No. 5/2011, p. 4 and the subsequent pages). At the same time, the subsequent paragraphs of that provision provide for exceptions to this rule. Pursuant to Article 55(2) of the Constitution: "Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: 1) was committed outside the territory of

the Republic of Poland, and constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request”. In accordance with Article 55(3) of the Constitution: “Compliance with the conditions specified in para. 2 subparas. 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body”. By contrast, within the meaning of Article 55(4) of the Constitution, the extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, as would an extradition which would violate rights and freedoms of persons and citizens.

The following are of relevance for the assessment of the allegations raised by the complainant: Article 55(1) and Article 55(2) of the Constitution.

It should be noted that, by allowing an exception to the absolute – pursuant to the previous version of Article 55 of the Constitution – protection of Polish citizens against extradition, the new version of Article 55(2) of the Constitution has limited it in two ways.

The first restriction on the admissibility of extraditing Polish citizens, which arises from Article 55(2) of the Constitution in its new version, is an absolute requirement that a prohibited act referred to in a European arrest warrant was committed outside the territory of the Republic of Poland. Due to the assumption provided for in Article 6(2) of the Penal Code, namely that the place of the commission of an offence comprises a number of places, Article 55(2) of the Constitution requires that all elements determining the place of the commission of an offence - i.e. the place where the perpetrator has acted or refrained from taking action which s/he was under the obligation to take, or where a criminal consequence has ensued or has been intended by the perpetrator to ensue - occur outside the territory of the Republic of Poland (cf. B. Nita, “Ograniczenia ekstradycji…”, p. 93 and the subsequent pages).

Secondly, there is a correlation between the admissibility of extraditing a Polish citizen and the requirement that an offence referred to in a European arrest warrant constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request. An additional restriction here is the requirement of the double criminality of an act referred to in an extradition request. The restriction alludes to the principle of *nullum crimen sine lege* as well as the prohibition against the retroactivity of law, which is related to the said principle. In the Polish system of law, the said principle is enshrined in the Constitution, in Article 42(1) of the Constitution. Pursuant to Article 55(2) of the Constitution, the requirement of the double criminality of an act has been adopted in an extreme form. In the literature on the subject, it is emphasised that an act referred to in the request must constitute an offence (simplifying the issue here) both at the time of the commission of the offence as well as at the time when the extradition request is submitted (cf. *ibidem*).

Taking the above into consideration, one should agree with the statement presented in the judgment of the Constitutional Tribunal that, in the light of Article 55(1) and (2) of the Constitution, the extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if all the following requirements are met: such a possibility stems from an international agreement ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member; the act covered by a request for extradition was committed outside the territory of the Republic of Poland; the act covered by a request for extradition constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

However, it would be simplification to state that "(...) the Extradition Treaty with the USA, in the light of the Constitution which is currently in force, is an international agreement ratified with prior consent granted by statute, and thus it fulfils one of the premisses provided for in Article 55(2) of the Constitution: «extradition of a Polish citizen may be granted (...) if such a possibility stems from an international agreement ratified by Poland (...)»".

As it follows from Article 55(1) of the Constitution, Polish citizens are, in principle, protected against extradition. In the situations indicated in Article 55(2) of the Constitution, which is of relevance here, the protection arising from Article 55(1) of the Constitution may be restricted, but when outlining its limits, the legislator is bound by the restrictions set out in Article 55(2) of the Constitution as well as restrictions arising from other provisions, in particular from Article 2 of the Constitution, indicated as a higher-level norm for the review in the present case. Exceptions to protection against extradition, guaranteed as a principle, must be interpreted in compliance with requirements arising from the Constitution (cf. also the above-cited judgment of the Constitutional Tribunal of 5 October 2010, ref. no. SK 26/08).

It is worth noting here, as part of a comparative legal analysis, that an analogous interpretation of the relation between protection against the extradition of the requested state's own nationals, guaranteed as a principle, and exceptions to that guarantee, was adopted by the Federal Constitutional Court of Germany (Bundesverfassungsgericht) in its judgments of: 18 July 2005 (2 BvR 2236/04), 3 September 2009 (2 BvR 1826/09) as well as 9 October 2009 (2 BvR 2115/09) – they all concerned the constitutional review of provisions on the European arrest warrant (for more see B. Nita, "Europejski nakaz aresztowania – europeizacja prawa karnego a standardy konstytucyjne państw członkowskich Unii Europejskiej", *Państwo i Prawo* Issued No. 5/2007, p. 56 and the subsequent pages; B. Nita, "Ograniczenia w przekazywaniu… , część I", *Europejski Przegląd Sądowy* Issue No. 4/2011, p. 4 and the subsequent pages).

In the light of Article 55(1) and (2) of the Constitution, stemming from an international agreement ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, an exception to protection against extradition, guaranteed as a principle to Polish citizens, must be rendered in such a way that a restriction on the citizen's freedom from extradition

would fall within the limits set out by Article 55(2) of the Constitution, indicated as a higher-level norm for the review, as well as by Article 55(4) of the Constitution. What follows from the last-mentioned provision is that extradition is prohibited, regardless of whether it concerns a Polish citizen, a foreign national or a stateless person, if the given person is suspected of the commission of an offence for political reasons, but without the use of force or if an extradition would violate the rights and freedoms of persons and citizens.

In a democratic state ruled by law, exceptions to protection against the extradition of Polish citizens, guaranteed by Article 55(1) of the Constitution, must meet requirements arising from the principle of proportionality (Article 31(3) of the Constitution as well as the principle of specificity of law (Article 2 of the Constitution).

It is necessary that the provisions referred to in Article 55(2) of the Constitution should specify clear premisses which will determine the extradition of a Polish citizen. As it has already been indicated, in the light of the Constitution, prohibition against extraditing Polish citizens is a rule to which the Constitution provides exceptions that are subject to assessment in the light of the constitutional principle of proportionality and other constitutional principles.

As the Constitutional Tribunal has pointed out, pursuant to Article 1 of the Extradition Treaty with the USA: "The Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities in the Requesting State seek for prosecution or have found guilty of an extraditable offense". The subsequent provisions of the said Treaty specify premisses determining the emergence of such an obligation. Articles 2 and 3 of the said Treaty outline a catalogue of extraditable offences, whereas Articles 4 to 8 of the Treaty indicate possible obstacles to extradition. By contrast, Articles 9 to 22 of the Treaty regulate some aspects of proceedings concerning extradition requests filed on the basis of the Treaty.

In addition, in the statement of reasons for the judgment, it has been noted that obstacles to extradition specified in extradition treaties may be absolute or relative in character. In the case of absolute obstacles to extradition, the Extradition Treaty with the USA states that "extradition shall not be granted"; by contrast, in the case of obstacles which are relative in character, it stipulates that "the Requested State may refuse extradition" (Article 6) or that "neither Contracting State shall be bound" (Article 4(1)).

In this context, it has been emphasised in the judgment that, in the Extradition Treaty with the USA, the following constitute absolute obstacles to extradition: an offence of a political or military character (Article 5); the person sought has been tried and convicted or acquitted with final and binding effect in the requested state for the same offence (the principle of *ne bis in idem*) (Article 7) as well as prosecution or execution of a sentence has become barred by the statute of limitations of the requesting state (Article 8).

The following are relative obstacles to extradition: the nationality of a person requested for extradition (Article 4) as well as the risk of capital punishment in the requesting state (Article 6).

One should agree with the statement that it follows from the content of the provision under review that nationality does not constitute an absolute exception to extradition, and only the requested state may refuse to extradite its own national.

The challenged provision provides for a possibility of extraditing Polish citizens. Therefore, it follows from the Extradition Treaty with the USA that it is possible to extradite a Polish citizen. The said thought expressed in the judgment by the Constitutional Tribunal may not be challenged.

However, it is impossible to agree with the subsequent thesis which directly occurs after the one presented above, namely that hence the requirement set out in Article 55(1) and (2) of the Constitution has been fulfilled, in accordance with which the extradition of a Polish citizen is possible "(...) if such a possibility stems from an international treaty ratified by Poland (...)".

In the light of Article 55 of the Constitution, the constitution-maker does not require that a ratified international agreement order the extradition of a Polish citizen. A requirement that suffices for a Polish citizen to be extradited, within the meaning of the Constitution, is a regulation contained in a ratified international agreement where such a possibility is implied. However, the problem lies elsewhere.

Primarily, the Extradition Treaty with the USA does not contain any regulations which would constitute the reflection of Article 55(2)(1) and (2) of the Constitution, as regards premisses narrowing down the admissibility of exceptions to protection against extradition which is guaranteed to Polish citizens.

One should agree with the statement that Article 4(1) of the Extradition Treaty with the USA in the context of the higher-level norms for the review indicated by the complainant – Article 55(1) and (2) in conjunction with Article 2 of the Constitution – may not be interpreted in isolation from the other provisions of the Treaty. Indeed, the said provisions do not constitute an autonomous basis of extraditing a Polish citizen.

However, it is a misunderstanding to state that: "The extradition of a Polish citizen is only possible when other premisses of admissibility of a request have been fulfilled and a legally effective court ruling has been issued, stating that none of the obstacles to extradition set out in Article 604(1) of the Code of Criminal Procedure has occurred".

Indeed, as it has been pointed out earlier on in the statement of reasons for the judgment of the Constitutional Tribunal, the Extradition Treaty contains autonomous, absolute and relative obstacles to extradition. Since this is the case, then due to the primacy of international agreements, which is guaranteed in Article 615(2) of the Code of Criminal Procedure, there is no possibility here to refer to the premisses indicated in Article 604(1) of the Code of Criminal Procedure.

As it has been aptly indicated in the decision of the Court of Appeal in Katowice, dated 2 March 2011 (Ref. No. akt II AKz 87/2011, LexPolonica No. 2558668), in the case where extradition relations between Poland and a third state are regulated by an extradition treaty, it is in the content of the treaty that one should look for grounds for extradition, and only when such issues are not regulated, one should look at national regulations (likewise, on the basis of the formerly binding legal system, the Court of Appeal in Warsaw in its decision of 7 March 1997 (Ref. No. akt II AKz 76/97, *Krakowskie Zeszyty Sądowe* Issue No. 11-12/1997, item 107). What also requires approval is the thesis stated further on in

the decision of the Court of Appeal in Katowice that, in the case where parties specified, in an international agreement, a catalogue of situations in which extradition is inadmissible, thus they concluded that other situations, which had not been mentioned in the said catalogue, might not constitute the basis of refusal of extradition. The said states, when signing the agreement, made a pledge that, in the cases set out in the agreement, they might refuse to extradite a person sought for extradition.

As the Supreme Court stated in its decision of 29 August 2007 (Ref. No. II KK 134/07, OSNwSK No. 1/2007, item 1887): "Article 615(2) of the Code of Criminal Procedure stipulates that the provisions of Chapter XIII of the said Code do not apply if an international agreement to which Poland is a party stipulates otherwise. This is linked to the constitutional principle of primacy of an international agreement ratified by Poland over a statute, where the latter may not be reconciled with the said agreement".

Despite the fact that the Code of Criminal Procedure has been amended, the following view presented by the Supreme Court in the decision of 29 July 1997 (Ref. No. II KKN 313/97, OSNKW No. 9-10/1997, item 85) is still up to date: "the legislator provided a court adjudicating on the request for extradition with freedom to adjudicate in a sense that it has the jurisdiction to state whether it follows from the binding provisions of the law, including bi- and multi-lateral international treaties, that it is *in concreto* admissible, or inadmissible, to extradite the said person to the requesting state".

The application of Article 604(1) of the Code of Criminal Procedure, in the case where the constitutional issue under examination has arisen, has been ruled out by the autonomous regulation concerning exceptions set out in the Extradition Treaty with the USA.

It should be added that the adoption of a different interpretation would lead here to a paradoxical consequence, in particular if one bears in mind that Article 604(1)(1) of the Code of Criminal Procedure specifies the Polish nationality of a person sought as an absolute obstacle to extradition, whereas the Extradition Treaty with the USA categorises it as a relative obstacle! Therefore, if – in the case concerning the complainant - the said provision of Article 604(1) of the Code of Criminal Provision had been applicable, the issue of the legal admissibility of the extradition would have been determined in a negative way by the court, due to the Polish nationality of the perpetrator (Article 604(1)(1) of the Code of Criminal Procedure).

As it has been indicated above, the regulation indicated in the above provision may not be linked only with the last stage of extradition proceedings, i.e. with proceedings before the Minister of Justice.

The insufficient specificity of obstacles to extradition addressed to the Minister of Justice, in my view, does not constitute a constitutional problem, since s/he may only improve the situation of a person sought for extradition. Bearing in mind this circumstance, it should be noted that the broader and more discretionary the way in which certain premisses are addressed to the Minister of Justice, the greater are the chances that, in the case concerning a particular person requested for extradition, there are circumstances which rule out extradition.

However, the point is that Article 4(1) of the Extradition Treaty with the USA, which is correctly read, also refers to the court adjudicating on the legal admissibility of extradition.

As it has already been indicated, Article 55(1) of the Constitution guarantees protection against extradition to Polish citizens, whereas Article 55(2) of the Constitution provides for departures from that principle, "if such a possibility stems from an international treaty ratified by Poland". What follows from those provisions of the Constitution and Article 2 of the Constitution, indicated as a higher-level norm for the review by the complainant, is that departures from the principle of protection against extradition, guaranteed to Polish citizens, must be precisely specified.

The said standard is not met by the challenged regulation. The Constitution, and in particular its Article 55(2), by way of exception provides for the extradition of a Polish citizen, "if such a possibility stems from an international treaty (...)". By contrast, the challenged provision of the Extradition Treaty with the USA leaves a decision on the extradition of a Polish citizen at the discretion of the executive authority (in my view, this is both the court as well as the Minister of Justice), which is to assess whether it is "proper and possible" to extradite the said person on the basis of unspecified provisions.

Bearing in mind the fact that the grounds for refusal of extradition of Polish citizens lack sufficient specificity in the challenged provision and that premisses which narrow down the admissibility of providing for exceptions to the guaranteed protection against extradition (Article 55(2)(1) and (2) of the Constitution) have not been included in the Extradition Treaty with the USA, I hold the view that Article 4(1) of the Extradition Treaty with the USA is inconsistent with Article 55(1) and (2) in conjunction with Article 2 of the Constitution.

Dissenting Opinion
of Judge Marek Kotlinowski
to the Judgment of the Constitutional Tribunal
of 21 September 2011, Ref. No. SK 6/10

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit this dissenting opinion to the judgment of the Constitutional Tribunal of 21 September 2011 in the case SK 6/10.

I share the argumentation presented in the context of that case in the dissenting opinion of Judge Wojciech Hermeliński.

Dissenting Opinion
of Judge Teresa Liszcz
to the Judgment of the Constitutional Tribunal
of 21 September 2011, Ref. No. SK 6/10

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the above-mentioned judgment, insofar as it rules that Article 4(1) of the Extradition Treaty between the United States of America and the Republic of Poland, signed at Washington on 10 July 1996 (Journal of Laws - Dz. U. of 1999 No. 93, item 1066, as amended; hereinafter: the Extradition Treaty), is consistent with Article 55(1) and (2) in conjunction with Article 2 of the Constitution.

In my opinion, the challenged provision of the Extradition Treaty is inconsistent with the indicated higher-level norms for the review in the part which includes the wording: "but the Executive Authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so".

STATEMENT OF REASONS

1. Firstly, I hold the view that it is always a decision of the Minister of Justice that is the final determination in a case concerning the extradition of a Polish citizen; however, in the case where the court adjudicated on the inadmissibility of extradition, the Minister of Justice is bound by the said ruling.

Secondly, what undoubtedly constitutes the substantive basis of a decision on extradition issued by the Minister of Justice is Article 4(1) of the Extradition Treaty, and the basis of competence – the same provision in conjunction with Article 25 of the said Treaty, which stipulates that "for Poland, the executive authority shall be the Minister of Justice (...)".

Thirdly, Article 4(1) of the Extradition Treaty explicitly states that the contracting states are not obliged to extradite their own nationals. Thus, what has been established is an exception to the principle expressed in Article 1 of the said Treaty that the contracting states agree to extradite, to each other, persons whom the authorities in the requesting state seek for prosecution or have found guilty of an extraditable offence. At the same time, Article 4(1) of the Extradition Treaty stipulates that the executive authority in the requested state (in Poland – the Minister of Justice) will be able to extradite a national "if, in its discretion, it be deemed proper and possible to do so".

2. The challenged regulation of the Extradition Treaty should be confronted with the higher-level norms for the review indicated in the Constitution, which comprise – in accordance with the *petitum* of the complaint – the provisions of Article 55(1) and (2) in conjunction with Article 2 as well as Article 78 of the Constitution. I agree with the Tribunal's determination that Article 78 of the Constitution is inadequate as a higher-level norm for the review in that case, and therefore I am going to deal solely with the

assessment of the conformity of the challenged provision to Article 55(1) and (2) in conjunction with Article 2 of the Constitution.

The starting point for that assessment should be Article 55(1) of the Constitution, which clearly provides for a prohibition against the extradition of a Polish citizen, with exceptions enumerated in paragraphs 2 and 3 of the said Article. One of the exceptions is a possibility of extradition if such a possibility stems from an international agreement ratified by Poland. The Constitutional Tribunal has concluded that we deal with such a situation in the present case, i.e. Article 4(1) of the Extradition Treaty provides for the possibility of the extradition of a Polish citizen, referred to in Article 55(2) of the Constitution.

Casting aside doubts raised during the hearing as regards the procedure for the ratification of the Extradition Treaty, I hold the view that the content of the challenged provision is incompatible with the indicated higher-level norms for the constitutional review. It provides for the extradition of a Polish citizen if this is possible, i.e. admissible in the light of the domestic (Polish) legal order – in particular in the light of the Constitution – whereas the Constitution makes reference in this regard to an international agreement, which results in a certain "vicious circle".

Due to the principle of protection of citizens' trust in the state and its laws, expressed in the Constitution, it is inadmissible for a provision of an international agreement on the basis of which citizens may be deprived of their fundamental right to stay in a country to which they are tied by nationality, and the right to be subject to the jurisdiction of the country, to be so general and to specify the premisses of extraditing citizens so imprecisely, as this is the case in Article 4(1) of the Extradition Treaty. Apart from the premiss that extradition should be "possible", understood as the legal admissibility of extradition, the other premiss is that extradition needs to be "proper", which mainly comprises humanitarian and political considerations that should be taken into account by the Minister of Justice, when s/he issues a decision on extradition. The assessment whether extraditing a citizen in a specific case is "proper" is left at the discretion of the said authority, by the provision challenged in the constitutional complaint. At the same time, the character of a decision by the Minister of Justice in that case is not clear, in particular whether this is an administrative act, or whether this is an action falling within the scope of criminal proceedings construed in a broad sense.

Leaving a decision on the extradition of a Polish citizen at the discretion of an administrative authority, i.e. the Minister of Justice, as the executive authority within the meaning of the Extradition Treaty, is also – in my opinion – clearly inconsistent with Article 55(5) of the Constitution, which stipulates that courts shall adjudicate on the admissibility of extradition. Although the said provision of the Constitution has not been indicated as a higher-level norm for the review in the *petitum* of the constitutional complaint, it is impossible not to mention that issue.

For the above reasons, I have found it necessary to submit this dissenting opinion.

Dissenting Opinion
of Judge Zbigniew Cieślak
to the Judgment of the Constitutional Tribunal
of 21 September 2011, Ref. No. SK 6/10

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended) as well as § 46 of the Annex to the Resolution of the General Assembly of the Judges of the Constitutional Tribunal issued on 3 October 2006 on the Regulations of the Constitutional Tribunal (Official Gazette – *Monitor Polski* (M. P. No. 72, item 720)), I submit my dissenting opinion to the statement of reasons for the judgment of the Constitutional Tribunal of 21 September 2011 in the case SK 6/10, insofar as it states that extradition proceedings before the Minister of Justice are conducted on the basis of the provisions of the Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws - Dz. U. No. 89, item 555, as amended).

1. As the Constitutional Tribunal has pointed out in the statement of reasons for the judgment in the case SK 6/10, extradition proceedings consist of three stages (see Article 602(2) and Article 603 of the Code of Criminal Procedure).

The first stage, following the submission of a request for extradition of a person who is sought for prosecution, the enforcement of a penalty or the application of a preventive measure adjudicated in that regard, takes place before a prosecutor. The second stage commences when the prosecutor refers the case to a circuit court which has territorial jurisdiction in that regard. At the third and the last stage, extradition proceedings is carried out by the Minister of Justice, who may extradite a person to a foreign state or may refuse to extradite that person. With regard to the last stage of extradition proceedings, the Constitutional Tribunal has stated, in its statement of reasons for the judgment in the case SK 6/10, that “the actual extradition of a person sought by the authorities of the requesting state is directly preceded (...) by *sui generis* proceedings conducted by the Minister of Justice, on the basis of the provisions of the Code of Criminal Procedure”. I disagree with such an assessment of the legal character of the action of “determining” by the Minister of Justice in the context of an extradition request (Article 603(5) and Article 603a(5) of the Code of Criminal Procedure).

2. Z. Cybichowski was right to conclude that the extradition of a person sought by a foreign state “has two aspects: a legal one and a political one” (Z. Cybichowski, *Prawo międzynarodowe. Publiczne i prywatne*, Warszawa 1932, p. 528). The first one falls within the realm of a circuit court which assesses the admissibility of extradition from the point of view of premisses set out in Article 604(1) and (2) of the Code of Criminal Procedure as well as the provisions of appropriate extradition treaties concluded by the Republic of Poland and legal acts regulating the activity of an international criminal court (see Article 615(2) of the Code of Criminal Procedure). The court’s legally effective decision which states the legal inadmissibility of extradition is binding for the Minister of Justice, as

– in such a case – s/he may not take a positive decision on the request for extradition. By contrast, where the court determines that extradition is admissible, the Minister of Justice issues a decision on the extradition of a person sought or on refusal to extradite that person, due to the occurrence of the so-called relative obstacles to extradition enumerated in Article 604(2) of the Code of Criminal Procedure, or obstacles of a different character, including political or humanitarian ones.

3. What constitutes the basis for the power to issue a "determination" (decision), which is vested in the Minister of Justice, is Article 603(5) of the Code of Criminal Procedure, whereas the substantive-law basis (in the case in the context of which the Tribunal's judgment has been issued (Ref. No. SK 6/10) should be looked for in Article 4(1) the Extradition Treaty between the United States of America and the Republic of Poland, signed at Washington on 10 July 1996 (Journal of Laws - Dz. U. of 1999 No. 93, item 1066, as amended; hereinafter: the Extradition Treaty with the USA). Taking into account the *ratio legis* of those regulations, a conclusion can be drawn that the decision of the Minister of Justice is administrative in character. The said act is an expression of a discretionary power of the state, undertaken as part of carrying out a certain administrative policy.

The circumstance that the basis for the powers vested in the Minister of Justice to carry out the said actions is contained in the provisions of the Code of Criminal Procedure does not rule out the criminal-law character of a decision issued by the authority. In my view, in the case under analysis, we deal with an administrative-law regulation that is characterised by the direct implementation of values emphasised in the context of the common good by an administrative authority. The legal norm which authorises the Minister of Justice to take action, due to reference to the construct of administrative discretion and to terms which lack sufficient specificity, displays the characteristics of a typical administrative-law norm. The fact that it is decoded from provisions included in a normative act generally regarded as one regulating the criminal procedure, is not and may not be of decisive significance for specifying the character of the norm, and thus also the nature of a decision issued by the Minister of Justice.

As it is stressed in the doctrine of administrative law, one of the vital attributes of public administration as the function of the state is aiming at the direct protection of the common good in the circumstances of complete freedom, granted by the legislator, which allows this administration to correct its actions in order to optimise the implementation of values that make up the common good (see I. Lipowicz, [in:] Z. Niewiadomski, Z. Cieślak, I. Lipowicz, G. Szpor, *Prawo administracyjne*, Warszawa 2006, p. 21). The above-mentioned relative freedom within the scope of determination by the Minister of Justice arises from the content of Article 4(1) of the Extradition Treaty with the USA, challenged in the case SK 6/10. Indeed, the said provision contains both the authorisation for the authority to act within the scope of administrative discretion as well as it includes terms which lack sufficient specificity. Administrative discretion which involves the flexibility of shaping the content of a legal effect which stems from the established facts, arises from the wording: "but the Executive Authority of the Requested State shall have the power to extradite such persons". Thus, the Minister of Justice as the executive authority, after

establishing the facts of a given case, makes a choice between two alternatives: to grant extradition or to refuse extradition. At the same time, both options available to the Minister fall within the scope of law, and they are aimed at the protection of the common good. By contrast, the use of the phrase: "if, in its discretion [according to its assessment – note by Z.C.], it be deemed proper and possible to do so" implies that the freedom to assess the facts from the point of view of a given value is encoded therein, which stems from the use of terms lacking sufficient specificity ("possible" and "proper"). In other words, in the process of deriving legal norms from the content of provisions, a public administration authority which is responsible for applying the said provisions is obliged to refer the assessment of given facts to the content of a specific value that is legally protected. Thus, the norm-maker has transferred certain authorisation to directly protect a vital interest in a specific situation to the Minister of Justice, as he aims for revealing a legal effect in given circumstances.

In conclusion, a decision issued by the Minister of Justice in the context of Article 4(1) of the Extradition Treaty with the USA is, not only and not primarily, governed by legal issues, but also by axiological premisses which require the protection of the values that make up the notion of the common good.

4. What also weighs in favour of the administrative-law character of a decision issued by the Minister of Justice on the extradition of a person sought by the requesting state is also the fact that it displays all the characteristics of administrative acts which are the typical legal form of the activity of public administration (cf. J. Starościak, *Prawo administracyjne*, Warszawa 1975, p. 232).

In accordance with the definition formulated by K. M. Ziemski, an administrative act constitutes the authoritative declaration of intent of a competent authority carrying out tasks within the scope of public administration, which is aimed at bringing about direct legal effects, is directed outside the administration, and expresses a determination on legal consequences, i.e. the consequences of a general norm or norms for an individual state of affairs, both in respect of the scope ratione personae and ratione materiae, which pertain to individually indicated subjects of rights and obligations, specifying conduct in particular situations, directly evoking a certain legal effect and thus resolving an issue (see K. M. Ziemski, *Indywidualny akt administracyjny jako forma prawna działania administracji*, Poznań 2005, p. 516).

Referring the above to the decision of the Minister of Justice, it should be noted that it evokes a direct legal effect in the form of the extradition of or refusal to extradite a person sought for prosecution, the enforcement of a penalty or the application of a preventive measure adjudicated in that regard. An act issued by a given minister is authoritative in character, namely it is adopted with regard to its addressee independently of the addressee, with a direct legal effect for him/her; the act is granted the presumption of accuracy and the enforcement of the act may be carried out by means of coercion (cf. K. M. Ziemski, *op.cit*., pp. 470-471). The said addressee is not subordinate to the Minister of Justice, due to an organisational or occupational hierarchy, who performs the tasks of public administration within the indicated scope by safeguarding the common good. This is manifested in specifying the legal consequences of the norm arising from Article 4(1) of

the Extradition Treaty with the USA with regard to concrete state of affairs and an individually indicated addressee.

5. In the light of the above findings, one might also consider the admissibility of appealing against the decision of the Minister of Justice, issued on the basis of Article 603(5) of the Code of Criminal Procedure and Article 4(1) of the Extradition Treaty with the USA, in a voivodeship administrative court, by relying on Article 3(2)(4) of the Act of 30 August 2002 – the Law on Proceedings Before Administrative Courts (Journal of Laws - Dz. U. No. 153, item 1270, as amended; hereinafter: the Law on Proceedings Before Administrative Courts). Indeed, the decision issued by the Minister may be regarded as a different act or action within the scope of public administration that concerns rights or obligations arising from legal provisions. The constitutive features of actions indicated in Article 3(2)(4) of the Law on Proceedings Before Administrative Courts, which are also displayed by an administrative act issued by a minister, are the following: a) they are taken by an administrative authority in a systemic or functional sense; b) they do not have the form of an administrative decision, a decision issued in administrative proceedings, enforcement proceedings or proceedings to secure claims, or an act aimed at supervising the organs of local self-government; c) they are public law in character (they do not fall within the scope of civil law); d) they have been addressed to a subject of rights and obligations that is not subordinate to the authority, due to an organisational or occupational hierarchy; e) they have been addressed to an individual addressee who is in a particular situation; f) they concern rights or obligations which directly or indirectly arise from legal provisions; g) they are legally binding, as they determine the legal situation of a specific subject or evoke a particular legal effect, which the law in force associates with a given act or actions (see B. Majchrzak, "Charakter prawny orzeczenia o wymierzeniu organowi kary za przekroczenie terminu wydania decyzji w sprawie pozwolenia na budowę", *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa* Issue No. 1/2007, pp. 88-89 and the literature on the subject cited therein).

6. Moreover, in my view, one may not entirely rule out that the provisions of the Act of 14 June 1960 – the Code of Administrative Procedure could be applied accordingly to the decision of the Minister of Justice, in particular in the context of a request for the re-examination of a given case (Article 127(3) of the Code of Administrative Procedure). This follows from the assumption that provisions on general administrative proceedings should regulate the case-resolution activity of public administration authorities, provided that their application has not explicitly been excluded or restricted (see Z. Niewiadomski, [in:] J. Drachal, E. Mzyk, Z. Niewiadomski, *Prawo administracyjne. Część procesowa*, Warszawa 2002, p. 29). As Z. Niewiadomski notes, "general case-resolution proceedings are standard proceedings, on the basis of which a vast majority of cases are determined for individual citizens, where the case-resolution activity of public administration (...) is required. These proceedings are applicable to entire public administration, and shape standards in that regard" (*ibidem*).

In the case of proceedings before the Minister of Justice with regard to extradition, we undoubtedly deal with the case-resolution activity of a public administrative authority,

as the result thereof is "to specify and individualise the general and abstract legal norm, which is done in an authoritative way by the organ of the state designated for that task (J. Zimmermann, *Polska jurysdykcja administracyjna*, Warszawa 1996, p. 5). Therefore, with regard to the decision of the Minister of Justice, which determines an administrative case on its merits, and hence being similar to an administrative decision in its character, Article 127(3) of the Code of Administrative Procedure could be applied by analogy, as it stipulates that: "There is no appeal against a decision issued in the first instance by a minister or a local self-government appellate body; however, a party that is dissatisfied with the decision may request the said authority to re-examine the case; as regards the request, provisions on appeals against decisions are applied accordingly". Although the admissibility of filing a request *per analogiam* in the context of administrative law has been challenged (see J. Starościak, *Studia z teorii prawa administracyjnego*, Wrocław-Warszawa-Kraków 1967, pp. 64-65), but if this concerns procedural norms, approving opinions are definitely in majority (cf. E. Iserzon, [in:] E. Iserzon, J. Starościak, *Kodeks postępowania administracyjnego. Komentarz, teksty, wzory i formularze*, Warszawa 1970, p. 333; M. Jaśkowska, "Związanie administracji publicznej prawem" [in:] *Księga pamiątkowa profesora Eugeniusza Ochendowskiego*, Toruń 1999, p. 143; M. Kosiarski, "Zakres stosowania analogii legis w prawie administracyjnym (część II)", *Kwartalnik Prawa Publicznego* Issue No. 2/2003, p. 46; E. Smoktunowicz, "Glosa do wyroku NSA z 3 maja 1985 r., sygn. akt II SA 112/85", *OSPiKA* Issue No. 11-12/1987, item 213, p. 459). Therefore, there are no serious obstacles to resorting to this mechanism as regards the possibility of appealing against the decision of the Minister of Justice on the extradition of a person sought by the authorities of the requesting state in accordance with the administrative procedure.

For the above reasons, I have felt obliged to submit this dissenting opinion to the statement of reasons for the judgment of the Constitutional Tribunal of 21 September 2011 in the case SK 6/10.