39/5/A/2011

JUDGMENT
of 8 June 2011
Ref. No. K 3/09*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

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

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearings on 31 January, 18 May and 8 June 2011, in the presence of the applicants, the Sejm and the Public Prosecutor-General, an application by a group of Sejm Deputies to determine the conformity of:

1) Article 61(1), (2) and (3) of the Act of 17 May 1989 on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 29, item 154, as amended) to Article 32(1) and (2) of the Constitution of the Republic of Poland,
2) Article 61(1) and (2) of the Act referred to in point 1 above to Article 64(1) and (2) of the Constitution,
3) Article 61(2) of the Act referred to in point 1 above to Article 2 of the Constitution,
4) Article 62 of the Act referred to in point 1 above to Article 45(1) and Article 175(1) of the Constitution as well as to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended),
5) Article 63(8) of the Act referred to in point 1 above to Article 77(2) of the Constitution as well as to Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms
6) Article 63(9) of the Act referred to in point 1 above to Article 31(3),

*The operative part of the judgment was published on 21 June 2011 in the Journal of Laws - Dz. U. No. 129, item 748.

Article 92(1), Article 165(1) and (2) as well as Article 216(2) of the Constitution,

7) Article 70[a](1) and (2) of the Act referred to in point 1 above to Article 25(1) and (2) of the Constitution,
8) Article 63(9) of the Act referred to in point 1 above to Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1995 No. 36, item 175, as amended),

adjudicates as follows:

1. Article 63(9) of the Act of 17 May 1989 on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 29, item 154, of 1990 No. 51, item 297, No. 55, item 321 and No. 86, item 504, of 1991 No. 95, item 425 and No. 107, item 459, of 1993 No. 7, item 34, of 1994 No. 1, item 3, of 1997 No. 28, item 153, No. 90, item 557, No. 96, item 590 and No. 141, item 943, of 1998 No. 59, item 375, No. 106, item 668 and No. 117, item 757, of 2000 r. No. 120, item 1268, of 2004 No. 68, item 623, of 2009 No. 219, item 1710, of 2010 No. 106, item 673 and No. 224, item 1459 as well as of 2011 No. 18, item 89) **is inconsistent with Article 92(1) of the Constitution of the Republic of Poland as well as is not inconsistent with Article 216(2) of the Constitution.**

2. Article 70[a](1) and (2) of the Act referred to in point 1 is consistent with Article 25(1) of the Constitution as well as is not inconsistent with Article 25(2) of the Constitution.

Moreover, the Tribunal decides:

pursuant to Article 39(1) and (2) 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, as well as of 2010 No. 182, item 1228 and No. 197, item 1307), **to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. Determining the subject of the allegation.

1.1. Changes in the applicants' stance on the subject of the allegation.

In a letter of 22 January 2009, a group of Sejm Deputies requested the Tribunal to examine certain provisions concerning proceedings on church property, included in the Act of 17 May 1989 on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 29, item 154, as amended; hereinafter: the Act on Relations Between the State and the Roman Catholic Church or the Act).

The Constitutional Tribunal wishes to point out that the structure of the application is not consistent. The *petitum* of the application challenges particular sections of the Act. However, such an outline of *petitum* does not correspond to the structure of the substantiation, where the applicants presented their allegations by focusing on problems. They touched upon the institution referred to in the challenged Act. The applicants did not always indicate higher-level norms for review which referred to the content of provisions. In this case, one may not speak of *falsa demonstratio*, as the applicants consistently emphasised (also in the supplementary letter of 3 March 2011) that, in their assessment, the challenged provisions infringed the rights of public entities, in particular communes.

The Constitutional Tribunal has not addressed the issue of the constitutionality of implementing acts issued on the basis of the challenged provisions. Despite the fact that the applicants indirectly showed the unconstitutionality of those statutes, they did not include the statutes within the scope of the allegation in the present case.

The subject of the allegation was modified by the supplementary letter of 3 March 2011, in which the allegations concerning a review of Article 61(1)-(3) of the Act on Relations Between the State and the Roman Catholic Church in the Republic of Poland were withdrawn. At the hearing on 18 May 2011, the applicants specified that the withdrawn allegations were those presented by the group of Sejm Deputies in points (1)-(3) of the *petitum* of the application of 22 January 2009.What is also of significance in the present case is the fact that, on 16 December 2010, there was the enactment of the Act amending the Act on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. of 2011 No. 18, item 89; hereinafter: the amending Act of 16 December 2010). The amending Act derogated some of the provisions concerning proceedings on church property.

The above circumstances have affected the subject of the allegation in the present case.

1.2. The significance of the amending Act of 16 December 2010.

1.2.1. The essence of proceedings on church property.

1.2.1.1. When analysing the subject of the allegation and the arguments presented by the applicants, the Constitutional Tribunal took the stance that the indicated problem, above all, concerned granting replacement property in proceedings on church property. It followed from the argumentation put forward by the applicants that the main issue was the protection of the property of communes in proceedings on church property.

Therefore, the Tribunal wishes to note, by referring to the interpretative resolution of 24 June 1992 (Ref. No. W 11/91), that in 1989 the legislator created a mechanism meant for resolving property issues of the Roman Catholic Church and for rectifying the damage caused thereto.

The Act on Relations Between the State and the Roman Catholic Church originally provided for two kinds of solutions in that regard. Firstly, immovable properties, or parts thereof, specified by statute, which were managed by church legal entities on the day of entry into force of the Act, became the property of those entities. Secondly, the Act provided for separate proceedings to return or transfer the ownership of immovable properties, or parts thereof, specified by statute to church legal entities (the proceedings were referred to in statutory provisions as proceedings on church property).

The Act constituted the basis for making public law claims against the state by church legal entities for the return or transfer of the ownership of property specified by statute.

1.2.1.2. The legislator restricted the scope ratione personae and ratione materiae of proceedings on church property. Pursuant to Article 61(4)(1) of the Act on Relations

Between the State and the Roman Catholic Church, the resolution of property issues might not infringe the provisions of the Act of 3 January 1946 on the nationalisation of basic branches of the national economy (Journal of Laws - Dz. U. No. 3, item 17, as amended). Also, the resolution of property issues might not infringe rights acquired by non-state third parties, and in particular by other churches and religious organisations, as well as by individual farmers (cf. Article 61(4)(3) of the Act). The Act set a time-limit for satisfying claims indicated therein. In accordance with Article 62(3) of the Act, applications for instituting proceedings on church property might be submitted within 2 years from the date of the entry into force of the Act. Claims which were not submitted within that time-limit expired. Article 77 of the Act stipulated that the Act entered into force on the day of its publication. The Act was published in the Journal of Laws of 23 May 1989. On the basis of Article 2 of the Act of 11 October 1991 amending the Act on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 107, item 459; hereinafter: the amending Act of 11 October 1991) the time-limit for submitting applications for instituting proceedings on church property was extended until 31 December 1992.

1.2.1.3. Claims made in the course of proceedings on church property could be satisfied in three ways. The resolution of property issues primarily consisted in returning the ownership of property falling within the scope of proceedings on church property to church legal entities. If the return of the ownership of the said property was hindered by obstacles which were difficult to surmount, it was possible to grant a replacement immovable property. Where it was impossible to resolve property issues in the above-mentioned ways, the legislator provided for compensation in an amount specified by provisions on the expropriation of immovable property.

In the view of the Constitutional Tribunal, what follows from the analysis of Annex 3 to the report on the activity of the Committee on Church Property is that it was only during proceedings on church property that a decision was made as to the way of resolving property issues. A given application indicated the basic property (i.e. the one which had been nationalised) and it was resolved, by means of a settlement or a decision delivered by the decision-making panel of the Committee, whether the property was to be returned, a replacement property was to be granted or compensation was to be awarded.

I follows from the Annex to the report on the activity of the Committee on Church Property that in some cases, within the scope of one settlement or decision, a given property was returned, a replacement property was granted and compensation was awarded. Article 61(1) of the Act on Relations Between the State and the Roman Catholic Church was interpreted in conjunction with Article 63(1) of the Act. Likewise, Article 61(2) was interpreted in conjunction with Article 61(1) of the Act on Relations Between the State and the Roman Catholic Church.

1.2.1.4. The Act regulated the protection of the rights of third parties in the course of proceedings on church property. Article 61(4)(3) of the Act on Relations Between the State and the Roman Catholic Church stipulated that the Committee's resolution of property issues might not infringe rights acquired by "non-state third parties, in particular by other churches and religious organisations as well as individual farmers". Also, there was no possibility of conducting proceedings on church property in order to return the ownership of property the legal situation of which was not determined, if this could lead to the violation of the rights of third parties (Article 61(2)(2) of the Act). Moreover, the scope of proceedings on church property did not include immovable properties that used to be owned by dioceses, parishes, monasteries, convents or other Greek Catholic (Uniate) institutions which on the day of entry into force of the Act were owned by other churches and religious organisations (Article 61(1)(1) of the Act).

The Tribunal has stated, without assessing the effectiveness of the cited provisions, that the protection of the rights of third parties is not a constitutional issue. This is indicated both by the application and the stance presented by the representative of the applicants, who emphasised at the hearing on 18 May 2011 that the application was aimed at protecting the interests of communes in proceedings on church property. Raising an allegation concerning the position of communes in proceedings on church property, the applicants indicated the following provisions as higher-level norms for the review: Article 64(1) and (2), Article 45(1) as well as Article 77(2) of the Constitution. The Tribunal wishes to point out that the said provisions express the right of ownership and the right to a fair trial enjoyed by the subjects of the constitutional rights and freedoms of the individual. By contrast, they do not apply to communes and other subjects of public law rights and obligations. It should be noted that the institution of the ownership of local self-government has been expressed and guaranteed in Article 165(1), second sentence, of the Constitution. The judicial protection of the self-governing nature of communes has been expressed and guaranteed in Article 165(2) of the Constitution. For that reason, the provisions indicated by the applicants do not constitute adequate higher-level norms for the review of the regulation concerning a commune or a different unit of local self-government.

1.2.1.5. The amending Act of 11 October 1991 provided for a possibility that the legal entities of the Roman Catholic Church which commenced their activity in post-WW II western and northern territories of Poland after 8 May 1945 would be granted land free-of-charge from the State Land Fund or from the State Treasury's Reserve of Agricultural Property (Article 70^{a}(1) and (2) of the Act). The Constitutional Tribunal draws attention to the fact that the said provisions were included within the scope of the allegation by the applicants, although they do not constitute the subject of proceedings on church property.

1.2.1.6. The Act on Relations Between the State and the Roman Catholic Church triggered the issuance of legal acts aimed at rectifying the damage caused by the drastic violation of rights and freedoms of persons and citizens by communist authorities. The said regulation constituted a starting point for statutory solutions concerning other churches and religious organisations. On the basis of statutes, the following have been established and have been functioning in accordance with the current law: the Committee on property issues concerning the Evangelical Augsburg (Lutheran) Church, the Committee on property issues concerning Jewish communities, the Committee on property issues concerning the Polish Autocephalous Orthodox Church, and the Interchurch Committee on property issues.

1.2.1.7. The Constitutional Tribunal points out that provisions concerning proceedings on church property were enacted under the rule of the Constitution of the People's Republic of Poland, dated 22 July 1952, during the period when the system of state councils was in operation, before the reintroduction of the institution of local self-government, in the circumstances where the principles of the unity of state authority and the uniformity of state property were binding. They were aimed at rectifying the damage caused to the Roman Catholic Church, and subsequently their application was to be discontinued. However, the application of the provisions concerning proceedings on church property has extended considerably in comparison with the assumption of the Act. As a result, the challenged regulations were binding within the changing normative context. The modification of the normative context comprised, *inter alia*, changes in constitutional provisions, and in particular the enactment of the Constitution of the Republic of Poland, which has extended the scope of the protection of rights and freedoms

of persons and citizens, and also the ratification of international agreements which protect the said rights and freedoms.

1.2.2. The normative situation after the entry into force of the amending Act of 16 December 2010.

The participants in proceedings before the Constitutional Tribunal unanimously emphasised the significance of the changes in the legal situation arising from the entry into force of the amending Act of 16 December 2010. It derogated Article 62, Article 63(4)-(8), Article 64, Article 65 as well as Article 67 of the Act on Relations Between the State and the Roman Catholic Church. The amending Act of 16 December 2010 entered into force on 1 February 2011.

In Article 2 of the amending Act of 16 December 2010, the legislator decided that as of 1 March 2011 the Committee on Church Property would be abolished (it completed its work at the end of February 2011). From the entry into force of the amending Act of 16 December 2010 until 28 February 2011, the work of the Committee was to submit a report on its activity to a competent minister for religious affairs and for national and ethnic minorities, the Secretariat of the Polish Episcopal Conference as well as to the Joint Committee of the Representatives of the Government of the Republic of Poland and of the Polish Episcopal Conference. Pursuant to Article 3 of the amending Act of 16 December 2010, the Committee on Church Property was to submit - to a competent minister for religious affairs and for national and ethnic minorities – documentation gathered in the course of proceedings on church property, including files the Committee had been provided with on the basis of Article 62(4) of the Act on Relations Between the State and the Roman Catholic Church.

The Committee on Church Property provided the competent minister for religious affairs and for national and ethnic minorities with applications for the institution of proceedings on church property, submitted on the basis of Article 62(3), first sentence, of the Act on Relations Between the State and the Roman Catholic Church as well as Article 2 of the amending Act of 11 October 1991, which had not been considered before the entry into force of the said Act, notifying participants in the said property proceedings in writing that the said applications had not been considered.

Pursuant to Article 4 of the amending Act, participants in proceedings on church property, with regard to whom a decision-making panel or the Committee on Church Property in full did not work out a decision before the entry into force of the said Act – within the period of six months from the moment of receiving written notification referred to in Article 64(1) of the Act on Relations Between the State and the Roman Catholic Church - may request that suspended court or administrative proceedings be resumed. In the case where such proceedings were not instituted, the said participants may request a court to determine the validity of a given claim. Considering a given case, the court applies the provisions of Article 63(1)-(3) of the Act. In the case where no request was submitted to the court within the prescribed period, the claim shall expire.

In the case where applications for the institution of proceedings on church property were not considered on the basis of Article 62(3), first sentence, of the Act on Relations Between the State and the Roman Catholic Church and Article 2 of the amending Act of 11 October 1991, Article 4(1) of the amending Act of 16 December 2010 shall apply respectively to participants in proceedings on church property, but the time-limit indicated therein is counted from the entry into force of the said Act.

1.2.3. The impact of the amending Act of 16 December 2010 on the course of proceedings in the present case.

The Constitutional Tribunal has stated that the amending Act of 16 December 2010 resulted in the formal derogation of certain provisions of the Act on

Relations Between the State and the Roman Catholic Church. They include Article 62 and Article 63(8) of the Act, which constitute the subject of the review in the present case.

Therefore, it should be considered whether there are grounds to discontinue the proceedings on the basis of Article 39(1)(3) 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). Pursuant to Article 39(1)(3) of the Constitutional Tribunal Act, if a normative act has ceased to have effect to the extent challenged prior to the delivery of a judicial decision by the Tribunal, the Tribunal shall discontinue proceedings.

In the opinion of the Constitutional Tribunal, the formal repeal of a normative act does not have to mean that it will be completely eliminated from the legal system. The Tribunal holds the view that one should draw a distinction between situations where a normative act under examination - despite having been formally repealed - results in regulating the future forms of conduct as regards the subjects of rights and obligations (it may constitute a source of requirements and prohibitions), and a situation where a repealed normative act is merely applied to the assessment and determination of legal effects of the past conduct of those subjects, on the basis of the binding norm governing powers which requires the application of a repealed normative act. In the former case, the normative act is binding and is subject to review by the Constitutional Tribunal. In the latter case, the normative act has ceased to have effect, and the review of the act is admissible only within the scope set out in Article 39(3) of the Constitutional Tribunal Act (cf. the judgment of 16 March 2011, Ref. No. K 35/08, OTK ZU No. 2/A/2010, item 10 and the jurisprudence indicated therein).

1.2.4. The status of the derogated provisions of the Act.

1.2.4.1. The provisions derogated by the legislator include Article 62 of the Act on Relations Between the State and the Roman Catholic Church. It constituted the legal basis of the existence of the Committee on Church Property as well as set the scope of the Committee's activity and the rules of procedure for the Committee. The other derogated provision included in the scope of the application lodged with the Constitutional Tribunal is Article 63(8) of the Act, in accordance with which decisions delivered by the decisions-making panel shall not be appealed.

The Constitutional Tribunal has stated that since the amending Act of 16 December 2010 explicitly provides for the dissolution of the Committee, then the provisions on its participation in proceedings on church property will not apply to any situation in the future. The norms arising from Article 62 of the Act on Relations Between the State and the Roman Catholic Church are systemic and procedural in character. Thus, with the dissolution of the Committee, they will no longer set prohibitions and requirements pertaining to the Committee's activity. Although the amending Act of 16 December 2010 included the assumption that the Committee should provide relevant authorities with a report on its activity and appropriate documents, but this requirement concerned the existing Committee, and not the one to be formed anew on the basis of Article 62 of the Act on Relations Between the State and the Roman Catholic Church. Therefore, the formal derogation of Article 62 of the Act resulted in the invalidity of that provision within the meaning of Article 39(1)(3) of the Constitutional Tribunal Act.

Also, Article 63(8) of the Act on Relations Between the State and the Roman Catholic Church is a provision which – after the entry into force of the amending Act of 16 December 2010 – may not be applied to future events and situations. Since the Committee on Church Property ends its activity and the legislator abolishes proceedings on church property in that context, one may not regard Article 63(8) of the Act as having effect. Hence, the Constitutional Tribunal has stated that the regulation ceased to have effect within the meaning of Article 39(1)(3) of the Constitutional Tribunal Act.

1.2.4.2. The fact that a normative act has ceased to have effect does not always imply the necessity to discontinue proceedings. Within the meaning of Article 39(3) of the Constitutional Tribunal Act, the Tribunal may issue a ruling on a normative act which has ceased to be valid before the ruling is issued if such a ruling is necessary for the protection of constitutional rights and freedoms. According to the jurisprudence of the Tribunal, for a constitutional review of an invalid provision to be justified, it is necessary to determine whether the following three criteria have been met:

– firstly, the provision being subject to assessment includes normative content which refers to the realm of rights and freedoms protected by the Constitution;

– secondly, there is no alternative legal instrument (apart from declaring a given provision to be unconstitutional) which could result in the change of a legal situation that has been established in a definite way before that provision ceased to have effect;

– thirdly, possible elimination of a given provision from the legal system will constitute an effective means of restoring the protection of rights that were infringed by the fact that the challenged legal regulation was in force.

The Constitutional Tribunal has found no grounds for examining the case on the basis of Article 39(3) of the Constitutional Tribunal Act. The Tribunal has stated that the applicants presented no arguments which weighed in favour of adjudicating on the derogated provisions. In particular, they did not make it probable that issuing a ruling concerning Article 62 and Article 63(8) of the Act on Relations Between the State and the Roman Catholic Church was necessary for the protection of the constitutional rights and freedoms referred to in Article 39(3) of the Constitutional Tribunal Act. The said argument supports the stance presented at the hearing on 31 January 2011 by the representative of the applicants that "the claims, demands or allegations, put forward in the application by the group of Sejm Deputies, have been satisfied by the amending Act". At the hearing on 18 May 2011, the representative of the applicants confirmed that the assessment was valid. Again he indicated that the issues raised by the applicants had undeniably been dealt with by the amending Act of 16 December 2010 (cf. verbatim record from the hearing held on 18 May 2011, p. 27).

Therefore, within that scope, the Constitutional Tribunal has decided to discontinue the proceedings.

1.3. The dissolution of the Committee on Church Property and the examination of Article 63(9) of the Act.

After the dissolution of the Committee on Church Property by the amending Act of 16 December 2010, what remained for examination by the Constitutional Tribunal was the allegation concerning Article 63(9) of the Act. This provision contains authorisation for issuing a regulation to indicate the property of state organisational units or local self-government property from which an immovable property may be selected for the purpose of transferring it as a replacement property or to indicate which state organisational unit may be burdened with the obligation to pay compensation.

The Constitutional Tribunal has stated that Article 63(9) of the Act was not formally derogated. This is a binding provision. Therefore, it is subject to substantive assessment by the Constitutional Tribunal.

1.4. Article 70^a of the Act and proceedings on church property.

In the present case, the applicants have also challenged Article 70^a(1) and (2) of the Act. Despite the fact that the said provision concerns the transfer of property to church legal entities, it does not fall within the scope of proceedings on church property. Neither

was it derogated by the legislator on 16 December 2010. Thus, it is subject to substantive assessment by the Constitutional Tribunal.

1.5. Conclusions.

Due to the withdrawal of the application for the examination of Article 61(1)-(3) of the Act as well as the fact that Article 62 and Article 63(8) of the Act ceased to have effect, the Constitutional Tribunal has stated that, in the present case, Article 63(9) as well as Article 70^{a}(1) and (2) of the Act are subject to substantive assessment. The said provisions were not affected by the amending Act of 16 December 2010.

2. The issue of the constitutionality of Article 63(9) of the Act.

2.1. The constitutional issue.

2.1.1. Reconstructing the constitutional issue in the present case, the Constitutional Tribunal stated that the applicants challenged the provision which authorised the Council of Ministers to issue a regulation in which the Council indicated the property of state organisational units or local self-government property from which an immovable property may be selected for the purpose of transferring it as a replacement property. In the applicants' opinion, the said authorisation does not meet requirements for issuing regulations (Article 92(1) of the Constitution) as well as infringes the principle of proportionality with regard to the right to manage property, as managing public property should be regulated by statute (Article 216(2) of the Constitution).

Moreover, in the assessment of the applicants, the challenged provision infringes the principle of the self-governing nature of the units of local self-government, as set out in Article 165 of the Constitution. Indeed, the organ of public authority which issues the said regulation is to decide about the property of local self-government, which is one of the elements of the independence of communes.

2.1.2. The Constitutional Tribunal has stated that the issue concerning Article 63(9) of the Act consists in assessing whether it is possible to specify in a regulation how the property owned by the State Treasury and that owned by the units of local self-government is to be managed and in what way the said property is to be transferred. Therefore, the constitutional issue is the separation of subject matter between a statute and a regulation.

2.2. The significance of Article 216(2) of the Constitution in the context of the issuance of regulations.

2.2.1. In the opinion of the applicants, the Constitution contains other norms than Article 92(1), which indirectly affect the separation of subject matter between a statute and a regulation. In the light of those norms, the subject matter indicated in Article 63(9) of the Act may not be specified in a regulation. To prove this, the applicants have indicated Article 216 (2) of the Constitution as a higher-level norm for the review in the present case.

Article 216(2) of the Constitution stipulates that the acquisition, disposal and encumbrance of property, stocks or shares, issue of securities by the State Treasury, the National Bank of Poland or other state legal entities shall be done in accordance with principles and by procedures specified by statute. The entities and legal transactions mentioned therein are broadly construed in the literature on the subject, taking into account the principles governing the management of public funds referred to in Article 216(1) of the Constitution. The systemic interpretation of that provision leads to a conclusion that the legal transactions mentioned in Article 216(2) of the Constitution are subject to the

restrictions introduced in Article 216(1) of the Constitution. The adoption of such interpretation of Article 216(2) of the Constitution entails that the requirement to specify certain principles and procedures for carrying out legal activities by statute refers to all state legal entities. The State Treasury and the National Bank of Poland are mentioned here merely as examples (cf. C. Kosikowski, *Finanse publiczne w świetle Konstytucji RP oraz orzecznictwa Trybunału Konstytucyjnego – na tle porównawczym*, Warszawa 2004, p. 190).

2.2.2. The Constitutional Tribunal has stated that reference made in Article 216(2) of the Constitution means that the legislator is to create procedural framework, leaving the substantive determination within that scope to the relevant organs of state legal entities. It should be stressed that Article 216(2) of the Constitution concerns state property, and not the property of local self-government. Therefore, the said Article does not refer to the aspect of the provision, authorising the issuance of a regulation, which concerns the units of local self-government. Since Article 216(2) of the Constitution stipulates that the acquisition, disposal and encumbrance of property by the State Treasury, the National Bank of Poland or other state legal entities shall be done in accordance with principles and by procedures specified by statute, then it may not refer – just as the legislator intends – to local self-government entities.

In addition, it should be noted that Article 216 of the Constitution concerns the disposal and encumbrance of the property of the State Treasury. The said provision does not concern the return and restitution of the property seized by the state during the years 1944-1989. However, there is no doubt that those issues also constitute matters which are required to be regulated by statute, in the case of which all essential aspects should be regulated directly in a statute.

The Constitutional Tribunal has noted that the challenged provision does not stipulate that terms and a procedure for the acquisition of the property should be specified in a regulation. Therefore, the content of Article 63(9) of the Act on Relations Between the State and the Roman Catholic Church does not correspond to Article 216(2) of the Constitution as a higher-level norm for the review; hence, the indicated higher-level norm for the review is inadequate.

2.3. Authorisation to issue a regulation - before the entry into force of the current Constitution of 1997 (hereinafter: the Constitution).

2.3.1. The Act on Relations Between the State and the Roman Catholic Church was enacted under the rule of the Constitution of 1952. In the context of those provisions, the rules for issuing implementing acts were not specified. In its previous jurisprudence, the Constitutional Tribunal posed the question as to what extent it was necessary to adjudicate on the unconstitutionality of all instances of statutory authorisation which had entered into force prior to 17 October 1997 if they contained no guidelines. The Tribunal concluded that the Constitution did not provide for derogating the provisions of statutes which contained authorisation to issue a regulation and which were without any guidelines; neither did the Constitution specify a time-limit for adjusting them so that they could comply with Article 92(1) of the Constitution. At the same time, the Tribunal emphasised that supplementing given authorisation with guidelines should happen sort of "by the way" in the course of amending a given statute. Moreover, in the rulings issued in recent years, the Tribunal assumed that sufficient amount of time had passed between the enactment and the entry into force of the Constitution for the legislator to adjust the pre-constitutional provisions containing authorisation to the requirements of Article 92(1) of the Constitution (cf. the judgments of: 29 May 2002, Ref. No. P 1/01, OTK ZU No. 3/A/2002, item 36; 6 May 2003, Ref. No. P 21/01, OTK ZU No. 5/A/2003, item 37; 26 April 2004, Ref. No.

K 50/02, OTK ZU No. 4/A/2004, item 32; of 11 February 2010, Ref. No. K 15/09, OTK ZU No. 2/A/2010, item 11). In the present case, the said adjustment of the guidelines on the basis of Article 63(9) of the Act did not occur.

2.3.2. Maintaining the well-established line of jurisprudence, the Constitutional Tribunal states that a provision authorising the issuance of a regulation, regardless of the day of its entry into force, must be consistent with the currently binding provisions of the Constitution, and in particular with Article 92(1) of the Constitution. Consequently, the Tribunal is going to examine the conformity of the challenged statutory authorisation to Article 92(1) of the Constitution.

2.4. The character of implementing regulations, and authorisation to issue a regulation.

2.4.1. Pursuant to Article 92(1) of the Constitution, regulations shall be issued on the basis of specific authorisation contained in, and for the purpose of implementation of, statutes by the organs of public authority specified in the Constitution. The authorisation has to have a detailed character in respect of: 1) the scope ratione personae (the indication of an organ of public authority which is competent to issue such a regulation), 2) the scope ratione materiae (the scope of matters to be regulated) as well as 3) the content (the indication of guidelines concerning the provisions of such a legal act).

The Constitutional Tribunal holds the view that authorisation with regard to which one may not indicate any statutory content which plays the role of "guidelines concerning the provisions of such act" is contrary to the Constitution. The lack of "guidelines" constitutes a sufficient reason for the unconstitutionality of authorisation, even if the other requirements referred to in Article 92 of the Constitution have been fulfilled.

In the legal order which provides for the separation of and balance between powers, based on the primacy of statutes as the basic sources of law, the Parliament may not at random "cede" law-making powers to the organs of the executive branch of government. The law-making decisions of an organ of the executive branch of government may not shape the basic elements of legal regulation (see the judgments of: 24 March 1998, Ref. No. K 40/97, OTK ZU No. 2/1998, cf. those of 12 as well as 25 May 1998, Ref. No. U 19/97, OTK ZU No. 4/1998, item 47).

2.4.2. In the opinion of the Constitutional Tribunal, the way of formulating guidelines, the scope of details contained therein and the content of guidelines are actually matters that concern the legislator. The review of the conformity of statutory authorisation to Article 92(1), first sentence, of the Constitution, is limited to two issues. Firstly, the Tribunal examines whether a statute contains any guidelines at all. Secondly, the Tribunal considers whether the way of editing guidelines complies with the said general principles determining which issues need to be regulated by statute and whether the said way is adequate to the nature of issues under regulation. If the said reconstruction of guidelines proves impossible, then the provision containing authorisation will have to be declared to be unconstitutional (see the judgments of the Constitutional Tribunal of: 26 October 1999, Ref. No. K 12/99, OTK ZU No. 6/1998, item 120 as well as of 31 March 2009, Ref. No. K 28/08, OTK ZU No. 3/A/2009, item 28 and the jurisprudence indicated therein).

2.5. The assessment of the conformity of Article 63(9) of the Act to Article 92(1) of the Constitution.

2.5.1. Taking into account rules arising from Article 92(1) of the Constitution, the Constitutional Tribunal states that Article 63(9) of the Act meets the requirements as to the scope ratione personae and ratione materiae. The authorisation specifies who is competent to issue a regulation (the Council of Ministers) as well as what issues are to be regulated in

that regulation (the indication of the property of state organisational units or local self-government property from which an immovable property may be selected for the purpose of transferring it as a replacement property or the indication of which state organisational unit is obliged to pay compensation).

The possibility of granting a replacement property in proceedings on church property directly arises from the Act (Article 63(1)(2) of the Act). The Regulation of 21 December 1990 supplements the Act with more detailed content. As regards statutory regulation set out in Article 63(9) of the Act, the Constitutional Tribunal has not found any guidelines concerning the content of a regulation. Also, the entirety of the Act on Relations Between the State and the Roman Catholic Church does not allow one to derive guidelines on how to regulate the content of a regulation. The mere statement that the law-maker shall specify property which may be subject to proceedings on church property does not determine what criteria the Council of Ministers is to apply when specifying replacement immovable properties in such proceedings. This results in the excessive freedom of the Council of Ministers as regards drafting the regulation.

2.5.2. The Tribunal has considered whether the scope of issues to be specified by regulation meets the requirements arising from Article 92(1) of the Constitution.

The Constitution provides for regulating certain issues by statute. In particular, this pertains to the legal regulation of the rights and freedoms of persons and citizens as well as to numerous issues concerning the units of local self-government. The requirement to regulate certain issues by statute does not have an absolute character and does not rule out any regulations within that scope. Within the meaning of Article 92(1), regulations shall be issued for the purpose of implementing a statute. A regulation as an implementing act to a statute may not regulate issues which are of significance from the point of view of a given realm to be regulated or the assumptions of the statute. Any significant issues must be regulated directly by statute.

2.5.3. The challenged provision assigns the following content to be specified by regulation: "the indication of the property of state organisational units or local self-government property from which an immovable property may be selected for the purpose of transferring it as a replacement property or the indication of which state organisational unit is obliged to pay compensation". Therefore, the Council of Ministers is to specify which state and local self-government immovable properties may be transferred as replacement properties. The mentioned issues are important both from the point of view of the status of communes and the assumptions of the Act on Relations Between the State and the Roman Catholic Church. The Council of Ministers gained the possibility of regulating an essential issue which should be included in a statute, and not in a regulation as an implementing act to a statute.

For the above reasons, the provision which authorises the issue of a regulation does not meet constitutional requirements. Article 63(9) of the Act on Relations Between the State and the Roman Catholic Church is inconsistent with Article 92(1) of the Constitution.

2.5.4. Therefore, due to the fact that the Constitutional Tribunal has declared the provision authorising the issuance of a regulation to be unconstitutional, the goal of the review before the Tribunal has been achieved; namely, a defective provision has been eliminated from the legal system. Consequently, there is no need for the Tribunal to present its stance on the other higher-level norms for the review indicated by the applicants with regard to Article 63(9) of the Act on Relations Between the State and the Roman Catholic Church.

3. The issue of the constitutionality of Article 70^{a}(1) and (2) of the Act.

3.1. The subject of the review.

3.1.1. The Act of 1991 amending the Act on Relations Between the State and the Roman Catholic Church introduced the possibility of the free-of-charge transfer of a strictly specified area of land which is part of the State Land Fund to the legal entities of the Roman Catholic Church which have commenced their activity in post-WW II western and northern territories of Poland after 8 May 1945.

In the light of Article 70^a(1) of the Act on Relations Between the State and the Roman Catholic Church, the legal entities of the said Church that commenced their activity in post-WW II western and northern territories of Poland after 8 May 1945 may receive, upon application, land that constitutes part of the resources of the State Land Fund or the State Treasury's Reserve of Agricultural Property. If the said land is managed or used by legal entities, the transfer of the ownership of land may only be carried out upon consent of those entities. Pursuant to Article 70^a(2) of the Act, the surface area of the transferred agricultural property, including agricultural land which is already owned by a given applicant, may not exceed in the case of:

1) the agricultural holdings of parishes – the surface area of 15 ha,

2) the agricultural holdings of dioceses – 50 ha,

3) the agricultural holdings of seminaries, diocesan seminaries, and seminaries run by religious orders – 50 ha

4) the agricultural holdings of homes run by religious orders – 5 ha, unless those institutions conduct activity indicated in Article 20 and Article 39; in those cases, agricultural properties to be transferred may have the surface of up to 50 ha.

What justified that regulation was ultimately a need to resolve property issues of the Roman Catholic Church in post-WW II western and northern territories of Poland. When transferring the activity of its legal entities from the pre-WW II eastern territories of the Second Republic of Poland to the post-WW II western and northern territories of Poland, the Church was – due to the policy of the state authorities of that time - deprived of the agricultural property which it had acquired prior to 1945.

Article 70^a of the Act on Relations Between the State and the Roman Catholic Church was to eliminate the negative effects of actions taken by communist authorities in the years 1946-1971, which were addressed against church legal entities that conducted their activity in the post-WW II western and northern territories of Poland.

It should be stressed that the application of Article 70^a of the Act on Relations Between the State and the Roman Catholic Church is not subject to proceedings on church property. Granting immovable properties in accordance with that procedure is not carried out before the Committee on Church Property, and the submission of applications has not been assigned a time-limit. Until today church legal entities may resort to that procedure.

3.1.2. In the view of the applicants, Article 70^a(1) and (2) of the Act provides the Roman Catholic Church with the best possibilities of increasing the area of agricultural holdings. The right to submit applications for agricultural properties is not restricted by a time-limit. In the case of the Roman Catholic Church, the group of legal entities that can submit applications is the largest. In the case of other churches, applications for granting agricultural properties may be submitted only with regard to parishes.

The applicants argued that, with regard to the Roman Catholic Church, the largest permitted surface areas have been adopted for supplementing or establishing new agricultural holdings. In the case of other churches, the said permitted surface areas are smaller. The Roman Catholic Church is privileged in comparison with the other religious organisations.

In the view of the applicants, the decision to create advantageous legal regulations for the Roman Catholic Church is inconsistent with the principle that public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical (Article 25(1) and (2) of the Constitution). The possibility of transferring agricultural land from the state property to the Roman Catholic Church constitutes the manifestation of the state's direct support for the implementation of the Church's mission which consists in disseminating the Roman Catholic doctrine.

3.2. The institutional dimension of the freedom of religion.

Article 25 of the Constitution refers to the institutional dimension of the freedom of religion:

1) the principle that churches and other religious organisations shall have equal rights;
2) the principle that public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical;
3) the principle of the freedom of expression within public life, as regards personal conviction, whether religious or philosophical;
4) the principle that the relationship between the State and churches or other religious organisations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere;
5) the principle of cooperation between the state and churches or other religious organisations for the individual and the common good;
6) the principle of regulating relations between the State and churches or other religious organisations by means of bilateral agreements.

The essential constitutional elements of the status of churches and other religious organisations include the principle of enacting legal provisions on churches and other religious organisations by means of bilateral agreements. The relations between the Republic of Poland and the Roman Catholic Church is determined by an international treaty concluded with the Holy See, and by statute. Relations between the Republic of Poland and other churches or religious organisations are determined by statutes enacted pursuant to agreements concluded between the competent representatives of those churches and the Council of Ministers.

The Constitutional Tribunal has stated that the provisions regulating the institutional position of churches and religious organisations, which are included in Article 25 of the Constitution, have been formulated as a systemic principle by the constitution-maker. Therefore, the interpretation of other constitutional provisions should be carried out in such a way that would guarantee the maximum possibility of implementing them.

Article 25 of the Constitution comprehensively regulates issues related to the equal rights of churches and religious organisations. Hence, it is unnecessary to refer in that regard to Article 32 of the Constitution.

The applicant indicated Article 25(1) and (2) of the Constitution as a higher-level norm for the review. Pursuant to those provisions: "churches and other religious organizations shall have equal rights" (Article 25(1) of the Constitution) and "public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life" (Article 25(2) of the Constitution).

The Constitutional Tribunal has stated that the indicated higher-level norms for the review should be interpreted by taking into account Article 25(3) and (4) of the Constitution.

3.3. The principle of equal rights of churches and other religious organisations.

Article 25(1) of the Constitution establishes the principle of equal rights of churches and other religious organisations. The incorporation of that principle into Chapter I of the Constitution confirms the special status of those entities.

The axiological basis of the equal institutional rights of churches and religious organisations is the dignity of the followers of all religions in a pluralist society. What follows from the principle of the dignity of the person is the requirement to protect the rights of the followers of particular religions by means of the Constitution.

The freedom of religion implies the equal institutional rights of churches and religious organisations. At the systemic level, the principle of equal rights of churches and other religious organisations rules out the possibility of establishing a state's religion and imposing a religious character on the state. The content of the principle of equal rights of churches and other religious, in the light of the Constitution, is the assumption that all churches and religious organisations which share a common significant characteristic should be treated equally. At the same time, the said principle implies different treatment of churches and religious organisations which do not share a common significant characteristic from the point of view of a given legal act (cf. the judgment of 2 April 2003, Ref. No. K 13/02, OTK ZU No. 4/A/2003, item 28). What follows from such rendering is a prohibition against discriminating or favouring particular churches in a situation where churches meet all requirements set by law. However, this does not mean that certain variation in the status of particular churches is not constitutionally admissible. The variation in the status of churches and other religious organisations arises from Article 25(4), which stipulates that relations between the Republic of Poland and the Roman Catholic Church shall be determined not only by statute, but also by international treaty concluded with the Holy See. In that context, the Tribunal wishes to emphasise that the principle of equal institutional rights of churches and other religious organisations may not be construed as a principle that creates a legitimate expectation of gaining actual equality.

3.4. The principle of the state's impartiality in matters of convictions.

3.4.1. The applicants have also indicated Article 25(2) of the Constitution as a higher-level norm for the review. The said provision, together with Article 25(1) and (3) of the Constitution, sets out the system of separation between the state and churches as well as other religious organisations.

Pursuant to Article 25(2) of the Constitution, public authorities are obliged to ensure the freedom of personal conviction, and the freedom to express such conviction in public life, to everyone, including the related freedom of decision within that scope. The impartiality of public authorities and respect for the equal rights of churches or other religious organisations by public authorities is closely related to respecting the freedom of personal conviction, whether religious or philosophical and the freedom to express such conviction in public life.

The interpretation of normative content of Article 25(1) and (2) of the Constitution should therefore be carried out in a close relation to Article 53 of the Constitution, which indicates the freedom of religion in the realm of the individual.

The principle of impartiality of public authorities in matters of personal conviction, whether religious or philosophical, does not rule out the positive involvement of the state in the implementation of the freedom of conscience and religion, as well as making it possible for citizens to satisfy their spiritual needs.

When taking such action, public authorities should adhere to the principles of objectivity and equal treatment of religious communities. The Polish term "*bezstronność*"

[impartiality] is generally considered in the literature on the subject as more favourable to religion and as one which provides for a broader scope of activity of public authorities.

3.4.2 The Constitutional Tribunal has stated that when determining the meaning of the principle of impartiality of public authorities, it should be noted that the Polish word "*bezstronność*" [impartiality] denotes "*brak uprzedzeń; obiektywizm*" [lack of prejudice; objectivity] (*Słownik języka polskiego*, M. Szymczak (ed.), Warszawa 1995, Vol. 1, p. 142). Impartiality rules out prejudice and implies adopting the same approach towards certain entities. But it does not rule out taking positive action for the sake of those entities. The impartiality of the state may not be regarded as tantamount to its passive role. It permits positive involvement in order to ensure the greatest possible freedom of conscience and religion to everyone in a democratic and pluralist society.

The principle of impartiality of public authorities in matters of personal conviction, whether religious or philosophical, remains related to the principle that the Republic of Poland shall be the common good of all its citizens, as set out in Article 1 of the Constitution. In a pluralist society, the state is a political community of all its citizens, as well as the common good of all citizens (regardless of citizens' personal convictions, whether religious or philosophical). For that reason, the state – as the common good of all citizens – does not take a stance as regards the said convictions, but guarantees that citizens and their views will be treated equally. The impartiality of public authorities is a means to guarantee harmonious relations among people of different convictions as well as among social groups holding different convictions (whether religious or philosophical). The principle of impartiality of public authorities in matters of personal conviction, whether religious or philosophical, delineates the boundaries of the activity of authorities.

3.5. The assessment of the conformity of Article 70^a(1) and (2) of the Act to Article 25(1) and (2) of the Constitution.

3.5.1. The Constitutional Tribunal has already stated - what the applicants did not notice - that challenged Article 70^a(1) and (2) of the Act on Relations Between the State and the Roman Catholic Church entered into force by means of the amending Act of 11 October 1991. The said provision was not part of the Act on Relations Between the State and the Roman Catholic Church at the moment of its enactment. The assumption was that the said provision was to compensate the damage caused by the change of the borders of the Polish state. After the WW II, a considerable number of immovable properties owned by church legal entities remained outside the Polish borders.

The transfer of an immovable property occurs in accordance with an administrative procedure on the basis of a decision of a voivode who is competent in that regard based on the location of the property; the decision is issued upon the consent of the President of the Agricultural Property Agency (the property owned by the State Treasury). The said decision constitutes a basis of adding entries in land registers. Thus, the transfer takes place outside the scope of proceedings on church property before the Committee on Church Property.

3.5.2. In Article 70^a(2) of the Act, the law-maker established limits on the surface area of transferred agricultural property. A permitted surface area is contingent upon two criteria: 1) the kind of a church legal entity as well as 2) the kind of activity which the church legal entity carries out. An additional restriction consists in that fact that the surface area of the transferred immovable property and the property is already owned by a church legal entity may not together exceed a certain specified value. A permitted surface area increases where a convent or monastery conducts activity involving establishing and running a school, a different educational institution or an educational and care institution.

Moreover, a permitted surface area is larger if the said convent or monastery conducts charity and social care activities.

The surface area of the transferred agricultural property, together with the land already constituting the property of a given applicant, may not exceed: with regard to agricultural holdings – 15 ha; with regard to agricultural holdings of a diocese – 50 ha; with regard to agricultural holdings of seminaries, diocesan seminaries and seminaries run by religious orders – 50 ha; with regard to agricultural holdings of homes run by religious orders – 5 ha, unless the said homes carry out activity which is referred to in Articles 20 and 39; in those cases agricultural properties that may be transferred may have the surface of 50 ha.

Taking into consideration the applicants' allegation and the content of the indicated higher-level norm for the review, the Constitutional Tribunal states that the arguments concerning the unconstitutionality of Article 70^{a}(1) and (2) of the Act are inapt. The following arguments weigh in favour of that:

3.5.2.1. The principle of equal rights of churches and religious organisations does not imply that all religious organisations are to be treated in an identical way. It constitutes a guarantee that the organs of public authority will create a legal framework which will make it possible to implement the equal rights depending on the competence and characteristics of particular churches and religious organisations.

The Tribunal is aware that a varied legal situation may result from actual differences among churches and religious organisations. The principle of equal rights does not give rise to a legitimate expectation of gaining actual equality. In the view of the Tribunal, where there are differences among churches and religious organisations, the said entities should be treated in a different way.

There may be differences among churches and religious organisations which arise from the different actual numbers of followers and the different degrees to which particular religious communities have become well-established throughout the history of the country.

3.5.2.2. The Constitutional Tribunal draws attention to the fact that the allegation of the excessively privileged situation of the Roman Catholic Church in respect of other churches and religious organisations, as regards the admissibility and premisses of the return of ownership of immovable properties in the post-WW II western and northern territories of Poland was the subject of consideration in the judgment of the Constitutional Tribunal of 2 April 2003 (Ref. No. K 13/02, OTK ZU No. 4/A/2003, item 28). In the said case, the Tribunal assessed the conformity of the provisions of the Act on Relations Between the State and the Polish Autocephalous Orthodox Church to the principle of equal rights. The indicated Act regulated the issue of returning the ownership of immovable properties in the post-WW II western and northern territories of Poland to that entity. Then the Tribunal stated that said legal regulation ensured equal legal protection of property rights of all churches and religious organisations.

3.5.2.3. None of the statutes regulating the property issues of churches and religious organisations provides for the possibility of returning the ownership of nationalised immovable properties situated in the post-WW II western and northern territories of Poland. However, the law provides for the acquisition of property rights as regards those territories, in the form of transferring the ownership of immovable properties, or parts thereof, when the transfer is to serve particular purposes (carrying out worship, carrying out educational activity, conducting charity and social care activities, setting up or enlarging an agricultural holding of a church legal entity).

3.5.2.4. The Constitutional Tribunal has drawn attention to the fact that regulations in that regard are included in Article 41(1) of the Act of 13 May 1994 on Relations Between the State and the Evangelical Augsburg (Lutheran) Church in the

Republic of Poland (Journal of Laws - Dz. U. No. 73, item 323, as amended); Article 26b(1) of the Act of 13 May 1994 on Relations Between the State and the Evangelical Reformed Church in the Republic of Poland (Journal of Laws - Dz. U. No. 73, item 324, as amended); Article 30(2) of the Act of 20 February 1997 on Relations Between the State and Jewish communities in the Republic of Poland (Journal of Laws - Dz. U. No. 41, item 251, as amended); Article 34(1) of the Act of 30 June 1995 on Relations Between the State and the Polish Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 97, item 482, as amended); Article 48(5) of the Act of 4 July 1991 on Relations Between the State and the Polish Autocephalous Orthodox Church (Journal of Laws - Dz. U. No. 66, item 287, as amended); Article 36 of the Act of 20 February 1997 on Relations Between the State and the Pentecostal Church in the Republic of Poland (Journal of Laws - Dz. U. No. 41, item 254, as amended); Article 35(1)(2) of the Act of 30 June 1995 on Relations Between the State and the Seventh-Day Adventist Church in the Republic of Poland (Journal of Laws - Dz. U. No. 97, item 481, as amended); Article 43 of the Act of 30 June 1995 on Relations Between the State and the Baptist Union in the Republic of Poland (Journal of Laws - Dz. U. No. 97, item 480, as amended); Article 37 of the Act of 30 June 1995 on Relations Between the State and the Evangelical Methodist Church in the Republic of Poland (Journal of Laws - Dz. U. No. 97, item 479, as amended).

The Tribunal has stressed that the solutions provided for in the statutes on relations between the state and churches as well as other religious organisations do not regulate in a uniform way - for all churches and religious organisations - as the acquisition of ownership of property in the post-WW II western and northern territories of Poland. However, such a state of affairs is not tantamount to the violation of the equal rights of churches and religious organisations.

The Constitutional Tribunal has concluded that it is not true that the Roman Catholic Church is the only entity which gained the possibility of acquiring the ownership of property in the post-WW II western and northern territories of Poland, although the applicants claimed to the contrary.

3.5.3. The Constitutional Tribunal has pointed out that the statutes regulating the status of particular churches and religious organisations were enacted on the basis of agreements concluded by the representatives of the Council of Ministers and the representatives of those entities. They constitute a compromise between the claims made by churches and religious organisations and the state's capability of redressing the caused damage.

When drafting religious statutes, the legislator took into account historical determinants, the number of followers, the structure and the scope of activity of particular churches and religious organisations. The mere argument of the applicants that the law favours the Roman Catholic Church is not sufficient to overrule the presumption of constitutionality of Article 70^a(1) and (2) of the Act.

It should be indicated that some other churches and religious organisations were also provided by the legislator with the possibility of acquiring the agricultural properties of the State Treasury by the legislator. Differences in procedures and criteria for granting those properties arise from the particular character of a given church or religious organisation. Such differences fall within the scope of Article 25 of the Constitution.

The Constitutional Tribunal has stated that Article 70^a(1) and (2) of the Act on Relations Between the State and the Roman Catholic Church is consistent with the principle of equal rights of churches and religious organisations.

3.5.4. In the view of the applicants, the challenged provision infringes the principle of the impartiality of public authorities in matters of personal conviction, whether

religious or philosophical. When determining the meaning of that principle, the Constitutional Tribunal pointed out, *inter alia*, that: "the authors commenting on constitutional provisions assume that the principle of impartiality expressed in Article 25(2) of the Constitution requires that public authorities should treat all convictions, whether religious or philosophical, equally (...) The content of the principle of impartiality considered in the institutional context is, above all, a prohibition against the interference of public authorities with the realm of religions and worldviews (...), and thus also with the activity of churches and religious organisations. By contrast, in the realm of public relations, where the state's regulation and interference is, to some extent, unavoidable, impartiality implies equal treatment of all religious communities; public authorities may not show that they approve or disapprove of any religions and communities representing them (...).

In the light of the Constitution and the assumptions in the doctrine of law, the principle of the impartiality of public authorities in matters of personal conviction, whether religious or philosophical, does not rule out positive involvement of the state for the sake of implementing the freedom of conscience and religion as well as making it possible for citizens to satisfy their spiritual needs" (the judgment of 14 December 2009, Ref. No. K 55/07, OTK ZU No. 11/A/2009, item 167).

Determining the meaning of the constitutional principle of impartiality in matters of personal conviction (whether religious or philosophical), the Constitutional Tribunal pointed out that the said principle brought about particular consequences both as regards taking a stance by public authorities in disputes concerning religions, worldviews or philosophical convictions, as well as undertaking action which shaped the substantive conditions of the activity carried out by communities representing particular religions or worldviews. Within the last-mentioned scope, the said principle – to a large extent – overlaps with the principle of equal rights of churches and religious organisations. Indeed, the principle of impartiality rules out enacting regulations which considerably differentiate between the legal situations of various religious communities within the scope of the substantive basis of their activity. In the case where the challenged provision concerning the substantive conditions of the activity of religious communities does not violate their equal rights, there are no grounds to state that it goes beyond the scope of regulatory freedom set out by the principle of impartiality under consideration.

Therefore, the Constitutional Tribunal has stated that Article 70^{a}(1) and (2) of the Act is not inconsistent with Article 25(2) of the Constitution.

3.5.5. The Constitutional Tribunal has stated that Article 70^{a}(1) and (2) of the Act on Relations Between the State and the Roman Catholic Church is consistent with Article 25(1) of the Constitution as well as is not inconsistent with Article 25(2) of the Constitution.

4. The conclusions of the judgment.

4.1. The Constitutional Tribunal has concluded that the provision authorising the issue of a regulation is unconstitutional. Although the judgment of the Constitutional Tribunal declaring the unconstitutionality of Article 63(9) of the Act is not tantamount to declaring the unconstitutionality of the Regulation of 21 December 1990, issued on the basis of that provision, still – in compliance with general systemic rules for resolving conflicts of laws – the Regulation also ceases to have effect. The derogation of the statutory authorisation results in a situation where the implementing act issued on the basis of the said provision also ceases to have effect (cf. the judgments of: 28 June 2000, Ref.

No. K 34/99, OTK ZU No. 5/2000, item 142 as well as 31 March 2009, Ref. No. K 28/08 and the jurisprudence cited therein).

4.2. The Tribunal emphasises that the derogation of Article 63(9) of the Act does not result in the fulfilment of the premiss of re-opening of proceedings, referred to in Article 190(4) of the Constitution, with regard to decisions made on the basis of the regulation concerning the selection of replacement immovable properties or the imposition of the obligation to pay compensation to church legal entities.

In the case under examination, the subject of the adjudication by the Tribunal is the provision of the Act which contains authorisation for issuing a regulation. The said provision did not constitute a basis for any decisions in individual cases. Such basis was constituted by statutory provisions providing for the possibility of granting replacement properties in proceedings on church property; by contrast, the provisions of the regulation were to limit the scope of freedom in a decision-making process concerning the allocation of those properties from the property of communes by the Committee on Church Property. Thus, the said provisions were advantageous to communes.

In accordance with a general rule, proceedings may be re-opened only when the Constitutional Tribunal declares the unconstitutionality of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued (cf. the judgment of 11 February 2010, Ref. No. K 15/09 as well as the judgment of 9 March 2011, Ref. No. P 15/10, OTK ZU No. 2/A/2011, item 9).

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

Dissenting Opinion
of Judge Adam Jamróz
to the Judgment of the Constitutional Tribunal
of 8 June 2011, Ref. No. K 3/09

1. 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; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the above judgment.

The dissenting opinion concerns the part of the ruling of 8 June 2011 in which, on the basis of Article 39(1) of the Constitutional Tribunal Act, the Tribunal discontinued proceedings within the scope of examining the non-conformity of Article 62(1), (2), (5), (7) and (9) of the Act of 17 May 1989 on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 29, item 154, as amended; hereinafter: the Act).

In my view, as regards the above-mentioned scope, the Tribunal should not have discontinued the proceedings. It should have declared the above indicated provisions of the Act to be inconsistent with Article 165(2) in conjunction with Article 175(1) and in conjunction with Article 165(1) of the Constitution.

2. By way of introduction, I wish to emphasise that, despite the legal basis for discontinuing the proceedings within the above-mentioned scope, namely Article 39(1) and (2) of the Constitutional Tribunal Act, indicated in the operative part of the judgment, the Tribunal discontinued the proceedings insofar as they concerned Article 62 of the Act, due to the fact that the provisions ceased to have effect; at the same time, the Tribunal stated that the substantive examination of the above provisions (in this dissenting opinion, this means Article 62(1), (2), (5), (7) as well as (9) of the Act) was not necessary for the protection of constitutional rights and freedoms. Therefore, the Tribunal discontinued the proceedings on the basis of Article 39(1)(3) of the Constitutional Tribunal Act, which clearly follows from part 1.2.4. of the statement of reasons for the judgment, marked with the heading "The status of the derogated provisions", due to having been derogated by the Act of 16 December 2010 amending the Act on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws – Dz. U. of 2011 No. 18, item 89; hereinafter: the amending Act). To sum up the analysis contained in that part of the statement of reasons for the judgment: "the Tribunal has stated that the applicants presented no arguments which weighed in favour of adjudicating on the derogated provisions. In particular, they did not make it probable that issuing a ruling concerning Article 62 and Article 63(8) of the Act on Relations Between the State and the Roman Catholic Church was necessary for the protection of the constitutional rights and freedoms referred to in Article 39(3) of the Constitutional Tribunal Act".

In my view, it is not apt to impose an obligation on the applicants that consists in making it probable that issuing a judgment on the unconstitutionality of Article 62 and Article 63(8) of the Act is necessary for the protection of the said constitutional rights and freedoms, which follows from the above excerpt of the statement of reasons. Such an obligation does not arise from any provisions of the Constitutional Tribunal Act, and especially it does not arise from Article 32 of the Constitutional Tribunal Act, which specifies formal requirements for an application. What follows from Article 39(3) of the Constitutional Tribunal Act is the possibility of substantive adjudication by the Tribunal, which is to assess whether in a given case, despite a normative act (a provision of law) has

ceased to have effect, the constitutionality of the normative act should still be examined for the purpose of protecting constitutional rights and freedoms.

In the substantiation for the application, in the part cited above, there is also the argument for the discontinuation of the proceedings in the context of the above-mentioned provisions of the Act, on the basis of Article 39(1)(1) and (2) of the Constitutional Tribunal Act. What is meant here is the statement by the representative of the applicants presented at the hearing on 31 January 2011 that "claims, demands or allegations from the application submitted by the group of Sejm Deputies have been dealt with in a substantive way in amendments (the amending Act), which – in the opinion of the Tribunal – was confirmed at the hearing on 18 May 2011, where the representative of the applicants confirmed that "the amending Act of 16 December 2010 dealt with the allegations put forward by the applicants". The statement by the representative of the applicants concerning the complex matter of the Act and the amending Act of 16 December 2010 may not, however, be regarded as a statement withdrawing the application within the scope of the examination of conformity to the Constitution (Article 45(1) and Article 175(1)). This is confirmed by the applicants' supplementary letter of 3 March 2011, the final conclusions of the applicants' representatives at the hearing on 8 June 2011 as well as the statement of the representative of the applicants delivered at the hearing on 8 June 2011 (included in the minutes). What follows from them is that the applicants maintained their allegations raised in the application of 22 January 2009 and the supplementary letter.

3. I agree with the Tribunal's ruling on the discontinuation of the proceedings, insofar as they concerned examining the conformity of the provisions of Article 62 of the Act to Article 45(1) of the Constitution, which was indicated as a higher-level norm for the constitutional review. Indeed, the Tribunal should conduct the substantive examination of the constitutionality of the above-mentioned provisions of Article 62 of the Act, despite the fact that they have ceased to have effect, for the purpose of protecting the constitutional right of the units of local self-government to preserve their self-governing nature, as set out in Article 165(2) of the Constitution, and not for the purpose of protecting the right to a fair trial, specified in Article 45(1) of the Constitution. I am going to address the issue of the said constitutional right of the units of local self-government further on in this dissenting opinion. The provision of Article 45(1) of the Constitution, included in Chapter II of the Constitution entitled "The Freedoms, Rights and Obligations of Persons and Citizens", in the section "Personal Freedoms and Rights", which sets out the right to a fair trial, does not - for obvious reasons - concern the constitutional right of the units of local self-government to preserve their self-governing nature, in particular by the protection of their right of ownership and other property rights, as referred to in Article 165(1) of the Constitution. Pursuant to Article 30 of the Constitution, what constitutes the source of rights and freedoms of persons and citizens, including (and maybe particularly) the source of personal rights and freedoms, and thus also the right to a fair trial, is "the inherent and inalienable dignity of the person". For obvious reasons, the constitutional right to a fair trial, specified in Article 45(1) of the Constitution, may not therefore be referred to the units of local self-government.

For the same reasons, I hold the view that it is legitimate for the Tribunal to discontinue the proceedings within the scope of examining the conformity of Article 63(8) of the Act to Article 77(2) of the Constitution, which specifies a constitutional right in the form of a measure for protecting the rights and freedoms of persons and citizens.

Also, I have no reservations as regards the Tribunal's discontinuation of the proceedings within the scope of examining the conformity of the challenged provisions of Article 62 of the Act to Article 6 of the Convention for the Protection of Human Rights

and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention) as well as within the scope of examining the conformity of Article 63(8) of the Act to Article 13 of the Convention. It follows from Article 39(3) of the Constitutional Tribunal Act that it refers to the constitutionally protected rights and freedoms; therefore, it does not concern the rights and freedoms set out in the Convention.

The applicants' letters and, above all, the course of the hearing do not unambiguously show that the applicants requested the Tribunal to examine the conformity of the challenged provisions, despite the fact that they have ceased to be universally binding, due to the protection of the rights of "third parties". Hence, I share the Tribunal's view that, also in that regard, the proceedings should have been discontinued.

In the aforementioned supplementary letter of 3 March 2011, while withdrawing the allegations presented in point 1 of the application, which concerned the examination of Article 61(1) of the Act in the light of Article 32 of the Constitution, the applicants supplemented the application with the request to examine the challenged Act in the light of the provisions of the Convention. Consequently, they requested the Tribunal to examine, *inter alia*, the conformity of the provisions of: Article 62 of the Act to Article 45(1) and Article 175(1) of the Constitution as well as to Article 6 of the Convention; Article 63(8) of the Act to Article 77(2) of the Constitution as well as to Article 13 of the Convention.

What followed from the applicants' letters and the stance adopted by their representatives was a request for examining the constitutionality of the provisions derogated by the amending Act, for the purpose of protecting the constitutional rights of the units of local self-government.

In my opinion, as regards examining the conformity of the provisions of Article 62(1), (2), (5), (7) and (9) of the Act to Article 175(1) in conjunction with Article 165(2) of the Constitution, the application was legitimate. In accordance with the principle of *falsa demonstratio non nocet*, which is respected in the Tribunal's jurisprudence, the applicants' allegations concerned the infringement of Article 165(2) in conjunction with Article 175(1) of the Constitution. Indeed, as it has been shown above, Article 45(1) of the Constitution, which specifies the right to a fair trial, does not refer to the units of local self-government; the actual allegations raised by the applicants with regard to the infringement of Article 45(1) of the Constitution concerned the infringement of Article 165(2) of the Constitution, which sets out the right of the units of local self-government to preserve their self-governing nature, in conjunction with Article 175(1) of the Constitution, indicated formally by the applicants as a higher-level norm for the constitutional review.

4. In the context of the Constitution (adopted in 1997), constitutional subjective rights are specified not only in Chapter II of the Constitution, which concerns the freedoms, rights and obligations of persons and citizens. Article 165(1), second sentence, sets out the constitutional right of ownership (and other property rights) which are granted to the units of local self-government. The scope of the said right is delineated by statute, but statutory provisions may not violate the essence of the right of ownership. The constitutional protection of the right of ownership constitutes a vital safeguard for the units of local self-government against the loss of their self-governing nature, which pursuant to Article 165(2) "shall be protected by the courts". The said provision specifies the constitutional right of the units of local self-government to be protected by courts.

The origin, legal character and doctrinal basis of the above-mentioned constitutional rights which are granted to the units of local self-government differ from the origin, essence and doctrinal basis of the rights and freedoms specified in Chapter II of the

Constitution. The latter rights are granted to the individual – (every) person or citizen. They have a common doctrinal basis, as those rights and freedoms arise from human nature, and in particular from the inherent and inalienable dignity of the person, which constitutes a source of his/her rights and freedoms. Obviously, the rights and freedoms understood this way, which are granted to the individual, do not concern the units of local self-government. Those units are, above all, the organs of public authority, but in accordance with ideas adopted in a modern state - the autonomy of local communities as well as the decentralisation of the state's power - the self-governing nature of those units should be guaranteed in the Constitution as the supreme legal act. In the Constitution, what guarantees the self-governing nature of the units of local self-government is the aforementioned right of ownership (and other property rights) as well as the right of the units of local self-government to preserve their self-governing nature.

Pursuant to Article 39(3) of the Constitutional Tribunal Act, the Tribunal shall not discontinue proceedings if issuing a judgment on a normative act (subject to review by the Tribunal) which ceased to have effect before the judgment is issued proves necessary for protecting constitutional freedom and rights. Although it is obvious that the freedoms mentioned therein refer to the individual, it does not follow from the wording of that provision that only the constitutional rights set out in Chapter II are relevant here, i.e. those concerning persons and citizens. This means that, with regard to the case K 3/09, in which the Tribunal discontinued the proceedings, due to the fact that the challenged provisions had ceased to have effect, the Tribunal should have examined the case within the scope of the provisions of the Act which concerned the constitutional rights of the units of local self-government, despite the fact that those provisions had ceased to have effect.

The provisions of the Act which the Tribunal should have subjected to the review of constitutionality are in particular Article 62(1), (2), (5), (7) as well as (9) of the Act, which determine the institutional shape of the Committee on Church Property. In compliance with the principle of *falsa demonstratio non nocet*, the Tribunal should have examined the conformity of the said provisions to the constitutional right of the units of local self-government to be protected by courts, as specified in Article 165(2) of the Constitution in conjunction with Article 165(1), second sentence, of the Constitution, which guarantees rights of ownership and other property rights to the units of local self-government, as well as in conjunction with Article 175(1), which stipulates that the administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts.

It follows from Article 165(2) of the Constitution that the self-governing nature of the units of local self-government shall be protected by the courts. Despite the fact that Article 45(1), which sets out the constitutional requirements of the right to a fair trial, does not refer to the units of local self-government, still the basic requirements concerning the constitutional standard also pertain to the fact that the self-governing nature of the units of local self-government shall be protected by the courts. They arise both from Article 165(2) of the Constitution and from the higher-level norm for the review indicated in Article 175(1) of the Constitution. The principle that the self-governing nature of the units of local self-government shall be protected by the courts means that the said protection is assigned to the courts mentioned in Article 175(1) of the Constitution, and not to any other bodies (institutions) established by provisions. The said courts administer justice, i.e. in particular they adjudicate on the rights or obligations of subjects, and in particular they provide resolution – in the light of the law – in the case of disputes among the subjects of rights and obligations; they also resolve issues concerning property rights enjoyed by the subjects of rights and obligations, in other words in private (civil) law cases.

The judicial protection of the self-governing nature of the units of local self-government may only be provided by the courts mentioned in Article 175(1) of the Constitution, which are competent, impartial and independent and they consider cases at a fair and public hearing, without undue delay. These features of court procedure which are explicitly enumerated as elements of the right to a fair trial, set out in Article 45(1) of the Constitution, also arise from the normative content of the administration of justice by the courts, as referred to in Article 175(1) of the Constitution.

The administration of justice by the courts, as the organs of public authority which apply the law (statutory provisions), when they adjudicate on rights or obligations, also consists in determining the facts of a given case, in order to assign it to the right legal category; in particular, as it has been mentioned, as regards the rights and obligations assigned to the subjects of rights and obligations, being as a result the addressees of particular and individual norms contained in judicial rulings.

What follows from the above findings is that the judicial protection of the self-governing nature of the units of local self-government enshrined in the Constitution, also with regard to the protection of their rights of ownership (and other property rights), which in the light of Article 165 of the Constitution is one of the guarantees of the self-governing nature of the units of local self-government, should be assigned only to the courts which administer justice within the meaning of Article 175(1) of the Constitution.

The constitutional standards of the said judicial protection do not arise from Article 45(1) of the Constitution, but from Article 165(2) and Article 175(1) of the Constitution; they differ from the standards specified within the scope of the right to a fair trial, as regards the substantive aspect of the right to a fair trial. The substantive scope of the right of access to a court enjoyed by the units of local self-government, as the organs of public authority, is – for obvious reasons – limited. It stems from statutory provisions; as regards the realm of the protection of ownership and other property rights, where the units of local self-government are private law subjects, the substantive scope of the right of access to a court is set by the scope of their rights of ownership and other property rights granted to the units of local self-government by statutes.

However, attention should be drawn to the fact that, with regard to the other elements of the right to a fair trial, established in the Tribunal's jurisprudence, the judicial protection of the units of local self-government, as referred to in Article 165(2) of the Constitution, does not differ from the judicial protection arising from the right to a fair trial specified in Article 45(1) of the Constitution. The judicial protection of the units of local self-self-government, arising from the normative content of Article 165(2) as well as from Article 175(1) of the Constitution, should be exercised by competent, impartial and independent courts, before which there is a fair and public hearing, which takes into account the well-established principles, in particular the principle of adversarial proceedings and subjects that are parties to such proceedings have the right to a court ruling within a reasonable period (without undue delay). The above requirements also refer to property issues, within the scope of the rights of ownership and other property rights, which are granted to the units of local self-government by statute. Issues concerning the right of ownership or other property rights enjoyed by the units of local self-government should therefore be examined exclusively by courts within the above meaning of the Constitution, and in accordance with the procedure which is compliant with constitutional requirements and which respects the standards of a democratic state.

Finally, it should be added that whenever issues concerning the right of ownership or other property rights (also when it comes to the property rights of the units of local self-government) entail determining the facts of cases, it is common courts (civil courts) that are competent to consider such cases.

5. Pursuant to Article 62 of the Act, the Committee on Church Property has been established, and comprised an equal number of representatives appointed by the Office for Religions and the Secretariat of the Polish Episcopal Conference (paragraph 1). The Committee shall conduct proceedings on church property; the participants in the proceedings shall include, apart from an applicant who may be a church legal entity, "all interested state and church entities" (paragraph 2).

Pursuant to Article 61(1) of the Act, proceedings on church property concern the return of the ownership of nationalised properties, or parts thereof, to a church legal entity (church legal entities). The said provision, in detail, mentions the premisses of nationalisation and legal or actual situations, in the context of which the return of ownership of properties, or parts thereof, to church legal entities is considered (Article 61(1)(1)-(7)).

Pursuant to Article 63(1) of the Act, the regulation may consist not only in returning the ownership of the immovable properties enumerated in Article 61(1) and (2), or parts thereof, but also in granting an appropriate replacement immovable property, if the return of the ownership of the property was hindered by obstacles which were difficult to surmount, or in awarding compensation in an amount specified by provisions on the expropriation of immovable property, in the event it is impossible to resolve property issues as provided for in points 1 and 2. Pursuant to Article 63(2) of the Act, issues concerning agricultural property may be resolved by selecting appropriate immovable properties from the State Treasury's Reserve of Agricultural Property. Article 63(3) of the Act constitutes that, in the course of proceedings on church property, the borders of a given property may adjusted, or servitude may be established or the existing servitude may be cancelled.

A decision issued by the Committee or a settlement made before the decision-making panel of the Committee constitutes the basis for an entry in land registers (Article 63(7)) as well as they have the effect of court enforcement clauses (Article 63(4)); a decision by the decision-making panel may not be appealed.

What follows form the above provisions is that proceedings on church property concern determining property rights and obligations, and in particular the right of ownership by the Committee on Church Property, which is not equivalent to a court, does not provide for the right to appeal against decisions, with the effect of entries in land register and with the effect of court enforcement clauses. There is no doubt that decision-making panels of the Committee administer justice; indeed, it is necessary to determine the facts of the case and its legal qualification, and in particular adjudication on the rights and obligations of the addressees of such a ruling or settlement.

Not only does the Committee not constitute a court within the meaning of Article 175(1) of the Constitution, but also it is not a independent and impartial organ of public authority, which is confirmed by other challenged provisions of Article 62 of the Act, and in particular paragraphs 5 and 9 of the said Article. Pursuant to Article 62(5) of the Act, "the Committee shall examine cases in decision-making panels, where each of them is comprised of 2 members appointed by the Office for Religions and the Secretariat of the Polish Episcopal Conference, and one representative of authorities which are higher in the hierarchy with regard to the participants in proceedings. The said representative may not be a person who represents a participant". By contrast, Article 62(9) stipulates that: "the number of the members of the Committee, a detailed course of proceedings on church property as well as remuneration for the members of the Committee and the ancillary personnel shall be specified by the Head of the Office for Religions consulting the issue with the Secretariat of the Polish Episcopal Conference".

The peculiar status of the Commission as well as the inadmissibility of the judicial or administrative proceedings concerning immovable properties which are the subject of proceedings conducted by the Committee, since such proceedings are suspended by virtue of statutory provisions, and the courts and organs of state administration refer their files to the Office for Religions so that it could transfer them to the Committee, results in a situation that, in the light of the provisions of the Act, a court procedure is ruled out in the cases considered by the Committee and proceedings before the Committee – aimed at determining property rights and obligations in an ultimate way and with the effect of enforcement – infringe the basic standards of a democratic state.

The fact that the challenged provisions have ceased to have effect and also the ultimate scope of the allegation indicated by the applicants leads to a situation that, although the provisions are no longer binding, , in my opinion, the Tribunal should have adjudicated on the unconstitutionality of particularly those provisions that determine the legal shape of the Committee, which is not a court, and yet it administers justice in the realm of property rights, infringing obvious standards of administering justice in a democratic state. The Tribunal should have adjudicated on the unconstitutionality of those provisions, for the purpose of protecting the constitutional right to judicial protection granted to the units of local self-government in the cases concerning the ownership of property. Pursuant to the provisions of the Act, the units of local self-government are excluded from the participation in proceedings before the Committee as well as are deprived of judicial protection as regards their property as a result of proceedings before the Committee. Many years of the functioning of the Committee confirms that proceedings before the Committee in the cases concerning the return of ownership of immovable properties to church legal entities may concern the rights of third parties and the rights of the units of local self-government. What follows from the ultimate scope of the allegation indicated by the applicants is that they requested the Tribunal to carry out substantive examination and adjudicate on unconstitutionality, due to the constitutional rights of the units of local self-government concerning the judicial protection of their property. In my view, this is justified.

Dissenting Opinion
of Judge Marek Kotlinowski
to the Judgment of the Constitutional Tribunal
of 8 June 2011, Ref. No. K 3/09

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; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to point 1 of the operative part of the judgment of 8 June 2011 and the statement of reasons for the judgment, issued by the Constitutional Tribunal in the case K 3/09, insofar as the Tribunal has declared Article 63(9) of the Act of 17 May 1989 on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 29, item 154, as amended; hereinafter: the Act) to be inconsistent with Article 92(1) of the Constitution.

In my view, proceedings concerning the review of the above-mentioned provision should have been discontinued on the basis of Article 39(1)(3) of the Constitutional Tribunal Act, despite the fact that Article 63(9) of the Act was not formally derogated by the Act of 16 December 2010 amending the Act on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. of 2011 No. 18, item 89; hereinafter: the Act of 16 December 2010). Indeed, in my opinion, it constitutes an integral part of the mechanism for resolving church property issues and of proceedings before the Committee on Church Property, which was dissolved on 1 March 2011 on the basis of the Act of 16 December 2010.

When derogating provisions on proceedings on church property before the Committee on Church Property, in Article 4 of the Act of 16 December 2010, the legislator provided for the possibility of resorting to previously applied solutions, in the case where the decision-making panel or the Committee in full did not work out a decision before the entry into force of the Act of 16 December 2010. In such instances, participants in proceedings on church property may request that suspended court or administrative proceedings be resumed, and where they were not instituted – the participants may apply to a court for compensation. Also, the legislator assumed that, in the course of examining a given case, a court should apply Article 63(1)-(3) of the Act. At the same time, as regards the provisions of the Act of 16 December 2010, we do not find any reference to the application of a regulation issued on the basis of statutory authorisation provided for in Article 63(9) of the Act. In the explanatory note to the bill of 16 December 2010 (the Sejm Paper No. 3678), the author of the bill did not address the issue of further applicability of Article 63(9) of the Act. During the hearing before the Constitutional Tribunal, the representative of the Sejm also could not explain the *ratio legis* behind leaving the said provision in the legal system. In my view, since the legislator clearly indicated which of the provisions governing proceedings on church property would further be applied by courts, then that enumeration is a closed list, and hence this implies that no other provisions will be applied to proceedings before courts, including Article 63(9) of the Act, and to be precise – a regulation issued on the basis thereof.

In the explanatory note to the bill of 16 December 2010, the author of the bill indicated that the objective of the bill was only to eliminate the Committee on Church Property, and not proceedings on church property as such. This does not change the fact that the construct of proceedings on church property has been modified considerably – by making it possible to refer cases which were not yet resolved by the Committee on Church Property (as well as those in which applications for instituting proceedings on church property were not yet considered) to a court – in comparison with the previous legal

situation. The basic difference consists in the possibility of appealing against a court's ruling; decisions issued by the decision-making panel could not be appealed. In my opinion, the lack of reference to the application of the provisions of a regulation issued on the basis of Article 63(9) of the Act confirms its close link with proceedings before the Committee on Church Property. Therefore, although Article 63(9) of the Act was not formally derogated, the proceedings concerning the review of its constitutionality should have been discontinued due to the fact that the provisions on the institution which this provision pertains to have ceased to have effect.

Dissenting Opinion
of Judge Sławomira Wronkowska-Jaśkiewicz
to the Judgment of the Constitutional Tribunal
of 8 June 2011, Ref. No. K 3/09

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; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of the Constitutional Tribunal of 8 June 2011, in the case K 3/09, in the part concerning the discontinuation of the proceedings in the context of the derogated provisions of the Act of 17 May 1989 on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 29, item 154, as amended; hereinafter: the Act of 1989), as the indicated discontinuation was based on the completely inadmissible assumptions that:

1) the occurrence of the premiss that issuing a ruling on a normative act which has ceased to have effect is necessary for the purpose of protecting constitutional rights and freedoms - which is a premiss determining that such a normative act should be subject to review carried out by the Constitutional Tribunal – is not verified by the Tribunal itself, but it has to be proved by the participants whose application has commenced the said review,
2) the subjects of constitutional rights and freedoms, for the protection of which it is necessary to issue a ruling concerning an invalid normative act, do not comprise the units of local self-government, including communes.

STATEMENT OF REASONS

1. What constituted the subject of the allegation in the case K 3/09 was a number of provisions of the Act of 1989; in particular, they comprised provisions which governed the so-called proceedings on church property. They were provided in the Act for the purpose of resolving property issues pertaining to the Roman Catholic Church and rectifying the damage caused to the Church in the past.

Although the content of the challenged provisions has not been changed for over 20 years, numerous and significant changes were systematically introduced into the normative surroundings of the provisions. Suffice to say that the Act was enacted when the Constitution of 1952 was in force; it was binding when subsequent amendments were introduced to the Constitution, when constitutional standards were changing considerably and when the new Constitution of 1997 was enacted. Proceedings on church property were conducted before the Committee on Church Property until the Committee was dissolved on 28 February 2011, despite the fact that – in accordance with the assumption of the legislator – it was possible to submit applications for instituting proceedings on church property only within the period of two years, beginning from 23 May 1989; then – in the extended period – until 31 December 1992.

The solution that was used in the Act of 1989 was, in many ways, original and innovative. Indeed, it provided for the possibility of making claims outside the courtroom with the involvement of interested parties i.e. church legal entities and the state. With the benefit of hindsight, proceedings on church property specified in the Act may be regarded as an instrument of transitional justice. However, as the years went by, the instrument was becoming increasingly inconsistent with the current Constitution, and the standards set by that Constitution.

First of all, it should be noted that at the very beginning, carrying out proceedings on church property coincided with the first stage of the reform of local self-government.

The property claims made by church legal entities were initially to be satisfied from the state's property. However, the moment when communes were established and granted property rights with regard to certain property of the State Treasury which constituted the source of compensation in proceedings on church property, to a large extent the said property ceased to be the state's property, and became the property owned by communes. Moreover, I fully share the view that the property which communes gained from the state was not free from liabilities, as is clearly indicated by the content of Article 13 of the Act of 10 May 1990 – the Introductory Law to the Act on Local Self-Government and the Act on the Employees of Local Self-Government Institutions (Journal of Laws - Dz. U. No. 32, item 191, as amended), and thus communes must have been aware that the property granted to them would be used for satisfying the justified claims of church legal entities. Nevertheless, assigning important tasks to communes, changing them into legal entities, and guaranteeing that they would have self-governing nature – for the time being at least at the level of a statute, resulted in a situation that they became subjects whose interests were legally protected.

A significant change with regard to the position of communes occurred at the moment of the entry into force of the current Constitution, i.e. on 17 October 1997, due to the constitutionalisation of their status as the basic units of local self-government and the fact that they were granted vital guarantees securing their existence, independence and powers. Pursuant to Article 165 of the Constitution, they were granted legal personality, the rights of ownership and the guarantee that their self-governing nature was to be protected by courts. The case in which the Tribunal had to adjudicate is thus a consequence of negligence caused by the law-making authorities which had not undertaken the effort to adjust the pre-constitutional Act of 1989 to the current Constitution.

2. The manner of shaping proceedings on church property before the Committee on Church Property, innovative as they were at the time of their introduction, revealed certain shortcomings, due to subsequent changes in the normative context. They were procedural in character and they manifested themselves primarily as follows: in the way proceedings on church property before the Committee were regulated, which was done by a regulation – being a legal act that is internal in character, the fact that the proceedings were conducted in camera, or the fact that communes were not guaranteed the right to be effectively involved in proceedings as participants (due to the lack of relevant provisions, the practice kept changing in that regard). The last-mentioned reservations very important. By carrying out the public tasks assigned to them, communes had – as it has already been mentioned – their own legally protected interests which they needed to present in proceedings before the Committee on Church Property. However, above all, doubts as to constitutionality were raised by Article 63(8) of the Act of 1989, which stipulated that a decision of the decision-making panel could not be appealed. Regardless of the fact whether the said provision was aptly interpreted, it shaped the jurisprudence of courts – communes were deprived of the possibility of resorting to legal means to verify the decisions of the Committee on Church Property. What is the most crucial here is the circumstance that this also entailed excluding communes from cases determined by the Committee with regard to court procedure, which – since the entry into force of the Constitution of 1997 – has been tantamount, in my opinion, to the infringement of the right to be protected by courts, which is guaranteed by the Constitution and which constitutes one of the most vital instruments securing the right of ownership, enjoyed by any subjects of rights, including communes. One may formulate a thesis that the lack of the possibility of making claims to secure the right of ownership causes it to be, in a sense, *ius nudum*. At the same time, I am aware that the provisions of the Act of 1989 did not have to be

interpreted as provisions infringing the constitutional right to a fair trial, which would probably have required more sophisticated methods of interpretation. However, the interpretation which disregarded the requirements put forward by the Constitution has become well-established in the jurisprudence of courts, which – in accordance with the consistent stance of the Constitutional Tribunal – should be taken into account during the examination of the constitutionality of legal provisions, thus resulting in determining their defectiveness.

The above-mentioned issues were noted by the Sejm, and were discussed in the letter of 6 November 2009 by the Marshal of the Sejm, which indicated the unconstitutionality of some of the solutions included in the Act of 1989. Similar remarks were included in the letter of 23 September 2011 by the Public Prosecutor-General.

The Constitutional Tribunal took into account the impact that the changes in the normative context had on the assessment of the constitutionality of the challenged provisions. This is manifested in point 1 of the operative part of the judgment, which states that Article 63(9) of the Act of 1989 (i.e. the provision which authorises the issuance of an implementing act to the said Act) is inconsistent with Article 92(1) of the Constitution. As regards the other challenged provisions, with the exception of Article 70^a(1) and (2) of the Act, the Tribunal decided to discontinue the proceedings on the basis of Article 39(1) and (2) of the Constitutional Tribunal Act. The discontinuation of the proceedings with regard to Article 61(1)-(3) of the Act of 1989 was caused by the withdrawal of the application by the authorised subject, to which I have no reservations; however, with regard to Article 62 and Article 63(8) of the said Act, this was caused by the fact that the indicated provisions had ceased to have effect on the basis of the Act of 16 December 2010 amending the Act on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 18, item 89), by derogating some of the provisions concerning proceedings on church property. The Tribunal did not take into account the possibility of conducting a review of the derogated provisions on the basis of Article 39(3) of the Constitutional Tribunal Act, and consequently it did not take a stance on the issue of their conformity to the current Constitution.

3. I do not share the Tribunal's view that there were no grounds to adjudicate on the basis of Article 39(3) of the Constitutional Tribunal Act, i.e. due to the necessity for the protection of constitutional rights and freedoms. The said stance is substantiated by the arguments presented below.

3.1. The solution provided for in Article 39(3) of the Constitutional Tribunal Act is unique in character. It creates a guarantee of the protection of constitutional rights and freedoms, only if normative acts infringing on the rights and freedoms, and challenged before the Constitutional Tribunal, are no longer valid. However, the Tribunal stated that, since the applicants had not argued for adjudication on the derogated provisions of 1989, and in particular they did not make it probable that subjecting the provisions to substantive examination was necessary for the protection of constitutional rights and freedoms, there were no grounds to consider the issue on the basis of Article 39(3) of the Constitutional Tribunal Act. The Tribunal did not provided any substantiation for its stance in that regard.

Article 39(3) of the Constitutional Tribunal Act indicates a crucial exception to one of the three premisses of discontinuing proceedings to determine the conformity of a normative act to acts which are higher in the hierarchy of the sources of law, namely, the premiss of the loss of validity; the exception is justified by important axiological aspects which are specified in the Constitution. At the same time, the Article does not raise any doubts that the Tribunal itself is obliged to establish that a circumstance determining

whether it is possible or impossible to substantively examine a case, and not to limit itself to the evidence and arguments presented by participants in proceedings.

Firstly, commencing a review of the constitutionality of a normative act before the Constitutional Tribunal always requires the initiative of subjects authorised by the Constitution, however after such proceedings are commenced, it is the Tribunal's obligation to thoroughly examine the case, within the scope of the subject matter specified by an authorised subject and higher-level norms for review indicated by that subject. Then the Tribunal alone examines whether there are premisses weighing in favour of the possibility of substantive adjudication, and if yes – whether the challenged normative act meets constitutional requirements. At the same time, one should make a proviso that in both cases the Tribunal is not bound by argumentation presented by the subject requesting the review or by other participants in proceedings – neither in a sense that it has to accept that argumentation, nor in a sense that it may not consider arguments which are not put forward by any of the participants; on the contrary, as the only organ of public authority which is competent to adjudicate on the constitutionality of law, the Tribunal has the obligation to thoroughly consider all the premisses weighing in favour of the substantive examination of a case, and then all reservations concerning the challenged regulation, which are supported with certain higher-level norms for review. The Tribunal may not, in that respect, limit itself to verifying stances presented in the course of proceedings, but it must independently and actively act, taking the initiative within the scope under discussion. Such a function of the Constitutional Tribunal – which differs, for example, from that of civil courts which, while resolving legal disputes, verify assertions of interested parties and rely on evidence provided by them, acting in the first place to grant protection to particular participants in civil law transactions, and only then to protect the legal order – arises from the Constitution and legislation.

Secondly, it is impossible to accept the thesis formulated by the Constitutional Tribunal also for the reason that the task of that organ of public authority is to safeguard the constitutional order of the Republic of Poland against any abuse by the legislative branch of government, which is done by eliminating defective normative acts from the legal system. The said task may only be carried out properly and effectively when the Tribunal does not make the substantive examination of a case or adjudication on the constitutionality of a legal act under examination to be contingent on whether argumentation presented by the subject requesting the review in accordance with any of the procedures provided for in the Constitution, or by other participants in proceedings, is more - or less - forceful, complete, convincing or apt. Carrying out or not carrying out the verification of a challenged normative act, and then – probably – declaring it to be constitutional or unconstitutional has an impact on the entire legal system, and thus it may affect, and often affects, the rights and obligations of other subjects who fall within the scope of the system. Rulings by the Constitutional Tribunal are, indeed, universally binding and are final. For those reasons, the Tribunal is obliged to independently and universally determine whether, in the light of the law, a given case should be examined as well as what ruling should be delivered as a result of such examination. The argumentation presented by other subjects merely constitutes significant assistance. A different approach would lead to a situation in which a request for conducting a review of the constitutionality of law, which meets formal requirements, but which does not contain convincing and complete argumentation could result in undermining the state of constitutionality if the Constitutional Tribunal – by limiting itself to verifying stances presented to it – discontinued proceedings or declared that the conformity of a challenged normative act to the Constitution, although there were objective grounds to carry out the review of such an act, and the allegation of unconstitutionality was apt, but what weighed in favour of that

was argumentation which was not put forward by participants in proceedings. I overlook the possibility when the purpose of a subject commencing a given review is to achieve such an effect, which may not, in practice, be entirely ruled out. However, even if this were possible, then - in the light of the assumed rules of interpretation of law – it is necessary to reject an interpretation which at least theoretically may lead to absurd consequences.

Thirdly, in my view, what should be accepted is the stance that any ensuing doubts concerning the issue as to whether issuing a ruling on an invalid normative act by the Constitutional Tribunal is necessary for the protection of constitutional rights and freedoms should be dispelled in such a way that it would be possible to substantively examine a given case. What weighs in favour of adopting the said rule is the significance of rights and freedoms provided for in the Constitution as well as the scale of negative consequences if the effects of their potential infringements are not eliminated.

It should be added that the Constitutional Tribunal had sufficient knowledge to establish whether its adjudication on the constitutionality of the challenged, and then derogated, provisions of the Act of 1989 would be necessary for the protection of constitutional rights and freedoms. The most vital piece of information that the Tribunal had in that regard concerned cases pending before courts and hitherto reactions of courts to those cases. The said knowledge is sufficient in particular where – as in the case under examination –the challenged provisions ceased to have effect during the examination of the case by the Tribunal. Needless to say, the intention behind the introduction of Article 39(3) into the Constitutional Tribunal Act was to enable the Tribunal to examine cases where, before the completion of proceedings, the legislator derogated the challenged provisions. Taking the aforementioned stance which is challenged in this dissenting opinion, the Constitutional Tribunal decided not to examine whether adjudication on the derogated provisions of the Act of 1989 was necessary for the protection of constitutional rights and freedoms. I believe that if the said "test of necessity" had been carried out, its result would have made it possible to substantively examine the case. At the same time, it may be noted that most of the allegations concerning the derogated provisions of the Act of 1989 were recognised by the Sejm and the Public Prosecutor-General; the hasty amendments to that Act, including a significant change in the legal system involving the dissolution of the Committee on Church Property and the referral of the claims of church legal entities to courts for consideration, prove that the legislator was aware of the numerous defects of the Act. Although the said circumstances as such do not determine anything, they seem to unambiguously suggest that the reservations as to the constitutionality of the challenged provisions are justified.

3.2. The premiss which weighs in favour of the admissibility of the Tribunal's examination of the case, within the meaning of Article 39(3) of the Constitutional Tribunal Act is to determine the meaning of the expression "constitutional freedoms and rights" as well as to establish who is entitled to those rights and freedoms. In that context, what is of primary importance is Chapter II of the Constitution, entitled "The Freedoms, Rights and Obligations of Persons and Citizens". The rights and freedoms mentioned in that chapter, varying considerably as to their formal character, are derived from "the inherent and inalienable dignity of the person", and the task of public authorities is to connect those rights and to protect them. At the same time, there is no doubt that subjects who are entitled to the rights and freedoms mentioned in that chapter are above all individuals (natural persons), as only they may be assigned with inalienable dignity, as is confirmed by the Constitution.

However, what is also generally acceptable is the view approved of in the jurisprudence of the Constitutional Tribunal that the said rights and freedoms, unless their

nature suggests otherwise, also refer to legal entities or – which should be added in my opinion – to other organisational units which have legal personality, such as partnerships. However, since the dignity of the person is to be the source of constitutional rights and freedoms, one should agree with the stance that the protection granted to the rights and freedoms of legal entities is derivative in relation to the protection of the rights and freedoms of individuals. Indeed, there is no doubt that individuals constitute the basic components of conventional entities, but above all that, by means of those entities, individuals exercise their rights and freedoms provided for in the Constitution.

The general acceptance of the assumption that the constitutional rights and freedoms from Chapter II of the Constitution are enjoyed by legal entities is, however, significantly restricted in some rulings by the Constitutional Tribunal. It is maintained that the said rights and freedoms may not be referred to state legal entities and self-government legal entities (of other state and self-government organisational units being legal entities), which – in general – comprise: a) the State Treasury, b) the units of local self-government, c) different types of state and self-government legal entities whose activity falls within the scope of private law, including the so-called public economic entities.

I disagree with that stance, for I hold the view that it is necessary within the scope under discussion to distinguish between two realms in which the state and the units of local self-government may act: the realm of 'empire', and the realm of 'dominion', with the proviso that, in the case of the state and self-government legal entities, one should distinguish those that comprise both realms, as well as those whose activities are limited only to the realm of 'dominion'. There is no doubt that, within the scope of the realm of 'empire', it is impossible to speak of the rights and freedoms of persons and citizens. However, the situation looks different in the realm of 'dominion'. Indeed, the same arguments for referring the rights and freedoms indicated in Chapter II of the Constitution to legal entities that are not linked with the state or local self-government do justify granting the said rights and freedoms to state and self-government legal entities.

In the context of the units of local self-government, including primarily communes which constitute the basic type of those entities, there is a need to put emphasis on of the content of Article 16(1) of the Constitution, which explains their axiological nature. Pursuant to that provision, the inhabitants of the units of basic territorial division shall form a self-governing community in accordance with the law; this entails that the basic components of the units of local self-government are their residents, and there are no doubts that the units of local self-government provide those subjects with the possibility of exercising their rights. The rejection of the view that the rights and freedoms set out in Chapter II of the Constitution may also be referred to the units of local self-government which act in the realm of 'dominion', which results in limiting the protection to which residents are entitled, but who – due to limiting the rights and freedoms of the units of local self-government, which is potentially inconsistent with the Constitution – will not be able to fully exercise their rights.

In this context, it is worth considering the content of Article 165(1) *in fine* of the Constitution, which stipulates that the units of local self-government shall have rights of ownership and other property rights, which fall within the category of the rights of persons and citizens. By stressing the circumstance that the said rights may be granted to the units of local self-government, the constitution-maker indeed assumed that the rights of individuals might be reflected in the rights of the units of the local self-government. In that context, one more issue should be emphasised. Pursuant to Article 64(2) of the Constitution, everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. Since, at the same time, the right of ownership and other property rights of the individual are undeniably protected by

means of the right to a fair trial, then such protection must also be provided for the right of ownership and other property rights of the units of local self-government.

Even if the possibility of referring the rights and freedoms of persons and citizens to the units of local self-government, including communes, was ruled out, then one should note that, apart from them, the Constitution provides for many other rights, e.g. the right to vote and the right to stand for election to representative organs of public authority, the right of at least 100,000 citizens to propose legislation or the right of the President of the Republic of Poland to issue official acts. They constitute a considerably diversified category, as they comprise powers and rights which – unlike the rights of persons and citizens – do not arise from the dignity of the person, but are granted by the constitution-maker and are vested in various subjects – primarily, though not only in individuals.

By contrast to the Constitution, which expressed the (constitutional) rights and freedoms of persons and citizens, in Article 39(3) of the Constitutional Tribunal Act, there is the term 'constitutional rights and freedoms' without any restriction that they refer only to persons and citizens. Therefore, it is justified to assume that the legislator has assigned broad meaning to the phrase "constitutional rights and freedoms", including the rights and freedoms of persons and citizens as well as other rights and freedoms specified in the Constitution (constitutional ones). All the rights and freedoms of persons and citizens indicated in the Constitution are constitutional rights and freedoms; however, the constitutional rights and freedoms also comprise those which are not the rights of persons and citizens. Thus, the term 'constitutional rights and freedoms' is broader than the term 'the constitutional rights of persons and citizens'.

As it has already been pointed out, constitutional rights and freedoms other than the rights and freedoms of persons and citizens constitute a highly diversified category. Article 39(3) of the Constitutional Tribunal Act only refers to some of them. They do not comprise the rights of subjects to whom the Constitution has assigned the tasks related to exercising power and whom it has granted authorisation (rights) to carry out activities serving the purpose of carrying out those tasks (the realm of 'empire'). The protection provided for in Article 39(3) of the Constitution Tribunal Act encompasses all those rights of persons and citizens as well as the constitutional rights and freedoms which are granted to individuals or legal entities in order to protect their interests, which also refers to state and self-government legal entities which are active in the realm of 'dominion'.

Therefore, if one assumed that a commune is not, even in derivative way, the subject of the constitutional rights and freedoms of persons and citizens, then it could not be concluded that it may not be the subject of constitutional rights. It is the Constitution, in its Article 165, which provides for the right of ownership and other property rights as well as guarantees that the self-governing nature of the units of local self-government shall be protected by courts. (NB At the same time, It is worth noting that since communes may be granted the right of ownership and other property rights which would not have the character of the rights of persons and citizens, this would mean that the Constitution provides for two origins of those rights: the dignity of the person in the case of private parties, and the act of granting them by the constitution-maker in the case of public entities; it seems to me that this is not noticed by the opponents of the view which permits to use the rights and freedoms of persons and citizens, in a derivative way, with regard to state and self-government legal entities).

4. Taking into account that the Constitutional Tribunal is obliged to independently verify the premiss of necessity to issue a ruling on an invalid normative act for the purpose of protecting constitutional rights and freedoms, which – in my view – may also be vested in communes, the discontinuation of the proceedings concerning the derogated provisions

of the Act of 1989, without carrying out the "test of necessity", was unjustified. Examining whether the said premiss occurred in that case would most likely have led to the substantive examination of the application in that regard, which – in the context of rather indisputable assessment of the challenged regulations as ones which infringed the right to be protected by courts, enshrined in the Constitution, would have resulted in declaring them unconstitutional. For these reasons, I have felt obliged to submit this dissenting opinion.