35/4/A/2011

JUDGMENT
of 19 May 2011
Ref. No. K 20/09*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Mirosław Granat – Presiding Judge
Zbigniew Cieślak
Stanisław Rymar – Judge Rapporteur
Piotr Tuleja
Sławomira Wronkowska-Jaśkiewicz,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 19 May 2011, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by the Polish Ombudsman to determine the conformity of:

> Article 73(4) of the Act of 13 October 1998 – the Introductory Law to Public Administration Reform Acts (Journal of Laws - Dz. U. No. 133, item 872, as amended), insofar as it provides for the expiry of the period for filing a claim for compensation before a decision is issued to confirm that the State Treasury or a unit of local self-government has acquired the ownership of an immovable property taken over for the construction of a public road, to Article 2 and Article 21(2) in conjunction with Article 31(3) of the Constitution of the Republic of Poland,

adjudicates as follows:

Article 73(4) of the Act of 13 October 1998 – the Introductory Law to Public Administration Reform Acts (Journal of Laws - Dz. U. No. 133, item 872, No. 162, item 1126, of 2000 No. 6, item 70, No. 12, item 136, No. 17, item 228, No. 19, item 239, No. 52, item 632, No. 95, item 1041 and No. 122, item 1312, of 2001 No. 45, item 497, No. 100, item 1084, No. 111, item 1194 and No. 145, item 1623 as well as of 2009 No. 31, item 206) **is consistent with Article 21(2) in conjunction with Article 31(3) as well as with Article 2 of the Constitution of the Republic of Poland and the principle of appropriate legislation derived therefrom.**

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* The operative part of the judgment was published on 7 June 2011 in the Journal of Laws - Dz. U. No. 115, item 674.

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) 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 regards examining the conformity of Article 73(4) of the Act of 13 October 1998 – the Introductory Law to Public Administration Reform Acts** (Journal of Laws - Dz. U. No. 133, item 872, as amended) **to Article 2 of the Constitution and the principle of protection of citizens' trust in the state and its laws which is derived therefrom, on the grounds that issuing a judgment is inadmissible.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. The subject of the review.

Subjected to review by the Constitutional Tribunal, Article 73(4) of the Act of 13 October 1998 – the Introductory Law to Public Administration Reform Acts (Journal of Laws - Dz. U. No. 133, item 872, as amended; hereinafter: the Introductory Law) reads as follows: "compensation referred to in paragraphs 1 and 2 shall be determined and paid out in accordance with the rules and procedure set out in provisions on compensation for expropriated immovable properties, upon a claim filed by the owner of such an immovable property within the period from 1 January 2001 until 31 December 2005. After the lapse of the said time-limit, the period for filing claims for compensation shall expire".

The said provision, in the first place, makes reference to a norm specifying the date of the acquisition of indicated immovable properties by the State Treasury and of the emergence of the right to claim compensation for expropriation (Article 73(1) of the Introductory Law) as well as to the norm indicating an entity obliged to pay out the compensation (Article 73(2) of the Introductory Law). Moreover, the provision challenged in the present case remains in conjunction with Article 73(3) of the Introductory Law, which stipulates that "the acquisition of immovable properties referred to in paragraph 1 by the State Treasury of a unit of local self-government shall be entered in a land register on the basis of a final decision issued by a voivode".

2. Higher-level norms for the review.

In the *petitum* of the application, the applicant indicates the following higher-level norms for the review: Article 2 of the Constitution as well as Article 21(2) in conjunction

with Article 31(3) of the Constitution. However, the substantiation for the application contains the allegation that Article 73(4) of the Introductory Law is inconsistent with the following three constitutional principles, namely: a) the principle of appropriate legislation, b) the principle of protection of citizens' trust in the state and its laws (hereinafter also referred to as the principle of loyalty – see the judgment of the Constitutional Tribunal of 25 June 2002, K 45/01, OTK ZU No. 4/A/2002, item 46); c) the principle of proportionality of restrictions on the constitutional right to just compensation for expropriation.

In the context of such a catalogue of higher-level norms for the review, two issues arise which require explanation before moving on to a substantive review. The first issue concerns Article 2 of the Constitution, which in the present case has been indicated as the source of two norms/principles (separate higher-level norms for the review). When arguing for the non-conformity of Article 73(4) of the Introductory Law to the principle of loyalty and the principle of appropriate legislation, the applicant did not introduce any differentiation into the substantiation and, at times, presented the same arguments in order to prove that the legislator had infringed both principles simultaneously. The issue was formulated in a similar way by the Public Prosecutor-General, who – while presenting arguments only for the conformity of the said provision to the principle of appropriate legislation - concluded that there was conformity to both principles. However, a different view was presented by the Marshal of the Sejm, who pointed out different criteria for the review in the context of the two substantively essential principles. The other issue that requires explanation, which was pointed out in the stance presented by the Sejm, concerns relations between the regulation of constitutionally admissible restrictions (Article 31(3) of the Constitution), which has been indicated as a norm "read in conjunction", and the regulation of constitutionally admissible grounds for expropriation (Article 21(2) of the Constitution), which has been indicated as the "basic" norm.

2.1. Making reference to the first issue, it should be noted that the constitutional principle of a democratic state ruled by law makes it possible to reconstruct the so-called derivative principles, which may constitute separate higher-level norms for an abstract review of the constitutionality of law. Although functionally related to each other and to some extent sharing common content, the derivative principles are not equivalent. The principle of protection of citizens' trust in the state and its laws in not tantamount to the principle of appropriate legislation, despite the fact that both serve the purpose of achieving the reliability of law, which is a constitutional value.

In the light of the extensive constitutional jurisprudence, the principle of loyalty - which *inter alia* bans making empty promises and introducing constitutionally unjustified changes into the "rules of the game" - primarily implies: a) the protection of acquired rights and legitimate expectations, b) consideration for pending interests, c) general prohibition against the retroactivity of law as well as d) the requirement of appropriate *vacatio legis*. By contrast, the principle of appropriate legislation primarily includes the requirement of specificity of law as well as the requirement to maintain an appropriate procedure for enacting the law (cf. e.g. the judgment of 13 March 2006, Ref. No. P 8/05, OTK ZU No. 3/A/2006, item 28, p. 277; W. Sokolewicz, comment 36 *in fine* on Article 2,

[in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz.* Vol. 5, L. Garlicki (ed.), Warszawa 2007, p. 48). Consequently, different allegations, and arguments supporting them, may weigh in favour of the infringement of those principles. Non-conformity to the principle of loyalty does not automatically imply non-conformity to the principle of appropriate legislation. Not every infringement of the principle of protection of citizens' trust in the state and its laws consists in the lack of specificity of law. In the view of the Constitutional Tribunal, each of the principles, regardless of how it has been derived from Article 2 of the Constitution, requires separate and proper substantiation of its content. The review of constitutionality in the light of each of the said principles is indeed conducted by means of different criteria which jointly constitute different tests (see remarks about the test of specificity – point 6 of this statement of reasons).

The said distinction is significant, since an obstacle which occurs in the context of the present case as regards examining an allegation of the infringement of the principle of loyalty (see points 4.1-4.3 of this statement of reasons) does not rule out the possibility of assessing Article 73(4) of the Introductory Law in the light of the principle of appropriate legislation.

2.2. Making reference to the second issue (i.e. the relation between a general and detailed regulation of constitutionally admissible restrictions on the one hand and the regulation of grounds for expropriation on the other), the Constitutional Tribunal points out that, in the light of the previous jurisprudence and the views of the majority of the doctrine, Article 31(3) of the Constitution makes it possible to reconstruct a norm which refers to all constitutional rights and freedoms, regardless of the fact whether particular provisions introduce grounds for restrictions (see e.g. L. Garlicki, comment 17 on Article 31, [in:] *Konstytucja...,* p. 16). Insofar as Article 21(2) of the Constitution lacks its separate content, it is necessary, in the course of interpretation, to supplement it with reference to other norms, and in particular to the constitutional principle of admissible restrictions on rights and freedoms.

3. The principle of *ne bis in idem*

3.1. In the context of the present case, the Tribunal has deemed it necessary to determine whether a substantive review may not be hindered by the principle of *ne bis in idem*.

Due to the need for protection and stability of situations arising as a result of issued rulings, it is useless to initiate review proceedings with regard to norms the constitutionality of which has already been determined (as regards the term "useless", see the judgment of 26 June 2001, Ref. No. U 6/00, OTK ZU No. 5/2001, item 122). Review proceedings are subject to discontinuation if norms which have already been subject to review are challenged again in the light of the same constitutional norms (cf. the judgment of 26 July 2006 (full bench), Ref. No. SK 21/04, OTK ZU No. 7/A/2006, item 88, point 1 in part VI of the statement of reasons and the jurisprudence cited therein; see also the judgment of 12 January 2010, Ref. No. SK 2/09, OTK ZU No. 1/A/2010, item 1, point 4.2. in part III of the statement of reasons and the jurisprudence cited therein; as well as the decisions of:

30 March 2009, Ref. No. SK 38/07, OTK ZU No. 3/A/2009, item 43, and 3 March 2009, Ref. No. K 34/08, OTK ZU No. 3/A/2009, item 30). Taking into account that the Constitutional Tribunal determines the constitutionality of norms, and not legal provisions, as well as bearing in mind that sometimes one provision may constitute the basis of reconstructing several different norms, it is necessary - for determining the occurrence of a procedural premiss - to assess each time whether there is full equivalence of content both at the level of the subject of a review and at the level of higher-level norms for the review.

What is of relevance in that context is whether adjudication on the previously challenged norm was carried out in the course of review proceedings commenced by way of constitutional complaint or question of law. Both instruments are measures for conducting a specific review and an analysis carried out by the Constitutional Tribunal is related to a specific case. The said relation is determined by the challenged scope of the norm. Therefore, one may not rule out the possibility of substantive adjudication if the initiator of a subsequent review presents new – previously not mentioned – arguments and circumstances which indicate a new scope of the given norm (cf. the judgment of 23 May 2005, Ref. No. SK 44/04, OTK ZU No. 5/A/2005, item 52).

3.2. Referring the above to the present case, the Tribunal states that there are no grounds for discontinuing the proceedings in the light of the principle of *ne bis in idem.*

First of all, the Ombudsman has indicated different higher-level norms for the review than in the case SK 11/02, in which the Tribunal adjudicated on the conformity of Article 73(4) of the Introductory Law to Article 21(2) of the Constitution (the judgment of 20 July 2004, OTK ZU No. 7/A/2004, item 66). In the case SK 11/02, the subject of the constitutional review was the equivalence of compensation for expropriation. The Tribunal stated that the legal form of expropriation as well as the aim thereof, being legitimate in a democratic state ruled by law, justified a departure from the principle of equivalence of compensation.

Secondly, the higher-level norms indicated in the course of the present proceedings are different from those put forward in the case P 33/07, in which the Tribunal ruled Article 73(4) of the Introductory Law to be consistent, insofar as it specified when the period for filing claims for compensation expired without linking that with the fact and date of issuing a decision, with Article 2, Article 32(1) and Article 64(2) of the Constitution (the judgment of 15 September 2009, OTK ZU No. 8/A/2009, item 123). Although the scope of Article 73(4) of the Introductory Law, which was under examination in that case, corresponds to some of the allegations formulated in these proceedings (which has been stressed by the Public Prosecutor-General), the Ombudsman has indicated new higher-level norms for the constitutional review.

Therefore, one should agree with the stance of the Marshal of the Sejm and the Public Prosecutor-General that it is admissible to conduct the substantive examination of Article 73(4) of the Introductory Law.

4. The significance of the judgment in the case P 33/07.

4.1. The starting point of further discussion is the judgment in the case P 33/07; the

statement of reasons for the said judgement includes the reconstruction of the content of Article 73(4) as well as of the said Article in conjunction with Article 73(3) of the Introductory Law, and the view that the mechanism for confirming expropriation and receiving compensation, which is set out in Article 73 of the Introductory Law, is correct systemically as well as does not limit the protection of rights vested in previous owners (see also the judgments of: 14 March 2000, Ref. No. P 5/99, OTK ZU No. 2/2000, item 60; 28 February 2008, Ref. No. K 43/07, OTK ZU No. 1/A/2008, item 8; 19 May 2009, Ref. No. K 47/07, OTK ZU No. 5/A/2009, item 68). Moreover, at that time, the Tribunal established three findings which are of significance for the present case.

First of all, in the situation where the Introductory Law does not contain special procedural solutions, a decision issued by a voivode, referred to in Article 73(3) of the Introductory Law, is a determination issued within the scope of administrative procedure. Consequently, general time-limits for resolving individual cases, set out in the Act of 14 June 1960 – the Polish Code of Administrative Procedure (Journal of Laws - Dz. U. of 2000 No. 98, item 1071, as amended), shall apply.

Secondly, the voivode's decision does not create a new legal situation, but it merely confirms that expropriation which occurred in a specific case was lawful. In other words, this is a declaratory act which states in a binding way that the *ex lege* change in the legal situation of certain parties brings about an *ex tunc* effect.

Thirdly, since expropriation occurred by law, and the voivode's decision serves as evidence, then it should be concluded that it is not necessary for the mere action of filing a claim for compensation, but it constitutes a necessary element of proceedings aimed at determining the amount and payment of compensation. The proceedings are conducted by the head of a county (Pl. *starosta*), who carries out tasks falling within the scope of government administration. Indeed, such a claim, filed by a person or entity whose immovable property has been expropriated, has a dual character. On the one hand, it constitutes a claim for compensation; on the other hand, it contains a request for instituting administrative proceedings in order to determine the amount and payment of compensation.

4.2. Referring the above to the present case, the Tribunal states that the allegations formulated by the applicant, insofar as Article 73(4) of the Introductory Law constitutes a "normative trap" that is inconsistent with Article 2 of the Constitution, are not justified by law. In the light of the stance adopted in the case P 33/07, there was no need for the legislator to introduce special time-limits for resolving individual cases which would bind in proceedings before a voivode. However, bearing in mind that expropriation occurred by statute which, at the same time, became the basis of a claim for compensation, a declaratory decision which confirmed a change in the legal situation might not be regarded as an obstacle to filing the claim referred to in Article 73(4) of the Introductory Law.

4.3. In conclusion, the Tribunal states that, by indicating the principle of loyalty as a higher-level norm for the review, the Ombudsman based the allegation of infringement of the principle on the interpretation of Article 73 of the Introductory Law which in the judgment in the case P 33/07 was considered to be unjustified by linguistic, systemic and

functional rules of interpretation. Due to the fact that the argumentation within the said scope has not been supplemented by the applicant in the course of the proceedings before the Constitutional Tribunal, it should be stated that the infringement of the principle of protection of citizens' trust in the state and its laws has not been proved. The Tribunal has concluded that it is useless to analyse again the allegations raised in the case P 33/07. However, this leads to a situation where there is no evidence for the non-conformity of the challenged regulation to the principle of loyalty. The proceedings within that scope are subject to discontinuation on the grounds that issuing a judgment is inadmissible (Article 39(1)(1) of the Constitutional Tribunal Act, Journal of Laws - Dz. U. No. 102, item 643, as amended).

4.4. The Constitutional Tribunal notes that the possible cases of expiry of the period for filing claims for compensation, mentioned by the applicant, could have been caused by the provision of incorrect information by the organs of public authority, as regards the time-limit for filing substantively relevant claims, or by proceedings carried out in breach of the general rules of administrative proceedings. In the judgment in the case P 33/07, the Tribunal noted that: "the dissemination of information on the content of provisions which trigger the *ex lege* loss of a property right should constitute one of the elements guaranteeing the exercise of rights provided for by the legislator". However, assessing whether the provisions of Article 73 of the Introductory Law were applied properly and taking appropriate legal measures in that regard remain outside the scope of the Constitutional Tribunal, even if such application might at times have had unconstitutional effects. In accordance with a general guarantee arising from Article 77(1) of the Constitution, on the basis of relevant special provisions, injured parties may seek legal protection in relevant proceedings and compensation for the unlawful actions of the organs of public administration.

4.5. Bearing in mind the above findings, the Tribunal subjected the two following allegations to substantive examination, namely that: Article 73(4) of the Introductory Law lacked specificity and was disproportionate.

5. The significance of the judgment in the case SK 14/05.

Anticipating further discussion, it should be mentioned that, in the circumstances of the present case, it is not possible to draw an analogy with the case SK 14/05 as well as to properly apply the conclusions concerning Article 442(1) of the Act of 23 April 1964 – the Civil Code, Journal of Laws - Dz. U. No. 16, item 93, as amended (the judgment of 1 September 2006, Ref. No. SK 14/05, OTK ZU No. 8/A/2006, item 97), as this has been done by the applicant. The provision which was then reviewed concerned the issue of the time-barring of claims, whereas Article 73(4) of the Introductory Law, insofar as it provides for the expiry of the period for filing claims, sets a fixed time-limit (for more on differences see B. Kordasiewicz, "Problematyka dawności", [in:] *System Prawa Prywatnego. Prawo cywilne – część ogólna. Tom 2*, Z. Radwański (ed.), Warszawa 2008, pp. 570-571). Moreover, in the judgment in the case SK 14/05, the higher-level norm for

review was Article 7(1) of the Constitution, and the constitutional issue concerned damage caused by unlawful actions taken by the organs of public authority. By contrast, in the present case, the subject of the review comprises the elements of the compensatory mechanism which is applicable in the context of lawful expropriation.

IV

1. The allegation that Article 73(4) of the Introductory Law is inconsistent with the principle of appropriate legislation.

1.1. Taking into consideration the fact that the principle of appropriate legislation, indicated here as a higher-level norm for the review, has on numerous occasions been the subject of discussion in constitutional jurisprudence, the Tribunal deemed it useful to point out that the said principle referred to any regulations, and in particular to those which shaped the legal situations of the subjects of constitutional rights and freedoms (see e.g. the judgment of 9 October 2007, Ref. No. SK 70/06, OTK ZU No. 9/A/2007, item 103). What follows from that principle if the obligation to formulate legal provisions in a clear and comprehensible way (cf. the judgment of 28 October 2009 (full bench), Ref. No. Kp 3/09, OTK ZU No. 9/A/2009, item 138; the judgment of the Constitutional Tribunal of 21 March 2001, Ref. No. K 24/00, OTK ZU No. 3/2001, item 51).

In the opinion of the judges of the Constitutional Tribunal adjudicating in the present case, the assessment of conformity to the principle of appropriate legislation should be carried out by means of two criteria which together constitute the test of specificity of law. The first criterion is precision which should be understood as the possibility of decoding legal norms from provisions by means of rules of interpretation assumed in a given legal culture. It is manifested in such regulation of rights and obligations that their content should be virtually unambiguous and should make it possible to enforce them. The other criterion is comprehensibility, which means that a provision is understood in the context of general language. That purpose is achieved by observing the rules on legal drafting.

The fulfilment of the above-indicated criteria does not determine the constitutionality of a regulation reviewed in the light of the principle of appropriate legislation. It is stressed in the jurisprudence that "the degree of specificity of particular regulations is relative with regard to the actual and legal circumstances that accompany each regulation. This relativity naturally results from the imprecision of language, in which legal texts are written, and from the variety of matters which are subject to regulation" (the judgment of the Constitutional Tribunal of 18 March 2010, Ref. No. K 8/08, OTK ZU No. 3/A/2010, item 23). What is essential in this context is that ruling a particular provision to be no longer legally effective due to its lack of clarity is *ultima ratio* in character. Given the principle that an interpretation which is consistent with the Constitution should be applied, it is possible to declare unconstitutionality in the light of the principle of specificity of provisions, where there is no possibility of ruling out doubts by applying the rules of interpretation (see the judgments of the Constitutional Tribunal of:

28 June 2005, Ref. No. SK 56/04, OTK ZU No. 6/A/2007, item 67; 15 January 2009, Ref. No. K 45/07, OTK ZU No. 1/A/2009, item 3).

1.2. The analysis of the conformity of the challenged provision to the principle of appropriate legislation should be commenced by stating that the provision restricts the constitutional right to just compensation for expropriation (see, however, the comments in part IV point 2 of this statement of reasons). Due to the special character of expropriation as well as the constitutional substantive and formal terms of the lawful taking over of property, and also taking into account the fact that a claim for compensation is lodged with an administrative authority, the legislator is obliged – in the circumstances as in the present case – to maintain a degree of specificity which rules out the discretion of administrative authorities. The legal basis and terms of satisfying claims for compensation for expropriation should be regulated in a way that is clear and comprehensible to the addressees who may expect the rational legislator to enact norms which raise no doubts as to the content of imposed obligations and granted rights as well as the procedure for enforcing them. What is prohibited is such formulation of any of the elements which would cause arbitrariness in the application thereof, both as regards the scope ratione materiae and ratione personae. The aim of the requirement of specificity, in the context of a regulation which sets out the operationalisation and restriction of the constitutional right to just compensation for expropriation is to ensure that expropriated owners will – solely on the basis of a provision or a collection of provisions – be aware of their legal situations as well as the substantive and procedural terms of satisfying claims for compensation they are entitled to.

1.3. Referring the above to the present case, the Constitutional Tribunal states that Article 73(4) of the Introductory Law corresponds to the constitutional requirement of specificity. The following arguments weigh in favour of that:

1.3.1. Firstly, the application of the linguistic rules of interpretation to the challenged provision in conjunction with Article 73(1) of the Introductory Law makes it possible to determine at what point ownership is transferred onto a public entity "upon compensation". The legislator indicated an event which causes loss in the property of the said parties, and which is legally relevant and generates compensatory liability. The event is the taking over of an immovable property. The source of a compensatory obligation is not an administrative act, but a statutory provision of a statute requiring the payment of compensation. One should draw a distinction between the lawful interference with the property of the said parties that has legal effects and is administrative in character, and a compensatory relationship which displays characteristics that are typical for legal relationships in civil law (E. Bagińska, J. Parchomiuk, "Odpowiedzialność odszkodowawcza w administracji", [in:] *System Prawa Administracyjnego.* Vol. 12, R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), Warszawa 2010, pp. 13-14 and the view of E. Łętowska cited therein). Assuming that a claim for compensation arises at the time of incurring loss for which the Act provides compensatory liability, the Constitutional Tribunal states that the doubts raised by the applicant with regard to the moment of emergence of a debt and a claim on the part of the injured party are unjustified.

1.3.2. Secondly, under the Act, since 1 January 1999, an eligible party has been entitled to file a claim which is not specified in respect of its scope ratione materiae. Indeed, it could only become more specific after the issuance of a decision by a voivode, which - as it has been established in the jurisprudence of administrative courts as well as constitutional jurisprudence – is both declaratory and evidential in character as an act which is necessary for determining the amount of compensation. In the Tribunal's opinion, the adoption of the construct of a claim which is not specified in respect of its scope ratione materiae does not *per se* infringe the principle of specificity of legal provisions, since the legislator has formulated complex and specific reference to the entire catalogue of provisions that shape the mechanism for determining the amount of compensation in expropriation proceedings (Article 128 and the subsequent provisions of the Act of 21 August 1997 on the Management of Immovable Property, Journal of Laws - Dz. U. of 2010 No. 102, item 651). As it was explained in detail in the judgment in the case P 33/07, within the scope that was not regulated, relevant provisions of administrative procedure were applied.

1.3.3. Thirdly, what clearly follows from the challenged provision is that satisfying a debt to which an eligible party is entitled due to expropriation has been deferred in time. However, the legislator has precisely marked the moment from which it is possible to specify the scope ratione metariae of a claim for compensation for expropriation. The only condition was the eligible party should file the claim. In the opinion of the Constitutional Tribunal, the content and character of a legal relationship that arises from Article 73 of the Introductory Law as well as the application of linguistic rules of interpretation clearly indicate that making a claim for compensation was not contingent upon the prior issuance of a relevant decision by a voivode (for more details see the cited judgment in the case P 33/07).

1.3.4. Fourthly, the application of the linguistic rules of interpretation to Article 73(4) and (1) of the Introductory Law leaves no doubt as to the understanding of the wording "upon a claim by the owner of an immovable property".

The claim referred to in the challenged provision has the form of an administrative-law claim, sought in the course of administrative proceedings; yet, it aims at providing the protection of a property right within the meaning of civil law. The claim for compensation is here an instrument of civil law. This is not affected by the circumstance that the legal basis of determining the amount and payment of such compensation is constituted by the norms of administrative law. An administrative act specifying the situation of a given party in a specific case may be indeed regarded as a civil-law event. As it follows from the above findings, a substantively essential claim is an instrument for satisfying a debt which has arisen on the part of an eligible party after its property has been taken over. In other words, the point here is a claim that is filed by a party which has incurred loss within the scope of its legally protected property.

Bearing in mind the lack of a legal norm which would exclude, from inheritance, the debt arising in the context of Article 73(1) of the Introductory Law, it should raise no doubt that an eligible party to file such a claim is also the heir of the owner who was expropriated. The heir was entitled to that right before a legally effective ruling was issued in inheritance proceedings (see Article 922 and Article 925 of the Civil Code respectively).

Making the time-limit for filing the claim contingent upon the completion of inheritance proceedings would render the ordering role of Article 74 of the Introductory Law as pointless.

In the opinion of the Constitutional Tribunal, due to the nature and substance of a compensatory relationship, a party eligible to file a claim referred to in Article 73(4) of the Introductory Law may also be – entered into the land register as the owner, before the issuance of a decision on the basis of Article 73(3) of the Introductory Law – a party that concluded a purchase agreement in the form of a notary deed concerning a given immovable property taken over for the construction of a public road with the owner of the property before 1 January 1999.

However, the said issue was not resolved in a consistent way in the jurisprudence of administrative courts. Indeed, two approaches were devised in that regard. According to the first approach, the party which was eligible to demand compensation and to file a claim might only be the owner who had been expropriated, and who had held the title of ownership on 31 December 1998 (see e.g. the judgment of the Voivodeship Administrative Court in Karków of 5 April 2007, Ref. No. II SA/Kr 1305/04; the judgment of the Voivodeship Administrative Court in Opole of 26 June 2006, Ref. No. II SA/Op 131/06; the judgment of the Voivodeship Administrative Court in Łódź of 15 May 2007, Ref. No. II SA/Łd 813/06; the judgment of the Voivodeship Administrative Court in Warsaw of 8 August 2007, Ref. No. I SA/Wa 864/07; the judgment of the Voivodeship Administrative Court in Gdańsk of 20 June 2007, Ref. No. II SA/Gd 200/07). In accordance with the second approach, an eligible party might also be a party that had been entered in the land register as an owner, and who had acquired the right of ownership - prior to the issuance of a decision confirming expropriation – by concluding an agreement with the expropriated owner (see e.g. the judgment of the Voivodeship Administrative Court in Warsaw of 7 October 2005, Ref. No. I SA/Wa 1319/04; the judgment of the Voivodeship Administrative Court in Rzeszów of 17 July 2007, Ref. No. II SA/Rz 106/07; the judgment of the Voivodeship Administrative Court in Gliwice of 28 April 2006, Ref. No. II SA/Gl 770/05; the judgment of the Voivodeship Administrative Court in Gliwice of 10 December 2007, Ref. No. II SA/Gl 626/07). The said issue was also the subject of the rulings of the Supreme Administrative Court, which initially favoured the first approach (the judgments of: 6 May 2008, Ref. No. I OSK 704/07 as well as 17 April 2008, Ref. No. I OSK 676/07; cf., however, the comments formulated in the judgment of 1 February 2007, Ref. No. I OSK 394/06).

The differences in interpretation led to the presentation of the legal issue to the bench of seven Justices of the Supreme Administrative Court (the extended bench), who adjudicated that: “as long as an act in law included in a notary deed has not been deemed invalid by a common court or the entry about the right of ownership in the land register has not been eliminated, one may not deprive these «newly land-registered owners» (i.e. persons entered in the land register), still before the issuance of a decision by a voivode which confirms the lawful acquisition of an immovable property by the State Treasury or a unit of local self-government, of the title “owner” as defined in Article 73(4) of the Act, i.e. a party that is authorised to file a claim for compensation – requesting that the amount of compensation be determined and paid. (...) In accordance with the constitutional principle of

the protection of ownership, it is impossible to take over ownership without compensation, and therefore the owner within the meaning of Article 73(4) of the Act, being eligible to file a claim for determining the amount and payment of compensation for a plot of land which – as it turned out later – by virtue of law from 1 January 1999 became the property of the State Treasury or a commune, may be a person whose right to an immovable property was entered in the land register as the right of ownership, as a result of the transaction of transfer of ownership with the previous owner of the immovable property, with the proviso that issuing a decision to determine the amount and payment of the said compensation may take place after entering the title of ownership transferred to the State Treasury or a unit of local self-government in the land register" (the judgment of 11 January 2010, Ref. No. I OPS 3/09).

Due to the above-mentioned arguments relying on the nature and substance of the legal relationship arising from Article 73 of the Introductory Law as well as the explicit wording and guarantee character of Article 21(2) of the Constitution, the Constitutional Tribunal shares the view of the Supreme Administrative Court formulated in the case I OPS 3/09. Transactions involving immovable properties referred to in Article 73(1) of the Introductory Law, carried out by expropriated owners whose titles of ownership had been entered in the land register, may not result in a situation where purchasers who act in compliance with the law and put trust in land registers, by incurring loss as regards their legally protected interests, would be deprived of legal protection and their constitutional rights would become illusory. The above-mentioned stance has been approved of in the latest jurisprudence of administrative courts (see e.g. the judgment of the Supreme Administrative Court of 26 April 2010, Ref. No. I OSK 99/10 as well as 23 June 2010, Ref. No. I OSK 92/10; see also the judgment of the Voivodeship Administrative Court in Gliwicach of 24 September 2010, Ref. No. II SA/Gl 892/10; the Voivodeship Administrative Court in Kraków of 15 December 2010, Ref. No. II SA/Kr 1255/10).

1.4. In conclusion, it should be stated that Article 73(4) of the Introductory Law is sufficiently precise and comprehensible that the linguistic rules of interpretation make it possible to derive a norm therefrom which is consistent with the Constitution. As a side remark to the above discussion, the Constitutional Tribunal wishes to note that the occurrence of differences in interpretation in the jurisprudence of administrative courts and the referral of the indicated issue to be resolved by the Supreme Administrative Court do not *per se* weigh in favour – as the Ombudsman appears to perceive that – of the infringement of the principle of specificity. The Tribunal points out that the shaping of the lines of jurisprudence as well as their variability may not be automatically regarded as a result of inappropriate legislation, since this is a typical phenomenon for a developed legal system – a natural consequence of discursiveness and openness of the legal language.

2. The allegation that Article 73(4) of the Introductory Law is inconsistent with Article 21(2) in conjunction with Article 31(3) of the Constitution.

2.1. In constitutional jurisprudence, it has been indicated on a number of occasions that the principle of a democratic state ruled by law requires maintaining proportionality (the judgment of 12 December 2005, Ref. No. K 32/04, OTK ZU No. 11/A/2005,

item 132). A derivative of such a general constitutional rule is the principle of constitutionally admissible grounds for interference with the realm of rights and freedoms, the content of which is specified in Article 31(3) of the Constitution. When assessing whether the indicated interference of the law-maker was consistent with the constitutional test of proportionality, one should each time take into account the specificity of particular rights and freedoms.

The review of the conformity of a legal provision to a norm reconstructed on the basis of Article 21(2) in conjunction with Article 31(3) requires providing answers to the following questions: 1) whether the challenged norm regulates the issue of compensation for expropriation; 2) whether it constitutes a restriction on the right to compensation; 3) whether the restriction has been imposed by statute; 4) whether the introduced restriction can lead to the achievement of set objectives, is necessary and its effects remain proportionate to the burdens imposed by it on a party that was expropriated; 5) whether the said restriction is justified on the grounds of public order, or the protection of the natural environment, health or public morals, or the freedoms and rights of other persons; 6) whether the restriction does not infringe the essence of the right to compensation for expropriation.

2.2. As the earlier discussion provided answers in the affirmative to the first three questions, the Tribunal, in the following sequence: a) assessed the proportionality of imposed burdens to an objective which was to be achieved by means of the challenged norm, b) identified constitutional values which justified the solution adopted by the legislator; c) verified whether the essence of the protected subjective right was preserved.

2.2.1. Making reference to the first one of the above-mentioned issues, it should be pointed out that it has been established in constitutional jurisprudence that Article 73 of the Introductory Law was aimed at adjusting facts and the legal situation with regard to immovable properties taken over for the construction of public roads in order to strike a balance between the public interest and the private interest (the cited judgments in the cases P 5/99 as well as SK 11/02). In the opinion of the Tribunal, the norm challenged in the present case directly aims at the achievement of the objective construed this way.

The statutory determination of a time-limit within which the rights or obligations of subjects may be shaped and exercised falls within the scope of a general construct referred to as “remoteness in time” (Pl. *dawność*). Speaking in general terms, this is a construct aimed at ensuring the reliability of transactions and preventing the existence of long-lasting and indissoluble legal relationships. Also, the evaluated regulation is conducive to adjusting the legal situation to facts. Failing to observe the time-limit set in Article 73(4) of the Introductory Law may not be rectified by an application to renew the said time-limit, and has a definite impact on the legal situation of the party that is eligible to compensation and the party which bears an obligation in that regard. By virtue of law, the said time-limit may not be replaced with another one on the basis of an agreement between the parties to a compensatory relationship. In the event of the lapse of the time-limit, authorities that are competent to examine a given claim to determine the amount and payment of compensation are obliged to consider the case on its merits and declare the party’s claim to be groundless (cf. e.g. the judgment of 16 September 2010, Ref. No. I OSK 1490/09).

In the opinion of the Constitutional Tribunal, the regulation under review, by making it possible to achieve the above-indicated objective, does not impose excessive burdens on eligible parties. Indeed, one should note that the legislator deferred in time the possibility of filing a claim for compensation and satisfying the said claim in the way that eligible parties were given two years - without prejudice to their subjective right – to obtain information about the adopted legislative solution and its impact on their property rights. Article 73(4) of the Introductory Law provided for a 5-year period for filing a relevant claim which did not have to meet any special formal requirements and played a dual role – as it was established in the judgment in the case P 33/07 (see point 4 of this statement of reasons). Moreover, this was the only action that was required from an eligible party by law so that the party could escape the negative consequence of the lapse of the time-limit. The mere indication of a fixed time-limit, maintaining adequate *vacatio legis*, may not be regarded as an excessive burden.

Whether a compensatory claim is satisfied depends on the level of activity and efforts of the eligible party, in accordance with the principle of *ius civile vigilantibus scriptum est*. The assumption that civil law requires due diligence on the part of persons or entities concerned with their rights is fully approved in a democratic state ruled by law (the judgments of: 22 February 2000, Ref. No. SK 13/98, OTK ZU No. 1/2000, item 5 as well as 25 May 1999, Ref. No. SK 9/98, OTK ZU No. 4/1999, item 78, point 7 *in fine* of the statement of reasons). Making reference to its earlier remarks concerning Article 73 of the Introductory Law, the Constitutional Tribunal states that, in circumstances such as in the present case, the solution adopted by the legislator corresponds to the constitutional requirement to strike a balance between the protection of the subjective rights of an expropriated owner and the protection of the public interest which justified expropriation (see the cited judgment in the case P 33/07, point 2 *in fine* of the statement of reasons; the cited judgment in the case SK 11/02, point 3 *in fine* of the statement of reasons). Moreover, the reference to the said principle ought to be regarded as justified in the light of the civil-law character of a compensatory relationship which arises from loss incurred as a result of the taking over of an immovable property. The Marshal of the Sejm aptly noted that the right to compensation, as any subjective right, merely specifies the subject's "capacity to take action", and the subject may take action or refrain from doing so within the scope set by law.

2.2.2. Making reference to the issue of identifying constitutional values that justify the introduction of a fixed time-limit, the Constitutional Tribunal wishes to note that although the legal institution of "remoteness in time" does not directly constitute the subject of constitutional regulation, the values it serves are constitutional in character and underlie the norms explicitly stated in the Constitution. Indeed, there has been no doubt in constitutional jurisprudence so far that the time-barring of claims as an institution falling within the scope of the notion of "remoteness in time" may serve the purpose of protecting the constitutional subjective rights as well as the reliability of a transaction (see e.g. the cited judgment in the case SK 9/98). Undeniably, the said view may also be referred to another aspect of "remoteness in time" i.e. a fixed time-limit, however with the proviso that "unlike in the case of the time-barring of claims,

the said time-limits have been set primarily for the achievement of objectives which are significant to the general public. They are characterised by considerable legal rigour, which mainly manifests itself in the fact that due to the inactivity of the eligible party during the time-limit set by statute the right vested in the party expires (...) Thus, the introduction of a fixed time-limit should be justified" (the judgment of 13 March 2006, Ref. No. P 8/05, OTK ZU No. 3/A/2006, item 28, point 2 of the statement of reasons).

In the opinion of the Constitutional Tribunal, determining the constitutionality of an objective, due to which expropriation was carried out, and of the mechanism provided for in Article 73(4) of the Introductory Law, implies the assessment of the time-limit challenged by the applicant. In the rulings in the cases SK 11/02 and P 5/99, the Tribunal stated that devising a special expropriation procedure with reference to immovable properties taken over for the construction of public roads was a legitimate solution in a democratic state ruled by law, as it served the purpose of the implementation and protection of the common good.

The introduction of a time-limit after the lapse of which a claim for compensation "expires" is justified by the necessity to maintain public order. The point here is the assessment of security of not only the subjects of rights and obligations but also the system of law as well as the principles governing the functioning of society in accordance with values shared by society, which have been enshrined in the Constitution. Undoubtedly, they include those cited earlier: the reliability of legal transactions as well as a general principle of civil law in the light of which property claims are time-barred or expire after a certain period.

In the view of the Tribunal, what also justifies setting a fixed time-limit in Article 73(4) of the Introductory Law is the requirement to strike a budget balance, which has the status of a constitutionally protected value (cf. e.g. the judgment of 9 April 2002, Ref. No. K 21/01, OTK ZU No. 2/A/2002, item 17). Without a correct and balanced budget, the organs of public authority would not be able to achieve objectives which are set for them, and in particular meet the constitutional requirement to protect the common good (the judgment of 24 November 2009, Ref. No. SK 36/07, OTK ZU No. 10/A/2009, item 151, point 4 of the statement of reasons). Indeed, financing claims for compensation for expropriation is not irrelevant to the budget. What would be reasonably justified and necessary, from the point of view of the stability of public funds, would be to set a period for which certain funds would be reserved for a certain substantively significant objective as well as to precisely indicate the moment when the liquidation of such financial reserves would be possible.

2.2.3. Making reference to the issue of the infringement of the right to compensation for expropriation, the Constitutional Tribunal draws attention to the fact that the introduction of a 5-year period when it is possible to seek compensation, at the same time meeting minimum procedural requirements, does not undermine the essence of the right to just compensation. Moreover, assuming that the criterion for the verification of that characteristic is the effectiveness of the implementation of a given subjective right in particular systemic circumstances where it is applicable (see point 4 part III of this statement of reasons), it should be stated that the protection guaranteed to parties which

were eligible to compensation in the context of Article 73(4) of the Introductory Law was actual. In the light of the findings from constitutional jurisprudence, which were made in the cases P 5/99, SK 11/02 as well as P 33/07, the compensatory mechanism under review ought to be regarded as corresponding to the constitutional guarantee of just compensation.

2.3. In conclusion, Article 73(4) of the Introductory Law corresponds to the criteria for usefulness, necessity as well as proportionality in a strict sense. It is therefore consistent with the principle of admissible and proportional restrictions on the constitutional right to compensation for expropriation.

3. For these reasons, the Tribunal adjudicated as in the operative part of the judgment.