27/3/A/2013

JUDGMENT

of 13 March 2013

Ref. No. 25/10*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

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

Grażyna Szałygo – Recording Clerk,

having considered – at the hearings on 9 January and 13 March 2013, in the presence of the applicant, the Sejm and the Public Prosecutor-General – an application by the Polish Ombudsman to determine the conformity of:

1) Article 63(8) in conjunction with Article 63(4), third sentence, of the Act of 17 May 1989 on Relations Between the State and the Roman

*The operative part of the judgment was published on 8 April 2013 in the Journal of Laws, item 432.

Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 29, item 154, as amended) to Article 165(2) in conjunction with Article 77(2), Article 78 and Article 31(3) of the Constitution as well as to Article 11 of the European Charter of Local Self-Government (Journal of Laws - Dz. U. of 1994 No. 124, item 607, as amended),

2) Article 62(2) of the Act referred to in point 1, insofar as it excludes relevant units of local self-government from the group of participants in proceedings, to Article 165 in conjunction with Article 32(1) and Article 31(3) of the Constitution,

3) Article 33(5) in conjunction with Article 33(2), third sentence, of the Act of 20 February 1997 on Relations Between the State and Jewish Religious Communities in the Republic of Poland (Journal of Laws - Dz. U. No. 41, item 251, as amended) to Article 165(2) in conjunction with Article 77(2), Article 78 and Article 31(3) of the Constitution as well as Article 11 of the European Charter of Local Self-Government,

adjudicates as follows:

Article 33(5) in conjunction with Article 33(2), third sentence, of the Act of 20 February 1997 on Relations Between the State and Jewish Religious Communities in the Republic of Poland (Journal of Laws - Dz. U. No. 41, item 251, of 1998 No. 59, item 375 and No. 106, item 668, of 2004 No. 68, item 623 as well as of 2010 No. 106, item 673), **construed in a way that it does not rule out other legal means than an appeal against a decision issued by the Regulatory Committee, is consistent with:**

a) Article 165(2) of the Constitution of the Republic of Poland,

b) Article 31(3), Article 77(2) and Article 78 of the Constitution.

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) and Article 39(1)(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item

1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654)**, to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. The subject of the application submitted by the Ombudsman.

The Polish Ombudsman (hereinafter: the Ombudsman or the applicant) has challenged the conformity of:

1) Article 63(8) in conjunction with Article 63(4), third sentence, 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, hereinafter: the Act on Relations Between the State and the Roman Catholic Church) to Article 165(2) in conjunction with Article 77(2), Article 78 and Article 31(3) of the Constitution as well as to Article 11 of the European Charter of Local Self-Government, done at Strasbourg, on 15 October 1985 (Journal of Laws - Dz. U. 1994 No. 124, item 607, as amended; hereinafter: the Charter);

2) Article 62(2) of the Act on Relations Between the State and the Roman Catholic Church, insofar as it excludes relevant units of local self-government from the group of participants in proceedings, to Article 165 in conjunction with Article 32(1) and Article 31(3) of the Constitution;

3) Article 33(5) in conjunction with Article 33(2), third sentence, of the Act of 20 February 1997 on Relations Between the State and Jewish Religious Communities in the Republic of Poland (Journal of Laws - Dz. U. No. 41, item 251, as amended; hereinafter: the Act on Relations Between the State and Jewish Religious Communities) to Article 165(2) in conjunction with Article 77(2), Article 78 and Article 31(3) of the Constitution as well as to Article 11 of the Charter.

The Ombudsman’s reservations primarily concern the way the legal situation of units of local self-government has been shaped in the context of the so-called regulatory

proceedings[*]. The unconstitutionality of solutions adopted by the legislator consists in the lack of the possibility to challenge decisions issued by the so-called regulatory committees, which conduct the above-mentioned proceedings. As a result, there is no judicial protection for the right of ownership revoked by a decision issued by a competent regulatory committee. An additional issue that arises in the context of the Act on Relations Between the State and the Roman Catholic Church is the fact that the units of local self-government are deprived of the status of participants in regulatory proceedings, despite the fact that communes were frequently required, by decisions of the Committee on Church Property, to return property that had been expropriated by the state.

What follows from the Ombudsman's written submissions to the Tribunal is that he challenges regulations that rule out a judicial review of decisions issued in regulatory proceedings.

In the letter of 26 June 2012, apart from the modification of the scope of allegation, there were no new arguments for the reservations raised by the applicant. The theses arising from the letter are concurrent with the applicant's stance presented in the application of 7 December 2010.

2. The jurisdiction of the Constitutional Tribunal as regards considering the Ombudsman's application.

2.1. The status of Article 62(2) and Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church.

2.1.1. By the Act of 16 December 2010 amending the Act on Relations Between the State and the Roman Catholic Church (Journal of Laws - Dz. U. of 2011 No. 18, item 89; hereinafter: the amending Act of 16 December 2010), the following provisions were 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.

[*] [Whenever the general term 'regulatory proceedings' is used here, it should be understood as defined by relevant Polish statutes i.e. as proceedings for the return of expropriated immovable properties, or parts thereof, to the legal entities of: the Roman Catholic Church, Jewish religious communities or others religious organisations in the Republic of Poland (see e.g. Article 61 of the Act of 17 May 1989 on Relations Between the State and the Roman Catholic Church in the Republic of Poland (Pl. *ustawa z dnia 17 maja 1989 r. o stosunku Państwa do Kościoła Katolickiego w Rzeczypospolitej Polskiej*) and Article 30 of the Act of 20 February 1997 on Relations Between the State and Jewish Religious Communities in the Republic of Poland (Pl. *ustawa z dnia 20 lutego 1997 r. o stosunku Państwa do gmin wyznaniowych żydowskich w Rzeczypospolitej Polskiej*).]

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 dissolved. The said Committee completed its work on 28 February 2011, and lodged a report on its activity with 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.

2.1.2. The Committee on Church Property provided the competent minister for religious affairs and for national and ethnic minorities with applications for the institution of regulatory proceedings, 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 Act of 11 October 1991 amending the Act on Relations Between the State and the Roman Catholic Church (Journal of Laws - Dz. U. No. 107, item 459), which had not been considered before the entry into force of the amending Act of 16 December 2010, notifying participants in the said regulatory proceedings in writing that the said applications had not been considered (Article 3(2) of the amending Act of 16 December 2010).

2.1.3. Pursuant to Article 4(1) of the amending Act of 16 December 2010, participants in regulatory proceedings, 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 about that, as 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.

Therefore, the Constitutional Tribunal considered that, before courts, different provisions on regulatory proceedings were to be applied than those challenged by the Ombudsman. Those were provisions that indicated what types of immovable properties were subject to regulatory proceedings (Article 61 of the Act on Relations Between the State and the Roman Catholic Church) as well as provisions specifying the possible outcomes of regulatory proceedings. The said provisions have not been derogated and they

are still binding.

2.1.4. The amending Act of 16 December 2010 derogated Article 62(2), Article 63(8), as well as Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church, which constitute the subject of the review in the present case. Consequently, it is necessary to consider the status of those provisions in the context of further adjudication in the present case.

2.2. The situation where provisions cease to have effect within the meaning of Article 39(1)(3) of the Constitutional Tribunal Act.

2.2.1. Due to the derogation of the above-indicated provisions, the Constitutional Tribunal has examined whether, with regard to Article 62(2) and Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church, there are grounds to discontinue the review proceedings pursuant to 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), due to the fact that the provisions ceased to have effect before the delivery of a ruling by the Tribunal.

The formal derogation of a normative act does not have to entail that the act will be completely eliminated from the legal order. One should distinguish between situations where a given normative act under examination, despite the formal derogation thereof, has effect in the form of shaping future actions of the subjects of rights and obligations and situations where a derogated normative act is applied exclusively to the evaluation and determination of legal effects of the past actions of the said subjects, on the basis of a binding norm that governs competence, which requires the application of the derogated normative act. In the first case, the normative act remains binding and is subject to review by the Tribunal. In the second case, the normative act has ceased to have effect, and the review thereof 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/2011, item 11 and jurisprudence cited therein).

2.2.2. The legislator derogated Article 62(2) of the Act on Relations Between the State and the Roman Catholic Church, pursuant to which the group of participants in regulatory proceedings comprised, apart from applicants, all interested state and church

entities. Also, Article 63(8) of the said Act was subject to derogation, in accordance with which there was no appeal against a decision of the decision-making panel of the Committee. The amending Act of 16 December 2010 also derogated Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church, mentioned in the Ombudsman's letter of 26 June 2012 as one of the provisions from which the Ombudsman had derived the challenged normative content (Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church).

2.2.3. 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 regulatory proceedings will not apply to any situation in the future. The norm arising from Article 62(2) of the Act on Relations Between the State and the Roman Catholic Church concerns the right to participate in the said proceedings vested in certain entities. Thus, with the dissolution of the Committee, the said norm will no longer set prohibitions and requirements pertaining to the Committee's activity as well as it will no longer apply to the proceedings before the Committee. Therefore, according to the Tribunal, the formal derogation of Article 62(2) of the Act has resulted in the situation where that provision ceased to have effect within the meaning of Article 39(1)(3) of the Constitutional Tribunal Act.

2.2.4. The norm arising from Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church may not also – after the entry into force of the amending Act of 16 December 2010 – be applied to future events and facts. Since the Committee on Church Property ended its activity and the legislator abolished regulatory proceedings in that context, one may not regard the norm arising from Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church as having effect within the meaning of Article 39(1)(3) of the Constitutional Tribunal Act. Hence, the Constitutional Tribunal states that the provision ceased to have effect.

2.3. The situation where provisions of Article 62(2) and Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church have ceased to have effect versus the necessity to adjudicate on the part of the Constitutional Tribunal.

The fact that the normative content of Article 62(2) and Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church, challenged by the applicant, is not binding does not imply that the proceedings are automatically subject to discontinuation. Within the meaning of Article 39(3) of the Constitutional Tribunal Act, the Tribunal may not discontinue review proceedings in the context of a challenged normative act which ceased to have effect before the delivery of a ruling by the Tribunal if issuing the ruling is necessary for the protection of constitutional rights and freedoms. For this reason, it should be considered whether issuing a ruling on the above-mentioned provisions 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 there is a link between the provision and the protection of constitutional rights and freedoms. Such a link exists if 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 established in a definite way before that provision has 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.

2.3.1. The Constitutional Tribunal has deemed that a provision under review may contain normative content referring to the realm of constitutional rights and freedoms only if it shapes the legal situation of the subjects of those rights. A provision does not contain normative content concerning the realm of constitutional rights and freedoms if it shapes the legal situation of subjects that are not subjects of constitutional rights and freedoms. In other words, it is not necessary for the protection of constitutional rights and freedoms to issue a ruling on a normative act that has ceased to have effect if the said act does not shape the legal situation of the subjects of constitutionally protected rights and freedoms.

It should be stated that a prerequisite for issuing a substantive ruling on provisions that have ceased to have effect is to show at least the probability that the constitutional rights and freedoms of certain subjects have been violated.

The Constitutional Tribunal has deemed that Article 39(3) of the Constitutional Tribunal Act should be interpreted in conformity to the Constitution, and the phrase "constitutional rights and freedoms" used in that provision should be referred to constitutional terms.

2.3.2. The Constitution specifies the subjects of constitutional rights and freedoms with the terms "persons and citizens". Most rights have been guaranteed to every person, but some have been granted only to citizens. What follows from the provisions of the Constitution is that the subjects of constitutionally protected rights and freedoms are primarily individuals. The subjects of constitutionally protected rights and freedoms may also comprise legal entities under private law, unless it arises from the essence of a given right that it may be granted exclusively to the individual. A basic function of the rights and freedoms of persons and citizens is the protection of the individual before public authorities. Naturally, the scope *ratione personae* of constitutional rights and freedoms does not include public legal entities whose actions have legal effects in public law. Such an interpretation is concurrent with theses presented by the Constitutional Commission of the National Assembly, during a debate on the rendering of human rights in what was to become the future Constitution (cf. Bulletin of the Commission, Issue No. XIV, p. 31).

2.3.3. The Constitutional Tribunal has consistently held the view that a unit of local self-government may not be regarded as a subject of constitutional rights and freedoms referred to in Article 39(3) of the Constitutional Tribunal Act. The term 'rights and freedoms' used therein should be construed as tantamount to the constitutional rights and freedoms of the individual, which have primarily been regulated in chapter II of the Constitution (cf. the decisions of: 13 June 2006, ref. no. Tw 10/06, OTK ZU No. 5/B/2006, item 171; 15 December 2009, ref. no. Tw 23/09, OTK ZU No. 3/B/2010, item 140; 22 May 2007, ref. no. SK 70/05, OTK ZU No. 6/A/2007, item 60; 17 June 2010, ref. no. Tw 7/10, OTK ZU No. 6/B/2010, item 400; 22 March 2004, ref. no. Tw 41/03, OTK ZU No. 3/B/2004, item 168; 23 February 2005, ref. no. Tw 46/04, OTK ZU No. 3/B/2005, item 99).

In the present case, the Tribunal has maintained that stance and stated that Article 39(3) of the Constitutional Tribunal Act concerns the constitutional rights and freedoms of private parties. By contrast, it does not pertain to the rights of the units of local self-government, which arise from the Constitution, but play different roles and have been granted for the attainment of different purposes. Since the phrase 'constitutional rights and

freedoms' has a well-established meaning and refers to the rights of the individual as well as the rights of private legal entities, one may not assume an interpretation of Article 39(3) of the Constitutional Tribunal Act that will be broader in scope than the scope of the provisions of the Constitution.

2.3.4. Arguments for the unconstitutionality of the challenged provisions, presented by the applicant, concern communes (Pl. *gmina*). In his letter of 26 June 2012, the Ombudsman emphasised that he was submitting his application on behalf of all participants in regulatory proceedings, and mentioned that the challenged provisions concerned the rights of private parties; however, he did not explicitly formulate an allegation that the challenged provisions infringed the rights of the said parties.

Despite the above-mentioned reservations, the Tribunal – going beyond the scope of the argumentation contained in the Ombudsman's application and letter of 26 June 2012 – stated that, for the thorough examination of the case, the situation of two categories of subjects should be analysed: communes, on the one hand, and individuals and private legal entities (private parties), on the other. The situations and status of those parties in the light of Article 39(3) of the Constitutional Tribunal Act should be considered separately.

2.4. The status of a commune versus the necessity to protect constitutional rights and freedoms.

The interpretation of Article 39(3) of the Constitutional Tribunal Act, adopted by the Constitutional Tribunal, indicates that the said provision does not concern rights vested in the units of local self-government, even if the said rights arise from the Constitution. Indeed, the said rights play different roles and have been granted for the attainment of different purposes.

2.4.1. In accordance with the jurisprudence of the Constitutional Tribunal (in particular the view expressed in the judgment of 29 May 2001, ref. no. K 5/01, OTK ZU No. 4/2001, item 87), the units of local self-government are not the subjects of constitutional rights and freedoms of persons and citizens. The Tribunal has explained that, firstly, the legal status of the organs of public authority is clearly regulated in separate provisions of the Constitution, outside of the provisions on the rights and freedoms of persons and citizens. Secondly, by the order of things, the organs of public authority perform tasks that arise from their scope of powers, and do not exercise rights and freedoms. Thirdly, "the realm of civil rights and freedoms does not overlap with the realm

of competence of the organs of public authority" (the decision of the Constitutional Tribunal of 22 May 2007, ref. no. SK 70/05 and the literature on the subject cited therein). The Constitution includes provisions that grant rights to the units of local self-government in their relations with the organs of the state. The units of local self-government are, *inter alia*, entitled to the right of ownership and other property rights (Article 165(1), second sentence, of the Constitution), the right to associate (Article 172(1) of the Constitution) and their self-governing nature shall be protected by courts (Article 165(2) of the Constitution). If the units of local self-government were granted the rights and freedoms of persons and citizens, guaranteed in chapter II of the Constitution, then the above-mentioned special provisions would be redundant. In the light of the provisions of the Constitution, the units of local self-government are public legal entities of a special status, the actions of which have legal effects in public law, and also the said units have certain rights in their relations with the state.

2.4.2. Therefore, insofar as the Ombudsman's application concerns rights vested in communes, the issue of admissibility of adjudication on provisions that have ceased to have effect does not arise. Communes are not the subjects of constitutional rights and freedoms. Within that scope, there is no need to issue a ruling for the protection of constitutional rights and freedoms. Article 62(2) and Article 63(8) of the Act on Relations Between the State and the Roman Catholic Church, insofar as they concern communes, may not be subject to review on the basis of Article 39(3) of the Constitutional Tribunal Act. The review proceedings within that scope are subject to discontinuation.

2.5. The necessity to protect the constitutional rights and freedoms of individuals and private legal entities.

2.5.1. It follows from Article 61(4)(3) of the Act on Relations Between the State and the Roman Catholic Church that the determination of ownership issues may not infringe rights acquired by non-state third parties. Thus, under no circumstances may the said determination entail the return of immovable properties acquired by the third parties. This involves all parties that have acquired any rights to immovable properties, both individuals and legal entities. The legislator intended to emphasise that even the restitution of the right of ownership may not lead to an infringement of rights vested in other private parties. The rights of third parties referred to in Article 61(4)(3) of the Act on Relations Between the State and the Roman Catholic Church comprise rights *in rem*, e.g. ownership or perpetual usufruct, as well as rights that are contractual in character, e.g. lease or

tenancy.

In the light of the provisions of the Act, an immovable property with regard to which an individual or a private legal entity holds the right of ownership or the right of usufruct may not be the subject of a decision issued by the Committee on Church Property. In principle, proceedings before the Committee could not concern the rights of the said private parties. Such activity would go beyond the scope of competence of the Committee. Moreover, it should be added that the above-mentioned private parties have not lost their right to assert their right of ownership in court proceedings in accordance with general principles. The challenged provisions do not contain solutions that would violate the rights of private parties indicated in the application.

2.5.2. In the view of the Constitutional Tribunal, the provisions of the Act on Relations Between the State and the Roman Catholic Church do not contain any provisions that limit the possibility of asserting the right of ownership as well as making other civil-law claims by private parties in proceedings before common courts. The defectiveness in that respect might not result from the provisions of the Act on Relations Between the State and the Roman Catholic Church, but from an erroneous interpretation of binding statutes, and in particular from the fact that the organs of public authority which are responsible for applying the law ignored interpretation requirements arising from the Constitution as well as international agreements ratified by Poland that provide for the protection of human rights. The Tribunal has found no grounds or arguments to state that this was a well-established interpretation.

The Constitutional Tribunal has been established to examine the hierarchical conformity of provisions, norms and normative acts. The cases of an erroneous interpretation and the inappropriate application of the law are outside its scope of jurisdiction.

2.6. The conclusions.

2.6.1. Within the meaning of the Act on Relations Between the State and the Roman Catholic Church, the Committee had no competence to determine the rights of third parties. Article 61(4)(3) of the said Act clearly stipulates that the determination of ownership issues may not infringe rights acquired by non-state third parties, and in particular by other churches and religious organisations as well as individual farmers. In the view of the Tribunal, the provisions of the Act on Relations Between the State and the

Roman Catholic Church do not impose restrictions on asserting the right of ownership and making other civil-law claims by private parties in proceedings before common courts. According to the legislator's intention, they do not concern third parties, they may not be applied to them and thus they do not contain normative content that pertains to constitutional rights and freedoms of third parties, which would justify the necessity to adjudicate within the meaning of Article 39(3) of the Constitutional Tribunal Act.

2.6.2. The applicant has argued that it is necessary to adjudicate on provisions that have ceased to have effect mainly due to the fact that the Tribunal's judgment will be of relevance for cases pending before the Supreme Administrative Court, and which have been suspended because of the Ombudsman's application lodged with the Constitutional Tribunal. However, the application of certain provisions after they were derogated does not, by itself, weigh in favour of the necessity to adjudicate about them in order to guarantee the protection of constitutional rights and freedoms. In the Tribunal's assessment, the provisions under examination do not contain normative content that refer to the realm of constitutionally protected rights and obligations.

2.6.3. For the above reasons, the Constitutional Tribunal has stated that with regard to Article 62(2) and Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church, there is no necessity to issue a ruling for the protection of constitutional rights and freedoms. The review proceedings in that respect are subject to discontinuation on the grounds that the said provisions have ceased to have effect.

3. The Analysis of Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities in the Republic of Poland

3.1. The constitutional issue concerning Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities in the Republic of Poland

The Ombudsman has challenged Article 33(5) in conjunction with Article 33(2), third sentence, of the Act on Relations Between the State and Jewish Religious Communities in the Republic of Poland, in accordance with which there is no appeal against a decision issued by the decision-making panel of a given regulatory committee. In the applicant's view, the said solution is inconsistent with the Constitution, as there is no possibility of appealing against a decision issued by the Regulatory Committee on the Property of Jewish Religious

Communities (hereinafter: the Regulatory Committee). This way the right of ownership revoked by a given committee is deprived of any judicial protection.

The allegation that decisions by the decision-making panel of the Regulatory Committee may not be appealed has been linked, by the Ombudsman, with the fact that decisions and settlements reached by the Regulatory Committee have the effect of court enforcement orders.

The Ombudsman has not challenged the restitution of the right of ownership or regulatory proceedings. The focus of the allegations presented in the application is on the lack of a possibility of judicial protection with regard to the property of Jewish religious communities as well as the lack of a possibility, on the part o such communities, to initiate a judicial review of decisions issued by the Regulatory Committee. The constitutional issue concerns the assessment whether there has been an infringement of the communities' right to have their self-governing nature protected by courts, in the case where there is no recourse to courts with claims for the judicial protection of property to which the communities are entitled.

3.2. The activity of the Regulatory Committee versus the guarantees of the self-governing nature of units of local self-government.

3.2.1. The Constitutional Tribunal has pointed out that the basic guarantee of the self-governing nature of the units of local self-government is ownership. In its Article 165(1), the Constitution regards communal property as a guarantee of the legal personality of local self-government, and in particular as a guarantee that communes are subjects of rights and obligations (see the judgment of 12 April 2000, ref. no. K 8/98, OTK ZU No. 3/2000, item 87). Ownership assigned to communes plays a special role and is of systemic significance. In the light of the provisions of chapter VII of the Constitution, communal property must primarily be perceived as an instrument for performing public tasks and protecting the collective interests of a local community (Article 163 of the Constitution). For this reason, in the context of communal property, it is not possible to clearly distinguish between the realm of '*imperium*' and '*dominium*'. Indeed, the said realms overlap. This affects the shaping of boundaries set for communal ownership, which is guaranteed in Article 165 of the Constitution, as well as indicates that the assessment of the possibility to perform public tasks requires considering ownership and property rights that are at the disposal of a unit of local self-government (see the judgment of 25 November 2003, ref. no. K 37/02, OTK ZU No. 9/A/2003, item 96).

The use of communal property for the performance of public tasks entails that the position of the units of local self-government as the subject of the right of ownership differs from the situation of private legal entities. The Constitutional Tribunal has stressed in its previous *acquis* (see the judgment of 29 May 2001, ref. no. K 5/01), as well as in its decision of 22 May 2007, in the case SK 70/05, that one may not fail to notice basic differences between the legal situation of individuals and private legal entities, on the one hand, and the constitutional status of communes as public legal entities, which exercise public authority within the scope of tasks assigned thereto, on the other. The different status of individuals and private legal entities, on the one hand, and public legal entities (communes), on the other, determines the character of rights and freedoms assigned thereto pursuant to the Constitution. In the light of the Constitution, one may speak of a different scope of protection for the right of ownership enjoyed by individuals or private legal entities and the protection of the right of ownership granted to communes (see the judgment of 12 April 2000, ref. no. K 8/98).

3.2.2. The Constitutional Tribunal has drawn attention to the fact that the self-governing nature of the units of local self-government is not absolute in character. The protection of communal ownership may not rule out or revoke the legislator's right to shape relations in the state. In particular, a restriction arising from a statute does not infringe the constitutional principle that the self-governing nature of units of local government shall be protected by the courts if it is justified by constitutionally protected aims and values. Therefore, assessment whether a given regulation meets the requirement of justified interference in the realm of the self-governing nature of communes may not be carried out without an interpretation that refers to the aim and axiology of a given statute that introduces such restrictions (see the judgments of 4 May 1998, ref. no. K 38/97, OTK ZU No. 3/1998, item 31 as well as of 9 April 2002, ref. no. K 21/01, OTK ZU No. 2/A/2002, item 17).

When facing a conflict between public interests at different levels - the interest of the public in general versus the interest of a given local community - the Constitutional Tribunal held the view that the public interest arising from the function of communal ownership and the purpose of interference might not justify arbitrary and unlimited interference on the part of the legislator in the realm of the property interests of the units of local self-government. The adoption of a different stance would entail that the burden of pursuing general objectives may be shifted, as a whole or to a large extent, onto a certain

local community, and consequently constitutional guarantees that regard the legal and property autonomy of the units of local self-government would be illusory in character (see the judgment of 25 November 2003, ref. no. K 37/020. To sum up, in this context, despite the argumentation of the applicant, the Constitutional Tribunal maintains the theses presented in the decision of 22 May 2007 by the full bench of the Tribunal adjudicating in the case SK 70/05. Contrary to the applicant's stance, the view is concurrent with the Tribunal's line of jurisprudence and does not have the character of a ruling that would constitute an exception.

The jurisprudence of administrative courts related to the Regulatory Committee.

3.3.1. Moving on to the issue of the jurisprudence of administrative courts, the Constitutional Tribunal stated that rulings that dismiss appeals against decisions issued by relevant regulatory committees in regulatory proceedings were based on the decision of the Supreme Administrative Court of 26 September 1991 (ref. no. I SA 768/91, Lex No. 26069). The Supreme Administrative court held that:

– the Regulatory Committee, acting on the basis of the Act on Relations Between the State and the Roman Catholic Church, is not an organ of state administration or local self-government within the meaning of Article 1(1)(1) of the Act of 14 June 1960 - the Code of Administrative Procedure (Journal of Laws - Dz. U. of 2000 No. 98, item 1071, as amended; hereinafter: the Code of Administrative Procedure), or any other organ of public authority established by law to perform tasks in the realm of state administration or local self-government, pursuant to Article 1(2) of the said Code;

– a decision by the Committee on Church Property bears no characteristics of an administrative decision,

– it is inadmissible to appeal against such a decision before the Supreme Administrative Court.

The Tribunal has established that administrative courts kept deriving a prohibition against reviewing decisions issued in regulatory proceedings from statutory provisions specifying the legal status of the Committee, the subject of regulatory proceedings as well as the character of decisions issued by the Committee.

3.3.2. Voivodeship administrative courts have taken a stance that since the Committee on Church Property is not an organ of public administration, and decisions issued by it are not administrative decisions or any other administrative acts within the scope of public administration referred to in Article 3(2)(4) of the Act of 30 August 2002 – the Law on

Proceedings Before Administrative Courts (Journal of Laws - Dz. U. of 2012 item 270; hereinafter: the Act on Proceedings Before Administrative Courts), then an appeal against such a decision is inadmissible and is subject to dismissal (cf. decisions of the Voivodeship Administrative Court in Warsaw of: 23 January 2007, ref. no. I SA/Wa 65/07, Lex No. 1007561 and ref. no. I SA/Wa 66/07, Lex No. 1007563 as well as 14 August 2008, ref. no. I SA/Wa 895/08, Lex No. 1039626).

The above-presented interpretation was questioned by the Supreme Administrative Court in its decision of 26 November 2008, ref. no. II OSK 687/07 (Lex No. 532161), which referred the following legal issue to be examined by a bench of seven Justices of the Supreme Administrative Court: "does Article 3(2)(1) or Article 3(2)(4) of the Act on Proceedings Before Administrative Courts is applicable to a decision by the Committee on Church Property, referred to in Article 62(1) [of the Act on Relations Between the State and the Roman Catholic Church]?"

In its decision of 9 March 2009, the Supreme Administrative Court (ref. no. II OPS 1/08, Lex No. 510605) suspended proceedings in a case on determining the legal issue due to the fact that on 22 January 2009 a group of Sejm Deputies filed an application, requesting the Constitutional Tribunal to determine the non-conformity of Article 61, Article 62, Article 63(8) and (9) as well as Article 70a(1), (2) and (3) of the Act on Relations Between the State and the Roman Catholic Church to the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8. Subsequently, in its decision of 15 November 2011 (ref. no. II OPS 1/08, Lex No. 1010821), due to an application of 7 December 2010 lodged with the Tribunal by the Ombudsman, the Supreme Administrative Court held that, in the case on determining the legal issue referred to it by the bench of the Supreme Administrative Court on 26 November 2008 (ref. no. II OSK 687/07), requirements for further suspension of the case were fulfilled.

3.3.3. The above-mentioned rulings of voivodeship administrative courts concerned appeals against decisions by the Committee on Church Property, which was established on the basis of the Act on Relations Between the State and the Roman Catholic Church. However, due to similarities between provisions concerning the Committee on Church Property and the Regulatory Committee on the Property of Jewish Religious Communities specified in the Act on Relations Between the State and Jewish Religious Communities as well as similarities between the adopted procedures, including the same

solution provided in Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities and in derogated Article 63(8) of the Act on Relations Between the State and the Roman Catholic Church, jurisprudence on the Committee on Church Property affects the application of provisions concerning the Regulatory Committee, set out in the Act on Relations Between the State and Jewish Religious Communities

Such a stance was also presented by the Supreme Administrative Court, in its judgment of 20 December 2007 (ref. no. II OSK 1570/06, ONSAiWSA No. 6/2008, item 116): "a decision by the Regulatory Committee on the Property of Jewish Religious Communities, issued on the basis of Article 33(2) and (3) [the Act on Relations Between the State and Jewish Religious Communities], is not an administrative decision issued by 'another authority' within the meaning of Article 1(2) of the Code of Administrative Procedure and may not be appealed to an administrative court".

3.3.4. In the context of the line of jurisprudence of administrative courts, the Constitutional Tribunal has noted that when determining the character of a decision of the Regulatory Committee, one needs to take account of the complexity of that decision. As pointed out by the Ombudsman, a decision by the Regulatory Committee evokes effects at two levels. Firstly, the said effects are evoked in relations between the state and Jewish religious communities. Secondly, the legal effects may also occur in relations between the state and the units of local self-government as well as in relations between the units of local-self government and religious communities. An analysis of the legal essence of decisions issued by the Regulatory Committee must combine the said two levels of an impact of decisions.

A decision by the Committee analysed in the context of relations between the state and a religious community differs from typical unilateral administrative acts, which specify the position of the private entity in a way that has legal effects. It is issued by an organ of public authority which comprises the representatives of both the state and a religious community. Such a decision should, wherever possible, be delivered after considering the stances of the two parties. In the context of relevant religious communities, the special character of regulatory proceedings in itself constitutes a guarantee of their interests that they are justly entitled to and, in such a case, there is no need to ensure that there was a possibility to refer to an authority of second instance. By contrast, a decision of the Regulatory Committee, examined from the perspective of relations between the state and local self-government is different in character.

As it has been noted by the Marshal of the Sejm, the Regulatory Committee is an organ of public authority that carries out certain tasks from the scope of public administration. A decision by the Regulatory Committee which concerns an immovable property of a unit of local self-government constitutes a unilateral legal act that has legal effects, that specifies the position of that unit and that imposes certain legal obligations. The Ombudsman presents in his application the above-mentioned characteristics of a decision by the Regulatory Committee. Due to its content and subject, the said decision falls within the scope of activity of public administration, and the special character of the authority that issues a given decision as well as the special character of the procedure applied may not undermine such classification. Analysed from the perspective of a unit of local self-government, the Regulatory Committee's decision on the property of local self-government appears to be an administrative act that manifests, in a unilateral way and with legal effects, the obligations of the Committee. In this context, the argumentation of administrative courts presented above raises reservations. Such reservations are also indicated in the decision of 26 November 2008, issued by the Supreme Administrative Court, in which the bench of 7 Justices of the Supreme Administrative Court was requested to resolve the above-mentioned legal issue. The said issue is presented further on in this statement of reasons.

3.4. The assessment of the constitutionality of Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities

3.4.1. The applicant has argued that challenged Article 33(5), in conjunction with Article 33(2), third sentence, of the Act on Relations Between the State and Jewish Religious Communities, makes it impossible to appeal against a decision issued by the Regulatory Committee, and in particular to appeal the decision to a court. Barring recourse to courts for parties to regulatory proceedings, with regard to any claims, was a result of combining the lack of possibility to appeal decisions issued by the Committee with the full legitimisation of the lack of recourse to courts, by assigning the effect of a court enforcement order to the said decision. In the Ombudsman's opinion, assigning the effect of court enforcement orders to the Committee's decisions is tantamount *de iure* to making them equal to those orders. Thus, according to the Ombudsman, one may claim that the fact that settlements and decisions issued by the Committee have the effect of court enforcement orders affects the interpretation of the term 'an appeal' used in Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities.

The Constitutional Tribunal has interpreted the Ombudsman's stance in such a way that since, as regards their effectiveness, the decisions of the Committee have been classified as equal to legally effective court rulings, and have been issued in one-stage proceedings, then the lack of possibility of appealing them implies the revocation of the right to an appeal (strictly speaking) or the right to lodge an appeal with a court, as it is possible in the so-called hybrid proceedings regulated by the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws - Dz. U. No. 43, item 296, as amended; hereinafter: the Code of Civil Procedure), in which it is possible to lodge an appeal with a common court against an administrative decision issued by an organ of public administration. Also, the applicant has stressed that the interpretation assigned by the legislator to the character of the decisions of the Regulatory Committee weighs in favour for the inadmissibility of a review also by an administrative court as regards the said "legally effective court decisions", since the said decisions bind all organs of the state on the basis of Article 365(1) of the Code of Civil Procedure.

3.4.2. Making reference to the arguments presented by the Ombudsman, the Constitutional Tribunal considered the character of regulatory proceedings before the Regulatory Committee. Pursuant to Article 32(3), first sentence, of the Act on Relations Between the State and Jewish Religious Communities, requests for instituting regulatory proceedings were to be lodged with the Regulatory Committee within the period of 5 years from the day of entry into force of the Act. This is a fixed time-limit from substantive law, as claims that were not filed within that time-limit expired (Article 32(3), second sentence, of the Act on Relations Between the State and Jewish Religious Communities). The requests were to be filed for various reasons both in civil cases as well as in administrative cases (e.g. expropriated immovable properties). If, before the entry into force of the Act, court or administrative proceedings were pending with regard to immovable properties that were to be returned to their previous owners, they were subject to suspension, and the courts and organs of public administration had to refer relevant case files to the Regulatory Committee (Article 32(4) of the Act on Relations Between the State and Jewish Religious Communities).

Proceedings pending before the Regulatory Committee may end with:

– reaching a settlement before the decision-making panel of the Regulatory Committee (Article 33(2), first sentence, of the Act on Relations Between the State and Jewish Religious Communities),

– issuing a ruling by the Committee, if the settlement has not been reached (Article 33(2), second sentence, of the Act on Relations Between the State and Jewish Religious Communities). What follows from the provisions of the Act is that a decision issued by the Committee should take account of an application filed by a Jewish religious community (Article 33(3) of the Act on Relations Between the State and Jewish Religious Communities),

– without arriving at a decision by the Committee (Article 34(1) of the Act on Relations Between the State and Jewish Religious Communities). In this case (and only then), proceedings before the Regulatory Committee have the character of obligatory preliminary proceedings (where the Committee precedes an organ of public administration or a common court), for after the obligatory proceedings before the Regulatory Committee, participants in those proceedings have a possibility of either re-opening court and administrative proceedings or instituting new court and administrative proceedings (Article 34(2), first sentence, of the Act on Relations Between the State and Jewish Religious Communities), under the condition that a claim for the return of expropriated immovable properties will expire. While examining a given case, a common court adjudicates within the scope of competence that is limited to the same outcomes as the Regulatory Committee in the course of regulatory proceedings (Article 34(2), second sentence, of the Act on Relations Between the State and Jewish Religious Communities).

3.4.3. The Ombudsman's doubts arise with regard to the lack of a possibility of appealing against the second of type of determination issued by the Regulatory Committee – namely, a decision of the decision-making panel of the Regulatory Committee, which as a whole or in part takes account of an application filed by a Jewish religious community for the return of expropriated immovable properties.

In the event of issuing a decision by the Committee, if a settlement has not been reached (Article 33(2), second sentence, of the Act on Relations Between the State and Jewish Religious Communities), the Committee, in principle, takes account of the application of a Jewish religious community (Article 33(3) of the said Act). In the case where a decision is issued by the Regulatory Committee, the Committee resolves the issue of the return of a given immovable property, and not a competent organ of public authority which would determine the case, if the Regulatory Committee had not been established. Depending on the character of a case examined in regulatory proceedings, we may deal with a formally administrative case (i.e. one which would be resolved by an administrative decision, e.g. a decision on the return of an immovable property expropriated or taken over

by the state) or a civil case (i.e. one that would be resolved outside of the court or by a common court). For this reason, it is difficult to draw conclusions about the character of the Committee's decision as such.

3.4.4. The Tribunal has shared the view of the Ombudsman that a decision of the Regulatory Committee (Article 33(2), second sentence of the Act on Relations Between the State and Jewish Religious Communities) does not have the character of a civil-law settlement. By contrast, it is unjustified for the Ombudsman to argue that a decision issued by the Regulatory Committee is regarded by the legislator – on its merits – as a court ruling or a determination that is equivalent to a ruling issued by a court of first instance. Such a conclusion seems to arise from the fact that decisions issued by the Regulatory Committee have the effect of court enforcement orders. The Tribunal points out that a decision of the Regulatory Committee is not a ruling of a common court, as the Committee is not an organ of the judiciary. The Committee's scope of competence has been delineated in a special way. Pursuant to Article 30(1) of the Act on Relations Between the State and Jewish Religious Communities, the subject of regulatory proceedings is the transfer of the ownership of given immovable properties, or parts thereof, that were expropriated by state, as specified by statute. Indeed, regardless of the character of a given case (considered in accordance with an administrative or civil procedure) that was the basis for lodging an application by a Jewish religious community with the Regulatory Committee, the said Committee may opt for only one of the following three solutions. The said determination of ownership issues may – in accordance with Article 31(1) of the Act on Relations Between the State and Jewish Religious Communities – consist either in transferring the ownership of an immovable property, or part thereof, to a Jewish religious community, or in granting an appropriate substitute property, if the transfer of ownership encountered obstacles that were hard to surmount, or in granting compensation set in accordance with provisions on the expropriation of immovable properties, in the event of failure to carry out the first two solutions.

The above-indicated circumstances do not weigh in favour of regarding a decision of the Committee as a decision issued by a quasi-common court. The resolution of civil cases on their merits is not always reserved to the scope of jurisdiction of a common court, which is confirmed, *inter alia*, by the traditional regulation of administrative proceedings on the return of an immovable property that was expropriated or taken over by the state. Thus, this is nothing out of the ordinary that civil-law claims are resolved in the course of

administrative proceedings, and not civil proceedings.

3.4.5. Similarly, the effect of a court enforcement order of a decision issued the Regulatory Committee does not determine its legal character, and also the meaning of the term ‘an appeal’ used in Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities. The Ombudsman’s conclusion drawn from Article 33(2), third sentence, of the said Act is too far-reaching. The literal interpretation of that provision indicates that the legislator assigns (as little, or as much, as) the effect of court enforcement orders to settlements and decisions issued by the Regulatory Committee. The fact does not determine the legal character of the decisions as such. This does not mean that the provision regards the effect of court enforcement orders as tantamount to the situation where courts are unconditionally bound by decisions of the Committee and there is no possibility of a judicial review of such decisions. Article 33(2) of the Act on Relations Between the State and Jewish Religious Communities indicates a procedure for enforcing decisions issued by the Regulatory Committee and requires that the provisions of court enforcement proceedings should be applied to the enforcement of decisions of the Committee. This is justified not only by the character of a dispute before the Regulatory Committee (the transfer of the ownership of a given immovable property), but also by the shortening of the enforcement process and the possibility of referring directly to a bailiff, and thus eliminating the need to file a claim for the return of the immovable property (Article 222(1) of the Act of 23 April 1964 – the Civil Code, Journal of Laws - Dz. U. No. 16, item 93, as amended) after the issuance of the Committee’s decision. In such a situation, there is no need to apply provisions on administrative enforcement which shorten the process of applying for the return of the immovable property.

The wording of Article 33(2), third sentence, of the Act on Relations Between the State and Jewish Religious Communities, which assigns decisions of the Committee with the effect of court enforcement orders, may not be used in support of the argumentation about the character of decisions of the Regulatory Committee. A court enforcement order may not only be a court ruling but also another official document which confirms the existence and scope of an enforceable claim of a creditor as well as the existence and scope of a liability on the part of a debtor, e.g. settlements that may be enforceable by courts, settlements reached before a court of arbitration or before other organs of public authority, as well as those indicated in a general way as “other acts that are subject to enforcement by a court”(Article 777(1)(3) of the Code of Civil Procedure). “Other acts” include, *inter alia*,

banks' enforced collection orders or administrative decisions, and thus there are no obstacles to indicate here decisions issued by the Regulatory Committee. Also, one may not draw a final conclusion from the fact that a decision of the Regulatory Committee constitutes a basis of entering a new owner in a land register, as in such entry may be made in the land register on the basis of not only court decisions, but also administrative decisions and notarial deeds.

What arises from the indicated provisions of the Act on Relations Between the State and Jewish Religious Communities is the legislator's intention that, regardless of the actual character of decisions issued by the Regulatory Committee, the enforcement of such decisions should take place by way of court enforcement proceedings regulated in the Code of Civil Procedure. By contrast, what determines the essence of a decision of the Regulatory Committee is the character of the said Committee, the impact of its determination on the shape of the legal situation of interested entities, as well as the character of a procedure in accordance with which a given determination has been delivered.

3.4.6. The Constitutional Tribunal has stated that the activity of the Regulatory Committee which consists in issuing decisions (Article 33(2), second sentence, of the Act on Relations Between the State and Jewish Religious Communities) constitutes a form of public administration activity understood in a broad sense. The Regulatory Committee has been placed within the structure of the organs of state administration. Regulatory proceedings are carried out by the Regulatory Committee on the Property of Jewish Religious Communities, which comprises the representatives of the Ministry of the Interior and Administration as well as the representatives of the Management Board of the Association of Jewish Religious Communities (Article 32(1) of the said Act). The decision-making panels of the Committee consider cases; each panel comprises two members appointed by the Minister of the Interior and Administration as well as by the Management Board of the Association of the Communities (Article 32(5) of the said Act). The detailed procedure concerning regulatory proceedings as well as the remuneration of the members of the committee were to be set out by the Minister of the Interior and Administration, upon consultation with the Association of the Communities (Article 32(7) of the said Act). Permitting the participation of persons indicated by the Association of Jewish Religious Communities in the Committee and issuing executive provisions to the Act, upon consultation with the Association of the Communities, met the requirement to

seek solutions that would maintain consensus in relations between the state and churches or other religious organisations. The said participation does not affect a substantive assessment of the character of a decision issued by the Committee, but it manifests the fact that Article 25(3) of the Constitution implies a requirement that the legislator should avoid unilateral interference in the realm of relations between the state and churches or other religious organisations as well as preferences for actions based on consensus (see the judgment of the Constitutional Tribunal of 2 April 2003, ref. no. K 13/02, OTK ZU No. 4/A/2003, item 28).

Even if it is hard to categorise the Committee as an organ of public administration, it does bear characteristics which allow one to assume that the issuance of decisions by the Regulatory Committee constitutes a form of public administration activity understood in a broad sense. These are as follows: placement at the central organ of state administration; explicit assignment of powers by statute as regards resolving certain matters in the name of the Republic of Poland; as well as the character of a decision which is unilateral and has legal effects within the realm of property rights of religious communities, and even more so in the case of the units of local self-government. Public authority is exercised not only by the central organs of state authority, but also by other institutions that perform functions that have legal effects based on powers granted to them by legal provisions. Administrative authority (the so-called '*imperium*') in a democratic state ruled by law does not have to be, each time, exercised by the state and the organs of the state, but may also be exercised by other organs of public authority and non-state institutions to which the state has assigned certain scope of administrative authority with regard to certain matters. The said statement, justified by arguments from the literature on the subject, has an impact on the interpretation of the term 'an appeal' used in Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities.

3.4.7. The Constitutional Tribunal has shared the applicant's view expressed in the letter of 7 December 2010 that the statement about a uniform and conciliatory character of regulatory proceedings before the Regulatory Committee requires some verification. Both the applicant and the participants in the review proceedings are right that the arguments about a somewhat conciliatory character of proceedings before the Committee refer to the stage of preparing and negotiating a settlement before the Committee, and not to the stage of issuing a decision by the Committee.

In the context of regulatory proceedings, the legislator prefers when participants

reach settlements, and facilitates this by changing the character of the procedure from adversarial to conciliatory. This is the reason why, in its resolution of 24 June 1992 (ref. no. W 11/91, OTK in 1992, Part I, item 18), directly after the commencement of proceedings by the Committee on Church Property on the basis of the Act on Relations Between the State and the Roman Catholic Church, the Constitutional Tribunal expressed the view that regulatory proceedings before the Committee: "are to some extent similar to conciliatory proceedings", which replace court or administrative proceedings within the scope of returning expropriated immovable properties to church legal entities. The doctrine of law even more strongly emphasises that regulatory proceedings mean "in a sense a conciliatory and judicial procedure" which displays some characteristics of arbitration (see D. Walencik, "Regulacja spraw majątkowych gmin wyznaniowych żydowskich w Polsce", [in:] *Prawo wyznaniowe w Polsce (1998-2009). Analizy – dyskusje – postulaty*, red. D. Walencik, Bielsko-Biała 2009, pp. 387-389).

The view from its interpretative resolution of 24 June 1992 was expressed by the Tribunal in proceedings in which the Tribunal did not assess the character of a determination of the Regulatory Committee where no settlement was reached before the decision-making panel of the Committee on Church Property (i.e. where the quasi-conciliatory character of proceedings did not suffice) and there were no reasons for the Committee to give up on issuing a decision in accordance with an application filed by a church legal entity. The resolution was issued in proceedings instituted by the Ombudsman's application about determining an interpretation of the Act on Relations Between the State and the Roman Catholic Church that is universally binding as to whether Article 61 of the Act on Relations Between the State and the Roman Catholic Church also comprised immovable properties expropriated by the rulers of the neighbouring states at the time when Poland had been partitioned, and after the regaining of independence in 1918 they were acquired by the Polish state and the return of which required by a normative act.

First of all, the said view was expressed by the Tribunal in order to compare the scope of immovable properties that were subject to determination of ownership issues with those which church legal entities acquired *ex lege* on the basis of Article 60 of the Act on Relations Between the State and the Roman Catholic Church (point 5 in part V of the statement of reasons for the resolution), and not in order to specify the essence of proceedings as such. The said view of the Tribunal was actually justified at the moment of presenting it, i.e. at the moment when the Regulatory Committee commenced its activity,

when it was necessary to read the intention of the legislator as to his preference for sorting out all issues related to ownership in a conciliatory manner, i.e. by encouraging participants in the proceedings to reach settlements.

Secondly, what may not determine the character of proceedings before the Committee and the character of a decision issued by the Committee is the fact that the proceedings replaced (preceded) court or administrative proceedings within the scope of returning expropriated immovable properties to church legal entities. For the above reasons, the Tribunal has held that the view concerning the character of a settlement reached before the Committee, expressed in the resolution, does not constitute an argument which would ultimately resolve the issue of the character of the Regulatory Committee for this analysis.

Within that scope, the view about the uniform and conciliatory character of regulatory proceedings needs to be corrected. Indeed, a decision by the Committee is always issued when a settlement is not reached, i.e. when the conciliatory approach fails. Then the Committee resolves a dispute between participants in the proceedings on the return of an expropriated immovable property, on the award of a substitute immovable property or on the payment of compensation. The Public Prosecutor-General aptly points out that a decision issued by a decision-making panel under Article 33(2), second sentence, of the Act on Relations Between the State and Jewish Religious Communities does not stem from an agreement between participants in regulatory proceedings. At the stage of issuing a decision by the Committee, one may only speak of consensus in the form of an agreement reached by the members of the decision-making panel of the Committee. However, in that part a substantive decision by the panel as a whole provides a resolution of the dispute between the participants in proceedings, and a religious community does not participate in issuing the decision by virtue of which it receives expropriated immovable properties or is awarded compensation.

As the Marshal of the Sejm has aptly stressed, the said dispute concerns the transfer of an immovable property that constituted the property of a unit of local self-government to a given religious community. Therefore, a decision of the Regulatory Committee also regards the legally protected interests of a unit of local self-government, and thus constitutes a determination that is unilateral and has legal effects in the realm of property rights enjoyed by the said unit as well as by a relevant religious community. The literature on the subject also indicates that the right to change ownership relations in a decisive and compulsory way is clearly visible in the activity of the Committee.

Evoking legal effects in the legal situation of other entities by means of decisions by the Committee means the exercise of certain powers from the realm of administrative authority (see A. Czohara, T. Zieliński, *Ustawa o stosunku Państwa do gmin wyznaniowych żydowskich w Polsce. Komentarz*, Warszawa 2012). Thus, regardless of the fact whether the placement of the Committee in the hierarchy of the organs of the state is formally more, or less, fixed, the Committee carries out public administration activity understood in a broad sense with regard to religious communities, as well as the units of local self-government, from the property of which applicants' claims are to be satisfied.

3.4.8. Since the activity of the Regulatory Committee has the character of public administration activity understood in a broad sense, and by means of a decision issued on the basis of Article 33(2), second sentence, of the Act on Relations Between the State and Jewish Religious Communities, the Committee in a unilateral way and with legal effects determines the legal situation of individual entities that are outside of the Committee and the structure of government administration, a decision by the Committee bears the characteristics of an external administrative act. By way of an administrative act, public administration determines the individual rights and obligations of other subjects thereof. However, the issuance of administrative acts is carried out in accordance with the administrative procedure. Thus, what follows from the general principles of administrative law is that regulatory proceedings that result in issuing decisions by a decision-making panel constitute administrative proceedings. The Act on Relations Between the State and Jewish Religious Communities in the Republic of Poland, in a detailed way, specifies the activity of public administration related to the conduct of regulatory proceedings with regard to Jewish religious communities.

The Act on Relations Between the State and Jewish Religious Communities in the Republic of Poland also contains special procedural provisions for codifying administrative proceedings included in the Code of Administrative Procedure. Pursuant to Article 1 of the Code of Administrative Procedure, the said Code regulates proceedings not only before "the organs of public administration" in individual cases that fall within the scope of the competence of those organs of public authority and which are resolved by way of an administrative decision (Article 1(1) of the Code of Administrative Procedure), but also before "other organs of state authority" as well as before "other entities", where they are appointed by law or on the basis of agreements to resolve individual cases by way of

administrative decisions (Article 1(2) of the Code of Administrative Procedure). The said decisions share the characteristic that they resolve a given case as a whole, or part thereof, on its merits (Article 104(2) of the Code of Administrative Procedure).

The Constitutional Tribunal has not determined whether resolving individual cases in the way that has legal effects by the Committee classifies the Committee's decision as an administrative decision or as a determination that displays the characteristics of an administrative act in a broad sense. Indeed, Article 104(1) of the Code of Administrative Procedure stipulates that an organ of public administration, and consequently 'another authority', also established by law, determining an individual case, in principle resolves the said case by issuing a decision, unless provisions stipulate otherwise. What follows therefrom is that the resolution of an individual case may involve issuing such an administrative act which has legal effects and which does not formally constitute an administrative decision. Therefore, one should underline that in the extensive jurisprudence of the Supreme Administrative Court the term 'an administrative decision' is interpreted broadly. It is regarded as tantamount to an administrative act in order to juxtapose it with other forms of administrative activity: normative acts, settlements, administrative agreements, civil-law acts that have no legal effects as well as those that do, and also actions.

Consequently, regardless of the final characteristic of a decision by the Regulatory Committee, in the view of the Constitutional Tribunal, regulatory proceedings before the Regulatory Committee constitute an administrative procedure characterised by a considerable degree of autonomy within which the provisions on general administrative proceedings are applied – if not directly then at least accordingly – with a clear preference for the application of the general administrative procedure to protect the interests of parties against any arbitrary action by an organ of public administration.

3.4.9. Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities mentions the term 'an appeal'.

The term 'an appeal' is used in the Code of Administrative Procedure, in which an appeal against an administrative decision is considered by a competent organ of public administration. An appeal in the course of the administrative procedure is a means of appeal which has a devolutive effect. The essential characteristics of an appeal comprise an obligation of a thorough examination of the case by an authority of second instance and the issuance of an appropriate substantive determination. An appellate authority may carry out

the taking of evidence and may, on that basis, single-handedly establish facts. In that sense, the term ‘an appeal’ in particular functions in the Code of Administrative Procedure. It should be added that a prerequisite for challenging decisions by way of an appeal comprises not only a relevant power granted to a party or a participant in proceedings as regards filing appeals, but also the designation of a competent authority that will consider appeals and will be vested with competence to determine cases as an authority of second instance, as well as the regulation of an appellate procedure.

Apart from an appeal lodged with an organ of public administration (within the meaning specified above), the term ‘an appeal’ also occurs in a number of other statutes and, in that case, denotes a legal means examined by a court. An appeal may be lodged with the court in the following situations:

1) against a decision, issued by an authority dealing with disability pensions, with regard to social insurance and family insurance, old-age and disability pensions, other benefits falling within the scope of competence of the Social Insurance Institution, as well as compensation awarded due to accidents and diseases ensuing from military service, or police or prison service (Article 476(2) of the Code of Civil Procedure);

2) against a decision issued by the President of the Office of Competition and Consumer Protection (Article 479^{28}(1)(1) of the Code of Civil Procedure);

3) against a decision issued by the President of the Energy Regulatory Office (Article 30(3) of the Act of 10 April 1997 – the Energy Law, Dz. U. of 2012 item 1059);

4) against a decision issued by the President of the Office of Electronic Communications (Article 206 of the Act of 16 July 2004 – the Telecommunications Law, Dz. U. No. 171, item 1800, as amended);

5) against a decision issued by the President of the National Broadcasting Council (Article 56 of the Act of 29 December 1992 on Radio and Television Broadcasting, Journal of Laws - Dz. U. of 2011 No. 43, item 226, as amended).

An analysis of the above-mentioned provisions of the statutes leads to the conclusion that the term ‘an appeal’ is used in normative acts also to denote a means of appeal that involves lodging an appeal with a common court against decisions delivered at first stage in proceedings conducted by a non-judicial public authority. In the above-mentioned cases, an appeal is considered by a common court with clearly specified jurisdiction and, above all, when a procedural statute stipulates so. What follows therefrom is that the legislator’s use of the term ‘an appeal’ in principle refers to an ordinary means of appeal in the course of the administrative procedure unless in a procedural statute the

legislator clearly indicates a common court as an organ of public authority that is competent to consider appeals against decisions issued by a non-judicial public authority and specifies the scope of the jurisdiction of the court in that respect.

Since there are no such regulations, the term ‘an appeal’ as used in Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities should be understood in a basic way as an appeal - an ordinary means of appeal in the course of the administrative procedure.

3.4.10. Similar conclusions as to the meaning of the term ‘an appeal’ in the light of Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities may be drawn from the analysis of the constitutional term ‘an appeal’. Pursuant to Article 78 of the Constitution, each party shall have the right to appeal against judgments and decisions made at first stage, and exceptions to this principle and the procedure for such appeals shall be specified by statute. Considering the said provision in the context of determinations which are administrative in character, the constitution-maker uses a general term ‘an appeal’, but does not specify the character and properties of legal means that are to be applied for the exercise of that right. The constitutional term ‘an appeal’ above all comprises an administrative appeal. The term ‘an appeal’ also comprises other, sometimes special, legal means which serve the same purpose, namely: to enable a party to institute a review procedure of an issued decision (see the judgments of the Constitutional Tribunal of: 16 November 1999, ref. no. SK 11/99, OTK ZU No. 7/1999, item 158; 11 May 2004, ref. no. K 4/03, OTK ZU No. 5/A/2004, item 41). This includes all legal means in the course of the administrative procedure which have a devolutive effect (see the judgments of the Constitutional Tribunal of: 15 May 2000, ref. no. SK 29/99, OTK ZU No. 4/200, item 110; 12 June 2002, ref. no. P 13/01, OTK ZU No. 4/A/2002, item 42). As regards the term ‘an appeal’ used in Article 78 of the Constitution, the scope of the application thereof comprises not only administrative proceedings in which a determination on the rights of a party takes place in proceedings that reflect administrative law relations between an authority issuing decisions (“a decision-maker”) and a party (see the judgment of 13 June 2006, ref. no. SK 54/04, OTK ZU No. 6/A/2006, item 64), but also other proceedings conducted by the organs of public authority for the purpose of considering particular cases of individuals and other private parties (see the judgment of the Constitutional Tribunal of 14 March 2006, ref. no. SK 4/05, OTK ZU No. 3/A/2006, item 29). This may entail considering a given case again by the same organ of public

authority which has issued a given decision (see the judgment of the Constitution Tribunal of 15 December 2008, ref. no. P 57/07, OTK ZU No. 10/A/2008, item 178). However, these are always legal means that fall within the scope of the stage of administrative proceedings.

Thus, the interpretation of the constitutional term ‘an appeal’ has substantive limits. In its jurisprudence, the Tribunal has indicated that one should reject the interpretation of the right to appeal, as referred to in Article 78 of the Constitution, which would lead to regarding a complaint lodged with an administrative court as “substantively equivalent” to and correlated with a means of appeal against an administrative decision. What is meant here is a set of differences concerning the scope and criteria of a review carried out in appellate proceedings in a broad sense and by an administrative court, as well as different determinations made by those organs of public authority (cf. the judgment of the Constitutional Tribunal of 11 May 2004, ref. no. K 4/03). Due to those differences, the scope of protection arising from Article 78 of the Constitution does not comprise the so-called hybrid proceedings, where a legal means to which a given party is entitled, referred to as ‘an appeal’, is directly lodged with a common court. In proceedings before a common court, the court examines the case at first instance, it is only in those proceedings that the court resolves a legal dispute where the authority that has issued an administrative decision is a party (see the judgment of the Constitutional Tribunal of 12 June 2002, ref. no. P 13/01). Such a legal means is no longer subject to the guarantees of an appeal against administrative determinations, but is subject to the guarantees of the right to fair trial, in particular as regards the right of access to a court and the right to institute proper court proceedings. Consequently, since all legal means within the constitutional scope of the term ‘an appeal’ are available within the administrative structure, an administrative appeal which is narrower in scope functions exclusively within the stages of administrative proceedings.

3.4.11. The wording ‘there shall be no appeal against a decision issued by the decision-making panel of a given regulatory committee’ means only that regulatory proceedings are conducted at one stage. If it had been the legislator’s intention to eliminate all legal means in Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities, the provision would mention ‘a legal means’, and not ‘an appeal’. When the legislator intends to rule out all legal means against a given determination, he resorts to wording within the meaning of which ‘there shall be no legal means’ against a

given determination. Such wording is, *inter alia*, used in the Act of 5 January 2011 - the Polish Electoral Code (Journal of Laws - Dz. U. No. 21, item 112, as amended – cf. Article 12(13), Article 20(5), Article 37(3), Article 145(4) and (5), Article 205(2), Article 218(2), Article 222(3), Article 254(2), Article 300(2), Article 304(7), Article 326(4), Article 346(3), Article 348(2), Article 394(4), Article 404(2), Article 405(2), Article 412, Article 420(2), Article 432(2), Article 436(3), Article 456(2) and Article (491a)).

Also, another argument weighs in favour of interpreting the term ‘an appeal’ - as used in Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities - in a strict way. There are situations in the administrative procedure where there is no appellate authority, whether due to its special scope of competence or its position in the administrative structure, e.g. among the supreme organs of public authority. In such cases, the Code of Administrative Procedure grants the right to file an application for re-examination of a given case in order to prevent one-stage proceedings before those authorities and, at least to a limited extent, provide guarantees of two-stage administrative proceedings. The said application is subject to provisions on appeals against administrative decisions; however, the fact that the said means of appeal clearly does not have a devolutive effect (Article 127(3) of the Code of Administrative Procedure) as well as the well-established interpretation of the term ‘an appeal’ in the light of the Code of Administrative Procedure determine that the said legal means traditionally remains outside the institution of an administrative appeal. Thus, it is not subject to a statutory bar on appeal, as stipulated in Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities.

One-stage proceedings before the Regulatory Committee do not rule out the application of the other means of appeal in the course of the administrative procedure. Article 33(5) of the said Act does not rule out the possibility of lodging an application with the Regulatory Committee to re-open proceedings (Article 148 of the Code of Administrative Procedure), due to procedural defects that occurred in the course of issuing a decision. Nor is it ruled out to file an application for a declaration of invalidity of the Committee’s decision (Article 157(2) of the Code of Administrative Procedure), due to substantive defects, but the recourse to those means is contingent upon the fulfilment of premisses set out in those provisions. Moreover, it is also not ruled out to overrule or change the Committee’s final decision on the basis of which a party has acquired a right, upon consent of a given Jewish religious community that has been awarded compensation,

provided that this serves a public interest or a justified interest of the party (Articles 154 and 155 of the Code of Administrative Procedure).

3.4.12. Finally, it should be indicated that, in Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities, the legislator does not rule out the admissibility of a judicial review to determine the legality of a decision issued by the Regulatory Committee.

What is more, in the view of the Constitutional Tribunal, the content of Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities constitutes an argument for the admissibility of such a review. The said provision is based on a general presumption of admissibility of various legal means in regulatory proceedings; indeed, if the legislator had assumed and stated otherwise, the challenged provisions would be redundant. Moreover, since out of available legal means the legislator has excluded, as mentioned above, only an appeal, an argument *a contrario* weighs here in favour of assuming the admissibility of a review by an administrative court in the context of issued decisions.

The fact that proceedings before non-judicial public authorities comprise one stage is in no way an obstacle to asserting rights before courts and does not rule out the possibility to challenge the legality of an issued decision in the course of administrative court proceedings. The view about the general admissibility of recourse to courts to assert rights infringed by a decision of a given regulatory committee (the rights of participants in regulatory proceedings and the rights of third parties) has already been presented in the jurisprudence of the Constitutional Tribunal. The fact that complainants had not exhausted all legal means that were formally available to them for asserting civil rights infringed by a decision issued by the Committee on Church Property was a reason for the discontinuation of review proceedings by the Tribunal in its decision of 26 September 2011 on a constitutional complaint (ref. no. Ts 255/10, OTK ZU No. 6/B/2011, item 449).

3.4.13. Since a decision issued by the Committee constitutes a form of public administration activity, it falls within the scope of a review by administrative courts (Article 3(1) of the Act on Proceedings Before Administrative Courts). The Constitutional Tribunal does not establish what kind of a determination which has legal effects is issued by the Regulatory Committee. However, one should note that a review conducted by an administrative court concerns complaints against administrative decisions

(Article 3(2)(1) of the Act on Proceedings Before Administrative Courts) as well as other acts or actions falling within the scope of public administration that concern rights or obligations arising from the provisions of law (Article 3(2)(4) of the Act on Proceedings Before Administrative Courts)". The entitlement to lodge a complaint lies with everyone who has a legal interest therein (Article 50(1) of the said Act), which comprises participants in regulatory proceedings and every third party whose legal interest has been infringed by a decision of the Committee.

3.4.14. What constitutes the basis of the applicant's stance presented in the present case is the view of the Supreme Administrative Court expressed in its decision of 26 September 1991 (ref. no. I SA 768/91) – repeated in several subsequent rulings of administrative courts – that the Committee on Church Property, carrying out its activity on the basis of the Act on Relations Between the State and the Roman Catholic Church, constitutes neither an organ of state administration nor an organ of local self-government within the meaning of Article 1(1)(1) of the Code on Administrative Procedure, in the version provided by the Act of 24 May 1990 amending the said Code (Journal of Laws - Dz. U. No. 34, item 201); nor is it any other organ of public authority established by law to perform tasks from the scope of state administration (local self-government administration), pursuant to Article 1(2) of the Code of Administrative Procedure, in the version provided by the amending Act of 24 May 1990. Also, in its decision, the Supreme Administrative Court deemed that a decision issued by the Committee on Church Property does not bear the characteristics of an administrative decision, and it may not be appealed to the Supreme Administrative Court.

Relying on the said ruling, in its judgment of 20 December 2007 (ref. no. II OSK 1570/06), the Supreme Administrative Court in Warsaw held that a decision by the Regulatory Committee on the Property of Jewish Religious Communities, issued on the basis of Article 33(2) and (3) of the Act on Relations Between the State and the Roman Catholic Church, is not an administrative decision issued by 'another authority' within the meaning of Article 1(2) of the Code of Administrative Procedure and it may not be appealed to an administrative court. As a result, the Supreme Administrative Court deemed that allegations raised by a housing cooperative in a cassation appeal against a letter from the Committee in which the Committee had refused to re-open proceedings that ended in granting a substitute immovable property to a Jewish religious community. The prerequisite for determining the legal character of the said letter was to determine

first the legal character of a decision by the Committee and, as a result, the relevance of the lack of possibility to file ‘an appeal’ for the recourse to extraordinary means of appeal. In its cassation appeal, the housing cooperative argued that the Voivodeship Administrative Court in Warsaw which had rejected the cooperative’s complaint had been incorrect. As held by the Voivodeship Administrative Court, relying on the view included in the above-indicated decision of 26 September 1991 by the Supreme Administrative Court, regulatory committees may not be regarded as “organs of public administration” within the meaning of Article 1(1) and (2) of the Code of Administrative Procedure, in conjunction with Article 5(2)(3) of the Code of Administrative Procedure; and moreover, in the current legal order, the activity of the Regulatory Committee does not also concern a broader notion of the activity of public administration. What is more, according to the Voivodeship Administrative Court, neither the letter on the lack of possibility to re-open proceedings nor the decision of the Committee constituted an administrative decision for that reason (Article 3(2)(1) of the Act on Proceedings Before Administrative Courts), or any other act that could be appealed to the Voivodeship Administrative Court (Article 3(2)(4) of the Act on Proceedings Before Administrative Courts), and hence the whole case did not fall within the scope of jurisdiction of the administrative court. The Supreme Administrative Court deemed the cooperative’s allegations invalid, and thus shared the standpoint of the Voivodeship Administrative Court in Warsaw.

The Constitutional Tribunal wishes to point out that neither in the statement of reasons for its decision of 26 September 1991 nor in the statement of reasons for the judgment of 20 December 2007 did the Supreme Administrative Court explain why the activity of the Regulatory Committee did not constitute a form “public administration activity” in the light of Article 30(1) and Article 32(1) of the Act on Relations Between the State and Jewish Religious Communities. No argument was indicated to prove that the Committee did not determine individual cases in a way that had legal effects, and that its decisions did not shape the legal situation of individuals and legal entities outside the Committee. By contrast, in both rulings, the Supreme Administrative Court relied on the argument that regulatory proceedings were conciliatory and too remote in character from “ordinary” administrative proceedings, as well as on the argument about “the special character of the institution of regulatory proceedings”, which the Court derived from the resolution of the Constitutional Tribunal of 24 June 1992 (ref. no. W 11/91). As it has already been indicated, that argument applies to the activity of the Regulatory Committee

when it issues a decision, in the case where participants in regulatory proceedings fail to reach a settlement, preferred by the legislator.

3.4.15. An interpretation of statutory provisions must take account of their normative context, which comprises both other statutes regulating matters related, in one way or another, to the subject-matter of provisions under interpretation, and the provisions of the Constitution. Indeed, statutory provisions should be interpreted in conformity with the Constitution. If there is more than one way of interpreting statutory provisions, then the interpretation that is the most consistent with constitutional values, principles and norms should prevail. At this point, it should be stressed that the normative context of the provisions under examination changed considerably shortly after the enactment thereof in 1997.

Regulatory proceedings specified in the Act on Relations Between the State and Jewish Religious Communities are modelled on the proceedings from the Act on Relations Between the State and the Roman Catholic Church. Hence, naturally, the organs of public authority that applied the Act on Relations Between the State and Jewish Religious Communities considered the way of application of the Act on Relations Between the State and the Roman Catholic Church. After the enactment of the said Acts, on 17 October 1997 the Constitution of the Republic of Poland entered into force. This fact is of relevance for the interpretation of the provisions under examination. The Constitution has introduced considerable changes as regards the standards of the right to a fair trial and judicial protection. Within the meaning of Article 45(1), everyone shall have the right to a hearing of his/her case before a court. Also, pursuant to Article 77(2) of the Constitution, statutes shall not bar recourse by any person to courts in pursuit of claims alleging infringement of rights or freedoms. The said provisions not only express the requirement that the legislator should introduce appropriate legal regulations, but also contain guidelines on the interpretation of binding legal provisions concerning the right of access to a court and the scope of recourse to courts. In particular, what follows from the above-mentioned provisions is the presumption of the existence of recourse to courts: any legal disputes are subject to examination by courts, provided that a given statutory provision does not explicitly introduce exceptions within that scope. Moreover, in accordance with Article 184, first sentence, of the Constitution, the Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration. This provision may be a basis for deriving the

presumption of review powers of administrative courts with regard to administrative acts (cf. the judgment of the Constitutional Tribunal of 19 October 2010, ref. no. P 10/10, OTK ZU No. 8/A/2010, item 78 and the literature cited therein). In its Article 165(2), the Constitution provides that the self-governing nature of units of local self-government shall be protected by courts. As in the case of the provisions guaranteeing the rights to a fair trial, this provision establishes not only requirements and prohibitions addressed to the legislator, but also provides binding guidelines on interpretation for the organs of public authority which are responsible for applying the law. It constitutes a basis for the presumption of judicial protection of communes.

Consequently, the entry into force of the Constitution resulted in changes in the legal system that involved the introduction of certain constitutional norms, but also the modification of the content of norms derived from statutory provisions with relation to the obligation to interpret binding statutes in conformity with the Constitution.

In the view of the Constitutional Tribunal, statutory regulations that were binding after the entry into force of the Act of 29 December 1998, which amended certain statutes due to the implementation of the systemic reform of the state (Journal of Laws - Dz. U. No. 162, item 1126), provided a legal basis for appealing decisions of the Regulatory Committee to administrative courts by interested communes or private parties, if issued decisions could affect their interests. What particularly weighed in favour of such an interpretation was a number of provisions of the Constitution which extended the scope of judicial protection with regard to self-governing nature of communes.

For the above reasons, the view presented in the jurisprudence of administrative courts that those courts have no jurisdiction as regards adjudicating on complaints against decisions issued by the Regulatory Committee may raise doubts.

3.5. Conclusions.

The Constitutional Tribunal has deemed that a decision issued by the decision-making panel of the Regulatory Committee resolves a legal dispute between participants in regulatory proceedings. The said decision is a unilateral determination which has legal effects with regard to the property rights of a given religious community and a given unit of local self-government that is obliged to return an immovable property, or part thereof. Shaping the legal situation of other subjects of rights and obligations entails exercising certain powers that fall within the scope of administrative authority.

The Constitutional Tribunal has stated that issuing decisions by the decision-

making panel of the Regulatory Committee constitutes a form of public administration activity understood in a broad sense. Consequently, the Committee's activity was subject to general regulations of administrative law. In particular, the term 'an appeal', used in challenged Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities, should be construed as an ordinary means of appeal in the course of the administrative procedure. The wording of Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities, pursuant to which "there shall be no appeal against a decision issued by the decision-making panel of a given regulatory committee", implies that regulatory proceedings comprise one stage. This does not rule out entitlement to other legal means, which does not concern only extraordinary means of appeal against a decision issued by the Committee in the course of administrative proceedings. It does not follow from Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities that there has been no recourse to courts as regards appealing the Committee's decisions. The said provision does not contain the content attributed thereto by the applicant and does not bar recourse to courts in the context of reviewing the legality of decisions issued by the decision-making panel of the Regulatory Committee.

Taking account of the above-indicated circumstances, the Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Stanisław Biernat
to the judgment of the Constitutional Tribunal
of 13 March 2013, ref. no. K 25/10

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the part of the judgment where the Tribunal decides to discontinue the review proceedings as regards examining the constitutionality of Article 63(8) in conjunction with Article 63(4), third sentence, 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 on Relations Between the State and the Roman Catholic Church). Moreover, I submit my dissenting opinion to the statement of reasons for the said judgment, in the part concerning the constitutionality of Article 33(5) in conjunction with Article 33(2), third sentence, of the Act of 20 February 1997 on Relations Between the State and Jewish Religious Communities in the Republic of Poland (Journal of Laws - Dz. U. No. 41, item 251, as amended; hereinafter: the Act on Relations Between the State and Jewish Religious Communities), construed in a way that it does not rule out other legal means than an appeal against a decision issued by the Regulatory Committee.

I. On the discontinuation of the review proceedings

1. As a reason for the discontinuation of its review proceedings, the Tribunal mentioned the circumstance that the provisions of Article 63(4)-(8) of the Act on Relations Between the State and the Roman Catholic Church were derogated by the Act of 16 December 2010 amending the Act on Relations Between the State and the Roman Catholic Church (Journal of Laws - Dz. U. of 2011 No. 18, item 89; hereinafter: the amending Act of 16 December 2010). As a result, the Committee on Church Property ended its activity on 28 February 2011. In the Tribunal's view, there are no premisses for a substantive review of the constitutionality of the derogated statutory provisions, as there

are no circumstances that would allow for this in the light of Article 39(1)(3) or Article 39(3) of the Constitutional Tribunal Act.

I disagree with that stance. I hold the view that requirements for the Tribunal's substantive review of the challenged provisions were met in the light of both Article 39(1)(3) as well as Article 39(3) of the Constitutional Tribunal Act.

2. With regard to Article 39(1)(3) of the Constitutional Tribunal Act, it has been stated a number of times in jurisprudence that, despite the formal derogation of statutory provisions, they should be regarded as binding in the sense that they may constitute the subject of a constitutional review when, at the time of the Tribunal's examination, cases are pending before the organs of the state (organs of public administration or courts) and, on the basis of formally derogated provisions, acts applying the law (administrative decisions and court rulings) may be issued. The Tribunal has taken such a stance recently, *inter alia*, in its judgment of 16 October 2012, ref. no. K 4/10 (OTK ZU No. 9/A/2012, item 106), delivered by the full bench, i.e. less than five months prior to the deliverance of this judgment, where the Tribunal provided substantive adjudication on the constitutionality of a provision that was formally no longer binding.

However, in the present case, the Constitutional Tribunal decided to discontinue the review proceedings without any reference to the previous line of jurisprudence. In the statement of reasons for the judgment, the Tribunal stated that: "the norm arising from Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church may not also – after the entry into force of the amending Act of 16 December 2010 – be applied to future events and facts. Since the Committee on Church Property ended its activity and the legislator abolished regulatory proceedings in that context, one may not regard the norm arising from Article 63(8) of the Act in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church as having effect within the meaning of Article 39(1)(3) of the Constitutional Tribunal Act. Hence, the Constitutional Tribunal states that the provision ceased to have effect".

I may not agree with such formulation. It should be noted that several proceedings are pending before the Supreme Administrative Court as regards cases on cassation appeals against decisions delivered by voivodeship administrative courts of appeal which dismissed complaints on decisions issued by the Committee on Church Property. Information on those proceedings was mentioned by the applicant in his procedural letters

and at the hearings. Administrative court proceedings were suspended due to proceedings pending before the Constitutional Tribunal – initially upon an application by a group of Sejm Deputies, and then upon an application filed by the Polish Ombudsman (hereinafter: the Ombudsman), i.e. at the time of instituting the review proceedings before the Tribunal in the present case. After resuming the suspended proceedings, the basis of rulings by the Supreme Administrative Court will, *inter alia*, be the provisions of the Act on Relations Between the State and the Roman Catholic Church, which have been challenged by the Ombudsman in the present case. It should be pointed out that administrative courts adjudicate on the basis of legal provisions that were binding at the moment of the issuance of given decisions, or acts, or the undertaking of actions from the realm of public administration that are subject to review (*tempus regit actum)*, and thus – in the context of the present case – in accordance with the legal order that had been binding before the challenged provisions were derogated by the Act of 16 December 2010. Therefore, undoubtedly, a norm that arises from the challenged provisions would be "applied to future events and facts" in rulings of the Supreme Administrative Court, to quote the wording used by the Tribunal. The circumstance that the Committee on Church Property ended its activity is irrelevant, since the subject of a review in administrative court proceedings comprises the Committee's decisions from the period when it still carried out its activity.

3. Moreover, I hold the view that there were no grounds to discontinue the proceedings in the present case in the light of the norm expressed in Article 39(3) of the Constitutional Tribunal Act. What follows from that provision is that the Tribunal should conduct a substantive examination of a given case in the context of a challenged normative act which has ceased to have effect, if issuing a ruling is necessary for the protection of constitutional rights and freedoms.

In the view of the Tribunal, in the present case, there are no grounds to adjudicate on the basis of Article 39(3) of the Constitutional Tribunal Act. Indeed, the point of the said provision is the protection of the constitutional rights and freedoms of persons and citizens, i.e. individuals and private legal entities, which mainly arise from chapter II of the Constitution. In the present case, there was no infringement of such rights.

I may not agree with the above stance for two reasons:

Firstly, what may be concluded from observing the application of the challenged Act is that there were instances of infringing the property rights of third parties (private parties) as a result of decisions issued by the Committee on Church Property. Despite the

Tribunal's assertions, the said persons were not able to resort to a court procedure to protect their rights, and in particular the right to a fair trial. Such a state of affairs stemmed from the rulings of common courts, the Supreme Court and administrative courts, which interpreted the norm included in Article 63(8) of the Act on Relations Between the State and the Roman Catholic Church as one which ruled out any legal means against decisions issued by the Committee on Church Property. Such practice is confirmed by rulings of the Supreme Court and administrative courts, as well as by information provided by the applicant's representatives at the hearings. There are grounds to express the view that the source of such a stance was the content of Article 63(8) of the Act on Relations Between the State and the Roman Catholic Church, and not merely the erroneous interpretation or application of that provision.

In the statement of reasons for this judgment, the Tribunal has made reference to Article 61(4)(3) of the Act on Relations Between the State and the Roman Catholic Church, pursuant to which the determination of ownership issues may not violate, *inter alia*, rights acquired by non-state third parties. On that basis, the Tribunal has concluded that the rights of third parties could not have been infringed. This argument is grossly unsatisfactory. One may derive the following norm from the cited provision: "it is prohibited to interpret and apply provisions on regulatory proceedings in such a way that the rights of third parties would be violated (...)". However, one may not rule out an infringement of such a norm in practice. This is a fundamental issue for lawyers to distinguish between the realm of obligations and the realm of facts. By analogy, one could argue that Article 7 of the Constitution, in accordance with which the organs of public authority shall function on the basis of, and within the limits of, the law, renders the functioning of the Constitutional Tribunal useless!

Also, one should note that it is irrelevant to assess the scale of the violation of rights enjoyed by third parties resulting from the decisions of the Committee on Church Property, which is difficult to determine due to the lack of available documentation. However, in the statement of reasons for the judgment of 16 March 2011, ref. no. K 35/08 (OTK ZU No. 2/A/2011, item 11), i.e. two years ago, the Tribunal (full bench) expressed the following view: "When determining whether there is 'necessity' to issue a ruling on the basis of Article 39(3) of the Constitutional Tribunal Act, it is irrelevant to determine the number of subjects whose rights have been violated as a result of the application of an unconstitutional normative act. There is necessity to issue a ruling for the protection of constitutional rights and freedoms of subjects if, hypothetically, at least one subject of

constitutional rights and freedoms may benefit from the Tribunal's elimination of a given provision under review from the legal system".

An example of infringing the rights of third parties may e.g. be a case in which a constitutional complaint is referred to the Tribunal. The Committee on Church Property issued a decision as a result of regulatory proceedings in which it awarded certain immovable properties to a Roman Catholic parish, where tenants exercising the right of pre-emption were individuals. The said persons filed an application to a civil court for it to declare the ineffectiveness of a ruling of the Committee. The circuit court refused to take account of an application filed by defendants for the dismissal of the application. The court of appeal modified the ruling of the circuit court and dismissed the application. The Supreme Court refused to accept a cassation appeal. In preliminary proceedings, the Constitutional Tribunal refused to proceed with the constitutional complaint (see the decision of 26 September 2011, ref. no. Ts 255/10, OTK ZU No. 6/B/2011, item 449), explaining that the complainants did not prove an infringement of constitutional rights and freedoms, for their claims referred to courts did not concern the rights of the tenants, but the revocation of the decision issued by the Committee (more precisely: declaring it to be ineffective). The Tribunal noted that "complainants might institute relevant proceedings". I consider the said decision to be inapt. The complainants undoubtedly showed that there might have been an infringement of their property rights by provisions that prevented them from making claims for the protection of the said rights in the case where it was impossible to challenge decisions issued by the Committee on Church Property. The Tribunal did not indicate what appropriate proceedings the complainants could have instituted. Those were not civil proceedings, since instituting such proceedings had failed. Nor were those administrative court proceedings, as administrative courts, in all cases, dismissed complaints lodged against decisions issued by the Committee on Church Property. The Constitutional Tribunal referred the complainants nowhere. For these reasons, I also disagree with the statement, in point 3.4.12 in part III of the statement of reasons for this judgment, that the reason for discontinuing proceedings by the Tribunal with regard to the constitutional complaint in the decision of 26 September 2011, ref. no. Ts 255/10, was the fact that the complainants had not exhausted all legal means for making claims to assert civil rights violated by the decision of the Committee on Church Property. The complainants exhausted such measures, including a cassation appeal to the Supreme Court.

As regards further justification for the allegation of the infringement of the rights of third parties and the analysis of court jurisprudence, I share the views presented by Judge Piotr Tuleja in his dissenting opinion.

Secondly, in the context of the occurrence of grounds to apply Article 39(3) of the Constitutional Tribunal Act, I disagree with the view expressed in the judgment in the present case that the said provision does not concern the protection of the rights of communes, but merely the rights and freedoms of individuals and private legal entities. However, the Tribunal does not question the circumstance that the rights of communes arise from the Constitution.

With regard to this fundamental issue, I hold a different view.

When providing a linguistic interpretation, it should be stated that Article 39(3) of the Constitutional Tribunal Act mentions ‘constitutional rights and freedoms’, but it does not state that these are the rights and freedoms from chapter II of the Constitution, as it has been assumed by the Tribunal. The results of such an interpretation must be verified by means of an interpretation arrived at by other methods. This in particular implies an analysis of the position of communes and the role of rights granted to them in the Constitution when juxtaposed with the rights and freedoms of individuals and private legal entities.

I agree with the Tribunal that the constitutional rights of communes are not identical to the rights and freedoms enshrined in chapter II of the Constitution. However, I hold the view that the rights of communes are separate, but parallel and equivalent to certain rights from chapter II of the Constitution. It is worth specifying what rights granted to communes are meant here. These are, first of all, the right of ownership and other property rights (Article 165(1), second sentence, of the Constitution) as well as, secondly, the judicial protection of the self-governing nature of communes (Article 165(2) of the Constitution). The first one of the rights mentioned here is equivalent to the right of ownership and other property rights guaranteed by Article 64 of the Constitution. The second right is an equivalent of the right to a fair trial (Article 45 of the Constitution). However, the Constitutional Tribunal rejected the possibility of comparing the rights of communes that are guaranteed in the Constitution with the rights and freedoms of individuals and private legal entities, arising mainly from chapter II of the Constitution. As it has been stated by the Tribunal: “In the light of the provisions of the Constitution, the units of local self-government are public legal entities of a special status, the actions of

which have legal effects in public law, and also the said units have certain rights in their relations with the state".

One may only partly accept the above description of the position held by communes, for it does not reflect their systemic characteristics. In the context under examination here, it should be noted that the status of communes is complex in the constitutional system. In the literature on the subject, this is referred to as 'the multi-faceted nature of communes' (cf. J. Dobkowski, "Wielopostaciowość gminy w prawie polskim*",* [in:] *Kryzys prawa administracyjnego,* Vol. 1, *Jakość prawa administracyjnego*, p. 253 and the subsequent pages). However, what is meant here is not the ambiguity of the term 'commune' as such, but the various roles which are played by communes in the light of the constitutional and statutory provisions, and various aspects of their legal situation.

Hence, a commune may be recognised as: 1) a self-governing community; 2) a unit of the basic territorial division of the state as well as 3) a basic unit of local self-government. Still, this list is not complete.

In the circumstances of the present case, it should be noted that, in the light of provisions which regulated the functioning of the Committee on Church Property, a commune was an entity which might be deprived of ownership or other property rights as a result of proceedings in which it might not participate and was deprived of the possibility of protecting its own rights. The characteristic of the legal situation of communes adopted by the Tribunal is not adequate to the situation of a given commune in the light of the challenged provisions. A commune that has been deprived of its property as a result of a decision by the Committee on Church Property does not act as an organ of public authority; nor does it exercise public authority. In such a situation, it is inadequate to distinguish the activity of a commune in respect of '*imperium*' or '*dominium*'; indeed, the commune is not here an entity that undertakes action on the basis of law, but it is an entity that is subject to external influence. Such a state of affairs makes it probable that there might have been an infringement of the constitutional rights of communes guaranteed in Article 165 of the Constitution.

In the situation under discussion, a commune acts in the first role – as a self-governing community. In accordance with the law, it comprises the total number of residents of the units of the basic territorial division of the state (Article 16(1) of the Constitution). Public tasks aimed at satisfying the needs of a self-governing community shall be performed by units of local self-government as their direct responsibility (Article 166(1) of the Constitution). In the light of the provisions of the Constitution, a

self-governing community is a legal term, and not just a sociological one. Such a community is the subject of rights and obligations and represents local interests. Ownership and other property rights guarantee the self-governing nature of communes in the realm of property, and their ability to satisfy the needs of the community.

It should be clearly emphasised that the interpretation of the status of a commune has nothing in common with former naturalistic theories which provided for an outside-of-the-state, or even a "pre-state", character of communes. Communes arise from the binding law, with the Constitution in the first place. However, the establishment of communes undoubtedly reflects the social reality of relations among residents of a given area and their common interests. In the light of the Constitution, the location of communes is linked with the following constitutional principles: democracy, decentralisation and subsidiarity.

Although the constitutional rights of communes are separate from the rights of individuals and private legal entities from chapter II of the Constitution, they are equal to them in respect of the admissibility of, and at times even the necessity for, the protection thereof by the Constitutional Tribunal in circumstances regulated in Article 39(3) of the Constitutional Tribunal Act. Hence, I do not accept the Tribunal's stance as to the discontinuation of proceedings concerning Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church.

II. On the statement of reasons for the judgment in the part where the Tribunal has ruled that Article 33(5) in conjunction with Article 33(2), third sentence, of the Act on Relations Between the State and Jewish Religious Communities is consistent with the Constitution

1. The Constitutional Tribunal has issues the so-called interpretative judgment in which it has adjudicated on the constitutionality of the challenged provision of the Act on Relations Between the State and Jewish Religious Communities, construed in a way that it does not rule out other legal means than an appeal against a decision issued by the Regulatory Committee. I agree with the Tribunal that it is inconsistent with the Constitution to completely deprive communes and private parties of any legal means aimed at protecting their rights infringed by decisions issued by the Regulatory Committee. An interpretative judgment is one of possible methods, but definitely not the only one, to guarantee such protection. Thus, I approve of the operative part of the judgment, but I have reservations about the statement of reasons.

2. The Tribunal's argumentation was based on dubious classification of the legal character of the Regulatory Committee, its decisions, regulatory proceedings as well as the admissibility of a judicial review. Also, what raises reservations is the assessment that the challenged provisions have been consistent with the Constitution, but courts just did not know how to correctly interpret and apply them.

With reference to the Regulatory Committee, the Tribunal has stated that the activity of the Committee "constitutes a form of public administration activity, understood in a broad sense". The said formulation has not been elucidated in a convincing way, although it has been repeated in the statement of reasons six times. It should be borne in mind that the Committee comprises an equal number of representatives appointed by the Ministry of the Interior and Administration as well as the Management Board of the Association of Jewish Religious Communities. The Committee considers cases in decision-making panels which are composed of two representatives appointed by the Ministry of the Interior and Administration as well as the Management Board of the Association of Jewish Religious Communities (Article 32(1) and (5) of the Act on Relations Between the State and Jewish Religious Communities). Thus, this is a body of a mixed composition based on parity. The Committee is composed of representatives of a central organisation of government administration as well as representatives of an association whose members are religious communities. What follows therefrom is that the Association of Jewish Religious Communities acts in two roles: as a co-author of decisions issued by the Committee as well as the addressee of those decisions. The same solution has also been adopted with regard to the Committee on Church Property as well as with Regulatory Committees established on the basis of other statutes. The said Association and Jewish religious communities are beneficiaries of regulatory proceedings. Actions that have legal effects, and among which the Tribunal includes the decisions of the Committee, are characterised by distinguishing the roles of: an organ of public administration (also in a functional meaning) which issues an act as well as the addressee (addressees) of the act. The said roles are joined in the structure and functioning of the Regulatory Committee. Therefore, decisions issued by the Committee appear to be more like bilateral and consensual actions between the state and non-state entities, which are a form of actions that have no legal effects. What characterises the said solution is pursuit of consensus between the partners. In fact, the adoption of such a solution was justified at the time of drafting the 1989 Act on Relations between the State and the Roman Catholic Church, which served as a model for the Act on Relations

Between the State and Jewish Religious Communities. The characteristics of regulatory proceedings that were presented by the Tribunal in its resolution of 24 June 1992 remain up-to-date (ref. no. W 11/91, OTK in 1992, Part I, item 18). The Tribunal has devoted considerable space to the interpretation of that resolution, which was issued 20 years ago, and emphasised a distinction between settlements reached before the Regulatory Committee and decisions issued by the Committee, by underlying a different character of the two ways of ending regulatory proceedings. Without challenging those differences, it should be noted that they are not significant in the context of this judgment. The issuance of a settlement or a decision requires determining the concurrence of stances held by the representatives of the Minister and the said Association, i.e. the representative of beneficiaries. At the same time, there is no doubt that Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities refers to decisions issued by the Committee, and not to the settlements; this was also the subject of the said resolution of the Constitutional Tribunal, ref. no. W 11/91.

There is no consistency in the Tribunal's statements on the legal character of a decision issued by the Regulatory Committee. The Tribunal "has not determined whether resolving individual cases in the way that has legal effects by the Committee classifies the Committee's decision as an administrative decision or as a determination that displays the characteristics of an administrative act in a broad sense", without explaining what it means by the last phrase. By contrast, as regards the characteristics of regulatory proceedings, the Tribunal holds that: "regardless of the final characteristic of a decision by the Regulatory Committee, in the view of the Constitutional Tribunal, regulatory proceedings before the Regulatory Committee constitute an administrative procedure characterised by a considerable degree of autonomy within which the provisions on general administrative proceedings are applied – if not directly then at least accordingly – with a clear preference for the application of the general administrative procedure to protect the interests of parties against any arbitrary action by an organ of public administration". If 'provisions on general administrative proceedings' are to be interpreted as the provisions of the Act of 14 June 1960 – the Code of Administrative Procedure (Journal of Laws - Dz. U. of 2013 item 267; hereinafter: the Code of Administrative Procedure), it should be borne in mind that pursuant to Article 1(1) of the said Code: "The Code of Administrative Procedure shall govern proceedings before the organs of public administration in individual cases that fall within the scope of competence of the said authorities and are determined by way of administrative decisions"; thus, it does not regulate a procedure for issuing "a

determination that displays the characteristics of an administrative act in a broad sense".

It is not lucid how "a clear preference for the application of the general administrative procedure" is actually manifested in the activity of the Regulatory Committee. In the statement of reasons for its judgment, the Tribunal did not address the content of the Order of the Minister of the Interior and Administration, dated 10 October 1997, on the detailed procedure for the activity of the Regulatory Committee on the Property of Jewish Religious Communities (*Official Gazette* - M. P. No. 77, item 730, as amended). The said Order specifies, *inter alia*, the provisions of the Code of Administrative Procedure which are applicable to regulatory proceedings. This is a solution which should be critically assessed by the Tribunal. An order is an act of domestic law which – in accordance with the well-established and consistent line of the Tribunal's jurisprudence – may not regulate relations between the subjects of rights and obligations that function outside public administration. The said Order, published in *The Official Gazette of the Republic of Poland* on 16 October 1997, i.e. prior to the entry into force of the Constitution, is binding and applicable also today. It regulates matters assigned to acts of universally binding law. Moreover, the Order specifies which provisions of the Code of Administrative Procedure, i.e. a statute, are applicable to regulatory proceedings, which determines that the application of other provisions is excluded. For instance, what is excluded (by virtue of the Order!) is a number of provisions that specify general principles of administrative proceedings, including the principle of judicial review of administrative decisions, as well as provisions on parties to proceedings, appeals, and extraordinary procedures for revoking or modifying decisions. Therefore, it would be difficult to accept the above-mentioned thesis expressed by the Tribunal about "a clear preference for the application of the general administrative procedure".

3. The interpretation of Article 33(5) of the Act on Relations Between the State and Jewish Religious Communities, and in particular of the term 'an appeal', has led the Tribunal to the conclusion that the legislator does not rule out the admissibility of conducting a judicial review to determine whether a decision issued by the Regulatory Committee is consistent with the law. In this context, in the statement of reasons, the Tribunal once again refers to the character of a decision issued by the Committee: "the Constitutional Tribunal does not determine what kind of a determination which has legal effects is issued by the Regulatory Committee. However, one should note that a review conducted by an administrative court concerns complaints against administrative decisions

(Article 3(2)(1) of the Act on Proceedings Before Administrative Courts) as well as other acts or actions falling within the scope of public administration that concern rights or obligations arising from the provisions of law (Article 3(2)(4) of the Act on Proceedings Before Administrative Courts)". At this point, a decision of the Regulatory Committee is not classified as "a determination that displays the characteristics of an administrative act in a broad sense". However, there is an interpretation of the said decision as an act concerning rights arising from the law. Yet, this interpretation proves dubious in the light of the Act on Relations Between the State and Jewish Religious Communities. Indeed, it may not be assumed that the rights of Jewish religious communities and of the Association of Jewish Religious Communities with regard to given property that is subject to regulatory proceedings constitute rights that arise *ex lege*.

In the context of the indicated provisions, one may not be surprised that administrative courts rejected complaints against decisions issued by the Committee; what is meant here is mainly the Committee on Church Property, but the same refers to the Regulatory Committee; those decisions differed too considerably from administrative decisions as the subject of administrative court review. The said review was not made any easier by the very Committee (in this case the Committee on Church Property). What is worth mentioning is the most characteristic wording from the statement of reasons for the decision of the Voivodeship Administrative Court of 23 January 2007, ref. no. I SA/Wa 65/07: "the Committee on Church Property in W. has held that it is an autonomous body, outside the system of the organs of public administration, displaying the characteristics of arbitration, and which does not perform tasks within the scope of public administration, and which has been established on the basis of the Act of 17 May 1989 on Relations Between the Roman Catholic Church in the Republic of Poland (Journal of Laws - Dz. U. No. 29, item 154, as amended). Both the systemic status of the Committee as well as the character of regulatory proceedings conducted before the Committee on Church Property allow one to draw the conclusion that the said Committee may not be regarded as an organ of public administration, and regulatory proceedings may not be classified as administrative proceedings. It has been underlined that the Committee on Church Property, and in particular regulatory proceedings conducted by the said Committee, may not be reviewed by an administrative court". Similar wording was in the statement of reasons for the decision of the Voivodeship Administrative Court of 14 August 2008, ref. no. I SA/Wa 895/08).

One should agree with the Tribunal that the entry into force of the Constitution should enhance the standards of the protection of constitutional rights; however, this has proved not to be the case. In particular, no amendments have been introduced to the statutes on regulatory proceedings. It is not clear to me what the Tribunal means by stating that "statutory regulations that were binding after the entry into force of the Act of 29 December 1998, which amended certain statutes due to the implementation of the systemic reform of the state (Journal of Laws - Dz. U. No. 162, item 1126), provided a legal basis for appealing decisions of the Regulatory Committee to administrative courts by interested communes or private parties, if issued decisions could affect their interests. What particularly weighed in favour of such an interpretation was a number of provisions of the Constitution which extended the scope of judicial protection with regard to self-governing nature of communes".

It should be noted that the provisions of the above-mentioned Act extended the scope of the judicial review of administration, but outside of the scope of this case. They changed nothing, whether directly or indirectly, as regards the admissibility of the review of decisions issued by the Committee on Church Property or the Regulatory Committee.

4. To conclude, I would like to return to part II of this dissenting opinion: the interpretative judgment by the Tribunal which paves a way to better protection of the rights of subjects affected by decisions issued as an outcome of regulatory proceedings deserves approval. However, a different matter that needed to be pointed out and modified was a number of defects in the statement of reasons that had arisen from the insufficient consideration of administrative-law provisions.

Dissenting Opinion
of Judge Leon Kieres
to the judgment of the Constitutional Tribunal
of 13 March 2013, ref. no. K 25/10

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 judgment of the Constitutional Tribunal of 13 March 2013 in the case K 25/10, in the part concerning the discontinuation of the review proceedings.

2. I agree with the argumentation presented in this case in the dissenting opinion submitted by Judge Stanisław Biernat. In my view, there were no grounds to discontinue the proceedings with regard to the Act of 17 May 1989 on Relations Between the State and the Roman Catholic Church (Journal of Laws - Dz. U. No. 29, item 154, as amended), and the Tribunal should have examined the case on its merits.

In the Tribunal's view, the main reason for discontinuing the proceedings was the fact that a commune (or another unit of local self-government) is not the subject of constitutional rights and freedoms, as these are only vested in individuals and private legal entities in a strict sense. Consequently, with regard to communes (and other units of local self-government), one may not apply Article 39(3) of the Constitutional Tribunal Act, which by way of exception also makes it possible to review the constitutionality of those provisions which were formally derogated by the legislator before the Tribunal issued its ruling. I disagree with the Tribunal's stance and, what is more, I consider it to be dangerous *pro futuro*, from the point of view of the position of the Polish local self-government as well as constitutional guarantees of the self-governing nature of communes and of their character as subjects of rights and obligations.

3. Although *prima facie*, one may agree with the Tribunal that "[n]aturally, the scope *ratione personae* of constitutional rights and freedoms does not include public legal entities whose actions have legal effects in public law", the said thesis directly referred to a commune raises serious reservations. Above all, the Tribunal did not take account of the

complex character of the basic unit of local self-government, as an entity that acts not only in the realm of *imperium*, but also the realm of *dominium*, as a subject of rights and obligations under private law, enjoying the right of ownership and other property rights. At the same time, it should be stressed that the status of a commune under private law and the principle that the self-governing nature of a commune is protected by courts, including the realm of ownership, arise from the Constitution (see e.g. Article 165 of the Constitution) and may not be narrowed down below the standards of the Constitution. The constitutional rights of communes should also be protected by the Tribunal.

4. Putting the Tribunal's argumentation into perspective, it is irrelevant for the Tribunal to explain that the "functions and aims" of the constitutional rights of a commune are different than in the case of rights and freedoms granted to individuals and private legal entities, i.e. to analyse the issue whether a commune is entitled to public subjective rights set out in chapter II of the Constitution (in principle, *ex natura*, there will be no entitlement to such rights) as well as whether differences in the status of communes and individuals and private legal entities in constitutional law justify different treatment of these groups (the existence of those differences raises no doubt). However, the issue posed this way does not prove anything, and in particular it does not weigh in favour of the Tribunal's decision to discontinue proceedings. Moreover, it inaccurately presents the constitutional dilemma that the Tribunal faces.

First of all, the rights of communes enshrined by the relevant provisions of the Constitution, including the right of ownership and the judicial protection thereof have been established by the constitution-maker, despite the separate catalogue of rights and freedoms set forth in chapter II of the Constitution. What is striking is that the scope of the application of Article 39 of the Constitutional Tribunal Act is not limited to the subjects of rights and obligations under private law, e.g. citizens. One may assert – contrary to what the Tribunal has stated – that Article 39(3) of the Constitutional Tribunal Act contains a collective category of rights and freedoms which should be reconstructed autonomously on the basis of the norms of the Constitution – regardless of the addressees of the norms (individuals and private legal entities or communes – public legal entities), and irrespective of where they have been included. Such an interpretation of the Constitutional Tribunal Act makes it possible to adhere to the general principle of *in dubio pro action* as well as to enhance the effectiveness of the review conducted by the Tribunal. Also, it is not without significance that this way one may avoid the troublesome argument *a contrario* from the

norms of the Constitution, which always poses risks and rarely completes the exegesis of the legal text (an argument that the Tribunal used *in casu* is the statement that since the Constitution specifies the subjects of constitutional rights and freedoms by means of the term "persons and citizens", this means that – deducing from the contrary – this does not concern communes).

Irrespective of the above, secondly, one should also discuss the actual consequence of the Tribunal's statement (which is otherwise apt) that the constitutional rights of communes within the realm of private law have been established to serve certain functions and aims. Despite what has been asserted in the statement of reasons for the judgment, this amounts merely to – simplifying, due to formal requirements of a dissenting opinion – the fact that a commune may not act as an entrepreneur, i.e. a subject of rights and obligations under private law that exercises the freedom of economic activity for the purpose of maximising profits. Performing tasks from the scope of competence of public administration, a commune – regardless of a chosen measure, whether from the realm of public law or civil law – has to aim at satisfying the needs of a local self-government community and at carrying out a public purpose defined by statute (NB the Tribunal's derivation of commune's rights as those of "a legal entity under public law", i.e. a construct with autonomous, and perhaps even – primary, rights when juxtaposed with the state, is not only useless and dogmatically controversial in the Polish legal order, but also weakens the Tribunal's argumentation, which ultimately aims for the contrary). The Tribunal's emphasis on the special character of aims and functions of a commune's property rights in no way invalidates the principle that they are protected by courts (such as they are – with all their restrictions), and above all this does not change the fact that communes are entitled to those rights on the basis of constitutional norms. Thus, they have the character of constitutional rights that are subject to protection.

5. In addition, it should also be noted that it is natural in the jurisprudence of the Tribunal that the rights and freedoms are also reconstructed from provisions outside chapter II of the Constitution. After the entry into force of the Constitution of 1997, there is presumption that rights and freedoms are "named" and are directly regulated in the text of the Constitution. However, the said rule is restricted when, usually because of the circumstances of a given case, the Tribunal confirms the existence of a right which so far has not explicitly been declared (e.g. by deriving norms from Article 2 of the Constitution; see the Tribunals' jurisprudence on the principle of justly acquired rights or the so-called

rights that are pending). The fact that the Tribunal derives subjective rights from the provisions outside chapter II of the Constitution is an approach that is indisputable (see e.g. the Tribunal's jurisprudence on the right to vote as a constitutional subjective right).

For these reasons, I submit my dissenting opinion.

Dissenting Opinion
of Judge Andrzej Rzepliński
to the judgment of the Constitutional Tribunal
of 13 March 2013, ref. no. K 25/10

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of the Constitutional Tribunal of 13 March 2013 in the case K 25/10.

I disagree with the decision that Article 62(2) as well as Article 63(8) in conjunction with Article 63(4), third sentence, of the Act of 17 May 1989 on Relations Between the State and the Roman Catholic Church (Journal of Laws - Dz. U. No. 29, item 154, as amended; hereinafter: the Act on Relations Between the State and the Roman Catholic Church), insofar as they concern communes, may not be the subject of the constitutional review on the basis of Article 39(1)(3) and Article 39(3) of the Constitutional Tribunal Act, and thus the review proceedings are subject to discontinuation.

STATEMENT OF REASONS

1. What constituted the basis for discontinuing the proceedings by the Constitutional Tribunal in the case under examination was the lack of a substantive premiss concerning the constitutional review of provisions that had been formally derogated, as there had occurred no circumstances specified in Article 39(1)(3) as well as Article 39(3) of the Constitutional Tribunal Act.

2. I disagree with the Tribunal’s ruling within that scope and the reasoning presented in that respect.

3. In my opinion, there were premisses for the Tribunal’s substantive review of the provisions challenged by the Ombudsman, on the basis of Article 39(1)(3) of the Constitutional Tribunal Act and, for other reasons, on the basis of Article 39(3) of the said Act. The content of the judgment in the case under discussion should be the same as in the

part concerning the Act of 20 February 1997 on Relations Between the State and Jewish Religious Communities in the Republic of Poland (Journal of Laws - Dz. U. No. 41, item 251, as amended).

4. Challenged by the Ombudsman, provisions of Article 62(2) and Article 63(8) of the Act on Relations Between the State and the Roman Catholic Church are no longer binding. The Committee on Church Property - which carried out the restitution of property illegally expropriated by the authorities of the People's Republic of Poland to the institutions of the Roman Catholic Church - has been dissolved. However, the fact that the above-mentioned provisions have ceased to have effect does not eliminate legal disputes which arose during the time when the Committee carried out its activity. The review proceedings before the Tribunal have revealed that, on the basis of those provisions, the acts of applying the law still occur. The Supreme Administrative Court deals with proceedings on cassation appeals, and the Voivodeship Administrative Court in Warsaw conducts proceedings on complaints against decisions issued by the Committee on Church Property. The said courts base their rulings in those cases on the provisions of the Act on Relations Between the State and the Roman Catholic Church, which have been challenged by the Ombudsman in the case under discussion. The Tribunal has not justified why it has refused to review the constitutionality of the provisions that still constitute, despite the formal derogation thereof by the Act of 16 December 2010 amending the Act on Relations Between the State and the Roman Catholic Church, (Journal of Laws - Dz. U. No. 18, item 89), the basis of rulings issued by administrative courts.

5. Communes as such were only passive addressees of decisions that brought about legal effects as a result of proceedings before the Committee on Church Property. In regulatory proceedings before the Committee on Church Property, the property rights of communes were particularly restricted by the fact that they were deprived of the status of a participant in the proceedings (Article 62(2) of the Act on Relations Between the State and the Roman Catholic Church). The said issue was, however, regulated properly in the statues on churches and religious organisations, issued subsequently, which granted interested communes "the right to vote", i.e. the right to present their stance in a given case, in particular as regards challenging value estimates for expropriated immovable properties that are subject to return, or challenging the very legal bases of applications filed by church entities and the validity thereof. This constitutes inadmissible differentiation in

the context of the legislator's interference with regard to communal property which is the subject of decisions issued by the Committee on Church Property as well as regulatory committees which do not mention the protection of property interests of private parties in a strict sense in regulatory proceedings. By contrast, the essence of all regulatory proceedings was the same: satisfying the legitimate claims for restitution made by religious communities, on the basis of special substantive-law provisions, which took account of the character of harm caused for historical reasons during the years of the People's Republic of Poland.

6. Although it is admissible to introduce different levels of protection for communal and private ownership – as the two types of ownership differ in their essence and serve different purposes – the said differentiation needs to be juxtaposed with the criteria set out in Article 31(3) of the Constitution (applied in conjunction with Article 165 of the Constitution). In my opinion, the said differentiation remained contrary to the constitutional principle of equal protection of ownership, guaranteed regardless of the subject of the right. Such a regulation is inconsistent with the principle of equality, which is in this case derived from Article 165 in conjunction with Article 32(1) and Article 31(3) of the Constitution. Such differentiation introduced with regard to the level of the said protection was unnecessary, ineffective and disproportionate in a strict sense.

7. Due to unambiguous and consistent jurisprudence of common courts, the Supreme Court and administrative courts, which construed the norm included in Article 63(8) of the Act on Relations Between the State and the Roman Catholic Church as a norm ruling out all legal means in the context of decisions of the Committee on Church Property, there was a need, arising from Article 39(3) of the Constitutional Tribunal Act, to issue a substantive ruling in the present case.

8. As I have stated in point 5 of this dissenting opinion, communes as such were only a passive addressee of decisions that have legal effects in the course of proceedings before the Committee on Church Property. This means that in proceedings on satisfying justified restitution claims made by the Roman Catholic Church, on the basis of special substantive-law provisions that take account of harm caused for ideological reasons during the years of the People's Republic of Poland, communes acted neither as an organ of public authority (*imperium*) nor as an entity representing their communal property interests

(*dominium*). They had to accept and comply with the decisions of the Committee on Church Property. Not only was such a state of affairs inconsistent with Article 165 of the Constitution, but also the fact that communes were not, in any way, present in regulatory proceedings rendered Article 63(8) of the said Act inconsistent with Article 16 of the Constitution, in which the constitution-maker confirms that a commune is a self-governing community of residents. The Tribunal has also ignored the content of Article 166 of the Constitution, which emphasises, similarly to Article 16 of the Constitution, that a commune is a community.

9. For this reason, I also disagree with the discontinuation of the review proceedings by the Tribunal, which has assumed the lack of a premiss mentioned in Article 39(3) of the Constitutional Tribunal Act. Unlike the Tribunal, which has deemed that in the present case the premisses for adjudicating on the basis of that provision have not been fulfilled, as it is only applicable to the rights and freedoms of individuals an private legal entities (the rights and freedoms that primarily arise from chapter II of the Constitution), I hold the view that the Tribunal should have issued a substantive ruling as it is necessary for the protection of constitutional rights and freedoms. If so, that this means that a community of residents (a commune) has property interests which must be subject to legal protection, including the right to a fair trial, which is in turn guaranteed by Article 165 of the Constitution.

10. Necessity to protect such rights directly arises from the jurisprudence of the Tribunal, which has aptly pointed out recently that: "When determining whether there is 'necessity' to issue a ruling on the basis of Article 39(3) of the Constitutional Tribunal Act, it is irrelevant to determine the number of subjects whose rights have been violated as a result of the application of an unconstitutional normative act. There is necessity to issue a ruling for the protection of constitutional rights and freedoms of subjects if, hypothetically, at least one subject of constitutional rights and freedoms may benefit from the Tribunal's elimination of a given provision under review from the legal system" (the judgment of 16 March 2011, ref. no. K 35/08, OTK ZU No. 2/A/2011, item 11).

11. The legislator has not determined in Article 39(3) of the Constitutional Tribunal Act that protection applies only to those constitutional rights and freedoms that refer to the rights of persons and citizens enumerated in chapter II of the Constitution. The

Tribunal has specified that the subjects of the said rights may comprise only individuals and private legal entities (private parties). This excludes communes. And I agree with this point, as long as it concerns the rights and freedoms of persons and citizens.

12. The Tribunal has determined in the case under examination that communes are entitled to constitutional rights, by stating that: "The units of local self-government are, *inter alia*, entitled to the right of ownership and other property rights (Article 165(1), second sentence, of the Constitution), the right to associate (Article 172(1) of the Constitution), and their self-governing nature shall be protected by courts (Article 165(2) of the Constitution)" (part III, point 2.4.1. of the statement of reasons). If so, then these are rights of a different type, but still constitutional rights, which are subject to constitutional protection – parallel to protection provided for the rights and freedoms of persons and citizens.

13. For this reason, the following constitutional rights of communes are subject to judicial protection: 1) the right of ownership and other property rights; 2) the right of peaceful assembly; 3) the self-governing nature of communes. In this context, what applies to those rights is Article 39(3) of the Constitutional Tribunal Act.

14. With regard to Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church and the content assigned thereto in the jurisprudence of courts, failing to acknowledge that these three constitutional rights of communes are to serve the protection of property interests concerning all residents in communes, it is inapt for the Tribunal not to carry out the substantive examination of the said provision.

For these reasons, I have submitted my dissenting opinion.

Dissenting Opinion
of Judge Piotr Tuleja
to the judgment of the Constitutional Tribunal
of 13 March 2013, ref. no. K 25/10

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of the Constitutional Tribunal of 13 March 2013, ref. no. K 25/10, in the part concerning the discontinuation of the review proceedings with regard to Article 63(8) in conjunction with Article 63(4), third sentence, as well as Article 62(2) 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 17 May 1989).

I hold the view that in the present case there are premisses for adjudication on the basis of Article 39(3) of the Constitutional Tribunal Act. Although the challenged provisions are no longer binding, a judgment should have been issued for the protection of the rights of third parties. It should be recalled that the provisions were also, already after ceasing to have effect, the subject of the allegation in the case K 3/09 (the judgment of 8 June 2011, OTK ZU No. 5/A/2011, item 39). However, at the time, the Constitutional Tribunal did not examine the premisses set out in Article 39(3) of the Constitutional Tribunal Act, as at the hearing the representatives of the applicants, in response to my question, clearly stated that their application did not comprise any infringement of the rights of third parties. Therefore, the issue of the infringement of the rights of third parties has for the first time been examined by the Constitutional Tribunal in these proceedings.

In the present case, the Ombudsman has raised the allegation about the infringement of the rights of third parties, although the reasoning for that allegation has been formulated only in point three of the procedural letter of 26 June 2012, and is very laconic. However, the Constitutional Tribunal inaptly assumes that, in the context of Article 39(3), an applicant must show that there is a probability that given constitutional rights or freedoms have been infringed. The requirement of showing the probability of such an infringement of constitutional rights or freedoms arises from Article 79(1) of the Constitution as well as from Article 47(1)(2) of the Constitutional Tribunal Act and

concerns the admissibility of a constitutional complaint. By contrast, Article 39 of the Constitutional Tribunal Act pertains to all proceedings on hierarchical review of norms and specifies the scope of competence of the Constitutional Tribunal.

If the Constitutional Tribunal states that a given challenged normative act is not binding, it must *ex officio* determine whether adjudication in that particular case is admissible due to the premisses set out in Article 39(3) of the Constitutional Tribunal Act. An extensive discussion about obligations that lie with the Constitutional Tribunal with regard to the application of Article 39(3) of the Constitutional Tribunal Act are in the judgment of 16 March 2011, ref. no. K 35/08 (OTK ZU No. 2/A/2011, item 11). In the view of the Constitutional Tribunal, the provisions challenged in the present case may not be a source of an infringement of the rights of third parties, and possible infringements arise from the defective application of the provisions. I disagree with that view. The Constitutional Tribunal has not carried out an analysis of a mechanism that has arisen from the challenged provisions and which has led to the infringement of the right of access to court and the right to a fair trial on the part of third parties. The said infringements have been caused by the challenged provisions. If they were not binding, there would be no constitutional issue for the Constitutional Tribunal to examine in the present case.

The Act of 17 May 1989 has undergone considerable evolution. Although its wording has changed to a small extent, its normative context has alerted significantly. In the circumstances of the totalitarian state, the said Act was a modern regulation. The conciliatory manner of resolving disputes was fully justified in the state where the organs of state authority did not guarantee the right to just determination of one's case. With the lapse of time, statutes became increasingly inconsistent with regard to constitutional standards. After the entry into force of the Constitution of 1997, provisions challenged in the present case became inconsistent with the right to a fair trial, enshrined in Article 77(2) and Article 45(1) of the Constitution. The constitutional right to a fair trial guarantees the effective judicial protection. In order to examine whether such protection at a statutory level is, in fact, effective, one should juxtapose the challenged provisions with provisions that specify the competence of courts. What is meant here is not merely the juxtaposition of the mere wording of those provisions, but also the way in which they were interpreted in the jurisprudence of courts.

The legislator aptly indicated in Article 61(4)(3) of the Act of 17 May 1989 that the determination of ownership issues could not infringe rights acquired by non-state third parties. However, the content of the norm does not as such rule out a situation where a

settlement reached into before the Committee or a decision issued by the Committee could infringe such rights, due to erroneous findings as to circumstances that are relevant to given regulatory proceedings, arrived at by the Committee (or a party to the proceedings), or due to lack of knowledge about the existence of rights of their parties. Firstly, a decision issued by the Committee could lead to a settlement with private parties (third parties) that have so far used an immovable property in question; the scope of those claims may in certain situations be affected by the fact whether the obligation of return of incurred property loss lies with the State Treasury or a commune (e.g. when there was an agreement between it and the third party), or with a private party. Secondly, attention should be drawn to a risk that, in regulatory proceedings, church legal entities have been granted immovable properties to which there are claims for restitution made by third parties (in particular, as substitute immovable properties). Thirdly, the transfer of an immovable property to a church legal entity might entail the loss of rights by third parties which are granted with regard to the State Treasury or a commune as the owners of an immovable property if those entities intend to sell the immovable property in their ownership. What is meant here is the right of pre-emption or the right of preferential purchase that arises from the Act of 21 August 1997 on the Management of Immovable Property (Journal of Laws - Dz. U. of 2010 No. 102, item 651, as amended) or Article 29 of the Act of 19 October 1991 on the Management of Agricultural Immovable Property of the State Treasury (Journal of Laws - Dz. U. of 2012, item 1187, as amended). All the above issues have been addressed in the jurisprudence of courts and rulings issued in those cases do not provide grounds to put forward the thesis that the instances of infringements of rights enjoyed by third parties should be treated as exceptions arising from the inappropriate application of law.

From the point of view of the present case, fundamental significance should be assigned not to the circumstance whether the Committee did really adhere to the requirement set forth in Article 61(4)(3) of the Act of 17 May 1989, but to the fact whether challenged provisions – in a situation where the Committee's decision interfered in the realm of the rights of third parties – would make it possible for those parties to seek effective protection of their rights in court proceedings.

In the first place, the case of the National Association of Teachers should be considered. Replying to a question of law, the Supreme Court stated that a decision issued by the Committee with regard to the return of an immovable property to a church legal entity, as regards the usufruct of that immovable property by its current usufructuary (here: the National Association of Teachers) as well as about the obligation to return repair and

maintenance expenditure incurred on that property, rules out the possibility of claims regarding usufruct between the usufructuary and the State Treasury (the resolution of the Supreme Court of 27 September 1996, ref. no. III CZP 96/96, OSNC No. 1/1997, item 7). In the statement of reasons for that resolution, the Supreme Court also provided an interpretation of Article 61(4)(3) of the Act of 17 May 1989, pursuant to which the determination of ownership issues could not infringe rights acquired by non-state third parties, and in particular by other church and religious organisations as well as by individual farmers. In the view of the Supreme Court, the provision refers to the determination of ownership issues as such and not to settlements related thereto, and entails that "the subject of the determination of ownership issues, as regards the return of ownership to a church legal property, may not be an immovable property that has already been used in a way mentioned in that provision, i.e. an immovable property with regard to which the State Treasury has lost its right to have the property at its disposal". The final adjudication in that case (issued by the Court of Appeal in Rzeszów) was challenged by the National Association of Teachers to the European Court of Human Rights, which determined that Poland had infringed Article 6(1) of the Convention, due to the fact that the said Association was unable to make claims for the return of expenditure incurred on an immovable property granted to a church legal entity in the decision issued by the Committee. The special character of the legal situation underlying those determinations consisted in the fact that a usufructuary was entitled to make certain claims (on the basis of previously binding § 15 of the Regulation of the Council of Ministers of 16 July 1991 on the implementation of certain provisions of the Act on Land Management and the Expropriation of Immovable Property, Journal of Laws - Dz. U. No. 72, item 311, as amended), provided that the State Treasury remained the owner of the land that had been subject to usufruct; due to the fact that a decision by the Committee on Church Property granted the ownership of a given immovable property to a church legal entity, such a resolution become impossible.

In the jurisprudence of the Supreme Court (cf. the judgment of the Supreme Court of 26 June 1996, ref. no. I CR 1/96, Lex No. 549009), there were also restitution claims concerning formerly privately owned immovable properties that were nationalised or expropriated by the state. When examining a dispute concerning the determination of the right of ownership, the Supreme Court stated that: "the determination of ownership issues may not resolve a dispute over the right of ownership and the right of perpetual usufruct between a church legal entity and a third party. Consequently, a decision issued by the

Committee on Church Property may not constitute an obstacle for a third party to assert its rights before the Court. Within the scope of the rights of third parties, the court is not bound by the decision issued by the Committee on Church Property. After the case was referred by the Supreme Court to be examined again, the Voivodeship Court in Warsaw, which received the case, ultimately stated (in its judgment of 23 October 1997, ref. no. III C 1957/96, unpublished) that in accordance with the Decree of 26 October 1945 on the Ownership and Use of Land in the Capital City of Warsaw (Journal of Laws - Dz. U. No. 50, item 279; hereinafter: the Warsaw Decree) the plaintiff was entitled to the right of ownership with regard to a building situated on land granted, with the right of perpetual usufruct assigned thereto, by a decision of the Committee on Church Property to a church legal entity. However, in proper administrative proceedings – on the examination of an application for time-limited ownership (currently: perpetual usufruct) lodged on the basis of the Warsaw Decree – the said application was not considered on its merits. As stated by the Supreme Administrative Court, "due to the final character of a decision issued by the Committee on Church Property (…) the organs of public administration have lost, since the date of issuance of the said decision, the possibility of examining the application lodged in accordance with Article 7(1) [of the Warsaw Decree]" (the judgment of the Supreme Administrative Court of 8 April 2003, ref. no. I SA 2017/01, unpublished)

The thesis about the existence of recourse to courts for third parties whose rights have been infringed by a decision of the Committee on Church Property is also not confirmed by the judgment of the Supreme Court of 23 July 2004 (ref. no. III CK 194/03, Lex No. 174181). Indeed, the case examined by the courts did not concern assessing (challenging) the effectiveness of the Committee's decision from the point of view of rights vested in third parties. The subject thereof was the determination of a dispute between a commune and a third person which only emerged as a result of the transfer of the immovable property to the church legal entity, where the property had previously been owned by the commune and it was impossible to implement a settlement reached by the plaintiff and the commune. From the point of view of the plaintiff, the Committee's decision constituted only an element of the actual situation the consequences of which should have been determined by the courts adjudicating on that case. The said claims were not related to the special character of communal ownership, and the plaintiff did not take part in the proceedings before the Committee, and thus – within that scope – one may not speak of a departure by the Supreme Court from the thesis put forward in the above-

mentioned judgment ref. no. III CZP 96/96. Ultimately, the Supreme Court indicated general provisions of civil law as a proper basis for resolving the dispute.

The Supreme Court adjudicated that civil courts might determine the invalidity of settlements reached before the Committee on Church Property, if the content of those settlements exceeded the scope of cases referred to it for consideration (e.g. the granting of a limited right *in rem* other than that mentioned in Article 63(3) of the Act of 17 May 1989; cf. the decision of the Supreme Court of 12 April 2007, ref. no. III CSK 427/06, OSNC No. 3/2008, item 39).

However, at the same time, the Supreme Court made a proviso that: "regulatory proceedings are not court proceedings, and the referral of cases determined in regulatory proceedings, with the lack of a possibility of an appeal against decisions issued by the decision-making panel of the Committee on Church Property (Article 63(8) [of the Act of 17 May 1989]), leads to restricting recourse to courts in cases which – as civil cases – are subject to examination by a common court in proceedings that comprise at least two stages". At the same time, one should note that the case in which the Supreme Court adjudicated did not concern the impact of the Committee's decision on the right of third parties which had arisen before the immovable property had been transferred to a church legal entity, but a dispute between the purchaser of the immovable property from the church legal entity with regard to which in a settlement reached into before the Committee – which had exceeded the scope of its competence – a limited right *in rem* was established.

What also indicates that there is no effective judicial protection for the rights of third parties that have been infringed by decisions issued by the Committee on Church Property is the set of circumstances which led to submission of a constitutional complaint to the Tribunal in the case Ts 255/10 (which ended with the issuance of a decision on refusal to proceed with the complaint due to the non-fulfilment of its premises, see the decision of the Constitutional Tribunal of 26 September 2011, OTK ZU No. 6/B/2011, item 449). The complainants that had filed the constitutional complaint claimed that they were entitled to the right of pre-emption in the context of a certain immovable property; however, the said immovable property was transferred by the Committee on Church Property to a church legal entity as a substitute immovable property. A civil court which the complainants requested to declare the invalidity of the decision dismissed their application.

A view has been well-established in the jurisprudence of administrative courts that committees issuing decisions in regulatory proceedings may not be regarded as the

organs of public administration within the meaning of Article 1(1) and (2) in conjunction with Article 5(2)(3) of the Act of 14 June 1960 – the Code of Administrative Procedure (Journal of Laws - Dz. U. of 2013 item 267; hereinafter: the Code of Administrative Procedure) - (cf. the decision of the Supreme Administrative Court of 26 September 1991, ref. no. I SA 768/91, Lex No. 26069) and that is why administrative courts have no competence to review decisions issued by the committees. Although – with reference to proceedings pending before the Constitutional Tribunal to review the constitutionality of the Act of 17 May 1989 – the Supreme Administrative Court raised doubts as to the said stance, the proceedings in the case were stayed until the issuance of a ruling by the Tribunal (cf. the decisions of the Supreme Administrative Court of 26 November 2008, ref. no. II OSK 687/07, Lex No. 532161 and 13 September 2011, ref. no. II OSK 742/07, Lex No. 965220).

The above examples indicate that, in practice, there were situations where a decision issued by the Committee on Church Property had an impact on the legal situation of third parties. However, courts either refused to consider cases where the effectiveness of the Committee's decisions was challenged (the circumstances of the case Ts 255/10, the jurisprudence of administrative courts) or – where rulings were issued – they adjudicated confirming the legal situation shaped by the Committee's decisions. Both administrative and civil courts emphasised the special character of proceedings before regulatory committees, which arose, *inter alia*, from Article 63(8) of the Act of 17 May 1989. As a result, there was a situation where third parties whose rights had been infringed by the Committee's decisions could institute court proceedings only with regard to claims or rights arising from the legal situation ultimately shaped by the Committee's decisions; they could not challenge the Committee's decisions from the point of view of the protection of their rights, in the context of granting the ownership of immovable properties to church legal entities. This is particularly clear in those cases where it follows from the character of the infringed right enjoyed by a third party that – just as this was the situation in the above-mentioned case resolved by the judgment of the Supreme Administrative Court, ref. no. I SA 2017/01 – the proper procedure for protecting the said right is to institute proceedings before administrative courts.

The challenged provisions created a mechanism that ruled out or restricted the possibility of examining a given case in the course of court proceedings. When the provisions were binding, courts either refused to consider cases or considered cases, but being bound by decisions of the Committee on Church Property, could not take account of

citizens' claims. In the light of the above, I may not agree with the statement that the infringement of the right to a fair trial resulted from the incorrect application of law. The necessity to deem the challenged provisions unconstitutional arises from the fact that they ruled out or restricted the possibility of protecting the claims of third parties in courts. It is not a task of the Constitutional Tribunal to determine whether and to what extent such claims are legitimate. However, the role of the Constitutional Tribunal is to guarantee judicial protection at the level of the enactment of law. The judgment of the Constitutional Tribunal declares the unconstitutionality of the challenged provisions which would open up the possibility for guaranteeing effective judicial protection on the basis of Article 190(4) of the Constitution. The discontinuation of the proceedings eliminated such a possibility.

Dissenting Opinion
of Judge Andrzej Wróbel
to the judgment of the Constitutional Tribunal
of 13 March 2013, ref. no. K 25/10

Pursuant to Article 68(3), first sentence, 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 in the part where, on the basis of Article 39(1)(1) and Article 39(1)(3) of the said Act, the Tribunal discontinued the review proceedings concerning the conformity of Article 63(8) in conjunction with Article 63(4), third sentence, 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 on Relations Between the State and the Roman Catholic Church) to Article 165(2) in conjunction with Article 77(2), Article 78 and Article 31(3) of the Constitution as well as to Article 11 of the European Charter of Local Self-Government (Journal of Laws - Dz. U. of 1994 No. 124, item 607, as amended), as well as the conformity of Article 62(2) of the Act on Relations Between the State and the Roman Catholic Church, insofar as it excluded relevant units of local self-government from the group of participants in proceedings, to Article 165 in conjunction with Article 32(1) and Article 31(3) of the Constitution.

The Constitutional Tribunal has justified the discontinuation of the proceedings within that scope as follows: firstly, Article 62(2) of the Act on Relations Between the State and the Roman Catholic Church, and "the norm arising from Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church", have ceased to have effect within the meaning of Article 39(1)(3) of the Constitutional Tribunal Act; secondly, Article 39(3) of the Constitutional Tribunal Act does not refer to "the rights of the units of local self-government, which arise from the Constitution, but play different roles and have been granted for the attainment of different purposes" (point 2.3.3.), and thus they may not be the subject of a review on the basis of the said provision of the Constitutional Tribunal Act.

I disagree with the content of that judgment in the part indicated above and the statement of reasons thereof.

I

There is no doubt that the challenged provisions of Article 62(2) and Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church were derogated by the Act of 16 December 2010 amending the Act on Relations Between the State and the Roman Catholic Church (Journal of Laws - Dz. U. of 2011 No. 18, item 89; hereinafter: the amending Act of 16 December 2010). Therefore, there is also no doubt that, within the challenged scope, they ceased to be binding before the delivery of a ruling by the Tribunal (Article 39(1)(3) of the Constitutional Tribunal Act).

By contrast, the Constitutional Tribunal has assumed, as a basis for its further, and in my opinion – redundant, discussion of the validity or invalidity of the above-indicated statutory provisions, that the formal derogation of a normative act, or part thereof, does not have to mean that it will definitely be eliminated from the legal system. Recalling its judgment of 16 March 2011, ref. no. K 35/08 (OTK ZU No. 2/A/2011, item 11), the Tribunal distinguishes between "situations where a given normative act under examination, despite the formal derogation thereof, sets out requirements or prohibitions regarding the actions of its addressees (regulates their future actions) and situations where binding legal norms require that past actions or events are to be categorised in accordance with the derogated legal act. In the first case, the normative act is binding and is subject to review by the Constitutional Tribunal. In the second case, it has ceased to have effect, and the review thereof is only admissible within the scope specified in Article 39(3) of the Constitutional Tribunal Act". Applying these assumptions to the present case, the Tribunal states that: firstly, the norm derived from Article 62(2) of the Act on Relations Between the State and the Roman Catholic Church is procedural in character and, after the dissolution of the Committee on Church Property, it does not set out requirements and prohibitions regarding actions; secondly, the norm arising from Article 63(8) in conjunction with Article 63(4), third sentence, of the said Act, may not also be applied after the entry into force of the amending Act, since the Committee ended its activity, and the legislator eliminated regulatory proceedings in that context; as a result, one may not consider that norm to be binding. On the basis of those assumptions, the Constitutional Tribunal has concluded that the indicated provisions have ceased to have effect within the meaning of Article 39(1)(3) of the Constitutional Tribunal Act.

I disagree with such an explanation of the fact that the provisions under the Tribunal's review have ceased to have effect and, as a result, with the statement that the challenged provisions have ceased to have effect in accordance with the criteria indicated in the judgment of 16 March 2011, ref. no. K 35/08.

I assume that the hypothesis in Article 39(1)(3) of the Constitutional Tribunal Act comprises, except for the so-called difficult cases, a situation where, as the provision specifies it, "the normative act has ceased to have effect"; yet, there are no reasonable grounds to assume that the phrase 'the normative act has ceased to have effect', as used in Article 39(1)(3), should be assigned different meanings, especially, as in the present case, the provisions of Article 62(2) and Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church have formally ceased to have effect. In its extensive jurisprudence, the Constitutional Tribunal has formulated other formal criteria for the situation where the provisions under the Tribunal's review have ceased to have effect; it has distinguished between the continued effect and application of formally derogated provisions of law; also, it has assessed whether a given derogated act was binding in the light of the legal consequences of the derogated provisions, etc. In my view, as regards adopting other than formal criteria for the situation where a provision has ceased to have effect for the purpose of interpreting and applying Article 39(1)(3) of the Constitutional Tribunal Act: first of all, this is irrational – as taking account of those diverse criteria for being binding or not being binding in the context of legal provisions, as times it is difficult to ultimately decide whether a given normative act, which has been repealed formally is still binding; if so, then in accordance with what rules and criteria; secondly, this does not end or restrict, due to the content of Article 39(3) of the Constitutional Tribunal Act, the constitutional review of an act that has ceased to have effect as an act formally derogated from the legal system, such as the indicated provisions of the Act on Relations Between the State and the Roman Catholic Church. Indeed, the provision of Article 39(3) of the Constitutional Tribunal Act is very clear and only requires a thorough analysis on the part of the Tribunal whether the Tribunal's review of a provision that has ceased to have effect within the meaning of Article 39(1)(3) of the Constitutional Tribunal Act is necessary for the review of the constitutional rights and freedoms.

As a result, I may not agree with the view held by the Tribunal, implied in the statement of reasons for the judgment in the present case, that in order to determine that the challenged provisions have ceased to have effect within the meaning of Article 39(1)(3) of

the Constitutional Tribunal Act, it is insufficient that they were derogated by the amending Act as of 1 March 2011, especially that, in the statement of reasons for the judgment, the Tribunal does not identify or discuss any transitional problems arising from the fact that they may potentially continue to be binding.

Further argumentation presented by the Tribunal for the thesis that formally derogated provisions are no longer binding concerns no so much the issue whether the provisions are still binding or not, but the issue of legal consequences that those provisions may or may not bring about of 1 March 2011. Arguments concerning further application of provisions that are no longer binding or arguments about the legal consequences the said provisions have brought about or will bring about in the future are undoubtedly constitutionally relevant, but in the context of Article 39(3) of the Constitutional Tribunal Act, since the issue of 'the necessity to protect constitutional rights and freedoms' is inevitably determined by the impact of the derogated provisions, in one way or another, on the legal and actual situation of the addressees thereof.

I disagree with the Tribunal that the challenged provisions may not be binding in a different way than formally, since it is obvious that the provisions of Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church, which are vital to the present case, not only may be applied after the entry into force of the amending Act of 16 December 2010, but – as a result of the judgment in the present case – will be applied in cases pending before administrative courts which unanimously interpret those provisions as rendering complaints against decisions of the Committee on Church Property, lodged with administrative courts, inadmissible. Therefore, if one was to adopt a broad perspective on the issue of normative acts being binding, as presented in the present case, then one should consistently deem that the provisions of Article 63(8) in conjunction with Article 63(4), third sentence, of the Act on Relations Between the State and the Roman Catholic Church, despite having been derogated, are still binding, and thus it is useless to assess them in the light of Article 39(3) of the Constitutional Tribunal Act.

II

Pursuant to Article 39(3) of the Constitutional Tribunal Act, the Tribunal may not discontinue review proceedings in the context of a challenged normative act which has ceased to have effect if issuing a ruling on the normative act 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 there is a link between the provision and the protection of constitutional rights and freedoms. Such a link exists if 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 established in a definite way before that provision has 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.

When justifying the discontinuation of the review proceedings, the Tribunal merely examines the first one of the above criteria, and makes a definite statement that Article 39(3) of the Constitutional Tribunal Act concerns the constitutional rights and freedoms of private parties. However, it does not refer to the rights of the units of local self-government, which arise from the Constitution, but play different roles and have been granted for the attainment of different purposes. Then, in a way specifying that formulation, the Tribunal states that the phrase ‘constitutional rights and freedoms’ has a well-established meaning and refers to the rights of citizens and individuals. At a different point, the Tribunal made a general statement that constitutional rights and freedoms have been granted to private legal entities, unless it follows from the character of a given right that it is vested only in the individual. Naturally, the scope *ratione personae* of constitutional rights and freedoms does not include public legal entities whose actions have legal effects in public law (point 2.3.2.).

III

In order to determine the issue whether Article 39(3) of the Constitutional Tribunal Act concerns the units of local self-government, in my view, one should first identify the constitutional problem in the present case.

The Committee on Church Property was an organ of public administration that was competent to issue, *inter alia*, legally binding final decisions which concerned e.g. the return of immovable property previously taken over by the state, or transferred to a

commune by virtue of the "communalisation" statute, to the Roman Catholic Church or other religious organisations. There is no doubt that the legal consequence of a decision issued by the Committee on Church Property is to transfer the ownership of a given immovable property from a commune to a given applicant (a church legal entity). As a result, the decision by the Committee leads to decreasing the property of the commune and, in that respect, it constitutes interference of a public authority in the realm of the constitutionally protected ownership of the commune. Interference of public authority in the constitutionally protected ownership of the commune is even more drastic, since as it follows from the application of the provisions of the regulatory statute, a unit of local self-government, i.e. the subject of the right of communal ownership, had no statutory guarantee that it could participate in regulatory proceedings which directly pertained to its constitutionally protected right of ownership (Article 165(1) of the Constitution).

Also, what requires emphasis is that depriving the commune of the ownership of an immovable property, by virtue of a decision issued by the Committee on Church Property, is not in any tangible way linked to the status of the commune as a public legal entity. The commune is deprived of part of the constitutionally protected property only because an immovable property that is subject to regulatory proceedings constitutes an element of communal property.

Stating that communes are not subjects of constitutional rights and freedoms, the Tribunal underlines that the units of local self-government are public legal entities of a special status, the actions of which have legal effects in public law. Thus, it assigns great significance to their status of "public legal entities". Therefore, it should be pointed out that it clearly follows from the systemic context of Article 165(1) of the Constitution that the constitution-maker, while using the term 'legal personality' in the first sentence of paragraph 1, used it to denote the capacity of the units of local self-government to act on their own behalf in property transactions under civil law; in accordance with the second sentence, the said units enjoy the right of ownership and other property rights. Thus, Article 165(1) of the Constitution mentions only legal personality (legal entities) under civil law (private law). In the light of the purpose, content and function of the above provision, the arbitrary division of legal entities into public legal entities and private legal entities, as carried out in the statement of reasons for the judgment of the Constitutional Tribunal, is irrelevant and may not substantiate the interpretation of Article 165 of the Constitution presented therein, in particular the assumption made by the Tribunal that the said provision does not grant communes a constitutional right within the meaning of

Article 39(3) of the Constitutional Tribunal Act, for a commune is a public legal entity, and public legal entities whose actions have legal effects in public law are not generally granted constitutionally rights and freedoms.

However, the division of legal entities into public legal entities and private legal entities, as carried out by the Tribunal, is arbitrary, since the statement of reasons for the judgment in the present case provides no criteria for that division; nor does it provide more legal characteristics of those legal entities. In fact, such categorisation of legal entities is not universally accepted in the doctrine of law or the jurisprudence of courts. The construct of legal personality under public law has for a long time been the subject of disputes and controversies in the doctrine, from the questioning of the existence of public legal personality to pessimistic opinions that it is impossible to formulate definite and indisputable criteria of distinctions between public legal entities and private legal entities. The criterion that is sometimes regarded as a basis of that division is fallible, as it does not take account of the internal divisions of communal ownership into those elements of communal property that serve the purpose of performing public tasks, and those that do not serve that purpose. Other criteria for the division are incomplete or fallible, or in any case are not universally accepted. As a result, the status of an individual or a legal entity as the subject of constitutional rights and freedoms directly depends on unknown, or at least unclear or arbitrary, and thus uncertain, criteria, which in any case are not based on the Constitution, as regards distinguishing between public legal entities and private legal entities, which undoubtedly does not properly serve the protection of constitutional rights and freedoms.

From a teleological perspective, granting legal personality to communes was intended for three constitutional purposes, namely: to make communes become equal subjects of the right of ownership and other property rights, to single out communal property, and to underline that the organisational structure of communes was separate from the state.

From that very perspective, the granting of legal personality to communes mainly, if not exclusively, serves the purposes of legal transactions in the realms of property relations under civil law, and does not ensure the exercise of public authority, which traditionally has been assigned to the state. Indeed, there is no doubt that legal personality is not a prerequisite of the efficient and lawful exercise of public authority by communes. What is more, tasks falling within the scope of public administration are not, to a large extent, performed by communes as legal entities, but by the organs of communes which do

not, within that scope, act on behalf of the communes, but on the basis of separate powers vested in them by relevant statutes. By contrast, the Tribunal does not seem to distinguish between a commune as a legal entity and an organ of the commune, which acts on behalf of that legal entity, as well as between a commune as a legal entity and an organ of that legal entity as an organ of public administration, when on page 10 that "the organs of public authority perform tasks that arise from their scope of powers, and do not exercise rights and freedoms". The statement is true with regard to the organs of public administration, but it is inadequate in relation to legal entities such as the units of local self-government in the context of the right of ownership.

I definitely cannot agree with the view that Article 165(1) of the Constitution has not established the constitutionally protected right of ownership and other property rights with regard to communes, and as a result it may not constitute the basis of reviewing statutory provisions, such as those challenged in these proceedings, which authorise an organ of public administration, i.e. the Committee on Church Property, to revoke the right of ownership to an immovable property that constitutes communal property in regulatory proceedings, in which the participation of a relevant commune was not guaranteed by statute. Any reference of the Constitutional Tribunal to the legal character of a commune as a public legal entity, the character of communal ownership, the performance of public tasks by communes is irrelevant to the case considered by the Tribunal, as it in no way concerns the exercise of public authority or the performance of public tasks by communes, but the state's interference in the constitutionally protected realm of communal ownership. The right of ownership of communes is their constitutional right, which is explicitly stated in Article 165(1), second sentence, of the Constitution. It is a constitutional right within the meaning of Article 39(3) of the Constitutional Tribunal Act.

It should be emphasised that Article 165(1) of the Constitution is applicable to the present case as a higher-level norm for the review of the challenged provisions, and not as a criterion for assessing whether communes are authorised to file an application or an appeal; the Tribunal consistently holds that they are not authorised to do so, by stating – in my opinion – erroneously that Article 165(1) does not grant communes a constitutional right, which - according to the Tribunal – may be granted only to individuals and private legal entities. By excluding, without any exception, all units of local self-government from the group of beneficiaries under that provision, the Tribunal takes a step further, excluding from the scope of application of Article 165 of the Constitution also all legal entities which potentially have the status of public legal entities. The Tribunal admits that the units of

local self-government have rights arising from the Constitution (point 2.4.), but Article 39(3) of the Constitutional Tribunal Act does not concern them, as the said rights play different roles and have been granted for the attainment of different purposes. However, the Tribunal does not explain what these roles and purposes are, in particular in the context of the constitutional right of ownership granted to the units of local self-government.

The Tribunal's view with regard to communes as the subjects of the right of ownership does not take account of the extensive jurisprudence of the Constitutional Tribunal concerning the special significance of communal ownership in the political system of the Republic of Poland and the protection thereof, especially the judgment of the Constitutional Tribunal of 20 February 2002, ref. no. K 39/00 (OTK ZU No. 1/A/2002, item 4), in which the Tribunal presented an extensive discussion of these issues. In particular, the Tribunal emphasised the following: "The protection of communal ownership is undoubtedly of special significance. Indeed, the emergence of 'communal property' as a separate category stems from the fact that the units of local self-government exist as the subjects of rights and obligations under public law. Providing the units of local self-government with property is intended to guarantee their self-governing nature and to safeguard their status as the subjects of rights and obligations. In that sense, communal ownership is a constitutional value that requires constant reinforcement. There is a view in the doctrine of law that the existence of communal ownership as such represents a function of local self-government, which – in order to become an effective tool for the decentralisation of political power – must be supported by the decentralisation of economic power (…). What weighs in favour of such reasoning is a number of arguments that may be derived from Article 165(1) of the Constitution as well as the previous jurisprudence of the Tribunal:

– firstly – communal ownership safeguards the basic values of local self-government, such as: its legal personality, its self-governing nature, and the possibility of performing its public tasks specified by statute. As it has been stressed in the literature on the subject, thanks to communal ownership, by preserving its self-governing nature, a commune may be a partner of the state government (…). Thus, Article 165(1) creates substantive bases for the guarantees of the status of local self-government as the subject of rights and obligations;

– secondly – ownership assigned to the units of local self-government fulfils a special constitutional role, for – as stated by the Tribunal in its ruling of 12 April 2000 – it

‘(…) determines (…) the real existence of a self-government system in the state. The existence of the relation set out in Article 165(1) of the Constitution undoubtedly binds the ordinary legislator; it implies a restriction that drafted regulations should not violate the constitutional scope of the self-governing nature attributed to communes. What follows from these findings is that any potential decrease in the property of local self-government introduced by statute requires particularly thorough supervision’ (ref. no. K 8/98, OTK ZU No. 3/2000, item 87).

– thirdly – the right of ownership granted to the units of local self-government is subject to constitutional protection (…). Constituting a reference point for the regulation of the said protection, Article 165(1) of the Constitution is of significance, as it manifests a close relation between the right of ownership enjoyed by the units of local self-government and their status as subjects of rights and obligations. For these reasons, ownership assigned to the units of local self-government is systemic in character, at least insofar as it constitutes a safeguard for: on the one hand – their self-governing nature, and on the other – the possibility of performing their public tasks to satisfy the needs of local communities, as provided for in relevant statutes. Whenever the legislator interferes in the realm of ownership powers of a unit of local self-government, he affects the scope of its status as a subject of rights and obligations, and modifies the constitutionally specified legal position of that kind of subjects of rights and obligations. One should bear in mind the circumstance that fundamental standards concerning the legal status of the units of local self-government have been set out in the Constitution, which indicates that the constitution-maker noticed the great need for safeguarding their status as subjects of rights and obligations.

- fourthly – although communal ownership may not be rendered – just as the right of ownership in general – in absolute terms, it may not be treated worse than ownership assigned to other subjects of the right. There is no doubt that the units of local self-government, to a greater or lesser extent, incur the expenditure of implemented reforms and this may also constitute a basis for imposing justified restrictions on their right of ownership. However, as the Tribunal has noted, ‘the further away we move in time from the borderline date of 27 May 1990, the more caution should be exercised as regards interference in property rights granted to communes’ (ref. no. K 18/95, *op.cit.*, s. 21). The lack of different types and forms of ownership (…) also implies the lack of differentiation within the scope of protection granted to the right of ownership with regard to a particular subject of the right. In this state of affairs, the right of ownership granted to the units of local self-government ‘is a subjective right or ownership in a technical sense, and its

content arises from Article 140 of the Civil Code (…). In this context, it is vital that the property of the units of local self-government is put at the sole disposal of the said units (i.e. that they are granted the right of ownership and other property rights), and the property is subject to the same protection as in the case of the property of citizens (…)' ".

To sum up, although the challenged provisions, formally derogated by the amending Act of 16 December 2010, ceased to have effect within the meaning of Article 39(1)(3) of the Constitutional Tribunal Act, the issuance of a ruling by the Tribunal was necessary for the protection of the constitutional right of ownership granted to communes (Article 165(1) of the Constitution).

Dissenting Opinion
of Judge Zbigniew Cieślak
to the statement of reasons for the judgment of the Constitutional Tribunal
of 13 March 2013, ref. no. K 25/10

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the statement of reasons for the judgment of the Constitutional Tribunal of 13 March 2013, ref. no. K 25/10. The reason for this dissenting opinion is my conviction that in the present case the Constitutional Tribunal had an obligation to issue a decision signalling the occurrence of inconsistencies in the law, removal of which would be indispensable to ensure the coherence of the legal system of the Republic of Poland.

1. Pursuant to Article 4(2) of the Constitutional Tribunal Act, the Tribunal shall submit to the competent law-making bodies observations concerning identified inconsistencies and gaps in the law, removal of which would be indispensable to ensure the coherence of the legal system of the Republic of Poland. The said provision introduces a legal obligation to issue the so-called signalling decision if relevant premisses specified by statute are fulfilled. The requirement to act (and not merely a possibility to do so) on the part of the Tribunal is primarily inferred by me from the grammar used in the wording of Article 4(2) of the Constitutional Tribunal Act ("The Tribunal shall submit") (cf. T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2002, p. 73). Secondly, the obligation to take certain action arises from the systemic function of the Constitutional Tribunal which consists in the protection of the primacy of the Constitution as the supreme law of the Republic of Poland (see Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym*, Warszawa 1999, p. 12), which sets out, in particular, the substantive and formal requirements concerning the entire legal system of the Republic of Poland. One of the instruments for the fulfilment of the said function, apart from the basic one i.e. adjudication on the hierarchical conformity of norms (Article 188 of the Constitution) is the issuance of decisions that are "informative and preventive in character", provided for in Article 4(2) of the Constitutional Tribunal Act (cf. Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*,

Warszawa 2003, p. 329). The obligation to resort to that measure is justified by the requirement of concern for the common good, which refers not only to citizens, but also to entities and authorities indicated by the Constitution and by statute (cf. J. Trzciński, "Rzeczpospolita Polska dobrem wspólnym wszystkich obywateli", [in:] *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980-2005*, J. Góral, R. Hauser, J. Trzciński (eds.), Warszawa 2005, pp. 455-456) And the powers of the Constitutional Tribunal are particularly important in this context, as one of the elements of the common good, i.e. the Republic of Poland (Article 1 of the Constitution), is a democratic state ruled by law (Article 2 of the Constitution), which is determined by the coherent system of regulations, where there is consistency (internal coherence) within the set of binding norms (cf. I. Chojnacka, "Sygnalizacja w praktyce orzeczniczej Trybunału Konstytucyjnego", *Biuletyn Trybunału Konstytucyjnego* Issue No. 1/2000, p. 82).

2. Pursuant to Article 4(2) of the Constitutional Tribunal, a statutory premiss for the Constitutional Tribunal to issue the so-called signalling decision is when the Tribunal finds an inconsistency in the law, removal of which will restore the coherence of the legal system. As argued by I. Chojnacka, the said institution is to play a complementary role in situations where, for various reasons, the Tribunal may not exercise its constitutional power to conduct a review of norms (e.g. due to being bound by the scope of a given application) or where an inconsistency found in the law does not stem from hierarchical non-conformity or has the character of a formal defect based on a different criterion than a contradiction between legal norms (see I. Chojnacka, *op.cit.*, p. 86). The Constitutional Tribunal dealt with one of those conditions in the case K 25/10. The said case revealed inconsistencies in the law arising from the infringement of the principle of equal rights of churches and other religious organisations (Article 25(1) of the Constitution) caused by the fact that the Committee on Church Property, which examined claims for the restitution of expropriated immovable property of the Roman Catholic Church, was dissolved, whereas other similar committees - the Interchurch Regulatory Committee on Property Issues, the Regulatory Committee on the Property of the Polish Autocephalous Orthodox Church, the Regulatory Committee on the Property of the Evangelical Augsburg (Lutheran) Church and the Regulatory Committee on the Property of Jewish Religious Communities - continued to carry out their activity. Due to being bound by the scope of the Ombudsman's application, the Tribunal could not determine the unconstitutionality of the relevant statutory regulations. Therefore, it was obliged to resort to the measure meant for

signalling inconsistencies in the law, as indicated in Article 4(2) of the Constitutional Tribunal Act.

3. In the light of the jurisprudence of the Constitutional Tribunal, the principle of equal rights of churches and other religious organisations means that all churches and religious organisations which share an essential common characteristic should be treated equally. At the same time, in the Tribunal's view, the said principle implies different treatment of churches and other religious organisations that do not share an essential common characteristic from the point of view of a given regulation (see the judgment of the Constitutional Tribunal of 2 April 2003, ref. no. K 13/02, OTK ZU Issue No. 4/A/2003, item 28). Such rendering implies a prohibition on discrimination against and unequal treatment of churches to the extent they meet the requirements prescribed by law (see the judgment of the Constitutional Tribunal of 2 December 2009, ref. no. U 10/07, OTK ZU No. 11/A/2009, item 163). The state may not grant additional (exclusive) rights to one of churches or religious organisations when they all share the same characteristics. Nevertheless, this does not mean that certain differentiation in the status of particular religions is not admissible constitutionally (cf. S. Bożyk, "Konstytucyjna zasada równouprawnienia Kościołów i innych związków wyznaniowych", [in:] *Zasada równości w prawie*, (eds.) H. Zięba-Załucka, M. Kijowski, Rzeszów 2004, p. 95). This differentiation follows from, for example, Article 25(4) and (5) of the Constitution which have provided for different legal forms of regulating relations with the state, where the Roman Catholic Church is singled out, since its relations with the state shall be determined not only by statutes but also by an international treaty concluded with the Holy See.

In this context, it is obvious to state that, within the scope of the currently binding law, there are differences between the legal situations of the Roman Catholic Church and other churches, in the context of which regulatory committees still carry out their activity and decide on the return of expropriated property. All those entities, to the same extent, share one essential characteristic (their property was taken over by the state and they are entitled to make claims for the return thereof), and yet, despite that, one of the elements of the scope *ratione personae* (the Roman Catholic Church) was deprived of the possibility of claiming its rights in regulatory proceedings conducted before the Committee, composed of the representatives of the Church. At the same time, one may not successfully defend the view that this was the case of a constitutionally legitimate departure from the principle of equality, due to the fulfilment of the substantive requirements of such a restriction,

which have been derived in the jurisprudence of the Constitutional Tribunal from the principle of equality expressed in Article 32 of the Constitution (on the necessity to interpret Article 25(1) of the Constitution with reference to assumptions formulated in the light of Article 32 of the Constitution – see L. Garlicki, comments on Article 25, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 5, (ed.) L. Garlicki, Warszawa 2007, p. 10). The above conclusion about the infringement of the principle of equality was also confirmed during the review proceedings before the Constitutional Tribunal in the speeches delivered by the representatives of the Sejm and the Public Prosecutor-General.

4. Additionally, as regards the said infringement in the context of the principle of equal rights of churches and other religious organisations, one should address the issue that the legislator may not undertake unilateral interference in the realm of relations between particular churches or other religious organisations and the state. In the light of Article 25(5) of the Constitution, such interference requires seeking legislative solutions that would be consensual in character. Thus, the Minister of Administration and Digitalisation carried out consultation with relevant churches and religious organisations as regards certain statutory changes that would aim at making their legal situations and the legal situation of the Roman Catholic Church more equal. As a result of the consultation, the Minister informed that the activity of the regulatory committees would be continued, and the legislative work in that respect would be discontinued (see the opinion of the Minister of Administration and Digitalisation of 31 January 2013 filed in the context of the case K 25/10, upon a request by the Presiding Judge in the present case). *Prima facie*, the above-mentioned circumstances render the obligation to issue the so-called signalling decision in the case K 25/10 pointless.

Considering the above, I hold the view that the scope *ratione materiae* of cases concerning "relations between the Republic of Poland and other churches or religious organisations" (Article 25(5) of the Constitution) does not comprise the return of immovable properties expropriated by the state to churches and other religious organisations (including also the functioning of the so-called regulatory committees). What follows therefrom is that the indicated issue has not been included in the scope of the international agreement entered into by the Republic of Poland and the Holy See - the Concordat between the Holy See and the Republic of Poland, signed in Warsaw on 28 July 1993 (Journal of Laws - Dz. U. of 1998 No. 51, item 318), and stems from 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), enacted before the entry into force of the Constitution of 1997. The principle of equal rights of churches and other religious organisations implies the conclusion that the subject of a bilateral action provided for in Article 25(5) of the Constitution should be determined on the basis of an international agreement entered into by the Roman Catholic Church and those statutory regulations that concern the said Church, which have been enacted since the entry into force of the Constitution of 1997 (and which have been subject to the procedure for agreements under Article 27 of the Concordat). Obviously, this scope does not include the issue of the return of church property. A similar view is formulated by L. Garlicki, in accordance with which: "one may (…) claim that the scope *ratione materiae* of the Concordat reflects the way in which the state understands the realm of relations that are subject to a consensual regulation" (L. Garlicki, *op.cit.*, p. 21). In other words, the negative attitude of relevant churches and other religious organisations to the issue of dissolving regulatory committees constitutes no obstacle to legislative work aimed at adjusting the legal situation to comply with the principle of equality which arises from Article 25(1) of the Constitution. Hence, it would be justified for the Constitutional Tribunal to issue the so-called signalling decision in the case K 25/10.

For the above reasons, I have felt obliged to submit this dissenting opinion to the statement of reasons for the judgment of the Constitutional Tribunal of 13 March 2013 in the case K 25/10.