Judgment of 30th October 2001, K 33/00

ENFRANCHISEMENT OF TENANTS OF FORMER ESTABLISHMENT-OWNED APARTMENTS

Type of proceedings:	Composition of the Tribunal:	Dissenting opinions:
Abstract review **Initiators:** Commissioner for Citizens' Rights; City Council of Zduńska Wola	5-judge panel	0

Legal provisions under review	Basis of review
Obligation for the current owners of a former establishment-owned apartment to transfer ownership of the apartment to an entitled tenant who occupied the apartment at the date of its acquisition by the current owner, upon the tenant's application and for the price stipulated by statute [Transferral of Establishment-Owned Residential Buildings by State Enterprises Amendment Act 2000: Article 3]	Rule of law Principle of social market economy Protection of ownership Principle of proportionality Guarantee of ownership and other property rights for communes [Constitution: Articles 2, 20, 21(1), 31(3), 64(1) and (2), 165(1)]

During Communist times, certain State enterprises leased apartments owned by them to their employees (so-called establishment-owned apartments; *mieszkania zakładowe*). From 1989, following the introduction of market economy conditions, the restructuring of enterprises, and the entry into force of legal regulations for the protection of tenants (including restrictions on the levels of permissible rent), it became unprofitable for workplaces to continue to manage housing resources and the Transferral of Establishment-Owned Residential Buildings by State Enterprises Act 1994 was enacted in an attempt to solve this problem. The 1994 Act enabled enterprises to gratuitously transfer ownership of any real estates within their housing resources to communes and housing cooperatives. Furthermore, the sale of such real estates was also permitted to any natural or legal person.

The Transferral of Establishment-Owned Residential Buildings by State Enterprises Amendment Act 2000 sought to provide tenants of former establishment-owned apartments with a degree of independence vis-à-vis the new owners (both communal and private) of such properties, and sought to stabilise a tenant's legal position. One provision of the amending Act, challenged in the present case, obliged current owners of formerly "establishment-owned" apartments, acquired by the current owner prior to the entry into force of the Act (i.e. 1st June 2000), to transfer ownership of such apartments to any currently entitled tenant occupying the apartment on the date of its acquisition by the current owner. Transfer of ownership was to take place "upon the application" of the entitled tenant (in essence, the tenant obtained a civil law claim against the current owner). The legislator also stipulated the price tenants were obliged to pay for acquisition of ownership: this price was to be equivalent to the purchase price paid by the current owner and could only exceed this price by a level representing the value of expenses incurred by the current owner; *ipso facto* it was impermissible for the current owner to make a profit on the transfer.

It was not entirely clear which "establishment-owned" apartments were subject to the challenged provision. This notion, contained in the former Apartment Law Act 1974 (which remained in force until 1994), was not present in any legislation in force on the date of entry into force of the 2000 Act and apartments which may have been subject to enfranchisement on the basis of this latter Act had already lost their "establishment-owned" apartment status. It was assumed that both new private owners and communes could be the addressees of tenants' claims.

The Commissioner for Citizens' Rights alleged that the challenged provision *de facto* eliminated one of the entitlements inherent in the notion of ownership, i.e. the right to dispose of one's property. Whilst not challenging the decision to vest tenants with the aforementioned claim, the applicant submitted that the realisation of such a claim should be subject to a short time period and that the transfer should not result in the current owner incurring losses. It was submitted, however, that the current statutory solution did not conform to Article 64(1) and (2) (the right to ownership and the principle of equal protection of property rights), read in conjunction with Article 31(3) (the principle of proportionality), of the Constitution.

The City Council of Zduńska Wola made an application concerning the interests of communes, which was considered jointly with that of the Commissioner for Citizens' Rights. This application also cited the following provisions of the Constitution as bases of review: Article 2 (the protection of acquired rights, as stemming from the rule of law principle); Article 20 (the principle of social market economy); Article 21(1) (the principle of protecting ownership); and Article 165(1) (guarantees of ownership and other property rights for communes).

RULING

The challenged provision does not conform to Articles 2, 21(1), 31(3), 64(1), 64(2) and Article 165(1) of the Constitution and is not inconsistent with Article 20 of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. From the rule of law principle, as expressed in Article 2 of the Constitution, stems the obligation for the legislator to comply with the principles of correct legislation, intrinsically linked with the principle of legal certainty, legal security and the protection of citizens' trust in the State and its laws.

2. The aforementioned principles have particular significance in the sphere of human and civil rights and freedoms. The norm expressed in the first sentence of Article 31(3) of the Constitution, whereby any limitations upon the exercise of constitutional rights and freedoms may be imposed "only by statute", signifies more than merely the necessity for the statute to indicate the scope of restriction on constitutional rights and freedoms and requires, furthermore, sufficient specificity whenever a statute interferes in the sphere of such rights and freedoms. For the same reasons that it is impermissible for such matters to be regulated in executive acts, a statutory provision which is so vague and imprecise that it causes uncertainty amongst its addressees as regards their rights and obligations, and leads organs responsible for application of that law to assume the

role of legislator, must be viewed as infringing constitutional requirements. In consequence, where the legislator adopts a legal provision, within the sphere of constitutional rights and freedoms, which exceeds a certain degree of imprecision, this may in itself constitute sufficient grounds for declaring that such a provision does not conform to the Constitution.

3. Any legal provision imposing limitations on the exercise of constitutional rights and freedoms must fulfil certain criteria. First, it must be formulated so as to allow for an unambiguous determination of the subjects whose rights and freedoms are limited and in which circumstances those limitations will apply. Second, the provision must be sufficiently precise, so as to ensure its consistent interpretation and application. Third, the provision must be drafted in such a manner that its scope of application may include only those situations which a reasonable legislator must be presumed to have intended to regulate with the relevant limitations on the exercise of constitutional rights and freedoms.

4. The Constitutional Tribunal entirely concurs with the view expressed in academic writings that the extremely unfortunate wording of the challenged Article 3 of the Transferral of Establishment-Owned Residential Buildings by State Enterprises Amendment Act 2000 constitutes an interference in the sphere of private property (Articles 20, 21 and 64 of the Constitution) and communal property (Article 165(1) of the Constitution) and prevents a clear ascertainment of this provision's scope of application. The Tribunal is not competent to adjudicate on problems concerning the interpretation of statutes. Nevertheless, the identification of such an interpretative ambiguity has considerable significance on the review of the constitutionality of this provision.

5. Whilst adjudicating, the Tribunal takes account of the situation in existence on the date of closure of the hearing (Article 316 § 1 of the Civil Procedure Code, read in conjunction with Article 20 of the Constitutional Tribunal Act). This signifies, in particular, that, in the absence of any established judicial practise on this matter, the Tribunal independently assesses the existence of any ambiguity in the interpretation as well as the scope of such ambiguity, which is significant when assessing the constitutionality of the challenged provision.

6. Regardless of questions concerning the binding force and category of addressees of the Council of Ministers' Resolution no. 147 of 5th November 1991 (concerning principles regarding the legislative technique), the legislator should not blatantly ignore the norms contained within these principles, especially since the correlation between the principles of drafting legal texts and the principles of interpretation thereof means that failure to comply with the former may result in serious difficulties regarding application of such law.

7. When adopting the challenged provision the legislator ignored a series of norms contained in the aforementioned principles, including the prohibition on inserting provisions in an amending Act whose content is beyond the scope of the issues regulated in the amended Act.

8. The legislator has the right to evaluate social developments and is empowered to take legal measures in order to invalidate, also in a special and extraordinary manner, the legal consequences of actions amounting to an infringement of the law or principles of integrity.

9. The limitations imposed by the legislator upon constitutionally guaranteed rights and freedoms should not only be legitimised by their aim (e.g. as indicated above) but must also be necessary for implementation of that aim. The prerequisite of necessity of the restrictions, envisaged by the first sentence of Article 31(3) of the Constitution, signifies inter alia that any provision interfering in the sphere of rights and freedoms should adequately achieve implementation of the constitutionally permissible goals and should create a minimum degree of detriment for the interested persons.

10. The essence of human and civil rights and freedoms, referred to in the second sentence of Article 31(3) and in Article 64(3) of the Constitution concerning ownership, must be understood as the "inviolable core" of every right and freedom. This inviolability consists in the fact that even restrictions which conform to all other constitutional norms may absolutely not impinge upon a certain sphere of constitutionally guaranteed human and civil rights. This sphere is defined by the function of a given right or freedom, specified with due regard for basic constitutional principles.

11. As far as ownership (the most important right protected under Article 64 of the Constitution) is concerned, one may speak of an infringement of its essence when limitations imposed relate to the fundamental rights comprising the content of ownership and to the exercise of the functions that this right should fulfil in the legal system, based on the underlying principles indicated in Article 20 of the Constitution.

12. The essence of the right of ownership consists in granting an owner (or co-owner) the broadest entitlements in respect of their property. The legislator should not create situations whereby a person having only a secondary right to use particular property (in this case the tenant) exerts more influence on the legal status of that property than its owner. This applies not only to private property, as referred to in Articles 20, 21 and 64 of the Constitution, but also to property belonging to units of local self-government, protected under the second sentence of Article 165(1) of the Constitution, since this constitutes an essential guarantee of their autonomy which is, in turn, a precondition for the proper execution of the public tasks assigned to them (Articles 16(2) and 163 of the Constitution).

13. The possibility to dispose of the object of ownership is one of the fundamental and most important elements of the right of ownership. The classical concept of ownership, derived from Roman Law, assumes that an owner may freely transfer their right to another person (*ius disponendi*), not only by means of an act *inter vivos* but also *mortis causa* (cf. Articles 21 and 64(1) and (2) of the Constitution). The right to dispose of property signifies, furthermore, the possibility for an owner to freely maintain ownership of property for as long as they so desire.

14. The challenged provision restricts an owner's freedom to dispose of an apartment in three ways. First, by imposing an absolute obligation on an owner to transfer their ownership right upon submission of an appropriate "application" by an entitled tenant (in essence this concerns the lodging of a claim). Second, by defining the person to whom the owner shall transfer ownership. Third, by rigidly specifying the amount to be paid to the owner in recompense for the loss of the apartment. Thus the challenged provision has the effect of transforming ownership of an apartment into a conditional right (especially in relation to the *sine die* nature of the tenant's claim), whilst limiting the amount of compensation for the transfer of ownership to the tenant to "the pur-

chase price" (without any adjustment) may lead to a substantial material loss on the part of the owner. This constitutes a considerably greater interference as regards the exercise of the right to ownership than other limitations on the freedom to dispose of property envisaged by Polish civil law, such as the right to repurchase and the right of pre-emption. In light of the absence of constitutional justification for such interference, the allegation of infringement of Article 64(1) and (2) of the Constitution is substantiated.

15. As a declaration of fundamental principles, Article 21(1) of the Constitution is more general in its content than Article 64 of the Constitution, which regulates the constitutional protection of property rights in more detail. An infringement of the norms contained in Article 64 is equivalent to non-conformity with Article 21(1).

16. Article 20 of the Constitution does not express a norm capable of serving as an adequate basis of review of the challenged provision.

17. A claim to acquire ownership of an apartment does not follow from Article 75(1) of the Constitution. Furthermore, this provision may not represent the basis for imposing an obligation on the owner of an apartment (a natural person or a non-State legal person) to transfer ownership of the apartment to their tenant. The burden of implementing the obligation placed on public authorities to support citizens in their pursuit of an apartment may not be entirely shifted onto owners of houses and apartments – also, since the fundamental aim of these activities is the extension of existing housing resources.

18. It follows from Article 75(2) of the Constitution that the legislator has a duty to protect every tenant (not only lessees) against the threat of homelessness, as well as to ensure the stability (but not absolute inviolability) of a tenant's lawfully acquired legal title to occupy an apartment. This provision does not, however, constitute a basis for creating a claim to acquire the status of legal owner of such property. Granting tenants a right to decide who is to be the owner of an apartment would contravene the constitutional protection of ownership.

19. Article 76 of the Constitution, above all, authorises the legislator to introduce preventive legal regulation, i.e. regulation precluding the occurrence of phenomena constituting "dishonest market practices" (e.g. when owners charge exorbitant fees or unfairly distribute a property's maintenance costs amongst tenants). It also provides a constitutional basis for imposing sanctions upon those resorting to such practices (e.g. the duty to compensate any losses caused thereby). It does not, however, justify the acquisition of additional benefits by the injured person.

20. The legislator is authorised to define the constitutional notion of "dishonest market practice" (Article 76) in a more concrete fashion, but any assessment as to whether such a practice has occurred in a particular case should, given the existence of any uncertainty or controversy, be based on the circumstances relevant to the particular case and be subject to judicial review.

21. The Constitutional Tribunal is not authorised to supplement the content of the challenged provision with any new elements intended to remove the non-conformity with the Constitution of the norm contained in this provision.

22. Article 191(2) of the Constitution restricts the ability (legitimacy) of the constitutive organs of local self-government units to submit applications to the Constitutional Tribunal where such applications relate exclusively to normative acts concerning matters within the scope of activity of a certain type of unit. Where, however, such a provision is challenged by a unit of local self-government and the scope of application of the provision extends beyond matters within the competences of this type of unit (e.g. it concerns both communal and cooperative apartments), then the *ratione materiae* of review exercised by the Constitutional Tribunal is not limited to the rules applying solely to such units. Conversely, the Tribunal's review should, within the limits specified in Article 66 of the Constitutional Tribunal Act, possess a composite character, since this serves to eliminate provisions which do not conform to legal norms possessing a higher status within the legal system (the so-called objective function – cf. Article 188 points 1-3 of the Constitution) and is not merely aimed at protecting the rights and interests of certain entities or categories (groups) of entities (the so-called subjective function). A restriction of the *ratione materiae* of review may only prove necessary in exceptional situations, e.g. when provisions concerning the legal status of the units of local self-government have been cited by the applicant as the constitutional basis of review.

23. Whilst it is obligatory for the organ having issued the legal act challenged by the application to participate in the hearing before the Constitutional Tribunal (Article 41(1) of the Constitutional Tribunal Act), a failure to fulfil this obligation does not prevent the case from being heard (conclusion derived from Article 60(3)).

Provisions of the Constitution and the Constitutional Tribunal Act

Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 16. […] 2. Local self-government shall participate in the exercise of public power. The substantial part of public duties which local self-government is empowered to discharge by statute shall be done in its own name and under its own responsibility.

Art. 20. A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.

Art. 21. 1. The Republic of Poland shall protect ownership and the right of succession.
2. Expropriation may be allowed solely for public purposes and for just compensation.

Art. 31. […] 3. Any limitation upon the exercise of constitutional freedoms and rights may by imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 64. 1. Everyone shall have the right to ownership, other property rights and the right of succession.
2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.
3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

Art. 75. 1. Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen.
2. Protection of the rights of tenants shall be established by statute.

Art. 76. Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute.

Art. 163. Local self-government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities.

Art. 165. 1. Units of local self-government shall possess legal personality. They shall have rights of ownership and other property rights.

Art. 188. The Constitutional Tribunal shall adjudicate regarding the following matters:

1) the conformity of statutes and international agreements to the Constitution;
2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
4) the conformity to the Constitution of the purposes or activities of political parties;
5) complaints concerning constitutional infringements, as specified in Article 79(1).

Art. 191. 1. The following may make application to the Constitutional Tribunal regarding matters specified in Article 188:

[…]

3) the constitutive organs of units of local self-government;
4) the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations;
5) churches and religious organizations;

[…]

2. The subjects referred to in para. 1 subparas. 3-5, above, may make such application if the normative act relates to matters relevant to the scope of their activity.

CT Act

Art. 20. In relation to cases not regulated in the Act concerning the proceedings before the Tribunal, the provisions of the Code of Civil Procedure shall apply as appropriate.

Art. 41. 1. The participation in the hearing of the organ or the representative of the organ which promulgated the normative act, the subject of the application, shall be obligatory.

Art. 60. 1. The hearing shall not be held before the expiry of 14 days from the date of delivery of the notice about the date thereof, except the case specified in Article 2, paragraph 3 which shall be examined by the Tribunal without delay.

[…]

3. If the participants in the proceedings, whose presence at the hearing is obligatory, or their representatives are in default, the Tribunal may adjourn the hearing and at the same time fix a new date for the hearing. The condition specified in paragraph 1 above shall not apply.