5/1/A/2012

JUDGMENT

of 18 January 2012

Ref. No. Kp 5/09*

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 – 1st Judge Rapporteur
Mirosław Granat
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Małgorzata Pyziak-Szafnicka
Stanisław Rymar
Piotr Tuleja
Sławomira Wronkowska-Jaśkiewicz – 2nd Judge Rapporteur
Andrzej Wróbel
Marek Zubik,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 18 January 2012, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by the President of the Republic of

* The operative part of the judgment was published on 31 January 2012, in the Official Gazette – *Monitor Polski* (M. P.) of 2012, item 39.

Poland, submitted pursuant to Article 122(3) of the Constitution of the Republic of Poland, to determine the conformity of:

> Article 30 of the Polish Citizenship Act of 2 April 2009, insofar as it expands the scope of premisses that determine the recognition of a foreigner as a Polish citizen, to Article 137 of the Constitution,

adjudicates as follows:

Article 30 of the Polish Citizenship Act of 2 April 2009 is consistent with Article 137 of the Constitution of the Republic of Poland.

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. Pursuant to Article 122(3) of the Constitution "[t]he President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. The President of the Republic shall not refuse to sign a bill which has been judged by the Constitutional Tribunal as conforming to the Constitution". The power to initiate an *a priori* review, also referred to as a preventive review, is solely vested in the President, due to his obligation to ensure observance of the Constitution, on the basis of Article 126(2) of the Constitution. The subject of a preventive review may only be bills adopted by the Sejm and the Senate and subsequently submitted to the President for signature as well as international agreements submitted to the President for ratification, with the proviso that – in accordance with Article 122(3) and (4) as well as Article 133(2) of the Constitution – higher-level norms for such a review may only be the norms set out in the Constitution (cf. the judgment of the Constitutional Tribunal of 16 July 2009, Ref. No. Kp 4/08, OTK ZU No. 7/A/2009, item 112).

In the case where the Constitutional Tribunal rules that certain provisions of an adopted bill are unconstitutional and, at the same time, it adjudicates that the provisions are inseparably connected with the whole bill, the President shall refuse to sign the bill. However, if the Tribunal does not adjudicate that the unconstitutional provisions are inseparably connected with the whole bill, the President shall sign the said bill with the omission of those provisions considered as being in non-conformity to the Constitution or shall return the bill to the Sejm for the purpose of removing the non-conformity (Article 122(4) of the Constitution).

The aim of a preventive constitutional review is to prevent a situation where unconstitutional norms become an element of the system of law, i.e. to avoid the negative consequences ensuing from the fact that norms infringing the Constitution are in force and are applied (see *inter alia* the above-cited judgment of the Constitutional Tribunal of 16 July 2009, Ref. No. Kp 4/08).

While conducting a preventive review, the Constitutional Tribunal is obliged to exercise caution as regards overturning the presumption of the constitutionality of a challenged normative act. The said requirement of caution is not, however, justified by the strong presumption of the constitutionality of legal acts subjected to such a review (indeed, the strength of the said presumption should be considered to be identical in every type of review conducted by the Constitutional Tribunal), but by the fact that, in the case of a preventive review, the Constitutional Tribunal has knowledge only about challenged provisions; naturally, it lacks knowledge as to how the provisions will be interpreted and applied. Apart from situations where the challenged normative act has undeniably been adopted in infringement of the required procedure or when the non-conformity of the challenged norms with the Constitution is obvious, the Tribunal is "(...) obliged to diligently and thoroughly analyse the text of a legal act under assessment (...) [as well as] must (...) exercise considerable caution and predict possible problems that may arise after the entry into force of the said act" (the judgment of the Constitutional Tribunal of 20 November 2002, Ref. No. K 41/02, OTK ZU No. 6/A/2002, item 83).

Referring the above remarks to the present case, the Constitutional Tribunal states that the case has been commenced by the President by submitting the said application pursuant to Article 122(3) of the Constitution. The indicated application meets requirements which determine the admissibility of subjecting a challenged provision to constitutional review. What has been indicated as the subject of the application is Article 30 of the Polish Citizenship Act of 2 April 2009, adopted by the Sejm and the Senate (hereinafter: the Act of 2009). On 6 April 2009, the said Act was submitted to the President for signature by the Marshal of the Sejm. On 27 April 2009, i.e. before the lapse of the time-limit of 21 days, as set out in Article 122(2) of the Constitution, the President – before signing the Act – lodged an application with the Tribunal for it to examine the constitutionality of Article 30, indicating Article 137 of the Constitution as a higher-level norm for the review. It should be added that the Act was not classified as urgent, within the meaning of Article 123(1) of the Constitution, and thus a seven-day time-limit for the President to sign the Act, as provided for in Article 123(3) of the Constitution, was not applicable in this context.

In conclusion, the Constitutional Tribunal states that, due to the fulfilment of the requirements indicated in Article 122(3) of the Constitution, it is admissible to examine the application on its merits.

2. An issue that requires a precise analysis is the subject of the constitutional review in the present case. As an organ of the state acting on the basis of an application submitted by an authorised applicant, the Tribunal is bound by the scope of the application (Article 31(1) and Article 66 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). Not only should the said application indicate a challenged normative act, or part thereof, and the allegation of the non-conformity of the said act to the Constitution, but it should also present the justification for the allegation (Article 32(1) of the Constitutional Tribunal Act). The reconstruction of the application requires taking into account all its elements.

The analysis of the *petitum* of the President's application dated 27 April 2009 as well as the analysis of particular allegations formulated in the statement of reasons for that application seem to suggest that the President challenges a fragment (part) of Article 30 of the Act of 2009. The *petitum* indicates that the subject of the review is Article 30 of the said Act, insofar as it expands the scope of premisses that determine the recognition of a foreigner as a Polish citizen. Since the applicant uses the phrase "expands the scope of premisses", this could mean that he compares Article 30 of the Act of 2009 with a different set of premisses that determine the recognition of a foreigner as a Polish citizen. As it follows from the statement of reasons for the application (pp. 1 and 2), the President makes reference, in that respect, to the Polish Citizenship Act of 15 February 1962 (Journal of Laws - Dz. U. of 2000 No. 28, item 353, as amended; hereinafter: the Act of 1962), which is currently in force, and in particular to those of its provisions which grant a voivode a power to recognise the following persons as Polish citizens: "1) a stateless person, on condition that s/he has resided in Poland for at least 5 years on the basis of a settlement permit, as well as 2) a spouse of a Polish citizen who has been married for at least 3 years and has been awarded a settlement permit in Poland". The following passages from the statement of reasons for the application might also weigh in favour of such reconstruction of the subject of the review: "Therefore, considerable caution should be exercised when expanding the catalogue of cases in which the acquisition of citizenship is determined by a decision of an organ of government administration" (pp. 3 and 4 of the application); "the expansion of the catalogue of premisses on the basis of which a foreigner is recognised as a Polish citizen, provided for in Article 30 of the Polish Citizenship Act of 2 April 2009, means the legislator's departure from treating the legal institution of recognising a foreigner as a Polish citizen as an exception" (p. 5 of the application).

At the same time, it should be noted that although the President does not directly indicate specific provisions of the Act of 1962 which set out the cases of recognising a foreigner as a Polish citizen, the analysis of that Act leads to a conclusion that the applicant means the following: 1) Article 9(1) with the following wording: "A person of undetermined citizenship or a stateless person may be recognised as a Polish citizen on condition that s/he has resided in Poland for at least 5 years on the basis of a settlement permit or the EC long-term residence permit" as well as 2) Article 10(1) with the following wording: "A foreigner who has been granted a settlement permit, the EC long-term residence permit or the right of permanent residence in the Republic of Poland, and who has been married to a Polish citizen for at least 3 years, may acquire Polish citizenship on condition that, within a period of time defined in paragraph 1a, s/he will submit a declaration of will to a proper authority and the authority will issue a positive decision" (at the same time, one should point out – contrary to what the President asserts – that, in the second one of the two cases, we do not, *de lege lata*, deal with the recognition of a foreigner as a Polish citizen, but with a separate institution which makes it possible to acquire Polish citizenship - cf. Article 9 and Article 10 as well as Article 17(1) and (2) of the Act of 1962). Similar, though not identical, premisses which this time consistently refer to the recognition of a foreigner as a Polish citizen are provided for in Article 30(1)(2)(a) and (b) of the Act of 2009, pursuant to which a foreigner shall be recognised as a Polish citizen if s/he is a foreigner who has been residing continuously in the territory of the Republic of Poland for at least 2 years, on the basis of a settlement permit, the EC long-term residence permit or the right of permanent residence, and who: 1) has been married to a Polish citizen for at least 3 years, or 2) is a stateless person. At the same time, it should be noted that the President has not carried out a detailed comparative analysis of the premisses that determine the recognition of a foreigner as a Polish citizen, provided for in the Act of 1962 as well as in the Act of 2009, and thus – even with the assumption that his intention was not to challenge the whole Article 30 of the Act of 2009 – it is impossible to precisely single out the fragments of the provision under consideration which would constitute the subject of the constitutional review.

Due to the consequences of the said lack of precision as regards specifying the subject of the application, when reconstructing the application, one should take into account the essence of the allegations raised by the President. Several arguments presented in the application quite clearly indicate that the interpretation of Article 137 of the Constitution provided by the applicant rules out the existence of a way of acquiring Polish

citizenship in the form of recognising a foreigner as a Polish citizen, which would be an alternative to the presidential prerogative. The President states *inter alia* that: "(...) the legal institution of recognising a foreigner as a Polish citizen, which is of practical significance, leads to the erosion of the President's prerogative. The Constitution explicitly indicates only one way of acquiring citizenship, namely: being granted Polish citizenship by the President (p. 3 of the application). The applicant also maintains that the justification underlying previously binding regulations on the recognition of a foreigner as a Polish citizen has become obsolete. The interpretation of the application in the light of those arguments and also the fact that the representative of the President specified the content of the application more precisely at the hearing allow one to assume that the allegation of unconstitutionality concerns the legal institution of recognising a foreigner as a Polish citizen by the organ of government administration, as it has been provided for in the Act of 2009, i.e. within the scope of all premisses set out in Article 30, the fulfilment of which makes such recognition possible and obligatory. Taking into consideration the established findings, the Constitutional Tribunal assumes that the subject of the review must be whole Article 30 of the Act of 2009.

3. Regardless of disputes as to the nature of citizenship and the evolution the said legal institution has undergone, it is assumed that citizenship involves strong legal ties which bind a certain individual with a given state, i.e. the membership of that individual in the state; the essence of citizenship comprises the entirety of mutual rights and obligations of the individual and the state, as provided for by binding legal norms.

J. Jagielski defines citizenship "as «a legal institution» the essence of which implies the existence of fairly durable legal ties, both in respect of time and space, that bind an individual with a given state and determine the membership of that individual in the community of the state, and which constitute a basis for the emergence of a set of mutual rights and obligations of the individual and the state" (J. Jagielski, *Obywatelstwo polskie. Zagadnienia podstawowe*, Warszawa 1998, p. 20)

Due to the existence of these special legal ties between individuals and a particular state, the following two groups are distinguished: individuals being the citizens of the state; and foreigners – a group which comprises both the citizens of other states as well as stateless persons, i.e. persons who hold no citizenship or whose citizenship is undetermined. The legal situation of citizens and foreigners is different.

An individual who has the status of a citizen constitutes part of a collective entity – the sovereign, participates in shaping its will, enjoys certain freedoms and rights, and has certain obligations, as well as is subject to protection by the state.

The increasing significance of human rights and freedoms as well as the conviction that each individual is entitled to enjoy them, and that they are of primary character with regard to the state, have led to a situation where contemporary constitutions generally guarantee the exercise of constitutional rights and freedoms to all people. This is also the case in Article 37 of the Constitution: "Anyone, being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution. Exemptions from this principle with respect to foreigners shall be specified by statute". The said exceptions are also provided for in the Constitution, which guarantees certain rights only to Polish citizens, including the right to participate in a referendum, presidential elections, as well as elections to the Sejm and the Senate (Article 62), the right to social security (Article 67), and access to health-care services, financed from public funds (Article 68(2)). As a result, persons who are not Polish citizens enjoy all those constitutional rights and freedoms which the Constitution does not reserve solely for Polish citizens, or the exercise of which has not been limited or excluded by statute. The expansion of the scope of rights and obligations which are granted to foreigners undoubtedly affects the assessment of the status of the citizen as the object of aspirations of persons who wish to acquire such status. The elimination of previously numerous restrictions and bans concerning foreigners has strengthened their legal situation and allows them to carry on with their lives in Poland without acquiring citizenship. In particular, this refers to foreigners who are not the citizens of the Members States of the European Union, which guarantees the free movement of persons, goods, services and capital. The said activity may also be conducted by the other foreigners. Pursuant to the provisions of the Act of 13 June 2003 on Foreigners (Journal of Laws - Dz. U. of 2011 No. 264, item 1573, as amended; hereinafter: the Act on Foreigners), foreigners may stay in the territory of Poland, and after being granted a voivode's permission, they may also reside in Poland for a specified period , or they may reside here on the basis of a settlement permit or the EC long-term residence permit. Foreigners that reside in Poland may conduct an economic activity within the limits set out in Article 13 of the Act of 2 July 2004 on the Freedom of Economic Activity (Journal of Laws - Dz. U. of 2010 No. 220, item 1447, as amended) as well as perform work if they meet the requirements specified in Article 87 of the Act of 20 April 2004 on Employment Promotion and Labour Market Institutions (Journal of Laws - Dz. U. of 2008

No. 69, item 415, as amended). In that respect, a possibility of broadly understood life activity in the territory of Poland stops being the main, or even a particularly important, motivation for applying for Polish citizenship.

The fact that Poland acquired the status of a Member State of the European Union on 1 May 2004 in a significant way affected the legal situation of Polish citizens. Article 20(1) of the Treaty on the Functioning of the European Union (*Official Journal C 326, 26/10/2012 P. 57;* hereinafter: the TFEU) provides for EU citizenship: "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship". This entails that both the acquisition and loss of EU citizenship occurs *ex lege* as a consequence of holding or loss of the citizenship of an EU Member State, and thus this means that Polish citizens are EU citizens.

EU citizenship complements the citizenship of an EU Member State and results in the acquisition of a number of rights arising therefrom. The most important rights enjoyed by EU citizens, on the basis of the above-mentioned Treaty and the Charter of Fundamental Rights of the European Union are the following: the right to move and reside freely within the territory of the Member States; the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; the right to petition the European Parliament, to apply to the European Ombudsman, the right to good administration as well as the right of access to documents. The fact that the acquisition of Polish citizenship implies the automatic acquisition of EU citizenship and a catalogue of rights granted to EU citizens undoubtedly increases the attractiveness of Polish citizenship to persons who come from countries that are not EU Member States as well as to stateless persons. If we limit our analysis to the legal consequences of holding Polish citizenship, overlooking the great value of belonging to the community of a state, which is a political, historical, cultural and axiological community, then it will turn out that nowadays the significance of Polish citizenship is set by the above-mentioned two factors: the protection of the Republic of Poland granted to foreigners, a wide range of rights and freedoms granted to them, which considerably diminishes the difference between their legal position and the position

of Polish citizens, as well as the status of an EU citizen, which is related to Polish citizenship.

4.1. In accordance with a universally accepted view, adopted also in international law, regulating issues concerning citizenship, namely the acquisition and renunciation thereof as well as legal effects related thereto, is left at the sovereign discretion of the state (see J. Jagielski, *op.cit.*, p. 21; B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, p. 199). Hence, the content of provisions regulating citizenship as well as a legal form in which various states regulate issues pertaining to citizenship, to a large extent, depend on their history and tradition. Some of them - for instance France, where the legal institution of citizenship appeared for the first time in the French Constitution of 1791 – have, since the Napoleonic Code, regulated the said institution in civil-law provisions. In contemporary times, however, most states have decided to enact a constitutional regulation of citizenship, although the degree of detail varies in those regulations. To mention just a few, such states include: Austria, Belgium, Portugal and Germany, as well as some states from our region, for example: Bulgaria, the Czech Republic, Lithuania, Slovenia, Slovakia and Hungary. Harsh experiences of the latter group of states have led to a situation where their constitutions contain an explicit prohibition against the deprivation of citizenship without the consent of a person concerned.

In Poland, the constitutional regulation of citizenship was included in the Constitution of 1921. It expressed the principle of the *ex lege* acquisition of citizenship by birth to parents being Polish citizens, as well as provided for the granting of citizenship by "an appointed state authority"; with regard to other ways of acquiring or renouncing citizenship, it made reference to statutes. However, from 1935, basic legal acts regulating issues related to citizenship in Poland were statutes, including statutes the application of which was intended only for a specified period and which regulated the extraordinary circumstances of the loss of citizenship. In 1997, there was a return to the constitutional regulation of the legal institution of citizenship, which manifested a vital connection between the status of the citizen and the constitutional status of the individual.

4.2.1. The Constitution of 1997, which is currently in force, contains two articles referring to citizenship: Article 34 and Article 137.

Article 34 of the Constitution comprises two provisions. The first paragraph indicates the ways of acquiring Polish citizenship, whereas the second one expresses the

principle of the long-lasting character of citizenship, which rules out the possibility of losing the status of the citizen against one's own will.

In Article 34(1) of the Constitution, the constitution-maker has provided for the *ex lege* acquisition of citizenship in accordance with the principle of *ius sanguinis*, stipulating that: "Polish citizenship shall be acquired by birth to parents being Polish citizens". In the same provision, in its second sentence, the constitution-maker has provided for other ways of acquiring citizenship, delegating the task of specifying them to the legislator, i.e. the representative of the Nation.

The placement of the two above-mentioned provisions in one paragraph indicates a close relation between the content of each of them. However, the relation is not manifested in the fact that the Constitution authorises the legislator to introduce exceptions to the principle of *ius sanguinis* (cf. the wording of Article 37 of the Constitution) or in the fact that it introduces other circumstances which the legislator is to take into account when specifying "other methods of acquiring Polish citizenship" by statute. In Article 34(1) of the Constitution, we find no verbal expression of such restrictions. On the contrary, the said provision does not comprise any substantive guidelines addressed to the legislator. This characteristic of the Polish constitutional regulation has been pointed out by the scholars of constitutional law (see L. Garlicki, comments on Article 34, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, p. 6), who have at times indicated that it leaves the legislator with a very broad scope of freedom (see B. Banaszak, *op.cit.*, p. 200; as well as R. Balicki, B. Banaszak, *Obywatelstwo polskie w Konstytucji Rzeczypospolitej Polskiej*, [w]: *Dziesięć lat Konstytucji RP*, H. Zięba-Załucka (eds.), E. Gdulewicz, Rzeszów 2007, pp. 9-10).

The relation between the content of the two provisions contained in Article 34(1) of the Constitution is manifested in the fact that Article 34(1) – directly or by reference – regulates constitutionally admissible ways of acquiring citizenship. One of those ways (the acquisition of citizenship in accordance with the principle of *ius sanguinis*) has been categorised as a basic one by the constitution-maker, in the sense that every person who fulfils the requirements set out in the said provision is, pursuant to the Constitution, a Polish citizen, and thus a subject of rights, freedoms and obligations related to that status. Therefore, it should be added that the said way of acquiring citizenship does not have a voluntary character.

In Article 34(1), second sentence, of the Constitution, the constitution-maker has used the phrase "by statute". According to a well-established rule for editing legal texts

and a rule for interpreting them which corresponds to the said rule, this means that the constitution-maker has authorised the legislator to specify other ways of acquiring citizenship than those set out in the Constitution. The lack of such a provision would entail that, in the light of its Article 34(1), first sentence, as well as Article 137, the Constitution would regulate the ways of acquiring Polish citizenship in an exclusive way. Thus, the inclusion of the analysed provision in the text of the Constitution manifests the fact that the constitutional regulation is not exhaustive, and consequently (as intended by the constitution-maker) the ways of acquiring citizenship may also – and at the same time only – be regulated in the form of a statute. It should be added that the analysed provision is not a simple, and also normatively redundant, repetition of the principle which states that a statute may regulate every matter within the limits generally set out for the scope of such a statute in the Constitution. Apart from granting authorisation, the provision imposes a certain restriction on the legislator as to the spectrum of matters he may regulate (see e.g.: L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2011, pp. 130-134; L. Garlicki, M. Zubik, *Ustawa w systemie źródeł prawa*, [in:] *Konstytucyjny system źródeł prawa w praktyce*, A. Szmyt (ed.), Warszawa 2005, p. 55; *Prawo konstytucyjne Rzeczypospolitej Polskiej*, P. Sarnecki (ed.), Warszawa 2008, pp. 56-58). Indeed, the constitution-maker has excluded from statutory regulation the way of acquiring citizenship in accordance with the principle of *ius sanguinis*, explicitly set forth in the Constitution. It should be added that the legislator's freedom is also restricted by the President's power to grant Polish citizenship, mentioned *expressis verbis* in the Constitution and being a prerogative in character, which entails that it is impossible to shape the powers of other state authorities within the scope of issues connected with granting Polish citizenship in an identical or considerably similar way to the powers of the Head of State.

It is worth emphasising that, with regard to the very content of regulations concerning matters related to citizenship, the legislator's freedom is restricted by the visions of the state, of the community of the state as well as of the obligations of the state towards individuals that constitute part thereof, which have been adopted in the Constitution. In particular, the legislator's activity is restricted by the obligation to protect state interests and security, the obligation to respect the person's dignity as well as the requirement of equal treatment and non-discrimination. The scope of the legislator's regulatory freedom is also restricted by international obligations binding the Republic of Poland.

To sum up the above discussion on the scope of the freedom granted to the legislator, who – pursuant to Article 34(1), second sentence, of the Constitution – specifies "other methods of acquiring Polish citizenship", the Tribunal concludes that the said freedom is restricted by the constitutional principle of acquiring citizenship by birth to parents being Polish citizens, the President's constitutional power to grant citizenship, and – as regards the content – numerous provisions of the Constitution which impose various obligations on the legislator, as well as ratified international agreements. However, the legislator's freedom is not restricted by any substantive solutions within the scope of regulating the additional ways of acquiring Polish citizenship, prescribed by the constitution-maker. Within the limits of his freedom, the legislator may rely on the collection of the historically established rules for granting citizenship (the principle of *ius soli* and the recognition of a foreigner as a Polish citizen) or may introduce new legal ways of obtaining citizenship.

4.2.2. The other constitutional provision concerning citizenship is Article 137, pursuant to which: "The President of the Republic shall grant Polish citizenship and shall give consent for renunciation of Polish citizenship". By virtue of norms expressed therein, the President has been authorised to issue two official acts which are considered to be typical representative powers in the context of internal affairs. One of them is an official act of the Head of State, by means of which a new member is included into a political community being the Polish state. The other one is the President's act of giving consent for someone to leave the said community. The declaration of will concerning the renunciation of citizenship made by a person concerned, as referred to in Article 34(2) of the Constitution, as well as the President's consent given for the said person to leave the community of the state, as mentioned in Article 137, are jointly a necessary and sufficient requirement for the effective loss of citizenship.

The power to grant Polish citizenship and the power to give consent to the renunciation thereof are – within the meaning of Article 144(3)(19) of the Constitution – the President's prerogatives, exercised by way of official acts that have legal effects and do not require the countersignature of the Prime Minister, and for which the Head of State is not accountable to the Polish Parliament. The said power is linked with the freedom to exercise it. Indeed, the President has the power to grant citizenship, but s/he is not obliged to do so; the President may grant citizenship, having in mind interests which s/he deems justified, taking into account his/her constitutional duties and the way of fulfilling them indicated in Article 126(3) of the Constitution. The President's power to grant Polish

citizenship is not subject to restrictions pertaining to the acquisition of the said citizenship. Indeed, the Constitution specifies no substantive premisses the fulfilment of which would determine the possibility of granting citizenship by the President (as is the case with regard to the acquisition of citizenship in accordance with the principle of *ius sanguinis*); nor does the Constitution provide for such premisses to be indicated by statute (unlike in the case of other instances of the acquisition of citizenship).

4.3. In Article 34(1) of the Constitution, the constitution-maker has used the phrase ‘to acquire Polish citizenship’ twice; whereas in Article 137, he has used the phrase ‘to grant Polish citizenship’. After considering a relation between the indicated constitutional terms, the Tribunal states that, within the meaning of the Constitution, these terms are not interrelated in a sense that they refer to two diverse ways of obtaining Polish citizenship, set out in the Constitution. Hence, the granting of citizenship may not be regarded as one of the ways of acquiring it. At the same time, this is confirmed by the wording of Article 34(1) of the Constitution, which stipulates that Polish citizenship is acquired by birth to parents being Polish citizens, and other ways of acquiring the said citizenship shall be specified by statute. Indeed, since the acquisition of citizenship, as provided for in the cited provision, takes place only in accordance with the principle of *ius sanguinis* as well as, additionally, in compliance with requirements set out in a statute, whereas the President’s power to grant citizenship directly arises from the Constitution, then the granting of citizenship must be regarded as a way of obtaining the status of the citizen which is independent from the acquisition of citizenship. What needs to be emphasised here is the fact that the acquisition of citizenship, both in accordance with the principle of *ius sanguinis* as well as in the cases specified by statute, constitutes an ordinary way of obtaining Polish citizenship; by contrast, the granting of citizenship by the President constitutes an extraordinary way of the acquisition thereof, with the proviso that none of the provisions of the Constitution assigns one of the ways with a privileged status. The legislator’s freedom to set out additional ways of acquiring citizenship corresponds to the President’s freedom to grant citizenship at his/her discretion, regardless of premisses specified in legal provisions in the context of other ways of obtaining citizenship. However, it should be borne in mind that, when indicating the said additional ways of acquiring citizenship, the legislator may not shape the powers of other organs of the state so that they would emulate the said power of the President.

The above conclusions are also supported with arguments concerning the place where the said provisions have been included in the Constitution; namely, Article 34, which regulates issues related to citizenship, has been placed in chapter II of the Constitution, entitled "The Freedoms, Rights and Obligations of Persons and Citizens". This emphasises the significance of the status of the citizen when it comes to determining the individual's position in the state. By contrast, Article 137 has been placed in chapter V of the Constitution, entitled "The President of the Republic of Poland", among provisions specifying powers vested in the Head of State. It includes a very important power, though one of numerous powers, of the President, i.e. the power to grant Polish citizenship. Thus, issues concerning Polish citizenship have been regulated in the Constitution in two places: primarily in the provision concerning the acquisition of citizenship (Article 34(1)), and moreover in the provision vesting the Head of State with the power to grant citizenship (Article 137). Also, for this reason, the Tribunal has not shared the applicant's view that recognising a foreigner as a Polish citizen - as a statutory form of the acquisition of citizenship - should be perceived as an exception with regard to the legal institution of granting citizenship by the President, which is provided for in the Constitution.

It is worth noting that relations between the term 'the acquisition of citizenship' and 'the granting of citizenship' were ordered differently by Article 88 of the Constitution of 1921, which stated that: "Polish citizenship shall be acquired by: a) birth to parents being Polish citizens, b) being granted citizenship by a competent state authority. Other provisions on Polish citizenship, the acquisition and loss thereof are set by statutes". Indeed, there is no doubt that, in the wording of the said provision, the granting of citizenship was one of the ways of acquiring it. However, the different formulation of provisions on obtaining citizenship in the Constitution which is currently in force has resulted in a change in the said relations, and consequently, as it has already been mentioned, the granting of citizenship by the President may not be regarded as a special – within the meaning of the Constitution – way of acquiring citizenship.

In addition, it should be stressed that, also pursuant to Article 4 and Article 17 of the Act of 2009, the acquisition of Polish citizenship comprises all cases of obtaining the said citizenship, including the granting of citizenship, which means that, in the context of the said Act, the expressions 'the acquisition of citizenship' and 'the granting of citizenship' not only are not mutually exclusive, but the former takes precedence over the latter. However, the fact that the analysed terms in the challenged Act are used in a different way than in the Constitution does not affect relations between them at the

constitutional level. Indeed, there is no doubt that the Constitution may not be interpreted by means of statutes, which implies *inter alia* the autonomy of constitutional terms.

There are numerous differences between the constitutional acquisition of citizenship in accordance with the principle of *ius sanguinis* as well as the granting of citizenship by the Head of State, provided by the Constitution. As the Tribunal has already stated, the basic one amounts to the fact that every person born to parents being Polish citizens becomes – as provided for in the Constitution – a Polish citizen (Article 34(1), first sentence, of the Constitution), whereas the granting of citizenship depends on the discretionary decision of the President, and a person concerned has no right to acquire the status of the citizen in that way.

Apart from the two ways of acquiring citizenship, which are regulated by the Constitution, Article 34(1), second sentence, of the Constitution authorises the legislator to indicate other situations where the acquisition of Polish citizenship will take place.

However, doubts may arise here as to whether the said provision should be understood as one containing solely the above-mentioned authorisation or – as it has been assumed in the doctrine (see L. Garlicki, comments on Article 34, *Konstytucja*..., p. 6) – also an obligation which the legislator would fulfil if he specified at least one more way of acquiring citizenship; yet, resolving this issue is of no significance for the assessment of constitutionality of the challenged regulation. The said provision of the Constitution, due to the fact that it has been included in the chapter regulating the rights, freedoms and obligations of persons and citizens, next to such principles as the inherent and inalienable dignity of the person as well as his/her freedom and equality, indirectly manifests the contemporary intention of particular states to adopt legal solutions that implement the policy of avoiding statelessness, and by means of obtained citizenship – they guarantee state protection to the individual. At the same time, this supports the above conclusions that, with regards to specifying "other methods of acquiring Polish citizenship", the Constitution does not impose any direct restrictions on the legislator, and in particular does not require that they should be linked with the constitutional principle of *ius sanguinis*. When regulating issues related to citizenship, the Constitution does not refer to the term 'nation', which evokes ethnic connotations. Also, the said provision does not require that the President's participation be ensured as regards obtaining citizenship in the ways provided by statute.

To sum up this part of the discussion, the Tribunal again emphasises that, for obvious reasons, the granting of citizenship by the President – as a separate legal

institution shaped by the Constitution – does not constitute the acquisition of citizenship, and in particular "other methods of acquiring Polish citizenship", referred to in Article 34(1), second sentence, of the Constitution. Acting on the basis of the said provision, the legislator is authorised to specify other ways of acquiring citizenship than those provided for in the Constitution. Such a way may be, although does not have to be, the recognition of a foreigner as a Polish citizen, carried out by an organ of government administration when the foreigner fulfils certain requirements. Therefore, there is no doubt that – as in the case of granting Polish citizenship – every way of acquiring citizenship provided for in the Constitution or specified by a relevant statute brings about the same legal effects, namely: it results in obtaining the status of Polish citizen.

5. As it has been established, pursuant to Article 34(1), second sentence, of the Constitution, the constitution-maker has authorised the legislator to specify the ways of acquiring Polish citizenship which differ from those indicated in the Constitution. In compliance with the said authorisation, the said "other methods of acquiring Polish citizenship" are currently regulated by the following two statutes: the Act of 1962 and the Repatriation Act of 9 November 2000 (Journal of Laws - Dz. U. of 2004 No. 53, item 532, as amended; hereinafter: the Repatriation Act).

The Act of 1962 provides for the *ex lege* acquisition of citizenship in the cases specified therein (e.g. by birth to parents who are both Polish citizens, as well as when one of parents is a Polish citizen and the other parent is either unknown, or his/her citizenship is undetermined, or s/he is a stateless person), by filing a declaration of will, which is then accepted by way of a decision issued by a voivode or consul, as well as by recognising a foreigner as a Polish citizen by a voivode. Moreover, the said Act also contains provisions on the granting of citizenship by the President. By contrast, the Repatriation Act regulates the *ex lege* acquisition of citizenship at the moment of crossing the border by a person of Polish decent who is arriving in Poland on the basis of a national visa for the purpose of repatriation, as well as the acquisition of citizenship by a person of Polish decent recognised as a repatriate when a decision on recognition becomes final. Thus, pursuant to binding legal provisions, Polish citizenship may be obtained on the basis of the Constitution in the following ways, which is also confirmed in statutory regulations: in accordance with the principle of *ius sanguinis* and when it is granted by the President; as well as it may be obtained on the basis of statutes: in accordance with principles complementing the principle of *ius sanguinis*, by filing a declaration of will about one's

willingness to take on citizenship, and the acceptance of the said declaration by a state authority, in the case of the recognition of a foreigner as a Polish citizen, as well as in the course of repatriation, and in the case of recognising a foreigner as a repatriate. Consequently, the possibility of obtaining citizenship *ex lege* is provided for in the Constitution as well as by statute. The said two types of normative acts also provide for assigning the status of the citizen in a secondary way, i.e. on the basis of a decision of a competent authority.

5.1. The binding Act of 1962, despite numerous amendments made thereto, no longer addresses contemporary challenges, such as: the large scale of migration; multiple citizenship; frequent marriages between Polish citizens and foreigners, and the related issue of the change of citizenship by the other spouse, the citizenship of children born to couples where one spouse is not a Polish citizen; moreover, the Act does not resolve a number of "historical issues", e.g. the issue of Polish citizenship in the context of persons who have lost citizenship against their will. Under the rule of the Constitution of 1997, a bill on Polish citizenship was drafted and its entry into force was planned for 1 January 2001, but it did not become binding due to the discontinuation of the legislative proceedings after the Senate had presented its amendments. Later on, work on a new bill was also carried out in the Chancellery of the President, but it did not result in the introduction of legislation. Hence, the Act of 2009 was awaited for a long time, and its authors aimed at the comprehensive regulation of issues concerning citizenship. In its Article 4, the said Act enumerates all legal ways of obtaining Polish citizenship, namely: acquiring citizenship *ex lege*, being granted citizenship, being recognised as a citizen and having one's status of the citizen restored; it overlooks only those ways of obtaining citizenship which have been regulated in the Repatriation Act. The basic forms of obtaining citizenship, i.e. *ex lege* acquisition in accordance with the principle of *ius sanguinis* as well as being granted citizenship by the President, have been specified by the Constitution; the others are provided for in the Act of 2009, in accordance with the authorisation expressed in Article 34(1), second sentence, of the Constitution; whereas the *ex lege* acquisition of citizenship due to repatriation as well as in the case of recognising a foreigner as a repatriate are still regulated by the Repatriation Act.

The solutions adopted in the challenged Act are generally consistent with the provisions of the signed, but not-yet-ratified, European Convention on Nationality; as regards obtaining and losing citizenship, they rely on earlier regulations. Significant

changes concern two cases: a different way of regulating the already existing institution of recognising a foreigner as a citizen as well as the first-time introduction of the legal institution of restoring citizenship. In the President's opinion, doubts as to constitutionality arise with regard to the legal institution of recognising a foreigner as a Polish citizen, which has been regulated anew. However, no doubts arise in the context of the other ways of obtaining citizenship that have been regulated in the Act of 2009. At the same time, the President's application is based on the assumption that the said recognition in the form provided for in the Act of 1962 remains consistent with the Constitution, despite the fact that – similarly to the granting of citizenship – it is a discretionary act pursuant to the said regulation.

Thus, the subject of the review in the case considered by the Tribunal is Article 30 of the Act of 2009, which regulates the legal institution of acquiring citizenship by being recognised as a citizen, and the higher-level norm for the review is Article 137 of the Constitution, which vests the power to grant citizenship in the President. The constitutional issue in the present case amounts to the question whether the statutory institution of recognising a foreigner as a citizen is identical to the legal institution of granting citizenship, or whether the former is sufficiently similar to the latter so that one may state that the former infringes the exclusive power of the Head of State as regards Polish citizenship.

5.2. The recognition of a foreigner as a Polish citizen, done by way of an administrative decision, is a legal institution that has had a long tradition in Polish law, although the way it was regulated in various statutes differed considerably. It was introduced by the Act of 20 January 1920 on Citizenship in the Polish State (Journal of Laws of the Republic of Poland - Dz. U. R. P. No. 7, item 44, as amended; hereinafter: the Act of 1920) in the early years of the Second Republic of Poland. That form of the acquisition of citizenship was also provided for in the Polish Citizenship Act of 8 January 1951 (Journal of Laws - Dz. U. No. 4, item 25; hereinafter: the Act of 1951), and at present it is preserved by the binding Act of 1962. Thus, the recognition of a foreigner as a Polish citizen has been one of the ways of acquiring Polish citizenship by means of an individual act issued by a public authority. As it has been pointed out a number of times, the said institution is also provided for in the Act of 2009, challenged by the President.

The existence and form of the said legal institution are justified by various reasons, depending on what purposes the legal institution is to serve in specific historical

circumstances; however, the reasons always include pragmatic ones: the recognition of a foreigner as a Polish citizen is, in practice, a convenient way to acquire Polish citizenship by a person who meets requirements set by statute.

The recognition of a foreigner as a Polish citizen, as provided for in the Act of 1920, was to regulate the legal status of Poles (persons of Polish decent) who were returning to their Homeland, restored as an independent state, as well as the legal status of persons who had been living in the territory of the new Republic of Poland for many years. Due to the emerging state and the emerging category of citizenship related thereto, the said legal institution was primarily aimed at confirming the readiness of vast numbers of people – who had had no possibility of being Polish citizens before – to be part of the new state. In those circumstances, the recognition of a foreigner as a Polish citizen had a peculiar character; namely, it was not so much an act of including a foreigner into the community of citizens as it was an act of establishing the said community. This was reflected in the language of the Act, which included the following phrases: "Polish citizenship serves every person (...) who (...)" or "the citizens of other countries who are of Polish decent shall be recognised as Polish citizens". The said recognition construed this way was distinguished from the act of granting citizenship "upon request of a person who wished to obtain it".

By contrast, the legal institution of recognising a foreigner as a Polish citizen, as set out in the Act of 1951, was intended to regulate the citizenship of persons who had permanently resided in Poland since at least 9 May 1945 and had no specific citizenship. Apart from the recognition of a foreigner as a Polish citizen, the said Act also provided for obtaining Polish citizenship by being granted the said citizenship.

The two indicated statutes, providing for the said recognition as a form of acquiring citizenship, aimed at sorting out issues pertaining to the status of the citizen after the WW I and WW II, which had brought about serious political and territorial changes, had resulted in the emergence of new states, and had triggered the process of large-scale migration. At that time, the legal institution of recognising a foreigner as a Polish citizen was used for sorting out issues related to citizenship after historical cataclysms.

The above-mentioned reasons for the recognition of a foreigner as a Polish citizen have lost their significance and are merely historical in character (see W. Ramus, *Instytucje prawa o obywatelstwie polskim*, Warszawa 1980, p. 165). As the Polish state and the community of its citizens became well-established, the legal institution of recognising a foreigner as a Polish citizen was regulated in a narrow way in the Act of 1962. If we

consider that the case of obtaining Polish citizenship by foreigners residing in Poland and being married to a Polish citizen has not *de lege lata* been taken into account within the scope of the said legal institution and falls under a different legal system, then it turns out that the said institution currently refers only to persons who have no citizenship and to persons whose citizenship is undetermined, provided that for at least 5 years they have resided in Poland on the basis of a settlement permit or the EC long-term residence permit. Both above-mentioned solutions are intended to facilitate obtaining Polish citizenship by persons having families with Polish citizens and to implement the policy of avoiding statelessness.

The Act which has raised the President's doubts provides for the recognition of a foreigner as a Polish citizen in a different way than the binding Act of 1962, as it considerably expands the catalogue of cases where such recognition will take place as well as eliminates the discretionary character of the said legal institution. Pursuant to challenged Article 30 of the Act of 2009, "[r]ecognition of a foreigner as a Polish citizen can take place in relation to:

1) a foreigner who has been residing continuously in the Polish territory for at least 3 years on the basis of a settlement permit, the EC long-term residence permit or the right of permanent residence, who has a stable and regular source of income in Poland as well as who has a legal title to dwelling premises;

2) a foreigner who has been residing continuously in the Polish territory for at least 2 years on the basis of a settlement permit, the EC long-term residence permit or the right of permanent residence, and who:

(a) has been married to a Polish citizen for at least 3 years or

(b) has no citizenship;

3) a foreigner who has been residing continuously in the Polish territory for at least 2 years on the basis of a settlement permit, obtained in connection with having a refugee status granted in the Republic of Poland;

4) an underage foreigner whose one parent is a Polish citizen and who has been residing in the Polish territory on the basis of a settlement permit, the EC long-term residence permit or the right of permanent residence, and where the second parent who does not have Polish citizenship has agreed to this recognition;

5) an underage foreigner whose at least one parent has had his/her Polish citizenship restored, if the underage foreigner resides in the Polish territory on the basis of a settlement permit, the EC long-term residence permit or the right of permanent residence,

and where the second parent who does not have Polish citizenship has agreed to this recognition;

6) a foreigner who has been residing continuously and legally in the Polish territory for at least 10 years and who meets all the following conditions:

a) s/he has been granted a settlement permit, the EC long-term residence permit or the right of permanent residence,

b) s/he has a stable and regular source of income in Poland as well as a legal title to dwelling premises;

7) a foreigner who has been residing continuously in the Polish territory for at least 2 years on the basis of a settlement permit, obtained in connection with his/her Polish decent".

Particular cases of recognising a foreigner as a Polish citizen have been conditioned on the fulfilment of specified premisses. The precise determination of some of them requires making reference to other normative acts. In particular, it is vital to specify what persons may be granted a settlement permit, the EC long-term residence permit or the right of permanent residence as well as a refugee status.

Pursuant to Article 64(1) of the Act on Foreigners, a settlement permit is granted to a foreigner who: 1) is underage, was born in Poland, and whose parent is a foreigner who has been granted a settlement permit; 2) is a spouse of a Polish citizen and was married for at least 3 years before filing the application, and provided that, directly before filing the application, s/he continuously resided in Poland for at least 2 years on the basis of a residence permit issued for a specified period; 3) directly before filing the application, continuously resided in Poland for a period no shorter than 10 years on the basis of a permit for a tolerated stay granted pursuant to Article 97(1)(1) or Article 97(1)(1a) or Article 97(2) of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (Journal of Laws - Dz. U. of 2009 No. 189, item 1472, as amended; hereinafter: The Act on Granting Protection), or for a period of 5 years due to obtaining a refugee status or being granted additional protection; 4) is a child of a Polish citizen and remains subject to his/her parental authority.

By contrast, the EC long-term residence permit is granted in accordance with Article 65(1) of the Act on Foreigners - with a few exceptions set out in Article 65(2) of the said Act - to a foreigner who, directly before filing the application, resided in Poland for at least 5 years, if s/he has: 1) a stable and regular source of income, which is sufficient to provide for him/her and his/her dependent family members; 2) health insurance or a

document certifying the coverage of medical costs in the territory of the Republic of Poland by an insurer.

The right of permanent residence is regulated by the Act of 14 July 2006 on the entry into, residence in and exit from the Republic of Poland of citizens of the EU Member States and their family members (Journal of Laws - Dz. U. No. 144, item 1043, as amended). Pursuant to that Act, the right of permanent residence after the lapse of the period of 5 years of continuous residence in the territory of the Republic of Poland is, in principle, acquired by EU citizens (Article 42) and their family members who fulfil certain requirements (Article 43 and Article 44).

The right of permanent residence can be granted, before the lapse of the 5-year period, to persons who: 1) were employed or self-employed and who - at the time when they stopped working or stopped conducting their economic activity which they had carried out in their own name and on their own behalf - reached the retirement age referred to in Polish legal provisions on old-age pensions, or who stopped working to go on early retirement, if prior to that, for a period of 12 months, the said persons had worked or conducted their economic activity which they had carried out in their own name and on their own behalf in the territory of the Republic of Poland and had resided in the territory of the Republic of Poland continuously for the period of more than 3 years; 2) were employed or self-employed and who ceased to work or to conduct their economic activity, which they had carried out in their own name and on their own behalf in the said territory, due to their permanent inability to perform work, provided that the said person had resided in the territory of the Republic of Poland continuously for more than 2 years; 3) are employed or self-employed, and who - after the period of 3 years of continuous residence and work or economic activity which they had carried out in their own name and on their own behalf, performs work or conducts economic activity in their own name and on their own behalf in another Member State, while still residing in the territory of the Republic of Poland or returning there at least once a week (Article 45(1)). This also refers to family members of those persons (Article 46). Residence within the territory of the Republic of Poland is considered to be continuous if intervals during the period of residence do not exceed the total of 6 months in a year; by contrast, the said residence is not considered interrupted if a given person leaves Poland due to: 1) compulsory military service or 2) a serious personal situation – and in particular pregnancy, labour, an illness, studies, work training and posting – which requires staying abroad, provided that the said period does not exceed subsequent 12 months (Article 47(1) and (2)).

The status of a refugee is regulated by the Act on Granting Protection. Pursuant to its Article 13(1), the said status is granted to a foreigner if, due to a justified fear of persecution in the country of origin on the grounds of race, religion, nationality, political convictions or membership in a certain social group, s/he may not or does not want to receive protection of the said country. The status of a refugee is also granted to a child born in the territory of Poland whose parent is the said foreigner (Article 13(2)).

Thus, when assessing the requirements for a foreigner to be recognised as a Polish citizen, set out in Article 30(1) of the Act of 2009, one may not overlook the circumstances that the fulfilment of the requirements will also depend on the compliance with other requirements specified in other provisions which are binding in Polish law and which considerably narrow down the group of persons who are eligible to obtain Polish citizenship in this way.

Additionally, it should be borne in mind that, within the meaning of Article 30(2) of the Act of 2009, a foreigner applying to be recognised as a Polish citizen, except for an underage foreigner referred to in Article 30(1)(4) and Article 30(1)(5), is obliged to have an official certificate to confirm his/her command of Polish, as mentioned in Article 11a of the Act of 7 October 1999 on the Polish Language (Journal of Laws - Dz. U. of 2011 No. 43, item 224, as amended), a certificate confirming that the said person has finished a school in the Republic of Poland, or a certificate of finishing a school abroad where the language of tuition was Polish.

By contrast, Article 30(3) of the Act of 2009 stipulates that, in order to determine whether a foreigner has been residing continuously in the territory of the Republic of Poland or not, Article 64(4) of the Act on Foreigners is applied accordingly, pursuant to which residence in the territory of Poland is regarded as continuous when no interval was longer than 6 months and together the intervals did not exceed the period of 10 months within required periods, unless an interval was caused by:
1) fulfilling work duties or working outside the territory of the Republic of Poland, on the basis of a contract signed with an employer whose registered office is in the territory of the Republic of Poland; 2) accompanying one’s spouse who is fulfilling his/her duties or working in the circumstances set out in point 1; 3) medical treatment undergone by the foreigner.

When analysing Article 30 of the Act of 2009, it is clearly visible that the legislator has provided for several premisses which were not known before in the context of recognising a foreigner as a citizen, in particular such as the continuous legal residence

of a foreigner in the territory of Poland for a set period. The said solution was discussed many times in the course of parliamentary work on the bill which was to become the said Act. However, no unified stance was proposed. During the debate, doubts were raised as to the constitutionality of the solutions. Also, the substantive construct of the recognition of a foreigner as a Polish citizen was challenged, namely because: 1) the Act expanded the category of persons who might apply for Polish citizenship; 2) when the statutory premisses were fulfilled, a voivode was obliged to recognise a foreigner as a Polish citizen; 3) the procedure for recognising a foreigner as a Polish citizen did not provide for the participation of the President; 4) as an administrative act, the act of recognising a foreigner as a Polish citizen was not sufficiently solemn, which might undermine the significance of the citizenship itself. With regard to the conformity to the Constitution of the statutory regulation of the legal institution of recognising a foreigner as a Polish citizen, it was argued that the said institution might be "competition" to the President's prerogative to grant citizenship, although, at the same time, the said reservations were not raised as regards such ways of obtaining citizenship as the acquisition thereof due to repatriation or in the case of being recognised as a repatriate as well as with regard to a completely new institution of restoring citizenship, which were the ways of obtaining Polish citizenship regulated by statute,, but were not explicitly provided for in the Constitution.

During the debate, two conclusions were striking, namely that: doubts as to constitutionality were not raised by the legal institution of the said recognition as such, which had been known to the binding law, but by the way it had been constructed in the Act of 2009 as well as that in such a context it was better to give up on the said legal institution, as the President's exercise of his/her prerogative to grant citizenship guaranteed the said inclusion of new persons into the community of the state.

Ultimately, it has been adopted in the challenged Act that a foreigner is recognised as a Polish citizen by way of an administrative decision, issued by a voivode who is competent to do so in a given location, upon the application submitted by the foreigner in the cases enumerated in the Act. This decision has a non-discretionary character, since the voivode is obliged to issue the decision when the foreigner meets the requirements confirming his/her actual links with Poland, as set out in the indicated Act. Refusal to recognise a foreigner as a Polish citizen may only occur when the acquisition of citizenship would pose a threat to the defence or security of the state, or to the protection of security and the public order, which constitutes the sole evaluative criterion provided for in the context of the recognition of a foreigner as a Polish citizen (Article 31(2) of the Act of

2009). A final decision on the recognition of a foreigner as a Polish citizen is subject to judicial review. The *ratio legis* underlying the said solution is the intention to devise a predictable procedure for acquiring Polish citizenship, which entails that a person applying for the acquisition of the said citizenship is provided with clear requirements set out by the legislator. At the same time, the legislator provides a clearer prospect for obtaining the status of the citizen if the person fulfils the said requirements. A person who wishes to spend his/her life in Poland may take action to meet the requirements. In addition, the voivode's obligation to recognise a foreigner who meets the requirements set out by statute as a Polish citizen corresponds to the right of the person who fulfils the requirements to be recognised as a citizen.

The solution adopted in Article 30 of the Act of 2009, which provides for the acquisition of citizenship by way of a decision issued by the organs of public administration, is known in many countries nowadays, for instance, in Austria, France, Spain, Germany, Switzerland or Italy. Also, there is a clear tendency that decisions in the cases discussed above should be taken by the organs of public authority which have relevant competence to confirm the degree of integration of a given foreigner with the community in which s/he lives. Among the countries from our region, only Russia has maintained a centralised form of granting citizenship by a decision of a public authority; decisions concerning citizenship are reserved for the President of the Russian Federation.

5.3. The challenged Act of 2009 also introduces certain modifications into the legal institution of granting Polish citizenship by the President. Article 137 of the Constitution, which authorises the President to grant citizenship, makes no reference to a statute, but there is a well-established view in the doctrine of Polish constitutional law, in accordance with which a statute should indicate requirements that must be met by a foreigner applying for citizenship and should set out a procedure for the granting of Polish citizenship by the President, as well as a procedure for giving consent to the renunciation of the citizenship (see P. Sarnecki, comments on Article 137, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, p. 1; L. Garlicki, comments on Article 34, *Konstytucja*..., p. 6).

During the period of the Second Republic, Polish citizenship was granted by the Minister of the Interior, after obtaining information in that regard from a commune where a given person lived, as well as upon receiving an opinion of the competent organ of general administration. Citizenship was granted "on request of a person willing to acquire it" if

s/he met requirements specified by statute, which included an unblemished reputation, residence in the territory of Poland for a period of at least 10 years as well as a command of Polish.

Under the rule of the Act of 1951, the granting of Polish citizenship was a discretionary act issued by the Council of the State. Pursuant to the Act of 1962, which is currently in force, citizenship is granted upon an application filed by a foreigner and depends on the fulfilment of the requirement of residence in the territory of Poland for a period of at least 5 years, on the basis of a settlement permit, the EC long-term residence permit or the right of permanent residence. In particularly justified cases, it is possible to depart from the fulfilment of the said requirement. Similar requirements were provided for in the subsequent versions of the Act, i.e. a certain period of residence in the territory of the People's Republic of Poland and then in the Republic of Poland. Citizenship was granted by an act issued by the Council of the State or by the President. Therefore, one may conclude that, in the Polish tradition, the granting of citizenship is an individual act issued by a competent minister or the Head of State, after specific requirements have been fulfilled by an applicant; however, it is always a discretionary act.

The Act of 2009 takes over the provision from the binding regulations which stipulates that citizenship is granted to a foreigner upon application. At the same time, it indicates requirements which are to be met by the said application, as well as information and documents that are to be attached to the application; also, it regulates a procedure for the examination of the application, including actions taken by various organs of public authority, consultation with certain organs of public authority, as well as the form and content of the act of granting Polish citizenship and of notification that citizenship will not be granted. The fulfilment of obligations to obtain information about a person applying for Polish citizenship - which are imposed by the Act on particular state authorities, namely the minister who is competent within the scope of internal affairs, the Chief of Polish Police, the Head of the Internal Security Agency or a voivode – serves providing the President with material that is indispensable for taking a decision about granting the said citizenship. However, at every stage of the procedure, the President may request the application to be referred to him/her and may resolve the issue in his/her discretion (Article 24). The said solution, apart from numerous others discussed below, reflects the autonomy of the President's decision and indicates the auxiliary character of the other state authorities in the course of the procedure for granting citizenship.

The Act of 2009 departs from a correlation between the admissibility of granting Polish citizenship and the fulfilment of certain requirements (e.g. residence in the territory of Poland), which is fully justified in the light of the current constitutional regulation. At the same time, the solution adopted in the Act under discussion confirms the stance that granting citizenship is solely up to the President, and that determination in such a case is discretionary in character. Also, the said conclusion is justified by other arguments. The Act of 2009 does not provide for any legal effects of an appeal against the President's decisions concerning citizenship, although – in accordance with a well-established view – it is admissible to re-apply for citizenship. Also, the Act does not require the President to justify his/her decision in that regard. What is more, it provides for the primacy of the legal institution of granting citizenship over the statutory ways of acquiring citizenship: the recognition of a foreigner as a Polish citizen or the restoration of citizenship. Indeed, in its Article 23, it stipulates that filing an application for Polish citizenship to be granted to a foreigner results in the discontinuation of pending proceedings to recognise him/her as a Polish citizen or to restore his/her citizenship.

Thus, the Act of 2009 reinforces the view expressed in the resolution of 9 November 1998, ref. no. OPS 4/98 (ONSA No. 1/1999, item 6), in which the Supreme Administrative Court stated that: "when issuing a legal act concerning the granting of Polish citizenship, the President of the Republic of Poland (...), acted as the Head of State, standing for the majesty of the State, the sovereignty thereof, the fully discretionary power of the State as regards the inclusion of a foreigner into the community of Polish citizens". Moreover, the said Act confirms the earlier view that the President's determination may not be appealed against in the context of granting Polish citizenship or refusal to grant it.

The legal institution of granting citizenship was developed during the period of the French Revolution. It was intended as an official way of including a foreigner into the community of the state, in recognition of his/her outstanding service to that community. The Resolution of the French National Assembly of 26 August 1792 stipulated that people who served the cause of freedom with their writings or bravery should not be regarded as foreigners by the nation that owes its freedom to their enlightened minds and valour (W. Ramus, *op.cit.*, p. 166). That form of secondary acquisition of citizenship, together with the provisions of the Napoleonic Code, was adopted in many European states and became a model for the contemporary notion of the granting of citizenship. It is characterised by the official form of including a foreigner into the community of the state, where the said foreigner does not come from the said state and does not need to be bound

by any actual ties with that state. The act of granting citizenship - devised this way, issued by the highest authorities of the state, having a unilateral character and legal effects - despite the evolution it has undergone, differs from the act of recognising a foreigner as a citizen. Granting citizenship refers in particular to persons whose decent is not related to the new homeland. By contrast, what is characteristic of the recognition of a foreigner as a citizen is an element of identification or confirmation of previously existing special and actual ties which bind the said foreigner with the community of the state to which s/he is to be admitted. The existence of such ties is also required in the context of other ways of acquiring citizenship such as the acquisition by way of repatriation or the restoration of citizenship, which - similarly to the legal institution of recognising a foreigner as a citizen - require confirmation of the existence of the said ties.

5.4. The granting of Polish citizenship by the President is not an act that is issued too frequently. During the years 1990-2010, the President accepted 22 000 persons into the community of Polish citizens; at the same time, it may be noted that the number of persons to whom Polish citizenship was granted was comparable during particular terms of presidential office and averaged around 5 500 per term.

According to the information provided by the Minister of the Interior and Administration (the letter of 8 November 2011, ref. no. DOiR.I.620-14-/11-PW), during the years 1999-2011, the President granted Polish citizenship to 15 661 persons; by contrast, competent public authorities (voivodes and, during the period from 1 January 1999 until 30 June 2001, also the governors of poviats (Pl. *starosta*)) issued 6 455 decisions concerning the recognition of a foreigner as a Polish citizen as well as regarding the acceptance of the declaration about the acquisition of citizenship as filed by a foreigner being a spouse of a Polish citizen, out of which 6 143 were positive decisions.

6. In conclusion, the Constitutional Tribunal states that the legal institution of granting Polish citizenship by the President and the legal institution of recognising a foreigner as a Polish citizen by way of an administrative decision issued by a voivode are two constitutionally admissible ways of obtaining the said citizenship. The power to grant citizenship is reserved solely for the President, since - in accordance with the Constitution – it constitutes his/her prerogative. By contrast, the recognition of a foreigner as a Polish citizen is a way of acquiring citizenship, which is admissible in the light of the Constitution, on condition that it is introduced by statute. The said requirement has been

fulfilled in the present case. By categorising the power to grant citizenship as a prerogative of the Head of State, the Constitution rules out that the said power may be vested in any other authority. Also, it rules out the statutory ways of acquiring citizenship which would be competitive, in legal terms, with the act of granting citizenship. The regulation of the Constitution and the challenged Act of 2009 present the granting of citizenship as an act of the Head of State which is solemn, has legal effects and is unilateral, and by means of which a foreigner is included into the community of the Polish state. The President's decision in that regard is discretionary in character. The Constitution and the Act of 2009 do not stipulate that the granting of citizenship is dependent on the fulfilment of any requirements, nor do they provide for the possibility of appealing against the President's decision. Thus, in Polish law, the legal institution of grating citizenship takes into account all the characteristics of the acquisition of citizenship, and – in comparison with the binding Act of 1962 – the provisions of the challenged Act enhance the said characteristics, preserving the basic attribute of a prerogative, i.e. its discretionary character.

By contrast, the recognition of a foreigner as a Polish citizen is an act which is non-discretionary in character. The voivode's power to recognise a foreigner as a Polish citizen is exercised solely when all requirements (premisses) indicated by statute are fulfilled.

A decision concerning the granting of citizenship does not have to take into account actual ties binding a foreigner with his/her new homeland, whereas the recognition of a foreigner as a Polish citizen is admissible only when such ties exist and are manifested, for instance, in Polish decent, marital relations or family ties with Polish citizens, continuous residence in the territory of Poland, or an officially certified command of Polish. The act of recognising a foreigner as a Polish citizen only confirms the existence of such ties. In addition, it should be remembered that a final decision on the recognition of a foreigner as a Polish citizen is subject to review by an independent court.

Consequently, this entails that granting Polish citizenship and recognising a foreigner as a Polish citizen are two significantly different ways of obtaining the said citizenship. Recognising a foreigner as a Polish citizen would prove more competitive than granting citizenship only if – similarly to granting citizenship – it was conceived of as a discretionary act, or if requirements the fulfilment of which determined the said recognition were illusory in character. Such reservations may not be formulated in relation to the Act of 2009, for the premisses of recognising a foreigner as a Polish citizen have

been enumerated therein and are objective in character. The said opinion is not impacted by the fact that mutual relations between the legal institution of recognising a foreigner as a Polish citizen and the legal institution of granting citizenship have undergone modifications in Polish law: beginning with the broad scope of recognising foreigners as Polish citizens in the Act of 1920, which – as the Tribunal has already noted – made it possible to establish the community of citizens of the state that was being restored at the time; then the narrow rendition of the granting of citizenship in the Act of 1962; and finally, the solution adopted in the challenged Act of 2009, which categorises the recognition of a foreigner as a Polish citizen as a non-discretionary act, being however admissible in many situations. The way of regulating the legal institution of recognising a foreigner as a Polish citizen in the Act of 1962 led to a situation where the legal institution of granting citizenship has in practice become a basic form of obtaining citizenship by way of an individual act of the organ of public authority. However, this does not determine that other ways of obtaining citizenship are exceptional in character in the light of the Constitution, when juxtaposed with the act of granting citizenship.

Also, the presented view is not changed by the fact that there may be situations where the President's motive to grant citizenship will be one of the premisses set out in Article 30 of the challenged Act; nor is it changed by the fact that the granting of citizenship is the President's prerogative. When categorising the President's power to grant citizenship as a prerogative, the Constitution emphasises the exclusiveness of the power vested in the Head of State with regard to granting citizenship; however, in its Article 34(1), second sentence, it does not rule out other ways of acquiring citizenship, also by way of an individual act of the organ of state authority. The Constitution does not require the President's participation in the procedure for issuing such an act.

7. The legal institution of recognising a foreigner as a Polish citizen, as regulated in Article 30 of the Act of 2009, manifests an open-ended concept of Polish citizenship. However, the subject of discussion may be the question whether the premisses of acquiring citizenship in the form under examination have been aptly selected, and in particular whether the requirements set for persons who apply for Polish citizenship are not too lenient. Such doubt arises in particular in the context of the previously made assertion about the scale of contemporary migration and the guarantee of numerous rights and freedoms provided to foreigners "who are under the jurisdiction of the Republic of Poland". Indeed, nowadays citizenship primarily means membership in a political,

historical, cultural and axiological community, which implies not only the catalogue of rights, but also the obligation to care and take responsibility for the common good, which the Republic of Poland should be to all its citizens.

The intention to make the premisses of recognising a foreigner as a Polish citizen as verifiable as possible has led to the situation where there are no premisses which would, in every single case, allow for assessing the degree of integration of a foreigner with the Polish community and culture and the degree to which s/he has internalised the constitutional values, which is usually provided for in the legislation of contemporary states. However, these are issues the resolution of which is primarily linked with the adoption of such a concept of the recognition of a foreigner as a Polish citizen, and not any other, and the choice of the said concept falls within the scope of the legislator's freedom - as the Tribunal has stressed a number of times - which is restricted by general constitutional principles and values. If one wanted to assess the presented doubts concerning the requirements the fulfilment of which determined the recognition of a foreigner as a Polish citizen, it should be noted that the applicant has indicated no higher-level norms for such a review (e.g. the Preamble, Article 1 and Article 2 of the Constitution, which specify the Republic of Poland as the common good of all citizens and a democratic state ruled by law, or its Article 5, which requires that the national heritage should be safeguarded).

In addition, it may not be ruled out that the entry into force of the new legal solutions will increase the number of cases of recognising foreigners as Polish citizens in relation to the acts of granting citizenship. Yet, in no way will this, in a legal sense, decrease the President's power to issue legally effective and discretionary acts of granting Polish citizenship.

Taking the above into consideration, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Zbigniew Cieślak
to the judgment of the Constitutional Tribunal
of 18 January 2012, Ref. No. Kp 5/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended) as well as § 46 of the Annex to the Resolution of the General Assembly of Judges of the Constitutional Tribunal on the Regulations of the Tribunal, dated 3 October 2006 (Official Gazette of the Republic of Poland – *Monitor Polski* (M. P. No. 72, item 720), I submit this dissenting opinion to the judgment of the Constitutional Tribunal of 18 January 2012, ref. no. Kp 5/09.

1. The main reason for submitting this dissenting opinion is the fact that I have assumed a different interpretation of the provisions of the Constitution that constitute the higher-level norms for the review with regard to challenged Article 30 of the Polish Citizenship Act (hereinafter: the Act of 2009) than the Tribunal. According to the complainant, the said higher-level norm for the review is Article 137 of the Constitution, which – as the Constitutional Tribunal has pointed out – must be interpreted in close conjunction with Article 34(1) of the Constitution. Only all those provisions of the Constitution (and thus Article 34(1) in conjunction with Article 137) make it possible to provide a proper answer to the question about the constitutionality of the statutory regulation which authorises a voivode to recognise a foreigner as a Polish citizen in the cases set out in Article 30 of the Act of 2009.

2. By word of introduction, in Article 34(1) of the Constitution, the constitution-maker has addressed the requirement of comprehensibility and succinctness of legal provisions. Indeed, placing two short sentences in one paragraph suggests that it comprises one thought which only for the sake of clarity has not been expressed in one complex sentence (cf. G. Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych. Komentarz*, Warszawa 2010, p. 364). Consequently, this emphasises close textual relations between the first and second sentence of Article 34(1) of the Constitution, which are even stronger than those between sentences that express an autonomous (single) thought, and formulated in separate paragraphs of the same article. In other words, in the case of Article 34(1) of the

Constitution, the result of the interpretation of the second sentence of Article 34(1) of the Constitution is to a large extent determined by the content of the first sentence.

The above assumption leads to a different conclusion than the one formulated in the statement of reasons for the judgment in the case Kp 5/09, in which the Constitutional Tribunal established that Article 34(1) of the Constitution on its own contains no substantive guidelines (does not set out solutions as to the merits) which would require the legislator to take into consideration "other methods of acquiring Polish citizenship". The restriction on the regulatory freedom is quite considerable, which follows from the necessity to determine the meaning of the phrase "other methods of acquiring Polish citizenship" in the context of the first sentence of Article 34(1) of the Constitution. What should be the consequence of that is the assumption that the scope of authorisation for the legislator provided for in Article 34(1), second sentence, of the Constitution comprises merely additional substantive premisses of the acquisition of citizenship, which by its nature (as clearly indicated by Article 34(1) of the Constitution) occurs *ex lege.* By contrast, the above authorisation does not provide for the possibility of introducing an additional procedure for (way of) acquiring Polish citizenship, e.g. on the basis of an administrative act issued by a voivode.

What should be regarded as another restriction on the legislator's freedom is the requirement to take into account a circumstance that the Constitution sets forth the premiss of acquiring citizenship "by birth to parents being Polish citizens". In my view, this is the way in which the constitution-maker aims at specifying what constitutes "the relations which bind a certain individual with a given state" (J. Jagielski, *Obywatelstwo polskie. Zagadnienia podstawowe*, Warszawa 1998, p. 9). Therefore, the statutory requirements for the acquisition of Polish citizenship may not entirely overlook the issue of decent (relation by blood), and such premisses which do not take them into account should be introduced only in cases that are justified by extraordinary circumstances (e.g. Article 14(1)(2), Article 15 or Article 16 of the Act of 2009).

3. The assumed interpretation of the phrase "other methods of acquiring Polish citizenship" is additionally confirmed by the content of Article 137 of the Constitution, which provides for the prerogative of the President of the Republic of Poland as regards granting Polish citizenship. The said provision specifies in a negative way the formulation used in Article 34(1), second sentence, of the Constitution. Indeed, it has introduced the second way of obtaining citizenship (apart from *ex lege* acquisition), at the same time

emphasising that there is a clear distinction in the light of the Constitution between (*ex lege*) acquisition and the naturalisation of a foreigner, which remains solely at the discretion of the President of Republic of Poland. Thus, the constitution-maker clearly declares that the authorisation for the legislator which is provided for in Article 34(1), second sentence, of the Constitution solely comprises the specification of additional requirements of the *ex lege* acquisition of citizenship, leaving outside its scope the possibility of authorising any organ of public authority to naturalise a foreigner. Article 137 of the Constitution provides for a solution which is separate with regard to its scope, and hence it is consistent with the one introduced in Article 34(1) of the Constitution. The last-mentioned provision provides for the *ex lege* acquisition of citizenship (the premisses may be specify in more detail by the legislator), whereas Article 137 of the Constitution stipulates that citizenship is granted by the President of the Republic of Poland, unambiguously determining that this is the only state authority that is competent with regard to the naturalisation of a foreigner.

4. The above-indicated regulation implements the fundamental rule for establishing the system of public authority, namely the principle of the separation of powers of particular organs of public authority. In particular, this implies the legislator's obligation to clearly and precisely separate actions assigned to particular organs of public authority. From the point of view of praxeology, this amounts to a requirement that one case should be assigned to only one authority and that there should be no case that would be left unassigned. The consequence of the fact that the said principle has been binding is, in the present case, the power of the President (as the only authority) to issue an act which results in the acquisition of Polish citizenship by a foreigner. The *ratio legis* behind entrusting that particular authority with "the classic attribute of the Head of State" (cf. R. Mojak, "Model prezydentury w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. (regulacja konstytucyjna roli ustrojowej Prezydenta RP a praktyka politycznoustrojowa realizacji modelu ustrojowego prezydentury" [in:] *System rządów Rzeczypospolitej Polskiej. Założenia konstytucyjne a praktyka ustrojowa*, M. Grzybowski (ed.), Warszawa 2006, p. 44) constitutes an intention to emphasise the significance of naturalisation which is carried out (and should be carried out) by "the supreme representative of the Republic of Poland" (cf. J. Jagielski, *op.cit.*, p. 170) as well as the fact that the significance of the presidential office is a proper guarantee that the act of granting Polish citizenship will not be random, even despite the lack of statutory requirements for

the issue thereof (cf. W. Ramus, *Instytucje prawa o obywatelstwie polskim*, Warszawa 1980, p. 174).

At the same time, one should note that the significance of the principle of separation of powers vested in the organs of public authority has been particularly underlined here as, within the scope of granting Polish citizenship, we deal with a prerogative of the Polish President, i.e. a power to issue acts which do not require, for their validity, the signature of the Prime Minister, in a way which is not at all limited by other state authorities or organs of the state (see A. Rakowska, "Prerogatywy prezydenta w Konstytucji RP z 2 kwietnia 1997 r.", [in:] *Instytucja prezydenta*, T. Mołdawa, J. Szymanek (eds.), Warszawa 2010, pp. 65-66). In other words, the legislator's intention was to emphasise the fact that the Polish President as the only authority has the power to determine the inclusion of a foreigner into the community of citizens of the Polish state.

5. The discussion carried out so far may be summed up in the following way: in Article 34(1) and Article 137 of the Constitution, the constitution-maker reveals the intention to assign the act of granting Polish citizenship with adequate importance (great significance), which is manifested in the necessity to have close relations with the Polish state (the so-called *ius sanguinis*) as well as the unique systemic position of the authority determining the inclusion of a foreigner into the community of Polish citizens. The said assumption should have been taken into account also by the legislator who exercises the authorisation granted to him in Article 34(1), second sentence, of the Constitution.

The necessity to formulate the above requirements and the fulfilment thereof is, moreover, related to the issue which occurs during the process of European integration, namely the preservation of the national identity of the Polish state, construed as specific culture, language, customs, religion, history and convictions or cherished values (cf. K. Wójtowicz, Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej, *Przegląd Sejmowy* Issue No. 4/2010, pp. 12-13) as well as a sense of community with all compatriots. At the same time, we deal with the issue of fulfilling the obligations towards the common good on the part of public authorities, which arise from the Preamble and Article 1 of the Constitution (cf. the dissenting opinion of Judge Z. Cieślak to the judgment of the Constitutional Tribunal of 20 April 2011, Ref. No. Kp 7/09, OTK ZU No. 3/A/2011, item 26)

6. What should also affect the positive assessment of the presented interpretations of the constitutional determinants of statutory ways and premisses of acquiring Polish citizenship is "certain reinterpretation of the role of citizenship as a distinguishing status of the individual in the state" (J. Jagielski, "Z problematyki obywatelstwa oraz prawa o obywatelstwie polskim (kilka refleksji na kanwie nowej ustawy o obywatelstwie polskim)", [in:] *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi*, J. Supernat (ed.), Wrocław 2009, p. 221). The development of the system of human rights leads to a situation where more and more freedoms and rights are addressed to each person that is under the jurisdiction of a given state. Therefore, the category of citizenship, which specifies the affiliation of a given person with the state as well as the ensuing catalogue of rights and obligations, loses its significance in the context of the situation (status) of the said person in the state, since most of the rights may also be enjoyed by a foreigner. In other words, from the perspective of human rights and fundamental freedoms, citizenship has lost its value as a criterion for distinguishing "a national" from the point of view the state from " a foreigner". Thus, to some extent, sharp boundaries are being blurred as regards differentiating between the status of the citizen and the status of the foreigner; this juxtaposition has so far constituted the main identifier of the role played by the legal institution of citizenship (see *ibidem*). In my view, this justifies the admissibility of adopting the interpretation of Article 34(1) of the Constitution in conjunction with Article 137 of the Constitution, without prejudice from the point of view of the status of the foreigner regarded as equal to a Polish citizen, within the scope of human rights, which are subject to extensive protection.

7. In conclusion, in my view, Article 30 of the Act of 2009 is inconsistent with Article 137 of the Constitution, since the constitutional authorisation granted to the legislator comprises only the introduction of – additional with regard to the Constitution – requirements of *ex lege* acquisition of Polish citizenship, by ruling out, on the basis of Article 137 of the Constitution, the admissibility of vesting any other public authority or organ of public authority (and in particular a voivode) with a power that would result in the naturalisation of foreigners.

For the above reasons, I have considered it my obligation to submit this dissenting opinion to the judgment of the Constitutional Tribunal of 18 January 2012 in the case Kp 5/09.

Dissenting opinion
of Judge Maria Gintowt-Jankowicz
to the Judgment of the Constitutional Tribunal
of 18 January 2012, Ref. No. Kp 5/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit this dissenting opinion to the judgment of the Constitutional Tribunal in the case Kp 5/09, which rules that Article 30 of the Polish Citizenship Act of 2 April 2009 (hereinafter: the Act of 2009) is consistent with Article 137 of the Constitution.

I believe that Article 30 of the Act of 2009 is inconsistent with Article 137 of the Constitution.

1. When assessing the constitutionality of Article 30 of the Act of 2009, challenged by the President, one should have taken account of the basic systemic circumstances which should determine solutions in an ordinary statute. Not in all countries contemporary citizenship is a constitutional matter. By contrast, the Polish constitution-maker elevates that institution to the constitutional level, and shapes its fundamental content.

The challenged Act of 2009 constitutes the first legal act which regulates the acquisition of Polish citizenship after the political transformation and under the rule of the Constitution of 1997, which is currently in force, thus replacing the previous Polish Citizenship Act that was enacted nearly 50 years ago. The first task of the legislator was to carefully adjust the statutory regulation to that constitutional and normative content.

Moreover, one should expect a comprehensive regulation of Polish citizenship which takes account of the up-to-date significance of that citizenship both in its political as well as legal aspects. What still remains at the discretion of the state – being the EU Member State – is the regulation of citizenship related thereto; however, one should not overlook the fact that the acquisition of citizenship in one of the EU Member States automatically entails acquiring EU citizenship with all the consequences of that fact. Holding EU citizenship provides for a possibility of exercising a number of rights arising therefrom, such as: the right to move and reside freely within the territory of the Member

States; voting rights in municipal and European elections, regardless of the fact in which Member State a given person resides or the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union.

That primary character of Polish citizenship increases the responsibility of the authority that is competent to grant citizenship.

2. The issue of the acquisition and renunciation of Polish citizenship has been jointly regulated in two provisions of the Constitution – Article 34, included in chapter II concerning the freedoms, rights and obligations of persons and citizens, as well as Article 137, included in chapter V regarding the systemic position of the President of the Republic of Poland. The separation of the two provisions follows from the structure of the Constitution, but – what is obvious – does not imply that each of them is autonomous. In the legal literature on the subject of citizenship, analyses that have been carried out generally indicate a close normative relation between both indicated provisions of the Constitution (see *inter alia* L. Garlicki, comments on Article 34*, Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. III, p. 6, J. Sandorski, "Obywatelstwo polskie a członkostwo Polski w Unii Europejskiej", [in:] *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, L. Wiśniewski (ed.), Warszawa 2006, p. 60).

In the *petitum* of the application, the President indicated only Article 137 of the Constitution as a higher-level norm for the review, thus emphasising his main allegation: the non-compliance of broadly understood recognition of a foreigner as a citizen with the prerogative of the President. However, it unambiguously follows from the statement of reasons for the application, which constitutes an integral part thereof, that the President refers the challenged provisions of the Act of 2009 to the entire constitutional regulation of Polish citizenship, hence also to Article 34(1).

The complementary character of Article 137 and Article 34 of the Constitution, as regards the acquisition of citizenship is analogous in the case of renunciation thereof. Article 34(2) of the Constitution, stipulating that a Polish citizen shall not lose Polish citizenship except by renunciation thereof, does not specify all the elements of the situation. Indeed, pursuant to Article 137 of the Constitution, it is the President that shall grant Polish citizenship and shall give consent for the renunciation of Polish citizenship. Therefore, Article 137 of the Constitution indicates that the declaration of will by a person concerned does not suffice for the loss of citizenship to be effective. It is also necessary to

obtain the consent of the President. Taking account only of the content of Article 34(2) of the Constitution may lead to an erroneous conclusion that the submission of the declaration of will, by the person concerned, results in the loss of Polish citizenship. Article 137 of the Constitution may not be regarded merely as a provision governing competence, unrelated to Article 34 of the Constitution, both as regards the acquisition and renunciation of Polish citizenship. Also, in the doctrine of law, it is indicated that the legal basis of official acts issued by the President with regard to matters regarding citizenship comprises both Article 34 and Article 137 of the Constitution (see R. Mojak, "Model prezydentury w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. (regulacja konstytucyjna roli ustrojowej Prezydenta RP a praktyka polityczno ustrojowa realizacji modelu ustrojowego prezydentury)" [in:] *System rządów RP, Założenia konstytucyjne a praktyka ustrojowa*, M. Grzybowski (ed.), Warszawa 2006, p. 46).

3. In the present case, the identification of the constitutional issue primarily amounts to the interpretation of Article 34 of the Constitution, which stipulates that: "Polish citizenship shall be acquired by birth to parents being Polish citizens. Other methods of acquiring Polish citizenship shall be specified by statute".

The second sentence of the said provision expresses constitutional authorisation to issue an ordinary statute which is to specify other methods of acquiring Polish citizenship than those set out in the first sentence.

Therefore, it is necessary to answer the question what method or methods of acquiring Polish citizenship the constitution-maker specified in the first sentence of Article 34(1) of the Constitution. Indeed, an ordinary statute may not go beyond the scope of that general, yet clearly formulated, constitutional restriction. The first sentence specifies a substantive premiss of acquiring Polish citizenship, namely by birth to parents being Polish citizens, i.e. on the basis of the principle of *ius sanguinis*. That traditional, and generally accepted, method of acquiring citizenship applies *ex lege* (and to be more precise: by the Constitution). Thus, the acquisition of Polish citizenship on the basis of Article 34(1) of the Constitution does not require an individual decision by a state authority that is competent in this regard. Therefore, the constitutional authorisation to specify other methods of acquiring Polish citizenship by statute, which would require a given organ of the state to provide a decision in every single case, i.e. to grant citizenship.

The rules on legal drafting, which have been well-established and binding for a long time, weigh in favour of such an interpretation. Indeed, if a given paragraph

(Article 34(1) of the Constitution) contains two sentences, then the content of the second sentence must remain closely related to the previous (first) one. With regard to the said provision, the interpretative requirement, reflecting the above-mentioned principle is additionally strengthened by the syntax of the second sentence of Article 34(1) of the Constitution, which begins with the words: "Other methods (...)"; that is others than those set out in the previous sentence, but substantively consistent with them.

Thus, there is no doubt that the ordinary legislator has the constitutional basis for indicating other substantive premisses of the *ex lege* acquisition of Polish citizenship. Such statutory solutions may concern the acquisition of Polish citizenship: in accordance with the principle of *ius sanguinis*, but only with one parent being Polish; on the basis of the principle of *ius soli,* in the case of children who have been found or born in the territory of the Republic of Poland, and whose parents are either unknown or stateless; or by repatriation. Therefore, the legislator has a possibility of specifying the methods of acquiring Polish citizenship *ex lege*, as long as he does not violate the basic constitutional principle of acquiring Polish citizenship by birth to parents being Polish citizens (Article 34(1) of the Constitution).

Due to the above circumstances, I cannot agree with the statement put forward by the Tribunal that Article 34(1) of the Constitution contains the unlimited authorisation for the ordinary legislator as regards specifying the methods of acquiring Polish citizenship, as well as other methods than the *ex lege* acquisition. The acquisition of citizenship may have a primary character – it takes place by birth (in accordance with the principle of *ius sanguinis* or the principle of *ius soli*) or it may be secondary in character – when it occurs by naturalisation – i.e. subsequent determination of the acquisition of Polish citizenship in an individual case. The constitutional regulation makes reference to that distinction established in law. Article 34(1) of the Constitution sets out the basic principle of the primary acquisition of Polish citizenship, whereas Article 137 regulates the issue of naturalisation. Therefore, there is no doubt that the limits of the statutory regulation concerning other methods of acquiring Polish citizenship than the constitutional ones are jointly set out in Article 34 and Article 137 of the Constitution.

Article 137 of the Constitution stipulates that "the President of the Republic shall grant Polish citizenship and shall give consent for renunciation of Polish citizenship". Thus, the Constitution unambiguously reserves that form of naturalisation for the scope of powers of the President. Hence, the legislator enjoys limited freedom as regards setting out - pursuant to Article 34(1), second sentence, of the Constitution - other methods of

acquiring Polish citizenship. The said freedom is undoubtedly restricted by the President's power with regard to granting Polish citizenship.

4. Assumed as a starting point, the Tribunal's argument that Article 34 and Article 137 of the Constitution are autonomous with regard to each other leads the Tribunal to state that, in the present case, the constitutional issue amounts to assessing whether the recognition of a foreigner as a Polish citizen by a voivode is identical to the constitutionally regulated act of granting the said citizenship by the President.

However, in my view, the essence of the allegation in the present case is not the method of acquiring Polish citizenship by recognition and granting, but the narrowing down of the scope, or as the applicant puts it – the erosion of the President's prerogative. In other words, it is to provide an answer to the following question: does the normative content of Article 137 of the Constitution, taking account of Article 34(1), provide for the possibility of decentralising the power vested in the Head of State and delegating it to each of voivodes, by ordinary statute. The degree of differentiating between various methods of granting Polish citizenship and methods of recognising a foreigner as a Polish citizen is less significant, as each of them brings about the same result, namely the acquisition of Polish citizenship. Therefore, the introduction of differences between the above-mentioned methods does not suffice to justify the conformity of Article 30 of the Act of 2009 to the Constitution.

What is vital for the assessment of the constitutionality of the provision challenged by the President in his application is the well-established and unchallenged line of jurisprudence of the Constitutional Tribunal, derived from Article 8(1) of the Constitution, which states that the Constitution is the supreme law of the Republic of Poland. The constitutional regulation is primary in character with regard to all the other normative acts. All other norms in the legal system must not only be consistent - i.e. not inconsistent - with regulations contained in the Constitution, but they must also constitute a coherent whole with the Constitution. This implies a necessity to create regulations, by the legislator, which will implement the provisions of the Constitution in the fullest way. Thus, the Constitutional Tribunal points out that it is necessary to regard constitutional terms and solutions as autonomous, i.e. firstly, as those that delineate the framework for ordinary legislation and, secondly, as constituting the basis of interpretation of provisions enacted by the legislator. In the judgment of 27 April 2005, ref. no. P 1/05 (OTK ZU No. 4/A/2005, item 42), when summing up the hitherto views, the Constitutional Tribunal

indicated that: “When interpreting constitutional concepts, definitions formulated in legal acts of a subordinate order cannot have meanings that bind and determine the mode of their interpretation. As it has many times been stressed in the case law of the Tribunal, constitutional concepts are autonomous in relation to the legislation in force”.

The adoption of different procedures for granting Polish citizenship and for recognising a foreigner as a Polish citizen, including the premisses which determine the said recognition in Article 30, may not determine that such a solution does not clash with the President’s act of granting Polish citizenship.

Pursuant to Article 137 of the Constitution, it is the President’s power to grant Polish citizenship as well as to give consent to the renunciation thereof. These are decisions in individual cases as regards including a particular person into the community of the state. Granting Polish citizenship and giving consent to the renunciation thereof belongs, apart from the power of pardon (Article 139 of the Constitution) as well as the power to confer orders and decorations (Article 138 of the Constitution), to the prerogatives of the President that express the classic attributes of the Head of State, which - unlike systemic powers - do not concern individual official acts issued by the President.

The power to grant Polish citizenship constitutes one of the autonomous powers of the President that do not require the countersignature of the Prime Minister, which are referred to as prerogatives of the President (as stated in Article 144(3)(19) of the Constitution). The classification of granting Polish citizenship as a prerogative of the President does not entail that the premisses and procedure concerning granting Polish citizenship may not be specified by statute. Such a possibility is fully confirmed by Article 126(3) of the Constitution, which stipulates that the President shall exercise his duties within the scope of and in accordance with the principles specified in the Constitution and statutes. Therefore, I share the views that have been formulated in the doctrine of law for many years, namely that it is a statute referred to in Article 34(1), second sentence, of the Constitution, that definitely may, and even should, specify the premisses of granting Polish citizenship by the President and a procedure for it (see P. Sarnecki, comments on Article 137*, Konstytucja Rzeczypospolitej Polskiej. Komentarz,* L. Garlicki (ed.), Vol. I, p. 1; L. Garlicki, comments on Article 34*, Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. III, p. 6).

The possibility of introducing such a regulation is confirmed by solutions concerning a similar prerogative of the President – the exercise of the power of pardon. It is worth noting that, with regard to the power of pardon, the constitutional regulation is

more laconic than in the context of citizenship. Article 139 stipulates that: “The President of the Republic shall have the power of pardon. The power of pardon may not be extended to individuals convicted by the Tribunal of State”. The Constitution does not contain authorisation for the legislator with regard to the power of pardon that would be analogous to the one expressed in Article 34(1), second sentence, of the Constitution. However, this did not constitute an obstacle for the legislator, who has specified, in the Code of Criminal Procedure (chapter 59 – Clemency), both the requirements for a petition for clemency as well as the procedure for examining such petitions, with the participation of courts adjudicating in a given case and the Public Prosecutor-General. In specific cases, courts may discontinue clemency proceedings, deciding not to further examine a given petition for clemency. What guarantees exercising the prerogative of the President is, on the one hand, the possibility of proceedings for the granting of clemency instituted *ex officio*, and - on the other hand - the right to directly lodge a petition for clemency with the President.

The Act of 2009 only partly meets the indicated requirements, as it does not set out the premisses of granting Polish citizenship by the President. By contrast, the legislator has, in great detail, specify the bureaucratic aspect of proceedings for granting Polish citizenship, namely the content of the petition and the procedure for granting Polish citizenship, in which the organs of government administration also participate.

Unlike in the case of the constitutional procedure for granting citizenship by the President, recognising a foreigner as a Polish citizen constitutes a statutory construct. The recognition of a foreigner as a Polish citizen is a special, administrative way of acquiring citizenship and it stems from the regulation adopted in the early years of the Second Republic of Poland. Solutions provided for in statutes on citizenship enacted in 1920 and 1951 were aimed at shaping the community of the state after the First and Second World War.

The Polish Citizenship Act of 15 February 1962 (Journal of Laws - Dz. U. of 2000 No. 28, item 353, as amended; hereinafter: the Act of 1962) provides for the possibility of recognising persons of undetermined citizenship or stateless persons as Polish citizens, on condition that they have resided in Poland for at least 5 years.

It should be pointed out that, in the past, the recognition of a foreigner as a Polish citizen constituted a justified way of acquiring Polish citizenship, the purpose for which was the inclusion of persons of Polish decent into the community of the state. However, for over 30 years the doctrine has indicated that recognising a foreigner as a Polish citizen, as provided for in the Polish Citizenship Act of 1962, is in fact identical with the act of

granting Polish citizenship by the President. This is even more true due to the fact that there are no longer political and social reasons which justify the existence of an additional simplified procedure for naturalisation. Indeed, basic differences between granting Polish citizenship and recognising a foreigner as a Polish citizen have become blurred (see e.g. W. Ramus, *Instytucje prawa o obywatelstwie polskim*, Warszawa 1980, pp. 164-165; J. Jagielski, *Obywatelstwo polskie. Zagadnienia podstawowe,* Warszawa 1998, pp. 92-93). It should be underlined that such allegations were formulated even before the entry into force of the Constitution, which is currently in force. Analogous doubts as to preserving two ways of naturalisation were also raised during legislative work on the Act of 2009.

Despite negative opinions, the Act of 2009 expands the scope of recognising a foreigner as a Polish citizen as well as changes its significance. The scope ratione personae of the premisses set out in Article 30 of the Act of 2009 comprises a majority of foreigners legally residing in the territory of the Republic of Poland, especially on condition that the said person has resided in Poland for a specified period . At the same time, the wording of the statutory regulation introduces the voivode's obligation to recognise a person meeting requirements set out in the Act of 2009 as a Polish citizen, if this does not pose a threat to state security or public order. This leads to the emergence of a certain right to Polish citizenship enjoyed by a foreigner, which was pointed out by the representative of the President at the hearing before the Tribunal. In my view, such formulation is not confirmed by the constitutional regulation. The way the act of granting Polish citizenship is regulated in the Constitution implies the discretionary power of the state as regards a decision on including a foreigner into the community of citizens. A decision in such a case is made autonomously by the President, as the Head of State. The President has a constitutionally guaranteed freedom to grant citizenship, in accordance with the character of his/her power. In the light of the Constitution, a foreigner is not entitled to make claims for Polish citizenship to be granted to him/her. Therefore, statutory solutions may not modify the concepts adopted by the constitution-maker.

5. The line of reasoning I have adopted here does not at all lead to the conclusion that the constitutional regulation of granting Polish citizenship means that the President has a monopoly on all the cases of acquiring Polish citizenship specified by the legislator. Even when assuming the restrictive interpretation of granting Polish citizenship by the President pursuant to Article 137 of the Constitution, one may point out that it undoubtedly

includes the case of acquiring citizenship by a foreigner who does not come from a given state and is not bound by any special ties with that political community.

Granting citizenship constitutes a basic way of naturalisation, being in a strict sense a secondary way of acquiring citizenship, which has a constitutive character. This is also confirmed by the dictionary meaning of the word 'granting', which denotes assigning something, vesting something in somebody, and a change of a situation (see *Słownik języka polskiego*, Vol. 2, Warszawa 1988, p. 244). Granting citizenship constitutes an act which has legal effects and is a unilateral decision concerning the inclusion of a foreigner into the community of a given state, done upon application by an individual who is not a citizen of the state and who expresses willingness to acquire given citizenship. Therefore, it regards those citizens of other states, stateless persons or persons whose citizenship is undetermined in the case of whom there are no special ties with Poland, and especially ties arising from Polish decent of previously lost Polish citizenship. Obviously, the said constitutive character of the act of granting Polish citizenship by the President does not mean that a given foreigner or stateless person might not have actual ties with Poland, such as, for instance, long-term residence in the territory of the Republic of Poland. However, it should be taken into account that the mere residence, in the context of the currently growing freedom of migration may not be regarded as tantamount to the existence of special ties with a given state.

The granting of citizenship does not exhaust the scope of the term 'naturalisation', as a broad interpretation thereof also comprises such constructs as the right of choice, recognition of a foreigner as a citizen and reintegration, which are regarded as naturalisation construed in a broad sense. In those situations, the main difference in the context of granting citizenship is the declaratory character of an individual act, which only confirms the acquisition of citizenship.

An administrative procedure for recognising a foreigner as a Polish citizen would be constitutionally admissible only in the case of the declaratory confirmation of special ties specified by law that an individual has with Poland. In particular, this concerns persons of Polish decent. In the above cases, the acquisition of citizenship takes place as a result of the declaratory statement or confirmation of actual special ties that existed previously i.e. broadly understood origin of one individual from that very state. The said ties in the form of Polish decent determine the fact that we deal with naturalisation in a broad sense, namely: a form of reintegration – a possibility of confirming Polish citizenship by a minor whose parent regained Polish citizenship; a certain aspect of repatriation – a possibility of

confirming Polish citizenship by a minor who permanently resides in the territory of Poland, where one of his/her parents is a Polish citizen; as well as direct naturalisation of a foreigner of Polish decent who has settled and has continuously resided in the territory of Poland.

The procedure for recognising a foreigner as a Polish citizen would also be admissible in the case of foreigners who are spouses of Polish citizens. Although the character of ties binding a person being naturalised does not arise from Polish decent, the fact of starting a family with a Polish citizen and additionally the decision to reside in the territory of Poland results in a situation where a decision about the acquisition of citizenship by such a person is declaratory in character, and not constitutive.

Taking into account the above division of the cases of naturalisation, there is no doubt as to constitutionality in relation with the procedure for the restoration of citizenship in the Act of 2009, in the course of which decisions are issued by the Minister of the Interior.

6. To sum up, I wish to emphasise that the particular character of the present case is determined by the fact that the subject of the case – Polish citizenship – has been elevated by the constitution-maker to the constitutional level and a statutory regulation should respect solutions provided for in the Constitution.

I entirely agree with the description of changes that have been taking place with regard to the legal status of foreigners in Poland and the status of Polish citizenship, presented in the statement of reasons for the judgment. They follow from the international legitimisation of human rights, which has triggered the enhanced legal protection and universal guarantee of fundamental rights, regardless of the fact of holding citizenship. In recent years, the legislator has made it possible to enable foreigners to legally reside in Poland and to take up all types of activity there, including economic activity. Thus, the status of Polish citizen is losing its social and economic significance, and is primarily gaining a political aspect. The acquisition of Polish citizenship by a foreigner, which entails acquiring all the rights and freedoms as well as obligations reserved to a Polish citizen, constitutes accession to the community of the Polish state. Indeed, the acquisition of Polish citizenship results in the inclusion of a person into the nation – the sovereign in which supreme power in the Republic of Poland is vested. Also, it should not be overlooked that, after Poland’s accession to the European Union, the acquisition of Polish

citizenship automatically results in the acquisition of EU citizenship, which implies greater responsibility of an authority determining the said acquisition.

However, I cannot not agree with the Tribunal's conclusion that the solution adopted in the Act of 2009, which restricts the President's power to the advantage of regional organs of government administration is adequate to the current status of citizenship. Although, *prima facie,* one may consider vesting the power to grant citizenship in the President to be anachronistic, however - when juxtaposed with generally outlined up-to-date tendencies - it seems appropriate, as entrusting this power to the Head of State constitutes the constitution-maker's emphasis of the political significance of naturalisation.

The acceptance of the legislator's approach, expressed in the challenged Act of 2009 - which not only maintains, but also considerably expands the existing dualism of the acquisition of citizenship by way of an individual act, namely: granting by the President and recognising by a voivode – would, in my opinion, require a prior and well-thought-out amendment to the Constitution.

When adjudicating on the conformity of the challenged provisions to the Constitution, the Constitutional Tribunal legitimises a paradoxical solution, namely: the Republic of Poland assigns much less significance to the acquisition of Polish citizenship than to the renunciation thereof.

In conclusion, I share the President's doubts raised in the statement of reasons for the application, being considerably more far-reaching than those presented in the *petitum*, namely that the entire procedure for recognising a foreigner as a Polish citizen by a voivode, as set out in the Act of 2009, is inconsistent with the constitutional regulation of citizenship.

For the above reasons, I have decided to submit this dissenting opinion.

Dissenting Opinion
of Judge Wojciech Hermeliński
to the judgment of the Constitutional Tribunal
of 18 January 2012, Ref. No. Kp 5/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act) and § 46 of the Annex to the Resolution of the General Assembly of Judges of the Constitutional Tribunal on the Regulations of the Tribunal, dated 3 October 2006 (Official Gazette of the Republic of Poland – *Monitor Polski* (M. P. No. 72, item 720), I submit this dissenting opinion to the judgment of the Constitutional Tribunal of 18 January 2012, ref. no. Kp 5/09.

In my opinion, Article 30 of the Polish Citizenship Act of 2 April 2009 (hereinafter: the Polish Citizenship Act) may be regarded as consistent with Article 137 of the Constitution only insofar as it stipulates that foreigners recognised as Polish citizens may be persons of Polish decent, persons whose relatives are Polish citizens, or who are related by blood or affinity to Polish citizens (cf. Article 30(1)(2)(a), Article 30(1)(4), Article 30(1)(5) and Article 30(1)(7) of the Polish Citizenship Act). Within the remaining scope, providing for the naturalisation of persons who have no families in Poland (cf. Article 30(1)(1), Article 30(1)(2)(b), Article 30(1)(3) and Article 30(1)(6)), the said provision considerably restricts the President's power to grant citizenship, and thus it should be deemed inconsistent with Article 137 of the Constitution. In my view, adjudicating on Article 30(2) and (3) of the Polish Citizenship Act is superfluous, as those provisions are auxiliary in character with regard to regulations which I consider to be unconstitutional.

I justify my dissenting opinion in the following way:

I hold the view that the Constitutional Tribunal has presented an erroneous interpretation of Article 34(1) and Article 137 of the Constitution, and - as a result - it has not examined the constitutionality of the challenged provision in a sufficiently thorough manner.

As it follows from the statement of reasons for the judgment, it stems from the assumption adopted by the Constitutional Tribunal that "acquiring" and "granting"

citizenship (cf. Article 34(1) and Article 137 of the Constitution) are two completely separate and equal ways of obtaining citizenship (cf., in particular, part III, point 4.3 of the statement of reasons for the judgment).

The said thesis is partly inconsistent with other findings presented by the Constitutional Tribunal, included in the challenged judgment (cf., in particular, the statement that the acquisition of citizenship in accordance with the principle of *ius sanguinis* (Article 34(1) of the Constitution), due to the fact that it takes place automatically, is "basic" in character with regard to other procedures for obtaining citizenship – point 4.2.1 part III of the statement of reasons for the judgment). In addition, the said thesis has not been sufficiently proved: I am not convinced by either the superficial and laconic linguistic interpretation of Article 34(1) and Article 137 of the Constitution (which amounts to the statement that since the Constitution contains two terms then - for an unknown reason – they must be completely disjunct, or an equally superficial historical interpretation (and, in particular, the fact that the genesis and *ratio legis* of the constitutional regulations have been completely overlooked).

In my opinion, when reconstructing the higher-level norm for the review, attention should have been paid to the aim of Article 34(1) and Article 137 of the Constitution as well as their place within the structure of the Constitution, which suggest that relations between these two provisions should be interpreted differently than this has been done in the judgment under analysis. I hold the view that the first provision has the character of the systemic *lex generalis* – sets out general rules for "acquiring" citizenship (despite appearances, they are not merely substantive rules – the primacy of the principle of *ius sanguinis*, but also procedural rules – the acquisition of citizenship on the basis of the provision takes place *ex lege,* and not thanks to a constitutive individual decision of the organ of the state). The second provision governs only competence – the purpose of which is to grant a certain authority (the President) the power to undertake actions that have legal effects in that regard with the exclusion of other entities ("granting" citizenship), and the said power has the character of a prerogative (i.e. an official act that does not require the countersignature of the Prime Minister and is discretionary in character – cf. Article 144(3) (19) of the Constitution).

The proper determination of constitutional framework of the legal institution of citizenship requires taking into account the principle which states that the Constitution should be applied as a whole – the provisions thereof are equal as regards their binding force, and the application of one of them may not completely rule out the fact that the

others are also in force and may be applied (cf. the judgment of 19 October 2010, Ref. No. P 10/10, OTK ZU No. 8/A/2010, item 78 and the previous rulings cited therein). In my view, juxtaposing Article 34(1) with Article 137 of the Constitution leads to the conclusion that it is "acquiring" citizenship that constitutes a basic constitutional category. Due to the wording of Article 34(1), second sentence, of the Constitution ("A Polish citizen shall not lose Polish citizenship except by renunciation thereof"), I am inclined to conclude that the Constitution does not provide for a closed catalogue of premisses and mechanisms the application of which leads to the acquisition of citizenship (cf. L. Garlicki, comments on Article 34, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (ed.), Vol. III, Warszawa 2003, p. 6), but it explicitly indicates their hierarchy. The basic (and statistically most common) form of the "acquisition" of Polish citizenship is the *ex lege* acquisition thereof by birth to parents being Polish citizens (cf. Article 34(1), first sentence, of the Constitution). However, if a given person does not meet the requirement of *ius sanguinis*, s/he may resort to the other form of the acquisition of citizenship provided for in the Constitution, i.e. s/he may submit an application to be granted Polish citizenship by the President (cf. Article 137 of the Constitution). A fundamental difference between the two procedures consists in the fact that Article 34(1), first sentence, of the Constitution is self-executing in character and may constitute a basis for claims concerning the granting of citizenship (in that sense, it is a source of the subjective right to citizenship), whereas being granted Polish citizenship by the President on the basis of Article 137 of the Constitution is a privilege awarded only to selected persons who apply for naturalisation and who are not subject to judicial review (cf. the resolution of the Supreme Administrative Court of 9 November 1998, Ref. No. OPS 4/98, Lex No. 34538).

I hold the view that by virtue of the authorisation for the legislator provided for in Article 34(1), second sentence, of the Constitution, it is admissible to devise other mechanisms for acquiring citizenship than those provided for in the Constitution. The legislator's freedom in that regard is, however, considerably limited. Possible statutory regulations concerning the acquisition of citizenship should have the following characteristics:

– they should be additional (supplementary) in character in relation to solutions provided for in the Constitution; indeed, they may not result in the marginalisation of the constitutional regulations;

- they may not negate the primacy of the principle of *ius sanguinis* among the premisses of acquiring citizenship (in that sense, solutions that at least indirectly refer thereto will always be more legitimate), as well as they need to take into account other constitutional criteria for membership in the Polish nation, such as common historical and cultural heritage (cf. the Preamble as well as Article 6(2) of the Constitution) or the obligation to remain loyal to the Republic of Poland and to be concerned with the common good (cf. Article 82 of the Constitution) as well as other constitutional principles (e.g. the principle of equality – Article 32 of the Constitution);
- statutory powers vested in other authorities than the President may not be identical with the President's prerogatives, i.e. they may not involve "granting citizenship" within the meaning of Article 137 of the Constitution (the necessity to respect "the special role" of the President in that regard is also emphasised in the doctrine of law – cf. e.g. P. Sarnecki, comment on Article 137 of the Constitution, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* L. Garlicki (ed.), Vol. I, Warszawa 1999, p. 1; R. Piotrowski, "Opinia o projekcie ustawy o obywatelstwie polskim z 13 października 2008 r.", *Opinie i Ekspertyzy Senatu* Issues No. OE-89, p. 1).

Despite the fact that it has a different starting point, the last-mentioned thesis is concurrent with a view that has been presented in the judgment to which I submit this dissenting opinion; namely, the Constitutional Tribunal has underlined that it is inadmissible to grant citizenship in a manner which is "an identical or considerably similar way to the powers of the Head of State" (cf. point 4.2.1 of part III of the statement of reasons for the judgment). However, the said statement has not been properly reflected in the assessment of challenged Article 30 of the Polish Citizenship Act.

Article 30 provides for a few combinations of premisses which make it possible for an administrative authority to "recognise" given persons as Polish citizens. For the purposes of the present case, the beneficiaries of the said Article may be divided into the following two groups:

- the first one comprises persons mentioned in Article 30(1)(2)(a), Article 30(1)(4), Article 30(1)(5) and Article 30(1)(7) of the Polish Citizenship Act, who have been singled out on the basis of family ties with Polish citizens (ranging from Polish decent to close relations by blood or affinity to Polish citizens;
- the other group comprises persons mentioned in Article 30(1)(1), Article 30(1)(2)(b), Article 30(1)(3), Article 30(1)(6) as well as Article 30(3) of the Polish Citizenship Act, who must meet the requirements of legal residence in the territory of the Republic of

Poland for a specified period, have a stable and regular source of income in Poland, hold a legal title to dwelling premises as well as have a command of Polish, which are not set out in the Constitution and are not related to Article 34(1) of the Constitution.

In its judgment, the Constitutional Tribunal disregards the indicated difference between particular paragraphs of Article 30 of the Polish Citizenship Act. Indeed, the Tribunal assumes that when the legislator regulates "other methods of acquiring Polish citizenship" within the meaning of Article 34(1), second sentence, of the Constitution, he is not "directly" restricted by the Constitution, and in particular he has no obligation to introduce principles "connected" to the principle of *ius sanguinis* (cf. part III point 4.3 of the statement of reasons for the judgment). Thus, the Tribunal assumes that the existence of at least symbolic ties with Poland is of no significance when it comes to assessing the constitutionality of the way of acquiring Polish citizenship.

In my view, the said view is fallacious. The identical treatment of all situations regulated in Article 30 of the Polish Citizenship Act and the application thereto of the unified institution of the administrative "recognition of a foreigner as a Polish citizen" constitutes a serious irregularity, for - in breach of the principle of equality (cf. Article 32 of the Constitution) - it requires the same treatment for the subjects of rights and obligations that differ considerably from each other. The phrase "recognition of a foreigner as a Polish citizen" suggests that the action is declaratory in character – that it constitutes official confirmation of actual facts in a way that is objective and independent from the will of subjects concerned – has existed before (cf. the civil-law institution of "the acknowledgment of paternity" – Articles 73-77 of the Act of 25 February 1964 – the Family and Guardianship Code, Journal of Laws - Dz. U. No. 9, item 59, as amended or the constructs of the recognition of states known from international public law – cf. Montevideo Convention on the Rights and Duties of States of 26 December 1933). Unlike the majority of the bench adjudicating in the present case, I hold the view that – since in the light of the Constitution the basic way of acquiring Polish citizenship is by inheriting it from parents (cf. Article 34(1) of the Constitution) – persons who may be "recognised as Polish citizens" are persons who have at least symbolic family ties with Poland. In the present version of the Constitution, it is not admissible to apply the said institution with regard to persons who lack that characteristic – indeed, by definition, one may only "recognise" what already existed at least to a minimal extent.

Obviously, the above statement does not mean that the persons mentioned in Article 30(1)(1), Article 30(1)(2)(b), Article 30(1)(3) and Article 30(1)(6) of the Polish

Citizenship Act may not apply for Polish citizenship on the basis of a different procedure than the one arising from the challenged provisions. Indeed, there are no obstacles to submitting applications for Polish citizenship to be granted by the President (after the consideration of each individual case of every candidate), who may issue a positive decision in that regard, in accordance with Article 137 of the Constitution.

Unlike the majority of the bench adjudicating in the present case, I hold the view that Article 30 of the Polish Citizenship Act, insofar as it provides for the possibility of naturalising persons who have no family ties with Polish citizens, clearly limits the powers of the Head of State. Although the modification of the rules for granting Polish citizenship that has been introduced by that provision does not consist in depriving the President of the right to grant Polish citizenship to persons mentioned in that provision, but is more subtle in character and involves the introduction of partly parallel and competitive procedure (cf. conflict rules arising from Article 35 of the Polish Citizenship Act). The said competitiveness is noticeable in a number of dimensions. Firstly, persons who at present have no choice but apply for the President's decision could, in the future, consider the alternative of resorting to an administrative procedure. Secondly, as the representative of the President stated at the hearing before the Tribunal, the premisses enumerated in Article 30 of the Polish Citizenship Act are the basic factors taken into account by the Head of State when assessing the validity of application for Polish citizenship. Thirdly, also the result of proceedings before the President and administrative proceedings would be the same – the acquisition of Polish citizenship. The said competiveness to a lesser extent occurs with regard to the mode of operation – there is no doubt that the President enjoys greater freedom as regards exercising the prerogative of "granting Polish citizenship" than a voivode in the course of "recognising a foreigner as a Polish citizen" (cf. however Article 126(3) of the Constitution). Yet, it is inapt for the majority of the bench adjudicating in the present case (cf. part III point 6 of the statement of reasons) to assert that the activity of administrative authorities, within the scope of the second mechanism, is entirely related and limited to virtually mechanical verification whether a person applying for naturalisation meet the statutory requirements. Some of the premisses provided for in Article 30 of the Polish Citizenship Act are not strict in character and have not been defined by means of objective criteria (e.g. having a "stable" and "regular" source of income in Poland). Thus, during the assessment thereof there will be an element of administrative discretion, which from the point of view of persons wishing to obtain Polish citizenship is similar to the President's freedom of decision (it results in the total lack of

certainty as to the result of naturalisation proceedings due to the discretion granted to relevant authorities).

As the result of the entry into force of the challenged provision, the granting of Polish citizenship by constitutive acts ("granting Polish citizenship" within the meaning of Article 137 of the Constitution) would become the realm of powers shared by the President and voivodes. Due to the fact that the administrative procedure provided therein is more favourable to persons who apply for naturalisation, the regulation contained in Article 137 of the Constitution would probably be rarely used in practice. What would occur would be certain *desuetude*, as the acquisition of Polish citizenship by way of individual acts of applying the law (regardless of their names) would become the domain of administration, whereas the Head of State would take decisions in that regard only in the case of statistically rare instances, where the application of the administrative procedure would be impossible or premature, or in order to honour persons who have rendered great service to Poland. Such perception of the President's role within the scope of granting Polish citizenship is contrary to the letter and spirit of Article 137 of the Constitution.

Finally, I wish to clearly emphasise that – similarly to the majority of the bench adjudicating in the present case – I recognise that the Act under analysis manifests the intention to simplify and enhance the transparency of the naturalisation procedure, as well as the aim to modernise the legal institution of Polish citizenship and to adjust it to the up-to-date legal and social requirements (including also Poland's membership in the European Union as well as the requirements of the European Convention on Nationality, adopted by the Council of Europe of 6 November 1997). However, this does not change the fact that Article 30(1) of the challenged Act fails a confrontation with the relatively conservative provisions on citizenship included in the Constitution. Thus, the implementation of examined intentions of the legislator should be regarded only on condition that the Constitution will be amended.

Dissenting Opinion
of Judge Marek Kotlinowski
to the judgemnt of the Constitutional Tribunal
of 18 January 2012, Ref. No. Kp 5/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit this dissenting opinion to the judgment of 18 January 2012 issued in the case Kp 5/09.

I share the argumentation presented with regard to the said case in the dissenting opinion submitted by Judge Maria Gintowt-Jankowicz.

Dissenting opinion
of Judge Teresa Liszcz
to the Judgment of the Constitutional Tribunal
of 18 January 2012, Ref. No. Kp 5/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit this dissenting opinion to the judgment of the Constitutional Tribunal of 18 January 2012, in the case Kp 5/09. I disagree with the ruling that Article 30 of the Polish Citizenship Act of 2 April 2009, challenged by the President of the Republic of Poland pursuant to Article 122(3) of the Constitution, is consistent with Article 137 of the Constitution.

STATEMENT OF REASONS

1. The subject of the allegation.

In the *petitum* of the application of 27 April 2009, the President has challenged Article 30 of the Polish Citizenship Act of 2 April 2009 (hereinafter: the 2009 Polish Citizenship Act), insofar as it expands the scope of premisses of recognising a foreigner as a Polish citizen – I am guessing – with regard to the previous Polish Citizenship Act of 15 February 1962 (Journal of Laws - Dz. U. of 2000 No. 28, item 353, as amended; hereinafter: the Polish Citizenship Act of 1962). However, what follows from the statement of reasons for the application as well as from the argumentation presented by the representative of the President at the hearing, the said provision was challenged in its entirety, i.e. also insofar as it obliges a competent authority to recognise a foreigner as a Polish citizen if s/he fulfils premisses specified therein. Therefore, the assessment of constitutionality should be referred to the subject of the allegation formulated in this way.

2. Higher-level norms for the constitutional review

In the *petitum* of his application, the President has indicated only Article 137 of Constitution as a higher-level norm for the review, which stipulates that the President of the Republic of Poland grants Polish citizenship and gives consent to the renunciation thereof. However, the statement of reasons for the application also mentions Article 144(3)(19) of the Constitution, which categorises granting Polish citizenship and giving consent

to the renunciation thereof as the so-called prerogative of the President as the Head of State, i.e. an official act which does not require the countersignature of the Prime Minister to be valid and is not subject to administrative review and judicial review. Moreover, as it has been emphasised by all the participants in the proceedings, there is a close normative link between Article 137 of the Constitution and Article 34 of the Constitution, which concerns the acquisition of Polish citizenship. Taking into account the previous practice of the Tribunal, in accordance with which an application for a constitutional review is considered to be one whole (consisting of a *petitum* and a statement of reasons), in my view, the following provisions should have been regarded as higher-level norms for the review: Article 137 in conjunction with Article 144(3)(19) as well as Article 34(1) of the Constitution. By contrast, in the operative part of the judgment, the Tribunal has made reference solely to Article 137 of the Constitution as a higher-level norm for the review. However, what follows from the statement of reasons for the judgment is that the Tribunal has also taken into account the other two provisions of the Constitution.

3. Arguments for unconstitutionality.

3.1. In my opinion, Article 30 of the 2009 Polish Citizenship Act is inconsistent with all the provisions indicated in point 2 as higher-level norms for the review for the reasons presented below.

The Constitution sets out two ways of acquiring Polish citizenship:

1) pursuant to Article 34(1), first sentence, of the Constitution, by birth to (both) parents being Polish citizens (*ius sanguinis*),

2) by being granted Polish citizenship by the President of the Republic of Poland, on the basis of Article 137 in conjunction with Article 144(3)(19) of the Constitution.

Moreover, Article 34(1), second sentence, of the Constitution obliges the legislator to specify other premisses of acquiring Polish citizenship by (ordinary) statute.

The other premisses of acquiring Polish citizenship are currently specified by: the 1962 Polish Citizenship Act and the Repatriation Act of 9 November 2000 (Journal of Laws - Dz. U. of 2004 No. 53, item 532, as amended).

The 1962 Polish Citizenship Act provides, in principle, for the *ex lege* acquisition of Polish citizenship by birth, where one of parents is a Polish citizen, thus extending the application of the constitutional principle of *ius sanguinis* (Article 4(1) of the said Act).

Moreover, the Act provides for a possibility of regaining Polish citizenship lost due to marriage with a foreigner, by submitting a relevant declaration of will in that regard by a person concerned.

In a similar procedure – i.e. by submitting and adopting relevant declaration – Polish citizenship may be acquired by a foreigner who has been married to a Polish citizen for at least 3 years and has resided in the territory of Poland (Article 10 of the Act).

The acceptance of a declaration submitted for the purpose of regaining or acquiring Polish citizenship by a competent authority may depend on the submission of the evidence of loss of or exemption from foreign citizenship (similarly to the granting of citizenship by the President of the Republic of Poland).

The Act also mentions the legal institution of recognising a foreigner as a Polish citizen by way of an administrative decision of a voivode (or a Polish consul). A person of undetermined citizenship or a stateless person may be recognised as a Polish citizen in the light of the Act of 1962, on condition that s/he has lived in Poland for at least 5 years on the basis of a settlement permit or the EC long-term residence permit.

The following principles explicitly arise from the regulation of the binding 1962 Polish Citizenship Act: the acquisition of citizenship on the basis of that Act only concerns persons who hold no other citizenship or are ready to renounce foreign citizenship. The premiss of acquiring citizenship is a personal link that binds a given foreigner to Poland – a relation by blood or marriage with a Polish citizen. The decision concerning the recognition of a foreigner as a Polish citizen – similarly to the decision of the President of the Republic of Poland concerning the granting of Polish citizenship – falls within the scope of discretion of the competent authority and is a constitutive act which has legal effects and is issued in the name of the state.

The challenged provision of Article 30 of the 2009 Polish Citizenship Act considerably changes the premisses of recognising a foreigner as a Polish citizen, in a majority of cases departing from the requirement of a personal link with Poland, apart from a relatively short period of legal residence in our country (generally much shorter than it is admissible in the European Convention on Nationality of 1997, which Poland has not yet ratified).

Secondly, a decision on the recognition of a foreigner as a Polish citizen issued by a voivode is not discretionary in character. If a person applying for Polish citizenship fulfils one of the premisses set out in Article 30 of the 2009 Polish Citizenship Act, then the voivode has the obligation to recognise that person as a Polish citizen. The challenged

provision in fact sets out the subjective right of such a person to be recognised as a Polish citizen. In my view, such a solution is inconsistent with Article 34(1) of the Constitution, which grants that right only to persons born to parents who are both Polish citizens. Citizenship as a special legal tie which binds a certain individual with a given state, the essence of which comprises the entirety of mutual rights and obligations of the individual and the state, may not be the subject of a claim arising from an ordinary statute, but should stem from a legal act issued by a state authority.

3.2. I share the applicant's allegation that such broad rendering of premisses which determine the recognition of foreigners as Polish citizens transforms this institution, regulated in an ordinary statute, into a procedure for acquiring Polish citizenship that is equivalent to the constitutional prerogative vested in the President, which arises from Article 137 in conjunction with Article 144(3)(19) of the Constitution, and consequently poses a risk that the said prerogative will become "devoid" of its meaning, thus infringing the indicated constitutional provisions. The "accessibility" of a voivode to and the non-discretionary character of his/her decision on the recognition of a foreigner as a Polish citizen, in my view, results in a situation that the main way of acquiring Polish citizenship, in the context of the challenged Act, is by being recognised as a Polish citizen.

At the same time, the point here is not exclusively, or even mainly, the actual restriction of the President's prerogative, but it is primarily the interest of the state. The new regulation has undoubtedly arisen under the influence of the not-yet-ratified European Convention on Nationality, takes into account only the interest of foreigners who apply for Polish citizenship – often not due to ties that bind them with our country, but for the purpose of improving their social status or even in order to avoid the threat of extradition. It does not, however, take into account the interests of the Republic of Poland to a sufficient extent, making it possible for its authorities to implement a reasonable immigration policy. In my view, those interests are not sufficiently safeguarded by the negative premiss of recognising a foreigner as a Polish citizen in the form of a threat to the defence or security of the state as well as the protection of state security and public order (Article 31(2) of the 2009 Polish Citizenship Act).

At the same time, it should be noted that the lack of citizenship does not prevent a foreigner from leading a regular life in Poland, as the underlying principle of the Constitution is to regulate the individual's freedoms and rights as those granted to every

person, including a foreigner. The Constitution links citizenship with having certain particular rights which are political in character.

The liberalisation of premisses determining the acquisition of Polish citizenship, providing for the said acquisition on the basis of "claims", undermines the value of citizenship, which negatively affects the authority of the Republic of Poland; in my view, this also implies the non-conformity of the challenged regulation to Article 1 of the Constitution, which stipulates that the Republic of Poland is the common good of all its citizens.

Dissenting opinion
of Judge Marek Zubik
to the Judgment of the Constitutional Tribunal
of 18 January 2012, Ref. No. Kp 5/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit this dissenting opinion to the judgment of the Constitutional Tribunal of 18 January 2012 in the case Kp 5/09.

I justify my dissenting opinion as follows:

1. The acquisition of Polish citizenship in the circumstances specified in Article 34(1) of the Constitution as well as the granting of the citizenship by the President on the basis of Article 137 of the Constitution should be regarded as two complementary legal solutions that indicate the ways of obtaining Polish citizenship. They specify a procedure for joining a community comprising a special category of subjects of rights and obligations that jointly constitute the sovereign of the state (the Preamble and Article 4(1) of the Constitution), in an exhaustive way in the context of the Constitution. A relation existing between those provisions is as follows: statutory regulations concerning the acquisition of citizenship must be confronted with the President's power to grant Polish citizenship.

I realise that contemporary civilisation changes are affecting the functioning of the legal institution of citizenship. However, the introduction of normative changes in that regard – as long as the Constitution specifies the group of the subjects of rights and obligations that constitutes the sovereign as well as a procedure for joining that group – should fall within the scope of the activity of the constitution-maker, and not of the legislator. Otherwise, the principle of the supremacy of the Constitution is undermined (the Preamble and Article 8(1) of the Constitution).

2. The acquisition of Polish citizenship is guaranteed by the Constitution in the case of persons born to parents being Polish citizens (Article 34(1), first sentence, of the Constitution). The legislator has been obliged to indicate other situations where the

acquisition of Polish citizenship may be possible (Article 34(1), second sentence, of the Constitution).

In the case specified in Article 34(1), first sentence, of the Constitution, the acquisition of citizenship ensues solely from the fulfilment of premisses which are objective in character. It occurs *ex lege.*

Authorisation arising from Article 34(1), second sentence, of the Constitution not only provides for the obligation to set out "other methods of acquiring Polish citizenship", but it also delineates the limits within which the legislator is to fulfil the obligation. He has been obliged to indicate such circumstances of the acquisition of Polish citizenship which, first of all, will occur *ex lege* and, secondly, will concern cases that are substantively related in their character to the "acquisition" explicitly provided for in Article 34(1), first sentence, of the Constitution. Thus, this means that, when specifying other methods of acquiring Polish citizenship, the legislator may not disregard the content of Article 34(1), first sentence, of the Constitution. The legislator may shape the substantive requirements of the acquisition of citizenship only in such a way that they would confirm the existence of certain ties binding a person who is to become a citizen with the community constituting the sovereign. The said ties may arise from Polish decent (Article 6(2), Article 34(1), first sentence, as well as Article 52(5) of the Constitution). They may also be shaped in a different way, provided that they will refer to constitutional values pertaining to such attributes of a national community as: common historical and cultural heritage or the achievements of previous generations of citizens, referred to *inter alia* in the Preamble to the Constitution.

3. The granting of citizenship by the President (Article 137 of the Constitution) constitutes a separate procedure for obtaining Polish citizenship, which is an alternative to acquisition. The said institution has been regulated in chapter V of the Constitution as one of the traditional powers vested in the Head of State which determines the legal situation of the individual. The President may exercise his/her power to grant Polish citizenship, but s/he is not obliged to do so. Also, it would be inadmissible to oblige the President, by statute, to grant Polish citizenship even after a person applying for citizenship meets the premisses specified by law. The President may freely decide about granting citizenship, and his decision in that regard is characterised by a considerable degree of discretion. What is also of significance in this context is the classification of the said power as a prerogative of the Head of State (Article 144(3)(19) of the Constitution). Thus, the constitution-maker

has excluded the said activity of the President from the scope of cooperation with the Prime Minister.

4. The differentiation made here between the two procedures for obtaining citizenship has been explicitly provided for in the Constitution, and may not be ruled out by a legislative decision. When introducing the ways of acquiring Polish citizenship, the legislator may not shape the powers of other organs of the state in a fashion that they would be identical, or substantially similar in their character, to the President's powers. Indeed, this would infringe the principle of the separation of powers within the scope ratione personae and would actually blur the existing constitutional model of the acquisition of citizenship, limited to the two institutions: the *ex lege* acquisition of citizenship and the granting of citizenship by the President.

A prerequisite for preserving the state of constitutionality is to devise statutory procedures pertaining to the acquisition of citizenship, in such a way that they will not contain an element of discretion on the part of the organs of the state which determine whether to include a given person into the community of Polish citizens. Possible introduction of another way of obtaining Polish citizenship than being granted the said citizenship by the President, with the preservation of such discretion, will entail devising a procedure which the Constitution – independently and exhaustively regulating procedures for obtaining citizenship – does not provide for and, thus, renders inadmissible.

5. Challenged Article 30(1) of the Polish Citizenship Act of 2 April 2009 (hereinafter: the Act) provides for certain solutions which are, in my opinion, inadmissible from the point of view of the constitutionally specified model for obtaining citizenship. It introduces, as one of the requirements for the recognition of citizens, *inter alia* a premiss of "a stable and regular source of income in Poland" (Article 30(1)(1) and (6) of the Act). It does not have an objective character and it leaves the organs of government administration with a considerable margin of discretion.

The procedure specified in challenged Article 30 of the Act provides for a discretionary determination of an organ of government administration as to the possibility of obtaining citizenship. Thus, it infringes the division of powers, adopted in the Constitution, which provides only for the President to grant Polish citizenship in this way. The mechanism for recognising foreigners as Polish citizens, as devised by the legislator, becomes competitive in relation to the President's power. At the same time, it results in the

creation of a new procedure for the obtaining of citizenship which may not be categorised as the acquisition within the meaning of Article 137 of the Constitution or *ex lege* acquisition in the cases specified by the legislator, within the meaning of Article 34(1), second sentence, of the Constitution. Therefore, the legislator has gone beyond the the scope of freedom granted to him as regards the shaping of the legal basis of acquiring Polish citizenship.

6. For these reasons, I do not share the assessment adopted by the Constitutional Tribunal as regards the conformity of whole Article 30 of the Polish Citizenship Act of 2 April 2009 to Article 137 of the Constitution. I state this irrespective of the fact that the said provision also raises constitutional doubts as to its conformity to Article 34(1) of the Constitution. However, the higher-level norm for the review was not indicated by the applicant, and thus it could not constitute a point of reference in the case under examination in the context of the assessment of constitutionality of the challenged provision of the Act.