Judgment of 12th January 2000, P 11/98

"REGULATED RENTS" IN PRIVATE BUILDINGS

Type of proceedings:	Composition of Tribunal:	Dissenting opinion:
Question of law referred by a court Initiator: Supreme Court – Administrative, Labour and Social Insurance Chamber	Plenary session	1

Legal provisions under review	Basis of review
Transitional application of provisions concerning regulated rents determined by commune councils at a level not exceeding 3% of the reconstruction value of living quarters, to the lease of living quarters owned by natural persons, until 31st December 2004, whenever this lease relation was established on the basis, or prior to the entry into force, of the former provisions concerning the lease resulting from an administrative decision [Lease of Living Quarters and Housing Allowances Act 1994: Article 56(2), read in conjunction with Articles 25 and 26]	Rule of law Principle of proportionality Principle of equality Protection of ownership [Constitution: Article 2, 31(3), 32 and 64(3); (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 1: Article 1]

The Polish communist authorities pursued a policy of controlling and regulating the use of housing resources, not only in relation to public resources and resources created by housing cooperatives, but also as regards privately-owned housing resources.

From the conclusion of the Second World War until 1987, a legal regime operated in numerous Polish cities whereby lease relations for living quarters in privately-owned buildings would be created on the basis of allocations carried out by administrative authorities. The legislator called this regime "public management of living quarters" and, subsequently, the "special lease procedure". Administrative regulation was accompanied by strict protection of the stability of lease relations, together with the operation of official – very low – rent levels. These factors, which signify a radical limitation on private owners' rights, combined with other weaknesses of the socialist economic system, lead to a significant devaluation of the old (pre-war) housing resources, discouraged the construction of new living quarters for leasing and eliminated the market for leasing living quarters. The rents paid by lessees (tenants) even failed to cover the maintenance costs of buildings which owners were obliged by statute to pay.

The legislator's first modest step towards liberalising the leasing of privately-owned living quarters was to prospectively abolish the "special lease procedure", as of 1987. This created the possibility for an owner to freely dispose of their living quarters, as of the moment when such quarters were vacated by the previously "allocated" lessee. Nevertheless, the principles of protecting the stability of existing lease relations (including protection for the family members of a deceased lessee) and, primarily, the principles of regulating rent levels, were not significantly amended. Furthermore, owners being natural persons (as opposed to, for example, housing cooperatives) received no State subsidies and, in one sense, they therefore bore the costs of realising social policy concerning housing.

As a result of changes in the system of government, based on respecting private ownership and

recognising market economy principles, restoring owners the possibility to freely determine rent levels became an outstanding issue in the 1990's. Concomitantly, the legislator needed to take account of the interests of lessees who were often impecunious and were accustomed to paying low rents.

The Lease of Living Quarters and Housing Allowances Act 1994 attempted to resolve this dilemma. As the title of the Act indicates, it regulated the leasing of living quarters (within both public and private resources) and, furthermore, the principles for taking advantage of a publicly-funded pecuniary social benefit, known as a "housing allowance", payable to persons on low-incomes who are living in quarters that they do not own (e.g. as a lessee or housing cooperative member).

The 1994 Act required lessees living in public housing resources (belonging to communes or to the State) to pay so-called regulated rent, determined by the commune councils pursuant to criteria specified within the Act (Articles 25 and 26 of the 1994 Act), Article 25(2) of which states that the maximum level of regulated rent shall not exceed 3% of the annual reconstruction value of the living quarters.

Article 56(2) of the 1994 Act, a transitional provision which was directly challenged in the present case, extends the applicability of provisions concerning regulated rents to living quarters owned by natural persons, whenever such a lease was established on the basis of an administrative decision or, alternatively, was concluded prior to the entry into force of provisions creating the administrative procedure for establishing lease relations in a particular location (i.e. until 1987). Regulated rents for such living quarters were intended to operate for a transitional period lasting 10 years from the moment of entry into force of the discussed 1994 Act – until 31st December 2004. This meant that private owners, to whom the provision was addressed, were not only prevented from increasing rents beyond the level of 3% of the annual reconstruction value of the living quarters during this period but, furthermore, were required to accept a lower rent whenever the appropriate commune council determined such a rent for a particular location. It should be added that, since the levels of housing allowance (mentioned above) paid by communes were correlated with rent levels, many communes pursued a policy of setting rent levels lower than the statutory maximum of 3% of the annual reconstruction value of the living quarters.

The question of the constitutionality of Article 56(2) of the 1994 Act appeared before the Constitutional Tribunal in connection with the examination – firstly by the Supreme Administrative Court and, subsequently, by the Supreme Court – of public-legal litigation between, on the one hand, a group of private owners of tenement buildings in Gdynia and, on the other hand, the Gdynia City Council, which passed a Resolution setting regulated rent levels at lower than 3% of the reconstruction value of the living quarters. The owners of the aforementioned buildings challenged this Resolution before the Supreme Administrative Court, insofar as the setting of rent rates at a level lower than the statutory maximum also applied to privately-owned living quarters. In December 1997, the Supreme Administrative Court ruled that the Council's Resolution was contrary to law insofar as it was challenged. The Court interpreted Article 56(2) of the 1994 Act in such a way that reference, in this section, to provisions concerning regulated rents was deemed to refer to the maximum rent level permitted by statute (i.e. 3% of the reconstruction value) and not to any lower level determined by the commune council for a particular location as regards living quarters belonging to that commune's resources.

At this time, a two-instance system of administrative judicial proceedings did not yet exist. The aforementioned administrative court judgment was, therefore, final and could only be reviewed by the Supreme Court under a special procedure known as “extraordinary appeal”. In the present case, such an extraordinary appeal was brought before the Supreme Court by the President of the Supreme Administrative Court, who alleged that the latter Court had adopted a flagrantly erroneous interpretation of Article 56(2) of the 1994 Act in the context of other provisions, including Articles 25 and 26 of the same Act.

In considering the extraordinary appeal, the Supreme Court became doubtful as to conformity of the aforementioned statutory provision with the Constitution and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, since this provision extended, for a transitional period, the application of regulated rents to privately-owned living quarters. Accordingly, the Supreme Court decided to refer a question of law regarding this matter to the Constitutional Tribunal.

The question of law referred by the Supreme Court was based upon the assumption that, as had been argued in the reasoning for the extraordinary appeal, the correct interpretation of Article 56(2) of the 1994 Act differs from that adopted by the Supreme Administrative Court. The Supreme Court considered that this provision requires regulated rents to be paid, at levels determined by commune councils, not only by lessees of publicly-owned living quarters but also lessees of privately-owned living quarters, as referred to in Article 56(1). The Supreme Court drew attention to the fact that the 1994 Act imposes upon communes a maximum limit of regulated rents (3% of the reconstruction value) but does not, however, impose any minimum limit. Communes may take advantage of the absence of such a lower limit and enjoy full discretion in setting rent levels, regardless of the actual maintenance costs for the living quarters. Private owners of living quarters, with respect to whom Article 56 of the 1994 Act applies, are not only deprived of the possibility to influence who occupies their quarters but are also forced to apply rent levels which communes usually deliberately set lower than actual maintenance costs. Fulfilment of the legal obligation to maintain housing resources in an appropriate condition requires owners to seek finances from other sources (their own income or loans). In the light of provisions concerning income taxes, the resulting losses incurred by private owners of leased living quarters may not be deducted from income earned by them from other sources.

Such an understanding of Article 56(2) of the 1994 Act became the catalyst for the question of law referred by the Supreme Court which, in particular, expressed its doubts as to whether protection of lessees may be realised at the exclusive expense and risk of a single social group – the owners of buildings and living quarters.

The Constitutional Tribunal’s reasoning in the present judgment indicates that the essence of unconstitutionality of the reviewed provision did not arise by virtue of applying, for a transitional period, regulated rents to arrangements where the owner (lessor) is a natural person but, rather, by virtue of the fact that a commune council’s Resolution may set such rent at a level lower than 3% of the annual reconstruction value of the living quarters (cf. point 28, read in conjunction with points 20 and 21, below). Furthermore, the Tribunal highlights the need to protect lessees’ confidence in the fact that regulated rents would not exceed this limit until the end of 2004 (cf. above).

The Tribunal ruled by a majority of votes that the challenged provision did not conform to the Constitution. ***Judge Biruta Lewaszkiewicz-Petrykowska*** submitted a dissenting opinion.

Given the Constitutional Tribunal's decision to delay, for 18 months, the loss of binding force of the unconstitutional statutory provision (cf. point II of the ruling below and Article 190(4) of the Constitution), the Supreme Court admitted that the Supreme Administrative Court judgment challenged in the extraordinary appeal infringed the still-operative 1994 Act and, accordingly, modified this judgment, dismissing the complaint of a group of private owners against the Gdynia City Council (Supreme Court judgment of 29th April 2000, III RN 96/98).

Subsequent statutes concerning the level of rents for living quarters, issued in 2001 and 2004, did not entirely respect the criteria of constitutionality laid down in the judgment summarised herein, and were also challenged before the Constitutional Tribunal (cf. the Constitutional Tribunal judgments in cases K 48/01, dated 2nd October 2002, and K 4/05, dated 19th April 2005 – summarised separately).

RULING

I

Article 56(2), read in conjunction with Articles 25 and 26, of the Lease of Living Quarters and Housing Allowances Act 1994:

1) does not conform to Article 64(3) of the Constitution, read in conjunction with Articles 2 and 31(3) of the Constitution and Article 1 of Protocol No. 1 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, since the enactment of the limitations imposed thereby on the right of ownership infringed the requirements laid down in these constitutional provisions,

2) conforms to Article 32 of the Constitution.

II

The Tribunal ruled that the loss of binding force of Article 56(2) of the aforementioned Act shall be delayed until 11th July 2001.

PRINCIPAL REASONS FOR THE RULING

1. The constitutional instruction to statutorily protect the rights of tenants (Article 75(2)) applies to all tenants and not merely lessees. In particular, this imposes an obligation upon the State to protect the stability of a tenant's legal title to occupied living quarters.

2. The principle of protecting against exceedingly high charges for the use of living quarters, at least insofar as they amount to dishonest market practices, may be derived from Article 76 of the Constitution. Whilst this provision specifies certain obligations of the State that must be concretised appropriately within ordinary statutes, it does not directly create individual rights and claims for citizens.

3. Viewed against the background of the evolution of Polish constitutional norms, there is no current basis for adopting a broad understanding of the notion of ownership, as

mentioned in Article 64 of the Constitution, nor for correlating this notion with the totality of property rights.

4. The guarantees of the right of ownership, contained in Article 64 of the Constitution, should be constructed whilst keeping in mind the general principles of the Polish constitutional system including, in particular, Articles 20 and 21, which classify private ownership as one of the bases of that system. In the light of these provisions, it is the State's constitutional duty to guarantee protection of ownership, which constitutes a value indicating the manner in which both Article 64 of the Constitution and provisions contained in ordinary statutes should be interpreted.

5. No doubts are raised as regards the constitutional principle of equality (Article 32) by having adopted the criterion of the right of ownership as the basis for differentiating the legal situation of those to whom legislation concerning housing relationships is addressed. In particular, there is nothing to prevent the law from imposing certain additional burdens or obligations upon an owner, pursuant to the principle "ownership obliges". The scope of any such obligations and burdens imposed upon owners is, however, a different matter. Provisions imposing such obligations may be reviewed on the basis of the constitutional principle of proportionality (Article 31(3)) and it is unnecessary to review them from the perspective of the principle of equality.

6. Article 31(3) of the Constitution defines the grounds allowing the imposition of limitations on individual rights and freedoms, including the right of ownership. From a formal perspective, it requires such limitations to be established "only by statute" whereas, from a substantive perspective, it permits the introduction of limitations "only when necessary in a democratic State" by reason of the values listed in this provision. An additional restriction on the permissible scope of limitations is that they may not infringe the "essence" of rights and freedoms; in relation to the right of ownership, this prohibition is repeated in Article 64(3).

7. Conditioning the permissibility of limitations on constitutional rights and freedoms upon them being established "only by statute" (Article 31(3) of the Constitution) is more than merely a reminder of the general principle of exclusivity of statutes (legal reservation) as concerns regulating the legal situation of individuals, which constitutes a classical element of the rule of law idea. It also formulates a requirement for statutory provisions to be appropriately specific. Since limitations on constitutional rights and freedoms may "only" be established by statute, this encompasses an instruction that statutory provisions must be complete and must independently specify all fundamental elements of the limitation on a particular right or freedom, in order to permit the extent (boundaries) of the limitation to be identifiable solely upon reading the statutory provisions. It is impermissible for statutes to include blanket provisions that leave organs of the executive power or local self-government with discretion to definitively shape such limitations and, in particular, to determine their scope of application.

8. Substantively, the wording of the first sentence of Article 31(3) of the Constitution refers to the principle of proportionality (prohibition on excessive interference), which constitutes an inseparable element of the rule of law concept. In assessing whether the principle of proportionality (prohibition on excessive interference) has been infringed, it is necessary to answer three questions: whether the enacted legislation is capable of producing the desired effects; whether the legislation is indispensable for protecting

the public interest to which it relates; whether the effects of the enacted legislation remain proportionate to the burdens imposed thereby upon a citizen. The discussed provision particularly emphasises the criterion of "necessity in a democratic State", which signifies that each limitation on individual rights or freedoms must be, primarily, reviewed as to whether the same aim (effect) could have been achieved by other means, less burdensome for the citizen and, *ipso facto*, interfering less (more superficially) with their rights and freedoms.

9. In contrast with Article 64(1) and (2), Article 64(3) of the Constitution refers only to the right of ownership and does not deal with other property rights. This provision fulfils a twofold function: firstly, it represents an unambiguous and explicit constitutional basis for imposing limitations upon the right of ownership; secondly, the grounds contained therein for permitting limitations on the right of ownership may be used as the formal and substantive criteria against which to review limitations introduced by the legislator.

10. The concept of the essence of rights and freedoms (Articles 31(3) and 64(3) of the Constitution) is based on the assumption that it is possible to distinguish certain basic elements (the core) of a particular constitutional right or freedom, in the absence of which such a right or freedom would cease to exist, from other additional elements (the periphery) that the ordinary legislator may formulate or modify in various different ways without destroying the identity of the given right or freedom. An interpretation of the prohibition on infringing the essence of a limited right or freedom should not be reduced solely to its negative aspect but should also recognise a positive aspect, related to the goal of indicating, at least illustratively, a certain inviolable core of a given right or freedom, upon which the legislator should not encroach, even when acting to protect the values indicated in the first sentence of Article 31(3) of the Constitution.

11. The essence of a property right encompassed within the scope of Article 64 of the Constitution would be infringed whenever the imposed limitations affected the basic entitlements comprised within the given right and prevented such a right from performing the function it was intended to fulfil within the legal order, based upon the assumptions indicated in Article 20 of the Constitution.

12. In order to define the essence of the right of ownership, it is necessary to refer to the basic components of this right, as they have been shaped during its development; they include, in particular, the possibility to use the owned property and to gather the fruits therefrom (cf. Article 140 of the Civil Code). The legislator may subject these possibilities to different types of limitations, which is permissible provided that such limitations fulfil the requirements specified in the first sentence of Article 31(3) of the Constitution. However, when the scope of limitations on the right of ownership becomes so broad that, by destroying the basic components of this right, they deprive the right of any real content and render it illusory, then the fundamental content (essence) of the right of ownership has been infringed. Each individual enactment interfering with the right of ownership must be assessed in the context of all other current limitations and taking into account whether or not the particular limitation (e.g. introduction of regulated rents) has been compensated for by the creation of privileges or assistance in other areas.

13. The lease of living quarters constitutes an "other property right" within the meaning of Article 64(1) of the Constitution and, *ipso facto*, it enjoys the protection envisaged in Article 64(1) and (2). It would be difficult, however, to treat the stabilisation of a lease (cf. point 1 above) as part of the essence of this property right, since a specific feature of a lease contract is its temporal limitation.

14. In the present case a conflict occurs between the rights of owners and the rights of lessees, both of whom enjoy protection (albeit unequal) at a constitutional level. Nevertheless, it would be an over-simplification to treat this collision as one-dimensional and to assume that the provision of a certain level of protection for one of these interests must automatically signify a diminution in the protection afforded to the other. The legal system is multi-dimensional in nature and both of these interests may also be protected on the basis of other, essentially external, means and procedures. Since the very essence of regulated rents arises from recognising the existence of a certain general and superior social need, the problems stemming from introduction of such rents may also be solved at a macro-social level and should not be treated only in terms of the owner-lessee relation.

15. The operative provisions very seriously limit an owner's possibilities to use and dispose of quarters mentioned in Article 56(1) of the Lease of Living Quarters and Housing Allowances Act 1994. This provision transformed all pre-existing lease relations, where such had been established on the basis of allocations resulting from administrative decisions or prior to the introduction of public management of living quarters or special lease procedure in a particular location, into contractual leases concluded for an unspecified time period. *Ipso facto*, as regards pre-existing situations, the 1994 Act requires the owners of buildings to respect the current occupation state of the particular quarters. The possibility for an owner to give notice terminating the lease is limited to situations specified in Articles 32 and 33(1) of the 1994 Act. The possibility for an owner to regain autonomy in deciding how to allocate the quarters is also diminished by Article 8(1) of the 1994 Act, stating that certain persons living with a lessee shall succeed to the lease relation in the event of the lessee's death. In such a situation, the right of ownership becomes illusory. Concomitantly, other legal provisions impose a series of significant obligations upon the owner of a building (cf. Article 9 of the reviewed Act, Articles 61, 66, 68 and 69 of the Construction Act 1994, Article 5 of the Maintenance of Order and Cleanness in Communes Act 1996).

16. According to the challenged Article 56(2) of the aforementioned 1994 Act, in cases involving a lease of quarters owned by natural persons, transformed pursuant to Article 56(1) (cf. above), the rent payable "shall be determined in accordance with the provisions governing regulated rents". It is not the Constitutional Tribunal's task to concern itself with the relative merits of the disparate interpretations of this provision to be found in the Supreme Administrative Court's judgment, in the position of the President of this Court in the extraordinary appeal lodged against this judgment, and in the question of law referred by the Supreme Court to the Constitutional Tribunal. However, no grounds exist for objecting to the interpretation adopted by the President of the Supreme Administrative Court and the Supreme Court, according to which Articles 25 and 26 of the 1994 Act, determining the regulated rents levels, are also applicable in their entirety to quarters owned by natural persons, on the basis of Article 56(2). Furthermore, it must be recognised that, following 5 years of practical application of the discussed provisions, the meaning established by such application became

actual and exclusive.

17. The 1994 Act, and especially the practical application thereof, failed to provide sufficient mechanisms to balance the revenue earned from regulated rents with the aforementioned maintenance costs of a building, its fixtures and fittings and its surroundings. Article 25(2) of this Act lays down a maximum regulated rent level of 3% of the annual reconstruction value of living quarters. Nevertheless, it is for the commune council to determine actual rent levels, having taken into account the factors indicated in Article 26(1) of the 1994 Act. Among these factors, the legislator mentions neither the actual maintenance costs of a building nor the legal status of a building and living quarters located therein. Articles 25 and 26 of the 1994 Act also do not indicate a minimum regulated rent level, leaving the relevant commune council with this decision. The owners of buildings have no power to determine regulated rent levels, nor even to present their views on this issue.

18. The broad scope of discretion enjoyed by commune councils in determining regulated rent levels does not raise significant doubts as regards buildings (quarters) within commune housing resources. To this extent, a commune takes a decision regarding its own property and where it considers that regulated rents should be lower than the statutory maximum of 3%, no legal obstacles exist to prevent such a decision being taken (in practice, communes determine rents at an average national level of 1.3%, i.e. at a level covering approximately 60% of the exploitation costs of habitable buildings). A commune is constitutionally obliged to care for its inhabitants and may (or even should) use its property for this purpose. Costs which are not recovered from regulated rents income may be covered by the commune from other sources, in particular from taxes and payments obtained from its residents. Such a model of assisting the weaker members of the local community corresponds to the ideas of social solidarity and subsidiarity. Setting a low level of regulated rents concomitantly has an influence on reducing the number of persons entitled to obtain a housing allowance, payment of which is one of a commune's direct responsibilities (cf. Article 166(1) of the Constitution). Nevertheless, application (pursuant to Article 56(2) of the 1994 Act) of the mechanism for setting regulated rents to privately-owned property, being "external" to commune property, has the effect that limiting rent levels permits a commune to avoid social tensions and minimise expenditure on housing allowances, whilst the costs resulting therefrom are not covered by the commune but, rather, by private owners.

19. The inadequacy of regulated rents vis-à-vis expenditures for building maintenance does not allow reserves to be set aside for creating renovation funds and for ensuring that the building is preserved in a good condition. This results in an advancing process of devaluation of tenement buildings. On the one hand, this should be regarded as a process involving a gradual deprivation of the right of ownership, leading to effects similar to expropriation as time passes. On the other hand, this also has a general social dimension, since many buildings with numerous apartments are approaching their so-called technical death, when not only the owner loses their property but also the tenants no longer have the possibility to occupy the quarters, which is difficult to reconcile with the duties of public authorities mentioned in Article 75(1) of the Constitution.

20. Depriving lessees of legal protection and granting owners an unlimited discretion to

dissolve lease relations and determine rent levels could, in the current reality, leave large groups of society with their most basic housing needs unsatisfied and, in consequence, seriously disturb the functioning of the social order to the point where it would be justified to rely on public order grounds (cf. Article 31(3) of the Constitution) to permit the introduction of statutory regulation of living quarters leases. Accordingly, it is justified to set rent levels which are not flagrantly disproportionate to a lessee's financial capacity and which, following payment, allow the retention of a respectable standard of living or, at least, a minimum existence. This corresponds to the contemporary understanding of the idea of a "social State" allowing certain sacrifices to be demanded from all members of society for the benefit of those who are personally unable to secure the existence of themselves and their families. The even further-reaching limitations on the right of ownership, denying the freedom to earn profits (gather fruits) by setting rent at a level which only covers a building's exploitation and maintenance costs, may also be recognised as necessary within the meaning of Article 31(3) of the Constitution, at least during a transitional period.

21. An analysis of the reviewed provisions of the 1994 Act leads to the conclusion that the limitations imposed thereby on the right of ownership are not restricted to the degree discussed above but, rather, deliberately leave regulated rent levels below the actual costs incurred by an owner. There would be no need to declare such a solution unconstitutional, *per se*, provided that other legal mechanisms existed simultaneously to compensate for losses sustained in this manner. No such mechanisms were created, however. *Ipso facto*, the operative provisions are based upon the assumption that, until 2004, ownership necessarily entails losses for the owner and, equally, that an owner is obliged to contribute to preserving the subject of their ownership in a certain condition. This means that the 1994 Act shifted onto the owners of buildings the main burden of sacrifices that society must make for the benefit of lessees, or at least those remaining in a difficult financial situation. Advantage was not taken of other possible solutions such as, for example: public financial support for maintenance and renovation costs; including completely within tax provisions any losses and expenses sustained by owners; or differentiating rent levels according to the lessee's income. Since the possibility exists to achieve the social goal (i.e. the protection of lessees) by other, less burdensome, limitations on an owner's right of ownership, the current Article 56(2) of the 1994 Act may not be recognised as a necessary limitation on the right of ownership, within the meaning of Article 31(3) of the Constitution.

22. The reviewed provisions also give rise to far-reaching doubts concerning fulfilment of the requirement, contained within the aforementioned constitutional provision, that limitations on rights and freedoms may be established "only by statute". Article 25(2) of the 1994 Act merely specifies the maximum regulated rent level, while Article 26 thereof leaves rent levels to be determined by the relevant commune council (which is done by way of Resolution) and the 1994 Act does not stipulate any minimum limit of such levels. The legislator has not established a sufficiently clear link, between Article 26 and provisions governing a lessor's obligations, to require a practical application of the 1994 Act whereby the minimum rent level (remaining within the 3% limit laid down by Article 25(2)) must reflect all costs, especially those specified in Article 21(1).

23. Given the conclusion that Article 56(2), read in conjunction with Articles 25 and 26, of the 1994 Act infringes the principle of proportionality, the Constitutional Tribunal

is under no obligation to take a position regarding the allegation that this provision infringes the essence of the right of ownership. Nevertheless, it may be noted incidentally that the legislator introduced no regulations to compensate for the far-reaching limitations on the right of ownership, including the setting of regulated rents below maintenance and exploitation costs, which, *ipso facto*, primarily shifts the basic cost of assisting society's weaker members onto the owners of tenement buildings. Whilst the provisions determining the maximum rent level may not be deemed unconstitutional *per se*, the combination of the version of this institution enacted in the reviewed provisions and other provisions governing private buildings leaves owners not even a minimum substratum of the right of ownership. A significant element of the right of ownership – the right to gather fruits – is destroyed, whilst a second element – the right to dispose of ownership – has simultaneously been deprived of any content. The consequence thereof is that the right of ownership, in effect, becomes illusory and is prevented from fulfilling the function within the legal order for which it was intended, based upon the principles expressed in Article 20 of the Constitution.

24. Infringement of the requirements imposed upon the legislator by Article 31(3), read in conjunction with Article 64(3), of the Constitution is equivalent to infringing the rule of law principle (Article 2 of the Constitution).

25. Article 1 of Protocol No. 1 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms contains three distinct principles. The first sentence of Article 1(1) guarantees peaceful enjoyment of one's possessions. The second sentence thereof mentions the possibility to deprive a person of their possessions subject, however, to certain conditions. The third principle, expressed in Article 1(2), sets forth that States are authorised, inter alia, to control the use of property in accordance with the general interest. The second and third principles, concerning specific modes of interference with the right of peaceful enjoyment of one's possessions, should be interpreted in light of the first, general principle.

26. In light of the jurisprudence of the European Court of Human Rights (ECHR) concerning Article 1 of Protocol No. 1 (as above), State interference with the right of ownership must express a fair balance between the requirements of public interest and the instruction to protect individuals' fundamental rights.

27. Regulated rents may *per se* be recognised as a permissible limitation on the right of ownership, on the basis of the aforementioned regulation (similarly – on the basis of the Constitution of the Republic of Poland), but only provided that all elements of an owner's situation are taken into account. Meanwhile, in the reviewed regulation, the Polish legislator did not envisage taking into account the significant nuances in the calculation of regulated rents, nor did the legislator link the calculation of rents with an owner's obligations, thereby allowing rent levels to be set below the actual costs incurred by the owner. Whilst it is not the Polish Constitutional Tribunal's task to supplement the jurisprudence of the European Court of Human Rights, the importance attached by that Court's jurisprudence, concerning Article 1 of Protocol No. 1, to the timely payment of rent and honest principles for calculation thereof, may constitute an additional argument for finding that the reviewed provision of the 1994 Act infringes the Constitution of the Republic of Poland.

28. In Article 56(2), read in conjunction with Article 25(2), of the 1994 Act, the legislator

undertook a type of obligation vis-à-vis interested lessees that the rent for quarters owned by communes, or other quarters specified in Article 56(1), would not exceed the limit of 3% of their annual reconstruction value until 31st December 2004, unless a commune applies a shorter period which is justified by the level to which housing needs are satisfied within that commune (Article 56(3)). On the other hand, by specifying the maximum operation period for regulated rents in buildings (quarters) owned by natural persons, the legislator undertook an obligation vis-à-vis owners that the institution of regulated rents in its current form would be abolished no later than at the end of 2004. Both obligations should be considered in the light of the principles stemming from Article 2 of the Constitution, i.e. the principle of protecting citizens' trust in the State and its laws and the principle of legal security.

29. The Constitutional Tribunal delayed the entry into force of the present judgment for the maximum permissible period (cf. Article 190(4) of the Constitution), in order to allow the legislator to fulfil the obligation to introduce appropriate amendments to the provisions regulating the lease of living quarters. Such amendments must, on the one hand, respect the right of ownership and, on the other hand, protect the entitlements promised to lessees by the discussed Act.

30. A statute's failure to conform to the Constitution may take different forms. In some cases, an infringement of the Constitution is clearly visible on the basis of the text of a statute, where it contains norms that are irreconcilable with constitutional norms, principles or values, regardless of the manner in which it is interpreted. Sometimes, however, the true significance of a statute (of norms contained therein) is only revealed during the course of its application. In such a situation, the Constitutional Tribunal or another organ of the judicial power should primarily utilise the technique of interpreting a statute in accordance with the Constitution, in order to eliminate any irregularities in its application and to impose a proper understanding thereof. However, there are limits to exercising this technique, especially where practical application of a statute infringes an individual's fundamental rights and freedoms. In this situation, it may be necessary to rule that a statute is unconstitutional where it is formulated in such an incomplete and imprecise manner as to allow a meaning to be attached to it, in practice, which collides with the Constitution.

MAIN ARGUMENTS OF THE DISSENTING OPINION

- The operative Constitution guarantees respect for a series of individual rights of a human being, enjoyment of which is only possible on the condition that the right to housing is fulfilled. This is necessary for the exercise of such constitutionally protected rights and freedoms as: private and family life (Article 47); health (Article 68); the possibility to educate oneself (Article 70); and protection of the interest of the family (Article 71). This justifies the view that, on the basis of the 1997 Constitution, it remains true to refer to the existence of the fundamental right to housing.
- Specific guarantees concerning the lease of property stem from the Constitution. This right is one of the property rights, subject to "equal for all protection", expressed within the same norm as the protection of ownership (Article 64(1) and (2)). Furthermore, Article 21(1) of the Constitution refers not only to the right of ownership within the meaning of the Civil Code but to all property rights, therefore also including the lease of property.
- The statutory limitation of rent levels does not interfere with the essence of the right of ownership but serves to control the exercise of this right. Normative determination of the maximum rent level must be regarded as a limitation on the freedom to shape the rights and obligations of parties to a lease relation and not as depriv-

ing an owner of the possibility to use their property. Furthermore, inability to earn profits does not constitute evidence that the essence of the right of ownership has been undermined. None of an owner's fundamental entitlements are precluded in consequence of the legislator having indicated an upper limit for lease rents.

- In almost all European countries, protection of the right to housing leads to limitations on the right of ownership. No abstract level exists of permissible limitations on the right of ownership; it is only acquaintance with the economic and social situation in a certain State at a given moment which allows for legislative limitations on the right of ownership to be properly assessed (from the perspective of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms).

- In the present case, the Constitutional Tribunal failed to take sufficient account of the housing situation in Poland, which is considerably worse than in countries in Western Europe, where private housing construction has continuously developed throughout several previous decades and local government financial resources permit the development of inexpensive communal housing. Following a few decades of public management of living quarters, Poland is encountering a particular factual and legal state within which both parties to the lease relation – lessor (owner) and lessee (tenant) – are in a coercive situation. Accordingly, the need to protect tenants, at least during a transitional period, seems to be an issue of both security and public order in Poland.

- During socialist times, the owners of tenement buildings were almost entirely deprived of the possibility to exercise their rights and did not benefit from them. On the one hand, this advocates the need to restore this possibility to them relatively quickly but, on the other hand, it is evidence that maintenance of regulated rents in the reviewed provisions did not worsen the hitherto situation of owners. The reviewed Act restored the attributes of ownership to the owners of buildings and quarters for the first time in post-war Poland. Without undermining the fact that owners of buildings constitute one of numerous groups at whose expense transformation is taking place, it must be asserted that they constitute a particular group of owners for whom such difficulties are, in reality, only transitional. The Act challenged by them actually shows the outlines of brighter perspectives for them.

- The basis for the Constitutional Tribunal's judicial decision was, in essence, an assessment of the practical application of the Lease of Living Quarters and Housing Allowances Act 1994 and not the wording of its provisions. A commune council's Resolution setting rent levels is not merely an expression of its private-legal competence as a lessor, stemming from the autonomous will to shape the content of lease relations, but also constitutes an expression of the commune's public-legal competences as a local legislator and has universally binding force. The legislator did not grant commune councils complete discretion in setting rent levels; statutory provisions indicate the factors to be taken in account when adopting a Resolution setting such levels. The complaints of building owners are, in reality, not directed against the content of the 1994 Act but, rather, against the practice of the communes when setting rent levels lower than is required to maintain housing resources.

- The present judgment departs from the hitherto direction of the Constitutional Tribunal's jurisprudence, according to which the Tribunal is not competent to review legislative solutions motivated by reasons of socio-economic policy. The transitional nature of the challenged Article 56(2) of the 1994 Act, and specification of the date on which regulated rents shall cease to operate in respect of private buildings, explicitly indicate that the legislator was aware of encroaching upon the sphere of private ownership and treated the limitations of the rent levels as a "necessary evil".

- The Constitutional Tribunal did not uphold the allegation that the challenged regulation infringes the principle of equality, expressed in Article 32(1) of the Constitution. However, the Tribunal failed to take into account that the quashing of provisions concerning regulated rents, within a restricted scope, may lead to an infringement of this very principle. The rent level payable for identical living quarters should not be decided on the basis of the owner's identity. Differentiation of rent levels could possibly be based on the lessee's material situation.

- The judgment summarised herein may be viewed as contradicting the principles of protecting acquired rights and respecting "interests in due course" and legal security, as encompassed within the rule of law clause (Article 2 of the Constitution).

Provisions of the Polish Constitution and the Protocol No. 1 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms

Constitution

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

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

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

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

Art. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Art. 47. Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

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

Art. 68. 1. Everyone shall have the right to have his health protected.
2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute.
3. Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age.
4. Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment.
5. Public authorities shall support the development of physical culture, particularly amongst children and young persons.

Art. 70. 1. Everyone shall have the right to education. Education to 18 years of age shall be compulsory. The manner of fulfilment of schooling obligations shall be specified by statute.
2. Education in public schools shall be without payment. Statutes may allow for payments for certain services provided by public institutions of higher education.
3. Parents shall have the right to choose schools other than public for their children. Citizens and institutions shall have the right to establish primary and secondary schools and institutions of higher education and educational development institutions. The conditions for establishing and operating non-public schools, the participation of public authorities in their financing, as well as the principles of educational supervision of such schools and educational development institutions, shall be specified by statute.
4. Public authorities shall ensure universal and equal access to education for citizens. To this end, they shall establish and support systems for individual financial and organizational assistance to pupils and students. The conditions for providing of such assistance shall be specified by statute.
5. The autonomy of the institutions of higher education shall be ensured in accordance with principles specified by statute.

Art. 71. 1. The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances - particularly those with many children or a single parent - shall have the right to special assistance from public authorities.
2. A mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by statute.

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

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

Art. 166. 1. Public duties aimed at satisfying the needs of a self-governing community shall be performed by units of local self-government as their direct responsibility.

Art. 190. […] 4. A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.

Protocol No. 1 to the European Convention

Art. 1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his

possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.