84/8/A/2010

JUDGMENT
of 29 October 2010
Ref. No. P 34/08*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Maria Gintowt-Jankowicz – Presiding Judge
Stanisław Biernat
Mirosław Granat
Ewa Łętowska – Judge Rapporteur
Mirosław Wyrzykowski,

Grażyna Szałygo - Recording Clerk,

having considered - at the hearing on 29 October 2010, in the presence of the Sejm and the Public Prosecutor-General - the following question of law referred by the District Court for the District of Mokotów in Warsaw (Pl. *Sąd Rejonowy dla Warszawy-Mokotowa*):

whether Article 35(4^1) of the Act of 15 December 2000 on Housing Cooperatives (Journal of Laws - Dz. U. of 2003 No. 119, item 1116, as amended), introduced by the Act of 14 June 2007 amending the Act on Housing Cooperatives and Certain Other Acts (Journal of Laws - Dz. U. No. 125, item 873), is consistent with Article 2, Article 31(3) in conjunction with Article 64(3), Article 64(2), Article 165(1) and (2) as well as Article 167(2) of the Constitution of the Republic of Poland,

adjudicates as follows:

Article 35(4^1) of the Act of 15 December 2000 on Housing Cooperatives (Journal of Laws - Dz. U. of 2003 No. 119, item 1116, of 2004 No. 19, item 177 and No. 63, item 591, of 2005 No. 72, item 643, No. 122, item 1024, No. 167, item 1398 and No. 260, item 2184, of 2006 No. 165, item 1180, of 2007 No. 125, item 873, of 2008 No. 235, item 1617 as well as of 2009 No. 65, item 545, No. 117, item 988, No. 202, item 1550 and No. 223, item 1779)**, added by Article 1(29)(b) of the Act of 14 June 2007 amending the Act on Housing Cooperatives and Certain Other Acts** (Journal of Laws - Dz. U. No. 125, item 873, item 873, of 2008 No. 235, item 1617 as well as of 2009 No. 117, item 988 and No. 223, item 1779)**, is inconsistent with Article 2, and thus with Article 64(2), Article 64(3) in conjunction with Article 31(3), Article 165(1) and (2) as well as Article 167(2) of the Constitution of the Republic of Poland.**

STATEMENT OF REASONS

[…]

* The operative part of the judgment was published on 4 November 2010 in the Journal of Laws - Dz. U. No. 207, item 1373.

III

The Constitutional Tribunal has considered as follows:

1. The subject of the question of law and of the review conducted by the Constitutional Tribunal.

In the case commenced by way of the question of law referred by the District Court for the District of Mokotów in Warsaw, in the first place, it is necessary to determine whether the said question meets the requirements of admissibility, specified in Article 193 of the Constitution and Article 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). Determining this will have an impact on specifying the subject of the constitutional review in proceedings before the Constitutional Tribunal.

1.1. The functional premiss of the question of law.

In accordance with Article 193 of the Constitution (as well as Article 3 of the Constitutional Tribunal Act, which repeats the same content), a question of law must fulfil the so-called functional premiss. This means that the content of a ruling delivered by the Constitutional Tribunal is to determine the matter pending before a court referring the question. This correlation is based on an appropriate relation between the content of a challenged provision and the facts of the case in the context of which the question of law has been referred. What may constitute the subject of a question of law is a provision the elimination of which from the legal system, as a result of a judgment delivered by the Constitutional Tribunal in that regard, will have an impact on the determination of the case with relation to which the question of law has been referred. In other words – it is indispensable that a provision about the constitutionality of which a given court asks is to be applied by that court when determining the case in the context of which the question of law has been referred. When the determination of the case is possible without resorting to the legal institution of questions of law, i.e. when there is a possibility of eliminating doubts by means of a proper interpretation of the legal act in question, provided by the court itself, or if there is a possibility of selecting a different act as the basis of determination – there is no functional premiss. Therefore, a functional premiss comprises, *inter alia*, the necessity to show that the reservations raised with relation to the challenged provision are objectively justified and significant enough that there is a need to clarify them in the course of review proceedings commenced by way of a question of law referred to the Constitutional Tribunal.

Therefore, if the adjudicating court has constitutional doubts as to a provision which is to be a premiss of its ruling, it should in the first place aim at eliminating them by applying rules concerning interpretation and conflicts of law, which are well-known in the field of law, in particular – where possible – by way of interpretation which is consistent with the Constitution. Such action fulfils the requirement that statutes should be interpreted in compliance with the Constitution, and it ought to precede the referral of a question of law to the Constitutional Tribunal under Article 193 of the Constitution. The process of providing an interpretation of a legal text, due to which the court decided to institute proceedings before the Constitutional Tribunal, is a fundamental element of the review of constitutionality conducted by the Constitutional Tribunal, and therefore the reasoning of the court in that regard is subject to review by this organ of the state. Otherwise, there would be a situation where the Constitutional Tribunal would have to give a substantive answer to questions of law based on an incomplete or erroneous interpretation provided by common courts. The content of a given legal norm which is applied by a court comprises

not only the literal meaning of a challenged provision, but also its systemic determinants, views adopted in the doctrine and the well-established line of jurisprudence in that regard.

The Tribunal, as an organ of public authority acting on the basis and within the limits of the law (Article 7 of the Constitution), has jurisdiction to assess whether the constitutionality of a provision challenged in a question of law is of significance to the content of a ruling which is to determine the issue with relation to which the question of law was referred. The tasks of the Constitutional Tribunal do not include pointing out to courts which provisions should be applied in a specific case; but – on the other hand – the thesis that it is only the court referring a question that decides whether a given provision may be the subject of a question of law could lead to non-compliance with Article 193 of the Constitution, by requiring the Tribunal to adjudicate on questions of law which concern issues that are not directly relevant as regards the determination of a case pending before a given court. This would, in turn, blur the distinction assumed in the Constitution between the power to initiate an abstract review of constitutionality of the law and the power to conduct such a review in the context of a specific case.

1.2. The facts of the case and a functional premiss.

The District Court for the District of Mokotów in Warsaw challenged Article $35(4^1)$ of the Act of 15 December 2000 on Housing Cooperatives (Journal of Laws - Dz. U. of 2003 No. 119, item 1116, as amended; hereinafter: the Act on Housing Cooperatives), added by Article 1(29)(b) of the Act of 14 June 2007 Amending the Act on Housing Cooperatives and Certain Other Acts (Journal of Laws - Dz. U. No. 125, item 873, as amended; hereinafter: the amending Act of 2007), within the entire scope of its content regulating the institution of quasi-usucaption introduced into the Act on Housing Cooperatives by the amending Act. The court presented a question of law in the context of joined cases which concerned determining the acquisition of an immovable property by usucaption by a housing cooperative, with the participation of the representatives of the Capital City of Warsaw. The direct substantive basis for adjudication on the case by the court is the provision that has been challenged in the question of law. The housing cooperatives that referred to the court requested that a judgment be issued to confirm that certain plots of land owned by a commune (where buildings had been erected by the cooperatives) had been acquired by them. The provision whose constitutionality is challenged in the question is the provision which is to constitute the legal basis of the determination of a case, as the court asks about the constitutionality of the content of Article $35(4^1)$ of the Act on Housing Cooperatives. In the context of the facts of the case, it is not even necessary to analyse relations between the norm which is to be applied by the court and the provision which is the carrier of the norm. The provision indicated in the *petitum* of the question as the subject of the review is equivalent with the norm which will be applied by the court, when the court resumes resolving the dispute pending before it. Therefore, the correlation required by Article 193 of the Constitution, between the facts of the case and the content of the challenged provision, is here undeniable.

1.3. The scope ratione personae of the challenged provision and a functional premiss.

In the light of Article $35(4^1)$ of the Act on Housing Cooperatives, the quasi-usucaption of immovable property provided for therein concerns three ownership situations which differ in respect of the owner of immovable property, namely: the property of the State Treasury, the property of a unit of the local self-government, and the property of an owner that remains unknown (which may also regard an individual or a legal person).

In the question of law referred by the District Court for the District of Mokotów in Warsaw, allegations are raised as to the shape of the institution of usucaption provided for in Article 35(4^1) of the Act on Housing Cooperatives; it is primarily indicated that there has been an infringement of the principle of appropriate legislation and a restriction of proprietary rights. This means that, regardless of the type of the owner against whom the effect of Article 35(4^1) of the Act on Housing Cooperatives is targeted – be it the State Treasury, a commune or another owner - constitutional doubts concern the very construct of usucaption in Article 35(4^1) of the Act on Housing Cooperatives, which is identical throughout the entire scope ratione personae of that provision. However, another issue is the question of adequacy of particular higher-level norms for the review indicated by the court, and thus the adequacy of arguments used in particular parts of the substantiation for the question of law, as regards particular owners. In the light of the above assumptions, taking into account primarily the fact that the allegations of unconstitutionality have been formulated with regard to the construct of usucaption, and not as regards the group of subjects/owners of the land which is acquired by usucaption by the housing cooperative, and at the same time the construct of the usucaption under consideration does not provide for any differentiation depending on the owner; in the context of the question of law, it should be acknowledged that there is a relation between the necessity to review a given provision and a ruling which is to be delivered by the court referring the question, and the said provision may – throughout its entire scope ratione personae – be subject to constitutional review in these proceedings.

In the cases with relation to which the court referred the question of law, the facts concern the usucaption of land which is owned by a commune. The court referring the question of law posed the said question in the context of the facts of the case which were available to it. When formulating the question and allegations as well as when indicating higher-level norms for the constitutional review, the court did that on the basis of the facts. The participants in the proceedings (the Sejm and the Public Prosecutor-General) stated in their written statements that, for that reason, the subject of the constitutional review should be Article 35(4^1) of the Act on Housing Cooperatives, insofar as it provides for the usucaption of land owned by a commune.

As regards cases examined by the Constitutional Tribunal in review proceedings commenced in the context of a specific case (here: in the review proceedings commenced by way of the question of law), the subject of an allegation is a specific regulation - within the scope of application of a questionable provision – which refers to a certain group of situations. The said group of situations may concern a certain structure ratione personae which is of significance when the Constitutional Tribunal, bound by the content and premisses of admissibility of the question of law, determines the subject of constitutional review in a case instituted on the basis of such a question. Where allegations are directed at a given regulation (a provision or a legal norm) concerning only a certain group of subjects, and where the allegations do not regard issues related to the subjects or issues pertaining to differentiation among the subjects in the context of the object of that regulation which is relevant to the entire group of the subjects (despite the fact that in the case in the context of which a question of law has been referred, there is only one subject that belongs to the group of subjects of the regulation), it is possible to have a situation where – obviously carrying out a case-to-case assessment – the subject of constitutional review conducted by the Constitutional Tribunal will be the challenged regulation (a provision or a legal norm) within its entire scope ratione personae (cf. e.g. the judgment of Constitutional Tribunal (full bench) of 17 December 2008, Ref. No. P 16/08, OTK ZU No. 10/A/2008, item 181 and the judgment of 28 May 2009, Ref. No. P 87/08, OTK ZU No. 5/A/2009, item 75). In the present case, the court referring the question has formulated

the subject of allegation and the constitutional doubts in the context of the challenged provision in a general way, without any consideration for the type of the owner. This is obvious, as the court – bound by the specific facts of the case – asks about the provision which it should apply *in concreto* (in the context of the given facts of the case).

The purpose of review proceedings before the Constitutional Tribunal is to eliminate unconstitutional provisions/norms from the legal system. In the context of questions of law which fulfil a functional premiss, but whose scope ratione personae is broader than the one resulting from specific facts which constitute the subject of a given case pending before the court, a need emerges for the Tribunal to assess whether a review of constitutionality based on a given question of law refers only to an excerpt of the challenged provision (the scope ratione personae determined by the allegations raised and the facts of the case) or to the entire provision. Therefore, when conducting a review of constitutionality, the Tribunal must take into consideration that:

– in the context of particular situations, narrowing down the scope of review purely for the reasons concerning the scope ratione personae (which emerge in the context of a particular case with relation to which a given question of law has been referred) would be incomprehensible and would have detrimental effects from the point of view of the coherence of the system of law; a potential necessity to carry out another review which would encompass a different scope ratione personae of the same provisions (if, of course, differentiating between the scopes ratione personae of the challenged provision does not entail differentiating between legal regimes subjected to constitutional review) – taking into consideration the fact that the result would actually be determined by a judgment issued in the present case – there would also be non-compliance with the principle of procedural economy (cf. e.g. the judgment of the Constitutional Tribunal of 31 October 2001, Ref. No. K 33/00, OTK ZU No. 7/2001, item 217 and the judgment in the case P 16/08 cited above);

– using a judgment which declares a challenged provision to be unconstitutional only within a certain scope may be a source of doubts as to the significance and effects of that judgment of the Constitutional Tribunal.

In such a situation, there is a need for the Constitutional Tribunal to carry out an assessment as part of a constitutional review whether and why a view constituting an answer to the doubts of the court referring a question also refers to the scope ratione personae (hypothesis) of the reviewed provision which remains beyond the scope delineated by the facts of the case pending before the court referring the question. In the context of the present case, this means that the Constitutional Tribunal has to express its opinion as to the significance of the assessment of constitutionality carried out with regard to the challenged provision which provides for quasi-usucaption from the point of view of conformity to the indicated higher-level norms for review, for the entire scope ratione personae of the challenged provision (cf. conclusions in points 4.9., 5, 6 of that part of the statement of reasons).

2. The challenged regulation and the practice of the application thereof.

2.1. The challenged provision – the legal character of the introduced institution.

Introduced by the amending Act of 2007, the challenged provision is part of Article 35 of the Act on Housing Cooperatives, placed in the transitional and final provisions of the Act on Housing Cooperatives. Article 35 of the Act on Housing Cooperatives concerns a situation where a housing cooperative has no legal title to land on which it has erected buildings or other technical infrastructure. This is a special and additional solution. In a similar situation, housing cooperatives may benefit from ordinary

civil law regulations, which are meant for entities applying for the acquisition of another's immovable property, i.e. claims for purchase (Article 231 of the Civil Code) and usucaption (Article 172 of the Civil Code). The provisions of Article 35 of the Act on Housing Cooperatives make reference to these legal institutions. They establish similar legal instruments in the form of a quasi-claim for purchase (Article 35(1) of the Act on Housing Cooperatives) as well as quasi-usucaption (Article 35(4)-(4^2) of the Act on Housing Cooperatives).

After subsequent amendments, including the amendment of 2007 and the judgment of the Constitutional Tribunal of 15 July 2009 in the case K 64/07 (OTK ZU No. 7/A/2009, item 110), Article 35 has the following wording:

"1. A housing cooperative that, on 5 December 1990, was in possession of land which constituted the property of the State Treasury, of a commune, of a legal person other than the State Treasury, a commune or an association of communes, or of an individual, as well as prior to that day the housing cooperative alone, or its legal predecessors, erected buildings or other technical infrastructure permanently attached to the land, may request the owner of the plot of land for construction, which was occupied for that purpose, to transfer the right of ownership to that plot of land for a consideration to the said cooperative. The provision shall apply if, prior to the day when the housing cooperative submits an application, a demolition order has not been issued. The provision of Article 4(3a) of the Act of 21 August 1997 on Land Administration (Journal of Laws - Dz. U. of 2000 No. 46, item 543) shall apply accordingly.

1^1. If buildings which meet the requirements specified in paragraph 1 are situated on several plots of land, some of which constitute the property of the housing cooperative and the others are subject to perpetual usufruct, the housing cooperative may apply for the acquisition of ownership of the plots with regard to which the cooperative is a perpetual usufructary. The provision of Article 69 of the Land Administration Act shall apply accordingly.

1^2. If buildings which meet the requirements specified in paragraph 1 are situated on land which is let for perpetual usufruct to an entity other than a housing cooperative which is the possessor of the buildings, the housing cooperative may request that the entity transfer its right of perpetual usufruct for a consideration to the cooperative.

1^3. If buildings that constitute the property of the housing cooperative are situated on several plots of land with regard to which the housing cooperative has the right of perpetual usufruct, and agreements letting land for perpetual usufruct set different time-limits for perpetual usufruct, the housing cooperative may request the owner of the land to change contractual provisions in order to unify the time-limits for perpetual usufruct by adopting an average time-limit.

2. If the owner of the land for construction referred to in paragraph 1 is the State Treasury or a unit of local self-government or an association of such units, instead of transferring the ownership of those plots to the housing cooperative, upon application submitted by the housing cooperative, the plots shall be let for perpetual usufruct.

2^1. (has ceased to have effect).

3. A consideration for the acquisition of rights to the plots referred to in paragraphs 1-1^2 is set in an amount corresponding to the market price of those plots, without taking into account the value of buildings and other technical infrastructure, provided that they have been built or acquired by the housing cooperative or its legal predecessors. If the State Treasury or a unit of local self-government is the owner of the plots to be sold, the competent organ of public authority may grant a discount in accordance with the rules set out in legal provisions on land administration.

4. If the status of the immovable property referred to in paragraph 1 is not legally regulated within the meaning of Article 113(6) of the Land Administration Act, the housing cooperative acquires the ownership of that property by usucaption, if it meets the requirements set forth in paragraph 1. The provision of Article 511 of the Code of Civil Procedure, insofar as it requires that interested parties be indicated in an application commencing proceedings, shall not apply.

4^1. A housing cooperative that, on 5 December 1990, was in possession of land which constituted the property of the State Treasury or a commune, or if the owner of that immovable property remained unknown, despite efforts undertaken to determine the owner's identity, and prior to that day, on the basis of a building permit and a decision determining the location of a construction project, the said housing cooperative erected a building, then it shall acquire the ownership of that property by usucaption. A court ruling declaring the acquisition of ownership of an immovable property shall constitute the basis of an entry in the land register.

4^2. If a person who has the right to a cooperative flat has applied for the transfer of the right of separate ownership, and the housing cooperative is not entitled to the right of ownership or the right of perpetual usufruct with regard to the land where the flat indicated in the application is situated, and the housing cooperative meets the requirements referred to in paragraph 4^1, then the management board of the housing cooperative shall – within the time-limit of 3 months from the date of submission of the application – apply to a court for it to determine the usucaption of the land where the building concerned is situated.

5. If the housing cooperative has not put forward a request for the transfer of the ownership of the land for construction referred to in paragraph 1, the acquisition of the ownership of those plots by the housing cooperative, upon the payment of a consideration set out in accordance with paragraph 3, may be requested by their owners".

Article 35 of the Act on Housing Cooperatives introduces additional and special legal possibilities of acquiring rights to land by housing cooperatives. By means of those measures, housing cooperatives may acquire a legal title to land also in the case where – on the basis of general provisions of Articles 231 and 172 of the Civil Code – this would be impossible, e.g. due to the lack of required premisses, such as: good faith, autonomous possession or uninterrupted possession for a period specified in the provisions of the Civil Code. In the light of Article 35 of the Act on Housing Cooperatives, the above-mentioned legal qualifications (type of possession, the period of possession and good faith) are irrelevant. Both in the jurisprudence of the Supreme Court (see point 2.4 of that part of the statement of reasons), as well as in the doctrine, it is assumed that the acquisition of ownership – provided for in Article $35(4^1)$ of the Act on Housing Cooperatives (K. Pietrzykowski, *Spółdzielnie mieszkaniowe. Komentarz,* Warszawa 2008, p. 290; S. Rudnicki, *Komentarz do Kodeksu cywilnego, Własność i inne prawa rzeczowe,* Warszawa 2007, p. 180), although it has been called "usucaption", is not actually the classic version of the institution or a variation thereof).

2.2. The reasons for introducing special legal instruments for housing cooperatives for the acquisition of developed land.

Expanding the range of rights of housing cooperatives – in comparison with the rights of other entities carrying out construction work on another's land and without a legal title – results from the manner of land administration for the sake of housing cooperatives in the past (during the period of the People's Republic of Poland). At that time (especially until the 1980s), little attention was paid to sorting out the formal aspects of ownership of immovable property, which entails that no land registers were kept for state-owned properties. Also, formal decisions were not always issued as regards the transfer of

ownership of land to housing cooperatives (for usufruct, as discussed below). As a result, housing cooperatives had difficulties in proving their rights to land which they occupied. Moreover, in the past, housing cooperatives usually acquired land from the state. The said land was most frequently transferred for usufruct. This was the basic form of administration of land in the context of non-state entities (for which administration and operative administration were not accessible). The legal status of such usufruct (similarly to administration) was never clearly specified. At present, the dominant view is that usufruct granted to social entities by the state, such as housing cooperatives, resulted in dependent possession. And that type of ownership excluded, and still excludes, the possibility of applying Article 172 and Article 231 of the Civil Code.

For these two reasons, with the use of legal simplified measures (by creating particular ways and manners of acquiring immovable properties available to housing cooperatives), it was intended to balance actual difficulties in applying classic methods of acquisition of land developed by a housing cooperative. The issue of regulating the right to land occupied by housing cooperatives has become more significant since the introduction of the possibility of granting property rights to the members of housing cooperatives with regard to flats they occupy. This has required determining rights to land of housing cooperatives which have been granted property rights.

2.3. The normative context of the challenged provision.

2.3.1. Several instruments for the acquisition of immovable properties, granted to housing cooperatives for the purpose of sorting out the legal situation of the properties.

The Act of 29 April 1985 on Land Administration and Expropriation (Dz. U. of 1991 No. 30, item 127, as amended; hereinafter: the Land Administration and Expropriation Act) provided for a possibility of acquiring a legal title to land by housing cooperatives. The Act of 13 July 1988 Amending the Act on Land Administration and Expropriation (Journal of Laws - Dz. U. No. 24, item 170) added, *inter alia*, paragraph 2 to Article 87, from the previous regulation, which read as follows: "2. In the case of the possessors of state land who, on 1 August 1988, do not hold documents about the transfer of land, issued in the form provided for by law, and who will not apply – until 31 December 1988 – for the legal status of the land to be determined, the land in their possession may be given for the purpose of administration, usufruct [in the case of housing cooperatives] or perpetual usufruct. The transfer is based on a decision of local organs of state administration, issued without the necessity for submitting applications for such transfer, within the borders determined with dividing borderlines set out in local land development plans or implementation plans".

In 1990 (the Act of 29 September 1990 Amending the Act on Land Administration and Expropriation, Journal of Laws - Dz. U. No. 79, item 464, as amended), actions were taken to sort out ownership rights to land in the case of social entities (due to the change of the political system):

1) on 5 December 1990 (the date of entry into force of the above-mentioned amendments) property rights were granted to state legal persons (the *ex lege* acquisition of the rights to perpetual usufruct of land), i.e. administration was replaced with perpetual usufruct,

2) the usufructaries of state and communal land (e.g. housing cooperatives) remained usufructaries (they did not enhance their legal titles),

3) however, some entities, including in particular housing cooperatives which on 5 December 1990 were the usufructaries of state and communal land, were granted the right to make claims for the establishment of perpetual usufruct of land and the transfer of ownership rights to buildings (Article 2c of the amendments of 1990). Initially, the said

claims became invalid on 31 December 1994, and then the period was extended until 31 December 1996.

In the following year (the Act of 4 October 1991 amending some terms of preparing housing investment in the years 1991-1995 and certain other acts, Journal of Laws - Dz. U. No. 103, item 446, as amended), Article 88a was added to the Land Administration and Expropriation Act, which stipulated that legal persons (including housing cooperatives) which until 5 December 1990 received final decisions determining the location of construction projects on land for construction owned by the State Treasury or a commune - were granted perpetual usufruct of the land.

Similar provisions were provided for in the Act of 21 August 1997 on Land Administration (Journal of Laws - Dz. U. of 2010 No. 102, item 651, as amended; hereinafter: the Land Administration Act.). What is meant here is in particular:

– Article 204: 1. A housing cooperative, an association of cooperatives and other legal persons which on 5 December 1990 were the usufructaries of land owned by the State Treasury or a commune are entitled to make claims for the establishment of perpetual usufruct of land as well as for the transfer of ownership of buildings, technical infrastructure and other facilities situated there.

2. The conclusion of an agreement to let land for perpetual usufruct is carried out without a tender.

3. The transfer of ownership of buildings, technical infrastructure and other facilities is carried out upon the payment of a consideration, unless the premises were built or purchased with the own means of the housing cooperative, the association of cooperatives and other legal persons.

5. The claims referred to in paragraph 1 became invalid if applications in that regard were not submitted until 31 December 1996.

– Article 205: "1. The claims made by housing cooperatives, associations of cooperatives and other legal persons concerning the establishment of perpetual usufruct, which originated prior to the entry into force of this Act, are subject to its provisions as of that day.

2. The provisions of Article 204 shall apply accordingly to the legal successors of housing cooperatives, associations of cooperatives and other legal persons, which existed on 24 December 1992 and still exist on the day of entry into force of this Act".

– Article 206: "the Council of Ministers specifies, by way of a regulation, specific rules and terms for determining the previous right of administration of an immovable property vested in state and communal legal persons, as well as the right of usufruct of property by housing cooperatives, associations of cooperatives and other legal persons, regarding measures referred to in Article 200(1), Article 201(2) and Article 204(3) as own means, specifying the value of properties and amounts due for the purchase of buildings, other technical infrastructure and facilities, securing the arising liability, as well as the types of documents constituting indispensable evidence in those cases";

– Article 207: 1. "persons who were the possessors of immovable properties constituting the property of the State Treasury or the property of a commune on 5 December 1990, and who still remained the possessors on 1 January 1998, may claim the return of the properties by means of an agreement of perpetual usufruct together with the transfer of ownership of buildings if they developed that land on the basis of building permits with permanent location for a given construction project. The acquisition of ownership of erected buildings paid for by the possessors, with their own means, is done free of charge".

1a. If an immovable property has been developed on the basis of a building permit with a location for a given construction project for a specific period of time, the conclusion

of the agreement referred to in paragraph 1 depends on whether the location corresponds to the local land development plan which was valid on the day of submitting the claim.

2. The possessors referred to in paragraph 1 may be exempted from the first payment for the perpetual usufruct if they submit applications for establishing usufruct on the properties in their name before the end of the year as of the day of entry into force of the Act.";

(The said provision has been the subject of examination by the Constitutional Tribunal; namely in the judgment of 3 June 2002, Ref. No. K 26/01, OTK ZU No. 4/A/2002, item 40 as well as in the judgment of 10 April 2006, Ref. No. SK 30/04, OTK ZU No. 4/A/2006, item 42. In the first case, the applicant argued that, as a result of the amendment to Article 207 of the Land Administration Act, the power of communes to have control over the properties entrusted to them has been diminished. In this context, conformity to Article 2 and Article 165(1) of the Constitution has been stated here. In the second case, the complainant applied for having the right of perpetual usufruct granted again to the possessors of properties which constituted the ownership of the State Treasury and communes. In this context, it was declared that there was no conformity to Article 2 of the Constitution, insofar as this concerns cases which were still pending before the entry into force of the amendment concerning the acquisition of perpetual usufruct of immovable properties which are owned by the State Treasury or a given commune and which have not been developed by their possessors).

– Article 208: "1. Individuals and legal persons that until 5 December 1990 received final decisions determining the location of construction projects or building permits, issued with regard to an immovable property owned by the State Treasury or a commune, shall acquire the immovable property for usufruct by way of tender, if applications for the acquisition of those properties were submitted prior to the date those decisions became invalid, but no later than on 31 December 2000.

2. Housing cooperatives, associations of cooperatives, the National Council of Cooperatives and other legal persons that until 5 December 1990 erected buildings with their own means or their legal predecessors did so, with permission granted by a competent building inspection authority, are entitled to make claims for the establishment of perpetual usufruct of land as well as for the free-of-charge transfer of ownership of the buildings erected there. These legal persons are entitled to the claim with regard to land which was in possession within the meaning of Article 207 on the day of submitting the claim and encompasses land which is necessary for the appropriate use of the building.

3. As regards the cases referred to in paragraph 2, the conclusion of an agreement perpetual usufruct of land and the transfer of ownership title to buildings shall be done without a tender as well as without the obligation to make the first payment.

4. the claims referred to in paragraph 2 have expired, if applications in that regard were not submitted until 31 December 1996".

The indicated provisions of the Land Administration Act are still legally binding.

2.3.2. Comparing previous instruments which make it easier for housing cooperatives to acquire land developed by those cooperatives with a view to sorting out the legal situation with regard to the challenged institution of quasi-usucaption.

What is characteristic in the quoted provisions of the Land Administration and Expropriation Act of 1985 and the Land Administration Act of 1997 is that special regulations for housing cooperatives only referred to land owned by the state and communes. Situations related to private land are therefore subject to ordinary civil-law rules. Therefore, concessions to housing cooperatives were made to the disadvantage of the state and communes. At the same time, Article 35 of the Act on Housing Cooperatives (Article 4^1 of which has been challenged in the present case) also encompasses private

land, in practice "excluding" it from an ordinary procedure in that regard. In other words, in the light of the present case, the subject of the special quasi-usucaption has been rendered in much broader terms than in the case of previous special regulations making it easier for housing cooperatives to acquire land developed by those cooperatives.

Another difference between the provisions of Article 35 of the Act on Housing Cooperatives and the provisions of the Land Administration and Expropriation Act of 1985 and the Land Administration Act of 1997 concerns the type of rights which may be acquired by housing cooperatives. In the said previous Acts, there is only mention of perpetual usufruct. By contrast, what is of significance in Article 35 of the Act on Housing Cooperatives is the right of ownership with regard to (public) land. This means the enhancement of the measure granted to a housing cooperative – as regards the effect of its application (the type of the right acquired by a housing cooperative: not perpetual usufruct, but ownership).

Another difference between the previous measures for the acquisition of land by a housing cooperative and the regime of Article 35 of the Act on Housing Cooperatives concerns the initiative of the acquisition of the right to land. The right of perpetual usufruct may be acquired by housing cooperatives upon application. By contrast, pursuant to the Act on Housing Cooperatives, it is not the owner of public land who implements a certain policy with regard to the administration of public land, but a single private entity.

In the original version of the Act on Housing Cooperatives, there were gradations of legal and factual situations which led to the acquisition of the rights to land. Paragraph 1 provided for a claim for the purchase of land. Article 35(4) concerns usucaption of a slightly different legal regime than the classic usucaption provided for in the Civil Code. The legal regime of the said institution, as provided for in the original version of Article 35(4) of the Act on Housing Cooperatives, entailed that a housing cooperative which had no right to land was entitled to "only" a claim for the transfer of the ownership of land for a consideration (the market value of the property). Needless to say, the claim was to be made against the owner of land (both public and private owner). Only when the situation of an immovable property in possession of a housing cooperative was not determined within the meaning of Article 113 of the Land Administration Act of 1997, the housing cooperative acquired the ownership of that property by "usucaption". Pursuant to Article 113 of the Land Administration Act of 1997, an immovable property whose legal situation is not determined should be understood as an immovable property with regard to which it was impossible to determine the identity of parties entitled to property rights, due to no land register, no relevant collection of documents or other documents. In other words, "usucaption" in the original version of the Act on Housing Cooperatives (Article 35(4)) was taken into account only when the owner of a given immovable property was unknown. There are more differences between Article 35(1) and Article 35(4) of the Act on Housing Cooperatives:

1) a payment – a claim under Article 35(1) requires a payment; a housing cooperative must pay a consideration to the owner of a given immovable property (the market value of the property), whereas usucaption is free of charge;

2) a legal effect – usucaption i.e. the acquisition of land by a housing cooperative occurs *ex lege* (see a different view presented by R. Dziczek, *Spółdzielnie mieszkaniowe. Komentarz*, Warszawa 2006, p. 274, who claims that "usucaption" under Article 35(4) of the Act on Housing Cooperatives does not occur *ex lege*, but on the basis of and on the day of the pronouncement of a court ruling), and in the case of a claim under Article 35(1) of the Act on Housing Cooperatives – upon the transfer of ownership of the property from the owner to a housing cooperative (by an agreement or a court's ruling issued in accordance with Article 64 of the Civil Code and Article 1046 of the Code of Civil Procedure).

Usucaption under Article 35(4) of the Act on Housing Cooperatives takes place even if a given housing cooperative is a dependent possessor (and not an autonomous one), and even if it has possessed a given property for less than the period of 20 years provided for in the Civil Code, and regardless of the fact whether this is done in good faith. The "unidentified" owner of a property subject to usucaption may be either a public party or a private one. Sufficient premisses are as follows: a housing cooperative was the possessor of the land on 5 December 1990, and prior to that date it had erected buildings for which no demolition order had been issued.

Two new paragraphs were added to Article 35 of the amending Act of 2007, namely: paragraph 4^1 (challenged in the present case) and paragraph 4^2. The said amendments consisted in introducing more forms of "usucaption" which were of a slightly different – in comparison with the previous one – legal regime. Thus, the legislator did not specify the date when usucaption comes into effect. Article 35(4^1) of the Act on Housing Cooperatives repeats (similarly to Article 34(4) of the said Act) the premisses of "usucaption". What is common is the requirement that a housing cooperative should possess land on 5 December 1990, also in this case, this may be autonomous possession or dependent one (the latter is more frequent). Moreover, both provisions require a housing cooperative to erect a building prior to 5 December 1990; however, Article 35(4^1) of the Act on Housing Cooperatives, unlike Article 35(4) – does not contain reference to paragraph 1 of that Article. As a result, the legal regime of acquisition under Article 35(4^1) of the Act on Housing Cooperatives does not apply to the acquisition of land "with other technical infrastructure attached to it" by a housing cooperative.

Apart from the indicated common elements, the provisions of Article 35(4) and (4^1) of the Act on Housing Cooperatives differ in respect of the legal institution of quasi-usucaption which is provided therein. It is required in Article 35(4^1) of the Act on Housing Cooperatives that a building should be erected on the basis of a building permit or a decision determining the location of a construction project; whereas Article 35(4) in conjunction with Article 35(1) of the Act on Housing Cooperatives requires only that no demolition order be issued, which means that in the last-mentioned provisions (Article 35(4) in conjunction with Article 34(1)), it is admissible to build illegally (i.e. without a permit). By contrast, pursuant to Article 35(4^1) of the Act on Housing Cooperatives, construction work done without a permit does not justify "usucaption".

However, the most important difference between these two types of "usucaption" is that – unlike Article 35(4) of the Act on Housing Cooperatives, which provided for "usucaption" (although as regards substantive law public and private properties) only with regard to immovable properties in the case of which the legal situation was not determined (unidentified owner) – Article 35(4^1) of the Act on Housing Cooperatives allows for the "usucaption" of immovable property which has been owned by the State Treasury or a commune. Therefore, on the basis of Article 35(4^1) of the Act on Housing Cooperatives, it is possible to "prescribe" an immovable property against its public owners. In addition, the subject of "usucaption" pursuant to Article 35(4^1) of the Act on Housing Cooperatives are immovable properties of an "unknown" owner (whether private or public one), despite previous attempts to identify that owner.

Also, Article 35(4^1) of the Act on Housing Cooperatives contains slightly different terminology. The word "unknown" is used with regard to a relevant owner; whereas in Article 35(4) of the Act on Housing Cooperatives, there is the category of a legal situation which is not determined (an unidentified owner) within the meaning of Article 113 of the Land Administration Act. There is no certainty that the legislator had the same kind of attribute in mind when he used the terms "unidentified" and "unknown".

Article 35(4^1) of the Act on Housing Cooperatives with regard to land whose owner may not be identified repeats the solution contained in Article 35(4) of the Act on Housing Cooperatives, but in a narrower scope. Indeed, Article 35(4) of the Act on Housing Cooperatives provides for the acquisition of land (whose legal situation is not determined i.e. land whose owner remains unidentified) by way of usucaption by a housing cooperative, also in the case where the housing cooperative erected a building on that land based on a building permit and a decision determining the location of a construction project (as it allowed the housing cooperative to acquire land by way of usucaption in all the cases set out in Article 35(1) of the Act on Housing Cooperatives). Within the scope under discussion, the said regulation seems redundant (see E. Bończak-Kucharczyk, *Spółdzielnie mieszkaniowe. Komentarz*, Warszawa 2008, see also M. Wrzołek-Romańczuk, "Niewykorzystane szanse nowelizacji. Uwagi do ustawy z 14 czerwca 2007 r. o zmianie ustawy o spółdzielniach mieszkaniowych oraz o zmianie niektórych innych ustaw, cz. 2", *Palestra* 2007, Issue No. 9-10, p. 149). The analysis of a legislative process, however, indicates that the legislator assumed a different *ratio*. One may point out here the view presented by M. Wrzołek-Romańczuk that "the legislator's aim was primarily to create a possibility of acquisition by usucaption in the context of an immovable property whose owner is unknown, and with regard to which a housing cooperative does not hold a legal title in the form of the right of ownership (or the right of perpetual usufruct) and, despite efforts undertaken in that regard, the cooperative did not manage to regulate that situation" (*op.cit*. p. 150).

What is of significance as regards formulating the infringement of the principle of a democratic state ruled by law in the context of the principle of appropriate legislation and the principle of specificity of law is other doubts concerning interpretation which arise from the challenged provision, apart from those indicated in the question of law.

However, what is shared by the "usucaption provisions" contained in Article 35 of the Act on Housing Cooperatives (including the provision challenged in these review proceedings) is that they do not specify a procedure for stating the fact that a given owner is unknown/unidentified. In particular, it is not known who, and in what manner and form, is to undertake "efforts" to determine the owner of the immovable property in possession of a housing cooperative (Article 35(4^1) of the Act on Housing Cooperatives); neither is it known who and in what manner would state that sufficient efforts have been undertaken in that regard, as well as what degree of intensity, or stopping at what stage or by what action, would fall within the category of ineffective "efforts".

Also, what has been added to Article 35(4^1) of the Act on Housing Cooperatives is a sentence (not included in Article 35(4) of the Act on Housing Cooperatives) which states that a court ruling declaring the acquisition of ownership of an immovable property pursuant to Article 35(4^1) of the said Act shall constitute the basis of an entry in the land register.

2.3.3. The observation of the previous legislative activity within the scope under consideration indicates that there are numerous subsequent overlapping instruments for the extraordinary acquisition of land, due to subsequent new regulations, as well as that there is an increasing number of types of land with regard to which those instruments are applicable (not only state-owned land and land owned by communes, but also private land). At the same time, the effect is being intensified (not only the acquisition of the right of perpetual usufruct, but also the acquisition of ownership), and the group of subjects who have the right to institute proceedings is expanding (not only housing cooperatives but also the members of housing cooperatives), as well as the sequential selection of a measure is being restricted, and simultaneously the procedural guarantees of "usucaption proceedings" are weakening. What follows from the account of historical development of the legislation

presented here is that, despite the subsequent regulations and the ensuing increasing facilitation of the acquisition of rights to land developed by housing cooperatives, this has not resulted in sorting out the legal status of land in possession of housing cooperatives. Article 35(4^1) of the Act on Housing Cooperatives does not merely constitute the extension of the range of situations involving the modification of an immovable property whose legal status is not determined (binding already before Article 35(4) of the Act on Housing Cooperatives was amended). It entails introducing new possibilities, in that context, as regards the property with relation to which a housing cooperative is granted property rights, and the legal institutionalisation of the granting of those rights, to the disadvantage of not only legal persons that are subject to public law, but also individuals and legal persons under private law. The institution introduced in Article 35(4^1) of the Act on Housing Cooperatives has radicalised (to the disadvantage of owners against whom "usucaption" was targeted) the goal itself which was to grant property rights to a housing cooperative in order to modify the legal titles to flats of the members of the housing cooperative.

2.3.4. The lack of clarity of the regulation. Obviously, the mere fact that there are different instruments for determining the ownership situation of land developed by a housing cooperative as well as different legal regimes governing quasi-usucaption does not in itself constitute an infringement of the Constitution. However, the problem is that the institutions which are not synchronised, which overlap and which are insufficiently operational, as regards their procedural aspects, raise doubts as to "in what legal situation" a given housing cooperative may sort out its rights to land which it has developed. The existing regulation concerning the special regime governing the acquisition of ownership of land developed by housing cooperatives does not explain the mutual relation between these two instruments. The scope ratione materiae of Article 35(4^1) of the Act on Housing Cooperatives partially overlaps with Article 35(1) of the Act on Housing Cooperatives (in the part concerning the known/identified owner being the State Treasury or a commune) and with Article 35(4) of the Act on Housing Cooperatives (in the part concerning the unknown/unidentified owner).

In the first case (Article 35(4^1) and Article 35(1) of the Act on Housing Cooperatives), a question arises as to a relation between the free-of-charge "usucaption" of property by a housing cooperative (on the basis of Article 35(4^1) of the Act on Housing Cooperatives) and Article 35(1) of the Act on Housing Cooperatives, if the cooperative has already managed to conclude an agreement for the transfer of ownership (or the transfer of perpetual usufruct) of an immovable property for a consideration to the cooperative.

Also, it is unclear which provision takes precedence (Article 35(1) or Article 35(4^1) of the Act on Housing Cooperatives) if on the day of "usucaption" (assuming that this is the day of entry into force of the amending Act of 2007) the housing cooperative has not yet concluded the agreement referred to in Article 35(1) of the Act on Housing Cooperatives.

In the second case (Article 35(4) and Article 35(4^1) of the Act on Housing Cooperatives), there are doubts as to the date of "usucaption" of an immovable property by the housing cooperative if a given building has been erected on the basis of a building permit or a decision determining the location of a construction project. In such a case, there are two instances of "usucaption" with different dates.

In its resolution of 26 November 2008 (Ref. No. III CZP 115/08), the Supreme Court expressed, for example, the view that, when comparing Article 35(1) and (2) with Article 35(4) and (4^1) of the Act on Housing Cooperatives, it should be stated that they refer to different factual and legal situations, have different scopes and provide for

different claims and rights for a housing cooperative, which are mutually exclusive; if a housing cooperative has by law acquired the ownership of an immovable property by "usucaption" on the basis of Article 35(4) or Article 35(4^1) of the Act on Housing Cooperatives, it is not eligible to make claims for the transfer of ownership of the property or for the conclusion of an agreement for perpetual usufruct on the basis of Article 35(1) or Article 35(2) of the Act on Housing Cooperatives. The said provisions make up a legal regulation which, in different factual and legal situations, allows housing cooperatives to acquire the right to land.

2.3.5. For the constitutional review conducted by the Constitutional Tribunal, the existence of such doubts in the context of subsequent legal regulations has a two-fold significance.

Firstly, there is the issue of mainstream judicial practice as regards dispelling those doubts; as long as such practice of interpreting a provision (and ruling out any doubts related thereto) is consistent and common, then such well-established interpretation of the provision is subject to constitutional review conducted by the Constitutional Tribunal (see, in particular, the judgments of the Constitutional Tribunal of: 13 April 1999, Ref. No. K 36/98, OTK ZU No. 3/1999, item 40; 3 October 2000, Ref. No. K 33/99, OTK ZU No. 6/A/2000, item 188; as well as the decision of the Constitutional Tribunal of 4 December 2000, full bench, Ref. No. SK 10/99, OTK ZU No. 8/2000, item 300; as regards the interpretation of the provision in the present case, as shaped by judicial practice, cf. below point 2.4.).

Secondly, the existing doubts as to the mutual placement and significance of provisions regulating similar or identical issues may not as such constitute the subject of constitutional review (a horizontal review of constitutionality). Indeed, the point is not the mere existence of different instruments in the Act on Housing Cooperatives, which are aimed at sorting out rights to land developed by a housing cooperative, or various types of quasi-usucaption. However, the ambiguities and doubts indicated in the context of the statutory regulation may be taken into account when considering the allegation of unreliable legislation (Article 2 of the Constitution), especially when it follows from the course of legislative work that it is difficult to claim that there is intentional and purposeful redundancy of regulations and institutions.

2.3.6. Draft amendments to the challenged provisions. Draft amendments to the Act on Housing Cooperatives, proposed by a group of Sejm Deputies – included in the Sejm Paper No. 3494/6^{th} term of the Sejm, which was submitted to the Sejm on 5 October 2010 – provided for a thorough reform of the legal regime governing the regulation of rights granted to a housing cooperative with regard to land developed by the cooperative, as well as for changes in the challenged provision aimed at eliminating some of its statements. Refraining from carrying out an assessment whether the proposed solutions stand a chance of being enacted in the proposed form, whether the said form raises doubts as to its constitutionality or effectiveness, as well as whether and when the proposed amendments will at all be enacted (bearing in mind that they have just been submitted), what should be pointed out is a characteristic argument presented in the explanatory note for the amendments. Page 23 contains the following statement: "the current provisions contained in Article 35 are not only bizarre, but above all they are unclear". This means that the doubts raised in the legal question are not new to some Deputies.

2.4. The jurisprudence of the Supreme Court in the context of the challenged provision and its significance for the subject of the constitutional review.

2.4.1. With regard to the requirement that a housing cooperative should possess an immovable property not only on 5 December 1990, but also on the day of entry into force of the amending Act (this issue has received critical comments from the Sejm), which has been mentioned in the question of law that commenced the review proceedings in the present case, one should indicate the decision of the Supreme Court of 17 November 2009 (Ref. No. III CSK 71/09). The Supreme Court stated that there were no legal grounds to transfer the premiss of uninterrupted possession from the institution of usucaption regulated in Article 172 of the Civil Code into the realm of application of Article $35(4^1)$ of the Act on Housing Cooperatives, and with regard to the period from 5 December 1990 until the entry into force of the latter provision, i.e. until 31 July 2007. Indeed, the said provision requires only the possession of an immovable property on 5 December 1990, and in no way does it refer to the character of possession, good or bad faith of the possessor, the period and the continuity of possession. In its application, there is no problem of running the period of usucaption to the disadvantage of the owner of the property. Moreover, the Supreme Court stated that the acquisition of an immovable property by usucaption, on the basis of Article $35(4^1)$ of the Act on Housing Cooperatives occurs *ex lege* (similarly to Article 172 of the Civil Code, and this is the only similarity between these regulations), on the day of the entry into force of the amending Act introducing that provision, i.e. on 31 July 2007. An analogical view was presented by the Supreme Court in its resolutions of 26 November 2008 (Ref. No. III CZP 115/08, OSNC No. 5/2009, item 71, the Bulletin of the Supreme Court 2008/11/12), of 24 February 2009 (Ref. No. III CZP 138/08, the Bulletin of the Supreme Court 2009/2/8, *Monitor Prawniczy* Issue No. 2009/15/838) as well as of 20 May 2009 (Ref. No. I CSK 420/08), in which it assumed that – in the case of the division of a housing cooperative which was in possession of a communal immovable property on 5 December 1990, and prior to that date, on the basis of a building permit and a decision determining the location of a construction project, it erected a building on that property – the property is acquired by usucaption on the basis of Article $35(4^1)$ of the Act on Housing Cooperatives by the housing cooperative which has emerged from the division.

2.4.2. The Constitutional Tribunal has on numerous occasions stressed in its jurisprudence that if a particular interpretation of a provision of a statute has become well-established in an obvious way and, in particular, if it has unambiguously and authoritatively been manifested in the jurisprudence of the Supreme Court or the Chief Administrative Court, then it should be regarded that the provision – in the course of its application – has acquired the content which the highest judicial instances of our country have recognised therein. Therefore, in the further discussion, the Constitutional Tribunal takes into account the interpretation of Article $35(4^1)$ adopted in the previous jurisprudence of the Supreme Court. Hence the Constitutional Tribunal does not share the view of the court referring the question that it is unclear (indeed, the jurisprudence of the Supreme Court has made it clear) whether – in the light of Article $35(4^1)$ of the Act on Housing Cooperatives – there is a premiss of possessing land also on the day on entry into force of the amending Act of 2007. Additionally, the Constitutional Tribunal assumes that the quasi-usucaption provided for in Article $35(4^1)$ of the Act on Housing Cooperatives is not a special case of the usucaption from Article 172 of the Civil Code.

2.4.3. However, the existing jurisprudence of the Supreme Court has not dispelled all the above-indicated doubts as to the quasi-usucaption regulated in Article $35(4^1)$ of the Act on Housing Cooperatives, and its relation to the "usucaption" from Article 35(4) of the Act on Housing Cooperatives, referred to above in point 2.3.4. In particular, so far the Supreme Court has not provided an interpretation concerning a procedure in accordance with which it would be stated that a given owner of an immovable property was not

determined, in the case where a housing cooperative applied for the acquisition of that property by usucaption.

3. Doubts concerning constitutionality in the context of the question of law.

The District Court for the District of Mokotów in Warsaw, which has referred the question of law in the present case, has raised doubts as to the constitutionality of the following issues:

– the introduction of a regulation which is non-systemic, lacks consistency and raises serious doubts as to the interpretation thereof (the higher level norm for review as regards the reliability of legislation – Article 2 of the Constitution);

– the introduction of that regulation without providing for an adjustment period; thus, it has had effects as of the day of entry into force of the Act (the higher level norm for review as regards the reliability of legislation – Article 2 of the Constitution);

– the proportionality (Article 31(3) of the Constitution) of the regulation which ruled out the protection of the hitherto owner of an immovable property, in the situation where effects occur *ex lege* at a certain date, by leaving the owner deprived of his/her property without receiving the payment of a consideration for the property (the higher level norm for review as regards the guarantee of ownership – Article 64 of the Constitution; the higher level norm for review as regards the guarantee of independence of local self-government – Articles 165 and 167 of the Constitution);

– the admissibility of the regulation which expands the group of subjects, at the expense of the property of local self-government (the guarantee of protection of self-governance and ownership – Article 165 and 167 of the Constitution) and state-owned property (the guarantee of protection of ownership – Article 64 of the Constitution).

4. The allegations of the infringement of Article 2 of the Constitution.

4.1. The status of communal ownership changed in 1997. Since the entry into force of the Constitution, communal ownership has been constitutionally protected – not only as control over property (Article 165(1), first sentence), but also as the subject and guarantee of being the subject of rights (Article 165(1), second sentence, of the Constitution) – (in this context cf. more closely point 6 of that part of the statement of reasons). For that reason, the principle of protection of citizens' trust in the state and its laws is regarded by the Constitutional Tribunal as binding also with regard to relations among the units of local self-government and the state. In its judgment of 18 July 2006 (Ref. No. U 5/04, OTK No. 7/A/2006, item 80), the Constitutional Tribunal assumed that what was binding was also the principle of trust in the state and its laws by the community of a unit of local self-government, which is based on "the reliability of law i.e. such collection of attributes that are assigned to the law which guarantee legal security as well as make it possible for the units of local self-government to decide about its actions, based on the full knowledge of the content of the binding legal text and the premisses of actions taken by the organs of the state and legal consequences that those actions may bring about".

4.2. In its judgment by the full bench in the case P 16/08, the Constitutional Tribunal presented the view that subsequent amendments and changes in normative concepts of housing cooperatives raise doubts in the light of the principle of reliability of law the principle of protection of citizens' trust in the state and its laws (Article 2 of the Constitution). All these changes – including the challenged provision in the present case, which has been covered by the amending Act of 2007 – concerned all cooperative relations, regardless of the time when a given housing cooperative was established, its size

and the date of acquisition of a flat from the cooperative, the financial terms of that acquisition and the scope of a subsidy from public funds, granted to the beneficiaries of the right to a flat at the time of the acquisition of the flat. In the light of Article 2 of the Constitution, doubts arise as to the admissibility of the process of continually solving the same problem (sorting out the rights of a cooperative to land), and thus continually favouring a certain category of parties. Indeed, challenged Article 35(4^1) of the Act on Housing Cooperatives entails favouring those housing cooperatives which did not gain legal titles to land, despite favourable terms that had been established by statute for many years (as referred to in point 2.3.1. of that part of statement of reasons). On the contrary, they acquire the ownership free-of-charge. This also means favouring the tardiness of the cooperatives which reluctantly gained from the transformational reform of cooperative relations. In that context, one should rule out the argument that the legislation dealt with was forced by the necessity arising from political axiology. The challenged solution (the acquisition of the right to land by housing cooperatives not in the form of usufruct, but ownership, in the original way, thus without any liabilities and *ex lege*, i.e. with the illusory guarantees of the protection of the rights of third parties during court proceedings) eliminates the chances of persons who have claims for the recovery of land lost due to historical circumstances, which is particularly relevant to communal and state land. There is no way of explaining why the rights of the persons who put forward claims for the recovery of land lost due to historical circumstances are to be less protected than the property-related aspirations of housing cooperatives, also submitted in the name of the transformational needs. Challenging the quasi-usucaption under Article 35(4^1) of the Act on housing Cooperatives, in the present case, entails enhancing the grounds for the allegation of infringement of Article 2 of the Constitution from the case P 16/08 for the same reasons (the infringement of the principle of the reliability of law and the principle of protection of citizens' trust in the state and its laws).

4.3. With the passage of time since the political transformation, there should be increasing caution as regards the proposal of "granting property rights to all". In other words, guarantee requirements towards that type of statutory solutions should increasingly meet the standards of a democratic state ruled by law, also as regards considering conflicting values, such as "common good", and should be characterised by due restraint when it comes to granting simplified forms of acquisition of ownership by some parties at the expense of others (housing cooperatives, and then later on – the members of the cooperatives who have been granted property rights). By contrast, the regulation challenged in the present case is characterised by increasing intensity, which has already been mentioned in points 2.3.1.-2.3.3. of this part of the statement of reasons, where the constructs adopted in the Act on Housing Cooperatives are compared with the constructs adopted in the previous statutes (including the amendments of the Land Administration and Expropriation Act and the Land Administration Act, enacted prior to 1997, i.e. before incorporating the guarantees of ownership (also communal ownership) into the Constitution, as well as in the light of subsequent changes of the Act on Housing Cooperatives, with particular attention paid to the amending Act of 2007). The said intensity manifests itself in a number of ways. First of all, the range of types of land has been regularly expanding (at present including also private land), as regards the manner of acquiring the rights of cooperatives. Secondly, the rights acquired by housing cooperatives have become increasingly well-established. Initially, this was perpetual usufruct, whereas now this is the most significant property right: ownership (here, *inter alia*, there is a difference in assessment of the present situation from the point of Article 2 of the Constitution, in comparison with the assessment of the constitutionality of the amendment

of Article 207 of the Land Administration Act, which was conducted in the light of the case K 26/01). Thirdly, acquisition is shaped as original, which eliminates the possibility of the rights of third parties that make claims for land – in particular, this is related to the recovery of land lost due to historical circumstances (which rules out the argument about the transformational necessity, as it underlies the genesis of the recovery of land lost due to historical circumstances). Fourthly, the measure has been enhanced by means of introducing the *ex lege* acquisition. At the stage of court proceedings, this form of acquisition does not, by its nature, provide for a possibility of weighing the assessment by the court adjudicating in a given case; the court only determines the occurrence of statutory premisses. This way, determining that effects with regard to ownership will occur *ex lege* deprives the court proceedings mentioned here of effective guarantees. This has already been criticised by the Constitutional Tribunal (cf. the judgment of 17 March 2008, Ref. No. K 32/05, OTK ZU No. 2/A/2008, item 27 as well as the judgment of 13 March 2007, Ref. No. K 8/07, OTK ZU No. 3/A/2007, item 26).

Such use of inadequate constructs and legal institutions constitutes the infringement of Article 2 of the Constitution.

4.4. The introduction of the systemic solutions was the subject of critical assessment provided by the Tribunal, as the infringement of Article 2 of the Constitution. What should be mentioned here is a characteristic view (formulated with reference to the legal institution of mortgage), that a rational legislator may not, in particular, enact provisions which are inconsistent with the established system of law, and which infringe the essence of a given legal institution. This also undermines the principle of protection of citizens' trust in the state and its laws, as expressed in Article 2 of the Constitution (see the judgment of the Constitutional Tribunal of 26 November 200, Ref. No. P 24/06, OTK No. 10/A/2007, item 126). The principle of appropriate legislation implies not only the principles of proper editing of a normative text, but also the principles of applying adequate legal constructs (in respect of a given purpose).

The institution of usucaption, which is regulated in the Civil Code, has already been discussed by the Constitutional Tribunal. In the judgment of 14 December 2005 (Ref. No. SK 61/03, OTK ZU No. 11/A/2005, item 136), the Constitutional Tribunal stated that Article 172 of the Civil Code is consistent with the Constitution, and pointed out that the institution of usucaption was primarily aimed at eliminating discrepancies between the persistent actual state of unauthorised and independent possession and the legal situation; in that aspect, this serves the purpose of sorting out the legal situation. This should simultaneously stimulate owners (and other subjects of property rights) to exercise their rights with regard to property, and at the same time counteract (prevent) persistent tardiness in the exercise of proprietary rights or other related rights.

The analysis of Article 35(4^1) of the Act on Housing Cooperatives (its place with relation to other solutions which have previously been binding, including the other provisions of that provision, in particular Article 35(4) of the Act on Housing Cooperatives – cf. point 2.3.2. of that part of statement of reasons) proves that the legislator – seemingly continuing certain assumptions – introduced another radical systemic change, without sufficient justification and in an ineffective way.

4.5. The infringement of Article 2 of the Constitution is also the lack of a transitional regulation (ignoring that particular situation that this is another amendment to the provision, which is also placed in the transitional provisions of the Act on Housing Cooperatives). As M. Bednarek aptly observes that: “The modification of traditional premisses of usucaption, introduced in Article 35(4) and (4^1) of the Act of

15 December 2000 on Housing Cooperatives infringes the right to a justified expectation, on the part of the owners of immovable property, that without the occurrence of the premisses of usucaption set out in the Civil Code – both as regards the type of possession and period of uninterrupted (autonomous) possession of an immovable property by a third party, they will not lose the right of ownership with regard to the possessor of the land, and in particular that this will not happen in a surprising way (and thus without respect for the relevant principle of further applicability of the previous statute) as well as by means of extraordinary and time-limited legal solutions (Article 2 of the Constitution). By contrast, the provisions of Article 35(4) and (4^1) the Act of 15 December 2000 on Housing Cooperatives, which in that case arbitrarily make reference to the date of 5 December 1990, allowing for the shortening of the uninterrupted period of possession of an immovable property by a housing cooperative which would be required in the light of general principles, were enacted in 2000 and 2007, and entered into force without the appropriately long *vacatio legis*. This allowed the previous owners to effectively counteract the effects of »usucaption«, established in the above-mentioned provisions of Article 35 of the Act of 15 December 2000 on Housing Cooperatives" (M. Bednarek, *Prawo do mieszkania w konstytucji i ustawodawstwie*, Warszawa 2007, pp. 789-790).

4.6. In the light of the application of the challenged provision, what is particularly unclear is the manner and scope of court adjudication. The instances of the loss of ownership of land on the basis of Article 35(4^1) of the Act on Housing Cooperatives, from the point of view of the actual owner of the immovable property, are mandatory and free-of-charge in character. They occur in disregard for traditional legal institutions (usucaption and a claim for purchase within the meaning of the Civil Code) which – as one may expect – are known to the owners deprived of ownership on the basis of traditional institutions which make the purchase of someone else's land possible.

A private owner who may lose his/her right to land, due to "usucaption" by a housing cooperative, may *inter alia* be the former owner of the property who was unjustly deprived of his/her property after the World War II, as a result of abuse of the law, as well as an expropriated person. An application for declaring a nationalization decision or an expropriation decision to be invalid, e.g. due to gross infringement of law (Article 156 of the Code of Administrative Proceedings) may be submitted without a specific time-limit. In Article 35 of the Act on Housing Cooperatives, there is no mention of non-infringement of the rights of third parties, which is included in all expropriation provisions. Therefore, with regard to that group of persons, it may turn out that they will be unfairly treated "with regard to the same immovable property" twice – i.e. during the communist regime in the People's Republic of Poland and then in the democratic Republic of Poland – as they are deprived of possibilities of making claims for the recovery of land lost due to historical circumstances. The Constitutional Tribunal may not find other acts of diligence intended by the legislator within the scope of determining the owner of a given immovable property; in particular, whether the lack of the owner's signature in the land register is sufficient to state that a given owner is "unidentified", or whether there is a need to verify "old" documents, e.g. previous (archived) mortgage registers or the archives of the offices which deal with land administration, or merely verification whether someone has not submitted an application for the recovery of a disputable immovable property which has not yet been examined. In such a situation, there has been the exclusion of Article 511 of the Code of Civil Procedure, insofar as it imposes an obligation to indicate interested parties in a given case in an application for instituting "usucaption" proceedings. This solution raises doubts as to whether there exist immovable properties without any owners in Poland, and who, in accordance with what procedure, and with what effort and diligence, states that it is

impossible to determine the owner of a given immovable property. In this context, the subject of doubts is whether the analysed institution of the Act on Housing Cooperatives, on the basis of Article 189 of the Code of Civil Procedure, requires bringing an action for determining the right of ownership, or whether this is to be stated by a court, as a result of fruitless application of the procedure under Article 609 of the Code of Civil Procedure (announcement about proceedings). All these doubts stem from the adoption of the construct that quasi-usucaption has *ex lege* effects, with declaratory court adjudication in the present case.

4.7. Regardless of the circumstances discussed above, which indicate that the challenged provision has infringed Article 2 of the Constitution, other instances of non-conformity to the principle of appropriate legislation, which accompanied the enactment of the provision, should be indicated. The amendment to the Act on Housing Cooperatives, made by the amending Act of 2007, stemmed from four bills: three bills proposed by a group of Deputies of the Sejm, contained in the Sejm Papers of the 5th term – No. 339 (dated 22 November 2005), No. 767 (dated 11 May 2006), and No. 768 (dated 22 May 2006) – as well as a bill proposed by the government, contained in the Sejm Paper No. 766 (dated 29 June 2006). None of those contained a proposal for the introduction of quasi-usucaption, referred to in the challenged provision. The provision was introduced in the course of legislative work (at the second stage of reading at the 37th session of the Sejm on 15 March 2007, when 110 amendments were proposed). The proposed solution raised reservations among experts and the legislative staff of the Sejm and Senate. Voting concerning the amendments was carried out in committees without substantive discussions (voting *en bloc*, also in the case of amendments with regard to which all experts raised reservations during the legislative process). It should be mentioned by the way that, pursuant to Article 3(5) of the Act of 6 May 2005 on the Joined Committee of the Government and Local Self-Government and on the Representatives of the Republic of Poland in the Committee of the Regions of the European Union (Journal of Laws - Dz. U. No. 90, item 759), the tasks of the Joined Committee *inter alia* include giving opinions on drafts of normative acts which concern issues related to local self-government. In the case of an amendment which considerably interferes with the right of ownership enjoyed by communes, depriving them *ex lege* of their property of statutory origin - such an opinion was not requested, which constitutes a further breach of the legislative procedure; from the point of view of the constitutional review of that sort, the said breach is subject to assessment of its conformity to Article 2 of the Constitution.

4.8. The content of challenged Article 35(4^1) of the Act on Housing Cooperatives, concerning not only rights enjoyed by the State Treasury and the units of local self-government, but also (at least potentially) the rights of private law persons, bears some affinity to a solution which was ruled out as one infringing human rights in four judgments of the ECHR versus France in the following cases: Lecarpentier, Application No. 67847/01, of 14 February 2006, Cabourdin, Application No. 60796/00, of 11 April 2006, Vezon, Application No. 66018/01, of 18 April 2006 as well as Saint-Adam and Millot, Application No. 72038/01, of 2 May 2006 (see commentary - P. Mikłaszewicz, *Europejski Przegląd Sądowy* Issue No. 9/2006, pp. 55-61). These cases concerned the intervention of the legislator which resulted in interference with the existing property relations, by favouring one party of a legal relationship to the detriment of the property of the other party. In the above-mentioned jurisprudence, it has been stated that the European Convention for the Protection of Human Rights and Fundamental Freedoms allows the

members of the Council of Europe to enjoy full autonomy as regards interference with the rights of the individual, which have been shaped on the basis of national provisions and which are protected under the Convention, but this does not mean an agreement to arbitrariness of such actions. In particular, this concerns the national legislator's interference, in a legally effective way, with the content of the rights and obligations of parties bound by an agreement, which have been shaped on the basis of provisions that were previously in force. The French statute did not contain transitional provisions and was characterised – similarly to the Polish solution which is applicable *ex lege* – by automatic application. According to the ECHR, the legislator is obliged to indicate, in a reliable and credible way, that the interference is justified by a specific public interest and is proportional to a set objective. Such a description of the public interest should be presented during the process of law-making, and it must be sufficiently detailed, verifiable, credible and predictable. Such requirements were neither met by the course of legislative work on the amending Bill of 2007 (the way of proposing amendments), nor by the global manner voting which was not preceded by a discussion, nor by the circumstance that, in the course of legislative work, it has not been realised that the institution of quasi-usucaption – which has been challenged in the present case – entails depriving the sole owners of their properties in order to grant this property to others, which is inadmissible even in the case of expropriation, protected by indispensable procedural guarantees, which are missing in the context of Article 35(4^1) of the Act on Housing Cooperatives.

4.9. Taking into account the sum of the circumstances discussed above in points 4.1.-4.7., the Constitutional Tribunal has concluded that Article 35(4^1) of the Act on Housing Cooperatives is inconsistent with the principle of as well as the principle of appropriate legislation, which arise from Article 2 of the Constitution. This is manifested in the following:

- the assumption that quasi-usucaption under Article 35(4^1) of the Act on Housing Cooperatives has been established *ex lege*, retrospectively with a declaratory court ruling which has declared it and with limited guarantees accompanying the explanation of premisses constituting the guarantees (the latter, in particular, means attempts at determining an owner);

– the lack of precision of the regulation (cf. points 2.3.4. and 2.3.5. of that part of the statement of reasons), which *inter alia* resulted from the course of legislative work (work concerning the amendments).

The said defects regard the entire scope ratione personae of that provision. In that context, the allegations of the court referring the question which concern the impropriety of that kind of situations in the light of Article 2 of the Constitution may be divided into those pertaining to private ownership, but also those regarding communal and state ownership, as the rights of housing cooperatives were shaped regardless of who were their owners.

5. The allegation of infringement of Article 64(3) in conjunction with Article 31(30 of the Constitution as well as of Article 64(2) of the Constitution.

The above-mentioned deficiencies concerning Article 2 of the Constitution result in the lack of effectiveness of protection within the scope of ownership, with regard to which the time-limit for quasi-usucaption is still running. The effect of the quasi-usucaption provided for in the challenged provision is the loss of ownership, free of charge, by the actual owner. The said owner may be either a public party (a commune, the State Treasury), as well as a private one. Interference with ownership takes on here the most burdensome form (from the point of view of the scale covered by Article 31(3) of the Constitution); indeed, quasi-usucaption results in the loss of ownership by the previous

owner for the sake of a person exercising the right provided for in Article 35(4^1) of the Act on Housing Cooperatives. That result concerns every owner, against whom the right from Article 35(4^1) of the Act on Housing Cooperatives has been exercised – be that the State Treasury, a commune or a private party falling into the category of "unknown owners". It should be emphasised that the state of "remaining unknown" (Article 35(4^1) of the Act on Housing Cooperatives, first sentence *in fine*), due to futile efforts to determine the owner (see the analysis of content of the provision presented in point 4.6. of that part of the statement of reasons), may refer to every party (the State Treasury, a commune, an individual and a legal person). In addition, the legislator does not impose an obligation to carry out fair proceedings which are aimed at determining the legal situation of a given immovable property and "identifying" the owner. In fact, the real owner of the immovable property bears the negative consequences of the fact that s/he did not make a claim for the recovery of the property him/herself (which is not subject to the statute of limitations) or "a claim for purchase" on the basis of Article 35(1) of the Act on Housing Cooperatives.

The infringement of Article 64(2) of the Constitution (the principle of "equal" legal protection of ownership, which stems from the above-mentioned deficiencies) should be considered from the point of view of the owner of given land. The protection of his/her ownership - when it regards land where houses have been erected without a legal title – varies depending on whether the builder was a housing cooperative (authorised under Article 35(4^1) of the Act on Housing Cooperatives), or whether it was a different party, unauthorised to make use of a privileged procedure of acquiring ownership. Also, what constitutes the infringement of Article 64(2) of the Constitution (the guarantee of ownership) is the circumstance that the owners deprived of their ownership in accordance with the procedure under Article 35(4^1) of the Act on Housing Cooperatives are treated differently, worse (in the sense that they have no proper guarantees) that the owners deprived of ownership also without their will, but in accordance with a different procedure (construction work on someone else's land, usucaption or expropriation). The guarantee of ownership, provided for in Article 64(2) of the Constitution, concerns the ownership of individuals and legal persons as well as – due to reference made in Article 165(1), second sentence – the units of local self-government.

6. The allegation of infringement of Article 165(1) and (2) as well as Article 167(1) of the Constitution.

With reference to the allegation of non-conformity of challenged Article 35(4^1) of the Act on Housing Cooperatives to the principle of the self-governing nature of units of local self-government (Article 165 of the Constitution), it should be noted that the principle of the self-governing nature of units of local self-government, including communes, entails that they are legal persons, with special emphasis on private-law subjective rights granted to them, i.e. the right of ownership and other property rights; additionally, the fact that their self-governing nature shall be protected by courts strengthens the position of the units of local self-government (see the judgment of the Constitutional Tribunal of 15 March 2005, Ref. No. K 9/04, OTK ZU No. 3/A/2005, item 24). Proprietary rights, within the scope of which a given commune takes decisions on its own and obtains profits from the possession of property, constitute a guarantee of actual self-governing nature. The establishment of ownership as a guarantee of the self-governing nature of units of local self-government has been done in the Constitution of 1997; whereas participation in the exercise of public power - done in its own name and under its own responsibility (which indeed, is not possible without ownership assigned to the one taking responsibility - is one of the systemic principles (Article 16(2) of the Constitution). Depriving communes of part of their property by statute, in the case where income generated from the property constitutes one of the

sources of revenues specified by statute the performance of the duties assigned to them, remains inconsistent also with Article 167(2) of the Constitution.

The principle of the self-governing nature of units of local self-government is not absolute in character. The protection of communal ownership may not exclude or rule out the legislator's right to shape property relations in the state. In particular, what does not infringe the self-governing nature of a commune is a restriction arising from a statute, however, only if it is justified by constitutionally protected goals and values, the primacy of which over the self-governing nature of units of local self-government has to be justified in constitutional provisions. Therefore, assessment whether a given regulation meets the requirement of justified interference with the realm of the self-governing nature of a commune may not be carried out without an interpretation that refers to the aim and axiology of a statute introducing the restriction.

In its judgment of 21 October 2008 (Ref. No. P 2/08, OTK ZU No. 8/A/2008, item 139), presenting its view on the constitutionality of the regulation which imposes an obligation on a commune to take over "unwanted" immovable property against the will of the commune, the Constitutional Tribunal indicated that "at present, it may not be stated that today communes must take into account far-reaching restrictions imposed on property rights granted to them, as long as this is required for sorting out the communist past, which is inconsistent with the principles of the present system".

This thesis remains up-to-date in the context of the present case. First of all, it may not be stated that sorting out the rights of a housing cooperative to land (regarded as an element of sorting out the communist past) necessarily requires the introduction of the unclear and badly regulated institution of the quasi-usucaption under Article $35(4^1)$ of the Act on Housing Cooperatives (particularly that this is not a sole instrument which is meant to serve that purpose to be achieved by the housing cooperative, but this instrument is the most burdensome to the owner who is being deprived of his/her property). Secondly, if a further goal of sorting out the rights of housing cooperatives as regards land is to make it possible to grant property rights to the members of the housing cooperatives as to flats they occupy, then the said granting of property rights - in the case of a housing cooperative whose right to land has not been determined – is not necessarily related to the institution of quasi-usucaption in Article $35(4^1)$ of the Act on Housing Cooperatives. It should be mentioned, sort of by the way, that Article 75 of the Constitution, which provides for supporting activities allow citizens to acquire their own homes, may be assigned a meaning which could rectify the constitutional deficiencies recognised in the context of the present case. So far it has been stressed in the previous jurisprudence of the Constitutional Tribunal that "the right to a home" – referred to in Article 75 of the Constitution does not determine a specific legal form in which the right to a home is to be acquired (see e.g. the judgments of the Constitutional Tribunal of: 15 July 2009, Ref. No. K 64/07, OTK ZU No. 7/A/2009, item 110, 17 December 2008, Ref. No. P 16/08, OTK ZU No. 10/A/2008, item 181, 24 April 2005, Ref. No. K 42/02, OTK ZU nr 4/A/2005, item 38, 29 May 2001, Ref. No. K 5/01, OTK ZU No. 4/2001, item 87).

7. The conclusion.

The infringement of Article 2 of the Constitution, resulting from the deficiencies of the legislation as to its clarity and the effectiveness of procedural guarantees, consequently leads to the infringement of ownership guarantees and it suffices to state that Article $35(4^1)$ of the Act on Housing Cooperatives is inconsistent with Article 2, and thus with Article 64(2), Article 64(3) in conjunction with Article 31(3), Article 165(1) and (2) as well as Article 167(2) of the Constitution.

8. The effects of the judgment.

As a result of declaring the provision to be unconstitutional, the court that had doubts as to the constitutionality of the provision received a ruling confirming the said reservations about constitutionality. The provision which the court intended to apply proved to be unconstitutional.

The unconstitutionality is related here to the legal institution of quasi-usucaption, introduced by the challenged provision, regardless of the fact who actually owns the land, the ownership of which the housing cooperative has claimed. The infringement of Article 2 of the Constitution is here universal in character (with regard to all owners against whom usucaption claims are made). Therefore, the provision ceases to have effect within its entire scope ratione personae.

The unconstitutionality of Article 35(4^1) of the Act on Housing Cooperatives updates the effects of the judgment which are referred to in Article 190(4) of the Constitution, pertaining to proceedings in which the fulfilment of the premisses of quasi-usucaption have been stated with regard to housing cooperatives on the basis of that provision. The ruling of the Tribunal has neither an automatic effect nor an effect derived from Article 190(4) of the Constitution as regards the realm of rights of the persons-residents of the flats provided by the housing cooperative who have been granted property rights to the flats.

9. For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the sentence.

Dissenting Opinion
of Judge Maria Gintowt-Jankowicz
to the Judgment of the Constitutional Tribunal
of 29 October 2010, in the case P 34/08

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of the Constitutional Tribunal of 29 October 2010 in the case P 34/08. In the present case, I do not find arguments which are sufficient to rule out the presumption of constitutionality in the context of challenged Article $35(4^1)$ of the Act of 15 December 2000 on Housing Cooperatives (Journal of Laws - Dz. U. of 2003 No. 119, item 1116, as amended; hereinafter: the Act on Housing Cooperatives).

1. The present case originated with a question of law. A constitutional review commenced by way of a question of law has to meet the requirements set out for that kind of proceedings in the Constitution and the Constitutional Tribunal Act. The basic premiss which allows for referring a question of law to the Tribunal is that the answer to such a question of law will determine an issue currently before a court (a functional premiss – Article 193 of the Constitution).

In the *petitum*, the court referring the question has challenged Article $35(4^1)$, as a whole, of the Act on Housing Cooperatives. The said provision concerns three different types of immovable properties: the property of the State Treasury, the property of a commune, and the property of an owner that remains unknown, despite efforts undertaken to determine the owner's identity. However, it follows from the substantiation of the question of law that the case with relation to which the question of law has been posed concerns the acquisition of an immovable property by usucaption, where the property is owned by a commune. I cannot agree with the view presented in the judgment of the Tribunal that the scope ratione personae of the provision is irrelevant due to the fact that the allegations of the court referring the question pertain to the construct of usucaption as such, and not to the subjects/owners of immovable properties which are acquired by usucaption by housing cooperatives.

Above all, the challenged provision refers, on the one hand, to two drastically different subjects - the State Treasury and a commune, and on the other hand to the owner of immovable properties that remains unknown. There is no doubt that the legal status of each of the subjects is different, and consequently there is a different scope of protection of property rights to which each of them is entitled. When raising allegations with regard to the construct of usucaption in Article $35(4^1)$ of the Act on Housing Cooperatives, the court referring the question deals with only one of the subjects, i.e. to the situation when usucaption concerns the property of a commune, since this is in accordance with the facts of the case pending before the court. The extensive discussion of direct and indirect effects which the challenged provision has on communes ends with the provisions regulating the situation of communes as the higher-level norms for this review, i.e. Article 165(1) and (2) as well as Article 167(2) of the Constitution.

Therefore, the indicated provision may be the subject of the Tribunal's assessment only with regard to immovable properties which are owned by communes. Indeed, it is only within that scope that the said provision is of significance to the case pending before the court referring the question. The assessment of the regulation within the broader scope bears the characteristics of an abstract review, which in the case of a question of law is inadmissible.

In that respect, I share the view of the Marshal of the Sejm that the judgment of the Constitutional Tribunal should declare the challenged provision to be unconstitutional only within a certain scope. This is exactly the case where the constitutional procedure concerning questions of law requires that the operative part of the judgment should declare the unconstitutionality of the said provision only within a certain scope.

2. Regardless of the comments about the scope of the review of the provision indicated in the question of law, I also disagree with the substantive determination of the present case, but for the above reasons I am going to discuss only the issues which fall under the formula of a judgment which declares a challenged provision to be unconstitutional only within a certain scope.

2.1. Above all, the assessment of constitutionality of Article 35(4^1) of the Act on Housing Cooperatives may disregard neither the historical and social context which has led to the particularly complex legal situation, nor the obvious fact that the ultimate addressees and beneficiaries of "introducing special legal instruments" for housing cooperatives for the acquisition of land developed by the cooperatives are the members of the cooperatives. These premisses were also the basis of my dissenting opinion to the judgment of the Constitutional Tribunal of 17 December 2008, Ref. No. P 16/08 (mentioned in this judgment).

The situation of housing cooperatives which possess buildings on another's land without a legal title is a consequence of the administration of land for the sake of housing cooperatives in the past, i.e. during the period of the People's Republic of Poland. Housing cooperatives carried out investment on land with regard to which they had no legal title. As a result, in the case of numerous housing cooperatives, the legal situation of land used by the cooperatives has not been determined. In many instances, such a state of affairs makes it difficult, or even impossible for the housing cooperatives, to fulfil the obligation to specify the object of separate ownership of all the flats, which arises from Article 42 of the Act on Housing Cooperatives, and it makes it impossible for the members of the housing cooperatives to acquire the right of ownership to a given flat.

It should be underlined that for many years the legislator has been seeking effective measures for sorting out the legal situation of immovable properties in possession of housing cooperatives. Numerous attempts at reforming housing cooperatives, the primary goal of which was to change the right of cooperative ownership of flats into the right of full ownership, lead to a conclusion that this is neither a simple nor a short process. However, the previous jurisprudence of the Constitutional Tribunal has supported reforms concerning ownership within the scope of housing cooperatives. Moreover, in the opinion of the Constitutional Tribunal, the efforts to eliminate the right of cooperative ownership of a flat were not only worth approval, but they were also constitutionally legitimate (see, *inter alia*, the judgment of the Constitutional Tribunal of 29 May 2001, Ref. No. K 5/01, OTK ZU No. 4/2001, item 87 as well as the judgment of the Constitutional Tribunal of 20 April 2005, (full bench), Ref. No. K 42/02, OTK ZU No. 4/A/2005, item 38).

There is no doubt that challenged Article 35(4^1) of the Act on Housing Cooperatives serves that very purpose. A characteristic feature of the solutions provided for housing cooperatives, before the addition of challenged paragraph 4^1 in 2007, was to impose the obligation - on housing cooperatives - to take initiative and undertake consistent action, so as to achieve the goal set by the legislator. However, since subsequent solutions turned out to be ineffective, the legislator decided to opt for further-reaching legislation. Namely, if a housing cooperative that, on 5 December 1990, was in possession of land which constituted the property of the State Treasury or a commune, or if the owner

of that immovable property remained unknown, despite efforts undertaken to determine the owner's identity, and prior to that day, on the basis of a building permit and a decision determining the location of a construction project, the said housing cooperative erected a building, then – pursuant to Article 35(4^1) of the Act on Housing Cooperatives - it shall by law acquire the ownership of that property by usucaption. The said regulation has reduced the obligations of the management board of a given housing cooperative to refer to a court for it to declare that the ownership of an immovable property has been acquired by usucaption, and the court ruling constitutes the basis of an entry in the land register. What is more, at the same time those amendments introduced paragraph 4^2 which sets a 3-month time-limit for the management of a given housing cooperative to refer to a court for it to declare the acquisition of the ownership of land by usucaption on the basis of paragraph 4^1, if a person who has the right to a cooperative flat has not applied for the transfer of separate ownership of the flat. Undoubtedly, the challenged provision together with paragraph 4^2 may be an effective tool for resolving a vital social problem in a definitive way.

The main doubts raised by the court referring the question concern the differences which the legislator introduced in the construct of usucaption in Article 35(4^1) of the Act on Housing Cooperatives in comparison with the original regulation, i.e. the provisions of Articles 172-176 of the Act of 23 April 1964 – the Civil Code (Journal of Laws - Dz. U. No. 16, item 93, as amended; hereinafter: the Civil Code). To be precise, the said doubts regard the establishment of "a different basis of the acquisition of the right of ownership, which is not equivalent to the hitherto existing legal institution of usucaption". In turn, the critical assessment of the lack of that equivalence is to justify the allegations of non-conformity of the challenged regulation to Article 2 of the Constitution.

As regards the first group of basic doubts raised by the court referring the question, they were dispelled by the Supreme Court. In its rulings concerning various aspects of the application of Article 35(4^1) of the Act on Housing Coopertaives, the Supreme Court stated, *inter alia*, that:

– previous regulations (prior to the amendments of 2007), contained in Article 35 of the Act on Housing Cooperatives, proved to be "insufficient to guarantee that housing cooperatives would have the possibility of acquiring rights to land, and thus the possibility of fulfilling their statutory obligation to specify the separate ownership of all flats, which is necessary for the achieving of the legislator's goal i.e. for granting property rights to the members of housing cooperatives",

– usucaption referred to in Article 35(4^1) of the Act on Housing Cooperatives is a special institution other than the one provided for in the Civil Code,

– if the linguistic interpretation of Article 35(4^1) of the Act on Housing Cooperatives does not suffice to dispel any doubts, then in accordance with the principles of legal interpretation – it is necessary to resort to a functional interpretation, taking into account the aim and functions of the regulation contained in that provision (see the decision of the Supreme Court of 17 November 2009, Ref. No. III CSK 71/09, Lex No. 551122; the resolution of the Supreme Court of 26 November 2008, Ref. No. III CZP 115/08, Lex No. 465364).

There is no doubt that the Supreme Court dispelled - in a very reliable way for common courts - most of the doubts concerning interpretation which were presented in the question of law, which refer to the institution of usucaption as such, provided for in the challenged provision, and to the scope ratione materiae of that regulation.

To sum up this part of my dissenting opinion, I find confirmation of my views in the above-cited jurisprudence of the Supreme Court. Namely, when examining a case concerning issues related to housing cooperatives, i.e. matters which are of great social significance and the legal regulation of which is complex and difficult (including the

contribution of the Constitutional Tribunal in that regard), it is necessary to consider the function and aim of the reviewed provision. In my view, it is the ineffectiveness of previous regulations that made the legislator propose the solution which does not infringe the Constitution, although it is not free from legislative deficiencies.

2.2. In the present judgment, the Tribunal has, to a large extent, shared the allegations raised in the question of law, *inter alia*, by carrying out an analysis of particular elements of usucaption, shaped by the sources of law being, in principle, of equivalent significance: the Act on Housing Cooperatives and the Civil Code. The lack of consistency between the Civil Code and the subsequent regulation (the Act on Housing Cooperatives), which follows from a "horizontal" analysis, is the basic ground for the non-conformity of 35(4^1) of the Act on Housing Cooperatives to the Constitution.

I cannot agree with that method of constitutional review in the present case, let alone with its outcome. Usucaption is an institution regulated solely at the level of an ordinary statute, whereas the Tribunal's jurisdiction is limited to the hierarchical review of norms (Article 188 of the Constitution). The Tribunal stresses that the review of constitutionality "does not comprise (...) dealing with the issues of horizontal inconsistency of statutory provisions", as the examination of "the horizontal non-conformity and inconsistency in the system of the sources of law" would result in assessing not so much constitutionality as "aptness" (see the judgment of the Constitutional Tribunal of 13 March 2007, Ref. No. K 8/07, OTK ZU No. 3/A/2007, item 26, the jurisprudence and the literature on the subject indicated therein). The judgment in the present case constitutes departure from those basic principles.

On the other hand, it is hard to disagree with the Tribunal's statement that the internal cohesion of the legal system is a desirable feature. However, in the practice of enacting and interpreting the law, frequently other values should take precedence, in particular if these are constitutional values, rights and principles. This should be so in the present case, where, above all, it may not be overlooked that the aim of the challenged regulation is grounded in the Constitution.

Article 75(1) of the Constitution stipulates that public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular shall support activities aimed at the acquisition of their own homes by citizens, where "own" is interpreted in accordance with the linguistic interpretation. This constitutional authorisation falls within the scope of social justice. It should be taken into account that it was housing cooperatives, and not the members of those cooperatives, that benefited from the transformation of the social and economic system. First, during the period of the People's Republic of Poland, a considerable number of cooperative buildings were erected, thanks to non-returnable state subsidies, and then, after the transformation, there were instances where housing cooperatives effectively blocked the modification of the right of cooperative ownership of a flat into the right of ownership of a flat.

Another argument against regarding Article 35(4^1) of the Act on Housing Cooperatives as inconsistent with the Constitution is the character of that provision. In my view, the provision is special and time-limited. Added as another paragraph to extended Article 35, it is placed in the section entitled "Final and transitional provisions". Undoubtedly, with steady progress in sorting out the legal situation of land on which cooperative buildings have been erected, the said provision would gradually lose significance. Thus, this can hardly be regarded as a radical systemic change.

Taking the above into consideration, I hold the view that the legislative deficiencies of the challenged provision, which have been indicated in the judgment, are insufficient to rule that the provision is inconsistent with Article 2 of the Constitution. The

existence of discrepancies within the system of law, although this is undesirable from the point of view of the quality and efficiency of that system, primarily requires that court should apply relevant rules of interpretation, as did the Supreme Court, making reference in this case to the aim of the Act. By contrast, when assessing such a provision, the Tribunal should not rely only on the principles of appropriate legislation, but should also take into account other constitutional values, in which the challenged provision is grounded.

3.1. Juxtaposing the challenged provision with the higher-level norms for the constitutional review, which express the independence of the units of local self-government, it should be emphasised that the said independence is not, and may not be, absolute in character.

Communes were established to carry out tasks and perform functions which are public in character and are targeted at self-government communities, i.e. local communities. Hence, communal ownership may not only be considered in the context of civil law. On the contrary, the use of communal ownership for the purpose of carrying out public tasks leads to a situation where the position of a unit of local self-government as the subject of ownership rights differs from the situation of private law subjects of such rights (see the judgment of 29 May 2001, Ref. No. K 5/01, OTK ZU No. 4/2001, item 87).

Therefore, in my opinion, it is necessary in the present case to take a broader view of the challenged regulation, than the one presented in the content of the judgment. The financial and economic factor, though undeniably important, may not override other aspects of activity undertaken in the realm of public administration. One of them should be the efforts of a commune to satisfy the housing needs of residents, among whom are the members of housing cooperatives.

There is no doubt that the aim of Article $35(4^1)$ of the Act on Housing Cooperatives is to sort out past issues dating before the transfer of ownership to communes, i.e. prior to 5 December 1990, which are justified by long-standing possession and the construction of buildings on the basis of a building permit and a decision determining the location of a construction project, granted to a housing cooperative. However, once again it should be stressed that this leads to finalising the transformation of cooperative housing, which implies allowing the members of a cooperative to modify the right of cooperative ownership of a flat into the right of ownership of a flat. The said goal is undoubtedly socially desirable and constitutionally legitimate. Hence, although the transfer of ownership to housing cooperatives, by certain type of “usucaption”, diminishes the property rights of communes, and thus affects their independence, it may not be regarded that this is excessive or that this is not justified by other constitutional values.

Therefore, it should have been stated that Article $35(4^1)$ of the Act on Housing Cooperatives is consistent with Article 165(1) and (2) as well as with Article 167(2) of the Constitution.

3.2. I do not share the view that Article 31(3) in conjunction with Article 64(3) and Article 64(2) of the Constitution are adequate higher-level norms for the review in the present case. Indeed, it is necessary to draw a distinction between private law parties and public law parties, such as a commune or, even more so, the State Treasury, when it comes to the constitutional protection of ownership of such entities. Refraining from drawing such a distinction may lead to absurd situations where, from the point of view of the principle of proportionality, we will hypothetically consider the admissibility of every restriction, and even more so the renouncement of ownership (e.g. the return of property seized by the state to private owners) on the part of the State Treasury or the units of local

self-government. Following that line of reasoning, one might assess, for instance, the act concerning the transfer of ownership to communes, on the basis of which, on 5 December 1990, the units of local self-government were granted property rights with regard to certain properties of the State Treasury.

4. Finally, it should be stressed that the judgment of the Tribunal raises serious doubts also as regards its effects which, from the point of view of the acquisition of full ownership by the members of cooperatives, may be disadvantageous, and definitely will further complicate the current legal situation.

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