40/5/A/2011

JUDGMENT

of 13 June 2011

Ref. No. SK 41/09*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Małgorzata Pyziak-Szafnicka – Presiding Judge
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski – Judge Rapporteur
Teresa Liszcz,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 31 May 2011, in the presence of the complainants, the Sejm and the Public Prosecutor-General, a constitutional complaint submitted by Mr Jan Skalski and Mr Marek Skalski, in which they requested the Tribunal to examine the conformity of:

> Article 215(2) of the Act of 21 August 1997 on the Management of Immovable Property (Journal of Laws – Dz. U. of 2010, No. 102, item 651, as amended) - insofar as it rules out the application of the provisions of the said Act which concern compensation for expropriated immovable properties that, on the basis of the Decree of 26 October 1945 on the Ownership and Use of Land in the Capital City of Warsaw (Journal of Laws – Dz. U. No. 50, item 279), became state property, to buildings other than single-family houses, including multi-family houses, commercial buildings and tenement houses, as

* The operative part of the judgment was published on 22 June 2011 in the Journal of Laws - Dz. U. No. 130, item 762.

well as to plots of land which, prior to the entry into force of the above-mentioned Decree, could have been allocated for the construction of buildings other than single-family houses - to Article 2, Article 21(2), Article 31(3), Article 32, Article 64(2) and Article 77(1) of the Constitution,

adjudicates as follows:

Article 215(2) of the Act of 21 August 1997 on the Management of Immovable Property (Journal of Laws – Dz. U. of 2010 No. 102, item 651, No. 106, item 675, No. 143, item 963, No. 155, item 1043, No. 197, item 1307 and No. 200, item 1323 as well as of 2011 No. 64, item 341) - **insofar as it overlooks the application of the provisions of the said Act which concern compensation for expropriated immovable properties to immovable properties that became the property of the capital city of Warsaw (a commune in the administrative division of Poland) or the state, on the basis of the Decree of 26 October 1945 on the Ownership and Use of Land in the Capital City of Warsaw (Journal of Laws – Dz. U. No. 50, item 279), and were other than single-family houses, provided that they became state property after 5 April 1958, and to the plots of land which, prior to the entry into force of the said Decree, could have been allocated for the construction of buildings other than single-family houses, provided that previous owners or their legal successors have been deprived of the actual possibility of managing the land after 5 April 1958, is inconsistent with Article 64(2) in conjunction with Article 32(1) as well as in conjunction with Article 31(3) of the Constitution of the Republic of Poland.**

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) as well as Article 39(1)(2) in conjunction with Article 39(2) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654), **to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. The subject of the review and higher-level norms for the review.

The constitutional complaint, submitted by Mr Jan Skalski and Mr Marek Skalski (hereinafter: the complainants), challenges Article 215(2) of the Act of 21 August 1997 on the Management of Immovable Property (Journal of Laws - Dz. U. of 2010 No. 102, item 651, as amended; hereinafter: the Act on the Management of Immovable Property). Article 215 of the Act on the Management of Immovable Property, contained in section VII of the said Act, as a transitional provision, regulates the issue of compensation for certain immovable properties that became state property, on the basis of the Decree of 26 October 1945 on the Ownership and Use of Land in the Capital City of Warsaw (Journal of Laws – Dz. U. No. 50, item 279; hereinafter: the Warsaw Decree). Article 215(1) of the Act on the Management of Immovable Property stipulates that the provisions of the said Act which concern compensation for expropriated immovable properties are applied accordingly to compensation for an agricultural holding on land that, on the basis of the Warsaw Decree, became state property, provided that its previous owners, or the legal successors of those owners running the agricultural holding, were deprived of the actual possibility of managing the holding after 5 April 1958. Challenged in the constitutional complaint, Article 215(2) of the Act on the Management of Immovable Property provides for the provisions of the said Act which concern compensation for expropriated immovable properties to be applied accordingly to a single-family house, provided that it became state property after 5 April 1958, as well as to a plot of land which, prior to the entry into force of the Warsaw Decree, could have been allocated for single-family housing, provided that its previous owner or the owner’s legal successors were deprived of the actual possibility of managing the land after 5 April 1958. Pursuant to Article 215(2), second sentence, of the Act on the Management of Immovable Property, as part of awarded compensation, the previous owner or the owner’s legal successors may receive a plot of land for the construction of a single-family house with the assigned right of perpetual usufruct.

The complainants have not challenged entire Article 215(2) of the Act on the Management of Immovable Property, but the specified scope of that provision, and more precisely: the normative content overlooked therein. In the opinion of the complainants, Article 215(2) of the Act on the Management of Immovable Property - insofar as it rules out the application of the provisions of the said Act which concern compensation for expropriated immovable properties that, on the basis of the Warsaw Decree, became state property, to buildings other than single-family houses, as well as to plots of land which, prior to the entry into force of the Decree, could have been allocated for the construction of buildings other than single-family houses - is inconsistent with Article 2, Article 21(2), Article 31(3), Article 32, Article 64(2) and Article 77(1) of the Constitution. The complainants' allegations concern depriving them of just compensation for an expropriated immovable property, unequal treatment before the law, disproportionate and unjustified differentiation with regard to the degree of protection of the right to compensation, as one of other property rights, as well as an infringement of the principle of social justice.

2. Formal grounds for the admissibility of the constitutional complaint.

The substantive assessment of the complainants' allegations must be preceded by resolving a few formal issues that determine the substantive review of the complaint by the Tribunal and the scope of that review.

2.1. The scope of allegation indicated by the complainants leads a conclusion that they have not requested the elimination of entire Article 215(2) of the Act on the Management of Immovable Property, but they have requested the Tribunal to determine whether the said provision is a complete regulation from the point of view of the higher-level norms for the review they have indicated. The complainants have argued that the legislator: "resorted to a partial regulation which was incomplete in character, within the scope of which – due to the character and nature of the regulation - he should have regulated, in compliance with the principle of equality, also the issues of compensation for buildings which were bigger than single-family houses and plots of land which could have been allocated for multi-family housing" (p. 9 of the constitutional complaint). The admissibility of the substantive review of the allegation is conditioned on prior examination by the Tribunal whether, in the present case, under examination we deal with legislative negligence or omission.

2.1.1. It should be pointed out that in the jurisprudence of the Constitutional

Tribunal, a distinction is drawn between legislative negligence and legislative omission (the adoption of an incomplete regulation by the legislator). Legislative negligence consists in "not issuing a legislative act, although the obligation to issue it arises from constitutional norms" (the ruling of 3 December 1996, Ref. No. K 25/95, OTK ZU No. 6/1996, item 52), i.e. it occurs when the legislator leaves a certain issue completely unregulated. By contrast, in a situation where, in an enacted and binding legal act, the legislator has regulated certain issues in an incomplete and fragmentary way, we deal with legislative omission. Within the scope of the jurisdiction of the Constitutional Tribunal, adopted in the Polish law, the Tribunal is not competent to adjudicate on legislative negligence. This also concerns constitutional complaints, as "the lack of (...) a particular regulation (...) may not (...) constitute the sole subject of a constitutional complaint" (the decision of 8 June 2000, Ts 182/99, OTK ZU No. 5/2000, item 172). By contrast, what raises no doubt is the admissibility of the review of incomplete regulations, i.e. those which, from the point of view of constitutional principles, have an excessively narrow scope of application or which, due to their purpose or subject, overlook significant content. "The allegation of unconstitutionality may concern issues that the legislator has regulated in a given legal act as well as subject matter he has omitted in the act, although – being obliged to comply with the Constitution - he should have regulated it" (the ruling in the case K 25/95). The Tribunal states that the Parliament is entitled to considerable freedom as regards deciding which realms are to be regulated; however, if such a decision is taken, then the regulation of a given matter must be made by meeting constitutional requirements. Dogmatic justification for the review of incomplete regulations was formulated by the Tribunal in the judgment in the case K 25/95; however, much earlier, *inter alia*, in the ruling of 23 February 1993, Ref. No. K 10/92 (OTK in 1993, Part 1, item 5), the Tribunal challenged the arbitrariness of specifying the group of persons entitled to receive benefits from the social insurance of farmers, insofar as the legislator had not taken into account a spouse, when specifying the group of close persons with regard to the insured farmer, who are entitled to a one-off compensation payment for a permanent or long-lasting injury caused by a farming accident. The dichotomous division into the instances of legislative negligence which are not subject to review conducted by the Constitutional Tribunal and incomplete regulations reviewed by the Tribunal was maintained in the rulings issued after the entry into force of the Constitution of 1997 – for the first time in the judgment of 6 May 1998, Ref. No. K 37/97, OTK ZU No. 3/1998, item 33 (see also *inter alia* the judgments of: 24 October 2001, Ref. No. SK 22/01, OTK ZU No. 7/2001, item 216;

19 May 2003, Ref. No. K 39/01, OTK ZU No. 5/A/2003, item 40; 8 November 2005, SK 25/02, OTK ZU No. 10/A/2005, item 112; 9 December 2008, Ref. No SK 43/07, OTK ZU No. 10/A/2008, item 175; 16 December 2009, Ref. No. K 49/07, OTK ZU No. 11/A/2009, item 169).

In the previous jurisprudence, the Tribunal pointed out that, in order to draw a distinction between an instance of legislative negligence and an incomplete regulation, one needs to answer the question whether, in a given situation, there is qualitative equivalence (or at least a far-reaching similarity) between the matters regulated in a given provision and those left outside the scope of the provision. When assessing the similarity, caution is necessary, as drawing similarities between various too hastily may result in an allegation that the Tribunal has gone beyond the scope of reviewing the law and has usurped law-making rights. In that context, in the decision of 11 December 2002, ref. no. SK 17/02 (OTK ZU No. 7/A/2002, item 98), the Constitutional Tribunal stated that the allegation formulated in the constitutional complaint that a regulation desired by the complainant had been omitted in Article 140 of the Act on the Management of Immovable Property was not confirmed by its equivalence to the regulated matters. Indeed, the actual situation of the complainant did not fall within the scope of the application of the challenged provision, and thus one might not conclude that the legal norm formulated by the complainant had been omitted by the legislator in the content of Article 140 of the Act on the Management of Immovable Property. By contrast, a different outcome resulted from the verification of the allegation in the case SK 22/01. When assessing Article 216 of the said Act, which contained an enumerative list, the Tribunal analysed similarities between situations left out of the scope of the challenged provision and those which had been regulated therein. The Tribunal emphasised that it did not assess whether the legislator had had a constitutional obligation to extend the application of the rule which provided for the return of an unused immovable property to include other situations than expropriation within the meaning of the Act of the Management of Immovable Property. However, since the legislator had resorted to such extension, then he should have introduced it by taking into account the principle of equality. When determining the list of statutes to which - pursuant to Article 216 of the Act on the Management of Immovable Property - the rules of returning expropriated immovable properties would apply, the legislator should not have acted in an arbitrary way and had an obligation to adjust the said determination to criteria that comply with the Constitution. Therefore, the Tribunal categorised the said situation as an instance of legislative omission. A similar result, with the use of the same methodology, arose from

assessing the constitutionality of the said provision in the Tribunal's judgment of 19 May 2011, Ref. No. SK 9/08 (OTK ZU No. 4/A/2011, item 34).

2.1.2. It follows from the jurisprudence of the Tribunal that the issue of incomplete regulations most frequently arises in the context of a dispute over equal treatment. In the judgment of 19 May 2003, ref. no. K 39/01, the Tribunal ruled that excluding Polish citizens from the group of persons entitled to the right to submit an application to be reunited with their families, and privileging only foreigners in that regard - in Article 24a(1) of the Act of 25 June 1997 on Foreigners (Journal of Laws - Dz. U. of 2001 No. 127, item 1400, as amended) – was inconsistent with Article 32 in conjunction with Article 2 of the Constitution. It was stressed in the said judgment that: "what follows from the essence of the infringement of the principle of equal treatment is, *inter alia*, that the subject of the infringement is the lack of a specific regulation – an identical, similar or close one – with regard to a certain category of subjects. The said omission is discriminatory in character and only an appropriate amendment to the provisions which would expand the group of subjects that may be the addressees of the said solution would result in eliminating unequal treatment in the realm of legal relations under analysis. However, such a situation may not be regarded as tantamount to recognising the existence of a legal gap. Unlike in the case of such a legal gap, the subject of the assessment is not so much the lack of a regulation as such, but a binding regulation which is unconstitutional as it creates situations that are discriminatory for some categories of subjects". For instance, the allegation of omission in respect of the scope ratione personae i.e. leaving a certain category or group of persons out of the scope of a regulation, was also examined by the Tribunal in:

- the case K 25/95, where the Tribunal considered the allegation that the Act of 2 July 1994 on the Rental of Flats as well as Housing Allowances omitted the right to sign a tenancy agreement in the case of persons who had concluded an agreement with the tenant of the flat to look after the flat;
- the case K 37/97, which concerned the unconstitutionality of Article 131 of the Act of 21 November 1967 on the Universal Duty to Defend the Republic of Poland, insofar as it did not include soldiers who were sole breadwinners as well as unmarried soldiers in the group of persons who were eligible to receive benefits to cover payments and bills for flats they occupied;
- the judgment of 6 January 2003, Ref. No. K 24/01 (OTK ZU No. 1/A/2003, item 1), in which the Tribunal reviewed the challenged provision, insofar as it excluded the

employees of the selling party, or of its legal predecessor, who occupied flats on the basis of tenancy agreements concluded for a specified period, related to their employment contracts, and signed after 11 November 1994, from the category of persons who were eligible to acquire flats in accordance with the terms set out in the statute under review;

– the judgment of 8 September 2005, Ref. No. P 17/04 (OTK ZU No. 8/A/2005, item 90), in which the Tribunal stated that the exclusion of teachers employed for at least half of the set weekly working hours (for at least half of the set working hours) in a private educational institution from the group of teachers who were eligible to receive earlier old-age pension benefits regardless of their age was inconsistent with Article 2 and Article 32(1) of the Constitution;

– the case K 49/07, in which the Tribunal stated the unconstitutionality of omitting the premiss of deportation for the purpose of forced labour within the borders of the pre-WW II Polish state, as specifying the group of persons eligible to receive the so-called deportation benefits had resulted in breaching the principle of equality and the principle social justice (see also other examples of the Tribunal's rulings cited therein, which concerned the omission of certain premisses of access to public benefits).

2.1.3. Taking into account the above considerations, it should be assumed that the extension of the scope of the regulation contained in Article 215(2) of the Act on the Management of Immovable Property, as proposed by the complainants, bears necessary similarity to the regulation contained in that provision. Indeed, the complainants do not require that the scope of the regulation in Article 215(2) of the Act on the Management of Immovable Property should comprise a new (separate) claim, which has not been provided for in that provision. Their allegation concerns the fact that the legislator has regulated (thus, we deal here with an enacted and binding regulation, and not with the lack of a regulation of a given issue) the issue of compensation for immovable properties taken over on the basis of the Warsaw Decree in such a way that he has granted compensation only to the former owners of single-family houses and of immovable properties which could have been used for single-family housing. However, he has overlooked the owners of other immovable properties who were also deprived of property on the basis of the Warsaw Decree, and they are not eligible for compensation. In the view of the Tribunal, the actual and legal situation of the complainants bears sufficiently considerable similarity to the regulated matter in the challenged provision that the substantive assessment of the

allegation formulated this way is admissible.

It should be emphasised that, in the present case, the task of the Constitutional Tribunal is not to determine whether it was the legislator's constitutional obligation to regulate the issue of compensation for immovable properties expropriated on the basis of the Warsaw Decree in the Act on the Management of Immovable Property; nor does the Tribunal assess whether it was apt to choose such a way of satisfying property claims made by the former owners of the expropriated immovable properties and their legal successors. Indeed, specifying particular institutional solutions falls within the scope of the legislator's autonomy. From the point of view of constitutional guarantees, the subject of assessment is a regulation already included in the said Act. The Tribunal is competent to examine whether the legislator – by leaving out the former owners of houses other than single-family houses, as well as of land allocated for the construction of buildings other than single-family houses, from the scope of the provision establishing the right to compensation for immovable properties expropriated on the basis of the Warsaw Decree – did not act in an arbitrary way and whether the criteria adopted for such a solution comply with constitutional standards.

2.2. The complainants indicated the following higher-level norms for the review in the *petitum* of their complaint: Article 2, Article 21(2), Article 31(3), Article 32, Article 64(2) and Article 77(1) of the Constitution.

In the procedural letter submitted at the hearing on 31 May 2011, the attorney for the complainants withdrew the complaint insofar as it concerned the review of the challenged provision in the light of Article 77(1) of the Constitution. Thus, the proceedings within that scope are subject to discontinuation, pursuant to Article 39(1)(2) in conjunction with Article 39(2) 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).

Moreover, the attorney for the complainants specified the higher-level norms for the review more precisely, by indicating relations between them. Ultimately, he requested the Tribunal to determine that Article 215(2) of the Act on the Management of Immovable Property was inconsistent, within the scope indicated in the complaint, with Article 21(2) as well as with Article 64(2) in conjunction with Article 2, Article 31(3) as well as Article 32(1) of the Constitution. The Constitutional Tribunal concluded such formulation of the subject of the allegation was admissible, as it did not result in the extension of the scope of the complaint, which would be inadmissible at that stage of proceedings.

2.2.1. As regards Article 32 of the Constitution, the attorney for the complainants

pointed out in the procedural letter submitted at the hearing that the higher-level norm for the review was only Article 32(1) of the Constitution (indicated in conjunction with Article 64(2) of the Constitution). However, he did not state, unlike in the case of Article 77(1) of the Constitution, whether he was withdrawing the allegation that Article 32(2) of the Constitution had been infringed.

Thus, when it comes to Article 32(2) of the Constitution, the complainants did not substantiate what rights set out in that provision, and in what way, were infringed by Article 215(2) of the Act on the Management of Immovable Property. Pursuant to Article 47(1)(2) of the Constitutional Tribunal Act, a complainant should indicate in his/her constitutional complaint what constitutional rights or freedoms have been infringed, as well as to specify the way in which they have been infringed. In the complaint under examination, the said requirement was not met with regard to Article 32(2) of the Constitution. Therefore, the proceedings within that scope are subject to discontinuation on the grounds that issuing a ruling in that regard is inadmissible.

2.2.2. Another higher-level norm for the review in the case under examination is Article 2 of the Constitution, indicated in conjunction with Article 64(2) of the Constitution. However, what follows from the substantiation of the complaint is that the complainants indicate Article 2 of the Constitution as an autonomous higher-level norm for the review. In the opinion of the complainants, the provision implies, *inter alia*, the requirement of equal treatment of subjects that are in analogical actual situations (p.10 of the complaint) as well as the right to just compensation for expropriated property (p. 5 of the procedural letter of 31 March 2008). Article 2 of the Constitution may constitute an autonomous basis of a constitutional complaint only when a complainant specifies the infringement of a subjective right, i.e. s/he indicates what constitutional right has been infringed as a result of infringing Article 2 of the Constitution. However, the constitutional rights and principles indicated by the complainants have no basis in Article 2 of the Constitution, but they are expressed by other constitutional norms, which have also been indicated in the complaint as higher-level norms for the review. Hence, due to the fact that the complaint lacks substantiation as regards the infringement of Article 2 of the Constitution, the proceedings are subject to discontinuation on the grounds that issuing a ruling is inadmissible.

2.2.3. Next the Tribunal considered whether it was justified to indicate Article 21(2) of the Constitution as a higher-level norm for the review. The said provision sets out the constitutional premisses of admissibility of expropriation. In the opinion of the

complainants, Article 215(2) of the Act on the Management of Immovable Property is inconsistent with Article 21(2) of the Constitution, due to the fact that, by virtue of that provision, they were deprived of the right to compensation for expropriation.

By contrast, what follows from the substantiation of the complaint is that the main allegation raised by the complainants concerns differentiation introduced by the legislator as regards the protection of another property right, i.e. the right to compensation for immovable properties expropriated on the basis of the Warsaw Decree. Moreover, the complainants also derived the right to equal treatment of subjects that were in analogical actual situations from Article 21(2) of the Constitution (see p. 10 of the complaint). Thus, the Constitutional Tribunal has concluded that – due to the fact that the complainants indicated Article 64(2) in conjunction with Article 32(1) of the Constitution, which fully corresponded to the content of their allegations – it is redundant to examine the conformity of the challenged provision to Article 21(2) of the Constitution. Therefore, within that scope, the proceedings are subject to discontinuation.

2.2.4. There is no doubt as to the admissibility of indicating Article 32(1) and Article 31(3) of the Constitution as higher-level norms for the review. After the higher-level norms for the review were specified in the complaint, the said provisions were indicated as intended to be read in conjunction with Article 64(2) of the Constitution. This is of relevance due to the fact that not every provision of the Constitution may be a higher-level norm for review, but only a provision which regulates a subjective right or freedom.

In accordance with the jurisprudence of the Constitutional Tribunal, Article 31(3) of the Constitution may not constitute an autonomous basis of a constitutional complaint, as it does not express separate rights and freedoms, and it must always be applied together with other norms set out in the Constitution. In the case under examination, the complainants do not derive particular subjective rights and freedoms from that provision, but they indicate it in conjunction with Article 64(2) of the Constitution in order to prove that disproportionate restrictions have been imposed on rights arising from Article 64(2) of the Constitution.

As regards Article 32 of the Constitution, it - above all - expresses a general rule and therefore it should primarily be referred to particular provisions of the Constitution, even if the constitutional regulation of a given right is incomplete and requires to be made more specific by statute. Consequently, this is “joint application” of two provisions of the Constitution – the right to equal treatment and the specific right to the equal exercise of particular constitutional rights and freedoms. Therefore, a constitutional complaint should

mention both provisions of the Constitution, as together they determine the constitutional status of the individual which has been violated by a given regulation. However, if rights are specified in a different normative act than the Constitution, then Article 32 of the Constitution constitutes a principle of the legal system, and not a separate right or freedom which is constitutional in character. In the case where the substance of a right is derived solely from a statute, pursuing the protection of the right by relying only on the principle of equality does not have a constitutional dimension (see the decision of 24 October 2001, Ref. No. SK 10/01, OTK ZU No. 7/2001, item 225).

In the context of the case under examination, the said issue, which has ignited controversy in the doctrine of law and has raised certain doubts in the jurisprudence of the Tribunal, is irrelevant, as the complainants also indicated Article 64(2) of the Constitution as a higher-level norm for the review. In other words, this is the case of the "joint application" of two provisions of the Constitution: Article 64(2) and Article 32(1). Indeed, what we deal here with is not only the right to equal treatment, but also the specific right to equal protection of a particular constitutional right related to property – the right to compensation.

2.2.5. As regards Article 64(2) of the Constitution as a higher-level norm for review, the way of formulating that provision may also raise doubts as to whether the provision comprises norms which regulate the rights and freedoms of persons and citizens, and consequently whether the infringement of the provision may be a premiss of a constitutional complaint. In other words, the point is to answer the question whether Article 64(2) of the Constitution merely constitutes more detailed confirmation of the principle of equality. With reference to the case under examination, the Constitutional Tribunal shares the previous stance of the Tribunal that Article 64(2) of the Constitution expresses the subjective right, of everyone, to equal legal protection of the right of ownership, other property rights and the right of succession. This is a subjective right in the sense that it not only creates an obligation on the part of the legislator or an organ of public authority which is responsible for applying the law to ensure that everyone shall be equal before the law, but it also provides subjects with the right to demand equal protection of the rights mentioned therein: the right of ownership, other property rights and the right of succession. A close correlation between "equal legal protection for everyone" and the right of ownership, other property rights and the right of succession entails that equality construed this way becomes the indispensable aspect of the said right, without which the rights referred to in Article 64(2) of the Constitution would be devoid of their essence.

Therefore, equality mentioned in Article 64(2) of the Constitution is not abstract in character. It refers to the specific rights set out in that provision as well as to guaranteeing them such, equal, protection (see the judgments of: 6 October 2004, Ref. No. SK 23/02, OTK ZU No. 9/A/2004, item 89; 11 May 2010, Ref. No. SK 50/08, OTK ZU No. 4/A/2010, item 34; 4 April 2005, Ref. No. SK 7/03, OTK ZU No. 4/A/2005, item 34).

Therefore, it was justified for the complainants to indicate Article 64(2) in conjunction with Article 32(1) of the Constitution in their complaint, as only together the said provisions specify the constitutional status of the individual, which has been infringed by the challenged regulation. Hence, there is no need to discontinue the proceedings in the context of Article 32(1) of the Constitution as a higher-level norm for the review, on the grounds that issuing a ruling in that regard is useless, for there exists a higher-level norm for the review which regulates a given right or freedom (in this case the equal protection of the right of ownership and other property rights).

3. The evolution of legal solutions concerning land expropriated on the basis of the Warsaw Decree.

The analysis of the allegations put forward by the complaints will be preceded by the presentation of legal solutions concerning immovable properties expropriated on the basis of the Warsaw Decree - from the moment of entry into force of the Decree until the present day - in order to show the evolution of the rights of the former owners of those immovable properties as well as factors which influenced the shape of the regulation subject to constitutional review in the case under examination.

3.1. The Warsaw Decree.

Promulgated on 21 November 1945 and binding since then, the Warsaw Decree stipulates in its Article 1 that, in order to make it possible to rebuild the capital city in a reasonable way and to develop it in a way that will meet the needs of the Nation, and in particular to quickly provide land for appropriate use, any land within the borders of the capital city of Warsaw shall become the property of the capital city of Warsaw, as of the date of entry into force of the Decree. The said provision explains the purpose of taking over private property by the municipality; the said purpose is of relevance for the interpretation of the provisions of the Decree. Indeed, it makes it possible to assume that the Warsaw Decree was an element of a land development plan, and not of nationalisation.

This is confirmed by its Article 7(2), pursuant to which the former owners were granted the right of perpetual tenancy to the land or the right to develop the land upon the payment of a nominal fee, which was to be taken into account by the commune (and subsequently by the State Treasury), unless the use of the land by its previous owner was incompatible with the purpose set out for the land in the development plan. With the benefit of hindsight, it may be stated that the said rights remained only on paper, and the organs of public administration did everything they could to hinder the exercise of those rights (see S. Rudnicki, *Prawo obrotu nieruchomościami*, Warszawa 2001, p. 769). However, one should also note that the basic idea underlying the Decree, namely the "communalisation" of the land within the borders of the capital city of Warsaw, was not challenged at that time. Society understood that in the context of private ownership of immovable property in the completely demolished districts of Warsaw - with the necessity to undertake the enormous task of reconstruction of the completely demolished capital city with the use of public funds which were the only funds available at that time – there was a need to eliminate any legal obstacles which could hinder or prevent the process of the reconstruction of the city (see *ibidem*, p. 768).

The Regulation of the Minister of Reconstruction Work of 7 April 1946, issued upon consultation with the Minister of Public Administration, on the taking over of the ownership of land by the commune – the capital city of Warsaw (Journal of Laws - Dz. U. No. 16, item 112), specified dates and a procedure for the taking over of the ownership of the said land by the capital city of Warsaw. In accordance with the Regulation, the land was regarded as taken over by the capital city of Warsaw as of the date of the publication of the minutes from the individual inspection of a given immovable property in the official journal of the Municipal Management Board. A subsequent regulation simplified that procedure. Pursuant to the Regulation of the Minister of Reconstruction Work of 27 January 1948 (Journal of Laws - Dz. U. No. 6, item 43), the taking over of immovable properties which had not been taken over earlier was carried out by way of announcements by the Municipal Management Board for the capital city of Warsaw, which were made available to the public in the official journal of the Municipal Management Board, and in one of Warsaw widely-read newspapers, as well as by posters put up in the city. Land was regarded as taken over, from the date of the publication of the official journal of the Municipal Management Board, where relevant announcements were included. From that date a six-month time-limit was counted for submitting an application for the right of perpetual tenancy to the land with the payment of a symbolic rent or the right to develop

the land upon the payment of a nominal fee, pursuant to Article 7(1) of the Warsaw Decree.

Article 7 of the Warsaw Decree vested the previous owners of the land, their legal successors or persons representing them, as well as the users of the land, with the right to submit - within the period of six months from the day when the ownership of the land was taken over by the commune - an application for the right of perpetual tenancy to the land with the payment of a symbolic rent or the right to develop the land upon the payment of a nominal fee. The commune was obliged to consider the application if the use of the land by the previous owner was compatible with the purpose set out for the land in the development plan (in the case of a legal entity – moreover, when the use of the land was not contrary to the entity's tasks set out by a parliamentary act or its rules of procedures). This was the sole criterion for granting the right of perpetual tenancy to the land or the right to develop the land. Although Article 7(5) of the Warsaw Decree mentions that the land may not be granted "for other reasons", the interpretation of that provision does not imply that other reasons constitute an autonomous premiss of refusing to grant the right of perpetual usufruct (see the judgment of the Supreme Court of 7 February 1995, Ref. No. III ARN 83/94, OSNP No. 12/1995, item 142; D. Kozłowska, E. Mzyk, *Grunty warszawskie w świetle orzecznictwa Trybunału Konstytucyjnego, Sądu Najwyższego i Naczelnego Sądu Administracyjnego*, Zielona Góra 2000, p. 12). When the application was accepted, the commune determined on the basis of what right the land was to be transferred as well as it set the terms for concluding an agreement. If the application was dismissed, the commune – in accordance with Article 7(4) of the Warsaw Decree – was obliged to grant the eligible applicant the right of perpetual tenancy to land which was of an equivalent use value or the right to develop such land, on the same terms, as long as the commune had reserves of land. The right of perpetual tenancy to land and the right to develop land were replaced in 1946 by the right of time-limited ownership, and since 1961 – this has been the right of perpetual usufruct.

As regards the ownership of buildings and other objects situated on the land expropriated on the basis of the Warsaw Decree, pursuant to Article 5 of the Decree, the said property temporarily remained the property of their previous owners, as an exception to the principle of *superficies solo cedit*. The buildings became the property of the capital city of Warsaw only after the aforementioned application was not submitted within the set time-limit as regards granting the right of perpetual tenancy to land or the right to develop land, or after the legally effective dismissal of such an application (Article 8 of the Warsaw Decree).

If the application was not submitted or, for other reasons, the previous owner was not granted the right of perpetual tenancy to land or the right to develop land, the commune was obliged to pay compensation, pursuant to Article 7(5) of the Warsaw Decree. The compensation was also awarded for all buildings that became the commune's property. Regulated in Article 9 of the Warsaw Decree, the amount of such compensation was to be determined by a municipal appraisal committee and was supposed to be equivalent to the amount of the capitalised value of the tenancy rent (the fee for the right to develop land) in the case of the land of the same use value, or with regard to buildings – the value of the buildings. The compensation was to be paid out in the form of municipal securities. The right to claim compensation emerged after the lapse of six months from the date when the land had been taken over by the capital city of Warsaw and it expired after the lapse of three years from that date. The composition and the rules of procedure of the municipal appraisal committee, the rules and the way of determining the amount of compensation as well as provisions on the issuance of municipal securities were to be specified in a regulation; however, the regulation was never issued.

On the basis of the Act of 20 March 1950 on the Regional Organs of Unitary State Authority (Journal of Laws - Dz. U. No. 14, item 130, as amended), due to the fact that the commune - the capital city of Warsaw ceased to exist, all the immovable properties owned by the commune became the property of the state. It was only in 1990, on the basis of the Act of 10 May 1990 – the Introductory Provisions to the Act on Local Self-Government and to the Act on Local Self-Government Employees (Journal of Laws - Dz. U. No. 32, item 191, as amended; hereinafter: the Act of 10 May 1990), that some immovable properties expropriated on the basis of the Warsaw Decree were communalised and became the property of the capital city of Warsaw. However, some other still constitute the property of the State Treasury or of third parties.

3.2. The Act of 12 March 1958 on Rules and a Procedure for Expropriating Immovable Properties.

The issue of compensation for nationalised land within the borders of Warsaw was again addressed in the Act of 12 March 1958 on Rules and a Procedure for Expropriating Immovable Properties (Journal of Laws - Dz. U. of 1974 No. 10, item 64, as amended; hereinafter: the Act of 1958), which considerably changed the rights of the former owners of that land. Firstly, the previous grounds for grating the right of perpetual usufruct, set out

in Article 7(2) of the Warsaw Decree, were retrospectively extended, by the Act of 1958, to include situations enumerated in its Article 3, which broadly specified the admissibility of expropriation if the property was indispensable for public service, for the purpose of protecting the state or carrying out the tasks specified in approved economic plans. By contrast, Article 54(2) of the Act of 1958 legalised decisions refusing to grant time-limited ownership which had been issued before the entry into force of the Act, provided that, considered *ex post,* they would be consistent with the grounds for expropriation set out in the Act of 1958. Secondly, in Article 53 of the Act of 1958, there were changes in rules for paying out compensation for particular immovable properties, which became the property of the state on the basis of the Warsaw Decree. The said immovable properties comprised agricultural holdings, orchards and vegetable farms – provided that the previous owners, or their legal successors managing those holdings, were deprived of the possibility of managing them after 5 April 1958 (the date of the entry into force of the Act of 1958) – as well as single-family houses and one plot of land allocated for the construction of a single-family house which became the immovable properties of the state after 5 April 1958. As regards the above-mentioned immovable properties, compensation was to be paid in accordance with the rules set out not in the Warsaw Decree, but those set out in the Act of 1958 (within that scope the application of Article 9 of the Warsaw Decree, which concerned compensation, was explicitly excluded). In the other instances, the provisions of the Warsaw Decree applied. There was no other justification for the date of 5 April 1958 than economic one, i.e. the intention to decrease state budget expenditure (see Z. Strus, "Grunty warszawskie", *Przegląd Sądowy* No. 10/2007, pp. 14-15).

The Act of 1958 "commenced the process of substitute regulations which eventually created an autonomous set of norms, which introduced differentiation - in an inexplicable way – into the legal situations of the former owners of land expropriated on the basis of the Warsaw Decree, and at the same time contributed to stagnation in the development of the city" (see *ibidem*).

3.3. The Resolution No. 11 of the Council of Ministers of 27 January 1965 on granting the right of perpetual usufruct to some land within the administrative borders of the capital city of Warsaw.

The Resolution No. 11 of the Council of Ministers of 27 January 1965 on granting the right of perpetual usufruct to some land within the administrative borders of the capital city of Warsaw (Official Gazette – *Monitor Polski* (M. P.) No. 6, item 18; hereinafter: the

Resolution No. 11) was issued "in order to sort out the legal status of the land and single-family houses, and small houses situated there, as well as agricultural holdings, orchards and vegetable farms within the administrative borders of the capital city of Warsaw of 1945", which followed from the introductory part of the Resolution. It granted the pre-WW II owners and their legal successors additional rights. It made it possible to submit applications for the right of perpetual usufruct for the persons who did not submit such applications within the time-limit provided for in the Warsaw Decree. However, this referred only to a certain category of immovable properties. Indeed, what was meant there was land constituting one plot of land for the construction of a single-family house, one plot of land with a single-family house, one plot of land with a small house, within the meaning of the Act of 28 May 1957 on the exclusion - from the public management - of single-family houses as well as flats in houses owned by housing cooperatives (Journal of Laws - Dz. U. of 1962 No. 47, item 228), as well as one plot of land with a building to be used as a craftsman's workshop, as well as an agricultural holding, an orchard and a vegetable farm. Thus, the group of eligible persons was decreased in comparison with the Warsaw Decree. Moreover, the Resolution No. 11 did not concern areas with regard to which a land development plan or the preliminary assumptions thereof provided for different use of the land, when the land was transferred by the state to other persons, or when land or buildings and facilities situated there were used for public purposes, for the purposes of the defence of the state or to carry out tasks specified in the approved economic plans or for other public needs. In the case of the death of a former owner, the group of eligible legal successors was limited to the spouse, children and parents of the deceased. The application had to be submitted within the period of six months from the date of the entry into force of the Resolution No. 11.

As regards its legal character, the Resolution No. 11 was an autonomous legal act issued without statutory authorisation. This means that it is not universally binding and, at present, it may not constitute the legal basis of administrative decisions (prior to 1980, i.e. during the period before the introduction of the judicial review of administrative decisions, it was assumed that autonomous resolutions issued by the Council of Ministers could constitute the basis of granting particular rights, see D. Kozłowska, E. Mzyk, *op.cit.*, p. 21 and the subsequent pages as well as the jurisprudence of the Supreme Administrative Court cited therein). As regards a case which regards granting the right of perpetual usufruct to land expropriated on the basis of the Warsaw Decree, commenced by way of an application submitted by a former owner, with reference to the Resolution No. 11, if the case did not

end with a final decision before the entry into force of the Act on the Management of Immovable Property, Article 214 of the said Act may be applicable (see the Resolution of the Supreme Administrative Court of 9 November 1998, Ref. No. OPK 11/98, ONSA No. 1/1999, item 14).

3.4. The Act of 29 April 1985 on Land Management and the Expropriation of Immovable Property.

The Act of 29 April 1985 on Land Management and the Expropriation of Immovable Property (the Journal of Laws - Dz. U. of 1991 No. 30, item 127, as amended; hereinafter: the Act on Land Management), in its Article 82 (prior to the publication of the consolidated text of 1991 – Article 89) led to the expiry of the right to compensation for immovable properties, buildings and other components of immovable properties taken over by the state on the basis of Article 7(4) and (5) as well as Article 8 of the Warsaw Decree. At the same time, it provided in its Article 83 (prior to the publication of the consolidated text of 1991 – Article 90) for the possibility of applying its provisions on compensation for expropriated immovable properties accordingly to certain immovable properties, namely: agricultural holdings on land which pursuant to the Warsaw Decree became the property of the state, provided that the deprivation of the actual possibility of managing those immovable properties occurred after 5 April 1958; single-family houses, if they became the property of the state after 1958; as well as plots of land which were allocated for single-family housing prior to the entry into force of the Warsaw Decree, provided that the deprivation of the actual possibility of managing them occurred after 5 April 1958. Thus, within that scope, the Act on Land Management repeated appropriate regulations from the Act of 1958. The Act of 1990 amending the Act on Land Management (the Act of 29 September 1990, Journal of Laws - Dz. U. No. 79, item 464), added that - as part of compensation - the former owner or the owner’s legal successors might be granted the right of perpetual usufruct to one plot of land for the purpose of building a single-family house.

In Article 82(2) of the Act on Land Management, persons who never submitted an application on the basis of the Warsaw Decree, or who could not expect that their application would be accepted, were allowed to submit applications until 31 December 1988 in order to be granted the right of perpetual usufruct to nationalised land which they used to own. However, this concerned only certain specified immovable properties: plots of land where there were single-family houses, small houses, houses with

fewer than 20 rooms, houses with regard to which – prior to 21 November 1945 – the rights of separate ownership of particular flats were granted, as well as houses which – prior to the said date – constituted the property of housing cooperatives.

In the literature on the subject, it has been emphasised that the above-mentioned regulation did not resolve all issues related to immovable properties expropriated on the basis of the Warsaw Decree. On the basis of the said regulation, only some buildings were returned to their former owners, and the right to compensation was ruled out with regard to all persons whose immovable properties could not, for various reasons, be returned, despite the fact that no compensation had ever been paid out. Also, attention has been drawn to the fact that the provisions on immovable properties expropriated on the basis of the Warsaw Decree raised numerous legal, moral and ethical reservations. Indeed, the Warsaw Decree provided for compensation for any immovable properties. The deprivation of the right to compensation in Article 82(1) of the Act on Land Management undermines the principle of the protection of ownership, expressed in the Constitution, whereas the differentiation introduced with regard to the rights of the former owners of immovable properties expropriated on the basis of the Warsaw Decree, provided for in Article 82 and Article 83 of the Act on Land Management, infringes the principle of equality before the law (see J. Stoksik, "Grunty warszawskie. Roszczenia wynikające z przejęcia gruntów na obszarze miasta stołecznego Warszawy", *Jurysta* No. 3/1993, pp. 9-10). The disapproval of the solutions contained in the Act on Land Management was reflected in the activity of the Polish Ombudsman, who – in the first year of office – received approximately 500 applications concerning unresolved claims for compensation for immovable properties expropriated on the basis of the Warsaw Decree. One of the Ombudsman's speeches delivered soon after taking the office was addressed to the Presidium of the Sejm, and called for taking appropriate legislative initiative, aimed at repealing Article 82(1) of the Act on Land Management. He emphasised that the reason for his intervention was not the mere fact that the ownership of property had been taken over, but the circumstance that the legislator had not kept his word as regards regulating the issue of compensation. Indeed, the Ombudsman held the view that the legislator's word – the promise to provide compensation by means of the issuance of securities – should have been kept. At the same time, the Ombudsman stressed that he would not take part in the discussion of further-reaching bills aimed at the recovery of ownership of expropriated immovable properties (see the speech of the Ombudsman with the ref. no. RPO/Ł/8/88, as well as "Sprawozdanie Rzecznika Praw Obywatelskich za okres 1 XII 1988-30 XI 1989", *Biuletyn RPO.*

Materiały No. 5/1990, p. 53).

Some of the provisions of the Act on Land Management, including Article 90(2) (in the consolidated text of 1991 – Article 83(2)), were the subject of the ruling of 31 May 1989 by the Constitutional Tribunal, ref. no. K 2/88 (*The Jurisprudence of the Constitutional Tribunal* (OTK) of 1989, item 1). The Tribunal adjudicated that depriving former owners of the possibility to choose the form of compensation, on the basis of Article 90(2) of the said Act, by overlooking the right to be granted a replacement plot of land, which had been granted and had not been exercised, constituted an infringement of the constitutional guarantee of respect for the individual's right of ownership. In the statement of reasons for the said ruling, the Tribunal also drew attention to the fact that the issue of compensation for the land taken over by the state on the basis of the Warsaw Decree had been regulated in the Act on Land Management in a way which was not beneficial for the former owners of immovable properties, as it deprived them of the right to compensation for the land. With the entry into force of the Act on Land Management, the former owners lost their rights to make claims for replacement land as well as claims for compensation, which had been granted to them in the Warsaw Decree, and had been subsequently confirmed formally (in the Act of 1958 and the Resolution No. 11). They expired on the basis of Article 89(1) of the Act on Land Management (in the consolidated text of 1991 – Article 82(1)), due to the fact that relevant actions had not been taken by the competent organs of the state. Article 90(2) of the Act on Land Management (the consolidated text – Article 83(2)), in lieu of the expired right to compensation on the basis of the Warsaw Decree, introduced compensation only for certain categories of expropriated immovable properties. A broader issue of the legal regulation of the state's obligations due to the communalisation, and then nationalisation, of immovable properties on the basis of the Warsaw Decree - due to the fact that the said issue was not the subject of the application submitted to the Tribunal - was not addressed by the Tribunal in the context of the case K 2/88.

3.5. The Act of 21 August 1997 on the Management of Immovable Property.

The continuation of the solution adopted in the Act on Land Management (as well as – indirectly – in the Act of 1958) is included in Article 214 and Article 215 of the Act on the Management of Immovable Property, which currently regulate the issue of compensation for immovable properties taken over by the state on the basis of the Warsaw

Decree.

Article 214 of the Act on the Management of Immovable Property makes reference to the expiry of the right to compensation granted to the former owners on the basis of the Warsaw Decree, which was stipulated in Article 82(1) of the Act on Land Management. Pursuant to Article 214 of the Act on the Management of Immovable Property, the former owners whose rights to compensation provided for in Articles 7 and 8 of the Warsaw Decree expired due to the lapse of the time-limit specified in Article 9(2) of the Warsaw Decree or on the basis of Article 82(1) of the Act on Land Management, and who, until 31 December 1988, submitted an application for the right of perpetual usufruct to land within the time-limit set in Article 82 of the Act on Land Management, may demand the return of one immovable property. The right arising from Article 214 of the Act on the Management of Immovable Property merely concerned certain categories of immovable properties, by analogy with the solution adopted, by the legislator, in Article 82(2) of the Act on Land Management.

As regards the issue of compensation, it is regulated by Article 215 of the Act on the Management of Immovable Property, which repeats the content of Article 83 of the Act on Land Management. On the basis of the provisions of the Act on the Management of Immovable Property, the persons eligible for compensation were the former owners (and their legal successors) of: 1) agricultural holdings on land which – on the basis of the Warsaw Decree – became the property of the state, provided that the owners were deprived of the actual possibility of managing the said holdings after 5 April 1958;

2) single-family houses, provided that the houses became the property of the state after 5 April 1958; 3) the plots of land which, before the entry into force of the Warsaw Decree, could have been allotted for single-family housing, provided that the owners were deprived of the actual possibility of managing the said holdings after 5 April 1958. By way of compensation, the former owner or the owner's legal successors may be vested with the right of perpetual usufruct to a plot of land for the construction of a single-family house. What follows from the regulation is that the Act on the Management of Immovable Property (and previously the Act on Land Management) not only did not expand the scope of the rights of the former owners to compensation, but it actually considerably limited them, due to the fact of introducing an additional premiss, which had not been included in Article 53(2) of the Act of 1958 and which made the award of compensation conditional on carrying out an assessment whether a plot of land for construction could have been allocated for single-family housing prior to the entry into force of the Warsaw Decree

(Article 53(2) of the Act of 1958 required that a plot of land should have been allocated for the construction of a single-family house without setting a time-limit). In the case of the former owners who are not mentioned in Article 215 of the Act on the Management of Immovable Property, there was no possibility of applying for compensation for expropriated land.

Compensation is determined by applying provisions on compensation for expropriated immovable properties accordingly; this means that both substantive-law provisions are applied, which affect the amount of the compensation, as well as procedural provisions, which specify a procedure for determining the amount of the compensation. In the case where a commune has become the owner of expropriated land due to communalisation on the basis of the Act of 10 May 1990, the commune is obliged to pay compensation. If the expropriated land has not been communalised, the obligation to pay compensation lies with the State Treasury. In this context, a claim for compensation is not restricted by any time-limit.

It is stressed in the jurisprudence of administrative courts that Article 215 of the Act on the Management of Immovable Property has a special character in comparison with general rules for awarding compensation which are provided for in the said Act. Therefore, it constitutes the sole basis of determining the premisses of awarding compensation, and its special character requires a strict interpretation. Thus, the indicated provision determines that the point is to satisfy the claims of only those owners, or their legal successors, who fulfil all the premisses mentioned therein. Failure to fulfil any of them results in the lack of grounds for compensation (see the judgment of the Voivodeship Administrative Court in Warsaw of 21 May 2004, Ref. No. I SA 2187/02, Lex No. 148911, the judgment of the Voivodeship Administrative Court in Warsaw of 18 December 2007, Ref. No. I SA/Wa 1041/07, Lex No. 463539). The possibility of exercising the right to compensation, as referred to in Article 215(2) of the Act on the Management of Immovable Property, with regard to a single-family house, occurs where the following requirements are jointly met: the land and house in question were subject to the provisions of the Warsaw Decree, the house became the property of the State Treasury after 5 April 1958 and it was a single-family house. The compensation is awarded only for the house. The land where the house is situated became the property of the state without any entitlement to compensation assigned thereto. By contrast, determining the amount of compensation for a plot of land must the preceded by determining whether the said plot of land was subject to the provisions of the Warsaw Decree, as well as whether it could have been allocated for

single-family housing prior to the entry into force of the Warsaw Decree. Also, it is necessary for the former owner and the owner's legal successors to have been deprived of the actual possibility of managing the land after 5 April 1958 (see *Ustawa o gospodarce nieruchomościami. Komentarz*, G. Bieniek (ed.), Warszawa 2008, p. 688 and the subsequent pages as well as the judgment of the Voivodeship Administrative Court in Warsaw of 20 February 2006, Ref. No. I SA/Wa 921/05, Lex No. 203893).

In the literature on the subject, it is stressed that Article 215 of the Act on the Management of Immovable Property repeats the content of Article 83 of the Act on Land Management, which in turn constituted the continuation of the solution adopted in Article 53 of the Act of 1958 (see J. Jaworski, A. Prusaczyk, A. Tułodziecki, M. Wolanin, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2009, p. 1375; *Ustawa...,* G. Bieniek (ed.), p. 687). Taking into account completely new circumstances in which the Act on the Management of Immovable Property was enacted, in the opinion of the authors, the adoption of such a solution by the legislator "is more than a little surprising, and raises doubts as to whether the legislator intended to definitively regulate the issue of land expropriated on the basis of the Warsaw Decree" (see M. Górski, *Problematyka własności nieruchomości warszawskich w okresie PRL i przemian ustrojowych*, Toruń 2006, pp. 95-96). The author emphasises that the provisions which are currently in force in no way resolve that complicated issue, as they maintain the differentiation in the legal situations of the former owners which has been created for the last 60 years. It is also noted that the possibility of applying the provisions on compensation for expropriated immovable properties to certain categories of immovable properties that were taken over by the state on the basis of the Warsaw Decree, which is provided for in Article 215(2) of the Act on the Management of Immovable Property, constitutes a limited form of remedy for the owners and their legal successors who were deprived of the chance to receive compensation pursuant to the provisions of the Warsaw Decree (see J. Jaworski and *et al*, *op. cit.*, p. 1375; the judgment of the Voivodeship Administrative Court in Warsaw of 20 October 2005, Ref. No. I SA/Wa 1493/04, Lex No. 191271).

3.6. International agreements.

The communalisation of land expropriated on the basis of the Warsaw Decree also concerned immovable properties owned by foreigners. Due to objections raised by the countries of origin of those persons, the government of the People's Republic of Poland concluded bilateral agreements on resolving financial claims with several countries. The

said arrangements entailed that another country being a party to the agreement took responsibility for resolving claims of its citizens and legal entities incorporated there, as regards their property in Poland which was taken over as a result of nationalisation and expropriation; in exchange for that, the Polish state offered to make fixed payments to injured parties, with the other country acting as an intermediary. The agreements provided for the right of the injured parties to choose against which country they would raise their claims for compensation. When an injured party consented to having the said claim satisfied by the state assuming the obligation of Poland, the Polish state was exempted from the obligation to pay compensation (see *ibidem*, p. 18). What was inadmissible was resorting to both options. Poland concluded such agreements, *inter alia*, with France, Great Britain, Switzerland, Sweden, Greece, the United States and Canada.

In the Act of 9 April 1968 on making entries in land registers as regards property taken over by the State Treasury, pursuant to international agreements on resolving financial claims (Journal of Laws - Dz. U. No. 12, item 65), it was stated that - on the basis of those agreements - the right of ownership to the immovable properties owned by foreigners or foreign legal entities from certain other countries, as well as rights arising from the right of perpetual usufruct or from other limited property rights, granted to those persons or entities, were assigned to the State Property, which could be confirmed by relevant entries in land registers. The basis of such an entry was a declaratory decision by the Minister of Finance (see A. Hetko, *Dekret warszawski – postępujące wywłaszczenie nieruchomości*, Warszawa 2008, p. 106).

4. The current legal status of the former owners of immovable properties expropriated on the basis of the Warsaw Decree.

The legal status of the owners of land expropriated on the basis of the Warsaw Decree (and their legal successors) is currently considerably varied, which results from numerous changes in legal provisions and the lack of definitive regulation of the issue in contemporary times. One may indicate persons that submitted relevant applications for the right to the land within the set time-limits, and the applications have not so far been considered. There are also persons that submitted relevant applications within the set time-limits, but were refused the right to the land or the right to compensation. Some of those persons currently took action – on the basis of Article 156 of the Act of 14 June 1960 – the Code of Administrative Procedure (Journal of Laws - Dz. U. of 2000 No. 98, item 1071, as amended) – in order to revoke rulings which did not grant the right to the land or the right

to compensation; some proceedings in that regard are pending before the organs of public administration and courts. Final decisions on the invalidity of rulings which ruled out the granting of the right to the land result in the elimination of those rulings from the legal system, with an *ex tunc* effect. Consequently, the legal situation of a given immovable property is restored as if an application based on the Warsaw Decree has never been considered. Pursuant to Article 5 of the Warsaw Decree, buildings shall again become the property of the former owners (or their legal successors), and an application for the right of time-limited ownership (currently the right of perpetual usufruct) is to be considered. Moreover, there are also persons that did not submit applications for the right to the land within the set time-limit, and within the scope of available legal possibilities, they did not apply for any rights to the land and buildings. There are also persons whose claims were – at least partly – satisfied on the basis of the Warsaw Decree or subsequent regulations (see A. Hetko, p. 101, M. Górski, *op.cit*., p. 101 and the subsequent pages).

What follows from information provided on the website of the capital city of Warsaw in the document entitled "The Analysis of the Issues Arising from the Binding Force of the Warsaw Decree" is that the Warsaw Decree concerned the land of the surface area of 14 146 ha. In the years 1948–1949, the former owners of immovable properties submitted approximately 17 000 applications for the right to the land, most of which were turned down in the subsequent years. However, some of those applications have not yet been considered. Currently, administrative proceedings related to the claims of the former owners of immovable properties expropriated on the basis of the Warsaw Decree are conducted before the Mayor of the Capital City of Warsaw as the organ of first instance, represented by the Bureau of the Management of Immovable Property for the Capital City of Warsaw. The list of plots of land with structures erected on them which are subject to claims made by the former owners or their legal successors (dated 10 November 2010 and available on the website of the capital city of Warsaw) contains over 2200 addresses. If a given immovable property belongs to the State Treasury, applications for the right of perpetual usufruct are considered by the Mayor of Warsaw Poviat - since 2002 the office is held by the Mayor of the Capital City of Warsaw.

Proceedings concerning complaints made by the former owners of immovable properties expropriated on the basis of the Warsaw Decree and their legal successors are also pending before the European Court of Human Rights (hereinafter: the ECHR) in Strasbourg. They deal with the lengthiness of administrative proceedings in cases involving claims related to immovable properties expropriated on the basis of the Warsaw

Decree, i.e. with the infringement of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended), pursuant to which everyone is entitled to a fair and public hearing within a reasonable time. Numerous complaints made by Polish citizens have been considered by the ECHR (see the judgments of: 9 March 2004 in the case Jabłońska versus Poland, Application No. 60225/00; 22 March 2005 in the case Szenk versus Poland, Application No. 67979/01; 1 February 2005 in the case Beller versus Poland, Application No. 51837/99; 28 marca 2006 in the case Koss versus Poland, Application No. 52495/99; 17 października 2006 in the case Grabiński versus Poland, Application No. 43702/02; 1 July 2008 in the case Berent-Derda versus Poland, Application No. 23484/02; 21 kwietnia 2009 in the case Serafin and Others versus Poland, Application No. 36980/04; 7 lipca 2009 in the case Prądzyńska-Pozdniakow, Application No. 20982/07; 7 July 2009 in the case Tymieniecki versus Poland, Application No. 33744/06; 20 October 2009 in the case Radoszewska-Zakościelna versus Poland, Application No. 858/08; 1 June 2010 in the case Derda versus Poland, Application No. 58154/08). In the view of the ECHR, although cases concerning the return of immovable properties expropriated on the basis of the Warsaw Decree display great complexity of factual and legal issues, still this does not justify the excessive lengthiness of administrative proceedings in those cases. The ECHR pointed out that the lengthiness of the proceedings was by no means caused by the actions of the complainants, and it was the administrative authorities that were responsible for failing to hear the cases within a reasonable time, as their activities were undertaken with considerable delay and there were long periods of complete lack of activity on their part, despite reprimands from local self-government appellate authorities and administrative courts.

5. Conclusions.

To recapitulate on the above-described legal situation of immovable properties expropriated on the basis of the Warsaw Decree, from the moment of the entry into force of the Decree until today, there is no doubt that the current legal situation of land expropriated on the basis of the Warsaw Decree is a result of the regulation issued more than 60 years ago. Initiated by the Act of 1958, the process of substitute regulations (in relation to the provisions of the Warsaw Decree) has resulted in creating an autonomous system of norms which, without any justification, diversified the situations of the former owners of immovable properties expropriated on the basis of the Warsaw Decree in respect of the

right to the expropriated immovable properties and the right to compensation for them. In the literature on the subject, the process that has shaped the legal situations of those persons is referred to as “the progressive expropriation of immovable properties”, which consists in taking away property over time, with more and more rights or areas of entitlement being gradually revoked or replaced by increasingly weaker rights (see A. Hetko, *op.cit.*, p. XXV).

In the resolution of 18 June 1996, ref. no. W 19/95 (OTK ZU No. 3/1996, item 25), with reference to the question of the First President of the Supreme Court, as regards the interpretation of certain provisions of the Act on Land Management, the Constitutional Tribunal stated that: “the former owners of land expropriated on the basis of the Warsaw Decree were not treated in a fair way by public authorities in accordance with the principles of social justice as well as the principle of protection of citizens' trust in the state and its laws (...). The practice of administrative authorities did not adhere to the provisions of the Decree of 26 October 1945 (...). In practice, applications for relevant rights to be granted [as specified in the Warsaw Decree] were frequently not considered (...). After the nationalisation of the property of the capital city of Warsaw, the organs of the state did not aim at satisfying the claims based on the Decree of 26 October 1945, despite the fact that (...) the Decree was still in force. (...) Due to the above circumstances, for the reasons caused by the legislator as well as the organs of public authority which were responsible for applying the law, a considerable number of persons that had been deprived of their right of ownership pursuant to the Decree of 26 October 1945, found themselves in an unstable and insecure situation as regards their rights, without being awarded just compensation for the expropriation of their property for the sake of the reconstruction of Warsaw, which was in breach of the provisions and assumptions of the Decree of 1945”.

6. Higher-level norms for the review.

6.1. The basic higher-level norm for the review in the case under examination is Article 64(2) of the Constitution, in accordance with which everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. What follows from the argumentation presented by the complainants is that they link the allegation of the infringement of Article 64(2) of the Constitution mainly with the protection of the right to compensation – as one of “other property rights” mentioned to in this provision. The allegation only indirectly concerns the protection of the ownership of

immovable properties expropriated on the basis of the Warsaw Decree (see p. 5 of the procedural letter of 31 March 2008, submitted by the complainants).

The constitutional guarantee of ownership set out in Article 64(1) of the Constitution, apart from the right of ownership construed in a strict sense and other property rights which are obligatory in character, also comprises rights which imply obligations, including the right to compensation (see E. Łętowska, "Własność i jej ochrona jako wzorzec kontroli konstytucyjności. Wybrane problemy", a paper presented at the 13th Conference of the Judges of the Polish Constitutional Tribunal and of the Lithuanian Constitutional Court, in Warsaw, on 24 June 2009; see also the judgments of: 23 May 2006 Ref. No. SK 51/05, OTK ZU No. 5/A/2006, item 58; 27 November 2007, Ref. No. SK 18/05, OTK ZU No. 10/A/2007, item 128; 2 December 2008, Ref. No. K 37/07, OTK ZU No. 10/A/2008, item 172). Therefore, this right is also subject to equal protection, for everyone, as declared in Article 64(2) of the Constitution. In the judgment of 19 December 2002, ref. no. K 33/02 (OTK ZU No. 7/A/2002, item 97), the Tribunal indicated two aspects of the constitutional protection of property rights, as regards the scope ratione personae. Firstly, such protection is granted to all persons, regardless of their personality traits or other particular qualities. As a result, a property right regulated by statute is subject to protection, regardless of who is entitled thereto. Secondly, the protection of subjective rights must be equal for all subjects. However, the said protection does not concern the guarantee of specific content of subjective rights, and their effectiveness with regard to particular subjects, but the existence of property rights provided for in statutes and the equal treatment of eligible persons. The legislator's obligation is not only to create provisions that will ensure the protection of property rights, but also to refrain from adopting regulations which could deprive the said rights of protection or impose restrictions on them. At the same time, the Tribunal stressed that equal protection might not be regarded as tantamount to the identical intensity of protection granted to particular categories of property rights. In the light of the above, the equality of protection refers only to property rights which belong to the same category. As regards the scope ratione personae, the principle expressed in Article 64(2) of the Constitution means that there is a prohibition against introducing different degrees of intensity of protection among the subjects of private law, individuals, the subjects of public law or the state. However, such differentiation may stem from binding public-law entities, in particular state entities, with constitutional norms which do not refer to individuals (see

the judgments of: 25 February 1999, Ref. No. K 23/98, OTK ZU No. 2/1999, item 25; 31 January 2001, Ref. No. P 4/99, OTK ZU No. 1/2001, item 5; 29 June 2001, Ref. No. K 23/00, OTK ZU No. 5/2001, item 124; as well as: L. Garlicki, commentary on Article 64 Konstytucji, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, Warszawa 2003; B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, p. 332 and the subsequent pages).

Article 64(2) of the Constitution should also be regarded as an instance of specific reference of the general principle of equality to particular realms of life. For that reason, it should be interpreted and applied in conjunction with Article 32(1) of the Constitution, which was stressed by the Constitutional Tribunal, *inter alia* in the judgment of 2 June 1999 (Ref. No. 34/98, OTK ZU No. 5/1999, item 94).

6.2. The other higher-level norms for the review indicated in the constitutional complaint, i.e. Article 32(1) and Article 31(3) of the Constitution, are considered in conjuction with Article 64(2) of the Constitution.

Article 32(1) of the Constitution is of special significance for the interpretation of Article 64(2) of the Constitution. As it has already been mentioned, the protection of property rights, which is equal for everyone, should be interpreted in conjunction with Article 32(1) of the Constitution, since ensuring that everyone is provided with equal legal protection is an element of the right to equal treatment by public authorities, expressed in Article 32(1), second sentence, of the Constitution.

The principle that everyone is equal before the law, set out in Article 32(1) of the Constitution, expresses the requirement to treat all similar subjects in a similar way, at the same time allowing to treat different subjects in a different way. In the jurisprudence of the Constitutional Tribunal, there is consistency as regards the preservation of the formula expressed in the legal system under the previous Constitution of 1952 (Journal of Laws - Dz. U. of 1976 No. 7, item 36, as amended; hereinafter: the Constitution of the People's Republic of Poland) that the constitutional principle of equality entails that all addressees of legal norms who, to the same extent, share a given significant characteristic should be treated equally. Equal treatment means treatment by applying the same measure, without either discriminating or favouring. The said definition has also become well-established in the present constitutional order (see *inter alia* the rulings of: 9 March 1988, Ref. No. U 7/87, OTK in 1988, item 1; 20 December 1994, Ref. No. K 8/94, OTK in 1994, Part 2, item 43; the judgments of: 22 February 2005, Ref. No. K 10/04, OTK ZU No. 2/A/2005,

item 17; 23 March 2006, Ref. No. K 4/06, OTK ZU No. 3/A/2006, item 32). It is emphasised in the jurisprudence of the Tribunal that equality also entails accepting that different addressees of legal norms are treated differently by law. The equal treatment of the same subjects by law usually means the different treatment of the same subjects in a different respect.

The unequal treatment of subjects belonging to the same category implies that differentiation has been introduced. Then we deal with a departure from the principle of equality, which is however not always tantamount to discrimination or privileged treatment (see the judgment of the Constitutional Tribunal of 24 February 1999, Ref. No. SK 4/98, OTK ZU No. 2/1999, item 24). In the context of every regulation, the Tribunal first of all has to determine on the basis of what criterion differentiation has been introduced with regard to the addressees of a legal norm, and then it should consider whether the said differentiation is justified (see the judgment of the Constitutional Tribunal of 16 December 1997, Ref. No. K 8/97, OTK ZU Nos 5-6/1997, item 70). Arguments justifying departures from the requirement of equal treatment must be relevant in character, i.e. they should remain directly related to the aim and main content of provisions which include the norm under review, as well as they should serve the achievement of that aim and the implementation of that content. Above all, they should fulfil the requirement of proportionality, which entails that the significance of an interest due to which differentiation has been introduced must remain in appropriate proportion to the significance of interests which will be violated as a result of unequal treatment of similar subjects. Finally, the differentiation must be linked to other constitutional values, principles or norms which justify the different treatment of similar subjects (see the ruling of the Constitutional Tribunal of 3 September 1996, Ref. No. K 10/96, OTK ZU No. 4/1996, item 33; the judgment in the case K 10/04).

6.3. Article 31(3) of the Constitution, which establishes the principle of proportionate restrictions on constitutional rights and freedoms, is of significance not only as regards interpreting the premisses of admissibility of expropriation, but also with regard to the conditions of restricting the right to compensation which, as one of "other property rights", is protected by the Constitution. In accordance with that provision: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and

rights of other persons. Such limitations shall not violate the essence of freedoms and rights". Thus, Article 31(3) of the Constitution provides for imposing restrictions on the exercise of rights and freedoms only on condition that this is necessary for the protection of one of the six values indicated therein. The enumeration contained in that provision is exhaustive in character, which means that if a restriction on a given right or freedom is not justified by any of the mentioned values, such a restriction may not be imposed, unless this is allowed by a special constitutional provision (see L. Garlicki, comments on Article 31 of the Constitution, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, Warszawa 2003).

The principle of proportionality prohibits excessive interference with constitutional rights and freedoms on the part of the legislator. Generally, it is understood as "the requirement to take measures which are adequate to set goals" (see K. Wójtowicz, *Zasada proporcjonalności jako wyznacznik konstytucyjności norm*, [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, M. Zubik (ed.), Warszawa 2006, p. 265 and the subsequent pages). When examining whether a given restriction on constitutional rights and freedoms falls within the scope of the principle of proportionality, the Constitutional Tribunal answers three questions: can this restriction result in achieving set goals, is it indispensable for the protection of a public interest to which it is related, as well as whether the effects of the restriction will be proportionate to the burden imposed on citizens (see the ruling of 26 April 1995, Ref. No. K 11/94, OTK in 1995, Part 1, item 12).

7. The analysis of the constitutionality of Article 215(2) of the Act on the Management of Immovable Property.

7.1. There is no doubt that challenged Article 215(2) of the Act on the Management of Immovable Property restricts the scope ratione personae and ratione materiae of the right to compensation for immovable properties taken over by the state on the basis of the Warsaw Decree, and introduces differentiation in the context of the rights of the former owners and their legal successors as regards receiving compensation for property nationalised on the basis of the Warsaw Decree. However, the said circumstance does not automatically determine the unconstitutionality of the said Article. The purpose of Article 215 of the Act, included in Section VII of the Act – "Transitional provisions, amendments to binding provisions and final provisions", was not to comprehensively regulate the return of immovable properties which had been communalised and

nationalised in Warsaw. According to the explanation provided in the letters of the Mayor of the Capital City of Warsaw, dated 3 December 2010 and 16 May 2011, the legislator's intention - when assigning the present content to Article 215(2) of the Act - was the protection of the acquired rights of persons that had submitted applications for compensation, in accordance with the procedure set out in the Act on Land Management, where the applications had not been considered until the entry into force of the Act on the Management of Immovable Property. This also arises from Article 233 of the Act on the Management of Immovable Property, pursuant to which the provisions of the Act are to be applied to cases pending before the entry into force of the Act.

However, the assessment of the challenged regulation may not be limited to the above statement based on the assertions that Article 215(2) of the Act on the Management of Immovable Property constitutes a literal repetition of previous regulations contained in the Act of 1958 and in the Act on Land Management as well as that it manifests the legislator's policy aimed at restricting the scope of the state's responsibility as regards compensation for land expropriated on the basis of the Warsaw Decree. Indeed, one may not disregard the circumstances that the previous regulations were derived from the assumptions of the political system of the People's Republic of Poland and the social and economic needs arising therefrom, which shaped the quality and boundaries of the legal protection of the right of ownership in a completely different way than it is currently the case in the light of the Constitution of 1997. The assumptions of the political system expressed in the Constitution of the People's Republic of Poland, which rejected the free-market economy and advocated a centrally-controlled one, entailed differentiating among forms of ownership, in respect of the scope ratione materiae and ratione personae. The Constitution of the People's Republic of Poland legitimised the seizure of private property by the state, thus creating national property – as in the USSR – organised in accordance with the principle of the unity of national property, which in its entirety was the property of the state. The division of property was established in the Act of 23 April 1964 – the Civil Code (Journal of Laws - Dz. U. No. 16, item 93, as amended; hereinafter: the Civil Code), in accordance with which property was divided into social property i.e. national (state) property, cooperative property and the property of other social organisations of the working class (Article 126 of the Civil Code), personal property (Article 132 of the Civil Code), the property of individual agricultural holdings (Article 131 of the Civil Code) as well as private property – referred to as the property of the individual (Article 130 of the Civil Code). Personal property almost solely comprised consumer goods which were to satisfy

the personal needs of the owner and his/her family. Personal property could also be a single-family house or a flat constituting a separate immovable property, together with indispensable outbuildings, provided that they met certain surface-area standards. Private (individual) property, comprising land, buildings and other means of production which were not categorised as social or personal property, was granted to individuals solely on the basis of, and within the limits of, statutes. The differentiation introduced into property rights at the same time reflected the unequal treatment of the subjects of the above-mentioned forms of ownership by the law, by granting them varied degrees of protection. The most intense protection, to which each citizen was obliged, was the protection of social property. The second one in line was personal property to which the state "granted complete protection" (Article 13 of the Constitution of the People's Republic of Poland). The property of the individual was placed last in that hierarchy, and the boundaries of the protection thereof were set by the provisions of statutes. It is stressed in the literature on the subject that the experience of that period caused the concept and awareness of ownership to undergo gradual erosion. What contributed to that phenomenon was the long-term disregard of public authorities for property and the exclusion of certain types of ownership from the scope of constitutional protection (see M. Safjan, "Konstytucyjna ochrona własności", *Rzeczpospolita* of 12 July 1999, as well as R. Pessel, *Rekompensowanie skutków naruszeń prawa własności wynikających z aktów nacjonalizacyjnych*, Warszawa 2003, p. 78 and the subsequent pages).

The model of protection of ownership adopted in the Constitution of the People's Republic of Poland considerably differed not only from the one provided for in the Constitution of 1997, but also from the principles adopted in the March Constitution of 1921 (Journal of Laws - Dz. U. No. 44, item 267), which in its Article 99 stipulated *inter alia* that: "The Republic of Poland shall respect all ownership - be it the personal ownership of individual citizens, or the collective ownership of associations of citizens, institutions, local self-government bodies, and finally of the State itself - as one of the most important bases of a social system and the legal order, as well as shall guarantee the protection of ownership to all residents, institutions and communities, and shall provide for cancelling or restricting ownership, be it personal or collective one, only in cases set out in statutes, when this is to serve a higher public purpose, and where it is done upon compensation". In that context, it is not irrelevant that the acts providing for the nationalisation of property, including the Warsaw Decree, were issued under the rule of the April Constitution, which was in force at that time (the Constitution of 23 April 1935,

Journal of Laws - Dz. U. No. 30, item 227) and which repeated the provisions of Article 99 of the March Constitution. Thus, the said acts should reflect the standards of protection of ownership established in that provision (see R. Pessel, *op.cit.*, p. 80 and the subsequent pages).

Articles 12 and 13 of the Constitution of the People's Republic of Poland were repealed by the amending Act of 29 December 1989 (Journal of Laws - Dz. U. No. 75, item 444) and were replaced with new Article 7 (which was subsequently kept in force by Article 77 of the Act of constitutional rank, dated 17 October 1992, on mutual relations between the legislative branch and the executive branch of the Republic of Poland as well as on local self-government, Journal of Laws - Dz. U. No. 84, item 426, as amended), pursuant to which: "the Republic of Poland shall protect the right of ownership and the right of succession, as well as guarantees full protection of personal property. Expropriation is admissible solely for public purposes and upon compensation". The legislator's intention to refrain from the subcategorisation of ownership was subsequently expressed in the Act of 28 July 1990 amending the Civil Code (Journal of Laws - Dz. U. No. 55, item 321), which on 1 October 1990 repealed the provisions of the Civil Code that constituted the basis of the unequal treatment of owners in respect of the type of ownership. Therefore, the distinction into social, individual and personal ownership was abolished. Consequently, the previous provisions differentiating among different legal statuses of ownership, in respect of its form and scope ratione materiae ceased to have effect and lost their significance (see S. Rudnicki, *op. cit.*, p. 3). Provisions that constitute the ultimate manifestation of changes that occurred after 1989 are Article 20, Article 21 and Article 23 of the Constitution of 1997, which specify the bases of the socio-economic system of the Republic of Poland, as well as Article 64 of the Constitution, which confirms the subjective right of ownership, the right of succession and other property rights, as well as equal protection thereof for everyone. At present, ownership is unified and universal in character, regardless of whose ownership it is and what function it fulfils. This is manifested by the unified way of protecting ownership against violation (see S. Rudnicki, *op.cit.* p. 3).

Thus, when analysing the regulation contained in Article 215(2) of the Act on the Management of Immovable Property, one should bear it in mind that in the last few decades changes that occurred within the scope of ownership were determined by political and ideological assumptions. By contrast, Article 215(2) of the said Act is evaluated in the light of the currently binding standards of protection of the right of ownership and other

property rights.

7.2. The complainants' allegations concerning Article 215(2) the Act on the Management of Immovable Property may not be analysed in isolation from the normative context which evolved from the moment of the entry into force of the provisions of the Warsaw Decree until the entry into force of Article 215 of the said Act, which at present regulates the issue of compensation for immovable properties expropriated on the basis of the Warsaw Decree. The detailed analysis of the evolution of legal solutions concerning immovable properties expropriated on the basis of the Warsaw Decree (see point 3 of that part of the statement of reasons) indicates that Article 215(2) of the said Act should be interpreted in conjunction with all provisions which – as regulations replacing the provisions of the Warsaw Decree – created an autonomous set of norms differentiating among the legal situations of the former owners of plots of land expropriated on the basis of the Warsaw Decree. At present, Article 215(2) of the Act on the Management of Immovable Property constitutes the sole basis of claims for compensation for immovable properties expropriated on the basis of the Warsaw Decree. The right to compensation for land, buildings and other components of immovable properties that became the property of the state, as referred to in Article 7(4) and (5) as well as Article 8 of the Warsaw Decree, expired on the day when the Act on Land Management entered into force, on the basis of Article 82(1) of the Act on Land Management. This is confirmed by the jurisprudence of administrative courts, pursuant to which Article 215(2) of the Act on the Management of Immovable Property is an autonomous legal norm which regulates issues involving compensation in the actual and legal circumstances specified therein. This is what was also adjudicated by the Supreme Administrative Court in the complainants' case in the judgment of 11 September 2007, ref. no. I OSK 942/06, thus upholding the judgment of the Voivodeship Administrative Court in Warsaw, in which the complainants had been refused compensation for an immovable property expropriated on the basis of the Warsaw Decree, due to the fact that no single-family house was erected there (the organs of public administration determined that the general land development plan of the capital city of Warsaw, dated 11 August 1931, provided for densely built-up four-floor buildings). In the substantiation of its ruling, the Supreme Administrative Court acknowledged that Article 215(2) of the Act on the Management of Immovable Property considerably restricted the rights to compensation of the owners of other immovable properties other than those indicated therein; however, it stressed that the restrictions introduced therein, in

the context of the present regulation – Articles 214 and 215 of the Act on the Management of Immovable Property as well as the previous regulation – Article 82 of the Act on Land Management, had to be regarded as the manifestation of the state's policy restricting the scope of its responsibility in an administrative way and that, as regards the assessment of the legislator's policy, the Supreme Administrative Court had no jurisdiction.

Despite the fact that the right to compensation provided for in the Warsaw Decree expired, when assessing the restriction in Article 215(2) of the Act on the Management of Immovable Property which had provided for compensation only with regard to certain immovable properties, the regulation of that issue in the Warsaw Decree may not be overlooked. Pursuant to Article 7(5) and Article 8 of the Warsaw Decree, a given owner who was not granted the right of perpetual tenancy to land or the right to develop land, or who did not at all submit such an application, was entitled to compensation for expropriated land and all buildings erected on the land which were suitable for use or repair and which became the property of the commune. The said compensation was to be paid out on the basis of the provisions of the regulation referred to in Article 9(3) of the Warsaw Decree. The said regulation has never been issued; however, the content of the cited provisions is clear – the transfer of an immovable property was to be done upon compensation which was not conditional on any other premisses concerning the scope ratione personae and ratione materiae. Subsequent legal regulations contained in Article 53 of the Act of 1958, in Article 83 of the Act on Land Management and currently in Article 215 of the Act on the Management of Immovable Property were to partially compensate for the said lack, but only within a limited scope. As a result, a certain group of persons, i.e. the former owners (their legal successors) of immovable properties other than single-family houses which became the property of the state after 5 April 1958, as well as plots of land which – prior to the entry into force of the Warsaw Decree – could have been allocated for the construction of buildings other than single-family housing, provided that a given former owner or the owner's legal successors were deprived of the actual possibility of managing the plots after 5 April 1958, has been deprived of the right to compensation for the expropriated property.

At this point, it should be pointed out that the scope of a review conducted by the Constitutional Tribunal is determined by the scope of a request contained in the *petitum* of a constitutional complaint which binds the Tribunal, pursuant to Article 66 of the Constitutional Tribunal Act. This means, in particular, that the Tribunal does not examine other premisses of granting the right to compensation, which are enumerated in

Article 215(2) of the Act on the Management of Immovable Property, including the right to compensation for persons who were deprived of the ownership of their immovable property on the basis of the Warsaw Decree before 5 April 1958.

7.3. The right to compensation for expropriated immovable properties.

As it has already been said, the complainants demand equal protection for the right to compensation for expropriation, which is one of "other property rights", referred to Article 64(1) and (2) of the Constitution. In accordance with the jurisprudence of the Constitutional Tribunal, the right to compensation is undoubtedly an autonomous subjective right, and a claim related thereto is normative in character, which constitutes one of "other property rights" within the meaning of Article 64(1) of the Constitution and, as such, is subject to separate protection on the basis of Article 64(2) of the Constitution. At the same time, a claim for compensation manifests the compensatory protection of a subjective property right; such protection is taken into account when the restitution of that right is impossible (see the judgment of 25 May 2006, Ref. No. SK 51/05). Although the basic means of protecting a subjective right are instruments involving prohibitions (which safeguard the possibility of unrestrained exercise of the right by an entitled subject, without any infringement and interference by third parties) as well as restitutive measures, applied in the case of an infringement that has already been committed, it is not always effective or possible to resort to those means.

In that context, a claim for compensation for expropriation constitutes a special instrument for protecting the interests of complainants who make claims due to the infringement of the right of ownership, when the said interests may not be protected by means of restitutive measures. The unique character of the institution of expropriation allows one to assume in such a situation that the right to compensation is a kind of substitute for the right of ownership of immovable property. The close relation weighs in favour of regarding excessive restrictions on claims for compensation due to the infringement of the right of ownership as unauthorised interference with the legal protection of ownership itself. In the light of the jurisprudence of the Tribunal, the evaluation of the entirety of regulations aimed at compensating for interference with the right of ownership may lead to a conclusion that the essence of the right has been infringed; the said interference is legitimate in the light of Article 31(3) as well as Article 64(3) of the Constitution (see the judgment of 12 January 2000, Ref. No. P 11/98, OTK ZU No. 1/2000, item 3). Such evaluation is even more justified in the case under

examination where the complainants have completely been deprived of the right to compensation for the expropriated immovable property.

7.4. Article 215(2) of the Act on the Management of Immovable Property in the light of the equal protection of property rights.

To determine if Article 215(2) of the Act on the Management of Immovable Property, in an unconstitutional way, differentiates among its addressees as regards the protection of the right to compensation for expropriation, the Tribunal should establish whether there is any similarity between addressees, i.e. whether it is possible to indicate a significant common factual or legal characteristic that would justify the equal treatment of the addressees. Determining that subjects are similar makes it possible to examine whether they are treated in a similar way in the light of the challenged regulation. By contrast, stating that the law does not treat similar subjects in a similar way (that it differentiates among them) entails determining whether such differentiation is admissible in the light of the principle of equality.

In the case under examination, the complainants aptly indicate that the relevant common characteristic which determines singling out similar groups, on the basis of the challenged provision - i.e. the former owners (their legal successors) of single-family houses or of plots of land allocated for the construction of single-family housing and the former owners (their legal successors) of other immovable properties expropriated on the basis of the Warsaw Decree - is that they were expropriated on the basis of the provisions of the Warsaw Decree and they did not submit applications to be granted the right of perpetual tenancy to land or the right to develop land, or to whom those rights were not granted for any other reasons. In such a situation, Article 7(5) of the Warsaw Decree required the commune to pay out compensation to the former owners and their legal successors, without making any differentiation in respect of the scope ratione personae and ratione materiae in that regard. The commune’s obligation to pay out compensation also concerned buildings on land when they became the property of the commune due to the fact that a given former owner had not been granted the right to the land.

Therefore, Article 215(2) of the Act on the Management of Immovable Property differentiates among the legal situations of the former owners of immovable properties expropriated on the basis of the Warsaw Decree as well as their legal successors. As it has already been mentioned, the principle of equal protection of property rights is a component of the general principle of equality. However, a departure from the principle of equality,

constituting an exception to the principle expressed in Article 64(2) of the Constitution (and thus also in Article 32(1) of the Constitution) is not tantamount to discrimination or privileged treatment, on condition that it is justified, i.e. it is based on convincing criteria. The said criteria must be relevant and proportionate as well as must be related to other constitutional values, principles or norms that justify the different treatment of similar subjects. Therefore, providing different protection to particular property rights must be confronted with the criteria adopted in Article 31(3) of the Constitution, which indicates both the way of understanding the premiss of necessity, and at the same time the proportionality of a restriction specified by law, as well as other constitutional values that may weigh in favour of maintaining such a restriction, hence in that case justify a departure from the principle of equal protection of property rights.

As regards Article 215(2) of the Act on the Management of Immovable Property, it is impossible to indicate any relation of the said provision to the aim and main content of the provisions of the Act on the Management of Immovable Property which could be implemented by the challenged provision. In particular, this may not be justified by the necessity to protect the acquired rights of persons who have submitted applications for compensation in accordance with the procedure set out in the provisions of the Act on Land Management, and which were not considered until the entry into force of the Act on the Management of Immovable Property, since granting compensation to other subjects would not constitute impediment in satisfying the claims of those persons. Justifying the differentiation would require proof that there are differences between the situations of the addressees of Article 215(2) of the said Act, i.e. the former owners of single-family houses and of the plots of land allocated for the construction of single-family housing, and the former owners of other immovable properties expropriated on the basis of the Warsaw Decree that it is necessary to subject them to another regulation. At the moment, there is no rational justification for the fact that the former owners of other immovable properties than single-family houses and of the plots of land allocated for other development than the construction of single-family housing were deprived of the right to compensation. Systemic changes after 1989, finalised by the entry into force of the Constitution of 1997, restored the unified character of ownership and the equal protection thereof. Article 64(2) of the Constitution currently provides a rule of interpretation in the context of the application of provisions on ownership.

Since it is impossible to prove the premiss that the said differentiation is relevant, then there is no possibility of analysing the proportionality of the differentiation. The lack

of the possibility of formulating a purpose for which the former owners of other immovable properties than single-family houses and of the plots of land allocated for other development than the construction of single-family housing were overlooked, as this rules out determining whether a proper relation was maintained between the significance of the goal and the intensity of the infringement of the principle of equality and the equal protection of the right to compensation as one of other property rights.

Finally, what is crucial for the assessment whether there was an infringement of Article 64(2) in conjunction with Article 32(1) of the Constitution, it is impossible to link the omission of the former owners of other immovable properties than single-family houses and of the plots of land allocated for other development than the construction of single-family housing, in Article 215(2) of the Act on the Management of Immovable Property, to any constitutional values, principles or norms. The introduced differentiation is not justified by any values mentioned in Article 31(3) of the Constitution, in particular it is not necessary for the protection of the rights and freedoms of other persons in a democratic state. Restrictions on the rights of the former owners of immovable properties expropriated on the basis of the Warsaw Decree, and thus limited compensatory responsibility of the State Treasury, appear to be aimed at protecting its budget.

As it has already been mentioned, the right to compensation for expropriation is a kind of substitute for the lost ownership of immovable property. For that reason, it is justified to provide special protection of that right, similar in its intensity to the protection of the right of ownership. The right of ownership and the guarantees indicated in Article 64 of the Constitution should be constructed in the context of the general systemic principles of the Republic of Poland, and in particular in the context of Articles 20 and 21 of the Constitution, which include private ownership in the basic systemic principles of the state. In the light of these provisions, the guarantee of the protection of ownership is a constitutional obligation of the state and constitutes a value which determines the interpretation of both: Article 64 of the Constitution as well as regulations contained in ordinary legislation.

7.5. In the light of the above, the analysis of the constitutionality of the challenged provision has revealed that Article 215(2) of the Act on the Management of Immovable Property, insofar as it overlooks the application of those provisions concerning compensation for expropriated immovable property to immovable property other than single-family houses which became the property of the commune – the capital city of

Warsaw, or the property of the state, on the basis of the Warsaw Decree could be used for housing other than single-family housing, provided that the former owners or their successors had been deprived of the actual possibility of managing the properties after 5 April 1958 is inconsistent with Article 64(2) in conjunction with Article 32(1) as well as in conjunction with Article 31(3) of the Constitution.

8. The effects of the judgment.

In this judgment, the Tribunal has determined the unconstitutionality of Article 215(2) of the Act on the Management of Immovable Property, due to its incompleteness from the point of view of constitutional requirements. This means that the Tribunal has adjudicated that the legislator overlooked something in the provision and, in accordance with the Constitution, this should have been regulated. The result of the ruling declaring the unconstitutionality of the challenged provision, insofar as it overlooks certain regulations, is not the fact that the challenged provision will cease to have effect. The Tribunal's judgment indicates the need for establishing legal regulations that are necessary for the implementation of constitutional norms. The consequence of the judgment is therefore the necessity for relevant action on the part of the legislator (see the judgments: Ref. No. SK 22/01, of 25 June 2002, Ref. No. K 45/01, OTK ZU No. 4/A/2002, item 46 as well as of 19 May 2011, Ref. No. SK 9/08).

The judgment declaring the unconstitutionality of the omission, as determined by the Constitutional Tribunal, does not automatically bring about the results which are referred to in Article 190(4) of the Constitution. Thus, it does not allow for satisfying the claims of the complainants. For the complainants to exercise their rights, there is a need for the legislator's intervention, which consists in introducing a provision which would eliminate the unconstitutional omission in Article 215(2) of the Act on the Management of Immovable Property (see the judgment in the case SK 22/01 as well as the decision of 11 October 2004, Ref. No. SK 42/03, OTK ZU No. 9/A/2004, item 99) into the legal system.

The Constitutional Tribunal draws attention to the fact that the case in which this judgment has been issued concerns the subject matter which is complex in respect of facts and legal aspects. The said complexity stems from the fact that considerable amount of time has elapsed since the loss of ownership by the complainants, as well as from the need to take into account previous legal regulations. The regulation of that subject matter also requires the proportional balance between the constitutional values: on the one hand,

respecting the right to compensation of those who have been deprived of the ownership of immovable property, on the other hand the necessity to strike a budget balance and take into account the financial possibilities of the state.

In that light, there is no doubt that the legislator needs an appropriately long period of time in order to introduce relevant amendments arising from this judgment. It is the legislator who makes a decision whether the said amendments should be limited to enacting provisions that would eliminate the adjudicated unconstitutionality, or whether there would be a complex regulation, which would comprehensively take into account the issue of immovable properties expropriated on the basis of the Warsaw Decree, in particular as regards the principles and procedure for granting and determining the amount of compensation. Regardless of the legislator's decision as to the limited or comprehensive regulation of the issue of compensation for the expropriated property, adherence to constitutional requirements in the current situation, as it has been mentioned before, complicated in respect of facts and legal aspects, does not have to consist in adopting the principle of full compensation.

It should be remembered that the current facts and a frequently complicated legal situation of immovable properties expropriated on the basis of the Warsaw Decree is not only an effect of the inconsistent policy of the legislator, but also the result of post-war political decisions taken on a mass scale, the consequences of which may not be reversed, or fully remedies, without detriment to the public interest. Although such effects should clearly be evaluated in the context of the infringement of the individual's rights, they should also be assessed in a special way from the point of view of constitutional axiology (see the judgment in the case SK 22/01). What is of significance for the said assessment is, *inter alia*, the fact that the full satisfaction of claims for compensation put forward by persons (or their legal successors) who were deprived of the ownership of immovable property on the basis of the Warsaw Decree could, as a result, lead to the infringement of the constitutional rights of other persons on a mass scale.

For the above reasons, the Tribunal adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Małgorzata Pyziak-Szafnicka
to the Judgment of the Constitutional Tribunal
of 13 June 2011, Ref. No. SK 41/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of the Constitutional Tribunal of 13 June 2011, as a whole, in the case SK 41/09.

I hold the view that the proceedings in the present case should have been discontinued on the grounds that issuing a judgment was inadmissible.

STATEMENT OF REASONS

The proceedings on examining the conformity of Article 215(2) of the Act of 21 August 1997 on the Management of Immovable Property (Journal of Laws – Dz. U. of 2010 No. 102, item 651, as amended; hereinafter: the Act on the Management of Immovable Property) to the Constitution should have been discontinued on the basis of Article 39(1)(1) of the Constitutional Tribunal Act on the grounds that issuing a judgment was inadmissible. The said inadmissibility occurs for two reasons: due to the generally specified scope of jurisdiction of the Tribunal, and due to the special character of review proceedings commenced by way of constitutional complaint.

1. Firstly, despite the view presented by the Constitutional Tribunal, the lack of regulation of compensation for immovable properties taken over on the basis of the Decree of 26 October 1945 on the ownership and use of land within the administrative borders of the capital city of Warsaw (Journal of Laws - Dz. U. No. 50, item 279; hereinafter: the Warsaw Decree), i.e. land expropriated on the basis of the Warsaw Decree, does not stem from legislative omission, but from the legislator's negligence. The assessment of that state of affairs does not fall within the scope of the jurisprudence of the Constitutional Tribunal.

The thesis that the Constitutional Tribunal, as a "negative legislator", may not replace the legislator as regards creating law is so obvious that it needs no justification. What also follows from that thesis is the lack of jurisdiction as to adjudicating on the non-conformity of legislative omission to the Constitution. However, at the same time, in accordance with the established jurisprudence of the Constitutional Tribunal, which is cited in the statement of reasons for the judgment, it is assumed that conducting the assessment of legislative omission is possible (the so-called incomplete regulation, relative negligence, or imprecise formulation). In the literature on the subject, it is pointed out that a distinction between legislative negligence and legislative omission is not based on established doctrinal grounds, and moreover there is no clear criterion which will make it possible to separate these two situations (cf. P. Tuleja, "Zaniechanie ustawodawcze", [in:] *Ustroje, doktryny, instytucje polityczne, Księga Jubileuszowa Prof. Mariana Grzybowskiego*, Kraków 2007, pp. 397-398). Consequently, in each case where the point is to assess the non-existing regulation, the Constitional Tribunal – in a sort of preliminary examination – qualifies the lack of regulation as legislative negligence or omission, thus resolving the question of its own jurisdiction. The criteria for distinguishing between these two terms have emerged from the Tribunal's jurisprudence. It appears that, in the jurisprudence, there are two criteria for distinguishing between legislative omission and legislative negligence, at the same time – in the present case – the application of each of the criteria leads to the same result.

1.1. Applying the first criterion, which may be regarded as subjective, the Tribunal states that it is not competent to act where the lack of regulation consists in "consciously leaving out a certain issue unregulated in law" (numerous rulings); "an allegation that there was deliberate legislative omission (a legal gap) may not be the subject of examination in proceedings before the Constitutional Tribunal" (the decision of 16 June 2009, Ref. No. SK 12/07, OTK ZU No. 6/A/2009, item 95, the judgment of 24 October 2000, Ref. No. SK 7/00, OTK ZU No. 7/2000, item 256). However, the examination is admissible when "excluding a certain group of persons that belong to a larger group of beneficiaries of constitutional law stems from the random configuration of premisses of regulations in ordinary legislation referred to that group" (the judgment of 9 June 2003, Ref. No. SK 5/03, OTK ZU No. 6/A/2003, item 50).

Leaving aside certain inaptness of the phrase "the awareness of the legislator", it should be noted that the quoted view of the Constitutional Tribunal is concurrent with the

view expressed in the literature, in accordance with which a review by the Constitutional Tribunal may not concern "sheer legislative negligence", also referred to as an axiological gap, which occurs when "the lack of regulation results from the deliberate (or at least tolerated) legislative policy" (E. Łętowska, K. Gonera, "Art. 190 Konstytucji i jego konsekwencje w praktyce sądowej*"*, *Państwo i Prawo* Issue No. 9/2003, pp. 4-5). In the opinion of Marek Safjan, "the sheer form of «legislative» negligence, which manifests itself in the lack of implementing certain political, economic and social assumptions of a given party's programme does not fall under the category of unconstitutionality and manifests certain legislative anarchy. It may be subject to political liability" (*Odpowiedzialność odszkodowawcza władzy publicznej (po 1 września 2004 r.)*, Warszawa 2004, p. 57).

If the admissibility of conducting a constitutional review of Article 215(2) of the Act on the Management of Immovable Property was to be assessed by means of a criterion specified as a subjective one, the lack of the jurisprudence of the Constitutional Tribunal seems to be obvious. Indeed, there is no doubt that the lack of a complex regulation of compensation for land expropriated on the basis of the Warsaw Decree manifests the decision of the legislator. Being consistent with the terminology used in the jurisprudence of the Constitutional Tribunal, it should be stated that the legislator is fully aware of the lack of appropriate regulation, and leaving a group of owners of the said expropriated immovable properties without any compensation is definitely not an issue of accidental configuration of statutory premisses determining compensation. This is best confirmed by legislative attempts aimed at solving the problem (governmental bills of 1999 and 2009, as well as the "city" bill, presented in the course of proceedings before the Constitutional Tribunal).

1.2. The other criterion is objective in character. By applying it, the Constitutional Tribunal evaluates the existing regulation, despite the fact that it is the lack thereof that is challenged. When, in a particular case, it turns out that a regulation under assessment is too narrow in its scope, with regard to constitutional principles, the Constitutional Tribunal regards this as legislative omission, and thus it recognises its jurisdiction in that context. It should be added that the positive outcome of the examination of jurisdiction is always, at the same time, the proof of the unconstitutionality of legislative omission that has been reviewed. Such reasoning is particularly applied when the lack of regulation is challenged in the light of the principle of equality (cf. the judgment of 19 May 2003, Ref. No. K 39/01, OTK ZU No. 5/A/2003, item 40). Without undermining that argument and previous conclusions, where the Constitutional Tribunal – relying on an objective criterion – deemed

that it had jurisdiction to review the constitutionality of the lack of regulation, I hold the view that, in the judgment to which I have submitted this dissenting opinion, the Constitutional Tribunal has gone much further, as it has deemed itself competent to assess that a regulation which dealt with exceptions should be extended to comprise a number of cases to which an exception was regulated. This statement should be elaborated on.

In a majority of rulings where the Constitutional Tribunal assumed its jurisdiction within the scope of reviewing the lack of regulation, the examination of constitutionality concerned provisions which enumerated subjects that had been granted certain rights; what was challenged was the omission (in a colloquial sense) of one of the categories of subjects. Such regulations were assessed by the Tribunal in the rulings cited in the statement of reasons, in particular concerning Article 216 of the Act on the Management of Immovable Property. There were two cases where the Tribunal concluded that the above provision, enumerating situations where an expropriated owner was entitled to compensation, lacked one among numerous situations where – in the opinion of the Tribunal – there was eligibility for such compensation, in accordance with constitutional principles (see the judgments of 24 October 2001, Ref. No. SK 22/01, OTK ZU No. 7/2001, item 216 and of 19 May 2011, Ref. No. SK 9/08, (OTK ZU No. 4/A/2011, item 34). In such cases, one may undoubtedly speak of omission falling within the scope of the jurisdiction of the Constitutional Tribunal.

We deal with a completely different situation in the case SK 41/09. What clearly follows from the historical account in the statement of reasons for the judgment (Part III, point 3.4) is that the regulation by virtue of which the owners of immovable properties indicated in the Warsaw Decree were deprived of their right to compensation was Article 82 of the invalid Act of 29 April 1985 on Land Management and the Expropriation of Immovable Property (Journal of Laws - Dz. U. of 1991 No. 30, item 127; hereinafter: the Act on Land Management and Expropriation). When eliminating claims for compensation on the part of the owners of land expropriated on the basis of the Warsaw Decree, in Article 83 of the Act on Land Management and Expropriation – as an exception to the adopted rule – the legislator provided for compensation for the owners of single-family houses and plots of land which, according to the pre-WWII land development plans, were allocated for the construction of such houses. It was emphasised in the statement of reasons that challenged Article 215 repeated the content of former Article 83 of the Act on Land Management and Expropriation. The incorporation of that provision into the new legal act manifested respect for acquired rights. If the legislator did not decide – whether for socio-political or budget

considerations – to satisfy the claims of all owners affected by the Warsaw Decree, then in any case – in the light of constitutional principles – he was obliged to preserve, in a statute, rights to claim compensation that had been granted before. At the same time, it is striking that the exception made with regard to the owners of single-family houses and plots of land for the construction of such houses, although it was introduced for the first time in 1958, is to some extent justified also by Article 75(1) of the Constitution, pursuant to which: "Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, (...) and supporting activities aimed at acquisition of a home by each citizen".

Provisions may not be interpreted in isolation from the historical context and the legal system where they are binding. In the present case, taking the said aspects into account leads to the conclusion that Article 215(2) of the Act on the Management of Immovable Property regulates exceptions to the rule introduced in 1985. What strengthens that legal statement is reference to actual circumstances which indicate the significance of "omission" in question. Immovable properties to which the hypothesis of Article 215(2) of the Act on the Management of Immovable Property refers, i.e. single-family houses and plots of land for the construction of such houses, due to the metropolitan sprawl of Warsaw, constitute a minority among the immovable properties affected by the Warsaw Decree. During the hearing before the Constitutional Tribunal, the Vice-Mayor of Warsaw explained that Article 215(2) of the Act on the Management of Immovable Property concerned only about 20% of the total number of immovable properties taken over on the basis of the Decree (verbatim record of the hearing p. 54). This means that the Constitutional Tribunal has considered the said lack in regulation to be subject to its jurisdiction, although the said lack encompasses a vast majority of cases which, in the view of the Tribunal, should be regulated. In order to implement the judgment of the Tribunal, it does not suffice to simply supplement the content of the provision, as this was the case in the context of previous rulings (cf. Ref. No. SK 22/01, SK 9/08), but it is necessary to issue an extensive statute.

1.3. To sum up these considerations, it should be stated that the reasoning which is the basis of adjudication in the case SK 41/09 considerably differs from the one presented in previous rulings, including those where an objective criterion for distinguishing between legislative negligence and legislative omission was adopted. Probably for the first time, on the basis of the fact that the legislator regulated an exceptional situation, the Tribunal has arrived at a thesis about the legislative omission of a number of situations and considered

itself competent to conduct the constitutional review of the said "omission". Since the very distinction between legislative omission and legislative negligence stems from the jurisprudence of the Constitutional Tribunal, the Tribunal undoubtedly has certain freedom as to specifying the meaning of these terms; in particular, it may define omission in a different way than it is colloquially understood. However, the said freedom is not far-reaching enough to allow the Tribunal to include situations which are contrary to omission into the semantic scope of the term. Due to such a solution, the jurisdiction of the Tribunal is extended to include the constitutional review of legislative negligence.

2. Secondly, in the case under examination, issuing a ruling was inadmissible due to the lack of a functional premiss, required – pursuant to Article 79(1) of the Constitution in review proceedings commenced by way of constitutional complaint. As it follows from the established jurisprudence of the Tribunal, the examination of a complaint is admissible only when the resolution of the complaint is of significance for the situation of the complainant, namely in the event of ruling the challenged norm to be unconstitutional, the complainant could gain the required protection of a constitutional right or freedom, which has been refused to him, due to the fact that the challenged norm was in force (cf. the judgment of the Constitutional Tribunal of 22 November 2005, Ref. No. SK 8/05, OTK ZU No. 10/A/2005, item 117; the decision of the Constitution Tribunal of 13 June 2011, Ref. No. SK 26/09, OTK ZU No. 5/A/2011, item 46).

2.1. In the present case, there is no such correlation, as the operative part of the judgment mentions a time-limit: unconstitutionality was declared with regard to the omission of compensation for immovable properties, other than single-family houses and plots of land allocated for the construction of such houses, provided that they became the property of the state after 5 April 1958. Although in respect of the subject, i.e. the type of expropriated immovable property, the complainants fall within the scope of the operative part of the judgment, the timeframe mentioned therein does not comprise them, since their legal predecessors were deprived of their ownership before the date indicated in the operative part of the judgment. Consequently, even if the Sejm enacted a statute that corresponded to the content to the Tribunal's judgment, namely it would introduce provisions granting compensation for immovable properties which became the property of the State Treasury after 5 April 1958, the situation of the complainants would not change, i.e. they would still have no right to compensation.

2.2. This observation should be generalised. There is no doubt that the date of 5 April 1958, included in Article 215(2) of the Act on the Management of Immovable Property has nothing to do with the process of taking over immovable properties in Warsaw by the state. In the light of the provisions of the Warsaw Decree (Article 1) and the implementing provisions thereto (the regulation of the Minister of Reconstruction) – in principle – the loss of ownership took place still in the 1940s. The date marking the entry into force of the Act of 12 March 1958 on Rules and a Procedure for Expropriating Immovable Properties (Journal of Laws - Dz. U. of 1974 No. 10, item 64, as amended; hereinafter: the Act of 1958) was repeated in subsequent legal acts. The point in time marked by the date of 5 April 1958 is therefore thoroughly random from the point of view of the owners of land expropriated on the basis of the Warsaw Decree. By mentioning the date in the judgment, the Constitutional Tribunal provided a new criterion for differentiating among the legal situations of the owners. Indeed, what follows from the operative part of the judgment is that the deprivation of the right to compensation, in the case of the owners of immovable properties expropriated on the basis of the Warsaw Decree, is unconstitutional, provided that the ownership was transferred to the state after 5 April 1958. The following question inevitably comes to mind: what about the owners who lost their property earlier? The group that has been overlooked in the judgment, and which also comprises the complainants, constitutes a majority.

2.3. In this context, one cannot help but think about the effects of the judgment. It is obvious that the rulings of the Tribunal which declare the unconstitutionality of legislative omission do not create norms, but only an obligation on the part of the legislator to enact appropriate provisions. However, what follows from such rulings is usually a clear guideline for the legislator as to the content of provisions. It appears that the judgment which this dissenting opinion refers to does not contain such a guideline.

For these reasons, I submit my dissenting opinion.