

## Decision

dated 8 May 1990 (K. 1/90)

The Constitutional Tribunal sitting with the bench composed of the Chairman, Antoni Filcek and Judges: Tomasz Dybowski, Maria Łabor-Soroka (Reporting Judge), Remigiusz Orzechowski, Janina Zakrzewska.

(...)

held

**that article 12, section 5 of the Act dated 29 April 1985 on Land Management and Expropriation of Realty** (uniform text in Journal of Laws, 1989, Number 14, Item 74) **in that part which lays down the rule that compensation for land severed from realty affected by partition at the owner's petition and taken over by the State for the purpose of the construction of streets is to be diminished by the amount due under the rules governing the exclusion of land from agricultural and forestry production contravenes article 7, article 67, section 2, and article 1 of the Constitution of the Republic of Poland.**

Reasoning

(...)

### II

Having analyzed the texts of relevant legislation and having held a hearing, the Constitutional Tribunal has found as follows.

The Act dated 13 July 1988 amending the Land Management and Expropriation of Realty Act (Journal of Laws, Number 24, Item 170) changed the rules for awarding compensation for land severed from realty affected by partition at the, owner's petition and taken over by the State for the purpose of constructing streets on the day when partition decisions or judgements became final or absolute (article 12, section 5).

According to the pre-amendment wording of article 12, section 5 of the Act dated 29 April 1985 on Land Management and Expropriation of Realty (Journal of Laws, Number 22, Item 99), the land severed from realty affected by partition was taken over by the State for the purpose of constructing streets on the payment of compensation calculated according to the rules applicable in the case of expropriation of realty. After the amendment, however, the compensation thus calculated is to be diminished, under the amended provision, by the amount due under the rules governing the exclusion of land from agricultural and forestry production with the only stipulate contained in the final sentence of the provision that „the reduction of the amount due may not exceed the amount of compensation.”

As the President of the Chief Administrative Court (NSA) has perceptively observed, the final sentence of article 12, section 5 of the Act dated 29 April 1985 on Land Management and Expropriation of Realty contains an obvious clerical error. The preceding sentence unambiguously speaks of compensation to the owner „diminished by the amount due under the rules governing the exclusion of land from agricultural and forestry production”, whereas the final sentence of article 12, section 5 of the said Act speaks of „diminishing the amount due,” which suggests that the amount due under the rules governing the exclusion of land from agricultural and forestry production is meant. With this interpretation, however, it is not known what the reason for such a „diminishing of amount due” is and, moreover, a logical connection with the latter part of the same sentence is broken („may not exceed the amount of compensation”). Thus, the second sentence of the provision should be taken to mean that the

amount by which compensation to the owner is diminished should not exceed the amount of compensation.

Therefore, a new rule of law has been laid down under which the calculated compensation for the land severed from realty affected by partition at the owner's petition and taken over by the State for the purpose of constructing streets may be diminished by the amount due to the State Treasury on account of excluding the said land from agricultural production.

Article 12 section 5 of the said Act dated 29 April 1985 (uniform text Journal of Laws, 1989, Number 14, Item 74) placed in the chapter entitled „General Provisions” introduced a third manner of obtaining land by the State Treasury, namely – by the operation of law – as a consequence of an administrative decision concerning the partition of realty issued in proceedings which are not expropriation proceedings.

This manner of obtaining land for the purposes of urbanization or for public use has not been provided for in article 13, section 2 of the said Act, which provides for the possibility of creating land pools for the above mentioned purposes only by purchasing under contract or expropriating for the benefit of the State.

Taking into consideration, however, that the said manner of obtaining land by the State by the operation of law, enacted in article 12, section 5 of the said Act on Land Management and Expropriation of Realty, is, as to the legal consequences, similar to expropriation, and because the same provision provides for the calculation of compensation according to the rules applicable to the expropriation of realty, it should be understood as a form of expropriation not preceded by expropriation proceedings.

Due to the adopted principle and manner of calculating it, the awarded compensation for the land severed for the purpose of constructing streets should take into account the manner of its calculation provided for in article 59 and the following ones of the Land Management and Expropriation of Realty Act. These provisions do not provide, as a rule, for encumbering compensation with pecuniary obligations. With respect to calculating compensation or expropriated realty, the said Act does in fact provide in article 67 for the possibility of setting off amounts due to the State and banks with which the realty is encumbered against its calculated value, but these amounts are not due because the land at issue has been excluded from production. This is so because charges „encumbering” realty are encumbrances that accrue before the decision of expropriation and compensation is issued. It should also be stressed that the very fact of expropriation does not entail exclusion of land from agricultural or forestry production. The fact of expropriation is not coincident each time with the fact of excluding the land in question from the said production. Hence, article 67 of the said Act, providing for the possibility of setting off the amount payable due to the exclusion of land, does not apply to possible later encumbrances.

The basis for calculating the amounts due to the State Treasury on account of the exclusion of lands, pursuant to article 13, sections 1 and 2 of the Act dated 26 March 1982 on the Protection of Agricultural and Forest Lands (Journal of Laws, Number 11, Item 79), is a decision excluding land for non-agricultural purposes and giving conditions of such an exclusion with the duty of paying the amounts due to the State Treasury on account of the exclusion falling to the person executing the exclusion.

Pursuant to article 4, sub-section 8 of the Act on the Protection of Agricultural and Forest Lands, the exclusion of land from agricultural or forestry production takes place when the land actually ceases to be used for agricultural or forestry purposes by the hitherto existing owner or by the buyer of the land for non-agricultural or non-forestry purposes. In the former

case, the amount due (i.e. a single fee) is paid by the hitherto existing owner, while in the latter case it is remitted by the buyer. The duties, as far as the actual amount due is concerned, are the same whereas the difference lies in the fact, pursuant to article 18, section 1 of the said Act, that the amount due from the person who bought the land is diminished by the amount equivalent to the compensation paid to the hitherto owner for the purchased lands calculated in accordance with the provisions concerning the expropriation of realty.

If, therefore, the land severed for the purpose of constructing streets is taken over by the State pursuant to article 13, section 2 of the Act on the Protection of Agricultural and Forest Lands, it would be then the duty of the competent state organizational unit, as the buyer, to effect the payment of the amount due on account of the exclusion of the land from agricultural and forestry production subtracting from that payment the amount paid out to the hitherto existing owner in compensation for expropriation. The transfer of this obligation by article 12, section 5 of the Act on Land Management and Expropriation of Realty onto the hitherto existing owner who does not exclude any land from agricultural production for the purpose of constructing streets, is incongruous with the cited provisions of the Act dated 26 March 1987 on the Protection of Agricultural and Forest Lands.

### III

(...) The Constitutional Tribunal, while examining the conformity of article 12, section 5 of the Act dated 29 April 1985 with the Constitution, considered in the first place the meaning of article 7 of the Constitution of the Republic of Poland which directly relates to the matter regulated by the provision questioned in the petition. The provision, important for the case at hand, establishes constitutional, i.e. increased; protection of ownership, allowing expropriation only for public purposes and for just compensation. Expropriation, as defined in article 7 of the Constitution, means, in the opinion of the Constitutional Tribunal, any deprivation of ownership for public purposes regardless of its form (not only by administrative decision) and just compensation is equitable compensation. Equitable compensation is at the same time an equivalent one because only equivalent compensation does not adversely affect the very nature of compensation for the property taken over. Any restriction of the right to equivalent compensation by introducing setoffs on account of other charges than those already encumbering the realty is an infringement of the constitutional principle of just, i.e. equitable, compensation and, therefore, is an infringement of the ownership itself.

The Constitutional Tribunal did not share the view of the Sejm's representative who claimed that the grounds for setting off the amount due on account of the exclusion of land from agricultural or forestry production against the awarded compensation for expropriation was the fact that it was the petition of the hitherto existing owner that initiated the proceedings and that, consequently, the partition of the realty was solely in his/her interest. The petition regards the partition of realty into parcels and the question of laying out streets. The severing of a part of realty to lay out a street may not lie at all in the interest of the hitherto owner (e.g. when parcels that have been partitioned already have access to a road). Moreover, upon laying them out, such roads, pursuant to article 1 and article 4, section 1, subsection 2 of the Act dated 21 March 1985 on Public Roads (Journal of Laws, Number 14, Item 60), become generally accessible and may be counted among public roads.

In the view of the Constitutional Tribunal, one may not identify the exclusion of land from agricultural or forestry production, at least in its temporal aspect, with the situation provided for in § 1, section 2, cited by the Sejm's representative of the Regulation of the Council of Ministers dated 28 November 1964 on the Transfer of Ownership of Realty and the Succession of Farms. The reason lies in the fact that the cited Regulation was issued for

specific civil-law purposes, namely the transfer of ownership of realty and the succession of farms. The said Regulation may not contravene the provisions of the Act on the Protection of Agricultural and Forest Lands, from whose provisions it does not follow that the actual change of land use in terms of time, is coincident. On the contrary, article 9, section 1 of the said Act suggests that the actual change of land use may be postponed and the land may still be used for agricultural purposes.

Furthermore, the argument of the Sedum's representative that the construction of a road is carried out at the expense of the State and the benefit is gained by the hitherto owner is wrong inasmuch as owners of land adjacent to the road share in the costs of constructing it pursuant to article 48 of the Act on Land Management and Expropriation of Realty:

When comparing the contents of article 12, section 5 of the cited Act on Land Management and Expropriation of Realty with forms of compensation adopted in the expropriation law, the Constitutional Tribunal held that the possibility of setting off the amount due on account of the exclusion of land from agricultural production, introduced by this provision, against the awarded sum of compensation for expropriation, for the sole reason that the exclusion is effected together with the partition of the realty at its owner's petition, meant isolating a certain category of owners and placing them in an unequal position in respect to other groups of owners being expropriated from their realty for urbanization purposes or for public use (including streets). With respect to the latter groups of owners no such possibility is allowed. As a consequence of the rule of law contained in article 12, section 5 of the said Act, a specific group of persons as owners of realty was deprived of the right to just compensation in contravention of the constitutional provisions included in article 67, section 2, and article 1.

Article 1 of the Constitution says that „the Republic of Poland is a democratic state under the rule of law which realizes the principles of social justice.” It is, therefore, the duty of the lawmaker to enact laws in such a manner so that they do not violate justice nor equality as fundamental constitutional civil rights. As far as the regulation contained in the questioned provision is concerned, one cannot assume based on the fact that land was excluded from agricultural production and set aside by the State for the construction of a street that the former owner will realize material gains compensating him/her for the reduction in the compensation for expropriation. Thus invoking the rule of law and justice – while evaluating the questioned provision of article 12, section 5 of the Act on Land Management – one has to keep in mind the restrictions following from articles 1 and 7 of the Constitution.

With respect to article 67, section 2, the Constitutional Tribunal has analyzed it on many occasions and has made its opinion known that citizens belonging to the same category are equal before the law and, have the same duties.

On this question, the Constitutional Tribunal wishes to add that article 67, section 2 of the Constitution in combination with the initial part of article 1 of the Constitution justifies the opinion that in a State ruled by law the equality guaranteed by article 67, section 2 of the Constitution is a right that should be enforced not only because of the characteristics of its carrier, cited in the said provision, but also for reasons not related to the person so endowed. Article 12, section 5 of the Act on Land Management and Expropriation of Realty contravened equality by placing one category of owners defined in the provision in an unequal position with respect to other owners of expropriated lands for the purpose of construction streets specifically by allowing for the possibility of reducing the compensation awarded to them by as much as the amount of the compensation.