

DECISION
of 28 November 2001
Ref. No. SK 5/01

The Constitutional Tribunal in a bench composed of:

Marek Safjan – Presiding Judge
Jerzy Ciemniowski – Judge Rapporteur
Zdzisław Czeszejko-Sochacki
Teresa Dębowska-Romanowska
Lech Garlicki
Stefan J. Jaworski
Wiesław Johann
Krzysztof Kolasiński
Biruta Lewaszkiewicz-Petrykowska
Andrzej Mączyński
Janusz Niemcewicz
Jadwiga Skórzewska-Łosiak
Jerzy Stępień
Janusz Trzeciński
Marian Zdyb,

having considered at the hearing in camera on 28 November 2001, a constitutional complaint lodged by Helena O. to determine non-conformity of: Article 2 paragraph 1 subparagraph e) of the Decree of the Polish Committee of National Liberation of 6 September 1944 on the implementation of rural land reform (consolidated text Journal of Laws – Dz.U. of 1945, No 3, item 13 with amendments) to Article 2, Article 21, Article 64, and Article 32 of the Constitution of the Republic of Poland,

d e c i d e s a s f o l l o w s :

pursuant to Article 39 paragraph 1 subparagraph 3 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz.U. No 102, item 643; as amended: 2000 No 48, item 552, No 53, item 638; 2001 No 98, item 1070), to discontinue the proceedings owing to the cessation of binding force by the challenged provision.

Statement of Reasons:

I

1. In the constitutional complaint of 18 November 2000, appended by the procedural writ of 14 December 2000, Helena O., represented by her legal counsel, applied for the establishment of non-conformity of Article 2 item 1 subparagraph e) (the correct designation of the respective provision should be formulated as: Article 2 paragraph 1 subparagraph e) of the Decree of the Polish Committee of National Liberation of 6 September 1944 on the implementation of rural land reform (consolidated text of 1945, Journal of Laws – Dz.U. No 3, item 13 with amendments) with Article 2, Article 21, Article 64 and Article 32 of the Constitution of the

Republic of Poland.

The constitutional complaint was lodged in the context of the following facts of the case.

On the basis of the Decree of the Polish Committee of National Liberation on the implementation of rural land reform, the Pomeranian Voivodeship Administration Office [*Wojewódzki Urząd Ziemiański – Pomorski*], on 13 September 1946, issued a certificate on the take-over into possession of the State Treasury, pursuant to the same Decree, of the estate of the sister and brother Helena O. and Jan T., with an area of 186.5445 hectares, situated in Kielbasin. On 3 January 1990, legal proceedings were instituted seeking to obtain the recognition of the take-over of the respective real estate as invalid. The plaintiff pledged that the certificate of the Voivodeship Administration Office was not an administrative decision, and could not constitute the basis of expropriation, and moreover, that the real property taken over, after its physical division, which had been carried out but not disclosed in the land and mortgage register owing to the outbreak of the war, already did not fulfil the acreage standards specified in Article 2 paragraph 1 subparagraph e) of the Decree.

The Voivodeship Administration Office in Toruń, by the decision of 26 November 1996 (*Ref. No. GP.II.6011/28/96*) ruled that the respective agricultural real estate with an area of 186.5445 hectares, inscribed in the land and mortgage register Kielbasin Volume I k.3, constituted on the day of entry into force of the Decree on the implementation of the rural land reform, i.e. on 13 September 1944, a legally indivisible joint property in co-ownership. As that real estate's overall area exceeded 100 hectares, it passed by virtue of the law alone into the ownership of the State Treasury on the basis of Article 2 paragraph 1 subparagraph e) of the Decree. The respective entry of the State Treasury as the owner of the taken over real property was inscribed in the land and mortgage register on the basis of the certificate from the Pomeranian Voivodeship Administration Office dated 13 September 1946.

Having considered the appeal by Helena O., the Minister of Agriculture and Food Economy upheld the challenged decision in force (*Decision dated 17 February 1998, Ref. No. GZ.rm.051/625-15/97*). He pointed out that the basis for the examination of the case consisted of the provisions of Article 2 paragraph 1 subparagraph e) of the Decree of the Polish Committee of National Liberation, which ruled that all landed estates being in the ownership or co-ownership of physical or legal persons with an overall area of more than 100 hectares, located on the territory of the Pomeranian Voivodeship, were transferred by virtue of the law alone, upon the date of entry into force of the Decree, in their entirety and without compensation, into the ownership of the State Treasury for the purposes of the rural land reform. The provisions of the Decree did not thereby introduce any requirement of issuing any declaratory decisions. As it is beyond dispute, as the Minister of Agriculture and Food Economy stated, that prior to 1 September 1939, no legal division of the respective real estate between the co-owners was carried out, it was subject to the take-over by virtue of the law pursuant to the Decree, owing to its overall area. No actual divisions could lead to the abrogation of co-ownership, if at the same time the respective legal actions and the appropriate changes of the entries in the land and mortgage register were not carried out.

In the complaint against the decision of the Minister of Agriculture and Food Economy, the legal representative of the plaintiff petitioned for the establishment of its invalidity, raising the plea of flagrant infringement of the law, i.e. of Article 1 paragraph 2 and Article 2 paragraph 1 subparagraph e) of the Decree of 6 September 1944 on the implementation of the rural land reform. He argued that according to teleological interpretation, it was allowable to take over the excess over the 100

hectares. Moreover, he stated that the Decree of the Polish Committee of National Liberation of 1944 was in contradiction with the „constitution of that time, the principle of respect for property and equality before the law”.

The Chief Administrative Court, by its judgement of 21 July 2000 (*Ref. No. IV SA 685/98*), dismissed the complaint. It stressed that the legal appraisal carried out by the organs of both instances was correct. The Chief Administrative Court, when reviewing the challenged decision, did not find it to infringe the provisions of the Decree on Rural Land reform. Furthermore, as an organ competent to review the Decree in terms of its conformity to the constitution, the Chief Administrative Court pointed at the Constitutional Tribunal.

The legal representative of the plaintiff lodged the constitutional complaint within the time limit set by the law. He pointed out in its statement of reasons that the forced take-over from the owners not only of the land, but also of their entire real property, was not contained in the purposes of the rural land reform. The actions of the communist authorities also had a political background and served the purpose of elimination of the ideologically inimical class of „large landowners”. The challenged provision of the Decree violated thereby Article 95, Article 96, Article 99 and Article 121 of the then binding March Constitution from the year 1921.

Analysing Article 2 paragraph 1 subparagraph e) of the Decree in terms of its conformity to the Constitution of the Republic of Poland of 2 April 1997, the representative of the plaintiff pointed out that the challenged provision violated Article 21 paragraph 1 of the Constitution, which guarantees the protection of private property. It is also in non-conformity to Article 21 paragraph 2 of the Constitution; firstly: by the fact that it does not award to the expropriated persons any fair compensation; secondly: because the take-over of their entire estates was not contained in the purposes of the rural land reform, and thereby in the notion of a „public purpose”, which is applied by the Constitution.

The provision of Article 2 paragraph 1 subparagraph e) of the Decree, according to the opinion of the plaintiff, is also in contradiction with Article 64 of the Constitution, which guarantees protection to all property. The principle of equal legal protection for everyone is derived from the principle of equality before the law. The challenged provision of the Decree breaks that principle in an obvious manner, by putting a certain category of people (owners of real estate properties exceeding the determined acreage standards) in a position of being excluded from legal protection.

The legal representative of the plaintiff indicated also the non-conformity of Article 2 paragraph 1 subparagraph e) of the Decree on the implementation of the rural land reform to Article 32 of the Constitution, expressing the principle of equality before the law. According to the opinion of the plaintiff, the actions of the authorities undertaken on the basis of the challenged provision had every feature of discrimination in social and economic life. The indicated provision of the Decree, according to the plaintiff, violates also Article 2 of the Constitution, which states that the Republic of Poland is a democratic state ruled by law, implementing the principles of social justice.

2. The Public Prosecutor-General, in his written statement of 25 April 2001, expressed the view that the provision of Article 2 paragraph 1 subparagraph e) of the Decree of the Polish Committee of National Liberation of 6 September 1944 on the implementation of the rural land reform (consolidated text of 1945 Journal of Laws – Dz.U. No 3, item 13 with amendments) conforms to Article 21 paragraph 2 and Article 2 of the Constitution of the Republic of Poland and is not in non-conformity to Article 32 and Article 64 paragraph 2 of the Constitution of the Republic of Poland.

The Decree on the implementation of the rural land reform – as stated by the Public Prosecutor-General – was a legal act featuring the political system in the years 1944-1989, which is clearly indicated both by the title of the Decree, as well as by the purports of Article 1 paragraph 1 section 2, which provides that the rural land holdings system in Poland shall be based on farms that are viable, healthy and capable of substantial production, and which are the private property of their owners.

The term used by the norm-maker pointing at the „take-over” into the possession of the State Treasury of the real estates specified in Article 2 paragraph 1 subparagraph e), and moreover „without delay”, indicates unequivocally that his will was for the effect of the transfer of ownership to be effected by the very virtue of the law at the time of entry of the Decree into force. The legal effect in terms of the rights in property – consisting in the transfer of ownership of the real estate property specified in the Decree to the State Treasury – was therefore „consumed” by a single act upon the day of its entry into force, i.e. on 13 September 1944 – Article 21 of the Decree (Journal of Laws – Dz.U. No 4, item 17), and on the Regained Western Territories [taken from Germany] upon the day of 27 November 1945 (Article 4 of the Decree dated 13 November 1945 on the administration of the Regained Western Territories; Journal of Laws – Dz.U. No 51, item 295). The Public Prosecutor-General underlined that the above ascertainment is of essential significance. Notwithstanding, it implies that if the challenged provision were found in non-conformity to the Constitution, the practical consequences of such a judgement would result in the possibility of the reversal of the effects caused by that provision over fifty years ago in terms of legal rights in property.

Referring to the judicial decisions of the Constitutional Tribunal, the Public Prosecutor-General found that there can be no doubt that the „transfer” into possession of the State Treasury of the real estate property mentioned in Article 2 paragraph 1 subparagraph e) of the Decree was an act of expropriation as conceived by Article 21 paragraph 2 of the Constitution. The more so, as the norm-maker – in Article 17 paragraph 1 of the Decree – clearly uses that term both with respect to the subjects holding the property being the object of the take-over for the purposes of the rural land reform, as well as to the taken over real estate.

Considering, whether the constitutional premises for the admissibility of expropriation were fulfilled, that is those of a public purpose and fair compensation, the Public Prosecutor-General ascertained, that the analysis of the text of the Decree indicates, that the public purpose of the expropriation of the landed real estates, which is mentioned in the challenged provision, cannot give rise to any doubts. Evidence of this is given both by the enumeratively listed purposes of the rural land reform specified in the Decree, as well as by the mechanisms serving the purposes of their implementation specified in that legal act. One cannot share the objection of the plaintiff, concerning the disproportion between the goals of the rural land reform and the means of their implementation, manifested by the take-over for these purposes of entire estates, which is to provide the evidence of the failure to fulfil the constitutional premise of a „public purpose”.

The Public Prosecutor-General pointed out that the definition of the term „landed real estate”, which was not defined in the Decree, is of essential relevance for the appraisal of that objection. The Public Prosecutor-General recalled that the Constitutional Tribunal, when establishing the generally binding interpretation of Article 2 paragraph 1 subparagraph e) of the Decree, in dealing with the case Ref. No. W. 3/89 (Constitutional Tribunal’s Decisions – OTK of 1990, p.173-179), has ascertained that when describing the real estate properties by the adjective „landed”, the norm-maker had in mind those objects of immovable property, which have

agricultural character, that is such real estates or parts thereof, which are or can be utilised for the production activities in agriculture covering the scope of plant production, animal livestock breeding or the cultivation of orchards (including the buildings or parts thereof).

The exclusions from being subject to the operation of Article 2 paragraph 1 subparagraph e) are contained in the provisions of the Ordinance of the Minister of Agriculture and Rural Land Reforms of 1 March 1945, concerning the implementation of the Decree of the Polish Committee of National Liberation of 6 September 1944 on the implementation of the rural land reform (Journal of Laws – Dz.U. No 10, item 51). These exclusions concern the land specified in § 7 and also the personal belongings of the owner of the taken over estate, as well as of the members of his family, which are not connected with the running of an agricultural farm, and also other things that are mentioned in § 11 subparagraph 1 of the same Ordinance. Considering the contents of the above indicated legal regulations, the Public Prosecutor-General stated, that it cannot be ascertained that the objective scope specified in the challenged provision „invalidates” the premise of a „public purpose”.

Doubts arise indeed, however – according to the Public Prosecutor-General – with respect to fulfilment of the premise of a „just compensation”, which – according to the contents of Article 21 paragraph 2 of the Constitution – determines the admissibility of expropriation. The possible failure to fulfil the requirement of just compensation should be regarded as a violation of Article 21 paragraph 2 of the Constitution.

The Decree on the implementation of the rural land reform provides in Article 2 paragraph 1 passage 3 that all of the landed real estate properties specified under the subparagraphs b, c, d and e of that provision are transferred into the ownership of the State Treasury in their entirety without any compensation. Nevertheless, in Article 17 of the Decree, addressing the expropriated owners and co-owners of the landed real estate properties specified in Article 2 paragraph 1 subparagraph e), these subjects were granted the entitlement – under the Decree – to obtain an independent agricultural farm outside of the territory of the *powiat* [district], in which the expropriated estate was situated, or if they would not take advantage of that right, to receive monthly allowance in the amount equivalent to the salary of a category VI civil servant. According to the opinion of the Public Prosecutor-General one can conclude from this that it was a form of compensation for the expropriated real estate properties.

The entitlement to receive agricultural farms, in accordance with Article 17 of the Decree, became extinct from the day of 5 April 1958, on the grounds of Article 12 paragraph 1 of the Act of 12 March 1958 on Selling of State-Owned Rural Real Estate Properties and Putting into Order of Certain Issues Connected with Implementation of Rural Land Reform and Settling of Territory with Farmers (Journal of Laws – Dz.U. No 17, item 71). Article 17 of the Decree, in turn, was derogated by Article 127 paragraph 4 subparagraph 1 of the Act of 23 January 1968 on Universal Provision of Pension Benefits for Employees and Their Families (Journal of Laws – Dz.U. No 3, item 6) from the day of 1 January 1968. On the basis of Article 99 paragraph 2 subparagraph 1 of the above mentioned Act, pensions and annuity benefits were granted *ex officio* in place of the annuities granted on the grounds of the provisions of the Decree on the implementation of the rural land reform.

According to the opinion of the Public Prosecutor-General, regardless of how in practice the provision of Article 17 of the Decree was applied, it follows from its purport that one can surely not regard the rights specified in its text as meeting the

condition of equivalence of the respective compensation. The expropriated owners or co-owners could receive independent agricultural farms. According to the contents of Article 12 paragraph 2 of the Decree, their area could not amount to more than 5 hectares of average quality land, and for horticultural farms it could not exceed 2 hectares. The acreage of these „independent farms” was therefore many times smaller than the area of the landed real estate properties taken over for the purposes of the rural land reform. Also the „monthly allowance” should be seen rather in terms of the categories of providing the means of existence for the expropriated owners and co-owners, rather than compensation, not to speak of „just compensation”.

The Public Prosecutor-General pointed out that significant objections might also be raised with respect to the very procedure for claiming the rights, which are mentioned in Article 17 paragraph 1 of the Decree. Even if it is possible to stipulate from the contents of that provision that the granting of an independent farm was to take place „under the Decree”, the situation still remains unclear, e.g. as to the conditions of payment, specified in Article 14 of the Decree, as it is not certain, whether they concerned also the expropriated landowners. As far as the „monthly allowance” is concerned, in turn, neither the Decree, nor the Ordinance of the Minister of Agriculture and Rural Land Reforms, of 1 March 1945, concerning the implementation of the Decree of the Polish Committee of National Liberation of 6 September 1944 on the implementation of the rural land reform (Journal of Laws – Dz.U. No 10, item 51 with amendments), do not foresee any procedure for the claiming of that entitlement. So, although in the deliberations on the fulfilment of the premise of „just compensation” one cannot disregard Article 17 of the Decree, its purport still does not allow to ascertain that that premise was fulfilled. Therewith, it has to be assumed that the decisive significance in this regard is attached to the contents of the passage 3 paragraph 1 Article 2 of the Decree, concerning the take-over of the landed real estate properties „without any compensation”; that expression articulates the intention of the norm-maker to expropriate the subjects that are mentioned in Article 2 paragraph 1 subparagraph e), without any compensation.

Summarising that part of the deliberations, the Public Prosecutor-General found that the challenged provision of Article 2 paragraph 1 subparagraph e) of the Decree did not fulfil the premise of just compensation, required by Article 21 paragraph 2 of the Constitution of the Republic of Poland, whereby he adopted the view that the above statement is not equivalent to establishing the unconstitutional nature of the challenged provision. Because reviewing the conformity of the challenged provision to the Constitution one should take into account both the period of time, when such a provision was in force, as well as the fact that the rural land reform is an accomplished fact, and the effects in terms of legal property rights caused by the Decree took place over fifty years ago.

The Public Prosecutor-General stressed that the Decree on the implementation of the agricultural land reform was adopted and realised before the entry into force of the Constitution of the Republic of Poland of 2 April 1997, and – which is even more significant – before the entry into force of the Act of 29 December 1989 on Amendment of the Constitution of the Polish People’s Republic (Journal of Laws – Dz.U. No 75, item 444), which has defined Poland as a democratic legal state implementing the principle of social justice. The Decree on the implementation of the rural land reform realised completely different principles of agricultural ownership system than those prevailing [formerly], as the result of which radical changes in the sphere of [land] ownership relations took place in the country. The expropriated landed real estate properties concerned were transferred to become the property of other subjects, whose ownership rights acquired in this way are also under the

constitutional protection granted both by the provisions concerning ownership and other property rights, as well as those concerning the principle of protection of legal safety and confidence in law, derived from the principle of the state ruled by law.

The Public Prosecutor-General pointed out that the establishment of the unconstitutional nature of the challenged provision would imply the possibility to reverse the effects caused by the Decree in terms of legal rights in property, and therefore the retroaction of the law. In the case under the examination, therefore, there is a collision between the constitutional principle of the protection of property with the principle of legal security and confidence in law. Under the circumstances of this collision, according to the Public Prosecutor-General, one should grant priority of constitutional protection to legal security and confidence in law. The practical consequence of a judgement of the Constitutional Tribunal determining the unconstitutional nature of the challenged regulation could consist in the possibility to change the relations that have been shaped since many years, which would clearly mean retroactive impact of the law. One should bear in mind, as the Public Prosecutor-General claims, that the elimination from legal relations of the challenged provision would imply the incapacity to apply that provision in the future, which is impossible anyway, owing to the fact that this provision was „consumed” by a single operation in the distant past, as has been already described above. In essence, the point is only to derogate the legal effects caused by it, and that would be in contradiction with the constitutional principles of legal security and confidence in law. For such reasons, the provision of Article 2 paragraph 1 subparagraph e) of the Decree – according to the opinion of the Public Prosecutor-General – conforms to Article 21 paragraph 2 and Article 2 of the Constitution of the Republic of Poland.

Considering the objection concerning the violation of the constitutional principle of equal legal protection of ownership rights for everyone, the Public Prosecutor-General pointed out that the principle of equal protection of ownership rights, expressed in Article 64 paragraph 2 of the Constitution, is a particular form of the general equality principle expressed in Article 32 of the Constitution. The basic premise of the equality principle stemming from Article 64 paragraph 2 of the Constitution consists in the comparability of the situation of a given category of subjects, in terms of legally distinguished relevant features. The Public Prosecutor-General notes that the plaintiff seems to perceive the violation of that principle in the very fact of expropriation. According to her opinion, that implies the discriminatory deprivation of the expropriated owners of the legal protection of their property rights. When such grounds are given in reasoning, the indicated standard of constitutional review of the challenged provision should be regarded as inadequate, according to the opinion of the Public Prosecutor-General. Ownership rights are not an absolute right and may be subject to limitations (Article 64 paragraph 3 of the Constitution), and may also be subject to expropriation, under the conditions specified in Article 21 paragraph 2 of the Constitution.

The violation of the constitutional principle of equality with respect to the subjects, whose ownership rights were limited, or who were expropriated, could be stipulated only in the situation, if the norm-maker would apply to them in an unjustified manner different criteria of the limitations of their ownership rights or of their expropriation. According to the Public Prosecutor-General, the plaintiff does not raise such a claim, whereas the contents of the challenged provision clearly indicates that the legal criterion of the expropriation, referring equally to all the owners and co-owners of landed real estate properties subject to expropriation for the purposes of the rural land reform, consisted in the criterion of the size of such estates as specified in Article 2 paragraph 1 subparagraph e) of the Decree. Expropriation as such, however,

cannot be regarded as the constitutive factor of the violation of the constitutional principle of equality.

The above presented arguments, according to the opinion of the Public Prosecutor-General, provide the evidence that Article 2 paragraph 1 subparagraph e) of the Decree is not in non-conformity to Article 32 and Article 64 paragraph 2 of the Constitution.

3. In the procedural writ of 26 July 2001, the legal representative of the plaintiff responded to the position of the Public Prosecutor-General and expanded the objective scope of the complaint by pledging the establishment of the non-conformity of Article 2 paragraph 1 subparagraph e) of the Decree of the Polish Committee of National Liberation to Article 1 of Protocol One to the Convention of Protection of Human Rights and Fundamental Freedoms, as well as to examine the conformity of Article 216 of the Act of 21 August 1997 on Real Estate Management (Journal of Laws – Dz.U. 2000 No 46, item 543) to Article 2, Article 21 paragraphs 1 and 2, Article 31 paragraph 3, Article 32 paragraph 1, Article 64 paragraphs 1, 2 and 3 of the Constitution of the Republic of Poland and to Article 1 of Protocol One to the Convention of Protection of Human Rights and Fundamental Freedoms; and moreover to ascertain that the Decree of the Polish Committee of National Liberation of 6 September 1944 is in contradiction with the norm contained in Article 87 paragraph 1 of the Constitution. According to the opinion of the legal representative of the plaintiff, the Decree of the Polish Committee of National Liberation was not issued by any constitutional organ of state possessing any lawmaking competencies, „was consumed *ex lege* at a single operation on the day of 13 September 1944”, and in connection with that it never had the capacity of an act of law as in the understanding of Article 87 paragraph 1 of the Constitution, „and since the date of its entry into force [of the Constitution] it could not cause any legal effects”.

II

The Constitutional Tribunal considered what follows:

1. Before the examination of the constitutional complaint is undertaken in terms of its substance, it is appropriate to respond to the procedural writ of the legal representative of the plaintiff, in which, apart from disputing the position put forward by the Public Prosecutor-General, the limits of the objective scope of the complaint were expanded on the grounds of a reference to Article 66 of the Constitutional Tribunal Act of 1 August 1997. At this point it should be stressed that the contents of Article 66 of the Constitutional Tribunal Act gives the evidence that the legislator has treated the limits of cognition of the Tribunal as a correlate of the limits of the scope of the petition. In consequence, the Constitutional Tribunal, when examining the conformity to the Constitution of the respective provisions, is bound by the limits of the scope of the application, legal question or complaint, in the sense that it cannot independently determine the objective scope of the complaint. At the same time, also other circumstances should be taken into account, namely those which condition the examination of the provisions challenged in the constitutional complaint.

According to Article 79 of the Constitution, a constitutional complaint may only concern a normative act, on the grounds of which a court or an organ of public administration has delivered a final decision on the freedoms, rights or obligations of the plaintiff that are specified in the Constitution. The premises for a constitutional complaint indicated in the constitutional act have been developed and defined more

precisely in the Constitutional Tribunal Act of 1 August 1997. According to Article 46 paragraph 1 of that Act, a constitutional complaint may be submitted within a specified time limit following the delivery to the plaintiff of a legally valid judicial decision, a final decision, or some other final judgement. When examining a submitted constitutional complaint, the first thing to do is to answer the question of whether on the grounds of the challenged provisions a court or an organ of public administration did indeed adjudicate on the constitutional freedoms, rights or obligations of the plaintiffs. Among the provisions challenged by the legal representative of the plaintiff in the constitutional complaint and in the procedural writ of 26 July 2001, only Article 2 paragraph 1 subparagraph e) of the Decree on the implementation of rural land reform was taken into account in the judgement concerning the rights of the plaintiff (see: *Judgement of the Chief Administrative Court of 21 July 2000*). Therefore, there are no grounds for conducting the examination of the entire Decree of the Polish Committee of National Liberation of 6 September 1944 on Implementation of Rural Land Reform (consolidated text of 1945, Journal of Laws – Dz.U. No 3, item 13 with amendments) and of Article 216 of the Act of 21 August 1997 on Real Estate Management (consolidated text of 2000, Journal of Laws – Dz.U. No 46, item 543) in relation to Article 2, Article 21 paragraphs 1 and 2, Article 31 paragraph 3, Article 32 paragraph 1, Article 64 paragraphs 1, 2 and 3 of the Constitution of the Republic of Poland and to Article 1 of Protocol One to the Convention for Protection of Human Rights and Fundamental Freedoms. It should be explained here that the statutory term for the lodging of a constitutional complaint specified in Article 46 paragraph 1 of the Constitutional Tribunal Act is 3 months from the date of delivery of the respective decision. After the lapse of that time limit it is not possible to expand (change) the scope of the petition. In the case of the plaintiff, the time limit for the submission of the complaint lapsed on 18 December 2000.

2. Acknowledging that the constitutional complaint concerning the case in question cannot cover the entire Decree on rural land reform, the Constitutional Tribunal – concerning the objection of the lack of constitutional legitimacy of the Polish Committee of National Liberation for issuing any decrees with legal force equivalent to acts of parliament, which applies also to the respective Article 2 paragraph 1 subparagraph e) – maintains the position that the issue of the legality of the operation of the state authorities enforced upon Poland in 1944 belongs today to the sphere of historical and political judgements. Such judgements cannot be directly transferred to the sphere of the legal relations established in those times.

The lack of constitutional legitimacy of such organs as the Polish Committee of National Liberation [PKWN], the National People's Council [KRN], the Provisional Government, and also the questionable legitimacy of the organs existing in later times, cannot have the consequence in the form of ignoring the fact, that they effectively exercised state authority. The normative acts of these organs were the basis for individual decisions, which, i.a. have shaped the structure of ownership in the domain of agricultural property, and also the legal relations in other spheres of social life. The lapse of time, which from the point of view of the law is not a neutral phenomenon, granted those relations permanence, and today they provide the basis for the economic and social existence of a large part of Polish society.

3. It should be recalled that the Constitutional Tribunal has dealt twice with the interpretation of Article 2 paragraph 1 subparagraph e) of the Decree on the implementation of rural land reform (*Resolutions of: 19 September 1990, Ref. No. W.*

3/89, Constitutional Tribunal's Decisions – OTK 1990, item 26; 16 April 1996, Ref. No. W. 15/95, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No 3/1996, item 13). In both cases the Constitutional Tribunal has acknowledged its own competence to determine the generally binding interpretation of the Decree with binding force equivalent to an act of parliament, although the then binding Constitution from the year 1952 (Article 33a paragraph 1) and Article 13 of the Act of 29 April 1985 on the Constitutional Tribunal (Journal of Laws – Dz.U. 1991 No 109, item 470 with amendments) made the Constitutional Tribunal competent to determine the generally binding interpretation of the acts of parliament. In the Resolution of 19 September 1990 the Constitutional Tribunal ascertained that „with respect to the binding force of the Decrees enacted earlier by the competent organs, which by virtue of the then binding law were described as Decrees with binding force equivalent to an act of parliament (...) all of these Decrees are subject to interpretation by the Constitutional Tribunal pursuant to Article 33a paragraph 1 of the Constitution and Article 1 subparagraph 1 of the Constitutional Tribunal Act”. The Constitutional Tribunal justified the above view by the fact that the respective binding Decrees did not differ from acts of parliament in terms of their legal force.

The Constitutional Tribunal confirmed its view concerning its own competence to determine the generally binding interpretation of legal acts with the force equivalent to acts of parliament in its Resolution of 7 March 1995, Ref. No. W. 9/94 (Constitutional Tribunal's Decisions – OTK 1995, part I, item 20), in which it established that: „the notion of the *act of parliament* used in Article 13 of the Constitutional Tribunal Act” denotes also the „lawmaking acts introducing into the legal system such norms ranked in the same way as ordinary acts of parliament, granted equal status in the hierarchy of the sources of the law with the acts of parliament”; an example of such an act being indicated the Decree on rural land reform.

Taking into account the fact that the Constitutional Tribunal has interpreted Article 2 paragraph 1 subparagraph e) of the Decree in the past, it needs to be pointed out that the purport of the Resolution of 16 April 1996 indicates that the Constitutional Tribunal has ascertained that the respective provision has exhausted its legal force upon the take-over of the landed real estate properties specified in it by the State Treasury and could not be applied subsequently.

It should be noted that the presented views of the Constitutional Tribunal were formulated with respect to cases initiated on the basis of applications by competent organs for the determination of generally binding interpretation of acts of parliament and, what is significant, in the context of the legal status in force at that time. When making reference to the facts that the Constitutional Tribunal had already interpreted Article 2 paragraph 1 subparagraph e) of the Decree on the implementation of rural land reform, one has to bear in mind that in accordance with Article 239 subparagraph 3 of the Constitution: „From the date of entry into force of the Constitution, the resolutions of the Constitutional Tribunal concerning the establishment of interpretations of the acts of parliament cease to have generally binding force”. Proceedings on the present case, however, are in progress according to the procedure of examination of a constitutional complaint lodged in accordance with the provisions of the Constitution of the Republic of Poland of 2 April 1997 and the provisions of the Constitutional Tribunal Act of 1 August 1997.

According to Article 79 paragraph 1 of the Constitution of the Republic of Poland, everyone, whose constitutional freedoms or rights have been violated, has the right to lodge a complaint with the Constitutional Tribunal „for its judgement on the conformity to the Constitution of a statute or another normative act upon which basis

a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution”. In the judicial decisions of the Constitutional Tribunal the so called material concept of the normative act has been adopted, which means that a normative act is deemed to consist of any regulation, which contains legal norms in its text, that is abstract rules of behaviour, addressed to a generally determined addressee. There is no doubt, therefore, that the objective scope of control is not limited to acts constituting the sources of universally binding law (as construed in Article 87 paragraph 1 of the Constitution), but also covers the acts that are mentioned in general terms in Article 93, as well as other acts of that type. The object of a complaint may therefore be an act of parliament, as well as a different act of a central organ of the state, establishing legal norms. The notion of the act of parliament refers to any acts with a force equivalent to the act of parliament and therefore also to pre-war Ordinances with the force equivalent to acts of parliament issued by the President of the Republic of Poland, and to Decrees with binding force equivalent to acts of parliaments issued in the period of the Polish People’s Republic (L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu [Polish Constitutional Law. Outline Presentation]*, Warszawa 2000, p 374 *et. seq.*).

4. Essential significance in the case under consideration, however, is attached to the problem of the binding force of Article 2 paragraph 1 subparagraph e) of the Decree of the Polish Committee of National Liberation of 6 September 1944 on Implementation of Rural Land Reform. As noted by the legal representative of the plaintiff, the Decree of the Polish Committee of National Liberation on Implementation of Rural Land Reform „was consumed *ex lege* by a single operation on 13 September 1944”, and owing to that it was never a legal act as construed in Article 87 paragraph 1 of the Constitution, „and from the date of its entry into force it could not cause any legal consequences”.

The Constitutional Tribunal does not find any grounds for the acknowledgment that the fact of legal consequences being caused by the Decree on the implementation of rural land reform at a single time should deprive that act of the characteristics of a legal act as construed in Article 87 paragraph 1 of the Constitution.

The position, according to which Article 2 paragraph 1 subparagraph e) of the Decree, owing to the nature of that provision, has exhausted its binding force upon the implementation of its purpose, that is the take-over into the possession of the State Treasury of the specified categories of landed real estate properties, is of essential significance for the appraisal of the competence of the Constitutional Tribunal to examine the conformity of the challenged provision to the Constitution. Indeed, according to Article 39 paragraph 1 subparagraph 3 of the Constitutional Tribunal Act, in the situation where a normative act, within the challenged scope, has ceased to have any binding force prior to the issue of the respective judgement by the Constitutional Tribunal, the proceedings in question shall be discontinued. The problem is therefore reduced to the question of whether the challenged provision of the Decree may be regarded as having any „binding force” on the day of issue of the judgement by the Constitutional Tribunal, and whether Article 39 paragraph 3 might possibly be applicable here, which article was added by the Act of 9 June 2000 on amendment of the Constitutional Tribunal Act and of the Act on Amendment of the Act – the Law on the System of Common Court of Law and Certain other Acts (Journal of Laws – Dz.U. No 53 item 638), which entered into force from 8 October 2000. It states that Article 39 paragraph 1 subparagraph 3 is not applicable, if the issue of a judgement on a normative act, which has ceased to have binding force prior to the issue of such judgement, is necessary for the protection of constitutional

freedoms and rights.

The Constitutional Tribunal upholds the position expressed in numerous of its prior decisions, according to which a provision is binding within the legal system, as long as it is or may be used as the basis for undertaking any individual acts of the application of the law, whereas the cessation of binding force as the premise for discontinuing the proceedings before the Constitutional Tribunal takes place only whenever such a provision cannot be applied any longer to any actually existing situation (*Judgement of 31 January 2001, Ref. No. P. 4/99*, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No 1/2000, p. 57). This is so, as the object of control may indeed encompass all the norms of the law in force. In its judicial decisions passed hitherto, the Constitutional Tribunal has many times articulated the view that the formal derogation or amendment of a provision does not always imply the cessation of the binding force of the legal norms expressed in such a provision – in particular in such sense, that one has to regard as a provision still in force such a regulation, which although it has been already formally derogated, but it is still applicable for the determination of the consequences of the events that occurred at the time when that provision was still in force.

In the present case we have to do with a different situation. The Decree of 6 September 1944 on Implementation of Rural Land Reform was not formally derogated, but the stipulation of the single time operation of Article 2 paragraph 1 subparagraph e) of the Decree leads to the conclusion that this provision cannot be applied any more, which implies, in turn, that it cannot be the basis for the take-over of land into the possession of the State Treasury any longer. Therefore, „the interpretation of the expression that *a normative act has ceased to have any binding force* should lead towards the judgement of whether the challenged legal norm has been removed from the legal order not only in the formal-legal sense, but also in the context of whether the revoked provision still generates determined consequences for the citizens and whether it can still be applied in practice” (*Decision of 13 October 1998, Ref. No. SK 3/98*, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No 5/1998, p. 434). Such judgement may be of essential significance in the case where the implementation of the legal norms contained in an act of parliament leads to their „consumption” (compare: *Judgement of 14 November 2000, Ref. No. K. 7/00*, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No 7/2000, p. 1290). Doubt as to the further binding force of a „consumed” provision was expressed by the Constitutional Tribunal when examining the conformity to the Constitution of Article 5 paragraph 1 of the Act of 10 May 1990 – Introductory Provisions to the Law on Territorial Self-government and to the Act on Self-government Employees. The Act – Introductory Provisions to the Law on Territorial Self-government and to the Act on Self-government Employees was never formally derogated by any subsequent act. Doubt as to the binding force of the challenged provision arose in connection with the fact that the communalisation of state-owned assets was a single operation. But in that case the Constitutional Tribunal decided that the process of communalisation was spread over time and one could not rule out the possibility that in the future decisions certifying the acquisition of communal property might still be issued. The challenged provision of the law may therefore still be applied by the organs of public authority.

According to the opinion of the Constitutional Tribunal, the analysis of Article 2 paragraph 1 subparagraph e) of the Decree of the Polish Committee of National Liberation on Implementation of Rural Land Reform leads to a different conclusion. In order to arrive at such a conclusion it was necessary to decide, whether the take-over of the landed real estate properties into the possession of the State

Treasury for the purposes of the rural land reform constituted an operation with a limited time frame, consisting of seizure of ownership of all the real estate properties being subject at the given time to the provision of Article 2 paragraph 1 subparagraph e) of the respective Decree, or whether it implied the permanent regulation of the issue of the magnitude of standard size areas of agricultural real estate properties that were allowed to remain in private ownership, with such implications in consequence, that upon their being exceeded they would be taken over into state ownership also in the future.

5. Pursuant to Article 2 paragraph 1 subparagraph e) of the Decree of 6 September 1944, landed real estate properties being in the ownership or co-ownership of physical persons or legal persons were destined for the purposes of the rural land reform if their total size exceeded either 100 hectares of total area or 50 hectares of farming land, whereas on the territory of the Voivodeships of Poznań, Pomerania and Silesia, if their total size exceeded 100 hectares of total area, regardless of the size of farming land within that area. All of the landed real estate properties specified in Article 2 paragraph 1 subparagraphs b, c, d and e, were immediately transferred, without any compensation, in their entirety into the ownership of the State Treasury with destination for the purposes indicated in Article 1 paragraph 2 of the Decree.

The expressions used to articulate the „transfer” into the ownership of the State Treasury of the real estate properties specified under the subparagraph e), and indeed their alienation „without delay”, indicate unequivocally that the transfer of ownership took place by virtue of the law as such at the time of entry of the Decree into force. According to Article 21, the Decree entered into force from the date of its publication; whereas the publication of the original text of the Decree took place in the Journal of Laws No 4, item 17, dated 13 September 1944.

As the Constitutional Tribunal has ascertained in its Resolution of 16 April 1996, this conclusion is unquestionable not only because of the wording of the interpreted provision, but also owing to the fact that neither in the Decree itself, nor in the regulations attached to it, can one find any passages, which would justify any other view, e.g. such one as stipulating that the transfer of the ownership rights was made dependent on some other acts of application of the law, which would have the constitutive features of the „take-over” of ownership title, or which would be postponing in time the effect expressed in Article 2 of the Decree. This implies that *ex lege* the Decree caused effects consisting of the transfer into the ownership of the State Treasury of the „landed real estate properties” specified in the provision under consideration. This effect was thereby independent of whether on the day of entry into force of the Decree on rural land reform the given parts of the territory of the state were already actually under the rule of the authority of the Polish Committee of National Liberation, or whether they still remained under German occupation. This is indicated by the expressions contained in the interpreted provision, in which there is mention, i.a., of the Voivodeships of Poznań, Pomerania and Silesia, that is of territories, which in the days when the Decree on rural land reform was issued and published were still under the German occupation.

This conclusion – as was ascertained by the Constitutional Tribunal – finds additional confirmation in Article 6 of the Decree, which orders the immediate establishment of state management over real estate properties specified in Article 2. The point was to assume management in the capacity of ownership over the property, which had previously been transferred into the ownership of the State Treasury. Article 1 paragraph 1 of the Decree of 8 August 1946 on Entry into the Land and Mortgage Registers of the ownership rights to the real estate properties taken over for

the purposes of the rural land reform, in turn, provided that the basis for inscribing on behalf of the State Treasury in the (land) and mortgage registers the ownership rights concerning the landed real estate properties specified in Article 2 paragraph 1 subparagraphs b), c), d) and e) of the Decree on rural land reform, „is a certificate from the Voivodeship Administration Office, establishing that the given landed real estate property is destined for the purposes of the rural land reform according to the above quoted provisions”. A certificate is essentially only a document confirming the existing actual status – in this case the status of the ownership of land – as structured pursuant to Article 2 paragraph 1 subparagraph b-e of the Decree.

The ascertainment that the Decree on rural land reform was realised *ex lege* in terms of ownership rights on 13 September 1944 concerns those parts of the state, which at the time when the Decree was issued constituted the territory of the Republic. Article 4 of the Decree of 13 November 1945 on Administration of Regained Western Territories (Journal of Laws -Dz.U. No 51, item 295) – which entered into force upon the date of its publication, i.e. on 27 November 1945 (Article 10), in turn – extended the scope of legislation (including that on agriculture) being in force on the area of jurisdiction of the Regional Court in Poznań to the area of the Regained Western Territories. Therefore, on the Regained Western Territories Article 2 paragraph 1 subparagraph e) of the Decree on rural land reform entered into force at a later date, as this happened only on 27 November 1945, with the effect that from that date the real estate properties specified in the subparagraph e) were transferred into the ownership of the State Treasury – subject to the application of the acreage standard foreseen *expressis verbis* for the Voivodeship of Poznań).

In its already previously quoted resolution of 16 April 1996 the Constitutional Tribunal came to the conclusion that in the light of the above presented findings, there are no grounds for assuming that the intention of norm-maker was the emergence of a legal material effect in the form of take-over into the ownership of the State Treasury as a whole also those real estate properties, which would exceed the area standards determined by Article 2 paragraph, subparagraph e) as the result of changes in the land ownership relations, which could occur already after the entry into force of the Decree on rural land reform. If the norm-maker wished to orient the operation of the mechanism of Article 2 paragraph 1 letter e) of the Decree also *pro futuro*, it would have either had to formulate that provision differently, or to add another provision, which would clearly justify such activities. An additional argument unequivocally supporting such interpretation of Article 2 paragraph 1 subparagraph e) of the Decree on rural land reform, which assumes the realisation of the effects of that provision in terms of rights in property as being concurrent with the time of its entry into force, was provided – according to the opinion of the Constitutional Tribunal – by the legislator himself 13 years later – in Article 7 paragraph 1 of the Act of 13 July 1957 on Transactions in Agricultural Real Estate Properties (Journal of Laws – Dz.U. No 39, item 172). That provision determined that „in the case of acquisition of agricultural real estate after the date of 12 September 1944 and prior to the date of entry into force of the present Act, involving the surpassing of the acreage norms specified in Article 2 paragraph 1 subparagraph e) of the Decree of 6 September 1944 (...) – the surplus land of such real estate may be taken over into the ownership of the State according to the procedure and the rules laid down in Article 5”. It is obvious that if the real estate properties, which are mentioned there, would be transferred *ex lege* and in their entirety into the ownership of the State Treasury at the moment of acquisition of property exceeding the respective acreage norm on the grounds of Article 2 paragraph 1 subparagraph e) of the Decree on rural land reform, the quoted provision of the Act of 13 July 1957 would have been completely irrelevant and void

(compare: *Resolution of the Constitutional Tribunal dated 16 April 1996, Ref. No. W. 15/95*).

Furthermore, when interpreting Article 2 paragraph 1 subparagraph e) of the Decree, the Constitutional Tribunal has ascertained that the judgement on the conformity of the interpreted provision to the Constitution would have presented a significant problem in such case, when the interpretation would have led to the conclusion that the acreage norms and the legal consequences of surpassing them, which were specified in Article 2 paragraph 1 of the Decree on rural land reform had been binding also *pro futuro*, and in further consequence to the conclusion that the same provision was applicable to real estate properties acquired under the rule of effectively binding constitutional norms. Indeed, in such case the interpretation established by the Constitutional Tribunal would have implied the recognition that in the legal system a legal norm was in force, the contents of which give rise to significant objections from the point of view of the principles of the democratic state ruled by law, social justice and protection of ownership as specified in Articles 1 and 7 of the constitutional provisions that remained in force on the basis of Article 77 of the Constitutional Act of 17 October 1992 on the Mutual Relations Legislative and Executive Authorities of the Republic of Poland and on Territorial Self-government (Journal of Laws – Dz.U. No 84, item 246 with amendments). The Constitutional Tribunal decided that this problem does not arise if the understanding of the interpreted provision consists of the stipulation that the effects of the provision in question were completed in full in the past with the transfer into the ownership of the State Treasury of the real estate properties specified in it for the purposes of rural land reform, and that presently they can only be determined *ex post* in a declaratory manner. These effects took place before the entry into force of the presently binding constitutional norms, and there was neither constitutional nor legislative act that would eliminate or correct them.

Having ascertained that Article 2 paragraph 1 subparagraph e) of the Decree on Implementation of Rural Land Reform had the features of a provision, the binding force of which was exhausted concurrently with the implementation of the purpose of that provision, that is with the take over into the ownership of the State Treasury of the agricultural real estate properties specified in the Decree, the Constitutional Tribunal considered, whether the respective provision could be the object of the application of the proposition that a provision is recognised as being in binding force, if it may be applied to events taking place in the past, the present or the future. The cause behind the doubts concerning this matter consists in the fact, that in numerous administrative proceedings, similarly as in the proceedings concerned with the present case under consideration, the administrative organs quote the provision of Article 2 paragraph 1 subparagraph e) of the Decree. One should bear in mind, however, that in these proceedings this provision was not applied, as it did not constitute the basis of the verdict on the case. The decision did not concern the substance of the case, i.e. the take over of landed real estate property according to the procedure of the Decree, but the invalidity of the decision issued in the course of the procedure of taking over of agricultural real estate by State Treasury. Reference to the respective provision made in the decisions of the Minister of Agriculture and Food Economy, and also in the judgement of the Chief Administrative Court dismissing the complaint, does not imply that it was actually applied to the resolution of the case, but it is of a secondary nature and serves for the appraisal of whether that provision was or was not applied in the process of taking over that specific estate in a manner providing the grounds for the establishment of flagrant violation of the law.

In conclusion, the Constitutional Tribunal decided that Article 2 paragraph 1

subparagraph e) is a provision, which has ceased to have any legally binding force.

The view about the Decree having been „consumed” has also been formulated in the doctrine of the law. There was no doubts about the fact, that the acquisition of landed real estate properties into State ownership on the basis of Article 2 paragraph 1 subparagraph e) of the Decree should be regarded as a single time event (W. Pawlak, *Z zagadnień prawnych reformy rolnej w Polsce Ludowej [Some legal issues of agricultural land reform in the Polish People’s Republic]*, RPEiS 1958, vol. 2, p. 71 *et seq.*; R. Budzinowski, *Przymusowe przejmowanie nieruchomości rolnych [Forced take-over of agricultural real estate]*, Warszawa-Poznań 1985, PWN, p. 1250, J. Szachulowicz in: *Gloss to NSA judgement dated 2 September 1994, II SA 2486/92 and II SA 500/94*).

Assuming that the provision challenged in the complaint does not have any binding force, in the sense that the effects of that provision have taken place in full at the time of transfer into the ownership of the State Treasury of the real estate properties specified therein for the purposes of the rural land reform, and they can presently be determined only *ex post* in a declaratory manner, the Constitutional Tribunal has decided that there are existing grounds for the discontinuance the proceedings pursuant to Article 39 paragraph 1 subparagraph 3 of the Constitutional Tribunal Act.

6. The Constitutional Tribunal considered thereby, whether despite of the cessation of the binding force of Article 2 paragraph 1 subparagraph e) of the Decree, there were no circumstances of the kind indicated in Article 39 paragraph 3 of the Constitutional Tribunal Act, which allow to pass judgement on a normative act that has ceased to have any binding force, if the issue of such judgement is necessary for the purposes of protection of constitutional rights and freedoms.

When considering this issue, the Constitutional Tribunal took into account those reasons, which are of significance for the protection of constitutional rights, stemming from the sense of justice, values such as the permanence and security of legal relations, and also took into account the constitutional and legal mechanisms of the enactment of the decisions of the Constitutional Tribunal on the unconstitutional nature of normative acts.

The enactment of the rural land reform was a social and economic necessity, which was faced by the 2nd Republic at the threshold of independence. The slow pace of implementation of such reform in the twenty-year period between the two world wars was caused by the shortage of financial resources of the State and fears concerning the possibility of destabilising the economic structure of agriculture. The awareness of the necessity to bring the changes in the structure of agricultural property was at the basis of the programmes of social transformations formulated by all the political groupings in the period of the war.

The Decree of the Polish Committee of National Liberation of 6 September 1944 on the implementation of rural land reform not only introduced changes in the structure of agricultural property, but by the scope and manner of its implementation it destroyed the Polish large landowners class as a social group and as a category of producers performing a specific function in the economic structure of the country. Under the conditions prevailing at that time it was one among many other initiatives leading to the weakening of the capacity of the society at large to resist against the political system together with the ideology constituting its foundation, forced upon that society by coercion. It should be taken into account that such kinds of actions, restrictions and repressions were directed not only at the landed gentry, but also other social strata, groups and professions.

After the lapse of over 50 years since the time of implementation of the rural land reform, the respective changes of a social and economic nature have become irreversible. Neither social considerations, nor legal reasons, do not allow for the restitution of the previous state of affairs. The Decree on the implementation of rural land reform was an act, on the basis of which agricultural real estate properties of determined size were taken over into the ownership of the State Treasury. Acknowledgement by the Constitutional Tribunal of the unconstitutional nature of the above Decree would have provided the basis for the reopening of proceedings concerning the take over of the landed real estate properties by State Treasury. It should be borne in mind, however, that the beneficiaries of that Decree obtained legal titles to the received land not on the grounds of that Decree, but by virtue of other acts of law. The Decree only created the resources of state-owned land, from which allocations for particular persons were made. The mutual relations between the acts constituting the basis for the take-over of the land holdings and their transfers and the legal instruments that are at the disposal of the Constitutional Tribunal for the performance of its constitutional competencies do not allow the construction of solutions, which would reconcile the rights of the persons, who were deprived of their property, with the legally acquired rights of the beneficiaries of rural land reform.

The Constitutional Tribunal deems it appropriate to refer to its own position contained in the reasons for the Resolution of 16 April 1996 concerning the establishment of generally binding interpretation of Article 2 paragraph 1 subparagraph e) of the Decree of the Polish Committee of National Liberation of 6 September 1944 on Implementation of Rural Land Reform. The Constitutional Tribunal restrained itself at that time only to interpret the provision indicated by the applicant and did not examine the legality of the issuance of the Decree on rural land reform by the Polish Committee of National Liberation, nor did it examine the conformity of the contents of that Decree to the presently binding constitutional norms. At the same time it acknowledged that „full appraisal of the sovereignty and legality of the Polish Committee of National Liberation as a Polish lawmaker belongs to the contemporary democratic founders of the political system” (*Ref. No. W. 15/95*, Official Collection of the Constitutional Tribunal’s Decisions – OTK ZU No 2/1996, item 13).

Taking the above into consideration, the Constitutional Tribunal decided, that in the respective case Article 39 paragraph 3 of the Constitutional Tribunal Act cannot be applied and decided as in the sentencing part above.

Dissenting Opinion
of Judge Zdzisław Czeszejko-Sochacki
to the Decision of the Constitutional Tribunal
of 28 November 2001, Ref. No. SK 5/01

In relation the Decision indicated in the header above I submit my dissenting opinion, both concerning the form of the decision and concerning some of the fragments of its justification.

Objections are provoked, above all, by the avoidance by the Constitutional Tribunal to resolve the issue on a substantive basis, the full grounds for which exist already in the Decision itself. The legal capacity of the Decree of the Polish Committee of National Liberation of 6 September 1944, on the grounds of the hitherto existing judicial decisions of the Constitutional Tribunal and judgements of

the courts does not give rise to any doubts. Also in the Decision of the Constitutional Tribunal of the present day, the position that the respective Decree is a normative act was not questionable. The Tribunal only limited itself to saying that Article 2 paragraph 1 subparagraph e) of the Decree exhausted its legal force upon the take-over of the landed real estate properties specified in it by the State Treasury and could not thereafter be applied any more.

The concept of exhaustion of the binding force („consumption”) of a normative act is not unequivocal enough to be able to be adopted as a basis for the decision of the Tribunal, and in any case it may in future practice of adjudication constitute a risky precedent, generating multiple problems. Reference to that concept may also be seen as reflecting the wish to avoid univocal acknowledgment of conformity to the Constitution, which was not infrequent in the recent period of adjudication by the Constitutional Tribunal, and which undermines the position adopted in the course of preliminary examination, (of the Constitutional Tribunal also, although with the bench composed of different judges).

A decision dealing with the substance of the case was necessary to the extent that voices are being raised in the press that suggest the possibility to reverse the respective Decree and in consequence to undermine the hitherto existing legal status. The evasion from the examination in terms of substance could provide legally unfounded but socially dangerous encouragement for the questioning of the acts and decisions issued on the grounds of other provisions of the above mentioned Article 2 paragraph 1 of the respective Decree.

It needs to be stressed that a judgement (decision concerning a matter of substance) pronounced by the Tribunal sitting in full bench, pursuant to Article 25 paragraph 1 subparagraph e) of the Constitutional Tribunal Act, in the event of the intention to depart from the legal opinion expressed in such a judgement, would require the examination of the case also by sitting in full bench. The purpose of this solution is to increase the consistency and permanence of the jurisprudence of the Constitutional Tribunal.

The reading of the decisions indicates, that in spite of their different form (of a decision rather than a judgement), and the reference made to the above indicated concept of exhaustion of legal force, the justification given is of a substantial nature, pointing in favour of conformity to the Constitution not only of Article 2 paragraph 1 subparagraph e), but also of the entire Decree. The circumstances, which the Tribunal took into account when considering whether, despite of the cessation of the binding force of Article 2 paragraph 1 subparagraph e) of the Decree, the premises indicated in Article 39 paragraph 3 of the Constitutional Tribunal Act do not exist, allowing adjudication if the pronouncement of a judgement is necessary for the protection of constitutional rights and freedoms, provide in this regard for the unequivocal motivation of the constitutional validity of that Act. The Tribunal took into account, therefore, the arguments that are of significance for the protection of constitutional rights, stemming from the sense of justice, values such as the permanence and security of legal relations. It should be noted that the judicial review of conformity to the Constitution must always take into account whether the consequences of the judgement will not damage these values. The following statement should be regarded as pertinently reflecting the essence of such review: „After the lapse of over 50 years since the time of implementation of rural land reform the changes of a social and

economic nature have become irreversible". The Constitutional Tribunal does not find any grounds for constructing solutions, „which would reconcile the rights of the persons who were deprived of their property with the legally acquired rights of the beneficiaries of the rural land reform".

Although one could further multiply the arguments in favour of the lack of grounds for the undermining of the conformity of the challenged normative act o the Constitution, what follows from the Decision of the Constitutional Tribunal is already sufficient enough to pronounce a judgement acknowledging conformity to the Constitution.

Regardless of the above presented position concerning the existence of sufficient grounds for a judgement concerned with the respective substance and to acknowledge conformity to the Constitution, my dissenting opinion is also the expression of my objections to the statements that are of a political nature, and which could give the impression of the lack of due objectivity and political neutrality. Indeed, the Constitutional Tribunal states the following: „The Decree of the Polish Committee of National Liberation of 6 September 1944 on the implementation of rural land reform not only did not change the structure of farmland holdings, but through the scope and the method of its implementation it *destroyed* the Polish landed gentry as a social class and as a category of producers playing a determined function in the economic structure of the country. Under the conditions prevailing at the time *it was one among many other activities leading to the weakening of the resistance capacity of society* with regards to the political system enforced by coercion and the ideology constituting its foundation".

Such a statement is: 1) unnecessary, as it has no legal quality – it is irrelevant for the purport of the decision; 2) politically one-sided and simplified, as at another place the Tribunal pertinently noted that the matter of legality of the actions of the state authorities belongs today to the sphere of historical and political judgements. Such judgements cannot be transferred directly to the sphere of the legal relations determined in those times; 3) it makes the legal decision of the Tribunal implicated in politics. On the grounds of the constitutional requirement of political neutrality of the judges of the Constitutional Tribunal and the position of the Constitutional Tribunal in the political system as the court with jurisdiction over the law, the Tribunal should present maximum prudence in its statements, to assure that its legal nature could not be questioned.

For all of these reasons I decided that it was necessary to submit my dissenting opinion.

Dissenting Opinion

of Judge Lech Garlicki to the Decision of the Constitutional Tribunal
of 28 November 2001, Ref. No. SK 5/01

Pursuant to Article 68 Paragraph 3 of the Constitutional Tribunal Act of 1 July 1997, I submit my dissenting opinion, because I believe that in the present case there were no grounds for ascertainment of cessation of binding force of the challenged provision, and – in consequence – for the discontinuance of the respective legal proceedings.

For my dissenting opinion I give the following statement of reasons:

1. As a matter of introduction it seems to be necessary to recall a number of issues connected with the model of the constitutional complaint, which was adopted in the Constitution of 1997. It is, as is well known, a narrow model, as the constitutional complaint may only be lodged in relation to a provision of the law, „on the basis of which a court or an organ of public administration has pronounced final judgement concerning his [everyone’s] rights and freedoms . . . specified in the Constitution”, and one cannot direct a constitutional complaint directly against a court judgement or some other act of application of the law. Within these limits, however, the protection guaranteed by the procedure of the constitutional complaint is full, as apart from the regulation of Article 79 paragraph 2 – the constitutional regulations do not foresee any limitation of the scope of such protection.

It should furthermore be stated, that in every situation, in which a „final judgement” appears, there must also exist a provision of the binding law in force, on the grounds of which the given judicial decision was issued. This stems from the general principle (expressed especially in Article 7 of the Constitution), that the organs of public authority can operate only „on the basis of, and within the limits of, the law”. In every situation, where a provision of the law exists, which provided the grounds for issuing a judicial decision, the same provision may be challenged by the procedure of the constitutional complaint. In other words, wherever a „final judicial decision” exists, it is not possible to have the situation of the non-existence of a provision of the law in force serving as its basis, and it is not possible not to have the possibility to lodge a constitutional complaint challenging that provision. Any severance of that three way relationship fails to observe the universally oriented approach of Article 79 paragraph 1 of the Constitution and distorts the sense and significance of the procedure of the constitutional complaint.

The point of departure must therefore always consist in the indication of the provision, „on the basis of which” the final adjudication of the case was arrived at. In the overwhelming majority of the cases it will be a provision of substantive law, deciding on the structure of the legal relationship, in the context of which the dispute had emerged, which was finally resolved by the court or some other organ of public authority. In other words, it is a matter of a provision deciding especially on the contents of the rights or obligations of the author of the constitutional complaint or in some other way determining his legal situation. That provision of substantive law might remain „hidden”, as it were, behind the procedural regulations (especially when judicial decisions are adopted by the courts of the highest instance), but it can always be indicated as the premise behind the ruling being adopted on the case in the given way, rather than any other. The constitutional complaint, unless one wishes to grant that procedure only the appearances of significance, can always be addressed against that provision of substantive law.

The provision of substantive law, pursuant to which a final resolution of a case has been arrived at, must be treated as a provision of law that is binding. This results from the above-mentioned principle of legalism, which allows adjudicating only on the grounds of a provision of the law in force.

In other words, if the court has resolved the case on the basis of a specific provision of the law, it implies that it has deemed that provision to be currently in force. In this context problems may arise, especially when in the meantime such a provision is repealed, but, as is well known, the case law of the Constitutional Tribunal has since a long time found a solution for such a situation, by adopting the concept of so called extended impact (being in force) of a repealed provision.

2. Based on these model premises, it is difficult to agree with the orientation of

thought of the Constitutional Tribunal, adopted in the present Decision. The point of departure for the constitutional complaint was the ruling of the Chief Administrative Court of 21 July 2000, issued in the context of two prior administrative decisions. The substantive basis for all of these judgements was Article 2 paragraph 1 subparagraph e) of the Decree of the Polish Committee of National Liberation of 6 September 1944 on Implementation of Rural Land Reform, which is unequivocally articulated in these verdicts. The Constitutional Tribunal, however, has ascertained the same provision (together with the entire Decree of 1944) has ceased to have any binding force and therefore cannot be challenged by the procedure of the constitutional complaint. If this position of the Constitutional Tribunal were accepted as pertinent, it would imply that the judgement of the Chief Administrative Court (and the preceding administrative decisions) were issued on the basis of a provision that has no legally binding force. Yet, if we look at the judicial decisions both of the Supreme Court and the Chief Administrative Court, we find that both in the nineteen-nineties and in the earlier decades – it regularly refers to the provisions of the Decree of 1944, treating them as the substantive basis for the resolution of diverse kinds of disputes and doubts (a list of examples of such cases is provided by A. Oleszko, *Problematyka własnościowa w świetle reformy oraz uporządkowania spraw związanych z reformą rolną i osadnictwem [Ownership Problems in the Light of Reform and Ordering the Issues Related to Land Reform and Settlement]*, Rejent 1996, No 11). And yet, now – in the light of today's Decision of the Constitutional Tribunal – it is being revealed that the above courts were applying non-binding provisions, which fails to be tenable in any confrontation with logic. It also fails the test of confrontation with the earlier judicial decisions of the Constitutional Tribunal, which has several times treated the provisions of the Decree of 1944 as the subject matter of the generally binding interpretation of the acts of law, and only a few weeks before it has also pronounced judgement on that Decree when controlling Article 216 of the Act of 1997 on Real Estate Management.

The source of the misunderstanding that has arisen is the unjustified obliteration of the difference, according to my belief, between the one time „consumption” of a provision, and the cessation of the binding force of that provision. It is true that a provision of the law may be constructed in such a manner, that it is applicable only to the situations existing at the time of its enactment, but this does not apply to the situations – even identical ones, which develop already after its promulgation. This implies only so much, however, that the scope of impact of the provision is limited in time, but – in relation to the situations to which that provision was applicable – that provision remains in the legal system as the basis maintaining the legal effects caused by it and as a barrier against attempts to legally and actually undermine the permanence of these effects. Moreover, whenever the question arises of whether – in relation to a specific situation from the past – the respective provision had indeed caused the legal effect that was foreseen by it, one needs first to verify, whether the same provision was indeed applicable to the respective situation, and thereby to apply that provision. As long, therefore, as the law allows for turning back to adjudication on situations from the past, the necessity remains to apply the „consumed” provision, and thereby it maintains partial (residual) binding force. One cannot presume, however, that if the provision „applicable only once” has already caused its legal effect, it has therewith ceased to have any binding force. For example, if a law would be passed today, by pursuant to which, upon the date of entry into force of that act, all the personal cars with engines above 2000 cm³ in the possession of the citizens would be transferred by virtue of the law into the ownership of the State Treasury, such a law would cause a single legal effect upon the day of its entry into force and would

immediately be consumed. No reasonable person would claim, however, that such an Act, having exhausted its capacity to produce effective consequences, has thereby ceased to have any binding force and cannot be challenged before the Constitutional Tribunal, in the context of disputes before the courts that would be in course as to the method of its application to specific persons and situations. I do not understand very well why any other model of reasoning should be applied to the Decree on rural land reform.

It has pertinently been pointed out, both in the judicial decisions of the Constitutional Tribunal and in legal doctrine, that the Decree of 1944 was a „one-time” act, as its application was exhausted with the revision of the ownership relations that existed at the time of its promulgation (and at the time of its subsequent amendment). However, the Decree did not become applicable to the situations, which developed in the later period, already after its enactment, so it „consumed itself”, as it were, at the time of its execution in the initial post-war years. This does not change the fact, however, that as the result of the application of the provisions of the Decree various kinds of legal situations developed, and – more importantly – different kinds of disputes arose on that account. The same happened in the case, which provided the reason for submitting the present constitutional complaint, as it concerned the invalidity of an administrative decision, issued some time ago on the basis of Article 2 paragraph 1 subparagraph e) of the Decree. The adjudication of this case required to determine, whether the administrative decision had correctly applied that provision as its basis. The organs of the administration, and subsequently the Chief Administrative Court, had to determine – here and now – the legal significance of Article 2 paragraph 1 subparagraph e) of the Decree, and to adjudicate on the correctness of its application. That provision, therefore, played a decisive role for the adjudication of the case and without referring to its contents it would not have been possible to deliver any verdict.

It is incompatible with logic to regard a provision as having no binding force, without reference to which the case could not have been adjudged in terms of substance, at the present time, pending before the court. It seems that when speaking of the binding force of a provision of the law we ought to have in mind something more than just the intellectually simplest situation, when on the basis of that provision new legal relations are formed in the context of newly arising actual situations. The binding force of the law may also be referred to in all those cases, where although the respective provision has already been revoked, or – what is more prone to discussion – has exhausted its practical application, but still serves as the premise for the adjudication of cases before the courts. As long as a provision maintains – even residually – any binding force, it may be the object of examination by the Constitutional Tribunal.

The object of such examination is not to determine whether the provision, at the time of its enactment, was conforming to the Constitution in terms of its contents, as this would require the Constitutional Tribunal to apply long obsolete constitutional regulations as standards of adjudication, which could lead in practice to essential difficulties (as it is very difficult to determine, for example, whether and what constitutional regulations might have prevailed in 1944). The object of examination consists in the question, however, whether the provisions of the Constitution currently in force allow the application of the past provision of the law by the courts adjudicating today. In other words, the Constitutional Tribunal must give an answer to the question of whether the application of a former provision as the basis of today’s court verdict does not violate the Constitution.

For the above reason I believe that Article 2 paragraph 1 subparagraph e) of the Decree of 1944 – in the scope, within which it may still provide the substantive basis

for the rulings of the courts – has still maintained its legal force, whereas the Constitutional Tribunal is competent to adjudicate on whether the application of this provision today is in conformity to the Constitution of 2 April 1997.

3. I regard the discontinuation of proceedings based on the argument of the lack of binding force of Article 2 paragraph 1 subparagraph e) of the Decree of 1944 as having no adequate legal or logical foundation. The Tribunal has resorted to a peculiar kind of evasion here, as – on the understanding that it is not possible to adopt a judgement stating the unconstitutional nature of the Decree – it failed to force itself to ascertain that from today's perspective – the application of the provisions of the Decree does not infringe on the Constitution of 1997. This fits in with the tendency – unfortunately increasingly frequently visible in the judgements of the Constitutional Tribunal, to abstain from ruling on substance in controversial cases (for example, see: *judgement of 14 June 2000, Ref. No. P. 3/00*, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 5/2000, p. 683 *et seq.* – with 4 dissenting opinions; *decisions of: 4 December 2000, Ref. No. SK 10/99*, OTK ZU No 8/2000, p. 1459 *et seq.* – with 5 dissenting opinions; *24 October 2001, Ref. No. SK 10/01*, OTK ZU No 7/2001, item 225 – with 5 dissenting opinions).

Usually such restraint has its price, for in order to avoid resolving the case one diverges from seemingly clear principles and normative rules. The same happened with the present decision.

Firstly, the constitutional structure of the constitutional complaint was diverged from by adopting the view, that there may be such court verdicts, against which such a complaint cannot be lodged, as these judgements are based on provisions that are not in force any more. This creates unnecessary and unjustified departure from the principle of universality of the constitutional complaint (Article 79 of the Constitution).

Secondly, it has dangerously opened the way for the restriction of the scope of cognition of the Constitutional Tribunal, once it has been ascertained that the „self-consumption” of a one-time provision is tantamount to the cessation of its binding force, because the same reasoning could be applied to any other cases of enactment of such provisions effectively acting only once. This could enable the legislator to avoid the review on the part of the Constitutional Tribunal, if only he could draft a provision that would be realised just at a single time, so that according to such reasoning it would subsequently lose its binding force. This would make an unnecessary and unjustified breach in the principle of objective universality of the review performed by the Constitutional Tribunal (Article 188 subparagraph 1 of the Constitution).

Thirdly, by evading the adoption of any position in terms of substance, the courts were not provided with any answer concerning the conformity to the Constitution of the provisions of the Decree, which after all the courts still do meet with in practice. It is difficult to regard this as an encouragement for the courts to refer difficult constitutional problems to the Constitutional Tribunal. Many times and rightly so, the Tribunal has criticised the phenomenon of autonomous adjudication by the courts on the non-conformity of the laws to the Constitution. If the Tribunal wishes, that the courts respect its jurisprudence and recognise its monopoly concerning the adjudication of constitutional issues, it will fail to accomplish that, if it only demonstrates the refined skill of formal excuses serving the purpose of discontinuing the proceedings. The more often the Tribunal demonstrates to the courts that they will not get any answer, the more will the tendency become entrenched to replace the Tribunal in resolving constitutional issues. This may

contribute to the making of an unnecessary and unjustified breach in the mode of resolution of constitutional issues. This may contribute to the creation of an unnecessary and unjustified breach in the principle of the monopoly of the Constitutional Tribunal concerning its capacity to rule on the non-conformity of the acts of parliament to the Constitution (Article 188 items 1 and 2 of the Constitution).

4. I believe that the constitutional complaint should have been accepted for substantive examination. I believe that the examination should have concerned the question of whether, based on the Constitution of 1997 it is possible to apply the provisions of the Decree from the year 1944 as the substantive law basis for presently issued administrative decisions and court judgements. I believe that the model of reasoning adopted in the judgement of 31 January 2001 Ref. No. P. 4/99 (Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 1/2001, p. 42 *et seq.*) should have been applied in this case, and therefore it should have been declared that the lapse of time, the necessity to respect the rights acquired in the meantime combined with the irreversibility of the changes that have occurred in the property holdings structure of the Polish rural areas make it imperative to pronounce the judgement that the application of the provisions of the Decree from the year 1944 nowadays does not infringe the Constitution of the Republic of Poland.

Paradoxically, however, the same issues had to be considered by the Constitutional Tribunal, because – even if it regarded the provisions of the Decree from the year 1944 as not having any binding force any more – it had to answer the question of whether the adjudicating on the conformity with the Constitution of the provisions of that Decree „is necessary for the protection of constitutional rights and freedoms” (Article 39 paragraph 3 of the Constitutional Tribunal Act). It was found that no such necessity existed, which seems to be a more general stipulation from what I proposed, namely to presume that the application of the provisions of that Decree was constitutionally admissible today. Therefore, the Tribunal has failed to avoid adopting a position on substantial grounds concerning this case, and its presumption that the Decree has no binding force, compelled the Tribunal to shift to a higher level of abstraction and to argue in support of the proposition, which is doubtful in my own opinion, that there is no necessary relationship between the implementation of the rural land reform and the protection of constitutional rights and freedoms.

For the above reasons I have found it necessary to submit my dissenting opinion.

Dissenting Opinion

of Judge Andrzej Mączyński to the Decision of the Constitutional Tribunal of 28 November 2001, concerning the case Ref. No. SK 5/01

Pursuant to Article 68 paragraph 3 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz.U. No 102, item 643 with amendments) I submit my dissenting opinion, as I do not share the arguments presented to justify the discontinuance of the proceedings and I believe that the case should be considered on the merits of its substance.

The challenged Article 2 paragraph 1 subparagraph e) of the Decree of the Polish Committee of National Liberation of 6 September 1944 (in conjunction with Article 2 paragraph 2 of the same Decree, which was not quoted in the constitutional complaint under consideration) undoubtedly served as the substantive legal basis for

the decisions issued in relation to the plaintiff's case by the Voivodeship Administration in Toruń on 26 November 1996 and by the Minister of Agriculture and Food Economy on 17 February 1998, as well as the judgement of the Chief Administrative Court of 21 July 2000, which was final and closed the proceedings on that case. Therefore, the quoted provision cannot be treated as having no binding force in the meaning of Article 39 paragraph 1 subparagraph 3 of the Constitutional Tribunal Act, especially when the Constitutional Tribunal upholds (quite rightly) the position that even a provision explicitly repealed maintains its binding force so long as it may still be applied. I remind that in the resolution of 16 April 1996 (*Ref. No. W. 15/95*) adopted by a bench composed of all of its judges, the Constitutional Tribunal not only provided the interpretation of the provision challenged in the present case, but also unequivocally proclaimed, that the provision in question has given rise to legal consequences, which still exist, that it has not been explicitly derogated, and that it can still be applied for the establishment of legal effects of events that have occurred in the past (Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 2/1996, item 13, p. 126). After the proclamation of that resolution no fact has occurred, which could justify the adoption of a different position concerning the same issue.

I find that the proposition concerning the „exhaustion of the binding force” of the challenged provision (part II points 4 and 5 of the statement of reasons), caused either following the fact that the deprivation of ownership foreseen by it occurred by the very virtue of the law, or by the fact that the size of the areas of land subject to the rural land reform specified in it was not supposed to apply to such land holdings, which exceeded this size after its entry into force (which incidentally gave rise to doubts in the initial years of enactment of the Decree), is not only completely lacking any supporting grounds in any provisions of the law, but also I regard it as highly dangerous, as it deprives the Constitutional Tribunal of the capacity to adjudicate on any provisions that anticipate the realisation of the effects specified by them at a single occasion by virtue of the law as such.

The extensive deliberation by the Constitutional Tribunal on the question of whether and why the challenged provision had „exhausted” or „consumed” its binding force was unnecessary, by the way, as owing to the content of Article 39 paragraph 3 of the Constitutional Tribunal Act, it was unavoidable to pronounce a position on whether the examination of the conformity of that provision to the Constitution was necessary for the protection of constitutional rights and freedoms, the infringement of which was claimed in the constitutional complaint. I could approve the parts of the justification concerning that issue (part II point 6) if the matter only concerned such property, which after its acquisition by the State Treasury was subsequently assigned to physical persons by the procedure enacted by the Decree on rural land reform, but not any more in the case of those real estate properties, which still constitute assets of the state. I stress by the way, that the rural land reform did not consist in the expropriation of real estate property to the benefit of the State Treasury, as the Constitutional Tribunal seems to presume, but above all in assignment to individual farmers, whereby the act of assignment issued on the basis of the same Decree provided the title for the acquisition of the respective ownership rights (see e.g. A. Stelmachowski, in the collective work entitled: „*Polskie prawo rolne na tle ustawodawstwa Unii Europejskiej*” [Polish Agricultural Law Compared to European Union Legislation, Warszawa 2002, p. 41, 42).

Dissenting Opinion

of Judge Marian Zdyb to the Decision of the Constitutional Tribunal

of 28 November 2001, concerning the case Ref. No. SK 5/01

I. Pursuant to Article 68 paragraph 3 of the Constitutional Tribunal Act of 1 August 1997, I submit my dissenting opinion concerning the above-indicated Decision together with the respective statement of reason. There is no doubt that judgement on the Decree of the Polish Committee of National Liberation of 6 September 1944 on the implementation of rural land reform is difficult from the standpoint of the currently binding Constitution, as it can neither ignore the legislation subsequent to that Decree, nor the effects caused by the same Decree. Moreover, the factor of the lapse of time is also not without significance here, which in conjunction with a negative constitutional assessment of the effects of the Decree, without any appropriate legislative solutions in place, makes the consequences of such a solution utterly unpredictable. This was undoubtedly taken into account by the Tribunal as it pronounced the decision, which I am challenging. Although I share a large part of the motives, which could have provided the grounds for this decision, I absolutely do not share the position contained in the decision adopted as their consequence.

The verdict adopted by this decision gives rise to my reservations, which should be presented in terms of two planes: firstly – the **legal formal one**; secondly – the **axiological one**. The first one, although it refers to the past, may give rise to serious legal problems for the future. The second one, in turn, is of key significance mostly for historical judgements (although not exclusively so).

II. In the present case the legal basis for the discontinuation of proceedings is of key significance. It should be considered independently of any other legal problems linked to the present case. I do not share the view of the Tribunal as to the possibility of declaring the cessation of binding legal force of a normative act giving rise to legal effects by the very virtue of the law alone upon the date of its one-sided consumption, which the Tribunal referred to the challenged provision of the Decree on the implementation of rural land reform. In this regard it is irrelevant whether such consumption takes place at the date of publication of the normative act in the Journal of Laws, or whether it is at some other date specified in the respective legislative act of parliament.

The problem of cessation of the binding force of a normative act seems to be more complex than what was formulated by the Constitutional Tribunal in the quoted decision, especially in the case of normative acts, which foresee emergence at one single time of rights and obligations. They emerge at the time of its entry into force. The stipulation that the date of entry into force of a normative act comprises concurrently the date of cessation of its binding force seems not to be legitimate, both from the point of view of the Decree on Implementation of Rural Land Reform, as well as (and possibly above all) other currently enacted normative acts. The hope should be expressed that the decision concerning the case Ref. No SK 5/01, does not indicate the beginning of such a case law line, which would exclude the ability for acts of this type to be controlled by the Constitutional Tribunal, and it is only the consequence of inadmissibility of adopting decision due to many complex internal and exterior factors, forcing the Tribunal to seek unconventional solutions. Under such circumstances, however, it would be more legitimate to refer to the legal basis of the decision on discontinuation of proceedings as consisting of Article 39 paragraph 1 subparagraph 1.

However, taking into account the risk attached not so much to the present decision, but rather to the possible adoption of a similar philosophy with respect to

future adjudication of the Constitutional Tribunal, I express my objection to such a formula of construing the binding force of a normative act. I do so for a number of reasons:

– First – as in the existing jurisprudence the practice has been established, the essence of which consists of the clearly outlined stipulation (which the Tribunal does not contradict in the decision, which I challenge) that „the interpretation of the expression that a normative act has ceased to have any binding force should lead to the assessment whether the challenged legal act has been removed from the legal order not only in the formal sense, but also whether the repealed provision still generates determined effects for the citizens and whether it may still be applied in practice” (*decision of 13 October 1998, Ref. No SK 3/98, Official Collection of Constitutional Tribunal’s Decisions – OTK ZU No 5/1998, p. 434*). There is no doubt that this Decree still gives rise to legal and actual effects, if only by the fact alone that the consequences of its adoption have not been revoked. These do not expire even at the date of a formal annulment of that act.

– Second – the jurisprudence of the Supreme Court and of the Chief Administrative Court until this date has clearly not subscribed to the presumption of the cessation of the binding force of the challenged act and its provisions. This is indicated by a number of their judgements, such as: the resolution of the Supreme Court of 27 September 1991 (*Ref. No. III CZP 90/91, Supreme Court Civil Chamber’s Decisions – OSNC 1992, No 5, item 72*); the judgement of the Supreme Court of 6 March 1998 (*Ref. No. III CKN 393/97, OSP 1998, No 10, item 171*); the judgements of the Chief Administrative Court of: 2 September 1994 (*Ref. No. II SA 2486/92, OSP 1995, No 10, item 219*); the judgement of the Chief Administrative Court of 2 September 1994 (*Ref. No. II SA 500/94, OSP 1995, No 6, item 126*). Also the Constitutional Tribunal, by adopting two resolutions concerning the interpretation of Article 2 paragraph 1 subparagraph „e” of the Decree (*resolutions of: 19 September 1990, Ref. No. W. 3/89, Official Collection of Constitutional Tribunal’s Decisions – OTK 1990, item 26 and of 16 April 1996, Ref. No. W. 15/95, Official Collection of Constitutional Tribunal’s Decisions – OTK ZU No 3/1996, item 13*), has acknowledged by pronouncing its interpretation that the respective provision is still in force, „as only a provision expressing a norm that is binding on the date of adoption of a resolution by the Tribunal may be the object of a generally binding interpretation”. At the same time, in the resolution concerning the case Ref. No. W. 15/95, it has clearly stated that: „In it’s judicial decisions so far the Constitutional Tribunal has many times expressed the view that formal repeal or amendment of a provision does not always imply the complete cessation of the binding force of the legal norms contained in it, particularly in such sense, that such a provision should be regarded as one still maintaining its binding force, which although it has been formally derogated, it is still applicable to the determination of the effects of the events that took place when that provision was in force. So it should indeed be even more doubtless that generally binding interpretation by the Tribunal was admissible in the case of a provision, which presently may still be applicable to the establishment of the effects of events that occurred in the past, as the provision in question has furthermore not been explicitly derogated by the legislator. Such a provision consists actually of Article 2 paragraph 1 of the Decree on rural land reform, which gave rise to effects, which are still lasting, in the sphere of land ownership rights”.

– Third – it would be oversimplification to adopt the assumption that the binding force of a normative act depends only on the capacity for unilateral individual acts of implementing the law being undertaken on its basis or on the possibility of the general act being consumed by the very one-time action foreseen by it. Under such

circumstances it would seem unacceptable to assume (assuming also the legality of the act concerned) that the Decree on Implementation of Rural Land Reform has ceased to have any binding force, because subsequent to the date of its announcement in the Journal of Laws there could not be and also today there cannot be any expropriation of land for the purposes of rural land reform. The question always is or may be significant, regardless of the issue of the legitimacy of the respective act as such, whether such act was applied to the appropriate addressees, whether it gave rise or could give rise to legal consequences, etc. Therefore, in Article 16 paragraph 1 of the Act of 11 May 1995 on the Chief Administrative Court (Journal of Laws – Dz.U. No 74, item 386 with amendments) in Article 16 paragraph 1 subparagraph 4 the contemporary legislator has allowed the possibility of petitions being filed to the Chief Administrative Court to challenge actions of the public administration concerning the granting, confirmation or recognition of rights or obligations resulting from the provisions of the law.

The problem of the application of the law connected with the issue of the binding force of a normative act is not exhausted by the general or individual executive action of an organ of the state. This is because the problem of the protection of the rights of the subjects being the addressees of acts of such nature still remain. To recapitulate, it needs to be stated that the issue of the application of the law cannot always be separated from the effects of the impact of a normative act.

– Fourth – normative acts that entail rights or obligations by virtue of the law as such and just once, at the point in time when they are published, may cause at most a unilateral form of consumption of the normative act. This implies only so much, that the will of the lawmaker was, for example, to structure obligations with a specific content, and that these arise upon the moment of publication of the respective normative act. Under such circumstances, the presumption of equivalence between the unilateral consumption of the normative act and the cessation of its binding force seems to be inadmissible. Legal relationships, regardless of whether they are created by virtue of the law or as the consequence of an individual act of application of the law (a court ruling, an administrative decision, etc.), do not lose their bilateral nature. Their essential element consists also of the other counterpart of the legal relationship, i.e. the addressee of the general normative act, at whom it is directed or the addressee of an individual act. Indeed, it cannot be presumed that any normative or factual statement or action of the organs of the state results in exclusively unilateral consequences. The Decree on Implementation of Rural Land Reform (if the question of the assessment of its legitimacy and of the legitimacy of the organ that issued it is put aside) cannot be treated any differently. Therefore, also in the case of this Decree the legal provision foreseeing the emergence of determined legal effects at the time of its issuance (Article 2 paragraph 1 subparagraph „e”) could not cease to have binding force from the moment of proclamation of that Decree. A different philosophy of conceiving this would have implied the uncritical acceptance of the methods of operation of public organs of that time, the consequence of which not infrequently was a unilateral tirade of the public power in relation to a citizen. Even if for a number of legal and factual circumstances it may be regarded as impossible to reverse all or most of the legal effects of the challenged provision of the Decree – with full awareness of the problems concerning its legitimacy – it seems to be inadmissible to formulate propositions, which would create the possibility of applying today the patterns of operation from that past period.

– Five – the complexity of the legal problems linked to the cessation of binding force makes it very difficult to indicate the moment when a normative act, which has not been derogated, loses its binding force. Theoretically such situations are possible.

Also in the practice of the application of the law one could indicate examples of the existence of such legal conditions. Undoubtedly, from this point of view one could also speak of the institution of *desuetudo*. Nevertheless, only derogation creates a reasonably perceptible frame of reference. A new normative act repealing the previous act creates a new quality in relation to the derogated act. One can say that the derogating act absorbs to a certain extent, and sometimes takes over or eliminates the legal consequences of the derogated act. In any case it determines the legal fate of the legal relationships shaped on the basis of the derogated normative act. But even then it does not necessarily have to imply the complete cessation of its binding force. Undoubtedly, in relation to the challenged provision one could indicate at least partial manifestations of derogation, consisting in the consequences of the subsequent laws. In order to establish such a fact it would be necessary to identify clearly and fully such acts. One cannot assume, however, that the challenged provision or the Decree on Implementation of Rural Land Reform as such was derogated in its entirety. The Act of 12 March 1958 on Selling of State-Owned Rural Real Estate Properties and Putting into Order of Certain Issues Connected with Implementation of Rural Land Reform and Settling of Territory with Farmers, as well as the Act of 26 October 1971 on Regulation of Ownership of Properties of Agricultural Farms, solved only a part of the problem, and namely that concerning the ownership titles indicated there, but they did not determine the other remaining issues in this regard, owing to the doubts as to the form of take over of the real estate properties on the basis of the Decree on Implementation of Rural Land Reform. This applies also to a number of other laws. This implies that one certainly cannot undermine the ownership titles of farmers or owners of real estate property taken over in the western regions of Poland. However, it is necessary to resolve the issue of the original legislative grounds for the take over of the land in question, and in this regard one possibly ought to discontinue the proceedings on the basis of Article 39 paragraph 1 subparagraph 1, but in no case due to the extinction of the Decree upon the date of its publication.

– Six – separate treatment is required by the problem of the so called loss of binding force of Article 2 paragraph 1 point „e” of the Decree, and also owing to the important constitutional values involved, which should not be conceived as being tantamount to the very fact of the loss of any binding force, but rather to the inadmissible or impossible animation of the legal status from the time preceding the adoption of the Decree. Such framing of the issue would have had to lead not so much towards the establishment of the loss of binding force as to the recognition of the existence of causes justifying the inadmissibility of adjudication, especially in the situation of passive behaviour by the legislator.

It should also be remembered, however, that even the derogation of the normative act does not always lead to the complete cessation of the binding force of the derogated act. In the jurisprudence of the Constitutional Tribunal the conviction has become durably sustained that even the repeal of a normative act is not always equivalent to the cessation of the binding force of such an act (see: *Ref. No. U. 13/97*). In order to establish that the challenged normative act has ceased to have any binding force it is necessary to determine that it cannot bear any further impact upon any actual factual state neither present nor future, and therefore that it does not give rise to any new legal effects. As a rule, a factor of decisive significance in this regard consists of the content of the derogating norm (see: *decision of 27 March 1996, Ref. No. U. 7/95*, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 2/1996, p. 116-117; *judgement of 24 September 1996, Ref. No. K. 13/95*, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 4/1996, p. 290; *decisions of: 19 February 1997, Ref. No. U. 7/96*, Official Collection of

Constitutional Tribunal's Decisions – OTK ZU No 1/1997, p. 81; 30 September 1997, Ref. No. U. 8/97, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 3-4/1997, p. 385 and resolution of 14 September 1994, Ref. No. W. 5/94, Official Collection of Constitutional Tribunal's Decisions – OTK 1994, Part II). Legal relations and legal effects shaped on the basis of a specific legal condition, regardless of whether the act providing their basis formally continues to have binding force, or whether it has been derogated, if the law does not provide otherwise, are then subject to evaluation from the point of view of their legality or conformity to the Constitution. As long as the effects of a normative act may be the subject of assessment, as long and within such scope it maintains its binding force.

– Seven – great significance is attached in the context of the present case to the content of Article 39 paragraph 3 of the Constitutional Tribunal Act, which allows for the possibility of review from the point of view of conformity to the Constitution also of such normative acts, which have lost their binding force prior to the issue of judgement, if that is necessary for the protection of constitutional rights and freedoms. In the present case, this basically does not allow for the grounds for discontinuation of proceedings due to cessation of the binding force of the provision considered, as even if it would have occurred, that provision would have qualified for scrutiny anyway, because it concerns the constitutional rights of the individual. So if the proceedings on the present case were to be discontinued, this would undoubtedly have to be done for reasons other than the cessation of binding force, because such cessation in the present case does not eliminate the possibility of scrutiny of Article 2 paragraph 1 subparagraph „e”, owing to the contents of Article 39 paragraph 3. The arguments raised in the statement of reasons of the courts behaviour point at the inadmissibility of adjudication (if the argumentation of the Tribunal referring to the inability to apply Article 39 paragraph 3 of the Constitutional Tribunal Act to this case is taken into account) or they speak in favour of substantive consideration of the case on its merits. It seems, that if substantive examination of the conformity to the Constitution of the challenged provision were conducted and the Tribunal would recognise the lack of adequate legitimacy of the Decree and of the organ, which issued it – then taking into account the overall circumstances of the case, the basic values contained by the Constitution currently in force, and especially the weight of the problems, which would have been generated by questioning the consequences of the Decree, it could maintain the position of the irreversibility of its effects. Security of the legal relations requires such treatment also in relation to episodic acts. Undoubtedly, the necessity to adjudicate on such acts as the Decree on Implementation of Rural Land Reform – as the respective action was neither undertaken by the normal legislator, nor by the constitutional lawmaker, it requires a creative approach on the part of the Tribunal. This results in the necessity, however, to apply such legal instruments, which would not create precedents likely to have a negative bearing on the future, especially on the evaluation of other episodic normative acts.

– Eight – the adoption of the principle ruling out the review of conformity to the Constitution of episodic normative acts, providing the basis for the emergence of rights and duties by virtue of the law, would give rise to a number of serious threats to the principle of the democratic state ruled by law. Hence, according to my belief, this approach is not legally valid from the point of view of the Constitution of the Republic of Poland, i.a. because:

1) Neither in Article 188, nor in any other of its provisions, the Constitution of the Republic of Poland does exclude from the control of the Constitutional Tribunal any category of laws (or any other normative acts specified in Article 188). The

adoption of the proposition formulated in the challenged decision of the Tribunal may give rise, at least potentially, to the very real risk of division of the laws into two categories: those, which are controlled by the Tribunal, and those which are not subject to such control, without any clear constitutional grounds for this. A category of normative acts (laws) could thereby arise with a status, which is unknown to the Polish lawmaker;

2) In this context the temptation might seem to be real for the lawmaker to seek to adopt episodic acts, which become consumed once at a single specified date. Such risk seems also to be possible with respect to acts secondary to legislation that are issued by the central organs of the state. The lawmaker could turn a principle structured as above into an instrument of evading the control of constitutional conformity of legal acts issued by it. If such acts did not concern the constitutional rights and freedoms, one would also be unable to take advantage of the possibility foreseen by Article 39 paragraph 3 of the Act (the possibility to adjudicate on a normative act, which has ceased to have binding force, but concerns the above indicated rights and freedoms). But also in the case of the rights and freedoms, if the arguments of Tribunal concerning Article 39 paragraph 3 in the decision that I question were accepted, such protection could be weakened or even ruled out;

3) Doubts would certainly arise as to when and if a given act has actually become consumed concurrently with the moment of its adoption (as was the case with the Decree from 1944, which referred also to the Polish territories being under the German occupation, in relation to which their status could have been shaped differently than what was anticipated by the Polish Committee of National Liberation, as actually they were not within the limits of its power at the time);

4) Excessively frequent use of the ability to adopt episodic normative act would be a threat to the legal order and the fundamental principles of the state ruled by law. The legislator, wishing to avoid the review of the conformity to the Constitution of an act would excessively revert to adopting laws consuming themselves upon the date of their adoption, or at some other precisely defined date, especially when there would be existing reasons for challenging them on the grounds of their non-conformity to the Constitution. Assuming a narrow interpretation of Article 39 paragraph 3 of the Constitutional Tribunal Act, this could even lead to the undermining of fundamental constitutional principles and „legislative lawlessness”. Anyhow, Article 39 paragraph 3, taking into account the fact that it is only a legislative provision which can be repealed or amended by the legislator any time, does not provide sufficient protection against the indicated potential threats;

5) Recognition that there is a possibility of complete consumption of normative acts and the cessation of their binding force at the time of their publication would lead to the weakening, and possibly to the deprivation of protection of legal interests of the addressees of such kinds of acts. In this context the contents of Article 16 paragraph 1 subparagraph 4 of the Act on the Chief Administrative Court would become incomprehensible. In this context it seems to be necessary to note also one further important circumstance, which is attached to the restrictive understanding of the binding force of a normative act, which is unjustified in my opinion. The matter concerns the possibility to revoke a constitutionally deficient normative act challenged before the Constitutional Tribunal, prior to the issue of the judgement on its unconstitutional nature, in order to avoid the negative consequences of a ruling of the Tribunal. In the past such situations have indeed taken place, especially in relation to secondary normative acts. This enabled to maintain the effects of a deficient legal act. This kind of practices, however, were prevented by the jurisprudence of the Tribunal, which defined the binding force of a normative act in broad terms.

For the reasons presented above I do not share the position of the Tribunal concerning the grounds for the discontinuation of the proceedings in the present case.

II. In terms of the second plane – it should be stated that the solution adopted in this decision actually leads to the indirect attribution of legitimacy both of the Polish Committee of National Liberation and of the challenged provision of the Decree, and as a further consequence of the entire Decree on Implementation of Rural Land Reform. It is my belief – which finds justification in what is indicated by the sources concerning the establishment of the Polish Committee of National Liberation and its authorisation to issue Decrees with binding force equivalent to laws – that both the Polish Committee of National Liberation and the Decree on Implementation of Rural Land Reform adopted by it did not possess the appropriate constitutional legitimacy. Such a conclusion emerges both when this problem is analysed from the point of view of the presently binding Constitution of the Republic of Poland, and of the Constitution of 17 March 1921, which according to the Manifesto of the Polish Committee of National Liberation of July 1944 was supposed to be the basis for the activities of the National People's Council (KRN) and of the Polish Committee of National Liberation, as well as of the April Constitution, which was formally binding at the time of adoption of the Decree on Implementation of Rural Land Reform. Indeed, no authorised and sovereign body expressing the will of the Polish nation had repealed the April Constitution. The paradox of the situation at that time consisted in the fact, that at the initial moment of elimination of the German occupation on the territory of the Republic of Poland, the act defining the status of that so called lawmaking power (KRN) and the basis of its operation (involving the indication of the March Constitution) was the Manifesto of the Polish Committee of National Liberation [PKWN], and therefore an act of an organ, which was supposed to be an „organ of executive power”. A dozen or so days later the National People's Council, referring to the March Constitution, but without indicating any specific basis, adopted the Act of 15 August 1944 on Interim Procedure of Issuance of Decrees with Binding Force Equivalent to an Act (Journal of Laws – Dz.U.RP No 1, item 3), in which it authorised the PKWN to issue Decrees with the binding force of acts of parliament. There is no doubt, therefore, that under these circumstances there were facts taking place of certain organs being endorsed as being „legitimate” by other bodies, which were not adequately legitimate themselves, and all this was coupled with reference being made to a Constitution, which was had no binding force (without properly respecting its purport, either). A completely separate problem consists of the way the PKWN was established both in formal terms and from the point of view of sovereignty of the will of the entity that established it.

Also the Decree on rural land reform adopted by the Polish Committee of National Liberation foreseeing the specific form of expropriation did not have any legal basis in the March Constitution and no such basis in the April Constitution. It seems that this fact cannot be overlooked and left unmentioned, even if this were only to imply a historical – legal judgement. Without that kind of establishment of facts and their evaluation, the foundations of the state ruled by law principle since 1989 become obscure. The attitude adopted with respect to the Decree on Implementation of Rural Land Reform has broader implications, as it always has some bearing upon the axiological assessment of other acts from the same period, the legitimacy of which could be doubtful. This is of essential relevance especially in relation to such acts, the application of which was combined with unlawful deprivation or limitation of fundamental rights. The Polish citizens, who were affected by such acts, deserve at

least moral satisfaction for the harm suffered, even if material compensation is not feasible.

There is no doubt that through such assessment a particular catharsis of the law developed in that way is accomplished, which is necessary for the authority of the currently enacted laws. The simple statement that the Decree has ceased to have any binding force, evading the above formulated considerations, may lead to the conviction that any law, which originates from someone who exercises even only actual power, is properly made legitimate. In this way one could presume that they cannot be subject to any legal judgement, if at some date they were consumed, including also such „normative acts” as ones allowing genocide, foreseeing the extermination and annihilation of the population, or other „inhuman” pseudo-acts adopted in totalitarian systems. As the effect, this could lead to justification and tolerance of various manifestations of „statutory lawlessness”, not only in the past, but perhaps also in the future.

Historical and legal data demonstrate the Decree on rural land reform was not a normative act of any sovereign legislative power, and the KRN and PKWN were not created as the result of the will of any sovereign over them, i.e. the Polish nation, adequately legitimised and expressed in the appropriate legal form. They were not any constitutional institutions, therefore. The full assessment of the lack of sovereignty and legality of the PKWN, as well as of the effects of the acts proclaimed by it – due to their consequences and scope – should be performed with the appropriate active involvement of the contemporary democratic lawmaker of the present political system.

In the context of the legal problem being settled here, which is connected with the Decree on Implementation of Rural Land Reform, one cannot fail to observe that regardless of a negative opinion on the very legitimacy of the respective organ and of the law enacted by it, important weight is also attached to the evaluation of the effects of these acts. The negative axiological view concerning the law of that time as well as its formal legitimacy, most often cannot lead today to the questioning of its effects as such today. Various circumstances may be found as the grounds for such stipulation. The following could be included:

– First – the circumstance that in spite of the non-constitutional nature of the PKWN – the Decrees which it issued functioned in the Polish legal system with effects such as acts of parliament, and if only for that reason they were subject to the generally binding interpretation determined by the Constitutional Tribunal. „In the present case it is significant – as the Tribunal stated in the resolution concerning the case Ref. No. W. 15/95 – that the authors of the Decree were seeking to cause the legal effects specified in its text, which effects were subsequently respected – explicitly or implicitly – by the legislator functioning at a later time, which was reflected by the amendments to the Decree (which was thereby treated as a source of the law), or in legislative delegations to its provisions (e.g. in the Act of 13 July 1957 and in laws adopted after that date)”;

– Second – the circumstance that in relation to many (but not all) situations and effects connected with the application of the Decree on Implementation of Rural Land Reform these were directly or indirectly legitimised by the subsequent legislation, the conformity of which to the Constitution has not been challenged. New normative frames of reference were created thereby, as well as completely new configurations of legal effects;

– Third – the respecting of the consequences of the Decree by the Polish legislator and at a later period by Polish legislation, both that from before 1989 (as the date of initiation of political system transformations and of the change of the

Constitution introducing the principle of the state ruled by law) and also after that date. The silence of the legislator and of the constitutional law maker over the 12 years of the Third Republic of Poland in this respect did not imply, which needs to be clearly stressed – any legitimacy of that law, and also the negation of the effects thus created. One may only presume that it was probably indeed the inability to deal with the effects of such kinds of acts that determined the passive attitude of the legislator.;

– Fourth – the complexity of legal problems connected with the actual state shaped by the Decree, which, without a system oriented interference of the legislator, makes it impossible today to verify them. For the same reason the possibilities available to the positive legislator also seem to be limited. The circumstance that the effects of the Decree reach very deeply into the sphere of present ownership relations and the sphere of rights properly acquired, may make it impossible to undermine them. The payment of compensation on such a large scale, on the other hand, exceeds the capabilities of the state, when all of its obligations are taken into consideration, and especially the duty to maintain the balance of the budget;

– Five – the questioning of the effects of the Decree of other acts from the same period could lead to chaos, which could be difficult to cope with. It could even give rise to a threat of disintegration of the legal system. Above all, it would generate the problem of never ending court suits. The inability to meet the respective claims and the inability to pay the possible compensation amounts would provoke the feelings of helplessness both on the part of the state and of the former owners. This could weaken the performance of the current tasks of the State. The inability to execute the decisions of state organs would also lead to weakening of its authority;

– Six – The problem of liability for the damages caused by the authorities that were lacking proper legitimacy also seems not to be without significance. This issue seems to be a very difficult and complex one, as the responsibility extends to some degree, regardless of the responsibility of the political forces symbolising the communist rule, also to the USSR of that time, which attempted to empower these forces, and also to the western states, which having the capacity to influence the shape of post war realities accepted the arrangement which emerged. In this context the question could arise, why the consequences of that state of affairs should be borne exclusively by the Third Republic of Poland, the citizens of which did not directly legitimise the Decree on rural land reform or any other such so called revolutionary acts. The presumption of consent from the (sovereign) nation for the adoption of that type of acts would be both a formal and substantial oversimplification;

– Seven – the questioning of the consequences of the Decree, would give rise to the necessity to resolve the problem of material compensation due to other social, professional and other groups, which were unfairly harmed by the communist system. Undoubtedly and in the first order of priority this problem would concern the families of the persons who were murdered, illegally imprisoned, persons who lost their health or their relatives as a result of their persecution, who were exposed to having their dignity humiliated, who were deprived of the ability to earn a living or to perform certain professions, etc. In the context of the loss of property, the issue of the loss of life or health, of the ability to earn a living, etc., stands out very strongly. It should be remembered that the consequences of the payment of compensation would also be borne by such persons. This would imply that yet another time such persons would be bearing the consequences of illegal or insufficiently legitimate actions of the organs of communist power. It is not without significance in this context, who should have the priority to receive compensation;

– Eight – Without the interference of the positive legislator the solution of just one problem connected with compensation for the past injustice would provoke a

spiral of claims concerning the lawless actions, which had been caused by the totalitarian communist system, claims that owing to their scale, duration, contribution of the external factor, could turn out to be impossible to satisfy. There is no doubt that the system oriented resolution of this problem requires also the full assessment of the responsibility of the persons, institutions and states, which contributed to the creation or shaping of such a system. Undoubtedly this would also require the judgement of those who supported or even shaped such a system. This concerns, for example, the former USSR. Moreover, it would not always be possible to exculpate the actions of the western states, which several times – indirectly or directly – contributed to the development of such a reference framework, which could enhance the implementation of actions contributing to the violation of fundamental rights of the Polish citizens.

Taking into account the above state of affairs, and therefore the unconstitutional or non-constitutional character of the Decree on Implementation of Rural Land Reform, and at the same time also the consequences, the reversal or repair of which, e.g. by appropriate material compensation, is impossible for the above indicated reasons, such a solution should be adopted as justified, which would not generate threats to the legal order for the future. Given the negative judgement on the constitutional aspect of the Polish Committee of National Liberation and the Decree, which it issued, two solutions would be legally justified. First – to recognise the lack of appropriate legitimacy of the Polish Committee of National Liberation and of the Decree that it issued, and at the same time to recognise, that due to important constitutional values it is not possible to reverse the effects of that act, unless the democratic lawmaker himself has decided otherwise. This problem would not apply to those situations, which were not covered by the scope of the Decree. Secondly – it would also be admissible, due to the consequences indicated in the present dissenting opinion, to discontinue the respective proceedings, but on the grounds of Article 39 paragraph 1 subparagraph 1. Both solutions would in essence lead to the same legal consequences and, what is significant, would not avoid answering the questions concerned with issues of substance, including the question concerning the legitimacy of the Polish Committee of National Liberation and its Decree on the implementation of rural land reform.