

**DECISION**  
of 24 October 2001  
**Ref. No. SK 10/01**

**The Constitutional Tribunal, in a bench composed of:**

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

having considered at he sitting in camera on 24 October 2001 constitutional complaints of Antoni Cz. and Maria L. seeking to determine that Article 2 paragraph 2 of the Act of 31 May 1996 on compensation payments for labour camp prisoners and forced labourers deported to the Third Reich and the Soviet Union (Journal of Laws – Dz.U. No 87, item. 395 with subsequent amendments) does not conform to Article 32 of the Constitution of the Republic of Poland

decides as follows:

**to discontinue proceedings on the grounds of the inadmissibility to pass a judgement.**

Statement of Reasons:

**I**

1. Two constitutional complaints were lodged with the Constitutional Tribunal by Antoni Cz. and by Maria L. with a request to determine that Article 2 paragraph 2 of the Act of 31 May 1996 on Compensation Payments for Deported Forced Labourers and Labour Camp Prisoners in the Third Reich and the Soviet Union (Journal of Laws – Dz.U. No 87, item. 395 with subsequent amendments; further: Act of 31 May 1996) does not conform to Article 32 of the Constitution of the Republic of Poland.

The constitutional complaints were lodged against a background of the following facts of the case:

In a decisions of 3 March 1998 and of 24 September 1997, respectively, the head of the Office for War Veterans and Victims of Repression on the basis of Article 1 paragraph 1 and

Article 4 paragraphs 1 and 2 of the Act of 31 May 1996 refused to grant rights to a compensation payment to the complainants. Justifying the decision, the head of the Office quoted Article 2 paragraph 2 of the Act of 31 May 1996, under which the repression in the understanding of the Act of Parliament is the deportation to forced labour for a period of at least six months from the territory of Poland, in its borders of before 1 September 1939, to the territory of: a) the Third Reich and lands occupied by it during the war in 1939-1945, b) the Soviet Union and lands occupied by it from 17 September 1939 to 5 February 1946 and after that by the end of 1948 from the territory of Poland in its present borders. The head of the Office ascertained the failure to meet the prerequisites defined in this regulation in both cases. The decisions were maintained in force by the decisions of the same organ, of 8 June 1998 and 3 February 1998, respectively. The complainants appealed against the decision to the Chief Administrative Court (NSA). The NSA in its verdicts of 6 June 2000 (*Ref. No. II SA/Ka 1316/98*) and of 9 May 2000 (*Ref. No. II SA/Po 672/99*) dismissed the complaints, ruling that the challenged decisions are in conformity to the law.

According to the complainants, Article 2 paragraph 2 of the Act of 31 May 1996 divides Polish citizens in an unjustified way into two categories depending on their place of residence, with only one of these categories granted by the legislator a right to compensation payments for forced labour, despite the fact that persons belonging to the two groups suffered the same repression. The complainants claimed that such differentiation did not have any substantive justification and thus breached the principle of equality.

The President of the Constitutional Tribunal in an ordinance of 13 March 2001 decided on joint cognisance of these two constitutional complaints.

2. Taking a position on the constitutional complaints, the Public Prosecutor-General said that Article 2 paragraph 2 of the Act of 31 May 1996 did not conform to Article 32 of the Constitution of the Republic of Poland.

The Public Prosecutor-General based the substantiation of his position on the following arguments:

The objective scope of the Act of 31 May 1996 covers persons that in the time of being subject to repression – defined in the Act – were Polish citizens and are Polish citizens at present, having a place of permanent residence on the territory of the Republic of Poland (Article 1 paragraph 1 of the Act of Parliament) with limitations specified in Article 1 paragraphs 2 and 3 of the Act. These limitations are to prevent the cumulation of the compensation payments for those eligible on the basis of the Act being reviewed, with extra payments to be received on the basis of other acts of parliament quoted in Article 1 of the Act of 31 May 1996.

Article 2 of the Act of 31 May 1996 enumerates the kinds of repression whose victims are eligible to seek a compensation payment defined in the Act. Analysis of the provision of this Article leads to the conclusion that the premises of it are of qualified nature. In the understanding of this Act, repression is not the very fact of forced labour but using this compulsion in a more severe form is.

The essence of the problem in the present case boils down to judging whether the selection by the legislator of a criterion in the form of deportation to forced labour with the limitation that the deportation had to take place from the territory of Poland and beyond its borders breaches the constitutional principle of equality.

It is not the objective of this Act to make up for all wrongs suffered by Polish citizens in effect of repression used against them during the last war and in the post-war period. In its very assumption the provision being reviewed covers a limited circle of persons. The legislator decided that a special kind of repression, that is being a labour camp prisoner and a deportee to forced labour by the Third Reich and the Soviet Union, should be a significant

feature of a selected group of entities. In relation to the second kind of repression, the legislator in the purport of Article 2 paragraph 2 of the Act of 31 May 1996, assumed that the deportation in the understanding of the Act is only the deportation from the territory of Poland and only beyond this territory. Such delineation of deportation borders leads to the situation where a type of repression ceases to be a decisive criterion for acquiring a compensation payment specified in the Act, with a place from which or to which the deportation took place, becoming such a criterion. The effect of using such a criterion constituted unjustified and therefore unfair differentiation of persons that are in the same situation, that is deported to forced labour by the Third Reich and the Soviet Union. Such a way of defining deportation borders does not find substantive justification and contradicts the purpose of the Act.

In addition, limited financial possibilities of the state whose budget is burdened with payments of compensations specified in the Act of 31 May 1996, cannot lead to drawing up legal regulations that deprive some groups of citizens of a right to these payments in an arbitrary way.

3. On the basis of Article 51 paragraph 2 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz.U. No 102, item 643 with subsequent amendments) in the present case, the Commissioner for Citizens' Rights joined the proceedings before the Constitutional Tribunal. In a written statement, the Commissioner for Citizens' Rights said that Article 2 paragraph 2 of the Act of 31 May 1996 does not conform to Article 2 and Article 32 of the Constitution of the Republic of Poland..

The Commissioner for Citizens' Rights based the substantiation of his position on the following arguments:

Compensation payments for forced labour for the Third Reich were not granted to all Polish citizens that suffered repression in special conditions (deportation to forced labour for over 6 months) but additional conditions were introduced, making the right to such compensation dependent on the place of residence in the territory of Poland before the deportation and on the place where forced labour was done. The acceptance of such criterions, differentiating the right of deportees to a compensation payment, is not supported by convincing arguments. According to the jurisdiction of the Constitutional Tribunal, such arguments must have a relevant and proportional character and have to be connected with other constitutional values, principles or norms. But the introduction of provisions, challenged in the present case, has no direct connection with the purport of the regulations on compensation payments for deportees because it deprives of a right to compensation payments persons that did forced labour in similar conditions. It cannot be proved, either, that the differentiation remains in an appropriate proportion to the weight of breached interests.

A right to compensation should be determined only by special conditions of repression, connected with deportation. The challenged regulation leads not only to the discrimination of those deportees whose deportation did not take place on the territory of Poland, or whose place of forced labour was not in the territory of the Third Reich, but also to breaching the principle of social justice.

## II

The Constitutional Tribunal considered the following:

1. Under Article 79 paragraph 1 of the Constitution, a constitutional complaint may be lodged by „everyone whose constitutional freedoms or rights have been infringed”. This means that not every infringement of the Constitution represents a condition of admissibility for lodging a constitutional complaint, but only the infringement of provisions expressed in it

that regulate human and civic freedoms and rights. A constitutional complaint has then to indicate both a specific person, whose freedoms or rights were breached, and which of the definite freedoms and rights (guaranteed, ensured, protected) in the Constitution were breached and in what way. This means that the adjudication by the Constitutional Tribunal is admissible only in the situation where, in a specific case, constitutional freedoms or rights were breached, and a person that lodged a constitutional complaint had based it on the statement that such freedoms and rights he/she enjoyed were breached. What is at issue here is the infringement made in a qualified way – namely by a final verdict of a court or a public administration organ with the verdict deciding about constitutional freedoms, rights and obligations of the complainant. This latter aspect was expressed in a proceedings point of view in Article 47 paragraph 1 paragraph 2 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz.U. No 102, item. 643 with subsequent amendments), which requires that a complainant should indicate in a constitutional complaint what constitutional freedoms or rights were breached in his/her opinion. It follows that a charge of breaching constitutional freedoms or rights should be adequately specified by the complainant (*the Constitutional Tribunal decision of 25 October 1999, Ref. No. SK 22/98*, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 6/1999, item 122) both in the subjective and objective aspect. A significant feature of accusatorial procedure before the Constitutional Tribunal accepted in the Polish law is that the review of the provisions challenged by the complainant is conducted exclusively from the point of view indicated by the complainant of the so-called constitutional model, that is not any provision of the Constitution, but only such which regulates some freedom or right. For this reason specification of a constitutional model in the text of a constitutional complaint has a considerable substantive, legal and procedural significance. The wording of the final part of Article 79 paragraph 1 of the Constitution also states that a regulation that is the basis of these freedoms or rights which were the subject of a final decision issued in the case of the complainant by a court or a public administration organ can be a constitutional model.

In the light of the regulation of a constitutional complaint accepted in the Polish law it is necessary, first, to clearly indicate in the text of the complaint what freedoms or rights were breached (and in what way), second – to prove that a complainant is a subject of a given freedom or a given right, third – that the freedom or a right have a constitutional rank, i.e. that it is based on a constitutional provision. The indication of constitutional solutions (institutions, principles) that do not meet these provisions, makes the complaint (or rather its examination) inadmissible, regardless of whether the Constitution was breached in the situation of the complainant, or even whether his/her constitutional freedoms or rights were breached that were not indicated in the constitutional complaint. The infringement of rights based on subconstitutional legislation cannot constitute the basis for a constitutional complaint (*Constitutional Tribunal's judgement of 8 June 1999, Ref. No. SK 12/98*, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 5/1999, item 96). Such rights may be protected in some other way (see e.g. Article 208 paragraph 1 in connection with Article 80 of the Constitution).

On the other hand, inappropriate indication in a specific case of a freedom or a right covered by constitutional protection, meets the above formal prerequisite but may determine the obvious groundlessness of a complaint or – as a further effect – an (unfavourable for the complainant) ruling as to the substance of the case.

It should be stressed that in line with the construction adopted in the Polish Constitution the very taking into consideration by the Constitutional Tribunal of charges contained in a constitutional complaint does not eliminate the effects of the infringement of constitutional freedoms or rights of the complainant. This can only be done in effect of reopening of proceedings, the reversal of a decision or other ruling made in a specific case (Article 190

paragraph 4 of the Constitution). A direct effect of a Constitutional Tribunal decision on the non-conformity of the provisions challenged in a constitutional complaint to the Constitution is the deprivation of the provisions of their binding force. Therefore, on this plane a judgement made in the proceedings instituted on the basis of a constitutional complaint has identical effect as a judgement made in the proceedings instituted on the basis of an application or a legal question. Identical effects of a decision on non-conformity to the Constitution, issued in proceedings instituted on the basis of an application, legal question and a constitutional complaint, does not cover up a particular character of a constitutional complaint as an instrument serving to protect constitutional freedoms and rights by the elimination from the legal order of the provisions that do not conform to constitutional models defining these freedoms and rights.

2. Before judging every constitutional complaint referred to it, the Constitutional Tribunal must examine whether the complaint meets admissibility prerequisites mentioned above. In the present case the complainants cited Article 32 of the Constitution as the only model for review. That is why the Constitutional Tribunal deemed it necessary to consider whether the charge of infringing only this constitutional norm may justify the lodging and, in consequence, the examination of a constitutional complaint. In the to-date jurisdiction of the Tribunal the matter received a varied treatment.

Tackling the problem of Article 32 of the Constitution as the grounds of the right protected by means of a constitutional complaint, it should be noted at the beginning that the language analysis of the text of the regulation has no decisive meaning since the expressions used by the constitutional legislator may suggest that what is at issue is a right, and a norm of an „objective right”, which are the basis of „subjective rights” of an individual. According to the Constitutional Tribunal, the normative purport expressed in art 32 paragraph 1 of the Constitution would not be changed if the text of this regulation was formulated without using the noun „right”.

Also the systemic interpretation does not provide an argument that would unambiguously resolve the problem under consideration. Article 32 of the Constitution was placed by the legislator in Chapter II, concerning human and civic freedoms, rights and duties but was placed in the sub-Chapter titled: *General principles*, preceding a catalogue of specific freedoms and personal, political, economic, social and cultural rights. This may suggest that we are dealing here first of all with certain general assumption (general principle) relating to the realisation of freedoms and rights of an individual mentioned further on, the principle „taken out of reckoning”. This principle means first of all that all people are equal „in dignity, freedom and rights,” referred to in other provisions of the Constitution and that discrimination in the realisation of these freedoms and right is inadmissible. Equality in the constitutional understanding does not have an abstract and absolute character, and in line with the common assumption does not mean the identity of rights of all individuals. Equality (the right for equal treatment) always functions in a certain situational context, must be referred to bans and orders or granting rights to some individuals (groups of individuals), in comparison with the status of other individuals (groups). Equality does not mean the same factual and legal situation of everybody, but it consists in „the same ability to various rights” (A. Esmein, *Prawo konstytucyjne*, [*Constitutional law*], translated by W. Konopczyński, K. Lutostański, Warszawa 1921, p. 427). At the same time Article 32 paragraph 1 of the Constitution refers both to law applying (all people are equal before the law) and law making (a right for equal treatment by public authorities, including legislative bodies). The first aspect of the issue remains beyond the scope of the present case, what is significant here is the problem of infringing the principle of equality by the legislator.

In doctrinal studies, concerning both the constitutional and international law, equality before the law is mainly treated in the categories of principles relating to human rights, rather than norms creating right of a constitutional character. The principle of equality is defined as a directive addressed to state organs banning to make legal provisions that discriminate or grant privileges to certain persons by groundless differentiation of their legal situation. In this context it is even stressed that „from the principle of equality no rights for citizens result” (S. Wronkowska, M. Zieliński, Z. Ziemiński, *Zasady prawa. Zagadnienia podstawowe* [Principles of law. Basic questions], Warszawa 1974, p. 130; A. Michalska, *Prawa człowieka w systemie norm międzynarodowych* [Human rights in the system of international norms], Warszawa-Poznań 1982, p. 89). In the studies of a textbook type, the problem of equality is as a rule discussed outside the catalogue of individual freedoms and rights, that is equality is treated as a principle concerning the entirety of freedoms and rights. Defining the notion of constitutional freedoms and rights, the doctrine specifies that these are legal situations of natural persons (or other private entities) that were determined by constitutional norms. A conclusion follows that the Constitution should define: the eligible subject, the obligated subject, the content of the obligation weighting on the obligated subject and circumstances in which a given subject is to fulfil a definite obligation. These elements may be specified *expressis verbis* in the text of constitutional regulations or by way of interpretation (K. Wojtyczek, *Ochrona godności człowieka, wolności i równości przy pomocy skargi konstytucyjnej w polskim systemie prawnym* [Protection of human dignity, freedom and equality by means of a constitutional complaint in the Polish legal system] [in:] *Godność człowieka jako kategoria prawna* [Human Dignity as a legal category], edited by K. Complaka, Wrocław 2001, p. 202, opting for admissibility to base a constitutional complaint exclusively on the charge of the infringement expressed in Article 32 of the Constitution of a right for equal treatment by public authorities).

According to the Constitutional Tribunal a position assuming that Article 32 of the Constitution constitutes only a „systemic principle”, is not quite correct. This provision expresses both the principle of equality as a norm (principle) of a law, as well as of a particular kind of a right, the right to equal treatment, which is a derivative of this principle. Everybody has a right for such treatment as persons in identical (as regards significant elements) situation. The complex character of this regulation should not remain without influence on the understanding of the right to equal treatment, as the two aspects are strongly connected. The problem concerns then the answer to a question whether (and if so, then to what extent) the right for equal treatment should be regarded as a constitutional right of an individual.

A peculiar character of a right to equal treatment consists in the fact that it is not possible to state that it was breached by a „simple” juxtaposition of a constitutional model and a challenged subconstitutional norm. It is also indispensable to take into account subconstitutional norms, regulating the legal status of other individuals (group of individuals) and comparing them to the norms addressed to the complainant and norms addressed first of all to persons in the same or similar, as regards significant elements, situation. From the legal and constitutional point of view it is important that these important elements of actual and legal situation of the complainant and other addressees from a „comparable” group (groups) should have their constitutional reference. In other words, Article 32 of the Constitution defines a legal situation of an individual ”jointly” with another norm that determines the legal situation of other entities. Except for extremely rare at present cases of general discrimination (e.g. in the form of slavery or caste society) it is difficult to indicate other cases where equality would not have specific reference to certain rights, freedoms and duties of an individual. Differentiation refers then as a rule to some specific right or freedom.

Assuming that it is a rule that a principle of equality (the right for equal treatment) does not mean by itself the necessity to undertake or give up specific measures by public authority organs, but it is updated in case of introducing a definite legal regulation or undertaking other measures, also this situation context is important – the kind of a freedom or a right, in connection with which differentiation takes place. The orders (bans) directed to public authorities that result from the very Constitution, that is relate to the matter, covered by constitutional provisions concerning human and civic freedoms and rights, have fully constitutional character.

Acknowledging that Article 32 expresses first of all a general principle, concerning constitutional freedoms and rights of individuals, it can be assumed that – being its derivative – a right for equal treatment also relates most of all to the realisation of these very freedoms and rights. As already mentioned, the Constitution does not formulate the assumption of equality in the understanding of universal egalitarianism of individuals but as an equal possibility to realise freedoms and rights. This means the right to equal treatment acquires a fully constitutional dimension in case of „inequalities” affecting certain regulated by norms freedoms and rights set forth in the Constitution. Thus the constitutional order of equal treatment of individuals should not be treated in a uniform way; regardless of a situational context, it acquires a different dimension in the situation where the mentioned situation context has no reference to specific freedoms and rights mentioned in the Constitution.

Considering then the right to equal treatment to be a constitutional right of an individual, the Constitutional Tribunal stresses that it has the character of a kind of a „second degree” right (metaright), that is it can be enjoyed in connection with specific legal norms or other activities of public authority organs, and not in isolation from them – as if „spontaneously”. If these norms or actions have no reference to specific freedoms and rights defined in the Constitution, a right to equal treatment does not fully have the character of a constitutional right, which is the reason why it cannot be protected by means of a constitutional complaint.

Another reason for accepting such a position is, that assuming that Article 32 of the Constitution expresses a right to equal treatment, identical with other constitutional rights and freedoms, one should accept at the same time that the right is subject to limitations admissible in the light of Article 31 paragraph 3 of the Constitution. Such a solution would not be correct because of different another legal construction of equality before the law. Any differentiation of a legal situation is considered to be the realisation of appropriately understood equality and not an exception from it. It should be also noted that provisions relating to the limitation of freedoms and rights in extraordinary conditions (Article 233 of the Constitution) show that equality is most of all a certain assumption relating to these limitations and not a separate right or freedom of an individual. In the opinion of the Constitutional Tribunal the relation: the principle of equality – constitutional human and civic freedoms and rights, should look the same way.

Summing up, the Constitutional Tribunal stated that Article 32 of the Constitution expresses most of all a general principle and that is why it should be in the first place referred to specific provisions of the Constitution, even if a constitutional regulation of a given right is not full and requires statutory specification. In such a scope it also determines the constitutional right to equal treatment. We are dealing here with the situation of „co-application” of the two regulations of the Constitution, and so not only with a right to equal treatment but also with a specified right to equal realisation of specific constitutional freedoms and rights. In a constitutional complaint the two provisions of the Constitution should be quoted, as it is them that determine the constitutional status of an individual that was infringed by a statutory or secondary regulation. As, however, regards the rights defined in normative acts other than the Constitution– if the purport of a specific right is determined

exclusively on their basis – Article 32 of the Constitution constitutes a principle of the system of law, rather than a freedom or a right of a constitutional character. A right to benefits, based exclusively on an act of parliament cannot be regarded as a constitutional right of an individual. If the content of a right results exclusively from an act of parliament, the demand of the protection of this right with reference to the principle of equality has not a fully „constitutional” dimension.

Article 5 of the Constitution envisages that the Republic of Poland ensures human and civic freedoms and rights. It follows that the protection of these freedoms and rights may be realised with the use of various legal means, but not solely and exclusively by means of a constitutional complaint. Article 79 paragraph 1 of the Constitution clearly separates a constitutional complaint from other means of freedoms and rights protection envisaged in the Constitution, in the context of which it is spoken about „infringed freedoms or rights” (Article 80, Article 77 paragraph 2) and „unlawfulness” (Article 77 paragraph 1). What follows from it is a peculiar „qualified” and limited in its subject matter character of a constitutional complaint as an extraordinary and subsidiary instrument of the protection of freedoms and rights. Therefore the prerequisites of admissibility of a constitutional complaint should be interpreted in a strict way, consistently with a peculiar character of this legal means, and not in an expanding way.

It should also be taken into account that the provisions of the Constitution on force foresee a very broad catalogue of human freedoms and rights. The scope of legal regulation covered by these provisions concerns all important spheres of life of an individual, therefore there is no need to „deepen” the protection realised by means of a constitutional complaint to include regulations that do not have reference to this sphere. This would lead to the degradation of a constitutional complaint.

Guided by the cited arguments, the Constitutional Tribunal states that constitutional complaints examined in the present proceedings are inadmissible for formal reasons. Neither the complaints, nor their supplementation or grievances indicate in an appropriately specified way the freedoms or a constitutional right that was infringed. A general quotation by the complainants of a right to equal treatment does not meet constitutional and statutory prerequisites for lodging a constitutional complaint..

For these reasons the Constitutional Tribunal on the grounds of Article 39 paragraph 1 paragraph 1 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz.U. No 102, item 643; with amendments of 2000 No 48, item 552, No 53, item 638; of 2001 No 98, item 1070) adjudicated as in the conclusion of the decision.

### **Dissenting opinion**

of judge Lech Garlicki

to the decision of the Constitutional Tribunal of 24 October 2001,

Ref. No. SK 10/01

On the basis of Article 68 paragraph 3 of the Constitutional Tribunal Act of 1 August 1997 I am presenting a dissenting opinion because I believe that it is admissible to base a constitutional complaint exclusively on a charge of the infringement of Article 32 of the Constitution,

My statement of reasons for this dissenting opinion is the following:

1. A starting point for the considerations of the Constitutional Tribunal is to seek the methods of interpretation of the Constitution that should have the greatest significance when examining a given case. Frequently indicated is language interpretation (with a rather questionable, in my opinion, thesis formulated at the same time that „a purely language analysis of the text <Article 32> is only of a secondary importance”), with systemic interpretation more strongly stressed, but also indicating that it does not provide the argument that „unambiguously resolves the discussed problem.” This leads to the conclusion that Article 32 in the first place formulates „a systemic principle” (the principle of a law), but also – a derivative of this principle – „a special kind of a right, a right to equal treatment”. At the same time this right is granted a character of „a kind of a second degree right” (metaright) and a conclusion is formulated that it is not applicable on its own but „only in connection with specific legal norms or other measures of public authority organs.” This results in a situation where the charge of infringing Article 32 can be made in a constitutional complaint only together with a charge of another, specifically indicated constitutional right (freedom). It is inadmissible to base a constitutional complaint on a charge of infringing Article 32, when the purport of a specific right – on the background of which equality was breached – results exclusively from an act of parliament

2. It seems to me that such methodology of considerations, on the one hand – in an unjustified way fails to recognise the significance of a language interpretation (Article 32 paragraph 1 sentence 2 clearly speaks of a „right to equal treatment by public authorities,” that is by a legislators, among others), and – on the other hand – other aspects of the systemic interpretation, connected with treating the Constitution as the expression of a certain system of values – are omitted. The interpretation of individual provisions of the Constitution must serve the realisation of this system of values, and so – in case of interpretation doubts – must always accept such understanding of a constitutional regulation that takes into account the obligation of this realisation in the fullest way. It is indisputable that the protection of freedoms and rights of an individual constitutes one of the basic elements of this system of values, on which the Constitution of 1997 was based. The interpretation of the provisions of this Constitution must therefore always be subordinated to the basic directive – ensuring possibly the fullest protection of freedoms and rights of an individual.

On the basis of this directive, interpretation of Article 32 should be made. This involves in the first place assuming that Article 32 constitutes not only a systemic principle but also a right of an individual. This results from the very language formulation of this provision and there are no grounds to assume that the constitution-maker did not know what he had done, especially when taking into consideration the difference between the formulation of Article 67 paragraph 2 of former constitutional provisions and Article 32 of the new Constitution. There are no grounds not to assume that the makers of the Constitution of 1997 consciously gave a new meaning to the principle of equality, including in it also an element of a right. This was admitted by the Constitutional Tribunal which at the same time relativised the significance of this right by attributing to it the character of a „second degree right” and depriving it of legal significance of its own. This approach does not seem to me to be rightful. In my opinion, Article 32 of the Constitution should be interpreted not only as an obligation to treat „everybody” in an equal way in moulding constitutional freedoms and rights they are entitled to, but in a broader way – as an obligation to treat „everybody” equally in all actions of public authorities.

3. This in particular means that if any human right does not have a constitutional rank, and it is formed exclusively on the level of an ordinary act of parliament, then also when creating this right the legislator has to take into account the obligation of equal treatment. He must then always respect the request for a legal situation of similar entities to be formed in a

similar (equal) way, and if he wants to waive this requirement, he must present a convincing justification. In this way the consequences of Article 32 are treated when examining applications and legal questions – it is beyond all doubt that every instance of unjustified treatment by the legislator of similar situations (entities), may be considered to represent the infringement of Article 32, even when an examined provision is not in any way connected with other freedoms or rights of a constitutional rank. The difference – in comparison with the reference of Article 32 to the provisions concerning specific constitutional freedoms and rights – consists in the fact that the purport of these freedoms and rights is determined at the constitutional level, which gives the legislator a limited freedom in regulating them. On the other hand, the forming of rights of an individual solely on the level of ordinary acts of parliament gives the legislator a much greater freedom as it depends only on his decision whether a given right would be formed or not. If, however, the legislator decides to form a given right, then the determination of the subjective and objective scope of this right (its content) cannot be done in an arbitrary way and has to, among other things, respect the consequences of the principle of equality. Many Constitutional Tribunal decisions can be indicated, where the infringement of these consequences was considered to be the sufficient grounds for the ruling on unconstitutionality of an act of parliament when examining applications and legal questions, although it was only once that Article 32 became the sole basis for a determining the non-conformity to the Constitution when examining a constitutional complaint.

I think there are no grounds to believe that the infringement of Article 32 may become the sole basis for a decision on non-conformity to the Constitution in the proceedings on an application or legal questions, and it cannot become such basis in the proceedings on constitutional complaints. Article 79 paragraph 1 allows to base a complaint on the charge of infringing any constitutional right (freedom) of an individual. And since the Constitutional Tribunal does not refuse to acknowledge a „right to equal treatment” the character of a right, then this right could be excluded from the protection of Article 79 only if the Constitution would make it clear, as is the case in relation to some rights of foreigners – in Article 79 paragraph 2. Such exclusion cannot be presumed or derived from qualifying a „right to equal treatment” to be a „right of a second rank.” The Constitution does not know the notion of „rights of the second rank” and if it formulates a freedom or a right of an individual, it also covers it with protection of Article 79 paragraph 1. Another direction of interpretation would be inconsistent with the obligation to interpret the Constitution in the way that is „friendly” to the protection of rights and freedoms of an individual.

4. This in my opinion leads to the conclusion that it is possible to quote in a constitutional complaint the charge of infringing Article 32 not only when it is possible simultaneously to indicate the infringement of another freedom or right of a constitutional rank, but also in every case when a right of an individual was formed on the level of an ordinary act of parliament but in a way infringing obligations and bans resulting from a right to equal treatment. Although the first of these situations takes place much more often, there is no reason to exclude the application of a constitutional complaint also in the latter one. The ordinary legislator can never act in an arbitrary way.

For this reason I believe that the present constitutional claim was admissible and should have been examined on its merits, and this conclusion is additionally strengthened when specific content of regulations that the present constitutional complaint relates to, is taken into account.

**Dissenting opinion**  
of judge Krzysztof Kolasiński  
to the decision of the Constitutional Tribunal  
of 24 October 2001 (*Ref. No. SK 10/01*)

On the grounds of Article 68 paragraph 3 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz.U. No 102, item 643, with subsequent amendments) I am presenting a dissenting opinion to the decision and its statement of reasons.

I do not share the position of the Constitutional Tribunal on inadmissibility to pass a judgement in the case instituted by a constitutional complaint, based on the charge of infringing the principle of equality of citizens set down in Article 32 of the Constitution:

On the basis of Article 79 paragraph 1 of the Constitution everybody whose constitutional freedoms or rights were infringed, has a right, on the principles based in the act of parliament, to submit a complaint with the Constitutional Tribunal concerning the conformity an act of parliament or another normative act to the Constitution. Under Article 79 paragraph 2 of the Constitution, a constitutional complaint cannot concern rights defined in Article 56, that is the right for asylum exercised by foreigners. The Constitution does not foresee other material and legal limitations of admissibility of a constitutional complaint.

Constitutional freedoms and rights were defined in the Chapter II of the Constitution, comprising general regulations, personal freedoms and rights, political freedoms and rights as well as economic, social and cultural freedoms and rights. The infringement of any right or freedom, formulated in each part of this Chapter may constitute the grounds for a constitutional complaint. There are no grounds to treat constitutional rights and freedoms formulated in the first part of this Chapter – general principles – in a different way. It contains, among others, specifically formulated constitutional rights, such as acquiring Polish citizenship by being born from parents that are Polish nationals (Article 34), the right of national and ethnic minorities to create their own educational, cultural institutions and the institutions serving to protect religious identity (Article 35 paragraph 2).

The treatment of individual rights and freedoms in a more general way does not mean the deprivation of provisions, in which they are set down, of normative content, and in consequence considering them not to express constitutional rights. In the interpretation of general norms, more detailed norms that correspond with them should be taken into account, if they are contained in the Constitution. Difficulties in the interpretation of provisions, in which constitutional rights were formulated in a general way, do not justify a position that these constitutional rights do not in fact exist, and therefore a constitutional complaint cannot be based on the charge of the infringement of such provisions. This remark also concerns the principle of equality before the law formulated in Article. 32. Evaluating the rightness of the charge of the infringement of a constitutional citizen right to equal treatment, the norm of Article 32 paragraph 2 of the Constitution should be used, which imposes a discrimination ban in political, social or economic life for any reason. Every legal regulation which is considered to be a manifestation of discrimination of a specific group of citizens, for any reasons, infringes a right of citizens to equal treatment. A charge of infringement of this right represents the independent grounds for a constitutional complaint. The complainant is obviously obliged to prove that his right was breached. In order to justify its rightness it is not enough to prove that entities similar in some respect were treated by the legislator in a different way, but also that differences in their legal situation have features of discrimination – has no rational justification. The position, contained in the statement of reasons of the decision, that Article 32 of the Constitution expresses the right to equal treatment but that it is not a constitutional right of an individual, is marked by internal contradiction. The words „everybody” contained in Article 32 paragraph 1 and „nobody” contained in Article 32

paragraph 2 concern individuals. The Constitution does not define other rights than constitutional ones. The attempt, presented in the statement of reasons of the decision, to degrade some constitutional rights to the category of „metarights” does not deserve approval.

**Dissenting opinion**  
of judge Marek Safjan  
to the decision of the Constitutional Tribunal  
of 24 October 2001  
in the case of Ref. No. SK 10/01

The position of the Constitutional Tribunal is not convincing as regards the basic question, which is the subject of evaluation as the grounds for the discontinuation of the proceedings, namely a decision that Article 32 of the Constitution does not represent a right of an individual, constitutionally protected by means of a constitutional complaint, because it does not belong to the category of rights and freedoms, set forth in Article 79 paragraph 1 of the Constitution.

The view that Article 32 of the Constitution constitutes a basis for a peculiar right, „a second degree right” which cannot be an independent source of rights of an individual, because it has a purely formal character and must be always referred to another constitutional right or freedom. In such an approach a right to equal treatment would be deprived of its purport and should be treated exclusively as an order addressed to the legislator, without a direct transmission on the rights of addressees of legal norms.

In the statement of reasons of the Constitutional Tribunal it is difficult to find arguments supporting the presented position. The arguments of the formal and dogmatic nature connected with placing the regulation of Article 32 of the Constitution in the sphere of regulations containing general principles, therefore outside the frame of the subchapter on personal freedoms and rights, do not justify such a view. The Tribunal correctly points to the fact that the evaluation based on this purely formal approach cannot have a decisive significance. Neither does the thesis developed in the statement of reasons, under which while applying the principle of equal treatment „it is indispensable to take into account also subconstitutional norms that regulate the legal status of other individuals (groups of individuals) and to compare (juxtapose) the norms addressed to the complainant and norms addressed first of all to persons that are in the same or a similar, as to significant elements, situation,” have decisive significance for the evaluation of the way of understanding of Article 32 of the Constitution. I fully share the view of the Constitutional Tribunal as to the need to quote specific normative regulations when deciding whether the right for equal treatment is respected, but I do not see in it an obstacle for deciding that we are dealing with a constitutional right that may be an independent basis for a constitutional complaint in the understanding of Article 79 paragraph 1 of the Constitution. It should also be said that the necessity of referring a right to equal treatment to specific normative regulations is not identical with the thesis that this right is deprived of any independent content that does not translate on the sphere of rights of an individual. On the contrary these contents may be relatively easily reconstructed, in accordance with constitutional traditions set by the jurisdiction of constitutional courts of many European countries, while the difference – in relation to other constitutional rights – concerns mainly the way of realisation of equal treatment in a legal system: as long as the right to equal treatment is always realised through normative regulations of a lower rank, the content of other rights connected e.g. with the protection of property, freedom of expression, a right to education etc. can be directly defined

on the level of constitutional norms. The defining of a difference of the nature of a right to equal treatment and other rights may have considerable importance for a completely different question connected with the possibility to directly shape the situation of an individual on the basis of constitutional norms. This issue is not visible in the Constitutional Tribunal's statement of reasons – the argument concerning a right to equal treatment as a „second degree” right only means that the right does not directly determine the contents of definite normative solutions and only sets definite „threshold” conditions for a legal norm, introduces a rudimentary requirement from the point of view of legal norms' addressees – of equal treatment in similar or the same situations. In no case does this particular feature of a right to equal treatment, which boils down to setting in the form of a peculiar minimum of formal justice (in many classical approaches – justice is realised by equal treatment of those to whom legal norms are addressed), deprive this right of its fundamental meaning in shaping the position of an individual in a democratic state ruled by law. The reasoning of the Constitutional Tribunal as to the nature of the principle of equality, as expressing a right that cannot be an independent basis of a constitutional complaint, would be sensible and justified only when it would not be possible at all to define the meaning, contents of a right to equal treatment, that is only when the directly derived from Article 32 order would have no direct significance for the evaluation of a legal position of an individual. It is not, however, so and many-year jurisdiction line of the Constitutional Tribunal confirms this thesis. The view presented in the statement of reasons arises so much the more reservations that Article 32 is without much hesitation treated as an independent basis for examining constitutionality in other types of the proceedings (concrete constitutional review – a legal question and abstract one). A right to equal treatment constitutes in such cases a basis for the evaluation of not only a regulation relating directly to the matter of constitutionally guaranteed rights and freedoms, but also to other spheres not covered by constitutional guarantees. Apparently this right – despite its formal character treated as a „second degree right” – may represent a sufficient unambiguous basis for determining the conformity to the Constitution of a legal provision but it cannot – according to the Tribunal – find such an application in the proceedings relating to a constitutional complaint. I can obviously see the difference between the treatment of prerequisites of a constitutional complaint and the scope of an application or legal question, but I do not understand why these differences should lead to a basically different evaluation of the independence of a right to equal treatment as a constitutional model. A claim that it is a „second degree right” cannot be convincing as it can successfully be an independent model of review which is confirmed by some judgements (see e.g. *Constitutional Tribunal's judgements of: 18 December 2000, Ref. No. K. 10/00*, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 8/2000, item 298; of 6 September 2001, Ref. No. P. 3/01, OTK ZU No 6/2001, item 163).

The doubts as to the view expressed in the statement of reasons are so much the greater that the provision of Article 32 expresses – in the opinion of the Constitutional Tribunal – a special kind of a substantive right although it is not a constitutional right. In relation to the evaluation of Article 32 only the following alternative is justified: either this right as a constitutional guarantee exists in relation to all spheres of legal regulation (that is when it is applied as an independent basis in other types of proceedings before the Constitutional Tribunal) or it does not exist as a universal right and cannot be applied outside the sphere set by constitutional rights and freedoms but then – consistently – there is no sense in treating it as a model of independent evaluation in all proceedings other than a complaint. But the Tribunal took quite a different course, deciding that „the obligation of equal treatment of individuals should not be treated uniformly, regardless of the situational context, it acquires a different dimension in the situation where the already mentioned situational context has no reference to specific freedoms and rights, mentioned in the Constitution”. Such a position

must lead to paradoxical conclusions, namely: 1) a right to equal treatment is a right of an individual of a non-uniform, differentiated field of application; 2) it has a character of a constitutional right only when it is combined with another right guaranteed by the Constitution; 3) this right cannot be the basis of a constitutional complaint in relation to the evaluation of these regulations that are beyond the area of constitutionally guaranteed freedoms and rights; 4) this right cannot be the basis for evaluation of all other regulations in case of a legal question or an abstract application. It follows that where the field of application of Article 32 of the Constitution seems to be the broadest, characterised by certain independence, the application of a constitutional complaint procedure becomes excluded, according to a Constitutional Tribunal position. Why does, in relation to those other fields, a right to equal treatment change its form, lose its status of a right and becomes a principle of a law addressed to the legislator? What character does Article 32 have while evaluating other areas of the law? Does it mean that there are no constitutional guarantees for equal treatment of individuals on these other fields of legal regulation, and if so, why should it be treated in the jurisdiction as a basis for considering some regulations to be unconstitutional? Does not the protection against discretionary power of the legislator which is coded in the essence of equality concern every sphere of the law? These are rhetorical questions. Guarantees granted by the Constitution, in the scope of this right, have to have, from the very nature of things, a universal character, as in every case of infringing this right – either in the area of constitutional rights and freedoms, or beyond this area – the same value is subject to protection. The protection of a right to equal treatment regardless of what rank of regulations and areas it concerns – is always directed towards the protection of an individual, and not an abstract value connected with the quality of a right, that could not be translated onto the subjective status of individuals. In effect the differentiation introduced by the Constitutional Tribunal becomes incomprehensible and not deprived of features of discretionary power. It should be accepted after all that this formal character of the right to equal treatment orders to take it into account in all areas of legal regulation, not only in the sphere of constitutional rights and freedoms, as accepted by the Constitutional Tribunal. There are even some reasons that could support the reversing of the thesis of the Tribunal – fully independent scope of the application of the right to equal treatment should manifest itself most of all on these fields of legal regulation where there are no separate constitutional guarantees. As regards rights and freedoms constitutionally guaranteed, the order of equal treatment in this sphere either results from clear norms of the Constitution itself (e.g. the right for equal protection of property rights, equal right to education, right of equal access to the health service, equal electoral rights etc.), or may be derived by way of a correct interpretation referring for instance to the principles and values decoded from Article 2 of the Constitution. It can be even assumed that equal treatment of individuals in the scope of elementary rights is a rudimentary, obvious obligation – included in the essence of these rights. This thesis cannot be accepted (at least as an obvious and undisputed thesis) on other fields of legal regulation.

It is not known, on the background of arguments presented by the Constitutional Tribunal, what is a prerequisite and what a conclusion of the reasoning presented in the statement of reasons: one gets an impression that this a conclusion, namely the impossibility to apply Article 32 as an independent model of review with a constitutional complaint, if it is not connected with proving that another constitutional right was infringed, is at the same time an assumption rather recklessly accepted as a starting point of reasoning that Article 32 represents a constitutional right of an individual only in the scope relating to other constitutional rights.

A conviction that by seeing in Article 32 of the Constitution a right of an individual to equal treatment would have to lead to universal egalitarianism would be completely

groundless. A right for equal treatment was never understood in this way and there never were any attempts in the constitutional jurisdiction for the obligation of mass egalitarianism to constitute a protected constitutional value. The formal character of a right to equal treatment never constituted an obstacle in seeking proper, just, evaluative criteria – taking into account other constitutional values and pointing to the fact that equality may only concern entities that show the same legally relevant feature, distinguished from the point of view of the contents of a subject of examined norm. This issue appeared clearly on the background of the jurisdiction concerning rights of a social and economic character, as part of which the Tribunal repeatedly questioned the simplified and primitivised treatment of the principle of equality, consisting in the lack of any differentiation.

It seems that the subject of the dispute about the character of a right to equal treatment is situated on a quite different plane than that defined in the statement of reasons of the Constitutional Tribunal. At issue is the very essence and notion of constitutional rights. These rights include – in my opinion – these constitutional guarantees from which sufficiently unambiguous, clear normative purport can be derived which have direct significance for the legal position of an individual vis-à-vis public authorities, and which in a more exact way define the sphere of legally guaranteed interests of an individual, the scope of his/her justified (in result of constitutionally granted guarantees) expectations towards the public authorities. A constitutional right formulated in this way does not have to determine *per se* the shape and purport of specific secondary norms, it is enough that it sufficiently clearly sets the frames for the discretionary power of the legislator in making the law that directly interferes in the sphere of legal interests of an individual. It then defines what are at least specific, possible to identify, minimum requirements (even if they relate more to the formal treatment of a norm and the scope of its application, rather than its substantive contents), that have to be respected by the legislator. The postulate of the necessary specification of a constitutional right, formulated both in the doctrine and jurisdiction, has to signify then at least the deriving from a constitutional norm of that minimum, guaranteed by the Constitution, sphere of the rights of an individual, but it is not tantamount with the reconstruction of the full normative contents of legal regulations related to some sphere of interests of an individual. Giving up such an assumption would have to lead directly to questioning any significance – as constitutional guarantees – of those rights that can be fully realised only on the level of ordinary acts of parliament and concluding at the same time that in all those cases in which the Constitution refers to ordinary acts of parliament for the specification of the content of a right, there is full freedom, not to say, discretionary power of the legislator. Constitutional regulations would become in consequence exclusively programme norms, and thus would be deprived of any guaranteeing significance from the point of view of the rights of an individual. Meanwhile a view is formulated that even the rights indicated in Article 81 of the Constitution may set guaranteeing minimum of its kind (e.g. in the scope of a right to environment protection the minimum is connected with the justified expectation of an individual for the introduction of protective interests, although the choice and content of these instruments falls exclusively within the jurisdiction of the legislator). A right for equal treatment highlights – in my opinion – that necessary and fully identifiable expectation of an individual connected with law making, although it does not determine the normative content of specific legal provisions. In this very meaning in which it delineates the frames of the discretionary power of the legislator, it must be treated as a constitutional guarantee, subject to protection in a constitutional complaint procedure.

The obligation to respect a right for equal treatment is at times perceived erroneously as the obligation of „equalisation” to the situation of entities taking advantage of a definite privilege, social advantage, allowance or precedence in the access to some public goods. Such an approach would be a very simplified treatment of a right to equal treatment, it would

reduce it to the obligation of broadening a circle of beneficiaries of definite legal solutions. Meanwhile, it should be strongly stressed, a right to equal treatment contains both a negative aspect and a positive aspect – it includes both the obligation to broaden advantages, when specific persons that are in identical situation were passed over, and the elimination of advantages when certain circle of people was distinguished *in plus* when they received it without due justification, on the basis of other constitutional values and principles. Determining that a provision is not in conformity to the Constitution due to the breaching of a right to equal treatment does not determine *per se* the existence in the future of a certain right, it only means that the sphere of application of a given solution is defined in a faulty way, with the infringement of the requirements of Article 32 of the Constitution. It falls within the sovereign jurisdiction of the legislator to shape the content of the challenged norm anew or finally eliminate it from the legal order. Therefore the sometimes expressed conviction that considering of a right to equal treatment to be a constitutional right of an individual would involve the Constitutional Tribunal's entering into the sphere of the jurisdiction of the legislative power.

I also cannot share the opinion that the impossibility to apply Article 31 paragraph 3 (the principle of proportionality) is an argument against considering a right to equal treatment to be a constitutional right. One should not lose from one's field of vision the fact that the determination of the field of application of Article 32 is subject to the mechanism of seeking a specific feature that distinguishes certain circle of entities, constructed for the sake of the reviewed normative solution. The weighting of constitutional reasons and values supporting the correctness of such distinguishing, and so the defining of the scope of application of Article 32, takes place in effect on other level than with the use of the criteria of Article 31 paragraph 3 of the Constitution. Many a time did the Constitutional Tribunal state that the application of the principle of equality should take into account the decoding from Article 2 of the values connected with social justice (sometimes it is said that the principle of equality is subject to correcting by the principle of justice, see e.g.. *Constitutional Tribunal's judgements of: 9 March 1988, Ref. No. U. 7/87, Constitutional Tribunal's Decisions – OTK in the period 1986-1995, Volume I, item 1; of 6 April 1993, Ref. No. K. 7/92, OTK in 1993., part I, item 7; Constitutional Tribunal judgement of 20 October 1998, Ref. No. K. 7/98, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 6/1998, item 96*). It is this mechanism that practically consumes the need to use the principle of proportionality. But one cannot derive an argument from this, supporting a thesis that a right to equal treatment is not a constitutional right. It may be noted that also other constitutional right, situated in the circle of fundamental principles of a Chapter on rights and freedoms, connected with the protection of human dignity is not subject to limitations of Article 31 paragraph 3, because none of the values indicated in this regulation justifies limiting constitutional guarantees of human dignity.

The complaints that are subject of the proceedings should be in consequence admitted to substantive review. They indicated typical normative situation whose evaluation required the evaluation from the point of view of principles of equal treatment of persons that were victims of forced labour during German occupation. In the case it became necessary to decide whether the accepted criterion of deportation as the basis for granting compensation constitutes, from the point of view of a right to equal treatment, a correct criterion distinguishing the category of beneficiaries of compensation payments foreseen in the challenged act of parliament. The results of this analysis cannot be determined here. But it should be said that the complainants in both complaints made probable, to say the least, the infringement by the regulation of Article 2 paragraph 2 of the Act of 31 May 1996 on compensation payments for persons deported to forced labour and labour camp prisoners in the Third Reich and the Soviet Union of a right to equal treatment.

For this reasons I resolved to present a dissenting opinion.

**Dissenting opinion**  
of judge Jerzy Stepień  
to the decision of the Constitutional Tribunal  
of 24 October 2001  
in the case of a Ref. No. SK 10/01

I. It is commonly accepted that a constitutional complaint is an extraordinary and subsidiary instrument. Not challenging such its character, I cannot agree with the thesis, represented in the statement of reasons of the present decision, that the *right to equal treatment by public authorities* formulated in Article 32 paragraph 1 of the Constitution is only a „peculiar kind of a right”, expressing a „general principle” that has a character of some kind of a second degree right, a peculiar „metaright”, the quoting of which cannot constitute an independent basis of a constitutional complaint. Normative content expressed in Article 32 paragraph 1 of the Constitution would not be changed – the statement of reasons goes on – „if the text of this regulation was formulated without the use of the noun „right”. What follows is the thesis that *a right to equal treatment* belongs to this category of rights and freedoms that is spoken about in Article 79 of the Constitution.

II. It should be noted as a matter of priority that the regulation of Article 32 paragraph 1 second sentence does not speak about any principle of equal treatment in general, by everybody and everywhere, but about very clearly specified obligation imposed on the public authorities. A symmetrically treated right on the side of the eligible entity should correspond to this obligation constitutionally imposed upon public authorities. Therefore the hypothetical omission of the word „right” in the analysed part of Article 32 paragraph 1 of the Constitution in fact does not change its normative purport, and this kind of language operation (if at all admissible) still more strongly stresses the constitutional character of a right to equal treatment of everybody by public authorities, that is dealt with in this provision.

III. But the essence of the problem lies – in my opinion – somewhere else. Let us notice that constitutional norms affect an individual, but they do it in a more or less noticeable way. That is why at least one division in that respect is possible. One category of these norms has a direct influence on shaping the constitutional position of an individual, the second shapes its statues only in an indirect way.

The first category will include all those norms that refer to freedoms, rights and duties, regardless of in what place of the Constitution they were placed, the second, on the other hand, will include those that only indirectly affect the position of an individual, as e.g. provisions defining the structure of state organs. Sometimes the division will seem blurred but – in my opinion – it is doubtless that a right to equal treatment by public authorities is in the very centre of this category of rights and freedoms that directly shape the systemic position of the entitled person. What is more – it should be accepted that the sense of *unequal treatment* represents a very severe discomfort in everybody’s subjective feeling.

After accepting such a point of view, it is clearly visible that the purpose of the introduction of the institution of a constitutional complaint should be seen in equipping the entity indicated in Article 79 of the Constitution in the instruments of independent protection

of its constitutional systemic position, defined by the area and borders of constitutional freedoms and rights that may be infringed by a court or a public administration organ by way of a decision, based on a provision that is not in conformity to the Constitution. Otherwise it would have to lead to a conclusion that an individual could defend on his own a certain sphere of constitutional freedoms and rights defining directly in his/her systemic position, while other sphere of subjective freedoms and rights of the same category could be protected only by means of other organs. This would be a symptom of a peculiar state paternalism, in fact incapacitating the subject of a complaint, infringing in particular human dignity (Article 30 of the Constitution). This kind of construction would also clash with the principle of subsidiarity in the relations individual – public authority expressed in the Preamble to the Constitution.

IV. Incorrect is also the argument, quoted in the statement of reasons of the decision to discontinue the proceedings, that the placement of Article 32 in the subchapter titled *General principles*, preceding a catalogue of specific personal, political, economic, social and cultural freedoms and rights, shows that a right to equal treatment is not a constitutional right, but only a *general principle taken out of reckoning*. Even a superficial analysis of the normative content of this subchapter allows to see there a series of very specific regulations that are the source of rights, e.g. in the sphere of acquiring Polish citizenship (Article 34), or the rights of national minorities (Article 35), and even so specified as the right for care abroad (Article 36). This subchapter is not therefore a collection of principles, as if taken out of reckoning, covering detailed rights, but it is rather the expression of the will of the constitution-maker to treat certain rights as particularly significant from the point of view of the constitutional position of an individual.

The following way of reasoning would be advisable: Chapter II is entitled: „The Freedoms, Rights and Obligations of Persons and Citizens” and because of the constructional transparency of the act was divided into subchapters. The first of them was titled: „General principles” Thus they were not „taken out of reckoning” but rather their basic weight was shown. Therefore they are not less important as „general”, but rather more important as mentioned as first.

V. Both interpretations – the language and systemic ones – unambiguously, in my opinion, lead to the conclusion, that a right to equal treatment expressed in Article 32 of the Constitution is in fact the reflection on the side of an individual’s rights of an obligation of a public authority organ imposed on the level of the Constitution. The teleological interpretation of the constitutional regulations analysed above justifies in turn the thesis that it is the purpose of the complaint to eliminate subconstitutional regulations hitting the systemic position of an eligible entity, defined by the whole sphere of constitutional freedoms and rights shaping its status. The above prerequisites inspire the conclusion that the charge of infringing by way of an act of parliament of a right to equal treatment by public authorities may constitute an independent basis for lodging a constitutional complaint, in accordance with the content of Article 79 of the Constitution.

**Dissenting opinion**  
of judge Janusz Trzcíński  
to decision of the Constitutional Tribunal  
of 24 October 2001 (*Ref. No. SK 10/01*)

1. I am presenting a dissenting opinion to the Constitutional Tribunal decision of 24 October 2001, to discontinue proceedings due to inadmissibility to pass a judgement in the proceedings instituted following the lodging of two constitutional complaints. In the complaints the complainants requests a Constitutional Tribunal to determine that Article 2 paragraph 2 of the Act of 31 May 1996 on Compensation Payments for Persons Deported to Forced Labour and Prisoners of Labour Camps in the Third Reich and the Soviet Union does not conform to Article 32 of the Constitution, which formulates a right to equal treatment. According to the complainants inequality in treating persons deported to forced labour, consisted in the fact, that the criterion of deportation beyond the borders of the Polish state of 1939 was adopted as significant, instead of the very fact of forced labour, which resulted in the situation where a part of former forced labourers who worked e.g. for the Third Reich on the territory of the occupied Poland cannot take advantage of the quoted act of parliament only because they were not deported.

Ruling to discontinue the proceedings due to inadmissibility to pass a judgement, the Constitutional Tribunal decided that Article 32 of the Constitution formulating a right to equal treatment cannot be an independent constitutional model when lodging a complaint and wrote in the statement of reasons, that in such a situation, in addition to Article 32, one has to quote always still another regulation of the Constitution that formulates a constitutional freedom or right. This latter reservation does not change the fact that Article 32 of the Constitution cannot be an independent constitutional model when lodging a constitutional complaint.

I consider the arguments used by the Constitutional Tribunal to be insufficient to take the decision that was taken by the Tribunal, and in some respect I consider them to be the arguments that could be supportive of regarding Article 32 of the Constitution as an independent constitutional model.

2. From the statement of reasons it follows that the Constitutional Tribunal believes that a right to equal treatment formulated in Article 32 of the Constitution is not the constitutional right referred to in Article 79 paragraph 1 of the Constitution (constitutional complaint). In other words that is not comprised in the scope of the notion „constitutional freedoms or rights”, because, according to the Constitutional Tribunal, a right to equal treatment is not a right of a subjective significance that could be breached in the sense set down in Article 79 paragraph 1 of the Constitution. In order to prove that a right to equal treatment is not comprised in the scope of the notion „constitutional freedoms and rights,” the Constitutional Tribunal cites three basic arguments.

a. According to the Constitutional Tribunal, a right to equal treatment cannot be treated as a constitutional right in the understanding of Article 79 paragraph 1 of the Constitution, because it is regulated in the Chapter II entitled „The Freedoms, Rights and Obligations of Persons and Citizens”, but in the subchapter „General principles,” which, in the opinion of the Constitutional Tribunal, points to the intention of the legislator not to treat Article 32 on the equal footing with other rights. The fact of regulating a right to equal treatment (Article 32) in subchapter „General principles” is in the opinion of the Constitutional Tribunal designed to weaken the normative character of this right, which in the statement of reasons assumes the form of a „general principle” „taken out of reckoning”.

This Constitutional Tribunal argument following from the analysis of the systematics of the constitution is not based on strong foundations. First, because the subchapter „General principles” is placed in the Chapter II of the Constitution entitled „The Freedoms, Rights and Obligations of Persons and Citizens”. It can be claimed then that the title of a Chapter determines the character of rights contained in it. Second – from the analysis of rights contained in the subchapter „General principles” it follows that all other rights comprised there cannot be regarded as freedoms and rights of subjective meaning. And so – Article 30

formulates dignity as a human and civic right that at the same time is the source of all freedoms and human rights, Article 33 speaks about equal rights of men and women in family, political, social and economic life, Article 34 speaks about a right to Polish citizenship, Article 35 – about the right of national minorities and freedoms they are entitled to, Article 36 – about a right of a citizen to the care of the state during his/her stay abroad. These undoubtedly are constitutional human and civic rights of subjective character. Their analysis shows that the significance and weight of these rights, among other things, were the reason why they were placed in the subchapter „General principles”, not to depreciate their legal significance but, on the contrary, to stress their significance for the description of a legal situation of an individual towards the state. Why then a right to equal treatment, a basic standard of legal culture defining the position of an individual, should not have a legal value just as other rights and freedoms regulated in Article 30-37 of the Constitution? Maybe „general principles” in the context of the whole Chapter II of the Constitution simply mean basic rights that determine the characteristics of rights of a human being.

b. The second argument against considering a right to equal treatment as an independent constitutional model when lodging a constitutional complaint, that is the argument for the elimination of Article 32 of the Constitution from the scope of the notion „constitutional freedoms or rights” – the Constitutional Tribunal derives from the thesis that „the purely language analysis of this provision has only a secondary significance” and that „according to the Constitutional Tribunal the formulation of this whole provision may justify the supposition that the legislator had no unambiguous concept as to whether the equality before the law should be shaped exclusively as a general principle (...) or a right (...), or as a kind of combination of <subjectivity> and <objectivity> elements”.

In my opinion, the analysis of the purport of Article 32 of the Constitution gives no grounds to such a conclusion as formulated by the Constitutional Tribunal. On the contrary, it supports a reverse thesis. It is the language analysis, that is the linguistic interpretation that in case of the analysis of Article 32 of the Constitution has the first rank significance. There are no doubts that Article 32 of the Constitution clearly formulates the right to equal treatment of an individual. It is worth quoting Article. 32 of the Constitution „All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. (paragraph 1). No one shall be discriminated against in political, social or economic life for any reason whatsoever. (paragraph 2)

The analysis of Article 32 of the Constitution shows that it formulates both the principle of equality (paragraph 1 first sentence and paragraph 2) and the right to equal treatment (paragraph 1 second sentence), which corresponds to the differentiation of equality before the law and equality in the law.

Analysing Article 32 of the Constitution, the Constitutional Tribunal noticed only one aspect of the issue, namely the principle of equality in its traditional and extreme formulation and gave it a peculiar interpretation, that is deprived it of features of a right, which was not so obvious, also on the grounds of regulations from before 1997, on the contrary it was very doubtful. A change of the Constitution resulted in the visible introduction to it, in addition to the principle of equality, a right to equal treatment, in order to clearly stress the subjective character of Article 32 of the Constitution and cross out to-date doubts that arose on the grounds of old constitutional regulations. Therefore, in answer to the question, that has to be asked on the grounds of Article 79 of the Constitution, what constitutional right was infringed, a citizen may answer that a right to equal treatment, whereas in answer to the question in what way it was infringed, the citizen (in this specific case) will answer that the regulations of an act of parliament that were at the foundations of a final judgement introduced inequality (discrimination) among citizens, exposing as a differentiating feature, the feature that is not very significant. In the case, examined by the Constitutional Tribunal,

this was the feature of deportation to forced labour. There is no doubt that by differentiating those deported to forced labour by means of a deportation criterion, and then refusing a right to compensation to those deported to forced labour that do not meet the criterion of deportation, the legislator breached the right to equal treatment of citizens wronged by the invaders. In the case under discussion, deportation as a criterion differentiating a group of citizens who were forced labourers had a secondary significance. And that was what the Constitutional Tribunal failed to notice, limiting its remarks to theoretical considerations, separated from specific complaints, that were subject of adjudication in the quoted judgement of the Constitutional Tribunal. When reading the statement of reasons, one gets an impression that the Constitutional Tribunal detached its considerations from the topic of the complaint and stopped at the level of abstract deliberations on the normative character of Article 32 of the Constitution.

c. As the third argument supporting the statement of reasons of the decision, the Constitutional Tribunal refers to the specific character of a constitutional complaint as one of the forms of instituting the proceedings before the Constitutional Tribunal. One may conclude that a constitutional complaint has such a specific character compared to an application and legal question. It consists in the fact that not all regulations, but only civic freedoms and rights described in the Constitution, constitute a point of reference (constitutional model) for a questioned legal act. Here is the only limitation that can be derived from Article 79 as regards constitutional models. Everything else represents an interpretation that is remote from the content of Article 79 paragraph 1 of the Constitution. In particular the limitation of constitutional rights, to only some rights, namely those that the Constitutional Tribunal considers to be an appropriate constitutional model for a constitutional complaint, represents unjustified limitation of understanding of a notion of „constitutional freedoms and rights” and thus the limitation of a constitutional right of a citizen (individual) to lodge a constitutional complaint. The Constitutional Tribunal should not lose from its view the double function of a constitutional complaint, namely – the repeal of an unconstitutional regulation and the protection of constitutional rights of a citizen. And all that should be done with taking into account a subject of a constitutional complaint. The present judgement is an example of the detachment of the subject of a constitutional complaint from a Constitutional Tribunal judgement to such an extent, that in part of the statement of reasons to the decision in which the Constitutional Tribunal presents its reasons, a legal situation of the complainants is not connected with the decision that regards Article 32 of the Constitution not to be a sufficient constitutional model, for constitutional complaints lodged in the present case that is the basis of the Constitutional Tribunal decision.