

**JUDGEMENT**  
of 21 May 2001  
**Ref. No. SK 15/00\***

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

Jerzy Stepień – Presiding Judge  
Lech Garlicki  
Stefan J. Jaworski  
Wiesław Johann  
Marek Safjan – Judge Rapporteur,

Lidia Banaszekiewicz – Recording Clerk,

having considered at the hearing on 21 May 2000, the constitutional complaint lodged by Ms Anna W., in the presence of the duly authorised representatives of the representatives of the parties to the case at hand: of the complainant, the Sejm of the Republic of Poland, the Public Prosecutor-General and the Commissioner for Citizens' Rights, concerning the matter of conformity of:

Article 228 § 1 of the Act of 16 September 1982 – Cooperative Law (consolidated text of 1995 Journal of Laws – Dz.U. No 54, item 288 with amendments) to Article 64 paragraphs 1 and 3 in conjunction with Article 21 paragraph 1 and Article 31 paragraph 3 of the Constitution of the Republic of Poland

a d j u d i c a t e s as follows:

**1. Article 228 § 1 of the Act of 16 September 1982 – Cooperative Law (consolidated text of 1995, Journal of Laws – Dz.U. No 54, item 288 with amendments) in the wording as existing prior to the entry into force of the Act of 21 October 1999 on the Amendment of the Act – Cooperative Law (Journal of Laws – Dz.U. No 99, item 1151) does not conform to Article 21 paragraph 1 and Article 64 paragraphs 1 and 2, as well as Article 31 paragraph 3 of the Constitution of the Republic of Poland.**

**2. The provision specified under the point 1 above is not in non-conformity to Article 64 paragraph 3 of the Constitution of the Republic of Poland.**

Statement of Reasons:

**I**

1. In the constitutional complaint lodged on 28 April 2000 the plea was made that Article 228 § 1 of the Act of 16 September 1982 – Cooperative Law (consolidated text of 1995, Journal of Laws – Dz.U. No 54, item 288 with amendments; hereinafter referred to as: Cooperative Law) does not conform to Article 64 paragraphs 1 and 3 in conjunction with Article 21 paragraph 1 and Article 31 paragraph 3 of the Constitution of the Republic of Poland, as it may dispossess an inheritor of the ownership title to a cooperative apartment

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\* The sentencing part of the judgement was published in the Journal of Laws – [Dziennik Ustaw] - Dz.U. No.54, item 572.

only because of his/her having failed to comply with the time limit specified by that Article [of Cooperative Law].

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

On 5 December 1995, the complainant acquired the inheritance from her deceased father, which was confirmed by the District Court in Bochnia by its decision issued on 13 June 1997. Following the issuance of that order the complainant filed an application to the housing cooperative to be admitted as its member and to obtain the confirmation of her title to the apartment – the ownership right to a cooperative apartment, acquired by the way of inheritance. By resolution dated 3 October 1997, the management of the cooperative refused to grant her membership of the same, on the grounds that she had failed to comply with the time limit specified by Article 228 § 1 of the Cooperative Law – by failing to submit by the required date the confirmation of the acquisition of inheritance or the evidence of the initiation of inheritance proceedings. The District Court in Bochnia, by its judgement of 10 February 1998 (*Ref. No. I C 1/98*), dismissed the action of the complainant applying for the abrogation of the respective resolution of the management of the cooperative. The Provincial Court in Tarnów, by its judgement of 9 April 1998 (*Ref. No. I Ca 140/98*), dismissed the appeal of the complainant, indicating in its statement of reasons, that she had failed to perform the preserving actions required by Article 228 § 1 of the Cooperative Law by the time limit of one year, as a consequence of which, pursuant to Article 228 § 3 of Cooperative Law, the title to the apartment had expired. On 10 June 1998, the complainant filed a cassation. During the period when the aforementioned cassation was being considered by the Supreme Court, the Constitutional Tribunal, by its judgement of 25 February 1999 (*Ref. No. K. 23/98*), had ruled that Article 228 § 3 of the Cooperative Law was not in conformity to Article 64 paragraphs 1 and 3 in conjunction with Article 21 paragraph 1 and Article 31 paragraph 3 of the Constitution of the Republic of Poland, and with Article 1 of Protocol No 1 to the Convention for Protection of Human Rights and Fundamental Freedoms, and also the Act of 21 October 1999 on the Amendment of the Act – Cooperative Law had been adopted, which introduced new wording of Article 228 of the Cooperative Law. The Supreme Court, by its judgement of 19 January 2000 (*Ref. No. II CKN 688/98*), dismissed the cassation of the complainant. In the statement of reasons for such a decision it stated that the consequence of the failure to observe the time limit set by Article 228 § 1 of Cooperative Law was, in accordance with Article 228 § 3, which was in force at the time of adjudication by the second instance court of appeal, the extinction of the cooperative property title to ownership of the apartment. The Supreme Court pointed out that „it had been up to the person lodging the cassation to plead not only the breach of substantive law (Article 228 § 3 in force at that time), but also to raise the plea, that the application of the consequences foreseen by the provision in question, under the specific circumstances of the case, was in contradiction with Article 5 of the Civil Code, leading to glaring injustice being served to the complainant”. The complainant lodging the cassation had failed to plead as indicated above, however, and for that reason the Supreme Court dismissed her appeal of last resort.

2. The Commissioner for Citizens' Rights, in his letter of 7 December 2000, gave notice of his participation in the proceedings concerning the constitutional complaint lodged by Ms Anna W. and presented his position, claiming that Article 228 § 1 of the Act of 16 September 1982 – Cooperative Law (consolidated text of 1995, Journal of Laws – Dz.U. No 54, item 288 with amendments), in the wording binding prior to the entry into force of the Act of 21 October 1999 on the Amendment of the Act – Cooperative Law (Journal of Laws – Dz.U. No 99, item. 1151; hereinafter: the Amending Act of 1999), was not in conformity to Article 64

paragraph 1 in conjunction with Article 31 paragraph 3 of the Constitution of the Republic of Poland and with Article 64 paragraph 2 of the Constitution of the Republic of Poland.

According to the Commissioner for Citizens' Rights, a preliminary decision is required as to the admissibility of substantive adjudication by the Constitutional Tribunal of the case in question, as the provision challenged by the constitutional complaint has already lost its binding force (Article 39 paragraph 1 subparagraph 3 of the Constitutional Tribunal Act). This issue is currently decided upon by Article 39 paragraph 3 of the Constitutional Tribunal Act, which stipulates that the provision of Article 39 paragraph 1 point 3 is not applicable, if the issuing of a judgement on a normative act that lost its validity prior to such judgement being issued was necessary for protecting constitutional freedoms and rights. According to the opinion of the Commissioner for Citizens' Rights, such a necessity occurs in the present case, as its essence – from the complainant's point of view – consists in the prevention of the loss of the inherited property right, which is subject to protection by virtue of Article 64 of the Constitution of the Republic of Poland.

Pursuant to Article 223 § 1 of the Cooperative Law, the ownership title to an apartment is a transferable right, is subject to succession to heirs and is enforceable. However, according to the legal status binding prior to the entry into force of the Amending Act of 1999, succession of the ownership title to an apartment was subject to a particular legal regime resulting from Article 228 of the Cooperative Law. According to the content of Article 228 § 1 of the Cooperative Law, in the event of death of a member of a housing cooperative, the inheritor should present, within the time limit of one year from the date of opening of the inheritance, evidence of the acquisition of inheritance, and if the respective court proceedings for its confirmation are not concluded by such date, he/she should submit evidence of initiation of the same. Failure to observe the time limit specified in the above provision caused the expiry of the ownership title to an apartment being the object of inheritance (Article 228 § 3 of the Cooperative Law).

Owing to the above, according to the Commissioner for Citizens' Rights, it should be acknowledged that the challenged provision interferes profoundly with the substance of the ownership title to an apartment, as well as with the very rights of succession by inheritance, and therefore with the rights being protected pursuant to Article 64 paragraph 1 of the Constitution of the Republic of Poland. Restrictions on the rights indicated in Article 64 paragraph 1 of the Constitution of the Republic of Poland could only be deemed admissible in a situation, when that would have been necessary due to the need to protect the values specified in Article 31 paragraph 3 of the Constitution of the Republic of Poland, and that, furthermore, only if such an end could not be attained by any other means, less painful for the citizen. The requirement to perform the preserving actions stipulated by Article 228 § 1 of Cooperative Law was introduced in order to serve the principle of single-person eligibility to cooperative property title to an apartment. Yet, the principle of one-person being eligible to hold the cooperative ownership title to an apartment is intended only to make the operation of the cooperatives more efficient, and the renouncement of that principle, as stated by the Constitutional Tribunal in the statement of reasons for the judgement of 25 February 1999 (*Ref. No. K. 23/98*), does not lead to any negative consequences for the cooperative. Therefore, according to the opinion of the Commissioner for Citizens' Rights, there was no necessity for the challenged provision to introduce restrictions on the enjoyment of the rights specified in Article 64 paragraph 1 of the Constitution of the Republic of Poland.

Furthermore, according to the Commissioner for Citizens' Rights, during the period when the challenged Article 228 § 1 of the Cooperative Law was in force, the principle of equal legal protection of ownership, other property rights, and the right of succession for everyone was not observed (Article 64 paragraph 2 of the Constitution of the Republic of Poland), since the legislator had deviated from the rigours of Article 228 § 1 in relation to

successors inheriting the title to a single-family house in a housing cooperative (Article 233 of Cooperative Law).

The Commissioner for Citizens' Rights has also pointed out, that the present case gives evidence of the lack of synchronisation between the provisions regulating cassation proceedings conducted by the Supreme Court and the legal consequences resulting from the judgements of the Constitutional Tribunal.

3. The Public Prosecutor-General, in his letter of 18 December 2000, presented the view that Article 228 § 1 of the Act of 16 September 1982 – Cooperative Law (consolidated text of 1995, Journal of Laws – Dz.U. No 54, item 288) was not in conformity to Article 64 paragraphs 1 and 3 in conjunction with Article 21 paragraph 1 and Article 31 paragraph 3 of the Constitution of the Republic of Poland.

The Public Prosecutor-General indicated, that Article 228 § 1 of the Cooperative Law questioned by the constitutional complaint was changed by the Amending Act of 1999 by providing it with new purport. He also recalled, that the Constitutional Tribunal in its judgement of 25 February 1999 (*Ref. No. K. 23/98*), stated that the provision of Article 228 § 3 of Cooperative Law was not in conformity to Article 64 paragraphs 1 and 3 in conjunction with Article 21 paragraph 1 and Article 31 paragraph 3 of the Constitution of the Republic of Poland, as well as with Article 1 of the Protocol No 1 to the Convention for Protection of Human Rights and Fundamental Freedoms. The waiving of the binding force of the challenged provision, however, is not an obstacle to the examination of the constitutional complaint (Article 39 paragraph 3 of the Constitutional Tribunal Act). It is also not prevented by the previously performed review of Article 228 of the Cooperative Law by the Constitutional Tribunal, as the establishment of non-conformity to the Constitution concerned § 3 of Article 228, whereas the present constitutional complaint concerns § 1 of Article 228.

The Public Prosecutor-General underlined, however, that due to the close connection of Article 228 § 1 with Article 228 § 3 of the Cooperative Law, the reasons stated for the indicated judgement of the Constitutional Tribunal also contain an assessment of the provision challenged by the present constitutional complaint. It is so, because the Constitutional Tribunal had expressed the view that the legal regulation restricting the inheritors in the enjoyment of their rights gives rise to reservations not only concerning the sanction consisting of the loss of the inherited apartment, but also concerning their being required to take specific action within a strictly determined time limit. The Civil Code does not limit by any deadline the period for claiming of confirmation for the acquisition of inheritance. The introduction of such a mandatory term in the Cooperative Law, therefore, implies the lack of due respect for the rights of successors, leading to the infringement of the constitutionally protected rights – the right to ownership, restricted property rights, and the right of succession. Such a solution gives priority to formal transparency and convenience, granting protection to the position of the cooperative, rather than to the constitutionally protected values. Undoubtedly, these objections refer also to the challenged provision of Article 228 § 1 of the Cooperative Law.

The Public Prosecutor-General indicated also, that the legislator had shared the presented objections, giving expression to the same views in the Amending Act of 1999, which gave new wording to Article 228 of the Cooperative Law.

4. The Marshal of the Sejm of the Republic of Poland, in his letter of 10 May 2001, recognised the constitutional complaint of Ms Anna W. as justified and ascertained that the constitutionally protected rights of the complainant suffered an infringement.

According to the Marshal of the Sejm, the stipulation expressed in the constitutional complaint should be acknowledged, that the failure to observe the time limit specified in

Article 228 § 1 of the Cooperative Law should not lead to the extinction of the property right consisting of the ownership title to an apartment. Within the scope under consideration, the legislator, by virtue of Article 228 § 1 of the Cooperative Law had made the persons inheriting such property rights subject to additional requirements, a failure of fulfilment of which within the specified time limit gave rise to a sanction consisting of the loss of the respective property title. According to the opinion of the Marshal, however, the substance of the restricted property rights, such as the cooperative title to an apartment, should be interpreted in such a manner, as to grant it protection approximating the protection foreseen for the ownership rights. It should be recognised, therefore, that „Article 228 § 1 of the Cooperative Law interferes profoundly with the substance of the property title to an apartment, as well as with the very succession rights, and thereby with the rights that are subject to protection pursuant to Article 64 paragraph 1 of the Constitution of the Republic of Poland”.

According to the opinion of the Marshal of the Sejm, the preserving actions stipulated by Article 228 § 1 of the Cooperative Law had been introduced in order to observe the principle of the cooperative title to an apartment being applicable to a single person only, which principle has no constitutional grounds.

Furthermore, the Marshal of the Sejm stressed that in connection with the judgement of the Constitutional Tribunal of 25 February 1999 (*K. 23/98*), finding that Article 228 § 3 of the Cooperative Law was unconstitutional, the Sejm had amended the Cooperative Law, providing Article 228 with new wording: „if the ownership title to an apartment has been transferred by succession to several inheritors, they should appoint from among themselves, within the time period of one year from the date of opening of the inheritance, a representative for the performance of acts in law connected with the exercise of that right”. In connection with the above, under the currently prevailing legal status, the provisions making the maintenance of the ownership title to an apartment by the successor dependent on the performance of preserving acts by the inheritor within a set time limit are not in binding force any longer.

5. On May 14, 2001, the Constitutional Tribunal received a letter from the attorney of the complainant informing about the death of Ms Anna W. The letter was appended with a summary death certificate, which indicates that the complainant, Ms Anna W., died on 19 December 2000. The legal heirs of the deceased are her husband Mr Karol W. and her daughter Ms Krystyna P.

## II

At the hearing on 21 May 2001 the duly authorised representatives of the participants in the proceedings upheld their positions expressed in the procedural writs. They also stipulated the continuation of proceedings concerning the present case in spite of the death of the complainant, finding that there were no grounds for staying or discontinuance of proceedings concerning this case.

## III

The Tribunal established the following:

1. First of all it ought to be considered, whether it is admissible to examine the constitutional complaint, taking into account the death of the complainant. The Act of 1 August 1997 on the Constitutional Tribunal (*Journal of Laws – Dz.U. No 102, item 643* with

amendments; hereinafter referred to as: the Constitutional Tribunal Act) does not contain any provision, which would regulate that issue. According to the text of Article 20 of that Act, in relation to matters not regulated in it, concerning the proceedings before the Tribunal, the provisions of the Code of Civil Procedure shall apply accordingly. Pursuant to the latter, in turn, in the event of death of a party concerned, the court is obliged *ex officio* to stay the proceedings concerned with the case until such time when the legal successors of the deceased report to the court or until the appointment of the trustee for the inheritance takes place (Article 174 § 1 point 1 and Article 180 § 1 point 1 of the Code of Civil Procedure). Proceedings are not stayed, but discontinued only in cases concerning non-transferable claims and rights (e.g. personal rights and property rights not subject to succession; compare e.g. *judgement of the Supreme Court dated 23 April 1985, Ref. No. III CZP 16/85*, Supreme Court Civil Law Department's Decisions – OSNCP 1985, No 12, item 195). In such a case the rendering of a judgement is inadmissible, as the respective right or claim becomes extinct with the moment of death of the party concerned (Article 355 § 1 of the Code of Civil Procedure).

The question arises, therefore, whether the above-indicated provisions of the Code of Civil Procedure are applicable to the proceedings before the Constitutional Tribunal?

The respective application of the provisions of the Code of Civil Procedure in proceedings before the Constitutional Tribunal implies that some of these provisions will not apply at all, either due to a different regulation of the given matter in the Constitutional Tribunal Act, or owing to their inadequacy (irrelevance) in relation to the proceedings in question (compare also the *decision of the Constitutional Tribunal of 3 March 1998, Ref. No. Ts 14/98*, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No I/1998, item 20, p. 29). There is no doubt about the fact, that the reference to Article 20 of the Constitutional Tribunal Act is of an auxiliary nature (see: A. Zieliński, *Zakres stosowania przepisów kodeksu postępowania cywilnego w postępowaniu przed Trybunałem Konstytucyjnym [The Scope of Application of the Provisions of the Code of Civil Procedure to Proceedings Before the Constitutional Tribunal]*, Palestra 1998, fol. 7-8, p. 54; Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym [Commentary to the Constitutional Tribunal Act]*, Warszawa 1999, p. 79; M. Masternak-Kubiak, *Procedura postępowania w sprawie skargi konstytucyjnej [Procedure Applied to a Constitutional Complaint]* [in:] J. Trzciński (ed.), *Skarga konstytucyjna [The Constitutional Complaint]*, Warszawa 2000, p. 171).

It is absolutely certain that the constitutional complaint concerns the rights *in personam* of the party filing a case. These may consist both of proprietary and non-proprietary rights, either transferable or non-transferable. However, one should not lose from sight the purpose and nature of the proceedings before the Constitutional Tribunal. Proceedings before the Constitutional Tribunal are not concerned with the correctness of the decision made by the organs applying the law and the essence of an individual case. The Tribunal, when examining a complaint, rules on the conformity of a normative act to the Constitution. Its verdict only indirectly concerns the individual case of the complainant in such a sense, that it decides on the admissibility of the application of a given normative act. A judgement ruling in terms of substance on a constitutional complaint, therefore, is undoubtedly of general significance, it is effective *erga omnes*; it has universally binding force (Article 190 paragraph 1 of the Constitution). The establishment by the Constitutional Tribunal of the non-conformity of a normative act to the Constitution causes the elimination of such an act from the legal system, and therefore it leads to consequences concerning not only the complainant, but also other participants in legal relations. According to Article 190 paragraph 4 of the Constitution, everyone may demand the reopening of such proceedings, in which the waived provision had provided the basis for determining his/her rights and obligations. Such a norm, furthermore,

cannot provide the basis for adjudication and cannot be binding *pro futuro* (compare: Z. Czeszejko-Sochacki, *Skutki prawne orzeczenia przez Trybunał Konstytucyjny o niekonstytucyjności aktu normatywnego* [Legal Consequences of a Ruling by the Constitutional Tribunal on the Unconstitutionality of a Normative Act], *Przegląd Sejmowy* [The Sejm Review]1996, No 3, p. 19).

According to the opinion of the Constitutional Tribunal, it cannot be stipulated that in the event of death of the complainant the above-indicated provisions of the Code of Civil Procedure shall apply. The reasons for discontinuing proceedings specified in the Constitutional Tribunal Act constitute a finite closed list. Indeed, the indicated reasons include the inadmissibility of the pronouncement of a judicial decision (Article 39 paragraph 1 subparagraph 1), but this does not imply that the same reasons are in question here as those leading to discontinuance in civil law procedure. The event consisting of the death of the complainant does not eliminate the capacity to attain the objective of the proceedings in progress concerning a constitutional complaint, which consists in eliminating from the legal system of a provision not in conformity to the Constitution. The differences characterising the proceedings concerned with a constitutional complaint, when compared to regular court proceedings, are significant enough to justify a very prudent approach to the application of the grounds for staying or discontinuing the proceedings. The adoption of any other position would significantly restrict the capacity to exercise the basic function of proceedings before the Tribunal concerned with the examination of conformity to the Constitution of legal regulations. It would be impossible for it to be reconciled with the universal public interest, the protection of which – in the light of the adopted model – is an essential premise for proceedings conducted on the subject of any constitutional complaint.

In consequence, the Tribunal acknowledges that the death of the complainant does not *per se* constitute a reason for staying or discontinuing the proceedings concerning the respective constitutional complaint. Thereby, the Tribunal did not share the view expressed earlier in the decision of the Constitutional Tribunal of 9 March 1999, Ref. No. SK 10/98 (Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 2/1999, item 27) on the discontinuance of proceedings concerned with a case due to the death of the complainant.

2. In the present case it was also necessary to consider the issue of admissibility of the constitutional complaint in relation to the repeal of the provision of Article 228 § 1 of the Act of 16 September 1982 – Cooperative Law (consolidated text of 1995, Journal of Laws – Dz.U. No 54, item 288 with amendments), in its wording existing prior to the amendment introduced by the Act of 21 October 1999 on the Amendment of the Act – Cooperative Law (Journal of Laws – Dz.U. No 99, item 1151). According to the general principle expressed in the provision of Article 39 paragraph 1 subparagraph 3 of the Constitutional Tribunal Act, the Tribunal discontinues its proceedings at a sitting in camera, if the challenged normative act, within the scope being questioned, ceased to have any effectively binding force prior to the delivery of a judicial decision by the Tribunal. In the case considered under the present procedure the provision of Article 228 § 1 of the Cooperative Law challenged by the complainant ceased to be in effectively binding force from the date of entering into force of the provisions of the Act of 21 October 1999, i.e. 14 December 1999. By the Act of 21 October 1999 on the Amendment of the Act – Cooperative Law the provision of Article 228 was given new wording: „if the ownership title to an apartment has been transferred by succession to several inheritors, the provision of Article 233 § 1 shall be applied accordingly”. The provision of Article 233, however, does not require the successors to necessarily conduct the procedure for the confirmation of the acquisition of inheritance with the restrictions that were contained in Article 228 in its original wording. At the same time, according to Article 2

of the above mentioned Act, „cases initiated and not concluded by a legally valid judicial decision shall be subject to the application of the provisions of the present Act”.

The object of the complaint, however, consists of Article 228 § 1 of the Cooperative Law as worded prior to the entry into force of the Amending Act of 1999: „in the event of death of a member of a cooperative, the inheritor should, within the time limit of one year from the date of opening of the inheritance, present the confirmation of acquisition of the inheritance, and if the court proceedings concerning that acquisition have not been concluded by that date, he/she should submit evidence of their initiation. If there are several successors, in addition, within the time limit of three months from the date of the judicial decision on the acquisition of inheritance becoming legally valid, they should indicate the inheritor, who has acquired the cooperative property title to an apartment as the result of distribution of the inheritance, or to present evidence of the initiation of the respective proceedings of distribution of the estate. In such a case the indication of the inheritor should take place within the time limit of three months from the date of conclusion of the distribution proceedings”.

According to the established position of the Tribunal (compare the *judgement of 31 January 2001, Ref. No. P. 4/99*, Official Collection of Constitutional Tribunal’s Decisions – OTK ZU No 1/2001, item 5), a provision must be deemed as binding within such scope, within which it is applicable to particular acts of law (the so called limited binding force of a provision), and therefore over such a period of time, during which it is or it may be the basis for the adoption of decisions concerning the application of the law (see e.g. the *judgement of 18 November 1998, Ref. No. SK 1/98*, Official Collection of Constitutional Tribunal’s Decisions – OTK ZU No 7/1998, item 120, p. 677, *judgement of 14 November 2000, Ref. No. K. 7/00*, OTK ZU No 7/2000, item 259, p. 1290). In consequence it should be noted that the hitherto applied interpretation of the notion of binding force of a provision has not been changed and continues to be in force.

It needs to be underlined that the provision of Article 39 paragraph 3 of the Constitutional Tribunal Act, according to which non-binding provisions may be subject to review, does not cover by its scope those situations, where the judicial decision concerns provisions that are formally repealed, but which may still constitute a basis for application in accordance with the above indicated interpretation. It becomes necessary to determine, therefore, whether in the present case Article 228 § 1 in its previous wording has maintained its binding force according to the interpretation established above.

Analysis of Article 2 of the Amending Act of 1999 indicates that the new regulations will be applicable only to cases initiated and not concluded by a legally valid judicial decision. According to the opinion of the Tribunal, Article 2 of the Act will in consequence be applicable both to such cases concerning which proceedings had been in progress that were not yet concluded by a legally valid decision on the day of its entry into force, as well as *lege non distinguente* in situations, where after the date of entry into force proceeding had been initiated to confirm the acquisition of inheritance. This results from systemic and teleological interpretation of this provision. Therefore, the stipulation is fully justified that the amendment introduced by the Act of 21 October 1999 has caused the provision of Article 228 § 1 in its previous wording to lose any binding force, even within limited scope of application, as it will not be applicable to any proceedings, which will be in progress after the entry into force of the respective Amending Act. It should be underlined, at the same time, that the new legal status does not impact the legal position of those persons, with respect to whom a legally valid conclusion of proceedings has indeed taken place. This statement applies also to such a situation, which took place in the present case, where a legally valid decision has taken place on the basis of Article 228 § 1 already after the date of enactment of the judicial decision of the Constitutional Tribunal concerning the issue of non-conformity to the Constitution of Article 228 § 3 of the Cooperative Law. In those cases the possibility did not exist to demand

the reopening of proceedings, if the respective judicial decision had been issued after the lapse of the one month term on the basis of Article 401<sup>1</sup> of the Code of Civil Procedure.

In the case concerning the object of the present proceedings the final judicial decision consisted of the verdict of the Supreme Court of 19 January 2000 (*Ref. No. II CKN 688/98*), i.e. issued after the date of entry into force of the above indicated Amending Act of 1999 (14 December 1999). The establishment of non-conformity of Article 228 § 3 of the Cooperative Law to the Constitution could not constitute, according to the position maintained by the Supreme Court, an obstacle for the dismissal of the respective cassation. For as was indicated in the statement of reasons for the judgement of 19 January 2000, the provision of § 3 Article 228 of the Cooperative Law was in force at the time of adjudication by the Court of Appeal of the second instance (it ceased to be in force only as the result of the *judgement of the Constitutional Tribunal of 25 February 1999, Ref. No. K. 23/98*, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 2/1999, item 25). The decision in this case was adopted on the basis of Article 228 § 1 of Cooperative Law in its previous wording. That provision, as already indicated above, has already definitively ceased to be in force.

Under such a state of affairs it becomes necessary to determine, whether Article 39 paragraph 3 of the Constitutional Tribunal Act may justify in relation to the present case the examination of Article 228 § 1 of the Cooperative Law. The basic premise for the application of Article 39 paragraph 3, and therefore for the undertaking of the examination of conformity to the Constitution of a provision that is not in force any more, consists of the establishment of the necessity for such examination in order to provide protection of the constitutional rights and freedoms.

Article 39 paragraph 3 does not specify any limits of a constitutional complaint and thereby it does not concern the scope of such a complaint as conceived in Article 66 of the Constitutional Tribunal Act. It is up to the Tribunal to assess, whether the complaint merits examination in terms of substance owing to the necessity of the existence of the premises implied by Article 39 paragraph 3. Reference being made in the text of the complaint to Article 39 paragraph 3 of the Constitutional Tribunal Act is therefore not necessary for the observance of the formal requirements applicable to a constitutional complaint.

According to the opinion of the Tribunal, in the present case there is a basis – in accordance with Article 39 paragraph 3 of the Constitutional Tribunal Act – for the conduct of examination of the conformity of the provision of Article 228 § 1 of Cooperative Law to the Constitution. The provision contained in Article 39 paragraph 3 of the Constitutional Tribunal does not determine that a judicial decision is issued by the Tribunal only when it finds the non-conformity of the challenged provision to the Constitution concerning the scope of the constitutional rights and freedoms. The recognition of the purposefulness of examining the challenged provision on the basis of Article 39 paragraph 3 does not yet determine *per se* the orientation of the judgement. The premise justifying the examination of conformity to the Constitution of a given provision consists in the establishment that there is a connection between the regulation in question and the protection of constitutional rights and liberties. Such a connection occurs whenever the following three premises are fulfilled:

– Firstly, that the provision being the object of examination contains normative purport relating to the sphere of constitutionally protected rights and freedoms;

– Secondly, that no alternative legal instrument exists (except for the possible establishment that the respective provision is unconstitutional), which could cause a change of the legal situation that has been definitively determined before the respective provision ceased to have any binding force;

– Thirdly, that the possible elimination of the respective provision from the legal system will constitute an effective measure for the reinstatement of protection of the rights infringed upon by the binding force of the challenged legal regulation.

If the consideration of the above indicated premises fails to lead to an unequivocal result, the particular directive concerning the interpretation of Article 39 paragraph 3 of the Constitutional Tribunal Act, expressed in the judgement of the Constitutional Tribunal of 12 December 2000, Ref. No. SK 9/00 (Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 8/2000, item 297, p. 1439), should be deemed as pertinent, according to which: „in the case of doubt in this matter, the presumption of law is in favour of substantive examination of the constitutional complaint”.

According to the opinion of the Tribunal, in the present case the premises indicating the purposefulness of examining the constitutionality of the already revoked and not binding Article 228 § 1 of the Cooperative Law have been fulfilled.

3. Prior to embarking upon the analysis of the substance of the matter, it is also necessary to consider the scope of the model, which should be applied to the present case for the examination of conformity to the Constitution of the challenged provision.

In the position of the Commissioner for Citizens' Rights the non-conformity of Article 228 § 1 of the Cooperative Law to Article 64 paragraph 1 in conjunction with Article 31 paragraph 3 and with Article 64 paragraph 2 of the Constitution was pointed out. Yet, the complainant did not indicate Article 64 paragraph 2 of the Constitution in her constitutional complaint, as the presumed basis for the establishment of unconstitutionality of Article 228 § 1 of the Cooperative Law in its previous wording. As already underlined many times in previous judicial decisions of the Constitutional Tribunal, the Tribunal cannot adjudicate with respect to a provision not indicated by the applicant or complainant (compare with the *judgement Ref. No. SK 3/98*, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 5/1998, item 69 and the *decision Ref. No. U. 2/98*, OTK ZU No 1/1999, item 6). It is also not possible for the Tribunal to rule *ex officio* on the non-conformity of a provision indicated in a constitutional complaint to constitutional norms other than those indicated in the complaint. For according to Article 66 of the Constitutional Tribunal Act, the Constitutional Tribunal is bound by the limits of the complaint. It becomes necessary to consider, therefore, whether the Commissioner for Citizens' Rights is entitled to independently indicate in the proceedings before the Constitutional Tribunal concerning a constitutional complaint the basis for the establishment of non-conformity to the Constitution of a determined provision of a law, if it was not indicated as the model for the establishment of unconstitutionality in the complaint itself. The Constitutional Tribunal has established that the above question should be given a positive answer. This issue has neither been resolved *expressis verbis* in the Constitution itself, nor in the Constitutional Tribunal Act, nor in the Act on the Commissioner for Citizens' Rights. The competence of the Commissioner for Citizens' Rights in this regard, according to the Tribunal, is implied, however, by the particular role of the Commissioner for Citizens' Rights in the proceedings before the Constitutional Tribunal, as well as from his autonomous position in such proceedings. According to Article 208 of the Constitution and to Article 1 paragraph 2 of the Act of 15 July 1987 on the Commissioner for Citizens' Rights (consolidated text dated 2001, Journal of Laws – Dz.U. No 14, item 147; hereinafter referred to as: the Act on the Commissioner for Citizens' Rights), the Commissioner for Citizens' Rights is positioned to guard the freedoms and rights of human being and citizen determined in the Constitution and other normative acts. Owing to this, he is assured a special position in the context of proceedings concerning the cases of constitutional complaints, which may be filed when constitutional rights and freedoms are violated, in accordance with Article 79 of the Constitution. In the proceedings before the Constitutional Tribunal, the role of the Commissioner for Citizens' Rights is not limited exclusively to the presentation of his position concerning the given case. According to the contents of Article 27 point 8 and Article 51 paragraph 2 of the Constitutional Tribunal

Act, the Commissioner for Citizens' Rights acts as a participant in the proceedings, where he has given notice of his participation in the proceedings in relation to a constitutional complaint, alongside with the subject, who has lodged the respective constitutional complaint. The general public interest connected with the proceedings concerning a constitutional complaint, as indeed first of all oriented at the elimination of an unconstitutional provision, and not exclusively at the protection of the individual interest of the complainant, is underlined by the very participation of the Commissioner for Citizens' Rights in such proceedings. The autonomous position of the Commissioner for Citizens' Rights with respect to the respective legal process indicates that the proceedings concerning the complaint also largely maintain the features of abstract control.

One cannot lose from sight the fact, that the Commissioner for Citizens' Rights belongs to the scope of subjects entitled to initiate proceedings according to the procedure of the so-called abstract examination (Article 191 paragraph 1 subparagraph 1 of the Constitution). By acceding to the complaint, the Commissioner for Citizens' Rights gives expression to his position in terms of substance concerning the assessment of conformity to the Constitution of the challenged regulation. Support by the Commissioner for Citizens' Rights of the position of the complainant concerning the unconstitutional nature of the respective provision could have been expressed in an autonomous application submitted to the Tribunal by the procedure of abstract examination. It would be contradictory with the purposes and premises of the proceedings before the Tribunal, however, to demand in every case of extending the constitutional standard (in relation to the complaint) that the Commissioner for Citizens' Rights should file an autonomous application under the abstract control procedure. It would also contradict the obvious considerations of procedural economy. A different conclusion would also contradict the purport of the provision of Article 16 paragraph 2 subparagraph 2 of the Act on the Commissioner for Citizens' Rights, as well as the constitutionally determined tasks of the Commissioner for Citizens' Rights.

As a consequence, it should be acknowledged that the Commissioner for Citizens' Rights is entitled to indicate, concurrently with the notification of his participation in the proceedings, what constitutional rights or freedoms have according to his opinion been infringed upon by the provision, requested by the complainant to be established as not in conformity to the Constitution. The Tribunal recognises thereby that in the present case it is necessary to determine, whether the indicated Article 228 § 1 of Cooperative Law does not infringe Article 64 paragraph 2 of the Constitution, referred to as one of the grounds for the unconstitutional nature of the challenged provision according to the position presented by the Commissioner for Citizens' Rights.

4. The revocation of Article 228 § 1 of the Cooperative Law by the Amending Act of 1999 led to the situation, that both in cases not concluded by a legally valid judicial decision at the date of its entry into force, as well as in the cases initiated after that date – the respective provision does not constitute the basis for adjudication concerning inheritances opened before its entry into force. In the present case Article 228 § 1 did constitute the basis for the adjudication. The provision of Article 228 § 3, as worded prior to the enactment of the announcement of the President of the Constitutional Tribunal on the cessation of its binding force, however, was closely connected with the provision of Article 228 § 1 challenged in the present case. The failure to fulfil the requirements specified there caused, according to Article 228 § 3, the extinction of the cooperative ownership title to an apartment. The question arises, whether in the present case the complainant fulfilled the requirement to exhaust the available legal means, which constitutes a basic premise for the lodging of a constitutional complaint (Article 46 of the Constitutional Tribunal Act). Indeed, the establishment by the Constitutional Tribunal of the non-conformity to the Constitution of the provision of Article

228 § 3 of the Cooperative Law opened the way for the demands of reopening of civil law proceedings, within the term of one month from the entry into force of the verdict of the Tribunal, concerning cases concluded by legally valid judicial decisions, the basis for the adjudication of which had consisted of the provision now established as being in non-conformity to the Constitution (Article 401<sup>1</sup> of the Code of Civil Procedure). In the case under consideration the complainant could not request the reopening of the proceedings, as at that time the respective proceedings were in progress before the Supreme Court. Therefore, she could not demand the reopening of proceedings within the indicated period of time, the course of which did not start from the date of the respective judicial decision becoming legally valid, but from the date of enactment of the respective judgement of the Constitutional Tribunal. It may be presumed, therefore, that if the legal regulatory status established subsequent to the revocation of Article 228 § 3 (after the enactment of the *judgement of the Constitutional Tribunal of 25 February 1999, Ref. No. K. 23/98*) had been taken into account by the Supreme Court, that could have resulted in a judicial decision favourable for the complainant and the allowance of the cassation. The Supreme Court, however, adjudicated finally on the basis of Article 228 § 1, without taking into account the status of the law that emerged subsequent to the revocation of Article 228 § 3.

On this occasion the position of the Commissioner of Citizens' Rights should be sustained, that the lack of capacity to take *ex officio* into the account the circumstance that the Tribunal established the unconstitutional nature of the respective normative act, was providing „evidence of the lack of synchronisation between the provisions of the law regulating the cassation proceedings conducted by the Supreme Court and the legal consequences stemming from the judgements of the Constitutional Tribunal”. According to the opinion of the Tribunal, the lack of such regulation cannot cause the inadmissibility of lodging a constitutional complaint in the situation, when – as it happens in the present case – we have to do with two provisions, one of which, directly introducing a sanction (the extinction of the respective right), has been established as being in contradiction with the Constitution, whereas the other one introduces formal restrictions, the existence of which may still form an effective obstacle for the definitive transfer of a property right to the successor of inheritance.

In the opinion of the Tribunal, in the case under consideration, the fact of the prior judgement establishing the discrepancy of Article 228 § 3 of the Cooperative Law with the Constitution cannot constitute an obstacle to the adjudication on the issue of conformity to the Constitution of Article 228 § 1 of the same Act. In this case the object of the constitutional complaint does not consist in the nature of sanction consisting of the extinction of the respective right *in personam*, connected with the failure to observe the time limits specified in the challenged provision that were introduced by Article 228 § 3, but the limitation consisting in binding the successors – acquirers by inheritance of the cooperative property title to an apartment – by the obligations to fulfil within specified time limits the formal requirements specified in Article 228 § 1.

It should also be noted that the Tribunal, in an earlier ruling (*decision of 16 November 1999, Ref. No. SK 20/99* concerning the case of application for the establishment of non-conformity of Article 228 § 3 of Cooperative Law to Article 64 paragraphs 1 and 3 in conjunction with Article 21 paragraph 1 and Article 31 paragraph 3 of the Constitution of the Republic of Poland) did not exclude the possibility of examining the conformity to the Constitution of Article 228 § 1 of Cooperative Law, despite of the revocation of Article 228 § 3, by stating in the reasons for the decision on the discontinuation of the case, that the „challenged Article 228 § 3 of the Cooperative Law (...) had lost its binding force as the result of a judgement of the Constitutional Tribunal, and therefore it cannot be the object of any review of conformity to the constitution. Although in the grounds for the complaint the

complainant refers to Article 228 § 1 of the Cooperative Law, but not only does she not indicate that provision in the *petitum* as the object of the application, but also does not at all explain what constitutional freedoms or rights, and in what way – according to the complainant – have been infringed upon. The content of the complaint formulated in this manner implies that the complainant subjected to constitutionality control only Article 228 § 3 of the Cooperative Law”.

Taking into the account the above-indicated circumstances, according to the assessment by the Tribunal, there are no obstacles for the Tribunal to consider the complaint concerning the present case.

5. Undoubtedly, the cooperative property title to an apartment is not subject to the same protection as [full] ownership rights (compare: reasons for the *judgement of the Constitutional Tribunal of 2 June 1999, Ref. No. K. 34/98*, Official Collection of Constitutional Tribunal’s Decisions – OTK ZU No 5/1999, item 34). According to Article 223 § 1 of Cooperative Law it is a transferable right, subject to succession and enforcement, but also as a limited right in property it has a narrower content and scope of entitlement for the person, in whom it is vested. That scope has been indicated by enumeration – differently than in the case of [full] ownership rights, the definition of which is of a negative nature (Article 140 of the Civil Code). On the other hand, however, it is a particular kind of rights, as has been pointed out by the Constitutional Tribunal in its Judgement of 25 February 1999 (*Ref. No. K. 23/98*). It constitutes a „peculiar ownership right”, which was devised in the place of full ownership in the period of the People’s Republic of Poland. In civil law doctrine it has been pointed out since a long time that it is a right, which is close to the [regular] ownership right.

This type of restricted property rights was introduced for the first time in the Act of 17 February 1961 on Cooperatives and their Associations (Journal of Laws – Dz.U. No 12, item 61; amended: in 1974, No 47, item 281). That regulation, as well as a number of other particular solutions in property law, had the purpose, above all, to assure the interference of the state in the sphere of these rights and their execution by the respectively empowered entities. The assumption was that these rights were to eliminate eventually in the future the ownership rights to an apartment, which stemmed from the principles of the political system. In longer time perspective ownership of real property was to be allowed exclusively to the state. One of the expressions of such development of the property law system consisted of the limitations on the free disposal of rights *in personam*. This tendency was particularly visible in the case of property rights to real estate.

In essence, therefore, taking into account both the economic grounds for its establishment, and the scope of rights pertaining to a member of a cooperative, the cooperative property title to an apartment fulfils functions that are similar to those of ownership rights. For this reason it has been rightly pointed out in the above quoted judgement of the Constitutional Tribunal (*Ref. No. K. 23/98*), that „the content of the restricted property right, such as the cooperative title to an apartment, should be interpreted in such a manner, as to approximate its protection to the protection granted to ownership rights”. The particular nature of this kind of rights is also implied by Article 3 and Article 204 of the Cooperative Law. On the premises of systemic interpretation, and also taking into account the basic principles of the protection of property adopted in the constitutional regulations, there can be no doubt that in the case of a collision between the interests connected with the protection of cooperative property and the rights connected with the protection of the cooperative title to an apartment, there are no grounds for attributing absolute priority to cooperative property. A different position would have had to lead to the conclusion that the social collective [group] property, such as was prevailing in the previous political system, was enjoying a privileged position and particular means of its protection. One cannot lose from

sight the fact that the property title to an apartment serves the same purposes as the [full] ownership rights (as a „peculiar ownership right”). It cannot be neutral for this position that the functions of cooperative property are taken into account. Notwithstanding, according to Article 3 of the Cooperative Law, it is supposed to serve to the benefit of the members of a cooperative and its protection serves the same purpose (compare: similar reasons quoted in the judgement *Ref. No. K. 23/98*).

Although the intention of this provision is to highlight the economic purpose of the activities of a cooperative (compare: *Resolution of the Supreme Court of 6 February 1996, III CZP 4/96*, Supreme Court Civil Chamber’s Decisions – OSNC 1996, No 4, item 58), but at the same time it underlines the particular role of the cooperative, which does not operate „for its own benefit”, but rather in order to satisfy the specific needs of its members, and thereby it should first of all take their interests into account. The presented position is also confirmed by Article 204 § 1 of the Cooperative Law, according to which the „object of the activities of a housing cooperative is to satisfy the housing needs of its members and their families, as well as the economic and cultural needs resulting from inhabiting a cooperative housing estate or building”. This provision ceased to be binding from 24 April 2001 (the date of entry into force of the Act of 15 December 2000 on Housing Cooperatives – Article 29 point 5; Journal of Laws – Dz.U. of 2001 No 4, item 27), but the same concept is expressed in Article 1 paragraph 1 of the new Act, which states that „the purpose of a housing cooperative (...) is to satisfy the housing needs and other needs of its members and their families, by providing the members with independent residential dwellings or single family houses, and also premises for other purposes”.

From this point of view it is of no significance that presently, according to the Act of 15 December 2000 on Housing Cooperatives, the possibility to establish *pro futuro* the cooperative property rights to an apartment. According to Article 37 of that Act, „once the Act enters into force, a housing cooperative cannot establish cooperative property rights to apartments, cooperative rights to premises for other uses, including garages, nor rights to parking places in multiple unit garage premises”. The entitled persons, who are eligible to the cooperative property title to an apartment, may demand the transfer to them of the ownership of the respective apartment under the condition of fulfilment of the premises indicated in Article 39 of the Act. The basic task of the housing cooperatives presently consists in the construction of houses, the establishment of cooperative tenancy rights to an apartment and the transfer to members of the cooperative of titles to an apartment legally separated from these cooperatives (compare: Article 1 paragraph 2 of the Act on Housing Cooperatives).

As already stressed above, the cooperative property title to an apartment has been structured by the legislator as a transferable one (both negotiable and subject to succession by inheritance), but the holder of such entitlement is subject to a number of restrictions. Some of them, concerning the obligations of the acquirers of such title by way of inheritance, were contained in Article 228 of Cooperative Law. Although the ruling of 25 February 1999 (*Ref. No. K. 23/98*) does not concern the provision of Article 228 § 1 of the Cooperative Law, but still a number of arguments indicated in that judgement concerns also the very issue of the requirement to observe the respective time limit and to fulfil other formal requirements, which are mentioned in Article 228 § 1.

Until September 24, 1999, i.e. until the date of publication in the Journal of Laws – Dz.U. of the announcement by the President of the Constitutional Tribunal on the cessation of the binding force of the § 3 Article 228 of the Cooperative Law, a failure to fulfil the respective preserving actions, within the time limits indicated in § 1 Article 228, had led to the extinction of the property title to a cooperative apartment. This sanction, however, did not result from the contents of Article 228 § 1, in which the legal consequences of the failure to observe the said time limits were not specified, but from the provision of Article 228 § 3 of

the Cooperative Law. Only the consideration of both of these provisions in conjunction led to the conclusion, that we have to do with strict final time limits, as only a separate provision decided on the consequences of a failure to keep to observe these terms, and thereby on their nature as periods of limitation.

It is necessary to consider, whether the application of certain obligations to the successors, without specifying any particular sanctions in the case of failure to fulfil them, can within the scope under discussion be regarded as infringing the protection of the right of succession. It should certainly be excluded, that given the revocation of the provision combining the failure to observe the set time limit with the sanction consisting of the extinction *ex lege* of the respective right, that very sanction might be taken into account. Given the lack of such regulation, indicating what consequences are the result of the failure to observe the one year term or possibly the three month term, which are mentioned in Article 228 § 1 of the Cooperative Law, it could be ascertained *prima facie* that from the date when § 3 of that provision ceased to have any binding force we have to do only with an instructive term, so that the failure to observe it does not lead to negative consequences for the eligible successors (compare: A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej [Civil Law. Outline of its General Part]*, Warszawa 1998, p. 366).

Closer analysis of the legal consequences connected with the infringement of the requirements, which are mentioned in Article 228 § 1 of the Cooperative Law, however, leads to the conclusion that on the side of the successors significant negative consequences could occur – regardless of the sanction foreseen by the revoked Article 228 § 3 (extinction of the rights).

First of all, according to Article 224 of the Cooperative Law, a cooperative cannot refuse to admit amongst its members a successor, who has fulfilled the actions foreseen by Article 228. This implies (*argumentum a contrario*) that regardless of the consequence consisting of the extinction of the respective right, a cooperative was able to refuse to admit as one of its members a person, who had failed to observe the time limits indicated in Article 228 § 1. The basis for such refusal could additionally be provided by Article 15 § 2 of the Cooperative Law, according to which a physical person, in order to become a member of a cooperative, should fulfil the requirements specified in its statutes. A cooperative could, therefore, referring to the content of that provision, determine as part of its statutes (compare: A. Stefaniak, *Prawo spółdzielcze [Cooperative Law]*, p. 26) that the basis for the refusal to accept someone amongst its members was the failure to fulfil the requirements, which are mentioned in Article 228 § 1 of the Cooperative Law. In consequence, despite of the cessation of binding force of § 3 of that provision, Article 228 § 1 of the Cooperative Law indirectly caused the emergence of the same legal consequences, as the extinction of the right *in personam* resulted from the interpretation of the contents of Article 228 § 1 in conjunction with other norms of cooperative law.

According to the opinion of the Tribunal, the obligations indicated in the provision of Article 228 § 1, considering the consequences of the failure to fulfil them, violate the principle of the protection of succession by inheritance and the principle of equal protection of property rights.

The first one has been expressed in Article 21 paragraph 1 of the Constitution. That provision introduces the constitutional guarantee for the succession of inheritance of assets left by a deceased person by its legal and testamentary heirs. This norm – as has been indicated in the judgement of the Constitutional Tribunal of 25 February 1999 – constitutes an „imperative for the organs of the state to create such legal provisions, which would not constitute an obstacle, but to the contrary, which would assure (...) the succession of rights and obligations by the way of inheritance”. That right constitutes, in essence, a correlate and supplement to the property rights, as it creates the possibility of its continuation after the

death of the previous owner. The purpose consists also of what has been pointed at in the above indicated judgement, that the organs of the state are obliged to protect the rights connected with inheritance, and also the obligation to establish procedures covering the establishment of the acquisition of inheritance, the distribution of inheritance, as well as the protection of the acquirer. Undoubtedly, the provision of Article 21 of the Constitution implies also the „positive requirement to enact such laws, that will be in agreement with the will of the testator. The unalienable correlate of the freedom of succession is the freedom to dispose of one’s property and property rights for the event of death”. In the reasons for the above indicated judgement, the Tribunal also pointed out, among other things, that the restricted rights in property are subject to constitutional protection, similarly as [full] property rights, on the basis of Article 64 paragraphs 1 and 2 in conjunction with Article 21 of the Constitution of the Republic of Poland: „similarly as in the case of [full] property rights, also within the scope concerning the protection of [limited] rights in property, the protection of such rights is the obligation of the state, which is implied by Article 21 of the Constitution, concerning both the scope of shaping the fundamental legal institutions in the service of such protection, and also the limits of such protection”. The provision of Article 64 paragraph 1 of the Constitution introduces the guarantee for the acquisition of property and for its disposal. This applies also to the dispositions in case of death. Yet, as has also been stressed in earlier judicial decisions of the Constitutional Tribunal (as most recently in the *judgement of 31 January 2001, Ref. No. P. 4/99*), the provisions of Article 20 and Article 21 of the Constitution establish the constitutional guarantee for the maintenance of ownership in private hands. The essence of the right of succession implies the assertion that it is an institution, the purpose of which is to perpetuate the property rights. The Constitution does not itself decide, however, on the formal issues connected with the very acquisition of inheritance by the successors nor on the mechanism for their take over of the rights and obligations of the deceased.

In the already previously quoted judgement of 25 February 1999 (*Ref. No. K. 23/98*) the Constitutional Tribunal has pointed out that the construction applied in Article 228 § 3 of the Cooperative Law „in reality remains in non-conformity to the norm expressed in Article 64 paragraph 1 of the Constitution, through the fact that it violates the right of everyone to succession by inheritance”. Such a solution was found to be a reflection of too far reaching interference with the sovereignty of the last will of the testator. The same assessment should be adopted, according to the opinion of the Tribunal, with respect to the requirement to fulfil the preserving actions, which are mentioned in Article 228 § 1 of the Cooperative Law. Similarly as in the context of the earlier ruling of 25 February 1999, the same assertion applies, that the successor may suffer from negative consequences, including – as has been demonstrated – the loss of a right being part of the inheritance, even when he did not know of the opening of the inheritance, and could not thereby undertake any actions in order to meet the time limits contained in the challenged provisions.

The assessing review of Article 228 § 1 of the Cooperative Law leads to the conclusion that the solution adopted in it was violating the constitutional guarantees of protection expressed in Article 21 paragraph 1 and Article 64 of the Constitution.

There is no doubt that the interference in the sphere of the legal mechanisms for the transfer of property title to dwellings to its legal heirs does not limit directly the very succession of such a right, but it makes it impossible – in specific situations, by the establishment of rigorous formal requirements – to maintain the rights acquired by way of inheritance. The protection of the rights to succession, guaranteed by constitutional norms, cannot be conceived in terms of purely formal categories, as the assurance of just the mere transfer of the testator’s rights to his legal successors, but it should be realised in the subsequent stages – by creating the appropriate legal conditions, which would prevent the

emergence on the successors' side of peculiar appearances of legal order. The adoption of any other position would deform the very sense of the constitutional guarantee. The acquisition of the respective right by the successors from the moment of the opening of inheritance, but prior to the fulfilment of the premises that were foreseen by Article 228 § 1, was not of a definite nature. The assessment of the legislatively established mechanisms for the transfer of rights as the result of succession cannot in consequence be detached from these additional premises, which were connected with the requirement to undertake the particular preserving actions, from the fulfilment of which the definite validity of the acquisition of the respective rights by the successors was dependent. The subject of the examination should therefore always consist of the complete structure of the given legislative solution, which has been applied in the case of succession by inheritance. There is no doubt that the legislator disposes of complete liberty in determining the subjects belonging to the circle of successors, as well as further premises, from which the definite validity of the transfer of the inheritance to the legal successors might depend (e.g. the determination of a time limit for the acceptance of inheritance limited to the value of assets or its rejection, after the lapse of which term the transfer of inheritance to its legal successors becomes definitely valid). It may also subject certain components of the inheritance to a separate regime and exclude them from the general mechanism of inheritance (such as in relation to the furnishings of a common household, see: Article 939 § 1 of the Civil Code). The solutions in this regard cannot be arbitrary or accidental, however. The constitutional guarantees granted to the rights of succession must always respect the model of inheritance adopted in the legal system and the principles governing that standard. Divergences from that model, and therefore deviation from the general mechanisms of the transfer of succession rights, will always be subject to assessment from the point of view of constitutional guarantees, and especially from the point of view of the legislative solutions adopted in the system that concern similar, alike categories of property rights that are subject to inheritance. The assessment conducted from that very point of view leads to the conclusion that the principles that are universally applied in the context of the adopted model of succession of property rights have been violated – by the introduction of the additional premises specified in Article 228 § 1. Yet, this already constitutes a direct basis for the position (adopted also in the case *Ref. No. K. 23/98*) that in this way there has at the same time occurred a violation of the constitutional guarantees established in relation to succession rights in Article 21 paragraph 1 and in Article 64 paragraph 1 of the Constitution.

The above-adopted assessment is directly connected with the issue of equal treatment of successors in similar or alike legal situations. The lack of such equality, being manifested by the different treatment of legal heirs to the rights regulated by act of parliament (cooperative property title on the one hand, title to a single-family house in a housing cooperative on the other hand), constitutes, at the same time, a manifestation of the violation – with respect to the cooperative property rights to an apartment – of the constitutional guarantees connected with the protection of succession and the principle of equal treatment of property rights (Article 64 paragraph 2 of the Constitution).

In Article 64 paragraph 1 it has been indicated that everyone shall have the right to ownership, other property rights, and the right of succession. Whereas according to paragraph 2, the above indicated property rights shall receive legal protection on an equal basis for everyone. This implies that, in principle, that cannot be differentiated according to subjective scope. As the judicial decisions of the Tribunal have already previously indicated (*judgements Ref. No. P. 2/98* and *Ref. No. K. 23/98*), the regulation contained in Article 64 of the Constitution repeats in certain directions, and in others it complements the regulation foreseen by Article 21 of the Constitution. The view expressed in the position of the Commissioner for Citizens' Rights merits to be reiterated, that also the principle of equal protection of rights has been violated, which principle is mentioned in Article 64 paragraph 2 of the Constitution.

Notwithstanding, the legislator is free to create rights in property other than ownership at will, both in terms of their legal features (*judgement of 2 June 1999, Ref. No. K. 34/98*), and in terms of their capacity to be transferable (compare: *judgement of 31 January 2001, Ref. No. P. 4/99*). This does not justify, however, the arbitrary shaping of the substance and the limits of particular property rights, which fulfil identical functions and protect similar interests. The existence of the premises arising from Article 228 § 1, however, unequivocally pointed at the infringement of the principle of equal treatment of property rights. One should also draw attention to the fact that different requirements applied to successors acquiring property rights to an apartment, and different requirements applied to successors inheriting the title to a single-family house in a housing cooperative. In the case of the latter, according to Article 233 of the Cooperative Law, the successors to whom the rights to a single-family house were transferred, should, within the term of one year from the date of opening of the inheritance, appoint from amongst themselves a legal representative for the purpose of performing the actions connected with the exercise of that right. This provision does not demand, as was the case with the norm contained in Article 228 § 1, the successor to present, within the term of one year from the date of opening of the inheritance, the confirmation of the acquisition of the respective inheritance, nor does it require the submission of evidence of its initiation, nor does it demand to indicate which one of the successors has received that right as the result of the distribution of the inheritance. The protection of the rights of succession is not of an absolute nature, but there is no justification whatsoever for the introduction of a mechanism, whereby the further existence of one type of rights in property is made dependent on the fulfilment of particular formal requirements (as in the case of the cooperative property rights to an apartment), while in the case of other similar rights such a requirement is not introduced (as in the case of the rights to a single-family house in a housing cooperative and the rights to an apartment under construction for the purpose to be transferred to become the property of a member of the cooperative, Article 233 of the Cooperative Law, see: *judgement of the Constitutional Tribunal of 31 January 2001, Ref. No. P. 4/99*).

In connection with the case under the analysis it should be noted, that the infringement of the constitutional principle of equal protection of the rights of succession results also from the fact that, according to Article 228 § 1 of the Cooperative Law, the successors were obliged to indicate from amongst themselves the one, upon whom the rights to the respective apartment were bestowed as the result of distribution of the inheritance, at the latest within the term of three months from the date of conclusion of the respective estate distribution proceedings. If such proceedings were not yet concluded, the successors were required to present evidence of its initiation. This stems from the assumption adopted in the respective Act of Law, that the respective property title could belong only to one person (the so-called principle of single-person eligibility to the cooperative property rights to an apartment). In connection with this it should be emphasised that the obligation to indicate the inheritor of the property title concerns the relations between the successors, which is also covered by the principle indicated in Article 64 paragraph 2 of the Constitution. First of all, one should recall the position maintained by the Tribunal, which has been expressed in the Judgement of 31 January 2001, Ref. No. P. 4/99, that such a legislative solution is admissible, according to which a certain property right remains in the hands of one subject inheriting the respective estate, whereas the other remaining successors inherit other components of the inheritance, or they obtain a monetary equivalent of their shares. The differentiation of the legal situation of the successors in the context of the legal solution adopted in Article 228 § 1, which represents a consequence of the principle of single-person entitlement, according to the opinion of the Constitutional Tribunal, does not find any justification in the context of the principle of equal protection of the rights of succession for everyone (Article 64 paragraph 2 of the Constitution). This issue has been raised in the Judgement of 25 January 1999, Ref. No. K.

23/98. Indeed, it has been indicated there, that regardless of the fact that this matter was not directly connected with the establishment of the unconstitutional nature of the provision of Article 228 § 3 of the Cooperative Law, the objectives of the activities of a cooperative do not constitute any basis, in the name of which there would be a need to introduce the requirement of single-person entitlement to the succession of cooperative rights. That principle is injurious for the successors, as it introduces coercion forcing them to distribute the inherited estate. This leads in consequence to deprivation or limitation of the rights pertaining to these subjects. The respective principle was introduced in order to assure the protection of cooperative administration. The Constitutional Tribunal has not recognised, however, any justification nor legal basis to allow it such far reaching – drastic – restriction of the constitutionally protected rights of succession. The requirement to indicate the successor inheriting the property rights leads to the situation, that the distribution of the inheritance becomes in fact mandatory. Such deviation from the rule expressed in Article 1035 of the Code of Civil Procedure „does not find any rational justification and (...) points at the possibility to regulate the rights of succession to the cooperative title to dwellings in accordance with the broadly conceived, constitutionally expressed rights of succession, without the excessive and unjustified limitation of such rights”.

Moving presently on to the evaluation of the adopted legislative solutions from the point of view of the principle expressed in Article 31 paragraph 3 of the Constitution, it should be ascertained, that in the case under consideration none of the premises justifying the interference by the legislator with the principle of protection of the rights of succession and equal protection of property rights for everyone have been observed.

The adopted legal structure, connected with the introduction of rigorous formal premises, on the fulfilment of which the definite transfer of property rights to an apartment was dependent, was not justified neither by necessity, nor by purposefulness of the protection of rights and values indicated in the provision of Article 31 paragraph 3 of the Constitution. According to the opinion of the Tribunal, in the face of the principle of protection of the rights of succession it is not admissible to introduce any formal requirements whatsoever as being applied to successors, which do not find justification in the light of the provisions of the constitution. In the case of the provision under discussion there is a lack of so called evident need for interference. The introduced means cannot be regarded as necessary, and objectives as impossible to achieve by applying other means (in accordance with the principle of proportionality expressed in Article 31 paragraph 3 of the Constitution; compare: *judgements of the Constitutional Tribunal: Ref. No. K. 11/94*, the Constitutional Tribunal's Decisions – OTK in 1995, Part I, item 12; *Ref. No. K. 10/95*, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No 2/1995, item 10, and *Ref. No. P. 2/98*, OTK ZU No 1/1999, item 2).

It should be stressed, above all, that the requirement to necessarily perform the preserving actions had only the purpose to assure the particular position of the cooperative. As far as the protection of the interests of the cooperative is concerned, the presently binding civil law fully assures the capability to claim its dues connected with the inherited apartment. As has already been indicated in the already several times quoted Judgement of 25 February 1999, „it is not for the cooperative to be concerned about determining, whether the person occupying a flat after its deceased member is indeed entitled to do so, but it is up to the interested successor himself/herself to demonstrate his/her rights. There is no doubt that a cooperative, as a creditor in relation to the successors of another one of its members, and also as the owner of the respective real property, undoubtedly has its legal interest in determining who is ultimately entitled to the cooperative title to an apartment. The legislator, however, cannot protect such a legal interest in a way involving the violation of the constitutionally protected rights, such as the right to ownership, limited rights in property, and the rights to

inherit them”.

As a consequence, it should be recognised that the solution, making the further existence of a cooperative property title to an apartment on the fulfilment of the premises indicated in Article 228 § 1 of the Cooperative Law, has no justification, neither in any grounds connected with the shaping of the legal order in the sphere of ownership relations, nor is it dictated by any reasons concerned with the protection of the public interest.

The introduction of solutions, the consequence of which – as is the case occurring in the event of failure to fulfil the formal requirements foreseen by Article 228 § 1 – may consist of the blocking of the acquisition of cooperative property rights to an apartment, leads to the conclusion that in such a case the outcome consists not only of restricting the rights of succession, but also of the infringement of the essence of these property rights. The very existence of such rights pertaining to the legal heirs is made dependent on the occurrence of premises that do not find any justification in the constitutional regulations. For the adopted legislative mechanisms affect that element, which constitutes an essential content of those rights in property, which have been structured in the system as being hereditary and transferable. In such case the consequence is that reasons of a formal nature are given preference without sufficient justification, their only purpose being to maintain transparency and convenience for the respective cooperative and its organs, giving them preference before values that are being protected on the basis of the Constitution.

The Constitutional Tribunal has not shared the view, however, according to which the regulation under this analysis also violates Article 64 paragraph 3 of the Constitution (prohibition to infringe upon the essence of property rights). On the basis of the constitutional provisions prevailing prior to the entry into force of the Constitution of 1997 it was assumed that ownership rights as defined in the Constitution covered not only the right to ownership, but also other property rights, including the rights in terms of obligations. This led to the conclusion that ownership in the constitutional sense is a synonym of property (e.g. *judgement of the Constitutional Tribunal of 11 February 1992, Ref. No. K. 14/91*, the Constitutional Tribunal’s Decisions – OTK in 1992, Part I, item 7, *Resolution of the Constitutional Tribunal of 11 January 1995, Ref. No. W. 11/94*, OTK in 1995, Part I, item 17). On the basis of the provisions of Article 64 of the Constitution, however, such broad conception of the ownership rights is not justified. This provision clearly distinguishes ownership from any other rights in assets. The cooperative ownership rights to an apartment belongs to that second category, in spite of the fact that, as has already previously been indicated, it is a particular law of an „ownership” nature. These two rights should not be perceived as being identical, however. The premise contained in Article 64 paragraph 3 of the necessity to assure the inviolability of the essence of the ownership rights does not apply to other property rights, the limitations of which should be contained in the general formula of Article 31 paragraph 3 of the Constitution.

Finally, it should be stated, that the establishment of the non-conformity to the Constitution of Article 228 § 1 of the Cooperative Law opens the opportunity to request the resumption of proceedings that were closed by a legally valid judicial decision or other ruling (Article 190 paragraph 4 of the Constitution and Article 401<sup>1</sup> of the Code of Civil Procedure). The possibility to reopen the proceedings, essentially concerning the same situations, which were covered by the ruling of 25 February 1999, Ref. No. K. 23/98, on the non-conformity to the Constitution of Article 228 § 3 of the Cooperative Law.

Taking the above considerations into the account, the Constitutional Tribunal adjudicates as in the sentencing part of the judgement.