POLISH LANDOWNERS' ASSOCIATION
MANAGEMENT BOARD

Warsaw, 3 February 2011

Prof. Andrzej Rzepliński, Esq.
President of the Constitutional Tribunal

Dear Sir,

The Polish Landowners' Association submits to you the attached open appeal addressed to all the Judges of the Constitutional Tribunal, sincerely believing that its content will provoke thought and reflection on the part of the respectable circle.

With kind regards,

Jerzy Mańkowski

President of the Management Board of the Polish Landowners' Association

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Appeal to the Judges of the Constitutional Tribunal

The year of 1989 was a turning point in Poland. Fundamental changes to the political system began thus leading to the empowerment of the society. Elementary civil rights and liberties were back in grace. Naturally, as a consequence of the above, it became possible for persons affected by the acts of the former regime to assert the protection of their basic rights, including – above all – the property rights. In 1991 Article 4 of the Civil Code (prescribing the interpretation and application of law in accordance with the objectives and regime of the People's Republic of Poland) was repealed, which brought hope for total independence and impartiality of judicial authorities.

The Constitutional Tribunal set up in 1985 was also one of the judicial authorities. As early as the beginning of its activity it created a huge body of rulings and gained considerable authority amongst political elites, representatives of the legal doctrine and – above all – in the society itself. The body of rulings of the Constitutional Tribunal developed constitutional clauses such as, in particular, the principle of state under the rule of law and the equality principle, thus removing numerous loopholes and doubts which arose as a result of absence of a modern constitution, also in the light of the so-called "Small Constitution"[i], which was in force since 1992.

Analysing the body of rulings of the Constitutional Tribunal from recent years the Polish Landowners' Association comes to believe that the Constitutional Tribunal departs more and more from the course of action which earned it so much recognition.

At the very beginning of its activity in the decision of 3 December 1986 the Constitutional Tribunal (U 4/86) stated that ***"the automatic and implied cancellation of the laws in force is not supported by the established legislative rules and, in addition, it would be impossible to reconcile it with the principle of cohesion and certainty of the legal system"***. Slightly over 14 years later in the judgement of 31 January 2001 (P 4/99), this time with reference to **repealed regulations**, the Constitutional Tribunal says that *"The Constitutional Tribunal adjudicating at full complement upholds the standpoint expressed in numerous previous rulings according to which a regulation is applicable in a legal system as long as on its basis individual acts of applying the law are or may be taken, whereas the loss of applicable force as a prerequisite for discontinuing the proceedings before the Constitutional Tribunal occurs only when such a regulation may not be applied to any actual situation"*.

However, still in the same year, in the case concerning Article 2 par. 1 letter e) of the decree dated 6 September 1944 on implementing an agricultural reform, in the decision dated 28 November 2001 (SK 5/01), referring to the above-mentioned decision dated 31 January 2001 the Constitutional Tribunal applied the principle on repealed regulations to regulations which were not repealed, i.e. were in force. Thus, after fifteen years **the Constitutional Tribunal denied its standpoint of 3 December 1986 and assumed that it was possible to imply automatic cancellation of regulations in force.**

From the logical point of view it would seem that despite all there is no problem, because if a certain regulation is not applicable to any actual situation, thereby it is not applied and the case should not reach the Constitutional Tribunal at all. However, it only seems so, because the direction newly adopted by the Tribunal went even further…

In the decision of 1 March 2010 (P 107/08) the Constitutional Tribunal adjudicated the loss of the binding force of § 5 of the executive order of the Minister of Agriculture and Agricultural Reforms dated 1 March 1945 regarding the decree of PKWN[ii] of 6 September

1944 on implementing an agricultural reform. Par. 1 of this regulation said that in cases for resolution whether a given piece of real property was subject to Article 2 sec. 1 letter e of the decree on implementing the legal reform the provincial (i.e. voivodship) (and not county, i.e. poviat) rural authority had jurisdiction in the 1st instance, whereas the Minister of Agriculture was to act as an authority for appeals.
When issuing that decision the Constitutional Tribunal found that: *Since 1990 till the end of the 1st half year of 2009 the Ministry of Agriculture and Rural Development received 17 081 matters to be decided on connected with recovery of the property taken over in favour of the State Treasury.* […] *According to the estimate of the Minister of Agriculture and Rural Development about 50% of such matters concerned Article 2 par. 1 letter e of the decree on rural reform considered under an administrative procedure on the basis of § 5 of 1945 Regulation* . Thus it follows that not only repealed regulations, or those which may not apply to any actual situation, but also regulations which have not been repealed and are still widely applied are regulations without a binding force.

In the above-mentioned regulation of 1 March 2010 the Constitutional Tribunal assumed that the said § 5 lost its binding force as of 5 April 1958, as a consequence of which the administrative procedure for this type of cases was totally closed. Meanwhile, in the judgement of 3 July 2007 (SK 1/06) the Constitutional Tribunal refers the persons concerned to administrative proceedings by stating: *...the persons concerned may apply for a decision finding that a given property was not subject to Article 2 par. 1 letter e of the decree on implementing an agricultural reform to be issued* […] *Such decisions may be appealed to the provincial administrative court and then a motion to quash may be filed with the Supreme Administrative Court.* Thus it transpires that in the opinion of the Constitutional Tribunal – on 3 July 2007 § 5 of the so-called executive order still had a binding force, but it lost it already on 1 March 2010 and – in addition – with effect as at 5 April 1958.

The situation presented above, as well as some other rulings of the Constitutional Tribunal with respect to redemption of proceedings gave rise to many anxieties on the part of the Polish Landowners' Association. For instance, there was a situation in which the Tribunal, by the decision of 6 Nov. 2007 (P 32/07), discontinued proceedings instigated by means of a Court's legal question as to the constitutionality of the PKWN's decree of 12 December 1944 on the nationalisation of forests. Admittedly, the issue was whether on the basis of that decree, which in the Court's opinion was constitutionally doubtful, the previous owner could lose property in favour of the State Treasury, however (in accordance with Article 42 of the Act on the Constitutional Tribunal) the Tribunal should have examined ex officio whether the procedure of making such laws was complied with. All the more so if in case Tw 19/05 the Tribunal itself reminds that: ***The validity of a decision is determined by the circumstance of whether it was adopted in the presence of a required number of members of a collective body (fulfilment of a prerequisite for a quorum)***... However – as it was revealed, among other things, on the website of the Polish Landowners' Association – **the resolution of PKWN on adopting that decree was passed without a quorum required by the Operating Rules of PKWN, which must signify that those regulations were invalid from the very beginning.**
However, the Tribunal discontinued those proceedings as it presumed in advance that the ownership of forests had been transferred on a one-off basis by the force of law itself and that was why the regulation did not apply any longer. And it was contrary to the fact that the Court had to apply that regulation right at that moment in order to establish who was entitled to such ownership.[iii]
Thus it seems justified to fear that the guidance on legal consideration followed by the Tribunal since 2001 appears to aim at counteracting the effects of changing the political system in the 90's of the previous century, at least in relation to persons financially affected

by the actions of the authorities of the former regime (including members of the Polish Landowners' Association). In relation to such persons the Constitutional Tribunal seems to evade adjudication in such cases.
Indeed the above situation leads to a division of citizens into those who have a right to constitutional protection of their rights and those who are deprived of such a right.

In the light of the above-described situation, sharing the view of the Supreme Court (III PZP 2/09) with respect to defining the frames of the operations of the Tribunal in the Constitution itself, as well as the opinion of the Supreme Administrative Court (I OPS 3/10) on non loss of the binding force of the regulations on the agricultural reform of 1944 the Polish Landowners' Association appeals to the Judges of the Constitutional Tribunal so that when holding their office and in order to make it possible to exercise the right to a constitutional complaint (Article 79 of the Constitution), the right to a fair examination of a case (Article 45 par. 1 of the Constitution), the right to independence of judges of other courts (Article 178 par. 1 of the Constitution), as well as in connection with the obligation to act on the basis of law and within its boundaries (Article 7 of the Constitution):

1) they cease evading adjudication by a discretionary assumption of the loss of the binding force of laws presented for a constitutional check;
2) they take into consideration that even if a given legal regulation indeed lost its binding force, it is still subject to a constitutional check in accordance with Article 39 par. 3 of the Act on the Constitutional Tribunal if it is necessary for the protection of the constitutional right such as the property right (Article 64 par. 1 and 2 of the Constitution), and exactly to such a right pertain complaints and legal questions connected with the decree on implementing an agricultural reform and the decree on the nationalisation of forests;
3) they let the Courts addressing legal questions assess whether in a specific case examined by them an answer to a question asked affects the content of the future resolution;
4) they do not determine in advance and contrary to the position of the Court addressing a legal question, whether given regulations are to be applied to a case examined by such a Court;
5) they cease to express opinions in the justifications of the issued rulings on matters unrelated to the constitutional check on legal regulations such as for instance imputing in decision P 107/08 the aim of "counteracting the effects of the agricultural reform" in cases for redressing grievances due to unlawful acts of the State consisting of confiscating property **in contravention of** Article 2 par. 1 letter e of the decree on implementing the agricultural reform or without any legal basis, or without determining in advance who may be entitled to what claims in the future.

Warsaw, 3 Feb. 2011 For the Management Board of the Polish Landowners' Association

Jerzy Mańkowski (President) *Marcin Schirmer* (Vice President)

[i] *Note to the translation - The so-called Small Constitution was an act passed in 1992 repealing the Constitution implemented in 1952 by the communist authorities and introducing basic elements of a democratic state. The fully democratic Constitution currently applicable in Poland was introduced in 1997.*

[ii] *Note to the translation – PKWN (Polski Komitet Wyzwolenia Narodowego - Polish Committee of National Liberation), established in 1944, was an executive authority of KRN (Krajowa Rada Narodowa - State National Council) which was set up in the same year (with the support of the Soviet Union) and usurped power. KRN empowered PKWN to pass decrees with the binding force of a statute. It was by two decrees of PKWN passed in 1944 that most extensive nationalisations of agricultural land and forests were carried out (without any compensation).*
After political changes in 1989 Poland as an only state from the previous Eastern Bloc did not make any restitution of the confiscated property despite declaring to do so at accession negotiations with the EU. It did not pay any compensation, either.
For 20 years the Polish Parliament has considered nearly 30 so-called reprivatisation bills. The only bill adopted by the Parliament was vetoed by the then president, Aleksander Kwaśniewski, and it was not enacted.

[iii] *Note to the translation – in Poland since 1944 as a result of nationalisation activities of the authorities the state took over the ownership of a great deal of properties which were not subject to nationalisation regulations at that time. In many cases take-overs were carried out on defective legal basis. In such a situation the only route that the aggrieved parties may take is to apply to courts for establishing their ownership rights. However, in many instances the state authorities argue that although admittedly a given property was not subject to regulations on the basis of which it was nationalised, it is still the property of the state on the basis of other nationalisation regulations. Therefore, in cases of that kind the courts often must ascertain whether a given property was subject to other nationalisation regulations and whether it became the state property on their basis.*