



COUR EUROPÉENNE DES DROITS DE L'HOMME  
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

**CASE OF HUTTEN-CZAPSKA v. POLAND**

*(Application no. 35014/97)*

JUDGMENT

STRASBOURG

19 June 2006

*This judgment is final but may be subject to editorial revision.*

**In the case of Hutten-Czapska v. Poland,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,

Mr C.L. ROZAKIS,

Mr J.-P. COSTA,

Mr B.M. ZUPANČIČ,

Mr G. BONELLO,

Mrs F. TULKENS,

Mr P. LORENZEN,

Mr K. TRAJA,

Mrs S. BOTOCHAROVA,

Mr M. UGREKHELIDZE,

Mr V. ZAGREBELSKY,

Mr K. HAJIYEV,

Mr E. MYJER,

Mr S.E. JEBENS,

Mr DAVID THÓR BJÖRGVINSSON,

Mrs I. ZIEMELE, *judges*,

Mrs A. WYROZUMSKA, *ad hoc judge*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 11 January 2006 and on 17 May 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

## PROCEDURE

1. The case originated in an application (no. 35014/97) against the Republic of Poland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Mrs Maria Hutten-Czapska (“the applicant”), on 6 December 1994.

2. The applicant was represented by Mr B. Sochański, a lawyer practising in Szczecin, Poland. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołaszewicz, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the situation created by the implementation of the laws imposing on landlords restrictions in respect of rent increases and the termination of leases amounted to a violation of Article 1 of Protocol No. 1 to the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52§ 1 of the Rules of Court).

On 16 September 2003, following a hearing on admissibility and the merits, it was declared partly admissible by a Chamber of that Section, composed of the following judges: Sir Nicolas Bratza, *President*, Mr M. Pellonpää, Mrs V. Strážnická, appointed to sit in respect of Poland, Mr J. Casadevall, Mr R. Maruste, Mr. S. Pavlovschi, Mr J. Borrego Borrego, and also of Mr M. O'Boyle, *Section Registrar*.

6. In a judgment of 22 February 2005 (“the Chamber judgment”) the Court held that there had been a violation of Article 1 of Protocol No.1 to the Convention. It further held that the above violation had originated in a systemic problem connected with the malfunctioning of domestic legislation in that it had imposed, and continued to impose, on individual landlords restrictions on increases in rent for their dwellings, making it impossible for them to receive rent reasonably commensurate with the general costs of property maintenance.

In that connection, the Court directed that in order to put an end to the systemic violation identified in the present case, the respondent State must, through the appropriate legal or other measures, secure a reasonable level of rent to the applicant and other persons similarly situated, or provide them with a mechanism mitigating the above-mentioned consequences of the State control of rent increases for their right of property.

In respect of the award to the applicant for any pecuniary or non pecuniary damage resulting from the violation found in the present case, the Court held that the question of the application of Article 41 of the Convention was not ready for decision and reserved that question as a whole, inviting the Government and the applicant to submit, within six months from the date on which the judgment had become final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they might reach.

More specifically, as regards Article 41 of the Convention, the Court considered that that issue should be resolved not only having regard to any agreement that might be reached between the parties but also in the light of such individual or general measures as might be taken by the Government in execution of the judgment. Pending the implementation of the relevant general measures, the Court adjourned its consideration of applications deriving from the same general cause (see paragraph 196 of the Chamber judgment).

7. On 20 May 2005 the Government requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the

Grand Chamber. A panel of the Grand Chamber accepted that request on 6 July 2005.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. Mrs Strážnická, the judge appointed to sit in respect of Poland, withdrew from sitting in the Grand Chamber (Rule 28). The Government accordingly appointed Mrs A. Wyrozumska to sit as an *ad hoc* judge in her place (Article 27 § 2 of the Convention and Rule 29 § 1).

9. The applicant and the Government each filed written observations on the merits. Subsequently, the parties replied in writing to each other's memorials/observations.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 11 January 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr P. STYCZEŃ,	<i>Counsel,</i>
Mr J. WOŁĄSIEWICZ,	<i>Agent,</i>
Mr Z. ŻYDAK,	
Mr J. BAJOR,	
Mr S. JACKOWSKI,	
Ms A. MEŻYKOWSKA,	<i>Advisers;</i>

(b) *for the applicant*

Mr B. SOCHAŃSKI,	<i>Counsel,</i>
Mr P. PASZKOWSKI,	<i>Adviser.</i>

The Court heard addresses by Mr Sochański, Mr Wołasiewicz and Mr Styczeń.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

11. The applicant, who is a French national of Polish origin, was born in 1931. She lived for a long time in Andrésy, France. At present, she lives in Poznań, Poland. She owns a house and a plot of land in Gdynia, Poland. The property previously belonged to her parents.

### A. General situation

12. Polish legislation on rent control has been the result of many historical and recent factors. Legislative schemes restricting rights of landlords and regulating increases in rent were already in operation before the Second World War. The description below of the general situation was based on the findings of the Polish Constitutional Court (*Trybunał Konstytucyjny*), which, on 12 January 2000, in one of its judgments concerning the constitutionality of certain aspects of the legislation on rent control gave thorough consideration to the historical background of such legislation and the factors contributing to the preservation of restrictions dating back to an early stage of the communist regime in Poland.

13. The rent control scheme was the consequence of the introduction of the so-called “State management of housing matters” (*publiczna gospodarka lokalami*) by the former communist authorities (see paragraphs 67-70 below). It was accompanied by provisions drastically restricting the amount of rent chargeable. The applicable provisions originated in the exceptionally rigid distribution of housing resources which characterised the first 30 years of the communist regime in Poland.

14. The circumstances did not change significantly after the end of the communist rule in 1989; indeed, at the beginning of the 1990s the situation of housing in Poland was particularly difficult, as was demonstrated, on the one hand, by a shortage of dwellings and, on the other hand, by the high cost of acquiring a flat. The State-controlled rent, which also applied to privately owned buildings, covered merely 30% of the actual cost of maintenance of buildings.

In 1994 those social and economic factors prompted the legislature not only to maintain elements of the so-called “special lease scheme” (*szczególny tryb najmu*) (see also paragraph 73 below) in respect of State-owned dwellings but also to continue to apply that scheme - temporarily, for a period of 10 years expiring on 31 December 2004 - to privately owned buildings and dwellings. In short, the system was a combination of restrictions on the amount of rent chargeable and of limitations on the termination of leases, even in respect of tenants who did not comply with the terms of the contract.

15. The material collected by the Constitutional Court in 2000 included a report prepared by the Office for Housing and Town Development (*Urząd Mieszkalnictwa i Rozwoju Miast*). According to that report, in 1998, after 4 years of the operation of the 1994 rent-control scheme, the average rent as fixed under that scheme covered only 60% of the costs of maintenance of residential buildings. The shortfall was to be covered by landlords. The scale of the problem was considered to have been very large since at that time 2,960,000 dwellings (25.5% of the country’s entire housing resources) were let under the rent-control scheme; that number comprised some

600,000 flats in buildings owned by private individuals. The total number of flats in Poland was estimated at about 11,600,000. Flats in privately owned buildings subject to the rent-control scheme constituted 5.2% of the country's housing resources.

The report stated, among other things:

“Before ... [1994], statutory rent determined by the Cabinet covered about 30% of running maintenance costs. At present, after four years of the operation of the [1994] rent-control scheme, municipalities set levels of rent covering on average 60% of maintenance costs. ...

In respect of buildings owned by municipalities, the shortfall is covered by municipalities, which frequently use for that purpose surplus received by means of letting commercial premises.

As regards privately owned buildings, where tenants pay controlled rent, the shortfall is covered by owners of buildings.”

16. In 2003-2004 the Government, in the course of the preparation of their bill amending the legislation on rent control (see paragraphs 114 et seq. below) collected considerable materials describing the present general situation of housing in Poland.

The situation is characterised by a serious shortage of residential dwellings. According to the 2002 National Population and Housing Census, the relevant deficit, defined as the difference between the number of households and the number of flats, amounts to 1,500,000 flats. There is a particularly acute shortage of flats for lease.

17. In the light of data collected by the Central Statistical Office (*Główny Urząd Statystyczny*) on the overall financial situation of households, in the years 1998-2003 household expenses such as rent and electricity bills amounted to 14.5%-15.4% of total expenses (18.6%-19.0% in pensioners' households). At the same time between 7% and 10% of Polish households were in rent arrears (1998: 7.5%; 1999: 7%; 2000: 7%; 2002: 10%; 2003: 9%).

In 2000 about 54% of the population lived below the poverty line, of which 8% were below the abject poverty line. In 2002 some 58% of the population lived below the poverty line, of which 11% were below the abject poverty line.

18. Various reports received by the Office for Housing and Town Development confirmed that the provisions relating to the protection of tenants as applicable until 31 December 2004 (see also paragraphs 89-93 below) limited the supply of flats available for lease. In the authorities' view, the introduction of the so-called “commercial lease” (*najem komercyjny*) – in other words a market-related lease – by removing restrictions on the increase of rent for privately owned buildings and freeing private landlords from their obligation to provide indigent tenants with alternative accommodation upon the termination of their lease, should

encourage private investors to build tenement houses designated solely for let.

19. The Government gave various figures to indicate the number of persons potentially affected by the operation of the rent-control scheme. They stated that according to information supplied by the Office for Housing and Town Development, the operation of the relevant legislation affected about 100,000 landlords and 600,000 tenants. Other sources cited by the Government stated that the total number of persons concerned was about 100,000 landlords and 900,000 tenants.

## **B. The facts of the case up to the adoption of the Chamber judgment**

### *1. Events before 10 October 1994*

20. The applicant's house was built in 1936 as a one-family house. It originally consisted of a duplex apartment, basement and attic.

21. During the Second World War, officers of the German Army lived in the house. In May 1945 the Red Army took it over and placed its officers there for some time.

22. On 19 May 1945 the Head of the Housing Department of the Gdynia City Council (*Kierownik Wydziału Mieszkaniowego Magistratu Miasta Gdynia*) issued a decision assigning the first-floor part of the duplex apartment to a certain A.Z.

23. In June 1945 the Gdynia City Court (*Sąd Grodzki*) ordered the return of the house to the applicant's parents. They began renovation of the house but, shortly afterwards, were ordered to leave their property. In October 1945 A.Z. moved into the house.

24. On 13 February 1946 the Decree of 21 December 1945 on the State Management of Housing and Lease Control (*Dekret o publicznej gospodarce lokalami i kontroli najmu*) entered into force. Under its provisions, the house became subject to the so-called "State management of housing matters" (see also paragraph 13 above).

25. In 1948, at a public auction, the authorities unsuccessfully tried to sell the house to A.Z., who was at that time employed by the Gdynia City Council, an authority responsible for the State management of housing matters at the material time. At about the same time, the applicant's parents, likewise unsuccessfully, tried to recover their property.

26. On 1 August 1974 the Housing Act (*Prawo lokalowe*) ("the 1974 Housing Act") entered into force. It replaced the State management of housing matters with the so-called "special lease scheme" (see also paragraphs 14 above and 69 below).

27. On an unknown date in 1975 a certain W.P., who was at that time the Head of the Housing Department of the Gdynia City Council (*Kierownik*

*Wydziału Spraw Lokalowych Urzędu Miejskiego*), tried to buy the house from the applicant's brother.

28. On 8 July 1975 the Mayor of Gdynia issued a decision allowing W.P. to exchange the flat he was leasing in another building under the special lease scheme for the ground-floor flat in the applicant's house. That decision was signed on behalf of the Mayor of Gdynia by a civil servant who was subordinate to W.P. On 28 January 1976 the Gdynia City Council issued a decision confirming that under the provisions governing the special lease scheme the flat had been let to W.P. for an indefinite time. Later, in the 1990s, the applicant tried to have that decision declared null and void but succeeded only in obtaining a decision declaring that it had been issued contrary to the law (see also paragraphs 44-49 below).

29. On 24 October 1975 the Head of the Local Management and Environment Office of the Gdynia City Council (*Kierownik Wydziału Gospodarki Terenowej i Ochrony Środowiska Urzędu Miejskiego w Gdyni*) ordered that the house should become subject to State management (*przejęcie w zarząd państwowy*). That decision took effect on 2 January 1976.

30. On 3 August 1988 the Gdynia District Court (*Sąd Rejonowy*), ruling on an application by A.Z.'s relatives, gave judgment, declaring that, after A.Z.'s death, her daughter (J.P.) and son-in-law (M.P.) had inherited the right to lease the first-floor flat in the applicant's house.

31. On 18 September 1990 the Gdynia District Court gave a decision declaring that the applicant had inherited her parents' property. On 25 October 1990 the Gdynia District Court entered her title in the relevant land register.

32. On 26 October 1990 the Mayor of Gdynia issued a decision restoring the management of the house to the applicant. On 31 July 1991, acting through her representative, she took over the management of the house from the Gdynia City Council. Shortly afterwards, she began to refurbish the house.

33. On an unknown date in the 1990s the applicant set up a private foundation called the Amber Trail Foundation (*Fundacja Bursztynowego Szlaku*). Since 1991, she has tried to place the seat of the Foundation in her house.

## 2. Events after 10 October 1994

34. After taking over the management of the house, the applicant initiated several sets of proceedings – civil and administrative – in order to annul the previous administrative decisions and regain possession of the flats in her house.

**(a) Proceedings before the civil courts**

*(i) Eviction proceedings*

35. On 16 June 1992 the applicant asked the Gdynia District Court to order the eviction of her tenants. In April 1993, on an application by the defendants, those proceedings were stayed. On 26 April 1996 her claim was dismissed.

*(ii) Proceedings concerning the relocation of tenants and compensation*

36. In April 1995 the applicant asked the Gdańsk Regional Court (*Sąd Wojewódzki*) to order the Gdynia City Council to relocate the tenants living in her house to dwellings owned by the municipality. She also asked the court to award her compensation, *inter alia*, for the fact that the authorities had deprived her parents and herself of any possibility of living in their own house, for damage to the property and arbitrary alteration of its use, and for mental suffering. On 5 July 1996 the Regional Court ruled that, under the Lease of Dwellings and Housing Allowances Act of 2 July 1994 (*Ustawa o najmie lokali mieszkalnych i dodatkach mieszkaniowych*), (“the 1994 Act”) the defendant authority had no obligation to relocate the tenants to accommodation owned by the municipality. It dismissed the remainder of the claims. The applicant appealed.

37. On 17 January 1997 the Gdańsk Court of Appeal (*Sąd Apelacyjny*) heard, and dismissed, her appeal. It observed that no provision of the 1994 Act obliged the municipal authorities to relocate the applicant’s tenants or, at her request, to provide them with alternative accommodation (*lokal zastępczy*). The relevant provisions of the 1994 Act, namely section 56(4) and (7) (see also paragraph 77 below), stipulated that a tenant had to vacate a dwelling only if the owner had offered him another flat owned by him or the municipality had agreed to provide the tenant with alternative accommodation owned or administered by it. As regards the applicant’s claim for damages for financial loss sustained as a result of the administrative decisions, the Court of Appeal observed that such claims could be determined by the courts of law only if a claimant had first applied for compensation to the administrative authorities and the outcome of the relevant administrative proceedings had been unfavourable. It referred the applicant to the Code of Administrative Procedure (*Kodeks postępowania administracyjnego*), which set out the rules governing the liability of public authorities for issuing wrongful decisions.

In so far as the applicant sought compensation for damage to the house and for the alteration of its use, the Court of Appeal considered that the defendant authority could not be held liable for the consequences of the laws which had previously been in force. In particular, it was not liable for the enactment of the post-war legislation which had introduced restrictive

rules concerning the lease of dwellings in privately owned houses and the State management of housing matters. Nor was it liable for the implementation of the special lease scheme introduced by the 1974 Housing Act and the operation of the 1994 Act, which incorporated certain similar rules for the protection of tenants whose right to lease flats in privately owned houses had been conferred on them by administrative decisions (see also paragraphs 71-72 below). Lastly, the court noted that the defendant could not be liable for any damage caused by the applicant's tenants.

38. Subsequently, the applicant lodged a cassation appeal (*kasacja*) with the Supreme Court (*Sąd Najwyższy*). On 13 November 1997 the Supreme Court rejected that appeal on procedural grounds. The court held that the applicant had not complied with the relevant formal requirements; in particular, she had not specified the errors of substantive civil law allegedly committed by the lower courts.

**(b) Administrative proceedings**

*(i) Proceedings concerning the annulment of the decision of 19 May 1945*

39. In October 1995 the applicant asked the Gdańsk Self-Government Board of Appeal (*Samorządowe Kolegium Odwoławcze*) to declare null and void the decision of the Head of the Housing Department of the Gdynia City Council of 19 May 1945. By virtue of that decision, the first-floor flat in the house had been assigned to A.Z. It had also formed a basis for granting the right to lease that flat in the applicant's house to A.Z.'s successors (see also paragraphs 22-23 and 30 above).

40. On 26 June 1997 the Board rejected her application. It noted that the impugned decision had been taken pursuant to the provisions of the Decree on Housing Commissions issued by the Polish Committee of National Liberation on 7 September 1944 (*Dekret Polskiego Komitetu Wyzwolenia Narodowego o komisjach mieszkaniowych*), a law which had at the relevant time governed all housing matters. It found that the decision had not been issued by the competent public authority and, in consequence, had not been lawful. Yet the Board could not declare the decision null and void (*stwierdzić nieważność decyzji*) because, pursuant to Article 156 § 2 of the Code of Administrative Procedure, if more than 10 years had elapsed from the date on which the unlawful decision had been made, the Board could only declare that the decision "had been issued contrary to the law" (*została wydana z naruszeniem prawa*).

41. The applicant appealed to the Supreme Administrative Court (*Naczelny Sąd Administracyjny*). On 15 January 1998 the court dismissed her appeal because she had not availed herself of an obligatory legal remedy in that she had not made an application to the Board for the matter to be reconsidered (*wniosek o ponowne rozpatrzenie sprawy*).

42. The applicant subsequently made such an application. On 23 June 1998 the Board upheld its decision of 26 June 1997. The applicant appealed to the Supreme Administrative Court. The Gdańsk Regional Prosecutor (*Prokurator Wojewódzki*) joined the proceedings and lodged an appeal on the applicant's behalf.

43. On 8 June 1999 the Supreme Administrative Court rejected both appeals. It confirmed that the impugned decision had been unlawful. It added that there had been several procedural shortcomings (for instance, the applicant's parents had not been notified of the proceedings and had never had any opportunity to challenge the decision; in addition, no legal basis had been given for it); however, in accordance with Article 156 § 2 of the Code of Administrative Procedure, the court could not annul the decision but could only declare that it had been issued contrary to the law. In passing, the court observed that the above-mentioned procedural shortcomings could be rectified by means of reopening the proceedings.

*(ii) Proceedings concerning the annulment of the decision of 8 July 1975*

44. In 1992 the applicant asked the Gdańsk Self-Government Board of Appeal to declare null and void the decision of the Mayor of Gdynia of 8 July 1975. By virtue of that decision, W.P. had been granted the right to lease the ground-floor flat in the applicant's house (see also paragraph 33 above)

45. On 27 January 1994 the Board rejected her application. The applicant appealed to the Supreme Administrative Court.

46. On 14 June 1995 the court dismissed her appeal. It found that the flats in the applicant's house had been let under the special lease scheme introduced by the 1974 Housing Act and that, accordingly, the mayor had been competent to issue the decision in question. It further observed that, despite some procedural errors committed by the Mayor of Gdynia (which could be rectified by means of reopening the proceedings), the decision had had a legal basis and could not, therefore, be declared null and void.

47. On 17 September 1994 the applicant asked the Mayor of Gdynia to reopen the relevant proceedings and to declare the impugned decision null and void. The mayor rejected her application as being lodged out of time.

48. On 29 December 1995 the Gdańsk Self-Government Board of Appeal, of its own motion, reopened the proceedings. It found that the contested decision had been made on behalf of the Mayor of Gdynia by a civil servant who had been W.P.'s subordinate and that that fact had in itself constituted a sufficient ground for reopening the proceedings, pursuant to Article 145 § 1 (3) of the Code of Administrative Procedure. That fact had also rendered the decision unlawful. However, since more than 5 years had elapsed from the date on which the decision had been given, the Board could not annul it. It could merely declare that it had been issued contrary to

the law, as laid down in Article 146 § 1 of the Code of Administrative Procedure.

49. The applicant appealed to the Supreme Administrative Court, alleging that the decision had never been served on the owners of the house and that it should have been declared null and void. On 28 November 1996 her appeal was dismissed.

*(iii) Proceedings concerning the annulment of the decision of 24 October 1975*

50. On 4 October 1994 the applicant asked the Gdynia City Council to reopen the administrative proceedings that had been terminated on 24 October 1975 by the decision of the Head of the Local Management and Environment Office of the Gdynia City Council. By virtue of that decision, the applicant's house had become subject to State management (see also paragraph 29 above). She further asked to have the decision declared null and void, submitting that it had lacked a legal basis. In particular, the house had incorrectly been classified as a "tenement house" (*dom wielorodzinny*), whereas in reality it was, and always had been, a one-family house and, as such, should not have become subject to State management. The decision, the applicant added, had been made solely for the personal benefit and gain of W.P., who had at that time been the Head of the Housing Department of the Gdynia City Council. In her view, it had been made to sanction the prior – and likewise unlawful – decision of 8 July 1975 whereby W.P. had acquired the right to lease the flat in her house.

51. On 7 December 1994 the Mayor of Gdynia rejected her application, finding that she had lodged it outside the prescribed time-limit. On 12 June 1995 the Gdańsk Self-Government Board of Appeal upheld the mayor's decision. Subsequently, the applicant appealed to the Supreme Administrative Court. On 14 November 1996 the court quashed both decisions because the Mayor of Gdynia had not been competent to rule on the application.

52. On 27 February 1997 the Gdańsk Self-Government Board of Appeal reopened the proceedings terminated by the decision of 24 October 1975. On 28 April 1997 the Board declared that that decision had been issued contrary to the law because the owners of the house had not been notified of the proceedings. It found that the Gdynia City Council had not acted with due diligence. In particular, it had made no efforts to establish who had been the rightful successors to the owners of the house. Indeed, at the material time the applicant and her brother had - on a regular basis - paid the relevant taxes on the property to the City Council. Relying on Article 146 § 1 of the Code of Administrative Procedure, the Board refused to annul the decision because more than 5 years had elapsed from the date on which it had been given.

53. On an unspecified date in 2002 the applicant asked the Governor of Pomerania (*Wojewoda Pomorski*) to declare the decision of 24 October

1997 null and void. The application was referred to the Gdańsk Self-Government Board of Appeal, a body competent to deal with the matter. The Board refused the application on 13 May 2002. It held that the matter was *res judicata*.

3. *The situation of the applicant's tenants*

(a) **The surface area of the flats**

54. The parties gave differing information as to the actual usable surface area of the flats in the applicant's house, a factor relevant for the determination of the chargeable rent.

(i) *The Government*

55. The Government submitted that the usable surface area of the applicant's house was 196 square metres. They produced an inventory made on 1 August 1991 in connection with the transfer of management of the house from the Gdynia City Council to the applicant (see also paragraph 32 above). The usable surface area of the house was estimated at 196 square metres; no net living area was indicated. There were four flats and no commercial premises. The number of habitable rooms in the flats was twelve. The surface area of those flats was estimated at 148 square metres. The total surface area of the house was indicated as 255 square metres.

(ii) *The applicant*

56. The applicant stated that the total surface area of the house occupied by the tenants and for which they paid rent was about 250 square metres. In that connection, she supplied a declaration of 28 May 2001, issued by the Gdynia Association of Landlords and Managing Agents (*Zrzeszenie Właścicieli i Zarządców Domów*), an agency that apparently administered her property. According to the declaration, since at least the 1950s the applicant's house had been divided into three flats leased by means of the agreements originating in the administrative decisions described above.

57. The usable surface areas of those flats for the purposes of fixing rent were as follows: flat no. 1 = 127.38 sq. m; flat no. 3 = 67.90 sq. m; and flat no. 4 = 54.25 sq. m. Accordingly, the total usable surface area occupied by the tenants was 249.53 sq. m.

(b) **Documentary evidence relating to rent paid by the applicant's tenants**

58. On an unspecified date in 1995 W.P. asked the Gdynia District Court to determine the amount of the rent to be paid by him. On 20 March 1996 the District Court gave judgment and determined the amount of rent at 33.66 Polish zlotys (PLN) per month. It ordered the applicant to pay costs in the amount of PLN 528.90.

59. According to the Gdynia Association of Landlords and Managing Agents' declaration of 28 May 2001 (see paragraph 56 above), the amounts of rent to be paid by the applicant's tenants were as follows: for flat no. 1 (usable surface area of 127.38 sq. m), occupied by J.P. and M.P., PLN 500.60; for flat no. 3 (usable surface area of 67.90 sq. m.), occupied by W.P., PLN 322.65; for flat no. 4 (former attic; usable surface area 54.25 sq. m.), occupied by J.W., PLN 188.25. Dwelling no. 2 (apparently originally the bedroom of the applicant's parents, which was later used as a drying room), which had previously been used by W.P. without any legal title or authorisation and for the use of which he had paid no fee, was at that time locked and sealed by the managing agent. W.P. was served with a notice ordering him to pay PLN 2,982.46 for the unauthorised use of the flat on pain of being evicted.

At the hearing the Government informed the Court that the rent paid by J.P. and M.P. on that date (26 January 2004) was PLN 531.63.

**(c) The tenants' financial situation**

60. At the Chamber's request to produce evidence demonstrating the situation of the applicant's tenants, the Government supplied a certificate issued by the Gdynia District Centre for Social Services (*Dzielnicowy Ośrodek Pomocy Społecznej*) on 19 February 1993. The certificate stated that W.P. had received assistance from the centre as from January 1993. He was to obtain a periodical social welfare benefit for March and May 1993. In 1992 he had received assistance for housing purposes. The certificate further stated that W.P. had earlier been assessed as having the "second degree of disability", the disability and its degree being subject to a medical verification in May 1993.

61. On 12 February 2004, in reply to an enquiry by the Polish Government in connection with the present case, the Gdynia City Centre for Social Services (*Miejski Ośrodek Pomocy Społecznej*) stated that the applicant's tenants, W.P., J.P., M.P. and J.W., were not receiving any assistance from the Centre and they had not received any assistance from social services for the past few years, that is from 1995 onwards.

*4. Amounts of controlled rent per square metre in Gdynia in 1994-2004, as supplied by the Government*

62. In reply to a question from the Chamber as to the amount of controlled rent received by the applicant from 10 October 1994 onwards, the Government stated that they had no details of the rent received by the applicant at the relevant time. However, they supplied indicators relevant for the fixing of a controlled rent, as determined by the Gdynia City Council for similar houses.

63. According to this information, in December 1994 the rent per square metre was 9,817 old Polish zlotys (PLZ); from January to November 1995

PLN 1.04; from December 1995 to October 1996 PLN 2.11; from November 1996 to December 1997 PLN 2.63; from January 1998 to January 1999 PLN 3.37; from February 1999 to January 2000 PLN 4.01; from February 2000 to February 2001 PLN 4.37, and from April 2002 to October 2002 PLN 4.61.

64. On 10 October 2002, following the entry into force of the Constitutional Court's judgment of 2 October 2002, it became possible for landlords to increase the rent up to 3% of the reconstruction value of the dwelling (see also paragraphs 86, 102-104 and 113 below).

From December 2002 to 30 June 2003 the relevant conversion index of the reconstruction value of the dwelling (see also paragraphs 75 and 85 below) was PLN 2,525.30. From 1 July to 31 December 2003 it amounted to PLN 2,471.86.

In 2004, the conversion index was fixed at PLN 2,061.21. The Government submitted that the reconstruction value of the dwellings in the applicant's house was calculated on the basis of the following three elements: 3% as above, the usable surface area of the flats and the relevant conversion index (PLN 2,061.21). The monthly rent per square metre in the applicant's house corresponded to 3% of the conversion index of the reconstruction value of square metre divided by 12 months ( $3\% \times \text{PLN } 2,061.21 = \text{PLN } 61.83/12$ ). It accordingly amounted to approximately PLN 5.15 per square metre. Having regard to the usable surface area of the house as indicated by the Government, the maximum monthly chargeable rent was PLN 1,009.40 ( $\text{PLN } 5.15 \times 196$  square metres). Taking into account the surface area as indicated by the applicant, the relevant amount was PLN 1,285.08 ( $\text{PLN } 5.15 \times 249.53$  square metres).

*5. Levels of free-market rent in Gdynia in 1994-2004 as supplied by the applicant*

65. According to the applicant, in the years 1994-1999 the free-market rent for the three flats in her house would have amounted to 1,700 United States dollars (USD) per month (USD 800 + USD 500 + USD 400 respectively, depending on the size of the flat). In the years 2000-2002 the rent would have decreased to USD 1,250 per month (USD 600 + USD 350 + USD 300). In 2003 it would have further been reduced to USD 900 per month (USD 450 + USD 250 + USD 200). She stated that her prognosis as to the decrease in rent was based on such factors as the devaluation of the house owing to its age and the decreasing demand and increasing supply of flats available for rent on the market.

### **C. Facts supplied by the Government after the adoption of the Chamber judgment**

66. In their referral request of 20 May 2005 the Government informed the Court that two of the applicant's flats had become vacant because W.P. had moved out of the applicant's house on 2 June 2003 and J.P. and M.P. had moved out on 6 September 2004. They also stated that J.W. had recently been offered a council flat by the authorities and was about to move out.

At the oral hearing, the Government submitted that J.W. was still living in the flat but that she was to move out within the coming weeks.

On 18 April 2006 the Government informed the Court that J.W. had moved to a council flat on 15 February 2006.

## **II. RELEVANT DOMESTIC LAW AND PRACTICE**

### **A. "State management of housing matters" and the "special lease scheme"**

67. The Cabinet Decree of 21 December 1945 on the State Management of Housing and Lease Control (*Dekret z 21 grudnia 1945 r. o publicznej gospodarce lokalami i kontroli najmu*), which came into force on 13 February 1946, introduced "State management of housing matters", which also applied to dwellings or commercial premises in privately owned buildings (see also paragraph 13 above).

68. Later, on 1 September 1948, the Decree of 28 July 1948 on the Lease of Dwellings (*Dekret o najmie lokali*) entered into force. Under its provisions, the State authorities administered all housing matters in the State and private sector alike. The public authorities were given power to issue a decision assigning to a tenant a particular flat in a privately owned building. Those provisions also laid down rules concerning rent control.

69. The 1974 Housing Act introduced the "special lease scheme", which replaced "State management of housing matters", although it did not significantly change the principles on which the right to lease was based. For instance, the right to lease a flat in a building subject to "State management" did not originate in a civil contract but was conferred on a tenant by an administrative decision. The owner of such a building had no say as to who could live in his or her house and for how long. The special lease scheme applied to residential and commercial premises.

70. Decisions on "allocation to a dwelling" (*przydział lokalu*) were, for all practical purposes, tantamount to "granting" a right to lease a dwelling (or commercial premises) under the special lease scheme. They were issued by the relevant departments of the local council (depending on which of the

many reforms of the system of public administration was being carried out, those departments were called variously “housing departments”, “departments of local management and environment”, “dwelling departments”, etc.).

## **B. The 1994 Act**

### *1. Abolition of the “special lease scheme” and introduction of a new rent control scheme*

71. This Act entered into force on 12 November 1994. It was intended to bring about a reform of the law governing the relationship between landlords and tenants. Although it abolished the “special lease scheme” and relaxed the control of rent by, for instance, allowing rents of commercial premises to be market-related and determined freely, as well as allowing rents for residential dwellings to be fixed freely in civil contracts between landlords and tenants, it maintained the control of rent of residential dwellings in which the right to lease a flat had earlier been conferred on a tenant by an administrative decision.

72. The 1994 Act introduced the system of “controlled rent” (*czynsz regulowany*) and set out detailed regulations on the calculation of rent for residential dwellings which had so far been subject to the “special lease scheme”. The provisions concerning controlled rent, the *ratio legis* of which was to protect tenants in a difficult financial situation during the transition from a State-controlled to a free-market housing system, were to remain in force until 31 December 2004.

The 1994 Act maintained, albeit with slightly modified wording, the rules concerning the protection of tenants against the termination of leases continued on the basis of previous administrative decisions and the right of succession to a lease.

### *2. Succession to the right to lease a flat*

73. Section 8(1) of the Act read:

“1. In the event of a tenant’s death, his or her descendants, ascendants, adult siblings, adoptive parents or adopted children or a person who has lived with a tenant in *de facto* marital cohabitation, shall, on condition that they lived in the tenant’s household until his or her death, succeed to the tenancy agreement and acquire the tenant’s rights and obligations connected with [the lease of] the flat, unless they relinquish that right to the landlord. This provision shall not apply to persons who, when the [original] tenant died, had title to another residential dwelling.

2. In cases where there is no successor to the tenancy agreement, or where the successors have relinquished their right, the lease shall expire.”

### 3. *Controlled rent*

74. Section 20 set out the following:

“1. Under the lease agreement the tenant is obliged to pay the rent.

2. In the cases provided for by the present statute, the rent shall be determined in a manner specified in this Act (controlled rent). In other cases the rent shall be determined freely.

3. The rent shall be determined with reference to the physical state of the building in question, its surface area and the condition of the flat and other factors which increase or reduce the flat’s value.

4. The parties shall specify the rent in their agreement.”

75. Section 25, which, pursuant to section 56(2) (see paragraph 77 below), also applied to privately owned flats subject to the previous special lease scheme, provided:

“1. Subject to the reservation set forth in section 66, controlled rent shall be paid by tenants of dwellings belonging to municipalities, the State Treasury, State legal entities or legal entities administering dwellings for non-profit-making purposes, except for housing cooperatives.

2. The maximum controlled rent must not exceed 3% of the reconstruction value of the dwelling (*wartość odtworzeniowa lokalu*) per annum.

3. The reconstruction value of the flat shall be the product of its usable area and the conversion index of 1 square metre of the usable area of the building.

4. The [relevant] Governor shall, by means of an ordinance issued quarterly, determine the conversion index of 1 square metre of the usable surface area of the residential building.”

### 4. *Transformation of “administrative lease” into “contractual lease”*

76. Under the transitional provisions of the Act the right to lease a flat conferred on a tenant by an administrative decision was to be treated as a lease originating in a lease agreement, concluded under the relevant provisions of the Civil Code. Tenants of such flats were to pay controlled rent until 31 December 2004.

Under section 55 of the Act the lease of a flat on the basis of an administrative decision issued under the 1974 Housing Act was to remain in force.

77. Section 56 laid down further regulations in respect of such “administrative leases”. It provided, in so far as relevant:

“1. Under this law, a lease which originated in an administrative decision on the allocation of a flat, or had another legal basis [that existed] before State management of housing or special lease scheme was introduced in a given locality, shall be treated

as a contractual lease signed for an indeterminate time under the provisions of this law.

2. Until 31 December 2004 inclusive, the rent for flats let in the manner specified in paragraph 1 in dwellings owned by natural persons shall be determined in accordance with the provisions concerning controlled rent.

...

4. If an owner referred to in paragraph 2 intends to dwell in his flat and with that intention has vacated the flat which he has hitherto let ... from the municipality, the tenant shall be obliged to vacate the owner's flat and to move into the flat [offered to him], provided that the [condition of] the flat in question complies with the requirements laid down by this law in respect of alternative accommodation. If such is the case, the owner may terminate the lease under section 32(2).

...

6. If the owner's adult child or parents are to dwell in his flat, subsection 4 ... shall apply by analogy.

7. If the landlord has offered the tenant alternative accommodation which he or she owns himself or if, at the owner's request, such alternative accommodation has been provided by the municipality, subsection 4 shall apply by analogy."

#### *5. Landlords' duties in respect of property maintenance*

78. Section 9 of the Act set out a detailed list of landlords' duties under a tenancy. It applied both to landlords letting flats for a freely determined, market-related rent and to landlords receiving controlled rent. It also listed the types of maintenance work to be carried out by landlords under lease agreements. That section provided, in so far as relevant:

"1. The landlord shall ensure that the existing technical facilities in the building are in working order; shall enable the tenant to use lighting and heating in the dwelling; shall ensure that the dwelling is supplied with cold and hot water and shall ensure the use of lifts, collective aerial, and other facilities in the building;

...

3. The landlord shall, in particular:

(1) maintain in working order and keep clean any shared premises and facilities in the building; the same should apply to the vicinity of the building;

(2) carry out repairs in the building and its dwellings and facilities, and restore any building which has been damaged, regardless of the cause of such damage; however, the tenant shall bear the costs of restoring damage for which he is liable;

(3) carry out repairs in the dwellings, repair or replace installations and technical facilities and, especially, carry out such repairs for which the tenant is not responsible; in particular, he shall:

a) repair and replace the water supply installation in the building and the gas and hot water supply installations, and repair and replace the sewage, central-heating (together with radiators), electricity, telephone and collective aerial installations – the latter, however, without fittings;

(b) replace or repair furnaces, window and door woodwork, floors, floor linings and plasterwork.

...”

#### *6. Termination of a lease in respect of tenants paying controlled rent*

79. In practice, if such a tenant had not fallen into more than 2 months' arrears of controlled rent, the lease could not be terminated unless he or she had used the flat “in a manner inconsistent with its function”, damaged the flat or the building, repeatedly and flagrantly disturbed the peace and upset order or had sublet the flat without obtaining the prior consent of the landlord (sections 31 and 32 of the 1994 Act).

However, even if a tenant had fallen into rent arrears exceeding 2 months, a landlord was obliged to notify him in writing of his intention to terminate the lease agreement and to allow him a one month time-limit to pay off both the arrears and the current month's rent.

If, following the termination of the lease agreement, the tenant did not vacate the flat (which was very often the case, given the acute shortage of cheap dwellings for rent and the high costs involved in buying a flat), the landlord had to bring an action for eviction against him. If an eviction order was made, the landlord, in order to have it enforced and the flat vacated, had to ask the relevant municipality to provide the tenant with “substitute accommodation”. As there was a very little supply of such accommodation, the enforcement and vacating the flat could take many years. Once an eviction order had become final, the tenant, as long as he lived in the flat, was obliged to pay so-called “compensation for extra-contractual use” (*odszkodowanie za bezumowne korzystanie*), equal to 200% of the current rent. If that sum did not cover the losses incurred by the landlord in connection with maintenance of the flat, he could sue the tenant for supplementary compensation.

### **C. The Constitutional Court's judgments declaring certain provisions of the 1994 Act incompatible with the Constitution**

#### *1. Judgment of 12 January 2000*

80. On 12 January 2000 the Constitutional Court, ruling on a legal question referred to it by the Supreme Court, declared unconstitutional section 56(2) read in conjunction with, *inter alia*, section 25 of the 1994 Act

(see paragraphs 75 and 77 above). It found that those provisions were in breach of Article 64 § 3 of the Constitution (admissible limitations on property rights) read in conjunction with Article 2 (rule of law and social justice) and Article 31 § 3 (principle of proportionality) of the Constitution (see also paragraphs 107 and 109-110 below) and Article 1 of Protocol No. 1 to the Convention because they had placed a disproportionately heavy and, from the point of view of the permitted restrictions on the right of property, unnecessary financial burden on the exercise of property rights by landlords owning flats subject to rent control.

The court ruled that the unconstitutional provisions should be repealed on 11 July 2001. That in practice meant that by that date Parliament had to enact new, constitutional legislation dealing with the matter.

81. Before giving its judgment, the Constitutional Court asked the President of the Office for Housing and Town Development (*Prezes Urzędu Mieszkalnictwa i Rozwoju Miast*) for information concerning the implementation of the 1994 Act and, more particularly, the manner of determining the “conversion index of 1 square metre of the usable surface area of the residential building” as referred to in section 25 of the Act. According to the information received, levels of controlled rent had never reached the statutory 3% of the reconstruction value referred to in section 25(2) but were determined by the municipalities at 1.3% of that figure. As a result, the levels of controlled rent covered merely 60% of the maintenance costs of residential dwellings. The rest had to be covered by landlords from their own resources. That did not allow them to put aside any sums for repairs.

82. In the judgment the Constitutional Court attached much importance to the fact that the relevant regulations concerning controlled rent had brought about a situation whereby the expenses incurred by owners of dwellings were much higher than the rent paid by tenants and that the former “had no influence on how the rates of controlled rent were determined”. In its view, that shortfall of the rent actually received had resulted in the progressive reduction of the value of tenement houses and this, with the passage of time, entailed consequences similar to expropriation.

The judgment contains extensive reasoning, the gist of which can be summarised as follows.

“One of the essential elements of the right of property is the possibility of deriving profit from the object of ownership, which is of particular importance in a market economy. The legislature may regulate and limit this right in view of, among other things, the social context of enjoyment of property and duties towards the community that are inherent in ownership. In exceptional cases, ... it is even [acceptable] to exclude temporarily the possibility of ... deriving an income from goods that are the subject of ownership. However, if the limitations on a property right go even further and the legislature places an owner in a situation in which his property necessarily inflicts losses on him, while, at the same time imposing on him a duty to maintain

property in a specific condition, it can be said that there is a limitation which impairs the very essence of that right. ...

The Constitutional Court observes that the applicable provisions very seriously limit the possibility for a landlord to use and dispose of his dwellings, as referred to in section 56(1) of the 1994 Act. In particular, under this section all earlier tenancy relationships, in so far as they originated in administrative decisions on the allocation of a dwelling ... were transformed into contractual leases for an indefinite period. ...

The Constitutional Court will not assess the compatibility of those regulations with the Constitution, as this is not the object of its ruling. It merely observes that, against that background, the owner of a building is practically deprived of any influence on the choice of tenants in his building and on whether the lease relationships with those persons should continue. ...

Thus, the possibility [for a landlord] to enjoy and dispose of property is very considerably limited. While it is not totally extinguished, as he may still sell his building (dwelling) or take out a mortgage on it and there are no restrictions on succession rights, the exclusion of the owner's right to dispose of dwellings subject to the provisions of the 1994 Act results in the depreciation of the market value of the building. By the same token, other attributes which have so far not been taken away from the owner, such as the possibility of enjoying and disposing [of his property], are substantially reduced and his property right becomes illusory.

At the same time, the legal provisions impose on the owner of the building a number of onerous duties... Not only do most of the applicable laws impose specific duties on the owner but they also provide for specific penalties for failure to comply with those duties or to discharge them properly. ...

The Constitutional Court considers that the 1994 Act and, especially, its practical application have not secured a sufficient mechanism for balancing the costs of maintaining a building, its equipment and surroundings and the income from controlled rent. ...

The Constitutional Court considers it necessary to draw attention to two further points which are relevant for the situation of the landlord.

First, the inadequacy of controlled rent *vis-à-vis* real expenses for maintenance of a building does not allow ... [landlords] to put aside savings for repairs and for keeping the building in a good condition. As a result, the tenement houses are gradually losing value. In terms of property rights, this should be perceived as a process of gradual deprivation of this right, leading, with the passage of time, to results similar to expropriation. Also, it has a general impact on the community because many tenement houses are approaching the time of their 'technical death' and, in consequence, not only will the owner lose his property but tenants will also lose the possibility of housing, which will hardly be compatible with Article 75 § 1 of the Constitution.

Secondly, the inadequacy of controlled rent *vis-à-vis* real expenses for maintenance of a building has not been duly recognised by the tax laws... [Under those laws], landlords are treated in the same way as businessmen or a person letting dwellings for a profit and must bear the financial consequences of all losses caused by the lease of their dwellings. ...

[As regards the principle of proportionality laid down in Article 31 § 3 of the Constitution]

... it may be justified to fix rent in such a way that it will not be disproportionate to the financial standing of tenants, so that it will be possible for them to maintain a decent standard of living (or at least a minimum standard) after paying the rent. Thus, it is in conformity with the contemporary perception of a “social state” to demand some sacrifice from all members of society for the benefit of those who cannot provide subsistence for themselves and their families. By the nature of things, the extent of that sacrifice depends on the level of income and imposes a heavier burden on those who are better off. By the nature of things, the owners of property may be required to make sacrifices, according to the general principle that ‘ownership entails obligations’. However, the distribution of burdens among specific members of society cannot be arbitrary and must maintain rational proportions.

In the circumstances obtaining in Poland, pursuant to Article 31 § 3, it may be justified to maintain the provisions limiting landlords’ property rights and, more particularly, excluding unrestricted freedom in fixing rates of rent and other charges collected from tenants. ... It may still – in any event in the transitional period – be justified to impose further-reaching restrictions on property rights, precluding the freedom to derive profit by fixing levels of rent in such a way as to cover only the costs of maintenance and upkeep of the building.

However, an assessment of the 1994 Act leads to the conclusion that the applicable restrictions do not stop there. The present regulations deliberately set the levels of controlled rents below the costs and expenses actually incurred by owners. That, in itself, would not necessarily have had to be considered unconstitutional had there been any parallel legal mechanism compensating for incurred losses. No such mechanisms have been set up. In consequence, the applicable provisions are based on the premise that property must – until the end of 2004 – entail losses for the owner and that, at the same time, the owner has a duty to incur expenses to maintain his property in a particular condition.

That means that the 1994 Act placed the main burden of the sacrifices that society had to make for tenants, or at least for tenants in a difficult financial position, on the owners of property. Besides, other remedies – such as, for instance, subsidising from public funds the costs of maintaining and repairing buildings referred to in section 56(1), ensuring full recognition in the tax regulations for losses and expenses incurred by landlords and making the level of rent dependent on the tenant’s income – have not been employed. Instead, the simplest means (being apparently the cheapest in social terms) have been applied, namely setting a low maximum level of rent and allowing the municipalities to make exceptions to that level. Consequently, it has been assumed that owners will cover the remaining costs of maintaining their property out of their own pockets. No proportionality whatsoever has been maintained in respect of the distribution of burdens (sacrifices) among the owners and the other members of society.

The Constitutional Court would stress once again that in the present context there is a constitutionally acknowledged necessity to protect the rights of tenants ... and this may be reflected in, among other things, provisions fixing a maximum level of rent. However, there is no constitutional necessity to afford them such protection mostly at the expense of private individuals – the owners of dwellings – because the duty to help the underprivileged and [the duties inherent in] social solidarity are incumbent

not only upon those persons. It is possible to adopt other legal solutions so as to secure at the same time the necessary protection to tenants and the minimum financial means needed to cover the requisite costs to the landlords. ... It is not for the Constitutional Court to indicate concrete solutions and to determine the ratio of costs to be incurred by tenants, landlords and the community as a whole. However, this court considers that there are no constitutional considerations to justify imposing the greater part of those costs on the landlords. ...

Consequently, section 56(2) is incompatible with the Constitution. A limitation on the right of property ... which is not ‘necessary’ does not satisfy the constitutional requirements of proportionality.

[Other considerations]

The finding that section 56(2) infringes the principle of proportionality makes it unnecessary for the Constitutional Court to determine whether that provision also infringes the very essence of the right of property since [a further finding to that effect] will not affect the merits of the ruling. It should merely be noted in passing that the question whether the “essence” of the right of property has been preserved must also be assessed ... against the background of the combination of existing limitations on this right. ... The manner in which [rent control] has been effected by section 56(2), taken together with other provisions regarding privately owned buildings has [resulted] in the owners being deprived even of the slightest substance of their property rights.

It is the Constitutional Court’s opinion that, in consequence, the right to derive profit from property, which is an important element of the right of property, has been destroyed and, at the same time, the second element, the right to dispose of one’s property, has been stripped of its substance. In consequence, the right of property has become illusory and unable to fulfil its purpose in the legal order based on the principles listed in Article 20 of the Constitution [principles of social market economy, economic activity, private ownership, solidarity, dialogue and cooperation].

[As regards the constitutional aspects of the situation of tenants]

A kind of obligation has been placed on the legislature to ensure that up to 31 December 2004 tenancy relationships concerning municipal dwellings and [privately owned] dwellings should retain their present form, including the level of rent [3% of the reconstruction value of the dwelling] ... The Constitutional Court considers that, having regard to the principle of maintaining citizens’ confidence in the State and the law made by it and the principle of legal certainty, which ensue from the rule of law laid down in Article 2 of the Constitution and are binding on the legislature, renouncing that obligation will be admissible only in the event of exceptional public necessity. At present, there is no such necessity ... It should be noted in passing that setting a time-limit for the operation of the rent-control scheme in buildings owned by natural persons also places an obligation on the legislature – for the benefit of landlords – to repeal the scheme in its present form by the end of 2004. This obligation should also be seen from the perspective of the principle of maintaining citizens’ confidence in the State.

[Final considerations]

The constitutional inadmissibility of setting the income received by landlords below a certain minimum does not automatically mean that the rent chargeable to tenants has to be increased, because that problem can be resolved by allocating public financial resources.”

### *2. Judgment of 10 October 2000*

83. In its judgment of 10 October 2000 the Constitutional Court held that section 9 of the 1994 Act (see paragraph 78 above), laying down landlords’ obligations, was incompatible with the constitutional principles of the protection of property rights and social justice because, in particular, it placed a heavy financial burden on them, a burden which was in no way proportionate to the income from controlled rent. The Constitutional Court ruled that that provision should be repealed by 11 July 2001.

### *3. Resultant amendments to legislation*

84. Following the Constitutional Court’s rulings of 12 January and 10 October 2000, Parliament adopted a new law governing housing matters and relations between landlords and tenants. The relevant statute - that is to say, the Act of 21 June 2001 on the protection of the rights of tenants, housing resources of municipalities and on amendments to the Civil Code (*Ustawa o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego*) (“the 2001 Act”) – entered into force on 10 July 2001. It repealed the 1994 Act and replaced the previous scheme of controlled rent with another statutory rent-control mechanism that restricted the possibility for landlords to increase levels of rent.

The 2001 Act was then successively amended. The most important amendments, adopted by Parliament on 17 and 22 December 2004, entered into force on 1 January 2005 (see paragraphs 124-132 below).

## **D. The 2001 Act**

### *1. Restrictions on rent increases*

85. Section 9 of the 2001 Act listed situations where a landlord could increase rent. That provision, in the version applicable until 10 October 2002 (see paragraph 102 below), read, in so far as relevant:

“1. Increases in rent or other charges for the use of a dwelling, apart from charges that do not depend on the landlord [e.g. those for electricity, water, central heating, etc.] may not be made more often than once every six months;

2. If a landlord increases other charges that do not depend on him, he shall be obliged to provide the tenant with a table of charges and the reasons for the increase;

3. In a given year the increase in rent or other charges, except for charges that do not depend on a landlord, shall not exceed the average general yearly increase in prices for consumer goods and services in the previous year in relation to the year preceding that year by:

(1) 50% - if the annual rent does not exceed 1% of the reconstruction value of the dwelling;

(2) 25% - if the annual rent is higher than 1% but not more than 2% of the reconstruction value of the dwelling;

(3) 15% - if the annual rent is higher than 2% of the reconstruction value of the dwelling.

Information on the increase in prices referred to in the first sentence [of this paragraph] shall be communicated in official bulletins of the President of the Central Statistical Office;

...

8. The reconstruction value of a dwelling shall be the product of its usable area and the conversion index of the reconstruction cost of 1 square metre of the usable area of the residential building. ...”

86. A further restriction on rent increases by landlords followed from section 28(2) of the 2001 Act, which provided that controlled rent could not exceed 3% of the reconstruction value of the flat. That provision was in force until 31 December 2004, the deadline that had already been set under the 1994 Act (see also paragraph 77 above).

Section 28(2) read:

“Until 31 December 2004 in all tenancy relations subsisting before the date of entry into force of this law, the level of rent in respect of dwellings that were subject to the controlled rent scheme on the date of the entry into force of this law, may not exceed 3% of the reconstruction value of the dwelling per year.”

## 2. *Termination of leases*

87. Section 11 of the 2001 Act listed situations in which a landlord could terminate a lease agreement that originated in an administrative decision.

Section 11(1)-(2) read, in so far as relevant:

“1. If a tenant is entitled to use a dwelling for rent, the landlord may give notice only for reasons listed in this provision ... Notice should, on pain of being null and void, be given in writing.

2. The landlord may give one month’s notice effective at the end of a calendar month, if:

(1) the tenant, despite a reminder in writing, still uses the dwelling in a manner contrary to the terms of the agreement or in a manner inconsistent with its function, thus causing damage; or if he or she has damaged equipment designed for common

use of residents; or if he or she he has flagrantly or repeatedly disturbed order, thus severely upsetting (*czyniąc uciążliwym*) the use of other dwellings; or

(2) the tenant has fallen into more than three months' arrears of rent or other charges for the use of the dwelling and, despite being informed in writing of the landlord's intention to terminate the agreement and given one month to pay off both the arrears and the current month's rent, has not paid those amounts, or

(3) the tenant has sublet the flat or part of it, or allowed it , or part of it, to be used fee of charge by another without the landlord's authorisation; or

(4) the tenant uses the flat which has to be vacated in view of the impending demolition or substantial renovation of the building...

88. Pursuant to section 11(3), a landlord who received rent which was lower than 3% of the reconstruction value of the dwelling could terminate the agreement if a tenant had not lived in the flat for more than 12 months or if he had title to another flat situated in the same town.

Section 11(4) provided that a landlord could terminate the agreement with 6 months' notice if he intended to dwell in his own flat and had provided the tenant with "alternative accommodation" (*lokal zastępczy*) or the tenant was entitled to a dwelling which met conditions for "alternative accommodation".

Under section 11(5), a landlord could terminate the agreement with three years notice if he intended to dwell in his flat but had not provided the tenant with any "substitute accommodation".

89. However, section 12(1) further limited the possibility of terminating leases. It stated that if a landlord intended to terminate a lease on the grounds mentioned in section 11(2)(2) (rent arrears unpaid despite the fact that a warning notice had been served and a further time-limit had been set for payment) and if the tenant's income would entitle him to obtain a lease on "social accommodation" (*lokal socjalny*) belonging to the municipality, no notice could be given unless the landlord had proposed a settlement to the tenant concerning the arrears and running charges.

As regards situations where, despite the termination of the lease agreement, the tenant did not vacate the flat, the landlord, had to – as under the previous regulations – sue him for eviction and, even if he obtained an eviction order, could not repossess the flat until the tenant had obtained a substitute dwelling from the municipality.

### *3. Duties in respect of maintenance and repairs*

90. The 2001 Act, in the version applicable up to 1 January 2005, did not contain any specific provisions setting out the duties of landlords and tenants with regard to maintenance and repairs of dwellings and residential buildings. Those issues were governed partly by the relevant provisions of the Civil Code (which applied in so far as a given matter had not been

addressed by the 2001 Act) and partly by the Construction Act of 7 July 1994 (*Prawo budowlane*) (“the Construction Act”), which lays down the general duties of owners of buildings.

91. Article 662 of the Civil Code, which lays down a general rule, reads, in so far as relevant:

“1. The landlord should give the object [of a lease] to the tenant in a usable state and should keep it in such a state for the duration of the lease.

2. Minor repairs related to the normal use of the object [of the lease] are incumbent on the tenant.”

92. Article 675 of the Civil Code reads, in so far as relevant:

“1. After the termination of a lease, the tenant shall be obliged to return the object [of the lease] in a condition not worse [than when he took possession of it]; however, he or she shall not be responsible for any deterioration of the object caused by reasonable wear and tear.”

93. Article 681 lists minor repairs for which a tenant is responsible. It reads as follows:

“Minor repairs for which the tenant is responsible are, in particular: minor repairs of floors, doors and windows, painting of walls and floors and the inner side of the flat’s entrance door, as well as minor repairs of installations and technical equipment that enable the use of lighting, heating, the water supply and the sewage system.”

94. Section 61 of the Construction Act provides:

“The owner or manager of a building shall be obliged to maintain and use the building in accordance with the rules set out in section 5(2).”

Section 5(2) states:

“The conditions for use of a building shall be secured in accordance with its purpose, in particular in respect of:

(a) the water and electricity supply and, if need be, the supply of heating and fuel, regard being had to their effective use;

(b) sewage, waste disposal and rainwater drainage.”

#### 4. *Succession to leases*

95. Article 691 of the Civil Code provides, in so far as relevant:

“In the event of a tenant’s death, the following persons shall succeed to the tenancy agreement: his or her spouse if the latter has not been a party to that agreement, his or her children, his or her spouse’s children, any other persons to whom he was obliged to pay maintenance, and a person living with the tenant in *de facto* marital cohabitation.

2. The persons referred to in paragraph 1 shall succeed to the tenancy agreement if they lived in the tenant’s household until his or her death.

3. If there are no persons in the categories referred to in paragraph 1, the lease agreement shall expire.”

### **E. The Constitutional Court’s judgment of 2 October 2002**

96. On 11 December 2001 the Ombudsman (*Rzecznik Praw Obywatelskich*) made an application to the Constitutional Court and asked, *inter alia*, that section 9(3) of the 2001 Act (see paragraph 89 above) be declared incompatible with the constitutional principle of the protection of property rights. The Ombudsman referred to numerous complaints that he had received from landlords, who claimed that levels of rent as determined under that section did not cover the basic maintenance costs of residential buildings. He also submitted that the recent rules for the determination of rent put landlords at a bigger disadvantage than the rules which had been laid down in the 1994 Act and which had already been repealed as being unconstitutional.

He criticised the legislation on the ground that it was exceptionally inconsistent. He referred, in particular, to the – in his view erroneous – statutory correlation between rent increases and the increase of prices for consumer goods and services, which were not related in reality to the costs of maintaining a building. He added that there were still no provisions to allow the landlords to recover losses incurred in connection with expenses for maintenance of property.

97. The representatives of Parliament and the Prosecutor General (*Prokurator Generalny*) asked the Constitutional Court to reject the application.

98. The court invited organisations of landlords and tenants to take part in the proceedings and submit their observations in writing. The Polish Association of Tenants, the Polish Union of Property Owners (*Polska Unia Właścicieli Nieruchomości*) and the All-Polish Association of Property Owners (*Ogólnopolskie Stowarzyszenie Właścicieli Nieruchomości*) filed their pleadings on 16, 17 and 18 September 2002 respectively.

99. The Polish Union of Property Owners supplied considerable statistical material, showing that the level of controlled rent represented on average around 1.5% of the reconstruction value of the building, which in turn amounted to some 40% of the costs of maintenance of residential buildings. They presented a sample calculation of monthly rent based on the average reconstruction value, the average size of a flat and the average gross income.

Assuming that the average reconstruction value was PLN 2,200, that 1.5% of that value was the average maximum reached by controlled rent and that the average flat had a surface area of 40 square metres, the average monthly rent amounted to PLN 110. That amount, they stressed, represented 5% of the average gross income, whereas, according to them, in the

European Union countries rent accounted for 25-30% of the average gross income.

100. The All-Polish Association of Property Owners submitted, among other things, that the impugned legislation was in breach of the constitutional principle of proportionality because a group of some 100,000 landlords had to bear the main burden of social protection afforded by the Polish State to about 900,000 tenants, without any financial support from some 15,000,000 Polish taxpayers.

101. The Polish Association of Tenants considered that the contested provisions were compatible with the Constitution. It drew attention to the fact that a large group of tenants, especially those who had been granted the right to a lease by means of administrative decisions, were in a poor financial position. It stressed that during the period of State management of housing matters those tenants had made investments and had thereby contributed to the maintenance costs of buildings, even though they had not been legally obliged to do so. At the hearing, in reply to the questions from the judges, the President of the Association admitted that tenants paying controlled rent also included well-off persons, in respect of whom an increase in rent would be justified.

102. On 2 October 2002 the Constitutional Court, sitting as a full court, declared section 9(3) of the 2001 Act unconstitutional as being incompatible with Article 64 §§ 1 and 2 and Article 31 § 3 of the Constitution (see also paragraphs 109 and 110 below). The provision was, accordingly, repealed. The repeal took effect on 10 October 2002, the date of the publication of the judgment in the Journal of Laws (*Dziennik Ustaw*).

103. In the reasoning for its judgment, the Constitutional Court extensively cited its judgment of 12 January 2000 (see paragraphs 84-86 above).

In conclusion, it held that the fact that the 2001 Act had abolished the scheme of rent control had not improved the situation of landlords because, instead, it had introduced a defective mechanism for controlling increases in rent. In its opinion, section 9(3) had not only “frozen” the disadvantageous position of landlords, a situation which had already been found to be incompatible with the Constitution, but had also, owing to the changing economic circumstances, significantly reduced any possibility of increasing rent to cover expenses incurred by them in connection with the maintenance of property.

The court repeated what it had already stated in its judgment of 12 January 2000, namely that the relevant provisions placed the main burden of the sacrifices that society had to make for the benefit of tenants in a difficult financial position on the owners of property. It went on to find that section 9(3) perpetuated the state of a violation of property rights that had subsisted under the 1994 Act, especially as landlords had not been

relieved of any of their previous duties in respect of maintenance of property.

104. The main thrust of the Constitutional Court's reasoning was as follows:

“During the transition from controlled rent to contractual rent it is necessary to control the increase in rent. ... In most European countries legislative bodies exercise control over rent increases. The introduction of such a mechanism into Polish law seems to be particularly justified and the need for it follows quite evidently from the shortage of flats and the absence of a lease market which would influence rates of rent. This very low supply of flats for rent has caused a situation in which tenants are exposed to undue demands from landlords. Hence there is a need to regulate rent increases.

While recognising this necessity, the Constitutional Court is convinced that the mechanism introduced by the impugned provision is defective and is objectively inappropriate for accomplishing the aims pursued by the legislature. ...

To begin with, the Constitutional Court will examine the impact of the operation of section 9(3) of the 2001 Act on landlords who were subject to controlled rent under the 1994 Act. In this court's view, the contested provision has not only “frozen” the disadvantageous position of landlords subsisting under the 1994 Act, a situation which was already found to have been incompatible with the Constitution, but has also actually aggravated that situation on account of changing economic circumstances. ...

At the time when the present legislation entered into force, tenants paid rent determined by the municipalities. [The rent paid], according to the information supplied by the Office for Housing and Town Development, covered merely 60% of the costs of maintenance of residential buildings. The 2001 Act did not increase rent to the level that could have been established according to the principles set out by the Constitutional Court in [the judgment of 12 January 2000]. Nor did the legislature give landlords an opportunity to increase rent to a level ensuring recovery of their expenses. The 2001 Act has frozen rates of rent and fixed them as a reference level for the calculation of future increases. ...

In the Constitutional Court's opinion, in order to arrive at reasonable level of rent it is necessary to take one of the following two measures: either a one-off increase in deflated rates of controlled rent, accompanied by a restrictive protection of tenants against further increases or, while freezing the applicable rates, permitting considerable increases in relatively rapid succession until an acceptable level has been reached. However, the legislature fixed an unreasonably low basic rent and allowed only strictly regulated increases, correlated with the inflation rate. The legislature did not take into account the fact that the rate of inflation was constantly declining, which means that permissible increases have been insignificant, amounting merely to a few percentage points of the basic rent and giving no opportunity, for purely mathematical reasons, to reach levels that would ensure profitability, or at least recovery of maintenance costs. The decrease in the inflation rate, although a generally positive sign of economic stability, has resulted in the stagnation of rent at low levels.

The deterioration of the situation of the landlords receiving controlled rent is also shown by a comparison of rent increases under the 1994 Act with increases permissible under the 2001 Act. As transpires from information supplied by the Office

for Housing and Town Development [in respect of the operation of the 1994 Act], at the relevant time municipalities raised controlled rent annually to a significant extent: in 1996, when the inflation rate was about 20%, by 30% on average, but in 1997, when the inflation rate was 13%, by 31%. The pace of transition to a reasonable level of rent was faster than at present, if only because municipalities, themselves owning residential buildings, had a strong interest in securing genuine increases in rent. Finally, the previous regulations gave landlords the hope of relaxing rent policy. Irrespective of the rates of controlled rent imposed on them by municipalities, they knew that from 2005 they would be able to negotiate rent freely. However, that encouraging prospect was wiped out by section 9(3) of the 2001 Act. Even though the ceiling of 3% will no longer apply after [31 December] 2004, given the provision of section 9(3), this ceiling will not be reached in reality.

In the Constitutional Court's view, the above circumstances give sufficient grounds to find that the situation of landlords who formerly received controlled rent is now unquestionably less favourable than it used to be under the 1994 Act. ... [O]n the contrary, section 9(3) has perpetuated the violation of the right of property. At this point, it is necessary to determine how the landlords' situation looks in other respects, apart from the restrictions on rent increases. If, following the ... judgment of 12 January 2000, the legislature had significantly changed any aspect of the legal position of landlords, thereby compensating for losses resulting from reduced rent, the evaluation of levels of rent in the present case would have had to be based on other criteria than those referred to by this court in 2000.

Since 12 January 2000 there have been no changes to legislation, apart from the enactment of the 2001 Act, which seriously aggravated the situation of landlords. They still bear the burden of obligations imposed by the Construction Act, whose non-fulfilment, as stressed by the Ombudsman, is subject to penalties. There have been no changes to regulations on income tax, at least in respect of deductions from tax (or from taxable income) of amounts spent on maintenance of buildings in which flats are let to tenants. Nor has the legislature introduced preferential loans for repairs. ... The Constitutional Court also points out that the 2001 Act has not materially improved the situation of landlords in respect of termination of leases. ...

Accordingly, it is fully justified to rely on this court's findings in respect of section 56(2) of the 1994 Act. Even though the provisions under consideration have changed, and the Court is now considering completely different legal instruments (control of rent increase as opposed to the scheme of rent control under the 1994 Act), the core of the dispute and the issues under consideration remain essentially the same, namely the situation of landlords on whom the legislature has imposed reduced levels of rent. In addition, section 9(3) leads to a difference in the treatment of landlords, depending on whether they are parties to lease relationships formerly governed by the rent control scheme, or to lease contracts based on freely determined rent. As shown above, in practice the rent increase mechanism adversely affects the first group of landlords and, at the same time, unjustifiably and at the tenant's expense, favours the second group.

In view of the foregoing, the Constitutional Court finds that the [operation of] the contested provision is tantamount to the continued violation of the right of property vested in a specific group of landlords, namely those who entered into a lease relationship by virtue of administrative decisions on the allocation to a dwelling, or on another basis, prior to the introduction of State management of housing matters in a given municipality. Not only did the legislature fail to adjust rates of controlled rent,

despite their having been found to be unconstitutional, but in fact, through the introduction of restrictive provisions on rent increases, practically froze such rents at levels that cannot be regarded as consistent with constitutional guarantees of the right of property. ...

It is worth reiterating, having regard to the [judgment of 12 January 2000], that the restrictions in question are undoubtedly guided by the need to protect public order and the rights of other persons, namely tenants. However, according to the Constitutional Court's case-law, Article 31 § 3 of the Constitution implies that restrictions on the rights guaranteed therein are necessary. In respect of the rent [control scheme], the Constitutional Court qualified as 'necessary' – at least during the transitional period – the restriction on the right of property 'precluding the freedom to derive profit, by fixing levels of rent in such a way as to cover only the costs of maintenance and upkeep of the building'. A reduction below that minimum was seen by this court as unconstitutional. Placing the financial burden of subsidising rent on a single social group, namely landlords, was also considered to have been unconstitutional since 'the duty to help the underprivileged and [the duties inherent in] social solidarity are incumbent not only upon those persons'. The Constitutional Court envisaged and still envisages the possibility of applying other legal solutions ... which would result in a more uniform social distribution of the burden linked to the necessity to satisfy housing needs. It is therefore unnecessary to place the entire burden on the single group of landlords. Consequently, the Constitutional Court considers that the restriction resulting from section 9(3) ... does not meet the criteria established by the principle of proportionality and goes beyond the tolerable extent of limitations on the right of property set out in Article 31 § 3 of the Constitution.

The Constitutional Court is not competent to fix minimum levels of rent... [However,] from the point of view of the protection of landlords' rights, [it] stresses again the crucial importance of the correct determination of the costs of maintenance and upkeep of residential buildings. This constitutes the absolute minimum rate. ...

As regards the implementation of the constitutional rights of tenants, the Constitutional Court stresses that, although in the present judgment section 9(3) of the 2001 Act has been found unconstitutional, the Act still imposes significant restrictions on the freedom to increase rent. The most important of them is definitely section 28(2), which remains in force and which provides that ... up to 31 December 2004 inclusive the annual rent may not exceed 3% of the reconstruction value of the dwelling."

#### **F. The Constitutional Court's judgment of 12 May 2004**

105. On 12 May 2004 the Constitutional Court heard a constitutional complaint lodged by a certain J.-M. O, challenging the constitutionality of section 9(3) and section 28(3) of the 2001 Act (see paragraphs 85 and 86 above). He submitted that those provisions were incompatible with Article 64 § 1 (protection of property rights) of the Constitution read in conjunction with Article 31 § 3 (principle of proportionality).

In their written pleadings, the Prosecutor General and representatives of Parliament asked the court to discontinue the proceedings in so far as they concerned the constitutionality of section 9(3) since it had already been

repealed by the judgment of 2 October 2002, and to hold that section 28(3) was compatible with the Constitution.

At the oral hearing, J.-M.O. stated that he intended to pursue his complaint only in so far as section 28(3) was concerned.

106. The Constitutional Court held that section 28(3) was compatible with the Constitution and found:

“As emerges from [the Constitutional Court’s judgments of 12 January 2000 and 2 October 2002], the question of maintaining the maximum ceiling on rent has already been examined by this court and the measure was considered to have been necessary from the point of view of public order – at least in the transitional period. The need to protect tenants against unduly high rent is justified by the situation of housing in Poland, which is the consequence of State management of housing and has resulted in a commonly experienced shortage of flats.

A limitation on levels of rent – such as the one introduced by the contested provision – does not impair the essence of the right of property because it does not deprive owners of essential elements of that right. It has to be stressed that the right to a lease is one of the pecuniary rights protected by Article 64 §§ 1 and 2 of the Constitution and that restrictions on the right of property are inherent in many pecuniary rights, including the right to a lease. The contested section has set a maximum ceiling on rent with a clear time-frame – up to the end of 2004 – and this also may have an impact on whether a temporary restriction on the right of property may be regarded as not impairing its essence.

It also has to be stressed that the setting of a clear time-frame in section 28(3) implies an obligation of the legislature towards landlords, which must be assessed from the point of view of the principle of citizens’ confidence in the State and the law made by it.”

### **G. Relevant constitutional provisions**

107. Article 2 of the Constitution states:

“The Republic of Poland shall be a democratic State ruled by law and implementing the principles of social justice.”

108. Article 20 lays down the basic principles on which Poland’s economic system is founded. It reads:

“A social market economy, based on freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.”

109. Article 31 § 3 reads:

“Any limitation on the exercise of constitutional freedoms and rights may be imposed only by statute, and only when it is necessary in a democratic State for the protection of its security or public order, or for the protection of the natural environment, health or public morals, or the freedoms or rights of other persons. Such limitations shall not impair the essence of freedoms and rights.”

110. Article 64 protects the right of property in the following terms:

“1. Everyone shall have the right to ownership, other property rights and the right of succession.

2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.

3. The right of ownership may be limited only by means of a statute and only to the extent that this does not impair the substance of such right.”

111. Article 75 refers to the protection of tenants. It reads as follows:

“1. The public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen.

2. Protection of the rights of tenants shall be established by statute.”

112. Article 76 provides:

“The public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute.”

## **H. General effects of the repeal of section 9(3) of the 2001 Act**

113. After 10 October 2002, as a result of the Constitutional Court’s judgment, it became possible for landlords to increase rent up to 3% of the reconstruction value of the dwelling. At the end of 2002 levels of rent generally increased. According to the Government, in the Warsaw District, where the previous rate was PLN 2.17 per square metre, the rent quadrupled, reaching around PLN 10.00 per square metre in 2004. According to reports published in the Polish press, in most other towns 3% of the reconstruction value of the dwelling corresponded to PLN 5.00-6.00 per square metre. Levels of freely determined contractual rent are still higher; sometimes and, especially, in large towns, the difference may reach even 200-300%.

## **I. The December 2004 Amendments**

### *1. Preparatory work and adoption by Parliament*

#### **(a) The Government Bill**

114. At the beginning of 2003 the Government started to prepare a bill amending the 2001 Act. The Government Bill was submitted to Parliament on 30 December 2003.

115. The explanatory memorandum on the bill stated that the aims of the proposed amendments were, among other things, “to specify rights and obligations of a landlord and tenant in order to strengthen the protection of the weaker party”; “to introduce new rules for the protection of tenants against the excessive increase in rent and other charges for the use of dwellings”; and “to reduce the disproportion between the constitutionally guaranteed protection of tenants and the constitutional rights of landlords”.

116. The Government proposed a number of changes to the existing provisions. The most important and controversial provision was the proposed section 28, pursuant to which (subsection 2) the scheme of rent control, despite the fact that the deadline for its operation had been set by the legislature for 31 December 2004, was to be maintained until the end of 2008 in respect of all lease agreements in force before 10 July 2001 under which the tenants paid controlled rent. That in practice meant all leases originating in administrative decisions regarding privately owned buildings.

The provision was to be applied mostly to all individual landlords, its operation in relation to public housing entities and housing cooperatives being of minimal effect. The explanatory memorandum stated that the repeal of the rent-control scheme in its entirety “could cause a dramatic increase in rent” after the end of 2004 and that the limitation “would allow a smooth transition from the levels of rent at the end of 2004 to levels fixed in accordance with general principles”.

The Government therefore proposed that controlled rent be frozen at the maximum level of 3% of the reconstruction value of the dwelling up to 31 December 2004; 3.25% up to the end of 2005; 3.5% up to the end of 2006; 3.75% up to the end of 2007 and 4% up to the end of 2008.

117. The effects of the proposed rent freeze on the property rights of individual landlords have received considerable media attention and have given rise to heated public debate. The proposal was severely criticised by all organisations of landlords.

118. Eventually, on 5 October 2004, the Government submitted to Parliament an amendment to their bill. They withdrew their original proposal to freeze levels of rent after 31 December 2004. They still maintained the proposal to limit the increase in rent for leases originating in previous administrative decisions.

#### **(b) The Deputies’ Bill**

119. On 22 June 2004 a group of deputies from the “Law and Justice (*“Prawo i Sprawiedliwość”*) party submitted a bill proposing amendments to the 2001 Act.

120. The general thrust of the proposed changes, as set out in the relevant explanatory memorandum, was:

“to secure the effective protection of the rights of tenants, as guaranteed by Article 75 § 1 and Article 76 of the Constitution, by:

(a) preventing the overuse by landlords of the right to terminate a lease agreement under section 11(5) of the 2001 Act;

b) preventing the dysfunction resulting from non-fulfilment by landlords of the duties incumbent on them in leasing dwellings (even in cases where the landlords are unknown and the municipality does not manage the property).”

**(c) Parliamentary debate**

121. Parliament decided to work on both bills simultaneously. The first reading took place on 6 October 2004. The second reading, following the report of the Parliamentary Committee on Infrastructure, the Committee for Family and Social Policy and the Committee on Self-Government and Regional Policy and the adoption of amendments, was on 17 November 2004. After the third reading, which took place on 19 November 2004, the bills were adopted by the *Sejm* (the lower house of the Polish Parliament) and transmitted to the Senate and the President of Poland on the same day.

On 6 December 2004 the Senate proposed several amendments, the most significant being the amendment to section 9 of the 2001 Act, restricting the maximum increase in rent to a level of 10% per year in situations where the rent paid exceeded 3% of the reconstruction value of the dwelling.

122. On 17 December 2004 the *Sejm* accepted some of the Senate’s amendments, most notably the amendment to section 9. On the same day the Act of Parliament was transmitted for signature by the President of Poland. The President signed it on 23 December 2004.

123. On 22 December 2004, following, among other things, press reports stating that the new provision of section 9 of the 2001 Act did not exclude the possibility of a one-off increase in rent even where the rent was equal to, or less than, 3% of the reconstruction value of the dwelling, Parliament passed, in an accelerated procedure, another bill amending the 2001 Act. The bill was tabled by a group of deputies and contained only one proposal, namely to add another subsection to section 9 of the 2001 Act (see paragraph 132 below). On the same day the bill was transmitted to, and accepted by, the Senate. The President of Poland signed the Act of Parliament on 23 December 2004.

*2. The 17 December 2004 Amendment*

124. The Act of 17 December 2004 on amendments to the 2001 Act on protection of the rights of tenants, housing resources of municipalities and on amendments to the Civil Code and amendments to certain statutes (*Ustawa o zmianie ustawy o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego oraz o zmianie niektórych ustaw*) (“the 17 December 2004 Amendment”) entered into force on 1 January 2005.

**(a) Restrictions on rent increases**

125. Section 1(8) of the 17 December 2004 Amendment introduced a new section 8a into the 2001 Act. This new provision was drafted with a view to implementing both the Constitutional Court's ruling of 2 October 2002 and the constitutional principle of the protection of tenants' rights. It subjects the increase in rent to various restrictions.

Section 8 a reads, in so far as relevant:

“1. The landlord may increase rent or other charges for the use of the dwelling, giving [the tenant] notice of the rent increase, not later than by the end of a calendar month [and] in compliance with the terms for giving notice.

2. The term for giving notice of an increase in rent or in other charges for the use of the dwelling shall be 3 months, unless the parties have stipulated a longer term in their contract;

...

4. An increase whereby rent or other charges for the use of the dwelling would exceed 3% of the reconstruction value of the dwelling within 1 year, may take place only in justified cases. At the tenant's written request, the landlord shall, within 7 days, give reasons for the increase and its calculation in writing.

5. The tenant may, within 2 months following the notice of the increase, challenge the increase referred to in subsection 4 by bringing a court action to have the increase declared unjustified or justified but in a different amount [; he or she may also] refuse to accept the increase, with the effect of the contract being terminated by the end of the term of notice. The burden of proof in respect of the justification of the increase shall rest with the landlord.

...

7. Provisions of subsections 1-6 shall not apply to increases:

(1) not exceeding 10% of the current rent or current charges for the use of the dwelling within a year;

...

(3) concerning charges that do not depend on the landlord.”

126. Pursuant to section 1(9)(a) of the 17 December 2004 Amendment, section 9 of the 2001 Act was reworded in its subsections 1 and 2 as follows:

“1. Increases in rent or other charges for the use of the dwelling, apart from charges that do not depend on the landlord [e.g. those for electricity, water, central heating, etc.] may not be made more often than every 6 months but, if the level of the annual rent or other charges for the use of the dwelling, apart from charges that do not depend on the landlord, exceeds 3% of the reconstruction value of the dwelling, a yearly increase cannot be higher than 10% of the current rent or current charges for

the use of the dwelling [; such an increase] shall be calculated without charges that do not depend on the landlord.

2. If charges that do not depend on the landlord have been increased, he or she shall give a tenant a written statement listing charges and reasons for their increase. The tenant shall be obliged to pay the increased charges only up to such a level that is necessary for the landlord to cover costs of supply of utilities referred to in section 2(8) [e.g. electricity, water, heating].”

**(b) Termination of leases**

127. Section 1(11)(a) of the 17 December 2004 Amendment introduced certain changes in respect of the termination of leases by individual landlords. However, the new section 11 of the 2001 Act differs only slightly from the previous provision on termination of leases (see paragraphs 87-88 above).

Section 11(1) now reads, in so far as relevant, as follows:

“If a tenant is entitled to use a dwelling for rent, the landlord may give notice only for reasons listed in subsections 2-5 .... Notice should, on pain of being null and void, be given in writing.

Subsections (2), (4) and (5) of section 11 remain unchanged. Subsection (3) now reads:

“ The landlord of a dwelling for the lease of which the rent is lower than 3% of the reconstruction value of the dwelling in a given year may terminate the lease:

(1) with six months’ notice if the tenant has not lived in the flat for more than 12 months;

2) with one month’s notice, expiring at the end of a calendar month, in respect of a person who has been entitled to another dwelling in the same or nearby locality and provided that dwelling meets the requirements for substitute accommodation.”

128. As regards cases where the landlord, his adult descendants or a person in respect of whom he is obliged to pay maintenance intend to dwell in the landlord’s flat (see also paragraph 93 above), the provision of the present section 11(7) is that the notice to quit given to the tenant should, on pain of being invalid, indicate the person who is to dwell in the flat. The terms for giving notice (6 months and 3 years respectively) remain unchanged).

129. Under section 11(12) the termination of a lease in respect of a tenant who on the date of giving notice is more than 75 years old and who, after the expiry of the applicable 3 years’ notice will have no title to another dwelling and will have no persons obliged to maintain him or her will take effect upon his or her death.

**(c) Duties in respect of maintenance and repairs**

130. The 17 December 2004 Amendment, in its section 5, introduced a new provision – section 6a – setting out a list of the landlord’s duties under the tenancy. In essence, it repeats the provision of section 9 of the 1994 Act (see paragraph 78 above).

131. Section 6b, introduced by the same section 5 of the 17 December 2004 Amendment, lays down the tenant’s duties. It reads, in so far as relevant:

“1. The tenant shall be obliged to keep the dwelling in a proper technical, sanitary and hygienic state as prescribed by other separate provisions and to comply with the rules of good conduct in the building. He or she shall also be obliged to take care, and ensure protection against damage or devastation, of parts of the building designed for common use, such as lifts, staircases, corridors, chutes, other [similar] premises and the surroundings of the building.

Subsection (2) sets out a detailed list of repairs and works involved in the upkeep of a flat.

*3. The 22 December 2004 Amendment*

132. The Act of 22 December 2004 on amendments to the 2001 Act on the protection of the rights of tenants, housing resources of municipalities and on amendments to the Civil Code (*Ustawa o zmianie ustawy o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego*) (“the 22 December 2004 Amendment”) entered into force on 1 January 2005. Its section 1 read, in so far as relevant:

“In section 9(1) [of the 2001 Act] the following subsection 1(a) shall be included:

‘The provisions of subsection 1 shall also apply in the event of an increase in rent or other charges for the use of a dwelling, except for charges that do not depend on the landlord if, after the increase, the level of the annual rent or other charges for the use of the dwelling, except for the charges that do not depend on the landlord, is to exceed 3% of the reconstruction value of the dwelling.’”

**J. The Constitutional Court’s judgment of 19 April 2005**

*1. The challenge to the constitutionality of the December 2004 Amendments*

133. On 4 January 2005 the Polish Union of Property Owners made an application to the Constitutional Court, challenging the constitutionality of the 17 December and 22 December 2004 Amendments (“the December 2004 Amendments”). The Union alleged, in particular, that the provisions extending State control over increases in rent for dwellings owned by private individuals were incompatible with the constitutional

principles of protection of lawfully acquired rights and citizens' confidence in the State and the law made by it.

In that context, they stressed that the Polish authorities, in breach of their obligation to terminate the operation of the rent-control scheme by 31 December 2004 that they had taken upon themselves by virtue of two successive laws, namely the 1994 Act and the 2001 Act, had failed to abolish the impugned scheme and had simply replaced it by further restrictions on increases in rent.

134. On 19 January 2005 the Prosecutor General made an application to the Constitutional Court, challenging the constitutionality of the December 2004 Amendments. In particular, he contested the provisions restricting increases in rent to 10% and submitted, *inter alia*, that those restrictions constituted an unjustified interference with landlords' property rights. He further alleged that Parliament was in breach of its duty to "legislate decently" (*zasada "przyswoitej legislacji"*), especially the duty to formulate legal provisions in a correct and coherent manner.

135. The Constitutional Court invited the Speaker of the *Sejm*, acting on behalf of Parliament, the All-Polish Association of Property Owners and the Polish Association of Tenants to take part in the proceedings and submit their written observations. The Speaker of the *Sejm* and the All-Polish Association of Property Owners fully supported the Prosecutor General's application. The association submitted detailed calculations of levels of rent that would be necessary to cover the maintenance costs of residential buildings. They maintained that in respect of most such buildings there was a "repair shortfall" (*luka remontowa*) amounting to 60% of the costs necessary for the reconstruction of the value of dwellings through major repairs and that, in order to secure sufficient means for such purposes, the levels of rent should reach 6% of the reconstruction value per year.

The Polish Association of Tenants considered that the current possibility of increasing rent set at the level of 3% of the reconstruction value by 10% per year already imposed an excessive burden on tenants. It submitted that the landlords' association had given exaggerated figures in respect of the costs of necessary repairs. In the context of rent increases, it also stressed that the State's financial assistance for tenants was practically non-existent.

## 2. *The judgment of 19 April 2005*

136. The Constitutional Court heard the Prosecutor General's application on 19 April 2005. It repealed section 1(9) (a) of the 17 December 2004 Amendment in so far as it made any increase in rent above 3% of the reconstruction value subject to a maximum yearly ceiling of 10% of the current rent and section 1 of the 22 December Amendment in its entirety.

In its judgment, it made an in-depth analysis of the housing laws as applicable from 1994 to 2004 and their historical and social background. It

referred to its previous judgments repealing the successive defective legal provisions and to their implications.

The judgment contains extensive reasoning and a thorough assessment of the various social, political and economic circumstances affecting the current state of the Polish housing legislation. The gist of the Constitutional Court's arguments is summarised in the following paragraphs.

137. The Constitutional Court first analysed the impugned provisions from the point of view of the principle of the rule of law as laid down in Article 2 of the Constitution (see also paragraph 107 above):

“In the opinion of the [court], the introduction of the contested legal provisions clearly violated the principle of proper legislation, which necessarily leads it to declare those provisions incompatible with the principle of rule of law as expressed in Article 2 of the Constitution. The amendments, contrary to the intentions of the legislature itself – as is confirmed by the content of the Sejm's written observations [filed in this case] – eliminated a market mechanism in a situation where the actual purpose of introducing restrictions on rent increases was to be the protection of tenants, that is to say, persons who in a given case do not accept the proposed increase. There is a distinct inconsistency between the provisions of the amendment in the initial bill and the provisions introduced following the parliamentary debate. In consequence, none of the declared aims of the [legislation] has been attained. Rents were not relaxed within rational limits encompassing the requirements of justice and of protection of landlords' rights and nor were effective and precisely determined procedures introduced to protect the rights of tenants against abuse of [landlords' right to] determine rent freely.

The new version of section 9(1)(a) has also violated the principle of ... confidence in the State and the law made by it. Thus, as already mentioned, there is no doubt whatsoever that until the adoption of the 17 December 2004 Amendment the legislation of the last decade consistently assured society, and especially persons directly interested in the situation of landlords and tenants, that rents that were controlled and at the same time limited to the level of 3% of the reconstruction value of the dwelling exclusively in respect of a certain category of premises would apply for the transitional period, that is, up to 31 December 2004. This period ... was [set] to make it possible for the Government and the legislature to develop a new, comprehensive and multi-faceted system governing the relations between landlords and tenants, fully taking into consideration the justified interests of the parties and also realistically allowing those same parties to prepare themselves for surviving the most difficult period and fully to accept the new state of affairs, so that mutual relations between the parties to a lease (or an analogous relationship) could be shaped in a rational manner and above all with due consideration for the concrete conditions determining rent. The date of 31 December 2004 as the deadline for the transition period was also confirmed in the 2001 Act, which further strengthened the conviction that after that date the mechanism for determining rent would be compatible with the principle of freedom of contract.

This societal conviction was further supported by the unambiguous case-law of the Constitutional Court, which on many occasions underlined the transitional character of the rent-control scheme. It thus follows that in the years 1994-2004 the unambiguous 'rules of the game' were established, whose period of validity was clearly indicated by the 1994 Act (section 56(2)) and then in some sense confirmed by section 28(2) of the 2001 Act. ...

The Constitutional Court's case-law has frequently expressed the opinion that the legislature must not fail to meet deadlines for those 'rules of the game' that it set itself. This opinion was expressed, *inter alia*, in ... the reasoning for [its judgment of 12 January 2000]. In its judgment ..., the Constitutional Court expressed the opinion that setting aside the principle of controlled rent for a ten-year transitional period would be acceptable only under exceptional circumstances, for otherwise there would be a violation of the principle of legal certainty expressed in Article 2 of the Constitution.

These considerations lead to the conclusion that the adoption of the contested law and its publication on 29 December 2004, with its entry into force on 1 January 2005, violated the 'rules of the game' which were laid down in the previous legislation and which were subject to an unambiguous time-limit [. This happened in a situation where] there were no exceptional circumstances or events that could justify or explain the extension of [those rules] for a longer period.

The breaking of what amounted to a promise laid down in a statute must be regarded as a particular kind of irresponsibility on the part of the public authorities, and hence an exceptionally jarring violation of the principle of confidence in the State and the law made by it, a principle constituting one of the foundations of the rule of law."

138. The Constitutional Court next referred to the principle of the protection of property and the principle of proportionality:

"Article 64 §§ 1 and 2 of the Constitution guarantees the protection of ownership and other property rights on an equal basis for all. Among these 'other property rights' are the right to lease residential premises and other rights relating to premises serving to satisfy housing needs. Each of these rights, whether accruing to landlords or to tenants, enjoys constitutional protection, but in different ways. As a rule these rights collide but, as has been pointed out [in one of the Constitutional Court's previous judgments], it would be a simplification to treat this conflict in linear terms, and to presume that providing a certain degree of protection to one of these rights must necessarily result in a weakening of the degree of protection afforded to the other.

Section 9(1) and (2) and section 9(1)(a) ... were based on the unjustified conviction that relations between landlords and tenants always have an antagonistic nature, which inevitably leads to the 'zero-sum game'. In reality, however, this does not have to be the case; on the contrary, properly determined relations between the parties to a lease agreement are of service both to landlords and tenants, provided that neither of the parties abuses its rights, since everyone is obliged to respect the freedoms and rights of others (Article 31 § 2 of the Constitution).

The Constitutional Court is fully aware of how difficult it is to balance the legitimate interests of both landlords and tenants and to create the best possible ways of organising their relations. This is particularly true in the Polish situation, in which the rights of landlords were not respected for a long time and housing matters were subject to State management for entire decades [.This], combined with other systemic and economic factors, resulted in the degradation of housing supply unheard of in the countries of western Europe, the consequences of which affected and still affect not only landlords but, ultimately, also tenants. Stepping back from this abyss will be difficult and will take many years, and the effective change of the present state of affairs will probably not be possible without committing public funds adapted to concrete situations (see the Constitutional Court judgment [of 12 January 2000]).

It is therefore the legislature's duty to strive to form a harmonious legal situation for landlords and tenants, so that their relations can be seen as desirably complementary rather than characterised by inevitable antagonism. Charges for the use of the premises, including rent, are a special element of those relations. They should ensure that the landlord not only covers the costs of building maintenance and repair, but also obtains a return on invested capital (amortisation) and a decent profit because no legal provisions may extinguish one of the basic components of the right to property, namely the right to derive profit from property ... . This was possible, as found by the Constitutional Court [in its earlier judgment], in the transitional period, during which it was considered reasonable to restrict profit [by fixing] such levels of rent as only covered the costs of maintenance and upkeep. Now complete regulations, fully and precisely determining the elements of rent, are required. The 2001 Act specified what are to be regarded as charges that do not depend on the landlord ... but it did not indicate ... the elements of rent as such. As a result, judicial control of reasons for rent increases is to a large extent illusory. ...

At the same time, the Constitutional Court considers it necessary to take into account the legitimate interests of tenants, and to establish effective mechanisms to protect them against abuse of their rights by a landlord. It is also necessary to develop a set of instruments that would make it possible to support tenants finding themselves in difficult financial and living circumstances. This must not be done, as has been the case hitherto, mainly at the cost of landlords, but mostly through the deployment of special public resources. Thus, the duties inherent in social solidarity and the duty to help the underprivileged are incumbent on society as a whole. ...

Over the last dozen years or so, attempts have been made in Poland to protect the legal interests of ... tenants through the statutory determination of percentage rent increase indicators, or of rent ceilings, or through the introduction of certain stronger control measures after a certain limit was exceeded, but in fact this has always been done in isolation from the concrete circumstances of given landlords and given tenants. An exception in this respect is the duty to determine officially the so-called 'conversion index', which of course adjusts the calculation of rent, but only locally, and, furthermore, is highly formalised and mechanical in nature.

The end of the transitional period for controlled rents must mean a real break with the statutory automatism in respect of setting levels of rent, determining the rent ceilings or imposing restrictions on rent increases. One should expect the establishment of a system providing flexible solutions, adapted to the requirements of a modern housing market, which – stressing the parties' freedom to determine rent levels – would also ensure effective control in order to prevent arbitrariness and abuse of that freedom.

The contested provisions allow the parties ... a very small margin of freedom, which does not take into consideration concrete circumstances, such as the technical condition of the premises and the building, the personal and financial situation of the tenants or local factors. The legislature believes that the elimination of irregularities in increasing rent, apart from rent being subject to an arithmetical ceiling, will be effected through a special procedure for judicial control laid down in section 8a combined with the mechanism restricting rent increases as laid down in section 9 of the 2001 Act, in particular section 9(1) and (1) (a).

The legislature, declaring that controlled rents would be abolished in the future, never promised that from 1 January 2005 the levels of rent determined by the parties

would not be controlled at all. However, judicial control to this end would be effective if the law clearly determined elements of rent and formulated precise criteria for its evaluation. But this did not happen. The 2001 Act does not indicate at all how rent should be determined (because rent increases as such are a different matter), even in such a fragmentary way as section 20 of the 1994 Act did. It thereby deprived a court assessing an increase in rent of the possibility of objective verification, on the basis of concretely enumerated elements of rent and clear criteria for their evaluation, whether or not the increase was justified (section 8a(5) of the 2001 Act), and hence created a risk of divergence between judicial decisions. It should also be noted that in certain situations the limiting mechanism introduced by section 9(1) and (1)(a) either excludes judicial control of rent altogether, or makes it completely illusory ... .

In consequence, ... both the contested amendments amounted to a breach of the principle of proportionality expressed in Article 31 § 3 of the Constitution, [notably] through defective formulation of the rules determining [rent], which do not give adequate protection either to landlords or to the rights of tenants.”

139. In the context of the principle of proportionality the Constitutional Court also referred to the Court’s Chamber judgment in the following terms:

“The Constitutional Court paid particular attention to the European Court of Human Rights’ judgment of 22 February 2005 in the case of *Hutten-Czapska v. Poland*. ...

Given the date of this judgment, [considerations] of the ECHR were already based on the legal situation obtaining on 1 January 2005. Hence they encompassed both the December 2004 Amendments to the 2001 Act and the Prosecutor General’s application. In the Constitutional Court’s view, the opinion expressed by the ECHR provides additional arguments in favour of finding that these amendments, in their parts contested in the application, violate the principle of maintaining confidence in the State and in the law made by it as laid down in Article 2 of the Polish Constitution and undermine in an inadmissible manner the standards of property protection common to the member States of the Council of Europe.”

140. It then went on to analyse the general situation:

“The Constitutional Court still holds the view (expressed in its judgment of 12 January 2000 ...) that

‘it is in conformity with the contemporary perception of a ‘social State’ to demand some sacrifice from all members of society for the benefit of those who cannot provide subsistence for themselves and their families.... In the circumstances obtaining in Poland, pursuant to Article 31 § 3, [of the Constitution], it may be justified to maintain the provisions limiting landlords’ property rights and, more particularly, excluding unrestricted freedom in fixing rates of rent and other charges collected from tenants.’

The latter remark was particularly significant for the assessment of legislation during the transition period, but it cannot be seen as having fully lost its relevance with the end of that period.

...

Thus, States which, like Poland, are undergoing radical systemic and economic transformation, must create legislative tools that make it possible for them to

overcome the consequences of historical events (arbitrary, peremptory interference with private property by the State) and to ensure the transition to conditions appropriate for democratic, liberal States governed by the rule of law. This is a very difficult task, especially given the absence of well-tried models of proceeding in such cases. The scale of the phenomenon far surpasses the post-war experience of the western European states. Changes in this area are being introduced by trial and error; they are slow and not effective enough – which has been pointed out by the Constitutional Court in the judgments cited above.

It is therefore not possible, in respect of the rights of landlords, who were formerly deprived of the possibility of fully enjoying their property, simply to give this possibility back to them in the form of unrestricted market-related rent. Such a measure, in a situation where private houses which previously taken in connection with the so-called ‘public management of housing matters’ have depreciated and require very major investments in repairs and high running maintenance costs, would mean imposing on tenants an excessive burden undermining their existence. ...

It must be kept in mind that the fact that landlords’ rights were infringed over several decades did not result from any acts by tenants, but was first and foremost caused by defective legislation. Removing, after years of neglect, all those harmful consequences may not therefore be done at the expense of tenants, and certainly not at their expense alone, but must above all stimulate the public authorities themselves to take appropriate action.”

141. In its final considerations the Constitutional Court stressed that, given that its judgment was inherently limited by the scope of the Prosecutor General’s application, it could not resolve comprehensively and definitely the fundamental systemic issues arising from the operation of the rent-control scheme. In particular, it could not address the mechanism for balancing the interests of landlords and tenants, a mechanism which was still missing in the existing legal system.

Having regard to the fact that sections 8a and 9 of the 2001 Act (in so far as they were still in force following the repeal) did not provide for any satisfactory and consistent mechanism and no appropriate legislative initiative to that effect had been envisaged, the Constitutional Court decided to prepare recommendations (*sygnalizacja*) for Parliament, whose object would be to formulate clear demands to create a mechanism making it possible to formulate precise criteria for judicial control of rent and related charges.

#### **K. The Constitutional Court’s recommendations of 29 June 2005**

142. On 29 June 2005 the Constitutional Court gave a decision (*postanowienie*) setting out the recommendations for Parliament (“the June 2005 Recommendations”) referred to in the judgment of 19 April 2005. It reads, in so far as relevant, as follows:

“1. Starting point

... Under the present legislation, as amended by the Constitutional Court's judgment [of 19 April 2005], landlords may increase rent or other charges for the use of the dwelling not more often than every six months but an increase in rent or other charges, apart from those which do not depend on a landlord, whereby rent would exceed 3% of the reconstruction value of the dwelling within one year may take place only in justified cases. ... [T]he tenant may challenge the increase by bringing a court action to have the increase declared unjustified, or justified but in a different amount, or may refuse to accept the increase with the effect that the contract is terminated at the end of the term of notice.

However, judicial control of increases in rent and the procedure for such increases do not apply if an increase does not exceed 10% of the current rent or current charges.

## 2. Lack of statutory criteria for judicial control

[The 2001 Act] does not indicate, and this is its fundamental shortcoming, the criteria on the basis of which the courts are to control increases in rent or other charges for the use of the dwelling. This situation is detrimental to both landlords and tenants. Accordingly, judicial control, lacking statutory criteria, certainly becomes very difficult and unforeseeable, if not illusory. This may lead to quite arbitrary decisions. It is likely that in this legal situation the courts would be forced to create an *ad hoc* set of criteria for the future assessment [of increases] rather than to review legal grounds for increases. It should be stressed that removing from the judicial control increases in rent and charges that do not exceed 10% will, in many instances, deprive tenants of the necessary protection and will, within several years, lead to rent being hauled up to an objectively unjustified level.

The above considerations lead to the conclusion that the statutory system of fixing the maximum ceiling of rent and other charges and of controlling increases determined algorithmically, which was justified in the transitional period ..., can neither satisfactorily serve the interests of landlords nor protect the justified interests of tenants. It is therefore necessary to regulate in a complex manner those matters, maintaining at the same time flexible solutions. ....

## 3. Factors influencing the level of so-called 'basic rent' [*czynsz początkowy*]

The question of determining rent and charges for the use of the dwelling cannot be seen only from the perspective of the criteria and rules for their increase. First of all, it is necessary to set a statutory starting point – in other words, elements of rent that would adequately take into account the rights of landlords.

At the same time, not losing sight of the necessarily complementary relationship between a landlord and a tenant, one should have regard to the fact that the essential duty of the tenant is to pay an economically justified level of rent, i.e. not too high but related to the justified economic interest of the landlord.

The point of departure for determining such ... rent should be an indication that its elements cannot be [fixed without relation to] running repairs and maintenance, an adequately determined depreciation and a decent profit. ...

The need to include the costs of repairs and maintenance does not require any further explanation – it is obvious. Likewise, a decent profit derived from the exercise of the right of property is an indispensable element of the genuine protection of

property rights. Without profit, there are no investments or even modernisation works, which are dictated by technological progress and which are also beneficial for the interests of tenants. The future detailed legal solutions should, however, pay due regard to the fact that the aims pursued by the public authorities (the State Treasury, other State authorities and municipalities) are different from those pursued by private individuals and bodies (such as housing cooperatives) and that the expectations of [those two groups] in respect of a decent rent should be established at different levels.  
...

It is also necessary to include among the elements of rent a return on landlords' investments in the construction or modernisation of the building in due time, it being understood as a basis for an adequately established depreciation level. ...

#### 4. Additional instruments for monitoring the level of rent

An auxiliary instrument, enabling the courts to assess thoroughly the basis of the determination of, and increase in, rent could entail, among other things, the setting up by the authorities, in the process of a true social dialogue with organisations of landlords and tenants, a system for monitoring the levels of rent in all municipalities which would, for example, disseminate information on the average level of rent in a given region. Such systems are known in some European countries as a 'rent mirror'.  
...

#### 5. Housing benefits

The justified 'basic rent', determined in the manner indicated above in respect of each residential building, might often be incompatible with the tenants' financial situation. ... In such cases the poorer tenants should be included in a system of individual benefits, justified by their [individual] circumstances, from the public funds, which would genuinely help them to fulfil their duty to pay rent regularly up to a certain determined amount.  
...

#### 8. Instruments for the necessary support of landlords

In certain situations (especially in respect of buildings regarded as part of the national heritage) it may happen that [even] properly determined rent will still not be sufficient to cover all the costs required for the necessary expenses involved in normal maintenance, in particular the necessary repairs or modernisation. In such precisely determined cases the system of public finances should provide for forms of individual support for landlords obliged to cover the extra costs involved in the maintenance of the buildings. Such support may take various forms, from housing subsidies, through loans on preferential terms for specific investments and, finally, to tax exemptions. ...  
...

#### 10. Inconsistent regulation of the rights and obligations of parties to a lease agreement.

The Constitutional Court considers it necessary to point to inconsistencies, as regards the setting out of a catalogue of landlords' and tenants' duties, between the

new sections 6a-6f of the 2001 Act and the provisions concerning the lease of a dwelling contained in ... the Civil Code. It is against the rules of proper legislation to include the provisions governing the lease of dwellings not in the Civil Code, which contains a full set of regulations on lease relations, but in a law whose object is to protect tenants generally, not to regulate the lease relationship.

[Final remarks]

The object of the Constitutional Court's present recommendations are shortcomings and lacunas to which it has pointed in recent years either in its judgments or documents providing information about its activities. ... Removing them in the near future is necessary also in view of the principle of the social market economy, which has particular importance in the present context. Now it is no longer possible to regulate those matters in a fragmentary or provisional manner. It should once more be stressed that those matters should be resolved through comprehensive solutions pursuing clearly defined aims which are compatible with the Constitution."

#### **L. The Ombudsman's challenge to the constitutionality of the remaining provisions of the 2001 Act relating to increases in rent**

143. On 24 August 2005 the Ombudsman made an application to the Constitutional Court for certain provisions of the 2001 Act to be declared unconstitutional. He asked, *inter alia*, that section 8a (4)-(5)-(7.1) of the 2001 Act (as amended in December 2004) be found to be incompatible with Article 64 § 1 and § 2 of the Constitution (principle of the protection of property rights) read in conjunction with Article 31 § 3 (principle of proportionality) and Article 76 (principle of protection of consumers against dishonest market practices). He further asked that section 9(1) of the 2001 Act be found to be incompatible with Article 2 of the Constitution (principle of the rule of law).

144. The Ombudsman first referred to the Constitutional Court judgment of 19 April 2005, stating that this judgment left no doubt whatsoever that the legislature's essential duty was to set up a legal mechanism balancing the constitutionally protected rights of landlords and tenants. Indeed, the attempts that had hitherto been made had proved to be unsuccessful mostly because of the authorities' choice to give priority to current political interests rather than to the law, as demonstrated by many earlier judgments of the Constitutional Court.

145. As to the contested provisions of section 8a, the Ombudsman stressed first their internal inconsistency, submitting that, on the one hand, subsections (4) and (5) made increases in rent above 3% of the reconstruction value per year subject to "judicial control" and required them to be "justified" but that, on the other hand, the latter subsection read *a contrario* meant that any other increases did not need to be justified. He further referred to the Constitutional Court's recommendations, pointing out that there were no statutory criteria for what was to be considered a

“justified increase”. In fact, he maintained, from the point of view of the landlord every rent increase was justified as it either increased his profit or reduced the losses involved in proper maintenance, while from the point of view of the tenant every such raise was “unjustified” as it involved greater expense on his part.

As regards section 9(1), the Ombudsman submitted that it was unclear and incompatible with the principle of proper legislation ensuing from the rule of law in that, for instance, it did not specify when the six-month period – relevant for determining the point from which a given increase in rent had applied – was to start. In the Ombudsman’s view, this lack of clarity could not be removed simply by interpretation of that provision and created a possible source of conflicts between landlords and tenants.

146. On the date of the adoption of the Court’s judgment the application was pending before the Constitutional Court. The case was listed for a hearing on 17 May 2006.

## THE LAW

### I. THE GOVERNMENT’S PLEA OF INCOMPATIBILITY *RATIONE TEMPORIS*

147. The Government, as they had already done at the admissibility stage of the proceedings before the Chamber, maintained that the alleged violation of the applicant’s property rights had taken place before 10 October 1994, the date on which Poland ratified Protocol No. 1 to the Convention.

#### A. The Chamber’s decision on admissibility

148. In its decision of 16 September 2003 the Chamber rejected the Government’s plea of incompatibility *ratione temporis* for the following reasons:

“The Court’s jurisdiction *ratione temporis* covers only the period after the ratification of the Convention or its Protocols by the respondent State. From the ratification date onwards, all the State’s alleged acts and omissions must conform to the Convention or its Protocols and subsequent facts fall within the Court’s jurisdiction even where they are merely extensions of an already existing situation (see, for example, *Yağci and Sargin v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, p. 16, § 40, and *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, nos. 29813/96 and 30229/96, § 43, ECHR 2000-I).

Accordingly, the Court is competent to examine the facts of the present case for their compatibility with the Convention only in so far as they occurred after 10 October 1994, the date of ratification of Protocol No. 1 by Poland. It may, however, have regard to the facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date (see *Broniowski v. Poland* (dec) [GC], no. 31443/96 [GC], § 74 19 December 2002).

The Court further observes that, indeed, the applicant's complaint is not directed against a single measure or decision taken before, or even after, 10 October 1994 but refers to a continued impossibility of regaining possession of her property and of receiving the adequate rent for lease of her house.

It also notes that it appears to be common ground that the situation complained of have arisen out of laws that applied before the entry into force of Protocol No. 1 in respect of Poland, on the date of the Protocol's entry in force and are still in force.

The Government's plea of inadmissibility on the ground of lack of jurisdiction *ratione temporis* must accordingly be rejected."

## **B. The parties' submissions**

149. The Government, in their oral and written pleadings to the Grand Chamber, relied on the Chamber's decision and, in particular, its finding that it would not consider the possible effect on the applicant's property rights of the decisions taken, or the laws applicable, before 10 October 1994. Furthermore, they cited the Chamber's judgment, pointing out that the Court, when defining the scope of the case and especially its jurisdiction *ratione temporis* had held that it would not examine the authorities' decisions to subject the applicant's house to State management or to allocate tenants to her flats and that the issue before it was whether there had been a violation of Article 1 of Protocol No.1 on account of the operation of the legal provisions as in force from 10 October 1994.

150. Thus, they argued, it should be noted in this context that State management of housing matters, introduced under the communist regime, had deprived owners of even theoretical rights in respect of their property. On the date of the Protocol's entry into force the applicant had therefore had no rights in respect of the termination of leases on her flats or the determination of the level of rent. The subsequent laws, as applicable from 10 October 1994 to the present day, had not introduced any restrictions which would reduce the applicant's hitherto practically non-existent rights but, on the contrary, had gradually increased her and other landlords' property rights with regard to the lease of their dwellings.

That being so, in the Government's view there had been no interference with the applicant's property rights during the period covered by the Court's temporal jurisdiction.

151. The applicant stressed that the situation complained of had been caused by the enactment of successive laws that – both before and after 10 October 1994 – had restricted the rights of landlords and had made it impossible for her to enjoy her property.

### C. The Court's assessment

152. The Court would first observe that, as clearly emerges from the applicant's statement of claim under the Convention, the object of the present application is her allegation of a continuing violation of her property rights "created by the implementation of the laws imposing tenancy agreements on her and setting an inadequate level of rent" (see paragraph 154 below).

While it is true that the "imposition of tenancy agreements" on the applicant originated in the operation of the "special lease scheme" dating back to 1974 (see paragraphs 71 and 76 above), it was nevertheless the 1994 Act which, with its entry into force on 12 November 1994, introduced the system of "controlled rent" and made the applicant's house subject to that system. That act equated in the eyes of the law the so-called "administrative lease" of the applicant's flats with a lease based on the free will of the parties to an ordinary civil contract (see paragraphs 72-79 above). Subsequent housing laws, which were enacted after that date and are still in force, maintained that system (see paragraphs 80-145 above).

Lastly, the Court considers that the Government's fresh argument that at the time of the entry into force of the Protocol the applicant did not have any rights in respect of the termination of leases or the determination of rent and that the laws enacted after 10 October 1994 did not in fact aggravate but remedied her situation (see paragraph 150 above) would more appropriately be examined when ascertaining whether the Polish authorities struck a fair balance between the interests involved.

153. Accordingly, the Grand Chamber sees no reason to depart from the Chamber's conclusion that the Government's plea of inadmissibility on the ground of lack of jurisdiction *ratione temporis* must be rejected.

## II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

154. The applicant complained under Article 1 of Protocol No. 1 to the Convention that the situation created by the implementation of the laws imposing tenancy agreements on her and setting an inadequate level of rent amounted to a continuing violation of her right to the enjoyment of her possessions. In her submission, the very essence of her right of property had been impaired because she was not only unable to derive any income from her property but also, owing to restrictions on the termination of leases of

flats subject to the rent-control scheme, she could not regain the possession and use of her property.

Article 1 of Protocol No. 1 reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

### A. Scope of the case

155. The Chamber, referring to the individual and general dimension of the case (see paragraph 141 of the Chamber judgment), held, *inter alia*:

“...the alleged continued violation of Article 1 of Protocol No. 1 concerns not only the individual applicant in the present case but also has significant – social, legal and economic – dimensions in terms of the effects of the contested legislation on the rights of numerous other persons. Thus, according to information supplied by the Government, the functioning of the rent-control scheme in Poland has already affected some 100,000 landlords whose property has been subject to the same restrictions as those complained of in the present case. Furthermore, between 600,000 and 900,000 tenants in Poland have taken advantage of the special rules governing the level of controlled rent and the termination of lease agreements under that scheme ....

The examination of the facts in the present case will therefore inevitably have consequences for the property rights of a large number of individuals. That will require the Court to assess Poland’s compliance with Article 1 of Protocol No. 1 not only from the perspective of the impact of the combination of impugned restrictions on the applicant’s right of property in the period under consideration but also in a wider context, going beyond the applicant’s individual Convention claim and taking into account the consequences of the operation of the rent-control scheme for the Convention rights of the whole class of persons potentially affected (see *Broniowski v. Poland* [GC], 31443/96, §§ 189 et seq., ECHR 2004-...).

156. The Grand Chamber considers that, without prejudice to its ruling on the question whether the present case is, or – as the Government maintained – is not, suitable for the “pilot-judgment” procedure (see paragraphs 227-228 below), the general context of the case and, especially, as rightly pointed out by the Chamber, the number of persons potentially affected by the operation of the rent-control scheme in Poland and the consequences that that scheme has entailed for their Convention rights may legitimately be taken into account in the examination of the applicant’s individual case.

## B. Compliance with Article 1 of Protocol No. 1

### 1. *Applicable rules in Article 1 of Protocol No. 1*

157. Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among other authorities, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37, which reiterates in part the principles laid down by the Court in the case of *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 24, § 61; see also *Broniowski v. Poland*, no. 31443/96 [GC], § 134, ECHR-2004-V).

### 2. *The parties' submissions*

158. The applicant relied on the arguments that she had submitted to the Chamber. In her view, the impugned restrictions had gone beyond what could be considered mere “control of the use of property”. Their continued application for many years had resulted in essential elements of her right of property being practically extinguished. In fact, she had been an owner only “on paper”. She did not have the possibility to decide who would live in her house and for how long. The lease of flats had been imposed on her by unlawful administrative decisions but, despite that fact, she could not terminate the lease agreements and regain possession of her house because the statutory conditions attached to the termination of leases, including the duty to provide a tenant with substitute accommodation, made it impossible in practice to do so.

The applicant further stressed that she had had no influence whatsoever on the amount of rent paid by her tenants. Indeed, under the contested laws the levels of rent were fixed without any reasonable relationship to the costs of maintaining property in good condition. This had resulted in a significant depreciation in the value and condition of her own house. In her submission, the cumulative effect of all those factors had brought about a situation similar to expropriation.

159. The Government disagreed and asked the Court to uphold the Chamber’s finding that the alleged interference had amounted to the control

of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. They pointed out that the applicant had never lost her right to the “peaceful enjoyment” of her property. Since 25 October 1990, when the Gdynia District Court had entered her title in the relevant land register, she had enjoyed all the attributes of a property owner. She had a right to use, to dispose of, to pledge, to lend and even to destroy her property. The measures adopted, in particular the limitations on the level of rent chargeable, had therefore only amounted to a control of the use of the applicant’s property.

### 3. *The Court’s conclusion*

160. The Chamber shared the Government’s point of view (see paragraph 145 of the Chamber judgment).

It noted that, while it was true that the applicant could not exercise her right of use in terms of physical possession as the house had been occupied by the tenants and that her rights in respect of letting the flats, including her right to receive rent and to terminate leases, had been subject to a number of statutory limitations, she had never lost her right to sell her property. Nor had the authorities applied any measures resulting in the transfer of her ownership. In the Chamber’s opinion, those issues concerned the degree of the State’s interference, and not its nature. All the measures taken, whose aim was to subject the applicant’s house to continued tenancy and not to take it away from her permanently, could not be considered a formal or even *de facto* expropriation but constituted a means of State control of the use of her property.

The Chamber therefore concluded that the case should be examined under the second paragraph of Article 1 of Protocol No. 1 (see *Mellacher and Others v. Austria*, judgment of 19 December 1989, Series A no. 169, p. 25, § 44; and *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 46, ECHR 1999-V).

161. The Grand Chamber fully agrees with the Chamber’s assessment.

### 4. *General principles deriving from the Court’s case-law*

162. The Court will consider the case in the light of the following principles.

#### (a) **Principle of lawfulness**

163. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. In particular, the second paragraph of Article 1, while recognising that States have the right to control the use of property, subjects their right to the condition that it be exercised by enforcing “laws”. Moreover, the principle of lawfulness

presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see, *mutatis mutandis*, *Broniowski*, cited above, § 147, with further references).

**(b) Principle of legitimate aim in the general interest**

164. Any interference with the enjoyment of a right or freedom recognised by the Convention must pursue a legitimate aim. The principle of a “fair balance” inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community. Moreover, the various rules incorporated in Article 1 are not distinct, in the sense of being unconnected, and the second and third rules are concerned only with particular instances of interference with the right to the peaceful enjoyment of property (see *Broniowski*, cited above, § 148).

165. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the “general” or “public” interest. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a margin of appreciation.

166. The notion of “public” or “general” interest is necessarily extensive. In particular, spheres such as housing of the population, which modern societies consider a prime social need and which plays a central role in the welfare and economic policies of Contracting States, may often call for some form of regulation by the State. In that sphere decisions as to whether, and if so when, it may fully be left to the play of free market forces or whether it should be subject to State control, as well as the choice of measures for securing the housing needs of the community and of the timing for their implementation, necessarily involve consideration of complex social, economic and political issues.

Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has on many occasions declared that it will respect the legislature’s judgment as to what is in the “public” or “general” interest unless that judgment is manifestly without reasonable foundation. These principles apply equally, if not *a fortiori*, to the measures adopted in the course of the fundamental reform of the country’s political, legal and economic system in the transition from a totalitarian regime to a democratic State (see *Mellacher and Others*, cited above, p. 27, § 48; *Scollo v. Italy*, judgment of 28 September 1995, Series A no. 315-C, p. 52, § 27; *Immobiliare Saffi*, cited above § 49; and, *mutatis mutandis*, *James*

*and Others*, cited above, pp. 32-33, §§ 46-47, and *Broniowski*, cited above, § 149).

**(c) Principle of a “fair balance”**

167. Not only must an interference with the right of property pursue, on the facts as well as in principle, a “legitimate aim” in the “general interest”, but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures designed to control the use of the individual’s property. That requirement is expressed by the notion of a “fair balance” that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.

The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State’s interference the person concerned had to bear a disproportionate and excessive burden (see *James and Others*, cited above, p. 27, § 50; *Mellacher and Others*, cited above, p. 34, § 48, and *Spadea and Scalabrino v. Italy*, judgment of 28 September 1995, Series A no. 315-B, p. 26, § 33).

168. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are “practical and effective”. It must look behind appearances and investigate the realities of the situation complained of. In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions for reducing the rent received by individual landlords and the extent of the State’s interference with freedom of contract and contractual relations in the lease market but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord’s property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State’s conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see *Immobiliare Saffi*, cited above, § 54; and *Broniowski*, cited above, § 151).

5. *Application of the above principles to the present case*

(a) **Whether the Polish authorities respected the principle of lawfulness**

(i) *The parties' submissions*

(α) The applicant

169. The applicant considered that the authorities had failed to respect that principle.

To begin with, all the administrative decisions implementing the measures for controlling the use of her property, notably those allocating flats to A.Z. and W.P. and subjecting her house to State management, had in 1996-1997 been declared to have been issued contrary to Polish law. Under Article 1 of Protocol No. 1 an interference by the State with the peaceful enjoyment of possessions – be it an expropriation or control of the use of property – could not be regarded as lawful if the relevant decision had been made contrary to the existing legal provisions.

Furthermore, the 1994 Act and, more particularly, the provisions imposing on individual landlords rent control and onerous duties in respect of property maintenance could not be considered “enforcement of laws” since they had been found to have been contrary to the Constitution and the Convention in two successive judgments of the Constitutional Court, given on 12 January and 10 October 2000.

The same conclusion applied to the 2001 Act. Thus, the Constitutional Court, in its third landmark judgment of 2 October 2002 on housing legislation, had declared unconstitutional the restrictive provisions on levels of rent increases. In its most recent judgment of 19 April 2005 it had held that the provisions of the December 2004 Amendments, in so far as they had extended the operation of the rent-control scheme beyond 31 December 2004, were unconstitutional.

In consequence, the measures taken by the State in the sphere of the applicant's property rights had all along lacked a sufficient legal basis.

(β) The Government

170. The Government disputed this. They submitted that the control of the use of the applicant's property had a clear, firm and constant legal basis in the form of successive laws applicable during the entire period falling within the Court's temporal jurisdiction. First, the 1974 Housing Act had applied until 12 November 1994. Secondly, the 1994 Act, which had been in force from 12 November 1994 to 11 July 2001, had introduced provisions for controlled rent and other limitations on the rights of landlords. Finally, the rules governing tenancy relationships applicable from 11 July 2001 to date had been laid down in the 2001 Act.

171. The Government accepted that the legality of any measure taken by the State could not be reduced to the mere requirement that a legal measure had to be enacted properly by a legislature. It also comprised compliance with the principle of legal certainty. Undoubtedly, an important aspect of legal certainty was that a law should not be changed unexpectedly, so as not to interfere with important decisions taken by individuals upon a *bona fide* understanding that that law had been adopted for a certain period and would be in force for that period. In the Government's view, the rent-control scheme under the 1994 and 2001 Acts – remedial legislation introduced for a definite period of time with the aim of protecting tenants – was an example of the implementation of the principle of legal certainty.

(ii) *The Court's assessment*

172. The Chamber came to the following conclusion on the question of lawfulness of the contested measures (see paragraph 155 of the Chamber judgment):

“ ... the control of the use of property by States is subject to the condition that it be exercised by enforcing ‘laws’ .... While in the present case there is no dispute over the fact that the restrictions on the applicant's right were imposed by the three successive housing laws, the applicant argued that the *ex post facto* rulings declaring the relevant administrative decisions contrary to the law and the legal provisions unconstitutional had retrospectively deprived those measures of any legal effect ....

However, the Court considers that those rulings and their consequences for the assessment of Poland's compliance with Article 1 of Protocol No. 1 are relevant for determining whether the authorities struck a fair balance between the interests involved. For the purposes of ascertaining whether the impugned measures were provided for, and taken under, ‘laws’ within the meaning of the second paragraph of that Article it thus suffices for the Court to find that they were applied under the Polish legislation in force at the material time.”

173. The Grand Chamber would add to this assessment, and in response to the applicant's arguments (see paragraph 169 above), that the entry into force of the Constitutional Court's judgments of 12 January and 10 October 2000 was postponed until 11 July 2001 (see paragraphs 80 and 83 above), which resulted in the impugned provisions of the 1994 Act being applicable up to that date. Accordingly, in these circumstances it can accept that the interference respected the principle of lawfulness.

**(b) Whether the Polish authorities pursued a “legitimate aim in the general interest”**

*(i) The parties’ submissions*

*(α) The applicant*

174. In the applicant’s view, the impugned housing laws had no legitimate justification.

Even if after the Second World War there had clearly been a need to secure homes for displaced persons, a fact that justified State management of multi-family houses, there had been no justification for taking such a step in respect of her house – which was, and had always been, a one-family house and not a tenement house. Putting tenants in the house and making the owner homeless could hardly resolve the problem.

The same applied to the subsequent restrictions, envisaged in the 1994 Act. Admittedly, they had been introduced to protect tenants in a poor financial position. However, no provision of the contested legislation had made the right to cheap rent dependent on a tenant’s individual situation. Since the applicable housing laws did not attach any conditions – such as the level of income, social or family situation and age of a tenant or the size or standard of the flat in question – to the entitlement to a low-rent dwelling, it was thus sufficient for a tenant to have the right to a lease granted pursuant to an administrative decision given under the communist regime in order to profit from the privileged situation under the rent-control scheme. Such a legal solution, which had moreover been adopted at the expense of private individuals who, like herself, were not necessarily in a better financial situation than their tenants, could hardly be said to have pursued any legitimate aim in the “general” or public” interest.

*(β) The Government*

175. In their written and oral pleadings, the Government consistently maintained that the principal aim of the contested legislation was, and had been, to protect tenants against unduly high levels of rent during the period of Poland’s economic transformation. In the 1990s the authorities had had to deal with the extremely difficult housing situation, which was characterised by the serious shortage and high prices of dwellings. This situation had required the State to control increases in rent not only in the State sector but also in the private sector. The State had had to take those measures in order to prevent large-scale evictions which would have inevitably followed the introduction of completely uncontrolled increases in rent and would have caused serious social tensions, thus jeopardising public order.

176. The Government further submitted that the rent-control scheme was a purely temporary emergency measure designed to deal with the serious

housing shortage in Poland, which had been compounded by the deteriorating economic situation of households. In that context, they referred to the statistical data produced by them, which showed that in the years 2000-2002 between 54% and 58% of the population had lived below the poverty line and that in the years 1998-2002 between 7% and 10% of households had been in rent arrears.

They also stressed that the need to limit increases in rent for a specified period had been found by the Polish Constitutional Court to have been in the general interest, in particular in the interest of protecting tenants in a poor financial situation during the transition from the State-controlled to the free-market system.

177. Accordingly, the scheme of State-controlled increases in rent was a measure adopted with a view to protecting interests of tenants in a free-market system and, more particularly, protecting them against the risk of being put on an unequal footing with economically stronger landlords. In the transition period, it was the State's concern to keep the rent chargeable at a socially acceptable level, a concern which in the light of the Court's judgment in the *Mellacher* case (§§ 53 and 54) should be considered legitimate.

*(ii) The Court's assessment*

178. Having examined the parties' arguments, the Grand Chamber sees no reason to disagree with the following findings of the Chamber (see paragraph 160 of the Chamber judgment):

“As evidenced by the material produced by the parties and the relevant judgments of the Polish Constitutional Court, the rent-control scheme in Poland originated in the continued shortage of dwellings, the low supply of flats for rent on the lease market and the high costs of acquiring a flat. It was implemented with a view to securing the social protection of tenants and ensuring – especially in respect of tenants in a poor financial situation – the gradual transition from State-controlled rent to a fully negotiated contractual rent during the fundamental reform of the country following the collapse of the communist regime ....

The Court accepts that in the social and economic circumstances of the case the impugned legislation had a legitimate aim in the general interest, as required by the second paragraph of Article 1.”

**(c) Whether the Polish authorities struck a fair balance between the general interest of the community and the applicant's right to the peaceful enjoyment of her possessions**

*(i) The parties' submissions*

*(a) The applicant*

179. The applicant submitted that the Polish authorities had manifestly failed to maintain a fair balance between the demands of the general interest invoked by them and her right of property.

She considered that the fundamental question in this case was who, and to what extent, was to bear the burden of the housing policy – landlords or the State. In her view, even the poor state of the country's budget and the costs of political and economic transformation of the State could not justify placing the main burden of making sacrifices for society's benefit on a specific group of property owners.

180. The applicant strongly contested the Government's argument in the proceedings before the Grand Chamber that the rent-control scheme was based on a specific social agreement between landlords, tenants and the State. In particular, she questioned the Government's assertion that "by virtue of that agreement the tenants had been guaranteed that their situation during the ten-year period following the entry into force of the 1994 Act would not change and the landlords – who had waived their claims for compensation – had been promised that after that period all restrictions concerning rent would cease to exist" (see paragraph 189 below). On the contrary, she argued, that scheme was not based on any voluntary commitments on the part of landlords or tenants but on State-imposed legal solutions creating a situation where one social group – tenants – was subsidised by the other group – landlords.

If this was, as the Government put it, a situation of "legal peace" (see paragraph 189 below), how – the applicant asked – could one explain the fact that it had created so many controversies in Poland and had given rise to several constitutional disputes with the State before the Constitutional Court? Moreover, on every occasion when the constitutionality of the relevant legislation had been considered, it had been severely criticised by the landlords as placing an exceptionally heavy burden on them and by the tenants as not being satisfactory from their perspective.

181. The applicant agreed that, as the Court had stated in a number of its judgments, for instance *Spadea and Scalabrino v. Italy*, *Scollo v. Italy* or *Mellacher and Others v. Austria*, limitations on the rights of landlords were common in many countries facing housing shortages. In some of the cases cited they had even been found to have been justified and proportionate to the aims pursued by the State in the general interest. However, in none of

those cases had the authorities restricted the applicants' rights to such an extent as in the present case.

182. In the applicant's view, the combination of various restrictions imposed on the rights of landlords by the 1994 Act and, subsequently, by the 2001 Act had constituted an unacceptable and disproportionate interference with their property rights.

In that regard, she pointed out that the Polish Constitutional Court, in its four successive judgments of 12 January 2000, 10 October 2000, 2 October 2002 and 19 April 2005, had found that restrictions on the rights of landlords imposed by the rent-control scheme under the 1994 Act and the 2001 Act had been incompatible with the constitutional principle of the protection of property rights and the rule of law. It had also held that the implementation of that scheme by the authorities had placed a disproportionate and excessive burden on landlords.

183. The tenancy under the 1994 Act had been imposed on her and other private landlords by a unilateral decision of the State. That decision had been accompanied by severe limitations on termination of leases. Further provisions of the 1994 Act had, on the one hand, set the rent chargeable at low levels, well below the average costs of maintenance of property and, on the other, had obliged the landlords to carry out costly maintenance works.

That state of affairs had not improved under the 2001 Act, which had practically maintained all restrictions on termination of leases and obligations in respect of maintenance of property and had aggravated the landlords' situation by freezing rents at unacceptably low levels. Furthermore, by virtue of the December 2004 Amendments the authorities had extended the operation of the rules imposing restrictions on rent increases beyond the final, statutory deadline that they had set themselves, an act found by the Constitutional Court to have been an exceptionally serious breach of the rule of law.

184. The applicant did not accept the Government's opinion that, with the entry into force of the Constitutional Court's judgment of 19 April 2005, the rent-control scheme had been abolished and that the parties to lease contracts were now free to determine rent (see paragraph 190 below). The provisions of the 2001 Act currently in force stated the contrary: under section 8a of the 2001 Act any increase whereby rent would exceed the ceiling of 3% was permitted only in justified cases and could be challenged before a court. At the same time, the landlords' onerous duties in respect of maintenance of property remained unchanged. As regards the termination of leases, the provisions differed only slightly from those under the previous, defective laws and the relocation of a tenant was still very difficult if not impossible. Those minor changes to the housing legislation could hardly be considered to have abolished the rent-control scheme. Nor did they improve the landlords' situation in any meaningful way.

Furthermore, the applicant stressed, the Constitutional Court, both in the judgment of 19 April 2005 and in the June 2005 recommendations had pointed to a number of serious shortcomings of the present system, considering that the 2001 Act as it stood at present “did not provide for any satisfactory and consistent mechanism for balancing the interests of landlords and tenants”. In that context the Constitutional Court had reminded the authorities of the urgent need to introduce rules whereby landlords, after decades of subsidising the State’s housing policy, might be able to derive a “decent profit” from their property, stressing that the right to derive profit was one of the basic components of the right of property. However, the authorities had not so far taken any steps to implement those recommendations.

The applicant also criticised the existing legislation for the lack of criteria as to what constituted a “justified increase in rent”, maintaining that, for all practical purposes, it prevented landlords from raising levels of rent. As the Constitutional Court had rightly pointed out in its judgment and recommendations, in the absence of such statutory criteria judicial control of rent increases had become illusory. In that regard, the applicant supplied details of one case lodged with a Polish court involving a dispute over a 13% increase in rent and added that given the average delay in the Polish civil courts, it might realistically be expected that the final ruling would be delivered within some two years, rent being frozen at the 3% level until the claim had been determined.

185. The applicant next referred to the Government’s argument that the rent-control scheme no longer affected her property rights and that she had obtained the relief sought since she was able to repossess the house because two of her tenants had already moved out and the third was about to do so shortly after the date of the oral hearing (see paragraph 192 below). The applicant admitted that attention given by the Polish media to her case before the Strasbourg Court had indeed resulted in her two tenants’ moving out. She had learnt of this fact from a representative of the Polish Government in June 2005 – who had nevertheless refused officially to transfer possession of the house to her – and had informed the Court thereof on 22 August 2005. Yet, on the hearing date, the third flat was still being occupied by J.W. She could not simply terminate the lease as, given J.W.’s advanced age, the latter belonged to the group of tenants statutorily protected against termination of leases under section 11(12) of the 2001 Act.

As regards the assertion that her property rights were no longer affected by the operation of the rent-control scheme in Poland, the applicant stressed that the violation of her rights had not been, and could not be, brought to an end by merely restoring possession of the house to her. The effects that the impugned legislation had entailed for her would not cease or be erased by the return of what had been left of her property. When the State had taken the house under its management, it had been in good condition. Now, after

years of neglect and disrepair – which had been caused both by the State’s careless management and by the impossibility for her to cover the necessary repairs from the rent received – it was close to ruin.

186. The applicant concluded by asserting that the Constitutional Court’s judgment of 19 April 2005 had not remedied the violation of Article 1 of Protocol No. 1 found by the Chamber in her case. Nor had it put an end to the systemic violation of the property rights of other, similarly situated landlords, as identified in her case.

She asked the Court to uphold the findings of the Chamber in their entirety.

(β) The Government

187. The Government considered that the authorities had maintained a reasonable relationship of proportionality between the means employed and the aims they had sought to achieve.

188. In their pleadings before the Grand Chamber they first referred to the Chamber’s conclusion that, on account of the operation of the rent-control scheme the authorities had imposed on the applicant a disproportionate and excessive burden (see paragraph 188 of the Chamber judgment). In that connection, they advanced the argument that, given that management of housing matters introduced under the communist regime had deprived owners of even theoretical property rights, on 10 October 1994 the applicant had had no rights in respect of the termination of leases on her flats or the determination of the level of rent (see paragraphs 151 and 153 above). Seen from this perspective, the impugned housing laws, as applicable from that date to the present time, had not reduced the applicant’s property rights but, on the contrary, had gradually increased the scope of her and other landlords’ rights in respect of the lease of their dwellings. Thus, in their view, the introduction of the rent-control scheme had in fact commenced the complicated process of restoring landlords’ rights, a process which, given the state of housing supply inherited from the communist regime and the need to balance the rights of all members of society, involved extremely difficult decisions on the part of the authorities.

189. In the proceedings before the Grand Chamber they also put forward another new argument, namely that the rent-control scheme had been based on a specific social agreement between landlords, tenants and the State. By virtue of that agreement the tenants had been guaranteed that their situation during the ten-year period following the entry into force of the 1994 Act would not change and the landlords – who had waived their claims for compensation – had been promised that after that period all restrictions on rent would cease to exist. The Government, for their part, had given an undertaking that by 31 December 2004 any restrictions resulting from that agreement would no longer apply. Thus, this situation could be described as “legal peace” as it had reflected the compromise reached by various social

groups. This was confirmed by the Constitutional Court's judgment of 19 April 2005, which had declared that it had been necessary to introduce the rent-control scheme during the transformation period. Moreover, in all its earlier judgments on that matter, the Constitutional Court had consistently recognised the need for the continued protection of tenants who had entered into lease agreements pursuant to administrative decisions and to whom the 1994 Act guaranteed a specific, maximum level of rent for a fixed time. It had explicitly acknowledged that the need to protect tenants against unduly high levels of rent had been fully justified by the housing situation in Poland.

Moreover, at the oral hearing they also maintained that restoration and improvement grants were available to landlords and that they could also take out commercial loans to finance the necessary repairs.

190. The Government further stressed that the means for controlling rent under both the 1994 Act and the 2001 Act had only been of a temporary nature and they had no longer been maintained after the Constitutional Court's judgment of 19 April 2005, which had in fact marked the end of the rent-control scheme in Poland. Thus, by virtue of that judgment all the previous restrictions had been abolished. Since then, rents in Poland had been regulated by free-market forces and at present there were no limitations imposed on them by the authorities. The parties to lease contracts could freely determine the level of rent and the rights of landlords were no longer limited in any way. By the same token, the Government had fulfilled the obligations they had taken upon themselves under the above-mentioned social agreement and the "rules of the game" referred to by the Constitutional Court had finally been complied with.

191. Furthermore, comparing the instant case to that of *Mellacher and Others v. Austria*, the Government maintained that if in the latter case the Court had found that "in remedial social legislation and in particular in the field of rent control ... it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy adopted", it *a fortiori* had to be open to the legislature not only to fix the level of rent below the market value but also to adopt measures affecting the implementation of leases arising from past administrative decisions, where tenants had had no say at all on the level of rent or on the choice of the flat – private or State-owned – which they had been allocated.

192. Lastly, the Government referred to the applicant's individual situation, stressing in that connection that the Constitutional Court's findings as to the inadequacy of controlled rent could not be decisive. Thus, the court had referred to the general situation in Poland, which had not necessarily applied to each landlord. They saw no reason why it should apply to the applicant's case. In that context, they also referred to the fact that two flats in her house had been vacated in June 2003 and September

2004 respectively. The third flat was to be vacated by a certain J.W. within several weeks following the oral hearing, as she had been allocated a flat owned by the Gdynia City Council. She had actually moved out in February 2006 (see paragraph 66 above). The applicant had never given J.W. notice to quit. Nor had she increased her rent even though J.W. had paid the amount corresponding to 1.5% of the reconstruction value of the dwelling. In consequence, the applicant could no longer claim that she had not regained possession of the house or that the rent-control scheme still affected her property rights.

193. In sum, the Government asked the Grand Chamber to hold that there had been no violation of Article 1 of Protocol No. 1.

*(ii) The Court's assessment*

194. In its assessment of the impact of the contested rent-control scheme on the applicant's right of property, the Chamber had regard to the fact that during the period under its consideration (from 10 October 1994 to 25 January 2005, the date of the adoption of its judgment) three different housing laws had applied to the applicant, namely the 1994 Act, the 2001 Act and the December 2004 Amendments. It is to be observed that the application in her case of the "special lease scheme" under the 1974 Housing Act (in the period from 10 October to 12 November 1994, the date of the entry into force of the 1994 Act) had had a negligible effect on "the peaceful enjoyment" of her possessions (see paragraph 170 of the Chamber judgment).

The Grand Chamber will proceed on a similar basis, taking into account the developments that have occurred after the adoption of the Chamber judgment.

*(α) The 1994 Act*

Main features of the rent-control scheme as introduced by the 1994 Act

195. The Grand Chamber, as the Chamber did, agrees with the Government that the 1994 Act was the first of the remedial laws enacted with a view to reforming housing in Poland during the period of the country's transition to a free-market system. It also agrees that, in comparison to the previous "special lease scheme", which had imposed full State control over the lease market, the 1994 Act was in general a step forward. In particular, that law limited State control over leases to dwellings which, regardless of whether they were owned by a municipality or a private individual, had hitherto been subject to the "special lease scheme", while allowing rents for commercial premises to be market-related (see paragraphs 171 and 172 of the Chamber judgment and paragraph 188 above).

However, and in so far as the applicant and other landlords owning flats previously subject to “the special lease scheme” were concerned, it maintained a number of restrictions on their rights which for the most part, as explained below, were comparable to those under the housing laws introduced under the communist regime.

196. To begin with, under sections 55 and 56 of the 1994 Act any lease that had originated in past administrative decisions allocating a flat was to be treated as a contractual lease signed for an indeterminate time. While that provision in effect created a quasi-lease agreement between a landlord and a tenant – which, again, was a step forward in terms of re-establishing the rudiments of contractual relationships on the lease market – landlords had no influence on the choice of tenant or the essential elements of such an agreement. This applied not only to the duration of the agreement but also to the conditions for its termination, which considerably restricted the landlords’ right to terminate the lease even in respect of tenants who persistently failed to comply with its statutory terms. In addition, even if landlords terminated the lease, they could not have the dwelling vacated and possibly rented out on the free-lease market unless they provided the tenant with “alternative accommodation” at their own expense. Such a cluster of legal rules, combined with the permanent shortage of dwellings in Poland, and the statutory succession right of the tenant’s relatives to a lease agreement made it very difficult for the landlord to regain possession of the flat (see paragraphs 16, 18, 73 and 79 above).

197. Further duties of landlords, potentially involving considerable expense on their part, were listed in section 9 of the 1994 Act, which obliged them to carry out specific repairs and maintenance work on their buildings. At the same time, their right to derive profit from leases was subject to statutory restrictions. Pursuant to section 25 of the 1994 Act the landlords had no power to fix the rent chargeable, as rents could not exceed a ceiling determined by law at the level of 3% of the “reconstruction value” of the dwelling (see paragraphs 76-83 above).

Impact of the 1994 Act on the applicant’s and other landlords’ property rights

198. However, as shown by the concrete application of the 1994 Act and as acknowledged by the executive and confirmed by the Polish Constitutional Court’s findings, levels of rent never reached the statutory ceiling of 3% of the reconstruction value but were maintained by the authorities throughout the country at a level covering some 60% of maintenance costs. The shortfall was covered by the landlords (see paragraphs 15 and 80-82 above).

The situation of the landlords was compounded by section 9 of the 1994 Act, which entailed further consequences adversely affecting their financial position in that it obliged them to carry out costly maintenance works, despite the fact that in practice the rent chargeable was set below the

average costs of maintenance of property, not to mention the costs of major repairs which were incumbent on the landlords. Moreover, the practical exclusion of landlords' rights in terms of free disposal of their flats, resulting from restrictive provisions on termination of leases, caused a depreciation in the market value of the buildings concerned (see paragraphs 71-82 above).

199. Those limitations and their impact on the property rights of landlords were examined twice by the Polish Constitutional Court. In its judgments of 12 January and 10 October 2000, resulting in the repeal of the 1994 Act, it found that the relevant provisions were unconstitutional as being incompatible with the principles of the protection of property rights, proportionality and the rule of law and social justice (see paragraphs 82 and 83 above). Furthermore, in the judgment of 12 January 2000 the Constitutional Court also assessed the situation in Convention terms and found that the impugned scheme of rent control amounted to a violation of Article 1 of Protocol No. 1 (see paragraph 82 above).

200. It is true that the Constitutional Court found that the introduction of the rent-control scheme was not *per se* incompatible with the Constitution or even Poland's international obligations since at the material time there was a "constitutionally acknowledged necessity to protect the rights of tenants" and, in view of the difficult housing situation, it was necessary to restrict or even exclude freedom in fixing rates of rent. However, it held that the manner in which rent control was effected by section 56(2) taken together with other provisions of the 1994 Act resulted in "owners being deprived even of the slightest substance of their property rights". It further stressed that there was no constitutional justification for affording the necessary protection to tenants mostly at the expense of private individuals – the owners of rented flats. In that regard, it observed that the 1994 Act had "deliberately set the levels of controlled rent below the costs and expenses actually incurred by owners" and that, given their duty to incur expenses to maintain their property in a particular condition, it had been based "on the premise that property must – until the end of 2004 – entail losses for the owner". In its view, the 1994 Act had placed the main burden of the necessary sacrifices that society should make for poor tenants on the landlords. In that context, the Constitutional Court attached considerable importance to the fact that Polish legislation lacked any parallel solutions enabling landlords to offset losses and expenses incurred in maintaining property, and pointed out that the situation could, and should, be remedied by "subsidising from public funds the costs of maintaining and repairing buildings ..., ensuring full recognition in the tax regulations for losses and expenses incurred by landlords and making the level of rent dependent on the tenant's income" (see paragraph 82 above).

201. The Government, as they had done before the Chamber, argued that the Constitutional Court's findings as to the general inadequacy of the

controlled rent could not be decisive in the applicant's individual case (see paragraph 192 above). However, the Grand Chamber rejects that argument, fully sharing the Chamber's assessment (see paragraph 175 of the Chamber judgment):

“... not only did the Constitutional Court support its findings as to the detrimental effects of the 1994 Act on the property rights of landlords by comprehensive research into the general housing situation in Poland and documentary evidence produced by the State authorities ... but it also had the advantage of direct knowledge of the circumstances obtaining in the country .... The Government, for their part, have failed to produce any evidence to show that those circumstances, although found to have been prevailing throughout Poland, did not apply to the applicant or that her situation materially differed from that of other Polish landlords.”

202. Relying on the Court's judgment in the case of *Mellacher and Others v. Austria*, the Government further argued that under Article 1 of Protocol No. 1, when enacting remedial housing legislation, States were entitled not only to reduce the rent chargeable to below the market value but even to take such radical measures as annulling validly concluded lease agreements (see paragraph 191 above).

The Grand Chamber finds that this argument has already been examined by the Chamber, which concluded as follows (see paragraph 176 of the Chamber judgment):

“The Court accepts that, given the exceptionally difficult housing situation in Poland, the inevitably serious social consequences involved in the reform of the lease market, as well as the impact that that reform had on economic and other rights of numerous persons, the decision to introduce laws restricting levels of rent in privately owned flats in order to protect tenants was justified, especially as it put a statutory time-limit on this measure .... However, as the applicant rightly pointed out ..., although the relevant Austrian legislation provided for many restrictions on, or the possibility of reductions in, the amount of rent chargeable, it also provided for procedures enabling landlords to recover maintenance costs (see also *Mellacher and Others*, cited above, §§ 31-32 and 55-56). No such procedures were available under the 1994 Act and, as noted by the Constitutional Court, Polish legislation did not secure any mechanism for balancing the costs of maintaining the property and the income from the controlled rent ....

Against that background and having regard to the consequences that the various restrictive provisions had on the applicant, the Court finds that the combination of restrictions under the 1994 Act impaired the very essence of her right of property. In that regard the Court would point out that the Constitutional Court, in its judgment of 12 January 2000, came to the same conclusion, holding that under the 1994 Act the individual landlords had been ‘deprived even of the slightest substance of their property rights’ and that, ‘in consequence the[ir] right to derive profit from property, ... an important element of the right of property ha[d] been destroyed and ... the[ir] right to dispose of one's property ha[d] been stripped of its substance’ ....”

203. The Grand Chamber agrees with the Chamber, fully endorsing its conclusions, in particular the finding that the combination of the restrictions

imposed by the 1994 Act impaired the very essence of the applicant's right of property.

(β) The 2001 Act

Period between 11 July 2001 and 10 October 2002

204. The dates marking this period are, respectively, the entry into force of the 2001 Act, a law which replaced the repealed 1994 Act and was designed to implement the Constitutional Court's judgments of 12 January and 10 October 2000, and the repeal – by virtue of the Constitutional Court's subsequent judgment of 2 October 2002 – of section 9(3) of the 2001 Act, a provision which introduced a new procedure for controlling increases in rent (see paragraphs 84-104 above).

205. Unlike the repealed provisions, section 9(3) of the 2001 Act made increases in levels of rent dependent on the inflation rate. However, it still maintained the previous maximum ceiling of 3% of the reconstruction value on the rent chargeable. In contrast to the 1994 Act, it did not contain detailed provisions on landlords' duties in respect of the maintenance of property. Yet their situation did not change materially as other statutes, most notably the Construction Act and the Civil Code, laid down rules similar to those applicable under the 1994 Act. The provisions on termination of leases were more detailed but they attached a number of restrictive conditions to giving notice to quit and in essence still maintained the rule allowing repossession of the flat only if the landlord had provided the tenant with alternative accommodation (see paragraphs 84-95 above).

206. As established by the Chamber (see paragraph 177 of the Chamber judgment), after only about four months of the operation of the new legislation, the Ombudsman challenged the constitutionality of section 9(3) of the 2001 Act before the Constitutional Court, submitting that the levels of rent as determined under that provision had not covered even the basic maintenance costs of residential buildings and that the new provision put landlords at a greater disadvantage than the rules for rent control laid down in the 1994 Act, which had already been found to have infringed their property rights (see paragraph 96 above).

207. The Constitutional Court, basing its findings on comprehensive documentary evidence and an assessment of the general situation throughout Poland, ruled that the applicable provisions for controlling levels of rent were incompatible with the constitutional principles of the protection of property rights and the rule of law and social justice. It held, among other things, that the current situation was "unquestionably less favourable than it used to be under the 1994 Act", that "the legislature [had] fixed an unreasonably low basic rent", that the 2001 Act had "seriously aggravated the situation of landlords" and that section 9(3) "perpetuated the violation of the right of property" that had subsisted under the 1994 Act. In addition, it

noted that the new provisions on termination of leases had not materially improved the situation of landlords (see paragraphs 103-104 above).

Still further, the Constitutional Court strongly criticised the legislature for its continued failure to introduce any statutory mechanism mitigating landlords' losses resulting from reduced rent and pointed out that "there ha[d] been no changes to regulations on income tax, at least in respect of deductions from tax (or from taxable income) of amounts spent on maintenance of buildings ... [n]or ha[d] the legislature introduced preferential loans for repairs".

It concluded that the operation of section 9(3) was tantamount to the continued violation of the right of property in respect of landlords and that the restrictions laid down in that provision went beyond the tolerable extent of limitations on that right (see paragraph 104 above).

208. The Grand Chamber, in its assessment of the applicant's situation in the period under consideration, shares the opinion expressed by the Constitutional Court, to which the Chamber subscribed, that the provisions of the 2001 Act as applicable at the relevant time unduly restricted her property rights and placed a disproportionate burden on her, which cannot be justified in terms of the legitimate aim pursued by the authorities in implementing the relevant remedial housing legislation.

Period between 10 October 2002 and 31 December 2004

209. The relevant period started with the repeal of section 9(3) of the 2001 Act by the Constitutional Court and ended with the entry into force of the December 2004 Amendments to the 2001 Act (see paragraphs 113-132 above).

The Chamber made the following findings in respect of that period (see paragraph 180 of the Chamber judgment):

"From 10 October 2002, following the repeal of section 9(3) it became possible for the applicant to increase the levels of rent for her flats up to 3% of the reconstruction value of the dwelling .... However, having regard to the relevant indicators as supplied by the parties, the Court considers that it did not result in the applicant's situation being materially improved. According to the Government, in the period immediately preceding the repeal of section 9(3), i.e. October 2002, the maximum rent for similar flats in her town was PLN 4.61 per square metre, whereas the amount actually available to the applicant throughout and at the end of 2004 reached PLN 5.15 .... That amount (approximately 1.27 euros), which was within the applicable rent rates (PLN 5.00-PLN 6.00) in most other towns in the country, represented a mere 10% increase in the previous indicative rent, which, as clearly established above, was totally insufficient to cover basic maintenance costs .... Consequently, the Court does not see how the possibility of increasing the rent up to the – apparently low and inadequate – statutory ceiling could ameliorate the situation found to have amounted to a continuing violation of the property rights of the applicant and of other landlords. Nor does it consider that it provided her and the whole class of affected persons with any relief for the past state of affairs."

210. In the proceedings before the Grand Chamber the Government submitted – and the applicant did not contest their assertion – that in respect of at least one of her tenants, a certain J.W., the applicant had not raised the rent to the statutory ceiling of the 3% of the reconstruction value but had kept it at the level of 1.5%. On this basis, they argued that the applicant could not effectively claim that her rights had been infringed by the operation of the rent-control scheme at the relevant time (see paragraphs 66 and 192 above).

However, the Grand Chamber considers that the question of whether or not the applicant raised the rent due from one of her tenants to 3% of the reconstruction value does not have a decisive bearing on its assessment of Poland's compliance with Article 1 of Protocol No. 1. It suffices for it, as it sufficed for the Chamber, to assume that at the material time nothing prevented the applicant from so doing. The core issue before it does not consist in making detailed calculations and speculating as to how much or how little the applicant or other landlords would gain from increasing rent to 3% of the reconstruction value. Rather, the issue is whether this improvement, effected after many years of forcing landlords to accept a level of rent which bore no relation whatsoever to the costs of maintenance of property – not to mention making it impossible for them to derive some profit from lease – put an end to the continued violation of Article 1 of Protocol No. 1 caused by the combined effect of the restrictions referred to above or, alternatively, provided the applicant with appropriate relief in terms of restoring her Convention rights.

211. In that regard, the Grand Chamber would note that no other restrictions on the rights of landlords were lifted. As pointed out by the Constitutional Court, the rules for the termination of leases did not materially differ from those applicable under the 1994 Act, which the same court had previously found to have amounted to “the practical exclusion of landlords' rights in terms of free disposal of their flats” and to have resulted in “the depreciation of the market value of the buildings concerned” (see paragraphs 82 and 104 above). What was more, notwithstanding that in January 2000 the Constitutional Court had already held that the State had “placed the main burden of the sacrifices that society had to make for tenants ... on the owners of property” and that that situation was exacerbated by the fact that there had been no legal ways and means in Poland enabling landlords to offset expenses or mitigate losses incurred in connection with the maintenance of property or to obtain funds for the necessary repairs, no such mitigating mechanism had been set up (see paragraphs 82 and 104 above).

In the circumstances, the Grand Chamber, although on a partly different basis (see paragraphs 209-210 above), comes to the same conclusion as the Chamber and holds that the violation of the applicant's right of property still continued over the relevant period.

Period between 1 January 2005 and 26 April 2005

212. The above dates mark the period of the operation of section 1(9)(a) of the 17 December 2004 Amendment and section 1 of the 22 December 2004 Amendment, which reworded section 9 of the 2001 Act and made any increase whereby rent would exceed 3% of the reconstruction value subject to a maximum yearly ceiling of 10% of the current rent (see paragraphs 124-141 above).

213. The Chamber, despite the fact that it did not have before it any submissions by the parties, considered it necessary to examine the relevant legislation as to its compliance with the Convention and held as follows (see paragraphs 182-184 of the Chamber judgment):

“182. Indeed, as the Government stressed, the undertaking to maintain the rent-control scheme only temporarily has been kept since the provision setting the deadline for the application of that scheme based on the maximum ceiling of 3% of the reconstruction value of the dwelling expired on 31 December 2004 .... The Government have also abandoned their original attempt to extend the rent freeze to 2008 ....

However, another proposal made by the Government – enunciated not only in the 1994 and the 2001 Acts but also made before this Court at the oral hearing, namely, that after 1 January 2005 market forces would regulate rent and no new rent control system would be introduced ... – has not been implemented.

On 1 January 2005 new provisions entered into force. The constitutionality of those provisions was contested by landlords before the Constitutional Court after being in operation for merely three days. By virtue of the December 2004 Amendments, the Polish State introduced a new procedure for controlling increases in rent, which in essence modifies the previous system only slightly. Firstly, all levels of rent may, on condition that the increase is effected with the appropriate notice and not more often than every six months, reach 3% of the reconstruction value of the dwelling. Secondly, levels of rent exceeding 3% of that value may not be increased by more than 10% annually ....

183. Given that the practical application of the new provisions remains a question for the future and depends on a number of factors, such as the relevant conversion index ..., the Court does not find it appropriate to draw conclusions as to the decisive or long-term effects of their operation on the applicant's and on other landlords' property rights. Yet it cannot but note that, given the recent amounts shown as the reconstruction value of the dwelling, the 10% increase in rent does not, for all practical purposes, entail any significant increase in rent. It can therefore hardly be seen as improving the applicant's situation in respect of covering the cost of maintenance works, which she is still obliged to carry out under section 6(a) of the 2001 Act.

184. Accordingly, it cannot be said that the December 2004 Amendments provided the applicant with any kind of relief that could compensate for the violation that has already occurred on account of the continued application of the rent control legislation

in Poland. In contrast, the new provisions seem to perpetuate the status quo found to have been incompatible with the requirements of Article 1 of Protocol No. 1.”

214. The December 2004 Amendments were subsequently examined as to their compatibility with the Polish Constitution by the Constitutional Court. In its judgment of 19 April 2005, the court not only relied on the Chamber judgment as one of the grounds supporting its finding that the introduction of the provisions extending the operation of the rent-control scheme beyond the deadline set by the legislature was in breach of the rule of law and of the principle of protection of property, but also assessed the State’s conduct as a “particular kind of irresponsibility on the part of the authorities” and an “exceptionally jarring violation of the principle of confidence in the State and the law made by it” (see paragraphs 137-140 above).

215. In the light of the Constitutional Court’s findings, the Grand Chamber cannot but subscribe to the Chamber’s conclusion that the enactment of the December 2004 Amendments was one more act by the State which infringed the applicant’s rights under Article 1 of Protocol No. 1.

Period after 26 April 2005

216. In respect of the period after 26 April 2005 the Government argued that, owing to the fact that the applicant’s house had been partly vacated and that it would be empty within weeks following the hearing of 11 January 2006 – which, as they subsequently confirmed (see paragraph 66 above) had actually occurred on 15 February 2006 – she could no longer claim that she had not regained possession of it. Nor could it be said, they added, that the rent-control scheme still affected her property rights (see paragraph 192 above). The applicant, for her part, considered that these events could not cease or erase the consequences that the rent-control scheme had already entailed for her property rights (see paragraph 185 above).

217. In connection with the Government’s first argument, the Court would reiterate that a decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of the status of a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among many other authorities, *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII; and *Scordino v. Italy (no.1)* [GC], no. 36813/97, § 180, ECHR 2006-...).

However, in the present case those conditions have not been met. While the Court agrees that the fact that the applicant, with the authorities’ help and at the very last stage of the proceedings before the Court, was able to repossess her house in its entirety does improve her situation, this circumstance can hardly be perceived as an acknowledgment, even in

substance, of the breach of the Convention right alleged by her and as a measure redressing the continuing violation of her property rights caused by the operation of the rent-control scheme, as found by the Court (see paragraphs 195-215 above).

Moreover, having regard to the States' obligation as laid down in Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined ... [in the ] Convention" and to the general context of the case (see paragraphs 155-156), the Court considers that this kind of practical solution, applied by the authorities in respect of an individual applicant in a case where the central Convention issue relates to the operation of a legislative scheme potentially affecting the rights of a large number of persons, does not absolve it from ascertaining whether the general problem underlying the situation complained of has been resolved and the cause of the violation of the rights of other persons removed.

Accordingly, the Court will deal with the second argument advanced by the Government, namely that following the entry into force of the Constitutional Court's judgment of 19 April 2005 the rent-control scheme was abolished and the rights of landlords are no longer limited in any way (see paragraph 190 above).

218. In that judgment, the Constitutional Court did not limit its considerations solely to an assessment of the constitutionality of the December 2004 Amendments but considered the case before it in the wider context of the operation of the rent-control scheme throughout a period of some 11 years preceding its ruling (see paragraphs 136-141 above). Finding that throughout that period the State had failed to introduce any satisfactory and consistent mechanism for balancing the rights of landlords and tenants, especially in terms of introducing consistent criteria for the determination of rent, it also decided to give recommendations to that effect to Parliament (see paragraphs 141-142 above).

219. The object of the June 2005 Recommendations were "shortcomings and lacunas to which [the Constitutional Court had] pointed in recent years". The court held that "removing them in the near future [wa]s necessary also in view of the principle of the social market economy, which ha[d] particular importance in the present context" and drew the authorities' attention to the fact that it was "no longer possible to regulate those matters in a fragmentary or provisional manner" (see paragraph 142 above).

220. The core defects of the 2001 Act which the Constitutional Court identified and regarded as requiring rapid resolution were, among other things, the lack of provisions setting out basic elements of rent and the absence of any statutory criteria for judicial control of rent increases. The Constitutional Court was particularly critical about the current "algorithmic" system of fixing a maximum ceiling on rent and controlling increases which, in its opinion, did not serve the interests of either landlords or tenants.

It stressed, as it had done before, that rent could not be unrelated to costs or repairs and maintenance; however justified such an approach might have been over the transitional period, it was not acceptable at present. It further stressed the importance of setting levels of rent in a manner enabling the landlords not merely to cover those costs from the rent chargeable but also to derive a “decent profit” from rent and receive a return on their investment.

221. Referring to the Government’s argument as to the lack of any restrictions on landlords’ rights, the Court would observe that it does not seem to be well-founded. Thus, in addition to introducing and maintaining defective provisions on the levels of rent the authorities have not removed the previous limitations on termination of leases (see paragraphs 127-128 above). From the landlord’s perspective, the situation has not changed considerably in comparison to the previous restrictive provisions. Nor has the State instituted any procedure or statutory mechanism enabling landlords to mitigate or compensate for losses incurred in connection with maintenance or repairs of property as the Constitutional Court has advised on many occasions (see paragraphs 82, 104, 140, 142, 144, 200, 207 and 211 above).

222. In consequence, it cannot be said that the Constitutional Court’s judgment has in itself eased the disproportionate burden placed on the exercise of landlords’ property rights by the operation of the impugned laws. Nor can it be said that the general situation underlying the finding of the violation in the present case has thereby been brought into line with Convention standards. In contrast, in the light of that judgment and the June 2005 Recommendations it is clear that not much progress in that field can, and will, be achieved unless the above-mentioned general defects of the Polish housing legislation are removed rapidly and the entire system is reformed in a manner ensuring genuine and effective protection of this fundamental right in respect of other similarly situated persons.

### **C. General conclusion as to the alleged violation of Article 1 of Protocol No. 1**

223. The Chamber, in its general conclusion on the violation of Article 1 of Protocol No. 1, had regard to the following considerations (see paragraphs 185-188 of the Chamber judgment):

“185. As the Court has already stated on many occasions, in spheres such as housing of the population, States necessarily enjoy a wide margin of appreciation not only in regard to the existence of the problem of general concern warranting measures for control of individual property but also to the choice of the measures and their implementation. The State control over levels of rent is one of such measures and its application may often cause significant reductions in the amount of rent chargeable (see, in particular, *Mellacher and Others*, cited above, § 45).

Also, in situations where, as in the present case, the operation of the rent-control legislation involves wide-reaching consequences for numerous individuals and has significant economic and social consequences for the country as a whole, the authorities must have considerable discretion not only in choosing the form and deciding on the extent of control over the use of property but also in deciding on the appropriate timing for the enforcement of the relevant laws. Nevertheless, that discretion, however considerable, is not unlimited and its exercise, even in the context of the most complex reform of the State, cannot entail consequences at variance with the Convention standards (see *Broniowski*, cited above, § 182).

186. The Court once again acknowledges that the difficult housing situation in Poland, in particular an acute shortage of dwellings and the high cost of acquiring flats on the market, and the need to transform the extremely rigid system of distribution of dwellings inherited from the communist regime, justified not only the introduction of remedial legislation protecting tenants during the period of the fundamental reform of the country's political, economic and legal system but also the setting of a low rent, at a level beneath the market value ... Yet it finds no justification for the State's continued failure to secure to the applicant and other landlords throughout the entire period under consideration the sums necessary to cover maintenance costs, not to mention even a minimum profit from the lease of flats.

187. Some five years ago the Polish Constitutional Court found that the operation of the rent-control scheme based on the provisions necessarily and unavoidably entailing losses for landlords had resulted in a disproportionate, unjustified and arbitrary distribution of the social burden involved in the housing reform and that the reform had been effected mainly at the expense of landlords. It reiterated that statement in its subsequent judgments, clearly indicating that the failure to abolish the rent-control system by 31 December 2004 might result in a breach of the constitutional principle of the rule of law and undermine citizens' confidence in the State. It repeatedly held that the adopted measures amounted to a continuing violation of the property rights of landlords. It stressed that the manner in which the authorities calculated increases in rent made it impossible, for purely mathematical reasons, for landlords to receive an income from rent or at least recover their maintenance costs ...

In the circumstances, it was incumbent on the Polish authorities to eliminate, or at least to remedy with the requisite promptness, the situation found to have been incompatible with the requirements of the applicant's fundamental right of property in line with the Constitutional Court's judgments. Furthermore, the principle of lawfulness in Article 1 of Protocol No. 1 and of the foreseeability of the law ensuing from that rule required the State to fulfil its legislative promise to repeal the rent-control scheme – which by no means excluded the adoption of procedures protecting the rights of tenants in a different manner ....

188. Having regard to all the foregoing circumstances and, more particularly, to the consequences which the operation of the rent-control scheme entailed for the exercise of the applicant's right to the peaceful enjoyment of her possessions, the Court holds that the authorities imposed a disproportionate and excessive burden on her, which cannot be justified by any legitimate interest of the community pursued by them. ...”

224. The Grand Chamber agrees with this assessment of the impugned situation. It would, however, add that, as established above, the violation of the right of property in the present case is not exclusively linked to the

question of the levels of rent chargeable but, rather, consists in the combined effect of defective provisions on the determination of rent and various restrictions on landlords' rights in respect of termination of leases, the statutory financial burdens imposed on them and the absence of any legal ways and means making it possible for them either to offset or mitigate the losses incurred in connection with maintenance of property or to have the necessary repairs subsidised by the State in justified cases (see paragraphs 203, 211 and 221 above). Furthermore, the Government's claim at the oral hearing that such a mechanism existed (see paragraph 189 above) has not been substantiated by any concrete examples from domestic law and practice.

In this regard the Court would once again refer to its case-law confirming that in many cases involving limitations on the rights of landlords – which were and are common in countries facing housing shortages – the limitations applied have been found to be justified and proportionate to the aims pursued by the State in the general interest (see *Spadea and Scalabrino* cited above, § 18; and *Mellacher and Others*, cited above, §§ 27 and 55). However, in none of those cases had the authorities restricted the applicants' rights to such a considerable extent as in the present case.

In the first place, the applicant had never entered into any freely negotiated lease agreement with her tenants; rather, her house had been let to them by the State. Secondly, the circumstances of the instant case are different from those in the case of *Spadea and Scalabrino*. In the latter case, although the State had temporarily suspended evictions from privately owned flats, landlords retained their right to terminate leases by means of a simple notice to quit, without any further restrictions. In contrast, in the instant case Polish legislation attached a number of conditions to the termination of leases, thus seriously limiting the landlords' rights in that respect. Finally, in the case of *Mellacher and Others*, while the domestic legislation restricted the rent chargeable, the levels of rent were never set, as in the present case, below the costs of maintenance of the property and landlords were able to increase the rent in order to cover the necessary maintenance expenses. That provision had at least made it possible for Austrian landlords to keep their property in a proper condition, whereas the Polish scheme did not, and does not, provide for any procedure for maintenance contributions or State subsidies, thereby causing the inevitable deterioration of the property for lack of adequate investment and modernisation (see paragraphs 82, 104 and 138).

225. It is true that, as stated in the Chamber judgment, the Polish State, which inherited from the communist regime the acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests of landlords and tenants. It had, on the one hand, to secure the protection of the property rights of the former and, on the other,

to respect the social rights of the latter, often vulnerable individuals (see paragraphs 12-19 and 176 above). Nevertheless, the legitimate interests of the community in such situations call for a fair distribution of the social and financial burden involved in the transformation and reform of the country's housing supply. This burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group or the community as a whole.

In the light of the foregoing, and having regard to the effects of the operation of the rent-control legislation during the whole period under consideration on the rights of the applicant and other persons in a similar situation, the Court considers that the Polish State has failed to strike the requisite fair balance between the general interests of the community and the protection of the right of property.

There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

### III. ARTICLE 46 OF THE CONVENTION

226. Article 46 of the Convention provides:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

#### **A. Application of the “pilot-judgment” procedure**

##### *1. The Government's objection to the application of the “pilot-judgment” procedure*

227. The Government, in their referral request and their further written and oral pleadings, contested the Chamber's decision to apply the so-called “pilot-judgment procedure” in the present case. Their arguments were threefold.

228. First, they maintained that the description of the applicant's situation as presented by her before the Chamber no longer corresponded to reality. Two of her tenants, W.P. and the family of J.P. and M.P., had already vacated the flats in June 2003 and September 2004 respectively. The third tenant, J.W., was to move out soon after the date of the oral hearing. Accordingly, the applicant had obtained the relief sought before the Court in terms of both taking over management of her property and repossessing her flats.

Secondly, the Government argued that the applicant's factual situation was not that of a typical landlord because she owned a one-family house, whereas most of the landlords affected by the rent-control scheme owned tenement houses. In addition, the applicant intended to locate the headquarters of her foundation "Amber Trail" in her house, which would suggest that her premises were to be used for commercial purposes rather than housing needs.

The Government's third argument was that the rent-control scheme as introduced by the 1994 Act no longer existed in Poland since the Constitutional Court's judgment of 19 April 2005 had rendered the situation compatible with the standards of protection of property rights under the Convention. They once again repeated that, following that judgment, the parties to a lease contract could freely establish the level of rent and the rights of landlords were no longer restricted in any way.

The Government concluded that the case should no longer be regarded as a "pilot case" involving a systemic problem connected with the malfunctioning of the Polish legislation – with all the consequences that this entailed from the point of view of Article 46 and Article 41 of the Convention.

## 2. *The applicant's arguments*

229. The applicant began by drawing the respondent Government's attention to the fact that she had not sought to influence the Chamber's decision to apply the "pilot-judgment procedure" because this matter lay exclusively within the Court's competence and depended on its assessment of the facts of her case.

However, she could not see any argument which could militate against the Chamber's decision. On the contrary, her case clearly fell within the criteria established in the *Broniowski v. Poland* judgment, in particular as the violation of her property rights was not "prompted by an isolated incident nor attributable to the particular turn of events in the case, but was rather the consequence of administrative and regulatory conduct on the part of the authorities towards an identifiable class of citizens". Both the *Broniowski* case and her case disclosed "the existence within the Polish legal order of a shortcoming as a consequence of which a whole class of individuals had been denied the peaceful enjoyment of their possessions" and gave cause to believe that these "deficiencies in national law and practice may give rise to numerous subsequent well-founded applications". Furthermore, in both cases the violation of property rights originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the State's failure to solve that problem. Indeed, for many years she had not been able to regain her property or to obtain a reasonable amount of rent not because of a shortcoming in a specific judgment or decision but because of defective legislation.

230. As regards the Government's argument that her house was about to become vacant, the applicant, as she had already done, argued that this event could not automatically stop, and erase the effects of, the violation of her property rights that had continued for many years.

Referring to the Government's assertion that her situation was not typical of the average landlord in Poland because her house was a one-family house, not a tenement house, the applicant stressed that, indeed, this had been exactly the argument that she had consistently but unsuccessfully put forward before various domestic authorities and courts when she had tried to repossess the house through legal proceedings. This, however, had been to no avail as all those authorities had found that the impugned housing laws had correctly been applied to her case.

Lastly, in the context of the Government's assertion that there was no State control over levels of rent and that the rights of landlords were no longer restricted, the applicant essentially repeated her arguments concerning the continuation of the violation of the Convention after the entry into force of the Constitutional Court's judgment (see paragraph 185 above).

In sum, the applicant invited the Court to continue to apply the pilot-judgment procedure in her case.

### 3. *The Court's assessment*

#### (a) **Principles deriving from the Court's case-law**

231. In the case of *Broniowski v. Poland*, concerning the issue of the compatibility with the Convention of a legislative scheme that affected a large number of persons (some 80,000), the Court found for the first time the existence of a systemic violation, which it defined as a situation where "the facts of the case disclose ... within the [domestic] legal order ... a shortcoming as a consequence of which a whole class of individuals have been or are still denied [their Convention right or freedom] and where "the deficiencies in the national law and practice identified in the applicant's individual case may give rise to numerous subsequent well-founded applications".

The Court further found that the violation in that case had "originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which ha[d] affected and remain[ed] capable of affecting a large number of persons" (see *Broniowski*, cited above, § 189).

232. In that connection, the Court directed that "the respondent State must, through appropriate legal measures and administrative practice, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under

Article 1 of Protocol No. 1” (see the fourth operative provision of the principal judgment).

The Court thereby made clear that general measures at national level were called for in execution of the judgment and that those measures should take into account the many people affected and remedy the systemic defect underlying the Court’s finding of a violation. It also observed that they should include a scheme offering to those affected redress for the Convention violation. It stressed that once such a defect had been identified, it fell to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate, the necessary remedial measures in accordance with the subsidiary character of the Convention (*ibid.* § 193 and *Broniowski v. Poland (friendly settlement)* [GC], no. 31443/96, §§ 34-35 ECHR-2005-IX).

233. This kind of adjudicative approach by the Court to systemic or structural problems in the national legal order has been described as a “pilot-judgment procedure” (see, for example, the Court’s position paper on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee for Human Rights of 4 April 2003 (CDDH(2003)006 Final, unanimously adopted by the Court at its 43rd plenary administrative session on 12 September 2003, paragraphs 43 to 46; and the response by the Court to the CDDH Interim Activity Report, prepared following the 46th Plenary Administrative Session on 2 February 2004, paragraph 37) (*ibid.*).

234. The object in the Court’s designating a case for a “pilot-judgment procedure” is to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the Convention right in question in the national legal order. One of the relevant factors considered by the Court in devising and applying that procedure has been the growing threat to the Convention system resulting from large numbers of repetitive cases that derive from, among other things, the same structural or systemic problem (*ibid.*).

Indeed, the pilot-judgment procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned their Convention rights and freedoms as required by Article 1 of the Convention, offering to them more rapid redress.

**(b) Application of the above principles to the present case**

235. The Chamber considered that the principles established in the *Broniowski* case applied equally to the present case, especially as the operation of the rent-control scheme might potentially affect an even larger number of individuals – some 100,000 landlords and from 600,000 to 900,000 tenants (see paragraph 191 of the Chamber judgment). It also held that, as in the *Broniowski* case, the facts of the instant case revealed the

existence of an underlying systemic problem connected with a serious shortcoming in the domestic legal order. The Chamber identified that shortcoming as “the malfunctioning of Polish housing legislation in that it imposed, and continue[d] to impose, on individual landlords, restrictions on increases in rent for their dwellings, making it impossible for them to receive rent reasonably commensurate with the general costs of property maintenance”.

236. The Grand Chamber agrees with the Chamber’s conclusion that the present case is suitable for the application of the pilot-judgment procedure as established in the *Broniowski* judgments.

It is common ground that the operation of the impugned housing legislation – which, regardless of the Government’s reservations as to the applicant’s allegedly atypical situation (see paragraph 228 above), applied to her in the same way as to the other landlords – potentially entailed consequences for the property rights of a large number of persons whose flats (some 600,000, or 5.2% of the entire housing resources of the country) were let under the rent-control scheme (see paragraph 15 and 19 above). While the number of similar applications pending before the Court currently stands at eighteen – a figure which, in comparison with the *Broniowski* case, may seem insignificant – one of those cases has been lodged by an association of some 200 landlords asserting a breach of their individual rights. At any rate, the identification of a “systemic situation” justifying the application of the pilot-judgment procedure does not necessarily have to be linked to, or based on, a given number of similar applications already pending. In the context of systemic or structural violations the potential inflow of future cases is also an important consideration in terms of preventing the accumulation of repetitive cases on the Court’s docket, which hinders the effective processing of other cases giving rise to violations, sometimes serious, of the rights it is responsible for safeguarding.

237. Although the Government maintained that the rent-control scheme no longer existed in Poland following the Constitutional Court’s judgment of 19 April 2005 (see paragraph 228 above), the Court can only refer to its earlier conclusion that, notwithstanding that ruling, the general situation has not yet been brought into line with the Convention standards (see paragraphs 221-222 above).

The Grand Chamber shares the Chamber’s general view that the problem underlying the violation of Article 1 of Protocol no.1 in the present case consists in “the malfunctioning of Polish housing legislation”. Indeed, this assessment is still accurate, in particular in the light of the Constitutional Court’s finding that the breach of the applicant’s and other landlords’ property rights originated in “defective legislation” that has continually been applied to them since the entry into force of the 1994 Act (see paragraph 140 above).

However, the Grand Chamber sees the underlying systemic problem as a combination of restrictions on landlords' rights, including defective provisions on the determination of rent, which was and still is exacerbated by the lack of any legal ways and means enabling them at least to recover losses incurred in connection with property maintenance, rather than as an issue solely related to the State's failure to secure to landlords a level of rent reasonably commensurate with the costs of property maintenance.

## **B. General measures**

238. One of the implications of the pilot-judgment procedure is that the Court's assessment of the situation complained of in a "pilot" case necessarily extends beyond the sole interests of the individual applicant and requires it to examine that case also from the perspective of the general measures that need to be taken in the interest of other potentially affected persons (see, *mutatis mutandis*, *Broniowski (friendly settlement)*, cited above, § 36). For that reason, the individual solutions adopted in the applicant's case and relied on by the Government in their arguments as to the application of the pilot-judgment procedure (see paragraph 228 above) cannot be regarded as decisive in this context.

239. As regards the general measures to be applied by the Polish State in order to put an end to the systemic violation of the right of property identified in the present case, and having regard to its social and economic dimension, including the State's duties in relation to the social rights of other persons (see paragraphs 139, 157 and 225 above), the Court considers that the respondent State must above all, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords, including their entitlement to derive profit from their property, and the general interest of the community – including the availability of sufficient accommodation for the less well-off – in accordance with the principles of the protection of property rights under the Convention.

It is not for the Court to specify what would be the most appropriate way of setting up such remedial procedures or how landlords' interest in deriving profit should be balanced against the other interests at stake; thus, under Article 46 the State remains free to choose the means by which it will discharge its obligations arising from the execution of the Court's judgments (see *Broniowski*, cited above, §§ 186 and 192).

The Court would, however, observe in passing that the many options open to the State certainly include the measures indicated by the Constitutional Court in its June 2005 Recommendations, setting out the features of a mechanism balancing the rights of landlords and tenants and criteria for what might be considered a "basic rent", "economically justified rent" or "decent profit" (see paragraph 136-141 above).

#### IV. ARTICLE 41 OF THE CONVENTION

240. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

##### **A. Damage claimed in the present case**

241. The applicant stated that she was aware that, on the basis of the *Broniowski* judgment, the Court might decide that the question of the application of Article 41 was not ready for decision and decline to award her just satisfaction. She nevertheless asked the Court to consider that her claims were ready to be examined, or even that it was necessary to examine them.

In this respect, the applicant pointed out that she was already 75 years old and that her case had already been pending before the Court for many years. Both her health and her financial situation were poor. Her means of subsistence were very limited; she was a retired music teacher, currently living in a small, modest flat in Poznań. The Court’s award would at least help her to repair the house and to be able eventually to move into her family property.

242. The applicant, as she had done before the Chamber, sought a total sum of 118,705 euros (EUR) for both pecuniary and non-pecuniary damage sustained by her on account of the continued violation of her right of property. That sum comprised EUR 40,000 for non-pecuniary damage and EUR 78,705 for pecuniary damage covering the costs of repairs caused both by the State’s negligent maintenance and her inability to cover the necessary repairs from the rent received under the rent-control scheme, as well as loss of profit from market-related rent.

243. In connection with the material loss she had sustained, the applicant produced an expert report that described in detail the present condition of her house. According to the expert, the technical condition of the house was such that it needed a major overhaul.

As regards the alleged loss of profit in terms of the amount of net market-related rent that the applicant could have received had the house not been subject to the rent-control scheme, the expert calculated the relevant amount for the period of 15 years following the applicant’s taking over the management of the house (see also paragraph 32 above). This amount was assessed at PLN 1,380,000, which corresponds to approximately EUR 350,000.

The applicant submitted that, having regard to the *Broniowski* case and the fact that the relevant Polish legislation limited the Bug River claims to

20%, she considered that the similar nature of her case required her to reduce her claim to a comparable proportion of the actual loss sustained by her. That proportion corresponded to the above-mentioned amount of EUR 78,705.

244. In respect of her claim of EUR 40,000 for non-pecuniary damage, the applicant repeated the arguments that she had put forward before the Chamber, explaining that that sum was to cover the damage she had suffered on account of the frustration and stress involved in her futile efforts to regain her property, and her lack of any possibility of enjoying possession of it. In that context, she emphasised that the stress involved in asserting her justified claims before the Polish courts and the fact that all those procedures had proved ineffective had placed a severe strain on her as an elderly person. She had also suffered serious distress resulting from her inability to realise her plans to locate the headquarters of her “Amber Trail Foundation” in her house.

245. As regards costs and expenses, the applicant sought a total sum of EUR 24,000, including EUR 9,457.50 incurred in connection with the proceedings before the Grand Chamber. This sum was exclusive of VAT.

246. The Government considered that the claims were excessive and not supported by material evidence. In particular, they criticised the expert report and questioned its evidentiary value, stating that it had apparently been prepared in order to impress the Court as to the allegedly considerable infringement of the applicant’s property rights. In their view, it gave exaggerated figures pertaining to the applicant’s alleged loss of profit from rent, a loss which should not be considered in the present case at all because it related to a general assessment of the consequences entailed by the operation of the rent-control legislation. As regards the legal costs incurred in the referral proceedings, the Government contested the number of hours (50) spent by the applicant’s lawyer on the preparation of the case and asked the Grand Chamber to make an award, if any, only in so far as those costs were, in their words, “proportionate to the involvement of the applicant’s lawyer in the case and [had] been actually and necessarily incurred and were reasonable as to quantum”.

## **B. The Court’s conclusion**

### *1. Pecuniary damage*

247. Having examined the circumstances of the case, the Court considers that the question of compensation for pecuniary damage is not ready for decision. That question must accordingly be reserved and the subsequent procedure fixed, having due regard to any agreement which might be reached between the respondent Government and the applicant (Rule 75 § 1 of the Rules of Court) and in the light of such individual or

general measures as may be taken by the respondent Government in the execution of the present judgment. Pending the implementation of the relevant general measures, which should be adopted within a reasonable time, the Court will adjourn its consideration of applications deriving from the same general cause (see *Broniowski*, cited above, § 198).

### 2. *Non-pecuniary damage*

248. As regards the applicant's claim for non-pecuniary damage, the Court sees good reason to make an award and, in this respect, depart on an exceptional basis from the approach taken in the *Broniowski* case (see *Broniowski*, cited above, § 198).

The Court's decision has been prompted by the particular and personal circumstances of the individual applicant in the present case. First of all, it has taken into account her age and health and the fact that both the proceedings that she brought in the Polish courts and the proceedings before this Court have lasted for a considerable time, thus inevitably exacerbating her frustration and distress. Having regard to the circumstances surrounding the State's taking of the property in question for the use of other persons and to the time it has taken the applicant to have her family house, an object of clearly significant sentimental and emotional value, returned to her, the Court has no doubt that the relevant domestic proceedings have placed a severe psychological strain on her. In deciding to make an award in respect of non-pecuniary damage at the current stage of the proceedings, the Court also considers it important that the applicant has not only asserted her own rights before it but has also taken upon herself the trouble and burden of acting – at least to some extent – on behalf of landlords in a similar situation.

249. In view of the foregoing and making its assessment on an equitable basis, the Court awards the applicant EUR 30,000 under the head of non-pecuniary damage.

### 3. *Costs and expenses*

250. As regards the costs and expenses borne by the applicant, the Court notes that the Chamber awarded the applicant EUR 13,000 for the costs incurred up to the adoption of its judgment (see paragraph 197 of the Chamber judgment). Having assessed the applicant's claim as a whole, the Court awards her EUR 22,500, to be converted into Polish zlotys at the rate applicable at the date of settlement, together with any tax that may be chargeable on this amount.

#### 4. *Default interest*

251. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

### FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection on incompatibility *ratione temporis* of the application;
2. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds* by 16 votes to 1 that the above violation has originated in a systemic problem connected with the malfunctioning of domestic legislation in that:
  - (a) it imposed, and continues to impose, restrictions on landlords' rights, including defective provisions on the determination of rent;
  - (b) it did not and still does not provide for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance;
4. *Holds* by 15 votes to 2 that, in order to put an end to the systemic violation identified in the present case, the respondent State must, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention (see paragraph 239 above);
5. *Holds* unanimously that the question of the application of Article 41 is not ready for decision in so far as the applicant's claim for pecuniary damage is concerned and accordingly,
  - (a) *reserves* the said question;
  - (b) *invites* the Government and the applicant to submit, within six months from the date of notification of this judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
  - (c) *reserves* the further procedure and *delegates* to the President of the Court the power to fix the same if need be;

6. *Holds* unanimously

(a) that the respondent State is to pay the applicant, within three months, the following amounts:

(i) EUR 30,000 (thirty thousand euros) in respect of non-pecuniary damage;

(ii) EUR 22,500 (twenty-two thousand five hundred euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* unanimously the remainder of the applicant's claim for non-pecuniary damage.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on June 2006.

Luzius WILDHABER  
President

T.L. EARLY  
Section Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Partly concurring and partly dissenting opinion of Mr Zupančič;

(b) Partly dissenting opinion of Mr Zagrebelsky.

L.W.  
T.L.E.

PARTLY CONCURRING, PARTLY DISSENTING OPINION  
OF JUDGE ZUPANČIČ

I

The issue touched upon by Judge Zagrebelsky is real. At the core of his partly dissenting opinion is the finding that the Convention's Article 46<sup>1</sup> narrows the binding effect of our judgments to what in constitutional law is called the effect *inter partes*, that is, between the State and the particular applicant affected by the judgment. In other words, Judge Zagrebelsky is critical of the *Broniowski v. Poland* case, in which this narrow *inter partes* binding effect was enlarged to encompass other identical or similar cases, irrespective of the question whether they were already pending before this Court.

Logically, the next question is whether the *Broniowski v. Poland* judgment – *ultra vires*, as Judge Zagrebelsky clearly implies! – introduces a so-called *erga omnes* binding effect into our decisions.

Have we indeed expanded the scope of jurisdiction to the extent that we may now pronounce with binding effect *erga omnes* and not only on particular cases immediately before us? Have we put ourselves into the role of the negative legislator for 46 countries? Does the *Broniowski v. Poland* judgment really represent a qualitative jump?

The answer to the latter question is simple and pragmatic. If in the *Broniowski v. Poland* case we had not decided the way we did, there would have been 80,000 cases pending in this Court. In the best of possible worlds, we would in due time (?) decide all these 80,000 cases. We would mechanically, or, as they say today, in “copy-paste” fashion, reiterate the *Broniowski v. Poland* judgment – 80,000 times.

The only beneficial effect of this, if it can be so called, would be to stick to the narrowly perceived letter of Article 46 of the Convention, adopted even before the time the European Commission of Human Rights had been waiting for the postman to bring an application so it would have something to do. In this connection, it is true that Protocol No. 14 did not make provision for our judgments to have *erga omnes* binding effect, but does that really prove the point Judge Zagrebelsky is making?

Moreover, imagine that the particular national legislation provides for the possibility of a so-called class action. Procedurally, class action is a situation in which all actual and potential plaintiffs are joined by law, that

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**1. Article 46 – Binding force and execution of judgments**

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case **to which they are parties**.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.” [Emphasis added.]

is, where one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defences of the representative parties are typical of the claims or defences of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In such a situation the applicants before the Court would be all the actual and potential plaintiffs and our decision concerning one of them would have binding effect – not *erga omnes* but in relation to this particular class of applicants. Just as in the *Broniowski v. Poland* constellation, the judgment of the European Court would bind the State to indemnify all of them. Would that be contrary to the letter and the spirit of Article 46, by which “[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”? In such an assemblage, evidently, “the parties” to the case would be all “actual and potential plaintiffs.” The pilot-judgment procedure introduced by *Broniowski* would then be, for this internal reason deriving from the national civil procedure, completely in agreement with both the letter and the spirit of Article 46 of the Convention.

I dare say that this class-action analogy works in most situations in which the Court would find it practical and reasonable to apply the pilot-judgment procedure. Not only is this far from violating Article 46 of the Convention, it is also far removed from the so-called *erga omnes* effect that would violate it.

## II

The *travaux préparatoires* of the Convention do indeed show that the current Article 41 was initially intended to have *erga omnes* binding effect on national jurisdictions.<sup>2</sup> This is what the founding fathers wanted. It was the politicians defending national sovereignty who replaced the formerly clear language of the Article in question with the current incomprehensible language drawn from an old German-Swiss arbitration agreement.

In order to respect the spirit of the Convention, we may take these political hesitations seriously and ask the next question. Is it better for Poland to be condemned in this Court 80,000 times and to pay all the costs and expenses incurred in 80,000 cases, or is it better to say to the country concerned: “*Look, you have a serious problem on your hands and we would prefer you to resolve it at home...! If it helps, these are what we think you*

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1. See, in this connection, the ambivalent and ambiguous judgment of the German Constitutional Court, Order of the Second Division of 14 October 2004, 2 BvR 1481/04, concerning the internal binding effects of the judgment of the Third Section of the Court in *Görgülü v. Germany* (no. 74969/01, 26 May 2004).

*should take into account as the minimum standards in resolving this problem...”?*

Which one of the two solutions is more respectful of national sovereignty?

The implicit fear that the Court has surreptitiously introduced the *erga omnes* binding effect of its decisions must thus be qualified. *First*, a *de facto erga omnes* effect exists anyway, whether the Court is forced to repeat it 60,000 times or not. There is no escaping this.

*Second*, a *de jure erga omnes* binding effect would be one expressed in the judgment *in abstracto*. In such a case we would say that a particular piece of national legislation that had been the cause of the case before us was incompatible with the Convention, or in other words “un-conventional”.

The Court clearly does not have, with the usual paraphernalia of constitutional law, an interest in meddling in what national legislation should or should not do. Subsidiarity is a healthy collateral effect of the simple fact that an international judicial body does not know how to, and thus does not want to, enter into the details of national legislative happenings.

This is the role rightly reserved for national constitutional courts.

*Third*, we are situated at the top of 46 national judicial pyramids. The message sent to one of these jurisdictions will have a completely different meaning in another. In other words, our pronouncements are decisions concerning minimum standards, irrespective of how the violations happened in Iceland or in Azerbaijan. We are not and cannot be the constitutional court for the 46 countries concerned. The fears that we shall usurp that role are not realistic.

The subsidiary international jurisdiction nevertheless plays a role and engages in a legal discourse and in decision-making, functions which are *somewhat* similar to what the constitutional courts do. I would expect constitutionalist legal academia to decipher all the constitutive differences.

Suffice it to say here that decisions such as *Broniowski* or *Hutten-Czapska* or for that matter *Lukenda* are practical and pragmatic decisions – akin to class-action judgments – that avert an increase in the quantity of cases without subverting the intended quality of the binding effect of the judgments of this Court. They say that for some people the experience of thirty years is the experience of one year repeated thirty times. I do not think we want to project this adage onto the States signatories to the Convention.

### III

In the end, and quite apart from the general question addressed above, I have voted against point number four of the operative provisions and its

reference to paragraph 239 of the judgment. The objectionable paragraph 239 reads as follows:

“... the Court considers that the respondent State must above all, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords, including their **entitlement to derive profit from their property** ...” [Emphasis added.]

The *travaux préparatoires* of Protocol No. 1 amply demonstrate the hesitations different prospective signatories had concerning its Article 1.<sup>3</sup> These hesitations concerned the question whether the right to property is a human right at all. *A fortiori*, the right to derive profit by merely owning an apartment building cannot be seen as a human right.

I think the language of Article 1 of Protocol No. 1 demonstrates this:

“Every natural or legal person is entitled to the **peaceful enjoyment of his possessions**. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” [Emphasis added.]

In other words, the question whether “*peaceful enjoyment of one’s possessions*” implies the “*entitlement to derive profit from one’s property*” must be answered in the negative. This is not the place to discuss the “social function of property”, although a clause to that effect is an integral part of many modern constitutions. Suffice it to say that a sheer profit for the landlord – in other words, income not derived from his services – is, for the tenant, of necessity a payment that is not reciprocated by a benefit.

How can that be a landlord’s human right?

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1. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 262, entered into force 18 May 1954.

PARTLY DISSENTING OPINION OF JUDGE  
ZAGREBELSKY

*(Translation)*

I concur with the Court's finding in the present case that there has been a violation of Article 1 of Protocol No. 1 in respect of the applicant. I also share the opinion that the violation is a systemic one which results from the particular statutory rules in force in Poland and could be eliminated if a system were set up conforming to the requirements outlined in paragraph 239 of the judgment.

However, I cannot accept the Court's conclusions as regards the indications given to the Government, as set out in points 3 and 4 of the operative provisions. My disagreement relates to the fact that these indications are given directly by the Court in the operative provisions of its judgment.

By way of introduction, I would note the weakness of the legal basis of the pilot-judgment procedure in its most evident aspect. I am referring to the indication in the operative provisions of the need for the State to amend its own legislation in order to solve a general problem affecting persons other than the applicant. I would observe in this connection that the text of Article 46 of the Convention simply states that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties" and that it is for the Committee of Ministers to supervise the execution of judgments. It seems to me that the expression "any case to which they are parties" may well refer precisely to cases between the applicant and the State that have been decided by the Court (this is logical seeing that its judgments are adopted following adversarial proceedings). The arguments set out by the Committee of Ministers in Resolutions Res(2004)3 and Res(2004)6 of 12 May 2004, which are addressed to governments, are undoubtedly of much importance and must be taken into account by the Court with a view to ensuring that the reasons given in its judgments are as clear as possible. Indeed, that is an essential requirement for enabling governments, under the supervision of the Committee of Ministers, to comply with judgments (Article 46 of the Convention) and to take all general measures necessary to prevent any further violations (Article 1). However, one cannot overlook the fact that the proposals to which the Court refers in paragraph 233 of the judgment were not included in the recent Protocol No. 14 amending the Convention.

Of course, the Court's judgments do have *erga omnes* effects in relation to persons other than the applicant and to other States. The Committee of Ministers' activities are clearly influenced by them. However, I would observe in this connection that although the Committee of Ministers' well-established practice of indicating general measures to governments and

asking them to implement them in order to prevent further violations is usually justified on the basis of Article 46 rather than by the Committee of Ministers' general obligations (under Articles 3, 8 and 15 of the Statute of the Council of Europe), it concerns a Convention institution whose nature, composition and responsibilities are entirely different from those of the Court, which reflect the latter's judicial function.

But even without wishing to attach too much weight to the above concerns, after the *Broniowski v. Poland* judgment of 22 June 2004 (no. 31443/96, ECHR 2004-V), I consider that judgments such as the present one undermine the relationship between the two pillars of the Convention system – the Court and the Committee of Ministers – and entrust the Court with duties outside its own sphere of competence. This seems patently obvious to me in the present case, much more so than in *Broniowski*. It gives me cause to suggest that that precedent does not indicate the only possible response to the issues raised here. It is not simply a question of instituting a compensation procedure which, while complex and costly, applies to a series of clearly defined individual cases. On the contrary, the solution to the problem in the present case involves a total overhaul of the legal system governing owners' rights *vis-à-vis* tenants, taking into account all the known difficulties, options and alternatives in such matters and the need to adopt a gradual approach in such a sensitive area – what is more, during the transition from communist to free-market regime. This applies both in future and as regards redress for any past violations.

It is sufficient to have regard to the Court's statements in paragraph 239 to infer that it is entering territory belonging specifically to the realm of politics and that its indications go beyond its jurisdictional competence, which concerns the case between the applicant and the State. Or else – as I am inclined to believe – the Court's indications, in view of their self-evidently vague content, cannot be regarded as binding. In my opinion, they require the Committee of Ministers' intervention in any event, without adding in any way to the system's efficiency (see, *mutatis mutandis*, *Lukenda v. Slovenia*, no. 23032/02, 6 October 2005).

I would add that the caution shown by the Court in recognising that the State has a wide margin of appreciation when laying down rules in such a difficult area might be merely ostensible. Whether by assessing a possible friendly settlement (as in *Broniowski v. Poland* (striking out), no. 31443/96, ECHR 2005-...) or by giving an opinion under Article 46 §§ 4 and 5 as introduced by Protocol No. 14, the Court should cast aside this caution and say, without referring to the position of a particular applicant, whether or not the general measures taken are capable of preventing violations in future. This highlights the nature of the problem I wish to raise here and the consequences of the fact that such indications by the Court are included in the operative provisions of the judgment and hence require "execution".

To conclude, I would emphasise that the issues which I have outlined concern only the nature and content of the operative provisions of the “pilot judgment” which the Court has adopted. Of much more importance – although it is not mentioned in the judgment – is the ensuing adjournment of all similar cases until the general problem has been resolved for all those in the same position as the applicant in the present case. Such an adjournment is fully justified in accordance with the principle of subsidiarity that characterises the Court’s role. This strikes me as a real innovation that may prove effective, especially as it does not undermine the balance of the Convention system, does not call into question the characteristic functions of judicial bodies and encourages the Committee of Ministers to perform its own duties.