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Constitutional Dimensions of the Judicial Restitution of Wrongfully Expropriated Property in Poland

LESZEK BOSEK*
KATARZYNA KRÓLIKOWSKA**

I. INTRODUCTION

The issue of post-war property nationalization and its possible restitution is important for all Central Eastern European countries, but definitely holds a special significance for Poland. This article deals with the legal difficulties associated with restituting property and receiving compensation for property taken in the process of mass nationalization by the communist state in Poland after World War II. The post-war Communist government's decision[1] to nationalize property was executed under special nationalization laws and decrees[2] and on the basis of administrative

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DISCLAIMER: RESPONSIBILITY FOR THE VIEWS AND OPINIONS EXPRESSED IN THE ARTICLE LIES ENTIRELY WITH THE AUTHORS.

1. The most severe laws on nationalization of whole branches of industry were adopted in the period of 1944 to 1947 by the Homeland National Council (Krajowa Rada Narodowa or"KRN") that was a parliament-like communist-controlled political body created during the later period of World War II, accepted and to a large extent controlled by the Soviet Union, and by the Polish Committee of National Liberation (Polski Komitet Wyzwolenia Narodowego or"PKWN"), which was a provisional government proclaimed on July 22, 1944 that exercised control over Polish territory retaken from Nazi Germany under the Homeland National Council.

2. The following legislative acts were enacted by the communist regime to nationalize the following kinds of property in Poland: Dekret z 6 września 1944 r. w sprawie reformy rolnej i rozporządzenia wydane na podstawie dekretu [Decree of September 6, 1944 on Agrarian Reform and Regulation Issued Pursuant to the Decree] (1945 Dz. U. nr. 3 poz. 13) (Pol.); Dekret z dnia 28 listopada 1945 r. o przejęciu niektórych nieruchomości ziemskich na cele reformy rolnej i osadnictwa [Decree of November28, 1945 on Takeover of Certain Landed Property for Purposes of Agrarian and Land Reform] (1945 Dz. U. nr. 57 poz. 321) (Pol.); Dekret z dnia 27 lipca 1949 r. o przejęciu

decisions issued after the war by competent administrative bodies. The state (social) property was further enlarged on a statutory basis.[3]

na własność Państwa niepozostających w faktycznym władaniu właścicieli nieruchomości ziemskich, położonych w niektórych powiatach województwa białostockiego, lubelskiego, rzeszowskiego i krakowskiego [Decree of July 27, 1949 on Takeover of Ownership of Landed Property Not in Actual Possession of Their Owners, Located in Certain Poviats of the Białostockie, Lubelskie, Rzeszowskie and Krakowskie Voivodships] (1949 Dz. U. nr. 46 poz. 339) (Pol.) (agricultural land); Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 12 grudnia 1944 r. o przejęciu niektórych lasów na własność Skarbu Państwa [Decree of December12, 1944 on Takeover by the State Treasury of Ownership of Certain Forests] (1944 Dz. U. nr. 15 poz. 82) (Pol.) (forestry); Ustawa z dnia 3 stycznia 1946 r. o przejęciu na własność Państwa podstawowych gałęzi gospodarki narodowej [Law of January3, 1946 on Nationalization of Core Branches of the National Economy] (1946 Dz. U. nr. 3 poz. 17) (Pol.) (large and medium industry, whole branches); Dekret z dnia 13 listopada 1945 r. o utworzeniu przedsiębiorstwa państwowego "Film Polski" [Decree of November 13, 1945 on Establishment of "Film Polski" State Enterprise] (1945 Dz. U. nr. 55 poz. 308) (Pol.); Ustawa z dnia 8 stycznia 1951 r. o przejęciu aptek na własność Państwa [Law of January8, 1951 on Nationalization of Pharmacies] (1951 Dz. U. nr. 1 poz. 1) (Pol.); Dekret z dnia 8 marca 1946 r. o majątkach opuszczonych i poniemieckich [Decree of March 8, 1946 on Abandoned and Ex-German Property] (1946 Dz. U. nr. 13 poz. 87) (Pol.); Dekret z dnia 6 września 1946 r. o ustroju rolnym i osadnictwie na obszarze Ziem Odzyskanych i byłego Wolnego Miasta Gdańska [Decree of September 6, 1946 on the Agricultural System and Settlement in Regained Territories and the Former Free City of Gdansk] (1946 Dz. U. nr. 49 poz. 279) (Pol.); Dekret z dnia 7 kwietnia 1948 r. o wywłaszczeniu majątków zajętych na cele użyteczności publicznej w okresie wojny 1939-1945 r [Decree of April 7, 1948 on Expropriation of Estates Occupied for Purposes of Public Utility During the 1939-1945 War] (1948 Dz. U. nr. 20 poz. 138) (Pol.); Ustawa z dnia 20 marca 1950 r. o przejęciu przez Państwo dóbr martwej ręki, poręczeniu proboszczom posiadania gospodarstw rolnych i utworzeniu Funduszu Kościelnego [Law of March 20, 1950 on Nationalization of Mortmain Property, Entrusting Farm Land to Parish Priests, and Creation of the Church Fund] (1950 Dz. U. nr. 9 poz. 87) (Pol.); Dekret z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m. st. Warszawy [Decree on the Ownership and Use of Land in Warsaw of October26, 1945] (1945 Dz. U. nr. 50 poz. 279) (Pol.), [the so-called "Bierut Decree"] (selected branches of industry); Obwieszczenie Ministra Gospodarki Komunalnej z dnia 3 września 1968 r. w sprawie ogłoszenia jednolitego tekstu ustawy z dnia 22 kwietnia 1959 r. o remontach i odbudowie oraz o wykańczaniu budowy i nadbudowie budynków [Law of April 22, 1959 on Renovation, Reconstruction, Finishing and Expansion of buildings] (1959 Dz. U. nr. 36 poz. 249) (Pol.); Dekret z dnia 2 lutego 1955 r. o przejęciu taboru żeglugi śródlądowej na własność Państwa [Decree of February 2, 1955 on Nationalization of Inland Shipping Stock] (1955 Dz. U. nr. 6 poz. 36) (Pol.) (urban properties); Ustawa z dnia 30 maja 1962 r- Prawo wodne [Law of March 3, 1962 – The Water Act] (1962 Dz U. no. 34 poz. 158) (Pol.) (water resources).

3. *See, e.g.,* Ustawa z dnia 25 lutego 1958 r. o uregulowaniu stanu prawnego mienia pozostającego pod zarządem państwowym [Law of February 25, 1958 on Regulating the Legal Status of Property Remaining under State Administration] (1958 Dz. U. no. 11 poz. 37) (Pol.); Dekret z dnia 18 kwietnia 1955 r. o uwłaszczeniu i o uregulowaniu innych spraw, związanych z reformą rolną i osadnictwem rolnym [Decree of April 18, 1955 on Enfranchisement and Regulation of Other Matters Relating to Agrarian Reform and Agricultural Settlement] (1955 Dz. U. no. 18 poz. 107) (Pol.); Ustawa z dnia 13 lipca 1957 r. o zmianie dekretu z dnia 18 kwietnia 1955 r. o uwłaszczeniu i o uregulowaniu innych spraw, związanych z reformą rolną i osadnictwem rolnym [Act of July 13, 1957 Amending the Decree of April 18, 1955 on Enfranchisement and the Regulation of Other Matters Related to Land Reform and Agricultural Settlement] (1957 Dz. U. no. 39 poz. 174) (Pol.); Obwieszczenie Ministra Rolnictwa, Leśnictwa i Gospodarki Żywnościowej z dnia 20 października 1989 r. w sprawie ogłoszenia jednolitego tekstu ustawy z dnia 12 marca 1958 r. o sprzedaży nieruchomości Państwowego Funduszu Ziemi oraz uporządkowaniu niektórych spraw związanych z

The Polish legal system allows for restitution and compensation in the so-called "judicial privatization" process of the nationalized property.[4] (i.e., within the boundaries of the ordinary judicial system of the country using typical legal institutions and concepts of domestic private and administrative law).

The legal situation in Poland allows this kind of spontaneous restitution, which other post-communist countries avoided by creating centralized systems or strategic plans for the return of properties or concerning compensation. Poland has not enacted general legislation containing a comprehensive program to address the regulation of nationalized Communist-era private property.[5] Since 1990, attempts have been made at regulating the matter with appropriate legal acts[6] and a number of bills have been proposed.[7]

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przeprowadzeniem reformy rolnej i osadnictwa rolnego [Announcement of the Minister of Agriculture, Forestry and Food Economy of Oct. 20, 1989 Regarding the Publication of a Uniform Text of the Act of March 12, 1958 on the Sale of Real Estate of the National Land Fund and the Ordering of Certain Matters Related to the Implementation of Land Reform and Agricultural Settlement] (1989 Dz. U. no. 58 poz. 348) (Pol.).

4. The terms were first used by the Supreme Court of Poland. *See* Sąd Najwyższy [Supreme Court] II CSK 498/12, June 12, 2013 (Pol.).

5. For experiences of Estonia, Latvia and Lithuania, see Frances H. Foster, *Restitution of Expropriated Property: Post Soviet Lessons for Cuba*, 34 COLUM. J. TRANSNAT'L L. 621, 656 (1996). For an example of the first studies regarding property restitution and transitional justice on post-communist societies, see Vojtéch Cepl, *A Note on the Restitution of Property in Post-Communist Czechoslovakia,* 7 J. COMMUNIST STUD. 368 (1991).

6. The only exception is legislation passed concerning restitution allowing for the claiming of the property of the Catholic Church and other churches as well as of confiscated Jewish communal property, such as synagogues and schools. Poland has passed legislation on communal property returns affecting communal claims. Still, so far no general restitution law regulates the terms, method, and procedure for the privatization ("restitution") of and compensation for property taken from natural persons and legal entities by the socialist government after 1944 on the territory of the Polish state, which was then transferred into state or cooperative property in the socialist economy.

7. *See* William R. Youngblood, *Poland's Struggle for a Restitution Policy in the 1990's*, 9 EMORY INT'L L. REV. 645 (1995). The Polish Government is still creating draft restitution laws to address at least some communist takings, *id*.

The drafts of these bills were connected with the debate on how to combine restitution with the ongoing privatization process[8] and housing privatization.[9] There was no standard model for the privatization process in post-communist countries since every country followed different methods of privatization, adapting to the economic and social circumstances specific to each country. From that perspective, returning the property to all or some groups of former owners whose property was nationalized during communism was only one of the applied models of privatization.[10] On the other hand, an interesting remark draws attention to the fact that Poland's failure to pass a reprivatization bill may be explained, at least in part, by the atypical strength of trade unions which represented distributive justice arguments against restitution.[11]

This article is focused on the judicial reprivatization of nationalized property in Poland where, due to the fact that a comprehensive national restitution law has not been enacted, claimants proceed on an individual basis by filing administrative and civil court actions to recover lost property. From a legal point of view, there is one important difference between judicial and statutory restitution, namely that the nationalization is not illegal in itself and no act of parliament declares nationalization illegal in Poland. This fact has a profound impact on the scope of judicial reprivatization and the margin of appreciation of the judges. Since the collapse of the socialist regime in 1989-1990, it is possible to bring civil

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8. Due to privatization plans, Poland's restitution schemes seemed to favor privatization as the central means of raising funds to satisfy property claims. Through privatizations, most large properties would be sold to private enterprises; thus, the original owners would only receive compensation for lost properties. The Polish privatization scheme would raise funds primarily via selling some companies by public tender or initial public offerings. The main priority seems to be privatizing large industries to promote foreign and domestic investment in the Polish industrial sector. *See* Beata Pasek, *East European Nations Swamped by Post-Communist Restitution Claims Economics*, L.A. TIMES, Apr. 18, 1999, at A4.

9. Housing often presents problems with restitution schemes where current sitting tenants are allowed to buy out the property. As a result, the former owners may only be eligible for compensation. A different approach was adopted, for instance, in the Czech Republic, where propriety was given to the restitution claims. *See* Martin Lux & Martina Mikeszova, *Property Restitution and Private Rental Housing in Transition: The Case of the Czech Republic*, 27(1) HOUSING STUDIES 77-96 (2012). For an explanation of how housing reforms and property restitution are intertwined, see SASCHA TSENKOVA, HOUSING POLICY REFORMS IN POST-SOCIALIST EUROPE: LOST IN TRANSITION (2009); Peter Marcuse, *Privatization and Its Discontents: Property Rights in Land and Housing in Eastern Europe*, *in* CITIES AFTER SOCIALISM: URBAN AND REGIONAL CHANGE AND CONFLICT IN POST-SOCIALIST SOCIETIES 175 (Gregory Andrusz et al. eds., 1996).

10. *See* HAXHI GASHI, A COMPARATIVE ANALYSIS OF THE TRANSFORMATION OF STATE/SOCIAL PROPERTY: PRIVATIZATION AND RESTITUTION IN THE POST-COMMUNIST COUNTRIES – KOSOVO AS A SUI GENERIS CASE OF PRIVATIZATION (2013).

11. *See* Anna Gelpern, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 U. PENN. J. BUS. L. 315, 331 (1993).

and administrative actions before Polish courts to seek restitution of improperly nationalized property or for compensation thereof. Only real confiscations are subject to judicial privatization (i.e., restitution); that is, only those takings that were not justified at that time in the wording and context of legal acts on nationalization and exceeded the limits and prerequisites for mass expropriation. In this sense, under judicial reprivatization, restitution and compensation are being decided on a case-by-case basis, which is why the whole process is also called "decentralized reprivatization."[12]

It must be stressed that judicial reprivatization of nationalized property is still one of the most complex issues in contemporary Polish property and constitutional law, thus raising many legal and policy questions. The courts do not have the competence and legitimacy to pursue a policy of "retroactive justice." The term "retroactive justice" was first used in a Hungarian Constitutional Court ruling allowing statutes of limitations to be extended in order to prosecute specific crimes that occurred under communism.[13] Nevertheless, "retroactive justice" is used broadly to apply to all applications of historical justice considerations, while "transitional justice" refers more narrowly to justice considerations regarding a prior regime. Therefore, the term "transitional justice" is more suitable since retroactive justice policies inherently reflect an acknowledgement of a moral, but not legal, obligation held collectively by groups (i.e., nations), and need a legal basis in the form of special restitution or reprivatization laws enacted by the parliament.[14] Without that collective obligation being expressed in an act of parliament, there is no justification for any restitution policies that burden citizens, because there is not the same feeling of responsibility for previous harm. Because of this, neither the Supreme Court nor the Supreme Administrative Court of Poland want to substitute themselves in place of the democratically elected legislators. Their openness to reversing the injustices of the nationalization process does not change the fact that the courts try to maintain an independent

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12. *See* Ewa Łętowska, *Orzecznictwo sądowe jako instrument reprywatyzacji zdekoncentrowanej, in* STUDIA I ANALIZY SĄDU NAJWYŻSZEGO. MATERIAŁY NAUKOWE "REPRYWATYZACJA W ORZECZNICTWIE SĄDÓW" MATERIAŁY Z KONFERENCJI NAUKOWEJ WARSZAWA, SĄD NAJWYŻSZY 85-96 (Mateusz Pilich ed.) (2016).

13. *See* Krisztina Morvai, *Retroactive Justice based on International Law: A Recent Decision by The Hungarian Constitutional Court*, in Transitional Justice 661 (Neil J. Kritz ed.) (1995).

14. *See* Peter Paczolay, *Judicial Review of Compensation Law in Hungary, in* TRANSITIONAL JUSTICE 669 (Neil Kritz ed.) (1995) (describing that with a collective moral obligation, citizens of a given country feel responsible for the actions of their country, even if the wrongs were committed under a prior government, because they were conducted under the auspices of the country).

attitude towards the issue by refraining from pro-reprivatization interpretations of law and from directly or indirectly undermining the effects of the nationalization laws.

Therefore, the purpose of this article is to analyze the current situation, in which classical judicial means are preferred for restitution and reprivatization, and to examine the constitutional problems that arise in connection with transitional justice in this matter. The reasons for the process are described, as well as the methods currently used to settle revindication and reprivatization of property. The article concludes that a restitution process based on judicial reprivatization is limited and this feature of the scheme is exacerbated with time. After twenty-eight years of transition, the courts deciding individual cases must implement constitutional values relating to the principles of legal certainty and security, protection of legitimate expectations and the sense of common good. Lastly, it shows how courts have in recent years dealt with the inevitable consequences of the lapse of time in restitution cases.

II. The Scope of Judicial Reprivatization

Unlike in most countries in Central and Eastern Europe, reprivatization in Poland comes down to judicial review of the correctness of the decisions issued in the past with regard to post-war nationalization laws and decrees. Any obligation of the state may arise only in cases where the nationalization or expropriation was not lawful under the then valid law; a situation which, according to some estimates, would be true in almost thirty percent of cases.[15] Each decree contained provisions relating to the nationalization of only one given type of property (i.e., agricultural property). The administrative authorities were not authorized to extend the scope of application of a decree to cover other goods (i.e., cultural goods or other types of property not specifically stipulated in the decree). Any decision relating to such property can be declared invalid and should be annulled. On the other hand, any decision issued within those boundaries would be sustained. In line with the decrees, facts indicating that nationalized property was not used for the purpose declared in the nationalization decree, like the rural reform, but used for other purposes, would not justify the claim for revindication of the property.[16]

15. *See* Karol Sobczak, *Reprywatyzacja*, Przegląd Ustawodawstwa Gospodarczego [REV. ECON. LITIG.] 8 (2000).

16. *See, e.g.,* Sąd Najwyższy [Supreme Court] III CK 536/02 June 24, 2004 (Pol.); Sąd Najwyższy [Supreme Court] III CK 536/02 Dec. 6, 2005 (Pol.); *see also* Sąd Najwyższy [Supreme Court] III CKN 1492/00, Feb. 13, 2003 (Pol.).

To date, there have been successful examples of property recovered or compensation granted as a result of court cases. For instance, the PKWN Decree of September 6, 1944 on Agrarian Reform applies to landed real estate properties in the ownership of physical persons or legal persons. They were immediately transferred in their entirety,[17] without any compensation to the owners, into the ownership of the State Treasury for the purposes indicated in Article 1 of the Decree. Properties were destined for the purposes of rural land reform if their total size exceeded either one hundred hectares of total area or fifty hectares of farming land. However, within the territory of the Voivodships of Poznan, Pomerania and Silesia the same applied to properties exceeding one hundred hectares of total area, regardless of the proportion of farming land they contained. The law has thus been infringed upon when a procedure was not followed or when the property was not of the type permitted to be nationalized under the law.

Any restitution attempt could be based on the nullity of the nationalization decision. As a general rule, the procedure does not differ from that applied to the return of other property wrongfully seized by the state on the grounds of an invalid administrative act. It is possible to challenge the validity of the regulation. Judicial reprivatization is carried out before two independent branches of the judiciary with the administrative courts having a prevailing role over the civil courts. The Supreme Court[18] and the Supreme Administrative Court[19] both rejected the idea of unifying the proceedings, thereby maintaining the dual path for seeking justice.[20] Thus, the main legal claim is brought before administrative bodies so that post-war administrative decisions can either be annulled or declared contrary to law. The administration authorities determine whether the property was, in the past, taken in violation of one of the nationalization laws.

17. Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 6 września 1944 r. o przeprowadzeniu reform rolnej [Decree of September 6, 1944 on Agrarian Reform] (1944 Dz. U. nr. 4 poz.17) (Pol.). The PKWN Decree caused *ex lege* effects consisting of the transfer into the ownership of the State Treasury. This effect was somehow independent of whether on the day the Decree entered into force, the given parts of the territory of the state were already actually under the rule of the Polish Committee of National Liberation, or whether they still remained under German occupation. The Decree mentioned some voivodeships, which were still under the German occupation in the days when the Decree on rural land reform was issued and published.

18. *See, e.g.,* Sąd Najwyższy [Supreme Court] III CZP 121/10, Feb. 17, 2011 (Pol.); Sąd Najwyższy [Supreme Court] III CZP 21/11, May 18, 2011 (Pol.) (according to this line of judicial decisions, the ordinary court is competent to rule on whether a property is subject to any of the nationalization laws only if the administrative competent institution or body denies its competence). *See also* Sąd Najwyższy [Supreme Court] I CSK 752/13, Nov. 14, 2014 (Pol.).

19. *See* Naczelny Sąd Administracyjny [Supreme Administrative Court] I OPS 3/10, Jan. 10, 2011 (Pol.).

20. *See* Trybunał Konstytucyjny [Constitutional Tribunal] P 107/08, Mar. 1, 2010 (Pol.).

Legal challenges to wrongful nationalization decisions or to decisions wrongfully refusing restitution are made pursuant to Articles 156, 157 and 160 of the Polish Administrative Procedure Code ("PAPC").[21] Article 156 Section 1 of the PAPC lists seven reasons to declare the administrative decision null and void.[22] Pursuant to Article 156 Section 2 and 7 of the PAPC, a public administration authority shall declare a decision invalid if, among other reasons, the decision has been issued without a legal basis or by grossly infringing the law, or if the decision contains a defect which renders the decision invalid by operation of law.[23]

Nevertheless, there is one important statutory time cap, which makes the application for restitution in kind unsuccessful after a significant passage of time. According to Article 156 Section 2 of the PACP, as a general rule, a wrongful decision, even that containing a defect which renders the decision invalid by operation of law, cannot be declared null and void only if a period of ten years has elapsed since the day the decision was served or pronounced or if the decision caused irreversible legal consequences.[24] Article 158 of the PACP states that where a decision cannot be declared null and void because of the grounds laid out in Article 156 Section 2 of the PACP, the decision may only be declared as "issued contrary to the law."[25] That means that restitution in kind is not possible since such a decision does not eliminate a wrongful decision and its binding effect, but it still allows compensation for wrongful administrative decisions that play a role in the compensation of damages. In other words, pursuant to the statutory provision it is always possible to launch administrative and compensatory procedures.[26]

Nevertheless, there is a significant exception with no time limits for annulment when the final decision was issued without legal basis or with

21. Ustawa z dnia 14 czerwca 1960 [Act of June 14, 1960 Code of Administrative Procedure] arts. 156, 157, 160 (1960 Dz. U. no. 30 poz. 168) (Pol.) [hereinafter Polish Administrative Procedure Code].

22. *Id.* art. 156 (providing that an application to declare the administrative decision null and void shall be accepted by the organ which made it if the decision: (1) has been issued in breach of the rules governing competence, (2) has been issued without legal basis or with manifest breach of law, (3) concerns a case already decided by means of another final decision, (4) it has been addressed to a person who is not a party to the case, (5) was unenforceable at the day of issuance and has been unenforceable ever since, (6) its enforcement would effect in crime, (7) it has a flaw making it null and void by the force of law).

23. *Id*. art. 156, §§ 2, 7.

24. *See id.*

25. *See id*.art. 158 §2.

26. *See id*. art. 160. It must be kept in mind that there is a statutory limitation for a claim under Article 160 of the PACP; a claimant who is successful in getting the nationalization decision declared invalid or at least issued contrary to law has only three years to claim damages under Article 160.

manifest breach (gross infringement) of law.[27] That kind of wrongful decision is not subject to such time limitations and can always be challenged. As a consequence, ten years from the date when an administrative decision in a nationalization case is issued, and at any time if the decision in that matter has produced irreversible legal effects, it shall not be declared null and void, i.e., the restitution in kind would be not possible. Both the broad judicial interpretation of the term "causing irreversible legal consequences" and lack of time caps for the gravest shortcomings of post-war administrative decisions are regarded as a restitution-friendly resolution of the colliding norms and values.[28]

However, in one of its recent judgments, the Polish Constitutional Tribunal emphatically pointed out the need to introduce and maintain time caps and limitations of claims in cases concerning manifest breaches of nationalization laws.[29] In a case involving the claims of a former owner of Warsaw property who, under the Bierut (Warsaw) Decree, submitted an overdue application for restitution in 1946, which municipal authorities wrongfully accepted in 1948, the Tribunal ruled that the lack of time caps and the possibility to declare administrative decisions null and void did not conform with Article 2 of the Constitution.[30] In 2012, when the case was finally heard by city officials, a period of seventy years had elapsed, and such an application meant that the former owner still had the potential possibility to regain real property. After such a long period of time, nullity of post-war decisions may lead to a destabilization of the legal order and negatively impact confidence in the legal system. Finally, it may be simply unjust, especially when certain rights had already been conferred upon a party on the basis of an administrative decision wrongfully made by state authorities.

The rule of law and legal certainty are the cornerstones of democratic states. The rule of law aims at restoration of a lawful state of affairs, or at least of removal of wrongful acts and decisions. But the legality of actions of competent state authorities is not absolute and should be adjusted to other constitutional values. The imperative duty of the state to remove any defective administrative decisions, on the basis of which a party has already acquired a right or legitimate expectation, does not prevail in extraordinary circumstances. The rule of law is constrained by its

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27. *Id.*art. 156 § 2.

28. Bohdan Zdziennicki, *Kolizja norm i wartości w sprawach reprywatyzacyjnych in* STUDIA I ANALIZY SĄDU NAJWYŻSZEGO. MATERIAŁY NAUKOWE "REPRYWATYZACJA W ORZECZNICTWIE SĄDÓW" MATERIAŁY Z KONFERENCJI NAUKOWEJ WARSZAWA, SĄD NAJWYŻSZY 64-69 (Mateusz Pilich ed.) (2016).

29. *See* Trybunał Konstytucyjny [Constitutional Tribunal], P 46/13, May 12, 2015 (Pol.).

30. *See id.*

other side, i.e., the need for stabilization of the socio-economic situation as well as social and property relations that occur as a consequence of (potentially wrongful) administrative decisions. One such manifestation of this legal security is the stabilization of one's legal situation determined by authorities empowered to act, which is then projected into the stabilization of social relations in a given society. What is more, the rule of law can be limited by the constitutional principles of trust in public institutions, legal certainty, and the protection of legitimate expectations; all of which are general principles of constitutional law stemming from Article 2 of the 1997 Constitution,[31] as laid down in a long line of the Tribunal's decisions. Although a limiting timeline on claims cannot be regarded as a constitutional right, the concept of prescription arises from the constitutional principle of legal certainty and is strictly connected with the principle of the democratic state.

The impact of the judgment in case P 46/13 on the jurisprudence of the administrative courts has been profound. Although the judgment concerns legislative omission (unconstitutionality of the content which was not regulated in the Code) and therefore requires implementation by the Parliament (which has not yet happened), administrative courts have already changed the way in which the law is interpreted. Wrongful decisions, which for a long time enjoyed a presumption of lawfulness, should be sustained only after ten years, despite being issued with a fundamental breach of law. Stabilization of administrative relations after a longer period of time is in the interests of public order and it is protected by constitutional values even in terms of the protection of bad-faith acquirers of rights and expectations.

The Tribunal's arguments have also influenced the interpretation of private law rules, as they are being applied by ordinary civil courts in other cases involving restitution issues. Limitation of legal claims is a universal legal institution that may be applied to the entire sphere of private law. The acquisition of landed property under the doctrine of adverse possession is recognized in all civil and common-law jurisdictions.[32] The Polish Civil Code permits the acquisition of ownership by adverse possession in Articles 172-176, as a legal instrument, which corrects the differences between the legal status and the actual state of affairs.[33] According to general property law, acquisition of ownership by adverse

31. *See* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION] Apr. 2, 1997, art. 20 (Pol.).

32. *See* BRITISH INST. OF INT'L AND COMPARATIVE LAW, ADVERSE POSSESSION (2006).

33. Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [The Act of April 23, 1964 Civil Code] art. 172-176 (1964 Dz. U. no. 16 poz. 93) (Pol.) [hereinafter Polish Civil Code].

possession is irrevocable after thirty years, even if the uninterrupted and spontaneous possession is in bad faith.[34] Polish law does not provide for any form of compensation for someone who loses proprietary title by way of adverse possession after the expiry of the limitation period.

However, in the first years of the transition period, despite many inconsistencies in the changing legal environment and due to the early stage of the restitution proceedings, the courts adopted a pro-restitution approach in interpreting the binding laws.[35] Before 1989, the Supreme Court excluded the possibility of the State Treasury acquiring nationalized property through general rules relating to adverse possession and on the basis of the principle of public credibility of land and mortgage registers.[36] In 1992, the Supreme Court adopted the rule that the State Treasury and legal state entities (such as state enterprises) could not count the period of possession from the moment of the transfer of nationalized property to state property to the moment of declaring the nationalization decision null and void, i.e., the whole period of fifty to sixty years during which possession was exercised on the basis of wrongful decisions.[37] It was also explained that possession of the property in bad faith by the State Treasury was not spontaneous and could not lead to acquisition through adverse possession because the declared nullity of the nationalization decision excludes (with the *ex tunc* effect for the past) any similarity to owner-like behavior. This extraordinary interpretation of the general rules of adverse possession has been criticized by prominent scholars,[38] and the Supreme Court changed its position only ten years later.[39]

34. *See id*. In order to acquire ownership by way of adverse possession two conditions must be met; uninterrupted possession as an autonomous possessor (i.e., the possessor must act "as the owner"); and a defined period of time must lapse, *id*. Limitation periods for adverse possession of real property are 30 years, when the possessor is in bad faith, *id*.

35. Some authors claim that transitional justice relates rather to the moral obligation to address only the issue of the rights acquired during transition without justification. *See, e.g.,* ANNA MŁYNARSKA-SOBACZEWSKA, AUTORYTET PAŃSTWA. LEGITYMIZACYJNE ZNACZENIE PRAWA W PAŃSTWIE TRANSFORMACJI USTROJOWEJ (2010).

36. *See, e.g.,* Sąd Najwyższy [Supreme Court], I CO 11/62, June 7, 1962 (Pol.); Sąd Najwyższy [Supreme Court], II CR 372/65, Sept. 24, 1965 (Pol.); Sąd Najwyższy [Supreme Court], III CZP 35/77, May 13, 1977 (Pol.); Sąd Najwyższy [Supreme Court], III CRN 199/81, Oct. 9, 1981 (Pol.).

37. *See* Sąd Najwyższy [Supreme Court], III CZP 133/92, Nov. 18, 1992 (Pol.).

38. *See* Tomasz Dybowski, *Glosa do uchwały [Gloss to the Resolution],* 5 PRZEGLĄD SĄDOWY [JUD. REV.] 114 (1992) (Pol.).

39. *See, e.g.,* Sąd Najwyższy [Supreme Court], II CK 274/02, Oct. 24, 2003 (Pol.); Sąd Najwyższy [Supreme Court], III CK 401/03, Sept. 23, 2004 (Pol.); Sąd Najwyższy [Supreme Court], III CZP 30/07, Oct. 26, 2007 (Pol.); Sąd Najwyższy [Supreme Court], III CZP 51/13, Sept. 11, 2013 (Pol.).

As far as the rules on adverse possession are concerned, the European Court of Human Rights has declared complaints concerning adverse possession by the State Treasury and municipalities of estates belonging to the persons who emigrated after World War II inadmissible.[40]

Last but not least, as in many other continental European jurisdictions, Polish law does recognize time-bars in property and compensatory claims. Limitations of claims is a very specific institution, whose purpose is to regulate real legal relationships between creditors and debtors by releasing the debtor from an obligation to comply with obligations not pursued by the creditor. As defined in Article 117 Section 2 of the Polish Civil Code, after the limitations period has run, the person against whom a claim is made may avoid satisfying the claim, unless he waives his right to use the statute of limitations as a defense.[41] Equity issues play a very significant role in judgments concerning time-bars for claims in damages,[42] especially in the interpretation of claims for compensation for unlawful administrative decisions under Article 160 Section 6of the PAPC.[43] For instance, in one recent case, the Supreme Court ruled that administrative proceedings concerning restitution in kind (in the form of establishing a perpetual usufruct title to land) pending after the annulment of the negative decision to grant restitution (in the form of temporary ownership under the Bierut (Warsaw) Decree), does not stop the limitation period (on the basis of the Article 123 Section 1 point 1 of the Polish Civil Code) running out on the claim for compensation in damages for refusal to establish the perpetual usufruct. In other words, referring the case back to the administrative authority for a new decision (after a declaration of invalidity of the previous decision) does not justify inaction to damages claims for administrative wrongs.[44]

Nevertheless, the most important issue related to limitation periods in restitution cases is the boundaries of the restitution-friendly approach of Polish courts to claims brought after Communism ended in Poland in 1989. Polish civil and administrative courts have held that while Communism lasted, it was pointless or even impossible to attempt to recover expropriated assets. This view corresponds to the fundamental assump-

40. *See, e.g.,* Borenstein v. Poland, App. No. 6303/04, E. Ct. H.R. (2008); Weitz v. Poland, App. No. 37727/05, E. Ct. H.R.(2009) (concerning properties subject to the municipal administration).

41. Polish Civil Code,*supra* note 33, art. 117 § 2.

42. *See, e.g.,* Sąd Najwyższy [Supreme Court], III CZP 78/14, nr. 66 item 66, Jan. 20, 2015 (Pol.); Sąd Najwyższy [Supreme Court], I CSK 142/13, Dec. 18, 2013 (Pol.).

43. Polish Administrative Procedure Code*, supra* note 21, art. 160 § 6.

44. *See* Sąd Najwyższy [Supreme Court], III CZP 14/16, July 13, 2013 (Pol.).

tion of private Polish law that the statutory time-bars of claims are suspended when the claimant had no objective possibility to seek redress.[45] The judiciary allowed the claimants to invoke extraordinary circumstances like "denied justice" to stop the limitation periods for unlawfully nationalized property until 1989.[46] However, communism as an obstacle ended in Poland in 1989-1990. Since then, there has been no excuse for inaction and the impossibility of reclaiming wrongfully expropriated property will no longer be accepted. The courts expect a demonstration of actions undertaken, proof that claimants have asserted their rights,[47] that legal means were not available in a given period of time,[48] or that possible actions by claimants were pointless[49] or could have resulted in considerable risk for them, their family or the social group they belong to.[50] After 2019, new claims will be barred by the general statutes of limitations.

III. Reasons for the Narrow Scope of Judicial Reprivatization

There are numerous reasons why the courts are reluctant to be "active" and "creative" in restitution cases and stick to the general rules of review of correctness of administrative decisions upholding those expropriations that were conducted within the limits of nationalization laws. Because nationalization was generally not illegal at the time when property was transferred, measures aimed to restore the original state of private ownership cannot be regarded as true restitution or compensation claims unless the nationalization decree states so. In most situations, either it was not unlawful under the law applicable at the time, or any wrongfulness was purged by time. Nationalization is not illegal *per se*, so no general recovery of damages is available.

45. *See* Sąd Najwyższy [Supreme Court], III CZP 72/01, Jan. 31, 2002 (Pol.).

46. *See, e.g.,* Sąd Najwyższy [Supreme Court], III CSK 160/11, Feb. 9, 2012 (Pol.); Sąd Najwyższy [Supreme Court], IV CSK 510/09, May 13, 2010 (Pol.); Sąd Najwyższy [Supreme Court], I CSK 343/12, Oct. 17, 2012 (Pol.); Sąd Najwyższy [Supreme Court], III CSK 204/12, Mar. 21, 2013 (Pol.); Sąd Najwyższy [Supreme Court], II CSK 458/13, May 21, 2014 (Pol.); Sąd Najwyższy [Supreme Court], III CSK 42/14, Dec. 16, 2014 (Pol.).

47. *See, e.g.,* Sąd Najwyższy [Supreme Court], V CSK 269/08, Nov. 21, 2008 (Pol.); Sąd Najwyższy [Supreme Court], V CSK 249/08, Jan. 16, 2009 (Pol.); Sąd Najwyższy [Supreme Court], II CSK 412/08, Jan. 20, 2009 (Pol.).

48. *See* Sąd Najwyższy [Supreme Court], IV CSK 184/13, Dec. 11, 2013 (Pol.).

49. *See* Sąd Najwyższy [Supreme Court], II CSK 17/11, Oct. 7, 2011 (Pol.).

50. *See, e.g.,* Sąd Najwyższy [Supreme Court], II CSK 241/08, Oct. 30, 2008 (Pol.); Sąd Najwyższy [Supreme Court], IV CSK 686/12, May 16, 2013 (Pol.); IV CSK 184/13; V CSK 269/08.

That is why it is doubtful whether the term "restitution" is correctly used to describe efforts to reverse some consequences from the nationalization of private property under the communist regime.[51] Restitution programs are a subset of reparations, which are defined as a legal remedy from a wrongdoer to a victim. Of course, there must be no identity between the wrongdoer and the payer, or between the victim and the beneficiary.[52] Terms such as restitution, return, and repatriation, refer to the handing back of what was stolen, i.e., stolen property to the original possessor or owner. It is clear that various forms of dispossession are treated differently in law, with some covered by private law instruments, and others by public law.[53] Restitution always denotes an unlawful situation,[54] including revocation of the wrongful act and the return of property

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51. *See, e.g.,* ANDRAS OSSKO, LAND RESTITUTION AND COMPENSATION AND PROCEDURES IN CENTRAL EASTERN EUROPE (2002); Mark Blacksell & Karl M. Born, *Private Property Restitution: The Geographical Consequences of Official Government Policy in Central and Eastern Europe,* 2 THE GEOGRAPHIC J. 178, 178-190 (2002); Reiner Frank, *Privatization in Eastern Germany: A Comparative Study,* 27 VAND. J. TRANSNAT'L L.809, 813-14 (1994); Jessica Heslop & Roberto Joel, *Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis,* 11 B.U. INT'L L.J. 243, 252 (1993); Dorothy Jeffress, *Resolving Rival Claims on East German Property Upon German Unification,* 101 YALE L.J. 527, 527 (1991); Mariana Karadjova, *Property Restitution in Eastern Europe: Domestic and International Human Rights Responses,* 3 REV. CENT. & E. EUR. L. 325, 325-363 (2004); Michael L. Neff, *Eastern Europe's Policy of Restitution of Property in the 1990's,* 10 DICKSON J. INT'L L. 357, 376 (1992); David Southern, *Restitution or Compensation: The Property Question, in* TRANSITIONAL JUSTICE 642 (Neil J. Kritz ed., 1995); Lavinia Stan, *The Roof Over Head: Property Restitution in Romania,* 22 J. OF COMMUNIST STUD. & TRANSITION POL. 180, 180-205 (2006); Alena Winterova, *Les procédures de récupération des biens en République Tchéque [Procedures for Recovery of Property in the Czech Republic]* 3 REVUE INTERNATIONALE DE DROIT COMPARE [R.I.D.C] 615, 615 (1997) (Fr.); Gelpern, *supra* note 11, at 331.

52. In other words, the person or people paying reparations do not have to be the people who committed the wrong, nor do the people benefiting from the restitution have to be the people who were themselves harmed. *See* Eric Posner & Adrian Vermeula, *Reparations for Slavery and Other Injustices*, 103 COLUM. L. REV. 689, 691-92 (2003)

53. For a comparative study of the various forms of recourse of cultural property, see Herbert Ganslmayr, *Return and Restitution of Cultural Property*, *in* 31 MUSEUM 62 (1979). *See also* Christian Armbrüster, *La Revindication de Biens Culturels de Point de Vue de Droit International Privé*, 93 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.I.D.C.] 724 (2004) (Fr.).

54. *See* HANS VAN HOUTTE, BART DELMARTINO & IASSON YI, 1 POST-WAR RESTORATION OF PROPERTY RIGHTS UNDER INTERNATIONAL LAW: INSTITUTIONAL FEATURES AND SUBSTANTIVE LAW (2008) (scholars from various disciplines suggest that government apologies for historical injustices fulfill important psychological goals. After reviewing psychological literature that contributes to this discussion, we present a list of elements that political apologies should contain to be acceptable to both members of the victimized minority and the non-victimized majority). *See also* ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000); Wojciech Kowalski, *Restitution of Works of Art Pursuant to Private and Public International Law*, *in* HAGUE ACADEMY COLLECT COURSES ONLINE 288 (2001); THE RIGHTS AND WRONGS OF LAND RESTITUTION: RESTORING WHAT WAS OURS (Derick Fay et al. eds. 2009); Karina Schumann & Michael Ross, *Government Apologies for Historical Injustices,* 30 POL. PSYCHOL. 219-241 (2009); Hans Van Houtte, *Mass Property Claim Resolution in a Post-*

wrongfully taken.[55] Nevertheless, there is a difference between the notions of "reprivatization," on one side, and "restitution"[56] and "confiscation"[57] on the other. These notions are often misunderstood in international literature but should be clearly distinguished.[58] Very rarely, the claims of former owners are described as revindication claims[59] or reprivatization.[60]

A. No Current Constitutional Rule Relating to Post-War Nationalization

First, under the current constitutional law there is generally no reversal of the consequences of the massive postwar expropriation. The Polish Constitution of 1997 guarantees the protection of property[61] and

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War Society: The Commission for Real Property Claims in Bosnia and Herzegovina, 48 INT'L & COMP. L. Q.625-638 (1999).

55. *See* PROPERTY IN EAST CENTRAL EUROPE: NOTIONS, INSTITUTIONS, AND PRACTICES OF LANDOWNERSHIP IN THE TWENTIETH CENTURY (Hannes Siegrist et al. eds.,2015).

56. *See* Piotr Stec, *Reprivatisation of Nationalized Property in Poland*, *in* 1 MODERN STUDIES IN PROPERTY LAW: PROPERTY 2000 357-371 (Elisabeth Cook, ed., 2001). Housing, land and property restitution processes have become a fundamental component of return, reintegration and recovery after wars. *See* RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 275-316 (Scott Leckie, ed., 2003).

57. The differences between these terms are discussed in WIESLAW DUDEK, MIĘDZYNARODOWE ASPEKTY NACJONALIZACJI W POLSCE 28 (1976) and KONRAD OSAJDA, NACJONALIZACJA I REPRYWATYZACJA 3 (2009).

58. *See* Andrzej Kozminski, *Restitution of Private Property, Re-Privatization in Central and Eastern Europe*, 30 Communist & Post-Communist Stud., 95–106 (1997); *see also* Gelpern, *supra* note 11, at 372.

59. *See* TADEUSZ DOMIŃCZYK, ROSZCZENIA REWINDYKACYJNE A STATUS PRAWNY MIENIA PONIEMIECKIEGO, available at www.senat.pl; *see also* Tadeusz Domińczyk, *Mienie opuszczone i mienie poniemieckie*, 9 Przegląd Sądowy 5 (2007) (Pol.).

60. *See, e.g.,*REPRYWATYZACJA W SYSTEMIE PRAWA [MATERIALS FROM THE CONFERENCE ORGANIZED BY THE LEGISLATIVE COMMISSION OF THE POLISH SENATE IN THE COOPERATION WITH THE MINISTRY OF STATE TREASURY] (1999) (POL.); JANINA ANTOSIEWICZ, REPRYWATYZACJA: PRAKTYKA ORGANÓW ADMINISTRACJI: DZIAŁALNOŚĆ PROKURATURY : ORZECZNICTWO SĄDOWE : UPRAWNIENIA BYŁYCH WŁAŚCICIELI 5 (Wydawn 1993); PIOTR KOCIUBIŃSKI, POWOJENNE PRZEKSZTAŁCENIA WŁASNOŚCIOWE W ŚWIETLE KONSTYTUCJI 16 (2013); Łukasz Bielecki, *Nacjonalizacja nieruchomości ziemskich na obszarze południowo-wschodniego pogranicza Polski*, 5 REJENT 9, 50 (2007) (Pol.); Paweł Borecki, *Reprywatyzacja nieruchomości na rzecz gmin wyznaniowych żydowskich*, 9 PAŃSTWO I PRAWO 61 (2011) (Pol.); Tomasz Filipowicz, *Prywatyzacja nieruchomości przejętych ustawą nacjonalizacyjną*, 3 NIERUCHOMOŚCI 12 (2008) (Pol.); Aneta Gajewska, *Reprywatyzacja a konstytucyjnoprawne podstawy własności w III RP, in* IUS ET VERITAS. KSIĘGA POŚWIĘCONA PAMIĘCI MICHAŁA STASZEWICZA, (Dariusz Dudek et. al eds., 2003); Edward Gniewek, *O reprywatyzacji mienia państwowego – refleksje ogólne*, *in* PRZEKSZTAŁCENIA WŁASNOŚCIOWE W POLSCE (determinanty prawne) (1996).

61. *See* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION] Apr. 2, 1997(Pol.). Article 20 states that a social market economy, based on the 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. According to Article 21 § 1, the Republic of Poland shall protect ownership and the right of succession. Article 64 §§ 1 and 2 state

the rule of law (Article 2),[62] but only *pro futuro* as it was confirmed by the Supreme Court (full panel of the Civil Law Department) in the resolution of March 31, 2011.[63] Most contemporary constitutions enumerate property among the protected rights, albeit merely takings and not restitution as such are constitutionally regulated. No constitutional court in Europe has yet held that the right to property (as expressed in Article 64 of the Polish Constitution[64]) would require the restitution of the property taken by the communist or socialist regime. For instance, the German Federal Constitutional Court stated that restitution or compensation is not based on the right to property but rather on the general principle of fairness and justice or on the principle of the social state.[65] Also, the Hungarian Constitutional Court determined that it must be denied that compensation may be based on the right to property.[66] This approach resembles the jurisprudence of the European Court of Human Rights, as the Covenant does not protect the right to have expropriated or nationalized property restituted. The argument that the Convention does not guarantee the right to restitution of property was repeated in the *Rucińska* cases[67] and refined in *Broniowski*.[68] The hope that long extinguished property rights may be revived cannot be regarded as 'possession' in the meaning of the Convention and its Protocol No. 1.

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that everyone shall have the right to ownership, other property rights and the right of succession and everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. Article 21 § 2 reads as follows: "Expropriation may be allowed solely for public purposes and for just compensation." Property is irreversibly converted to state use. In such instances, returning the property to its former owner is impossible. If the property is excluded from restitution schemes because of "state needs," former owners are only eligible for compensation. Article 64 states that the right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right. Article 77 § 1, everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.

62. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION] Apr. 2, 1997, art. 2, (Pol.).

63. Sąd Najwyższy [Supreme Court], III CZP 112/10, Mar. 31, 2011 (Pol.).

64. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION] Apr. 2, 1997, art. 64, (Pol.).

65. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 23, 1991, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 84, 90 (Ger.).

66. *See, e.g.,* Hungarian Compensation Act (Act No.21/1990 (Hung.), Hungarian Compensation Act (Act No. 27/1991 (Hung.); Hungarian Compensation Act (Act No. 10/1992 (Hung.); Hungarian Compensation Act (Act No, 64/1993) (Hung.). *See also* LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY THE HUNGARIAN CONSTITUTIONAL COURT 108, 151 (2000).

67. Rucińska v. Poland, App. No. 33752/96, Eur. Ct. H.R. (2000).

68. Broniowski v. Poland, App.No. 31443/96, Eur. Ct. H.R. §182 (2004).

What is more, the democratic 1997 Polish Constitution has no retroactive effect. The same applies to the constitutional protection of property rights that was first established in the Third Polish Republic since the Law of December 29, 1989[69] amending the socialist 1952 Constitution.[70] Also, the practice of the European Court of Human Rights does not force countries to return nationalized property, due to the fact that ECHR, specifically Protocol 1, Article 1, does not have a retroactive force for the time when the nationalization of properties occurred, because the countries were not signatories of the Convention.[71] For instance, under the relevant Czech law,[72] as applied and interpreted by domestic authorities, the applicant neither had a right nor a claim amounting to a legitimate expectation of obtaining compensation and, therefore, could not be regarded as having a "possession" within the meaning of Article 1 of Protocol No. 1.[73] Hence, the Court in Strasbourg refuses to examine the nationalization of properties, on account of *ratione temporis*. The Covenant entered into force with respect to Poland in 1977 and therefore, the Polish state may not be held responsible under its provisions for facts that occurred before that date.[74] Consequently, the Court is not competent, *ratione temporis*, to examine the expropriation that occurred in 1945-1962 (even if they would be regarded as breaches of the Convention but occurred before its competence was accepted by the State against which the complaint is made) nor its continuing effects. In the context of post-war Czechoslovakian expropriations under the Beneš decrees, recognition of old property rights, long since impossible to exercise effectively, was excluded.[75]

69. Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej [The Act of December 29, 1989, amending the Constitution of the Polish People's Republic] (1989 Dz. U. nr. 75 poz. 444) (Pol.).

70. Prior to the current 1997 Constitution, the country was governed by the so-called Small Constitution of 1992, which once again amended only the main articles of the Constitution of 1952. The law of 1989 entered into force stating in Article 7 that expropriation must be only for the public purpose and against just compensation.

71. European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 1, protocol 1.

72. Tomáš Bata v. Czech Republic, App. No. 43775/05, Decision of June 24, 2008, Eur. Ct. H.R. ¶ 78 (2008).

73. European Convention on the Protection of Human Rights and Fundamental Freedoms, *supra* note 71, protocol 1.

74. *See* Jasiūnienė v. Lithuania, App. No. 41510/98, Judgement of Mar. 6, 2003, Eur. Ct. H.R. § 38 (2003). For a similar decision concerning Hungary before the U.N. Human Rights Committee, see Somers v. Hungary, Views of the U.N. Hum. Rts. Committee, Comm. No. 566/1993, CCPR/C/53/D/566/1993 (1996).

75. *See* Gratzinger v. Czech Republic, App. No. 39794/98, 35 Eur. Ct. H.R. 202 (2002) (holding that if a violation occurred at a time when the Convention was not yet in force, or before the respondent State had accepted the competence of the European Commission of Human Rights to

Nevertheless, so-called continuing violations are distinguishable from instantaneous acts with lasting effects. The Commission dealt for the first time with the concept of continuing violations in the *De Becker* case. But, although the concept encompasses various types (continuing situations *sensu stricto*, composite acts and complex acts),[76] it cannot be applied to the consequences of post-war communist nationalization. A continuing violation of the Convention is a situation which originates before the date on which the Convention entered into force but which continues after that date.[77] Thus, the concept of continuing violations has little application in cases concerning restitution of post-war nationalized property. Only a current administrative decision stating that property of the claimant was not subject in the past to the nationalization laws can be treated as a decision conferring legitimate expectations and legal interest, which are protected as "possessions" in the meaning of the Article 1 Protocol 1 to the ECHR.[78]

Second, the Supreme Court rejected the idea of applying the constitutional requirement of state liability for wrongful legislation (Article 77 of the Constitution) with retroactive effect to takings and expropriation acts that occurred in the period from 1944 to 1989.[79] The starting point for new rules on state liability in damages, as stated in Article 77 Section 1 of the Constitution, is October 17, 1997.[80] Therefore, the nationalization decrees cannot be confronted with the current constitution on this matter either.[81] There is no possibility of applying new provisions on state

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deal with individual petitions, the Commission has no competence *ratione temporis* to deal with such a violation). *See also* Szechenyj v. Hungary, App. No. 21344/93, Eur. Ct. H.R. (1993); Gelusek v. Hungary, App. No. 23318/94, Eur. Ct. H.R. (1994); Polacek v. Czech Republic, App. No. 38645/97, Eur. Ct. H.R. (1997); Prezoldova v. Czech Republic, App. No. 28390/95, Eur. Ct. H.R. (1995).

76. The evolution in the Court's jurisprudence from the initial case of *De Becker v Belgium* (1958) until the judgment of the Grand Chamber in *Varnava v Turkey* (2009) is outlined in Antoine Buyse, *A Lifeline in Time: Non-Retroactivity and Continuing Violations under the ECHR*, 76 NORDIC J. INT'L L. 63, 63-88 (2006).

77. For decisions on inadmissibility of complaints see Mach v Poland, App. No. 68750/11, Eur. Ct. H.R. (2016); Woźny v Poland, App. No. 70720/11, Eur. Ct. H.R. (2016) (both cases concern the pre-war state bonds issued in 1936 and interest rates. The complaints were inspired by the judgment of the Polish Constitutional Tribunal of 24 April 2007 r., Ref. No. SK 49/05, stating the non-conformity of one of the provisions of the Law of 1990 amending the Civil Code with constitutional guarantees of property and equal treatment because it limited the indexation by the court of monetary claims stemming from the bonds issued by the State Treasury before 1950).

78. *See* Bennich-Zalewski v. Poland, App. No. 59857/00, Eur. Ct. H.R. (2008).

79. *See* III CZP 112/10.

80. *See* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION] Apr. 2, 1997, art. 77, (Pol.).

81. *See* Trybunał Konstytucyjny [Constitutional Tribunal], K 20/02, Sept. 23, 2003 (Pol.) (according to the resolution of the Supreme Court consisting of seven judges of May 19, 2009, III CZP

liability, which entered into force after September 1, 2004, to facts and events that took place in the 1940s and 1950s of the 20th century. Therefore, the legislative omission of the Council of Ministers to issue a legislative act implementing, or rather introducing, a general compensation scheme and procedure for industrial properties nationalized under the decree that happened before the amendment of June 17, 2004 to the Civil Code entered into force, cannot be a basis of the claim for compensation for legislative wrongfulness.[82] Before 1997, the state was not liable for damages caused by the non-issuance of legal acts against the legislative obligation to do so.[83] Some other scholars claim that in this respect state liability for damages caused by the non-issuance of legal acts against the legislative obligation lacks justification even under in the Article 77 of the Constitution, so it could not even exist before 2004 and entry into force of the Article 417, Paragraph 4 of the Civil Code.[84] The practice of leaving the establishment of the form and extent of compensation to be received up to further governmental regulations is nowadays often found unconstitutional for breaching rule of law requirements such as clarity, certainty and protection of legitimate expectations. For instance, the 1946 Nationalization of Industry Act provided that owners of nationalized property[85] would be compensated by the state. The compensation was to

139/08, OSNC 2009, No. 11 item 144, new rules on the state liability for legislative omission cannot be applied when the duty to enact a given regulation or a bill is not yet fulfilled but was established before the entry of the 1997 Constitution).

82. Ustawa z dnia 17 czerwca 2004 r. o zmianie ustawy — Kodeks cywilny oraz niektórych innych ustaw [Act of June 17, 2004, Amending the Civil Code and Certain Other Laws] (2004 Dz.U. nr. 162, poz. 1692) (Pol.).

83. MAREK SAFJAN, ODPOWIEDZIALNOŚĆ ODSZKODOWAWCZA WŁADZY PUBLICZNEJ (PO 1 WRZEŚNIA 2004 ROKU) 18 (2004).

84. *See* STANISŁAW BIERNAT ET AL. KONSTYTUCYJNE PODSTAWY FUNKCJONOWANIA ADMINISTRACJI PUBLICZNEJ TOM 2 537 (M. Wyrzykowski ed. 2012); *see also* LESZEK BOSEK, BEZPRAWIE LEGISLACYJNE 126, (2007); Leszek Bosek, *Konstytucyjna formuła odpowiedzialności odszkodowawczej administracji publicznej, in* 2 SYSTEM PRAWA ADMINISTRACYJNEGO, (R. Hauseret al. eds., 2012).

85. *See* Ustawa z dnia 3 stycznia 1946 r. o przejęciu na własność Państwa podstawowych gałęzi gospodarki narodowej [Nationalization of Industry Act] (1926 Dz. U. nr. 3, poz. 17) (Pol.). According to Section 1 of the Nationalization of Industry Act, "in order to ensure the planned rebuilding of the state economy, the economic sovereignty of the State and to foster the general wellbeing, the State shall take over ownership of enterprises on the conditions laid down in this law," *id.* Sections 2(1) and 3(1) of the Nationalization of Industry Act identified those properties that could be nationalized. The Polish state could nationalize, inter alia, all mining and industrial enterprises in the following sectors of the state economy: mines and mining leases subject to mining law; oil and gas industry – including mines, refineries, gasoline production and other processing plants, gas pipes and synthetic fuel industry; companies that generate, process or distribute electricity or gas; water supply companies serving more than one municipality; steelworks, aviation and explosives industry; armaments, aviation and explosives industry; coking plants; sugar factories and refineries; industrial distilleries, spirit refineries and vodka production plants; breweries

be paid in the form of bonds to be issued (probably governmental bonds) and, only in exceptional cases, in cash. A special law, which was never adopted, would have regulated the issuance, trade and usage of such bonds. Section 7 set out the general principles by which compensation would be paid, including that owners of nationalized enterprises "shall receive compensation from the State Treasury within one year of which a notice of final determination of the amount of compensation due has been served on him" as determined by special commissions, whose rules and procedures would be determined by a Cabinet Ordinance.[86] However, these special commissions were never set up during the Communist era. The post-Communist governments have also never set up the commissions.

In those exceptional cases when the state assumed the obligation to compensate property losses, such obligations were not fulfilled. In these situations, the right to compensation is recognized as flowing from the state's lack of compliance (constitutional omission). But this standard does not apply to omissions that happened before 1997. In this case, no entitlement is presumed, nor is any obligation of the government toward former owners recognized.[87] This approach is also confirmed in the jurisprudence of the European Court of Human Rights.[88]

Third, the Polish Constitution contains no provision addressing the issue of reprivatization of communist-state property. In some of the Central and Eastern European countries, legitimacy, validity and lawfulness of the post-war nationalization has been contested and undermined *en bloc*.[89] For instance, the Albanian restitution law implements Article 181

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with an annual output exceeding 15,000 hectoliters; yeast production plants; grain plants with a daily output exceeding fifteen tons of grain; oil plants with an annual output exceeding 500 tons and all refineries of edible fats; cold stores; large and medium textile industry; printing industry and printing houses; (B) industrial enterprises not listed in (A) if they are capable of employing in the production more than fifty persons on one shift; and (C) all transport enterprises (standard gauge and narrow – gauge railways, electric railways and aviation transport enterprises) and communication enterprises (telephone, telegraph and radio enterprises).

86. *Id.*

87. For cases relating to Article 7, § 4 and § 6 of the law of 1946 on Branches of Economy, see Sąd Najwyższy [Supreme Court], III CZP 82/05, Nov. 24, 2005 (Pol.); Sąd Najwyższy [Supreme Court], I CSK 273/07, Dec. 5, 2007 (Pol.). For cases relating to Article 9 Sec. 3 of the 1945 Bierut Decree, see Sąd Najwyższy [Supreme Court], I CSK 441/07, Mar. 12, 2008 (Pol.); Sąd Najwyższy [Supreme Court], I CSK 352/09, Mar. 4, 2010 (Pol.).

88. Inadmissibility of complaints, see Pikielny v. Poland, App. No. 3524/05, Eur. Ct. H.R (2012), Ogórek v. Poland, App. No. 28490/03, Eur. Ct. H.R. (2012).*See also* Lubelska Fabryka Maszyn i Narzędzi Rolniczych PLON v. Poland, App. No. 1680/08, Decision of Oct. 3, 2017, Eur. Ct. H.R. (2017) (declaring the application inadmissible).

89. *See* Saida Bejtja & Dritan Bejtja, *Private Property Issues in Eastern Europe in Restitution and Compensation Problems*, 3 ACADEMIC J. OF INTERDISCIPLINARY STUDIES. 1 (2014); *see also*

of the Albanian Constitution of 1998, which obliged the state to issue "laws for the just resolution of different issues related to expropriations and confiscations done before the approval of this Constitution."[90] The principles and rules of ownership settlement in restitution law also apply to legal provisions issued by the new regime between 1990 and 1998. It must be noted that an even more clear but extraordinary constitutional provision requires "just" regulation and introduces no constitutional obligation to return expropriated or even confiscated property in kind to the former owners; also the compensation does not have to be full, but should be just (i.e., fair).[91] However, the Albanian case is an exception. In one of the rulings, the Hungarian Constitutional Court made it clear that without a clear constitutional provision of that kind, any statutory restitution regulated in the case of nationalized properties is neither a "right" nor an "obligation" of the state but a gratuitous act of the state.[92] Those initiatives were undertaken to reverse the nationalizations of socialism by returning property or paying compensation to former owners. For instance, the Hungarian compensation law and the scheme[93] is a sign of state generosity[94] and has the function of an *ex gratia* allotment.[95] Some other constitutional courts held that the goal of restitution law is and should be rectification of past wrongs,[96] but without any indication that it is an obligation of the state. In a decision reached by the German Constitutional Court, it was stated that a significant factor affecting the design of the restitution in that country was the German concept of *Vergangenheitsbewältigung,* which ought to be translated as "coming to terms with the past."[97] In other jurisdictions, restitution was regarded rather as a means

G. Douglas Harper, *Restitution of Property in Cuba: Lessons Learned from East Europe*, ASCE 1999 410 (1999).

90. *See Opinion on the Draft Law on Recognition, Restitution and Compensation of Property of the Republic of Albania,* European Commission for Democracy Through Law (Venice Commission), CDL-AD(2004)009, 277/2004, 3 (Mar. 16, 2004); *see also* Law on Restitution and Compensation of Property, Law No. 9235, Jul. 29, 2004 (Alb.).

91. *Id.*

92. *See* Paczolay, *supra* note 14, at 669.

93. In this case, the Hungarian Constitutional Court was asked for an advisory opinion on the question of whether the government could differentiate between the special restitution laws the type of compensation awarded, based on the type of property that had been held.

94. *See* Alkotmánybírósága (AB) [Constitutional Court], 1057/G/1990, AB 21/1990 (Hung.).

95. *See* Alkotmánybírósága (AB) [Constitutional Court], April 18, 1991, AB 16/1991 IV.20 (Hung.), Magyar Kozlony 1991/42 (Hung.) (striking down the provisions of the First Compensation Law which allowed restitution of agricultural property because they deprived existing agricultural cooperatives of their property without expropriation proceedings and adequate compensation).

96. *See* Latvijas Republikas Satversmestiesa [Constitutional Court of the Republic of Latvia], No. 04-01(99), Apr. 20, 1999; *see also* Naléz Ústavníhosouduzedne 24.3.2004 (ÚS) [Decision of the Constitutional Court of Mar. 24, 2004], sp.zn. I ÚS 38/02 (Czech).

97. *See* Heslop & Joel, *supra* note 51, at 252.

of speeding up privatization and developing a market economy, or property compensation was declared as a social goal.[98] A similar conclusion was reached in Estonia, where restitution was seen as ownership reform undertaken in the general public interest and as a specific task of the state—not as a moral obligation, but rather as a task in building up the rule of law and market economy.[99] In Poland, the Constitutional Tribunal identified the "beneficial social aspect" of the compensation scheme dealing with the properties left beyond the Bug River.[100] To summarize, even the reasoning for introducing statutory restitution schemes is described as being based on the idea that, once introduced, such restitution programs would achieve a more favorable social result than being based on justice or fairness, much less an obligation toward expropriated persons.

B. No Constitutional or International Rule in the Past

The common solution in the post-socialist states is the recognition of validity of the pre-constitutional law in general. In that way, Poland respects the principle of continuity of the state and law acts. In other words, the collapse of the communist system did not lead to the annulment of earlier nationalization legislation.

What is more, one of the fundamental cornerstones establishing the limit of judicial reprivatization in Poland is the fact that nationalization itself was not illegal at the time it was enacted and executed. The nationalization and expropriation acts were legally carried out pursuant to the nationalization decrees made in the past, even if they would infringe on current standards for the protection of property[101] and would today constitute cause for restitution and compensation claims.[102] Today, recognition of minimum standards for governmental takings is in line with modern international law and the current positions adopted by democratic countries. While the provision allows government takings, it requires a legitimate public use justifying the takings and compensation for property owners.

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98. *See* Alkotmánybírósága (AB) [Constitutional Court] AB 15/1993 (Hung.); Alkotmánybírósága (AB) [Constitutional Court], AB 1543/B/1991 (Hung.). The same view on restoration of ownership rights to land was expressed in Lietuvos Respublikos Konstitucinis Teismas [Constitutional Court of the Republic of Lithuania], 20/94-21/94, Mar. 8, 1995.

99. *See* Riigikohus [Supreme Court], No. 3-4-1-10-2000, Dec. 22, 2000 (Est.).

100. *See* Trybunał Konstytucyjny [Constitutional Tribunal], K 2/04, Dec. 15, 2004 (Pol.).

101. *See* RACHELLE ALTERMAN, TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS (2010).

102. *Compare* U.N. Yearbook of the Int'l Law Commission, 53rd Sess., mtg. at 26, U.N. Doc. A/56/10 (2001).

First, despite the political controversies, it is the accepted view that nationalization laws in Poland were issued by the internationally recognized government of that time. Therefore, all legislation from 1944 through 1989 (not only the nationalization laws of 1944 through 1962), is still considered valid.[103] Most nationalization laws and decrees were not formally derogated. Therefore, after 1990, the Polish Constitutional Tribunal had many opportunities to examine the legality of the issuance of the nationalization laws and decrees (their conformity with the previous constitutions). However, it did not examine their legality, nor did it examine the conformity of the contents of the decrees to the presently binding constitutional norms.

In an early decision, the Tribunal acknowledged that full appraisal of the sovereignty and legality of the Polish Committee of National Liberation as a Polish lawmaker belongs to the democratic founders of the political system.[104] The Constitutional Tribunal stated that the issue of the legality of the operation of the state, which authorities enforced upon Poland in 1944, today belongs to the sphere of historical and political judgments. Such judgments cannot be directly transferred to the sphere of legal relations established in those times. In other words, the lack of constitutional legitimacy of such organs, such as the PKWN, the KRN, and the Provisional Government, as well as the questionable legitimacy of the organs existing in later times, cannot have consequence (ignoring the fact that they effectively exercised state authority).

Consequently, the Constitutional Tribunal decided in 2001 to discontinue the proceedings launched by the constitutional complaint to determine the nonconformity of one of the provisions of the Decree of the Polish Committee of National Liberation of September 6, 1944 on the implementation of rural land reform to some articles of the 1997 Constitution.[105] Although the nationalization decrees and laws had binding force equivalent to acts of parliament (since they did not differ from acts of parliament in terms of their legal force and once introduced into the legal system must be ranked in the same way as ordinary acts of parliament and granted equal status in the hierarchy of the sources of law with the acts of parliament),[106] the reason for the cessation of the proceedings regarding the challenged provisions was the fact that its binding force

103. *See* RECHTSFRAGEN DER TRANSFORMATION IN POLEN: SCHWEIZERISCH-POLNISCHES KOLLOQUIUM 19 (Josef Aregger et al. eds., 1995).

104. *See* Trybunał Konstytucyjny [Constitutional Tribunal], W 15/95, Apr. 16, 1996 (Pol.).

105. *See* Trybunał Konstytucyjny [Constitutional Tribunal], SK 5/01, Nov. 28, 2001 (Pol.).

106. *See, e.g.,* Trybunał Konstytucyjny [Constitutional Tribunal], W 3/89, Sept. 19, 1990 (Pol.); W 15/95.

should be regarded as a "single time event." They have exhausted their legal force upon the take-over of the properties specified by the State Treasury and could not be applied subsequently. They do not have any binding force on the day of issue of the judgment by the Constitutional Tribunal because a provision is binding within the legal system as long as it is or may be used as a legal basis for *ex lege* effect or for undertaking any individual acts of the application of the law, whereas the cessation of binding force as the premise for discontinuing the proceedings before the Constitutional Tribunal takes place only whenever such a provision cannot be applied any longer to any existing situation. Therefore, the Decree of the Polish Committee of National Liberation on rural reform was consumed *ex lege* by a single operation on September 13, 1944[107] and, owing to that, it has exhausted its binding force upon the implementation of its purpose; that is, the take-over into the possession of the State Treasury of the specified categories of properties. Its provisions cannot be applied anymore which implies that it cannot be the basis for the take-over of land into the possession of the State Treasury any longer.

As Sadurski positively notes, a massive involvement of constitutional courts in the reparation process could be problematic. This is because strong judicial review may send a negative message, lifting the rights discourse from public discourse to the small world of constitutional experts.[108] Also, the Supreme Court rejected the concept of illegality of the nationalization decrees because of the presupposed lack of the legitimate powers of PKWN.[109] This was followed by other decisions of the Polish Constitutional Tribunal on the discontinuance of the proceedings concerning the PKWN Decree of 1944 on forests.[110] This decree was repealed in 1990 and cannot be applied in any manner because it is not a legal basis for any take-over of forest land by the State Treasury.

Second, also under previous constitutional law, the nationalizations between 1944 and 1961 are not presumed illegal in Poland.[111] Although

107. *See* Wiktor Pawlak, *Z zagadnień prawnych reform rolnej w Polsce Ludowej*; 2 RUCH PRAWNICZY, EKONOMICZNY I SOCJOLOGICZNY 71 (1958); *see also* ROMAN BUDZINOWSKI, PRZYMUSOWE PRZEJMOWANIE NIERUCHOMOŚCI ROLNYCH 1250(1985).

108. *See* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS. A STUDY OF CONSTITUTIONAL COURTS IN POST-COMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 298-99 (2005).

109. *See, e.g.,* Sąd Najwyższy [Supreme Court], III CKN 273/01, Nov. 5, 2002 (Pol.); Sąd Najwyższy [Supreme Court], III CKN 36/02, Oct. 24, 2003 (Pol.); Sąd Najwyższy [Supreme Court], IV CSK 345/09, Feb. 17, 2010 (Pol.); Sąd Najwyższy [Supreme Court], II CSK 174/10, Oct. 6, 2010 (Pol.); Sąd Najwyższy [Supreme Court], III CSK 119/06, Sept. 14, 2006 (Pol.).

110. *See, e.g.,* Trybunał Konstytucyjny [Constitutional Tribunal], P 32/07, Nov. 6, 2007 (Pol.); Trybunał Konstytucyjny [Constitutional Tribunal], SK 8/04, Apr. 6, 2005 (Pol.).

111. There was a draft bill introduced by the Suchocka government in the winter of 1993, which contained listed regulations which, according to the government, were to be presumed illegal.

Article 99 of March 1921 applied,[112] only on July 22, 1952 was a new socialist constitution promulgated. By the adoption of fundamental law, the first and most important chapter of the post-war political, economic and social development of Poland came to an end. The nationalization laws in general, and the Constitution of 1952 in particular, make no reference to compensating the individuals whose property was taken or seized. The economic system based upon the people's socialist-state ownership of the means of production was established, as well as socialist collective ownership, which was aimed at the liquidation of private property and private management of the production means.[113] Although the new basic law embodied communist principles, such principles were, to a greater or lesser extent, imposed upon the country before its enactment.[114]

Article 99 of the 1921 Constitution contained the guarantee of just and fair compensation for expropriation.[115] However, non-conformity of

112. The Polish Committee for National Liberation acted on the basis of the March Constitution of 1921. The 1935 constitution was officially abolished in 1944 and the communist authorities officially returned to the March 1921 Constitution, while introducing many laws based on the socialist system. The Committee also stated that the March Constitution of 1921 would be the Polish constitution until a new one could be written. However, the Constituent Assembly, on February 19, 1947, adopted what is known as the Small or Little Constitution incorporating only most of the basic provisions of the Constitution of 1921.*See* Cyril E. Black, *Constitutional Trends in Eastern Europe, 1945-48*, 11 REV. POL. 197-98 (1949).

113. As to the economic structure, the Constitution of 1952 incorporated the provisions concerning the basic economic order and provided the formal legal framework for the increased and still increasing state activity in the economic field. The concept of "People's Democracy" denotes a state where "as a result of the revolutionary struggles and transformations, the power of the capitalists and landlords has been overthrown" (and "a new social system" was established. *See* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ (1952) [KRP] [CONSTITUTION] July 22, 1952, preamble (Pol.). According to the provisions of the Constitution of 1952, the economic structure was characterized by the gradual elimination of the remnants of the former private enterprise system and by the introduction of a state-directed, state-owned, centrally controlled and planned economy. Referring to the means of production, the people were in possession. The state established planned economy founded on enterprises constituting "social property," which allowed cooperative and social organizations possess, and the development of the economic life took place in line with a National Economic Plan as a sign of socialist state industry, *id.* art. 3 § 3, art. 7 § 1. It was understood as a direction and supervision of all economic activity by the state in the field of foreign trade where the state enjoyed absolute monopoly with complete exclusion of private enterprises, *id.* art. 7 § 2.

114. In the literature, the law's strict adherence to the Soviet Constitution of 1936 was noticed as well as the efforts to follow the pattern of "the full realization of the Socialist system." KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ (1952) [KRP] [CONSTITUTION] July 22, 1952, art. 14 § 1 (Pol.); *see also* Stephen Gorove, *The New Polish Constitution*, 1954 WASH. U. L. REV., No. 3, 261-270 (June 1954) at 262 (The country, guided by "the historic experience" of the Soviet Union, established a socialist society and became the last East European satellite to produce a full-fledged post-war socialist constitution).

115. Article 99 reads as follows: "The Republic of Poland recognizes all property, whether belonging personally to individual citizens or collectively to associations of citizens, institutions,

the nationalization decrees with Article 99 of the 1921 Constitution (which was in force between 1944 and 1947 according to Article 81 Section 2 of the 1935 Constitution) cannot be the subject of constitutional review exercised by the current Polish Constitutional Tribunal.[116] It has no competence or legitimacy to rule upon the conformity of the legal norms introduced after the war with the constitutional rules, which were in force before the 1997 Constitution. Now, they cannot be challenged as inconsistent with the 1921 Constitution. For that reason, the Tribunal has decided to discontinue the proceedings concerning the 1944 decree on forests[117] and the 1944 decree on rural reform, both challenged as introducing nationalization (taking of private property) without just and fair compensation, not for public purposes and by an organ having no legitimate competence to enact such laws.[118]

But, even if the nationalization laws could be ruled upon, there is a fundamental difference between expropriation and socialist nationalization of whole branches of industry. Socialist countries in Eastern Europe nationalized private property on a massive scale. Communist nationalization aimed at the eradication of the entire system of private property.[119] Mostly, it happened without compensation, as it was regarded as a first and necessary step to socialist revolution.[120] Thus, nationalization and

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self-government organizations, or the state itself, as one of the most important bases of social organization and legal order, and guarantees to all citizens, institutions, and associations, protection of their property, permitting only in cases provided by a statute the abolition or limitation of property, whether personal or collective, for reasons of higher utility, against compensation. Only a statute may determine to what extent property, for reasons of public utility, shall form the exclusive property of the state, and in how far rights of citizens and of their legally recognized associations to use freely land, waters, minerals, and other treasures of nature, may be subject to limitations for public reasons. The land, as one of the most important factors of the existence of the nation and the state, may not be the subject of unrestricted transfer (commerce). Statutes will define the right of the state to buy up land against the will of the owners, and to regulate the transfer of land, applying the principle that the agrarian organization of the Republic of Poland should be based on agricultural units capable of regular production and forming private property." *See* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ (1921) [KRP] [CONSTITUTION] Mar. 17, 1921, art. 99 (Pol.). It is worth mentioning that the April Constitution of 1935 overruled most provisions of the March Constitution of 1921, except for Article 99 so the provision was in force also in the period of 1935-1944.

116. *See* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ (1935) [KRP] [CONSTITUTION] Apr. 23, 1935, art. 81 (Pol.).

117. *See, e.g.,* Trybunał Konstytucyjny [Constitutional Tribunal], SK 4/03, Dec. 12, 2005 (Pol.); SK 8/04.

118. *See, e.g.,* Trybunał Konstytucyjny [Constitutional Tribunal], SK 4/03, Dec. 12, 2005 (Pol.); Trybunał Konstytucyjny [Constitutional Tribunal], SK 19/13, May 26, 2015 (Pol.).

119. *See* CSONGOR KUTI, POST-COMMUNIST RESTITUTION AND THE RULE OF LAW 4 (2009).

120. *See* WIESŁAW LANG, PROBLEM REPRYWATYZACJI W KONTEKŚCIE ZASAD PAŃSTWA PRAWA I AKSJOLOGII POLSKIEGO SYSTEMU PRAWA, STUDIA IURIDICA TORUNIENSIA, PRZEMIANY POLSKIEGO PRAWA (LATA 1989–1999) (EwaKustra ed.,2001); 1 RUCH PRAWNICZY, EKONOMICZNY

communist takings fundamentally differ from "normal" takings or "typical" expropriation. Accordingly, the task for the post-communist governments in handling past legacies is fundamentally different as well. Therefore, there seems to be no duty to compensate for communist takings from the perspective of the constitutional protection of property rights (takings of private property) at the time expropriations took place even though the Polish Constitutions of 1935 and 1921 were technically operating at the time the takings occurred.[121]

In addition, expropriation was unlawful under international law of that time when it was discriminatory, not for a public use, or not accompanied by just compensation. But mass nationalization was regarded as the right of a sovereign state represented by its government and there is no international rule from those days on compulsory compensation.[122] This is somehow different than current international rule[123] although it is doubtful whether restitution is an emerging norm in international law at all. The current international standard of "prompt, adequate and effective compensation"[124] to foreigners was controversial in the post-war period, especially between the capitalist and socialist countries and in particular in the case of nationalization.[125] There is no international act which forces countries to return properties nationalized during the communist era.[126]

I SOCJOLOGICZNY 2005 (Pol.). *See also* Bohdan Zdziennicki, *Reprywatyzacja w świetle zasad prawa, in* 3 STUDIAPRAWNICZE (2015); SAFJAN, *supra* note 83.

121. For some unjust enrichment theories related to redress for expropriation of property see Jimenez de Arechaga, State Responsibility for the Nationalization of Foreign Owned Property, 11 N.Y.U. J. INTL L. & POL. 179 (1978). According to some authors, nationalization laws carried out without compensation still constitute confiscation. *See, e.g.,* RYSZARD PESSEL, REKOMPENSOWANIE SKUTKÓW NARUSZEŃ PRAWA WŁASNOŚCI WYNIKAJĄCYCH Z AKTÓW NACJONALIZACYJNYCH 26 (2003).

122. The view was summarized by the prominent scholar and international lawyer of Polish origin, Manfred Lachs in *Nacjonalizacja i rozwój międzynarodowych stosunków gospodarczych (zagadnienia prawne)*, 10 PAŃSTWO I PRAWO 519-21 (1958) (Pol.). *See also* Wieslaw Dudek, *Regulowanie odszkodowań wynikających z roszczeń na tle ustawodawstwa nacjonalizacyjnego (zagadnienia prawno-międzynarodowe)*, 6 PAŃSTWO I PRAWO 972-73 (1968) (Pol.).

123. For interesting international comparison and analysis of constitutional protection worldwide, see, for example, A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS (1999) and GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY LESSONS FOR AMERICAN JURISPRUDENCE (2006).

124. Lee A. O'Connor, *The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State*, 6 LOY. L.A. INT'L & COMP. L. REV. 355, 358 (1983).

125. *See* Frank G. Dawson & Burns H. Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727 (1962).

126. *See* G.A. Res. 217 (III) A Universal Declaration of Human Rights, art. VIII (Dec. 10, 1948) (Article 8 of the Universal Declaration of Human Rights adopted and proclaimed by General Assembly resolution 217A(III) of 10 December 1948, creates a right to effective remedy or acts violating fundamental rights guaranteed by the constitution or by law but the scope and content of

Poland and other socialist states claimed that the right to decide on the socio-economic regime is one of the sovereign prerogatives of the sovereign state. This right also includes the controversial right to modify the property relations existing at the time when the change is made, and to introduce new legal institutions and concepts of property law.

The same "old" principle of sovereignty was construed in the post-war period to impose a duty on the states that had nationalized the property of foreign citizens to compensate other states acting as representatives or agents of their expropriated citizens. In the period of 1948-1971, the Polish government entered into many indemnity agreements to settle the issue of restitution with a number of countries whose citizens had been affected by the nationalization laws and decrees and other legal acts introducing socialist reforms.[127] According to the prevailing view, entering into indemnity agreements was not an acknowledgment of any legal or international obligation toward other states or their citizens to pay restitution or compensation for nationalized property. Neither customary law, nor principles of international law set any obligation to compensate for the nationalized property of foreigners. The Polish state concluded indemnity agreements only voluntarily[128] and the lump sums were paid *ex gratia*.[129] Neither can it be said that these agreements released Poland from any obligation under international law for the takings of property previously owned by foreign citizens. Indemnity agreements are no proof against the unlawfulness of nationalization laws. On the other hand, acceptance of the compensation paid out by foreign governments on the

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the right to redress is unclear and it does even not necessarily create an obligation to compensate every type of violation).

127. Among them, one can find the USA, Canada, the United Kingdom, France, Belgium, Austria, the Netherlands, Denmark, Switzerland, Sweden, Norway, Greece. Some of the treaties have been registered and published in the United Nations Treaty Series pursuant to Article 102 Sec. 1 of the United Nations Charter, for example: the Treaty for the Settlement of Certain Financial Questions (with Exchanges ofNotes and Additional Protocol of 25January 1973), Austria-Pol., Oct. 6, 1970, 1057 U.N.T.S. 15973 [hereinafter Treaty with Austria]; Agreement on Settlement of Financial Matters, Can.-Pol., ¶ 223, Oct. 15, 1971, 869 U.N.T.S. 12484 [hereinafter Treaty with Canada]; Agreement (with Annex and Exchange of Notes) Regarding Claims of Nationals of the United States, Pol.-U.S., July 16, 1960, 384 U.N.T.S. 5518 [hereinafter Treaty with United States].

128. *See* Dudek, *supra* note 122, at 972-73. According to those agreements and international custom, countries which signed them with Poland assumed their own responsibility for the payment of compensation to their citizens and the procedure for claiming damages is regulated solely by the domestic law of the states. The bilateral indemnity agreements provided for specific amounts (lump sums) of compensation paid by Polish government. Recipient states were not obliged to pay compensation to their citizens, i.e., to the individuals who had lost their property.

129. *See* DUDEK, *supra* note 57, at 50.

basis of the indemnity agreements concluded with Poland settles all claims of the former owner to expropriated property.[130]

Due to the reasons mentioned above, nationalization under socialism, no matter how disapproved of nowadays, cannot be regarded as illegal expropriation under the constitutional property clause nor under international law. Mass nationalization by communist governments in central and eastern Europe cannot be regarded in terms of confiscation or illegal expropriation because it cannot be regarded as unlawful in legal terms. Any general comparison to confiscation is not allowed.[131] Therefore, in the debate over the shape of the future reprivatization it is alleged that it should apply to both legally and illegally nationalized property.[132] That is also why only real confiscations are subject to judicial privatization (restitution); that is, only those takings that were not justified in the context of legal acts of nationalization and which exceeded the limits and prerequisites for mass expropriation.[133]

IV. THE SHIFT IN THE INTERPRETATION AND APPLICATION OF NATIONALIZATION LAWS

Because Polish legislators refuse to act, ordinary courts (i.e., administrative and civil courts) administer justice in restitution cases within the boundaries and limits of existing law with little room for potentially creative interpretation of the binding regulations and traditional civil law institutions.[134] The lack of a general restitution law, imperfections in judicial restitution and its cost, and the need to make a political decision on how to balance the postulates of stabilization of legal relations and restitution to the former owners, all contributed to the change in the general

130. *See* Trybunał Konstytucyjny [Constitutional Tribunal], SK 33/99, Oct. 24, 2000 (Pol.). *See also* Mateusz Pilich, *Międzynarodowe umowy indemnizacyjne w praktyce sądów, in* STUDIA I ANALIZY SĄDU NAJWYŻSZEGO. MATERIAŁY NAUKOWE. "REPRYWATYZACJA W ORZECZNICTWIE SĄDÓW" MATERIAŁY Z KONFERENCJI NAUKOWEJ WARSZAWA, SĄD NAJWYŻSZY, 26 LUTEGO 2016 R. 108, 132, (Mateusz Pilich ed., 2016); Magdalena Soszyńska, *Polsko-amerykański układ indemnizacyjny z dnia 16 lipca 1960 r. jako forma realizacji odpowiedzialności Polski za powojenną nacjonalizację mienia obywateli Stanów Zjednoczonych* 4 PRAWO – ADMINISTRACJA – KOŚCIÓŁ 134 (2005).

131. For the Cuban example, see Jose A. Oritz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. L.A. INT'L & COMP. L. REV. 321 (2000).

132. *See* Stec, *supra* note 56, at 357-71.

133. *See* Maria Anna Zachariasiewicz, *Rozwój nauki o zasiedzeniu czy ślepy zaułek? Koncepcja wyłączającego zasiedzenie "imperialnego" władztwa Skarbu Państwa*, 9 REJENT 224 (2005).

134. *See* Łętowska, *supra* note 12, at 86.

approach of the judiciary to their interpretation and application of nationalization laws.[135] The analysis of the rulings published by the Polish Supreme Court reveals that the Court is reluctant to allow excessive interpretation in favor of the claimants, especially if this conflicts with the constitutional axiology revealed in the reasoning delivered in judgments by the constitutional court.[136] Some authors claim that this can be taken as proof of an indirect influence of the Constitution on property law and property relations.

In practice, the courts have sanctioned many compensation payments for Article 160 claims. According to Article 160 of the PAPC, a party having suffered harm either as a result of an administrative decision later declared invalid, or as a result of declaring the administrative decision invalid, is entitled to compensation for the "*actual harm*" suffered.[137] In the jurisprudence of the Supreme Court we can find the assumption, according to which any damage stemming from refusal to establish rights to nationalized property must be understood as loss under the general provision of Article 361 Section 2 of the Civil Code and simultaneously as "*real damage*" pursuant to Article 160 Section 1of the PACP.[138] Once a positive administrative decision is either declared null and void or issued contrary to the law, the claimant can file a civil action for compensation or restitution in the civil courts pursuant to Article 160 of the PAPC, which is the legal basis for compensation for administrative unlawfulness.[139] Especially under the Bierut (Warsaw) Decree, in most cases, claimants based their claims upon the state's breach of its duty to award restitution or to pay compensation for nationalized property,[140] or because of the refusal, which is deemed to be contrary to law.[141] Article 160 of the PAPC was replaced by the new Article 417 of the Polish Civil Code on state liability in tort, which has been in force since September 1, 2004.[142] This only means that when the claimed damage was caused on

135. *See* Aurelia Nowicka & Stanisław Sołtysiński, *Refleksje na temat rekompensat za mienie znacjonalizowane po II wojnie światowej*, *in* STUDIA I ANALIZY SĄDU NAJWYŻSZEGO. MATERIAŁY NAUKOWE. "REPRYWATYZACJA W ORZECZNICTWIE SĄDÓW" MATERIAŁY Z KONFERENCJI NAUKOWEJ WARSZAWA, SĄD NAJWYŻSZY, 26 LUTEGO 2016 25 (Mateusz Pilich ed., 2016).

136. *See id*.

137. Polish Administrative Procedure Code, *supra* note 21, art. 160.

138. Sąd Najwyższy [Supreme Court], III CZP 6/03, Mar. 21, 2003 (Pol.).

139. *See* Polish Administrative Procedure Code, *supra* note 21, art. 160.

140. *See, e.g.,* Sąd Najwyższy [Supreme Court], I CSK 112/06, July 19, 2006 (Pol.); I CSK 441/07.

141. *See* SądNaczelny [Supreme Court], III CZP 129/09, Mar 12, 2006 (Pol.).

142. Polish Civil Code, *supra* note 33, art. 417.

or after September 1, 2004, the general rules of the Polish Civil Code apply.[143]

Since the constitutionalization of the right to compensation for harm unlawfully caused by public authorities occurred on the day the 1997 Constitution entered into force, no basis exists for challenging the reviewed limitations insofar as they apply to harm occurring prior to this date. According to the Constitutional Tribunal, Article 160 does not conform to Article 77(1) of the Constitution in the parts limiting compensation for actions contrary to the law of public authorities to "actual harm" but the ruling is applicable only to "harm" occurring after October 17, 1997, i.e., since the entry into force of the Constitution.[144] Hence, compensation claims for damages caused by issuing wrongful final administrative decisions before September 1, 2004, even if declared either invalid after that date or as issued contrary to Article 156 of the PAPC, ought to be settled pursuant to the "old" provisions of Article 160 Sections 1, 2, 3, and 6 of the PAPC, and not according to new regulations of the Civil Code. This is due to the transitional provisions of the 2004 Amendment stating that Article 160 must be used to seek compensation for "events and legal situations" that occurred before the entry into force of the 2004 Amendment.[145] Therefore, if the wrongful decision was issued before entry into force of the 1997 Constitution, compensation would always be limited to "actual harm" (*damnum emergens*) without lost profits (*lucrum cessans*), even if the supervisory decision was issued after September 17, 1997. Lost profits are profits which the injured person could have obtained had the harm not occurred. In that way, Article 160 of the PAPC permanently limits the scope of compensation claims by persons injured as a result of a defective decision issued by a public authority. However, the date of issue of the supervisory decision is important to determine the time limits for action for compensation for the damage suffered.

The Supreme Court modified the consequences of the abovementioned ruling of the Constitutional Tribunal, finding that a final decision within the meaning of Article 160 Section 6 of the PAPC is not the primary decision, but rather a supervision decision issued as the result of a case review application being upheld.[146] In other words, the Supreme

143. That means that when the claimed damage was caused on or after September 1, 2004, the damage must be claimed within three (3) years from when the victim learned about the damage but no longer than within ten years from when the damage occurred. Article 160 PAPC was repealed in 2004 pursuant to the Law of June 14, 2004 on Amendments to the Civil Code and Other Statutes.

144. *See, e.g.,* Trybunał Konstytucyjny [Constitutional Tribunal], SK 56/12, Apr. 24, 2014 (Pol.); K 20/02.

145. Polish Administrative Procedure Code, *supra* note 21, art. 160.

146. *See* III CZP 112/10.

Court found that Article 160 Section 6 of the PAPC applies to both decisions, which constitutes important circumstances for former owners. The limitations period for claims for damages should therefore be calculated only from the second decision resulting in nullity of the nationalization decision.[147] Moreover, if the unlawful final administrative decision was issued before 1997, then the compensation under Article 160 Section 1of the PAPC does not include profits lost as a consequence of this decision, even when those lost profits would be due after 1997 and under the current Constitution.[148] So, even if the declaration of nullity or issuing in breach of the law was stated after September 1, 2004, Articles 160 Sections 1, 2, 3 and particularly 6 apply. Additionally, if the final wrongful decision was issued before the day of entry into force of the 1997 Constitution, compensation under Article 160 Section 1 of the PAPC is always limited and excludes lost profits (including profits lost after 1997 and after 2004), even if the supervisory decision was issued after September 17, 1997. The courts agree that there is no legal justification for claims by former owners, which aim to recover lost profits if they seek to recover damages including lost profits incurred before the day of entry into force of the 1997 Constitution.[149]

Moreover, the courts take the position, in favor of the State Treasury, that the amount of compensation must be mitigated. All legal and factual restrictions must be included which would have affected the state of the property if it had not been nationalized. It must be remembered that most urban properties utilized by private persons in socialism were subject to special public housing allocations of dwellings. Those officially assigned private housing, allocated by the state on an administrative basis to tenants, were subject to obligatory lease contracts that could not be freely terminated, thus diminishing the value of the property and limiting profits from leasing it.[150] Former owners must also face the allegation

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147. *See*III CZP 78/14 (confirming this interpretation in a resolution adopted by a panel of seven judges).

148. *See* III CZP 112/10.

149. *See, e.g.,* III CZP 112/10; Sąd Najwyższy [Supreme Court], I CSK 524/08, Apr. 16, 2009 (Pol.); Sąd Najwyższy [Supreme Court], II CSK 26/09, June 18, 2009 (Pol.); Sąd Najwyższy [Supreme Court], I CSK 66/09, Oct. 16, 2009 (Pol.). *Compare* Sąd Najwyższy [Supreme Court], III CZP 123/08, Dec. 5, 2008 (Pol.) (taking a different approach than aforementioned cases by determining that particular kinds of damage suffered (i.e., lost profits), can also be caused and established after the moment in which the harming event happened).

150. *See, e.g.,* Sąd Najwyższy [Supreme Court], I CKN 1215/00, Nov. 27, 2002 (Pol.); Sąd Najwyższy [Supreme Court], I CK 644/03, June 8, 2003 (Pol.); Sąd Apelacyjny w Warszawie [Court of Appeal in Warsaw], I ACa 583/03, Sept. 23, 2003 (Pol.); Sąd Apelacyjny w Warszawie [Court of Appeal in Warsaw], I ACa 1084/03, Feb 19, 2014 (Pol.); Sąd Apelacyjny w Warszawie [Court of Appeal in Warsaw], I ACa 349/04, Mar. 4, 2005 (Pol.); Sąd Apelacyjny w Warszawie

that their property would be in any way subject to individual expropriation according to additional laws, such as the Decree of April 26, 1949 on Acquisition and Transfer of Estates Indispensable for Realization of National Economic Planning[151] or the Law of March 12, 1958 on Principles on Mode of Estates' Expropriation.[152] In practice, it must be taken into account that in reprivatization cases it is crucial to establish a ruling on which date the court is to use to determine the value and state of the lost property, i.e. the amount of damage suffered. According to the Supreme Court, the amount of compensation for the nationalized property is settled at the time damage occurred and not later.[153]

Another example is the observation that in recent years a significant shift in the jurisprudence of the Supreme Court and the Constitutional Tribunal took place, from the early conviction of the judiciary in the 1990s that broad judicial reprivatization was possible and available to all. This conviction is still somewhat present in the jurisprudence of the Supreme Administrative Court.[154] But even here, a tendency toward constraining the interpretation of nationalization laws goes together with a lack of will among the judiciary to question and reverse the binding force and legal effects of nationalization laws and decrees. The courts find themselves incompetent to review the laws in terms of their conformity to the 1997 Constitution, as well as to the previous constitutions in force—pointing at the Constitutional Tribunal.

The courts are also reluctant to undermine the legal binding force and consequences of nationalization acts by rejecting any interpretation of post-war decree provisions containing announcements of future restitution or compensation. It is clear that the state may also have legal obligations from nationalization laws; for instance, where the compensation

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[Court of Appeal in Warsaw], I ACa 326/06, July 12, 2007 (Pol.); Sąd Apelacyjny w Warszawie [Court of Appeal in Warsaw], I ACa 405/06, Feb. 19, 2008 (Pol.).

151. Obwieszczenie Przewodniczącego Państwowej Komisji Planowania Gospodarczego z dnia 26 stycznia 1952 r. o ogłoszeniu jednolitego tekstu dekretu z dnia 26 kwietnia 1949 r. o nabywaniu i przekazywaniu nieruchomości niezbędnych dla realizacji narodowych planów gospodarczych [Decree of April 26, 1949 on Acquisition and Transfer of Estates Indispensable for Realization of National Economic Planning] (1952 Dz. U. nr. 4 poz. 31) (Pol.).

152. Ustawa z dnia 12 marca 1958 r. o zasadach i trybie wywłaszczania nieruchomości [Law of March 12, 1958 on Principles on Mode of Estates' Expropriation] (Dz. U. 1958 nr. 17 poz. 70) (Pol.).

153. *See, e.g.,* Sąd Najwyższy [Supreme Court], V CSK 81/13, Dec. 12, 2013, (Pol.); Sąd Najwyższy [Supreme Court], V CSK 388/12, Jun 14, 2013 (Pol.); Sąd Najwyższy [Supreme Court], I CSK 678/09, Oct. 13, 2010 (Pol.).

154. *See* EWA BAGIŃSKA & JERZY PARCHOMIUK, ODPOWIEDZIALNOŚĆ ODSZKODOWAWCZA W ADMINISTRACJI 542 (Roman Hauser et. al. eds., 2016); *see also* Zdziennicki, *supra* note 120, at 5.

was foreseen in those laws and was not actually paid. Some of the nationalization laws contained provisions regulating opportunities to claim restitution or compensation for property nationalized by the communist authorities.[155] Such claims are brought before the courts. For instance, the 1946 Act on Nationalization of Industry required the State to compensate property owners for nationalized property. But, regulations like the Law of January 3, 1946 on Nationalization of Core Branches of the National Economy contain neither legal rights nor claims for former owners and merely a promise to regulate the issue of compensation for nationalized property in the future.[156] Article 7 Section 1 of the Law is not a legal basis for compensation claims based on the take-over of ownership by the State Treasury, one of the enterprises listed in Article 3 thereof.[157]

Also, the Decree on the Ownership and Use of Land in Warsaw of October 26, 1945, the so-called Bierut (Warsaw) Decree, conferred numerous rights on expropriated persons.[158] It transferred ownership of all properties within the pre-war boundaries of Warsaw to the Warsaw municipality. The land was then nationalized in 1950. Today, claims under the Decree are generally granted only to those former owners who, in the period from 1947 to 1949, submitted an application for restitution to local authorities within the prescribed time. The Communist government rejected or failed to review many of those claims; thousands of them remained still open when the socialist regime finally collapsed in 1990. According to Article 7 of the Decree, as a general rule the taken properties should be "returned" in kind by granting a legal title elsewhere, instead of ownership of the taken land.[159]

155. *See* JANUSZ GOŁĘBIOWSKI, NACJONALIZACJA PRZEMYSŁU W POLSCE 313 (1965); ANDRZEJ KRAUS, USTAWA O NACJONALIZACJI PRZEMYSŁU 20 (1946).

156. Ustawa z dnia 3 stycznia 1946 r. o przejęciu na własność Państwa podstawowych gałęzi gospodarki narodowej [Law of January 3, 1946 on Nationalization of Core Branches of the National Economy] (1946 Dz. U. nr. 3 poz. 17) (Pol.).

157. *See* Sąd Najwyższy [Supreme Court], III CZP 86/17, Dec. 15, 2017 (Pol.).

158. Bierut Decree, *supra* note 1.

159. *Id*. art. 7.

The Decree allowed former owners of these properties to apply for temporary ownership rights of the property, which after 1961 was transformed into the perceptual usufruct right to land. The Decree contained two forms of compensation: restitution in kind and compensation in bonds. The Decree compensated only rejection of the application for restitution in kind.[160] If return would be impossible, due to Article 7 of the Decree, the owner was entitled to acquire another piece of land, and in the second step, indemnification paid in municipal bonds that have never been issued.

On June 25, 2015, the Constitutional Tribunal ruled upon the constitutionality of numerous provisions of the new law, providing an additional basis upon which restitution-in-kind of the Warsaw properties can be denied.[161] The Tribunal ruled that the newly adopted Article 214(a) of the Act of August 21, 1997 on Real Estate Management[162] is consistent and in line with the guarantees of property in Article 64 Section 1 and 2, equal treatment in Article 32 Section 1, the proportionality rule in Article 31 Section 3,and the rule of law in Article 2 of the 1997 Constitution.[163] Article 214(a) is also consistent with the expropriation clause in Article 21 Section 2 of the Constitution.[164] The restitution in kind can be, therefore, refused in any of the following instances:

- when the property is already used or designated for public purposes which justify individual expropriation under current law (some administrative courts present the interpretation that the property must be restituted even if it is currently used for public purposes).[165] The Tribunal decided that if public purposes justify expropriation it is also justifiable to deny restitution of that property;

- when establishing perpetual usufruct rights on the property is impossible because of the sale of the property to a third party or due to establishment of a perpetual usufruct right in that property to another person. The Tribunal decided that claim cannot be satisfied due to objective reasons or binding administrative rules;

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160. *See* Sąd Najwyższy [Supreme Court], III CZP 111/14, Mar. 6, 2015 (Pol.).

161. *See* Trybunał Konstytucyjny [Constitutional Tribunal], KP 3/15, July 19, 2016 (Pol.) (containing three dissenting opinions, motion submitted by the President of the Republic of Poland).

162. Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami [Act of August 21, 1997 on Real Estate Management] (1997 Dz. U. nr. 115 poz. 741) art. 214(a) (Pol.) [hereinafter Polish Real Estate Management Act].

163. *See* KP 3/15.

164. *See* Polish Real Estate Management Act, *supra* note 162, art. 214(a); *see also* KP 3/15.

165. *See* Przesłanki roszczenia rewindykacyjnego na podstawie art. 7 ust. 2 dekretu warszawskiego w świetle orzecznictwa sądowadministracyjnego, BO NSA 15-43 (2013) (explaining the resolution of the Supreme Administrative Court of 26 November 2008 r, Ref. No. I OPS 5/08).

- when the division of existing property is impossible in accordance with the binding spatial order regulations and the return relates only to part of the property. The Tribunal decided that claim cannot be satisfied due to objective reasons or binding administrative rules;

- when the State Treasury or local authorities erected and financed a building on the property and the value of the building exceeds significantly the value of the land. In the opinion of the Tribunal, it is justified due to economic reasons as the provision is aimed at retaining the city's ownership of buildings which it financed using its own resources; and

- when the State Treasury or the city rebuilt the property of which over sixty-six percent had been destroyed. Article 214(a) was intended to retain the city's ownership of properties which it had rebuilt using its own resources. Again, the Tribunal declared this as justified for economic reasons and as an example of realization of public purposes (promoting housing).

Also, the new Article 215(b) of the Act of August 21, 1997 on Real Estate Management was declared consistent and in line with Article 64 Section 1 and 2, Article 31, Section 3, and Article 2 of the Constitution.[166] Article 215(b) sets a new procedure for disposing of old administrative claims.[167] It makes possible the discontinuation of administrative proceedings under Article 7 of the Bierut (Warsaw) Decree, leading to restitution if the parties or their addresses may not be identified.[168] Because of this, numerous proceedings have been put on hold since there is no contact either with the former property owner or with his or her heirs. According to the Tribunal, there is an important *ratio legis* supporting Article 215(b), which is the stability of legal relations and the legal situation of the properties in Warsaw.[169] Otherwise, the proceedings that are currently pending but cannot be finished by any kind of decision, whether positive or negative, are due to the fact that the current address or even

166. *See* Polish Real Estate Management Act, *supra* note 162, art. 215(b).

167. *See id.*

168. The City of Warsaw gradually announces deadlines for each property for former owners, who made a request for restitution, to participate in the proceedings and they run from the date of announcement of the claim. This provision ensures that the proceedings relate to former owners who really make efforts to have expropriated properties recovered. The expropriated property remains in hand of the State Treasury or the City of Warsaw unless former owners the property or their heirs come forward within prescribed period of six months and prove their right to property within the next three months. The announcement shall be published in a nationwide newspaper and on the website of the competent authority, and shall contain information about the name and last known address of the former owner and request to come forward and prove the rights to described property. Decision to discontinue administrative proceedings relating to return of Warsaw property constitutes a legal basis disclosure of ownership of the State Treasury in the land register.

169. *See* Polish Real Estate Management Act, *supra* note 162, art. 215(b).

the identity of the former owner of his or her heirs remain unknown to the city officials. Once again, the Tribunal confirmed the consequences of the lapse of time. Since the entry into force of the Bierut (Warsaw) Decree, seventy years have lapsed—which is twice as much as the time limits for adverse possession in bad faith.[170] In the case of inactivity for almost seventy years, it must be assumed that passivity is a sign of lack of willingness to request restitution and justifies discontinuance of the proceedings. Lack of interest in restitution may lead to disqualification of return claims, but, as discontinuation of the proceedings is not final, it does not infringe on the property rights of the true owners.

V. CONCLUSION

Restitution in Poland is court-conducted, *ad hoc* restitution litigation, which appears incoherent in some of its outcomes. It was not until 1989-1990 that former owners of nationalized property were able to look to courts to regain their expropriated property. In practice, there are many decisions of courts related to the return of property issued after 1990. Many decisions and contracts through which property was taken during the communist regime were declared invalid and some property has been returned to the former owners and their heirs, or compensation for administrative unlawfulness is being paid. But judicial reprivatization is divided into many stages. It happens sometimes to the detriment of the claimants seeking restitution because decisions are made regarding only parts of the whole picture of a given property. Decisions issued by the courts are therefore often casuistic, fragmented and scattered.[171] Thus, the possibilities for deciding restitution claims implementing transitional justice reasoning are limited.[172]

But, on the other hand, statutory property reparation programs undertaken in other countries in Central and Eastern Europe after the fall of the communist regimes proved to fail to fulfill "the promise of the rule of law" and procedural fairness.[173] The analyzed provisions of some of the reparation schemes lead, in practice, to the creation of winners and losers of reparation, and to a breach of the idea of formal equality before the law, so ultimately, these schemes fall short of fulfilling those promises.[174]

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170. *See* Dybowski, *supra* note 38.

171. *See* Łętowska, *supra* note 12, at 100.

172. *See* KatnerWojciech, *Uwarunkowania prawne reprywatyzacji w Polsce (Zakres przedmiotowy i podmiotowy, roszczenia reprywatyzacyjne)*, 7 PAŃSTWO I PRAWO 17 (2003).

173. *See* Grażyna Skąpska, *Restitutive Justice, Rule of Law, and Constitutional Dilemmas, in* RETHINKING THE RULE OF LAW AFTER COMMUNISM, 215 (Adam Czarnota et al. eds., 2005).

174. *See* Csongor Kuti, *Post-communist Property Reparations: Fulfilling the Promise of the Rule of Law?*, 48.2 ACTA JURIDICA HUNGARICA 169, 169–70, 181—84 (2007) (the most common

From this perspective, judicial privatization seems to be in favor of the claimants to some extent. Claims against different government authorities under the administrative code are generally subject to no compensation ceiling, and no residence, citizenship or legal-status limitations are in force with regard to eligible claimants. However, in the absence of a central administrative authority, judicial reprivatization creates an enormous burden on courts and administration.[175]

Without a clear policy on restitution, this also makes judicial reprivatization a very hard public task. Nationalization and communist reforms introduced profound changes, mostly irreversible, in property relations and in the structure of property ownership in Poland. By the scope and manner of their implementation, they also destroyed many social groups and categories of producers performing special functions in the pre-war economic structure of the country. It should be taken into account that such actions, restrictions and repressions were directed not only at the specific groups within the society (large landowners, manufacturers or gentry), but also other social strata, groups and professions. They should also be regarded as, among many others, initiatives leading to the weakening of the capacity of the whole society to resist the political system together with the ideology constituting its foundation. Property nationalized by the Polish governmental bodies pursuant to the 1944-1962 legislation changed property relations in Poland, but many of them were present on the political agenda of that time of not only the communist party.[176] Therefore, the answer to the question of whether the transformation of the post-communist societies would restore pre-communist property relations must be negative.[177] The principle of past harm as a normative value does not offer enough guidance for courts in justifying property reparations in the post-communist context, because "essentially

distinction made by the legislators was the one between agricultural properties and forestry and buildings, between different kinds of real property, as well as between movable and immovables properties, commercial and non-commercial ones, and between communal and individual type of holdings. It usually meant the difference in treatment and in certain situations resulted in unequal outcomes for the former owners). *See also* Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFF. 298 (2004).

175. Maciej Kaliński, *Meandry reprywatyzacji gruntów warszawskich, in* OCHRONA STRONY SŁABSZEJ STOSUNKU PRAWNEGO. KSIĘGA JUBILEUSZOWA OFIAROWANA PROFESOROWI ADAMOWI ZIELIŃSKIEMU, 361 (Maria Boratyńska ed., 2016) (noting the principle of full compensation was probably the reason of reluctance of the political parties to enact any restitution laws concerning revindication of lawfully taken properties).

176. *See* CZESŁAW MADAJCZYK, SPRAWA REFORMY ROLNEJ W POLSCE 1939–1944: PROGRAMY – TAKTYKA (1961); GOŁĘBIOWSKI, *supra* note 155, at 313.

177. *See* Eric Hanley & Donald Treiman, *Did the Transformation to Post-Communism in Eastern Europe Restore Pre-Communist Property Relations?*, 20.3 EUR. SOC. REV. 237–252 (2004).

everybody suffered under communism."[178] Everybody has to accept his or her share of the loss and destruction that occurred during Nazi and communist rule.

178. Jon Elster, *On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution*, 1 EAST EUR. CONST. REV. 16 (1992).