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# The Problem of Property Reprivatization in Warsaw

KATARZYNA J. McNAUGHTON\*

## I. INTRODUCTION

Nearly three decades have passed since the collapse of the *Iron Curtain*, and during this period most post-Soviet European countries have gone through a successful process of political, economic, and legal transformation from totalitarian regimes to full democracies. Poland is among these countries. As a result of this transition, Poland became a member of NATO in 1999, and, in 2004, joined the political structures of the European Union. These new allegiances clearly indicate that Poland went through a satisfactory process of economic and legal transition and fulfilled all the necessary membership criteria. Considering the many consequences of this political transformation,<sup>1</sup> the problem of a lack of adop

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1. The Soviet legacy is perceived as one with prevalent corruption at the individual and institutional level, which lacks decommunization, respect for the rule of law, trust towards legal institutions and courts, etc. As a result of the Roundtable Agreements in 1989, a political compromise between the Communist Party and Solidarity Party was achieved. According to this agreement, the Communists were to keep 65 percent of the seats in the Parliament. Thus, the first elected President, Wojciech Jaruzelski, was essentially their candidate. In addition, they were guaranteed there would be no decommunization and lustration. To many members of the Solidarity movement, this agreement was a “national betrayal,” and resulted in a huge split within the movement. The first non-Communist Prime Minister in Poland, Tadeusz Mazowiecki, stated in 1989 during his exposé that the peaceful transition to democracy should be a priority. Therefore, he introduced the policy of a “Thick Line,” meaning formal approval for a policy of non-pursuit of decommunization. The Roundtable Agreements allowed for the process of “morphing” of many former communists and their collaborators, who remained in positions of power under different titles in the political, legal, financial, and academic fields. This process merely transformed them from corrupt apparatchiks to white-collar criminals and corrupt bureaucrats. See Zbigniew Romaszewski, *Nie godzę się na niesprawiedliwość*, DZIENNIK POLSKI (Sept. 22, 2006), [http://www.romaszewski.pl/publikacje/2006\\_wrzesien-rozmowa-o-okraglym-stole-jego-konsekwencjach-i-nie-tylko-dziennik-polski-22-wrzesnia-2006-roku](http://www.romaszewski.pl/publikacje/2006_wrzesien-rozmowa-o-okraglym-stole-jego-konsekwencjach-i-nie-tylko-dziennik-polski-22-wrzesnia-2006-roku); ALEKSANDER KUPATADZE, ORGANIZED CRIME, POLITICAL TRANSITIONS AND STATE FORMATION IN POST-SOVIET EURASIA (2006).

tion of comprehensive reprivatization laws<sup>2</sup> may appear to be a minor issue. One could not be more mistaken. In Poland, the issue of reprivatization still divides society and results in major social costs, not to mention placing a burden on the budget. Most importantly, however, the most recent information coming from various sources (e.g., law enforcement, and NGOs) with regard to alleged criminal offenses committed in the process of reprivatization of Warsaw's properties in the past few years are alarming and raise very important questions. Among these questions are the following: are these crime allegations true, and if so, what is the scale of this criminal misconduct, and what percentage of Warsaw's properties have been reprivatized in a fraudulent manner?

Moreover, for a long time the international community has been critical of Poland for its reluctance to introduce comprehensive legislation that would allow reprivatization of properties nationalized by the Communist government. In fact, many other post-Soviet European countries, such as the Czech Republic, Hungary, unified Germany, and Estonia, are

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2. See TOMASZ LUTEREK & INSTYTUT STUDIOW POLITYCZNYCH, REPRYWATYZACJA. ZRODLA PROBLEMU 324 (2016). Reprivatization is defined as a legal process which aims to return the ownership of nationalized property to the previous or original owner. Property becomes nationalized when, on the basis of a legal statute, private ownership of a particular property is transferred *ex lege* to the government. The first country to introduce nationalization of private property in order to support the implementation of socialist ideology was Russia in 1917. Theoretically, we distinguish two forms of nationalization: socialist and capitalist nationalization. The former does not foresee any compensation, while the latter, except in criminal cases, typically does. Thus, nationalization without granting any compensation to the owner can be equated with confiscation. In legal language, the term confiscation comes from the Latin phrase *confiscation* and *confiscate*, which identifies items and/or property which are taken away from the owner by the government. In the Polish Penal Code, the court may order confiscation of property and/or fruits of the crime as an additional penalty to the defendant, especially in financial/economic crime cases. Thus, confiscation of property in Polish criminal law should be differentiated from a civil law construction of *ius caducum*, which was incorporated from Roman law. *Ius caducum* regulates the case of an heirless property where ownership is transferred to the government. There are two basic forms of reprivatization: statutory and judicial reprivatization. In the case of statutory reprivatization, the government has to enact a legal statute which aims to reverse the process of the prior nationalization of private property. If such physical restitution of the ownership of property is not possible, the statute establishes financial compensation. Judicial reprivatization is more complex, and it requires an individual to pursue a claim in civil court challenging the validity of the nationalization decision, which allegedly violated substantive laws. The latter is the type of reprivatization that can be identified in Poland. With three exceptions, the Polish government had never issued any reprivatization statute. The first exception applied to the Polish Catholic Church and was issued in 1989. The second statute introduced a compensation scheme to those Polish citizens who, between 1944 and 1952, were forced to relocate from the Eastern part of the Polish territory, which as a result of the Yalta Agreement became a jurisdiction of the Soviet Union. The third category includes owners who received compensation from the Communist government and who were foreign citizens residing in Poland at the time of nationalization. From 1948 to 1971, the Polish government signed bilateral treaties with various countries whose citizens lost their property as a consequence of the process of nationalization.

considered model jurisdictions which enacted successful reprivatization regimes.

It appears that Poland paid a “high price” for its move from a totalitarian regime to a full democracy. The term “high price,” however, cannot be understood in a strictly economic sense (e.g. budget deficit, inflation, high unemployment, etc.) as it provides us with an over-simplistic picture of a post-Soviet European country which has undergone a major socio-legal transformation. From 1945 until 1989, the ruling Communist government enacted a broad spectrum of nationalization laws which essentially confiscated private property<sup>3</sup> and created a new landscape of ownership relationships. None of the nationalization statutes were explicitly repealed either by the democratic government, or by the Constitutional Tribunal.<sup>4</sup> In contrast to most other post-Soviet countries, the private property which was nationalized cannot be returned to the previous owners or their heirs, because they do not have legal claims to restitution or compensation. Although the framers of the Communist nationalization laws (the Bierut Decree) envisioned subsequent compensation statutes,<sup>5</sup> these were never enacted, and the Polish Supreme Court<sup>6</sup> stated that there is no cause of action stemming from the lack of subsequent legislative action. Additionally, the lack of comprehensive reprivatization legislation resulted in the emergence of *judicial reprivatization*, which can be explained as individual claims made by former property owners, and/or their heirs, challenging nationalization decisions made as a result of erroneous application of substantive laws by the Communist government. In other words, former owners can only institute a judicial proceeding in the Polish courts if it challenges the validity of a particular nationalization decision when the communist government itself violated the nationalization laws which they established. Thus, by its very nature, a judicial reprivatization is available only to those former owners who lost property

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3. In Poland, prior to World War II, private ownership was the predominant form of ownership; however, between 1944 and 1958, the Communist government passed a bundle of nationalizations laws which essentially eliminated capitalism. The following laws were enacted: the Agrarian Reform Decree of 1944, the Nationalization of Forests Decree of 1944, the Warsaw Land Decree of 1945, and the Nationalization of Industry Act of 1946. See LUTEREK & INSTYTUT STUDIOW POLITYCZNYCH, *supra* note 2, at 324.

4. The Constitutional Tribunal is the equivalent of the U.S. Supreme Court, as it determines the constitutionality of Polish legislation. In a 2001 verdict, the Court stated that, after the passage of many decades after the nationalization of land in the country, some profound social, economic, and legal effects had occurred which are long-term and non-reversible. See Trybunał Konstytucyjny [Constitutional Tribunal], SK 5/01, Nov. 28, 2001 (Pol.).

5. The only exception is the 1944 Agrarian Reform Decree.

6. See Sąd Naczelny [Supreme Court], CZP 82/05, Nov. 24, 2005 (Pol.).

because the Communist government disregarded the laws which they enacted, and is not available to those whose property was nationalized in accordance with the (Communist) law at that time, albeit without any compensation. The fact that the Polish government has never issued any compensation legislation for the nationalized property does not constitute a governmental tort,<sup>7</sup> and thus, attempts of Polish claimants to receive compensation through the European Tribunal of Human Rights have not been successful.<sup>8</sup>

The very fact that legal status, in terms of eligibility to initiate judicial reprivatization, varies significantly among individuals, creates tensions within society. Successful claimants are perceived to be unfairly privileged. For an average citizen, the entire concept of judicial reprivatization is vague and not easily comprehensible, as it requires a deep knowledge of various areas of law, such as administrative, constitutional and civil law. Moreover, Poland, like other post-Soviet European countries after the collapse of the Communist regime, went through an intense social stratification and marginalization of major segments of society, as well as negative economic changes for which Polish society was not prepared. The new system was not perceived as more fair and just, and to some members of society, the feeling of deprivation became a prominent feature of their lives. While in the past it was the totalitarian system, today it is the 'invisible hand of the market' that has resulted in the general feeling of anomie.<sup>9</sup> Thus, from a societal perspective, it is understandable that the current model of judicial reprivatization can be perceived as unjust, and that its complex legal mechanism, as exhibited in the case of Warsaw, can be labelled as "wild."<sup>10</sup>

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7. The Supreme Court in its decision from 2005 stated that the lack of enactment of compensation laws, despite the fact that nationalization statutes explicitly obliged the government to issue them, doesn't qualify as a governmental tort. The main reason behind this finding was that at the time when nationalization statutes were passed, the Polish Constitution and Civil Code did not contain any provisions introducing this type of tort. In 2004, a major reform of the Polish Civil Code finally established a concept of governmental tort, but these new provisions do not apply to events which took place prior to this reform, in accordance with the principle of *Lex Retro Non Agit*. See *id.* at 4.

8. See for example, *Ogorek v. Poland*, ECHR, Application No. 28490/03, Decision of 18 September 2012; *Pikielny and Others v. Poland*, ECHR, Application No. 3524/05, Decision of 18 September 2012; *Sierminski v. Poland*, ECHR, Application No. 53339/09, Judgment of 2 December 2014.

9. Robert Merton, *On the Evolving Synthesis of Differential Association and Anomie Theory: A Perspective from the Sociology of Science*, in *SOCIAL DEVIANCE, READINGS IN THEORY AND RESEARCH* (2001).

10. "Wild reprivatization" is not a legal term, but rather a figure of speech introduced in public media and by Warsaw's NGOs, like *Miasto Jest Nasze*, for example. See Jakub Oworuszko & Piotr Wroblewski, *Warsaw: There is a map of Wild Reprivatization. 28 Investigations Resumed, the case*

This article examines the problem of reprivatization in Poland, with particular emphasis on the legal issues of judicial reprivatization in Warsaw, as well as its consequences for the justice system and society. It is important to emphasize that Polish society was harmed twice by the application of punitive laws which confiscated and nationalized their private property without compensation: first by the German Nazi occupiers, and subsequently by the Communists. This fact certainly adds to society's perception of the scale of injustice and suffering that they went through from 1939 until 1989. However, there were segments of Polish society for whom the process of nationalization was quite beneficial, for example, the land reform introduced in 1944, which granted ownership of farm lands to many Polish peasants.

Part II of the paper opens with subsection A, which starts with a general overview of the problem of sovereignty of the Communist government, and the legality of nationalization laws. With the lack of comprehensive reprivatization law in the country, these arguments are often raised as legal arguments of last resort in front of the Polish courts by the claimants. This part of the paper will explain the lack of efficacy behind these arguments, as well as the fact that Polish individuals have no legal claims of restitution or compensation under the current laws. This state of affairs is caused by the lack of adequate laws and by the adoption of the principle of *legal continuity* between the communist state and the democratic state, as established in 1989.

In subsections B and C, we will examine the problem of judicial reprivatization, as it has emerged in Warsaw in the past few years. This part will analyze the root causes and patterns of the manifestation of the problem, and finally will scrutinize the phenomenon of "wild reprivatization." We will evaluate its nature and scale. Finally, we will consider the implications of this problem. In the light of various irregularities disclosed in the process of judicial reprivatization in Warsaw, the Polish Parliament enacted a new statute in 2016 which aims to remedy the problem. In the final subsection of this part of the paper, we will evaluate the pros and cons of this legislation. The final part of this paper ends with general remarks regarding the problem of restitution in Poland, and points to potential ways to address it, so that a satisfactory form of social justice may be achieved.

## II. THE PROBLEM OF REPRIVATIZATION IN POLAND

### A. The General Overview of the Current Legal Framework

In November 2016, the Warsaw Bar Association<sup>11</sup> organized a conference devoted to the problem of reprivatization in Warsaw, during which lawyers and academics had an opportunity to discuss this complex issue from an interdisciplinary perspective. Zbigniew Banaszczyk<sup>12</sup> was one of the main speakers, and, in his opening remarks, he got to the core of the issue of reprivatization in Poland. He emphasized that if one were to take a narrow legal perspective, the issue of reprivatization would not exist in Poland *per se*. In the public discourse, the term reprivatization had been used erroneously because none of the nationalization laws which were enacted in Poland, including the Bierut Decree, ever introduced any compensatory regime for the former owners. In other words, under the current Polish legislation, there are no legal claims which former owners may pursue to achieve restitution of the original property or financial compensation. Therefore, the problem of reprivatization in Poland, from the legal perspective, is in fact a problem of vindication by various individuals of their constitutional right to be compensated for damages which occurred as a result of a governmental tort.<sup>13</sup> Moreover, the process of revindication of a constitutional right, in connection with the government's liability for damages inflicted in the exercise of public authority, is possible only because of the recognition in the domestic legal system of the principle of *legal continuity* of the laws adopted by the Communist government. The doctrine of *legal continuity* is well known in jurisdictions which went through a process of political transformation

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11. In light of the most recent cases of allegedly fraudulent reprivatization taking place in Warsaw, as revealed by the Polish press and the association of Warsaw's citizens called Miasto Jest Nasze, this conference constituted a very important reaction of Warsaw's district lawyers specializing in reprivatization claims under the Bierut Decree. In addition to lawyers and academics, representatives of various non-governmental organizations, including the World Jewish Organization, were also present. See *Konferencja "Reprywatyzacja. Rzeczywistość - Mity - Przyszłość"*, OKRĘGOWA RADA ADWOKACKA W WARSZAWIE (Oct.24,2016), <http://www.ora-warszawa.com.pl/pl/7431266-konferencja-reprywatyzacja-rzeczywistosc-mity-przyszlosc>.

12. Zbigniew Banaszczyk is a lawyer and a professor at the Civil Law Department at the University of Warsaw. He is a recognized expert in the area of governmental tort liability, and author of many publications in his area of interest. See *Zbigniew Banaszczyk*, BIBLIOGRAFIA UNIwersytetu WarsZawskiego, <http://bibliografia.icm.edu.pl/g2/main.pl?mod=s&a=1&s=4627&imie=Zbigniew&nazwisko=Banaszcyk> (last visited Jan. 31, 2018).

13. In the civil law systems, like Poland's, a different legal term is being used in this context, namely a "delict." Delict was incorporated from the Roman law tradition to conceptualize an obligation to compensate another party for wrongdoing, absent a contractual relationship between parties.

from a totalitarian regime to a full democracy. According to this principle, despite the political change, the new democratic country is founded upon the existing legal framework. In other words, the laws which were adopted by the Communist regime remain valid and stay in force until they are explicitly revoked by the Constitutional Tribunal or by a legislative act of the Polish Parliament. Thus, the process of legal transition means that an entirely new legal system is built upon the foundation of the old Communist regime. Reliance on the principle of *legal continuity* is not intended to provide the totalitarian law with any legal legitimacy; it simply prevents the country from going into a state of legal chaos. Despite any political transformation, including a totalitarian regime, no country can start from a point of “zero” when it comes to its laws.<sup>14</sup> In the context of a legal transformation, another legal principle which plays a substantial role in the process of reprivatization in Poland is *non-retrospectivity of laws*. It provides a foundation for other principles: legal security, certainty of legal transactions, and protection of established rights.

It seems that one of the important features of the process of reprivatization in Poland, and in particular in Warsaw, is its legal complexity, i.e., the interaction of various provisions of civil, administrative, and constitutional law. As already mentioned, the term reprivatization that circulates in the public discourse is misleading in the sense that it creates an impression that former owners possess legal claims under the nationalization statutes, which they do not.<sup>15</sup> Taking a legal perspective to this issue clearly reveals that a thorough understanding of the nature and efficacy of revindicative claims by former owners requires an examination of the Polish civil law regime for the government’s liability for damages inflicted in the exercise of public authority. That is because when the nationalization laws were established, including the 1945 Bierut Decree,<sup>16</sup> former owners, pursuant to these statutes, lost their ownership of various types of properties *ex lege*. The only reason why the former owners could sometimes recover their property or receive compensation is because

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14. A strong doctrine of *legal continuity* can be identified in the rulings of constitutional courts of other post-Soviet Eastern European countries, i.e., the Czech Republic and Slovakia. For a comparative study, see WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POST-COMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2005).

15. Acknowledgement of this fact remains difficult to accept for many Polish victims of nationalization laws. Thus, due to a lack of domestic legal provisions, victims often decided to pursue their claims at the European Tribunal of Human Rights.

16. Decree on Ownership and Usufruct of Land in the Area in the Capital of Warsaw, Oct. 26, 1945, art. 7 ust. 1 [hereinafter Bierut Decree].



these nationalization laws often were enforced by the government in violation of their substantive provisions. In other words, the Communist government was legally entitled to nationalize property within various sectors of the economy, but only under particular conditions set forth in these statutes.

In the aftermath of World War II, the Bierut Decree was introduced in order to rebuild the capital of Poland, which was substantially destroyed during the war. Under this decree, the ownership of all land properties located within the Warsaw city borders was transferred to the municipality of the Capital City of Warsaw. However, the former owners had the right to apply for temporary ownership of the property,<sup>17</sup> which the decree described as a right of perpetual usufruct, under the condition that the enjoyment of this right by the owners could be reconciled with the local plan of urban development. As the evidence indicates, a majority of these official claims were rejected by the government, despite the fact that the usage of the property could have been easily reconciled with the local plan. Thus, these refusals were discretionary, arbitrary, and issued in violation of the Decree itself. The bottom line is that if the Communist government had enforced the Bierut Decree and other nationalization laws without any violation, there would be no basis for reprivatization or revindication of the former owner's rights. Thus, the legal essence of the Polish reprivatization mechanism lies within the Polish Code of Administrative Procedure. The major issue of whether the Communist government committed wrongdoing, delict, or a tort while conducting nationalization rests within the judicial discretion of specialized administrative courts, not civil courts.<sup>18</sup>

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17. This term was developed by the Polish jurisprudence in order to emphasize that it is practically a legal ownership, although limited in time, and with an obligation to pay a lease. As we see, the term reprivatization which circulates in the public discourse is misleading in the sense that it creates an impression that former owners possess legal claims under the nationalization statutes, which they do not.

18. Specialized courts, such as administrative courts and labour courts, are a unique feature of the Polish judicial system. They handle litigation in very specific, but narrow areas of the law. With regard to the problem of a lack of comprehensive legislation on the issue of reprivatization in Poland, these courts were forced to carry on their shoulders the heavy burden of deciding issues which, in a democratic country, should be decided by the legislature and society. I have received this critical opinion from a civil law expert at the University of Warsaw, Professor Maciej Kalinski, whom I had the pleasure of interviewing for the purpose of this paper during my research trip stay in Warsaw in November of 2016. His opinions stand in striking opposition to the view presented by another Polish scholar, and a former Constitutional Tribunal Justice, Professor Ewa Letowska. She criticizes the very concept that administrative courts decide the issue of governmental tort while being completely removed from the mainstream of legal thought, as expressed by the Polish Civil Supreme Court, and Constitutional Tribunal. In her opinion, for various reasons, judges from administrative courts do not see or understand that by deciding individual cases of reprivatization,

*B. The Emergence of a New Paradigm of Judicial Reprivatization in Warsaw*

In Poland, the process of nationalization was pursued as a major economic reform, enacted by the Communist government from 1944 until 1952.<sup>19</sup> Reprivatization is a legal and economic process subsequent to nationalization, and can have a statutory or judicial form.<sup>20</sup> In the case of statutory reprivatization, a statute is enacted by the parliament in order to reverse the process of nationalization by either returning the ownership of a property to a legal owner (*restitutio in natura*), or, if such restitution is not possible, in the form of financial compensation (*restitutio in valuta*). In Poland, as already mentioned, the scale of nationalization was massive; however, statutory reprivatization was never introduced, despite the fact that nationalization acts themselves envisioned enactment of subsequent compensatory provisions.<sup>21</sup> Thus, the current problem of reprivatization in Poland refers to a judicial revision of legality of nationalization acts. If the court determines that a particular nationalization was carried out in violation of then binding statutes, it can decide either to restore the ownership of the property to its legal owner,<sup>22</sup> or to compensate for damages.

The issue of judicial reprivatization constitutes a complex bundle of administrative and civil laws with legal loopholes and ambiguities. Because of the lack of comprehensive reprivatization laws, administrative and civil courts were forced to deal with reprivatization claims, and thus

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they essentially shape the socio-legal landscape of the country without taking any responsibility for the social consequences of their recognition of illegality of nationalization decisions.

19. The primary goal of nationalization laws was to eradicate any form of private ownership, as a necessary precondition to implement a political system based on a Marxist/Leninist version of socialist ideology. Robert Jastrzebski, *Reprywatyzacja w Państwie Polskim z Punktu Widzenia Historii Prawa*, in *STUDIA I ANALIZY SĄDU NAJWYŻSZEGO TOM III 22* (Mateusz Pilich ed., 2016).

20. Reprivatization is a term commonly used in public discourse, however, it has never been introduced by any statutory law, or a case-law, and thus, there is no legal definition of this term in Polish law.

21. With the exception of two statutes, which regulated reprivatization with regard to the Polish Catholic Church, and so called “Mienie Zabuzanskie.” As a result of nationalization of land and forests, approximately 2700.000 ha. of land, and 1780.000 ha. of forests were taken over from private hands into the government’s hands. See PIOTR MAKARZEC, *SPRAWOZDANIE Z II KONGRESU OGÓLNOPOLSKIEGO POROZUMIENIA ORGANIZACJI REWINDYKACYJNYCH*, WARSZAWA, 19 MARCA 2007 (2007).

22. This form of restitution is not possible if a third party, acting in good faith, purchased such a property from the government.

became the policy makers. In particular, judicial reprivatization with regard to Warsaw's properties<sup>23</sup> constitutes a very recent socio-legal phenomenon, which illustrates the various negative consequences when a judiciary is forced to fulfill the role of a policy maker.

Warsaw's private properties were nationalized under the Bierut Decree of 1945,<sup>24</sup> which introduced a very specific legal mechanism of nationalization, explicitly violating a fundamental principle of the Roman law, i.e., *superficies solo cedit*. The essence of nationalization under the Bierut Decree was that the government was taking over ownership of the land, while the former owner, under particular circumstances, could still possess "temporary ownership" of the building. Under this decree, the ownership of all land properties located within Warsaw's city borders was transferred *ex lege* to the municipality of the City of Warsaw, while former owners had the right to apply for a perpetual lease<sup>25</sup> of the land, under the condition that the enjoyment by the former owner of this right could be reconciled with the officially established purpose of a particular property in the Urban Plan of Development of the City of Warsaw. The owner had only six months to submit the application from the date that the City of Warsaw took possession of a particular property. If the applicant did not submit the claim within this statutorily designated period of time, such a claim was considered to expire. Regardless of the original intentions of the Communist lawmakers,<sup>26</sup> a few facts need to be emphasized. First, the Decree in Art. 8 provided that a separate compensation

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23. Initial signals concerning suspicious irregularities with regard to reprivatization in Warsaw came from non-governmental organizations such as Miasto Jest Nasze. Also, a significant amount of investigative journalism disclosed information indicating potential criminal offences being committed by Warsaw City Hall officials in the process of reprivatization of various city properties.

24. The Bierut Decree was a statute introduced in 1945 which nationalized a majority of Warsaw's private properties. While the full name of this statute was a Decree on Ownership and Usufruct of Land in the Area of the Capital City of Warsaw, it became known as Bierut's Decree, named after the First Communist Party official at the time of its introduction, Boleslaw Bierut. Approximately 40,000 private properties were taken away from the private owners, which was about 94% of the city, from the pre-World War II borders. See Jerry S. Majewski, *Warsaw curse Bierut*, WYBORCZA.PL (Feb. 9, 2015), [http://wyborcza.pl/alehistoria/1,121681,17369869,Warszawskie\\_przeklenstwo\\_Bieruta.html?disableRedirects=true](http://wyborcza.pl/alehistoria/1,121681,17369869,Warszawskie_przeklenstwo_Bieruta.html?disableRedirects=true).

25. Under Art. 7 ust. 1 of the Decree, the original claim of the former owner to obtain perpetual lease was subsequently reformulated into a perpetual usufruct, which in legal doctrine is often defined as a temporary ownership because of the time limit of the ownership over the property, i.e., up to 99 years. See Bierut Decree, *supra* note 17, art 1.

26. Important feedback in this context was provided by Dr. Tomasz Krawczyk, who is an attorney in Warsaw specializing in the area of reprivatization. He emphasized that, considering the fact that World War II had just ended, the introduction of a six-month period of time to claim a temporary ownership was designed with questionable intentions because the process of publication of this decree was not very formal and transparent.

statutory regime would be enacted if temporary ownership was not granted. Second, the enforcement of the Decree by the Communist government was conducted in bad faith; in a majority of cases, claims for the establishment of temporary ownership were rejected. In other words, there was no discretionary power for Warsaw city administrative officials to decide whether the owner could obtain temporary ownership. Once the conditions established in Art. 7 para. 2 were met, the government was obliged to grant temporary ownership of the nationalized property. Due to the fact that the Decree did not precisely define the meaning of its relevant provisions, the reality was that the government denied almost all applications<sup>27</sup> when a particular property was designed to fulfill any public utility function, such as schools, hospitals, living apartments, and hotels. Moreover, it was often the case that claims were rejected even when the official plan of development had not yet been adopted for a particular property. A detailed examination of this unique legal mechanism of nationalization, as introduced in the Bierut Decree, is necessary in order to understand the essence of judicial reprivatization in Warsaw, and the root causes of its abuse.<sup>28</sup>

1. First, the ownership of nationalized properties was automatically transferred to the municipality of the Capital City of Warsaw; in other

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27. Art. 7 ust. 2 states that temporary ownership of the property must be granted by the municipality of the City of Warsaw if the enjoyment by the present owner could be reconciled with the use of the land, as specified in the urban plan of development. According to the official data, from approximately 40,000 nationalized properties, roughly 17,000 claims were filed from 1946, which means that only 30% of Warsaw's property owners filed a claim under the Bierut Decree. Around 4,000 properties were subject of a restitution to former owners between 2002 and 2016, while approximately 3,500 cases are in motion, and about 4,600 cases are still pending, meaning that they were filed by the former owners, but the communist government never took them under their consideration (so-called "sleeping claims"). Tomasz Demiańczuk, *Biała Księga reprivatyzacji warszawskich nieruchomości*, MAISTO STOLECZNE WARSZAWA (July 13, 2016), [www.um.warszawa.pl/aktualnosci/bia-ksi-ga-reprivatyzacji-warszawskich-nieruchomo-ci](http://www.um.warszawa.pl/aktualnosci/bia-ksi-ga-reprivatyzacji-warszawskich-nieruchomo-ci).

28. As already stated, it is very difficult to provide an accurate answer of how many reprivatization decisions in Warsaw qualify as criminal offenses involving fraud, corruption, and abuse of power. The criminal investigation is ongoing, and in February 2017, in the light of recently disclosed reprivatization scandals, the Polish Parliament, on the basis of a newly enacted statute, established a special investigative reprivatization commission. This commission was granted a mixture of prosecutorial and administrative powers, with the main goal of reviewing suspicious prior reprivatization decisions. The Chair of this Commission is Patryk Jaki, a Vice-Minister of Justice, and its members were elected by the parliament. This commission is designed to cooperate with the prosecutors if deemed necessary. If the commission determines that a particular case of reprivatization in Warsaw creates a reasonable suspicion that a criminal offense was committed, a legal warning that there is a criminal investigation in progress with regard to a particular property must be disclosed in the official land registry documents for the subject property. *Informacje*, MINISTERSTWO SPRAWIEDLIWOSCI (Oct. 18, 2016), <https://www.ms.gov.pl/pl/informacje/news,8717,komisja-weryfikacyjna-w-sprawie-reprivatyzacji.html>; <https://ms.gov.pl/pl/o-ministerstwie/kierownictwo-ministerstwa-sprawiedliwosci/>.

words, nationalization took effect *ex lege*, without any subsequent administrative or court decisions.

2. Two types of claims were granted to former owners. The first was limited in time, i.e. six months from the moment that the City of Warsaw took possession of a particular property, and constituted a claim for the establishment of temporary ownership,<sup>29</sup> which the administrative authorities of Warsaw were obliged to acknowledge if the enjoyment of the property by the owner could have been reconciled with the use of land specified in the urban plan of development.

3. The second claim was compensatory in nature,<sup>30</sup> and was available to those former owners who submitted a temporary ownership application which was not granted. The scope and legal mechanism of the enforcement of these compensatory claims was to be established in a separate statute, which was never enacted.<sup>31</sup>

As a result of the enforcement of the Bierut Decree, former owners can be grouped into two legal categories: those who lost their property and never filed a claim for the establishment of temporary ownership, and those whose claims were rejected or never considered by the government. Only the latter category of owners can pursue reprivatization claims.<sup>32</sup> However, the efficacy of these claims depends on whether the property was nationalized prior to 1958, and whether the original nationalization act will be nullified by the court or declared as issued in violation of laws. In addition, when we link the provisions of the Bierut Decree with the subsequent laws (which were enacted during the entire Communist era, and whose primary purpose was to expand the original scope of conditions justifying nationalization), it becomes clear that the legal situation of former owners must be individually examined. The status of reprivatization claims in Poland is a case-by-case analysis, as the court must determine whether the violation of law by the Communist government was substantial, and if a *restitutio in natura* is possible.

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29. The Bierut Decree, *supra* note 16, art. 7 ust. 2., refers to a right to perpetual usufruct.

30. *See id.*, art. 7 ust. 5.

31. The Bierut Decree, in its closing articles, provides explicitly that a separate statute will be enacted in order to establish a compensatory legal framework. *See* Bierut Decree, *supra* note 16.

32. Reprivatization claims are based on Kodeksu postępowania administracyjnego [K.p.a.] [Code of Administrative Procedure] Art. 156 § 1 (Pol.).

It seems that the least complex legal situation can be identified in the following scenario: when the former owner filed the claim to obtain temporary ownership, which was subsequently denied in violation of law, and the act of nationalization caused irreversible legal effects (Scenario A). Under these circumstances, the administrative court cannot nullify the nationalization act, but can only declare that such an act was issued in gross violation of law.<sup>33</sup> This verdict provides the claimant with a direct compensatory claim, based on Art. 160 of the K.p.a. The most complex cases of reprivatization are those where the former owner filed the claim for temporary ownership, which was never decided by the government (Scenario B) and also those where a temporary ownership claim was denied in violation of law, and subsequently nullified by the administrative court (Scenario C).

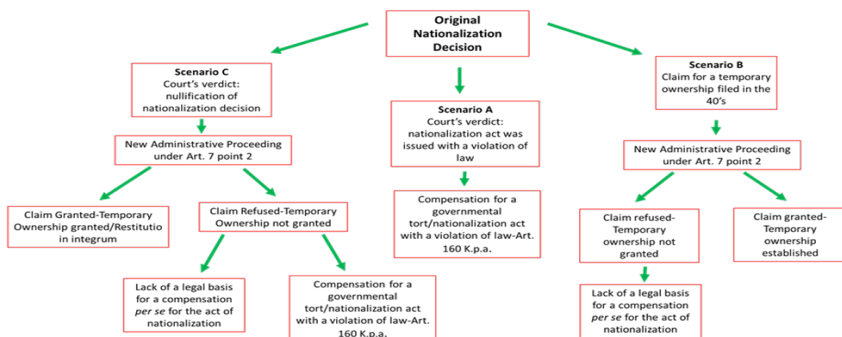


Fig. 1. Judicial Reprivatization Model under the Bierut Decree: No Legal Basis for Compensation Per Se for the Act of Nationalization

In this case, due to the fact that the Bierut Decree is still in force, a new administrative proceeding pursuant to Art. 7.1 will reopen. As already mentioned, the scope of conditions under which the government can nationalize Warsaw's property was significantly expanded in the subsequent statutes,<sup>34</sup> and basically, from 1958, the government was granted an extensive discretionary power to nationalize any private property.<sup>35</sup>

33. To be legally precise, the court declares that the administrative decision which denied temporary ownership of the property was issued in gross violation of law.

34. Especially when in 1958, the Real Estate Management Act and Mechanisms of Nationalization was adopted. Ustawa z dnia 12 marca o Zasadach i Trybie Wywłaszczenia Nieruchomości [Act of March 12, 1958 on the Rules and Procedure of Expropriation of Real Estate] (1958 Dz. U. nr. 17 poz. 70) (Pol.).

35. When the Communist government was limited exclusively by the Bierut Decree, it had to consider a particular plan of urban development for the city of Warsaw when making a nationalization decision. However, due to the introduction of another nationalization statutory law in 1958, the Communist government was no longer limited to consider Warsaw's urban plan of development

On the basis of these statutes, only some categories of owners<sup>36</sup> are entitled to compensation, in a maximum amount of 10% of the average cost of building a five room house.<sup>37</sup> In particular, as a result of the introduction in 1958 of the Real Estate Management and Mechanism of Nationalization Act, the legal situation of Warsaw's former property owners<sup>38</sup> was deliberately differentiated by the policy maker. The line of legal division went along an arbitrarily decided date of April 1958, because those who lost their property prior to this date were left without any compensation.

This state of affairs lasted for many decades until 2011, when the Constitutional Tribunal<sup>39</sup> had to address the constitutionality of the provisions of the 1958 statute.<sup>40</sup> At the core of the Tribunal's legal analysis was Art. 215.2,<sup>41</sup> and whether it violates the Polish Constitution of 1997 by ignoring the right to compensation held by those categories of owners who lost their property as a result of nationalization acts prior to 1958. The verdict of the Tribunal was considered very unsatisfactory because it stated that this is a matter which requires legislative action by the Parliament in the form of a comprehensive reprivatization law. The truth is that the Tribunal "washed its hands" by not deciding on this important issue because it only delivered a non-binding opinion for civil courts according to which Art. 215 is constitutional, but only when applied to the entire category of former owners, regardless of the date of nationalization. The gravity of this verdict is enormous from the perspective of litigation over reprivatization claims in Warsaw because of the following issue: when a

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when making nationalization decisions, as the scope of legal conditions justifying nationalization was substantially expanded. For example, it could justify its decision by the necessity to fulfill the Economic Plan, which were typically established for a five-year period by the Communist Party.

36. There were only two categories of owners who were granted a limited compensatory right if the nationalization of their property took place after April 4th, 1958: owners of a family house and building plot, and owners of farming, fruit, and vegetable farms.

37. See Ustawa z dnia 30 listopada 1995 r. o pomocy państwa w spłacie niektórych kredytów mieszkaniowych, refundacji bankom wypłaconych premii gwarancyjnych oraz zmianie niektórych ustaw. [Act of 30 Nov. 1995 on State Aid in Repayment of Some Housing Loans, Reimbursement of Guarantee Premiums Paid to Banks and Amendments to Certain Acts] (1995 Dz. U. nr 5, poz. 32) (Pol.).

38. Those whose property was originally nationalized under the Bierut Decree.

39. The verdict was issued on October 28, 2015, P 6/13. Maciej Górski, *TK odebrał nadzieję byłym właścicielom gruntów warszawskich na odszkodowanie*, RZECZPOSPOLITA (Jan. 25, 2016), <http://www.rp.pl/Opinie/301259975-TK-odebral-nadzieje-bylym-wlascicielom-gruntow-warszawskich-na-odszkodowanie.html#ap-1>.

40. The 1958 Act on Real Estate Management was replaced by the 1985 Act on Land Management and Expropriation, which after several reforms is still in force in Poland. 1958 Dz. U. nr. 17 poz. 70; Ustawy o Gospodarce Nieruchmosciami [Act on Land Management and Expropriation] (Dz. U. 1985 nr. 22. poz. 99) (Pol.).

41. Dz. U. 1985 nr. 22. poz. 99.

former property owner succeeds at the administrative court by having the nationalization act declared null, the original claim for the establishment of temporary ownership will be revisited one more time.<sup>42</sup> If one of the following conditions is met, there will be no *restitutio in natura*:<sup>43</sup>

1) the property was sold, or a third party obtained a right of temporary ownership;<sup>44</sup>

2) the original property cannot be separated (e.g. a plot was built-up after World War II and the new building crosses over the borders of the original property. This seems to be a common problem in the Old Town, where buildings had been destroyed in World War II and subsequently reconstructed, but not within the same borders), or;

3) the land is used as a public road or is designated a public road.

Under this scenario, the only available claim for the former owner can be found in Art. 160 K.p.a.,<sup>45</sup> under which the former owner can be compensated for damages caused by unlawful nationalization, which is limited to *damnum emergens*.

It is important to emphasize at this point that this is not a nationalization compensation *per se*, but rather a compensation for damages caused by the fact that the government pursued nationalization in violation of law. Thus, it becomes clear at this point that the term “reprivatization,” which functions in the public discourse, is not the most adequate legal term to describe the process of vindication by various individuals of their constitutional right to be compensated for damages caused by unlawful nationalization decisions.<sup>46</sup>

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42. Keeping in mind that the original scope of conditions justifying refusal of such a claim had been significantly expanded under legislation subsequent to the Bierut Decree.

43. This legal feedback was kindly provided by attorney Maciej Gorski, who is a Warsaw-based expert in this area of law. See *Prawo nieruchomości - więcej niż pasja*, MACIEJ GORSKI, <http://maciej-gorski.pl> (last visited Jan. 31, 2018); Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami [The Act dated 21 August 1997 on Real Estate Management] art. 215 (1997 Dz. U. nr. 115 poz. 741) (Pol.) [hereinafter Act on Land Management and Nationalization].

44. Despite the fact that the civil construction of a right of temporary ownership was clearly an invention of the Communist government, this construction survived and still exists in the legal sphere. Thus, any property nationalized by the government could have been subsequently sold or obtained by a third party's right of temporary ownership.

45. The legal situation of a former owner who filed the original claim for the establishment of temporary ownership which was never decided, is similar to the above analyzed scenario. Whether the court will consider interpreting the ALMN in broad terms, and thus grant compensation as a result of the fact that a final nationalization decision was lawfully issued, is problematic.

46. As Professor Banaszczyk stated, judicial reprivatization in Poland exists because the current government took the legal responsibility of compensating former owners for the governmental torts committed during the Communist era.



In the process of judicial reprivatization, one has to differentiate between a compensation for an unlawful nationalization act,<sup>47</sup> and a compensation for the nationalization act *per se*. The latter form of compensation was never explicitly introduced in the legal system. The only legal provision which provides a limited form of compensation for nationalized property is Art. 215 of the Act on Land Management and Nationalization (ALMN).<sup>48</sup> However, as already indicated, this provision is very problematic in terms of its constitutional validity because it applies only to a limited category of owners.<sup>49</sup>

Due to the fact that the Constitutional Tribunal issued a non-binding legal opinion regarding the lack of constitutionality of this article, the entire paradigm of judicial reprivatization is without any solid legal foundation.<sup>50</sup> Litigation attorneys<sup>51</sup> have attempted to convince civil courts that the compensation as dictated by the ALMN act should be applicable to all claimants. The only weakness in their legal arguments is that they cannot rely on any authority.

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47. This distinction is decided by administrative courts, and if the court finds that nationalization was pursued in gross violation of law, and the act itself caused irreversible legal effects, the court cannot nullify such a decision but may only decide that a particular nationalization act was issued in violation of law. The latter verdict opens a direct compensatory claim based on Art. 160 K.p.a.

48. This act, originally introduced in 1958, went through several major reforms in 1985 and 1997. Art. 134 ust. 1 and Art. 151 regulate the procedure and scope of compensation, which is evaluated by taking into consideration the condition of the property on the date of nationalization and the current market-based value of similar properties. Act on Land Management and Nationalization, *supra* note 43, Art. 215.

49. This provision applies to those owners who lost their property after April 5<sup>th</sup>, 1958, and only if the government nationalized certain categories of land: agricultural land, a one-family house, or a plot designed for a one-family house. Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 30 listopada 2004 r. w sprawie ogłoszenia jednolitego tekstu ustawy o gospodarce nieruchomościami [Announcement of the Speaker of the Sejm of the Republic of Poland regarding the Publication of a Uniform Text of the Act on Real Estate Management] (2004 r. Dz. U. nr. 261 poz. 2603) (Pol.).

50. This fact is well acknowledged by some representatives of the Polish doctrine. For example, Dr. T. Luterek's opinion seems to be very critical, as he describes this paradigm as a "Konceptualna Przeważa Reprywatyzacyjna," which can be translated into a "Conceptually-Quasi-Fraudulent Reprivatization." See *Reprywatyzacja "Być może czekają nas roszczenia lokatorów" Rozmowa*, SUPER BIZ.PL (May 12, 2016), [http://superbiz.se.pl/opinie-biz/reprywatyzacja-byc-moze-czekaja-nas-rozszczenia-lokatorow-wywiad\\_922354.html](http://superbiz.se.pl/opinie-biz/reprywatyzacja-byc-moze-czekaja-nas-rozszczenia-lokatorow-wywiad_922354.html).

51. This was a very important point made by attorney Tomasz Krawczyk, from the Warsaw Law Offices of Golebiowska, Krawczyk & Partners. See *Reprywatyzacja*, GKR LEGAL, <https://www.gkrlegal.pl/oferta/159/>. (He emphasized that it is not possible to evaluate in an accurate manner the probability of winning in any reprivatization case, as one judge may decide to follow the broad interpretation of the ALMN act, as suggested by the Constitutional Tribunal, while another judge will simply reject it).

The current socio-legal phenomenon of judicial reprivatization in Warsaw<sup>52</sup> cannot be explained without making a reference to the judicial system of administrative courts, due to their significant role within the process, as well as the impact of classical civil law jurisprudence on these courts' reprivatization decisions.

The significant position and jurisdiction of administrative courts in the Polish justice system comes from the fact that Polish legal jurisprudence recognizes the dichotomy between public and private law. In the context of reprivatization claims, administrative courts became important players because they have exclusive jurisdiction to nullify nationalization decisions of the communist government, under Art. 156 § 1 pkt. 2 K.p.a.,<sup>53</sup> or to declare such decisions issued "contrary to the law," under

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52. The Bierut Decree nationalized approximately 30 percent of Warsaw's area. The issue of judicial reprivatization in Warsaw also has a political dimension. The current President of Warsaw, Hanna Gronkiewicz-Waltz, as a result of the recent investigation conducted by the Central Anti-Corruption Bureau (CBA), is being accused of not exercising sufficient supervision over the reprivatization process within the City Hall. The report, which was disclosed in March 2017, emphasized that twelve properties out of fifty investigated were returned to the former owners without any legal basis. The President refused to sign the protocol and rejects accusations of a lack of sufficient monitoring. As of March 24, 2017, the CBA notified Warsaw prosecutors about their suspicions of criminal offenses being committed by City Hall officials: in particular, the failure to fulfill administrative duties for the purpose of obtaining a material benefit, as regulated in Art. 231 § 2 of the Polish Penal Code. This is a felony, punishable with imprisonment from one to ten years. In December 2017, three public officials from the City Hall were arrested under bribery charges. Also, Gronkiewicz-Waltz has been summoned several times by the Reprivatization Commission to testify as a witness. At the end of October 2017, due to her refusal to testify, the Commission fined her. The President of Warsaw claims that the Commission is unconstitutional, and thus, she has no legal duty to adhere to its subpoenas. See *Komisja weryfikacyjna vs Hanna Gronkiewicz-Waltz. Jest kolejna grzywna dla prezydent Warszawy*, RMF 24 (Oct. 18, 2017, 3:58 PM), <http://www.rm24.pl/fakty/polska/news-komisja-weryfikacyjna-vs-hanna-gronkiewicz-waltz-jest-kolejn,nld,2454146>. See also Piotr Kaczorek, *CBA składa nowe zawiadomienie o przestępstwach przy reprivatyzacji w Warszawie*, CENTRALNE BIURO ANTYKORUPCYJNE (Mar. 24, 2017), <https://cba.gov.pl/pl/aktualnosci/3655,CBA-sklada-nowe-zawiadomienie-o-przestepstwach-przy-reprivatyzacji-w-Warszawie.html>.

According to the official documents published by the Warsaw City Hall, former property owners, who had property nationalized under the Bierut Decree between 1947 and 1949, filed approximately 17,000 applications for the establishment of the right of temporary ownership. A majority of them were rejected or are still pending an administrative decision to be issued. Since 1990, approximately 7,000 applications were filed in the aftermath of nullification of the original nationalization decisions by the administrative courts. As a result, the President of Warsaw issued approximately 4,000 decisions of *restitutio in integrum*, excluding financial compensation decisions. See Tomasz Demiańczuk, *Biała Księga reprivatyzacji warszawskich nieruchomości*, MAISTO STOLECZNE WARSZAWA (July 13, 2016), <http://www.um.warszawa.pl/aktualnosci/bia-ksi-ga-reprivatyzacji-warszawskich-nieruchomo-ci>. Several major newspapers investigated the scope of irregularities in the process of reprivatization of Warsaw's properties. See, e.g., *Reprivatyzacja w Warszawie*, GAZETA PRAWNA.PL, <http://www.gazetaprawna.pl/tagi/reprivatyzacja-w-warszawie;dzika-reprivatyzacja>.

53. Kodeksu postępowania administracyjnego [K.p.a] [Code of Administrative Procedure] (Pol.).

Art. 158, if a nullification is not possible due to having produced “irreversible legal effects.”

Considering that former property owners have no direct claims based on the Bierut Decree, the critical provisions of the administrative law became: Art. 156 § 1 pkt. 2, and Art. 158, which allow challenges to administrative decisions with regard to their property. From a legal perspective, these two provisions can be considered as a safety valve and a legal mechanism which enables individuals to challenge in perpetuity administrative decisions which were issued in a flagrant violation of law. The administrative law in Poland introduces a rebuttable presumption of legality of administrative acts issued by administrative authorities, which means that despite the fact that a nationalization decision was illegal, i.e., issued in violation of substantive nationalization laws, it remains valid and legal until eradicated from the legal sphere by a judicial decision of an administrative court. These administrative law provisions can be considered as a necessary legal construction within any democratic jurisdiction; however, since any nullification decision of the court works *ex tunc*, judicial decisions of whether to annul any nationalization act must be properly balanced with several constitutional standards, which includes the following principles as expressed in Art. 2 and Art. 31 of the Constitution: *protection of acquired rights in good faith, legality, and trust*.

According to Roman Trzaskowski,<sup>54</sup> who is the current judge of the Supreme Court, the Supreme Court is confronted with a heavy burden because the majority of nationalization acts were issued by the Communist government in violation of laws which were enacted within this

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54. See Roman Trzaskowski, *Reprywatyzacja w Orzecznictwie Izby Cywilnej Sądu Najwyższego*, in *STUDIA I ANALIZY SĄDU NAJWYŻSZEGO TOM III 135* (Mateusz Pilich ed., 2016).

scope.<sup>55</sup> In other words, from 1945 until 1958, the Communist government enacted several statutes<sup>56</sup> which were supposed to govern the process of nationalization of major sectors of the Polish industry. The fact that former owners can challenge the validity of nationalization decisions comes from their erroneous enforcement and not from the fact that they did not envision any compensation. Thus, considering that a majority of nationalization decisions were unlawful, i.e., issued in violation of then-binding laws, and the massive scale of the process of nationalization, every decision in this realm by the Supreme Court will be evaluated from a legal, moral, and social perspective. Until recently, the Polish government, as a policymaker, did not address the problem of reprivatization. That is a major factor underlying why administrative courts became primary participants in the process of reprivatization in the country.

Whether the perspective of the Constitutional Tribunal<sup>57</sup> has a substantial impact on reprivatization decisions by administrative courts remains a matter of debate. First, in 2001, the Tribunal effectively foreclosed any constitutional challenges by individual claimants to nationalization laws. It held that, despite the illegitimacy of the Communist regime in Poland, the subsequent influence of this regime on the formation of Polish society was significant and constitutes the very basis

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55. Very important feedback on this issue was provided by Warsaw based attorneys, Stefan Jacyno and Radosław Wiśniewski from Wardyński & Partners, who stated that on the basis of their experience in reprivatization litigation, the Communist government rarely adhered to any procedural rules. For example, when taking over factories owned by private owners, the government didn't prepare detailed protocols, as required by law, which would contain all the necessary information regarding the factory, and whether a particular nationalization decision meets the criteria established by the substantive laws. It was often the case that the nationalization decision was not accompanied with any protocol, and the former owner was only granted a very ambiguous nationalization decision stating that the factory is taken over on the basis of relevant provisions. As of today, those former owners who decide to challenge nationalization decisions, often rely on their own, private documentation, such as for example photographs taken in order to document at the court that their factory didn't meet the statutory criteria to be nationalized. International Academic Conference on the Confiscation of Property in Poland and Efforts at Restitution, held by Cardinal Stefan Wyszyński University in Warsaw (June 28-30, 2017).

56. See note 3. See LUTEREK & INSTYTUT STUDIOW POLITYCZNYCH, *supra* note 2.

57. It is important to emphasize that the Tribunal has authority to eradicate any legislation which violates the Polish Constitution, and also to issue legal opinions which theoretically are not binding for the civil and administrative courts. However, many attorneys with whom I met in Warsaw while conducting research for this paper emphasized that it is not unusual or ineffective for lawyers to rely on the authority of the Tribunal while litigating reprivatization cases. In particular, its verdict issued in 2009, in which the Tribunal confirmed that Art. 215 of the statutory law on the management of properties (Ustawa o Gospodarce Nieruchmosciami [Act on Real Estate Management] (1997 Dz. U. nr. 102 poz. 651) (Pol.) is constitutional only under the condition that it will be applicable to all properties nationalized under the Bierut Decree. However, this verdict does not constitute a binding precedent, as it is only an advisory opinion. Thus, some lower courts recognize it as binding while others do not.

of the economic and social existence of a major part of Polish society up to the present. In other words, the passage of time cannot be ignored from the legal perspective, otherwise it will lead to social chaos and perhaps even civil war. In 2015, the same Tribunal issued a verdict according to which the problem of reprivatization in Poland will disappear slowly and no longer constitute a significant social and legal issue. It seems that the Tribunal considers the passage of time as a factor in the reprivatization context because over time there will be fewer and fewer claimants. Both verdicts of the Tribunal indicate a strong assumption that time will erase the problem.

When it comes to the judicial determination regarding the nullification of the nationalization decision, the essence of the court's analysis is focused around the issue of whether a particular nationalization decision resulted in "irreversible legal effects," as stated in Art. 156 § 1 pkt. 2 K.p.a. If such legal effects occurred, according to Art. 160 K.p.a., the court cannot eradicate such a decision, but instead, can only determine that such an act was issued in gross violation of the law. This verdict provides the claimant with the opportunity to seek compensation for the lost property, but the compensation is limited only to *damnum emergens*.

When the court nullifies the nationalization decision, a new administrative proceeding begins, pursuant to Art. 7 of the Bierut Decree. The aim of this proceeding is to determine whether the subject property meets the statutory conditions under which the claimant can be granted temporary ownership.<sup>58</sup> The legal condition of temporary ownership, established *expressis verbis* in the Bierut Decree, is that the individual usage of the property by the owner can be reconciled with the City of Warsaw's Urban Developmental Plan.<sup>59</sup> If this legal condition is possible to meet,

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58. An important criterion, which must be taken into consideration when making a decision of whether the claimant of the property has any legal standing, is to determine that the original owner of the property was not compensated on the basis of an indemnization treaty as a foreign citizen. The nationalization of Warsaw's properties affected not only Polish citizens, but also foreign citizens. Because of the high level of criticism coming from foreign jurisdictions, the Communist government was politically pressured to compensate the damage caused to non-Polish citizens. Thus, between 1946 and 1971, Poland signed ten bilateral indemnization treaties with European countries, as well as with the USA and Canada. See ALEKSANDER HETKO, DEKRET WARSZAWSKI. WYBRANE ASPEKTY SYSTEMOWE (2d ed. 2012).

59. See Bierut Decree, *supra* note 16, at ust. 1. The City of Warsaw is legally obliged to develop in accordance with specific statutory laws known as the Urban Plan of Development for the City. This process is designed to be transparent and to provide Warsaw's residents with a right to object to any of the City's proposals. This Urban Plan of Development is supposed to guarantee that Warsaw's architectural expansion proceeds on a long-term and coherent basis. Thus, if the property of the claimant is situated in a part of Warsaw which, according to the Plan, is dedicated to perform certain public utility functions (i.e. public schools, hospitals, playgrounds, cemeteries), the owner can obtain temporary ownership of his or her property if the public function can be

which means that the ownership of the property can remain with the legal owner while the property still can perform certain statutory public functions, we have a classic case of *restitution in integrum* where the former owner recovers his property. On the contrary, if the condition as established in Art. 7.2 of the Bierut Decree cannot be met, the former owner has a compensatory claim. As we see, the nullification of the original nationalization decision seems to be the most beneficial to the claimant because it has the potential for a physical restitution of the property into the owner's hands.

As already mentioned, the concept of "irreversible legal effects" of a nationalization decision, as formulated in Art. 156 § 2 K.p.a., remains the key term within the entire reprivatization debate, as its interpretation conditions whether administrative courts are obliged to nullify the original nationalization act. The core of the problem is that the judicial interpretation of this term by the Supreme Court is not convergent with the opinion of the Supreme Administrative Court (SAC). This situation is defined by the Polish doctrine as clear evidence that one can have different understandings of the term "irreversible legal effects," depending on the legal perspective and the social consequences one wants to achieve. The bottom line in this debate is that the SAC seems to be in opposition to the judicial interpretation of this concept by the Supreme Court, which supports an old civil law principle of *public credibility of land and mortgage registers*.

According to the Supreme Court,<sup>60</sup> when we have a situation in which the original owner was deprived of the ownership of the property through an illegal nationalization act, and the government, as the new owner of this property, made subsequent financial transactions regarding the property (i.e. sale, lease, granting temporary usufruct), third parties who were involved in these legal transactions are protected by the principle of *public credibility of public land registers*. In other words, if a third party, relying in good faith on the public information available in the land registry that the government is the legal owner of a property, decided to purchase or lease such a property, this legal transaction cannot be reversed and qualifies as a case of irreversible legal effects. However,

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accomplished while the private ownership of the property remains in the hands of the legitimate owner. This legal issue will be examined in the subsequent part of this paper. Thus, it is sufficient to mention here only that under the Communist regime, the possibility for a private individual to perform public utility functions through the means of owning a property was very limited by the law; only private schools, hotels, and (to a limited degree) hospitals could do so. In addition to these legal restrictions, one has to consider that the Marxist ideology constituted a major underpinning of the interpretation of then binding laws.

60. See Sąd Naczelny [Supreme Court], III AZP 4/92, May 28, 1992 (Pol.).

the case law of the SAC seems to be very ambiguous on the issue of irreversible legal effects.<sup>61</sup> On the one hand, it sometimes recognizes that the principle of public credibility of land registers protects third parties who purchased a property in good faith, and thus it creates irreversible legal effects, but on the other hand, the SAC considers that the mere fact that a nullification of the nationalization decision will not result in restitution of a property in *natura* does not necessarily mean that such a nationalization act caused irreversible legal effects. The line of reasoning is the following: the nationalization decision was issued in flagrant violation of law by administrative authorities, and, after it was re-examined by the administrative court, it became nullified. The rationale behind this nullification is that the original act did not result in irreversible effects, as a third party become the owner of such property not on the basis of the original nationalization act, but on the basis of subsequent governmental administrative decisions, which do not affect the issue of “irreversibility of legal effects.”

Certainly, the lack of a bright line on how to maintain constitutional standards and social justice when making a judicial determination whether to nullify the nationalization act, combined with two other significant provisions of the civil law,<sup>62</sup> contributed to the emergence of the legal phenomenon of “Wild Reprivatization.”

### *C. The phenomenon of “Wild Reprivatization” in Warsaw*

It appears that the term “Wild Reprivatization” emerged in public discourse not only because of the complex mechanisms of judicial reprivatization, which are beyond the comprehension of laymen, but also because the system became abused by fraudulent reprivatization cases.<sup>63</sup> These abuses were facilitated by two unique civil law constructions: the

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61. See Naczelny Sąd Administracyjny [Supreme Administrative Court], OPK 4-7/98, Nov. 9, 1998 (Pol.); Naczelny Sąd Administracyjny [Supreme Administrative Court], IV SA 2182/99 (Pol.).

62. The first provision allows for public trade between parties of Bierut Decree claims. The second provision is linked to the civil law construction of a legal representation for a third party, who is subject to a civil proceeding and whose physical address cannot be identified.

63. According to the Ministry of Justice and Prosecutor General, the criminal investigation of approximately 100 properties which were reprivatized in Warsaw is ongoing. See MINISTERSTWO SPRAWIEDLIWOŚCI, <https://www.ms.gov.pl/> (last visited Jan. 21, 2018). The non-governmental organization Miasto Jest Nasze provides on its website a model of reprivatization which links together in a criminal conspiracy some major political figures, organized crime groups, and attorneys. It also provides a report with a list of properties which, according to this organization, were reprivatized in a fraudulent manner. See *Warszawska Mapa Reprywatyzacji*, *supra* note 10.

possibility to trade in legal claims,<sup>64</sup> and the institution of a legal representative for a person whose place of residence is unknown, i.e. a *curator*.<sup>65</sup>

With regard to the former, the principle according to which an individual can trade his or her legal claim or right is well established in Polish jurisprudence. In the context of Warsaw reprivatization, the following factors have to be considered. On the basis of the Bierut Decree, former owners whose property was nationalized did not have a compensatory claim *per se*, but a claim to the establishment of temporary ownership of the property. Before such a claim can be re-examined today, first the claimant has to nullify the prior nationalization decision. As we see, the legal process is complex and uncertain, and thus on the one hand, when a claimant is approached by a third party with a proposition to purchase such an uncertain claim it may seem like a fair proposition. On the other hand, there seems to be a certain element of vulnerability present for the claimant when being approached by a professional buyer of Bierut Decree claims, due to the buyer's knowledge, expertise, and funds. As long as parties engage in a fair deal, without "insider" knowledge, there is no legal problem, and no conflict of interest. The problem arises when a third party, based on his or her special knowledge,<sup>66</sup> proposes a deal to the claimant, as has been alleged to have occurred in the prominent recent case of property which was located at the time of nationalization at Chmielna 70.<sup>67</sup>

The second contributing factor to the abuses of the current model of reprivatization refers to the civil law institution which is established in order to secure personal and property rights of the person whose place of physical residence is unknown to the court, and who is a party to the civil

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64. Legal claims based on the Bierut Decree can be traded, as with any other legal claims or rights, pursuant to Art. 912 of the Civil Code. Kodeks cywilny [Civil Code] Art. 912 (Pol.). However, the new statute enacted in September 2016, in order to remedy the abuse and fraudulent reprivatization taking place in Warsaw, introduced several limitations within this realm. For example, once the City Hall of Warsaw announces publicly the address of the property with regard to which the original claim based on the Bierut Decree was filed by the owner, legal heirs to such property have six months from the official publication to provide the City Hall with their names and residential addresses, and subsequently within three months they must gather sufficient evidence of their ownership rights to the property. In the case no legal action is taken on behalf of the legal heirs of the property, their legal claims to such property expire and the property ownership is transferred to the government.

65. This institution is regulated in the Civil Code, Family Code, and also various other statutes.

66. Similar to inside knowledge in the corporate context.

67. The case of reprivatization of Chmielna 70 was examined on the basis of publicly available documents on the website. See CHMIELNA 70, <https://chmielna70warszawa.wordpress.com/> (last visited Jan. 21, 2018).



proceeding. In Warsaw, many former owners of property died in World War II, but there are no official records which would confirm their death. A typical modus operandi of a third party who wants to take ownership of a particular property in Warsaw.<sup>68</sup> illegally is that the person will request the court to establish him or her as a legal guardian of the legal owner.<sup>69</sup> Polish courts agreed to such requests, despite some of the legal owners being in their hundredth year of age, because there was no legal presumption of their death in the absence of official records confirming the death. For example, in the reprivatization case of a property located at Targowa Street, a well-known professional buyer of Bierut Decree claims was a co-owner of a property and requested the court to make him the legal representative of his co-owner, whose physical address was not known to him. He provided false testimony that he made several attempts to find her and was unsuccessful. The court agreed, and thus, he became the full owner of the property.<sup>70</sup>

*D. The new legislative statute on property reprivatization in Warsaw as a legal remedy to the legal and social disorder arising from the Bierut Decree*

In the aftermath of the recent public disclosure of reprivatization irregularities in Warsaw by various democratic constituencies (e.g. private citizens, investigative journalists, and NGOs), the current government adopted three significant measures in order to address the problem.

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68. The abuser knows that the original owner of the property is no longer alive, or his or her heirs are impossible to identify. *See generally* Ewa Andruszkiewicz, *Reprywatyzacja w Warszawie: Kancelarie adwokackie miały poparcie elit politycznych i wymiaru sprawiedliwości*, GAZETA PRAWNA (Mar. 3, 2016), <http://prawo.gazetaprawna.pl/artykuly/972506,reprywatyzacja-w-warszawie-dyktat-prawa-wlasnosci.html>.

69. Any person can become the legal representative for a party whose place of residence is unknown, and for whom there is no record of death. A legal representative does not have to be a court-appointed attorney. In the context of reprivatization, where many former property owners who died during the war may not have relatives residing in Poland, this construction of civil law may seem absurd due to its vulnerability for potential abuse.

70. Marek Marcinkowski was indicted on July 21, 2017, for attempting to pursue a fraudulent reprivatization. He was also summoned to testify as a witness by the Reprivatization Commission; however, his defense lawyer challenged the constitutionality of the Commission and asserted Marcinkowski's right to remain silent. *See Akt oskarżenia przeciwko Markowi M. w sprawie usiłowania doprowadzenia do bezprawnej "reprywatyzacji" nieruchomości położonej w Warszawie przy ul. Targowej*, PROKURATURA OKREGOWA W WARSZAWIE (July 21, 2016), [http://www.warszawa.po.gov.pl/pl/main/komunikat/id/392/alias/akt\\_oskarzenia\\_przeciwko\\_marcinkowi\\_m\\_w\\_sprawie\\_usilowania\\_doprowadzenia\\_do\\_bezprawnej\\_%E2%80%99reprywatyzacji%E2%80%9D\\_nieruchomosci\\_polozonej\\_w\\_warszawie\\_przy\\_ul.\\_targowej\\_.html](http://www.warszawa.po.gov.pl/pl/main/komunikat/id/392/alias/akt_oskarzenia_przeciwko_marcinkowi_m_w_sprawie_usilowania_doprowadzenia_do_bezprawnej_%E2%80%99reprywatyzacji%E2%80%9D_nieruchomosci_polozonej_w_warszawie_przy_ul._targowej_.html); Lawyer: restitution/commission acts against the Constitution, Wolters Kluwer (June 26, 2017), <http://www.lex.pl/czytaj/-artykul/adwokat-komisja-reprywatyzacyjna-dziala-wbrew-konstytucji>.

The first measure was adopted by the District Attorney, Prokurator Krajowy, on November 17, 2016, who issued Executive Order Nr. 98/16 and established a special team of prosecutors to re-examine past reprivatization cases.<sup>71</sup> If the results of the verification of past prosecutorial decisions demonstrate that prosecutors' refusal to pursue criminal investigations was unjustified,<sup>72</sup> then the newly established team of prosecutors is obliged to undertake all necessary criminal and civil measures in order to "freeze" these reprivatization decisions.

For example, on March 22, 2017,<sup>73</sup> as a result of an investigation pursued by the special reprivatization team, prosecutors from the Warsaw Praga District issued a legal motion to the civil court demanding to invalidate the 2015 sale contract of the property located at Stalowa 25. This property involved two elderly women who sold their Bierut property claims to a third party for the amount of PLN 30,000.<sup>74</sup> The legal argument raised by the prosecutors is that the purchase price established by the parties was symbolic and it did not reflect the real market value of the property. Thus, the contract violated the basic principles of fairness and social norms, as established in Art. 58 § 2 of the Civil Code.

Another example of investigative work pursued by the reprivatization team refers to the property located at Odolanska 7,<sup>75</sup> whose nationalization on the basis of the Bierut Decree was nullified as a result of an

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71. Prokurator Krajowy Zbigniew Ziobro established a special investigative team of prosecutors whose main task is to re-examine former decisions of prosecutors refusing to investigate alleged cases of fraudulent reprivatization in the city. In other words, a highly specialized team of prosecutors was set up in order to go through the files of those reprivatization cases which the Warsaw district prosecutors had refused in the past to investigate. For the legal statute that authorizes Prokurator Krajowy to issue such an executive order, *see* Ustawa z dnia 28 stycznia 2016 r. Prawo o Prokuraturze [Act of 28 January 2016. Law on the Prosecutor's Office] (Dz. U. z 2016 r. poz. 177 ze zm.) (Pol.).

72. Prosecutors in Poland, as in the United States legal system, exercise prosecutorial discretion. Thus, the special team of prosecutors was established in 2016 to determine not whether the former decisions of prosecutors were illegal, but rather if they were unjustified. According to press reports, 95% of prosecution cases related to reprivatization in Warsaw have ended in failure. In half of these proceedings, investigations were not even initiated, while 19 cases were dismissed, and one was suspended. Tomasz Gzell, *Prokuratura regionalna bada 40 spraw dotyczących reprivatyzacji*, (Sept. 9, 2016) <http://www.rp.pl/Nieruchomosci/309139982-Prokuratura-regionalna-bada-40-spraw-dotyczacych-reprivatyzacji.html#ap-1>.

73. *See* *Pozew Prokuratury Regionalnej w Warszawie do Sądu o uznanie za nieważne czynności prawnych i zabezpieczenie roszczenia w sprawie nieruchomości położonej przy ul. Stalowej 25 w Warszawie, nabytej za 30 000,00 zł*, PROKURATURA REGIONALNA W WARSZAWIE (Mar. 30, 2017), <http://warszawa.pr.gov.pl/news/583.3>

74. This fraudulent reprivatization case was re-examined by the prosecutors under the following number: Sygn. akt RP III Par 76.2017. *Id.*

75. *See* *Sprzeciw Prokuratury; Regionalnej w Warszawie od decyzji z dnia 27 września 2013 roku, Nr 359/GK/DW/2013, wydanej z up. Prezydenta M. St. Warszawy przez Zastępcę Dyrektora*

administrative decision issued in 2013 by Warsaw's City Hall officials. Prosecutors challenged the legality of this nullification decision, as the material gathered in the nullification process at the City Hall did not provide sufficient evidence that the claimant to this property in fact had it in their possession when making the original claim in 1949. In fact, the evidence indicates that the nationalized property was in the possession of the Communist government, and that the relevant building was established as the official headquarters for the Ministry of Public Safety.

The analysis of the foregoing two cases clearly shows that the spectrum of reprivatization irregularities being detected is very broad.<sup>76</sup> Such inappropriate behavior<sup>77</sup> violates fundamental standards of fairness in legal transactions and gross negligence on the side of administrative authorities in the process of evaluating evidence in reprivatization proceedings.

The second measure adopted at the governmental level was the appointment of a Commission of Inquiry on March 9, 2017 to investigate the regularity and legality of the operations of the authorities and public and local government institutions in the reprivatization process conducted across Poland in the period of 1989-2016.<sup>78</sup> This is an investigative commission equipped with broad prosecutorial powers, established

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*Biura Gospodarki Nieruchomościami*, PROKURATURA REGIONALNA W WARZAWIE (May 31, 2017), <http://warszawa.pr.gov.pl/news/605>.

76. It is important to emphasize that because of this paper's page limit, only two cases of fraudulent reprivatization were examined. Moreover, as of October 2017, there are 150 ongoing criminal investigations, according to the Prosecutor General. See Redakcja, *Minister Sprawiedliwości ostro o aferze reprivatyzacyjnej. Handlarze roszczeń powinni drzeć*, NIEZALEŻNA (Sept. 10, 2017), <http://niezalezna.pl/205408-minister-sprawiedliwosci-ostro-o-aferze-reprivatyzacyjnej-handlarze-roszczen-powinni-drzec>.

77. It is important to acknowledge that at the time this paper was being written, there was an ongoing criminal investigation being pursued by various law enforcement authorities, including the special team of prosecutors, the Central Anti-Corruption Office, and the special Parliamentary Investigative Commission on Reprivatization in Warsaw. Therefore, the author of this paper knowingly used the term "wrongdoings," instead of any legal terms, such as fraud, bribery, abuse of power, or gross negligence in the enforcement of statutory obligations by City Hall representatives. See *Sprzeciw Prokuratury Regionalnej w Warszawie od decyzji z dnia 27 września 2013*, *supra* note 74; PROKURATURA KRAJOWA, <http://pk.gov.pl/> (last visited Jan. 21, 2018); CENTRALNE BIURO ANYKORUPCYJNE, <https://cba.gov.pl/> (last visited Jan. 21, 2018); Wydział Komunikacji Społecznej i Promocji, *Patryk Jaki przewodniczącym komisji weryfikacyjnej ds. reprivatyzacji w Warszawie*, MINISTERSTWO SPRAWIEDLIWOSCI MAY 11, 2017), <http://ms.gov.pl/pl/informacje/news,9336.patryk-jaki-przewodniczacym-komisji.html>; *Komisja weryfikacyjna informacje ogólne*, MINISTERSTWO SPRAWIEDLIWOSCI, <http://bip.ms.gov.pl/pl/komisja-weryfikacyjna/informacje-ogolne/> (last visited Jan. 31, 2018).

78. See Ustawa z dnia 9 marca 2017 r. o szczególnych zasadach usuwania skutków prawnych decyzji reprivatyzacyjnych dotyczących nieruchomości warszawskich, wydanych z naruszeniem

on the basis of a statutory act adopted by the Polish Parliament. The Commission launched its investigative work in March 2017 and revised 13 privatized property cases within the first five months in Warsaw.<sup>79</sup> Among the examined cases was a property located at Chmielna 70.<sup>80</sup> As a result of the Commission's investigation, it was determined that Warsaw City Hall officials grossly violated Art. 7 and Art. 77 § 1 of the Code of Administrative Proceedings. Therefore, the Commission decided to nullify the reprivatization decision and the ownership of the subject property was returned to the Polish government. The essence of the legal violations committed by City Hall officials was that they did not perform a diligent examination of the legal basis of the transaction between a third party and legal heirs to the property. It turned out that a third party was acting in good faith, but legal heirs to the property were in fact not legitimized to engage in any transaction referring to this property, because the original owner of the property had already been compensated in the past and thus any legal claims based on the Bierut Decree had expired. Despite the complexity of legal issues surrounding the subject property,<sup>81</sup> the evidence available clearly indicates that the City Hall officials committed a

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prawa [Act of 9 March 2017 on Special Rules for the Legal Consequences of Reprivatization Decisions regarding Warsaw Real Estate, Issued in Violation of the Law] (2017 Dz. U. nr. 1 poz. 718) (Pol.).

79. See Komisja weryfikacyjna informacje ogólne, *supra* note 76.

80. The file number for this property is Sygn. Akt R 8/17. Grzegorz Majewski provided an interview for *Gazeta Prawna* on August 31, 2016, in which he claimed that he acted in good faith when entering into the purchase transaction, and that he neither violated legal norms, nor ethical norms of his profession. See CHMIELNA 70, *supra* note 66.

81. The subject property at the former Chmielna 70 originally belonged to Danish citizen Martin Holger, who permanently resided in Warsaw, and whose property was nationalized under the Bierut Decree. Due to international pressure in the aftermath of nationalization, the Communist government signed several bilateral treaties, i.e., indemnization treaties, according to which foreign citizens who lost the ownership of their properties in Poland were to be financially compensated by the Polish government. Denmark was among these countries, and the Polish government transferred an adequate amount of compensation money into a Dutch governmental account. Thus, Holger was legally compensated and any legal claims under the Bierut Decree to the subject property expired *ex lege*. The essence of this case is that Holger's heirs sold their alleged claims to this property based on the premise that Holger never obtained the compensation money. This is the crucial link which connects us to a third party, Grzegorz Majewski, who purchased the claims to this property from Holger's heirs. The main figure in the City Hall who was responsible for granting the ownership of the property to Grzegorz Majewski was a former director of the department dealing with reprivatization. According to his testimony, he did not engage in any illegal act, since prior to the final verdict his department requested all the necessary documentation from the Ministry of Foreign Affairs in order to determine whether Holger was placed on the list of Dutch citizens compensated by the government. The official response from the Ministry was that they are not in a possession of any such formal or informal list. The very fact that there has been no official list, and that the subject treaty between the Danish and Polish government was not ratified and published was, in the opinion of the department of the reprivatization director, sufficient evidence to determine that Holger was not compensated and thus, his heirs were eligible to sell their claims to the

flagrant violation of law by being grossly negligent in their examination of the case. The second issue that inevitably arises in this particular context (i.e., the significant value of the property involved, and a prominent Warsaw attorney as the ultimate beneficiary) is whether we are dealing with flagrant gross negligence or corruption.

Finally, the third type of measure enacted by the government, aiming to curb fraudulent reprivatization, is a statutory act enacted in 2015, which came into force on September 17, 2016,<sup>82</sup> as a “Small Reprivatization Statute.” The legal analysis of this act allows us to conclude that the main purpose of this statute was to close any further opportunity to commit fraud, bribery, and other forms of criminal behavior in the process of reprivatization. Thus, it is a *post-crime*, emergency type of legislation which aims to limit future offenses. As with any emergency type of statute, despite the fact that its general goal is justified, it comes with various unintended social consequences. Due to the statute’s flaws,<sup>83</sup> it does not completely close the opportunity to abuse the reprivatization process in a criminal matter. Before taking a deeper insight into this new law, there remains one more important issue which must be emphasized with regard to the nature of the phenomenon of “Wild Reprivatization.”

The recent political and public discourse is primarily focused on criticizing the triad of measures<sup>84</sup> adopted by the current government, and pays little attention to the fact that white-collar crime<sup>85</sup> has flourished

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property. The former director of the reprivatization department was subpoenaed by the Commission of Inquiry in June 2016. See *Postępowania przed komisją: d. ul. Chmielna 70, supra* note 78.

82. The full Polish title of this statute is: Ustawa z dnia 25 czerwca 2015 r. o zmianie ustawy o gospodarce nieruchomościami oraz ustawy – Kodeks rodzinny i opiekuńczy, published in Dz.U. 2016 poz. 1271, but it functions in the legal sphere as “Mała ustawa reprivatyzacyjna,” which translates into “Small Reprivatization Act.” See *Ustawa z dnia 25 czerwca 2015 r. o zmianie ustawy o gospodarce nieruchomościami oraz ustawy - Kodeks rodzinny i opiekuńczy* [Act of June 25, 2015 amending the act on real estate management and the Act - Family and Guardianship Code] (2016 Dz. U. poz 1271) (Pol.).

83. Feedback provided by Maciej Kalinski, on November 10, 2016, during the interview in Warsaw. Maciej Kalinski is a professor of civil law at Warsaw University Faculty of Law.

84. The triad of measures includes: the special team of prosecutors re-evaluating past prosecutorial decisions not to launch a criminal investigation into allegedly fraudulent reprivatization cases, the Commission of Inquiry over Reprivatization Cases from 1989, and the Small Reprivatization Bill.

85. Edwin Sutherland introduced the concept of “white-collar crime” in 1939 as “crime committed by a person of respectability and high social status in the course of his occupation.” The essence of his definition of white-collar crime is that it does not have to violate criminal law *per se* in order to qualify as crime as long as there has been a violation of trust entrusted upon the perpetrator and social harm. Thus, Sutherland defines white-collar crime as a moral transgression independent of the illegal nature of the act itself. See Edwin Sutherland, *White Collar Criminality*, AM. SOC. REV. 1 (1940).

behind the respectable facade of Warsaw City Hall over the past decade.<sup>86</sup> Moreover, the ongoing criminal investigations and the reversal of twenty-three prior reprivatization<sup>87</sup> decisions by the Commission of Inquiry indicates a likelihood of the existence of a political-criminal nexus.<sup>88</sup> The fact that political discourse is primarily preoccupied with shifting the responsibility for the lack of comprehensive reprivatization laws onto the incumbent government, and the lack of pressure put on the current president of Warsaw to resign and take political accountability for her lack of supervision over the City Hall officials, clearly demonstrate that the dynamics of “trivializing white-collar crime” have unfolded.<sup>89</sup> According to H. Pontell,<sup>90</sup> white-collar crime “not only suffers from trivialization, but also from a failure of recognition, from invisibility, from its status, as a non-issue.” There are many factors that contribute to this process; for example, legal weaknesses in proving fraud and/or conflict of interest, but also lack of direct victimization, as in society not being aware that it has been victimized by fraudulent reprivatization until prosecutors launch investigations. Also, Moynihan’s concept of “Defining Deviancy Down”<sup>91</sup> is quite helpful in understanding the process of trivialization of white-collar crime at the societal level. According to Moynihan, in light of the increasing volume of crime, as a society we have become so familiar with this criminogenic reality around us that we no

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86. The President of Warsaw is legally obliged to supervise the reprivatization process at City Hall.

87. According to the data available at the website of the Commission, as of January 11, 2018. See *Postępowania Przed Komisją*, supra note 78.

88. Among the most active NGOs in Warsaw fighting against fraudulent reprivatization is *Miasto Jest Nasze*, which published on their website an interactive map called “Reprivatization Mafia in Warsaw.” This map provides the names and connections between various actors engaged in reprivatization. These persons include politicians, businessmen, lawyers, judges, and organized crime gang members. See *Warszawka Mapa Reprywatyzacji*, supra note 10. Moreover, Prosecutor General Zbigniew Ziobro, during his most recent public conference, stated “[t]he scale of irregularities during the Warsaw reprivatization was gigantic, and that the people who engaged in this process were prominent politicians, lawyers, who guaranteed to each other due to their political and social power in the city, criminal immunity. This is the essence of mafia type association.” See *Ziobro: Wartość wyludzonych nieruchomości sięga miliarda złotych*, TELEWIZJA POLSKA, <https://www.tvp.info/34370081/ziobro-wartosc-wyludzonych-nieruchomosci-siega-miliarda-zlotych> (last updated Dec. 10, 2017).

89. Henry Pontell introduced the phrase “Trivialization of White-Collar-Crime” in order to illustrate how various societal and political factors, combined with the very nature of white-collar crime, lead to undermining and lack of recognition of this type of criminal offense by society and the criminal justice system. See Henry Pontell, *Theoretical, Empirical, and Policy implications of Alternative Definitions of “White-Collar Crime”*: *Trivializing the Lunatic Crime Rate*, in THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 39-56 (Shanna Van Slyke, Michael Benson & Francis Cullen eds., 2016).

90. *Id.* at 42.

91. Daniel Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17 (1993).

longer react to it. We take it for granted. Also, we do not necessarily denote many of these crimes as deviant.<sup>92</sup> Finally, British criminologist M. Levi describes this process in the following manner: “[t]he fraudster is not lodged in the public imagination as some familiar “folk demon.” Hoodlums, drug traffickers, child batterers, and terrorists are well established in our tabloid gallery of rogues and misfits.”<sup>93</sup> In the case of Warsaw’s fraudulent reprivatization, typical factors which shield white-collar criminals from being labeled as offenders and deviants – high social status, respectability, running successful and legitimate businesses – are present and applicable.

From a political perspective, there is nothing surprising about the fact that the opposition party criticizes the policy of the incumbent government.<sup>94</sup> This practice constitutes a well-established democratic standard. When it comes to a legal statute, however, the pros and cons can vary depending on the political and economic views being taken. Interestingly, most academics, lawyers, and judges agree that the legal mechanism of the “Small Reprivatization Bill,” which aims to stop the problem of reprivatization in Warsaw, is unfair and violates both the Polish Constitution and European Convention on Human Rights.<sup>95</sup>

On the other hand, when taking a strictly criminological perspective, this statute seems to be the masterpiece on how to control fraudulent reprivatization. The following reasoning provides the supporting arguments.

The reprivatization process cannot be understood exclusively as a legal or judicial process, but rather, as a process deeply embedded in a larger political and social context. Various political and social variables provide us with a contextual framework for the analysis of reprivatization-related crime. Many criminological theories (e.g. anomie/strain,

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92. In Poland, since 2002, there had been several investigative commissions enacted at the Parliamentary level, which investigated a number of white-collar crime cases involving top-level politicians and businessmen, i.e. the Rywin scandal, the PKN Orlen scandal, the Agrarian-Land scandal, the Gambling sector scandal, and the ongoing Amber Gold scandal; see *Największe afery biznesowo-polityczne w Polsce*, BANKIER.PL (June 6, 2014) <https://www.bankier.pl/wiadomosc/Najwiecez-afery-biznesowo-polityczne-w-Polsce-7216379.html>.

93. See Michael Levi, *Trans-National White-Collar Crime: Some Explorations of Victimization Impact*, in CONTEMPORARY ISSUES IN CRIME AND CRIMINAL JUSTICE: ESSAYS IN HONOR OF GILBERT GEIS (Henry N. Pontell & David Shichor eds., 2001).

94. The current opposition party in Poland, Platforma Obywatelska, criticizes the enactment of the special team of prosecutors to review past reprivatization cases which were dismissed, and the Commission of Inquiry.

95. See Konstytucja Rzeczypospolitej Polskiej [Constitution of the Republic of Poland of February 4, 1997] (1997 Dz. U. nr. 78 poz. 483) (Pol.); Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols Nos. 11 and 14*, Nov. 4, 1950, (entered into force Sept. 3, 1953) 213 U.N.T.S. 221, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

learning/differential association, control theory, routine activity theory) point to the role of contextual factors in crime causation, and all of them can be applied to the study of white-collar crime in the present reprivatization context.

Coleman's theory of white-collar crime<sup>96</sup> seems to be the most adequate theory supporting the enactment of the "Small Reprivatization Bill." He proposes the "routine activity" theory, according to which the convergence of three elements explains why crime is committed: the supply of motivated offenders, the availability of suitable targets, and an absence of capable guardians.<sup>97</sup> In the Warsaw case, there had been a critical element of opportunity, in the form of vague reprivatization laws containing legal loopholes, and a lack of "gatekeepers" who would monitor this entire process. The process of "Wild Reprivatization" consisted, to a certain extent, of white-collar crime, but the central question remains as to the scope of illegality *per se*.<sup>98</sup>

Therefore, if one agrees that the "routine activity" theory explains the root causes of Warsaw's "Wild Reprivatization," one has to admit that the only policy to be enacted is to eliminate the existing opportunity to commit crime. This is precisely what the government did. Now the question is whether the cost of implementing such a policy will outweigh its desirable goals.<sup>99</sup>

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96. See James Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93 AM. J. OF SOC. 406 (1987).

97. Criminology scholars agree that routine activity theory is applicable not only to predatory crimes, but also to organized crime, including organized crime in countries undergoing political, and economical transition. See ALEXANDER KUPATADZE, *ORGANIZED CRIME, POLITICAL TRANSITIONS AND STATE FORMATION IN POST-SOVIET EUROASIA* (Palgrave Macmillan ed., 1st ed. 2012).

98. The author of this paper would like to emphasize one more time that for the purpose of this publication, a broader criminological approach to the concept of crime was applied, following Sutherland's framework. Thus, the very fact that there had not been any criminal law violations, but only violations of administrative and/or civil law, constitutes the essence of Sutherland's theory.

99. Pursuant to the new reprivatization statute in Warsaw, on February 22 and March 29, 2017, the City of Warsaw started issuing individual Notices or Announcements, in Polish and English, concerning properties for which legal heirs have six months to appear at the City Hall in order to claim their legal rights to these properties; afterwards, they have three months to prove their claim. The time starts running from the date of publication of the relevant notice. The legal mechanism introduced in this bill states that if legal heirs to the property do not provide sufficient evidence to prove their ownership, their claims based on the Bierut Decree will expire and the subject property will *ex lege* become the property of the government. Various stakeholders provide their arguments that this reprivatization bill is not fair and transparent legislation. In other words, Poland is criticized that this statute does not address the problem of nationalization from the Bierut Decree, but rather, it closes any legal possibility to challenge nationalization acts after six months from the time the address of the property was disclosed. At the end of March 2017, 63 notices were issued. However, due to the fact that the City Hall updates the website monthly, in order to calculate the total number of notices issued, one would have to request City Hall for the official number. These



## III. CONCLUSIONS

Normative systems do not operate within a vacuum, and with regard to Poland, it has to be emphasized that the year 1989 had a profound impact on the social, political, and economic conditions. With the collapse of the Soviet Union and the so-called “Eastern bloc,” Poland began a phase of reconstruction (legal, socio-political, economical) and opened a new chapter during which major legislative changes, which were necessary in order to join the two political structures of the European Union and NATO, were initiated. The political and economic transformation of Poland, as well as many other post-Soviet countries, is often characterized by scholars in terms of following the fallacy that the introduction of a democratic system could be simply based on Western patterns. According to Melich,<sup>100</sup> the attempt to construct a new democratic order without considering the specific features of a country, such as political and social history (previous democratic experience), and culture (individualistic or paternalistic culture, religious or secular approach), is at risk from the following pitfalls: the fragility of civil society, incoherence of democratic institutions, the revival of old communist habits and the return of post-communist elites (former apparatchiks and their children), revisionist voices, and populist voices. Perhaps the policy maker in Poland, by not enacting a comprehensive reprivatization statute, felt that similarly to other Western countries, it could afford not to regulate a certain socio-economic issue. The truth is, in a country which went through a major political transformation, the process of reprivatization has to be governed, or at least supervised, when the policy maker refused or was unable to do so. Thus, the question is: who was supposed to become such a “gate-keeper” in the case of Poland? The Supreme Court, the Constitutional Tribunal, society, or someone else?

There is no doubt that Polish administrative courts became a critical chain in the administration of justice in the context of reprivatization. Unfortunately, this form of reprivatization has nothing in common with social justice and fairness because in the absence of a comprehensive statute, it constitutes a process of judicial correction of erroneous law enforcement by the Communist government. The question is whether this

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notices are also available in English at the Warsaw City Hall official website. See *Ogłoszenia i informacje-sprawy dekrétowe*, BIULETYN INFORMACJI PUBLICZNEJ, [https://bip.warszawa.pl/Menu\\_podmiotowe/biura\\_urzedu/SD/ogloszenia/default.htm](https://bip.warszawa.pl/Menu_podmiotowe/biura_urzedu/SD/ogloszenia/default.htm) (last visited Feb. 25, 2018).

100. See Jiri Melich, *The Relationship between the Political and the Economic in the Transformations in Eastern Europe: Continuity and Discontinuity and the Problem of Models*, 34 EAST EUR. Q. 2 (2000).

is the optimal model of reprivatization which society desires and deserves.<sup>101</sup>

From the perspective of individuals who became victimized by nationalization decisions because they lost their property, this is a relevant question. It also remains a critical question for an average citizen, because the current model of reprivatization produces substantial economic costs and is questionable in terms of its legal foundations. Several representatives of the legal doctrine, including Ewa Łętowska<sup>102</sup> and Tomasz Luterek,<sup>103</sup> expressed a very critical opinion of the judicial work performed by administrative judges, who are blamed for the poor and short-term vision reflected in their reprivatization verdicts. According to Łętowska, administrative courts established a “model of decentralized and isolated reprivatization” in the country, by which she means that individual justices, when making particular nullification decisions, were not able to perceive that each decision, considering the scale and illegality of a majority of nationalization acts, contributes to a phenomenon of “massive reprivatization.” Moreover, she points to a critical decision which was issued in 2008 by the Supreme Administrative Court,<sup>104</sup> in which the court departed from an established principle according to which a former property owner cannot be restituted *in natura* if the property is designated for public utility purposes (e.g. schools, playgrounds, cemetery, public road, park, etc). Under the Bierut Decree, many owners whose property was nationalized filed legal claims to obtain temporary ownership of the property (perpetual usufruct). The only condition required to have the claims considered was that the usage of the property could have been reconciled with the function which the property was assigned in the City’s Plan of Development. This function often was described in general terms as public utility. The significance of this 2008 verdict is that from the court’s perspective, the fact that a nationalized

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101. Dr. Tomasz Luterek raises similar issues in his recent publication. According to Luterek, the recent scandal in Warsaw regarding reprivatization disclosed major factors which triggered a criminogenic environment to pursue fraudulent reprivatization claims. Thus, Polish society is forced to “wake up” and decide on the shape of reprivatization. LUTEREK & INSTYTUT STUDIÓW POLITYCZNYCH, *supra* note 2.

102. See 1997 Dz. U. nr. 102 Poz. 651. Łętowska emphasizes that the main goal of any nullification of nationalization decisions by administrative courts should be restitution of property *in natura*, and not a financial compensation. Mariusz Jałoszewski & Waldemar Paś, *Prof. Ewa Łętowska: Własność nie jest święta [CYKL “WYBORCZEJ”]*, WYBORCZA.PL (Feb. 14, 2015), [http://wyborcza.pl/magazyn/1,124059,17405654,Prof\\_Ewa\\_Letowska\\_Wlasosc\\_nie\\_jest\\_swieta\\_CYKL.html?disableRedirects=true](http://wyborcza.pl/magazyn/1,124059,17405654,Prof_Ewa_Letowska_Wlasosc_nie_jest_swieta_CYKL.html?disableRedirects=true).

103. *Id.* at 317-28; Jałoszewski & Paś, *supra* note 104.

104. According to Łętowska, this verdict opened the gate to an excessive model of reprivatization, within which former owners are disproportionately favored by the judicial system at the cost of the entire society. *Id.*

property performs a public utility function today does not prohibit the court from returning the property to the original owner. In other words, the court stated that a public utility function can easily be performed by a private owner. It is hard to agree with this line of reasoning because various public functions, such as providing affordable accommodation, public school education, etc., are statutorily prescribed to be performed by counties. Counties are legally obliged to perform them regardless of whether they are profitable. Once a private owner takes responsibility to provide accommodation, his or her primary aim is to generate a profit, and this is exactly what can be currently witnessed in Warsaw. The court restitutes the property to its legal owner, despite the fact that the property is designated to perform a public utility function – such as affordable apartments for citizens – and the new owner decides immediately to increase symbolic rental fees to a fair market-value.<sup>105</sup> People who spent their entire lives there because they were renting in good-faith from the city of Warsaw, are forced to exit because they can no longer afford to stay. Do they deserve any legal protection or help in relocation, and if so, what kind? It seems that the current process of judicial reprivatization in Warsaw is unable to balance these contradicting social interests.

Another important conclusion that emerges in the context of reprivatization is that Polish administrative courts became the “gatekeepers” of fairness in the administration of justice in reprivatization cases. According to some representatives of the legal doctrine,<sup>106</sup> for various reasons, the courts failed to perform this function because they outweigh the interests of former owners against third parties, who, while acting in good faith, became legal owners, and tenants of previously nationalized properties.

Unfortunately, recently disclosed “irregularities” in the process of reprivatization in Warsaw not only add to the already identified flaws in

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105. The owners of restituted properties are labeled as “czyściciele kamienic,” which translates to the “cleaners of tenement houses.” They often engage in criminal behavior, such as threats and cutting off electricity and water to force tenants who cannot afford to pay the new rent to exit the contract. This criminogenic phenomenon is well recognized by the Polish law enforcement and society. Various civil movements formed as a result of the emergence of this negative phenomenon. Among them was an activist, Jolanta Brzeska, whose body was found in the forest near Warsaw. As of 2017, the Warsaw prosecutors re-opened a criminal investigation into her murder case. See *Dlaczego zginęła Jolanta Brzeska*, SIECI PRAWDY - TYGODNIK MŁODEJ POLSKI (Oct. 10, 2016), <https://www.wsieciprawdy.pl/wsieci-dlaczego-zginela-jolanta-brzeska-pnews-2984.html>; Renata Krupa-Dąbrowska, *Czyściciele kamienic zapłacą zadośćuczynienie wyrzuconym z mieszkań*, RZECZPOSPOLITA (Jan. 19, 2017), <http://www.rp.pl/Nieruchomosci/301199982-Czysciciele-kamienic-zaplaca-zadosuczynienie-wyrzuconym-z-mieszkan.html#p-1>; NASZEMIASTO, <http://warszawa.naszemiasto.pl/tag/wlasciciele-kamienic-warszawa.html> (last visited Jan. 31, 2018).

106. Professor Ewa Łętowska is among the harshest critic voices.

this paradigm, but also trigger fundamental questions; are these irregularities minor exceptions to a sound exercise of justice in reprivatization matters, or rather, do they constitute the tip of an iceberg, which would indicate that there is something fundamentally wrong in the process of the administration of justice in Poland?<sup>107</sup>

Another important question is whether administrative and civil courts can be regarded as taking a pro-reprivatization position because their judgements favour claimants. Certainly, such a critical approach to the justice system with regard to reprivatization must be balanced with more moderate opinions, as expressed by M. Kaliński and R. Trzaskowski.<sup>108</sup> According to both scholars, Polish courts were placed in the difficult position of having to decide on reprivatization claims because the policy maker failed to do so. Unlike the legislator, who simply has an option of not passing certain laws, the justice system *nolens volens* becomes engaged in the process of public policy making. Thus, it is inevitable that courts' verdicts on reprivatization will be criticized or applauded, depending on who the audience is. The aim of this paper was not to take sides in the foregoing debate, nor did it aim to provide satisfactory answers to these questions. Rather, its goal was to emphasize that the current model of judicial reprivatization in Poland is a very complex legal issue and has flaws. To put it bluntly, the current model of judicial reprivatization refers to erroneous enforcement of nationalization laws by the Communist government. Thus, it favors those owners who were "lucky" because their properties were nationalized in violation of then binding laws. In contrast, there are those owners who were less "lucky"

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107. See e.g., Tomasz Luterek's perspective in the recent interview for *Gazeta Prawna*, in which he formulates a hypothesis according to which successful judicial reprivatization in Warsaw would not be possible if not for a tacit approval of attorneys and judges. Ewa Andruszkiewicz, *Reprywatyzacja w Warszawie: Kancelarie adwokackie miały poparcie elit politycznych i wymiaru sprawiedliwości*, *Gazeta Prawna* (Mar. 3, 2016), <http://prawo.gazetaprawna.pl/artykuly/972506,reprywatyzacja-w-warszawie-dyktat-prawa-wlasnosci.html>; *How to solve the problem of reprivatization?*, *Polskie Radio* (Jan. 02, 2017), <http://www.polskieradio.pl/130/2791/Artykul/1722854,Jak-rozwiazac-problem-reprywatyzacji>.

108. Professor Maciej Kaliński, from the University of Warsaw, provided me with several critical points that are necessary to take into consideration before making any conclusions that administrative and civil courts are pro-reprivatization. For example, the legal principle of public credibility of land registers is applicable only when certain conditions are met. This principle will protect any third party that purchased a nationalized property from the government, and, generally speaking, is recognized by the courts, despite the fact that from a legal perspective, one of its fundamental conditions is not met. Namely, the price of the property in the contract must be of a fair-market value and not be symbolic, which was the case in Warsaw, because the government offered many nationalized properties for sale with a 70% discount of the market price. In other words, if courts are pro-reprivatization, they should ignore the principle of public credibility of public land registers, as it does not apply to the majority of Warsaw properties, and former owners should be restituted *in natura*.

because their properties were nationalized in accordance with law. Only the former group can attempt to nullify the original nationalization acts.

The fact that within the judicial system, one can identify different interpretations of relevant statutory provisions and then question how to balance constitutional principles, constitutes a major source of concern. However, the issue of consistency of judicial verdicts on reprivatization remains critical because individuals in the same legal position should be treated equally in a democratic system. What seems to be the case in Poland is that it is hard to predict whether the claimant will be successful with his or her claims, as it all depends on the judge's interpretation of the law.

The very fact that individuals who were victimized by nationalization of their property, but whose legal status in terms of their eligibility to initiate judicial reprivatization varies significantly among individuals, creates tensions within society. Successful claimants are perceived to be unfairly privileged. The entire concept of judicial reprivatization is vague and complex, and requires deep knowledge of various areas of law, including administrative and civil law. It is beyond the comprehension of an average citizen.

Finally, the legal phenomenon of judicial reprivatization created various myths<sup>109</sup> around the process of privatization which can be devastating to a young democracy, as they undermine the legitimacy and credibility of the justice system. The myths contribute to a process of disintegration of Polish society, as well as lack of trust in public institutions and in fellow citizens. Nevertheless, in the light of ongoing criminal investigations, the fundamental question is: what is the scale of fraudulent reprivatization in Warsaw, and do the disclosed irregularities represent the "tip of the iceberg"? As we are seeing, Poland paid a high price for the lack of comprehensive reprivatization laws, and the new statute adopted in Warsaw has to be regarded as a strictly crime-control, emergency regulation. The bottom line is that, in post-Soviet European countries like Poland, reprivatization cannot be understood as a legal and economic process aiming to restore the *status quo* prior to nationalization.

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109. Among them are the following: 1. Reprivatization claims are universal; 2. Most properties in Warsaw were restituted to third parties, and not the original owners or their heirs. According to the official report on reprivatization, published in 2016 by the City Hall, the above statements are not justified. With regard to the first myth, there have been approximately 40,000 properties nationalized by the Bierut Decree, and approximately 17,000 claims based on this Decree were filed, which means that the problem of reprivatization refers to an estimated 30% of Warsaw's nationalized properties. With regard to myth number two, approximately 13 percent of reprivatization decisions were issued to third parties, and not to the original owners or their heirs.

Reprivatization is an important element of a wider process of decommunization,<sup>110</sup> understood as a transition from the authoritarian regime to a full democracy and a liberal market. Decommunization also means that, to a certain extent, society will be compensated for the harm caused by the wrongdoing of the former government (i.e., by nationalization of private property, by limiting personal rights and freedoms, by invigilation of society, by censorship of media and press, by political prosecutions, by murdering of political opponents, etc). Due to the complex nature and the scope of harm, Polish society needs to achieve a consensus that will provide a uniform sense of justice. Unfortunately, the recent statute enacted in Warsaw does not meet the above criterion.

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110. LUTEREK & INSTYTUT STUDIOW POLITYCZNYCH, *supra* note 2, at 324.