



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International
and Comparative Law Review

Volume 41 | Number 3

Article 2

Winter 2018

Restitution of Private Property in Postwar Poland: The Unfinished Legacy of the Second World War and Communism

Michael Bazylar

Szymon Gostynski

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>

Recommended Citation

Michael Bazylar and Szymon Gostynski, *Restitution of Private Property in Postwar Poland: The Unfinished Legacy of the Second World War and Communism*, 41 Loy. L.A. Int'l & Comp. L. Rev. 273 (2019). Available at: <https://digitalcommons.lmu.edu/ilr/vol41/iss3/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

Restitution of Private Property in Postwar Poland: The Unfinished Legacy of the Second World War and Communism

MICHAEL BAZYLER*
SZYMON GOSTYNSKI**

“[P]roperty restitution has been underway in Poland for well over two decades now.... As far as private property is concerned, the existing legal system in Poland makes it perfectly clear that any legal or natural person (or their heir) is entitled to recover prewar property unlawfully seized by either the Nazi German or the Soviet occupation authorities, or by the postwar communist regime. Claimants may use administrative and/or court procedure to demonstrate that their property was unlawfully seized and to recover it.”

Polish Foreign Minister Witold Waszczykowski, interview with Israeli on-line newspaper YNetnews, published June 15, 2016

“I’m ashamed that it has taken Poland until now, twenty-eight years after the fall of communism, to prepare such a bill. This should have been taken care of a long time ago.”

Polish Deputy Justice Minister Patryk Jaki, at a press conference introducing a national Polish property restitution law, the Large Reprivatization Draft Act, October 11, 2017

* Professor of Law and the 1939 Society Law Scholar in Holocaust and Human Rights Studies, Fowler School of Law Chapman University, California. The author was raised in Poland and holds dual U.S.-Polish nationality.

** Attorney, Gostyński i Wspólnicy sp. k., (Gostyński & Partners), LLM, Member of Kraków and New York State Bars. The authors thank Kristen Nelson, Rajika Shah and Kathryn Lee Boyd for their assistance in preparation of the report for Poland for the 47-Nation European Shoah Legacy Institute (ESLI) Immovable Property Restitution Study, upon which this article is partially based. In the interest of full disclosure, both authors represent claimants seeking restitution of properties in Poland. We dedicate the article to the memory of Professor Zbigniew Gostyński of the Faculty of Law of Jagellonian University in Kraków.

“Poland, the former leader of the social and political transformation, is the last state of the former Eastern bloc which has not carried out reprivatization.”

“Justification” section of the Large Reprivatization Draft Act, October 20, 2017

I. INTRODUCTION

II. NULLIFICATION OF GERMAN OCCUPATION LAWS AND COMMUNIST NATIONALIZATIONS

- A. 1945 Decree on Judicial Decisions made during the German Occupation
- B. 1946 Decree Regarding Post-German and Deserted Properties
- C. 1944 Decrees on Agrarian Reform and Takeover by the State Treasury of Ownership of Certain Forests
- D. 1945 Warsaw Land Decree
- E. 1946 Nationalization of Industry Act

III. FALL OF COMMUNISM AND UNSUCCESSFUL EFFORTS TO ENACT PRIVATE PROPERTY RESTITUTION LEGISLATION

- A. 1999 Restitution Bill
- B. 2001 Restitution Bill
- C. 2005 – 2007 Restitution Bills
- D. 2008 Compensation Bill
- E. 2015 Small Reprivatization Act
- F. 2017 Large Reprivatization Draft Act

IV. PATCHWORK OF EXISTING LAWS DEALING WITH RESTITUTION

- A. Annulling Nationalization Decisions and Seeking Damages under the Polish Administrative Procedure Code
 - 1. Article 156
 - 2. Article 158
 - 3. Article 160

V. LITIGATION BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

- A. *Ogórek v. Poland*
- B. *Pikielny v. Poland*
- C. *Sierminski v. Poland*
- D. *Piechanow v. Poland*
- E. *Sierpiński v. Poland*
- F. *Plon v. Poland*

VI. LITIGATION IN THE UNITED STATES

- A. *Haven v. Polska*
- B. *Garb v. Poland*

VII. PROPERTY LOCATED IN THE EASTERN TERRITORIES BEYOND THE BUG RIVER

- A. Domestic Efforts Concerning Bug River Properties
- B. Bug River Litigation Before the ECHR

VIII. CONCLUSION

I. INTRODUCTION

Germany invaded Poland on September 1, 1939, marking the start of the Second World War. For the duration of the war, Poland was occupied by either Nazi Germany or the Soviet Union. The Red Army did not leave after the expulsion of the German forces. Poland—like the other Eastern European countries—became a vassal of the Soviet Union. Due to elections that are widely believed to have been rigged by the Soviets, Poland became a Communist state in 1947. Full freedom for the Polish nation was not achieved until the collapse of the Polish People's Republic in 1989.

Upon coming to power, the Polish Communists began a process of massive nationalization of the economy. As a preliminary step, all laws enacted by the German occupier were nullified. Newly-enacted legislation in 1945 gave victims a ten-year window to reclaim immovable property confiscated during the German occupation. After ten years, unclaimed property would become property of the Polish state. At this point, the Communists still had not consolidated their power and so ostensibly, individuals who lost private property had a legal right to reclaim it.

In the Polish capital of Warsaw, special legislation nationalized all private immovable property within the boundaries of the prewar city under the so-called Bierut Decree (named after the first postwar Communist president Bolesław Bierut). The decree was enacted as part of the emergency measures taken to rebuild Warsaw, which lay in ruins at the end of the war. The Bierut Decree permitted prewar owners to apply for a temporary ownership ("*prawo własności czasowej*") and today known as a perpetual usufruct ("*użytkowanie wieczyste*") (ninety-nine-year renewable lease), of their property. However, the Polish Communists denied almost all such applications or failed to act on them. As will be discussed *infra*, these Communist-era machinations still plague Warsaw today.

In the case of Polish Jews, the impact of the immediate postwar restitution legislation was small because 90 percent of Polish Jewry (3.3 million before the war) perished during the Holocaust. After the war, many Jewish survivors left the country never to return, and those who stayed were often threatened if they attempted to recover their property.

Whatever property was returned to dispossessed owners under the immediate postwar legislation was soon made irrelevant by a second wave of widespread confiscations under the postwar Stalinist regime. Nationalization laws passed in the late 1940s and 1950s confiscated property from all Poles, regardless of religion or ethnicity.

After 1989, Poland began the process of privatization and the complex task of dealing with the Communist legacy. Poland is seen as the

success story of post-Soviet return to capitalism, with the economy of the post-Communist Republic of Poland largely privatized during the last quarter-century. However, all has not gone well with the process of returning of private property confiscated by the Communists. As with other post-Communist states of Eastern Europe, privatization of immovable property brought on large-scale corruption. This corruption, known as “wild privatization,” is prevalent in Poland to this day. Widespread local media coverage beginning July 2016 of these “wild privatization” scandals (such as in Warsaw, where property values have skyrocketed over the last decade)¹ has led all major political parties to call for new legislation surrounding the ongoing post-Communist restitution process in Warsaw and throughout Poland.²

As of this writing in mid- 2018, the unfinished legacy of restitution of immovable property (called “reprivatization,” or, *reprzywatyżacja* in Polish) remains a hot topic, with the ongoing property scandals in Warsaw driving most of the media coverage. A special verification commission, *Komisja Weryfikacyjna*, was created in 2017 by the Sejm (the Polish Parliament) to examine the apparently dubious privatizations of formerly private properties that have taken place in Warsaw.

Aggravating the problem is that Poland remains the *only* country in the European Union and the only former East European communist state that has yet to enact comprehensive legislation dealing with restitution or compensation of private property nationalized by the Polish postwar Communist regime. While strides have been made in restitution of communal property, the absence of a legal regime for restitution of expropriated private property and heirless property (most often property belonging to Jewish families whose entire family line perished during the Holocaust and the Second World War) remains a politically charged issue.

1. Iwona Szpala & Małgorzata Zubik, *Kto zarobi na pl. Defilad? Ujawniamy kulisy reprzywatyżacji*, WYBORCZA PL. (Apr. 22, 2016), <http://warszawa.wyborcza.pl/warszawa/1,150427,19957789,kto-zarobi-na-pl-defilad-ujawniamy-kulisy-reprzywatyżacji.html?disableRedirects=true>. On April 22, 2016 the newspaper *Gazeta Wyborcza* published an expose of the wrongful return by the city of Warsaw of property at the former address Chmielna 70. The property, worth approximately 160 million zlotys [US \$ 40 million], went into private hands. City officials permitted the transfer of the property even though the former owner, a Danish citizen, had already been awarded compensation in the 1950's. See discussion *infra* Sections III, IV.

2. See, e.g., Jan Cienski, *Communist Land Grab Haunts Warsaw's Mayor*, POLITICO (Aug. 26, 2016), <https://www.politico.eu/article/communist-land-grab-haunts-warsaws-mayor-civic-plot-form-poland/>; Jakub Dymek, *Your House Is Now Ours: How the Law Surrounding the “Reprivatization” of Properties in Warsaw Is Being Exploited*, KRYTYKA POLITYCZNA & EUR. ALTERNATIVES (Aug. 29, 2016), <http://politicalcritique.org/cee/poland/2016/your-house-is-now-ours/>.

Several restitution bills have been introduced over the last two decades in the Sejm; none have made it into law. The closest that Poland has come to enacting such a measure was in 2001 when the Sejm passed a comprehensive restitution law under which claimants would have received compensation of up to 50 percent of the value of the seized property. However, Polish President Alexander Kwasniewski vetoed the law. The supposed reason was that enacting a full restitution regime for private property nationalized by the post-war Communist regime would have a crippling effect on the Polish economy.

In late 2017, the Ministry of Justice proposed another comprehensive restitution law. Under this scheme, the government (and those who bought private property sold by the post-Communist government) would get to keep all the private property in their possession that was originally stolen by the Communists. In-kind restitution, presently available under Polish law, would stop. Instead, a limited number of former owners or their heirs would receive compensation of between 20-25 percent of the value of what they lost. The proposal was met with so much opposition that it was never formally considered by the Sejm.

This article analyzes the current legal regime in Poland concerning restitution of private property. It aims to illustrate why *reprzywazyzacja* under current laws remains such a large, nagging problem in Poland. Part II discusses the historical process that has led Poland to this mess: first, the immediate postwar laws nullifying Nazi-era confiscations, unevenly applied, and followed by the Communist-era nationalization of private property that took place in the Soviet-dominated Polish People's Republic. Part III examines the various efforts to pass comprehensive restitution legislation in the post-Communist Republic of Poland. Part IV analyzes the patchwork of existing laws dealing with restitution and demonstrates the failure, so far, to achieve a fair and transparent process of *reprzywazyzacja* through the application of Polish property laws before regular and administrative courts. Part V examines litigation against Poland before the European Court of Human Rights arising from Communist-era confiscations and Part VI examines litigation in the United States. As will be shown, neither the European court nor American courts have been friendly to such litigation. Part VII discusses the one bright spot in this arena, involving compensation for properties lost by Poles who lived in those parts of pre-war Poland that were transferred to the Soviet Union after the war (territories known as "beyond the Bug River properties") marking the new demarcation between postwar Poland and the USSR. For these properties, the post-Communist government obligated itself to pay those who lost their properties and with prodding from the European

Court of Human Rights has paid such claims. Claimants who lost properties within the territory of present-day Poland, which the Polish state has held on to for close to seven decades, have not fared as well.

Until late 2017, the official position of the ruling Law and Justice Party (“PiS”) was that restitution has been going on in Poland over the last two decades through the normal judicial process and pursuant to existing Polish laws. This process, however, has been a huge disappointment. In December 2015, the U.S. State Department Special Envoy on Holocaust Issues characterized Polish laws governing private property and the Polish court system as “especially cumbersome, challenging, time consuming and expensive for claimants outside of Poland.”³ Likewise, the European Court of Human Rights has criticized Poland for its slow and burdensome judicial process governing restitution.⁴

In October 2017, PiS appeared to have changed its position. In a surprising turnabout, Deputy Justice Minister Patryk Jaki (the chair of the Verification Commission and 2018 PIS-led coalition candidate for mayor of Warsaw) announced at a press conference that his ministry will be introducing a new comprehensive reprivatization law. According to Jaki: “I’m ashamed that it has taken Poland until now, 28 years after the fall of communism, to prepare such a bill. This should have been taken care of a long time ago.”⁵ The Jaki bill, however, was never formally introduced in parliament, and so its fate remains unknown.⁶

II. NULLIFICATION OF GERMAN OCCUPATION LAWS AND COMMUNIST NATIONALIZATIONS

The occupying German authorities put a legal veneer on their theft of Polish private property, whether owned by Jews or other targeted groups.⁷ Following the German incorporation of western Poland into the Third Reich in 1939, the region was subject to legislation promulgated by the Third Reich. As a result, western Poland was bound by German laws on property regulation, including Nazi laws stripping Jews of their

3. Letter from Nicholas Dean, Special Envoy on Holocaust Issues, U.S. State Dept., to Nowy Dziennik, Polish Daily News (Dec. 22, 2015) (on file with the World Jewish Restitution Organization).

4. See discussion *infra* Section V.

5. *Deputy Justice Minister Announces Planned New Restitution Laws*, RADIO POL. (Nov. 10, 2017), <http://www.thenews.pl/1/9/Artykul/329962,Deputy-justice-minister-announces-planned-new-restitution-laws>.

6. See discussion *infra* Section III.F.

7. See MICHAEL BAZYLER, HOLOCAUST, GENOCIDE AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD 14-21 (2016) [hereinafter HOLOCAUST, GENOCIDE AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD].

property. In central Poland—the administratively autonomous unit of Nazi Germany known as the General Government—the population was subject to separate laws promulgated by the governing civilian authority. These laws in both German-occupied regions provided legal cover for the confiscation and seizure of property belonging to Polish Jews and other targeted groups.⁸

Immediately after the end of the Second World War and as part of the country's shift from a market economy to a Soviet-style socialist economy, the Polish Commission of National Liberation (a provisional government of Poland established in 1944 by the Soviet Union and in opposition to the Polish government-in-exile in London) and the Provisional Government of National Unity (created following decisions between the Allied Powers at the Yalta Conference), passed a series of laws addressing (1) the return of property taken during the German occupation from Polish Jews and other target groups, and (2) the subsequent nationalization of property for all Poles.

Legal acts promulgated by the German occupiers that resulted in private property confiscation were contrary to Article 46 of The Hague Convention (IV) respecting the Laws and Customs of War on Land, and its annex: October 18, 1907 Regulation concerning the Laws and Customs of War on Land, which states that “private property cannot be confiscated.”⁹ Shortly after the German invasion of Poland in 1939, private property confiscation had also been declared null and void by Article 2 of the November 30, 1939 President's Decree on the Invalidity of Legal Acts of Occupying Authorities (issued by the Polish government-in-exile), which stated that all legal acts or orders of occupying authorities regarding any private or public property are null and void.¹⁰

For a few years immediately following the end of the war, between 1945 and 1948, a series of decrees were passed to undo the unlawful takings of immovable property that had occurred during the Nazi occupation of Poland.

8. See Monika Krawczyk, *The Effect of the Legal Status of Jewish Property in Post-War Poland on Polish-Jewish Relations*, in *JEWISH PRESENCE IN ABSENCE: THE AFTERMATH OF THE HOLOCAUST IN POLAND 1944-2010* 792-802 (Feliks Tych et al. eds., 2014).

9. International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land Oct. 18, 1907, 187 Consol. T.S. 227, 1 Bevans 631.

10. Dekret Prezydenta Rzeczypospolitej z 30 listopada 1939 r. o nieważności aktów prawnych władz okupacyjnych [President's Decree of 30 November 1939 on the Invalidity of Legal Acts of Occupying Authorities] art. 2 (Dz. U. 1939 nr 102 poz. 1006) (Pol.).

A. 1945 Decree on Judicial Decisions made during the German Occupation

The June 6, 1945 Decree on the Binding Force of Judicial Decisions made during the German Occupation in the Territory of the Republic of Poland (“1945 Decree on Judicial Decisions made during the German Occupation”) provided that all judgments delivered during the German occupation were invalid and had no legal effect.¹¹

The provisions of the 1945 Decree on Judicial Decisions made during the German Occupation were confirmed and developed in the 1940s and 1950s by Polish Supreme Court jurisprudence. The Supreme Court held that German notarial deeds drafted during Second World War had no legal effect. The Decree invalidated the purchase-sale contracts of unlawfully seized property of Polish citizens, when new owners bought properties from German administrators or occupier-appointed trustees via German notarial deeds.¹² Rightful owners, however, still had to initiate administrative or court proceedings to invalidate the contract.

B. 1946 Decree Regarding Post-German and Deserted Properties

At the end of the Second World War, Poland was a subject of multiple agreements between the Allied powers. These agreements included: 1) the February 1945 Yalta Conference, between President Franklin D. Roosevelt (United States), Prime Minister Winston Churchill (United Kingdom) and Chairman of the Council of Peoples’ Commissars Josef Stalin (Soviet Union); and 2) the July 1945 Potsdam Conference agreement, between President Harry S. Truman, Churchill (and later Prime Minister Clement Atlee) and Stalin.

Under these agreements, the borders of postwar Poland shifted. Eastern Poland (east of the Bug River) was incorporated into the Soviet Union and eastern parts of Germany bordering Poland now became Polish territory. Poland ultimately suffered a net loss of 20 percent of its territory through these border revisions, losing a vast amount of prewar territory in the east to the Soviet Union, but also gaining valuable land in

11. Dekret z dnia 6 czerwca 1945 r. o mocy obowiązującej orzeczeń sądowych, wydanych w okresie okupacji niemieckiej na terenie Rzeczypospolitej Polskiej [June 6, 1945 Decree on the Binding Force of Judicial Decisions made during the German Occupation in the Territory of the Republic of Poland] (Dz. U. 1945 nr 25 poz. 151) (Pol.).

12. See Krawczyk, *supra* note 8, at 813. Monika Krawczyk has noted that the law had rather minimal effects on the Polish Jewish population because most had either perished or left the country. *Id.* Krawczyk further describes how people manipulated the Polish legal system in the early post-war years by getting false witnesses to confirm the death of former Jewish property owners so that persons who were not the rightful heirs could purchase the property. *Id.* These false acts prevented real heirs from being able to make legitimate claims. *Id.*

the west that was previously part of Germany and the Free City of Danzig (Gdansk).

The March 8, 1946 Decree Regarding Post-German and Deserted Properties (“1946 Decree Regarding Post-German and Deserted Properties”—which superseded the May 6, 1945 Law on Abandoned and Derelict Property and the March 2, 1945 Decree on Abandoned and Derelict Property)—was adopted to provide order to the immovable property situation in war-torn Poland, where numerous property owners had perished or left the country.¹³

The 1946 Decree regulated real property whose owners could not be identified or located because of the war. This was a major problem for postwar Poland since approximately one-fifth of its population, including 90 percent of its Jewish citizens, did not survive the German occupation. Poland suffered the highest population loss per capita of any German-occupied country. The Decree gave property owners a fixed amount of time—ten years after enactment—to recover lost property. In post-war Poland, homeless war victims and people forcibly resettled from the former Polish East—the so-called “territory east of the Bug River” (territory lost by Poland at the end of the war)—needed housing. Consequently, the Communist government considered the ten-year statute of limitations as sufficient for pre-Second World War property owners or their successors to get their property back. Property not claimed during the time limit specified either escheated to the Polish State or was legally transferred to those persons who were occupying the property.

While the 1946 Decree returned *de jure* control to former owners over their property where the property was occupied by other people, the former owners (like Jewish returnees and other Poles who fled east) had to go through administrative or court proceedings to regain material control of the property. However, it was rarely as simple as going to court and having a judge issue an eviction notice to serve on the non-Jewish occupants of the Jewish returnees’ property (i.e. families that had moved in during the war). Polish attorney Monika Krawczyk, head of the Foundation for Preservation of Jewish properties in Poland, aptly describes the situation:

After liberation from the German occupation, assets lost by the Jews during the war could be reclaimed. This was facilitated formally by the legislation passed in the early years of independence. However, it was far easier, in practical terms, for Jews returning from camps or from hiding to regain possession of their property in large towns and

13. Dekret z dnia 8 marca 1946 r. o majątkach opuszczonych i poniemieckich [March 8, 1946 Decree Regarding Post-German and Deserted Properties] (Dz. U. 1946 nr 13 poz. 87) (Pol.).

cities than in small towns and villages. Jews returning to their family homes tended to find other families already living there, and they were often met with aggression, death threats or even murder. Exhuming mass graves and stripping corpses was the final form of plunder of Jewish property by their Polish neighbors. Terrified by such behavior, Polish Jews would often decide to leave the country in search of a new future abroad.¹⁴

British-Polish historian Halik Kochanski confirms Krawczyk's description and elaborates on another layer of complexity to the post-war property situation for returning Polish Jews:

The Jews were also uncertain of their welcome in Poland. There were numerous instances of anti-semitism among the Polish population directed towards survivors, which stemmed from a number of factors. There was a severe shortage of housing because of the damage caused by the war, and some of the reluctance of the Gentile Poles to vacate Jewish homes had its roots not in anti-semitism but in a simple fear of homelessness. Indeed, the state passed a series of decrees during 1945 which placed 'abandoned and formerly German properties' under state administration, but many of these 'abandoned' properties had been owned by Jews, who faced the prospect of court action against the state to reclaim them.¹⁵

In the case where the former owner's property was abandoned or deserted, the returning owners could simply retake possession of the property and did not have to initiate administrative or court proceedings. Retaking possession of the property stopped the running of the ten-year statute of limitations. For Polish Jews, many returned but then left after the war for new lands; and so their properties became once again legally abandoned.

German property located in areas that were formerly part of the Third Reich and the Free City of Danzig, but which became part of Poland after the war, was automatically nationalized on April 19, 1946, except for property belonging to persons of Polish nationality or "other nationality persecuted by the Germans." A 1987 decision from the Supreme Court of Poland affirmed this presumption of escheat of property to the State.

14. Krawczyk, *supra* note 8, at 814.

15. HALIK KOCHANSKI, *THE EAGLE UNBOWED: POLAND AND THE POLES IN THE SECOND WORLD WAR* 549 (2012).

C. 1944 Decrees on Agrarian Reform and Takeover by the State Treasury of Ownership of Certain Forests

Under the Polish Committee of National Liberation's September 6, 1944 Decree on Agrarian Reform ("1944 Agrarian Reform Decree")¹⁶ and the December 12, 1944 Decree on Takeover by the State Treasury of Ownership of Certain Forests ("1944 Nationalization of Forests Decree"), the Polish state nationalized certain forests and farmland.¹⁷ Under the 1944 Agrarian Reform Decree, farms exceeding 100 hectares in overall area or 50 hectares of arable land were nationalized. Under the 1944 Nationalization of Forests Decree, forest or forest lands covering an area of over 25 hectares were transferred to the state Treasury. The Communists were rapacious; they interpreted the decree to include also palaces and manor houses that stood alongside agricultural lands and private forest land. As a result, seventy years later some individuals in post-Communist Poland have been able to successfully reclaim those parts of the properties. Other claims are ongoing.

According to the Ministry of Foreign Affairs, administrative challenges may be lodged as to whether the property nationalized under the 1944 Agrarian Reform Decree actually met the requirements set out in the law. The appropriate authority with which to lodge the challenge is the voivode (government-appointed provincial governor), and appeals of those challenges are made to the Minister of Agriculture and Rural Development.¹⁸

If the conditions from the 1944 Nationalization of Forests were not fulfilled, the claimants may demand the return before the common courts. However, it is unknown how many properties were returned under the procedures prescribed by the Ministry of Foreign Affairs.

16. Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 6 września 1944 r. o przeprowadzeniu reformy rolnej [Polish Commission of National Liberation's September 6, 1944 Decree on Agrarian Reform] (Dz. U. 1944 nr 4 poz. 17) (Pol.).

17. Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 12 grudnia 1944 r. o przejęciu niektórych lasów na własność Skarbu Państwa [Polish Commission of National Liberation's December 12, 1944 Decree on Takeover by the State Treasury of Ownership of Certain Forests] (Dz. U. 1944 nr 15 poz. 82) (Pol.).

18. *Claims Arising from the Decree on Agrarian Reform and the Decree on Takeover by State Treasury of Ownership of Certain Forests*, PROP. RESTITUTION IN POL., http://propertyrestitution.pl/Restitution,after,1989,legal,regulations,20.html#agrarian_reform (last visited Mar. 29, 2018).

D. 1945 Warsaw Land Decree

The Decree of October 26, 1945 on Ownership and Usufruct of Land in the Area of the Capital of Warsaw (“1945 Warsaw Land Decree”), also referred to as the “Bierut Decree” (named after the Polish Stalinist leader Bolesław Bierut, who was President of the Republic of Poland from 1947-1952), transferred ownership of property in Warsaw to the municipality of the Capital City of Warsaw.¹⁹ Under Article 7 of the 1945 Warsaw Land Decree, former property owners had the right to apply for what eventually became known as a *perpetual usufruct* (ninety-nine-year leasehold use of publicly held land) on the nationalized land or on another plot of land of comparable size.²⁰ If the municipality dismissed the application for perpetual usufruct, ownership of all buildings on the land was transferred to the municipality and then the State Treasury. Most applications were rejected, and many others were never processed. Rejected claims technically could be appealed by seeking to have the decision declared invalid pursuant to Article 165 (now renumbered as Article 156) of the Polish Administrative Procedure Code.²¹

If no perpetual usufruct was granted to the owner for the land in question or for a plot of land of comparable size, the owner was entitled to indemnification payment in municipal bonds. However, none of these bond payments were ever issued. In fact, no ordinances governing how compensation would be calculated have ever been issued. The Communist authorities did the same for other nationalization laws containing compensation clauses: they either failed to pay compensation or enact a contemplated compensation scheme.

The 1945 Warsaw Land Decree has been described as having more practical than ideological effects, as it made it possible for the government to begin rebuilding the city which had been devastated by the war.²² It is estimated that after the war “90% of industrial plants, 72% of resi-

19. Dekret z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m. st. Warszawy [Decree of October 26, 1945 on the Ownership and Use of Land in the Area of the Capital City of Warsaw] (Dz. U. 1945 nr 50 poz. 279) (Pol.).

20. *Id.* About 15,000 applications were filed under the Bierut Decree, with only 303 granted. Janucz Palicki, *Warszawska reprivatyzacja w pigułce: Brutalni gracze, wielkie pieniądze, poważne zarzuty* [Warsaw Reprivatization in a Nutshell: Brutal Players, Big Money, Serious Accusations], NEWSWEEK PL. (Aug. 23, 2016), <http://www.newsweek.pl/polska/warszawska-reprivatyzacja-najwazniejsze-fakty-i-zarzuty,artykuly,387827,1.html>.

21. Krawczyk, *supra* note 8 at 810.

22. See Piotr Stec, *Reprivatization of Nationalised Property in Poland*, in 1 MODERN STUDIES IN PROPERTY LAW 361 (2001).

dential developments and 90% of cultural heritage treasures and architectural monuments” were destroyed.²³ Past decisions by the National Council Presidium of Warsaw can be challenged (via Article 165 of the Polish Administrative Procedure Code)²⁴ or verified, by an application to either the Local Government Board of Appeals (for property owned by municipalities) or the Minister of Infrastructure and Development (for property owned by the State Treasury). Appeals can also be made for decisions formerly made by the Ministry of Municipal Economy to the Minister of Infrastructure and Development. Where past decisions are declared invalid, they are re-examined for perpetual usufruct. If there are damages associated with the invalid decision, they may be pursued via Articles 156, 158 and 160 of the Polish Administrative Procedure Code,²⁵ and via Articles 417 of the Polish Civil Code.²⁶

Some individuals (either still living prewar owners or, most often, heirs) with property claims in Warsaw have successfully claimed damages or obtained return of their properties without having to challenge decisions made pursuant to the 1945 Warsaw Land Decree. This has been achieved by submitting a claim for damages or property return directly to the Mayor of Warsaw under Articles 214 and 215 of the 21 August 1997 Law on Real Property Management.²⁷ It is unknown how many properties have been returned under these procedures. What is known is that the process has been burdensome and rife with corruption. City authorities have rejected claims because of a small difference in spelling of names, inability to prove that the prewar owners are no longer alive, or some other technicality. At the same time, city authorities allowed restitution to take place to individuals who legally were not entitled to the property.

In 2015, the Sejm passed legislation that made it more difficult to seek damages or return of property in Warsaw for which claims for a perpetual usufruct were made under the Bierut Decree in the 1940s.²⁸

23. See Piotr Styczeń, *Polish Experience of Pilot Procedure and Implementation of Judgment Hutten-Czapska against Poland – An Example of Specific Non-Compensatory Redress*, in *ROUNDTABLE: PROPERTY RESTITUTION/COMPENSATION: GENERAL MEASURES TO COMPLY WITH THE EUROPEAN COURT’S JUDGMENTS 2* (2011).

24. Ustawa z dnia 14 czerwca 1960 - Kodeks postępowania administracyjnego [Act of June 14, 1960 Code of Administrative Procedure] art. 165 (Dz. U. 1960 nr 30 poz. 168) (Pol.) [hereinafter Polish Administrative Procedure Code].

25. Polish Administrative Procedure Code, *supra* note 24, arts. 156, 158, and 160.

26. Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny [The Act of April 23, 1964 Civil Code] art. 417 (Dz. U. 1964 nr 16 poz. 93) (Pol.) [hereinafter Polish Civil Code].

27. Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami. [Act of August 21, 1997 on Real Estate Management] (Dz. U. 1997 nr 115 poz. 741) arts. 214, 215 (Pol.) [hereinafter Polish Real Estate Management Act].

28. Ustawa z dnia 25 czerwca 2015 r. o zmianie ustawy o gospodarce nieruchomościami oraz ustawy – Kodeks rodzinny i opiekuńczy [Law of June 25, 2015 amending the Act on Real Estate

Under the new law dubbed the Small Reprivatization Act, Warsaw authorities can outright refuse the return of land if it is now being used for a public purpose, such as a school or a public park. Claims to buildings which were more than 66 percent destroyed after the Second World War can also be refused. It is also possible to refuse to grant a perpetual usufruct right to a real estate if it is used by public-law entities for public purposes, when land is sold to third parties and when public-law entities incur considerable expenditures related to the real estate, or when the real estate cannot be divided due to spatial planning arrangements.

The legislation aimed to stop the problem of speculators purchasing Warsaw property claims for low values from the original owners or their heirs and then applying for a perpetual usufruct or compensation as the new legal owner. Some of these purchases were even made by local attorneys, in a brazen breach of their fiduciary duty, from their own clients. The clients were either unaware of the true value of their claim or were otherwise misled by their counsel. Now, such third-party transfers must be done through a notarial deed, with the City of Warsaw having the preemptive right to purchase the claim for the price to be paid by the third party.

The legislation also closes the possibility for a trustee to be appointed to represent an anonymous heir, and also would not permit the return of properties in public use. However, the pre-Second World War owners of property in Warsaw or their heirs, who lost their rights pursuant to the 1945 Warsaw Land Decree, but applied for return of the property prior to December 31, 1988, may have their property returned under the new law.

In August 2015, instead of signing the legislation, Poland's then-President Bronisław Komorowski referred the legislation to the Polish Constitutional Tribunal. In its judgment of July 19, 2016, the Constitutional Court found the law constitutional.²⁹ On August 17, 2016, President Andrzej Duda signed the law and it entered into force on September 16, 2016.

Formally an amendment to Articles 214(a) and 214(b) of the Real Estate Management Act and the Family and Guardianship Code, the Small Privatization Act of 2015 created a *six-month deadline* for pre-Second World War owners of property in Warsaw to file administrative claims for the return of their property after the City of Warsaw issues an announcement asking claimants (those who filed a claim for a perpetual

Management and the Family and Guardianship Code] (Dz. U. 2016 poz. 1271) (Pol). For further discussion of the Warsaw privatization scandals, see Palicki, *supra* note 20.

29. See Trybunał Konstytucyjny [Constitutional Tribunal], SK 9/15, July 19, 2016 (Pol.).

usufruct under the Bierut Decree in the 1940s and 1950s or their heirs) to come forward. Claimant heirs then have *three months* to obtain a decision from an administrative tribunal that they are indeed the last surviving heirs under Polish law to the original postwar Bierut Decree claimant. The following announcement, posted on the City of Warsaw website (in both Polish and English, with bold in original) on July 20, 2018, is typical:

NOTICE

Pursuant to Article 214b (2) and (4) of the Real Estate Management Act of 21 August 1997 (consolidated text of 2018, item 121 as amended), the following notice is hereby issued.

The Real Estate Restitution Department of the City of Warsaw (hereinafter “the Department”), by way of the application of **3 August 1948** filed by **Leon Handelsman**, residing in **Warsaw**, at **ul. Sienna 60** (the Applicant’s last address of residence known to this Department) (hereinafter “the Applicant”), is conducting administrative proceedings in respect of establishing the right of perpetual usufruct, under Article 7(1) of the Decree on the Ownership and Usufruct of Land within the City of Warsaw, dated 26 October 1945 (Dz.U. [Journal of Laws] No. 50, item 279, hereinafter “the Decree Proceedings”), of the real estate in **Warsaw** at **ul. Bugaj 16**, formerly marked as **real estate in Warsaw reg. No. 2602/2603** (hereinafter “the Real Estate”). Except for the said application, no other papers have been filed on this matter.

The Applicant or his legal successors are requested to appear in person before this Department, within six months from the date of this notice, provide their current addresses of residence and, within the successive three months, prove their right to the Real Estate. Failure to do so may result in the discontinuance of the Decree Proceedings.

On the ineffective expiry of the 6-month time limit for the Applicants to join the matter in question and provide their current addresses of residence, or, if they claim their rights and provide their current addresses of residence, on the ineffective expiry of the successive 3-month period, the Decree Proceedings will be discontinued, in accordance with Article 214b(1) of the Real Estate Management Act of 21 August 1997.

As of July 2018, the City has issued zero announcements in fifteen different batches for 210 Warsaw properties. Some batches contain announcements for over 30 properties; some only a few. The above announcement (the last one as of this writing) was part of a batch of only three. The *only* place where the announcement appears is on the City of Warsaw website (and buried within the website), with no further publicity. The timing of the issuance is completely random. Most egregiously, as soon as the City posts a new batch of announcements it takes down from its website the previous batch, *even if* the six-month deadline has not expired.

Moreover, there is a big catch: “the successive three months [to] prove their right to the Real Estate” is *impossible to meet*. Heirs must gather the necessary documents from archives that can be strewn all over the world, especially for Jewish heirs whose family members most likely emigrated from Poland after the war if they survived the Holocaust. Even in Poland these documents are difficult to obtain since archival records are not open to the public. Such documents – birth and death certificates and any heirship proceedings conducted abroad – must then be translated into Polish and authenticated under Polish law. Court hearings must then be held for the judge to rule that the applicant heirs are indeed the last surviving heirs. If the judge denies the heirship motion for lack of inadequate documentation (i.e. claimant unable to provide a death certificate or other documentation that the pre-war Jewish owner of the property was murdered in the Holocaust), the denial must be appealed. The whole process can take years.

Most shocking, even if an applicant has appeared and filed a claim with the City within six months of the issue of the announcement, the City has been denying suspension of the proceedings to conclude the inheritance proceedings. It appears, therefore, that the true goal of the City authorities is *not* to return or compensate for Warsaw properties for which a claim was filed in the 1940s under the Bierut Decree, but to do everything possible for the property not to be restituted.

Complicating the issue is corruption. Reprivatization of buildings in Warsaw has become a lucrative business. In the last decade, many people successfully reprivatized buildings with vague proof of actually being connected in any way to the rightful heirs of owners; for example, arcane legalities and a lack of official diligence from the authorities enabled the reprivatization of a building in the name of a person who would have been over 130 years old at the time.

In the summer of 2016, an investigative piece in the daily *Gazeta Wyborcza* revealed a deal that took place in 2012 involving one of the most expensive pieces of property in the center of Warsaw at Chmielna 70. The property is supposedly worth 160 Polish million Zloty (PLN) (US \$ 40 million). The article revealed that officials who were tasked with dealing with issues of reprivatization of Chmielna 70 were beneficiaries of the process themselves and had business ties with other people who had recently acquired the buildings.



© *Gazeta Wyborcza* Aerial view showing location of Chmielna 70

The Chmielna 70 scandal led the Warsaw mayor, Hanna Gronkiewicz-Waltz, to fire three officials, including one of her deputy mayors. According to the mayor, upon review it appeared that the transfer of the plot was “hastily taken” and that the three officials involved did not consider “all of the circumstances of the case.” Gronkiewicz-Waltz insisted she was not to blame, and that the problem stemmed from the failure of the Sejm to enact a comprehensive restitution law.

PiS pinned the entire problem of “wild privatization” on Gronkiewicz-Waltz and her administration, suggesting that she is corrupt and willing to privatize the entire city and give it away to foreign investors. In response, the mayor claimed that many of the plans for privatization and investment in real estate in Warsaw were public knowledge for years and nobody protested about them at the time, including her predecessor, Lech Kaczyński, the leader of PiS who later became President of Poland and tragically died in 2010 in the Smolensk plane crash. The Central Anticorruption Bureau (“CAB”) announced that it would be probing into whether there were irregularities in so-called reprivatization decisions made from 2010 to 2016 in the affairs of the city’s officials dealing with reprivatization.

In November 2016, PiS proposed a bill in the Sejm to create a special Verification Commission (*Komisja Weryfikacyjna*), “to investigate the regularity and legality of the operations of the authorities and public and local government institutions in the reprivatization processes conducted across Poland in the period 1989-2016, and in particular, to detect the connections of public officials with the beneficiaries of the creation of operations.”³⁰ In its explanatory language, the bill referred specifically to the scandal involving Chmielna 70 as the impetus for creating the Commission, but noted that this transaction was merely “the tip of the iceberg”:

The scandal associated with the reprivatization of property located in Warsaw at the former address ul. Chmielna 70 (now Plac Defilad) exposed the significant irregularities in the whole process of the restitution of property seized by the communist authorities after Second World War. There are legitimate concerns that the ills of reprivatization are connected to public officials working in central and local government across Poland. Warsaw has been particularly affected by the phenomenon of so-called ‘wild reprivatization.’ Suffice it to mention that the Bierut Decree saw approximately 40,000 properties in the capital transferred to the Treasury. In the face of a long-term lack of political will to introduce clear statutory rules, a space was opened up for widespread abuse, irregularities and crimes in the acquisition of property in the most prestigious locations of the developing city. Following the political transformation [of 1989], a large group of former owners, their heirs, and to a large extent people who had redeemed claims, began efforts to acquire their properties. The lack of statutory regulation created scope for abuse, in which officials and law enforcement agencies have often played a key role. Elements in their favor guaranteed the finalization of lucrative ownership transfers. For many years, these measures aroused much social and legal controversy. They also provoked countless human dramas related to the fact that the new owners of tenement houses caused the mass eviction of the tenants of their acquired properties. It should be emphasized that the reprivatized tenements were owned by local governments and were often allocated for rent below market prices. Therefore, the tenants of these tenements are

30. Resolution of the Republic of Poland Sejm on the appointment of a Commission of Inquiry to investigate the regularity and legality of the operations of the authorities and public and local government institutions in the reprivatization processes conducted across Poland in the period 1989-2016 (Nov. 21, 2016) (Pol.) [hereinafter “Resolution of the Republic of Poland Sejm”]; see also *New Commission Probes Property Restitution Scandal in Warsaw*, RADIO POL. (June 26, 2017), <http://www.thenews.pl/1/9/Artykul/313409,New-commission-probes-property-restitution-scandal-in-Poland>.

largely those in need – the elderly, the sick, and those with very low income.³¹

Created in March 2017 and chaired by Deputy Justice Minister Patryk Jaki, the nine-member parliamentary commission was given the power to revoke restitution decisions and to send back any restitution decision for re-processing to the body that originally issued it.³² It also was given the right to halt the proceedings of other state entities, including courts, and to make new entries in land and mortgage registers when it overturns a restitution decision. In June 2017, the Commission began to hold hearings, and in July 2017, it revoked two previous restitution decisions issued by the City of Warsaw.³³ As of this writing in mid-2018, the Commission has instigated proceedings for over sixty properties, with most of these resulting in the original transfer being annulled by the Commission.

Some observers argue that the commission was set up by PiS as a vendetta against the opposition Civic Platform Party, since the mayor of Warsaw, Hanna Gronkiewicz-Waltz, is a member of the opposition. As a result, the commission has been accused of a lack of impartiality. According to Ombudsman Adam Bodnar, writing in October 2017:

[U]ndoubtedly, the purpose of the Verification Commission is to seek, in a specific way, the social sense of justice. However, its extraordinary, exceptionally broad powers, combined with the use of general clauses determining the basis of its action, make it crucial to question the limits of interference in the power of law.³⁴

E. 1946 Nationalization of Industry Act

The January 1946 Act on the Nationalization of Basic Branches of the State Economy (“Nationalization of Industry Act”) required the State to compensate property owners for nationalized property.³⁵ According to

31. Resolution of the Republic of Poland Sejm, *supra* note 30.

32. See Ustawa z dnia 9 marca 2017 r. o szczególnych zasadach usuwania skutków prawnych decyzji reprivatyzacyjnych dotyczących nieruchomości warszawskich, wydanych z naruszeniem 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] (Dz. U. 2017 poz. 718) (Pol.).

33. See AP, *Panel in Poland Cancels 2 Restitution Decisions Found Wrong*, FOX NEWS (July 10, 2017), <http://www.foxnews.com/world/2017/07/10/panel-in-poland-cancels-2-restitution-decisions-found-wrong.html>.

34. *Jaki o dymisji Bodnara. “Pisze do mnie w obronie handlarzy roszczeń,”* TVN WARSZAWA (Oct. 3, 2017), <https://tvnwarszawa.tvn24.pl/informacje,news,jaki-o-dymisji-bodnara-pisze-do-mnie-w-obronie-handlarzy-roszczen,242710.html>.

35. Ustawa z dnia 3 stycznia 1946 r. o przejęciu na własność Państwa podstawowych gałęzi gospodarki narodowej [The Act of January 3, 1946 on Taking over the Ownership of Basic

Section 1 of the Nationalization of Industry Act, “in order to ensure the planned rebuilding of the state economy, the economic sovereignty of the State and to foster the general well-being, the State shall take over ownership of enterprises on the conditions laid down in this law.”³⁶

Sections 2(1) and 3(1) of the Nationalization of Industry Act identified those properties that could be nationalized.³⁷ The 1946 Nationalization of Industry Act provided that owners of these entities would be compensated by the state.

Section 7 sets out the general principles by which compensation would be paid, including that owners of nationalized enterprises “shall receive compensation from the State Treasury within one year on which a notice of final determination of the amount of compensation due has been served on him” as determined by special commissions, whose rules and procedures would be determined by a Cabinet Ordinance.³⁸

However, such special commissions were never set up during the Communist era. The post-Communist governments likewise have also never set up such commissions.

The non-passage of the Cabinet Ordinance has been the subject of many legal actions initiated in domestic courts and the European Court of Human Rights (“ECHR”). See discussion *infra*.

III. FALL OF COMMUNISM AND UNSUCCESSFUL EFFORTS TO ENACT PRIVATE PROPERTY RESTITUTION LEGISLATION

There is no comprehensive Polish law that specifically addresses restitution for the next tranche of major property confiscations in Poland:

Branches of the National Economy] (Dz. U. 1946 nr 3 poz. 17) (Pol.) [hereinafter Nationalization of Industry Act].

36. *Id.* § 1.

37. *Id.* §§ 2(1), 3(1). According to § 3(1), the Polish state could nationalize, *inter alia*, (A) all mining and industrial enterprises in the following sectors of the state economy: mines and mining leases subject to mining law; oil and gas industry – including mines, refineries, gasoline production and other processing plants, gas pipes and synthetic fuel industry; companies that generate, process or distribute electricity or gas; water supply companies serving more than one municipality; steel-works, aviation and explosives industry; armaments, aviation and explosives industry; coking plants; sugar factories and refineries; industrial distilleries, spirit refineries and vodka production plants; breweries with an annual output exceeding 15,000 hectolitres; yeast production plants; grain plants with a daily output exceeding 15 tons of grain; oil plants with an annual output exceeding 500 tons and all refineries of edible fats; cold stores; large and medium textile industry; printing industry and printing houses; (B) industrial enterprises not listed in (A) if they are capable of employing in the production more than 50 persons on one shift; and (C) all transport enterprises (standard gauge and narrow-gauge railways, electric railways and aviation transport enterprises) and communication enterprises (telephone, telegraph and radio enterprises).

38. *Id.* § 7.

the nationalization of property by the Communist regime. These nationalization measures affected all Poles, regardless of race, religion or ethnicity. Poland is the only EU country and the only former Eastern European communist state not to have enacted such a law. Instead, a patchwork of laws and court decisions promulgated from 1945-present address the following two general areas of private immovable property:

- The nationalization of property from private individuals by the Polish state and the possibility of return or compensation—including a specific legal regime for property located in the capital (Warsaw); and
- Compensation for property located in the so-called territory east of the Bug River (pre-war property that had been lost by Poles in eastern territories that became part of the Soviet Union).

As power shifted from the former Communist regime to a new democratic parliamentary republic in Poland in 1989, the focus turned to property taken by the Communist regime's nationalization policy and not just property taken from Polish Jews and other targeted groups during the Second World War.

Over the last twenty-five years, the Polish government and its officials have proposed over a dozen versions of draft laws pertaining to the restitution of property taken due to nationalizations made by the Polish post-war Communist regime. Such legislation is badly needed. It would serve to reduce mounting litigation in domestic, foreign and international courts. Most important, it would put an end to the inequitable, inefficient and at times corrupt restitution process that has been going on in post-Communist Poland since 1989. To date, however, no measures have been enacted. The most important ones are discussed herein.

A. 1999 Restitution Bill

In 1999, a Bill on the Restitution of Immoveable Property and Certain Kinds of Movable property and Certain Kinds of Movable Property Taken from Natural Persons by the State of the Warsaw Municipality, and on compensation ("1999 Restitution Bill") was introduced in Parliament (the Sejm).³⁹ The Bill provided that persons whose property had

39. Rządowy projekt ustawy o reprivatyzacji nieruchomości i niektórych ruchomości osób fizycznych przejętych przez Państwo lub gminę miasta stołecznego Warszawy oraz o rekompensatach [Draft Bill on the Restitution of Immoveable Property and Certain Kinds of Movable Property Taken from Natural Persons by the State of by the Warsaw Municipality, and on Compensation] (Pol.) [hereinafter 1999 Restitution Bill].

been taken over by the State as a result of particular law under the totalitarian regime would have received 50 percent of the value of their property.

However, according to the terms of the bill, successful claimants would only be those who were Polish citizens as of December 31, 1999. President Aleksander Kwasniewski, apparently on the grounds of the citizenship requirement, vetoed the 1999 Restitution Bill by refusing to sign it. There was not enough support for the 1999 Restitution Bill in the Polish Parliament to override the President's veto (which requires a three-fifths vote of the Parliament).

B. 2001 Restitution Bill

The Polish parliament passed a property restitution bill which provided that former owners could recover 50 percent of the property's value. The bill required claimants to be Polish citizens and would have precluded virtually all Jewish claimants. President Aleksander Kwasniewski vetoed the bill, stating that the bill was flawed and the estimated cost of twelve-billion dollars was too high, and it never became law.

C. 2005-2007 Restitution Bills

Between 2005 and 2007 the Parliament considered several versions of the Bill on Compensation for Real Estate and Some Other Property Assets Seized by the State ("2005-2007 Restitution Bill").⁴⁰ This bill offered no restitution *in rem* and instead offered compensation of 15 percent of the value of the property on September 1, 1939 to be paid in installments.

Covered property included assets seized by the German occupiers and the Polish state. Critics of the proposed bill argued that the compensation amount was too low, that the procedure would be too complicated, and that no restitution *in rem* would be provided. The bill expired in 2007 without having been enacted.⁴¹

D. 2008 Compensation Bill

The 2008 Compensation Bill would have provided compensation of approximately 20 percent, but likewise not *in rem* restitution.⁴² The value

40. Bill on Compensation for Real Estate and Some Other Property Assets Seized by the State (Pol.) [hereinafter 2005-2007 Restitution Bill].

41. Krawczyk, *supra* note 8, at 815.

42. Projekt ustawy o zadośćuczynieniu z tytułu krzywd doznanych w wyniku procesów nacjonalizacyjnych w latach 1944 -1962 [Draft Law on Compensation for Damage Resulting from Nationalization in the Years 1944 - 1962] (*draft*, Dec. 9, 2008) (Pol.).

of the claims that would have been covered by the law was estimated to be PLN 100 billion (US \$ 26.5 billion). A two-step claim procedure was proposed. Projections indicated that 80,000 applications would be submitted and that payment would be in installments over a fifteen-year period.

In 2010, the Minister of Finance issued a report stating that the 2008 Compensation Bill would increase public debt by approximately 1 percent and that the allocation of money for compensating nationalization claims “might result in Poland’s exceeding the permissible limits of the national debt in relation to GNP as set by the European Union.”⁴³ As a result, the government in 2011 decided not to submit the 2008 Compensation Bill to the Sejm.

E. 2015 Small Reprivatization Act

As discussed above, the so-called Small Reprivatization Act⁴⁴ passed by the Sejm in 2015 that went into effect in 2016 after being upheld by the Constitutional Tribunal, dealt only with restitution of private property in Warsaw that was nationalized under the special regime for the capital established in 1945 by the Bierut Decree. As noted, the real goal of the law was not to reprivatize any property but to extinguish open claims for Warsaw properties that have around since the 1940s. However, because of the controversies in Warsaw regarding restitution of property, it appeared that PiS was now ready to introduce a comprehensive restitution law for the whole country. It did so in 2017.

F. 2017 Large Reprivatization Draft Act

In October 2017, the Ministry of Justice, represented by Deputy Justice Minister Patryk Jaki, head of the parliamentary Verification Commission, issued a draft of the so-called Large Reprivatization Act.⁴⁵ As noted above, at an October 11, 2017 press conference announcing that such a law was about to be introduced by his ministry, Jaki explained: “I’m ashamed that it has taken Poland until now, twenty-eight years after

43. *Ogórek v. Poland*, App. No 28490-03, Eur. Ct. H.R. (2012) ¶¶ 59-60 (quoting and summarizing report of the Polish Ministry of Justice).

44. Ustawa z 25 czerwca 2015 r. o zmianie ustawy o gospodarce nieruchomościami oraz ustawy - Kodeks rodzinny i opiekuńczy [Small Reprivatization Statute] (Dz. U. 2016 poz. 1271) (Pol.).

45. Ustawa o zrekompensowaniu niektórych krzywd wyrządzonych osobom fizycznym wskutek przejęcia nieruchomości lub zabytków ruchomych przez władze komunistyczne po 1944 [Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944] (*draft*, Oct. 31, 2017) (Pol.).

the fall of communism, to prepare such a bill. This should have been taken care of a long time ago.”⁴⁶ In the Justification section accompanying the proposed legislation, the Justice Ministry noted: “Poland, the former leader of the social and political transformation, is the last state of the former Eastern bloc which has not carried out reprivatization.”⁴⁷

The 2017 draft law sought to create the following restitution scheme: 1) all ongoing court proceedings, whether before regular courts or administrative tribunals, related to restitution (except for proceedings by the Verification Commission) would be cancelled; 2) all potential restitution claims available under current Polish law would be extinguished; and 3) return of the actual confiscated real estate would be no longer possible. In return, some claims would be converted into rights to compensation from the state in the amount of 20-25 percent of the prewar value of the property. In December 2017, speaking to the London-based *Guardian* newspaper, Jaki explained the merits of the bill: “It is the first comprehensive draft bill after 1989 which shall regulate definitively the reprivatization of goods seized by the communist authorities after 1944... This draft means the end of buying and selling claims for the restitution of the property, and finally – a key issue – the end of returning property containing tenants.”⁴⁸

Unfortunately, the October 2017 proposed legislation would make the situation worse. The biggest problem is the substantial number of exclusions and limitations in the proposed law.

Article 6 requires that claimants currently be citizens of Poland and that the property owners who lost their property in the 1940s and 1950s were Polish citizens *and* residing in Poland at the time that their property was expropriated.⁴⁹ This requirement excludes the vast community of Holocaust survivors and their heirs living outside Poland. For this reason,

46. *Deputy Justice Minister Announces Planned New Restitution Laws*, POL. RADIO (Nov. 10, 2017), <http://www.thenews.pl/1/9/Artykul/329962,Deputy-justice-minister-announces-planned-new-restitution-laws>.

47. Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944, *supra* note 45 (“Justification”).

48. Christian Davies, ‘*They Stole the Soul of the City, How Warsaw’s Reprivatisation Is Causing Chaos*,’ THE GUARDIAN, Dec. 18, 2017.

49. See Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944, *supra* note 45, art 6. (“The right of compensation shall be entitled to a natural person (eligible person) if: on the day of the seizure of the property such a person was a Polish citizen . . . and was domiciled in the territory of the Republic of Poland and was the owner or co-owner of the seized real property [and] is a Polish citizen on the effective date of the Act and on the date of filing the application.”) (internal subsection numbering omitted) (translation by author).

Israel publicly protested these citizenship and residency exclusions.⁵⁰ This provision also discriminates against non-Polish nationals.⁵¹

Article 6 also states that only natural persons are eligible to apply for compensation under the draft law.⁵² The problem is that in prewar Poland real properties were owned both by natural and legal persons. Many companies, including even some large companies, were family-owned corporations, with family members as sole shareholders, and these family-owned companies owned real estate. This provision totally excludes such families from compensation simply because the families held property through their corporations.

Article 7 makes the right to compensation available only to the first circle of heirs: spouses and children and their progenies.⁵³ The problem is that 90% of Polish Jews were murdered during the Holocaust, including entire direct family lines and so the only remaining heirs very often are aunts, uncles, nieces, nephews, and cousins. This provision excludes them from recovery simply because the Germans decided to kill every Polish Jew and almost succeeded in doing so. Moreover, this exclusion contravenes existing Polish succession rules and so deprives lawful heirs under Polish law of their lawfully inherited property rights.

Article 11 excludes foreign claimants who were eligible to apply for compensation to their own governments under twelve bilateral treaties signed between Communist Poland and fourteen Western countries. Moreover, such foreign claimants would be ineligible irrespective of

50. See, e.g., *Israel: Polish Restitution Bill Discriminates Against Jewish Survivors*, JERUSALEM POST (Oct. 27, 2017), <https://www.jta.org/2017/10/27/news-opinion/world/polish-restitution-bill-discriminates-against-holocaust-survivors-israel-says>; Raya Kalenova, *Last Chance for Poland to Return Property to Rightful Owners*, EUOBSERVER (Dec. 12, 2017), <https://euobserver.com/opinion/140243>.

51. It should be noted that Holocaust survivors from Poland who were imprisoned in German concentration camps and ghettos are eligible today to receive compensation from the Polish government, regardless of whether they are Polish citizens and/or living abroad. The Polish citizenship and residency criteria are not applied to these claimants. See *Council for War Veterans and Victims of Oppression*, URZĄD DO SPRAW KOMBATANTÓW I OSÓB REPRESJONOWANYCH (last visited Apr. 26, 2018) <http://www.kombatanci.gov.pl/en/the-office/council-for-war-veterans-and-victims-of-oppression.html>

52. Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944, *supra* note 45, art. 6 (“The right of compensation shall be entitled to a natural person”)

53. Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944, *supra* note 45, art. 7 (“In the event of the death of an eligible person who was the owner or co-owner . . . [the right to compensation is inherited by] a natural person if he is the heir or co-heir of that person, as long as he belongs to the [category of an] heir as defined in Article 931 and Art. 932 §1-3 of the Act of 23 April 1964 -Civil Code (Journal of Laws of 2017, item 459, 933 and 1132 [“first circle of heirs”].”)

whether they ever applied or received such compensation.⁵⁴ This is simply unfair. If a claimant obtained recovery from his/her own government for property stolen in Poland then it is right to exclude such claimant or heir from further compensation, but if the claimant never applied or received compensation, they should be allowed to participate.

Article 75 extinguishes all ongoing legal proceedings in Poland seeking restitution or compensation for stolen property under existing Polish law.⁵⁵ In other words, those who have obtained restitution of their stolen properties (or compensation) over the last 28 years are able to keep their properties, but those who are only seeking restitution now would be barred from doing so. These include claimants who have already filed claims for restitution of Warsaw properties under the 2015 Small Reprivatization Act.

Remaining eligible claimants receive only 20-25 percent of the value of the property at the time of the expropriation at some undetermined time. Most unfair, restitution *in rem* of the confiscated property, currently available under Polish law, is extinguished. The post-Communist Polish state or local authorities get to keep the properties that the Communists originally stole. The government authorities would then be free sell these properties, with no guarantee that these sales would be transparent or fair. Based on past Polish experience, corruption would again infect the process. Despite its name, the draft Large Reprivatization Act would not reprivatize even a single piece of property.⁵⁶

54. Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944, *supra* note 45, art. 11 (“The right to compensation shall not be vested in a person who before the date of entry into force of the Act, received compensation [or] was entitled to compensation from a foreign state in connection with the conclusion of an international agreement between the Polish state or its government and a foreign state or government under which a foreign state has accepted the obligation to settle claims for compensation for the acquisition of property by the State of Poland as a result of nationalization or expropriation, in particular: 19 March 1948 Agreement with France; Protocol 1 of 12 May 1949 and Protocol 2 of 26 February 1953 with Denmark; 25 June 1949 Agreement with Switzerland; 16 November 1949 Agreement with Sweden and the supplement of the 29 October 1964 Agreement; 11 November 1964 Agreement with the United Kingdom; 23 December 1955 Agreement with Norway; 16 July 1960 Agreement with the United States; 14 November 1965 Agreement with Belgium and Luxembourg; 22 November 1963 Agreement with Greece; 20 December 1963 Agreement with the Netherlands; 19 January 1966 Agreement with Sweden; 6 October 1970 Agreement with Austria; and 15 October Agreement with Canada”) (internal subsection numbering omitted) (translation by author).

55. Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944, *supra* note 45, art. 75 (“If on the date of entry into force of the Act proceedings are pending in an administrative or judicial proceeding, the proceeding shall be discontinued.”)

56. The 20 percent compensation is based on the formula for the compensation of properties lost by Poles in the lost Polish territories, beyond the Bug River. However, there is a significant

The period to claim compensation is also short. The draft law sets up a one-year period from its entrance into force for filing compensation claims.⁵⁷ Additionally, claimants must accept the compensation decision within 14 days from delivery of decision on confirmation of the right to compensation (Article 28).⁵⁸ A one-year claims deadline is particularly difficult for Jewish survivors and heirs as well as other claimants living abroad. Claimants living around the world often lack any documentation, and need time to locate it in Polish archives, which are currently difficult to access. They also need time to find all heirs. The draft provides that applications filed after the one-year deadline will not be considered. Accordingly, claimants who miss the deadline will lose their right to seek compensation. The fear therefore is that the draft law would not provide a comprehensive compensation scheme. Like the Small Reprivatization Act for Warsaw, it would instead fully and finally extinguish all open restitution claims for property in Poland stolen by the Nazis and Communists, with heirs receiving only a negligible payment.

Last, there is no certainty when compensation will be paid since the draft bill does not set out the mechanics of compensation. It is also unknown where the money will come from, and how much will be allocated. At the October 2017 press conference, Deputy Justice Minister Jaki stated that it will cost “over a dozen billions of zlotys.”⁵⁹

difference between the properties forever lost to Poland beyond the Bug River just after the war and expropriated properties within Poland, which today remain on current Polish territory. The first were lost forever while the latter have been used for the last 70 years for public or private benefit. While a 20 percent compensation scheme may seem reasonable for the Bug River claims, applying the same formula to expropriated properties located within current Polish territory seems unfair.

57. Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944, *supra* note 45, art. 31(1).

58. *Id.* art. 28.

59. Marcin S. Wnukowski, *Material New Developments in the Reprivatization of Property in Warsaw*, NAT'L L. REV. (Oct. 17, 2017), <https://www.natlawreview.com/article/material-new-developments-reprivatization-property-warsaw>. PiS also resurrected the idea of Germany paying reparations to Poland for wartime losses, with such funds being used to pay compensation to Jewish claimants whose property was nationalized in Poland during the Communist era. See Ben Cohen, *Defending Bid for World War II Reparations from Germany, Poland's Deputy PM Appeals for Jewish Understanding*, ALGEMEINER (Sept. 4, 2017), <https://www.algemeiner.com/2017/09/04/defending-bid-for-world-war-ii-reparations-from-germany-polands-deputy-pm-appeals-for-jewish-understanding/>. As explained by Polish Prime Minister Mateusz Morawiecki: “I would say that nobody is going to provide compensation for the elimination of the great culture of the Polish Jews, which is never going to be re-established. Also, the 3 million Polish citizens who were killed, they are not going to be brought back to life. But all the material losses, they have never been compensated even to a small degree.” Morawiecki added that ‘some part’ of any reparations from Germany that might be forthcoming ‘should be given to the successors of the Jewish victims.’ ‘Today, if Jewish friends are coming to me — and I have many of them — and they say, “Listen Mateusz, my grandfather had a house here, or a plot here, why can’t he recover it?” I say it’s because this is a

In March 2018, 59 United States Senators sent a bipartisan letter to Polish Prime Minister Mateusz Morawiecki “to express concern about legislation regarding Holocaust property restitution that has been proposed by the Polish Ministry of Justice. This draft legislation would adversely affect Holocaust victims and their heirs and is therefore of urgent importance to many of our constituents, millions of Americans, and Holocaust survivors around the world.”⁶⁰ The letter concluded that the draft bill “would be a failure of justice... [and urged the prime minister] to work with the Polish Parliament to pass fair and just restitution legislation.”⁶¹

completely new country, re-established from the apocalypse of the Holocaust and the Second World War,’ Morawiecki said. ‘But if there were some reparations, I think that some portion of this should be going to the successors of the Jewish victims.’ Candidly, he continued: ‘Today, Poland cannot pay for crimes and sins that were not ours. We were actually falling victim to what the Germans have done during the Second World War, and they have never paid for this, for the material losses.’” *Id.* (quoting Polish Prime Minister Mateusz Morawiecki). Germany unequivocally rejected the demand on the ground that all wartime claims between Poland and Germany were extinguished by postwar treaties. See *Germany Rejects Repeated Demands from Poland for World War II Reparations*, HAARETZ, Sept. 8, 2017.

60. Letter to The Honorable Mateusz Morawiecki, Prime Minister of the Republic of Poland, from 59 U.S. Senators, March 26, 2018, <https://www.baldwin.senate.gov/imo/media/doc/Baldwin-Rubio%20Senate%20Letter%20to%20Poland%20Property%20Restitution.pdf>; see also Vanessa Gera, *US Senators Appeal to Poland Over Property Restitution Bill*, U.S. NEWS (March 27, 2018), <https://www.usnews.com/news/best-states/florida/articles/2018-03-27/us-senators-appeal-to-poland-over-property-restitution-bill>.

61. *Id.* Two Warsaw tenant groups—the Committee for the Defense of Tenants’ Rights (Komitet Obrony Praw Lokatorów and the Warsaw Free City Association (Wolne Miasto Warszawa)—sent a reply to the American senators defending the bill. The letter pointed out: “Our organizations have many tenants of buildings formerly owned by private persons, including Jewish families. These people have often been severely affected by the lack of a comprehensive law on reprivatization and are the reason that we have been lobbying for years that one be passed.” The letter points to a “reprivatization mafia” that has “cheated legitimate claimants and received possession of various properties in an illegal manner. Our organizations have been exposing these cases for years. The victims have been former owners and their heirs, but above all the people who have been living in these properties, sometimes since before the war themselves.... Imagine the situation when somebody sells their restitution claim to a specialized mafia lawyer and the next thing is that you find out that your building is now in the hands of a property developer that wants all the old tenants out and will use any means to accomplish that. Unfortunately, the restitution of property is most usually accompanied by attempts to monetarize it where the original heir actually receives very little, but some specialized firms make a fortune.”

The tenant groups supported the bill’s provisions of extinguishing all legal rights to the actual return to the property and paying instead limited compensation.: “Our organizations have been strong in lobbying for some time that any reprivatization bill would have to be based on two premises: Firstly is that property cannot be returned (unless we are speaking of a single residence inhabited by the former owner or heirs). This is because of the irreversible effects, including many legal aspects such as tenancy or sale to third parties, or building public facilities on such lands. Returning property has also had many negative social effects for their residents, including being uprooted from lifetime homes and communities, being driven into poverty or even into homelessness. Secondly, if compensation is to be paid, it should be on the value of the property at the time

As of this writing in mid-2018, the fate of the Justice Ministry's 2017 draft bill remains unknown. After extensive criticism, the bill was pulled back for revisions and has yet to be introduced in the Sejm.

IV. PATCHWORK OF EXISTING LAWS DEALING WITH RESTITUTION

The absence during the last twenty-nine years in independent Poland of a comprehensive law dealing with restitution of private property seized during the Nazi and Communist eras leaves claimants only the possibility of obtaining restitution through a patchwork of laws before Polish courts. However, as the U.S. State Department Special Envoy on Holocaust Issues Nicholas Dean explained in December 2015, Polish laws governing private property and the Polish court system are “especially cumbersome, challenging, time consuming and expensive for claimants outside of Poland.”⁶² The European Court of Human Rights likewise has criticized Poland for its slow and burdensome judicial process governing restitution.⁶³ This section explains the current system.

A. Annuling Nationalization Decisions and Seeking Damages under the Polish Administrative Procedure Code

It is not possible in Poland today for claimants to directly challenge nationalizations that were legally carried out pursuant to the country's nationalization decrees (such as the 1946 Nationalization of Industry Act or the 1945 Warsaw Land Decree). However, it is possible to bring civil actions in Polish courts seeking compensation/restitution of improperly nationalized property.

A Polish Constitutional Tribunal decision of November 28, 2001 also effectively foreclosed constitutional challenges to the country's nationalization laws, including questioning the constitutionality of the confiscations and nationalizations under the laws; the enacting Communist

it was taken, minus whatever credit or other incumbrance was on said property. The reasons for this are complex and have been the subject of debate for more than two decades. We are afraid that the government of Poland would be simply unable to bear any more costs and that this is probably one of the reasons for never signing such a bill.” An Open Letter to US Senators Concerning Property Restitution in Poland from Warsaw organizations involved with issues concerning reprivatization and restitution and some members of the Verification Commission (last visited May 15, 2018), <http://lokatorzy.info.pl/wp-content/uploads/2018/04/letter-to-us-senators.pdf>.

62. Letter from Nicholas Dean, Special Envoy on Holocaust Issues, U.S. State Dept., to Nowy Dziennik, Polish Daily News (Dec. 22, 2015) (on file with the World Jewish Restitution Organization).

63. See discussion *infra* Section V.

government (the “PKWN”), and the laws themselves.⁶⁴ One set of commentators described the court’s decision in the following manner:

The [court] held that despite the illegitimacy of the Communist regime in Poland, its organizations, and its policies, the subsequent influence of those activities on the formation of Polish society has been so extreme, that to overturn them now would unhinge the ownership infrastructure and legal framework of property relations in many spheres of Polish life. “The time that has passed cannot be ignored from the legal perspective,” the Tribunal held, “since it made these relations last, today they constitute the basis of the economic and social existence of a major part of Polish society.”⁶⁵

The effect of the Constitutional Tribunal’s decision has been crushing for claimants seeking the return of nationalized immovable property. Absent the enactment of restitution legislation by the Polish government, claimants must proceed on an individual basis by filing administrative and civil actions in Poland to recover their property.

During a June 2016 visit to Israel, Israeli Foreign Minister Witold Waszczykowski defended Poland’s restitution process:

The difficulty and complexity of the matter lies in the fact that Poland was severely ravaged during World War Two. Its borders changed dramatically, which, in turn, resulted in a mass resettlement of populations living on Poland’s territory. That also affected the question of property and ownership. Nevertheless, property restitution has been underway in Poland for well over two decades now.

Restitution should not be regarded as an element of international politics. Nor should it be seen as a problem in Polish-Jewish relations. This is because only approx. 15% of those potentially interested in restitution are Jews now living outside of Poland. The remaining 85% are current non-Jewish Polish citizens. Property restitution is a process in which claimants’ ethnic or religious background is irrelevant: the Polish law treats everyone in the same manner. As far as private property is concerned, the existing legal system in Poland makes it perfectly clear that any legal or natural person (or their heir) is entitled to recover prewar property unlawfully seized by either the Nazi German or the Soviet occupation authorities, or by the postwar communist regime. Claimants may use administrative and/or court procedure to

64. Trybunału Konstytucyjnego [Constitutional Tribunal], SK 5/01, Nov. 28, 2001 (Pol.).

65. Max Minckler & Sylvia Mitura, *Roadblocks to Jewish Restitution: Poland’s Unsettled Property*, HUMANITY IN ACTION, <https://www.humanityinaction.org/knowledgebase/115-roadblocks-to-jewish-restitution-poland-s-unsettled-property> (last visited Mar. 29, 2018).

demonstrate that their property was unlawfully seized and to recover it.⁶⁶

Legal challenges in Poland referred to by the Foreign Minister are made principally using Articles 156, 157, and 160 of the Polish Administrative Procedure Code.

Articles 156 and 158 relate to the ability to have an administrative decision (i.e., the postwar Communist government's decision to nationalize an applicant's property) declared annulled or issued contrary to law.⁶⁷ Administrative challenges to nationalization decisions occur at the agency level. The administrative action merely determines if the property was taken in violation of one of the nationalization laws (meaning that a procedure was not followed or the property was not of the type permitted to be nationalized under the law).

If there is a positive administrative outcome and the decision that permitted the nationalization of the claimant's property is either declared null and void or issued contrary to the law, then only at that point may the claimant file a civil action for compensation or restitution in the common (civil) courts pursuant to Article 160. The specifics of Articles 156, 158, and 160 are described below.

1. Article 156

Under Article 156, an application to declare the administrative decision null and void must be accepted by the organ which made the decision if it: (1) has been issued in breach of the rules governing competence, (2) has been issued without legal basis or with manifest breach of law, (3) concerns a case already decided by means of another final decision, (4) has been addressed to a person who is not a party to the case, (5) was unenforceable at the day of issuance and has been unenforceable ever since, (6) its enforcement would effect in crime, (7) has a flaw making it null and void by the force of law.⁶⁸ However, if ten years have expired from the date of its service or promulgation or the decision has produced irreversible legal effects, it shall not be declared null and void for all the above-mentioned reasons except (2) and (5). However, the Polish Constitutional Tribunal decided that reason (2) should also be added to that exception.⁶⁹

66. Eldad Beck, *Polish Foreign Minister: There's More to Us than the Holocaust*, YNETNEWS (June 15, 2016), <https://www.ynetnews.com/articles/0,7340,L-4816365,00.html>.

67. Polish Administrative Procedure Code, *supra* note 24, arts. 156, 158.

68. *Id.* art. 156.

69. Trybunału Konstytucyjnego [Constitutional Tribunal], P 46/13 No. 5, 2015 (Pol.).

2. Article 158

Article 158 states that where a decision cannot be declared null and void because of the grounds laid out in Article 156 Section 2, the decision shall only be declared “issued contrary to the law.”⁷⁰

3. Article 160

Article 160 sets out principles for compensation, which apply equally to both decisions declared “null and void” (Article 156) *and* decisions “issued contrary to the law” (Article 158). Thus, even if a decision cannot be called “null and void,” if it is “issued contrary to the law,” the same compensation principles apply.⁷¹

Article 160 was repealed in 2004. The repeal was done pursuant to the Law of June 14, 2004 on amendments to the Civil Code and other statutes (“2004 Amendment”) in force since September 1, 2004.⁷² Article 160 of the Administrative Procedure Code was replaced by an expanded Article 417 of the Polish Civil Code, which describes instances of the state’s liability in tort.⁷³

However, the transitional provisions of the 2004 Amendment state that Article 160 can still be used to seek compensation for “events and legal situations” that subsisted before the entry into force of the 2004 Amendment.⁷⁴

Thus, in those narrow instances where a claimant seeks to have a decision issued prior to September 1, 2004 (such as a final nationalization decision made by the postwar Communist government) declared “null and void” or “issued contrary to the law” under Articles 156 or 158, Article 160 can still be used to seek compensation. When the claimed damage was caused on or after September 1, 2004, the general rules of the Polish Civil Code apply (i.e., that the damage must be claimed within three years from when the victim learned about the damage but no longer than within ten years from when the damage occurred).

A claimant who is successful in getting the nationalization decision declared invalid or issued contrary to law then has three years to claim damages under Article 160.⁷⁵ In addition, according to Supreme Court

70. Polish Administrative Procedure Code, *supra* note 24, art. 158.

71. *Id.* art. 160.

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

73. Polish Civil Code, *supra* note 26, art. 417.

74. Act of June 17, 2004, Amending the Civil Code and Certain Other Laws, *supra* note 72.

75. Polish Administrative Procedure Code, *supra* note 24, art. 160.

case law, persons who did not take part in the annulment proceedings (pursuant to Articles 156 and 158) can still claim damages under Article 160.⁷⁶

While the Ministry of Foreign Affairs states that for the last thirty-five years Poland's administrative law "has provided for the possibility, in perpetuity, to challenge administrative decisions (including decisions of property deprivation)," ⁷⁷ these administrative and civil actions are routinely costly, drag on for years, and require extensive documentation (including for example, proof that the claimant owned the property on the very date of the taking, civil status documents, official proofs of succession after the former owners of the property)—proof not likely in the possession of Holocaust and Second World War survivors and victims' heirs.

The precise number of properties that have been returned or compensated for under Articles 156, 158 and 160 of the Polish Administrative Procedure Code is unknown.

IV. LITIGATION BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Two ECHR decisions, *Ogórek v. Poland* and *Pikielny v. Poland*, both issued on September 18, 2012, addressed lingering issues of restitution and compensation relating to Poland's 1946 Nationalization of Industry Act.⁷⁸ *Ogórek v. Poland* was filed with the ECHR in 2003 and *Pikielny v. Poland* was filed with the ECHR in 2005. Both cases were ultimately declared inadmissible for failure to exhaust domestic remedies. A third case, *Plon v. Poland*, seeking compensation for the nationalized industrial property, which the Communist authorities obligated themselves to make under the 1946 Nationalization of Industry Act, likewise was dismissed in 2017 on the ground that even if all domestic remedies were exhausted, the ECHR still cannot provide a remedy since the nationalizations took place before Poland became subject to the European Convention of Human Rights.⁷⁹

In effect, the decisions issued in Strasbourg by ECHR against Poland have been disappointing for claimants.

76. See *Private Property*, PROPERTY RESTITUTION IN POL., <http://propertyrestitution.pl/Restitution,after,1989,legal,regulations,20.html> (last visited Mar. 29, 2018).

77. *Id.*

78. *Ogórek*, Eur. Ct. H.R., *supra* note 43; *Pikielny and Others v. Poland*, App. No. 3524/05, Eur. Ct. H.R. (2012).

79. *Lubelska Fabryka Maszyn i Narzędzi Rolniczych "Plon" v. Poland*, App. No. 1680/08, Eur. Ct. H.R. (2017).

A. Ogórek v. Poland

The *Ogórek* case relates to compensation/return of property improperly nationalized under the 1946 Nationalization of Industry Act.⁸⁰ The case was filed with the ECHR in 2003 and the Court did not issue a decision until 2012. That it took the ECHR nine years to decide the case illustrates the ECHR's limited impact on restitution in Poland and other Eastern European states.

In *Ogórek*, applicants were non-Jewish Polish nationals whose father had owned a limestone plant and limestone deposits in Poland before, during, and after Second World War.⁸¹ The limestone plant was nationalized by a decision from the Ministry of Industry and Commerce in 1948 ("1948 decision") pursuant to the Nationalization of Industry Act. According to the terms of the decision, applicants' father was to be compensated for the nationalization.⁸²

In 1990, applicants requested that the Ministry of the Economy declare the 1948 decision null and void pursuant to Article 156 of the Polish Administrative Procedure Code.⁸³ In 2001 and 2002 the Minister for Economy denied the request and a request for reconsideration.⁸⁴

In 2002, applicants challenged the decision by the Ministry of the Economy in the Supreme Administrative Court, which then referred the matter to the Warsaw Regional Administrative Court.⁸⁵ In 2004, the Warsaw Regional Administrative Court quashed the decision of the Ministry of the Economy on the grounds that the Ministry had failed to establish whether the limestone plant was legally nationalized under the Nationalization of Industry Act, i.e., whether the plant was capable of employing more than fifty persons per shift as per Section 3(1) of the Act.⁸⁶

In 2007, in response to the Warsaw Regional Administrative Court's decision, the Minister for Economy declared the 1948 decision null and void because at the time of the nationalization, the plant had suffered war damage and could not employ more than forty-two people per shift (not more than fifty, as was required by the Nationalization of Industry Act) and therefore was not subject to the nationalization law.⁸⁷

80. *Ogórek*, Eur. Ct. H.R., *supra* note 43.

81. *Id.* ¶ 3.

82. *Id.* ¶ 4.

83. *Id.* ¶ 5.

84. *Id.* ¶ 6.

85. *Id.* ¶ 7.

86. *Id.* ¶ 8.

87. *Id.* ¶ 9; see also Ustawa z dnia 3 stycznia 1946 r. o przejęciu na własność Państwa podstawowych gałęzi gospodarki narodowej [Nationalization of Industry Act] (Dz. U. 1946 nr 3 poz. 17) (Pol.).

Between 2003 and 2005, while the above proceedings were taking place, applicants also filed administrative and constitutional court actions and applications to the Prime Minister alleging inactivity on the part of the Prime Minister for failing to enact the Cabinet's Ordinance described in the Nationalization of Industry Act, which as described above, was meant to set out rules for compensation for nationalized enterprises.⁸⁸

These efforts were dismissed, and in 2005 the Warsaw Regional Administrative Court held that applicants' interests are protected by Article 417 of the Civil Code, which "makes it possible to seek damages caused by the legislative omission of the State Treasury"— i.e., the failure to enact the Cabinet Ordinance.⁸⁹

However, a 2006 decision by the Warsaw Regional Court, in an action by applicants for damages, came to the opposite conclusion. The Regional Court found that the civil law applicable at the material time did not provide for the State Treasury's liability for legislative inactivity (i.e., the new language on legislative omissions contained Article 417 introduced September 1, 2004, would not apply retroactively).⁹⁰

This same principle of non-applicability to Article 417 to nationalization compensation claims was also discussed in Supreme Court decisions from November 2005 brought by *E.K.* and from a December 2007 claim lodged by a limited liability company, *Lubelska Fabryka Maszyn i Narzędzi Rolniczych* ("Plon."). The Supreme Court said that Article 417 of the Civil Code did not apply to events and situations existing before its entry into force, "even if this state of affairs continually existed until the present day."⁹¹ Thus, as interpreted by the Polish Supreme Court in 2005, Article 417 could not serve as a mechanism for redress for the government's failure to ever enact the Cabinet Ordinance setting out rules and procedures for compensation under the Nationalization of Industry Act.

Applicants then filed a second claim for damages in the Warsaw Regional Court in 2009 seeking damages arising out of the nationalization of the limestone plant.⁹² Relying on Article 160 of the Polish Administrative Procedure Code, the Court granted applicants' claim in its entirety and awarded each of the two applicants PLN 8,378,114.25

88. *Id.* ¶¶ 13-24.

89. *Id.* ¶ 23 (quoting language from the Warsaw Regional Administrative Court Decision).

90. *Id.* ¶ 31.

91. *Id.* ¶¶ 45-48.

92. *Id.* ¶ 33.

(approximately US \$2 million) plus interest.⁹³ The Court held that applicants had sustained a loss and should be compensated and that the loss was the value of the plant at nationalization, the value of the limestone deposits exploited by the States and the costs associated with rehabilitating the nationalized land.⁹⁴

In an appeal to the Warsaw Court of Appeal by the State Treasury, the Court of Appeal affirmed the compensation for the value of the buildings and equipment and postponed the examination of the value of the limestone deposits pending a new expert opinion.⁹⁵ In its decision, the ECHR explained:

In the present case the applicants were awarded partial compensation for the actual damage caused by the nationalisation of their enterprise, corresponding to the value of the limestone plan, i.e. destroyed buildings, machines and technical equipment. The proceedings concerning the remainder of their claim are still pending before the Warsaw Court of Appeal . . .

In these circumstances, the Court finds that the application is premature and that, in accordance with the subsidiarity principle, it cannot accept it for substantive examination. This ruling is without prejudice to the applicants' right to lodge a fresh application under Article 34 of the Convention if they are unable to obtain appropriate redress in the domestic proceedings.⁹⁶

Thus, given the positive decision by the Warsaw Court of Appeal and the then still-pending action relating to the value of the limestone deposits, the ECHR determined the applicants' application to the ECHR was premature and was dismissed without prejudice.

B. Pikielny and Others v. Poland

The *Pikielny* case relates to compensation and return of property nationalized under the 1946 Nationalization of Industry Act.⁹⁷ The case was filed with the ECHR in 2005, but no decision was issued by the Court until 2012.

Pikielny also addressed the issue of claimants' rights with respect to compensation for property nationalized by the 1946 Nationalization of Industry Act. Applicants' Jewish ancestors owned a textile manufacturing factory in Łódź, Poland, consisting of some fifteen various buildings,

93. *Id.* ¶ 34.

94. *Id.*

95. *Id.* ¶ 36.

96. *Id.* ¶ 69.

97. *Pikielny*, Eur. Ct. H.R., *supra* note 78.

mills, a plot of land and a garden.⁹⁸ The applicants' grandfather founded the factory in 1889.⁹⁹ Following the outbreak of the Second World War, the Nazis took the factory owners and the applicants' other relatives to concentration camps or ghettos.¹⁰⁰ The factory was taken over by Germans and throughout the war operated under the Nazi-appointed trustee.¹⁰¹ Two of the applicants and one of the owners survived the concentration camps and returned to Łódź at the end of the war.¹⁰² They found the factory functioning largely as it had been during the Nazi occupation.¹⁰³

On February 12, 1948, the factory was nationalized by a decision from the Ministry of Light Industry ("*Pikielny* 1948 decision") pursuant to the Nationalization of Industry Act.¹⁰⁴ The owners were neither notified of the nationalization nor compensated for it.¹⁰⁵

In December 2004, applicants inquired into possible compensation for the factory and the Minister for Economy and Labor stated that no laws have been enacted regulating compensation for nationalized property (i.e., no Cabinet Ordinance describing the rules and procedure for compensation under the Nationalization of Industry Act had been enacted).¹⁰⁶ The Minister also informed applicants this issue would be resolved once Parliament passed a restitution law.¹⁰⁷

After December 2004, applicants did not file any domestic action for compensation for the factory. Instead, they complained to the ECHR that they had been deprived of their property in violation of Article 1 of Protocol No. 1 to the European Convention on Human Rights.¹⁰⁸ They claimed their right to compensation, as laid down in the Nationalization of Industry Act, had not been satisfied although the legal basis for their claim was still in force.¹⁰⁹

Relying upon the same laws and cases as were described in *Ogórek*, the ECHR in *Pikielny* held that despite Poland's "continued failure to enact an ordinance setting out rules for compensation . . . [under the 1946 Act for nationalized property] . . . the procedures under Articles 156 § 1

98. *Id.* ¶ 3.

99. *Id.*

100. *Id.* ¶ 5.

101. *Id.*

102. *Id.* ¶ 6.

103. *Id.* ¶ 6.

104. *Id.* ¶ 7.

105. *Id.* ¶ 8.

106. *Id.* ¶ 14.

107. *Id.*

108. *Id.* ¶ 40.

109. *Id.* ¶ 41.

and 160 of the [Administrative Procedure Code] offer reasonable prospects of success . . .”¹¹⁰ for compensation. For this reason, the ECHR dismissed the suit against Poland for failure to exhaust domestic remedies.¹¹¹ The Pikielny claimants never filed a claim in Polish courts.

C. Sierminski v. Poland

The *Sierminski* case relates to compensation/return of property nationalized under the 1945 Warsaw Land Decree.¹¹²

The December 2, 2014 judgment in *Sierminski* (which became final on March 2, 2015), applied the panoply of Polish Civil Code and Administrative Procedure Code provisions discussed in *Ogórek* and *Pikielny*, to another nationalization law, the 1945 Bierut Decree. The applicant’s parents owned land within the administrative borders of Warsaw, which was taken pursuant to the Bierut Decree.¹¹³ In accordance with the terms of the Decree, the applicant’s predecessor sought in 1949 a perpetual lease of comparable land. The request was denied by administrative decision in 1961.¹¹⁴

In 1993, the applicant requested that the 1961 decision be declared null and void pursuant to Articles 156 and 158 of the Polish Administrative Procedure Code.¹¹⁵ In 1994, the Minister of Construction and Land Planning found part of the 1961 null and void and part of it issued contrary to the law (both of which have the same legal effect and allow an applicant to seek damages).¹¹⁶

In 1994, the applicant then requested that authorities review the 1949 application for perpetual use with respect to the part of the land, which was declared null and void.¹¹⁷ As of the date of the ECHR’s decision 20 years later, these proceedings were still pending.¹¹⁸ The ECHR found that the length of proceedings in this case was excessive and failed to meet the “reasonable time” requirements of Article 6 Section 1 of the European Convention on Human Rights.¹¹⁹ On account of the excessive length of proceedings, the ECHR awarded the applicant EUR 17,000 in

110. *Id.* ¶ 61.

111. *Id.* ¶ 63.

112. *Sierminski v. Poland*, App. No. 53339/09, Eur. Ct. H.R. (2014).

113. *Id.* ¶ 5.

114. *Id.* ¶ 5.

115. *Id.* ¶ 6.

116. *Id.* ¶ 7.

117. *Id.* ¶ 10.

118. *Id.* ¶¶ 10-24.

119. *Id.* ¶¶ 62-67.

non-pecuniary damages.¹²⁰ Whether the damages were ever paid is unknown.

D. Plechanow v. Poland

In *Plechanow*, the Court examined the applicability of Article 1 of Protocol No. 1 to the European Convention on Human Rights (“Protocol No. 1”)—the right to peaceful enjoyment of one’s possessions (right to property) – to claims relating to property taken under the 1945 Warsaw Land Decree.¹²¹ Applicants in *Plechanow* alleged they had been deprived of compensation for illegal nationalizations because they had applied for compensation to the wrong government authority.¹²² Applicants also believed they were victims of repeated administrative reforms and inconsistencies with Polish domestic law, which made ascertaining the proper government entity difficult.¹²³

At issue in *Plechanow* was a building in Warsaw whose ownership had been transferred to the City of Warsaw under the 1945 Bierut Decree. In 1964, the Board of the Warsaw National Council denied the original owner’s request to temporary ownership of the building, otherwise authorized by Article 7 of the Bierut Decree so long as the land had not been designated for public use (“1964 Decision”).¹²⁴ Applicants were the heirs to the original owner of the building. Between 1975 and 1992, the state Treasury sold several apartments in the building to third parties.¹²⁵

On November 30, 1999, the Local Government Board of Appeal declared the 1964 Decision “null and void” with respect to the part of the property still in government control.¹²⁶ With respect to the other portion, which had since been sold to third parties, the Board declared the 1964 Decision was issued in breach of law.¹²⁷ The Board further stated that applicants were entitled to compensation for damages caused by the 1964 Decision having been issued in breach of law (“1999 Ruling”).¹²⁸

On December 21, 2000, applicants lodged compensation claims pursuant to Article 160 of the Administrative Procedure Code with the Warsaw Regional Court against the Warsaw municipality.¹²⁹ On March 21,

120. *Id.* ¶¶ 78-79.

121. *Plechanow v. Poland*, App. No. 22279/04, Eur. Ct. H.R. (2009).

122. *Id.* ¶ 23.

123. *Id.* ¶ 26.

124. *Id.* ¶¶ 9-10.

125. *Id.* ¶¶ 6-11.

126. *Id.* ¶ 19.

127. *Id.* ¶ 17.

128. *Id.* ¶ 18.

129. *Id.* ¶ 23.

2002, the Regional Court dismissed the claim. It acknowledged applicants' damage as a result of the 1964 decision, but found that the state Treasury, not the municipality should have been sued.¹³⁰ The Regional Court found that the Supreme Court decision of January 7, 1998—relied upon by applicants—stating the municipality was the proper party in compensation actions, had become obsolete in light of later interpretation of Section 36 of the Local Government (Introductory Provisions) Act of May 10, 1990.¹³¹ The latter indicated that the state Treasury was the proper party.¹³²

Between 2002 and 2005, the applicants challenged the Regional Court decision which declared they had sued the wrong party by lodging an appeal with the Warsaw Court of Appeal that they lost; a cassation appeal with the Supreme Court that was dismissed without being entertained; and a complaint with the Constitutional Court that was discontinued.¹³³

The ECHR first considered whether it had temporal jurisdiction to hear the case. The Court's jurisdiction only covers the period after the date of ratification of the Convention and Protocols (October 10, 1994 for Poland).¹³⁴ However, it can consider facts prior to ratification if they are considered to have "created a continuous situation extending beyond that date . . ."¹³⁵ The Court found that even if applicants' claim of entitlement to compensation was created by the original interference (the 1964 Decision, which was prior Poland's ratification of the Protocol No. 1), the 1999 Ruling confirmed that entitled and enabled applicants could seek redress for the interference. Accordingly, the Court found it had temporal jurisdiction.¹³⁶

The Court next determined whether applicants had any "possessions" within the meaning of Article 1 of Protocol No. 1. Property rights can be "possessions" for the purpose of the provision, and "possessions" can include claims where the applicant argues that he has a "legitimate expectation" of obtaining effective enjoyment of the property right.¹³⁷ In the Court's view, the 1999 Ruling "established that the 1964 Decision had been issued in breach of law and this fact entitled applicants to seek

130. *Id.* ¶ 23.

131. *Id.*

132. *Id.*

133. *Id.* ¶¶ 24-29.

134. *Id.* ¶ 78.

135. *Id.* (internal citations omitted).

136. *Id.* ¶ 79.

137. *Id.* ¶ 83.

compensation for their damage.”¹³⁸ Thus, applicants had a “legitimate expectation” that the claim would be processed in accordance with domestic laws, and that they would receive compensation for their nationalized property.¹³⁹

Finally, the Court had to determine if there was an Article 1 of Protocol No. 1 violation. The Court reiterated that the protections under Article 1 of Protocol No. 1 include not just a state’s duty not to interfere, but also to give rise to positive obligations.¹⁴⁰ It found that the case law concerning who the proper defendant should be in compensation actions at the domestic level (municipality vs. state Treasury)—including at the Supreme Court (whose job it is to resolve conflicts in lower court decisions)—“has often been contradictory.”¹⁴¹ In support of this finding, the Court referred to at least seven conflicting resolutions, judgments and decisions from the Polish domestic courts on the issue.¹⁴² Further, the Court found that “shifting the duty of identifying the competent authority to be sued to the applicants and depriving them of compensation on this basis was a disproportionate requirement and failed to strike a fair balance between the public interest and the applicants’ rights.”¹⁴³ As a result, the applicants had been denied their right to property under Article 1 of Protocol No. 1.¹⁴⁴

The Court did not decide as to whether the applicants’ pecuniary and non-pecuniary damages claimed under Article 41 of the Convention were warranted.¹⁴⁵ The Court requested the Polish government submit its views on the issue.¹⁴⁶

The issue of damages in the initial judgment was thereafter stricken from the case in a subsequent October 15, 2013 judgment.¹⁴⁷ The Court found that the domestic issue of the conflicting jurisprudence concerning the proper defendant in compensation actions in Poland had been resolved; that applicants were utilizing the new domestic procedure in a matter then-pending before the Warsaw Regional Court; and that the principle of subsidiarity (i.e., that Polish courts must have the opportunity to provide a solution for the alleged violations) should apply.¹⁴⁸ Thus, the

138. *Id.* ¶ 84.

139. *Id.*

140. *Id.* ¶ 99.

141. *Id.* ¶ 105.

142. *Id.* ¶ 106.

143. *Id.* ¶ 108.

144. *Id.* ¶¶ 111-112.

145. *Id.* ¶ 117.

146. *Id.*

147. *See* Plechanow, Eur. Ct. H.R., *supra* note 121.

148. *Id.* ¶ 28.

ECHR found that domestic courts were in the best position to assess the injury, to put an end to the violations of the Convention, and to redress the consequences.¹⁴⁹ As far as we are aware, the matter is pending before the Warsaw Regional Court

E. Sierpiński v. Poland

The *Sierpiński* case, decided on November 3, 2009, includes facts strikingly similar to those described in *Plechanow*, decided four months earlier.¹⁵⁰ Just as in *Plechanow*, the Court in *Sierpiński* examined the applicability of Article 1 of Protocol No. 1 to the European Convention on Human Rights (“Protocol No. 1”)—the right to peaceful enjoyment of one’s possessions (right to property)—to claims relating to property taken under the 1945 Warsaw Land Decree.

However, in *Sierpiński*, applicants had sued the state Treasury for a plot of land that had been taken pursuant to the 1945 Bierut Decree (a decision declared to have been issued in breach of law on June 14, 2000), only to be told by the Warsaw Regional Court and the Court of Appeal that the municipality was the proper party for the action.¹⁵¹ Thus, the domestic decisions in *Sierpiński* were the exact opposite of what the domestic courts had said in *Plechanow*. This underscores the inconsistencies in domestic legislation on the issue of proper parties in compensation actions. The Supreme Court refused to hear applicants’ cassation complaint on the issue.¹⁵²

Relying on the same reasoning from *Plechanow*, the Court in *Sierpiński* found that the applicant had “fallen victim of the administrative reforms, the inconsistency of the case-law and the lack of legal certainty [in Poland] . . .” and “[a]s a result, the applicants were unable to obtain due compensation for damages suffered.”¹⁵³ As a result, Poland had failed in its positive obligation to provide measures to project the applicant’s right to property under Article 1 of Protocol No. 1.

In a subsequent July 27, 2010 judgment in the case, the Court noted that a friendly settlement was reached between the government and applicants for PLN 700,000 (approximately US \$180,000) for the claimed pecuniary and non-pecuniary damages.¹⁵⁴ According to the terms of the settlement, the money would be paid within thirty days of the ECHR striking

149. *Id.* ¶ 30.

150. *Sierpiński v. Poland*, App. No. 38016/07, Eur. Ct. H.R. (2009).

151. *Id.* ¶¶ 12-19.

152. *Id.* ¶ 22.

153. *Id.* ¶ 110.

154. *See Sierpiński*, Eur. Ct. H.R., *supra* note 150, at ¶ 8.

the case from its docket, which the Court did in its July 27, 2010 judgment.¹⁵⁵ In exchange for the payment by the government, applicants waived all future claims (in domestic and international forums) relating to the facts giving rise to the action.¹⁵⁶ It is unknown whether the *Sierpiński* applicants received the settlement funds.

*F. Plon v. Poland*¹⁵⁷

On October 26, 2017, the ECHR issued its latest decision of a Polish restitution case, unanimously rejecting the application of the claimants. As discussed above, the claim was first brought in the Polish courts by the limited liability company *Lubelska Fabryka Maszyn i Narzędzi Rolniczych* (“*Plon*”). *Plon* was established in 1937 and had engaged in manufacturing agricultural machinery and farming equipment.¹⁵⁸ In 1947, the company was nationalized pursuant to the 1946 Nationalization of Industry Act.¹⁵⁹ In 2002, the heir of one of the shareholders applied to the Ministry of Economy to have the 1947 decision declared null and void.¹⁶⁰ In 2004, the Ministry rejected the application because the enterprise in question was nationalized pursuant to the terms of the 1946 nationalization law (*Plon* was capable of employing more than fifty people on one shift, and therefore subject to the 1946 nationalization decree).¹⁶¹ In 2009, the Supreme Administrative Court upheld the decision.¹⁶²

The regular courts likewise dismissed claimants’ claim for compensation, which the 1946 law contemplated under an ordinance that the Communist authorities never enacted.¹⁶³ Though Article 417 of the Civil Code makes the State Treasury’s liable in tort for the State’s failure to enact legislation, that tortious liability provision, enacted in 2004, was not retroactive.¹⁶⁴

In its decision, the ECHR held that Article 1 of Protocol No. 1 of the ECHR, guaranteeing the right to property (“the peaceful enjoyment of his possessions”) likewise cannot be applied retroactively.

155. *Id.*

156. *Id.* ¶¶ 8-11.

157. *Lubelska Fabryka Maszyn i Narzędzi Rolniczych* “*Plon*,” *supra* note 79.

158. *Id.* ¶ 5.

159. *Id.* ¶ 6.

160. *Id.* ¶ 7.

161. *Id.* ¶ 9.

162. *Id.* ¶ 13.

163. *Id.* ¶¶ 30-43.

164. *Id.* ¶¶ 16, 43.

80. . . . The Court also notes that it is only competent to examine complaints of violations of the Convention which took place after its entry into force in respect of the respondent State. . . .

81. . . . [T]he Court considers that in essence the main thrust of these complaints is the same, namely that following the failure to implement the Cabinet's obligation to provide compensation for the nationalization of the enterprises in question, the applicants had been unable to obtain compensation for the alleged legislative omission. . . .

84. The Court observes that to the present day the Cabinet has not enacted any such ordinance. . . . [However], the court points out that the State has a wide margin of appreciation when passing laws in the context of a change of political and economic regime.

89. In the Court's view, the applicants' situation must therefore be distinguished from that in the case of *Broniowski v. Poland*, where the right to compensation arising from pre-ratification legislation was subsequently incorporated into Polish law and recognized by the national courts [citation omitted] By contrast, in the present cases the domestic courts, including the Supreme Court and the Constitutional Court, have continually rejected the existence of a right in national law to compensation for legislative omission for failure to enact an ordinance pursuant to section 7 of the 1946 Act or any other claims for compensation for former owners of nationalized property. In particular, the Supreme Court held that until the entry into force of the 2004 Amendment Act the State's failure to issue the relevant ordinance could not constitute a basis for a compensation claim. In a further judgment it explained that the Civil Code provisions enabling a plaintiff to seek compensation for legislative omission (Article 4171) had been introduced on 1 September 2004 and were unambiguous: the operation of this provision was precluded in respect of legislative omissions that originated in facts that had occurred earlier (see paragraph 18 above). The Constitutional Court also confirmed that, in the light of constitutional standards, it could not be accepted that section 7 of the 1946 Act had any legal effect and that only a statute could regulate compensation for nationalized property. . . .

90. This interpretation of the domestic law in respect of the concept of legislative omission does not appear to have been arbitrary or manifestly unreasonable. Consequently, in view of the Court's limited jurisdiction to interpret domestic law [citation omitted] in the circumstances of the present cases, it does not find it necessary to substitute its view for that expressed by the Polish courts, including the Supreme Court and the Constitutional Court. . . .

91. In the light of the conclusions reached by the domestic courts, the Court observes that the applicants' claims are not based on any statu-

tory provision. It further accepts the domestic courts findings and considers that the provisions of section 7 of the 1946 Act could not be interpreted as establishing any kind of claim or entitlement

92. Accordingly, the Court finds that the applicants cannot be considered to have had any claim under domestic law that could qualify as a “possession” protected under Article 1 of Protocol No. 1 to the Convention.¹⁶⁵

And so it stands. Even though the Polish State benefited from the 1946 nationalization legislation—and in which it obliged itself to pay out compensation—its failure to do so does not create a remedy under either Polish or European law.

VI. LITIGATION IN THE UNITED STATES

The American-centered Holocaust restitution movement and accompanying litigation in American courts that began in the late 1990s led to multi-billion dollar court settlements with Swiss banks, French banks, Austrian companies, German companies, and multiple European insurance companies for their roles in facilitating and/or benefiting from the massive thievery that took place as European Jews were being persecuted and then murdered.¹⁶⁶ These remarkable efforts led to compensation totaling more than US \$ 8 billion in individual and community-based payments, with significant European and American government cooperation.¹⁶⁷ Litigation against Poland in American courts, however, has not been successful. To put in simple terms, while Austrian-born Holocaust survivor Maria Altmann may have succeeded in her litigation against Austria in American courts in her quest for the return of the valuable

165. *Id.* ¶¶80-92.

166. *See generally* MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS (2003); STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF THE SECOND WORLD WAR (2003); MICHAEL R. MARRUS, SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S (2006); HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY (Michael Bazylar & Roger Alford. eds., 2006); HOLOCAUST, GENOCIDE AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD, *supra* note 7, at 14-21.

167. “A combination of court settlements and other U.S.-facilitated agreements resulted in over \$8 billion for Holocaust victims and their heirs from Swiss banks, German companies, Austrian companies, and French banks, as well as several large European insurance companies. Most of these agreements were concluded with the participation of European governments and the U.S. Government. As of today, nearly all of the \$8 billion from these agreements has been either distributed to survivors and heirs or otherwise obligated for continuing programs to support needy survivors or promote Holocaust education and remembrance.” *America’s Role in Addressing Outstanding Holocaust Issues: Hearing Before the Subcomm. on Europe of the H. Comm. on Foreign Affairs*, 110th Cong. 8 (2007) (statement of J. Christian Kennedy, Special Envoy for Holocaust Issues).

Klimt paintings belonging to her family – as documented in the feature film *The Woman in Gold* – similar restitution litigation by Polish-born survivors in American courts against Poland ended in failure.

A. Haven v. Polska

In 1999, two individuals filed an action in United States courts against the Republic of Poland, the State Treasury of the Republic of Poland and an insurance company, Powszechny Zakład Ubezpieczeń (“PZU”) in *Haven v. Polska*.¹⁶⁸ Plaintiffs filed a civil lawsuit in federal court in Chicago for the seizure of family lands by the state and the subsequent refusal by PZU (which was nationalized after WWII) to honor insurance contracts.¹⁶⁹

The Polish defendants challenged the jurisdiction of United States court by claiming it could not be sued there.¹⁷⁰ To overcome the presumptive immunity of foreign states from the jurisdiction of the courts of the United States, a specific statutory exception under the Foreign Sovereign Immunities Act (“FSIA”) had to apply to the defendants.¹⁷¹ Plaintiffs relied upon the commercial activity exception, whereby the foreign state’s immunity is abrogated when the suit is “based upon” a commercial activity by the foreign State in the United States.¹⁷²

The court found that the commercial activities alleged (PZU marketing insurance to customers in the United States on the internet) had no relation to the plaintiffs’ property nationalization claims.¹⁷³ Plaintiffs’ other arguments as to why immunity was abrogated—including that a 1960 Settlement Agreement between the United States and Poland (“U.S. Bilateral Agreement”) expressly waived immunity and that a letter from the Polish Consulate in the United States to Plaintiff regarding service of process expressly waived immunity – were equally unpersuasive to the court.¹⁷⁴ Thus, the action was dismissed for lack of subject matter jurisdiction over any of the defendants.¹⁷⁵

168. *Haven v. Polska*, 215 F.3d 727 (7th Cir. 2000).

169. *Id.* at 730.

170. *Id.*

171. *Id.*

172. *Id.*; 28 U.S.C. § 1605(a)(2).

173. *Haven*, 215 F.3d at 736.

174. *Id.*

175. *Id.*

B. Garb v. Poland

The same year—in 1999—another group of plaintiffs filed a class action suit in the United States federal court in Brooklyn against the Republic of Poland and the Ministry of the Treasury in a case known as *Garb v. Republic of Poland*.¹⁷⁶ Plaintiffs' claims arose in the context of "the mistreatment of Jews in Poland after the Second World War—mistreatment that [District Court] Chief Judge Korman properly described as 'horrendous' . . . In particular, plaintiffs challenge the Polish Government's expropriation of their property following the asserted enactment of post-war legislation designed for that purpose."¹⁷⁷ In particular, plaintiffs sought redress for property taken from Jews under the post-war nationalization acts from 1946 and 1947 regarding abandoned and deserted properties.¹⁷⁸

Just as in *Haven v. Polska*, the Polish government defendants challenged the jurisdiction of United States courts by claiming it could not be sued there. In order to overcome the presumptive immunity of foreign states from the jurisdiction of the courts of the United States, a specific statutory exception under the FSIA had to apply to the Republic of Poland and the Ministry of the Treasury.¹⁷⁹ Two statutory exceptions relied upon in the case included the commercial activity exception, in which the State acts as a commercial actor (28 U.S.C. § 1605(a)(2)) and the international takings exception, where the alleged taking of property occurred in violation of international law, (28 U.S.C. § 1605(a)(3)).¹⁸⁰

The Court held that the FSIA precluded resolution of plaintiffs' immovable property claims arising in Poland in United States courts. With respect to the commercial activity exception, the Court found that "a State's exercise of its power to expropriate property within its borders is a decidedly sovereign act."¹⁸¹ The takings exception was found to be equally inapplicable on more technical grounds relating to the location of property in issue, as well as the character of the defendant.¹⁸² However, the District Court (affirmed on appeal) underscored that:

[S]trong moral claims are [not] easily converted into successful legal causes of action", [the complaint was dismissed] "*not* because of a

176. See *Garb v. Poland*, 440 F.3d 579 (2d Cir. 2006).

177. *Id.* at 581.

178. See *Garb v. Poland*, 207 F. Supp. 2d 16, 17-19 (E.D.N.Y. 2002) (judgment vacated on other grounds by 440 F.3d 579 (2d Cir. 2006)).

179. *Garb*, 440 F.3d at 581.

180. *Id.* at 582.

181. *Id.* at 588.

182. *Id.* at 589-90.

determination that the challenged conduct here is lawful . . . [t]he complaint is dismissed solely because the Republic of Poland and its Ministry of the Treasury may not be required to defend that cause of action alleged in the complaint in the United States. The dismissal places on the Republic of Poland the obligation to resolve equitably the claims raised here.¹⁸³

Because of the Court's decision, plaintiffs were unable to maintain their action in the U.S. court.

VII. PROPERTY LOCATED IN THE EASTERN TERRITORIES OR BEYOND THE BUG RIVER

As a result of the significant shift in Polish borders after the Second World War, the property of many Polish citizens ended up being located in areas outside of the revised borders of Poland, in particular the area east of the Bug River (i.e., east of the Curzon line in the Yalta Conference agreements).

Through the so-called 1944 "Republican Agreements" between the Polish Committee of National Liberation ("PKWN") (a provisional government of Poland established in 1944 fully sponsored by the Soviet Union and in opposition to the Polish government in exile in London) and the Communist governments of the former Soviet Republics of Lithuania, Belarus and Ukraine, Polish citizens were repatriated from those areas to live in what are now the present borders of Poland.¹⁸⁴ In the Republican Agreements, the Polish State created for itself the obligation to compensate persons who were forced to abandon their property when they were "repatriated" from the "territories beyond the Bug River."¹⁸⁵

A similar 1945 Agreement was also concluded between the government of the Polish People's Republic and the government of the Soviet Union.¹⁸⁶ According to the Polish government, between 1944 and 1953, approximately 1,240,000 persons were "repatriated" pursuant to the terms of the Republican Agreements and a majority were compensated for their losses.

183. Garb, 207 F. Supp. 2d at 39 (internal quotations omitted and emphasis in original).

184. Agreement of September 22, 1944, between the Polish Committee of National Liberation and the government of the Lithuanian SSR on evacuation of Polish citizens from the territory of the LSRR and the Lithuanian population from the Territory of Poland; Agreement of September 9, 1944, between the Polish Committee of National Liberation and the government of the Belarusian SSR on evacuation of Polish citizens from the territory of the BSRR and the Belarusian population from the territory of Poland; Agreement of September 9, 1944, between the Polish Committee of National Liberation and the government of Ukraine on population exchange between Poland and Soviet Ukraine.

185. *Id.*

186. Agreement between Polish People's Republic and the Soviet Union (1945).

A. Domestic Efforts Concerning Bug River Properties

Nearly forty years later, the Polish communist state passed a series of laws that built upon the compensation obligations created by the Republican Agreements. The first law enacted was the April 29, 1985 Land Administration and Expropriation Act (“1985 Bug River Law”).¹⁸⁷ Section 81 of the 1985 Bug River Law provided that:

(1) Persons who, in connection with the war that began in 1939, abandoned real property in territories which at present do not belong to the Polish State and who, by virtue of international treaties concluded by the State, are to obtain equivalent compensation for the property abandoned abroad, shall have the value of the real property that has been abandoned offset either against the fee for the right of perpetual use of land or against the price of a building plot and any houses, buildings or premises situated thereon.”¹⁸⁸

Essentially, the 1985 Bug River Law gave persons the right to apply the value of their abandoned property to the purchase of a perpetual lease on property located in Poland.

The August 21, 1997 Land Administration and Expropriation Act (“1997 Bug River Law”) repealed the 1985 Bug River Law.¹⁸⁹ The 1997 Bug River Law contained similar property offset language to the 1985 Bug River Law, but Section 213 of the 1997 Bug River Law included a new provision that made the law inapplicable to any property held by the state Treasury’s Agricultural Property Resources.¹⁹⁰

The Cabinet’s Ordinance of January 13, 1998 (“1998 Ordinance”) laid out procedures for the implementation of the 1997 Bug River Law.¹⁹¹ The effect of the 1998 Ordinance was that compensatory property or perpetual usufruct could only be enforced through a public auction, meaning that repatriated persons were not given priority over purchasing State land.¹⁹²

187. Ustawa z dnia 29 kwietnia 1985 r. o gospodarce gruntami i wywłaszczaniu nieruchomości [Land Administration and Expropriation Act of April 29, 1985] (Dz. U. 1985 nr 22 poz. 99) (Pol.).

188. Broniowski v. Poland, App. No. 31443/96, Eur. Ct. H.R. ¶ 47 (2004).

189. Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami [The Land Administration Act of August 21, 1997] (Dz. U. 1997 nr 115 poz. 741) (Pol.).

190. Broniowski, Eur. Ct. H.R. *supra* note 188, ¶ 49.

191. Rozporządzenie Rady Ministrów z dnia 13 stycznia 1998 r. w sprawie sposobu zaliczania wartości nieruchomości pozostawionych za granicą na pokrycie ceny sprzedaży nieruchomości lub opłat za użytkowanie wieczyste oraz sposobu ustalania wartości tych nieruchomości [Cabinet’s Ordinance of January 13, 1998 on the Procedure for Offsetting the Value of Real Property Abandoned Abroad Against the Price of a Title to Real Property or Against the Fees for Perpetual Use, and on the Methods of Assessing the Value of Such Property] (Dz. U. 1998 nr 9 poz. 32) (Pol.).

192. Broniowski, Eur. Ct. H.R. *supra* note 188, ¶ 52.

The Local Self-Government Act of May 10, 1990 (“1990 Local Self-Government Act”)¹⁹³ also reduced the amount of property available for compensation. The 1990 Local Self-Government Act reestablished municipalities in the country and transferred most of the state Treasury’s land to the municipalities. This reduced the amount of property available for compensation to repatriated persons because, according to the 1985 and 1997 Bug River Laws, eligible property came from the State Treasury.¹⁹⁴

The June 10, 1994 Law on the administration of real property taken over by the State Treasury from the army of the Russian Federation (“1994 Law on Russian Federation Property”)¹⁹⁵ provided that repatriated persons were supposed to be given priority over this property. In reality, however, the resources left by the Soviet Army had already been exhausted.¹⁹⁶

A May 30, 1996 Law on the administration of certain portions of the State Treasury’s property and the Military Property Agency (“1996 Treasury and Military Property Law”) provided that the Military Property Agency could organize competitive bids for the sale of real property, but Bug River repatriates had no priority under this law over other bidders.¹⁹⁷

A December 21, 2001 amendment to the 1996 Treasury and Military Property Law¹⁹⁸ stated that *no* property administered by the Military Property Agency could be designated for the purpose of compensation for abandoned Bug River property.¹⁹⁹

193. Ustawa z dnia 10 maja 1990 - Przepisy wprowadzające ustawę o samorządzie terytorialnym i ustawę o pracownikach samorządowych [Act of May 10, 1990. Provisions Introducing the Act on Local Self-Government and the Act on Local Government Employees] (Dz. U. 1990 nr 32 poz. 191) (Pol.).

194. Broniowski, Eur. Ct. H.R. *supra* note 188, ¶ 53.

195. Ustawa z dnia 10 czerwca 1994 o zagospodarowaniu nieruchomości Skarbu Państwa przejętych od wojsk Federacji Rosyjskiej [June 10, 1994 Law on the Administration of Real Property Taken Over by the State Treasury from the Army of the Russian Federation] (Dz. U. 1994 nr 79 poz. 363) (Pol.).

196. Broniowski, Eur. Ct. H.R. *supra* note 188, ¶ 57.

197. Ustawa z dnia 30 maja 1996 r. o gospodarowaniu niektórymi składnikami mienia Skarbu Państwa oraz o Agencji Mienia Wojskowego [A May 30, 1996 Law on the Administration of Certain Portions of the State Treasury’s Property and the Military Property Agency] (Dz. U. 1996 nr 90 poz. 405) (Pol.) [hereinafter “1996 Treasury and Military Property Law”].

198. Ustawa z dnia 21 grudnia 2001 r. o zmianie ustawy o organizacji i trybie pracy Rady Ministrów oraz o zakresie działania ministrów, ustawy o działach administracji rządowej oraz o zmianie niektórych ustaw [The Law of December 21, 2001 on Amendments to the Law on the Organization and Work of the Cabinet and on the Powers of Ministers, to the Law on the Branches of the Executive and to Other Statutes] (Dz. U. 2001 nr 154 poz. 1800) (Pol.).

199. Broniowski, Eur. Ct. H.R. *supra* note 188, ¶¶ 58-59.

These laws provided that repatriated persons were entitled to compensation for property abandoned in territories beyond the present borders of Poland. The question as to whether, in practice, compensation could feasibly be achieved has been the subject of a considerable number of lawsuits over the years.

On July 5, 2002, the Ombudsman, acting on behalf of repatriated persons, asked the Constitutional Tribunal to declare unconstitutional certain portions of the Bug River laws that restricted the compensation rights of repatriated persons.²⁰⁰ The Ombudsman focused on laws stating that repatriated persons could not apply for compensation from agricultural and military property.

The Polish Constitutional Tribunal, in a December 19, 2002 decision held that Sections 212(1) and 213 from the 1997 Bug River Law were unconstitutional, insofar as they excluded the possibility of offsetting the value of property abandoned abroad against the sale price of State agricultural property.²⁰¹

The Constitutional Tribunal's landmark decision further described that the Republican Agreements gave rise to an obligation to award compensation, but they were not a "direct basis for repatriates to lodge compensation claims" and the legislature was therefore left to decide how the compensation would be provided. The Tribunal further stated that repatriated persons had a "right to credit," which was not simply an expectation of compensation, but a property right protected by the Constitution.²⁰²

On November 21, 2003, the Supreme Court issued a judgment in a case, which had originated in the Warsaw Regional and Appellate Courts. The plaintiff had brought an action against the State Treasury and Minister for the Treasury for pecuniary compensation for property abandoned Bug River property. This was considered a landmark decision for Bug River claims and the State's civil liability for the failure to enforce the right to credit. The Court held:

In conclusion, [the Bug River claimants] may, under Article 77 §1 of the Constitution, seek pecuniary compensation from the State Treasury for the reduction in the value of the [right to credit] resulting from the enactment of legislation restricting their access to auctions . . . which either made it impossible for them to enforce their rights or reduced the possibility of enforcing those rights

200. See Trybunał Konstytucyjny [Constitutional Tribunal], K 33/02, ¶ 80, Dec. 19, 2002 (Pol.).

201. Broniowski, Eur. Ct. H.R. *supra* note 188, ¶¶ 79-80.

202. *Id.* ¶ 82 (quoting Sąd Naczelny [Supreme Court], I CK 323/02, Nov. 21, 2003 (Pol.)).

That does not mean, however, that it is possible [for the claimants] to obtain the full pecuniary value of the property abandoned in the Borderlands. It would be contrary to . . . section 212 of the Land Administration Act 1997, by virtue of which the legislature — acting within its legislative autonomy — laid down specific compensatory machinery. The crucial point is, however, that previous legislative action rendered [this machinery] illusory — as the Constitutional Tribunal has unequivocally held. This had an impact on the actual value of the [right to credit]. Indeed, the value of this right was reduced since the legislature, on the one hand, excluded from the scope of section 212 . . . [certain] portions of State land and, on the other, through the application of this provision in practice (failing to hold auctions), made it unenforceable. [I]n consequence, the right to credit could not, and still cannot, be realized.²⁰³

In the early 2000s, while Polish courts grappled with Bug River property issues, the Senate prepared a Bill with amendments to the 1997 Bug River Law. The President signed the Bill in December 2003. Under the December 2003 Act, compensation for abandoned property beyond the present borders of the Polish State was offset by the price of state property or the fee for the right of perpetual use. Bug River claimants were exempted from paying a security before an auction for the sale of State Treasury and municipal property. Claimants were to receive 15 percent of their original entitlement.

On the date of entry into force of the December 2003 Amendment, the State Treasury's Agricultural Property Agency and Military Property Agency issued communications via the Internet announcing they had suspended all auctions for the sale of state property because they could not be held before numerous amendments to the legislation had been introduced. Although this conduct was condemned by the Supreme Court, nothing was done to change the decision of the State Treasury.

B. Bug River Litigation Before the ECHR

In contrast to claims for restitution or compensation arising from confiscation of property in existing Polish territory, which have all failed before the ECHR, the European court has been friendlier to the Bug River claims.

In 1996, unable to obtain relief in Poland, claimant Jerzy Broniowski sued in the ECHR in 1996 for compensation for his family's

203. Broniowski, Eur. Ct. H.R. *supra* note 188, ¶¶ 108-110 (quoting Sąd Naczelny [Supreme Court], I CK 323/02, Nov. 21, 2003 (Pol.)).

Bug River property. Following years of hearings on admissibility and the subsequent relinquishment of jurisdiction in favor of the Grand Chamber, the Court issued a pilot judgment in *Broniowski v. Poland* on June 22, 2004.²⁰⁴

Broniowski was a Polish national and claimed the state failed to satisfy his entitlement to compensation for property in Lwow (now Lviv in the Ukraine).²⁰⁵ The property belonged to his grandmother when the area was still part of Poland. Broniowski's grandmother was repatriated after Poland's eastern border was redrawn along the Bug River.²⁰⁶ After a thorough examination of all of the laws previous described above, the Grand Chamber found that the State of Poland had violated Article 1 of Protocol 1 of the European Convention of Human Rights in requiring Bug River claimants to participate in property auctions (which were almost never run) without any priority over other bidders, and in only offering claimants compensation in the amount of 2 percent of the original property value.²⁰⁷ The Court held that the government had effectively made it impossible for Bug River claimants to receive compensation.²⁰⁸ The Court rejected the State's objections on the bases of its economic and social constraints, finding that the State, in adopting the 1985 and 1997 Bug River Laws, reaffirmed its obligation to compensate Bug River repatriates, notwithstanding the fact that it faced social and economic constraints.²⁰⁹

In a subsequent September 28, 2005 Grand Chamber judgment, the Court announced a settlement had been reached between the government and applicants that included both individual and general remedial measures.²¹⁰ The *Broniowski* applicants would receive PLN 213,000 (approximately US \$ 54,000) for pecuniary and non-pecuniary damages and PLN 24,000 (approximately US \$ 6,000) for costs and expenses.²¹¹ However, the Court noted that the original *Broniowski* decision affected not just the *Broniowski* applicants, but also 80,000 other similarly-situation persons.²¹² The remedial measures for the other affected persons came in

204. *Broniowski*, Eur. Ct. H.R. *supra* note 188.

205. *Id.* ¶¶ 9-14.

206. *Id.* ¶ 14.

207. *Id.* ¶ 186.

208. *Id.* ¶¶ 168, 179.

209. *Id.* ¶¶ 162, 175, 187.

210. *See Broniowski v. Poland*, App. No. 31443/95, Eur. Ct. H.R. (2005) (Judgment of September 28, 2005).

211. *Id.* ¶ 31.

212. *Id.* ¶ 3.

the form of the July 8, 2005 Law on Exercising the Right to Compensation for Immovable Property Left outside the Borders of the Republic of Poland (“2005 Bug River Law”).²¹³

Pursuant to Article 2 of the 2005 Bug River Law, former owners of immovable property located outside of the present borders of Poland are entitled to compensation if they are:

- (1) persons who were Polish citizens on 1 September 1939 and were settled at the time within the then existing borders of the Republic of Poland and were resettled from that territory for the reasons referred to in the Law (a 23 October 2012, Constitutional Tribunal decision found the residency requirement, as defined in Article 2(1), to be unconstitutional. A 13 December 2013 Amendment to the 2005 Bug River Law redefined the status of resident in Article 2(1) and reopened the claims process for persons previously excluded on account of the old definition); and
- (2) persons who are citizens of Poland (at the time of the filing of the claim).²¹⁴

The single option auction scheme from the 1985 and 1997 Bug River Laws was abandoned and instead the 2005 Bug River Law permitted claimants to choose between two compensation options: a one-time payout from a newly-created Compensation Fund for an amount equal to 20 percent of the value of the original Bug River property, or a 20 percent offset of the indexed value of the original property against the sale price of State property acquired by competitive bidding. Funds for the Compensation Fund came from the sale of public property from the Agricultural Property Stock of the Polish Treasury.

If those funds were insufficient, the 2005 Bug River Law provided for a state budget loan.²¹⁵ The claim filing process for the 2005 Bug River Law closed on December 31, 2008. A December 12, 2013 Amendment to the 2005 Bug River Law reopened the claims filing process for claimants excluded based on the previous definition of residency in the former Polish territories, for a period of six months.

213. *Ustawa z dnia 8 lipca 2005 r. o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej* [Act of 8 July 2005 on the exercise of the right to compensation for leaving the property outside the current borders of the Republic of Poland] (Dz. U. 2005 nr 169 poz. 1418) (Pol.) [hereinafter “2005 Bug River Law”].

214. *Id.* art. 2.

215. See MINISTRY OF TREASURY OF THE REPUBLIC OF POL., ROUND-TABLE PROPERTY RESTITUTION/COMPENSATION: GENERAL MEASURES TO COMPLY WITH EUROPEAN COURT’S JUDGMENTS (2011).

In *Wolkenberg and Others v. Poland* in 2007, the ECHR again addressed the issue of Polish restitution legislation for property beyond the Bug River and examined the recently-enacted 2005 Bug River Law.²¹⁶

After the passage of the 2005 Bug River Law, a government delegation examined all of the Bug River case files lodged with the ECHR and selected seventy-five applicants for participation in an accelerated compensation program on account of applicants' "age, health, or difficult personal situation."²¹⁷ The *Wolkenberg* applicants were chosen for this accelerated program and they received 20 percent of the value of their original Bug River property, credited into their own bank accounts.²¹⁸ Through their complaint, applicants sought the remaining 80 percent of the value of their family's Bug River Property, pointing out that previous Bug River legislation provided for full compensation for property, whereas the 2005 Bug River Law provided for only 20 percent, thereby depriving them of a "lawfully accrued right."²¹⁹ In denying their claim, the Court emphasized its previous views from *Broniowski* that:

[I]n a situation involving a wide-reaching but controversial legislative scheme with significant economic impact for the country as a whole, the national authorities must have considerable discretion in selecting not only the measures to secure respect for property rights but also the appropriate time for their implementation. The choice of measures may necessarily involve decisions restricting compensation for the taking or restitution of property to a level below its market value.²²⁰

Further, the Court found that:

The choice that the authorities made, in particular their decision to impose a statutory ceiling of 20% on compensation, does not appear unreasonable or disproportionate, considering the wide margin of appreciation accorded to them and the fact that the purpose of the compensation was not to secure reimbursement for a distinct expropriation but to mitigate the effects of the taking of property which was not attributable to the Polish State."²²¹

The Court concluded that the 2005 Bug River Act as implemented, removed the legal obstacles to the "right to credit" that had been found in the *Broniowski* judgment.²²²

216. See *Wolkenberg v. Poland*, App. No. 50003/99, Eur. Ct. H.R. (2007).

217. *Id.* ¶¶ 13, 20.

218. *Id.* ¶ 17.

219. *Id.* ¶ 26.

220. *Id.* ¶ 61.

221. *Id.* ¶ 64.

222. *Id.* ¶ 71.

As of 2012, 111,600 claims have been filed, 47,538 claims have been processed, and over PLN 2.3 billion (roughly US \$ 600 million) has been paid to successful Polish citizen claimants under the 2005 Bug River Law.²²³

VIII. CONCLUSION

As an outlier state, Poland needs to confront its past and do what all the other Eastern European post-Communist states (both those inside and outside of the EU) more or less have done: institute a comprehensive, transparent, and corruption-free national regime for the restitution of private property stolen during the Nazi and Communist eras. The law should allow both the remedy of *in rem* restitution and alternatively the remedy of compensation where actual return of the property is not possible.

Post-communist Poland prides itself on how well it has managed the transition of its economy away from Soviet-style socialism.²²⁴ As such, Poland is often viewed as a model for the other post-Communist states to follow. In the restitution arena, however, Poland is the laggard, and needs to look to its neighbors on how restitution can be achieved.

Until the recent Warsaw reprivatization scandals, Polish society appeared disinterested in the issue. It now looks that Poles want their lawmakers and government officials to put in place a transparent and fair process of *reprivatyzacja*. While the draft Large Reprivatization Act presented by the Ministry of Justice in 2017 met the goal of having a nationwide restitution law for immovable property, the draft law contained many unfair provisions, and so the bill was abandoned. The year 2018 brings new opportunities to end “the Polish exception”²²⁵ and for Poland to catch up with the rest of Europe.

223. EUROPEAN SHOAH LEGACY INST., STATUS REPORT ON RESTITUTION COMPENSATION EFFORTS 14-15 (2012).

224. In fact, “[the] *Polish economy grew faster than any other European economy in the period from 1990 to 2015*, OECD’s Secretary General Angel Gurría said at a conference marking 20 year of partnership and cooperation between Poland and the OECD. Poland has made impressive progress in raising the living standard of its citizens in 1990-2015. *Poland Records Impressive Hike in Living Standards in Past 20 Years*, WARSAW VOICE (Nov. 30, 2016), <http://www.warsawvoice.pl/WVpage/pages/articlePrint.php/37366/news> (emphasis added).

225. Gideon Taylor & Michael Bazylar, *Poland Must Return Property Confiscated in Holocaust to Rightful Owners*, NEWSWEEK (Aug. 6, 2016), <http://www.newsweek.com/time-poland-return-property-confiscated-holocaust-rightful-owners-487237>.