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The Reprivatization Act for Warsaw Real Estate: Presentation of the Desired Assumptions Together with Remarks on the Draft Act Presented by the Polish Government

MACIEJ GÓRSKI*

I. THE BACKGROUND AND CURRENT PROBLEMS OF ONGOING REPRIVATIZATION PROCEEDINGS IN WARSAW

Poland is the only country of the former Eastern Bloc where a reprivatization act has not been passed after the breakup of the Soviet Union and where no fair compensation has been paid to former owners for the damage they suffered due to typically unlawful nationalization of assets conducted without adequate compensation. Thus, undoubtedly, the adoption of the so-called “big” reprivatization act is a necessary legislative task which should be conducted with respect for both the former owners and their legal successors, as well as the acquired rights of citizens making use of the property at the moment, in various forms, from the previously nationalized property.

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After World War II, pursuant to the Decree of October 26, 1945 on ownership and use of land on the area of the capital city of Warsaw (hereinafter referred to as the “Decree”), all the private real estate within the boundaries of Warsaw became the property of the Capital City of Warsaw.¹ The government’s intent to rebuild the capital city after it was ruined by the war justified its taking over around 40,000 pieces of real estate. It should be highlighted that the Decree itself was not wrong in principle if it was properly executed, because it was not intended to take over private property without compensation. The Decree offered former owners the possibility to seek temporary ownership title (i.e., the perpetual usufruct—powers almost as wide as ownership rights) through the submission of the appropriate application within six months from the day Warsaw took possession over the real estate.² In all those cases when it was impossible to grant such a right (e.g., owners had not submitted an appropriate application or the real estate was intended for public purposes), the Decree provided compensation for the lost property. However, the problem was that applications for temporary ownership rights, despite the existence of conditions to be taken into account, were refused and compensation was never paid. The Decree was never formally repealed. The specificity of the Warsaw lands refers to the fact that their former owners did not demand to be granted new powers; they wished merely to exercise their rights that had already been granted to them under the Decree. Thus, their lands were inappropriately taken over by the government, even in light of the past law.

In spite of twenty-seven years passing since the system’s transformation in Poland, the issues of the Warsaw land reprivatization efforts still remain unregulated. Currently, it is possible to regain (and potentially obtain compensation for) those pieces of real estate that have been taken over in violation of the Decree. This so-called “small,” or “case-report,” or “court” reprivatization led to numerous irregularities. Primarily, the reprivatization process is not equal for all the entities entitled to restitution and compensation claims depend on numerous factors, which means they are not available to all the former owners. Additionally, the process aggravates social tensions, in particular, those between eligible heirs of former owners and tenants in returned buildings. It should be noted that very often the buildings were returned together with their current tenants, known as “municipal tenants” (namely those with whom the capital city

1. Dekret z Dnia 26 Października 1945 r. o Własności i Użytkowaniu Gruntów na Obszarze m. st. Warszawy [Decree on Ownership and Use of Land in the Territory of the City of Warsaw of October 26, 1945] (1945 DZ. U. nr 50, poz. 279) (Pol.) [hereinafter Warsaw Decree].

2. *Id.* art. 7.

of Warsaw concluded tenancy agreements). Until recently, it was also possible to return pieces of real estate that were used for public purposes.

On the one hand, it is no fault of tenants that they obtained from the Warsaw authorities a tenancy allotment in a tenement house encumbered with claims. On the other hand, former owners have the rights to exercise their claims to the property. Because former owners have no option to make a choice between the restitution and compensation claim, their claims often result in recovering buildings with tenants, contrary to their goals. These tenants have been abandoned by state and local government institutions without adequate protection.

Consequently, the problem of delay, the complexity of proceedings that often last several dozen years, variable interpretations of the regulations, and, finally, lack of certainty about a positive conclusion of the case led to instances of selling Decree claims (rights to pursue recovery of nationalized properties) to the detriment of former owners. The elimination of such irregularities would be possible through maximum simplification of proceedings and guaranteeing the claims' execution date.

It should be highlighted that the lack of the legislator's action is also the expression of the legislator's intention. Accepting the possibility of conducting "small reprivatization" on the basis of powers under the Decree and subsequent regulations led to the emergence of a series of "interests in progress" (proceedings pursuant to Article 7 of the Decree,³ Articles 214 and 215 of the Act on Real Estate Management,⁴ and Article 160 of the Administrative Proceeding Code⁵). However, as previously indicated, not all former owners (or their heirs) are equally entitled to claims regarding plots of the Warsaw land. In fact, there are currently 3,500 pending proceedings for the recovery of real estate, about 4,000 administrative proceedings for establishing compensation and probably several hundred, if not more, compensatory redress proceedings through civil channels (in light of 40,000 pieces of real estate having been taken over under the Decree). The future reprivatization act, if it is to be compliant with the Constitution of the Republic of Poland, the European Convention for the Protection of Human Rights, as well as standards of the democratic rule of law, should not exert any negative impact on pending

3. *Id.* art 7.

4. Ustawa z 25 czerwca 2015 r. o zmianie ustawy o gospodarce nieruchomościami oraz ustawy - Kodeks rodzinny i opiekuńczy [Small Reprivatization Statute] (2016 Dz. U. poz. 1271) arts. 214, 215 (Pol.).

5. Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of June 14, 1960 Code of Administrative Procedure] art. 160 (consolidated text: 2017 Dz. U. z r. poz. 1257) (Pol.).

proceedings (that is, it should not revoke powers which are currently due and which are executed).

Former owners of nationalized real estate (and their heirs) may be divided into two groups: the first group refers to owners currently entitled to claims stemming from irregularities committed in the course of the nationalization and who are currently seeking their rights; the second group refers to owners who are currently not entitled to any claims and entities who do not currently seek their rights (who do not file proceedings) even if they are entitled to such claims. Taking into consideration the necessity for the final regulation of the closure of the reprivatization, the future act should: (i) prevent the instigation of new proceedings, (ii) grant powers to the second group and compensate for the property lost, and (iii) allow the second group of entities to complete the pending proceedings.⁶

Undoubtedly, due to financial possibilities as well as the considerable lapse of time and ensuing ownership changes, it is not possible that the powers granted to the above-mentioned second group of entities constitutes so-called “full reprivatization,” consisting the return of real estate and full compensation. For that reason, the future reprivatization act should moderate the amount of compensation due to a certain portion of the nationalized real estate value. On the other hand, with regard to the first group, optimizing the costs of pending proceedings would be possible through a system of incentives that allows the entitled entities who have pending proceedings and those executing their interests within the scope of so-called “small reprivatization” to enjoy a quicker and simpler manner of establishing compensations.

II. WHAT SHOULD BE THE SHAPE OF THE REPRIVATIZATION ACT REGARDING WARSAW REAL ESTATE?

First of all, the future reprivatization act should allow for settling claims with the group of former owners who have claims that have not been satisfied, but who are not entitled to any claims at the moment. For that purpose, they should be granted the right for compensation constituting a portion of the value of previously communalized property. The future act should be a compromise and it should take into account the national budgetary capacity; however, the compensation granted, if it is to be fair (just), may not be merely symbolic.

6. See Ustawa o zrekompensowaniu niektórych krzywd wyrządzonych osobom fizycznym wskutek przejęcia nieruchomości lub zabytków ruchomych przez władze 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. 20, 2017) (Pol.).

Second, it is necessary to ensure the Constitutional guarantees to integrity of interests in progress continue. The future act may not limit the rights currently sought by former owners, namely, it may not deprive them of the possibility to seek return of the real estate or compensation under the existing rules, as long as those proceedings have been instigated before the date on which the Act enters into force.

Third, it is necessary to definitely regulate the issue of claims for the future. It is crucial to terminate the option of filing new claims under the current applicable rules after the date on which the Act enters into force. Similarly, the right to file applications for compensation pursuant to the new law should be limited in time; however, the time-frame should be adequately long, but not shorter than three years.

Fourth, the act should exclude social conflicts. The recent years have demonstrated that admitting the option of returning the buildings with tenants was a mistake. Thus, such an option should be excluded. Obviously, such a question will refer merely to cases instigated before the date on which the new act enters into force (in light of terminating the option of filing new claims for returning buildings with tenants after the date on which the Act enters into force). Thus, taking into consideration the necessity to maintain interests in progress, that is, not limiting the existing rights, it is suggested to replace the restitution claim with the compensation claim, which should be reduced by the value of outlays carried out by the state. Similarly, the return of real estate should not apply to: (i) real estate used or intended for the execution of public purposes, (ii) real estate developed by the State Treasury or the unit of the territorial self-government after the date on which the Decree entered into force, if the value of such development significantly exceeds the value of the land, (iii) real estate which, in compliance with the binding provisions of law, may not be divided for the purpose of meeting claims, as well as (iv) real estate on which the building referred to in Article 5 of the Decree has been rebuilt or renovated from public funds covering more than sixty-six percent of the building.⁷ In all those cases compensation should be due. Additionally, the Act should, on the same basis, regulate the question of entities which as a consequence of the fact that the so-called “small reprivatization act” entered into force last year, provided for new, previously unknown preconditions for refusing to return the real estate that deprived those entities of their rights without any compensation.⁸

Fifth, the proceedings regarding establishing compensation should be maximally simplified. Quick proceedings resolve the lack of certainty

7. *See* Warsaw Decree, art. 5.

8. *See generally* Small Reprivatization Act.

for entitled entities with regard to the amount and deadline for the execution of their rights; such uncertainty has repeatedly caused irregularities to appear in the context of currently run proceedings. Moreover, the simpler the proceeding: (i) the lower the costs are for the civil servant system, and (ii) the lower the costs are for running such proceedings by entitled entities. Thus, compensation should not be established on the basis of individual valuations but on the basis of the table of unit values constituting the attachment to the Act, which would determine the value of one square meter of the land, depending on the location and purpose, according to the status as of the date on which the Decree entered into force and according to current prices. On the sole basis of the application itself and submitted documents, the civil servant would be able to determine individually the amount of the compensation due. The value of the real estate, constituting the basis to establish the compensation, would be equal to the product of the land area multiplied by the unit price determined by the Act and made conditional on the location and purpose of the real estate according to the general development of the capital city of Warsaw of 1931. The establishing of unit prices would have to be entrusted to professionals, e.g., to the team of real estate appraisers. In cases of developed real estate, compensation would be adequately increased.

Sixth, entities seeking claims according to the existing rules should have the possibility to switch to simpler and easier proceedings for establishing compensation, obviously under the condition of waiving the existing claims. In this case, the compensation should be respectively higher, not less than by fifty percent, due to the fact the situation of the entity resigning from the existing claims for returning or full compensation is basically different from the situation of the entity that was not entitled to any right until the regulation entered into force. Additionally, a higher compensation constitutes a considerable incentive, resulting in a significant optimization of the costs of proceedings due to the fact that a considerable number of entities would switch to new rules.

III. THE DRAFT OF THE REPRIVATIZATION ACT PRESENTED IN 2017 BY THE GOVERNMENT OF POLAND

At the end of 2017, the Polish Ministry of Justice presented a draft of the reprivatization act, that is, the draft of the act on compensating for certain damage caused to natural persons as a consequence of taking over the real estate or movable monuments by the communist authorities after 1944 (hereinafter the “Draft”).⁹ Undoubtedly, the Draft covers issues regarding the reprivatization of the “Warsaw real estate.” This Draft is a good starting point for instigating the discussion over the final shape of so-called reprivatization as it constitutes an attempt to deal with problems occurring with regard to the legal situation of nationalized property. However, it is evident that the discussed Draft, initiating the legislative process and thus, constituting its initial stage, has its weaknesses, in particular with regard to observing standards set forth by the Constitution of the Republic of Poland (hereinafter the “Constitution”), as well as by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “ECHR”), or the Charter of Fundamental Rights of the European Union (hereinafter referred to as the “CFREU”).¹⁰

The Draft proved to be controversial mainly due to: (i) discontinuance of all pending proceedings, (ii) the cessation of many claims without fair compensation, (iii) the limitation of entities entitled to a small number of heirs, (iv) discrimination against former owners and their heirs on the grounds of nationality, (v) unequal treatment depending on the type of property taken over, and (vi) no guarantee as to when the right to compensation will be exercised.¹¹

IV. DISCONTINUATION OF PENDING PROCEEDINGS AND TERMINATION OF RIGHTS DUE

This part of the article will present detailed comments referring to the basic solutions presented in the Draft which need to be further discussed.

Pursuant to Article 75, item 1, point 1 of the Draft,

9. 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.

10. *See generally* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION] Apr. 2, 1997 (Pol.); European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 02.

11. *See generally* 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, arts. 1-79.

[O]n the date of this Act's entry into force, all rights or claims arising from the take-over of ownership or co-ownership in real estate for the State Treasury or for the benefit of other legal persons under public law pursuant to the provisions referred to in Article 2 point 3 and Article 13 shall elapse and the same applies to the take-over with the violation of these provisions or without legal basis, unless this Act provides otherwise.¹²

On the other hand, in compliance with Article 75, item 3, of the Draft,

[I]f on the date of the Act's entry into force, an administrative court or court-administrative proceedings are pending with regard to the rights, claims or encumbrances referred to in item 1, the proceeding shall be discontinued. The court will return to the party the entire registration or court fee paid on the basis of the regulations on court fees in civil and court and administrative proceedings.¹³

It follows from the wording of the above regulation that under the Draft all restitution claims (e.g., those for establishing the perpetual usufruct under Article 7 of the Decree on ownership and use of land in the area of the capital city of Warsaw¹⁴), as well as compensatory claims (e.g., those under Article 160, Section 1 of the Administrative Proceeding Code for damage occurring as a consequence of issuing the decision violating the provisions of law or in relation to reporting the invalidity of such a decision,¹⁵ or under Article 417, Section 1 of the Civil Code for damage caused by an illegal act or omission in the exercise of public authority¹⁶) shall be terminated.¹⁷ This applies not only to those rights that may arise in the future (legal expectations), but also to those that have already been created (such as claims for the payment of compensation). Consequently, all proceedings aimed at the acquisition of rights (also with regard to maximally shaped legal expectations) as well as those proceedings aimed at the execution of existing rights (execution of claims for the payment of compensation) will be discontinued and the rights to their enforcement will be terminated.

12. *Id.* art. 75(1)(1).

13. *Id.* art. 75(3).

14. *See* Decree on Ownership and Use of Land in the Territory of the City of Warsaw of October 26, 1945, art. 7.

15. Act of 14 June 1960 Code of Administrative Procedure, art. 160.

16. Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of April 13, 1964 Civil Code] (1964 Dz. nr. 16 poz. 93) art. 417 (Pol.).

17. *See* Piotr Tuleja, *Komentarz do art. 2, in 1 KONSTYTUCJA RP KOMENTARZ DO ART. 1-86* (Marek Safjan & Leszek Bosek eds., 1st ed. 2016).

V. CONSTITUTIONAL RESERVATIONS

A. Infringement of the Democratic Rule of Law Clause

One of the basic principles of the democratic rule of law clause set out in Article 2 of the Constitution is the principle of citizens' trust in the state.¹⁸ It is recognized as a foundation of the rule of law,¹⁹ and the basis for other principles; it signifies, above all, the need to protect and respect legitimately acquired rights and interests in progress.²⁰

B. Protection of Legitimately Acquired Rights

The importance of this principle results primarily from the way in which it affects economic, social and cultural rights, and rights stemming exclusively from acts of law. The Constitution of the Republic of Poland offers the legislator a wide range of discretion in shaping the wording of these rights. The restriction of this freedom is the principle of the protection of rights legitimately acquired. The Constitutional Tribunal derived from the principle of protection of individual's trust in the state and the law as well as the principle of the protection of acquired rights. Determining the significance of this principle, the Constitutional Tribunal stated that the principle of the protection of acquired rights prohibits the arbitrary elimination or limitation of the individual's or other private entities' rights in legal transactions. The principle of the protection of acquired rights protects subjective rights, both public and private ones. However, outside the scope of this principle there are legal situations which do not have the character of subjective rights or the justifiable nature of those rights.²¹

In particular, claims for compensation due to former owners and their heirs arising out of unlawful acts or omissions in the exercise of their public authority should be regarded as legitimately acquired rights, and thus subject to constitutional protection. They are due to, among others, the issuance of administrative judgements (decisions) in serious breach of the law, for example, a decision refusing the granting of temporary ownership rights to Warsaw real estate.

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

19. Tuleja, *supra* note 17.

20. Among others, the judgement of the Trybunał Konstytucyjny [Constitutional Tribunal], K 9/92, no. 1, item 6, Mar. 2, 1993 (Pol.).

21. Tuleja, *supra* note 17 (citing Trybunał Konstytucyjny [Constitutional Tribunal], K 5/99, no. 5, item 100, June 22, 1999 (Pol.)).

The protection of legitimately acquired rights is also subject to maximally shaped legal expectations (temporary subjective rights).

They have been defined as cases in which, although neither an act conferring the right nor a right has been adopted, but all the essential prerequisites for the acquisition of such a right have been met, but the last stage of a definitive transfer of the subjective right to the waiting party has not yet been completed.²²

The Constitutional Tribunal concluded also that:

[T]he principle of the protection of acquired rights covers both rights acquired by means of specific decisions granting benefits and rights acquired in abstracto under the Act prior to their being applied for. As far as legal expectations regarding rights are concerned . . . —the Constitutional Tribunal— in spite of all the difficulties that arise here—has taken on the position of protecting maximally shaped legal expectations, i.e. those that meet all the statutory prerequisites for acquiring rights under the rule of a given act, regardless of their relation to the subsequent act.²³

Therefore, given that the maximally shaped legal expectations are those which basically satisfy all statutory requirements for the acquisition of rights under a given act, and that only the final stage determining the definitive transition of subjective rights to the waiting party is lacking, a case of acquiring the right to compensation under Article 215 of the Act on Real Estate Management shall be undoubtedly considered such a legal expectation.²⁴

In relation to the above-mentioned, the Draft violates the provisions of Article 2 of the Constitution.²⁵ The principle of the protection of legitimately acquired rights within the scope in which it terminates existing (as of the date of the Act's entering into force) legitimately acquired rights, including claims for compensation, as well as legal expectations of acquiring rights, including obtaining the perpetual usufruct right under the Decree on Ownership and Use of Land on the Area of the Capital City of Warsaw or the right to establish compensation under Article 215 of the Act on Real Estate Management.²⁶

22. BOGUSŁAW BANASZAK, *KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ* (2nd ed. 2012).

23. K 14/91 at 117.

24. *See* Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami. [Act on Real Estate Management of August 21, 1997] (1997 Dz. U. nr. 115 poz. 741) art. 215 (Pol.).

25. *See* KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION] Apr. 2, 1997, art. 2 (Pol.).

26. *See id.* *See also* Act on Real Estate Management of August 21, 1997, art. 215.

C. Principle of the Protection of Interests in Progress.

Article 2 of the Constitution also prohibits the violation of interests in progress, which ensures the protection of an individual in situations in which he or she has started certain undertakings based on existing regulations.²⁷ Such undertakings may include actions aimed at the recovery of nationalized real estate or obtaining compensation, particularly due to their spread over time and the multiple stages of reprivatization proceedings carried out on the basis of the binding regulations. Frequently several court and administrative and civil proceedings are necessary to achieve the final goal, as long as these acts were in fact undertaken before the Act entered into force. Therefore, if it is now impossible to carry out such proceedings, which were commenced before the new regulations entered into force, then such actions of the legislator should be considered to violate the principle of the protection of interests in progress resulting from Article 2 of the Constitution.

Returning to the very principle of citizens' trust in the state and its law, it has been noted that it bears a certain resemblance to the principle of compliance with contracts, which is known from private law and international law which "in democratic systems, is an exponent of the role of the state and a basis for all relations between it and its citizens"²⁸ and the consequence of which is the assumption that if a given undertaking has been already instigated, and the law anticipated that it would be executed within a certain period of time, then the citizen will be able to use that time unless there are special situations.²⁹ Moreover, this principle requires that,

[T]he change of the law currently in force, which has adverse effects on the legal situation of entities, should in principle be carried out with the use of a technique of transitional provisions, and at least relative *vacatio legis*. In fact, they offer stakeholders the opportunity to adapt to a new legal situation.³⁰

To summarize this part of the concerns expressed about the Draft, it is important to emphasize once again that an individual cannot be surprised by legislative actions which prevent them from exercising their

27. See Tuleja, *supra* note 17; see also KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP]; [CONSTITUTION] Apr. 2, 1997, art. 2 (Pol.).

28. Tuleja, *supra* note 17 (citing MIROSLAW WYRZYKOWSKI, Remark to Art. 1, p. 25; Trybunał Konstytucyjny [Constitutional Tribunal], KP 2/08, Nov. 19, 2008.).

29. See Trybunał Konstytucyjny [Constitutional Tribunal], K 13/01, no. 4, item 81, Apr. 25, 2001 (Pol.).

30. *Id.*

rights under the currently existing law, especially if they started to exercise those rights before the new regulations entered into force.³¹ Therefore, the project, which orders the discontinuance of all pending proceedings, undoubtedly violates the principle of citizens' trust in the state and the law established by it, as well as the resulting principle of the protection of interests in progress. Moreover, in so far as the Draft terminates all rights vested in former owners and their successors in connection with the nationalization of their property, it also violates the principle of the protection of the legitimately acquired rights and therefore is contrary to Article 2 of the Constitution.³²

VI. VIOLATION OF THE OWNERSHIP RIGHT

To the extent that the Draft terminates any and all rights or claims resulting from the takeover of ownership or co-ownership title in real estate in favor of the State Treasury or other legal entities of the public law on the basis of the aforementioned nationalization regulations, which undoubtedly constitute property rights, the Draft violates the general principle of the protection of ownership expressed in Article 21, item 1 of the Constitution.³³

The concept of ownership, to which Article 21 of the Constitution refers, is autonomous and it "goes beyond the civil law concept," referring to all property rights.³⁴ There exists no doubt that rights and claims, referred to in Article 75, item 1, point 1, of the Draft constitute property rights. The scope of the application of this provision refers to rights and claims existing at the date of the Act's entry into force. These are claims for compensation, legal expectations for establishing compensation or claims for establishing perpetual usufruct rights.

As mentioned above, Article 21, item 1 of the Constitution of the Republic of Poland establishes a general principle of the protection of ownership and constitutes a legal principle of the social and economic system. We distinguish three aspects of it: (i) it is an expression of the principle of the political system of the Republic of Poland, (ii) it imposes

31. 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.

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

33. *Id.* art. 21.

34. *Id.*; see also Trybunał Konstytucyjny [Constitutional Tribunal], K 6/05, Mar. 3, 2008 (Pol.); Trybunał Konstytucyjny [Constitutional Tribunal], P 12/11, Dec. 13, 2012 (Pol.).

certain obligations on public authorities, and (iii) it guarantees subjective rights.³⁵

It should be emphasized that, for assessing the compliance of the Draft Act with the Constitution, the wording of Article 64 also plays an important role, according to which:

1. Everyone shall have the right to ownership, other property rights and the right to the succession. 2) Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights, and the right of succession. 3) The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of the right.³⁶

It is emphasized in the text of Article 64 that the Constitution guarantees the individual's subjective rights to ownership. In contrast to the language expressed in Article 21 of the Constitution on the protection of ownership title as the system's principle, formulated from the side of the state's obligations, Article 64 offers concrete subjective rights and constitutes a basis for implementing measures foreseen for their protection (including the constitutional complaint).³⁷ "The purpose of ownership protection is primarily to protect against any infringement of the existing ownership status. On the other hand, guarantees created by subjective law relate to the possibility of holding ownership by the individual and the right to use it freely. They also offer the possibility to protect this possession from interference by public authorities, in particular the legislator or bodies issuing legislative acts under the law."³⁸

The literature also emphasizes that the constitutional right of ownership is a so-called "protective law" which sets out the scope of the state's obligations, including non-infringement of the sphere of guaranteed freedom by means of actions of the ruling character.³⁹ As it has been frequently highlighted by the Constitutional Tribunal:

[T]here is a well-established opinion that the order for the protection of ownership and other property rights, formulated in Art. 21 par. 1 and Art. 64 par. 1 of the Constitution, implies given obligations for the standard legislator: a positive obligation to adopt regulations and procedures

35. See Kamil Zaradkiewicz, *Komentarz do art. 21, in 1 KONSTYTUCJA RP KOMENTARZ DO ART. 1-86* (Marek Safjan & Leszek Bosek eds., 1st ed. 2016); see also Leszek Garlicki, *Artykuł 21, in 3 KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ KOMENTARZ 5* (2003).

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

37. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION] Apr. 2, 1997, arts. 21, 64 (Pol.).

38. BANASZAK, *supra* note 22.

39. Zaradkiewicz, *supra* note 35.

granting legal protection to property rights and a negative obligation to refrain from regulations which could deprive such rights of such protection or limit it. The protection provided to subjective property rights shall also be real. The point of reference (criteria for verifying this feature) must be the effectiveness of the implementation of a particular subjective right in the specific system environment in which it operates.⁴⁰

Therefore, if Article 75 of the Draft, deprives former owners of illegally nationalized assets and their successors not only of the property rights listed therein (termination of rights and claims), but also of their subjective rights and the possibility to avail themselves of the means envisaged for their protection (discontinuance of pending proceedings) with the simultaneous absence of any transitional provisions—such action by the legislator will undoubtedly violate Article 21, item 2 and Article 64, item 1 as well as Article 64, items 1 and 2 of the Constitution.

VII. VIOLATION OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS – ARTICLE 1, PROTOCOL 1

Termination of rights and claims, as well as discontinuance of ongoing proceedings, shall not only constitute a violation of the Constitution, but also of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. In compliance with its wording, “[e]very natural or legal person shall have the right to have his or her property respected. No person may be deprived of his or her property, except in the public interest and under the conditions provided for by law and in accordance with the fundamental principles of international law.”⁴¹

As the European Court of Human Rights has repeatedly emphasized, “property claims” falling within the concept of “property” are also protected if the ownership “has an autonomous character, the meaning of which is not limited to the possession of physical goods” and does not depend on the formal classification used in the national legislation.⁴² Therefore, in addition to physical goods, certain rights and interests constituting assets may also be treated as “ownership,” and thus as “property” for the purposes of this provision.⁴³ The definition of “property” is not

40. Trybunał Konstytucyjny [Constitutional Tribunal], K 6/05, p. 56Mar. 3, 2008 (Pol.).

41. European Convention on the Protection of Human Rights and Fundamental Freedoms, *supra* note 10, art. 1.

42. *Beyeler v. Italy*, 2001-I Eur. Ct. H.R. 57 (2000).

43. *See Iatridis v. Greece*, 1999-II Eur. Ct. H.R. 75, § 54, (1999); *Beyeler*, 2001-I Eur. Ct. H.R. 57, § 100.

limited to “the property existing,” but may also include assets, which includes claims in respect of which the claimant can claim that he or she has at least a “reasonable expectation” of being able to effectively exercise his right to ownership.⁴⁴

In view of the above, the discontinuance of proceedings and the termination without fair compensation for the property rights existing before the date of entry into force of the new regulations will also constitute a breach of Article 1 of Protocol No. 1 to the ECHR.⁴⁵

VIII. LIMITATION OF THE GROUP OF ENTITLED HEIRS

In compliance with the wording of Article 7, item 2 of the Draft,

In the event of the death of an entitled person who is the owner or co-owner of the property at the date of its acquisition, the person entitled or co-entitled is the natural person, if he or she is the heir of co-heir of that person, as long as he / she belongs to the group of heirs determined in Art. 931 and Art. 932 § 1-3 of the Act of 23 April 1964—the Civil Code.⁴⁶

It follows from the provision cited that entities entitled to compensation shall include merely:

persons who are owners and co-owners of real estate;

their direct heirs, insofar as they are children of the former owner (or their descendants pursuant to Article 931, section 2 of the Civil Code), their spouse, or parents.

This means that the group of heirs of former owners entitled to compensation has been limited only to direct heirs. According to the presented Draft, it will therefore be impossible to obtain compensation by the further (direct) heirs of the former owner, such as grandchildren, and also direct heirs not belonging to the group indicated by the Draft provider (e. g. siblings), as well as their descendants and heirs.

44. See, e.g., *Plechanow v. Poland*, App. No. 22279/04, ECLI:CE:ECHR:2009:0707JUD002227904 (Eur. Ct. H.R., July 7, 2009).

45. European Convention on the Protection of Human Rights and Fundamental Freedoms, *supra* note 10, art. 10.

46. 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, art 7.

IX. CONSTITUTIONAL RESERVATIONS – ARTICLE 32 AND ARTICLE 64,
ITEM 2

Consideration may be given as to whether such a far-reaching limitation of the group of eligible heirs does not prejudice the right to succession under Article 21, item 1 and Article 64, item 1 of the Constitution.⁴⁷ It follows from their content that the protection of property and the protection of successions are closely linked to each other. Such protection should apply to all property and succession rights. In addition, the Constitutional Tribunal, in its previous jurisprudence, has identified the concept of ownership with the concept of property, without limiting the concept of ownership to ownership within the meaning of the civil law.⁴⁸ The Draft undoubtedly violates the right of succession in relation to the aforementioned entities (and their heirs), by depriving them of the rights and claims due to them (existing) before the date of the Act's entry into force.

However, there should be no doubt that the exclusion from compensation of the heirs of former owners who do not belong to the group of heirs referred to in Articles 931 and 932, Sections 1-3 of the Civil Code, violates Article 32 of the Constitution (the principle of equality) and Article 64, item 2 (the principle of equal legal protection of the right to succession). The Draft, in an ineluctable manner, discriminates against heirs not listed in Article 7, item 2 of the Act, conferring an unjustifiable advantage on the persons referred to in this provision over other heirs.

It should be noted that, in compliance with the jurisprudence of the Constitutional Tribunal, "the principle of equality 'refers to the fact that all the entities of law (addressees of the legal rules), demonstrating a given feature (relevant feature) to an equal degree, shall be treated equally, namely with equal measure, without discriminatory and favorable approaches' Thus, the principle of equality provides for 'equal treatment of legal entities within a particular class (category)'."⁴⁹

Therefore, if according to the Draft, entities within one class (category) of "heirs" are divided in such a way that some of them are entitled to compensation and others are no longer entitled to compensation, then it may be considered that they are not treated equally, and the principle of equality expressed in Article 32 of the Constitution has been grossly violated.

47. See KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION] Apr. 2, 1997, arts. 21, 64 (Pol.).

48. See Trybunał Konstytucyjny [Constitutional Tribunal], K 23/98, Feb. 25, 1999 (Pol.).

49. Tuleja, *supra* note 17.

X. DISCRIMINATION ON GROUNDS OF NATIONALITY

In compliance with the wording of Article 6, item 1, point 2 of the Draft, the right to compensation is due merely to a natural person (in addition to other requirements), who is a citizen of Poland on the date of the Act's entering into force and on the date of submitting the application for compensation.⁵⁰

It should also be noted, however, that the discrimination based on nationality in the Draft is at least twofold. First, some non-nationals of the Republic of Poland who are also heirs to former owners of nationalized property (the real estate), will be deprived (similarly to entities who are citizens of the Republic of Poland) of their rights and claims which existed before the Act's entering into force, if it is passed with the wording of the Draft. In this case, discrimination will consist in the fact that unlike Polish citizens, they will not receive the right to compensation, although like Polish citizens they will be deprived of their existing rights. Second, the remaining group of non-nationals of the Republic of Poland, who are also heirs to former owners of nationalized real estate, will not receive the right to compensation on such terms as it has been granted to the citizens of the Republic of Poland.

XI. VIOLATION OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS – ARTICLE 14

Pursuant to Article 14 of the ECHR, “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or any other status.”⁵¹

According to the European Court of Human Rights, this Convention also includes the prohibition of discrimination on grounds of nationality.⁵² Therefore, if citizenship is to be a decisive criterion for granting the right to compensation (irrespective of whether or not non-nationals were entitled to rights and claims before the Act was entered into force), with a simultaneous belonging (together with nationals of the Republic of Po-

50. 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, art. 75.

51. See European Convention on the Protection of Human Rights and Fundamental Freedoms, *supra* note 10, art. 14.

52. See European Convention on the Protection of Human Rights and Fundamental Freedoms, *supra* note 10, art. 14; see also *Dhahabi v. Italy*, App. No. 17120/09, ECLI:CE:ECHR:2014:0408JUD001712009 (Eur. Ct. H.R., Aug. 4, 2014).

land) to the same category of entities (former owners (heirs) of the nationalized property), then such a legislative solution should be assessed as a violation of Article 14 of ECHR.

XII. NO GUARANTEE AS TO THE DATE ON WHICH THE ENTITLEMENT TO COMPENSATION IS EXERCISED

Pursuant to the wording of Article 31, paragraph 1 of the Draft, the compensation is to be distributed in parts between the beneficiaries in proportion to the funds accumulated for this purpose.⁵³ On the other hand, in compliance with Article 32, portions of monetary compensation will be paid from the Compensatory Fund. The revenues are supposed to come from: (i) deductions conducted pursuant to Article 23, item 3, of the Act of August 21, 1997, on Real Estate Management, (from proceeds from sales, fees for permanent management, usufruct, rent and lease payments for the real estate of the State Treasury);⁵⁴ (ii) funds from the sale of five percent of shares owned by the State Treasury in each of the companies created as a result of commercialization within the meaning of the Act of August 30, 1996, on Commercialization and Certain Employee Rights;⁵⁵ (iii) funds from the sale or alienation of shares by the unit of the territorial self-government or the association of units of the territorial self-government, pursuant to Article 4c of the Act of August 30, 1996, on Commercialization and Certain Employee Rights;⁵⁶ (iv) funds from bequests, legacies, and donations; (v) subsidies from the state budget granted in case of the event of a shortfall of the funds mentioned in points 1-4, in the amount determined in the annual budget act; and (vi) other revenues.⁵⁷

The above-mentioned points mean that: (i) there is no time limit within which the right to compensation must be exercised, and (ii) there is no minimum amount of the Compensation Fund's revenues for a given year. This makes the right to compensation illusory, since it can be exercised for an indefinite period of time due to the insufficient amount of funds accumulated in the Compensatory Fund, which, on the other hand,

53. 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, art. 31.

54. Act on Real Estate Management of August 21, 1997, art. 23.

55. Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 11 maja 2017 r. w sprawie ogłoszenia jednolitego tekstu ustawy o komercjalizacji i niektórych uprawnieniach pracowników [Act August 30, 1996, on Commercialization and Certain Employee Rights] (Dz. U. 2017 poz. 1055)(Pol.).

56. *Id.* art. 4(c).

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, art. 32.

will depend to a considerable degree merely on the intention of the executive authority.

Moreover, the proceeding for the confirmation of the right to compensation may be initiated only by means of an application submitted on the official form, which is to be specified by the regulation of a minister competent for matters relating to construction, planning and spatial development, as well as housing. This unnecessarily makes the confirmation of the right to compensation subject to specific activities of the executive authority.

XIII. CONSTITUTIONAL RESERVATION – ARTICLE 2

The principle of citizens' trust in the state, expressed in Article 2 of the Constitution, also contains a ban on the creation of apparent powers. As pointed out in the literature, the violation of the principle protecting citizens' trust in the state and the law established by it should refer to a situation in which a specific legal solution is illusory and apparent.⁵⁸ This notion has also been confirmed by the Constitutional Tribunal which stated that "the legislator cannot create normative constructions that are unenforceable, constitute an illusion of law and consequently only give the appearance of protecting the interests of the individual."⁵⁹

Thus, due to the lack of a fixed timeframe there can be no determination about the minimum amount of the Compensatory Fund's revenue that makes them dependent on the intention of the execution authority. So, entities that have obtained the confirmation of the right to compensation cannot be certain as to whether their right will be exercised at all before the time limit. This issue may give rise to legitimate concerns as to whether the right provided for in the Act will be merely illusory and apparent.

XIV. SUMMARY OF COMMENTS TO THE DRAFT

It is advisable to start work on the reprivatization law, which aims to organize the legal status of nationalized real estate. Still, the expectation should be clearly stated that the final form of this law will be in accordance with the Constitution and normative acts of international law. Moreover, it will meet its objectives, that is, on the one hand, it will eliminate existing irregularities, and, on the other hand, it will ensure fair and equitable compensation to former owners of real estate and their heirs.

58. *See generally* Tuleja, *supra* note 17.

59. Trybunał Konstytucyjny [Constitutional Tribunal], K 18/10, no. 1, item 2, Jan. 8, 2013 (Pol.).

Thus, the Draft which, without due justification and observance of the principle of proportionality, so considerably violates provisions of Articles 2, 21, 32, and 64 of the Constitution, and Article 14 of ECHR, and Article 1 of Protocol 1 to ECHR, that it should be negatively assessed with respect to the scope commented on.