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# Property Restitution Processes in Poland: Perspective of the Commissioner for Human Rights

MAŁGORZATA ŚWIĘTCZAK\*

Almost from the beginning of its activity of the Polish Commissioner for Human Rights, one of the key areas of interest for those holding the office has been the problem of restitution of property that was seized in post-war years for the purposes of reforms, which transformed the social and economic system in Poland.<sup>1</sup> That issue gained particular importance after a political breakthrough in 1989 when democratization of public life had started and guarantees of respect for fundamental human rights as well as ownership rights were restored.

At that point, hopes that it would be possible to achieve actual restitution of long-lost (nationalized) property were rising. The Office of the Commissioner, as the body safeguarding constitutional freedoms and rights, was inundated with complaints from citizens who were victims of post-war nationalization expecting their claims to be satisfied. At the same time, the Commissioner also received complaints from persons fearing the privatization of public property, who perceived it as a threat to their current and seemingly legitimately-obtained rights. Interventions of the Commissioner for Human Rights relating to such complaints referred to virtually all areas of property restitution. It is impossible to

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1. See First Historic Address of the CHR, Jan. 27, 1988 (Jan. 27, 1988), referring to 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] (1945 Dz. U. no. 50 poz. 279, as amended) (Pol.).

indicate the number and subject matter of all the Commissioner's interventions; they are described in detail in annual reports on the activity of the Commissioner for Human Rights.<sup>2</sup>

#### I. INTRODUCTION: THE CONCEPT OF PROPERTY RESTITUTION IN POLAND, AND PRESENT CIRCUMSTANCES

The necessity to redress injustice suffered by former owners seemed obvious practically from the beginning of the political transformation process; it has never been challenged by any of the successive governments of the Republic of Poland. Yet, despite attempts of successive Parliaments of the III Republic of Poland aimed at passing an appropriate bill, the issue has not been resolved in a comprehensive and systematic way, and legislative work undertaken until this point has not produced any specific outcomes. The only groups of victims addressed by special legal acts are property owners from beyond the Bug river,<sup>3</sup> as well as churches and religious associations.

However, allowing matters to run their natural course did not automatically solve the "property restitution issue." On the contrary, it seems that over time, problems arising from already initiated yet incomplete proceedings have become increasingly difficult to solve. In many situations, special provisions made it possible and still make it possible to carry out micro-scale restitution in individual cases, using a number of "systemically dispersed" legal instruments. Property seizures took place based on various instruments—sometimes pursuant to an act, individual administrative decisions, and court orders. Sometimes these were purely practical actions that lacked any legal basis. Yet, the chances for property restitution (or compensation) depended largely on the regulations under which one was deprived of his/her assets. As a result, only claims of small groups of victims can be satisfied, and the selection criteria of those groups seem to be random, selective, and by no means reasonably justified. Consequently, the process fails to meet the minimum criteria for the equal treatment of citizens by law. The end result of complicated proceedings is often uncertain and can be attributed to pure luck in many cases.

Primarily, however, *quasi*-restitution was only possible when former property seizure also violated provisions that were in effect at that time. Yet, if the misappropriation of property was conducted within the then-applicable law—which is now considered as blatantly conflicting

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2. See generally *Informacje roczne o działalności RPO*, RZECZNIK PRAW OBYWATELSKICH, <https://www.rpo.gov.pl/pl/content/informacje-roczne-o-dzialalnosci-rpo> (last visited Feb. 4, 2018).

3. See *Broniowski v. Poland*, 2002-X Eur. Ct. H.R. ¶ 2.

with the fundamental principles of the democratic rule—former owners are not entitled to any compensation. Basing the property restitution procedures on the principle of responsibility for blatant abuse committed by former authorities—*prima facie* rational—paradoxically enough, leads to an almost schizophrenic effect: nowadays, we still try to ensure the execution of acts that stand in stark contradiction with the current constitutional order and whose axiology we reject, and the present-day society continues to pay for excesses of non-democratic authorities that ruled a couple of dozen years ago.

When positive law treats such a complex matter in a selective and superficial manner, the whole burden for resolving complicated disputes concerning not only ownership relationships but also settlement and compensation is borne by citizens who are involved in years-long litigation, as well as by law enforcement bodies that need to deliver justice under the circumstances of shaken axiological order. As a result, the majority of fundamental principles pertaining to both the restitution of property as well as indemnification (compensation) developed in judicial rulings as well as in verdicts of the Constitutional Tribunal, which are “less visible” for citizens, and in many cases with the involvement of the Commissioner for Human Rights who had either participated in cases resolved by decisions taken by extended judicial panels or had initiated legal proceedings.

## II. COMMISSIONER FOR HUMAN RIGHTS AS THE BODY COMPETENT FOR PROTECTING CONSTITUTIONAL RIGHTS AND PROPERTY RESTITUTION CASES

### *A. Description of the Position of the Commissioner and His/Her Competencies*

All such problems were brought up in complaints submitted to the Commissioner. Complainants expected the Commissioner to take specific actions in defence of violated rights. Indeed, the specific position of the Commissioner who is placed beyond the traditional division of powers, as well as his/her relatively broad—yet not omnipotent—competencies render the Commissioner an appropriate person to deal with such cases.

The Polish Commissioner for Human Rights is a constitutionally-appointed body which ensures compliance with the law, and protects human and civil rights and freedoms laid down in the Constitution as well

as other normative acts.<sup>4</sup> The Polish Constitution in Article 80 stipulates that “pursuant to the principles laid down in the Act, everyone shall have the right to apply to the Commissioner for Human Rights for assistance in the protection of his/her freedoms or rights infringed by public authority bodies.”<sup>5</sup> It is one of the means of safeguarding civil rights and freedoms.

Pursuant to Article 210 of the Polish Constitution, “the Commissioner for Human Rights shall be, in his/her activities, independent of other State authorities and shall be accountable only to the Sejm, in accordance with principles laid down in the Act.”<sup>6</sup> The scope and methods of the Commissioner’s work are specified in the Act of July 15, 1987 on the Commissioner for Human Rights.<sup>7</sup> In cases concerning the protection of human and civil rights and freedoms, the basic duty of the Commissioner is to examine whether authorities, organizations or institutions that are required to respect and implement rights and freedoms violated the law or breached principles of social coexistence and justice either through an affirmative act or by failing to act. In this case, the Commissioner established that when human and civil rights and freedoms, (including the principle of equal treatment) are violated, he or she may operate with a relatively broad scope, as laid out in the Act.<sup>8</sup> The Act differentiates between action taken in individual cases (Article 14), and action taken in general, system-related matters (Article 16).<sup>9</sup>

In individual cases the Commissioner may, first and foremost, submit various interventions addressed to public authorities that, as he or she established, have violated the freedoms and rights of individuals and citizens. The Commissioner may also demand the instigation of proceedings in civil cases and participate in every ongoing procedure. The Commissioner holds the same powers in administrative proceedings; it may demand the instigation of proceedings, lodge complaints to an administrative court, and participate in the proceedings.<sup>10</sup> The Commissioner is also entitled to submit cassation appeals to the Supreme

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4. See KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ Z DNIA 2 KWIECZNIA 1997 [CONSTITUTION OF THE REPUBLIC OF POLAND OF APRIL 2, 1997] art. 208 (1997 Dz. U. no. 78 poz. 483, as amended) (Pol.).

5. See *id.* art. 80.

6. *Id.*

7. See Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich [Act on the Commissioner for Human Rights of July 15, 1987] (2017 Dz. U. no. 958)(Pol.)

8. *Id.*

9. *Id.* arts. 14, 16.

10. See *id.* In the Polish legal system administrative proceedings are divided into two instances, just like the proceedings before administrative courts that control the operation of public administration.

Court both in civil<sup>11</sup> and criminal<sup>12</sup> cases. Yet, for obvious reasons, a broad application of all those competencies is limited due to the statutory principle of subsidiarity of the Commissioner's actions, as well as the organizational possibilities of the Office.

The actual strength of the Commissioner's activities is thus determined by his or her general rights. For example, in relation to examined cases, the Commissioner may, present to relevant authorities, organizations and institutions evaluations and conclusions aimed at securing effective protection of human and citizens' rights and freedoms and facilitate the resolution of such cases. The Commissioner may also submit requests for the initiation of statutory initiatives (but does not have the initiative right as Commissioner) or for the issuance of amendment of other legal acts in cases concerning the freedoms and rights of individuals and citizens. The most powerful legal measure that the Commissioner for Human Rights can use is to submit motions (so-called abstract motions) to the Constitutional Tribunal, requesting it to determine the non-compliance of lower-ranked normative acts with the Constitution. The Commissioner may also participate in proceedings held before the Tribunal which were initiated by other entities, for example, courts presenting legal queries or citizens presenting under the individual constitutional complaint procedure. The Commissioner is also entitled to present legal issues to the highest judiciary bodies—the Supreme Court and the Supreme Administrative Court—so that they, in extended compositions, may make decisions aimed at clarifying legal doubts that lead to discrepancies in verdicts of courts of law and administrative courts. Submitting such legal queries for examination is an important tool for standardizing the judicial practice.

### *B. The Scope and Nature of Complaints Submitted to the Commissioner's Office*

Due to the broad competencies of the Commissioner's Office, he or she receives citizen complaints referring to virtually all fields of life. With respect to property restitution cases, persons who submit such complaints

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11. *Id.* In light of the provisions of the Code of Civil Procedure cassation appeal is an extraordinary means for appealing against some final verdicts passed by second-instance courts, it also plays a public role: in order for it to be accepted by the Supreme Court for interpretation, the case must involve significant legal issues arousing interpretation doubts or a qualified breach of law.

12. *See generally*, 2017 Dz. U. no. 958 (what is typical of the Polish Commissioner is not the possibility to lodge a cassation appeal in criminal cases as such but a historically determined special privilege to challenge a final conviction to the benefit of a given party; the Commissioner may do that at any time).

are mainly: former owners of nationalized real estate or their heirs, who were deprived under several legal acts of their assets: land for the purposes of agricultural reform, and companies—under the industry nationalization process or under the procedure for placing them under public administration, pharmacies, pensions and small business entities. Complaints also pertain to property seized from churches and religious associations, nationalization of forests and lakes, compensation for those from beyond the Bug River, property claimed under the “Wisła” campaign,<sup>13</sup> real estate seized when state borders were determined, settlement of the so-called Reclaimed Territories, Warsaw land, and deserted and post-German estates.

The complaints submitted by that group of people pertain to the failure to satisfy their claims for the restitution of stolen property or at least for a compensation, which results from the lack of a general act on property restitution. In situations where the so-called micro-privatization is legally possible—by means of fragmentary regulations in some special provisions—complaints refer in principle to the duration and inconvenience caused by proceedings that are caused by both factual as well as *stricte* legal circumstances, for example, lack of documents destroyed during the war period, hindered access to archives, difficulties in contacting all possible heirs, and unclear provisions or changeable judicial decisions.

However, former owners are not the only group sending complaints to the Commissioner for Human Rights. With this “bottom-up” property restitution possible and property can be returned in kind, current property owners or users of property previously seized by the state also approach the Commissioner with concerns about a possible loss of their rights, which they often obtained in good faith (but also, for instance, lessees of real estate who have invested in it for many years, in the hope of buying it on preferential terms). Among the complainants is a special group: tenants of apartments in buildings that are still owned by the state or municipality, but who are affected by property restitution claims of former owners. These are usually individuals who, for various reasons—financial, personal, livelihood or health-related—are not able to satisfy their residential needs on the free market. Public authorities are obliged to fulfill residential needs of their citizens, especially those in difficult situations. This obligation is clearly stated in Articles 75 and 76 of the

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13. I.e., the military pacification and resettlement campaign that was conducted at the end 1940s and directed at the civil population (of various nationalities) living in the south-eastern part of Poland.

Polish Constitution.<sup>14</sup> One should also not overlook concerns voiced in the public discussion about excessive privatization of land that should be intended for public use, particularly to land in municipal areas returned on various grounds (parks, squares, recreational grounds), that serve inhabitants, as well as historic buildings.

*C. Main Problems from the Point of View of the Commissioner Office's Practice*

The problem lying at the heart of most of those complaints is the lack of clear, predictable and understandable rules of conduct in property restitution cases. There are singular, fragmentary regulations allowing one to reclaim his or her property or to obtain relevant compensation. For example, it is possible in case an individual administrative decision to deprive somebody of assets was a gross violation of the then-applicable provisions, yet, such regulations are lacking in many cases. Sometimes legal loopholes may be filled by referring to general provisions, but in other cases it is not possible. Regulations are often inconsistent. Since specific legislation is missing, such cases rely on general legal constructs from the Code of Administrative Procedure (annulment of decisions), the Code of Civil Procedure (determination of legal status of real estate as of long-gone times) or from the Civil Code (liability for compensation, settlements between the owner and the person without legal title, etc.). Those provisions are not always relevant for resolving 'historical' cases. The grounds for making settlements, as well as their scope, are still highly disputable from a legal standpoint and they are a source of never-ending doctrinal disputes and discrepancies in verdicts.

What is of fundamental importance, however, is not the difficulties in applying the right methods of legal reasoning, but the deeply-rooted axiological chaos concerning the basis for resolving such conflicts of value. What is primarily missing is a clear declaration of the legislator on which claims are considered not only morally, but legally justified and to what amount. So far it has not been determined to what extent the community of citizens of the Polish state from the beginning of the 21st century is still liable for the historical injustice that authorities ruling many years ago committed (as well as for the acts of occupying powers and for the complete devastation of the country after the war). It should be remembered that those authorities lacked democratic legitimacy and were imposed by the geopolitical order established after World War II ("WWII"). That new order also resulted in shifting the Polish State's

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14. See KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ Z DNIA 2 KWIEŃNIA 1997, arts. 75, 76.



borders. Furthermore, the actions of post-war authorities brought injustice to other citizens through blatantly unfavourable reforms of the monetary system, nationalization of banks and deposits, political repressions, and forfeiture of property for example.

Under such circumstances, the entire burden and responsibility for resolving hugely complicated historical and legal problems needs to be borne by law enforcement bodies, such as administrative authorities and administrative and common courts of law. It should be remembered that those bodies must in each case assess whether the property seizure was compliant with the legal status in place several dozen years ago when the social and economic situation, as well as an anachronic system of observance of the constitution were completely different. Therefore, it is not possible to avoid encountering unpredictable judicial decisions and differences in the way cases are resolved. Doubts do not only refer to the interpretation of historical provisions as such but also to which body—after a number of significant public administration reforms—should run the proceedings in particular cases (a decision made by an incompetent body is burdened with a legal defect, which justifies the elimination of the verdict from the body of rulings). The issue concerning the mode, scope, and entities with which one could address claims for defective decisions from the past was resolved only several years ago by the Supreme Court. The decision was reached in the full composition of the Civil Chamber (several dozen judges),<sup>15</sup> and explained how to interpret intricate time-related issues, resulting from numerous changes of law governing the disputed matter.<sup>16</sup>

Thus, *de facto*, most solutions to property restitution problems are created by judgements, including resolutions passed in extended compositions of the highest courts to unify the interpretation of law. Yet, the elimination of discrepancies through resolutions of the Supreme Court and Supreme Administrative Court takes place after many years and may refer to only singular, fragmentary issues. Instability of judicial rulings primarily affects citizens themselves: even the unification of the interpretation of specific provisions - which, by nature, takes time - will not change the legal status of those individuals who have already definitely lost their cases as a result of applying another interpretation

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15. See Ref. III CZP 112/10 (Mar. 31, 2011) (Pol.).

16. The lack of proper regulations in that scope was previously considered a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms, drawn up on November 4, 1950 in Rome. See European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 6 § 1 [hereinafter Convention]; see also *Plechanow v. Poland*, 2009-IV Eur. Ct. H.R.; see also *Sierpiński v. Poland*, 2009-IV Eur. Ct. H.R.

that stands at the variance with the current standpoint of the judiciary. Failure to resolve the issue of property restitution by the legislator also leads to the fact that the law development in that field involves the highest cost possible—not only due to workload to the whole judicial sector, but also because of harm sustained by citizens who engage their own resources and efforts to arrive at the principles helping to resolve such cases.

From the Commissioner for Human Rights' perspective, the current status violates fundamental principles of a democratic rule of law, such as the principle of the certainty of law (legal security) and its predictability. It also runs counter to a significant constitutional value: citizens' trust towards the state and its law. Those shortcomings result in a systemic breach of the principle of equal treatment of citizens before law, which in turn violates the principle of justice—the key value that the law should serve.

Such complicated proceedings, in terms of evidence and legal aspects, by nature take numerous years. The need to initiate a specific sequence of procedures (inheritance-related, pertaining to administrative and legal issues as well as civil aspects) results, by default, in the violation of the constitutional right to have a case resolved in reasonable time. The European Court of Human Rights has on a number of occasions declared that Poland breached its Convention obligations because an excessively lengthy proceeding that lasts a dozen years or more is often a prominent feature in property restitution cases.<sup>17</sup> Additionally, this reality creates uncertainty as to the legal status of disputed real estate (preventing possible investment) and overburdens the judicial system that needs to hear complicated, historical cases. This process generates additional social costs.

### III. EXAMPLES OF INTERVENTIONS MADE TO DATE BY THE COMMISSIONER FOR HUMAN RIGHTS

The 30 years of experience of the Commissioner's Office makes it possible to identify certain general principles followed when examining cases related to the broadly understood issue of property restitution. Those principles may be presented in an order that corresponds to legal measures that the Commissioner has at its disposal.

The ineffectiveness of the Commissioner's numerous appeals to solve the property restitution issue by means of an act of Parliament made

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17. European Convention on the Protection of Human Rights and Fundamental Freedoms, Article 6, sec. 1 and Article 1 of Protocol No. 1.

the Commissioner's role in this area that of an entity striving to "tidy up" the legal system—by way of presenting legal queries, submitting requests for interpretation of the law, and conducting information activities on the individual and general levels.<sup>18</sup> From the very beginning, it was rightly assumed that the legal measure consisting in the so-called abstract verification of constitutionality of formerly binding laws would be ineffective. Even if such a request had been acknowledged and invalidated the challenged provisions, it would not solve all ownership-related problems. The passage of time, subsequent trade in nationalized properties, and protection of rights obtained in good faith by third parties would make the Tribunal's possible derogation fail to automatically eliminate legal effects that took place in the past. Such a view was also expressed by the Constitutional Tribunal in a precedential ruling concerning the decree on the agricultural reform.<sup>19</sup> The problem of property restitution, therefore, still remains in the realm of economic and social policy. Yet, it could be solved by the legislative power, which has been legitimately empowered to make decisions of such a profound importance for the whole country.

*A. Review of the Constitutionality of the Nationalization Acts and Contemporary Legislation*

According to the Commissioner for Human Rights, attempts to challenge the overall constitutionality of nationalization acts that had consequences in the past are doomed to fail. Those acts were passed several dozen years ago and they resulted in the transformation of ownership relations in the country, including the acquisition of rights by third parties. Those effects already took place in the past. Yet, one cannot transfer ownership on this basis now, even though the acts may still formally be in force. In that sense, their nature is historical. A simple reversal of legal consequences and automatic restoration of the state from just after, or even before, WWII is not possible.

That situation is further complicated by the fact that in some cases, as with the Warsaw land decree, the nationalization act was not only the basis for deprivation of property in the past but also for conducting present-day proceedings aimed at restitution of buildings that were

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18. See COMM'R FOR HUM. RTS., HANDBOOK OF THE COMMISSIONER FOR HUMAN RIGHTS: LOST PROPERTY, RESTITUTION, AND COMPENSATION (1992).

19. See Dekret Polskiego Komitetu Wyzwolenia Narodowego z 6 września 1944 r. o przeprowadzeniu reformy rolnej. [Decree of the Committee for National Liberation of 6 September 1944 Concerning the Agricultural Reform] (1944 Dz. U. no. 4 poz. 17, as amended) (Pol.); see also Trybunał Konstytucyjny [Constitutional Tribunal], SK 5/01 of Nov. 28, 2001 (Pol.).

communalized or nationalized in 1940s or 1950s. Repealing the nationalization act may lead to further unpredictable and undesirable consequences in these cases, such as attempts to challenge the legitimacy of obtaining rights pursuant to those provisions. The ruling of the Constitutional Court from 2010 concerning agricultural reform also confirms that possible elimination of old provisions that constituted the basis for property relationship shifts should be treated with the utmost caution.<sup>20</sup> Arguments presented in the justification of that ruling raised substantial doubt as to whether decisions passed on that basis—not only those depriving former owners of their rights, but also more favourable ones—such as allowing them to reclaim previously seized properties, were still valid or not. Owners' uncertainty concerning the legal title they had was finally eliminated by subsequent resolutions of extended compositions of the Supreme Administrative Court,<sup>21</sup> and the Supreme Court.<sup>22</sup> These resolutions confirmed the legitimacy of the *status quo*.

Nowadays, the legal status is different, as provisions applicable since 2017 make it impossible to submit the so-called abstract motion to the Constitutional Tribunal (among others, by the Commissioner for Human Rights) if a normative act loses effect before a ruling is passed; it is only possible under the individual constitutional complaint procedure initiated by the citizen.<sup>23</sup> The Commissioner may not initiate the proceedings, yet it can join them. It is even more doubtful whether a possible attempt at “abolishing” a whole historical nationalization act would still be within the jurisdiction of the Tribunal. Rulings (especially their justifications) concerning compensation for former owners of Warsaw land (cf. below) show that, according to the constitutional court, due to consequences for the whole legal system (social, economic and financial), such a decision should be only taken by the Parliament.

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20. See Trybunał Konstytucyjny [Constitutional Tribunal], P 107/08, March 1, 2010 (Pol.) (concerning the annulment of proceedings: the Constitutional Tribunal refused to verify the constitutionality of executive provisions to the decree, claiming that since nowadays there are no instances of taking over land property, then not only legally substantive provisions but also procedural provisions *de facto* lost their binding effect).

21. See Naczelny Sąd Administracyjny [Supreme Administrative Court], I OPS 3/10, Jan. 10, 2011 (Pol.). The Commissioner also participated in those proceedings defending the legitimacy of already passed rulings. In his opinion, to consider all of them invalid would blatantly affect the safety of transactions as well as rights of persons acting and showing trust towards final and legally-binding resolutions.

22. See Sąd Najwyższy [Supreme Court], III CZP 121/10, Feb. 17, 2011 (Pol.); see also Sąd Najwyższy [Supreme Court], III CZP 21/11, May 18, 2011 (Pol.).

23. See Artykuł 59 ust. 1 ustawy z dnia 30 listopada 2016 r. O organizacji i trybie postępowania przed Trybunałem Konstytucyjnym [Act on the Organization and Mode of Proceedings Conducted Before the Constitutional Tribunal of November 30, 2016] art. 59(1) (2016 Dz. U. nr. 30 poz. 2072) (Pol.).

Currently passed legal acts could surely still be subject to the assessment of the Constitutional Tribunal. The Commissioner for Human Rights was active in that regard. Yet, the limitations of this article do not allow one to list all of his or her activities. One example of an effective intervention was the challenging of legal solutions that significantly limited the scope of previously awarded claims concerning the so-called property from beyond the Bug River.<sup>24</sup> Former owners considered the scope of the compensation problem for illegal acts by public bodies, and compensation for damages arising from those administrative decisions, which were passed in gross breach of legal provisions, extremely important. The provisions limiting that compensation to only the so-called actual damage (i.e., excluding the so-called lost benefits) were deemed, at the request of the Commissioner, unconstitutional.<sup>25</sup> The Commissioner also joined proceedings before the Constitutional Tribunal initiated by individual citizens and supported their standpoints. Examples here are cases brought by former owners who managed to regain their old property. In those situations, where occupants residing in the returned building had a right to a council flat, and the commune failed to provide it on time, tenants could stay in their current place of residence on the same terms but the owner was entitled to compensation from the commune. The Commissioner challenged the limitation on the scope of that compensation and the Tribunal confirmed the unconstitutionality of such regulations.<sup>26</sup>

In some cases, people are discouraged from submitting such motions because of the ineffectiveness of the Tribunal's rulings. It mostly refers to those cases in which the Tribunal does not deem what the legislator stated in the disputed provision as unconstitutional, but rather it deems what is missing in a provision as unconstitutional (as an example, a given provision lacks information on what compensation rights a given citizen has). In the Polish legal system, Constitutional Court is considered a "negative legislator" since it can only eliminate a

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24. *See* Trybunał Konstytucyjny [Constitutional Tribunal], K 33/02, Dec. 19, 2002 (Pol.). Prior to 2005, the claims of people resettled from beyond the eastern border of Poland could only be satisfied by the so-called right to consider the value of assets left behind and allow them to obtain national property for free or at a discount; yet exercising this right was in fact restricted due to small supply of such land and starting from 1994 it was practically impossible as agricultural property, constituting a significant restitution resource, was excluded from this possibility. *see also* Trybunał Konstytucyjny [Constitutional Tribunal], K 33/02, Dec. 19, 2002 (Pol.) The decision passed by the Constitutional Tribunal challenged this solution and acknowledged the argument presented by the Commissioner that this way the constitutional principle of citizens' trust towards the state and the law it creates is violated.

25. *See* Trybunał Konstytucyjny [Constitutional Tribunal], K 20/02, Sept. 23, 2003 (Pol.).

26. *See* Trybunał Konstytucyjny [Constitutional Tribunal], SK 51/05, May 23, 2006 (Pol.).

specific norm from the law but it has no power to reformulate it or add a missing element to it. In such instances intervention of the legislator is required to bring about a real change in law. Therefore, in those property restitution cases where a possible acknowledgement of unconstitutionality would still require the passing of new provisions by the Parliament, possible submission of a motion is an ineffective measure. What can explicitly illustrate this situation is the problem of compensation for former owners of Warsaw land. Several rulings in which the Tribunal clearly stated the unconstitutionality of provisions limiting (or depriving people of) such compensation<sup>27</sup> did not meet with any response from the legislator even though in justifications the Tribunal indicated the necessity to pass new laws constituting legal basis for the realization of compensation rights (the Tribunal's ruling as such does not have such an effect).

### *B. Unification of Judgments of Common and Administrative Courts*

For all of these reasons, the Commissioner for Human Rights decided that a more effective intervention measure was striving to unify fragmented court rulings by means of the so-called abstract legal queries addressed at both the Supreme Court and the Supreme Administrative Court.

For illustrative purposes only, it is worth referring to the Commissioner's request to decide whether a takeover of property by the State, without a legal basis but as part of public power (the so-called *imperium*), may lead to the acquisition by prescription—a method for acquiring subjective rights in private, civil law settings (called ownership within *dominium*). In that particular example, the Supreme Court prioritized the stabilization of legal relationships and claimed that, with some exceptions, prescription was possible.<sup>28</sup> Other legal queries made by the Commissioner concerned the request to interpret provisions on state compensation responsibility towards citizens for failure to pass legal

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27. See Trybunał Konstytucyjny [Constitutional Tribunal], SK 41/09, June 13, 2011 (Pol.); see also Trybunał Konstytucyjny [Constitutional Tribunal], P 6/13, Oct. 28, 2015 (Pol.) (ruling passed in full composition of the judicial panel of 28 October 2015, ref. P 6/13); Trybunał Konstytucyjny [Constitutional Tribunal], Kp 3/15, July 19, 2016 (Pol.) (ruling passed in full composition of the judicial panel of 19 July 2016, ref. Kp 3/15.) To justify the ruling SK 41/09, it was emphasized that its effect is not the loss of validity of provisions in which some regulations were omitted but pursuant to the Constitution that issue needs to be regulated: “the ruling, therefore, does not create any law-making consequences, consisting in the establishment of a new legal norm. It only obliges the legislator to pass legal regulations necessary for the realization of constitutional norms. Legislator's intervention is also required to allow the complainants to exercise their rights.”

28. See Izba Cywilna Sądu Najwyższego [Civil Chamber of the Supreme Court], III CZP 30/07, Oct. 26, 2007 (Pol.).

acts.<sup>29</sup> The Commissioner also asked the Supreme Court whether the nationalization of waters at the beginning of 1960's ceased the right of third parties to use lakes for economic purposes, when those rights were granted as late as in the middle of the XIX century.<sup>30</sup> Similar interventions were also made before the Supreme Administrative Court in cases related to the decree on agricultural reform,<sup>31</sup> among other things. Recently, he also presented a legal query concerning a case examined by the Supreme Court and related to claims for financial settlement for non-contract usage of buildings covered by the Warsaw decree, that is, settlements between those owners who managed to regain seized land (buildings) and the capital city of Warsaw.<sup>32</sup>

### *C. Joining the Proceedings Conducted in Individual Cases*

It also happens that the Commissioner for Human Rights decides to intervene in individual cases of citizens. Such situations are truly exceptional. In his actions, the Commissioner follows the subsidiarity principle: parties in proceedings should independently use legal means they are entitled to. If the nature of the case requires it, they can use professional legal assistance at their own cost or at the cost of the state. Those in a difficult financial or personal situation may be assigned a court-appointed attorney. The Commissioner, in turn, usually decides to be formally involved in the proceedings when, for various reasons, the citizen is not able to use legal assistance and his/her special personal situation requires it. Additionally, the case must be of precedential nature and must offer the opportunity to shape judicial decisions in a particular field or solve a given problem affecting a bigger group of citizens.

In recent years, the Commissioner for Human Rights decided to join court and administrative proceedings concerning property left behind the Bug river. The Commissioner also tried to encourage the adjudicating panels of the Supreme Administrative Court to assume a favourable interpretation of legal provisions on mutual representation of those entitled to compensation to respect a deadline for submitting relevant

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29. It is an issue concerning responsibility for the so-called legislative omission – the problem affected, among other things, those nationalization acts in which former owners were granted compensation but it has never been paid out. See Sąd Najwyższy [Supreme Court], III CZP 139/08, May 19, 2009 (Pol.) (acknowledging such a responsibility, yet, only for the future, and eliminating the possibility of receiving compensation in this way for property nationalized years ago).

30. See Sąd Najwyższy [Supreme Court], III CZP 139/06, April 18, 2007 (Pol.).

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

32. See Sąd Najwyższy [Supreme Court], III CZP 84/16, April 19, 2017 (Pol.).

requests.<sup>33</sup> Ultimately, that problem was resolved by the resolution of the Supreme Administrative Court.<sup>34</sup> The Commissioner also participated in those proceedings. In several cases, the Commissioner lodged complaints to an administrative court concerning the lengthiness of proceedings, such as property restitution proceedings. Proceedings related to appropriate compensation for property left beyond the Bug river belong to one of the lengthiest and most notorious case extensions, constituting a systemic problem. This has also been noticed by the Court in Strasbourg, and was addressed by the Commissioner in numerous interventions to province governors and competent ministers, to no avail.

Last year, the Commissioner for Human Rights also lodged a cassation complaint in a case related to the agricultural reform decree affecting a substantial area of two Warsaw suburbs communes where land estate was parcelled out for the purposes of the agricultural reform. Almost 1700 current inhabitants of those areas were parties in that case. According to the Commissioner, the content of the challenged verdict passed by the administrative court, which eliminated from legal status decisions taken more than 70 years ago (undoubtedly defective), may make those persons uncertain as to whether they legitimately acquired their property, even though that status should not be disputable. Yet, there is a concern that at least some of them, using their own resources and at their own cost, will have to seek confirmation of the current *status quo*.

#### *D. General Interventions Indicating the Need for Legislative Action*

Since it is obvious that solving property restitution problems is mostly possible through amendments of the currently applicable legislation, most activities undertaken by the Commissioner consisted of general interventions addressed either to competent ministers or to the President of the Council of Ministers. It is the government that, on the one hand, has the power to take the legislative initiative and, on the other hand, is the body which shapes the overall internal policy. Therefore, it has the power to lay down commonly binding procedures, applicable to all interested individuals, and is able to assess the costs of satisfying their claims.

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33. The final deadline for submitting such a request (renewing it) was the end of 2008, but, not all entitled individuals respected it. *See* Ustawa z dnia 8 lipca 2005 r. o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej [The Act of July 8, 2005 on the Implementation of the Right to Compensation for Property Left Beyond the Present Borders of the Republic of Poland] (2015 Dz. U. nr. 169 poz.1418)(Pol.).

34. *See* Naczelny Sąd Administracyjny [Supreme Administrative Court], I OPS 3/17, Oct. 9, 2017 (Pol.).



Since the Commissioner was aware of challenges associated with enacting a uniform, universal property restitution law, the Commissioner also made attempts to bring about changes to the law in fragmentary cases. They related to diverse issues, such as the need to grant compensation to former owners of Warsaw land,<sup>35</sup> lengthy property restitution proceedings conducted before administrative bodies (mainly in the so-called Bug river cases, but also agricultural reform), and a legal basis which should be adopted for granting possible compensation for former forest owners. A number of interventions related to the need to perform the verdicts of the Constitutional Tribunal including the abovementioned rulings on compensations for the owners of Warsaw land, and also the method for challenging rulings on the restitution of property taken from churches and religious associations passed by special national-church committees, called regulatory committees.

What has a special place in that context, is the issue of executing the verdict of the Constitutional Tribunal of 2015, in case P 46/13,<sup>36</sup> and—for obvious reasons—the problem of enacting a universal property restitution law. Those issues will be discussed in the last part of this article.

#### IV. CURRENT INITIATIVES OF THE COMMISSIONER, AND POSSIBILITIES OF SOLVING THE EXISTING PROBLEMS

##### *A. The Need to Pass the So-called Comprehensive Property Restitution Act – Correspondence with the Presidents of the Council of Ministers (case no. IV.7004.9.2016)*

Recently, the most important activity of the Commissioner has been corresponding with subsequent heads of the government. This correspondence included comprehensive, systemic interventions addressed to subsequent Presidents of the Council of Ministers, requesting them to prepare a general property restitution act and, ultimately, solve the problems arising from unfinished property restitution processes.<sup>37</sup> In those cross-sectional interventions, the

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35. See Intervention Addressed to the President of the Council of Ministers, RPO-706023/12, Oct. 23, 2012 (Pol.) (stating that the method of seizing that land was so specific that this group needed to be treated separately).

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

37. See, e.g., Intervention Addressed to the President of the Council of Ministers, RPO-706023/12, Oct. 23, 2012 (Pol.); Intervention Addressed to the President of the Council of Ministers, IV.7004.9.2016, Oct. 7, 2016 (Pol.); Interventions to Further Government Members Responsible for the Direction of Strategic Legislative Work, IV.7004.9.2016, May 9, 2017 and Oct. 2, 2017 (Pol.).

Commissioner indicated some areas of legislators' neglect and the resulting breaches of citizens' rights.

The Commissioner for Human Rights once again pinpointed such negative phenomena as follows: the unfair treatment of particular citizen groups (out of which only some members may regain their assets, in varying degree); creating possibilities for various types of abuse; the lack of sufficient protection for tenants living in tenement houses undergoing property restitution; and shifting the responsibility of solving all complicated problems onto public enforcers, such as public administration and the judicial system. With reference to a commonly mentioned argument about limited budgetary resources, he observed that it could be the reason why compensations, however modest they are, should be awarded according to transparent and just principles. What is of key importance is, primarily to ensure that all citizens are treated equally, and then to establish transparent procedural rules for granting compensations with principles that are predictable to all interested parties.

In these interventions, the Commissioner criticized a legislator who, in property restitution cases, had almost fully withdrawn from his role as regulator of social relationships. Moreover, this abdication had occurred in an area that arouses strong emotions in the society, involves serious financial costs and, primarily, is an area in which unresolved disputes lead to real tragedies of people. "The whole burden and cost of conducting property restitution proceedings, which are now and will still be pending in the future, has been shifted by the legislator to the judicial system and ultimately also to former owners and their successors. They are burdened with the task of seeking, by way of trial and error, those mechanisms in the legal system that would allow them to have their legitimate rights satisfied."<sup>38</sup>

Responses received so far do not harbour much hope for the passing of such an act in the foreseeable future. The direction of legislative work in the State Treasury Department and then in the Finance Ministry was awaiting the final approval of the Council of Ministers. Therefore, a draft act prepared by the Ministry of Justice and discussed in section 4 seemed to be such a significant breakthrough.

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38. See Intervention Addressed to the President of the Council of Ministers, RPO-706023/12 at 6.

*B. The Institution of Annulment of Administrative Decisions: Time Framework and Compensation for a Defective Decision (case no. IV.7004.45.2015)*

Irrespective of the so-called comprehensive property restitution act—whose passing encounters obvious difficulties—what plays a huge role in property restitution cases is the precedential ruling of the Constitutional Tribunal in the case no. P 46/13. According to this ruling, what is unconstitutional is the provision that makes it possible to annul an administrative decision—even if it blatantly violates the law—without any time restrictions, and even when, based on that decision, third parties already made life arrangements trusting that the status confirmed by the decision was legitimate. This ruling is crucial for property restitution cases since the provision which was partially deemed unconstitutional constitutes the basic *quasi*-restitution mechanism, making it possible to reverse the consequences of illegal property seizures (or possibly obtain relevant compensation). Yet, due to specific wording of the operative part of the Tribunal's ruling, it does not bring direct effect. This fact means that it does not repeal the disputed provision; once again, a legislator's intervention is required to implement that ruling within the legal system.

The Commissioner for Human Rights intervened in that case too. Unfortunately, despite several interventions addressed to the competent minister (as well as the Speaker of the Senate),<sup>39</sup> and initial declarations concerning plans to amend the questionable provisions, so far, there has not been any change. In October 2016, the Senate also abandoned legislative work on the implementation of the abovementioned ruling of the Constitutional Tribunal. What can be noticed, however, is the way the ruling has affected verdicts passed by administrative courts. Among other things, one can observe more restraint in establishing a blatant violation of law by decisions from many years ago. Nevertheless, individual statements of judicature do not set precedence in the Polish legal system. Therefore, they do not result in the change of the generally applicable law.

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39. See *Wystąpienia do Ministra Spraw Wewnętrznych i Administracji* [Interventions to the Minister of Interior and Administration], IV.7004.45.2015, Jan 7, 2016, April 28, 2017 and Sept. 25, 2017 (Pol.). *Wystąpienie do Marszałka Senatu* [Intervention to the Speaker of the Senate] IV.7004.9.2016, Oct. 7, 2016.

*C. The Problem of So-called Warsaw land, and the Appointment of the Special Verification Commission (case no. IV.7004.5.2017)*

The legal problems presented above surely facilitated abuse, especially in those cases where land that could be reclaimed was extremely valuable. Media reported cases of extortionate rulings by means of fictitious documents and instances of the so-called “tenement houses purges” tormenting tenants living in returned council buildings, forcing them to move so that subsequently renovated apartments could be rented on a commercial basis. In order to fight with such instances of abuse, in 2017,<sup>40</sup> a special Verification Commission was established. The Sejm appointed this body according to a political tenet: to perform the function of an administrative institution equipped with special competencies and to rule, in many cases, following the principles of equity. The Commission may, for example, repeal legally binding decisions concerning the restitution of buildings to their pre-war owners if it establishes irregularities in the process of granting such a decision many years back. Decisions can also be repealed if the Commission determines that a private owner acted in breach of the law after reclamation of a building, or even if such breaches were committed by its subsequent owner. What is even more contentious is the possibility to annul the decision (even the one approved by the court) in case the Commission deems it contrary to the public interest.

Controversies surrounding the appointment of the Commission, as well as its operation, were discussed in interventions of the Commissioner for Human Rights addressed to the President of the Republic of Poland, among other officials.<sup>41</sup> In a separate intervention,<sup>42</sup> the Commissioner brought the need to maintain constitutional and convention-related standards for interrogating people summoned for Commission’s hearings to the attention of the Commission’s President. The Commissioner also asked him to clarify how that body applied some legal provisions (the act comprises a number of the so-called general clauses as well as evaluative, unclearly defined concepts, whose unambiguous interpretation is required to respect the rights of participants of such procedures).

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40. See Ustawa o szczególnych zasadach usuwania skutków prawnych decyzji reprivatyzacyjnych dotyczących nieruchomości warszawskich, wydanych z naruszeniem prawa [Act of March 9, 2017 on Special Principles for Removing Legal Consequences of Property Restitution Decision Affecting Warsaw Real Estate, which Were Taken in Breach of Legal Provisions] (2017 Dz. U. 718, as amended (Pol.)).

41. See Intervention of the Commissioner, IV. 7004.5. 2017, Mar. 16, 2017 (Pol.).

42. See Intervention of the Commissioner, Sept. 29, 2017 (Pol.).

*D. Draft of the So-called Comprehensive Property Restitution Act,  
Dated October 2017*

Against the background of previous deliberations, one can truly appreciate the ground-breaking significance of the recent initiative to finally resolve problems in that area. The draft act, prepared by the Ministry of Justice, strives to “redress some injustice that individuals suffered after communist authorities seized real estate or moveable property after 1944.”<sup>43</sup> The draft act aims to regulate all issues related to post-war nationalizations. It also strives to regulate the legal status of real estate and partially satisfy resulting claims. As of Spring 2018, however, it is difficult to say whether, and in what shape, the proposed draft will become applicable law. It was assumed, though, that the said act would enter into force on 1 January 2018. Yet, the draft has been recently withdrawn back to the Ministry to be reshaped and rewritten. What sparks most doubts and questions is primarily the financial safeguarding of the act’s implementation, which depends on the state of the budget (incidentally, it has always been presented as an argument preventing property restitution acts from being passed). The final shape of the proposed solution depends primarily on the decision of the Parliament of the Republic of Poland.

The draft of the act, in its 26 October 2017 version, only provides for the satisfaction of property restitution claims in the form of compensation, and it only applies to properties taken over based on an enumerated list of nationalization acts. What is completely excluded are returns in kind. The only exception that may apply is the regulation of the legal status of land in Warsaw for those individuals who have continuously resided there for many years. Compensations will be awarded in one of three forms: the so-called right of recognition (i.e., recognizing the value of the right and taking it into account when assessing the sale price of national or local real estate or the fee for converting perpetual usufruct into property ownership), the financial compensation paid from the special Compensation Fund, or treasury bonds. The amount of these compensations is limited to 20% of the value of seized property and, in the case of bonds, 25% of that value. The draft of the act precisely specifies the method for calculating the value of seized property and indicates, among other things, that its status should

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43. See Projekt ustawy o zrekompensowaniu niektórych krzywd wyrządzonych osobom fizycznym wskutek przejęcia nieruchomości lub zabytków ruchomych przez władze komunistyczne po 1944 r. [To Compensate for Some of the Harm Done to Natural Persons as a Result of the Acquisition of Real Estate or Movable Monuments by the Communist Authorities After 1944], draft dated Oct. 26, 2017 (Pol.).

be assessed at the date of seizure and with the consideration of all burdens existing at that time. The draft also provides for the necessity of presenting possible claims in a uniform, yearly period, from the entry of the act to its enforcement. After that period, claims shall expire. All compensation proceedings are supposed to be unified. Province governors will be competent authorities in those matters. Therefore, all restitution proceedings that are conducted currently in administrative or judicial procedures with respect to the restitution of property or compensation will be cancelled.

Compensation will be granted only to natural persons who are Polish citizens. It will not be granted to all those persons who managed to get any compensation (or return in kind) for the seizure of property pursuant to nationalization acts. According to the Act, those individuals would be the citizens of all countries with whom the so-called indemnification agreements were concluded, American or Canadian citizens for example,<sup>44</sup> irrespective of whether appropriate compensation was paid to them by the governments of their countries.<sup>45</sup> The compensation can only be offered to former owners or heirs from their closest families: descendants, spouses, parents. The Act even excludes siblings from the group entitled to compensation. Additionally, the Act eliminates the possibility of compensation for individuals beyond that narrow included group, who obtained property restitution claims from those who were primarily entitled under various agreements.

It is not entirely clear what would be the ground for granting compensation. On the one hand, although all those deprived of property pursuant to provisions specified in the Act were supposed to be entitled to it, the Act comprises a number of substantive exclusions listing the reasons for refusing compensation. On the other hand, Article 12 of the draft clearly states that the right to compensation should be granted for such real estate that was taken over by the State Treasury or another legal person under public law, in blatant violation of the law or without legal

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44. *See* Agreement Between the Polish People's Republic and the Government of Canada Concerning Financial Settlements (Oct. 15, 1971); *see also* Agreement Between the United States of America and the Government of the Polish People's Republic Concerning Claims Pursued by the Citizens of the United States (July 16, 1960).

45. Indemnification agreements were concluded as part of economic agreements between the government of the Polish People's Republic and the governments of a dozen or so countries; apart from the US and Canada such countries included: France, Denmark, Switzerland, Sweden, the United Kingdom of Great Britain and Northern Ireland, Norway, Belgium, the Netherlands, Luxembourg, Greece and Austria. Those agreements have never been formally published in Poland as binding legal acts - preferential treatment of foreign nationals compared to Polish citizens who never received any compensations for deprived estates seemed to be one of the reasons for the lack of publication of those acts.

grounds. Therefore, a person applying for such compensation needs to submit, among several other required documents, a declaration stating that the property was taken over under such circumstances.

Making the decision to grant compensation dependent on whether the estate was taken over in compliance or in violation of nationalization provisions would change the whole philosophy of planned “property restitution” in an evident way. First, the planned mechanism has very little to do with eliminating the restitution of property in kind. By principle, it does not strive to reverse, even partially, changes in ownership relationships (in those cases when, after many years, it is still possible). Second, its aim is to, in accordance with the name of the act, partially redress some damage done by previous authorities who failed to observe their own principles when depriving others of their property. The draft initiator consistently avoids the term “damages” and treats the awarded benefit as granted *ex gratia*. For those reasons, it seems unlikely that it will be possible to obtain compensation for the majority of estates seized in the 1940s and 1950s, as long as the nationalization happened under the legal order in place at that time. If it is so indeed, drafted provisions do not extend the legal basis for property restitution processes in comparison with the current state. Yet, they significantly limit property rights of former owners as well as their legal successors by introducing the criterion of citizenship, excluding the possibility of returning property in kind, and providing legal restrictions concerning the value of the right to which one is entitled.

The unquestionable advantage of the proposed solutions is placing dispersed property restitution processes into consistent frameworks that, as should be specifically emphasized, are equal for everyone (although, in fact, to the limited number of those actually entitled). Such a solution requires a compromise that can be reached by, among other things, limiting present-day rights. It is not possible to ensure a claim satisfaction level that would allow individuals to have their property fully returned in kind as well as grant financial compensation. Capping the amount of compensations is, by principle (subject to possible exceptions), consistent with both the Polish Constitution (as long as its scale is rightly justified) as well as the Convention on the Protection of Human Rights.

On numerous occasions, the European Court of Human Rights examined complaints from former owners of property that had been nationalized in subsequent post-war political transformations in Central and Eastern Europe.<sup>46</sup> In such cases, however, it consistently reasserted

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46. Those cases were heard in the context of an alleged breach of Article 6, sec. 1 of the Convention (the right to fair and public examination of a case in a reasonable period by an

that, in its view, Article 1 to Protocol No. 1 to the Convention does not guarantee the acquisition of the right nor does it impose any restrictions on countries with respect to establishing the category of property subject to restitution (here, countries, signatories of the Convention, differ significantly) or conditions for restitution in kind. What is really important is whether legal provisions in that matter are clear and predictable for its addressees and whether such an interference with the convention law (here: ownership right) is legally justified and well grounded. The principle of *fair balance* between the interests of an individual and the measures applied to realize a publicly useful goal is a key criterion for assessing the admissibility of such an intervention.

In a way, those principles relate to the problem of property restitution as such. The Court in Strasbourg stated on numerous occasions that—especially in the period of serious political, social, and economic transformations—it is not possible to guarantee immediate and full satisfaction of people’s justified claims. On the contrary, as decisions concerning adopted property restitution principles are, by principle, political in nature, national authorities must always evaluate the pros and cons stemming from undertaken actions to find a balance between the need to satisfy various claims and conflicting interests. In that category of issues, they can enjoy substantial independence. Yet, that independence is not unlimited, and any restriction on the realization of formerly acquired rights must be particularly justified with the need to realize other values significant for the society (including the need to ensure necessary support to other “socially disadvantaged” groups) that could not be achieved in any other way. One of the mentioned, and possibly justified, mechanisms for limiting restitution (compensation), is the reduction of the amount of granted money or possibly paying those amounts in installments. Article 1 of Protocol No. 1 to the Convention does not guarantee the right to compensation in the full amount or in every possible situation.

Nowadays, the most controversial issue seems to be linking the right to compensation with one’s citizenship. That mechanism was adopted from the so-called Bug River Act of 2005.<sup>47</sup> In those cases, the allocation of compensation was approved only to Polish citizens by the Polish

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independent and objective court) and from the point of view of conformance with Article 1 of Protocol No. 1 to the Convention (the right to respect ownership and freedom from unjustified interference of authorities). See Convention, art. 6, sec. 1, art. 1 of Protocol No. 1 to the Convention. See *Atanasiu v. Romania*, ECLI:CE:ECHR:2010:1012JUD003076705 (Eur. Ct. H.R. Oct. 12, 2010), for an example of a case covered by the pilot ruling procedure.

47. See 2015 Dz. U. nr. 169 poz.1418.



Constitutional Tribunal.<sup>48</sup> Also, the European Court of Human Rights acknowledged that, in principle, the Republic of Poland fulfilled obligations resting on the country in an appropriate manner by adopting the Act of 2005 in that shape. Yet, it should be emphasized that, in case of people living beyond the Bug River, the criterion of citizenship was the reason for their resettlement from the so-called Polish eastern frontier (and deprivation of property). Mass repatriation referred to when Poles and Jews, citizens of the Soviet Union of Lithuanian, Belarusian or Ukrainian nationality, were resettled in reverse direction. Unlike that extraordinary situation, post-war nationalizations that took place on the territory of Poland affected all owners equally, irrespective of their origin or nationality. Therefore, this regulation would also require exceptionally careful examination of its conformance with the EU principle of equal treatment of all citizens of the European Community.

It also seems that citizens of countries with which indemnification agreements were concluded should be dealt with separately. It is indeed the case that a specific amount of resources were allocated for the satisfaction of their claims, as opposed to the claims of Polish citizens (yet, the actual fulfillment of those obligations is a different matter). If the current compensation benefits are to be granted *ex gratia* in a significantly limited amount and will not be addressed to all entitled individuals, it seems that in those cases, after considering all circumstances, it would be more difficult to claim that victims were not treated equally and that the rules of social justice were violated.

Surely, those whose situation deteriorates, that is, those who will possibly be deprived of satisfying their claims in the present form, will have reservations regarding the Act. The allegation concerning the violation of their property rights as well as the principle of protection of acquired rights, or even pending interests, that is derived from the rule of law clause in the Constitution should be, however, confronted with the objectives of the act: the final resolution of problems resulting from unfinished property restitution processes, elimination of legal chaos, uncertainties surrounding the legal status of lands and, primarily, the unequal treatment of citizens. An inevitable consequence of a

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48. See Trybunał Konstytucyjny [Constitutional Tribunal], K 2/04, Dec. 15, 2015, (Pol.). The Tribunal was supposed to assess separately whether limiting the Bug River compensation only to Polish citizens should apply not only to former owners but also their heirs. Compare Trybunał Konstytucyjny [Constitutional Tribunal], SK 1/17, Dec. 19, 2017, (Pol.) in which the Commissioner is also participating. The decision of Dec 19, 2017 confirms this particular compensation is of social nature and therefore the constitutional guarantees referring to ownership and inheritance do not apply to Bug-River cases. Hence, the citizenship-related exclusion clause is in accordance with the Polish Constitution.

comprehensive transformation of restitution processes in order to maintain the principle of equality in claims satisfaction is the deprivation of some rights from those individuals who were in a relatively better situation than the rest of victims. Redressing all forms of injustice in full is, namely, unrealistic. It is also difficult to find a *stricte* legal basis in either the Polish Constitution or the European Convention to pursue such demands that would be enforceable. One should not fail to observe that new provisions improve the legal situation of some entitled individuals, in particular former owners of Warsaw land, by offering them the possibility to obtain compensation but also allowing them, in some cases, to favourably regulate the legal status of owned real estate.

In conclusion, the fundamental issue of whether the balance between the protection of private interests and public interests in the drafted provisions has been maintained will surely be the subject of numerous discussions. The confrontation of legal, political, historical and economic arguments should be expected in the course of this debate. In fact, it all comes down to the question of how, in those extremely complex cases, we should strive to implement the principle of justice: to return what needs to be rightfully returned to people, without bringing injustice to others. The debate is likely to end before either the Polish Constitutional Tribunal or the European Court of Human Rights. In any case, what should be considered a breakthrough is the fact that after so many years that debate finally has been initiated. Its course will be closely monitored by the Commissioner for Human Rights as well.