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Conditions of Citizenship and Domicile in Polish Restitution Regulations in Light of European Law

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I. INTRODUCTION

Polish restitution regulations, both proposed and currently in force, employ conditions of citizenship and domicile in defining the categories of persons authorized to obtain restitution benefits for property taken in connection with World War II or after the war. Such conditions were included in previous and current regulations concerning property “beyond the Bug River,” i.e. property lost in connection with the postwar change in Poland’s eastern borders. These conditions were included in reprivatization bills proposed in Poland after 1989, including the only bill in this area to be passed by the Polish parliament in March 2001, which was subsequently vetoed by President Aleksander Kwaśniewski.¹ Conditions of citizenship and domicile are also found in the latest reprivatization bill drafted by the Polish Ministry of Justice, dated October 26, 2017,² which, at the time this article goes to press, is still at the stage of inter-ministerial consultations at the Government Legislation Center.

Conditioning entitlement to restitution benefits on citizenship or domicile generates numerous controversies because the socio-political changes occurring during and after World War II often required the

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1. .See *Decyzja Prezydenta RP w Sprawie Ustawy Reprywatyzacyjnej*, PREZYDENT PL (Mar. 22, 2001), <http://www.prezydent.pl/archiwalne-aktualnosci/rok-2001/art,15,decyzja-prezydenta-rp-w-sprawie-ustawy-reprywatyzacyjnej.html>.

2. .Ustawa o zrekompensowaniu niektórych krzywd wyrządzonych osobom fizycznym wskutek przejęcia nieruchomości lub zabytków ruchomych przez władze komunistyczne po 1944 [Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944] (*draft*, Oct. 26, 2017) (Pol.).

former owners of property, or their family and heirs, to leave Poland, which sometimes entailed the loss of Polish citizenship. Given the complex postwar fate of persons who survived the war and in light of the over forty years of the communist regime in Poland, when obtaining any kind of restitution benefits was nearly impossible, to require the former owners of property or their families and heirs to demonstrate Polish citizenship or domicile in Poland appears unjust, particularly, with respect to people forced by wartime or postwar turmoil to leave Poland.

But regardless of the social assessment of the use of conditions of citizenship and domicile, such conditions continue to appear in both proposed and existing Polish restitution regulations. The use of these conditions is justified by the Polish authorities, on one hand, by the need to create the possibility of obtaining restitution benefits only for persons strongly tied to Poland and, on the other hand, by Poland's financial limitations as a country that, following the transformation in 1989, is still striving to build its prosperity on the basis of a free-market economy.³ At the same time, this explanation seems inadequate in light of international agreements binding on Poland, and in particular, acts of European law, whose overriding principles are respect for human dignity, human rights, equality, justice, and the rule of law. Moreover, the Terezin Declaration,⁴ signed on June 30, 2009, by forty-six states (including Poland), which addresses issues of restitution for property taken during and after the war in detail, requires that regulations introduced in the area of restitution of real property enable pursuit of restitution claims in a non-discriminatory manner. The guidelines drafted for the Terezin Declaration on pursuit of restitution claims to real property state that non-discriminatory restitution and compensation processes should “*inter alia* . . . overcome citizenship and residency requirements.”⁵

Regardless of the general objections to the use of conditions of citizenship and residence, on October 26, 2017, the drafters of the comprehensive reprivatization bill for Poland decided to include these criteria in the draft, apparently,⁶ because the current regulations on

3. *Justification*, 3.7 & 3.14, Ustawa o zrekompensowaniu niektórych krzywd wyrządzonych osobom fizycznym wskutek przejęcia nieruchomości lub zabytków ruchomych przez władze komunistyczne po 1944 [Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944] (*draft*, Oct. 26, 2017) (Pol.).

4. HOLOCAUST ERA ASSETS CONFERENCE, TEREZIN DECLARATION (June 30, 2009).

5. *Id.*

6. *See* Renata Krupa-Dąbrowska, *Ministerstwo Sprawiedliwości przygotowało nową wersję projektu dużej ustawy reprivatyzacyjnej*, RZECZPOSPOLITA, (Nov. 27, 2017), <http://www.rp.pl/Nieruchomosci/311279958-Ministerstwo-Sprawiedliwosci-przygotowalo-nowa-wersje-projektu-duzej-ustawy-reprivatyzacyjnej.html>.

property in the former eastern borderlands have already been reviewed by the European Court of Human Rights (“ECtHR”) in Strasbourg, the Court of Justice of the European Union (“CJEU”) in Luxembourg, and the Polish Constitutional Tribunal. As a result of these examinations, the regulations concerning property “beyond the Bug River” containing such conditions were not found wanting with respect to their compliance with the Polish Constitution⁷ or standards imposed by European law. Questions thus arise, including whether or not the conditions of citizenship and domicile used in the regulations governing property in former eastern lands were not undermined in the rulings of the Constitutional Tribunal, whether the CJEU or the ECtHR is tantamount to their universal compliance with standards of Polish and European law, and consequently, whether or not they can be employed in a comprehensive restitution law in Poland? Before reaching an affirmative answer to this question, the nature and scope of regulations concerning property “beyond the Bug River” and the criteria of Polish citizenship and residence used in those regulations must be examined. For this reason, I will first present the issue of property in former eastern lands and the related mechanism for pursuit of restitution claims. Then, I will examine, in detail, the conditions of citizenship and domicile included in the regulations governing claims for property in former eastern lands and how those conditions have been evaluated in the case law of the Constitutional Tribunal and the two European courts.

II. EASTERN LAND ACTS AS AN EXCEPTIONAL EXAMPLE OF RESTITUTION REGULATIONS IN THE POLISH LEGAL SYSTEM

The territory of Poland in the interwar period differed significantly from the area currently within the borders of Poland. On November 11, 1918, when Poland regained its independence after 123 years, the image and conception of Polish borders was still uncertain and continued to be shaped over the following years. A significant portion of the eastern border of Poland was established pursuant to the Treaty of Riga of March 18, 1921,⁸ under which the eastern border of Poland followed *inter alia* the *Zbrucz* (Zbruch) and *Dźwina* (Daugava) rivers, and also included lands east of the Bug River. This is why the territories of prewar Poland east of the current border are commonly referred to as lands “beyond the

7. *See* Ustawa z dnia 2 kwietnia 1997 r. Konstytucja Rzeczypospolitej Polskiej [Constitution of Republic of Poland of April 2, 1997] (1997 Dz. U. nr 78 poz. 483) (Pol.).

8. *Traktat pokoju między Polską a Rosją i Ukrainą* podpisany w Rydze dnia 18 marca 1921 roku [Treaty of Peace Between Poland and Russia and Ukraine of March 18, 1921] (1921 Dz. U. nr 49 poz. 300) (Pol.).

Bug” (*zabużańskie*) and their prewar inhabitants are also referred to as “people from beyond the Bug” (*zabużanie*).

These eastern lands were cut off from Poland after the end of World War II. As a result of negotiations conducted before the end of the war among the Great Powers (the Soviet Union, the United States, and the United Kingdom), it was determined at Stalin’s express wish that the lands of prewar Poland, east of the Curzon Line⁹ (a modified version of which corresponds to today’s eastern border of Poland), would fall to the Soviet Union. Conclusion of the border agreement between Poland and the USSR on August 16, 1945,¹⁰ subsequently revised by the agreement of February 15, 1951,¹¹ confirmed the previous arrangements agreed upon by the Big Three.¹² In exchange, Poland received the prewar German lands east of the Oder and Lusatian Neisse rivers. Consequently, Poland lost about a fifth of its prewar territory, resulting in mass migrations of the population residing in eastern lands.¹³

Resettlements of the population connected with removal of eastern lands from Poland were carried out on the basis of “republic treaties,” i.e., international agreements concluded after the war by Poland with the Soviet republics bordering Poland. Agreements were concluded at that time with the Soviet republics of Belarus,¹⁴ Ukraine,¹⁵ and Lithuania,¹⁶

9. .See Letter from Lord Curzon, British Foreign Secretary, to Georgy Chicherin, People’s Commissar for Foreign Affairs of the Russian Soviet Federative Socialist Republic (July 11, 1920) (regarding the conception of a demarcation line between the Polish and Bolshevik armies proposed during the Polish/Bolshevik War).

10. .See Umowa między Rzeczpospolitą Polską i Związkiem Socjalistycznych Republik Radzieckich o polsko-radzieckiej granicy państwowej [Agreement between the Republic of Poland and the Union of Soviet Socialist Republics on the Polish-Soviet state border] (1947 Dz. U. nr 35 poz. 167) (Pol.)

11. .See Umowa pomiędzy Rzeczpospolitą Polską a Związkiem Socjalistycznych Republik Radzieckich o zamianie odcinków terytoriów państwowych, podpisana dnia 15 lutego 1951 r. (ratyfikowana zgodnie z ustawą z dnia 26 maja 1951 r.) [Agreement between the Republic of Poland and the Union of Soviet Socialist Republics on the exchange of sections of state territories, signed on February 15, 1951 (ratified in accordance with the Act of May 26, 1951).] (1952 Dz. U. nr 11 poz. 63) (Pol.).

12. .See Tomasz Dubowski, *Granica polsko-rosyjska jako granica zewnętrzna Unii Europejskiej*, BIAŁOSTOCKIE STUDIA PRAWNICZE, 80-81 (2011).

13. .See KRYSZYNA MICHNIEWICZ-WANIK, MIENIE ZABUŻAŃSKIE: PRAWNE PODSTAWY REALIZACJI ROSZCZEŃ (2008).

14. .Agreement of September 9, 1944, between the Polish Committee of National Liberation and the government of the Belarusian SSR on evacuation of Polish citizens from the territory of the BSSR and the Belarusian population from the territory of Poland, Bel.-Pol., Sept. 9, 1944.

15. .Agreement of September 9, 1944, between the Polish Committee of National Liberation and the government of the Ukrainian SSR on evacuation of Polish citizens from the territory of the UKSRR and the Ukrainian population from the territory of Poland, Pol.-Ukr., Sept. 9, 1944.

16. .Agreement of September 22, 1944, between the Polish Committee of National Liberation and the government of the Lithuanian SSR on evacuation of Polish citizens from the territory of

and finally the USSR itself.¹⁷ Under these agreements, the Polish population residing in eastern lands were resettled to the current territory of Poland, and in turn, the Belarusians, Ukrainians, Lithuanians and Rusyns residing in Polish territory were resettled to the east. The republic treaties also provided various solutions in terms of settlement for property left behind by resettled persons, and guaranteed arrivals in the “Recovered Territories” (formerly German) that they would be allocated land and a home left by the German population resettled from those lands.¹⁸ For this reason, it is accepted that the main goal of the guarantees included in the republic treaties was to provide assistance to the resettled Polish population, thus establishing conditions for facilitating their existence inside the new, postwar borders of Poland. This is also why it is recognized that the benefits awarded for properties in the east are in the nature of public-law social benefits, and not private-law compensation.¹⁹

Given the numerous doubts connected with the lack of ratification and publication of these treaties, the obligations assumed by Poland under international law, with respect to settlement for property left in the east, were not susceptible to direct enforcement.²⁰ For this reason, these

the LSRR and the Lithuanian population from the Territory of Poland, Lith.-Pol., Sept. 22, 1944; these *also* Agreement of July 6, 1945, between the Provisional Government of National Unity of the Republic of Poland and the government of the USSR on the right to change of Soviet citizenship of persons of Polish and Jewish nationality residing in the USSR and their evacuation to Poland and on the right to change of citizenship of persons of Russian, Ukrainian, Belarusian, Rusyn and Lithuanian nationality residing in the territory of Poland and their evacuation to the USSR, Pol.-USSR, July 6, 1945).

17. Umowa między Rządym Polskiej Rzeczypospolitej Ludowej a Rządym Związku Socjalistycznych Republik Radzieckich w sprawie terminu i trybu dalszej repatriacji z ZSRR osób narodowości polskiej [Agreement between the Government of the Polish People’s Republic and the Government of the Union of Soviet Socialist Republics regarding the date and mode of further repatriation of persons of Polish nationality from the USSR] (1957 Dz. U. nr 47 poz. 222) (Pol.).

18. *See* TOMASZ LUTEREK, REPRYWATYZACJA: ŹRÓDŁA PROBLEMU 259-261 (2016).

19. *See, e.g.*, Trybunał Konstytucyjny [Constitutional Tribunal], P 1/87, June 10, 1987 (Pol.); Trybunał Konstytucyjny [Constitutional Tribunal], K 33/02, Dec. 19, 2002 (Pol.); Trybunał Konstytucyjny [Constitutional Tribunal], K 2/04, Dec. 15, 2004 (Pol.); Trybunał Konstytucyjny [Constitutional Tribunal], SK 11/12, Oct. 23, 2012 (Pol.); Sąd Najwyższy [Supreme Court] I CR 768/73, Feb. 1, 1974 (Pol.); Sąd Najwyższy [Supreme Court] III CZP 63/79, Oct. 10, 1979 (Pol.); Sąd Najwyższy [Supreme Court] III AZP 39/92, Feb 4, 1993 (Pol.); Naczelny Sąd Administracyjny [Supreme Administrative Court] OSK 606/11, Apr. 26, 2012 (Pol.); Naczelny Sąd Administracyjny [Supreme Administrative Court] I OSK 1856/12, May 21, 2013 (Pol.); Naczelny Sąd Administracyjny [Supreme Administrative Court], I OSK 2201/14, November 6, 2014 (Pol.); Naczelny Sąd Administracyjny [Supreme Administrative Court] I OSK 1020/13, December 9, 2014 (Pol.); Naczelny Sąd Administracyjny [Supreme Administrative Court], Case I OSK 1113/14, February 18, 2016 (Pol.); Naczelny Sąd Administracyjny [Supreme Administrative Court], Case I OSK 2025/14, May 24, 2016 (Pol.).

20. *See* Małgorzata Masternak-Kubiak, *Glosa do wyroku TK z dnia 19 grudnia 2002 r., K 33/02 [Note on Constitutional Tribunal Judgment of December 19, 2002, Case K 33/02]*, 6 PAŃSTWO I PRAWO [STATE AND LAW] 119 (2003) (Pol.); *see also* Roman Kwiecień, *Charakter*

obligations were incorporated into the national legal order after the war and implemented on the basis of various acts of national law.²¹ Until October 2005, these solutions generally boiled down to a right of offset, under which the price for acquisition of real estate (owned by the public entities) would be reduced by the value of property left behind in the east. This settlement for property left behind in the east did not take the form of classic compensation for injury, but was understood as a type of public assistance benefit for persons resettled from the east, helping them organize their existence in postwar Poland. Thus, the settlement obligations assumed by Poland in the republic treaties were in essence more similar to public assistance benefits of a social nature than damages in the traditional sense.

The setoff right was most often exercised by the eligible persons during the initial resettlement period in the 1940s. Problems with the exercise of the setoff right began along with successive waves of

prawny i znaczenie umów repatriacyjnych z 9 i 22 września 1944 roku [The Legal Nature and Significance of the Repatriation Agreements of September 9 and 22, 1944], 4 PRZEGLĄD SĄDOWY [JUDICIAL REV.] 17 (2005) (Pol.).

21. *See, e.g.*, Dekret z 6 grudnia 1946 r. o przekazaniu przez państwo mienia nierolniczego na obszarze ziem odzyskanych i byłego Wolnego Miasta Gdańska [the Decree of December 6, 1946, on Transfer by the State of Non-agricultural Property in the Area of the Recovered Territories and the Former Free City of Danzig] art. 9 (1946 Dz. U. nr 71 poz. 389) (Pol.); Dekret z 10 grudnia 1952 r. o cesji przez państwo nieruchomości nierolniczych na cele mieszkaniowe i budowę indywidualnych domów jednorodzinnych [Decree of December 10, 1952, on Cession by the State of Non-agricultural Real Property for Residential Purposes and Construction of Individual Single-family Houses] art. 14 (1952 Dz. U. nr 49 poz. 326) (Pol.); Dekret z 18 kwietnia 1955 r. w sprawie uwłaszczenia i uregulowania innych spraw związanych z reformą rolną i rozliczeniem rolnictwa [Decree of April 18, 1955, on Enfranchisement and Regulation of Other Matters Connected with Agricultural Reform and Agricultural Settlement] art. 12 (1955 Dz. U. nr 18 poz. 107) (Pol.); Ustawa o sprzedaży przez państwo budynków mieszkalnych i działek budowlanych z 28 maja 1957 [Act on Sale by the State of Residential Houses and Construction Plots of May 28, 1957] art. 8 (1957 Dz. U. nr 31 poz. 132) (Pol.); Ustawa o gospodarce gruntami w miastach i majątkach [Act on Management of Land in Cities and Estates of July 14, 1961] art. 17b (1961 Dz. U. nr 32 poz. 159) (Pol.); Ustawa o gospodarce gruntami i wywłaszczaniu nieruchomości [Act on Management of Land and Expropriation of Real Estate of Apr. 29, 1985] art. 88 (1985 Dz. U. nr 22 poz. 99) (Pol.); Ustawa o gospodarce nieruchomościami Skarbu Państwa przejęta od Sił Zbrojnych Federacji Rosyjskiej [Act on Management of Real Estate of the State Treasury Taken Over from the Armed Forces of the Russian Federation of June 10, 1994] art. 16 (1997 Dz. U. nr 70 poz. 363) (Pol.); Ustawa o gospodarce nieruchomościami [Real Estate Management Act of Aug. 21, 1997] art. 212 (1997 Dz. U. nr 115 poz. 741) (Pol.); Ustawa o przekształceniu prawa użytkowania wieczystego przysługującego osobom fizycznym w prawo własności [Act on Conversion of the Right of Perpetual Usufruct Held by Natural Persons into the Right of Ownership of Sep. 4, 1997] art. 6 (1997 Dz. U. nr 123 poz. 781) (Pol.); Ustawa o stosowaniu się do ceny sprzedaży lub opłat za wieczyste użytkowanie nieruchomości Skarbu Państwa o wartości nieruchomości pozostawionej poza bieżącymi granicami państwa polskiego [Act on Application Toward the Sale Price or Fees for Perpetual Usufruct of Real Estate of the State Treasury of the Value of Real Estate Left Beyond the Current Borders of the Polish State of Dec. 12, 2003] (2003 Dz. U. nr 6 poz 39) (Pol.).

resettlements²² in the 1950s and later, when further regulations governing the right of setoff imposed numerous conditions on eligible persons which had to be fulfilled for them to exercise their right of setoff.²³ The growing restrictions on the exercise of setoff rights led to a situation where the exercise of this right was the exception rather than the rule. Moreover, when it was possible to exercise the right of setoff, the factual and legal state of the real property offered to the holders of this right was so complicated or problematic that holders often abandoned their exercise of the right of setoff. Under those circumstances, the right of setoff became an illusory legal institution (*ius nudum*), as the conditions for exercising it prevented its effective realization.²⁴

The applicant in *Broniowski v. Poland*,²⁵ in which the ECtHR decided for the first time to issue a pilot judgment, struggled with similar problems. Under the facts of that case, the applicant's grandmother was resettled after the war from land now in Ukraine. The applicant's mother managed to exercise the right of setoff inherited from her mother by acquiring real property worth barely two percent of the value of the property left behind in the east by her mother. In subsequent years, after long proceedings, when the applicant finally managed to reach a situation where he could exercise the remaining right of setoff, the property offered to him for this purpose had such a complicated factual and legal state (among other things, requiring significant investments in the property or located in a distant part of the country of no interest to the applicant) that he ultimately abandoned his exercise of the right of setoff. Moreover, further regulations concerning property "beyond the Bug" prevented exercise of the right of setoff by holders who, like the applicant, had already exercised the right of setoff in any manner regardless of the value of the real estate acquired through this procedure. In this situation, the ECtHR concluded that the regulations in the Polish legal system and the practice for exercise of the right of setoff reduced it to an illusory right, resulting in Poland's violation of the applicant's right of property (the

22. .See MICHNIEWICZ-WANIK, *supra* note 13.

23. .See generally Sąd Najwyższy [Supreme Court], I CK 323/02, Nov. 21, 2003 (Pol.) (in which the court describes in detail the circumstances limiting the possibility of exercising the right of setoff, indicating that this provides grounds for a claim for damages against the State Treasury).

24. .See Jan Mojak, *Glosa do uchwały SN z dnia 22 czerwca 1989 r.*, III CZP 32/89 [Comment on Supreme Court Resolution of June 22, 1989, Case III CZP 32/89], 1 PAŃSTWO I PRAWO 1991, 119; see also K 33/02 at 1.

25. .*Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, 185-187.

peaceful enjoyment of possessions)²⁶ guaranteed by Article 1 of Protocol 1.²⁷ to the European Convention on Human Rights (“ECHR”).²⁸

In light of the structural problems of the Polish legal system with the realization that claims for eastern properties affect a large portion of the entitled persons, the ECtHR decided for the first time in the *Broniowski* case to apply the procedure of a pilot judgment.²⁹ Thus, the court also required Poland to implement solutions enabling effective realization of “Bug River claims” (as the court calls them) in a manner consistent with the standards of Article 1 of Protocol 1 to the ECHR. The aim of issuing a pilot judgment was not only to resolve the applicant’s specific case,³⁰ but also to impose an obligation for a systemic solution to the problem with Bug River claims. This, in turn, could reduce the number of identical claims pending before the ECtHR³¹ and, in the longer term, reduce the number of new applications filed with the court in similar cases.

The immediate result of the judgment in *Broniowski v. Poland*³² was the adoption of the Act on Realization of the Right to Compensation for Real Property Left Beyond the Current Borders of the Republic of Poland of July 8, 2005 (2005 Dz. U. no. 169 item 1418, as amended—hereinafter the “2005 Act”). The 2005 Act introduced an alternative to realization of Bug River claims in the form of a setoff, by enabling right holders to apply for monetary compensation. In this respect the 2005 Act limited the ability to realize Bug River claims to twenty percent of the

26. .See *id.*

27. .See Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, 213 U.N.T.S. 262 (promulgated in Poland under 1995 Dz. U. nr 36 poz. 175 (Pol.)).

28. .See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (promulgated in Poland under 1993 Dz. U. nr 61 poz. 284) (Pol.)).

29. .For more on the pilot judgment procedure, see FREDERIC SUDRE, DROIT INTERNATIONAL ET EUROPEEN DES DROITS DE L’HOMME 848 (2012) (Fr.).

30. .Broniowski’s case ended in 2005 in a friendly settlement with the Polish government, under which Broniowski was awarded monetary compensation under the same terms as adopted in the act passed as a result of issuance of the pilot judgment, i.e. compensation equal to 20% of the value of real property left in the east by his grandmother, notwithstanding prior exercise of the right of setoff equal to 2% of the value of the lost property. As a result of the settlement, the ECtHR struck the case from the list of pending cases. See *Broniowski*, 2004-V Eur. Ct. H.R. 1; see also Magda Krzyżanowska-Mierzewska, *Sprawy mienia zabużańskiego przed ETPCz (Bug River Property Case Before the ECtHR)*, 12 EUROPEJSKI PRZEGLĄD SĄDOWY 23 (2008) (Pol.).

31. .The ECtHR registrar announced the reduction in the number of identical cases resulting from issuance of the pilot judgment in *Broniowski v. Poland* in two press releases on December 12, 2007 and October 6, 2008. . See Press Release, Eur. Court of Human Rights, Bug River Cases Resolved (Dec. 12, 2007); see also Press Release, Eur. Court of Human Rights, First ‘Pilot Judgment’ Procedure Brought to a Successful Conclusions: Bug River Cases Closed (Oct. 6, 2008).

32. .See *Broniowski*, 2004-V Eur. Ct. H.R. 1.

value of property left in the east. Thus right holders may seek realization of the right of setoff or seek payment of compensation equal to twenty percent of the value of former eastern properties.

The 2005 Act entered into force on October 7, 2005, and in 2007 the ECtHR found in *Wolkenberg v. Poland*³³ and *Witkowska-Toboła v. Poland*³⁴ that the aims of the pilot project in *Broniowski* were being achieved.³⁵ The court held that the mechanism for pursuing Bug River claims applied in the 2005 Act met the standards under Article 1 of Protocol 1 to the ECHR. In this context, the court pointed out that Poland had a wide margin of appreciation in regulating the method of pursuing Bug River claims, and within that discretion, the mechanism applied in the 2005 Act was reasonable, proportionate, and struck a fair balance between the protection of the claimants' property rights and the general interest.³⁶ The Strasbourg judges stressed that the level of compensation for Bug River claims set in the 2005 Act, twenty percent of the value of the property left behind, was fair, particularly considering that the loss of the real estate in the east did not result from any act or omission of the Polish authorities but resulted from the political arrangements by the Great Powers that were connected with defining the postwar borders of Poland.³⁷ The ECtHR also noted that the settlement for property left in the east was in the nature of aid rather than restitution, which provided further justification for limiting the level of payment of Bug River claims to twenty percent of the value of the properties left in the east.³⁸

The history of the regulations governing Bug River claims reveals the exceptional nature of these regulations within the Polish legal system.

33. *Wolkenberg v. Poland*, App. No. 50003/99, Eur. Ct. H.R., 72-77 (2007).

34. *Witkowska-Toboła v. Poland*, App. No. 11208/02, Eur. Ct. H.R., 74-79 (2007).

35. *See* *Krzyżanowska-Mierzewska supra* note 30, 22-25 (raising serious doubts as to the complete success of the pilot judgment in *Broniowski v. Poland*.) The use of this procedure led to adoption of the 2005 Act in Poland, but until it was adopted nothing happened in many of the Bug River cases pending before the ECtHR, *see id.* The author thus seems to suggest that the success from the court's perspective was the systemic solution to the issue, as a result of which the number of cases and incoming applications was reduced, *see id.* But from the perspective of protection of individual rights, the applicants could expect only significant percentage limitation on their claims, while the one advantage was the assurance of being able to obtain monetary compensation, *see id.* But the latter solution, the author suggests, could have been achieved in any event without the judgment from the Strasbourg court, in light of the legislative work underway at the same time and the development of the Polish case law inclining toward monetary satisfaction of Bug River claims, *see id.*

36. *See* *Wolkenberg*, App. No. 50003/99, Eur. Ct. H.R., 64, 66; *see also* *Witkowska-Toboła*, App. No. 11208/02, Eur. Ct. H.R., 66-67.

37. *See* *Wolkenberg*, App. No. 50003/99, Eur. Ct. H.R., 63; *see also* *Witkowska-Toboła*, App. No. 11208/02, Eur. Ct. H.R., 65.

38. *See* *Wolkenberg*, App. No. 50003/99, Eur. Ct. H.R., 64; *see also* *Witkowska-Toboła*, App. No. 11208/02, Eur. Ct. H.R. 66.

This exceptional nature consists, first and foremost, of the fact that this is one of the few examples of restitution regulations aimed at satisfying claims arising out of the seizure of real property after World War II. As the conference sessions clearly show, Poland lacks comprehensive systemic solutions for satisfaction of restitution claims for the seizure of property after World War II. Instead of the reprivatization act demanded for years, claimants pursue their rights in *ad hoc* proceedings based on general instruments of private and public law.³⁹ On the other hand, the uniqueness of the regulations governing property “beyond the Bug” also arises from the very source and nature of the benefits that can be obtained through settlement for properties left in the east. As articulated by the ECtHR, Bug River claims take their original source not in acts or omissions of the Polish authorities, but in postwar political arrangements by the Great Powers. In addition, the Strasbourg judges perceived the assistance-based nature of the benefits available when pursuing Bug River claims, which are not aimed at full compensation for the financial loss connected with the loss of Bug River property but at the mitigation of the effects of resettlement.⁴⁰ For these reasons, the regulations governing Bug River claims cannot be regarded as an example of restitution regulations in the classic sense, which are aimed at redressing the injury arising out of seizure of property after World War II. Due to the exceptional nature of the Bug River claims, the solutions followed in the current 2005 Act should be carefully analyzed before replicating them in other laws. This observation also applies to the conditions of citizenship and domicile, which, as examples of exceptional solutions, should be applied with particular caution in other types of restitution regulations, as I will discuss later in this article.

III. CONDITION OF CITIZENSHIP IN EASTERN LAND ACTS

Holding Polish citizenship (both at the start of the war and at the time of assertion of the demand) as a criterion for pursuing Bug River claims was not introduced into the Polish regulations governing properties left in the east until 2003. But this does not mean that the condition of Polish citizenship is not bound up with the occurrence and nature of Bug River claims.⁴¹

39. .See Ewa Łętowska, *Orzecznictwo sądowe jako instrument reprivatyzacji zdekoncentrowanej*, in *STUDIA I ANALIZY SĄDU NAJWYŻSZEGO* TOM III 86 (Mateusz Pilich ed., 2016).

40. .See Wolkenberg, App. No. 50003/99, Eur. Ct. H.R., 63; *see also* Witkowska-Tobola, App. No. 11208/02, Eur. Ct. H.R., 65.

41. .See Sąd Najwyższy [Supreme Court], III CZP 84/90, Apr. 10, 1991 (Pol.).

The use in national regulations of Polish citizenship as a condition for enforcing Bug River claims was challenged in 2004 in a proceeding before the Polish Constitutional Tribunal.⁴² In that case, the tribunal pointed out that, despite failure for over fifty years to employ the condition of citizenship in the national regulations governing Bug River property, the condition of Polish citizenship was strongly accented in the republic treaties which conditioned the possibility of settlement for property left in the east on holding Polish citizenship as of September 1939. The tribunal found that the essence of this requirement for claims was the desire to ensure living conditions enabled resettled Polish citizens to begin their lives over again in a new location within the postwar borders of Poland. In the tribunal's view, the *ratio legis* for the criterion of holding Polish citizenship reveals the social nature of the benefits obtained through exercise of Bug River claims, which, by their nature, are closer to public-law aid benefits than to civil-law damages. Moreover, in the tribunal's view, the external nature of the circumstances surrounding the original causes of the resettlement of Polish citizens and the principles behind the claims for properties left in the east justify the use of the criterion of Polish citizenship in the mechanism for pursuing Bug River claims. Thus, in light of the specific circumstances of the sources of the postwar actions of resettling the Polish population, as well as the exceptional public-law nature of the benefits received in exercise of Bug River claims, the Constitutional Tribunal ultimately held that the condition of Polish citizenship for pursuing Bug River claims is consistent with the Polish Constitution.

Interestingly, in the context of the constitutionality of the requirement to hold Polish citizenship, the Constitutional Tribunal also cited the principle of the citizens' trust in the state and affirmed that this principle applies directly only to Polish citizens, confirming the consistency with the principle of the condition of holding Polish citizenship. The tribunal added that the principle of citizens' trust in the state with respect to the criterion of Polish citizenship could be relied on by a non-citizen only, secondarily, in terms of equal treatment of citizens and non-citizens, for example, under EU law. This issue later became the subject of analysis by the CJEU under the procedure for obtaining a preliminary ruling. But the Luxembourg court did not analyze the criterion of holding Polish citizenship in September 1939 on the part of resettled persons and examined the issue of the requirement to hold Polish

42. .See K 2/04 at 2.

citizenship also by heirs asserting claims of resettled persons who had a right of setoff under the regulations governing property beyond the Bug.

In the *Teisseyre* case,⁴³ two grandchildren of a woman who was resettled in Poland sought payment of compensation under the 2005 Act for the property left in the east by their grandmother, who held Polish citizenship. One of the grandchildren held Polish citizenship and was awarded compensation, while the other was denied compensation because he lacked Polish citizenship. He was a Finnish citizen who had never resided in Poland. Under these facts, the Supreme Administrative Court, hearing a complaint against the refusal to award compensation due to the lack of Polish citizenship by one of the heirs of the resettled owner, sought a preliminary ruling from the Court of Justice on the compatibility of this requirement of the 2005 Act with the prohibition of discrimination on grounds of nationality provided for in Article 18 of the Treaty on the Functioning of the European Union.⁴⁴ Examining its jurisdiction to take up the case, the Court of Justice stated that the prohibition in Article 18 TFEU concerns discrimination within the scope of application of the Treaties, including the fundamental freedoms guaranteed by the Treaties, and in particular, the right to move and reside freely in the territory of the member states under Article 21 TFEU.⁴⁵ Beyond that, the court recognized that the subject matter of the case and the 2005 Act lies within the exclusive competence of the member states,⁴⁶ s the aim of the concept of EU citizenship under Article 20 TFEU is not to expand the scope of application of the Treaties to matters unrelated to the law of the European Union (“EU”).⁴⁷ Because the grandson resided in Finland, and never in Poland, the Court of Justice found that the case had no connection with situations covered by the Treaty provisions concerning the free movement of people, including Article 21 TFEU.⁴⁸ Consequently, the Court held that it clearly lacked jurisdiction to reply to the question referred by the Supreme Administrative Court.

While the Court of Justice found that the *ratione materiae* did not justify taking the case, this does not mean that the condition of Polish citizenship in the Polish regulations governing Bug River claims is

43. .Case C-370/13, *Teisseyre v. Minister of Treasury*, ECLI:EU:C:2014:2033 (Court of Justice order of June 19, 2014).

44. .See Treaty on the Functioning of the European Union art. 18, 2012 O.J. C 326/1.

45. .See Case C-370/13, *Teisseyre v. Minister of Treasury*, 31.

46. .See AURELIA NOWICKA & STANISLAW SOŁTYSIŃSKI, REFLEKSJE NA TEMAT REKOMENSAT ZA MIENIE ZNACJONALIZOWANE PO II WOJNIE ŚWIATOWEJ 56 (M Mateusz Pilich ed.).

47. .See Case C-370/13, *Teisseyre v. Minister of Treasury*, 32–33.

48. .See Case C-370/13, *Teisseyre v. Minister of Treasury*, 34.

clearly consistent with EU law, or the prohibition on discrimination on grounds of nationality set forth in EU law. As expressly stated by the Luxembourg judges, the principal basis for the order was that the case lacked a connection with the free flow of persons under the facts of the case, namely that the heir of the resettled owner who was not a Polish citizen had not resided in Poland. *A contratrio*, it may be assumed that under different circumstances, if the heir lacking Polish citizenship had exercised the right to move freely within the territory of the member states and resided in Poland, then the Court of Justice would be inclined to take the case.⁴⁹

Additionally, it has been pointed out that a ruling on the merits by the Court of Justice would also have been possible if another of the Treaty freedoms were raised, namely the free flow of capital set forth in Article 63 TFEU.⁵⁰ It is accepted in the case law of the CJEU that inheritance is an example of the flow of capital of a personal nature.⁵¹ However, limiting this type of flow of capital due to the type of citizenship held could manifest discrimination on grounds of nationality, as referred to in Article 18 TFEU.⁵² Thus, it cannot be ruled out that in the future, notwithstanding the order in *Teisseyre*, the Court of Justice will provide a reply on the merits as to the condition of citizenship in the Polish regulations governing Bug River claims, where it might conclude that a limitation of this type violates the EU's prohibition of discrimination on grounds of nationality.

It should be pointed out that when issuing the order in the *Teisseyre* case, in the description of the facts, the Court of Justice also noted the exceptional, public-law and assistance-related nature of the benefits obtainable by pursuing Bug River claims.⁵³ So, even if a merits ruling were to be issued in the future where the Court of Justice upheld the compatibility with EU law of the use of the criterion of citizenship in Polish regulations governing Bug River claims, the exceptional nature of restitution regulations awarding claimants public-law benefits in the nature of assistance, rather than civil-law damages, would have to be borne in mind.

Currently, it would not be correct to claim that the Court of Justice has accepted the use of the condition of citizenship in the Polish

49. .See NOWICKA & SOŁTYSIŃSKI, *supra* note 46, at 53–54.

50. .See Maciej Taborowski, *Mienie zabużańskie nie dla Trybunału Sprawiedliwości? [Territorial Property not for the Court of Justice?]*, 155 RADCA PRAWNY 39, 40 (Pol.).

51. .See Case C-513/03, *Hiltten-van der Heijden*, ECLI:EU:C:2206:131, 40 (Court of Justice judgement of Feb. 23, 2006).

52. .See Taborowski, *supra* note 50, at 40.

53. .See Case C-370/13, *Teisseyre v. Minister of Treasury*, 10–11.

restitution regulations as compatible with the prohibition of discrimination on grounds of nationality. First and foremost, given the procedural nature of the order issued in *Teisseyre*, as of now, there is no merits ruling by the Luxembourg court on this issue. Even if such a ruling were issued, the holding would have to be analyzed in light of the exceptional nature of the regulations governing Bug River claims.

IV. CONDITION OF DOMICILE IN EASTERN LAND ACTS

As with the condition of citizenship, the condition of domicile (the need to have resided in Poland in September 1939 and now) was not included in the national regulations governing Bug River claims until 2003. Unlike the criterion of citizenship, residence in Poland was not an explicit requirement under the republic treaties. Nonetheless, the condition of residing in prewar Polish lands falls within the range of principles underlying settlement for property left behind in the east as a form of assistance for the Polish population, who, because of the change in borders, had to be resettled and lost their previous place of residence in eastern lands. For this reason, in 2004, the Constitutional Tribunal held that the criterion of place of residence, in light of its link to the *ratio legis* of the regulations governing settlement for property left in the east, is consistent with the Polish Constitution.⁵⁴ In the same judgment, however, the tribunal found that requiring claimants to reside in Poland today, as of a strictly defined date (i.e. the date of entry into force of the regulations), was not relevant to the obligation to settle for property left in the east, and consequently, this requirement was held to be unconstitutional.⁵⁵ For this reason as well, in the 2005 Act, the criterion of domicile was included only with respect to the period when the war broke out, in the form of a requirement of residence in the former territories of Poland as of September 1, 1939. With the condition of domicile constructed in this manner, the Constitutional Tribunal issued another judgment in 2012, holding that it arbitrarily established access to the benefits provided by the 2005 Act by conditioning such benefits on the incidental fact of residing in the former territories of Poland on September 1, 1939.⁵⁶ In the tribunal's view, setting such an exact date as the legally relevant moment for determining the criterion of domicile could deprive persons of the benefit of the 2005 Act, who, despite not residing in the former territory of Poland on that exact date, nonetheless lost the center of their life interests due to the war and the following

54. .See K 2/04 at 2.

55. .See *id.*

56. .See SK 11/12 at 23.

resettlement from the east.⁵⁷ Thus, the tribunal held that the criterion of domicile in this form was unconstitutional. Consequently, the 2005 Act was amended in 2014 so that the requirement of residence in the former territory of Poland would not be limited to any specific date. Thus, the 2005 Act retains the condition of domicile, determining the social nature of the Bug River claims with respect to Polish citizens who lost their place of residence as a result of resettlement. However, this criterion now extends the operation of the Bug River regulations to all persons potentially entitled to the assistance benefits provided for in the regulations.⁵⁸

So far, neither the CJEU, nor the ECtHR has examined the compatibility of the condition of domicile in the Bug River regulations with standards of European law. Although the conclusions in the Court of Justice order in the *Teisseyre* case, discussed in the previous section, were focused on the criterion of citizenship, the arguments raised in that case also referred indirectly to issues connected to the place of residence. First and foremost, in the request for a preliminary ruling in that case,⁵⁹ the Supreme Administrative Court cited the ruling by the Court of Justice in *Tas-Hagen and Tas*.⁶⁰ In that judgment, the Luxembourg court held that the requirement that Dutch citizens establish permanent residence in the Netherlands in order to become beneficiaries of the assistance benefits paid to civilian victims of the war violated the EU's prohibition of discrimination on grounds of nationality. The Court of Justice concluded that the citizenship requirement was sufficient to demonstrate a connection between the recipients of assistance benefits and the society of the member state awarding the benefits. The additional requirement of domicile had no rational justification and imposed disproportionate conditions for access to the social benefits.⁶¹

57. *See id.*

58. *See* Piotr Nycz, *Zamieszkiwanie na byłym terytorium Polski jako przesłanka otrzymania rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej [Residence in the former territory of Poland as a condition for receiving compensation for real estate left beyond the current borders of the Republic of Poland]*, 12 PREGŁAD SĄDOWY 85, 92 (Pol.).

59. *See* Naczelny Sąd Administracyjny [Supreme Administrative Court], I OSK 2024/11, Apr. 30, 2013 (Pol.).

60. *See* Case C-192/05, *Tas-Hagen and Tas*, ECLI:EU:C:2006:676 (Court of Justice judgment of Oct. 26, 2006); *see also* Case C-370/13, *Teisseyre v. Minister of Treasury*, 37 (holding that it was not justified to rely on the judgment in *Tas-Hagen and Tas*, as the Tases were citizens of the Netherlands residing in that member state before exercising the freedom of movement and settling in another member state, Spain, while *Teisseyre*, who did not hold Polish citizenship, resided in Finland and had never resided in Poland).

61. *See* Case C-192/05, *Tas-Hagen and Tas*, 38–40.

The issue of the place of residence during the period of receipt of social benefits intended for victims of war and persecution was also analyzed by the Court of Justice in the *Nerkowska* case.⁶² In the court's view, Polish citizenship and prolonged residence in Poland by a recipient of assistance benefits for victims of war manifested sufficient ties of the beneficiary with Poland as a member state awarding social benefits to its citizens, even if the beneficiary exercised the freedom to move and took up residence in another member state.⁶³ Thus, the court deemed the condition of having a place of residence in Poland for the period of collecting assistance benefits for victims of war by Polish citizens residing in other member states as incompatible with the principle of proportionality, and held that this condition does not comply with the EU's ban on discrimination on grounds of nationality.

Despite the lack of findings by the CJEU and ECtHR on the permissibility of the criterion of domicile in the Bug River regulations, the conditions for permissibility of the use of the condition of place of residence when regulating access to assistance benefits for victims of war, which falls within the competence of the EU member states, may be cited. These considerations lead to the conclusion that access to social benefits awarded by the member states may be conditioned on a connection between the beneficiaries and the member state awarding the benefits. However, establishing the criteria for verifying the strength of this connection requires particular care and weighing of the interests of society and the potential beneficiaries. In the judgments cited above, the Court of Justice held that conditioning the receipt of social benefits for victims of war on both citizenship and domicile may be disproportionate and violate the prohibition of discrimination on grounds of nationality. Thus, simultaneous employment of the conditions of residence and citizenship when establishing the conditions for access to assistance benefits in EU member states may be permissible only in exceptional circumstances justifying such a combination of criteria. The resettlements connected with the postwar change in Poland's borders may be regarded as such an exceptional set of circumstances to justify the combined use of citizenship and domicile during the resettlement period, as provided in the current wording of the 2005 Act. The public-law nature of the assistance benefits available under the 2005 Act enables the acceptance of the simultaneous use of both of these conditions when determining the applicants' connection to the fortunes of the Polish population resettled

62. .Case C-499/06, *Nerkowska v. ZUS*, ECLI:EU:C:2008:300 (Court of Justice judgment of May 22, 2008).

63. .See Case C-499/06, *Nerkowska v. ZUS*, 43.

from the east following the war and consequently eligible for assistance. Therefore, it is the social character of the benefits and the exceptional nature of the circumstances for awarding such benefits that are the decisive factors permitting the member state to use the place of residence as an eligibility criterion.

V. SUMMARY

The analysis presented here allows for a few summary remarks.

First, the regulations governing property beyond the Bug are an exceptional example of restitution regulations in the Polish legal system. This results from the absence of comprehensive restitution regulations in Poland, as well as, the specific context in which properties in Poland's former eastern lands were lost. Unlike the seizure of property in the postwar territory of Poland as a result of acts or omissions by the Polish authorities, the Bug River properties were left in the east as a result of arrangements by the Great Powers as to the postwar borders of Poland, independent of the Polish authorities. The exceptionality of the Bug River regulations is further evident in the public-law nature of the assistance benefits that could be obtained under these regulations. In view of these exceptional aspects, the ECtHR held that the mechanism for pursuing Bug River claims set forth in the 2005 Act is consistent with the standards under Article 1 of Protocol 1 to the European Convention on Human Rights. But this does not mean that any restitution regulation employing similar solutions would automatically be consistent with the ECHR standards for protection of the right to property.

Second, use of the conditions of citizenship and domicile in regulating access to Bug River benefits has not yet been evaluated on the merits as to its compliance with standards of European law. Nonetheless, the existing CJEU case law permits the use of the condition of citizenship or domicile in light of the special nature of social benefits, whose regulation lies within the competence of the member states. But the simultaneous use of the conditions of citizenship and domicile must be justified by extraordinary circumstances, as the decisions by the Court of Justice indicate that requiring combined fulfillment of both of these criteria may lead to a finding of a violation of the EU's prohibition against discrimination on grounds of nationality.

Third, the exceptional nature of the regulations governing Bug River property and the permissibility of employing citizenship and domicile as conditions for obtaining those assistance benefits excludes the possibility of incorporating the solutions from the Bug River regulations, particularly the criteria of citizenship and place of residence, in a

comprehensive reprivatization act. That would unjustifiably equate the aims and character of these two regimes. The aim of the Bug River regulations was to carry out an intergovernmental obligation of Poland involving the award of assistance benefits of a public-law nature to the resettled Polish population from the east, while the aim of a comprehensive reprivatization regulation should be to award damages of a private-law nature. Thus carrying over the conditions of citizenship and domicile to the bill for a reprivatization act dated October 26, 2017, erroneously equates the aims and legal nature of this proposed act with the regulations governing Bug River properties. For this reason as well, their use in the proposed reprivatization act does not ensure compliance with standards of European law, and to the contrary, may lead to a finding that they are incompatible with the standards arising under the law of the Council of Europe and the European Union.