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TRUST AND SOLIDARITY AT A TIME OF TRANSFORMATION. THE PROBLEM OF SO-CALLED BUG RIVER PROPERTY CLAIMS IN THE CASE LAW OF THE POLISH CONSTITUTIONAL TRIBUNAL AND THE EUROPEAN COURT OF HUMAN RIGHTS

1. THE GENESIS OF THE ZABUŻANIE PEOPLE'S[1] CLAIMS

1. World War II brought about considerable geopolitical changes. Numerous nations had to pay the price of losing their sovereignty and succumbing to compulsory revisions of state borders. Central Eastern Europe – the main arena of war between two competing political blocs – arguably experienced the most drastic territorial transformations, which occurred without the consent of the interested nations. Consequently, these changes resulted in mass and, in most cases, involuntary migration waves of people[2].

These processes affected Poles in a special way. By virtue of the agreements between the Big Three (the United Kingdom, the United States and the Soviet Union) post-war Poland gained lands in the West (formerly German territories located to the East of Oder and Lusatian Neisse) at the expense, however, of territories to the East of the so-called Curzon Line, delineated to a large extent by the Bug River.

One consequence of territorial revisions at the eastern frontier of Poland was mass relocation of Polish citizens from the lands incorporated into the Soviet Union. It is estimated that in the period between 1933–1952 approx. 2 million people from the Eastern Borderlands (also known as Kresy) had to leave their homes (hereinafter: the Zabużanie people). Whilst in the literature they are often referred to as repatriates, the term "displaced persons" seems more adequate[3].

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[1] The Polish term "Zabużanie" literally means "people from the lands beyond the Bug river".

[2] More on this: C. Kuti, *Post-Communist Restitution and the Rule of Law*, Budapest 2009, pp. 98–100.

[3] K. Michniewicz-Wanik, *Mienie zabużańskie. Prawne podstawy realizacji roszczeń*, Wrocław 2008, p. 17.

For they were most often relocated from native areas that formed part of Poland before World War II onto lands they had no connection with, ones which were ceded as a result of bargains between three great powers.

2. Forced at a time of political turmoil, migrations were a serious endeavour in organizational terms, of importance for the formation of Polish statehood following World War II. Mass displacements were the subject of agreements concluded between the Polish Committee of National Liberation (a self-proclaimed, temporary executive authority operating under the auspices of the Soviet Union from 21 July 1944 on the territories "liberated" from German occupation; hereinafter: PKWN, from Polish: *Polski Komitet Wyzwolenia Narodowego*) and the governments of the Byelorussian, Ukrainian and Lithuanian Soviet Socialist Republics[4]. These documents, often termed the Republican Accords, regulated the evacuation of Ukrainian, Belarusian and Lithuanian populations from the new Polish territory as well as Polish citizens who found themselves in the above Soviet Republics. Their provisions were complemented by an agreement of 6 July 1945 between the Provisional Government of National Unity of the Republic of Poland (in Polish: *Tymczasowy Rząd Jedności Narodowej*, recognized from 6 July by the major powers, hereinafter: PGNU) and the Soviet Union on the right to change the Soviet citizenship of Polish and Jewish nationals living in the USSR, their relocation to Poland, and the right to change the Polish citizenship of Russian, Ukrainian, Belarusian, Ruthenian and Lithuanian nationals living in Poland and their relocation to the USSR (hereinafter: the 1945 Repatriation Agreement).

The final migration wave of the Zabużanie people occurred pursuant to the provisions of the territorial exchange agreement of 15 February 1951 between the Republic of Poland and the Soviet Union[5]. On the international plane, repatriation ended 6 years later by force of the agreement of 25 March 1957 between the Polish People's Republic and the Soviet Union on the timeframe and procedure of further repatriation from the Soviet Union of Polish nationals[6] (hereinafter: the 1957 Repatriation Agreement).

The repatriation policies specified in the Republican Accords formally embraced the so-called right of option, which left the Zabużanie people with an

[4] These were the following agreements: 1) of 9 September 1944 between the Polish Committee of National Liberation and the Government of the Byelorussian Soviet Socialist Republic pertaining to the evacuation of Polish citizens from the territory of the BSSR; 2) of 9 September 1944 between the Polish Committee of National Liberation and the Government of the Ukrainian Soviet Socialist Republic pertaining to the evacuation of Polish citizens from the territory of the UkrSSR and of the Ukrainian population from the territory of Poland; 3) of 22 September 1944 between the Polish Committee of National Liberation and the Government of the Lithuanian Soviet Socialist Republic pertaining to the evacuation of Polish citizens from the territory of the LSSR and of the Lithuanian population from the territory of Poland.

[5] Polish Official Journal of Laws of 1952, No. 11, item 63.

[6] Polish Official Journal of Laws of 1957, No. 47, item 222.

option to independently decide on participating in the relocation process. Notwithstanding, considering the political circumstances surrounding the operation (with the areas affected having been in fact annexed by the Soviet Union), freedom of residence granted, in the words of the parties to the repatriation agreements, was at most ostensible. Meanwhile, relocations gave rise to severe property and non-property losses on the part of the Zabużanie people, and brought about radical changes to their professional and personal lives, including the necessity of leaving behind all the assets they had amassed before moving. It must be born in mind that the first phase of relocations occurred when the war was still ongoing (1944–1945).

The Republican Accords regulated a number of questions related to property and estate, however they merely contained vague promises of future compensation rather than concrete principles governing settlements in respect of the assets left behind. This must have amplified the sense of uncertainty among the displaced as to their material wellbeing. Under the Accords, relocated farmers were to receive land of a size to be determined in a future agriculture bill, whilst peasants – as the Accords proclaimed, "even if they do not possess land at the time of relocation, they will receive, upon their wish, an allotment of land under general rules".

At the same time, the Accords imposed upon the migrants precise limits as to their freedom as regards managing their assets. They could take personal items (clothes, shoes etc.), food, home and farm equipment as well as livestock and items necessary to pursue an occupation. However, the Accords prohibited exporting any items of considerable financial value, including money, securities, gold and platinum, precious stones and works of art. These goods, following an inventory by proxies and representatives of the parties to the Accords, were to be put "under the care" of the state.

2. THE NATURE OF THE OBLIGATIONS ARISING FROM THE REPUBLICAN ACCORDS IN THE LIGHT OF INTERNATIONAL AND DOMESTIC LAW

1. Legal consequences of the above political events were far-reaching. Obligations as against the relocated citizens meant it was necessary to undertake certain actions with a view to providing them with compensation for the assets they were deprived of. Since neither directly after World War II nor during the Communist period in Poland was the problem of the Zabużanie people's property solved, the problem rose to prominence after 1989, at a time of rampant political transformations, becoming a momentous element of the constitutional discourse in the Third

Polish Republic. A critical role was played by the constitutional case law as well as the European system of human rights.

2. The Polish Constitutional Tribunal adjudicated three times in cases concerning the Zabużanie people, every time providing an impulse for the legislature to attempt to furnish a comprehensive package of reforms to redress the claims.

The first judgment – prompted by a request of the Ombudsman – of 19 December 2002[7] tackled the fundamental controversy of the legal status of the Republican Accords and claims stemming therefrom. Serious doubts had been triggered by the fact that it was problematic to consider the provisions of the Accords to have binding force domestically. Particularly, it was contentious whether the Accords should have been ratified and if so, whether such ratifications took place. Second, there was the problem of their publication[8]. However, these formal improprieties only served as a background to the critical constitutional problem, i.e. the degree to which, if at all, the legislator of the Third Polish Republic fulfilled its obligations against the Zabużanie people created by the communist regime back in 1944[9].

To scrutinize the effectiveness of the regulations governing compensation, the Tribunal tracked a number of statutes. Exclusion of certain assets (agricultural land belonging to the State Treasury and the Military Property Agency) made it impossible for the people entitled to refunds of the value of assets left outside of the territory of Poland to offset it against the sale price of land or fees for perpetual use in respect of land located within the contemporary boundaries of the country. This is why the Tribunal held those laws to be unconstitutional.

Less than two years later the Tribunal considered a provision which the legislator envisaged as a comprehensive solution of the Zabużanie people's property problem. A number of Members of Parliament challenged before the Tribunal the compatibility of the entirety of the Act of 12 December 2003 on Offsetting the Value of Property Abandoned Abroad Against the Sale Price or Fees for Perpetual Use of State Treasury's Land[10] (hereinafter: the Act on Offsetting) with Articles 2, 21, 31(3), 32, 52(1), 64(1) and 64(2) of the Constitution. The case culminated in

[7] Ref. Number K 33/02; OTK ZU No. 7A/2002, item 97.

[8] The Republican Accords were neither ratified nor published. They stipulated that they do not require ratification, but they enter into force merely by means of their signing (Article 22) and that they are not subject to publication in the Journal of Laws, but should only be made publicly available (Article 20).

[9] This perspective appears justified considering the view, dominant in the doctrine, that mere ratification and publication of the agreements did not constitute a circumstance that could have nullified their effectiveness under international law (see.: K. Michniewicz-Wanik, *Mienie*..., p. 30) nor did it nullify or otherwise restrict, in any way, the right of the Zabużanie persons to compensation pursuant to the laws of the Third Polish Republic. See: M. Masternak-Kubiak, *Glosa do postanowienia Naczelnego Sądu Administracyjnego z dnia 16 września 2004 r. (sygn. akt OSK 250/04)*, "Przegląd Sejmowy" 2005, issue 1, p. 156.

[10] Polish Official Journal of Laws of 2004, No. 6, item 39.

the judgment of 15 December 2004[11], where some of the complainants' arguments were accepted, however merely several provisions were struck down as unconstitutional.

The final judgment in the Zabużanie people's case law was the judgment of 23 October 2012[12], handed down in response to a constitutional complaint filed by an heir of a repatriate who questioned one of the requirements in respect of acquiring the right to compensation, namely the necessity of residing within the former territory of Poland as of 1 September 1939. This requirement was introduced by means of another regulation in the area, i.e. the Act of 8 July 2005 on the Execution of the Right to Compensation by Virtue of Leaving Land Outside of the Current Borders of the Republic of Poland[13].

3. Looking back at the legal characterization of the claims of the Zabużanie people, it must be noted that the Republican Accords were concluded at a unique time in the history of Polish statehood. In H. Kelsen's terms, it could be named a period of transition for the basic norm of the legal system, where legalism must have succumbed to the brute force of political and military facts. The then-existing normative order was nominally (the Communists claimed they were reverting to the system under the March Constitution of 1921) and factually (by exercising real political power since 1945 recognized – as the Provisional Government of National Unity on the international plane) challenged.

The Communist government, which attempted to forcefully impose a new regime, patently lacked legitimacy. The Constitutional Tribunal has noted this fact, arguing that the PKWN cannot be considered a constitutional authority of a sovereign state, with democratic legitimacy and actual independence. Neither is it feasible to impute equivalence into the Republican Accords as in fact they constituted a one-sided obligation of the PKWN towards the Zabużanie people. Nevertheless, as noted by the Tribunal in another case, "lack of legitimacy of such bodies as the PKWN, the State National Council, the PGNU, as well as doubtful legitimacy of their successors, cannot detract from the fact that they exercised factual state power"[14]. Therefore, already in its first judgment on the matter, the Tribunal held that these historical circumstances may not, in and of themselves, cause the claims based upon the Republican Accords to be invalid[15]. This impor-

[11] Ref. number K 33/02; OTK ZU 11A/2004, item 117.

[12] Ref. number SK 11/12; OTK ZU 9A/2012, item 107.

[13] Consolidated text: Polish Official Journal of Laws of 2016, item 2042, as amended.

[14] Procedural decision of the Polish Constitutional Tribunal of 28 November 2001, ref. number SK 5/01 (OTK ZU No. 8/2001, item 266). The view corresponds with the, commonly accepted in the literature, description of the PKWN as a "*de facto* government". See: P. Łaski, *Refleksje na temat żądań odszkodowawczych zabużan z tytułu utraty mienia na Kresach Wschodnich w świetle prawa międzynarodowego i prawa polskiego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, issue 4, p. 42.

[15] From an international perspective, it is noted that a legal defect in the Republican Accords (brought about by a lack of legal legitimacy of the PKWN) was convalidated under post-war Po-

tant inference gave an inspiration as to the overall direction of interpretation of a number of specific issues concerning the Zabużanie people's claims.

With the entering into force of the agreement of 21 July 1952 between the Republic of Poland and the USSR, the UkrSSR, the BSSR and the LSRR on mutual settlements resultant from repatriations and the delimitation of the Polish-Soviet border the Republican Accords were held to have been executed *inter partes* and its international significance was reduced to merely historical. Notwithstanding, the legislator, the Constitutional Tribunal and the doctrine continued to treat the Accords as a relevant point of reference as regards assessing the fulfilment of Poland's compensatory obligations[16]. Although – as confirmed by the Constitutional Tribunal – the Accords could not be the direct basis of the Zabużanie people's claims (the right to compensation)[17], yet they could ground a "legitimate expectation" that they would be helped.

As the Tribunal explained in its judgment of 15 December 2004, in respect of "historical agreements where the balance between the parties is heavily distorted to the severe detriment of the Polish side, coupled with the PKWN's doubtful legitimacy, this governmental body undertook a public obligation that land losses sustained by Polish citizens relocating of their own accord or relocated from the territories of the Byelorussian SRR, Lithuanian SRR and Ukrainian SRR would be compensated by the Polish state to those Polish citizens who would find themselves within the contemporary boundaries of Poland. Realization of assurances contained in the Republican Accords necessitated taking appropriate domestic legislative and administrative action".

In these words the Tribunal recognized that the claims under the Republican accords have their source in international law, at the same time ruling decisively that the essence of the constitutional problem triggered thereby pertains to obligations that the state has committed to in accordance with its law towards its citizens. This gave rise, on the part of the legislator, to a duty to introduce into the domestic system laws aimed at redressing any claims owners of land formerly within the bounds of Poland may have. Under the condition of constitutional

land-Soviet Union treaty relations through a confirmation by the PGNU, an authority commonly recognized and authorized to represent Poland on the international plane. See: R. Kwiecień, *Charakter prawny i znaczenie umów repatriacyjnych z 9 i 22 września 1944 roku*, "Przegląd Sejmowy" 2005, issue 4, pp. 11–13.

[16] R. Kwiecień, *Charakter prawny*..., pp. 20–21; K. Michniewicz-Wanik, *Mienie*..., pp. 59–60.

[17] The same inference was drawn by the Tribunal under the Constitution of the Polish People's Republic by reference to the legal construction of the Accords as "their provisions pertain, first and foremost, to the mode and timeline of evacuation of the people outlined therein and the rules governing the keeping of records of the assets abandoned by those people outside of the Polish territory. These agreements do not contain more detailed regulations concerning the rules and mode of granting compensation for immovable property left outside of the Polish borders" (judgment of the Constitutional Tribunal of 10 June 1987, ref. number P 1/87, OTK ZU 1987, item 1).

transformation in 1989 another circumstance should be noted, that is the dilemma to what extent and in what form the new democratic state should be responsible for non-performance or improper performance of the obligations of the Polish People's Republic.

On account of the above considerations, the Zabużanie peoples' problem detaches itself slightly from classic restitutive justice which constitutes, in and of itself, one of the most significant and difficult elements of transitional justice[18]. Naturally, the problem reflects, to a certain extent, traditional dilemmas related to attempts to deal with the past through the use of legal instruments. It bears testimony to the tension between justice and legal certainty. Nonetheless, the peculiarity of obligations generated by the Republican Accords, the historical context of their inception and, above all, the reality of their later recognition at a time of constitutional transformation gifted it with another dimension.

Consequently, it appears warranted to surmise that the essence of the constitutional dispute around the Zabużanie people's property comes down to determining the meaning of performance of these obligations for legitimacy of the new democratic order. For the legislature of the Third Polish Republic unilaterally adopted a number of assurances from the Republican Accords, affirming the continuity of state obligations. In this context it is key to identify those constitutional values which should serve as the foundation for assessment of state actions towards the Zabużanie people.

3. REALISATION OF ZABUŻANIE PEOPLE'S CLAIMS

1. As noted above, the Republican Accords virtually brushed aside the property (or financial) issues related to repatriation, merely mentioning them in general terms. The Accords with Belarus and Ukraine envisaged that "the value of properties left after evacuation" is to be refunded to the relocated pursuant to an "insurance assessment" under the laws in force at the time in Poland and the interested republics, and where no such laws existed – "assets are to be assessed by the proxies and representatives of the parties". It must be stressed that the Republican Accord with Lithuania reserved explicitly that these principles applied merely to movables, to the exclusion of "land" abandoned due to evacuation. All the Accords contained a declaration of the PKWN to the effect that the relocated farmers "will receive land of a size prescribed in the Act on

[18] R. G. Teitel, *Transitional Justice*, New York–Oxford 2002; A. Czarnota, M. Krygier, *Po postkomunizmie – następny etap? Rozważania nad rolą i miejscem prawa*, "Studia Socjologiczne" 2007, issue 2, p. 185.

the Agricultural Reform" and "peasants who relocate to Poland, even if they do not possess land at the time of relocation, they will receive, upon their wish, an allotment of land under general rules". In addition, the Zabużanie people were to benefit from empty "houses in towns and country neighbourhoods" following the relocation of Germans.

These and other representations and assurances made in the Republican Accords compelled the Constitutional Tribunal to establish that compensation promised therein "had the character, first and foremost, of "aid", predominantly of social nature (and not only indemnificatory) which provided Polish citizens with a new starting point in life after they lost all the assets they left behind outside of the newly found boundaries of the state. Compensation, in accordance with the Accords, was to be allocated only to citizens of the Republic of Poland (under the law as it stood on 1 September 1939) of Polish and Jewish nationality who – by deciding to migrate to the territory of Poland within its boundaries post-World War II – thereby manifested their bond with the Polish state and nation".

Already in its first judgment of 19 December 2002 the Tribunal, which scrutinized various specific institutional arrangements governing the performance of the promised benefits, acknowledged both the scale of obligations undertaken by the Polish state by means of the Republican Accords and the bleak economic post-war reality, all of which made it so that "the process of providing compensation to repatriates declared in the agreements concluded with the USSR and the Soviet Republics had to be moderate and staggered over time". Considering the difficult economic situation of the state and all social groups, the Tribunal conceded that under such conditions it could not be determined in advance that "partial compensation, limited in time or of a special character, was by its nature inconsistent with the principle of justice. This inference applies also to mechanisms which dictated merely partial compensation for losses sustained due to warfare activities and territorial revisions".

It was the opinion of the Tribunal that the nature of the obligations under the Republican Accords moves towards a wide margin of discretion of the legislator in determining the rules of compensation. However, evidently, the exact legislative structure of the manner and scope of compensation was determined – alongside the provisions of the Republican Accords themselves – by solutions that had been adopted in the field in the past.

2. Before 1989, a number of legislative acts regulated the acquisition of state assets as an equivalent for assets left behind in the Eastern Borderlands. The enactments availed themselves of the notion of the so-called right of offsetting which granted the Zabużanie people the right to offset the value of land abandoned outside of the eastern border of Poland against the value of land received

in Poland (usually the sale price or fees for perpetual usufruct)[19]. The mechanism has been retained after 1989[20].

It was not until the Compensation Act of 2005 that provided for an option for the Zabużanie people to obtain compensation in pecuniary form. As a result, an entitled person – depending on their choice – could either offset the value of land abandoned outside of the eastern border of Poland against the sale price of land owned by the State Treasury, the sale price of perpetual usufruct belonging to the State Treasury, fees for perpetual usufruct over the State Treasury's land and the sale price of buildings thereon and other equipment or premises, fees for transformation of perpetual usufruct into freehold ownership of land belonging to the State Treasury, or opt for a payment from the Compensation Fund. Both modes of compensation were capped at 20% of the value of the abandoned land.

[19] Such a mechanism was prescribed in: Article 23(1) of the Decree of 6 September 1946 on the Agricultural System and Settlement in the Recovered Territories and the Former Free City of Gdańsk (Polish Official Journal of Laws, No. 49, item 279, as amended); Article 9 of the Decree of 6 December 1946 on the Transfer by the State of Non-Agricultural Land in the Recovered Territories and the Former Free City of Gdańsk (Polish Official Journal of Laws, No. 71, item 389, as amended); Article 14 of the Decree of 10 December 1952 on the Grant by the State of Immovable Non-Agricultural Property for Construction of Housing Estates and Detached Family Houses (Polish Official Journal of Laws, No. 49, item 326); Article 12 of the Decree 18 April 1955 on the Emancipation and Regulation of Other Matters Related to the Agricultural Reform and Agricultural Settlement (Polish Official Journal of Laws, No. 18, item 107, as amended) – offsetting under this law took place "without settlement or estimation"; Article 8 of the Act of 28 May 1957 on the Sale by the State of Housing Premises and Building Plots (Polish Official Journal of Laws, No. 31, item 132, as amended); Article 17b of the Act of 14 July 1961 on the Management of Land in Towns and Neighbourhoods (Polish Official Journal of Laws, No. 32, item 159, as amended), added to the Act on 25 April 1969; Article 88 (Article 81 since 10 April 1991) of the Act of 29 April 1985 on the Management of Land and Expropriation (Polish Official Journal of Laws, No. 22, item 99, as amended).

[20] It has been envisaged in the following: Article 16 of the Act of 10 June 1994 on the Management of State Treasury's Property Took Over from the Military of the Russian Federation (Polish Official Journal of Laws, No. 79, item 363, as amended); Article 212 of the Act of 21 August 1997 on the Management of Property (Polish Official Journal of Laws, No. 115, item 741, as amended); Article 6 of the Act of 4 September 1997 on the Transformation of the Right of Perpetual Usufruct Belonging to Natural Persons into the Right of Ownership i (Polish Official Journal of Laws, No. 123, item 781, as amended); Article 3 of the Act of 12 December 2003 on Offsetting the Value of Property Abandoned Abroad Against the Sale Price or Fees for Perpetual Use of State Treasury's Land (Polish Official Journal of Laws, No. 6, item 39, as amended; hereinafter: the Act on Offsetting).

4. THE CONSTITUTIONAL STATUS OF THE RIGHT OF OFFSETTING AND THE ADMISSIBILITY OF ITS STATUTORY LIMITATIONS

1. In later judgments the Tribunal consistently upheld its original view on the nature of the obligations under the Republican Accords. However, its final pronouncement on the matter significantly titled the balance between the social and compensatory aspects of compensation. The first judgment in the series (ref. number K 33/02) qualified the right of offsetting as a self-contained public property right of a special character subject to – as a peculiar surrogate of the right of ownership – protection under Articles 64(1) and 64(2) of the Constitution and Article 1 of Protocol 1 to the European Convention of Human Rights (hereinafter: the ECHR).

The Tribunal also reserved, at the outset of its reasoning, that it is not for a constitutional court to assess "the degree to which an enforceable right of offsetting could eliminate the harm sustained by a loss of property in the Eastern Borderlands. A solution to this problem must be crafted by the legislator as it concerns the general problem of evening losses born by different groups of people as a result of decades-long territorial changes throughout history and ownership transformations having occurred several tens of years ago. What may be assessed, however, is the manner of protection of the property right accorded to citizens by the legislator. For it generated a fully legitimate expectation on the part of the Zabużanie people to the extent that the state recognizes an autonomous compensatory obligation of the state".

In subsequent judgments the Tribunal set out to verify specific limitations, both objective and subjective, of the mentioned right by singling out those elements that, in its estimation, step markedly beyond the margin of discretion left to the legislature.

2. In respect of the first group of limitations of the right of offsetting, the Tribunal admitted the lawfulness of moderating the amount of compensation for reasons related to public interest and the principle of common good (Article 1 of the Constitution), stating that one of its permanent elements is, *inter alia*, preservation of the ability of the state to perform its fundamental obligations. It is necessary to take into account the limited financial capabilities of the state when moderating compensation for morally justified claims of the displaced. The Tribunal's declarations on its willingness to also consider – for the purposes of solving the issue of offsetting – issues of an economic nature exposed it to critical remarks and accusations of diminishing the importance of justice in dealing with the past at the expense of the financial condition of the state[21].

[21] A. Młynarska-Sobaczewska, *Odpowiedzialność państwa polskiego za mienie zabużańskie*, "Państwo i Prawo" 2010, Vol. 2, p. 64.

Notwithstanding, it appears that the Tribunal's restraint in assessing the scope of compensation due should generally be viewed positively. Setting aside the indisputable difficulties with evaluating the economic capabilities and efficiency of the state as regards performing such obligations[22], this restraint is justified by considerations of the strictly political nature of disputes around economic consequences of restitutive justice. It is inconceivable to avoid questions about who is going to bear the cost of restitutive justice, particularly at a time of constitutional and economic transformation. As uniquely political matter, this issue is reserved primarily for a democratically elected legislator. No Central Eastern state has successfully grappled with it, and research shows that neither utilitarian nor arguments from justice and equity can outweigh the fiscal realities, largely due to political divisions set against the background of limited financial capabilities and a myriad of entangled and often conflicting interests[23]. More generally, one could see the limited utility of law as an exclusive instrument of dealing with the past, one which, in such circumstances as the above, must reconcile the requirements of ideal justice and political realism[24].

What deserves to be emphasized is the specificity of the Zabużanie people's property problem in a far broader context of restitutive policy. In the case of reprivatisation, it is the state that is responsible for compensation as it was a beneficiary of the performed expropriation. The legal context of the Republican Accords was different. The Polish state did not benefit from ownership transformations occurring at the time, but it undertook a one-sided obligation to assist those citizens who lost their assets in the Eastern Borderlands to the benefit of third states.

The Tribunal clearly distinguished between the historic and legal circumstances of the Zabużanie people and the victims of post-war nationalization. Whilst the former "did not have their property rights or management of assets compulsorily seized by either the Polish state or its institutions (…) There are no grounds for holding that the revision of territorial borders, which ended up harming the Zabużanie people, was contributed to in any way by the Polish state. These assets landed in the hands of the Byelorussian SSR, Lithuanian SRR and Ukrainian SRR, respectively (and state successors thereof). The character of the compensation for the value of the abandoned assets by the Polish state has never been, and is still not, that of an indemnification (in civil terms) for assets expropriated *de facto* (or without a legal basis), but constitutes *sui generis* financial assistance

[22] This was noted by the Tribunal in its judgment of 15 December 2004, in which it admitted that "there are no means nor tools to attempt an establishment of a scale of justified restrictions. It requires a meticulous and reasonable decision of the legislator to opt for a relevant determinant and 'balance' between protection of the rights of the Zabużanie people and capabilities of the state as well as protected constitutional values".

[23] W. R. Youngblood, *Poland's Struggle for a Restitution Policy in the 1990s*, "Emory International Law Review" 1995, issue 9, pp. 676–677.

[24] R. Teitel, *Transitional Justice*, New York, Oxford 2002, p. 213.

for Polish citizens who happened to have been relocated onto the current territory of Poland" (ref. number K 2/04).

This distinction is reflected in the character of state obligations towards these groups, and hence, *eo ipso*, in the margin of discretion to be accorded to the legislator as regards determining the principles of compensation. Ultimately – as the Tribunal stated in its final judgment on the matter (ref. number SK 11/12) – the scope of obligations of the state "towards Polish citizens disadvantaged in this way is much smaller than that applicable to persons who were expropriated by virtue of legal pronouncements enacted by the Polish State following World War II".

This is not to say, however, that the Tribunal declined to examine the constitutionality of the offsetting mechanism. Criticism was levelled against the uniform cap on all pay-outs set at 50,000 PLN[25]. These restrictions were held to be excessive and socially unjust, and, in particular, inconsistent with the principles of protection of vested rights and trust of citizens towards the state. What was decisive to reach that conclusion was the fact that the legislator failed to indicate the factors it guided itself by in exerting such a clear interference with the right of offsetting. The Tribunal in its judgment of 15 December 2004 (ref. number K 2/04) deemed the amount limits "not sufficiently justified and too arbitrary, and therefore – falling short of the requirements in Articles 2, 31(3) as well as Article 64(2) of the Constitution". Moreover, the Tribunal held that the institution of a uniform amount limit of 50,000 PLN led to unequal treatment of the entitled persons (Article 32) and to equal protection of their property rights (in breach of Article 64(2)) since "those entitled to compensation, in case of whom the value of abandoned assets surpasses 50,000 PLN, could obtain full repayment (in relation to the entirety of the abandoned property), whilst those with the right of offsetting amounting to a larger sum – only partial repayment (or even merely fractional)". It was significant for the Tribunal that all the regulations concerning compensation hitherto had not envisaged such limitations.

In the same judgment the Tribunal negatively assessed the deprivation by the legislator of the right of offsetting in relation to people who, pursuant to other provisions of the law, obtained ownership or perpetual usufruct of a property which value was lower than that of the right of offsetting (thus only partially executing their right of offsetting)[26]. Held to be in contravention of the constitutional principle of equal protection of property rights (Article 64(2) of the Constitution), it introduced a hardly definable, vague criterion of limitation (falling foul of Article 64(1)). This in turn, led to discrimination of those who, before the entering into force of the 2003 Act, took steps aimed at executing their right of offsetting.

[25] The Tribunal examined Article 3(2) of the Act on Offsetting and Article 53(3) on the Act of 30 August 1996 on Commercialization and Privatization (Polish Official Journal of Laws of 2002, No. 171, item 139, as amended).

[26] This was regulated by Article 2(4) of the Act on Offsetting.

Ramifications of this arrangement must have been, in the eyes of the Tribunal, socially unjust and undermining of the principle of trust of citizens towards the state, which was all the more deplorable as the legislator had in the past attempted to provide an incentive to the Zabużanie people to pursue claims for offsetting under the threat of losing that right if not raised within a specified time period.

Remarkably, in the K 33/02 judgment the Tribunal examined not only the formal structure of the provisions governing the right of offsetting, but also their normative context which allowed it to fully appreciate and distil the meaning of rights to be derived therefrom. As the Tribunal pointed out the forms of compensation prescribed by the legislator may vary, however they must be tangible and proportionate.

"Functional antinomy" is a term the Tribunal used to describe the state of the currently existing legislation on the matter. Relevant was the practical functioning of the key laws (their context and the circumstances of executing the right of offsetting in practice). Critique was aimed at the parliament's practice of excluding new types of property from the ambit of the right (assets belonging to the Treasury Agricultural Property Stock and the Military Property Agency). That practice, compared to a situation where a debtor disposes of their property, had been an object of intense criticism of academic writers[27].

In the face of a lack of a real possibility of using the right of offsetting, it became, as the Tribunal put it, an "empty obligation" (*nudum ius*). Availability of the right was evaluated "not only by reference to exclusions of certain properties from its ambit for any reason, but the real chances of executing the right as well as its economic value. The Acts of Parliament which decreased the availability of the State Treasury's land to the Zabużanie people have, in essence, led to their expropriation as they are not, and will not, be able to benefit from their right". Whereas "an assessment of the possibility to execute this right is the more significant as the legislator – accepting as a rule the existence of obligations towards the Zabużanie people by virtue of international agreements – at the same time did not execute any alternative compensatory mechanisms. The right of offsetting was, for decades, the sole (*de lege lata*) solution at the disposal of the Zabużanie people to obtain compensation for material loss they sustained as a result of territorial revisions in the 1940s".

3. Of significance in the Tribunal's case law have been considerations about legislative limitations of the scope of recipients entitled to benefit from compensation (subjective limitations). First, scrutiny was lent to the requirement that the Zabużanie people or their successors, to execute their right of offsetting, had to permanently reside within the territory of Poland as of 30 January 2004 (the date

[27] P. Łaski, *Refleksje*..., p. 49.

the Act on Offsetting entered into force), 60 years after the Republic Accords were signed[28]. It was held to be unreasonable and arbitrary in the K 3/04 judgment.

The Tribunal stressed that no previous regulation concerning compensation envisaged such a restriction. The provision, consequently, breached the principle of proportionality (due to limitation of the right to offsetting for reasons other than those specified in Article 31(3) of Constitution), as well as Article 32 (unequal treatment of potential recipients due to their residence inside or outside the territory of Poland) and Article 64(2) (excessive distinctions as regards protection of property rights of the Zabużanie people).

The domicile requirement, i.e. that the displaced must have lived within the territory of Poland as of 1 September 1939 (present in both the Act on Offsetting and the Compensation Act of 2005), was also negatively assessed[29]. The prerequisite was examined as part of proceedings commenced upon a claim of one of the Zabużanie people's heir. In the SK 11/12 judgment the Tribunal denied that the domicile requirement appeared in the Republican Accords, which referred to people "resident" in the Eastern Borderlands, and no specific date was indicated therein. Institution of the domicile requirement in subsequent enactments "constitutes an unwarranted limitation of the rights of the Zabużanie land owners to compensation for abandoned assets – both by reference to the Compensation Act and the legal situation between 1955–2003".

The Tribunal contended that the domicile requirement "serves to tailor the Zabużanie people's compensation to the budgetary capabilities of the state which is – on account of the source of the obligations in question – constitutionally impermissible". The judgment referred to historical arguments to interpret the legal context of repatriation processes. In Interwar Poland, it was stated, the scope of protection of land ownership did not depend on one's place of residence and that – according to interwar provisions in force till the sixties of the 20th century – having more than one place of residence was permitted. The Tribunal did not avoid calling upon the reality of the time at which the Zabużanie people's displacements occurred. The Tribunal recognized the fact that before the Second World War, many workers travelled to the place of business of their employer, as well as the fact that workers' migration waves were connected with sizable state investments undertaken at the time. It was extremely unjust to predicate the availability of compensation upon the residence requirement where it was the state itself whose actions prompted citizens to move, often large distances. The Tribunal's reasoning also drew upon the principles of reasonableness and life experience, in line with which "in most cases a change of place of residence without selling the previous property manifested that the person concerned intended to return to the Eastern Borderlands".

[28] This requirement was instituted by Article 2(1)(3) of the Act on Offsetting.

[29] As per Article 2(1)(1) of the Act on Offsetting and Article 2 point 1 of the Compensation Act of 2005.

The requirement, in conclusion, was struck down by the Tribunal as excessive, falling in contravention of Article 61(2) in conjunction with Article 31(3) of the Constitution. Interestingly, the Tribunal considered the principle of social justice fit to constitute a lens through which the challenged provisions should be assessed, as well as the principles of trust towards the state and the law enacted thereby, even though the complainant did not argue those principles in their written case.

5. TIME FACTOR IN THE CONTEXT OF THE LEGISLATIVE DISCRETIONARY POWER

1. Judging by the reasoning and outcomes of the Constitutional Tribunal's pronouncements analysed above, two significant tendencies are discernible. As for both, it appears, the time factor holds considerable weight.

First, the Tribunal moved away from emphasizing the social character of compensation towards a more indemnification-centred analysis. In the final judgment it was affirmed that compensation for the assets abandoned in the Eastern Borderlands is not to be understood as compensation for expropriation under Article 21(2) of the Constitution. For "the right to that benefit is "derivative" from the lost right to Kresy property only in the sense that possession of a legal title to the abandoned assets is one condition for obtaining compensation". With regard to the indemnificatory element, the Tribunal noted its distinction from compensation envisaged in Article 21(2), holding that "both functions of compensation in issue in this case shall be assessed by reference to the time that has passed since the Zabużanie people were deprived of their property".

In the aforementioned final judgment the Tribunal accorded more weight to the indemnificatory character of the compensation. First, it was noted that the structure of compensation prescribed in the Compensation Act of 2005 was far from that of a welfare benefit. "The challenged act (as well as its predecessors) (…) does not grant 'any settling-in assistance' to the victims of expropriation who did not own property in the Eastern Borderlands, but only lived there all their lives on leased, rented or otherwise licensed premises and were at all times in a worse economic situation than those entitled to compensation (…). Compensation (and, previously, the right of offsetting) were always granted to all Zabużanie people under equal rules, regardless of how big of a percentage of their overall assets the abandoned land constituted". The Tribunal buttressed this line of reasoning with the fact that the amount of compensation is calculated with respect to the value of the abandoned assets, whilst social benefits normally represent a lump sum. Also, the right to have one's entitlement to compensation is sub-

ject to succession. In the assessment of the Tribunal "the challenged legislation permitted granting compensation in cash should be assessed rather as the sign of strengthening the compensatory role of these rights, but not their social character. Exercise of the right of offsetting 'necessitated' that the compensation be, at least temporarily, directed to obtaining a right of ownership or perpetual usufruct over land as a primary good"[30].

Second, I wish to draw attention to the Tribunal's perspective on the margin of discretion accorded to the parliament when it comes to regulating compensation. Initially, the Tribunal declared restraint in this issue, stating that balance must be struck between numerous factors surrounding restitution disputes (i.e. justice and legal certainty). With time, however, as evinced especially in the final judgment, the Tribunal resorted to more formalized means of examining the legislator's discretion. Calling upon L. Fuller's principle of internal morality of the law, the Tribunal applied a more rigorous construction of the domicile requirement, thus stressing that instrumental effectiveness of law should not overshadow its legitimacy in a democratic state.

Subsequent judgments of the Tribunal have tended to show that as time passes and the foundations of the democratic state strengthen, the legislator's margin of discretion as regards the Zabużanie people's property issue shrinks. Particularly, the shortcomings of the challenged legislation were said, in the final judgment on the matter, to deserve "distinctly strong criticism also because the law attaches to a certain, constantly diminishing, group of people whose age and state of health may impede them in executing their rights".

6. THE SIGNIFICANCE OF THE BRONIOWSKI V. POLAND CASE BEFORE EUROPEAN COURT OF HUMAN RIGHTS

1. The international context played a critical role in solving the Zabużanie people's problem in the Third Polish Republic. Of particular importance were

[30] A clear shift towards accepting the indemnificatory character of compensation signifies a turn in the position of the Constitutional Tribunal in this respect and as such it failed to win unanimous approval among the members of the adjudicating panel. For an analysis of the preparatory works on the legislation does not yield support to the opinion that the legislator changed its outlook on the issue. It appears that rather it was intended to expedite the process of execution of the Zabużanie people's claims by introducing a direct manner of compensation in the form of money payments. Judge Z. Cieślak in his dissenting opinion stressed that to say that compensation is to indemnify the entitled families for difficult financial conditions they had to suffer in the past constitutes "a departure from internationally established and accepted legal foundations of the provisions in question and unwarrantedly distorts the purpose and function of the law, encroaching upon the margin of discretion of the legislator".

Poland's obligations given rise to due to the adoption of the ECHR. Once the jurisdiction of the European Court of Human Rights (ECtHR) has been recognized, Zabużanie people's claims could be assessed through the prism of applicable international standards. The culminating point was the case of *Broniowski v Poland* (Application No. 31443/06), the judgment in which was issued on 19 December 2002[31].

It shall be stressed that as the jurisdiction of the ECtHR is limited, a broader, moral-political approach to the legal problem before it was barely feasible. Already at the outset of the judgment the Court asserted that it was not its task to consider any legal, moral, social, financial or other obligations of the Polish state stemming from the fact that the Zabużanie people were deprived of their assets by the Soviet Union after World War II and forced to migrate.

The Court felt it was in its right to consider only whether Article 1 of Protocol 1 (the right to property) was violated as a result of the actions and omissions of the Polish government as against the execution of the right of the complainant to compensation he was entitled to under Polish legislation in force at the time Protocol 1 was enacted. The Court – by reference to the findings of the Polish Constitutional Tribunal and domestic common courts – held that the complainant's rights were of a sufficiently property character to come within the ambit of Article 1 of Protocol 1.

Legality and efficiency of the pertinent Polish regulations were examined, particularly as to there being a balance between the interests of an individual, whose rights have been violated, and the general interest, for the benefit of which given restrictions were instituted. The Court opined that a state undergoing a political and economic transformation has a wide margin of appreciation when it comes to shaping the law and introducing restrictions and limitations as regards its citizens' property rights. Among the aims pursued by the challenged legislation, which impeded the complainant's claim, were: reintroduction of a system of local government (it resulted in a communalization of land that could potentially be included in compensation), restructuring of the agricultural sector and acquisition of financial means to modernize military institutions, something lying in the interest of the general public. This, however, in the opinion of the Court, could not justify the reality that the Zabużanie people were not entitled to an equivalent despite binding domestic legislation providing them with that right. Compensation awarded to the complainant in the *Broniowski* case amounted to just 2% of the value of the property left behind, which is way out of balance. The principles which underpin the ECHR, particularly the rule of law and legality, require states not only to obey, respect and apply domestic legislation in a predict-

[31] For more on this, see: M. Krzyżanowska-Mierzewska, *Sprawa mienia zabużańskiego przed ETPCzP*, "Europejski Przegląd Sądowy" 2008, issue 12; P. Leach, *Beyond the Bug River – A New Dawn for Redress Before the European Court of Human Rights*, "European Human Rights Law Review" 2005, issue 2.

able and coherent manner, but also to ensure proper legal and factual conditions for its execution.

2. The judgment in *Broniowski* is relevant not only to the Zabużanie people's question, but, more broadly, to the development of an international system of protection of human rights in Europe. For in the case the Court resorted, for the first time, to a procedural device since dubbed a "pilot judgment"[32]. It was stated that at the root of every violation of an individual right lies a systemic problem whose source is the content of the law, hence it is the case that not only the complainant, but a wider group of people is affected by the violation.

The pilot judgment procedure was aimed at identifying structural problems that could give rise to recurrent violations of rights guaranteed by the ECHR. The judgment in *Broniowski* was, without a doubt, an impulse for the Polish legislator (acted upon in the form of the enactment of the Act on Offsetting in 2003) to adopt new legislative norms that the Court considered effective. As a consequence, subsequent analogous cases were dismissed by the ECtHR[33]. As evinced by the Constitutional Tribunal's judgment of 15 December 2004, however, the Act on Offsetting was defective and was held to be partially in defiance of the Constitution.

Judgments in cases concerning the Zabużanie people could serve as a model example of judicial dialogue. The question was considered almost simultaneously by the Polish Constitutional Tribunal and the ECtHR, which availed themselves of each other's reasoning to buttress their arguments. Judgments of both courts prompted the legislator to enact new laws. Also, the synergy conduced to entrenching the legitimacy of both courts[34]. *Broniowski* and other pilot judgments (e.g. *Hutten Czapska v Poland*) marked an important step in the development of the European system of human rights. Beforehand, what lay at the core of the ECtHR's control mechanism was an individual complaint, which caused the institution to be perceived as a superior court to which complainants resorted only after they exhaust all domestic avenues of appeal. Adoption of a broader, more systemic approach to the Court's determinations moved it closer to a European

[32] For more on this, see: E. Lambert-Abdelgawad, *La Cour européenne au secours du Comité des Ministres pour une meilleure exécution des arrêts "pilotes" (en marge de l'arrêt Broniowski)*, "Revue trimestrielle des droits de l'homme" 2005, issue 61, pp. 203–224; L. Garlicki, *Broniowski and after: on dual nature of pilot judgments*, (in:) S. Breitenmoser, B. Ehrenzeller, M. Sassoli, W. Stoffel, B. Wagner Pfeifer (eds.), *Human rights*, *democracy and the rule of law: liber amicorum Luzius Wildhaber*, Zürich 2007, pp. 177–192.

[33] It was in this way that application of a pilot procedure eased the burden on the system of protection established in the Convention, thus preventing an institutional paralysis of the ECtHR.

[34] W. Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights*, *the Accession of Central and East European States to the Council of Europe*, *and the Idea of Pilot Judgments*, "EUI Working Papers LAW" 2008, No. 33, pp. 35–36.

constitutional court, endowing its judgments with a more generally applicable dimension[35].

7. TRUST AS THE FOUNDATION AND SYMBOL OF CONSTITUTIONAL TRANSFORMATION

1. The case law of the Strasbourg court, although it did provide an impulse for *ad hoc* activity of the legislator, could not replace it in an inevitable attempt to solve a complicated moral and social dilemma that compensation for the Zabużanie people's property represents. The Constitutional Tribunal must have limited its inquiry to the constitutional boundaries of the legislator's discretion. In other words, the judiciary could not substitute for the legislature in resolving this pressing and complex moral, political and economic conundrum.

Already in its first judgment (ref. number K 33/02), the Constitutional Tribunal explicitly noted that, in constitutional terms, the issue of compensation for the Zabużanie people cannot be "boiled down to redressing the injustice sustained by those people under a totalitarian regime". The political and constitutional problem at stake could be broken down to a question about the scope of responsibility of a contemporary democratic state that is the Third Polish Republic for actions and obligations undertaken by a non-democratic regime operating without proper legitimacy[36]. Aside from other specific constitutional minutiae, the Tribunal stressed time and time again that the Zabużanie people's claims should be examined in the context of the principle of trust of citizens towards the state and the law enacted thereby.

This perspective should not be surprising as the above judgments touched upon the problem of symbolic and legal continuity of a state during a time of constitutional transformation[37], which had an unprecedented impact upon the

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[35] J. L. Jackson, B*roniowski v. Poland: a recipe for increased legitimacy of the European Court of Human Rights as a supranational Constitutional Court*, "Connecticut Law Review" 2006, Vol. 39, issue 2, pp. 759–806; W. Sadurski, *Partnering*..., pp. 43–46.

[36] *Cf.* A. Młynarska-Sobaczewska, *Odpowiedzialność*..., p. 57; P. Łaski, *Refleksje*..., p. 42.

[37] It was already in the K 33/02 judgment that the Tribunal added the so-called discontinuation principle to the group of relevant exceptions and for anyone to successfully call upon it would require a clear declaration of the legislature. This view is lent support to by academic writers who have argued that pre-1989 legislation was, post transformation, adopted with reservations, which does not equate granting legitimacy to the 1944–1989 regime, but merely recognizes the effects of then-enacted legislation (including obligations the Polish People's Republic undertook towards its citizens), except those irreconcilable with the rule of law. It has been observed that "[in] the area of public law, giving effect to legal relations should depend upon whether they were intended to serve the common good or an equitable individual interest worthy of protection, or whether they constituted an element of an institutionalized system of repression or state dominance", so writes:

legitimacy of the new political-legal order. For the legislator of the Third Polish Republic affirmed the availability of the right of offsetting against the value of acquired ownership or perpetual usufruct rights, thus formally taking over (inheriting) previous obligations owed to this particular group of citizens. In this way the principle of trust actualized as a social value and an object of legal protection, rightly described by sociologists as "the missing link of the Polish transformation"[38]. For the Zabużanie people trust connoted a particular reaction both towards the state, undergoing a radical constitutional transformation, and the law as an instrument of social change.

The citizens' sense of belonging and identification with a wider polity is an inextricable element of the value of trust towards the state. Corresponding with it is the duty of public authorities to protect the polity's members. Although, from a legal standpoint, they are, most of the time, obligations of the *ex gratia* type, they play a pivotal role in the trust-building process[39]. It must be remembered that any legislative attempts aimed at redressing harms deeply entrenched in history must not only balance all the relevant interests in a reasonable manner[40], but also manifest respect for all those affected by injustice. There is hardly a better test of trust than keeping a promise made to the victims. Trust is not attained by enacting irrational, dysfunctional, "emptied out of content" or even ostensible regulations. This may be a reason why the Tribunal has applied an increasingly more rigorous standard of assessment of the relevant legislation.

The stringency of the Tribunal's interpretation could be explained by the fact that the Zabużanie people's issue was a litmus test to the entire restitutive policy of the Third Polish Republic. For the Tribunal had no point of reference to rely on in its determination – the legislator had failed to institute any systemic laws regarding reprivatisation. Hence some have alleged that, paradoxically, the Zabużanie people were privileged by the parliament.

The Tribunal accepted that, notwithstanding the above reservations, the obligations undertaken in the Republican Accords have the character of public promise, which was said to have justified the "references" to the Accords in legislation establishing the right to compensation. The Tribunal also pointed to specific constituent elements of the rule of law which impose certain restrictions on the legislator's discretion. Primarily, it held that it was necessary to "estimate, in a complex and diligent manner, the possibility of there occurring a real, comprehensive and, as far as possible, final redress of any and all claims arising by virtue of the right of offsetting, as well as whether it is possible

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K. Zaradkiewicz, *O obowiązku zadośćuczynienia zabużanom, czyli o problemie lojalności państwa i obywatela*, (in:) M. Zubik (ed.), *Prawo a polityka*, Warszawa 2007, p. 256.

[38] P. Sztompka, *Zaufanie: brakujące ogniwo polskiej transformacji*, "Odra" 2009, Vol. XLIX, issue 3.

[39] K. Zaradkiewicz, *O obowiązku…*, pp. 254, 257.

[40] Z. Ziembiński, *O pojmowaniu sprawiedliwości*, Lublin 1992, pp. 183–184.

to enact constitutionally compliant statutory provisions which would eliminate any obstacles and improprieties in the actions of public authorities" (ref. number K 2/04).

It is a natural element of building trust to a new order that all laws prone to being classified as arbitrary (if only due to insufficient justifications for their existence) are repealed. The sentiment found its strongest expression in the SK 11/12 judgment, where the Constitutional Tribunal opined: "If the parliament decides to introduce benefits that are not absolutely required by the Constitution, it must reasonably and cautiously determine all the conditions governing their inclusivity and exclusivity. In particular, it is impermissible to resort to such access criteria that are arbitrary and detached from the purpose of a given regulation, albeit easy to apply and verify". These declarations of the Tribunal, it is submitted, shall be read chiefly as a protest against the practice of instrumentalisation of law, so characteristic of the previous political regime.

8. SOLIDARITY AS A MISSING LINK OF SYSTEM TRANSFORMATION

1. The fact that the Constitutional Tribunal clearly accentuated the principle of citizens' trust towards the state and the law enacted thereby may be interpreted as a step towards a far-reaching and long-term goal of building stable foundations of the rule of law which recognizes "inherited" obligations and performs them diligently and with respect for the victims. It was an aspiration for the post-Communist Poland to settle with the past obligations which, in turn, would prove the authenticity of the constitutional transformation[41].

Whereas the Tribunal's reasoning heavily featured the principles of common good (to justify the moderation of claims) and formal requirements of the rule of law (to assess the margin of discretion of the legislature), what appears to have been missing from the debate around the Zabużanie people's property is the constitutional principle of solidarity[42].

[41] A. Młynarska-Sobaczewska notes in this context that the type of responsibility stemming from Bug River property claims may be referred to as liability *ab initio*. See: A. Młynarska-Sobaczewska, *Odpowiedzialność*..., p. 69.

[42] Solidarity as a value is featured both in the preamble to the Polish Constitution of 1997, where "the obligation of solidarity with others" is imposed upon those who apply the Constitution, and in Article 20, as an element of the principle of social market economy.

Solidarity connotes an imperative context for determining complex problems straddling the border between politics and law[43]. It is hardly disputable that it lays at the core of the state's initial obligation undertaken towards the Zabużanie people – the goal was to include this group of citizens in the newly born polity. At a time of political transformation solidarity's relevance gained more value. By referring to solidarity the integrating function of law, crucial at a time of systemic changes, could have been bolstered strengthening the spirit of the community in confrontation with its difficult past. In this way, the idea of solidarity could be an axiological foundation for policy of transitional justice.

In practice, however, fragmentary, forced and often inept legislative attempts resulted in reducing the complex issue of the Zabużanie people, within the constitutional discourse, to protection of individual property rights. Subsequent legislative solutions were adopted as a reaction to domestic and international courts' objections. Whereas, the legislator had no comprehensive plan for solving this issue. The adopted approach, acceptable in the context of resolving conflicts of constitutional rights in established democracies, seriously hampered any efforts to bring the problem within the scope of transitionary justice. Neither did it release the community-building potential residing in a reflection on the ways of surmounting the issue.

It is pertinent to note at this point that the lack of conscious restitutive policy based upon solid theoretical foundations was a general feature of transformation in all Central Eastern European states. It was the liberal understanding of the right to property that underpinned the transition[44]. In the case of the Zabużanie people, due to the dearth of arguments drawing upon other important constitutional values and principles, on which the state restitutive policy could be based, the argument from the right to property must have gained the most prominence. This is probably why there was an observable shift in the approach of the Constitutional Tribunal towards a more indemnificatory character of the Zabużanie people's compensation. The limited jurisdiction of the ECtHR contributed to this narrow approach.

Conversely, it is submitted that, in the context of a political transformation, solidarity could yield a wider axiological foundation for a budding legal order than protection of property rights, in practice accorded not to the directly affected but to their successors. The Constitutional Tribunal, however, did not tackle this

[43] It must be stressed that this argument has been prominent is the constitutional discourse of West Germany where, in line with the so-called principle of nationwide solidarity, the entire society was burdened with the responsibility for rebuilding the state and compensating people who were relocated from lands that, as a result of World War II, ended up beyond the boundaries of the democratic German state. In the Polish doctrine, direct references to the principle of solidarity were rather rare. Solidarity has been referred to by K. Zaradkiewicz in a peculiar context – as a normative sources for moderating the amount of compensation. See: K. Zaradkiewicz, *O obowiązku*..., pp. 248–249, 253.

[44] C. Kuti, *Post-Communist*…, pp. 285–287.

argument in a meaningful way. This restraint cannot be explained by the complaint-based character of proceedings before the Constitutional Tribunal. For it had the option of referring to the mentioned argument indirectly, if only by signalling it in passing, as it did with the principles of common good, as well as trust of citizens towards the state and the law enacted thereby.

In defence, however, it is true that the systemic context of Poland's transformation has imposed certain obstacles. For a successful reference to social solidarity would necessitate broadly addressing the issue of reprivatisation, one of the largest neglects of the Polish transformation. Paradoxically, solidarity, which used to underlie the undertaking of obligations towards repatriates in the first place, could be used nowadays to justify moderating and cutting down on granting compensation or putting the Zabużanie people in a wider context of other harms which redress has become a duty of the new state. This obstacle, admittedly, is strictly political and as such cannot justify giving up on arguing for the normative value of the principle of solidarity.

Finally, it must be noted that such political determinations belong to the legislature. Even the most activist constitutional court, functioning within the paradigm of a "negative legislator", could never substitute for a legislative power with the widest democratic legitimacy. The international system of human rights contains a similar functional limitation. Constitutional case law in cases concerning the Zabużanie people could, however, be an impulse to set off a discussion on this important dimension of social and constitutional transformation.

It would be a functional solution to draw upon the idea of solidarity to resolve complex issues of the past. In this way the uncontroversial axiological justification for historical obligations could be tapped into. Simultaneously, introduction into the constitutional discourse of the argument from solidarity, at an important time for Poland's constitutional identity, would be capable of emphasizing a momentous source of legitimacy for the new order. This could be a chance to reach for a modern instrument of social integration that could be used to build solidarity on the institutional foundation of the rule of law[45].

[45] For more on the subject of the relation between solidarity and the rule of law, see: A. Czarnota, *Prawo a współczesne odmiany solidaryzmu społecznego*, (in:) A. Łabno (ed.), *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, Warszawa 2012, pp. 72–73. More on this: K. J. Kaleta, *Dialektyka solidarności a państwo prawa*, "Filozofia Publiczna i Edukacja Demokratyczna" 2016, Vol. V, issue 1 pp. 37–62.

TRUST AND SOLIDARITY AT A TIME OF TRANSFORMATION. THE PROBLEM OF SO-CALLED BUG RIVER PROPERTY CLAIMS IN THE CASE LAW OF THE POLISH CONSTITUTIONAL TRIBUNAL AND THE EUROPEAN COURT OF HUMAN RIGHTS

Summary

The article deals with the issue of the Zabużanie people's claims. The Zabużanie people were persons who lost their assets as a result of relocation from the Eastern Borderlands (also known as Kresy) of the Second Republic of Poland caused by a revision of territorial borders after the Second World War. The Author describes the genesis and legal nature of the so-called Republican Accords regulating the principles of assistance for displaced persons and forms of realisation of the Zabużanie people's claims in the statutory law of the Third Republic of Poland. Then, the author discusses the case law of the Constitution Tribunal and the European Court of Human Rights related to that legislation. He indicates a shift in the case law with reference to the scope of discretion accorded to the legislator in respect of adopting compensatory mechanisms. The author underlines the special role that was played by the principle of trust of citizens towards the state and the law enacted thereby in the Tribunal's assessment of the adopted legislative solutions. At the same time, the author indicates that the potential of the constitutional idea of solidarity was not fully used when solving the issue of the Zabużanie people's claims. In the opinion of the author, the idea of solidarity could be an axiological foundation for a policy of transitional justice.

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KEYWORDS

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