

Judgment of 19th December 2002, [K 33/02](#)
**RIGHT TO OFFSET THE VALUE OF PROPERTY LEFT IN THE FORMER
 EASTERN TERRITORIES OF POLAND (I)**

Type of proceedings: Abstract review Initiator: Commissioner for Citizens' Rights	Composition of Tribunal: 5-judge panel	Dissenting opinions: 0
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Legal provisions under review	Basis of review
Several provisions regulating the disposition of the State Treasury's real estate, insofar as they do not allow purchaser to offset the value of property left beyond the River Bug [Real Estate Management Act 1997: Articles 212(1) and 213; Farm Real Estate of the State Treasury Management Amendment Act 1993: Article 17; Certain Components of the State Treasury Property and the Military Property Agency Management Act 1996: Article 31(4)]	Rule of law Principle of proportionality Protection of property rights [Constitution: Articles 2, 31(3), 64(1) and (2)]

Following the end of the Second World War, Poland's eastern and western borders were shifted westwards, as a result of a decision of the Allied Powers. Poland lost the areas situated east of the so-called Curzon line to the Soviet Union, and more specifically to the Lithuanian, Belarusian and Ukrainian Soviet Republics. The Polish populations from these areas were relocated to Poland, within her new borders. The issue of compensation for property left by Polish nationals in the territories annexed to the USSR was intended to be regulated in domestic law, according to a series of so-called republican agreements (*umowy republikańskie*) – these being agreements concluded between the “Polish Committee of National Liberation” (*Polski Komitet Wyzwolenia Narodowego*, a provisional legislature and executive of the Communist regime), and the governments of the neighbouring Soviet Republics.

As of the year 2002, the Polish legislator had not introduced a system of compensation for the aforementioned property, known as “property left beyond the Bug River” (*mienie zabużańskie*) – from the name of the river constituting the border between Poland and the USSR. The relevant statute (i.e. Offsetting the Value of Property Abandoned Beyond the Present Borders of the Polish State Against the Price of State Property or the Fee for the Right of Perpetual Usufruct Act 2003) was adopted only on 12th December 2003. Nevertheless, statutes regulating the administration of State Treasury estates, adopted at various earlier times, allowed the value of property left beyond the Bug River to be offset against the price to be paid for purchase of State-owned land, or against the price to be paid for perpetual usufruct right (*prawo użytkowania wieczystego*, i.e. a legal concept similar to a perpetual lease) over such land.

In the present case, the Commissioner for Citizens' Rights challenged several provisions regulating the disposition of real estate managed by the State Treasury's Agricultural Property Agency (*Agencja Własności Rolnej Skarbu Państwa*), now renamed as the Agricultural Real Estate Agency (*Agencja Nieruchomości Rolnych*) and also by the Military Property Agency (*Agencja Mienia Wojskowego*) in relation to real estate which had previously formed the part of so-called State Agricultural Farms, or which had

become redundant for army purposes – insofar as these provisions did not allow the value of property left beyond the Bug River to be offset against the price of land purchased by private persons from the aforementioned Agencies. The Commissioner considered that the “right to offset” vested in persons who left their property beyond the Bug River – and their heirs – constituted a subjective property right protected by Article 64 of the Constitution. The principle of the citizen’s trust in the State and its laws, contained in Article 2 of the Constitution, imposes a duty on the State to adopt provisions which ensure an effective and efficient realisation of citizens’ rights. The Commissioner alleged that, by restricting the stock of State-owned land to which the right to offset the value of property left beyond the Bug River applies, the legislator made it virtually impossible to settle the claims of persons who left their property there, thus rendering their “right to offset” illusory. In the Commissioner’s opinion, the legislator thereby limited the protection of property rights in a manner contrary to the criteria of proportionality contained in Article 31(3) of the Constitution, thus infringing the essence of the property right, in violation of the prohibition expressed in the same constitutional provision.

RULING

The challenged provisions do not conform to the principle of citizens’ trust in the State and its laws, stemming from Article 2 of the Constitution, and with the guarantees of protection of property rights, contained in Article 64(1) and (2), read in conjunction with Article 31(3), of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. The principle of citizens’ trust in the State and its laws, inferred from the constitutional principle of the rule of law (Article 2), comprises a prohibition on the creation of illusory legal institutions, and in particular such provisions which prohibit the realisation of a subjective right recognized by the legislator.
2. All property rights established in the Polish legal order are subject to protection on the basis of Article 64 of the Constitution. This protection concerns not only property rights resulting from legal relationships based on civil law, but also includes so-called public property rights.
3. The constitutional principle of equal protection of property rights contained in Article 64(2) means, firstly, that everyone is entitled to such protection, notwithstanding the personal characteristics or other special features of the person concerned; a property right provided for by statute is subject to protection regardless of the status of the beneficiary. Secondly, the protection of property rights must be equal for all subjects. The principle under consideration, however, does not concern any particular contents of the property right and does not imply identical protection in case of different categories of rights, even if they are similar in a functional sense (e.g. rights relating to usufruct and rights relating to tenancy). However, this principle does not permit the legislator to take a strictly formal approach to the categorisation of property rights and to grant a certain right weaker legal protection than other rights which, although for-

mally belonging to a different category of property rights, are similar or almost identical in terms of their content, construction and function.

4. In principle, the legislator may not restrict an individual's possible enjoyment of a property right to the point where this right becomes a specific *nudum ius* (i.e. a right which is practically devoid of material value). In the light of Article 64(1) and (2) of the Constitution, it is especially illegitimate to interfere in the sphere of an individual's legally protected property interests, without formally depriving the interested person of their legal title, since this amounts to *de facto* expropriation, within the meaning of the jurisprudence of the European Court of Human Rights on the basis of Article 1 of Protocol No.1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention).
5. The property rights protected by the Polish Constitution and the European Convention comprise the "right to offset", which allows the value of property left by Polish nationals beyond the Bug River to be offset against the price to be paid for State-owned land or for perpetual usufruct rights over such an estate. The right of offset was also present as a rule in Polish post-war legislation after 1990 (in particular in Article 212 of the Real Estate Management Act 1997). That right constitutes a substitute for the right to property which was lost; it is not merely an expectation of the right to compensation, but rather a public property right given legal recognition in the legal order of the Republic of Poland.
6. Although the Polish Committee of National Liberation was not a constitutionally legitimate organ of a sovereign State, the agreements concluded by the Committee with the governments of the Soviet Republics – Lithuania, Belarus and Ukraine (the so-called "republican agreements", which were not promulgated in the Journal of Laws), together with the intergovernmental agreement of 21st July 1952, created legitimate expectations of Polish nationals as regards the domestic legal regulation of compensation for the loss of property beyond the Bug River. The agreements allowed the Polish legislator unfettered discretion as to how to regulate the issue of compensation.
7. The challenged statutory provisions, which restrict the possibility of enjoyment of the right to offset vested in persons who left their property beyond the Bug River, and which violate the contents of this right, cannot be considered necessary in a democratic State governed by the rule of law and do not correspond to any of the values indicated in Article 31(3) of the Constitution. Accordingly, these provisions infringe the guarantees expressed in Article 64(1) and (2) of the Constitution.
8. Furthermore, the constitutional principle of protecting the citizen's trust in the State and its laws (cf. point 1 above) requires the removal from the legal order of obstacles which preclude the enjoyment of the right to offset. In accordance with this principle, it is the method of protection of the right to offset which is relevant, and not the contents of this right.
9. Article 212(1) of the Real Estate Management Act 1997 (which allows the value of property left beyond the Bug River to be offset against the price to be paid for purchase of land or for perpetual usufruct right) is inconsistent with the constitutional provisions forming the basis of the Tribunal's review only insofar as it excludes the possibility to offset the value of property left beyond the Bug River against the price to be paid for State-owned farm land. The remainder of this provision shall remain in

force following the entry into force of the Tribunal's judgment, since this remainder provides for the very mechanism of the right to offset.

10. The removal of legal restrictions created by the challenged provisions allows the right to offset, contained in those parts of the provision which shall remain in force, to be an effective right, as opposed to the illusory instrument of compensation which it has hitherto been. The Constitutional Tribunal does not, however, evaluate the appropriateness of the legislator's adoption of particular institutional (i.e. legal) solutions for compensating the loss of property interests of persons who left their property beyond the Bug River, and their heirs, since this remains within the sphere of legislative autonomy. Accordingly, the appropriate subject-matter for the Tribunal's ruling is the particular mechanism chosen by the legislator (i.e. as opposed to other potential solutions which could have been adopted by the legislator).
11. The unconstitutionality of the challenged provisions does not arise by virtue of a legislative omission (i.e. the absence of certain provisions dealing with compensation for persons having left their property beyond the Bug River), but rather results from the adoption of a defective legal norm within the existing statute.
12. The fact that the value of property left beyond the Bug River may now, to a limited degree, be offset against the price to be paid for the acquisition of undertakings (or certain other property rights), by virtue of an amendment of 5th December 2002 which inserted Article 53(3) into the Commercialisation and Privatisation of State Undertakings Act 1996, of 30th August of that year, does not exempt the legislator from the duty to fashion the mechanism contained in the challenged provisions so as to ensure that it constitutes a genuine instrument of protection of the right to offset.
13. The finding of unconstitutionality of the challenged provisions does not of itself lead to an infringement of the rights of users, tenants, lessees or other persons enjoying property rights over State-owned land. There is no statutory duty to dispose of such real estate and a decision as to whether to dispose of any given real estate may not be taken in disregard of existent legal relationships.

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 64. 1. Everyone shall have the right to ownership, other property rights and the right of succession.
 2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.
 3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.