The Achilles Heel of Estonia's Ownership Reform: The Case of Emigrants

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A. Introduction

Estonia proclaimed its independence in 1918. However, the Molotov-Ribbentrop Pact concluded by the totalitarian superpowers (the Soviet Union and Germany) in order to divide Europe into spheres of political influence, interrupted the development of this state. The Soviet Union, using intimidation and military force, occupied Estonia and annexed it to the USSR in the 1940s.[1] The Republic of Estonia, like other Baltic States, existing de jure during the period of occupation and restored its independence in 1991. However, the continuity of a state is a complex phenomenon,[2] which becomes apparent in different spheres of statehood. One of them is the area of ownership relations and restitution of the property, which was unlawfully taken.

Continuity of property ownership was declared by the decision of the Supreme Soviet of the Estonian Republic.[3] In this article, I will analyze one of the main problems of Estonian ownership reform and explore the solution for providing compensation of property to German emigrants who left Estonia before the end of World War II.

The process of property restitution has probably nowhere proceeded without distress. Nevertheless, the historical circumstances of the Baltic States have created a specific situation, some of the topical and peculiar aspects of which will be presented in this article. In general, during the restitution of real estate in Estonia, we witness a confrontation between the owners of the returned houses and their tenants. The restitution of the property of those who had repatriated to their 'Vaterland' at the invitation of Hitler has turned into a battleground, a fierce legal-

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[1] Estonia was actually occupied twice by the Soviet Union and once by Nazi Germany in the 1940s. For more detailed information about historical aspects of these occupations please visit http://estonica.org/eng/teema.html?kateg=43.

[2] T. Kerikmäe, *European Convention on Nationality and States Competence: The Issue of Human Rights, Juridica International*, II Law Review University of Tartu 5 (1997).

[3] Decision of the Supreme Soviet of the Estonian Republic "Omandiõiguse järjepidevuse taastamisest" (on the restoration of ownership continuity), *Riigi Teataja* (State Gazette) 1990, 22, 280.

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political struggle concerning the whole society. Since we are dealing with a problem that is contradictory, politicians on both sides of the argument try to take advantage of the situation. There are different social groups at the centre of the dispute and therefore it has been proved impossible to reach a common position. Simultaneously, it is clear that the government interests have been alert here in respect of both the state budget and the continuity policy. The focus of the property scandal that surfaced in Tallinn was the legality of the restitution of the houses to the repatriated, estimated to reach hundreds of millions of kroons in value.

In this article I analyse relevant provisions of the Estonian laws on property reform. Past and present international treaties will be considered including their validity and applicability to the question. I will go on to examine which solutions the Estonian Supreme Court in their ruling on the matter and subsequent initiatives in the Estonian Parliament have offered. I will also touch upon the possibilities for appealing the issue to the European Court of Human Rights.

B. *De lege lata* – Dead Letter?

The legal dilemma lies in the interpretation of the Estonian Principles of Ownership Reform Act (hereinafter PORA).[4] Namely, Article 7(3) has to provide an explanation as to what extent certain groups of emigrants should be treated as legally entitled subjects of the ownership reform in Estonia after it regained independence.

> Applications for the return of or compensation for unlawfully expropriated property which was in the ownership of persons who left Estonia on the basis of agreements entered into with the German state, and which was located in the Republic of Estonia, are resolved by an international agreement.[4]

This provision excludes applications by émigrés for the restitution of their property from the group of entitled subjects provided by law. The compensation (and determination of the legally entitled) seems to depend on international agreements.

In the opinion of the Estonian Owners Society, the problem stems not from the interpretation of the law, but from the law itself. True, it is unclear from the definition of the provision, which of the concrete treaties is under consideration. The main questions deriving from the confusion caused by the above provision of domestic legislation are the following:

- Which treaties ("agreements entered into with German state") determine the circle of legal subjects of the case;
- which treaties ("an international agreement") are to be referred to for providing a compensation mechanism for those legal subjects;
- whether "an international agreement" can also apply to other treaties apart from those concluded with Germany;

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[4] Adopted on 13 June1991, *Riigi Teataja* 1991, 21, 257, enforced on 20 June 1991.
[4] § 7(3) PORA.

- whether both categories of agreements are required for the effective implementation of § 7(3)?

Previously, both politicians and lawyers pointed out the need for new negotiations with Germany, which would lead to the conclusion of a new treaty on the basis of which the problem could be regulated by the Estonian national legislation. However, the German government has declared[5] that it does note wish to be involved in demands against Estonia with regard to the restitution of the property of the repatriated, and as a result, the burden of responsibility to solve the problem has been left to Estonia.

As a corollary, there arises the question of which international treaties must be observed when dealing with the applications for the restitution and compensation of property belonging to the emigrants who left Estonia between 1939 and 1941? If a country restores its sovereignty after an occupation or annexation, both its international rights and duties are, as a rule, restored in full. From 1918 till 1940, the Republic of Estonia concluded over 210 bilateral international agreements and was a participant in more than 80 multilateral conventions.[6] R. Müllerson has written, "[s]till, most treaties concluded more than fifty years ago by the Baltic States had become obsolete. It is clear that restitutio ad integrum after more than fifty years is more often a legal fiction than a realistic option."[7] True, changes in circumstances may force us to make corrections in our legal relations, but according to the policy of continuity every pre-occupation treaty must be carefully reviewed separately to prove its legal validity or the opposite.

C. Pertinent International Treaties

There are two treaties that are usually contemplated with regard to the legality of property restitution to German emigrants. When examining Estonia's possible (international) obligations, I assume that it is the Republic of Estonia that must conclude the treaties mentioned in §7(3) of PORA. However, the above provision (§7(3)) only speaks about "agreements entered into with the German state" and "an international agreement." In the following sub-sections, the agreements between Estonia and Germany and between the two superpowers, Germany and USSR, will be analyzed with the purpose of finding their possible influences on Estonia's legal obligations.

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[5] Letter of State Chancellor Gerhard Schröder, 20 July 2000.

[6] T. Kerikmäe & H. Vallikivi, *State Continuity in the Light of Estonian Treaties Concluded before World War II*, V Juridica International. Law Review University of Tartu 33 (2000).

[7] R. Müllerson, *Law and Politics in Succession of States: International Law on Succession of States*, *in* B. Stern (Ed.), Dissolution, Continuation and Succession in Eastern Europe 16 (1998).

I. Treaty between Estonia and Germany

The Treaty[8] consists of:

- The Protocol of 1939 between Germany and The Republic of Estonia (concerning the repatriation of the German national group from Estonia to Germany);
- its supplementary protocol regarding the transfer of sums to Germany.

In accordance with this Treaty (Art III), the German Government created a so-called 'German Confidant Government' (Treuhand) in Tallinn:

> A special institution, which is entitled by the statutory mandate in correspondence with this Article to take administration over the emigrates' property which was declared, left and subject to transfer, to liquidate without delay, and finally to organise and monitor the performance of the emigrants' debts and obligations left behind.[9]

The Confidant Government came under the jurisdiction of Estonian legislation. The obligation of the Estonian Government consisted in the responsibility to, "guarantee to the newly established institution a necessary legal status under Estonian law for the performance of its duties."[10] The realization of agricultural ownership by Treuhand was to take place by the permission of the Estonian Minister of Agriculture. It is a matter of historical fact that Estonia was unable to fulfil the Treaty obligations due to Soviet occupation.

Still, to what extent should the above treaty be considered binding on the Republic of Estonia today? In order to define the German emigrant group, the text of the Treaty has to be examined more closely. The Treaty contained a requirement, which obliged each emigrant to fill in and sign the provided form to notify the property subject to transfer, and mail it to the Estonian Ministry of Foreign Affairs within a period of two weeks, beginning from the day of departure. One can ask whether those provided forms can be viewed as the basis of identifying the group of persons entitled to restitution of their property left in Estonia.[11]

One of the unresolved questions is whether, and in what way, the Republic of Estonia could have or should have disputed the treaty's legal force. During the time of occupation, the Estonian Republic was unquestionably viewed as a legal subject de jure, although, de facto it was practically non-existent. In this regard, it was impossible to declare the nullity of the treaty on the part of Estonia to the other treaty parties. Therefore, Estonia cannot be accused of non-performance of the current Treaty.

At the same time, as a result of a logical analysis, the Treaty as a legal docu-

[8] *Riigi Teataja* 1939, 17, 29 and *Riigi Teataja* 1940, 2, 4.
[9] *Id.*
[10] *Id.*
[11] However, there has been confusion because different co-existing lists of emigrants were provided by different institutions and some of the German post-emigrants left Estonia after their property was nationalized later (i.e. after the opportunity to use treaty-based system).

ment currently seems void, for the circumstances forming its bases have altered. Rebus sic stantibus (fundamental change of circumstances) is a well-known principle of law, which is incorporated into the 1969 Vienna Convention on the Law of Treaties, Article 62.[12] Although not valid as a treaty during and after World War II, it can be viewed as a codified customary law today. This principle has been relatively arbitrarily operated at different times, and that is why the wording of the Vienna Convention has provided welcome clarifications: "may not be invoked as a ground for terminating or withdrawing from a treaty *unless* … [emphasis added]." All elements of Article 62(1) of the Vienna Convention would seem to be fulfilled in favour of Estonia. It the clause is invoked by Estonia, the result in this case would be the elimination of Treuhand and everything relating to what was agreed upon in 1939 between Germany and Estonia.

By contrast, based on Article 62(2)b, Germany could not rely on *rebus sic stantibus* as grounds for the termination of the Treaty, because of the fact that the fundamental changes were the outcome of its own breach of the obligations of the Treaty.

II. Treaty between the Soviet Union and Germany

Even if the *rebus sic stantitbus* doctrine would be formally inapplicable to Estonia,[13] another substantial reason for the Treaty's nullity could theoretically be the existence of another treaty. The treaty between the USSR and Germany[14] signed by K. Schnurre and A. Voshinski on 10 January 1941, which entered into force on the same day. The 1941 Treaty stipulated in Article 1 that:

> the government of the USSR pays to the German government a full and final compensation for all the German applications in relation to the USSR in parts of the property situated on the territories of the Latvian, Lithuanian and Estonian Socialist Republics, as well as the compensation for German proprietary claims against the natural and legal persons, who were or are in possession of domicile on the territory of the above mentioned states, 200 million state marks.

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[12] Vienna Convention on the Law of Treaties, 1155 UNTS 331, ratified by Estonia - *Riigi Teataja* II 1993, 13/14, 16. Art. 62 Fundamental Change of Circumstances:
1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, it may also invoke the change as a ground for suspending the operation of the treaty.

[13] *See* Free Zones of Upper Savoy and the District of Gex, 1932 PCIJ (Ser. A/B) No. 46, at 157.

[14] The text of the 1941 Treaty has been published in Abteilungen Potsdam (Bundesarchiv).

It seems that the 1941 Treaty could be a means for clarification and drawing the line between the emigrants and post-emigrants. Article 2 of the 1941 Treaty defines German property and claims for property, in accordance with the treaty:

- German citizens and Germans by origin, who have resettled to Germany or are resettling;
- the nationals of the German State having a permanent residence in the Baltic States;
- natural and legal persons having a permanent residence outside of the USSR (excluding the ex-diplomatic and consulate representatives' property);
- Riga and Estonian Treuhand's Administrative Assembly' property and property claims.

Article 3 defines the property that Germany was to compensate. The property enumerated in Articles 2 and 3 moved, in accordance with the agreement, under the supervision of the treaty party. The property of the emigrants, beginning from the moment of departure, came under the command of the corresponding treaty party. The units of the German Treuhand were liquidated and the emigrants' property remained under the jurisdiction of the Soviet power, subject to nationalisation.
If, in discussing the first treaty (Estonian – German) one may indicate the moment of its arrival at its nullity, the second treaty (German – USSR) has been void from the moment it was concluded. The following points may be presented in favour of this argument:

> Secrecy:
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> Article 18 of 'The Pact of The League of Nations,' if not registered in the Secretariat of the League of Nations, is not binding;
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> Contradiction with the international law:
>
> This relates more specifically to the prohibition of the use of force (state aggressor, which according to the treaty in question is the state that intervened into the internal affairs of the third state without the latter's consent).[15]

Deriving from customary law, Vienna Convention Article 34 states the general rule relating to third states: "A treaty does not create either obligations or rights for a third State without its consent." Here, the USSR created obligations for Estonia (third party) without its consent, and therefore the 1941 Treaty can be considered not to be binding on Estonia. (It would be possible to apply a number of exceptions to a provision of such voluntary nature (e.g. in the form of customary law), but not in this case.

Notwithstanding the fact that the 1941 Treaty is not binding on the Republic of Estonia, according to international law, this fact still has nothing to do with the (other) state's obligation to perform any written duty stated in the treaty, which is

[15] E. Lippmaa characterizes the 1941 Treaty and the consequences stemming from it as, "a typical contractual damage caused by two felonious parties to a third party…". Truly, none of the treaties are binding for a third state (here: Estonia) without the corresponding consent on the part of that state. E. Lippmaa, *Were the repatriated Estonians?*, Sõnumileht, 26 August 1998.

in force independent of the treaty. The consequences of the realization of the current agreement have to be treated as a factual reality. Simultaneously, it would bring legal consequences to the parties of the treaty, independent of the treaty's validity, in the area of property claims as presented by the individual persons.

The present agreement, in reality, constituted the fact that Germany sold the property of the emigrants, which was left on the territory of the USSR. Thus, it seems that (despite the validity of the current Treaty) in a situation where an emigrant has not got the compensation from the German State, or he/she is not satisfied with it, he/she is requested to turn to Germany for a solution. The problem is that the property (real estate of German emigrants) is in fact still in possession of the Republic of Estonia (since it was held in the possession of the Soviets in the annexed territory of Estonia). However, I disagree with the simplified statement that in the case of the 1941 Treaty being void, the restitution has to take place because of the absence of a compensatory mechanism.

The academic E. Lippmaa correctly states[16] that in case of the Treaty of 1941, we only deal with an interstate calculation, that there was no issue about the individual property claims against the treaty parties, and that the USSR paid only approximately 4% of the earlier estimated market value of the property left in the Baltic States. Currently, one should take into account Article 69 of the Vienna Convention (the consequences of the nullity of the treaty), which stipulates that, "Void provisions of the treaty have no force" (Article 69(1)), but, nevertheless, one may say, a provision of Article 69(2) could be applied as customary law.
As to the determination of the group, E. Lippmaa also argues, that[17]

> the emigrants of 1940 were mostly the refugees whose property had illegally been nationalized by the occupying powers. According to international law concerning the refugees, they have the right to that property. However, all the repatriated cannot be treated as refugees.[18]

A. Reinans[19] points out that Germany has officially treated the group of people who left in 1941 as emigrants, not as refugees, because *Nachumsiedlung* concerned the persons whose property had already been nationalized in 1940.[20]

The situation is further complicated by the fact that there exists no complete list of the emigrants. The number of emigrants from Estonia is estimated at about 7,000 to 7,500. That, however, was followed by a further repatriation of the couple of hundred Baltic Germans who had been released from the citizenship during the first wave of departure, as well as, about the same number of German citizens, and some individuals with foreign passports.[21] Narrowing down the circle of

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[16] Lippmaa, *supra* note 15.
[17] *Id.*
[18] The rights of the repatriants were primarily affected by the decree on nationalization of big houses, *ENSV Teataja* (official Gazette of the Estonian SSR) 1940, 37, 433.
[19] A. Reinans, *The Repatriated as Refugees and Citizens*, Sõnumileht, 16 June 1998.
[20] Obviously, it has to be clarified how these persons received compensation from Germany.
[21] Information provided by German-Baltic Cultural Society in Estonia, *see* S. Kivimäe, *Before Requesting Information from Germany, One Should Study the Materials Available*, Postimees, 21 May 1998.

individuals concerned is especially significant because (although they will remain subjects of the property reform), their unlawfully disowned property will be regulated by law in a different manner, based on the particularity of individuals[22] (subjects) rather than the property in question (object). The question is whether the list of those individuals could be drawn up on the basis of the void treaties.

D. *De lege ferenda* – Dead Man Walking?

With the order of the Estonian Government, a committee of specialists[23] was formed in 1998. The specialists arrived at the expert opinion that restitution of property on the basis of the present wording of §7(3) of the Act is not possible.[24] The expert opinion was founded both on the analysis of the general conception of the property reform, and the system of terms and provisions used in the PORA. In my separate opinion appended to the expert report, I stipulated the following:

- the first treaty, between Estonia and Germany, became invalid at a certain moment of time;
- the second treaty, between the Soviet Union and Germany, has been invalid from the moment it was concluded (mainly because it concerned third states, including Estonia, without their agreement).

However, I joined the other experts in that "the result of the realization of the treaties could be viewed as a 'factual reality' in order to define the group of individuals with justified right to compensation". However, according to the currently valid law of the Republic of Estonia, it was impossible either to return or compensate for this property due to the absence of treaties that were binding on the Republic of Estonia. This situation contradicts the general conception of the property reform, according to which the property has to be returned to the previous (legally entitled) owners in the process of the property reform and, also, contradicts the foundation of §3(3) of the PORA, which states that the property will be restituted in accordance with the PORA, or in a manner and under conditions defined by other legislation of Estonia. An amendment proposal to the rather problematic PORA was recently under discussion at the Estonian Parliament (*Riigikogu*), a draft which declared §7(3) of the Act void. In order to make restitution legal, the term "real danger of repression" has been introduced into the text of law. The purpose of this was to change the property reform to the advantage of those who departed from the Baltic States to Germany (due to the treaty

[22] *See* D. Polman, *Ownership Reform and the Repatriated in Germany as Legally Entitled Subjects*, Juridica 3 (1999).

[23] In which I myself participated together with the lawyers I. Koolmeister and M. Rask and the advisor to the Minister of Justice, E. Silvet.

[24] Obviously, the argument of the former *Treuhand*'s official, "may that be the price for escaping the deportation to Siberia", which supports the refusal to restitute property, and according to which the emigrants handed over their property for the use of the German Government, is legally incorrect. *Id.*

concluded between the USSR and Germany on 10 January 1941).[25] To conclude the Act of the Republic of Estonia – The Establishment of a Simplified Order for Proving the Unlawfulness of Property Disownment[26] § 1 – the last sentence will be added in the following wording:

> The property that has been handed over or left behind in some other way in the process of repatriation from Estonia, due to the treaties concluded between the USSR and Germany, will, similarly, be counted among the property that has been left behind due to a real danger of repression.[27]
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> Provisions for application as stated in §2:
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> (1) The local committees for the return and compensation of unlawfully disowned property will review all applications concerning the restitution and compensation of property, received on time from the individuals, who had departed from Estonia to Germany due to the treaties concluded between the USSR and Germany in 1941, and will work out a solution on the basis of the provisions of the current law.
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> (2) The duty to verify their repatriation from Estonia to Germany on account of the treaties concluded between the Soviet Union and Germany in 1941, lies with the repatriated individuals, who have turned in the petition, or with their legal successors.
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> (3) The property that was unlawfully disowned will be restituted or compensated to the repatriated individuals who had previously lived in Estonia, and who have turned in their petitions, or to their legal successors, if they provide a certificate or verify with their signature that the property has not been previously compensated, and give their assent to the search for pertinent data from the archives or any other institution. The procedure for recording the assent and the order of data research will be established by the Estonian government.
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> (4) If the property, the restitution of which is claimed on the basis of the current law, has been transferred to a third person in the restitution process or in any other legal manner before the current law became effective, the property will be compensated in the general manner established by law.

However, the Parliament has been incapable of adopting the proposal.[28] Its drafters have been accused of conducting secret politics, of deliberate misinterpretation of the Constitution, etc. The most alleged problematic aspects of the proposed amendment are that it should have retrospective force and make reference to the void 1941 Treaty.

The current subject is topical due to the principle of the legal security of an

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[25] The historian T. Alatalu, in his open letter (Sõnumileht, 2 July 2000) considers the innovation inappropriate because, "it was a transfer from one totalitarian State to another". H. Aasmäe states on 15 February 2000 that the adoption of the new amendment may create an unpleasant precedent of restitution for the Czech Republic and Poland.

[26] *Riigi Teataja* 1991, 43, 518.

[27] This argument is probably based on the above expert opinion, which was even more concrete when referring to the property which was "transferred by the involved individuals to Soviet officials, or which they deserted in some other way, or which was nationalized from them."

[28] Although, after the second reading of the draft on 26 January 2000, it was assigned a third reading on 16 February 2000, the draft then disappeared from the list of draft legislation.

individual. More correctly, due to the absence of it. In the words of the Supreme Court,[29] "[o]ne of the principal theses of the property reform is to avoid causing new injustice." Even more so, the Supreme Court has pointed out[30] that §10 of the Constitution stipulates that "the rights, freedoms and duties listed in the second chapter of the Constitution do not exclude the other rights, freedoms and duties that are derived from the spirit of the Constitution and are in accordance with it, and which conform to the principles of human dignity and the social and democratic state". Also, both legal security and legal expectation belong among the principles of the democratic state governed by the rule of law. Out of these principles stems everyone's right to justified expectation that whatever is stipulated by the law will be applied to the persons who have begun materializing their rights. A law that violates this right is contrary to the Constitution.

In accordance with the laws in force in Estonia, property can neither be restituted nor compensated due to the absence of the corresponding treaties binding on Estonia, and the category of individuals in question cannot be clearly viewed as legally entitled subjects of the ownership reform.

In addition to that, on 29 February 2000 the State Prosecution opened a criminal case on the basis of §161 of the Criminal Code over the fact, that the officials of the City Administration of Tallinn, having taken advantage of their official position, had from 1995 through 1999 been restituting the properties of the Estonian citizens who had repatriated to Germany, causing substantial damage to the Estonian State. On that very same day, the State Prosecutor changed the investigating agency and delegated the criminal case to the Defense Police for pre-trial investigation. The Defense Police established that the officials had been aware of the fact that the property cannot be restituted on the basis of the "Principles of the Ownership Reform Act".

However, the Defense Police has completed[31] the investigation of the criminal case concerning the restitution of the properties to the individuals who had repatriated to Germany. According to the Defense Police, until 1997, the officials had not been aware of the treaty concluded between the Soviet Union and Germany in 1941 which included the list of the repatriated persons, excluding the possibility, both, to treat this property as unlawfully disowned, as well as its restitution and compensation.

E. Judicial Observations

The ownership reform has seen numerous debates in courts, but no solution has been found. Finally, a decision of the Supreme Court on 28 October 2002 revisited the issue.[32] The Tallinn Committee for the Return of and Compensation of

[29] Judgment of Estonian Supreme Court of 30 September 1998: 3-4-1-6-98.
[30] Judgment of Estonian Supreme Court of 17 March 1999: 3-4-1-2-99.
[31] Since 7 September 2000.
[32] Judgment of Estonian Supreme Court of 28 October 2002: 3-4-1-5-02. Available at http://www.nc.ee/english/const/2002/3-4-1-5-2002i.htm.

Unlawfully Expropriated Property dismissed the application of D. to declare her an entitled subject of ownership reform. The committee stated in its decision that pursuant to Article 7(3) of the PORA, applications for return of or compensation for unlawfully expropriated property, which was in the ownership of persons who left Estonia on the basis of agreements entered into with the German state and which was located in the Republic of Estonia, are resolved by an international agreement.

D. then submitted a complaint to the Tallinn Administrative Court, disputing the decision of the Tallinn Committee. She also requested that Article 7(3) of the PORA not be applied, because it was in conflict with the Constitution, especially the principles of legal certainty, legitimate expectation, equal treatment, and protection of confidence. The Court satisfied D.'s complaint and invalidated the decision of the Tallinn committee to the extent that the plaintiff was not recognised as an entitled subject of ownership reform. The Court also declared subsection 7(3) of PORA unconstitutional and did not apply it. In its petition to the Supreme Court of 19 February 2002, the Court pointed out that Article 7(3) of the PORA infringes upon the general right to equality established in paragraph 1 of Article 12 of the Constitution and is in conflict with Articles 10 and 14 of the Constitution.[33]

The Administrative Court, in its arguments in the petition pointed out that the subsection of PORA in question is not unconstitutional on its own. It is due to the activities of the legislator, that the provision has become unconstitutional, specifically because there has been no solution to the problem in more than ten years. The Administrative Court further argued that the provision had lost its regulative character and did not guarantee the plaintiff the right that her application will be examined within reasonable time or that it will be examined at all. The Legal Chancellor also submitted his arguments in which he stated that in his opinion the provision is in conflict with several articles of the Constitution;[34] whereas the Minister of Justice found that the provision was in conformity with the Constitution. The fact that two of the highest legal officials interpreted the law in such a different way illustrates what political and legal consequences the judgment would have.

The Supreme Court rejected the argument that there is a right based on §32 of the Constitution:

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[33] Art. 10 of the Constitution reads: "The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law."
Article 14 of the Constitution reads: "The guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments."

[34] The Legal Chancellor established first that we deal with infringement of the protected area of right of succession, established by Art. 32(4) of the Constitution, that the prolonged omission of the legislative and executive powers is in conflict with Art. 14 of the Constitution and that the principle of definitiveness or determinateness, as stated in Art. 13(2) of the Constitution, which is a part of the principle of legal certainty is violated when during a long period the legislation does not define the legal grounds of and procedure for handling applications. Judgment of Estonian Supreme Court of 28 October 2002: 3-4-1-5-02.

> the decision to undo the injustices caused by violation of the right of ownership and to create the preconditions for the transfer to a market economy, was based on the principle of a society based on democracy and the rule of law, and was possible because a big proportion of the unlawfully expropriated property was in the possession of the state when Estonia's independence was restored.

The Supreme Court en banc held that it could not declare Article 7(3) of PORA invalid, because the unlawfully expropriated property should in that case be returned to or compensated to some persons who resettled pursuant to the procedure established by PORA. It declared that this was a political decision that could not be made by the judiciary and that it is the duty of the legislator to deal with the problem. The Supreme Court en banc therefore stated that it was "convinced that the disputed provision is in conflict with the Constitution because the legislator failed to fulfil its duty to sufficiently comprehensibly establish the rights of persons who resettled and of the users of the property which had belonged to them." The Court went on to state that the "general right to organisation and procedure, established by Article 14 of the Constitution, obligates the executive and legislative powers to achieve a political agreement and to give a clear message to the persons who resettled, whose property was expropriated, and to their successors, as well as to the lessees using the property, concerning the return or non-return of the property", but that "failure to fulfil and obligation cannot be declared invalid."[35]

The Supreme Court thus stated that there was an apparent conflict with the Constitution, but that it was unable to rectify the situation by simply declaring the provision invalid, as this would in essence mean taking on the role of the legislator.

F. Still Nowhere?

The latest turn in the progression of events has been again somewhat unexpected. While the previous amendment proposal quietly vanished, a new proposal for an amendment[36] was introduced by four members of parliament, according to which "persons who left Estonia according to the treaties signed with Germany are not legally entitled subjects of property reform with regard to the property which belonged to them and was unlawfully taken before their departure from Estonia." An explanatory note attached to the proposal brings out the ideological basis for the amendment – it is believed that the treaty is considered invalid for Estonia and that there is no real likelihood of a treaty being concluded on the matter with either Germany or the Russian Federation. Therefore, the section of the law, which refers to the treaties, is also not based on reality. The explanatory note refers to the judgments of the Supreme Court, which require the legislative body to amend the

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[35] There was a dissenting opinion to the judgement in which judges Ilvest, Jõks, Kivi and Kõve stated that the judgment should have been postponed from entering into force in order to "avoid the call for partial stay of the ownership reform and uncertainty as for subsection 7(3) of PORA."

[36] 15 SE I, submitted by E. Sepp, T. Tootsen, T. Kauba and H. Kalda from the Centre Party. Proposal of 1 April 2003. Available on the Internet at http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid =030940030&login=proov&password=&system=ems&server=ragne1.

proposal so that it is no longer in conflict with the principle of legal clarity. It is stated that since PORA referred only to a possibility of conclusion of a treaty with Germany, the emigrants have never enjoyed the status of being legally entitled subjects of PORA. The authors of the proposal were of the opinion that the conclusion of international contracts mentioned in Article 7(3) of PORA should be thought of as future possibilities, not a matter of fact. This interpretation undermines the rule of law, however.

The protocol of the 26 May 2003 meeting of the economic committee of the Parliament on the matter of the new proposal,[37] where it was decided to put the proposal to the first reading, also proves interesting reading. It appears that there had been 65 cases in Tallinn where ownership of property has been restored and in 35 of these cases the property has been sold to third parties.[38] The practice of both the local authorities and courts has been divergent. Therefore, an issue arose concerning compensatory mechanisms in order to guarantee the principle of equal treatment. One of the authors of the proposal stated that compensation by the state depends on the market value of the estates in question, a Machiavellian approach, which hopefully was just a *lapsus lingua*. The chairperson of the committee proposed to add a compensatory mechanism, which would exclude the possibility of the state having to pay billions of kroons.

Representatives of the Pro Patria Union, who were behind the previous amendment proposal, and former Prime Minister, M. Laar, raised a poignant issue, when they asked whether the authors were convinced that the emigrants left Estonia voluntarily. One of the authors answered that leaving was not an obligation, but a possibility.[39]

It should be noted that the government was also not in favour of the proposed amendment, but it has not provided a solution to the problem either.

G. Conclusion

There is a real possibility to take the case to the European Court of Human Rights in Strasbourg. The ECHR's recent judgement in the *Jahn case*[40] could bring new light to the issue, especially considering Article 1 of Protocol 141 to the European Convention on Human Rights:

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[37] Available in Estonian from the website of the Estonian Parliament at http://web.riigikogu.ee/ems/sarosbin/mgetdoc?itemid=031700001&login=proov&password=&system=ems&server=ragne1.

[38] There have been claims against the city of Tallinn in the amount of 12.244.208 EEK related to restoration of property.

[39] Another dimension had been introduced to the debate with these words because the principal aim of the Centre Party seems to be only to guarantee legal certainty for tenants who could not privatise their apartments.

[40] Case of *Jahn and others v. Germany*, Judgment of the European Court of Human Rights of 22 January 2004. People in the Soviet Occupied Zone of Germany owned more than 100 hectares of land which were expropriated under the land reform (*Bodenreform*). The Law of 1990 cemented the ownership for those who possessed the land.

[41] Art. 1 of Protocol 1 to the ECHR.

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

No one is trying to claim that Estonia was to blame for World War II and its consequences. At the same time, the ownership reform has been left unfinished regarding the persons covered in this article. Property was returned to some of the emigrants (or their descendants) and it seems that if the proposal, which tried to exclude this group of people from the application of the ownership reform, were to be passed, or if there is no action taken to resolve the issue soon, it would give fair basis to turn to the Strasbourg Court. Arguably, the principle of exhaustion of domestic remedies should not prevent applications to Strasbourg by all interested persons. In light of the latest decision of the Estonian Supreme Court and the continuing inability of the Estonian Parliament to resolve the issue, there is no effective remedy for these interested persons in Estonia at present.

PORA has upset a number of property relationships and has failed to cater to the expectations of some interest groups, whereas hundreds of houses have been already restituted in the capital city. The houses that have already been returned can be repossessed through civil litigation. The interesting fact is that the current Constitution (1992) of the Republic of Estonia did not exist at the time of adopting PORA. Today, it extends constitutional protection to all relationships created by the Act. Article 15 of the Constitution reads as follows: "Everyone whose rights and obligations are violated has the right of recourse to the courts. Everyone has the right, while his or her case is in front of the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional." This provision applies not only to rights contained in the Constitution, but it opens the door to internationally protected human rights.

Notwithstanding the fact that Estonia has ratified the European Convention on Human Rights,[42] the problems of the property reform remain within its jurisdiction, despite the fact that Estonia has issued a reservation about the laws concerning the property reform.[43] As the reservation only applies to the text of law as they were on the date of the reservation, Article 7 (3) of PORA could also be considered as a law without content and not actually functioning correctly.

Continuity does not exclude per se all the deliberations in dealing with life situations. In the case of conflict of interests, a flexible social agreement must be reached. Does the legislator's reluctance to resolve the matter reflect social

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[42] *Riigi Teataja* II 1996, 11/12, 34.

[43] The reservation concerns the Additional Protocol No 1, Art 1. Estonia declares that the conventional provision does not extend to the legislation regulating the restitution of the rights of persons who are victims of Soviet annexation.

agreement? The question is not so much of restitution of property but of a correspondence of Estonian legislation with the policy of State continuity.

In addition to the issues of state continuity, the problem is a multilevel one: it is connected with the liability of a state for the omission of the legislator and to larger issues of the rule of law. In conclusion, the issue is topical in light of the recent decisions of the European Court of Human Rights relating to the land reform in Germany. Although Estonia has made a reservation to the Protocol, which dealt with protection of property, there might be ways for the affected individuals to get a hearing in front of the ECHR on this issue. In case the ECHR decides against Estonia, it would bring liability to the State, which could amount to billions of kroons.

H. Postscript

Recently the political debate surrounding the issue has been activated. In 2006 the new Minister of Justice initiated a new draft law which would return or compensate the assets. The decisive judgement should come from the Estonian Supreme Court regarding the validity of *de lege lata* and the possible non-compliance of inaction of the Estonian Parliament which is not capable to amend or modify the existing law to the principles of the Estonian Constitution. The judgement is due at the time of finalizing the current article and should be available when this article is published.