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RESTITUTION LAW AND THE CONSTITUTIONAL REVIEW OF THE RESTITUTIONS IN THE CZECH REPUBLIC (PRINCIPLES OF THE DECISIONS OF THE CONSTITUTIONAL COURT REGARDING THE RESTITUTION OF JEWISH PROPERTY)

Abstract:

The constitutional review of the restitution proceedings in the Czech Republic belongs to the area characterized by its specific legal and social relevance. The specific sense of restitutions emerges from the effort of the state to remedy past unfairness together with the effort to protect the principle of legal certainty in present. The article attempts to come to terms with these problems, and to link the basic principles of the decisions of the Constitutional Court of the Czech Republic regarding the restitutions with the special focus on the restitutions of Jewish property. The analysis of these decisions indicates also some of the essential problems in the application of restitution laws. Within the decision-making of the restitution cases, Constitutional Court establishes also the basic general principles of the rule of law and constitutional review in the Czech Republic.

Keywords:

Constitutional Court of the Czech Republic, Constitutional Review, Restitution proceedings, Restitutions of Jewish property, Meaning and purpose of restitution legislation, Confiscation, Political persecution

I. Introduction

The Constitutional Court of the Czech Republic has been dealing with the issue of restitution since its foundation and the constitutional review of the restitution proceedings belongs to the areas characterized by exceptional complexity. The roots of restitution reach back into history and are related with the complicated political, social, and economic events, which have taken place in Czechoslovakia over the last century. The issue of restitution must be viewed not only from the perspective of the current legal framework, but also with respect to the statutes, which governed the course of restitution following liberation and which had a significant impact on the manner in which restitution was treated after 1989.

A specific area in questions of restitution concerns the restitution of Jewish property, which is intended to mitigate (but it no way rectify, as emphasized by legislators and the Constitutional Court) some of the proprietary wrongs wrought upon the Jewish citizenry following the occupation of the Republic by Nazi Germany.

The roots of restitution legislation reach back to the brief period following the Second World War when under specific historical and legal circumstances the post-war proprietary relationships were sorted out. This treatment and its con-

sequences are reflected in the handling of later restitution claims (including the restitution of Jewish property) and has influenced the rulings of the Constitutional Court in specific cases. The short post-war period, in which claims were allowed for the restitution of funds and properties confiscated after September 29th, 1938 under the duress of occupation or national, racial or political persecution, was also accompanied by other enormous proprietary changes, namely the confiscation of property of politically undesirables and extensive nationalization in many industrial sectors.

II. Restitution of Jewish property after 1989

After 1989 several restitution statutes were issued, formulated by lawmakers as noted by the Constitutional Court „in 1990 or a bit thereafter, aware not only of those reasons still lingering in memory which led to such intervention in property rights, but also of the need to limit the change in property relations so as to remain adequate for the intended purpose, namely to carry out targeted and precisely defined changes in the distribution of property, so prevalent at that time.“[1])

The first law which dealt with the question of restitution[2]) – Act no. 403/1990 Coll. (as amended by Act no. 458/1990 Coll.) – brought about only the „lessening of certain proprietary wrongs“.

In essence this involved the return of items to their original owners from whom it was taken, or possibly returning items to a circle of other „entitled persons“. Aside from this it was possible to provide financial compensation or to return the purchase price and pay the difference between the eventual financial compensation and this purchase price. The law required property to be returned by organizations which held the property as of November 1st, 1990, based upon the written request of the entitled person. If no agreement was reached, the matter was decided by a court. This law however was of very limited significance for „Jewish“ restitution, both in terms of the volume of property and the definition of entitled persons. In principle this was to involve the original owner, or the person from whom the property was actually taken. If the owner had died or been declared dead (this process could be carried out as part of the restitution process), then the claim passed to the inheritors of the will, which would be the children (or adopted children) and spouse. The third group consisted of the parents of the original owner, the fourth his siblings, and the fifth the other inheritors of the original owner or their surviving children. These groups became entitled to a claim if there were no entitled persons in the preceding group. These were essentially special regulations for inheritance rights. Considering the relatively limited range of property to which Act no.

[1]) Ruling Pl. ÚS-st.21/05 of 1. 11. 2005, no. 477/2005 Coll.

[2]) If we do not consider the special treatment for the return of certain church buildings (particularly to the monastic orders and congregations and to the Olomouc archbishopry), enabled by Act no. 298/1990 Coll.

403/1990 Coll. pertained, it was necessary to adopt additional legal regulations to handle restitution.

Among the more important restitution statutes was Act. no. 87/1991 Coll. concerning extra-judicial rehabilitation, Act no. 229/1991 Coll., concerning ownership of land and other agricultural property, Act no. 243/1992 Coll., regulating certain questions associated with Act no. 229/1991 Coll., Act no. 92/1991 Coll. on the transfer of state property to other persons, and in certain aspects also Act no. 119/1990 Coll., on court rehabilitation and other laws and regulations issued for its implementation. Nearly ten years after the first restitution regulations were put in place, Act no. 212/2000 Coll. was adopted, concerning the mitigation of certain proprietary wrongs caused by the holocaust and the amendment of Act no. 229/1991 Coll., concerning ownership of land and other agricultural property as amended by Act no. 93/1992 Coll.

With respect to the individual restitution of Jewish property, the most important regulation is found in the basic "Restitution Act", which concerns extra-judicial rehabilitation (as well as Act no. 87/1991 Coll.), and its respective amendment by Act no. 116/1994 Coll. The purpose of restitution and its extent was defined in the preamble of this law as follows: „The Federal Assembly of ČSFR(Czech and Slovak Federative Republic), in an effort to mitigate the effects of certain proprietary and other injustices which occurred during the period from 1948 to 1989, and being aware that these injustices, and even more so the injustices from the preceding period, including injustices to citizens of German and Hungarian nationality, can never be fully remedied, but wanting to confirm its intent that no similar injustices ever occur again..." The legal formulation contained in this preamble is most often reiterated with respect to the interpretation and application of restitution statutes in individual cases – the intent of post-1989 restitution law is not to remedy every proprietary wrong, but rather to mitigate the effects of certain proprietary wrongs and other injustices.

The regulations of this law are intended to mitigate the effects of certain proprietary and other wrongs arising from civil and commercial transactions and administrative acts carried out during the period from February 25th, 1948 to January 1st, 1990 (the „decisive period") in violation of the principles of a democratic society, with respect to the rights of citizens expressed by the UN Charter, the Universal Declaration of Human Rights, and related international agreements on civil, political, economic, social, and cultural rights. According to the provisions of par. 5, this law cannot be used in cases where the property was acquired during occupation by persons considered unreliable by the state or as a result of racial persecution.

According to the original wording of the law an entitled person is a physical person whose property was transferred into state ownership in cases specified in § 6 of the law, provided such person is a citizen of ČSFR. It was only with the amendments carried out by Act no. 116/1994 Coll., that the category of entitled persons was expanded to include physical persons who are citizens of ČSFR, and who at the time the property was transferred into state ownership according

to § 6 had a claim to it according to Decree of the President of the Republic no. 5/1945 Coll., concerning the invalidity of certain legal transactions involving property from the time of the occupation or according to Act no. 128/1946 Coll., provided the transfer or transition of ownership rights which was declared invalid according to these special regulations occurred due to reasons of racial persecution, and this claim was not satisfied after February 25th, 1948 for reasons of political persecution or actions, which grossly violated generally acknowledged human rights and freedoms.

Similar treatment concerning land and agricultural property is contained in Act no. 229/1991 Coll., which was amended by Act no. 243/1992 Coll. This amendment included among entitled persons citizens of ČSFR who lost property according to Decree of the President of the Republic no. 12/1945 Coll. or Decree no. 108/1945 Coll., who committed no crimes against the Czechoslovak state and who regained their citizenship pursuant to Act no. 245/1948 Coll., concerning the citizenship of people of Hungarian nationality, Act no. 194/1949 Coll., on the acquisition and revocation of Czechoslovak citizenship, or Act no. 34/1953 Coll., through which certain persons acquire Czechoslovak citizenship if this has not already occurred through Decree of the President of the Republic no. 33/1945 Coll., and their property, to the extent specified by special regulation, was transferred to the state.

Special regulations concerning the restitution of Jewish property were contained in Act no. 212/2000 Coll. already mentioned above. The first part of the law is devoted to mitigating certain proprietary wrongs suffered in the period from September 29th, 1938 to May 8th, 1945 by the Jewish community, foundations, and associations through the confiscation of their property through the transfer or passing of ownership rights which was declared invalid by Decree of the President of the Republic no. 5/1945 Coll. or Act no. 128/1946 Coll. As for items which were, as of the effective date of this law, in the ownership of the state and which belonged, before the transfer or transition declared invalid, to the Jewish community, foundations and associations, these items were transferred free of charge (with the exception of legally mandated taxes) into the ownership of the Federation of Jewish Communities or into the ownership of Jewish communities in the Czech Republic. The appendix to the law contains a list of items which were transferred free of charge into the ownership of the Jewish museum in Prague. To carry out the law, a series of government directives were issued, containing, in accordance with the provisions of § 2 par. 2, a list of items, which were to be handed over free of charge in the way of donation contracts.

The law further called for the free transfer of works of art, which were taken in the period of September 29th 1938 to May 8th, 1945 from physical persons as a result of the transfers or transitions of ownership rights, which were declared invalid by the aforementioned post-war legislation.

The second area of property concerned agricultural land. Entitled persons were new citizens of the Czech Republic who lost property in the period from

September 29th, 1938 to May 8th, 1945 who were entitled to a property claim according to Decree of the President of the Republic no. 5/1945 Coll., or according to Act no. 128/1946 Coll. provided that this property had not been returned to the entitled person, nor had compensation been offered according to these laws, even though according to them compensation should have been offered, nor had compensation been provided, according to international agreements between the Czechoslovak Republic and other countries following the Second World War. The conditions of entitled persons were treated differently here, particularly with respect to citizenship and the provision of compensation.

III. Assessment of restitution legislation following 1989

The process of restitution of Jewish property beginning in the early 1990s was and continues to be marked by a number of complications and complex questions which have accompanied the separate individual claims of applicants. One of the basic obstacles for many people who have come forward for their property has been the condition of citizenship in the ČSRF or ČR respectively, as a necessary requisite for exercising a restitution claim. This condition has excluded many foreign applicants. Also problematic is the assessment of entitled persons in the sense of § 3 par. 1 of the Extra-judicial Rehabilitation Act with respect to the retention or loss of the citizenship of the applicant according to the principles contained in Decree no. 33/1945 Coll. Government bodies, often based upon incomplete documentary evidence, frequently came to conclusions which were incorrect, namely that a certain person lost citizenship based upon the aforementioned decree, or that the person was unreliable to the state in the sense of Act no. 128/1946 Coll.

These problems were also exacerbated by the fact that even after 1989, when adjudicating restitution claims the courts in certain cases proceeded from and referred to rulings dating from the totalitarian regime, a period of legal abuse. Abuse of the decrees under the former regime resulted for example in the detention of persons considered unreliable to the state, while in reality this was an attempt by the regime of that time to use any somewhat unclear circumstances to its advantage. The verdicts of these rulings however were in certain cases simply reiterated by the courts in their rulings after 1989, without even conducting a closer examination of whether they were manifestations of political persecution.

The restitution of Jewish property is often marked (to an even greater degree than restitution of property seized by state bodies in the „decisive period“, since it dates all the way back to 1938) by very complicated examinations of legal actions which occurred under complex historical circumstances. This fact considerably complicates the process of restitution of Jewish property. It involves often very complex documentation to determine the actual situation in the past, legal assessment of questions of the transfer of ownership rights which occurred based on confiscation or nationalization, the significance of political or racial

persecution, and many other issues. The specific problems associated with the restitution of Jewish property are clear from the following analysis of the judicature of the Constitutional Court.

IV. Judicature of the Constitutional Court regarding the restitution of Jewish property

The complexity and difficulty in ruling on restitution claims is reflected in the extensive judicature of the Constitutional Court, which has been dealing with the constitutional analysis of the rulings issued in proceedings on the restitution of Jewish property since its very inception to the present day.

The common denominator in these Jewish property restitution cases is the fact that the key events necessary to judge the cases often occurred before 1948, before the „decisive period" defined by the restitution statutes. Even though the amendment of some of these regulations moved the historical threshold back to the beginning of German occupation in 1938, the evaluation of restitution claims is burdened by the difficulty in determining the facts, in providing documentation, and the need to objectively assess rulings issued in the past from the perspective of political or racial persecution, or other interests being pursued in socialist Czechoslovakia in the fight against the „class enemy".

Although the judicature of the Constitutional Court pertaining to the restitution of Jewish property is very extensive and diverse and often non-uniform, the Constitutional Court has established certain basic principles for assessing the constitutionality of the rulings of public authorities on the restitution claims of individual plaintiffs. Certain principles contained in the judicature of the Constitutional Court pertain to restitution in general, while some are specific to the restitution of Jewish property since the cases occur before the decisive period, that is, before 1948.

- *The meaning and purpose of restitution legislation – mitigation of wrongs versus the principle of legal certainty*

The interpretation of the meaning and purpose of restitution legislation is significant primarily in that the CC repeatedly refers to this in its rulings on specific cases. Of course, in its interpretation of the purpose of restitution statutes, the Constitutional Court oscillates between the tendency to remedy injustices to the broadest extent and the tendency to limit restitution claims from the perspective of guaranteeing the principle of legal certainty. In other words, on the one hand the court, in some of its decisions, emphasizes the effort to mitigate wrongs by reflecting on the fact that not even the period after 1945 may be considered democratic and the ruling of public authorities during communism must be examined with respect to their conformity to the principles of due process. On the other hand, the Constitutional Court points out that inju-

stices cannot be mitigated endlessly and it is necessary to take into account the fact that during the period from 1945 to 1948 it was possible to pursue restitution claims through the courts.

This second, restrictive approach was also expressed by the Constitutional Court in its decision sp. zn. Pl. ÚS-st 21/05 of November 1st, 2005[3]). Here, the Constitutional Court stated that the purpose of legal restitution is, in accordance with the law, the effort to mitigate certain proprietary wrongs. However, it emphasized that the limit of this purpose is the requirement of the principle of legal certainty. In the interpreting the purpose of restitution and defining its role in this process, the Constitutional Court stetess that the will of the state, or of legislators respectively, to mitigate certain proprietary wrongs, is underscored by the fact that the legislators are not obliged to take this step: „While the proprietary wrongs which legislators intended to mitigate (not rectify) essentially occurred at variance with the principles of the legal state in the past, neither the Constitution nor any other legal regulation requires that this property be returned or that compensation be offered for it or any changes made in the legal codes for this purpose. It was the free will of the state to allow former owners of the property in question to make claims for its return... The very root of restitution claims then was the beneficence of the state, precisely defined from a temporal and material perspective...“ The Constitutional Court adds that not even Art. 1 of Protocol no. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to renewed rights of ownership.

In the opinion of the Constitutional Court, disputes over ownership reaching back into the past should be viewed from the perspective of the principal of legal certainty being one of the basic pillars of the legal state. From the perspective of respecting the principle of legal certainty, the Constitutional Court argues the position of the owners who have used the property in question uninterrupted for 40 years and who are suddenly confronted with a situation where the ownership rights are in doubt based upon events which they did not influence and of which they often were not even aware: „Their good faith in acquiring rights from the state in accordance with the law must be protected, and in the interest of legal certainty it is not possible to admit an interpretation claiming the absolute invalidity of legal acts which would push legal relations back through decades into the distant past.“

The Constitutional Court further stated that while it has introduced a tendency to atone for wrongs to the broadest extent possible, this has always only been within the scope of the statutes adopted to mitigate these wrongs, i.e. in the decisive period, in the period of the totalitarian system exercised by the communist party, and not other injustices. The Constitutional Court concluded that the legislators had expressed their clear intent to limit the redress of injustices

[3]) no. 477/2005 Coll.

not only from a material standpoint, but above all through the time limitation of February 25th, 1948, the date the communist regime came to power. For this reason, one may conclude that intervention in the ownership relations existing before this date was not socially desirable and with respect to the goals of restitution legislation not necessary. Insofar as such need did subsequently arise „from a pressing need to resolve issues (regarding Jewish property for example), laws such as Act no. 243/1992 Coll. and Act no. 212/2000 Coll. were passed, which modified the given timeframe.

- *The principle of special restitution statutes – circumventing the meaning and purpose of restitution legislation*

A fundamental turning point in the judicature of the Constitutional Court upon which the current judicature of the Constitutional Court is based is the aforementioned ruling of the Constitutional Court of 1. 11. 2005. Here, the Constitutional Court is primarily concerned with the question whether it is possible when making restitution claims to use general civil statutes (such as civil suits for the determination of rights, for eviction, or for the release of property) instead of restitution statutes.

Up until that ruling, in its decisions the Constitutional Court had admitted that beyond the framework of restitution statutes, general courts may assess the validity and effects of administrative or other actions through which the state had acquired ownership.

This opinion is demonstrated for example in the findings of sp. zn. I. ÚS 539/98, in which the Constitutional Court considered the constitutional complaints of plaintiffs who appealed the rulings of ordinary courts which had rejected their restitution claims on the grounds that they were not entitled persons according to Act no. 87/1991 Coll., even though in the case of these particular properties the state had clearly taken them without legal justification. In hearing this constitutional complaint the Constitutional Court referred to the provisions of § 3 par. 1 of Act no. 87/1991 Coll. where an entitled person is a „physical person whose property was transferred into the ownership of the state in cases given in § 6 of the law, provided he/she is a citizen of ČSFR.“ The definition of „entitled person“ according to this law only applies to cases which the cited law specifies: „It is therefore clear that in relation to the Civil Code Act no. 87/1991 Coll. represents a special law which must be applied preferentially, naturally of course only in those cases where it expressly applies. For the legal relations of persons who are not entitled persons according to Act no. 87/1991 Coll., this law cannot have the standing of a special law.“

Similarly, in its ruling sp. zn. IV. ÚS 403/98, the Constitutional Court stated that the state had taken property without legal justification, and that there was nothing preventing a claim for the property based on general civil law. In the opinion of the Constitutional Court expressed in this ruling: „the existence of

special restitution statutes does not preclude in such case action according to general statutes."[4])

In the arguments at the conclusion of the given ruling the Constitutional Court took a differing legal position which it expressed as follows: A civil suit for the determination of ownership rights cannot be used to circumvent the meaning and purpose of restitution legislation. It is not possible to effectively make a claim based on general regulations protecting ownership rights which were lost before 25. 2. 1948 where special restitution regulations have not established a manner for mitigating or rectifying these proprietary wrongs.

The Constitutional Court concluded in this analysis of the constitutional complaint of plaintiff Oldřich Kinský, who had filed a claim for the determination of ownership rights to the property specified in the constitutional complaint. The essence of the plaintiff's argument laid in the claim that the property in question was never transferred to the state through confiscation, since confiscation proceedings were never properly carried out, so that the plaintiff never ceased being the owner and the steps, which the Czechoslovak state carried out in the proceedings for allocating this property were thus invalid. In this regard the Constitutional Court stated that it is not possible to make property claims beyond the scope established by current laws, that is, beyond the framework of the restitution statutes, if such property was handled as confiscated or nationalized property, provided that it was taken by the state before the decisive period.

The Constitutional Court further stated that: „The restitution statutes essentially legalized the ownership of property which the state had acquired through confiscation, nationalization, or other property transaction, regardless of whether without the existence of such circumstances it would have been possible in certain cases to exercise claims of ownership rights to such property according to general statutes.

At this juncture it is interesting to present a differing point of view regarding the conclusions of the plenary opinion expressed by justice Eliška Wagnerová. In her dissenting opinion she states that in the justification of the opinion she sees a „Copernican reversal" in the judicature of the Constitutional Court in relation to actual restitution when it infers that „the restitution statutes legalized the state's ownership of property it had acquired through confiscation, nationalization, and other property transactions...By adding in relation to this particular interpretation of the restitution statues that it is irrelevant that, without the

[4]) It must be noted that the cited findings, issued before the plenary opinion, dealt with the relationship between restitution statutes and general statutes in cases where the property was taken by the state within the decisive period. The plenary opinion states however that considering that these findings do not establish any temporal or other restriction for the expressed legal opinion, in principle they allow the approach where the former owner of property lost *before* the decisive period may make a claim using general statutes.

existence of these laws it would have been possible in certain cases to exercise ownership rights to such property according to general statutes, it explains the purpose of restitution statutes in a manner entirely contradictory to the judicature of the Constitutional Court up to this date. In other words, the opinion ascribes to the restitution statutes the purpose of expropriating, at the very least, that property which the state seized through physical occupation."

In spite of the conclusion contained in this plenary opinion of the Constitutional Court, in its decisions the Constitutional Court has not a priori rejected every civil suit to determine ownership in restitution claims, as will be documented below.

- *The legal nature of confiscation according to the Decrees of the President of the Republic – disputes over the validity of confiscation*

In its opinion the Constitutional Court also examined the legal nature of confiscation according to Decree no. 12/1945 Coll., concerning the confiscation and expedited distribution of the agricultural property of Germans, Hungarians, as well as traitors and enemies of the Czech and Slovak nation, or according to Decree no. 108/1945 Coll., concerning the confiscation of enemy property and concerning National Recovery Funds. Confiscation according to these decrees was a legal act which cannot be judged with respect to defects in the related administrative (declaratory) rulings, unless expressly permitted by law. In matters of confiscation according to Decree no. 12/1945 Coll., confiscation typically occurred without any administrative proceedings if the owner of the property was a person whose property was subject to confiscation as indicated by administrative bodies, and if he himself did not petition for a decision to be made through such proceedings, or if the administrative office itself did not consider the issue of such a declarative ruling necessary. The Constitutional Court stated that affirmation of defects in the confiscation proceedings of the issued ruling does not in itself impugn the effects of confiscation, as the legal title of the transfer of ownership rights is not the legal act here, but the decree itself.

Granting protection to confirmed ownership rights extinguished over sixty years ago would, according to the Constitutional Court, violate the legal certainty of persons acquired over this period from the state or from the previous owner. On the contrary, refusing protection to confirmed rights may not in such cases be in conflict with no. 11 of the Charter of Basic Rights and Fundamental Freedoms (hereinafter the „Charter").

Here the Constitutional Court cited its previous finding, sp. zn. IV. ÚS 437/01, in which it stated that public authorities assessing a constitutional complaint in which the plaintiff assails the validity of a confiscation order issued in 1946 were not obliged to examine whether the particular (declaratory) administrative ruling on whether the conditions for confiscation are met according to Decree no. 108/1945 Coll., was issued in accordance with the legal statutes valid at that

time. In this case the Constitutional Court stated that in spite of the fact that in its opinion the conditions were not met for confiscation in the particular case of this plaintiff, in 1946, when the confiscation order was issued, Czechoslovakia was a democratic state and thus it was possible to file an appeal with the appropriate provincial national committee (pursuant to § 1 par. 4 of the cited decree). As the plaintiff failed to do so, it is not possible to overturn the particular confiscation order through a determination suit. The Constitutional court also stated that this conclusion corresponds to the system of restitution statutes, and the will of legislators respectively, to limit the reparation of proprietary wrongs to those which occurred in the decisive period (between 25. 2. 1938 to 1. 1. 1990).

The Constitutional Court also emphasized that if disputes were resolved during this period which had begun before this period (e.g. a dispute over the validity of confiscation), then in its rulings it would back those who subsequently clearly suffered abuse of the Decrees of the President of the Republic (for example through arbitrary annulment of rulings in favor of the owners, or their legal successors).[5])

- *State citizenship as a condition for filing a restitution claim*

In its judicature, the Constitutional Court has elaborated several times on the basic condition necessary for filing a restitution claim, which is state citizenship. It has examined this condition from many aspects, one of which being the issue of uninterrupted citizenship with respect to the amendment of Act no. 243/1992 Coll. by Act no. 30/1996 Coll., which as of 9. 2. 1996 established the condition of uninterrupted citizenship.

In its finding in case sp. zn. II. ÚS 326/98 of 13. 6. 2001 the Constitutional Court stated that the provisions of § 2 par. 1 of Act no. 243/1992 Coll., (specifying laws governing the acquisition and loss of citizenship) contains a „static reference" to statutes governing the acquisition and loss of citizenship, and therefore the changes later inserted to their text cannot be used. In no case can this provision be used to conclude that to be eligible for restitution, a person may not again lose reinstated citizenship or citizenship retained according to Decree no. 33/1945 Coll. Such interpretation would mean making restitution of property impossible for those who were forced to leave Czechoslovakia and due to their new living circumstances renounced their citizenship or even had their citizenship revoked arbitrarily by the former regime. Such interpretation would be contrary to the purpose of the restitution laws.[6])

The Constitutional Court further stated that as legislators had inserted new paragraph 3 into § 2 of Act no. 243/1002 Coll., the additional condition (i.e. of having uninterrupted citizenship up to January 1st, 1990), could in no case

[5]) See CC finding sp. zn. 309/97

[6]) Also compare the finding of sp. zn. 143/01.

concern those people who had exercised their restitution claims according to the original wording of the cited law in 1992, who met all of the conditions established by this law at that time, even if a ruling had not been made regarding their claim at the time Act no. 30/1996 Coll. went into effect.[7])

From another perspective of assessing whether the restitution conditions of citizenship have been met, the Constitutional Court has stated that if the original owner of property fails to meet this basic condition of restitution, then this condition cannot be met by the citizenship regained by his descendants. The Constitutional Court emphasized that mitigation of the effects of certain proprietary wrongs according to § 1 of Act no. 243/1992 Coll. is unconditionally bound to the fulfillment of the aforementioned basic condition, i.e. state citizenship. If the original owner did not renew citizenship, the restitution claim may not be justified simply because of the fact that his daughter or granddaughter meets the special subjective conditions established for persons deriving a restitution claim from an original owner.[8])

An even more complicated and sensitive question than that of citizenship is the question of judging claims of German nationality (and the related confiscation of property according to the Decrees of the President of the Republic) and the institution of „persons unreliable to the state" which was frequently abused in the past. The Constitutional Court examined this issue in finding sp. zn. III. ÚS 107/04,[9]) where it stated that from a historical perspective, one must keep in mind that if a citizen of the Protectorate during the Second World War claimed to be of German nationality in order to obtain German citizenship, at the time this was understood to be an expression of the willingness to contribute to carrying out the criminal policy of Nazi Germany and manifestation of betrayal to the Czechoslovak state: „Such action would according to Decree of the President of the Republic no. 33/1945 Coll. be considered grounds for the loss of Czechoslovak state citizenship. At the time, it was irrelevant whether German officials accepted the request for German citizenship or not, at issue is the manifested intent itself of such persons.

The post-war decrees of the president of the republic allowed for exceptions when assessing the conditions for the confiscation of enemy property for cases where people demonstrated that they had applied for German citizenship under duress or other reasons of special consideration, but they were responsible for demonstrating such circumstances themselves. A legal framework was established according to the processing standards of that time for post-war procedures of examination in such cases."

[7]) This interpretation was referred to by the Constitutional Court in subsequent judicature, for example finding sp. zn. 145/01.

[8]) See for example the ruling sp. zn. IV. ÚS 192/94 of 13. 12. 1994, or the ruling of sp. zn. IV. ÚS 675/01 on 12. 3. 2003.

[9]) The „Zámek Opočno" (Opocno Castle) case

In this finding the Constitutional Court took a somewhat controversial opinion, namely that the entire practice of confiscating enemy property in the period from May 1945 to February 1948 „may have been influenced by the peculiarities of the post-war period, but nevertheless took place under the relatively democratic conditions of a pluralistic democracy while maintaining elementary legal guarantees enabling just decisions to be made. "

In this regard the Constitutional Court further states that it is aware that in certain cases of confiscation and nationalization by Czechoslovak offices and courts from May 1945 to February 25th, 1948 there were some irregularities and excesses which were not rectified in a legal manner at the time, even though the possibility of legal defense existed in principle: „Restitution legislation passed after 1989 however did not set the goal of eliminating every possible proprietary injustice which could have occurred in the post-war period. Democratic legislators after 1989 above all had to respect the time factor, i.e. the fact that after such a long time it is not possible to right every wrong. To assess the validity and effects of administrative or other actions which constituted the basis for the transfer of ownership is, after such a long time, very difficult to the point of being impossible."

In this case the Constitutional Court also defined the term „racial persecution" in the sense that it is used in § 3 par. 2 of Act no. 87/1991 Coll. For purposes of restitution it is characterized as „encompassing only the most egregious forms of racism, particularly committed through the holocaust, but not other forms of persecution on national grounds. Such interpretation does in no way violate the constitutional principle of legal equality embedded in Art. 1 of the Convention."

- *On the obligation of the court to evaluate the question of political persecution within the scope of restitution proceedings*

In concluding this analysis, let us consider a recent finding of the Constitutional Court which examines the question of state citizenship from a different perspective. In finding sp. zn. 617/08 on 24. 2. 2009, the Constitutional Court considered a similar question, i.e. the manner in which the ordinary courts judged the question of whether the legal predecessor of a plaintiff was an entitled person pursuant to § 3 par. 1 of the Extra-judicial Rehabilitation Act. The ordinary courts ruled that he was not, since by claiming German nationality he had lost Czechoslovak citizenship (according to Decree no. 33/19 Coll.), and was a person considered unreliable to the state (pursuant to Act no. 146/1928 Coll.) In this case the Constitutional Court, in conjunction with the purpose of restitution, emphasized to the contrary that in applying the law on extra-judicial rehabilitation the courts should not proceed too restrictively and formally, but must be very sensitive in their interpretations, always with a view to the circumstances of the specific case. Civil authorities are obliged to interpret the legally determined circumstances in the spirit of mitigating certain proprietary

wrongs. Political persecution must then be taken into consideration by every court examining restitution, since this an important circumstance which either did or did not affect the particular legal situation.

In this context and with reference to period literature and judicature, the Constitutional Court has examined the consequences of declaring Jewish ethnicity and listing German as one's native language (based upon the census taken in 1921). It stated that if a person claimed Jewish ethnicity, that this was clear indication that the person did not consider himself to be German and did not desire to be a member of the German national group. The use of the German language by Jews cannot in and of itself be considered incriminating or constitute grounds for claiming the particular person behaved as an enemy to the Czech nation. These people could not rightfully have their property confiscated according to Decree no. 108/1945 Coll.

In this ruling the Constitution Court also expressed the legal opinion that it considers it inadmissible for ordinary courts to base their decisions on and directly refer to the decisions of civil authorities from the decisive period, a time where the law was abused by the totalitarian regime. It chastised ordinary courts for not taking into consideration in their deliberations whether the rulings of district and regional courts from the 1950s were not acts of political persecution, i.e. whether these rulings were not merely a means hiding the intent to punish the original owner through confiscation as a person belonging to a certain social and propertied group, in the given case the „capitalist property" of a Jewish family.

V. Conclusion

Analysis of the judicature of the Constitutional Court offers a rounded perspective on the real problems encountered by the application of restitution laws in individual cases. As evident from the first section of the analysis, a fundamental problem or specific aspect of the restitution of Jewish property is the fact that this problem must be viewed from the perspective of the historical context from which it comes. This brings with it considerable difficulties in determining the factual state in individual cases, as well as the frequent ambiguities with respect to the application of relevant statutes in the proceedings for making restitution claim. The actions of civil authorities both in the decisive period, the years from 1945 to 1948, and the preceding period up to February 1948, must be viewed from the perspective of the political and social situation in which these bodies made their decisions. Whether in the conditions of limited democracy existing here up to 1948 or particularly afterwards up to 1989, there was frequent abuse of the law for the purpose of protecting the interests of „socialist society". The purpose of rulings issued in this period was often not to carry out the law but to ensure other particular interest.

The problems mentioned here have also affected the manner in which the restitution of Jewish property has been treated by the post-1989 legal frame-

work. Even in this democratic period the effort to mitigate proprietary wrongs encounters a number of difficulties or injustices, beginning with the condition of state citizenship, which for many applicants is an insurmountable hurdle for the exercise of a restitution claim, up to the complicated determination and documentation not only of the actual circumstances, but even the application and interpretation of restitution statutes.

This analysis of the judicature of the Constitutional Court concerning the restitution of Jewish property attempts to summarize the basic principles which factor into the decisions of the Constitutional Court when judging the constitutionality of restitution proceedings. Although the analysis does not include (and in the given scope cannot include) all principles which appear in decisions on restitution cases, it reflects the basic problems and difficulties which are encountered in the application of restitution states in specific cases.