



Winter 2018

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Recommended Citation

Barbara Blaszczyk, *The Attempts at Legal Regulation of Restitution in Poland in the Early Transition Period: Main Dilemmas and Obstacles*, 41 Loy. L.A. Int'l & Comp. L. Rev. 359 (2019).

Available at: <https://digitalcommons.lmu.edu/ilr/vol41/iss3/5>

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The Attempts at Legal Regulation of Restitution in Poland in the Early Transition Period: Main Dilemmas and Obstacles

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It is an honor for me to take part in this important conference. As an economist, I would like to emphasize the fact that I do not consider myself a specialist in restitution, rather that title belongs to those in the legal area. However, there was a period in my life when I worked very closely with this issue.

In the early 1990s, at the beginning of Poland's transition from a socialist economy to a market economy, as an adviser to the Parliament, I was active in both the field of research and in preparing the legal framework for the privatization of our economy. At the time, a big part of our economy was in the state's hands.¹ The first privatization law was passed in July 1991,² followed by a new law introduced in 1996.³ Restitution, or as we called it, reprivatization (meaning the return of nationalized properties to private hands), was one of the possible paths to re-establish the private sector. Behind this very broad term of reprivatization, we understood it to mean giving property back to its former owners or to compensate their losses. More precisely, reprivatization should include all of the situations in which property has been acquired by the state without just compensation.⁴

In the following paper, I will use reprivatization and restitution as synonyms. Given the complexity of the issue, reprivatization, or

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1. In 1988 the state sector produced 81.2% of GDP and the private sector (including agriculture) only 18.8%. MACIEJ BAŁTOWSKI & KOZARZEWSKI PIOTR, ZMIANA WŁASNOŚCIOWA POLSKIEJ GOSPODARKI 71 (2014).

2. Ustawa z dnia 13 lipca 1990 r. o prywatyzacji przedsiębiorstw państwowych [The Act of 13 July 1990 on the Privatization of State Enterprises] (1990 Dz. U. nr. 51 poz. 298) (Pol.).

3. Ustawa z dnia 30 sierpnia 1996 r. o komercjalizacji i prywatyzacji [The Act of 30 August 1996 on Commercialization and Privatization] (1996 Dz. U. nr. 118 poz. 561) (Pol.).

4. TOMASZ LUTEREK, REPRYWATYZACJA. ŹRÓDŁA PROBLEMU 77 (2016).

restitution, needed a special law beyond privatization law to solve the problems connected with this subject in Poland.

I was asked by the organizers of this conference to speak about the early restitution attempts in Poland because of my presence in the teams that prepared opinions on similar issues during these times. From 1991 to 1996, I was the vice-president of the so-called Council of Ownership Changes to the prime minister in Poland, Rada Przekształceń Własnościowych. The Council, which was made up of nine experts, was an advisory and consulting organ to the government and covered all issues related to privatization. We prepared numerous opinions on the different privatization procedures and their implementation, and among others, we had the opportunity five times to submit our opinions on drafts of reprivatization bills that were prepared during our tenure. We collected all of our opinions and when the Council finished its activity in 1996, we published them in one collective volume.⁵ This volume should be available at the Parliament Library.

The second institution I would like to mention in connection with my expertise in restitution is CASE, the Centre of Social and Economic Analysis, where I worked during the nineties. CASE is a think-tank, active in the research and advisory area, and was established by a small group of economists interested in transition issues. With this particular organization, we managed to publish a number of books and papers on the topics of post-communist transition and privatization in countries from our region. In some of these publications,⁶ we made detailed comparisons between the reprivatization bills in other post-communist countries as compared to our drafts and analyzed their lessons for Poland.

The third body of work that I want to direct you to is a book written by Dr. Tomasz Luterek, who is among us today. The book discusses the background of Polish reprivatization and the sources of difficulties.⁷ I was one of the reviewers of this noteworthy publication and I strongly advise you to read this very interesting interdisciplinary book, which attempts to clarify the factors that hindered the enactment of the reprivatization law until today.

5. Rada Przekształceń Własnościowych przy Prezesie Rady Ministrów (1996), *Opinie, stanowiska i oświadczenia przygotowane w latach 1991-1996*.

6. Jerzy Baehr & Tomasz Kwieciński, *Reprivatization in Post-Communist Countries*, in *PRIVATIZATION IN POST-COMMUNIST COUNTRIES*, vol. II, 67-92 (Błaszczyk B., and R. Woodward eds., 1996), CASE; Jerzy Baehr & Tomasz Kwieciński, *Polskie dylematy reprivatyzacji: wybrane zagadnienia prawne*, in *PRYWATYZACJA W POLSCE I W NIEMCZECH WSCHODNICH*, 222-241 (Błaszczyk, B., Quaisser W. and R. Woodward eds., 1997) CASE.

7. LUTEREK, *supra* note 4.

I will now focus on the rationale for restitution in Poland as we have seen it at the beginning of the transition in 1990, which I will try to present in a systematic order.

First, the ethical considerations—after post-war massive confiscations of private properties, we thought that restitution would be morally justifiable, as at least partial compensation. In our view, the properties should either be returned to those who were set to inherit or were unjustifiably deprived of them, or those people should receive other compensation.

The second consideration was of economic and systemic nature—private property is a crucial element of any free market economy. We needed to quickly broaden the private sector at the expense of the very dominant state sector. In our view, restitution would help in this process, leading to more private entities and to more private properties on the market.

The third rationale was rooted in our understanding of the rule of law. The respect for private property rights and protection against their violation is one of the fundamental elements of state order, as is written in the Constitution of Poland.⁸ Unless such a right is strongly guaranteed, people will be afraid that their property can be taken. In this regard, unless the state would compensate the losses of its citizens stemming from unlawful confiscations in a not so distant past, the credibility of the state could be questioned.

The last consideration was pragmatic—in order to increase the pace of privatization of state-owned enterprises that during former confiscations often became owners of private land and other property, it was very important to quickly clarify the property claims before starting the privatization procedures. We thought that having an act on restitution would help clarify and put in order the property rights.

These were the main arguments as to why we thought that restitution was a matter of crucial importance in Poland. There were also many counterarguments to it. One counterargument was related to the bad state of the Polish economy in the 1980s and early 1990s. The public debt was enormous and inflation was huge. The post-communist economy was a disaster and the economy was in need of costly structural reforms. The social costs of these reforms were predicted to be very high, and restitution would cause additional costs. This is probably why the issue of restitution was excluded from the first privatization law in 1991.

8. Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution of the Republic of Poland of Apr. 2, 1997] art. 20, 21, & 64 (1997 Dz. U. no. 78 poz. 483) (Pol.).

Another argument that was often raised in the public debate was that the whole society took great material and physical losses during World War II and the period immediately following. Why should only a portion of the society (the former owners of property) be given the properties back while the rest would be not compensated for their losses? Many politicians thought in a similar way.

Doubts were also raised as to whether the land that was given to the farmers during the land reform in 1945 would be taken back from the farmers. Subsequently, it was stated by the authors of the restitution projects that such an intention did not exist and the beneficiaries, the target group of the agricultural reform, would not be obliged to give the properties back.

Many other questions were raised. For instance, would a restitution act not cause an avalanche of complaints and claims from persons who would be excluded or not satisfied by the law? Would it not bring about numerous abuses, malpractices, and corruption?

There have been numerous attempts directed at preparing the reprivatization law. Altogether, there were about eighteen drafts of the restitution law discussed. Some of the drafts came close to being passed, but were never enacted. They differed from each other in many respects. The most advanced of the drafts, from a technical point of view, was a rather large-scale draft, but only concerned Warsaw properties. It was proposed in 1999 by the government of Jerzy Buzek and was agreed upon by the Parliament.⁹ However, it was vetoed by President Aleksander Kwaśniewski because, in his opinion, it was too high of a financial cost. A similar draft was prepared again by the government of Donald Tusk from 2008 to 2010,¹⁰ but was abandoned because of the global financial crisis at this time.

Aside from the compensations awarded just after World War II to foreigners (excluding German nationals) for their property left in Poland that was nationalized under indemnification agreements, there were only partial regulations implemented. These partial regulations include, for example, the 2005 Restitution Act for Polish citizens who had lost their properties from former eastern Polish provinces (now part of other

9. Rządowy projekt ustawy o reprivatyzacji nieruchomości i niektórych ruchomości osób fizycznych przejętych przez Państwo lub gminę miasta stołecznego Warszawy oraz o rekompensatach [Government Bill on the Reprivatization of Real Estate and some Movables of Natural Persons Taken Over by the State or Municipality of the Capital City of Warsaw and on Compensations] (1999 Dz. U. nr. 1360 poz. 20) (Pol.).

10. LUTEREK, *supra* note 4, at 297-298; http://www.msp.gov.pl/portal/pl/48/14834/Informacja_na_temat_prac_nad_projektem_ustawy_o_swiadczeniach_pienieznych_przyzn.html.

countries) after World War II.¹¹ Another example is the 1989 Restitution Act for the Catholic Church and Other Religious Organizations.¹² There was also an important government directive from 1993 to set up a special restitution fund to accumulate reserves in order to fulfill future reprivatization claims. In 2000, this directive was confirmed by the Parliament in the amendment to the privatization law.¹³ The Reprivatization Fund is made up of contributions from former state-owned companies sold in public offers—5% of shares from each privatized company.¹⁴ However, a general restitution law that would apply to all Polish citizens deprived in the communist period is still missing.

I will now delve into the differences between consecutive restitution drafts that have been discussed in the past by our government and parliament. The first difference was in the proposed scope of restitution. A very narrow proposal was to limit the object of restitution to the property that had been confiscated by an over-inclusive interpretation of the nationalization laws of 1945-1950. For instance, when smaller properties were confiscated than the law prescribed, like small factories employing less than 50 people, only then would compensation be due. Implementing such a proposal would mean accepting the nationalization laws and compensating only their mistakes. This would be unjust and against the logic of reprivatization, which aims to compensate losses in a fair way. In effect, all property that has been nationalized without compensation should be included into the process.

Another question regarding scope was whether only the property located in today's existing borders of the country should be included in the process of restitution or whether property nationalized in former Polish regions, now belonging to other countries, should also be included. This question was answered in the aforementioned law from July 2005—deciding for a broader scope. There was also a question as to what kind of real property should be the subject of restitution. Eventually, a broader

11. Ustawa z dnia 8 lipca 2005 r. o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami R.P. [The Act of 8 July 2005 on the Exercise of the Right to Compensation for Leaving the Real Property Outside the Current Limits of R.P.] (2005 Dz. U. nr 169 poz. 1418) (Pol.).

12. Ustawa z dnia 17 maja 1989 r. o stosunku do Kościoła katolickiego w Rzeczypospolitej polskiej [The Act of 17 May 1989 on the State's Relationship with the Catholic Church in the Republic of Poland] (1989 Dz. U. nr. 29 poz. 154) (Pol.).

13. Ustawa z dnia 29 marca 2000 r. o zmianie ustawy o komercjalizacji i prywatyzacji przedsiębiorstw państwowych [The Act of 29 March 2000 Amending the Act on Commercialization and Privatization of State Enterprises] (2000 Dz. U. nr. 31 poz. 383) (Pol.).

14. Fundusz Reprywatyzacji exists until now and had in January 2017 some 4,500,000,000 Polish zloty in its account.

scope seemed more appropriate. The kinds of land included agricultural land, forests, houses, etc.

The second difference between the drafts was in the choice of beneficiaries of reprivatization, in other words, who had the right to apply for the restitution. Should the beneficiaries be limited to Polish citizens? Polish citizens now, or at the time of nationalization? What about foreigners? Only former owners, or also their heirs? Individuals or institutions? Discussed drafts differed very much in this regard. The most popular view was that all deprived people had to be citizens of Poland at the time of nationalization and their heirs should be included.

Another difference refers to the form of reimbursement of damage. Not everything can be reimbursed "in kind" or given back in the very same form in which it was taken. There was an idea to offer a replacement, such as other property owned by the state treasury. At some point it was suggested to offer restitution bonuses that would serve as vouchers, as opposed to damages. These bonuses or vouchers were to be exchanged for shares of state-owned companies that were being privatized, parts of state-owned real estate, or for money. There was also a discussion as to what form of reimbursement should have priority. It seems that nowadays only two forms of reimbursement would be accepted, in kind or monetary.

Other points of decision included whether compensation should be partial or in full, paid immediately or installments over time, and whether it should be digressive relative to the value of claims or subject to taxation. There was also discussion as to the method of valuation of properties claimed for restitution. Finally, the legal effects of such a general restitution law on other laws was discussed, for example, whether or not this law, once enacted, should block other legal ways of making claims for nationalized properties that exist now.

It goes without saying that the drafts of the reprivatization law discussed by the Polish Parliament and government differed in many respects and compromise was difficult due to the various parties' competing interests.

As mentioned previously, our Council of Ownership Changes took a stance on all drafts of privatization discussed in the first half of 1990. We were convinced that restitution needed very fast legal regulation because of economic and social reasons, like the blocking of privatization and the questioning of confidence in the new government, respectively. We were of the opinion that the law should have broad scope and should concern all types of confiscation, not merely those that were in conflict with the communist law; all nationalization laws and decrees of 1945-

1950 were illegal and unconstitutional. We thought that the scope of reprivatization should include many different types of property and should concern many types of beneficiaries, not limited to individuals and current Polish citizens. We supported many kinds of reimbursement, restitution in kind, when possible, and reprivatization bonuses that could be exchanged for other state properties. We especially acknowledged the need to determine the value of properties at the time of deprivation, not the current market value, as well as the expenses undertaken by public entities for the maintenance of the properties to date. Finally, we saw the need when drafting this law to take into consideration the financial limitations of the government, in terms of partial compensation, digressive quotas and taxes. Upon reflection, I believe our opinions were quite reasonable at the time, and many of the suggestions could be sustained today, apart from the reprivatization bonuses.

The reprivatization law failed not for lack of ideas, but for lack of solutions. Despite the fact that members of most political parties supported the idea of reprivatization and many efforts have been made, it has still not been resolved. I attempt to explain this lack of resolution in the final section of my discussion.

The discussions began in the early 1990s. Initially, compromise was difficult because of the extreme solutions for reprivatization proposed by differing political forces. Former property owners, followed by some right-wing parties, demanded full restitution in kind, while the left-wing parties were in favor of a small or even symbolic scale and scope of reprivatization. The constant turnover within the government and the radical political change that followed each election, together with the lack of continuity of work, posed the biggest hurdle to enacting a law. To a large extent, politics dominated the law on reprivatization. Let's look at two examples for this thesis.

As mentioned above, the government of Hanna Suchocka passed a directive about establishing a reprivatization reserve from shares of privatized companies for future restitution claims in 1993. This directive was accompanied by another decision blocking the state treasury from selling real estate that was the object of private restitution claims. According to estimations made at that time, 80% of those claims could be satisfied in kind from those properties; but the next government of Waldemar Pawlak, leader of the farmers party PSL, cancelled this second directive in 1994. This political decision had very important consequences for the future – it made restitution in kind impossible. Subsequent projects treated this kind of restitution as more or less

marginal and had to propose other solutions, such as compensation in exchange for money or other real estate.

Another example was when President Kwaśniewski vetoed a well-prepared draft of the reprivatization bill discussed for many years by the Buzek government and approved by the parliament in 2000. Kwaśniewski said the bill was contrary to the rules of social justice, against equal rights of citizens and harmful for the economy. Since then, the climate for restitution has worsened due to a fear of the high social and financial costs of broad scale compensations.

From 2008-2010, the Donald Tusk government discussed the next draft of the reprivatization law; however, the presentation was never made to the parliament because the government viewed the financial costs of regulation as too high. It was typical for this and many other governments to indefinitely adjourn important decisions that would be costly for the state budget unless they were supported by a strong political group of interest.

This brings us to another reason why the restitution law could not be effective. Admittedly, there was a lack of broad societal support for restitution. The social groups that suffered under confiscation are relatively small, weak and not very influential in comparison to the part of society that is not interested in or against reprivatization. All those who benefited from the confiscation, for example those who have gained land thanks to land reform or received flats given almost for free by the government in the early socialist period, have not seen the need for any corrections of this situation in favor of deprived former owners. Even if they were not obliged to give anything back, they would not be ready to bear together, with all other citizens, the indirect economic costs of restitution that would come out of the state budget. Additionally, many land owners were concerned that former owners would disturb them in purchasing the land for a cheap price. Finally, the Catholic Church and other religious organizations received compensation even before the process of transition started.¹⁵ Consequently, the Church was no longer interested in the fight for restitution on behalf of other citizens.

On the side of the authorities, even those that understood the moral obligation and practical need for reprivatization, there was not enough determination to resist the pressures of opponents and bring this process to an end. It also seems as though there was not a sufficient educational

15. Ustawa z dnia 17 maja 1989 r. o stosunku państwa do kościoła katolickiego w Rzeczypospolitej polskiej [The Act of 17 May 1989 on the State's Relationship with the Catholic Church in the Republic of Poland] (1989 Dz.U. nr. 29 poz. 154) (Pol.).

effort to explain to the people the rationale for reprivatization and to convince them of its necessity.

There was a lack of consideration as to the costs of such decisions for future generations and later governments. These costs appeared very quickly. Because no reprivatization law exists to settle restitution issues, affected parties must turn to an alternative course to seek compensation by way of damages through individual court procedures and subsequent administrative decisions. However, the courts are not well prepared for such procedures; for example, there is a lack of proper technical rules on valuation of the claimed property. Instead of using the value at the moment of nationalization, often times the present value is used. As a result, there has been no consistency and there have been many defective court and administrative decisions.

What is more, without detailed legal regulation of this issue a great loophole was established. Numerous law offices and other middlemen decided to make their business from the unresolved restitution cases in Poland. Some of them cheat the heirs of former owners by acquiring their property claims for low amounts, and after receiving positive decisions from the court, selling the same property for very large sums. Also, in the last few years, a strong criticism of new owners of houses appeared. These new owners received the properties back on the basis of their own restitution claims or on claims acquired from the families of former owners. They also misused their ownership rights in persecuting the inhabitants of these houses in order to force them out.

On the other hand, the financial situation became increasingly dangerous for the state and local budgets. The amount of money that has to be paid out for reprivatization is growing each year and more resources will need to be set aside for the growing number of property restitution claims. The scale of these public expenditures together with the unresolved restitution issue will probably convince the government that it is time to not only resume the discussion on reprivatization, but to bring this issue to a close. Recently, we have been informed that the government is working on a new draft of reprivatization and that there is a political will to implement it quickly.

Let us hope that this law will be based on sound principles, taking into account not only the needs of the authorities, but also the interests of former owners as well as today's societal groups. Let us also hope for this law to be in line with moral standards and the rule of law.