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Taxation of the Restitution of Confiscated Property in Poland

MATEUSZ TCHÓRZEWSKI*

I. INTRODUCTION

Close to three decades have passed since democracy and the rule of law were reestablished in Poland. However, property restitution continues to be a highly divisive and unresolved issue. With that in mind, the goal of this article is to discuss the crucial ramifications of the role of taxation within the ongoing efforts and discussions aimed at creating adequate restitution legislation in Poland.

The question of introducing such legislation is connected to numerous, complex issues, some of the crucial ones being:

- 1) The scope of persons covered by the legislation,
- 2) Valuation of property at issue,¹
- 3) Rules for establishing the amounts to be paid out as compensation,²
- 4) Deciding under what circumstances restitution in kind can take place, and
- 5) Considering the expenses incurred by various entities for conserving and/or improving the property as well as taking into consideration relevant, previously existing mortgages.

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1. There is a disagreement as to the proper timing for identifying the value of property for the purposes of restitution. It seems that from amongst the opinions on this topic, two need pointing out. According to one opinion current value of property should serve as a basis in that regard. According to the other opinion this is not justified; instead the period of the first few years following the fall of Communism in Poland should serve as the most adequate benchmark for valuation. *See* TOMASZ LUTEREK, REPRYWATYZACJA: ŹRÓDŁA PROBLEMU 305-313 (2016); *see also* Evan Hochberg, International Academic Conference on Confiscation of Property in Poland and Efforts at Restitution (June 28-30, 2017).

2. *See generally* LUTEREK, *supra* note 1, at 305-316. The author points out that, as a rule, the amounts paid out as compensation should be substantially lower than the actual value of relevant property, this being, arguably, one of the main dilemmas of restitution.

There seems to exist a substantial basis in the very foundations of the Polish legal system to address the wrongs committed by Nazi Germany and, later on, the Communist *régime* installed by the Soviet Union. Doing so in a systematic way requires introducing appropriate legislation. This is yet to be done, even though Poland regained its *de facto* independence and reestablished the rule of law in 1989. It needs to be pointed out that the protection of individual property has been historically deeply-rooted in Polish legal culture.³ The lack of restitution legislation presents a certain inconsistency – on one hand it is argued that the People's Republic of Poland was, in fact, a foreign imposed *régime*, and that its basic legal values were completely alien to the Polish legal tradition. On the other hand, in spite of strong condemnation of this *régime*, many of its legacies live on, the lack of restitution being one of them.⁴

Problems of wrongful confiscation and restitution of property conducted by foreign powers and/or puppet states were faced by Polish lawmakers early in the 20th century and seem to bear resemblance to the current issues facing Poland.⁵ In fact, legislation was introduced as early

3. In 1422, *przywilej czerwiński* (the Privilege of Czerwińsk) was issued, which established that the monarch could not confiscate a nobleman's property without due process of law. Due process included the requirement of having one's case heard in a court of law and a trial based on written laws. Beginning in the 15th century, the candidates for the position of judge were selected by *Sejmiki* (provincial parliaments). The burghers, starting from the 14th century, also enjoyed privileges (which were usually issued individually for each urban center) that protected their property, and the administration of justice was largely the prerogative of city councils. In this regard the situation of farmers and serfs changed significantly over time. However, it may be stated that in the Polish legal tradition, the protection of individual property started to develop very early and extended to relatively large portions of the realm's population. See JULIUSZ BARDACH, BOGUSŁAW LEŚNODORSKI & MICHAŁ PIETRZAK, *HISTORIA USTROJU I PRAWA POLSKIEGO* 91-93, 118, 239 (2003); see also MAKILLA DARIUSZ, *HISTORIA PRAWA W POLSCE* 72-73 (2008).

4. See generally K. H. Łaszkiwicz, *Problematyka reprivatyzacji w Polsce*, in *DOBRA KULTURY I PROBLEMY WŁASNOŚCI* (2005).

5. The period of 1939-1989 was not the first instance in modern history where confiscations of property were conducted on Polish territories by foreign powers. Polish territories were partitioned between Prussia, Austria and Russia in the second half of the 18th century. The attempts aimed at regaining statehood, which took place in the 19th century, were not successful and were followed by repressions which included confiscation of property belonging to the participants of the struggle for independence. It deserves attention that in the early 19th century a puppet Polish state was established on a portion of Polish territories, controlled by tsarist Russia. A significant portion of the aforementioned repressions took place within the framework of this puppet state (Kingdom of Poland) which was, initially, formally independent from the rest of the Russian Empire (the Russian Tsar held the title of King of Poland). This bears some interesting resemblances to the People's Republic of Poland which was formally a sovereign state but was largely under *de facto* Soviet control. It is worth pointing out that the communist *régime*, which

as the interwar period, which addressed specific issues related to property confiscated as a repression for independence struggles (i.e., insurrections). The scope of this legislation was, effectively, relatively narrow. The statute on goods confiscated by former occupying governments from the participants of the struggle for independence⁶ consisted of thirteen articles. Persons who were able to benefit from restitution had to be either a former owners' descendants in a direct line or their living spouses, provided they were Polish citizens and were not convicted of offenses against the Polish state. Restitution was subject to taxation, which was imposed on a net value of goods over 10,000 thousand zlotys. The taxation was progressive with rates ranging from 4% to 30%.

It needs highlighting that Poland was among the forty-six countries which approved the Terezin Declaration on Holocaust Era Assets and Related Issues, where it is clearly stated that:

Noting the importance of restituting communal and individual immovable property that belonged to the victims of the Holocaust (Shoah) and other victims of Nazi persecution, the Participating States urge that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.⁷

The lack of restitution legislation often results in the feeling of injustice and unfairness among the claimants.⁸ As for the reason why the restitution legislation has not yet been introduced, it might be due to the fact that many Polish voters feel their parents and grandparents were victims themselves. They were victims both of World War II and Soviet-Communist domination, the consequences of which can still be felt today.

According to this perception, Polish society is still relatively impoverished due to all the destructions and atrocities which took place during World War II as well as by the consequences of the Soviet-

did not provide substantial protection of private property, was installed by the Soviet Union in the aftermath of World War II. See Robert Jastrzębski, *Reprywatyzacja w Państwie Polskim z Punktu Widzenia Historii Prawa*, in *STUDIA I ANALIZY SĄDU NAJWYŻSZEGO TOM III 9-19* (Mateusz Pilich ed., 2016).

6. Dz.U. [Journal of Laws] No 25, poz. 189 as amended.

7. Terezin Declaration of Holocaust Era Assets and Related Issues, June 30, 2009, available at <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> [hereinafter Terezin Declaration].

8. See LUTEREK, *supra* note 1, at 285-99.

Communist economic model which was imposed on Poland after the war alongside with Soviet *de facto* occupation.⁹ This deep feeling of hurt and injustice makes it politically difficult to implement full and complete restitution legislation in Poland. In spite of a long period of growth, the living standards in Poland are still significantly lower than those of Western Europe and the United States¹⁰ – this adds to the feeling that Polish society suffered serious and largely unaddressed injustices during and after World War II. This translates into actions (or lack thereof) of Members of the *Sejm* (Parliament).

It needs pointing out that there exist different opinions on taxation of restitution. According to one opinion, restitution and compensation for confiscated property should not be taxed as it would be unfair to impose a tax burden on persons who were deprived of the right to use their property for decades.¹¹ According to the second opinion, an inheritance tax should be applicable to large amounts paid as restitution compensation, with tax rates as high as 40%, large sums amounting to the equivalent of 325,000 British pounds. Such taxation is perceived as a superior solution to simply setting the limits of the compensation amounts which are paid out.¹² This demonstrates an approach where taxation is viewed as one of fundamental elements of shaping the effective scope of restitution legislation.

Currently, there exist certain, albeit very limited, possibilities to pursue restitution claims in Poland.¹³ Generally, this applies to the instances where confiscation was conducted in a manner which constituted a breach of law. Such unregulated restitutions lead to substantial dysfunctions and are harmful to the very notion of restitution.¹⁴

9. *See id.* at 171-225.

10. According to World Bank data, as of 2016, Poland's nominal GDP per capita amounted to 12,414.10 USD, which amounts roughly to 21% of US nominal GDP per capita. *See GDP Per Capita*, THE WORLD BANK GROUP, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?year_high_desc=false.

11. *See* Hochberg, *supra* note 1.

12. *See* LUTEREK, *supra* note 1, at 315.

13. Polish courts highlight the fact that restitution, as currently conducted, is selective and determined by such factors as current (changing) trends in relevant court rulings (semi-precedents), access to documents, and access to professional legal counsel. The fairness of such ways of conducting restitution is doubtful. *See* ŁUKASZ BERNATOWICZ, REPRYWATYZACJA NA PRZYKŁADZIE GRUNTÓW WARSZAWSKICH 197 (2015).

14. *See* LUTEREK, *supra* note 1, at 271-272.

II. TAXATION OF RESTITUTION IN THE POLISH CONTEXT

A. *General Goals and Principles of Taxation in Polish Law in the Context of Restitution*

The Polish tax system assumes that taxes are put in place in order to fulfill certain goals.¹⁵ The primary goal of taxation is generally considered to be fiscal, i.e., the purpose of a tax is to provide the state (a unit of local self-government) with necessary financial resources. However, there exists some disagreement as to what role the non-fiscal goals of taxation should play.

According to one view, the non-fiscal goals of taxation can, in fact, be harmful since they make tax law increasingly complicated and inefficient.¹⁶ In this view, as a rule, tax law is not an appropriate tool for pursuing non-fiscal goals; this should happen *via* spending of resources which were collected by means of taxation. However, taxes can serve, and indeed very often do serve, non-fiscal goals when it is necessary to use them in order to maintain social peace.

According to the second view, the primary role of taxation is also a fiscal one. However, taxation can also successfully serve secondary goals, such as providing stimuli for the economy, addressing social issues (such as reduction of poverty and inequality, promoting education, etc.) as well as helping environmental issues (such as reducing pollution, greenhouse emissions, etc.).¹⁷

It seems safe to state that there is no major opposition to the notion of non-fiscal goals of taxation as long as they serve to maintain social peace, as it is regarded higher than the current fiscal interests of the state.

One of the principles of Polish tax law is that taxation should be universal¹⁸ *i.e.* as a rule, all events which are relevant from the point of

15. See LECH MORAWSKI, *WSTĘP DO PRAWOZNAWSTWA* 164 (2002). It is important to have in mind that in Poland, as in many other civil law countries, the opinions of respected legal scholars carry an important weight both in terms of shaping the legislation as well as in interpreting it.

16. See TAX STUDIES INST., *WSTĘP DO NAUKI POLSKIEGO PRAWA PODATKOWEGO* 24-25 (Witold Modzelewski ed., 2010).

17. See ANDRZEJ GOMUŁOWICZ & DOMINIK MĄCZYŃSKI, *PODATKI I PRAWO PODATKOWE* 350-59 (2016).

18. See Kazimierz Działocha et al., *Komentarz do art. 84 Konstytucji Rzeczypospolitej Polskiej*, in *KONSTYTUCJA RZECZPOSPOLITEJ POLSKIEJ. KOMENTARZ. TOM II* (Zubik Marek et al. eds., 2016). This rule has been induced from article 84 of the Polish Constitution, which states

view of a given tax structure (income, supply of goods and services, etc.) should be covered by a given tax.¹⁹ Any exceptions in that regard could not only be viewed as assigning a non-fiscal purpose to a given tax, but also, potentially, as a breach of the Constitution of the Republic of Poland.

B. Taxation of Restitution in Poland – Personal Income Tax

In the context of restitution there are two taxes, which may prove to be relevant to the issue at hand: income tax and inheritance tax. Within the framework of the Polish Personal Income Tax Act (“PIT”) all income, as a rule, is subject to income taxation.²⁰ Income is derived from specific sources of revenue and consists of a surplus of revenues, derived from a given source of revenue, over the costs of acquiring thereof within a given tax year.²¹ The notion of sources of revenue is crucial from the point of view of determining the scope of the income tax. This is done by providing a list of sources of revenue which includes so called “other sources.”²² The goal for including such “other sources” of revenue in the aforementioned list was to give the tax authorities significant discretion when deciding if certain economic gain should be considered to constitute income for the purposes of personal income taxation. This discretion is, however, significantly limited, among other things, by the provisions of Article 21 of the PIT, which deals with tax exemptions, and most notably Paragraph 1, Point 3. This provision states that compensations are exempt from taxation, provided that their amount or rules for setting thereof stem directly from separate statutes.²³ In accordance with Article 21, Paragraph 1, Point 3b, other compensations, which stem from a court ruling, are exempt from taxation up to the amount which is stated in such ruling, excluding compensations acquired while conducting a business activity and benefits which the

that everyone shall comply with responsibilities and public duties, including the payment of taxes, as specified by statute.

19. *See* Trybunał Konstytucyjny [Constitutional Tribunal], K 41/02, Nov. 20, 2002 (Pol.). According to the Tribunal, article 84 of the Constitution establishes the principles of universality and equality of taxation.

20. *See* Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 8 grudnia 2017 r. w sprawie ogłoszenia jednolitego tekstu ustawy o podatku dochodowym od osób fizycznych [Notice of December 8, 2017 Consolidation of Personal Income Tax Act] art. 9 §1 (2018 Dz. U. poz. 200) (Pol.).

21. *See id.* art. 9(2).

22. *See id.* art. 10(1).

23. *See id.* art 21(3).

taxpayer could have acquired had the injury had not taken place.²⁴ Another relevant exemption could stem from Article 21, Paragraph 1, Point 29 of the PIT which exempts the revenues that relate to compensations paid in accordance with the provisions which regulate the management of real estate.²⁵

Principles of Polish income taxation typically assume that only income – understood as a positive difference between revenues and costs of acquiring thereof – should be subject to taxation. Having that in mind, it seems that an effective exemption of restitution from income taxation should not be viewed as a divergence from the fiscal goal of taxation.²⁶ Instead, it can be viewed as a way of ensuring that the claimant will be made whole, since there is no income to be taxed as long as the *sui generis* costs suffered by the claimant (confiscation) offset the *sui generis* revenue (restitution). Polish courts tend to be relatively conservative when interpretation of tax law is concerned, therefore there exists a significant risk that any economic transfer which is not explicitly exempted from taxation will be considered as taxable income. As a result, a direct exemption is often necessary in order to make sure that taxation does not take place.

It seems that, as far as restitution to the original owners is concerned, restitution *per se* should not effectively fall into the scope of personal income taxation. If income taxation was to take place, it should be viewed as a means of addressing social and political, as well as economic, issues in the context of safeguarding social peace.

C. Taxation of Restitution in Poland—Inheritance and Gift Tax

Inheritances are, as a rule, subject to inheritance and gift tax regulated by the Inheritance and Gift Tax Act of 1983 (“IGT”).²⁷ It is important to point out that the provisions of the PIT, by the virtue of Article 2, Paragraph 1, Point 3 of the PIT, do not apply to the revenues covered by the IGT. Inheritance and gift tax of course should not be applied to claimants who are the original owners of a given property; the question is then, whether it should affect their successors.

24. *See id.* art 21(3b).

25. *See id.* art 21(29).

26. *See* ADAM BARTOSIEWICZ, PIT. KOMENTARZ 421-429 (5th ed. 2015).

27. Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 5 kwietnia 2017 r. w sprawie ogłoszenia jednolitego tekstu ustawy o podatku od spadków i darowizn [Announcement of the Speaker of the Sejm of the Republic of Poland of April 5, 2017 regarding the publication of a uniform text of the Inheritance and Gift Tax Act] (2017 Dz. U. poz. 833) (Pol.).

The very reasons which arguably justify not covering restitution in terms of general income taxation would also suggest that inheritance and gift tax should affect the successors of the original owners. Granting an exemption in this context could constitute a departure from the principle of universality of taxation.

III. RELATIONSHIP BETWEEN RESTITUTION TAXATION AND RESTITUTION LEGISLATION

A. General Relationship Between Restitution and Taxation

As mentioned before, introducing restitution legislation poses certain dilemmas. It is not the goal of this article to discuss them in detail. However, it needs pointing out that in many instances restitution will be connected to substantial financial burdens that are to be carried by the state. In fact, the question of whether the value of property should be taken at the moment of confiscation or at the current value is a source of heated debate. Similarly, another important question is how to treat the costs of improving the state of the property and the maintenance costs.

There seems to be little doubt that restitution does not constitute an economic gain that should be taxed within the framework of personal income tax. However, inheritance and gift tax should be, arguably, applicable. If restitution legislation is to be limited in terms of factors such as the scope of entitled claimants and the valuation of property, as well as taking into consideration the costs incurred for maintenance and/or improvement of such property, then exempting restitution from inheritance and gift tax could potentially be expected. Conversely, if the restitution were to be, in general terms, broad, then some form of taxation based on the model of inheritance and gift tax should arguably be applied. The precise rules for establishing the effective tax burden will likely be contingent on the actual scope of the restitution.

B. Polish Restitution Bill of 2017

Polish Ministry of Justice has announced a bill which aims at regulating the issues of restitution of confiscated property in Poland.²⁸

28. Ustawa o zrekompensowaniu niektórych krzywd wyrządzonych osobom fizycznym wskutek przejęcia nieruchomości lub zabytków ruchomych przez władze komunistyczne po 1944 [Law to Compensate for Some of the Harm Done to Individuals as a Result of Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944] (*draft*, Oct. 20, 2017) (Pol.).

The Ministry argues that the provisions of this bill will solve the issue of restitution and remove the ills which accompanied unregulated restitutions. The bill is controversial, the proposed scope of the restitution being relatively limited—it has met both with strong criticism²⁹ and praise.³⁰

The aforementioned bill includes important provisions in regards to taxation. It is set to modify existing IGT and PIT in such a way that explicitly exempts the relevant compensations from taxation, both in terms of personal income tax as well as inheritance and gift tax.

IV. CONCLUSION

The question of restitution of confiscated property poses many complex dilemmas. While trying to address the proper role that taxation should play in the context of restitution, the goals and potential consequences of taxation should be taken into consideration, most notably in which instances taxes should be viewed as an efficient tool to address non-fiscal issues.

Associating non-fiscal purposes with taxation carries a risk of reducing its fiscal effectiveness.³¹ This does not seem to be justified if more efficient tools are available. A certain tension can be observed within the discussions about restitution. This tension exists between the need to do justice to the victims of authoritarian regimes and the corresponding financial constraints. The more general, full, and comprehensive the restitution is the more financial strain it will create. This strain could potentially be partly offset by specialized taxation of restitution. Using taxation in this context does not, however, seem to be justifiable as there are numerous other broadly discussed mechanisms which can be used. These mechanisms will likely be both more effective as well as more transparent than taxation.

29. See World Jewish Restitution Organization “Profoundly Disappointed” at Proposed Polish Property Legislation That Would Exclude Vast Majority of Holocaust Survivors and Their Families, WORLD JEWISH RESTITUTION ORG. (Oct. 20, 2017), <https://wjro.org.il/world-jewish-restitution-organization-profoundly-disappointed-proposed-polish-property-legislation-exclude-vast-majority-holocaust-survivors-families/>. (The World Jewish Restitution Organization has expressed profound disappointment in this regard and urged the Polish government to ensure that the legislation, when introduced to the Parliament, will have eligibility criteria and claims process that are fair and just).

30. See also Tomasz Luterek, *Ustawa reprivatyzacyjna to zwiastun dojrzalej wspólnoty i silnego państwa*, JAGIELLOŃSKI 24 (Oct. 14, 2017, 5:20 PM), <http://jagiellonski24.pl/2017/10/14/ustawa-reprivatyzacyjna-zwiastun-dojrzalej-wspolnoty-i-silnego-panstwa/>.

31. TAX STUDIES INST., *supra* note 16, at 25.

It seems that restitution should not be taxed within the framework of income taxation as, by definition, there is no effective income involved. In respect to the inheritance and gift tax, restitution should, arguably, be taxed according to the very same rules which are applied to other, corresponding events (inheritances). The questions of fairness and justice as well as fiscal, historical and political constraints should not, as a rule, be settled by means of taxation, unless maintaining social peace makes it necessary to do so. Instead, they should be addressed by setting out the specific rules that govern the restitution of confiscated property.³²

32. It is highly probable that introducing a broad and comprehensive restitution legislation would be more likely if it were to include an obligation to invest in Poland the amounts which stem from restitution.