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The New Polish Restitution Act: An Unacceptable Project

TOMASZ LUTEREK*

A comprehensive restitution act, which has been recently presented, demonstrates that the current Polish government is starting, on one hand, to analyze the problem sensibly. On the other hand, a strong influence of different lobbies interested in keeping the reprivatization *status quo* can also be noticed.

When listening to the press conference during which the postulates for the new act were presented, people may have had the impression that it was a successful attempt to solve problems with, curb the pathology of, and unlock the development of the real property market in Poland. It seemed to be a very modern view on the issue. The authors of the draft understood undeniably the essence of the problem, its complexity and multidimensionality. Unfortunately, when one reads the draft bill itself, it turns out that its content contradicts the presented postulates in the most essential points.

The issue of reprivatization is complicated and demands not only a general look at the problem, but also specific interdisciplinary knowledge. Therefore, for the success of the legislation process, the method of communicating and translating the proposals will be important. It must also be kept in mind that the presented concepts threaten the interests of the “reprivatization mafia,” and for that reason numerous actions aimed at undermining this project can be expected. The difference between the postulates presented at the conference and the content of the bill is the best example of this situation.

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I am going to comment on the proposed solutions extensively, but first I would like to draw attention to a few issues:

- The regulation rejects the restitution model of returning the property in kind. It should be strongly emphasized that the restoration of proprietary relations that existed over seventy years ago is extremely hard, and in most cases even impossible.
- Present-day Polish society does not have to and is not obliged to transfer its funds to the former owners. Yet, it can and, in my opinion, should allocate some funds within the scope of its capabilities for the benefit of former owners as an expression of social solidarity as well as community goodwill.
- The implementation of the law will make the former property owners a privileged category among other victims of the communist regime.
- The proposal of 20-25% of the present value of real property rights nationalized after Second World War is significant. It is more than just a symbolic gesture; it is a declaration of the Polish State's attachment to the system of traditional values of Western civilization, including property rights. The real value of nationalized property laws on the date of nationalization, as valorized for today, is much lower.
- After taking into account the mortgage encumbrances, it may turn out that the value of many claims is negative, of which some owners of loans drawn in francs are, unfortunately, perfectly aware.
- After all, passing the reprivatization act, even such an adverse one, will benefit the condition of public finances. It is the current reprivatization model that generates the highest costs.
- Lack of a comprehensive reprivatization law has "frozen" a lot of properties in the country for decades. Instead of working, they are, at best, inactive and are not fulfilling their potential. The Parade Square in Warsaw seems to be the best example of the situation.
- The current restitution bill deprives the vast majority of Polish landowners' descendants of the right to compensation. The current bill also deprives non-citizen descendants of Polish citizens the right to compensation. I hope both of these things will change.

I admit that the proposed title of the law (Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944¹) touches the crux of the matter. It must be remembered that the damage done by the communist authorities to former owners is only a small percentage in the sea of cruelty and lawless behaviour perpetrated by the Communists during their dictatorship. The number of infringements for which compensation should be paid is uncountable and it concerns rights that are more sacred than just property rights, including the right to life, the right to health and the right to personal inviolability. Therefore, it can be said that the vast majority of citizens can claim losses suffered during the previous political system. But it is important to consider: Who should pay for the compensation? Should it be the Polish state and its citizens who were trying for decades to overthrow the totalitarian anti-democratic system imposed by the Soviets?

When the Polish State was independent and governed by democratically elected authorities, the property rights of owners in the Polish State were protected. The German and Soviet occupation put an end to that protection. From September 1939 to 1989 only the occupation authorities or the authorities subordinated to the Soviet Empire existed. Thus, key political, economic, proprietary and social decisions were made outside Poland. Our country and its citizens became its greatest victims. Günter Grass, a German writer and Nobel laureate, once said: “If only Polish people charged us for ruined cities, ruined factories, robbed artworks or a civilization delay which came as the consequence of the war, we would be their debtors for infinity.”² This remark concerns not only Germans, but also Russians and the Soviet Union. Those who are guilty, namely Germans and the Soviet Union, should be responsible for the claims of losses incurred during the World War II and Soviet domination. But is it possible to enforce such claims in the existing international force arrangements? For the time being, it seems to be very difficult. Nevertheless, familiarizing ourselves with and analyzing the cause-and-effect relationships related to property transformations connected with geopolitical decisions will point us to those responsible. It turns out that the present-day Polish society does not have to and is not

1. 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 Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944] (*draft*, Oct. 20, 2017) (Pol.).

2. Sławomir Sieradzki, Niemiecki kon trojański, WPROST (Sep. 21, 2003, 1:00 a.m.), <https://www.wprost.pl/49330/Nemiecki-kon-trojanski>.

obliged to transfer its funds to the former owners. Yet, it can and, in my opinion, should allocate some funds, within the scope of its capabilities, for the benefit of former owners as an expression of social solidarity as well as community goodwill.

The vital elements of the presented reprivatization solutions show a compromise and create a kind of philosophical framework. The former owners have to understand that certain processes are irreversible and sometimes you need to find solutions which are a step forward; you cannot claim your rights at the sacrifice of others, causing new harm. On the other hand, beneficiaries of nationalization, especially Polish peasants and tenants living in tenement houses, should agree to transfers from the state budget to provide at least symbolic benefits to former owners.

The proposal of 20-25% of the present value of real property rights nationalized after Second World War is significant. It is more than just a symbolic gesture; it is a declaration of the Polish State's attachment to the system of traditional values of Western civilization, including property rights. The real value of nationalized property laws on the date of nationalization, as valorized for today, is much lower. The precise calculations, which are based on a methodology of appraisal used in the indemnification agreements with the U.S. and other democratic states, indicate that the value of claims from seventy years before should be many times lower than the present-day value. It must be borne in mind that these were property values in the most devastated country in Europe, the capital city of which was razed to the ground by the German Nazi regime. Within seventy years, the valorized property value has risen about 50 times, thanks to the effort and hard work of three generations of Polish people. It was they who uplifted this country from ruins, and



managed to achieve this without any help from the Marshall Plan, which rebuilt the whole of Western Europe.

Warsaw, 1945.

Is this way of deduction going to be understood by heirs from the U.S., which is a country supporting reprivatization claims against Poland? Probably it is, more than by us here in Poland. The U.S. understands market mechanisms and price fluctuation at the property market perfectly. In Detroit, a fallen city, which despite its tragic history, was not razed to the ground like Warsaw, Dresden, Hiroshima or Aleppo, the prices of properties decreased by several times. In Detroit, which used to be considered as a symbol of American industrial might for decades, it was possible to buy a house for \$100 in 2011. The same house once cost \$35,000 (350 times more). Moreover, it should be emphasized that when buying this house for \$100, one did not have to include the costs of removing mines, exhumation, demolishing, decluttering, etc.

The Americans understood the mechanisms of the property market perfectly when they signed the indemnification agreements with Poland. The method of valuing the reprivatization claims should be similar to those from the indemnification agreements.



Detroit, 2011.

The implementation of the law will make the former property owners a privileged category over other victims of the communist regime.

They will be treated better than those whose parents were murdered in the torture rooms established by the former Bureau of Safety, those who lost all their savings as a result of a communist “exchange” of money or those who were brought into bankruptcy under the so-called “battle for trade.”

The act rejects the restitution model which means returning the property in kind. It should be strongly emphasized that the restoration of proprietary relations that existed over seventy years ago is extremely hard and, in most cases, impossible. The crucial question is whether this is needed or rational. The changes concern not only the development of specific properties, but also their surroundings. After World War II, new communication routes, entire districts and cities were established. We now have a modern geodetic and urban grid, which has mostly been shaped in the last half century. The restitution of certain historical parcels torn out of the current planning structure causes spatial disorder and thwarts the entire architectural concept. It is perfectly visible in Warsaw where single parcels have been returned from “property islands” in the homogeneous investment fields. The capital of Poland, which, as a result of German occupation, was mostly torn down and both purposefully and methodically razed to the ground, was rebuilt or rather built from scratch thanks to the Herculean effort of the country’s inhabitants as well as the enormous expenditure of Polish taxpayers. Taking into consideration the historical context and remaining fragments of the city, a new city, with new squares, facades and districts, was created. It was inhabited mostly by new citizens. The return to proprietary relations from 1945 is a mistake. If we were to return what was municipalized, most of it would be rubble full of mines in the ruined city. In order to implement the concept of restitution in Warsaw, the city would have to be torn down again. Does this sound, to say the least, unreasonable? Yes, it does, as does the idea of restitution of the pre-war parcels in their present state. The only difference is that the second concept is currently being implemented thanks to the decisions of Polish judges.

The enactment of the concept of restitution in a country which, as a result of the last war, was totally destroyed, devoid of nearly half the territory, and then rebuilt according to the assumptions of communist doctrines, is the yardstick of the intellectual horizons of modern elites, definitely an irrational claim. Restoring the proprietary relations of the 1940s would, in effect, take the land that has been cultivated by peasants for several dozens of years. In towns, the tenants of old tenement houses would have to leave them or accept the conditions of the now-restored, former owners.

The absurdity of the concept of restitution, which is out of touch with reality, is even more vivid when it comes to the comparison between the bygone and present-day Upper Silesia. In the place where there used to be coal mining property, today there is an out-of-work pit, which requires considerable outlays for recultivation. If the Warsaw reprivatization model were to be implemented there, the former owner would get the property back in its current condition. While on the day of nationalisation the former owner would be in possession of a prosperous coal mine bringing him a great profit, today he would have to be satisfied with property of low, if not negative, value. Is this logical and fair? According to the dominant axiology among some Warsaw judges and officials, the answer is yes. According to reasonable and honest people, however, the answer is no.

It is also worth remembering that in most cases the rightful owners are no longer alive. Therefore, we can transfer the old property rights only to their heirs who, just like me, have not participated in working that estate out. So, I temper my expectations and appeal to the heritage of my ancestors, which should be protected and respected. The exception is that I emphasize the intangible one, connected with the cult of working, learning and placing the good of my homeland before my own financial claims.

Personally, I would support a high inheritance tax modeled on British and American law, totaling anywhere from 40% to 70% of the value of the property, as opposed to the reduction to 20-25% proposed in the bill. The financial result is *de facto* the same but the first idea has stronger axiological argumentation.

We must remember that when we restore old laws, we also restore old obligations. For example, in pre-war Poland, just like today, most of the properties were encumbered with mortgages. These circumstances are not being taken into account in the judgements of Polish courts. Giving another example, there is no difference for the judges whether somebody built a tenement house in 1938 with their own money or financed it with the money from a loan, from which he paid only a small percentage of what he was obligated to pay.

Communist nationalisation is the physical annexation of property, and from the juristic point of view, taking away proprietary rights. These terms are usually treated as synonyms, which results in the emergence of mental shortcuts and leads to the creation of, euphemistically speaking, unreasonable ideas, such as the return of properties in kind without taking into account mortgage encumbrances or easements. To put it simply, the real property right is recorded in the proprietorship register in four

sections which are of equal importance and equally affect the content of proprietary rights. Until now, within the framework of so-called judicial reprivatization, only Section I (which indicates realties geodetically) and Section II (which points at the owner) have been taken into account. Neither Section III (in which the easements encumbering on the proprietary rights are revealed), nor Section IV (in which the mortgages of the property are recorded), have been considered.

“Realty value” is a common term which denotes the value of the title to real property. It is often a product of the effects of various rights regarding the real property. Considering all components is the only way to determine the final value of the owner’s estate. After taking into account the mortgage encumbrances, it may turn out that the value of many claims is actually negative, which some owners of loans drawn in francs are, unfortunately, perfectly aware of. Seventy years ago, the number of indebted properties was huge, and the number of bankruptcies was markedly higher than it is today.

Therefore, the method for determining the value of reprivatization claims needs to be precisely stated in the law in order to avoid serious methodological mistakes with the methods of appraisal used for the church commission’s actions and the reprivatization of Bug River properties. The Ministry of Development and the Polish Federation of Asset Valuers Associations should adopt a standard which precisely sets out the method of valuation for the purposes of the reprivatization law. The possibility of manipulation and corruption here should be reduced as much as possible. Moreover, the work of property appraisal experts should be examined by specialized courts.

In media coverage, there is often a narrative pointing at the enormous costs of reprivatization and the lack of financial resources in the budget to meet the claims on this subject. This is a reflection of the narrative used by some politicians, which unveiled a protective umbrella over the reprivatization mafia and took action, or rather resisted petrifying the pathological and highly corrupt “reprivatization model.” Passing the restitution bill will benefit the condition of public finances. It is the current reprivatization model that generates the highest costs. The value of real properties returned so far amounts to tens of billions of zloty. The value of those to be returned in the near future is calculated to be another tens of billions of zloty. Can the state budget and local governments afford such transfers of capital?

Moreover, the lack of proprietary order, which is caused by the legislative abandonment in the area of reprivatization, generates enormous costs as it increases uncertainty and stunts development and

investment processes. This uncertainty, which arises from the unfinished reprivatization process, results in either a weakening of property rights or perpetual usufruct rights entitled to many entities, especially those in the public domain, such as local governments or public individuals. This often results in those entities refraining from making investments or repairs. In a particularly painful way, this is visible in downtown Warsaw. Modern office buildings are built in peripheral districts instead of the city centre itself so that investors can acquire ownership rights to plots that are not threatened by reprivatization claims. The old tenement houses are the subjects of an absolutely scandalous situation. Since the wartime hecatomb, the number of historical buildings in Warsaw is now relatively small. The buildings that have survived should be treated with special care. Unfortunately, due to the problem of reprivatization and the probability of restoration of the tenement houses, the Council of the Capital City of Warsaw has stopped renovations and will not undertake restoration work. Therefore, thousands of post-war tenement houses are falling into ruin. The fate of these houses is shared by their tenants who live in constant uncertainty due to the lack of regulation of titles to individual properties.

Lack of investment results in lower taxes for local governments. New workplaces are not being created – these are the costs that also need to be included in the calculation. Limiting the cost perception of the whole process to a simple transfer from the state budget to former owners exposes the lack of knowledge of the people who formulated them.

Real property market experts and property appraisal experts value the cost of “non-working” realties. The lack of a comprehensive reprivatization law has “frozen” a significant number of properties in the country for decades. Instead of working, they are—in the best-case scenario—inactive and are not exploiting their potential. The Parade Square in Warsaw seems to be the best exemplification of this situation.

The current restitution bill deprives descendants of Polish landowners’ the right to compensation. Polish landowners were the social group treated by Communists in the worst possible way. To put it bluntly, they were exterminated. Therefore, in my opinion, the descendants of Polish landowners should be included in the law.

The current restitution bill not only excludes the descendants of Polish landowners, but also the descendants of Polish citizens who themselves are not Polish citizens. This issue concerns mostly the descendants of Polish elites who had to flee Poland and emigrate for fear of the communist terror, as well as Polish Jews who survived the brutal extermination carried out by the German Nazis. From my point of view,

the descendants of Polish citizens, including Polish Jews, should be taken into account in the law.

The present-day condition of reprivatization is significantly different from the ideas of the counter-revolution of the early 1990s supporters. According to them, reprivatization was seen as an obvious component of the rebuilding of the democratic system. Reprivatization, which doctrinally restores the property rights to the former owners, seemed to be the simplest and most fair way of privatization. As it turned out in practice, such a solution was not so simple and fair, and as a society, we had to face one of the greatest paradoxes concerning the settlement with our communist past. It turned out that the restoration of proprietary relations from the times before the communist nationalization and the payment of compensation for the harm suffered by former owners came at the cost of the great majority of today's society living within the new social-proprietary structure. The same society that was trying to overthrow the totalitarian anti-democratic system for decades, and by whose attachment to the values of Western civilization (including the respect for property rights) it was possible to take into consideration the claims of former property owners. It seems that the clash of these outwardly opposed arguments of former owners and current taxpayers is a yardstick of the rooting of democracy, community thinking and searching for compromise solutions that give the best possible opportunities for the development of the country and its contemporary inhabitants.

The reprivatization in Poland was carried out only partially and often in a manner that raised doubts about its legality and rationality. In the context of certain entities, such as churches, citizens of Western countries (and former socialist countries) the reprivatization process was completed. Regarding Polish citizens and Polish legal entities, in most cases reprivatization was unregulated. Until the announcement of this project (with the estimable but unfortunately vetoed acts before), the Polish State had not come up with any collective concept of a solution to the problem. Those deciding lacked the knowledge and understanding to develop philosophical assumptions to reach a rational political decision. This led to distortions of the whole idea of reprivatization and intensified the unequal treatment of the various entities affected by the nationalisation regulations. Reprivatization still continues to generate more and more costs for both the local governments and the State. As it stands, the benefits of reprivatization seem to fall primarily to organized criminal groups, often corrupt officials, judges and prosecutors, at the same time threatening former owners and present possessors.

Therefore, a comprehensive restitution bill, which has been recently presented, is not a successful attempt to solve the problem, curb the pathology and unlock the development of the real property market in Poland.

The essence of the proprietary right is certainty—the specific determination of the question of belonging. Such certainty can only be given by a strong state. Unfortunately, the foregoing situation in terms of reprivatization is proof of the weakness of the Polish State. It seems that a positive turn in this matter could be a symbolic point from which we might start to build a community that has found a consensus in such a sensitive area, settling its communist past with the related evolution of proprietary relations. It is worth remembering how crucial the influence of the property regulated and guaranteed by the strong state is on the certainty and legitimization of “being at home” by a considerable part of today’s Polish citizens. Everybody should be aware of these relationships in the context of the implementation of a comprehensive reprivatization law in Poland. Ownership and its scope, as well as the country guarantees, fundamentally influence the possibility of rational, predictable and peaceful planning.