

Facts and Myths on Restitution of Property in Poland: part 2

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Abstract:

The article presents analysis of current social and legal circumstances of property restitution by pre-war owners or their heirs in Poland. The main issues concern the present legal environment of property restitution in Poland, recent experiences of pre-war owners or their heirs in their attempts to reconstitute their properties, the draft law on restitution presented recently by the Polish ruling party and various false concepts around restitution of property in Poland.

Present Legal Environment of Property Restitution in Poland

As it was indicated on the beginning, Poland remains the last EU member state which has not enacted a law concerning restitution of property nationalized by communist authorities. There were multiple, however unsuccessful, attempts to regulate the issue. The closest to success was the draft law of 2001, vetoed by President Aleksander Kwaśniewski. Throughout the years, the problem of property restitution, as difficult legally, challenging economically and charged politically, was avoided. No simple solutions were considered available. Thus, thousands of former owners and their heirs living in Poland or dispersed around the world face a complex legal regime built from many particular laws, modified by jurisprudence and practice of administrative organs. The most popular laws serving as legal bases for property takeover were the following (in chronological order):

- 1) PKWN Decree of 6 September 1944 on Agrarian Reform;¹

¹ Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 6 września 1944 r. o przeprowadzeniu reformy rolnej (Dz. U. z 1945 r. Nr 3, poz. 13) (Pol.).

- 2) PKWN Decree of 12 December 1944 on Takeover by the State Treasury of Ownership of Certain Forests;²
- 3) Decree of 2 March 1945 on Abandoned Property;³
- 4) Law of 6 May 1945 on Abandoned Property;⁴
- 5) Decree of 26 October 1945 on Ownership and Usufruct of Land in the Capital City of Warsaw (the so-called ‘1945 Warsaw Land Decree’ or ‘Bierut Decree’);⁵
- 6) Decree of 28 November 1945 on Takeover of Certain Landed Property for Purposes of Agrarian and Land Reform;⁶
- 7) Law of 3 January 1946 on Nationalization of Core Branches of the National Economy;⁷
- 8) Decree of 8 March 1946 on Abandoned and Ex-German Property;⁸
- 9) Decree of 7 April 1948 on Expropriation of Estates Occupied for Purposes of Public Utility During the 1939-1945 War;⁹
- 10) Decree of 26 April 1949 on Acquisition and Transfer of Estates Indispensable for Realization of National Economic Planning;¹⁰
- 11) Law of 20 March 1950 on Nationalization of Mortmain Property, Entrusting Farm Land to Parish Priests, and Creation of the Church Fund;¹¹

² Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 12 grudnia 1944 r. o przejęciu niektórych lasów na własność Skarbu Państwa (Dz. U. z 1944 r. Nr 15, poz. 82) (Pol.).

³ Dekret z dnia 2 marca 1945 r. o majątkach opuszczonych i porzuconych (Dz. U. z 1945 r. Nr 9, poz. 45) (Pol.).

⁴ Ustawa z dnia 6 maja 1945 r. o majątkach opuszczonych i porzuconych (Dz. U. z 1945 r. Nr 17, poz. 97) (Pol.).

⁵ Dekret z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m. st. Warszawy [Bierut Decree] (Dz. U. z 1945 r. Nr 50, poz. 279) (Pol.).

⁶ Dekret z dnia 28 listopada 1945 r. o przejęciu niektórych nieruchomości ziemskich na cele reformy rolnej i rolnictwa (Dz. U. z 1945 r. Nr 57, poz. 321) (Pol.).

⁷ Ustawa z dnia 3 stycznia 1946 r. o przejęciu na własność Państwa podstawowych gałęzi gospodarki narodowej [Nationalization Law] (Dz. U. z 1946 r. Nr 3, poz. 17) (Pol.).

⁸ Dekret z dnia 8 marca 1946 r. o majątkach opuszczonych i poniemieckich (Dz. U. z 1946 r. Nr 13, poz. 87) (Pol.).

⁹ Dekret z dnia 7 kwietnia 1948 r. o wywłaszczeniu majątków zajętych na cele użyteczności publicznej w okresie wojny 1939-1945 (Dz. U. z 1948 r. Nr 20, poz. 138) (Pol.).

¹⁰ Dekret z dnia 26 kwietnia 1949 r. o nabywaniu i przekazywaniu nieruchomości niezbędnych dla realizacji narodowych planów gospodarczych (Dz. U. z 1952 r. Nr 4, poz. 31) (Pol.).

¹¹ Ustawa z dnia 20 marca 1950 r. o przejęciu przez Państwo dóbr martwej ręki, poręczeniu proboszczom gospodarstw rolnych i utworzeniu Funduszu Kościelnego (Dz. U. z 1950 r. Nr 9, poz. 87) (Pol.).

12) Law of 8 January 1951 on Nationalisation of Pharmacies.¹²

Before 1945, the majority of agricultural land and forests belonged to rich noble families as the pre-war government started agrarian reform just before the outbreak of the war. The PKWN Decree on Agrarian Reform followed the suit and led to finish the reform. In effect, not only vast areas of fields, but also residential properties like castles and palaces, were taken from the aristocrats by the government. The effects of the PKWN Decree on Forests were similar.

The privately-held industry was usually taken under the above-mentioned 1946 Law on Nationalization of Core Branches of the National Economy. The law indicated particular industry branches, including, *inter alia*, mines, ironworks, refineries, distilleries, printing, textiles, energy and transport.¹³ Under the law, also facilities of any other type were nationalized if they employed more than 50 workers on one shift.¹⁴ In effect, a vast majority of industry was nationalized during the period of 1946-1950. The law provided that every expropriated owner would receive a proper compensation within a year from the takeover.¹⁵ The compensation had to be calculated and granted by special committees appointed by the government. In practice, the committees were never created and, thus, no compensation was paid.

The situation in Warsaw was different than the rest of the country because Warsaw properties were nationalized by the Polish communist government in 1946 under the ‘Bierut Decree’. The decree did not apply to the rest of Poland. Under the decree, all the real property located in pre-1945 Warsaw became a property of the Polish state. As the city was heavily damaged during the war, a decision to nationalize all the land within was nothing out of the

¹² Ustawa z dnia 8 stycznia 1951 r. o przejęciu aptek na własność Państwa (Dz. U. z 1951 r. Nr 1, poz. 1) (Pol.). A useful list of laws concerning nationalization in the post-war Poland, including the laws entered into force after 1950 and the amendments, can be found on the ‘Property Restitution in Poland’ information website (in English): <http://propertyrestitution.pl/Selected,legal,grounds,for,taking,over,property,in,1944-1989,19.html> (last visited Nov. 13, 2017).

¹³ Nationalization Law, Article 3(1)(A).

¹⁴ Nationalization Law, Article 3(1)(B).

¹⁵ Nationalization Law, Article 7.

ordinary. The official reasoning for this decision was to facilitate the reconstruction of the ruined city, which was partially true. Theoretically, those who lost their properties in Warsaw were entitled to receive back a “temporary ownership” (i.e. perpetual usufruct) rights to the buildings upon filing a motion.¹⁶ However, in practice all such motions were refused or even never assessed by the authorities.

Various separate legal acts, including these indicated above, concerned takeovers of property of churches, pharmacies and other particular groups.

As indicated above, certain laws provided the expropriated owners or their heirs a possibility to recover property rights or to obtain proper compensation. From a legislative point of view, these laws safeguarded basic rights of the expropriated parties. However, in practice, just like in the case of the motions filed under the ‘Bierut Decree’, no such rights were effective due to legal nihilism typical for Communist regimes. The subject was dead until 1990 and only upon the fall of the Soviet Union and the changes in Poland which took place in 1989-1990 the pre-war owners or their heirs could raise their claims once again and seek justice.

As there is no single coherent law on the process of seeking restitution and compensation, each applicant has firstly to assess carefully a legal basis for the claim. Usually, either they rely on the provisions guaranteeing certain compensation or they submit the unlawfulness of the takeover in order to demand restitution. One has to rely on an entangled construction of multiple pieces of legislation, including these mentioned above, and the provisions of Polish codes, including the Civil Code,¹⁷ Civil Procedure Code¹⁸ and Administrative Procedure Code.¹⁹ Therefore, the claimants, irrespectively on their background, citizenship, type of property and legal basis of nationalization, usually pursue similar path

¹⁶ Bierut Decree, Article 7.

¹⁷ Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Civil Code] (Dz. U. z 1964 r. Nr 16, poz. 93) (Pol.).

¹⁸ Ustawa z dnia 23 kwietnia 1964 r. – Kodeks postępowania cywilnego [Civil Procedure Code] (Dz. U. z 1964 r. Nr 43, poz. 296) (Pol.).

¹⁹ Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego [Administrative Procedure Code] (Dz. U. z 1960 r. Nr 30, poz. 168) (Pol.).

through, firstly, administrative bodies to nullify the takeover decisions, and secondly, through civil courts, pursuing remedy in form of restitution or compensation. Everything is performed under the general procedural rules applied in other types of proceedings. With regard to various types of cases, some discrepancies are possible. For example, in case of Warsaw properties, an heir may complete the restitution procedure just before the municipality.

Beside the restitution itself, the heirs often have also to prove their property and inheritance rights after the pre-war owners. With regard to real estate in Poland, the inheritance has to be established in proceedings before Polish courts in accordance with general procedural rules. That process requires additional time and resources from the heirs. In practice, this is often the main obstacle for the heirs. While the restitution itself would be rather simple in many cases, difficulties arise at the stage of death confirmation or establishing inheritance in Polish courts. Due to the lack documents caused by the time passed and the turmoil of the World War II as well as variations of name spelling (in particular with regard to Jewish names which can appear in three or more versions in various documents) foreign heirs are refused their rights. In effect, they cannot begin the restitution successfully. In some instances, the courts even deny their jurisdiction over the case.

The complexity and obscurity of the issue described above is not only unfavorable for the heirs, but also allowed for fraudulent restitutions by false heirs or proxies, in particular in Warsaw. There were approximately 4,000 Warsaw properties which were handed over to people who had claimed to be the heirs of the rightful owners. It is unknown how many of them were really the genuine heirs of the genuine owners. There are grounds to believe that many documents were forged and that the circle of corruption run up to advocates, town hall officials, judges and property developers, who all closely co-operated in taking Warsaw properties unlawfully. In many cases the genuine heirs were forced or misled to sell their claims for a fraction value of the property to so-called 'claim traders' who then succeeded in obtaining

property rights or a full compensation. That process was called a ‘wild reprivatization’. Since 2016, when the ‘reprivatization scandal’ erupted, the property restitution issue has been one of the most discussed problems of Warsaw and became even more politically charged than before.²⁰ Now, the shadow of a doubt has fallen on all the past and present restitution proceedings which led to halting the process and even reversing it in some instances.²¹

The situation was addressed partly by the Law of 25 July 2015 on changing the Law on Real Estate Management and the Family Code,²² which aimed at limiting the scope of cases in which restitution is allowed and closing the remaining open cases concerning Warsaw properties once and for all. The main points of the law are the following:

1. A former owner of a property taken under the ‘Bierut Decree’ who lost the right to compensation provided by the decree may have his (or her) former property restituted if he (or she) or his (or her) legal successor applied for a perpetual usufruct right to the property prior 31 December 1988.
2. An organ may deny an application for a perpetual usufruct right to an estate taken under the ‘Bierut Decree’ not only due to reasons established in the decree (i.e. contradiction with zoning plan), but also due to the following circumstances:
 - a. The estate is used or intended to be used for a public purpose (defined widely in Article 6 of the Law on Real Estate Management – includes public roads, airports, infrastructure, public offices, schools, monuments etc.);
 - b. The estate has been sold or given into a perpetual usufruct to a third party;

²⁰ Prokuratura Krajowa, *Prokuratura prowadzi ponad 100 postępowań dotyczących reprivatyzacji nieruchomości warszawskich*, 12 October 2016, <http://www.pk.gov.pl/aktualnosci-prokuratury-krajowej/prokuratura-prowodzi-ponad-100-postepowan-dotyczacych-reprivatyzacji-nieruchomosci-warszawskich.html#.WhMrTUribIU> (last visited Nov. 11, 2017).

²¹ PAP, *Chmielna 70: komisja weryfikacyjna oddaliła odwołania Marzeny K., Janusza P. i mec. Grzegorza M. od decyzji o zwrocie miastu nieruchomości*, RZECZPOSPOLITA, 14 November 2017, <http://www.rp.pl/Nieruchomosci/171119536-Chmielna-70-komisja-weryfikacyjna-oddalila-odwolania-Marzeny-K-Janusza-P-i-mec-Grzegorza-M-od-decyzji-o-zwrocie-miastu-nieruchomosci-.html> (last visited Nov. 14, 2017).

²² Ustawa z 25 czerwca 2015 r. o zmianie ustawy o gospodarce nieruchomościami oraz ustawy - Kodeks rodzinny i opiekuńczy [Small Reprivatization Statute] (Dz. U. z 2016 r., poz. 1271).

- c. A building, the value of which “significantly exceeds the value of the property taken for that purpose”, was erected by the State Treasury or the community on the estate after the ‘Bierut Decree’ entered into force;
 - d. The building taken under the ‘Bierut Decree’, damaged within the years 1939-1945 more than in 66% was rebuilt or repaired with use of public funds;
 - e. It is impossible to divide the estate in accordance with law and “spatial order” if only a part of it is subject to a claim under the ‘Bierut Decree’.
3. An organ may discontinue proceedings regarding applications filed under the ‘Bierut Decree’ if it is impossible to establish the parties of the case or their addresses while the application is the only existing document concerning the case. It has to make a public announcement that it is requesting the former owner of the property or his (or her) heirs by the press and Internet (including name of the owner, address of the estate and other relevant information) to contact. If within 6 months from the announcement no interested party contact the organ or, if contacted, fail to prove the rights within the following 3 months or to indicate the address, the proceedings will be discontinued. Therefore, the applicants will have only 6 months to take part in the proceedings – otherwise, they permanently lose their right to restitution as the property concerned will become public.²³ Moreover, no compensation is possible.
4. State Treasury and Warsaw municipality enjoy pre-emptive rights to rights and claims under the ‘Bierut Decree’. These rights do not concern the transactions reported in the proceedings before the law entered into force.

The law, called the ‘Small Reprivatization Statute’, has entered into force in September 2016. After only one year, it is difficult to fully assess its effects. However, some conclusions can be made. Firstly, the law caused many applications, which would previously effect in

²³ Small Reprivatization Statute, Article 1; ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami [Law on Real Estate Management] (Dz. U. z 2015 r., poz. 782), Article 214a-214b.

restitution, to be refused due to additional grounds for refusal. Secondly, the new procedures started after few months after the law entered into force, which slowed down the restitutions. Thirdly, the proceedings before the municipality, rather due to bad publicity of the restitution issue than the law itself, are frozen. At the same time, a special parliamentary verification committee was appointed to analyze the most controversial restitutions.²⁴

In conclusion, the present legal environment of property restitution in Poland remains complex, particular and obscure. The owners or their heirs need help of professional lawyers to assess the chances of their claims on *ad hoc* basis without clear estimation of possible success. Criminal activity around restitution brought the issue in the spotlight and raised doubts and bad atmosphere around any trials to get any property back by the rightful heirs as well as any other entities. For more than 25 years Poland has been waiting for the complex law on the property restitution to be passed. Now the time is really high.

²⁴ *Supra* note 25; Małgorzata Zubik, *Reprywatyzacja. Komisja weryfikacyjna zacznie od Hanny Gronkiewicz-Waltz*, *Gazeta Wyborcza*, 12 June 2017, <http://wyborcza.pl/7,75398,21951198,reprywatyzacja-komisja-weryfikacyjna-zaczyna-prace-najpierw.html> (last visited Nov. 14, 2017).