

Facts and Myths on Restitution of Property in Poland: part 4

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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.

The New Polish Draft Law on Restitution – Legal Considerations

After years of legal uncertainty with regard to possibilities of restitution or compensation for unlawfully taken properties and facing a serious scandal around Warsaw properties restitution, the current government took another chance to propose a complex and coherent draft law to organize and unify filing restitution claims. At the same time, their aim is to limit the number of claimants, to propose a limited compensation instead of restitution and to ensure that only a lawful owners or their heirs would obtain compensation. The draft, called the ‘Big Reprivatization Statute’ (as it concerns the whole Poland, different than the ‘Small Statte’ which concerns Warsaw properties only) although it is subject to amendments and currently it is difficult to assess when, if ever, and in which shape it will enter into force, has already raised controversies in Poland and abroad.¹

¹ Lahav Harkov, Edelstein Concerned About Polish Bill Denying Restitution to Holocaust Survivors, THE JERUSALEM POST, 29 October 2017, <http://www.jpost.com/Diaspora/Edelstein-concerned-about-Polish-bill-denying-restitution-to-Holocaust-survivors-509748> (last visited Nov. 4, 2017); Hagay Hacoen, *Polish Jews Protest Legislation Blocking Their Right to Claim Family Lands*, THE JERUSALEM POST, 21 October 2017,

This part of the article provides legal considerations on the most important points of the draft law to initiate discussion concerning its aims and measures proposed by the ruling party. One of the major changes is that restitution of the confiscated real property to rightful heirs would not be possible any longer. The only remedy provided to the applicants would be monetary compensation for the lost property. The compensation would be limited to 20% of the value of the property at the time of the takeover by the Polish state.² If the applicant accepts the compensation to be paid by the means of treasury bonds, the amount of compensation relates to 25% of value instead of 20%.³ The limitation of remedies and of the amount of the compensation apply to all the nationalized properties, irrelevant of the grounds of their takeover. This limitation was previously applied in the Law of 8 July 2005 on the Execution of the Right to Compensation for a Real Property Left beyond the Present Borders of the Republic of Poland⁴ and was considered justifiable due to historical circumstances by the European Court of Human Rights.⁵

However, with regard to various groups of properties or owners even the above-mentioned remedy would not be allowed while their claims would expire upon the draft law entering into force.⁶ For example, no compensation is granted for properties taken as parts of enterprises under the 1946 Law on Nationalization of Core Branches of the National Economy.⁷ That is the gravest, but not the only one limitation with regard to the grounds of the takeover listed in the draft.⁸

<http://www.jpost.com/Diaspora/World-Jewish-Restitution-Organization-urges-Poland-to-change-tracks-508002> (last visited Nov. 4, 2017).

² Draft Law, Article 18(3).

³ Draft Law, Article 18(4).

⁴ Ustawa z dnia 8 lipca 2005 r. o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej (**Dz. U. z 2016 r., poz. 2042 ze zm.**) (Pol.).

⁵ *Broniowski v Poland*, ECHR, Application No. 31443/96, Judgment of 22 June 2004; *Wolkenberg and Others v. Poland*, ECHR, Application No. 50003/99, Judgment of 4 December 2007.

⁶ Draft Law, Article 75(1).

⁷ Draft Law, Article 12(2).

⁸ Draft Law, Article 13.

Other limitations concern the applicants. Not only the scope of applicants is limited to physical persons,⁹ but also the previous owner and his or her heirs must meet certain prerequisites. On the day of the takeover, the owner must have been a Polish citizen, must have not lost the citizenship afterwards, must have had a domicile on the territory of Poland and his or her property rights proven with regard to the property concerned. In addition, the applicant (be it the owner or a heir) must be a Polish citizen on the day of the draft law entering into force and on the day of making the application.¹⁰ Moreover, not every heir can be the applicant. Each allowed heir must be a physical person and a spouse or a descendant (child, grandchild etc.) of the owner. No legal persons or curators for the deceased would be allowed to claim for compensation.¹¹ If there are more claimants with regard to a certain property, they are all allowed to obtain compensation in proportionate parts. They may also appoint only some of them as their representative to submit the application.¹² The citizenship requirement, although controversial, in practice is not difficult to meet for a majority of potential applicants, even if they are currently citizens of other states and live outside of Poland, as they usually meet legal requirements for confirmation of the Polish citizenship due to their ancestry. Also a vast majority of the pre-war owners were Polish citizens.

With regard to the owners who were not Polish citizens, the drafters of the law pointed out to the fact that after the World War II Polish government has concluded with a number of countries whose citizens were mostly affected by the takeovers so-called indemnity agreements. According to these agreements, Poland has paid significant amount of compensation to another state, which, in return, took on itself the responsibility to compensate its own citizens for their property nationalized in Poland. Such agreements were concluded with (in alphabetical order): Austria, Belgium, Canada, Denmark, France, Greece, Lichtenstein, Luxembourg, the

⁹ Draft Law, Article 6(1).

¹⁰ Draft Law, Article 6(1).

¹¹ Draft Law, Article 7(2); Civil Code, Articles 931 and 932(1)-(3).

¹² Draft Law, Article 7.

Netherlands, Norway, Sweden, Switzerland, United Kingdom and the United States of America.¹³ In theory, any citizen of any of the above-mentioned states should be refused compensation from Poland as he would have to claim it from his or her own government. In practice, the compensation under the indemnity agreements was often not paid, and even if it was, it often concerned only a small part of the value of the property. In result, in many cases foreign previous owners or their heirs seek restitution and compensation before Polish authorities as they were not fully remedied as they should have been. At the same time, citizens of other states, who have not concluded any such agreement, are still free to file their claims.

That issue has led to another limitation of the scope of potential claimants. The person who was entitled to compensation under an indemnity agreement concluded by Poland, even if eventually he or she did not receive any money, is not entitled to compensation.¹⁴

The applicants would have only a 1 year window to file applications for the compensation in accordance with the new law on a special form, providing the following information:

- 1) Description of the property (location, register number, legal basis for the takeover, information about its status at the time of the takeover);
- 2) Statement that the property was taken illegally;
- 3) Information about the property owner and the applicant (if applicable);
- 4) Indication the mode of payment of the compensation;
- 5) Inheritance after the owner by the applicant (if applicable);
- 6) Polish citizenship of the owner and the applicant (if applicable);
- 7) Polish domicile of the owner at the time of the takeover.¹⁵

The application is filed to a voivode (regional governor) – a local government officer. The voivode, if assesses the application positively, will request the applicant for the opinion of

¹³ A full list of indemnity agreements can be found here:
<http://propertyrestitution.pl/Nationalization,after,WW2,18.html> (last visited Nov. 11, 2017).

¹⁴ Draft Law, Article 11.

¹⁵ Draft Law, Article 20.

expert witness on the value of the property.¹⁶ After assessing the value of the property, the voivode issues final decision on the compensation. The draft law stipulates that the final decision should be issued within 6 months from the application.¹⁷ Within 14 days after receiving the final decision, the applicant has to declare acceptance of the decision and the compensation. Otherwise, it would be regarded as renouncing the claim.¹⁸

The ‘Big Reprivatization Statute’ also follows suit of the ‘Small Statute’ (concerning the Warsaw properties only) in refusing compensation for the property currently used for the public purpose or the buildings that were destroyed or heavily damaged at the time of the takeover.¹⁹

As it was indicated above, the change with regard to the claims is sweeping: all the claims and their legal bases, including the ‘Bierut Decree’ and others, would expire upon the draft law entering into force.²⁰ All the pending proceedings would be discontinued and all the cases would be assessed in accordance with new law. That would cause many current or potential applicants to be barred from pursuing their claims due to particular above-mentioned limitations.

At the same time, some groups of applicants may find positive aspects of the law. Among them there are, for example, the lawful owners of properties taken in Warsaw under the ‘Bierut Decree’ or their heirs who failed to file an application for restitution prior 1990. According to the current rules, any person who was entitled to Warsaw property taken by the Polish state after World War II under the 1945 Warsaw Land Decree had to file a motion until the end of 1990 to reconstitute the property or to receive a compensation for it.²¹ It means that if an owner or a heirs files a motion now, he or she may be refused any remedy. The new draft (in its current wording) brings them

¹⁶ Draft Law, Article 24(2).

¹⁷ Draft Law, Article 26(4).

¹⁸ Draft Law, Article 28.

¹⁹ Draft Law, Article 13(2)-(3).

²⁰ Draft Law, Article 75.

²¹ Law on Real Estate Management, Article 111a.

some hope. It is stated explicitly in the draft law that a person who did not file the application on time is entitled to compensation.²²

Nevertheless, the general view at the draft law, which sweeps away current restitution claims and replaces them with only a claim to a relatively small compensation various vague or even contradictory provisions, mysterious lacunae, is rather negative as various solutions included in the draft raise controversies, in particular abroad.²³

²² Draft Law, Article 10(1).

²³ *Supra* note 32.