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## **RESTITUCJA: The Problems of Property Restitution in Poland (1939–2001)<sup>1</sup>**

**Marek Jan Chodakiewicz and Dan Currell**

On August 6, 1997, a score of members of the Prince Czetwertyński family demonstrated before the United States Embassy in Warsaw. The demands of these Polish aristocrats were simple: restitution of their property or a monetary compensation for its loss. They claim—and property registers support their claim—that the land on which the U. S. Embassy sits belongs to them. Moreover, they also had a charming neo-classical chateau that survived the Nazis' destruction of Warsaw, was occupied by the U.S. Embassy, and was subsequently razed to make way for the current embassy building.

The Czetwertyński family acquired the chateau in 1900. After Poland's defeat in 1939, the Nazis expropriated the property, which became one of the main Gestapo residences in Warsaw. In 1945, after the arrival of the Soviets, the Communist state radio took over the chateau but continued to pay nominal rent to the owner, the dowager Princess Róża Czetwertyńska. She was also permitted to take out a bank loan for necessary repairs. Next, the Americans occupied it with the permission of the Communist regime in 1949, the year the Princess died. Her son, Prince Stanisław Czetwertyński, inherited the property. In 1954, however, the Communists arrested him and sentenced him to eight years on trumped up charges of being an "Anglo-Saxon" imperialist spy. His property was expropriated. Meanwhile, the U.S. government had vainly attempted to buy the property from the Czetwertyński family. Finally, in

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<sup>1</sup> This paper would have been impossible without the assistance of Jakub Brodacki, Richard Tyndorf, and Anna Gräfin Praszma. Much of the evidence cited comes from Polish archives where I researched for several years to complete my doctoral thesis "Accommodation and Resistance: A Polish County during the Second World War and

December 1956, ignoring the expropriated owners, the governments of Poland and the U.S. concluded an agreement which granted the latter an eighty-year lease on the land. The agreement stipulated that the Communist regime would be responsible for settling all claims concerning the property taken over by the U.S. government. As for the chateau, the Communists voided its status as an historical landmark, thus paving the way for its destruction. The chateau no longer graces the posh Aleje Ujazdowskie neighborhood because in 1960 the U.S. government leveled it and in 1963 replaced it with the current hideous structure. Thus, the U.S. Embassy continues to occupy property stolen by the Communists from its rightful owners.<sup>2</sup>

The Czetwertyński family's experience is not unique. Stolen properties of similar provenance abound in Poland, giving rise to a tangled web of legal and political problems. We shall consider the problem of property restitution in Poland. First, we shall concentrate on the historical background of events between 1939 and 1989 as it pertains to property relations. Next, we shall discuss the current legal and political climate surrounding property restitution. Finally, we shall attempt to propose a method for dealing with the claimants of property stolen by Nazis and Communists at various times during the twentieth century.

The process of restitution (*restytucja*), within a broader context of reprivatization (*reprzywazyzacja*), currently under way in Poland is an attempt to redress the injustices of the Nazi and Communist revolutions that ravaged the nation between 1939 and 1956.<sup>3</sup> Because Communists remained in power for almost half a century, the political and legal fight for

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Its Aftermath, 1939–1947” (Columbia University, New York, 2000) (forthcoming from Lexington Books, 2004, as *Between Nazis and Soviets: Occupation Politics in Poland, 1939-1947*).

<sup>2</sup> See “Czetwertyńscy kontra Ambasada USA,” *Biuletyn Ziemiański* 3 (12) (Nov.–Dec. 1997): 1–2; Leonard Stern, “Europe’s Dispossessed: Exiled Aristocrats Turn Up the Heat to Recover Communism’s Cold War Spoils,” *Citizen* [Ottawa], 1 Nov. 1998, p.D3.

<sup>3</sup> Restitution means returning property to former owners; reprivatization signifies putting state property that had been confiscated from private owners back into private hands. Reprivatization can refer to the restoration of property to the original proprietor; but it also describes transfer of state property (that once was private) to any private party. Finally, privatization (*prywatyzacja*) means making state property private.

property restitution could begin in earnest only after 1989. This essay addresses certain problems faced by expropriated owners (*wywłaszczeni właściciele*) of property in Poland. By expropriated owners we mean those whose property was confiscated in return for nominal or no compensation during the Nazi or Communist regimes and whose well-founded claims to ownership were subsequently disregarded by the prevailing judicial systems. Sometimes small pieces of property were taken by the local population rather than the reigning regime, but these confiscations were only possible because of the revolutionary climate of disrespect toward private property engendered by the Nazis and Communists. In any event, efforts to return property to its legitimate owners were generally doomed in the Nazi and Communist legal systems, as those who attempted to seek restitution soon discovered. Many expropriated owners, equally victimized by a corrupt legal system, recognized the futility of seeking compensation and thus never approached the courts. Thus, the Nazi and Communist revolutions from above victimized expropriated owners and their successors in Poland through race and class conflict, as well as by encouraging excesses from below.

## **Two Revolutions**

The Nazi revolution (1939–45) almost totally exterminated Polish Jews and slaughtered Polish Christians, especially the elites. The Communist revolution (1939–41 and 1944–56) resulted in additional killing of traditional elites and persecution of various categories of so-called “enemies of the people”: political opponents, clergymen, entrepreneurs, successful farmers, and non-conforming intellectuals. Extensive property confiscations were corollary to both revolutions. All this would have been impossible without a war.<sup>4</sup>

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<sup>4</sup> On the first Soviet occupation see Jan T. Gross, *Revolution from Abroad: The Soviet Conquest of Poland's Western Ukraine and Western Belorussia* (Princeton, N.J.: Princeton University Press, 1988); Ben-Cion Pinchuk, *Shtetl Jews*

World War II began with a joint invasion and partition of Poland by Hitler and Stalin in September 1939. The conquerors looted the country, carrying off with them priceless art works, industrial equipment, and anything else of value. Stalin seized Poland's extensive Eastern Borderlands, replacing the old Polish legal, economic, social, political, and cultural systems with a Soviet one.

In terms of property relations, Sovietization meant wholesale expropriation of private, religious, and Polish state assets. All economic enterprises were confiscated by the Communist regime, ranging from small shops to giant estates and factories. Furthermore, the Communists undertook collectivization of agriculture. They converted at least some churches and synagogues into grain warehouses; they repressed all economic activity outside of the state sector. Whereas land expropriations affected mostly the Polish Christian nobility (*ziemiaństwo*), other confiscations harmed the Jews in particular since they traditionally constituted the bulk of the entrepreneurial class in the eastern Polish lands. The Soviets also took over the property of hundreds of thousands of Polish citizens (Poles, Jews, Ukrainians, and Belarusians) who were deported to the Gulag, and of tens of thousands who were shot as "enemies of the people" in 1940 and 1941. Finally, the largely Ukrainian and Belorussian peasantry faced the specter of land collectivization.

Meanwhile, Hitler divided his share of Poland into two zones. The western part was incorporated directly into the Reich. Central Poland became a separate entity called the Government General (*Generalgouvernement*) under total Nazi control.

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*under Soviet Rule: Eastern Poland on the Eve of the Holocaust* (London: Basil Blackwell, 1990). On the Nazi occupation of central Poland see Jan Tomasz Gross, *Polish Society Under German Occupation: The Generalgouvernement, 1939–1944* (Princeton, N.J.: Princeton University Press, 1979). See also Marek Jan Chodakiewicz, *Żydzi i Polacy, 1918–1955: Współistnienie, Zagłada, Komunizm* (Warsaw: Fronda, 2000), 519–29.

In western Poland the Germans replaced Polish laws and institutions with those transplanted from the Third Reich. The invaders seized all Jewish possessions and all large and medium-sized Polish Christian property. Additionally, tens of thousands of Polish citizens (mostly Christian) were shot, while almost a million were expropriated and deported from western to central Poland.

In the Government General—central Poland—the conquerors amended the pre-war Polish legal system with a plethora of Nazi decrees. As a result, while only some Christian Poles lost their large and medium-sized estates and enterprises, the Nazis stripped all Jews of their property. Of course, the definition of “Jewish property” was very flexible. It was enough if one person of Jewish extraction sat on the board of an enterprise for that business to be considered “Jewish property” subject to expropriation. Moreover, the Nazis confiscated or destroyed a certain number of small properties, usually as punishment for resistance. In the most extreme cases, between 50,000 and 100,000 Polish peasants from an area south of Lublin were expropriated and expelled from their land to make room for ethnic German settlers.

In 1941, Hitler captured Stalin’s share of Poland. The Nazis incorporated some of the Eastern Borderlands into the Government General, creating separate administrative entities for the rest. As for property, in the East the Nazis mostly left Soviet arrangements in place with two main exceptions. First, the new conquerors allowed at least some non-Jewish expropriated owners to oversee their old landed estates and industrial enterprises. Second, all Jewish property was confiscated both before and during the process of exterminating its owners. After the Jews were deported to their deaths, some of their belongings were looted by the locals (Ukrainians, Belorussians, Lithuanians, and Poles), who considered these things abandoned property slated to

be appropriated by the Nazis. Similar plundering took place later in central Poland, when the bulk of the Polish Jewry was exterminated.

### **Property Management by the Nazis**

Several Nazi bureaucracies dealt with Polish property. The Real Estate Administration (*Liegenschaftsverwaltung*) handled mostly expropriated landed estates, including their industrial components, while the Trust Administration (*Treuhandverwaltung*) controlled confiscated industrial enterprises, stores, warehouses, apartment buildings, houses, and personal possessions. Naturally, the Nazis' racist dogma led to a separate office for Jewish property: the Trust Administration for Jewish Houses and Land (*Treuhandverwaltung für den jüdischen Haus- und Grundbesitz*).

The Real Estate Administration and the Trust Administration either exploited the confiscated property directly or rented it to other users. Naturally, the choicest estates, factories, and shops went to German companies. Small enterprises (both Jewish and Christian) were often leased to the *Volksdeutsche* (ethnic Germans) but also to Polish Christian entrepreneurs. Likewise, many small properties were rented to Polish tenants—the Nazis often just took over rent collection after the predominantly Jewish flight, ghettoization, deportation, or murder. Thus, confiscated real estate became the property of the German state and, to generate income, the new Nazi landlords rented it out to the local population. With certain modifications this arrangement survived the return of the Soviets in 1944 and 1945.

### **Under the Communist Regime**

During their retreat, the Nazis looted and destroyed much property; the Soviets did the same during their advance, treating what they “liberated” as legally theirs. This was just one of the momentous changes taking place in Poland at the time.

Stalin directed these changes, acting with the tacit approval of his western allies. To maintain a façade of moderation, Stalin started off slowly; between 1944 and 1947 the revolution was imposed incrementally from above. At first, he re-incorporated the Polish Eastern Borderlands into the USSR, expelled several million Christian Poles to central and western Poland, and deported tens of thousands to the Gulag, and expropriated their property. Then he expelled several million Germans from eastern Germany and awarded those lands to Poland. Meanwhile, Stalin ushered Polish Communists into power and crushed the opposition.

In 1945 so-called People’s Poland consisted of the old central and western Polish lands as well as the eastern German territories. In order to appear moderate to the West, Stalin’s puppet regime in Warsaw had to disguise its revolutionary zeal in reformist garb. Instead of introducing a whole new corpus of laws, the Communists amended pre-war Polish legislation with a series of revolutionary decrees.<sup>5</sup> To a certain extent they emulated the Nazi approach of imposing a dual legal system on central Poland, and undertook a series of actions reflecting their hostility to private property.

First, the new government took over all of the Polish assets of the Third Reich. That included all Jewish and Polish property confiscated by the Nazis in central and western Poland. This meant, for example, that the new Communist state took over rent collection from the Polish tenants of the formerly Jewish property. In terms of low-level institutional transformation, for

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<sup>5</sup>Pre-war Polish laws and the Constitution of 1921 were, of course, friendly toward private property. See Krzysztof H. Laszkiewicz, “Chodzi przede wszystkim o prawo,” *Gazeta Polska*, 9 Dec. 1998, p.9.

example, the newly formed County Land Bureau (Powiatowy Urząd Ziemski) took over tasks formerly handled by the Nazi Real Estate Administration.

Second, the new regime expropriated landed estates under the guise of land reform. Significantly, the expropriation of landed nobility occurred from above by the Communist police and party functionaries and not through the spontaneous, revolutionary action of the people. True, peasants often looted what they considered abandoned property after landowners fled their estates, but the Communists set the example by looting smaller landed estates that should have been immune from confiscation even under Communist law.

Third, as early as 1944 the Communists selectively seized property deemed vital to the regime, including the possessions of suspected anti-Communists of all social classes. The government also expropriated the property of Polish citizens who had declared themselves to be ethnic Germans (Volksdeutsche) during the Nazi occupation.

Against this background, the Soviet-sponsored government of Poland encountered problems with property owners. Expropriated owners demanded the restitution of property seized by the Nazis and resisted further expropriations by the Communists. Simultaneously, private businessmen established a multitude of small- and medium-size enterprises desperately needed by a country attempting to rebuild itself after the war. Due to foreign policy constraints and internal weaknesses, the regime was unable to deal with these businessmen and property owners in a revolutionary way until after 1947.

### **Aborted Restitution**

Unfortunately, since access to the archives in Poland was very limited before 1989, scholars have not yet fully assessed the extent of the struggle for private property following



World War II. Currently, we can only map out general trends and extrapolate from a few examples of attempts to retain and reclaim private property by individual owners.

After 1944 practically all large industrial enterprises remained state property. The regime ignored the pleas of Western corporations to reclaim their property. Hostility to foreign capital was unequivocal. Some Polish citizens, however, were able to regain businesses lost to the Nazis. Usually, the Communists acquiesced to the rightful owners' management of mid-size enterprises, while retaining a certain amount of state control over production. However, the regime had no way to prevent many small entrepreneurs and artisans from resuming full control of their establishments.

These trends varied regionally. In the northern and western territories of new Poland (the old Reich), state control of property was the greatest: restitution would have meant returning property to Germans. Nevertheless, newly arrived entrepreneurs established a number of small businesses, and throngs of those expelled from Poland's Eastern Borderlands went west to occupy confiscated German properties.

A partial restitution did take place in the old Polish western provinces (now west-central Poland). Naturally, the Communists banned the landed nobility from the restitution drive, but waves of refugees from other social classes returned home and reclaimed property that had often been abandoned by its German wards after their westward flight.

Similar phenomena occurred in central Poland, with three exceptions. First, probably most of the expropriated owners attempting to reclaim their property were Jewish. Second, most large landowners had escaped expropriation by the Nazis, only to lose their property to the Communists in 1944 and 1945. Third, the Communists confiscated all of the land (and eventually almost all property built on it) in the capital city of Warsaw.

Everywhere expropriated owners had to endure a complicated bureaucratic and judicial process in their attempts to reclaim property. Only some of the hardships were caused by the reluctance of the temporary users of the property to vacate it. Oftentimes these people reacted with hostility and even violence to the efforts to have them evicted.<sup>6</sup>

Fortunately, during the process of reclamation, the expropriated owners and their heirs could invoke Polish prewar laws which strongly protected property rights and were not yet fully amended by Communist decrees. Moreover, lower echelon lawyers, judges, and technical experts in the courts and the civil administration were still non-Communist and often even anti-Communist members of the prewar elite. Sympathetic officials often tried in vain to exclude the manor house or estate garden from Communist expropriation or at least to appoint the owner as estate manager.

Certain evidence suggests that local parish (*gmina*) councils respected the rights of rightful owners, including Jews. Composed of non-Communists, at least in some cases these councils voted to restore smaller businesses to their owners. Such favorable decisions, however, were often reversed or stonewalled by the Communist authorities.<sup>7</sup> Likewise, lower courts

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<sup>6</sup> In Central Poland, many expropriated owners were Jewish, and Jewish memoirs are full of accounts of their unpleasant and occasionally deadly attempts to reclaim property from Christians. The circumstances of these terrible events remain unclear, but from the legal point of view, in many instances claimants had to go through judicial and administrative channels to prove their inheritance rights. Naturally, this was problematic since most Jewish owners had been killed in the Holocaust and it was often their distant heirs who had to establish the validity of their claims. See Lucjan Dobroszycki, *Survivors of the Holocaust in Poland: A Portrait Based on Jewish Community Records, 1944–1947* (Armonk, N.Y.: M. E. Sharpe, 1994).

<sup>7</sup> For example, Chana Kotlarz attempted to reclaim the sawmill of a relative who died in the Holocaust. Despite the backing of the local parish council in Zaklików and Christian workers at the sawmill, Kotlarz was prevented from recovering the property by the Communist authorities in the county. See Starosta Powiatowy Jan Pytel w Kraśniku do Obywatela zarządzającego tartakiem “Lipa” w Lipie, 15 Nov. and 5 Dec. 1944, Chana Kotlarz w Lublinie do Starostwa Powiatowego w Kraśniku, 6 Feb. 1945, Protokół zeznania Bolesława Woźniaka i Józefa Łyszczarza, 14 June 1945, APLOK, Starostwo Powiatowe w Kraśniku, Różne, file 495. It has been argued that central Communist authorities were sympathetic to Jewish claimants. However, most decisions concerning property restitution were taken at the county and township levels, where Jews (and others) often experienced hostility from the officialdom. See Jan T. Gross, “A Tangled Web: Confronting Stereotypes Concerning Relations between Poles, Germans, Jews, and Communists,” *The Politics of Retribution in Europe: World War II and Its Aftermath*, Istvan Deak, Jan T. Gross, and Tony Judt, eds. (Princeton: Princeton University Press, 2000), 107, 128.

routinely awarded property to lawful heirs, but Communist bureaucrats often stalled the execution of court orders.<sup>8</sup> Nonetheless, some small property owners managed to reclaim their property.

## Confiscations and Restorations

The Communist regime could have issued a decree restoring all possessions confiscated by the Nazis to their rightful owners, but the Marxist-Leninist rulers would do no such thing.<sup>9</sup> They hoped to gain support in villages by confiscating noble estates and distributing some of that land among the peasants. The Communist refusal to return Jewish property to Holocaust survivors was aimed at courting Polish lower classes who benefited from such expropriations.<sup>10</sup>

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<sup>8</sup> In the Kielce town archive, there are 279 volumes of documents concerning Jewish attempts to reclaim property. According to Krzysztof Urbański, the Town Court (*Sąd Grodzki*) heard and ruled on 90 percent of cases immediately after the claim was made. It appears that most rulings favored the claimants. Since all was according to the law, a higher Communist organ of control (*Prokuratoria Generalna*), after reviewing several of these verdicts, was able to reverse only a few during its surprise inspection in Kielce between Sept. 25 and Oct. 5, 1945. See Krzysztof Urbański, *Kieleccy Żydzi* (Kraków: Małopolska Oficyna Wydawnicza, n.d. [1993]), 183–91. A partial success of restitution, at least in a short run, is also confirmed in contemporary Jewish accounts regarding other provinces of Poland. See *The American Jewish Yearbook, Volumes 46–49: 1944–48* (Philadelphia: The Jewish Publication Society of America, 1944–47).

<sup>9</sup> Instead, the government issued a series of confusing decrees (*dekrety*) and regulations (*ustawy*) concerning “abandoned” and “post-German” property of March 2, May 6, and July 23, 1945, and March 8, 1946. Together with prewar inheritance laws, these decrees and regulations served as the basis for the litigation process of restitution. The decree of March 2, 1945, stipulated the exclusion from the restitution process of property “of serious importance to the interests of the state.” A hostile interpretation of the decree could prevent any property from being restored. See Urbański, *Kieleccy Żydzi*, 181–85. See also Bernard D. Weinryb, “Poland,” in Peter Meyer et al., *The Jews in the Soviet Satellites* (Syracuse, N.Y.: Syracuse University Press, 1953), 207–326.

<sup>10</sup> At the time, many Jews who left Poland asserted that they could not live in a graveyard. Later, many survivors stressed Polish anti-Semitism as the chief factor triggering their flight. It seems that the refusal to return property to rightful owners, the desire to build a Jewish state in Palestine, the fear of an allegedly impending war between the East and West, the concern for personal security stemming from an ongoing anti-Communist insurrection, and a swelling tide of common banditry in the countryside encouraged a great wave of Jewish emigration from Poland after 1946. Historically, Jews were used to various attitudes of the local population toward them, which oscillated between friendliness and hostility. But Polish Jews also persevered in the face of even the most acute hatred from the majority ethnic group as long as the central authorities could guarantee Jewish property and security. This the Communists were unwilling to do. Thus, for Jews, there was practically no reason to stay in Poland. Curiously, most scholars have ignored or misunderstood the question of Jewish property after the war. For a multifaceted discussion of excesses against the Jews see David Engel, “Patterns of Anti-Jewish Violence in Poland, 1944–1946,” *Yad Vashem Studies* 26 (1998): 43–85; Marek Jan Chodakiewicz, *Sources of Conflict: The Polish Independentist Insurgency and the Jews in Poland, 1944–1947* (Boulder, Colo.: East European Monographs, forthcoming 2002).

Besides, private property ownership was inimical to Marxist ideology. According to the lawyer Mark Verstandig, who was a high-ranking aide to a leading Communist secret policeman:

My second run-in with Colonel [Mieczysław] Mietkowski took place over legislation for the restitution of private property which had been confiscated by the Germans—or, to put it more simply, the return of Jewish property stolen by the Nazis... In his view, it made no sense to restore nationalised property to private ownership... [However, I argued that] for the government to take over only Jewish property formerly expropriated by the Nazis was in effect to sanction Nazi anti-Jewish laws. But the colonel continued to argue that it was illogical to return Jewish property when very soon all private property would be nationalised [i.e., expropriated by the Communists]... It is worth noting that, while stubbornly promoting anti-Jewish legislation, Mietkowski was himself Jewish.<sup>11</sup>

In the late 1940s and early 1950s a new wave of confiscations engulfed the country, encompassing small- and medium-sized businesses as the Communists implemented stage two of their “salami” tactics. Between 1944 and 1947, large entrepreneurs were the first to be expropriated, while small- and medium-sized businesses were reassured, as was the West, that nothing would happen to them. As soon as Stalin and his henchmen dealt with the large enterprises, they moved on to the rest, including agriculture, which was partially collectivized through coercion. The upheaval of 1956, however, halted the collectivization drive as individual peasants spontaneously reclaimed their land. This was the only successful (and spontaneous) restitution in the Soviet Bloc, and the regime grudgingly acquiesced though it later mounted several futile attempts to reverse it. Uniquely, for the next several decades Poland was a socialist country with private agriculture. Another Polish anomaly was a budding private service sector, which revived after 1956 but bloomed only in the 1970s. Tailors, shoemakers, restaurateurs, car mechanics, and others maintained their small establishments legally despite onerous Communist tax policies.

Throughout the period, however, the regime flatly rebuffed timid attempts by expropriated owners (other than peasants) to reclaim their property or seek monetary compensation. Perhaps the only exceptions were the symbolic reparations paid after 1956 to a small number of U.S. citizens whose possessions had been taken over by the state during and after World War II.<sup>12</sup>

Meanwhile, the Communist party *nomenklatura* at all levels began a slow process of property accumulation, mostly of real estate. While party brass acquired lavish estates and plundered national art depositories for choice items, lower-ranking kleptocrats acquired apartments and built houses at nominal expense. Next, Communist functionaries established contacts with the private sector, trading political favors for services and a share of the profits. Barter was a common means of exchange; the black market thrived. The party *nomenklatura*'s enrichment accelerated during the 1980s, when many embarked on semi-private entrepreneurial ventures at home and abroad.

### **Annus Mirabilis: 1989**

In general, the collapse of the Soviet Bloc and the disintegration of the USSR paved the way to a dramatic change in property relations in Poland. In particular, the Round Table Agreement in Poland resulted in substantial change. Concluded in the spring of 1989, the agreement paved the way for power sharing between the Communists and the so-called democratic opposition, which purported to speak on the behalf of the outlawed trade union Solidarity. In reality, it represented its left wing, where former Communists were overrepresented. Solidarity's left-wingers agreed to allow the Communists to retain control over

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<sup>11</sup> Mark Verstandig, *I Rest My Case* (Melbourne: Saga Press, 1995), 216.

the police, the army, and the economy in exchange for an unfree election held in June 1989, where only 35 percent of all seats could be contested. The rest were assigned to the Communists.<sup>13</sup>

Amazingly, after the fall of the Berlin Wall in November 1989 alleviated any need for undemocratic solutions to Poland's crisis, the formerly dissident left fought adamantly not to revise its deal with the Communists. In essence a golden parachute, the deal saved Communist party kleptocrats from major purges. Even after the self-dissolution of their party, Communists were permitted to retain positions of power. They took full advantage of this opportunity to embark on an orgy of embezzlement and shady deals, taking out bank loans that were never repaid and swallowing properties for nominal prices. The process slowed only somewhat after the first fully democratic and free elections of October 1991 saw the left defeated. A confusing succession of anti-Communist, left-liberal, liberal-libertarian, conservative-nationalist, and center-liberal governments followed. Their lack of cohesiveness and the toll the reforms were taking on the people resulted in the victory of the post-Communists in the 1993 election. However, in 1997 the center-right took the vote and finally formed a stable coalition government pledging to implement much needed reforms, including property restitution.

Still, many of Poland's businesses are currently tied to the former party *nomenklatura*, which controls much of the banking and real estate markets. Yet the dramatic events of 1989 fundamentally changed property relations in Poland. Post-1989 governments vigorously privatized the state sector, Western businesses invested in the robust Polish market, and a multitude of small firms sprung to life. To give a stake in the new system to the population at

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<sup>12</sup> According to a government decree of 1960, U.S. citizens were compensated a paltry \$60 million for property confiscated in Poland. See *Gazeta Wyborcza*, 4 Aug. 1999.

<sup>13</sup> For an apologia of the Round Table Agreement see Wiktor Osiatyński, "Poland," in *The Roundtable Talks and the Breakdown of Communism*, Jon Elster, ed. (Chicago: University of Chicago Press, 1996), 21–68.

large, certain political forces proposed a “universal property empowerment” (*powszechnie uwłaszczenie*), where every citizen would receive redeemable stock in state enterprises under privatization or some other form of compensation.<sup>14</sup> Lastly, the rightful owners of expropriated properties began with growing boldness to clamor for restitution.

As a result of both the Nazi and Communist revolutions from above and almost half a century of socialism, property relations in Poland are now quite complicated. Unlike in other post-Communist countries however, there is a continuum of property ownership. The state remains the largest proprietor, but around 13 million Polish peasants mostly own the land they farm, having never lost it to collectivization. There is a contingent of small artisans who survived on the fringes of the Communist economy after 1956 and whose ranks have lately grown unimpeded. Some of them own their work-stations. Moreover, since the 1970s, the number of Poles owning their dwellings (mostly apartments) has risen dramatically, especially since the collapse of Communism. Most important, there has also been a spontaneous privatization of the service sector. Most grocery stores, car garages, and similar establishments are firmly in private hands. Many medium-sized enterprises have also been privatized, some of them by Western investors and others by Polish citizens, including quite a few Communist party kleptocrats.

### **Contemporary Politics**

Although full reparations to all private owners and their heirs would be ideal, economic and political limitations will naturally circumscribe the provisions of any restitution plan. Nevertheless, a serious commitment to respecting private property rights will signal foreign investors and governments that Poland has taken a major step toward economic and legal

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<sup>14</sup> A right-wing politician symbolically called it “universal ‘reprivatization.’” See Jacek Kurski, “Powszechna ‘reprivatyzacja,’” *Sprawa Polska: Pismo Chrześcijańsko-Narodowe* 2 (Nov.–Dec. 1998): 3–4.

maturity.

Unfortunately, since 1989, Poland has been painfully slow to recognize the rights of expropriated owners. The nation faced enormous problems restoring political democracy and resuscitating its economy, which had been in dire straits before the fall of Communism. Poland applied a so-called economic shock therapy to transform its moribund state-owned economy to a privatized free market system. The “shock therapy” arguably worked, but it also created an enormous amount of social displacement, triggering hyperinflation, unemployment, and labor unrest which became immediate political concerns. Further, members of the Communist party *nomenklatura* continued to dominate Poland’s banks, industry, and media. This state of affairs resulted in an orgy of embezzlement and graft as Communists saw that their political and economic power was in its twilight.

Needless to say, since the post-Communists control much of Poland’s wealth, they vehemently oppose property restitution. Successive Solidarity governments were swamped with a multitude of problems concerning political and economic transformation, while conservatives in parliament were unable to muster enough votes to ensure appropriate restitution legislation. Faced with a multitude of everyday problems, the average Polish voter reacted with indifference or even hostility toward attempts by expropriated owners to reclaim ancestral property. The latter were late to organize themselves and lobby for their rights.

It is important to stress that most privatized enterprises were built (or at least greatly expanded) after 1945. This complicates the potential claims of many expropriated owners: the state or cooperative owners maintained the property, oftentimes expanding and improving it, so they often object to returning it to former owners. On the other hand, expropriated owners



contend that free use of their property for almost half a century should be compensation enough for all the improvements made.

Another looming issue is the role of Communist law in the restitution process: much land was confiscated in violation even of Communist-era laws, and some factions want restitution to extend only to property confiscated in violation of laws that were in force at the time. To what extent should Communist laws and normative administrative decrees be heeded?

These are only the most important issues that lawyers and legislators in Poland will have to contend with. As yet, no satisfactory, nationwide solution has been found, although property restitution has been taking place case-by-case as a result of court litigation or administrative action by local authorities.

## **Political Problems**

Broad property restitution could lead to the partial restoration of pre-war elites and the reemergence of religious denominations and ethnic minorities stifled under Communism. For this reason and others, restitution has many enemies, and the Polish parliament barely managed to pass comprehensive reprivatization legislation in January 2001.<sup>15</sup> For almost ten years pro-reprivatization forces on the political right initially ignored the urgency of property restitution, and then failed to secure popular support to carry it out. Various associations of expropriated

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<sup>15</sup> The newest draft of the reprivatization law was ready on Sept. 2, 1998, providing monetary compensation of 50 percent of the current value in government bonds. However, the post-Communist president vetoed it. For its draft see "Ustawa z dnia. . . o reprivatyzacji nieruchomości i niektórych ruchomości osób fizycznych przejętych przez Państwo lub gminę miasta stołecznego Warszawy oraz o rekompensatach," 2 Sept. 1998, Unpublished manuscript in the authors' collection. An amended version was passed both by the lower and upper houses in January 2001, returning only a few properties to the owners and their inheritors but granting everyone entitled a monetary compensation of 50 percent of the current value of the property in government bonds. See Z. P., "Reprivatyzacja okrojona," *Rzeczpospolita*, 12 Jan. 2001; Żaneta Semprich, "Sejm uchwalił: Przywrócenie utraconej własności lub bony," *Rzeczpospolita*, 13 Jan. 2001; Z.P., "Obcokrajowcy spłaceni," *Rzeczpospolita*, 23 Jan. 2001; E. O. "Odszkodowania dla wszystkich obywateli II Rzeczypospolitej," *Rzeczpospolita*, 26 Jan. 2001; Kazimierz Groblewski, "Senat rozszerza prawo do rekompensat," *Rzeczpospolita*, 27 Jan. 2001.

owners failed to unify and advance a common agenda, a problem that was eliminated only recently by the creation of the Consultative Forum for Reprivatization. Meanwhile, liberal forces worked overtime to discourage restitution and reprivatization. Administratively, expropriated property often falls under the fragmented jurisdictions of various local and central institutions, and government bodies themselves control many properties. All of this makes the reprivatization process extremely complex.<sup>16</sup>

At one point, opponents of reprivatization had convinced many peasants and urban tenants that they would be evicted from their lands and houses if property were restored to its original owners. Along the same lines, some have threatened the imminent return of “feudalism” and “foreigners” to Poland. This propaganda has gained wide currency in the country despite the fact that Poland’s tenancy laws broadly favor the rights of tenants over those of owners. This anti-restitution propaganda was successful even though the descendants of Poland’s landed nobility unequivocally pledged to seek restitution only of properties still held by the state, excluding those held by private individuals. Under that guarantee, peasants would be exempt from any claims to land they came to occupy after the Communists had confiscated it. Moreover, Polish law permits acquisition by adverse possession (*prawo zasiedzenia*) after ten years of occupancy.<sup>17</sup>

Most of the gains achieved in the reprivatization campaign so far have come from political arrangements rather than legal ones. According to the 1989 Round Table Agreement,

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<sup>16</sup> The only exception concerns the expropriated landed estates which fall under the jurisdiction of the Agricultural Property Agency of the State Treasury (Agencja Własności Rolnej Skarbu Państwa).

<sup>17</sup> According to a Communist decree of Sept. 6, 1946, all property claims by rightful heirs not filed with a court in Poland by Jan. 1, 1947, are void. Furthermore, when no legal action is undertaken, anyone can claim the inheritance and, after ten years, a legal action against him by the heirs is impossible because the statute of limitations expires (*przedawnienie*). Thus, as the eminent libertarian pundit Stanisław Michalkiewicz noted, existing law is less than hospitable toward expropriated owners. See, for example, Marek Jan Chodakiewicz, “Niszczenie elit: Rewolucyjny bandytyzm i ziemianie (1939–1945),” *Biuletyn Ziemiański*, 3 (26 Oct. 1995): 1, 3.

the Catholic Church was allowed to seek property restitution from the state. Other religious denominations followed, including a tiny band of Jews. Symbolically, the Lomdei Mishnayot synagogue in Auschwitz was the first building returned to the Jews in that town. However, these were all extralegal victories based on political concessions in the spring of 1989. They did not benefit every denomination equally. For example, the Baptists are still battling to regain their places of worship.<sup>18</sup>

The political and legal climate became propitious for reprivatization in the late 1990s. After the electoral victory of Solidarity in 1997, one of the most outspoken advocates of property restitution, Krzysztof Hubert Laszkiewicz, became Deputy Minister of Treasury in charge of reprivatization. Several drafts of restitution legislation were prepared, but the parliament failed to pass any of them until January 2001. For ten years in independent Poland old Communist decrees of expropriation were still on the books. To confuse things even further, in 1997 Poland adopted a new constitution that failed to solve the restitution question.

So expropriated owners were left to conduct their quests alone, and though property issues are extremely complex, the atmosphere is certainly more sympathetic now than it ever was after 1989. Yet Laszkiewicz continuously warned that if the parliament did not pass appropriate legislation quickly, expropriated owners would turn to litigation and taxpayers or various third parties would have to foot the bill. Accordingly, the Ministry of Treasury prepared a program of property restitution that was to be implemented in conjunction with general privatization. Finally, in July 1999, exhausted by leftist stonewalling, a broad conservative-libertarian coalition formed a committee on reprivatization in Poland's parliament. In January 2001 the coalition finally, pushed the property restitution legislation through both the lower and upper houses.

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<sup>18</sup> Danuta Frey, "Baptyści narazie odzyskali nadzieję," *Rzeczpospolita*, 7 Aug. 2000.

Enraged post-Communists, including the president, who promptly vetoed it, threaten to reverse the legislation when they return to power.

### **A Bureaucratic Nightmare**

In a landmark case in November 1998, a Polish court awarded compensation to the Wedel family, famous pre-Communist Warsaw confectioners. The Communists not only confiscated their chocolate factory but for 40 years the regime also used the Wedel name to advertise its wares. This despicable practice was continued by Pepsico, which acquired the Wedel enterprise in the early 1990s.<sup>19</sup>

This verdict sent a message to those who had bought stolen property from the post-Communists and other unscrupulous parties—and there are many who might be concerned. The Marriott Hotel in Warsaw was built on expropriated land; the French embassy has acquired a building whose original owner has been trying to reclaim it since 1988; the U.S. embassy sits on land taken from the Czetwertyński family. Ironically, even the new Palace of Justice is situated on properties stolen by the Communists from Jewish and Christian owners.

Indeed, the problem of reprivatization seems to be the most acute in the capital city of Warsaw where, by a special decree of October 26, 1945, the Communists expropriated literally all landholders.<sup>20</sup> The state still benefits from its exploitation of properties belonging to

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<sup>19</sup> See Lidia Oktaba, “Ugoda: 5 mln dla spadkobierców Wedla,” *Rzeczpospolita*, 19 Nov. 1998. The Wedel case has become a favorable precedent for other plaintiffs in similar predicament. For example, the Polish branch of the Archduke von Habsburg family has significantly improved its chances to receive a compensation of US\$50 million from the Heineken Corporation which acquired the Habsburg brewery in Żywiec from the Communist kleptocrats. See Maciej Kuciel and Danuta Frey, “Habsburgowie kontra Browary Żywiec,” *Rzeczpospolita*, 11 July 2000; “Arcy-Żywiec,” *Życie*, 19-20 May 2001; Artur Pałyga, “Każdy ma prawo do historii,” *Rzeczpospolita*, 6 June 2001; D. Fr., Żywiecki browar w NSA, *Rzeczpospolita*, 2 March 2002.

<sup>20</sup> “Dekret z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m. st. Warszawy,” in *Dziennik ustaw* 50 (1945): 434. For property owners battling to regain inheritances in Warsaw, at times successfully, see Danuta Frey, “Skutki unieważnienia odmowy,” *Rzeczpospolita*, 29 July 2000; Idem, “Wielkie arystokratyczne nazwiska,” *Rzeczpospolita*, 5 Aug. 2000; Danuta Frey, “Dziesięć lat czekania,” *Rzeczpospolita*, 21 Aug. 2000; Idem,

individuals ranging from the family of Poland's first president, who lost an elegant villa, to thousands of citizens who lost modest plots of land. Some have prevailed on the authorities to return their property, but most seek redress in vain. One American citizen of Polish extraction has been consistently denied the return of his family house, which is occupied by General Wojciech Jaruzelski, Poland's former dictator. Jaruzelski bought it for peanuts from the state and now claims to own it by adverse possession.

The current bureaucratic process for reprivatization is Kafkaesque. Perhaps the case of Professor Władysław Witwicki's legal successors is instructive. Professor Witwicki was a famous scholar, translator of Plato into Polish, and an intrepid savior of Jews during World War II. After the arrival of the Red Army, he was evicted from his suburban house in Konstancin outside of Warsaw. Until 1956 the villa served as residence for the Soviet commander-in-chief of the Polish Communist army. In 1957, the house was taken over by the Ministry of Health, which established a small hospital there. In the late 1970s the hospital was closed down and the property practically abandoned, while remaining under the jurisdiction of the Ministry of Health.

Throughout this period the secret police forced Witwicki and his successors to pay property taxes and other fees as he was still the rightful owner of the house even under Communist law. This went on until the late 1970s. The family has consistently tried to repossess the house, and their efforts doubled after 1989. The Ministry of Health, however, has refused to relinquish the property, claiming that in 1957 the minister issued a decree expropriating the family. Yet under prevailing law the health minister had no right to issue decrees. That right was limited to the president and, after the Communists eliminated that office, to the prime minister.<sup>21</sup>

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"Hotel Europejski oddany," *Rzeczpospolita*, 9 Dec. 2000; Idem, "Zablokowane Centrum Bis," *Rzeczpospolita*, 23 Jan. 2001.

<sup>21</sup> Legal matters were a farce in Communist Poland. The parliament rubber-stamped Communist legislation; important decisions were usually made at secret meetings of the Politburo of the Communist party. If parliament

Furthermore, no copy of the alleged expropriation decree has survived, and local property registers unequivocally show the Witwickis as the sole owners of the house. But the ministry still refuses to return it to them, claiming that there is no legal precedent to follow. The case will probably return to court.

### **Creeping Restitution**

It is a great paradox that the state cannot afford to maintain seized property but is reluctant to return it to its original owners. For example, practically all large state farms are unprofitable, with hordes of idle employees and decaying assets. These farms are bleeding money from the public coffers, but there is no official predisposition to return them to their original owners. Still, at least in theory, former owners have the legal right to be the first ones to offer a bid for their property in a state auction, and some have reclaimed their property this way. To salvage the budget, oftentimes local authorities eagerly give up municipal and parochial properties for a penny. Unfortunately, all too frequently it is the local party kleptocrats who acquire, and often resell, manor houses and other properties.

Through this and other means, a creeping restitution is under way. Former owners return to their old factories that are being privatized. For example, the Majewski and Zaborski families, former owners of a pencil factory in Pruszków, were voted back in as owners by the descendants

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was not in session, the prime minister could issue decrees, which generally reflected the will of his colleagues in the Politburo. Aside from the period after their seizure of power (1944–47), when a self-appointed “Home National Council” (Krajowa Rada Narodowa) issued a bevy of decrees implementing the will of Stalin as communicated by the Politburo of the Polish Communist party, it was very rare for Communist prime ministers to issue decrees. They deemed it important to preserve the appearance of legality, and thus observed the mere formality of parliamentary approval. In an emergency, though, the Communists could overlook appearances. For example, martial law was imposed in Poland in December 1981 by the decree of an ad-hoc Military Council of National Salvation (Wojskowa Rada Ocalenia Narodowego) even though parliament was still in session. See Jerzy Kochanowski, ed., *Protokoły posiedzen Prezydium Krajowej Rady Narodowej, 1944–1947* (Warsaw: Wydawnictwo Sejmowe, 1995); Bogusław Barnaszewski, *Polityka PPR wobec zalegalizowanych partii i stronnictw* (Warsaw: Wydawnictwo Naukowe Semper, 1996); Andrzej Swidlicki, *Political Trials in Poland, 1981–1986* (London: Croom Helm, 1988), 16–25.

of their workers who long cherished memories of pre-Communist times. Another indirect mode of reprivatization is for owners to lease their own property from the state, as is the case with the Wielowieyski family in Chelmno.

Some enraged inheritors have resorted to direct action: Krystyna Kryszowska in Warsaw hired private security guards, seized her family palace, evicted employees of the state institution that was occupying it, changed the locks, and moved back in.<sup>22</sup> It turned out that the Communists had violated their own law by expropriating this estate since its size was less than the minimum 50 hectares required for confiscation as described in the decree on the so-called “land reform” of 1944. Moreover, the infamous decree apparently failed to provide for the confiscation of manor houses, objects of art, and other private possessions that served no agricultural purpose.<sup>23</sup> This discovery has formed the basis of a lawsuit by the Count Stefan Dęmbinski family seeking the return of its castle in Czemierniki. In this vein, the Supreme Administrative Court has recently ruled that many confiscations of breweries, sawmills, spirit distilleries, commercial fishponds, and other industrial enterprises were illegal under the decree. And so were expropriations of apartment buildings in nearby towns that did not constitute an integral part of the agricultural estate. Thus, the courts have recently ruled that the Tarnowski family will receive its properties in Tarnobrzeg back and they have now looked more favorably at the petition of the Polish branch of the Habsburg family who wants to reclaim its famous brewery and other real estate in Żywiec. (Alas, there still has not been comparable legal relief for thousands of Habsburgs’ farmer-montagnard neighbors, the Rusins who lost their pasture land in

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<sup>22</sup> The expense of maintaining a security force eventually overwhelmed her; she was eventually forced to move out. However, she continued to battle for her rights in courts. Finally, the courts restored the property in January 2001. Alas, Lady Kryszowska died in November 2000. See Danuta Frey, “Po dziesięciu latach procesów pałac w Rozalinie wraca do właścicieli,” *Rzeczpospolita*, 5 Jan. 2001.

<sup>23</sup> See a trenchant legal analysis of the unconstitutionality of the so-called land reform by a leading restitution lawyer Józef Forystek, “Kij w mrowisko,” *Rzeczpospolita*, 31 July 2000.

the Tatra mountains to Communist confiscations. They cannot afford good lawyers and public relations experts.)

In another legal twist favoring the dispossessed, the parliament's human rights ombudsman filed a motion in provincial court in Łódź to restore property to a Polish family who had declared themselves ethnically German during the Nazi occupation. In 1947, a Communist court found the family not guilty of treason because they had been members of the Polish anti-Nazi underground, but the court still confiscated all of their property, clearly as punishment for having cooperated with the pro-Western branch of the resistance. There are now grounds to reverse this unjust verdict and reopen other such cases to scrutiny. Thus, the Western concept of the rule of law is slowly pushing out the totalitarian rule of collective responsibility in Poland.<sup>24</sup>

## Legal Issues

Restoring private property after fifty years of Nazi and Communist rule is a project littered with novel legal questions. For example, should Poland recognize its Communist-era laws at all? If so, what should be done with those laws that authorized confiscation programs?

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<sup>24</sup> The preceding two sections are culled from interviews granted to me by some of the rightful owners and from the Polish press. See "Czterdziesty kontra Ambasada USA," p.1–2; Kaja Bogomilska, "Dom widmo," *Gazeta Polska*, 31 March 1994, p.8; Ewa Ligęza-Sieniarska, "Bliskie naprawienie krzywd?" *Nadwiślańskie Echo*, 2 April 1998, p.7; "W Warszawie nie szanują świętego prawa własności: Pani Iwanicka kontra prezydent miasta," *Życie Warszawy*, 10 Sept. 1997, p.1; Stanisław Wielowieyski, "Nie 'zyciowi' ziemianie," *Gazeta Polska*, 23 Sept. 1998, 6; Krzysztof Hubert Laszkiewicz, "Wolą zabrać niż oddać," *Gazeta Polska*, 30 September 1998, 7; Danuta Frey, "Naród dał, dekret zabrał," *Rzeczpospolita*, 1 Oct. 1998, p.7; Krzysztof Hubert Laszkiewicz, "Bezprawne nawet w PRL," *Gazeta Polska*, 28 Oct. 1998, p.8; Danuta Frey, "Spadkobiercy przed murem," *Rzeczpospolita*, 27 July 1998, p.13; "Bezdomny bohater," *Gazeta Polska*, 2 Dec. 1998, p.4; Kaja Bogomilska, "Dworskie życie," *Gazeta Polska*, 18 August 1994, p.5; Tomasz Świderek, "Szkola cierpliwości: TC Dębica SA," *Rzeczpospolita*, 19 Oct. 1998, 12; Żaneta Semprich, "Pełnomocnik Habsburgów chce do Trybunału," *Rzeczpospolita*, 12 May 2000; Danuta Frey, "NSA o nieruchomości w Dukli," *Rzeczpospolita*, 9 June 2000; "Czekanie na papiery bez pokrycia," *Rzeczpospolita*, 17 June 2000; Marzena Lewandowska and Michał Majewski, "Zajazd na Pęcice," *Rzeczpospolita*, 27 June 2000; Danuta Frey, "Góralki przeciw Orbisowi," *Rzeczpospolita*, 29 June 2000; idem, "Zwrot z opóźnieniem," *Rzeczpospolita*, 12 July 2000; idem, "Łatwiej zabrać niż oddać," *Rzeczpospolita*, 2 Aug. 2000; idem, "Wystarczy być wykonawcą planu," *Rzeczpospolita*, 8 August 2000; "Awantura w małym dworku," *Rzeczpospolita*, 16 Aug. 2000; Danuta Frey, "Czy baszta wróci do rodziny?" *Rzeczpospolita*, 6 Nov. 2000; Bogdan Podgórski, "Spadkobiercy mają coraz mniej czasu," *Rzeczpospolita*, 29 Jan. 2001; idem, "Nie każdy volksdeutsch był



And how can one distinguish the two? On another front, broad restitution calls out for a general theory on which claims are based: why are expropriated owners of real property entitled to something from the government? Valuation questions will be important: should owners be paid current market value, value at the time of confiscation, or some other measure? What if buildings have been added or removed? How does one value property that had to be cleared of rubble or buildings rebuilt (completely or in part) after the war? Indeed, why only compensate for real property—why not compensate for the destruction of a house, or loss of crops? We cannot entirely resolve these questions but we will attempt to lay out some fundamentals.

Current legislative proposals for widespread restitution fall far short of justice and would create tremendous incentives for the state to continue to cheat expropriated owners. Recently proposed legislation provides that an expropriated owner be entitled either to 60 percent ownership of his land with the option to purchase the rest from the state (!), or compensation equal to 60 percent of the property's value.<sup>25</sup> However, this was changed to 50 percent according to the law that passed parliament in January 2001. The statute applies to takings effected between 1944 and 1962, excluding the victims of Nazi takings.

Objections to property restitution are not limited to Polish politics. Though the U.S. State Department appears broadly to support efforts at restitution in formerly Communist countries, at least some legal scholars oppose any direct property restitution.<sup>26</sup> In their view, restitution is problematic because, among other things, it improperly focuses largely on real property and

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odszczepeńcem,” *Rzeczpospolita*, 13 Nov. 1998.

<sup>25</sup> “Property Restitution Creeps Forward,” *Polish News Bulletin*, 8 Sept. 1999 (1999 WL 7825814).

<sup>26</sup> “We routinely raise property restitution issues with official visitors of all levels from the countries of [Central and Eastern Europe] . . . and our main purpose has been to advocate further steps in private and communal property restitution that appear appropriate for each country.” See Stuart Eisenstat, Under Secretary of State for Economic, Business and Agricultural Affairs, Testimony Before the Commission on Security and Cooperation in Europe (March 25, 1999), available at [www.state.gov](http://www.state.gov).

“does not correspond in any sense to criteria of need [or] standards of equal citizenship rights.”<sup>27</sup> Instead, some scholars favor a policy of privatizing state assets through a lottery or similar system, as the critical problems to be solved by restitution do not “depend on the transfer of property to its *previous owners*.”<sup>28</sup> In their view, transferring the property to everyone is just as good.

### **The Basic Proposal**

Transferring stolen property to everyone—through lottery or otherwise—looks much like a ratification of Communist takings, and it would do little to instill confidence in property rights. Expropriated owners should have their property rights fully restored (to the extent possible) and/or be compensated at the current market rate for the value of their losses. Stolen art, another problem commonly arising in the aftermath of World War II, is treated this way in some jurisdictions, and our proposal for the treatment of real property in Poland follows the basic logic of New York’s replevin law as applied to stolen works of art.

The analogy between expropriated property and stolen art may at first seem strained, especially as real property is rarely thought of in the same category as chattel. But art shares with land several key characteristics: each piece is unique, good pieces tend to hold or gain value over time, and clear evidence of ownership (or provenance, as with art) is often difficult to show. This makes valuable works of art different from most other chattel, and the law surrounding the restitution of stolen works of art differs accordingly. But in addition to the legal similarities between art and real property, there is a pregnant historical commonality too: the Nazis carried on an extensive program of art theft during World War II, and courts around the world are still

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<sup>27</sup> Claus Offe and Frank Bönker, “A Forum on Restitution, Essays on the Efficiency and Justice of Returning Property to its Former Owners,” *East European Constitutional Review*, 3 (Summer 1993): 30–31.

deciding who owns what.<sup>29</sup>

In New York—where much art litigation takes place, and also the jurisdiction most sympathetic to plaintiffs in this regard—an original owner of art can bring a replevin action against a current owner, even if that owner is a subsequent bona fide purchaser. A plaintiff showing original ownership of the item is entitled to possession of the art or compensation at current market value, and the current owner is left with a claim against the previous seller. Interestingly, the statute of limitations is effectively tolled in instances where the plaintiff could not with reasonable effort have located the artwork in order to bring an action for its return, giving life even now to claims arising from the Nazis' program of art theft.

Similar rules should apply to claims for the restitution of expropriated property. Because disputes over art and real property share some of the same complexities—proving ownership of a unique item, dealing with subsequent purchasers, choosing between remedies in kind or in cash—the basics of a property restitution scheme could draw from the common law as it has been developed for stolen art: property should be returned (or the owners compensated at current market value), and the statute of limitations should be tolled for as long as it remains impossible or futile to bring a good claim for restitution.

The similarities between restitution of stolen art and restitution of real property cannot be taken too far. Economic stability and government budgets are implicated in property restitution, so these issues will have to be dealt with accordingly. For example, stable property relations are important, and they cannot be too upset by the restitution process. Both *Pepsico* and *Jaruzelski* are good examples: for reasons of public policy, their property rights should remain secure—

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<sup>28</sup> Ibid.

<sup>29</sup> For coverage of both the history and law on this issue, see Kelly Diane Walton, “Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art,” *Fordham Intellectual Property, Media and Entertainment Law Journal* 9 (1999): 549.

unlike subsequent purchasers of stolen art, who in many jurisdictions are left empty-handed. In property cases the government will have to compensate plaintiffs, unlike art disputes which can remain entirely private. This may seem especially unjust since the likes of Jaruzelski benefited by manipulating a corrupt system of public ownership while many art purchasers made their acquisitions in good faith. But current property owners' windfalls might be more gradually captured through a property tax that travels with the land, with revenues used to compensate expropriated owners.

### **What of Communist Law?**

In creating a theory of recovery for expropriated owners, Poland will first need to decide what to do with its Communist-era laws. Various factions have advocated compensating owners only for property taken in violation of Communist law, giving full effect to all confiscatory statutes and "normative" administrative acts.<sup>30</sup> There is little to commend this approach. Poland's Communist-era regime lacked any meaningful distinction between its legislative, administrative, and executive functions, so there is little sense in only compensating for what the government took in violation of the laws it chose to make.<sup>31</sup> Normative administrative acts were effectively on a par with parliamentary statutes during Communist rule, so an agency that merely stated a rule governing its takings therefore took in compliance with the law.<sup>32</sup> Expropriated owners should not be denied recovery because their loss was draped in the thin cloth of a confiscatory statute or administrative declaration.

Yet the retroactive repeal of Communist-era laws would pose serious problems of its

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<sup>30</sup> William R. Youngblood, "Poland's Struggle for a Restitution Policy in the 1990s," *Emory International Law Review* 9 (1995): 645-47.

<sup>31</sup> See Ewa Letowska, "Courts and Tribunals Under the Constitution of Poland," *St. Louis-Warsaw Trans. Law. Journal* (1997): 69.

own. Property relations are currently more or less stable—indeed, stable enough to support one of Europe’s most rapidly growing economies—and they arise at least in part from Communist law. An attempt to retroactively repeal that law would seriously threaten Poland’s economic stability, so Communist-era property laws must be substantially retained.

In this sense, rather than asking whether Poland should enforce Communist laws—for in any event it must live with many of their results—we should ask what can be done now to vindicate expropriated owners in light of the Communist era. To maintain stable property relations without tolerating Communist takings, Poland should retroactively treat Communist-era takings as though they occurred under a regime requiring fair compensation for government takings. This would leave expropriated owners with good claims for just compensation, but current owners could rest assured in their existing property rights.

From the expropriated owner’s perspective, this is the same rule as with the law of stolen art as discussed above: a good contemporary claim for restitution or compensation at full market value. But from the current owner’s perspective, the result is necessarily quite different. Whereas in some jurisdictions subsequent bona fide purchasers of stolen art are essentially left empty-handed, current owners’ rights to property must be more secure than this.

### **Why Only Real Property?**

As noted above, some commentators have criticized restitution schemes on the grounds that they unjustifiably favor real property claims: “the norm of equal treatment forbids privileging one class of victims above the rest, so this argument goes.”<sup>33</sup> But as a practical matter, claims for things still in existence—like fine art—are much more viable than claims for

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<sup>32</sup> Ibid., 70.

intangible losses or things long-since destroyed. A replevin action for stolen art cannot fail on account of a judgment-proof defendant; if the defendant has the art, the court can order its transfer to the plaintiff.

This simple observation may point to a broader principle: the law works well in difficult cases when it focuses on distribution: re-allocating existing resources. It does not, in practice, work well when it comes to compensating for net economic losses. Stated more broadly, because the items to be really or constructively redistributed are storing value that remains in the Polish economy, property restitution is constrained to a set of awards whose ceiling is by definition some fraction of the economy's total value. The government will not always be able to access that value by selling the property or returning it to its owners, but sticking to redistribution places a logical ceiling on the cost of restitution.

So we propose that each plaintiff should point to some thing whose current market value is the measure of his loss.<sup>34</sup> All pieces of real property meet this standard, as do fixtures and chattels still in existence. Yet in many or most cases, the property claimed will have been improved. In these cases—e.g., apartment buildings built on a formerly rural plot of land—the expropriated owner will have to point not only at the specific thing taken, but at the particular bundle of rights in it to which he was and is entitled.

## **Valuation**

We propose that expropriated owners be compensated at current market value. Any other rule is an invitation to corruption, for the gap between the compensation owing for a piece of

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<sup>33</sup> Stephen Holmes, "A Forum on Restitution, Essays on the Efficiency and Justice of Returning Property to its Former Owners," *East European Constitutional Review*, 3 (Summer 1993): 30–31.

<sup>34</sup> This should not set a precedent for adjudicating government takings going forward—the perverse incentives created by such a rule should be obvious.

property and its current market value (40 percent in some schemes) becomes an economic good subject to political allocation and its attendant shenanigans. If expropriated owners are compensated at a rate below the property's going market value, the government will have an incentive to pay cash damages, sell the property to cover the cost, and keep the difference. This is a senseless result unless there is a significant improvement on the property that cannot be removed or turned into a leasehold. Moreover, it runs contrary to the preference for widespread ownership of land. In those cases, the land may have to be sold to satisfy the plaintiff's partial claim.

### **Who Should be Eligible to Claim?**

Currently, property restitution is limited to Polish citizens. Reportedly, however, a good number of foreigners have been able to circumvent the law. Germans in particular allegedly find Polish substitutes who buy their old property back. Naturally enough, most of such rumored land purchases take place in western and northern territories of Poland that had belonged to Germany before 1939. Some German families want to return home to their Silesian, Pomeranian, or East Prussian *Heimat*. Moreover, many Germans have filed individual petitions with local Polish authorities to be allowed to reclaim their property.<sup>35</sup>

Finally, a few Jewish Americans filed two separate lawsuits in Chicago and in New York against the Republic of Poland with demands that their families' expropriated property be restored to them.<sup>36</sup>

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<sup>35</sup>German efforts to reclaim property have scared local Poles immensely. See Edith Heller, "Angst vor dem Vergangenheit," *Focus*, 8 June 1998, 276–77; AST, "Nieruchomości cudzoziemców: Niemcy kupują najwięcej," *Rzeczpospolita*, 12 July 2000; Jolanta Zarembina, "Nie będzie Niemiec..." *Rzeczpospolita*, 25 Jan. 2002.

<sup>36</sup>The lawsuits ignited a storm of indignation in the Polish press. For example, it was immediately pointed out that at least one of the plaintiffs had already accepted compensation for his family's property in Poland. However, the most violent reactions were not engendered by the issue of property restoration but, rather, by how the cases were

All debates concerning restitution of property to the rightful owners and their legal successors who currently do not hold Polish citizenship boil down to this: To return property to any foreigner would create a precedent that in turn would trigger a flood of similar demands by millions of Germans. Thus, Poland refuses to recognize any foreign claims except for the heirs of those persons who were Polish citizens in 1939. The only other exception concerns the German-Jewish community property which can be reclaimed by Jewish organizations in Poland. Here, however, the Polish authorities apply the religious rather than the ethnic principle, so the exception cannot serve as a precedent for foreign claimants.

From a policy standpoint, this rule draws a distinction between expropriated owners that at first seems unfair—arguably disfavoring those who not only lost their property, but were ejected from Poland altogether. But in most instances, departure from Poland was an economic blessing in the long-run, so it makes little sense for the Polish government to be paying compensation to foreigners whose fortunes were generally improved precisely on account of their departure.

Finally, the entire separate of issue of how to deal with property claims of persons displaced as a result of postwar population transfers should be raised, and it should be pointed out that they often received compensation from their governments and that it would be unacceptable, say, if Germans could claim against Poland but Poles removed from the Eastern

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pled (the first complaint was filed with the U.S. District Court for the Eastern District of New York; the second in the Northern District of Illinois). According to the complaints, Poland continued ethnic cleansing of the Jews after the Holocaust and appropriated the victims' property. See Adam Michnik, "Kłamstwo w cieniu Szoah," *Gazeta Wyborcza*, 3 Aug. 1999, p.1. Stanisław Krajewski, who represents the Board of the Union of Jewish Religious Communities in Poland called the argument of the complaint "shocking." See Stanisław Krajewski, "Oburzająca argumentacja, rzeczywisty problem," *Gazeta Wyborcza*, 5 Aug. 1999. More calmly, the influential libertarian pundit Stanisław Michalkiewicz advised the Poles to ignore the lawsuit and pass legislation to restore property to its rightful owners. See Stanisław Michalkiewicz, "Polska jak Białoruś," *Życie*, 17 Aug. 1999, p.15. There is also at least one lawsuit in Poland by a Jewish inheritor, who has dual (Polish and U.S.) citizenship, and has resided in New York since 1947. However, the inheritor's family accepted compensation from the Communists so the plaintiff's chances of restoration are practically nonexistent. See Danuta Frey, "Nowojorski lekarz procesuje się w Warszawie," *Rzeczpospolita*, 14 July 2000.



Borderlands could not claim against the countries who took over that territory.

### **Administrative Problems**

Though it is important to resolve key questions about how property restitution should occur, administering the process is a separate—and entirely more challenging—question. The criminal underworld in Poland has already been taking advantage of the unclear status of private property. In Kraków, con-men claiming to be acting as agents for expropriated Jewish owners concluded fraudulent transactions with the state, thus acquiring several pieces of prime real estate. In one instance, in 1998, the alleged perpetrators took a building from municipal authorities which they claimed they had bought from its Jewish owner, a 111 year-old man. In fact, the owner died in Israel in 1957.<sup>37</sup> These sorts of scams are only the most obvious challenges facing Polish authorities.

As the story above illustrates, there are bound to arise some difficulties with basic questions of proof. Problems thus far have been more a product of corruption and incompetence than poor record-keeping, so the system's principal features must minimize incentives for corruption. These kinds of matters are beyond the scope of this essay, but suffice it to say that, as we have noted, any system that invites the political allocation of an economic good will breed corruption. Valuation and compensation at a market rate for property should overcome much of that difficulty, but only if the valuation can be efficiently carried out by neutral parties.

The mechanics of determining “market value” are never simple; legal systems struggle with this point regularly, especially in cases where there is no ready market for the property in question. The particular difficulties here include an unusual marketplace of formerly state-owned

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<sup>37</sup> See Witold Gadowski, “Kamienica od nieboszczyka,” *Gazeta Polska*, 23 June 1999, p.11; WG, “Następna kamienica,” *Gazeta Polska*, 28 July 1999, p.4; Maciej Kukiel, “Winny rejent i sprzedawca: Wyludzenie kamienicy

properties, the need to appraise properties in their constituent parts (to divorce the original property from subsequent improvements), and a government and judiciary not altogether friendly to private claimants. Whatever system of property appraisals is used, it must account for and attempt to counter the near certainty that government-retained appraisers will come in low, private appraisers will come in high, and the incentive for all parties to bribe appraisers is tremendous. Again, the exact contours of this system will have to be worked out through experience, but the general attempt should be to have multiple, genuinely independent appraisers and give them each an incentive to err in the direction of the property's actual market value.

## **Conclusion**

It is highly unlikely that a full restitution will ever take place. Too much property has changed too many hands in too many places. The fear of a sudden social displacement could create a terrible backlash against private property ownership, the free market, and democracy in general. As Abraham Foxman of the Anti-Defamation League has warned, "What concerns me today is the zealous quest for restitution without regard for consequences."<sup>38</sup> Yet, at least a partial restitution is possible. Perhaps, to minimize the possibility of the backlash, the rightful owners and their heirs should be issued with special government bonds. Each owner would receive full amount on the property expropriated. The bonds would be redeemable for 10 percent of their value in a year, 25 percent in 10 years, 50 percent in 25 years, and for their full value in 50 years. Meanwhile, the rightful owners could trade their bonds at the stock market. This should attract foreign investors and much needed capital to Poland. A moral compensation for the victims of race and class struggles should accompany the restitution.

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w Krakowie," *Rzeczpospolita*, 30 Jan. 2002.

<sup>38</sup>Abraham H. Foxman, "The Dangers of Holocaust Restitution," *The Wall Street Journal*, 4 Dec. 1998, p.A18.