Proposed Polish Legislation on Private Property

Updated Position Paper

November 15 , 2017

This memorandum updates the World Jewish Restitution Organization (WJRO) position paper dated October 20, based on a review of the text of the proposed legislation and justification subsequently published by the Ministry of Justice.

On October 11, Deputy Minister of Justice Patryk Jaki, and Administrative Law Department Director Professor Kamil Zaradkiewicz, presented a framework for a comprehensive national reprivatization law. On October 20, the Ministry of Justice published the text of the proposed legislation.

The World Jewish Restitution Organization (WJRO) welcomed the Polish Government's decision to support such legislation. Poland is the only major country in Europe that has not passed national legislation for the restitution of property wrongfully seized during the Holocaust and/or nationalized by the Communist regime. As noted by the Ministry of Justice Justification accompanying the proposed legislation, "Poland, the former leader of the social and political transformation, is the last state of the former Eastern bloc, which has not carried out reprivatization." WJRO has urged Poland for over twenty years to address this issue in a comprehensive manner.

However, WJRO has serious concerns that the proposed legislation is not just and fair for all who lost property, including Polish survivors of the Holocaust and their families.

A. Restrictions on Eligibility

1. **Citizenship and Residency: The proposed legislation discriminates based on citizenship and residency. It requires Polish residency (and citizenship) at the time the property was seized. It also requires Polish citizenship currently, including for heirs.**

Discrimination based on citizenship and residency will exclude most Holocaust survivors and their families, as well as many other Jewish and non-Jewish rightful property owners, who fled Poland during the Holocaust and its aftermath or during Communist rule.

The Communist authorities nationalized property between 1944 and 1962. By requiring residency, the legislation bars survivors who left Poland during the Holocaust or at any point before the property was nationalized.

Further, because most Holocaust survivors and their families do not currently hold Polish citizenship, even those Holocaust survivors who were still residents and citizens at the time their property was nationalized are still likely to be excluded based on the requirement of having current citizenship. Those who are entitled to apply for Polish citizenship would face undue obstacles, because Holocaust survivors often do not have birth certificates or other documents proving citizenship and many elderly survivors do not have the resources to pursue renewed Polish citizenship.

Indeed, the Terezin Declaration on Holocaust Era Assets, endorsed by 47 countries on June 30, 2009, calls for countries to address private property claims in a "nondiscriminatory manner". Guidelines and Best Practices issued the following year pursuant to the Terezin Declaration provided that the claims process for private property should be "non-discriminatory, inter alia by encouraging solutions to overcome citizenship and residency requirements".

2. **Heirs: The proposed legislation bars claims by heirs other than spouses and first line heirs (i.e. children, grandchildren).**

The restriction of heirs' eligibility creates an unprecedented exception to existing Polish succession rules and deprives heirs of their lawfully inherited property rights. This restriction is particularly harmful for heirs of victims of the Holocaust. Because approximately 90% of Poland's Jewish population was murdered during the Holocaust, the heirs to many Jewish properties are not spouses or linear heirs.

3. **Companies: The legislation prevents people from filing claims for their companies.**

Individual property owners and their heirs should not be excluded from filing claims for their property simply because their property was owned through shares in a pre-war company. In pre-war Poland property was owned both by natural people and companies. Many companies were family companies with family members as the shareholders.

4. **Bilateral Agreements: The existence of a postwar bilateral agreement should not prevent people from filing claims under the legislation.**

An exclusion based on the bilateral agreements made by the former Communist Polish government – regardless of whether the person benefited from the bilateral agreement – unfairly bars Holocaust survivors and their families, as well as other Jewish and non-Jewish rightful property owners, from filing claims. This impacts citizens of countries with some of the largest populations of Holocaust survivors and others of Polish heritage – including Canada, France, Sweden, the United Kingdom, United States and other countries.

Most Holocaust survivors and other property owners were not eligible to benefit from the bilateral agreements because they were not yet citizens of their new country at the time that their property in Poland was taken.

People who received damages, or were entitled to claim for damages, from foreign states as a result of the bilateral agreements should not be excluded from the proposed legislation. Indeed, there may be a significant number of individuals who were entitled to, but did not, claim under such agreements because they were unaware of them and who did not receive any award. The legislation should provide that such people are eligible to apply for compensation, but that such compensation will be reduced by whatever actual payment was previously received.

B. Exclusions of Types of Properties

1. **"Lawful" Expropriations: The legislation would have the effect of ratifying the Communist regime's "lawful" expropriations.**

The legislation, as currently worded, ratifies the Communist regime's "lawful" expropriations. It limits compensation to cases in which the Communist expropriation was "in gross violation of law or without a legal basis." This excludes many property owners whose property was expropriated using lawful means. As a result, the legislation would uphold and validate a large percentage of wrongful nationalizations that took place in Poland. This would largely undermine the whole purpose of the legislation.

2. **Warsaw: The legislation does not enable claimants to seek compensation when they did not file claims under the Warsaw Decree.**

The legislation expressly provides that a person is eligible to file a claim if he or she did not timely file an application for the temporary ownership right under the Warsaw Decree. However, in practice such a person would not be able to seek compensation under the legislation because his or her property was expropriated "lawfully." Under the Warsaw Decree the expropriation of property was lawful when a person failed to file an application before the statutory period expired.

3. **Public Purpose: Claimants cannot receive compensation if their property was intended for public purpose andor currently is intended for public purpose.**

The wording of the proposed legislation is not entirely clear, but it appears to deny claimants compensation for the confiscation of their property based on the Communist authorities' intended use of the property and the current use of the property for public purpose – a broad and ambiguous category. While protections for property in public use may be justified in cases of in-kind restitution – such as to protect a public school or hospital – the intended andor current use of the property is not a reason to deny compensation.

4. **Exclusion of Industrial, Agrarian, and Forest Properties**

The legislation excludes properties expropriated under the 1946 act on industrial nationalization, as well as agrarian and forest properties.

C. Procedural Issues

1. **Claims Deadline: The legislation allows only 1 year for people to file claims.**

A one-year claims deadline is particularly difficult for Holocaust survivors and their families, as well as other property owners and their heirs living abroad. Claimants living around the world, many of whom left Poland without any documentation, need time to receive notice of the legislation, identify all heirs, obtain all required documents, and secure needed assistance for submitting claims. The legislation provides that applications filed after the deadline will not be considered, and that the deadline will not be reinstated. Accordingly, claimants who miss the deadline will lose their right to seek compensation.

2. **Archives Access and Claims Procedures: The legislation should ensure that archives and the claims process are accessible for elderly claimants now living outside of Poland.**

The Terezin Declaration recognizes that claims processes should be "should be expeditious, simple, accessible, transparent, and neither burdensome nor costly to the individual claimant". The legislation should establish special administrative and procedural arrangements – such as liberalizing existing archive access and privacy restrictions – that recognize that most former owners of properties taken during and after the Second World War are elderly and many of their heirs have little or no knowledge of their property or of their family history. Without such arrangements, property owners living abroad would face severe practical impediments to pursuing claims.

Additionally, the proposed legislation contains specific procedural provisions that will pose difficulties for claimants, particularly those living outside of Poland. For example, a claimant is given a short period – 14 days -- to accept compensation from the delivery of a decision confirming the right to compensation. Failure to meet this short deadline results in complete waiver of the right to compensation. Similarly, the legislation provides exclusive jurisdiction to Polish courts in matters of the inheritance of the right to compensation. This poses a particular challenge to foreign claimants, and is incompatible with European Union succession regulations. Additionally, an applicant filing via proxy must provide a power of attorney with a notarized signature – while the normal rule is that a power of attorney, without notarization, is sufficient to represent a person in administrative proceedings. Recognition of decisions of foreign courts and facilitating signature of documents and other required administrative steps is essential to ensuring an accessible process for claimants living outside Poland.

3. **Pending Proceedings: The legislation would terminate all pending proceedings.**

The legislation would discontinue all proceedings pending before administrative bodies or courts related to the expropriation of property. This would include cases that are in the final stage after claimants undertook the longstanding, time-consuming, and costly process of research of documents and succession proceedings. These claimants have a legitimate expectation in their claims, and termination of the claims would deprive them of their property right.

D. Financial Issues

1. **Restitution/Compensation: The legislation does not permit restitution of properties and does not provide "genuinely fair and adequate compensation".**

The Terezin Declaration's Guidelines and Best Practices provides: "Restitution in rem is a preferred outcome, especially for publicly held property. When in rem restitution is not feasible or not possible without expropriating third persons' property, other acceptable solutions may include substituting property of equal value or paying genuinely fair and adequate compensation."

2. **Timing of Compensation: The legislation should prioritize timing of payments based on age and/or status as victims of persecution.**

The proposed legislation provides compensation over a number of years. Holocaust survivors and other victims of persecution, who have waited many years for restitution or compensation cannot afford to wait longer and should have priority in the scheduling of compensation payments.

E. Movable Cultural Property Issues

1. **The legislation only covers movable cultural property expropriated at the same time as the expropriation of real property.**

Under the proposed legislation, it is only possible to seek restitution of movable cultural property that was taken together with expropriated real property. In practice, the provisions on movable cultural property would only cover movable property taken from palaces and manor houses expropriated under the 1944 Land Reform Decree – properties listed as cultural properties or monuments.

The legislation would thus exclude the vast majority of movable cultural property taken from Jewish owners during the Holocaust – either because the property was taken prior to 1944 or

because the property was seized separately from the confiscation of real property. The legislation appears also to exclude movable cultural property plundered from Jewish owners outside of Poland but that now is located in Poland.

2. **Acquisition by the State: The legislation permits the State Treasury to acquire the seized valuable movable cultural property for 20% of its value.**

The legislation enables the current holder of a claimed movable cultural property to keep it for up to 10 additional years. During this period, the State Treasury is authorized to buy out the movable cultural property for 20% of its value. In practice, this mechanism allows the State Treasury to acquire valuable movable cultural property for the steeply reduced price of 20% of its value.

3. **Transparency: Public museums should provide complete lists of movable cultural property in their possession.**

The legislation requires that public museums should, within six months, compile a list of movable cultural property and that the list should be open and available to the public. However, the list required by the legislation is limited to movable properties covered by the legislation. In accordance with the 1998 Washington Principles on Nazi-Confiscated Art, public museums should conduct provenance research to identify all art in their possession that was confiscated by the Nazis and not subsequently restituted, and should make this information public.

F. Heirless/Abandoned property

Beginning soon after the conclusion of World War II, a number of countries throughout Europe recognized that the unique circumstances of the Holocaust made it essential that property restitution include heirless and/or unclaimed property. The unprecedented scale of the Holocaust meant that in many cases entire families were murdered and no heirs remained to claim ownership of the victims' property. Further, the return of such formerly Jewish-owned property plays a crucial role in meeting the material and medical needs of surviving Holocaust victims – needs that are more acute as victims age – and in funding research and education to preserve the memory of those who perished in the Holocaust. Countries that have addressed the issue either through claims-based processes, or the establishment of foundations, include Czech Republic, France, Greece, Macedonia, Norway, Serbia and the Slovak Republic. The Terezin Declaration took note of the persecution of innocent people and groups, "the vast majority of whom died heirless" and according to the Guidelines "States are encouraged to create solutions for the restitution and compensation of heirless or unclaimed property from victims of persecution… "

Some ninety percent of Polish Jewry was killed in the Holocaust. The issue of heirless and/or unclaimed property of those Jews should be addressed through appropriate measures.