



On Political Grounds: A Forward-Looking Argument for Property Restitution in Poland

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Abstract

In all, 90% of Polish Jews, more than 3 million people, were murdered by the Nazis during the Holocaust, and 90% of the survivors left Poland. The survivors and their heirs, most of them not currently living in Poland, saw their land confiscated by the Nazis, nationalized by the communists and reprivatized and sold to others. Poland is the only country in the EU not to have a comprehensive restitution law. The issue of land restitution is still present in current debate in Poland, as part of a broader discussion over the Second World War, communism, privatization and corruption. While Poland blocked all restitution claims in 2021, Jewish communities as well as other governments called Poland to adopt a comprehensive restitution law for everyone. Now, 30 years after the fall of communism, what justifies such claims? This paper argues that forward-looking collective responsibility is the most helpful concept to understand the Jewish restitution problem in Poland today, and claims that any future settlement of this issue should be based on it. By applying this concept, as developed by Iris Marion Young, to the Polish restitution case, we look into the past – not to look for people to blame, but to look for social connections that have implications for the present. This way, we can remember the past, learn from it and heal relationships between people without being slaves to it.

Keywords Poland · Jewish · Restitution · Property · Responsibility · Intergenerational Justice

Introduction

At the dawn of the third decade of the twenty-first century, the debate over the issue of justice for historical wrongs has never been more lively – from Instagram influencers in Britain who demand reparations for slavery and colonialism to indigenous peoples in Australia demanding restitution of their stolen lands, it is clear that the

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passage of time does not weaken such claims; on the contrary, the calls for historical justice are multiplying. This paper deals with a particular historical justice problem – post-WWII land restitution in Poland. This problem concerns every Polish person whose home or business was nationalized by the communists but, in particular, the Jewish community, which was murdered and persecuted by the Nazi Germans on Polish soil before the rise of communism.

In all, 90% of Polish Jews, more than 3 million people, were murdered by the Nazis during the Holocaust, and 90% of the survivors left Poland (Niewyk and Nicosia 2003, 37). The Jewish community of Poland, the largest in the world at some point, became almost extinct after a millennium of Jewish life in Poland.

The survivors and their heirs, most of them not currently living in Poland, saw their land confiscated by the Nazis, nationalized by the communists and reprivatized and sold to others. No Polish government since the democratization in 1989 has legislated a land restitution law, making it the only country in the EU not to have done so (US Mission in Poland 2020). It is difficult to explain with one, simple answer why Poland chose not to legislate such a law while all its neighbors did. However, it could be related to the dominant Polish narrative of victimhood that makes it difficult for Poland to admit any wrongdoing in the process that transferred formerly Jewish property into non-Jewish hands (see below).

To this day, the issue remains a bone of contention between Poland and the Jewish communities around the world. During the most recent election campaign in Poland, a state TV report warned that the opposition candidate Tzraskowski “will satisfy Jewish claims,” and thus adding antisemitism (echoing canards on Jewish greed, although all Poles will have claimed back property) to the already murky soup of politics, history, identity and law (Liphshiz 2020).

In this paper, I will present the restitution problem in Poland, as well as the calls to settle it today inside and outside Poland.

This paper will also discuss two main ethical challenges to the call for restitution: Should we try to correct old wrongs although a long time has passed? Can we attribute responsibility to people who were not alive when the wrongs were done, or were alive but were not personally involved?

Finally, I will explain why forward-looking collective responsibility is the best justification for the Jewish restitution claim in Poland.

From the Ashes of War to Privatization Dilemmas: A Brief History of the Restitution Problem

The Second World War left Poland in an unprecedented state of destruction: According to estimations, around 80% of the buildings in Warsaw were completely destroyed by the Nazi German army, following a direct instruction from Hitler to raze the Polish capital (Vale and Campanella 2005, 135).

The Jews who chose to return to Poland did not find a welcoming environment. The war did not bring an end to antisemitism, especially as Jews were accused of collaborating with the Soviet occupiers by the Polish nationalists and far right. In Kielce, 42 Holocaust survivors were murdered by an angry Polish mob following

rumours that they abducted a Polish boy to use his blood due to their anaemia. Many Jews who tried to return to their village or small town were threatened by their neighbours not to return and reclaim their property, and were forced to move to the big cities of Poland (Polonsky 2013).

Following the rise of communism to power after the war, the first General Secretary of the Polish United Workers' Party (PZPR, the communist party of Poland), Bolesław Bierut ordered the nationalization of all land in Warsaw. The official name of this decree was a Decree on Ownership and Usufruct of Land in the Area of the Capital City of Warsaw, but it is known as the Bierut Decree [*Dekret z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m. st. Warszawy* (1945 *Dz. U. nr. 50 poz. 279*)]. All private property, approximately 40,000 properties, many of them in ruins, were taken away from private owners. That amounted to about 94% of the city in its pre-World War II (WWII) borders, as the rest of the property was not in private hands (McNaughton 2018). Owners were allowed to apply for "temporary ownership," which gave them some rights in the nationalized property that used to be theirs.

This move was in accordance with Poland's need to quickly rebuild its capital after the war, but also with the communist ideology that objects to private ownership over the means of production such as land. "New Warsaw is to be the capital of the socialist state. We must fight consciously and with deliberate diligence to give our town a definite ideological stamp," said Bierut in his speech to Party Congress on the 3 July 1949 (Vale and Campanella 2005).

In the rest of Poland, the Decree of September 6, 1944, on Agrarian Reform nationalized all agricultural properties that were either 100 hectares of total area or 50 hectares of farming land (*Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 6 września 1944 r. o przeprowadzeniu reformy rolnej* 1944). The property was taken without any compensation to the owners. In addition, in Warsaw and other Polish cities, Łódź, Gdansk, Lublin, Kraków, Katowice and Poznań, properties which were not nationalized *de-jure* were transferred to the management of the state, with strict limitations on the rights of the owners, who were recognized as "temporary owners." Joseph Gidynski calls this process a "virtual confiscation" (Gidynski 1962).

Housing commissions decided which persons or families would live in available flats, including those that were theoretically owned by private individuals. In accordance with the communist ideology, landlords (those who still owned their houses or were recognized as "temporary owners") were not allowed to profit from their property, as it was managed by the state. The expensive costs of maintenance or renovations were imposed on the owners, while preventing them from selling their property or enjoying it in any way. In addition, a decree on 27 July 1949 made the state the creditor of all mortgages, after multiplying their value by 30 (*Dekret z dnia 27 lipca 1949 r. o zmianie dekretu z dnia 13 kwietnia 1945 r. o nadzwyczajnym podatku od wzbogacenia wojennego* 1949). This way, land ownership became a burden rather than an asset, and it is no surprise that many people chose to give up their property, and definitely not to reclaim lost property (Gidynski 1962). In 1957, the government wished to encourage people to build their own homes, as it could not meet the huge demand for houses. Owners who had such houses enjoyed a more or less "Western"

concept of ownership over their house, on the condition that they or their close family alone lived in the house and that they had only one house (Gidynski 1962).

In May 1945, a law regarding heirless and abandoned property came into force in Poland. This law allowed people to reclaim their property unless it had been nationalized (*Dziennik Ustaw 1945 nr 17 poz. 96 i 97, Ustawa z dnia 6 maja 1945 r. o majątkach opuszczonych i porzuconych* 1945). A deadline for all the claims was extended at the request of Jewish organizations. It is not certain how many Jews got their property back, but probably very few: Firstly, most of them left Poland or died during the war – as mentioned above, 90% of Polish Jews were murdered, and 90% of the survivors left Poland after the war (Niewyk and Nicosia 2003). Secondly, the procedure of reclaiming property involved the courts, and most Holocaust survivors in 1945 did not have the money for a long judicial process. Thirdly, the law limited the claims to parents, children, siblings and spouses of the owners: many of those people were murdered by the Nazis, and the heirs were actually further distanced, for example, nieces and nephews or cousins (Meng 2011). Fourthly, many of their former properties (all of them in Warsaw, for example) were indeed nationalized and therefore outside the scope of this law. Finally, those who left Poland could declare their interest in reclaiming their property, but many of them were afraid to publicly admit that they wanted private property at the height of Stalinism (Skapska 2005).

Poland did sign international bilateral agreements with other countries, compensating them for their citizens' confiscated property. However, those agreements cover only those who were citizens of those countries at the time of confiscation. For example, Poland transferred 40 million US dollars to the USA to compensate American citizens for their confiscated property, but not Polish citizens who became American citizens after the war – the vast majority of Holocaust survivors (US State Department 2021). According to the US State Department, Poland has made payments to almost 500,000 people who survived Nazi slave labor, but most of them are probably not Jewish (US State Department 2021).

In addition, no such agreement was signed with Israel, home to the biggest number of Holocaust survivors from Poland (Niewyk and Nicosia 2003). Thus, those agreements, signed decades ago by the communist government, did not solve the restitution problem. Such agreements were concluded, in alphabetical order, with Austria, Belgium, Canada, Denmark, France, Greece, Liechtenstein, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, the UK and the USA (Wozniak 2018). Therefore, the restitution issue went into stagnation until the fall of communism in Eastern Europe.

Officially, the communist regime of Poland was not antisemitic, as communism is committed to equality between all people. In the early days of the regime, there were even some Jews in senior roles. However, under the influence of Stalinist antisemitism (and the campaigns against “cosmopolitans” who were antisemitic in all but name), it has become more and more oppressive towards Jews. During the 1950s, most Jews were sacked from their roles in the party. In 1968, following Israel's victory in the Six Day War, the Polish government started an internal campaign against “Zionists”, which was an excuse for harassment, firing and persecution of Jews. In those years, when Poland started to process the traumatic past, the newly built monument at Auschwitz did not even mention the word “Jews” although 90% of the

victims were Jewish and that was the reason why they were murdered there by the Germans. That was the situation until the fall of communism (Polonsky 2013, 409). During this anti-Zionist campaign, 9000 people lost their jobs, the great majority of them Jews. More than 15,000 Jews left Poland for Israel, western Europe and North America. They were forced to give up their Polish citizenship (Polonsky 2013).

After the fall of communism, 1997 was a watershed moment in the legal history of Poland, with the adoption of the new democratic constitution. In addition to the right to property and succession, and the right to remedies from the state, Article 31 § 3 of the Constitution lays down a general prohibition on disproportionate limitations on constitutional rights and freedoms (The Constitution of the Republic of Poland 1997).

In 2009, Poland expressed commitment to restitution of Jewish property in a joint statement, issued in Terezin, the site of the former Theresienstadt ghetto in the modern Czech Republic. A total of 47 countries signed the declaration – 46 in 2009 and Serbia at a later date – including Poland, the USA, Germany, Israel, the UK, France, Hungary, Brazil, Romania and Russia to name a few examples. The representatives declared that:

We consider it important, where it has not yet been effectively achieved, to address the private property claims of Holocaust (Shoah) victims concerning immovable (real) property of former owners, heirs or successors, by either in rem restitution or compensation, as may be appropriate, in a fair, comprehensive and nondiscriminatory manner consistent with relevant national law and regulations, as well as international agreements (Terezin Declaration on Holocaust Era Assets and Related Issues 2009).

The Terezin Declaration is not an international, legally binding treaty. However, it can also be read as a recognition that, although Jews and non-Jews alike suffered under Nazism and communism, the double persecution and targeting of Jews, as well as the fact that most Polish Jews and their descendants do not live in Poland any more, separates the Jewish claims from other claims.

Present Day Debate on Restitution in Poland

Indeed, the discussion regarding restitution in Poland does not happen in a social, political or legal vacuum. According to Ruti Teitel, transitional justice and coming to terms with the wrongs of the past happen in a transition from autocracy – to democracy (Teitel 2000). Poland did go through such a process in the 1990's following the fall of communism. However, since 2015, a different process took place in Poland – transition from a relatively liberal democracy to populist autocracy under the rule of the Law and Justice populist right wing party (PiS). According to Freedom House, the status of democracy score in Poland has dropped since 2015 from 80 points out of 100, to 59, and from a “consolidated democracy” to a “semi-consolidated democracy” (Freedom House 2022). Behind those rankings and numbers, there is a worrying trend of dismantling democratic institutions and removing any kind of checks and balances on the will of the executive branch.

There was no single moment in which the attack on democratic institutions in Poland happened or the transition to a populist, “semi-consolidated democracy” was complete (Sadurski 2019). However, we can look at certain points in time which, when considered all together, create a momentum towards an authoritarian regime and further away from democracy and the rule of law. In 2016, legal and constitutional changes paralysed the Constitutional Tribunal of Poland and gave complete control over it to the ruling PiS government. Judges appointed by the previous government were forced to retire or had their appointments declared null and void, while the government packed the court with new, supportive judges to give it a majority (Sadurski 2019). The tribunal has become a governmental ally.

As of early 2024, a new government is now in power in Poland: PiS and its right wing allies failed to secure a majority following the 2023 Sejm elections, which paved the way for the centrist opposition party, the Civic Platform, to form a government headed by former Prime Minister Donald Tusk. It is too early to tell how that change will impact democracy in Poland, the rule of law, the independence of the judiciary and also the restitution issue. It should be noted that, even before the successive PiS governments, Poland avoided legislating a restitution law, including under Civic Platform governments. Until now, the new government did not speak about the restitution issue.

In Poland, the questions of memory and how to remember what happened are still lingering in the public discourse, and it still might be the case even if Poland legislates a restitution law. In 2018, the Polish Sejm amended the Act on the Institute of National Remembrance (Ustawa z dnia 27 czerwca 2018 r. o zmianie ustawy o Instytucji Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary 2018). The original law, from 1998, stated (article 55) that Holocaust denial or denial of communist crimes are punishable criminal offences in Poland. However, the new amendment stipulates that:

Whoever claims, publicly and contrary to the facts, that the Polish Nation or the Republic of Poland is responsible or co-responsible for Nazi crimes committed by the Third Reich, as specified in Article 6 of the Charter of the International Military Tribunal enclosed to the International agreement for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945 (Polish Journal of Laws of 1947, item 367), or for other felonies that constitute crimes against peace, crimes against humanity or war crimes, or whoever otherwise grossly diminishes the responsibility of the true perpetrators of said crimes – shall be liable to a fine or imprisonment for up to 3 years. The sentence shall be made public. (Staff 2018)

The government justified the law by the incorrect term “Polish Death Camps” used by people outside Poland, such as the former US President Barack Obama. Poland was furious, as the term might make people believe that Poland is responsible for the Holocaust, while those who created and operated the death camps were the Nazi Germans. However, it is clear that the law does not help correct this historical error, as it does not apply to foreigners speaking outside Poland, and this phrase is never

used within the country (Sadurski 2019). In fact, this amendment is a part of the government's efforts to control the discussion in Poland around history. In the narrative promoted by the right-wing Law and Justice Party (PiS), there is only a place for Polish heroism, Polish victimhood and Polish patriotism, and certainly no place for anything that adds complexity to this simplistic narrative (Hackmann 2018). To put it simply, according to this narrative, Poland was a victim of the two dictatorships [the Union of Soviet Socialist Republics (USSR) and Nazi Germany] who occupied it, and all its citizens, regardless of ethnicity, suffered under the occupation. Therefore, it is inappropriate to discuss why one group of victims (Catholic Poles) owes something to another (Jews).

It is not the purpose of this paper to answer the question of the responsibility of some Polish people to crimes that happened under German occupation. However, this amendment demonstrates how important the questions of historical justice are to Poland and to its government. In our case, the restitution case, no one seems to be interested in moving on from history: not the potential claimants who wish to be compensated, and not the Polish government who wants to keep the discussion alive in a way that is politically convenient – appealing to Polish patriotism and narrative of martyrdom. In such a public atmosphere with such legal conditions, it is clear why today there is no place for a discussion on the mass nationalizations of property belonging to victims of Nazism and communism, or who benefited from them.

So far, we have one example of Polish historians being sued on the basis of this law (after the amendment) that demonstrates how the Polish courts interpret this statute. In 2018, Jan Grabowski and Barbara Engelking, both of them well respected historians of the Holocaust, published a book called *Dalej jest noc* (*Night without an End*). In this book, they accuse Edward Malinowski, a mayor of a village in Poland, of handing over Jews to the Germans, on the basis of the testimony of a Holocaust survivor. Malinowski's niece sued both authors and based her claim, among other things, on the Act on the Institute of National Remembrance Article 55. She claimed the defendants violated her (individual) "right to national identity" (Stephanie Chan 2022). It is interesting to note that this "right to national identity" is given according to this law to all Poles, regardless of ethnicity. However, it does mean that other particular national identities which might be in conflict with the Polish narrative (such as Jewish, Roma or Lithuanian) are not protected.

Initially, despite the fact that it is hard to see how blaming a mayor of one village in Poland equals to blaming the Polish nation for crimes done by the Germans, the plaintiff was successful in the Warsaw District Court. Only later that year did the authors win on appeal to the Warsaw Court of Appeal (*Leszczyńska v. Engelking and Grabowski* 2021), who interpreted the statute differently.

The debate around restitution is influenced not only by questions of history and narrative but also with very material concerns and suspicions of corruption around the re-privatization process in Poland.

Gostynski and Bayzler give an example of a building in Warsaw which was given back to a person who was supposedly 130 years old at the time of the restitution (Bazyler and Gostynski 2018). Another example made the national headlines in Poland in 2016: the Chmielna 70 scandal. Chmielna 70 is one of the most expensive addresses in Warsaw and therefore in Poland: This prime location property was

estimated to be worth more than 160 million Polish Zloty, around 30 million GBP. In 2016, the daily newspaper *Gazeta Wyborcza* revealed that the process of privatization of Chmielna 70 involved officials from the Warsaw City Hall who were also the beneficiaries of this process, or had business ties with the buyers of the property (Bazyler and Gostynski 2018). At the same time, Polish newspapers published articles about a new type of restitution related business: buying claims. Those “professional claimants” offer the lawful heirs a deal: They buy their claim for a fraction of the real value, in return for an easy way to at least receive some money (Górczyńska 2016).

The Terezin Declaration (see above) from 2009 was signed by the centrist Civic Platform government. Politically, it was impossible that the right wing PiS that led the successive Polish governments that followed would choose to honor this political commitment. As mentioned above, at the time of writing, the Civic Platform is once again in power in Poland, but it is too early to say whether the newly elected coalition would choose to act to honor the declaration.

Until 2021, claimants could claim back property in court, in what the Polish Court itself defined as “judicial privatization” (Bosek and Krolikowska 2018). The legal way to do that was through articles 156 and 157 of the Polish Administrative Procedure Code (PAPC), which stipulate the requirements for the court to declare an administrative action null and void. One of those requirements is that the action was done by a gross violation of the law. As most nationalizations were done by law, this is a *de facto* confirmation that there was nothing wrong with taking away people’s private property without any form of compensation.

However, in 2015 the Constitutional Tribunal of Poland ruled that the declaration of an administrative act as null and void due to a gross infringement of the law is unconstitutional, as the Constitution of Poland stipulates that “The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.” According to the Tribunal, this situation creates legal uncertainty that goes against the rule of law and social justice. The case in question dealt with a request from a claimant to declare as null and void the deadline for temporary ownership requests following the nationalization in Warsaw in 1948. The Tribunal ruled that, today, it is difficult to say whether actions of a government from another era, 70 years ago, constitute a gross infringement of the law (Constitutional Tribunal Decision of 12 May 2015).

The Polish legislature has reacted to this decision and amended PAPC so that it is possible to declare an administrative action null and void only if no more than 10 years have passed since that action [*Kodeks postępowania administracyjnego (The Code of Administrative Proceedings) z dnia 14 czerwca 1960 r. (Dz.U. tłum. gb Nr 30, poz. 168) 1960*]. Moreover, the act will not be declared null and void if it has already caused “irreversible legal consequences.” While the Polish courts already accepted that those 10 years could be counted from the end of the communist regime (and not from the day of the decision to nationalize property), today, more than 30 years after the fall of communism, it is not possible any more. The meaning of this amendment is that restitution in kind is not possible any more in Poland, unless the act that the claimants wish to nullify (for example, selling the nationalized property to a third party), happened in the last 10 years.

The only option for claimants today is to try and claim compensation for the nationalization of their property, as this claim does not require the nullification of the administrative act.

Those laws contradict the Terezin Declaration, which urges states to promote restitution. They also go against the Guidelines (to which Poland objected but almost all other signatories accepted) that prefer in kind restitution over monetary compensation (2010 Terezin Guidelines and Best Practices 2010).

Even before this amendment came into force, not many people were successful with getting their properties back: According to unofficial estimations, around 4,000 properties in Warsaw were returned to people who claimed to be their original owners, after the courts accepted to nullify the nationalization act in accordance with the PAPC (Wozniak 2018). It is likely that part of the problem was that, as mentioned above, most acts of nationalization were not done by a gross infringement of law. On the contrary, they were done by laws and decrees of the communist regime.

The Polish government's view is that to stop corruption in the restitution process, there should be no restitution at all. That also fits with the Polish agenda of refusing restitution, as Poland has nothing to apologize for. After the entry into force of the anti-restitution law of 2021, Prime Minister Mateusz Morawiecki announced that "I can only say that as long as I am the PM, Poland will surely not pay for the German crimes. Not a zloty, not a euro, not a dollar" (Harkov 2021). As long as the restitution issue is still discussed as a German crime, it is clear why restitution in Poland seems to be challenging.

Those laws, first narrowing the restitution option in 2016–2017 and then blocking it completely, have created a diplomatic crisis between Israel and Poland: Minister of Foreign Affairs of Israel Yair Lapid claimed that the law is "immoral and a disgrace" [דיפל ריאיי – Yair Lapid (@yairlapid) 2023]. The World Jewish Restitution Organization continues to call upon Poland to redress the restitution issue with comprehensive legislation (WJRO 2024)

The calls for restitution are heard in the USA too, as the home to the second-biggest Jewish community in the world: In 2017, the Justice for Uncompensated Survivors Today (JUST) Act came into force after both Republican and Democratic legislators supported it. The JUST Act puts an obligation on the US State Department to report to the US Congress once a year on restitution efforts in Europe and what is being done to compensate the uncompensated Holocaust Survivors (Justice for Uncompensated Survivors Today (JUST) Act of 2017).

Today, only 4500 Jews live in Poland (World Jewish Congress 2023). The community, too small to hold and maintain all the communal property (such as cemeteries or synagogues), does not campaign in public for Poland to adopt a restitution law. Anyway, the 4500 Jews represent only a fraction of the original owners and their heirs, from the pre-war community of almost 3.5 million Jews. Thus, the debate around restitution is made mainly in legal channels (such as the Polish courts and the European Court of Human Rights), through diplomatic channels (e.g. between Poland, Israel and the USA) and through representative organizations such as the World Jewish Restitution Organization (WJRO). The WJRO focuses on documenting Jewish property in Poland, including communal property and heritage, and on

position papers and reports to keep this issue relevant and remind the Polish government that it is not resolved yet.

The Argument for Restitution in Poland

As mentioned above, Jewish organizations as well as the international community (following the Terezin Declaration) call on Poland to redress the problem of restitution and give remedies to former property owners, Jews and non-Jews alike. However, from an ethical point of view, this claim faces several challenges.

One possible challenge is the fear of infinite claims: The effort to make past injustices right can succeed or enjoy brief success only. In many historical justice claims, the given compensation is partial, or even not material at all. Therefore, the claimants have to choose between accepting it (as just satisfaction is better than nothing) and losing much of the legitimacy for any future claims, or rejecting it and missing a once-in-a-lifetime opportunity for compensation. Even if one generation of claimants accepts a compromise, the next generation can claim that they are not bound by it, and that their ancestors had no right to compromise (Posner and Vermeule 2003).

A settlement of a historical justice claim accepted by one generation and then rejected by the next one is a possible scenario. However, this should not mean we should give up finding a long-lasting settlement. Following the Holocaust, the new states of Israel and the Federal Republic of Germany (West Germany) reached a reparations agreement, merely a decade after the Nazi Germans committed the worst atrocities in history towards Jewish people, which make up most of Israel's population. The goal of the agreement was to denounce past crimes and put a gap between the present and the dark past, as suggested by its name in German, "*Wiedergutmachung*," ["to make (something) good again"; West Germany and Israel 1952].

Another common view against historical justice claims does not deny we may have some duties towards deceased people or their descendants, but those duties are superseded by stronger claims, those of the present. A well-known Aristotelian ethical principle states that people who benefited in an unjust way at the expense of others should return what they earned (Aristotle 2019). According to the supporters of this view, we should compensate, for example, African Americans, because many of them are worse off in the present due to the crimes of colonialism and slavery. This is distributive justice – we should help the worse off and strive for equality, not historical justice.

Can historical justice and distributive justice be reconciled? We can take into account principles of distributive justice when addressing historical justice cases: e.g. prefer compensating victims or their descendants who are worse off in the present. Another option is that a state who should pay compensation should use a more egalitarian tax system to fund it, so that the money would come from the pockets of the better off (Fishkin 1991, 95). If we follow that path, it does not matter if the wrongdoers of the past, or their descendants, pay today. The better-off should be paying.

Such claims prefer the present over the past. Those who claim that distributive justice matters while historical justice does not matter at all (such as Richard

Vernon) require a “clean” analysis of profit and loss, regardless of history and context, in which only the present matters (Vernon 2003).

However, for any person, and especially for victims of injustice, recognition of the past, even if symbolic, matters, and not just the present power dynamics between perpetrator and victim. According to German-Jewish philosopher Hannah Arendt, recognition of our experiences by other people gives them a validation, a meaning and a place in the public realm that they could otherwise never have:

The presence of others who see what we see and hear what we hear assures us of the reality of the world and the reality of ourselves, and while the intimacy of a fully developed private life, such as had never been known before the rise of the modern age and the concomitant decline of the public realm, will always greatly intensify and enrich the whole scale of subjective emotions and private feelings, this intensification will always come to pass at the expense of the assurance of the reality of the world and men. (Arendt 2018, 50)

Reparations carry the same public, symbolic meaning for the victims and their descendants – an assurance that other people saw how they suffered and that the suffering was real. It is hard to imagine anything more offensive than the erasure of the suffering of others, such as Holocaust denial. Holocaust deniers take away the assurance from Holocaust survivors that what was done to them and their families was real and was wrong. To address this issue, indeed, sometimes, governments issue official apologies for past injustices. For example, the USA issued an official apology for overthrowing the Kingdom of Hawaii (US Congress 1993). In spite of the lack of material compensation, such an apology is far from being meaningless (Posner and Vermeule 2003, 698). That is not to argue that, in our case, an apology without any material consequences would be sufficient. Recognition is the key to a good and long-lasting settlement. According to Bennett, when we apologize, we dissociate ourselves in the present (who feel remorse) from our past selves who wronged others (Bennett 2022). This is even more true for intergenerational justice: A recognition of the wrong is the way of a certain generation to break from all previous generations who wronged or refused to apologize. While an apology alone might not be enough, no reconciliation process could do without it.

Another challenge for the restitution claim is the issue of collective responsibility. During the war, some Polish people took active part in the murder and dispossession of Jews, some saved lives of Jews while putting themselves and their families at risk, and others did nothing at all. Any future settlement of the claims, coming from the Polish treasury, involves all Poles paying some price for the actions done by others, rather than for their own individual acts. What justifies that?

Adam Daniel Rotfeld, former Minister of Foreign Affairs of Poland, who was born to a Jewish family, said that “it has not occurred to me to claim compensation” (Kuti 2009). The essence of this Polish argument against restitution is that all Poles suffered under communism. Therefore, it is unjust that one group of victims gets compensated while another group pays compensations. If we are to justify reparations in Poland, this is a challenge that we must overcome.

The debate around collective guilt and responsibility has gained a lot of attention since the Second World War and the subsequent Nuremberg Trials. On the one

hand, it was clear that the list of Germans who are accountable to the atrocities of the Holocaust and the war is much longer than the list of defendants in Nuremberg: Only a large-scale system could create and maintain the industry of enslavement, deportations and murder. On the other hand, many Germans who felt shame and guilt did not contribute themselves to the atrocities, and could not do anything practical to stop them. Should they, as well as all Germans, be considered guilty? Philosophers such as Jaspers and Arendt came up with new terms to try and explain what kind of guilt or responsibility all Germans share, even if they did not take part in the atrocities themselves (Jaspers 1961).

Today, a helpful terminology is the replacement of the discourse on guilt or even responsibility with a discourse on Moral Pollution (Appiah 1986). Kwame Anthony Appiah claims that moral pollution is about people's moral integrity and reputation in society. It can be blemished even without guilt or responsibility. Such is the status of descendants of the oppressors – they are not guilty nor responsible, but they suffer from moral pollution. According to Appiah, moral pollution is connected with the reputation we have in society. For example, the reputation of Germany and Germans in the world is impacted by the Holocaust, although almost all Germans living today were not living adults during the 1940s. However, it is unclear why we should pay a price for moral pollution or how it can be resolved – can the flaw in our reputation, caused by no action of our own, be corrected by our actions?

According to Oshana, moral pollution does not constitute only reputational damage, but also a fundamental flaw in ourselves. We cannot go back in time and change the actions of our ancestors, but we can react to those actions in a moral manner: denounce the injustice and do our best to deal with its consequences in the present. Our failure to do so, Oshana claims, is what creates the moral pollution, rather than the past injustice (Oshana 2006). It also passes the pollution onwards to our children, who will have to face the same choice in the future. Apologies or reparations schemes can be a way for societies to leave moral pollution behind.

A possible problem with this concept of moral pollution is that we lack examples for the successful purification of the pollution. Germany went through an impressive process of transition from Nazism to a peaceful, democratic liberal society, whilst acknowledging the wrongs of the past, and paying a price for them. This might lead us to two conclusions, both counter-intuitive and problematic: The first one is that Germany today has no moral pollution regarding the Holocaust. It had a moral pollution that has since been resolved.

This conclusion does not fit the official position of the German government and the feelings of many Germans, not to mention the victims and their descendants.¹ Even if we wish to say that Germany does not have to compensate Holocaust survivors any more (which seems plausible, as Germany already did that), it is still likely that Germany still has some moral obligations regarding the Holocaust that arose from its moral pollution. For example, there may be a duty to teach the subject in schools or to erect and maintain memorials. Of course, it is possible that, in a few

¹ See, for example, the words of Chancellor Angela Merkel regarding the “eternal responsibility” of Germany (Dw.Com 2021).

hundred years, the intuitions of our descendants will change: We usually do not feel very strongly about wrongs done in ancient times. Perhaps, in 500 years, teaching the Holocaust in schools in Germany will not be as important as it is today.

The other option is concluding that there is no way to (fully) remove moral pollution. This conclusion is also problematic: it might diminish the incentive to wrongdoers (or their descendants, suffering from moral pollution) to go through an atonement process.

A similar idea to moral pollution was formulated by the American philosopher Larry May: He differentiated collective responsibility from shared responsibility (May 1996). The first of the two is the responsibility of a corporation, organization or a state. The responsibility of its members cannot be derived from it. For example, if an oil corporation is responsible for marine pollution, it does not mean that every single employee, director or shareholder is individually responsible. Therefore, we say that they are collectively responsible. The concept of shared responsibility describes a type of responsibility common to people who perform some kind of act together: Only their joint contribution could lead to the result, but each one of them could not have done it on their own. May's paradigmatic case of shared responsibility is hate crimes, especially in the South of the USA. According to May, all Southerners carry some kind of shared responsibility for hate crimes against African Americans: even if they did not take part in acts of violence, many of them held white supremacist beliefs that made it possible for the perpetrators to act and go unpunished. In our case, can it be said that the prevalence of antisemitic ideas in Poland made the confiscation possible and thus made the Polish people responsible?

The problem is that, even if we note the prevalence of antisemitism in Poland 70 years ago, it does not necessarily mean Polish people today are responsible or hold the same beliefs. In addition, beliefs are complicated. Some people might, for example, not like Jews and avoid any contact with them, which is antisemitic, but they might not support harming them or taking away their possessions. In a survey conducted in 2010 in Poland by Polish researchers, around 20% of the respondents agreed or tended to agree with the statement that the Holocaust was a crime, but the almost complete disappearance of Jews from Poland is a good result of it (Kucia et al. 2014).

Larry May's idea of shared responsibility deals with people who have some kind of connection to unjust acts that are done around them (May 1996). Their descendants, even if they hold the same beliefs that made the injustice possible, live after it, and therefore did not create the conditions for the acts to happen.

In addition, in the Polish case, it cannot be said that we have a big group of perpetrators who contributed to a single injustice. We have many perpetrators, each committing an individual, independent act (e.g. invading an empty house or signing a decree of nationalization) that can be attributed only to them. Why, then, should the responsibility be shared among everyone?

Moreover, it seems possible that in our case that many people who invaded houses that were not theirs or benefited in any way from the expropriation of Jewish property did it out of opportunism, not hate. Thus, it was not hate that made it possible, even though the victims of this crime were Jews who had their houses taken because they were Jews. Therefore, it is difficult to say that all Polish people today

bear some kind of shared responsibility because their ancestors, supposedly, held antisemitic beliefs that made the mass property confiscation possible.

Another challenge to the restitution claim is the passage of time. More than 80 years have passed since the war, and many of the people who lost their property to Communism are long dead. Throughout history, countless wrongs were done by people to other people. However, even the most passionate adherents of historical justice claims do not claim we should compensate anyone for any wrong. Reparations for people who lost property in the ongoing war in Ukraine seems, *prima facie*, reasonable, while reparations for Northern Europeans for the enslavement of their ancestors by the Roman Empire 2000 years ago does not. When is the limit beyond which the injustice is just too far to compensate for?

It is common in many legal systems to assume that rights lose their powers with time. In some systems, a statute of limitation applies not only to civil law rights but also to criminal offences. This is due to procedural, pragmatic reasons (e.g. it is difficult to prove claims from the distant past) but also due to substantial reasons: As time passes, the stolen property plays an ever-declining role in the lives of the descendants of the owners, and a growing one in the lives of the descendants of the wrongdoers. Waldron acknowledged that it may seem unfair as such justifications encourage thieves to cling to their stolen property:

The view that a violated entitlement can "fade" with time may seem unfair. The injustice complained of is precisely that the rightful owner has been dispossessed. It seems harsh if the fact of her dispossession is used as a way of weakening her claim. It may also seem to involve a moral hazard by providing an incentive for wrongdoers to cling to their ill-gotten gains, in hope that the entitlement they violated will fade away because of their adverse possession. (Waldron 1992, 15)

However, there is another problem with this argument against restitution that Waldron did not mention: One of the substantial justifications of a statute of limitations is that the victims had time to claim their rights and did not do so. Therefore, they pay the price for their inaction, which hints that the property might not be important for them. Actually, it is not an incentive for the thief to hold on to the property, but rather an incentive to the owner to claim the property back as soon as possible. However, in our case, most of the heirs of property in Poland could not claim their property back due to the cold war that broke the relations between Poland and the West, and the lack of a free political debate under communism in Poland. Therefore, any limitation should be counted not from the day of the expropriation, but rather from the day in which Poland legislates a restitution law, a day that still lies in the future. As long as there was no fair opportunity to claim the property back, we cannot really know what kind of role the stolen property plays in the legitimate owners' lives. I do agree with Waldron that practical considerations should be taken into account, and that is the reason why the assumption at the foundation of this paper is that real restitution (i.e. descendants of Polish Jews who can prove that their ancestors owned property – will get the land back) is almost always impossible and unjust.

I also agree with Waldron that the right to claim back property or be compensated for it is not infinite. But any choice we make regarding the point in time from

which we do not accept claims seems arbitrary. When does a claim become too old? According to Rawls, the answer to this question is the generation of grandchildren or great-grandchildren of the victims (Rawls 1971). This is the generation that the victims knew personally, or could have known personally if they had not been murdered. When property is stolen from the victims, it not just robs them, but also robs them of their ability to transfer their property to people they care about, and it seems plausible to assume that people care about their children and grandchildren. If the line is drawn in this generation, we are led to the conclusion that descendants of victims of Nazi atrocities should be compensated today (as many grandchildren of the victims are still alive). Thompson criticises this statement, and suggests referring to “family lines” that can be traced back to the victims, as the victims probably intended not only to bequeath their property to their descendants, but also give their descendants the same power to do so to their descendants (Thompson 2001).

One way or another, the choice that was made by many Eastern European countries (but not Poland) to legislate a compensation law only for property confiscated after 1945 (i.e. by the communists, not by the Nazis) cannot be morally justified. The choice of this very moment in time, in which Eastern Europe was ethnically homogeneous as never before, following the mass murders and deportations of minorities, is suspicious, to say the least. Every deadline might seem arbitrary, but the one currently chosen is unjust (Avineri 1993).

Don't Look Back in Anger: Forward-Looking Collective Responsibility

Another concept, developed in the last 2 decades to deal with those ethical challenges, is the idea of forward-looking collective responsibility. According to proponents of such responsibility (such as Goodin and Young, see below), we should not look at the past in a judgmental way, to look for people or entities to blame. Rather, we should look at our collective responsibility to put things right in the future, from now and on. Could this be the concept that takes the debate forward from the zero-sum game it is at the moment, avoids the clash of narratives and focuses on building a better future for Jews and Poles?

Robert Goodin proposed a model of responsibility based on the concept of vulnerability: We are responsible towards people who are vulnerable to our actions (Goodin 1986). If this view is applied, Poland has responsibility (not blame) for all those who lost property and are vulnerable to the decision not to compensate for it, and to Jews in particular as a minority in Poland.

Iris Marion Young presented another possible answer to the question of responsibility in her book *Responsibility for Justice* (Young 2011). Young was concerned about structural injustice. An example of such injustice is the issue of homelessness. We cannot find a person, an organization or even a single action that made homeless people homeless. And yet, the situation in which they are homeless is unjust (Young 2011). Young proposed the social connection model of responsibility: We should end homelessness even though no one could personally be held accountable for people being homeless, because we live in the same society and share the same cities as homeless people. In other words, we have a social connection with them.

Young was aware of the conflicting desires of the victims of injustice to be validated and compensated for what was done to them, and in addition not be slaves to the past and break free from it:

Only a passive soul resigned to injustice will allow himself or herself to be mired in, imprisoned by, a slave to, bogged down in the past. It is a mad and dangerous wish, however, to break with the past entirely, to aim to make the past irrelevant. If we do not face the facts of historic injustice, we may be haunted by victims' ghosts and destined to repeat the perpetrators' wrongs. (Young 2011, 172)

As a way to remember the past but not be chained by it, Young suggested her forward-looking model of responsibility: We should look backwards, to the past, to identify the social connection between people living today, which will help us determine who is connected somehow to the situation today. This should not be another way to judge the people of the past (or present) and try to find those who are guilty. We should ask ourselves in every case: Do these two (or more) groups of people have a history together? How strong was the bond between them? A close and long relationship suggests a heavy responsibility to correct today the effects of past injustices (Young 2011).

I have mentioned above the antisemitism, violence and discrimination that Jews faced in Poland before and after the Holocaust by their fellow Polish people. Any settlement of the restitution problem in Poland has to address those facts, as they created some of the conditions for the problem. Such a treatment of an ethnic minority, without one person or group of people to blame (the Catholic Church? The communists? Polish far right?), make it a classic case of structural injustice, and suitable for implementing Young's ideas.

In our case, there is no doubt that two ethnic groups, Jews and Poles, had a social connection for hundreds of years in Poland. An unjust situation exists between the two groups. Therefore, Poland should do its best to correct it. The duty to compensate the Jews is without prejudice to other ethical duties that Poland may have: If we assume that Poland has a duty to help poor Polish people today, or compensate all victims of communism, or build a better healthcare system, it does not absolve Poland from the duty to compensate as fully as possible. Of course, the priorities can be debated, but it seems unreasonable that the restitution to the victims of Nazism and communism should come at the bottom, with nothing being done.

It is not impossible that the classic model of responsibility, according to which we should bear responsibility only for our own actions that contributed directly to the current situation, can be applied to Poland. We know that there were Polish people who invaded their neighbors' houses. We know that the Polish government and the Sejm (the Parliament), that represent the democratic will of the Polish people, have repeatedly decided against any form of restitution, although they are well aware of the need to do so.²

² For the history of failed attempts to legislate a restitution law in Poland see Bazyler and Gostynski (2018).

Yet, Iris Young's model of collective, forward-looking responsibility is the most suitable justification to the Jewish Restitution Claim. Firstly, it is tactically prudent (if nothing else) to speak of the good relations between Jews and Poles that justify restitution, rather than a blame game that fundamentally contradicts the Polish Second World War narrative. Perhaps, this is the best chance to convince the Polish government and those who object to restitution in Poland. Secondly, it fits the debate inside and outside academia in the twenty-first century regarding historical justice: This concept can apply to many other debates on historical justice, such as the reparations for slavery in America. Thirdly, it avoids the complex and controversial debate around Poland's responsibility. When we do not look backwards to look for people to blame, it is irrelevant to what extent is Poland, which did not exist as a sovereign state during the war, is responsible for the actions of individual Poles. It also overcomes the challenges of the passage of time and of collective responsibility, as we put a moral burden on present people due to the actions (or omissions) of present people, not past people.

However, there are some theoretical difficulties with the application of this concept to the post-WWII Jewish restitution claim in Poland. In the American racial context, the main goal, according to Young, is to end systematic discrimination and bring social equality to all communities in the USA. It is clear that the situation in which white people are in a better position in society than non-whites has to end, without delving into the question of to what degree are present white people responsible for it. In the Polish–Jewish context, I have already made the claim that the main goal is recognition: some kind of acknowledgement that what happened was fundamentally wrong, and a promise to do anything to prevent such wrongs from happening again. It should also include remorse over the long failure to address this issue. An apology matters more, and it also gives the victims and their descendants a sense of vindication. It is also the only practical way forward, as full restitution is impractical. Can we really do that without judging the past or the present? Indeed, we do not want to look for someone to blame (certainly not personally). But the very nature of remorse, apology and atonement contradicts the will not to be judgmental and look forward to a better, just future.

Still, I believe that Young's theory is the most helpful argument for (symbolic) restitution in Poland. Applying Young's ideas to Poland does not mean forgetting the wrongs that were done to Jews and focusing on the future. However, what justifies the claim for restitution is not the guilt of Poland as a state, not the injustice that was brought by people who are dead and not the antisemitism of some Polish people. What justifies it are at least 1000 years of Jewish history in Poland, a history that creates an undeniable connection between Jews and Poles. This connection creates a duty to denounce the injustices and break away from them, to create a better future. To truly reconcile Jews and Poles, Poland has to take action regarding the former Jewish property it still holds.

An interesting implication of Young's model to the Polish restitution case is that, if the goal of restitution is to heal connections between present people, there is some degree of priority to the few Jews who live in Poland and to all former land owners who are Polish residents, a part of Polish society. This priority could mean a different remedy (for example, compensations rather than restitution for

non-residents) or a place at the head of the queue when it comes to processing applications.

It cannot, however, mean a residency requirement as a prerequisite condition for remedy, which ignores the reality of the millions who were left with no option but to leave Poland. In addition, a residency or citizenship requirement is a violation of the Terezin Guidelines and Best Practices, which call upon states to overcome such requirements and be inclusive (2010 Terezin Guidelines and Best Practices 2010).

Part of the reconciliation efforts has to address also the great injustice of forcing Polish Jews to immigrate actively by adopting anti-Jewish policies or by creating a hostile environment for people who already lost almost everything in the Holocaust (Polonsky 2013).

Summary

In this paper, I have presented the current situation of the restitution problem in Poland, as 30 years after the fall of communism, Poland has yet to adopt a restitution law to compensate former land owners whose property has been nationalized by the communist regime. Until 2021, land owners could try and claim their land in court (although the chances of success were slim), but now, it is not possible any more.

The debate around the issue in Poland is a part of a bigger debate on the dark past of Nazi occupation and communist tyranny, the role of some Polish people in the crimes of those regimes and the corruption that came with the transition to a capitalist liberal democracy. This issue is still in contention between Poland and the Jewish communities all over the world.

I have analysed the philosophical arguments in favour of restitution for Jews in the post-WWII Polish context. Any settlement of the problem should enjoy broad social and political support. Otherwise, any settlement could be just the preamble for further conflicts instead of an opportunity for the descendants of both victims and perpetrators to move on.

A common argument against restitution, made, for example, by Vernon, is that the moral obligation to strive for equality in the present (distributive justice) supersedes it. We need to help improve the lives of people who are worse off in the present because we want a more equal society, regardless of the historic reasons that led us to inequality. However, the fact that we might have better use for our resources than correcting the wrongs of the past does not mean the division has to be all for distributive justice, nothing for historical justice.

Another argument against historical justice is the passage of time: it seems intuitive that claims lose their strength over time as the injustice plays a declining role in the lives of people. There must be a point in time that marks the end of claims we are willing to consider. Those who claim that the Jewish post-WWII restitution claim in Poland should not be considered need to take into account that this point in time should be calculated on the basis of a fair opportunity to claim the property back. Polish Jews and their descendants never had a fair chance to claim back the property: not under the nationalizing communists, and not in modern Poland that has not legislated a restitution law.

As a basis for restitution claim, we need to establish a moral relationship with the past, but we also have to base it on a relationship between different people. The best model to explain the kind of responsibility Polish people may have towards Jews whose ancestors lost their property to Nazis, invading neighbors and communist nationalizations was presented by the late Iris Young: Polish people have a forward-looking collective responsibility. This concept entails a responsibility to correct the wrongs of the past from today – and onwards – without looking for people to blame. We should look to the past to understand who has a social connection to the present situation. In our case, it is hundreds of years of Jewish history in Poland that create this responsibility, rather than the traditional approach that bases responsibility on the wrongs done to Jews by individual Poles. It might not be easy to apply the forward-looking approach, as the main component of the future settlement should be a symbolic apology or at least a recognition of the injustice, which has to involve some kind of judgement of the past. However, overall, I believe that this is the right direction to pursue, and that any future settlement of this issue should be based on it.

Glossary

- Collective responsibility** Any kind of responsibility borne by individuals for actions or omissions they did not personally do.
- Distributive justice** Principles of justice concerning ways to distribute benefits (such as resources) or burdens in society.
- Historical justice** or **inter-generational justice**, is concerned with making amends for wrongs that happened generations ago, in the past.
- Judicial privatization** The attempts of claimants in Poland to re-possess their land through the national court system of Poland. In the few successful attempts, the transfer of the property from the state to individuals was done by the court rather than by a comprehensive statute.
- PiS** “Law and Justice”, a populist right-wing party in Poland, in government between 2015 and 2023. Under PiS rule, Poland saw a process of democratic backsliding.
- Restitution** Returning property to its rightful owner, or compensating them for the expropriation of it.
- Sejm** The Parliament of Poland, the legislative branch of the Polish Republic.
- Structural injustice** An unjust social arrangement for which it is impossible to hold particular individuals as personally guilty or responsible.

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