Post-Communist Restitution and the Rule of Law

Csongor Kuti

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Introduction

It was a long time ago, even before I got admitted to the law school, when I had my first encounter with property. My grandmother, she decided to submit her claim for my great-grandfather's 3 hectares land, taken by the communist authorities sometime in the foggy 50's. Great-grandfather had, besides his land, four children—some of them passed away in the meantime—each with numerous offspring on their turn. So it proved to be a truly painful experience to contact everyone, to clarify the succession and to nominate a common representative. Especially, that there was a deadline for submitting such claims, a deadline fortunately manifold prolonged by our government. All in all, a rather boring story, and if I could have read Penner then, I would most probably agree with him: property is a bore.[1] Of course, none of us had, thus the only thing we read was the confusion on each other's faces, when the mayor of a dusty village in a God-forgotten corner of Transylvania told us that there is no available land to restitute anymore. And even if there would be any, it is impossible to identify the old boundary signs. Something smelled fishy: as if the government wanted to restore a landscape that did not exist anymore.[2] A quick family council decided that we can live very well without those 3 hectares, as the costs of a legal action would most probably exceed the worth of the land. Obviously, my family is not exactly an idealist type. If it were to be so, it could have happily filed one of the about 1 million lawsuits generated by the Romanian land restitution scheme.[3]

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[1] Katherine Verdery, *The Vanishing Hectare: Property and Value in Postsocialist Transylvania*, Cornell University Press, 2003, p. 79–93.
[2] J. E. Penner, *Property in Law*, Oxford University Press, 1997, p. 1.
[3] *Ibid.*, p. 97.

I have less dramatic experiences with property from earlier times. Not that we did not come across it often enough: as we quickly learned, almost everything belonged to the people: the buses, the school benches, the forests, the entire country. Who exactly were "the people", it remained a mystery, but one thing was sure: clearly, it was none of us. Everything was everyone's and no one's in the same time: why bother than?

1. On restitution and the rule of law

If one looks for writings on post-communist restitution in a library, one may find a decent number of recent publications in the field of anthropology[4] or economy,[5] but—surprisingly—very few in legal scholarship.[6] On the contrary, there are plenty of books on historical justice–related restitution (in former colonies, Holocaust reparations, or other post-conflict situations). Is this a sign of caution, or simply a lack of interest on behalf of legal scholars? In the following passages I will present three different arguments: one maintaining that other questions of transitional justice, especially the one relating to its retributive aspect, appeared more acute, or dramatic, as they concerned the faith of persons, rather than of objects (through lustration and decommunization), while the other two arguments are built on the special characteristics of the communist era takings. First, it is argued that the nature of the takings themselves is problematic, as the bulk of the nationalization was carried out by means of law, or "in the shadow of law";[7] therefore, their legality is difficult to challenge. Second, the

[4] See, for example: Verdery, *op. cit.*; Chris Hann, *The Postsocialist Agrarian Question*, Lit Verlag Münster, 2003.

[5] See, for example: Johan F.M. Swinnen (ed.), *Political Economy of Agrarian Reform in Central and Eastern Europe*, Ashgate, c1997; Henri A.L. Dekker, *Property Regimes in Transition: Land Reform, Food Security and Economic Development: A Case Study in the Kyrgyz Republic*, Ashgate, 2003; Hella Engerer, *Privatization and its Limits in Central and Eastern Europe*, Palgrave, 2001.

[6] See, for example: A.L. Cartwright, *The Return of the Peasant: Land Reform in Post-Communist Romania*, Ashgate, 2001 (a work of socio-legal scholarship).

[7] I borrowed this suggestive expression from Grażyna Skąpska, "Restitutive Justice, Rule of Law, and Constitutional Dilemmas," in Czarnota, Krygier, and Sadurski (eds.), *Rethinking the Rule of Law after Communism*, Central European University Press, 2005, p. 215.

passage of a relatively long period of time—during which some of the former owners passed away, taken properties were reassigned, modified, or destroyed, evidence of the initial title might have been lost, the structure and composition of society has significantly changed—raises a number difficult questions.

Deprivations of property during the authoritarian regimes were neither the sole, nor—arguably—the most important losses that had to be endured. Real and presumptive opponents of the emerging communist regimes, entire social classes categorized as enemies, and in certain cases the entire population, suffered serious limitations upon their right to life, security, privacy, freedom of movement, speech, religion, etc. This made opponents of property restitution schemes argue that there are no reasonable justice considerations that may validate compensations for certain losses, while others are left unaddressed.[8] Consequently, a major dilemma for transition governments was to handle somehow the legacy of the past: "violations of human rights, travesty of legality, pervasiveness of collaboration with the secret police […] outright crimes conducted for political reasons."[9] The problem, which occurred as most acute, was the fact that perpetrators of the above acts, the former oppressors, often managed to position themselves in the halo of the emerging political elite, and the need for a purge, for a settling of accounts was intensely felt. The "settling of accounts" differed in form and intensity from country to country, but it managed to raise the same host of moral, political, and legal controversies, and became, as Sadurski labeled it, "one of the most vexed and divisive questions of post-communist transition."[10] In Czechoslovakia, the notorious "Lustration Law," providing for the exclusion of former secret police members and collaborators from public offices, was upheld in part by the Constitutional Court, in one of its most famous decisions. In Hungary, also through a much-cited decision, the Constitutional Court dismissed

[8] See, for example: Offe and Bönker in "A Forum on Restitution: Essays on the Efficiency and Justice of Returning Property to Its Former Owners," *East European Constitutional Review* 2 (1993), p. 31; see: Chapter 2, *infra* for more details.

[9] Wojciech Sadurski, "'Decommunisation,' 'Lustration,' and Constitutional Continuity: Dilemmas of Transitional Justice in Central Europe," European University Institute, Florence, EUI Working Paper Law No. 2003/15, p. 2.

[10] *Ibid.*, p. 3.

a bill that would have created the possibility of prosecuting those involved in the suppression of the 1956 revolution and the repression that followed it, grounding its view on rule of law considerations.[11]

The entire process of breaking with the past is extremely difficult to deal with in an uncompromising manner within a democratic framework. Moreover, law itself can hardly be regarded as the right instrument for performing a symbolic rupture: classical liberal regimes are characteristically abstaining from performing symbolic or didactic actions in order to conserve their highly praised ideological neutrality.[12]

In the defense of property restitution programs it can be argued that large-scale expropriations during authoritarian rule did not have solely an economic (reform of ownership structures) or a punitive (e.g., taking of dissident property) feature, but represented much more than that. In the context of the Holocaust, expropriation of Jewish properties appears as part of the genocidal project,[13] while communist nationalization targeted the eradication of the entire system of private property,[14] and by that the (at least political and economical) annihilation of "exploitative classes."[15]

Another possible—hopefully not too far-fetched—explanation for a relative caution in addressing the question of mitigation of property injustices might be found in the nature of the initial takings themselves. As it will be explained in this book, restitution policies rely heavily on considerations of justice and legality. Restitution aims to correct past injustices and to consolidate the moral foundations of the system.[16] The problem, however, can be the aforementioned past wrong itself. It is easy to identify such injustice in the case of colonization, where the preexisting social organization was simply wiped out, or in the case of

[11] Ruti Teitel, "Post-Communist Constitutionalism: A Transitional Perspective," in Sadurski (ed.), *Constitutional Theory*, Ashgate, 2005, pp. 465–6.

[12] Sadurski, *op. cit.*, pp. 5–9.

[13] Christopher Kutz, "Justice in Reparations: The Cost of Memory and the Value of Talk," *Philosophy and Public Affairs* 32.3 (2004).

[14] Hungarian Constitutional Court (hereinafter HCC), AB 27/1991, 91/E/1990.

[15] Skąpska, *op. cit.*, p. 215.

[16] The re-establishment of a private property system, as a precondition of a market economy, was also an important goal of post-communist restitution schemes, and it will be discussed extensively in Chapter 2, but it is less relevant for the present argument.

Nazi or other war-related takings, but it is slightly more complicated to point to an injustice in the case of communist nationalization (collectivization).

Writing about collectivization of land, Verdery notes[17] that except for the Soviet Union—where collectivization took place with terrible violence, famine, and massacres—the methods adopted in the rest of the communist countries were less extreme. Roughly two main methods can be identified: taking through confiscation (especially in the case of those labeled "enemies of the regime" or of "the nation": those charged with war crimes, etc.) or through donations and exchanges. In the former case, it is perhaps slightly easier to point to an injustice, especially if the confiscation was the outcome of a conviction for political beliefs, or if the authorities "forgot" to provide for compensation. However, many formal requirements were still respected as to uphold as much as possible the impression of legality. As to the latter case, "donations" were the usual method of forming the collectives—procedural requirements insisted on witnesses and signatures to demonstrate free consent. Simultaneously, land exchanges had to be made between the newly constituted collectives and the neighboring non-members, so as to form compact plots. Cartwright notes—writing about Romania—that forcing through the exchange (despite the protests of the non-member landowner) was not decreed as lawful until 1951, even though the practice started much earlier.[18]

The fact that a certain appearance of legality was kept—takings usually took place within the framework of a so-called land reform and/or procedural formalities were used to demonstrate the former owners' free consent—makes it difficult from both justice and legal perspective to point to and to prove a past wrong. The variations in the preexisting property regimes, in the character of the takings, and in the diverging methods applied even within each type of taking,[19] lead to important

[17] Verdery, *op. cit.*, p. 46.

[18] Cartwright, *op. cit.*, p. 83; see also: Chapter 1, n. 21.

[19] For instance, there were significant differences between the methods used for land collectivization in the Soviet Union, Hungary, or Romania, or for instance Poland, which renounced collectivization early on. Similarly, as it is shown below, the takings of land in New Zealand were based on the Waitangi Treaty, while no such instrument was employed in the neighboring Australia.

differences in the outcome of restitution processes; therefore, their importance cannot be overlooked in the analysis of restitution methods and policies.

Finally, the problems raised by the passage of time can—with a little exaggeration—be captured in the question: who should compensate whom, for what, and at which costs? As the book argues, restitution schemes failed to offer convincing arguments upon their choice in answering these questions, and thereby raise doubts on one hand as to the justness of the programs, and on the other hand as to their ability "to fulfill promises of the rule of law."[20]

The compensating agent—*prima facie*—is the state, which carried out the takings, although this is slightly more complicated in the case of Jewish and repatriated persons' properties. (In the former case, compensation may be granted by a foreign government, for example, in the Hungarian Golden Train case, discussed in Chapter 2, *infra*. In the latter, for example, the Hungarian Constitutional Court held that the state's obligation exists only in those cases in which it gave up through international agreements its claims to repatriated citizen's properties.[21]) Nevertheless, the compensating government is certainly not identical with the one that caused the injustices that are remedied. This is especially true for takings affected during military occupation (notably the cases of the Baltic States and of the German properties expropriated during Soviet occupation). As it is argued in Chapter 2, there is no such clearly formulated obligation in international law that would require successor governments to remedy property losses caused to the citizens by their predecessors. (This obligation nevertheless is recognized as existing with respect to the properties of foreign citizens.[22]) Further, traditionally, domestic constitutional law does not know restitution as a remedy for wrongful seizure. Finally, a formalist approach—fashioned by the European Court of Human Rights, or the UN Human

[20] Skąpska, *op. cit.*.

[21] HCC, AB 45/2003, 960/B/1995 part II/B, para. 7. The Court also stressed that the Hungarian state has no obligation to compensate property losses of Hungarian citizens, caused outside the boarders of Hungary by foreign states, on the basis of the 1947 Paris Peace Treaty (see also: HCC, 1043/B/1992).

[22] European Court of Human Rights (hereinafter ECHR), James and Others v. United Kingdom, Application No. 3/1984/75/119, Judgment of 22 January 1986.

Rights Committee, as discussed in Chapters 2 and 4, *infra*—may lead to the inadmissibility of complaints about restitution, as the relevant international provisions entered into force after the violation in question has occurred.

Determining the beneficiaries of the compensation program has never been an easy exercise, as it proved to be a powerful means of exclusion or inclusion, creating or perpetuating discrimination and class injustice, raising the question of intergenerational equity. Through drafting the pool of possible claimants, the claimable items, and the temporal limits of the program (cut-off dates), the restitution schemes demonstrate their preference to certain generation (*ancién régime*'s *status quo*) social group, or institution. As it is argued in the subsequent chapters of the book, the programs created winners and losers of restitution. In certain cases they preferred the majority over certain minorities, churches over other civil organizations or one church over another, landowners over other owners, victims of communist takings over victims of Nazi takings, etc.

Finally, the governments pursuing a restitution program were faced with the problem of costs. In fact, the given financial capacities of the state presented a core argument in justifying limited compensation. Albeit, if remedying past property losses is thought of in terms of justice, reliance on limited financial capacities—although it is an objective fact—does not appear as a convincing argument for denying (even the theoretical) chance to full compensation. However, restitution programs were closely linked with economical reform, and had the—sometimes declared—twin goal of undoing past injustice and creating the preconditions of market economy. This duality made more plausible those economical reasons invoked for sustaining the limited character of restitution, and also permitted—as it was the case in Hungary—to ground the entire program not on the subjective right to remedy, but on governmental gratitude.

* * *

Due also to the problems that were sketched above, facing the past represents a serious test for the new democracies in—as Skąpska's stylish expression states—fulfilling the promises of the rule of law. From the above passages it already may be inferred that addressing

the question of property injustices is a problem at least as relevant in its implications and consequences as the question of lustration and decommunization.

Writing about the essence of the rule of law, Raz notes that law should be able to actually guide human conduct.[23] This view is nicely completed by Teitel, who argues that in periods of political upheaval, the rule of law serves to mediate the normative shift in justice. For natural lawyers, continues Teitel, the predecessor regime's immorality determines the necessity for a "fresh start," for the rule of law to be grounded in something else than adherence to the preexisting law.[24]

The commitment to processes that "allow property rights to be secure under legal rules that will be applied predictably [...] is the essence of the rule of law"—Cass tells us.[25] The question that arises than is the following: were restitution laws "good laws"? One must note that modern theories of the rule of law deny its moral features. Raz and Rawls speak about a legally good system, instead of a morally good one.[26] Neumann adds that rational people need a predictable, not a fair system: "[w]e know that life is not fair and we plan our lives accordingly [...] it matters not at all whether this unfairness is found inside or outside the courtroom, so long as it is predictable."[27] Moreover, law is essentially good, because there are good reasons to have law and be governed by it—adds Marmor.[28] At most, it might be argued that the rule of law—although representing basically functional values—also promotes additional goods (beyond functionality), such as impartiality, transparency, etc., and these contribute to the popularity of the rule of

[23] Joseph Raz, *The Authority of Law*, Oxford University Press, 1977, pp. 211–2.
[24] Ruti G. Teitel, *Transitional Justice*, Oxford University Press, c2000, pp. 11–27.
[25] Ronald A. Cass, "Property rights systems and the rule of law," Boston University School of Law, Working Paper Series, Public Law and Legal Theory Working Paper No. 03-06 2003, available online, at http://ssrn.com/abstract_id=392783, p. 2.
[26] Michael Neumann, *The Rule of Law: Politicizing Ethics*, Ashgate, 2002, pp. 1–20.
[27] *Ibid.*, p. 45.
[28] Adrian Marmor, "The rule of law and its limits," USC Public Policy Research Paper No. 03-16, available online, at http://ssrn.com/abstract=424613, p. 53.

law ideal.[29] Albeit, as Rosenfeld stresses, it is unclear even within a single tradition of the rule of law, whether its first and foremost concern is predictability or fairness.[30]

Given all the theoretical controversies, it is perhaps not too difficult to imagine the sort of problems which national courts had to face when dealing with reparation cases. They were facing the task of flashing out a concept of the rule of law—which was regularly asserted to be a cornerstone of the new system in post-communist constitutions—and almost concomitantly, they had to deal with reparation claims within this new conceptual framework. The cases cited in this book are an illustration also of this problem. Albeit this is not to say that judges and courts of "established democracies" would have had a much easier time in dealing with restitution issues. The jurisprudence of the European Court of Human Rights in restitution matters gives a telling account in this respect. It is extremely exciting to see the anguish of the Strasbourg court to conciliate reparation-related claims with its own vision of the rule of law (and how transitional problems influence this view). As the cases presented in this book demonstrate, the Court's vision can be easily categorized neither as predictability, nor as fairness-centered, although there are commentators who argue that the Court is reluctant to inquire into the actual circumstances of the loss of property or of the reparation claim, preferring to foster the stability of property relationships.[31] What arguably follows is that not even the European Court of Human Rights could convincingly solve the problem of matching the specific problems of transition with the inner logic of the right to property.

2. What is it all about?

The central argument of the book starts from the idea that property restitution schemes do not have an exclusively reparative nature; moreover, restitution was deliberately linked with structural reform, and

[29] *Ibid.*, p. 10.

[30] Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," Cardozo Law School Working Paper Series No. 36 (2001), p. 5, available online, at http://papers.ssrn.com/paper.taf?abstract_id=262350.

[31] Tom Allen, "Restitution and Transitional Justice in The European Court of Human Rights," *The Columbia Journal of European Law* 13.1 (2007), p. 45.

due to this duality, the scheme features a mixed distributive-reparative character. This, however, represents a real problem for the rule of law, as, according to Hayek's remark, "any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law." According to Hayek, the rule of law is inherently leading to economic inequalities, but this inequality is acceptable, until it is not deliberately produced, and until it consists in the differentiated treatment of the different persons, that is, objective equality of opportunities is preferred to a subjective equality.[32]

Building on this finding, the book explores whether the Central and East European restitution programs manage to live up to the Hayekian requirement of offering objectively equal opportunities to those placed in an equal situation. However, the analysis demonstrates that the various limitations that are placed on restitution (person-related, temporal, quantitative, and property-based) betray concerns towards substantive equality, which in practice resulted in unjustified inequalities, producing arbitrary outcomes.

But even if one endorses a minimalist reading of the rule of law, as proposed by Raz, according to which the rule of law needs not to produce just outcomes,[33] and accepts the functionalist view which expects not more and not less than (restitution) laws to be predictable, coherent, and consistent,[34] one may find that the post-communist schemes fall short in some aspects (quantification, deadlines, evidence) from the requirements of this thin version of the rule of law, too. Conclusively, whatever role it is considered that the rule of law may have during transition, the consequences of these restitution policies reach far beyond the transition period, as in the same time they perpetuate old, and create and entrench novel, property injustices.

Perhaps readers of this book will find it intriguing that the political process analysis was deliberately avoided. This was not done out of shortsightedness: the enormous influence of politics on the entire reparation procedure is unquestionable, and the political dimension of the problem is not less fascinating then the legal one. However, the

[32] F. Hayek, *The Road to Serfdom*, University of Chicago Press, c1991, p. 59.
[33] Joseph Raz, "Rule of Law and Its Virtue," in Cunningham (ed.), *Liberty and the Rule of Law*, Texas A&M University Press, 1979, p. 4.
[34] See also: Neumann, *op. cit.*, p. 45.

intention was to demonstrate that even such a highly politicized matter can be dealt with as a strictly comparative constitutional and jurisprudential issue, using the tools of legal analysis, without having to face the danger of collapsing law into politics. Hopefully, this approach will be regarded as a strength, rather than a weakness of this project.

The book is structured in four chapters, out of which the first one is dedicated to the drafting of a background theory of property, while each of the following three chapters consists of the detailed discussion of an element of the above-explained argument.

Accordingly, the intention of the first chapter is to provide a background, against which restitution schemes fashioned in Central and Eastern Europe can be assessed. The chapter is broken down into six subchapters. The first one deals with classical theories of property, departing from the late Middle Ages and ending with the great thinkers of Enlightenment. The focus is on John Locke, the changes in thinking that preceded, were caused by, or followed him, its subsequent critique and refinement (Rousseau, Hume, the utilitarian theories). Arguably, the influences of the Lockean, pre-political conception of property are the most significantly felt in the restitution schemes of post-socialist Central and Eastern Europe. Feldmann speaks about privatization as a process by which "natural right to private property gains recognition and the incentive quality of private property becomes effective" in the transition countries,[35] while Engerer also found that "possessive individualism" represents the "philosophical background of the kind of market economy taken as model by Central and Eastern European countries."[36] The rest of the chapter briefly presents the neoclassical theories, and the Nozickean and Rawlsian concepts.

Chapter 2 discusses the relationship between justice and reparations. Departing from Raz's argument, according to which justice is an ideal distinct from the rule of law,[37] and also endorsing Radbruch's view of the relationship between these two ideals as an antinomy be-

[35] Horst Feldmann, *Die Eigentumstheorien Lockes und Humes und ihre Lehren für den Aufbau privatwirtschaftlicher Eigentumsordnungen in den Transformationsländern*, Tübingen, 1993, p. 15, quoted by Engerer, *op. cit.*, p. 41.
[36] Engerer, *op. cit.*, p. 40–1.
[37] Raz, *op. cit.*, p. 4.

tween two essential elements of legality,[38] the first subchapter argues that this contrast is most difficult to deal with in regime change contexts. The following two subchapters briefly discuss the role of the rule of law in transitions, and attempt to explain the goals attached to post-communist restitution. In the following, an overview of the main forms of justice, and correspondingly, of the forms which various restitution policies embraced, is given. The bulk of this chapter, represented by subchapter six, is dedicated to the two fundamental justice problems that transitional property reparation schemes have to answer: why property injustices have to be mitigated, and why former property owners enjoy a privileged status in comparison with other victims of past injustices. The analysis concludes that although neither international law, nor general principles of justice, not even domestic constitutions recognize a general right to restitution, in a number of exceptional cases (illegal or unconstitutional takings, lack of compensation), a solid argument may be made for the existence of such a right. Under the second question, three possible arguments that may justify property restitution are presented: recognition and protection of rights, past harm, and political persecution. Albeit none of them can adequately explain why former property owners are preferred to other victims. Therefore, subchapter seven argues that transitional compensation schemes have a pronounced distributive character, which, taking into consideration the fact that material justice is the archenemy of formal rationality, constitutes a serious threat to the rule of law.

Chapter 3 focuses on the pool of beneficiaries, arguing that even those who had been placed in an equal situation—that is, all suffered past property injustices—are not offered an objectively equal opportunity to claim redress. The argument developed in this chapter maintains that due to the fact that the schemes addressed restitution—at least in part—from a distributive perspective (which resulted in an attempt to create a substantive equality between victims), the result that they achieved was objective inequality, as everyone was entitled to restitution between the same limitations, while everyone suffered losses of different extent. Here, each subchapter is dedicated to a different

[38] Gustav Radbruch in Csaba Varga, *Law and philosophy: selected papers in legal theory*, Project on Comparative Legal Cultures of the Faculty of Law of Eötvös Loránd University, Budapest, 1994.

limitation. Consequently, the first subchapter deals with person-related limitations (citizenship and residence), the second with quantitative (caps), the third with temporal (cut-off dates), while the fourth with property-based limitations (distinctive treatment according to the nature of the lost property: movable or immovable, various immovable, commercial, religious, and communal). The chapter concludes that these differences in treatment between various former owners are mostly arbitrary, and in certain cases deliberately introduced so as to produce inequalities, and thereby meet the Hayekian concerns as far as they produce results that conflict with the idea of the rule of law. The analyzed provisions of the restitution schemes lead in practice to exclusion, to the creation of winners and losers of restitution, to a breach of the idea of formal equality before the law.

Finally, in the conditions in which according to the conclusions of the previous chapter restitution schemes fall short from a thick conception of the rule of law (justice, rights, or objective equality), chapter four investigates whether requirements of a thin reading—focusing on foresight, clarity, and consistency—were still met by post-communist property redistribution. However, as the problems analyzed in the three subchapters (valuation, time limits, and probation) demonstrate, the restitution programs' provisions are not beyond criticism. As what concerns valuation, certain cases' entitled persons were brought in a situation in which it was impossible for them to exercise their right, in other cases international agreements were disregarded, or subsequent norms altered the initially established entitlement. Further, compensation through vouchers demonstrated incoherence in practice (especially as what concerns the vouchers' future utilization), and constituted mostly a theoretical, rather than an actual compensation. Time limit related concerns are pertaining to the submission deadlines, which almost in every analyzed example had to be extended, in certain cases even several times, and to the length of proceedings, which in some cases were considered as leading to a breach of right to remedy, or amount to an unconstitutional omission. Evidence-related problems arose with regard to the number of documents required, or the conditions attached to their use, which made their employment impossible in practice.

The inquiry uses a comparative perspective, which on one hand focuses on the analysis of nine different post-communist restitution schemes: the Czechoslovakian (and subsequently Czech and Slovak),

Estonian, German, Hungarian, Latvian, Lithuanian, Polish, and Romanian ones. On the other hand, the post-communist schemes are contrasted—where appropriate, and to the relevant extent—with experiences from around the world, such as the indigenous claims in Australia, New Zealand, United States, and Zimbabwe; the Holocaust restitution in United States and some West European states; and the Croatian apartment cases.

A comparative standpoint—which attempts to draw conclusions upon the comparison of different approaches to restitution—has necessarily to presume a "significant degree of congruence between problems and their possible solutions across the spectrum."[39] Of course, similarities and differences need to be evaluated with due care: for instance, in the Holocaust restitution, the need for a corporate body to administer restituted goods was based on a completely different reason than in the case of the Maori. Or, in the case of Croatia, international pressure for the restitution of pre-war real estate was arguably exerted neither with the desire to engender the rule of law, nor with the intention to support the emergence of market economy, as was the case in the rest of Central and Eastern Europe, but primarily out of a very pragmatic attempt to resettle refugees and displaced persons.

There is an obvious difference in Western and Eastern approaches to restitution. However, as such dichotomies "over-simplify complexity,"[40] value judgments are to be avoided, and due care is given to the backgrounds that generated the different approaches to restitution. Moreover, even within Central and Eastern Europe, the diversity of the factors affecting restitution policies was so significant that broad conclusions may be drafted only with peculiar care. (For instance, under communist regimes, in most of the countries in the region a very limited private possession of land was tolerated, while in Poland there was no collectivization.)

However, comparative knowledge might prove its worth by contributing the specific and difficult problem of property restitution. What this book aims at is not a solution which "can be fitted with an

[39] Norman Dorsen, Michel Rosenfeld, András Sajó, and Susanne Baer, *Comparative Constitutionalism: Cases and Materials*, West Group, 2003, p. 4.

[40] Günther Frankenberg, "Critical Comparisons: Re-thinking Comparative Law," *Harvard International Law Journal* 26 (1985), p. 411.

adapter and plugged into"[41] any chosen system; rather, it will seek for a deepened understanding of the problem. "Comparative law"—writes Glendon—"helps us to understand the dynamics of social, as well as legal, change."[42] Comparative analysis has the capacity "to push analytic categories to higher levels of abstraction in order to bridge differences and similarities observed"; moreover, "it holds the potential to help us better understand law and legal systems."[43]

[41] Mary Ann Glendon, Michael Wallace Gordon, and Cristopher Osakwe (eds.), *Comparative Legal Traditions*, West Publishing Co., 1994, p. 10.
[42] *Ibid.*.
[43] John C. Reitz, "How to Do Comparative Law," *American Journal of Comparative Law* 46 (1998), p. 617.

CHAPTER 1

Theories of Property

I have described briefly in the Introduction my personal, somewhat boring encounters with property, but for the innocent bystander, property is simply the right to a thing: land, house, and movables. Pipes reminds us that the American revolution was carried out for the protection of property, and quotes Adams, who argued that the term "happiness" in the Constitution's Preamble conveyed "property," and this is the reason why the normative part of the Constitution contains no express provision on the sanctity of property.[1] For a first-year (civil) law school student, it is the Holy Trinity of *jus utendi, fruendi et abutendi* or *usus, fructus et abusus*—a curious incantation in a long-dead language—from which, in the ideal case, it may be deduced that property is a bundle. But no one can convincingly establish whether property is the sum of the elements of this bundle, or only of some of them, and in any event, how many pieces can be taken from the puzzle without ruining the picture. Underkuffler argues that theory is unable to advance a definition of property beyond mere description, and doubts whether property is a coherent idea in law.[2] Others, more plastically, talk about an "identity crisis."[3] Theorists emphasize that the modern regulatory (welfare) state, which creates a "strain between property's protective ideals and the exigencies of modern governance,"[4] contributes es-

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[1] Richard Pipes, *Property and Freedom*, Vintage Books, 2000. According to this argument, the pursuit of happiness was closely related to the acquisition of property.

[2] Laura Underkuffler, *The Idea of Property: Its Meanings and Power*, Oxford University Press, 2003, pp. viii–ix.

[3] Penner, *op. cit.*.

[4] James W. Ely, Jr., *The Guardian of Every Right: A Constitutional History of Property Rights*, 1992; cited by Underkuffler, *op. cit.*, pp. 1–3.

sentially to the erosion of property that not so long ago provided the boundary of the legitimate scope of government.[5]

In spite of all these problems in coming to grasp property, the restitution fever that burnt in the former socialist part of Europe reflected the firm belief that property would advance democracy and markets. The Hungarian Compensation Law's Preamble spoke about the creation of an efficient market economy,[6] the Estonian Supreme Court identified a similar goal of the ownership reform,[7] while other courts in Poland and Lithuania emphasized the positive social aspects of property reform.[8] For the post-socialist elite, property became also a question of justice, symbolizing—together with accountability—a commitment to instituting the rule of law. The already mentioned Hungarian preamble and the Estonian decision both mention the building of a rule of law regime amongst the goals of property restitution or compensation. Justice and accountability bore heavily on the legitimation of the emerging order.[9]

Seemingly, there is a slight paradox: property—not only as a right, but also as a value—was in the focus of the discourse, while there was hardly any consensus as to what property meant—both as a right and value. Of course, lack of consistency has never been a problem in political discourse.[10] But there is more behind this than mere cynicism. According to Engerer, the issue of property can be reduced to three major questions: evolutionary (emergence and transfer), justification,

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[5] Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy*, University of Chicago Press, 1990.

[6] Law No. XXV of 1991, Preamble, available online, at http://www.complex.hu/kzldat/t9100025.htm/t9100025.htm.

[7] Estonian Supreme Court (hereinafter ESC) Decision 3-4-1-10-2000 of 22 December 2000, available online, at http://www.nc.ee/english.

[8] Polish Constitutional Tribunal (hereinafter PCT), K 2/04, Judgment of 15 December 2004; Lithuanian Constitutional Court, "On restoration of citizens' ownership rights to land," Decision of 8 March 1995.

[9] Verdery, *op. cit.*, p. 79.

[10] For instance, in 1990, the prime minister of Romania at a parliamentary debate found himself speaking about the necessity of the "prevent[ion of] the concentration of land in the hands of one proprietor, for that would discourage the formation or preservation of village communities as spaces of the authentic national spirit." Quoted also by Verdery, *op. cit.*, p. 77.

and functional (functions performed).[11] Departing from this classification, she argues that in Western legal thought, the functional aspect formed the essence of the discourse, as in the established democracies the existence of private ownership and the separation of private and public sectors is seen as a basic fact that requires no justification. Quite the opposite, in the Central and Eastern European discourse, the evolutionary and justification aspects—how property emerges, how it can be justified, and how the state redefines its role within the new property rights system—occupy a central place.[12] The Hungarian Constitutional Court, for example, considered that the scope of the constitutional protection of property must be considered within the framework of public and private law restrictions, and it must take into account the subject, object, and function of competing private and public claims.[13]

The question that arises then is the following: how does the post-socialist experience contribute to property's "identity crisis"? Can we really speak about a genuine difference in approach? If we turn to Posner and Vermeule, we may learn that there is no essential difference between East and West in terms of goals: each approach attempts to minimize uncertainty about property rights.[14] Engerer observes that transformation (transition) is not a process following given rules, but rather a process producing them. Therefore, neoclassical, contractarian, and monetary theories may not thoroughly explain property rights in transition. She argues that, except maybe for institutionalism, there is a certain vacuum of theory in this field.[15] Verdery notes that from the restitution process one may learn that obtaining property rights is far less important than controlling the context in which these rights could be exercised.[16] In any event, conclusions should be drawn with

[11] Hella Engerer, *op. cit.*, p. 12.
[12] *Ibid.*.
[13] Decision "On the Freedom of Enterprise and on the Licensing of Taxis, No. 24/1994"; and Decision "On the Local Government Apartments, No. 64/1993"; quoted also by Underkuffler, *op. cit.*, p. 146.
[14] Eric A. Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Harvard Law Review* 117 (2004), pp. 762–5. (The article is also available in form of a Working Paper at the University of Chicago's website, Public Law and Legal Theory Working Paper No. 40, March 2003, at http://www.law.uchicago.edu/faculty/posner/resources/eapav.transitional.pdf.)
[15] Engerer, *op. cit.*, pp. 104–5.
[16] Verdery, *op. cit.*, p. 20.

due care: the troubled waters of property rights transition have barely started to settle.

This chapter is dedicated to the presentation of the most important theories of property, to explore what lies—in terms of theory—behind the apparently straightforward quest of "getting one's things back" so popular in most of the post-socialist countries of Central and Eastern Europe for over a decade. The text is broken down into subchapters, each of them dedicated to different theories, and to their reflection in various instances and aspects of post-communist restitution programs.

1. Classical theories

It might seem somewhat strange today, but much more than one would actually think changed in the way we perceive the world along the breaking lines of the chasm whose first crack was caused by Luther's *Manifesto*, and what we know as Reformation. Up until then, private property was regarded by the church as a consequence of the Fall of Man, whose depravity was reflected in the division into mine and thine.[17]

The early Christian Church accepted private property as a fact of life, and exhorted the faithful to engage to the maximum extent possible in charity.[18] Matthew 19:16–21: when someone asked Jesus how to attain eternal life, He told him to obey the Commandments, and that if he wished to be perfect, he should sell his possessions and give the proceeds to the poor. Still, a balance had to be found between Christian ideals and mundane reality: after all, what would happen, if everyone gave his possessions to charity? Augustine came up with the solution, arguing that a property-free society is only possible in Paradise because it demands perfection. He viewed property as a responsibility, a kind of "trust" held by the individual for the public good:[19] "the evil uses good gold for evil, and the good uses good gold for good."[20] Tomas

[17] Ingo Böbel, *Eigentum, Eigentumsrechte und institutioneller Wandel*, Berlin, 1988; quoted by Engerer, *op. cit.*, note 11, p. 14, n. 7.
[18] Pipes, *op. cit.*, pp. 13–4.
[19] *Ibid.*, p. 15.
[20] Cited in Alfons Heilmann (ed.), *Texte der Kirchenväter*, Vol. III, Munich, 1964, p. 208; quoted by Pipes, *op. cit.*.

Aquinas in *Summa Theologica* put property in a justice context, where justice is the "perpetual and constant will to render to each one that which is his." Personal possession is good, because it has an educative effect: it teaches man to praise both work and the goods, which are its results. Moreover, argued Aquinas, private property creates an incentive for man to be preoccupied with his own affairs, which would have a beneficial effect on peaceful co-existence.[21] However, God is the sole owner, man, against all appearances, only uses the goods. Aquinas showed—borrowing the idea from Aristotle—that property enables charity, which is a Christian obligation, thus the rich are obliged to give their superfluous wealth to the poor.[22]

Although "veneration of property" was considered a heresy, the Christian Church did not venture beyond voluntary renunciation of one's own wealth. Pope John XXII for instance crushed the Franciscan "Spirituals," who advocated renunciation of all possessions. Over one hundred of them were burnt at stake. He issued a bull in 1323, declaring it a heresy to deny that Christ and the Apostles had had possessions. Six years later, in a new bull, the pope asserted that property of man over his possessions does not differ from that of God over the universe, which He bestowed on man; property is, therefore, a natural right, predating human law.[23]

Later, Reformation refined this view. Especially Protestants, on the basis of the seventh commandment ("thou shall not steal"), argued that property is a right created by God, thus private, instead of communal property was willed for man.[24] Calvin wrote approvingly of industry and trade, rejecting the medieval prohibitions on usury. There are theorists who argue that Calvinism did a great deal to foster capitalism.[25] This change of paradigm did not solve the problem, only reversed the question of justification: now the obviously existing communal property needed to be explained somehow. In the late Middle Ages, when secular authorities began to assault church properties,

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[21] Manfred Brocker, *Arbeit und Eigentum, Der Paradigmenwechsel in der neuzeitlicher Eigentumstheorie*, Darmstadt, 1992; quoted by Engerer, *op. cit.*, note 11, p. 14, n. 7.
[22] Pipes, *op. cit.*, p. 16.
[23] *Ibid.*, p. 17.
[24] Brocker refers to Melanchthon; quoted by Engerer, *op. cit.*, p. 15.
[25] Pipes, *op. cit.*, p. 17.

the Catholic church turned to defend property on a principled basis, and started to gave up viewing it as an unavoidable reality. To protect church goods from seizures by the crown, theologians began to speak about the inalienable right to property. (This idea was later on picked up and built upon by Grotius.)[26] The ground for such a discourse was also prepared by the rediscovery of Roman Law, which began to be taught in the early 12th century at Italian universities.[27] This quarrel between church and state firmed the status of property as "sacrosanct," even if the parties of the dispute traced the justification of ownership to different sources. According to the Second Vatican Council,[28] private property (understood as the right to dispose over material goods) is part of the expression of the personality, and makes possible the fulfillment of the individual's social role. Therefore, it is extremely important for both individuals and communities to hold possessions. Private property should be regarded as a sphere of autonomy, an extension of human freedom, and one of the conditions for civil liberties. Moreover, goods should be transferred to the public domain only through the acts of a competent authority, according to the requirements, and within the limits of the common good, and upon fair compensation.[29]

In spite of the Church's obvious concern for property and its role in society, it was the Enlightenment that brought with emphasis the question of property into focus. Theorists argue that while the absolutist monarchies of the Middle Ages justified political power by the principle of hierarchy—supreme power was God-given, and transmitted through descent—this theory did not fit the diversified and already complex distribution of property.[30] With the surge of commerce, property also came to mean capital.[31] The rising "middle class" of merchants, manufacturers, and intellectuals has outgrown the feudal social structure, and it desperately wanted its share of fortune (property) and

[26] *Ibid.*, p. 17–8.
[27] *Ibid.*.
[28] 1962–5.
[29] A II. Vatikáni Zsinat Dokumentumai, Szt. István Társulat, az Apostoli Szentszék Könyvkiadója, Budapest, 2000, Gaudium et Spes, p. 716.
[30] Böbel, *op. cit.*, and Niklas Luhmann, *Gesellschaftsstruktur und Semantik. Studien zur Wissensoziologie der modernen Gesellschaft*, Vol. 3, Frankfurt am Main, 1993; quoted by Engerer, *op. cit.*, note 11, p. 15.
[31] Pipes, *op. cit.*, p. 25.

fame (political power).[32] It is the utterly material universe of Descartes and Newton in which these processes take place: property is things, and the right to as many things as possible is the goal of everybody, because property and power are perceived as being directly proportionate. Harrington argued that he who controls the country's wealth controls its politics, as the latter depends on armed power, and mercenaries have to be paid.[33] On the other hand, "[p]olitical power [...] I take to be a right of making laws [...] for the regulating and preserving of property," writes Locke right in the introduction of the *Second Treatise*.[34] There was a long way, however, from Thomas Aquinas to John Locke, and before getting to him, some other thoughts about property need to be explored. On the one hand, communal well-being became the sum of individual happiness, while property was now seen as a reward of a rational life. Many 16th–17th century writers approve the pursuit of private interest.[35] On the other hand, beginning with the Renaissance, theorists started to seek a more rational justification for worldly authority than the will of God as revealed in the Holy Scriptures, and this justification was found in reason. This view came to dominate Western thought in the 17th–18th centuries. Grotius, in *Rights of War and Peace*, discusses the origins of property, and asserts that the "right of first occupancy" occurred before there were states.[36] Law of nature is "so unalterable that God Himself cannot change it."[37] This necessarily leads to the inviolability of property. Arguably, one side effect of the subjects'

[32] However, not everybody believed in the sanctity of private property: for instance, Winstanley and his "Diggers" movement advocated a communistic theory, according to which neither land, nor its fruits should be marketable commodities; interestingly, they were equally hostile to intellectual property and criticized savants for monopolizing learning just like landlords monopolized the soil. Beer, *British Socialism*; Manuel and Manuel, *Utopian Thought*, both referred to by Pipes, *op. cit.*, p. 37.

[33] James Harrington, *The Commonwealth of Oceana* and *System of Politics* (1656); in Pipes, *op. cit.*, p. 32.

[34] John Locke, *Treatise of Civil Government and a Letter Concerning Toleration*, Appleton-Century, 1965, p. 4.

[35] It is enough to point for example to Spinoza's *Ethics* or the Preamble of the U.S. Constitution.

[36] Jeremy Waldron, *The Right to Private Property*, Clarendon Press, Oxford, c1988, p. 154.

[37] Grotius, *Rights of War and Peace*, Vol. II; quoted by Pipes, *op. cit.*, p. 29.

right to undisturbed possession justified denying them political rights—on the ground that reciprocity demanded the subjects to leave the sovereign full power to run the affairs of the state.[38]

Grotius also departed from the mirage of a Lost Paradise, where everyone lived in a peaceful community of goods. According to him, private property emerged as a response to the inevitable shortage of resources that subsequently occurred, by way of contract, an implicit or explicit agreement that led to the division between mine and thine. This is important, because, as theorists emphasize, as long as private property is man's creation, it remains revocable.[39] From a theoretical perspective it is extremely interesting to note that in the case of the indigenous people, variations of the natural rights theory (what Frame calls "the imperial export model")[40] were employed both to justify and—later, after decolonization—to condemn the taking of their lands.[41]

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[38] *Ibid.*.

[39] Brocker; quoted by Engerer, *op. cit.*, p. 18.

[40] Alex Frame in Janet Mclean (ed.), *Property and the Constitution*, Hart Publishing, 1999, p. 226.

[41] In Blackstone's words, property is "[t]he sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (William Blackstone, *Commentaries on the Laws of England*, II.1; quoted by Frame, *op. cit.*, p. 226). He viewed property in land as a "transient" property, acquired through first occupancy, and lasting as long, as the first occupier was effectively using it. However, when the number of potential first occupiers increased, conceptions of "more permanent dominion" were entertained, and individuals appropriated not the mere use, but "the very substance" of the thing (*Ibid.*, II.3; also quoted by *Frame*, *op. cit.*, p. 227). Examined from the colonies' perspective, the Blackstonian definition looked unsatisfactory. Maclaurin, a New Zealand-raised scholar, came up with the idea of a "hierarchy of agricultural development," structured on multi-tiered scale, from the lowest to the most evolved, and naturally finding fully matured property solely at the top of this ladder. His hierarchy looks as it follows: 1. Bushmen of South Africa: wandering hunters; 2. Australian Aborigines: defined hunting grounds belonging to clans; 3. Maories of New Zealand: primitive agriculture; 4. village community with intensive agriculture, arable land divided among families, pastures held in common (R.C. Maclaurin, *On the Nature and Evidence of Title to Realty*, Clay & Sons, 1901; also quoted by Frame, *op. cit.*, p. 227). As it naturally flows from the above presented, that which is below the top level is something less than property, and therefore indigenous lands could

Hobbes went one step further than Grotius did, and asked what would happen, if, in spite of the initial contract, man would still infringe on the property of his fellows. For him, breaches of the contract appeared as inevitable; therefore, he argued that an authority had to be created to guarantee exclusion. Interestingly, Hobbes reached back for the Aquinean phrase *suum cuique tribuere* ("to render to each one what is his," see *supra*),[42] and translated *suum* as "propriety." But one may find hints in this direction also in Grotius, who divided one's belongings into "alienable" and "inalienable," stressing that certain goods, as "life, body, freedom, honor" are attributes of personality sanctified by the law of nature, and can not belong to others.[43] The representatives of the tumultuous English political life quickly picked up these notions: in 1646, a Leveller argued that "by natural birth all men are equally and alike born to like propriety, liberty and freedom."[44]

Hobbes followed Grotius' footsteps, but he did away with the original happy community, and considered more likely a *bellum omnium in omnes* ("war of every man against every man") for domination.[45] To put an end to anarchy, man transferred to a group of persons their natural rights. Thus it is possible to consider the state as the sole owner, who grants to its members a right of use. This way, the individual's undisturbed possession is safeguarded from other individuals' attacks, but not from the state, which is free to do what it pleases, until it does not encroach on the individuals' right to self-preservation.[46]

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be considered "unoccupied" or "legally vacant," and taking them into possession was a fairly decent thing to do for the European colonists. In these conditions the "courts of the conqueror" found it extremely difficult to uphold indigenous claims to restitution. A telling example in this sense is the U.S. Supreme Court decision in the Tee-Hit-Ton v. United States (348 U.S. 272 [1955]), in which the Court held that if the tribes did not have a deed for their ancestral land, they did not own it in a constitutional sense (Nell Jessup Newton, "Indian Claims in the Courts of the Conqueror," *American University Law Review* 41 [1992], pp. 822–3).

[42] The phrase is actually attributed to Plato; its Latin translation is credited to Cicero, Pipes, *op. cit.*, p. 30.

[43] Grotius, *Jurisprudence of Holland*, Vol. I; quoted by Pipes, *op. cit.*, pp. 30–1.

[44] *Ibid.*.

[45] Engerer, *op. cit.*, p. 18.

[46] Thomas Hobbes, *Leviathan*, ed. by C.B. Macpherson, Penguin Books, 1968, p. 188.