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Liviu Damşa

The Transformation of Property Regimes and Transitional Justice in Central Eastern Europe

In Search of a Theory

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To the loving memory of my mother,
Elvira Minodora

Acknowledgments

It is customary to thank those who have facilitated academic work. I believe this is a wonderful convention. However, it is one think to devise a concept in general terms and quite another thing to elaborate it into precise expression. That process has taken some time in my case. It has involved discussion with numerous colleagues, academics or practitioners. I hope that they will accept my expression of profound gratitude without being mentioned by name. Much of what I have written is made up of reactions of what others have written. I generally mentioned them by name, in the references, but they are just part of my sources of inspiration. Some authors whose importance for the forming of my ideas became clear only at later stages of writing are not mentioned. I acknowledge here my profuse **indebtedness** to every one of them.

In this book I offer some arguments developed during my doctoral research at Warwick. If they sometimes sound more peremptory than they should, I hope that it is because I have tried to state them as clearly as I could, and not because I have disregarded the thoughtful criticism of my teachers. Among the many people who helped me writing this book, István Pogány deserves special mention. I could not have started my work without his guidance, continued it without his feedback and insights, or finished it without his strong encouragements. The words could hardly express my gratitude to him. At Warwick, George Mezaros and Lee Bridges revised my first chapters and provided thoughtful criticism. I am grateful to each of them for their generous help and encouragements. Bill Bowring (Birkbeck) and John McEldowney (Warwick) revised the manuscript and made various suggestions for improvement. Their suggestions reflect in this book and I am grateful to them for their kind help and suggestions for improvement. Among my colleagues at Warick, Abou Jeng made suggestions on several chapters. Sharifah Shekalala invited me to Warwick workshops and conferences, where I could present the drafts of various chapters and spent countless hours discussing with me research or writing strategies. I am grateful to Abou and Sharifah for their kindness. Rafal Manko (Amsterdam), Adam Sulikovski (Wroklaw), and Cosmin Cercel (Notthingham) offered me the opportunity to present various drafts at the

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Shortly after I stared my doctoral studies, my mother passed away. I could not think at the research leading to this book without her encouragement and persistence. I owe her so much for what I am and wish to dedicate this study to her sweet and cherished memory. May God rest her in peace!

This book includes a revised version of the following paper: 'The Incomprehensible Post-communist Privatisation', *Global Journal of Comparative Law 3(2) 137–185*, (Chapter 4). I benefited from the comments of the anonymous reviewers for the *Global Journal of Comparative Law* and I wish to thank Francis Botchway the editors of this journal for copyright permission.

Contents

Table of Cases

ENGLAND

Livingstone v The Rawyards Coal Company: (1879–80) L.R. 5 App. Cas. 25
"Nazym Khikmet" case, [1996] 2 Lloyd's L Rep, 362 (Sir Thomas Bingham, Evans LJ, and Thorpe LJ)

HUNGARY

Hungarian Constitutional Court Decision 21 (of 4 October 1990) on Compensation for Expropriated Property (Compensation I)
Hungarian Constitutional Court Decision 16 (of April 20) 1991 (Compensation II)
Hungarian Constitutional Court Decision 27/1991 (Compensation III)
Hungarian Constitutional Court Decision 28/1991(Compensation IV)
Hungarian Constitutional Court Decision 16/1993 (Restitution Jewish Possessions)

LITHUANIA

Lithuanian Constitutional Court Decision of 27 May 1994 "On restoration of citizens' ownership rights to land"
Lithuanian Constitutional Court Decision of 8 March 1995

POLAND

Polish Constitutional Tribunal Judgment of 19th December 2002- K 33/02
Polish Constitutional Tribunal Judgment of 15th December 2004- K 2/04 (on the "Right to Offset the Value of Property Left in the Former Eastern Territories of Poland" (I and II)
Polish Constitutional Supreme Court Decision of 21 November 2003

ROMANIA

Romanian Constitutional Court Decision No. 151 of 17 March 2005, published in the Official Monitor No. 444 of 25 May 2005
Romanian Constitutional Court Decision No. 250 of 18 September 2001, published in the Official Monitor Part I No. 746 of 22 November 2001

US

ECtHR CASES

Table of Legislation

CZECH REPUBLIC (AND FORMER CZECHOSLOVAKIA)

Czech and Slovak Federal Republic Law on the Mitigation of the Consequences of Certain Property Losses (Small Restitution Law), Act No. 403/990Sb of 2 October 1990)
Czech and Slovak Federal Republic Law on Extrajudicial Rehabilitation, 21 February 1991 (large restitution law)

HUNGARY

Ministry of Finance Decree No. 281, 1972 (X, 3)
Ministry of Finance Decree No. 7/1977 (V, 6)
Law VI of 1988 (on economic associations)
Law XXIV of 1988 (on foreign investment)
Law XIII of 1989 (on the transformation of business organizations and associations)
Law VIII of 1990 (on the protection of state property entrusted to enterprises)
Law No. XXV of 1991 (Compensation Law), of 27 June 1991 (to settle ownership conditions, for the partial indemnification of damages caused by the State to the property of citizens)
Law No XXIV 7 April 1992 (to settle ownership conditions, to provide partial compensation for unjust damages inflicted by the State to the property of citizens as a result of enforcing legal provision created between 1 May 1938 and 8 June 1949)

GERMANY

German First Act for Rectification of SED Injustice (29 October 1992, as amended on 23 June 1994)
German Second Act on the Rectification of SED Injustice (23 June 1994)

ROMANIA

Law 119 of 11 June 1948 (for the nationalisation of industrial, banking, insurance, mining and transportation enterprises), published in Official Monitor of Romania, No. 133 bis of 11 June 1948
Decree 326/1949 (3 August 1949, regulating the transmittal of the goods of State administered by ministries, state institutions, and popular councils), published in the Official Bulletin of Romania, No. 52 of 6 August 1949
Decree 92/1950 (of 19 April 1950, for the nationalisation of some immovable property), published in the Official Bulletin of Romania, No. 36 of 20 April 1950
Decree 111/1951 (of 14 July 1951, for the regulation of situation of any kind of goods taken by the state, without heirs or owners, and also of some goods which are not of use of budgetary institutions), published in the Official Bulletin of Romania, No. 81 of 27 July 1951
Decree No. 92 of 19 April 1950 for the nationalization of some immovable(s), published in the Official Bulletin of Romania, No. 36 of 20 April 1950
Decree 224/1951 (of 12 December 1951 for the execution of immovables in the satisfaction of State's creances)
Decree 409/55, of & September 1955, for the regulation of transmittal of the goods belonging to the State), published in the Official Bulletin of Romania, No. 26 of 23 September 1955
Law No. 4/1973 (regarding the development of dwellings and the sale of dwellings from the State fund to the population), published in the Official Bulletin of Romania, No. 121 of 31 December 1980
Decree-Law No. 61/1990, published in the Official Monitor of Romania, Part I No. 22 of 8 February 1990
Law No. 15 of 7 August 1990, published in the Official Monitor of Romania, Part I No. 98 of 8 August 1990
Law No. 85 of 22 July 1992, published in the Official Monitor of Romania, Part I No. 180 of 29 July 1992
Law No. 18/1991, published in the Official Monitor of Romania, Part I. No. 37 of 20 February 1991
Government Decision No. 834 of 14/12/1991 published in the Official Monitor of Romania, Part I, No. 259 of 20 December 1991
Law No. 76/1994, published in the Official Monitor of Romania, Part I, No. 260 of 15 September 1994
Government Ordinance No. 19 of 27 January 1994, Official Monitor of Romania, Part I, No. 28 of 28 January 1994
Law No. 112/1995, published in the Official Monitor of Romania, Part I No. 279 of 29 October 1995.
Government Decision No. 20 of 17 January 1996, published in the Official Monitor of Romania Part I, No. 16 of 23 January 1996.
Government Decision No. 1011 of 22 October 1996 published in the Official Monitor of Romania, Part I, No. 263 of 28 October 1996

Law No. 114 of 11 October 1996, published in the Official Monitor of Romania, Part I, No. 254 of 21 October 1996
Government Decision No. 11/1997 modifying and supplementing Decision No. 20/1996), published in the Official Monitor of Romania, Part I, No. 27 of 18 February 1997
Law No. 79/1997, published in the Official Monitor of Romania, Part I, No. 264 of 15 July 1998
Law No. 152/1998, republished in the Official Monitor of Romania, Part I, No. 744 of 2 November 2009
Law No. 213 of 17 November 1998, published in the Official Monitor of Romania, Part I, No. 448 of 24 November 1998
Law No. 1 of 11 January 2000, published in the Official Monitor of Romania, Part I No. 8 of 12 January 2000
Law No. 10 of 8 February 2001, published in the Official Monitor of Romania, Part I, No. 75 of 14 February 2001
Law No. 247 of 19 July 2005, published in the Official Monitor of Romania, Part I, No. 653 of 22 July 2005
Governmental Emergency Ordinance No. 51/2006, published in the Official Monitor of Romania, Part I, No. 566 of 30 June 2006
Law No. 12/2007, (of 9 January 2007), published in the Official Monitor of Romania, Part I, No. 43 of 19 January 2007
Law No. 1 of 30 January 2009, for the modification and completion of the Law 10/2001, published in the Official Monitor of Romania, Part I, No. 63 of 3 February 2009

Abstract

This book examines the transformations of property regimes in post-communist Central Eastern Europe (CEE) and the role played by restitution and privatisation in these transformations. The argument which it develops is that during the transitional period, the transformation of state property into private property was the most important goal for post-communist CEE countries. However, transitional justice as a field does not offer a complete theorisation of the two legal instruments, restitution and privatisation, utilised for transformation state property into private property in post-communist CEE. The theorisation of 'restitution', for example, is incomplete in the transitional justice literature and in the literature on correction of historical wrongs, and therefore of lesser applicability in the case of post-communist restitution. Similarly, privatisation processes in post-communist CEE are generally ignored in the transitional justice literature, which does not explain why such processes should occur during transitions to more democratic political regimes, what these processes aimed to achieve or what it was their relation with other legal instruments utilised to correct past wrongs. It is argued in this book that for a more complete theorisation of this particular CEE post-communist transitional process consisting in changes of property regimes, the transformations of property in post-communist societies should be studied in a more holistic way. The main legal vehicles used for such transformations, privatisation and restitution should not be studied separately and in abstract, but in their reciprocal relationship, and in relation to the dimension of justice which each could achieve.

The theorisation of restitution in transitional justice literature and in the literature on correction of historical wrongs is examined in detail, in order to provide a general analytical characterisation of restitution, applicable to the post-communist settings. Several of the main normative arguments advanced in these literatures against restitution are examined, and a rebuttal of them, respectively, a discussion of their applicability in post-communist contexts is offered. Similarly, the justifications provided for property transformation in post-communist societies are examined in detail, and a critical assessment of them, and in particular of privatisation, is offered in this book.

Post-communist legislation having as object restitution, implemented in CEE countries, is examined from a law in context and interdisciplinary perspective, in order to show that the agendas of post-communist 'transitional' governments were dominated by measures transforming property, assessable from a distributive justice perspective, and not by a retributive or corrective justice framework.

This book offers a more complete theorisation of 'restitution' than that generally found in the transitional justice literature, or in the literature on correction of historical wrongs. It also integrates privatisation in a theory of post-communist transformation of property. Because of its interdisciplinary character and the legal concepts and themes it analyses and discusses, it also contributes to the comparative law literature and to the legal theory on property and restitution.

One day-I had been living then for a year in Berlin-I was invited to the (West) German State Security Service. I was told a Romanian name, one that I did not know, and then I was shown the picture of a man, and his diary in which the man has written my name and address. The West German Security Service suspected that the individual was in Berlin at the Romanian Secret Police's order, with the mission to kill several 'undesirables.' I was warned not to enter in bistros with dubious Romanian personnel.

In Romania, Timisoara, where I lived until the day of my forced expulsion, there is today a big factory processing fruit juice. Its owner is the man who was arrested then in Berlin for criminal missions. The then 'evil winder' is today a businessman,[1] one of the numerous businessmen, bankers, politicians, and professors whose status in the period of dictatorship allowed them to use their influences and capital to make a good start in the market economy. The then fear mongers are making today the country to join Europe.

I am hearing that the Timisoara's fruit juice has a good taste. But I will not drink it, because otherwise I will drink with a fear that I do not feel it any longer.[2]

Herta Müller, *When something is in the air, usually is not a good thing*, 2003

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[1]'Evil winder' is the most appropriate word I could find for the approximate translation of the Romanian 'vantura rele', which it does not exist in Romanian as such but is invented by Herta Muller, and therefore metaphoric and poetic even in Romanian and not easily translatable. Usually in Romanian a 'vantura timp' or 'time winder' is called someone whose activity is superficial and not serious, and the change of word 'time' with 'evil' or 'ill'-to do bad things to the others- in the expression, could suggest that the activity of the Romanian communist secret police, the dreadful *Securitate*, albeit very serious for the opponents of the communist regime, was in fact and in relation to the human life just another unserious activity of persons who could not do something serious for themselves and for society.

[2]Herta Muller, 'When something is in the air, usually is not a good thing' (Cind ceva e in aer, de regula nu e un lucru bun) at 226, in the *King bows and kills—Der Konig Veneigt Sich und Totet*, Munchen: Karl Hanser Verlag, 2003 for the original edition; (Polirom, 2005 for the Romanian translation).

Chapter 1
Introduction

The transformation of communist property into private property was undoubtedly one of the most important changes to take place after the implosion of the communist regimes in Central and Eastern Europe in 1989. In many ways, this remarkable transformation was a reversal of the 'transfer' of private property into the hands of the state that occurred in all the countries of the region both prior to and after the Second World War.[1] However, the earlier transfer was conducted principally by fascist or communist governments in the shadow of, or in outright breach of the law of that time.[2] By contrast, the post-communist transformation of property was apparently based on rule of law ambitions, and on two devices which could be conceived of as legal instruments: restitution and privatisation.

Post 1989, a burgeoning literature has addressed the post-communist transformation of property, most notably in the fields of economics, political theory, philosophy, sociology and anthropology. Given the importance of the law in the transformation of communist property into private property, one may also expect to find a voluminous legal literature dedicated to this transformation. Such an expectation is strengthened by the fact that the relationship between the two legal instruments, 'restitution' and 'privatisation,' used for the accomplishment of the transformation, is not always obvious. Yet, writing in 2009, one of the only two legal scholars who have authored monographs dedicated to 'post-communist restitution,' observed the following:

> 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 or economy, but—surprisingly—very few in legal scholarship. On the contrary, there are plenty of books on historical justice–related restitution (in former colonies, Holocaust reparations, or other

[1] See generally Pogány (1997), Rothschild (1974), Herman (1951).

[2] The nationalisation of private property after WWII was not necessarily operated by communist governments or by governments dominated by communists. The case of Czechoslovakia, where property already nationalised or confiscated by Nazis was transferred to the state by the non-communist Beneš' government, in the aftermath of WWII, is paradigmatic for the region. See e.g. Judt (2007).

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post-conflict situations). Is this a sign of caution, or simply a lack of interest on behalf of legal scholars?[3]

If this is the case with legal monographs on post-communist restitution, the English-language legal scholarship does not include any monograph on post-communist privatisation, even though legal scholars have addressed the topic during the past two decades.[4] The arguable result of this lacuna in legal scholarship is that the post-communist transformation of property has not been systematically theorised. Ruti Teitel's seminal *Transitional Justice,* published in early 2000s, partially fills this gap.[5] In this book, Teitel offers a sophisticated analytical framework, which facilitates the analysis of all democratic transformations, including the post-communist transformation of property. However, as I will argue in this study, Teitel does not present a fully theorised analysis of the post-communist transformation of property.

1.1 Objective of the Study and Its Contribution to the Legal Scholarship

This study attempts to address the gap in the legal scholarship outlined above, by offering a new framework for analysing the post-communist transformations of property. In particular, this study advances and defends two theses. First, that restitution and privatisation have distinct properties, which should allow for sharp distinctions to be drawn between these two legal institutions in any general theory of transitional justice. Second that what is labeled as 'post-communist restitution' in transitional justice studies is *sui-generis*, it is a hybrid legal institution, which has sharp distributional features, and it is often confused with privatisation.[6] The book argues that the transitional justice literature offers an incomplete theorisation of restitution, the vehicle of post-communist property transformations with which this book is primarily concerned. In addition, this book also advances the thesis that the transitional justice literature (and the literature on post-communist transformations) offers an incomplete theorisation of the post-communist transformation of property.

The arguments presented to support these theses are sixfold. First, that in the post-communist CEE context, the political and legal undertakings of the democratic regimes that replaced totalitarian ones were not based necessarily on ideas

[3]Kuti (2009, 2).

[4]See e.g. Rittich (2002), Black et al. (2000), Coffee (1999), Stephan (1996), Klaudt (1994). The only economic monograph in English, aiming at theorising more comprehensively the post-communist privatisation is Hella Engerer's *Privatization and its Limits in Central and Eastern Europe* (2001).

[5]Teitel (2002).

[6]See e.g. *infra*, text to *n 9–20,* in *Chap. 4*.

of retributive justice.[7] Thus, the main economic, social and political transformations goals of the post-communist transitions were related to the distribution, or the *giving-away* of the communist property, and not to retribution or compensation for past wrongs.

Second, that the normative arguments offered in the economic, political and philosophical scholarship for the transfer of communist property are weak or undertheorised. Moreover, many descriptions of the alienation of communist property, provided in legal scholarship misrepresent the post-communist transformations.

Third, that the dominant literature on post-communist property transformation misunderstands or mischaracterises the particularities of the communist legal arrangements concerning property. As a result, this literature frequently offers normative prescriptions for the transformation of communist property which have a weak basis in reality, contributing to the undesirable consequences of this transformation during the post-communist period.

Fourth, that the dominant literature offers an incomplete theorisation of the property transformations during the post-communist period, by focusing on the lesser instrument utilised for transformations, restitution, and by ignoring the major one, privatisation. This incomplete theorisation is reflected, for example, in the unsatisfactory ways in which post-communist restitution is analysed in transitional justice theory. It is also reflected in the general indifference of transitional justice theory towards the theorisation of post-communist privatisation.

Fifth, that the incomplete theorisation of post-communist property transformations is also reflected in the literature on '*historical justice*.' In this literature only restitution receives attention, and not privatisation, while the 'post-communist restitution' is treated incidentally. Nevertheless, the arguments against wide encompassing restitution measures for historical wrongs offered in this literature are sometimes extended to the 'post-communist restitution.' However, they are not applicable in the post-communist contexts mainly because the time elapsed since the perpetration of the communist wrongs is relatively short.

Sixth, that the use by the post-communist CEE governments and legislatures of two distinct legal institutions, privatisation and restitution, to accomplish the same goal of giving-away the communist state property, warrants a reconsideration of the ideas concerning post-communist restitution and privatisation. Restitution and privatisation are quite distinct institutions in the continental civil law tradition to which all the legal systems of CEE countries belong, and could not be confused in the way they usually are in the transitional justice scholarship. Because of their distinct characteristics, these two institutions could not perform a similar role when 'giving away' state property after the fall of communism in CEE, as often assumed in the scholarship. There is also an urgent need for an analysis of the role of the law in such transformations. Similarly, the limit of constitutional or legal changes in democratic transformations deserves reconsideration and further theoretical attention.

[7]See e.g. Arthur (2009, 326) insisting that only the claims for retributive justice measures and not the claims for distributive justice measures were recognised as legitimate justice initiatives during times of political change, in the 1990s.

The arguments outlined above have far reaching implications for transitional justice theory. Once it is accepted that the post-communist transformations were mainly distributive in character, this theory can only be developed in one or two ways. To accept the idea that the post-communist transformations were animated by distributive justice goals and, as such, that they were not transitional justice measures. Or, second, to incorporate these measures as distinct species of transitional justice, and to integrate distributive justice ideas in the core of transitional justice theory. Either way, transitional justice theory should pay more attention to the peculiarities of the post-communist transformation. It should not attempt to incorporate the measures transforming communist property as 'transitional,' merely because they were adopted by democratic regimes replacing totalitarian ones after 1989.

The contribution that this study attempts to make to the literature extends, nevertheless, outside the field of transitional justice. First, by combining philosophical and legal theory insights, related to property, with the specifics of post-communist property transformations, this study offers a theorisation of these transformations, which could be integrated more easily within the tradition of liberal thought. In this way, the book may contribute to the development of general political philosophy and its understanding of issues surrounding property. This, in turn, may serve as a basis for further theorisation of property by legal scholars.

Second, by focusing on the distinctiveness of communist property, and on the conceptual problems posed by the transformation of this property, this study provides the necessary analytical apparatus for the legal comparativist who wants to grasp the post-communist legal transformations.[8] Thus, it contributes to the comparative law scholarship on discrete legal institutions, such as property, corporations, restitution, and unjust enrichment.

Third, this study also offers a critical evaluation of ideas related to restitution presented in two important scholarly fields, *transitional justice* and *historical justice.* Through this study *restitution* is mostly seen as a legal institution already existent in 1989 in the legal systems of the CEE communist countries, and common to the continental civil law and to the common law traditions. Nevertheless this critical evaluation of ideas about restitution in other fields of scholarly inquiry than law allows for a better theorisation of the restitution's role in the post-communist legal systems. Besides, this linkage of fields of apparent disjunctive inquiry related to 'restitution,' such as *transitional justice*, *historical justice*, or *Law,* contributes to the comparative scholarship in all these fields.

Fourth, this study proposes a new conceptual framework for the analysis of property transformations in the post-communist era. In this framework, post-communist

[8] *Infra*, Chap. 4. I treat in this chapter the communist property as a distinct socio-legal category, which cannot be equated with the pre-communist or western ideas of property centered on individual property. Continental civil law concepts such as 'patrimony,' juridical persons or corporate patrimonies, common to all the CEE countries' pre-communist legal heritage, are contrasted for example in this chapter with the specific communist ideas related to property, respectively with the organisation of 'corporate' property in communism, in an attempt to show how difficult is for the western comparative lawyer to grasp the distinctiveness of the communist legal system or the problems posed by the dynamics of post-communist property transformations.

restitution and privatisation are seen in their mutual interplay, and as two instances of the larger process of the alienation of the communist state's property. 'Post-communist restitution' is also seen as a hybrid, *Janus* faced legal institution, strongly distributional in character. This framework reconciles a number of apparent inconsistencies and tensions in the economic, political, philosophical and transitional justice scholarship discussing the nature and the results of post-communist property transformations.[9] Insofar as it reconciles these inconsistencies and tensions, this study contributes to the scholarship dedicated to the post-communist transformations of property.

Fifth, this study critically analyses a number of assumptions advanced in various fields, about the contribution of private property to the overall development of the ex-communist CEE countries. It examines the layer of law affected by the post-communist enactments supposed to contribute to the transformation of communist property into private property. It also underlines the social perpetuation of the communist organisation of property, long after the socialism's demise in the CEE. As comparable kinds of analyses are undertaken by 'law and development' scholars,[10] the critical examination in this study of post-communist law and society, and of the impact of post-communist social and legal changes on the development of the CEE countries, also contributes to this field of inquiry.

1.2 The Focus of the Study

There is an impressive literature dealing with the post-communist transformation of property in various scholarly fields. In spite of the volume of this literature, the two legal institutions utilised for the post-communist transformation of property, privatisation and restitution, are rarely treated together in this scholarship. Often, the two institutions are seen as discrete matters, to be analysed separately. Such as a tendency is most notably seen in economics where, for example, various privatisation schemes adopted in post-communist Europe are analysed using either enterprises as units of analysis and comparators,[11] or based on the particularities of the

[9]Given the volume of the literature on post-communist transformations, it is impossible to cite here even tentatively, some of the important authors. Therefore, just with the title of example, see Stark (1990); A Forum on Restitution. Essays on the efficiency and justice of returning property to its former owners, *E. Eur. Const. Rev. 2:3 (1993)*, 30–40; Jon Elster, The Necessity and Impossibility of Simultaneous Economic and Political Reform, in: Greenberg et al. (1993, 267–275), Murrell (1995), Stiglitz (1999), Gryzmala-Busse and Luong (2002), Easter (2002), Ekiert and Hanson (2003), Bohle and Greskovits (2007), Elliot (1995), all examining the promises and dilemmas of capitalist transition and economic transformation in the context of post-communist society.

[10]See e.g. Trubek and Galanter (1974).

[11]See e.g. Nellis (2002).

industrial, financial,[12] commercial,[13] or agricultural branches of the economy.[14] The most that this type of examination can provide is, thus, a comparative analysis of privatisation of formerly communist industrial or agricultural holdings, or of privatisation of the social housing in various former communist states.[15] While the treatment of privatisation as a discrete matter in the economic literature is understandable, given the wide variety of privatisation schemes adopted in the post-communist world, it also has a major drawback. It cannot offer the necessary syntheses, which would further support normative arguments in favour of privatisation. Such a drawback is particularly important in the case of economic scholarship, because the economic literature often advances strong normative evaluations of privatisation and prescriptions for the preferential use of this legal instrument in alienation of the communist state's property.

This lack of synthesis also extends beyond the field of economics, to fields such as *Law* or *transitional justice*. In these areas, unlike in economics, more attention is paid to restitution, the other legal instrument utilised for the transformation of communist property. Restitution is seen as a discrete matter, and comparative analyses of various schemes of restitution in the former communist countries are provided in such studies.[16] As in the case of the economic literature, this treatment of restitution as a discrete matter in scholarly fields other than economics is understandable. A wide variety of restitution schemes were adopted in the post-communist period. However, this treatment of restitution presents a major drawback. It cannot offer the necessary syntheses, which would further support normative arguments either against restitution or in favour of privatisation, which the academic literature advances.

In contrast to this scholarship, the present study takes a holistic approach. It argues that the post-communist transformation of property should be analysed from the perspective of both instruments used to accomplish the transformation, privatisation and restitution. This study presents a more comprehensive analysis of the post-communist privatisation than that which is usually found in legal scholarship, as well as clear criteria to distinguish privatisation and restitution. Furthermore, the study offers a new framework for the understanding of post-communist property transformations, in which both privatisation and restitution are seen in their mutual interplay. An awareness of the interplay of privatisation and restitution allows us to avoid the inconsistencies and tensions apparent in the scholarship that treats restitution and privatisation as discrete matters and in isolation from one another. Such inconsistencies and ambiguities are illustrated for example by Offe and Bönker's imperfect normative framework for the assessment

[12]See e.g. Clarke et al. (2005), Bonin et al. (2005), Hawkins and Mihaljek (2001).

[13]See e.g. Earle et al. (1994), Radosevic and Rozeik (2005).

[14]Turnock (1998), Csaki and Lerman (1997).

[15]See e.g. Lux (2001), Pichler-Milanovich (2001), Kingsley and Struyk (1992).

[16]See e.g. Kuti (2009).

of post-communist restitution, which is discussed in more detail in the fifth chapter of the book.[17] These inconsistencies and ambiguities can be found in relatively large numbers in the literature dealing with the post-communist transformation of property. They cannot be avoided unless the interplay of privatisation and restitution, in shaping the transformation of communist property, is taken in consideration.

Nevertheless, any work that provides an overview of broad social, economic and legal transformations, such as those involved in the post-communist transformation of property, is necessarily subject to several limitations. Amongst these limitations, the most severe is that such a study must be selective in terms of the issues chosen for consideration. In the context of the post-communist transformation of property-and the remarkable variety of restitution and privatisation schemes adopted in different post-communist countries-this entails focusing on only some of the various schemes for the sake of synthesis and brevity. This sacrifice represents a limitation of this book, which deals more in abstract terms with post-communist privatisation and restitution, to the detriment of detailed, empirical analyses of privatisation and restitution schemes that have been implemented in particular countries.

As a work of synthesis, this study also moves rapidly over many issues that would deserve more exhaustive treatment. For example, the book provides a rather sketchy overview of the interplay of law, ideology, politics and economic change in shaping ideas about how communist property should be transformed in particular communist countries. Any post-communist CEE country presents particularities in this regard, particularities which reflect the great variety of privatisation and restitution schemes that have been adopted in the region.

In addition, this book has, of necessity, only been able to deal in a relatively limited way with such questions as the constitutional and doctrinal influences in various CEE states that have shaped post-communist outcomes of privatisation and restitution. Similarly, the study has not been able to explore in detail the particular political arrangements and constitutional structures that have been instituted in various post-communist countries and such issues as how these arrangements may have influenced the outcomes of privatisation and restitution. Finally, the book presents only a cursory analysis of matters such as judicial training and strategic planning in particular CEE countries and whether such matters have had an influence on the implementation of privatisation and restitution laws.

A more complete treatment of these issues would not have been possible in the comparatively limited space afforded by a book, without sacrificing the synthesis that lies at the heart of this study. An analysis of the additional issues outlined above, in special in relation to ‘restitution’, would also have added little to what is already known. To take an example, the post-communist CEE countries share the

[17]Claus Offe and Frank Bönker, ‘A Forum on Restitution. Essays on the Efficiency and Justice of Returning Property to its Former Owners,’ *2 E. Eur. Const. Rev. 30 (1993)*; Claus Offe and Frank Bönker, ‘The Morality of Restitution: Reflections on Some Normative Questions Raised by the Transition to Private Economy,’ in Offe (1996, 105–131).

continental, Civil Law tradition. Their legal systems, even under communism, were shaped by this legal tradition.[18] The influence of this tradition in the development of the post-communist constitutional thought is already well documented in the scholarship.[19] On the other hand, the specific influence of German or French constitutional thought on post-communist constitutional ideas related to the transfer of communist property is less documented. For example, one of the best studies in English, of such influences, concerns Hungary. In this country, constitutional ideas of German import influenced the elaboration of the Hungarian Constitutional Court's doctrines and shaped the constitutional outcomes of post-communist laws, most notably in the case of 'restitution.'[20] But Hungary presents many constitutional particularities, not necessarily shared by other countries of the region.[21] Thus, a detailed discussion of these variable influences on the elaboration of post-communist constitutional thought, and indirectly, on the outcome of privatisation and restitution laws in particular CEE countries, would incommensurately have added to the length of the book. In addition, while analyses of restitution can already be found in English, similar analyses of privatisation are much harder to be found. This is due, in large measure, to the fact that both constitutional and regular courts in the region, as well as international judicial and quasi-judicial bodies, including the ECtHR, the ECJ, and the Human Rights Committee constituted under the ICCPR, have rarely involved themselves with the very technical business of privatisation. It is also true that a rigorous empirical analysis of the external doctrinal influences that have shaped particular CEE countries' post-communist constitutional thought, in matters related to privatisation or restitution, would involve the analysis of materials on restitution that are available elsewhere and of materials on privatisation that are difficult or even impossible to find. Faced with this dilemma, I opted for a treatment of restitution and privatisation that emphasis the similarities of the problems faced by post-communist countries in matters relating to restitution and privatisation.

As for the influences that matters such as judicial training or strategic planning may have had with respect to the implementation of privatisation and restitution laws in various CEE post-communist countries, I have chosen to emphasise the similarities between these countries, rather than the dissimilarities. In the case of judicial training, this approach is justified by the fact that there was no general EU 'model' that could have been adopted by the post-communist countries.[22] The French model, which is not necessarily the closest to an ideal type of training provided in the 'western' EU countries, was adopted by most post-communist CEE countries, as a result of French technical assistance.[23] In any event, this model was

[18] See e.g. Ajani (1995), Osakwe (1985).

[19] See e.g. Sadurski (2008), Procházka (2002).

[20] See e.g. Dupré (2003).

[21] For example, a strong constitutional court in the early post-communist period. See Scheppele (1999).

[22] Piana (2007).

[23] *Ibid*.

adopted years after the post-communist judiciary began to adjudicate on aspects of the restitution and privatisation laws. Thus, it is doubtful that this external influence on judicial training in the CEE played any significant role in the implementation of the post-communist restitution and privatisation laws. It is safer to assume that the communist legacy was more important in this respect, although further research is needed to determine what role this legacy may have played in particular CEE countries. In any event, there is continuing debate as to whether judicial training post 1989 has helped the CEE judiciaries to bring their interpretative ethos in line with that of their western EU counterparts.[24]

A more differential treatment appears, however, to be warranted in the case of the influence of the post-communist strategic planning with respect to privatisation and restitution laws, even if recent literature stresses the absence of such planning in the early post-communist period.[25] Various outcomes, mainly of restitution, are, nonetheless, discussed in the book, including outcomes resulted from variations in strategic planning. Also discussed in the study is the instrumentalist view of the law adopted by post-communist lawmakers. The book also examines the unwarranted assumption of post-communist planners that an administrative bureaucracy, which preserved all the unpleasant characteristics of the communist-era state bureaucracy, would be capable of implementing in a 'just' or satisfactory manner even the best-designed laws and regulations. These issues, concerning the planning and elaboration of laws transferring communist property, are common to all of the post-communist countries of the CEE region. They warrant more detailed treatment that is possible in this book.

This study also provides, at least in outline, an analysis of the influence of the EU and of other significant international actors in shaping various policies of communist property transfer in CEE countries. These influences, and in particular that of the EU, have been important and deserve more scrutiny. Nevertheless, the author believes that there are good reasons for dealing with the transfer of communist property, in this study, as having derived generically from the 'Washington Consensus,' and for not discussing the (variable) influences that the EU or other significant international actors may have had on any specific CEE country.

Among these reasons, the most important is that the process of transforming communist property into private property was well underway in most of Central and Eastern Europe before the EU's economic conditions and legislation began to

[24]See e.g. Kühn (2004), Łetowska (1997).

[25]See e.g. Ágh (2010), discussing the frequent changes in the post-communist CEE governments and the difficulty of strategic planning of the transition; Bohle and Greskovits (2009, 51), showing that the CEE governments turned to ad hoc and temporary measures to ease the pain of adjustment and lay the basis for new investment; Orenstein (2008, 86), stressing the lack of strategic thinking during the transformation of the communist welfare state, and the adoption of emergency measures to respond to the social problems posed by the economic transformation.

impact strongly and visibly on the CEE accession countries in the latter 1990s.[26] For example, the EU adopted the so called *Copenhagen Criteria*, to be fulfilled by former communist countries wishing to enter negotiations to adhere to the EU, only in the wake of the Yugoslav wars. These criteria, adopted at the Copenhagen European Council, in June 1993, arguably played an important role in the process of negotiating the entry of these former communist countries in the EU, and helped to shape the transformation of the legal systems of these countries. Nevertheless, by the time of the adoption of the *Copenhagen Criteria*, privatisation and restitution laws had been in force in force in the ex-communist countries for at least 2 years. Thus, these criteria did not retroactively 'shape' the CEE restitution and privatisation laws, which were already producing effects when the criteria were adopted.

Moreover, the ratification of the *European Convention on Human Rights* (ECHR) by the former communist countries was only realised after 1992. By that time, the bulk of the privatisation and restitution laws had already been enacted in the region and these laws were producing effects. However, as the post-communist lawmakers continued to adopt restitution or privatisation laws after their respective countries had ratified the ECHR, it is clear that the Convention, and, in particular the case law of the ECtHR interpreting the Convention, played a role in shaping these laws. This role is acknowledged in the book. Nevertheless, the Convention played, at best, a rather minor role when the restitution or privatisation laws were first debated and enacted in the CEE post-communist countries. Moreover, it is important to note that the ECtHR lacks jurisdiction, *rationae temporis*, to adjudicate on issues relating to legislation concerning property, where the legislation in question was adopted by CEE countries prior to their ratification of the ECHR.

In addition, and as shown by international relations theorists such as Peter Govan, most of the first decade after 1989 was dominated by EU trade policies towards the former CEE countries which encouraged property transformations, privatisation or unilateral 'liberalisation' of trade by CEE countries, but not necessarily the lifting of cold war trade barriers imposed by the western countries.[27] Thus, the EU appeared to support the *Washington Consensus* at the moment when privatisation and restitution laws were first enacted and implemented by the post-communist countries, rather than a broader agenda centered on positive obligations derived from constitutional principles or Human Rights.[28] This preference for the 'market economy' and, at least implicitly for privatisation, is also shown in the workings of the OSCE, one of the most successful international actors concerned with elaborating the principles of the new European constitutional architecture.[29]

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[26]Pridham (2005, 194).

[27]Peter Gowan, '*Neo-Liberal Theory and Practice for Eastern Europe*,' *New Left Review* (1995).

[28]Such an agenda, if it existed in any coherent way, it was adopted at a later date.

[29]See e.g. Steves (2001, 347), discussing the OSCE Bonn summit of April 1990, when all member states accepted the principles of the free market. This summit preceded the OSCE Paris summit in November 1990, where the norms of behaviour for democratic states were formulated in the so called *Paris Charter.*