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Post-communist Property Reparations: Fulfilling the Promises of the Rule of Law?

Abstract. Property reparation programs undertaken in Central and Eastern Europe after the fall of the communist regimes fail to fulfill ‘the promises of the rule of law’. Reparation schemes do not have an exclusively reparative nature, moreover, reparation was deliberately linked with structural reform, and due to this duality, the scheme features a mixed distributive-reparative character. This resulted in two troublesome aspects: on one hand, there is no evidence of a compelling argument, which justifies the mitigation of past property deprivations at large. On the other hand, it can not be satisfactorily demonstrated why property-related injustices enjoy a privileged status when it comes to reparations, in comparison to other types of losses. Further, bearing in mind the Hayekian objection towards distributive justice, even those who had been placed in an equal situation—i.e. all suffered past property injustices—are not offered an objectively equal opportunity to claim redress. Due to the fact that the schemes addressed reparations—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 reparation between the same limitations, while everyone suffered losses of different extent. 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 reparation schemes lead in practice to the creation of winners and losers of reparations, to a breach of the idea of formal equality before the law. In the conditions in which reparation schemes fall short from a thick conception of the rule of law (justice, rights or objective equality) it worth investigating, whether requirements of a thin reading—focusing on foreseeability, clarity and consistency—are still met by post-communist property redistribution. Unfortunately at least under three aspects—valuation, time limits and probation—the reparation schemes’ provisions are not beyond criticism. The complexity of tasks that transition societies had to face is obvious and uncontested. Transitional law, according to Teitel, is a sui generis paradigm, a vehicle of social, political and ideological transformation. The amendments to the rule of law ideal, justifiable in the context of transition can go as far as—for example—to allow governments to decide upon the concrete form of the reparation, the type of wrongs it want to address, the period in time intended to be covered. But they may not create winners and losers; they may not distinguish between those placed in the same situation.

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This paper analyzes the property reparation programs of post-communist Central and Eastern Europe from the perspective of the rule of law. Its central argument is that ultimately these schemes fall short from fulfilling what Skapska stylishly calls “promises of the rule of law.”¹ Writing about the essence of the rule of law, Raz notes that law should be able to actually guide human conduct.² 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.³

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”—tells us Cass.⁴ The question that arises than is: were reparation 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. 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.”⁵ Moreover, law is essentially good, because there are good reasons to have law and be governed by it—adds Marmor.⁶ 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 law ideal.⁷

Unfortunately, post-communist reparation schemes are problematic exactly under the above-mentioned features, which are thought to be essential for the rule of law ideal. The argument starts with the idea that property reparation schemes do not have an exclusively reparative nature, moreover, reparation was deliberately linked with structural reform, and due to this duality, the scheme features a mixed distributive-reparative character. This, however,

¹ Skapska, G.: Restitutive Justice, Rule of Law, and Constitutional Dilemmas. In: Czarnota–Krygier–Sadurski (eds.): *Rethinking the Rule of Law After Communism*. Budapest, 2005. 215.

² Raz, J: *The Authority of Law*. Oxford, 1977. 211–212.

³ Teitel, R. G.: *Transitional Justice*. Oxford, c. 2000. 11–27.

⁴ Cass, R. A.: *Property rights systems and the rule of law*. http://ssrn.com/abstract_id=392783, 2.

⁵ Neumann, M.: *The rule of law: politicizing ethics*. Burlington, VT, 2002. 45.

⁶ Marmor, A.: *The rule of law and its limits*. <http://ssrn.com/abstract=424613>, 53.

⁷ *Ibid.* 10.

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, i.e. objective equality of opportunities is preferred to a subjective equality.⁸

Building on this finding, one of the essential requirements that reparation schemes have to live up consists in offering objectively equal opportunities to those placed in an equal situation. However, the various limitations that are placed on reparations (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, proposed by Raz, according to which it needs not to produce just outcomes,⁹ and accepts the functionalist view, which expects not more and not less than (reparation) laws to be predictable, coherent and consistent, may find that post-communist schemes fall short in some aspects (quantification, deadlines, evidence) from the requirements of a thin version of the rule of law too.

Before addressing the issue of limited reparations, the justness of the entire scheme has to be assessed. Starting from Raz's argument, according to which justice is an ideal distinct from the rule of law, completed with Radbruch's view of the relationship between these two ideals as an antinomy between two essential elements of legality,¹⁰ it seems that this contrast is most difficult to deal with in regime change contexts.

One compromising attempt is represented by Teitel's argument, which maintains that in transitions, law's role itself is transitional and not foundational. Transitional jurisprudence's task is to bridge conventional legality and radical transformation. Which values prevail in this conflict—argues the author—are ultimately determined by particular historical and political legacies.¹¹ To these factors the—economical and political—interests of the emerging new elite can be added, even accepting the amendment that present interests are to some extent contingent upon the legacies of the past.

⁸ Hayek, F.: *The Road to Serfdom*. University of Chicago Press, c1991. 59.

⁹ Raz, J.: Rule of Law and Its Virtue. In: Cunningham (ed.): *Liberty and the Rule of Law*. Texas, 1979. 4.

¹⁰ Radbruch, G.: *Rechtsphilosophie*. Heidelberg, 1987.

¹¹ Teitel: *op. cit.* 215.

More importantly, however, it can be argued, that while the above-enumerated elements determine the prevailing values of transition, the appropriateness of the choice is function of the effectiveness of the chosen value in fulfilling the envisaged objectives. In other words: if radical transformation is the order of the day, and all this is done in the name of justice, the outcome of the process should be demonstrably just. Otherwise, lofty principles of justice will serve only as facades to arbitrariness. But property reparation schemes feature two troublesome aspects from this point of view. On one hand, there is no evidence of a compelling argument, which justifies the mitigation of past property deprivations at large. On the other hand, it can not be satisfactorily demonstrated why property-related injustices enjoy a privileged status when it comes to reparations, in comparison to other types of losses.

The linking of property reparations with reforms resulted in two broad and distinct goals that were expected to be realized through reparations. On one hand, to compensate individuals for the property losses they suffered as a consequence of unjust governmental actions. On the other, to resettle property relationships so as to achieve certainty in possessions which was regarded as a precondition for the creation of an efficient market economy. The processes were generally envisaged as being guided by the principles of the rule of law.

Such is the case of Hungary, where property compensation had a declared social goal. Or, in Poland, the Constitutional Tribunal identified “a beneficial social aspect” of the compensation scheme dealing with the properties left beyond the Bug River.¹² Similar conclusion was reached by the Estonian Supreme Court,¹³ arguing that “ownership reform was undertaken in public that is in general interests. Ownership reform is a specific task of the state in building up a rule of law state and a market economy.” The Lithuanian Constitutional Court has managed to find some social goals in reparations too, arguing that “[t]he restoration of the rights to land has actually meant process of agrarian reform. [...] The restoration of the rights of ownership and land reform are inseparable processes. The restoration of the rights to land was the basic means for implementing of land reform.”¹⁴

Contrary views have been voiced, for example, by the Czech¹⁵ and the Latvian¹⁶ courts, which both held that the goal of restitution laws is (reparative)

¹² K 2/04. Judgment of 15th December 2004, concerning the right to offset the value of property left in the former Eastern territories of Poland.

¹³ Decision 3-4-1-10-2000, of 22 December 2000.

¹⁴ On restoration of citizens' ownership rights to land, decision of 8 March 1995.

¹⁵ I. US 38/02, judgement of 24 March 2004.

¹⁶ Case No. 04-01(99), judgement of April 20, 1999.

justice, i.e. the rectification of past wrongs, without mentioning any related social aims. This statement of the Constitutional Court is especially interesting in the case of the Czech Republic, where commentators identified, at least at the moment of the adoption, additional purposes of reparations, alike those that were mentioned above. According to Cepl for instance, the new political elite considered restitution as helpful means in speeding up privatization and developing market economy.¹⁷ However, it seems that by 2004 the Court managed to find a narrower ratio legis behind the restitution scheme.

According to Stephen Holmes, the economic rationale could fail out of consideration of efficiency: record-keeping was poor under communist administration, the judiciary is under-sized and under-educated, and promises to restore property in kind creates serious uncertainty in possessions.¹⁸ Fact is that, for example, the Romanian restitution process generated about 1 million lawsuits¹⁹ and as of 2007, the process has not been terminated. Albeit, argues Holmes, “even if restitution is both economically inefficient and morally unjust, it is good policy,”²⁰ because it helps legitimating the new property system, by preventing the former communist elite from appropriating (all) state assets. “Good policy,” however, does hardly further the case of the rule of law.

Undoubtedly, by adding additional aims to property reparations, as land reform, establishing the preconditions of a market economy etc. a strong distributive aspect of reparations is created. Kutz notes, for instance, that because on one hand communist takings of property were generally maintaining a semblance of legitimacy, and on the other hand the communist regimes are ‘off the stage’, post-communist reparations are pushed towards a more distributive approach to compensation.²¹

The UN Human Rights Committee has stressed in the case of *Somers v. Hungary*, that objective compensation criteria of compensation have to be applied equally and without discrimination.²² Patrick Macklem considers that

¹⁷ Cepl, V.: A note on the restitution of property in post-communist Czechoslovakia. (7) *Journal of Communist Studies* 367, 1991, also quoted by Crowder, R. W.: Restitution in the Czech Republic: Problems and Prague-Nosis, (5) *Indiana International and Comparative Law Review*, 237.

¹⁸ Holmes, Stephen in A Forum on Restitution: Essays on the Efficiency and Justice of Returning Property to Its Former Owners. *East European Constitutional Review*, 1993. 32.

¹⁹ Verdery, K.: *The Vanishing Hectare: property and value in postsocialist Transylvania*. Ithaca, N.Y. 2003. 46.

²⁰ Holmes: *op. cit.* 33.

²¹ Kutz, Ch.: Justice in Reparations: The Cost of Memory and the Value of Talk. (32) *Philosophy & Public Affairs*, 2004. 298.

²² CCPR/C/57D/566/1993, Decision of 29 July 1996, para. 9.4.

this language is urging governments entertaining compensatory schemes to pay close attention to the demands of distributive justice.²³ The Hungarian Constitution Court recognized this a couple of years earlier, when it argued that the constitutionality of the compensation law has to be assessed on the basis of distributive justice, taking into consideration not merely the interests of the victims, but also the concurrent constitutional tasks.²⁴

Turning to the two troublesome aspects mentioned above, the first fundamental question that needs an answer is whether communist takings of property demand reparations or not? Undoubtedly, Article 8 of the Universal Declaration of Human Rights creates a right to effective remedy for acts violating fundamental rights guaranteed by constitution or by law.²⁵ A similar provision is reiterated by the International Covenant on Civil and Political Rights.²⁶ Commentators note, however, that the scope and content of the right to redress is fuzzy and unclear, and it does not necessarily create an obligation to compensate every type of violation. Although a right to compensation is consistently recognized for victims of serious violations (such as torture, forced disappearance, extra-legal executions etc.).²⁷

In addition, even if the major international documents, such as the Universal Declaration,²⁸ a protocol to the European Convention on Human Rights²⁹ or the European Union's Charter of Fundamental Rights³⁰ mention the right to property, none of them recognizes a right to restitution.

In the case of *Somers v. Hungary*, the UN Human Rights Committee held that the Covenant did not protect the right to property, and therefore "there is no right, as such, to have (expropriated or nationalized) property restituted." On the other hand, the Committee also noted, that the Covenant itself entered into force with respect to Hungary in 1976, and therefore the Hungarian state

²³ Macklem, P.: 1 Rybná 9 Praha 1: Restitution and Memory in International Human Rights Law. (16) *European Journal of International Law*, 2005. 10–11.

²⁴ HCC, AB 15/1993, 1543/B/1991.

²⁵ Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

²⁶ Art. 2 (3) of the International Covenant on Civil and Political Rights, G. A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

²⁷ Orentlicher, D. F.: Addressing Gross Human Rights Abuses: Punishment and Victim Compensation. In: Henkin and Hargrove (eds.): *Human Rights: An agenda for the next century. American Society of International Law*, 1994. 449.

²⁸ Universal Declaration of Human Rights. *op. cit.* art 17.

²⁹ European Convention on Human Rights, Protocol 1 Enforcement of certain Rights and Freedoms not included in Section I of the Convention of 20 March 1952, art. 1.

³⁰ Charter of Fundamental Rights of the European Union, 2000/C 364/01, art 17.

may not be held responsible under its provisions for facts that occurred before that date. A similar conclusion was reached by the European Court of Human Rights in the case of *Jasiūnienė v. Lithuania*, where the Strasbourg court refused to examine the nationalization of the claimant's land, on account of *ratione temporis* lack of competence.³¹ At the same time, the Court stated that the Convention does not guarantee the right to restitution of property. This argument was repeated also in *Rucińska*,³² and refined in *Broniowski*.³³ Neither the hope that long extinguished property rights may be revived, nor a conditional claim which has lapsed as a result of failure to fulfill the condition, can be regarded as 'possession', in the meaning of the Convention and its Protocol No.1. Albeit even if there is no clear-cut standard for property restitution in international law, the obligation of successor regimes to repair the wrong done by their predecessor is unequivocally formulated.³⁴ Moreover, it may also be invoked that general principles of international law also assert the requirement of prompt, adequate and effective compensation for the expropriation of property. But in *James and others*, the European Court of Human Rights pointed out that the principles in question apply exclusively to non-nationals, thus they do not govern the treatment accorded by the states to their own citizens.³⁵

Symmetrically, most contemporary constitutions enumerate property among the protected rights, albeit merely takings, and not restitution are constitutionally regulated. At a domestic level, however, things are even more complicated, and reparation efforts face serious dilemmas related to the retrospective/prospective or individual/collective dimensions of reparations.³⁶

Kutz argues that "expropriation on its own is not a categorical wrong like murder or political repression; it does not by its very nature vault to the head of the line for repair."³⁷ Posner and Vermeule, argue that property is always uncertain in domestic law, due to the government's freedom to regulate that property at any time. However, add the authors, such unsettling of property

³¹ *Jasiūnienė v. Lithuania*, Application no. 41510/98, Judgement of 6 March 2003, para. 38.

³² *Rucińska v. Poland*, European Court of Human Right, Application no. 33752/96, Decision of 27 January 2000.

³³ *Broniowski v. Poland*, ECHR, Application no. 31443/96, Judgement of 22 June 2004, para. 182: Article 1 of Protocol no. 1 "does not guarantee a right to full compensation in all circumstances."

³⁴ Meron, Th.: *Human Rights and Humanitarian Norms as Customary Law*. Gloucestershire, 1991. 171.

³⁵ *James and Others v. United Kingdom*, Application no. 3/1984/75/119, Judgement of 22 January 1986, para. 58–65.

³⁶ Teitel: *op. cit.* 119.

³⁷ Kutz: *op. cit.* 285.

rights is tolerated, if it promotes a pressing social goal and its achievement does not significantly undermine the market.³⁸ Of course, this reasoning applies within the framework of a market economy. Still, a Hungarian Constitutional Court opinion cited in the foregoing paragraphs of this chapter, managed to declare some of the nationalization decrees as unconstitutional, exactly because their goal could not be defended on the basis of social need, while their finality was the liquidation of an entire property class.³⁹ (A quite contrary view was voiced by the Romanian Supreme Court, which held that the manner in which nationalization decrees have been applied could not be reviewed by the courts.⁴⁰) The Hungarian Court's arguments back Sadurski's critique⁴¹ of Posner and Vermeule: communist takings were not promoting a pressing social goal, and they did significantly undermine the market (by basically terminating it), thus they fundamentally differ from 'normal' takings, accordingly the tasks for the post-communist governments in handling past legacies were fundamentally different too.

As it was already hinted at in the foregoing passages, the legality of communist takings is controversial too. In many cases, the nationalization and confiscation failed to comply with the then existing legal requirements. But while legal takings are difficult to challenge, there is a much stronger case against illegal (or de facto) takings. One example of holding communist nationalization decrees unconstitutional is the above-cited example of the Hungarian Constitutional Court. Failure to comply with obligations assumed through international conventions is another example in this sense: the above described cases of the properties left over the Bug River, and the Hungarian-Czechoslovakian population exchange agreement illustrate the problem. Another good example in this sense is Decree no. 52 of 1950 issued by the State Council of the People's Republic of Romania, which led to the nationalization of a large number of houses and apartments. The decree disregarded constitutional guarantees, as it provided that the expropriated goods are transferred to the state without

³⁸ Posner, E. A.–Vermeule, A.: *Reparations for Slavery and Other Historical Injustices*, (103) *Columbia Law Review*, 2003. 68.

³⁹ HCC, AB 27/1991, 91/E/1990, *supra*.

⁴⁰ For further details: *Brumarescu v. Romania*, ECHR, Application no. 28342/95, Judgement of 28 October 1999, para. 15–20.

⁴¹ Sadurski, W. S.: "Decommunisation". "Lustration", and Constitutional Continuity: Dilemmas of Transitional Justice in Central Europe. Florence, *EUI Working Paper Law*, 2003. 15.

any compensation.⁴² The Lithuanian Constitutional Court has found that the “nationalization and other unlawful socialization of property” was started by the occupation government (i.e. Soviet Union). Therefore, even if the post-communist government cannot be held responsible for the actions of the occupying forces, steps had to be taken towards the restoration of rights of people which had been violated.⁴³

Thus, under those circumstances in which the illegality of the takings can be demonstrated, there are strong reasons to recognize the ‘survival’ of former property rights, even if the state withholds the discretion to decide upon the concrete form of the compensation which may be granted in these cases. A category of exceptional cases is represented by the situations in which the state assumed an obligation (to compensate property losses) which was never fulfilled. In these situations, the right to compensation should be recognized as flowing from the state’s lack of compliance—as the Hungarian Constitutional Court put it: constitutional omission⁴⁴—rather than made function of an *ex gratia* allotment. The major problem with *ex gratia* reparation is that governmental benevolence does not equate with justice. Official magnanimity does neither presume (recognize) the existence of entitlement, nor of any governmental obligation towards their holders. Such compensation, alike presidential pardon, is rather about those who exercise the discretion, than those who benefit from it. This constitutes one of the main controversies of the Hungarian compensation law (no. XXV of 1991): the preamble speaks about the principles of the rule of law and the society’s sense of justice, but at the end of the day, the entire scheme is made a function of state generosity.⁴⁵

Critiques of the *ex gratia* approach to reparations have pointed it out that even acts of grace have to conform to constitutional requirements, and for instance should not affect the fulfillment of the state’s constitutional, international or previously assumed legal obligations. According to this view, even the sequential approach to reparation (the periodicity of regulation, as opposed to the periodicity of execution) may appear problematic. Finally, it must be noted that magnanimity is classically regarded as a measure destined to

⁴² The Constitution of 1948, art. 10 provided that expropriations can be effected only for a public utility, through law and upon the payment of just compensation established by the judiciary.

⁴³ LiCC, Ruling of 27 May 1994, and Ruling of 20 June 1995.

⁴⁴ HCC, AB 16/1993, 1378/E/1990; AB 37/1996, 837/E/1995; AB 45/2003, 960/B/19995.

⁴⁵ HCC, AB 21/1990, 1057/G/1990.

attenuate the consequences of the application of harsh laws, and not as a lawmaking principle.⁴⁶

A peculiar case is the one of those who lost property as a consequence of their opposition to the regime, as an accessory punishment to criminal convictions. In many post-communist states, laws for the rehabilitation of those subjected to repression for political reasons were enacted. Rehabilitation also created the possibility to claim compensation for the property losses suffered.

Interestingly, the Venice Commission, in its Opinion on the Albanian Draft Law on Recognition, Restitution and Compensation of Property, considered that the “practicable solution” would be that instead of the recognition of original, pre-expropriation ownership, the compensation acts should create the title for regaining property.⁴⁷ In this regard, it worth noting the arguments of the Romanian Constitutional Court as to the contrary. The Court emphasized that in the case of properties, which were transferred into the state’s possession through an unlawful act, or without any legal basis, the individual’s legal right has never been extinguished. This means that symmetrically, the state has no ownership rights, and therefore these properties cannot be covered by the same acts, which regulate the legal status of property that passed into state ownership. To hold otherwise, would either confer a retroactive effect on such a norm, or create a form of taking unknown to the constitution.⁴⁸

The second troublesome question that reparation schemes face is why do only certain wrongs committed under the preceding regime deserve compensation? In other words, what makes the difference between various past wrongs that justifies reparation? There are three possible justifications worthy of discussion: the recognition and protection of rights, the idea of past harm, and the principle of political persecution.⁴⁹

In post-communist context it is rather difficult to ground property reparation on the idea of rights. The communist regimes that effected the takings made use of their legal powers to do so, except for the cases where takings took place under military occupation, in breach of the existing legal provisions governing expropriation, or the state simply failed to fulfill its obligations regarding compensations. Thus, as Teitel observes, “[p]roperty rights entitlements arising

⁴⁶ Sajó, A.: A részleges kárpótlási törvény által felvetett alkotmányossági kérdések [On the constitutional problems raised by the partial compensation bill]. (34) *Állam és Jogtudomány*, 1992. 200–201. and 220.

⁴⁷ European Commission for Democracy Through Law, Opinion no. 277/2004, CDL-AD (2004) 009, para. 9.

⁴⁸ RCC, Decision no. 73 of 19 July 1995.

⁴⁹ Teitel: *op. cit.* 132–134.

out of past wrongs are constructed *ex post* and are, simultaneously self-referential and justificatory of present property distributions.”⁵⁰ But, the right to property is neither the sole, nor the paramount fundamental right recognized by post-communist constitutions.

The principle of past harm, as a normative value, does not offer enough guidance in justifying property reparations, at least in the post-communist context. And that because it simply sweeps too broad. As Elster remarked, “essentially everybody suffered under communism”.⁵¹ Some were imprisoned, placed under secret surveillance, had their books placed on index, barred from leaving the country or many simply lost career opportunities or suffered other losses. István Pogány noted that “the economic consequences of expelling Jews from certain sectors of employment [...] was at least as severe, for the individuals concerned and for their families, as the confiscation of property proved for others.” The obvious result, to which the principle of past harm has to lead therefore, is universal and equivalent reparations.

Therefore, the third justification, namely political persecution (discrimination) needs to be brought into play. The above-mentioned Hungarian Constitutional Court decision did also relay on the discriminating feature of past takings, while attempting to demonstrate their lack of compliance with constitutionally protected values. The argument of the Court maintained that the notion of public utility does not extend to takings that stigmatize or discriminate against individuals or groups.⁵² The nationalization process initially was targeting the assets of a certain class, later properties of a certain size, and finally the near complete annihilation of the institution of private property.

Discriminative taking, as a ground for reparation appears perhaps most obvious in the case of Holocaust restitution. In Hungary, after the fall of the right-wing regime, an impressive number of decrees issued between 1945 and 1947 provided for the return of immovable and movable goods—especially those pertaining to small businesses—and regulating the faith of heirless properties.⁵³ In post-war Czechoslovakia, Decree no. 5 annulled all transactions that occurred on the basis of racial or political persecution under the German Reich beginning with 29 September 1938. This was soon reconfirmed by Law no. 128 of 1946. Of course, Holocaust reparations take place in an entirely different context:

⁵⁰ *Ibid.* 133.

⁵¹ Elster, J.: *On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution.* (1) *East European Constitutional Review*, 1992. 16.

⁵² Pogány, I.: *Righting Wrongs in Eastern Europe.* Manchester, 1997. 171.

⁵³ Prime Minister’s Orders no. 7590/1945, 3630/1945, 10.480/1945, 300/1946, 12.530/1946, 6400/1947, 5280/1947, and Governmental Decree no. 13.160/1947.

confiscation of Jewish assets was part of a genocidal program, which makes these claims more compelling.⁵⁴

A paradoxical counter-example is represented by the Czech Constitutional Court's decision upon a challenge was targeting the decree on the Confiscation of Enemy Property and the Funds of National Renewal.⁵⁵ The act in question identified as enemies of the nation persons of German and Hungarian nationality, with the scope of subjecting them to property confiscation. The presumption of enmity was refutable if these persons could demonstrate their loyalty to the Czechoslovak Republic. As the Court pointed out, the decree was based on a presumption of responsibility of the German and Hungarian minorities. However, the Court did not find any discriminatory feature in the decree under scrutiny, arguing that the presumption of responsibility is a 'just sanction', a 'proportionate response' to the Nazi aggression, and not a nationalistic revenge.⁵⁶ The question of the "Beneš decrees" was raised at international level in front of the UN Human Rights Committee by a complaint against Slovakia.⁵⁷ Here the applicant alleged that the restitution scheme was discriminatory because it left uncompensated the victims of the 1945 seizures. The Committee, however, found that the scheme does not appear "prima facie" discriminatory, simply because it deals with victims of communism, but ignores the victims of injustices committed by earlier regimes. For these reasons, the complaint was declared inadmissible.

In any case, the criterion of persecution does not give a satisfactory explanation that may justify property reparations. True enough, it helps drafting the pool of beneficiaries by distinguishing those persecuted—the confiscation of dissident's assets is the paradigm—from all the others who may also have suffered some property losses. Still, not only property owners were persecuted under communist regimes, and from a moral perspective, for example persecution that took the form of imprisonment, can not be considered to be less worthy of compensation than confiscation.⁵⁸

⁵⁴ Kutz: *op. cit.* 285.

⁵⁵ Decree No. 108/1945 Sb.

⁵⁶ CCC, Pl. US 14/94. 15–19.

⁵⁷ Peter Drobek, v. Slovakia, Communication No. 643/1995 (31 May 1994), CCPR/C/60/D/643/1995.

⁵⁸ As Offe and Bönker, argue, "it would be morally wrong to let the choice of rectificatory strategies be distorted by the morally irrelevant fact that property can be given back, while years lost in prison cannot." 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*, 1993. 31.

Further, bearing in mind the Hayekian objection towards distributive justice, this paper argues that even those who had been placed in an equal situation—i.e. all suffered past property injustices—are not offered an objectively equal opportunity to claim redress. Due to the fact that the schemes addressed reparations—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 reparations within the same limitations, while everyone suffered losses of different extent.

There are four main aspects under which the limitations placed upon reparations betray egalitarian attempts, while in practice they result in exclusion: person-related limitations (citizenship and residence), quantitative (caps), temporal (cut-off dates), and finally property-based (distinctive treatment according to the nature of the lost property: movable or immovable, various immovable, commercial, religious and communal). 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 reparation schemes lead in practice to the creation of winners and losers of reparations, to a breach of the idea of formal equality before the law.

The most common person-related limitation on reparation is the one that requires for the victims to possess the citizenship and/or to be resident of the state against which they are willing to vindicate their claim to reparation. These requirements were set in order to exclude certain ‘undesirable’ individuals, who left the country during or even prior to the communist takeover. This is the case of the former, pre-communist elite and of the dissidents, and in many cases also of certain ethnic groups, like Sudeten Germans and Hungarians (expelled from post-war Czechoslovakia), Russians in the Baltic States, and Jews in several cases.⁵⁹

Under what I call ‘strict regimes’, both of the above conditions were—at least originally—contemplated by the restitution or compensation schemes, in certain cases a subsequent easement was brought by the courts. Lithuania, Czechoslovakia and subsequently Slovakia managed to stick to the harsh rule, while in the cases of the Czech Republic and Poland the residence condition was considered as unconstitutional and eliminated by the constitutional courts. ‘Milder regimes’ established only one—or, both, but alternatively—of

⁵⁹ Avineri, Sh. in: A Forum on Restitution: Essays on the Efficiency and Justice of Returning Property to Its Former Owners. (2) *East European Constitutional Review*, 1993.

the two criteria. Accordingly, further distinctions may be made depending whether a policy fashioned exclusively the citizenship condition—which is obviously harsher, as it excludes those who lost their citizenship in the meantime—or it accepted also residence as an alternative—obviously milder, as it accommodates also returning expatriates. In this section fall the two other Baltic States, Hungary and Romania. The German solution constitutes an exception, as Property Act⁶⁰ did not envisage any residence or citizenship related restriction on the potential circle of beneficiaries. The initial approach excluded, however from restitution properties taken during the Soviet occupation.

Turning to the issue of quantitative limitations, it can be said that reparation programs differed significantly under this aspect. In the case of Hungary and Poland, original properties were not returned—except for certain religious assets,—merely a partial compensation in form of vouchers, or the possibility to offset the value of the taken property against new acquisitions was offered instead. In the other analyzed countries actual restitution—of the originally taken or in kind—was contemplated, but to different extent: almost all programs included an upper limit on the reparations that could have been received by individual claimants. The question of ceilings is problematic, because instead of giving each individual an equal objective opportunity, it gives an equal subjective possibility to receive compensation within general and equal limits. This treatment goes categorically against the rule of law, according to the above-cited passages from Hayek, as they deliberately produce inequality. What is problematic here is the fact, that these schemes under the guise of equality result in fact in exactly its opposite, as they create an opportunity to full compensation for small holders, while former owners of larger estates necessary receive only a partial redress.

The third type of limitations that were imposed by all reparation programs were related to the cut-off date, i.e. the point in past, which marks the beginning of the period of time that the scheme was meant to cover. As these programs were—at least partially—intended to rectify past injustices, they naturally had to have some definition of this ‘past’. However, even if seemingly objective in its character, the cut-off dates could have been manipulated in such a way so as to discriminate between the victims, and to favor certain groups over another. In post-communist context the various reparation schemes came up with different solutions as to the setting of a cut-off date. Ranging from the Polish case, in which, due to its exceptional character of compensating only a

⁶⁰ Gesetz über Regelung offener Vermögensfragen of 23 September 1990.

rather small category of victims, the cut-off date problem does not exist, as such, to the German approach, which logically and unequivocally rolled back the baseline so as to cover both Nazi and communist era takings, the policies fancy diverging cut-off dates. The Baltic States and Germany represent a fairly unproblematic category from this perspective, as their reparation programs were drafted in such a way so as to include from the outset both Nazi and communist era takings.

Setting a timeframe for reparation law's applicability was an objective necessity: the legislators had to decide how far they intend to reach back into the past for rectifying former property injustices. Obviously, the history of property injustices can not be restricted to Nazi and communist takings. Rectification programs may attempt to deal with wrongs older than a century: the post-colonial examples of Native Indian, Aborigine and Maori claims constitute the relevant paradigm. Of course, to design such a scheme it does not take merely a willing government, but also a significant popular demand in this respect. The relative success of the above-mentioned examples is largely do to the existence of well-organized and goal-oriented organization of former owners, with a significant enough political weight to exert a sufficient pressure on the government.⁶¹ For example, Verdery notes about post-communist Russia, that restitution is impossible because collectivization took place much earlier than in the rest of the communist countries, while the preexisting private ownership structures were extremely unstable.⁶² Accordingly, the absence of a comprehensive reparation scheme is partly do to the lack of surviving victims. This lack of such survivors can be covered by organizations, as in the case of the indigenous claims, or, more closer to Europe, the various Jewish organizations (arguably the most successful of them being the Claims Conference), that sustained with relative success claims for heirless properties. Being an essential element of any reparation program, the cut-off date is, in the same time, a handy tool of exclusion: through the setting of such baselines certain groups of victims can be distinguished and excluded from the benefits of the scheme.

As to what concerns property-based distinctions, it must be said that in most cases the various types of properties were treated separately, sometimes also by separate norms. The most common distinction made by the legislators

⁶¹ For instance, while writing about Maori restitution, Barkan notes that the Maoris count for about 13% of the population; Barkan, E.: *The guilt of nations: restitution and negotiating historical injustices*. New York, N. Y. 2000. 167.

⁶² Verdery: *op. cit.* 91–92, quoting Humphrey, C.: *Marx Went Away but Karl Stayed Behind*. Ann Arbor, MI, 1998.

was the one between agricultural properties (and forestry) and buildings, thus between different kinds of real property. This separation usually meant also a difference in treatment, and this in certain situations resulted in unequal outcomes for the former owners. Another type of—perhaps less artificial—distinction was the one between movable and immovable properties, and this was quite important too, as post-communist reparation schemes mostly avoided to address the issue of movables, a question which, in turn, was more present in Holocaust restitution claims. Finally, a third type of problematic property-based distinction was made on the basis of ownership: some of the programs discern between communal (and various forms of communal) and individual types of holdings, while in every case distinction is also made between commercial and non-commercial properties. Distinctions made according to the certain property objects produce exclusion—the loss of certain objects is simply not compensated, while other objects lost in similar circumstances are—or, attempt to equalize the outcome of the process, by including different categories of property under a broader ceiling.

Finally, in the conditions in which reparation schemes fall short from a thick conception of the rule of law (justice, rights or objective equality) it worth investigating, whether requirements of a thin reading—focusing on foreseeability, clarity and consistency—are still met by post-communist property redistribution.

The European Court of Human Rights, in the *Paduraru* judgment has explained in some details the legal uncertainty that may be engendered by the norms' lack of clarity and coherence. It has also noted that the great number of complaints filed with the Romanian courts for the return of properties or for the annulment of purchase contracts is exactly the product of this uncertainty, while the judges required to decide these cases lack a sufficiently predictable and coherent legal ground. The Court has also noted that diverging outcomes are inherent in adjudication, but the role of the supreme judicial body would be exactly to solve such contradictions in the case law (and pointed towards to Romanian highest instance's indecision on controversial questions of law). Absent a mechanism that ensures coherence in adjudication, persistent and profound divergences in questions of great social interest can lead to the engendering of a permanent uncertainty and a loss of confidence in the judiciary, a fundamental component of "l'Etat de droit".⁶³

Accordingly, even at its most minimalist interpretation, the rule of law must mean the rule of regular and foreseeable law, which, in a perhaps over-

⁶³ *Paduraru c. Roumanie*, CEDH, Requête no 63252/00, Arrêt de 1 decembre 2005, para. 94–99.

optimistic reading may eventually amount to procedural fairness. Unfortunately at least under three aspects—valuation, time limits and probation—the reparation schemes' provisions are not beyond criticism.

The practice of leaving the establishment of the concrete form and extent of the compensation to be received up to further governmental regulations was found unconstitutional in Lithuania⁶⁴ (for breaching rule of law requirements such as clarity, certainty, security and protection of legitimate expectations), but was left unchallenged in Romania. In Hungary, the Constitutional Court found acceptable the government's reluctance to fulfill international obligations relating to compensation, holding that the common solution given by the Compensation law shall be applicable also to those whose original entitlement arose from international agreements.⁶⁵

Deadlines for filing claims to reparation proved unrealistically short, and even in those cases in which they were not challenged in court, they were subsequently prolonged—even repeatedly—to make it possible for more applicants to benefit from the project. In Czechia for instance, the Constitutional Court found the shortness of the deadline as an effective barrier for the applicants in pursuing their rights,⁶⁶ while in Slovakia similar claims were dismissed on the grounds of that special circumstances justify special treatment.⁶⁷ The length of the reparation proceedings was also problematic. The Lithuanian Supreme Court found a breach of the right to effective remedy,⁶⁸ the Estonian Supreme Court spoke about the violation of the requirement of legal clarity,⁶⁹ while the Hungarian Constitutional Court discovered an unconstitutional omission in cases in which the authorities failed to react in reasonable time.⁷⁰

Evidence-related problems have arisen either in combination with the shortness of deadlines (in Hungary, for e.g. it was possible to complete the submitted application even after the deadline has passed, but in Slovakia failure to comply with legal requirements was considered to result in the lapse of the claim), or due to the authorities refusal to allow access certain sites or documents. Further, certain forms of evidence, such as witness testimonies were not allowed in the majority of the analyzed cases. In Poland, for example, a witness-related requirement that in practice precluded anybody younger than 78 years of age

⁶⁴ LiCC, case no. 19/02, Ruling of 23 August 2005.

⁶⁵ For e.g. see: HCC, AB 16/1993, 1378/E/1990.

⁶⁶ CCC, Pl. US 3/94, Judgement of 1 November, 1994.

⁶⁷ SCC, Pl. US 3/00 of 24 April, 2001.

⁶⁸ LiSC, Ruling of 22 May 2000.

⁶⁹ ESC, Case no. 3-4-1-5-02, Decision of 28 October 2002.

⁷⁰ HCC, AB 16/1993, 1378/E/1990.

from depositing in the favor of the applicants, was found to be at odds with the principle of the rule of law.⁷¹ However, a Romanian provision that required depositions to be made by all the owners (or their heirs) of the plots surrounding the claimed land remained unchallenged. Conclusively, in many situations it was up to the constitutional courts to come to the former owners' rescue and clarify problematic provisions. While in some cases the constitutional courts came to the individuals' rescue by striking down some of the problematic legal provisions, or court decisions, in other cases they remained deferential, and upheld the legislative arrangements, and in the third instance, some of the problematic provisions passed unchallenged. Still, a massive involvement of constitutional courts in the reparation process is problematic in itself. As Sadurski notes, strong judicial review system may send a negative message, obscuring the rights discourse and lifting it from public discourse (deliberation) to the small, specialized world of constitutional experts. And this aspect is considered to be at least as important, as the undeniable gains—visible in reparations perspective from the above analysis—of having the legislation monitored by specialized guardians.⁷²

The post-communist governments of Central and Eastern Europe had two main options in entrenching a new political elite resulting from a combination of the old nomenclature and the leaders of the democratic opposition movements, which was experiencing a pressing need for legitimacy after the fall of the totalitarian rule. One was the political option, consisting in demonstrating allegiance towards democratic values and institutions—to the rule of law. Other was the economic option, the creation of a market economy that carried the promise of a well-being characteristic of the much envied capitalist societies.

Unfortunately, the solution chosen was arguably the worst one, as transition governments attempted to achieve both options in the same time, under the false impression that the two totally distinct goals may legitimate and support each other. As this paper argues, it is theoretically untenable to pursue an even (or close to even) distribution of property in the name of reparatory justice on the basis of the argument that this would facilitate better the emergence of a market economy. It is equally wrong to talk about the role of privately owned property in a market economy, as an argument that justifies mitigation of past property injustices.

⁷¹ PCT, K 2/04, Judgement of 15 December 2004.

⁷² Sadurski, W.: *Rights Before Courts. A study of Constitutional Courts in Post-communist States of Central and Eastern Europe*. New York, N. Y. 2005. 298–299.

The complexity of tasks that transition societies had to face is obvious and uncontested. Czarnota, Krygier and Sadurski wrote in this context about the burden that has fallen upon “institutions of justice”, in the attempt to conceal the competing interests and expectations, a process, which resulted in a transformation of “expectations and the realities on which they are based.”⁷³ This view echoes to a certain degree Teitel’s argument on the role of law during transitions. Accordingly, during transition periods, rule of law ideals are applicable only with significant amendments, generated by the tumultuous context of the transformation process. Transitional law, according to Teitel, is a *sui generis* paradigm, a vehicle of social, political and ideological transformation.⁷⁴

The analysis of the various property reparation processes across Central and Easter Europe, however, create and uneasy feeling towards the above-delineated conception of the transitional rule of law. For as it was argued, property reparations pursued a number of goals and not all of them were targeting the greatest benefit of the people. A redrafting of power structures was taking place, a struggle between the elites, which defined to some extent the context of transition, and thus, implicitly, the rule of law ideals, as Teitel correctly noted. Obviously, law had to be responsive to these circumstances of the political change.⁷⁵ Albeit the question that arises is whether one may accept all the outcomes—the distinctions made by reparation schemes, the exclusion of certain groups (of former owners and of types of properties) from the benefits of the program—under the argument that “it is what the law does and it is the reason why law does it”?⁷⁶ Is perpetuation of old (and creation of new) injustices justifiable by the *sui generis* nature of transition?

The answer to these questions, in the light of problems analyzed in this paper must be a categorical no. Regardless, how specific the circumstances of transition from authoritarianism to democracy are, regardless of the transitional tasks of the rule of law, a core, a minimum of the ideal must be recognized as invariably surviving in any kind of regime context (transitional or not), for otherwise there would not be much left to talk about. This—on the footsteps of Krygier—I take it to be the protection against arbitrary exercise of power.⁷⁷ Arbitrary, in property reparations context equates with unjustified

⁷³ Czarnota–Krygier–Sadurski (eds.): *op. cit.* 3.

⁷⁴ Teitel, R.: Transitional Rule of Law. In: Czarnota–Krygier–Sadurski (eds.): *op. cit.* 279–294.

⁷⁵ *Ibid.*

⁷⁶ Krygier, M.: Rethinking the Rule of Law after Communism. In: Czarnota–Krygier–Sadurski (eds.): *op. cit.* 271.

⁷⁷ *Ibid.* 272.

distinctions in the treatment of those placed in an equal situation. Whereas unjustified stands for the lack of any convincing argument that may explain how the envisaged scheme does contribute to a better furtherance of the multiple goals that it proposed to achieve. As it was argued, economic reform and mitigation of past injustices are goals, which can not explain and justify each other.

The amendments to the rule of law ideal, justifiable in the context of transition can go as far as—for example—to allow governments to decide upon the concrete form of the reparation, the type of wrongs it want to address, the period in time intended to be covered. As it was shown in this paper, there are clear-cut guidelines neither in international law nor in legal theory that may shed enough light on these matters. But they may not create winners and losers; they may not distinguish between those placed in the same situation. For transition may come to an end, but the injustices that it entrenched will perpetuate.