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POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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PRIVATE PROPERTIES ISSUES FOLLOWING THE CHANGE OF POLITICAL REGIME IN FORMER SOCIALIST OR COMMUNIST COUNTRIES

STUDY

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PETITIONS

Private properties issues following the change of political regime in former socialist or communist countries Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia

STUDY

Abstract

Some transformations occurred in the area of private property ownership following the change of political regime in former socialist or communist countries. The six analysed countries (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia) illustrate well the whole range of contentious problems in a region where the Communist regimes have varied tremendously in their approach to private property, intensity of social control, repression and overall legitimacy. This diversity of situations poses today different types of dilemmas for the property restitution process and these six countries responded in different manners to these general challenges, in the context of their own peculiar social and economic history.

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DISCLAIMER

FOREWORD

The present research deals with private properties issues in Romania, Bulgaria and the Western Balkans. It consists of two studies: the first one has the title "Private properties issues following the change of political regime in former socialist or communist countries" (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia) and the second one has the title "Private properties issues following the regional conflict" (Bosnia and Herzegovina, Croatia and Kosovo).

The aim of the first study is to analyse the transformations that occurred in the area of private property ownership following the change of political regime in former socialist or communist countries. The six countries looked at are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia. These countries illustrate well the whole range of contentious problems in a region where the Communist regimes have varied tremendously in their approach to private property, intensity of social control, repression and overall legitimacy. This diversity of situations poses today different types of dilemmas for the property restitution process, dilemmas which are approached by each country in a different manner.

The second study - besides sketching out the legal background of international and EU law for property restitution/compensation in the context of the conflict or war in former Yugoslavia - deals with the effects of this conflict in terms of the property issues arising from it; it covers Bosnia and Herzegovina, Croatia and Kosovo. In a civil war or regional conflict, like the one in former Yugoslavia, the members of an ethnic group may be dispossessed by the 'winners' and forced to leave their property or may leave for fear of reprisals; both alternatives result in ethnic cleansing. In the post-conflict phase property restitution/compensation has become a crucial component of the return of internally displaced persons to their homes of origin.

The main question for the countries in both studies is how an emerging democracy can "respond to public demands for redress of the legitimate grievances of some without creating new injustices for others."1 Moreover, property rights and transparency represent the very bases of a functioning market economy: each of the countries faces the difficult task of finding a balance between remedying violations of property rights and guaranteeing a functioning land market, which enables or will enable full freedom of movement of capital in the EU.

[1] Solomon, R.H., 'Preface', in: Kritz, N.J. (ed.), *Transitional Justice,* vol. III, 1995, p. xv.

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LIST OF ABBREVIATIONS

ADS	Agency for Public Domains
AKKP	Albanian Property Restitution and Compensation Agency
BCC	Bulgarian Constitutional Court
BiH	Bosnia and Herzegovina
BMAFLR	Bulgarian Ministry of Agriculture, Forestry and Land Reform
BSP	Bulgarian Socialist Party
CAP	Agricultural production cooperative (Cooperative Agricole de Productie in Romanian)
CASBI	State Commission for the Administration of Assets from Enemies
CCEC	Central Commission for Establishing Compensations
COM	Council of Ministers
CSD	Centre for the Study of Democracy
DFJ	Democratic Federal Yugoslavia
DPA	Dayton Peace Accord
EC	European Commission
ECJ	European Union Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
FNRJ	Federal People's Republic of Yugoslavia
FRA	Fundamental Rights Agency
GDP	Gross Domestic Product
GERB	Citizens for European Development of Bulgaria (Bulgarian abbreviation)
IAS	State owned farms (Romanian abbreviation)
IDP	Internally displaced persons
LCONA	Law on the Compensation of Owners of Nationalised Assets
LOUAL	Law on Property and Use of Agricultural Land
LRNIP	Law on Restitution of Nationalised Immovable Property
LTPSCE	Law on Transformation and Privatisation of State and Communal Enterprises
MP	Member of Parliament
MRF	Movement for Rights and Freedoms
NARP	National Agency for Restitution of Property in Romania
OECD	Organisation for Economic Cooperation and Development
OHR	Office of High Representative for Bosnia and Herzegovina
OJ	Official Journal
OSCE	Organisation for Security and Cooperation in Europe
OTR	Occupancy/tenancy rights
RS	Republic of Srpska
SAA	Stabilisation and Associations Agreements
SAR	Romanian Academic Society
SFRJ	Socialist Federal Republic of Yugoslavia
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union
TKZS	Agricultural labour cooperative farms (Bulgarian abbreviation)
UDF	Union of Democratic Forces
UNHCR	United Nations High Commission on Refugees
WW II	2nd World War

EXECUTIVE SUMMARY

The restitution of confiscated property to former owners in the ex-communist states of Central and Eastern Europe was a policy decision with momentous consequences, as the level of assets concerned was huge and the impact of handing back to former owners residential or commercial property, four decades after nationalization, was difficult to anticipate. The solutions adopted – relatively quickly, or slowly and incoherently, in many steps spanning a long period of time – were very different from country to country.

The historical legacies explain some of this variation in approach. The implementation of the Communist project was uneven and country-specific. In societies with little established aristocracy and fewer large real-estate owners, the nationalization of residential houses and farming land was more difficult to justify in political terms, so it took about a decade or more after taking power for the Communist governments to consolidate sufficiently to enable them to embark upon the expropriation of millions of peasant farmers or urban lower-middle classes. By contrast, large real-estates and the factories tended to be confiscated earlier. In mountainous areas, confiscation of property was less frequent than in lower, more productive areas.

The determination of the political push towards property nationalisation, especially in the rural sector, was another diverging factor. At one end of the scale, in Romania or Albania the state took control of almost all properties, either directly or through the cooperatives. By contrast, in Yugoslavia (as in Poland) most of the land had remained in individual family farms during the socialist period. In addition, some regimes (Yugoslavia, Hungary) started to relax central control in the '70s or the '80s, trying to simulate a market economy through ”competition” between two or more state-owned enterprises. Therefore the search for a way to put property into private ownership started earlier in some of the Communist countries, while others remained totally unprepared up until 1989.

Still, unlike in the former Soviet Union, in the Western Balkans, Bulgaria and Romania legal records of previous owners still existed, for both commercial and residential property, so the restitution of the actual assets – buildings, land, industrial assets – was a feasible option. In practice, however, there were many practical difficulties. Often the land became unavailable: for example in urban localities which changed and expanded during Communism, when whole neighbourhoods were erased in order to make room for the socialist housing units. Land improvement works, artificial lakes of experimental farms lie today on top of former plots. In consequence, land swaps or compensation arrangements had to be made.

In the countries that pursued this strategy, the restitution did not necessarily lead to land fragmentation, but it may have facilitated the transition from socialist cooperatives to corporate farms. In other countries such as Romania and Bulgaria (and many in Central Europe) some large state farms were downsized, but managed to survive as corporations. But in general the social pressure to dismantle the agro-cooperatives was so high that no post-1989 cabinet could have resisted it.

There are a number of **fundamental difficulties and dilemmas** the post-Communist governments in Bulgaria, Romania and the Western Balkans had to face:

- How far back in time should the process go? Should only Communist expropriations (or "collectivization") done through law or decree be considered, or cases that occurred during World War II or immediately after, sometimes through unlawful abuse (as in the case of the Jewish community, for example) be included?
- Should former owners be given back their same physical property, or another one of similar value, or should they be compensated financially instead? In the last case, should the compensation be in cash, or in vouchers which are the equivalent of shares in some specially-established funds or in existing state companies? Should the

amount of the compensation be at full value, or should it be capped (i.e. some confiscation and redistribution may occur)? Should vouchers be immediately tradable, or should temporary restrictions be imposed?

- Related to the point above, how far can we go with the argument that the state is liable and should redress the wrongs done forty or fifty years ago to some individuals? Do the post-Communist generations have a moral obligation to finance the restitution process fully, or are there other social considerations that should play a role? For example, if a building nationalized in 1950 still exists, but is occupied by many tenants, can it be restored with no restrictions attached to the (inheritors of the) former owner? Can absentee landlords be reinstated on their land, even if this would mean evicting families with no title but who have used the land for decades (the case of many Roma communities)? Such concerns of inter-generational redistribution are legitimate in any sort of public policy and formed the crux of the argument, even though not always explicitly, when the issue of restitution was discussed in the early nineties.
- Can the restitution process follow fully the inheritance rules from the Civil Code, or should eligibility be more restricted, for instance only to the original owners and their children? Should only individuals who are residents of the country be eligible, or should émigrés qualify too?
- Regarding industrial assets or agricultural land, how can the opposing goals of justice and economic efficiency be reconciled, since in many cases restitution is likely to result in a fragmented and unmanageable ownership structure?
- Finally, can the post-Communist public administrative apparatus be trusted to discharge in a reasonably fair and effective way the daunting task of identifying the lawful owners, assessing properties and compensating the eligible individuals for their lost properties? What procedures and institutions must be created, at the central and local level, to ensure property restitution proceeds accurately and expeditiously?

This report outlines the manner in which six South-East European countries – Romania, Bulgaria, Croatia, Bosnia, Serbia and Albania – responded to these general challenges, in the context of their own peculiar social and economic history. Like Central Europe, they all had to confront these dilemmas in the first years after the fall of the Communist regime, because the more the process of restitution dragged on, the more complicated the situation became. The liberalization of the economies after 1990 created a market for all types of assets and as a result of this natural pressure, transactions proliferated, even in situations where ownership rights were not certain. It was obvious from the start that delays or piecemeal strategies tended to create more conflicts, overlapping property rights and actions in courts.

The similarities and differences are all highlighted in the report and the answers given to the dilemmas highlighted above. Both nationalisation and restitution policies varied significantly, and these variations had an impact for the structure of the case-studies presented in this report. The main structure of the case studies includes an overview, the historical background of the expropriation process, the restitution/compensation process and conclusions. However, the inner structure of each topic is not the same in all countries – for instance because some of them have adopted legislation for restitution, while others have not.

Most of these countries (with the exception of Serbia) attempted to restore in kind or compensate the previous owners for the property confiscated during the communist regime. However, the restitution or compensation process has been inconsistent, the procedures (legal, administrative) have not been coherent, and the process itself has generally been slow. **The main common problems** related to restitution in the six countries under scrutiny, as they resulted from our analysis, are:

- Belated adoption of property restitution policies;
- Unclear and unpredictable policy on property restitution;
- Weak institutional capacity to implement the policy;
- The emergence of conflicting rights on the same property;
- Ineffective compensation systems.

All these problems have caused a lot of discontent among previous owners or current tenants, and generated waves of complaints to external institutions such as the European Court of Human Rights (ECtHR) and petitions to the European Parliament (EP).

However, the issue of restitution or compensation for property confiscated by the former communist regimes does not fit into the sphere of competence of the European Union, so that any future developments linked to the accession of EU to the ECHR will be completely neutral to it.

The role of the European Court of Human Rights.

The ECtHR can examine applications only to the extent that they relate to events which occurred after the Convention entered into force. In those cases where the property was confiscated in the period 1949-1989, that is, before the date of the entry into force of the Convention with regard to all six States, the Court is not competent *ratione temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present date.
Therefore, in the absence of domestic laws providing for restitution or compensation for lost property or of domestic courts' final judgments providing for restitution or compensation, none of those who had lost their possessions before 1989 can have a chance to win a case before the ECtHR.

The judgments finding a violation of Article 1 of Protocol No. 1, in cases of property lost during the communist regime, are related not to the fact of the nationalisation or confiscation by the authoritarian power, but to the actual failure of the States to comply with their own legislation providing for compensation or restoration of property or with final judicial or administrative decisions restoring property or awarding compensation, rendered by domestic authorities in favour of the applicants, during the period following the ratification of the Convention.

This amounts to the paradoxical, but nevertheless real situation that if a post-communist state refuses to take any steps to address in law the issue of properties nationalized before 1989, that state is fully insulated against claims before ECtHR. Only once a country begins to pass national legislation on the matter can it become liable in international courts. However, it must be said that, in spite of this strong institutional incentive for non-action, most post-communist countries in CEE and SEE [abbreviations not explained] could not avoid passing some sort of legislation on property restitution, as a result of domestic political pressure. It is the difference in timing and quality among these bodies of national law that explain the wide variation in the number of claims (and, subsequently, successful claims) coming before ECtHR from each state.

When comparing the judgments rendered by the Court in cases involving each of the countries, some common patterns emerge for all (or only a subgroup), in addition to a relatively less important set of specific features for each country. With regard to those countries that have a significant number of judgments, a leading judgment can be identified. These are normally followed by dozens of similar judgments, which address the same legal issue and give place to well-established case-law.

The main issues under the Convention are the non-enforcement of final judicial decisions; the quashing of final judicial decision and failure by the courts to respect the final character of judgments; the failure of the domestic authorities to provide compensation to which the applicants were entitled under domestic law; deprivations of property in the context of special protected tenancy and access to court in order to ask for restitution of confiscated property.

The role of the European Union.

The countries under scrutiny differ as regards their status vis-à-vis the European Union: Romania and Bulgaria are already members, Croatia is a candidate country, while the other three countries, Albania, Bosnia and Herzegovina and Serbia, are potential candidates. In this respect it follows that the **European Union has at present different leverage and different mechanisms to influence the process of property restitution in each of them**. The issue of property restitution has been always addressed in country reports of the European Commission from the perspective of human rights; concrete examples of country reports are given in each of the case-studies presented in Part II of the present study.

Generally speaking, the leverage of the EU on national policy is stronger in the years before a milestone is reached: either as a condition to be fulfilled before the country can start accession negotiations; or during this process, as a benchmark to be monitored before negotiations can be concluded. However, there are peculiarities about the issue of property restitution – it is a particularly sensitive national issue in every country, very political in nature, grounded in moral and historical judgments, with a huge amount of resources at stake. This and the fact that it exceeds the explicit mandate of the EU, tends to limit the Union to the role of guardian of procedures, rather than reviewer of the substance of the national decisions adopted. On the other hand, a reasonable and timely solution to the problem of property in every post-communist state willing to join the EU is crucial, one way or another, as a building block of the rule of law, which is a membership prerequisite. This is the dilemma confronting the EU institutions: encouraging a fair policy on restitution, but only using indirect instruments for this goal.

Recommendations:

In our opinion, the European Union should continue to use its traditional monitoring mechanisms and conditionality systems to assess the extent to which countries have implemented policies to address the issue of property restitution. In this process the EU should not limit its assessment to the review of legislation, but should also request concrete action plans with clear benchmarks, budgetary allocations and responsible institutions, once the national governments have adopted a law. In other words, the Union cannot impose a solution on East European societies, but once such a solution is agreed by the legitimate authorities of the particular country, it can request that the government and the administration do not undermine the policy through implementation flaws.

This would be a good strategy bearing in mind a well-known phenomenon: it is often easier for the national voters and the public to make the government embrace the broad principles of a policy, and even to adopt a law, but much more difficult to monitor their implementation. External monitoring of administrative performance in this field, as well as the performance and fairness of other structures, such as the judiciary, which play a role in the process of property restitution, may be an important contribution to an increased level of accountability in the candidate / prospective candidate country, and thus a tool to improve the quality of governance.

On the particular case of property restitution, the solutions do not come without significant costs (which would be lower if restitution in kind were to be the solution adopted by the countries). In this context the EU may explore together with the countries concerned a mechanism for financing such costs in a manner which is both practical and morally acceptable. Various arrangements may be considered, from linking restitution

with the privatization process, to mutual funds, selling of state assets, special purpose loans, etc. Due consideration must also be given to the implications for the national budgetary deficit likely to be impacted.

National cases

1. The section on **Albania** deals with the complex problems concerning property restitution in a country that for almost a decade suffered from social turmoil and unstable governments. First, the legal framework has been volatile and incoherent over time. The financial burden that the amount of compensation to former owners would place on the state has never been estimated. Furthermore, as described in the relevant section of the report, there have been serious issues regarding the methodology for establishing the compensation sums. The current law on restitution allows for restitution in kind or compensation in cash at the property's market price, and the methodology to establish the compensation value has been approved by the National Property Restitution and Compensation Agency. However, it has been criticised by international organisations, because it makes the value of compensation dependant on the income the property would have generated if it had been in the possession of the rightful owners. The chapter also describes the administrative procedure of the restitution process.

The 2008 EC Progress Report highlighted that, despite the problems created by the lack of property registration and the legalisation of informal use of land, Albania had registered some advance in the restitution process and the enforcement of property rights. In the same year, a report issued by the European Parliament on the property restitution process in Albania discussed thoroughly the problems created by the disruptive legal framework and the inefficient institutional setup for the management of property issues after 1990. Its conclusions and recommendations were in line with those of the EC 2009 progress report, according to which Albania showed little progress on issues related to property rights in general. The report urged the adoption of a comprehensive working plan in order to improve the situation regarding property rights.
Another report, made by the Property Restitution and Compensation Agency in October 2009 for the use of the Prime Minister's office, shows that no decisions have been taken after July 2009, since the deadline stated in the law had not yet been postponed. This means that besides new claims the Agency will have to provide an answer to pending claims, the administrative investigation of which has not yet been finalized. Usually claims are still pending due to missing documents or procedural mistakes which impeded or delayed the adoption of a final decision. However, human resources are not available to speed up the process or support better communication with beneficiaries. At this moment the number of requests is already too large for the current administration to handle.

The lack of personnel is reflected in the number of judicial appeals on property restitution issues. Only one third of all appeals were dealt with so far, which reflects a low capacity, to a large extent due to the lack of trained personnel. This issue needs to be addressed by future reform plans.

Making the process of evaluation of restitution claims more efficient is crucial, since unsolved claims end up in judicial courts, a trend that is accelerating: between August and October 2009, 187 lawsuits were initiated against the Agency's decisions. The demand for highly trained staff is urgent, both for dealing administratively with the files and to represent the state in courts. A property fund out of which compensation in kind could be made does not yet exist. Five years after the adoption of the current law on restitution and compensation, despite additional legal acts that aimed at clarifying the procedure, restitution in kind has never been made.

According to the law, property used in the public interest cannot be returned to its owners. This required initial registration of immovable property that could be used for restitution all over the country. The Albanian Assembly took a recent decision to verify

property titles, including those belonging to the State. The institution in charge identified a high level of uncertainty related to registered titles, including the ones in state ownership. Thus, setting up a Property Fund based on the records of the Immovable Property Registration Office is not legally secure.

A yearly fund for cash compensation was included in the state budget. For 2009 this fund reached 10 million Euros and it was used to cover compensations for 211 out of the 521 owners who had their property rights restored that year. The compensation process is made according to the distribution of the claimed land across the value maps of the Agency. These maps need to be continually updated by the final compensation deadline in 2015. Considering the dynamics of the real estate market and of the number of filled and solved claims, the budget needed to cover compensation can be expected to grow.

2. The chapter on **Bosnia and Herzegovina** highlights the special situation of a country with split governance. A law on the denationalisation of property seized during the Communist regime was adopted at the state level, but immediately suspended, thus producing no legal effects. The study describes the events after World War II and the Bosnian war of the '90s which had important implications for the restitution process, and reviews critically the final draft of the proposed law on denationalisation, as well as the governmental and institutional challenges to the implementation of the proposed law. It examines the existing policy conflicts and problems that the proposed law could aggravate, including the complications arising from the Dayton Peace Accords. Then it moves on to predict the impact of government and administrative corruption in the implementation process.

Even though the current draft form of the restitution law has weak points, they can be addressed in by-laws, codes of conduct, and the administrative tools and mechanisms that do not have to be a part of the formal law. Adopting this Law would at least establish an institutional framework, after which there is a six-month period before the actual implementation begins. The adoption of the Denationalisation/Restitution laws in each entity (they are in progress) should be in line with the state level law. The ideal solution, though probably the least likely, would provide that Entity laws be in accordance with the state law, and that they empower the state level law in terms of speed and quality of implementation by creating specific regulations on registering property at municipal/city/district levels and making such data available to the public and all interested parties. New registers of property (a register of confiscated property subject to denationalisation, a register of property that shall be used for the purpose of natural compensation, and a general register of all municipal property) should be in place in each of the municipalities in Bosnia and Herzegovina or at the cantonal or entity level. Such registers, aside from simple counting of the property, should contain data that is in the possession of the public bodies (location, type and size of the property, under which law the property was confiscated and the legal basis for confiscation, who is in possession of such property or who has occupancy rights and on what basis, approximate commercial value of the property). Such registers should be available to the public as well as to all interested parties. In addition, a combined register of persons and companies that have been compensated for their property through bilateral agreements (such as the Agreement between the U.S. Government and SFRJ) should be established and made available to the public and interested parties.

Municipalities should be required by law to establish registers of property which is unaccounted for and provided a binding deadline within the law for beginning of procedure before the court by the relevant public office (public defender) in the name of the targeted municipality, and stating that all property which is unaccounted for after the deadline belongs to the State of Bosnia and Herzegovina.

Transparency and access to data should be improved at all levels, in the policy-making process (draft laws, future by-laws and other relevant policy documents, registers of property subject to restitution law, decisions in the process of denationalisation as well as statistical and other relevant data). Integrity and anti-corruption measures should be

imbedded either in the law or by-laws and codes of conduct of relevant bodies, as requested for the implementation of the Dayton package of property laws. Special attention should be given to conflict of interest-related issues in the appointment of members of the municipal commissions, as well as the appointment of members of the Appellate Commission, with both soft (prevention) and hard (ban on appointment to public service employment) measures against those that breach the codes of conduct or other similar instruments.

The international community should give special attention to the issue, as it is one of the last issues in Bosnia and Herzegovina that precedes the beginning of the development of a free market – corruption aside. Therefore, the denationalisation issue, as well as effective, timely, fair and just implementation of the Law and international treaties, should become a criterion for Bosnian progress in accession to the EU.

By the end of the denationalisation process, Bosnia and Herzegovina should consider a special approach to the property that belonged to victims of the Holocaust or the last war in Bosnia and Herzegovina. Even though the country is in a difficult economic situation, no state should benefit from sufferings of the past. Such measures pay tribute to the victims of tragic historical events, and at the same time prevent special interests within the State from making money and taking precedence over the interests of all citizens. In complex situations, the tenants should be given the right to buy such apartments as guaranteed under the law. Bosnia and Herzegovina can consider a solution similar to the one in Macedonia, and create a fund out of the money received through the sale of public property to be used for paying compensation to victims and their descendents. The fact that proper and fair denationalisation is not a condition for the BiH roadmap to the EU raises suspicions that this matter will never be adequately or fairly resolved. Since there is almost no leverage from the international community in relation to denationalisation policies, it is expected by many that the final outcome of denationalisation will be a failure.

3. In the chapter on **Bulgaria**, we describe and analyse the restitution process against its historical and political background. The process of nationalisation of agricultural land, or urban, industrial and other property in the early communist period and the subsequent practices of alienation of property are also briefly presented in order to facilitate the understanding of subsequent developments. The legislation, the judicial practice and the decisions of the Bulgarian Constitutional Court on property restitution in the transition period are discussed in detail. The social, economic and urban development consequences of this process are also outlined with a special attention given to the minorities, with an emphasis on the restitution of property to the Bulgarian ethnic Turks.

The restitution of property in Bulgaria over the last twenty years has been one of the most far-reaching and complex social processes. It has been shaped by and has itself shaped Bulgarian politics. Issues of the balance between retributive justice and the general public good, issues of evaluation of the past and projections for the future, and indeed issues of political identity were all entangled in this process. Therefore, any overall judgment is necessarily partial and controversial. One thing is clear, however: the process of restitution has determined the outlook of contemporary Bulgaria in a variety of important ways.

In terms of *economic efficiency* the restitution of agricultural lands in their real boundaries has fragmented the plots, and has created a serious need for consolidation of lands. Bulgarian agriculture, partly as a result of this fragmentation, has been one of the sectors with the most severe difficulties to recover after the crisis of the 1990s. This fragmentation also creates problems in absorbing EU funding in the sector.
The benefits of the restitution process should therefore be sought mostly in the area of social (retributive) justice and the legitimacy of the transition to liberal-democracy and

market economy. Here, the restitution efforts of the political elite indeed created a significant constituency of owners supporting the political transformation.

4. The chapter on **Croatia** reviews the various positions of the European bodies and other international organisations such as the Organisation for Security and Cooperation in Europe (OSCE), ECtHR etc, in relation to the process of restitution and compensation. It further covers the legal framework and analyses critically the Law on Compensation, weakened by the inherent conflict of interest of the County Administration Offices. There are also important issues with the implementation of the legal framework: the slow pace of procedures in the County Administration Offices and the decisions taken by the national courts that affect the process of restitution and compensation.

A number of problems stem from the choice of the County Public Administration Offices as the responsible body for the arbitration of claims to restitution and compensation: (i) the inherent conflict of interest; (ii) the different principles applied to the administrative procedure, and (iii) the slow pace of the procedure. The conflict of interest problem is the greatest threat to the just settlement of claims to restitution and compensation. However, it is also at this point in time the most difficult to change because 71% of all cases have been settled by this administrative mechanism. The recommendation here must then be generalized to the politics of the Republic of Croatia in the future. A possible solution to prevent future conflict of interest problems could be by introducing a practice that would permit the Committee for the Prevention of the Conflict of Interest to consider and point out any potential areas of concern before any act of legislation is presented to the Parliament. Of course, the Committee would not have the power to change the legislation but at least it would have oversight and whistle-blower status. This would also work towards giving the Committee a more prominent position within the structure of government.

The problem of the different principles of procedure being applied in different counties could be solved by the passing of additional regulations and the changing of the contradictory wording in the Law on Compensation by the legislature. This sort of solution should at least be contemplated for the most contentious issues. The less controversial issues must continue to rely on the Administrative Court for their resolution as foreseen by the legislative framework.

The third problem of the slow pace of the administrative procedures calls for Government pressure to be placed on the counties to complete the administrative stage of the process of restitution and compensation. The European Commission and the European Parliament could also encourage the Croatian Government to the complete the process.

The last recommendation is based on the general problem of ownership and tenancy rights. These problems can be partially remedied by a proactive organisational policy by the Republic of Croatia. Three different registers for the categorisation of property for the restitution and compensation process could be created: (i) one register would document the current property whose restitution is requested; (ii) the second register would document the property that is set aside for compensation by the state or counties; (iii) the third register would document the current owners of the property whose restitution is requested and when these ownership rights were gained.

These three registers would avoid a plethora of problems that surround the tenancy and ownership issues: tenants who have requested to be granted ownership rights of privately owned apartments could be easily identified. These cases would obviously be dismissed because they are based on a basic misunderstanding of the Croatian civil law. The second problem that would be solved is that the tenants who have legitimately requested ownership rights for state-owned apartments could also be easily identified. The conclusion of these cases would then depend on the pace of the administrative procedure. The tenants in these cases would receive the right to purchase the property and the original owner would receive compensation.

The third problem that would be placed in a clearer light is the minority of cases where corruption or a conflict of interest within the legal or administrative bodies is in question. The cross- referencing of the first and third register would clearly identify the property that has been given to individuals through illicit means. Since the third register would contain both the owner and the date their ownership rights where granted this would set the stage for a more detailed investigation by the authorities of those individuals who gained property without proper tenancy rights or the rights to restitution and compensation. This final recommendation would require a political action to regulate and sanction corruption within the Republic of Croatia.

5. **Romania** is distinctive among the countries in the region because of the combination of widespread nationalisation, high expectations – the target was *restitutio in integrum* – and weak institutions to implement these challenging tasks. The restitution policy was designed and re-designed gradually, over a period of almost 20 years, so it lacked a coherent vision. The report highlights the frequent changes in legislation which lead to overlapping entitlements provided by the law at various moments in time. The outcome was a slow process with a disjointed practice both in the administration and the judicial system. The restitution in kind of agricultural land and forestry is slowly coming to an end, but the process of compensation for the claims that could not be addressed in this way is very protracted. The restitution of urban property has barely reached half way, again with a major delay in providing compensation. The prospects are not encouraging because at the current pace the restitution process is likely to be prolonged over several decades.

The poor implementation of the restitution policy made Romania a leader in the number of cases taken to the ECtHR and also in the number of sanctions applied in respect of property issues. The failure of the administration and judiciary to comply with the rules created by this intricate framework and the different interpretation given to the rules triggered a clear reaction from the international organisations Romania adhered to, especially the ECtHR.

The most important idea emerging from this research is the fact that a lack of political vision and frequent changes in the legal framework were the main causes of the existing uncertainties regarding the restitution of property. Therefore, there is an obvious need for the political class to refrain from major policy shift. The key word should be consolidation of the legal framework by a clear-cut interpretation of the law by the Constitutional and High Courts, in order to provide the lower courts with the necessary basis for a unitary practice.

Secondly, increasing the capacity of the administrative bodies in charge of restitution should become a priority. Institutional audits for the central level, Bucharest City Hall and other laggard institutions are recommended in order to find pragmatic ways for speeding up the bureaucratic process by eliminating redundant checks and streamlining the procedures. The compensation mechanism should become truly effective. Payment titles should be directly enforceable, and the Proprietatea Fund should be listed on the stock market as soon as possible.

Another important aspect to be considered is the capacity of the state to pay the promised compensation. The economic crisis greatly affected the Romanian treasury, with the public budget facing high deficits and lower incomes at a time when the social expenditure is rising. As the payment of compensation is already a cumbersome process, it is not advisable that budgetary constraints should add to this delay. In addition, the value at which the shares in the *Proprietatea Fund* are traded now on the unregulated market indicates that the real price of the shares may be significantly lower than the nominal value used for compensation. As compensation will be at the trading value, a higher rate of transfer of the shares owned by the state to private recipients should be anticipated. The Fund has already transferred about 40% of the value of assets into titles to claimants.

Under these circumstances, it is advisable to have more restitution in kind or compensation with other properties of equivalent value, which are not claimed back by former owners. However, the laggard local authorities such as Bucharest have not finalised an inventory of properties, although the deadline provided by the applicable law expired years ago. A better enforcement of such laws and an improvement in the performance of other institutions, such as the land register (cadastre) or archives, are crucial for reducing the total monetary cost of the restitution process to the rest of the society, by maximizing the in-kind or equivalent options.

6. In **Serbia**, property restitution has not yet been fully addressed in legislation or administrative practice, but similar issues are expected to arise if the country's government makes the same mistakes as its neighbours in designing the restitution/compensation policy. The first step towards denationalisation was the Law on Declaring and Registration of Seized Property in 2005. The Law regulated the procedure for declaring and registering seized property, as the first step in the process of returning property to its owners. The purpose was to quantify the property seized by means of nationalisation, expropriation, confiscation etc, applied after 1945 in Serbia, in order to establish the appropriate manner of returning it to the owners by enacting the law on denationalisation.
About 73,000 applications were filed within the deadline, and some more submitted after the deadline with the expectation that it would be extended. Up to September 2009 it is estimated that around 76,000 claims submitted by approximately 130,000 individuals were collected. There are 49,400 applications containing the requested documentation, and 16,100 without sufficient data for identification of the nationalised property.

In 2007 Serbia produced a second important draft law, this time called by its proper name: the Law on Denationalisation. It entered the adoption procedure, it was accepted by the Government of Serbia and released for public debate. During the public debate many objections were raised, however, such as those related to violation of the rights of current owners, as the law provided for the seizure of assets from the current owners without compensation. It also contained provisions on the restitution of construction land by establishing a dual ownership between the building owners and land owners. After sharp criticism during the public debate, the Government withdrew the draft law from the legislative procedure.

Such a delay of almost two decades is likely to make Serbia a very special showcase for the difficulties of the restitution process in South-Eastern Europe. The market pressure has produced situations which, after successive transactions, will be hard to disentangle. In addition, the government is pressed to come up with a separate law, dealing with the division of public property between the state and Serbia's 174 municipalities. It plans to do this in 2010, largely because without clarifying the situation of municipal property, many investment projects, including those financed by the EU, cannot proceed. But securing municipal property in law before the broad lines of restitution are set is likely to complicate the matter further.

The assessments as to the financial implications of restitution or compensation are rather blurry and give rise to disputes between various stakeholders and the Government. In-kind restitution could decrease the direct financial costs to society, as this method would eliminate monetary compensations. However, the more the issue drags on, the more difficult it will become to use this mechanism, as Serbia delays a clear decision on this matter.

INTRODUCTION

The restitution of confiscated property to former owners in the ex-communist states of Central and Eastern Europe has been in general little discussed and analyzed in the policy and the political literature of transit in spite of the heated and polarising debates around the issue in the societies concerned. Things stand in marked contrast with the subject of privatization, which is much better known and has produced an impressive body of written analysis. This is just one among the many paradoxes and dilemmas outlined in this report – because the stakes in the restitution process were similarly high and the broader social consequences of handing back in a way or another buildings, land, forests or industrial assets to their original owners, four decades after they were nationalized, could be momentous and, to some extent, difficult to anticipate at the moment when such a decision to restitution was made.

Not only the subject was under-researched in theory, but even the practical details of the decisions made by the legitimate authorities installed after 1989 were muddled to a large extent. The big moral and public policy dilemmas implied were addressed mostly by default, without having a consistent discussion in society, or at odds with the direction of this discussion. The solutions reached were as a result different, adopted relatively quickly, or slowly and incoherently, in many steps spanning a long period of time.

The historical legacies explain some of this variation in approach. The Communist project was aimed to function as a great social equalizer, within – but also across – societies in the region, but its unique general framework was pressed upon different social, economic and cultural realities in the aftermath of the World War II. The motives for nationalization were political as well as economic. It was a central theme of the state socialist policy that the means of production, distribution and exchange, should be owned by the state on behalf of the people or working class to allow for rational allocation of output, consolidation of resources, rational planning of the economy and changing the patterns of living in urban and rural areas. Private property was regarded as the main impediment to these goals of the Communist regime, and as a result it had to be severely curtailed.

However, the implementation of the Communist project allowed for substantial cross-country – and, sometimes, intra-country – variation. In societies with little established aristocracy and even fewer large real-estate owners, the nationalization of residential houses and farming land was more difficult to justify in political terms, so it took about a decade or more after taking power for the Communist governments to consolidate enough until they were able to embark upon the expropriation of millions of peasant farmers or urban lower-middle classes. By contrast, large real-estates and the factories tended to be confiscated earlier. In mountainous areas, confiscated property was less frequent than in lower, more productive areas.

In Romania, Bulgaria and the countries of the Western Balkans, we are dealing precisely with the type of historical social structure where nationalizations were bound to be ideologically difficult: nations of smallholders, predominantly rural, with a thin layer of urban middle strata just emerging in the decades before the Communist takeover[2]. The states themselves were quite young, a result of a fervent process of nation-building in the second part of the 19th century, and the rural smallholder had been exalted in the fledgling national cultures as the backbone of the young polity. What is more, some governments had already redistributed some agricultural land to the poorest peasants immediately after 1945, before the full Communist take-over. Reversing the trend and going against this class in the name of social justice was difficult, at least at the beginning.

[2] Joyce Gutteridge (1952). Expropriation and Nationalisation in Hungary, Bulgaria and Romania. International & Comparative Law Quarterly , Volume 1 , Issue 01 , pp 14-28 Published online by Cambridge University Press, 2008.

Nevertheless, it happened, sooner or later, in all these countries. In rural areas the metaphor of "collectivization" imported from USSR helped making the things look acceptable politically: the farming land would not be technically nationalized, but "consolidated" in larger exploitations "managed collectively" by the former owners. In Yugoslavia, a similar structure was adopted even for many industrial plants. However, this was nationalization in all but name, because the state and party bodies performed a centralized control over the decisions made, exit was not possible and micro-management from the top became the norm.

While Communism was a common blueprint for the whole region, however, the determination of the political push towards property nationalisation, especially in the rural sector, varied a lot from one country to another. At one end of the scale, in Romania or Albania the state took control of almost all properties, either directly or through the cooperatives. By contrast, in Yugoslavia (like in Poland) most of the land had remained in individual family farms during the socialist period. In addition, some regimes (again, Yugoslavia, or Hungary) started to relax the central control in the '70s or the '80s, attempting to simulate a market economy through ”competition” between two or more state-owned enterprises trying to act as private enterprises would. Thus the search for a process that would put property into private ownership started earlier in some of the Communist countries, while others remained totally unprepared to explore the issue up until 1989.

Still, unlike in the former Soviet Union, in Western Balkans, Bulgaria and Romania legal records of previous owners still existed, for both commercial and residential property. Restitution of the actual assets – buildings, land, industrial assets – was a feasible option, had the post-Communist governments decided to pursue it. People lost the right to utilize their land, but they did not lose the nominal title to the land[3]. Over the years, as rural residents moved to the city or died, some land became the property of the cooperative.

In actual practice, it was not always possible to return the exact plot of land or building to an individual or to his/her descendents. Often other pieces of property were offered to former owners in compensation, either to avoid agricultural fragmentation or because the property ceased to exist as such – for example in urban localities which changed and expanded a lot during Communism, and whole neighbourhoods were erased in order to make room for the new socialist housing units. In the countries that pursued this strategy, the restitution did not necessarily lead to land fragmentation, but it may have facilitated the transition from socialist cooperatives to corporate farms. In other countries such as Romania and Bulgaria (and many in Central Europe) some large state farms were downsized, but managed to survive as corporations. But in general the social pressure to dismantle the cooperatives was so high that no post-1989 cabinet could have resisted it.

There are a number of **fundamental difficulties and dilemmas** the post-Communist governments in Bulgaria, Romania and the Western Balkans had to face:

- How far back in time should the process go? Should only Communist expropriations (or "collectivization") done through law or decree be considered, or cases that occurred during the World War II or immediately after, sometimes through unlawful abuse (like in the case of the Jewish community, but not only) be included?
- Should former owners be given back their very same physical property, or another one of similar value, or should they be compensated financially instead? In the last case, should the compensation be in cash, or in vouchers which are the equivalent of shares in some specially-established funds or in existing state companies? Should the amount of the compensation be at full value, or should it be capped (i.e. some

[3] Dudwick, N., Fock, K., and Sedik, D. (2007): *Land Reform and Farm Restructuring in Transition Countries. The Experience of Bulgaria, Moldova, Azerbaijan and Kazakhstan*, World Bank Working Paper No. 104, (Washington, DC: World Bank)

confiscation and redistribution may occur)? Should vouchers be immediately tradable, or temporary restrictions must be imposed?

- Related to the point above, how far can we go with the argument that the state is liable and should redress the wrongs done forty of fifty years ago to some individuals? Do the post-Communist generations have a moral obligation to finance the restitution process fully, or there are other social considerations that should play a role? For example, if a building nationalized in 1950 still exists, but is occupied by many tenants, can it be restored with no restrictions attached to the (inheritors of the) former owner? Can absentee landlords be reinstated on their land, even if this would mean evicting families with no title but who have used the land for decades (the case of many Rroma communities)? Such concerns of inter-generational redistribution are legitimate in any sort of public policy and made the crux of the argument, even though not always explicitly, when the issue of restitution was discussed in early nineties.

- Can the restitution process follow fully the inheritance rules from the Civil Code, or eligibility should be more restricted, for instance only to the original owners and their children? Should only individuals who are residents of the country be eligible, or émigrés should qualify too?

- Regarding industrial assets or agricultural land, how can the opposing goals of justice and economic efficiency be reconciled, since many times restitution is likely to result in a fragmented and unmanageable ownership structure?

- Finally, can the post-Communist public administrative apparatus be trusted to discharge in a reasonably fair and effective way the daunting task of identifying the lawful owners, assessing properties and compensating the eligible individuals for their lost properties? What procedures and institutions must be created, at the central and local level, to ensure property restitution proceeds accurately and expeditiously?

This report outlines the manner in which six South-East European countries – Romania, Bulgaria, Croatia, Bosnia, Serbia and Albania – responded to these general challenges, in the context of their own peculiar social and economic history. Like Central Europe, they all had to confront these dilemmas in the first years after the fall of the Communist regime, because the more the process of restitution dragged, the more complicated the situation would became. The liberalization of the economies after 1990 created a market for all types of assets and as a result of this natural pressure, transactions proliferated, even in situations when ownership rights were not certain. It was obvious from the start that delays or piecemeal strategies tended to create more conflicts, overlapping property rights and actions in courts.

The similarities and differences are all highlighted in the report and the answers given to the dilemmas above emphasized. Both nationalisation and restitution policies varied significantly, these variations having an impact also for the structure of this case-studies presented in this report. The main structure of the case studies includes an overview, the historical background of the expropriation process, the restitution/compensation process and conclusions. However, the inner structure of each topic is not the same in all countries, for instance because some of them have adopted legislation for restitution while others have not.

Part One - International law and the role of the European Union

Chapter 1 - The role of the European Court of Human Rights

1. THE RELEVANT INTERNATIONAL LAW PROVIDING FOR THE PROTECTION OF PROPERTY: THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND ITS MECHANISM OF ENFORCEMENT

1.1 The Council of Europe and the European Court of Human Rights

Sooner or later after the fall of the communist regime, all the six countries became members of the Council of Europe, a political intergovernmental organisation, created in 1949, which has now 47 member States[4], namely almost all the European Countries, except Belarus, but including Russia and Caucasian countries. The main objectives of the Council of Europe are to develop and maintain democracy and respect for human rights and rule of law. Several important international treaties were concluded by the Council of Europe member States, in order to guarantee that the three objectives were met.

The **most important piece of international law created within the Council of Europe is** the Convention for the Protection of Human Rights and Fundamental Freedoms (also known under a shorter title, as the **European Convention of Human Rights**), of 1950. The Convention is not only a declaration of the most important civil and political rights, but provides an efficient mechanism of collective enforcement of those rights, by the means of the European Court of Human Rights. Fourteen Protocols amended the Convention during the last 60 years. Protocol No. 1, of 1951, provided in its Article 1, for protection of property - a right which was not initially included in the Convention. Once the six countries acceded to the Council of Europe, they also ratified the European Convention of Human Rights and its Protocols, as a requirement for membership.

Table 1. Dates of Accession to the Council of Europe

Country	Albania	Bosnia-Herzegovina	Bulgaria	Croatia	Romania	Serbia
Date of ratification ECHR	2.10.1996	12.07.2002	7.09.1992	5.11.1997	20.06.1994	3.3.2004

Any person or group of persons[5] under the jurisdiction of all the 47 Countries of the Council of Europe can file an individual application against one or more of those countries, to the European Court of Human Rights, which, in 1998, after the entry into force of Protocol No. 11 to the Convention, had become the unique judicial body[6] competent to supervise the respect for the European Convention of Human Rights. Following such an application, the Court can state, by a reasoned judgment, that there was a violation by the State of one or more of the human rights and fundamental

[4] For the dates of accession, see Council of Europe's internet site: www.coe.int.
[5] See Article 34 of the ECHR.
[6] Before the entry into force of Protocol No. 11, there were two judicial bodies: the European Commission of Human Rights, competent to deal with the admissibility of the applications and the Court.

freedoms provided for in the Convention. The Court can also award a just satisfaction[7] to the applicant, in respect of the violation of his rights. According to the Court case-law cited in the judgment *Brumărescu v. Romania* on just satisfaction (Article 41) of 23 January 2001[8]"a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach". The Court also stated that "the Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach" because "this discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed". Moreover, "if the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate"[9].

The Council of Europe's executive body, namely, the Committee of Ministers is competent to supervise the execution of the ECtHR judgments by the respondent States, as far as the individual measures in order to redress the violation are concerned, but also with regard to general measures, as changes of legislation or administrative practice, in order to prevent similar violations of human rights.

1.2 The accession process to the European Union: a vector for the ECtHR judgments enforcement

A couple of years after their accession to the Council of Europe, Bulgaria and Romania expressed their willingness to become members of the European Union (EU), which seemed to offer them prospects of economic relief and greater political stability. The preparation for accession to the EU was a long process of institutional and legal changes by the mechanism of law approximation, aimed to ensure that the two countries were able to comply with the criteria for membership[10]. Those criteria were either economic, such as having a functioning market economy, or political, i.e 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.'

Bulgaria and Romania joined the EU in 2007. The negotiation for accession with Croatia began in 2005. Stabilisation and Associations Agreements (SAA)[11] were subsequently signed with Bosnia and Herzegovina, Serbia and Albania[12] with the prospect of membership once they are ready for it.
The progress of each candidate country towards accession was or is constantly monitored by the European Commission. Regular reports are released to the public, in which the European Commission deals with the level of protection for human rights, including the right to property, by candidate countries. The main indicators for the EU institutions, in this area, are the judgments of the European Court of Human Rights. Thus, the **commitment toward accession to the EU became eventually a platform for enforcing the ECtHR judgments** and preventing other violations of human rights.

[7] According to Article 41 of the ECHR:" If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."
[8] Application no. 28342/95, published in *Reports of Judgments and Decisions 2001-I.*
[9] See also *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34.
[10] The criteria were laid down by the Copenhagen European Council, in June 1993.
[11] More information available on the European Commission website: http://ec.europa.eu/enlargement/potential-candidates/index_en.htm
[12] For general information about enlargement, see www.europa.eu

The EU Reform Treaty (Treaty of Lisbon) which entered in force from 1st of December 2009 says that 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'[13]. Once the EU will be a party to the Convention, individuals will be able to bring applications against EU before the European Court of Human Rights, if they can argue that EU institutions violated their human rights provided for in the Convention and its Protocols. By virtue of Article 35 of the Convention, such applications could be brought only after exhaustion of 'domestic remedies'. At the EU level, actions before the Court of Justice of the European Union (ECJ) could be seen as domestic remedies. Such a judicial mechanism is now only a matter of future legal development. In any event, the area of the **restitution or compensation for property confiscated by the former communist regimes does not fit into the sphere of competences of the European Union**, so that any future developments linked to the accession of EU to the ECHR will be completely neutral to it. According to the Treaty of Lisbon, 'such accession shall not affect the Union's competences as defined in the Treaties'[14].

2. RESPECT FOR PROPERTY THROUGH ECtHR GENERAL FIGURES

2.1. Statistics concerning ECtHR judgments on property issues and pending applications

The relevant general figures published in the last European Court of Human Rights' annual report[15] refer to the period between 1 November 1998[16] and 31 December 2009[17].

In respect to Bulgaria, 'only' 35 out of 272[18] judgments are about property (slightly over 10 %); meanwhile Bulgaria had, during the relevant period, 110 judgments which concerned length of proceedings (violation of Article 6 of the Convention) and 201 judgments concerning the right to liberty and security (violation of Article 5 of the Convention) – see Tab. 2. Similar figures show that Croatia had 'only' 4 out of a total of 133 judgments finding a violation, namely less than 5%, concerned property. Meanwhile, Croatia had 72 judgments concerning length of proceedings (violation of Article 6).

However, in respect to Romania, the Court's statistics show a different situation: 372 out of 582 judgments finding a violation, which represent almost 65 %, concerned property issues (Tab. 2).

These statistics include all the cases of violation of Article 1 of Protocol No. 1, not only the cases concerning property confiscated during the communist regime. The Court does not provide any official statistics about the particular number of judgments concerning property lost during the communist regime as a separate issue in property related cases. However, the Court's database available on its Internet site[19] offers the complete collection of judgments, including those concerning property lost under the communist regime. Therefore, the Court's Internet site can be the source of unofficial statistical data. The total number of judgments concerning property lost under the communist regime can be obtained from it, as well as the figures related to various subgroups, determined by the nature of the legal issues at stake.

[13] Article 6 of the TEU.
[14] Idem.
[15] See the provisional version of the *Annual Report 2009*, published on 29 January 2010 on www.echr.coe.int and the *Annual Report 2008 of the European Court of Human Rights, Council of Europe* (2009) Strasbourg.
[16] Creation of the new Court, following the entry into force of Protocol no 11 to the Convention. There were only 4 judgments of the former Court, against Bulgaria and Romania; only one of them – *Vasilescu v. Romania,* of 22 May 1998 – concerning property (gold coins confiscated during the communist regime).
[17] *Annual Report 2009*, p. 144-145.
[18] Only those judgments finding a violation are reported here.
[19] http://www.echr.coe.int/

Table 2. Statistics on cases before ECtHR, all six countries

	Total number of application pending at 31.12.2009	Number of applications declared inadmissible	Total number of ECtHR judgments	Number of judgments finding violation	Judgments finding a violation of Article 1 of Protocol No. 1 (Right to property)	Systemic problem (Article 46 applied)
Albania	228	139	20	18	9	Yes
Bosnia-Herzegovina	2,071	861	13	13	7	Yes
Bulgaria	2,728	4,164	292	272	35	No
Croatia	979	4,332	170	133	4	No
Romania	9,812	19,417	646	582	372	Yes
Serbia	3,197	2,455	40	38	5	No

Before discussing those special cases, it should be noted that Albania, Bosnia-Herzegovina and Serbia – namely half of the states covered by the study – do not have yet a significant amount of judgments rendered by the European Court. This situation can be partially explained either by the fact the Convention was relatively recently ratified by Bosnia-Herzegovina (on 12 July 2002) and Serbia (on 3 March 2004) – i.e. some ten years after Bulgaria or Romania – or by the fact that only a relatively small number of applications are brought before the Court, as is the case with Albania, which had 228 applications pending on 31 December 2009. However, it is important to see that almost half of the judgments given by the Court with respect to Albania and Bosnia-Herzegovina were about property issues.

The relatively low figures, for those countries, of ECtHR judgements finding a violation of property should not be seen as an indication that this issue is not important. The number of applications pending before the Court should also be taken into consideration for each of those countries. Only Albania has a relatively low number of applications. The other two countries of the first group, Bosnia-Herzegovina and Serbia, had a relatively high number of applications pending at the relevant time compared with their population. Despite the fact that there are no official statistics on pending applications concerning property lost during the communist regime and related restitution, it is likely that this kind of complaints are filled in significant numbers.

There are no data available concerning the number of pending applications referring to property issues, but the proportion of judgments concerning property can be an indicator; another indicator could be the number of cases communicated to the respondent Governments concerning property issues[20]. If the number of applications pending is relatively high and many applications about property were communicated to the Governments, therefore, potentially, there is room for new violations of property to be found in the future. So, despite the fact that countries like Bosnia and Herzegovina, Serbia or Albania do not have a significant number of judgments concerning property, the evolution of number of judgments against these three States should be monitored for the next few years, in order to have an adequate picture of the situation and the real scale of the confiscated property problems.

[20] Available on Court's website, http://www.echr.coe.int/

In contrast to Albania, Bosnia-Herzegovina and Serbia, **Romania** has the **largest number of judgments finding a violation of property rights**: almost ten times more than the second place, Bulgaria. Romania has also the largest number of applications pending before the ECtHR, which is almost three times more than the second ranked of the six relevant countries, Serbia.

Bulgaria and Croatia have comparatively low records of ECtHR judgments finding a violation of property, when it comes to the proportion of those cases within the general figures of judgments finding a violation. This seem to indicate that property – whether lost during the communist regime or not – is not currently an important issue for those countries, given the fact that both ratified the Convention more than a decade ago. However, before jumping to conclusions, further analysis of the relevant judgments should be conducted in order to see if violations of property rights are only isolated issues or not.

A significant part of the judgments finding a violation of Article 1 of Protocol No. 1 of the Convention concerns property lost during the communist regime. Before going into details of those cases, it should be mentioned that a high number of the applications concerning the property lost before the ratification of the Convention by the respective States are declared inadmissible (see Tab. 3).

2.2. Inadmissible cases

Between 1st November 1998 and 31 December 2009, a significant number of applications were declared inadmissible by the Court[21].

Table 3. Number of applications declared inadmissible before the ECtHR

	Total number of applications allocated to a judicial body	Number of applications declared **inadmissible**	Ratio
Albania	380	139	36%
Bosnia-Herzegovina	2,948	861	29%
Bulgaria	7,099	4,164	58%
Croatia	5,455	4,332	79%
Romania	28,883	19,417	67%
Serbia	5,356	2,455	45%

Nearly 70% of the applications against Romania were declared inadmissible, as well as almost 80% of the applications against Croatia, or some 60% of those against Bulgaria. There is no statistical information about how many of those applications concerned property lost during the communist era. The Court's database offers to the public only those inadmissibility decisions taken by a chamber of seven judges, but not those which are taken by a committee of three judges[22], which are only communicated to the parties. The number of inadmissibility decisions of a chamber, concerning property lost during the communist regime, can only be an indicator of the real number of this kind of inadmissible cases.

The applications are declared inadmissible by the Court for various reasons, according to the admissibility criteria which are laid down by Articles 34 and 35 of the Convention, as being introduced outside the **six months time limit** or without the previous **exhaustion**

[21] *Annual Report, 2009,* p. 144-145
[22] Articles 27 to 29 of the Convention.

of domestic remedies, or as being incompatible *ratione temporis* or *rationae materie* with Article 1 of Protocol No. 1 to the Convention. The Court can examine applications **only** to the extent that they relate to **events** which occurred **after the Convention entered into force**[23]. In those cases where the property was confiscated in the interval 1949-1989, that is, long before the date of the entry into force of the Convention with regard to all six States, **the Court is not competent** *ratione temporis* **to examine the circumstances of the expropriation** or the continuing effects produced by it up to the present date. In this regard, the Court considers that deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of 'deprivation of a right'[24]. Moreover, in the Court's view 'possessions', within the meaning of the Article 1 of Protocol No. 1 can only be '**existing possessions**' or assets, including, in certain well-defined situations, claims. For a claim to be considered an 'asset' falling within the scope of Article 1 of Protocol No. 1, **the claimant must establish that it has a sufficient basis in national law**, for example where there is settled case-law of the domestic courts confirming it or where there is a final court judgment in the claimant's favour[25].

Therefore, in the absence of domestic laws providing for restitution or compensation for lost property or of domestic courts' final judgments providing for restitution or compensation, none of those who had lost their possessions before 1989 have a chance to win before the ECtHR.

This amounts to the paradoxical, but nevertheless real situation that if a post-communist country refuses to take any steps to address in law the issue of properties nationalized before 1989, the respective state is fully insulated against claims before ECtHR. Only once a country begins to pass national legislation on the matter can it become liable in international courts. However, it must be said that, in spite of this strong institutional incentive for non-action, most post-communist countries in CEE and SEE could not avoid passing some sort of legislation on property restitution, as a result of domestic political pressure. It is the difference in timing and quality among these bodies of national law that explain the wide variation in the number of claims (and, subsequently, successful claims) coming before ECtHR from each state.

3. MAIN LEGAL ISSUES UNDER THE CONVENTION

3.1. Overview

The judgments finding a violation of Article 1 of Protocol No. 1, in cases of property lost during the communist regime, are therefore related not to the very fact of the nationalisation or confiscation by the authoritarian power, but to the **actual failure of the States** to comply with their own legislation providing for compensation or restoration of property or with final judicial or administrative decisions restoring property or awarding compensation, rendered by domestic authorities in favour of the applicants, during the period following the ratification of the Convention.

These judgments often find, in addition to the violation of Article 1 of Protocol No. 1, a second violation of **Article 6** of the Convention (right to fair trial) regarding a number of particular issues, as for example, the **excessive delays** due to the lack of efficiency of compensatory legislation and proceedings, the breach of the **access to court** requirement because of the lack of enforcement of final judicial or administrative

[23] The European Convention of Human Rights entered into force with regard to Albania, on 2 October 1996; with regard to Bosnia and Herzegovina, on 12 July 2002; with regard to Bulgaria, on 7 September 1992; with regard to Croatia, on 5 November 1997; with regard to Romania, on 20 June 1994 and with regard to Serbia, on 3 March 2004

[24] See, among many others, *Malhous v. Czech Republic,* decision of 13 December 2000 (application no. 33071/96).

[25] See, among many others, *Ramadhi and Others v. Albania*, judgment of 13 November 2007 (application no. 38222/02).

decisions ordering restitution of lost property or the breach of the **principle of legal certainty** because of the quashing of final judicial decisions ordering restitution of property.

When comparing the judgments rendered by the Court in cases involving each of the countries, some **common patterns** emerge for all (or only a subgroup), in addition to a relatively less important set of specific features for each country. With regard to those countries that have a significant number of judgments, a leading judgment can be identified. These are normally followed by dozens of similar judgments, which address the same legal issue and give place **to well-established case-law**.

The **main issues** under the Convention are the non-enforcement of final judicial decisions; the quashing of final judicial decision and failure by the courts to respect the final character of judgments; the failure of the domestic authorities to provide compensation to which the applicants were entitled under domestic law; deprivations of property in the context of special protected tenancy and access to court in order to ask for restitution of confiscated property.

3.2. Access to court in order to ask for restitution of confiscated property

Outside the scope of Article 1 of Protocol No. 1, but within the sphere of the legal protection of the property lost before 1989, the ECtHR addressed also the issue of the lack of access to court for those persons who wanted to ask for restitution of confiscated property, because of high court fees[26] or other legal obstacles[27].

3.3. ECtHR finding of a 'widespread problem affecting large numbers of people'

Facing a large number of similar applications, the Court found with respect to Romania and Albania that the violation of the applicants' rights guaranteed by Article 1 of Protocol No. 1 in the context of restitution/compensation for confiscated property[28], originated in a widespread problem affecting large numbers of people, namely the unjustified hindrance of their right to the peaceful enjoyment of their property. The Court found that 'there are already dozens of identical applications before the Court. The escalating number of applications is an aggravating factor as regards the State's responsibility under the Convention and is also a threat for the future effectiveness of the system put in place by the Convention, given that in the Court's view, the legal vacuums detected in the applicants' particular case may subsequently give rise to other numerous well-founded applications. (…)'[29]. General measures were required under Article 46 of the Convention, in order for those countries to be able to redress the systemic problem[30].

Consequently, the low number of judgments rendered to date against some States is not at all an indicator for the actual magnitude of the problems (especially with regard to Albania) related to confiscated property, which is far more significant. Moreover, given the finding of the Court in respect of the 'deficiency in the procedural system', other similar applications may be potentially successful.

[26] *Weissman v. Romania,* judgment of 24 May 2006 (application no. 63945/00) and *Iorga v. Romania,* judgment of 25 January 2007, (application no. *4227/02*).
[27] *Lupaş v. Romania,* judgment of 14 December 2006 (applications nos. 1434/02, 35370/02 and 1385/03) published in *ECtHR Reports* 2006-XV (extracts) and *Faimblat v. Romania* judgment of 13 January 2009 (application no. 23066/02).

[28] Article 46 of the Convention was also applied in respect to Bosnia and Herzegovina (see the cases *Čolić and 14 others v. Bosnia and Hertzegovina,* judgment of 10 November 2009, but outside the context of immovable property lost during former regime.
[29] The case *Ramadhi and Others v. Albania*, cited above.
[30] See also the cases *Faimblat v. Romania* and *Viaşu v. Romania* cited above and *Katz v. Romania,* judgment of 20 January 2009 (application no. 29739/03).

3.4. Non-enforcement of final judicial decisions and deprivation of property in the context of special protected tenancy

In view of the number of relevant judgments and the extent of this problem among the majority of the six States, the most important issue in this area is the non-enforcement of final judicial decisions ordering the restitution of immovable goods (plots of lands, buildings, apartments) or awarding compensation for lost property (*e.g.* certain amount of money or equivalent goods)

The Court, in its well-established case-law, has examined the non-enforcement of a decision recognising title to property, as interference within the peaceful enjoyment of property[31]. The ECtHR concluded several times, in respect of Albania, that Article 1 of Protocol No. 1 had been violated because of the failure to enforce final judicial decisions concerning the applicants' right to compensation for plots of land which had been nationalised under the communist regime[32]; pleading lack of funds, as the government had done, did not justify the situation[33].

In similar judgments against Bulgaria, the Court had to deal with failure to enforce final court decisions awarding compensation[34] or ordering the restitution of houses, which had been expropriated during the communist regime, (in one case the house was converted into a museum and classified as a national historic monument, before the Bulgarian National Assembly voted, in June 1994, a moratorium on the laws concerning the restitution of properties with historical monument classification, which prevented the applicants from obtaining restitution of their property[35]) or plots of land[36].

The Court had to deal with the same issue, with regard to Romania, concerning failure to enforce or delays in enforcing, by the administrative authorities, final judicial decisions ordering the restitution of property (plots of land, buildings or apartments) lost during the communist period. The leading case *Sabin Popescu* (judgment of 2 March 2004) was followed by more than fifty other similar judgments.

With respect to the non-execution of judgments ordering not the restitution as such, but that the administrative body (*e.g.* Land Commission, in Albania) take a decision regarding the applicants' claims[37] on land appearing to have belonged to their parent and confiscated during the communist period, the ECtHR found a violation of Article 6 §1 of the Convention. However the Court rejected the claim under Article 1 of Protocol No. 1 as incompatible *ratione materiae* with the provisions of the Convention recalling 'that there is a difference between a mere hope of restitution, however understandable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision (…)'. The Court concluded that 'in the context of their restitution claim, the applicants had no 'possessions' within the meaning of the first sentence of Article 1 of Protocol No. 1', so that the guarantees of that provision do not therefore apply to the present case.

The Court examined a particular situation of non-enforcement of final judicial decisions with regard to Bosnia-Herzegovina. The judicial decisions in question ordered private banks to release 'old savings', namely the foreign currency savings deposited prior to

[31] see *Burdov v. Russia*, no. 59498/00, ECHR 2002-III, *Jasiūnienė v. Lithuania*, judgment of 6 March 2003 (application no. 41510/98).
[32] ***Ramadhi and 5 others v. Albania*, judgment of 13 November 2007** (application no. 38222/02); *Hamzaraj v. Albania (no. 1)*, judgment of 3 February 2009 (application no. 45264/04); *Nuri v. Albania*, judgment of 3 February 2009 (application no. 12306/04); *Vrioni and Others v. Albania and Italy*, judgment of 29 September 2009 (application no. 35720/04 and other joint applications).
[33] *Beshiri and others v. Albania,* judgment of 22 August 2006 (application no. 7352/03).
[34] *Zaharievi v. Bulgaria*, judgment of 2 July 2009 (application no. 22627/03).
[35] *Debelianovi v. Bulgaria,* judgment of 29 March 2007, (application no. 61951/00).
[36] *Mutishev and others v. Bulgaria,* judgment of 3 December 2009 (application no. 18967/03)
[37] *Gjonbocari and others v. Albania* (judgment of 23 October 2007 (applocation no. 10508/02).

dissolution of the Socialist Federative Republic of Yugoslavia[38]. Although it is questionable to equivalate such cases of property lost because of the fall of the former regime, with cases involving property lost during the communist regime, mention should be made of them.

Another violation of Article 1 of Protocol No. 1 found by the ECtHR originated in the special legislation protecting special tenancies or allowing tenants of nationalised houses to buy the apartments they were occupying despite the fact that the former owners had obtained the restitution of their houses by final court decisions.
The failure to restore or compensate for property sold by the State to third parties (tenants) was examined by the Court in the leading case *Străin v. Romania* (judgment of 21 July 2005)[39]. The ECtHR judgment was followed by more than one hundred similar judgments that concerned the sale by the state of apartments nationalised under the communist regime to third parties (tenants) without compensation to the legitimate owners, although the domestic courts declared, after 1994, that the acts of nationalisation had been illegal and ordered the restitution of the houses to their original owners.

The impossibility of obtaining eviction orders against former State tenants occupying applicants' flats was the other issue addressed by the ECtHR in this particular area. The Court concluded that the applicants' right to the peaceful enjoyment of their possessions had been violated in that, for a protracted period, they were prevented from controlling their property and from receiving rent, despite the fact that the Romanian courts had ordered the return of their apartments nationalised during the communist period[40]. Following the tenants' refusal to sign a new lease with them, the former owners applied for eviction orders. However, due to the initial failure to comply with the formalities laid down by Emergency Government Order No. 40/1999 on the protection of tenants and the fixing of rents for residential accommodation, the existing leases were extended for five years, preventing the applicants from receiving any rent. The Court considered that to penalize landlords who failed to comply with the formal conditions laid down in the emergency order, by imposing on them such a heavy obligation as that of keeping tenants in their property for five years without any realistic prospect of being paid any rent, had placed them under an individual and excessive burden such as to upset a fair balance between the competing interests.

The similar issue of non-enforcement of final eviction orders to enable repossession of the flat was also addressed by the ECtHR in a case against Serbia[41] concerning the violation of the applicant's right to the peaceful enjoyment of his possessions due to the authorities' failure to enforce a final eviction order issued by a Belgrade municipality in administrative proceedings in the context of a special 'protected tenancy regime'. The order provided for the applicant's repossession of his flat. Domestic courts have themselves held that the municipality was not only under a legal obligation to enforce the order at issue but also had sufficient funds and available flats to provide the protected tenant with adequate alternative accommodation. Lastly, the domestic courts noted that there were no legal means by which the applicant could have compelled the municipality to honour its own eviction order.

[38] *Jeličić v. Bosnia and Herzegovina*, judgment of 31 October 2006 (application no. 41183/02); *Pejaković and Others v. Bosnia and Herzegovina*, judgment of 18 December 2007 (applications nos. 337/04, 36022/04 and 45219/04).
[39] Application no. 57001/00.
[40] *Radovici and Stănescu,* judgment of 02 November 2006
[41] *Ilić v. Serbia,* judgment of 9 October 2007 (application no. 30132/04).

3.5. Quashing of final judicial decisions and failure by the courts to respect the final character of judgments

The quashing of final judicial decisions ordering the restitution of immovable goods (such as plots of lands, houses or apartments) or awarding compensation, which constituted *inter alia* a breach of Article 1 of Protocol No. 1, was an endemic problem for Romanian and Albanian legal systems[42] before relatively recent legislative changes.

The case *Brumărescu v. Romania,* (judgment of 28 October 1999) is the leading case out of nearly a hundred other similar judgments concerning the Supreme Court's quashing of final court decisions ordering restoration of confiscated property, following a supervisory review lodged by the Prosecutor General on the ground of Article 330 of the Code of Civil Procedure which allowed him to challenge final court decisions.

The Court had also to deal with similar Albanian cases[43] of the quashing of final decisions in favour of the applicants which concerned plots of land awarded by way of compensation for the nationalisation of the applicant's property before 1989, by the Supreme Court in supervisory review proceedings[44].

With regard to somewhat similar situations, the ECtHR addressed the failure by the Bulgarian courts to respect the final character of judgments ordering the restitution of certain plots of land to the applicants[45]. In subsequent proceedings brought by the local authority, the Supreme Court reconsidered the issues already determined by final judicial decision and found that the applicants were not legally entitled to the land in question and that the final decisions in their favour did not have *res judicata* effects for the administrative authorities, as this decision was given in proceedings which were administrative by their nature, with the participation of the restitution commission. The effect of those subsequent proceedings was to deprive the applicants of their possessions, in violation of the principle of legal certainty. Those cases are similar to Romanian and Albanian cases described before, the only difference being that the Romanian and Albanian legislation, unlike the Bulgarian law, provided for a special extraordinary appeal (supervisory review). But despite the fact that different means were employed, the same effect, consisting in a deprivation of property in violation of the principle of legal certainty, was achieved.

3.6. Failure of the domestic authorities to provide compensation to which the applicants were entitled under domestic law

Another important issue within the area of the right to property, related to compensation for the confiscated property provided by the law, concerns the failure of the authorities to provide compensation – or even to determine its nature or amount – to which the applicants were entitled under domestic law for the expropriation, during the communist regime, of properties which had belonged to them or their ancestors.

In Bulgarian cases, at the time of the expropriations the applicants were awarded compensation in the form of flats[46] which the authorities undertook to build but which had still not been finished or handed over to the applicants when the ECtHR delivered its judgments. The Court noted in particular that the uncertainty the applicants faced for many years was coupled with the lack of effective domestic remedies to rectify the situation and the reluctance – even active resistance – of the competent authorities to provide a solution to the applicants' problem.

[42] See, for example, *Ryabykh v. Russia,* judgment of 24 July 2003 (application no. 52854/99).
[43] *Driza v. Albania*, judgment of 13 November 2007 (application no. 33771/02).
[44] *Vrioni and Others v. Albania*, judgment of 24 March 2009 (application no. 2141/03).
[45] *Kehaya and others v. Bulgaria,* judgment on merits of 12 January 2006 (application no. 47797/99 and others linked to it).
[46] *Kirilova and others,* judgments on merits of 09 June 2005 (joined application no. 42908/98, 44038/98, 44816/98 and 7319/02).

In Croatia and Romania, the main problem was the continuing failure of the authorities to determine the final amount of the compensation and to pay it to the applicants entitled under domestic law for the expropriation of their properties decided before 1989. The ECtHR noted that most of the delays were caused by the successive postponements which, in the Court's view, reveal a deficiency in the procedural system[47]. The case also relates to the lack of an effective remedy under domestic law which would have enabled the applicants to obtain a decision determining the amount of their compensation. It consequently found also a violation of Article 13 of the Convention.

The case *Viaşu v. Romania* (judgment of 9 December 2008)[48] is the leading case of dozens of judgments concerning the failure of the Romanian authorities to determine the amount and to pay compensation for property lost during the communist regime. These cases concern the ineffectiveness of the proceedings provided for in the legislation on compensation, namely Laws Nos. 1/2000 and 10/2001 and their subsequent modifications, including Law No. 247/2005.

[47] The case *Vajagic v. Croatia* , judgment of 20 July 2006 (application no. 30431/03).
[48] Application no. 75951/01.

Chapter 2 - The potential role of the EU

This report presents an analysis of the property restitution process following the change of political regime in former socialist or communist countries. Unlike in the case of restitution of property after a regional conflict where extensive international legislation has been developed, in the field covered by the present study relevant international norms are mostly absent. This is due to the ideologically difficulties to promote at international level rules that would refer to political arrangements in various countries and regulate what should happen in the field of property rights once the political regime of a given country shifts from socialism/communism to democracy. Moreover, should such international rules be developed, the likelihood of socialist or communist countries signing and ratifying them is extremely low. Consequently, apart from the role of the ECHR to which the countries covered by this study are parties and of the ECtHR as accepted jurisdiction to apply the Convention (addressed in the previous chapter), the implications of the Treaty on the Functioning of the European Union must also be assessed.

Article 345 from the Treaty on the Functioning of the European Union (previously article 295 of TEC) reads: *"The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership"*. This article has been interpreted by the European Court of Justice in the case 182/83, Robert Fearon and Company Ltd v. The Irish Land Commission, judgment of 6 November 1984, [1984] ECR 3677. The issue there was related to the adoption by Ireland of a system of compulsory acquisition of land and was referred to the ECJ by the supreme court of Ireland for a preliminary ruling. The ECJ held that *"Although article 22[49] 2 of the Treaty does not call in question the Member States ' right to establish a system of compulsory acquisition by public bodies , such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment".* It follows that Member States may design their own systems provided that they comply with the non-discrimination rule[50]. It is however not clear to what extent this ruling will also cover the issue of property restitution for new Member States that have witnessed a significant change of political regime.

An in-depth analysis - which is also relevant for the present report - of the issue of fundamental freedoms and the implications of the property restitution process for the full enjoyment of these freedoms have also been analysed in the report on *LOT2: private properties issues following the regional conflict*[51]. The issue of fundamental rights and the changes introduced by Treaty of Lisbon which makes ECHR legally binding are also relevant, especially since the European Court of Justice will apply to acts of the Member States when they apply EU law[52]. A poor track record of compliance with ECtHR decisions is by no mean a commendable situation, neither for member states nor for candidate countries to the European Union, as it reflects on the country's capacity to respect and enforce human rights on its territory. While the ECtHR is, as we have seen in the previous chapter, not part of the European Union institutions, the importance of complying with its decisions has often been emphasised during the pre-accession process.

A possible role could be envisaged here also for the Fundamental Rights Agency. The EU has also a special agency, the Fundamental Rights Agency (FRA), competent to undertake researches and formulate opinions concerning the situation of human rights in

[49] Corresponding to art. 345 TFEU
[50] An extensive analysis of the ongoing debates as to the interpretation of article 345 TEU has been provided by the report on LOT2: private properties issues following the regional conflict, pages 25 to 28
[51] Report on LOT2: private properties issues following the regional conflict, pages 28 to 31
[52] Report on LOT2: private properties issues following the regional conflict, pages 31 to 39.

the EU[53]. The reports and opinions given by FRA are not legally binding, but they can offer valuable indicators about the scale of human rights problems in the EU.

The restitution of property in the region over the last twenty years has been one of the most far-reaching and complex social processes. It has been shaped by and has itself shaped politics. Issues of the balance between restorative justice and the general public good, issues of evaluation of the past and projections for the future, and indeed issues of political identity are all entangled in this process. Therefore, any overall judgment will be consequently partial and controversial. One thing is clear, however: the process of restitution, or lack of it, has determined the outlook of the region in a variety of important ways. The research showed a common set of issues that have had an impact on property restitution policy:

Belated adoption of property restitution policies: in some of the countries analysed the political decision in this respect has not yet been taken. Countries that dealt with this issue in the early '90s in a satisfactory manner proved that it is more efficient, including from an economic perspective, to address the issue sooner rather than later, avoiding complications that are partially generated by the passage of time. Continuous hesitations that prolong past injustices are in the end detrimental, as the clarification of the status of property is key to economic development and to respect of human rights. Often privatisation and property restitution are seen as two antagonistic movements, but in reality this is only an issue of timing. Only if privatisation is done before the property issues are settled does it generate conflicts. Otherwise property restitution can be an added value to the process of economic transformation which is the final goal of privatisation.

On the other hand, one could also speak here of a reverse causality: it may not be that certain deliberate decisions about property restitution in the early '90s created confusion and weakened the rule of law – but, on the contrary, those states with weaker institutions and poorer governance were also less likely to adopt a reasonable framework for property restitution. Why some post-communist states were "stronger" than others (in an institutional sense) and more able to implement consistent policies, is a long discussion in the literature of transitology. However, it is clear today that the inconsistent process of property restitution correlates with poor governance in other areas too, all having as common denominator a defective policy-making process and an ineffective public administration.

It was only later, in the second part of the transition (after 2000) and largely under the pressures of the EU pre-accession monitoring, that the quality of governance in these countries improved to some extent. The process of property restitution could not make exception from this general trend. However, in this area in particular the mistakes made in the early '90s created consequences which are hard to reverse today.

Unclear and unpredictable policy on property restitution: in the same vein, frequent changes in the policy on restitution were identified as a vulnerability of the system. Often the shifts in policies were dramatic and highly unpredictable, generating substantive changes in a process of property restitution which was under way. It followed that similar cases received sometimes completely different solutions, depending on the moment when they were initiated, forcing the beneficiaries of the respective decisions to look to the national justice system or to the ECtHR in an attempt to remedy administrative and legal discrimination.

[53] The FRA's duties are to collect, analyse and disseminate objective, reliable and comparable information related to the situation of fundamental rights in the EU; to develop comparability and reliability of data through new methods and standards; to carry out and / or promote research and studies in the fundamental rights field; to formulate and publish conclusions and opinions on specific topics, on its own initiative or at the request of the European Parliament, the Council or the Commission and to promote dialogue with civil society in order to raise public awareness of fundamental rights.
http://fra.europa.eu/fraWebsite/about_us/activities/tasks/tasks_en.htm

Weak institutional capacity of the entities that had to implement the restitution policy, apart from the general state of the public administration in a particular country. The general low administrative performance is extremely visible in this area in all states analyzed. Responsible institutions tend to be new and with a mandate limited in time, so having an air of provisory arrangement than may demotivate their personnel. They are often understaffed and lack real leadership: since the issue is marred by controversy, no top politician in the region has become famous or popular for being seen to push it. The institutional path that must be followed by the beneficiaries of restitution laws is cumbersome, bureaucratic and unclear. Support documents, such as cadastre registries and clear confiscation documents, are often missing or prove to be inaccurate (which, to some extent, is also a reflection of the state of development and the administrative discipline in the respective country *before* the Communist period). As a result of all these, real political determination is often lacking, sending a signal to the administration that delays are not going to be punished, while speeding up the process may create risks. Shifts between the political powers generate changes in the overall policy and legislation, which in turn modify the procedures while the process is ongoing, thus increasing the administrative burden on the competent authorities.

The same forest of issues apply to the justice system, more or less, with a significant impact on property restitution. Courts are overloaded and understaffed, trials are long and costly, and the final decision is often unpredictable due to the lack of unified jurisprudence of the judges. Given the importance of evidence gathering in these cases, the duration and cost of the trials is furthermore increased by the unavailability of reliable data and documents in the administration.

Conflicting rights on the same property. With the passing of the years, the legal situation of immovable property becomes more and more complicated, as what was initially confiscated by the state is later on used as a basis for land ownership or agrarian reforms and thus transferred by the state to new private owners. The same is true for commercial properties which are being sold or concessioned after the privatisation of former state-owned companies. Houses and apartments are often sold to the tenants that occupied them for many years (the price paid often being significantly less than the market price). State property is split by tier of governance – national, regional, municipal – and so additional players appear into the picture, which make the eventual court cases substantially more complex. Through all these decisions the governments create more obstacles to property restitution, increasing also the costs entailed by such a policy once adopted: irrespective of which party will be favoured – the initial owner or the new owner – compensation mechanisms must be envisaged for the other party.

In countries with a multilayered and autonomous polities – such as Bosnia and Herzegovina – a policy on property restitution proves to be even more difficult to design given the decision-making freedom of the constitutive entities. Problems might arise from divergent policies implemented at different levels. The same difficulties arise when the nationally designed policies are to be implemented primarily by local and regional administration – which at some point becomes de facto owner of the property to be given back. Here there is a natural tendency to delay the process so that the administration does not lose its assets.

Ineffective compensation systems. In countries where compensation for nationalised property is awarded to initial owners (or the new owners when conflicting rights exist, depending on the policy choice as to who will get the assets and who will be compensated) it is mainly given in "shares" or "bonds". The case of Romania is illustrative: the *Proprietatea Fund* is still not listed on the stock exchange many years after its establishment, and as a result the shareholders are forced to trade their shares on the non-regulated market at a price equal to one third of the nominal value. In Bulgaria, the people that received securities could only use them to buy economically unattractive state-owned companies.

The countries under scrutiny differ insofar as their status vis-à-vis the European Union is concerned: Romania and Bulgaria are already members, Croatia is a candidate country, while the other three countries, Albania, Bosnia and Herzegovina and Serbia, are potential candidates. In this respect it follows that the European Union has at present different leverage and different mechanisms to influence the process of property restitution in each of them. The issue of property restitution has been always addressed in country reports of the European Commission from the perspective of human rights; concrete examples of country reports are given in each of the case-studies presented in Part two of the present report.

Generally speaking, the leverage of the EU on national policy is stronger in the years before a milestone is reached: either as a condition to be fulfilled before the country can start accession negotiations; or during this process, as a benchmark to be monitored before negotiations can be concluded. However, the peculiarities of property restitution – it is a particularly sensitive national issue in every country, very political in nature, grounded in moral and historical judgements, with a huge amount of resources at stake – and the fact that it exceeds the explicit mandate of the EU, limits somehow the Union to the role of guardian of procedures, rather than reviewer of substance on the national decisions adopted. On the other hand, a reasonable and timely solution to the problem of property in every post-communist state willing to join the EU is crucial, one way or another, as a building block of the rule of law, which is a membership prerequisite. This is the dilemma confronting the EU institutions: encourage a fair policy on restitution, but only using indirect instruments for this goal.

The European Union should continue to use its traditional monitoring mechanisms and conditionality systems to assess the extent to which countries have implemented policies to address the issue of property restitution. In this process the EU should not limit its assessment to the review of legislation, but should also request concrete action plans with clear benchmarks, budgetary allocations and responsible institutions, once the national governments adopted a law. In other words, the Union cannot impose a solution on East-European societies, but once such a solution is agreed by the legitimate authorities of the particular country, it can request that the government and the administration do not undermine the policy through implementation flaws.

This would be a good strategy aware of a well-known phenomenon: it is often easier for the national voters and the public to make the government embrace the broad principles of a policy, and even to adopt a law, but much more difficult to monitor their bureaucratic implementation. External monitoring on the administrative performance in this field, as well as the performance and fairness of other structures, such as the judiciary, which play a role in the process of property restitution, may be an important contribution to an increased level of accountability in the candidate / prospective candidate country, and thus a tool to improve the quality of governance.

On the particular case of property restitution, the solutions do not come without significant costs (which in any case would be lower if restitution in kind would be the solution adopted by the countries). In this context the EU may explore together with the countries concerned a mechanism for financing such costs in a manner which is both practical and morally acceptable. Various arrangements may be considered, from linking restitution with the privatization process, to mutual funds, selling of state assets, special purpose loans, etc. Due consideration must also be given to the implications for the national budgetary deficit likely to be impacted.

Part Two - Analysis of the property restitution process and the legal framework

Chapter 1 - Albania

1. OVERVIEW

As indicated in previous briefings of the European Parliament[54] the legal framework on property restitution in Albania did not bring the desired results. Various laws on restitution or compensation for different types of property have been adopted in Albania since the early '90s. However, it was only through the 1998 Constitution that the right to own private property was formally recognized. The latest law on restitution, issued in 2004, which specifically targets compensation for expropriations carried out after 1944, made the restitution process even more confused. Only the restitution of immovable property is addressed. Moreover, the financial burden that the amount of compensation to former owners would place on the state has never been estimated. Lacking an estimation of how much should be returned and how exactly it should be done, the Albanian government has been found unprepared in the face of an increasing number of non-favourable ECtHR rulings. Currently, 219 claims from former owners are awaiting the ruling of the ECtHR. On the other hand, estimating the value of compensation is very difficult, since there are no complete records of former property titles.

The current law on restitution allows for restitution in kind or compensation in cash at the property's market price. The methodology for establishing the value of compensation has been approved by the National Property Restitution and Compensation Agency. Highly criticized by international organisations, the methodology sets the value of compensation according to the return that the property was expected to have brought when it was not in the possession of its rightful owners. A limit of 100ha was set for restitution of agricultural land. For other types of property, no such limits exist. However, if the property is currently used in the public interest or if it has been already privatized then its restitution to former owners is prohibited and compensation is provided. The total value of approved compensation from 2005 to 2009 amounted to almost 20 million Euros. Legal provisions on restitution in kind do not exist; therefore, no such restitutions have been made. The deadline for submission of claims on restitution of expropriated property, accompanied by supporting evidence, was at the end of 2008. So far, 51,000 decisions have been issued, out of which 10,000 are still waiting to be solved.

The restitution process is managed through central and regional agencies. In Albania there are currently 12 Regional Restitution Agencies, coordinated by the Property Restitution and Compensation Agency. Regional offices are in charge of collecting the claims and issuing a first resolution. The first decision can be appealed to the national agency. Up to October 2009, 950 such appeals had been filed. If the National Agency rejects the appeal, a judicial procedure can be initiated. In 2008, almost 16% of civil law suits were related to property restitution.

The 1998 Albanian Constitution recognizes the right to private property as a fundamental human right. One of its articles refers to the need to adapt and continue improving previous legislation on property seized through expropriations and confiscations carried out before the adoption of the new Constitution. This urged readdressing the issue of unjust seizure of private property during the communist regime. Moreover, the Constitution stresses the need for national legislation to comply with international

[54] Frangakis, N.; Salamun, M. and Gemi, E., *Property Restitution in Albania*, Briefing Paper, Brussels, 2008. http://www.europarl.europa.eu/activities/committees/studies/download.do?language=fr&file=22483#search=%20restitution%20

agreements ratified by the Albanian government on the matter[55]. Thus, international law on human rights takes precedence over national legislation.

The restitution process in Albania was constantly pushed up on the public agenda by local missions of international organisations. From 2003 to 2009, all the Progress Reports of the European Commission Delegation strongly criticized the lack of compliance with the constitutional provisions regarding the restitution of private property[56] while the cooperation of the government with the OSCE mission in Albania for the development of an efficient restitution methodology received positive remarks. On the other hand, the progress reports urged the government to evaluate the situation of public land to be restituted as well as to estimate the budget which should be made available for compensation in cash for seized property[57]. Even though the adoption of the restitution law was welcomed, its implementation received heavy criticism. The 2005 progress report of the EC Delegation warned of the lack of compliance with the established timetable for restitution of property[58]. One of the biggest problems related to the development of the restitution methodology was the lack of proper registration of immovable property before its seizure[59]. The 2006 report acknowledged breaches in regulations regarding property rights to be key factors in the emergence of social conflicts[60]. Another serious issue related to the property restitution process was the high uncertainty of judicial rulings on property rights claims[61].

These issues are encountered in other countries that faced extensive confiscation of property. However, disentangling them in the Albanian case has its specificities. One of them was the adoption of the "legalisation law" at the beginning of the '90s. According to this law, informal inhabitants of public land became owners of the occupied land[62].

The EU Commission criticised also the lack of legal provisions regarding the restitution of property that belonged to religious communities, despite repeated requests to the Albanian government to take a stance on the matter[63]. The 2007 report qualified the restitution process as generally slow. However, the transparency of the institutions in

[55] Thus, international treaties are qualified as directly executable before domestic courts. It further considers the international conventions ratified by law to be part of the national legislation in force all over the territory of the country. It specifically considers that such agreements are directly applicable (if this is possible) and in cases of conflict with the local law, they have priority. Thus, the legal status of any international law ratified is that of the national law. Consequently, the provisions of these treaties have the same effect as domestic law, and may be invoked by individuals in the same way. See art. 122 of the Constitution, which provides that:

1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law. The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement.
2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it. The norms issued by an international organisation have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organisation is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein.

[56] European Commission, *Albania, Stabilisation and Association Report 2003,* Brussels, COM(2003) 139 final, 26.03.2003. http://ec.europa.eu/enlargement/pdf/albania/com03_339_en.pdf

[57] European Commission, *Albania, Stabilisation and Association Report 2004*, Brussels, COM(2004) 203 final, http://ec.europa.eu/enlargement/pdf/albania/cr_alb_en.pdf

[58] European Commission, *Albania 2005 Progress report,* Brussels, COM (2005) 561 final, 09.11.2005 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1421_final_progress_report_al_en.pdf

[59] *Ibid*.

[60] European Commission, *Albania 2006 Progress Report*, Brussels COM (2006) 649 final, 08.11.2006, pg. 13, http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/al_sec_1383_en.pdf

[61] *Ibid*., pg. 14.

[62] The law that would formalize the informal properties occupied illegally by people in the country.

[63] Religious communities filed their requests for recognition, restitution and/or restitution of their properties unjustly taken by the communist regime. However, their requests had not been addressed properly and fully.

charge of the restitution process is thought to have increased to some extent. The approval of the strategy on property issues was considered a positive development[64].

The 2008 EC Progress Report highlighted that, despite the problems created by the lack of property registration and the legalisation of informal use of land[65], Albania had registered some advance in the restitution process and the enforcement of laws regarding respect for property rights[66]. In the same year, a report[67] issued by the European Parliament on the property restitution process in Albania discussed thoroughly the problems created by the disruptive legal framework and the inefficient institutional setup for the management of property issues after 1990. Its conclusions and recommendations were in line with those of the EC 2009 progress report, according to which Albania showed little progress on issues related to property rights in general. Moreover, the report urged the adoption of a comprehensive working plan in order to improve the situation regarding property rights. Several problems stood out in relation to private property issues[68], such as:

- the lack of transparency and accuracy in legal provisions on property rights, which has favoured the development of corrupt practices across the sector;
- the large proportion of all claims brought to the People's Advocate which concern potential breaches of property rights;
- the lack of progress regarding the restitution of religious communities' property;
- the delay in the completion of immovable property records;
- the lack of an inventory of public land to be used in the restitution process;
- the lack of transparency and the inefficiency of the land legalisation process, despite assigning an increasing number of personnel to work on it;
- the inefficient results of the agency for the control of property titles, whose activity led to delays in transactions on the real estate market;
- the lack of development of a stable real estate market, due to private property rights issues.

The EU is a major stakeholder in the development of the national property rights policy. The Albania – EU Stabilisation and Association Agreement, which entered into effect in April 2009, strengthened even further the role played by the EC Delegation in future developments on property rights issues in Albania. With a view to future EU integration, the reports issued by the EC Commission are highly regarded by national policymakers. Furthermore, among other issues, they provide a check-list of requirements to be fulfilled in respect to property rights regulations. Hence, Progress Reports are reference tools for the elaboration of national policies.

The OSCE mission in Albania is another important player in the development of national policies on property restitution. The representatives of the OSCE in Albania have constantly been offering advice and support on property rights reform. In 2007 the OSCE helped the Agency for Property Restitution and Compensation to create and manage a database containing all the submitted restitution and compensation claims on immovable property. However, this database is not currently an efficient tool for the administration of claims on property restitution[69]. Currently, the efforts of the OSCE are directed towards property registration, rather than the restitution process itself[70]. Even though

[64] European Commission, *Albania 2007 Progress report*, Brussels, COM(2007) 663, 6.11.2007, pg. 15, http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/albania_progress_reports_en.pdf
[65] *Ibid*. Pg. 14
[66] *Ibid*.
[67] Frangakis, N.; Salamun, M., Gemi, E., op. cit.
[68] European Commission, *Albania 2009 Progress report,* Brussels, COM(2009) 533 final, 14.10.2009, pg. 12-35 http://ec.europa.eu/enlargement/pdf/key_documents/2009/al_rapport_2009_en.pdf
[69] OSCE Presence in Albania, Press release, Tirana, 27 June 2007, http://www.osce.org/item/25342.html
[70] It has elaborated a project in 2008 aiming at the implementation of an immovable property registration project along the country's largely undeveloped Ionian Sea coast. The project aims to include more than 70,000 properties in the registration process. See OSCE Presence in Albania, "Property reform", http://www.osce.org/albania/18643.html

the OSCE continues to be an important player in property related issues, its position has been significantly reduced in recent years. The reports made by the OSCE mission in Albania to the organisation's Permanent Council include the assessment of progress of reforms on property rights restitution. The latest report, issued in October 2009, urged the government to provide strong guarantees on private property ownership, investments and lending[71]. Such reports provide incentives for Albania to make further advancements in property rights reform.

2. HISTORICAL BACKGROUND OF THE EXPROPRIATION PROCESS

The history of property nationalisation through unjust confiscations and sequestrations, among other methods, overlapped with the withdrawal of the German army from Albanian territories, on November 29th 1944. Immediately after the end of the Second World War, there were four forms of property seizure: (1) massively against the so-called 'bejlere'; (2) through judicial rulings; (3) through Law no. 37, of January 1945, on the extraordinary tax on war benefits; and (4) through Law no. 108, of August 1945, on Agrarian reform[72].

Official data on the amount of land confiscated, sequestrated or nationalised does not exist. However, "Property with Justice", the former owners' association, provides some data on the amount of land seized in 1945[73].

Table 4. Land ownership, 1945

Land-owner class	14450ha	or	3.67%
Rich proprietors	87970ha	or	22.37%
Middel and small proprietors	237668ha	or	60.44%
God-fearing Agency	3163ha	or	0.80%
State-owned property	50000ha	or	12.71%
Total	**393251ha**	**or**	**100%**

Table 5. Distribution of land lots by size within the total amount of nationalised land in 1945

Size of land lot	Total amount	Percentage of total nationalised land
0.00 to 0,50 ha	10707 ha	2,7%
0,51 to 1,00 ha	20072 ha	5,1%
1,01 to 3,00 ha	101995 ha	25,9%
3,01 to 5,00 ha	70417 ha	17,9%
5,01 to 10,00 ha	84775 ha	21,5%
over 10,01 ha	105687 ha	26,9%

The 1950 Constitution of the Popular Republic of Albania set the grounds for the regulation on the management of common property. However, the new Constitution kept the concept of private possessions (see article 11).

[71] OSCE Presence in Albania, *Report by the Head of the OSCE Presence in Albania to the OSCE Permanent Council,* 22 October 2009, http://www.osce.org/documents/pia/2009/10/40893_en.pdf

[72] For further explanations see H. Vukaj (Current deputy General Director of the Agency for Restitution and Compensation for Properties): "The key of the government towards integration – the legal solution of the property related problems", paper presented in the National Scientific Conference "Challenges of the Albanian Society in the process of the European integration", organised by the University of Tirana and Shkodra "Luigj Gurakuqi" University, Tirana, 24.07.2009.

[73] Source: Association of ex-owners "Property with Justice"

Decree no. 4494[74], consequently amended through the law on expropriation and temporary usage of property[75] provided for the expropriation of the immovable property of specific persons in the public interest, for the benefit of the state, cooperatives and social associations. Art 3 foresaw compensation for each expropriation made[76]. These guarantees were revoked by Articles 16 to 19 of the Constitution of the Socialist Popular Republic of Albania. The aforementioned articles declared that private property does not exist and turned the state into the rightful owner of the seized land[77].

3. THE RESTITUTION / COMPENSATION PROCESS

3.1 Legal framework: privatization versus restitution

The policy discourse regarding property rights changed shortly after 1990. The new constitutional rules[78] acknowledged that the right to own private property is a fundamental human right.

Subsequent regulations strengthened the legal basis that would ensure the full enjoyment of private property. Law 7512/1991, on sanctioning and protecting private property, free initiative, *independent economic activity and privatisation*[79] allowed for distribution of the common public property that was owned by the state to Albanian citizens. This law allowed for the land on which the buildings were constructed to be transferred to citizens in return for (small) payment[80]. Later on, in 1992, upon the adoption of a second law, state-owned apartment buildings were sold to tenants, who also gained co-ownership rights over the land on which the apartment building was erected[81].

State-owned property in rural areas was distributed in the same manner. In 1991, the Law on Land[82] allowed for the distribution of agricultural land to families who were currently living in the village or had been living there up to the end of August 1991. All legal and natural persons (Art. 3 Law on Land), families that had been living in the village for a long time and newcomers who had resettled there after 1945 were equally eligible to receive land[83]. As opposed to the law on independent economic activity and privatisation, the Law on Land did not allow for the property to be leased.

None of these laws addressed the issue of former owners. None of the laws of 1991 and 1992 took into account possible claims coming from former owners for restitution of the property that had been unjustly taken away. Thus, it can be said that initially, the Albanian state distributed immovable property to its citizens without taking into consideration the fact that the property could have been unjustly confiscated by the

[74] Decree no. 4494. dated 31.03.1969
[75] Law no. 4626, dated 24.12.1969, published in the "Përmbledhës i Përgjithshëm i Legjislacionit në Fuqi të Republikës Popullore Socialiste të Shqipërisë, 1945-1985" Volume 1, Publication of the Juridical Bureau of the Council of Ministers apparatus, Tirana 1986, pg. 255.
[76] Decree no. 4494/1969 served as a legal basis for expropriations until 1994 when a law was approved on the same issue. Law No.7848 dated 25.7.1994 'On Expropriations in the public interest and acquisitions of immovable properties for temporary users " repealed the Decree.
[77] Law no. 5506, dated 28.12.1976, published in the "Përmbledhës i Përgjithshëm i Legjislacionit në Fuqi të Republikës Popullore Socialiste të Shqipërisë, 1945-1985" Volume 1, Publication of the Juridical Bureau of the Council of Ministers apparatus, Tirana 1986, pg. 9.
[78] Law No. 7491 of 29.4.1991 on the major constitutional provisions, amended. Art. 11; art. 27.
[79] Law No. 7512/1991 on the regulation and the protection of private property, free initiative, private and independent economic activity and privatisation, as amended.
[80] Ibid., Art. 21, paragraph 1
[81] Law No. 7652/1992 on the privatisation of state-owned flats, Art.. 1; Art. 5.
[82] Law No. 7501/1991 on land, published in Official Journal no 5, as amended (and later Law No. 8053 of 21.12.1995 on granting ownership of agricultural land without compensation; a draft amendment of 28.1.2008 provides for the compensation with other land of users of land within urban and tourist zones given to them before February 1996 and for which they have documents of use. See at http://www.keshilliministrave.gov.at).
[83] Frangakis, N.; Salamun, M., Gemi, E., op. cit.

previous regime. These reforms made the restitution problem even more complex. The 1998 Constitution acknowledged and tried to address some of these issues.

3.2 First attempts for restitution

The 1976 Constitution, which had passed all property into state ownership, was amended. Articles 10 and 11 of the 1991 Constitution stated that private property can be owned by natural and legal persons alike, and they have equal rights to enjoy property.

Within this legal framework Law No. 7501, of July 1991, on land[84] was adopted. This law divided the agricultural land among the citizens whose residence was in the villages or areas considered agricultural. According to the law the land was divided on the basis of the family members equally[85]. Law no. 7698, of 1993, on restitution and compensation to ex-owners was approved. This law allowed for the restitution of urban property to former owners whose property was taken after November 1944. Thus, only the land that was within the yellow line, the line that divides the urban from agricultural land, could be given back or compensated. Moreover, the law explicitly addressed the restitution of the property that was unjustly confiscated or expropriated after November, 1944.

Initially, the property that had been seized on the grounds of Law 37 of 1945, on extraordinary tax, was not subject to the restitution law of 1993. An amendment of 1995 extended the meaning of "former owners" to include those whose properties had been seized based on Law 37. The Constitutional Court decided the extension was not constitutional arguing that the property confiscated under Law 37/1945 was confiscated for fiscal purposes and not in an unjust manner[86].

The legal approach to restitution faced severe criticism, which was reflected in subsequent legislative acts. Article 181 of the 1998 Constitution gave a two to three years deadline for the identification of a solution for the unjust effects of the previously adopted legislation on property restitution[87]. Three years after the deadline had passed, in 2004, Law 9235/2004, *on restitution and compensation of property*, was adopted.

The development of the legal framework did not make the restitution problem easier to solve. The estimation of the financial burden that the compensation process would place on the state budget was never made. The Albanian Constitution states that any bill must be accompanied by the financial costs of its implementation. However, no such evaluation was annexed to the restitution law in 2004, nor has been conducted in any way since then[88].

3.3. Current framework for restitution/compensation

A report commissioned by the EP in 2008 presented a detailed account of the current provisions on restitution89. Even though since its adoption it has been amended several times, the 2004 law on restitution is still the only law in Albania the object of which is restitution of property which had been confiscated after the 2nd World War. The current law provides that expropriated subjects (the ex-owners) are the natural or legal persons, or their heirs, whose property had been nationalised, expropriated, confiscated or taken in any other unjust manner by the state90.

The law stipulates the restitution of immovable property, where possible, or compensation at market price. However, there are some limits on the extent to which a property can return to the ownership of its former owner. First of all, only property expropriated after November 29th, 1944 or that was obtained after 1939 and expropriated based on Law 37/1945 *on extraordinary tax for war profits,* can be

[84] Law No. 7501/1991, published in Official Journal no 5, pg. 246.
[85] A similar process began in the urban areas as well, where the apartments and state enterprises were privatized and voucher bills were distributed among citizens.
[86] Decision of the Constitutional Court no 16, dated 17.4.2000.
[87] Frangakis, N.; Salamun, M., Gemi, E., op. cit.
[88] Art. 82 of the Constitution.
[89] Frangakis, N.; Salamun, M., Gemi, E., op. cit..
[90] Ibidem, p. 18

returned. Second, property that has been privatised through previous laws, and property that is used in the public interest cannot be returned. Third, if the owner had not already received agricultural land through the legalisation law, he/ she could recover up to 100ha, independently of the amount of land that was previously confiscated. If the owner benefited already from the legalisation law, the amount of land received would be taken into consideration in the restitution process. Building sites which had been already privatized were returned to owners if they had not already been legally used for construction, while current owners are compensated at market prices. If investments have been made, then different rules apply depending on whether their value is higher or lower than 150% of the building site's value.

As mentioned earlier, restitution of the actual property has rarely been the case, since the procedures are not yet in place. In fact, upon restitution of property rights to former owners, the law provides for restitution in kind, with property of comparable value and utility. The second option is compensation, which can be made in shares in companies with State capital, or money[91].

The value of compensation is set at the market price. The law grants the same rights to religious communities as it does to natural and other legal persons.

Article 5 of the 2004 law provides that the regulation of restitution of movable property should be dealt with in a subsequent law, which has not yet been approved.

The property restitution legislation which is currently in force provided for the establishment of the State Committee on Property Restitution and Compensation, which was composed of politically nominated members of both majority and opposition parties, as well as the President's office. The composition had to finally be approved and appointed by the Albanian Assembly. Commissions composed by the same rules were also foreseen at regional level[92]. However, their structure was seen as an obstacle to the efficiency of the restitution process. Thus, in 2006, an amendment to the law provided for the replacement of the commissions with individual administrative institutions, namely the Property Restitution and Compensation Agency and its regional offices. Twelve such regional offices were in place[93] up to January 2010, when a new amendment to the law abolished[94] them. As from February 2010 only the central agency deals with the property restitution and compensation process. The Ministry of Justice and the institutions of the Prime Minister are in charge of the control and management of this agency, including the appointment of its leader.

The organisation of the national agency is regulated by Decision 566/2006 of the Council of Ministers, *on the organisation and functioning of the Property Restitution and Compensation Agency*[95]. Each regional agency has five to eleven employees[96] who are now going to be transferred to the national agency in Tirana[97]. However, the restructuring process still has a long way to go. The draft regulations for the central agency need to take into account a detailed consideration of the number of claims seeking a resolution, as well as the property restitution deadline which has been set for the end of 2011[98].

[91] Idem.
[92] Law 9235/2004, on restitution and compensation of property, Chapter IV.
[93] See http://www.akkp.gov.al/
[94] Law No. 10.207, dated 23.12.2009, "On some changes in Law no. 9235/2004 on restitution and compensation for property" , amended, published in official journal 194, December 2009, dated 20.1.2010. (according to the law, it came into force 15 days after publication, i.e. on the 5th February 2010)
[95] A new sub-legal act is expected to be approved so that the new rights and duties of the Agency will also be detailed. Art. 2 of Law No. 10207/2010 requires that the Council of Ministers shall approve the rules according to which the Agency will function.
[96] *See* http://www.akkp.gov.al/struktura.html
[97] However, a clear structure of the Agency is expected to be approved soon by the Council of Ministers.
[98] Law 10207/2010, Art. 7.

3.4 Land market value

The 2004 restitution law approved a fair compensation at market value of the property which had been expropriated, which would assume a considerable budgetary effort. However, an estimation of its size has not yet been made. The OSCE mission in Albania attempted to estimate the monetary value of compensations for agricultural land, if restitutions in kind could not be made. The OSCE estimation indicated the value of compensation to be between US $ 26,000- $103,000 / ha[99]. Article 13 of the law in effect leaves the choice of methodology for the estimation of land value to the Property Restitution and Compensation Agency, who need to seek approval by the Assembly[100]. The OSCE and the World Bank were highly critical of the methodology used for compensation for agricultural land, which is based on the potential earnings from agricultural production[101].

The methodology requires the elaboration of a land value map based on the estimated value of land. Compensation would be made according to the map. Since 2006 such maps have been finalized for Tirana and Kavaja[102]. In Tirana, for example, the map set the value of land at somewhere between 131 Euro and 550 Euro per square meter[103]. Based on the figure given by the Property through Justice Association, in Tirana alone compensation should be given for at least 22,000 m^2, which would raise the costs to over 70 mil Euro.

Initially, the value of land was set through regional decisions[104], which all were subsequently replaced by Decision 1620/2008[105]. According to this decision, the price for building sites in all the regions cannot be less than 1,5 Euro/m^2, and up to 12,900 Euro/m^2 in the centre of Tirana[106].

3.5. Limitations to the restitution/compensation and forms of compensation

The 2004 law provides for unlimited restitution of urban properties and a maximum of 100 ha restitution of agricultural land, out of which is deducted the amount of land received under Law 7051/1999, *on land*. The valuation of the value of land already

[99] OSCE Presence in Albania, *Commentary on the draft law "On Recognition, Restitution and Compensation of Property",* presented to the Assembly of the Republic of Albania by OSCE led Technical Expert Group on 27 October 2003. *See* http://www.osce.org/documents/pia/2003/11/1434_en.pdf

[100] Decision of the Assembly of the Republic of Albania No. 183, dated 28.04.2005. On the approval of the methodology on the valuation of immovable property that will be compensated and of the methodology to be used for compensation. Official Journal 33/2005, pg. 1219; published on 18.05.2005.

[101] Aivar Tomson, *Assessment of mass valuation methodology for compensation in land reform process in Albania, Agricultural Services Project*, ASP-LVE, OSCE Presence in Albania and World Bank, September 2005-March 2006.

[102] Decision of the Council of Ministers No. 816, dated 20.12.2006, for the approval of the prices for building sites, defined on the relevant map, for Tirana city and Kavaja district. Published in the Official Journal no. 143, dated 30.122006, pg. 5637.

[103] Ibidem.

[104] Such decisions are:

- Decision 653, dated 29.9.2007, For the approval of the prices for building sites as determined on the relevant maps, for the regions of Lezha, Dibra, Korca and Kukes,
- Decision 555, dated 29.8.2007, For the approval of the prices for building sites as determined on the relevant maps, for the regions of Berat, Gjiroksastara, Vlora, Dibra, and the cities, Bulqiza, Burrels, Klos and Vlora.
- Decision Nr.139, dated 13.2.2008 For the approval of the prices for building cites as determined on the relevant maps, for the regions of Fieri, Elbasan, Tirana, Vlora, Durres and Shkodra, regions. Published in the Official Journal no. 25, dated 25.02.2008, pg. 901. *See* http://www.qpz.gov.al/doc.jsp?doc=docs/Vendim Nr 139 Datë 13-02-2008.htm

[105] Decision 1620/2008, published in the Official Journal no. 196, dated 07.01.2009 pg. 10701 *See* http://www.qpz.gov.al/botime/fletore_zyrtare/2008/PDF-2008/196-2008.pdf

[106] Decision 1620/2008, Annex.

received is also made at market price[107]. Return of the property takes precedence over compensation in money.

As mentioned earlier, an immovable property is not returned to its owner when it serves a public interest and when[108]:

- it is used to fulfil obligations derived from treaties and conventions to which the Albanian government is a party, or
- it is occupied as an effect of one of the following legal acts:
  - Law No. 7501, of 19.7.1991, *on land*
  - Law No. 7983, of 27.7.1995 on purchasing agricultural land, pastures and meadows
  - Law No. 8053, of 21.12.1995, on transfer of agricultural land in ownership without payment
  - Law no.8312, of 26.3.1993, on undivided agricultural land
  - Law no.8337, of 30.4.1998, on transferring into ownership the agricultural land, pastures and meadows
  - Decision No. 452, of 17.10.1992, on Restructuring of Agricultural Enterprises

Even though the law states that restitution in kind takes precedence over compensation in cash, where restitution of property rights was granted, only compensation in cash has been made. The total budget for 2005-2009 spent on cash compensation amounts to 150 m Euro. The sum is already significant, considering that compensation has been paid only for plots of up to 200 m^2, which means that the same subjects could address new claims for the remaining amount of land for which property rights were restored, but compensation has not yet been paid (see Table 3).

Table 6. Cash compensation process during the period 2005-2009

Year	Budget allocated for compensation to expropriated subjects (in millions of Euro)	No of solved claims (up to 200 m^2)[109]	Location of property compensated
2005	1,44	27	Tirana
2006	2,15	59	Tirana, Kavaja
2007	3,59	119	Tirana, Kavaja, Berat, Korce, Diber, Kukes, Vlora
2008	3,59	163	Whole country
2009	9,14	211	Whole country
2010	5,02	-	-

So far, no decisions that would imply compensation in kind have been made. Moreover, no property restitution fund has been created[110].

[107] Law 7051/1999, art. 3.
[108] Law 7051/1999, art. 7. Paragraph 1 provides a list of the situations considered public interest.
[109] See http://www.akkp.gov.al/kompensimi.html
[110] Law 7051/1999, Art. 12. There is only one general Decision no. 868, dt. 18.6.2008 "On the creation of the physical compensation fund from the agricultural land fund". Published in Official Journal 138/2008, dated 2.9.2008. It is seen however as not a proper legal basis to start compensation.

3.6. Administrative procedure for restitution/compensation

The claims for restitution are submitted by the former owners, who have the burden of proof that their claim is legitimate. The list of documents is provided by Decision 747/2006 of the Council of Ministers, *on the procedures for collecting, elaborating, and administering the requests of the expropriated subjects during the process of recognition, restitution or compensation of the property*[111]. The list includes the certificate of registration for the immovable property, documents from the State Archive, cadastral documentation, a map of the property, and so on. It is not easy for expropriated subjects to prepare the claim, especially the map of the property, which is particularly expensive to prepare.

The deadline for the submission of requests was the 31st of December 2008. According to the data provided in a draft document for the reform strategy in the field of property rights, 51,000 decisions for 39,000 ha has been filed by the date[112]. The process continues since the initial deadline was postponed and there are still former owners who have not yet filed their claims[113]. The law states that a request should be resolved within 3 months after its submission[114]. In addition, art. 24 of the law clearly stated that all claims needed to be addressed by the end of June 2009. The deadline was postponed until the end of 2011[115]. Legally the evaluation process of claims has ended. However, 10,000 outstanding decisions are waiting to be finalized[116]. This deadline does not apply to cash compensation, as the law allows for this process to continue until 2015. In 2008, 163 subjects were compensated for plots of up to 200 m^2, based on the land value map. In 2009, 521 requests for compensation in cash were registered, out of which only 211 were paid[117].

Until the end of 2009, the requests were received by the regional offices of the Property Restitution and Compensation Agency (AKKP). Following the restructuring of the claim management institutions, they will be submitted directly to the national agency. The 12 regional offices decided on the restitution of property rights, while the national agency established the amount to be compensated. The latter served also as a higher administrative appeal body to the decisions taken by regional offices. The appeal could be submitted by former owners or by the State Advocate[118]. The agency could also take the initiative in reviewing decisions. It is reported that up to October 2009, around 950 cases were appealed to the AKKP. From July to September 2009, 135 appeals had been registered with the AKKP, out of which 31 were filed by the expropriated persons and 124 by the local offices of the State Advocate[119]. Only 83 decisions were issued during this period. Thus, on average, only 1/3 of the appeals submitted to the Agency had been dealt with.

The process has now changed. Any decision regarding restitution or compensation and all reviews of claims will be done by the Agency, while appeals will be submitted to the Tirana District Court within 30 days after notification of the decision. If no appeal is

[111] Decision 747/2006 of the Council of Ministers, published in Official Journal no. 121, 2006, pg. 4829. *See* http://www.qpz.gov.al/botime/fletore_zyrtare/2006/PDF-2006/121-2006.pdf
[112] "Draft Inter-Sectoral Strategy Reform in the Field of Property Rights", Council of Ministers, Tirana, 2009.
[113] Initially this deadline was two years after the entrance into force of the law. In fact, expropriated subjects express a different view: in an interview with the representative of the Association of expropriated owners Property through justice, Mr. Toro, he expressed the view that there is no reason to limit the right of expropriated subjects to submit their requests. Interview with Mr. Toro on October 27, 2009 (personal communication).
[114] Law 9235/2004, article 18.
[115] Law 10207/2010, Art. 7.
[116] Data referred in the Draft report of K. Kelm, Land Administration and Management Project Component A: "Security of Tenure and Registration of Immovable Property Rights: Study on Security of Registered Titles in Albania", World Bank, Tirana, 23 October 2009.
[117] http://www.akkp.gov.al/1343.html
[118] Law 9235/2004, article 18.
[119] Agency for Restitution and Compensation for Properties, *Report to the Prime Minister*, 16.10.2009.

made, the decision of the Agency is changed into an executive title and is directly enforced[120].

3.7. Judicial review

The law provides for the judicial review of the decisions taken by the AKKP. The appeals have to be made within 30 days upon the receipt of notification of the decision of the AKKP, otherwise the decision becomes final. It is reported that for the period from July to September 2009, there were 187 lawsuits filed against the AKKP for its decisions on compensation issues[121]. However, there is no data on how many decisions of the latter have been appealed in court.

The Annual Statistical Book of the Ministry of Justice does not provide any detailed data on cases related to property restitution or compensation. However, general property-related statistics are provided. Thus, for 2008, it is reported that out of 17,281 civil lawsuits filed in courts of first instance, 2,753 were related to possible breaches of property rights regulation[122]. Out of 12,251 judgments issued by courts of first instance, 1,936 were property related. In fact lawsuits related to property issues form a significant proportion of civil lawsuits[123].

4. CONCLUSION

The efficient development of the restitution process faces several obstacles. A report of the Property Restitution and Compensation Agency issued in October 2009 for the use of the Prime Minister's office shows that the Agency had taken no decisions after the 1st of July 2009, since the deadline stated in the law had not yet been postponed. This means that besides new claims the AKKP will have to provide an answer to pending claims the administrative investigation of which has not yet been finalized. Usually claims are still pending due to missing documents or procedural mistakes which impeded or delayed the adoption of a final decision. However, human resources are not available to speed up the process or support better communication to beneficiaries. Actually, the number of requests is already too large for the current administration to handle. Thus, it is highly recommended for the next phase of the process to look into ways in which more human resources could be allocated to its management. This should be part of a larger process focused on raising the administrative capacity of the institutions that implement the restitution process.

The lack of personnel is reflected in the number of judicial appeals on property restitution issues. As noted above, only one third of all appeals were dealt with, and that reflects a low capacity, to a large extent due to the lack of trained personnel[124]. This issue needs to be addressed by future reform plans.

Making the process of evaluation of restitution claims more efficient is crucial, since unsolved claims end up in judicial courts. As mentioned earlier, between August and October 2009, 187 lawsuits were initiated against the Agency's decisions. Even though the State Advocate is the competent institution to defend in a court of law the property of the state or the legality of decisions made by its institutions, the Agency has to have its own legal representation. Thus, the demand for highly trained staff increases even more.

The change of political power directly affects the institutional setup designed to ensure property restitution. The employees of the Agency do not enjoy civil servant status. Thus, they can be replaced once the party in power changes. This is the situation of the

[120] Law 10207/2010, art. 2 and 5. Also see Civil Procedure Code of the Republic of Albania.
[121] Agency for Restitution and Compensation for Properties, *Report to the Prime Minister*, 16.10.2009
[122] Ministry of Justice, *Annual Statistical Book, 2008*,. *See* http://www.justice.gov.al/UserFiles/File/vjetari/Vjetari_Statistikor_2008.pdf
[123] Ibid., pg. 151, http://www.justice.gov.al/UserFiles/File/vjetari/Vjetari_Statistikor_2008.pdf
[124] Agency for Restitution and Compensation for Properties, *Report to the Prime Minister*, 16.10.2009

leadership position of the Agency, which has been occupied by four different people in five years. Allegations of corruption, as well as political changes, have led to their replacement. The changes in the statute and structure of the Agency also generate ambiguity, making the institution as a whole highly unstable.
Further, the decisions of the Agency have related only to the restitution of property rights accompanied by cash compensation. As mentioned before, a property fund out of which compensation in kind could be made does not yet exist[125]. Five years after the adoption of the current law on restitution and compensation, despite additional legal acts that aimed at clarifying the procedure, restitution in kind had never been made.

According to the law, property used in the public interest cannot be returned to its owners. This required initial registration of immovable property that could be used for restitution all over the country. The Albanian Assembly took a recent decision to verify property titles, including those belonging to the State. The institution in charge identified a high level of uncertainty related to registered titles, including the ones in state ownership. Thus, setting up a Property Fund based on the records of the Immovable Property Registration Office is not quite legally secure.

A yearly fund for cash compensation was included in the state budget. For 2009 this fund reached 10 million Euros and it was used to cover compensations for 211 of the 521 owners who had their property rights restored that year[126].

The compensation process is made according to the distribution of the claimed land across the value maps of the Agency. These maps need to be continually updated by the final compensation deadline in 2015. Considering the dynamics of the real estate market and of the number of filled and solved claims, the budget needed to cover compensation can be expected to grow. The government should take that into consideration for the elaboration of the national yearly budget.

[125] Ibid.
[126] Ibid

Chapter 2 - Bosnia and Herzegovina

1. OVERVIEW

The recent history of Bosnia and Herzegovina (BiH), has a significant impact on today's policy discussions related to property rights. The Balkan War had a devastating impact on the political structure of Bosnia and Herzegovina and resulted, among other things, in complex and tense inter-ethnic relationships that are reflected in the collaboration (or the lack thereof) between policy stakeholders at all levels of state and public administrations. The development and implementation of a restitution policy of properties seized during communism has to take into account the complex institutional setup and the sensitive issues of ethnicity.

Today, the State of Bosnia and Herzegovina consists of two entities (Federation of Bosnia and Herzegovina and Republic of Srpska), and 10 cantons that include a number of municipalities (there are more than 159 municipalities in Bosnia and Herzegovina). Each canton has its own parliament and government and they all have different jurisdiction when it comes to restitution and denationalisation issues. The Bosnia and Herzegovina Parliamentary Assembly consists of the House of Peoples and the House of Representatives. Both entities have their own respective parliaments. Although the international community invests great efforts attempting to harmonize legislation in the two entities, the final outcome of a law on restitution may be different for each entity.

The structure of the judiciary in Bosnia and Herzegovina is equally complex. The Constitutional Court is the supreme judicial body. The BiH State Court has three divisions (Administrative, Appellate and Criminal) with jurisdiction over state level legislation and appellate jurisdiction over cases initiated in the entities; it is likely to have jurisdiction over cases related to the Law on Denationalisation (both administrative and appellate). The BiH State Court also has a War Crimes Chamber established in 2005. Both BiH entities have their own Constitutional, Supreme and Administrative Courts, and a number of lower instance courts. The Federation of Bosnia and Herzegovina has cantonal and municipal courts, whereas the Republic of Srpska has only municipal courts.

In 1996 two laws were adopted in Republic of Srpska and several cases were processed according to their provisions. In 2000, a new law on this issue was passed, but the Office of the High Representative for Bosnia and Herzegovina suspended all three pieces of legislation. On the other hand, in 1997, both the Federation of BiH and the Republic of Srpska adopted legislation on the sale of apartments with occupancy rights, as well as laws on privatisation.

Recently the Government prepared a draft law on denationalisation[127] which was not publicly released at the time of the finalisation of this report. However, the version submitted for consultations with various stakeholders was analysed in this report.

[127] Bosnia and Herzegovina, Ministry of Justice, draft Law on Denationalisation, Sarajevo; June, 2009.

2. HISTORICAL BACKGROUND OF THE EXPROPRIATION PROCESS

2.1. The Impact of World War II

The draft law on denationalisation targets the properties nationalised after January 1, 1945. However, some prior issues will also have an impact on implementation. During the WW II, the majority of the Jewish population residing in Bosnia and Herzegovina were either killed in the holocaust and/or dispossessed of their property. Immediately after the war, the state of Yugoslavia adopted the 'Restitution Law' of 1946 and other related acts covering the management of property confiscated during the WW II occupation[128] (1945 -1949). It granted the right for the surviving owners and relatives to claim back the property within one year, after which the property would be transferred to state ownership. For thousands of properties no claims had been submitted but the authorities failed to register these as state-owned property. According to one of the interviewed stakeholders, and to official public statements, approximately 7,000 apartments are currently abandoned with no legal owners, most of them dating from the WW II period. Even though the State holds no official rights over these properties, it granted occupancy rights to political leaders and clientele, as stated by many persons interviewed.

2.2. Compensation for nationalised property given during communism

In 1964, the Socialist Federal Republic of Yugoslavia and the United States of America signed an Agreement on the compensation of U.S. citizens (legal and physical persons) that were subject to nationalisation or similar actions during the period 1948 – 1964[129]. According to this Agreement, all U.S. nationals - mostly Jewish persons who fled Yugoslavia and emigrated to the U.S. during the period WW II and immediately after - who were affected by any kind of property confiscation procedure during the Communist period from 1948 – 1964, were entitled to, and received, just and fair compensation. However, there are no records of the properties that were subject to this agreement or of the owners that received compensation. As in the case of the unclaimed property that belonged to the victims of the Holocaust, the state (Yugoslavia and/or Bosnia and Herzegovina) did not register itself as the owner of many of these properties. Property registers in BiH courts still indicate the previous owners as current owners. This may create confusion as regards the right to file a request for restitution (denationalisation) or might hinder the procedure for purchasing such state properties by the current residents as provided by several laws of BiH.

2.3. The impact of the Balkan War

The Balkan War caused the dislocation of more than half of the population of Bosnia and Herzegovina. Over 2.3 million people became internally displaced persons (IDP's) in Bosnia and Herzegovina, or refugees (relocated outside of the country). Following the signing of the Dayton Peace Accord (DPA), the governing structures in place only formalised wartime relocations of IDPs, which made the exercise of property rights in Bosnia and Herzegovina even more complex and in some instances nearly impossible.

During 1998 and 1999, under intense pressure from the international community, the State of Bosnia and Herzegovina and both entities (Federation of Bosnia and Herzegovina

[128] *Zakon o postupanju sa imovinom koju su vlasnici morali napustiti u toku okupacije I imovinom koja im je oduzeta od strane okupatora I njihovih pomagača* (the law on management of property that has been abandoned by the owners in WW II and property that has been confiscated by the occupying forces and their supporters in WW II), *Službeni list* (official gazette) DFJ (Democratic Federal Yugoslavia) nr 36/45; 52/45; and *Službeni list* (official gazette) FNRJ (Federal People's Republic of Yugoslavia) nr. 64/146;104/46;88/47;99/48;77/49.

[129] Agreement between the Government of the Socialist Federal Republic of Yugoslavia and the Government of the United States of America Regarding Claims of United States Nationals, *Službeni list* (official gazette) SFRJ, nr. 9/65, *Međunarodni ugovori I drugi sporazumi* (International and other agreements), pgs. 687-690.

and Republic of Srpska) adopted a so-called package of property laws which focused exclusively on IDP and refugee return and reintegration. As Charles B. Philpott[130] put it, while implementing the DPA, the international community shifted its main policy approach from the 'right to return to return of rights'. In other words, for over a decade the international community used the 'package of property laws' as the main tool for the return of IDPs and refugees to their homes. All other important property issues, such as the restitution or the compensation of property confiscated during the Communist regime, were left aside for the sake of achieving the primary goal: the return of people and stabilisation of communities[131]. In 2008, the main supervising actors – OSCE, OHR and the United Nations High Commission on Refugees (UNHCR) - declared the process successfully completed. Aside from strong pressure for efficient implementation of 'the package of property laws' (1997-2008), the approach of the international community also included a variety of political integrity and anti-corruption policies[132] to facilitate the return of properties. Thus 1,025,011 persons (less than half of the estimated 2.3 million persons who were evacuated) returned to their homes, and over 200,000 property claims were processed, with 99% of the property being returned to owners.

However, the success in the return of the IDPs and refugees to their homes created serious problems related to the return of property that had been nationalised or confiscated during the Communist regime. One of the major issues relates to primary housing. In many instances, the right to return meant that persons were provided with housing that had, in many cases, complex legal issues regarding ownership as presented above. As the 'package of property laws' provided the right for occupants to buy the apartments in which they were residing, most such property changed ownership (from State to private) creating conditions under which natural restitution is impossible.

Finally, confusion in terminology exacerbates property law and property restitution issues. In most cases official documents refer to 'the package of property laws' as 'restitution laws', which creates a widespread impression that the restitution issue has been solved and therefore there is no need to reopen what will inevitably be a sensitive matter for Bosnia and Herzegovina.

3. THE RESTITUTION / COMPENSATION PROCESS

At present there are no legal acts and/or policy documents in place at any administrative level in Bosnia and Herzegovina (neither state nor entity level) that regulate the issue of restitution of property nationalised or confiscated during the Communist regime. In the Federation of Bosnia and Herzegovina (one of the entities) there were several attempts to adopt such a law, but all were rejected by the Parliament.

On the other hand, in 1996 the Republic of Srpska adopted two laws on property restitution (the Law on Return of Confiscated Property and the Law on Return of Confiscated Land[133]). A number of cases were processed on the basis of these two laws before 2000 when the Republic of Srpska adopted a new act (Law on the Return of Confiscated Property and Compensation[134]) regulating denationalisation and restitution of property and abolishing the previous ones. However, immediately after the adoption of

[130] Charles B. Philipott*, "From the Right to Return to the Return of Rights: Completing Post-War ;Property Restitution in Bosnia and Herzegovina"; International Journal of Refugee Law*, Vol. 18, No. 1, pp. 30-80, Oxford University Press, 2006

[131] The majority of proceedings relating to the implementation of property laws were under the jurisdiction of the national/local authorities. However, the international community (Office of the High Representative) had the final say in some matters (for example, removal from office of all those who were considered an obstruction to the process) as well as the power to suspend any legislative act considered to be obstructive to the implementation of the DPA. Due to such distribution of power, the package of property laws was implemented more efficiently than implementation of any other legal act in Bosnia and Herzegovina.

[132] For example, employees in public offices, public officials and also judges had to disclose their property and prove that they had not in any way interfered with the property rights of IDPs or refugees.

[133] *Službeni glasnik RS* (official gazette of the Republic of Srpska); nr. 21/06.

[134] *Službebni glasnik RS* (official gazette of the Republic of Srpska); nr. 13/2000.

the new law in 2000, the Office of High Representative for Bosnia and Herzegovina (OHR) suspended it, as well as the previous ones, leaving this subject unregulated in the Republic of Srpska since that moment.

In 1997 and later, both the Federation of BiH and the Republic of Srpska adopted and fully implemented a Law on Sale of Apartments with Occupancy Rights and other laws regulating the privatisation of property, including the privatisation of residential buildings. These laws partially interfered with the denationalisation/restitution concepts at both the state and/or entity level and create serious challenges for legislators to find a fair approach to solve the overlapping rights that would result from the denationalisation/restitution efforts.

3.1. Draft of State Denationalisation Law in Bosnia and Herzegovina

The draft law[135] (state level, June 2009) is comprehensive in terms of coverage comprising denationalisation as well as restitution issues. It refers to the approximately 25 legal acts since 1945 that regulated nationalisation, confiscation or expropriation of property in the former Yugoslavia. This draft law provides for three main forms of denationalisation/restitution:

- restitution of the property to its rightful owners or their legal successors (private or legal persons);
- restitution in kind - of another property of equivalent value;
- financial compensation (just and fair financial compensation based on an estimated value of the property).

The June 2009 draft law favours restitution of the original property or of a property of similar value. It suggests that financial compensation shall be applied only in cases when restitution of the original property or of another of similar value is not possible. Financial compensation will be made through the issue of 20-year state bonds, distribution of company shares (e.g. in cases where for example a company has built on the land that is subject to restitution) and, in exceptional cases, restitution may be in cash. It seems clear that restitution of the original property or a property of similar value is the preferred form of restitution if this draft law is adopted.

In this draft law, the following types of property are the subject of restitution:

- construction land (including both land with buildings and unused construction land);
- apartments and office/business spaces;
- movable properties (only those with historical, cultural or artistic value);
- agricultural land and forestry.

Regarding the eligibility of the claimants, the draft law defines as entitled parties all natural and legal persons, churches and religious communities, foundations (set up under legacies) and registered associations (as legal entities). In the case of physical persons, the right to restitution/compensation is provided for former owners themselves as well as for their direct descendents. For legal persons, endowments and associations, such entities are entitled to denationalisation/restitution of confiscated property if they are still active/in business; otherwise their successors are entitled if they can prove legal continuity.

The draft law envisages that the responsible parties, those required to fulfil obligations under the law, are the legal state bodies who currently own or possess the claimed property, or legal persons who have gained or benefited from such property while the

[135] Bosnia and Herzegovina, Ministry of Justice, Draft Law on Denationalisation, Sarajevo, June 2009. Note: even though government officials did not want to disclose the document, the key stakeholders shared it with the research team during interviews. Please note that this is not an official text. It was provided by one of the stake-holders consulted by the Government, not from the Government itself.

property was state-owned. As such, the responsible parties envisaged by this draft law would include: public companies, municipalities, cantons, the Federation of Bosnia and Herzegovina, the Republic of Srpska, the District of Brčko, and Bosnia and Herzegovina as a state. The Draft Law provides for a three-year period for submission of requests for denationalisation/restitution by any interested parties, after entering into force.

3.2 Financial Implications for the Implementation of the Draft Law

An economic feasibility analysis for the implementation of the draft law was conducted by the Bosnian Economic Institute[136]. The document forecasts that most of the denationalisation/restitution would be implemented through natural restitution or natural compensation by the State. The total estimated current market value of property subject to denationalisation is 53 bn. KM (approximately €25 bn). In addition, the necessary amount for financial compensation is estimated at between 1.62 and 1.98 bn KM. The compensation will be provided in 20-year bonds having a 'grace period' or delay in initial payments for five years. Thus, if denationalisation started January 1 2011, final payouts would be completed by December 31 2030, with equal yearly payments from January 1 2016 to December 2030.

The feasibility study document uses a base cost of 1.801 bn. KM (approximately €950 m.). In addition, it forecasts administrative costs of implementation of 91.5 m. KM (approximately €47 m.) that will be covered by the state. The feasibility study also recommends providing financial compensation below the market value of the property, quoting examples from other countries, without proposing a model for calculation. It further suggests that, under the conditions of forecast 6% annual growth in GDP combined with an anticipated decrease of the public expenditure as a share in GDP (decreasing from 47.29% of GDP in 2006), Bosnia and Herzegovina can implement the draft law and meet the resulting financial obligations without any serious negative impact on its budget.

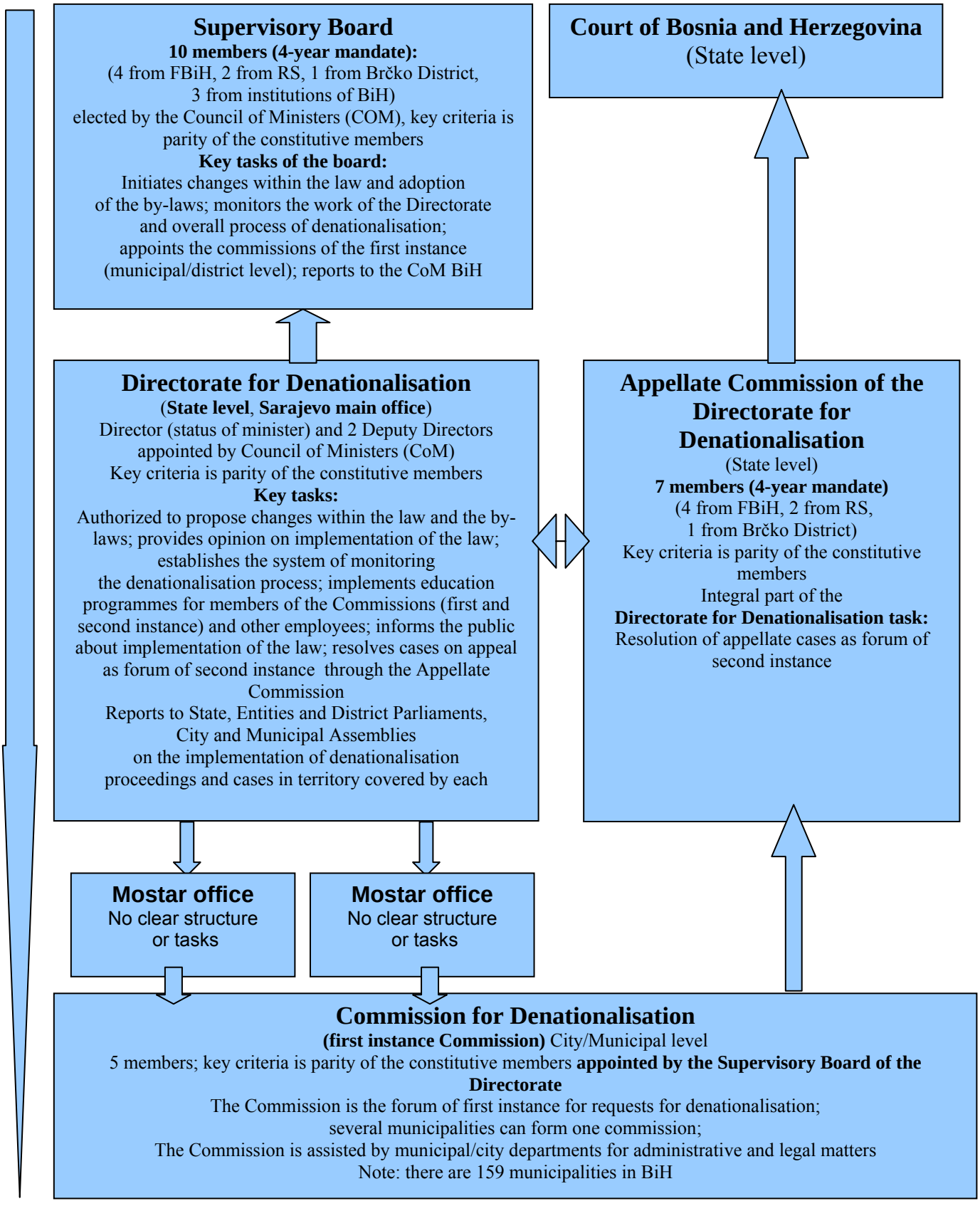
3.3. Institutional implications for the implementation of the Draft Law

Currently, the only official body that deals with restitution issues is the State Restitution Commission established in 2004 by the Decision of the Council of Ministers of Bosnia and Herzegovina. The Commission deals with citizens' claims for restitution and is involved in drafting and amending restitution policies, applicable for returning persons. Although the denationalisation legislation is not yet in place, the June 2009 draft law provides the replacement of this Commission by a BiH state level Directorate for Denationalisation (in fact acting as a state level ministry).

The June 2009 draft law envisages establishment of a state-level Directorate for Denationalisation which would serve as the institution responsible for implementing the Denationalisation Law (see Table 4. Institutional Framework for Implementation of Denationalisation Law).

[136] The brief analysis is a part of the 2009 Draft Law on Denationalisation; however neither the institution nor authors have been named (Bosnian Economic Institute has been confirmed as the author by all of the interviewed stakeholders)

Table 7. Institutional Framework for Implementation of Denationalisation Law as Proposed in June 2009 Draft Law



As the Denationalisation Law represents State level legislation, the main institutions responsible for its implementation will be *state governed*, even though most proceedings will be implemented by city, municipal and district administrations and Denationalisation Commissions. The Denationalisation Commissions, as framed under the June 2009 draft law, will be responsible for the resolution of requests submitted for denationalisation. Its members will be appointed by the Supervisory Board of the Directorate for Denationalisation, and Commissions will be assisted in their work by the *Općinski odjeli za imovinsko-pravne poslove* (city/municipal departments for property management and legal matters). The Appellate Commissions will deal with cases in the second instance. The Court of Bosnia and Herzegovina (administrative department) shall provide recourse to appeal in the third instance. Also,the municipal courts will implement the actual decisions of the Denationalisation Commissions (implementing the decisions in court registers) and will uphold a ban on property repossessions or other transfers of property while the procedure is before the Denationalisation Commission. The subsidiary application of the general *Zakon o upravnom postupku* (Administrative Procedure Code) will govern any procedures before the bodies in charge of implementing the Denationalisation Law.

A matter of concern for the application of the draft law is the institution building required on one hand by the need to balance between nationalities and, on the other hand, by the complex structure of the legislature (state, entities). The draft law requires that the Supervisory Board of the Denationalisation Directorate should appoint 5 persons from each of the 159 municipalities (though some municipalities will have joint commissions) - as members of the municipal/city/district commissions, within 60 days of the adoption of the Law. This may prove challenging in such a timeframe as it needs to meet the 'parity of the constitutive people' (meaning the Supervisory Board will be tasked with balancing a complex parity to ensure representation from Bosnian, Croat and Serb nationalities).

The fact that laws on denationalisation at the level of the Entities (FBiH and Republic of Srpska) are under adoption procedure, but not yet in place, may create another conflicting and challenging issue. As seen in the recent BiH history, the laws adopted at entity and state levels are not always in line, creating major difficulties in implementation. If this proves to be the case for property restitution policy, then the organisational structures designed to implement State and Entity laws may find themselves in conflicts of jurisdiction. Under these circumstances, the policy is prone to fail, or the implementation to prove extremely difficult.

3.4. Conflicting Policy Issues and Dilemmas

Although the proposed Denationalisation Law has many strong points, including the proposed institutional framework, challenges in implementation may be foreseen even at this early stage. The most important ones derive from the previously existing legal framework, historical background, institutional and policy-making framework and the generally accepted practice in public administration. In BiH public administration has proved to be slow, ineffective and influenced by all forms of corruption. 'The BiH 2009 Progress Report, states that corruption remains prevalent and continues to be a serious problem, especially within government and other State and Entity structures'[137]. Even though problems are anticipated in the return of all kinds of property subject to the Denationalisation Law, the biggest challenges are expected in personal housing properties (apartments and residential buildings) and business-related properties (shares and commercially-used land). The low capacity of the administration is common throughout Central and Eastern Europe and lessons can be learnt from the neighbouring countries more advanced in the restitution process. However, in the Western Balkans and even more so in Bosnia and Herzegovina, the abuses that occurred during the Balkan

[137] European Commission, Bosnia and Herzegovina 2009 Progress Report

War and even further back in time are bringing additional challenges for restitution of the property confiscated during communism.

Historical Aspects of Restitution Policy Challenges

Immediately after WW II (as described in Section 1), the SFRJ put into force laws on the restitution of property that was confiscated during WW II. According to those laws, if the evicted owners did not submit requests for the return of their property, the state (SFRJ) became the owner of that property. The state was responsible for initiating legal procedures for the expropriation of that property. It seems that such legal procedures were not initiated in many cases and thousands of properties continue to be registered under the names of former owners. Similarly, some of the properties for which Yugoslavia had paid compensation to U.S nationals are still registered under the names of the former owners. Despite that, the state was the *de facto* owner and awarded occupancy rights to other people. As a result it is difficult to denationalize these properties, either under the Dayton Peace Accord for the benefit of DIPs or under future restitution laws for the benefit of former owners whose confiscated properties cannot be restored. Therefore, a pre-requisite for the proper application of any denationalisation policy is to tackle issues left unsolved in the last 60 years.

Dayton (DPA) Complications Impacting on the June 2009 Draft Law

The main goal of the Dayton package of property laws was the return of refugees and IDPs to their 1992 pre-war homes and apartments. The Dayton package of property laws not only regulates the rights of owners to repossess their property or receive compensation, it also regulates the right of tenants living in social housing (including nationalised properties) to purchase the apartments they live in. Many claims settled through the Dayton package involved properties confiscated under the communist regime, and ownership was legally awarded in Dayton package settlements (1997-2008). Any restitution policy of the properties confiscated under the communist regime has to take into account such situations; otherwise it risks reopening very sensitive issues. The policy makers (strongly supported by the international community), decided that any new legal solutions on denationalisation could not interfere with previous property laws. Therefore there will be no change in the policy approach toward resolution of conflicting interests between the former owners and the tenants/occupants.

The strong enforcement of IDP and refugee return policies and property laws prior to the adoption and implementation of the Denationalisation Law left former owners (as well as some of the described groups of occupants) feeling that their rights have been and will continue to be violated by the State. In cases where tenants/occupants of property have already purchased the property from the State (based on the Dayton package of property laws), the former owners who are entitled under the Denationalisation Law will have only the choice of compensation in kind (with another property of similar value) or financial compensation. The latter of these two options means payments significantly lower than the market value of their original property. It is especially important to emphasize that former owners are concerned that the denationalisation process may not be guided solely by criteria of fairness and effectiveness but rather by the economic interest of the State[138].

Simultaneously it is also relevant to note that the Republic of Srpska (one of the entities of Bosnia and Herzegovina), had partially implemented denationalisation-like laws during the period 1996-2000, and that an unknown number of cases had already been processed based on such laws. It is therefore reasonable to question whether those to be compensated or to receive restitution within the future Denationalisation Law will in the end be better or worse off than those compensated between 1996 and 2000. However, the new proposed Denationalisation Law, in its text and supporting documents, rejects

[138] Interreligious Council in Bosnia-Herzegovina, „Public Declaration on the Proposed Law of Denationalisation", 23.02.2009

the possibility of dealing with any property rights acquired by other laws prior to the entry into force of the new law.

Both entities (Federation of BiH and Republic of Srpska) adopted the Law on Sale of Apartments with Occupancy Rights or other laws regulating the privatisation of property, including the privatisation of residential buildings. At the same time, the international community encouraged the sale by municipalities of industrial and agricultural land in order to boost the local economy and design a platform for the *sustainable return of displaced persons*. This meant more than the return of property, but the sustainable return of people to their communities of origin. Since a substantial number of both legal and private persons used this opportunity to buy property from the State (or the municipality as the authorized party), the restitution policy of properties confiscated by the state needs to be fine-tuned to the current situation.

This results in a situation where the second 'policy step' (privatisation) took place before the first one (denationalisation). Namely, the majority of tenants/occupants purchased their apartments or other property. Now the same apartments/property or equivalent property are to be returned to the former (original) owners, as the Draft Denationalisation Law asserts that natural compensation shall take precedence. The situation may prove to be even more complicated in relation to legacies and donations to the religious communities. In these cases, as stated by the Inter-Religious Council of Bosnia and Herzegovina, the task now is to 'make an egg out of an omelette'[139]. This unwrapping of prior history and reverse sequencing - especially in the absence of updated property registers - presents a huge challenge in the adoption and implementation of the new Law on Denationalisation.

Impact of Corruption in Adopting and Implementing the Denationalisation Law

All of the policy stakeholders interviewed during the data collection phase of the project[140] indicated that corruption is likely to be a key problem in both the design and implementation of the draft Denationalisation Law. Although their perceptions concerning the forms of corruption and their actual influence on denationalisation efforts may differ, they all agree that a number of municipal and/or entity leaders misused their positions (i.e. they manipulated decisions concerning the sale of property that is now the object of denationalisation, and they did so for their personal gain or for the benefit of their family or political party).

According to stakeholders' statements expressed during the interviews, interested parties and journalists have found several such apartments in the Sarajevo municipalities of *Centar* and *Stari Grad* (the two municipalities expected to be most pressured by the Denationalisation Law in terms of housing issues). In these prime areas, apartments and lucrative construction land were distributed to political leaders, municipality leaders, and employees (or their family members) that have good political connections and so-called 'political protection' for such actions. From the interview, it appears that a uniquely sophisticated 'parity of the constitutive people' tended to serve corruption, as the 'constitutive people' representatives (meaning the main national/ethnic political party leaders) collaborated well in appropriating the right to 'distribution of wealth' to their members, setting aside their customary national/ethnic barriers in service of their larger goal to grab property for themselves and their political friends[141].

A brief overview of national and local newspapers periodically shows stories in which politicians or their close relatives abuse their power to obtain confiscated property (the same property that will become the subject of restitution). A common problem in each of

[139] Jakob Finci, member of the MRV (representative of the Jewish community) during public discussions on the Denationalisation Law (2008/2009).
[140] Representatives of the Inter-Religious Council of Bosnia and Herzegovina, the Open Society Institute BiH, Representative of the Association of Tenants 'DOM'
[141] Zoran Žuljevic, (interview, December, 17, 2009)

the published cases is that property that was taken by such acts of corruption is usually unaccounted for at the time of seizure (not registered as state or public property).

It is important to note that most of the 'unaccounted' property is in downtown areas, as cities have grown since the time of Communist era property confiscation or since the time when such property was built or bought by its original owners. Therefore, for example, most of the 'unaccounted' property in the city of Sarajevo is in the municipalities of *Centar* and *Stari Grad* (Old Town) where the price/value of property is extraordinary compared to the overall market and economy in Bosnia and Herzegovina[142].

Such questionable decisions on property management, or the property itself, may become the subject of court proceedings in either Entity or State courts. Judging by developments related to property law during the Dayton-related return period, the Constitutional Court might be burdened with legal charges involving violations of human rights or breach of international conventions that Bosnia and Herzegovina has ratified.

Sources stated that the prevailing private interests in the management of property that was subject to confiscation/nationalisation (or any other kind of expropriation) are creating an environment in which the first Draft Law was rejected by the Parliament of Bosnia and Herzegovina with no explanation (as stated in the supporting documents of the June 2009 Draft Law). Such lack of political will to regulate the issue creates an atmosphere in which policy makers intentionally obstruct the process by asking questions such as, 'where do we start ... with the Ottoman Empire, Austro-Hungarian Monarchy or where?'; or they introduce other issues (ethnic, refugee, economic) as a reason to further stall the process. This tendency, coupled with the fact that denationalisation in Bosnia and Herzegovina is not a priority for the international community[143] or a condition for Bosnia and Herzegovina's roadmap to the EU membership, leaves unbridled space for blocking the process for an unpredictable period of time, leaving thousands of people deprived of their property or their rights. In Bosnia's post war and current economic situation, this deprives some people of their last or best chance to recover from the sentence of poverty the last war inflicted on them.

4. CONCLUSION

It remains to be seen how the legal jurisdiction over property issues in Bosnia and Herzegovina will be defined. It is highly likely, however, that some developments might prove more complex than expected because of all issues stated in this document. Even though it is difficult to provide adequate recommendations on a policy that in fact does not exist, there are some issues that may add value to the anticipated policy framework and assist in resolving some of the conflicting issues.

It is recommendable to adopt the state-level law on denationalisation as proposed by the June 2009 Draft Law. Even though the law has weak points as elaborated in this paper, such weaknesses can be resolved through the adoption of by-laws, codes of conduct, and some administrative tools and mechanisms that do not have to be a part of the formal law. Adoption of the Law would start the procedure to establish an institutional framework for implementation of the law. As stated in the Draft Law, there is a six-month period between adoption of the Law and the beginning of actual implementation; this is needed for institution building of the Directorate for Denationalisation with all of its structures (bodies) such as Commissions (first and second instance) and Supervisory

[142] This issue emerged with all of the interviewed stakeholders, although, due to lack of registration and lack of available data, it is impossible to count the number of properties or total value of properties where such abuse occurred.

[143] For example, a communication from the former High Representative Mr. Wolfgang Petritch to the *Zlatko Lagumdžija* (President of the Council of Ministers at the time) clearly says that there is no condition in international treaties for Bosnia and Herzegovina to initiate the process of denationalisation.

Board, and to prepare the necessary mechanisms for the actual functioning of the Directorate.

The adoption of the Entity Denationalisation/Restitution laws (that are in progress) should be in line with the state level law. The ideal solution (though probably the least likely) would provide that Entity laws be in accordance with the state law, and that they empower the state level law in terms of speed and quality of implementation by creating specific regulations on registering property at municipal/city/district levels and making such data available to the public and all interested parties. New registers of property (a register of confiscated property subject to denationalisation, a register of property that shall be used for the purpose of natural compensation, and a general register of all municipal property) should be in place in each of the municipalities in Bosnia and Herzegovina or at the cantonal or entity level. Such registers, aside from simple counting of the property should contain data that is in the possession of the public bodies (e.g. location, type and size of the property, under which law the property was confiscated and the legal basis for confiscation, who is in possession of such property or who has occupancy rights and on what basis, approximate commercial value of the property). Such registers should be available to the public as well as to all interested parties. In addition, a combined register of persons and companies that have been compensated for their property through bilateral agreements (such as the Agreement between the U.S. Government and SFRJ) should be established and made available to the public and interested parties.

Municipalities should be required by law to establish registers of property which is unaccounted for and provided a binding deadline within the law for beginning of procedure before the court by the relevant public office (public defender) in the name of the targeted municipality, and stating that all property which is unaccounted for after the deadline belongs to the State of Bosnia and Herzegovina.

Transparency and access to data should be increased at all levels , in the policy-making process (draft laws, future by-laws and other relevant policy documents, registers of property subject to restitution law, decisions in the process of denationalisation as well as statistical and other relevant data). Integrity and anti-corruption measures should be imbedded either in the law or by-laws and codes of conduct of relevant bodies as were imposed during the implementation of the Dayton package of property laws. Special attention should be given to conflict of interest-related issues in the appointment of members of the municipal commissions, as well as the appointment of members of the Appellate Commission, with both soft (prevention) and hard (ban on appointment to public service employment) measures against those that breach the codes of conduct or other similar instruments.

The international community should give special attention to the issue, as it is one of the last issues in Bosnia and Herzegovina that precedes the beginning of the development of a free market (aside from the problem of corruption and lack of integrity). Therefore, the denationalisation issue, as well as effective, timely, fair and just implementation of the Law and international treaties, should become a criterion for Bosnian progress in accession to the EU.

By the end of the denationalisation process, Bosnia and Herzegovina should consider a special approach to the property that belonged to victims of the Holocaust or the last war in Bosnia and Herzegovina. Even though Bosnia and Herzegovina is in a difficult financial situation, no state should benefit from suffering such as the Holocaust. Such measures pay tribute to the victims of tragic historical events, and at the same time prevent special interests within the State from making money and taking precedence over the public interest and interests of all citizens. In complex situations, the tenants should be given the right to buy such apartments as guaranteed under the law. Bosnia and Herzegovina can consider a solution similar to the one in Macedonia, and create a fund out of the money received through the sale of such property to be used for paying compensation to victims and their descendents through a variety of actions. The fact that proper and fair

denationalisation is not a condition for the BiH roadmap to the EU raises suspicions that this matter will never be adequately or fairly resolved. Since there is almost no leverage from the international community in relation to denationalisation policies, it is expected by many that the final outcome of denationalisation will prove a failure.

Chapter 3 - Bulgaria

1. OVERVIEW

In this report, we have described and analysed the restitution process in post-communist Bulgaria in its historical and political background. The process of nationalisation of agricultural land, or urban, industrial and other property in the early communist period and the subsequent practices of alienation of property were also briefly described in order to make possible the understanding of subsequent developments.

The legislation, the judicial practice and the decisions of the Bulgarian Constitutional Court on property restitution in the transition period were discussed in detail. The social, economic and urban development consequences of this process were also outlined. The issue of the effects of restitution on the minorities in Bulgaria was also briefly addresses, with an emphasis on the restitution of property to the Bulgarian ethnic Turks. Special attention was given to the issue of compensation of both the pre-nationalisation owners and third parties.

The restitution of property in Bulgaria over the last twenty years has been one of the most far-reaching and complex social processes. It has been shaped by and has itself shaped Bulgarian politics. Issues of the balance between retributive justice and the general public good, issues of evaluating the past and making projections for the future, and indeed issues of political identity are all entangled in this process. Therefore, any overall judgement will be necessarily partial and controversial. One thing is clear, however: the process of restitution has determined the outlook of contemporary Bulgaria in a variety of important ways.

It would be fair to say that in terms of *economic efficiency* restitution of agricultural lands within their real boundaries has fragmented the plots, and has created a serious need for merger of land plots. Bulgarian agriculture, partly as a result of this fragmentation, has been one of the sectors facing the most severe difficulties in recovery after the crisis of the 1990s. This fragmentation creates also problems in securing EU funding in the sector.

The benefits of the restitution process should therefore be searched for mostly in the area of *social (retributive) justice and the legitimating of the transition to liberal-democracy and market economy*. Here, the restitution efforts of the political elite indeed created a significant constituency of owners supporting the political transformation. Existing public opinion polls show that only a relatively small minority has rejected and opposed restitution. Yet, in the popular cost/benefits analysis, apparently the utility produced by the Bulgarian model of restitution, together with the other benefits of the transition process, has been outweighed by other costs.

2. HISTORICAL BACKGROUND OF THE EXPROPRIATION PROCESS

The Restitution of property in Bulgaria aimed at remedying the injustice done to owners of nationalised private property which started after the communist takeover in 1944. A series of laws provided the legal grounds for the nationalisation of different types of private property in the period of consolidation of communist rule in the country.

The first law was adopted immediately after the communist coup of September 9, 1944. It is the 'Order-Law on the Trial by a People's Court of the Persons Responsible for the Involvement of Bulgaria in the World War[144]. In 1946 the 'Law on Confiscation of Property Obtained through Speculation and Other Illegal Means'[145] was adopted, followed

[144] *State Gazette*, № 219/6.10.1944.
[145] *State Gazette*, № 78/1946.

by the 'Law on the Nationalisation of Private Industrial Enterprises and Mining'[146] in 1947 and the 'Law on Nationalisation of Large Urban Real Estate Property'[147] in 1948. A long list of laws nationalising a wide range of types of property followed related to the introduction of state monopolies in tobacco, oil products, alcohol, the banks, the insurance companies, the forests etc. In this regard, the 1992 Law on Restitution of Nationalised Immovable Property[148] lists more than 25 laws, which were grounds for nationalising property after 1944.

Though often subsumed under the general term 'nationalisation of property' the practices of confiscation of property according to these laws were diverse. Some of the laws envisaged nationalisation with no compensation, others with some compensation. Thus, the *'Order-Law on the Trial by a People's Court (etc)'* of 1944 provides for the confiscation of the entire property (or parts of it) of the convicted. No compensation is envisaged. The legislator has imposed even harsher rules: all property that was transferred to relatives of the convicted person after January 1, 1941 and all the property obtained by their spouses and their descendants after the same date, is considered as property of the convicted person and thus is liable to full or partial confiscation. Thus on the ground of this law alone some 137 industrial plants have been nationalised.
As a result of the *'Law on Confiscation of Property Obtained through Speculation and Other Illegal Means'* in 1946-1947 another 700 enterprises and private property with a value of around 8 billion Levs were confiscated[149].

The nationalisation process proper started in 1947 with the adoption of the new Constitution of People's Republic of Bulgaria on December 6. Formally, this constitution in its article 10 acknowledged the right to private property - it was declared protected by the law. However, a fine distinction between property in general and property obtained by one's own labour was drawn, with only the latter enjoying 'a special protection'. Furthermore, in the final section of art.10, it was stated that 'the state may nationalise, in full or in part, certain branches or certain enterprises from industry, commerce, the transport and credit institutions', where a compensation to their owners is due.

2.1. Nationalisation of industrial property

This provision was immediately put in action in the *'Law on the Nationalisation of Private Industrial Enterprises and Mining'*[150], adopted a couple of weeks after the Constitution by the Grand National Assembly. This Law provided for the nationalisation of all industrial and mining plants and included a list of all those plants. It also provided for the nationalisation of all the assets, capital, shares, etc. related to the activity of the respective enterprises. Even the houses of the owners that were in the yards of the plants were to be nationalised. In case the owners had no other house, a flat of limited size was to be offered as compensation. The owners were often employed as specialists in their nationalised plants, because of shortage of technically educated personnel.

Compensation in state bonds for the nationalised plants and other property was envisaged, as requested by the 1947 Constitution. However, in cases of collaboration with the previous regime and with the enemies of the People's Republic of Bulgaria, such compensation was to be withdrawn. In fact, no compensation was paid to any of the owners: the provision remained inactive once the nationalisation process was underway. It was assumed that the owners collaborated, one way or another, either with the previous regime or with the enemies of the communist rule. Hence no compensations were due.

[146] *State Gazette* № 302/27.12.1947.
[147] *State Gazette* № 87/1948.
[148] *State Gazzette,* № 15/21.02.1992.
[149] The whole of the Bulgarian industry in 1945 comprised 4623 predominantly small-scale enterprises, with some 127.118 employees and some 220 medium and large enterprises. Bulgarian industrialists owned 70.5% of the means of production in the country, the rest being state or cooperative-owned or in foreign hands. Source: Gyuzelev, Boyan
[150] *State Gazette* № 302/27.12.1947.

In 1948 the process continued with the nationalisation of banks and the insurance companies. The private banks were merged in the Bulgarian National Bank, and a Bulgarian Investment Bank was established.

As a result of the nationalisation process altogether 6100 enterprises had become state-owned. The process of nationalisation of industrial property was seen by the communist leaders of the country as the first step towards the rapid industrialisation of the country. The Soviet-type centralised economy was to be the main vehicle in turning rural, underdeveloped Bulgaria into an industrialised, developed country.

2.2. Nationalisation of residential property

The nationalisation after 1945 concerned also private housing. Because of housing shortages in the towns, as well as for ideological reasons, the policy was to limit private real estate ownership to one dwelling per family and to take away from their owners apartments allegedly exceeding their needs. All flats 'in excess' were nationalised. In some cases the owners received state bonds in compensation. Owing to regulations modifying the conditions of payment on these bonds, in practice compensation was never received by the owners.

2.3. Nationalisation of agricultural property

For Bulgaria the changes in the ownership of agricultural land were no less important: 75.3% of the population in Bulgaria was rural[151], with predominantly small private landownership[152]. The agricultural sector was labour-intensive and very inefficient. The need for improving productivity through modern agricultural techniques and larger farms had already given rise to the cooperatives movement in Bulgaria prior to the communist era[153]. However, the communists took over the cooperative initiative, and managed to introduce a Soviet-type collectivisation in the Bulgarian villages[154].

The first steps towards Soviet-type collectivisation were taken with the 1946 '*Law on Labour Land Property*'[155]. According to it, agricultural lands above 200 decare and in some regions with bigger farms – 300 decare, were nationalised. The land that was thus nationalised (estimated to be 804 542 decare)[156] was included in the state agricultural land fund. From this fund in the late 1940s and the 1950s some 128 000 property-less rural families received land at regulated prices. The land thus distributed amounted to 1.4 m. decare[157]. However, these families did not enjoy for long the private ownership of their newly acquired land - the process of collectivisation had already started. Initially, the collectivisation was entirely voluntary – farmers were positively motivated to join the collective farms by offering them favourable conditions of use of agricultural machinery,

[151] Source: National Statistical Institute, *Results from Censuses*, v.1, Demographic characteristics, Sofia 1994, p. X.
[152] Big farms with more than 500 decare of land are just 0,1% of all farms. Farms with more than 100 decare were 10,7% and there 33,1 % of all arable land was included. The predominant majority – 63,1% were farms with less than 50 decare of land. Source: Mateev, B. (1967) *Dvizhenieto za kooperativno zemedelie v Bulgariya v usloviyata na kapitalizma*.
[153] The first cooperative in Bulgaria was created in 1890. After WW I the cooperative movement grew and included one million members. It was better developed than the cooperative movements in the neighbouring countries and enjoyed state support in having access to lower interest rate credits. Gruev, Mihail.(2009). *Preorani Slogove: Kolektivizatziya i sotzialna promyana v Bulgarskiya severozapad 40-te – 50-te godini na XX vek. Ciela*, Sofia.
[154] In the pre-socialist era cooperatives the participation of the landowners was entirely voluntary (kept their property, economic independence and only pooled their efforts in obtaining credit, buying equipment, etc. The land was not collectively used. Collectivisation, however, has an entirely different philosophy. The land is jointly owned and worked, and the profit is shared among members.
[155] *State Gazette*, №81/ 9.04.1946.
[156] These were the official data, which the Bulgarian Ministry of Agriculture, Forestry and Land Reform (BMAFLR) used at the start of the restitution process in 1992. However, some claimed that the nationalised land was much greater. They referred to different data, and to an article "Historic Victory in Agriculture', published in the official newspaper of the communist party *Rabotnichesko delo* in 1959, where the then Minister of Agriculture Ivan Prumov declared that more than 2,5 m. decare of land had been nationalised.
[157] Again according to the data of BMAFLR.

preferential loans, free veterinary services, free lessons and advice, etc. Furthermore, farmers that were given land up to 50 decare were not to pay for it, if they joined the so-called „Agricultural labour cooperative farms" (known as TKZS)[158]. By the end of 1947, 3.8% of the land was included in TKZS.

In December 1947 the first republican constitution of the country - the constitution of the People's Republic of Bulgaria - was adopted. This marked the consolidation of the communist rule in the country, euphemistically called the 'people's democracy'. The new 'Dimitrov'[159] Constitution was ambiguous concerning the ownership of agricultural land. Though in its art.10 it announced that private property and private economic initiative were recognized and protected by the law, in art.11 it was declared that large private landownership was inadmissible. In the same art.11, it was declared also that the land belonged to those who work it. In addition, a special protection and support was granted to the cooperatives (art.9).

The next step towards eliminating private property in the Bulgarian village was taken with the 1948 '*Law on Buying Large Agricultural Equipment from Private Owners*'[160]. All heavy agricultural equipment was nationalised, and its owners compensated with state bonds, which eventually turned out to have no value. This move meant that the alternative – private agriculture – was not viable for the vast majority of farmers, needing equipment for their land, yet having no access to it outside the collectivised farms. In addition, with the amendment of the Law on TKZS in 1948[161], cooperated farmers could not keep part of their land, as had been possible prior to this amendment. Farmers had to become members of the cooperatives with all their land, domestic animals and all their agricultural equipment.

Yet by the end of 1948, only 6.2% of all arable land was included in TKZS. The pressure on the private farmers was further increased through the introduction of some essentially coercive measures. The state had introduced the forceful collection of 'obligatory state supplies' in agricultural products. Those producers who could not provide them were forced to buy products in order to pay for their obligatory contributions to the state, thus accruing huge debts. This measure was in effect a natural tax on private land, which was steeply progressive. TKZSs were exempted from this tax. Many of the landowners could not survive under these unfavourable economic conditions[162]. The alternative for the economically pressured private landowners was to join the TKZS (where only land for personal use was taxed, yet at a preferential rate) – or to sell one's land and migrate to the towns.

These combined strategies of the communist rule made Bulgaria the first country among the Soviet satellites to complete the collectivisation process. Even though this forceful collectivisation met resistance in certain regions, the process continued, and by the end of 1957 86.5% of all land was included in the TKZSs. The process was completed by the end of the 50s, when this rate was 99%[163]. Formally, by entering the TKZSs the farmers preserved their property rights over the land and other stock and equipment. Theoretically, the members were receiving rent for their land and other assets as well as a salary for their work. However, exiting TKZSs was impossible, and effectively, land ownership and administration was in all practical terms in the hands of the state. Formal land-ownership remained with the TKZS and its members, but it was decoupled from the equipment (the capital assets), which was state-owned.

[158] They could keep 5 to 10 decare for their own personal use, paying only for this land, again at preferential price.
[159] After the communist leader of the country Georgi Dimitrov.
[160] *State Gazette* № 48/28.02.1948.
[161] Law on agricultural labour cooperative farms, amended and republished, *State Gazette* № 63/18.03.1948.
[162] Pressure was exerted through other means as well – 'kulaks' were threatened with political trials, were sent to labour camps for sabotage and anti-state activity, their children were pressured in school, entry to the universities was denied to some of them, etc.
[163] Filip Panayotov, Ivanka Nikolova, *Bulgariya 20 vek: Almanakh*, Trud Publ., 1999.

The process of 'nationalisation' of agricultural land was completed in 1971, when a new socialist constitution of the country was adopted. It provided the legal framework for the next, more mature period of communist rule in the country – the so-called 'real socialism'. In article 14 of this Zhivkov[164] Constitution, the only forms of property in the People's Republic of Bulgaria were declared to be *state, cooperative and personal property*. What 'personal property' meant was clarified in art.21 of the Constitution. According to it 'citizens are entitled to *personal ownership* of real estate and goods to meet their own and those of their families needs,' as well as 'the small-scale means of production and the products of the household activity of the co-operators and the other labourers, given to them for their personal use and other supporting activities'. Private property (beyond the type and extent of ownership, protected under 'personal property') was not legally recognized.

In the early 70s, the 800 or so TKZSs in the country were integrated into 170 giant agro-industrial complexes (APK), where the land and all other assets were publicly owned.

3. THE RESTITUTION / COMPENSATION PROCESS

The framework for the restitution of private property was provided by the new Bulgarian Constitution of 1991[165]. Its article 17 guaranteed the right to private property:

1. The right to property and inheritance is guaranteed and protected by the law.
2. The property is public and private.
3. Private property is inviolable.

Non-voluntary alienation of property for state and communal needs can be carried out on the basis of a law, under the condition that these needs cannot be satisfied in any other way, and after fair compensation'.

3.1. Restitution of agricultural land

3.1.1. Legal framework

The restitution of property in Bulgaria started as early as February 1991 with the adoption of the *'Law on Property and Use of Agricultural Land'* (*LOUAL*)[166].

The restitution of agricultural lands, nationalised by the communist regime in the late 1940s and 1950s, proved to be one of the most disputed aspects of the transition to market economy and democracy in Bulgaria in the 90s.

There were two general political projects of compensating or restoring the rights of the landowners after the changes in 1989. The first one, advanced by the ex-communist Bulgarian Socialist Party (BSP), envisaged a *limited restitution of land* and *financial compensation for the rest of the property* (through government bonds or other similar means). Under this model, the owners were not supposed to recover their own lands in real-boundaries from the time before the communist nationalisation. They could receive equivalent land from the same category (quality) on the territory of the town or village, where their former properties were located. This provision was meant to facilitate the preservation (in a reduced form) of the big communist co-operative farms (TKZS). The socialist-supported model envisaged either later privatisation of these farms or their transformation into real co-operatives among the former landowners, and the workers and the management of the state farms.

[164] After the communist leader of the country Todor Zhickov.
[165] *State Gazette* № 56/13.07.1991.
[166] *State Gazette* №17/1.03.1991.

The alternative political project of *full restitution* of land was defended by the pro-reformist anti-communist opposition - the Union of Democratic Forces (UDF). They insisted on full restitution of all property in its „real boundaries' – the boundaries of the plots of land before its nationalisation.

BSP, who won the first democratic elections in 1990, managed to pass the first land-reform law in 1991 – *The Law on Ownership and Use of Agricultural Lands (LOUAL**).*** It enshrined the above mentioned principles of landowner *compensation*.

However, the second general elections in the country in 1991 brought to power a new centre-right majority dominated by the Union of Democratic Forces (UDF). The first major legislative initiative of the new pro-reform majority was to amend *LOUAL*[167]*.* The aim was to substitute the *compensation* principle with the *restitution* principle. According to UDF only the restitution principle served historic justice. The amendments to *LOUAL* provided for much *more extensive restitution* of agricultural lands in their *real boundaries* from the time before nationalisation. The restitution presupposed the liquidation of the state owned co-operative farms (TKZS). The task of the dissolution of TKZS was given to the so-called 'Liquidation committees', to whose activity some members of the Bulgarian public connect the destruction of the agricultural sector in Bulgaria in the 90s.

The general rules for the restitution of agricultural land are determined in article 10 of *LOUAL*. According to the 1992 amendments, the restitution of agricultural land is very extensive and inclusive. It covers all cases of land nationalisation – done both directly by the state through various laws and orders, extralegal provisions, etc., as well as through the system of TKZS, as explained in the section on nationalisation. As a general rule, the land had to be restored to its owners and their heirs within its original boundaries, wherever this is possible (art. 10a). An upper limit of 200 decare (and 300 decare for some parts of Dobrudja region, where the biggest pre-nationalisation grain farms were located) was determined. Compensation was owed for the land above this upper limit. No restrictions on the size of the compensation were introduced[168]. The land was to be given back to its original owners or their heirs. Yet, whenever these were foreign citizens, they had to sell their property to Bulgarian citizens within a three year period (art. 10a, 3, 4). This was so, since in its art. 22, the 1991 Bulgarian constitution did not allow for foreign citizens to own land in Bulgaria. This provision was amended in 2005[169] (and the amendment entered into force after the EU accession of the country in 2007), allowing the citizens of EU and some other states to own land in Bulgaria. This amendment was a prerequisite for Bulgaria's accession to the EU in 2007. Yet many non-EU citizens still cannot own land in Bulgaria, and accordingly, still have to transfer their title over it within the specified three–year time- limit.

3.1.2. Administrative framework

The envisaged procedure for restitution of land was not in general burdensome. The owners or their heirs had to file a declaration with the Municipal Office of Agriculture, claiming the restitution of their property rights over their land. After the decision was announced by the Office, it could be challenge in court within 14 days. The filled-in declaration had to include description of the claimed property together with evidence for property rights over it. Such evidence could be diverse – from notary acts to declarations for membership in the TKZS, audit books for rent payment, decisions for granting property rights according to the 1946 Law on Labour Agricultural property and, as the law said - 'other written documents'[170].

In 1995 the new ex-communist majority in Parliament introduced an amendment to art. 10a of *LOUAL*. It required that the ownership of the land in real borders be determined

[167] Law on Amending and Supplementing the Law on the Ownership and the Use of Agricultural Lands, *State Gazette* No. 28/3.04.1992.
[168] Ibid. Art.10(8).
[169] *State Gazette* № 18/25.02.2005.
[170] Art. 12 (2) of *LOUAL*.

'as indicated in the municipal land cadastres'[171]. This amendment, however, was struck down by the Bulgarian Constitutional Court the same year[172]. The amendment aimed to restrict and make more burdensome the restitution of property procedure, which was seen by parts of Bulgarian society as too liberal, allegedly granting more extensive property rights than justified by documents. In general it was true that ownership documents such as notary acts were not absolutely required to prove one's title over the land. In some cases even the testimony of neighbours and a written declaration were deemed sufficient. This might have raised concerns of abuse. Yet the newly introduced restrictions could also be abused by those standing to win from blocked restitution of the land in real boundaries. And the threat to the right to private property this latter abuse posed was deemed sufficient by the Bulgarian constitutional court to rule out this amendment (see more below).

The body responsible for processing the restitution of land applications was, as mentioned, the municipal authority's Agriculture office and the local authority council. The applications were to be submitted within a seventeen-month period upon the promulgation of the Law. Subsequent amendments to the law in 1997, 2002 and 2007 allowed for applications to be filed even after this period, yet the title over the property in such cases had to be proven by producing the official documents: no testimony of neighbours or written declarations were considered admissible. These additional provisions allowed those citizens, who in the dramatic time of the early transition period did not manage to have their land returned, to do so later, though under more restrictive conditions. The number of those, who use this more demanding provision, should not be high, since by 1999 more than 92% of the land had been returned to its previous owners or their heirs[173].

3.1.3. Outcomes

Thus by the end of 1998 some 4,393,000 hectares or 79.60 % of land had been returned to its owners and by 30 July 1999 in real terms a property of 5,171,900 hectares had been returned - which is 92.72% of the land liable to return. According to a Report by the Ministry of Agriculture on the state of the reform of the agriculture in the country, already in 1998 in 4196 'zemlishta' (the agricultural land in a municipal unit) the restitution had been completed[174]. And by December 27, 2000, 99.79% of the land with recognized claims for restitution had been returned to its owners[175].

3.1.4. Obstacles

However, despite the early and relatively radical start of the land restitution process in Bulgaria, there have been some serious problems and concerns.

One of the main concerns was due to the widely *inclusive scope of the law* – where up to 200 decare of one's land is returned to its owners, based not on producing legal evidence to one's title via notary acts, but by producing written evidence of title of diverse character. The Municipal Agriculture office decided on all the applications and issued a document, which has the status of a notary act for the land. In case the office did not grant the ownership rights to the applicant, the latter within 14 days could challenge the decision before the District court, where all types of evidence, envisaged in the Civil procedure code are admissible (art. 12,3 (5) of *LOUAL*). Its decision could further be appealed. Thus often restitution of property court judgements are based on the testimony of an elderly neighbour, etc. This practice was justified by an appeal to the

[171] *State Gazette* № 45/16.05.1995.
[172] Decision of BCC №8/1995, *State Gazette* № 59/30.06.1995.
[173] According to the 1999 Report of the Ministry of Agriculture and Food, available at http://www.mzh.government.bg/Article.aspx?lang=1&lmid=421&id=421&rmid=0
[174] Ibid.
[175] According to the 2000 report of the Ministry of Agriculture and Food. Available at http://www.mzh.government.bg/Article.aspx?lmid=420&id=420&lang=1.

poor condition or the sheer absence of regional land cadastres, as well as by the expected targeted destruction of ownership documents (the TKZS declarations, the so-called 'emlyacheski' registers, kept at the Municipality, etc.) by those opposed to the restitution of land.

However, despite the benign intentions, the legal effect of these measures was sometimes adverse. To meet the restitution claims, the law required that at least 50% of the municipal land fund be allocated for compensation to those owners, whose land cannot be given back in real boundaries (Art. 10b of the Law). It was soon realized, however, that the claims of the owners exceed the available land by up to 40% of all the municipal land in the country, making it impossible to compensate with adequate land all the owners. The alternative, adopted in 1999 with an amendment to *LOUAL*, was to issue personal ('poimenni') compensation bonds (art. 10b (5)), whenever compensation with land was impossible. As will be discussed below, problems pertaining to the trade in such bonds, the determination of the value of the claims to be compensated, etc. detracted from the legitimacy of this measure.

Another major issue concerned *bona fide* third parties, who have acquired ownership over the land legally during the pre-1989 period. Sometimes the rights of these bona fide third parties were violated. We will explore further this issue later in the study.

3.1.5. The Role of the Bulgarian Constitutional Court

Since the time of the adoption of *LOUAL*, which coincided with the establishment of the Bulgarian Constitution Court, this body has ruled repeatedly on the issue of land restitution[176]. It would be justified to say that the Court has (co)determined the course of the agricultural reform and the restitution of the property in the country as a whole. The general constitutional policy of this body has traced the following trajectory.

First, in 1992 the Court ruled that the amendment made by UDF majority to *LOUAL*, which introduced the principle of extensive restitution, was constitutional[177]. Thus the real-boundaries principle was declared *compatible* with the Constitution.

Secondly, after UDF lost its majority in Parliament at the end of 1992, the Court in its 1993 – 1996 decisions consistently defended the principle of extensive restitution as the *only model* of restoring the rights of the former landowners, compatible with the Constitution[178]. It elevated the *real-boundaries principle to constitutional status*. Thus in its *Decision 12/1993,* the Court declined to balance the right to real-boundaries restitution against other interests. The judges argued that 'the social motives behind the [amendments, backed by socialists] cannot eliminate its contradictions with basic constitutional principles.'

This case marked a significant change in the position of BCC on restitution: while in the first case in 1992 the judges argued that *the real-boundaries principle was compatible with the Constitution*, in the subsequent decisions they put forward an argument that *it was constitutionally required.*

Thirdly, when the UDF government replaced the Socialists in 1997, the BCC somewhat 'softened' its position on the enforcement of the right of property in order to allow for certain governmental initiatives in the agricultural sector aiming at speeding up the reforms.

By the end of 1997 the doctrine of 'real-boundaries' had become largely obsolete. Since the BSP lost power in the spring 1997 elections, the constitutional policy of the BCC from the former period, aiming at preventing the dominance of BSP ideology, was no longer meaningful. Apart from the new political environment, there was another consideration to

[176] A detailed analysis of the jurisprudence of BCC, related to land restitution is provided in Annex 1.
[177] Decision 6/1992., http://www.constcourt.bg/Pages/Practice/PracticeByYear/Default.aspx.
[178] Decision 12/1993; Decision 7/ 1995; Decision 8/1995; Decision 4/1996. http://www.constcourt.bg/Pages/Practice/PracticeByYear/Default.aspx.

be taken into account. The prolonged (1992- 1996) stand-off between the legislature and the BCC on the issue of restitution, and the general reluctance of the BSP to speed up the process, had resulted in a *near-catastrophe in the agricultural sector*. The land was divided into endless *small plots*, some of which with *unclear ownership*, and many owned by people with no intention of becoming farmers. Since there was *no land market*, a huge percentage of arable land was becoming wasteland[179].

The real-boundaries principle was envisaged and defended as *a principle of justice*: returning to people what they rightfully owned. Since most of the Bulgarians before 1944 were holders of some land property, the principle was also meant to *partly compensate* the hardships of the transition to democracy with the restoration of property rights. The *inefficiency of the reform*, however, made the 'compensation' for the economic difficulties *largely symbolic*.
All these factors led the BCC to a decision in which the judges declined to extend and apply consistently the real-boundaries doctrine.

On the one hand, the judges argued that the owners had not lost their ownership rights during the communist period, but had been only prevented from their exercise: the real-boundaries principle was meant to 'restore' these rights as they were before nationalisation. On the other hand, only lands up to a certain limit (up to 200 decare/300 decare in limited cases) were to be given back in full, the rest being compensated for with state bonds (Art. 10 *LOUAL*). The Court, however, did not challenge this provision. Yet, the coherent application of the real-boundaries doctrine seemed to reject this form of inequality before the law.

In 1998 BCC[180] thus rejected the challenge of this provision of *LOUAL* by the Prosecutor General, who claimed it violated the right to property of the big land-owners as well as the constitutional requirement of equality before the law (only the small land-owners had received their land in full and in real boundaries). The judges now argued that the *right to restitution was not a constitutional right* and could be balanced against other legitimate interests (including those of the landless peasants, who were the beneficiaries of the 1946 land reforms). There was no violation of equality before law, because the law provided for compensation for lands (in compensation bonds) over the restitution limit of 200 (300) decare.

This decision seems to be in contradiction with its previous jurisprudence on restitution. In it the constitutional status of the real-boundaries doctrine was in fact rejected. The unwillingness to 'balance' the right to restitution against considerations of social justice and economic efficiency was also reconsidered.

In a way, the BCC in its post 1997 jurisprudence left the doors open for the legislature for a major revision of the principles of agricultural policy: this revision could lead to efficient agriculture, without the violation of already established property rights. Most importantly, the BCC seemed to re-evaluate its position on the property arrangements under communism. While in previous decisions the judges held that the communist period simply constituted an unlawful obstruction on the use of property rights, this new 1998 decision admitted that some of the communist policies had legitimate effects for the present.

It is difficult to give an unambiguous evaluation to the restitution of agricultural land in Bulgaria. As it became apparent by the end of the 90s, this process has not led to the development of the agricultural sector. On the contrary, according the data of NSI and the Agricultural ministry, the agricultural output has shrunk (with a 35% decrease in domestic animal products), and some 1/3 to ½ of the arable land was not in use at the

[179] It is impossible to obtain reliable data on the size of the waste-land in this period. The official data of the Agricultural ministry are that out of 48 m. decare arable land, 10 m. were wasteland in 2000. According to other sources, however, up to 30% (OECD, 2000, "Report on agriculture in Bulgaria"), or even ½ of all arable land was wasteland at the end of the 90s.
[180] Decision 15/1998. http://www.constcourt.bg/Pages/Practice/PracticeByYear/Default.aspx.

end of the 90s. The often quoted reason for this poor condition of the Bulgarian agricultural sector is the prolonged process of land restitution, which was mainly due to the often radical changes and contradictions in the restitution legislation[181]. The result was that at the end of this long process, some 1.7 m. owners had property rights over 27% of the arable land in the country. This fragmentation of the land does not allow for the development of efficient agriculture in the country unless a speedy process of land merger is undertaken.

In summary, it could be argued that there was a general consensus in Bulgarian society on the restitution of agricultural land to its owners, though there were competing models on how this restitution should be put in practice – the major issue being whether it should be given back within its real boundaries.

3.2. Restitution of Urban and Industrial Property

3.2.1. Legal framework

No such consensus existed on the issue of the restitution of urban and other immovable properties.

After the 1991 elections the *Law on the Restitution of Nationalised Immovable Property*[182] (LRNIP) was a top priority in the agenda of the pro-reform UDF government. It was immediately promulgated in February 1992. Surprisingly, despite the political climate in 1992 of deep division in the Bulgarian society along ideological lines, there was no strong popular opposition to restitution laws[183].

Nevertheless, the issue of restitution of urban and industrial property became the focus of similar political and constitutional controversies, as the restitution of agricultural land.

In general, the restitution of urban and industrial property had a more limited scope than the restitution of agricultural land. Yet the law was quite liberal: it allowed the restitution of property to both private persons and legal entities, to Bulgarian and foreign citizens (though restrictions of selling the returned property within three years applied in the case of the latter).

Section 1 of the Law provided that the former owners of real estate property nationalised by virtue of several early communist era laws, became *ex lege* the owners of their nationalised property if it still existed, if it was still owned by the State and if no adequate compensation had been received at the time of the nationalisation.

Section 7 provided for an exception to the requirement that the real property be still owned by the State. It concerned *the property rights of third parties.* It provided that even if certain property had been acquired by third persons after nationalisation, the former owners or their heirs could still recover it if the third persons in question had become owners in breach of the law, by virtue of their position in the Communist party or through abuse of power - i.e. 'bad faith' third parties do not defeat the right to restitution. According to the Government this provision was necessary since during the communist period there had been numerous cases in which the privileged people of the day had obtained apartments unlawfully. The former pre-nationalisation owners had to bring an action before the courts against the post-nationalisation owners within a one-year time limit. If the courts established that the title of the post-nationalisation owners involved breaches of the law or was tainted by abuse of power they declared it null and void and restored the property to the pre-nationalisation owners.

[181] These were the conclusions of the OECD report on Agricultural Policies: Bulgaria 2000.
[182] *State Gazette* №15/1992.
[183] It was just 19% of the adult population, who opposed any form of restitution according to an NCIOM survey at the beginning of 1992 despite the claims of the ex-communist, then in opposition, that the restitution was disfavoured by the majority of the public in Bulgaria. The data are quoted in "Politika i privatizatziya", the report for 1993 of the *Centre for the Study of Democracy* in Sofia (CSD).

The law guaranteed some rights to the current tenants of the returned flats: they could continue occupying them for three years after the rights of the pre-nationalisation owners were restored.
When the property could not be restored to its pre-nationalisation owners, they were entitled to just compensation through compensation bonds.

Special attention deserves the mentioned article 7 of *LRNIP*, since it is in the centre of a major controversy in Bulgarian society in the transition period. It has been the ground of more than 2000 complaints before ECtHR. The 1992 restitution law had provided a procedure for claiming the right to ownership of urban property before a court: if this property had been acquired illegally, or by an abuse of official administrative or political position. If this was the case, the pre-nationalisation owners received the right to challenge any transfer of this property to a third party, and to ask for the nullification of the transfer. On the grounds of this provision, allegedly tens of thousands third party property owners had lost their property after years of title over it[184].
In 1992 a *second restitution of urban property law* was passed –'*Law on Restitution of Property over Some Alienated Properties According to the Law on the Territorial and Urban Development, The Law on the Planned Development of Populated Areas, The Law on the Development of the Populated Areas*'[185]. It concerned properties expropriated for the purposes of urban development, subsequent to the nationalisation of property in the early communist period. According to this law, the owners of property or their heirs could get back their property, if the buildings still existed at the time of entry into force of the law and the measure for which the expropriation was undertaken had not been started. Even if the buildings had been destroyed, the property over the plot itself could be returned, in case the construction works on the plot had not been started and the plot itself could be properly constituted according to the applicable regulations. If the former owners had been monetarily compensated for their alienated property, they had to repay this compensation before they restored their property rights.

3.2.2 Outcomes

Let us give some substance to the effects of the restitution of urban property[186]. According to the data, in the period after the adoption of *LRNIP* – and by September 2000, more than 100 104 restitution claims declarations were submitted. More than 58 000 properties were given back to their original owners. This is 58.3% of all immovable property estimated to be subject to restitution (where more than 86% of the effective restitution was located in the towns). From these figures it is clear that 8 years after the restitution of immovable property in Bulgaria was launched, the restitution process has met serious impediments and was far from complete. This meant that a new law was needed that would speed up and ease the process of restitution of nationalised property.

Both the second 1992 restitution law and *LRNIP* had considerable implications for construction in the city of Sofia (and the other bigger Bulgarian towns) and for city and town development in the country in general. The socialist-type neighbourhoods with

[184] It is impossible to give the exact figure here. As a result of the 2006 amendment of art.7 of *LRNIP* (for more details the section on Compensation), some estimated that 50 000 people will receive compensation via the so-called "zhilishtni" (housing) compensation bonds. However, it is difficult to say how many of them are third parties, rather than pre-nationalisation owners, who could also not recover their property in real boundaries: both categories were entitled to compensation. One could speculate that between 50 000 and 100 000 people were affected by these provisions. The figure 50 000 is quoted in a newspaper article from 2006. Source: http://paper.standartnews.com/bg/article.php?d=2007-06-26&article=193597. The figure 100 000 is quoted by the socialist politician Luben Kornezov, who initiated the 2006 amendment of *LRNIP*. He admitted that it concerned the property of some pre-nationalisation owners as well, and not only the third parties affected by the restitution. He estimated that altogether some 30 000 flats had to be compensated for. Source: http://www.segabg.com/online/article.asp?issueid=2644&sectionid=16&id=0000101.
[185] *State Gazette* №15/21.02. 1992.
[186] The data are from a survey on the effects of the 1992 restitution laws, conducted by The Bulgarian Statistical Institution in the period October 1999 - September 2000

blocks of flats and large inter-block green areas with playgrounds started to give way to areas with more densely built houses, with less and less space, green areas and playgrounds. Whole parks started to disappear, chunks from the biggest parks in Sofia – Borisova Gradina and South Park were cut off as a result of restitution claims. On the returned plots blocks of flats and offices were built. The same was true of the other big towns in Bulgaria with strong investor interest. Even the inter-block green spaces in the older socialist-type neighbourhoods started to disappear rapidly, as the owners of the plots reclaimed their property and started building there. In 2007 amendments to the Law on Territory Development were passed[187] that were meant to guarantee the preservation of the green areas in towns with more than 50 000 citizens. These provisions prohibited change in the status of the land: if the plot had been included in the city development plan as a green space/garden/park, the plot could not be used for building an office block, for example. Prohibited as well was the change in the status of plots included in the existing parks/green areas, etc.

The procedure for changing the status of the plot was previously widely used (and abused) and was the main culprit for the densification of the buildings in the major towns in the country. However, these legislative changes did not stop the process of disappearance of green areas and the construction works in the inter-block spaces. Thus after strong popular pressure to stop this process (live-chains of citizens around plots to stop the bulldozers, protests of mothers with baby carriages and children in the playgrounds, demonstrations of eco-activists etc)[188], in the summer of 2008, the Parliament imposed a moratorium on starting new buildings in the inter-block spaces.

A related issue raised serious concerns in society. According to *LRNIP*, even parts of hospital yards, the grounds of the universities, schools, scientific institutes and other state and municipal institutions, could be returned to their pre-nationalisation owners, if the plots could be turned into separate plots fit for construction. Thus buildings rapidly started growing in surprising places. Especially controversial were the restitution claims in the 'Students' municipality' in Sofia, where new casinos, clubs and other such establishments were appearing overnight. After a scandal at the end of 2008 (a student was killed in front of an illegal club on a returned plot), under popular pressure new amendments to the Law on the Development of the Territory were passed. However, they did not forbid all restitution in the yards (or the (parts of the) buildings themselves) of educational, scientific, cultural and healthcare institutions. Rather, restitution was still allowed, yet only after an explicit written resolution, signed by the respective Minister[189].

3.3. The Restitution of Property over Forests

It was only in November 1997 that the restitution of property over forests was provided for with the '*Law on Restitution of Property over Forests and the Lands from the Forest Fund*'[190]. All forests nationalised as a result of the 1946 *Law on Labour Land Property*, and as a result of art. 7 of the *1947 Bulgarian constitution* (declaring forests exclusive state property) as well as a series of other laws from the early communist era, were to be returned to their former owners or their heirs. The private forests and the private lands from the National forest fund constitute just 15% of the forests in the country, the majority of which are state property (just above 6% of all forests are *municipal* public property).

The restitution of private forests was to be within 'real boundaries', and where this was impossible, the owners were to be compensated with forests similar in size and quality in the same or in a neighbouring area. The exclusion list was relatively short – forests in the National parks and those falling in the 200m 'border area', the natural and archaeological

[187] *State Gazette* № 61/2007.
[188] One of the articles covering this socially explosive issue in 2008 was titled "Civil wars against each metre of new urban development" http://www.segabg.com/online/article.asp?issueid=2972&sectionid=5&id=0001001. There were numerous other such articles: http://sg.stroitelstvo.info/show.php?storyid=500831, http://www.econ.bg/news86030/article138364.html, http://dnes.dir.bg/2008/06/24/news3129843.html.
[189] Amendment to the *Law on the Regulation of the Territory, State Gazette* № 17/2009.
[190] *State Gazette* №111/25.11.1997.

reserves, some historic gardens, etc. could not be returned within their real boundaries. Ife there were illegal buildings within the borders of the forests liable to return, the pre-nationalisation owners could buy them at market prices. If they were to refuse to buy them, their forests and lands would be bought by the state and the owners compensated. Those who had built illegal dwellings in the forest lands, and had no other holiday house, could buy the plot (up to one decare of land). If the latter did not do it within three months of the evaluation of their plot, the pre-nationalisation owners of the forest could buy it. Forests could be restituted even to those, who were compensated for their nationalised lands, if they returned the received compensation. Those owners, whose forests have been cut down after 1990, are compensated with 'poimenni' (named) compensation bonds for the lost wood and the plot itself is returned to them.

The procedure was similar to that for the restitution of agricultural property, though the period for filing the declarations was shorter - one year. Art. 13 (3) specifically determined that oral testimonies and written declarations of the claimants are not valid grounds for restitution of forests.

3.4. The Issue of Compensation

In 1997 the UDF won an absolute majority in the National Assembly, after a catastrophic two-year rule by the BSP majority government of Zhan Videnov. This rule left the country in deep financial and economic crisis. The new government of Ivan Kostov speeded up the restitution process and extended the scope of properties to be returned to their former owners.

Thus in November 1997, they passed the *Law on the Compensation of Owners of Nationalised Assets*[191] (*LCONA*) better known as 'The Luchnikov'[192] law. It mainly regulates compensation for nationalised property in the period of socialist rule, whenever it could not be given back in real boundaries and in full to the former owners or their heirs. However, the law also regulates the compensation to be paid for nationalised movable properties (art.3 of the Law). It allows the substitution of property already given back to its previous owners in real boundaries - for bonds or parts of the buildings, enterprises, or other objects, built on their land/property (art.2(3)).
In line with the manifest priority in post-socialist Bulgaria for restitution in 'real boundaries', compensation was considered a second-best scenario. Only when all possibilities for full restitution have been exhausted, or when such compensation is the will of the holder of the title upon the property, is compensation an option.

The value of the compensation determined in the Luchnikov law has *not* in general been correlated to the initial value of the confiscated property. Rather, in general the real market value of the property at the time of the adoption of the law in November 1997 has been taken instead. It was only with respect to properties other than real property, land and valuables - i.e. only concerning shares in enterprises, capital, etc., that the value of the property at the time of its nationalisation is also taken into account. For these latter cases, the value of the property at the time of its nationalisation is taken, multiplied by the average salary at the time the compensation bond is issued, and the result is divided by the average salary at the time of nationalisation. In addition, no upper limit on restitution claims was determined in the Law.

The compensation takes three forms according to the Law: the owners could obtain: 1.ideal parts in currently existing real properties, corresponding to the value of their nationalised property, 2. they could get shares in the enterprises developed on their property, and 3. they could get the so-called compensation bonds, which would be tradable on the stock exchange (art. 3 (1), 1, 2, 3).
There are three different compensation instruments. There were, first, 'compensation bonds', tradable on the stock exchange and usable in privatisation bids.

[191] *State Gazette* №107/ 97.
[192] After to its right-wing sponsor Svetoslav Luchnikov.

A particularly interesting second type are the so called 'zhilishtni' (i.e. housing) compensation bonds. These were issued to pre-nationalisation owners, whose flats could not be returned, as well as to those third parties, whose flats were returned to their pre-nationalisation owners. They are special, since with them only housing could be purchased. The process of issuing such instruments started at the end of 1998. However, the first auction of municipal housing took place only in October 2000 in Sofia. Up to 90% of the price of the property could be paid with such instruments. Different municipalities determined different ratios of compensation bonds/cash for purchasing municipal property. Moreover, the attractive offers were few, leaving the owners of such bonds with 'papers' with low value. Especially grave was the situation of third parties, left with no flats to live in after they lost their case in Court on grounds of art.7 of *LRNIP*. The amendment of this article had long been on the agenda of BSP. But after several attempts and two decisions of the Bulgarian constitutional court against these amendments from the mid-90s, the socialists have been unsuccessful in bringing it to life. In the meantime, a judicial practice developed, in which third parties were recognized as non-bona fide even in cases when, through no fault of their own, they had flat purchase contracts signed not by the authorised person, but by their deputy, without due authorisation (with just a comma before the signature). This was a common practice during socialism, which resulted in late 90s and later in numerous (tens of thousands) cases of Courts announcing such contracts were not valid, and returning the flats to their pre-nationalisation owners.

Thus in June 2006, an amendment to art.7 of *LRNIP* was finally adopted[193], introducing new paragraphs 2 and 3. The amendment only concerns persons who had not yet sold the housing compensation bonds they had received. New paragraph 2 provided that persons who lost their property under article 7 should have priority when applying to buy municipal apartments and should be entitled to pay in bonds, at nominal value. Yet this new provision was not accompanied by an amendment to article 41 of the Municipal Property Act, which explicitly prohibits the sale of apartments for bonds. Also, the new paragraph 2 does not affect the established case-law according to which municipalities are under no duty to sell apartments. New paragraph 3 provided that, if no apartment was offered by the relevant municipality within three months, the person concerned was entitled to receive *in cash the nominal value* of his or her bonds from the Ministry of Finance. The realisation of this right was conditional on the adoption by the Council of Ministers of implementing regulations. Their adoption has been delayed by a year[194].

A third type of compensation bonds are the so-called 'poimenni' (named) compensation bonds. They are issued on the ground of amendments in 1997 to *LOUAL* and the 1999 amendment[195] to the Law on Restitution of Property over Forests and the Lands from the Forest Fund[196], which allowed for compensation with bonds for those owners, whose land or forests could neither be returned in 'real boundaries' nor be substituted with other lands/forests, since such were unavailable.

The process of issuing these compensation instruments continued for many years, and was a constant source of fraud allegations, corruption scandals and general disappointment in society. The owners of compensation instruments were dissatisfied because they were not treated equally by law- they were unequally treated, when compared to those pre-nationalisation owners, who were given their property back in real boundaries, or were compensated with a similar property. Despite the promises, it took five years before all the enabling legislation was passed that would make possible the use of these compensation bonds in bids for state assets in a process of privatisation.

[193] *State Gazette* №53/30.06.2006.
[194] *State Gazette* №37/8.05.2007.
[195] *State Gazette* №49/28.05.1999.
[196] *State Gazette* №110/25.11.1997.

Thus it was only in 2002, when the long-awaited amendments[197] to the Luchnikov law as well as a new 'Law on the Trade in Compensation Instruments'[198] were passed.

The amendments proved ineffective in speeding up and easing the restitution process. The growing dissatisfaction with the compensation instruments was greatly enhanced by the fact that the list of assets was not attractive. There was considerable uncertainty about the list itself, about the property of the assets (often there were unsettled disputes between the state and the pre-nationalisation owners of (parts of) the enterprises over their property rights), and often just a small share of assets (usually up to 10% of their value) was offered for purchase with compensation instruments[199].

Most importantly, compensation bonds in general (with the exception of some of the 'housing' ones discussed above) are not exchangeable for cash. No interest accrues. They can only be used for participation in privatisation tenders/purchasing of property and their value largely depends on the availability of privatisation offers. A secondary market for compensation bonds developed in Bulgaria. Until November 2004, the bonds were traded at between 15 and 25 % of their nominal value. As bond prices remained low over a long time, many persons sold them during that period and obtained between 15 and 25% of their nominal value[200].

In general, the value of the compensation bonds had plummeted due to speculations and uncertainty on the market, partly because of inadequate and untimely legislation. The legislator failed clearly to distinguish the different types of compensation instruments (these were the three types mentioned above) yet determined that only compensation bonds could be used in privatisation bids. Later this restriction was lifted. This uncertainty has brought chaos to the stock exchange where the bonds were traded, as a result of which the price of the compensation bonds plummeted.

In addition, the introduction of the mechanism for compensation through bonds has given rise to some of the notorious cases of alleged abuse of power and corruption in the transition period in Bulgaria. The opportunity was provided by the fact that it was the Regional administration in the 29 regions in Bulgaria, together with the Ministry of the Economy, which issued and registered such bonds. Some of the most scandalous cases of fraud concerned the value of the bonds issued for certain nationalised moveable or immoveable property. This value was determined according to a very complex formula, which was liable to confusion. This led to often grossly unrealistically determined values, leading to cases where the compensation due was overvalued by up to 250 times. These manipulations were allegedly accompanied by an authorisation from the respective state and municipal bodies (raising corruption concerns). As recently as October 2009, cases have been decided at the Supreme Court of Cassation concerning the scandalous practices of nationalised properties bond evaluations from the late 90s[201].

[197] *State Gazette* №45 and №47/ 2002.
[198] *State Gazette* №47/10.10.2002.
[199] The expectation that the list would include profitable enterprises with serious market share such as Kintex, Bulgarian River/Sea Fleets, the Bulgarian cinematography studios, etc. was not met, with only the minority share of Bulgarian telecommunications company (34,78% - or 632 643 000 levs in compensation bonds) and Bulgartabak holding (12,84% or 79 295 000 levs in compensations bonds), etc. being offered. There were some attractive assets offered - 72% of the resort 'Sts. Konstantin and Elena' (purchased for 66 802 000 levs in bonds), yet often the most attractive assets were either altogether withdrawn from the list, or the share offered greatly reduced (as was the case with the attractive 'Bulgarian sea fleet' (from the 30% of shares initially announced, only 3% were offered.) Source: official information on the privatisation process in Bulgaria (by 30.11.2009) of the State Privatisation Agency of Bulgaria, available at www.priv.government.bg.
[200] At the beginning of November 2004, there was a sudden surge in the price of compensation bonds on the secondary stock market in connection with the privatisation of several major enterprises (BTK, Bulgartabac holding, and several others). Within several weeks, in January 2005 bond rates reached 100 % of their nominal value and more. At the end of January 2005 bond prices fell again and later stabilised at around 70 % of their value (and subsequently their price fell further).
[201] A final verdict against the former chair of the Regional cassation court in Plovdiv was reached in October. The value of the nationalised assets was determined 250 times higher than their real value. The decision is that

The public reputation of the compensation process was further damaged, since some politicians from the Government were implicated in the compensation bonds scandals. The vice-prime-minister in Ivan Kostov's right-wing government (1997-2001) Alexander Bozhkov resigned after a series of privatisation and compensation bonds scandals[202].

In general, the practice of issuing compensation bonds lacked transparency. At the same time information from responsible state bodies was leaked, it seemed, to interested parties. This allegedly benefited speculative players on the stock exchange, corrupting the entire process. All in all, the market value of the compensation bonds was way below its nominal value (reaching as low as 2-3% of it and stabilising at 35-40%), so that the owners of the nationalised properties that could not be returned were left dissatisfied.

To give some substance to the effects of the discussed Law on compensation, it should be noted that in less than three years after its adoption some 46,878 requests for compensation for property that could not be given back were filed, of which more than half were satisfied (25 177 by 30 Sept 2000). Compensation bonds of value over 1592.3 m. leva were issued[203]. By 2009 bonds with a value of 1.823 bn leva had been issued. The compensation bonds saga continues to this day. At present bonds with value of 600 m. leva (approximately 300 m. Euro) are still on the market. They cannot be used, and the process of restitution of property in the country cannot be completed, since the state still does not offer attractive assets to be purchased with them nor, alternatively, has it adopted a procedure for buying them from the owners at their nominal value for cash. This problem has reached the European Ombudsman, Nikiforos Diamandouros. He was addressed by the owners of such currently unusable compensation bonds, who demand that the European Commission include among the indicators for monitoring Bulgaria's reforms progress the question of the unfinished restitution process in Bulgaria[204].

The value of the compensation bonds, the speculation in their trading on the stock exchange, as well as the corruption scandals accompanying the process have raised serious concerns about its legitimacy.

3.5. Restitution of the Property of the Former Tsars of Bulgaria and Their Successors

The personally acquired or inherited properties of Tsar Simeon II and Tsar Ferdinand and their families were nationalised by the communist regime in 1947[205]. In 1998, the Prosecutor General of the Republic brought a challenge against this law before the BCC, claiming that it was a violation of, among a number of other provisions, Art.17 of the 1991 Constitution. It amounted, according to him, to an expropriation (without compensation) of assets for political reasons.
The Court in its *Decision 12/1998* accepted this argument, and unanimously held that the nationalisation of royal assets contradicted the inviolability of private property and the restrictions on expropriation of assets enshrined in Art. 17. The Court argued that there was no justified public need for the expropriation of the royal assets. As to the property of the families of the tsars, the BCC held that family relationship and inheritance rights could not be a legitimate ground for the expropriation of assets. This, in the view of the judges, was a violation of equality before the law. The BCC refused to consider the compliance of the nationalisation laws with the 1947 Constitution (which justified the nationalisation), claiming that this was outside its jurisdiction.

The decision of the Court condemned the nationalisation of the property of the tsars' families by the communist regime as illegitimate and unnecessary acts, which could not justify restriction of the right to restitution. If restitution was granted to other people by

the former judge has to return to the state 16 049 834, 86 levs – or apprx. 8 million euro. There are a number of similar cases currently heard at the Regional and Supreme Cassation courts in the country.
[202] Alexander Bozhkov was acquitted on all charges before he died in 2009.
[203] National Statistical Institute, "Report on the restitution process (research conducted Oct. 1999-Sept 2000).
[204] The source of this information is an analysis in the issue of the legal journal 'Praven svyat' http://www.legalworld.bg/show.php?storyid=10425.
[205] *State Gazette* №305/1947.

law, the royal families should also enjoy it on grounds of equality before the law. The decision obviously created problems of coherence since, as discussed above, a few months later the Court ruled that the right to restitution was *not* a *constitutional right*, and different forms of compensation for nationalised property were deemed then equally acceptable by the BCC.

As a result of the decision of the BCC, seven titles of immovable property were restored to the former king of Bulgaria[206]. However, there was a popular discontent with the restitution of (some or all of) these properties in parts of the Bulgarian society. Some challenged the whole restitution of the royal assets as illegitimate. Others challenged the restitution only of certain assets (where the documents were allegedly not impeccable).

Two of the last governments in Bulgaria promised they will specifically deal with the issue of royal restitution. In the last Parliament a Committee on the 'tsar's assets' was formed. The report of the committee consisted of statements of facts (the former king of Bulgaria Simeon II has not presented ownership documents for some of the restituted properties, there are also other mistakes). Yet the report did not contain any conclusions[207].

The current government of GERB has committed itself to reconsider the restitution of the royal assets. A new Parliamentary committee was formed on the issue in the autumn of 2009. Some steps were indeed taken to address the issue effectively[208]. In December 2009 the majority in the Parliament voted a moratorium on the 'use' of the royal assets: any building or other activity is to be stopped there. The moratorium will be valid till the adoption of a special law dealing with the royal assets.

3.6. Restitution and Minorities in Bulgaria

3.6.1. The restitution of Property to Bulgarians of Turkish ethnic origin

Serious injustice, perpetrated against the Bulgarian citizens of Turkish origins in the mid to late 80s, had to be remedied by the state in the early transition period of Bulgaria. From the early 70s to late 80s sustained efforts were undertaken by the communist party and the state to assimilate the ethnic minorities in the country with the aim of creating an ethnically homogeneous Bulgarian nation. The process was euphemistically named 'the revival process'. It included the forceful replacement of the Islamic names of the Bulgarian citizens of Turkish origin (as well as the Roma, the pomaks, and the tatars) with Bulgarian names. The use of the Turkish language in public was forbidden, as was their right to religious practice. Their cultural practices were suppressed. The process intensified in 1984, when the campaign with the change of names was undertaken. It met serious resistance, culminating in demonstrations against it in December 1984 and January 1985[209]. The second wave of resistance was in 1988-89, when several informal human rights organisations were established by the ethnic Turks in the country. The high point of the resistance was in May 1989, when their activists organised hunger strikes

[206] His rights over the residences Banya and Vranya initially, and later Sitnyakovo, Sarugyol, Tzarska Bistritza etc., were restored, as well as 16,540 decare of forests in the Rila mountain. Of these 16,450 decare forests, 4 521 decare were returned by "mistake" by the authorities. The procedure for the return of an eight asset was stopped.

[207] This peculiar result was reached, since the Committee's majority conclusion was that the restitution of the tsars' assets was unlawful. Yet after a scandal in the governing coalition (consisting of BSP, the tsarists – NDSV, and the Turkish ethnic party MRF) over these conclusions, the report was voted without the conclusions and the whole issue was removed from the agenda.

[208] Thus in November 2009 the Agricultural ministry started a legal procedure, claiming compensation from the ex-king of 5 m. levs for the timber illegitimately cut down from the forests, returned by mistake to the former king.

[209] Initially, Western journalists and human rights organisations reported more than 100 victims of the repressions; for example, *The New York Times,* on Feb.8, in its article "Toll in Bulgaria's Turkish Unrest is put at 100". Later, the Helsinki Watch Report "Destroying Ethnic Identity: The Turks of Bulgaria" (issued in September 1987) said that 'estimates of Ethnic Turks killed under these circumstance range from 300 to 1500" (p.4). These estimates are exaggerated. Recent historical accounts quote between 8 and 10 victims of the events. Source: Gruev, Mihail i Alexei Kalionski (2008) *Vuzroditelniya process: Myusyulmanskite obshtnosti i komunisticheskiya rezhim*, Sofia.

and demonstrations[210]. The response of the communist party and the State was a massive campaign of forceful expulsion of a great part of the one million Turkish population of Bulgaria to neighbouring Turkey, cynically nicknamed 'The Great Excursion'. Thus between June and August 1989 around 300 000 Bulgarian Turks were forced to leave the country. The process stopped in late August, when Turkey closed its borders because of impossibility of receiving more immigrants. Because of economic hardships up to half of the Turks that left returned to Bulgaria by the early 1990. At that time the regime was already changing. Petar Mladenov, the successor of Todor Zhivkov at the state and party helm declared a change in the policy towards the ethnic minorities and the ethnic Turks in particular and recognized that the assimilation process was a mistake[211]. In the following years, several legislative acts restored the basic human rights of the ethnic Turks. The policy of forceful change of the names was terminated with a decision of Parliament in January 1990 and the right to learning 'one's mother tongue' was restored at the end of 1991(as 4 hours per week of elective courses).

During the expulsion, many of the ethnic Turks were forced to sell at unfavourable prices their immovable property to the Municipal bodies responsible for housing. Other movable property was also sold at very low prices. A major problem for those ethnic Turks who chose to return was that their dwellings had been already sold by the Municipal services to third parties. Many spent the winter in temporary lodgings, while filing complaints and undertaking administrative and judicial measures to restore their property rights. The difficulties in restoring their property rights[212] justified the adoption of a special restitution law for their particular case of injustice by the communist regime. In 1992 the UDF majority adopted the *Law on restitution of real estate property to Bulgarian citizens of Turkish ethnic origin, who applied for exit visas to Turkey and other countries in the period May –September 1989*[213]*.* According to its provisions, the property of the ethnic Turks who applied to leave for Turkey and other countries in this period, and which had been bought by the state, the municipalities, the state and public organisations or their firms, as well as by the cooperatives, is restored to its former owners, if within four months of the entry into force of the Law the former owners pay to the buyer the sums they received from the transaction. Those former owners, who have received as a compensation for the sold property another property, or who own another property (satisfying their housing needs) in the same area, or who have transferred their property to relatives, do not have their property restored. All acts of voluntary endowment of the properties to the state and the municipality, as well as all renouncement of property rights are declared null and void. As a result, all contracts with which the property is transferred to third parties have no legal effects. The former owners have to pay for all the improvements in the properties and they have no valid claims against the third parties for compensation for foregone benefits. The use of the properties had to take place no later than on April 1, 1993.

According to this law, bona fide third parties are compensated by the state and the municipality with a property of equal value, but only if: (1) they were on the list of those with most urgent housing needs (this provision was struck down by BCC the same year)[214] and if (2) they have not used party or other office-related privileges in buying it. In case such compensation was not provided within three months of the entry into force of the Law, the state had to monetarily compensate the third party with *twelve times* the

[210] According to numerous reports, 9 were killed in late May 1989 during and in the aftermath of the demonstrations. The leader of the Turkish Ethnic Party MRF Ahmed Dogan, who participated in the events, also confirms this figure in his 1994 interview for *Gledishta* newspaper, reprinted in *Duma* daily on June 13, 1994.
[211] In an official report by Alexander Lilov (then member of Politburo of the Communist party and a chief 'ideologist' of the Party) in December 1989, all the mistakes of the ethnic policy of the party were recognized, and it was declared, that the assimilation policy was a personal mistake of Todor Zhivkov. It was urged that those responsible for the abuses during the assimilation process be identified and tried. The communist governments, however, did not do much in this regard.
[212] This difficult battle at the different court instances is well described in the ECtHR case *Kushoglu v. Bulgaria*, application 48191/99, where a violation of Protocol 1 of the Convention was recognized in 2007.
[213] *State Gazette* № 66 / 14.08.1992.
[214] Decision of BCC № 18/14.12. 1992, *State Gazette* 102/1992.

value he had paid for the property. The same rights were enjoyed by those third parties, whose property rights were denied as a consequence of court decisions. Third parties who did not satisfy the conditions for being compensated with an equal value property or monetary compensation twelve times the value they paid, would still receive monetary compensation equal to the value paid by them for the property. In addition, the third parties could keep the property if within a month of the filing of the declaration of the claim for restitution by the former owner, they pay the former owner twelve times the price the third party had paid for the property. Importantly, the scope of the law was *severely limited* by the provision, according to which only Bulgarian citizens[215] who had permanent residence in Bulgaria on or prior to March 1992, could enjoy the rights protected in the Law. This was a second limitation, after limiting the preclusive time of the restitution claims to four months from the entry into force of the Law.

From the details of the provisions above it should be clear that the Law tried to strike a fair balance between the rights of the initial property owners, who were forced by the communist regime to sell their property (and to sell it at disadvantageous prices) and the rights of the third parties. Nevertheless, the Law was challenged before the Bulgarian constitutional court less than a month after its adoption. In September 1992 a group of 49 MPs demanded that the whole law be declared unconstitutional, because of violation of a series of constitutionally protected rights. The Court in its Decision[216] declared the Law constitutional, and overruled just one of its provisions (which was not among those directly challenged by the petitioners) – concerning one of the conditions disqualifying third parties from real property compensation/twelve times monetary compensation.

Because of the exclusive time limit and the requirement that the claimants have permanent residence in Bulgaria on March 1992, it could be expected that not all ethnic Turks could benefit from this law. There are, however, no reliable data on the effects of this law, as well as on the general state of the property rights of ethnic Turks. The issue has not been in the public agenda in the last 15 years. The Turkish ethnic minority party MRF was the minor coalition partner in two consecutive governments - that of the former king of Bulgaria Simeon Saks-Koburgh-Gotta (2001-2005) and that of Sergey Stanishev (2005-2009). The issue was not brought in Parliamentary discussion, nor in any way brought to the public attention. The only recent interest on the issue was due to a decision of ECtHR on the case *Kushoglu et al. v. Bulgaria*, application 48191/99, where a violation of Protocol 1 of the Convention was recognized in 2007 by the Court. The decision was that the state should guarantee the exercise of the right to use one's property to the litigants. However, no other such cases were filed with ECtHR nor are expected to be filed, because of the 5-year time-limitation.

3.6.2. Restitution and the Roma

The Roma had not particularly benefited from the restitution, since few of them had property or land that was nationalised in the early communist period, or that was alienated in the later periods for communal needs. Very few of them were affected by the restitution as third parties either, since they rarely used the opportunity to buy the nationalised flats they would rent at subsidised rates from the municipality. The effects of the restitution on their welfare and rights should be, rather, sought elsewhere. In the bigger towns of Bulgaria Roma ghettos often grow on municipal or state land. Very rarely has the land been sold to the families, so Roma in general have no ownership documents. Over some of this land in the period after 1992 restitution claims were declared. These claims have raised serious problems, since the Roma have no property documents over the land and thus according to *LOUAL* and *LRNIP* it should be returned to its pre-nationalisation owners. Because the Roma have nor documents or any other legal ground for occupying the land, they are not owed compensation according to these laws – neither in real terms, nor monetary ones. Indeed, several cases of forced eviction of

[215] Bulgarian ethnic Turks did not lose their Bulgarian citizenship when they left the country in 1989.
[216] Decision of BCC № 18/14.12. 1992, *State Gazette* 102/1992.

Roma who illegally occupy land in the outskirts of Sofia have happened in Sofia and some other major towns[217]. Particularly troubling is the 'Maksuda ghetto' case in the centre of Varna[218], where some 1000 Roma live without even registering there. The right to property over the land, where the Roma currently live, has been restored to its pre-nationalisation owners already in 1999, yet their rights are ineffective. A solution to this problem with a long history and serious social consequences is neither offered, nor actively sought: neither are the owners compensated nor have the Roma been offered other land.

There are several human rights organisations that monitor these processes – the Bulgarian Helsinki Committee being the most prominent one.

3.6.3. Restitution of Property to persons of Jewish origin/organisations of the Jewish community in Bulgaria

By 2009 almost all claims for property restitution to former Bulgarian citizens of Jewish origin/ restitution of property belonging to organisations of the Jewish community in Bulgaria had been satisfied, following the general administrative and judicial procedures for restoring property rights to their pre-nationalisation owners. One of the last remaining cases of unreturned property of Shalom, the organisation of the Jewish community in Bulgaria, was finally resolved, after the National hospital of endocrinology, which was occupying the building, found its new home in June 2009. A particular difficult case is that of a plot of land in the centre of Sofia, where the central Hotel Rila was built after the war. The litigation between the state and the organisation of the Jewish community in Sofia, who owned the plot before WW II, is ongoing.

3.7. Bulgarian Constitutional Court (BCC) on Urban Restitution and the Compensation

Since 1995, BCC has had numerous interventions in the area of urban restitution and compensation, which are analysed in detail in Annex 1. We summarise the main lines of development here.

BCC was firstly triggered by the adoption in 1995 by the socialist legislative majority of amendments[219] to *LRNIP*, one of the major political achievements of the 1991-1992 UDF government. The controversy had broad social implications: many flats, restored to their pre-nationalisation owners, had occupants, for whom the state was incapable or unwilling to provide adequate housing.

In its first decision[220] in this area, the justices declared unconstitutional amendments to *LRNIP* which prolonged by three years the permission for lessors of returned flats to continue occupying them. This case outlined the major contours of the approach of the BCC. The judges took the view that *unless bona fide third parties had already acquired ownership over the property, they had no protection against the interests of the former owners (for instance, as lessors).*
The BCC espoused a *compromise* between the *total rejection* of the constitutional relevance of the communist period for the determination of property rights, and the recognition that certain transactions in the communist period *had produced* legitimate entitlements. Their interpretations generally *advanced the interests of the restitution*

[217] Thus in June 2008 a ghetto populated by some 40 Roma in 'Studentski grad' in Sofia has been demolished, yet no data on whether the Roma had returned to their home towns in the North central region of Bulgaria are available. http://www.segabg.com/online/new/articlenew.asp?sid=20060503000400000111. Another such case concerns the illegal occupation of municipal land in Burgas' neighbourhoods of Gorno Ezerovo and Meden Rudnik. The demolition of the ghettos there left some 300 Roma homeless. There are also the cases in 'Malinova dolina' in Sofia, the 'Serdica ghetto' case, etc.
[218] Spas Spasov, "Clockwork of a Ghetto", *Dnevnik,* 22 Apr 2007
[219] *State Gazette* №20/1995 and *State Gazette* № 40/1995.
[220] Decision 9/ 1995, *State Gazette* № 66/25.07.1995.

beneficiaries against the interests of third parties (lessors). Their position was broadly consistent with the views of the UDF and its supporters at the time.

In the period 1995-1996, as in the case of agricultural restitution, this specific constitutional policy aimed to counter-balance the dominance of the ex-communist BSP, controlling both the legislative and the executive branches of power. The clash between the BCC and the government became evident in the determination of the category of *third parties acting in bad faith*, against whom the former owners could start judicial proceedings. This was the controversial art.7 of LRNIP, discussed above.

The judges ruled on this issue in *Decision 1, 1996*[221]*.* A group of BSP parliamentarians argued that this provision violated the right to property by making possible the alienation of assets, acquired by *de facto bona fide* third parties in accordance with legal rules existing at the time. And if indeed the property had been acquired in violation of existing rules, responsibility for this should be held the *state*. The BCC dismissed the challenge, reasoning that the procedure in art. 7 was necessary for the implementation of the general philosophy of the law: to restore justice by restitution of nationalised urban property. The BCC recognised that in certain cases the property had been transferred to *de facto bona fide* parties, while the violation of the law was done by the state administration. Nevertheless, the transfers as a whole were void, and did not create rights for the third parties against the real owners.

The Jurisprudence of BCC in this area in 1995-1996 could briefly be characterised as *protection of the right to restitution.* Yet the obvious consequence of BCC decision was that the *protection of the rights of bona fide third parties* was not always guaranteed. It raised the possibility of numerous applications (more than 2000 , according to human rights lawyers in Bulgaria) to ECtHR for violations of Protocol 1 of the European Convention on Human Rights.
After 1997, *BCC Jurisprudence moved away from its prior practice of upholding the constitutional status of the right to restitution towards first, balancing this right against the public interest and, second, denying it a constitutional status.*

To conclude, more stringent enforcement of the rights of pre-communist property owners was necessary in the period 1995-1996, since the ex-communist party had full control over the government and the legislature. In contrast, in 1997, political parties friendly to the interests of the owners came to power, which made strict judicial scrutiny of regulation unnecessary. The need for a new constitutional policy became clear for the judges later in 1998. With the coming to power of the UDF government in 1997, the Court gradually fine-tuned its time-management scheme and started paying much more attention to claims grounded in the *present* and the *future*, as justifications for restriction of restitution rights. Previously unacceptable arguments from economic efficiency came to be seen by the judges as 'trumps' against claims of retributive justice. The shift was most evident in relation to industrial property, where the previous policy of the Court had been one of encouragement of the former owners to claim full restitution. Finally, BCC shifted its position from recognising the constitutional status of the right to restitution to denying it such status.

4. CONCLUSION

In this report, we have described and analysed restitution process in post-communist Bulgaria in its historical and political background. The process of nationalisation of agricultural land, or urban, industrial and other property in the early communist period and the subsequent practices of alienation of property was also briefly described in order to make possible the understanding of subsequent developments.

[221] Decision №1/18.01.1996, *State Gazette* № 9/30.01.1996.

The legislation, the judicial practice and the decisions of the Bulgarian Constitutional Court on the property restitution in the transition period were discussed in detail. The social, economic and urban development consequences of this process were also outlined. The issue of the effects of restitution on the minorities in Bulgaria was also briefly addresses, with an emphasis on the restitution of property to the Bulgarian ethnic Turks. Special attention was given to the issue of compensation of both the pre-nationalisation owners and the third parties. Finally, the jurisprudence of ECtHR on restitution-related cases was presented.

The restitution of property in Bulgaria over the last twenty years has been one of the most consequential and complex social processes. It has been shaped by and has shaped itself Bulgarian politics. Issues of the balance between retributive justice and the general public good, issues of evaluation of the past and the projections for the future, and indeed issues of political identity are all entangled in this process. Therefore, any overall judgement will be necessarily partial and controversial. One thing is clear, however: the process of restitution has determined the outlook of contemporary Bulgaria in a variety of important ways.

It will be fair to say that in terms of *economic efficiency* restitution of agricultural lands in their real boundaries has fragmented the plots, and has created a serious need for comasation of lands. Bulgarian agriculture, partly as a result of this fragmentation, has been one of the sectors with most severe difficulties to recover after the crisis of the 1990s. This fragmentation creates also problems in the appropriation of EU funding in the sector.

The benefits of the restitution process should therefore be searched for mostly in the area of social (retributive) justice and the legitimacy of the transition to liberal-democracy and market economy. Here, the restitution efforts of the political elite indeed created a significant constituency of owners supporting the political transformation. Yet, Bulgaria is one of the countries in Eastern Europe in which most of the people still consider the transition process generally unjust; they also believe that crooks, criminals and politicians are the main beneficiaries from the changes. As a result, Bulgaria is one of the countries with the lowest trust in politicians and public institutions in Europe. One could only speculate about the actual impact of the restitution process for the formation of such attitudes. Indeed, existing public opinion polls show that only a relatively small minority has rejected and opposed restitution. Yet, in the popular cost/benefits analysis, apparently the utility produced by the Bulgarian model of restitution, together with the other benefits of the transition process, has been outweighed by other costs. The good news is that this dissatisfaction does not affect the commitment of Bulgarians to democracy in general.

Chapter 4 - Croatia

1. OVERVIEW

The Republic of Croatia declared its independence as a sovereign state on June 25th, 1991. In line with other Eastern European states at the time the immediate task of the Croatian state was to ensure the political, economic and social transformation of the communist regime structure. In theory the three principal goals for all these new states was to create a democratic political system, a market economy, and a responsive civil society. One of the primary tasks of the states in carrying out these reforms was the return of property expropriated by the communist regimes. The all-pervasive expectation of the general public was that this element of the transition would be carried out quickly without any political or social problems. The practice of returning socially controlled property to its original private owners, however, proved much more complex than originally thought. Determining 'who is going to get what from the state' is a complex political question. It means in fact determining the economic and social power of individuals within a young market - governed society. It is always a question of inclusion and exclusion of moral or symbolic claims to property. This determination of legitimacy is not politically neutral. Instead it is based upon the various political forces that hold power within the given political structures. Further, the major theoretical problem for the state is that it must act against itself in order for the process of restitution and compensation to proceed. The state must consider its interests subordinate to the interest of the former owners requesting the return of private property. This paradox naturally leads to a conflict of interest within the various levels of government and administration. Another major problem to arise within the restitution or compensation process is the fact that socially controlled property often had a designated social-legal person who acquired rights of management, disposal and use. These legal rights of management, disposal and use were granted by the civil law of the Socialist Federal Republic of Yugoslavia. If the institutional and contextual framework of the former socialist regime is considered, these legal rights of management, disposal and use are equivalent to ownership rights. This naturally leads to the duplication of legal claims to ownership. All these issues are compounded in the Republic of Croatia by its involvement in the Homeland War from 1991 to 1995. The Republic of Croatia's participation in the Homeland War means that its administrative apparatus also must handle claims by refugees and displaced persons.

The primary purpose of this analysis is to examine the legislative framework and the administrative procedure for the restitution and compensation of property expropriated by the Socialist Federal Republic of Yugoslavia in the Republic of Croatia. The restitution and compensation of refugees and displaced persons in the Republic of Croatia will be considered peripherally in this analysis and only mentioned in relation to the compensation and restitution of property taken away by the communist regime. The legislative framework will be examined in order to decipher the extent and the political rationale of the restitution and compensation process. The administrative procedure will be examined in order to be able to make an informed judgment upon the efficiency of the process and to attempt to spot any inconsistencies and deficiencies within administrative practice. Special attention will also be given to the role played by international organisations in the process of restitution and compensation. The examination of the role played by international institutions will specifically be carried out in order to assess the extent and quality of their participation in the formulation and implementation of policy. This analysis is especially relevant for the Republic of Croatia because it can be used as a measurement of the progress of the dual processes of European integration and globalisation. The analysis will then present the major obstacles and problems in the whole process of restitution and compensation and conclude with a list of recommendations.

The position of the European Court of Human Rights and the European Commission of Human Rights was weakened by the fact that the Republic of Croatia did not ratify the European Convention of Human Rights and Fundamental Freedoms until after the property in question was already nationalised. The European Court of Human Rights concluded that it lacked the *ratione temporis* to rule in cases involving the restitution and compensation in Eastern Europe[222]. In turn the European Commission of Human Rights pointed out that Protocol 1 Article 1 guaranteed the negative right of not having your property arbitrarily taken away. It does not guarantee the positive right of restitution. Therefore, the Strasbourg bodies recognize that they do not have jurisdiction to rule on the restitution and compensation processes itself. However, they do recognize that they have a role to play in certain instances that are peripheral or related to the restitution and compensation processes. These are:

- a determination of the interests of new and former owners of the property formerly expropriated
- competing interests among the tenants and the owners of the restored possessions
- the enforcement of a court or administrative order which creates new rights to property
- a new expropriation of already restored possessions[223]

This partial jurisdiction is the basis upon which the European Court of Human Rights decided to hear two cases peripherally connected with the Croatian restitution and compensation process. These two cases both involved the holders of tenancy rights who wanted to gain the rights of ownership[224]. Both cases where considered inadmissible by the Court since the tenancy rights were held upon privately owned apartments. The transferring of ownership rights to the tenants in these two specific cases would involve the violation of the rights of private ownership. The Court does not have the legal jurisdiction to require private individuals to sell their property. The problem with these two cases is the confusion of tenancy rights for the occupiers of state-owned apartments and tenancy rights for the occupiers of privately owned apartments. The tenants who occupied state owned apartments had the right under Croatian civil law to ownership; however, the tenants who occupied privately owned apartments did not have this same advantage. This general confusion of the application of the correct legal provision or act governing tenancy and ownership rights is a major impediment to the settlement of the problem between owners and tenants in the restitution and compensation process.

The main international organisations that have an interest in the restitution and compensation process are the European Union and the Organisation for Security and Cooperation in Europe (OSCE). However, the main concern of both these international organisations is with the compensation and restitution of refugees and displaced persons during the Homeland War. This larger humanitarian and human rights issue leaves little space within the reports of both international organisations to consider the restitution and compensation of property expropriated under the t regime of the Republic of Yugoslavia. The OSCE is almost exclusively concerned with the restitution of the property of refugees and displaced persons. This is understandable because it has international jurisdiction and the capacity to handle such humanitarian issues. The official OSCE Mission to Croatia was shut down when a decision was reached that Croatia had to a great extent fulfilled the requirements of the international community. The official OSCE Mission was replaced with an OSCE Head Office in Zagreb. The Office monitors the implementation of the Sarajevo Declaration Process, especially the issues of refugee

[222] Karadjova M., "Property Restitution in Eastern Europe: Domestic and International Human Rights Law Responses", *Review of Central and East European Law* 2004 No.3, 325-363, Koninklijke Brill N.V., http://web.ebscohost.com/ehost/pdf?vid=5&hid=3&sid=2c53af6c-51ec-41ba-91bb-48dfa3f692a5%40sessionmgr103#db=poh&AN=14614001
[223] *Ibid.*
[224] ECtHR *Soric vs. Republic of Croatia,*Decision of 16 March, 2000, ECtHR *Strunjak vs. Republic of Croatia,* Decision of 5 October 2000

return and reintegration implying the repossession of property by the returnees. It is also in charge of monitoring the implementation of a comprehensive solution for former occupancy/tenancy rights (OTR) holders willing to return to the Republic of Croatia. It is with OTR where the return of refugees and displaced persons overlaps with the issue of restitution and compensation of property taken away during the communist regime. In accordance with the Law on Compensation, holders of OTR should be considered eligible for acquiring ownership rights. A report by the Head of the OSCE Office in Zagreb in March 2008 to the OSCE Permanent Council states the following:

'In total, around 13,100 applications from the former OTR holders intending to return to Croatia have been filed for the two housing care programmes. Until the end of 2007, around 4,500 cases have been resolved through the physical allocation of housing, while almost 2,000 cases have been rejected or issued with negative consents. The Office estimates that almost 3,900 cases with positive decisions await physical resolution and around 2,800 cases are still pending decision on eligibility. The Government plans to complete the entire exercise of providing housing care to former OTR holders by the end of 2009. As of the end of 2007, there was no indication of the necessary appeals procedure which is to be established to ensure a fair administrative process when deciding on the applications.'(OSCE Office in Zagreb)

This paragraph indicates that the process of resolving the issues of OTR holders is moving forward and shows that the Croatian Government is planning to resolve all the claims by a set date. The OSCE is critical, however, that there is no appeals procedure for the negatively decided claims. In assessing the implementation of these internationally mandated tasks by the Republic of Croatia, it becomes evident that the added pressure of OSCE monitoring produces adequate results from the Croatian Government and Administration.

This assessment of the Croatian Government's performance under the political pressure and monitoring of the OSCE has implications for the general position of the European Union towards the restitution and compensation process of property taken away during the communist regime.
The 2007 screening on Judiciary and Fundamental Rights states:

'Articles 3, 48 and 50 of the Constitution together with the international agreements ratified by Croatia provide for the right to property.

The process of restitution of property that was confiscated after World War II continues to proceed slowly. Provisions discriminating on grounds of nationality have not been removed from the Law on the Restitution of Nationalised Property. The process of repossession by Croatian Serb refugees of their property in Croatia following the war in the 1990s is to a large extent complete[225]; however, a few properties still need to be returned. Other problems remain, notably as regards unsolicited investments made by those who were occupying some of this property. This has led to demands for compensation from the rightful owners. There are also some cases reported of agricultural land and business premises that have not been returned to their rightful owners.'

The European Commission's Progress Report 2008 for Croatia states:

Property rights are generally assured. However, there are outstanding cases of delayed property repossession and problems with compensation for the use of private property taken under war legislation from the 1990s. The Ombudsman again warned of the lack of proper administrative decisions that should be issued for persons applying for housing

[225] Recent ECtHR rulings have found Croatia responsible for extensive and insufficiently justified delays in the return of private property allocated by the Croatian Government during the 1991-1995 conflict. In the *Radanovic v. Croatia* and *Kunic v. Croatia* cases the Court determined that lengthy delays in repossession violated the owners' rights to property and that remedies available for owners to repossess property were ineffective. Following the rulings, Croatia will need to reassess the compensation available to owners for the undue delay in the return of their properties.

care and compensation for the use of their property. Non-issuance of such administrative decisions prevents the claimants pursuing their right to appeal. The process of restitution and compensation for property nationalised after World War II continues to go slowly. (European Commission)

Also, on the occasion of the Council Decision of 12 February 2008:

„Some Member States underlined in this context the importance of accelerating the process of restitution of property, in line with the relevant Croatian Constitutional Court rulings.'

The relatively small space in the European Commission Progress report dedicated to the issue of restitution and compensation of property nationalised after World War II in turn indicates relatively little concern. An increase in political pressure from the European Commission and other European Union organisms/ institutions would almost certainly act as a catalyst for the entire restitution and compensation process to be brought to a conclusion.

2. HISTORICAL BACKGROUND OF THE EXPROPRIATION PROCESS

The nationalisation of property within the Socialist Federal Republic of Yugoslavia was a continuous process spanning several decades. After the establishment of a communist regime in 1943 Tito declared class warfare on the bourgeoisie. Due to the ideologically charged atmosphere of this period the early forms of nationalisation and confiscation of private property were carried out with particularly brutal force. Political and military trials were mounted in order to confiscate the private property of citizens, especially those who willingly participated in the German occupation. The nationalisation process continued in a more systematic and orderly form after World War II. The main nationalisations of the post-war period occurred from 1945 to 1948 through parliamentary acts. On May 29th, 1945 the 'Law on Treatment of Property which Owners had to abandon during the Occupation' was passed. This law stated that all property taken away during the rule of the Independent State of Croatia must be returned to its previous owners. This law mainly involved the return of private property to Jews, Roma and Serbian minority groups within Croatia. The nationalisation and confiscation process in the Socialist Federal Republic of Yugoslavia continued in a less intense form until the late 80s. One major change occurred in the 1950s when the classification of property was reformed. All property owned by the Socialist Federal Republic of Yugoslavia changed from the category of state-owned property to socially controlled property. This meant that certain socially organised groups gained autonomous control over the property they used. The theoretical difference between these two systems of classification was that the state no longer had full monopoly power over the uses of property within its territory. This system of property classification was unique among communist states to the Federal Socialist Republic of Yugoslavia.

2.1. The Impact of World War II

A problem with the parameters outlined by these six points is that claims for compensation and restitution are only considered legitimate if the property was confiscated by the communist regime of Yugoslavia before or after World War II. In other words, there is no provision within the law to compensate the victims of confiscations during the period of the Independent State of Croatia and the German occupation. The issue is complicated by the fact that the Federal Socialist Republic of Yugoslavia passed legislation on the compensation and restitution of property confiscated during World War II. This was supposed to rectify the loss of private property suffered mainly by the Serbian, Roma and Jewish minorities during the rule of the Independent State of Croatia and the German occupation.

2.2. Compensation for nationalised property given during communism

The Socialist Federal Republic of Yugoslavia also signed a bilateral agreement with the United States of America in 1957 that compensated the Jewish population that had emigrated to the USA. This is especially relevant since the USA has been one of the main promoters of the idea that restitution and compensation process in Eastern Europe should include its present citizens. The argument of these groups has been that because of the state's interest in socially controlled property, the restitution and compensation process that took place under the Socialist Federal Republic of Yugoslavia was severely curtailed. The owners of private property confiscated by the non-communist forces during WWII received only a small portion of their total property back after the war. If their claims were considered under the Law on Compensation they would be entitled to a greater portion of their original holdings. The problem with the exclusion of these claims by the Law on Compensation is that it does not properly consider the political character of the institutional and contextual framework of the approved legislation, determining it instead as ideologically neutral. This is especially relevant since this exclusion mainly affects minority groups in the Republic of Croatia. The Administrative Court ruling on this issue upheld the legislation of the Socialist Federal Republic Yugoslavia as having already dealt with the issue of the compensation and restitution of confiscated property by non-communist forces during WWII (Gagro). This is a legitimate ruling by the Administrative Court because it must consider the Republic of Croatia as legally continuous from the Socialist Federal Republic of Yugoslavia. The one entity that had the authority to correct these historical injustices was the Croatian Parliament, the Sabor. This issue clearly demonstrates that when the legislative framework was passed in 1996, the political composition in the Sabor lacked a capable minority component.

3. THE RESTITUTION / COMPENSATION PROCESS

3.1. The legal framework

The main body of legislation that was meant to be used as the institutional framework for the restitution and compensation process in the Republic of Croatia is contained within one act of Parliament: the *Law on Compensation for the Property Confiscated during the Communist Regime.* This act of the Croatian Parliament, the Sabor, was passed on October 11th ,1996. Subsequently, the act was amended in 2002 by a Constitutional Court decision. The act was meant to answer all of the most contentious issues with respect to the compensation and restitution processes. How far back in time would the process extend? What types of property are subject to denationalisation? Who is entitled to compensation or restitution? What forms of compensation would be offered? What is the legal limit of compensation in monetary value? What is the administrative procedure for obtaining the right to restitution or compensation? The answers to these important questions will be identified and analyzed in order to determine the advantages and disadvantages for different parts of Croatian society. An important general principle of the analysis is that legislative outcome is always the consolidation of political negotiations between different interests in society. This general principle will be used by the analysis to identify the political interests that are represented or absent in the legislative framework for compensation and restitution, and to determine the law's relative merit for different social and political groups.

The primary goal of the Law on Compensation in the Republic of Croatia is retributive justice. This meant that the state would be distributing property for the purpose of atoning for the past injustices committed by the Federal Socialist Republic of Yugoslavia during nationalisation. The political negotiation arrived at this decision by determining that retribution for past wrongs was more important than the present financial status of the state which is placed under considerable strain by this type of redistributive mechanism. The ultimate purpose of the legislation is also instrumental in determining

whether the primary means of denationalisation would be compensation or restitution. Since the ultimate purpose in the Republic of Croatia is retributive justice, preference here is given to restitution of the actual property originally held by the owner. However, because of the impracticalities of returning all of the original property to all of the former owners, the Republic of Croatia had to settle for a mixed system where compensation is considered a substitute for restitution when restitution in kind is determined to be impossible. Namely, compensation is applied in cases where restitution in kind is not possible due to the protection of acquired rights or public interest.

Another basic issue to be identified in analyzing the legislative framework for restitution and compensation is what property can be considered legitimate for the denationalisation process. In the case of the Republic of Croatia this can be summarized in six points:

1) The property that was confiscated/nationalised/expropriated by any one of the 32 legal acts of the former communist regime listed in the Law on Compensation
2) The property that was confiscated based on decisions by the administration of the cities, counties and municipalities
3) The property taken away based on decisions and verdicts issued by either the army or civilian bodies from 15 May 1945 to the date of the adoption of the Law on Compensation
4) The property taken away without any legal basis
5) The property that was taken away based on verdicts of the courts of former Federal Socialist Republic of Yugoslavia from 15 May 1945 to 25 June 1991 that dealt with political crimes, politically motivated crimes, or other crimes if the verdict was reached through abuse of rights or political power
6) The property that was taken away before 15 May 1945 if the confiscation was based on decisions/verdicts reached by Yugoslav communist authorities.

Another important issue to analyze is the eligibility of claimants to property restitution and compensation. It is important to note here that the articles of the Law on Compensation pertaining to this issue were changed in 2002 following a Constitutional Court decision that declared the 1996 Law unconstitutional. The general problem with 1996 Law on Compensation was that it discriminated against foreign citizens and Croatian citizens who obtained their citizenship after 1996. The new Law on Compensation defines eligible claimants into 3 categories:

1) Former owners (private persons) and their legal successors where the provisions of the Inheritance Law apply
2) Foreign legal and private persons if the compensation has been regulated through state bilateral agreements
3) Legal persons can be compensated only if they demonstrate a continuous legal presence on the territory of the Republic of Croatia.

Exceptionally, legal persons can be compensated in cases when their legal presence on the Croatian territory was not possible due to political reasons and the claimant can demonstrate that they had promoted Croatian national interests. The 3 categories of the new 2002 Law on Compensation, although an improvement on the 1996 Law, still represent a contradiction. This has been pointed out in academic article by the Administrative Court Judge Božo Gagro[226]. The contradiction arises in the inconsistency between categories two and three that foreign legal and private persons are deemed eligible but 'only if they demonstrate a continuous legal presence on the territory the Republic of Croatia.' The third category is a remnant of the 1996 Law on Compensation and should have been nullified or modified with the 2002 Constitutional Court decision. It was meant to be an exception to the rule on the illegitimacy of foreign claims. However,

[226] Gagro B., "Practice of the Administrative Court of the Republic of Croatia and Uncertainties in the Application of the Law on Restitution /Compensation of Property Taken During the Time of the Yugoslav Communist Government", report for the website of the Administrative Court, http://www.upravnisudrh.hr/praksa/full.php?link=../praksanov/referat_bg.htm

if observance of category three is given priority over category two it might lead to the exclusion of foreign claims considered legitimate under the 2002 Law on Compensation. This represents a problem especially for the administration of the claims to restitution and compensation because the law leaves the claims of foreign persons and Croatian citizens living abroad open to the arbitrary interpretation of the administrative office handling the claim. This sort of gap in the law leads to different decisions made by different administrative offices and the unequal treatment of claimants.

The type of property that is subject to the Law on Compensation is also defined. This can be placed in six categories: (1) unused construction land; (2) agricultural land, forests and forested land; (3) residential and business buildings, or apartments and business facilities; (4) ships and boats; (5) firms; (6) movable property. This part of the Law on Compensation represents a normal definition of the types of property to be returned through compensation and restitution. The list of property types is comparable to those of other Eastern European states. The only special item to be noted here is that under the category of movable property is included cultural, historical and traditional property of value for the national and cultural traditions of Croatia.

Given the budgetary constraints, the law on compensation specifies that the total amount of the compensation cannot exceed 3,700,000 kuna (approximately 510,344 EUR). For lesser claims to compensation the determined real value of property is multiplied by a set rate that decreases as the determined real value of the property increases. What this means in simple terms is that large claims would be compensated with smaller portion of the actual value of their claim. The following table was included within the Law on Compensation in order to define and categorise the claims by value:

Table 8. Value of claims on property restitution in Croatia

	The value of the confiscated property in EUR	The rate of compensation in %	The amount of the compensation in EUR
I	0 – 13,793	100 – 73,26	0 – 10,105
II	13,793 – 137,931	73,26 – 67,07	10,105 – 92,509
III	137,931 – 275,862	67,07 – 61	92,509 – 168,250
IV	275,862 – 689,655	61 – 46,78	168,250 – 322,599
V	689,655 – 1,379,310	46,78 – 31,99	322,599 – 441,277
VI	1,379,310 – 10,344,827	31,99 – 4,93	441,277 – 510,344
VII	Over 10,344,827	4,93 – 0	510,344

* the values in EUR are approximate since they are calculated based on current exchange rates

The compensation is given in government bonds that are disbursed regularly twice a year (over a period of twenty years) and can be used for purchasing bonds or shares from the Croatian Privatisation Fund or for purchasing property owned by the Republic of Croatia. This system of distributing government bonds has functioned well as a means of compensation.

The determination of the real value of the property is carried out by a ministry or an agency of the Republic of Croatia depending upon the type of property in question. The Ministry of Agriculture and Forestry is responsible for the determination of agricultural and forested land. The Ministry of Environmental Protection, Physical Planning, and Construction is responsible for the determination of the value of apartments, office buildings and unused construction land. The Ministry of Sea, Transport, and Infrastructure is responsible for the determination of the value of boats. The Ministry of Culture is responsible for the determination of the value of artistic, historical and cultural

property. The Croatian Fund for Privatisation is responsible for the determination of the value of firms. In case of a disagreement or conflict with any of the parties involved in the determination of value, the Ministry of Finance has the jurisdiction to determine the value of the property in question. These determined values are then passed on to the State Compensation Fund. The State Compensation Fund's operations are governed by three Government Regulations and four Protocols which define and categorize the appropriate compensation based on the value and the property in question.

The Law on Compensation also outlines the administrative procedure for requesting restitution or compensation for property expropriated by the communist regime. The institutional framework for implementation of the different aspects of the administrative procedure for restitution and compensation of property has not changed since 1996 when the Law on Compensation was adopted. The claims are administratively distributed depending upon the location of the property in question. Each County Public Administration Office is responsible for the collection of claims that are under their territorial jurisdiction for all the different categories of property. The County Public Administration Office is then charged with processing and deciding the claims in collaboration with the Public Prosecutor's Office. The Public Prosecutor's Offices are employed as the representatives of the interests of the state in each specific case. Any complaints about decisions of these administrative bodies are sent to the Ministry of Justice or the Administrative Court. In the case of a suspicion of a violation of constitutional rights in the process of restitution or compensation, appeals can also be made to the Constitutional Court.

3.2. Obstacles

The structure of the administrative procedure can be severely criticized for several legal and administrative reasons. The administrative structure for the processing of claims, as underlined by the legislative framework, inherently places the Public Administration Offices of each county in a *de facto* conflict of interest position. This is because the County Public Administration Office is given the exclusive duty of deciding upon claims to property that are mostly owned by the counties themselves. This places the County Public Administration Offices in a position to decide upon the approval or denial of claims to its own property vis-à-vis the eligible claimants. The point that must be highlighted is that this does not automatically imply the malpractice of the County Public Administration Offices in their decisions over claims. The County Public Administration Offices are still capable of a fair decision. It does, however, imply that the legislative framework left the door open for such administrative malpractices to occur. The present structure of administrative procedure ties together too closely the decisions on the claims to restitution and compensation, and the ownership and economic interests of the counties. This conflict of interest could have been avoided by giving the role of arbitrator on claims to restitution and compensation to another state or county body that does not have such a vital interest in the property in question. This role of arbitrator is usually reserved for the national or county courts that have little direct interest in the outcome or results of the process of restitution or compensation. The only conclusion that can be reached is that the legislature wanted to ensure that the public or state interest was protected in the decision of the claims. This does, however, potentially infringe upon the rights of citizens and other eligible claimants. This inherent conflict of interest is the central problem this analysis found with the administrative procedure.

This analysis observed another peripheral problem with regard to the structure of the administrative procedure. This peripheral problem also originates from the position of the County Public Administration Offices in the administrative structure. The peripheral problem is that the distribution of property claims to the County Public Administration Offices does not guarantee any uniformity of the procedure or decisions brought by the County Public Administration. There is no clear outline of the rules or procedures the county must follow in order to process the claims and no clear outline of the documentation needed to make a claim for property. This leaves a significant portion of

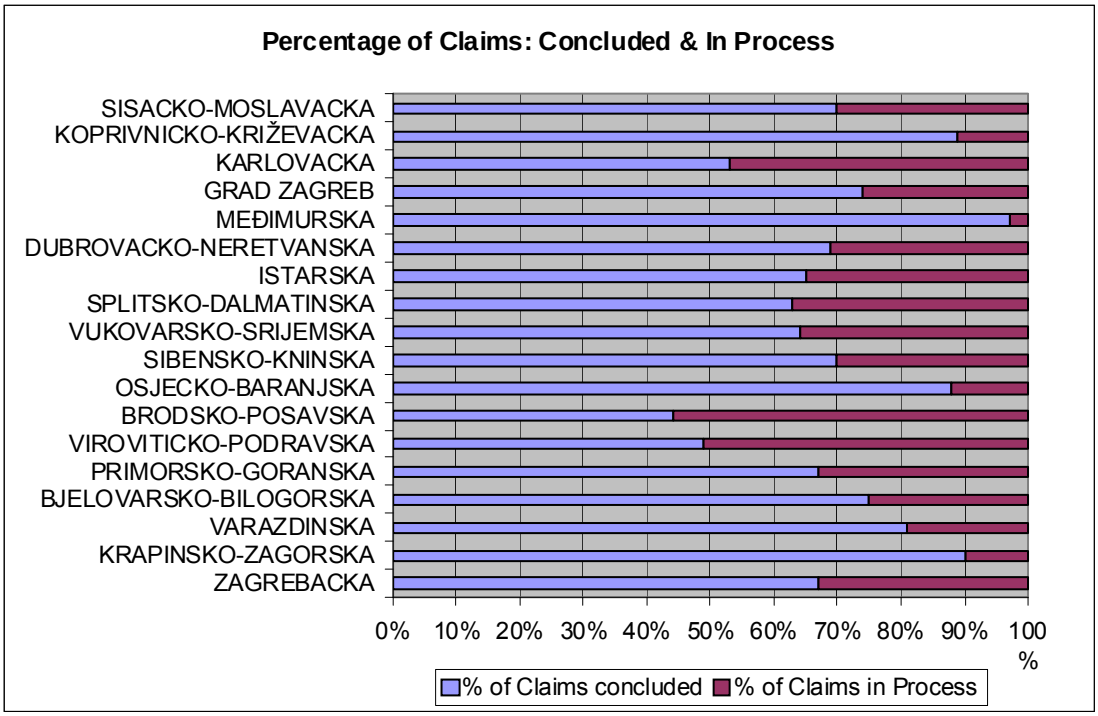
the process of restitution or compensation to be arbitrarily decided by the County. This is a question of proper regulation to ensure the equal treatment of each claimant. Of course, the claimant could appeal to the Administrative Court; however, if the appeal process is looked at as an administrative obstacle to obtaining the right to property, the person appealing to the Administrative Court because of an incorrect procedure or decision is still placed at a disadvantage. A more positive role of the legislation in creating the regulations for the County Administration to follow is desirable for the more equal treatment of claimants.

The final area to be addressed in this section of the analysis will be whether or not precise protection of tenants is granted by the Law on Compensation. The Law on Compensation granted protection to tenants in Article 22. Article 22 basically states that the rights of previous owners are guaranteed unless another person has tenancy rights to the same property. In cases where tenancy rights are possessed by another person, the previous owner has the right to compensation and the tenant has the right to purchase the property at a preferential price below the market value. This is clearly outlined in the Law on Compensation; however, this is still a major issue for the process of restitution and compensation that will be more clearly explained in the problems and obstacles section of the analysis. The problem seems to stem from the incorrect application of the law by both owners and tenants.

A prerequisite to note for the proper interpretation of the following section is that the data gathered here was primarily collected by the researchers making requests to all 21 County Public Administration Offices and the Ministry of Justice. Unfortunately, the information provided by the County Public Administration Offices was not all of the same quality. The problem was that the County Offices were not legally obliged to keep records on most of the data requested. This is the reason why the research could not gather all of the statistics for all of the counties. The research tried to include all of the data submitted by the County Offices. The Ministry of Justice did not submit any of the requested data or statistics.

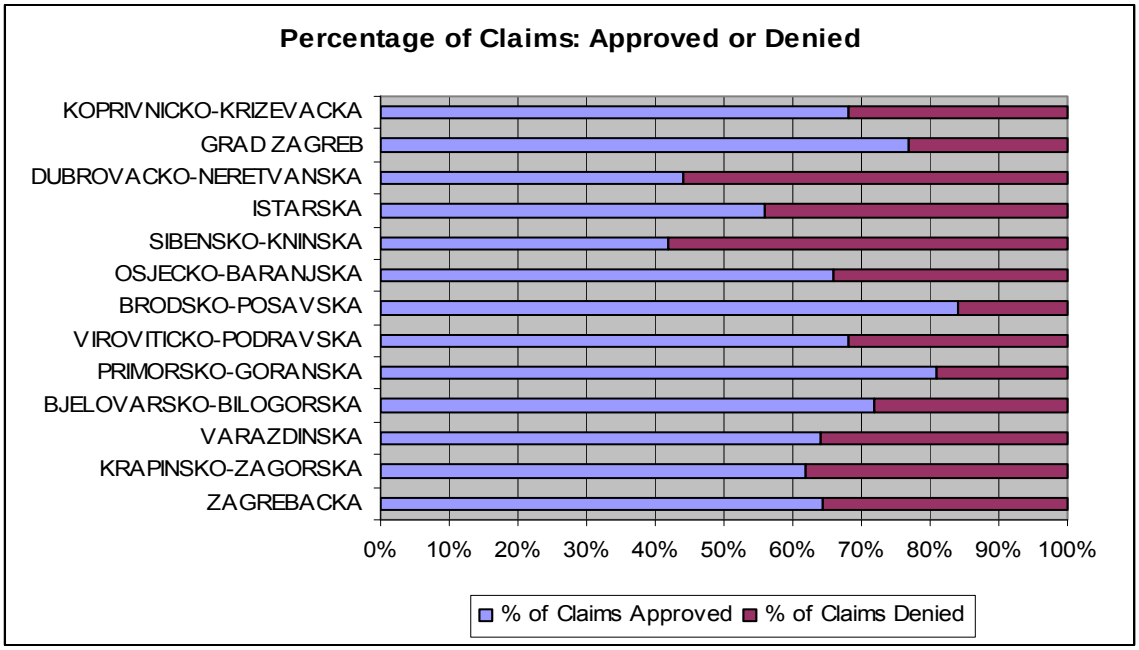
The first aspect of the administrative procedure to be examined will be the efficiency of the County Public Administration Offices in the processing of the claims to restitution and compensation. A clear measure of the efficiency of the procedure of the claims can be deduced from each county if the total number of claims for each county is reduced to a percentage and then is further classified into two categories: (1) claims concluded and (2) claims in process. This is visually displayed in figure 1. As can be calculated from the data in figure 1, the average of concluded claims is 71% for all of the counties which are taken into account in this data set. If a normal distribution is assumed, the standard deviation from the average (mean) is 13.5%. This means that the average difference of most counties in the concluding of claims is either plus or minus 13.5 % from 71%. This leaves us with a range from 57.5 % to 84.5% of concluded claims where most of the counties should be found. Indeed, 11 out of 18 counties were found to be within the range. The counties that could be qualified as completing the administrative procedure for restitution and compensation at a relatively normal speed are Zagrebacka, Grad Zagreb, Dubrovacko-Neretvanska, Istarska Splitsko-Dalmatinska, Vukovarsko-Srijemska, Sibensko-Kninska, Primorsko-Goranska, Bjelovarsko-Bilogorska, Sisacko-Moslavacka, and Varazdinska. The remaining seven counties are split between four counties that have concluded claims above the standard deviation and three that have concluded claims below the standard deviation. The four counties that are most efficient in completing the restitution and compensation process are Medjimurska, Krapinsko-Zagorska, Koprivnicko-Krizevacka and Osjecko-Baranjska. The three counties that are having problems with the concluding of the administrative procedures for property claims are Karlovacka, Brodsko-Posavska and Viroviticko-Podravska. Their slow progress should be questioned and further researched by the Croatian Government. The counties that did not present the proper information for this data set and are not included in the chart are Licko-Senjska, Zadarska, and Pozesko-Slavonska.

Figure 1. Percentage of Claims: Concluded and in Progress, Croatia



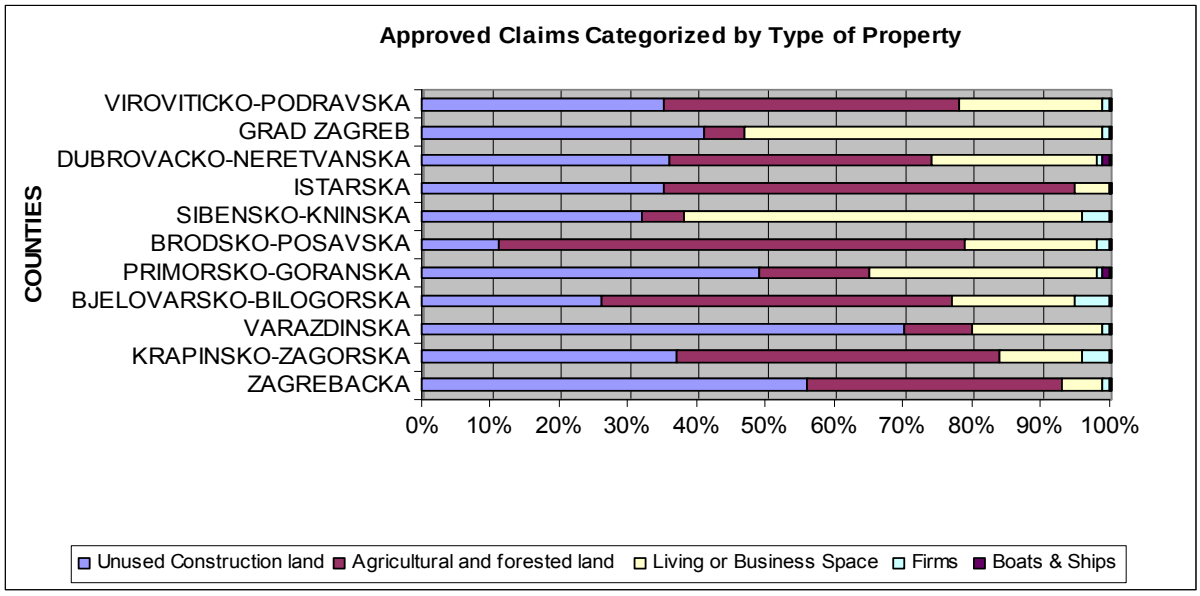
Another important aspect of the administrative procedure to analyze is the outcomes of the claims to restitution and compensation. The number of total reported claims for property that the analysis was able to obtain from 13 counties is 46,072. From this number of total claims, 26,325 claims have been concluded. The total number of claims approved has been 18,282 and the total number of claims denied has been 8,043. This indicates a 69% approval rate and 31% denial rate aggregated on the national level. These aggregated totals can be further divided into 13 counties that presented information for this data set. These results can simply be graphically organised by reducing the total number of claims of each county to a percentage and then dividing them into two categories: (1) the percentage of claims approved (2) the percentage of claims denied. This is visually displayed in figure 2. Dividing the claims by county shows a small difference in the average percentage of claims approved with 65% and an average precentage of claims denied 35%. The graph shows only two counties with considerably lower than average approval rates, these are Sibensko-Kninska and Dubrovacko-Neretvanska. The counties that did not provide information for this data set and are not included in the chart are Licko-Senjska, Zadarska, Pozesko-Slavonska, Karlovacka, Medjimurska, Sisacko-Moslavacka, Brodsko-Posavska and Vukovarsko-Srijemska Counties. The relatively high number of unaccounted for counties in this data set is due to the fact that the counties ignored the requests for information or gave partial answers to the requests.

Figure 2. Percentage of Claims: Approved or Denied, Croatia



It is also important to note the types of property that are most frequently being approved by the County Public Administration Offices. The different categories of property are already predetermined by the legislative framework. The property categories are unused construction land, agricultural and forested land, business or living space, firms, and boats and ships. Data for this investigation has been given by 11 out of 21 counties. The results are represented graphically in figure 3. As can be clearly seen in figure 3, the three categories of property claims approved most frequently are unused construction land, agricultural and forested land, and business and living space. The average percentage of approved claims for each different category is 39% for unused construction land, 34% for agricultural and forested land, 24% for business and living space, and 1% for firms. The average percentage of boats and ships approved for restitution or compensation is negligible with only 12 items approved through all 11 counties. These average percentages of approved claims roughly correspond to the average percentages of original claims requesting restitution and compensation. The counties that did not present the proper information for this data set and are not included in the chart are Licko-Senjska, Zadarska, Pozesko-Slavonska, Karlovacka, Koprivinica-Krizevci, Medjimurska, Sisacko-Moslavacka, Brodsko-Posavska, Vukovarsko-Srijemska and Osječko-Baranjska.

Figure 3. Approved Claims Categorized by Type of Property, Croatia



The third aspect of the administrative procedure left to examine is the position and function of the national courts in relation to the restitution and compensation process. In particular, the analysis will examine the function of the decisions and the rulings of the Constitutional Court and the Administrative Court in the structure of restitution and compensation. Under normal circumstances the Constitutional Court has the jurisdiction to strike down any legislation that violates or contravenes the principles of the Croatian Constitution. The Constitutional Court, however, recognized the exceptional historical and political circumstances that led to the formulation of the Law on Compensation. In this context the Constitutional Court found it inappropriate to consider the Law on Compensation within the framework of the Croatian Constitution. The Constitutional Court recognized the impossibility for the equal treatment of all citizens within the context of restitution and compensation. There is going to be an inherent disparity between the persons who receive restitution in kind and those who receive compensation. The Constitutional Court ruled that it did not have the jurisdiction to make decisions in such exceptional circumstances. The Constitutional Court deferred responsibility to determine the political priorities and financial extent of the restitution and compensation process to the Croatian Sabor[227]. This decision by the Constitutional Court reinforced the legislative framework and confirmed the Croatian Parliament as the final authority in the restitution and compensation process. In other words, the Constitutional Court took a passive role in relation to the restitution and compensation process. It clearly identifies the process of restitution and compensation as a political issue that goes beyond the court's scope of jurisdiction. The obvious exception to this 1999 ruling was when the Constitutional Court modified the law in order to allow foreign citizens to become eligible claimants for restitution and compensation[228]. The other decisions the Constitutional Court made in reference to the process of restitution and compensation where not focussed on the Law on Compensation directly.

The position of the Administrative Court is somewhat different because its active participation was foreseen by the legislative framework. The Administrative Court's duty is to function as the main institution for the hearing of appeals. The Court in this role is also responsible for the active institutionalisation of administrative procedures and

[227] Karlovcan – Djurović Lj., "The Law on Restitution /Compensation for Property Taken During the Time of the Yugoslav Communist Government – Practice of the Administrative Court of the Republic of Croatia", *Almanac of the Faculty of Law at University of Rijeka*, Issue no. 29, March 2008, p. 643 – 679
http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=40006
[228] *Ibid.*

practices. The Administrative Court can overturn the decisions of the County Public Administration Offices as well as provide guidance to the counties regarding the proper administrative procedures for particular cases. The Administrative Court has been an instrumental mechanism for the entire process of restitution and compensation. It has ruled on a relatively large number of cases that needed further clarification of administrative and legal rules and procedures. This relatively large number of cases has subsequently raised protests about the Law on Compensation from Administrative Court judges. According to two Administrative Court judges, Božo Gagro and Ljiljana Karlovcan – Djurovic, the Law on Compensation for Property Confiscated during the Communist Regime is unclear and vague in various aspects which is the reason why different decisions are reached by different County Public Administration Offices regarding the same matters[229]. For example, the provisions of the Law regulating the eligibility of claimants, mentioned above, are not precise enough which is why some County Public Administration Offices apply them differently. The judges pointed out that a rather slim body of law contained within the Law on Compensation is meant to regulate a very large number of issues and cases related to restitution/compensation of property. They believe that further amendments to the Law on Compensation are necessary for the administrative procedure to be more objective.

The *2007 Report on the Work of the Public Prosecutor's Offices*[230] points out various ongoing problems with the process of restitution and compensation. It mentions three principal problems in particular. These are the inherent conflict of interest in the County Public Administration Offices, the slow pace of the administrative procedure, and the problem of incorrect or missing documentation. This analysis would add to this list of grievances a fourth problem, which is the continuing conflict between the tenants and the owners. These four problems are the major obstacles to the process of restitution and compensation coming to a close.

The inherent conflict of interest problem of the County Public Administration Offices was already discussed above. It originates from the dual position of the County Offices in the legislative framework. In most cases the County Public Administration Offices are both the arbitrators and owners of property rights. This unfortunately cannot be reversed at this point in time since 71% of all cases for restitution and compensation have been concluded. It can be inferred that the choice of this dual position for the County Public Administration Offices is strategic. The choice was meant to safeguard the interests of the state. This strategic move by the Croatian Government and legislature places the rule of law and the rights of people entitled to restitution or compensation in jeopardy.

The second problem listed by the Public Prosecutor is the slow pace of the administrative procedure. According to the Public Prosecutor this is partially a result of the inherent conflict of interest of the County Public Administration. The Public Prosecutor seems to believe that there is an intentional slowing of procedure in some cases of interest to a county. In addition to this observation of the Public Prosecutor, the slow procedure seems to be a result of the low priority placed on the restitution and compensation process by the counties. The counties have a number of constitutionally assigned essential tasks that take priority over any other duties assigned to them through legislation. It is probable that this type of organisational rationale is being employed by the counties at present. This type of organisational rationale is significantly blocking the completing of the restitution and compensation process.

The third problem is the issue of improper or missing documentation. According to the Public Prosecutor, missing documentation is the major reason for the denial of claims for restitution and compensation of property. The problem with this denial of claims for missing documentation is that a portion of claimants could not obtain the proper documents from state institutions. For example, one claimant requested the

[229] Gagro B., *op. cit.*, see note (187); Karlovcan – Djurović Lj., *op. cit.*, p. 643 – 679.
[230] State Public Prosecutor's Office, *Report on the Work of the Public Prosecutor's Offices for 2007*, www.dorh.hr

documentation on the history of a parcel of land to identify the means by which the communist regime nationalised her family's land[231]. Obtaining this documentation would clearly show whether or not she was entitled to restitution or compensation. However, her request for the documentation was denied by the Cadastre Office because the documentation could not be found. Later, it was determined that the registration number had been changed on that particular parcel of land, but the authorities did not know the new registration number. The inability of the authorities to track down the proper documents here may significantly interfere with a claimant's rights to restitution and compensation.

The most troublesome property issue involves the long standing conflict between the owners of the confiscated apartments and the holders of the tenancy rights occupying these apartments. According to the State Office for Statistics, in 2001 there were almost 12,000 private apartments occupied by the so called 'protected tenants'. According to numbers stated by the Association of Tenants, today there are approximately 5,000 such apartments. The Croatian Constitution and civil law have a number of provisions that protect both the owners and the tenants. The problem is in the fact that there is a general confusion among owners and tenants over the correct act or law that is applicable in their particular case. This could clearly be seen in the applications of tenants to the European Court of Human Rights. The European Court declared their cases inadmissible because it was clear that the applicants misunderstood the rights granted to them by the European Convention and the civil law of Croatia. The general problem with tenants is that they want to be granted ownership rights for apartments that are privately owned. The general problem with the original owners is that they want restitution in kind where the Law on Compensation prescribes compensation. The Law on Compensation clearly states in Article 22 that where tenancy rights exist, the original owner is entitled to compensation and the person holding tenancy rights is entitled to gain ownership. Both sides of the conflict do not recognize the exceptional legal circumstances that led to the Law on Compensation. The correct application of the various civil laws is necessary for the majority of the cases involving owners and tenants. However, there is also a minority of cases where ownership and tenancy rights were abused by the legal or administrative organs of the state. A solution to most of these cases involving ownership and tenancy rights will be presented in the next section.

4. CONCLUSION

A number of problems stem from the choice of the County Public Administration Offices as the responsible body for the arbitration of claims to restitution and compensation. The three major problems here are the inherent conflict of interest, the different principles applied to the administrative procedure, and the slow pace of the procedure. The conflict of interest problem is the greatest threat to the just settlement of claims to restitution and compensation. However, it is also at this point in time the most difficult to change because 71% of all cases have been settled by this administrative mechanism. The recommendation here must then be generalized to the politics of the Republic of Croatia in the future. A possible solution to prevent future conflict of interest problems could be by introducing a practice that would permit the Committee for the Prevention of the Conflict of Interest to consider and point out any potential areas of concern before any act of legislation is introduced into parliament. Of course, the Committee would not have the power to change the legislation but at least it would have oversight and whistle blower status. This would also work towards giving the Committee a more prominent position within the structure of government.

The problem of the different principles of procedure being applied in different counties could be solved by the passing of additional regulations and the changing of the contradictory wording in the Law on Compensation by the legislature[232]. This sort of

[231] Milanovic, Petra (personal interview, December 16th, 2009)
[232] Gagro B., op. cit.

solution should at least be contemplated for the most contentious issues. The less controversial issues must continue to rely on the Administrative Court for their resolution as foreseen by the legislative framework. The third problem of the slow pace of the administrative procedures calls for Government pressure to be placed on the counties to complete the administrative stage of the process of restitution and compensation. As mentioned earlier, the pressure from the EU Commission and the EU Parliament could also be indirectly placed on the Croatian Government in order to encourage the completion of the process.

The last recommendation is based on the general problem of ownership and tenancy rights. These problems can be partially remedied by a proactive organisational policy by the Republic of Croatia. The Republic of Croatia should create three different registers for the categorisation of property for the restitution and compensation process. One register would document the current property whose restitution is requested. The second register would document the property that is set aside for compensation by the state or counties. The third register would document the current owners of the property whose restitution is requested and when these ownership rights were gained. These three registers would avoid a plethora of problems that surround the tenancy and ownership issues. The first problem that would be solved is that tenants who have requested that they be granted ownership rights of privately owned apartments could be easily identified. These cases would obviously be dismissed because they are based on a basic misunderstanding of the Croatian civil laws. The second problem that would be solved is that the tenants who have legitimately requested ownership rights for state owned apartments could also be easily identified. The conclusion of these cases would then depend on the pace of the administrative procedure. The tenants in these cases would receive the rights to purchase the property and the original owner would receive compensation. The third problem that would be placed in a clearer light is the minority of cases where corruption or a conflict of interest within the legal or administrative bodies is in question. The cross referencing of the first and third register would clearly identify the property that has been given to individuals through illicit means. Since the third register would contain both the owner and the date their ownership rights where granted this would set the stage for a more detailed investigation by the authorities of those individuals who gained property without proper tenancy rights or the rights to restitution and compensation. This final recommendation would require a political will to regulate and sanction corruption within the Republic of Croatia. At this point in time there is no indicator that such a political will exists among the key actors within the Croatian political system.

Chapter 5 - Romania

1. OVERVIEW

The restitution of property confiscated during communism is a process prolonged over nineteen years, yet unfinished. It is particularly difficult firstly because of the wide coverage of the initial nationalisation and secondly because of the weak state mechanisms responsible for the implementation of restitution or compensations. However, probably the largest contribution to the existing chaos is the lack of unitary political vision on this issue and the delayed, piece-meal approach in developing the legal framework.

In the first part of the '90s the denationalisation of the property confiscated during communism had a strong distributive scope. The denationalisation of both agricultural and non-agricultural properties created new ownership rights rather than restated the rights of the former owners. After the shift in power of the political parties, the restitution of property had a significant change in scope enforcing the rights of the former owners to regain their properties confiscated by the communist regime. Consequently, this lack of unitary vision lead to overlapping rights for the same property, multiple owners considering themselves entitled to it. Under these circumstances the restitution process has taken a very complex turn, as one owner wins and the other loses. Therefore, no matter what policy decisions are taken now, a significant number of people will be discontent.

The European Commission's (EC) reports cover this issue of property restitution from the first opinion issued on Romania's accession in 1997 until the Monitoring report of 2006. Property restitution was considered in the context of civil and political rights, justice reform and the functioning market economy hindered by the low enforcement of property rights. In the 1999 Regular Report[233] the EC notes that the 'restitution of property confiscated by the state remains a slow process. The adoption of required legislation is still hampered by lack of political consensus' (p.17). In 2000, the EC[234] observes that 'a law on restitution of agricultural land and forests was promulgated in early 2000 but the implementation of the law has proved to be complicated and is behind schedule. In the case of other types of property (mainly real estate), proposed legislation to clarify those instances where restitution/compensation is due has been blocked in the Senate. Judicial practice in this area continues to lack uniformity and procedures are cumbersome' (p.22). Further on, the 2001 Regular Report notes on one hand the disappointing implementation of the restitution laws, but also points to the intervention of the Ministry of Justice that issued a circular letter to courts asking them to pay attention to the social consequences of restitution, which breaches the principle of an independent judiciary. All reports issued by the EC from 2002 to 2006 mention the slow progress in restitution and the weak capacity of the administration to deal with it. A more recent study conducted in 2008 by a Romanian think-tank[235] finds the outcomes of restitution as very poor while the process has to deal with major institutional weaknesses and even lack of political will, especially at local levels.

Regarding the ECtHR, Romania stands out by the number of plaintiffs per capita and the concentration of judgments on property related issues. Furthermore, the ECtHR found a systemic problem in the case of property restitution in Romania (see the section on the role of the ECtHR). In February 2010, ECtHR has decided to apply the pilot-judgement procedure to deal with large groups of identical cases stemming from the same structural problem in the restitution of property in Romania. Two major issues are covered by this procedure: the right to a fair fearing within a reasonable time (access to court to claim

[233] EC, 1999, "Regular Report from the Commission on Romania's Progress towards Accession", p.17
[234] EC, 2000, "Regular Report from the Commission on Romania's Progress towards Accession", p.22
[235] SAR, "Restituirea proprietăţii: De ce a ieşit aşa prost în România?", Policy Brief 34, 2008

ownership and the delay on the part of the administrative authorities in ruling on the restitution request) and the protection of property, more precisely the ability to obtain compensations under the restitution laws.

The report on Romania will further give an overview of the confiscation process during communism which in this country was more intensive and widespread compared to neighbouring countries. It analyses the separate confiscation paths for agricultural, residential and industrial property and the special situations for minorities (especially Jewish and German). The next section covers the restitution process that took place after the fall of communism, observing the fluctuations in the vision of restitution from a distributive privatisation approach towards a policy closer to restitution as a mean of redressing former abuses. It also provides a picture of the mixed outcomes resulting from the implementation of the restitution laws. The report concludes with the main challenges of the restitution of properties confiscated during communism in Romania and policy recommendations for the improvement of the process.

2. HISTORICAL BACKGROUND OF THE EXPROPRIATION PROCESS

Officially, expropriation was for the communist regime an instrument used to achieve several objectives: to replace private property with state or collective ownership; to replace the free market with a centralized command economy; and to achieve wealth redistribution from the 'very rich' to the 'very poor'. In practice, expropriation went beyond the principles set in laws. There are two core problems with the expropriation and restitution claims, originating in the expropriation mechanisms:

the fact that expropriation took place without proper compensation (even when the law formally provided for compensation), so that now previous owners claim either due compensation or restitution;

the fact that more property was confiscated than was covered by the laws, resulting in a *de facto* expropriation while the property rights remained legally with the owner. In these situations the owners were obviously not compensated in any way.

The expropriation framework was set in the Constitution of 1948, which stipulated that all natural resources, forests, waters, and infrastructure (railways, communication, and radio) would be transferred to the state, whereas production means, banks, insurance companies in private ownership could be expropriated if this was done to serve 'the public interest'. Expropriations for different types of property were based on special laws, most of them enacted between 1948 and late '50s. There is no comprehensive assessment of the value of the confiscated property.

2.1. Nationalisation of industrial property

Law 119/1948 expropriated **industrial property**, based on 77 criteria. It mentioned that compensation would be paid except for the 'individuals who, being employed by the State, communes or counties, had made illicit gains' and those 'who have fled the country'. In practice, no compensation was paid, as most owners qualified under one of the above (e.g., by having been imprisoned on mostly alleged political or criminal charges), or else the state simply seized the property even when the legal requirements were not met. In 1948-1949 a wide range of commercial activities were expropriated by special laws or decrees (banks, insurance companies, cinemas, railways, laboratories, hospitals, restaurants, taxis, manufactures etc.).

2.2. Nationalisation of residential property

Residential property was expropriated by Decree 92/1950, which stated that houses and hotels owned by rich people would be expropriated without compensation. The Decree specified that houses belonging to public servants / clerks, small owners/middle class and pensioners were not to be expropriated, but in practice they were nevertheless

seized by the State. Also, this Decree confiscated property belonging to people that fled the country illegally. Later on, Decree 223/1974 also seized the properties of people who legally left the country and refused to return. Other nationalisation acts confiscated the properties of those convicted for political reasons and of those that failed to sell the second property (any family was entitled to own only one dwelling). These were acts of similar abuses, however affecting a much smaller number of people. Still political dissidents who, during communism, lost their properties when imprisoned (as part of the sentence) cannot claim their right unless they can prove in courts their conviction had political reasons[236].

Table 9. Residential property confiscated, nationalised and expropriated by Romanian communist authorities, 1945 – 89

Decade	Legislative framework	Number
1940s	Law 187/1945, Decree 83/1949	1,263
1950s	Decree 92/1950, Decree 111/1951, Decree 224/1951, Decree 513/1953, Decree 409/1955	139,145
1960s	Decree 218/1960, Decree 712/1966, Law 18/1968	4,662
1970s	Law 4/1973, decree 223/1974	62,116
	Unspecified	33,882
	Total	241,068

Source: Stan (2006)[237] quoting the Official Journal part II, 11 June 1994, p.9.

2.3. Nationalisation of agricultural property

In **agriculture**, the nationalisation process took place between 1945 and 1959, starting with the land reform in 1945 and continuing with the so-called 'collectivisation'. In 1945, under the agricultural reform, the land was explicitly expropriated only from owners that held large properties (over 50 ha). 1.5 million ha had been expropriated and redistributed to peasants, so that the agricultural land would be administered mainly through properties below 5 ha. Later, for the collectivisation, all landowners were targeted with no regard to the dimension of the property, with the exception of a number of small peasant households in the mountain areas who remained un-collectivised. The process of 'collectivisation' consisted in 'persuading' peasants to enter collective farms (until 1948, by imposing a production quota to be transferred to the state on those who refused the transfer of their land to the collective farm; afterwards by intimidation, forced repossession, deportations, imprisonment, particularly after 1952, for those who were still opposing collectivisation). Despite the name, the collective farms were acting as state companies; the people that contributed with their properties in the farms had no control over any aspects of the management, no possibility to pull out and no benefits whatsoever. The collectivisation was actually a nationalisation of the agricultural properties. By the end of 1989 collective farms included 86% of the farming land in Romania[238].

Apart from these collective farms, which were nominally owned by their members (though in practice this made very little difference, since the central state control was complete), proper state owned farms were also created (IAS), in general on larger and more productive estates confiscated in 1945 from the large private owners. These state

[236] Cartwright Andrew, 2000, "Against 'de-collectivisation' land reform in Romania, 1990-1992", Max Planck Institute for Social Anthropology, Working Paper no. 4, Halle/Saale.
[237] Stan, L. 2006 "The Roof over our Heads, Property Restitution in Romania", *Journal of Communist Studies and Transition Politics*, Vol.22, No.2, June 2006, pp.180–205
[238] Constantin, Florentina, *Privatisation of Agriculture in Some East-European Countries (Hungary, Poland, Romania, Bulgaria)*, PhD Thesis Academy of Economic Studies, Faculty of International Business and Economics, Dept History of Economy and Geography, 2005.

farms incorporated in subsequent decades land reclaimed or improved through public investment, for example through drainage in the Danube floodplain which produced very good quality land.

Table 10. Collective ownership of agricultural land

	1949	1950	1955	1956	1957	1958	May 1959
Land surface	14.693	288.900	1.301.200	1.837.500	3.607.600	4.501.700	5.601.760
Number of families	4.042	67.700	390.400	683.300	1.458.300	1.848.000	2.100.000

Source: Iancu (2001)[239]

2.4. Nationalisation of property belonging to minorities

The confiscation practice gave rise to two categories of restitution claims nowadays originating from: those who have been 'expropriated without title' – who claim that the expropriation had been illegal even according to the expropriation laws in force under the communist regime - and those 'expropriated with title' – who contest the initial expropriation laws.

Regarding the minorities, nationalisation of immovable property most affected the Germans and the Jewish. There were three waves of confiscation: the first one during the war (Jewish) or immediately after the war (Germans, Hungarians), the second one during the general nationalisation and the third one (up to 1989) when emigration to Israel or Germany was conditioned in practice by the donation of properties or their taking over by the communist state.

In the 40's the Jewish were expropriated successively by both authoritarian regimes: the extreme-right one before 1945, through special anti-Semitic legislation; and the Communist one afterwards, through general nationalisation laws. Starting with 1938 and throughout World War 2, 'aryanisation' of the Romanian economy meant confiscation by the state and redistribution to the 'ethnic Romanian element' of commercial and residential property of Jewish families[240]. In Transylvania after August 1940, when this province came under the control of the Hungarian authorities, the same thing happened, just with different beneficiaries of the redistribution. In some cases the Jewish families were also deported – to concentration camps in Transdniester or to Auschwitz-Birkenau, respectively – in other cases they were left in place as tenants in their former property (or managers of the business on behalf of the new owners). Finally, there were also instances when Jewish property was taken over by intrepid 'Aryans' without any involvement from authority, by sheer private abuse.

At the end of 1944, when Romania shifted sides and was occupied by the Soviet army, a law[241] was quickly passed providing for the return of possession of property to the Jewish population without any extra formalities (i.e. by default). Though well intended, this law subsequently created more problems than it solved, because it meant that no documents were produced for those whose property had been confiscated and ownership documents destroyed. What is more, not all Jewish people who were entitled to take back their properties managed to do so in reality before the general Communist nationalisation, either because of disorganisation or lack of enforcement capacity at that time. Moreover, another act[242] was adopted in 1948 that made the Jewish Democratic Committee (subsequently the Federation of Jewish Communities) the legal inheritor of those who

[239] Iancu, G. "Aspecte din procesul colectivizării agriculturii în România (1949-1960)", *Anuarul Institutului de Istorie din Cluj –Napoca*, 2001, p. 210-238.
[240] *Comisia Internationala pentru Studierea Holocaustului in Romania - Raport Final*, Polirom 2005
[241] Law 641/1944, chapter III
[242] Decree 113/1948

died in concentration camps without family inheritors. With the tacit approval of the Communist Party, which by that time strictly controlled every minor aspect of the social and economic life in Romania, the Committee / Federation allegedly sold most of this property to private owners between 1948 and the mid-'50s.

Hungarians and Germans were officially declared 'enemies' in 1945 and their assets (land, estates, forests) were taken over by State Commission for the Administration of Assets from Enemies (CASBI)[243], a state institution that was supposed to administer these assets. In 1948 the assets were transferred to state property by the communist regime[244]. This successive confiscation has created difficulties in the restitution as the restitution laws after '90s concern only the properties confiscated after 1948. In many cases the administrative bodies refused the restitution, while the judiciary ruled in favour of the claimants, though with no unitary application.

The Jewish people who survived and came back from deportation, or who remained in Romania during the war, lost most of the private property through the general nationalisation laws passed by the Communist regime in 1948-50. There is no indication that ethnic discrimination may have occurred in the process. However, a more subtle form of expropriation took place in the case of Jewish and Germans in the following decades, until 1989, when they were applying for passports to emigrate to Israel or Germany. The Communist authorities reportedly forced them to sign 'donation acts' for the benefit of the state, and there are signs that at least in some cases this was a process of blackmail (property-for-passport). In other cases financial compensation was paid, set according to technical norms, but only after the fleeing owners had renovated the house at their own expense. Since no proper real estate market was functioning at that time, it is difficult to tell if the compensation was paid at fair value or not. Reportedly, in some instances the sum was smaller than the cost of renovation[245].

As a result of this complex situation, Romanian citizens of Jewish origin – or Jewish originating from Romania but who are no longer citizens – have come before courts after 1990 with very different cases. This happened especially after 2001 (when Law 10/2001 was adopted) which made it possible to contest the take-over based on the ground that the financial compensation was unfair. Today there is a mixture of argumentation and supporting documents (or, rather, lack thereof) from those who: (i) had the right to take back their 'aryanised' property but did not manage to do so before 1948; (ii) had their property nationalised by the Communist regime through general legislation in 1948-50; (iii) donated or sold their property to the state and emigrated between 1950 and 1989.

The Romanian courts have adjudicated very differently in these cases, with diverging solutions for apparently similar cases of 'expropriation with compensation', for example. However there is no systematic data about the number of claims for property restitution or court cases involving former owners of Jewish or German origin, because ethnicity is not recorded in these situations and no independent and reliable study was made on this sensitive matter.

[243] Law 91/1945
[244] Decree 228/1948
[245] Interview with Damiana Oţoiu, researcher at the Institute for Political Studies of the Bucharest University, author of a PhD thesis (due in March 2010) on restitution of property to the Jewish community in Romania.

3. THE RESTITUTION / COMPENSATION PROCESS

The Romanian framework for the restitution of property lacks coherence and unity. The progressive development of the restitution policy has lead to different approaches in restitution for different types of properties with separate institutional set-ups for implementation. The result is a luxuriant legal framework, creating an uncertain and ineffective system with three administrative instruments in addition to the judicial tools, and very mixed outcomes.

3.1 Legal framework

3.1.1 Agricultural property and forestry

Agricultural land was the subject of the first restitution initiative after the fall of communism. It was first regulated by two Governmental Decrees (42 and 43 in 1990) by granting property rights to members of the collective farms (Cooperative Agricole de Productie – CAP[246]) within the limits of 0.5 ha per plot. One year later, the main law on the restitution of agricultural land (Law 18/1991 on land resources) was issued. It abrogated in part the decree 42/1990 and provided the first legal framework for restitution of agricultural property to former owners and their heirs providing only for restitution in kind. The law introduced limits regarding the amount of land that could be restored and the eligibility of applicants, namely non-citizens were explicitly excluded.

For the restitution of agricultural land the law 18/1991 provided for the establishment of local commissions at the level of each commune, town or municipality, under the supervision of a county level commission appointed and lead by the prefect[247]. The local commission is lead by the mayor/ deputy mayor and was formed of the general secretary of the town hall, citizens - representatives of property owners, specialists in forestry, water, agriculture, legal advisers working in the town hall or other state institutions including local farm cooperatives (in the early version). The role of the local commission was to analyse the files submitted by the claimants and propose the award of property title and also to keep records of the available and restored land. The role of the county level commission is to supervise, control and validate the solutions proposed by the local level commission and to award the property titles. If a claimant was discontent with the decision taken at County level commission, then he could challenge it to the Court.

In 1991, the claimants could receive back plots of up to 10 ha per person with additional limits on land ownership to 100 ha per family, but no less than 0.5 ha, even if they brought into the CAP a piece of land smaller than that. In addition they were forbidden to sell these plots for the next 10 years. However, this law aimed not only to ***restore*** the old ownership over land, but also to explicitly ***create*** property rights: many individuals were eligible even if they did not bring any land into the CAP in the '50s. This was the case with the victims of the 1989 Revolution (1 ha and tax exemption); people who were employees of the CAP between 1987-1990, if they had permanent residence in the village; local civil servants (up to 0.5 ha); and, wherever there was enough land left, any family who intended to move and remain permanently in the commune (up to 10 ha). As some observers noted[248], this first wave of post-Communist property restitution was quite redistributive in nature and (unconsciously) followed into the steps of the 1945

[246] Under Communism, the agricultural sector was divided into state farms IAS (28%, 411 state farms), collective farms CAP (65%, 3776 cooperatives) and a very small private sector in small plots or in mountainous regions. The restitution of agricultural land has been done differentiated depending whether the plots claimed back were part of CAP or IAS.
[247] The nomination and activity of the local commissions were regulated by Government Decision 131/1991, amended and completed by Government Decision 730/1992. It was replaced by Regulation from 21/11/2001, valid until the Government Decision 890/2005 was adopted. The latter was further changed by two other Government Decisions in 2005 and 2006.
[248] Lucian Luca, "Sectorul agroalimentar din Romania intr-o perspectiva europeana", Working Paper 39, World Bank, ECSSD, June 2005, Chap. 4.

agro reform, by maintaining the 10 ha cap on the plots allocated. Since many families had more that 10 ha when the collectivisation began, a substantial land reserve thus appeared which enabled authorities to give land to the other categories of beneficiaries of the Law 18/1991.

However, additional complications appeared when new regulations designed from 1997 on (Law 169/1997) raised the restitution cap to 50 ha, increased the limit of 30 ha of forest land per family and extended the limit of land ownership to 200 ha per family. Also this law gave detailed provisions on the procedural pathway for implementation. However, as the law was not accompanied by the usual norms of application, some public authorities halted the restitution invoking the incomplete legal base while others proceeded further.

Three years later, in 2000, a new law was adopted (Law 1/2000) changing the implementation rules but also reducing the limit of restored forest land to 10 ha. The law specified that if the claims exceeded the amount of available land at that moment, the beneficiaries would be compensated in cash. For these compensations, the evaluation of the land, financial sources and how they are going to be paid were regulated only in 2004[249]. The funds necessary for these compensations were allotted to the Prefectures in each county from the state budget and the Prefectures directed the funds further to the claimants. However, this mechanism was hardly used as the procedure for compensation was changed only one year later by the Law 247/2005 that centralized and unified the compensation measures for both agricultural and non-agricultural properties.

According to the Law 247/2005 the compensation rights granted on the basis of Law 18/1991 (republished) and Law 1/2000 were decided upon by the Central Commission for Establishing Compensation and were paid exclusively in equivalent shares to the Proprietatea Fund. In 2007, the Government decided[250] to allow compensation in cash for amounts that did not exceed the threshold of 500.000 lei (approximately €125.000). For amounts higher than the threshold, the claimant could decide whether to receive the entire amount only in shares or a combination of cash (up to the threshold) and shares. Depending on the value, compensation in cash is paid in one or two instalments over a period of two years after the issue of the title.

The deviation from the restitution principle in the first years after the fall of communism (law 18/1991) that not only restored the old ownership rights, but also created property rights for a large number of people lead to many complications later on, as the process of (re)allocation of plots proceeded. The following acts (Law 1/2000, Law 247/2005) enforced the rights of the former owners bringing forward the issue of restitution of the land, preferably on the same plots they owned before confiscation. However, in many cases those plots had been already privatized in the early ’90s. Thus the changes in the legal framework lead to overlapping rights that had to be dealt with in the courts. As it will be detailed later in the paper, the laws on the restitution of agricultural land generated an avalanche of law suits. Under these circumstances the restitution process has taken a very complex turn, as one owner wins and the other loses. Therefore, no matter what policy decisions are taken now, a significant number of people will be discontent.

Regarding the eligibility of the claimants, the initial version of the law 18/1991 allowed Romanian citizens residing abroad to submit claims only if they relocated to Romania and excluded foreign citizens from applying. The limitation on residence was removed by the Law 169/1997. Regarding citizenship the situation was far more complex as the Romanian Constitution adopted in 1991 excluded foreign citizens from the right of owning land – for inherited land they were obliged to sell it within a year. The Constitution of 2003 acknowledged the right of foreign citizens and stateless persons to own land but only under specific conditions: resulting from accession to the European Union (which provided for from five to seven years derogations for property rights over

[249] Government Decision 1546/2004
[250] Government Emergency Ordinance 81/2007

land for European citizens) and other international treaties, as provided by organic laws and by heritage. Following the Constitutional reform of 2003, the ineligibility of foreign claimants under the law 18/1991 was challenged before the Constitutional Court. The Court decided[251] that the Romanian state's decision to limit by law the eligibility of claimants based on citizenship was constitutional and the limitation is applicable also to the heirs. As many members of German and Jewish communities had fled the country during communism, giving up Romanian citizenship, the limitation based on citizenship has affected them most.

All these provisions have applied only to the land that was part of the agricultural cooperatives (CAP) in 1990, at the beginning of the restitution process. The land that was included in the assets of state farms (IAS) followed a different route, even more blurred and lacking uniform application. Regarding the land that belonged to state farms (IAS) the restitution was regulated by the Law 15/1990 that launched a larger privatisation programme of state companies. The state farms have partly changed ownership from state to private by issuing shares. Former owners claiming back their land confiscated during communism received shares in these companies. Gradually, as the IAS failed to become economically viable, they were integrated in the Agency for Public Domains (ADS) under the Ministry of Agriculture and afterwards transferred to local authorities for restitution. By 2005 the process of privatizing the former state farms (IAS) was more or less complete: out of the 739 such entities taken over by ADS, about a third were successfully privatized and the rest were dismantled, with the land leased out through public tender.

The procedures for restitution of agricultural land were subject to multiple amendments, reflecting on one hand an incoherent policy vision and on the other hand the practical difficulties encountered both by claimants and by the authorities in charge. For example, the deadline for the submission of claims was extended 6 times, from 30 days, expiring in April 1991 until fourteen years later in November 2005. The documents required were supposed to prove the right to claim and the amount of land claimed. However, as the amount of land to be legally restored has varied in time, the former owners had to submit multiple claims at different moments in time. Furthermore, both communism (in the '45s land reform) and the restoration of agricultural property from the early '90s have created overlapping rights on the same plots leading to the need for more complex regulations, to more difficult implementation, and in many instances to court cases. By the end of 2009, it is clear that any solution taken in one go and implemented consistently would have been better than the piece-meal approach that occurred in Romania, which changed the rules of the game several times during the process.

3.1.2. Non-agricultural property: a restitution policy subject to major shifts

During the 1990s, the restitution of non-agricultural property, both in public policy and in the jurisprudence of the Courts, was subject to major shifts favouring in turns the former owners and the tenants.

In the early '90s, the only restitution path was the judicial one. Those expropriated without legal titles (that is, abusively even according to the Communist legislation) could obtain their original property by suing first the state, to obtain a confirmation that their property title is still valid and the expropriation had been illegal, and secondly the tenants, to obtain *de facto* ownership. Most of such lawsuits were successful[252]. The

[251] Decision no.630 of 26 June 2007, published in OJ no.518 of 1 August 2007; Decision no.1002 of 6 November 2007, published in OJ no.801 of 23 November 2007

[252] Flavius Baias, Bogdan Dumitrache şi Marian Nicolae, *Regimul juridic al imobilelor preluate abuziv*. *Vol. I: Legea Nr. 10/2001 comentată şi adnotată* (*The Legal Situation of Nationalised Property. 1st Volume: Law 1/2001 discussed and annotated),* Rosetti, Bucharest, 2001.

politicians[253] attempted to block restitutions ruled by Courts, arguing that if a special law does not exist, judges cannot decide the matter on the basis of the Civil Code. It was the exclusive role of the Parliament to pass such laws and the role of the judges was simply to apply the law. They urged against the enforcement of the courts' decisions, adding that these breach the law to benefit the former owners.

In 1995, the Supreme Court of Justice, under political pressures, decided that in the absence of a special law, the courts cannot rule on property restitution cases[254]. On the other hand, in 1995 the Constitutional Court in a constitutional check on the forthcoming law 112/1995 argued that the properties nationalised without a title cannot be considered *de jure* the property of the State[255]. However, the fine delimitation of these situations was cancelled by the practice of supervisory review[256] quashing final judiciary sentences whatever the validity of the property title. The General Prosecutor[257] at the time, as his successors, frequently used the supervisory review practice to change mandatory and final decisions that had already ruled in favour of former owners. These issues lead to an avalanche of complaints to the European Court of Human Rights (ECtHR) ever since Romania signed the Convention in 1994 and a significant number of cases lost by the Romanian State[258]. The institutionalisation of supervisory review was also criticized by the European Commission[259] and was eliminated from the Civil Procedural Code in 2003[260].

As a response to international pressures, the avalanche of law suits and the lack of consistent jurisprudence in the Romanian courts, the first law on restitution was issued in November 1995. Law 112/1995[261] regulated the possibility of restoration to former owners of properties that were confiscated based on Decree 92/1950 (with a valid title) and only to those owners that continued to live in those properties as tenants. The tenants (other than former owners) were allowed to buy the properties they lived in, for an advantageous price equal to the accounting book value. The rest of the former owners were eligible only for financial compensation. Law 112/1995 was extremely controversial and it has been said that many of the political leaders that promoted and voted the law took benefit of it as they inhabited and bought protocol houses that had been nationalised during communism[262].

Following the first decisions of the ECtHR against Romania on the issue of property rights and access to justice, one can notice a shift of both legal framework and legal practice[263]. Adopted in 1998, Law 213 on public property and its legal regime[264] refers to the

[253] The incumbent President at that time took a public stand on the issue and opposed Court restitutions reported in the media. Following this public declarations, the Parliamentary opposition tried to initiate the impeachment of the president, failing on vote.
[254] Currently the High Court of Cassation and Justice, Decision No. 1/2 February 1995 published in the OJ 177/8 August 1995.
[255] Decision 73/1995 published in the OJ 177/8 August 1995.
[256] The supervisory review ("recurs in anulare") was an extra-ordinary appeal mechanism by which the General Prosecutor could request the Supreme Court to re-analyse a final and enforceable decision of another court if that court exceeded the competences of the judiciary or the judges participated in crimes related to that decision (art 330 of the Civil Procedural Code). Although the supervisory review was provided in the 1993 Civil Procedural Code, in 2000 an Emergency Governmental Ordinance expanded the competences of General Prosecutor on this matter as well as the terms of submission of such appeals.
[257] The General Prosecutor is the head of all prosecutors in the country.
[258] *Brumarescu vs Romania*, issued in 1999, and about 80 cases on the quashing of final judicial decision between 1998-2009
[259] EC - 2001 "Regular Report on Romania's Progress towards Accession", p.20; EC - 2002 "Regular Report on Romania's Progress towards Accession" p.24-25; EC - 2003 "Regular Report on Romania's Progress towards Accession", p.18
[260] By Governmental Emergency Ordinance 58/2003, later approved and amended by Law 195/2004.
[261] Law 112/1995, published in the OJ 279/ 29 November 1995
[262] Stan, L, 'The Roof over our Heads, Property Restitution in Romania", Journal of Communist Studies and Transition Politics, Vol.22, No.2, June 2006, pp.180–205
[263] Socaciu E.M., *Problema Dreptatii si Restituirea Proprietatii in Romania Post-comunista*, (*The Issue of Justice and Property Restitution in Post-Communist Romania)* Doctoral Thesis, University of Bucharest; Baias, Flavius, Dumitrache, Bogdan şi Nicolae, Marian, *Regimul juridic al imobilelor preluate abuziv, Vol. I: Legea Nr. 10/2001* comentată şi adnotată, Rosetti, Bucureşti, 2001
[264] Published in the OJ 448/24 November 1998

possibility of retrieving property confiscated by the state, with or without a title, without the need for a special law, but did not provide for an administrative path for restitution. Also the Supreme Court reversed its jurisprudence by deciding that the courts have competence to judge the cases on abuses on property rights and other rights that took place between1944-1989[265].

The first law regulating the administrative restitution of non-agricultural property was adopted only in 2001 – in Law 10/2001 on the judicial regime of the estates confiscated abusively from March 6, 1945 to December 22, 1989 – and amended several times since[266]. The types of properties covered by the law were defined as the land properties with or without constructions that were subject to nationalisation, attempting to cover the variety of abusive seizure of properties during communism:

- properties nationalised or confiscated on the basis of nationalisation laws published or not in Official Journals, including properties belonging to individuals and legal persons
- properties confiscated following court decisions on confiscation of property for political crimes against the regime
- properties seized during war and not restored
- estates confiscated without a valid title or without respecting the nationalisation laws
- donations to the state or to other legal persons done by special laws or donations annulled by Court decisions
- estates taken over without payment of equitable compensation

The law provided for restitution in kind as the rule. The initial exceptions mentioned by law 10/2001 regarding buildings which host public institutions or services such as schools, kindergartens, hospitals etc. were eliminated in 2005 (Law 247/2005). When restitution in kind was not possible, other remedies were available: compensation with other goods and services, or financial remedies, or a combination of the two. The value of the compensation represents the value of the confiscated estate updated to the current market value. However, the payment of financial compensation has a ceiling of approximately €125,000 that can be paid in cash, while any amount above this ceiling will be compensated with shares in a specially set-up investment fund (Proprietatea Fund). Unlike restitution of agricultural property, the eligibility of claimants was more permissive. Restitution requests can be submitted by owners or their heirs without a residence or citizenship test.

Tenants in houses subject to restitution under law 10/2001 are protected by establishing, in accordance with the law, a five-year mandatory renting contract and a ceiling to the rent value. Moreover, if there is no agreement on establishing the value of the rent for a new rental contract, or the surface of the living space, the old contract prevails.

The policy shifts created conflicting property rights of former owners vs. new owners (former tenants). The first law on restitution of urban properties (Law 112/1995) allowed the tenants to purchase the buildings they lived in and former owners were entitled to compensation. Law 10/2001 changed the policy providing for restitution in kind as the rule in restitution to the former owners. However, as many properties had already been purchased by tenants, the former owners either failed to receive back the property title or had to challenge the other title issued to the tenants before courts, with very mixed outcomes. Both administrative and judicial procedures have a non-uniform practice on this issue. In addition, as the restitution process is likely to be prolonged for a long period, it is likely to see a new line of case law as the annulment of the property titles for

[265] Decision 1/28 September 1998
[266] Republished twice in 2005 and further amended by OUG 209/2005, Law 263/2006, Law 74/2007, Law 247/2005, Law 1/2009, Law 302/2009

former tenants after 15-20 years since the purchase of the property may be interpreted as a breach of their property rights.

Recently, **a new law** (Law 1/2009) was adopted to deal with the conflicting property rights of former owners and new owners (former tenants). Thus, a property bought by the tenants based on law 112/1995 could not be returned to its initial owner and the claimant is entitled only to compensation. In addition, the law restricted the types of purchasing titles based on law 112/1995 that could be challenged before the court and the former owner could follow only the administrative path. In addition, tenants who bought the houses they were living in at low prices, and lost them when challenged by the initial owners in court, would receive compensation at the current market value of the houses instead of the reference price adjusted for inflation. The law was promulgated after the Constitutional Court decided that it complies with the Constitution. This law represents actually a new turn in policy direction restating the principles of the early 90's. How this law will impact on restitution process is difficult to judge. The guidelines resulting from ECtHR jurisprudence point to the effectiveness of the compensation mechanism and if the restitution procedures fail to ensure that, any limitation on access to justice could be interpreted as deprivation of property rights, in breach of art. 1 of the Additional Protocol no 1 of the Convention.

3.2 Administrative procedure and outcomes for restitution in kind

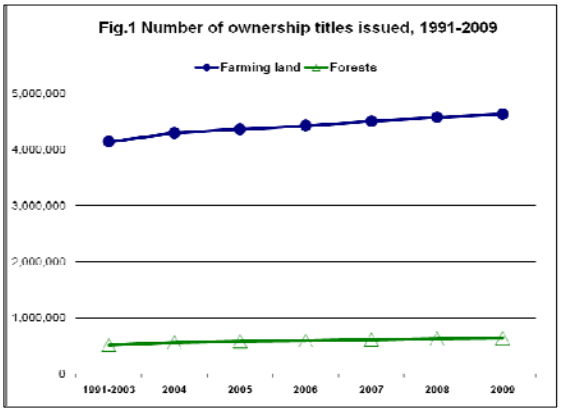
Romania is distinctive among the countries in the region because of the combination of widespread nationalisation, high expectations as *restitutio in integrum* was the target and weak institutions to implement this challenging task. In addition, the political will oscillated in time creating overlapping property rights for both owners and tenants. Also different governance layers involved in the implementation of the restitution policy had diverging interests. The local authorities that owned the nationalised land and buildings had little incentive to give them up easily[267]. Secondly central authorities imposed strict controls over local authorities in order to ensure that the compensation is paid only if restitution in kind was not possible. All these are ingredients for a difficult implementation and explain the massive delays and legal and procedural complications that are so common in the restitution process. To analyse the outcomes, the report will scrutinise each institutional step that is followed in the restitution process and will attempt to identify the main challenges.

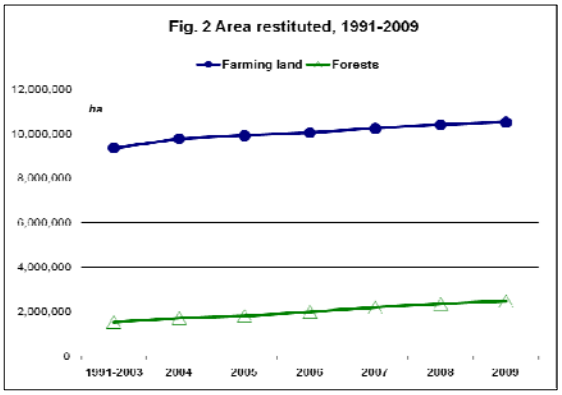
In order to claim back the confiscated properties, the former owners had to submit a request to the authority which held that particular estate on their inventory (in most cases, local authorities)[268]. The file is assessed by a commission that conducts verification on all conditions provided by the law and issues a decision for restitution in kind or compensation measures. There are separate commissions for agricultural-forestry claims and for non-agricultural claims. Subsequently the file is submitted to the county Prefect for a second legality check for non-agricultural property, or to a county-level commission for validation for agricultural land and forestry.

[267] Verdery K (2002) 'Seeing like a Mayor, or How Local Officials Obstructed Romanian Land Restitution' *Ethnography*, Vol 3(1): 5–33

[268] The properties belonging to the communities of the national minorities have been regulated separately by two Governmental Emergency Ordinances 13/1998 and 83/1999 republished in 2005. The laws referred exclusively to immovable properties and provided a different procedure for restitution. At central level a Special Restitution Commission was created to deal with the claims submitted by churches and communities of national minorities. This report does not cover the restitution of these properties.

3.2.1. Agricultural and forestry property





On the basis of the law 18/1991, a total of 3.8 million beneficiaries were given 9.3 million ha of land, and 4.3 million ownership titles were issued. The process was however slow and led to many complaints from people, who claimed their land back precisely in the old locations and blamed corruption in local restitution committees when this was not possible. A special subgroup of former owners found themselves 'captive shareholders' in the incorporated state farms. Nevertheless, by the end of the 90's around 77% of the property titles had been issued, covering about 85% of the area claimed[269].

As a result of implementing Law 1/2000, the total area given back by 2005 reached 10.2 million ha and 98.8% of the property titles had been issued, covering 96% of the claimed area[270].

While the restitution of farming land and forests seems to have come to an end, both in terms of number of titles and area involved (see charts), it is likely that the flow of court cases generated by this process will continue to haunt the authorities for a while yet.

Agricultural property (Law 18/1991; Law1/2000)		2005	2006	2007	2008	2009
Judecatorie	1st instance	10,636	26,802	40,067	37,985	30,599
Tribunale	1st instance					
	Appeal	4,398	11,805	493	235	177
	2nd appeal	1,284	6,375	12,108	11,075	8,564
Curti de apel	1st instance		3	7	13	18
	Appeal	367				
	2nd appeal	3,634	1,757	516	327	222

Source: Superior Council of Magistrates

[269] Lucian Luca, *Sectorul agroalimentar din Romania intr-o perspectiva europeana*, Working Paper 39, World Bank, ECSSD. Iunie 2005. Cap. 4.
[270] Ibidem, p. 36

3.2.2. Restitution of non-agricultural property

The situation is here much more delayed at the first level of decision. According to the data provided by NARP[271] about 45% of the claims are pending at local level, including about 22.000 claims for which the responsible institution is not yet clear. Although the law provided for restitution in kind as the first option for resolving the claims only a quarter of the properties have been given back in kind; for the remainder of the claims the former owners should receive financial compensation (cash or securities at face value). There are several reasons for this situation. The first one is the fact that many of the claimed properties had been demolished in the process of 'urban modernisation' during communism. Another reason is the sale of some of these properties to the tenants in the early 90's, creating therefore overlapping property rights on the same building, leading to a significant number of law suits for comparing the property titles. The number of cases in the courts using the special laws is provided in the table below; while the number of cases based on the Civil Code (including the comparing of property titles) is not available as the existing statistical tools are not sensitive enough.

Non-agricultural property (Law 112/1995; L10/2000; Law1/2009)		2005	2006	2007	2008	2009
Judecatorii	1st instance	1,031	934	863	915	750
Tribunale	1st instance	9,646	10,996	10,490	9,088	8,092
	appeal	264	373	194	108	108
	2nd appeal	58	234	183	73	77
Curti de apel	1st instance		2	13	35	70
	appeal	5,469	4,710	5,220	4,595	3,975
	2nd appeal	1,027	1,325	838	507	384

Source: Superior Council of Magistrates

3.3. The performance of local authorities and the judicial decisions vary significantly

There are counties where the restitution of both agricultural and non-agricultural property is close to the end with very few claims still pending. However, according to NARP[272] there are local authorities which have barely resolved 25% of the claims for non-agricultural property (Bucharest) or between 40-60% (Constanta, Vrancea). Bucharest has a special situation as it concentrates a large number of claims for non-agricultural property. About one out of four properties claimed back is located in Bucharest. For the rest of the local administration that lags behind, the reason for low performance cannot be attributed to the number of claims, which is relatively small. In these cases, the reasons can be found either in lack of capacity or lack of political will. It is also noticeable that local authorities performed better overall (56% of claims have been processed) than the central authorities that have ownership over claimed properties (only 33% of claims have been processed).

[271] A response to a request based on Law 544/2001 on free access to public information. The data refer to end of 2009.
[272] Ibidem

One of the causes for the existing delays in restitution is to be found in the weak capacity of the administration. Romanian administration ranks low in the comparative assessments of the World Bank studies[273]. The general low capacity affects the implementation of all national policies, including restitution. In addition to the existing weaknesses, the bureaucracy has to deal with historical weaknesses. In the Southern regions of Romania, the records of properties from pre-communist time have been very poor, so to prove or verify property rights can be a real challenge. Situations with mismatching descriptions of the claimed property from the property title, cadastre register or equivalents and nationalisation acts are quite common, as mentioned by representatives of local authorities[274].

The combination of lack of capacity and oscillating political will lead to massive delays. Therefore, Law 10/2001 provided for the judicial path to overcome the lack or inadequacy of response on behalf of local commissions. Consequently, the courts have competence to issue a decision regarding the restitution of claimed property as the administrative path failed to provide one, including the restitution in kind[275]. As the administrative restitution path failed, especially in some counties, the courts have to bear the burden of the implementation of restitution policy. For example, in the Tribunal of Bucharest, which is the competent court for solving the disputes on Law 10/2001 for Bucharest, about 10% of all cases are linked to property restitution[276]. Among the most frequent cases brought before the courts are the non-response of the administration, and challenges against the decision of the administration based on Law 10/2001.

The implementation of the restitution policy created non-unitary practice in several aspects both on substance and procedures. The most significant issues are: 1. whose title prevails when overlapping rights were created over time by the numerous legal provisions and 2. whether a judicial path for restitution based on the Civil Code is available to the claimants when an administrative path is available.

In an attempt to solve the issue of overlapping rights the legislation and the courts brought into discussion the good/ill faith of the buyers (tenants) at the moment of purchasing the property. Law 10/2001 provided the possibility for the former owner to challenge the title awarded to the tenant based on law 112/1995. As the law did not provide a clear definition of good/ill faith the courts have applied it very differently. The question posed to the courts was whether the tenant that wanted to buy the apartment should have checked if the state received a notification on that respective property and if so, if the lack of diligence on the side of the buyer may constitute ill faith and therefore invalidate the ownership title. The counter-argument was that the seller was the state, therefore the buyer was of good faith when presuming the state was the owner. The Constitutional Court confirmed this mechanism of evaluation, failing however to define it more precisely, despite several decisions issued on this aspect. In several rulings the ECtHR[277] argued that the sale by the state of a property abusively confiscated to third persons (irrespective of their good faith) represents a deprivation of assets from the perspective of the previous owner. Combined with the ineffectiveness of the compensation mechanism this deprivation breaches article 1of the Additional Protocol 1 of the Convention. Although ECtHR issued several decisions on the issue of good faith, the newly enacted Law 1/2009 mentions again the good faith mechanisms as the key criterion thus prolonging the uncertainty in the legal interpretation of property rights.

[273] World Bank Governance Indicators (1996-2008): http://info.worldbank.org/governance/wgi/index.asp
[274] SAR, "Restituirea proprietăţii: De ce a ieşit aşa prost în România?", Policy Brief 34, 2008
[275] This was a source on non-unitary judicial practice. Some courts ruled directly the in-kind restitution of the property when it was possible, others quashed the administrative decision and asked the administrative bodies to issue a new decision. Following an *appeal in the interest of the law* (see footnote 45) submitted by the General Prosecutor, the High Court decided that Courts can directly decide the restitution in kind if certain conditions are met. High Court Decision no 20/2007 published in OJ 764/12.11.2007
[276] Data obtained via "Portalul instantelor de judecata" (http://portal.just.ro/) on 2008 and 2009, accessed on 30 January 2010
[277] Leading case *Porteanu vs Romania*, no 4596 of 16.02.2006, see also *Gingis vs Romania*

Another contentious aspect of restitution has been the duality of the administrative and judicial routes for the restitution of properties. The courts also hear cases where restitution is sought by claimants on the basis of the Civil Code irrespective whether claimants have used or not the administrative path regulated by the Law 10/2001. Article 480 of Civil Code provides that "property is the right to enjoy and dispose of an asset in an exclusive and absolute manner, within the limits of the law" completed by article 481 that "nobody can by forced to renounce her property, only for public utility and receiving a fair and prior compensation". Based on these articles, starting with early '90s a significant number of claimants challenged the nationalisation or confiscation during communism and claimed back their properties. As mentioned before, in early '90s both politicians and the High Court argued that the courts cannot decide the restitution in the absence of a special law. Later the courts had no common position on whether a plaintiff could claim restitution by opening a lawsuit based on the Civil Code after a special law was enacted or could only follow the procedures of the special law regulating restitution via administrative means. Some courts accepted such claims, others rejected them. The divergence of opinions was widespread.

In 2007, the General Prosecutor submitted an appeal in the interest of the law[278] before the High Court of Cassation and Justice in order to unify the judicial practice regarding admissibility of actions on restitution in courts, while an administrative path is available. The High Court ruled that the special law (Law 10/2001) should be used provided that it complies with the European Convention for Human Rights. Under the recent rulings of the European Court for Human Rights, Romania was sanctioned because the administrative path failed to put into practice an effective system of remedies. Under these circumstances, it is up on the reading of ECtHR jurisprudence by each judge whether to accept or not claims based on the Civil Code. Judges stated that the High Court's decision is not helpful in practice as it fails to provide any guideline. As a consequence the courts continue to accept claims on both legal grounds, though not all courts and not even all panels within one court have the same practice (some of them accept and others reject claims based on Civil Code).

3.4. A lot of complaints to the Ombudsman

The lack of effectiveness in the restitution process is also reflected in the number of complaints filed with the Ombudsman. In 2000, the Ombudsman received 4,379 complaints, most of them referring to alleged infringements of individual rights in the process of restitution of land or residential property by administrative bodies[279]. In 2008[280], almost 1.000 people submitted petitions to the Ombudsman on property restitution issues (representing about 1/8 of the total number). Furthermore out of 42 inquiries conducted by this institution more than half were related to the failure of the administration to answer claims for property restitution.

[278] The appeal in the interest of the law is a procedure provided by the Romanian legal framework to be used when there is inconsistent jurisprudence of various courts on the same point of law. It is initiated by the General Prosecutor and judged by the High Court of Cassation and Justice. The decision of the High Court is mandatory with regard to the interpretation of the legal issue for the entire judicial system and applicable only to future cases

[279] EC – 2000 "Regular Report from the Commission on Romania's Progress towards Accession", p.22

[280] Avocatul Poporului, "Raport de activitate pentru anul 2008" (Annual Report 2008)

3.5. The administrative procedure and outcomes in case of compensation.

If restitution in kind is not possible, for both agricultural and non-agricultural properties, the file is forwarded to the National Authority for Restitution of Property (NARP) that provides the secretariat for the Central Commission for Establishing Compensations (CCEC). The CCEC, using independent evaluators, decides upon the amount to be awarded as compensation to the claimants. Although the CCEC has competence only for legality check on the rejection of restitution in kind, in reality it carries out a full verification of all conditions, even though the file has already been checked twice - at local and county/Prefecture levels. Further, the claimants decide whether to receive compensation in cash or securities at face value. The value of claims that go beyond the €125,000 limit is paid in securities to Proprietatea Fund that will be changed into shares when the Proprietatea Fund is listed on the stock market.

As regards agricultural land and forestry, about 52.030 claims for financial compensation had been forwarded to central level by October 2009. Out of these, 32.000 were returned to the local levels as the files were incomplete or some irregularities were noticed, 9.194 files were approved for compensation while the rest are still pending at central level. The overall value of compensation for agricultural land and forestry awarded by October 2009 was about 2bn lei (€550m).

Regarding non-agricultural land, out of about 52.578 valid claims based on law 10/2001 for properties that could not be given back in kind, at the end of 2008 the NARP had a backlog of 40.905 claims. The Central Commission issued compensation decisions for only 6.513 claims with an average of about 2.000 claims per year. The situation is very discouraging if the same performance is maintained. It seems that the central level needs more than 20 years to deal only with the claims already received. The compensation awarded so far amounted to about 6bn lei (equivalent to approximately 1.7bn euro) paid in cash and securities at face value to the Proprietatea Fund**.** As only 56% of the claims have been processed at local level, the backlog at central level is likely to become even more considerable and the payment of compensation to be an issue for the forthcoming decades.

The delays in the evaluation of compensation at central level, especially for non-agricultural properties, is very likely to increase the number of cases before the Court of Appeal in Bucharest, which is the competent court for disputes with the CCEC. So far about 2 out of the 40 cases handled per session of the administrative complaints courts refer to property restitution, as estimated by independent experts. The number is expected to rise in the future. The most frequent causes refer to the non-response of the central commission. However, it seems that a new line of causes is emerging regarding the obligation to pay the compensation already approved. Law 247/2005 that regulates the compensation measures failed to provide that compensation titles are directly enforceable. If the state fails to pay the compensation approved as cash payments, the claimant needs to open a law suit to oblige the state to comply with its own decisions.

In 2005, the Proprietatea Fund was created in order to provide additional financial means to support the restitution process[281]. The Proprietatea Fund is a closed investment fund, established for ten years, with the possibility of extension on the decision of the General Assembly of the Shareholders. When established it received state participations in 117 companies and the amounts resulting from the sale of 4% of the shares held by the state in the Romanian Commercial Bank and 3% of the shares in Romtelecom SA. Also the fund is the recipient of trade accounts receivable from countries such as Sudan, Syria, Congo, Nigeria, North Korea etc and the receipts from the activity of international trade and cooperation by the Romanian state before the 31st of December 1989.

[281] Regulated by the Law 247/2005 and subsequent Government Emergency Ordinance 81/2007 and Governmental Decision 1481/2005, modified by Governmental Decision 1581/2007. Also, Proprietatea Fund has to fulfill the same conditions as the other players on the capital market as regulated by Law 297/2004

Currently the Fund has a portfolio of 88 companies with a common stock of 14.240.540.675 lei (equivalent to approximately €4bn), out of which €550 m are still in process of transfer from the state institutions. Initially the state was the only shareholder. By January 2010, 40.17% of the common stock had been transmitted to private individuals as compensation for properties confiscated during the communist regime.

The Ministry of Finance is in charge of the administration of the Proprietatea Fund until an independent administrator is selected[282]. The administration of the Fund has three levels: the General Assembly of the Shareholders, in charge of the major decisions including the nomination of the Supervisory Board[283]; the Board of Directors in charge of the management; and a Supervisory Board with a role of control. The voting system in the General Assembly is favourable for the small investors, with the exception of the Ministry of Finance which has a dominating position.

Law 247/2005 provided a four-month period after the law was published in the Official Journal, for the Ministry of Finance to organise an international tender for the selection of the administrator. However it was only in September 2008 that the Government issued Decision no 959/2008 that established the competencies of the selection commission that will manage the tendering process for the selection of the administrator of the Fund. A company has been selected following the tendering process and the contract was signed in February 2010. The delay in transferring the administration of the Fund to a private specialised body fuelled the concerns of the claimants that the Fund is responding rather to the interests of the state than of the shareholders, decreasing therefore public trust in the effectiveness of the remedy of compensation-by-shares.

Other significant issues affecting the credibility of the compensation-by-shares policy via the Proprietatea Fund are the persisting difficulties in trading the securities and their real price. According to the initial provisions of law 247/2005 the Proprietatea Fund was supposed to start the procedures for listing on the Bucharest Stock Exchange[284], to a deadline eliminated two years later by Government Emergency Ordinance 81/2007. Furthermore, the constitutive act of the Proprietatea Fund[285] from 2005 stated clearly that the shares can be sold only on the regulated market. As the Fund was not listed on any regulated market, the shareholders were unable to trade. This issue was sanctioned by the ECtHR considering that the Proprietatea Fund 'does not function at present in a way that may effectively provide compensation to the applicants'[286]. In 2007, the Government amended the Constitutive Act of the Proprietatea Fund[287] eliminating this restriction, thus opening the possibility of selling the titles on the unregulated market. However the ECtHR continued to sanction Romania on these grounds considering that compensation by securities to Proprietatea Fund does not yet represent effective compensation[288] because their market value can't be established.

The effect of the delayed listing of the Proprietatea Fund on the regulated stock market is reflected in the difficulty of evaluating the real transaction value of Proprietatea Fund securities. The conversion of the compensation title into securities uses the rate of 1 RON per share, as provided by the law. In 2009 the shares were sold for 0.1 to 0.3 RON per share on the unregulated market but this is unofficial information collected from owners who sold their shares during the period when the research was conducted and from the

[282] Law 247/2005
[283] According to the GD 1481/2005 the members of the Supervisory Board were nominated by the Ministry of Finance. In 2007 the GD 1581/2007 charged the General Assembly of the Stakeholders to nominate the Supervisory Board.
[284] Law 247/2005, Art 12(4) , title VII.
[285] Government Decision 1481/2005
[286] *Radu v. Romania*, no. 13309/03, § 34, 20 July 2006, and *Ruxanda Ionescu v. Romania*, no. 2608/02, § 39, 12 October 2006
[287] Government Decision 1581/2007
[288] *Suciu Werle v. Romania* no 26521/05§ 20, 13 December 2007

media[289]. One can note the difference between the administrative value of the share at the conversion of the compensation titles and the sale value. The claimants are discontent with the current situation, arguing that the compensation they receive in shares is of far lower value than the State claims. On the other hand, after the listing of the Fund on the stock market, the conversion of compensations into shares will take into account the stock market value. If the value of the shares remains at such low levels, the stock of shares owned by the state will be consumed at a much higher pace, rising questions on the sufficiency of allocations for the property restitution process.

The prospects for listing are unclear. In January 2010 the Proprietatea Fund was not yet registered with the Romanian National Securities Commission, which is a pre-condition for listing on the stock market and the evaluation of Proprietatea actives could be a challenge as about 50% of the companies in the portfolio are not listed either. The current management of the Fund estimates that the listing will be finalized by the end of 2010[290] and the same prospects were mentioned for the press[291] by the new private administrators of the Fund.

Given the difficulties of tackling the issue of restitution in kind because of the created overlapping rights, the effectiveness of compensation for the confiscated property is a key issue. Two aspects are problematic from this perspective. The first one is the long duration in the processing of the claims. For urban property only 56% of the claims have been processed at local level while for the award of compensation the backlog is massive. For agricultural land and forestry, the report identifies significant delays especially in the processing of compensation claims. Taking into account that the restitution of agricultural land has been ongoing for 19 years and of urban property for 9 years, the results are puny and the perspectives are bleak. If the same processing rate is maintained, it is likely that the compensation process will be extended for decades from now on. In addition to this issue, the mechanisms for awarding the cash and share-compensation are dysfunctional. Only a very small number of claimants have actually received cash compensation. Also the securities at face value offered by the Proprietatea Fund are not considered effective compensation as long as the Fund is not listed on the stock market that would provide a transparent valuation tool. Taking into consideration these issues, the administrative path for restitution and for the award of compensation failed to provide effective remedies. As a consequence, the burden for the effective application of the law lies within the courts. However, again the weak capacity of the state institutions failed to provide an adequate answer as the courts proved unable to apply the law in a fair and unified way. ECtHR ruled on several occasions that the domestic legal provisions on compensation mechanisms are ineffective and observed the large scale of the problem[292]. The ECtHR recommended on several occasions that Romania must take legislative, administrative and budgetary measures in order to make the procedure for compensation genuinely consistent, accessible, speedy and foreseeable. As the response on behalf of Romania was not adequate and the ECtHR caseload on such issues is increasing, the Court recently decided[293] to apply the pilot-judgement procedure. This procedure allows the Court to deal with large number of identical cases stemming from the same structural problem. Two pilot cases have been selected under Article 6§1 of the Convention – right to a fair hearing within a reasonable time and Article 1 of Protocol no. 1 – protection of property. The first case Atanasiu and Poenaru v Romania (no 30767/05) refer to applicants inability to obtain access to a court in order to claim ownership of a nationalised property and the delay on the part of the administrative authorities in ruling

[289] *Financiarul*, 12 nov 2009. In March 2010, a derivative product (warrant type) on the Vienna Stock Market indicated the price of 0.428 lei per Fondul Proprietatea title.
[290] Interview conducted with the President of Proprietatea Fund, January 2010
[291] *Ziarul Financiar*, 08 September 2009.
[292] *Viasu v. Romania,* no 75951/01, December 2008; *Katz v. Romania,* no 29739/03, January 2009; *Faimblat v. Romania,* no 23066/02, January 2009.
[293] ECtHR press release no 158/25.02.2010 "The Court Applies the Pilot-Judgement Procedure to Romanian Cases Concerning the Restitution of Properties Nationalised under Communism".

on the restitution request. The second case Solon v Romania (no 33800/06) concerns the applicant's inability to obtain compensation for a nationalised property under restitution law.

4. CONCLUSION

The overall conclusion to be drawn on the restitution of the property in Romania concerns the lack of political decision. The piecemeal approach that occurred in Romania, which changed the rules of the game several times during the process was definitely the weakest point in the restitution process. For both agricultural-forestry and non-agricultural land, the lack of strategic vision is obvious. The policy was built gradually with frequent major changes of directions. All significant features of restitution, such as restitution in kind vs. compensation, *restitutio in integrum* vs. established thresholds, eligibility of claimants, deadlines and other procedural aspects have changed over time leading to a complicated legal framework and to an even more complex implementation, involving both administrative and judicial authorities. The failure of the administration and judiciary to comply with the rules provided by this intricate framework and the different interpretation given to the rules provoked a clear reaction from the international organisations Romania adhered to, especially the ECtHR. The nationalisation process does not fall within the competence of the ECtHR because Romania was not a signatory of the Human Rights Convention at that moment. It follows that the Court cannot compel the state to restore property. However, since the state decided to engage in restitution, after it signed the Convention, the Court takes a view on whether the process is conducted in a fair and effective manner. Romania features among the top countries in terms of the number of plaintiffs to the ECtHR among its citizens and also in terms of the number of sanctions on property issues. In addition to these, the piecemeal approach used by Romania in restitution lead to a number of important aspects such as overlapping rights, non-unitary application of the law, burdens on the already weak institutions and failure to provide effective compensation that provoked a growing discontent in public opinion as to how restitution was handled by the Romanian state.

Considering their findings on the situation in Romania, the experts would like to propose the following recommendations:
The most important issue resulting from this research is the fact that a lack of political vision and frequent changes in the legal framework were the main causes for the existing chaos in the restitution of property. Therefore, there is an obvious need for the political class to refrain from major policy shift. The key word should be consolidation of the legal framework by a clear-cut interpretation of the law on behalf of the Constitutional and High Court to provide the lower courts with the direction in the application of the law that is so much needed.

Secondly, increasing the capacity of the administrative bodies in charge of restitution should become a priority. Institutional audits for the central level, Bucharest City Hall and other laggard institutions are recommended in order to find pragmatic ways for speeding up the bureaucratic process by eliminating redundant verifications and by streamlining the procedures. The compensation mechanism should become truly effective. Payment titles should be directly enforceable, and the Proprietatea Fund should be listed on the stock market as soon as possible.

Another important aspect to be considered is the capacity of the state to pay for compensation. The economic crisis greatly affected the Romanian state, the public budget facing high deficits with lower incomes while the social costs are rising. As the payment of compensation is already a cumbersome process, it is not advisable that budgetary constraints should add to delays in the process. In addition, the present value of the securities to the Proprietatea Fund as they are traded now on the unregulated market indicate that the real price of the shares will be significantly lower than the current face value used for compensation. As compensation will be at the trading value, a higher rate of transfer of the shares owned by the state to private recipients should be

anticipated. The Fund has already transferred about 40% of the value of assets into titles to claimants. Under these circumstances, it is advisable to have a better enforcement of the restitution in kind rule or compensation with other properties of equivalent value which are not claimed back by former owners. However, the laggard local authorities such as Bucharest have not finalized an inventory of properties, although the deadline provided by the applicable law expired years ago. A better enforcement of such laws and an improvement in the performance of other institutions, such as cadastre or archives, is likely to generate better conditions for application of the in-kind or equivalent options.

CHAPTER 6 – SERBIA

1. OVERVIEW

After the political changes in 2000, when Mr. Milosevic, the former president of the Republic of Serbia, and his party lost the presidential and parliamentary elections, Serbia moved towards democratisation, while facing the consequences of abundant human rights violations that occurred during the communist regime and afterwards, including nationalisation of property. Unlike other former socialist countries, Serbia did not address the issue of property restitution immediately after the change of regime, despite the demands of former owners and the international community.

The European Union called for the adoption and implementation of the Law on Denationalisation in Serbia and the Community of Serbia and Montenegro. Decision 2004/520/EC[294] of the Council is the first act which explicitly asks for the adoption and implementation of legislation on property issues, in the section of 'Human Rights and Protection of Minorities': 'adopt/implement legislation on property restitution'. Since then, the Council of the EU has systematically argued for the adoption of a property restitution law[295]. In 2006, a decision of the Council regarding respect for human rights and the protection of minorities re-enforced the initial recommendation for the adoption of property restitution law, including a guideline on (state-owned) urban property: 'Adopt adequate legislation on the restitution of property and ensure its full implementation, notably by addressing the issue of (State-owned) urban property'. The same request was reiterated by Decision 2008/213/EC[296] 'Adopt adequate legislation on the restitution of property and ensure full implementation' .The position taken so far by the European institutions indicates that restitution of property is considered as one of the many steps Serbia could take to provide remedies for abuses that occurred in the past, under authoritarian regimes.

2. HISTORICAL BACKGROUND OF THE EXPROPRIATION PROCESS

2.1. The notions of 'nationalisation' and 'denationalisation' – ratione materiae

The main effect of nationalisation was the replacement of private ownership with various forms of collective ownership. This review will cover the type of property subject to nationalisation, the state bodies in charge of its application and the beneficiaries of this process.

As the scope is the reparation of the consequences of the unjust confiscation of property, it is expected that the denationalisation process will include all cases of property seizure based on the violation of the right to peaceful enjoyment of property. In 2002, a working group appointed by the Ministry of Finance of the Republic of Serbia to draft the Law on Denationalisation identified eight forms of property seizure that may qualify as nationalisation:

[294] Council Decision 2004/520/EC of June 14, 2004 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo, as defined by the United Nations Security Council Resolution 1244, OJ EU, L 227/21 of June 26, 2004.
[295] Council Decision 2006/56/EC of January 30, 2006 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo, as defined by the United Nations Security Council Resolution 1244, OJ EU, L 35/32 of February 7, 2006.
[296] Council Decision 2008/213/EC of February 18, 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244, OJ EU, L 80/46 of March 19, 2008.

1. *Nationalisation (in a narrow sense)*. This refers to the seizure of property by decisions based on the Laws on Nationalisation. The Nationalisation Laws set limits for property ownership and whatever exceeded the established thresholds was nationalised (e.g. more than 10 hectares of arable land, more than two apartments). The compensation provided upon seizure of the property amounted to 10% of the property value[297]. However, most often no compensation was paid to former owners. For some assets[298], the owners were entitled by the law to full compensation, but as with the partial compensation, they were not paid in practice.

2. *Confiscation*. Confiscation is a type of a penalty which consisted of seizure of assets. It was imposed as a secondary sanction or as an independent sanction;

3. *Sequestration*. The sequester was a measure of managing the property of a missing person (i.e. a person who left the country or a person who disappeared during the war). After the expiration of certain time-limits, the property was ceded to the state or a legal person who acted as administrator;

4. Expropriation is a method of seizing property in the public interest (e.g. public facilities such as roads, railways, hospitals, schools). In this case, the compensation had not been either symbolic, as in the case of simple nationalisation, or full. The first law on expropriation included the obligation to pay full compensation at market price[299], but the legal acts issued later on referred only to the obligation to pay 'fair' compensation[300] (i.e. in practice, the value of the 'fair' compensation was lower than the market value of the asset. For example, in the case of confiscated buildings, the compensation would equal the value of the materials used to build the building);

5. *Illegal seizure*. In many cases, property was simply taken away without any reference to the law. This was the case of the 'Volksdeutschers', citizens of Yugoslavia, whose property was taken away because they were ethnically German, regardless of whether they collaborated with the German Army during the Second World War. Only the 'Volksdeutschers' who cooperated with the partisans avoided the seizure of assets;

6. *Illegal pressure*. Numerous people were forced to donate their property to the state, either by concluding gift agreements or by giving up their assets in favour of the state;

7. *Implementing the regulations on the origin of property*. The Law on the origin of property in Serbia envisaged the possibility of property seizure if the owner could not provide evidence, upon demand, on how the property was acquired. The burden of proof was on the property owner, not upon the state;

8. *Constituting the special tenant's right*. Due to scarce accommodation capacities immediately after the Second World War the state decided to establish a special right of habitation for the benefit of various persons who had no accommodation. Holders of this right of habitation, as well as the members of his/her family after his/her death, could use someone else's apartment for living, paying in return a symbolic fee. In some cases, this right still exists.

[297] See Article 42 of the Law on Nationalisation of Renting Buildings and Constructive Land ("Official Gazette of FPRY" No. 52/58, 3/59, 24/59, 24/61, 1/63 and "Official Gazette of SFRY" No. 30/67 and 32/68).
[298] See Article 8 of the Law on Nationalisation of Private Economic Enterprises ("Official Gazette of FPRY" No. 98/46 and 35/48).
[299] See Article 11 of the Basic Law on Expropriation ("Official Gazette of FPRY" No. 28/47, 31/47, 108/47 and 26/51).
[300] Ćirković B., "Expropriation and Fair Compensation in Yugoslavian Law", Belgrade 1979; Stojanović D.D., "Expropriation and fair compensation", *Anali Pravnog fakulteta",* No. 1-2, Belgrade 1970.

From 1941 until 1968 a large number of legal acts that generated various forms of property seizure were issued. Researchers and activist groups tried repeatedly to make an inventory of nationalisation laws. For the purpose of this report, more than forty such regulations were identified[301].

[301] 1. Decision of AVNOJ about a Transition of Enemy Property to the State Property, the State Administration of Property of Absent Persons and Sequestration of Property which the Occupying Authorities Forcibly Alienated (*Official Gazette of DFJ*, No. 2/1945);
2. Law on Agrarian Reform and Colonisation (*Official Gazette of DFJ*, No. 64/1945 and *Official Gazette of FPRY*, No. 24/1946, 101/1947, 105/1948, 21/1956, 55/1957 and 10/1965);
3. Law on Agrarian Reform and Internal Colonisation (*Official Gazette of NRS*, No. 39/1945 and 4/1946);
4. Law on Agrarian Reform and Internal Colonisation (*Official Gazette of the NRS*, No. 5/1948, 1/1949 and 34/1956);
5. Decision to Establish a Tribunal for Crimes and Offences Against Serbian National Honour (*Official Gazette of the NRS*, No. 1/1945);
6, The Decision for the Court for Prosecution of Crimes and Offences Against Serbian National Honour (*Official Gazette of the NRS*, No. 3/1945);
7. Law on Combating Illegal Speculation and Economic Sabotage (*Official Gazette of DFJ,* No. 26/1945);
8. Law on the Prohibition of Inciting National, Racial (Tribal) and Religious Hatred and Discord (*Official Gazette of DFJ*, No. 36/1945);
9. Law on Protection and Management of National Property (*Official Gazette of DFJ*, No. 36/1945);
10. Law on the Confiscation of Property and Execution of Confiscation (*Official Gazette of DFJ*, No. 40/1945);
11. Law on Confirmation and Amendments to the Law on the Confiscation of Property and Execution of Confiscation (*Official Gazette FPRY* No. 61/1946 and 74/1946);
12. Law on Seizure of War Yield Acquired During the Enemy Occupation (*Official Gazette of DFJ*,, No. 36/1945);
13. Law on Confirmation and Amendments to the Law on the Confiscation of War Yield Acquired During the Enemy Occupation (*Official Gazette FPRY*, No. 52/1946);
14. Law on Citizenship (*Official Gazette of DFJ*, No. 64/1945, *Official Gazette FPRY*, No. 105/1948);
15. Act Revoking the Citizenship of Officers and NCOs of the Former Yugoslav Army, who will not Return to the Homeland and have been Members of the Military Forces Serving the Occupier, who Escaped and do not want to Return (*Official Gazette of DFJ*, No. 64/1945 and *Official Gazette FPRY*, No. 86/1946);
16. Act on Crime Against the People and the State (*Official Gazette of DFJ*, No. 66/1945 and *Official Gazette FPRY* No. 59/1946 and 86/1946);
17. Law on Combating Illegal Trafficking, Illegal Speculation and Economic Sabotage (*Official Gazette FPRY,* No. 56/1946 and 74/1946);
18. Law on Transition to State Property and the Sequestration of Enemy Property and Property of Absent Persons (*Official Gazette FPRY,* No. 63/1946 and 74/1946);
19. Law on the Treatment of Property Owners that they must Leave During the Occupation and their Property Confiscated by the Occupier and his Helpers (*Official Gazette FPRY,* No. 36/1945);
20. Law on Amendments and Confirmation of the Treatment of Property Owners that they must Leave During the Occupation and their Property Confiscated by the Occupier and his Helpers (*Official Gazette FPRY,* No. 64/1946);
21. Law on Protection of National Assets and Assets under Administration of the State (*Official Gazette FPRY,* No. 86/1946);
22. The Law on the Nationalisation of Private Business Enterprises (*Official Gazette FPRY,* No. 98/1946 and 35/1948);
23. Regulation of Arondation of Agricultural Land (*Official Gazette FPRY,* No. 99/1946);
24. NKOJ Decision on Temporary Prohibition of Colonists Returning to their Previous Place of Residence (*Official Gazette of DFJ*, No. 13/1945);
25. Law on the Treatment of Abandoned Land Colonists in AKMO (*Official Gazette of the NRS*, No. 9/1947);
26. Law on Revision of Assignments of the Land to Agrarian Colonists Interested in AKMO (*Official Gazette FPRY* No. 89/1946);
27. Law on the Liquidation of the Agrarian Reform Carried out by 6 April 1941. at the huge lands in the Autonomous Province of Vojvodina;
28. Basic Law on Expropriation (*Official Gazette FPRY* No. 28/1947);
29. Basic law on the Treatment of Expropriated and Confiscated Forest Lands (*Official Gazette FPRY*, No. 61/1946);
30. Criminal Code ("Official Gazette FPRY" No. 13/1951);
31. Law on Enforcement of Penalties, Security Measures and Educational-correctional Measures (*Official Gazette FPRY*, No. 47/1951);
32. Regulation of Property Relations and the Reorganisation of Rural Cooperative Societies, (*Official Gazette FPRY,* No. 14/1953);
33. Law on Agricultural Land Fund of National Property and Granting Land to Agricultural Organisations ("Official Gazette FPRY" No. 22/1953);
34. Law on the Nationalisation of Renting Buildings and Construction Land (*Official Gazette FPRY,* No. 52/1958);
35. Basic Law on the Exploitation of Agricultural Land ("Official Gazette FPRY" No. 43/1959 and 53/1962 and *Official Gazette FPRY*, No. 10/1965, 25/1965, 12/1967 and 14/1970);

As shown above, the nationalisation process has been carried on throughout many years, dating back to before the Second World War. During the Second World War German forces carried out the confiscations, while Serbian (i.e. Yugoslavian) liberation forces confiscated property during and immediately after the Second World War. A massive nationalisation followed after the Second World War during the '50s and '60s. The main laws on nationalisation never been repealed explicitly. The Federal Constitutional Court stated in its decision from 1992 that the Laws on nationalisation have been repealed implicitly by the adoption of the 1974 Constitution[302]. Nationalisation in the narrow sense was not carried out in Serbia after the '70s.

2.2. Volume of nationalised properties

Nationalisation covered movable and immovable properties, savings, other valuable assets such as art works, securities and other forms of capital investment in companies, but there is no reliable data about the numbers of nationalised properties or their extent. As an example, for land, older studies[303] estimate that approximately 640,000 ha had been nationalised. More recently, some authors[304] estimate the size of the land that is claimed back at 1,200,000 ha. The Restitution Network (the association of different organisations established by former owners of nationalised property) estimate the size of the land that is claimed back at about 630,000 ha, mainly agricultural land. However, the Restitution Network emphasised that this represents only 20% of the nationalised land[305]. Another publication[306] refers to requests for denationalisation from former owners for: 36,148 plots of land, 29,285 plots of agricultural land, 14,698 plots of construction land, 10,563 houses, 8,049 business premises, 5,267 apartment buildings, 1,263 farms, 958 mills, 796 factories, 290 hotels, 120 mines, and 88 theatres.

2.3. The value of nationalised properties

Various attempts to estimate the value of nationalised property were made in Serbia. The tax administration estimated the total value of nationalised property to be somewhere between 102 – 220 billion Euros. This estimation was made by Mr. Slobodan Ilić, state secretary in the Ministry of Finance[307], and it took into account the applications that were submitted within the deadline provided by the Law on Reporting and Recording Nationalised property, which is discussed later. The value of the goods which were reported after the legal deadline is not counted, even though meanwhile the number of applications nearly doubled. However, this does not necessarily mean that the value of the property doubled too. The assessment methodology used by the tax authority was

36. Law on Determining Constructive Land in Cities and Settlements of Urban Character (*Official Gazette FPRY*, No. 32/68);
37. Law on the Nationalisation of Private Pharmacies (*Official Gazette FPRY*, No. 50/1949);
38. Law on Associations, Meetings and other Public Gatherings (*Official Gazette FPRY*, No. 65/45 and 29/47);
39. Law on Confirmation and Amendments to the Law on Organisation and Activities of the Credit System (*Official Gazette FPRY*, No. 68/1946);
40. Regulation on Auditing Licenses and Liquidation of Private Credit Companies (*Official Gazette FPRY*, No. 51/1946);
41. Rules on Procedure of Liquidation of Private Credit Companies (*Official Gazette FPRY*, No. 57/1946).

[302] See Decision of Federal Constitutional Court of Yugoslavia U. No. 7/92 and 49/92 from December 3rd, 1993, published in *Decisions Bulletin of Federal Constitutional Court for 1992 and 1993*. A very similar opinion was expressed by the Constitutional Court of Serbia in its decision IU. No. 177/2004 from November 25th, 2004, published in *Decisions Bulletin of the Constitutional Court for Serbia*, No. 2/2004.

[303] Stipetić V, Agrarian Reform and Colonisation in FPRY in 1945-1948, Zagreb, 1954, p. 439; Mirković M, Economical History of Yugoslavia, Zagreb, 1968, p. 210; Božić Lj, Agrarian Policy with the basis of Agrarian Cooperatives, Sarajevo, 1963, p. 293.

[304] Glišić S, "The data analysis of deprived property files", *Hereticus*, Vol. VI(2008), No. I, p. 75.

[305] See Mirjana N. Stevanović, "Oduzeta imovina sve dalja od bivših vlasnika", 04/08/2009 http://www.danas.rs/vesti/ekonomija/oduzeta_imovina_sve_dalja_od_bivsih_vlasnika.4.html?news_id=168424

[306] "Mreža za restituciju ocenjuje Nacrt zakona o restituciji i građevinskom zemljištu kao do sada najbolje ponuđeno rešenje", 15 May 2007, *Pronadi Pravo,* http://www.pronadjipravo.com/index.php?link=opsirnije&id=282&table=vesti

[307] "Nacionalizovana imovina vredna do 220 milijardi evra", 24.09.2009, *Biznis,* http://www.biznisnovine.com/cms/item/stories/sr.html?view=story&id=40149

the same as the one applied for measuring the tax base in case of disposal of real estate rights. Lacking accurate data in the application, the range of possible errors recognized by the tax administration itself is over 50% (102 – 220 million). The state has not yet published a second assessment of how much the actual compensation would be worth in cash, or to what extent restitution in kind of nationalised property would actually solve the problem.

The former owners of nationalised property made their own calculations. For one of them the nationalised construction land alone is worth at least 200 billion dollars[308]. On the other hand, some former owners estimated that the value of property for which applications are filed is about 25 – 50 billion Euros[309]. Another assessment[310] points out that this would be only a fifth of the value of the whole property nationalised, since about 4/5 of the former owners (or heirs) did not file an application for various reasons. Moreover, when evaluating the size of nationalised property, some of the former owners believe that there are many requests that will be found inadmissible. Out of the admissible requests, they believe that about 70% could be resolved by restitution and the remaining 30% by compensations in cash or bonds[311]. Applying declining balance scales, as was the case in Germany[312] and Croatia, would lead to a smaller burden, leaving the value of compensation at somewhere between 1 and 4 billion Euros[313].

2.4 The beneficiaries of nationalisation

In order to understand the nationalisation process that was carried out in Serbia one should analyse two important moments. The first nationalisation, primarily nationalisation in the narrow sense of the word, was undertaken for the benefit of local government (municipalities), and sometimes in favour of companies that had no connection with the state - the so-called 'society-owned' enterprises. In the case of Serbia, as opposed to that of other socialist countries, private companies passed into 'self-management'. This meant that a company's own employees, as representatives of the society (community) of people living in the State of Serbia (i.e. Yugoslavia), were in charge of its management. The municipalities, as well as 'society-owned' enterprises were neither owned nor managed by the state. They were independent legal entities having their own property, revenues (sources of revenues) and ownership. Therefore, in Serbia (i.e. former Yugoslavia) the state did not seize the goods for its own benefit, but in favour of a 'third party', primarily municipalities and self-managed companies, allegedly outside state control. The assets were given to third parties without compensation, as gifts, making the return of property to the former owners even more complicated from the legal point of view. As the ownership was transferred to them, nobody, including the state, can request them to give back the acquired property, if the request is based only on the fact that the ownership was acquired without compensation.

The second event occurred during the '90s, when the state carried out a few 'partial' transfers of property rights. One such small transfer of assets is related to assets of local government and autonomous territorial bodies (municipalities and the province). Through

[308] "Nacionalizovanozemljiste vredi 200 milijardi dolara", *Nezavisne Novine,* http://www.novine.ca/arhiva/2002/15_11_02/yu.html
[309] T. Spalevic, "Oduzeto još čeka", 10.05.2007, *Novosti,* http://www.novosti.rs/code/navigate.php?Id=5&status=jedna&vest=103563&title_add=Oduzeto%20još%20čeka&kword_add=denacionalizacija and http://www.bgdcafe.com/forum/lofiversion/index.php/t31180.html
[310] Mirjana N. Stevanović, "Oduzeta imovina sve dalja od bivših vlasnika", Danas.rs, 04/08/2009 http://www.danas.rs/vesti/ekonomija/oduzeta_imovina_sve_dalja_od_bivsih_vlasnika.4.html?news_id=168424
[311] Tatjana Spalevic, "Država vraća dedovinu", *Novosti,* 10.10.2007, http://www.novosti.rs/code/navigate.php?Id=4&status=jedna&vest=109700&title_add=DRŽAVA%20VRAĆA%20DEDOVINU&kword_add=denacionalizacija
[312] For example: German Law provided that former owners who should receive up to 10,000 DEM will receive 100% of compensation; for amounts over 10,000 DEM up to 20,000 DEM, the compensation will be reduced by 30%; for amounts over 20,000 up to 30,000 DEM it will be reduced by 40%; for amounts over 3,000,000 DEM it will be reduced by 95% (§ 7 of German Law on Compensation from 1998).
[313] Tatjana Spalevic, "Država vraća dedovinu", *Novosti,* 10.10.2007 (see note 271); "Parivodić: Imovinu vratiti natu ralno", 22 October 2007, http://www.mail-archive.com/sim@antic.org/msg37537.html

the Law on Assets Owned[314] all the goods belonging to local governments that have territorial autonomy became the property of the Republic of Serbia. This transformation covered existing assets, as well as those that would be acquired in the future. The aforementioned law covered nationalised goods, as well as any other property owned by the municipality and province, including the property acquired from their own budgets by the municipality or province. Unlike traditional nationalisation, these goods remain in the possession of municipalities and provinces, but they are transferred into the ownership of the state. The law introduces the obligation to obtain approval from the competent government authority for the disposal of such goods, including encumbrance by mortgage or instituting other collaterals, and renting. The same regime is envisaged for the goods that are invested in the establishment of public companies (a company founded by the state, province or municipality). The municipalities and provinces, as well as public companies make efforts to re-establish property rights, thus competing with the former owners of nationalised property.

For the former owners of nationalised goods the law on privatisation is of great importance. In Serbia, the privatisation process started in the early '90s. Since privatisation began, over the last twenty years, most enterprises were privatized. Thus, by the beginning of 2009, the privatisation process was almost complete. There are only few companies (328 in October 2009[315]) that remain under state control. A small number of these companies, which have also a small value, were resold. The assets of many of these companies included nationalised goods that have been sold as part of the privatisation process. This complicates the restitution process even more.

The fact that privatisation is almost completed strikes the former owners of nationalised property doubly. First, it makes restitution in kind of assets held by privatized companies extremely complicated, and second, as the process has been already concluded, it excludes the possibility of issuing securities that could be used in the privatisation process. According to the Law on Privatisation[316], 5% of the privatisation price is allocated to a fund for compensation of the former owners of nationalised property. By the end of 2008, when most of the privatisations were done, the fund had reached about 52 – 53 million Euros[317]. Other sources point to 90 million Euros[318].

2.5. The procedure and the authority carried out the nationalisation

Special commissions at municipality level (in the first instance) and at regional level (in the second instance[319]) carried out the nationalisation process. The regional commissions decided appeals against the decisions of the municipality commissions. The decision of the regional commission was final and could not be appealed. The final decision was the document suitable for registration in land and other registries as well. The property was nationalised regularly in favour of municipalities, which were consequently obliged to pay the compensation (at least according to the law). At the federal level a body was set up having the right to give instructions and explanations to local and regional commissions. The commission was disbanded after accomplishing its task.

2.6. Nationalisation effects regarding minorities

With the exception of the ethnic Germans (Volksdeutschers), the nationalisation process was carried out equally, disregarding ethnicity. During the Second World War, the Serbian partisan movement established a *de facto* government and carried out

[314] Published in *Official Gazette of NRS,* No. 53/95, 3/96, 54/96, 32/97 and 101/2005.
[315] http://www.priv.yu/
[316] Law on privatisation, published in *Official Gazette RS*, No. 38/2001, 18/2003, 45/2005 and 123/2007, article 61, paragraph 1, point 3.
[317] M. Avakumović, "Za restituciju od 102 do 221 milijarde evra", *Politika Online,* 24/09/2009, http://www.politika.rs/rubrike/tema-dana/Za-restituciju-od-102-do-221-milijarde-evra.sr.html
[318] LJ. Malešević, "Hotel "Putnik" prodat, naslednici tuže državu", 20.02.2009, http://www.naslovi.net/2009-02-21/dnevnik/hotel-putnik-prodat-naslednici-tuze-drzavu/1048732
[319] For example see Article 54 of Law on Nationalisation of Rented Buildings and Constructive Land (*Official Gazette FPRY*, No. 52/58, 3/59, 24/59, 24/61 and 1/63, and *Official Gazette SFRY,* No. 30/67 and 32/68).

nationalisation on the respective territories. Moreover, during this time mass expulsion of 'Volksdeutschers' took place in large parts of the territory. The partisans carried out mass expulsions, assassinations and deportations of ethnic Germans regardless of whether they had collaborated with Nazis or not. The partisans did not carry out such measures against any other ethnic minorities. Nevertheless, the representatives of some minorities gathered statistics regarding the nationalisation of property belonging to people from that minority. During the Second World War the German Army confiscated the property of Jewish community. Just before the end of the war and immediately afterwards, the partisans gave back the formerly nationalised property to the Jewish community wherever the liberation movement was victorious. Soon after, the property of the Jewish community was again nationalised[320] in the larger nationalisation process that covered even the prominent members of the liberation movement.

3. THE RESTITUTION / COMPENSATION PROCESS

So far, no restitution or compensation law was adopted in Serbia. However, there are several pieces of legislation devoted to privatisation and transfer of immovable property from the state to the local authorities.Debates on the timeframe of nationalisation, which should be implicitly addressed by the law on denationalisation, are still on the public agenda.

3.1. The relevant international legal norms as sources of importance for the right to denationalisation

The bilateral international treaties and agreements that the former Yugoslavia signed with certain countries to readdress their citizens for Nationalised Property are possible relevant sources for the process of denationalisation in Serbia. For example, Yugoslavia concluded two agreements with the United States of America (USA) by which the latter agreed on compensating American citizens for the property that had been seized under the nationalisation process in the former Yugoslavia, while Yugoslavia would pay the agreed amount of money in return. Only Amercan citizens can file claims under this treaty, independently of how they had acquired the citizenship of the US or where their permanent residence was. According to data on the agreement that can be found on the official website of the US government, Yugoslavia has fulfilled its payment obligations, so that the US citizens have no claim against Serbia for nationalised property[321]. It is true that these contracts could not cover all the US citizens due to their time of validity, as well as changes in citizenship status. It is not entirely sure how many such agreements were signed between the former Yugoslavia and other countries. Similar provisions can also be found in some special agreements concluded on other subjects. Some of them have not even been published according to the standard publication rules for international treaties.

There are indications about an agreement between SFRY and the Federal Republic of Germany. The issue of nationalisation of properties in Yugoslavia that belonged to ethnic Germans (Volksdeutschers) has been 'an open issue' for Germany for a long time after the end of the Second World War. On the other side, Yugoslavia has also considered as 'an open issue' the issue of war compensation, which was never received from Germany. After the meeting between President Tito and Mr. Willy Brandt held on Bryony islands on April 1973, Germany never raised the issue of the Volksdeutschers' property and gave to Yugoslavia the amount of 700.000.000 German marks as a 'gift'. In return, Yugoslavia did not request war compensations anymore. There was no formal agreement, but the experts[322] consider that President Tito and Mr. Brandt concluded either a secret

[320] Aleksandar Lebl, "Čija je imovina ubijenih Jevreja", *Politika Online,* 29/07/2009 http://www.politika.rs/rubrike/ostali-komentari/CHija-je-imovina-ubijenih-Jevreja.lt.html
[321] 2007 FCSC Ann. Rep, http://www.usdoj.gov/fcsc/07rpt/annrep07.htm
[322] Goran Nikolić, "Pitanje imovine bivse nemacke nacionalne manjine u Jugoslaviji" *Nova Srpska Politička Misao*, 22 October 2008, http://www.nspm.rs/istina-i-pomirenje-na-ex-yu-prostorima/pitanje-imovine-bivse-nemacke-nacionalne-manjine-u-jugoslaviji.html

agreement or a gentleman's agreement compensating the value of the nationalised property of the Volksdeutschers and the value of war damage.

3.2. Relevant domestic sources of legal norms of importance for right to denationalisation

Serbia's legal system is civil law based, which means if denationalisation is decided, it has to be done by law. So far, this has not happened yet. Initial steps were taken in 2002, when for the first time the Ministry of Finance appointed a working group that was charged with drafting a Law on denationalisation, which was entitled the Law on Restitution and Compensation for Deprived Property. The draft should have been presented to the public in the second half of 2003, but it was dropped at the last moment allegedly because the value of the nationalised property was not determined and neither was the burden of the state[323]. This draft law used the basic model of denationalisation providing restitution, but due to the many loopholes it included, in practice, many cases would have been settled through compensation either in the form of bonds and/or money. This model foresaw the establishment of property rights on construction land in favour of former owners. In Serbia, the state retained the right of ownership of land in the central parts of cities, while the buildings were owned by other entities (natural or legal persons). That would mean that the former owners of the land became its owners again, but the current owners of the buildings retain their property. While the former owners favoured this initiative, the Government did not endorse it, claiming that it would generate disputes between landowners and the owner of the buildings[324].

To collect data on the value of nationalised property, in 2005 Serbia adopted the Law on Reporting and Recording of Nationalised Property. This law envisaged the obligation of the former owners (or their successors) to submit an application to the competent authority (the Republic Directorate for Property of Serbia) which included information about seized property, as well as the former owner. The Law prescribed the obligation to submit the applications before June 30th, 2006. There was a series of problems associated with this law. First, it did not determine the meaning of the term 'nationalisation' in the law, which would have allowed the former owners to understand whether they have to submit the application or not. Until now there is no legal definition of nationalisation. Theoretical definitions or definitions contained in other models of law could not be accepted for the purpose of the Law on Reporting and Recording of Nationalised Property because they are numerous and very different. Every law should define the notions for its own purpose except in cases of well-known notions, which are clearly defined in the legal system or are generally accepted notions. It could happen that someone did not file an application believing that his/her case would not be considered as nationalisation, especially as the cost of collecting the documents was significant and the risk that the Law on denationalisation would not cover his/her particular case was high. In addition, this law stipulates that the mere filing of the application is not to be considered as a request for denationalisation, but that the former owners have an obligation to submit a separate application for denationalisation in accordance with the future law on denationalisation (when and if it will be adopted). Another serious deficiency of the law is that it did not foresee the consequences in the case when the applicant does not submit, along with the application, the necessary information about the nationalised property. This left the door open for claims that could contain only one sentence: 'Return my property' and thus the main goal of the law would be missed.

About 73,000 applications were filed before the deadline. However, lots of applications were submitted after the deadline with the expectation that the deadline for submission

[323] Miroslav Antic, "Kraj bajke o restituciji", 10 March 2005, http://www.mail-archive.com/sim@antic.org/msg22508.html
[324] Nada Kovačević, Branka Mališ, "Srbija razgovara: Vraćanje nacionalizovane imovine", *Politika Online,* 20/04/2009, http://www.politika.rs/rubrike/Drustvo/Srbija-razgovara-Vracanje-nacionalizovane-imovine.lt.html

would be eliminated or extended. Until September 2009 it is estimated that there were more than 76,000 applications submitted by approximately 130,000 persons[325]. The Republic Directorate for Property of Serbia, which received the applications, did not have any duty to analyze them, but only to receive and record, especially because the filing of these applications was not the same as the application expected to be submitted requesting denationalisation, which might have given more accurate data. The deputy director of the Republic Directorate for Property in Serbia said in 2007 that 73,396 applications had been submitted on time. There are 49,402 applications containing requested data, but there are 16,101 applications without sufficient data for identification of nationalised property[326].

The Tax Administration was given the task of assessing the value of nationalised property covered by the applications submitted on time. Due to possible errors, the assessment was given in a large range. According to the Tax Administration the total value of nationalised property for these timely applications amounts to 102 – 220 billion Euros[327]. If we take into account the report submitted after the deadline, this value could be significantly higher. This data is accepted by the Ministry of Finance and is published in the media. This value was obtained by applying the methodology used in calculating tax liability in the case of purchasing real estate, based on the data available from the submitted applications.

In 2007 Serbia produced the second draft of the Law on denationalisation. This time the law was entitled: the Law on Denationalisation. The law entered the adoption procedure; it was accepted by the Government of Serbia and released for public debate. During the public debate many objections were highlighted, leading to the withdrawal of the Law from the legislative procedure. The main objections were related to the violation of the rights of current owners. The law provided for the seizure of goods from the current owners without compensation. Thus, if the owner is a legal person (a private or a public company) and if he holds nationalised property, the current owner has to prove that he paid the market price for it. As in the 2002 model, this model also contained provisions on the restitution of construction land establishing an ownership duality between building owners and land owners. After sharp criticism aroused during the public debate, the Government withdrew the draft law from the legislative procedure.

In early September 2009 Serbia adopted the new Law on Planning and Construction[328], which entered into force on September 11th, 2009. The new law contained provisions regarding construction land that have significance for the possible forms of denationalisation. According to this law, the previous regime of construction land (whose owner was the state while other persons owned the buildings located on that land) was changed insofar as the owners of buildings acquired the ownership of the construction land located under and around their building. This decision makes it very unlikely that the state would later on introduce rules on restitution of land to former owners. It is likely that from now on the construction land is mostly excluded from the possibility of denationalisation in the form of restitution. This type of property was obviously very important for former owners considering its value.

In kind restitution is still possible for agricultural land, forests and forest land. For agricultural land, the restitution has been carried out partially under a special law that covered only the agricultural land confiscated or seized in the procedure of forced execution[329]. The property was confiscated because the owners of agricultural land have not paid the taxes or similar duties to the state. The confiscations were carried out in

[325] "Prodaja nacionalizovanog - enigma ili inercija?", 17 March 2009, http://www.infogo.biz/prodaja-nacionalizovanog-enigma-ili-inercija.html
[326] "Zakon o restituciji može se očekivati tek krajem ove godine", *Pronadi Pravo,* 31 July 2007, http://www.pronadjipravo.com/index.php?link=opsirnije&id=318&table=vesti
[327] "Nacionalizovana imovina vredna do 220 milijardi evra", 24.09.2009, *Biznis,* http://www.biznisnovine.com/cms/item/stories/sr.html?view=story&id=40149
[328] *Official Gazette of RS,* No. 72/2009.
[329] *Official Gazette of RS*, No. 18/91.

favour of state enterprises or cooperative associations. The procedure of restitution was conducted very slowly because Serbia's land registries are either not up to date or completely lacking in some parts of the territory. The task has been accomplished almost 20 years after the adoption of the law. Meanwhile, efforts were made in order to expand the effects of the law to nationalisation in general, but without any success. This property was partially privatized if it belonged to companies that were privatized. Practically, out of the items in which the former owners were very interested to receive back, such as business premises, forests and forest land, and small parts of agricultural land, very few remain available[330].

Published data shows former owners' requests for denationalisation of land (unidentified type) reaches 246,503 ha, agricultural land - 300,732 ha, forests and forest land - 42,964, for construction land - 10,900 ha, business premises – 616 ha, houses – 12,861 ha, apartments and buildings – 1,625 ha, other buildings – 1,087 ha and for other property – 14,454 ha[331]. The privatisation did not concern the forests and forest land, which comprises about 7% of the whole requested land[332].

3.3. Public opinion and political parties about denationalisation

Serious and comprehensive assessments of public opinion on denationalisation, as far as it is known, have not been carried out. Various organisations, especially those which are directly interested in denationalisation, conducted a mini-survey on the issue. The results showed that the vast majority of respondents had a positive attitude towards denationalisation. Usually about 70% of the respondents support the need of denationalisation, about 20% percent are against, while others have no clear position on it. Thus, for example, according to the survey which 'Projuris' conducted on-line, 72% of respondents support denationalisation, 21% are against it and about 7% are not able to give a view[333]. In the literature, primarily legal, there are significant numbers of articles that support denationalisation.

The political parties generally express support for denationalisation, but without concrete measures after the elections. Even in election campaigns not much attention is dedicated to denationalisation, probably due to the assessment that it is a small number of voters who could be won with the tale of denationalisation. On the other side, there could be at least the same number of the opponents which means that the party will not gain more votes speaking about denationalisation during the election campaign.

The time additionally lost makes denationalisation in Serbia even more difficult. Other states that have conducted denationalisation did it shortly after the democratic changes, while the former owners were not yet well enough organised, while they were satisfied with the measure of denationalisation itself and in many cases before the entry into the force of the European Convention on Human Rights for the state. In Serbia, the denationalisation process hesitated for which there are subjective and objective reasons as well. Considering objective reasons it should be borne in mind that Serbia carried out democratic changes shortly after the war in which it was defeated, and which was preceded by long-term economic sanctions. The consequence of it all is that in some moments of hyper-inflation Serbia's economy was classified as underdeveloped, so that it did not have the potential to carry out denationalisation. Three years after the hyper-inflation - in 1997 Serbia had a GDP per capita of 2,110 dollars[334], which was still slightly

[330] For example, the municipality "Stari grad" generally exceeds by six times the average revenue of other municipalities, while municipalities "Vračar" and "Savski venac" only by two. Data source – internal data of Ministry of Finance.
[331] Irena Radisavljević, Petar Đurović, "Svi ćemo plaćati za otetu imovinu", 09.08.2009 http://www.mail-archive.com/sim@antic.org/msg46897.html
[332] http://www.blic.rs/_print.php?id=9393
[333] http://www.projuris.org/portal/index.php?option=com_poll&id=21:denacionalizacija&Itemid=69
[334] Statistical Office of the Republic of Serbia http://webrzs.stat.gov.rs/axd/drugastrana.php?Sifra=0001&izbor=odel&tab=30

less than Morocco, Swaziland, Congo and Indonesia. Thanks to the tactics of privatisation sales, preserving the stability of the national currency with relatively low inflation and an acceptable budget deficit, Serbia attracted significant capital based on foreign investments and the effects of using both measures, balanced the foreign trade deficit and budget deficit for years, achieving better effects than some EU member states (such as Bulgaria), which did not have war and economic blockade, and was highly aided by the EU.

4. CONCLUSION

Serbia has not yet adopted a law on restitution of compensation for the nationalised property, but has proceeded with various initiatives on privatization of industrial property and transfer of immovable property to the local governments. As time goes by the issue of property restitution will become furthermore complicated to solve. Such delay of almost two decades is likely to make Serbia a very special showcase for the difficulties of the restitution process in South-Eastern Europe.

The market pressure has produced situations which, after successive transactions, will be hard to disentangle. In addition, the government is pressed to come with a separate law, dealing with the division of public property between the state and Serbia's 174 municipalities. It plans to do this in 2010, largely because without clarifying the situation of municipal property, many investment projects, including those financed by the EU, cannot proceed. But securing municipal property in law before the broad lines of restitution are set is likely to complicate the matter further.

The assessments as to the financial implications of restitution or compensation are rather blurry and give rise to disputes between various stakeholders and the Government. In-kind restitution could decrease the direct financial costs to society, as this method would eliminate monetary compensations. However, the more the issue drags, the more difficult will become to use this mechanism, as Serbia delays a clear decision on this matter.

ANNEXES

ANNEX 1 - THE JURISPRUDENCE OF THE BULGARIAN CONSTITUTIONAL COURT ON PROPERTY RESTITUTION

The Role of the Bulgarian Constitutional Court in land restitution.

Since the time of the adoption in 1991 of the *Law on Ownership and Use of Agricultural Land LOUAL*, which coincided with the establishment of the Bulgarian Constitution Court (BCC), this body has ruled repeatedly on the issue of land restitution. It would be justified to say that the Court has (co)determined the course of agricultural reform and restitution of property in the country as a whole. The general constitutional policy of this body has traced the following trajectory.

First, in 1992 the Court ruled that the amendment made by UDF majority to *LOUAL*, which introduced the principle of extensive restitution, was constitutional[335].

Secondly, after UDF lost its majority in Parliament at the end of 1992, the Court consistently defended the principle of extensive restitution as the only model of restoring the rights of the former landowners, compatible with the Constitution[336].

Thirdly, when the UDF government replaced the Socialists in 1997, the BCC somewhat 'softened' its position on the enforcement of the right of property in order to allow for certain governmental initiatives in the agricultural sector aiming at speeding up the reforms.
The BCC interfered for the first time with the process of restitution of agricultural land in 1992[337]**.** The UDF-led legislative majority had adopted the above-mentioned amendments to *LOUAL*. The major principle behind them envisaged restitution of agricultural lands in their 'real boundaries' (the pre-nationalisation boundaries). This principle required the dissolution of the existing communist co-operative farms (TKZS).

The representatives of the BSP in the legislature challenged the real-boundaries principle, arguing that it violated Art. 17,1 and 3 of the Constitution by infringing the right to property of the socialist co-operatives. Two further challenges concerned the very dissolution of the existing co-operatives, and the appointment of so-called '*liquidation committees*', supposed to direct and supervise the dissolution process. Also, the challengers attacked the newly introduced possibilities for foreign citizens to have their land restored[338].

The Court declared that real-boundaries restitution *did not contradict* the Constitution and the right to property. The judges further upheld the right of foreign citizens to have their land returned. The most controversial proved to be the provisions concerning the dissolution of the communist co-operatives. In the view of the petitioners, these provisions violated, apart from the right to property, also the constitutional right to association (Art. 57,1 of the Bulgarian Constitution). The Court, however, held that the communist farms were by no means real co-operations but were established by coercion, in violation of the right to association. Therefore, their dissolution could not be considered a violation of the right to association. Since the land was to be returned to the former owners, the right to property was also not infringed upon. Similar arguments led BCC to uphold the setting up of liquidation committees.

[335] Bulgarian Constitutional Court Decision 6/1992.; see note 138
[336] Bulgarian Constitutional Court Decision 12/1993; Decision 7/ 1995; Decision 8/1995; Decision 4/1996; see notes 138 and 139.
[337] Summaries of all decision of BCC can be accessed at the web-site of BCC at http://www.constcourt.bg/Pages/Practice/PracticeByYear/Default.aspx.
[338] Though it required that non-Bulgarian citizens had to transfer title over land to Bulgarian citizens, as indicated in the text above.

The decision of the constitutional judges must be interpreted against the political background of the early Bulgarian transition to democracy. The pro-reform UDF had just won control over the government, and had a fragile majority in parliament (together with the ethnic Turkish party Movement for Rights and Freedom - MRF). The whole socialist system of lower-level government stood almost intact, as well as the state-run economy, including the agricultural sector. At these levels dominated the 'unreformed' ex-communist administration, and the powerful group of ex-communist managers in the state-run economy.

The involvement of the BCC in setting the constitutional policy of restitution became stronger subsequent to the 1992 jurisprudence of the Court in this area.

The UDF lost power at the end of 1992: MRF switched sides and formed a government with the BSP. The socialists saw a chance to block the radical restitution plan of its opponents.

Amendments to LOUAL were swiftly introduced, which although not challenging directly the real-boundaries principle, were meant to dilute it through the introduction of various exceptions. The first attempt envisaged an exception from the restitution process for plots of land, for which their current possessors had already obtained the right to construct buildings, although the construction had not started. In those cases, the possessors could preserve the land, while the former owners forfeited their right to restitution. The pre-nationalisation owners had to be compensated by the state with other lands.

The BCC in its *Decision 12/1993* declined to balance the right to real-boundaries restitution against other interests, and in practice elevated the *real-boundaries principle to a constitutional status.* The judges argued that 'the social motives behind the [amendments] cannot eliminate its contradictions with basic constitutional principles.' Another major reason of the judges was equality before the law: they argued that some owners had already their property returned, which would discriminate against the owners whose land had not been restored before the amendments.

This case marked a significant change in the position of BCC on restitution: while in the first case in 1992 the judges argued that *the real-boundaries principle was* ***compatible*** *with the Constitution, here they put forward an argument that it was constitutionally* ***required.***

The most sustained legislative attempts to dilute the real-boundaries principle, and to strengthen state control over the ownership of land, were made in 1995. First, the owners of agricultural lands were obliged by law to offer their land to the state and the local municipalities in case they planned to sell it. BCC struck down this principle as an unconstitutional violation of the right to private property, since this right included the right to dispose of the land. Furthermore, the new rule discriminated among different actors in economic life, in the view of the Court.

The amendments also reintroduced an exception from restitution for lands in populated areas, which had buildings on them (even illegal), or whose possessors had obtained the right to construction. The Court struck down the amendment for the reasons stated in its 1993 decision on the issue. It expressed the view that because the owners of the land had never really lost their right to property, since the communist nationalisation was illegal, any rights, acquired by other people (possessors) over the land during the communist rule, were also illegal and void.

Most interesting was the attempt of the Socialist government in 1995 to create possibilities for the preservation of co-operative farms that grew out of state farms. In most cases, they were managed by the former directors of the state farms, and created a strong political and electoral lobby for the BSP. The 1995 amendments allowed for the owners of land, who were willing to form (or remain in) a co-operative farm, to ask the relevant authorities to have their plots of land grouped together in common blocks. This required the violation of the real-boundaries principle. The Court held that this possibility created an unconstitutional privilege for the participants in co-operative farms, and thus

was a violation of the equality before the law, and the equality of different economic actors, proclaimed by the Constitution (Art. 19,2)[339].

Finally, the 1995 amendments to LOUAL envisaged the possibility of compensation for owners of land, which it was impossible to restore (because of public construction work, etc.), with investment bonds. These investment bonds gave the right to their holder to participate in the privatisation of state assets. The Court struck down the arrangement, pointing out that 'the compensation for alienated property should be done with an equal piece of property… no pragmatic considerations could derogate this principle'.

Thus, in the period 1995-1996, the BCC became the enforcer of a real-boundaries doctrine which was elevated to a constitutional status[340]. The underlying rationale of this doctrine was a particular vision of time, a particular view of the relation between the communist period and the post-communist transition. On many occasions the court held that 'the owners have… never lost their property but have only been prevented from exercising their real estate rights over a certain period of time'[341]. On this view, all transactions and developments under the 45 years of communist rule in Bulgaria had no legal significance.

By the end of 1997 the doctrine of 'real-boundaries' had become largely obsolete and unnecessary. Since the BSP lost power in the spring 1997 elections, and was in a state of free fall[342], the constitutional policy of the BCC from the former period, aiming at the prevention of the dominance of BSP ideology, was no longer meaningful.

Apart from the new political environment, there was another consideration to be taken into account by the judges. The prolonged stand-off between the legislature and the BCC on the issue of restitution, and the general reluctance of the BSP to speed-up the process, had resulted in a *near-catastrophe in the agricultural sector*. The land was divided into endless *small plots*, some of which with *unclear ownership*, and many owned by people with no intention of becoming farmers. Since there was *no land market*, a huge percentage of arable land was becoming wasteland[343].

The real-boundaries principle was envisaged and defended as a principle of justice: returning to people what they rightfully owned. Since most Bulgarians before 1944 were holders of some land property, the principle was also meant to partly compensate the hardships of the transition to democracy with the restoration of property rights. The *inefficiency of the reform*, however, made the 'compensation' for the economic difficulties *largely symbolic*.

All these factors led the BCC to a decision in which the judges declined to extend and apply consistently the real-boundaries doctrine.

On the one hand, the judges argued that the owners had not lost their ownership rights during the communist period, but had been only prevented from their exercise: the real-boundaries principle was meant to 'restore' these rights as they were before nationalisation. On the other, only lands up to a certain limit (up to 200 decare and in limited cases – up to 300 decare) were to be given back in full, the rest being compensated for with state bonds (Art. 10 LOUAL). The Court, however, did not challenge this provision. Yet, the coherent application of the real-boundaries doctrine seemed to reject this form of inequality before the law.

[339] Decision 8/1995. See notes 138, 139, 345.
[340] See also Decision 4/1995 and Decision 20/1996. Especially important in political terms was Decision 22/1995.
[341] Decision 8/1995.
[342] The same was true of the economy of the country, characterized by deep financial and economic crisis.
[343] It is impossible to obtain reliable data on the size of the waste-land in this period. The official data of the Agricultural ministry are that out of 48 m. decare arable land, 10 m. were wasteland in 2000. According to other sources, however, up to 30% (OECD 2000 report on the agriculture in Bulgaria), or even ½ of all arable land was wasteland at the end of the 90s.

Thus in 1998 the Prosecutor General challenged the provision of LOUAL which imposed the size-restriction on restitution, arguing that it was a breach of the inviolability of the right to property.

The BCC rejected the complaint and upheld the challenged provision of LOUAL[344]. Surprisingly, the judges now argued that the *right to restitution was not a constitutional right*. According to their view in this case, the precise form of compensation was to be determined by the legislature. The Court, again inconsistently with previous jurisprudence, held that the provision was the necessary balance between the rights of the big owners whose land had been expropriated in 1946 in order to provide land for the landless peasants, and the beneficiaries of these reforms.
The judges also held that there was no violation of the principle of equality (the Prosecutor General had argued that big land-owners were in an unequal position - all other property owners had been given back their property in full). There was no violation, because the law provided for compensation for lands (in compensation bonds) over the restitution limit. Finally, the judges argued that such a radical revision of the restitution policy of the state after seven years of reform would be practically impossible and extremely costly.

This case seems to be in contradiction with previous jurisprudence on restitution. The constitutionalisation of the real-boundaries doctrine was in fact rejected, as well as the unwillingness to 'balance' the right to restitution against considerations of social justice and economic efficiency. In a way, the BCC left the doors open for the legislature for a major revision of the principles of agricultural policy: this revision could lead to efficient agriculture, without the violation of already established property rights.

Most importantly, the BCC seemed to re-evaluate its position on the property arrangements under communism. While in previous decisions the judges held that the communist period simply constituted an unlawful obstruction on the use of property rights, this new 1998 decision admitted that some of the communist policies had legitimate effects for the present. Thus, the right to restitution of big land-owners was rejected. The BCC thus allowed for an inconsistency: the communist nationalisation had no legitimate effects for small landowners, while it did have such effects for big ones.

Bulgarian Constitutional Court on Urban Restitution and the Compensation

BCC Jurisprudence in 1995-1996: protection of the right to restitution

Since 1995, the Bulgarian constitutional court has made numerous interventions in the area of urban restitution and compensation. It was firstly triggered by the adoption in 1995 by the socialist legislative majority of amendments[345] to the Law on the Restitution of Nationalised Immovable Property (LRNIP), one of the major political achievements of the 1991-1992 UDF government.
While the UDF adopted the laws of urban restitution during its stay in government (1991-1992), the BSP started curbing in various ways the restitution rights of former owners, when it gained an absolute majority in Parliament in 1994. The controversy had broad social implications: many flats, restored to their pre-nationalisation owners, had occupants, for whom the state was incapable or unwilling to provide adequate housing.

In the first judicial dispute on the topic, the constitutional justices declared unconstitutional amendments to LRNIP which prolonged by three years the permission for lessors of restituted flats to continue occupying them. The law envisaged a substantial increase of the rent (still well below market rates) as a compensation for the prolongation of the restrictions. The Court held that:
'It is inadmissible from the point of view of [the inviolability of private property] to prolong temporary restrictions or to introduce new ones when the property has been

[344] Decision 15, 1998.
[345] *State Gazette* №20/1995 and *State Gazette* № 40/1995.

already given back…The rights of the lessors cannot be opposed to the rights of the owners, which are constitutionally protected. The rights of the lessors are rights vis-à-vis the state and the local governments, which are obligated to fulfil their duty in securing accommodation for the lessors'[346].

Three dissenting opinions insisted that the BCC should have balanced Art. 17,3 of the law and the issue of retributive justice with other considerations, as the rights of *bona fide* third parties, for which the state was currently unable to provide the necessary accommodation. It was pointed out that the Constitution allowed even for expropriation of property in case of public need and after due compensation.

The BCC considered other issues in this decision as well. The amendments changed the procedure under which the owners could claim their rights before a court, in case their properties had been acquired by third bona fide parties. The Court struck them down as unconstitutional – it violated equality before the law, since many owners had already tried to defend (and some of them lost) their property.

This case outlined the major contours of the approach of the BCC to the issue of urban property restitution. The judges took the view that *unless bona fide third parties had already acquired ownership over the property, they had no protection against the interests of the former owners (for instance, as lessors).*

The BCC espoused a particular time-management scheme in its jurisprudence on urban restitution. It was a *compromise* between the *total rejection* of the constitutional relevance of the communist period for the determination of property rights, and the recognition that certain transactions in the communist period *had produced* legitimate entitlements. This compromise was not made fully determinate by the existing restitution legislation, and the judges acquired significant opportunities to fill-in the resulting gaps. Their interpretations generally *advanced the interests of the restitution beneficiaries against the interests of third parties* (lessors). This position of BCC was broadly consistent with the views of the UDF and its supporters at the time.
In the period 1995-1996, similarly as in the case of agricultural restitution, this specific constitutional policy aimed to counter-balance the dominance of the ex-communist BSP, controlling both the legislative and the executive branches of power. BCC sent a clear signal that not all state institutions were willing to accept the same interpretation of the communist past as the BSP.

The clash between the interpretation of the relevance of the communist past advanced by the BCC and the government became especially evident in the determination of the category of *third parties acting in bad faith*, against which the former owners could start judicial proceedings. This was the controversial art.7 of the Law.

The question of *non-bona fide* third parties related to the very essence of the communist regime and raised the issue of whether the use of an official position in the Communist Party could result in legitimate property rights. The judges ruled on this issue in *Decision 1, 1996*[347]. A group of BSP parliamentarians attacked the provision before the BCC in November 1995, some four years after its adoption. They argued that it violated the right to property by making possible the alienation of assets, acquired by *de facto bona fide* third parties in accordance with legal rules existing at the time. The retroactivity of the arrangement was alleged to add to its unconstitutionality. Further, the petitioners argued that if the property had been acquired in violation of existing rules, responsibility for this should be held by the *state*. It was a failure of the state administration to perform its functions which lay at the bottom of these problems.
The BCC dismissed the challenge, reasoning that the procedure provided in art. 7 of LRNIP was necessary for the implementation of the general philosophy of the law. The rationale of the law was not disputed by the petitioners: it was to restore justice by

[346] Decision 9/ 1995, *State Gazette* №66/25.07.1995.
[347] Decision №1/18.01.1996, *State Gazette* № 9/30.01.1996.

restitution of urban property nationalised through the period 1945-1952. Since the right to property of the former owners was restored not by art. 7, but by other provisions of LRNIP (arts. 1 and 2), art. 7 was required for the judicial nullification of transfers of property, declared void by these other provisions.
The BCC recognised that in certain cases the property had been transferred to *de facto bona fide* parties, while the violation of the law was done by the state administration. Nevertheless, the transfers as a whole were void, and did not create rights for the third parties against the real owners.

The petitioners had argued that, apart from the other alleged flaws, art. 7 contained a constitutionally inadmissible ground for the nullification of property transactions: 'the use of official or party (political) position'. They argued that this was not a legally determinable ground: after all, the benefits and privileges for communist party officials and functionaries were either established by law or were not contrary to the laws and practices existing at the time. The judges dismissed the challenge, stating that 'the use of official and party position' was a concrete expression of a legally relevant, morally objectionable behaviour'. For the legal relevance of this fact as a ground for the invalidation of the transfers, the BCC referred to art. 26,1 of the Law on Obligations and Contracts: 'null and void are contracts, which… violate the good morals'[348].
The obvious consequence of the BCC decision was that the *protection of the rights of bona fide third parties* was not always guaranteed. It raised the possibility of numerous applications (more than 2000 thousand, according to human rights lawyers in Bulgaria) to ECtHR for violations of Protocol 1 of the European Convention on Human Rights. The issue will be separately discussed below**.**

BCC Jurisprudence after 1997 – from balancing the right to restitution against the public interest to denying it a constitutional status

After the coming to power of UDF in 1997, some of the Kostov government's legislation was also challenged before the BCC. Various objections were raised both to the amendments to the procedures, and to the general strategy of urban restitution. Also, a different important issue was raised: the constitutionality of the verdicts of the communist People's Court, which had been established in 1944-45 to deal with alleged crimes perpetrated by the pre-communist regime. The legality of relationships from the communist and the pre-communist period were at the bottom of this controversy.

Yet, the very changes in the positions of the different political actors (the coming of UDF to power, and the shift in structural imbalances) led to a more nuanced view of the judges about the communist past.

The change of judicial attitude was subtle and started to take shape in *Decision 4, 1998* concerning the constitutionality of some of the provisions of 1997 *LCONA* (see above for details of this law). This decision was a clear signal that the Court was more ready to hear and accept arguments in favour of rights acquired during the communist period, or to restrict restitution rights for the sake of economic expediency and the public interest. The first issue concerned the alleged *extension of the scope of restitution.* The petitioners argued that the law unconstitutionally extended the range of properties to be given back, by including assets nationalised by legislative acts not mentioned in previous legislation: the law referred to 'all decrees, which alienate property in favour of the state', without enumerating them. This, they argued, violated the principle of the rule of law. The Court rejected the claim, reasoning that it was within the jurisdiction of the National Assembly to extend the scope of restitution, provided that they stayed within the broad principle (art. 4 of LRNIP) of restituting property for which the state had not secured adequate compensation. Moreover, the extension of restitution was beneficial from the point of view of the equality before the law. The BCC also upheld that an extension of the beneficiaries of restitution as constitutional: previous legislation had entitled only owners and their *ex lege* inheritors, while the new law included inheritors by

[348] Ibid. See also *Decision 11/ 1996*.

will as well. The judges argued that this fell within the legitimate discretion of the National Assembly. The Court, however, interpreted the beneficiaries so as not to include people who had acquired property rights through transactions.

Thus the BCC declared constitutional an inclusion in the scope of restitution of assets confiscated under the Order-Law for the Trials by a People's Court of the Persons Responsible for the Involvement of Bulgaria in the World War (Order-Law)[349]. On this issue, the petitioners alleged a violation of the separation of powers principle, because the present-day National Assembly had in fact overruled by a law the verdicts of a judicial body - the People's Court.

The Court ruled that the People's Court was not an element of the then existing judicial system, but an extraordinary judicial body, which in certain cases had rendered 'verdicts' even against deceased persons. From the point of view of the 1991 Constitution, the acts of such a body could not be called genuine verdicts. Therefore, the termination of the effect of the Order-Law could not be interpreted as a violation of the rule of law, the principle of separation of powers or the independence of the judiciary, they concluded.

Thus far, the judges followed their previous policy of declaring immoral and *illegitimate* the communist rule and some of its major characteristics. However, in relation to two other quite controversial laws, they markedly changed their stance, and in fact upheld the legitimacy of some communist measures, which were part and parcel of the 'class-war' against the bourgeoisie.
In order to stress the difference between the *extraordinary* character of the verdicts of the People's Court and the acts of *normal* judicial bodies during the communist period, the BCC invalidated the extension of restitution over property nationalised by ordinary court verdicts under laws from the 1940s: the *Law on Confiscation of Property Acquired Illegally or through Speculation*[350], and the *Order-Law on Supplies and Prices*[351]. These laws had victimised many representatives of the pre-communist business elite, and were meant to enforce state regulation over the economy by nationalising the assets of 'offenders'.

The basic argument of the BCC was that, if the effects of past verdicts under these laws were reversed by an act of the present-day legislature, this would be a violation of the separation of powers and the independence of the judiciary (with retroactive force). Following the same rationale, it refused to extend the restitution principle over property confiscated on the basis of *the Law on Collection of Taxes*[352]: the judges argued that failure to pay one's taxes is not tolerated under the 1991 Constitution, and therefore, there was no ground for the removal of the legal effect of this piece of legislation.

This decision validated the *legitimacy* of some elements of the communist regime. The Draconian tax policy of the fledging communist regime, and the measures against the 'black marketers' were hardly different in essence from the other measures in the general Marxist-Leninist philosophy of 'expropriation of the expropriators', espoused by the communist regime. Their result was the same – confiscation and nationalisation of property. The distinction drawn by the BCC in this case hinted that only features of the communist regime which were 'extraordinary' would be illegitimate and incapable of leading to legal entitlements, while the 'normal' judicial and governmental process could render constitutionally respectable results.

This position of the Court was in open contradiction with its decision concerning the restitution of flats and the rights of *non bona fide* third parties, discussed above. There, the judges took the view that entitlements stemming from 'normal' decisions of communist party leaders had not created rights for third parties although it was a 'normal', and 'not extraordinary', practice for communist leaders and functionaries to

[349] *State Gazette* №219/1944.
[350] *State Gazette* №78/1946.
[351] *State Gazette* №213/1945.
[352] *State Gazette* №304/ 1948.

have certain privileges or to grant privileges, this was not seen by the judges as a ground leading to legal entitlements.

Decision 4/1998 considered a second major group of challenges against the law *(LCONA)* concerning provisions which extended the time limitations for acquiring property by possession. Since the process of restitution was very slow and cumbersome, not all former owners had managed to reclaim their property rights by the time envisaged in the exclusive time limits. This at first sight procedural issue raised very interesting questions of the constitutionality of the restitution philosophy of the state. In general, the BCC upheld the extension of the time limitations because, in the view of the judges, there had been objective administrative difficulties for the former owners, leading to the impossibility for them to protect their rights. The BCC held that 'justice requires that priority should be given to the rights of the owner vis-à-vis the possessor.'

However, one specific issue of exclusive time limits led to a very bad split in the Court concerning the interpretation of paragraph 2 from the transitional provisions of LRNIP, which extended the time limits included in one of the major privatisation laws: the *Law on Transformation and Privatisation of State and Communal Enterprises (LTPSCE)*. According to this provision, the former owners of industrial property received a prolongation of the period for application for restitution of parts of enterprises or parts of their shares. The same right was recognised for owners of lands upon which state or communal enterprises had been built. The challenge against the constitutionality of the provision could not mobilise 7 of the votes of the judges (the required number of votes for a provision to be declared unconstitutional), but only 4. Thus the provision was upheld. However, only 6 judges *affirmed* its constitutionality. For this reason, the BCC decided to publish both of the opinions (of the majority and the minority) in its judgment.

The issue at stake behind the technicalities of the debate was *to what extent the right to restitution could be balanced against the public interest:* in other words, to what extent compensating injustice done during the communist period could be limited for the sake of legal stability and economic efficiency. In Bulgarian law, exclusive time limits aim to create stability of property rights by prohibiting challenging the *status quo* after a certain period of time. By 1997, the biggest political problems in Bulgaria were the slow privatisation of assets and the inefficiency of the reforms in general. Re-communisation and the dominance of ex-communist ideology in public life were by no means a central problem, which, in our view, explains the fact why the Court was so badly divided on the issue of exclusive time limits in the restitution of industrial enterprises. In short, *the restitution had impeded to a degree the process of privatisation, since the potential investors were reluctant to invest in assets over (parts of) which there could be claims for restitution.*

The change in the stance of the BCC was clear: in 1998, the judges were open to arguments, which they would have rejected on ideological grounds in the period 1995-1996. The defence of property rights of pre-communist owners was more nuanced and far less rigid. Still, in this decision the Court upheld a number of benefits for the owners of nationalised property, some of which had serious financial implications for the national budget, and others restricted the rights of persons who were negatively affected by the restitution process.

A further remarkable shift in the position of BCC is set in another piece of its 1998 jurisprudence. In the focus of BCC *Decision 26/1998* were the *amendments*[353] *to the Law on Transformation and Privatisation of State and Communal Enterprises (LTPSCE)*. In it BCC turned down an application by the Prosecutor General for the annulment of amendments to LTPSCE, aiming to speed up the process of privatisation, and to make it more efficient. The new rule envisaged that, if there had been a decision for the privatisation of a certain state company, the people having the right to restitution over (parts of) this enterprise could claim *only* compensation through shares, parts of

[353] *State Gazette* №39/1998.

companies, or investment bonds: they could not claim full restitution of their assets. The Prosecutor General argued that this was a violation of the right to property and the rule of law. The Court here reasoned that ***the right to restitution was not a constitutional right***. It was within the legislative discretion of the National Assembly to introduce alternative ways for the compensation of the rights of previous owners. This was not a coercive expropriation. The BCC dismissed the claim about a violation of the rule of law.

This was a remarkable case in many respects. For our purposes the major issue is that the judges denied the constitutional status of the right to restitution, and granted enormous discretion to the legislature in the determination of different forms of compensation for nationalised properties. The most interesting element of the decision was that in it the BCC recognised that the 'restoration of justice' had a very strong *'present'* dimension, relating to the efficiency of the reforms and the interest of the public in general.

In conclusion, more stringent enforcement of the rights of pre-communist property owners was necessary in the period 1995-1996, since the ex-communist party had full control over the government and the legislature. In contrast, in 1997, political parties friendly to the interests of the owners came to power, which made strict judicial scrutiny of regulation unnecessary. The need for a new constitutional policy became clear for the judges later in 1998. With the coming to power of the UDF government in 1997, the Court gradually fine-tuned its time-management scheme and started paying much more attention to claims grounded in the *present* and the *future*, as justifications for restriction of restitution rights. Previously unacceptable arguments from economic efficiency came to be seen by the judges as 'trumps' against claims of retributive justice. The shift was most evident in relation to industrial property, where the previous policy of the Court had been one of encouragement of the former owners to claim full restitution. Finally, BCC shifted its position from recognising the constitutional status of the right to restitution to denying it such status.

ANNEX 2 - ECTHR JURISPRUDENCE ON RESTITUTION CASES FROM BULGARIA

The ECtHR has ruled a number of times on restitution of property cases from Bulgaria. There are more than 2000 such cases pending before the Court.

In 2007 the ECtHR took a landmark decision – Velikovi and others v. Bulgaria *(Applications nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01, and 194/02)* – in which the main principles of application of the European Convention on the Protection of Human Rights to the Bulgarian restitution laws were elaborated. In these cases the Court grouped together a number of applications, elaborated general principles, and applied them by making distinctions among the different groups.

Other important cases of the ECtHR concerning the problem of restitution in Bulgaria are:

Osman v. Bulgaria (Application № 43233/98, Decision 16.02.2006) – restitution of agricultural property;

Gospodinova v. Bulgaria (Application № 37912/97, Decision 16.04.1998 r.) – ruling on the admissibility of restitution claims;

Kirovi v. Bulgaria and Turkey (Application №58694/00) – ruling on the admissibility of restitution claims;

Kehaya and others v. Bulgaria (Application №47797/99 and № 68698/01, Decision from 12.01.2006);

Kalinova v. Bulgaria, (Application № 45116/98);

The main provision of the ECtHR which is under consideration in the landmark Velikovi and others v. Bulgaria case is Article 1 of Protocol No 1.

In the general case, the applicants complain that they have not been compensated properly for expropriation of property, which is given back to former owners. Some of the cases arise from claims for irregularities in the very process of restitution, when principles such as the supremacy of the law and legal stability have been violated, as they are embedded in Art. 6. 1 of the ECtHR (Kehaya and others v. Bulgaria). The ECtHR has not become an instrument for redress of failed restitution claims: the judges have declined to rule on such cases due to the fact that at the time of nationalisation in the 1940s the Convention was not in force. Further, as stated in the Gospodinova v. Bulgaria case, the Court (then the Commission) argued that Article 1 from Protocol 1 is only applicable to property that exists either in the form of legal title or (as made clear in the Osman case) in the form of unchallenged continuous possession.

We present here the main arguments from the Velikovi and others v. Bulgaria judgement, which contains the general approach of the ECtHR to the discussed problems. The main point of contention in the Velikovi case, and in the restitution of urban property in general, is the provision of Art. 7 (Article 7) of 1992 *Law on the Restitution of Nationalised Immovable Property (LRNIP)*. It declares the legal titles of third parties null and void, if they have acquired property rights over apartments in violation of the law/through abuse of powers/by virtue of their position in the Communist party. The point of contention was what kinds of violations of the law and abuse of power could lead to the invalidation of the property rights of third parties (which otherwise could be considered *bona fide* buyers of state property).

The ECtHR view on the nationalisation of real property by the communist regime

After 1945 the communist regime in Bulgaria introduced a series of nationalisation laws of a punitive or redistributive nature. As regards housing, the policy was to limit private real estate ownership to one dwelling per family and to take away apartments allegedly

exceeding the family's needs. All city apartments 'in excess' were nationalised. In some cases the owners received state bonds in compensation. Owing to changes in the regulations, in practice compensation was never received by the owners.

The nationalised apartments were allocated to Municipal housing funds, which managed them and rented them out at fixed rates. Special legislation established a system of categorisation of those in need of housing and provided for detailed rules, on the basis of which municipalities rented out and sold apartments. The rules, which changed many times during the relevant period, provided for (1) precedence rights for various groups ('anti-fascist and anti-capitalist' veterans, large families, etc), (2) limitations on the number of rooms and on the size of the apartments candidates could rent or buy (on the basis of factors such as number of children, profession, health problems, etc) and (3) special procedures for renting or buying apartments belonging to State enterprises. Most of these rules were also applicable where newly built State apartments were rented out or sold.

A large number of nationalised apartments were sold to tenants in the 1960s and 1970s pursuant to a new housing policy whose purpose was the accumulation of financial resources for the construction of new dwellings.

In practice, during the communist period and until 1990 an individual in need of housing could only buy an apartment by applying to a competent state body. The procedure was administrative, followed by the signing of a contract prepared by the administration. Candidates had to fill out the relevant forms and submit the required documents. The relevant municipal authority would then issue a decision and present to the candidate for signature the sale-purchase contract.

The ECtHR view on the process of restitution of property after the fall of the communist regime; articles 1 and 7 of the Restitution Law

As discussed above, after the fall of the communist regime in 1990, Parliament enacted legislation aiming at rendering justice to those whose property had been nationalised without compensation, or to their heirs. A number of denationalisation laws covering different types of property (industrial plants, shops, dwellings, agricultural land, etc.) were adopted.
Article 1 of *LRNIP* provided that the former owners of certain types of real property nationalised by virtue of several early communist era laws, became *ex lege* the owners of their nationalised property if it still existed, if it was still owned by the State and if no adequate compensation had been received at the time of nationalisation.

Article 7 provided for an exception to the requirement that the real property be still owned by the State. It provided that even if certain property had been acquired by third persons after nationalisation, the former owners or their heirs could still recover it if the third persons in question had become owners in breach of the law, by virtue of their position in the Communist party or through abuse of power. According to the Government this provision was necessary since during the communist period there had been many cases in which the privileged of the day had obtained apartments unlawfully. The former pre-nationalisation owners had to bring an action before the courts against the post-nationalisation owners within a one-year time limit. If the courts established that the title of the post-nationalisation owners involved breaches of the law or was tainted by abuse they declared it null and void and restored the property to the pre-nationalisation owners.

The Restitution Law's scope and manner of application – judicial practice, public debates and amendments.

In practice, in some cases the ground for annulment was a finding that there had been abuse of office or of a position in the Communist party. In other cases the relevant files retrieved from the archives did not contain proof of approval by an administrative

authority, as required by regulations in force at the relevant time. Other grounds on which the courts granted article 7 claims included breaches of regulations dating from the 1950s and the 1960s establishing a link between the number of family members and the number of rooms they were entitled to, breaches of requirements such as that the buyer should be a tenant or an employee of the State agency or enterprise using the apartment, etc.

In a large number of cases under article 7, the omission identified by the courts as decisive was the fact that the sale contract, or another relevant document, such as, for example, a tenancy order or a relevant approval, had been signed by the deputy to, or the superior of, the official in whom the relevant power was vested (i.e. deputy mayor instead of the mayor, deputy minister instead of the minister, regional governor instead of district governor). After an initial period of uncertain judicial practice, the courts adopted the view that such defects had the automatic effect of rendering the transactions null and void *ab initio*.

The application of article 7 has been the object of heated public debate, including in the Parliament. One of the central issues has been the question whether or not it was justified to allow the nullification of decades-old property titles for minor administrative omissions that had been the responsibility of the administration, not the individual concerned. In 1995 and 1996 the Parliament adopted amendments to the Restitution Law repealing article 7 or limiting its scope to cases involving substantial breaches of the law committed in bad faith or abuse of power. All those amendments were declared anti-constitutional by the Constitutional Court on the basis that they purported to modify already acquired civil rights to restitution. See the discussion on BCC jurisprudence on these issues above.

The issue of State liability for administrative omissions

In its judgment of 18 January 1996, refusing a motion to declare article 7 unconstitutional, the Constitutional Court dealt with the argument that the law affected disproportionately the rights of the post-nationalisation owners, many of whom had not done anything unlawful. It stated:

'The Constitutional Court shares the [petitioners'] concern that there may be many cases where the breaches of the law ... resulted from [acts of] the administration... That fact, however, does not concern the nullity of the transactions ... The transaction[s] remain null and void regardless of which party had breached the law. The question of responsibility for damages in such cases is a separate issue. The Constitutional Court considers that article 7 of the [Restitution Law] does not exclude claims for damages against State bodies or State officials who have breached the law when effecting the transactions. The possible legislative elaboration of that responsibility in cases under article 7 falls within the competence of Parliament.'

Parliament has not adopted a law elaborating on possible civil liability of officials or State bodies responsible for a breach of the law that led to nullification of a property title. As confirmed by the courts (decision 1893/1.12.2004 on civil case 1518/2003 of the Higher Court of Cassation), such claims by persons in the applicants' position are not possible either under the State Responsibility for Damage Act of 1988 (as it did not apply with regards to damage occasioned before its entry into force) or under general civil law.

Compensation and other pecuniary consequences for the post-nationalisation owners

Developments until 2000

The initial text of the Restitution Law of 1992 did not provide for any compensation for persons ordered to vacate their property under article 7. For several years, the question whether such compensation should be paid by the State was the subject matter of heated debates. In 1995 and 1996 Parliament adopted amendments to the Restitution

Law concerning the issue of compensation. Most of these amendments were thereafter declared unconstitutional by the Constitutional Court on various grounds (see above).

An amendment introduced in June 1996 (paragraph 3 of the supplementary provisions to LRNIP[354] - 'the June 1996 amendments') was not struck down by the Constitutional Court and remained in force until its repeal by Parliament in January 2000. It provided that persons who had been ordered to vacate their apartments under article 7 were to be paid by the State full market value cash indemnity. Also, until this payment was effected, they were entitled to rent temporarily State-owned apartments, or to receive a rent allowance. The above obligations of the State were to be governed by regulations to be issued by the Government.

The Council of Ministers did not adopt the regulations necessary to put in practice the June 1996 amendment. Former owners, who lost their apartments in cases under article 7 of LRNIP, did not receive market-value cash indemnity or any rent allowance. In some cases, the evicted post-nationalisation owners were able to rent municipal apartments at fixed rates. In a large number of cases, however, the requests made were unsuccessful because of lack of availability or because the competent authorities interpreted the relevant law as allowing discretion and refused the requests.

In November 1997 a new law, the *Law on Compensation for Owners of Nationalised Assets* (LCONA) was passed. Its main purpose was providing compensation for property taken under several nationalisation laws and which could not be returned physically. It introduced a provision (articles 5 § 3) stating that persons who had lost their dwellings pursuant to article 7 of the Restitution Law should 'receive housing compensation bonds, if they [had] not received the indemnity provided for in [the June 1996 amendment]'.

In January 2000, the June 1996 amendment was repealed. The bill was introduced in Parliament with the explanation that the State did not have the resources to pay in cash.

Compensation by bonds after 2000

After January 2000, the former owners whose title had been declared null and void could apply for housing compensation bonds under articles 5 § 3 of LCONA within three months of January 2000 or within two months of the final judgment in their case.

The requests are examined by the relevant ministry or regional governor. Experts assess the market value of the property. The nominal value of the bonds to be issued is equal to the full market value of the dwelling. The decisions are subject to appeal before the Supreme Administrative Court.

Compensation bonds are not exchangeable for cash. No interest accrues. They can only be used for participation in privatisation tenders and their value thus largely depends on the availability of privatisation offers (see the discussion of *LCONA*-related issues in the main text).

The value of the bonds fluctuated for several years. Many of the claimants sold them at prices between 15 and 30% of their nominal value, before they reached and surpassed their nominal value in the end of 2004. Eventually, they stabilised at around 70 % of their value.

In June 2006 the Parliament amended again article 7 of the Restitution Law, introducing new paragraphs 2 and 3. The amendment only concerns persons who had not yet sold the compensation bonds they had received. New paragraph 2 provided that persons who had lost their property under article 7 should have priority when applying to buy municipal apartments and should be entitled to pay in bonds, at nominal value. The new provision was not accompanied by an amendment to article 41 of the Municipal Property Act, which explicitly prohibits the sale of apartments for bonds. Also, the new paragraph 2 does not affect the established case-law according to which municipalities are under no

[354] *State Gazette* № 51/1996.

duty to sell apartments. New paragraph 3 provided that, if no apartment was offered by the relevant municipality within three months, the person concerned was entitled to receive *in cash the nominal value* of his or her bonds from the Ministry of Finance. The realisation of this right was conditional on the adoption by the Council of Ministers of implementing regulations. Their adoption has been delayed by a year.

The Court's assessment

Has there been interference with Article 1, Protocol 1?

It is not disputed that the applicants were deprived of their property as a consequence of the legislation and the judicial practice. The Court thus found that there was a deprivation of property. In order not to constitute a violation of rights under Article 1, Protocol 1, such deprivation of property must be (1) lawful, (2) serve legitimate aims- be in the public interest and (3) must strike a fair balance between the general interest and the individual's fundamental rights.

Lawfulness

The applicants' property titles were declared null and void by the Restitution Law, the relevant provisions of Bulgarian civil law on property and contracts and Bulgarian administrative law. The Court accepted, therefore, that the interference with the applicants' property rights was provided for by Bulgarian law.

The Court noted that for years there was uncertainty in the interpretation of the Restitution Law and its consequences on a number of issues (regarding consequences of various defects in the transactions, the position of *bona fide* third persons, State liability for administrative omissions, etc). Furthermore, the Bulgarian legislature's approach to compensation for persons deprived of property under article 7 changed several times in contradictory directions. Although in 1996 the law provided for full market value compensation, the Council of Ministers failed to adopt implementing regulations and no such compensation was paid. After 2000, the uncertainty concerning compensation bonds continued.

According to the Court, however, the cases concerned a unique period of social and legal transition in Bulgaria. The legal reform after the fall of communism, in particular with regard to the restitution of nationalised property, was the product of a difficult political compromise. The Court considered, therefore, that the issues raised by the applicants with respect to the quality of the relevant law are intertwined and inseparable from the question whether or not the interference with their property rights had a legitimate aim and was necessary in a democratic society for the achievement of such an aim.

Legitimate aim

The Court reiterated that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. In the cases under examination the Court has no doubt that the Restitution Law, which provided that the State should restore the property it had expropriated without compensation during the communist regime, pursued an important aim in the public interest. Indeed, that was not disputed by the applicants. It is obvious that compensating the victims of those arbitrary expropriations was an important step in the restoration of democracy in Bulgaria, after several decades of totalitarian rule.

As to the goal pursued by article 7 specifically, the Court noted that that provision authorised persons whose property had been expropriated by the State in the 1940s without compensation to claim it back not only from the State but also from private individuals, whenever the latter's title had been tainted by abuse of power or breaches of the law.

Proportionality

The concern to achieve 'fair balance' between the demands of the public interest and the protection of the individual's fundamental rights is reflected in the structure of Article 1 of Protocol No. 1 as a whole.

In these circumstances the Court considered that the first factor to be taken into consideration must be (1) the importance of the Restitution Law's aim – to restore justice for persons whose property had been taken away by the communist regime arbitrarily and without any compensation, (2) and the underlying rationale of article 7 – to sanction those who had profited from their position in the communist regime or had acted unlawfully to acquire property.

Therefore, the question whether, in a particular case of deprivation of property, the property was taken owing to a material breach of provisions of the law or abuse of power on the one hand or, on the other hand, as a result of an administrative omission of a minor nature for which the administration, and not the individual, had been responsible, is highly relevant to the assessment of proportionality under Article 1 of Protocol No. 1 to the Convention.

In sum, the Court considered that the proportionality issue must be decided with reference to the following factors: (i) whether or not the case falls clearly within the scope of the legitimate aims of the Restitution Law, having regard to the factual and legal basis of the applicants' title and the findings of the national courts in their judgments declaring it null and void (abuse of power, substantive unlawfulness or minor omissions attributable to the administration) and (ii) the hardship suffered by the applicants and the adequacy of the compensation obtained/available to the applicants at the relevant time (the bonds compensation scheme and the possibilities for the applicants to secure a new home for themselves).

With respect to the compensation bonds, the Court takes into account the amounts actually received by the applicants, the fact the rise in bond prices in the end of 2004 was unforeseeable and that, in general, the legislation on compensation changed frequently and cannot be characterised as foreseeable.

On the basis of this analysis, the ECtHR divided the applications into three main groups. First, there was the group where the third parties had acquired the property title through some form of abuse of powers/use of their position within the communist regime/party. These cases basically fell within the legitimate aim of Article 7 of the Restitution Law, and the ECtHR did not find violation of their rights under Article 1 of Protocol 1. The second group of cases concerned violations of the laws at the time of obtaining the property title, of which the third parties were aware or should have been aware (when flats were obtained in breach of residence permission laws, or laws concerning limitations on the sizes of the flats under communism). In these cases, the ECtHR also did not find violation of the Convention and its protocols. Finally, the third group of cases concerned invalidations of legal titles due to administrative fault of the state for which the third party did not have responsibility. Such were the cases when property titles were signed not by the proper administrative official, for instance. In the absence of full compensation for such third parties, the ECtHR found violation of Art.1 of Protocol 1.

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