Chapter 21

Restitution of Property Nationalised by the Soviet-style Dictatorships: An Assessment on the Role of the European Court of Human Rights

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Abstract

The intersection of the legacies of past totalitarian nationalisations and the current system of human rights protection reveals significant findings. This chapter emphasises the inherent tensions in the human rights framework when dealing with the mass seizure of private property by Soviet-style dictatorships in East Central Europe. This calls for a critical reevaluation of the ability of legal tools to effectively deal with the effects of former totalitarian regimes. The European Court of Human Rights (ECtHR) has approached these challenges with considerable deliberation, fully aware of the substantial and far-reaching implications of its rulings across East Central Europe. However, expecting the Court to resolve the complex issue of equitable restitution for nationalised property, particularly when individual states have struggled and failed to manage it in a fair manner, would be unrealistic. The complexity of this matter has required the ECtHR to adopt a cautious and measured stance, taking into account the broader regional context and the inherent limitations of its mandate.

Keywords: nationalisation, restitution, private property, Soviet-style dictatorship, transitional justice

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1. Introduction – Protocol No. 1 to the European Convention on Human Rights (ECHR) and the Problem of Nationalisations

Article 1 of Protocol No. 1 to the ECHR[1] states that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[2]

In consequence, the ECHR – through the additional Protocol No. 1 – protects property, or as is stated in the text of the ECHR, 'possessions'. Within the framework of human rights, the protection of property rights emerges as a fundamental principle, serving as a foundational element that upholds individual autonomy and contributes to societal stability. This principle is deeply embedded in the broader system of human rights, reflecting its essential role in maintaining both personal freedom and social order. "Every natural or legal person is entitled to the peaceful enjoyment of his possessions," declares this principle, echoing across legal codes and moral doctrine alike. Possessions, tangible or intangible, are more than mere material objects; they are extensions of self, repositories of labour, and embodiments of identity. They signify the fruits of endeavour, and the expressions of dreams nurtured into reality. For a person to be stripped of their possessions is to be deprived not only of their belongings but also of their dignity, agency, and a sense of place in the world.

Yet, this entitlement is not absolute but tied to the notion of the *public interest*, a nebulous concept often invoked to justify interventions into the private sphere. "No one shall be deprived of his possessions except in the public interest," the ECHR solemnly proclaims, hinting at the balance between individual rights and collective welfare. It is a recognition that the needs of the many may, at times, necessitate sacrifices from the few, but it is a principle that demands rigorous scrutiny and adherence to due process. Bound by legal frameworks and international norms, the deprivation of property rights must be carefully adjudicated within the confines of established law. The stipulation, "subject to the conditions provided for by law and by the general principles of international law" echoes a commitment to procedural fairness and strict compliance with legal standards. It is a safeguard against arbitrary

1 For an outstanding commentary of the ECHR from East Central Europe see Bîrsan 2010.

2 For a general analysis of the Article 1, Protocol No. 1, see Selejan-Guţan, pp. 2011, 219–229; Bercea, 2020, pp. 266–273.

confiscations and capricious exercises of power, ensuring that justice remains the guiding tool in matters of property rights.

Moreover, the framework of rights is intertwined with the principle of state sovereignty, which grants governments the authority to enact legislation in the pursuit of the common good. The legal text emphasises that "the preceding provisions shall not, however, in any way impair the right of a State", thereby affirming the prerogative of states to regulate property use in accordance with broader societal objectives. This includes measures such as taxation and the enforcement of legal claims, where states are tasked with creating a balance between protecting individual liberties and fulfilling the imperatives of governance. Within this equilibrium between individual rights and collective needs, the principle of the peaceful enjoyment of possessions remains a critical element of legal and social harmony.

The issue of nationalisations executed under Soviet-style dictatorships in East Central Europe presents a profound challenge, emphasising not only the vulnerability of property rights but also testing the limits of the human rights framework. This practice, particularly widespread in the volatile environment of post-World War II Eastern Europe, starkly challenges the principle of the sanctity of possessions. In the shadow of authoritarian rule, diverse entities such as businesses, religious institutions, and individuals were deprived of their property, subject to the arbitrary dictates of totalitarian regimes focused on power consolidation and ideological uniformity. Industrial and agricultural assets, and personal residences, were co-opted into the state apparatus, becoming tools in the expansive political schemes of governments that exercised unfettered dominion over both the economic and personal spheres of their subjects, often sidelining basic human rights in pursuit of ideological goals.

This assault on property rights also exposes the inherent vulnerabilities of the human rights system. Confronted with the brute force of authoritarian regimes, the legal and moral edifices constructed to safeguard possessions find themselves tested to their limits – even in the present. The principles enshrined in international law and conventions, intended to shield individuals from arbitrary deprivation, falter in the face of the past authoritarian measures. The goal of this chapter is to prove that the efficacy of human rights mechanisms becomes severely compromised faced with the nationalisations imposed by the Soviet-style dictatorships.[3] Additionally, it aims to explain why this is the case.

3 For a classic analysis of nationalisations, see Katzarov, 1964.

2. Some Remarks on Nationalisation and Restitution of Property (Reprivatisation)

The author of this chapter has previously written extensively on the legal nature of nationalisations from the perspective of legal history, trying to explain its nuances in relation to the nationalisations which took place in the West.[4] This chapter is based on the author's past views: there is no such self-standing legal institution as nationalisation. In legal discourse, the term 'nationalisation' carries significant ideological weight and fervour. There is no need to invent a self-standing legal concept for a *Soviet-style* phenomenon which can be explained using an extant and consistent terminology.

To dismiss nationalisation as a mere legal institution is to overlook its true nature as a veil of propaganda draped over the revolutionary act of seizing assets and placing them under state control. It is, in essence, a form of expropriation, albeit one tainted by the contagion of ideology. Unlike its predecessors in legal history, this brand of expropriation eschews the fundamental principles established well before – the principles of just and preliminary compensation – opting instead for a blatant usurpation of property rights. In short: nationalisation is nothing else than illegal mass expropriation.[5]

The question of whether the state should provide compensation for nationalisation presented a contentious issue. Although some nationalisation measures ostensibly acknowledged the notion of compensation, the actual practice of providing such compensation was virtually non-existent. Many nationalisation rules totally omitted any rule on compensation. Where such rules did exist, they served more as futile ornaments than substantive guarantees. This discrepancy between rhetoric and reality highlighted a troubling trend: the manipulation of law as a tool of deception and control within authoritarian regimes. The concept of fair compensation, rooted in capitalist notions of equity and property rights, ran counter to the ethos of socialist transformation espoused by many regimes. To offer compensation, therefore, was no less than to flirt with the resurrection of capitalism, a prospect antithetical to the revolutionary fervour driving nationalisation efforts. To put it simply, fair compensation would be a measure that would lead to a return to capitalism, essentially a revival of capitalism. Compensation, after all has the effect of preserving the exploiting class. For this reason, real compensation was unfathomable.[6]

4 For the latest of the author's texts on this topic, see Veress, 2023, pp. 281–310.

5 To maintain precision in this analysis, it is important to acknowledge that some expropriations in East Central Europe were carried out without fair compensation even outside the Marxist ideology. An example of this is the 1945 Romanian land reform. However, these expropriations were primarily driven by goals of redistribution into private property. As such, they fall outside the scope of this study.

6 Veress, 2023, pp. 297–299. For a debate on whether compensation is necessary for foreigners under international law, see Seidl-Hohenveldern, 1958, pp. 543–552. and Katzarov, 1964, pp. 283–368.

This ideological position rendered real compensation untenable, a concession that would betray the very principles upon which nationalisation was founded. The refusal to offer compensation acted as a strategic measure to prevent the re-establishment of classes perceived as exploitative, thereby preserving the achievements of the 'revolution'. From this perspective, the lack of compensation for nationalisation represents a calculated policy decision aimed at maintaining the purity of communist doctrines. This debate extends beyond legal technicalities, representing a conflict between philosophical perspectives.

Nationalisation, that illegitimate expropriation, represented a subversion of established norms in service of ideological imperatives. The absence of fair and preliminary compensation, pillars upon which the edifice of expropriation rests, rendered the act not only unlawful but morally reprehensible. It is a blatant reminder of the perils of unchecked power and the corrosive influence of ideology on legal institutions.

It is also important that expropriation, as a legal mechanism, indeed finds its foundation in the public interest. In the realm of property rights and the exercise of state power, the notion of public interest serves as both shield and sword, a principle intended to balance the needs of the collective against the rights of individuals. However, the concept of Soviet-style nationalisation twisted and distorted this noble notion, perverting it to cloak mass expropriation. The Manifesto of the Communist Party (1848) already stated that "the theory of the Communists may be summed up in the single sentence: Abolition of private property."[7] Nationalisation usurped this notion of public interest, transforming it into a guise for the extensive seizure of assets and industries in a frightful experiment of social engineering. Nationalisation was just a term to legitimise mass expropriation under the banner of class equality. In the hands of authoritarian regimes, nationalisation became a weapon of mass expropriation, a tool to consolidate power and control over the means of production and the entire society. The appearance of public interest was stripped away, revealing the true nature of nationalisation as a tool of oppression and exploitation. It is important not to lose sight of the true essence of public interest – a principle meant to serve the common good, not to justify the abuse of power.

After the dissolution of Soviet-style regimes in East Central Europe, a critical inquiry emerged within the discourse of political and legal reform: Was it feasible to restore nationalised properties to their original owners? This question provoked a varied display of responses across the region. The debate captured not only the logistical challenges of restitution but also the ideological and ethical considerations inherent in rectifying the legacies of authoritarian governance. The landscape of transitional justice presented a varied and at times profoundly disheartening tableau.

Following the transition from regimes characterised by Soviet-style dictatorships, the imperative of addressing reparations for nationalisations became a prominent issue. The ideal path to redress lay in unravelling the effects of nationalisation

7 Veress, 2023, p. 283.

by restoring properties to their rightful owners or their descendants (*restitutio in integrum*). However, this vision of reparation was met with a chorus of dissenting voices, each armed with their own arsenal of arguments and justifications. Foremost among these was the pragmatic consideration of legal transformations, governed by the principle of *tempus regit actum*, which posited that past actions are governed by the laws of the time in which they occurred. This legal maxim, rooted in the need for continuity and certainty, posed a formidable obstacle to the reversal of nationalisation.

Economic considerations also played a critical role in the discourse surrounding restitution, significantly influencing its perceived viability. The complexities associated with the restitution of industrial assets, deeply implanted within state-owned enterprises, posed substantial challenges. While reprivatisation seemed feasible for agricultural and residential properties, the industrial sector, having undergone fundamental transformations during the decades of dictatorship, appeared practically beyond the scope of reprivatisation. Instead, these state-owned enterprises often found their pathways to privatisation through sales to private investors. As political and legal debates progressed, the concept of reprivatisation remained an appealing yet largely unattainable objective. The aspiration for restitution, although strongly desired by many, was moderated by the realities of political and legal limitations and economic necessities. This juxtaposition of the ideal of justice against the pragmatic considerations of political and economic contexts characterised East Central Europe in transition.

'Post-communist' East Central Europe emerged from the Soviet-style mass nationalisations that had reshaped the region's economic and social fabric. The process of restitution, while emblematic of the region's transition from communist rule, was far from uniform. Instead, it manifested in a patchwork of measures, varying in scope and nature from one state to another. Compensation and restitution in kind emerged as the predominant forms of redress, albeit in different proportions and with varying degrees of effectiveness.

In some states, compensation materialised as the primary means of restitution, offering financial recompense to those whose properties had been seized or nationalised during the communist era. This monetary compensation, while providing a semblance of justice, often fell short of addressing the full extent of losses incurred, leaving many claimants disillusioned with the process. In contrast, other states opted for restitution in kind, returning nationalised properties to their rightful owners or their descendants. This form of restitution, while more directly addressing the injustices of the past, posed significant logistical and legal challenges, particularly in cases where properties had changed hands multiple times or had been repurposed for other uses.

Moreover, the process of restitution was further complicated by the partial and selective nature of its implementation. Political considerations, economic constraints, and legal ambiguities often influenced the scope and extent of restitution measures, leading to disparities in outcomes across the region. As a result, the promise of

restitution remained elusive for many, particularly those whose claims were deemed politically sensitive or economically unfeasible.

As the legacy of nationalisation and reprivatisation is addressed, the role of the European Court of Human Rights (ECtHR) becomes a central question. The mandate of the ECtHR is to adjudicate cases involving alleged violations of the ECHR, ensuring that member states uphold their obligations under this treaty.[8] However, despite its noble mission, the ECtHR faced and faces inherent limitations in addressing the complex issues surrounding nationalisations and reprivatisations. Now some of the details can be analysed.

3. The Temporal Scope of the ECHR and of Protocol No. 1

The first fundamental issue and tool to limit its jurisdiction used by the ECtHR is related to the temporal scope of the ECHR and of Protocol No. 1. The concerned states acceded to the ECHR and ratified it long after nationalisation took place. For example, Hungary ratified the ECHR in 1993,[9] more than three decades ago, while Romania did so in 1994.[10]

As an example, in the case of *Costandache v Romania*, the ECtHR examined the applicant's complaint regarding the refusal of Romanian State authorities to return a property that had been nationalised by the Romanian State under Decree No. 92/1950. The Court determined that the nationalisation had been carried out by Romanian authorities, as confirmed by domestic court judgments in 1950, prior to 20 June 1994 when the Convention entered into force for Romania. Therefore, the ECtHR concluded that it lacked jurisdiction, *ratione temporis*, to assess the circumstances of the nationalisation or its ongoing effects. Consequently, the Court stated that there was no basis for finding a continuing violation of the Convention

8 Paczolay, 2022, pp. 133–155.

9 1993. évi XXXI. törvény az emberi jogok és az alapvető szabadságok védelméről szóló, Rómában, 1950. november 4-én kelt Egyezmény és az ahhoz tartozó nyolc kiegészítő jegyzőkönyv kihirdetéséről.

10 Lege nr. 30 din 18 mai 1994 privind ratificarea Conventiei pentru apararea drepturilor omului şi a libertatilor fundamentale şi a protocoalelor aditionale la aceasta conventie.

attributable to Romanian authorities that would fall within the Court's jurisdiction over time.[11]

In accordance with the ECtHR, individuals who undergo deprivation of property during the process of nationalisation, in jurisdictions that are at the time not subject to the ECHR regime, do not possess a property right that falls within the protective scope of the ECHR. This statement, although apparently straightforward, holds significant implications for the course of legal proceedings and the boundaries of justice. It asserts that nationalisation measures themselves fall outside the jurisdiction of the ECHR system.

Applicants attempted to circumvent this approach by arguing that the nationalisation of their property constituted a continuous violation of their rights. However, the Court rejected this interpretation, asserting that the deprivation of ownership or other rights *in rem* is generally an instantaneous act and does not create a continuous situation of deprivation of a right (*Malhous v the Czech Republic (dec.) [GC];*[12] *Preußische Treuhand GmbH & Co. KG a.A. v Poland (dec.), § 57*).[13] Furthermore, the Court determined that the applicants did not possess a property right at the time when the ECHR and Protocol No. 1 came into force. In consequence, the ECtHR regarded the deprivation of ownership or other rights *in rem* as an immediate and singular occurrence, rather than an ongoing condition of rights deprivation. The Court viewed such acts as instantaneous events, not as prolonged or continuous infringements on property rights.

As a judge, the author would likely adopt a cautious approach similar to the Court's stance. However, in his capacity as a university professor, he has the freedom to express a broader perspective on justice. His concern lies in the complexity inherent in the *continuity argument*, which extends beyond the Court's ostensibly simplistic position. The crux of the matter lies in the conflation of disparate situations stemming from nationalisation, which can be categorised into three distinct forms. Firstly, nationalisation conducted in accordance with the laws of the Soviet-style dictatorship; secondly, nationalisation carried out in contravention of the legal conditions imposed by the dictatorship; and thirdly, nationalisation undertaken without any legal basis. All three forms are common in the history of nationalisations.

11 There is no official English translation of the judgement, the French official version states the following: "*La Cour relève que l'expropriation a été faite par les autorités de Roumanie, comme l'arrêt de la cour d'appel de Iaşi l'a confirmée, en 1950, soit avant le 20 juin 1994, date d'entrée en vigueur de la Convention à l'égard de la Roumanie. La Cour n'est donc pas compétente ratione temporis pour examiner les circonstances de l'expropriation ou les effets continus produits par elle jusqu'à ce jour (cf. Malhous c. République tchèque (déc.), n° 33071/96, 13 décembre 2000, CEDH 2000-XII). Elle estime que, dans ces conditions, il n'est nullement question d'une violation continue de la Convention imputable aux autorités roumaines et susceptible de déployer des effets sur les limites temporelles à la compétence de la Cour (cf., mutatis mutandis, l'arrêt Prince Hans-Adam II de Liechtenstein c. Allemagne, précité, § 85).*" *https://hudoc.echr.coe.int/eng?i=001-43536.*

12 https://hudoc.echr.coe.int/fre?i=002-5837.

13 https://hudoc.echr.coe.int/eng?i=001-88871.

In the first scenario, it may indeed be feasible to uphold a decision rejecting the continuity of the violation. However, in the latter two scenarios, such an argument may not hold true. In the second and third scenarios, nationalisation occurred outside the bounds of legality prescribed by the law of the Soviet-style dictatorship. It either transgressed the legal framework established by the dictatorship or lacked any semblance of legality altogether. In these cases, the state was divesting itself of a right it had never lawfully obtained. The complexity arises from the varying legal contexts and implications associated with each form of nationalisation, necessitating a nuanced approach to justice that acknowledges these differences.

The court's reluctance to engage deeply with the legacies of totalitarian regimes is understandable given the complex legal and moral issues such engagement entails. Historical contexts marked by systemic injustice and lawlessness under totalitarian rule present a formidable challenge. The expectation for the ECtHR to address historical injustices – issues that individual states themselves have inadequately reconciled – places an immense and unrealistic burden on the court. These legacies, fixed within the collective memory of nations, pose significant challenges to legal redress. Tasking the ECtHR to solve these historical grievances may exceed its intended judicial mandate and capabilities. While the court may opt to limit its engagement with these historical complexities, it retains an undeniable responsibility to uphold justice in contemporary issues. As a guardian of human rights, the ECtHR must remain vigilant against current violations and ensure state accountability, thus balancing its judicial restraint with its duty to protect fundamental rights.

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4. A Duty of the East Central European States to Restitute Nationalised Property?

Nationalisation certainly deviated from the standards of human rights. Can this deviation be construed as imposing a duty on post-communist East Central European states to restitute nationalised property?

The ECtHR, as a political institution by nature, approached the issue of state sovereignty with caution, aiming to minimise its intervention in this domain. Fully aware of the potential consequences, the Court sought to avoid acting with undue force, carefully designing its decisions and considering the broader implications of its rulings. Nationalisation, a comprehensive reconfiguration of property ownership on a massive scale, carried significant implications with far-reaching consequences. The Court was acutely aware of the complexities involved in this process and the macro-level impact that any of its decisions could have. Consequently, the ECtHR's approach was characterised by a careful balance between the imperatives of justice and the practical realities of political pragmatism. While dedicated to upholding human rights principles, the Court was mindful of the risks of intruding too deeply

into matters of state sovereignty. In doing so, it aimed to respect the autonomy of individual states in determining their approach to restitution.

The inquiry posed revolved around whether the ECHR, which had already been ratified and was in force in the relevant states, mandates these states to restore nationalised property. The response to this query is also negative.

Article 1 of Protocol No. 1 cannot be construed as imposing an obligation on the Contracting States to restore property that was transferred to them prior to their ratification of the Convention (*Jantner v Slovakia*, § 34).[14] This rationale is straightforward: Article 1 of Protocol No. 1, as mentioned, does not guarantee the right to *acquire* property. The justification for this stance is elegantly simple yet profound in its implications: Article 1 of Protocol No. 1, as articulated above, does not explicitly enshrine the right to acquire property. While the Article guarantees the right to peaceful enjoyment of possessions, it does not extend to encompassing a general obligation for states to restore property acquired prior to their ratification of the Convention.

5. Does the ECHR, Once in Force, Set Standards for Restitution?

A compelling question arises when considering whether the ECHR provides a framework for national legislators in conceptualising restitution cases. The Court has consistently responded in the negative in several landmark cases, maintaining that such matters are best left to the discretion of national legislators. This position highlights the balance between international human rights law and domestic legal systems. While the ECHR establishes a general framework for the protection of human rights, it intentionally refrains from prescribing specific mandates or guidelines for addressing complex restitution issues at the national level. Instead, it defers to the autonomy of national legislators, allowing them to develop solutions tailored to the unique sociopolitical contexts of their respective states. In essence, the Court's position acknowledges the diversity of approaches and interpretations within the East Central European legal landscape, recognising the importance of allowing national legislators the flexibility to determine the solutions for these difficult issues within their respective jurisdictions.

For example, the ECtHR stated that Article 1 of Protocol No. 1 does not impose any limitations on the freedom of Contracting States to define the scope of property restitution and establish the conditions under which they opt to restore property rights to former owners (*Maria Atanasiu and Others v Romania,* § 136).[15]

14 https://hudoc.echr.coe.int/eng?i=001-60964.
15 https://hudoc.echr.coe.int/eng?i=002-806.

Specifically, Contracting States are afforded a broad margin of appreciation in deciding to exclude certain categories of former owners from such entitlements. In cases where certain categories of owners are excluded by the national legislator, their claims for restitution cannot form the basis of a 'legitimate expectation' warranting protection under Article 1 of Protocol No. 1 (*Gratzinger and Gratzingerova v the Czech Republic* (dec.) [GC], §§ 70-74;[16] *Kopecký v Slovakia* [GC], § 35;[17] *Smiljanić v Slovenia* (dec.), § 29[18]).

In consequence, the East Central European states possess the freedom to formulate their own restitution policies. Each state has the power of determining whether restitution is necessary, as well as the scope, entitlement criteria, and procedural mechanisms for restitution. Each state independently chose its own regime in this regard.

6. The Role of the ECtHR in Restitution of Nationalised Property

Following the examination of the three grounds for refusal discussed in the preceding subchapters, the role of the ECtHR in the restitution of nationalised property emerges as a pertinent question. In the exploration of the complexities of the ECtHR, it became clear that its capacity to deal with restitution cases was circumscribed by specific limitations. What, then, fell within its jurisdiction? Essentially, the ECtHR was tasked with assessing the conformity of national legislation and procedures – autonomously and divergently established by each state – with the ECHR, specifically concerning the restitution of nationalised property implemented after the ECHR's ratification by a given state. The Court intervened only when these procedures were found to contravene the Convention. Yet, even in such cases, the ECtHR found itself grappling with some of the most convoluted legal dilemmas in its history. With hundreds upon hundreds of restitution cases emanating from East Central European states, the Court was thrust to the centre of a legal labyrinth and saw the limits of its jurisprudence tested.[19]

The ECtHR did not emerge with a comprehensive solution for the restitution of nationalised property. Despite the widespread recognition of the injustices perpetrated

16 https://hudoc.echr.coe.int/eng?i=001-22710.

17 https://hudoc.echr.coe.int/eng?i=002-4236.

18 https://hudoc.echr.coe.int/eng?i=001-93340.

19 The Interlaken process was initiated in 2010 to address the backlog at the European Court of Human Rights, notably intensified by the high volume of restitution cases from East Central Europe, with the objective of enhancing the court's efficiency. However, the Court tends to prioritise formal requirements and procedural grounds for rejecting cases to reduce this backlog – a strategy more suited to a commercial court than one dedicated to human rights adjudication.

by Soviet-style dictatorships and the myriads of uncertainties, ambiguities, and political considerations surrounding restitution, it would be unrealistic to anticipate the ECtHR to effectively address problems that remained unresolved by the affected states themselves in a fair and equitable manner.

Through meticulous examination and analysis of decisions rendered by the ECtHR, this article aims to highlight five specific issues.

a) Given the constraints elicited earlier, it is evident that numerous restitution cases are not adjudicated under the provisions of Protocol No. 1, but instead, they are scrutinised through the lens of the fair trial requirements stipulated in the civil limb of Article 6 of the ECHR, where procedural considerations take precedence.[20]

In the specific context of the restitution of nationalised properties in Romania, the ECtHR observed, under Article 6, that the absence of legislative coherence and conflicting case law regarding the interpretation of certain provisions of restitution laws contributed to a pervasive atmosphere of legal uncertainty (*Tudor Tudor v Romania*, § 27[21]). Therefore, given the inconsistent decisions rendered by domestic courts and the absence of justification for departing from the apparent logic of a prior judgment, the deprivation of an applicant's 'possessions' cannot align with the principles of the rule of law, must not exhibit arbitrariness, and consequently fails to satisfy the criterion of lawfulness as stipulated in Article 1 of Protocol No. 1 (*Parvanov and Others v Bulgaria*, § 50[22]).

A substantial portion of cases pertained to instances of non-compliance with final judicial decisions or non-enforcement of such decisions. According to the ECtHR, a judgment that imposes an obligation on authorities to provide compensation, whether in the form of land or monetary compensation, in accordance with domestic legislation governing the restitution of property rights grants the applicant an enforceable entitlement that qualifies as a 'possession' within the purview of Article 1 of Protocol No. 1 (*Jasiūniene v Lithuania*, § 44[23]). Consequently, in cases where a final court judgment favours the claimant, the concept of 'legitimate expectation' may be invoked (*Driza v Albania*, § 102[24]).

A subset of cases presented to the Court pertained to the failure to uphold the *res judicata* effect of a final judgment, leading to the annulment of the applicant's property title without compensation. In such instances, the Court has determined that the breach of the principle of legal certainty constitutes a violation of the requirement of lawfulness under Article 1 of Protocol No. 1.

20 For a general analysis of Article 6 ECHR, see Selejan-Guţan, 2011, pp. 128–152; Bercea, 2020, pp. 187–215.

21 https://hudoc.echr.coe.int/fre?i=001-91885.

22 https://hudoc.echr.coe.int/fre?i=001-72191.

23 https://hudoc.echr.coe.int/eng?i=001-60975.

24 https://hudoc.echr.coe.int/fre?i=001-83245.

This was exemplified in cases such as *Parvanov and Others v Bulgaria* (§ 50), *Kehaya and Others v Bulgaria* (§ 76)[25], and *Chengelyan and Others v Bulgaria* (§§ 49-50).[26] The requirement of lawfulness extends beyond mere adherence to domestic legal provisions; it encompasses compliance with the principles of the rule of law. Consequently, it entails safeguarding individuals from arbitrary actions, as was held in *Parvanov and Others v Bulgaria* (§ 44).

b) The ECtHR endorsed the excessive duration of restitution proceedings, also in the context of fair trial requirements (Article 6 of the ECHR).[27]

In the 2012 judgment of the case *Catholic Archdiocese of Alba Iulia v Romania*[28], the ECtHR unanimously concluded that there was a violation of Article 1 of Protocol No. 1 to the European Convention on Human Rights. The case revolved around a Catholic religious community seeking to reclaim, under an emergency ordinance (a provisional act adopted by the Government) enacted in 1998, ownership of assets nationalised by Romanian authorities during the communist era: the building and the collection of the Batthyaneum, a vast repository of valuable books, manuscripts, documents, and artifacts. The ECtHR observed that almost 14 years after the initiation of the preliminary procedure stipulated by the ordinance, the applicant had not received any notification of a decision, leaving it in a state of uncertainty regarding the fate of the assets. Moreover, the Court emphasised that the cultural and historical significance of the property in question exacerbated the inexplicable inaction. This occurred in 2012. Subsequently to this judgement, after another nine years, in 2021, the state rejected the restitution claim. While the author can comprehend (but not accept) the Romanian state's desire to retain ownership of this collection of globally significant codices and historical documents, it should have adjusted its legislation accordingly rather than committing another infringement.

The excessive duration of restitution proceedings has led to a violation of Article 6, as indicated in the case of *Sirc v Slovenia* (§ 182)[29]. In such instances, the Court often deemed it unnecessary to assess the applicants' complaints under Article 1 of Protocol No. 1. However, when delays occurred in proceedings subsequent to the recognition of the applicant's property rights, the Court identified a distinct breach of Article 1 of Protocol No. 1. This was primarily due to the uncertainty in which the applicants were left regarding the fate of their property, as illustrated in cases such as *Igarienė and Petrauskiene v Lithuania* (§§ 55 and 58)[30] and *Beinarovič and Others v Lithuania* (§§ 141 and

25 https://hudoc.echr.coe.int/eng?i=001-72559.
26 https://hudoc.echr.coe.int/eng?i=001-178697.
27 On the issue of excessive duration, for further details see Bălăşoiu, 2017, pp. 133–141.
28 https://hudoc.echr.coe.int/eng?i=001-113434.
29 https://hudoc.echr.coe.int/eng?i=001-85763.
30 https://hudoc.echr.coe.int/eng?i=001-93730.

154)[31]. In the case of *Kirilova and Others v Bulgaria* (§§ 120-121)[32], significant delays were observed in the delivery of flats offered as compensation for the expropriation of the applicants' properties.

c) If a state, subsequent to ratifying the Convention, enacts or maintains restitution legislation, such legislation bestows upon individuals a 'new right of ownership', thereby establishing a legitimate expectation safeguarded under Article 1 of Protocol No. 1.

However, the anticipation that a previously enforced law would be amended in the future to favour an applicant does not constitute a form of legitimate expectation within the context of Article 1 of Protocol No. 1. There exists a distinction between a mere hope for restitution, albeit understandable, and a legitimate expectation, which necessitates a more tangible foundation than a mere hope and must be rooted in a legal provision or act, such as a judicial decision. This differentiation was underscored in cases like *Gratzinger and Gratzingerova v the Czech Republic* (dec.) [GC] (§ 73) and *Von Maltzan and Others v Germany* (dec.) [GC] (§ 112).[33]

In the pilot judgment[34] *Manushaqe Puto and Others v Albania* (§§ 110-118),[35] the Court delivered a significant verdict, finding a violation of Article 1 of Protocol No. 1 to the Convention. This ruling was based on the failure to enforce a final decision that had granted the applicants compensation instead of restitution for their property.

When considering the execution of enacted reforms, the essence of the rule of law inherent in the Convention and the principle of lawfulness articulated in Article 1 of Protocol No. 1 mandate that States adhere not only to the enactment of laws but also to their consistent and foreseeable application. This encompasses not only the obligation to respect and implement laws in a coherent manner but also, as a natural consequence of this obligation, to establish the legal and practical frameworks necessary for their effective execution. This assertion, highlighted in the case of *Broniowski v Poland* [GC] (§ 184)[36], underscores the critical importance of ensuring not only the existence but also the operational efficacy of restitution legislation.

d) The ECtHR exercised caution also regarding compensation matters. In general, the ECtHR asserted that Article 1 of Protocol No. 1 mandates that the compensation awarded for property seized by the State must be 'reasonably related' to its value (*Broniowski v Poland* [GC], § 186). Furthermore, the Court

31 https://hudoc.echr.coe.int/eng?i=001-183540.
32 https://hudoc.echr.coe.int/eng?i=001-69311.
33 https://hudoc.echr.coe.int/eng?i=001-68660.
34 For the notion of pilot judgement see Haider, 2013 and Leach, 2011, pp. 223–241.
35 https://hudoc.echr.coe.int/fre?i=001-112529.
36 https://hudoc.echr.coe.int/fre?i=001-61828.

reiterated that regardless of the justification presented by the Government for its interference with the applicant's property rights, a lack of funds cannot excuse the failure to enforce a final and binding judgment on debt owed by the State (*Driza v Albania*, § 108; *Prodan v Moldova*, § 61[37]).

On the other hand, the ECtHR endorsed the reduction of compensation levels for expropriated land, implemented through amendments to subordinate legislation during ongoing domestic administrative proceedings, provided that such reduction aligns with the overarching objective of safeguarding the public finances and the compensation awarded is not deemed unreasonably low (*Serbian Orthodox Church v Croatia*, §§ 62, 65–68[38]).

In assessing the adequacy of compensation, the ECtHR confronted an exceptionally sophisticated and challenging scenario. Recognising the unique circumstances at play, the Court ultimately determined that a minimum threshold of 10% of the present-day value of the initial property could be deemed reasonable within the particular context of Albania, as articulated in the case of *Beshiri and Others v Albania* (§§ 194-196).[39] This judgment reflected the Court's recognition of the complex economic realities inherent in addressing compensation issues within the Albanian context.

e) Lastly, one of the most intriguing topics for a scholar in private law is the matter of sales by the State of a nationalised property to a third party acting in good faith. In Romania, Act No. 112 of 1995 initiated the process of restitution for buildings situated within localities, particularly in urban settings. However, this legislation only permitted the restitution in kind of residential buildings that were previously leased to the former owner (a Romanian citizen) or their heirs, or were unoccupied by other tenants at the time (Article 2).

Conversely, the law allowed all tenants, not just those affected by nationalisation measures, to purchase the nationalised real estate they were renting, well below the market price, effectively as a means to solidify the benefits of nationalisation for these individuals, akin to a consolidation of previous nationalisation in disregard of the restitution rights of previous owners. The sale of nationalised apartments to tenants was presented as a social policy measure by the ruling party, which argued that restitution would leave large segments of the population homeless. In reality, however, this policy served as a means to enable the party's supporters to acquire property, thereby securing their loyalty. Act No. 112 of 1995 impeded the comprehensive implementation of subsequent restitution measures. The tenants who purchased property were regarded as acquiring it in good faith from the state. The zenith of restitution

37 https://hudoc.echr.coe.int/eng?i=001-61757.
38 https://hudoc.echr.coe.int/eng?i=001-204082.
39 https://hudoc.echr.coe.int/fre?i=001-202475.

for nationalised buildings in Romania was achieved with Act 10 of 2001, which enabled a more expansive scope of in-kind restitution for nationalised buildings, excluding those that had already been sold to former tenants.[40] Based on these premises, this category of cases is characteristic to Romania.

According to the ECtHR, when a Contracting State, having ratified both the Convention and Protocol No. 1, introduces legislation allowing for the complete or partial restitution of property nationalised under a previous regime, such legislation may be interpreted as conferring a new property right protected by Article 1 of Protocol No. 1 upon individuals who meet the eligibility criteria. This was underscored in the case of *Maria Atanasiu and Others v Romania* (§ 136), highlighting the potential for legislative measures to reinforce property rights within the framework of international conventions.

Similarly, the establishment of arrangements for restitution or compensation under pre-ratification legislation may also trigger the protection of Article 1 of Protocol No. 1, provided that such legislation remains in force following the Contracting State's ratification of Protocol No. 1. This principle was affirmed in cases such as *Von Maltzan and Others v Germany* (dec.) [GC] (§ 74), *Kopecký v Slovakia* [GC] (§ 35), and *Broniowski v Poland* [GC] (§ 125), emphasising the continuity of property rights under evolving legal frameworks. Certainly, a perplexing question emerges: if the ECtHR acknowledges the continuity of the 'property right' (a claim for restitution) that originated before the Convention came into effect in a certain state and endeavours to safeguard it, why does a similar rationale not extend to cases concerning the persistence of property deprivations stemming from illegal nationalisation?[41] This disparity in approach prompts deeper inquiry into the court's interpretation and application of legal principles, inviting scrutiny of the underlying factors influencing its decisions.

The ECtHR considered the act of a state selling an individual's property to a third party who acts in good faith, particularly when this occurs before the final judicial confirmation of the individual's title, constitutes a deprivation of property. This deprivation, especially when accompanied by a complete absence of compensation, contradicts the principles outlined in Article 1 of Protocol No. 1. This assertion was affirmed in the case of *Vodă and Bob v Romania* (§ 23)[42], highlighting the significance of safeguarding property rights as enshrined in international legal frameworks.

In the case of *Katz v Romania* (§§ 30-36)[43], the ECtHR identified a widespread issue stemming from flawed legislation regarding the restitution of nationalised buildings sold by the State to third parties acting in good faith. Despite numerous amendments to the law, the situation failed to improve. The Court viewed this

40 Veress, 2022, pp. 261–262.
41 For this reasoning, see above, subchapter 3.
42 https://hudoc.echr.coe.int/eng?i=001-84892.
43 https://hudoc.echr.coe.int/eng?i=001-90757.

legislative inadequacy not only as exacerbating the violation of Article 1 of Protocol No. 1 but also as posing a threat to the future efficacy of the Convention machinery under Article 46 of the Convention, regulating the binding force and execution of ECtHR judgements.[44] This challenge persisted in subsequent cases such as *Preda and Others v Romania* (§§ 146-148)[45] and *Ana Ionescu and Others v Romania* (§ 29)[46], emphasising the ongoing significance of addressing systemic issues within the legal frameworks governing property restitution in Romania.

The failure to enforce final judgements, alongside various deficiencies within the Romanian property restitution system, culminated in a breach of Article 1 of Protocol No. 1 in the case of *Maria Atanasiu and Others v Romania*. This pivotal legal dispute not only highlighted systemic shortcomings but also prompted the initiation of a pilot judgment procedure (§§ 215-218). Such a development underscored the critical need for addressing structural flaws within the restitution framework to ensure the effective protection of property rights.

7. Conclusions

The ECtHR found itself entangled in a mesh of moral, legal, political, and economic dilemmas when confronted with legislation pertaining to the restitution of property seized by former Soviet-style totalitarian regimes or compensating those affected by such nationalisations in East Central Europe. In my opinion, the Court was hesitant to assume either the political or moral responsibility on behalf of the states involved. This cautious approach stemmed from the significant social and economic ramifications such decisions could potentially entail. Indeed, a ruling concerning Albania or Croatia, for instance, had the potential to reverberate across the entire region, affecting national economies and political landscapes alike.

Thus, the ECtHR undertook the formidable task of balancing justice with practical considerations, addressing a multitude of complex issues that extended beyond mere legal interpretation. As the arbiter of human rights, the Court was acutely conscious of its role in influencing the socio-economic landscape of the region, exercising caution to mitigate potential unintended consequences.

The Court was unable to undertake "the reform of the political, legal, and economic structure of the State concerned, which inevitably entails the adoption of economic and social laws on a large scale."[47] Similar to the partial solutions offered

44 On the article 46 ECHR, see Sicilianos, 2014, pp. 285–316.
45 https://hudoc.echr.coe.int/eng?i=001-142671.
46 https://hudoc.echr.coe.int/fre?i=001-191274.
47 Broniowski v Poland [GC], § 149.

by states, many of the former illegalities are now irreversible, resulting in the Court also providing only partial solutions to this issue despite its earnest intentions. Ultimately, the adequacy of the Court's actions is subject to subjective interpretation.

While the ECtHR plays a crucial role in safeguarding civil and political rights across Europe, its ability to address the complex issues surrounding nationalisations and reprivatisations was truly limited. The pursuit of restitution, though a noble endeavour aimed at rectifying historical injustices, encountered practical and legal obstacles that transcended the jurisdictional reach of a human rights court. Complex legal frameworks, competing claims, and political sensitivities rendered the process of restitution inherently challenging, with no easy solutions readily available. But the court undeniably possessed the capacity for further action, albeit within certain limits.

In this light, there can be observed a reluctance on the part of the ECtHR to engage directly with the difficulties of property rights processes in the eastern half of Europe. This may reflect a pragmatic recognition of its limitations rather than a dismissal of the importance of restitution.

Ultimately, while the pursuit of restitution for injustices suffered under communist nationalisations is a noble endeavour, it may necessitate a broader engagement encompassing legal, political, and socioeconomic dimensions beyond the remit of a human rights court. As East Central Europe struggles with the complexities of its past, the quest for justice and reconciliation, property rights must be tackled with sensitivity, nuance, and a recognition of the authentic challenges at hand. Simultaneously, a sense of pessimism arises as restitution processes remain forever incomplete in numerous countries. The opportunity to implement a more comprehensive and equitable solution to restitution, emerging over three decades following the regime changes, is perceived to have elapsed. The endeavour to revert a society altered by dictatorships to its pre-totalitarian state has proven unattainable – also in terms of property rights.

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