

Property Rights and Transitional Justice: Restitution in Hungary and East Germany

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**Property Rights Under Transition
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“How can an emerging democracy respond to public demands for redress of the legitimate grievances of some without creating new injustices for others?”¹

The past 50 years have been a period of tremendous change in the way that many people in the world are governed. When a new government attempts to correct for rights violations of the prior regime, policies for the transition often reflect considerations of “retroactive justice.”² This paper attempts to explore how different applications of retroactive (or “transitional”) justice regarding land expropriations lead to different land restitution programs in different countries. In Section I, this paper will lay out the link between transition and changing property rights regimes. In section II, land reform policy options for transitioning countries are described, focusing on restitution and factors that might influence policy design. In section III, case studies of Hungary and the former East Germany are presented as two countries that included land restitution policies as part of their transition. The paper concludes in section IV with implications from restitution efforts for other policy areas.

I. TRANSITION

Literature on transitions in property rights regimes portrays property rights as socially constructed reflections of a country’s economic systems and social values. Demsetz would argue that legal rules around property rights “evolve” to arrive at the most efficient set of rules.³ Merrill, however, would refine Demsetz’s thesis to allow social norms and

¹ Solomon, Richard H. “Introduction,” from *Transitional Justice*, ed. Kritz, Neil J., (1995) p. xxiii.

² Morvai, Krisztina. “Retroactive Justice based on International Law: A Recent Decision by the Hungarian Constitutional Court,” from *Transitional Justice*, ed. Kritz, Neil J., (1995) p.661. The term “retroactive justice” is a translation of a term used in a Hungarian Constitutional Court ruling allowing statutes of limitations to be extended in order to prosecute specific crimes that occurred under communism. “Retroactive justice” will be used broadly to apply to all applications of historical justice considerations, while “transitional justice” refers more narrowly to justice considerations regarding a prior regime.

³ Demsetz, Harold. “Towards a Theory of Property Rights.” 57 *American Economic Review Papers and Procedures* 347-358 (1967).

interest group theory to affect a property rights system in a given society.⁴ In the past 50 years, the world has experienced regimes that have substantially weakened property rights. This weakening has often resulted in expropriation of individual property. With the failure of these regimes in the more recent past, the world has also experienced a new wave of transitions that include a strengthening of property rights and policy measures to deal with the prior regime's expropriations. The transition under inquiry here is the collapse of Eastern European former communist regimes.⁵

Since 1989, a number of former communist countries have made the transition to market-based democracies. Instituting a private property regime was a key aspect of this transition, as property privatization had tremendous signaling power about the country's commitment to the transition, both within the country and externally.⁶ Land restitution in these countries was thus a high-profile event, and was expected to dramatically affect the distribution of land ownership. Estimates of how much land affected in total run as high as 60%.⁷ As case studies of contrasting approaches to land restitution in a transitioning property regime, this paper will analyze Hungary and the former East Germany (GDR).

II. LAND REFORM

Retroactive (or "transitional") justice is often one of the first symbolic actions undertaken by a new government and can quickly establish its legitimacy (or illegitimacy).⁸

One of the most interesting aspects of transitional justice is that governments seek to right

⁴ Merrill, Thomas W. "Introduction: the Demsetz Thesis and the Evolution of Property Rights," 16 *Journal of Legal Studies* 1 (2002) at 338.

⁵ One other major transition of the past 50 years with implications for shifting property rights regimes is independence from colonial governments in Africa and Asia. This transition will not be explored in this paper.

⁶ Verdery, Katherine. "The Obligations of Ownership: Restoring Rights to Land in Postsocialist Transylvania" from *Property in Question*, eds. Verdery, Katherine and Humphrey, Caroline (2004) p.142.

⁷ Marcuse, Peter (1996). "Privatization and Its Discontents: Property Rights in Land and Housing in Eastern Europe" from *Cities After Socialism: Urban and Regional Change and Conflict in Post-Socialist Societies*, eds. Gregory Andrusz, Michael Harold, and Ivan Szelenyi, p.175

⁸ For example, the 1989 execution of former Romanian dictator Nicolae Ceausescu damaged the credibility of the new Romanian government.

wrongs done by a previous government. Certain actions may have been perfectly legitimate under an earlier property rights regime, but under the property rights regime of the new government those actions could constitute harms. In creating a restitution program, the government is holding themselves accountable for the actions of the previous one.

International doctrine around this issue currently holds that: “a) the state is obligated to provide compensation to victims of human rights abuses perpetrated by government and b) obligations for compensation carry over to successor governments.”⁹ The interpretation of what constitutes a human rights abuse varies, but currently no international doctrine *requires* countries to set up a land restitution program. Despite this, many transitioning countries drafted new constitutions following the transition that reflected a commitment to land restitution, and some created laws that grant individual citizens the right to sue for restitution under certain parameters. Two essential questions underlie the theoretical discussion. First, why do countries engage in land restitution? Second, why do different countries have different forms of restitution? The former question is addressed briefly; the latter in depth.

Why do countries retribute land?

Restitution programs are a subset of reparations. Reparations are defined as a legal remedy from a wrongdoer to a victim, but without the constraints of identity between the wrongdoer and the payer, or between the victim and the beneficiary.¹⁰ In other words, the person or people paying reparations do not have to be the people who committed the wrong, nor do the people benefiting from the restitution have to be the people who were themselves harmed. A common application of reparations is a transitional justice situation;

⁹ Kritz, Neil J., “The Dilemmas of Transitional Justice,” from *Transitional Justice*, ed. Kritz, Neil J., (1995), p. xxxvii.

¹⁰ Posner, Eric A. and Adrian Vermeule. “Reparations for Slavery and Other Historical Injustices,” 103 *Columbia Law Review* 689 (2003), at 691-92.

however, reparations can also be applied without a government transition.¹¹ Restitution, as a type of reparation, refers to restoring a property right that has been diminished or taken to its original status, or providing a form of compensation if this is not possible.¹²

Restitution is not the only policy option for dealing with injustice in prior expropriation or inequalities in land distribution. In addition to restitution, other options include redistribution and tenure reform.¹³ Redistribution involves taking land from large landholders, often absentee landlords or land that is underutilized, and giving it to those who do not have land. This can be done through a market approach, where the government buys out large landholders, or through the use of force.¹⁴ Land tenure reform refers to policies that change the nature of property rights, for example by making tenants owners. Among these possible options, countries choose restitution because restoring a right to its original status establishes a connection to the system in place before the regime that conducted the expropriations. Neither redistribution nor land tenure reform make that direct connection, and thus lack the characteristics of transitional justice that might be desired by a new government.

Why do different countries have different forms of restitution?

A substantial level of variety exists between land restitution systems in different countries. Even with similar types of government transitions, such as occurred in post-colonial or post-socialist countries, different kinds of restitution are observed. This paper outlines five potential factors explaining why transitioning countries might produce different restitution systems: (1) Strength of individual property rights against the state prior to the

¹¹ A recent example of non-transition reparations payments were those for Japanese-American internees during WWII. Beneficiaries to the 1988 U.S. program were Japanese-Americans who had been interned, not their direct descendents and not Japanese-Americans generally.

¹² Zirker, Olivia. "This Land is My Land: The Evolution of Property Rights and Land Reform in South Africa," 18 *Connecticut International Law Journal* 621 (Spring, 2003) at 635.

¹³ *Id.* at 634-35.

¹⁴ Government-sponsored forced redistribution in Zimbabwe is an example of this. See *id.* at 639.

regime that conducted the expropriations; (2) Degree of injustice present in land expropriation; (3) Willingness of society to recognize collective moral obligation; (4) Internal constraints on new government; and (5) External constraints on new government.

Following a more detailed discussion of these factors is an analysis of how the factors might affect the design of a restitution system, from a theoretical perspective.

(1) Strength of property rights. If restitution seeks to reinstate the status quo for property rights that were in existence before the prior government, variation in those initial property rights would produce different restitution programs. Property rights that were relatively strong may be more likely to be reinstated, while in a restitution program rights that were weaker might not be reinstated.

(2) Degree of injustice. Countries often seek restitution when either citizens have been harmed, citizens have unfairly benefited at the expense of others, or both. Land expropriation can fall into both categories. If the expropriation caused only harm but not unjust enrichment, the design of a restitution scheme might look quite different than if the expropriation was done for the benefit of another group. Restitution for harm is ordinarily a strict standard and requires both identity between the victim and the beneficiary, and foreseeability that the victim would be harmed.¹⁵ Restitution for unjust enrichment is a more forgiving standard, in that to hold an individual or group liable for benefiting itself at the expense of someone else, foreseeability is not required. However, there is a more difficult standard of proof with an unjust enrichment restitution. This requires proof that the victim *would have* benefited, save for the action of the wrongdoer. For harm, the sole requirement is proof of previous harm.

¹⁵ Posner, *supra* note 10, at 701.

(3) Collective moral obligation. Retroactive justice policies inherently reflect an acknowledgement of a moral obligation held collectively by groups such as nations or racial/ethnic groups. With a collective moral obligation, citizens of country X feel responsible for actions of their country, even if the wrongs were committed under a prior government, because they were conducted under the auspices of the country. But without that collective obligation, there is significantly less justification for restitution policies that burden citizens because there is not the same feeling of responsibility for previous harm.

(4) Internal constraints. The dominant external constraint on a transitioning government is fiscal: restitution can be an expensive process, both to administrate and to implement the substance of what a program attempts to accomplish. Transitioning governments vary widely in the extent to which they are willing to burden their budgets with efforts to reconcile past wrongs.

(5) External constraints. International financial institutions such as the World Bank and the IMF often assist transitioning countries with loans, subject to certain constraints about how the transition is handled. Under structural adjustment programs, for example, governments operate under severe budget constraints and might be unable to allocate money to a restitution effort if they want to remain eligible for the loan. The degree of dependence on international institutions or on foreign governments for financial support during a transition varies widely. From a theoretical perspective, it is possible to explore how these factors might affect the actual mechanics of a restitution system.

Design of restitution systems

With consideration of all of these factors, it is possible to be addressing some of the institutional design considerations. Given that a government has decided to implement some form of land restitution, Posner and Vermeule outline four major considerations for

institutional design: 1) type of benefit; 2) identity of payers; 3) identity of beneficiaries; and 4) single event v. continued benefits.¹⁶

With the first consideration, the type of benefit can be “natural restitution” (restitution of the claimed parcel of land); “substitutional restitution” (restitution of a similar piece of land); or compensation in some non-land form: an ownership share in another entity, entitlement to a government benefit, or simply cash.¹⁷ These forms have some key differences: as some people frequently attach value to land above its monetary value, in those cases restitution that is not in-kind will fail to fully compensate. Additionally, the cost of administering these different types of restitution will vary widely. The second consideration, who pays for the restitution, is usually straightforward. The continuity of law principle establishes that a current government is obligated to compensate for a prior regime’s failings. But beyond that, the government must determine where certain burdens may fall; for example, whether the current occupants of claimed land will be compensated for being dispossessed, and if so, how much compensation should they receive. Similar issues govern the third consideration, who benefits from restitution. In some instances, there may have been more than one transition in property rights regimes within a single country. In the GDR, for example, citizens endured the Nazi party’s confiscation of private property, takings under subsequent Soviet occupation, and then finally collectivization of private land under the socialist regime. Circumstances like these create overlapping claims, and establishing whose ownership interests to privilege is a difficult matter. Generational considerations (allowing benefits to attach to descendants of people

¹⁶ Posner, *supra* note 10, at 735.

¹⁷ Foster, Frances H. “Restitution of Expropriated Property: Post-Soviet Lessons For Cuba,” 34 *Columbia Journal of Transnational Law* 621 (1996) at 633-35.

who were dispossessed of their land) can be controversial as well.¹⁸ The final consideration of a restitution system, the temporal nature of benefits, is not widely addressed in the literature. Efficiency considerations point towards systems of one-time benefits. It is now appropriate to delve into the cases where restitution has been put into practice.

III. CASE STUDIES

Hungary

Hungary's transition to a market economy included a land restitution program that was shaped by a hugely significant court decision articulating a definition of "retroactive justice" for the country. As a consequence of this decision, Hungary's restitution policy universally substituted monetary restitution for actual restitution of land that had been expropriated under the communist regime. While the restitution was narrow in scope (in that there was no right to reclaim land that had been expropriated), it was wide in scale: former land owners, non-owners, non-residents and even foreign citizens were entitled to restitution. Hungary's restitution policy, as summarized by one scholar, was: "Everyone should get something," not "I should get mine back."¹⁹

Land in Hungary under the Austro-Hungarian empire was generally held in large estates farmed by peasant families. In 1919, following World War I, the Communist Party had a brief window governing the country during which enterprises were nationalized and all land plots larger than 40 hectares were seized by the government. However, the government failed to reallocate land to the peasants, and shortly a right-wing party drove out the

¹⁸ As previously discussed, restitution for harm (rather than unjust enrichment) typically requires foreseeability: that the harm was deliberately done to the claimant, not simply their predecessors. However, institutional design can bypass this requirement: in the East German restitution effort, the right to claim land expropriated by the Communist government was extended to children of parents whose land had been expropriated, on the grounds that the communists knew their actions were also harming the children of the property owners, because property is divisible. See Posner, *supra* note 10, at 700.

¹⁹ Swain, Nigel. "Getting Land in Central Europe," from *After Socialism: Land Reform and Social Change in Eastern Europe*, ed. Abrahams, Ray, (1996), p.214.

Communists. Up until WWII, Hungary was governed under this autocratic government. The social structure at this time consisted of a small group of rich and powerful landholders, a larger group of wealthy-to-middle class peasants, and another, smaller, group of the poorest families who may or may not have owned their own land, in addition to operating farms belonging to wealthier peasants.²⁰ During WWII, Hungary initially allied with Germany but was subsequently occupied by German forces. Hungarian Jews and other groups suffered persecution, confiscation of property and in many cases, genocide at the hands of Nazi Germany. From 1944 to 1945, Hungary was occupied by the Soviet Union.

After the Soviet Union officially withdrew, it continued to exercise a significant amount of influence over the socialist government in Hungary. Land reform progressed: a 1945 decree issued by the government transferred land of “great estates” to either peasant families or to become State and communal property.²¹ In 1949, cooperatives were first organized by forced consolidation of small parcels. Over the years, these cooperatives grew larger and larger, prompting dissatisfaction among the population and complaints that cooperatives bore a resemblance to the old feudal system.²² This factor and resentment over the continued involvement of the Soviet Union exploded in violence in 1956.

In the Revolution of 1956, students, activists and political leaders seeking to free Hungary of Soviet influence were brutally suppressed. Revolution swept the country, and in the upheaval, all cooperative farms collapsed as people fled. Over 20,000 Hungarians are believed to have died at the hands of the Soviet army in this year. The Soviets ultimately quelled the revolution, and the Hungarian government acted quickly to rebuild the

²⁰ Hann, Chris. “Land Tenure and Citizenship in Tazlar,” from *After Socialism: Land Reform and Social Change in Eastern Europe*, ed. Abrahams, Ray, (1996), pp.29-30

²¹ Paczolay, Peter. “Judicial Review of Compensation Law in Hungary,” from *Transitional Justice*, ed. Kritz, Neil J. (1995), p. 669

²² Nyiri, J. and Dixon-Gough, Robert W. “Conceptions of rural planning following land privatisation in Hungary,” from *Land Reform and Sustainable Development*, ed. Dixon-Gough, Robert W. (1999), p. 140.

cooperative farm structure. By 1962, 95% of the land was collectivized and most citizens were forced into cooperatives. However, the structure of the cooperatives varied. “Specialist cooperatives” in some areas allowed families to continue farming their own lands. Market reforms were introduced to cooperative farms over the intervening years, such as profit-sharing and technological innovation. This so-called “goulash communism,” a blend of capitalist influences with communist policies, increased the agricultural output of the collective farms relative to prior systems (a feat not replicated anywhere else in Eastern Europe.)²³ During the entire period the government retained a cadastre, a legal registry for land which would later assist in the restitution process.

After the fall of the Soviet Union, there was a huge amount of debate in Hungary about how to design a land restitution program. Encouraging investment was one clear objective: the country faced high debt service requirements from credit extended to it by several World Bank loans, underscoring the importance of attracting investment. Many Hungarian citizens and the powerful Independent Smallholders Party were pushing for land restitution. However, agricultural expertise was concentrated among rural citizens, and thus the prospect of granting farmland to urbanites who would not know how to manage it seemed unwise.

The Hungarian Constitutional Court became involved when policymakers, unable or unwilling to answer these difficult questions themselves, decided to ask the Court for an advisory opinion on the question of whether the government could differentiate the type of compensation awarded, based on the type of property that had been held. In issuing an opinion that was broader than the question asked, the Court to a large extent set Hungary’s restitution policy. The Court determined that land was not distinct from other assets, and to

²³ <http://countrystudies.us/hungary/39.htm>

treat land differently (for example, by returning expropriated land in-kind) would constitute an equal protection violation.²⁴ Additionally, and importantly for collective farms, the Court held that a restitution program could not differentiate compensation based on whether someone was formerly an owner or not, as that would also be an equal protection violation. The Court's reasoning centered on the idea that such a restitution program would achieve a "more favorable social result," rather than a more abstract conception of justice or fairness. However, the ruling made it clear that restitution was not a "right" but a gratuitous act of the state.²⁵

In deciding who was eligible to claim restitution, the government listed four different categories of ownership entitled to restitution: 1) member of a cooperative under common ownership; 2) member of a cooperative who holds legal title to their land; 3) individuals who suffered land expropriation during 1939-49; and 4) individuals who suffered other persecution and loss besides land expropriation during 1939-49.²⁶ Importantly, restitution was opened up to non-citizens and non-residents.²⁷ There were several iterations of legislation to specify exactly who was eligible for restitution.²⁸ Hungary set out the strictest deadline among all post-Communist countries for its land restitution: individuals with

²⁴ In a subsequent ruling, the Constitutional Court created an important exception to this in declaring that land belonging to the Catholic Church would be restituted in-kind. See Paczolay, Peter. "The Role of Religion in Reconstructing Politics in Hungary." 4 *Cardozo Journal of International and Comparative Law* 261 (1996).

²⁵ Paczolay, *supra* note 21, at 675.

²⁶ The differentiation between former cooperative members was significant: cooperatives had developed two separate types of systems for pooling land, one in which cooperative members retained title to their land and another in which title was transferred to the cooperative as a whole. Under the Constitutional Court's decision, each group was entitled to restitution. See Ossko, Andras. "Land Restitution and Compensation Procedures in Central Eastern Europe," OICRF Briefing (2002).

²⁷ Heller, Michael and Christopher Serkin. "Revaluing Restitution: from the Talmud to Postsocialism." 97 *Michigan Law Review* 1385 (1999) at 1402.

²⁸ Additionally, a later law (the "Fourth Law") set up a preferencing system for granting vouchers to individuals who planned to use land for farming, as the country was experiencing declining agricultural productivity. See Swinnen, J.F.M. "Political and Economic Aspects of Land Reform and Privatization in Central and Eastern Europe," OICRF Briefing (2000).

restitution claims had 90 days from the issuance of the law to file (although failures to file on time were accepted, if the lateness was not due to fault).²⁹

The restitution program designed around these criteria featured a voucher system.³⁰ The major institutions set up to conduct the program included a Compensation Office and Land Allocation Committees. The Compensation Office acted to judge claims on land, issue compensation coupons or vouchers, and administer auctions where vouchers are used. Vouchers for expropriated property are issued on a sliding scale basis, depending on the value of the expropriated property, and usually restore only a small percentage of the property's actual value.³¹ Voucher holders are entitled to purchase property³², buy stock sold in process of privatizing state property, acquire arable land; or can also use the voucher as payment for state-owned housing, as collateral on small business loans, or as an annuity payment for life.³³ While markets for vouchers flourished in urban areas, there were not as many options in rural areas. Information flow, particularly in rural areas, was perceived as poor and there was confusion about what land voucher-holders were eligible to purchase. Some citizens also refused out of principle to use their voucher for anything but land.³⁴

Restitution was swift and, on some counts, successful. Hungary is typically regarded by the international community as a star performer in the transition to a market economy. However, for the purposes of this paper it is illustrative to assess "success" along the

²⁹ Neff, Michael L. "Eastern Europe's Policy of Restitution of Property in the 1990's." 10 *Dickinson Journal of International Law* 357(1992) at 376.

³⁰ Mechanisms also existed for non-land restitution. A share-distribution mechanism for allocated (non-land) cooperative property for former cooperative workers based on duration of service and salary received. See Hann, *supra* note 20, at 35-36.

³¹ Claims up to \$2,300 are compensated in full; the next \$1,150 are compensated 50%; the next \$2,300 get 30%; and amounts above these totals get 10% up to a maximum compensation of about \$57,000. See Heller, *supra* note 27, at 1402.

³² The right to purchase land is circumscribed: citizens can purchase land 1) where confiscated land was located; 2) the district where the claimant now resides; 3) the district where the claimant was a member of a cooperative as of January 1, 1992; 4) any districts that that cooperative land also encompasses. See Swain, *supra* note 19, at 194.

³³ Neff, *supra* note 29, at 374.

³⁴ Hann, *supra* note 20, at 36-37.

following dimensions: redistribution of land ownership, productivity of new system, and satisfaction of citizens. Huge amounts of land were redistributed: approximately 800,000 vouchers were awarded, to be used either in auctions for property or redeemed for cash or invested. Those vouchers were used in total to claim 2.1 million hectares. Of land allocated from the two distinct forms of cooperatives, 1.8 million hectares were reallocated to 1.6 million cooperative workers who had owned cooperative land; while 1.2 million hectares reallocated to cooperative workers who had not owned the land they worked.³⁵ In general, auctions permit multiple buyers at a given price who then split up plots, enabling poorer people to have an opportunity to purchase land through an auction when their vouchers might otherwise be worth too little to participate.³⁶

Hungary's restitution was efficient to execute, although productivity has been somewhat diminished by certain features of the restitution. About 75% percent of restitution vouchers have been issued since the program's inception, with a face value of approximately \$650 million.³⁷ Restitution had initially been estimated to cost between two to four billion dollars.³⁸ However, because land was able to be divided into small plots, Hungary faces high levels of fragmentation in its agricultural land which threaten productivity. A further tension exists in some of the particular features of the cooperative modernization, awarding higher land values to older, retired members who were more likely to sell the land or not use it as productively as younger, more active members.³⁹ Finally, Hungary's restitution produced mixed satisfaction among citizens. For Hungary's poorest

³⁵ Ossko, *supra* note 26.

³⁶ Swain, *supra* note 19, at 214.

³⁷ European Bank for Reconstruction & Development, Transition Report 6 (Nov. 3, 1997).

³⁸ Gelpert, Anna. "The Laws and Politics of Reprivatization in East-Central Europe: A Comparison," 14 *University of Pennsylvania Journal of International Business Law* 315 (1993), section 4.3.

³⁹ Kovacs, Katalin. "The Transition in Hungarian Agriculture 1990-1993: General Tendencies, Background Factors and the Case of the 'Golden Age,'" from *After Socialism: Land Reform and Social Change in Eastern Europe*, ed. Abrahams, Ray, (1996), p.64.

citizens, standards of living have fallen since socialism because there is no longer government-provided health care or social insurance.⁴⁰ Incentives to work as migrant laborers in Germany are high. On the other hand, some argue that while income levels may not have changed, land distribution gives people access to better quality land than previously held by their families and thus represents a true opportunity for advancement.⁴¹ In addition, Hungary's process featured significant public participation, and has been touted as an example of a truly democratic process.⁴²

East Germany (GDR)

Restitution under the German reunification was a balancing act. It was clear that remedying the expropriations that had occurred to citizens of both the GDR and West Germany would be important, but it also seemed clear that the cost of doing so would fall largely on the more financially stable West Germany. One significant factor affecting design of the restitution was the German concept of *Vergangenheitsbewältigung*, or “coming-to-terms with the past.”⁴³ The legacy of the atrocities committed under the Nazi regime instilled a desire for backwards-looking justice in compensating victims of that regime. The same backwards-looking justice was also a feature of the land restitution, even though most land expropriations occurred after the time of the Nazis. At the same time, of course, there was a desire to make the restitution as efficient as possible so that the unified Germany could be a powerful economic force.

Similar to Hungary, modern Germany's origins are as a feudal agricultural society. Unlike Hungary, prior to WWII under the Weimar Republic, Germany had no experience

⁴⁰ Hann, *supra* note 20, at 45.

⁴¹ *Id.* at 40-41.

⁴² Swain, *supra* note 19, at 214.

⁴³ Heslop, Jessica and Joel Roberto. “Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis.” 11 *Boston University International Law Journal* 243 (1993) at.252.

with government-initiated land expropriations or collectivization. During WWII, Jews and others in Germany suffered persecution, expropriation of property, and genocide, as in elsewhere in Europe.

Following WWII, East Germany was occupied by the Soviet Union for four years. The Soviets undertook two main activities that affected property rights.⁴⁴ Initially, they reclaimed land owned by war criminals and those affiliated with the Nazi party. As a second step, they engaged in a general land redistribution in accordance with communist principles by confiscating all large holdings, defined as plots of land larger than 250 acres. This land was pooled, and from it small plots were allocated to the poor, landless, and to refugees. The pools were actually too small for farming, and this redistribution was an intermediate step to fully collectivized agriculture.

After the Soviets officially withdrew in 1949, the GDR government then proceeded to collectivize agriculture. Different policies emerged for dealing with different types of property ownership. Legislation for the formation of agricultural cooperatives for GDR citizens passed in 1952.⁴⁵ Ceding private land to the state to be collectivized into agricultural cooperatives, although theoretically voluntary, was enforced through propaganda and coercion. Land that belonged to citizens no longer residing in the GDR was governed by a different set of policies. Property belonging to refugees who left the GDR without official permits was initially registered and placed in a trusteeship. Ultimately, it was confiscated by state as abandoned property. Property belonging to individuals who had held land but never lived in the GDR, or for GDR citizens who had emigrated legally, were officially allowed to retain title to their land. However, in practice the state levied leasing and other fees and

⁴⁴ Frank, Rainer. "Privatization in Eastern Germany: A Comparative Study," 27 *Vanderbilt Journal of Transnational Law* 809 (1994) at 813-14.

⁴⁵ *Id.* at 815.

ultimately expropriated that land as well. East Germans who were either landless and needy, or well-connected, were placed within houses that had been vacated and proceeded to pay nominal rent to a state-run agency.⁴⁶

The decision to reunify East and West Germany following the collapse of the Soviet Union was a given. However, the role that land restitution would play within the reunification process was not clear. There was a clear desire for a measure of retroactive justice, as indicated by Wolfgang Schauble, Minister of the Interior, in 1991: “It was and remains a giant task, to overcome and remedy the violations of rights of the past forty-five years, so that in the present and the future there is not great suffering from the losses, and so that old injustices do not become new injustices.”⁴⁷ Restitution and recognition of individual property rights also seemed to fit the free-market ideology of West Germany. One leading politician, justice minister Klaus Kinkel, was vehement in his insistence on “natural” restitution (i.e. in-kind restitution of land).⁴⁸ It was believed that financial compensation would be too expensive, although estimates of the cost of financial compensation for land were almost negligible in comparison with the true cost of reunification as calculated later.⁴⁹ The unified government decided on a policy of in-kind restitution.

Eligibility for land restitution was one of the most controversial issues. Given the different layers of expropriations that had occurred within East Germany since 1939 (under Nazi rule, under Soviet control, and under the socialist government), there was a serious problem of overlapping claims. Land taken under Soviet occupation represented approximately one-third of the area of the GDR. Ultimately, the government determined

⁴⁶ Kinzer, Stephen. “Anguish of East Germans Grows With Property Claims by Former Owners,” *The New York Times*, June 5, 1992, Page A3.

⁴⁷ Stack, Heather M. “The ‘Colonization’ of East Germany?: A Comparative Analysis of German Privatization.” 46 *Duke Law Journal* 1211 (1997) at 1221.

⁴⁸ Southern, David. “Restitution or Compensation: The Property Question,” from *Transitional Justice*, ed. Kritz, Neil J. (1995), p.642.

⁴⁹ *Id.* at 642.

that only landowners whose property was taken by the socialist government were given the option of restitution in-kind. Clearly disadvantaged by this determination were owners of property taken by Soviet occupation, eligible only for a compensation award and not for restitution. Cutting off restitution for those landowners was thus a controversial proposition, and a lawsuit brought by owners of property taken under Soviet occupation reached Germany's Constitutional Court. The German government prevailed in the case, on the grounds that the Soviet Union had been a "foreign occupying power" and thus the German government could not be accountable for their actions.⁵⁰ A simpler explanation is that creating a cut-off point for restitution of land claims made the process less complicated and less expensive for the government.

However, even with the cut-off restitution was both complicated and expensive. The restitution policy for land taken post-1949 initially contained two major limitations. The land that an owner seeks to reclaim must 1) not now be currently dedicated towards public use; and 2) not have been acquired through fraud.⁵¹ A government institution, the Treuhand, was set up to process and evaluate claims. An initial filing date of October 13, 1990 was established, but more claims on land were filed than the Treuhand could process. The deadline for filing claims was then extended to December 31, 1992. Approximately 1.1 million claims were registered to land within the former GDR (some including claims to more than one piece of land), so that there exist over 2 million separate claims. These claims represented over half the land area of the former GDR.⁵²

Because of the uncertainty around title to land that was the subject of a restitution claim, investment in East Germany was slow. In the city of Leipzig, the mayor captured the

⁵⁰ Heslop, *supra* note 43, at 249.

⁵¹ *Id.* at 249.

⁵² Southern, *supra* note 48, at 644.

frustration: “The legal claims of old proprietors block the entire economic development...put[s] all investment plans on ice.”⁵³ The government responded with two laws, one in 1991 and another in 1992, creating an expedited procedure for land sales that have the potential to contribute to economic growth in the country. Under this legislation, known as the investment exception, the government was allowed (but not *required*) sell land, regardless of a pending restitution claim, *if* there is an enumerated public benefit such as provision of jobs.⁵⁴

For comparison purposes, the degree of success of the GDR’s restitution will be assessed along the same dimensions as with the Hungarian case: redistribution of land ownership, productivity of new system, and satisfaction of citizens. Restitution in the former GDR was not designed to have redistributive effects. Redistribution did occur on a macro-level, from West to East Germany through government subsidies to industry and enhanced provision of social services. However, the land restitution itself was not specifically redistributive. Assessing productivity in the former GDR is different than in Hungary, as land for agricultural uses is relatively less important. After the investment exception was passed, capital flowed more quickly into the former GDR. In some places, however, uncertainty over titles dampened economic activity and contributed to the poor performance of the East German economy throughout the 1990s. As of September, 1995, of the 2.7 million restitution claims that had been filed, representing claims on over half of the land area of the former GDR, only about one-third had been decided.⁵⁵ But by 2003, decisions had been reached on 96% of all restitution claims on behalf of individuals (as

⁵³ *Id.* at 644.

⁵⁴ The initial Investment Acceleration Law (1991) created a procedure where the Treuhand could issue an “investment priority authorization certificate” that would enable land to be sold. However, potential investment proposals were often ignored by local authorities. A second law, the Investment Priority Law (1992) strengthened the previous law, by extending to local authorities the power to grant certificates and strengthening what “special purposes” would justify an investment priority. *See id.* at 643.

⁵⁵ Stack, *supra* note 47, at 1236.

opposed to firms).⁵⁶ On a larger scale, the restitution is perceived to have been bad for Germany from an economic perspective. Estimates for the total cost of all German reunification efforts exceed \$1.9 trillion, more than the total national debt.⁵⁷

The level of citizen satisfaction with land restitution in Germany is easy to assess: it was low. Germany endured incredible social conflict during its reunification, especially around the land restitution issue. There were several major sources of discontent: increased uncertainty over property rights and corresponding negative effects on the market, and perceived unfairness: while a limited set of West German property owners were believed to be benefiting from the restitution, disproportionate burdens were borne among East German middle class residents. The political unrest turned into violence: the chief of the Treuhand was assassinated in 1991 by left-wing extremists.⁵⁸ Many East Germans who had been living in homes that owners had fled 50 years earlier faced restitution claims from those owners. Prior owners were more likely to claim land that had dramatically appreciated in value, for example, in the suburbs of Berlin. In one Berlin suburb in 1992, two individuals whose homes were being reclaimed by West Germans hung themselves.⁵⁹

IV. CONCLUSION AND IMPLICATIONS

While the two cases might seem to suggest that vouchers dominate in-kind restitution in attempts to restitute land, that conclusion would be inaccurate. Germany's restitution would have been difficult for the country regardless of the form. Neither restitution program, on its own, was a significant factor in increasing well-being for the citizenry as a whole. The

⁵⁶ Ragnitz, Joachim. "German Unification: Restitution of Nationalized Properties." Presentation at the Goethe-Centre Nicosia, February 28, 2004. Of the claims that have been decided, 18% were returned to former owners, 42% were denied, 13% were withdrawn from the process by claimants, and the balance were determined in another way, for example through compensation.

⁵⁷ "German reunification can be a factor in eurozone fiscal rules." *EUBusiness*, March 20, 2005.

⁵⁸ Heslop, *supra* note 43, at 294.

⁵⁹ Kinzer, *supra* note 46, at A3. More than half the houses in the town of Zepernick had been claimed by West Germans as of 1992; the town's location 40 minutes from downtown Berlin has caused property values to rise dramatically.

conclusion that *can* be drawn from the cases is the extent to which the five factors outlined in part II predicted observed differences in the system designs. The five factors, again, are: (1) status quo property rights existing when prior regime took power; (2) degree of injustice; (3) collective moral obligation; (4) internal constraints; and (5) external constraints.

Along four out of the five factors, the GDR would have been expected to enact a “stronger” restitution program than Hungary. “Stronger” means valuing the rights of individuals to property they used to own relatively more highly than the rights of current occupants of that property. Hungary had already experienced partial collectivization prior to WWII, while the GDR had not. Thus, the GDR’s status quo property rights regime that it sought to return to recognized individual property rights more strongly than did Hungary’s. The GDR also had a demonstrably greater sense of collective moral obligation to right the wrongs of the past, under the philosophy of *Vergangenheitsbewältigung*, indicating a willingness on the part of the entire society to fund a comprehensive restitution program. The internal constraints of the political dynamics of German reunification pushed for a strong in-kind restitution program; while in Hungary the use of the Constitutional Court permitted establishing a voucher program. External financial constraints on the GDR were not nearly as severe as those in Hungary, permitting design of a German restitution program not hindered by cost considerations. The one area in which Hungary and the GDR were effectively the same is the degree of injustice present in land expropriation under Communism.

The implications of these conclusions have the potential to be far-reaching. While very few countries continue to operate under centrally planned economies, land reform issues continue to challenge governments all over the world. Issues such as indigenous land rights and squatters in informal settlements continue to challenge countries in both the developed

and developing world. While restitution is not an appropriate solution for all or even most land reform issues, the insights of restitution based on retroactive justice may inform policy discussions in the future.

On a concluding note, some scholars argue that land restitution is not that important.

Jon Elster offers up a contrarian view about the centrality of property rights in a transitional justice context.

It is important to keep in mind that essentially everybody suffered under Communism. Whereas some lost their property, others--many others--had opportunities denied to them through the arbitrary or tyrannical behavior of the authorities. . . . It would be arbitrary and wrong to single out one group of victims--the owners of tangible property--for compensation. . . . Property rights are, in my opinion, among the least rather than most inviolable rights. Those protecting individual dignity, autonomy, and privacy are much more central.

This quotation serves as a powerful reminder that harm that is observable and compensable is often not the harm that societies should worry about most.