

Distributive Justice in Transitions

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The Origins of Competing Claims to Land in East Central Europe. In-Kind Restitution as a Problem of Fair Division*

Monika Nalepa**

4.1. Introduction

Nations that transition from authoritarian regimes to democracy or emerge after years of protracted civil war often engage in various methods of transitional justice to address wrongs committed in the pre-transition periods. One such transitional justice mechanism that has been variously considered and implemented in these circumstances is the restitution of property, specifically, land. The countries of East Central Europe have presented notorious case studies in this context; they have either avoided property restitution altogether, or they have reallocated property in blatantly unfair ways. But simple solutions or ready-made formulas for property restitution are not, of course, readily available, and each scheme must address the historical, practical, and equitable concerns applicable to the lands and people involved.

The impediment to fair restitution on which I focus here is the challenge of historical “layering of claims”. Generally, this “layering” phenomenon arises when the same piece of land is expropriated by an authoritarian regime or occupant and transferred to a new owner. From this owner, the land is then expropriated again – usually by a different autocrat or occupant. But instead of returning the land to its original

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owner, the property is conveyed to yet another new beneficiary, typically one who is aligned with the authorities effecting the expropriation. This process can be iterated several times, and each stage generates a new class of claimants to the same piece of land.

Hungary's experience poses an excellent illustration of such layering of competing claims. Prior to World War II, in May 1939, farmland was expropriated from Hungary's Jews. The land was transferred to Hungarians who were potential sympathizers with Nazi Germany. After World War II, the Socialist coalition that came to power expropriated the farms from the Fascist sympathizers. But instead of returning the property to the original Jewish owners or their heirs, the lands were transferred to landless peasants in compliance with land reform legislation. As the Communists became more and more confident of their ability to rule, they further embarked on a project of full-scale collectivization.

Historical layering of claims increases the demand for restitution in ways that exceed the capacity of newly transitioning states. Hungary had a succession of three compensation acts to deal with the complex layers of claimants.¹ Therefore, it is important to explore the mechanism behind the layering of claims. In the countries of East Central Europe, I explain how two factors contribute to the layering of claims. The first is the absence of land reform during the interwar period; the second is the popular support for Communist rule in the aftermath of WWII. First, in countries that did not carry out land reform in the interim world war period, after WWII, the new governments did not return lands to their original landowners because the need for land redistributions to landless peasants. These new governments used land redistribution policies as means of boosting their popularity. Second, the

¹ Act XXV of 1991 on Providing, in Order to Settle Ownership Relations, Partial Compensation for Damages Unjustly Cause by the State in the Properties of Citizens, is referred throughout this article as Compensation Act I; Act XXIV of 1992, on Providing, in Order to Settle Ownership Relations, Partial Compensation for Damages Unjustly Cause by the State in the Properties of Citizens through the enforcement of Legal Rules Framed from 1 May 1939 to 8 June 1949 is referred throughout this article as Compensation Act II; Act XXXII of 1992 on the Compensation of Persons unlawfully Deprived of their Lives or Liberty for Political Reasons is referred to as Compensation Act III.

new Communist governments that came to power with the backing of the Soviet Union lacked legitimacy in the eyes of many social and ethnic groups. This varied in degree within the region. For example, in Poland, where the Communists had to fight a civil war before they could assume power, the Communists were perceived as less legitimate than in Bulgaria or Czechoslovakia, where the Communists and Soviets were viewed as liberators from German occupation. In countries where Communists enjoyed popular backing, particularly if land reform had already been implemented before WWII, Communists could reverse its effects by embarking on full-scale collectivization. Where Communists lacked popularity, land redistribution became the Communists' strategy of appeasement. This helps account for variation in the extent of collectivization carried out across Communist Europe. Where Communists eventually acquired legitimacy, as in Hungary, the recently land-endowed peasants were expropriated anew. In other countries, such as Poland, Communist authorities risked too much by pursuing large-scale collectivization.

Different patterns of land reform and collectivization translate into different numbers and types of claimants. For instance, in Hungary, the total number of claimants to the same piece of property could be as high as four:

- 1) The Jewish owner expropriated by the Nazis;
- 2) the Arian benefactor, awarded the Jewish land by the Nazis and then expropriated by the Communists;
- 3) the landless peasant, first endowed by the Communists to be later expropriated by collectivization; and
- 4) the farm worker who used the land during the Communist period and is in possession of it at the time of transition.

Furthermore, territorial changes and population transfers between states following WWII were responsible for creating different categories of claimants based on citizenship. One can distinguish at least four such groups: First, there are claimants who were citizens of the country where expropriations took place both at the time they were carried out and at the time when claims were made (that is, after the fall of Communism). Second, there are claimants who were citizens of the country where the expropriations took place at the time they oc-

curred, but fled the country following the expropriation and are no longer its citizens at the time they are making claims. Third, there are those who were not citizens at the time of the expropriation, but are citizens at the time they are making claims; and finally, those, that were not citizens in either period.²

The subject of this chapter is the mechanism behind the historical layering of claims, how the consequences of these successive expropriations lead to an allocation problem (a problem with overlapping endowments to the same piece of property), and the possible institutions for resolving such problems. It is organized as follows. The next section deals with the ways in which international conflicts contributed to the historical layering of claims in ECE; it focuses especially on the territorial changes and population transfers that resulted from WWII. The redrawing of borders in the WWII aftermath resulted in population transfers and forced expropriations. Victims of earlier expropriations, joining the class of landless peasants, frequently became the grateful benefactors of post-war land confiscations. In section 4.3., I present the impact of the two factors responsible for the “layering of claimants”: the lack of land reform prior to WWII and the popularity of Communists in the WWII’s aftermath. Since differences in the acuteness of demand for land redistribution and popularity of Communist regimes

² Obviously, this typology can be further expanded by distinguishing whether or not the country where the expropriations took place authorized or took advantage of the expropriations. Due to citizenship restrictions attached to restitution laws, these groups of claimants enjoy different levels of recognition for their claims. Countries implementing reprivatization are most likely to recognize property rights of persons holding citizenship on both occasions. However, one could make the argument that this is precisely the group that suffered least, as demonstrated by the fact that the expropriated citizens preferred to remain in the country that confiscated their goods over leaving following expropriation. Istvan Poganyi argues that property loss is one of the smallest wrongs suffered by the victims of the succession of Fascist and Communist authoritarianisms in Central Europe. Nevertheless, since claimants in the first category (citizens at the time of expropriation and at the time claims are made) are the most influential constituency that politicians must cater to in order to be reelected, it is easy to understand why their property claims would be the first to be recognized. Yet, this recognition is hardly associated with any normative considerations and more with the fact that it is citizens who are in a position to reward or to punish politicians for property restitution proposals with their votes.

at the time of their takeover vary from one Communist country to the next, I discuss these factors in a comparative framework for three Central European states: Poland, Hungary and the Czechoslovakia. What unites these cases is geographical proximity, dependence on the Soviet Union and 50+ years of Communist rule that ended in 1989 with democratic transitions. Among all Post-Communist countries, I chose these three countries because each exemplifies a unique combination of factors contributing to the layering claims.

Next, in section 4.4., I show how the layering of claimants translates into difficulties with implementing reprivatization. In order to do this, I reconstruct the problem of land restitution as a “claims problem” in the sense of cooperative game theory. Cooperative game theory uses axioms to characterize allocation rules. While some of these axioms are technical, others specify normatively desirable properties of allocation rules, such as equity, impartiality and efficiency. I use the compensation acts implemented in Hungary in the aftermath of transition to democracy to illustrate the practical significance of these axioms. Section 4.6. concludes.

4.2. International Factors in the Historical Layering of Claims

This section explains how international conflict led to redefining borders in a way that affected the strength of some ethnic groups *vis-à-vis* others. While disempowered groups suffered expropriations, those whose status was elevated benefited at their expense.³

The first set of claimants to land restitution was generated by the wave of expropriations that preceded World War II. Countries sympathizing with Nazi Germany, implemented the infamous “Arianization laws” For instance, in Slovakia, a March 1939 decree confiscated all land belonging to Jews. Similar laws were implemented in Hungary. Referred to as the “Second Jewish laws”, the May 1939 Act sanctioned the expropriation of Jewish-owned agricultural land. When the Hungarian Government started to cooperate with Nazi Germany in earnest,

³ For a book length discussion of how structural changes of modernization, wars, and occupation affected relationships between ethnicities in the Baltics see R. D. Petersen, 2002, *Understanding Ethnic Violence: Fear, Hatred, and Resentment in Twentieth-Century Eastern Europe*, New York: Cambridge University Press.

a 1942 bill sharpened this enabling measure making confiscations of Jewish land mandatory starting from September that year.⁴ Expropriations continued throughout World War II and its aftermath. They extended to other countries in East Central Europe. While the beneficiaries of the pre-war expropriations were predominantly Arian sympathizers of the pro-Nazi government, the expropriations that followed the commencement of WWII awarded the confiscated property to landless peasants and Communist sympathizers.

The political and military storms that swept through the continent left few countries with their borders intact. However, a comparison of the territorial gains and losses of the three Central European countries I focus on in this chapter indicates sharp contrasts between Poland, Hungary, and the Czech Republic. Figure 1 was created using pre and post-war GIS-based maps of Europe. Table 1 presents numerical results.

⁴ Act XV/1942, cited after Istvan Poganyi, 1997, *Righting Wrongs in Eastern Europe*, Manchester and New York: Manchester University Press

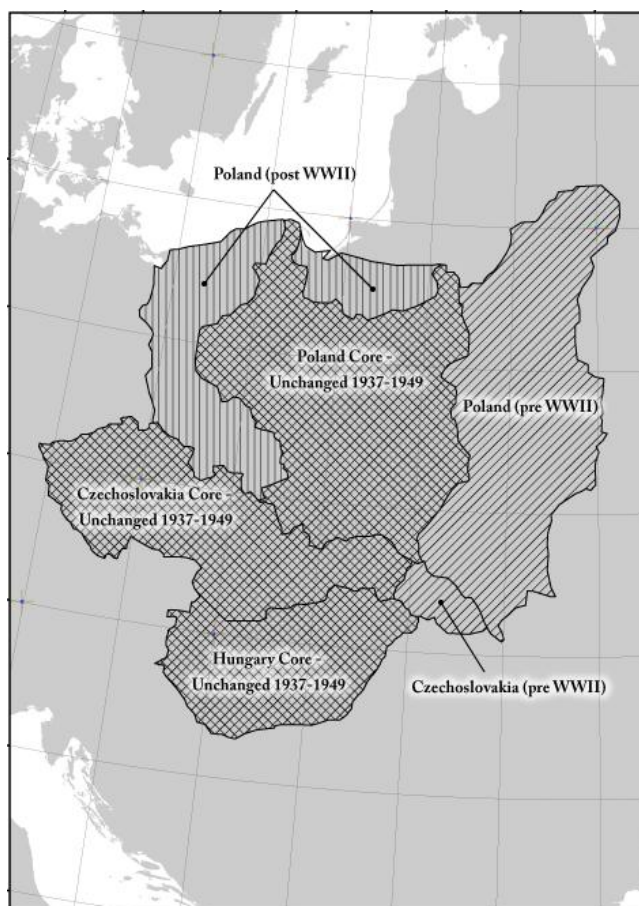


Figure 1: Poland, Hungary, and Czechoslovakia Before and After WWII. Source: C. Scott Walker, Digital Cartography Specialist Harvard Map Collection Harvard College Library; prepared using IEG-MAPS, *Compiler:* Andreas Kunz, *Cartography:* Joachim Robert Moeschl, *Editor:* Andreas Kunz.

	Poland	Czechoslovakia	Hungary
Pre-war	383,573	143,594	93,581
Post-war	302,612	129,738	93,581
Unchanged core	198,950		
% unchanged	51.8%	90.3%	100%
new area post WWII	103,662		
% new area	52.1%		

Table 1.

While Hungary reverted almost completely to its 1938 borders, Poland over the course of the war lost close to half of its territory in the east but gained an equivalent territory in the west. (As a result, the bulk of land that was to be redistributed to landless peasants and Polish citizens-refugees from the East had belonged to ethnic Germans before the war.)

Territorially, Czechoslovakia did not change as much as Poland did, but the war had a very dramatic effect on the country's ethnic composition. I elaborate on the role of redrawing of borders and subsequent population transfers in generating successive layers of land-owners using illustrations from Poland and Czechoslovakia.

4.2.1. Poland

The most recent movie by celebrated Polish dissident director, Andrzej Wajda, starts with a scene on a bridge over the river Bug in the late summer of 1939. In the scene, refugees entering the bridge from the west are fleeing Nazi aggression that began 1 September. On the opposite end of the bridge, they see another group of refugees – escaping the Soviet invasion that began 17 September 1939. A man from the first group cries out “People! Where are you going? You are heading the wrong way! Turn back!”. As the confused crowds intersect, some refugees turn around, while others pursue their initial route.⁵

The Soviet invasion was sanctioned by German and Soviet ministers of international affairs – Joachim von Ribbentrop and Vyacheslav Molotov – in an agreement also known as the Hitler-Stalin pact. The pact signed on 23 August 1939 stipulated that:

In case of the political transformation of the Polish state, the spheres of influence of Germany and the Soviet Union will become separated by the border marked by the three rivers: Narew, Wisla and San [...] The question whether or not it would be in the interest of both to maintain an independent Polish state will be determined in the near future and will depend on subsequent political developments.

⁵ Andrzej Wajda, 2007, “Katyn”, Akson Studio.

Both sides commit to resolving the question on the basis of a friendly agreement.⁶

The territories of Poland that became occupied as a result of the pact's implementation are illustrated in Figure 2 below.

The refugees who fled from the West to the East ended up trapped in the Soviet Union. They could not receive passports to return home, where they had left behind their families, homes, and often farmland. Following WWII, a civil war broke out in Poland between the Communist partisans who had been fighting on the Eastern front with Stalin's Red Army and members of the Polish resistance that formed around the Polish Government in exile, known as *Armia Krajowa* (National Army), AK.⁷ The Communists emerged victorious in the civil war and confiscated the land of the refugees trapped behind the Soviet border. Pooling it with land confiscated from ethnic Germans and from large estate holders, the Communists used it to carry out land reform benefiting landless and smallholding peasants. Further expropriations were performed by the Soviets, who following the provisions of the Yalta peace conference took over territories occupied in 1939. In compensation for land losses in the East, Poland received German inhabited territories in the West. Communist authorities euphemistically called these territories the "Recovered Lands", neglecting the fact that the road to "recovery" led through forceful transfers of German nationals living in these territories. The Germans' land and all unmovable property were confiscated.

⁶ Translated from Polish text of agreement provided by Polish Radio. Available online at: <http://www.polskieradio.pl/historia/peryskop/artykul110455.html>.

⁷ The subsequent section covers the Polish civil war in more detail.



Figure 2: Ribbentrop-Molotov Pact.

The consequences of the Ribbentrop-Molotov Pact extended to the Baltics and even Romania. And not only Poles, but also Belarusians and Ukrainians were left behind the Soviet Border following the Red Army's invasion of 1939. However, in 1945, it was mostly Polish refugees who tried to leave the Soviet Union – many of them hungry for land and tempted by the promises of land redistribution that the Communists had made prior to the war.⁸

In summary, while Poland lost sizable amounts of land in the East, it also gained sizable areas in the West. Hence, it received enough land to redistribute to landless and, so-called, dwarf-holding peasants.⁹ More than three quarters of the land redistributed after the war had previously belonged to Germans.¹⁰

⁸ K. Kersten, 1986, *Narodziny systemu władzy, Polska 1943-1948*, Paris: Libella.

⁹ Dwarf-holdings were characterized by properties under 2 hectares.

¹⁰ Poganyi, *supra* n. 3.

4.2.2. Czechoslovakia

Czechoslovakia's territory did not change as a result of WWII as much as Poland's. However, its ethnic composition underwent considerable changes. Although prior to the WWII, Czechs and Slovaks made up only 65% of Czechoslovakia's population, after the war they made up 94%. A 1930 census carried out in Czechoslovakia put the ethnic Germans at 3,305,000. Only 250,000 survived the forced transfers initiated by President Edvard Benes in 1946.¹¹ The number of Hungarians living in Czechoslovakia also fell dramatically, dropping from 585,434 in 1930 to 354,532 in 1950.¹² From an extremely diverse federation, that incorporated Sudeten Germans, Carpathian Ruthenians, and Hungarians, it became almost homogenously Czech and Slovak.

Many scholars have attributed Czechoslovakia's success in maintaining democratic institutions up to the very beginning of WWII to its pluralistic constitution, originally designed to accommodate the plurality of ethnic and religious minorities living there.¹³ The end of ethnic pluralism went hand in hand with the demise of constitutional protections of the rights of the few ethnic minorities that remained.

Article XIII of the Potsdam Conference Peace Treatise held in August 1945 between the three allies sanctioned the removal of German minorities from Central European countries. The conference did not stipulate what would happen to the property left behind by these minorities, but President Benes in a preamble to his decree for implanting the Potsdam provisions, explained why owners of immobile property, the bulk of which was land, would not be compensated for their losses:

¹¹ According to Poganyi, *supra* n. 3, 600,000 Sudeten Germans evacuated with the German forces before the decrees went into effect.

¹² Z. A. B. Zeman, 1991, *The Making and Breaking of Communist Europe*, Cambridge: B. Blackwell.

¹³ For a book length discussion of how states use strategies of assimilation, accommodation and, elimination with regard to their minorities, see Harris Mylonas, 2009, "The Politics of Nation-Building: The Making of Co-Nationals, Refugees, and Minorities", Doctoral Dissertation: Yale University. For an alternative view expressing the concerns of some of the members of these minorities see (1978) "Seeds of Conflict: Minorities in Czechoslovakia", KTO Press: v. 2-3.

Following the demand of the landless Czechs and Slovaks for an effective implementation of the land reform, and led by the desire once and for all to take the Czech and Slovak soil out of the hands of traitors of the Republic, and to give it into the hands of the Czech and Slovak farmers and persons without land, I decree, upon proposition of the government as follows: With the immediate effect and without compensation is confiscated, for purposes of the land reform, agricultural property owned by all persons of German and Hungarian origin.¹⁴

Minorities associated with Nazi occupiers – however loosely defined – were expropriated of 1.8 million hectares of agricultural land followed by another 1.3 million hectares of forests. Some 71% of land redistributed in Czechoslovakia after the war had belonged to members of the German minority.¹⁵

4.3. Domestic Determinants of the Historical Layering of Claims

The Teheran, Potsdam, and most notably Yalta conferences, solidified the fate of East-Central Europe. Falling on the wrong side of the iron curtain spelled the end of democracy, as elections were structured so as to consistently produce Communist victors that enjoyed the support of Soviet allies. However, backing from the Soviet Union, ironically, did not ensure domestic support for Communist rule. The opportunity to carry out land reform (if it had not been already implemented in the interim world war period), however, gave the Communist authorities an opportunity to appease vast masses of landless and small-holding peasants by either transferring to them land taken over from the Fascists and their co-ethnics (land that was formerly owned by the Jewish population in Hungary) or land coming from expropriating German (in Poland and Czechoslovakia) and Hungarian (in Slovakia) minorities.

With the exception of Hungary, most countries emerged from WWII with territories different from those that belonged to them before the war. Furthermore, vast areas of land controlled by Germany and its allies were placed under control of Communist governments.

¹⁴ Poganyi, *supra* n. 3: 40

¹⁵ Paganyi, *supra* n. 3: 41.

The 1947 Paris Peace Treaty required that that Slovak and Hungarian governments return Jewish property to its rightful owners. The Communist governments however, blatantly ignored the treaty's provisions. In Poland and Czechoslovakia they carried out a series of expropriations on the ethnic Hungarian and German minorities of their own. Instead of returning Nazi expropriated land to their rightful owners in 1945, the Communists were able to add the confiscated land into the pool of assets to be redistributed among landless peasants to boost their popularity.

In Communism, the ultimately just allocation of land is complete collectivization, that is, the creation of state or collective farms, owned jointly by individual users of the land, who had previously surrendered their farm assets to the collective. However, embarking on the project of complete collectivization was not prudent for all Communist governments across ECE, particularly those that lacked popularity with domestic audiences or those that faced severe demands for land redistribution. First, because Communist governments faced different degrees of pressure for redistribution: where Communist governments had to appease their critics or satisfy demands of landless and displaced persons, collectivization projects were placed on the backburner. I discuss the two considerations in sections 4.3.1. and 4.3.2. below. First, however, I present schematically, the logic of my argument. Below, Figures 3a and 3b below contain the dynamic mechanism I propose to explain the layering of claimants in ECE. An important assumption in this mechanism is that Communist rule in ECE was not a subject of matter of choice for East Europeans. Rather, all countries that fell on the wrong side of the iron curtain had to accept Communist rule as sanctioned by the Yalta Peace Conference. However, even though Communists had power fall into their laps undeservedly, they still had to put considerable effort into keeping it. It is these circumstances they faced and the strategic choices they made that explain the resulting layers of claimants to the same piece of property.

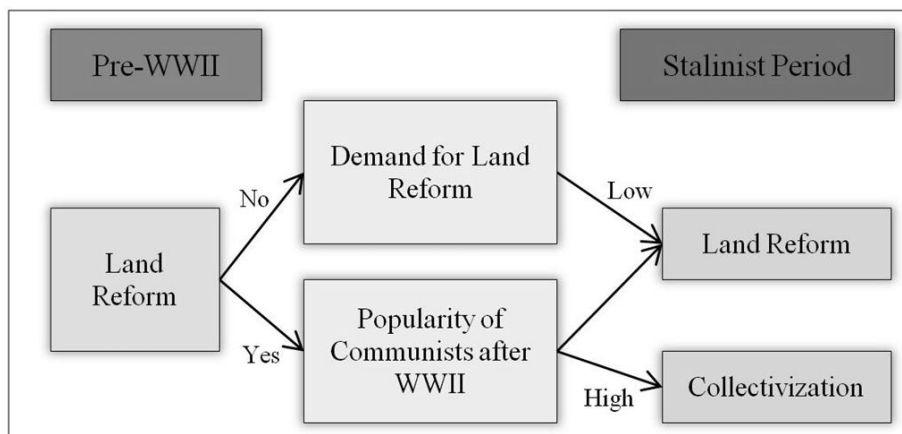


Figure 3a.

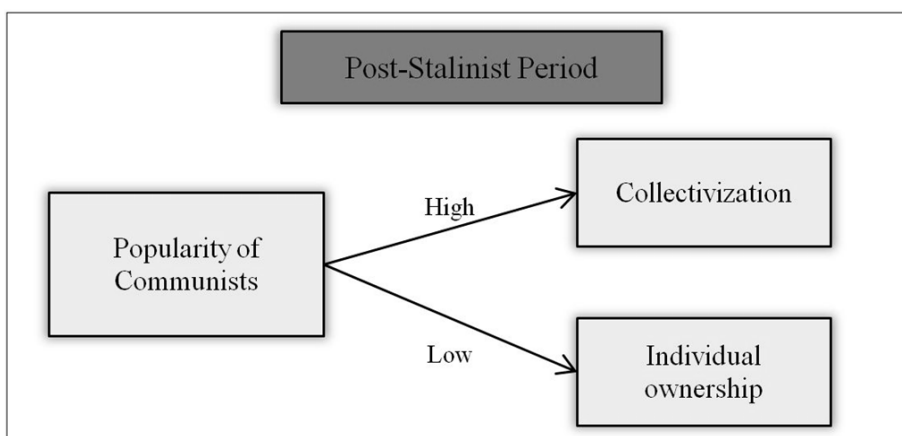


Figure 3b.

There are two parts in the mechanism presented here. Figure 3a represents the determinant prior to the war – the presence or absence of land reform. If land reform had been successfully implemented before WWII, the demand for land redistribution was relatively low, paving the way for Communists to embark on a full scale collectivization project, provided they were sufficiently popular, a topic covered by the second part of the mechanism. If land reform had not been successfully implemented, or was lacking altogether, Communists were forced to redistribute land to landless and smallholding farmers or – as in the case of Poland – to refugees who had lost their land following the So-

viet invasion. In states without land reform in the interim war period, whether or not Communist governments were able to eventually collectivize depended on how popular their rule was with the general public. The second part of the mechanism behind the historical layering of claims is presented in Figure 3b. It takes place after land reform in the Stalinist and post-Stalinist periods. Where Communists did not have to work hard at gaining popularity or where they had been successful with their strategy of appeasement and land redistribution, they could move forward with the collectivization project. But in places where they continued to lack popular backing, the collectivization project was delayed.

4.3.1. Urgency of Land Reform After WWII

In this subsection, I argue that whether and how many land titles were redistributed from large estates to landless peasants in the pre-WWII period determines the urgency of demand for land reform in the post-WWII period.

4.3.1.1. Poland

According to the 1931 census, prior to WWII, 61% of the population of Poland worked in agriculture, even though prior to the war, merely 17.1% of the rural population could support itself off the land they owned. Interim Polish governments had made attempts at implementing land reform: the pre-war government created 734,100 new peasant farms and increased the size of 859,000 existing ones.¹⁶ However, the speed of the reforms could not keep up with natural growth rates in rural areas. Istvan Pogany reports that “while 133,000 hectares of agricultural land were redistributed each year, the rural population grew 250,000 annually”.¹⁷ According to the 1931 census, more than half of the farms prior to WWII were still smaller than 5 hectares and a third of the rural population remained landless.¹⁸ The transitional

¹⁶ Poland Census, 1931, *Głowne Stosunki Zawodowe w Rolnictwie, Główny Urząd Statystyczny*.

¹⁷ Poganyi, *supra* n. 4: 46

¹⁸ Poland Census, *supra* n. 13.

Communist government, the Polish Committee for National Liberation (PKWN) appointed in July 1944 dealt with the acute demand for land in one of its first decisions. A November 1945 decree combined legislation redistributing large estates to landless and small-holding farmers with legislation expropriating two categories of war victims:

- 1) Polish citizens (both Poles and minorities) who were forcefully detained behind the Soviet Borders after the invasion of 17 September 1939.
- 2) Members of the German minority forcefully repatriated in 1946.

This led to the taking of 9.3 million hectares, of which 6 million were redistributed. Five million families who had moved to the “Recovered Territories” had by 1949 received land taken over from the Germans. The decree from November 1945 combining redistribution with nationalization in one stroke put an end to landless peasantry in Poland.¹⁹ But in the same stroke, it expropriated hundreds of thousands of former landowners without compensation.

Awarding land to landless peasants in this way could well have been just from the distributive justice point of view. The Communist bill, however, had tacked on legislation nationalizing land belonging to refugees – both Polish and German citizens. It is these latter expropriations that should be addressed by transitional justice mechanisms. Unfortunately, as the Polish land reform act of 1944 illustrates, the two types of land reallocations were often regulated by one and the same act, making the unwinding of it all the more difficult.

¹⁹ Technically, the November decree supplemented an original September 1944 ordinance. Upon its implementation, six million hectares were redistributed, creating 814,000 new farms and expanding a further 254,000. Unfortunately, the average size of small farms was increased by less than 2 hectares. Agrarian sociologists in Poland claim that, instead of resolving the agrarian dilemma, this solution merely scratched the surface, L. Kocik, 1996, “The Privatisation and Market Transformation of Polish Agriculture: New Conflicts and Divisions”, in *After Socialism: Land Reform and Social Change in Eastern Europe*, R. G. Abrahams (ed.), Providence: Berghahn Books.

4.3.1.2. Hungary

Hungary also failed to enact land reform in the interim war period. But this was not due to extraordinarily high growth rates, but because politics were dominated by the aristocratic, large landowning classes. According to Poganyi, the Hungarian reforms were the most limited in Eastern Europe, covering only 6% of the arable land and requiring endowed peasants to indemnify former owners. Because the mandated indemnities exceeded the market price of the land to be redistributed, peasants “awarded” the land could not afford to invest in the technology required to properly utilize it.

Upon coming to power, the Communists seized upon the opportunity to use the acute demand for land redistribution to their advantage. The Szeged antifascist front, created in 1944, decreed in March of that year that medium and large estates in areas controlled by the Arrow Cross (the Hungarian allies of Nazi Germany) and by Germans would be confiscated. The goal of the measure was to win over civilian peasants to collaborate with the resistance. This behavior of Communist partisans in Hungary is one example of a broader set of strategies of combatants used in civil wars to convert passive civilians into active collaborators.²⁰ Although the land redistribution decree worked as the Communists had intended, it could hardly quench the demand for large-scale reform. This demand was so acute that the Smallholders party was able to win an absolute majority in the 1945 elections campaigning almost exclusively on promises of land redistribution. By the time the Communists had solidified their rule in 1948, 35% of the territory of Hungary had been redistributed, with more than 60% of it redistributed to “natural persons”. Some 90% of the benefactors had been either landless or “dwarf-holders” prior to the reform. The reform clearly privileged the peasant class. A regressive compensation rule was implemented, according to which larger holdings were compen-

²⁰ See Kalyvas, 2006, *The Logic of Violence in Civil War*, New York: Cambridge University Press for an example of such combatant activity from the civil war in Greece; See J. Elster, 2006, “Redemption for Wrongdoing: The Fate of Collaborators after 1945”, *Journal of Conflict Resolution* 50, 3: 324-38 for examples from France on using transitional justice-like mechanisms in WWII France to boost support for anti-Vichy resistance.

sated in smaller amounts. Any surplus in excess of 100 hectares was not compensated at all, unless the holder was of “peasant origin”, (from a family whose vocation was “agricultural production”), in which case up to 200 hectares would be compensated, or unless the holder had “made an outstanding contribution to the armed resistance against German occupation”, in which case up to 300 hectares would be compensated. The reform reduced the percentage of landless peasants working in agriculture from 46% (in 1941) to only 17% in 1945.²¹

4.3.1.3. Czechoslovakia

Czechoslovakia was the only country in our set of East Central European cases, where land reform was successfully carried out in the interim world war period. Five acts were passed between 1919 and 1920.²² The 1919 “Confiscation Act” restricted the size of agricultural land holdings to 150 hectares. Indeed, it was so radical that it could not be fully implemented.²³

The demand for continued redistribution returned in the aftermath of WWII. Initial confiscations of minority land had been sanctioned by the Allies at the Potsdam Peace conference. Long before the Communists became a force to be reckoned with in Czechoslovakia, President Edvard Benes, who was in charge of the government in exile, issued decrees expropriating Sudeten Germans. However, once the Communists came to power in 1948, the process of land reform, collectivization, and minority expropriations went hand in hand. As, the Communist influence grew, the nationalization of all privately owned property, including land, became more and more imminent. A July 1947 law extended the 1919 land reform act so that somewhere be-

²¹ Poganyi, *supra* n. 3.

²² Some of the ethnic minorities living in Czechoslovakia – most notably the Hungarians who held the largest landed estates that were subjected to redistribution – complained about being unjustly treated in the reforms. According to a political pamphlet published by representatives of the Hungarian minority, Hungarians were over-represented as suppliers of land submitted for redistribution, and under-represented in the group of peasants awarded land.

²³ According to Poganyi, *supra* n. 3: 43, about 2,300 “residuary estates” could not be covered by the 1919 Act.

tween 700,000 and 800,000 additional hectares of land were confiscated. The maximum size of land plots was reduced from 150 to just 50 hectares, yielding an additional 700,000 hectares ready to be redistributed. Of the total 2.2 million hectares of land, the Communist government redistributed 1.7 million to 350,000, mostly landless, families. It retained only 0.5 million hectares to create collective farms. Very soon, however, after the Communists had consolidated their rule, they extended the collectivization project to cover land previously allocated through land reform. Using a combination of threats, blackmail, and petty rewards, they induced landowners to “voluntarily” surrender their newly acquired land for the creation of collective farms. By 1960, over 84% of agricultural land in Czechoslovakia belonged to collective farms.

Why was the collectivization project so much more successful in Czechoslovakia than in Poland and Hungary? I argue that in countries where their domestic legitimacy was particularly low, urgency of land reform delayed the Communists’ collectivization project. It was delayed even more by the presence of social and ethnic groups in need of appeasement. The three countries considered here present cases of interesting variation in this regard. Figure 4 below compares the extent to which Communists in Poland, Hungary and Czechoslovakia were successful in creating collective farms.

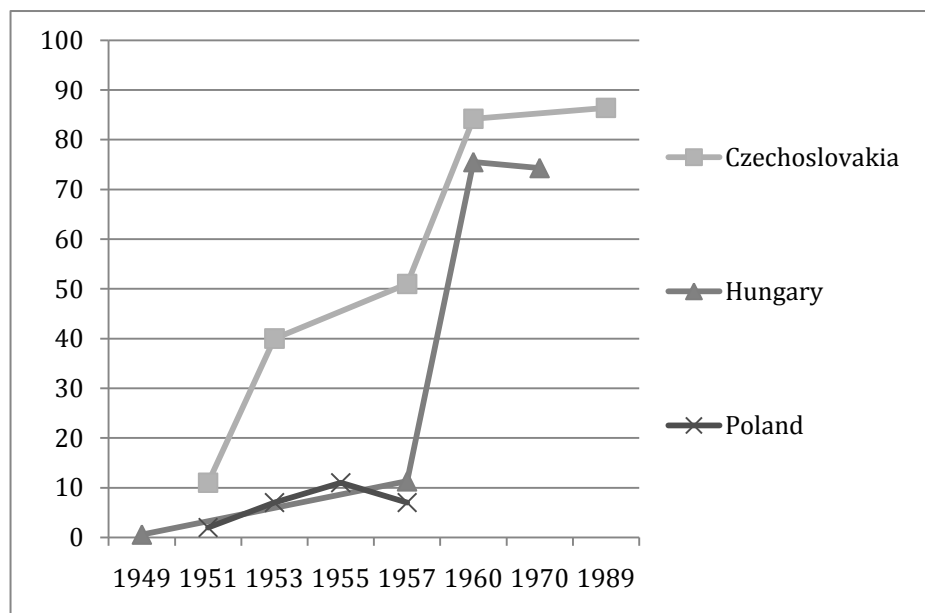


Figure 4: The progression of collectivization in East Central Europe under Communist rule. Source: author's compilation on the basis of Poganyi (1997) and Kocik.

We see, for instance, that in Poland, the collectivization process had barely begun before it was reversed. This is consistent with the struggle of Communists to contain domestic opposition described by Grzegorz Ekiert.²⁴ The Communists could not secure enough social support from the rural population to pursue the creation of collective farms. In addition, as described by agrarian sociologists, the few collective farms that were created were far less efficient than the less technically sophisticated individual farms. The next section discusses the relationship between Communists' popularity and their success in implementing collectivization in more detail.

²⁴ G. Ekiert, 1996, *The State Against Society: Political Crises and their Aftermath in East Central Europe*, Princeton: Princeton University Press.

4.3.2. Popularity of Communists in the Post-War Period

This section is devoted to the second factor responsible for the historical layering of claims in ECE: the domestic support for Communist rule following WWII.²⁵

4.3.2.1. Poland

The Yalta Peace conference of 1945, assigning Poland to the sphere of influence of the Soviet Union sealed its fate for the 45 years to follow. This fact was welcomed by one part of the anti-Fascist resistance but despised by another. Soviet domination was welcomed by the Polish Committee of National Liberation (PKWN), the self-proclaimed government of Red Army-liberated Poland. However, Armia Krajowa (AK), the military wing of the Polish Government in exile, associated with Allied forces in the West regarded the aggressor-turned-liberator as an enemy of Poland and the PKWN as traitors. Civil war broke out between the two groups.²⁶ The Communists won, but were far from popular. They also had to work particularly hard on appeasing hundreds of thousands of displaced Poles.

The process of land redistribution continued into the late 1940s. Eventually, 40% of Poles from territories taken over by the Soviets had been resettled. Ironically, the same persons who had been the victims of an earlier confiscation conducted by WWII winners – the Soviet Union – became the benefactors of land confiscations carried out on nationals of the WWII losers – Nazi Germany.

This complex process of land redistribution produced at least two layers of claimants. A final potential layer that would have been ob-

²⁵ The origins of domestic support for Communists deserve systematic treatment going beyond anecdotal evidence cited below for Poland. One could, for instance, compare the relative vote share of Communist and social democratic parties in the interim war period and argue that they were more popular in countries where they did not have to compete for votes with social democratic parties. Note that for landless or disadvantaged peasants, social democrats offered an attractive alternative to the Communists: they promised redistribution without the subsequent threat of collectivization.

²⁶ Another movie by Andrzej Wajda – one of his first – (“Popiół i Diament”, 1958, Akson Studio) – vividly shows the drama of Poles caught in the civil war.

tained through collectivization was avoided, as illustrated in Figure 4, because the Polish Communists never became popular enough to convince recently endowed peasants and refugees to surrender their assets to collective farms.

Nevertheless, fast forwarding to 1989, Poland became the case of a transitioning democracy that has to assume responsibility for the expropriations carried out by its own former authoritarian regime, as well as expropriations committed by neighboring authoritarian regimes that refuse to take responsibility for their past wrongdoing. In the end, the amount of compensation Poland could afford to award to the victims of expropriations would have been spread so thinly that reprivatization was judged not worth implementing at all.²⁷

4.3.2.2. Hungary and Czechoslovakia

Stalin gave Hungary and Czechoslovakia more leeway to establish Communist rule of their own variety. In the immediate WWII aftermath, both countries had one set of democratic elections each, in which Communists, falling shy of winning absolute majorities, secured non-trivial representation in their respective parliaments. In Czechoslovakia, Communists held 6 out of 26 cabinet seats in the National Front government. With another five portfolios allocated to their sympathizers, Communists were able to take control over the Czechoslovak government in February 1948. With so much support, the Communists could swiftly carry out collectivization. This is consistent with the data in Figure 3.

The Hungarian Communists won 17% of seats in the legislature in the November 1945 elections. If land reform had been carried out prior to WWII, the backing of the Soviet Union would have allowed them to carry out collectivization almost as easily as the Czech Communists had.²⁸ Two factors impeded their efforts. The first was associ-

²⁷ Nevertheless, other countries facing similar problems to Poland went ahead with restituting property rights. See Lynn M. Fisher and Austin J. Jaffe, 2003, "Restitution in Transition Countries", *Journal of Housing and the Built Environment* 15, 3: 233-48.

²⁸ Note, however, that Hungary, unlike Czechoslovakia described in section 4.2.2., did not have at its disposal land belonging an ethnic minority ready to be expro-

ated with the Smallholders' victory in the 1945 election, in which Smallholders secured 57% of the vote. The Smallholders immediately embarked on land redistribution reform described in subsection 4.3.1. In 1947, the Communists took over power from the Smallholders, but inducing the newly endowed landowners to turn over their acquisitions to collective farms was close to impossible. The recently endowed peasants hardly had been given a chance to enjoy their recently appropriated estates. The second impediment to swift collectivization dated back to the Bela Kun revolution of 1919, a failed Communist turnover that generated considerable hostility to the idea of land communes. As a result, the collectivization process did not commence until pacification of the Budapest uprising brought to power Janos Kadar. The Soviet installed leader, after crushing what remained of the revolutionary institutions reverted to mild Khrushchevite policies, in line with his belief that "in order for society to be crushed it also had to be bribed".²⁹ The Hungarian regime was open to reform, increasing the wealth of Hungarians and even allowing them to travel abroad. It earned itself the label of "Goulash Communism". This allowed Hungarian Communists to gradually reintroduce collectivization and toward the 1980s we see increasing proportions of land being collectivized, culminating in 78% in 1989.

These sections conclude the historical part of the chapter. I have reconstructed the diverse sets of factors leading to the historical layering of claims in Poland, Hungary and Czechoslovakia. Table 2 in the annex to this chapter, summarizes the contribution of international (lost and gained territories and changes in ethnic composition as a result of Allied arrangements) and next, domestic factors (existence of land reform before WWII and popular support for Communist rule in WWII aftermath) responsible for the layering of claims. As I show in the remainder of this chapter, taken together, these factors are responsible for generating lists of claimants to the same piece of land and determine how easy or difficult it is to carry out reprivatization.

priated as punishment for supporting Nazi Germany. Hence, land reform had to be conducted relying entirely on resources of currently in the hands of ethnic Hungarians.

²⁹ Ekiert, *supra* n. 24

Before I move on to the post-transition problem of reprivatization, I consider briefly an alternative explanation for the implementation of collectivization in Poland, Hungary, and Czechoslovakia. This explanation rests on non-political factors affecting the quality of land. Suppose that the structure of arable land in the three countries was sufficiently different to warrant early collectivization in Czechoslovakia, delayed collectivization in Hungary, and no collectivization at all in Poland. One might for instance argue that if Poland had more arable land than Hungary and Czechoslovakia, collectivization there would be more difficult there than in the two latter countries. I obtained data on the size of arable land as a percentage of total territory and present the figures for years 1961-2001 in Figure 5.

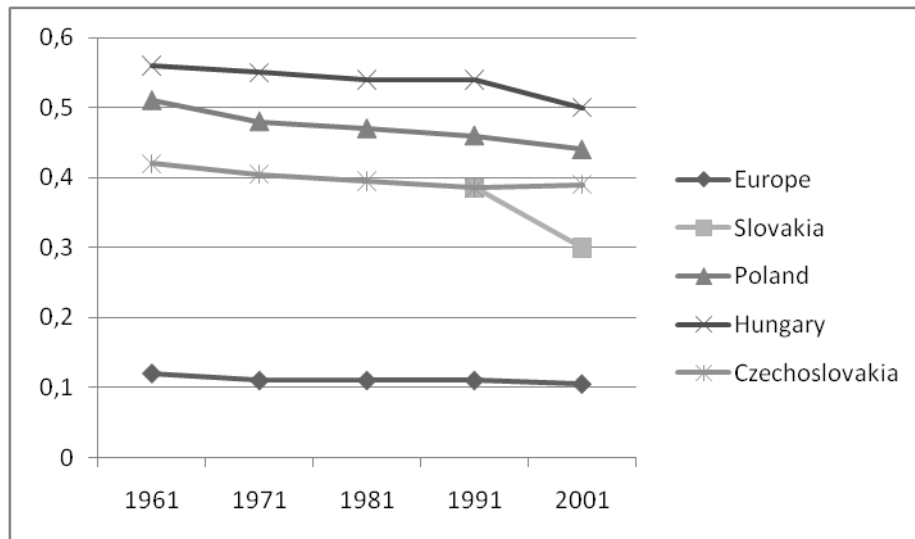


Figure 5: Arable land as percentage of total land in Poland, Hungary, Czechoslovakia and Czech and Slovak Republics, relative to all of Europe 1961-2001.

As we see, even though differences in the size of arable land relative to total state territory exist between the three countries, these differences are minor, when compared to the rest of Europe. Furthermore, contrary to expectation, the country with the largest arable land relative to its total size is not Poland, but Hungary.

Indeed, Poland is different from Hungary and Czechoslovakia in many important ways. Alone, these characteristics do not translate into

failure of collectivization in any direct way. However, demographic growth in a sizable population of landless peasants, population transfers, coupled with high demand for land reform can shed light on why Communists who were still struggling for popularity could not risk replacing land reform with collectivization.

4.4. Reprivatization as a Claims Problem

Reprivatization refers to transitional justice mechanisms that deal with returning immobile assets – be they land, real estate, or factories – to their rightful owners after an occupying force or authoritarian regime has ceased to be in control of these assets. The aim of reprivatization procedures is to solve the tragedy of the commons problem that would arise among agents with competing claims if each were to pursue independently the return of his or her own property. With overlapping claims to the same piece of property there is not enough to satisfy everyone and priority goes to whoever brings his claim first. Reprivatization, in this sense is similar to bankruptcy proceedings in which the total amount of a firm's due debts exceeds the total amount of its assets. When the debtor cannot pay all his creditors, individual execution could lead to a first come, first served distribution. Creditors who knew of the risky condition of the estate would be unfairly privileged. Moreover, a series of independent executions considerably exceeds the cost of handling similar cases in one overarching decision.

In the case of reprivatization, unequal access to legal resources and to information about the condition of the asset to be restituted could prioritize former owners with larger claims or better financial and legal resources, leaving small claim holders empty-handed. Allocation based on such principles is hard to justify, because who gets to be the first is in Dworkin's terminology a matter of *brute*, not *option* luck.³⁰

³⁰ Ronald Dworkin, 1981, "What is Equality? Part 1: Equality of Welfare", *Philosophy and Public Affairs* 10: 185-247.

4.4.1. Evaluating Reprivatization Laws

Reprivatization is a problem of local justice, and therefore, can be studied both from the normative and empirical perspective.³¹ First, one might ask what should be the properties of restitution laws. Second, we might look into the real-world institutions dealing with past expropriations and to see what properties are satisfied.

One can evaluate restitution laws from two normative perspectives. First, restitution laws may be designed for the sake of maintaining equity among former owners. I refer to this as *horizontal* fairness as opposed to *vertical* fairness, which evaluates restitution laws from a retributive perspective. The latter stems from the Kantian premise: no matter what the consequences, property must be returned to rightful owners.

Cooperative game theorists³² have formalized a number of appealing properties that one may want allocation rules to adhere to and have identified rules that satisfy different combinations of these properties. This has allowed them to use these properties (referred to as “axioms”) to characterize allocation rules in the form of “the only method that satisfies properties x, y, and z”. Thomson refers to this way of analyzing allocation rules as the axiomatic method.³³

³¹ Jon Elster, 1992, *Local Justice. How Institutions Allocate Scarce Goods and Necessary Burdens*, New York: Russell Sage Foundation.

³² R. Aumann and M. Maschler, 1985, “Game Theoretic Analysis of a Bankruptcy Problem from the Talmud”, *Journal of Economic Theory* 36: 195-213; R. J. Aumann, M. Maschler, *et al.*, 1995, *Repeated Games with Incomplete Information*, Cambridge: MIT Press; E-Y Gura and M. Maschler, 2008, *Insights into Game Theory: An Alternative Mathematical Experience*, New York: Cambridge University Press; H. Moulin, 2003, *Fair Division and Collective Welfare*, Cambridge: MIT Press; Barry O’Neil, 1982, “A Problem of Rights Arbitration from the Talmud”, *Mathematical Social Sciences* 2: 345-71; W. Thomson, 2003, “Axiomatic and Game-Theoretic Analysis of Bankruptcy and Taxation Problems: A Survey”, *Mathematical Social Sciences* 45: 249-97; Peyton Young, 1987, “On Dividing an Amount According to Individual Claims and Liabilities”, *Mathematics of Operations Research* 12: 398-414. Peyton Young, 1994, “Claims and Liabilities”, in *Equity in Theory and Practice*, Princeton: Princeton University Press: 90-99.

³³ Thomson, *supra* n. 30.

An axiomatic approach in normative analysis of restitution laws is justified here, because they are a perfect example of *pluralism* in principles of justice characterizing real-world institutions. First of all, reprivatization integrates corrective and distributive principles. The corrective aspect consists in preventing the wrongful beneficiary from profiting from the unjustly acquired asset. This deprivation can be interpreted as a form of punishment. The distributive aspect refers to dividing what is left of the property among the claimants. Thus, despite the traditional sharp division between the principles of corrective and distributive justice, dating back to Aristotle, the answer to the concern of both is provided by the same institution. Reprivatization displays a variety of distributive principles. Lexicographic, proportional, egalitarian and Rawlsian elements appear together.

4.4.2. Formal Framework

The analysis below relies heavily on Young, Ein-Ya Gura and Machler.³⁴ I begin with the single-claims model for studying criteria for allocating a homogenous, divisible good equitably among a group of claimants.³⁵ Land, even though not perfectly homogeneous and at times, not that easily divisible fits this description quite well.

Let $N = \{1, \dots, n\}$ be the set of claimants. Claimants are described by numerical claims against a piece of property t . The numerical claim of claimant i characterizes his *type*, which is expressed as a positive number x_i . A *restitution problem* arises when the total amount of claims exceeds the available amount of the good. Formally, a claims problem (x, t) consists of a list of claims $x = (x_1, \dots, x_n)$, where $x_i > 0$, for $i = 1, \dots, n$, against a quantity t , where $0 < t < \sum_i x_i$. No claimant should receive a negative allotment or more than his claim. Thus, a *solution* to a claims problem (x, t) is a vector $y = (y_1, \dots, y_n) \in R^n$, such that $\sum_i x_i > t$ and $0 < y_i < x_i$, for all $i \in N$. A rule determines the relevant allocation for every claims problem. Formally, an *allocation rule* is a function $F: R^n \times R \rightarrow R^n$. F associates a unique solution $y = F(x, t)$ with every claims problem and is defined for any number of claimants, n . For

³⁴ Ein-Ya Gura and Machler, *supra* n. 30. Young and Moulin, *supra* n. 30

³⁵ Young, *supra* n. 30: 190

every $i \in N$, $y_i = F_i(x, t)$ defines the portion assigned to agent i by the allocation rule F .

4.4.2.1. Equity of Allocations

The best way to understand equity of allocations is via the concept of the *standard of comparison*. A standard of comparison determines the priority of claimants to various portions of the good. Let $X = \{(x_i, y_i) : x_i > 0 \text{ and } 0 < y_i < x_i\}$. X is a set of *situations*. A situation is a pair consisting of a single claim and a possible allotment. A *standard of comparison* is a weak ordering P on X such that $0 < y_i < y_j < x_i$ implies $(x_i, y_i) P (x_i, y_j)$. Informally, for two former owners with identical claims, the owner with a smaller allotment (y_i) has a *priority* to receive the next portion of the good before the owner with a larger allotment (y_j).³⁶ This priority may also be interpreted as being *more deserving* to receive further portions of the good.³⁷ Note that the definition of a standard says nothing about priorities among claimants with different claims. Equity is always defined with respect to a standard of comparison and different standards may handle such priorities differently.

Before formally defining equity with respect to a standard of comparison, I describe the intuition conveyed by the formal definition.

From a normative perspective, maintaining a situation of unsatisfied priorities is undesirable. A *transfer* ε from person i to j is *justified* if the priority of i after the transfer is strictly lower than the priority of j before the transfer: $(x_j, y_j) P (x_i, y_i - \varepsilon)$. An allocation is called *equitable* when no transfer is justified, that is when for all $i, j \in N$, and for all sufficiently small ε , $(x_i, y_i - \varepsilon) P (x_j, y_j)$. Informally, equity holds when a transfer of the good from the claimant with lower priority (with a larger allotment relative to his claim) to the person with higher priority (with a smaller allotment relative to his claim) would reverse the order of priorities. In other words, a situation is equitable with respect to a given standard of comparison if every transfer from a less deserving

³⁶ Aristotle's rule of proportional distribution may serve as an example of a rule based on a standard of comparison. The standard in this case is the rate of loss suffered by each claimant, Aristotle, *Nicomachean Ethics*, Indianapolis: Bobbs-Merrill, 1962.

³⁷ Young, *supra* n. 30

claimant, i , to a more deserving claimant, j , makes i at least as deserving after the transfer as j was before the transfer.³⁸

Equity may be viewed as a desirable property for allocation rules. Other desirable properties of allocation rules discussed here are: impartiality, monotonicity, consistency, and continuity. I consider each of these additional properties below.

Impartiality. We will call an allocation rule F *impartial*, if it depends only on the individual claims and the total amount to be distributed. This means that any properties of claimants that are relevant for determining how much of the good they are awarded have to be expressed as part of the claims vector. In the single claims model, each agent's entitlement to the good in dispute must be represented by a scalar.

Monotonicity. An allocation rule F is *monotonic* if for every vector of claims $x > 0$ and every two amounts of the good,

$$0 < t < t^* \Rightarrow F_i(x, t) < F_i(x, t^*), \text{ for every claimant } i.$$

Monotonicity requires that when the amount of good to be divided increases, the portions received by the claimants do not decrease.

Pairwise consistency. An allocation rule F is *pairwise consistent* if for every n -person claims problem (x, t) , $(y_1, \dots, y_n) = F(x, t)$ implies that $(y_i, y_j) = F[(x_i, x_j), y_i + y_j]$ for every $i \neq j$. Pairwise consistency requires that the claims of third parties are irrelevant to the way the good is divided between any two claimants. Suppose two claimants in a larger problem involving more claimants were to pool together the allotments assigned to them in the larger problem, and to allocate them again using the same allocation rule. Pairwise consistency says their portions should be exactly the same.

Continuity. An allocation rule F is *continuous*, if whenever a sequence of claims problems (x^k, t^k) converges to a claims problem (x, t) , then $F(x^k, t^k)$ converges to $F(x, t)$.

These axioms represent normatively desirable properties of allocation rules. From a practical point of view, a desirable property of allocation rules is the ability to associate with it a standard of compari-

³⁸ *Id.*

son. This is especially true for reprivatization. Before I describe what is formally necessary for such a standard of comparison to exist, I define one more formal concept, following Young – that of a *numerical standard of comparison*.³⁹ A standard of comparison P is numerical when there exists a real valued function $r: X \rightarrow R$, such that $r(x_i, y_i) \geq r(x_j, y_j)$ if and only if $(x_i, y_i) P (x_j, y_j)$. The existence of numerical standards of comparison allows us to express the priority of a claimants holding a certain allotment to further amounts of the good as a real numbers, so that claimants with higher numbers have a priority before claimants with lower priorities.⁴⁰ In short, the relation of “being greater or equal than” between real numbers represents priority between claimants. This is a very useful property of allocation rules, as it allows us to rank order claimants from most deserving to least deserving with respect to any portion of the good to be divided. A natural question to ask is: when does a standard of comparison exist for a given allocation rule? The general answer is provided by Peyton Young’s Theorem 2: *If a claims rule is impartial, pairwise consistent, and continuous, then it is equitable relative to a numerical standard of comparison and it is monotonic.*⁴¹

In Young’s model the information about an agent is limited to the numeric worth of his claim. Effectively, real world reprivatization laws resemble priority systems generated by standards of comparison, though no standard is defined formally. Although statutes do not specify the priorities of claimants to every possible amount of the reprivatized good, based on their claims only, claims are divided into general categories and subcategories, based on citizenship and depending on the period in which the expropriation took place. The standard of comparison could be a very useful tool for handling reprivatization of land. In cases where there are historical overlapping claims to an estate that has been transformed into a collective farm, successive pieces of land are only gradually available for restitution. Without a standard of comparison, the compensation of former owners cannot take place until the entire estate is ready to be returned, which could take months if not

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

years, particularly in the case of large terrains that were formerly collective farms. If there existed a standard of comparison for a given reprivatization rule, the procedure for satisfying claims could be efficiently enhanced, because claimants could be paid gradually as plots of the reprivatized collective estate become available. The priority would be determined by the claimant's claim and the portion he has already acquired, as reflected in the standard of comparison.

4.4.2.2. Are Reprivatization Rules Equitable?

We are now in a position to examine actual property restitution laws that were considered and implemented in East Central Europe for their compatibility with the axioms of continuity, impartiality and consistency. The compatibility with these axioms translates into the existence of a numeric standard of comparison, which – in turn – is equivalent to specifying a complete list of priorities of each claimant to any possible amount of the reprivatized estate. This means that the reprivatized land could be gradually distributed to claimants, without waiting until the entire estate is ready to be handed over.

4.5. Restitution Laws Applied to Land in Hungary and Poland

The axioms presented above, apart from formalizing normatively appealing properties of allocations, indicate which rules can be simplified and have their process of implementation shortened. This is important in light of how flooded post-Communist economies have become with claims merely upon announcing their intentions to reprivatize confiscated property. This section outlines for illustrative purposes the bills that have been proposed and/or implemented in Poland and Hungary.

4.5.1. Hungary

In April 1991, Hungary passed a compensation law extending to landed property nationalized after June 1949. Through the end of November, 386,000 people had submitted compensation claims for a total of 1,360,000 items of property – with 1,227,000 claims for land, 100,000 for real estate and 32,000 for businesses. The National Office for Compensations and Restitution expected the number to reach 500,000 by 16 December 1991. Eventually, the deadline for submitting

the compensation claims was extended for a couple of more years. The average entitlement under the bill was 52,000 forints per claim,⁴² forcing the government to issue 30 billion forints' (384 million USD) worth of compensation certificates.⁴³

In section 4.3., I explained how multiple layers of claimants to the same piece of property had accumulated in Hungary. This, from a practical point of view, made in-kind restitution difficult. But the alternative option – monetary compensation – was politically challenging for the following reason. One of the main parties that formed the first post-Communist governing coalition was the historical Smallholders' Party. It distinguished itself from competitors by promising in-kind restitution favoring landowners a big part of its electoral campaign program. The Smallholders sought restitution in the very specific and limited sense of reversing to the property relations in agriculture from 1947. Pogany writes: "for the Smallholders, restitution was seen as a means of reconstituting a ... social order characterized by a pronounced emphasis on the agrarian sector and by a comparatively egalitarian and homogenous peasant-oriented culture".⁴⁴

Resisting pressures from the Smallholders, the first post-Communist government coalition after transition to democracy, decided to resolve the allocation problem by refraining from in-kind restitution in favor of monetary compensation. This first law "indemnified" former owners using a sliding scale resembling regressive taxation. Damages were to be paid in indemnification vouchers, which could be used for the purchase of property, stock and business shares sold over the course of privatizing state property as well as for acquisition of arable landed property. Victims of property losses were compensated in the full amount of the damage suffered if it was below 200,000 f. Damages suffered between 200,000 f and 300,000 f were to be compensated 200,000 f plus 50% of the amount above 200,000 f, damages between 300,000 f and 500,000 f in 250,000 f plus 30% of the amount above 300,000 f, and damages over 500,000 f were to be

⁴² Yet under the sliding scale outlined in the bill, only a few hundred people getting more than 1 million forints (12,800 USD).

⁴³ *MTI Hungarian News Agency*, 4 December 1991.

⁴⁴ Poganyi, *supra* n. 3: 156

compensated in 310,000 f and 10% of the amount over and above 500,000 f. Figure 6 represents graphically the compensation sliding scale.

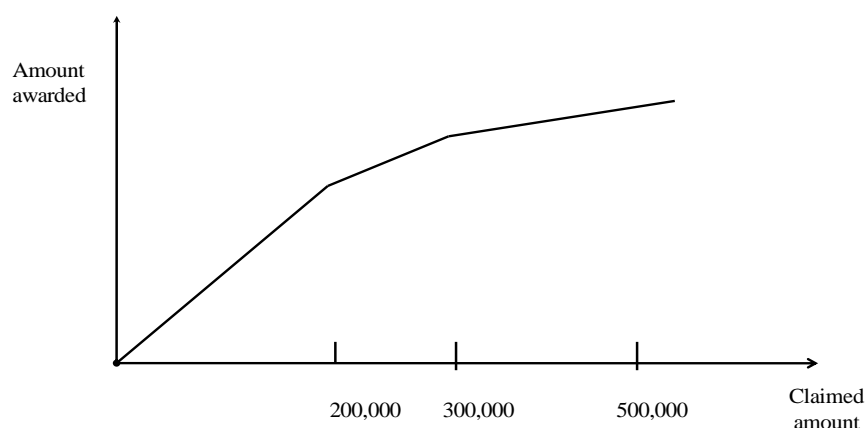


Figure 6: Hungarian Compensation Law.

Such a sliding scale was especially hurtful to former landowners, particularly after the court began recognizing the property rights of workers of cooperatives.

Thus, in Compensation Act II, an exemption to this rule was made in the case of arable land held by cooperatives and the state. It was sold in auctions restricting participation to:

- 1) Persons whose expropriated arable land was presently owned or used by the cooperative
- 2) Members of the cooperative as of January 1991 who continue to hold such membership at the time of the auction
- 3) Permanent residents as of June 1991 of the municipality or city in which the cooperatives arable land is located.

Apart from this, the right to purchase could be exercised only by a person committing herself to use the land for agricultural purposes

and not to withdraw the land from agricultural purposes for a period of five years.⁴⁵

This last measure was adopted in response to a Constitutional Court decision.⁴⁶ The leading party in the post-Communist coalition, the Hungarian Democratic Forum (MDF), had sent the new bill for constitutional review, unhappy with the fact that it favored landowners. Herman Schwartz writes about the court's decisions in the following words:

In response, the Court ruled that special benefits for a group are presumed unconstitutional and violate the equal protection provisions of the constitution. If such benefits are to be granted, declared the Court, there must be a specific cost-benefit analysis showing how they would promote general welfare.⁴⁷

The court believed that taking agricultural land belonging to the cooperatives, in order to implement the proposed scheme of partial restitution to Smallholders required the cooperatives to be paid 'full, unconditional compensation' in accordance with the Constitution's provisions for eminent domain indemnification. The defense of members of cooperatives who were current holders of agricultural property was consistent with the Court's insistence in the first compensation case that former property owners "do not enjoy priority over former non-owners in the distribution of state - owned assets".⁴⁸

However, Poganyi noted that in the third of the compensation cases considered by the Court, the justices affirmed the constitutional-

⁴⁵ N. J. Kritz, 1995, Hungary: Compensation Laws. Law No. 25 (26 June 1991), Law No. 24 (7 April 1992). *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Laws, Ruling and Reports*, Washington, D.C.: United States Institute of Peace Press, III: 748-50.

⁴⁶ Kritz, 1995, Hungary: Constitutional Court Decision on the Statute of Limitations, *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Laws, Ruling and Reports*, Washington, D.C.: United States Institute of Peace Press, III: 629-40.

⁴⁷ Cited after H. Schwartz, 2000, *The Struggle for Constitutional Justice in Post-Communist Europe*, Chicago: University of Chicago Press: 105.

⁴⁸ L. Solyom and G. Brunner, 2000, *Constitutional Judiciary in a New Democracy, The Hungarian Constitutional Court*, Ann Arbor: University of Michigan Press.

ity of the principle of compensating former owners, while non-owners were excluded, as long as distinctions between former owners and former non-owners which were based on ‘rational reason’.⁴⁹ It also reaffirmed the constitutionality of smallholders’ rights to repurchase (for compensation vouchers) their land from the state and from cooperatives. The Court did question, however, the cut-off date of 8 June 1949 as limiting from below which expropriations would be compensated. And it also questioned the fact that landowners would be compensated in full, while others only by a fraction of their property’s worth.⁵⁰ To comply with the Constitutional Court’s decision, Hungary had to adopt two more compensation acts. The Compensation Act II of June 1991 corrected the effect of partial indemnifications to farmers, by creating financial assistance, in the form of a general subsidy, available to “those purchasing agricultural land where the ordinary level of compensation would not enable them to purchase smallholdings equivalent in value to those they had lost”. This part of the law was, however, struck down by the Constitutional Court that declared that such subsidies for former Smallholders amounted to positive discrimination in favor of one category of former owners over others”.⁵¹ Finally, the II Compensation Act also extended indemnification to persons expropriated on the basis of the Jewish Laws of 1939. To summarize, Smallholders wanted to restitute agricultural property to ethnic Hungarians. However, the Constitutional Court recognized as identically valid claims of those affected by government takings before the Communist takeover, that is, Jews and Germans. The social and political objectives which the Independent Smallholders’ Party wished to bring about through selective restitution of smallholdings were frustrated by the Constitutional Court ruling.⁵² By the end of 1998, one third of all farmland and one-fifth of former state property had been transferred to new owners.⁵³

⁴⁹ Poganyi, *supra* n. 3: 160-61

⁵⁰ K. Okolicsanyi, 1992, “Hungarian Compensation Law Proposal Covering the 1939-1949 Period”, *Survey of East European Law* 3, 1: 5, 8, 11, 12.

⁵¹ Poganyi, *supra* n. 3: 162

⁵² Poganyi, *supra* n. 3: 169

⁵³ *MTI Hungarian News Agency*, 3 March 1998.

4.5.2. Poland

A major challenge to property restitution was whether to extend Poland's responsibility for expropriations that took place outside of post-WWII borders. The first restitution law was proposed, in 1991, by the Minister of Ownership Transformations (in short: privatization), Janusz Lewandowski. Lewandowski outlined a plan for limited reprivatization, which would substitute restitution in kind with a form of partial monetary compensation. This form, he believed, would be least likely to collide with an ambitious privatization program. For Lewandowski and his Gdansk-based party of neo-liberals, privatization and not reprivatization was the main tool for reversing the effects of 40+ years of Communist nationalization. Unfortunately, his proposal came on the heels of one of the first divisions within Solidarity (the divisions were known as the "war on the top between President Lech Walesa and Mazowiecki's – and subsequently Bielecki's – cabinet). Literally one day after Lewandowski's proposal, President Lech Walesa proposed a draft law pushing for in-kind restitution. The President's plan included a populist provision reserving 20% of the shares of privatized companies to their employees. This sparked a campaign among former Warsaw property owners, who began to demand the restitution of forty five hundred buildings nationalized in 1945 via a special Decree concerning land in Warsaw.

While in 1990, claims for restitution of property all over Poland amounted to 70,000, by 1991 that number had doubled. The Ministry of Ownership Transformations estimated the value of property under dispute at between 12.5-15 billion zlotys.

Meantime, work on a privatization bill in Parliament came to a halt with the premature termination of the legislative term (the termination was due to a transitional justice measure that is described below). Following the elections, the *Sejm* was dominated by post-Communist parties. The new proposal offered some 80,000 former owners bonds for purchasing shares in privatized companies instead of the original property they had lost. It was defied by former owners who now organized in the Polish Union of Property Owners and demonstrated in Warsaw demanding immediate restitution of property in kind. The government's response was that restitution at a level de-

manded by the former owners would bankrupt the state. Instead, it proposed to set aside 5% of the profits from selling stocks of privatized companies to directly compensate former owners for loss of property. Unconvinced, the ex-owners continued to demand restitution in kind and threatened to take their grievances abroad. They were joined over the course of the following year by international Jewish organizations and lobby groups.

In April 1995, eight influential Congressmen wrote to U.S. Secretary of State, Warren Christopher, accusing 13 Eastern European countries of deliberately obstructing the process of property restitution and making it difficult for Jews to recover properties they lost during World War II. The politicians, who included both Republicans and Democrats, threatened Eastern Europe that its relations with the U.S. would sever unless these countries passed laws guaranteeing restitution and compensation for real estate seized by the Nazis and nationalized by the Communists. The Polish government responded to these challenges by promising that the terms of awarding compensation to former Jewish owners would be no more favorable than those used with regard to other nationalities.⁵⁴ Under pressure from international and domestic organizations, the government withdrew its proposal from consideration by the *Sejm* and continued to fine-tune its details to ensure passage. When eventually, in June 1995, the *Sejm* approved a scheme to use reprivatization bonds to compensate former owners of properties illegally seized by the Communists, the leader of the Polish Union of Property Owners – Janusz Szczypkowski – lodged a protest with the European Council over delays in compensating the ex-owners. Szczypkowski threatened to ask the Brussels-based World Union of Real Estate Owners to file a protest on his behalf with the United Nations. His argument was that a “basic human right of property ownership is violated in Poland”.⁵⁵ The bill provided for returning property to nine Jewish communities. A year later, the restrictions led the World Congress of Jewish Organizations to question the admission of Poland, Romania, and the Czech Republic to NATO. The reprivatization scheme that was passed in the *Sejm* required a statute specifying the

⁵⁴ Gazeta Wyborcza No. 90, 15-17 April 1995: 1.

⁵⁵ *United Press International*, BC Cycle, 3 April 1996.

categories of restitution, both in terms of citizens and property to be returned. These specifics were not settled until September 1999, when the Solidarity coalition led cabinet and two post-Communist parliamentary parties submitted their proposals.

The cabinet bill included Poles who lost property in what was Polish territory that had been taken over by the Soviet Union after the war (about 90,000 claims). Those seeking compensation for property lost between 1944 and 1962 could get 50% worth of their claims, either the property itself or in the so-called reprivatization bonds. It stipulated that Poland could face up to 170,000 claims from 2.5 million people, totaling \$ 27 billion to \$ 32 billion (110-130 billion zlotys), about the same amount as Poland's annual government budget. The State Treasury committed to earmark 15% of revenues from privatization to satisfy restitution claims. The draft was heavily criticized by the Polish Union of Property Owners, who demanded that it also include confiscations carried out in the years 1939-1962. Yet, the cabinet's proposal was still quite generous to former owners. The bills proposed by the post-Communist parties were considerably less far-reaching. A special parliamentary committee was appointed to resolve differences between the three proposals. The committee passed a special amendment restricting receiving compensation for property seized by Communist authorities after World War II to Polish citizens residing currently in Poland. Predictably, this further severed relationships with the World Jewish Organization. Most notably, Elan Steinberg, director of the Jewish Congress, pointed out that any restitution bill that fails to extend back to 1939 rewards property to someone who was given Jewish property by the Nazis and subsequently lost it to the Communists, giving this person a stronger legal claim than the pre-war owner.⁵⁶ The committee then passed another amendment to the cabinet bill – committing the descendants of former property owners in Poland to paying an inheritance tax upon being compensated for land and buildings confiscated under the Communist regime.

⁵⁶ P. Finn, "Poles May Bar Payments for Post-war Acts; Panel Narrows Definition Of Who May Be Compensated", Washington D.C.: *The Washington Post*, 8 January 2000.

Descendants of former property owners were believed to make up about 80% of all property restitution claimants in Poland.⁵⁷ Although by June 2000, the initial expectation of 170,000 restitution claims was downgraded to 110,000 (about 34% of those who lost their property under the Communist regime were not able to document it), in March 2001, post-Communist President Aleksander Kwasniewski decided to veto the bill. Kwasniewski justified his decision by pointing out that, according to the associations of former owners, the number of applications may reach 250,000 bringing the total cost of compensation due to almost 69 billion zlotys. It is very plausible that he did not want to antagonize the international community by openly excluding Jewish organizations (representing descendants of the victims) from the reprivatization scheme. The principle of compensating everyone who was expropriated or no one was easier to defend than arbitrarily restricting compensation to Polish citizens living with Poland's borders at the time.

Thus, despite many perturbations, no restitution law was implemented in Poland. A law that would placate the demands of international organizations would bankrupt the state. At the same time, a law that Poland could afford was too exclusionary of influential international groups. The most recent attempt, while successfully passed through the legislature, was yet again vetoed by President Kwasniewski in 2004 who claimed that because it is impossible to estimate potential number of claimants, a reprivatization law would have bankrupted the state.

4.5.3. Compliance of Reprivatization Acts With Symmetry, Impartiality, Continuity and Pairwise Consistency

This section applies our model of allocation to reprivatization laws passed in Hungary. Its goal is to illustrate how one verifies whether a numeric standard of comparison for a given reprivatization exists. In order to apply the findings of our model, all parameters in the allocation problem must be defined. This includes (a) a well-defined value of

⁵⁷ *Polska Agencja Prasowa News Agency*, 29 February 2000.

the estate (b) well-defined types of claimants, and a (c) well-defined rule for allocating the estate.

We can treat the landed estate as the good to be divided, t ; claimants and their claims as the vector $\mathbf{x} = (x_1, x_2, \dots, x_k, \dots, x_n)$, and the distribution of land as the allocation rule F . First note that for land restitution to be a problem at all, the total amount of the claim must exceed the value of the good to be distributed. This is more likely to be the case in countries that experienced the historical layering of claimants. Checking whether the axioms of Theorem 2 are satisfied (so that there exists a numerical standard of comparison), requires noting where the empirical institutions diverge from the model.

One of the first things we ought to do is to establish if the set of claims is objectively given or defined formally by the law. By “objectively given”, I mean that it includes all property owners who have been unfairly expropriated by one authoritarian regime or another, be it Fascist or Communist. Alternatively, we may accept as admissible claims only those that are stipulated as admissible by the law. For instance, the Compensation Act I limited the set of valid claims to persons expropriated after June 1949. If we treat claims as objectively given, it is immediately obvious that the Compensation Act I was not *impartial*, as other factors than the agent’s claim mattered for determining if his allotment were 0 or some positive amount. These factors not captured by the claims vector included citizenship at the time of expropriation and at the time of restitution, intent to farm the land in question, and all sorts of other factors that might enter into the consideration of the land commission.

According to the model, no claimant should receive a negative allotment. For every $i \in N$, $y_i > 0$. This case may easily be violated when a *claimant* is *in possession* of the property to be restituted. Note that countries that had collectivized farms prior to the transition and include in the set of claimants persons occupying the land among fail to satisfy this property, because that last claimant, once the land taken, even if he is later compensated, will suffer a net loss.

The extent to which the situations described above spoil the usefulness of applying the rationing model to reprivatization laws depends on how often they arise. Let us assume, for now, that the described

situations of negative allotment and impartiality are extra-ordinary, that is, let us suppose that the set of claimants has been adjusted to match the expropriations that have objectively been carried out. I will explain below, how reprivatization rules satisfy continuity, and consistency.

To see when reprivatization rules are *continuous*, we have to ask what happens to the agent's allotment when the amount of the good to be distributed rises. Note that in the Compensation Act I, claims are divided into a series of categories depending on their size. Within each category, the good is distributed according to a fixed proportion. However, the proportions are not constant across claimants, but change as the size of the claim reaches a size category. This is illustrated in Figure 6 in section 4.5.

A rule is continuous when there are no "gaps" in the relationship between the claim amount and the allotment awarded to an agent.

By the same token, the rules are *pairwise consistent*. Recall, that pairwise consistency requires that if two agents divide between themselves the good they received in a larger rationing problem, they arrive at the same allotments. In the Hungarian compensation law, agents with smaller claims receive larger proportions of their claims. But the extent to which their claims get satisfied does not depend on other agents' claims. This is not so with Compensation Act II granting allocation powers to land committees. In these cases, the presence of third claimants was critical to the way in which land was divided between any pair of claimants.⁵⁸

It follows from the above analysis, that the Compensation Act I is equitable relative to a numeric standard of comparison, provided the set of claimants is not constrained by citizenship. This means that for a given list of claimants, there exists a precise ordering of priorities among them to any possible amount of the good that can be apportioned. The restitution laws are also *monotone* in the amount of the good (if more of the land appears for redistribution, each claimant should receive a larger portion).

⁵⁸ Young, *supra* n. 3 shows that thanks to the property of consistency, Aristotle's proportional rule is collusion-proof.

Note that the existence of a standard of comparison, by which a rule can be equitable does not yet ensure that all other normatively desirable properties are satisfied.

As has been noted earlier, the Compensation Act I of June 1991 is not proportional. It also fails to be collusion proof, a normative property that we did not specify above. Specifically, if a number of agents were to divide the size of a claim amongst each other they could ensure themselves more compensation than if they pooled their claims and had them represented jointly. To see this take two victims X and Y , with identical claims worth 400,000f. Suppose X is deceased, but has left two children each of whom is bequeathed half of his property, leaving the two claimants X_1 and X_2 with a claim of 200,000 forints each. Note that although initially the landed property was exactly the same, the descendants of X get compensated the total 400,000f worth of the land, while Y gets only 280,000.

There is also a rather arbitrary restriction on compensating descendants of victims. If one of them is no longer alive, his portion may not be split between the remaining descendants. It seems paradoxical that compensation claims of the same value, made by heirs should depend on the number of their deceased siblings.⁵⁹

4.6. Conclusion

I conclude this chapter noting some broader policy implications and the international ramifications of reprivatization decisions. Throughout the 1990s and well into 2000s, the Commission for Security and Cooperation in Europe held a series of hearings before Congress about dealing with successive Fascist and Communist expropriations suffered by U.S. citizens in East Central Europe. The title (“Property restitution, compensation, and preservation: competing claims in post-communist Europe”) of the hearing held on 18 July 1996 recognized the overlapping claims problem. The proceedings of the commission focused on claims of persons holding current U.S. citizenship. First, the commis-

⁵⁹ The easiest way to see this paradox is to take any two, no longer living, victims X and Y , who lost property of the same value. X had 2 children, Y had 3, but one of them died; each of the descendants of X get 1/6 more than each of the descendants of Y .

sioners noted that in many countries, citizenship rules constrain who is entitled to having his or her property restituted. Holding citizenship at the time the expropriation took place is typical, but some states also required citizenship at the time restitution was supposed to take place. Meanwhile, U.S. citizens are unable to have their claims represented by the U.S. Claims Settlement Commission, if they were not U.S. citizens at the time of expropriation. This, however, is quite common, as Jewish refugees fleeing Europe from Nazis or Communists frequently had to wait many years for the naturalization process to be completed. After identifying these problems, the commissioners complained about the diversity in approaches to property restitution across East Central European countries. Chairman Christopher H. Smith went as far as to propose the establishment of a common international standard akin to international trade standards established by the WTO.

This chapter has shown that such ideas make no sense given the diversity of expropriation patterns. Whether or not land reform was carried out by the interim WWII governments, and how popular were the post-war Communist governments were factors affecting whether or not land was collectivized (as in Czechoslovakia), redistributed to individuals (as in Poland) or first redistributed and then collectivized (as in Hungary). These domestic factors, along with international factors associated with ending WWII and peace building in its aftermath contributed to the historical layering of claimants. Formal analysis of property restitution as a claims problem shows that such increases in the total number and the types of claimants make property restitution, and the reprivatization of land in particular, hard – in the sense of violating desirable properties of restitution laws. Understanding the variation in factors contributing to the “layering” of claimants can help understand variation in type of reprivatization laws that have been adopted in Eastern Europe and their success

Annex

	WWII expropriations		Post-WWII expropriations				Number of claims
	Fascist	Soviet	Communist legitimacy after WW2	Demands for Land Reform	Expropriations of ethnic minorities	Collectivization	
Poland	No	Yes	Very low (civil war)	Extremely Urgent	Yes	No	2-3
Hungary	Yes	No	Low	urgent	No	Yes, but inconsistent	4
Czech R	No	No	Relatively High	Not so urgent	Yes	Yes, consistently	3
Slovakia	Yes	Yes	Moderate	Not so urgent	Yes	Yes, consistently	3

Table 2: Layering of claims in ECE and pressures for land redistribution

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Distributive Justice in Transitions

Morten Bergsmo, César Rodríguez-Garavito, Pablo Kalmanovitz and Maria Paula Saffon (editors)

The chapters of this book explore, from different disciplinary perspectives, the relationship between transitional justice, distributive justice, and economic efficiency in the settlement of internal armed conflicts. They specifically discuss the role of land reform as an instrument of these goals, and examine how the balance between different perspectives has been attempted (or not) in selected cases of internal armed conflicts, and how it should be attempted in principle. Although most chapters closely examine the Colombian case, some provide a comparative perspective that includes countries in Latin America, Africa, and Eastern Europe, while others examine some of the more general, theoretical issues involved.

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