TITLE: RESTITUTION OF PROPERTY IN EASTERN EUROPE
LEGAL, ECONOMIC AND POLITICAL
ISSUES

AUTHOR: Edited by: JON ELSTER
UNIVERSITY OF CHICAGO

THE NATIONAL COUNCIL
FOR SOVIET AND EAST EUROPEAN
RESEARCH

TITLE VIII PROGRAM

1755 Massachusetts Avenue, N.W.
Washington, D.C. 20036
NCSEER NOTE

This report summarizes papers delivered at a June 1993 conference on the restitution of confiscated property in Eastern Europe, conducted by the Center for the Study of Constitutionalism in Eastern Europe of the University of Chicago Law School. The report was published in the Center’s quarterly journal the East European Constitutional Review, and the report, in offprint, has been delivered by the editors to the Council for supplementary distribution to its readers who are not on the Center’s subscription list.

PROJECT INFORMATION:

CONTRACTOR: University of Chicago
PRINCIPAL INVESTIGATOR: Jon Elster & Stephen Holmes
COUNCIL CONTRACT NUMBER: 807-18
DATE: January 12, 1994

COPYRIGHT INFORMATION

Individual researchers retain the copyright on work products derived from research funded by Council Contract. The Council and the U.S. Government have the right to duplicate written reports and other materials submitted under Council Contract and to distribute such copies within the Council and U.S. Government for their own use, and to draw upon such reports and materials for their own studies; but the Council and U.S. Government do not have the right to distribute, or make such reports and materials available, outside the Council or U.S. Government without the written consent of the authors, except as may be required under the provisions of the Freedom of Information Act 5 U.S.C. 552, or other applicable law.

* The work leading to this report was supported in part by contract funds provided by the National Council for Soviet and East European Research, made available by the U. S. Department of State under Title VIII (the Soviet-Eastern European Research and Training Act of 1983). The analysis and interpretations contained in the report are those of the author.
EAST EUROPEAN CONSTITUTIONAL REVIEW

Essays on the efficiency and justice of returning property to its former owners.

A FORUM ON RESTITUTION

On June 18 and 19, 1993, the Center for the Study of Constitutionalism in Eastern Europe held a workshop at the Central European University in Budapest, on the philosophical, economic and legal problems surrounding the restitution of confiscated property in post-Communist societies. Some of the issues that were raised at the workshop are explored in the essays that follow.

Claus Offe & Frank Bönker
University of Bremen

In every East European country, the restitution of property expropriated under Communism has become one of the most controversial issues of the "great transformation." This comes as no surprise, as the restitution issue is closely related both to the fundamental process of property reform and to the question of how to deal with the Communist past. Restitution is one way among others to transfer state-owned assets to private holders of property titles on the basis of rights. At the same time, restitution, along with retribution and disqualification from public-sector employment, is a strategy of backward-looking justice, since property losses represent an important class of injustices committed by the ancien régime. Hence, the restitution issue can be analyzed from the point of view of efficiency and of justice. In this note, we adopt both points of view but focus on restitution through the lens of just one of its aspects, namely its morality.

"Morality," as we use the term here, is an attribute of the justifications an actor uses to defend his action, and not of the action itself. There are two large classes of such justifications: reasons from duty, and reasons derived from the collective desirability of the known consequences of action. Further, assessments of the moral validity of such reasons come in a thick and a thin version. In a thick version, we need to determine whether the arguments on which the actor bases his action are “in fact” valid, that is, whether a duty to follow a certain course of action really exists or whether, respectively, the consequences an actor stresses are actually desirable ones. In contrast, a thin test boils down to a test of the consistency, authenticity, or honesty of the actor. The question becomes whether or not the arguments invoked are opportunistic, selective, or idiosyncratic, thus raising the suspicion that the actor is in fact making immoral use of moral arguments, employing them as a pretext for the pursuit of selfish or otherwise objectionable courses of action.

It is such a thin test of the morality of restitution that we want to undertake here. In the case of arguments from duty, the morality test is then whether the actor invokes one moral norm as universally valid with a view to violating it for what appear to be opportunistic, arbitrary, or contingent reasons. Similarly, in the case of consequentialist arguments, the test is whether or not the actor has made a reasonable effort to assess the actual or likely consequences of action, whether he has compared them to the foreseeable consequences of all alternative options available, and whether all consequences of action, to the extent knowledge can be acquired with due effort and on the basis of available experience and theory, are actually taken into account.

There is an interesting asymmetry between duty-based arguments for and against restitution. Any such argument for restitution faces a threefold burden of proof. Proponents must demonstrate (i) that Communist expropriations were invalid due to their unlawful or illegit-
conflicts over the various seizures made before the end of the 1940s. Restitution laws provide for preferential treatment of land. To prevent a general opening of the Pandora’s box of injustices, these limitations suggest that under existing property laws, some kinds of arbitrary interests, privileges, and resentments have governed the actual practice of restitution. It appears that in most cases strategic reasoning and ad hoc considerations have clearly dominated:

(i) Expropriations vs. other injustices. The provisions concerning the restitution of property losses are much more generous than the ones concerning non-property losses. As it would be morally wrong to let the choice of rectificatory strategies be distorted by the morally irrelevant fact that property can be given back, while years lost in prison cannot, the concentration on property losses primarily reflects the strategic importance attached to property reform and the greater political leverage of former property owners compared with other victims of the Communist regime.

(ii) Cut-off points. The post-Communist governments have, as a rule, tried to confine restitution to expropriations made after the Communist seizure of power. This has been justified by the democratic character of some of the postwar governments. Yet as Shlomo Avineri explains in his essay, the single most important motive has been a strategic one, namely to exclude Jews and Germans, who suffered expropriation and expatriation and to prevent a general opening of the Pandora’s box of conflicts over the various seizures made before the end of the 1940s.

(iii) What kind of property is to be restituted? Several restitution laws provide for preferential treatment of land. No convincing arguments for this practice can be detected, as opposed to the political interest in nurturing a political constituency of smallholders and fueling the prevalent fears of speculative land purchases by foreigners and holders of “dirty money.”

(iv) Who is entitled to restitution? Most restitution laws exclude foreigners from restitution. Two justifications are conceivable. First, it has been argued that only those people who actually had to live under the Communist regime should benefit from restitution. Second, there may well be an economic case against too much foreign involvement. However, political interests in catering to chauvinist sentiments also played a role. In contrast, it is hard to find any justifiable principle supporting the preferential treatment for churches, compared to other legal persons, in Hungary and Poland. With regard to inheritance rules, budgetary considerations may justify a restriction of the category of claimants, as in Hungary, whereas the generous original Czechoslovak solution that expanded the circle of heirs far beyond the one provided for in the Civil Code looked rather arbitrary.

(v) To what extent is property to be restituted? Restitution laws often link the actual amount of compensation to the size of the property loss or limit the size of property to which restitution claims can be made. Such provisions can be partly justified by budgetary considerations, but there is certainly a political desire to spread benefits as widely as possible.

(vi) Property rights and duties. Several restitution laws make restitution or, at least, the form of restitution dependent on the current or intended use of the property. Such provisions can be defended as attempts to take into account the potential negative economic or social effects of natural restitution and to avoid an overstretching of duty-based arguments. Moral doubts arise, however, if such provisions are applied selectively. This is clearly the case in Hungary, where only the Churches are entitled to apply for natural restitution by promising a specific use of the property.

Assessing outcomes
Turning now to the thin test of consequentialist justifications, two main arguments for restitution can be distinguished. According to the first one, restitution enhances the credibility of economic reform by increasing its irreversibility. Second, restitution is seen as a way to
overcome the notorious problem that results from the discrepancy between the small amount of domestic savings and the huge stock of state assets to be privatized.

Yet, these eventual favorable outcomes of restitution must, first of all, be balanced against a number of very likely negative ones: (i) As it does not correspond in any sense to criteria of need, past or future achievement, or to standards of equal citizenship rights, restitution causes certain injustices which are further aggravated by the contingencies within the very process of restitution. (ii) Restitution nurtures the "old" economic attitudes of claiming resources from the state and favors rent-seeking behavior. (iii) Restitution aggravates the notorious fiscal problems of post-Communist states. (iv) Since the former owners and their heirs are not necessarily the most suitable owners and entrepreneurs, natural restitution may lead to a temporary misallocation of assets. (v) Natural restitution makes property rights uncertain until all claims are filed and resolved, thus increasing private investment risks and delaying the privatization process. (vi) Restitution may lead to the restoration of highly inefficient smallholdings. (vii) Restitution via compensation may fuel inflation. (viii) Due to its distributional effects, restitution may endanger the social consensus needed for the lasting establishment of a new polity. In addition, there are certain risks for the future legitimacy of the property order, as, for an indefinite future, those who may become wealthy by making good economic use of their restituted property are likely to have their success attributed not to their entrepreneurial efforts and skills, but to the entirely undeserved windfall that an arbitrary political decision is seen to have bestowed upon them.

Considering the likely costs of restitution, the question arises whether "cheaper" functional equivalents exist. This question must be answered affirmatively, especially since, strictly speaking, the consequentialist arguments adduced in favor of restitution hardly add up to justifications for restitution proper, but only to a justification for the partial giving away of state assets. Neither the increase in policy credibility nor the partial solution of the absorption problem depend on the transfer of property to its previous owners. A lottery, for example, would accomplish the same effect, as would privatization vouchers allotted freely to all citizens. Moreover, citizen's vouchers appear to come at a lower price, particularly in terms of fairness. Given both the immense probable costs of restitution and the existence of less costly functional equivalents, the morality of consequentialist justifications for restitution must therefore be questioned.

Furthermore, a general case can be made against too strong a reliance on any consequentialist reasoning whatsoever in the context of post-Communist transformations. Proponents of restitution usually share the general assumption that building a replica of the institutional machinery that has been so successful in the West will generate the same outcomes in the East. This intuition is, however, analytically faulty, for several reasons. The hoped-for functioning of institutions may well depend on cultural patterns and informal contexts of meaning which cannot be "imported," and the desired consequences may take a long, uncertain gestation period to materialize. 

Given our ignorance regarding the effects of institutional reform, it would be foolhardy, and perhaps even morally objectionable, to rely on consequentialist arguments in designing institutions for the new Eastern Europe.

Stephen Holmes
Professor of Law
University of Chicago

As Claus Offe and Frank Bönker's careful essay shows, many objections, both economic and moral, can persuasively be lodged against the restitution of private property confiscated under Communism. Viewed coolly, restitution seems neither efficient nor just. The most powerful economic objection to the policy points to the cloud over title created by the promise to restore buildings, land, and other belongings to their former owners. The much-awaited economic upswing will be painfully postponed if jittery property holders refuse to invest in improvements for fear of unforeseeable judicial decisions transferring current possessions to their "true" owners. Given poor record-keeping in many countries, not to mention the inadequate preparation of judicial and legal personnel, it is not surprising that courts today, in all countries where restitution is underway, are glutted with claim disputes that are proving clumsy to resolve. Paradoxically, one of the most frustrating legacies of totalitarianism can be discerned in the woefully inadequate bureaucratic coordination characteristic of all post-Communist states. There are simply too many agencies responsible for registering ownership rights and delivering valid title, and they will be even less able to perform their vital task in a relatively consistent way, if the courts, too, remain a key player in the process.

(While the economic argument against restitution
that focuses on legal snags is quite strong, another common economic argument is weak. Former property-owners, it is true, are unlikely to be the world’s most talented entrepreneurs; but when free alienability is legally guaranteed, other people, who can put the property to a profitable use, can acquire it by offering an attractive price.)

The claim that restitution is inefficient is often accompanied by the claim that restitution is unjust. Those tapped by fate to receive windfalls from the past, it is said, are unlikely to be either particularly needy or particularly worthy. More importantly, they did not suffer more terribly under Communism than did their fellow citizens. (See Jon Elster’s “On Doing What One Can,” EECR, Summer 1992.) People who were denied opportunities for self-realization, including the chance to sell their labor power, were bullied just as grossly and unfairly as those whose tangible property was seized. The norm of equal treatment forbids privileging one class of victims above the rest, so this argument runs. It is therefore morally abhorrent to single out the expropriated for special reparations, while other injustices go shamefully unredressed, simply because property is easier to quantify and administer. Hence, “as it would be absurd to indemnify everyone, it follows that one should not compensate anyone” (Elster, p. 16).

Taken together, the economic and moral arguments against restitution seem unbeatable. Nevertheless, restitution is going on, in the Czech Republic, Hungary, Croatia, Bulgaria, Lithuania and elsewhere. Parliamentarians have been overriding the advice of economists and moral philosophers. Why?

It might be that East European politicians are personally unscrupulous or have a weak grasp of economic theory. Certainly, pressing interests are at stake. But not all the advocates of restitution are venal or naive. Some quite knowledgeable and apparently disinterested local political observers also favor restitution. And their choice, given the unimpeachable arguments weighing on the other side, cries out for an explanation.

One important factor is the following: To discredit restitution, it does not suffice to show that it is inefficient and unjust, because economic growth and equity are not the only values at stake. Besides efficiency and justice, there is legitimacy. I am referring here to the legitimacy of the new economic order as well as the legitimacy of the new democratic order. Privatization is already underway. Millions of state-owned apartments and parcels of land are being transferred, by hook or by crook, into private hands. Voucher experiments have been tried, most notably in the Czech Republic, but a good deal of privatization has been less bureaucratic. Some privatized property has been funneled through outright purchase, much through informal deals. The predictable and much-publicized result has been unregulated nomenklatura privatization. This skewed and shady outcome is natural because hasty giveaways of state assets inevitably favor the savvy few who, under the old regime, lived off the fat of the land, and still today know how to cultivate useful contacts in strategic places.

Economists correctly remind us that, economically speaking, it doesn’t matter who gets title to property. So long as the legal owner can sell it on a free market, property is likely to end up in the hands of someone who knows how to use it. Restitution is absurd or pointless from this perspective, because it involves looking backward, toward an unrecoverable past, rather than looking forward, toward the capitalist world that must be created.

Morally wrong but politically correct?

But even if it does not matter economically, who receives first property rights does matter politically, at least in a democracy. If former KGB generals conspicuously enrich themselves by renting choice housing to foreign visitors, or former party hacks glide through the streets in sleek Western cars, then the legitimacy of the private property system itself may eventually come into question. Resentful citizens, moreover, can do more than bad-mouth the ostentatious nouveaux riches. They can vote. More specifically, they can provide electoral support for envy-mongering political parties from the right or the left who will be increasingly prone to stoke up dangerously destabilizing sentiments in an already troubled political scene.

My thesis, then, is the following: even if restitution is both economically inefficient and morally unjust, it is good policy if it can indirectly support democratization by helping legitimate the fledgling property system. It can do this, in turn, by helping break the pernicious monopoly of the former nomenklatura on the appropriation of state assets. This is one good reason, which plays a role alongside the bad ones, for parliamentary support for restitution throughout the region.

Privatization is underway, as I have said, and nowhere will the process be rationalized fully, or made to conform to the precepts of morality or economic doctrine. Nomenklatura privatization, however ugly, can-
The governmental bodies meant to supervise the process would probably be ineffective even if they were not, as they usually are, for sale.) In this context, restitution offers the possibility of an alternative route to ownership. Here we have a practicable channel to sudden proprietorship wholly independent of former service to the Communist state. A highly visible class of new and non-nomenklatura owners may lend a touch of legitimacy to the ideologically shaky property system by modifying somewhat the public perception that most of the new wealth has fallen into the hands of the old elites.

A critic of this suggestion might admit that nomenklatura privatization is a massive problem while still denying that restitution is a desirable solution. Why not give away state-owned property, as Offe and Bönker suggest, by lottery, or in equal shares, by implementing some sort of voucher scheme? This is an important comment and, to some extent, a persuasive one. Voucher systems can provide an alternative to nomenklatura privatization without visiting undeserved benefits on a small and arbitrarily selected class of citizens. But this argument, while strong theoretically, appears somewhat weaker when we take political realities into account.

As we know from Western experience, democratic parliaments do not hesitate to allocate scarce resources in order to garner votes and build electoral constituencies. (They normally do this with taxes and subsidies.) Those who have a reasonable chance to benefit disproportionately from distributive decisions by state authorities, furthermore, are likely to organize themselves into lobbies to press for the enactment of legislation advantageous to themselves. In a new democracy, especially one which is willy-nilly engaged in the privatization of huge stocks of state assets, many such rent-seeking groups will naturally spring up. And this is no particular cause for scandal. In such circumstances, in any case, we should certainly expect the passage of clientelistic legislation governing methods of privatization. (For instance, as Ellen Comisso pointed out in her lucid contribution to the Center's conference on restitution held in Budapest this June, the Hungarian Smallholders' Party proved to be an extraordinarily attractive coalition partner for the Democratic Forum, willing to support the governing party on all other issues so long as it got the restitution bill it sought.)

Voucher privatization, admittedly, is the most morally admirable alternative to nomenklatura privatization. But, even if it is enacted, it will cover a limited proportion of state assets at best. As a result, restitution, too, can play an important role in healthily diversifying the routes to ownership throughout the region. Restitution is not beautiful in itself, but it is an effective tool for chipping away at the predominance of the former nomenklatura among the new propertied elites. Moralists and cynics may object to calling this second-best solution a form of "justice." But that, in my opinion, is a matter of labeling, not politics.

A final point. When evaluating the politics of restitution in Eastern Europe we must remember that Communist regimes did not simply confiscate private property, as did the Nazis and many other arbitrary governments. Communism did not just seize this factory or that farm, it abolished the institution of private property itself. It may have ruined people in other ways (by coaxing them into mutual espionage, for instance), but the abolition of property was its ideological cornerstone. By contrast, post-Communist governments have been enacting restitution laws less for the purpose of restoring individual pieces of real estate than in order to symbolize and celebrate the rebirth of private property itself. However inequitable and irrational, restitution laws have proven irresistible to governments whose only source of legitimacy is a now-fading memory of the euphoric end of Sovietism. The wounds of the past will not be healed in this way, of course, and the ex ante situation will never be even approximately recreated. But "restoring" confiscated property, like rechristening streets and squares with their old names, is a striking way to kiss Marxism good-bye. This is another reason why Elster's and Offe's arguments against singling out property losses for special compensation, while appealing on paper, will not slow down the restitutive politics observable in Eastern Europe today.

Shlomo Avineri

Prof. of Political Science

Hebrew University

Laws about restitution of property in post-Communist societies are primarily informed by normative considerations about the idea of private property and its inviolability. It is this norm that is seen as having been violated by Communist ideology and its concomitant practice of nationalization, and is now being restored.
But this restoration of the rights of the expropriated private-property owners is occurring in a specific historical context that severely circumscribes the conditions of restitution and reparations. Though restitution laws differ from country to country, there is a common subtext which makes the laws appear, if looked at closely and in the context of relevant historical conditions, not only as a victory of norms of private property over Communist ideology and practice ("what has been stolen has been returned"), but also as a vehicle for the construction of post-Communist national identity. Several preliminary comments are in place here:

1) The collapse of the Communist regimes in Central and Eastern Europe was not only a revolution against Communism but also a restoration of national independence, sovereignty and identity, and a liberation from domination by Russia, which in many cases (e.g. Poland, Hungary, the Baltic republics) has been seen for generations as the historical enemy oppressor—a "barbaric" or "Asiatic" conqueror imposing its brutal rule over much more "civilized," "European" nations. In some cases, as in Poland, religious traditions were intermingled with nationalism. A strong return to history and historical memory has thus accompanied these post-Communist restorations.

2) Most of the Central and Eastern European countries that gained independence after 1918 were constituted as nation-states, both in their own self-understanding and in accordance with the Wilsonian principles embedded in the post-1918 treaties of Versailles, Trianon and St-Germain-en-Laye. Yet practically all of them included large populations of national/religious minorities who did not belong to the majority titular nations: Germans, Jews and Ukrainians in Poland, Sudeten Germans in Czechoslovakia, and so on. Many of the political tribulations, instabilities and authoritarian developments in these countries between 1918 and 1939 can be traced to the dilemma of attempting to establish a nation-state under conditions where large national minorities put enormous strains both on democratic institutions and on the national aspirations of the majority. At least in one case, Czechoslovakia in 1938-39, these problems facilitated the country's dismantling.

3) While all these countries and their populations suffered horribly during World War II, they emerged from the vicissitudes of war with much more homogenous and sometimes mono-ethnic demographic structures. Most of the Jews were killed by the Nazis, and most of the ethnic Germans were expelled after the war, from the Sudetenland and from the newly annexed areas in Poland. It is a cruel irony that two such totally disparate developments—one perpetrated by Nazi Germany and the other a punishment for the complicity of local ethnic Germans with the Reich—for the first time gave the Central and Eastern European countries the kind of ethnic homogeneity envisaged in the idea of a nation-state.

Under Communism, with its ideological internationalism, this new aspect of post-1945 ethnic identity was suppressed in Eastern Europe. Liberation from Communism meant, among many other things, that for the first time the new reality of national homogeneity could now be enjoyed by these societies in a way denied to them before 1939. From the point of view of the mono-ethnic states, these countries were "restored" after 1989 to a far "purer" reality of nation-statehood than they had ever enjoyed in the past.

4) Last, and of cardinal importance for our discussion: the Communist confiscations of the late 1940s were, in fact, the second wave of mass expropriations in these societies within a decade. The first expropriation was that of Jewish property during World War II. This occurred in different modes in different countries. In occupied Poland, it was done by the Germans in the course of the deportation, ghettoization and eventual extermination of three million Polish Jews. In fact, however, much of the real estate fell into the hands and effective control of the local Polish population, or in the case of Warsaw (where 30% of the pre-war population was Jewish) was taken over immediately after the war by the state in its enormous effort to rebuild the city. In Slovakia and Hungary, expropriation was carried out through local legislation "Aryanizing" Jewish property. Similarly, the expulsion of the German ethnic population after the war from the Sudetenland and the areas newly annexed to Poland created another wave of expropriation, which further transferred large amounts of assets from an "alien" ethnic group to the majority population. The Communist confiscations were thus, in many cases, expropriations from (previous) expropriators. The fact that Jews and Germans owned much urban real estate, industrial plants and forest land in these countries made this first wave of expropriation quite significant in scope. This pre-Communist...
The new laws: history between the lines

The traces of these historical events, which are sometimes conveniently overlooked in the post-Communist rhetoric about overturning Communist expropriations, do, however, appear clearly in the specific legislation in each country as well as in the public debates surrounding the drafting of the laws. An analysis of the strategies employed in restitution legislation makes it clear that despite the different conditions in different countries, restitution legislation is not only a way of redressing the injustices involved in the Communist infringement on the rights of property, but functions also as a vehicle for the construction of national identities in nation-states which have for the first time achieved a high degree of homogeneity. The common endeavor—sometimes explicit and sometimes less so—was to ensure that restitution laws would not restore property to previous owners, or their heirs, who do not belong to the majority population. Jews and Germans, in a cruel twist of historical irony, are thus lumped together in the camp of persons who find it difficult to benefit from restitution laws, because the newly liberated post-Communist societies are determined to construct their newfound national identity to the exclusion of these erstwhile minorities, each “problematic” in its own way.

A few examples:

1) The most explicit case is the Czechoslovak law of restitution, passed when the country was still united and essentially inherited by the two successor states. This law limits restitution to property expropriated after February 25, 1948—the date of the Communist takeover and the beginning of Communist one-party dictatorship in Czechoslovakia. This cut-off date excludes from restitution the property of more than two million Sudeten Germans expelled from Czechoslovakia by the democratic government of Eduard Beneš in 1945-47. The paradox is that the February 1948 threshold also excludes from restitution all Jewish property expropriated by the Nazis in the protectorate of Bohemia and Moravia (as well as Jewish property forcibly “aryanized” by the Slovak fascist state between 1938 and 1944), very little of which was returned to its original Jewish owners or their few surviving heirs in the chaotic circumstances of the immediate post-war years. This includes not only individually owned Jewish property but also Jewish communal property: thus the Old-New Synagogue in Prague (the oldest synagogue in Europe) cannot, under present legislation, be restored to the Jewish Community of Prague, and is still part of the State Jewish Historical Museum. Whatever one may think about the Czech insistence not to reopen the Sudeten question, one of the consequences of the 1948 cutoff date is that Czech (and Slovak) Jews, victims of Nazi Germany (for whose crimes the Sudeten were expelled), are now being victimized for the second time by Czech legislation defending the construction of the national identity of the Czech Republic.

2) The debate on restitution in the Polish Sejm confronted analogous problems, though in an very different context. In pre-1939 Poland, Jews made up about 10% of the population, and in cities like Warsaw they made up almost one-third of the inhabitants. Consequently, in many urban centers, as well as in most of the market towns (shetels), a disproportionate chunk of real estate was owned by Jews. After the initial post-1989 euphoria about undoing the injustices of Communist expropriation, both legislators and the press realized that a sweeping restitution law based on norms of the inviolability of private property might open the door to massive claims from survivors or relatives of erstwhile Polish Jews now living abroad (there is virtually no Jewish community left in Poland). Sometimes references were made to “people from New York or Tel Aviv” reclaiming property in Poland and “recreating pre-1939 conditions.” Similar fears were expressed with regard to Germans expelled from Poland after the war. The legal construction employed by the draft law now under consideration allows claimants who live outside Poland to claim their (or their ancestors’) property if they return to Poland and regain Polish citizenship. Some members of the Polish landowning classes that left for the West after the Communist takeover, or as members of the Anders Army, may indeed return to Poland—willingly, no doubt, as some of them already have. Presumably few “from New York or Tel Aviv” are likely to do the same.

With regard to former German property in the areas
annexed after 1945, the legal situation is different: without getting into the legal technicalities, all Germans expelled from the “new territories” and their descendants are excluded from current Polish restitution law. The construction of the Polish nation-state is preserved in either case.

3) The debate on restitution in Hungary raised parallel problems, though most of the confiscation of Jewish property was not done during the brief occupation of Hungary by the Germans in 1944, but was an outcome of a series of anti-Jewish Hungarian laws, most enacted even before World War II. One of the peculiarities of the Hungarian context was that in Hungary much of the heavy industry (iron, steel, and the like) was in the hands of Jews, or converted families of Jewish origin, and before 1939 Budapest had a Jewish population of almost 25%. The two laws that gradually infringed on Jewish rights, including property and professional rights, were the First Jewish Law of June 25, 1938, and the Second Jewish Law of May 4, 1939. Initially the Hungarian restitution law covered only property expropriated by the Communists after June 8, 1949—excluding expropriations of Jewish property before and during World War II, and leaving it in the hands of the state, or in the hands of individuals who either managed to buy it at garage-sale prices or “aryanized” it and were now able to reclaim it under the new restitution law. The existence of a relatively large Jewish population in contemporary Hungary made the consequences of such legislation evident for existing Hungarian society. The issue was brought before the Supreme Court, which mandated parliament to reconsider the law and include expropriations between May 1939 (the Second Jewish Law) and June 1949 in the restitution law. Given the anarchy conditions of the war, this still does not resolve all the problems, but it certainly does not exclude from restitution by a blanket regulation current Hungarian citizens of Jewish background.

In this respect the situation in Hungary is different, in that in practice the original draft excluded living Hungarian Jewish citizens, not descendants of murdered Jews and expelled Germans living abroad. For the same reason, the consequences of this initial draft for the redefinition of the Hungarian nation would have been more far-reaching—hence the outcry. The initial Hungarian draft law would also have excluded ethnic Germans expelled by the Hungarian government after 1945; the Supreme Court decision rectified their position as well.

Similar situations are due to arise in Lithuania, where at least in Vilnius, which was part of Poland before 1939, ethnic Lithuanians were a minority in the city and the Jewish and Polish majority controlled most of the real estate.

In short, restitution is not only about property and property right; it is also about the construction of national identity and the boundaries of that identity. Legal debates about redressing the injustices of Communist expropriation by restitution, compensation, coupons and the like, will remain incomplete and politically and intellectually incomprehensible if they do not take into account these crucial issues of national identity. Much of the public discourse in post-Communist societies revolves around problems of national identity and its construction: the teaching of history, the renaming of cities, squares and streets, the evocation of battles, victories and defeats, the reinvention of tradition. Laws of restitution are another chapter in this reconstruction of, and search for, a national self.

George Sher

Professor of Philosophy

Rice University

I would like briefly to address both a relatively narrow and a relatively broad question about the moral case for compensating those who were harmed by Communism. The narrower question is whether those whose property (or whose parents’ or grandparents’ property) was taken have more of a claim to be compensated than those who lost only opportunities. The broader question is whether any claims to compensation can hold up in light of the pervasiveness of injustice throughout history. The reason pervasive injustice may seem to militate against compensation is that even if we undo the effects of all known injustices or wrongs, we are likely only to move from one morally objectionable situation to another.

I approach both questions by challenging a common assumption about compensation. It is commonly supposed that the aim of compensating someone for a wrongfully inflicted harm, or for the effects of some unjust institution or set of arrangements, is precisely to restore him to the position that he would now occupy had the wrong act or
injustice not occurred. Underlying this view is the assumption that the victim's current entitlements are precisely what they would have been in the wrong's absence. The entitlements he would now enjoy in an alternative, "rectified" world without the initial wrong are assumed simply to carry over to the actual world.

This assumption, however, is mistaken. Two distinct principles limit the degree to which a person's entitlements carry over from the rectified to the actual world. First, differences between a person's levels of well-being in the rectified and actual worlds that are traceable to his failure to perform certain (readily available) acts in the actual world are not compensable. And second, differences between a person's levels of well-being in the rectified and actual worlds that are traceable to his performing certain productive or otherwise meritorious acts in the rectified world are also not compensable. These principles have a direct bearing on both of the questions raised at the outset.

The principles are relevant to our broader question—Does it make sense to compensate at all?—because they undermine the supposition upon which it rests: that any attempt to compensate for the effects of known wrongs will only move us from one morally objectionable situation to another. For if claims to compensation can be shown to lose their force with the passage of time, then compensating only for the effects of more recent wrongs will not amount to replacing one morally objectionable situation with another that is equally objectionable. And when the two principles above are conjuncted with certain natural assumptions, they strongly imply that claims to compensation often do become less pressing with the passage of time.

Those principles may also illuminate our narrower question—whether those whose property was taken under Communism now have a stronger claim to be compensated than those who were deprived of opportunities. According to Jon Elster, the answer is no, and since most who lived under Communism were deprived of opportunities, it follows that fully compensating all of its victims “would amount to little more than people taking in each other’s laundry.” (“On Doing What One Can,” EECR, Summer 1992, p. 17.) However, contra Elster, I argue that our second principle may support a positive answer. My reasoning rests on the following assumption: that if one person was unjustly deprived of some property, much less of what the second person would now be entitled to in a rectified world would probably be the result of his own actions there. If this assumption is correct, then by our second principle, the first person is entitled to compensation for a smaller proportion of what he has lost than is the second.

Ulrich K. Preuss
Professor of Law
University of Bremen

The politics of restitution treats the problem of justice in the temporal dimension. The question is whether it is justifiable to change authoritatively the distributional pattern of a past political order on the grounds that this order (and its concomitant distribution of wealth) is viewed as unjust and illegitimate. Three hypothetical cases can be distinguished.

First, we could conceive of “eternal” principles of justice which must always be established whenever possible within a given social and political order, irrespective of the afflictions this may bring down upon those who have reconciled themselves to the unjust order or who have taken advantage of its injustice. In this case the overthrow of an old and unjust social and political order would amount to substituting a just for an unjust system.

Second, we might be ready to accept that there is no such thing as an eternal principle of justice, but nevertheless reject the idea that every social order and every epoch has its own principles of justice that are equally valuable and merit equal recognition in their respective periods and location. We might believe in the idea of the moral progress of mankind, if we possessed universal standards by which we were able to differentiate more backward from more advanced principles of justice. In this case, a change of the political order by a revolution will be regarded as an event which justifies the destruction of given life conditions on behalf of moral progress. The revolution would amount to substituting advanced for backward principles of justice.

Finally, we could also imagine a case in which a revolution or overthrow aims at the restoration of a preceding social and political order which is regarded as more just and more legitimate than the current order because it had been abolished by illegitimate means and on behalf of illegitimate principles. In this instance the change of the social and political order has the aim of correcting past
moral conscience. The revolution would amount to a healing of the wounds of the past, more an act of undoing injustice than of establishing a new kind of justice.

It is possible and even likely that we will find proponents of all three hypothetical cases among the main designers of the transformations of Central and Eastern Europe. Rather than trying to determine the empirical facts of the situation, I would like to relate them to the principle of the rule of law. This principle was invoked time and again during the revolutions of 1989, and in some cases was even declared the principal guide of all the political actions of the revolutionaries. But the notion of “rule of law” is by no means clear. Does it mean the protection of legal rights irrespective of their moral, political or economic justification? In this case, the rule of law would extend its protection over a static society in which the devaluation or delegitimation of legal rights as a consequence of social and economic changes would be ruled out. Or does it imply the categorical prohibition of any kind of legal retroactivity to the effect that legal rights acquired in the past are immune from takings or can be taken only in exchange for compensation? Or does the “rule of law” simply establish the principle that any kind of social change is permitted, but that it has to be carried out through legally, that is, that the agents of social change have to utilize the forms, procedures and essential principles of the law?

**Revolution or reform**

Obviously, answers differ depending on the main characteristics of the change which a society is undergoing. The French Revolution explicitly declared the abolition of the so-called “duly acquired rights” of the feudal classes. These were the rights which had come into the possession of their holders according to the rules of the feudal order—the very order whose destruction was the main aim of the revolution. Since the feudal order and its concomitant privileges, immunities and powers—the “duly acquired” entitlements—were regarded as utterly immoral and entirely incompatible with the moral standards of enlightened humanity, there was no moral conflict between the traditional entitlements and the new order: the moral underpinnings of the old rights had simply melted away in the luminous sun of the revolutionary moral conscience.

The French Revolution is paradigmatic of a strategy of the moral devaluation of a past social, political, and legal order. One of the most important and visible consequences was the recklessness with which both the legitimacy and the legality of the ancien regime were devalued and ultimately destroyed. A few years later Prussia, then Germany’s largest and most powerful state, pursued a different course of action. While the leading reformist elite was convinced that the transformation of the feudal-absolutist regime into a modern civil society was inescapable, they viewed with horror the experience of the French Revolution and therefore initiated a “revolution from above.” This led to the paradox that the autocratic state was chosen to serve as a midwife for the creation of its natural opponent, namely a civil society. This required a reconciliation of the leading forces of the feudal-absolutist regime with the new order based on the principles of equal citizenship and individual freedom.

Whereas the French revolutionaries had contended that this strategy was as absurd as reconciling water and fire, the Prussian reformers pursued the idea that the transformation of the old into the new order should take place with minimal cost to the privileges and powers of the nobility. In order to prevent the impression that these privileges were thoroughly illegitimate and hence no longer warranted the protection of the law, it was explicitly declared that social and legal reforms had to be carried out according to the then valid law. The compromise between these two conflicting goals—the elimination of a social, economic, and legal order which no longer met the needs of society on the one hand, the considerate and indulgent treatment of the beneficiaries of the old order on the other—was embodied in the ruling that the retraction of the nobility’s privileges had to be compensated.

At first glance it would seem that the nobility was compensated for the loss of their privileges according to the doctrine of compensation for expropriated property. On closer scrutiny however it becomes clear that the analogy is highly questionable. The principle of compensation for takings under eminent domain presupposes the legitimacy of property as a social institution: if property is expropriated, this does not mean that its possession is in any way illegitimate or socially undesirable. Rather, it reflects a particular conflict of—equally legitimate—public and private interests which have to be harmonized: the public authority has the right to expropriate the prop-
property with due process of law, but it has to pay just compensation. If this doctrine is applied to the withdrawal of the nobility's privileges on behalf of the imperatives of a liberal-capitalist society, the analogy presupposes that these privileges are thoroughly legitimate and that, by mere accident, as it may happen in particular circumstances, the privilege of a particular person collides with the public interest in a particular situation.

Obviously this is not the case in those historical conflicts in which two entirely different and ultimately incompatible social and legal principles clash with each other. While both liberal and conservative authors have concurred that legal institutions that no longer reflect the spirit of the present generation must give way to new laws and social institutions, they have disagreed about the right of the contemporary generation to judge the past and to recognize or nullify rights which are rooted in the past. The question is not merely academic, because the moral devaluation of past entitlements normally entails their economic annihilation. In 19th-century Germany this legal problem encapsulated the far-reaching socio-economic question of whether the feudal nobility could survive as a social class in the new liberal-capitalist society. As it happened, the generous allowance granted by the Prussian reforms for the transmutation of patrimonial privileges into marketable land (which included the liberation of the peasants) enabled them to play a major economic, social and cultural role in the process of Germany's emergence as a leading industrial state.

Be that as it may, it comes as no surprise that conservative authors such as Friedrich Julius Stahl (one of the intellectual originators of the Rechtsstaat) or F.C.V. Savigny (the main exponent of the "historical school of law") defended the right of the disprivileged nobility to compensation for the withdrawal of their entitlements. Thus, while Stahl accepted that, in the course of great world-historic changes, the acquired rights of individuals and classes had finally to give way, he insisted upon their recognition as existing rights. Hence, their retraction had to be compensated. Ferdinand Lassalle, the founder of the Social Democratic Party, wrote an extensive treatise on so-called "duly acquired rights," and not surprisingly drew the opposite conclusion. According to his reasoning the retraction of a right must be compensated as long as it lawfully exists. Whenever the contents of a retracted right have already been prohibited, i.e., declared illegal by the public conscience, Lassalle stated, there is no reason for compensation, because what has been taken is no longer recognized as lawful property. The opposite postulate amounted to nothing less than the recognition of the right of individuals and social classes to force the public spirit into a tributary relation of dependency and bondage to the social classes and individuals whose entitlements were rooted in the previous order. In other words, Lassalle made a distinction between takings which do not question the social legitimacy of private property, and those expropriations which express the social disapproval of the institution of property as such, or of the holder of the property. With regard to the problem of the disempowerment of the nobility in the 19th century, the German legal theorist Lorenz v. Stein introduced the conceptual distinction between "expropriation" and "delegitimation" of property (Enteignung and Entwahrung). The former is due to conflict within civil society, while the latter includes the takings which follow from the development of a civil society. For Stein the historical necessity of delegitimation of feudal powers did not necessarily imply the refusal of compensation for the nobility. For others, like Lassalle, these economic transformations expressed the historical delegitimation of the preceding entitlements and hence did not need to be paid for. An equal split can be found in the 20th century with regard to the socialization of property: even if, as almost all political forces and constitutional experts agree, socializations are something essentially different from expropriations belonging to the class of takings which Stein called Entwahrungen, it does not follow that they should not be compensated. In fact, the German Basic Law explicitly orders compensation, whereas socialists and communists certainly would argue, quite in line with Lassalle, that society should not be forced to pay for its own improvement.