Perpetual Transitions:
The Europeanization of Property Restitution Problems in South-Eastern Europe

I. The problem

The success of European Union enlargement to include former Communist countries was possible due to the accomplishment of their transformations from Communist systems to capitalism and democracy. Joining the European Union should have meant in principle an end to the period of postcommunist transition and the beginning of one of integration into the EU, but because of the great variation across the transformation paths among former Communist states (Stark 1996), some transitions seem to have taken longer than others. The EU was therefore presented with a set of new members and aspiring candidates who still struggle to achieve the required changes. While two countries which experienced some of the most painful transitions, the so-called Eastern Balkan countries Romania and Bulgaria, managed to join the EU in 2007 (but have since experienced considerable 'day after EU' malaise), the Western Balkans accession countries are still struggling to accomplish the institutional foundations of a sound market economy and a consolidated democracy.

One of the most determinedly recurrent policy problems in the Balkans is that of property rights. The evidence from Eastern Europe shows that security of property rights is more important for development than financing constraints (Johnson *et al.* 2002). Global models too tend to show the greater significance of property rights as compared to contracting institutions when explaining economic growth (Acemoglu and Johnson 2005). The property rights malaise in the Balkans is increasingly tending to cross the borders into Europe. As all the countries in South-Eastern Europe (SEE) belong to the Council of Europe, they fall under the jurisdiction of the European Court of Human Rights (ECtHR), which is presently overwhelmed by property-related legal cases. Moreover, as they are either new or aspiring members of the European

Union, the question has come to feature prominently in the Stabilization and Accession agreements (SAPs) signed between EU and Western Balkan countries, the regular monitoring reports of the European Commission and the European Council decisions. The accomplishment of the chief conditions of the EU accession, a functioning market economy and the respect of human rights, both require the resolution of the property restitution problem.

This paper surveys the South-East European experience in this key area of transformation: the establishing of a secure basis for property rights by the post communist regime. We ask what determined the a given country´s choice of a specific policy towards restitution, and what the consequences were: what, in addition, made European institutions involve themselves in this domestic problem and what the impact was of their intervention. Ultimately, we are concerned with the interplay of the process of Europeanization with the process of transformation. Our policy analysis presents first a survey of the problem in both the Eastern and Western Balkans in order to understand the path dependencies leading to the restitution policies of countries there and the interplay between domestic and external (European) factors in the formulation of domestic policies towards property restitution in the Balkans. We then analyze in detail the growing role of the European institutions, particularly ECtHR in the process of formulation and implementation of such policies, to review at last the challenges facing the EU property restitution policy towards the Balkan countries.

Property restitution is not a simple problem of the rule of law which can be solved to everybody's satisfaction by passing some legislation or other, nor is it a problem of economic policy alone which can be decided upon to the disregard of individual and group rights and their history. The policy choices present the policymaker with difficult trade-offs (Holmes 1993). The difficulties in the Balkans were no different from those encountered in Central Europe and the Baltic, but the need to stabilize this post-conflict, hard-pressed region lent them a greater urgency. The stakes were higher in South-Eastern Europe, making policy choices more difficult.

The first general choice can be phrased as justice versus economic efficiency. Post-conflict and post-totalitarian settings are ripe with injustice. Whole groups, as well as many individuals were unjustly deprived by their rights, including their property. The retributive justice perspective argues that such injustice needs to be addressed in order for the new democratic regime to develop on a sound basis (Elster 2006). A new system of formal legal rules cannot be enacted on the foundation of past

injustices or harms, and so specific legal forms of political and moral condemnation of the past need to be established. The new regime cannot avoid 'dealing with the past in order to make the future happen' (Teitel 2000). However, a successful transition to market economy and integration into EU needs stable basic economic institutions: we know that no development is possible unless property disputes are solved, reducing transaction costs (North 1992)/ Privatization, a cornerstone of transition economic policy, cannot proceed if certainty is not achieved on the status of state property (Stark and Bruszt 1998). Even from an EU integration perspective, any property in a new member country must have a clear status if it is to be acquired by an EU citizen or involved in an EU funded project. While those two objectives, restitution of justice and search for economic efficiency, should ideally go together, as the greatest stability is likely to be achieved by the implementation of a just solution, they often conflict in practice because transitional justice has high transaction costs, as a result of competing claims, poor property archives, corrupt administrations and unprofessional judiciaries (Swinnen 1999; Sadurski and all 2005). Although the cost varies according to the choices governments make, property restitution is always costly. Furthermore, as regards industrial assets or agricultural land, restitution sometimes results in a fragmented and unmanageable ownership structure, therefore contrasting the goals of justice and economic efficiency.

The second general choice can be phrased as thin versus thick rule of law. The attempt to solve restitution claims, particularly through compensation, risks falling short of a substantial fulfilment of the rule of law (Kuti 2009). The bulk of the restitution in East Central Europe could not but favour the members of the national majorities' groups dispossessed by Communism versus other groups in the meantime absent, for instance the deported Germans and Jews (Offe 1993; Avineri 1993). In another example, the result that restitution policies achieved was objective inequality, as everyone was entitled to reparation within the same limitations, while having suffered losses of different extent (Kuti 2009).

*The third general choice can be described as retributive justice versus restorative justice. The main problem for transitional justice is how an emerging democracy can "respond to public demands for redress of the legitimate grievances of some without creating new injustices for others."(*Solomon *1995: XV)* The attempt to restore property in kind led to competing valid claims, as some states had sold on the expropriated property to new owners, who could then present equally valid ownership

titles. There are many such cases: for instance, in post-Dayton Bosnia returning refugees were accommodated in property previously expropriated during Communist times and which had already been claimed back by its owners. Many attempts to treat restitution in a retributive way (by rehabilitating older claims), particularly with restitution in kind without putting conditions to the owner, raised fresh questions of social justice. If a building expropriated in 1950 still exists but is occupied by many tenants, can it be restored with no restrictions attached to the former owner or the former owner´s heirs? For instance, can absentee, perhaps emigrant, landlords be reinstated on their land even if that means evicting families with no title but who have had the use of the land for decades, as in the case of many Roma communities? Many governments needed to find an alternative to absolute justice to solve such conflicting interests and attain some social peace and relative justice, in Hans Kelsen's words (Kelsen, 1971: 21-2). Restorative justice solutions look for legitimacy by accommodating the objectives of efficiency, wealth-maximization, and public choice regulation (Braithwaite 2001; Eisnaugle 2003; Priban 2009). But such trust-building, reconciliation solutions between those who lose from a regime policy and those who win are by no means cheap, as they usually entail compensations from the state to both sides of the conflict.

Finally, there is a fourth dilemma, that of implementation, which can be only partly subsumed in the trade-off between efficiency and justice. Is it worth engaging in such a demanding administrative process, knowing the low capacity and weak integrity of post communist administration, or would such an endeavour merely create resources for corruption? Can the post-Communist public administrative apparatus be trusted to accomplish in a reasonably fair and effective way the daunting task of identifying lawful owners, assessing properties and compensating the right people for their lost properties? What procedures and institutions must be created, at the central and local level, to ensure that property restitution proceeds accurately and expeditiously and avoids conflicts of interest? Should the reconstitution of property be made as accurate as possible, or should one rather promote a uniform treatment to simplify the administrative task and reduce the potential for discretion?

There are no simple answers to such policy questions. Furthermore, as we shall show, a rational cost-benefit analysis could not in many instances have ensured the best solution. Even if many governments attempted to create a collective solution to the problem with a unitary policy approach,

many individuals or groups sought justice by individual law suits in domestic and international Courts. Thus was created the remarkably complicated landscape that domestic governments and the EU are presently faced with in the Balkans.

Why return property at all? To sum up the complex motivation behind restitution policies (Holmes 1993; Pogany 1997), we can divide factors behind such exploits into bottom-up and top-down driven. Bottom-up factors were primarily the claims of former owners and their descendants, the individual decisions of petitioned Courts which decided to rule in such cases on the basis of the civil code and not special legislation, but also the entrepreneurship of people having the current use of expropriated property who demanded the legalization of their status, once private property was reinstituted as a norm. The more property had been expropriated under Communism, the more grassroots demand existed after 1989 and the option of not returning it became impossible: Nozick's entitlement theory (Nozick 1974) summarized the widespread belief in countries where public opinion was dominantly anticommunist. As Communism was mostly perceived as a form of foreign occupation, as the famous essay of Milan Kundera (1977) proclaimed, the fairest distribution was considered to be what had existed before Communism had violated the natural and legal order of things: the legitimate public policy was therefore the one seeking a restoration to that particular state of affairs. Finally, top-down actions originated from either political parties, with anticommunists all favouring some form of restitution policy, and from international actors involved in conflict resolution, particularly in the former Yugoslavia.

II. Transformation

The choice of restitution policy in Eastern Europe depended partly on the extent and depth of expropriation, which varied from state to state. Three distinct communist systems operated in the region, with differing implications for post communist reform: essentially Stalinist totalitarian regimes in Romania and Albania; an orthodox communist regime in Soviet-bloc Bulgaria; and a reformed communist system in Yugoslavia which had incorporated some liberal elements and shared a number of features with the Central European states (Bugajski 1997). Unlike the 'pact-ed' revolutions of Central Europe, transitions in the Balkans were disputed fiercely (McFaul 2002). Anticommunists did

not win from the onset, as in Central Europe or the Baltics, because former Communist parties successfully manipulated the new electoral institutions, as well as nationalism (Mungiu-Pippidi 2006). That led to a considerable time lag of SEE transitions compared to Central European ones.

The differences between types of Communism translated into a wide variation across countries in the treatment of property. At one end of the scale, in Romania or Albania, Communists confiscated most private property including arable land and residential apartments, and included it either in collective farms, where the nominal owners were the farmers, or state property. Communism was also an ongoing project, not a static regime: the fall of the regime in 1989 interrupted Romania's dictator Ceausescu´s fresh design of "village systematization", a brutal expropriation and destruction of the traditional villages. By contrast, in Yugoslavia, as in Poland, most of the land had remained as individual family farms during the socialist period and fewer residential buildings were confiscated. In addition, Yugoslavia, like Hungary relaxed state ownership prior to 1989 in the hope of generating a more competitive economy, while the other countries remained totally unprepared to explore the matter before 1989. However, unlike in the former Soviet Union, in the Western Balkans, Bulgaria and Romania legal records of previous owners still existed, for both commercial and residential property (Dudwick and all 2007).

The restitution histories in Romania, Albania and Bulgaria speak strongly of the 'unity imposed by history' of the Balkan countries (Pavlowitch 1999). Before the advent of Communism they had been overwhelmingly rural countries, with up to 80% of the population made up of peasants. Owning land had been a secular aspiration of the peasants in the Balkans, which began to materialize only with the land reforms after the First World War, so the confiscation or collectivization by the Communists of peasants' small plots was highly unpopular (Mitranyi 1951). As the post communist transitions in these countries, unlike in central Europe, were initially controlled by Communist factions, the first restitution acts were passed by Communists in an attempt to limit the process. They were typically de-collectivization acts, mixing the restoration of small quantities of the land previously shared in collective property to a de facto privatization, granting land also to people who had not owned any before - in fact in Albania only to the latter. Residential properties, which had been confiscated in large numbers in

those countries - for instance all buildings urban in centres were to be turned into offices, embassies, and so forth - were in part occupied by tenants who rented them from the state. Tenants´ status ranged from poor Roma families cramped in small flats to the former Communist *nomenklatura*, who occupied the most luxurious buildings which had been the property of the interwar elites, a symbolic issue of great political significance. The levels of the rents in such houses remained subsidized years after the market took hold, making tenants from formerly expropriated property a privileged category. By the mid-nineties, what had been a legal conflict between the state and a section of the population, the former owners, had gradually turned into a genuine social conflict between two categories of population. In the countryside, the conflict pitted the new owners resulting from the post communist privatization of lands against the old owners, who would not settle for the restitution of only a portion of their former property (Swinnen 1999). In towns, the conflict similarly placed former owners who claimed back their flats and houses in opposition to the new tenants occupying them.

The collapse of the former Communist economy added new categories of problems and conflicts, such as in Albania where peasants occupied their former lands in the North and in Tirana squatters built whole new townships on agricultural land now claimed by its former owners. The more a comprehensive resolution of the property restitution problem was delayed, the more such problems became insoluble. Ceausescu's home village, for instance (Scornicesti), a vanguard for all social experiments, had been 'systematized' in the late eighties, so peasants had their traditional houses demolished. They were dispossessed and moved into blocks of flats as tenants. After 1990, when all public housing was privatized to the benefit of its occupants, they became the owners. However, they could not buy the land under the blocks, because it had belonged to other former members of the collective farm, who took legal action and won their case in Court (Mungiu-Pippidi 2010).

Property battles were central to post communist politics in SEE, dividing former Communists, advocates of minor restitution, with a discourse of efficiency and restorative justice to the anticommunist parties, historical or new, which were promoting as a ground rule retributive justice and the restoration of property as a key market institution. In Romania and

Bulgaria, the anticommunist alliances (Democratic Convention and Union of Democratic Forces, respectively) made restitution their chief policy and enacted it immediately when they came to power. In all three countries mentioned, where nationalization had been the most extensive, the evolution of restitution bills showed the struggle between former Communists and their challengers (see Appendix 1). The original modest de-communization bills of the Communists were corrected by bills by anti-Communists promoting full restitution, which were not however fully implemented within the new electoral cycle, when Communists returned and shifted policy again. That fed millions of legal actions in various courts, some of which eventually reached the European Court of Human Rights.

The legal aspects of the battle for property redistribution were also similar in Albania, Bulgaria and Romania. The new democratic Constitutions (1991, Romania and Bulgaria; 1998, Albania) reinstated private property in its own right. The important novelty in these Constitutions was the specification that on human rights matters national legislation had to comply with international agreements ratified by the national governments. Thus, international law on human rights took precedence over national legislation, and despite lack of immediate enforcement of property rights the door was open for retributive justice on the matter. Furthermore, the Courts in Romania and Bulgaria played an important role in favour of restitution, as judges ruled in many civil cases in favour of former owners. Such decisions were endorsed by the Supreme Court of Justice in Romania, leading to an open reprimand of the judiciary by post-Communist President Ion Iliescu in 1995 (SAR 2009), and by the Constitutional Court in Bulgaria, which limited the reversal of restitution policy by the post-Communist party (Bulgarian Socialist Party).

The stand-offs over land restitution in Romania and Bulgaria had catastrophic consequences for the agricultural sectors in these countries. In both countries, agriculture contracted more and recuperated later than the rest of the economy during transition. Late in the nineties, when the two countries were struggling to acquire ‘functional market economy’ status from the European Commission, in order to be invited to start negotiations with the EU, there

was still no land market worthy of the name[1]. A huge percentage of arable land was becoming wasteland, and the property on it was so fragmented and disputed that few farms met the size criteria making them eligible for EU farming subsidies (Negrescu 1995). It took as long as until the end of 2000 for Bulgaria to return all land to its owners[2], although the process had started as early as February 1991 with the adoption of the '*Law on Property and Use of Agricultural Land'* (*LOUAL*)[3]. In Romania, by 2000 only 77% of property titles have been distributed, and about a million actions over land were paralyzing the Courts (Kuti 2009). The administrations in all three countries had conflicts of interest as a main feature. Land commissions and local administrations operated at their own discretion and to their own profit, generating great dissatisfaction (Gelpern 1993; Verdery 2004).

As to urban property, its restitution saga has outlasted the process of EU accession[4]. By September 2000, eight years after the launch of the restitution of immovable property in Bulgaria, more than 100,104 restitution claims had been submitted and fewer than 60% satisfied[5]. In Romania, by the end of 2009 more than 200,000 claims had been submitted on the basis of law 1/2001, with nearly half of them solved: the rest still were still dragging through administrative procedures and the Courts (SAR 2009). A law passed in 1995 by President Iliescu's government had privatized many properties, granting them to their tenants, but they had already been claimed by their original owners. The result was therefore two opposing camps with valid titles to property. In Albania, law 9235/2004 finally provided for the unlimited restitution of urban properties and of a maximum of 100 ha of agricultural land. Return of property was to take precedence over financial compensation. By the deadline of 31st of December 2008, 51,000 applications had been received, so the deadline was extended until the

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[1] *Farm Survey 1996*. Sponsored by the European Commission and World Bank. Bucharest: Ministry of Agriculture and Food.
[2] According to the 2000 report of the Ministry of Agriculture and Food. Available at http://www.mzh.government.bg/Article.aspx?lmid=420&id=420&lang=1.
[3] Published in *State Gazette* №17/1.03.1991. Amended by the anticommunist government a year later as Law on Amending and Supplementing the Law on the Ownership and the Use of Agricultural Lands, *State Gazette* No. 28/3.04.1992.
[4] The data are from a survey on the effects of the 1992 restitution laws, conducted by The Bulgarian Statistical Institution in the period October 1999 - September 2000.
[5] Idem previous note.

end of 2011, since many owners had not managed to assemble the necessary papers and complete the forms. Legal action over property matters formed a significant proportion of civil lawsuits, despite Albania's poorer court infrastructure and less active litigation culture compared with Romania or Bulgaria[6].

The financial compensation process worked no better than the restitution in kind. In Bulgaria, a *Law on the Compensation of Owners of Nationalised Assets*[7] was passed in November 1997, but the process of issuing compensation bonds lacked transparency, so it was permanently plagued by scandals (Stefan and all 2010). In less than three years after the adoption of a law on compensation, some 46,878 requests for compensation for property that could not be given back were filed, of which more than half were met[8]. By 2009, bonds with a value of 300 m. Euro were still going to waste on the market, because the state did offered no attractive assets to be purchased with them. In Romania, compensation was granted by a Central Commission for Establishing Compensation on the basis of Law 247/2005 on compensation rights and sums were paid, exclusively in equivalent shares, to a state established Property Fund. By mid-2010, the Property Fund has still not yet been listed on the stock market after years of delays and owners have complained that the state has endowed the Fund with the least attractive assets in its portfolio (SAR 2009). In Albania, the owners lobby group called The Property through Justice Association estimated in 2009 that in Tirana alone compensation should be given for at least 22,000 m^2 of land which cannot be returned, but which would raise costs to over seventy millions Euros (Stefan and all 2010).

The decisive shift of policy towards the restitution of property (including to minorities) by the end of the 1990s in Romania and Bulgaria was greatly helped by the ECtHR, which repeatedly uncovered violations of owners' rights'. In Albania, the tangled property situation became part of the broader file on state capacity and underdevelopment, so after 2000 it rose to a prominent position on every international donor's agenda. OSCE drafted the restitution bill.

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[6] http://www.justice.gov.al/UserFiles/File/vjetari/Vjetari_Statistikor_2008.pdf
[7] *State Gazette* №107/ 97.
[8] National Statistical Institute, "Report on the restitution process (research conducted Oct. 1999-Sept 2000).

From 2003 to 2009, all Progress Reports of the European Commission (EC) strongly criticized the lack of compliance with constitutional provisions regarding the restitution of private property[9] and urged the government to evaluate the situation of public land to be returned and the budget which should be made available for financial compensation for seized property[10]. The 2006 EC report acknowledged breaches in regulations regarding property rights to be key factors in the emergence of social conflict[11]. In short, in Albania, restitution and property reform were driven mostly by the international community, with the EU serving as the key enforcer of recommendations by other organizations, such as OSCE or the World Bank.

The property agenda in the former Yugoslavia confirmed Claus Offe's warning that any process of property restitution would have to start with a high-risk definition of who are 'we' (Offe 1993), as states embracing nationalism added new confiscations to the old Communist ones . The successor state Croatia declared its independence in 1991 and in October 1996 passed a *Law on Compensation for the Property Confiscated during the Communist Regime,* amended in 2002 by a Constitutional Court decision. The primary goal of the law was retributive justice, so preference was given to restitution of the actual property originally held by its owners. However, because of the impracticalities of returning all of the original property to all of the former owners, Croatia settled for a mixed system whereby compensation was considered when restitution in kind was not possible due to the protection of acquired rights or public interest (Stefan and all 2010). Following public information requests solicited in 2010 from the thirteen Croatian counties the number of total reported claims computed was 46,072, of which 69% were approved. In accordance with the Law on Compensation, holders of rights of occupancy/tenancy (OTR) should be considered eligible for acquiring ownership rights. A report by the OSCE in Zagreb, which monitors the repossession of property by the returned refugees according to the Sarajevo Declaration Process, stated in 2008 that the process of re-adoption by Croatian Serb

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

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

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

refugees of their property in Croatia following the war in the 1990s was to a large extent complete[12] . The European Commission's Progress Report 2008 for Croatia stated that 'Property rights are generally assured. However, there are outstanding cases of delayed property repossession and problems with compensation for the use of private property taken under war legislation from the 1990s. The process of restitution and compensation for property nationalized after World War II continues to go slowly[13]. And the European Council Decision on Croatia's accession of 12 February 2008 mentioned that "Some Member States underlined in this context the importance of accelerating the process of restitution of property"[14]

The situation in Bosnia and Herzegovina highlights its special sovereignty situation. By 2010 the State of Bosnia and Herzegovina consisted of two entities, the Federation of Bosnia and Herzegovina and the Republic of Srpska, along with 10 cantons. Each canton has its own parliament and government and they all have different jurisdiction when it comes to restitution and denationalization issues. The Yugoslav secession wars caused the dislocation of more than half the population of Bosnia and Herzegovina. Over 2.3 million people became internally displaced persons (IDP's) there, or refugees relocated outside of the country. During 1998 and 1999, under intense pressure from the international community, the State of Bosnia and Herzegovina and both entities (Federation of Bosnia and Herzegovina and Republic of Srpska) adopted a so-called package of property laws which focused exclusively on IDP and refugee return and reintegration (Philpott 2006) All other important property questions, such as the restitution or the compensation of property confiscated during the Communist regime, were left aside for the sake of achieving the primary goal: the return of people and stabilization of communities. In 2008, OSCE and the United Nations High Commission on Refugees (UNHCR) declared the process successfully completed. Thus 1,025,011 persons - fewer than half the estimated 2.3 million persons who had been evacuated - returned to their homes and more than

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[12] Organization for Security and Cooperation in Europe, *Report of the Head of the OSCE Office in Zagreb to the OSCE Permanent Council*, 06 March 2008, p. 1-17

[13] European Commission, *Croatia 2008 Progress Report,* 05 November, 2008, p. 1-74, accessible at http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/croatia_progress_report_en.pdf

[14] Council Decision of 12 February 2008 (2008/119/EC), accessible at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:042:0051:0062:EN:PDF

200,000 property claims were processed, with 99% of the property being returned to its owners. In many instances, the state housing provided to returnees had unclear property status and was claimed by its former owners. As the 'package of property laws' provided the right for returnees to buy the accommodation allocated to them, properties were practically privatized to new owners, making their subsequent restitution to original claimants impossible. In June 2009, the federal Government prepared a draft law favouring restitution of original property or of property of similar value, implying that financial compensation should be applied only in cases where restitution of original property or property of similar value is not possible (Stefan and all 2010). A feasibility study forecast proposed a figure of approximately 950 million euros for direct restitution costs, with a further implementation cost of 47 millions. Laws on denationalization at the level of the Entities are also in the process of being adopted, although the Office of the High Representative for Bosnia and Herzegovina suspended two 1996 laws on denationalization which had been adopted in the Republic of Srpska and thwarted another attempt in 2000.

In Serbia, the question of property restitution was not addressed after the fall of Slobodan Milosevic in 2000. Decision 2004/520/EC[15] of the European Council is the first act to ask explicitly for the adoption and implementation of legislation on property matters, in the section on 'Human Rights and Protection of Minorities'. Since then, the Council of the EU has systematically argued for the adoption of a property restitution law[16]. Decision 2008/213/EC[17] clearly demands that Serbia should 'Adopt adequate legislation on the restitution of property and ensure full implementation'. While the primary international concern with property restitution in Serbia originated with minority protection, once the process has started for minorities it will not be possible to hold it there.

A first step towards denationalization was the Law on Declaring and Registration of Seized Property in 2005. More than 76,000 applications were submitted by approximately

[15] Council Decision 2004/520/EC of June 14, 2004.
[16] Council Decision 2006/56/EC of January 30, 2006.
[17] Council Decision 2008/213/EC of February 18.

130,000 persons[18] before the September 2009 deadline, the total value of nationalized property for which timely applications being estimated at 102 – 220 billion Euros[19]. Many of the claims refer to buildings which had changed ownership through successive transactions. However, no follow-up law was issued; instead, by mid 2010 the government was more concerned with dividing public property among the state and Serbia's 174 municipalities. If such legislation is adopted, the 174 municipalities will become the owners of formerly nationalized property.

This brief survey shows that the restitution policies of transitioning countries were determined by many factors, some of them path-dependent. The most important are:

(1) The degree of 'communization' of a given society (nationalization, expropriation, persecution of certain groups) by the state in Communist or post-Communist times, which determines the salience and legitimacy of de-communization policies. In post-totalitarian settings like Albania and Romania, there was practically no alternative discourse to de-communization, the divergence being rather between a limited and an extended one;

(2) The political distance between Communists and anticommunists, also depending on the type of Communism. The more Communist states took steps to humanize their regimes prior to 1989 and strike pacts with their opponents, agreeing to a change of regime, the less policy distance we find between Communists and anticommunists during transition, resulting in fewer radical policy shifts or even no shifts at all. That meant less institutional overhaul and lower transaction costs, too. That is the case in the Central European countries, and to some extent the former Yugoslavia as well;

(3) Internal constraints on the government, resulting from the use given to formerly expropriated property; where it was turned over to a large number of private occupants (protected tenants, squatters) who then benefitted from it directly, as against property being kept for public use. Governments were constrained in their capacity to restore property, a situation encountered everywhere but especially in Albania and Romania;

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[18] "Prodaja nacionalizovanog - enigma ili inercija?", 17 March 2009, http://www.infogo.biz/prodaja-nacionalizovanog-enigma-ili-inercija.html

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

(4) External constraints on governments, which existed in all SEE countries and mattered greatly. They were due to the commitments of the international community to the stabilization of the Balkans (resulting in limited sovereignty of some regions) and protection of minorities but also, importantly, to the commitment of all those countries to joining the EU;

(5) Ideology, because, all other things being equal, anti-Communists favoured restitution policies and post-Communists resisted them (see also Appel, 2000).

The importance of the external factor was, as we have seen, decisive in countries like Croatia and Bosnia-Hercegovina In the next section, we shall see that even its less direct role had a considerable effect.

III. Europeanization

Clearly, the origins of the European influence in SEE are to be found in the desire of all those countries to join the EU. While the transition in SEE has lagged behind that of Central Europe, the latter provided the blueprint (Vachudova 2005**)**. Romania and Bulgaria emulated their former Warsaw Pact fellows (Hungary, Czechoslovakia, Poland) when applying to join the European institutions: first the Council of Europe (a preliminary step for accession to both NATO and the EU) and then the EU (see Table 1). The Western Balkans was a further step behind the Eastern Balkans due to the two Yugoslav wars, but once the stabilization of the region was achieved it followed on. Once the European Convention of Human Rights was signed on the occasion of joining the Council of Europe, external conditionality became an important factor aiding democratization and implementation of human rights. After EU accession began, EU conditionality automatically included the requirements of Council of Europe under the Copenhagen criteria of democracy and the rule of law. So Europeanization, defined as domestic change under EU influence, had in fact been initiated long before accession (Borzel and Risse 2003; Schimmelfennig and Sedelmeier 2005).

Table 2. *Steps towards EU accession*

Stage of Europeanization	Albania	Bosnia-Herzegovina	Bulgaria	Croatia	Romania	Serbia
Ratification of ECHR (Council of Europe membership)	1996	2002	1992	1997	1994	2004
Association agreements signed (Stabilization and Association (SAA) for Western Balkans)	2006	2008	1993	2001	1993	2008
Membership applications			1995	2003	1995	
Invitation to start negotiations			1999	2005	1999	
Accession			2007		2007	

The European Convention of Human Rights, in Protocol No. 1 of 1951, Article 1, provides for the protection of property. Any person or group of persons living under the jurisdiction of any of the forty-seven countries of the Council of Europe can make an individual application against one or more of those countries (Article 34), to the European Court of Human Rights. Following such an application, the Court can state, by a reasoned judgment, if there was a violation by that state of one or more of the human rights and fundamental freedoms provided for in the Convention. The Council of Europe's executive body, the Committee of Ministers is competent to supervise the implementation of ECtHR judgments by the respondent States, as far as individual measures for redressing any violation are concerned, but also with regard to general measures, such as changes of legislation or administrative practice, in order to prevent other similar violations of human rights.

The admissibility criteria of suits submitted to the Court are laid down by Articles 34 and 35 of the Convention; legal cases can be lodged with the European Court only after the exhaustion of domestic remedies within a six months time limit. A case is inadmissible if found incompatible *ratione temporis* or *rationae materie* with Article 1 of Protocol No. 1 to the Convention. The Court can examine applications only to the extent that they relate to events which occurred after the Convention came into force[20]. In those cases where property was confiscated between 1949-1989, that is, long before the date of the Convention with regard to all six States, the Court is not competent *ratione temporis* to examine the circumstances of an expropriation or of the continuing effects produced by it up to the present.

In that regard, the Court considers that deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of 'deprivation of a right'[21]. Moreover, in the Court's view 'possessions', within the meaning of Article 1 of Protocol No. 1 can only be 'existing possessions' or assets including, in certain well-defined situations, claims. For a claim to be considered an 'asset' falling within the scope of Article 1 of Protocol No. 1, the claimant

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

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

must establish that it has a sufficient basis in national law, for example where there is settled case-law confirming it in the domestic courts or where there is a final court judgment in the claimant's favour[22].

Therefore, in the absence of domestic laws providing for restitution or compensation for lost property or of domestic courts' final judgments providing for restitution or compensation, none of those who lost their possessions before 1989 can win before the ECtHR, the Court intervening in favour of the rule of law rather than for an absolute right to property (Allen 2007). The paradox therefore is that only a post-communist country which initiates regulation on the matter after adopting the Convention of Human Rights can become liable under international law. Hungary, which had prior to its accession passed a law on the subject solving the matter by means of a small universal compensation, was therefore insulated from any further claims.

Table 2. South-East European property cases before EHCR

	Total number of applications pending at 31.12.2009	Number of applications declared inadmissible	Total number of ECtHR judgments	Number of judgments finding violation	Judgments finding a violation of Article 1/P1 (Right to property)	Systemic problem (Article 46 applied)
Albania	228	139	20	18	9	Yes
Bosnia-Herzegovina	2,071	861	13	13	7	Yes
Bulgaria	2,728	4,164	292	272	35	No
Croatia	979	4,332	170	133	4	No
Romania	9,812	19,417	646	582	372	Yes
Serbia	3,197	2,455	40	38	5	No
Montenegro	430	241	1	1	1	No
FYROM	1,077	1,119	63	63	4	No

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

Source: European Court of Human Rights, as of March 1, 2010.

The review of the cases before the Court, presented in Table 2, shows that the Court had found violations of Article 1 for all the countries of the region, and a systemic problem was identified in the case of Romania, Albania and Bosnia. Romania is the undisputed regional leader at both law suits and violations in the area of property, with nearly ten thousand cases admitted and many more found inadmissible, with 372 of 582 judgments finding a violation had occurred. She has also the largest number of applications pending before the ECtHR, three times more than Serbia the SEE country with the next highest number of claims. In the case of Bulgaria, 35 of 272 judgments where a violation was found concerned property matters. Croatia had four of 133 judgments finding a violation, but Bulgaria, during the relevant period, had 110 judgments which concerned the length of proceedings (a violation of Article 6 of the Convention) and Croatia had seventy-two, some of them property related. Albania, Bosnia-Herzegovina and Serbia do not have yet a significant number of judgments rendered by the European Court, a situation partially explained by the fact that the Convention was only relatively recently ratified by those countries. Almost half the judgments handed down by the Court with respect to Albania and Bosnia-Herzegovina concern property issues, and Bosnia-Herzegovina and Serbia have a relatively high number of applications pending in relation to their populations.

The judgments which found a violation of Article 1 of Protocol No. 1, in cases of property lost during the communist regime, are not directly related to the fact itself of nationalization or confiscation by the authoritarian government. What they sanction is the failure of the present states to comply with their own legislation providing for compensation or restoration of property, their failure to enforce final judicial or administrative decisions restoring property or awarding compensation. They address too the need to ensure the right to fair trial, access to courts and finally the breaching of the principle of legal certainty because of the quashing of final judicial decisions such as ordered the restitution of property. The European Court found for instance with respect to Romania and Albania that the violation of applicants' rights as guaranteed by Article 1 of Protocol No. 1 originated in a

widespread problem which was affecting large numbers of people, namely the unjustified hindrance of their right to the peaceful enjoyment of their property. The Court found that '… The escalating number of applications is an aggravating factor as regards the State's responsibility under the Convention … the legal vacuums detected in the applicants' particular case may subsequently give rise to other numerous well-founded applications. (…)'[23]. The Court required the states to search for a general solution, according to Article 46 of the Convention, in order to be able to address the systemic problems[24].

Another major cause of the infringement of property rights is the non-enforcement of final judicial decisions ordering the restitution of immovable goods or awarding compensation, considered by the Court as amounting to interference with the peaceful enjoyment of property [25]. The failure to enforce final judicial decisions concerning an applicant's right to compensation for nationalized property[26] in Albania, Bulgaria or Romania cannot be excused by lack of funds[27]. The Court noted in particular that the uncertainty faced for many years by applicants for compensation in Romania, Bulgaria and Croatia was coupled with a lack of effective domestic remedies to rectify the situation and the reluctance – even active resistance – of the competent authorities to provide a solution to the applicants' problem[28]. It consequently found also violations of Article 13 of the Convention, the right to an effective domestic remedy.

Another set of violations of Article 1 is related to protected tenancies, or the authorization of occupants of nationalized houses to buy their flats, even after former owners had had final court decisions restoring their assets. The failure to restore or compensate for property sold by the State to third parties (tenants) was examined by the Court in the leading case *Străin v. Romania* (judgment of

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[23] The case *Ramadhi and Others v. Albania*, cited above.
[24] See also the cases *Faimblat v. Romania* and *Viaşu v. Romania* cited above and *Katz v. Romania,* judgment of 20 January 2009 (application no. 29739/03).
[25] see *Burdov v. Russia*, no. 59498/00, ECHR 2002-III, *Jasiūnienė v. Lithuania*, judgment of 6 March 2003 (application no. 41510/98).
[26] *Debelianovi v. Bulgaria,* judgment of 29 March 2007, (application no. 61951/00); *Ramadhi and 5 others v. Albania,* judgment of 13 November 2007 (application no. 38222/02); *Vrioni and Others v. Albania and Italy*, judgment of 29 September 2009 (application no. 35720/04 and other joint applications).
[27] *Beshiri and others v. Albania,* judgment of 22 August 2006 (application no. 7352/03).
[28] The case *Vajagic v. Croatia* , judgment of 20 July 2006 (application no. 30431/03).

21 July 2005)[29]. The ECtHR judgment was followed by more than a hundred similar judgments concerning the sale by the state of apartments nationalized under the communist regime and made available to third parties (tenants) without compensation to the legitimate owners. A similar issue was addressed by the ECtHR in a case against Serbia[30].

Another endemic problem for the Romanian and Albanian legal systems and only recently addressed by legislative changes, is the systemic quashing of final judicial decisions ordering the restitution of immovable goods or awarding compensation. In all such cases the Court found, among other things, a breach of Article 1. The case *Brumărescu v. Romania,* (judgment of 28 October 1999) is the leading case out of nearly a hundred other similar judgments concerning the Romanian Supreme Court's quashing of final judgements due to a supervisory review lodged by the Prosecutor General. The Court had to deal with Albanian[31] and Bulgarian[32] land restitution cases too, when final decisions by the Supreme Court in favour of applicants were quashed in supervisory review proceedings.

Damages paid by states found guilty of breaches by ECtHR are small, even for modestly sized budgets such as Albania's. For 2008, for instance, Romania, which had the highest number of violations, had to pay damages of about 10 million euros in all[33]. The sum seems insignificant compared to the 1.4 billion costs (partly in state assets) of restitution paid in the same period to individuals who did not resort to ECtHR[34]. The transaction cost to the Romanian economy of the uncertainty over property in the land and real estate market is even greater. In any case, it is clear that at this modest level of damages the main leverage of ECtHR is political and exercised through EU institutions.

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[29] Application no. 57001/00.
[30] *Ilić v. Serbia,* judgment of 9 October 2007 (application no. 30132/04).
[31] *Driza v. Albania*, judgment of 13 November 2007 (application no. 33771/02). *Vrioni and Others v. Albania*, judgment of 24 March 2009 (application no. 2141/03).
[32] *Kehaya and others v. Bulgaria,* judgment on merits of 12 January 2006 (application no. 47797/99 and others linked to it).
[33] 'Guvernul a platit in acest an despagubiri CEDO in valoare de 10 milioane de euro', Mediafax News Agency, 1.10.2010
[34] According to Varujan Vosganian, a former Romanian finance minister. See interview on Hotnews, 4 august 2010, http://www.hotnews.ro/stiri-politic-7661480-vicepresedintele-pnl-varujan-vosganian-discutat-online-cititorii-hotnews-traian-basescu-ajuns-niciodata-traian-basescu-fara-ajutorul-meu.htm

As the importance of broadly accessible and secure property rights is essential for both economic development and a stable rule of law regime, the EU could not avoid being drawn into the property disputes following the historical conflicts in the region, either on an ethnical or a political basis. Restitution or compensation for property confiscated by the former communist regimes does not fit formally into the sphere of competences of the European Union, Article 345 from the Treaty on the Functioning of the European Union specifies that *"The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership"*. According to the European Court of Justice, Member States may therefore design their own systems provided that they comply with the non-discrimination rule[35]. But the Copenhagen EU accession criteria openly step into the national legal systems of the candidate countries when requiring that candidates should respect the rights of minorities and establish rule of law.

The judgments of the European Court of Human Rights provided important benchmarks for the EU accession process, as they obviously addressed far broader concerns than the infringement of individual property rights. Rather than seeing existing property problems as a historical exception, such judgments revealed the difficulty of building the rule of law and an accountable administration within the framework of a disputed and seemingly perpetual transition, which is itself a serious hindrance to successful EU accession. While Bulgaria and Romania, which joined in 2007, originally experienced less direct involvement of the EU in its property affairs than did the Western Balkans, in 2009 the European Commission decided to continue their monitoring mechanism in the sphere of the rule of law beyond the customary three years. That decision was taken because those countries were found to be unable to provide full guarantees of their capacity to enforce EU law.

Conclusions

While in the case of the most advanced post communist countries, such as Estonia or Slovenia, European enlargement was largely a matter of business as usual, consisting mostly in the transfer of *acquis* as in previous enlargements, in the case of constrained accessions in the

[35] Case 182/83, Robert Fearon and Company Ltd v. The Irish Land Commission, judgment of 6 November 1984, [1984] ECR 3677

Balkans, the EU had to become increasingly involved as an agency dealing with transformation and development problems. In order to proceed with legal harmonization and other more typical Europeanization processes, the EU had to assist and try to speed up the process of institutional transformation. That meant the involvement of the EU in human rights promotion, state capacity enhancing reforms and reinforcing the rule of law, in which particular area the process of *Europeanization met the process of transformation, an often unfinished one*.

The construction of a stable and legitimate property rights regime is a test case for the EU's ability to transfer strong institutions to new member or accession countries. Both Communism and the transition from this regime has to be accomplished eventually. Limiting a problem in time is essential to a succesful public policy: if no file is ever closed, no problem can be solved, leading to continuous uncertaintly and high transaction costs. As the insightful verse of T.S. Eliot runs, "If all time is eternally present/All time is unredeemable". While the situation of property restitution in these countries provides clear evidence that Europeanization helps transformation, particularly if the EU assumes the role of a transformation agent, it also highlights the limits of its power. Transformations are complex, path-dependent processes and the formulation of public policy in such environments is seriously constrained and differs essentially from what is the norm in developed countries and consolidated democracies. In his classic comparison between policymaking in industrial and post-industrial nations, Gabriel Almond (1974) argued that the main difference lies in the effort needed in developing nations to build systems (such as the rule of law) while in developed ones policymaking consists mostly in 'reform' - the maintenance of systems already created and the fine tuning of policies according to the ideology of the party in government. The policymaking landscape in SEE presents an unusual complexity, as at least three different processes interact. First, 'transformation' is still going on, which corresponds to Almond's 'development', a process of institution-building and an undertaking of great difficulty. 'Europeanization', including special policies of integration and harmonization based on the EU model, is both a prompting of and a postscript to the process. Second, we find 'reform' as well, ideologically driven policy which exist everywhere - for instance, in Romania's and Bulgaria's adoption of flat income taxes. But third, as a result of the social engineering of Communism and its complicated legacy, we still have some persistent form

of ‘revolution’, a struggle between old and new elites which decisively shapes politics and institutional development. Through the complexity of this landscape, the EU accession of the Valkan countries is not business as usual, but rather a complex battlefield where these processes come together or conflict in the formulation of public policy.

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Appendix 1. Laws concerning property passed after 1989 in South-Eastern Europe

Country	Agricultural land	Urban property
Albania	Law 7501, 1991- *on land granting property rights* Decision 452, 1992 - *on restructuring of agricultural enterprises* Law 7698, 1993 – *restitution law* Law 8312, 1993 - *on undivided agricultural land* Law 7983, 1995 – *on purchasing agricultural land* Law 8053, 1995 - *on transfer of agricultural land in ownership without payment* Law 8337, 1998 - *transferring into ownership the agricultural land* Law 9235, 2004 - *on restitution and compensation of property*	Law 7652, 1992 - *on the privatisation of state-owned flats* Law 9235, 2004- *on restitution and compensation of property*
Bosnia-Herzegovina	**Republic of Srpska:** Law *on return of confiscated land*, 1996 Law *on the return of confiscated property and compensation*, 2000 Both laws were suspended in 2000	**Republic of Srpska:** Law *on return of confiscated property,* 1996 Law *on the return of confiscated property and compensation,* 2000 Both laws were suspended in 2000 **Bosnia and Herzegovina and Republic of Srpska:** Law *on sale of apartments with occupancy rights*. 1997
Bulgaria	Law *on property and use of agricultural land,* 1991, amended in 1992, 1995, 1997 and 2005 Law *on restitution of real estate property to Bulgarian citizens of Turkish ethnic origin, who applied for exit visas to turkey and other countries in the period May – September 1989*, 1992 Law *on restitution of property over forests and the lands, the forest fun,* 1997 amended in 1999 Law *on the compensation of owners of nationalised assets*, 1997, amended in 2002	Law *on the restitution of nationalised immovable property*, 1992 amended in 2006 Law *on restitution of real estate property to Bulgarian citizens of Turkish ethnic origin, who applied for exit visas to turkey and other countries in the period may – September 1989*, 1992 Law *on restitution of property over some alienated properties according to the law on the territorial and urban development, the law on the planned development of populated areas, the law on the development of the populated areas*, 1992 Law *on the compensation of owners of nationalised assets*, 1997, amended in 2002
Croatia	Law *on Restitution/Compensation of*	Law *on compensation for the property*

	Property Taken During the Time of the Yugoslav Communist Government, 1996, amended in 2002 by the *Act amending and Supplementing the 1996 Compensation for the Taken Property, 2002*	*confiscated during the communist regime*, 1996, amended in 2002 Law *on compensation*, 2002
Romania	Law- Decrees 42 and 43 *granting property rights to members of the collective farms,* 1990 Law 15 *on reorganizing state-owned companies,* 1990 Law 18 *on land restitution,* 1991, amended in 1997 and 2005 Law 1 *on reinstating property rights for agricultural land and forestry,* 2000, amended in 2005 Law 213 *on public property and its legal regime,* 1998	Law 112 *on the legal regime of buildings which were transferred to the state,* 1995 Law 213 *on public property and its legal regime*, 1998 Law 10 *on the judicial regime of the estates confiscated abusively, March 6, 1945 to December 22, 1989,* 2001, amended in 2005 and in 2009
Serbia	Law *on reporting and recording of nationalised property,* 2005	Law *on reporting and recording of nationalised property,* 2005